JOENSUUN YLIOPISTO
Kauppa- ja oikeustieteiden tiedekunta

UNIVERSITY OF JOENSUU
Faculty of Law, Economics and Business Administration

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A HUMAN RIGHTS APPROACH TO CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION IN THE AFRICA'S GREAT LAKES REGION: A FOCUS ON THE DRC CONFLICT

ACADEMIC DISSERTATION

Academic Dissertation submitted, with the permission of the Faculty of Law, Economics and Business Administration for public defence in AG101 Auditorium (Agora Building), Yliopistokatu 4 University of Joensuu, on 15th January 2010 at 12 noon.

Joensuu 2010

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Publisher University of Joensuu

Sales University of Eastern Finland Library/Sales of publications
P.O. Box 107, FI-80101 Joensuu, FINLAND
tel. +358-13-251 2652, fax +358-13-251 2691
Email: joepub@uef.fi

ISBN 978-952-219-324-7
978-952-219-325-4 (pdf)

University of Joensuu Printing Press

ABSTRACT

The Africa's Great Lakes Region has been the site of the most devastating armed conflicts and humanitarian crises the world has witnessed since the end of the Cold War. The 1994 Rwandan genocide, the epicenter of the Great Lakes conflicts, sparked a horrific multinational conflict that swept across the region. This has ultimately intensified in the Democratic Republic of Congo (DRC), where it dragged the armies of eight neighbouring countries, guerrilla movements and militias; with millions dying in the fights and attendant massacres, starvations and diseases. Although this catastrophic conflict has attracted a relatively little attention from the international community and powerful institutions like the UN, it calls for a critical re-examination of the approaches to conflict prevention and management, currently available within the UN system.

This study critically examines the adequacy and effectiveness of the various methods and approaches to conflict prevention and management as have been applied in resolving the Africa's Great Lakes conflicts. In so doing, it augments the various comprehensive efforts undertaken to address the root causes of these conflicts and lay the foundations for their resolution and for sustainable peace in the region.

Conflict prevention is a central goal of the UN system, but it also constitutes one of the UN's greatest challenges. In light of the challenges presented by events in Somalia, the Africa's Great Lakes (especially Rwanda genocide and Congo crises), Sierra Leone, Bosnia, Iraq and Afghanistan, to mention but only a few, a great deal of research over the past few years have sought to demonstrate the virtues of conflict prevention and to identify how it can better be operationalized.

However, the resolution of conflict and achievement of durable peace in any particular part of the world is not confined to a single strategy. Thus a range of tools and strategies available for conflict prevention and management reflect the complex mix of legal, political, economic, social, cultural and institutional factors that coalesce to form violent conflict complexes that frequently transcend state boundaries. Thus there is a need for a holistic approach to prevention, one that addresses the linkage between human rights and conflicts, and recognizes the nexus between the two.

In this study therefore, I discuss different approaches to conflict prevention and management before I come to a settled conclusion that each of the different approaches existing within the UN conflict

resolution system, lacks some precision and effectiveness, so much that a human rights approach is proposed.

The main argument is rooted on the general failure of traditional approaches to conflict prevention and management within the UN system. In measuring success and failure of such approaches, I test the most often used conflict resolution mechanisms within the UN, namely; negotiation, peacekeeping operation and international adjudication, as case studies. The choice of these, among the many UN approaches to conflict resolution, is inspired by their use in resolving the Africa's Great Lakes conflict, where the combination of all these had been applied. The Inter-Congolese Dialogue (ICD) political negotiations, the deployment of the United Nations Peacekeeping Mission in Congo (MONUC) and international adjudication-both in the *Case Concerning Armed Activities in the Territory of the Congo* (Democratic Republic of Congo v. Uganda) which ended in 2005 before the ICJ and *Thomas Lubanga Case*, which, at the time of writing is pending before the ICC, form part of these approaches. Furthermore, in relation to international adjudication, the role of the ICTR is briefly examined in the regional dimension of the Africa's Great Lakes conflicts.

Having presented the conceptual framework for the study on a human rights approach to conflict prevention, management and resolution, the Africa's Great Lakes conflict is analyzed with a view to portray the features, historical underpinnings as well as the impact that the conflict have had on the rights of individuals and communities in the region.

Before testing the efficacy or otherwise of each of the conflict resolution methods above mentioned, an overview of the major approaches to conflict prevention and management is made in Chapter Three. Both the UN and non-UN based mechanisms for conflict prevention and management are reviewed, pointing out the limits and shortcomings of these mechanisms, especially in resolving internal armed conflicts, like those in the Africa's Great Lakes region.

In the final analysis, the need for a new approach is realized, wherein, a human rights approach to conflict prevention and management is strongly proposed. As chapter six attests, the relationship between conflict prevention and management on the one hand, and human rights promotion and protection on the other, is multifaceted, intricate, and fluid, evolving in response not only to changes in the nature of contemporary violent conflict but also to the two camp's growing experience in working as partners instead of competitors. The chapter also makes clear that to see the relationship as two-sided distorts reality, for there are in fact three camps involved: conflict

resolution, human rights and international humanitarian law. The last of these seeks to regulate the conduct of war and to protect civilians during armed conflict, and is a human rights and legal tool that can strengthen a peace process or agreement by helping to reduce suffering and creating legitimacy for settlement.

Through a mixture of both analysis of field data and interpretive research, the complexity of the Africa's Great Lakes Conflicts is investigated with a view to examining methods applied to resolve it, and to determine a viable conflict management mechanism. At this beginning, the role played by human rights at different stages in the conflict cycle; from human rights abuses that precipitate violent conflicts through third party intervention in the form of peacekeeping and adjudication, to a clear human rights approach to conflict prevention, management and conflict resolution. The same touches upon the chapters throughout the study with the existence of human rights concerns in each of the chapters.

ACKNOWLEDGEMENTS

Such a lengthy academic exercise as writing a doctoral dissertation is a long journey prone to isolation, and it is my pleasure to thank everyone who walked with me. It is important to note that although responsibility for errors rests solely with me, the success of this work has, to a great extent, depended on the efforts, support, contributions, and encouragement from a number of individuals and institutions, without whom this work would not have been accomplished. Indeed, I am grateful to all of them. As it is hard to mention them all by name, perhaps apologies are in order, for all those who are not mentioned here.

First and foremost, I owe my deepest gratitude to my supervisor, Jaakko Husa, Professor of Constitutional Law and General Jurisprudence at the Department of Law of the University of Joensuu who was unfailingly supportive and guided me all the way from the initial stages of this study to its final completion. As a supervisor, he availed himself for advice relating to my work whenever I turned to him. His outstanding knowledge and experience gave me intellectual support, and his kindness and encouragement promoted my work to its current stage.

Second, I would like to thank the pre-examiners of my thesis, Professor Timo Koivurova (who also kindly accepted the appointment to act as an official opponent in the public defence of this thesis) and Dr. Eyassu Gayim for their insightful comments and for the vital guidance received as a result of their preliminary examination. I would also like to extend my gratitude to Dr. Sally Harris who spent her precious time to proofread and improve the English language of my thesis. Her linguistic comments and corrections added valuable input to this thesis.

Thirdly, I would like to express my sincere gratitude to the Finnish Evangelical Lutheran Mission (FELM) and the Joensuu Lutheran Parishes for generously extending a scholarship to me throughout the years of my doctoral studies. While I thank all those who contributed to this scholarship, I would especially like to express my heartfelt thanks to Leena Haavisto, Lea Honkanen and Sirpa Honkanen, who, in their different capacities within the FELM and the Joensuu parishes, worked tirelessly on the logistics of the scholarship and my stay in Finland during my studies.

Tumaini University, Iringa University College deserves many thanks for releasing me off my teaching duties through study leave to pursue my doctoral studies.

Fourthly, during the post-graduate seminars at the Department of Law of the University of Joensuu, my fellow doctoral students have been a source of inspiration; sharing and mutual learning and their constructive comments have enriched the PhD experience along the way, for which I wish to thank them all.

Finally, I would like to express my heartfelt thanks to my family. My parents, who first, but unknowingly, kindled the light of my educational life by letting me off my traditional Maasai childhood duties of looking after cattle to attend primary school, jointly deserve many thanks. This was a beginning of my long academic journey which ultimately promoted me from a cow-herder to a PhD holder. More importantly, I am deeply grateful to my wife Nai for her love, encouragement and support during my studies. Together with our children Agape and Amani and other members of my extended family, they have been patient and endured long intervals of my absence from home to pursue my studies at the University of Joensuu in Finland, away from home.
Last, but not least, I thank God Almighty for his care, love and guidance throughout my life and during this challenging period of my studies.

Joensuu, 2010 **Andrew Mollel**

TABLE OF CONTENTS

COPYRIGHT ..... **ii**
ABSTRACT ..... **iii**
ACKNOWLEDGEMENTS ..... **vii**
ABBREVIATIONS ..... **xiii**

1 CONCEPTUAL FRAMEWORK AND METHODOLOGICAL OVERVIEW **1**
1.1 General Introduction 1
1.1.1 Background to the Study and Motivation 5
1.1.2 Human Rights Discourse as a Contentious Reality 12
1.1.3 Defining Relevant Research Concepts 16
1.1.4 Research Questions 28
1.2 Research Objectives and Significance of the Study 28
1.3 Methods of Research and Data Collection 29
1.3.1 Research Philosophical Perspectives 32
1.3.2 Field Research and Literary Sources 37
1.3.2.1 Informal Interviews 37
1.3.2.2 Questionnaires 39
1.3.2.3 Case Study 40
1.3.3 Reliability and Validity 41
1.3.4 Ethical Considerations 43
1.3.5. Literary Sources and Participation in Conferences 44
1.3.6 Bridging the Fieldwork and Academic Studies 45
1.4 Research Structure and Scope of the Study 47
1.5 Concluding Remarks 51

2 THE AFRICA'S GREAT LAKES CONFLICTS ANALYSIS **53**
2.1 Introduction 53
2.2 The Basic Features of the Africa's Great Lakes Conflict 56
2.3 Historical, Socio-Political Background as Sources of Conflicts 58
2.3.1 The Role of the West in the Intensification of Conflicts in the Africa's Great Lakes 60
2.3.2 Rwandan Conflict: Introduction of violence in the Great Lakes Region 65
2.3.2.1 The Second Republic – The Regime of Habyarimana 66
2.3.2.2 From Conflict to Genocide 1990-1994 69

2.3.2.3 Genocide and War 70
2.3.2.4 The Impact of the Rwandan Genocide on the Great Lakes Conflicts 73
2.3.3 The DRC Conflict from 1990s to the Present 75
2.3.3.1Internal Causes: Human Rights Violations, Ethnicism and the Citizenship Question 77
2.3.3.2 The *Banyamulenge* Ethnogenesis and Conflicts in Eastern DRC 80
2.3.3.3 The Congolese Nationality Legislation and its Implications on Conflicts 83
2.3.4 External Causes of the Conflict: Foreign Interventions 90
2.3.4.1 Justification for Interventions of African Foreign Troops 90
2.3.4.2 Hidden Agenda for Foreign Interventions 93
2.3.5 The Burundi Conflict from 1993 to the Present 95
2.4 The Human Rights Impact of the Conflict and Ethnic Reactions 97
2.5 Conclusion 99

3 APPROACHES TO CONFLICT PREVENTION AND MANAGEMENT: 103
AN OVERVIEW 103
3.1 Introduction 103
3.2 Development of the Concept of Conflict Prevention within the UN 105
3.3 Methods of Conflict Prevention, Management and Resolution 107
3.3.1 Collective Security Systems 107
3.3.2 Types of Dispute Settlement 109
3.3.2.1 The UN Charter-Based Mechanisms 115
3.3.2.2 Non-Charter-Based Mechanisms 119
3.4 Evaluating the Effectiveness of the UN Approaches to Conflict Resolution 124
3.5 Conclusion 128

4 PEACEKEEPING OPERATIONS IN CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION: A FOCUS ON THE *MONUC* 131
4.1 Introduction 131
4.2 Defining Peacekeeping 133
4.3 The Legal Status of UN Peacekeeping Operations 138
4.4 The Effectiveness of Peacekeeping Operations in Conflict Management 145
4.5 UN Peace Keeping Operations in Congo: The ONUC and the MONUC 146
4.6 Assessing Success and Failure 155
4.7 Human Rights Components of Peacekeeping Operations 159
4.8 Human Rights Components of MONUC 162

4.9 African Regional Peacekeeping 166
4.10 Conclusion: Challenges and Limitations of the Approach 170

5 INTERNATIONAL ADJUDICATION AND RESOLUTION OF ARMED CONFLICTS IN THE DRC 175
5.1 Introduction 175
5.2 Development of Adjudication in International Law 178
5.3 Background to the Armed Activities on the Territory of the DRC 185
5.4 The Role of the ICJ in the DRC Conflict 189
5.5 International Criminal Adjudication 198
5.5.1 State 'Criminality' and International Criminal Adjudication 200
5.5.2 Individual Criminal Liability and International Criminal Adjudication 204
5.5.3 Assessing the efficacy of the International Criminal Tribunal for Rwanda (ICTR) 207
5.5.4 International Criminal Adjudication and the Congo Conflict 210
5.5.5 Lubanga case 212
5.6 Conclusion 217

6 SYSTEMIC INTEGRATION OF HUMAN RIGHTS AND CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION 219
6.1 Introduction 219
6.2 The Relationship Between Human Rights, Conflicts and Conflict Management 222
6.2.1 Principles and Standards 222
6.2.2 International Normative Standards of Human Rights 223
6.2.3 Normative Standards of Human Rights in Africa 225
6.2.4 Principles of Conflict Resolution 226
6.2.5 Points of Convergence and Divergence 227
6.3 Human Rights and Conflict: The Interface 234
6.3.1 Human Rights Violation as Both Causes and Manifestations of Violent Conflict 234
6.3.2 A Sustained Denial of Human Rights as a Structural Cause of High-Intensity Conflict 238
6.4 Human Rights and Conflict Management: Contradictory or Complementary? 243
6.4.1 Respect for Human Rights as a Primary Form of Conflict Prevention Mechanisms 243
6.4.2 Combining the Prescriptive Approach of Human Rights Actors with the Facilitative Approach of Conflict Management Practitioners 246
6.4.3 Integrating Human Rights and Justice Issues in Managing Conflicts 250

6.4.4 Conflict Management as an Alternative to Litigation in Dealing with Rights- Related Conflicts 253
6.5 Capacity Building and Training Programmes 257
6.5.1 Training Conflict Management Practitioners on Human Rights Awareness and Instruments 257
6.5.2 Training Human Rights Actors on Conflict Management Skills 260
6.6 Insights Gained from Linking Human Rights and Conflict Management in Practice 263
6.6.1 The Dialectical Nature of the Relationship Between Human Rights and Conflicts 263
6.6.2 Targeting Actors from both Fields Separately 264
6.6.3 Conflict Resolution as an Imperative Aspect in Human Rights Education and Training 265
6.6.4 Raising Human Rights Indirectly in Training Settings: A Strategic Approach 266
6.7 Conclusion 268

7 GENERAL CONCLUDING REMARKS 271
7.1 Lessons: Possibilities and Challenges 271
7.2 Enhancing Effectiveness in Conflict Prevention and Management 284
7.3 Final Conclusion 286

REFERENCES 291
Books 291
Articles 302
Reports 312
Table of International Legal Instruments 313
Table of Cases 315

APPENDICES 317
Appendix A: Map of the Africa's Great Lakes Region 317
Appendix B: Selected UN-Mandated Peacekeeping Operations, 1945-2008 318
Appendix C: Interview Questions and Questionnaire List 320

ABBREVIATIONS

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples Rights
ACRF	African Crisis Response Force
ADR	Alternative Dispute Resolution
AFDL	*Alliance des Forces Démocratiques pour la Libération du Congo –Zaïre (*Alliance of Democratic Forces for the Liberation of Congo-Zaire)
AIDS	Acquired Immunodeficiency Syndrome
AMIB	African Mission in Burundi
AMIS	African Mission in Sudan
APRM	African Peer Review Mechanism
ARUN	*Alliance Rwandaise pour l'Unité Nationale*
AU	African Union (formerly OAU)
BSA	British Sociological Association
BWC	Biological Weapons Convention
CAR	Central African Republic
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CIA	Central Intelligence Agency (US)
CIAT	*Comité International d'Accompagnement de la Transition* (International Committee in Support of the Transition)
CIVPOL	Civilian Police
CNN	Cable News Network
CRC	Convention on the Right of the Child (UN)
CWC	Chemical Weapons Convention
DDR	Demobilization, Disarmament and Reintegration
DDRRR	Demobilization, Disarmament, Repatriation, Resettlement and Reintegration
DPA	Department of Political Affairs
DPKO	Department of Peacekeeping Operations (UN)
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECOMOG	ECOWAS Monitoring Group (Liberia and Sierra Leone)
ECOSOC	Economic and Social Council
ECOWAS	Economic Organization of West African States
EU	European Union
FAR	*Forces Armees Rwandaise*
FARDC	*Forces Armees de la Republic Démocratique du Congo*
FAO	Food and Agriculture Organization
FDD	Forces for the Defence of Democracy (*(Forces pour la Défense de la Démocratie)*
FDLR	*Forces Démocratiques pour la Libération du Rwanda*
FRODEBU	*Front pour le Democratie au Burundi*
FRY	Federal Republic of Yugoslavia
FUNA	Former Uganda National Army
GA	General Assembly – United Nations
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product

GLR	Great Lakes Region
GNP	Gross National Product
HCNM	High Commissioner for National Minorities
HIV	Human Immunodeficiency Virus
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Center for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IFAD	International Fund for Agricultural Development
IFOR	NATO Implementation Force (former Yugoslavia)
IGAD	Intergovernmental Authority on Development
IGO	Intergovernmental Organization
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
INSTRAW	International Research and Training Institute for the Advancement of Women
ISC	Independent State of the Congo
ISS	Institute for Security Studies – Pretoria, South Africa
ITLOS	International Tribunal for the Law of the Sea
JFC	Joint Force Commander
JMC	Joint Military Commission
KFOR	Kosovo Force
LRA	Lord Resistance Army (Uganda)
MICIVIH	*Mission Civile Internationale en Haïti (*International Civilian Mission in Haiti)
MLC	*Mouvement pour la Libération du Congo* (Movement for the Liberation of the Congo)
MONUA	*Mission d'Observation des Nations Unies à l'Angola* (United Nations Observer Mission in Angola)
MONUC	*Mission de l' Organisation des Nations Unies en République démocratique du* Congo (United Nations Organization Mission in the Democratic Republic of Congo)
MRND	*Mouvement révolutionnaire national pour le développement*
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
NALU	National Army for the Liberation of Uganda
NATO	North Atlantic Treaty Organization
NEPAD	New Partnership of African Development

NGO	Non-Government Organization
NIEO	New International Economic Order
OAS	Organization of American States
OAU	Organization of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
ONUC	*Opération des Nations Unies au* Congo (UN Operation in Congo)
ONUSAL	*Observadores de las Naciones Unidas en El Salvador (*United Nations Observer Mission in El Salvador)
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
P-5	The five permanent member states of the UNSC
PKO	Peacekeeping Operation
PLO	Palestine Liberation Organization
PSC	Peace and Security Council (AU)
PSF	Peace Support Force
PSO	Peace Support Operation
RCD	*Rassemblement Congolais pour la Démocratie* (Congolese Rally for Democracy)
RECAMP	*Renforcement du capabilite African pour Maintien la Paix* (Reinforcement of African Military Peacekeeping Capacity)
ROE	Rules of Engagement
RPA	Rwandese Patriotic Army
RPF	Rwandese Patriotic Front
RPTC	SADC Regional Peacekeeping Training Centre
RES	Resolution
RTLM	*Radio-Télévision Libre des Mille Collines*
SADC	Southern African Development Community
SC	Security Council
SCR	Security Council Resolution
SFOR	Stabilization Force (Former Yugoslavia)
SG	Secretary General
SOFA	Status of Force Agreement
SPLA	Sudanese People's Liberation Army
SRSG	Special Representative of the Secretary – General
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN CIVPOL	UN Civil Police
UN	United Nations
UNAMID	UN/African Union Mission in Darfur
UNAMIR	United Nations Assistance Mission in Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNAVEM	United Nations Angola Verification Mission
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFICYP	UN Force in Cyprus

UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund (formerly United Nations International Children's Emergency Fund)
UNITA	National Union for the total Liberation of Angola.
UNITAF	Unified Task Force (Somalia)
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Mission in Kosovo
UNO	United Nations Organization
UNOB	United Nations Operation in Burundi
UNOGBIS	United Nations Peace-Building Support Office in Guinea-Bissau
UNOMIG	United Nations Observer Mission in Georgia
UNOMIL	United Nations Observer Mission in Liberia
UNOMSIL	United Nations Observer in Sierra Leone
UNOSOM	UN Operation in Somalia
UNPROFOR	UN Protection Force (Former Yugoslavia)
UNRF II	Uganda National Rescue Front II
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
UNTSO	United Nations Truce Supervision Organization
UNU	United Nations University
UPC	Uganda Peoples Congress; also means Union of Congolese Patriots (led by Thomas Lubanga).
UPRONA	*Union Pour le Progres Nationale* (Union for National Progress Party)
WFP	World Food Programme
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMD	Weapons of Mass Destruction
WNBF	West Bank Nile Bank Front
WTO	World Trade Organization

1 CONCEPTUAL FRAMEWORK AND METHODOLOGICAL OVERVIEW

1.1 General Introduction

This chapter is set to provide the conceptual and methodological framework for the study on the application of human rights in conflict prevention and management, with the focus on the Great Lakes Conflict. Its main objective is to open discussion on the research subject, by laying down the foundations for a deeper understanding of human rights concerns in resolution of armed conflicts. By highlighting the background and motivation of the issue, the first chapter acts as an eye opener for the understanding of the limits and weaknesses that attend contemporary UN conflict resolution mechanisms, and argues for the need for a multidisciplinary approach to the subject that incorporates a human rights approach. The chapter further defines the various main research concepts, including different perspectives through which the concept of human rights is viewed and describes the methods applied in conducting the study. Before making the final concluding remarks on the chapter, the structure and scope of the study is presented; the subject contents of each chapter in the study is highlighted.

Two bodies of international law govern internal armed conflicts such as civil wars.[1] Humanitarian law,[2] or 'the law of armed conflicts' applies to the parties to a conflict, laying down certain rules for the protection of those who are not, or who are no longer taking part in fighting. It also restricts the means of warfare – in particular weapons– and the methods of warfare, such as military tactics, etc. The rules provided by humanitarian law are typically fairly specific, as they are designed to be interpreted and applied by military commanders.[3] Owing to the controversy surrounding

[1] The international law of warfare has been based on the assumption that a basic difference exists between *international law of war,* that is to say armed conflicts between two or more States, and *non-international armed conflicts*, namely conflict breaking out of the territory of a State between rebels and the central authority.

[2] See Greenwood, C. 'Historical Development and Legal Basis' in Fleck, D (Ed.), (1995). *Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press, pp.8-12.

[3] See these rules elaborated in the 1949 Geneva Conventions and their Additional Protocols: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609 and

applicability of humanitarian law principles to some of the conflict management methods, there have been many ongoing debates. One of the topical debates concerns the extent to which UN forces deployed in conflict situations are obliged to respect humanitarian law.[4] One stumbling block for peacekeeping forces for instance, is that the relevant principles are enshrined in the international instruments governing the conduct of combatants engaged in armed conflict of an international or non-international character.[5] Given the fact that such principles are still predominantly concerned with international armed conflicts as opposed to non-international ones, the nature of conflict is relevant to the success or failure of the deployed peacekeeping force. Nonetheless, it is now generally accepted that UN forces are bound by humanitarian law, whether in performing duties of a peacekeeping or enforcement action.[6]

Human rights law is applicable in both pre-and post armed conflict times, during which humanitarian law clearly does not apply; but the query as to which set of laws will apply in a particular conflict situation is not always easily discerned. If one holds to the common historical position that the two regimes are applicable depending on the categorization of the conflict,[7] then, a dangerous *lacuna* may exist if the applicability of both regimes is denied. An example involving non-state actors, who are neither party to the international humanitarian and human rights law instruments nor recognised internationally, may create such a situation. However, in situations where the law does not apply, the international accountability of such groups for human rights abuses remains unclear (although such acts would be criminalized under domestic criminal law).[8]

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III).

[4] See Palwankar, R. (1993) 'Applicability of international humanitarian law to United Nations peace-keeping forces' in *International Review of the Red Cross* No 294, p.227-240.

[5] Murphy, R. (2007). *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice*, Cambridge: Cambridge University Press, p. 214.

[6] See Cerone J, (2006) 'Holding Military and Paramilitary Forces Accountable' in Mertus, J & Helsing, J. (2006). *Human Rights and Conflict: Exploring the Links Between Rights, Law and Peacebuilding*, Washington DC: United States Institute of Peace Press, p. 217; See further Greenwood, C. (1995)'Scope of Application of Humanitarian Law' in Fleck, *supra* note 2, p.46. This is not just a practical necessity, but may arise from obligations of states to respect, and ensure respect for the Geneva Conventions and Protocols in all circumstances. See also Tittemore, B. (1997) 'Belligerents in Blue Helmets: Applying International Humanitarian Law to the United Nations Peacekeeping Operations' *Standford Journal of International Law*, vol. 33, No. 1, pp. 67-117. at 107.

[7] See this argument clearly brought forward in Meron, T. (1983) 'On the Inadequate reach of Humanitarian and Human Right Law and the Need for a New Instrument' in *American Journal of International Law*, vol. 77, No. 3, pp. 589-606.at 602.

[8] See Robinson, D and Von Hebel, H. (1992) 'War Crimes in Internal Armed Conflicts: Article 8 of the

The leading theory among publicists and advocates is that humanitarian law is *lex specialis* to human rights law in situations of armed conflicts.[9] The most influential statement of this doctrine was given by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

> "The Court observes that the protection of the International Covenant on Civil and Political Rights [ICCPR] does not cease in times of war. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflicts which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[10]

The effect of this is that humanitarian law is to be used to interpret a human rights rule. Conversely, in the context of the conduct of hostilities, human rights law may not be interpreted differently from humanitarian law.[11] Human rights are a key issue in guaranteeing consistent and effective conflict resolution mechanisms. Their neglect discredits the UN approaches while undermining other advances in conflict management. This fact manifested itself in the various efforts taken to try to resolve the Africa's Great Lakes conflict. Although much has already been done, the conflict persists. This is probably not due entirely to lack of appropriate conflict resolution strategies or to incapacity, but to several other elements. First, there is lack of interest. Africa is considered too peripheral to the contemporary interest of the international community to actually be part of it. The September 11 crisis and its vast consequences only accelerated the process of Africa's international marginalization. Compared to

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ICC Statute' *Yearbook of International Humanitarian Law*, vol. 2, pp. 193-209.

[9] Koskenniemi, M. (2003).'Fragmentation of International Law: Topic (a): The Function and Scope of the *Lex Specialis* Rule and the Question of 'Self-Contained Regimes: An Outline', prepared for the Study Group on Fragmentation of International Law of the International Law Commission, available at <http://www.un.org/law/ilc/sessions/ 55/fragmentation_outline.pdf, § 2.2>, last visited, September 8, 2009.

[10] ICJ, Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), pp. 24–25; *see also* ICJ, Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), pp.102, 105.

[11] Doswald-Beck, L. (1997) 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or the Use of Nuclear Weapons' *International Review of the Red Cross*, No.316, pp. 35-55.

the conflicts in the Middle East, the Balkans in Eastern Europe, the fight against the Taliban in the Afghans and Pakistan, Africa carries only a limited fear factor.

Second, there is a very low pain threshold of the economically developed Western world. This threshold, as Prunier puts, is so low that we cannot even tolerate watching the pain of others on television.[12] So one of the diplomat's jobs is to remove the visible signs of pain from the CNN or other broadcasts before they can prevent Western spectators from going about their familiar domestic pleasures. Humanitarian action becomes a substitute for political decision. High-protein supplementary feeding is brought in, a vaccination campaign is undertaken, reassuring shots of black babies with white nurses are displayed, and then the cameras roll off. Mission accomplished! These factors, and many similar ones, have given rise to the persistence of the "Great Lakes Conflict" storyboard of the past decade, from the 1994 Rwanda Genocide to the ensuing refugee crisis in the region, from the fall of Mobutu to the 1998 "Africa's First World War" and the continued efforts to resolve the DRC conflict.

Conflict resolution strategies applied in the region have increasingly sought to address both political and economic issues and to incorporate regional and international dimensions, in the absence of incorporation of human rights issues, which are both the cause and the result of conflicts.[13] This study examines the applicability and relevance of human rights to all types of conflict resolution mechanisms generally and particularly those applied in resolving the Africa's Great Lakes Conflict. It considers the various conflict resolution methods and the general approaches to conflict management both within the UN Charter and those outside the ambit of the Charter, peacekeeping, peace-building, peace enforcement and preventive diplomacy.[14] It combines academic analysis, field experience, and reflection with forward-looking proposals for more effective conflict resolution mechanisms designed within the UN in partnership with regional, sub regional and local actors.

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[12] Prunier, G. (2009). *From Genocide to Continental War: The Congo Conflict and the Crisis of Contemporary Africa*, London: Hurst & Company, p. xxxv.
[13] Mertus & Helsing, *supra note* 6, p. 5.
[14] See further discussions of these terms in Galtung, J. (Ed.), (1976), *Peace, War and Defense: Essays in Peace Research*, Vol.II, Copenhagen: Ejlers, p. 282.

With all of this in mind, this study focuses not only on the management of conflicts, but also on the prevention and resolution of conflicts. The reason for this is that it is more effective to contain conflicts than to deal with them once they have begun. It contends that a human rights approach to conflict offers an epistemological and practical basis for better understanding and preventing conflicts.[15] The greatest advantage of the human rights-approach is the legitimacy that is attached to the whole idea of human rights. The language of rights can therefore be employed for the benefit of conflict resolution processes.

1.1.1 Background to the Study and Motivation

There is a substantial weakness and limitation in the existing mechanisms for the prevention of violent conflicts in international law. Despite the need to be able to move quickly to prevent genocide and crimes against humanity, the United Nations has no capacity to avert such catastrophes, even when prompt action could save hundreds of thousands of lives. The international community's failure to prevent and resolve conflicts culminated in its failure to stop genocide in Rwanda in 1994 and to avert "ethnic cleansing" occurring in the Darfur region of Sudan. Such examples illustrate this incapacity, as do the other massive killings of civilians in Cambodia, the former Yugoslavia, East Timor, Sierra Leone, the Democratic Republic of the Congo, Liberia, and elsewhere.[16]

All these episodes led to intense studies, debates and evaluations over the UN capacities to address conflicts generally and internal armed conflicts in particular. The central conclusion indicated the existence of serious weaknesses within the organization, calling for various alternatives. Conflict prevention and management have thus acquired a relatively uncontested status within the UN community. Significant thought is the question of which types of strategies are worthy of being adopted in preventing and managing conflicts.

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[15] Murray, R. 'Conflict Prevention and the Human Rights Framework in Africa' In McEvoy, K & Newburn, T. (Eds.), (2003) *Criminology, Conflict Resolution and Restorative Justice*, New York: Palgrave MacMillan, pp. 83-100.

[16] Peck, C. (1996), *The United Nation as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflicts*, The Hague: Kluwer Law International, p. 11

Peace building strategies, properly conceptualized, lie at the point where the UN Charter's main concerns-peace and security, development and human rights- intersect and overlap. Policies which enhance economic development and distributive justice, encourage the rule of law and protect fundamental human rights- including the right to participate through the ballot box in the making of the government decisions which fundamentally affect peoples' lives- are all in their own way security policies as well, addressing many of the problems which lie at the heart of violent conflicts.[17]

Although there is an attempt to regulate and manage armed conflicts, these efforts are seriously hampered by a number of factors. The basic presumption of international law post-1945 according to Article 2 (4) and 2 (7) of the UN Charter that the use of force is illegal, is qualified by the rules to the effect that self-defence and collective security are allowed. Furthermore, post-1990s legal framework accepted or at least tolerated the use of force for humanitarian intervention, which is defined as a coercive interference in the internal affairs of a state involving the use of armed force with the purposes of addressing massive human rights violation or preventing widespread human suffering.[18] At the same time, international humanitarian law, which is intended to provide for rules regulating the actual conduct of warfare, has not always been respected and it is further limited by the distinction between international and non-international armed conflicts.[19] It remains obvious, therefore, that preventing wars and massive human rights violations requires an alternative approach.

This study proposes a multidisciplinary approach to conflict prevention and management. The study is not positioned in any single family of legal sciences, but it rather combines public international law rules, human rights and theoretical as well as methodological perspectives of conflict resolution. Human rights violations have been a major source of conflicts in the Africa's Great Lakes region.[20] Discrimination,

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[17] Peck, Ibid, p.ix

[18] See generally Simon, C. (2001). *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford: Oxford University Press; Welsh, J. 'Authorizing Humanitarian Intervention' in Price, R. & Zacher, M. (Eds.) (2004). *United Nations and Global Security*, New York: Palgrave Macmillan; Gray, C. (2000) *International Law and the Use of Force*, Oxford University Press, Oxford; Gray, C. 'The Use of Force and the International Legal Order' in Evans, M. (ed.), (2003). *International Law*, Oxford: Oxford University Press, p. 589.

[19] For a thorough discussion of contemporary distinction between Wars and Belligerents, see Cassese, A. (2008). *The Human Dimension of International Law: Selected Papers*, Oxford: Oxford University Press, p. 99.

[20] Mugwanya, G (2003) *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, New York: Transnational Publishers, pp. 180-224.

disregard for the rule of law, electoral malpractices, dictatorial regimes, suppression of popular participation in the affairs of government and impunity are but a few of the factors that violate human rights and lead to conflicts in the region. The perpetration of gruesome acts of sexual violence against women and girls in the conflicts in Burundi, Rwanda and the Democratic Republic of Congo (DRC) bears testimony to the impact of conflict on human rights.

The Africa's Great Lakes conflicts (and others) have shown that traditional conflict resolution approaches currently applied under the auspices of the UN and regional bodies such as the AU are limited in impact and sustainability when undertaken without due consideration of human rights concerns. The relationship between conflict and human rights is both short-term and long-term in nature. In the short term, violent and destructive conflicts can lead to human rights violations. In the long term, a sustained denial of human rights can lead to conflicts, as fundamental needs of human beings are frustrated.[21] The protection of rights is therefore of the utmost importance if conflicts are to be dealt with in an effective and constructive manner and lasting peace is to be created.

This direct relationship between rights and conflict has been generally under-explored in trying to resolve the Africa's Great Lakes conflicts. In view of the effects of conflict on human rights, any attempt at resolving them must take into account the protection of human rights, rather than just the cessation of hostilities and negotiation of peace agreements. Though these measures have been successful in some conflicts, more often than not the protection of human rights is not given its necessary due prominence in conflict resolution.

Since the early 1990s the Africa's Great Lakes region has been convulsed by interlocking civil wars, inter-state conflict and flawed democratic transitions.[22] Many

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[21] Mertus & Helsing, *supra* note, 6. p.28.

[22] Nzongola-Ntalaja, G. (2003) *The Congo from Leopold to Kabila,* London: Zed Books, p. 215-16. According to Nzongola-Ntalaja the countries included in the designation 'Great Lakes' varies greatly from context to context. However, without delving into the various divergent views as to what constitutes Africa's Great Lakes Region, the region is understood here to include not only the political "core" countries of Burundi, Rwanda and DRC, but also includes such neighbouring states in East Africa as Kenya, Tanzania and Uganda. For further description of this region, *see* for example Mpangala, G. (2000). *Ethnic conflicts in the Region of the Great Lakes: Origins and Prospects*, Dar Es Salaam: Dar Es Salaam University Press, p. 1.

millions of lives across the region have been lost or blighted as a result of violence and displacement. Of the countries in the region, only Tanzania has managed to avoid such catastrophe, although it has been heavily affected by the strain of hosting hundreds of thousands of refugees.[23]

In addressing the above arguments, the conflicts in the Africa's Great Lakes Region are closely examined, with the DRC as a case study. The conflicts of the last decade across the region must be understood in the context of longer-term dynamics of ethnic conflict and state formation. It is particularly important to study patterns of intervention in each other's affairs by the states of the region and the role of natural resources in fuelling conflict.[24] Three factors have been identified by analysts as key contributors to conflict in the region: ethnicity, state failure and greed. Peace-building strategies have increasingly sought to address these factors.[25] But, have these efforts sought to acknowledge the historical contexts within which these factors emerged? There is no question that ethnicity has been an important factor in generating conflict in the Great Lakes region. However, ethnicity must be understood in a historical and political context. For example, Hutu and Tutsi identities are in no way 'primordial.' These identities hardened under colonial rule and became virtually the sole basis for political action in Burundi and Rwanda after the colonial era ended. Ethnicity has also undoubtedly played a major role in causing conflict in Uganda and the DRC.

In the case of the DRC, the people of the Congo have suffered cruelty throughout the past century from a particularly brutal experience of colonial rule. Following independence in 1960 and external interference by the United States and other Western powers, there was a generation-long spoliation at the hands of Mobutu (the dictator installed by the West in 1965), and periodic warfare which continues fitfully

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[23] By the end of 2004, more than 1 million refugees from the Great Lakes region were hosted in Tanzania, although by 2008 the number dropped to 334,862 following voluntary repatriation, local integration and resettlement to a third country, available at <http://www.moha.go.tz>, last visited September 8, 2009. See further for these statistics, Mwachifi, S.(2006) 'Security and Related Implications of Forced Migration: East Africa and Great Lakes Region', paper presented to the East African Summer School for Refugee and Humanitarian Affairs, Nairobi, 2006, p. 5. (On file with the Author)

[24] Huggins, C. (2004) 'Preventing Conflict through Improved Policies on Land Tenure, Natural Resource Rights, and Migration in the Great Lakes Region' *Eco-Conflicts*, Vol. 3 No. 1, pp. 1-4.

[25] Lunn, J. (2006) 'The African Great Lakes Region: An End to Conflict?' RESEARCH PAPER 06/51 25 OCTOBER 2006, available at < ttp://*www.parliament.uk/commons/lib/research/rp2006/rp06-051.pdf*>. last visited, September 8, 2009.

even now in the east of the country. But, as an insightful political history of the Congolese democratic movement in the 20th century decisively makes it clear, the Congolese people have responded by trying both to establish democratic institutions at home and to free themselves from exploitation from abroad. (Indeed, internal and external exploitation cannot be separated one from the other).[26] Much of what is happening derives from the inbuilt culture of brutality from the time of King Leopold II of Belgium, who owned the "Congo Free State" as his private property. Leopold has gone down in history as a man of greed, who carved out an empire based on terror to harvest rubber.[27] Congolese families were held hostages, starving to death if the men failed to produce enough rubber. The shocking massacres and widespread brutality of the Belgian staff of a company which was 'trading' (substitute word for 'plundering') in the Congo, provided an outline for Joseph Conrad's famous historical novel on Congo 'Heart of Darkness'[28] which, set in the 1890s, remain a true testimony of crimes committed by colonial rulers in the heart of Africa, the current DRC. In this way, a terror was unleashed that, by all accounts, would eventually halve the population of the Congo. "During the Leopold period and its immediate aftermath the population of the territory dropped by approximately ten million people"[29]

Congo was to attain independence smoothly in 1960. However, under the turbulent ghost of King Leopold II it fell under General Joseph Mobutu, who staged a military take over, and tyrannically misruled the country for 32 years while receiving misguided Western foreign assistance. His criminal government was preoccupied with extraction and extortion such that, like King Leopold II, he ran the country as a personal property until Laurent Kabila's forces overthrew him in 1997. Kabila was himself assassinated four years later, to be succeeded by his son, the current President Joseph Kabila. The conflict under current study started all over in 1998, and efforts to resolve it motivated this study.

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[26] Nzongola-Ntalaja, *supra* note 22, cover page.
[27] Prunier, *supra* note 12, p. 76.
[28] See generally Cox, C. (Ed.), (1982) *Conrad: Heart of Darkness, Nostromo and Under Western eyes: A Casebook*, London: Macmillan; Conrad, J. (1999) *Heart of Darkness and Selections from The Congo Diary of Joseph Conrad*, New York: Modern Library.
[29] Hochschild, A. (1988). *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa*, Boston: Houghton Mifflin, p. 233.

As pointed out early, for the purposes of this study, only one country in the Africa's Great Lakes region, the DRC will be studied. Only by looking at the Great Lakes region as whole, however, with this one country as a case study, can one comprehend the calamities suffered by this part of the African continent.

The DRC is chosen as a case study for a number of reasons. Different traditional conflict resolution initiatives have been applied in the DRC since the war broke in August 1998. The involvement of many parties in the war and the complexity of interests have made conflict resolution initiatives rather complicated.[30] From the time the war broke various initiatives were taken under a sub-regional organization (SADC), a regional set up (AU) and the international community, particularly under the UN. Firstly, the SADC and AU led various negotiations, culminating in the process of the Inter-Congolese Dialogue from the aborted Addis Ababa meeting, through the Sun City I process of February-April 2002, the December Pretoria Agreement up to the Sun City II final talks of April 2003.[31]

Following the April 2003 Sun City Agreement, the composition of Transitional Government was finally settled and agreement reached to integrate all rebel factions into an integrated national army. Under a '1+4 formula', the Transitional Government involved the appointment of four Vice-Presidents under President Joseph Kabila, thereby ensuring the representation of the main armed Congolese parties to the conflict.[32] The parties declared the conflict in the DRC formally over. The new Transitional Government was promulgated in June 2003, leading to relatively peaceful parliamentary and presidential elections in July 30th, 2006 with the run-off on October 29th 2006.

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[30] For a thorough discussion on the parties involved in the DRC conflict and their varying interests, see Mpangala, *supra* note 22, p. 92

[31] See detailed discussions of this dialogue in Apuuli, P. (2004). 'The Politics of Conflict Resolution in the Democratic Republic of Congo: The Inter-Congolese Dialogue Process' in *African Journal of Conflict Resolution*, vol. 4 No.1, pp. 65-84.

[32] The various elements and entities involved in the Inter-Congolese Dialogue, Parties to *the Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo*: were the Government of the Democratic Republic of the Congo the Congolese Rally for Democracy (RCD), the Movement for the Liberation of the Congo (MLC), the political opposition, civil society, the Congolese Rally for Democracy/Liberation Movement (RDC/ML), the Congolese Rally for Democracy/National (RCD/N) and the *Mai-Mai*.

The second set of conflict resolution initiatives in the DRC conflicts was that conducted under the auspices of the UN or UN led institutions. Firstly, the UN deployed a more military approach in the form of Peacekeeping operations, the MONUC,[33] which comprises of more than 17,000 personnel, being the biggest UN force in the world and costing $1.2 billion a year.[34] The mission must be seen as the start of the long road to change leading to free elections and sustainable and responsible government. Furthermore, should peacekeepers deploy to enforce peace and/or respond to a humanitarian crisis they must deploy in significant numbers with the appropriate command structure, mandate and capability to coerce effectively as required.

Additionally, judicial settlement or rather an adjudication-as-conflict-resolution approach has been tried in resolving the Congo conflict. Following armed activities committed by foreign troops from Uganda, Rwanda and Burundi in the DRC territory, the latter initiated proceedings before the ICJ in June 1999, alleging *inter alia*, that acts of armed aggression carried out by Uganda on the DRC territory constituted a flagrant violation of the United Nations Charter and the Charter of the Organization of African Unity (OAU).[35] The case, which continued against Uganda alone, ended in 2005 with the ICJ verdict implicating Uganda to have breached international law against the DRC and was thus ordered to pay damages. In another vein, following the issuing of a warrant of arrest in January 2006, in March Thomas Lubanga Dyilo, a former Ituri militia leader, was handed over to the ICC by the DRC authorities.[36] However, other militia leaders in custody are reported to have been released, by the Congolese authorities.[37] At the time of writing this thesis, this case was still pending before the ICC. It remains to be seen what impact the ICC's decision will have on the developments in the DRC conflict.

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[33] This is an initial name of the French words "*Mission de l' Organisation des Nations Unies en République démocratique du Congo*, the United Nations Organization Mission in the Democratic Republic of the Congo (hereinafter to be referred to as "the MONUC")

[34] Wrong, M. (2006) 'Congo on the Edge'. Available from the website of the *All Party Parliamentary Group on the Great Lakes and Genocide Prevention* at: <http://www.appggreatlakes.org>, last visited, September 8, 2009.

[35] The original case was brought against Uganda, Burundi and Rwanda. The DRC discontinued the cases against Burundi and Rwanda in 2001 and filed a new submission against Uganda in 2002.

[36] For a copy of the ICC's arrest warrant, see < http://www.icc-cpi.int/cases/RDC.html>, last visited September 8, 2009.

[37] Twenty-first report of the Secretary-General, 13 June 2006, para. 54.

Despite these notable initiatives by various organizations and 'never again' call after Rwanda genocide, the conflict prevention performance has been and is still *ad hoc* and ineffective because it does not address the root causes of conflicts. All the approaches have rarely addressed human rights, local dynamics and the historical as well as the multifaceted nature of the conflicts. Furthermore, participants in the peace process are restricted to representatives of political parties, the state and rebel movements, to the total exclusion of the civil society and other human rights groups.

In order to understand the present conflict situation in the Great Lakes region, it appears that focus should be placed not on the ancient past, but rather on the recent history, starting from colonialism, which has a great impact on the origin of these conflicts.

The various approaches to resolution of conflicts, as applied within the region will also be thoroughly studied. Proper analysis of these conflicts together with the suggestions on the new approaches to durable resolution of the same and prevention of other conflicts of similar nature will be fully addressed.

1.1.2 Human Rights Discourse as a Contentious Reality

In the contemporary human rights discourse and practice, human rights are constructed as both a 'sword' and a 'shield'. As Shivji puts it, human rights are a contentious discourse in which different, and often-contradictory, perspectives representing different interests in national and international society seek dominance or hegemony.[38] Just as dominant and dominating interests may employ the ideology of human rights to justify and rationalize their dominance, so also the forces that seek to resist dominance may deploy human rights to mobilize their resistance. With such divergent scholarly views within and about human rights, it becomes imperative for one to examine the very concept of human rights before one can justify its use as an appropriate approach to conflict resolution.

The most celebrated document in the history of human rights, the Universal Declaration of Human Rights,[39] was adopted in 1948 when the world had just emerged from one of the most devastating conflicts, the Second World War. It was a

[38] Shivji, I. (Ed.) (2004) *Constitutional and Legal System of Tanzania*, Dar Es Salaam, Mkuki na Nyota Publishers, p. 104.

[39] UN.G.A Res.217 (III) of December 10, 1948 (hereinafter referred to as "the UDHR").

direct response to the barbarous acts, which outraged the conscience of mankind,[40] and, it was hoped, would therefore become a cornerstone for future conflict resolution processes. Whether this ambitious hope lived up to reality, remains to be seen.

Even today, when the declaration has just turned to its 60th anniversary recently, there are still divergent views as to the validity of these so-called universal values, "human rights." In one view, it is argued that there were only 56 out of the current 192 member states of the United Nations with only three from Africa, including the then apartheid South Africa, when the Universal Declaration of Human Rights was adopted.[41] More than two-thirds of the world's peoples were under colonial rule, and they were referred to as 'natives.' They were not thought to be human enough to have human rights! Many scholars and policy makers of multicultural heritage and orientation, though familiar and sometimes even comfortable with the West,[42] see cross-cultural referencing as the most critical variable in the construction of human rights discourse.[43] They critique the existing human rights corpus as culturally exclusive in some aspect and therefore view parts of it as illegitimate or, at the very least, irrelevant in non-Western societies. These challenges have raised important questions about whether human rights norms deserve the authority they claim to have acquired: whether their claims to universality are justified, or whether they are just another cunning exercise in Western moral imperialism. That is, having no more ability to dominate the world through direct imperial rule, the West (led by the United States, the United Kingdom, and France) now masks its own will to the power in the impartial, universalizing language of human rights and seeks to impose this fake agenda on a plethora of world cultures that do not actually share the West's conception of individuality and liberal democracies.[44] Some, including Makau Wa

[40] Preamble, para 1 of the UDHR.
[41] See Shivji, (2004), *supra* note 38; See further Avruch, K. (2006) 'Culture, Relativism and Human Rights' in Mertus & Helsing, *supra* note 6, p. 98.
[42] "The term West" or "Western" is used here to refer to Western Europe and North America.
[43] For views of this nature, see Mutua, M (1995) 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', *Virginia Journal of International Law*, vol. 35, No. 2, pp. 339-380, (arguing that the current human rights regime is Eurocentric and that the creation of a truly universal human rights jurisprudence can result only from the multicultural elaboration of norms).
[44] Ignatieff, M. (2001), 'The Attack on Human Rights', *Foreign Affairs* 80/6, p. 102-116.

Mutua, have called for a multicultural approach to reform the human rights regime so as to make it more universal.[45]

While Mutua repeatedly affirms his respect for the human rights movement's noble goals and ideals, he contends that its eurocentric bias has led to the unwitting imposition of Western political, economic, and cultural norms on non-Western societies.[46]

The "constitutionalists" are the academics of the movement—including Louis Henkin, Henry Steiner, Philip Alston, and Thomas Franck—who view the human rights corpus as a constitutional framework. The "cultural pluralists," to which Mutua presumably belongs, are non-Western thinkers who accept the human rights ideology and its European genesis, but who criticize its political implications, and emphasis on the individual, and its prioritization of certain rights. "Political strategists" are governments, especially the United States, and institutions, including the IMF and World Bank, who champion human rights inconsistently, near-sightedly, and usually for political benefit.

Admittedly, Africa urgently needs to build a culture of respect for human rights if it is to resolve ongoing conflicts and achieve political stability and social and economic progress. But this culture cannot take hold if it is imposed paternalistically as a Western creation that non-Western societies must swallow uncritically -- especially if human rights are packaged with liberal democracy and market fundamentalism, now both widely associated with the hypocrisies of Western-driven globalization. The growth of a legitimate human rights culture in Africa depends on a reconstruction of the international human rights corpus to replace its Eurocentric bias ("runaway individualism") with a truly universal cross-fertilization of cultural, religious, and legal traditions.[47]

This may partly explain the peculiarity of the present African Human Rights regime and its departure from the dominant or prevailing discourse of the concept. By dominant here, I mean the mainstream of the debate of the Western liberal conception, which depicts human rights as individualistic and universalistic. The

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[45] See Mutua (1995), *supra* note 43, at p. 345-346.

[46] See generally Mutua M (2002) *Human Rights: A Political and Cultural Critique*, Philadelphia: University of Pennsylvania Press, p. 256.

[47] An-Naim, A & Deng, F. (1990) *Human Rights in Africa*: *Cross-Cultural Perspectives*, Washington, DC: The Brookings Institution, p. 290.

development of African human rights standards awarded a kind of priority to the community over the individual, which is characteristic of African societies in general and to the African perception of human rights in particular.[48] This is clearly reflected in the major African human rights instrument, the African Charter on Human and Peoples Rights (also called the Banjul Charter).[49] Compared to other regional human rights regimes, the Banjul Charter has taken a holistic approach in the rights to be protected in Africa. The Charter does not only contain the ordinary individual civil, political, economic, social and cultural rights, but it also contains a number of collective rights of the peoples such as the right to equality, self-determination, development, peace and satisfactory environment, or the so-called 'solidarity rights.'

However, the prevailing rights discourse on Africa has been singularly deficient in contextualizing the human rights ideology within the neo-imperialist domination of Africa. Indeed, even the role of Western imperialism in the violation of human rights in Africa is hardly discussed in spite of the massive literature on the subject. To cite some few examples: in the dominantly western literature and media, one finds, again and again, references to such African leaders as Amin, Bokassa, Nguema, Mobutu, etc, as gruesome perpetrators of human rights violations, which indeed they were, but these citations go without mentioning the fact that Bokassa was France's protege, that Nguema received support from Spain and the US,[50] that Amin was installed and supported by Britain, while the US closely supported Mobutu in exchange for its political, economic and strategic interests from the mineral rich DRC. Thus, in a way, most of the human rights violations in Africa are a result of a chain of endless civil wars, most of which are manufactured in the West.

Now if this is the true nature of human rights discourse as portrayed in the foregoing discussion, how possible is it that a human rights approach to conflict resolution is proposed in this study? Although some of these critiques are valid, and although there is some truth in the statement that the idea of human rights was first articulated in the West in modern times, it would appear to be an approach particularly suited to

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[48] Nowak, M (2003), *Introduction to the International Human Rights Regime*, London: Martinus Nijhoff Publishers, p. 205.
[49] Adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.
[50] Shivji, I. (1989) *The Concept of Human Rights in Africa*, Dakar: CODESRIA, p. 53.

contemporary social, political and economic conditions, and thus of widespread contemporary relevance to the resolution of conflicts, both in the West and the Third World. Again, if the idea of the concept of human rights as both a 'sword' and a 'shield' is plausible, then human rights can properly be employed in conflict resolution processes.

Thus, in this study, a relationship between human rights and conflicts is analyzed in efforts aimed at resolving the latter. Human rights are portrayed as both the source and solution to conflicts. When the George W. Bush administration invaded Iraq, it justified its actions partly, by appealing to the need to liberate the Iraqi people from the oppression of Saddam Hussein, making a normative argument based implicitly on universal human rights.[51] This has been considered as a dramatic recent occasion when rights arguments have been used to legitimize the use of arms.

Human rights stand as an integral part of every armed conflict and are central concerns, even in cases in which the motive for a conflict has no connection to human rights, or in which human rights are not invoked as a rationale for a conflict. In the American Civil war, one of the Union's objectives was to end Southern blacks' slavery. Abuses of human rights also spawned many wars of liberation against colonial powers and wars waged by leftist guerrilla insurgents against corrupt or dictatorial governing regimes. In the wars in former Yugoslavia, Serbian political leaders incited Serbs to join them in their nationalist territorial claims by reminding them of the unredressed ancient and World War II-era human rights violations against Serbs, and blaming that suffering on other Yugoslav national groups.[52]

1.1.3 Defining Relevant Research Concepts

Africa's Great Lakes Region: There are divergent views as to what exactly constitutes the Africa's Great Lakes Region, hence the need for a definition. Furthermore, an unqualified reference to the Great Lakes Region implies to many, especially in the Western World understanding, the region of North America, formed by the Great

[51] Lund, M. (2006). 'Human Rights: A Source of Conflict, State Making and State Breaking' in Mertus & Helsing, *supra* note 6, p. 39
[52] *Ibid*, p.26.

Lakes of Superior, Michigan, Huron, Ontario and Erie.[53] Even when it is clear that it is Africa's Great Lakes Region, definitions vary.[54] One considers the core countries to include Burundi, the Democratic Republic of Congo (DRC),[55] Kenya, Rwanda, Tanzania and Uganda; and parts of other countries, notably the Central African Republic, Chad, Congo Brazzaville, Sudan and Zambia.[56] A second definition considers the region as that part of Africa which encompasses the countries of Burundi, the DRC, Kenya, Rwanda, Tanzania, Uganda, Ethiopia, Eritrea and Sudan. The third definition is a narrower one, which considers the Great Lakes Region as being the same as the Interlacustrine region.[57] In this definition, the area includes Burundi, the DRC, Eastern Kenya, Rwanda, Northern Tanzania and Uganda. A fourth perspective considers the Africa's Great Lakes Region as constituting only the six countries of Burundi, the DRC, Kenya, Rwanda, Tanzania and Uganda.[58]
Given the historical developments in the Africa's Great Lakes Conflicts, which are of concern to this study, the last definition is preferred. [59]

It must be admitted that the Great Lakes is a geopolitical concept and a recent one. In fact, the concept itself is intricately intertwined with the region's troubled history;[60] and any description of the area must be contextual if confusion is to be avoided. The

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[53] Karni, M et al (Eds.), (1975). *The Finnish Experience in the Western Great Lakes: News Perspectives*, Turku: Institute for Migration, p.34.
[54] Mpangala, G and Mwansasu, B (eds) (2004), *Beyond Conflict in Burundi*, Dar es Salaam: The Mwalimu Nyerere Foundation, p.388.
[55] In order to avoid any confusion with the other Congo, we use "the DRC" to refers to Congo-Kinshasa as opposed to Congo-Brazzaville; formerly the Congo Free State under King Leopold II (1885-1908); the Belgian Congo under the Belgian colonial administration (1908-1960); known also as Zaire (from 1972 to 1997); and renamed the Democratic Republic of Congo by Laurent Kabila when he overthrew Mobutu Sese Seko who misruled the country for 32 years. Where the context so admits, we also use "Congo" to refer to the same. The DRC is the third largest country in Africa, situated on the Equator and bordering nine other countries and with a population estimated to be 55 million people. After Sudan, it is the largest country in Sub-Saharan Africa. It is made up of many ethnic groups. The largest amongst them are the Kongo, Kwangu-Kwilu, Mongo, Bwaka, Luba and Zande. The country is no less diverse linguistically. The DRC is richly endowed with natural resources, including diamonds, which are its most valuable export. Other valuable mineral assets include gold, copper, cobalt, casserite and coltan. It also has enormous timber resources. An estimated 4 million Congolese have died as a result of conflict over the last decade.
[56] This definition follows the geographical extension of the area of the Southern African Development Community (SADC).
[57] See also Mpangala, G. (2004), 'Origins of Political Conflicts and Peace Building in the Great Lakes Region,' Institute of Development Studies, University of Dar Es salaam, Paper presented at a Symposium on "Ramifications of Instability in the Great Lakes Zone" Arusha, February 2004, p.6. (On file with the Author).
[58] *Ibid*
[59] Uurtimo, Y and Väyrynen, T (Eds) (2000). 'Peace-Building in the Great Lakes Region of Africa,' Tampere Peace Research Institute. Occasional Papers No.79, p.15
[60] See Nzongola, *supra* note 22, p. 43.

name derives from the system of lakes and tributaries draining the central section of the Rift Valley of Africa. The Great Lakes in the system, some of which were named after European Monarchs by the first European travellers to see them, are Lakes Victoria, Tanganyika, Kioga, Kivu, Edward and Lake Albert. Lake Victoria is the second largest lake in the World and the largest in Africa, while Tanganyika is the second largest in Africa and the fifth largest in the World.[61]

It is important to note however that although the concept of the Africa's Great Lakes may be a recent phenomenon in the international discussions, the countries in the region have had a long historical linkage. Such linkages are traceable from the developments of centralized states around the interlacustrine region in the 13th century A.D,[62] the long distance trade which linked all the six countries in the region,[63] colonialism[64] and recently by violent conflicts.

This region, which has since the 1960s, been the arena of civil strife of an often protracted nature[65] has sometimes been described as a "conflict system" with mutual interdependencies. These include the potential for the prolongation and extension of violence conflict, as for potential for conflict resolution.[66] It is a region that has been in turmoil for the last four decades with the violent conflicts particularly in the DRC, Burundi and Rwanda. The civil war in the latter was characterized by widespread acts of genocide culminating in the killings of a minimum of 800,000 people in 1994.[67] This catastrophic event was a logical outcome of an ideology and politics of exclusion that had generated earlier episodes of large-scale massacres and the flight of Rwandans of Tutsi origin into exile. But the roots of the genocide ideology lie deep in the history of ethnic identity construction and mobilization under colonial rule. The

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[61] *Ibid.*

[62] The period was marked with the interactions between the Hima and Nilotic pastoralists from the North with the Bantu agriculturalists, giving rise to the formation of centralized states around the region

[63] See Mpangala and Mwansau, *supra* note 54. The period also marked the beginning of the spread of Kiswahili language within the region.

[64] German East Africa, which lasted for thirty years, constituted Tanzania Mainland, Rwanda and Burundi. Following defeat of the Germans during the First World War, Rwanda and Burundi came to be linked to the DR Congo under the Belgian Colonial rule, while Kenya, Tanzania and Uganda were linked under British colonialism.

[65] Rwanda, Burundi and the DRC have experienced violent conflicts of varying degrees since colonial rule, and especially since the 1960s.

[66] Uurtimo and Väyrynen, *supra* note 59.

[67] Ibid.

variety of protracted conflicts with different degrees of escalation faced by these countries is what came to be described as the "Africa's Great Lakes Conflicts."[68]

Conflict: From the Latin for 'to clash or engage in a fight', a confrontation between one or more parties aspiring towards incompatible or competitive means or ends.[69] Conflict may be either manifest, recognizable through actions or behaviours, or latent, in which case it remains dormant for some time, as incompatibilities are unarticulated or are built into systems or such institutional arrangements as governments, corporations, or even civil society.[70] Within the field of international relations, Peter Wallensteen[71] identifies three general forms of conflict: interstate, internal, and state-formation conflicts. Interstate conflicts are disputes between nation-states or violations of the state system of alliances. The international community, however, has become increasingly concerned with the rise in frequency and intensity of internal conflicts, which are contributing to the expanding nature, sophistication, and, at times, legitimization of interventionist policies. Examples of internal and state-formation conflicts include civil and ethnic wars, anti-colonial struggles, secessionist and autonomous movements, territorial conflicts, and battles over control of government. Today, attention has also focused on 'global conflicts', where non-state groups combat international and regional organizations.[72]

A primary assumption underlying this study is that conflict is a natural, normal and inevitable part of life.[73] This implies that conflict as a social and political phenomenon cannot be eliminated, prevented, or resolved. The challenge is to manage it in a constructive way that allows for the expression of discord and legitimate struggle without violence. One can, however, speak of the resolution and prevention of a specific conflict concerning a particular issue or set of issues.

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[68]Ibid.
[69] See Havermans, J. (1999). Conflict Prevention and Peace-building in Africa: Report of the Conference Organised by the European Centre for Conflict Prevention, The Hague: European Centre for Conflict Prevention.
[70] Laakso, L. (Ed.). (2002). *Regional Integration for Conflict Prevention and Peace Building in Africa: Europe, SADC, and ECOWAS*. Helsinki: Hakapaino Oy, p. 35.
[71] See Wallensteen, P. (2002) *Understanding Conflict Resolution: War, Peace and the Global System*, London, London: Sage Publications, p. 209.
[72] *Ibid*, p. 221.
[73] Peck, *supra* note 16

International law recognizes at least four different types of conflict situations, each of which is governed by a different set of legal norms: (i.) situations of tensions and disturbances; (ii.) international armed conflicts; (iii.) wars of national liberation; and (iv.) internal armed conflicts.

Situations of Internal Tensions and Disturbances: The term "internal tensions and disturbances" refers to situations that fall short of armed conflict, but involve the use of force and other repressive measures by a government to maintain or restore public order or public safety.[74] Only IHRL applies in such situations, although it should be noted that governments are permitted to derogate from or limit a restricted set of obligations under IHRL in the context of tensions and disturbances.[75]

International Armed Conflict: The term "international armed conflict" refers to situations that involve two or more states engaged in armed conflict. In such situations, the central provisions of IHL become operative, particularly those contained in the four Geneva Conventions and Protocol I to the Geneva Conventions. In addition, most human rights guarantees remain applicable in such situations, albeit subject to the same types of derogations and limitations permitted to governments in situations of internal tensions and disturbances.

Wars of National Liberation: The term "wars of national liberation" refers to armed conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination."[76] Generally speaking, the same provisions of IHL and IHRL that

[74] A non-exhaustive list of examples of situations of tensions and internal disturbances are provided in Article 1(2) of Protocol II to the Geneva Conventions, and include "riots, isolated and sporadic acts of violence and other acts of a similar nature." Article 1(2) expressly provides that Protocol II does not apply to situations of tensions and disturbances.

[75] Many IHRL treaties, including the ICCPR (Articles 12, 13, 18, 21 and 22) and the CRC (Articles 10, 14 and 15), contain limitation clauses that permit governments to lawfully restrict the free exercise of certain rights in such situations. For example, a government may legitimately impose restrictions on freedom of movement in an environment in which riots are occurring without actually violating the right to freedom of movement of affected persons. However, such restrictions are in general only permissible to the extent that they are (i.) prescribed by law, and (ii.) strictly necessary for achieving their legitimate purposes. Some IHRL treaties also contain derogation clauses, which permit states to temporarily derogate from (i.e., suspend) certain guarantees in times of genuine public emergency. However, treaties containing derogation clauses typically list several rights that cannot be suspended even in times of emergency.

[76] Article 1(4) of Protocol I to the Geneva Conventions.

apply in the context of international armed conflict apply equally in the context of wars of national liberation.[77]

Internal Armed Conflict: The term "internal armed conflict" refers to all armed conflicts that cannot be characterized as either international armed conflicts or wars of national liberation.[78] Protocol II provides that internal armed conflicts "must take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement (Protocol II)."[79] The ICTY Appeals Chamber has further refined this definition, *inter alia*, in its landmark decision, *Prosecutor v. Dusko Tadic a/k/a "Dule"*.[80]

This study will refer to "violent" or "armed" conflict if direct, physical violence is involved, and will simply use the term "conflict" if violence is not an issue. Where the term "prevention" is used, it refers to the prevention of violent or armed conflict, and the study focuses mostly on intra-state conflict rather than inter-state conflict.[81]

Conflict management: Like the associate term 'conflict regulation', is sometimes used as a generic term to cover the whole gamut of positive conflict handling, but is used here to refer to the limitation, mitigation and containment of violent conflict. Interventionist efforts towards preventing the escalation and negative effects, especially violent ones, of ongoing conflicts. Rarely are conflicts completely resolved.

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[77] *Ibid.* It should be noted, however, that different legal norms would apply in a state that is not party to Protocol I, since the Geneva Conventions do not cover wars of national liberation.
[78] Article 1(1) of Protocol II to the Geneva Conventions.
[79] In contrast to Protocol II, Common Article 3 to the Geneva Conventions does not provide a definition of internal armed conflicts, but simply refers to them as "armed conflict(s) not of an international character occurring in the territory of one of the High Contracting Parties". Thus, Common Article 3 appears to establish a threshold for application that is lower than that found in Protocol II. For an analysis of the conditions of application of Common Article 3, see paragraphs 215-220 of the ICJ decision in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 1986 I.C.J. 14 (June 27). Also, for a lucid assessment of the difficulties in establishing when Protocol II applies, see Arturo Carillo, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT'L L. REV. 1, at 66-97.
[80] No. IT-94-1-AR72, Appeal on Jurisdiction, paras. 66-70 (October 2, 1995), 35 I.L.M. 32 (1996). Among other things, the ICTY Appeals Chamber provided useful clarifications regarding the appropriate geographic and temporal frames of reference for internal armed conflicts.
[81] Miller, C. (2005). *A Glossary of Terms and Concepts in Peace and Conflict Studies*, 2nd Edn, Addis Ababa: University for Peace.

More often, they are reduced, downgraded, or contained. Such developments can be followed by a reorientation of the issue, reconstitution of the divisions among conflicting parties, or even by a re-emergence of past issues or grievances. Conflict management when actively conducted is, therefore, a constant process.[82]

A variety of techniques have been identified and employed in conflict management efforts. The following are the most prominent: First, conflicting parties are brought together to establish a mutual agreement. Second, governments or third parties to the strife may directly intervene to introduce or impose a decision. Third, new initiatives, programmes, or institutional structures (for example, elections) are implemented to address the conflict in question. Fourth, contending parties are compelled or coerced to utilize previously established means of resolution or containment. Fifth, government or another third party may use coercion to eliminate or instill fear among one or all those engaged in a given conflict, leading to subsidence.

Conflict management should not be viewed as a simple, linear or structured process. Those assuming or charged with such a task must usually overcome an intensely chaotic situation. Conflicts are frequently managed directly by the society in which they occur. When not possible or when conflicts become national in scope, government normally assumes the task, provided it is not a party to the conflict. In cases where the government is unable or unwilling to intervene, international organizations increasingly assume the role of conflict manager.

Conflict prevention: The anticipation of conflict that seeks to redress causal grievances to avoid the escalation of violent forms of conflict engagement or to curtail the re-occurrence of violent exchanges or some combination of these elements. The term 'conflict prevention' can be misleading, because theoretically none of the aforementioned aspects aspire to 'prevent' conflict as such. Instead, the aim is often to resolve a conflict at hand or more typically to prevent escalation or violent manifestations, through conflict management mechanisms. Although at times referred to as 'preventive diplomacy' and 'crisis prevention', such activities usually involve maintaining the status quo due to potential threats associated with crises or the anticipated outcomes from engaging in a dispute. Conflict prevention, however,

[82] See Peck, *supra* note 16 p. 24.

recognizes that in order to avoid the catastrophes associated with strife, particularly violent upheaval, change is usually necessary, for example, through new institutions, revitalized processes, or the sharing of power.

In any case, conflict prevention as an approach relies heavily on accurate analysis of any latent or minor disputes in the hope of identifying appropriate strategies for resolution or intervention. Such efforts are collectively categorized as 'early warning systems', which vary in complexity and approach. They may include fact-finding missions, consultations, inspections, report mechanisms, and monitoring.[83] The predictive nature of conflict prevention raises several issues, particularly regarding the timing of intervention and the possibility of precipitating pre-emptive action by parties beyond the conflict.

Humanitarian and moral concerns are often insufficient for initiating effective conflict prevention efforts, even in the face of egregiously violent circumstances. As a result, numerous arguments are put forth on behalf of conflict prevention, for example, geo-strategic concerns, security interests, cost-benefit analyses, and refugee issues. Despite the increasing technical capacity and human ability to identify deadly conflicts before they erupt, as well as the likelihood of extreme costs in life, social cohesion, and regional instability, conflict prevention remains in the realm of theory more than practice.[84]

Conflict prevention has predominantly been viewed as the task, if not the responsibility, of international organizations or nation-states neutral to the given conflict. It, however, does not necessarily, nor should it depend solely, on external parties. The most effective method of conflict prevention, although not described as such, is accountable governance, whereby citizens and groups have access to effective avenues and mechanisms for resolving the range of disputes and conflicts that ordinarily arise within societies. Such access not only involves governmental structures, but also requires the cooperation of civil societies and business communities. This is particularly true in settings where violent conflict has already

[83]Mac, A and Furlong, K. 'When Aspiration Exceed Capability: The UN and Conflict Prevention' in Price and Zacher, *supra* note 18, p. 60.
[84] Ibid.

occurred and conflict prevention focuses on inhibiting recurrences, for example through some form of reconciliation.

According to Michael Lund, conflict prevention entails "any structure or interactive means to keep intrastate and interstate tensions and disputes from escalating into significant violence and to strengthen the capabilities to resolve such quarrels peacefully as well as alleviating the underlying problems that produce them, including forestalling the spread of hostilities into new places."[85] Thus, it is a medium and long-term strategy instead of short-term, undertaken by a variety of actors, intended to create a stable and fair environment. There are other terms which are similar to conflict prevention such as *prevention action, preventive engagement, preventive deployment*, which are used very loosely and even interchangeably with other phrases such as *peacemaking, conflict management, conflict resolution, democracy building* and *peacekeeping*.[86] For example, the definition of *preventive diplomacy* described in *An Agenda for Peace* as "action to prevent disputes from arising between parties and escalating into conflicts and to limit the spread of the latter when they occur"[87] can be easily interpreted as conflict prevention.

Prevention can be divided into a few categories. The Carnegie Commission on Preventing Deadly Conflict lists two categories: "structural prevention," which address as the root causes of deadly conflict, and "operational prevention," described as "early engagement to help create conditions in which responsible authorities can resolve tensions before they lead to violence."[88] The former consists of measures to ensure that crises do not arise in the first place or to ensure that they will not recur, whereas the latter refers to measures applicable in the face of immediate crisis.

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[85] Lund, M (1999) 'Improving conflict prevention by learning from experience: context, issues, approaches and findings,' paper presented at the Conflict Prevention Network Annual Conference, Berlin, 31 October 1999. (On file with Author).

[86] Lund, M. (1996). *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy*, Washington DC: United States Institute of Peace, p.32.

[87] Boutros-Ghali, Boutros, (1992). *Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*. Report of the Secretary-General, adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277-S/24111, 17 June. New York: United Nations.

[88] Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict-Final Report*, pp.40 and 69.

The UN International Commission on Intervention and State Sovereignty (ICISS) identifies other types of prevention:

- "structural prevention": ongoing efforts that target issues of economic development, human rights, arms trafficking and governance and that help build international regimes or a "culture of prevention"
- "early prevention": initiatives generated as soon as early warnings indicate a serious dispute in the context of uneasy stability
- "late prevention": crisis diplomacy when serious armed conflicts appear imminent or have begun and
- "post-conflict peace building"; initiatives designed to prevent a recurrence of armed conflict[89]

The above-mentioned description of post-conflict peace-building is a little ambiguous. However, using its definition explained in *An Agenda for Peace*, 'in the largest sense, to address the deepest causes of conflict: economic despair, social injustice and political oppression',[90] it is comprehensible that it has a strong preventive character. Therefore, *pre*-conflict structural prevention and *post*-conflict peace-building are more or less the same activities, which can broadly include from development to governance issues. There are strong arguments supporting the view that this strategy of structural prevention and peace-building should be enhanced *prior* to conflict.

Although conflict prevention seems to be a new concept, it is actually one of the primary obligations of Member States set forth under Chapter VI in the UN Charter in 1945.[91] The term *preventive diplomacy* was first coined by the then UN Secretary-General Dag Hammarskjold in 1960.[92] Nevertheless, it received relatively little attention as a distinct concept due to the Cold War. Following the demise of the Cold War, preventive diplomacy attracted attention partially due to the issuance of *An Agenda for Peace* in 1992, which identified it as "the most desirable and efficient" option, among four key elements, for managing conflicts, together with other

[89] ICISS, *The Responsibility to Protect-Research, Bibliography, Background-Supplementary Volume to the Report of the ICISS* , p.32.
[90] UN, *An Agenda for Peace*, para.15.
[91] UN, *Prevention of Armed Conflict*, p. 2.
[92] See Lund (1999), *supra* note 85, p. 32 and Hammarskjold, *Annual Report of the S-G on the Work of the Organization*, 16 June 1959-15 June 1960, 2.

capacities such as confidence building measures, fact-finding, early-warning, and preventive deployment.[93]

Conflict resolution is a range of processes aimed at alleviating or eliminating sources of conflict. The term "conflict resolution" is sometimes used interchangeably with the term dispute resolution or alternative dispute resolution. Conflict resolution has been developing as a field since the 1950s. Its emergence as an interdisciplinary field can be traced to the human relations and inter-group relations movements, which followed the Second World War.[94] The creation of conflict resolution as an academic discipline and field of practice grew out of five movements: 1) the industrial and labour management based on the work of Shepard and Mouton (1964)[95] which emerged from the organizational relations in the 1960s; 2) the problem-solving workshops and mediation which was introduced in international relations by Burton (1969),[96] Kelman (1976),[97] Doob (1971),[98] and Mitchell (1981);[99] 3) religious figures redirected their work in peace-related endeavours to an emphasis on "peace-making";[100] 4) lawyers and the court system were criticized by the general public which resulted in what is known today as alternative dispute resolution (ADR); and 5) the interpersonal and family disputes practices emerged as another level of conflict resolution derived from human relations practices, as led by Walton (1971), Hynes (1981),[101] and Coogler (1978).[102]

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[93] UN, *An Agenda for Peace*, para 23-32.
[94] Abu-Nimer, M. (1996) 'Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities,' *American Journal of Economics and Sociology*, vol.55, No.1, pp.35-52.
[95] Blake, R., Shepard, H. A., and Mouton, J. (1964) *Managing Intergroup Conflict in Industry*, Houston TX: Gulf Publishing.
[96] Burton, J. (1990). *Conflict Resolution and Prevention*, London: Macmillan.
[97] Kelman, H. and Cohen, S. (1976). 'The Problem-solving Workshop: A Social-Psychological Contribution to the Resolution of International relations.' *Journal of Peace Research*, vol. 2, No. 13, pp. 79-90.
[98] Doob, L. (Ed.), (1970). *Resolving Conflict in Africa*: *The Fermoda Workshop*, New Haven: Yale UP, p. 22.
[99] See generally, Mitchell, C. (1981) *Peace Making and Consultant's Role*, New York: Nichols Publishing Company.
[100] Scimecca, J., 'Conflict Resolution the Bases for Social Control or Social Change?' in Sandole, D. & Sandole, I., (Eds:), (1987) *Conflict Management and Problem Solving*, New York: New York UP, pp- 30-34.
[101] Haynes, J. M., (1981) *Divorce Mediation: A Practical Guide for Therapists And Counselors*, New York: Springer.
[102] Coogler, O. J., (1978) *Structured Mediation in Divorce Settlement: A Handbook for Marital Mediators*, Lexington, Lexington.

Out of these movements, several intervention approaches are being developed and applied to different levels of conflict. However, the main processes of conflict resolution are conciliation, facilitation, negotiation, mediation, and arbitration. While conflict resolution scholars disagree on the boundaries of this field, some scholars include arbitration as a conflict resolution intervention process, and exclude conciliation processes. For the purpose of this study, Western conflict resolution will include all five intervention processes. Conflict resolution is multifaceted in that it refers to a process, a result, and an identified field of academic study as well as an activity in which persons and communities engage every day without ever using the term. The antagonisms in question may involve interpersonal relationships, labour-management issues, business decisions, inter-group disputes, disagreements between nation-states, or international quarrels.

As pointed out elsewhere, not all conflicts are harmful. Some may ultimately result in positive social change. As noted by Nigerian sociologists Onigu Otite and Isaac Olawale Albert, 'although conflicts have negative connotations many constitute an essential creative element for changing societies and achieving the goals and aspirations of individuals and groups'.[103] Conflict resolution involves recognition by the clashing parties of one another's interests, needs, perspectives, and continued existence. The most effective forms identify the underlying causes of the conflict and address them through solutions that are mutually satisfactory, self-perpetuating, and sustaining. Conflict resolution can also be practiced with a variety of emphases, including but not limited to cooperation, non-confrontation, non-competition, and positive-sum orientation. Serious challenges are found when parties at times favour, for various reasons, continuation of conflict over its resolution. In such cases, the role of external parties can be critical in creating a balance of power, enacting sanctions or incentives, or acting as neutral mediators or invested facilitators.[104]

[103] Otite, O and Olawale, I. (1999). *Community Conflict in Nigeria: Management, Resolution and Transformation*. Spectrum Books, Ibadan, p. 17.
[104] Miller, *supra* note 81.

1.1.4 Research Questions

The research problem in this study is weakness and limitation in the existing mechanisms aimed at preventing and resolving conflicts in international law. Consequently, the following research questions will be addressed:

- First, are the currently existing UN and AU conflict prevention and management mechanisms adequate and effective? The currently existing UN and AU approaches to conflict prevention and resolution will be assessed in answer to this question.
- Second, how have human rights violations (abuses) contributed to the eruption of conflicts in the Africa's Great Lakes Region? The question will be addressed by assessing the extent to which different local laws and regulations which violate specific human rights have triggered armed conflicts within the country under study. In this case, the Congolese nationality legislation is examined to determine its contribution to the eruption of conflicts particularly in eastern DRC.
- Third, how does the impact of human rights ensure effective conflict resolution in the African Great Lakes Region? The question will be answered by exploring the various ways of bridging the current gap between human rights and conflict prevention and management as applied generally and in the Great Lakes Region of Africa in particular.

1.2 Research Objectives and Significance of the Study

The main objective of the current study is to assess the adequacy and effectiveness of the existing mechanisms for conflict prevention and management, and the extent to which the link between Human Rights Norms and Conflict Prevention and Management may act as an alternative approach to preventing and resolving the Africa's Great Lakes conflicts.

Specifically, the study is intended to achieve, *inter alia*, the following objectives:

- To assess the adequacy and effectiveness of the currently existing UN and AU approaches to conflict prevention and resolutions as has been applied in relation to the Africa's great lakes generally and in the DRC conflicts in particular.

- To assess the extent to which, violations of human rights standards within the region has been one of the major contributing factors for the frequent eruptions of internal violent conflicts in the region. In this respect, the study is intended to review the various (local) laws and regulations, particularly those relating to citizenship, to determine their contribution to the eruption of conflicts in the religion;
- To research on the best ways in which the link between human rights and conflict prevention and management will enhance the capacity of the region for conflict prevention, management and resolution.

This study will therefore identify the various types of human rights the violation of which is prone to triggering conflicts in the region, with a view to arguing that respect for such rights will not only reduce the possibility of eruption of more conflicts, but will also resolve the existing ones.

At the end, incorporation of human rights in current efforts to build strong and reliable mechanisms for Peace and Conflicts Prevention and management is highly recommended with the intention to enhance the state of security and stability in the region and in the African continent at large.

1.3 Methods of Research and Data Collection

This research is based mainly on an analysis of primary and secondary texts. The documents used are UN documents, such as UN Treaties, Security Council resolutions, General Assembly resolutions, reports of the Secretary-General and other reports from researches conducted under the auspices of the UN. Secondly, various research projects by scholars on human rights, conflicts and conflict resolution, peacekeeping, legal studies of related issues and the history of the areas concerned were broadly referred to and consulted. Thirdly, reports of Non-Governmental Organisations (NGOs) that were involved in human rights and conflict resolution processes in the areas concerned, together with written work by people who actually worked on the field were studied carefully in order to revisit what had been represented by the UN official documents and to reconstruct the view on each conflict resolution approach.

Fourthly, some journalistic reports concerning the Great Lakes conflicts and indeed the Congo conflict were used to obtain additional information. However, the use of journalistic reports was deliberately restricted, since any presentation of a situation cannot be immune from an individual's own interpretation and value judgement. This also applies to academic studies, and to any written work, but the nature of journalism and the structure and environment where journalism functions appear to intensify this tendency. Different articles on a supposedly unique event sometimes create an impression that there were different facts.

To supplement the documentary research, some empirical studies were conducted between January and June 2007 in the research subject data collection areas. Such research was aimed at obtaining both grass roots information as well as the views of people who had actually been involved in the various conflict resolution processes research areas. The field research applied qualitative research strategy in data collection. As argued by Denzin and Lincoln[105] qualitative research is applicable in studying phenomenon in their natural settings, and interpreting them in terms of the meanings that people bring them. To achieve this goal, fieldwork, which is one of the primary elements of qualitative research,[106] was conducted. The relevant sites selected for field research were various offices, organizations and institutions within Tanzania,[107] Burundi and Democratic Republic of Congo.

In Tanzania the field research entailed data collection from persons who were involved in the Burundi Peace Process, a mediation process initiated in 1996 by the former Tanzanian President Julius Nyerere in Arusha town, Northern Tanzania, and continued later by former South African President Nelson Mandela.[108] This peace process, which was fully endorsed by the UN Security Council in 2002,[109] was aimed

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[105] Denzin, N & Lincoln, Y, (Eds.) (2003). *The Landscape of Qualitative Research: Theories and Issues*, 3rd Edn., California: Sage, p. 46.

[106] Merriam, S. (1998). *Qualitative Research and Case Study Application in Education*, 2nd ed. San Francisco; Jossey-Bass, p. 43.

[107] Although Tanzania has never been an actual party to any of the Africa's Great Lakes conflicts, it has been closely involved in the conflict resolution initiatives for both the Rwanda and Burundi conflicts since 1990s, with most of the conflict management institutions located in Tanzania.

[108] Mr. Mandela was designated by the Eighth Arusha Regional Summit on December 1, 1999, to succeed as Facilitator former Tanzanian President Julius Nyerere who died in October 1999.

[109] Following a briefing by Mandela on the situation in Burundi, the UN Security Council under Resolution 1286 (2000) Unanimously endorsed his designation as the new Facilitator of the peace

at preventing and resolving the conflicts between the government and the various rebellious groups involved in the conflict in Burundi.[110] As such, the fieldwork in this research component involved visiting various important research centres in Dar es-salaam, including the Nyerere Foundation, which is the documentation and research center involved in conflict resolution initiatives in the Africa's Great Lakes region. Other institutions visited in Tanzania were the University of Dar es salaam Center for the Study of Forced Migration, which conducts researches on the migration of refugees due to the Africa's Great Lakes conflicts, the Ministry of Home Affairs, the Ministry of Foreign Affairs and the main office of the UNHCR in Dar es-salaam.

One of the major impacts of armed conflicts in the Africa's Great Lakes region is the production of thousands of refugees fleeing their home countries and seeking refuge in neighbouring states.[111] This fact connotes a failure of the existing mechanisms to prevent and resolve conflicts in the region. Another target area for data collection in Tanzania was therefore Refugees camps located in Northern Tanzania, where interviews and informal discussions were conducted with Congo and Burundi Refugees staying in three refugee camps: Kibondo, Kasulu and Nyalugusu. The fieldwork within refugees' camps lasted for one week only, with interviews conducted with three refugees in each camp, making a total of nine interviewees.

In Congo the field research aimed at, among other things, taking a close look at the effectiveness or otherwise of the UN Peacekeeping Mission in the DRC (MONUC)[112] in resolving the Congo conflict. It entailed a one-month visit to Eastern Congo towns in the Kivu Provinces, which is the main source area of conflicts in the Congo. Interviews and informal discussions on the conflict in the DRC involved twenty-one people in total who were met and interviewed at different times. They included MONUC senior personnels, the Division and the MONUC Human Rights Coordinators, leaders of three different Human Rights civil society organizations, ordinary members of the local population, government officials, leaders of political

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process and a successor to the late Mwalimu Julius Nyerere and expressed its strong support for his efforts to achieve a peaceful solution to the conflict; See Press Release SC/6787 of January 19, 2000.

[110] Thirteen of the 19 warring parties of Burundi were involved in a historic Burundi Peace Process, which culminated in signing of an agreement aimed at ending a seven-year civil conflict in the country.

[111] Number of Burundian refugees in Tanzania

[112] See *supra* note 33.

parties, academicians and church leaders. In cases where interviews and informal discussions were considered inappropriate, questionnaires were administered.

In Burundi 10 people were interviewees at different times. Due to time constraint, a research assistant was engaged to continue collecting further data from Burundi by interviewing persons who played varying roles in the Burundi Peace process and in the Burundi government in general. These include former senior political and government officials, leaders of the principal opposition political parties, members of parliament, legal practitioners (advocates and judges), local and international organisations (NGOs) working as human rights defenders in Burundi. The idea was to receive as much diverse views as possible from interviewees of different cadres and backgrounds.

The field research aimed at collecting empirical data from research components as per research proposal and plan, with focus on the following general research questions:

1. How Laws and Regulations in the Great Lakes Region violate human rights of specific groups and therefore cause conflict?
2. To what extent were human rights violated during armed violent conflicts in Great Lakes Region?
3. How successful/effective have the various UN/AU approaches to conflict resolution been in resolving the Great Lakes conflict?
4. How successful/effective is the UN Peacekeeping Mission in the DRC (MONUC) in resolving the Congo conflict?

1.3.1 Research Philosophical Perspectives

Since this study employs qualitative research strategy for data collection, as was pointed out earlier, it encompasses a wide range of philosophical positions, methodological strategies and analytical procedures.[113] As for methodological tools, therefore, I used more than one technique of data collection utilized in the social

[113] See discussion on this point in Morse, J. 'Emerging from the data; The Cognitive Processes of Analysis in Qualitative Inquiry' in Morse, J. (Ed.) (1994). *Critical Issues in Qualitative Research Methods*, Thousand Oaks, CA: Sage, pp.23-43.

sciences.[114] Review of relevant literature, author's participation in international and national conferences and workshops, historical methods, descriptive methods, interview and survey questionnaire methods, were employed in the collecting data process.

According to social science research methodologists,[115] there are three different philosophical perspectives that underlie qualitative research: positivism,[116] interpretive and critical perspective. This three-fold classification is the one that is adopted here. However, it needs to be stated that, while these three research epistemologies are philosophically distinct (as ideal types), in the practice of social research these distinctions are not always clear. There is considerable disagreement as to whether these research paradigms or underlying epistemologies are necessarily opposed or can be accommodated within the one study.

It should be clear from the above that the word 'qualitative' is not a synonym for 'interpretive,' Qualitative research may or may not be interpretive, depending upon the underlying philosophical assumptions of the researcher. Qualitative research can be positivist, interpretive, or critical (see Figure 1 below). It follows therefore from this that the choice of a specific qualitative research method (such as the case study method) is independent of the underlying philosophical position adopted. For instance, case study research can be positivist, interpretive or critical, just as action research can be either of the three. These three philosophical perspectives are discussed below.

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[114] See Krishnaswami, O.R (1998), *Methodology of Research in Social Sciences*, Bombay: Himalaya Publishing House, at p.65.

[115] Guba, G & Lincoln, S. (1998). 'Do Inquiry Paradigm Imply Inquiry Methodology?' in Fetteman, M. (Ed.), *Qualitative Approaches to Evaluation in Education: The Silent Scientific Revolution*, Praeger, New York, p.25. See this idea offered by Klein, K & Myers, D. (1999). 'A Set of Principles for Conducting and Evaluating Interpretive Field Studies in Information Systems.' *MIC Quarterly*, vol. 23, No.1, p. 67-94.

[116] Positivism is an epistemological position that advocates the application of the methods of the natural sciences to the study of social reality and beyond. See more details on this definition in Bryman, A, (Ed.), (2004). *Social Research Methods*, New York: Oxford University Press, p.12.

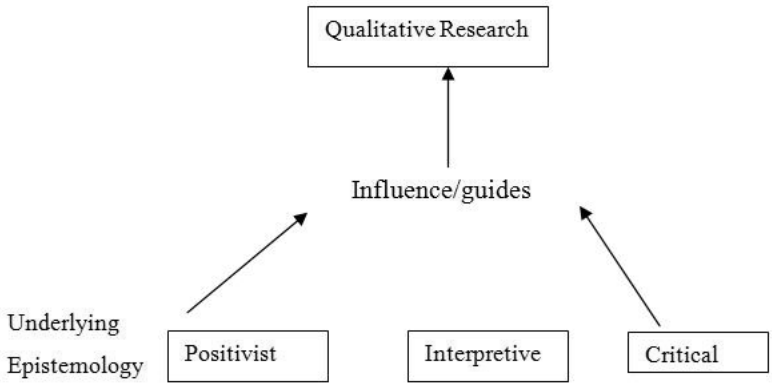

Figure 1. Underlying philosophical assumptions

A research can be classified as positivist if it is presented as being objective, seeking to explain what happens in the world by searching for regularities and causal relationships between its constituent elements.[117] Generally, it assumes that reality is objectively given and can be described by measurable properties, which are independent of the observer (researcher) and his or her instruments.[118] It means that the observation of phenomenon must be neutral and uncorrupted by theory, if the verification principle is to hold.[119] This often involves manipulation of reality with variations in a single independent variable in order to identify regularities in, and to form relationships between, some of the constituent elements of the social world. Predictions are made on the basis of previous observations and realities and their interrelationships. Positivist research can therefore be replicated by carrying out the test in the conditions that originally existed. Although there has been much debate on whether or not positivism paradigm is suitable for the social sciences, one may still safely conclude that, being reductionist in nature, positivism tackles specific aspects of the phenomenon being investigated, building understanding of parts rather than wholes.[120]

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[117] Burrel, B & Morgan, G. (1979). *Sociological Paradigms and Organizational Analysis*. London: Heinemann. p.9.
[118] Levin, C. (1988). *Sociology Ideas: Concepts and Applications*, Washington, DC: Wadsworth, p.66; See also Carson, *et al* (2001). *Qualitative Research*, London: Sage, p.78.
[119] Williams, M & May, T. (1996). *Introduction to the Philosophy of Social Research*, London: Routledge, p.99.
[120]Bryman, *supra* note 116, p. 15.

A research is classified as interpretive if it is assumed that our knowledge of reality is gained through social constructions such as language, consciousness, shared meanings, documents, tools and other artefacts.[121]

Interpretive research addresses the world from the point of view of the people studied, attempting to understand phenomenon through meanings that people assign to them.[122] The main idea is to reach an in-depth understanding of the social world and to interpret the meaningful character of social action. Such an in-depth understanding requires a researcher to immerse himself or herself in the phenomenon to be studied.[123] Thus instead of separating the researchers from the subjects and seeing them as simple sources of data, interpretive research defends and promotes the engagement between the researcher and the subject. However, such engagement must be exposed transparently so as to describe the conditions in which the results were found, i.e. research should be conducted not subjectively. It is from this reality that subject matters have to be set in their social and historical context so that the intended audience can see how the current situation under investigation emerged. Interpretive research does not define dependent and independent variables, but focuses on the complexity of human sense-making as the situation emerges.[124] In this view, interpretive research seeks to understand a moving target, and each instance is treated as a unique historical occurrence. Because of this reality, some interpreters have accused interpretive research as lacking generalisations.

On this point, it may be stated that one of the outcomes of the extensive debates in philosophy is that there is a philosophical basis for the abstraction and generalisation in interpretive research. According to Walsham,[125] there are four types of generalisation from interpretive case studies: the development of concepts, the generation of theory, the drawing of specific implications and the contribution of rich insight. And as Walsham stresses, the key point is that theory plays a crucial role in

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[121] See Klein & Myers, *supra* note 115, p.29.
[122] Hammersley, M. (1995). *The Politics of Social Research*, London: Sage, p.88.
[123] *See* generally Simon, *supra* note 18.
[124]See generally Kaplan, B. & Maxwell, J. (1994). 'Qualitative Research Methods for Evaluating Computer Information Systems', in Andreson, J. *et al*, (Eds.). *Evaluating Health Care Information Systems: Methods and Applications*, Thousand Oaks, CA: Sage, p. 54.
[125] Walsham, G. (1995). 'Interpretive Case Study in IS Research: Nature and Methods,' in *European Journal of Information Systems*, vol. 4, No.2, pp. 74-91.

interpretive research, and clearly distinguishes it from just anecdotes. But it should be noted that theory is used in a different way than is commonly applied in positivist research where researchers are interested in falsifying theories. In interpretive research, theory is used as a "sensitising device" to view the world in a certain way.[126]

The critical approach is concerned with the way in which current social arrangements fail to meet human needs and ideals.[127] Their objective is a political one, which is to fight oppression and radically change the status quo.[128] Proponents of this approach believe that social reality is historically constituted and that people produce it. While recognising that people can consciously act to change their social and economic conditions, they argue that their ability to do so is constrained by various forms of social, cultural and political domination.[129] Their main focus is on the oppositions, conflicts and contradictions in contemporary society, and thus seek to be emancipatory.

After reviewing the three perspectives described above, I have concluded that the best approach for the current study is primarily *interpretive* research. Two main points are among the many reasons for favouring interpretive research approach. First, since I am interested in investigating the complexity of the Africa's Great Lakes conflict with a view to determining a viable conflict management mechanism, it becomes inevitable to gain an in-depth understanding of the conflict situation by tracing the actors; the root causes and to be able to make a concise analysis. Using interpretive approach will allow me to increase my understanding of the critical social, historical and political issues related to the persistence of conflicts in the research area, despite various efforts in resolving them. Second, as interpretive approach recognises the value content of research, it encourages to expose these values and to be more aware of them during the research process so as to be more conscious of their biases.

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[126]See Klein & Myers, *supra* note 115.
[127] See Hammersley, *supra* note 122, p.22.
[128] See Burrel & Morgan, *supra* note 117, p. 21.
[129] See this argument stressed in Klein & Myers, *supra* note 115.

1.3.2 Field Research and Literary Sources

1.3.2.1 Informal Interviews

The current study employed, among other tools, semi-structured interviews with a sample of informants in each research component. The choice of this method was considered to be most suitable, as it allows both parties to explore the meaning of the questions and answers involved. The method naturally allows the interviewer to depart significantly from any schedule or guide that is being used and can ask new questions following up interviewees' replies. In this way, there is a clear sharing through interactions, an element which is usually not so central or lacking all together in other research procedures. As Bryman[130] claims, the interview is the most widely employed method for the collection of qualitative data. It is generally assumed that the interview acts as a medium through which the researcher can gain access to information and share knowledge with those who have it and thus be able to organise and remember the presentation of their knowledge.

Interviews were conducted at different times, with respondents identified in three different data collection areas. In Tanzania, the selected data collection areas for this study were such centers as Mwalimu Nyerere Foundation; Center for the Study of Forced Migration; three refugee camps in North Western Tanzania, namely Kibondo, Kasulu and Nyalugusu; Ministry of Justice and Constitutional Affairs and the Ministry of Home Affairs, the latter being the government unit responsible for all migrations and refugees issues in the country. In these areas, respondents consisted of refugees from the three refugee camps mentioned above. The selection of respondents was such that from each camp, three refuges were interviewed. Four were from Congo while the rest were from Burundi. The aim was to maintain gender balance in ideas and also to gain insight on different responses from each country. The group further consisted of three diplomats who were very instrumental and played key roles in the Burundi Peace Process which took place in Arusha. The last in this group of respondents was a famous professor and researcher who had researched and written at length on the Africa's Great Lakes Conflicts.

[130] Ibid, p.319.

From Burundi, respondents consisted of legal practitioners (advocates and two judges); long-experienced members of parliament of Burundi; leaders of human rights NGOs; leaders of the principal political parties in Burundi and members of the local population from the four areas which have been mostly affected by civil wars in Burundi. From the DRC respondents interviewed consisted of church leaders; MONUC personnel, including those from the mission's human rights department; leaders of civil society organisations; members of the local community; government officials; academicians and legal practitioners (advocates).

Before embarking on the actual interviews, a pilot study of few of the respondents was conducted in order to test the interview guide and develop the subsequent revision of the instrument used for data collection. Interviews were then conducted with each subject. Each interview lasted between 45 to 75 minutes, the longest being 90 minutes. Subsequent interviews were conducted either in the respondents' respective offices or in their places of residence. Preparations for the interviews were such that respondents were given prior information, either through telephone or through research assistants who arranged the interview sessions. Before the start of each interview, each respondent was notified on the aim of the interview, that it only serves academic purposes and that the information passed on will be kept strictly confidential. The option for anonymity was also explained to each respondent.

Most interviews were audio-recorded using a digital recorder and transcribed in order to provide accuracy in data collection. Interviews with some of the respondents were however jotted down some time after the informal interview time elapsed. These practices were considered important in that they allowed the interviewer to check for errors in interpretation of data and to use extensive quotations in the text of this thesis. Field notes (scratches or jotted notes) were taken during the interview to record important and meaningful interactions between subjects and the interviewer. Transcriptions were coded and categorized inductively using content analysis to organise data.

It must be pointed out however that interviewing, though it is one crucial method of qualitative research, is not free from problems. The main challenges perceived in applying interviews as a data collection research method are numerous. In the first place, given the sensitivity of the research topic with its main focus on armed and

ethnic conflicts, respondents' scepticism was prevalent as they became alarmed at the prospect on their words being preserved using a recorder, despite prior notice of the purpose of the interview and accession. As a result, some of the interviews were not as interesting as they were expected to be. Another big stumbling block was a linguistic one. With the exception of informants from Tanzania, interviewees from both Burundi and the DRC had difficulties in expressing themselves in a language in which the interviewer was fluent. Both countries are the so-called "francophone", using French as a second or official language. At times, those respondents who could speak Swahili,[131] poor as it might be, were preferred in the selection process, to those who spoke only French and their local native languages.

Also, at times, some of the interviewees distorted the required information through selective perceptions, with a desire to please the interviewer. In such cases, there was no option but to replace such an interviewee with a more straightforward one.

Interviewing, the transcription of interviews and the analysis of the transcripts are all very time-consuming,[132] but the advantages derived therefrom are immense.[133] The views of respondents certainly gave the interviewer and researcher of this study valuable insight in approaching the topic on the application of human rights in conflict prevention and management.

1.3.2.2 Questionnaires

A survey questionnaire method was found appropriate to extract information from informants who could not be directly interviewed due to various reasons. Survey questionnaires usually inform research by providing information from a known sample of informants selected on the basis of specified criteria. Typically, data from survey questionnaires is collected without the researcher intervention.

Specific questions were prepared in the light of the current study research objectives. Different sets of questionnaires were designed and administered to different target respondents. In the first set, I administered both structured and semi-structured questionnaires to different respondents in the research areas. Given the multilingual

[131] The local native language of the interviewer.
[132] See Bryman, *supra* note 116, p.319.
[133] On the advantages of interviewing vis-à-vis other methods of data collection in qualitative research, see *Ibid* p.338.

nature of the informants selected from the DRC and Burundi, questionnaires were administered in three different languages, namely Swahili, French and English. The contents, structure, format and sequence of the questionnaires used are as shown in appendix "C."

Pre-testing of the survey questionnaires was carried out among a few refugees in the three refugee camps in Tanzania (men and women), and they were collected immediately for verification. This allowed minor changes to be made to improve the contents and form of the questionnaires. The questionnaires were sent to contact persons identified through research assistants in both Burundi and the DRC, others identified through the embassies of both countries and the Mwalimu Nyerere Foundation Centre. In the course of field research in Congo and Burundi, more persons were identified, making a total number of persons who received the questionnaires to be 45. The survey questionnaire was administered via electronic mails, personal visits and telephoning. Two research assistants in the DRC and one in Burundi also facilitated the work. The number of people who responded and returned the survey questionnaires was 31. As some questionnaires were responded to in Swahili and French language, proper translation was sought before the findings were analysed.

1.3.2.3 Case Study

The need to study a complex topic within its organisational context led me to adopt a case study methodology. A case study involves a detailed examination of a single or a particular occurrence.[134] Its main concern is the detail and complexity of the case, which it treats as a bound system. In general, a case study methodology is a preferred method for investigating questions that ask how or why of both historical and contemporary events.[135] It can produce an in-depth understanding of a particular situation and an analysis of its meaning in a discovery process.[136] Case study evidence can be drawn from a variety of sources, including interviews, direct observations, participant observation, and even documents and archival records. Three main types of case studies are distinguished: namely, explanatory, causal and descriptive.[137]

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[134] See Burrel and Morgan, *supra* note 117, p.49.
[135] Yin, R (2003), *Case Study Research: Design and Methods*, 3rd Ed, London/New Delhi: SAGE Publications, p. 112.
[136] *See* Merriam, *supra* note 106, p. 46.
[137] See Yin, *supra* note 135, p. 114.

Explanatory case studies collect data before theories or specific research questions are formulated. Causal case study focuses in looking at the cause-and-effect relationships, and search for explanatory theories of the phenomena.

Descriptive case study requires a theory to guide the collection of data and this theory should then be openly stated at the outset. The more thoughtful the theory, the better the descriptive case study will be. Insights from this type of research can exert a strong influence on policy, practice and research, with the role of the researcher being that of a versatile, functioning simultaneously as a scientist, a fieldworker, and a toolmaker and as a technical developer.[138] While the conclusions from such case study research may not be generalizable, they focus strongly on qualitative issues; they may nevertheless suggest important implications for other similar contexts.[139] In the current study, the Africa's Great Lakes Region is an overall research area. However, given the vastness of the region,[140] it will be unrealistic, if not impossible to try and conduct the current research for the whole region. Although the Africa's Great Lakes is considered as a conflict system, the DRC conflict, which is among the many other conflicts in the region, was selected for this study. Again, only some aspects of the conflict in the DRC are thoroughly studied.

1.3.3 Reliability and Validity

Although there is a view that reliability and validity are important criteria for establishing and assessing the quality of research for the quantitative research,[141] qualitative researchers have employed the same terms in very similar ways when seeking to assess or evaluate the quality of qualitative research. It has however been proposed to specify terms that provide an alternative to reliability and validity, to be *trustworthiness* and *authenticity*.[142] The latter encompasses credibility, transferability, dependability and confirmability of research and research findings.

Credibility, which replaces internal validity, entails both ensuring that the research is carried out according to the canons of good practice and respondent validation of

[138] Denzin & Lincoln, *supra* note 105, p. 48.
[139] *See* Bryaman, *supra* note 116, p.51.
[140] For geographical coverage of this region, see generally Nzongola –Ntajala, *supra* note 22.
[141] See Bryman, *supra* note 116, p.272.
[142] Ibid, p.273.

findings.[143] In this study, the opportunity I was afforded to discuss, with members of the target group, concepts as they appeared in the semi-structured questionnaires and in the interview instruments, before and after field research, provided the basis for ensuring credibility of the research findings.

On *transferability* (or external validity), Guba and Lincoln[144]argue that qualitative findings tend to be oriented to the contextual uniqueness and significance of the social world being studied. Thus, whether findings hold in some other contexts, or even in the same context at some other times, is an empirical issue. The study on the relevance of human rights in prevention and management of the Africa's Great Lakes conflicts is not necessarily contextual. It is however clear that its outcomes cannot be generalized in all other situations. They can only be used as a basis of investigation of other similar conflicts within the other times and places. The applicability of this research to other regional conflicts and conflict resolution initiatives is therefore to be determined by the similarity of the nature of those other initiatives.

As a parallel to reliability in quantitative research, *dependability* establishes the merit of research in terms of trustworthiness through auditing approach. While dependability allows a researcher to make methodological changes during the course of the research, these have to be well described and reported.[145] The literary sources and review of relevant literature (Section 1.3.5), the case study description and review of research methods with my research supervisor together with peer researchers during the course of research, provide a reasoned justification for the methodologies, procedures as well as theoretical inferences used in this research.

The conclusions drawn from the data collected through the interviews and survey questionnaires are confirmable. *Confirmability* is concerned with ensuring that, while recognising that complete objectivity is impossible in social research, the researcher can be shown to have acted in good faith without overtly allowing personal values or theoretical inclinations to sway the conduct of the research and findings deriving from it.[146] The main contents of questionnaires in this research are as set out and shown in appendix "C" and records of their responses and those of interviews are all available

[143] See Ibid, p.275.
[144] Guba and Lincoln, *supra* note 115, p. 27.
[145] See Bryman, *supra* note 116, p.15.
[146] Ibd.p.276.

from the author. They all prove the confirmability of this research making it more valid and reliable.

1.3.4 Ethical Considerations

Ethical issues play a direct and great role in assessing the integrity of any social research in a particular discipline.[147] They arise from the kinds of problems social scientists investigate and the methods used to obtain valid and reliable data.[148] Such issues tend to revolve around certain aspects that recur in different guises, which may be broken into four main areas:

- Whether there is harm to participants;
- Whether there is lack of informed consent;
- Whether there is an invasion of privacy;
- Whether deception is involved in a particular research.[149]

Discussions aimed at observing ethical principles had been carefully conducted between the researcher and the research participants in this study. Particularly for research participants from the DRC side, issues relating to human rights abuses, conflicts and the resolution of the same were perceived to be highly sensitive, requiring all precautions on the maintenance of confidentiality of informants' records. The situation in other research areas was not exceptional either. As such, various measures were deliberately taken to avert the possible ethical-side-effects on the treatment of research participants.

Firstly, the privacy, anonymity and confidentiality of participants was assured by formulating both the questionnaires and the interview instruments in such a way that disclosure of participants' particulars (names, address, occupation etc) for identification purposes was left optional. In cases where I personally happened to know some of such information relating to some of my informants, I endeavoured as far as possible to keep them confidential, as the avoidance of engendering harm to the respondents is a rule of thumb in social science research.[150] Add to this, and in line

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[147] Ibid. p.504.
[148] Nachmias, F. (1996). *Research Methods in the Social Sciences*, 5th Ed, London: St. Martin's Press, p.77.
[149] Adopted as have usefully been broken down by Diener and Candall (1978) and quoted *verbatim* in *Ibid*, p.509.
[150] Mertens, D. (2005). *Research and Evaluation in Education and Psychology: Integrating Diversity with Quantitative, Qualitative and Mixed Methods*, 2nd Ed, London: SAGE Publications, p.328.

with the principle of neutrality, the method of informal and semi-structured interviews as well as the semi-structured questionnaires gave leeway to the respondents to have wide options of giving only information they considered not endangering their roles as research participants.

Although considering, as some authors contend,[151] that it is not practicable to ensure that absolutely everyone has the opportunity for informed consent, I tried as much as I possibly could, to inform each participant about the nature of the research, what it is all about, how and why is it being undertaken and its possible implications to research participants. All research outcomes were reported in a way that the anonymity and confidentiality of all participants was assured.

Furthermore, except for the few institutions mentioned on the part of Tanzania in this study, I deliberately omitted to make any direct reference to cities and exact locations of the sites in which I conducted my fieldwork. Specific reference to such places was considered undesirable as may somehow identify and therefore embarrass my respondents. Reference to some of the institutions in some research sites, such as refugee camps, is not intended to violate the rights of informants, but it was considered that it does not in itself expose the identity of informants.

1.3.5. Literary Sources and Participation in Conferences

In addition to field research findings, this study would have been incomplete in the absence of basic literary sources, author's participation in international and regional conferences, workshops and post-graduate seminars, as well as reviewed literature that validate the outcomes of the study. The literature review and participation in conferences and workshops, provided an opportunity for testing and expanding the understanding of the research problem, and allowed exchange of research experiences. Some of the statements, meanings and ideas developed in this thesis originated from in-depth deliberations held with individuals and groups at various conferences and academic seminars.

[151] See this fact emphasised under the British Sociological Association (BSA) *Statement* of Ethical Practice, available at <http://www.britsoc.org.uk/about /ethic.htm>, last visited, September 8, 2009.

The literary sources used in this study included textbooks, UN documents, policy documents, laws and regulations from each of the countries under study, results of previous studies, journals and reports of international and local organizations operating in the region, official statements and other relevant materials on the research components. Most of these materials and documents were accessed in electronic form and through various libraries visited. These included the East African Library in Arusha, law libraries of Helsinki University, University of Dar es salaam, Joensuu University, and libraries of the Attorney General Chambers of each of the countries under study.

In particular, the library of the Parliament of Finland provided excellent literature relevant for this study. Once they were collected, a considerable time and interpretive skill is often required to ascertain the meaning of the materials that have been uncovered, in relation to the research being undertaken.

1.3.6 Bridging the Fieldwork and Academic Studies

People who work in the field of human rights protection and conflict resolution often become frustrated by the enormous gap between the hopeless reality on the ground and the noble words of international law which do not seem to reduce the suffering of people in areas of conflicts at all. However, one who suffers from human rights abuses may be encouraged simply in the knowledge that what he/she is seeking is the implementation of his/her right. Those who taught me the value of international human rights law told me their experience of human rights violations. Even though the various UN human rights approaches to conflict resolution cannot offer immediate remedy to victims of human rights violations, by reaching a common understanding that what they suffered was against their human rights, they might gain energy to continue their claims for justice. Of course, there are situations where people are deprived of any force to resist-or even to protect their lives. Most of the contemporary UN approaches to conflict resolution are then unable to communicate with those people or to offer the best solution, but lead to a situation where such atrocities are only witnessed. What is required of the international community is the prevention of such situations by every means possible, including the development of international law and extension of human rights functions into conflict situations. This author

believes that such prevention, deterrence and institution -building can contribute towards establishing a society that respects human rights to a greater extent.

One of the ambitious intents of this study is to bridge the gap between fieldwork and academia in human rights and conflict resolution discourse. It is disappointing when discussions on human rights and conflict resolution amongst academics make light of the reality on the ground. For instance, good human rights record has often been used, as conditionality for a particular society to deserve certain advantages. Two instances explain this scenario. In the first instance, a good human rights record has often been used as a condition for allocating development aid to developing countries, by increasing the amount of foreign aid to the recipient countries with good human rights records and reducing economic assistance to the countries with bad or unsatisfactory record. In the second instance, a good human rights record is a condition for the acceptance of a particular country for membership in such regional integration as the European Community. However, the question is not as to what is written on paper or to a promise of empty words, but rather to the reality on the ground. While a Western scholar may happily argue about the nominal development of human rights promotion in a political or legal sphere, people continue to suffer daily human rights violations, harassment and discrimination based on ethnic affiliation in the very state in which they live. Yet, politicians whose decisions might have possibly resulted in the deaths of thousands of people roundly condemn another occurrence of human rights abuse. It is lamentable if academics are not able to critically assess such immense effects, while human rights conditionality, without strong enforcement mechanisms has extremely weak effects. A scholar can only be happy with nominal development of human rights protection when he/she does not witness the pain of the victims of human rights abuses. Needless to say it would be impossible to change overnight a currently prevalent system that each day allows countless cases of human rights abuse to occur in the world.

However, in discussing the development of international humanitarian law, human rights law or a system of human rights protection, it is a basic requirement for a scholar to remember that the issue involves peoples' lives.

Human rights workers in the field can contribute to development of international human rights law by reporting the reality on the ground and giving feedback on problems they face either in interpreting international human rights law or in trying to

apply it. On the other hand, the flow from academia to the field of information on the legal discussion will support those workers who are often isolated in the middle of an insecure environment and who struggle to work for human rights and justice.

It is now time for the United Nations to study systematically the functions of human rights in its conflict resolution strategies so that previous mistakes are not repeated. For any strategy to engage effectively in resolving conflict durably, it must be designed from the outset to incorporate human rights norms.

1.4 Research Structure and Scope of the Study

The chapters in this thesis are organised along the notion of stages of conflicts. Such organisation is indicative of the fact that human rights considerations are important factors throughout the course of armed conflict, and every conflict can be depicted as passing through any number of different stages. For analytical purposes, Julie Mertus and Jeffrey Helsing[152] identified three overlapping stages, which I adopt here:

- *The conflict intensification stage*: Communal conflicts turn violent; human rights violations are often a root cause of conflict, and the ability of perpetrators to act with impunity contributes to the intensification of conflict; the failure to address human rights issues hinders conflict prevention efforts.
- *The armed conflict stage*: Armed conflict intensifies as competing factions take up arms; human rights abuses are both a common by-product of violence and a component of wartime strategy; international human rights norms inform standards for international intervention in conflicts, evaluation of the conduct of armed forces, and wartime protection of civilians.
- *The postconflict/postcrisis stage*: Armed conflict ceases, and efforts at rebuilding begin; human rights considerations play a role in peace agreements, the treatment of refugees, civil society-building efforts, human rights education campaigns, and the creation of truth commissions and other efforts to hold perpetrators of human rights abuse accountable. If patterns of destructive relationships are not transformed into healthier patterns of interaction, this third stage can lead to a new round of intensified conflict.

This study examines operational issues confronting conflict prevention and management mechanisms and human rights concerns in responding to each of these

[152] See Mertus and Helsing, *supra* note 6 p. 10.

stages. The following outline seeks not to summarize each chapter, but rather to situate the chapters of the thesis within the context of the three stages.

An overview of the main features of the regional conflict as well as an inventory of existing regional mechanisms for conflict management is made in Chapter Two. In this chapter, I suggest that the main features and driving force for the conflicts in the region studied are colonial legacies and the role of the West in relation to the current trade and political relations with countries in the region, construction of ethnic identity and legitimacy, discrimination on the basis of ethnicity and human rights violations before, during and after the violence. The chapter helps to frame the historical relationship between the Africa's Great Lakes conflicts and human rights violations. Towards the end of the chapter, we indicate that human rights violations by way of discrimination on the basis of ethnicity can be both the symptom and cause of conflict. As Ellen Lutz points out, human rights are often at the core of a conflict or war. Human rights or human security have often been cited in more recent examples of humanitarian intervention. Human rights have also been cited as one reason for armed intervention or pre-emptive war, including the military intervention by the U.S-led coalition in Iraq.[153] Lutz noted that the differences between human rights and conflict management approaches play out among the parties in actual conflict situations, as they have in Rwanda, Congo, Yugoslavia and many other places. There are many examples of human rights claims being manipulated by aggressive powers in order to justify intervention. But as many of the scholars emphasize, human rights are not only significant factors in the conduct of war or the justification for war, but also critical sources of conflicts that devolve into war. Often both sides of a conflict compete in proclaiming themselves victims of human rights violations.

Chapter Three is an overview of the approaches to conflict prevention and management. The various conventional mechanisms for the resolution of conflicts, both UN Charter based and non-Charter based mechanisms are reviewed. What is indicated at the end of the chapter is the main argument of this thesis, namely, contemporary conflict resolution mechanisms are limited and full of shortcomings. The chapter evaluates the effectiveness of the current UN approaches to conflict

[153] See Ibid, p. 11.

resolution in light of contemporary internal armed conflict situations. In view of the failure of the UN to effectively respond to the various conflicts with the resultant catastrophes, including genocide in both Rwanda and Bosnia, the chapter concludes with a proposal for the strengthening of a human rights approach as discussed throughout this study.

Chapter Four, on the Role of Peacekeeping in conflict prevention and management with a focus on the MONUC, attempts to show, in practice, how difficult the UN conflict resolution mechanisms have proved to be, in the absence of human rights components. The chapter sets to analyse UN Peacekeeping as one of the major conflict resolution methods applied in resolving the Africa's Great Lakes conflicts, drawing from the MONUC in the DRC as a case study. The human rights components of UN peacekeeping and of the MONUC in particular is analysed in the light of acts of human rights atrocities taking place on the ground in the DRC, despite the deployment of the MONUC. The chapter concludes with challenges and limitations of the approach, and with a proposal to strengthen the African regional peacekeeping and that human rights component of peacekeeping operations is vital if the root cause of the conflicts is to be addressed.

Chapter Five presents yet another conflict resolution mechanism tested in resolving the Congo conflict. The chapter titled "International Adjudication and Resolution of Armed Conflicts in the DRC" discusses various efforts taken so far, in the form of international adjudication in resolving the Congo conflict. The role of the ICJ in armed conflict settlement is critically examined with a sober conclusion that both in the *Case of Armed Activities in Territory of the Congo* and in the parallel adjudication of the *Bosnia-Herzegovina case*, the ICJ does not prove itself to be a suitable forum for the resolution of internal armed conflicts. The chapter further examines the role of international criminal adjudication, in the light of individual criminal responsibility. The role of both the International Criminal Tribunal for the Rwanda (ICTR) and the International Criminal Court (ICC) in addressing post conflict issues are well addressed. With proposals initially mounting pressures to the international community to establish an international criminal tribunal for the DRC, the role of the ICTR in addressing the Rwandan conflict is examined.

The role of the ICC in the Congo conflict is examined in the light of individual criminal responsibility, taking reference of the *Lubanga case*, which was still pending during the writing of this thesis. Although the importance of international adjudication in the development of international law is reiterated, the overall conclusion of the chapter is that, unless a number of shortcomings are addressed, the method may not suit internal armed conflict situations of such a nature as the DRC conflict.

Chapter Six constitutes the main thesis of this study. The chapter, titled "Systemic Integration of Human Rights and Conflict Prevention, Management and Resolution," focuses on the relationship between the fields of human rights and conflict management as a means to prevent conflict.[154] As this chapter attests, the relationship between conflict management and resolution on the one hand, and human rights promotion and protection on the other is multifaceted, intricate and fluid, evolving in response not only to changes in the nature of contemporary armed conflicts, but also to the two camps' growing experience in working as partners instead of competitors. The chapter also makes it clear that to see the relationship as two-sided distorts reality, for there are in fact three camps involved: conflict resolution, human rights and international humanitarian law. The last of these--which seeks to regulate the conduct of war and to protect civilians during armed conflict, and which is championed not least by humanitarian relief agencies--can serve as a bridge between peace negotiations and human rights advocates because it is a human rights and legal tool that can strengthen a peace process or agreement by helping to reduce suffering and creating legitimacy for settlement. The richness of the interaction among these

[154] Issues of human rights and conflict interact in multiple ways as discussed in Ramcharan, B. (2004). 'Human Rights and Conflict Resolution', in *Human Rights Law Review*, vol. 4, No. 1, pp. 1-18; Summer, D. and Schnabel, A. (2003). *Conflict Prevention: Path to Peace or Grand Illusion*, Tokyo: UNU; Thoolen, H. 'Early Warning and Prevention,' in Alfredsson et al. (eds), (2001). *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, The Hague: Martinus Nijhoff Publishers., p. 301; Mahoney, L. (2003). 'Unarmed Monitoring and Human Rights Field Presences: Civilian Protection and Conflict Protection,' *The Journal of Humanitarian Assistance*, August 2003, available at <http://www.jha.ac/articles/a122.htm>. Last visited, September 8, 2009; Lutz, E., et al., (2003). 'Human Rights and Conflict Resolution from the Practitioners' Perspective,' *The Fletcher Forum of World Affairs*, 27(1) (Winter/Spring); Saunders, J. (2002). 'Bridging Human Rights and Conflict Prevention: A Dialogue between Critical Communities,' Carnegie Council on Ethics and International Affairs, at <http//www.cceia.org/ viewMedia.php/prmTemplateID/1/prmID/161>. last visited, September 8, 2009.; O'Flaherty, M (2004). 'Sierra Leone's Peace Process: The Role of the Human Rights Community,'in *Human Rights Quarterly*, vol. 26, No. 4, pp. 983-1027; O'Flaherty, M. (2003). 'Future Protection of Human Rights in Post-Conflict Societies: the Role of the United Nations,' in *Human Rights Law Review*, vol. 3 No. 1, pp. 53-76.

approaches, the way in which they can reinforce and complement, and not just undercut one another's efforts are discussed. I draw attention here to a point made several times in this thesis, that the relation between human rights and conflict resolution seems particularly important in efforts to create sustainable peace. In light of challenges presented by conflicts in such countries as the DRC, Afghanistan, Bosnia, Iraq, and Somalia, substantial efforts must be devoted to the task of determining the critical components of a stable and sustainable peace. Many of the ideas in the chapter merit serious consideration in building sustainable settlements in societies emerging from conflicts.

The last chapter, chapter seven provides some concluding remarks. The chapter brings forth the discussions on the possibilities and challenges of the relevance of human rights in conflict prevention, management and resolution discussed in the whole study before making some recommendations and conclusions.

1.5 Concluding Remarks

This chapter provided the conceptual and methodological framework for the study on the relevance of human rights in conflict prevention, management and resolution, with the conflicts in the Africa's Great Lakes region and in the DRC in particular, as a case study. There is a general consensus among scholars that conflict is sometimes inevitable. So is fighting. But respect for rights and fighting within the laws of war is what is in high demand.[155] However, there is a dilemma encountered in merely relying on respect for human rights and laws of war in the time of conflicts. On the one hand, international humanitarian law is always focused on armed conflict and the need to mitigate the suffering of those touched by it; but it does not deal with the causes of war, or with the questions whether one conflicting party or the other is right. On the other hand, the complexity posed by contemporary non-international armed conflicts, accompanied with the old international law principles, such as non-interference into states' internal affairs, arose the need for alternative approaches to conflicts, other than dependency on international humanitarian law. Human rights law, in contrast focuses on the condition of all people under all circumstances, not just in wartime. Moreover, the lack of human rights is itself often a source of armed

[155] Mertus & Helsing, *supra* note 6, p.509.

conflicts. Thus, making efforts to ensure respect for human rights is critical to achieving long term conflict resolution, peace and stability.

Consequently, the chapter examines the background and motivation leading to the argument for a human rights approach to conflict resolution mechanisms. For that reason, it considers the various efforts taken to resolve the conflict in the DRC and in the Africa's Great Lakes region as a whole. Throughout this discussion in this chapter, it becomes clear that the applicability and relevance of human rights to all types of conflict resolution mechanisms generally and particularly those applied in resolving the Africa's Great Lakes Conflicts are of critical importance. The contemporary critiques on human rights are highlighted with a view to justify the proposed human rights approach to conflict resolution. The chapter further stirs up the argument that international humanitarian law serves as a bridge between conflict resolution and human rights. It provides a vehicle to get human rights concerns on the table. It is a human rights and legal tool that peace negotiators can use to reduce suffering and build confidence among the victims. The successful implementation of humanitarian law can strengthen a peace process or agreement without necessarily disrupting the creation of a sustainable peace, by enhancing the legitimacy of that peace.

2 THE AFRICA'S GREAT LAKES CONFLICTS ANALYSIS

2.1 Introduction

The end of the ideological Cold War viewed by some as the "ultimate triumph of Western liberalism,"[1] created a hope among many that it signalled an end to the history of global hostilities and marked the beginning of peace in the world.[2]
The most optimistic ironically went as far as arguing that the human race might be witnessing, not just the end of the Cold War but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.[3]

Unfortunately this hope very soon proved to be based on a total misconception of realities, as triumph in political liberalism which was central to the end of the Cold War did not necessarily bring real peace to govern the material world in the long run. It therefore soon became clear that, although the end of the Cold War brought various changes in the types and nature of global conflicts, violence persists.[4] In reality, the vacuum left by the cessation of Cold War conflicts was immediately filled up by different other forms of threats to international peace and security.[5]
Included in this list of new threats are civil wars, terrorism with its associated response to contain the "existence of weapons of mass destruction,"[6] a response used disingenuously as a justification for the hegemonic invasion and destruction of Iraq by the US, and recent threats in the form of nuclear weapons.[7]

Civil wars or internal armed conflicts are presently the major challenge to international peace and security.[8] The outbreak of civil wars, starting from the bloody conflict in the South Balkans, (particularly within the former Yugoslavia), Somalia, Sierra Leone, Ivory Coast, Sudan (Darfur)

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[1] See Fukuyama, F. (1989). 'The End of History' in *The National Interest, vol.* 16, pp. 3–18.
[2] See also Airas, M (Ed.) ((1998), *The Role of the International Cooperation in Conflict Prevention in Africa*, Helsinki: KATU, p.10.
[3] Fukuyama, *supra* note 1.
[4] Eriksson, M (2002), 'Armed Conflict 1946-2000: A New Dataset' in *Journal of Peace Research,* Vol. 39 No.5, pp.615-637.
[5] Para 4 of preamble to the UNSC Res No. 48/84 of 16 December 1993, on the Maintenance of International Security, in which the UN expressed its serious concern over new threats to international peace and security, the persistence of tensions in some regions and the emergence of new conflicts.
[6] Mohan, R (2005), 'Fractured Ideologies: Westernization, Globalization and Terrorism' in *International Journal of Contemporary Sociology*, Vol.42 No.2 (2005), p.251
[7] The Iran and North Korea are cases in point.
8 See UN Secretary General's Report (2001), *Prevention of Armed Conflicts*, A/55/985–S/2001/574, available at <http://www.reliefweb.int/library/documents/2001/un-conflprev-07jun.htm,>,last visited, September 8, 2009.

and Africa's Great Lakes conflicts created a level of violence and human suffering greater than any Cold War crises.[9]

Although many factors led to the root causes of the conflicts in the Africa's Great Lakes region, this study is concerned specifically with a few of such factors, namely colonial history with its effects on ethnicity, combined with the post independence global economic and political relation with the Western world, the 1994 Rwandan genocide and human rights violations as discussed below in this chapter.

The Africa's Great Lakes conflict has attracted international and regional attention in recent years in terms of news, academic analysis and humanitarian intervention concerns.[10] The attention has resulted from the complexities of the conflicts taking place and the volatile political environment in the region.[11] The major determinant of the recent conflict and instability in the Great Lakes region is the decay of the state and its instruments of rule of law in the Congo. For it is this decay that has made it possible for smaller states the size of Congo's smallest province, such as Uganda, or even of a district, such as Rwanda, to take it upon themselves to impose rulers in Kinshasa and to invade, occupy and loot the territory of their giant neighbour. According to Nzongola, such a situation would have been unthinkable if the Congolese state institutions were functioning in a normal way as agencies of governance and national security, rather than as Mafia-type organizations, serving the selfish interests of Mobutu and his entourage, particularly his generals.[12]

The Congo under a capable and responsible government could have stopped the genocide of 1994 in Rwanda, the second major determinant of instability in the region, or at least prevented the genocidal forces from using Congolese territory to launch raids into Rwanda. This disintegration of the Mobutu regime and the state decay associated with it made both possibilities academic while Kabila's sponsorship by Rwanda and Uganda made it possible for these countries to feel entitled to determine the Congo's destiny. The power vacuum created by the state decay reinforced neighbours' determination to fish in troubled waters and to maximize their resource extraction from the Congo.

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[9]Peck, C. (1998), *Preventing Deadly Conflict,* a Final Report of the Carnegie Commission on Preventing Deadly Conflict, Rowman & Littlefield Publishers, New York/Oxford, p.22

[10] Hawkins, V. (2004) 'Stealth conflicts: Africa's World War in the DRC and International Consciousness', *The Journal of Humanitarian Assistance* (January 5, 2004): 1 – 18.

[11] Mpangala, G (2000), *Ethnic conflicts in the Region of the Great Lakes: Origins and Prospects*, DUP, DSM, p.vii

[12] Nzongola-Ntalaja, G. (2003) *The Congo from Leopold to Kabila,* London: Zed Books, p. 215.

The region entered the twenty-first century still embroiled in a major war unleashed in 1998 and involving all of the countries comprising it, except Tanzania, with some countries pretending to protect themselves against rebel incursions, while they were actively involved in looting the Congo's natural resources.

The primary focus of the chapter is to attempt to make both a regional and a country-by-country analysis of the Africa's Great Lakes Conflicts. The importance of such an analysis cannot be overemphasised. A long-term resolution of conflicts will greatly depend on the clear understanding of the causes and nature of the conflicts. The emphasis of the chapter is therefore to provide an analysis, however brief, of a number of cross-cutting issues relating to the conflict in the region, including its features; the historical, socio-political background; and the long-standing interests of external forces in plundering the region's riches.[13] The impacts of colonial legacy in the region and the role of the West in the intensification of conflicts are discussed. The chapter then sets out to analyze the extent to which human rights violations, in particular discrimination on the basis of ethnicity, has contributed to ethnic reactions, hence violent conflicts.

However, I hasten to point out here that besides the general overview of the regional nature of the conflict, the country-by-country analysis will concentrate in only three countries of the Africa's Great Lakes region. These are Burundi, the DRC and Rwanda. As the whole study puts much emphasis on the Congo conflict as the regional case study, the chapter provides a much-detailed analysis of the Congo conflicts compared to the other two countries. The internal causes to the conflict in the DRC, including the nationality question for the *Banyamulenge* ethnic minority, authoritarianism, human rights abuses together with external causes, especially foreign interventions to the conflict situations in the DRC are all analysed.

This chapter, in the context of human rights, looks closely at the citizenship question for the *Banyamulenge* ethnic minority, authoritarianism, and foreign interventions in the conflict situations in the DRC. Time and space do not allow analyzing these three countries from the time of their independence, so the scope of the study is limited to the conflict timeline: the 1990s to the present. Nevertheless, the chapter contends that the countries singled out are representative of others in the region. Because of its strong connections with the intensification of internal armed conflicts in the region, the 1994 Genocide in Rwanda will be studied. The region actually comprises six

[13] *Ibid.*

independent states, but not all have been directly involved in the civil wars, although obviously they are not spared by the effects of the crises in their neighbourhoods.[14]

2.2 The Basic Features of the Africa's Great Lakes Conflict

Conflict *per se* is an integral part of human relations and cannot be entirely eliminated or controlled. The ultimate aim is to transform the violent expression of conflict into one expressed through non-violent means.[15] Conflict is part of social life and, even if one may wish to be so, no society is without conflict, except a dead one.[16] It has, in fact been argued elsewhere that conflicts do have positive dimensions as they may be transformed into something creative, thereby invoking change.[17] However, the reality remains that no matter how necessary they may be, conflicts, and particularly violent ones, are always evil and never good to social harmony in any society.[18]

The Africa's Great Lakes conflicts present a unique violent situation, leading to human suffering and social destruction throughout the region. There is a general observation that very little knowledge exists on how to deal with the Africa's Great Lakes conflicts.[19] Despite great progress towards sustainable peace in the region, sporadic violence continues in some of the countries of the region.[20] The complication in addressing the Africa's Great Lakes conflicts is caused by the fact that the origins of the war and actors in it keep changing significantly over time.[21] The conflicts in the region have a dual character: even if most of the conflicts have a distinct local and /or national anchorage, they are at the same time fuelled by or fuelling regional conflicts. A regional approach is therefore necessary for both analysis and management of the conflicts. Hence, the Great Lakes region is illustrative example of the need to abandon the artificial dichotomy between intra-and inter-state conflicts. It is, as well, an example of an armed conflict, in which a possible containment of violence has to take into account the interface between structural and direct violence.

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[14]Although Tanzania has remained as an island of stability in the region, the burden of hosting hundreds and thousands of refugees is seriously felt. See Mpangala, supra note 11, p.120.

[15] Kumar R. (1998) *Civil Wars, Civil Peace: An Introduction to Conflict Resolution*, London: Pluto Press, p. 3.

[16] Doom, R and Gorus, J (Eds) (2000), *Politics of Identity and Economics of Conflicts in the Great Lakes Region*, Brussels: VUB University Press, p.51.

[17] See Uurtimo, Y and Väyrynen, T. (Eds.) (2000). 'Peace-Building in the Great Lakes Region of Africa', Tampere Peace Research Institute. Occasional Papers No.79. p.11.

[18] See Tshitereke, C. (2003). 'On the Origins of War in Africa' in *African Security Review*, vol. 12 No. 2, pp.81-90.

[19] From Hawkins, *supra* note 10, p.18.

[20] Although there have been lots of efforts to resolve these conflicts, mistrust and fear of escalation reign throughout the region.

[21] The wars and conflicts in the Africa's Great Lakes involve actors from local, national and international communities.

Although positive developments for durable peace have taken place within the region, enormous challenges lie ahead, both for the creation of a sustainable peace, and for proper utilization of the lessons learned from the conflict, for future regional stability. It becomes more and more obvious that both a comprehensive conflict resolution approach and effective peace-building efforts are needed. Moreover, the peace-building efforts have to empower regional and local actors and have to be implemented as early as possible in order to prevent violent conflict escalation, human rights violations, and expensive post-conflict reconstruction.[22]

Numerous writings and detailed reports on the Africa's Great Lakes Conflicts are abounding. It is however necessary to make a systematic and comprehensive analysis because these conflicts have often been analyzed on a descriptive level, with little reference to broader structural and historical context within which they are situated. Furthermore, while pretending to stick to nothing but the truth, most of the conflict analyses in the region reveal a clear ideological bias. The bias manifests itself in an unwarranted and deliberate ignoring of the fact that many of the conflicts in the region are mostly products of the western economic and political interests, arising from colonial or neo-colonial relations.[23]

Since 1960 there have been 11 outright wars in the DRC, five in Burundi and two in Rwanda, not forgetting the constant low-intensity warfare.[24] An estimated four million people have lost their lives as a direct result of these conflicts and a further four million have been forcibly displaced.[25] The 1994 Rwandan genocide appears to have marked a decisive moment in the history of the regional and international communities' approach to crimes against humanity. The involvement of more than eight African nations in the DRC war of 1998–2000,[26] also signalled a clear breach of the principle of non-interference in the internal affairs of other states.[27]

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[22] See Airas, *supra* note 2.
[23] See Peck (1998), *supra* note 9, p.15.
[24]Wallensteen, P and Sollenberg, M (2001), 'Armed Conflict: 1989-2000' in *Journal of Peace Research*, Vol. 38, No. 5, pp. 629-644.
[25] *Ibid*
[26]See Hwakins,*supra* note 10.
[27] Dalley, P. (2006), 'Challenges to Peace: Conflict Resolution in the Great Lakes Region of Africa' in *Third World Quarterly*, Vol. 27, No. 2, pp. 303–319. See also Adibe, C. 'Do Regional Organizations Matter? Comparing the Conflict Management Mechanisms in West Africa and the Great Lakes Region' in Boulden, J (ed) (2003), *Dealing with Conflict in Africa*, New York: Palgrave MacMillan, p.88.

2.3 Historical, Socio-Political Background as Sources of Conflicts

As in many other parts of the African continent, conflicts in the Great Lakes region have a long history.[28] It has been argued elsewhere that there have been legitimate and illegitimate conflicts in Africa.[29] Whereas legitimate conflicts have been mainly concerned with the struggle for total liberation of society from oppressive and exploitative regimes,[30] illegitimate conflicts have not been guided by such objectives. Rather, the conflicts in this category are prompted by struggles for political power and economic resources[31] on the basis of such ideologies as ethnicity, racialism and religious antagonism.[32] Periodic violence in the Great Lakes Region provides a typical example of such conflicts. It is important to note here that the Great Lakes region has been leading in the number conflicts going on in Africa in terms of scale and persistence, leading some to describe the region in terms of the notion of "conflict fatigue [33]

The regional nature of the Africa's Great Lakes conflict manifests itself in the fact that, while their origins are internal, civil wars tend to become regional conflicts in the Great Lakes as they inevitably spill over into other countries in the region often reinforcing each other. There are several reasons for this scenario. One is the fact that blood, cultural, and linguistic ties rarely correspond to national borders, both because of the arbitrary manner in which political boundaries of the African countries were drawn in European capitals during colonization of Africa,[34] and because of the migratory and refugee flows which occurred within the countries in the region as a result of the conflicts. Consequently, rebels can easily find refuge in the neighbouring countries with people with whom they have much in common and, at times, share a cause.[35] In addition, people often see dynamics in neighbouring countries as a mirror of their own, reinterpreting internal events in terms borrowed from outside.[36]

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[28] Ibid

[29]Mpangala, G & Mwansasu, B (Eds). (2004), *Beyond Conflict in Burundi*, Dar es Salaam: The Mwalimu Nyerere Foundation, p.2

[30] An example is given of legitimate armed conflicts in the first such struggles for national independence during colonial domination, and in the second phase of struggles against dictatorial and oppressive regimes in independent African states.

[31]See Dalley,, *supra* note 27.

[32]Mpangala and Mwansasu, *supra* note 29, p.3

[33] Ibid, p.4. See also Duly, G. (2000). 'Creating a Violence-Free Society: The case of Rwanda.' *Journal of Humanitarian Assistance*. available at <http://www-jha.sps.cam.ac.uk/c/c090.htm>, last visited, September 8, 2009.

[34] The arbitrarily drawn artificial colonial boundaries in Africa disregarded ethnic ties and ethnic differences among the African local communities. This led to splitting a single ethnic group making it fall under two different countries, while grouping together different ethnic groups into one country.

[35]The Interahamwe militia who had taken refuge in the DRC Congo provides a typical example.

[36] See Uvin. P *et al* (2005), 'Regional Solutions to Regional Problems: The Elusive Search for the Security in the African Great Lakes' in *The Fletcher Forum of World Affairs,* vol. 29 No.2, p.70.

The regional nature of this conflict can also be explained by the deliberate actions of political leaders within the Great Lakes countries who support the rebellious groups of their ethnic ties in neighbouring countries in order to weaken their opposite ethnic groups in those neighbouring states.[37] This situation is further explained by the fact that all key power holders in almost all the four countries in the Great Lakes region rose to power through armed violent wars launched from neighbouring countries,[38] making them sceptical of anyone else contending for power so that they do all they can to prevent others from repeating their achievements.

However, these are only but the results and not the causes of the conflicts themselves. Tracing the causes of the Africa's Great Lakes conflicts in historical perspective, Paul Kagame, President of the Republic of Rwanda argued that there are many views as to the causes of the conflicts in the Great Lakes region. Some argue that the root cause is embedded in the pre-colonial social and political structures of societies in the region.[39] Others argue that the starting point in any discussion on the origin of conflicts in the region is the imposition by the colonial powers of a system of ethnic identity and political/administrative structures that created deep division of societies in the Africa's Great Lakes. This latter situation, it is said, was perpetuated by the Hutus regimes since independence in both Rwanda and Burundi, culminating to the Rwandan Genocide in 1994.[40] Although Kagame accepts that recent years have seen many regions of Africa involved in war and external or internal conflict, he rightly contends that conflict is not exclusively an African phenomenon, neither is it endemic in the Great Lakes Region, and rejects the prevailing view that Africa is conflict-centric.

According to Kagame, the conflicts experienced in the region are a manifestation of serious structural weaknesses. Their underlying causes have internal as well as external components. The interactions between the legacy of colonial history and the post-independence models of governance, as well as the international political, social, and global economic milieu in which this interaction occurs, is the appropriate context in which to place the recurrent conflicts.

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[37] These same reasons prompted Rwanda and Uganda to send their troops to the DRC to assist the Tutsi Congolese in their fight to remove Mobutu's regime following an ultimatum given to them to leave the country, and in the recent DRC and Rwanda joint military operation against Rwandan Hutu rebels in the DRC.

[38] The current presidents of both Rwanda and Uganda came to power by overthrowing the existed regimes and the same holds true for sizable parts of the transitional governments of Burundi and the DRC.

[39] See generally Kamukama, D (1997), *Rwanda Conflict: Its Roots and Regional Implications*, Kampala: Fountain Publishers.

[40] See Gaparayi, I (2000), 'Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of the *Gacaca* Tribunals' Paper submitted to the Center for Human Rights, University of Pretoria, in partial fulfillment of the requirements for the LLM Degree, p.3 (On file with the Author).

The structural causes of the conflicts include bad governance, the politics of exclusion, and widespread state sponsored or state condoned human rights violations. I would, however, like to dwell on some of the more fundamental causes that are hardly ever subjected to analysis by so-called experts on the region.[41]

2.3.1 The Role of the West in the Intensification of Conflicts in the Africa's Great Lakes

The use of the term ethnicity has gained much currency in scholarship over "tribalism", a term coined arguably to describe the African specificity, which is being discarded because of its pejorative connotation. Ethnicity is the active sense of identification with some ethnic unit, whether or not this group has any institutional structure of its own, or whether it has any real existence in the pre-colonial epoch. Ethnicity is a fundamental social fact of life. Yet one needs to distinguish between its moral and strategic versions. When conceptualized as internal, these cognitive valuations engender moral ethnicity.[42]

Nowhere is ethnicity as the defining mode of conflict more tragically evident than in the Great Lakes region of Africa.[43] Yet, as we now realize, ethnicity as a descriptor of violence is a poor guide to unravel the complexities of internal armed conflict situations, their interconnectedness in time and space, and the manner in which they enter the consciousness of both actors and outsiders.[44]

The analysis of the historical background to the problem of ethnic antagonism, which has been the major factor behind violent conflicts in the Africa's Great Lakes Region, has much to do with colonialism. The existence of primordial forms of ethnic groups among pre-colonial African societies in the Great Lakes is an indisputable fact; but ethnic antagonism and ethnic conflicts of the sort and on the scale prevailing in the region today is a colonial creation.[45] However, this fact has not always been welcome by many, and some analysts have simply dismissed any analyses that attribute the current Africa's miseries to the legacy of colonialism.[46] Be it as it may, while it is true as acknowledged elsewhere in this work that the recurrent and persistent conflicts in Africa and in

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[41] Kagame, P (2006, May 17-24), 'Conflicts in the Great Lakes Region' in *The African Executive*, availableat<http://www.africanexecutive.com/modules/magazine/articles.php?article=693&magazine=70 17/10/2006>. Last visited, September 8, 2009.
[42] Jua, N., & Nkwi, P. (2001). 'Leveling the playing field. Combating racism, ethnicity, and Different forms of Discrimination in Africa.' Yaoundé, Cameroon: International Center for Applied Social Sciences, Research, and Training.
[43] See UN Secretary General's Report, *supra* note 8
[44] Discussed in Kumar, *supra* note 15, p.15
[45] Mpangala, *supra* note 11, p.9. See also Doom, *supra* note 16, p.98
[46] Tshitereke, *supra* note 18, p.83

the Great Lakes in particular is caused by multiple factors, attempts to dissect Africa's current predicaments must revisit the complexity of the past.

Thus, one of the fundamental historical questions in the Africa's Great Lakes conflict revolves around whether ethnic conflicts, at least of the current scale, existed prior to colonial rule in the Region. The Africa's Great Lakes region historiography provides us with a negative answer to this question.[47] In Rwanda and Burundi, history indicates that society is made up of three social ethnic groups.[48] The *Twa* who relate to the pigmies, were the first inhabitants and form a smallest component of the population in both countries. Then came the *Hutus* who belong to the Bantu group from Chad and Cameroon, and finally the *Tutsi*, who descended from Ethiopia.[49]

It is important to note here that even if this region was not a land of peace and bucolic harmony before the coming of colonialism,[50] there is no trace in its pre-colonial history of a systematic ethnic violence as such. There was therefore no particular confrontational relation, and the three groups lived side-by-side, shared the same culture and customs, spoke the same language, had same clan names and lived together with no land distinctively being the home of any particular so called ethnic group. But colonialism invented the ethnicity factor out of the only difference which was visible to them, namely that of division of labour, where the Hutus are crop cultivators, while the Tutsis are pastoralists and artisans.[51]

Initially, colonial anthropologists associated the concept of ethnicity or tribalism[52] with a primitive and barbarous mystique peculiar to the African, thus requiring "a colonial civilizing mission."[53] However, through the indirect rule, or rather the divide and rule system of colonial administration, the colonialists realized the divisive nature of ethnic identity, and being essentially opportunistic, they opted to take advantage of it for their own interests.[54]

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[47], See Kamukama, *supra* note 39, p.4.
[48] Ibid
[49]Ibid.
[50]It is obvious that as in any other societies, there were some hostilities, but these much more frequent among competing dynasties of the same category than between the Hutus and the Tutsi as ethnic groups.
[51]Mpangala, *supra* note 11, p.27.
[52]Tribalism was viewed by colonial anthropologists as being associated with the lowest level of development of societies in their early stage, and the ethnicity was the next in the level of development; See generally Moore, S. (1994). *Anthropology and Africa: Changing Perspectives on a Changing Scene*. Va. Charlottesville/London: University Press.
[53] Mpangala, *supra* note 11, p.5.
[54] See also this view in Kamukama, *supra* note 39, p.20.

In order to fulfil its motive of producing raw materials and providing markets for European industrial products, the colonial state integrated African societies in the Great Lakes Region into their colonial administration systems, colonial economy and colonial ideology.[55] In this process, "racism" and "civilizing mission" became a common ideology used as an instrument to justify colonialism. Its direct application meant categorization of social relations into superior, less superior and inferior races for the Whites, Asians and Blacks respectively.[56]

In order to understand the impact of colonialism on ethnic identity and ethnic conflicts in the Great Lakes region, two aspects have to be taken into account. One is the colonial ideology of racism, and the second is the establishment of political boundaries, which were arbitrarily drawn in the Berlin Conference in total disregard of the social, political and cultural interests of ethnic communities in the region.[57]

Racism is an ideological notion or dogma that makes one racial group condemned by nature to congenital inferiority and another group is destined to congenital superiority.[58] While European colonialists in the Africa's Great Lakes used the racist ideology to justify colonial domination, oppression and exploitation as elsewhere in the continent, the same racist ideology was used to divide Africans in the region into antagonistic ethnic groups on the basis of superior and inferior categories.[59] Members of each ethnic group in the region were allocated to different roles within the framework of the colonial systems in their considered order of superiority and qualities. In Rwanda and Burundi where the Belgians took over colonial administration from the Germans,[60] the system of indirect rule was inherited with necessary modifications. These modifications necessitated various changes aimed at transforming Rwanda and Burundi into "modern" societies, and they also necessitated the introduction of various reform measures. These included a formal institutionalization of ethnicity by dividing society into three groups, which were called ethnic groups.[61] Everyone was then issued with an identity card, stating his or her ethnicity.[62] It was upon production of an identity card that the colonial authorities could determine the allocation of various opportunities in society, including schools, civil services, and the like, depending on the ethnic group to which one belonged. The system promoted members of Tutsi ethnic group as an elite and

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[55]Ibid.
[56]Mpangala, *supra* note 11, p.44; See further, generally, Koskenniemi, M. (2001), *The Gentile Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge: Cambridge University Press.
[57] See Doom, *supra* note 16, p.191
[58] Mpangala, *supra* note 11, p.5
[59] Ibid, p.6
[60]The takeover came as the result the defeat of the Germans during the First World War in 1918.
[61]The Hutus group represented 84% of the population, the Tutsi about 15% and the Twa about 1%.
[62] See this in Kamukama, *supra* note 39, p.6

educated ruling class. The colonial administration reserved ruling positions as exclusive for the Tutsi through a biased system of education, which regarded the Tutsi as being more superior race of Hamitic origin,[63] and their subjects Hutus an inferior ethnic group of Bantu origin. The racial distinction was based on height and light skin-colour differences and may have been an attempt to identify and give preferences to those perceived as having a "more European" look. The shorter, darker Hutus were classified as Bantu, a term used analogous to the serfs of medieval European feudalism.[64] The lighter-skinned Tutsi were earmarked for leadership positions because the Belgians ascribed to them a greater intelligence and ability for leadership, while the Hutus were denied any privileges and relegated to peasant status. This was a beginning of a formalized social stratification on ethnic basis, changing the once flexible class boundary between these two social groups into a sharp and an insurmountable ethnic barrier.

In the DRC, the role of colonialism in making ethnicity the focal point of identity was not different. When the Belgium colonial administration assumed control over the Belgian Congo, cultural organizations based on ethnic identity were permitted, making ethnic membership the form of identification.[65] Additionally, ethnic identity and ethnic conflicts in the DRC is mainly a continuation of the same in neighbouring states, which as we have seen above, is a colonial creation. These racial distinctions later became the cornerstone for ethnic conflicts that ensued in the whole area of the Africa's Great Lakes.

The second aspect is the link between the artificial nature of political borders in the Africa's Great Lakes region as elsewhere in Africa and ethnic conflicts. The link is made on the basis of the premise that these imposed borders, which disregarded ethnic groups and natural resources distribution, inevitably led to internal ethnic conflicts, territorial disputes accompanied by separatist groups and persistent disputes over natural resources.[66] In this respect, we would like to differ with controversial arguments by some scholars that colonial bureaucrats drew up territorial boundaries in Africa along cultural tribal units, and imagined them as socio-political units for action.[67] These

[63] This ideology was first invented by the Catholic White fathers. See Kamukama, Ibid, p.6

[64] Sarkin, J (2001), 'Towards Finding a Solution for the Problem Created by the Politics of Identity in the Democratic Republic of the Congo (DRC); Designing Constitutional Framework for Peaceful Cooperation.'p.70 available at <http://www.scholar.google.com/scholar?hl=fi&lr=&q=cache:6L1EpD3zmCUJ:www.kas.org.za/Publications/Seminar Reports/PoliticsofIdentityandExclusion/sarkin.pdf+politics+of+identity+in+the+DRC+Congo>, last visited, September 8, 2009.

[65] Ibid, p.68

[66] Cone, C & Solomon, H (2004).'The state and conflict in the Democratic Republic of Congo' *South African Journal of Military Studies*, vol. 32, No. 1, pp. 51-75.

[67] See Doom, *supra* note 16, p.100

artificial borders divided people who were under the same political organization before colonialism. For instance, the Hutus and Tutsi of Urwanda and Urundi, who intermingled as one society before the coming of colonialism, were separated; some came under the current Rwanda and Burundi, while others were left as minorities within Uganda and the Belgian Congo or Zaïre.[68] So, as was rightly argued by Paul Kagame, the artificial boundaries created by former colonial masters had the effect of bringing together many different people within nations that were not prepared for the cultural and ethnic diversity (especially when a new regime was going to foster ethnic conflict) , and separating language, religious and ethnic communities.[69]

In short, in order to protect, defend and prolong their interests, some of the Western actors in the region have fuelled the conflicts and variously obstructed the peace processes for a long time. In the 19th and 20th centuries scramble, the brutality (of genocidal proportions) was committed in the plunder of ivory and rubber. In the current scramble, the loot is diamonds, gold, coltan, copper, cobalt, timber, wildlife reserves and fiscal resources.[70] Indeed, the current role of the West in the intensification of conflicts in the Africa's Great Lakes region can be summarized into three corners of inter-imperialist rivalries between the Western powers in the region. In one corner stands the US with its quest for global dominance and insatiable appetite for the strategic minerals of the region to mainly feed its military-industrial complex, including electronic, aeronautics, nuclear medicine, and missile technology etc. It should be noted that since the 1960s, Washington has had geo-political interests in the Great lakes region, and helped to install in power and strongly supported the autocratic regime of Mobutu Sese Seko between 1965 to 1990s.[71] The US is also strategically bent to bringing to an end the old colonial spheres of influence as presently defined by British, French and Belgian interests. In the other corner lies the traditional Franco- Belgian interest seeking to maintain their foothold *albeit* in a conflict and collaboration mode with the Belgium unable to, but France intent on expanding its sphere of influence into traditional British areas. In the third corner, stands the rest of the EU and Britain in particular, seeking to dislodge the privileged position of

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[68] See Griggs**,** R (1994), 'Geostrategies in the Great Lakes Conflict and Spatial Designs for Peace' available at <http://www.google.fi/search?hl=fi&q=colonial+political+boundaries+and+ethnic+conflicts+in+the+Great+Lakes+region+&meta> last visited, September 8, 2009.
[69] See Kagame, *supra* note 41.
[70] Baregu, M. (2002) 'The Clones of Mr. Kurtz: Violence, War and Plunder in the DRC' *African Journal of Political Science* (2002), vol.7 No.2, pp. 11-38.
[71] See this fact clearly discussed in the Report entitled, SIDA (2004) *A Strategic Conflict Analysis for the Great Lakes Region*, Division for Eastern and Western Africa, Article No.SIDA3689, Stockholm, available at< http://www.sida.se/?d=118&a=3140&language=en_US> last visited, September 8, 2009.

France in particular in collaboration with the US. This struggle is what has been variously termed the second scramble for Africa.[72]

These realities rendered many conflicts and civil wars in the Africa's Great Lakes Region intractable.

2.3.2 Rwandan Conflict: Introduction of violence in the Great Lakes Region

At independence in Rwanda, it is technically true that within a mere three years, a Tutsi-dominated monarchy under colonial rule gave way to a Hutu-led independent republic. But in practice, the changes mostly affected the top echelons of Rwandese society. A small band of Hutus, mainly from the south-centre and, therefore, not representative even of the entire new Hutu elite, replaced the tiny Tutsi elite.[73] They were backed with enthusiasm by the Catholic Church and their former Belgian colonial masters. Accepting the racist premises of their former colonial oppressors, the Hutu now treated all Tutsi as untrustworthy foreign invaders who had no rights and deserved no consideration.[74]

Having established discriminatory policies, the government mounted intensive and omnipresent propaganda claiming that Tutsi were foreigners who had repressed the Hutu people in serfdom for four centuries and the revolution and the republic were the expression of victory of the Hutu majority over the feudal minority Tutsi.[75] This propaganda, which amounted almost to conditioning people to violence, led the population to internalise the racist biases of the regime founded on an antagonistic vision of the Tutsi.[76]

The discriminatory regime increased the departure of Tutsi to neighbouring countries[77] from where Tutsi exiles made incursions into Rwanda.[78] The word *Inyenzi*, meaning cockroach, came to be used to refer to these assailants. Each attack was followed by reprisals against the Tutsi within the

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[72] Baregu, *supra* note 70.
[73] Prunier, G. (1997) *The Rwanda Crisis: History of a Genocide 1959-1994*, London: Hurst and Company, p.53.
[74] *Ibid.*
[75] Gasana, E; *et al* 'Rwanda' in ACDESS (Eds.) (1999) *Comprehending and Mastering African Conflicts, The Search for Sustainable Peace and Good Governance*, London: Zed Books, p. 153.
[76] As pointed out in the report of the OAU Panel: "Other than the change in the names and faces of the tiny ruling class, independence really produced only one major change for Rwanda: the introduction of violence between the two, increasingly divided, ethnic groups". OAU Panel Report (2000).
[77] See generally Guichaoua, A. (1992) *Le Problème des Réfugiés Rwandais et les Populations Banyarwanda dans la Région des Grands Lacs Africains*, Geneve : UNHCR
[78] Exiled Tutsi became an early example of a new reality that later would convulse the entire Great Lakes Region and many of its neighbouring countries. Conflicts that generate refugees can easily lead to conflicts generated by refugees. See further Adelman, H (1998) 'Why Refugee Warriors are Threats' *Journal of Conflict Studies*, vol. 18, No. 1, pp. 49-69.

country.[79] The dissensions that soon surfaced among the ruling Hutu led the regime to strengthen the authority of the then President Grégoire Kayibanda as well as the influence of his entourage, most of whom came from the same region as himself, that is the Gitarama region in the centre of the country. The drift towards ethnic and regional power became obvious. From then onwards, a rift took root within the Hutu political establishment, between its key figures from the Centre and those from the North and South who showed great frustration.[80] Increasingly isolated, President Kayibanda could not control the ethnic and regional dissensions. The disagreements within the regime resulted in anarchy, which enabled General Juvénal Habyarimana, Minister of Defence and Army Chief of Staff, to seize power through a coup on July 5, 1973, thus ending the First Republic.[81]

2.3.2.1 The Second Republic – The Regime of Habyarimana

Following a trend then common in Africa,[82] President Habyarimana, in 1975, instituted the one-party system with the creation of the *Mouvement révolutionnaire national pour le développement* (MRND), of which every Rwandese was a member *ipso facto*, including the newborn. Since the party encompassed everyone, there was no room for political pluralism. The structures of a totalitarian regime were put in place systematically. The party was everywhere, from the very top of the government hierarchy to its very base.[83]

From the beginning of 1980s, the external factors which had encouraged economic development were reversed, with the progressive decrease of external aid and serious deterioration of terms of trade.[84] The losses were felt at every level of Rwandese society, causing widespread discontent. Growing inequality between most rural and some urban dwellers exacerbated the frustration of peasant farmers.[85]

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[79] Prunier (1997), *supra* note 73, pp. 56-62. Before these incursions ceased, 20,000 Tutsi had been killed, and another 300,000 had fled to the Congo, Burundi, Uganda, and what was then called Tanganyika.

[80] Gasana, E; *et al, supra* note 75, p. 157; Kakwenzire, J; *et al* "The Development and Consolidation of Extremist Forces in Rwanda 1990-1994" in Adelman, H & Suhrke, A. (1999) *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire,* New Brunswick: Transaction Publishers, p. 19.

[81] Gasana *et al, supra* note 75, pp. 155-158.

[82] See generally Decalo, S. (1990) *Coups and Army rule in Africa* , New Haven: Yale University Press.

[83] All officials were chosen from party cadres. Article 7 of the 1978 Constitution made Rwanda officially a one-party State with the consequence that the MRND became a "State-party", as it formed one and the same entity with the Government.

[84] Gasana *et al, supra* note 75, pp. 159.

[85] OAU, Report of the International Panel of Eminent Personalities (2000) *Rwanda: The Preventable Genocide* OAU/IPEP/PANEL also available at <http://www.oau-oua.org/Document/ipep/rwanda-e/EN.htm> last visited, September 8, 2009, (hereinafter referred to as "OAU Panel Report").

The inability to control the rapid demographic increase exacerbated the land-shortage situation, thus leading to potentially explosive social disorders.[86] By the end of the 1980s, the number of peasants who were land-poor (less than half a hectare) and those who were relatively land-rich (more than one hectare) both rose. By 1990, over one-quarter of the entire rural population was entirely landless; in some districts, the figure reached 50 per cent. Not only was poverty on the rise, but so was inequality.[87]

In addition, although already dependent to an unhealthy extent on international assistance, the Habyarimana government reluctantly concluded that it had little choice but to accept a Structural Adjustment Programme from the International Monetary Fund (IMF) and World Bank[88] in return for a loan conditional on the rigid and harsh policies that characterized western economic orthodoxy of the time.[89]

Like his predecessor, Grégoire Kayibanda, Habyarimana strengthened the policy of discrimination against the Tutsi by applying a similar quota system in universities and government services. A policy of systematic discrimination was pursued even among the Hutu themselves, in favour of Hutu from Habyarimana's native region, namely Gisenyi and Ruhengeri in the north-west, to the detriment of Hutu from other regions.[90] This last aspect of Habyarimana's policy, considerably weakened his power: henceforth, he faced opposition not only from the Tutsi but also from the Hutu, who felt discriminated against and most of whom came from the central and southern regions.

Like Kayibanda, Habyarimana became increasingly isolated and the base of his regime narrowed down to a small intimate circle. Rwandese used to call that group "a*kazu*" (a small hut) in reference to the most restrictive or narrow political circle, which surrounded the *mwami* (King).[91] This

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[86]Rwanda population density was 221.9 inhabitants per Km^2 in 1970, 283.5 in 1978 and 386 in 1986. J C Williams (1995) *Cahiers africains* 14. The economic crisis led to endemic malnutrition in the country which, between 1984 and 1989, transformed itself into food shortage and even into famine in 1989 in Gikongoro. That social crisis proved even more pronounced among the rural youth. Those youth with uncertain futures no longer adhered to the official slogans. Many of them went to try their luck in the informal urban sector. Over the years, there developed a floating mass of unemployed young men and women. These men were there in addition to those enrolled in the militia *Interhamwe* (Those Who Stand Together or Those Who Attack Together) who were the spearhead of genocide. See also Gasana *et al, supra* note 75, pp. 159.

[87] DesForges, A. (1999) *Leave None to Tell the Story: Genocide in Rwanda,* New York: Human Rights Watch.

[88]In this regard, a lesson is to be learned in the analysis of the conflict in Rwanda for the international financial institutions. "Even if the adjustment programme did not contribute directly to the tragic events of 1994, such a reckless disregard for social and political sensitivities in such a conspicuously sensitive situation would unquestionably have increased the risk of creating or compounding a potentially explosive situation." *See* OAU Panel Report (2000).

[89]Woodward, D. (1996) *The IMF, the World bank and Economic Policy in Rwanda: Economic and Social Implications,* Oxford: Oxford University Press, p. 25; *see also* A Storey (1999/03) 17 *Development Policy Review* 1.

[90]Gasana, E; *et al, supra* note 75, p. 158.

[91]*Ibid, p.* 159.

further radicalized the opposition whose ranks swelled more and more.[92] In October 1990, an attack was launched from Uganda by the Rwandese Patriotic Army (RPA), military wing of the Rwandese Patriotic Front (RPF), a political organization whose forebear, the *Alliance Rwandaise pour l'Unité Nationale* ("ARUN"), was formed in 1979 by Tutsi exiles based in neighbouring countries and elsewhere in the world.[93] With the military assistance of France, the RPA advance was halted.[94] After that, the RPA installed itself in the north from where it launched a guerilla war, under close supports from Ugandan president Yoweri Museveni, who paid tribute to the RPF for the military assistance he received from them during his guerilla war aimed at ousting Milton Obote.

To understand the violence of the RPF, it is necessary to go back a bit to its Ugandan origins. The hard core of the RPF was made up of men who were young boys in Uganda in the early 1980s. They grew up as refugees in the violence of Uganda civil wars.[95] Their first experience of blood came with the Idi Amin massacres of the 1978-1979 war with Tanzania, and then later they suffered from the anti-Rwandese pogroms of 1982 and joined the Museveni's guerilla forces.[96] There they not only fought, but they also witnessed army government massacring civilians in the Luweero region. Once they won the war they were quickly pressed again into combat, this time in the North, against troops of the "prophetess" Alice Lakwena. Now the tables were turned; this time they were the "forces of law and order" and it was the local population who were the insurgents. They in turn committed massacres; to such an extent that President Museveni had to send special military judges to the north to curb his own army. One of these judges was Paul Kagame, and some of the men he had to judge were later his own subordinates in the RPF. The whole life history of these forces therefore, even before they set foot on Rwandese soil had been full of the sound and the furry of civil wars, and for them violence was not exceptional; it was a normal state of affairs.[97]

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[92] *Ibid*.

[93] The Rwandese Patriotic Front demanded the implementation of the rule of law, the abolition of the policy of ethnic and regional discrimination as well as the right for refugees to return to their motherland. *See* Prunier (1997), supra note 73, p. 74.

[94] *Ibid, pp.* 101-102.

[95] There is abundant literature of varying interests on the political convulsions of Uganda between 1979 and mid-1990s. Among the most interesting works, one could mention Dodge, C and Raundalen, M (Eds.) (1987) *War, Violence and Children in Uganda,* Oslo: Norwegian University Press; Kasozi, A. (1994) *The Social Origins of Violence in Uganda (1964-1985*), Montreal: McGill University Press; Gersony, R. (1997) *The Anguish of Northern Uganda*, Kampala: USAID; Ondonda, A. (1998) *Museveni's Long March*, Kampala: Fountain Publishers; Finnstrom, S. (2003) *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda,* Uppsala: Uppsala University Press, and many more.

[96] During the Uganda civil war, since Museveni was a Munyankole Muhima, also suspected to be of Tutsi origin, Obote's thugs of Uganda Peoples Congress (UPC) Youth Wing attacked and killed Rwandese Tutsi refugees in Ankole whom they assimilated to their Bahima cousins.

[97] Prunier, G. (2009). *From Genocide to Continental War: The Congo Conflict and the Crisis of Contemporary Africa*, London: Hurst & Company, p. 13.

2.3.2.2 From Conflict to Genocide 1990-1994

The civil war launched from Northern Rwanda by the eager to return RPF on October 1, 1990, lasted, with long periods of cease-fire, for close to four years. Its final three months coincided with the period of the genocide, which was halted only by the ultimate triumph in July 1994 of the RPA over the "*genocidaires*".[98] Throughout this period, old patterns re-emerged.

Indeed, it was always at least possible, if not probable, that history would repeat itself and an opportunistic and threatened government would again awaken the sleeping dogs of ethnic division. There had been no punishment for those Hutus who had led the massacres of the Tutsis in the early 1960s and 1970s, and the careers flourished of those who organized cruel repression of opponents throughout the first decade and a half of the Habyarimana regime. Now, in the wake of the October 1, 1990, invasion, impunity flourished for the demagogues who were deliberately fuelling the latent animosity toward those they considered perfidious outsiders, a category including not just the Tutsi of the RPF but every Tutsi still in Rwanda, as well as any Hutu alleged to be their sympathizer. Any question of class or geographical division among Hutus had to be submerged in a common front against the intruders. It was not difficult for the government to exploit its own failures in order to rally the majority behind it. In a country where so many had so little land, it took little ingenuity to convince Hutu peasants that the newcomers would reclaim lands they had left long before and on which Hutu farmers had settled. From October 1, 1990, Rwanda endured three and a half years of violent anti-Tutsi incidents.[99]

Despite the official end of the civil war between the RPF and the Government forces resulting from the signing of the Arusha Accords[100] on August 4, 1993, extremist elements continued to push for less amicable solutions.[101] On October 23 1993, the President of Burundi, Melchior Ndadaye, a Hutu, was assassinated in the course of an attempted coup by Burundi Tutsi soldiers resulting in one of the worst massacres in Burundi's bloody history.[102] In Rwanda, Hutu extremists exploited this

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[98] The French word for perpetrators of genocide.

[99] Massacres of Tutsi were carried out in October 1990, January 1991, February 1991, March 1992, August 1992, January 1993, March 1993, and February 1994 to mention only a few. *See, e.g.*, Desforges, *supra* note 87.

[100] *See* Peace Agreement Between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, 4 Aug. 1993 [hereinafter Arusha Peace Agreement].

[101] Since the beginning of the war and the democratization process, a constant barrage of virulent anti-Tutsi hate propaganda began to fill the air. Clearly, the media played a prominent role in keeping passions at a fever pitch before and during the genocide. See generally Chrétien, J; et al. (1995) *Rwanda : Les médias du génocide*, Khartala, Paris.

[102] Lemarchand, R. (1996). *Burundi: Ethnic Conflict and Genocide*, 2nd Edn., Cambridge: Cambridge University Press and Woodrow Wilson Center Press, p. xiv.

assassination to prove that it was impossible to agree with the Tutsi, since they would always turn against their Hutu partners to kill them.[103]

2.3.2.3 Genocide and War

On April 6 1994, under strong international pressure, President Habyarimana and other heads of State of the region met in Dar-es-Salaam (Tanzania) to discuss the implementation of the peace accords. The aircraft carrying President Habyarimana and the Burundian President, Ntaryamira, who were returning from the meeting, crashed around 8:30 pm near Kigali airport. All aboard were killed. Although the responsibility of the crime has never been established, a small group of his close associates—who may or may not have been involved in killing him—decided to execute the planned extermination. Within hours of the plane crash, the killings in Rwanda began. Roadblocks were thrown up to prevent escape. Leaders viewed as moderate or "pro-Tutsis" were singled out to be killed first, and then the campaign of exterminating all Tutsi began. The events unfolded in what seems clearly to have been a preplanned and organized manner.[104]

The killings continued, day and night, for the next fifteen weeks. The international community did virtually nothing to intervene. Indeed, the UN Assistance Mission in Rwanda (UNAMIR), which on April 6 had 2,500 troops in Rwanda to oversee implementation of the Arusha Accords, within weeks pulled out all but a token force of 450, and gave the remaining troops no mandate to intervene in the killing of civilians.[105] The killing of Tutsi which henceforth spared neither women nor children, continued up to July 18 1994, when the RPF triumphantly entered Kigali. The estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more people.[106]

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[103] As one analyst put it, "The movement known as "Hutu Power", the coalition that would make the genocide possible was built upon the corpse of Ndadaye." Desforges, *supra* note 87 and. Gasana, E; *et al*, *supra* note 75, p. 162.

[104] Accordingly, the assassination of President Juvénal Habyarimana on April 6, 1994, was simply "the spark to the powder keg which set off the massacre of civilians" and not the root causes of the genocide as some seem to suggest. *See, Report of the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Sequi, Special Rapporteur of the Commission on Human Rights*, U.N. ESCOR Commission on Human Rights, 51st Sess., Prov. Agenda Item 12, para. 19, U.N. Doc. E/CN.4/1995/7 (1994) [hereinafter U.N. Doc. E/CN.4/1995/7 (1994)]; For a detailed description of these events, *see* African Rights (1995) 35-36; *See also* OAU Panel Report (2000), *supra* note 85..

[105] United Nations Independent Inquiry (1999) December, 21; *See also* Security Council Resolution adjusting UNAMIR's mandate and authorizing a reduction in its strength S/RES/912 (1994) 21 April 1994; OAU Panel Report (2000).

[106] U.N. Doc. E/CN.4/1995/7 (1994) para. 24; Establishing a reliable toll of those killed in the genocide and its aftermath is important to counter denials, exaggerations, and lies. The necessary data have not been gathered but speculation about death tolls continues anyway, usually informed more by emotion than by fact. Whichever might be the case, the overriding reality is that large numbers of innocent people suffered at the hands of their fellow citizens and that the outside world did nothing to stop it. On the other hand, establishing the number of persons killed in the genocide will not help much in assessing the number of people involved in their execution. The circumstances of the

This historical overview shows the need to avoid over-simplistic analysis and stereotyping in considering the history of conflict in Rwanda, which should not in any way be reduced to a basic conflict between the Hutu and the Tutsi.[107] Such ingredient, though necessary, is not sufficient.[108] It was necessary to transform those tensions into systematic mass violence, a feat which could only be achieved through careful planning and execution under the direction of political elites.[109] The role (lack) of the leadership in that process especially during the Belgian colonisation and the first and second republic is primordial. In addition, like in many other African countries,[110] several distortions, corruption and racialisation were introduced in the history of Rwanda. Accordingly, a lack of an objective authoritative non-controversial history must be regarded as one of the basic causes of the conflict.

In 1994, the United Nations Special Rapporteur on the human rights situation in Rwanda identified three causes of the genocide, which were "immediately apparent."[111] The first was the "rejection of alternate political power" typical of the region, but which "takes on a special form in Rwanda, where it has strong ethnic overtones."[112] The Special Rapporteur observed that the mass killings of Tutsi "is not ethnic as such, but rather political, the aim being the seizure of political power, or rather the retention of power, by the representatives of one ethnic group, previously the underdogs, who are using every means, principally the elimination of the opposing ethnic group, but also the elimination of political opponents within their own group."[113]

The second identified cause of the genocide was the "incitement to ethnic hatred and violence."[114] In this respect, the most significant instrument was *Radio-Télévision Libre des Mille Collines* (RTLM), the propaganda organ of the Hutu extremists: "RTLM does not hesitate to call for the

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crimes varied enormously: there were professional soldiers armed with machine guns or grenade-launchers firing into crowds, each of whom may have killed dozens, if not hundreds, of people, and there were groups of assailants armed with clubs or sharpened pieces of bamboo who jointly killed a single person. There can be no simple formula to assess how many killers murdered one victim or how many victims were slain by one killer.

[107] *See also* Mekenkamp, M ; *et al*. (1999) *Searching for Peace in Africa : An Overview of Conflict Prevention and Conflict Management* Utrech : European platform for conflict prevention and transformation, p. 34; available at <http://www.oneworld.org/euconflict/sfp> last visited, September 9, 2009.

[108] While it is true that ethnicity and conflict do interpenetrate in Africa (e.g. Rwanda, Burundi) as elsewhere (e.g. Bosnia), it must be reiterated that ethnicity and religion do not, of themselves, reveal why people would kill each other over their differences. See *Report of the Carnegie Commission* (1998).

[109] "[I]t is often assumed that mass violence is an inevitable human phenomenon. On the contrary, systematic mass violence and large scale atrocities necessarily require organization, planning and preparation, often accomplished under the authority of government". Akhavan, P. (1997), 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda' *Duke Journal of Comparative & International Law*, vol. 7, No. 2, pp. 325-48.

[110] African conflicts show a number of crosscutting themes and experiences. *See* U.N. Secretary-General Report 1998.

[111] U.N. Doc. E/CN.4/1995/7 para. 55.

[112] *Ibid* para 56.

[113] *Ibid*.

[114] *Ibid*.

extermination of the Tutsi and it is notorious for the decisive role that it appears to have played in the massacres. It is known as the 'killer radio station', and justifiably so."[115] This systematic campaign of incitement to ethnic hatred and violence was "made more dangerous by the fact that the generally illiterate Rwandese rural population listens very attentively to broadcasts in Kinyarwanda; they hold their radio sets in one hand and their machetes in the other, ready to go into action."[116]

The third cause was "impunity" which, like incitement, was "a recurrent cause of the massacres."[117] Impunity is the cumulative effect of the rejection of alternate political power and the incitement to ethnic hatred and violence. Because, at the time of the genocide in 1994, "no legal steps had been taken against those responsible for the earlier and present massacres, although they were known to the public and the authorities,"[118] there was no fear of punishment.

It can thus be concluded that the tragedy of 1994 cannot be reduced to an uncontrollable spontaneous ethnic violence or just a cold reaction to objective or structural problems. As a matter of fact, the oppressing poverty of the country,[119] fear of domination and threat of war were the proximate causes of the events, yet these factors emerged in a predisposed psycho-cultural context laden with mythical-histories, fears, and misperceptions, indubitably inflamed by extremist propaganda, that account for the intensity of violence. The point is merely that the genocide ideology was the product of a much longer and much more complex process.[120] The exclusion policy, the lack of leadership, the lack of an objective authoritative non-controversial history, the lack of a constitutional culture, the incitement to ethnic hatred and violence, the culture of impunity, the proliferation of arms,[121] the struggle for power and resources[122] among Tutsi factions, among Hutu factions or among Hutu-Tutsi factions, the structural socio-economic situation (e.g., poverty, overpopulation, land pressure) but also psycho-cultural (e.g., related to identity, irrational myths,

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[115] *Ibid* para 59.
[116] *Ibid*.
[117] *Ibid.* para 60.
[118] *Ibid* para 61.
[119] Poverty is both a cause and a consequence of conflict. *See also* U.N. Secretary-General Report (1998).
[120] *See also* Prunier (2009), *supra* note 97, p. 40; Utterwulghe, S. "Rwanda's protacted social conflict : considering the subjective perspective in conflict resolution strategies" (August 1999) *The Online Journal of Peace and Conflict Resolution* available at <http://www.trinstitute.org/ojpcr/> last visited, September 9, 2009.
[121] *See* Brown, E. (Eds.) (1996) *The International Dimensions of Internal Conflict,* Cambridge: MIT Press, p. 247; See *also* Africa Watch *A Human Rights Watch Short Report* 5 (7) (June 1993) 6-10.
[122] Competition for resources typically lies at the heart of conflict. The lack of domestic capital ensured that the state would be an important source of resources and would become the subject of intense distributional conflicts. *See* U.N. Secretary-General Report (1998). Nevertheless, the Rwandese conflict should probably not be interpreted as being triggered by demographic pressure, as some analysts and media have suggested. Research has shown that the relationship between demographic pressure and genocide is much more indirect and complex than outside observers tend to believe.

mistrust and fear) are but some of the factors that explain the conflict in Rwanda. But most, if not all of these factors draw their origin from the same or similar policies cultivated long during colonial rule. Therefore, it is my contention that for the conflict of this nature to be genuinely resolved, both kinds of causes must be identified and then fully considered in conflict resolution strategies.

2.3.2.4 The Impact of the Rwandan Genocide on the Great Lakes Conflicts

The Rwandan Genocide of 1994 is an overwritten subject,[123] and this explains the reason why it does not feature much in this work. Rwanda has made tremendous strides since the genocide, and the Rwanda of today is by and large politically stable.[124] Nevertheless, it is not possible to make a comprehensive analysis of the Africa's Great Lakes conflicts without considering the role of the Rwandan Genocide. To adapt an old metaphor, when Rwanda sneezes, the Congo and Burundi catch a cold. Besides the role of Rwanda as a state in fuelling regional conflicts through its military actions in the DRC in recent years,[125] most of the ongoing upheavals in the Africa's Great Lakes have direct roots in the 1994 Rwandan Genocide.[126] Millions of its citizens fled the conflict in every direction: some eastwards to Tanzania, others southwards to Burundi, and most dramatically, others west to the eastern Kivu region of the DRC. At the same time, much of the leadership and many of the troops and militia of the genocide had escaped from Rwanda into eastern DRC refugee camps, where they had unlimited access to weapons. This has been a sure-fire formula for disaster that continued to rage the region to date. While Rwanda, Burundi, and the DRC each have its own multiple challenges to meet, their interconnectedness can hardly be overestimated. Without peace, their futures are all jeopardized, with incalculable consequences not only for their own citizens but also for the neighbouring states in the region. Beyond domestic solutions to domestic problems, therefore, must be found regional solutions to regional problems.[127] Almost every one of the

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[123] For different views relating to this subject, see generally Taylor, C. (1999) *Sacrifice as Terror: Rwanda Genocide of 1994*, Oxford: Berg Publishers; Prunier (2009), *supra* note 97; Prunier (1997), *supra* note 73; Uvin, *supra* note 36; Mamdani, M. (2001) *When Victims Become Killers. Colonialism, Nativism, and the Genocide in Rwanda*, Princeton: Princeton University Press; Gourevitch, P. (1999) *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families: Stories from Rwanda*, London: Picador; Melvern, L. (2004) *Conspiracy to Murder: The Rwanda Genocide*, London: Verso; Dallaire, R. (2005). *Shake hands with the devil: The Failure of Humanity in Rwanda*, New York: Carrol & Graf trade paperback edition; Kamukama, *supra* note 39; Barnett, M. (2002) *Eyewitness to a Genocide: The United Nations and Rwanda*, Ithaca, NY: Cornell University Press; Kuperman, Alan J. (2001) *The Limits of Humanitarian Intervention: Genocide in Rwanda*, Washington,DC: Brookings Institution Press.

[124]See Jordaan, E (2006), 'Inadequately Self-Critical: Rwanda's Self-Assessment for the African Peer Review Mechanism' in *African Affairs*, vol.105 No. 420, at p. 333

[125] Rwanda troops crossed the DRC border twice. In 1997 they assisted Laurant Kabila in ousting the Mobutu's regime and in 1998, Rwanda in alliance with Burundi and Uganda tried to replace their former ally Laurent Kabila, accusing him of now backing the remnants of the *Interahamwe* forces.

[126] Griggs, *supra* note 68.

[127] See suggestions to that effect by Uvin, *et al*, *supra* note 39.

ongoing violent conflicts in the countries of the Africa's Great Lakes region can be explained in connection to the Rwandan Genocide in some ways. In the DRC for instance, the relationship between the 1994 Rwandan Genocide and the Congo conflict, which started in August 1998, is very clear as explained in more details in chapter five of this work.

In addition, Congolese armed forces had attacked local *Tutsis* (*Banyamulenge*) in Eastern DRC, an event that prompted Rwanda and Uganda in 1997, to give full support to the rebel groups in the DRC in their fight against former President Mobutu, as a way of neutralizing armed activities by the *Interahamwe* and other armed forces.[128] The fragility of the situation in Rwanda is derived from today's situation in the country. Although outwardly peace and stability has been established in the country under the currently mainly Tutsi dominated regime, there is a general but effective marginalization and at times, direct oppression of the Hutus, apparently as a retaliation for their active involvement in the 1994 genocide.

To that extent, there are more skeptical voices outside the Rwandan community. A veteran analyst of the Great Lakes region, the Belgian academic Filip Reyntjens, wrote in 2004:

> "There is a striking continuity from the pre-genocide to the post-genocide regime in Rwanda. Indeed, the manner in which power is exercised by the RPF echoes that of the days of single-party rule in several respects. A small inner circle of RPF leaders takes the important decisions, while the Cabinet is left with the daily routine of managing the state apparatus. Under both Habyarimana and Kagame, a clientilistic network referred to as the *akazu* accumulates wealth and privileges. Both have manipulated ethnicity, the former by scapegoating and eventually exterminating the Tutsi, the latter by discriminating against the Hutu under the guise of ethnic amnesia […] a mere two years after the extreme human and material destruction of 1994, the state had been rebuilt."[129]

For Reyntjens, the problem is that this reaffirmation is in practice based on a restoration of Tutsi hegemony. He goes on to reflect on the stance of the international community, arguing that it is faced with a "grave dilemma":

> "By indulging in wishful thinking, the international community is taking an enormous risk and assuming a grave responsibility. While it is understandable that the 'genocide credit' and the logic of 'good guys and bad guys' should have inspired a particular understanding of a regime born out of the

[128] This conflict later involved fighting of 8 countries in the DRC soil.
[129] Reyntjens, F. (2004) 'Rwanda, Ten years on: From genocide to dictatorship', *African Affairs*, Vol. 103, No. 411, pp. 208-9. He also claims that the Tutsi elite today is mainly drawn from networks "based on a shared past in certain refugee camps in Uganda" (pp. 188-9).

genocide, this complacent attitude has incrementally, step by step, contributed to a situation that may well be irreversible and that contains seeds for massive new violence in the medium or long run."[130]

According to his reasoning, he finds that, on the one hand, now that it is ostensibly legitimized by elections, the Rwandan regime will be even less inclined to engage in any form of dialogue with the opposition at home and abroad. On the other hand, most Rwandans, who are excluded and know full well that they have been robbed of their civil and political rights, are frustrated, angry and even more desperate. The risk that may be brought about by this state of affairs is the possibility, in future, for Rwanda to descend into violence once more.

2.3.3 The DRC Conflict from 1990s to the Present

The Congolese political history with different political regimes can be divided into six periods: First, is the Congo Free State under King Leopold II (1885-1908); second, is the Belgian Congo under the Belgian colonial administration (1908-1960); third, is the First Republic of Independent Congo under Patrice Lumumba and other first politicians (1960-1965); fourth is the Second Congo Republic (Zaire) under Mobutu dictatorship regime (1965-1997); fifth is the war period under Laurent Desire Kabila (1996-2003); the sixth is the transition period (2003-2006) and the current regime under Joseph Kabila (2006-present).[131]

For the purpose of this study however, which is intended to contribute to the ongoing efforts to bring the conflict to complete end and establish peace in the country and in the region, I shall focus upon the events and developments that have occurred in the post-Mobutu period, beginning in the 1990s, immediately before and after the Mobutu regime was formally overthrown and Laurent Kabila came to power.

Ever since its independence from Belgium on June 30, 1960, the DRC has represented the full range of African maladies, from colonial domination and exploitation through corruption, authoritarian rule and ethnic conflicts, to military regimes and mismanagement.[132] The political and constitutional history of the Congo has been a vicious circle of *coups* and counter-*coups*, rebellions, mutinies, round tables, national conferences or dialogues and unconstitutional regimes, the whole

[130] *Ibid*, p. 210. By 'genocide credit' he means the way in which, in his view, the genocide became "a source of legitimacy astutely exploited to escape condemnation… allowing the RPF to acquire and maintain victim status and, as a perceived form of compensation, to enjoy complete immunity" (p. 199).
[131] Throughout these periods, the DRC has moved from one crisis to another with actors and interests changing over time.
[132] Mangu, A. (2003) 'The Conflict in the Democratic Republic of Congo and the Protection of Rights under the African Charter' in *African Human Rights Law Journal*, vol. 3, No. 2, pp. 235-263.

unfolding as tragedy and farce.[133] Some 40 years on, the DRC has gone from one crisis to another crisis, with actors nearly identical to the ghosts of the past.[134] In 1996, after three decades of authoritarian rule, Mobutu was terminally ill and unable to serve his Western patrons. Laurent-Desire Kabila, a former Lumumba disciple turned businessman, was traced to Tanzania, reconverted to active politics, and was appointed to lead a rebellion against Mobutu by the US-proclaimed 'new breed' of African leaders.[135] On May 17, 1997, Kinshasa fell to Kabila's Alliance of Democratic Forces for the Liberation of Congo-Zaire (*Alliance des Forces Démocratiques pour la Libération du Congo –Zaïre*-AFDL). Kabila proclaimed himself President. On August 2, 1998, some of Kabila's comrades from the Banyamulenge ethnic group rebelled against Kabila, accusing him of authoritarianism, corruption, mismanagement, nepotism and tribalism.[136] They created a rebel movement named Congolese Rally for Democracy (*Rassemblement Congolais pour la Démocratie*-RCD), with backing from some of Kabila's former allies, notably Rwanda and Uganda. The Movement for the Liberation of the Congo (*Mouvement pour la Libération du Congo*- MLC) joined the rebellion against Kabila. The RCD later split into RCD-Goma, which remained the main rebel group, RCD-National (RCD-N) and RCD- *Mouvement de Libération* (RCD-ML).[137] But most of these rebel groups fighting inside Congo are largely the creation of outside interventions and their motives for the fight substantially differed depending on the interests of those who sent them.[138]

The most recent conflict in the DRC involved several foreign rebel groups based in the DRC and launching attacks against their respective governments.[139] At the climax of the conflict, at least seven other African countries had regular troops in the DRC. Angola, Namibia, Zimbabwe and Chad lent support to President Kabila, while Burundi, Rwanda and Uganda backed the rebels. This conflict is probably the most devastating crisis Africa has experienced in its post-colonial history,

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[133] Ibid
[134] Ibid.
[135] See this expression used in Prunier (2009), *supra* note 97, p. xxxi.
[136] Nzongola-Ntalaja, *supra* note 12, p.227.
[137] For concise account of these guerrilla groups, see Prunier (2009), Ibid, p. 181 onwards.
[138] For an elaborate account of the motives of each rebel group in the DRC conflict, see Afoaku, O. 'Congo's rebels: Their Origins, Motivations and Strategies' in Clark, J. (Ed.) (2002) *The African Stakes of the Congo War*, New York: Palgrave Macmillan, pp. 109-128.
[139]The included the FDD *(Forces pour la Défense de la Démocratie*/Forces for the Defence of Democracy), the *Interahamwe*, the ex-FAR (*Forces Armees Rwandaise*, former Rwandan Army of the late President Juvenal Habyarimana), the Ugandan ADF (Allied Democratic Forces), the LRA (Lord's Resistance Army), UNRF II (Uganda National Rescue Front II), NALU (National Army for the Liberation of Uganda), FUNA (Former Uganda National Army), WNBF (West Bank Nile Bank Front) and the old Angola rebel movement, UNITA (National Union for the total Liberation of Angola).

and one of the most complex and perplexing events that the post-Cold War world has seen,[140] with effects beyond the sub-region to afflict the continent of Africa as whole, according to the former UN Secretary-General Kofi Annan.[141] In the words of Howard Wolpe, the US Envoy to Africa's Great Lakes Region, the DRC war was the most widespread interstate war in modern African history.[142] It was also considered by some analysts the 'African equivalent of the World War I' and labelled 'African World War.'[143]

The conflict resulted in the violation of virtually all rights provided for by international as well as African human rights standards. Over four million people reportedly died in the conflict. This figure is much higher than the national population of many states in Africa and elsewhere, and several times superior to the number of victims of the Rwandan, Yugoslav and Sierra Leonean conflicts that has recently attracted so much attention that the UNSC eventually resolved to set up three international tribunals to prosecute and punish persons responsible for the violation international human rights and humanitarian law in each of those countries.

There has been a stream of scholarly works accounting for origins and causes of the Congo conflict.[144] One general view, which has become prevalent, has been to depict the causes for the Congo conflict as resulting from three main factors: namely, ethnicity, state failure and greed.[145] However, much as there is some truth in some of these contentions, a close analysis of the historical developments as well as contemporary accounts of the conflict reveals that the causes of the conflicts in the DRC, as should be its solutions were both internal and external.[146]

2.3.3.1 Internal Causes: Human Rights Violations, Ethnicism and the Citizenship Question

To a large degree, the key to violent conflicts in the DRC as well as in the Africa's Great Lakes region lies, directly or indirectly in the crisis of post-colonial citizenship[147] in the Kivu provinces of

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[140] Breytenbach, W; et al. (1999) 'Conflicts in the Congo: From Kivu to Kabila' in *African Security Review*, vol. 8 No.5.
[141] 'Extract from the Report of the UN Secretary-General on UN Deployment in the DRC' (2000) 7 *South African Journal of International Affairs*, p. 183.
[142] Wolpe, H. (2000) 'The Great Lakes Crisis: An American View' in *South African Journal of International Affairs*, vol. 7, No. 1, pp. 27-42.
[143] Naidoo, S. (1999) ' Rebels without Pause: Diplomacy in the Democratic Republic of Congo Conflict' in *South African Journal of International Affairs*, vol. 6, No.2, pp. 217-226.
[144] See gerally Doom, *supra* note 16; Clark, supra note 157; Nzognola, supra note 12; Turner, T. (2007) *The Congo Wars: Conflict Myth and Reality*, New York: Zed Books; Prunier (2009), *supra* note 116; Mpangala, *supra* note 11, etc.
[145] Lunn, J. (2006) 'The African Great Lakes Region: An End to Conflict?' RESEARCH PAPER 06/51 25 OCTOBER 2006.
[146] Mangu, *supra* note 151.
[147] Nzongola-Ntalaja, 'The Politics of Citizenship in the DRC,' *State Borders and Nations: Negotiating Citizenship in Africa*, Annual International Conference, Center of African Studies, University of Edinburgh, May 19-20, 2004; *See* also Mamdani, *supra* note 123, p. 19.

the Eastern DRC.[148] The Belgian colonial administration implemented a policy of random transfer of part of the Tutsi population from the highly populated Rwanda to the lowly populated eastern Congo. This transfer which was done in total disregard of the historical borders between the two territories, together with the various crises that took place within Rwanda and Burundi since 1959 have generated major flows of Rwandese and, to some extent, Burundian immigrants into the DRC.[149] These migrations affected the demographics, economics, politics and security in the Great Lakes region and in the Kivu's in particular.[150] The consequential presence of trans-national identities in the Kivu province, with porous borders and contested citizenship has heightened the spread of conflicts in the area.[151]

The political grievances of the *Banyamulenge*[152] and *Banyarwanda*[153] involve access to nationality rights and claims to resources such as land, based on those rights.[154] These grievances developed from the introduction of narrow criteria for the acquisition of citizenship within the Congo-Zairean nationality laws,[155] the effects of which were exacerbated by the influx of refugees and armed

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[148] The Kivu province of Eastern DRC, as referred to in this study, is the area between latitudes 2.0°N and 3.0°S and longitudes 28°E and 29°E. It is located at the junction between the well-defined Ruzizi basin to the South and the Lake Albert trough to the North and also borders Rwanda. This area includes the most prominent geological and geophysical features of the Western Rift Valley of Africa, i.e. the plains of Lake Kivu, the Ruzizi basins, the Virunga volcanics, the Ruwenzori horst and the Lake Albert trough. This area is also unique in the DRC as there has been little government and administrative control from Kinshasa since the time of Mobutu who ruled the area through indirect rule, giving leeway to the Banyamulenge ethnic local leaderships.

[149]Mollel, A. (2007) 'Judicial Settlement of Armed Conflicts in International Law: Reflecting the 2005 International Court of Justice Decision in the Democratic Republic of Congo Case,' in *Nordic Journal of International Law*, vol. 76, No. 4, pp. 407-434.

[150] *See* for a detailed treatment of this issue, Colliers, J & Malan, M. (2001) *Peacekeeping in the DRC: MONUC and the Road to Peace*, Monograph 66, Institute of Security Studies, Pretoria; Other *Banyamulenge* immigrated to the DR Congo from Burundi and Rwanda with the approval of Belgian colonial authorities; *See Human Rights Watch*, 'Democratic Republic of the Congo: What Kabila is Hiding-Civil Killings and Impunity in Congo,' October 1997, available at <http://www.justiceinitiative.org/activities/ec/ec_noncitizens/CERD_Feb04.PDF>, last visited, September 9, 2009.

[151] To adapt an old metaphor, one could say, *when the Eastern Congo sneezes, the entire Great Lakes Region of Africa including the whole of Africa catch a cold*. Several interconnected elements shaped conflicts in the Great Lakes region, including the tinderbox of ethnic tensions and clashes in the Eastern DR Congo Kivu provinces, which are *de facto* under the Banyamulenge control. Even the current conflicts going on between the Congolese renegade general Laurent Nkunda who is continuing attacks on government army is just but a continuation of the unrest.

[152] Rwandese and Burundian Immigrants of Tutsi origin who settled in Mulenge region, South Kivu, Eastern DRC. For more discussions about this ethnic group, *see* Vlassenroot, K. (2002). 'Citizenship, Identity Formation & Conflict in South Kivu: The Case of the Banyamulenge' in *Review of African Political Economy*: vol. 29, No. 93, pp. 499-516.

[153] Rwandese immigrants of Hutu and Tutsi origin who settled in North Kivu, Eastern DRC.

[154]Sarkin, s*upra* note 64.

[155] After various Congolese nationality legislation, an *ordonnance-loi* of 1971, stipulated that all *Banyarwanda* and *Barundi* living in the Congo on June 30, 1960 could claim citizenship rights, a policy that was reversed in 1977. Yielding to pressure from 'native' Congolese, the Legislative Council repealed the previous legislation and, in 1981, pushed through a nationality law which was modified by the decree-law No.197 of January 29, 1999. This effectively deprived the *Banyarwanda* of all citizenship rights, stating that only individuals with an ancestral connection to the population who had been residing in Congo in 1885 would retain Congolese citizenship; S*ee* also this point discussed in Lemarchand, L. (2001) *Exclusion, Marginalization and Political Mobilization: The Road to Hell in the Great Lakes*, Copenhagen: CAS, p. 10.

militias from Rwanda and Burundi.[156] In some instances, the militias used the refugee camps as their kraals to prepare and launch attacks on their territory of origin as well as using the receiving country as a means to advance their claims for citizenship and other claims.[157] Incidentally, these immigrants were eventually to play a key role in the various guerrilla movements that continued to destabilize the DRC with effects felt throughout the whole of the Africa's Great Lakes Region.[158]

The controversy over the *Banyamulenge* nationality centres on both the actual date of their first arrival into the Kivu provinces of the DRC and on the very term "*Banyamulenge.*"[159] *Banyamulenge* advocates argue that their ancestors settled in the present-day eastern Congo during the seventeenth century in the hills they have named Mulenge from which their name, *Banyamulenge,* is derived.[160] Indigenous Congolese, as well as the former Zairean government, on the other hand, claim that the *Banyamulenge* did not arrive in the Congo until the colonial period.[161] Furthermore, it is strongly argued that there was never any Congolese community known as the Banyamulenge until these Rwandan foreigners self-proclaimed themselves as such. The answers to these opposing views and many others are crucial for the right-based conflict resolution approaches that are inclusive of all sections in Congo society.

The need to look at the whole issue from the nationality rights point of view comes from the fact that the *Banyamulenge* use this as the basis to claim their sense of identity to the DRC nationality, although many authors have avoided discussing it. In the final analysis, it is argued that an understanding of nationality rights is essential for anyone dealing with conflict prevention and resolution in such a situation as the present one relating to the DRC conflicts.

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[156] The greater the refugee influx from Burundi and Rwanda into the region, the more complicated the citizenship question became as indigenous Congolese continued to associate the *Banyamulenge* with their country of origin than with the Congo where they claim to belong.

[157] Rubin, B, Armstrong A, & Ntegeye, G. (eds.) (2001), *Regional Conflict Formation in the Great Lakes Region of Africa: Structure, Dynamics and Challenges for Policy,* Nairobi: Centre on International Cooperation, University and the African Peace Forum, New York, p. 9.

[158] Note that the 1998 "Africa's First World War" ignited by Laurent Kabila's move to oust Mobutu and take over Kinshasa was, to a large extent, backed by the guerrilla movements from the Eastern DRC.

[159] The argument is, using the name of the place where they first settled, "Mulenge region", the Banyarwanda foreigners are in fact camouflaging their real identity to distance themselves from Rwanda, their origin. *See* further Vlassenroot, *supra* note 152.

[160] Nzongola-Ntlaja, *supra* note 12, p. 2.

[161] *See* this argument strongly advocated by one of former Mobutu's Ministers in Sarkin, *supra,* note 64, p. 3.

2.3.3.2 The *Banyamulenge* Ethnogenesis and Conflicts in Eastern DRC

The current conflict in east DRC has its roots in the nationality issue of the Congolese of Rwandan origin,[162] the *Banyamulenge* and *Banyarwandwa*.[163] The emergence of the two groups is mainly a colonial creation, traceable from the impacts of the scramble and the ultimate partition of the African continent into western powers' spheres of influence.[164] The *Banyamulenge* were incorporated into the DRC, (then the Congo Free State) for the first time in 1885 when its borders were drawn at the Berlin Conference,[165] with the result that the Rwandans living in the west of the main Rwandan Kingdom found themselves in the Belgian Congo.[166] They migrated to South Kivu in the 19th century in search of better pastureland and to escape the army of King Rwabugiri who wanted to conquer the Southern part of Rwanda, *Kyaniaga*, which was until then autonomous.[167] According to a similar historical view, these groups left Rwanda at the end the 19th century to escape political rebellion in the Court of Mwami Musinga and moved towards the *Itombwe* area in the east DRC.[168] Since then, they remained quasi-homogenous, preserving their identity, mostly preferring intra-marriage to inter-ethnic marriages.[169]

But the term "Banyamulenge"[170] emerged in 1967 to distinguish the pastoral ethnic group living in the *Mulenge* region or *Itombwe* area in South Kivu from the Rwandan refugees, especially the Tutsi who started migrating into DRC in 1959 fleeing from the Hutu revolution, hence, they were referred to as "fifty-niners."[171] This new identity gave the Banyamulenge some historical legitimacy over their lands that was accepted and negotiated by the indigenous Congolese tribal communities.[172]

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[162] *Ibid*.
[163] For the description of these terms, see generally Vlassenroot, *supra* note 152, p. 502.
[164] For a modern and detailed analysis of this issue, *see generally* Pakenham, T. (1991) *Scramble for Africa*, New York: Random House.
[165] A comprehensive account of the Berlin conference and the borders delimitation in the African continent can be found in Förster, S; et al., (eds.) (1988) *Bismarck, Europe, and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition*. London: Oxford University Press and German Historical Institute.
[166] See Economic and Social Council (ECOSOC). (1997). 'Report on the Situation of Human Right in Zaire' wherein the United Nation's Special Rapporteur on Human Rights in Zaire, Mr. Roberto Garreton strongly argued that the Banyamulenge were settled in Kivu at least by the end of the eighteenth century.
[167]Newbury, C. (1998) *The Cohesion of the Oppression: Citizenship and Ethnicity in Rwanda 1860-1960*, New York: Columbia University Press, pp. 48-49.
[168] J. Hiernauz, '*Notes sur les Tutsi de l'Itombwe: La Position Athropolgique d'unde Population Empiree,' Bulletins et Memoires de la Sociere d'Anthropologie de* Paris, Series 19, No 7, (1965), 61-379.
[169] See more in Butts, H & Brandshaw, H (Eds.), (2002), *Central African Security: Conflict in the Congo*, Proceedings Report No. A715324 Army War College Carlisle Barracks Pa, p. 13.
[170] Since mid-1996, the term Banyamulenge has been used widely to refer to ethnic Tutsi living in eastern Congo.
[171] See, Lemarchand (1996), *supra* note 102, p. 3.
[172] These included the local populations such as Bafulero and Bbembe. See for more treatment of this subject, William, J. (1988), "Banyarwanda and Banyamulenge," *Cohiers Africains* No.25 as quoted in Butts, *supra* note 169, p.13

On the other hand, the *Banyarwanda* were separated from Rwanda by the Convention signed on May 14, 1910 between the German Empire and the Belgian Kingdom that set today's boundaries between Rwanda and the DRC by which several Rwandan territories were incorporated into the DRC.[173] *Banyarwanda* include natives of *Butshuru* (or *Banyabwisha*) in the North Kivu province, Rwandan immigrants during colonial period and some 50,000 Tutsi refugees.[174]

The second wave of Rwandan immigrants into the DRC resulted from the colonial immigration policies of the 1930s and 1940s, which were implemented randomly by moving people from the Rwandan highly overpopulated territory to the land-abundant North Kivu.[175] However, this was not the end of the influx of Rwandans into the DRC. Tens of thousands of political refugees fleeing ethnic conflicts in Rwanda in 1960s and 1970s were registered by the UNHCR in various territories of the Kivu provinces[176] of the DRC.[177]

The current security instability in the eastern DRC, however, intensified following the massacre of Hutus and Tutsis triggered by the assassination of Burundian President-elect Melchior Ndadaye on October 21, 1993. At this time a third wave of up to 400,000 Hutu refugees from Burundi crowded into existing refugee camps in Tanzania, Rwanda and Burundi although more than half ended up in DRC. The fourth and largest flow of refugees followed in the wake of the 1994 genocide and involved approximately two million Hutus from Rwanda fleeing into eastern Congo and Tanzania.[178] Most had fled Rwanda when the Tutsi-dominated Rwandan Patriotic Front (RPF) and its military wing, the Rwandan Patriotic Army (RPA) took power in Kigali, advancing from Uganda under Paul Kagame with the support of the country. Up to 30 000 Hutus, who fled into North and South Kivu, were members of the former Rwandan army (*ex-Forces armées rwandaises or ex-FAR*) and the *Interahamwe* (Rwandan Hutu) militia, who had been responsible for the massacre of up to 800,000 Rwandan Tutsis and moderate Hutus in the preceding months. The perpetrators of the genocide subsequently rearmed in the refugee camps of eastern Congo (ironically under the protection of the international community and with substantial financial and

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[173] Hochschild, A. (1998) *King Leopold's ghost. A story of Greed, Terror and Heroism in Colonial Africa*, London: Macmillan, p. 141.
[174] Butts, *supra* note 169, p. 13.
[175] See, Gondola, D. (2002). *The History of the Congo*, Westport, CT: Greenwood, p. 77; On the legal problems created by colonial boundaries on the African post-colonial states, see S. Smis, 'The Legal Status of International Land Boundaries in Africa' in Doom, and Gorus, *supra* note 16, p. 191.
[176] Butts, *supra* note 169, p. 17
[177] Most of them went to Masisi, Kalehe, Fizi and Walikale and the rest were probably absorbed into the local Rwandan population in the DRC.
[178] Lemarchand (2001), *supra* note 155,p. 6.

other support from the diasporas), and were able to resume the war in 1996 and again in 1998, bolstered by the recruitment of the Congolese Hutus and supporters from neighbouring states.[179]

The massive influx of refugees produced by the 1994 Rwandan genocide completed the current estimates of the *Banyamulenge* population in the DRC.[180] Consequently, the population of the Congolese of Rwandan origin became large, outnumbering that of the Congolese origin living in the eastern part of Congo. Thus, land scarcity became the major issue of confrontation, especially in the highly populated North Kivu area. The conflict over land in Kivu emerged from many causes. The first is an increase in the rural population due to an increased growth rate of the population. The second cause was an over concentration of the rural population and a massive migration from Rwanda. The third main reason was the quasi-absence of industrial development to absorb labour surplus from rural areas.[181]

In addition, more and more Congolese of Rwandan origin emerged as political leaders of the Kivu provincial government and they became strongly opposed to any type of federalism in the DRC.[182] To that effect, since 1965, the *Banyamulenge* have been trying to put in place their own structure of power, especially given the fact that the Mobutu regime had no direct control over Kivu, where he ruled through indirect rule, making the *Banyamulenge* immigrants more powerful in east DRC. The climax of *Banyamulenge* high political visibility was seen in the 1970s when Mobutu appointed Bisengimana Rwanda to the position of Chief of State in the Office of the President. The result was the law of January 5, 1972 that conferred Banyarwanda Congolese (Zairean) citizenship. From 1972 to 1980, Congolese indigenous ethnic groups for whom this influence represented domination by foreigners resented their influence in the political life of Kivu province.[183] These groups also claimed that Tutsi immigrants throughout the Mobutu period marginalized them and that their land ownership rights in the hills were jeopardized.[184]

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[179] Including Tanzania, Zambia, Congo-Brazzaville, Gabon and the Central African Republic. See also International Crisis Group (ICG), *Scramble for the Congo: Anatomy of an ugly war*, Report 26, ICG, Brussels, December 20, 2000, p 13. *See further*, Colliers & Malan, *supra* note 150, p. 22.

[180] Although there are divergent views on the actual estimates of the current number of the Banyamulenge ethnic group in the DRC, it is agreed that they account for more than 2 million people in the Kivu provinces of eastern DRC.

[181] See Butts, *supra* note 169.

[182] Lemarchand (2001), *supra* note 155, p. 5.

[183] From the time of their arrival to date, the indigenous Congolese considered and still consider the Banyarwanda living in the DRC as foreigners. This view was strongly expressed by a Congolese citizen of the Maniema ethnic group, during a personal interview with the author in Bakavu town of South Kivu on June 9, 2007.

[184] Gnamo, A. (1999) 'The Rwandan Genocide and the Collapse of Mobutu's Kleptocracy' in Adelman & Suhrke, *supra* note 80, pp. 321-349.

In 1966, the *Bakajjika* Law[185] substituted the traditional land tenure system for a more legal ownership that benefited the *Banyarwanda*. Additionally, the nationalization of small and medium sized firms that occurred in November 1973 helped the *Banyarwanda* acquire 45 percent of arable land in Masisi, which they used as pasture in a region in which agriculture provided the livelihood for more than 70 percent of people. They also acquired 90 percent of all nationalized businesses in North Kivu.[186] All these created a long-term tension and instability in the area.

2.3.3.3 The Congolese Nationality Legislation and its Implications on Conflicts

The right to citizenship, used here synonymously with the right to nationality is a means of acquiring the necessary legal status to enjoy such entitlements in life as rights to vote, to own property, to health care, to education, employment rights and even the right to travel outside one's country of residence. It is a human's basic right, for it is key to full enjoyment of other rights within a particular state.[187]

It should be understood, therefore, that whereas most of the rights are guaranteed to "everyone"[188] within a particular territory, some of the rights are considered specific only to citizens or persons with the nationality of a particular state.[189] Consequently, all states are continuously struggling to determine the precise legal boundaries of citizenship rights for persons within their territorial jurisdictions[190] This is not different for African states born out of decolonisation such as the DRC.

However, much as governments have, by virtue of the sovereignty principle, the right to put in place legal mechanisms governing the process by which aliens may acquire citizenship of the

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[185] The *Bakajika Law*, enacted in June 1966, was the first in a series of laws designed to ensure government control of the land and its riches. It gave ownership of all wealth above and below the ground to the state, thus ensuring that the government could claim all public mineral rights.

[186] Butts, *supra* note 169, p. 18.

[187] *See* the often-quoted words of Justice Earl Warren in (*Trop v. Dulles*, 1958) quoted in Batchelor, C. (1995). 'Stateless Persons: Gap in International Protection', *International Journal of Refugee Law*, vol. 7, No. 2, pp. 231-59.

[188] Note that this phrase is commonly used in almost all provisions of international human rights standards and national constitutions, except for those rights considered particular to citizens only.

[189] *See* this fact as stressed in Article 21 of the *Universal Declaration of Human Rights, 1948*.

(1) "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives", and in Article 25 of the International Covenant on Civil and Political Rights (ICCPR), 1966 thus: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country."

[190] H. Batiffol, & P. Lagarde, *Droit international prive'*, (6th edn), LGDJ, Paris Vol. 1, (1974), 66

country,[191] Congolese nationality legislation has been very chaotic and inconsistent since colonial times. Such an inconsistency has been one of the main sources of continued unrest in east DRC. Since the attribution of nationality is inherently part of a state's sovereignty, legal conflicts are likely to emerge as soon as citizens from one country develop a relationship with either the territory of another country or its citizens.[192] Sometimes, these relations lead to an intermingling of laws as seen in the growing recognition of dual citizenship, and sometimes they lead to the disappearance of one's legal link to a state, statelessness.

The Congolese of Rwandan origin (*Banyamulenge*) have been victims of the complexities of the Congolese nationality laws. To understand their nationality status as far as Congolese nationality laws are concerned, one has to understand the general principles of nationality law. However, as it is stated elsewhere, nationality law can be compared to different "colours" which are subsequently mixed so as to achieve a desired effect. Two of these 'colours' have already been mentioned above as nationality based on birthplace–or *jus sol*: the fact of being born in a territory over which the state maintains, has maintained, or wishes to extend its sovereignty; and bloodline–or *jus sanguinis*: citizenship resulting from the nationality of one parent or other more distant ancestors. However, two other "colours" are often forgotten or neglected. These are, marital status, as marriage to a citizen of another country can, in some legal jurisdictions, lead to the acquisition of the spouse's citizenship; and past, present or future residence in the country's past, future or intended borders (including colonial borders).[193]

Nevertheless, the traditional African notion of citizenship is such that, no matter where one is born, one belongs to the soil or homeland of the parent through whom one traces his or her descent. Ethnic citizenship is therefore the foundation for national citizenship in Africa, although it is also possible to acquire citizenship by naturalization.[194]

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191 This right was elaborated long ago under the Convention on Certain Questions relating to the Conflict of Nationality Laws, The Hague - 12 April 1930 which states:

Article 1:"It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."

Article 2: "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

192 *See* the example of the Kurds of Iraqi origin in Turkey.

193 Weil, P 'Access to Citizenship: A comparison of Twenty-Five Nationality Laws' in Aleinikoff, T & Klusmeyer, D. (Eds.). (2001) *Citizenship Today: Global Perspectives and Practices* Washington DC: Carnegie Endowment for International Peace, pp. 17-35.

194 *See* this point stressed in Nzongola-Ntalaja, *supra* note 12.

Right from the creation of the Independent State of the Congo (ISC) on May 29, 1885, King Leopold II came up with legislation on nationality through the Royal Decrees of December 27, 1892 and June 21, 1904. For obvious reasons, this legislation had been influenced by the Belgian colonial policies in its inspiration by a particular humanism. Hence, nationality regulated by the Royal Decree of 1892, was concerned with the integration of foreigners in grouping the individuals called Congolese nationals. Everything seems to indicate that the government in power at the time was above all preoccupied with a demographic concern in exercising this attribution of sovereignty,[195] with little concerns for the original Congolese nationality. This argument is substantiated by the chaotic status of Congolese nationality as consolidated in colonial nationality legislation. The Royal Decree of June 21, 1904 explained the conditions under which a person could change his nationality through emigration, stating:

> "Every native Congolese, as far as he resides on the territory of the state, preserves his Congolese nationality, is submitted to the laws of the State and will be treated as a subject of the state; this notably goes as far as competence of criminal law, extradition and expulsion, even if he pretends to have become resident abroad through naturalization, or otherwise of foreign nationality, if he has put himself in dependence of a foreign power. The individual who, in the case of the former precedent, leaves the territory of the state, without the mind to return, must officially notify the general governor, and when he fails to do this, he is confined to the legal obligations of the Congolese subject."[196]

Thus, not much regard was paid to the origin of the Congolese nationals both during the Independent Free State and later during the Belgian Congo.

Following the horrific abuses of natives' rights under King Leopold,[197] the Belgium government annexed the Independent State of the Congo in 1908.[198] As a result, the latter disappeared and the Congolese lost their nationality and acquired that of Belgium through the application of rules of international law on state succession.[199] This acquisition, however, did not provide them with the status of Belgian citizens. From Congolese they became Belgian subjects, a status they shared without any distinction with other Belgian subjects in the other Belgian colonies of Rwanda and

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[195] *See* Doom, *supra* note 16, p. 290.

[196] *See* Sections 1 and 2 of the Royal Decree of 1904.

[197] King Leopold's abuse of natives' rights went beyond the obligations imposed under the terms of *The Act of Berlin* which states under Article IV thus: "All the Powers exercising sovereign rights, or having influence in the said territories undertake to watch over the preservation of the native races, and the amelioration of the moral and material conditions of their existence" See Hochschild, *supra* note 173, p. 117.

[198] This came out because of the public outcry following reports on King Leopold's grave abuses against natives' rights in the Congo. For details on the annexation of the Independent State of the Congo by the Belgian Government, *See* 'Supplement: Official Documents,' in *The American Journal of International Law*, (3) 1(1909), 89-94.

[199] These rules are more clearly explained in Evans, M. (Ed.) (2003), *International Law*, Oxford: Oxford University Press, p.213.

Burundi that were governed by Belgium as a single colonial entity. In other words, from a formal point of view, "in international law, the Congolese nationality and the Congolese as far as they represented the nationality of a state, had disappeared with the Independent State of the Congo".[200] Nevertheless, the expression of Congolese nationality had been preserved in texts, which regulated the Belgian nationality with colonial status. The colonial Charter (1908) puts the principle of the differentiation of legal statuses among the residents of Congo in these terms:

> "The Belgians, the Congolese registered in the Colonies and the foreigners enjoying all the civil rights recognized by the legislation of Belgian Congo. Their personal status is ruled by their national laws as far as they are not contrary to the public order. The natives who were not registered in Belgian Congo enjoy civil rights which were admitted to them by the legislation of the colony and by their customs as far as these were contrary to neither the legislation nor the public order."[201]

However, it must be understood that nationality is the quality by which a group of men, women and children identify themselves with a political community that is constituted in a sovereign state.[202] Moreover, unlike their neighbours in (then) Ruanda-Urundi and in spite of the term 'tutelage', the Congolese have always had a nationality by birth. The establishment of the international mandate and henceforth being put under the tutelage of the former German colonies in Central Africa has cost their inhabitants citizenship in a state. The Congolese nationality was, in a way, decapitated, deprived of the enjoyment of civic and political rights.[203]

Unfortunately, even preparations for independence in the DRC failed to agree on which indigenous people would legitimately inherit independent Congo, although it was at least agreed basically that the Banyarwanda should be included among the independence beneficiaries and also given the right to vote upon proof of ten years residence in the Congo.[204] When the Congo attained independent statehood,[205] these colonial texts on Congolese nationality remained applicable, even though the nationality they regulated had legally changed very significantly.

The nationality question for the Banyarwanda-speaking minority in the DRC remained tense and sensitive until 1964, when the *Luluabourg* Constitution for the DRC was adopted. Article 6 of the Constitution stated, "Congolese citizenship is recognized for every person, one of whose parents

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[200] G. Kerken, '*La nationalite de Congolais ou sujets belges du Congo'*, Revue Belge de Droit compare' No.4, (1937), 70.
[201] *See* Section 4 of the Colonial Charter. More specifically, *see* Doom, *supra*, note 16.
[202] *See* the *Nottebohm Case* (Second Phase), Judgment of April 6, 1955, ICJ Rep. 1955, 4, 23.
[203] Doom, *supra*, note 16, p. 67.
[204] The 1920 round table Conference held in Brussels to discuss the independence of the Congo.
[205] Congo attained its independent statehood from Belgium on June 30, 1960.

was or had been a member of one of the tribes established within the territory of the Republic of the Congo in its borders as defined on October 18, 1908.[206] This provision, though promising, did not solve the problem and it, in fact, automatically excluded most Congolese of Rwandan origin who migrated into the DRC between 1937 and 1955, unless they made a special request within 12 months to change their nationality of origin.[207] Just the following year, that is 1965, local authorities in Kivu denied the Banyarwanda the right to run for office because they were foreigners. In addition, many Banyarwanda who had positions in the local administration during the colonial period were, as of 1960, dismissed and replaced by members of indigenous ethnic groups.[208]

In subsequent years this issue continued to be contested. In 1971, President Mobutu Sese Seko signed a decree-law that stated, "All persons of Ruanda-Urundi origins established in the Congo by June 30, 1960, are Zairean from this date."[209] In 1972, the nationality act, required under the constitution promulgated as *Law 002* repeated the provisions of Article 6 of the 1964 constitution, but added that "persons originating from Ruanda-Urundi who had taken up residence in the province of Kivu before January 1, 1950, and had henceforth continued to reside in Zaire until the entry into force of the law, acquired Zairean nationality as of June 30, 1960".[210] This law, which in effect granted collective nationality to the Congolese of Rwandan origin, was an attempt to dispel a sense of insecurity among the Banyarwanda who were experiencing increased hostility from the indigenous groups in eastern Congo.

The 1972 Law, however, proved to be counterproductive, and in 1981, Mobutu agreed to sign a new law on nationality, invalidating the 1971 decree. The new law, resulting from the need to address the situation whereby the indigenous groups now became minorities in the Kivu province, provided that only persons who could demonstrate an ancestral connection to the population residing in the territory in 1885, then demarcated as the Congo, would qualify to be citizens of the Congo.

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[206] *See* this Constitutional provision discussed in Cyubahiro, N. (1989*), Heritage Colonial, Hestoire des Ethnies frontiales du Zaire: Le cas des Hutu et des Tutsi du Kivu, Kinshasa: Depot legal No. 093/89, 2e trimestre,* June 27.
[207] *See* Butts, *supra* note 169, p. 17.
[208] *See* Makombo, A (1997). 'Civil Conflict in the Great Lakes Region: The Issue of Nationality of the Banyarwanda in the Democratic Republic of Congo,' *African Yearbook on International Law*, Vol. 5, pp. 49-62.
[209] Cyubahiro, *Supra,* note 206, p. 63.
[210] *See* this issue further explained in ECOSOC Report, *supra* note 185.

In practice, the 1981 law deprived both those Banyarwanda who were descendants of pre-1885 settlers and those who were not, of their right to Zairean citizenship.[211] It is to be noted that some permanency on the current Congolese Nationality Legislation is found in the 1999 Nationality Law, which completed that of 1981. It brings about no substantial modifications to the former regime. Indeed, it was destined to give a facelift to the 1981 law. One can especially discern an agenda to adapt the designations of the country and its institutions to the change of political regimes that intervened in May 1997. The only important modification linked, for that matter, with the political evolution, concerns the procedure of definitive naturalization, especially where the law demanded the advice of the Central Committee. As this institution disappeared with the '*Mouvement Populaire de la Revolution'*, a single party, the reunited legislative organ in congress gave this advice.[212]

Thus, I can summarise the characteristics of the present nationality law in Congo as follows: First, the exclusivity of Congolese nationality; second, the predominance of the consanguinity tie (*ius sanguinis*) in order to determine the nationality of origin.[213] In this respect, the nationality of origin is determined from a connection with an ascendant member of a Congolese tribe settled in Congo as of August 1, 1885. Thirdly, the acquisition of the nationality on individual demand, whether it is a matter of option or naturalization by the President of the Republic; and fourth, restrictions inherent in the quality of Congolese nationality by acquisition.

The means of acquiring nationality permits us to say whether legislation could be qualified as 'open' or 'closed'. Of the candidate for Congolese nationality, this legislation demands, not only long-time residence in Congo, but also a high degree of assimilation; knowledge of the languages of the country and the carrying of a name drawn from Congolese cultural patrimony.[214] Partial and definitive naturalization are separated by a 15 years interval; whereby the plaintiff should have established his or her principal centre of activities in Congo for at least the last ten years before this demand.[215]

The option for the naturalization may be refused. When they are obtained, the newly Congolese person is submitted to strong restrictions concerning the exercise of civic and political rights. He only has the right to vote and not of eligibility; he only has access to subordinate functions in the

[211] *See* Lemarchand, R. (1997), 'Patterns of state collapse and reconstruction in Central Africa: Reflections on the crisis in the Great Lakes region,' *Afrika Spectrum*, vol. 32, pp. 173-193, where she argues that the boundaries of Zaire in 1885 had not yet been fixed, and therefore proof of pre-1885 ancestry is impossible to establish in juridical terms.
[212] Article 15.
[213] Article 4.
[214] Article 53.
[215] Article 12 point 9.

army and in the public administration.[216] These restrictions are permanent since the law of 1981. Definitive naturalization, which makes the individual a real citizen, requires the advice in conformity with the united legislative organ in congress. Finally, the constitution or the law may exclude the naturalized person from the exercise of some public functions.

Under these conditions, it is possible to indicate a particular internal contradiction between the Congolese nationality law and the international law provisions that compete to fight statelessness. Articles 14 and 18 of the Congolese law of 1981 or the actual law-decree have been conceived with the purpose of granting nationality *ipso jure* to the minor, whose father, or whose mother if the father has died, are unknown or without nationality. This child may renounce the Congolese nationality when it comes of age, on the condition that it can prove possession of a foreign nationality. However, if the mother or father appears later they still have a right to recognize the interests of the child in engaging in a procedure of naturalization and fulfil all the legal requirements.

As such, the application of the 1892 Decree has disappeared, for the child who was born from an unknown or stateless father became a Congolese national through naturalization or option. The fact that these persons, who are considered to be of "doubtful nationality" have no recourse to these ways of acquisition, leaves again the shadow of statelessness hanging over them and their descendants.

As a direct consequence, fear and mistrust have made their domicile in the eastern Congo. One explanation could easily be found for this general mood, in the question of nationality, but this can be no more than a side issue. Indeed, here reality and fantasy have come together and have lead the populations into conflicts involving bloodshed. What kind of relationships should be established between the populations? Investigation will lead to research on the causal connections with all the dangers of extrapolation and error along with it. The important thing remains to be the identification of the citizenship rights of everyone in Kivu if the volatile element is to be avoided in the area.[217]

[216] Article 13, 16 and 22.
[217] J-C, Willame,. 'Kivu: La Poudriere' in Grip. *Kabila prend le povoir*, Editions Complexe, 1998, 31

The specialists on the region of the Great Lakes underline above all, the problem of indeterminate nationality status of the Kinyarwanda speaking populations in the area.[218] It is complicated by difficulties of coexistence with autochthonous populations. Indeed, there is first the question of land and submission to traditional authority.[219] For a long time, Kinyarwanda speakers have demanded civic and political rights, [220] leading to the ethnic conflicts of 1962-1966. These immigrants have subsequently been called the Banyamulenge.[221]

2.3.4 External Causes of the Conflict: Foreign Interventions

The external factors that contributed to the Congolese conflict can be viewed in two main aspects. As already emphasised, the conflict in the Congo was externally driven and involved troops from several other African countries, siding with either the rebels or the DRC government, all providing official justifications for their interventions, but acting on different hidden agenda. Besides African States whose interventions was visible, the invisible and real force behind the Congo war came from Western States, led by America, France and their multinational corporations with the main aim to preserving both economic and political interests, at the expense of losses of million lives in the DRC.

2.3.4.1 Justification for Interventions of African Foreign Troops

In September 1996, the Banyamulenge, many of whom had served with their kinsmen in the Rwanda army, were prompted by Zairean persecution and the (Tutsi-led) Rwandan government's anticipation of an increase in attacks by Hutu militias from their bases in the refugee camps of Eastern DRC, to launch counter-strike, partly retaliatory but in the main pre-emptive, against the Mobutu and thereafter the Kabila regime that reportedly backed them.[222] It is the repeated failure of the international community to take action against the *genocidaires* of 1994 that provided the major justification for the Rwandan unilateral interventions in the DRC.[223] Uganda also made it clear that its army was in the Congo to fight against Uganda rebels allegedly based in Eastern DRC. Rwanda

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[218] F. Reyntjens, 'Situation geostrategique en Afrique centrale', in grip. *Kabila prend le pouvoir*, Brussels: Editions Complexe, 1998, 150; *See* also Willame, *supra* ,note 217, pp. 32-35, 38-40.
[219] P. Laurent, & T. Mafikiri, *Mouvements des populations, cohabitions ethniques, transformations agrairres et fanciers dans le Kivu montagneux. Repers historiques et perspective theonique*, (Rapport intermediaire de recherché pour le CIUF et l'AGCD, Universite de Louvain Institut d'etudes du developpement, June 1996), 101, quoted in Willame, *supra* note 217, 40.
[220] *See Rapport de la Mission* TEUWEN *au Kivu*, 6 November 1966.
[221] F. Reyntejens, & S Marysse, (Eds.) *Les conflicts au Kivu: antecedents et enjeux*, Antwerp, (1996), 33-34.
[222] Cornwell, R. and Potgieter, J. (1998) 'African Watch: A Large Peace of Africa' in *African Security Review*, vol. 7, No. 6, pp. 74-86.
[223] Wolpe, *supra* note 142, p. 31.

and Uganda referred to international law and justified their cross-border raids and interventions in the DRC as 'hot pursuit.' This was however an unfortunate misuse of the term, as the right to hot pursuit can only be exercised in relation to the law of the sea.[224] According to Dugard, if a state wishes to justify cross-border raids, it must do so in terms of the right of self-defence or, possibly reasonable reprisal action.[225]

Dugard noted that, unlike self-defence, which is authorized in modern international law,[226] reprisals remain illegal *de jure* in view of Article 2 (4) of the United Nations (UN) Charter.[227] Even if the argument of hot pursuit and self-defence or anticipatory self-defence could stand by default, it would not hold. Hot pursuit or self-defence cannot be invoked to acquire title to the territory of a foreign state. Nor can it be used to justify the occupation of the Congolese territory, the exploitation of the Congolese natural resources, the commission of gross human rights violations and the establishment of puppet government in Kinshasa under the false pretence of helping Congolese people establish democracy.

Uganda and Rwanda leaders also justified their campaign in the DRC on the basis that they wanted to help the Congolese people to get rid of Kabila and establish an all-inclusive democratic regime in the DRC. Such a justification was really surprising and made a mockery of democracy. At no time did the people of DRC call upon Rwanda and Uganda for assistance in ousting their "dictator" and establish the genuine democratic regime. Rwanda and Uganda, who pretended to help 'free' or 'liberate' the Congolese people from dictatorship and establish a more human-rights friendly regime in the Congo, are not known as fully-fledge democratic countries respectful of these rights.
Such arguments, recently advanced by the Bush and Blair administrations to wage war on Iraq, are unjustifiable in modern international law. It is inconsistent with the principles of non-aggression, non-interference in the internal affairs of another state, development of friendly relations among nations, equality of states, self-determination of peoples and respect for the political independence of foreign states that should govern the civilized world.[228]

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[224] See Article 111 and 112 of the *United Nations Convention on the Law* of the *Sea 1982* (UNCLOS), 1982, 1833 UNTS 3; 21 ILM 1261 (1982).
[225] Dugard J, (2000) *International Law: A South African Perspective*, Lansdowne: Juta Law, p. 421.
[226] See art 51 of the UN Charter; See also *Nicaragua v USA* (1986) ICJ Reports 14, pp. 99-100 (the court held that self-defense was the rule of customary international law). See Dugard, *Ibid*, p. 418.
[227] Dugard, *supra* note 225, p. 420.
[228] See art 1(7) UN Charter; Declaration on principles of International Law concerning Friendly Relations and Co-Operation among states in Accordance with the Charter of the United Nations 1970 (xxv) 1970); Resolution on the Definition of aggression, preamble and Art 7.

Just weeks after the outbreak of the rebellion initiated by *Banyamulenge* dominated regiment in Kivu on August 2 1998, the rebel troops had already advanced across the country from the east to the western seaboard. They had captured the Kitona and Mbanza Ngungu military bases in the Bas-Congo, where they recruited a number of solders of Mobutu's past army and were heading for Kinshasa. Faced with this rapidly deteriorating military situation, Kabila denounced the rebellion as an invasion by Uganda and Rwanda in an effort-in which he ultimately succeeded-to mobilize the Congolese people around an anti-Tutsi banner and to secure his own political survival.

Kabila also appealed to other SADC members for assistance to a fellow SADC member state under external aggression.[229] Following a meeting of their defence ministers in Harare on 17 to 18 August 1998, Angola, Namibia and Zimbabwe agreed that the government of Laurent-Desire Kabila required the full support of the SADC to guarantee its survival. Speaking in his capacity as head of the SADC Organ on Politics, Defence and security, President Mugabe announced that the meeting had agreed that military aid should be sent to secure Kabila's position.

Although former South African President Mandela, who was the chairperson of SADC disagreed that it was a proper SADC decision, since he was not consulted and all SADC members did not attend the meeting, Angola, Namibia and Zimbabwe later sent troops to the DRC. Chad also joined them.

In line with the principle of political independence or sovereignty, people are free to choose their own political system or government.[230] This is an internal affair, an exercise of self-determination, which allows no interference by any foreign state. However, there are circumstances where interventions by foreign governments to support a friendly incumbent government are permissible under international law. This is the case, for instance, when the rebels are supported by another or other states and such support is sufficiently substantial to amount to an armed attack or an aggression[231]

[229] The DRC become SADC member state at its Blantyre summit in 1997.
[230] *Nicaragua v USA*, supra note 226, p. 108
[231] Dugard, *supra* note 225, pp. 426-428.

2.3.4.2 Hidden Agenda for Foreign Interventions

With the end of the Cold war, President Mobutu who had served the American and Western interests in Africa, was no longer of use and was regarded a man of the past.[232] America had now to bank on new generation of leaders represented by President Museveni and Kagame in the Great Lakes region, and these new allies were asked or just too willing to assume leadership in the region. To better serve their interests, the Rwanda and Uganda leaders realized that they had to maintain control over the exercise of power in the DRC. By dismissing the Rwanda and Uganda officers who commanded the Congolese army and who were accredited with him to look after the interests of their governments, Kabila's days were numbered, and according to the logic of his former patrons he no longer qualified to remain in power in the DRC. Rwanda and Uganda sought to replace him with a more pliant client. Angola, Chad, Libya, Namibia and Zimbabwe reacted by sending troops or providing some kind of assistance to President Kabila in an attempt to restore the regional balance of power and help maintain their own influence in the region.

As Howard Wolpe stressed, the interests at stake in the Congolese crisis were enormous.[233] They were political, military but also, and even mostly, economic ones. The UN report on the plundering of the resources of the DRC in which the Congolese warring parties and their respective allies were involved, bears testimony to this.[234] Foreign countries involved in the Congolese conflict became exporters of diamonds, gold, copper, timber and other natural resources from DRC. The fighting between Rwanda and Uganda armies on the Congolese territory at Kisangani, for instance, may only be understood as a fight for leadership and control over diamonds, the gold mining industries and other natural resources.[235] On the other hand, the Zimbabwean battle for Mbuji-Mayi was mostly a war over the control of diamonds. Economic interests were important for the rebels' allies and Kabila's supporters as well.[236]

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[232] See this argument well articulated in Clark, J 'Causes and Consequences of the Congo War' in Clark *supra* note 157, pp. 1-10.
[233] Wolpe , *supra* note 142, p. 27.
[234] See United Nation Security Council, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth in the DRC in 2002* (S/2001/357), 12 April 2001.
[235] Dugard , *supra* note 225, p. 126.
[236] The management of Gecamines, the leading Congolese mining company, was given to Billy Rautenbach, a Zimbabwean businessman very close to president Mugabe, in compensation for the rule played by the latter in Kabila's political survival. Zimbabwe entered into a joint venture with the DRC in the diamond industry through Zimcom operating in Mbuji-Mayi.senior officer within the Zimbabwe Defence Force, through the Harare registered company, Osleg, also embarked on a partnership with a Congolese company, Comiex. This company had links with sengamines, an alluvial diamond-mining project in the DRC. Zimbabwe was even poised to take over MIB, the miniere des Bakwanga, in Kasai. Meanwhile Zimbabwe, through the Zimbabwe defence industries, entered into a partnership with the DRC through Congolese strategic Reserves to form Congo Duka (Pty)Ltd. The Zimbabwean parliament ratified this agreement in 1999. To name but a few theatres of conflict, internal wars in Angola, Sierra Leone and DRC were also

Similarly, the real reason of the war in the DRC has much to do with foreign interventions directly involving Western superpowers led by America. This source of intervention and counter intervention in African international relations, and for that matter the DRC, has been salient in both the Cold War and the post-Cold War periods.[237] Classical realists had no difficulty understanding the hostility of the rulers of fragile states toward their neighbours who have wished them ill for any number of reasons. Rene Lemarchand has unconsciously deployed precisely this variety of old-fashioned power political analysis to the foreign policies of the states of the Great Lakes region recently with great success.[238] That the goals and ambitions of Yoweri Museveni and Paul Kagame were not generally shared by their countrymen was of no particular relevance to Lemarchand. All he suggests in his analysis was that the security of regimes remains of paramount concern, and a motive force behind foreign policy when regimes are really threatened. Although this language is not explicitly used, the analysis broadly supports this view.

The increasing US role and influence in the Great Lakes region has generated tensions with France. France has not concealed its distaste for what it considers a growing Anglo-Saxon sphere of influence (Britain has also mediated between Uganda and Rwanda and is a major donor to both countries) in a region that was traditionally part of France's *chasse gardée* (private hunting grounds). The fall of the *Hutu* government in Rwanda in 1994, and the subsequent demise of Mobutu in the Congo in 1997 significantly reduced French influence in Central Africa. The US is a close ally of Rwanda and Uganda, the two countries with significant influence in this region, whose leaders greatly mistrust France's role. The current Rwandan government has never forgiven France for its assistance to the genocidal *Hutu* regime in 1994. The rivalry between Paris and Washington has implications for a durable peace in the Great Lakes region.

The EU as well has recently taken a more active role in the peacemaking efforts in the region. In 2003, France deployed the first soldiers of a 1,400-strong largely European force mandated to protect civilians in Bunia until the expected arrival of 3,000 Bangladeshi peacekeepers by September 2003. Belgium, with its long and complicated relation to the region, as well plays an active role.

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diamond –fueled. Ironically, the precious stone and oil have turned out to be a curse of many Africa peoples. The real motivation of the recent British and US war on Iraq also demonstrates how oil may be a misfortune for Iraq and other Arab countries around Israel.

[237] See generally Clark, J. 'Realism, Neo-Realism and Africa's International Relations in the Post-Cold War era' in Dunn, K. and Shaw, T (Eds.) (2001) *Africa's Challenge to International Relations Theory'*, New York: Palgrave.

[238] Lemarchand, R. 'Foreign Policy Making in the Great Lakes Region' in Khadiagala, G and Lyons, T. (Eds.) (2001) *African Foreign Policy, Power and Process*, Boulder CO: Lynne Rienner, p. 33.

In terms of resolving the DRC conflict, various diplomatic efforts within the SADC, AU/OAU and the UN culminated in the signing of the *Lusaka Agreement* of 1999, and the holding of the Inter-Congolese political negotiations that ended with the adoption of the *Global Inclusive Agreement*, Signed in Pretoria on December 16, 2002.

On the UN side the MONUC, which together with other forms of conflict resolution approaches to the DRC conflict, forms part of subsequent discussion, was created. Suffice it to point out here that the Congolese conflict was both an internal rebellion against an authoritarian regime that did not care for the rights of the people and also a foreign aggression of the DRC by some African states, with complicity of or direct support from the most powerful actors on the international scene, the Western powers.

2.3.5 The Burundi Conflict from 1993 to the Present

Burundi is leading in the Great Lakes Region in terms of the number of periodic violent conflicts since independence.[239] Political conflicts in Burundi have been among the conflicts in the Great Lakes region and Africa since independence.[240] Discussions on the common and differing positions as to the causes of conflicts among the parties to the conflicts often brought out the implications on the common and differing positions in terms of suggested solutions to the conflicts.[241]

It is however commonly agreed that the civil wars in Burundi, in which almost half a million people have died since October 1993,[242] stem from underlying causes of conflicts over political participation and resource scarcity, compounded by imbalances and militarization of society.[243] Yet, the Burundi conflicts, like many other conflicts in the Great Lakes region have normally taken the form of ethnicity, racialism and regionalism, all previously implanted by colonialism as was discussed elsewhere in this chapter. It all started as a tragedy to the country's attempt transition to democracy. After decades of Tutsi military and political dominance, President *Buyoya* and his Union for National Progress Party (UPRONA), under the international pressure for democratization, launched constitutional reforms that led in June 1993 to presidential and parliamentary elections. *Melcheor Ndadaye*, the leader of the opposition party, FRODEBU emerged

[239] Mpangala and Mwansau, *supra* note 29, p.390
[240] Ibid, p.119
[241] Ibid
[242] Reyntjens, P. (2006), 'Briefing Burundi: A Peaceful Transition after Decades of War' in *African Affairs*, Vol.105 No.418, p.117.
[243] Boulden , *supra* note 27, p.216.

victorious in the said elections, becoming both the first democratically elected and first Hutu president in the history of Burundi.[244]

Discontented with the loss of power, the Tutsi-dominated army staged a coup and killed a number of FRODEBU leaders, including the President, Ndadaye, shortly after he assumed power. This assassination plunged the country into a brutal wave of deadly violence, displacing about 150,000 people,[245] and making the neighbouring countries of Rwanda, Tanzania and the DRC bear the brunt of refugees fleeing the conflict.[246] As the *coup* collapsed in the face of its rejection in the international community and at home, the conspirators decided to devise other strategies by forming different armed rebellious movements which handicapped the search for peace in Burundi and in the Africa's Great Lakes region in general. This was then the beginning of a decade-long armed conflict, which caused deaths, internal displacements or exile abroad over a million people.[247] An international accommodation agreed between the FRODEBU and UPRONA in September 1994 rapidly broke down: the president and the national assembly were impotent, the cabinet was divided and unable to formulate, leave alone implement coherent policies, and the army effectively controlled what little state power remained. When, on July 25, 1996 the army staged a new *coup* which restored former President Buyoya to power, this in effect confirmed the existing situation in the country.[248] From there, real peace has never returned, and the political transformation in Burundi has taken place in difficult circumstances. Only the future will tell whether democracy, human rights and peaceful resolution of continuing intricate problems will return Burundi to political stability.

Although the situation remained very fragile and stalemate constantly loomed in Burundi political life, various conflict resolution and prevention initiatives, have been undertaken. Popular among these was the Burundi Peace Process which had been carried out in Arusha Tanzania under the former Presidents, the late Julius Nyerere and Nelson Mandela of Tanzania and South Africa respectively, since 1998 to 2000. These peace negotiations which ended up with the signing of the Arusha Peace Accord were an historic event not only for Burundi but also for the Great Lakes Region and Africa as whole.

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[244] Reyntjens ,*supra* note 242, p. 110
[245] Boulden, *supra* note 27, p.217
[246] For details of the event following the coup, see Press, "Military Coup in Burundi Dissolves New Democracy", in *The Christian Science Monitor*, November 22, 1993, p. 6: Ezekiel Pajibo, "Burundi Analysis: Burundi, A Democracy Gone Awry: Is Power in Burundi Rally about Tribalism?" in *African Faith and Justice*, November 4 1993.
[247] Reyntjens ,*supra* note 242, p. 110.
[248] The longing for power by the Tutsi ethnic group proved to the international community of its unwillingness to respect any transition through democratic means.

2.4 The Human Rights Impact of the Conflict and Ethnic Reactions

Human rights violations are both the cause and consequence of conflict. First, there are numbers of ways in which human rights violations can generate conflict. In the most general sense, grievances over the denial or perceived denial of rights can generate social conflict. This may be the case where there is systematic discrimination, differential access to education or health care, limit on freedom of expression or religion, denial of rights to political participation, etc. These violations may seem relatively minor, in comparison to some of the grave crimes we are familiar with, such as war crimes and genocide, but they still generate grievances and social unrest.

Discrimination, intolerance and other violations of human rights based on ethnicity and other prejudices have acted as immediate causes of violent conflicts in the Africa's Great Lakes Region. All human beings are equal before the law and are entitled *without any discrimination* (emphasis supplied), to equal protection of the law.[249] Discrimination is the very negation of the principle of equality and an affront to human dignity. The Charter of the United Nations speaks three times about respect for human rights and fundamental freedoms *for all without distinction* (emphasis supplied) as to race, sex, language or religion.[250] The International Covenant on Civil and Political Rights, 1966[251] obliges states parties to ensure the rights of all individuals 'without distinction of any kind, such as race, colour, sex, religion, language, political or other opinion, national or social origin, property, birth or other status.'[252] Although none of these instruments define what discrimination means,[253] a working definition of the term was once developed by the Human Rights Committee, which defined discrimination as:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose of or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.[254]

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[249] Article 7 of the Universal Declaration of Human Rights, 1948

[250] See Articles 1, 55 and 75 of the Charter of the United Nations.

[251] GA res. 2200A (XXI), 21 UNGA OR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967) (hereafter referred to as ICCPR).

[252] Article 2 of the ICCPR.

[253] Neither the Universal Declaration of Human Rights, nor the ICCPR define 'discrimination'. A definition of this term can only be found in conventions and declarations dealing with types or forms of discrimination. See Symonides, J. (Ed.) (1998). *Human Rights: New Dimensions and Challenges*, Ushgate Dartmouth: UNESCO Publishing, p.11

[254] The General Comment of the Human Rights Committee in its 37th Session in 1989. See also this quotation in Farer, J.T & Gaer, F. 'The UN and Human Rights: At the End of the Beginning' in Roberts, A & Kingsbury, B (Eds.) (1993), *United Nations Divided World*, 2nd Edn. Oxford: Clarendon Press, pp. 240-44 and further discussion on the same in Symonides, *Ibid*, p.12

The prohibition of discrimination is formulated at present not only in the Charter of the United Nations and the International Bill of Rights but also in the impressive number of instruments dealing with discrimination on specific grounds or directed against persons belonging to vulnerable groups, adopted by the United Nations, the International Labour Organization (ILO)[255] and UNESCO.[256] Standards concerning non-discrimination can also be found in a series of instruments adopted by regional organizations.[257]

Implementation of conventional provisions imposing obligations on states is subject to control and verification procedures based on the periodic states reports and also providing, as the case with the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination,[258] the possibility of individual communications. Some of the treaties monitoring bodies are authorized not only to consider state reports but also to receive individual communications and formulate general recommendations.[259] The need for the elimination of all forms of discrimination and intolerance formulated under the United Nations system from the moment of its creation is a very important element in the efforts of the international community to ensure full implementation and observance of human rights for all. Discrimination and violation of rights of persons belonging to vulnerable groups (women, children, minorities, refugees, aliens and migrant workers) should be seen as a cause of serious conflicts and danger of international peace and stability in the Africa's Great Lakes Region.[260]

Effective prevention of human rights violations must address their root causes. And if armed conflicts lie in the root of human rights violations, it follows that such conflicts must be scaled down and prevented. After all, human rights protection and securing peace go hand in hand.[261]

A catalogue of persistent, widespread and gross human rights abuses is the everyday reality in the Great Lakes region of Africa for quite sometimes now, with impunity acting as a catalyst for

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[255] Article 5 of the ILO Private Employment Agencies Convention No. 181 1997, ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour No. 182 1999, ILO Equal Remuneration Convention No. 100 1951, ILO Protection of Wages Convention No. 95 1949 and the ILO Discrimination (Employment and Occupation) Recommendation No. 111 1958

[256] See for instance the UNESCO Convention against Discrimination in Education 1960.

[257] See for instance Article 14 of the ECHR; Article 1 of the ACHR; Article 2 of the ACHPR.

[258] 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966) (hereinafter referred to as the CERD).

[259] These include, the Human Rights Committee for the ICCPR, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women, Committee Against Torture and the Committee on the Protection of All Migrant Workers and their Families.

[260] See Symonides, *supra* note 253, p.13

[261] Nowak, M (2003), *Introduction to the International Human Rights Regime*, London: Martinus Nijhoff Publishers, p.281.

renewed cycles of violence. In a vicious cycle, the human rights abuses are committed throughout the region and beyond.

In this context, large scale massacres of unarmed civilians, deliberate and arbitrary killings, and extrajudicial executions, disappearance, torture-including rape and other forms of sexual abuse and ill-treatment have been constantly committed by the warring parties in the region. Also, arbitrary arrests, incommunicado detention, detention conditions amounting to torture and cruel, inhuman or degrading treatment and punishment, denial of due process in the administration of justice, the use of child soldiers and the use of the death penalty seem to be the norm.[262] In addition to abuses perpetrated in the context of insurgency and counter-insurgency operations, numerous human rights violations occur in the context of law enforcement and the administration of justice. Many arrests appear to be arbitrary without substantive evidence resulting in unlawful detentions. Others are apparently politically motivated and result in prolonged detention without charge or trial. There are widespread reports of detainees suffering beatings and other forms of ill treatment. In the context of fair trial procedures, serious concerns arise in all three countries. In Burundi, for instance, most of the trials, which have taken place, continue to fall far short of international standards for fair trial, despite the activities of the UN Program for Judicial Assistance.

2.5 Conclusion

Devastations resulting from the conflicts in the Africa's Great Lakes region are very immense. There are several very strong regional dynamics, as well as direct and indirect interactions between the conflicts in the region. It is thus necessary to have a clear regional analysis as a basis for actions in the different countries in the region. This does not necessarily mean that implementation must be on a regional level. However, it is necessary to analyse how the situation or intervention in one country affects the neighbours.

It may be asked why the Great Lakes region is more prone to violent conflicts than the other areas of the African continent. Part of the answer lies in the complex history of the post-1885 relations between the peoples of the Great Lakes, which has been marked by the construction of ethnic identity in Burundi and Rwanda, and its manipulation by the colonialists; the deeper penetration of the economic and political life by immigrants from Burundi and Rwanda in 1970s; and the trauma

[262] Amnesty International's recommendations to the Commission are featured in the main document: *'1999 Commission on Human Rights- Making Human Rights Work: Time to Strengthen the Special Procedures'* (AI Index: IOR41/01/99).

of the 1994 Rwandan genocide and its repercussions for the Rwanda's two main "ethnic" groups, the Tutsi and Hutus in the area.

An analysis of the evolution of the Africa's Great Lakes conflicts and attempts to end them, lead me to conclude that when an entire region is deeply divided by violent conflicts as the case with the Great Lakes region, it is not possible to enforce peace, even if there have been successful negotiations reached for settlement. In other words, combatants cannot enforce peace against themselves. They can participate in peacemaking, and ultimately must do so, but if there is to be peace enforcement, then others will have to do it. It has further been suggested that in an interstate conflict of magnitude and complexity like that of the DRC, building the peace capacity of regional organizations is unlikely to lead to successful peace enforcement.[263]
The region's recognition of its limited capacity in conflict management has led to a number of capacity building efforts over the years. Virtually all of them, however, are focused on traditional peacekeeping- they do not build capacity for enforcement missions. It is my contention that these efforts may contribute to the region's capacity to mediate peace agreements, and perhaps even monitor them, but add little to the region's ability to enforce those agreements. In any case, it is doubtful that such capacity building efforts can overcome the fundamental problem of broad regional ethnic antagonisms.[264]

It remains clear that although the discourse of conflict resolution in recent years has shifted to the idea of regional solutions for regional problems,[265] the UN retains the paramount responsibility, according to the Charter, to maintain international peace and security. This includes in this case assisting in resolving conflicts, especially region-wide wars like those in the Great Lakes region.
With the UN inaction in the Rwandan genocide[266] as well as its sluggish pace in resolving the Congo conflicts, it remains that something of alternative have to be done, as can be seen with the current efforts in each of the countries of the Africa's Great Lakes region.

Justice and reconstruction processes in Rwanda, including the role of the *Gacaca* tribunals and that of the ICTR, the Burundi Peace Process culminating in the signing of ceasefire agreements and the recent political elections in the DRC, are only but the signs for future hope. The overall conclusion is that although a number of peace processes have taken place with regards to the Africa's Great

[263] Boulden ,*Ibid*, p.27.
[264] Ibid, p.289
[265] See this idea being advocated by Uvin, P *et al*, *supra* note 36.
[266] See the confession to that effect by the UN Secretary-General, Kofi Annan in Boulden , *supra* note 27, p.253

Lakes conflicts, this situation cannot be taken for granted. There are still challenges and risks for reversals. The ongoing conflicts within different countries at the time of writing this thesis bear witness to these realities. The ongoing conflict in eastern Congo, the political tensions in Burundi, the strained relation between some of the countries in the region are some of the challenges that need to be addressed in order to pave the way for building sustainable peace and stability.

Other challenges include lack of coordination of the ongoing interventions, and the inability to evaluate the impact of the other interventions, both from top-down and bottom-up perspectives.

3 APPROACHES TO CONFLICT PREVENTION AND MANAGEMENT: AN OVERVIEW

3.1 Introduction

Conflict prevention and management have become the *sine qua non* of the post-cold war period.[1] The destructive effects of internal armed conflicts in the 1990s, such as the 1994 genocide in Rwanda and the 1995 massacres in Srebrenica, Bosnia-Herzegovina, spurred a range of initiatives to examine more closely the capacity of the United Nations to prevent violent conflicts.[2] Thus, making peace is now pursued by a veritable industry of international, regional, state and non-state actors. Efforts to bring about peace and reconstruction have been fashioned by universalistic conflict resolution models that have a standard formula of peacemaking, with a trajectory of ceasefire agreements, transitional governments, demilitarization, constitutional reforms, "democratic" elections and the recent power-sharing negotiations in the aftermath of post-election crisis.[3] Indeed, deadly violence that visits upon humanity on an almost daily basis is not because there is lack of proper tools to prevent or resolve conflict; rather, the challenge is to properly calculate the appropriate approach or mixture of approaches to utilize along the war to peace continuum (tactic), when to apply certain techniques (timing), and in what measures (intensity).[4]

But the underlying concern is that many conflict prevention/resolution approaches in the region, most of which have failed;[5] have been focusing on *post*-conflict, short-term providing fast result, and using military force. This approach is not only costly and risky, but it also does not address the root causes of conflicts. Therefore, in order to achieve sustainable peace, it is argued in this chapter that alternative strategies are imperative; that is *pre*-conflict, long-term, and using people-oriented and rights-based approach, based on the full analysis of root causes of the conflicts.[6]

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[1] Lund, M. (1997), *Preventing Violent Conflicts*, US Institute of Peace Press, Washington, p.61 See also Daley, P. (2006), 'Challenges to Peace: Conflict Resolution in the Great Lakes Region of Africa' in *Third World Quarterly*, Vol. 27, No. 2, pp. 303–319. See further Oloka-Onyango,J. 'Constitutionalism, Community and Prevention of Conflict in Contemporary East Africa' in Oloka-Onyango,J. (Ed) (2003), *Constitutionalism Development in East Africa for Year 2001*, Kituo Cha Katiba, Series No.3, p.6.

2 United Nations, *Prevention of Armed Conflict* Report of the UN Secretary-General, UN Doc. A/55/985–S/2001/574, June 7, 2001. See the report in <http://www.reliefweb.int/library/documents/2001/un-conflprev-07jun.html> last visited, September 9, 2009.

[3] Daley, *supra* note 1; The concept of power-sharing is slowly replacing the will of the people in democratic elections, such as those in Kenya and Zimbabwe in 2007 and 2008 respectively, where ridged elections resulted in post-election crisis, leading to violent conflicts which claimed lives of many.

[4] Carnegie Commission on Preventing Deadly Conflict: *Preventing Deadly Conflicts*: Final Report, Washington, DC: Carnegie Commission of New York, December 1997.

[5] Nowhere have the current conflict resolution strategies failed than in the Africa's Great Lakes region where conflicts left a scar of volatile situations for potential recurrence of conflicts at anytime.

[6]Carnegie Commission, *supra* note 4.

In view of the heavy human, material and financial cost of the Africa's Great Lakes conflicts and their negative impacts on the national and regional development, it has now become necessary to shift emphasis from conflict resolution to conflict prevention.[7] Kofi Annan[8] cemented this argument when he pledged to move from a "culture of reaction" to a "culture of prevention."[9] This is an approach that accords utmost importance to preventing problems before they happen and thereby minimizing consequent damage, rather than reacting to conflicts after they have taken place.[10] Indeed, prevention is better than cure.[11] Thus, as Michael Brown posits, 'conflict prevention should be the international community's top priority because keeping disputes from transforming into violence in the first place is key to sustainable peace'.[12]

Experience over the past years has clearly pointed out the dangers of ignoring prevention and the problem of trying to intervene at the point where conflicts are locked into a process of escalation. But conflict prevention is not a discrete technique or method in itself. It is an orientation that can be applied with a variety of techniques, programs and projects in many fields, from development, human rights protection and promotion, humanitarian affairs and democracy building to military affairs and diplomacy. These activities prevent or mitigate conflicts when they are consciously designed and operated with attention to conflicts' sources and manifestations.[13]

After identifying the nature and classification of the conflicts in the Great Lakes region, an appropriate approach for conflict prevention and management has to be sought. Consequently, this chapter explores a variety of the major conflict management approaches, currently applicable in the resolution or management of conflicts, including those that are not expressly provided for under the Charter of the United Nations.[14] The chapter starts by tracing the development of the concept of conflict prevention within the UN dispute settlement systems, followed by a comprehensive account

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[7] The former may be referred to as a reactive approach which presupposes that the conflict has already erupted; while the latter refers to proactive measures which presuppose that the conditions for the eruption of conflicts have emerged or have been created. See also Mpangala, G and Mwansasu, B (Eds.) (2004), *Beyond Conflict in Burundi*, Dar es Salaam: The Mwalimu Nyerere Foundation, p.1.

[8] The outgoing United Nations (UN) Secretary-General 1992 –2006.

[9] He made the remarks in his keynote address to the *Stockholm International Forum on Preventing Genocide* on January 26, 2004. See also UN Press Release, SG/SM/9126: See this originally discussed in United Nations, *Prevention of armed conflict*, *supr*a note 2.

[10] Peck, Connie. (1996), *The United Nation as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflicts*, The Hague: Kluwer Law International, p. iii. See also United Nations, *Prevention of Armed Conflict*, *supra* note 2.

[11]See Nowak, M (2003), *Introduction to the International Human Rights Regime*, London: Martinus Nijhoff Publishers, p.277.

[12] Brown, M. (Ed), (1996), *The International Dimensions of Internal Conflict*, Cambridge, MA: MIT Press, p.605.

[13] See Lund, *et. al*., (1998), *Preventing and Mitigating Conflict: A Guide for Practitioners*, Washington, DC: Creative Associates International Inc, p.23.

[14] Charter of the United Nations, 1945 (hereafter referred to as the "UN Charter").

of the varieties of methods of conflict prevention and management. In this section, I make a brief discussion of collective security systems from the inter-war period (during the League of Nations) through the UN period. Thereafter, the UN Charter-based mechanisms are discussed with an overview of the various preventive diplomacy dispute settlement methods provided for under the UN Charter. The other conflict prevention and management mechanisms that developed outside, though closely connected to the UN Charter have also been discussed. In the final analysis, the effectiveness of the approaches in preventing and resolving contemporary intra-state conflicts is evaluated, followed by the conclusion.

3.2 Development of the Concept of Conflict Prevention within the UN

Conflict prevention is explicitly enshrined in the UN Charter, which refers to the need for "effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace."[15] But during the Cold War rivalry period, little attention was paid to conflict prevention by the Security Council, the UN body charged with the responsibility for the maintenance of peace.[16] As the Organization's security mandate dealt only with threats to international peace and security, civil wars that did not threaten international peace and security were off the limits of the UN.[17] Thus, not until the end the Cold War and the UN's liberation from the debilitating ideological constraints of superpowers rivalry did the concept of conflict prevention begin to be taken seriously. Conflict prevention as a concept intensified in the 1990s with the publication of an *Agenda for Peace*,[18] whose approach was, however, far more limited in that it presented prevention as a policy largely restricted to preventive diplomacy.[19] This remained as a package of measures to create confidence that required early warning based on information gathering and informal or formal fact-finding.[20] Conflict prevention is now prevalent and relatively uncontested within the United Nations system.[21] Its acceptance as a term of art comes after decades of debate after the end of the Cold War within the UN secretariat and among UN member states over appropriate international responses to civil wars and internal conflicts. The general result of this debate in the 1990s has been to shift conflict prevention from association with

[15] Paragraph 1, Article 1 of the UN Charter.
[16] Price, R & Zacher, M (Eds.), (2004). *The United Nations and Global Security*, New York: Palgrave Macmillan, p. 12.
[17] Ibid, p. 60.
[18] United Nations, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, New York, United Nations, para.23; Available also as UN Doc. A/47/277 - S/24111, June 17, 1992, available at <http://www.un.org>, last visited, September 9, 2009.
[19] Preventive diplomacy is defined here as a range of peaceful dispute resolution methods mentioned in Article 33 of the UN Charter when applied before a dispute crosses its threshold to an armed conflict.
[20] See Price and Zacher, *supra* note 16, p. 60.
[21] United Nations, *Prevention of Armed Conflict*, supra note 2.

outside intervention (of the developed North in the global South) to emphasis on the responsibility of member states to manage potential conflict within their own borders.[22]

Conflict prevention activities may range from diplomatic initiatives, through efforts designed to reform a country's security sector and make it more accountable to democratic control, to preventive deployments of forces designed to prevent or contain disputes from escalating to armed conflicts. Other conflict prevention activities may include military operations, fact-finding missions, consultations, early warning, inspections and monitoring.[23]

A further argument in this chapter is however not related to the effectiveness or ineffectiveness of any of the conflict prevention activities; rather on the appropriateness of a particular approach for a particular conflict. For instance, Western model of conflict resolution promoted in the Africa's Great lakes region is fundamentally flawed. It is inadequate in both its analysis of the causes and dynamics of contemporary armed conflicts in the region and in the prescription that follows this analysis. The emphasis in such models is placed in the assumption that the full imposition of liberal democracies and neo-liberal economic reforms offers the best chances for durable peace. Reviewing the peace processes in the Africa's Great Lakes conflict, as exemplified by the situation in the DRC, it becomes clear that standard peace formula pushed by these models fail to address the complexity of politics in the Africa's Great Lakes. The conduct of peace negotiations reinforces the view that the space of African politics is the preserve of the international actors, the domestic political elite and armed movements to the total exclusion of civil society.[24]

Using examples of the conflicts and peace processes in the DRC, the chapter contends that contemporary global frameworks for conflict resolution that rest on the acceptance of neo-liberal political and economic models cannot lay the foundations for the conditions necessary for sustainable peace in the region. This necessitates the utilization of a more inclusive concept of peace, the starting point of which has to be the emancipation of humanity from human rights abuses.[25]

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[22] Cousens , E. 'Conflict Prevention' in Malone, D. M. (Ed.), (2004). *The UN Security Council: From the Cold War to the 21st Century*, Boulder: Lynne Rienner Publishers, p. 101.

[23] Boutros-Ghali, B. (1995) *An Agenda for Peace:* Report of the Secretary-General, New York: United Nations. Supplement to An Agenda for Peace: Report of the Secretary-General.

[24] Daley, *supra* note 1.

[25] Ibid.

3.3 Methods of Conflict Prevention, Management and Resolution

Throughout history, human communities have devised rules, customs and laws to serve as standards of conduct for their members, to keep their societies running smoothly and prevent conflicts. By complying with these rules, community members have been better able to anticipate and predict the conduct of other members. Thus, laws provided security for the community. As community evolved into states, so they too created rules to govern their relations with one another. These rules became the basis of international law.[26]

3.3.1 Collective Security Systems

The UN war-prevention role has often been called "collective security" although in practice the United Nations has been largely an adjunct to the operation of local and global balances of power. Before the United Nations, the most common security arrangement among independent political entities has been through alliances and balance of power.[27] The balance of power system had weaknesses as a peacekeeping mechanism and did not always deter aggressors. In the years preceding 1914, moreover, the system had developed a rigidity of alignments that robbed it of the fluidity that theory–and apparently practice–require for the effective operation of the balance-of-power mechanism.

The task of finding a workable substitute for the balance of power went through tedious efforts,[28] culminating in the world's first major attempt at a collective security through the League of Nations in 1919. But the League's collective security system was not any effective either. During the interwar period, no country was strong enough to defy all the others if the others were united. But the League members and the United States (as the major non-member) were not sufficiently convinced that every war anywhere was a threat to them. And certainly, they lacked commitment to use their combined force against any and every case of aggression, regardless of who the aggressor might be. The League Covenant did not require such a commitment.

In short, the League collective security system did not work well because the disposition of members to view their own security as separable from that of others was reinforced by weak legal commitments and ineffective decision-making procedures.

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[26] Peck, *supra* note 10, p.164.

[27] Balance of power is the term usually applied to a system in which states relies on international alliances to promote their individual security interests. See further Riggs, R and Plano, J. (1988) *The United Nations: International Organization and World Politics*, California: Brooks/Cole Publishing Co, p. 123.

[28] On the various options tried in finding a workable universal security system, see Rigs and Plano, *Ibid*, p. 124.

An example given of the failure of the League of Nations to adhere to collective security is the Manchurian Crisis, when Japan occupied part of China (which was a League member). After two years of deliberation, the League passed a resolution condemning the invasion without committing the League's members to any action against it. The Japanese replied by quitting the League of Nations. This inaction by the League subjected it to criticisms that it was weak and concerned more with European issues (most leading members were European), and is considered by many to have encouraged, or at least to have not deterred, the aggression shown by the Axis powers leading to World War Two.

The framers of the UN Charter retained the Collective Security concept of peace enforced by the community of nations. On paper, the Charter seemed a reasonable approach to collective security. It commits all its members to "avail to the Security Council armed forces, assistance and facilities, including rights of passage, necessary for the maintenance of international peace and security."[29] The capacity of the Security Council to take military action on its own initiative was dependent on the subsequent negotiation of the special agreement with member states to make standby military forces and facilities available at its call. Each such agreement required ratification by the states concerned according to their respective constitutional processes.

However, no Article 43 agreement ever reached the ratification stage, because the major powers could not agree on the size and character of their respective national contributions or on where the units should be based. Hence, the broad Charter commitment to collective security under Article 43 was never translated into a specific commitment to supply troops and material. Even in the only two instances (North Korea in 1950 and Iraq in 1991) where collective security action under the UN auspices was taken; the actions were more voluntary than being Charter sanctioned.[30] Despite the intent of the Charter, members retained the right to decide for themselves, according to the circumstances of each case, how their military forces should be used. If collective military action were to be taken at all, it would be on voluntary basis. Furthermore, during the Cold War era, collective security had little relevance to the dramatically worsening relations between the East and the West, to the extent that both sides resorted to military pacts–NATO and Warsaw Pact–as their first line of defence against each other. This was regarded by many as crushing defeat for the principles of the UN Charter and the concept of collective security in particular.

A major lesson of more than sixty years of UN efforts to provide collective security and enforcement is that while international military action (in contrast to sanctions) should be authorized by the United

[29] Article 43 (1) of the UN Charter.

[30] See discussions on the different speculations in Gray, C (2000), *International Law Governing the Use of Force*, 2nd ed, Oxford: Oxford University Press, p. 199.

Nations, the actual work of applying force is now subcontracted through alternative forms of global security systems. These include what has become known as "coalition of the willing" led by one or more major powers and resort to UN peacekeeping operations which is the subject of the next chapter.

3.3.2 Types of Dispute Settlement

In state practice in the 19th Century, war was often represented as a last resort as a method of resolving conflicts.[31] Some might say that the prevailing view before the 2nd World War, and therefore before the UN Charter regime was that resort to war by states was permissible as a way of acquiring title to statehood through conquest.[32] But this trend was denunciated even as early before the 2nd World War, as in the 1928 General Treaty for the Renunciation of War[33] in which states condemned recourse to war for the resolution of international controversies.[34]

Modern rules for the settlement of international disputes were developed from long ago. In 1899, rules on settlement of international disputes were codified at the Hague Peace Conference (on the basis of draft documents prepared by the International Law Institute in 1875 and the International Law Association in 1895).[35] At the Second Hague Peace Conference (1907), the revised text of the Convention for the Pacific Settlement of International Disputes was approved.[36] Currently, 71 states are still bound by the 1899 or the 1907 Conventions.[37] In 1928, the League of Nations adopted the Geneva General Act for the Pacific Settlement of International Disputes,[38] which was acceded to by 19 States. In recent years, however, several states have revoked their acceptance. In 1949, the United Nations revised the formal clauses of the Act, but only eight states have acceded to this version of the document and its precise legal status remains unclear until today.[39]

Additionally, there are a number of regional treaties related to the peaceful settlement of disputes. The American Treaty on Pacific Settlement of Disputes (1948) binds the members of the

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[31] Brownlie, I. (2003) *Principles of Public International Law*, oxford: Oxford University Press, p. 697.
[32] Thus, for instance, the conquest of Alsace-Lorraine by German Empire in 1871-1918 was not the object of a policy of non-recognition either by France or by third states; See further Brownlie, *Ibid.*
[33] General Treaty for the Renunciation of War (Kellogg-Briand Pact), Paris, 27 August 1928.
[34] See Article I of the General Treaty, *Ibid*, as quoted in Brownlie, *supra* note 31, p. 698.
[35] See the First *Hague Convention for the Pacific Settlement of International Disputes*, 1899, 32 Stat. 1779, 1 Bevans 230, 26 Martens Nouveau Recueil (ser. 2) 720, 187 Consol. T.S. 410, *entered into force* Sept. 4, 1900.
[36] Bevans 577; 2 AJIL Supp. 43 (1908).
[37] *Ibid*, p. 166.
[38] League of Nations, *Treaty Series*, vol. XCIII p. 343; for subsequent actions published in the League of Nations *Treaty Series*, see references in General Indexes Nos. 4 to 7 and 9, and for those published in the United Nations *Treaty Series*, see annex C in volumes 907 and 915.
[39] Vicuna, F. 'The Settlement of Disputes and Conflict Resolution in a Revitalized Role for the United Nations Security Council. In Dupuy, R.J. (Ed.) (1993) *The Development of the Role of the Security Council*, Dordrecht: Martinus Nijhoff Publishers, p. 41-49.

Organization of American States. The 1957 European Convention for the Pacific Settlement of Disputes binds members of the European Union. Likewise, the 1964 Protocol of the Commission of Mediation, Conciliation and Arbitration became part of the Charter of the OAU and is therefore binding on all OAU (currently AU) members.[40] There are also a myriad of multilateral and bilateral treaties with clauses for the settlement of any dispute arising under those treaties.

Finally, the UN Charter regime on peaceful settlement of disputes was strengthened further when the General Assembly passed the 1982 *Manila Declaration on the Peaceful Settlement of International Disputes*[41] and approved the 1988 *Declaration on the Prevention and Removal of Disputes and Situations which May Threaten International Peace and Security and the Role of the United Nations in this Field*.[42] Nonetheless, most of these documents relating to the settlement of disputes were drafted at the time when international disputes, or rather inter-states disputes, were the most common types of disputes. It is therefore argued that there is a dire need for a new dispute settlement regime, which also clearly address internal or intra-states conflicts, which are prevalent today.

The processes of solving problems relating to conflicts, whether in traditional inter-state disputes or in the nowadays far more common situations of intra-state conflicts, have invariably been referred to with different names depending on the contextual origin and scholarly disciplines. In any case, the language of the UN Charter does not embrace the term "conflict resolution" or "conflict prevention." Except for the implied analogue of "the prevention and removal of threats to the peace" under Article 1, such concepts seem alien to the Charter. Instead, the Charter refers to such terms as peaceful or pacific settlement of international disputes.[43] With such a categorical reference to "international disputes," one may be tempted to pose a question whether the drafters of the Charter had ever envisioned the application of the Charter-based conflict resolution methods to internal armed conflicts situations. By necessary implication, the answer is no since there are other provisions in the UN Charter prohibiting intervening in matters which are essentially within the

[40] One of the principles of the OAU enshrined under Article 3 (4) of its Charter was the 'peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration. For that purpose, the Declaration on the establishment, within the Organization of African Unity (OAU), of a Mechanism for Conflict Prevention, Management and Resolution, adopted by the 29th Ordinary Session of the Assembly of Heads of States and Governments of the OAU, held in Cairo, Egypt, from 28 to 30 June 1993. See further the African Union, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, July 9, 2002, Durban South Africa, Available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol_peace%20and%20security.pdf>, last visited July 11, 2009.

[41] UN Doc A/RES/37/10 of November 15, 1982

[42] UN Doc. A/RES/43/51 of December 5, 1988.

[43] The whole Chapter VI of the UN Charter is devoted to this purpose of peaceful Settlement of international disputes. See also Articles III and XIX of the OAU Charter, 1963.

domestic jurisdiction of any state.[44] Perhaps this explains the reasons for the invention of such modern peace-support terms as "preventive diplomacy, peacemaking, peacebuilding, peace enforcement and peacekeeping."[45]

Just as the sources and manifestations of conflicts are immensely varied,[46] so too are the approaches to understanding, preventing and resolving them. Some scholars talk of reactive approaches, which presuppose that a conflict has already erupted and is going on, be it violent or non-violent, and a proactive approach, which is intended to resolve the conflict in a long term.[47] Included in this latter approach for instance is conflict prevention methods and peace building. Yet others distinguish conflict resolution approaches utilized by states from those utilized by non-state actors.[48] Whereas states actions may include diplomacy, military or legal methods, non-state measures include the activities of non-governmental organizations (NGOs) and private voluntary organizations in the fields of human rights, humanitarian assistance and economic and social development, among others.

When analyzing the UN as a dispute settlement system, Peck discusses three general approaches to disputes identified in the conflict resolution literature: 1) a power-based approach; 2) a rights-based approach and 3) an interest-based approach.[49] In the first approach, disputing parties attempt to determine who is most powerful through a power contest. In the worst scenario, this approach manifests itself in the form of war as its most obvious and extreme version, although less intense forms are also possible. The rights-based approach to conflict resolution (settlement) involves resolution based on a standard or normative principle commonly recognized by the parties concerned. Often, the legal system is used as a source of those norms. Rights-based approaches to conflict settlement may be found in both formal adjudication in courts and informal law (arbitration,

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[44] Article 2 (7) of the UN Charter states:
"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the 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 Vll."

[45] See detailed description and distinction of and between each of these terms is to be found in United Nations, *An Agenda For Peace, supra* note 18. See further discussions of these terms in Galtung, J. (Ed.), (1976), *Peace, War and Defense: Essays in Peace Research,* Vol.II, Copenhagen: Ejlers, p. 282.

[46]Conflicts may be categorized as intrapersonal conflicts, interpersonal conflicts, group conflicts, organizational conflicts, community conflicts, intra-state or internal armed conflicts (for example civil war like the case of the DRC- which is the subject of this study) and international conflicts.

[47] Mpangala, G and Mwansasu, B (Eds.) (2004), *Beyond Conflict in Burundi*, Dar es Salaam: The Mwalimu Nyerere Foundation, p.1.

[48] See this categorization in Creative Associates International. *Preventing and Mitigating Violent Conflicts: A Guide for Practitioners*. Washington, DC: Greater Horn of Africa Initiative and United States Agency for International Development, 1996.

[49] Peck, *supra* note 10, p.10.

and alternate dispute resolution). The International Court of Justice (ICJ/World Court, The Hague) and the newly created International Criminal Court (ICC) have been considered as fora for adjudication in conflicts related issues. The jurisdiction of the former deals with state disputes whereas the latter is the domain of individual indictments for human rights violations in the time of conflicts. In a rights-based approach, the parties try to determine who is right according to international law. Arguments and evidence are presented to prove that the other party was in breach of some agreed upon rules of international law, such as a treaty, convention or other accepted customary rules of international law. In an interest-based approach, parties attempt to reconcile their underlying interests by discovering solutions which will bridge their different needs, aspirations, fears or concerns in a manner that is satisfactory to both.

Different organs of the UN focus roughly on each of the different approaches of dispute settlement referred to above. Good offices and mediation by the UN Secretary-General and his representatives appear to offer the most scope for the interest-based dispute settlement approach. The International Court of Justice has the most important role to play in the rights-based dispute settlement and the Security Council has a wide range of power-based procedures at its disposal. Figure 2 below shows these three approaches and other options open to disputing parties for the resolution of their disputes.

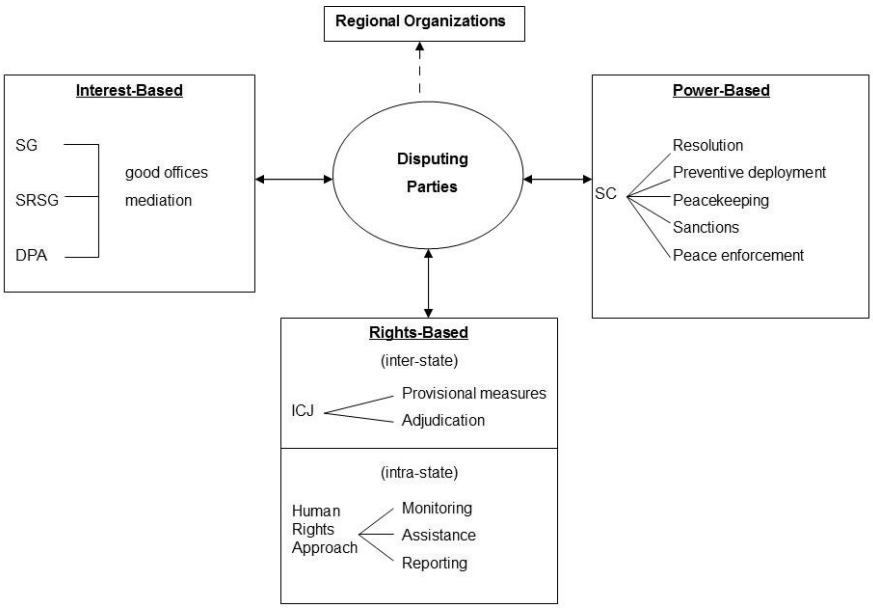

Figure 2: Major UN approaches to conflict resolution. (Adopted from Peck, p.14)

In most cases however, the three approaches above are related and interdependent. The reconciliation of interests takes place within the context of the parties' rights and power. Thus in the process of resolving a dispute, the focus may shift from interest, to right, to power and back again.[50]

In summing up, figure 3 shows the full range of dispute settlement approaches. As the figure demonstrates, even though the UN is using a wider range of its dispute settlement repertoire, certain approaches, especially preventive diplomacy and pre-conflict peace-building, remain highly underdeveloped. A full spectrum of the activities in the peace and security area has been categorized as: 1) building peace (within states and by international organizations); 2) maintaining peace (preventive diplomacy and preventive deployment); 3) restoring peace (peacemaking and peacekeeping) and enforcing peace (sanctions and peace enforcement).[51] Figure 4 makes the point that even now, the UN focuses most of its efforts on power-based methods in resolving conflicts. As it is suggested elsewhere in this work, a truly effective conflict prevention and management

[50] Ibid, p. 11.
[51] See Evans, G (1993), *Cooperating for Peace: The Global Agenda for the 1990s, and Beyond*, Allan and Unwind, Sydney. Evans in this book also provides a comprehensive analysis of each strategy, suggesting the circumstances under which each should be used and offers some extremely useful suggestions about how each could be improved.

mechanism would look like a pyramid to the right of this figure, focusing more on the rights-based methods of preventing and managing conflicts. It is thus argued that only when this approach fails, would efforts be spent on restoring peace, and as a means of last resort, on enforcing peace.[52]

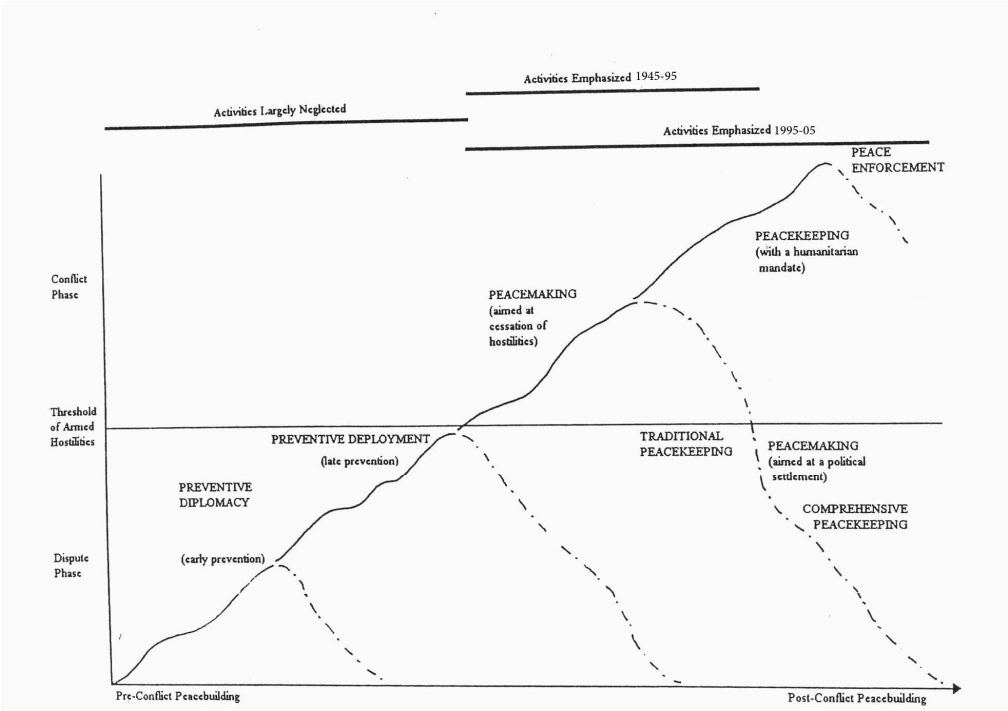

Figure 3: The UN´s Role in Peace and Security over the Development and Resolution of Conflict

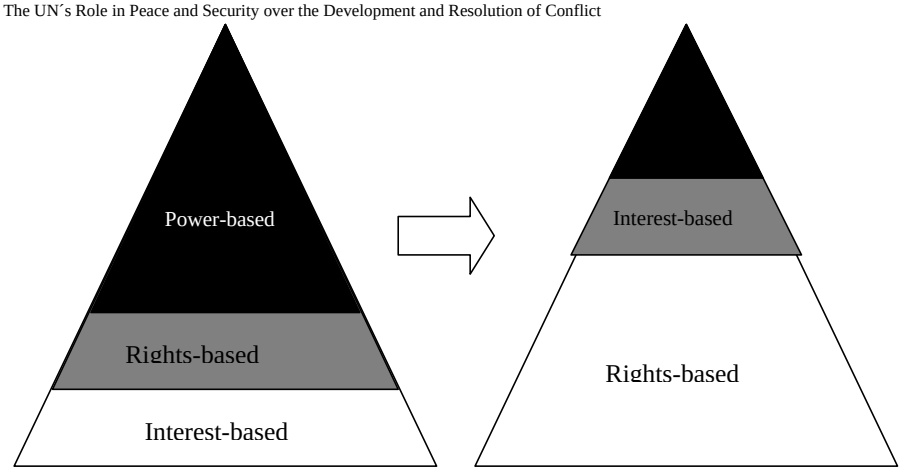

Figure 4: Changing the emphasis of UN's role in conflict resolution. (Adopted from Peck, p.18)

[52] See Peck, supra note 10, p. 17.

Be that as it may, the mandate of the United Nations to engage in conflict prevention has been strongly established by the drafters of its Charter long ago. The cardinal mission of the organisation therefore remains "to save succeeding generations from the scourge of war."[53] To that end, Member States have committed themselves "to take effective collective measures for the prevention and removal of threats to the peace …"[54]

3.3.2.1 The UN Charter-Based Mechanisms

The Charter-based procedures for settling international disputes are catalogued in Article 33 of the UN Charter, which states:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[55]

As can be noted, the above Charter provision acknowledges the fact that the conflict resolution approaches mentioned therein are not exhaustive. Room is therefore left to "other peaceful means of their (states') own choice."[56] It is not surprising therefore that other conflict settlement mechanisms, such as peacekeeping and good offices to be discussed later in this chapter have been developed over time and are currently in full use. But one of the conflict resolution theory states that to resolve any conflict, the set of available approaches that can be applied include coercion, mediation, arbitration, negotiation and adjudication.[57]

Merrills[58] has grouped the UN Charter-based means of dispute settlement into Diplomacy Methods (i.e. negotiation, inquiry, mediation and conciliation) on the one hand and Legal Methods (i.e. arbitration and judicial settlement of conflicts) on the other.

Negotiation among parties to a dispute is as old as the state system and is the most common method of dispute settlement. It involves direct discussion by diplomatic representatives of

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[53] A pledge that was inserted in the Charter as a direct reaction to the effects of the 2nd World War. See the same issue stressed further in the Report of the Secretary-General on the work of the United Nations, *Prevention of Armed Conflict, supra* note 2

[54] See Article 1(1) of the UN Charter.

[55] All these techniques of dispute resolution were embodied in international law and practices well before the advent of the United Nations, and the Charter merely recognized their existence and encouraged their use.

[56] UN Charter, Article 33.

[57] Schellenberg, J. (1996) *Conflict Resolution Theory, Research, and Practice,* Albany: State University of New York Press, p. 9.

[58] Merrills, J. 'The Means of Dispute Settlement, in Evans, M. (Ed.)(2003), *International Law,* Oxford: Oxford University Press, p. 531; See further Peck, *supra* note 10.

the parties to the dispute, for purposes of reaching an agreement on matters at issue. But negation is only possible if the parties to the dispute are ready and willing to deal with each other. In situations of serious conflicts where no possibilities exist to make the parties negotiate, other methods may be the best option.

Inquiry, as a term of art, is used in two distinct, but related senses. In the broader sense it refers to the process that is performed whenever a court or other body endeavours to resolve a disputed issue of fact. In another sense, which is our present concern, inquiry refers to a specific institutional arrangement, which disputing parties may select in preference to arbitration or other techniques, because they desire to have some disputed issue independently investigated. In its institutional sense then, inquiry refers to a particular type of international tribunal known as the commission of inquiry and introduced by the 1899 Hague Convention.[59] Although it is not mandatory that the parties accept the findings of the inquiry, they usually do. The inquiry is limited to findings of fact and does not include proposed terms of settlement.[60]

Good offices (not mentioned in Article 33) is the name given to friendly assistance rendered by a third-party for the purpose of bringing disputants together so that they may seek to reach a settlement. Good offices may be rendered by a state, a group of states, or even an individual of international standing such as the UN Secretary-General. The third-party representative meets each disputant separately but may, with consent convey messages between them. Technically, good offices are limited to facilitating negotiation by the states directly concerned and do not include discussion of substantive issues. The method is particularly useful where the disputing parties have broken off diplomatic relations or where negotiations have been interrupted and neither side takes the initiative to resume them, out of pride or out of fear that such action would be an indication of weakness.

Mediation occurs when a third party actively participates in the discussion of substantive issues and offers proposals for settlement. If the disputants are not speaking, the mediator may also render good offices as a prelude to mediation. A mediator may meet with the parties

[59] See Article 9 of the *Hague Convention for the Pacific Settlement of Disputes 1899*, which states: "In differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties, who have not been able to come to an agreement by means of diplomacy, should as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation."

[60] As most disputes hinge on disputed questions of fact, inquiry may be means of lowering tensions as well as reducing the area of disagreement between the disputants.

either separately or jointly and is expected to maintain an attitude of impartiality throughout. He can expect little success unless he enjoys the confidence of all parties. His proposals are suggestions only, with no binding force on any party. Disputants are of course free to reject an offer to mediate.[61] The most important elements of a successful mediation are neutrality and legitimacy on the part of the mediator. And it has been argued that; "the assurance of neutrality in mediation creates the necessary perception of mediator legitimacy, professionalism, and fairness… the third party is not connected to either disputant, is not biased towards either side, has no investment in any outcome except settlement, and does not expect any special reward from either side."[62]

Conciliation[63] is a procedure for settling a dispute by referring it to a commission, or occasionally a single conciliator, charged to examine the facts and recommend a solution that the parties are free to accept or reject. Conciliation is more formal and less flexible than mediation. Whereas mediation is a continuing process of assisting negotiations among parties to a dispute, conciliation involves formal submission of the dispute to a conciliation body in anticipation of a final report containing the conciliator's findings and recommendations for settlement. The boundaries between the two tend to be blurring in practice because the conciliator usually confers informally with the parties, hoping to find an area of agreement. Moreover, in the United Nations parlance, the terminology of mediation, conciliation and good offices is frequently used without careful reference to the legal distinctions among them. Thus the UN conciliator may in reality be a mediator who also finds it necessary to render good offices and never has occasion to publish a formal recommendation for a settlement.

Another view is that conciliation is closer to inquiry in many senses. Conciliation puts third-party intervention on a formal legal footing and institutionalizes it in a way comparable, but not identical to inquiry. The function of the conciliation commission is to provide information and advice as to the merits of the parties' positions and to suggest a settlement that corresponds to what they deserve, not what they claim. This approach reflects the historical link between conciliation and the procedure for enlarged inquiry.

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[61] Riggs, R and Plano, J. (1988) *The United Nations: International Organization and World Politics*, California: Brooks/Cole Publishing Co, p.187.

[62] Bercovitch, J. (Ed.,) (1996), *Resolving International Conflicts–The Theory and Practice of Mediation*, London: Lynne Reimer, p.57.

[63] It has also been defined as an intervention to resolve an international dispute by a body without political authority that has the trust of the parties involved and is responsible for examining all aspects of the dispute and proposing a solution that is not binding for the Parties. See Mollel, A. (2007). 'Judicial Settlement of Armed Conflicts in International Law: Reflecting the 2005 International Court of Justice Decision in the Democratic Republic of Congo' in *Nordic Journal of international Law*, 76(4), pp. 407-434.

Arbitration[64] is a procedure by which disputants agree to submit a controversy to judges of their own choice, who render a legally binding decision based on the principles of international law. Commonly each side names one or two arbitrators, and those two or four designate one additional arbitrator to complete the panel. The essential characteristics of arbitration are (1) free choice of judges (arbitrators), (2) respect for international law, and (3) obligation to comply with the award. The parties frequently stipulate in the arbitral agreement (*compromis)* the particular rules of law or equity, or even special rules, that are to be applied. The parties are relieved of their obligations to accept or carry out the award only if the arbitrator disregarded instructions in the *compromis*. Arbitration is at least as old as the Greek city-states, and within the modern state systems it enjoyed a substantial renaissance during the nineteenth and early twentieth centuries. Since 1994, arbitration has been used extensively in resolving trade and investment disputes but less frequently in resolving political disputes between states. One notable recent example is the U.S-Iran agreement to arbitrate claims arising out of the hostage crisis.[65] Many modern treaties include a provision that controversies arising out of the interpretation or application of the treaty shall be resolved by arbitration.[66] The other most notable modern example is under the 1982 Law of the Sea Convention, which relies more on arbitration as the dispute settlement mechanism.

Judicial Settlement or Adjudication, like arbitration produces a legally binding award or judgment based on rules of international law. Unlike arbitration, however, the parties for their particular case do not choose the judges, but are members of the pre-constituted international tribunal. Settlement of disputes by international courts based on voluntary acceptance by the parties is made possible either through advance agreement to accept the jurisdiction of the court in special types of cases or through agreement at the time the dispute is submitted.[67] The same is generally true of arbitration. The International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice (PCIJ) are principal examples of judicial bodies for the settlement of disputes at the global level. The role of adjudication in the resolution of disputes is limited in several ways.[68] Decisions have generally been carried out, but no effective means have been available to enforce Court decisions against a few recalcitrants that have ignored their obligation to comply. Noncompliance is most common in cases involving controversies over the Court's jurisdiction.

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[64] Ibid.

[65] Iran-US Settlement of the Hostage Crisis: Jan. 1981, US-Iran. 20 I.L.M. 223 (hereinafter referred to as the Iran-United States): *Background Information: Iran-United States Claims Tribunal*, IRAN-US CLAIMS TRIBUNAL, available at <http://www.iusct.org/background-english.html> last visited, September 8, 2009.

[66] Such arbitration clauses, as are famously referred to, are worded thus: "any dispute, controversy or claim arising out of or relating this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration."

[67] See Article 36 of the ICJ Statute.

[68] Mollel, *supra* note 63, p. 415.

However, the weaknesses and limitations of the international adjudicatory system as a whole, and its jurisdictional limitations in armed conflicts situations in particular have been pointed as main shortcomings of the legal approach to dispute settlement.[69] These matters, and many others relating to adjudication as a conflict resolution mechanism, will be dealt with in more details under chapter five of this study.

Although in theory the UN Charter provides for a range of dispute settlement procedures, in practice it has never been able to fully develop an effective dispute settlement mechanism. Many disputes, both international and internal, have gone unresolved and others have only been addressed when it was too late to stop their escalation into fully- blown conflicts.[70] Arguably, the weaknesses and limitations of each of the above methods and the UN in general in resolving contemporary internal armed conflicts make it imperative to resort to other non-Charter based approaches to conflict resolution.[71]

3.3.2.2 Non-Charter-Based Mechanisms

The non-Charter-based conflict resolution mechanisms presuppose a number of alternative conflict settlement actions which are not expressly provided for under the UN Charter. The actions and activities considered here are not necessarily totally outside the indirect Charter mandates, but they are referred so only for academic analysis on the basis that they are not expressly provided for under the UN Charter. Some of these actions and activities have, by all indications, led to multilateralism being besieged in the recent years. Other choices have then developed in the form of unilateralism, bilateralism, regionalism or such disguised devises as 'coalitions of the willing.' It is nobody's argument that these choices are exclusive or that they cannot be used together. The argument rather is on the legality and appropriateness. And even where such actions may be considered legal, as argued by some scholars,[72] the other concern is which one will prevail in the situation of a conflict between them. The obvious answer, if one goes by the letter and spirit of the UN Charter, is multilateralism. Moreover, multilateralism is not an option, but an inevitable product of evolutionary process, which represents a high level of organising human society into an international world community. Any retreat from it amounts to chaos wherever hegemony of power prevails, as with such cases in the recent past, as the Iraqi one. Unilateralism is a blatant form of such a retreat, and so is the long discredited concept of 'coalition of the willing.'

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[69] *Ibid*.
[70] See the cases of Somalia (1992 / 93), Bosnia (1992 / 93) and even the recent Israeli-Palestine conflict.
[71] *Ibid*
[72] Wilson, J. (2007). 'The Legal, Military and Political Consequences of the 'Coalition of the Willing' Approach to UN Military Enforcement Action' *Journal of Conflict and Security Law*, vol. 12, No.2, pp. 295–330.

However, with the clearly diminishing efficacy of the UN as a principal world legitimiser,[73] as viewed in the aftermath of its debacles in Bosnia, Somalia and Rwanda,[74] non-Charter based approaches to conflict prevention and management have emerged. The UN Charter envisaged a centralized system of collective security in which the UN Security Council would have readily available forces of its own for the purpose of taking military enforcement action under its own authority and control.[75] These forces were never created, and the Security Council has had to rely heavily upon authorising willing coalitions of states to take action on its behalf. Although such an approach to military enforcement action is said to be legally permissible, it gives rise to a series of consequences of a legal, military and political nature that call into question the extent to which it provides the Council with an effective means of exercising its primary responsibility for the maintenance of international peace and security.

Thus, besides unilateralism and other illegitimate means of resolving disputes, various other approaches to conflict resolution and management have been favoured. Included are the approaches to peace as early proposed by Galtung,[76] namely, peacemaking, peacekeeping, peace enforcement and peace-building.

Peacemaking generally includes measures to address conflicts in progress and usually involves diplomatic action to bring hostile parties to a negotiated agreement. The United Nations Secretary-General, upon the request of the Security Council or the General Assembly or at his own initiative, may exercise "good offices" to facilitate the resolution of the conflict. Peacemakers may also be envoys, governments, groups of states, regional organizations or the United Nations. Peacemaking efforts may also be under-taken by unofficial and non-governmental groups, or by a prominent personality working independently.

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[73] Term preferred in Martin, A. (2005). 'The Contribution of Critical Theory to the New Thinking of Peacekeeping: Some Lessons from MINURSO' Working Paper No.15, Centre for Conflict Resolution, Department of Peace Studies, University of Bradford.

[74] Peck, *supra* note 10, p. vii.

[75] Article 43 (1) of the UN Charter states:

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

[76] Galtung, *supra* note 45, pp. 282–304.

Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. The concept of peacekeeping, which is the subject of the next chapter, is not one of the Charter-based-based approaches to conflict prevention and management. However, Dag Hammarskjöld, the second UN Secretary-General, referred to it as belonging to "Chapter Six and a Half" of the Charter, placing it between traditional methods of resolving disputes peacefully, such as negotiation and mediation under Chapter VI, and more forceful action as authorized under Chapter VII. Over the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace, in the aftermath of intra-state conflicts.

Peacebuilding involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development. Peace-building is a complex, long-term process of creating the necessary conditions for sustainable peace. It works by addressing the deep-rooted, structural causes of violent conflict in a comprehensive manner. Peace-building measures address core issues that affect the functioning of society and the State, and seek to enhance the capacity of the State to effectively and legitimately carry out its core functions.

As peace-building has become and is likely to remain one of the primary challenges facing the United Nations membership,[77] a more detailed discussion of the mechanism is worthwhile. Coined in the 1970s by Johan Galtung,[78] peace-building gained significant currency in the 1990s, when UN Secretary-General Boutros Boutros-Ghali defined post-conflict peace-building as "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict".[79] The United Nations continues to situate peace-building squarely in the realm of post-conflict recovery,[80] contrary to the view of many scholars and practitioners, who assert that peace-building has as much to do with prevention as recovery.[81]

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[77] See this elaborated in the United Nations System in the New Millennium: Fostering Substantive and Operational Linkages in the Implementation of Peace, UN Doc. S/2001/1054 of November 7, 2001, p. 3

[78] Galtung, *supra* note 45, pp. 284–302.

[79] United Nations, *An Agenda for Peace, supra* note 18, para. 21. For a comprehensive review of how 24 governmental and intergovernmental bodies conceptualize peacebuilding, see Barnett, M., Kim, H., O'Donnell, M., and Sitea, L. (2007), 'Peacebuilding: What is in a Name?', *Global Governance*, vol. 13, no. 1, January–March, pp. 35–58.

[80] See this assertion in Price and Zacher, *supra* note 16, p. 153.

[81] Michael Doyle and Nicholas Sambanis view peacebuilding as fostering the "social, economic, and political institutions and attitudes that will prevent … conflicts from turning violent. In effect, peacebuilding is the front line of preventive action." Doyle, M and Sambanis, N. (2000), 'International Peacebuilding: A Theoretical and Quantitative Analysis', *American Political Science Review*, vol. 94, no. 4, p. 779; Charles Call and Susan Cook refer to

Despite the daunting and largely unmet challenges of the post conflict state-building project, the concept of peace-building has been expanded further to include a wide variety of projects aimed more at host populations and 'civil society' than at the organs of state. Peace-building is now seen to include activities such as the facilitation of interaction among former enemies, the inculcation of respect for human rights and political pluralism, and the accommodation of ethnic and cultural diversity.

Though a non-Charter based Mechanism for conflict resolution, the peace-building norm in the UN system was crowned by the UNSC when it established its definition in February 2001:

> …peace-building is aimed at preventing the outbreak, the recurrence or continuation of armed conflict and therefore encompass a wide range of political, developmental, humanitarian and human rights programmes and mechanisms.[82]

This requires short and long term actions tailored to address the particular needs of societies sliding into conflict or emerging from it. These actions should focus on fostering sustainable institutions and processes in areas such as sustainable development, the eradication of poverty and inequalities, transparent and accountable governance, the promotion of democracy, respect for human rights and the rule of law and the promotion of a culture of peace and non-violence.

Problems arise because peace-building as a post-conflict management mechanism is faced with a number of conceptual criticisms and practical limitations. First, peace-building may have a serious conceptual flaw as it is built on the premise that political and economic liberalization will promote stability and consolidate peace.[83] As Roland Paris has argued, peace-building is in effect an enormous experiment in social engineering--an experiment that involves transplanting Western models of social, political and economic organization into war-shattered states in order to control civil conflict: in other words, pacification through political and economic liberalization.[84] Ironically, the liberal economic model can widen inequalities, create economic dislocation, and consolidate the power of those who benefited from black market activities during the conflict. At the same time, political liberalization can reinforce and entrench political differences and divide peoples, as is the case in the DRC, Bosnia and Kosovo where nationalist parties gained office in UN-supervised elections.[85]

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peacebuilding as "efforts to transform potentially violent social relations into sustainable peaceful relations and outcomes." Call, C and Cook, S. (2003), 'On Democratisation and Peacebuilding', *Global Governance*, vol. 9, No. 2, p. 240.

[82] UN Doc. S/PRST/2001/5 February 20, 2001.

[83] Price and Zacher, *supra* note 16, p. 147.

[84] Paris, R. (1997). 'Peacebuilding and Limits of Liberal Internationalism' *International Security*, vol. 22, No. 2, p. 56.

[85] Price and Zacher, *supra* note 16.

A second challenge confronting peace-building is its own legitimacy.[86] In the first place, there is concern that peace-building can entail the imposition of foreign ways. Local economic patterns, local civil society, and traditional mechanisms of conflict management and the leadership may be overshadowed or disrupted by peace-building activities. In Somalia for instance, UN efforts largely ignored local conflict management mechanisms in favour of a more formal diplomatic model. The process was only marginally successful and served to undermine pre-existing instruments of mediation and negotiation. A second legitimacy question relates to the general marginalization of the developing world. Peace-building is viewed by some as a component of a larger agenda of western political and economic supremacy: "Peace-building in this context becomes an inherently conservative understanding, seeking managerial solutions to fundamental conflicts over resources and power, seeking to modernize and re-legitimize a fundamental status quo respectful, reinforcing, and reflective of national and international market-oriented political economy.[87] Developing countries are frequently suspicious of peace-building, regarding it as another manifestation of western interventionism and cultural imperialism. Opposition also stems from the view that peace-building will draw resources away from development efforts and marginalize the role of local societies in establishing a peace free from external interference by Western states, international organizations, and multinational corporations.

A third challenge facing peace-building efforts is the sheer magnitude of the task. Post-conflict societies often lack effective institutions of governance, have massive human security problems, and face enormous development challenges. In many cases, conflicts are frozen by external intervention and are prone to resumption if one or more parties believe military victory is possible. This problem is exacerbated if there is a fragmented political authority in the society, if there is social opposition to peace-building activities, or if there are significant social elements or local leaders with an economic or political stake in the continuation of conflicts.

A fourth challenge facing peace-building efforts is presented by the divergent interests and agendas of participating states. At a political level, peace-building missions are subject to UNSC approval and mandate renewal and are therefore vulnerable to bargaining and shifting political alignments among the members of the Council. This can lead to vague or unsuitable mandates, which provide

[86] Sens, A. (2004). 'From Peacekeeping to Peace-building: The United Nations and the Challenges of Intrastate War' in Price and Zacher, *supra* note 16, p. 147.
[87] See Alejandro, B. (2003). 'What Kind of Peace is Being Built? Critical Assessment from the South' in *What Kind of Peace is Being Built? Reflections on the State of Peace-building Ten Years After the Agenda for Peace*, Working Paper No. 7, The Peace-building and Reconstruction Program Initiative, Ottawa: International Development Research Center, p.5.

poor guidance for operational tasks, a problem that plagued UN missions in Somalia, the former Yugoslavia and Rwanda.

The fifth challenge is the nature of the UN system itself. Just as the case with peacekeeping, there is no clear institutional home for peace-building in the UN, and because the activities of peace-building cut across the mandates and activities of so many parts of the UN system, there is a pressing need for coordination among secretariat departments, UN agencies, and non-UN actors. The responsibilities for peace-building therefore remain scattered on such autonomous UN organisations as the UNHCR, UNICEF, and UNDP etc, over which the UN secretariat has little or no control.[88] Following recommendations from the *Brahimi Report*,[89] leading to a review of peace-building support offices in 2001, a Plan of Action on Peace-building was developed to establish general guidelines on ways to coordinate peace-building efforts more effectively within the UN system.

A sixth challenge facing the implementation of peace-building efforts is the fact that in many contingencies, the UN is not the only or even the primary external actor. The proliferation of NGOs and the increasing relevance of regional organizations and the international financial institutions exacerbate this challenge.

Summing up on the obstacles and practical limitations to peace-building, Allen Sens concludes that peace-building remains a work in progress, and although formidable obstacles must be overcome, it will endure as long as responses to intrastate conflicts demand the restoration of civil order and the prospects for a peaceful future.[90]

3.4 Evaluating the Effectiveness of the UN Approaches to Conflict Resolution

The United Nations was formed in 1945 with the mandate to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[91] The organization was thus structured by its designers to avoid the pitfalls that led to the demise of its predecessor, the League of Nations. Hence, under the UN Charter, the primary purpose of the United Nations is described:

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[88] Sens, *supra* note 86.

[89] Report of the Panel on United Nations Peace Operations, popularly called the *Brahimi Report*, UN Doc. A/55/305-S/2000/809, August 17,2000. Available at <http://*www.un.org/peace/reports/peace_operations* >, last visited, September 8, 2009.

[90] Sens, *supra* note 86, p. 153.

[91] Para 1 of Preamble to the UN Charter.

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[92]

By assessing its past performance, however, it is difficult to conclude that the UN is successfully meeting these expectations. Initially, the breakout of the Cold War made it virtually impossible for the UN to be effectively engaged in its core task of maintaining international peace and security. The end of the Cold War was therefore to have introduced an era of peace with an emphasis on a stronger multilateralism towards global security.[93] However, these expectations were soon found to have been misplaced. Despite a new thrust on multilateralism heralded by the United Nations, the organisation is often accused of being ineffective in settling conflicts, preventing genocide, and other crimes against humanity. The failure of the UN to prevent human suffering in both the relatively old cases of Somalia (1992 / 93), Bosnia (1992 / 93), Rwanda (1994), the Iraqi war on weapons of mass destruction (2003) as well as in those considered as recent events like the UN's delayed response to Darfur crisis, its impotence in South-Ossetia and its failure to stop the recent invasion of Israel into Gaza Palestine, have demonstrated the limits of the UN's ability to prevent and manage violent conflicts wherever they occur. Ineffective performance of the UN, especially in crisis prevention, has caused great frustration, contributing to the growing image of an impotent UN among its opponents. As David Kopel criticizes: "waiting for the United Nations to act is often just as futile as waiting for Godot, and hundreds of thousands or millions of people die while waiting"[94] Both in Rwanda and in Bosnia, the UN failed to prevent genocide from taking place. In each case there was plenty of warning of the forthcoming mass killings, but the UN mishandled both of them. Two reports examining these cases assume a high profile and could have a big impact on future policy-making in conflict prevention and conflict management within the UN.[95]

In the case of Rwanda, the inadequate resources and the major countries' absence of political will were the underlying causes of failure. The report sums up that the UN presence in Rwanda was not

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[92] Article 1 of the UN Charter.

[93] See O'Neill, J & Rees, N. (2005*), United Nations Peacekeeping in the Post-Cold War Era*, New York, Routledge, p. 1.

[94] Kopel, D, Gallant, Paul & Eisen, J. (2006). 'Is Resisting Genocide a Human Right?' *The Nortre Dame Law Review* vol. 81, No. 4, pp. 101-169 at p. 162.

[95] United Nations, *Report of the Independent Inquiry into United Nations actions during the 1994 Rwanda Genocide*, UN Doc. S/1999/1257,December 16, 1999 (hereinafter referred to as "the Rwanda Report"), and United Nations, *Report of the Secretary-General pursuant to General Assembly resolution 53/35*: The fall of Srebrenica (hereinafter referred to as "the Srebrenica Report"), UN Doc**.** A/54/549, November 15 1999.

planned, dimensioned, deployed or instructed in a way that provided for a proactive and assertive role in dealing with a peace process in serious trouble.[96] The mission lacked well-trained troops, functioning material and military capacity. The seriousness of strong political commitments was made worse by the unilateral withdrawal of the national contingents during crucial moments of the unfolding crisis.[97] In the case of Srebrenica, with the lack of commitments by outside powers to an effective resolution of the war in Bosnia, a consensus absent in the Council, lacking a strategy, and burdened by an unclear mandate, UNPROFOR was forced to chart its own course.[98]

It becomes clear that the peace implementers should be able to continually adjust mission mandates, rules of engagement, troop strength and military capacities of peace missions to changing realities on the ground. The Rwanda mandate changed in nature from Chapter VI to Chapter VII of the Charter at a stage of the conflict when it would still have been possible to stop the genocide. But UNAMIR II failed, in the final analysis, because of the unwillingness of UN member States to provide troops for it. Two months after the Security Council agreed to the mission, UNAMIR II still only had 550 troops instead of 5,500. In the case of Srebrenica, after the Security Council had established the safe areas, the force commander requested 34,000 troops, but finally had to settle for a light option with a minimal troop reinforcement of around 7,600 that was to be defended, if necessary, by NATO air strikes.[99]

In its recommendations, the Rwanda Report points prominently to the need to improve the early warning capacity. It argues that it is essential to improve the ability of the UN Secretariat to analyse and respond to information about possible conflicts, and its operational capability for preventive action. In this context, the report suggests that further enhancement of the cooperation between different Secretariat departments, agencies and outside actors, including regional and sub regional organizations, NGOs and the academic world, is essential.[100] The Report presented to the Millennium Summit of the General Assembly in September 2000 internalizes the lessons from

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[96] Rwanda Report, *Ibid*, p. 21.

[97] By its resolution 912 (1994) of 21 April 1994 the UNSC adjusted the mandate of UNAMIR, Expressing its deep concern also for the safety and security of UNAMIR and other United Nations personnel. Parallel to that, the UN cut its forces in the UNAMIR from 2,500 to 250 following murder of ten Belgian soldiers assigned to guard the moderate Hutu Prime Minister, Agathe Uwiliyingimana.

[98] Srebrenica Report, *supra* note 4, p. 17.

[99] United Nations Protection Force, UN Department of Public Information, September 1996, see <http://www.un.org/Depts/dpko>, last visited, September 8, 2009.

[100] Rwanda Report, supra note 90 p. 41.

Rwanda, Srebrenica and other conflicts where the UN has missed opportunities for conflict prevention and management.[101]

Furthermore, several problems currently exist related to the UN's preventive capacity. First, the Security Council is already overwhelmed by armed conflicts, and is largely unable to deal with potential new crises. As Peck points out, although both the UN Charter and the *1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field*,[102] urge the UN to become involved 'early in a dispute or situation' or 'at any stage of a dispute or situation,' the fact is that most disputes do not reach the Security Council's agenda until they have escalated into armed conflict.[103]

A second problem, common to all multilateral organizations, is that ultimately the decision for action rests with member states that act in accordance–or at least not contrary to their national interests. Security Council decisions to intervene are often more dependent upon the domestic imperatives of the dominant powers, particularly members of the permanent five, rather than on agreed upon normative criteria.[104] The unwillingness of these states to support action, whether directly or indirectly through authorization for regional organizations limits the ability of the UN and other actors to undertake collective action.

A third problem is that some of these weaknesses are natural and inevitable. In almost 64 years since the UN was formed, the nature and location of armed conflicts has changed. It is no longer wars of the type envisaged in the Charter that occupy the attention of diplomats and militaries; rather than wars between states, we are seeing more and more violent conflicts located within state borders. The UN was not set up to deal with the complexities and controversies associated with maintaining peace and security within the borders of nation states.[105]

Thus the UN Secretary General has noted that perhaps the most delicate kind of preventive diplomacy is that which seeks to bring about reconciliation between antagonistic political forces

[101]United Nations, Millennium Assembly's Challenge: Put Summit Commitments into Action, Says General Assembly President, as General Debate Concludes, UN Doc. UNIS/GA/1701 September 25, 2000.
[102] UN Doc. A/RES/43/51 of December 5, 1988.
[103] Peck, *supra* note 10, p.70.
[104] Weiss, G. (1996). 'Collective Spinelessness: UN Actions in the Federal Republic of Yugoslavia,' in Ullman, R. ((Ed.), *The World and Yugoslavia's Wars.* New York: Council on Foreign Relations, p. 62.
[105]One of the Principles of the UN as listed under Article 2 (3) requires Member states …to settle their international disputes by peaceful means… Reference to "International disputes" is, by necessary implication exclusion of non-international disputes, including civil wars. Refer also to Article 2 (7) of the UN Charter.

within a country, in the hope of preventing or resolving conflicts, which, if left to escalate, might in time become a direct threat to international peace and security.[106] Due to the prohibition on intervention in the internal affairs of sovereign states, any outside initiative to assist in the resolution of disputes between parties must be invited by the state party, and accepted by both parties.[107] This is often complicated by unwillingness on the part of the state to recognize opposition forces in a particular conflict.

3.5 Conclusion

The purpose of this chapter has been to examine the various approaches to conflict prevention, management and resolution; and to determine their effectiveness or otherwise, in preventing and resolving the currently prevailing intra-state conflicts like those in the DRC. The chapter examined the historical perspective of the concept of conflict prevention within the UN and various methods of conflict prevention and management. A wide range of dispute settlement options, both the UN Charter-based and non- Charter-based mechanisms were highlighted.

The evaluation of the effectiveness of these approaches reveals that both at the time of the Cold War and even thereafter, only a very limited part of their potential is used. The approaches to conflict resolution under the UN dispute settlement system were drastically curtailed by the all-consuming bipolar power-struggle, which developed between the East and the West; and the reign of terror, which was brought on by the production and proliferation of nuclear weapons. The UN's major organs with dispute settlement potential were all constrained in what was perfectly within the capacity and mandates.

Following the end of the Cold War, the UN began to utilize a wider range of alternative disputes settlement mechanisms and strategies not necessarily provided for under the UN Charter. Thus there is a significant increase in the use of peacemaking, peacekeeping, sanctions and peace-building. Preventive diplomacy however, continued to be largely neglected, despite the fact that it was more frequently mentioned as central to the UN dispute settlement system.

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[106] *Annual Report, 1998.* p.39.

[107] Vogt points out that sovereign authority over purely internal political and social situations is increasingly challenged: "The pressure for the review of the constraint in intervening by regional and international organizations in internal security situations will likely increase in importance and urgency as it is becoming apparent that internal conflicts will likely increase…" See Vogt, M 'Alternative Strategies for Conflict Resolution' in Vogt, M and Ekoko, E. (Eds.), (1992). *Nigeria in International Peacekeeping* 1960-1992. Lagos: Malthouse Press, Ltd., p. 320. Although at present this challenge is occurring primarily in the realm of Chapter VIII enforcement mechanisms, it seems more logical that non-forcible intervention would be more acceptable and in accordance with the provisions of the UN Charter than military action. This may ultimately require orienting the entire framework of peace-related activities in the international system towards the cultivation of democratic systems of governance, arms reduction, and sustainable development.

The discussion in this chapter indicates that even long after the end of the Cold War, institutional, practical and many other limitations continue to hamper the effectiveness of the UN as world's dispute settlement system as demonstrated by failure to prevent or resolve a number of ongoing intra-state conflicts. Indeed, success and failure of the UN in conflict resolution determine the different conflict resolution approaches to be adopted by the international community. The weakness in dealing effectively with conflict within the UN has created a loophole for lawlessness within the international community, with the current prevailing unilateralism, including the concept of coalitions of the willing which is slowly replacing the requirement that actions relating to international peace and security be done with authorization of the UN. Of course, my argument does not imply that the UN is completely inactive to resolve full-blown conflict or to ameliorate suffering of victims, but the fact that this is the least opportune moment for intervention means that there has been a major flaw in the system.

Various conflict resolution researches have come up with a number of proposals for the improvement of the UN conflict prevention and management systems.[108] Besides the emphasis on resort to less confrontational non-charter based mechanisms, some of the proposed changes involve the development of new mechanisms. In Figure 3 above, for instance, parts of the existing system which have a role to play in international and intra-state disputes are shown.

Some of the new mechanisms, which might be created to augment the system, are presented in Figure 4. The strengthening of a human rights approach to conflict prevention and management, which is indicative of figure 4 above, is discussed in details in Chapter 6 of this work. It should be noted however, that some of the proposals require sound financial basis and dramatic increase in the UN budget.

Throughout this discussion, it is also noted that the UN Charter-based conflict resolution methods were designed to deal with international conflicts and not internal armed conflicts situations. It might be opportune time to think of a new conflict resolution regime that takes into account the latter situation. In the mean time, resort to regional agencies or arrangements, and other peaceful means including a human rights approach to conflict resolution as discussed in subsequent chapters of this work, is ideal.

[108] One more strongly emphasized proposal relates to the establishment of UN Conflict Prevention and Resolution Centers. For a detailed discussion on this proposal, see Peck, *supra* note 10, pp. 150–163.

4 PEACEKEEPING OPERATIONS IN CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION: A FOCUS ON THE *MONUC*

4.1 Introduction

Peacekeeping has long been treated as an instrument of conflict management, and it has played a critical role in managing conflicts in Africa, Asia, Central America, and Europe.[1] Despite the dramatic increase in the number of peacekeeping operations deployed in efforts to resolve the outstanding conflicts around the world, the method is fundamentally flawed in that it usually fails to address the underlying causes of conflicts.[2]

This chapter analyses peacekeeping as one of the major conflict resolution methods applied in resolving the Africa's Great Lakes conflicts.[3] I will focus on its capacity as a tool for conflict resolution, paying particular attention to the dual goal of containing violence on the one hand and furthering peace-building efforts on the other. While it is recognize, of course, that peacekeeping

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[1] Since 1945, the UN has undertaken 61 field missions, participated in the implementation of 172 peaceful settlements that have ended regional conflicts, and enabled people in more than 45 countries to take part in free and fair elections. See also Thakur, R. and Schnabel, A. (Eds.). (2001). *United Nations Peacekeeping Operations: Ad hoc Missions, Permanent Engagement*, New York/Tokyo: The United Nations University, p. 3. Though with different approaches, p*eacekeeping* as an *ad hoc* method of managing various conflicts was applied long ago, (e.g. the United Nations Truce Supervision Organization (UNTSO) which has served in supervising the observe of the truce in Palestine since 1948; the United Nations Military Observer Group in India and Pakistan (UNMOGIP) which has been deployed in the border between India and Pakistan since 1949, when Kashmir became a battlefield after the independence of India and Pakistan from Britain in August 1947). The Security Council resolved on 20 January 1948 (Resolution 39) to establish a United Nations Commission on India and Pakistan (UNCIP), consisting of member states mainly for the purpose of mediating between the two parties. Seven new missions were established later, with four of them being observer missions. First was the United Nations Observer Group in Lebanon (UNOGIL, 1958). In response to complaint by Lebanon that the United Arab Republic was instigating a revolt in Lebanon, UNOGIL was established by the Security Council under Resolution 128 of 11 June 1958 with a mandate to ensure that there be no illegal infiltration of personnel or supply of arms or other material across the Lebanese borders. Although the concept of peacekeeping was not yet used then, this trend continued later with actual and more robust UN peacekeeping operations that followed, including the 1963 ONUC for Congo, the United Nations Yemen Observation Mission (UNYOM, 1963-64) which was established by Security Council Resolution 179 of 11 June 1963, its mandate being, in accordance with the disengagement agreement between the United Arab Republic, Saudi Arabia and Yemen, to verify Egyptian withdrawals and cessation of Saudi arms aid to the Royalists of Yemen, to the most current ones like the MONUC in the Democratic Republic of Congo.

[2] See the challenges leveled against peacekeeping and its failure as a conflict resolution method in the following works: Price, R. and Zacher, M. (Eds.) (2004). *United Nations and Global Security*, New York: Palgrave Macmillan, p. 147; Charters, A. (1994). *Peacekeeping and the Challenges of the Civil Conflict Resolution*, Frederiction: University of New Brunswick, Center for Conflict Resolution; Fortna, V. (2004). 'Does Peacekeeping Keep Peace? International Intervention and the Duration of Peace After Civil War'. *International Studies Quarterly*, vol. 48, No.2, pp. 269–292.; Wainhouse, D. (1973). *International Peacekeeping at the Crossroads*, Baltimore, Johns Hopkins University Press, p. 122; Bratt, D. (1996).'Assessing the Success of UN Peacekeeping Operations,' in *International Peacekeeping*, vol.3 No. 4, pp. 64-81, among others.

[3] Although in May 2004, the Security Council created the UN Operation in Burundi (ONUB) under Security Council Res. 1545, U.N. SCOR, 4975th, U.N. Doc. S/RES/1545 (2004); and in October 1993 by Security Council Res. 872/1993 it established the United Nations Assistance Mission for Rwanda (UNAMIR), peacekeeping mission as conflict resolution method, *per se*, has been used in the DRC through the United Nations Organization Mission in the Democratic Republic of Congo, *Mission de l' Organisation des Nations Unies en République démocratique du Congo*, (hereinafter to be referred to as "the MONUC").

has over the years been performed by various organizations,[4] this chapter will mainly centre on United Nations peacekeeping operations, reasoning that many of the aspects explored here are obviously relevant to the peacekeeping efforts of other organizations as well. Given the question of legitimacy that has quite often arisen, the legal status of UN peacekeeping forces is briefly discussed. In addition, the whole argument for and against the appropriateness, efficacy or otherwise of peacekeeping as a conflict prevention and management mechanism will be addressed.

The *Mission de l'Organisation des Nations Unies en République démocratique du Congo* (hereafter, MONUC) is treated as a case study. Its history will be traced from its development as the ONUC [5] to the current MONUC. The nature, organization, role, and mandates, as well as the successes and failures of the operation in resolving the Congo conflicts are analyzed. The chapter further addresses the core argument in the main study: namely, the human rights approach to conflict prevention, management and resolution. Thus, the chapter gives some insights into how UN missions of today[6] address human rights abuses by looking at the human rights components of UN peacekeeping operations generally and those of the MONUC in the DRC[7] in particular. However, strictly speaking, this chapter does not go into details of such human rights issues as gender or child soldiers, which are considered to be beyond the scope of the chapter. Rather, a synopsis of some of the most salient short- to medium-term human rights challenges, especially those outlined in the United Nations Security Council (UNSC) resolution 1493 (2003) mandate in the areas of impunity and the rule of law, is given. The chapter then concludes with an examination of the challenges and limitations that attend to peacekeeping as a method of conflict prevention and management. As a response to these challenges, regional peacekeeping operations (in this case, those operating under the AU Peace and Security Council) are highly recommended.

This chapter basically seeks to answer the question whether peacekeeping is a suitable instrument or approach to conflict resolution and management. A related question to be answered is when does

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[4] Hawks and Doves. (2004). 'Peacekeeping and Conflict Resolution', *Berghof Research Centre for Constructive Conflict Management*-Edited Version, August 2004.

[5] Initialled from the French words '*Opération des Nations Unies au Congo.'*

[6]See Major General Patrick C. Cammaert, 'UN Peacekeeping and Human Rights Abuse,' Lecture held at the occasion of the presentation of the Max van der Stoel Human Rights Award 2006, Tilburg University, 14 December 2006. (On file with the author). Major General Patrick is General Officer Commanding the Eastern Division of MONUC.

[7] In order to avoid any confusion with the other Congo, we use "the DRC" here to refer to Congo-Kinshasa as opposed to Congo-Brazzaville. The DRC was formerly called the Congo Free State under King Leopold II (1885-1908) and called the Belgian Congo under the Belgian colonial administration (1908-1960). It was later known also as Zaire (from 1972 to 1997), and finally renamed the Democratic Republic of Congo by Laurent Kibila when he overthrew Mobutu Seseseko who misruled the country for 32 years.

peacekeeping work and when does it not? The purpose of such an inquiry is to help develop a list of factors that enhance the effectiveness of UN peacekeeping operations, and also a list of factors that, based on lessons learned, are not conducive to effective peacekeeping operations. The answers are sought through an analysis of UN peacekeeping operations in the DRC. The MONUC's role in tackling the Congo conflict is assessed. Inevitably, lessons learned from the ONUC, one of the UN's earliest and largest peacekeeping operations in the Congo are used in assessing the current and future prospects of the MONUC. It must be stated at the outset, however, that by looking at the various UN peacekeeping case studies, success or failure of a particular peacekeeping mission is not an appropriate factor to be used in judging whether peacekeeping is, or is not, an effective conflict resolution approach.

After all, as pointed out by Williams Durch,[8] success and failure in peacekeeping are not readily definable in black and white terms. For instance, is a mission that keeps key protagonists apart for ten years, but whose departure is immediately followed by a new outbreak of war a success for what it sustained for ten years or a failure for what happened afterward? Or, is a mission whose continuous presence in a conflict area paralyses local state functions by creating indefinite dependency on its presence a success or failure? It is by looking at the present peacekeeping operations that such questions can be addressed.

4.2 Defining Peacekeeping

Despite the lack of a universally agreed-upon definition, peacekeeping as it is usually understood rests on certain principles which derive from those previously listed by the former United Nations Secretary-General Dag Hammarskjold in regard to UNEF I.[9] They include consent of the parties to the dispute for the establishment of the mission; non-use of force except in self defence; voluntary contributions of the contingents from small, neutral countries to participate in the force; impartiality and non-intervention; and day-to-day control of peacekeeping operations by the Secretary-General.

Peacekeeping refers to the deployment of a United Nations presence in the field, *hitherto* with the consent of all the parties concerned,[10] normally involving United Nations military and/or police

[8] Durch, W. (Ed), (1993), *The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis,* New York: St. Martin's Press, p.12.

9 The United Nations Emergency Force I; This was the first armed UN mission explicitly labeled "peacekeeping" and it was dispatched to the Sinai Peninsula in response to the 1956 Suez Crisis to observe the cease-fire and withdrawal of the British, French and Israeli forces from Egyptian territory.

[10] Peacekeeping operations are undertaken under Chapter VI of the UN Charter although in most cases also Chapter VII authorization is added. See for instance the 1993 UNOSOM II in Somalia, the 1999-2005 UNAMSIL in Sierra Leone, the 1999 MONUC in the DRC, the 2003 UNMIL in Liberia, etc. But on the issue of consent, see the Darfu Conflict where the Sudanese Government initially refused peacekeeping forces deployment in their country. Finally, with concerted negotiation efforts, a hybrid UN-AU peacekeeping force has now been deployed in Darfur since May 2007.

personnel and frequently civilians as well.[11] It has been referred to elsewhere as "preventive deployment,"[12] and is meant to be a technique that expands the possibilities for both the prevention of conflict and the making of peace.[13] This definition shows the flexibility of "peacekeeping as a concept that can even be described as ambiguous. The word "hitherto" implies the possibility that the condition of obtaining the consent of all the parties may be dispensed with.[14] The definition proposed by the *Peacekeepers Handbook* compiled by the International Peace Academy has been used by the UN for many years. It defines peacekeeping as,"…the prevention, containment, moderation and termination of hostilities between or within states, through the medium of a peaceful third party intervention organized and directed internationally, using multi-national forces, police and civilians to restore and maintain peace."[15] The question of consent, the difficulties in obtaining it and consequences of deployment of peacekeeping without the consent of all parties to a dispute needs more treatment in the subsequent sections of this chapter.

Although the evolution and historical developments of UN peacekeeping operations date way back to the *nascent period*,[16] there had been no consensus on a particular definitional context or on the principles of peacekeeping. In general, the definitions provided in textbooks and elsewhere are so vague that it is best to understand the nature of any single mission by examining its mandate and how it sets about achieving the mission. According to the *Handbook on UN Multidimensional Peacekeeping Operations*,[17] depending on its mandate and with a significant civilian component, a multidimensional peacekeeping operation[18] may be required to:

- Assist in implementing a comprehensive peace agreement

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[11] See proposals for reforms under Report of the Panel on United Nations Peace Operations, popularly called the *Brahimi Report*, UN Doc. A/55/305-S/2000/809, August 17,2000, found in (2000) 39 ILM 1432, also Available at <http://*www.un.org/peace/reports/peace_operations* > last visited September 8, 2009.

[12] Preventive deployment consists of dispatching non-armed and impartial support personnel into a zone of crisis in order to enhance the vitality of diplomatic processes. For more on this description, see generally Levitt, J. (*2001)* 'Conflict Prevention, Management, and Resolution: Africa -Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Cases of the OAU, ECOWAS, SADC, and IGAD', *Duke Journal of Comparative and International Law. Vol.11, No. 39, p.5-34.* See further Katayanagi, M. (2002). *Human Rights Functions of United Nations Peacekeeping Operations*, The Hague: Martinus Nijhoff Publishers, p.20.

[13] *See* Report of the UN Secretary-General (Boutros Boutros-Ghali), No. A/47/277 - S/24111, *An Agenda for Peace: Preventive diplomacy, Peacemaking and Peacekeeping*, New York: United Nations, 1992, para.47.

[14] Katayanagi, *supra* note 12, p.49.

[15] International Peace Academy (1984). *Peacekeepers' Handbook*, New York: Pergamon Press, p.31.

[16] The period between 1946 to 1956 when several observer Missions and Commissions, such as the UNTSO and the UNMOGIP were set up. According to some scholars, the history of peacekeeping is divided further into an *Assertive period* (1956-67); a *Dormant Period* (1967-73); a *Resurgent Period* (1973-78); and a *Maintenance Period* (1978-85). See further descriptions of these periods in Katayanagi, *supra* note 12, p.37.

[17] United Nations Peacekeeping Best Practices Unit. (2003). *Handbook on United Nations Multidimensional Peacekeeping Operations*. New York: United Nations, p.1-2

[18] Also referred to as "peace operations."

- Monitor a cease-fire or cessation of hostilities to allow space for political negotiations and a peaceful settlement of disputes
- Provide a secure environment encouraging a return to normal life
- Prevent an outbreak or spill over of conflict across borders
- Lead territories or states through a transition to stable government based on the democratic principles, good governance and economic development and
- Administer a territory for a transition period, thereby carrying out all functions that are the normal responsibility of government.[19]

The proliferation of peacekeeping at the end of the Cold War brought with it a generational approach to the definition of peacekeeping operations. This approach does not give a correct account of peacekeeping operations since features of one generation may overlap with those of the other; however, to avoid confusion and keep in perspective the complexity of its evolution, it has been common to analyze the theories of peacekeeping by using divisions into three generations. The first generation is characterized as a situation where a political organ of the UN deploys a military force between two or more armies, with their consent, pending and in the absence of a particular political settlement. The second generation, or "new peacekeeping" are best defined as UN operations authorized by political organs or the Secretary-General, responsible for overseeing or executing the political solution of an interstate or internal conflict, with the consent of the parties. Third-generation peacekeeping operations[20] are those deployed with the expectation that they will employ more coercive measures beyond self-defence, linking the type of peacekeeping with peace enforcement measures envisaged under Chapter VII of the UN Charter.

As one can see from this "generational shift" from classical peacekeeping operations originally conducted during the Cold War, contemporary peace operations are increasingly complex. According to the Pearson Peacekeeping Centre in Canada, they are:

- deployed into both inter-state and intra-state conflicts;
- conducted in every phase of the conflict spectrum, from prevention through to post-war reconstruction;
- dependent on close cooperation among civilian, police and the military organizations from the international community , with parties to the conflict and war affected populations;

[19] United Nations, *supra* note 17.
[20] Katayanagi, *supra* note 12.

- opening in new areas of international activity with conflict-affected countries such as reforms to the security sector.[21]

Because of the paradigm shift, "peace support operations" (PSO)[22] is now an umbrella term used to cover a multiplicity of UN field activities in support of peace, ranging from essentially preventive deployments to long-term state-building missions. They include conflict prevention, conflict mitigation, peacemaking, peacekeeping, peace enforcement and post-conflict peace building.[23]

The position of peacekeeping in a framework of Multifunctional Peace Support Operations and war is illustrated below (Figure 5). For a peace enforcement force, which finds on deployment that it is able to lower its operational profile to one more akin to peacekeeping, the consent divide is of little immediate significance. For a peace enforcement force with robust rules of engagement (ROE),[24] the transition to a peacekeeping profile or the exercise of coercion can be left to the judgment of the Joint Force Commander (JFC).

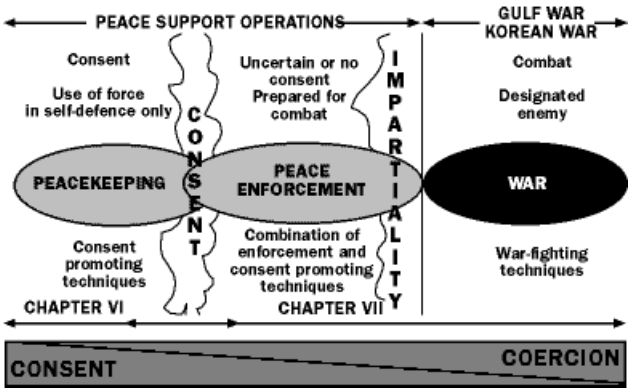

Figure 5 - Framework of peace support operations[25]

[21] Pearson Peacekeeping Centre, Canada, available at <http://www.peaceoperations.org/en/peace_operations.asp.> last visited, September 8, 2009.

[22] The term is used widely to describe activities in complex humanitarian emergencies. When used in relation to military activities, it refers to multifunctional operations in which impartial military activities are designated to create a secure environment and facilitate the efforts of the civilian elements of the mission to create a self sustaining peace. See further definitions in *Peace Support Operations: A Working Draft Manual for African Military Practitioners*, DWM 1-2000 (February 2000), available at <http//www.iss.co.za/Pubs/Other/PeaceSupportManualMM,> produced as a result of a workshop held at the SADC Regional Peacekeeping Training Centre in Harare, Zimbabwe, 24-26 August 1999; last visited, September 8, 2009.

[23] Murphy, Ray. (2007). *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice*, Cambridge: Cambridge University Press, p. 1.

[24] The ROEs are instructions of when and how to use force-the Bible/Koran of the military components of peacekeeping operations.

[25] See *supra* note, 22 above.

There is currently a great deal of semantic and conceptual confusion surrounding peacekeeping and peace enforcement. For this reason, Figure 6 below tries to clarify the distinction between the two operations on the basis of consent and capability of each operation.

The horizontal dotted line indicates a minimum level of consent necessary for the conduct of peacekeeping—'you cannot keep peace unless there is a peace to keep'—and the vertical dotted line indicates the minimum force level, in comparison with any potential opposition, below which peace enforcement is not feasible—'you cannot fight wars from white-painted vehicles'. In the top left quadrant, consent is high, thus a force can successfully conduct a peacekeeping operation with low combat capability. This is traditional, classic peacekeeping, e.g. UNFICYP.[26] In the top right quadrant, consent may appear high, but is assessed as uncertain or fragile and there is an expectation that it might be withdrawn. In such circumstances, the judicious option is to deploy, prepare for peace enforcement, with the expectation that the deployment of such a force will deter hostile acts and ensure compliance from the outset. However, the deployment of a peace enforcement force may not always be the most prudent option. If, for example, all the parties perceive themselves to be responsible and trustworthy partners in any peace process, the deployment of a peace enforcement force may be regarded as indicating a lack of trust and thus prove counterproductive. In the bottom right quadrant, the anticipation is that the PSO will be opposed and that the use of force will be necessary to ensure compliance with the mandate. In the bottom left quadrant, consent for the operation is below the critical level necessary to conduct peacekeeping, yet the force does not have the combat capability necessary to enforce compliance against opposition. A peacekeeping force deployed in this quadrant will eventually lose credibility and the operation may become untenable. This quadrant should be avoided.

While decisions concerning the PSO posture are stark, as indicated by the choice of quadrant, the multidimensional nature of PSOs requires that commanders are allowed maximum flexibility to develop the operation towards the attainment of military objectives and the political endstate. PSOs concern the management of change and transition and co-ordination with a great number of civilian elements. The arrow marked 'strategic direction' indicates the direction that a PSO should aim to progress as compliance is enforced and built into consent and the PSF is able to switch its efforts to support civil development and the peace-building process.

[26] United Nations Force in Cyprus.

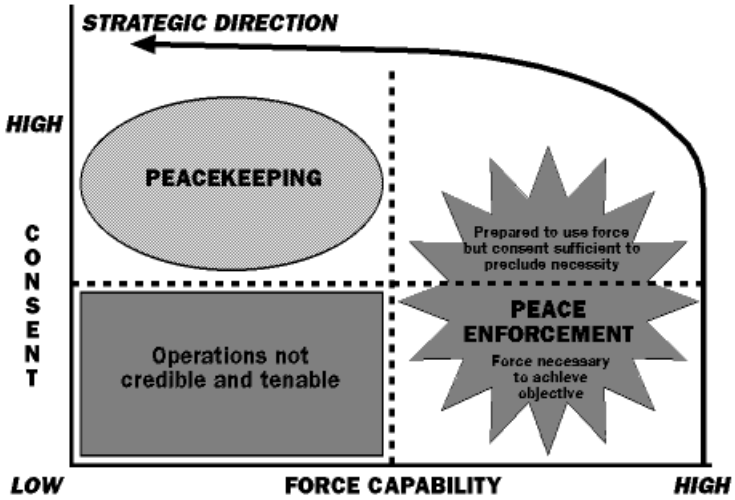

Figure 6 - The relationship between consent and capability
(Adopted, *mutatis mutandis*, from Hayes: 2001)

4.3 The Legal Status of UN Peacekeeping Operations

The concept of "peacekeeping operations" has generated a number of questions under international law within and outside the United Nations. In the first place, the legal basis for the establishment of UN peacekeeping operations has remained a debatable issue for quite some time now. The main question has been, "under which article of the UN Charter can peacekeeping operations be established and implemented?" Although Chapters VI and VII of the Charter provide for pacific settlement measures and actions which may be taken with respect to threats to the peace or breaches of the peace or acts of aggression, the deployment of peacekeeping is not expressly provided for anywhere within the UN Charter.[27] Arguably, however, certain operations may be linked to pacific settlement measures, thus invoking Article 36(1) of the UN Charter,[28] whereas, supervision of cease-fires or the withdrawal of troops may fall under the provisional measures in accordance with Article 40[29] or even measures under Article 41.[30] Despite this possibility, these provisions hardly

[27] The UN Charter does not make any express provision for peace keeping, and the precise legal basis of the concept remains unclear to date. See further Nowak, M (2003), *Introduction to the International Human Rights Regime*, London: Martinus Nijhoff Publishers, p.319.

[28] Article 36(1) provides: "The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment."

[29] The relevant provision states:

> "In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be

provide for an obvious legal basis of UN peacekeeping operations within the Charter. While it may be argued that agreement on the basic principles would lessen the opportunity for conflicting interpretations of the Charter and the divisive controversies, there is merit in maintaining a flexible and adaptive approach to peacekeeping operations. Indeed, the lack of express mention of peacekeeping in the Charter has not inhibited its development. In fact, this may have helped establish peacekeeping as a flexible response to international crisis, while at the same time contributing to a misunderstanding of its true nature.[31] Given this lack of clear legal origin, traditional peacekeeping operations were sometimes said to be based on 'Chapter VI½' and required, in principle, invitation or consent on behalf of the recipient state.[32]

It may be safely argued therefore, that the concept developed over time,[33] as an invention of the United Nations through practice.[34] The concept gained momentum during the time of the Cold War as a partial reaction to the natural demise of the collective security concept envisioned by Article 43, which reminds us of the sweeping ambitions of the founding of the Charter of the United Nations.[35] The consequence of such failure, which is attributable to lack of unanimity resulting from the then sharp divide between the Western and Eastern blocs during the cold war era,[36] meant also serious inability of the UNSC to develop preventive diplomacy,[37] response to breaches of the peace, threats to the peace and acts of aggression. As a result, and in the absence of such collective

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without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures."

[30] Article 41 of the Charter states:
"The Security Council may decide what 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."

[31] See Murphy (2007), *supra* note 23, p. 5.

[32] *Ibid*, p.7.

[33] Armed military peacekeeping mission was utilized for the first time in the Sinai Conflict between Israel and Egypt in 1956, with the deployment by the United Nation General Assembly, of the United Nations Emergency Force (UNEF I, 1956-1967). UNEF II was deployed six years later following the October 1973 war and it remained in place until Israel and Egypt signed their historic Peace Treaty in 1979. The two operations are what most refer to as "classical peacekeeping force". Subsequently though, the United Nations undertook dozens of such missions with varying scope, duration, and degree of success, most of them involving conflicts whose origins can be traced to the end of colonial empires in various parts of the world. See also Durch, *supra* note 8, p.1.

[34] Gray, C "The Use of Force and the International Legal Order" in Evans, M. (Ed.) (2003), *International Law*, New York: Oxford University Press, p.610.

[35] The said Article 43 provides for member states to make available "armed forces, assistance and facilities …for the purpose of maintaining international peace and security"

[36] During the cold war, global collective security under the United Nations was impossible due to the use of veto from either of the parties, in a world divided into hostile blocs, USSR being on the one part and the US on the other with allied states in each side.

[37] See Peck, C. (1996), *The United Nation as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflicts*, Kluwer Law International, The Hague, p. iii.

security measures, "peacekeeping" was invented.[38] The subsequent discussions on the contemporary roles and mandates of the UN peacekeeping missions will bear witness to this assertion.[39]

In the absence of a clear legal basis through the Charter and bearing in mind that there is no single procedure for establishing peacekeeping operations, another question that arises is whose responsibility it is to create peacekeeping forces—the UNSC or the United Nations General Assembly (UNGA) as the two principal organs of the UN? The ICJ addressed this question in the *Certain Expenses Advisory Opinion Case*.[40] The case was referred to the "World Court" in accordance to the UNGA resolution asking for an advisory opinion concerning the issue: whether certain expenditures authorized by the UNGA constituted expenses of the Organization within the meaning of Article 17(2) of the UN Charter.[41] The expenditures in question were for UNEF and ONUC. The ICJ held that, although the primary responsibility of the maintenance of international peace and security lies with the UNSC,[42] it was open to the UNGA to recommend peacekeeping, but not to decide on enforcement action, which remains an exclusive province of the UNSC.[43] However, there is currently no practical and clear distinction between peacekeeping and Chapter VII enforcement action since the UNSC and not the UNGA exercises the main responsibility for peacekeeping. Furthermore, the distinction is blurred when one takes into account the actual role currently played by the deployed missions on the ground. From the first major UN peacekeeping force, the UNEF I,[44] to the present day forces, their role and mandate have expanded tremendously.[45]

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[38] The General Assembly took an alternative role under the *Uniting for Peace Resolution* to make recommendations to member states on the use of force. See also UNGA Res. 377 (v), (3 November 1950)

[39] Riggs, R and Plano, J. (1988) *The United Nations: International Organisation and World Politics*, Brooks/Cole Publishing Co. California, p.128.

[40] *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports 1962, p.151

[41] The UNGA resolution 1731(XVI), 20 December 1961. Article 17(2) reads:

> "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."

[42] See for instance Article 24 of UN Charter

[43] See Gray, *supra* note 34,p.611. See further discussions on the doctrine of inherent powers of the UN and its organs in the Decision of the ICJ in two cases: *The Reparation for Injuries Suffered in the Services of the United Nations*, ICJ Rep.1949, p. 174 at 182; and *Legal Consequences for the States of the Continued Presence of South Africa in Namibia*, ICJ Rep.1971, p.50.

[44] See Durch, *supra* note 8.

[45] See further discussion on the issue in Slim, H. (1995), 'Military Humanitarianism and the New Peacekeeping: An Agenda for Peace?' *Institute of Development Studies Bulletin*, Vol. 27, No. 3, pp.64-72

It is acknowledged that each peacekeeping operation is ordinarily deployed with specified roles and mandates as may be spelt out under the UNSC resolution deploying the particular mission.[46] Nonetheless, the traditional roles of peacekeeping missions involved, in ascending order of complexity and intrusiveness: uncovering the facts of the conflict, monitoring of border or buffer zones after armistice agreements have been signed, verification of agreed-upon force disengagements or withdrawals, supervision of the disarming and demobilizing of local forces, maintaining the security conditions essential to the conduct of elections, and even the temporary, or transitional administration of countries.[47]

Principles governing peacekeeping operations are distinct from enforcement actions under Chapter VII in that they are, (at least traditionally), to be impartial, lightly armed, not to use force except in self-defence, and they are to operate with the consent of the host state.[48] Although, as it can be noted, the function of peacekeeping forces is not to settle disputes but to curb disorder and prevent the spread of violent conflicts, ideally, the return of peace and stability will permit a negotiated settlement of political differences. Thus, it becomes one tool in the toolbox for conflict resolution, though the Charter separates its prescriptions for pacific settlement of disputes from enforcement actions.[49] However, new developments have often created a situation where peacekeeping engaged more in the range of activities which are much more assertive and interventionist in nature than they might have been in the past.[50] The new peacekeeping missions are shown to be much more militarily and politically active with operations ranging from war-fighting to being the political midwife to the birth of new democratic governments.[51]

In matters of principle, peacekeeping operations frequently struggle to maintain or even deliberately overstep the three key principles of consent, impartiality and minimum force. The consent of the host state to the presence of a peacekeeping force is said to confer the legitimacy required for a lawful presence in its territory against the state's sovereignty and domestic jurisdiction principles. However, the issue of consent has raised difficult questions in the mainly intra-state civil wars of today's humanitarian emergencies, where the consent of all parties concerned to UN operations has

[46] See for instance the UNSC resolution No. 143(1960) on the ONUC, resolution 749(1992) on UNPROFOR in Yugoslavia, resoution 946 (1994) on UNOSOM II in Somalia, resolution 1706 (2006) UNMIS in Darfur, resolution (S/RES/1325) (2000) on UNFPA, for Women, Peace and Security, etc
[47] Durch, *supra* note 8. See also Holst, J. 'Enhancing Peacekeeping operations' *Survival* (May-June 1990): 265-266
[48] See Gray, *supra* note 34, p.612
[49] See Riggs and Plano, *supra* note 39, p.135
[50] See for instance UNOSOM II whose mandate included "to prevent any resumption of violence, and if necessary, take appropriate action against any faction that violates or threatens to violate the cessation of hostility"
[51] Such examples could be seen in the cases of Somalia, Mozambique and Cambodia

been extremely difficult to achieve and maintain.[52] Likewise, with judgements about UN impartiality being so much a matter of the perception and vested interest of the different parties concerned, most UN peacekeeping actions are perceived as at best ambiguous and at worst as downright partisan in wars which are still "live".[53]

The former UN Secretary General, Kofi Annan, attempted to revitalize UN peacekeeping operations when, in 1999, he convened an independent panel to assess the shortcomings of the existing system and to make frank, specific and realistic recommendations for change. In 2000, 'The Panel on UN Peace Operations' gave its recommendations on politics, strategy, and operational and organisational issues in a report popularly known as the *Brahimi Report*.[54] In its over fifty recommendations the report is designed to remedy a serious problem in strategic direction, decision-making, rapid deployment, operational planning and support, and the use of modern information technology within UN peace operations. It thus calls for more effective conflict prevention strategies, pointing out that prevention is necessary for those who would otherwise suffer the consequences of war. It is reiterated that prevention is a less costly option for the international community than military action, emergency humanitarian relief, or reconstruction after a war has run its course. Specifically on peacekeeping, the Brahimi report maintains that peacekeepers must be able to carry out their mandates professionally and successfully and be capable of defending themselves. They must also have, 'robust rules of engagement,' against those who renege on their commitments to a peace accord or otherwise seek to undermine it by violence.[55] Overall, the report also warns that force alone cannot create peace; it can only create the space in which peace may be built.[56]

More crucial, is the discussion of the legal status and safety of peacekeeping troops. Peacekeepers operating under Chapter VI of the UN Charter are normally protected by Article 104 and 105 of the UN Charter, giving them a status comparable with the diplomatic immunity of the United Nations officials.[57] In December 1994 the UNGA passed the 'UN Convention on the Safety of UN

[52] In complex conflict situations, (such as those in the, the DRC, Somalia and Darfur), the opposing parties, for different interests, may have conflicting views as far as the deployment of UN Peacekeeping forces is concerned. At one time or another, every political faction in the Congo was hostile to the UN presence in the country. See also Durch, *supra* note, 8, p. 333
[53] See Slim, *supra* note 45.
[54] *Brahimi Report*, *supra* note 11
[55] *Ibid.*
[56] *Ibid*, para 55.
[57] Article 104 "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." See also Article 105

personnel'[58] in order to strengthen the position and protection of UN peacekeepers.[59] Under this Convention and other existing law, a UN peacekeeping force is considered a subsidiary organ of the UN, established pursuant to a resolution of the Security Council or General Assembly. However, the Convention does not apply to the UN troops operating as combatants in enforcement action under Chapter VII of the UN Charter, whose operations are thus governed by international humanitarian law.[60] Furthermore, the legal status of peacekeeping forces is normally established in concrete terms through a legal instrument known as the Status of Forces Agreement (SOFA).[61]

Individual forces possess their own distinct characteristics depending on the peculiarity of the mission. However, in a nutshell, the legal framework of UN peacekeeping forces is usually made up of the following:

- The resolution of the UN Security Council or General Assembly authorizing the deployment of a peacekeeping force,
- The SOFA or the Status of Mission Agreement (SOMA) between the UN and the host state,
- The agreement through exchange of letters between each participating state and the UN and,
- The regulations for the force issued by the Secretary-General.[62]

The need for a clear legal basis upon which the force relies is advisable given the difficulties that can be encountered in the field. Whereas the mandate establishing a force defines its purpose, a SOFA provides the more detailed principles under which the force functions and specifies its relationship with the host government and parties to the conflict. The obvious difficulties in

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1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. (…)

[58] Convention on the Safety of United Nations and Associated Personnel, New York, December 1994,United Nations, *Treaty Series, vol*. 2051, p. 363 (hereinafter referred to as "the Safety Convention"). On a detailed discussion on the protection afforded by the convention to members of peacekeeping operations, see further Månsson, K. (2008). 'Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International Law' in *Nordic Journal of International Law*, Vol. 77, Nos. 1-2, pp. 175-179.

[59] The General Assembly:
(…) urges States to take all appropriate measures to ensure the safety and security of United Nations and Associated personnel within their territory (…).

[60] Wolfgang B & Martin V. (Eds.) (1998). *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia-Peacekeepers' Views on the Limits and Possibilities of the United Nations in a Civil War-Like Conflict*, Aldershot UK: Ashgate, p.19; See also Article 2 of the UN Convention on the Safety of UN personnel which states:(…)
"This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

[61] SOFAs are International Agreements developed for the express purpose of defining the legal rights and responsibilities of military forces stationed on foreign soils.

[62] Murphy (2007), *supra* note 23, p.108. See further Murphy, R. (2004). 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?,' in *Criminal Law Forum*, vol. 14, No. 2, pp. 127-224..

relation to SOFAs, just as in the requirement of consent, arise in situations where an effective government with which to negotiate does not exist. This was the case in relation to UNOSOM in Somalia, where all semblance of normality had disintegrated. In these circumstances, even if agreed to, the SOFA would be worthless on the ground.

There are two more quite different but related legal questions that are generated by the concept of peacekeeping, that need to be mentioned here: namely; the applicability of IHL law in the context of peacekeeping forces as well as the accountability of members of the force. The first issue is easier to address than the second. In recent years, a consensus has emerged that IHL applies in any armed conflict or occupation, even those arising or occurring in the context of peacekeeping operations deployed under the auspices of the United Nations.[63] Any remaining doubts were resolved in August 1999, when the UN Secretary-General promulgated a code of "Principles and Rules of International Humanitarian law applicable to the United Nations forces conducting operations under United Nations command and control."[64] The code essentially sets forth, in summary fashion, the main provisions of IHL and holds that they are applicable to the United Nations forces situations of armed conflict; they are actively engaged therein as combatants, to the extent and for the duration of their engagement.[65] It further provides that IHL provisions are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence .[66]

This acknowledgement that the UN peacekeepers may become combatants under the rules of IHL is also reflected in the Statute of the International Criminal Court. Attacks against peacekeepers constitute crimes under the ICC Statute—but only in situations where the peacekeepers are entitled

[63] See Cerone, J. 'Holding Military and Paramilitary Forces Accountable' in Mertus, J & Helsing, J. (2006). *Human Rights and Conflict: Exploring the Links Between Rights, Law and Peacebuilding*, Washington DC: United States Institute of Peace Press, p. 217.

[64] "Observance by the United Nations Forces of International Humanitarian Law," ST/SGB/1999/13, August 6, 1999. As the scope of the code is limited to regulating the conduct of UN forces under UN command and control, it would be inapplicable to peacekeeping forces under the command and control of regional organizations, such NATO, even in situations where such forces are deployed under the UN auspices. For example under Resolution 1244, the UNSC authorized Member States and relevant international organizations to establish KFOR, the NATO-led peacekeeping force in Kosovo. Although KFOR was mandated to coordinate closely with the work of the UN Interim Administration Mission in Kosovo, it remained under NATO command and control.

[65] Ibid, at Section 1.1.

[66] Ibid. See also Article 2 of the Safety Convention, which, while requiring states parties to criminalize attacks against peacekeepers, also stipulates that the Convention "shall not apply to a United Nations operation authorized by the UNSC as an enforcement action under Chapter VII of the UN Charter in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

to the protection given to the civilians or civilian objects under the international law of armed conflict,[67] clearly implying that there would be times when they would be so entitled.

On the second issue, that of accountability, given the complex configuration of most peacekeeping missions, an IHL violation committed by a peacekeeper could possibly entail the responsibility of a number of entities: the peacekeepers' sending or seconding state, the territorial state,[68] the United Nations, the regional intergovernmental organization (if any) deploying the mission or peacekeeping force, member states or the intergovernmental organisations under the auspices of which the peacekeeping mission was deployed, and, finally, the mission or peacekeeping force itself (to the extent it may be deemed to have limited international legal personality as a subsidiary body of an intergovernmental organization). In addition, as noted above, certain violations will entail individual criminal responsibility of the perpetrator.

In order to ascertain which of these legal subjects may be held to account, it must be determined whether the particular subject is bound by IHL and whether that subject may be held responsible for the act committed by the individual peacekeeper. Each determination requires a complex analysis involving such considerations as the scope of each entity's international legal personality, whether such personality extends into the field of IHL,[69] and whether the conduct of the perpetrator may be attributed to the entity under the relevant rules of international law governing responsibility for the commission of internationally wrongful acts.[70]

4.4 The Effectiveness of Peacekeeping Operations in Conflict Management

Another important question insofar as the concept of peacekeeping is concerned, is one of merits. Does peacekeeping keep peace? In other words, do international interventions to help maintain peace in the aftermath of civil wars actually produce durable peace? The essence of the question is whether peace lasts, not whether it was achieved in the first place. It is not meant to compare wars in which peacekeepers were deployed during the fighting (such as Somalia) to other wars to see if the presence of peacekeepers establishes cease-fires (that is, whether they <u>make</u> peace) but rather, whether they <u>keep</u> peace.

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[67] See Article 8 (2) (b) (iii) of the *Rome Statute of the International Criminal Court*, 1998, 2187 UNTS. 90; 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter "the Rome Statute"]

[68] I.e. the state within which the violation occurs.

[69] For example, even following the promulgation of the IHL Code by the UN Secretary-General, it remains unclear whether the UN itself is bound by IHL.

[70] See part 1, chapter 2 of the International Law Commission Draft Articles on States Responsibility (2001).

Since the end the cold war, the international community and the UN have moved beyond "traditional peacekeeping" between states and have become much more involved in internal armed conflicts (civil wars), monitoring and often even managing or administering various aspects of transition to peace within states.[71] Michael O'Connor suggests that especially in the case of internal conflicts, traditional peacekeeping should be abandoned in favour of peace enforcement where the military component acts as a law enforcement constabulary under a dominant and impartial political authority, rather than as a force interposed between warring factions and monitoring unstable peace agreements.[72] The clashes that such a suggestion and similar ones bring with old principles of the United Nations will be discussed later in this chapter.

Suffice it to say here that many of the discussions on the subject reveal lack of enough knowledge on whether peacekeeping really works. On the one hand, opponents of peacekeeping often point to dramatic failures that dominate news coverage of peacekeeping as judgements of their failures without acknowledging the success stories that make less exciting news. On the other hand, proponents are also guilty of selection bias. The vast literature on peacekeeping compares cases and missions, but generally examines only cases in which the international community intervenes, not cases in which belligerents are left to their own devices. Surprisingly, very little work has been done to examine empirically whether peace is more likely to last in cases where peacekeepers are present than when they are absent.[73] Case studies of peacekeeping effects in particular missions either do not address this issue or rarely, usually implicitly, do so on counterfactual assessments.
Thus, the few studies that addressed this empirical question, at least in passing, come to contradictory conclusions from which it is not at all clear whether peacekeeping works. A closer look at both the UN Peacekeeping operations in the Congo and peacekeeping under the African regional context may shed light to these contradicting views.

4.5 UN Peace Keeping Operations in Congo: The ONUC and the MONUC

This section is partly based on interviews and questionnaire investigation of the participants in UN peacekeeping in Congo (MONUC) and the local population in the DRC. Some of the data were gathered through field research conducted in June 2007 in eastern DRC at three MONUC camps, including the headquarters of the force. Members of the local population in the eastern DRC also

[71] Fortna, *supra* note 2, p. 292.
[72] O'Connor, M. (2001). 'Policing the Peace' in Thakur, R and Schnabel, *supra* note 1, p. 58.
[73] For a good example of comparative work on peacekeeping success and failures that take peacekeeping as a universe of cases, see Howard, L. (2001). 'Learning to Keep the Peace? United Nations Multidimensional Peacekeeping in Civil Wars'. Unpublished PhD.diss., Political Science, University of California, Berkeley. (On file with the Author).

provided some information.[74] In the said research, participants in this peacekeeping force took part in the interview and the questionnaire (see Appendix "C") was administered to a sample of respondents, including soldiers who served in the force, civilian members of the force and humanitarian aid workers. The sample was stratified. Since it was a mailed questionnaire, one should not claim that the answers are entirely representative, but on the other hand, the tendencies are often very clear and found in most of the literature relating to the subject, so I would be inclined to rely on them, particularly where they are consistent. These interviews and answers to the questionnaire, together with historical research, form the basis of this section of the chapter.

The general practical problem explored can be formulated as a very simple question: what is the role of the MONUC in resolving the Congo conflict as seen by both the participating solders and by the general public in the DRC? More particularly, was the deployment of a UN peacekeeping mission an effective mechanism for conflict prevention in the Africa's Great Lakes? A third formulation of the question would be, "Where do we locate the MONUC in so far as its success or failure in resolving the Congo conflict is concerned?" A brief overview of the nature of the mandate and deployment of the MONUC as presented later in this section will assist in answering these questions.

The organization, functions and assessment of the current UN peacekeeping mission in the DRC, the MONUC[75] cannot be understood without some knowledge of its predecessor, the ONUC.[76] The latter became the second major UN peacekeeping operation to be deployed since the inception of the concept.[77] There are substantial parallels between the situations under which the two operations have been deployed, save for the Cold War paradigm: a divided country, a variety of internal and external actors in the conflicts, a formal request by the Congolese government for UN support to restore territorial integrity and to remove foreign troops from the country and ambiguity over the UN's role as third party. Thus, it is appropriate to examine, albeit briefly, the ONUC operation to see whether it provides any relevant conflict resolution lessons to be learned that will help determine whether to call the present UN mission MONUC in resolving the Democratic Republic of the Congo conflict a success or a failure.

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[74] The main Headquarters of MONUC is in Kinshasa with 6 other Sector Headquarters in Mbandaka, Eastern Division Headquarters in Kisangani, Kananga, Kalemie, Kindu and Bunia.
[75] *See supra* note 3.
[76] *See supra* note 5.
[77] ONUC was second after UNEF. See *supra* note 9.

The ONUC operated within the Congo, which had descended into chaos on the withdrawal of the Belgian colonial power in 1960. The original mandate of the force was to supervise the withdrawal of Belgian forces from the Republic of the Congo, to assist the Government in maintaining law and order and to provide technical assistance.[78] But this mandate was subsequently modified and expanded to allow the use of force beyond self-defence when the UNSC used the language of Chapter VII authorizing the force to prevent the occurrence of civil war and secession of the province of Katanga.[79] In essence, it could be argued that the operation shifted its role from that of a traditional peacekeeping operation to enforcement action, although this view did not receive support from the ICJ.[80]

In a further UNSC resolution, the policies and purposes of the UN with respect to the Congo were reaffirmed thus:

a) To maintain the territorial integrity and the political independence of the Republic of the Congo;
b) To assist the Central Government of the Congo in the restoration and maintenance of law and order;
c) To prevent the occurrence of civil war in the Congo;
d) To secure the immediate withdrawal and evacuation from the Congo of all foreign military, paramilitary and advisory personnel not under the United Nations Command, and all mercenaries; and
e) To render technical assistance.[81]

It must be admitted however that, in practice, the actual mission of the ONUC was more complex and demanding than viewed legally and theoretically. It was not only required to deal with the Congolese internal civil war situation, but it also had to prevent, in interim, a direct clash of superpower military forces in a country which became both an open and covert Cold War battleground.[82] For the first eight months, ONUC found itself in an impossible situation: reluctant to withdraw, for the sake of the civilian populace; reluctant to take sides, to preserve a semi-balance of impartiality; and unable to take significant military initiatives because the mandate was interpreted

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[78] By its resolution No.143 of July 14, 1960, the UNSC "decides to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as might be necessary until, through that Government's efforts with United Nations technical assistance, the national security forces might be able, in the opinion of the Government, to meet fully their tasks." *See also United Nations Document S/4387* of July 14, 1960 quoted in Durch, *supra* note 8.

[79] By its resolution No.161 of February 21, 1961, the UNSC:

1. "Urges the United Nations to take immediately all the appropriate measures to prevent the occurrence of civil wars in the Congo including arrangements for the ceasefires, the halting of all military operations, the prevention of clashes, and *the use of force, if necessary, in the last resort*; (Emphasis added).
2. Urges that measures be taken for the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and paramilitary personnel and political advisors not under the United Nations command;"(*United Nations Document S/4741* of February 21, 1961). See also Evans, *supra* note 34, p.223.

[80] See the Court's decision in the *Certain Expenses Case*, *supra* note 40.

[81] UNSC resolution 169 of November 24, 1961. UN Doc. S/5002. 9 votes to none, with 2 abstentions by France and the UK.

[82] Durch, *supra* note 8, p.315.

to forbid such actions, particularly by Hammarskjöld, who was strongly averse of violence.[83] Furthermore, although Congo and its bordering lands were gaining their independence from different colonial powers at the time the UN deployed the ONUC, colonial interests added to UNOC's initial political complexity. In addition, a colonial "ghost" still lingered in the minds of local Congolese who misidentified any western foreigner, including the UN officers, as just other "Belgians" with dangerous and occasionally fatal consequences.

ONUC was an important model of peacekeeping with several outstanding features. At the peak, the force involved some 20,000 troops; it was the first UN peacekeeping force which was composed of both civilian and military components, and its mandate arguably crossed the threshold of enforcement action.[84] However, the ONUC in the minds of many was a regrettable UN peacekeeping operation that a generation of UN officials wanted to forget—or at least never repeat.[85] Although its four-year presence in the Congo[86] arguably prevented worse disintegration of civil order,[87] UNOC did not by any means put an end to civil and political unrest in the country.[88] The current conflict and humanitarian crisis upon which MONUC has been deployed borrows much of its origins from the failure of ONUC to move towards a long-term resolution that would have involved the establishment of appropriate state structures and forms of governance in the DRC. ONUC officially terminated its operations from the Congo at the end of June 1964.

In short, the final assessment of the ONUC indicates that the operation lacked almost every element that history says is necessary for a successful peacekeeping mission, including lack of effective support from the Great Powers, lack of support from all parties to the conflict, a clear and transparent mandate, sufficient and good command, control, communication and logistics. It also (notoriously) became partial in its dealings with the conflict parties, especially in the crisis leading to the arrest and the assassination of Lumumba. Its legitimacy was challenged repeatedly and therefore its role as an effective third party in conflict resolution was highly compromised, and it fell into financial crisis leading to its premature withdrawal from the Congo.[89]

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[83] *Ibid*.
[84] Katayanagi, *supra* note 12, p.27.
[85] Durch, Supra note 8, p.316.
[86] It was deployed in July 1960 and it withdrew its operations from the Congo officially at the end of June 1964. See also Durch, *supra* note 8, p.333
[87] Whatever its shortcomings under extreme circumstances, UNOC had its accomplishments to its credit. See for more analysis on this point, Riggs and Plano, *supra* note 39, p.138
[88]Durch, *supra* note 8, p.244
[89] See Riggs and Plano, *supra* note 39, p.138.

Despite all these shortcomings, the ONUC provided some important lessons that could or should have been applied in subsequent UN peacekeeping operations, including the current MONUC. Besides financial lessons, which have led to the current missions being funded as "expenses of the organisation", ONUC also showed the need for better training and cooperation-- from planning and deployment through logistics and communications.

In efforts to address the conflict in the current DRC,[90] the UN joined the various regional peacemaking initiatives undertaken within the African Great Lakes region framework. The initiatives included the *Lusaka Ceasefire Agreement*, which was signed on July 10, 1999 by the six states that were party to the conflict,[91] and the subsequent *Inter-Congolese Dialogue Process* which culminated in the *Sun City II Agreement* of April 2003.[92] It sought to place a heavy burden of responsibility on a UN peacekeeping force, whose presence was deemed an essential component, not only providing for standard monitoring and verification tasks, but also for carrying out a number of peace enforcement tasks. The latter included the tracking down and disarming of armed groups;[93] the screening for mass killers, perpetrators of crimes against humanity and other war criminals; and the handing over of suspected *genocidaires* to the International Criminal Tribunal for Rwanda.[94] It was assumed that these tasks would have to be carried out by the UN peacekeepers.[95] Consequently, the UNSC decided that the previously authorized UN personnel in the DRC would constitute the MONUC and expressed its intention to expand MONUC based on assessed conditions of security,

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[90] The origins, nature and parties to this conflict are as discussed early under chapter Two of this Thesis.

[91] The six parties to the Congo conflict, which signed the ceasefire agreement for a cessation of hostilities, were the DRC, Angola, Namibia, Rwanda, Uganda and Zimbabwe. The main provisions of the agreement included:
• the immediate cessation of hostilities;
• the establishment of the JMC, comprising the belligerent parties under a neutral chairperson appointed by the OAU, to investigate ceasefire violations, work out mechanisms to disarm identified militias and monitor the withdrawal of foreign troops according to an agreed schedule;
• the deployment of an 'appropriate' (peacekeeping and peace enforcement) UN mission tasked with disarming the armed groups, collecting weapons from civilians and providing humanitarian assistance and protection to vulnerable populations; and
• initiating an 'inter-Congolese dialogue' intended to lead to 'a new political dispensation in the DRC'.

[92] For a fairly detailed treatment of the Inter-Congolese Dialogue Process, see Apuuli, P. (2004). 'The Politics of Conflict Resolution in the Democratic Republic of Congo: The Inter-Congolese Dialogue Process' in *African Journal of Conflict Resolution*: 4(1), pp.65-84.

[93] The identified 'armed groups' included Rwandan *Interahamwe* militia and the former Rwandan government forces (FAR); Congolese Mai Mai militias; the Allied Democratic Front (ADF), the Uganda National Rescue Front II, the West Nile Bank Front and Lord's Resistance Army in Uganda; UNITA; and the *Burundian Forces pour la défense de la démocratie* (FDD).

[94] With its Seat in Arusha Tanzania, this is an *ad hoc* International Criminal Tribunal established in 1994 as a response to the conflict in Rwanda which to the 1994 Genocide. However, this latter task was later discarded by the UNSC aas it was considered too costly given the reluctance of troop contributing countries. See UNSC Res.955 of November 1994.

[95] Malan, M, and Colliers, J. (2001). 'Peacekeeping in the DRC, MONUC and the Road to Peace', Pretoria, South Africa: Institute for Security Studies, p. 2.

access and freedom of movement as well as cooperation on the part of the signatories to the Peace Agreement.[96]

Initially established as a small military liaison team in 1999, the MONUC was turned incrementally into a multidimensional peacekeeping mission with a broad mandate. Comprehensive assessments of it have been rare.[97] This is surprising because the MONUC-with 18,434 uniformed personnel in 2008 is one of the biggest and more expensive missions ever deployed by the UN. Moreover, although general criticism of UN peacekeeping is not unusual, condemnation of MONUC's performance has been exceptionally fierce. For example, international opinion has labelled it as the world's least effective peacekeeping force,[98] while the Congolese citizens repeatedly assaulted peacekeepers to vent their angers at the mission and its alleged failures.[99] An internal UN report even observed that the mission was tainted by a perception of "impotence and cowardice."[100] It is from these realities that a more scholarly assessment of the MONUC's role in the peace process is imperative.

The original mandate of the MONUC was simply based on Chapter VI of the UN Charter and constituted the following:

a) To monitor the implementation of the Ceasefire Agreement and to investigate its violations by parties;
b) To establish and maintain continuous liaison with the headquarters of all the parties military forces;
c) To develop an action plan for the implementation of the Ceasefire Agreement;
d) To work with the parties to obtain the release of all prisoners of war, military captives and cooperate with international humanitarian agencies;
e) To supervise and verify the disengagement and redeployment of the parties' forces;
f) To facilitate humanitarian assistance and human rights monitoring, with particular attention to vulnerable groups;
g) To cooperate closely with the Facilitator of the National Dialogue, provide support and technical assistance and coordinate other UN agencies' activities to this effect; and

[96] See UNSC res.1279 of November 30, 1999 by which the UNSC decided that personnel authorized under its previous resolutions: S/RES/1273 of November 5, 1999; S/RES/1258 of August 6, 1999 and S/RES/1273 of April 9, 1999. would constitute the United Nations Organization Mission in the Democratic Republic of Congo (MONUC).
[97] Roessler, P and Prendergast, J. 'Democratic Republic of Congo' in Durch, W. (Ed.) (2006) *Twenty First-Century Peace Operations*, Washington, DC: United States Institute for Peace and the Henry L. Simpson Center.
[98] Is this the World's Least Effective Peacekeeping Force?,' *The Economist*, Dec.4, 2005, pp. 43ff.
[99] Grignon, F and Kroslak, D. (April 2008) 'The Problem with Peacekeepers' in *Current History*, vol. 107, No. 70, pp. 186-7.
[100] 'UN Report Accuses Peacekeepers of Failing the Congolese People', *Financial Times* (London), March 23, 2005, p. 3.

h) To deploy mine action experts to assess the scope of the mine and unexploded ordinance problems, coordinate the initiation of the mine action activities, develop a mine action plan, and carry out emergency mine action activities as required in support of this mandate.

The peace enforcement tasks required of the UN peacekeeping force envisioned under the Lusaka Agreement, obviously required a Chapter VII mandate and not a Chapter VI one as indicated above.[101] The relevant part of the Agreement reads:

> "The United Nations Security Council, acting under Chapter VII of the UN Charter and in collaboration with the OAU which provides ceasefire monitors to the DRC, shall be requested to constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation of this agreement; and taking into account the peculiar situation of the DRC, mandate the peacekeeping force to track down all armed groups in the DRC. In this respect, the UN Security Council shall provide the requisite mandate for the peacekeeping force."[102]

However, contrary to the above-contemplated mandate of the envisaged peacekeeping force, MONUC was flawed from its conception within the UN, being a Chapter VI operation with only one Chapter VII component that allowed it self-defense and limited protection for the civilian population. It is hard to find an explanation for such a departure in the approach, but, according to one senior DPKO[103] officer who is a representative of the Mission to the United Nations, "the Congo file started in Africa, not in the United Nations. The Lusaka Agreement called for the UN forces, but they did not know what they were writing. As the UN was not there, it came in with the framework which was not theirs."[104] Ultimately, what the Lusaka parties asked for was a force to restore and enforce peace; what they got was what the UN was willing and able to provide. One would then conclude that the mandate of UN peacekeeping operations is a function of what member states are likely to be willing to bear and what troop-donating countries are willing to commit to. Or as another member of the MONUC puts it, there is no such a thing as bad mandate. The mandate is what the Security Council makes it. Simply put, there was no willingness among the UN member states to commit combat troops to a Chapter VII mission in the DRC--not in the initial stage.

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[101] A Chapter VI peacekeeping operation is normally deployed to help keep peace, and the peacekeepers are not authorized to use force other than for self-defence. In contrast, a Chapter VII peacekeeping operation also referred to as "Peace Enforcement" operations, authorize UN peacekeepers to use military force if necessary to restore peace and security.

[102] See Article III (11) of the Lusaka Ceasefire Agreement of July 10, 1999.

[103] DPKO is the UN Department of Peacekeeping Operations, which is responsible for the planning, preparing, conducting and directing UN peacekeeping operations.

[104] From interviews with the UN Representative in the MONUC in Congo, June 10, 2007.

The involvement of MONUC in the DRC conflict over a decade now can be broken into four broad phases:

The first phase began with the creation of the MONUC in 1999 and ended with the Pretoria accord and on the formation of a government of national unity in late 2002. Shortly after the signing of the Lusaka Accord, the UNSC authorized the deployment of 90 military personnel to establish liaison with the signatories.[105] In late 1999 the mission formally renamed MONUC and was subsequently expanded to 500 observers and a protection force of 5,037 soldiers to monitor the implementation of the ceasefire agreement.[106] Following agreements between the DRC on the one side and Uganda and Rwanda on the other, on the withdrawal of the latters' forces from the DRC, MONUC troops ceiling was boosted to 8,700 soldiers in late 2002. The mission was mandated to support, 'on voluntary basis', the DDRRR (disarmament, demobilization, repatriation, resettlement and reintegration) of foreign armed groups.[107] During its first three years, MONUC's role was limited but effective. Its thinly spread personnel, 455 military observers and 3,595 soldiers (as of October 2002), verified ceasefire violations and the eventual withdrawal of foreign armies.

The second phase of MONUC's deployment (2003-04) began in the wake of the Pretoria accord in 2002. During this period the mission's efforts were to be geared towards supporting the transition and the government of national unity in Kinshasa.[108] The transition government moved to the centre of political attention because it was to become the backbone of the implementation of the peace agreements that had been concluded in Lusaka and Pretoria. Key to MONUC's concept for this phase was the provision of security for the members of the transitional government. To this effect, the UNSC authorized MONUC to deploy nearly 10 percent of its troops (some 1,000 blue helmets) to the capital.[109] It also chaired the International Committee in Support of the Transition (CIAT), a body of international representatives that was to accompany the transition. Hence, this phase was described by William Swing, the head of MONUC, as the 'Kinshasa phase', where the transitional government was expected to lead the peace process.[110]

However, the most disrupting events during this phase occurred in the DRC's eastern part. The first major crisis occurred in Bunia (Ituri District) in May 2003, when ethnic militias fought over control of the city after the withdrawal of the Ugandan army. The 700 blue helmets in Bunia were

[105] UNSC Res.1254, August 6, 1999.
[106] UNSC Res.1279, November 30, 1999 and 1291 of February 24, 1999.
[107] UNSC Res.1355, June 15, 2001, para.32.
[108] UNSC Res.1493, July 28, 2003, paras 1-6.
[109] Second Special Report of the Secretary-General on MONUC, UN Doc.S/2003/566, May 27, 2003, paras 35-8.
[110] Cited in Rogier, E. 'MONUC and the Challenges of Peace Implementation in the DRC' in Malan, M and Gomes Porto, J. (Eds.) (2004) *Challenges of Peace Implementation: The UN Mission in the Democratic Republic of Congo*, Pretoria: Institute for Security Studies, p. 22.

bystanders to the massacres of 400 civilians. The crisis triggered the deployment of a 1,400 strong Interim Emergency Multinational Force (Operation *Artemis*) by the European Union.[111] Equipped with Chapter VII mandate, the force stayed for three months and re-established basic order in Bunia. Subsequently, the UNSC increased the MONUC's troop numbers to 10,800 and provided it with a Chapter VII mandate for Ituri and the two Kivu provinces.[112] Barely a year later, another crisis erupted in Bukavu, when forces led by renegade commander Laurent Nkunda, a former RCD general occupied the provincial capital of South Kivu. Again, MONUC failed to prevent killings and human rights abuses.[113] The Bukavu crisis in particular was a major blow to MONUC's credibility in the DRC. In response, the UNSC expanded MONUC's Chapter VII mandate to include the entire Congolese territory and authorized the deployment of additional 5,900 peacekeepers, less than half the number that the mission had requested.[114]

The third phase, from October 2004 to December 2006, mainly revolved around the organization of presidential, parliamentary and provincial elections. As in other war-torn countries, the UN regarded the elections in the DRC as 'a key element in the transition from a post-conflict to a truly democratic, unified and stable state.[115] MONUC organized a large logistical operation to prepare the registration of voters and the organization of a constitutional referendum and the elections. It also trained Congolese police officers to provide security for the elections. During the polls, MONUC was backed by an EU interim force (EUFOR DRC) of 1,500 troops.[116] The mission was deployed after the UNSC had declined a request by the Secretary-General for an additional 2,590 troops to enable MONUC to deal with security contingencies during the polls.

MONUC's fourth phase started in the wake the 2006 elections.[117] Daunting core tasks remained to be completed. These included the creation of a stable security environment, the planning of security sector reform, strengthening the rule of law and protecting civilians.[118] MONUC was also mandated to provide assistance to the Congolese government in the preparation for local elections.[119] Recurrent violence attested to the precarious post-election environment, especially in North Kivu,

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[111] Ulriksen, S, *et al*, (2004). 'Operation Artemis: The Shape of Things to Come' in *International Peacekeeping*, vol. 11, No.3, pp. 508-525.
[112] UNSC Res.1493, supra note 108, para 26.
[113] UNSC Res.1291, February 24, 2000.
[114] UNSC Res.1565, October 1, 2004.
[115] UN, 'Special Rapporteur of the Secretary-General on Elections in the Democratic Republic of Congo,' UN Doc.S/2005/320, May 26, 2005, para 3.
[116] UNSC Res.1671, April 25, 2006.
[117] See UNSC Res.1756, May 15, 2007.
[118] UN, 'Twenty-Third Report of the Secretary-General on MONUC,' UN Doc. S/2007/156, March 20, 2007, para 43ff.
[119] UNSC Res.1797, January 30, 2008.

where renewed fighting between rebels and the army displaced tens of thousands of civilians. Insecurity was widespread as thousands of Congolese combatants remained outside of the disarmament, demobilization and reintegration process (DDR) for nationals. The formation of the security sector remained insignificant.[120] MONUC reported physical violence against civilians and serious human rights abuses, wherever the army was deployed.[121]

4.6 Assessing Success and Failure

The literature on peacekeeping missions offers a variety of determinants of success and failure, ranging from mandate implementation to more demanding criteria (whether a self-sustaining peace exists after peacekeepers withdraw) to even more exacting standards (whether root causes of conflict have been resolved and whether institution building has been successful).[122] These ambitious standards reflect unrealistic expectations about the impact that a mission can have within a limited time. This is essentially true in countries that present a very difficult environment. In the DRC, MONUC is also an ongoing mission, and it is thus impossible to determine the long-term viability of peace. Therefore two relatively modest criteria are used here: whether the mission mandate has been implemented and whether human suffering and human rights violations have been reduced.

The mandate implementation is the most widely used criterion to assess success and failure. It is also the most equitable one because it examines standards that the UN has set itself.[123] It is also the politically most relevant one since decisions of the UNSC about ongoing peacekeeping missions take into account the extent to which mandates are being implemented. The second yardstick is used because it directly relates to the reduction of large-scale violence, which is the overall goal of every peacekeeping mission. But because violence is difficult to measure in civil wars, I refer here to human suffering as a consequence of violence, which can be roughly assessed by considering the level of human rights abuses and internal displacement.

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[120] Refugees International, *DR Congo: Transition Without Military Transformation*, Washington DC, December 13, 2007.

[121] MONUC Human Rights Division, 'The Human Rights Situation in the Democratic Republic of Congo January to June, 2006,' Kinshasa, July 27, 2006, para 42.

[122] For overview of these criteria, see Howard, M. (2008). *UN peacekeeping in civil wars*, Cambridge /New York: Cambridge University Press, pp. 6-8; Durch, W and Berkman, T. 'Restoring and Maintaining Peace: What We Know so Far' in Durch, (2006), *supra* note 97, pp. 15-16; See also Fortuna, *supra* note 2, pp. 269-92.

[123] See Howard, *Ibid*, p. 7.

Mandate Implementation

In the following paragraph, I examine whether MONUC succeeded in implementing the core tasks of its mandate.[124]

Facilitating the DDRRR of foreign combatants.

The presence of foreign-armed groups in the eastern DRC has been central to the regional dimension of the war. Of particular concern was the security threats posed by the continued presence of the *Forces Démocratiques pour la Libération du Rwanda* (FDLR), an offshoot of the forces responsible for the Rwandan genocide in 1994. To address this issue, MONUC was mandated to facilitate the DDRRR of foreign combatants.[125]

Repatriation of the insurgents was agonizingly slow. In 2007, it was estimated that 6,000 rebels remained in the DRC. The Rwandan government did not play a constructive role, as it did not publish a list of the FDLR members it sought on charges of genocide, a clarification that may have encouraged lesser members of the movement to return home. Moreover, the FDLR leaders held their fighters hostage, killing those who attempted to defect. But the most important reason for the slowness was that MONUC's mandate rested on the principle of voluntary repatriation. As early as 2004, MONUC had warned that the continued pursuit of its voluntary repatriation would not succeed in resolving the problem within an acceptable time.[126] The UNSC never seriously considered a mandate to forcefully repatriate the FDLR. This left the mission with a few other means than seeking to persuade foreign fighters to return to their countries.[127] In late 2005 and since 2006, MONUC also gave logistical support to *Forces Armees de la Republic Démocratique du Congo* (FARDC) operation against the FDLR. Considering the mandate, the slow repatriation was the best result that the MONUC could realistically achieve. It fulfilled its mandate but was unable to sufficiently speed up the return of the FDLR fighters.

Military Tasks

Deterring violence and Protecting Civilians. MONUC was authorized to use all necessary means to contribute to the improvement of the security conditions and discourage violence and spoilers.[128] Regarding this element of its mandate, MONUC's record has sometimes been one of dramatic

[124] I omit here the monitoring of the arms embargo: it was inconsequential because MONUC did not have the mandate to enforce it.
[125] UNSC Res.1355, June 15, 2001, para 32.
[126] UN, 'Twenty-Third Report of the Secretary-General on MONUC, *supra* note 118, para 74.
[127] For a revealing example, see Second-Special Report of the Secretary-General on MONUC, UN Doc.S/2003/566, May 27, 2003, para 21.
[128] UNSC Res.1565, October 1, 2004, para 6.

failure. It performed abysmally during crises in Bunia and Bukavu and not much better during other emergencies.[129] The resumption of fighting in North Kivu since November 2006, which escalated in later in 2008 and triggered massive civilian displacement, did not galvanize a determined response by MONUC. The same was true during early episodes of fighting in Kinshasa in 2006 and 2007, which resulted in the deaths of some 400 people. MONUC's inaction in preventing the violence has been accompanied by a poor record in protecting civilians, a notable failure in the light of the UNSC's emphasis on this task.[130] Although MONUC received 'the most assertive mandate yet regarding the protection of civilians,' protecting civilians largely remained a written ambition.[131]
In analysing further the strength and weaknesses of the MONUC in this aspect, the perception on the operation's role on the ground in the DRC, from MONUC personnel, local and international NGOs and the Congolese citizens has been sought. The difficulty of such an analysis in terms of what is working, what is not working and what can be learned to help future operations succeed is that the definition of "success" and "failure" depends on who and where you are. Opinion is highly divided. On the part of the UN headquarters, the operation is basically doing according to the plan. If you are talking to local NGOs and Congolese, they are wondering why armed soldiers either sit around their bases or drive their UN vehicles on the country's dirty roads without protecting civilians or stopping the fight between conflicting parties.[132] Yet MONUC personnel feel frustrated for lack of both sufficient mandate and adequate resources they require in fulfilling their mission.[133]
A senior MONUC official in Bukavu summarized that frustration. "Look, people should not have thrown stones at MONUC if they have given us the mandate and people to do the job. Where is the P-5? Where are the Western troops"? MONUC officials therefore point out that despite many skirmishes, and some regrettable massacres, the ceasefire between the signatories to the *Lusaka Agreement* is holding. They however find that the DPKO needs to take MONUC more seriously by providing more personnel, finances and mandate. In their view, DPKO does not think the Congo is a priority. Although the world is aware of what is happening in the Congo, no one takes it seriously.

The head of a Congolese Human Rights NGO in Bukavu represented the often-expressed view of the Congolese people about the MONUC: "The mandate has never been understood by the people. We thought they were here to restore peace. Now we learn they are only here for themselves-not to

[129] On Bukavu, see Turner, T. (2007) *The Congo Wars: Conflict, Myth & Reality*, New York: Zed Books, pp. 96-105; On Bunia, see Ulriksen, S, *et al*, *supra* note, 111.
[130] See Månsson, K. (2005). 'Use of Force and Civilian Protection: Peace Operations in the Congo,' *International Peacekeeping*, vol. 12, No.4, pp. 503–519.
[131] Holt, V and Berkman, T. (2006) *The Impossible Mandate? Military Operations, the Responsibility to Protect and Modern Peace Operations*, Washington, DC: Henry L. Stimson Center, p. 91.
[132] From interviews with Congolese locals, residents of *Bukavu* town on June 12, 2007.
[133] Many of the Senior MONUC personnel interviewed voiced their frustrations.

intervene." It becomes important therefore, that the local population understands the mandate of a particular UN peacekeeping operation. When the MONUC first came, everybody in the DRC celebrated, but as time went by, there is disappointment.

Reducing Human Suffering

The second yardstick to assess MONUC-reducing human suffering-was chosen for methodological reasons over other criteria. Examining alternative indicators, for example, whether large-scale violence was brought to an end, raises significant challenges in terms of the availability and quality of data, particularly in war-torn countries like the DRC. While the day-to-day peacekeeping activities of MONUC soldiers have probably done little to alleviate insecurity in the DRC, their presence may have prevented more atrocities.

Many Congolese acknowledge that their country is better off with MONUC than without it. They acknowledge the value of observing violations of human rights and reporting them to the rest of the world. Many also acknowledge that MONUC's presence is a source of revenue for local business communities. But they usually come back to what they see as the fundamental issue, namely: its perceived inability or reluctance to intervene and contain the ongoing conflict in the country, and this has sometimes led to serious negative sentiments from members of the local population, against the force.[134] The MONUC operation is perceived by many Congolese as being too passive, especially when massacres are reported to it without any action being taken by them. As such, either out of ignorance or given the reality on the ground, they would like to see the MONUC mandate changed to make it a force for peace.[135] Furthermore, there is the impression that MONUC is operating with an unspoken slogan: "How soon can we get out"?

Despite the clear gap between the official MONUC opinion and the voice from the field, in the opinion of the locals the presence of the MONUC has had a very positive effect, and if it were to be enlarged that positive effect would be enhanced dramatically.[136]

[134] *UN Office for the Coordination of Humanitarian Affairs* reports "Demonstrators Stone MONUC Headquarters" (June 2004); "Anti-MONUC Protest in Rutshuru turns Violent" (September 2008).
[135] This is based on views from another Congolese NGO leader in Goma.
[136] Butts, H & Brandshaw, H. (Eds.), (2002), 'Central African Security: Conflict in the Congo', Proceedings Report No. A715324 Army War College Carlisle Barracks Pa.

4.7 Human Rights Components of Peacekeeping Operations

The question that arises is what a UN force should do when it becomes aware that parties to the conflict in which the force is deployed are violating applicable principles of human rights. The importance of this question derives from the fact that respect for human rights is essential for genuine peace. Violations of human rights provoke conflict, while improving their protection is often one of the conditions for moving towards peaceful settlement of conflicts. In all conflict management approaches, therefore, human rights must be honoured so that man is not to be compelled as a last resort to rebel against tyranny and repression.[137]

International human rights law is an integral part of the normative framework for United Nations peacekeeping operations.[138] The UDHRs, which sets the cornerstone of international human rights standards, emphasizes that human rights and fundamental freedoms are universal and guaranteed to everybody. United Nations peacekeeping operations are therefore to be conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates.

However, unless the mandate of the force clearly states, there is currently no implicit legal duty for peacekeeping forces to protect civilians from human rights violations.[139] Thus, from their early times, UN peacekeeping operations activities have mainly focused on monitoring cease-fires, peace agreements and controlling buffer zones between conflicting parties; but human rights were not a consideration in their operations.[140] Review of the various UN peacekeeping operations demonstrates that ending or preventing deliberate and systematic human rights violations have hardly been the core or fundamental objective of peacekeeping operations.[141] Consequently, UN peacekeeping forces failed to protect civilians from massacres in Rwanda and in Srebrenica,

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[137] Para 3 of the Preamble to the *Universal Declaration of Human Rights*, UNGA resolution 217 A (III), UN Doc A/810 /1948 of 10 December 1948.

[138] UN (2008). *United Nations Peacekeeping Operations: Principles and Guidelines*, Department of Peacekeeping Operations, Field Support, p.14.

[139] Murphy (2007), *supra* note 23, p.289.

[140] Henkin, H (Ed.) (2000), *Honouring Human Rights*, The Hague/London/Boston: Kluwer Law International, p.5.

[141] See detailed account of the role of peacekeeping missions in the protection of human rights in Katanayagi, *supra* note 12, p.235; See also for similar discussions Steele, D. (1998). 'Securing Peace for Humanitarian Aid' in *International Peacekeeping* 5(1), Spring 1998: 66-88, p. 70. "The process of intervention starts with a call to end massive human rights violations and is then frequently limited to mandate to enforce humanitarian objectives." Also Knudsen, T. (1996).'Humanitarian Intervention Revised: Post-Cold War Responses to Classical Problems' in *International* Peacekeeping 3(4), Winter 1996: 146-165, p. 147. "What we seen in cases like Croatia and Somalia has not been a whole-hearted attempt to stop or prevent genocide by full-scale use of force as prescribed by the Groatian doctrine of humanitarian intervention. Instead, outside interference has on most occasions attempted to limit it and provide relief after the damage has been done."

Bosnia-Herzegovina on the basis of their specific mandates limitations.[142] Certainly this scenario does not make any common sense if one considers that most of the peacekeeping operations are deployed in situations where human rights are seriously undermined.[143]

Another question therefore arises: If UN peacekeeping forces are unable to stop large-scale human rights abuses who will have the capacity to do so? At the present time, protection of human rights is considered as an essential element of UN peacekeeping operations.[144] Protection of non-combatant's basic rights to life and dignity is a fundamental element of all military operations. The *Brahimi Report* suggests a more assertive and interventionist approach in such cases and states that 'UN Peacekeepers--troops or police--who witness violence against civilians should be presumed to be authorised to stop it, within their means.[145] Should members of a peacekeeping operation who are designated as combatants witness war crimes but take no action to stop them, they themselves become parties to those war crimes. The prevention of abuses of basic human rights and the imposition of justice will however, require a peace operations force that is appropriately trained and equipped for such tasks.

As such, increasingly, peacekeeping requires that civilian political officers, human rights monitors, electoral officials, refugee and humanitarian aid specialists and police play as central a role as the military.[146] Peacekeepers are now expected to undertake particular activities for the protection of civilians. Hence, in November 2002, the Office of the High Commissioner for Human Rights (OHCHR) concluded a Memorandum of Understanding with DPKO to clarify their respective roles.[147] The memorandum recognizes that protection and promotion of human rights have become essential elements of conflict prevention, peace maintenance, and post-conflict reconstruction.[148] According to the memorandum, human rights components of peacekeeping operations are to be based upon international human rights standards. An innovation is that the operations will be charged with promoting an integrated approach to human rights including civil, political, cultural, economic, and social rights. Also included are the rights to development, and particularly the rights

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[142] Both the United Nations Assistance Mission in Rwanda (UNAMIR) and the United Nations Protection Force (UNPROFOR) were presented but could not stop the 1994 Rwandan Genocide and the 1995 ethnic cleansing in Former Yugoslavia respectively.

[143] See for instance the Unified Task Force in Somalia, the French-led *Operation Turquoise* in Rwanda, and the US-led Multinational Force in Haiti.

[144] Krasno, Jean (Ed.). (2004). *The United Nations: Confronting the Challenges of a Global Society*, Bouder/London: Lynner Rienner Publishers, p. 100

[145] See Executive Summary, *Brahimi Report*, *supra* note 11 , p. 3.

[146] Boutros-Ghali, *supra* note 13.

[147] *Memorandum of Understanding between the Office of the High Commissioner for Human Rights and the Department of Peacekeeping Operations*, concluded at Geneva, November 22, 2002.; See detailed discussion on this development in Krasno, *supra* note 144.

[148] *Ibid.*

of women, children, minorities, internally displaced persons and other vulnerable groups.[149] The memorandum introduces an important human rights mechanism into peacekeeping by institutionalising timely information alerts and exchanges.[150] As stated further in the memorandum, human rights components should normally combine promotion and protection functions so as to ensure a comprehensive approach to human rights in accordance with international human rights standards.[151] Accordingly, in extraordinary case of human rights abuse, there is nothing legally wrong if the UNSC takes measures under Chapter VII of the UN Charter.

And when Chapter VII mandate is invoked, the restriction under Article 2 (7), non-interference in matters which are essentially within domestic jurisdiction, is no longer applicable to the particular UN peacekeeping operation.[152]

The need to ensure that human rights are protected in the design and operation of peacekeeping missions came to be addressed within the context of a general move to operationalize the notion of human rights as a crosscutting responsibility in all the work areas of the United Nations—a concept that was articulated by the Secretary-General in his 1997 UN Reform Programme.[153]

The first specifically human rights mandated mission, established in 1991, was tasked with monitoring the implementation of the *San Jose Peace Agreement* in El Salvador (ONUSAL).[154]

In 1992 the UN established a mission to oversee the political transition in Cambodia (UNTAC), again with a human rights component. The following year saw the establishment, jointly by the UN and the Organization of American States (OAS), of the first exclusively human rights-focused mission in Haiti (MICIVIH). It was in this same context that human rights programmes were located in other UN missions such as those for Georgia (UNOMIG),[155] Liberia (UNOMIL), Angola (UNAVEM III and MONUA), Sierra Leone (UNOMSIL and UNAMSIL), Guinea-Bissau (UNOGBIS), Democratic Republic of Congo (MONUC), and Ethiopia and Eritrea (UNMEE). Those UN missions that assumed transitional authority, such as in Kosovo (UNMIK) and East Timor (UNTAET), also included human rights components.

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[149] *Ibid*.
[150] See Section 18, Ibid.
[151] *Ibid.*
[152] A caveat is placed in the last part of Article 2(7) of the UN Charter thus: "… but this principle shall not prejudice the application of enforcement measures under Chapter VII".
[153] Annan, K. *Renewing the United Nations: A Programme for Reform*, UN documents A/51/950 of 14 July 1997.
[154] A description of this and all other UN peacekeeping missions can be found at <http://www.un.org/Depts/dpko/dpko/home.shtml>, last visited, September 8, 2009.
[155] The human rights component of this mission is jointly staffed by UN and OSCE human rights officers.

4.8 Human Rights Components of MONUC

During the entirety of the MONUC deployment, there has been evidence of human rights abuse throughout the DRC. Most of the human rights abuses are committed by the armed forces of the warring parties.[156] They include arbitrary killings, arbitrary arrests, mass rape, illegal detentions, harassment and extortion, ill- treatment and torture of prison detainees.[157]

The importance of a human rights component within the MONUC was first highlighted by the UNSC in 2000.[158] In March 2003, a resolution was adopted, by which the Secretary-General was requested to increase the number of personnel in the MONUC's human rights component to assist and enhance the capacity of the Congolese parties to investigate all the serious violations of international humanitarian law and human rights.[159] The MONUC Human Rights Division developed its mandate in accordance with UN Security Council Resolution 1565 (2004), as confirmed by Resolution 1628 (2005). MONUC is mandated "to assist the Government of National Unity and Transition in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons. MONUC provides advice and assistance concerning the essential legislation of human rights and fundamental freedoms." The Human Rights Division (HRD) is to assist the authorities to put an end to impunity and to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice. The HRD monitors and documents human rights violations across the country. Special attention is paid to violations of the rights to life, liberty and physical integrity; to elections-related human rights violations; and to the link between the exploitation of natural resources and human rights abuses. The Division is to protect individuals under imminent threat of physical violence, notably witnesses, victims and human rights defenders.

Within the MONUC,[160] human rights work is done by a number of divisions, including Child Protection, Humanitarian, Civilian Police (CIVPOL) and Military observers. MONUC's human right section is presently composed of 50 personnel, inclusive of both administrative and substantive staff, possibly to be increased to 90 with the approval of the new budget.[161] At the time

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[156] Thirteenth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of Congo S/2003/211, February 21, 2003; See also Annan K. (1994) 'Peace-Keeping in Situations of Civil War,' in *New York University Journal of International Law and Politics*, vol. 26, No 4, pp. 623-644.

[157] MONUC Human Rights Division, 'DR Congo: Monthly Human Rights Assessment-October 2006,' *Africafiles*, November 23, 2006.

[158] See UNSC RES/1291/200 in which the Security Council, among other things, authorized the expansion of MONUC in the area of human rights.

[159] See S/RES/1468, March 20, 2003.

[160] Part of the information on this section emanates from the interviews conducted on June 11, 2007 to the Head of MONUC Human Rights section in MONUC headquarters in Bukavu, eastern DRC.

[161] The budget was to be approved during the time of field research.

of the current research, MONUC had 12 field offices in the DRC, with a further two anticipated to be operational soon. This may seem like a sizable presence in the field, but the number of human rights officers and offices is miniscule, when one considers the size of the country.

The Human rights section of MONUC has the following basic tools at its disposal to join forces in the fight against impunity for human rights violators:

- Monitoring
- Special investigations and
- Thematic reports.

Each of the tools is considered in more details below:

Monitoring involves the following elements:

- *Pro-active observation.* This entails learning about the environment to be worked in. To be at the service of a community, one must be able to understand its dynamics and keep abreast of current events. One must know who is who and know the geography of the region. Above all, one must be accessible. All of this requires a non-bureaucratic approach to human rights work.
- *Interventions/interactions with local authorities.* Local authorities are responsible for the protection and promotion of human rights. It is therefore of paramount importance to engage with them in a respectful but frank dialogue. It is always preferable to address issues locally. Only in exceptional cases should matters be brought to the attention of the central authorities.
- *Protection of civilians.* This entails preventive actions and re-settlement initiatives to reduce the threat caused by proximity. Protection of civilians is normally done through intervention with the authorities. A classical example is interventions with prosecutors, the police or the military hierarchy in the event of illegal arrests and detentions. At times, threats against civilians may mean the civilians themselves demand re-settlement. Luckily, since the DRC is so vast, the option of re-settlement does not usually entail more refuge abroad. It must be stressed; nevertheless, that resettlement is considered an extreme measure that is seldom resorted to.
- *Reporting.* Reports can be made to the UNSC or to the MONUC Headquarters or shared with pressure groups such as concerned members of the diplomatic corps. The ultimate goal of *monitoring* is to establish a historical record, so that the truth is available to the persons it belongs to. It can possibly also be used for justice and compensation purposes. Due to

limited resources, the Human Rights section has had to prioritize its monitoring activities, focusing essentially on gross violations of human rights: summary execution/extra-judicial killings, enforced disappearances, torture, and illegal arrests or detention. Sexual violence, including that visited upon men, has been singled out as an area deserving particular attention. The need to limit the breadth of monitoring tasks and to prioritize springs from the conviction that it is better to do little, but do it well, than to be spread too thin and thus have little or no impact at all.

- *Special investigations.* Such investigations by the Human Rights Section are spearheaded by a two-person team, which concentrates on gross violations of human rights. In the DRC, the latter are normally associated with massacres, in which case the section organises a larger multi-disciplinary investigation team. Besides limited resources, a major challenge to special investigations is in the fact that it is virtually impossible to conduct follow-up on an initial investigation. This limit imposes the use of particular stringent caution in terms of exposure of witnesses and other sources of information. "*Do no harm*" is a basic tenet of human rights work. There may be times when a special investigation team will have to decide whether to gather information and by so doing risk jeopardizing the sources of information, or to go home empty handed. This dilemma unfortunately becomes even more acute in situations where the team knows that it may never be able to go back and check that those sources are, in fact, safe and sound and, if they are not, intervene for their protection. Somewhat linked to the issue of special investigation, is the sad realization that the systematic and effective use of modern forensic techniques to ascertain causes of death, as well as for the purpose of identification, is a distant dream in the DRC. The issue of identifying the many missing persons and their families, which so far does not appear to be a priority on the agenda of civil society, is therefore likely to remain an unfortunately neglected aspect of investigation. Both in fact-finding activities of a monitoring nature, and in special investigations, a major and necessary challenge is to adopt a methodology that renders human rights work fully compatible with the requirements of criminal justice (including meeting the burden of proof), if these activities are to support the fight against impunity.

- *Thematic Reporting.* This type of reporting aims at collecting and analysing data on the areas that deserve particular attention. The challenge is to point to the root causes of problems, and to identify recommendations that can lead to a concrete improvement in the human rights situation.

On the rule of law, the story is not that much different. After years of dictatorship and war, the DRC is a state with limited police, and no judicial and correctional capacity in the territory that has remained under government control, and little or no capacity at all elsewhere. The task of reconstruction is therefore immense. Here, in a situation totally void of any form of legality, MONUC operates under Chapter VII. According to its Rules of Engagement, MONUC's military can and do arrest and detain civilians and militia elements that are caught red-handed engaging in obviously criminal acts. The lack of a national/judicial/detention capacity results in such suspects being released after short periods of detention. At times, persons may be arrested for contravening orders imposed under MONUC's Chapter VII authority –for instance, refusal to disarm in the town of Bunia. This raises a number of questions relating to the legal framework for these arrests and the position of MONUC as a peacekeeping mission, as opposed to being considered as an occupying power subject to humanitarian law rules under the four Geneva Conventions [162] and their Protocols.

Another major challenge, which is of a general nature but also impacts on human rights and the rule of law, is co-ordination. How does one ensure co-ordination of the different actors involving in human rights functions? How does one ensure that donor money, however well intended, does not generate conflict and jealousies among NGOs, and result in the distribution of existing networks and grass-root initiatives? For example, in Bukavu, eastern Congo an initial spontaneous and successful co-ordination around the issue of sexual violence suffered a major setback the moment donors and other external players began to show an interest in it. Somewhat understandably, the focus of many actors shifted from helping the victims to fund-raising and power grabbing. As a result, co-ordination came to a virtual standstill for a number of months during which the debate revolved around rather fictitious items of a purely formal nature. Eventually, after much struggling, the co-ordination picked up again. However, it would appear that not much progress in addressing violence occurred during that unfortunate interlude.

Despite the presence of the Human Rights Section and all these human rights functions, the MONUC's human rights mandate has been unnecessarily weak and not well-defined. The implementation of MONUC's humanitarian assistance and human rights mandate appears to rest on

[162] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 1949 ('Geneva I'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* 1949 ('Geneva II'); *Geneva Convention Relative to the Treatment of Prisoners of War* 1949 ('Geneva III'); and *Geneva Convention Relative to the protection of Civilian Person in Time of War* 1949 ('Geneva IV').

the "as MONUC deems within its capabilities and under acceptable security conditions" portion of the mandate.

Success in these efforts in the overall prevention and management of the Congo conflict remains to be seen.

4.9 African Regional Peacekeeping

The United Nations pacific dispute settlement system is supposed to be supplemented by coordination with regional agencies or arrangements.[163] Although the Charter does not define these, they have been understood as including the AU.[164] Since its overtaking of the OAU in 2002, the AU has given emphasis and priorities to the transformation of its conflict resolution mechanisms towards more protection of human rights of civilian populations within the context of the African region.[165]

Many reasons explain the need to embark on African regional peace and conflict resolution initiatives. In the first place, conflict prevention and management in Africa is the responsibility of Africans. African states and governments must take a leading role in bringing peace and managing conflicts in determined ways, without sole dependence on the West or the UN.[166] But other reasons relate to the current trend of responses to conflicts and security crises in Africa. In general, there is non-equal treatment, which is a consequence of ongoing marginalization of Africa and political scepticism arising from Western stereotypes. Africa is still perceived in the West as backward, primitive, brutal and tribal. As can be seen from Soyinka-Airewele Western discourse analysis in the former Yugoslavia, people were *killed* in *ethnic conflict*, in Rwanda; they were *massacred* in *tribal violence.*[167] The International community was spending 1.50 USD per day per refugee in Kosovo, while at the same period in Rwanda and Sierra Leone the amount was 0.11 USD.[168]

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[163] See Article 33(1) and 52(2) of the UN Charter; the Manila Declaration on the Pacific Settlement of International Disputes of 1982 A/RES/37/10; See further Evans, *supra* note 34, p.547.

[164] See this clarification in Evans, *Ibid*, p .614.

[165] The old OAU lacked a clear vision on human rights conflict situations, as it was state-centric, emphasising on respect for territorial integrity, sovereignty and non-interference on states' internal affairs as its founding principles. See the idea developed in the *Cairo Declaration of 29 June 1993 on the establishment of a Mechanism for Conflict Prevention, Management and Resolution in Africa* adopted by the 29th Session of the OAU Conference of Heads of State and Government; AHG/DECL. 1-3 (XXIX), AHG/Res. 218-227 (XXIX)

[166] Albaugh, E. 'Preventing Conflict in Africa: Possibilities of Peace Enforcement' in Rotberg, R *et al* (2000), *Peacekeeping and Enforcement in Africa: Methods of Conflict Prevention*, Cambridge/Massachusetts: The World Peace Foundation.

[167] Soyinka-Airewele, (2001). 'Western Discourse and the Socio-Political Pathology of Ethnicity in Contemporary Africa'. in Udogu, E. (Ed.). *The Issue of Political Ethnicity in Africa*. Alderchot: Ashgate, p.174

[168] Boulden, J (Ed.) (2003), *Dealing with Conflict in Africa*, New York: Palgrave MacMillan, p. 25

When any politician from almost any country mentions the *holocaust*, the following sentence says usually something as "never again". However, the International community, represented by members of the UN Security Council, was for a long time immersed in a debate whether the situation in Rwanda should be called genocide or not. Bleak immediate testimony that it comes from an article by the former Czech delegate at the Security Council, Karel Kovanda.[169] Because it was still debating what to call the events in Rwanda instead of addressing them as genocide, the result has been that these events have destabilized the GLR up to the present moment.[170]

Subsequent reviews by the United Nations, the Organisation of African Union Unity (OAU) and national legislatures of some troop-contributing states have all agreed that there was ample early warning and opportunity for response to the preventable genocide of April 1994 in Rwanda. Estimates by the UN Assistance Mission for Rwanda (UNAMIR) force commander at the time, General Romeo Dllaire that a deployment of approximately 5,000 troops to Rwanda a few days before the genocide would have been sufficient to halt the genocide have been borne out in subsequent investigations.[171] United Nations actions during the 1994 Rwandan genocide create an almost criminal blame on the Organization, both for its failure to prevent the Genocide and for its double standards. The UN Security Council as well as UN staff sent a directive from the Headquarters in New York to General Dallaire indicating that the UN forces could, if necessary, exceed their mandate in one solitary circumstance, namely: the evacuation of foreign nationals. Such a directive was not only viewed with incredulity, but it was also a shocking double standard as there was no such a similar directive issued to rescue the Rwandans.[172] This is not surprising, as permanent members of the UNSC usually have no particular interest in rapid, flexible and effective steps leading to manage conflicts in Africa.

Admitting some of these realities, the former UN Secretary-General, Kofi Annan states:

> "The United Nations does not have, at this point in its history, the institutional capacity to conduct military enforcement measures under Chapter VII of the UN Charter. Under present conditions, *ad hoc*

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[169] Vladimír, K.(2004) 'UN Peacekeeping Operations in Africa' *Jan Masaryk Centre of International Studies, University of Economics, Prague*, available at <http://www.ceeisaconf.ut.ee>, last visited, September 8, 2009.

[170] Almost all of the conflicts in the Africa's Great Lakes Region have some close connections to the 1994 Rwanda genocide. See further Mollel, A. (2007). 'Judicial Settlement of Armed Conflicts in International Law: Reflecting the 2005 International Court of Justice Decision in the Democratic Republic of Congo' in *Nordic Journal of international Law*, vol. 76, No. 4, pp. 407-434.

[171] See Report of the Secretary-General on *Prevention of Armed Conflict*, United Nations, A/55/985–S/2001/574, available at <http://www.reliefweb.int/library/documents/2001/un-conflprev-07jun.htm>, last visited, September 8, 2009.

[172] See more elaborate discussion on this issue in the *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, S/1999/1257, New York: United Nations, December 15, 1999.

> Member States coalitions of the willing offer the most effective deterrent to aggression or to the escalation or spread of an ongoing conflict ... The Organization still lacks the capacity to implement rapidly and effectively decisions of the Security Council calling for the dispatch of peacekeeping operations in crisis situations. Troops for peacekeeping missions are in some cases not made available by Member States or made available under conditions, which constrain effective response. Peacemaking and human rights operations, as well as peacekeeping operations, also lack a secure financial footing, which has a serious impact on the viability of such operations."[173]

In view of the above reasons, and with the apparent UNSC double standards with regards to peacekeeping deployment in African conflicts situations,[174]coupled with the unwillingness of developed states to provide troops, the only viable solution is to avail a standby African regional peacekeeping force. The failure of the UNAMIR to prevent the genocide in Rwanda in 1994, the sluggishness that overshadowed the establishment of a peacekeeping force to intervene the conflicts in Somalia (the UNISOM I)[175] and the premature withdrawal of UNISOM II[176] amidst high tensions and continuous deadly conflicts in Somalia in 1991 to 1993 support this line of argument. Furthermore, the long delays in the deployment of the MONUC and the UN Assistance Mission to Sierra Leone (UNAMSIL) in the DRC and Sierra Leone respectively in 1999 with consequential serious loss of human lives and property in the said countries add more to the reasons why the AU should and must develop its own regional peacekeeping and peace building capabilities.

The development of regional peacekeeping operations capabilities in Africa would play a central role as it reflects the different political and security environment of Africa. Since its inception, the AU has taken important steps in developing peacekeeping, human rights and security on the continent. The most significant AU organ when it comes to peacekeeping capabilities is the Peace and Security Council (PSC), established in 2003.[177] The establishment of the PSC, which becomes a higher authority mandated to intervene in internal conflicts,[178]comes as a response to the need for the coordination of the African Regional Mechanisms for Conflict Prevention, Management and Resolution, which was previously incorporated as one of the Central Organs of the of the former

[173] UN Report on Reform, 16 July 1997.
[174] See this argument emphasised by Evans, *supra* note 34, p.613.
[175] UN Operation in Somalia I.
[176] UN Operation in Somalia II.
[177] Established under Article 2 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union of 2003, pursuant to Article 5(2) of the Constituting Act of the African Union (CA), 2002.
[178] See Article 7, of the PSC Protocol, reaffirming the AU' right to intervene as already stated under Article 4(h) of the CA, that the PSC can recommend to the Assembly of Heads of States and Governments intervention on behalf of the Union, in a Member State in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments.

OAU.[179] The PSC is composed of an African Standby Force, a body of multidisciplinary military and civilian ready for rapid deployment.

So far, the AU has mandated and fielded two missions: the African Union Peacekeeping Mission in Burundi (AMIB)[180] and the African Union Peace Mission in Sudan (AMIS). The two cases are pivotal in terms of reflecting how human rights are more centrally placed in the African Peace and Security agenda in the present organization. Although full success of the two missions cannot be asserted here, AMIB was able to oversee the implementation of the ceasefire agreements, contributing to the creation of conditions suitable for the deployment of UNOB on June 1, 2004. Similarly, despites the crisis faced by AMIS as the situation in Darfur continued to escalate, its deployment and its repeatedly extended mandate, paved way to the establishment of a joint African Union/United Nations Hybrid operation in Darfur (UNAMID), which was authorized by Security Council resolution 1769 of 31 July 2007.

Additionally, the possibility of establishing peacekeeping operations on a regional level is not a novel phenomenon in the African continent. One example of Africa's regional peacekeeping operation under Chapter VII before the birth of the AU was under the Economic Community of West African States (ECOWAS), a sub-regional organisation of the OAU. It established the ECOWAS Cease-fire Monitoring Group (ECOMOG) in Liberia and Sierra Leone in (1990-1997) and (1997-2000) respectively.[181] Although this peacekeeping operation has been criticized on its legitimacy, impartiality and for going beyond the generally accepted spheres of peacekeeping operations,[182] its achievement for paving way for peace in the region cannot be totally dismissed. Its intervention in Sierra Leone saved thousands of lives by providing a buffer between the combatants and hundreds of thousands of forcibly displaced persons.[183]

Although there might be some disadvantages in the larger involvement of regional organizations in keeping the peace, the advantages are immense. The proximity of the AU to conflicts areas in the African continent gives it knowledge of the genesis of African conflicts and of the players involved. The shared culture and history can support conflict resolution as well.

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[179] See Decision AHG/Dec.160 (XXXVII) adopted by the 37th Ordinary Session of the Assembly of Heads and Governments of the OAU in Lusaka Zambia in 2001.
[180] The deployment of AMIB in 2003 aimed to achieve synergy in peace efforts within the Great Lakes
[181] In cases, ECOMOG successfully undertaken humanitarian intervention and restored democracy in the two countries.
[182] It is claimed that the force involved itself in enforcement actions without the authorization of the UNSC. See more critics on the force in Katayanagi, *supra* note 12, p.33.
[183] See further discussions on the success of ECOMOG in Rotberg, R *et al*, *supra* note 166, p.169.

However, although the AU and some of its sub-regional organizations are now capable of deploying military forces, they generally lack the staying power and multidimensional capability of forces like the UN's. Many of the new structures are yet to be fully operational. One of the most significant shortcomings of the AU is the lack of institutional capacity, especially the human resources, to adequately develop policy, and plan and manage peace operations. The AU has only a handful of staff dedicated to managing peace operations, significantly less than its UN and EU counterparts. Investing in African peacekeeping capacity through training and equipping peacekeepers is a worthwhile thing for the rest of the world to consider.

One of the critical challenges for an African regional peacekeeping force is financing. As can be seen from the first two AU peace operations, the AMIB and the AMIS, which were mainly donor funded, it is clear that, for the foreseeable future, the AU will be dependent on donor support for its peace operations. This is problematic because it denies the AU the independence to make decisions about some of the strategic, operational and even tactical aspects of peace operations it may wish to undertake.

As we shall see later, the performance of any peacekeeping that is deployed is dependent on, among other things, the resources at its disposal in the course of its operations. One comment is worth making at this juncture about the lessons learned from some of the AU regional peacekeeping operations, particularly the AMIB, which stands so far as the AU's first fully-fledged peacekeeping operation. Despite the need for regional peacekeeping initiatives, the UN should still retain its primary role of maintenance of international peace and security by involving itself in the planning and close consultation with regional peace initiatives.

4.10 Conclusion: Challenges and Limitations of the Approach

In an attempt to explore the conflict prevention and management strategies applied in resolving the Africa's Great Lakes conflict, the United Nations Organization Mission in the DRC, the MONUC, have been taken as a case study. While all peacekeeping operations could be said to have a preventive function in that they are intended to avert the outbreak or recurrence of conflict, their preventive role has been particularly hampered by the various shortcomings as discussed in this chapter. If one notes that conflicts are either still ongoing or have recurred in

most of the places where peacekeeping operations have been deployed, then the challenges and limitations of peacekeeping as a conflict prevention and management approach is evident.

This chapter has attempted to analyze the concept of peacekeeping and to explain the inadequacies and shortcomings of this method as a conflict-resolution strategy. There are numerous legal, political, financial, organisational and operational reasons for the UN's inability to put up effective peacekeeping on the ground whenever and wherever needed. Surely, the UN's failure to solve ongoing conflicts does not mean a failure of UN peacekeeping *per se*. But the United Nations (and the international community) failed when it introduced military conflict management as a core component of broadly defined peacekeeping strategies without backing up these expanded peacekeeping mandates with necessary moral and material support.

Beyond financial constraints, another significant challenge results from difficulties in reconciling the UN foundational principles of non-interference into states' internal affairs[184] and the inviolability of state sovereignty on the one hand, and its noble role of the maintenance of international peace and security on the other. The proscription on interference in State's internal affairs could be lifted under Chapter VII of the UN Charter for collective enforcement,[185] but unless the situation is determined unanimously by the Security Council to be a threat to international peace, these criteria continue to pose doctrinal dilemmas. This inhibits deployment of more vigorous peace operations where intervention is required, especially in the currently common internal armed conflicts situations, which typically result in massive human rights violations.

Another concern is that, unless the currently prevailing nature and mandate with which peacekeeping operations are deployed is changed, such forces will find their freedom of action considerably more constrained and endangered.[186] The deployment of unarmed or lightly armed troops in peace support operations in circumstances where no true peace exists, and the risk to life that this entails, discourages states that perceive no vital interest in the outcome from making units

[184] Article 2 (7) of the UN Charter prohibits the intervention of States' internal affairs. See also the 1965 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of the Independence and Sovereignty*, UNGA Res.2131 (XX) of December 21, 1965.
[185] Thakur and Schnabel, Albrecht, *supra* note 1, p. 238; Article 2(7) of the UN Charter puts a caveat to the principle of non interference into internal affairs thus: "this principle shall not prejudice the application of enforcement measures under Chapter VII".
[186] The Somalia situation is a good case in point.

available to the UN. Therefore, only peace enforcement forces prepared for combat and capable of effective coercion should be deployed into a potentially hostile environment like that in the DRC.[187] Although UN peacekeeping may not necessarily be the best instrument for the task at hand in every instance, it has always been one of the visible symbols of the UN role in international peace and security. But one major deficiency of the UN when it comes to peacekeeping operations is the fact that there is no military branch within the organisation. Despite the establishment of the Department of Peacekeeping Operations (DPKO), the conduct of peacekeeping operations remained to be on *ad hoc* basis to-date, and due to the inability of members to agree on a comprehensive set of guidelines to govern all UN operations; this is likely to remain the *status quo*.[188]

There are also impediments internal to peacekeepers themselves. Despite the existence of a comprehensive set of guidelines for UN peacekeeping operations, it is outrageous that UN peacekeepers' abuse of their role and mission is widespread.[189] A report by the UN Secretary-General's Special Envoy on Sexual Exploitation and Sexual Abuse makes it clear that some of the UN peacekeepers engage in acts of sexual misconduct and sexual exploitation in the course of their peacekeeping roles.[190] In the aftermath of these abuses, 2005 saw members of the UN peacekeeping mission in the DRC, MONUC facing 150 charges of sexual exploitation and abuse, including rape, and trafficking of persons.[191]

Unless clear and severe actions are taken against UN personnel who infringe upon their codes of conduct, the UN may in fact be fuelling more scepticism on the part of the receiving populations against peacekeeping operations. In order to ensure those who are mandated do not become perpetrators of abuse, the UN must take a stronger stand against those who commit acts of sexual misconduct, and must ensure that victims see the abuser brought to justice and that fair and reasonable reparation is offered.

Given the enormous problems that peacekeepers from developed states have had in Africa, and considering the demonstrably high degree of reluctance of western governments to take part in

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[187] It is understood that as the original Chapter VI mandate of the MONUC could not work to enable the force fulfil its objectives, it has now been mandated to operate under Chapter VII meaning that it is allowed to use all necessary means including pre-emptive force within its capacity, to carry out its tasks.
[188] Murphy, supra note 24, p.97.
[189] Complaints emerged against Peacekeeping Operations in Cambodia, Bosnia, Macedonia, Mozambique, West Africa, Eritrea, Kosovo and currently the DRC. See also Murphy (2007), *supra* note 23, p. 230.
[190] *Report of the UN Secretary-General: A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Sexual Abuse in United Nations Peacekeeping Operations*, UN Doc.A/59/10, 24 March 2005 ('Zeid Report), para 66.
[191] Ibid.

future peacekeeping activities on the continent, African governments must take the leadership role in dealing with the brutal realities of African conflicts.[192] Therefore, perhaps more so than at any other time in the past, African governments need to be committed to establishing and enhancing local, sub-regional, and regional mechanisms to prevent, manage, and resolve conflicts in Africa.[193] This is not to diminish the role of the UN in maintaining peace and security in the world since the UN will still need to provide technical, financial and other logistical supports to regional peacekeeping operations, like those developing in the African continent.

As the analysis of the MONUC portrays, the human rights component of peacekeeping operations is vital if the root cause of the conflicts is to be addressed. In essence, both UN forces and other peacekeeping forces deployed under regional or sub-regional arrangements can only be effective as a conflict management strategy if their activities include the protection and promotion of human rights in the areas they are deployed. This entails not only stopping human rights abuse as perpetrated by the parties to the conflict in question but also abstinence by members of the peacekeeping forces from taking advantage of the conflict situation to commit acts of human rights violations.

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[192] *See Recommendations of the Brookings Institution/UNHCR/OAU Workshop on Internal Displacement in Africa*, Addis Ababa, Ethiopia, Oct. 19-20, 1998; *see generally* UNHCR, "The State of the World's Refugees: A Humanitarian Agenda" (1997) <http://www.unhcr.ch/refworld/pub/state/97/toc.htm> last visited, September 8, 2009. The Security Council has repeatedly been accused of double standards with its treatment of Africa and there is a great concern about the unwillingness of developed states to provide peacekeeping forces in difficult situations in Africa, even if such situations led to serious catastrophes like the genocide in Rwanda. Again, there were long delays in deployment of MONUC in the DRC despite several urges from the Secretary-General on the urgency of deploying such a force. See further discussion on this issue in Gray, supra note 24, p.615

[193] Levitt, *supra* note 12, *p.3*

5 INTERNATIONAL ADJUDICATION AND RESOLUTION OF ARMED CONFLICTS IN THE DRC.

5.1 Introduction

Adjudication or judicial settlement of disputes is one among a range of existing UN-Charter based mechanisms to resolve conflicts,[1] recognized and practiced by states in international law from classical times.[2] It is a general term referring to settlement of disputes by all sorts of national and international judicial bodies known as courts or tribunals, and in particular permanent global and regional courts of general or specialized jurisdictions established pursuant to a treaty in which independent judges render legally binding decisions on the basis of International Law.[3]

Adjudication generally refers to processes of decision making that involve a neutral third party with the authority to determine a binding resolution through some form of judgment or award.[4] Adjudication is carried out in various forms, but most commonly occurs in the court system. It can also take place outside the court system in the form of alternative dispute resolution processes such as arbitration, private judging, and mini-trials. However, court-based adjudication is usually significantly more formal than arbitration and other ADR processes. The development of the field of alternative dispute resolution has led many people to use the term *adjudication* to refer specifically to litigation or conflicts addressed in court.[5] Therefore, court-based adjudication will be the main focus of this chapter.

Various approaches have been used to resolve the DRC conflicts, including adjudication. This chapter examines the role of adjudication in the resolution of armed conflicts. It therefore addresses all judicial means of dispute settlements that have relevance in the conflict resolution processes in the DRC. So, attention will be centered on the role of such international judicial bodies as the International Court of Justice (ICJ),[6] the *ad hoc* International Criminal Tribunals [the International Criminal Tribunal for the Former Yugoslavia (ICTFY)[7] or the International Criminal Tribunal for

[1] See Article 33 of the Charter of the United Nations, 1945 (hereafter referred to as the "UN Charter").
[2] The other is arbitration in which states themselves set up a tribunal to decide their dispute (s).
[3] See this definition in Boczek, B. (2005). *International Law: A Dictionary*, Oxford: The Scarecrow Press Inc., p. 365.
[4] Douglas, Y. (1999), *The Dictionary of Conflict Resolution*, San Francisco: Jossey-Bass Publishers, p. 5.
[5] Heidi and Burgess, G. (1997). *Encyclopedia of Conflict Resolution*, Denver: ABC-CLIO, p. 2. This excerpt of the Burgess' book includes a helpful discussion of the key differences between court-based adjudication and alternative dispute resolution processes.
[6] Established as one of the Six Principal Organs of the United Nations. *See* Article 7 (1) of the UN Charter.
[7] The Unite Nations Security Council (hereinafter referred to as "the UNSC"), acting under Chapter VII of the UN Charter, and by Security Council resolution No. 827 & 808 (1993) established the International Criminal Tribunal for the Former Yugoslavia for the sole purpose of prosecution of persons responsible for serious violations of International

Rwanda (ICTR)[8]], and the International Criminal Court (ICC).[9] Mention will also be made of the Nuremberg Tribunal[10] and other judicial bodies involved in settling disputes on the international level.[11] In relation to the ICJ, the chapter makes a critical examination of the role of this Court in the light of the 2005 ICJ Judgment on the *Case Concerning Armed Activities on the Territory of the Congo.*[12] The discussion in the initial part of the chapter will therefore mainly focus on the decision of the ICJ in that case, as a lesson on the role of the ICJ in settling armed conflicts in international law that could be learned and applied to the future. The main argument is that, although the adjudicatory role of the ICJ as the principal judicial organ of the UN is a crucial method in pacific settlement of international disputes, it is unlikely to suit armed conflicts situations.

Jurisdictional limitations of the ICJ in adjudication of armed conflicts situations are pointed out. Specifically, this chapter points to the preclusion of the Court from adjudicating the other cases brought by the DRC against Rwanda and Burundi as an illustration of one such limitation. It stresses, however, that the very outcome of the 2005 ICJ decision in the *Democratic Republic of Congo* v *Uganda* case is, in fact, really another example of its limitations.

Without getting into detailed discussions of theories of compliance with international law, which is considered to be beyond the scope of this chapter, the chapter further discusses the question of compliance with the current ICJ decision in the light of previous state practices. Since there are no established enforcement mechanisms in the international system akin to those in national legal

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Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. *See* preamble to the Statute for the International Criminal Tribunal for the Former Yugoslavia, 1993.

[8] Having been established by the UNSC acting under Chapter VII of the UN Charter, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. *See* UNSC resolution 955 (1994) of 8 November 1994 as amended by Security Council resolutions 1165 (1998) of 30 April 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002.

[9] The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. *See* Article 1 of the *Rome Statute of the International Criminal Court*, 1998, 2187 UNTS. 90; 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter "the Rome Statute"]

[10] Was an International Military Tribunal established for the trial and punishment of major war criminals of the European Axis. The trials were held in the city in the city of Nuremberg In Germany, from 1945 to 1949. *See* Article 1 of the Charter of the International Military Tribunal, August 1945.

[11] Although not all judicial bodies are discussed here, it is understood that such other international judicial bodies may also include the International Center for Settlement of Investment Disputes (ICSID), International Tribunal for the Law of the Sea (ITLOS), etc.

[12] Application instituting proceedings filed in the registry of the Court on 23 June 1999, General list No. 116. See also order on request for indication of provisional measures: I.C.J Press *Communique* 2000/24 (1 July 2000). On this, *see also* Kristiotis, D Case Note (2001) 50 ICLQ, pp.662–9; For further discussion on this case, see Alexander, O. (2006) 'Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of Congo v. Uganda)* in *International and Comparative Law* Quarterly. Vol. 55, No. 3, pp. 753-763(11).

systems, the question of whether decisions of international judicial bodies (the ICJ in this case) are complied with remains at the mercy of the losing states. In the final analysis, I point to the current weaknesses and limitations—with regard to the administration of justice--of the international legal system as a whole.

More importantly, even if the Ugandan government, in this case, were to comply with the current ICJ's decision, one may still pose a question: Is that all? Couldn't we think of more justice for remedies to the DRC and its people through further responsibility in international law? Does the 2005 ICJ's judgment provide an effective remedy for the human rights atrocities, war crimes, war of aggression and crimes against humanity committed by the military and paramilitary forces organised by Uganda and its allies in the territory of the DRC from 1998 to early 2003? These questions and many others, leads to the discussion of the desperate jurisdictional limitation faced in international adjudication of armed conflicts by the ICJ under its Statute, particularly in dealing with states' responsibility for crimes and wars crimes generally under international law.

To discuss these issues, the present chapter will be divided into six parts. Part 1 will introduce the subject under discussion and point out the aim and structure of the chapter. Part 2 will dwell on the historical development of the concept of adjudication in international law, tracing this development from the time of the PCIJ to the current ICJ, looking at the mandate of the Court, the nature and legal effects of its decisions generally, and the enforcement mechanisms for such decisions under its Statute and general international law. Part 3 will be devoted to the background of the armed activities in the territory of the Congo by Uganda and its allies with the resultant serious negative effects on the population and property of the DRC. Part 4 will be devoted to the role of the ICJ in the DRC Conflict. This entails an assessment of the history of the proceedings leading to the 2005 ICJ decision, of the jurisdictional limitations of the Court and of compliance with its decisions by the losing states, in the light of past experience of states' practices. Part 5 is concerned with international criminal adjudication where I examine the concepts of "State's criminality" and individual criminal liability. While I use the *Bosnia-Herzegovina* case to elaborate on the role of the ICJ in the former, I take reference of the *Lubanga* case to examine the role of ICC in the latter. The last part, Part 6, will bring forth some conclusions, pointing out the main argument of this chapter, namely the inefficacy of international adjudication in dealing with armed conflict situations in international law. This part will also provide for some recommendations about possible ways to move forward.

5.2 Development of Adjudication in International Law

Before the twentieth century, international disputes were usually resolved by diplomatic negotiation, occasionally by arbitration, and often by war. Negotiations did not always substitute for the use of force, which unfortunately remained the ultimate instrument of diplomacy.[13] While this trend continued until recent days, with the concept of humanitarian intervention gaining momentum as a sort of legitimizer, the basic presumption of international law according to Articles 2 (4) and 2 (7) of the UN Charter is that the use of force is illegal, except for self-defence and/or collective security. Thus, diplomatic means of settling conflicts, including adjudication, are today considered central to the maintenance of global security.

Historically, judicial settlement of disputes developed from arbitration, the latter being the oldest of all known legal methods of disputes settlement in international law.[14] With time, though, many pacifists perceived the limitations and weaknesses of arbitration and sought to fill in other ways the gap through which nations could still plunge to war. They emerged with another plan—conciliation. Those issues which governments were not willing to submit to arbitration should be referred to another kind of third party whose recommendations would not be binding. This principle, however, like arbitration, had its limitations. It signaled the failure to avert the First World War.

Because both arbitration and conciliation possessed some limitations[15], it became necessary to devise other ideas to resolve disputes peacefully or to stop wars after they began. These involved mediation, good offices[16] and inquiry. Another proposal which seemed most attractive was that associated with the creation of an international court of justice. A permanent legal tribunal could operate under commonly accepted practices and perhaps even statutes; it could be distinctive in its procedures and authority. The main idea was that if nations could agree to establish rules of behaviour and a genuine judicial court, they would then willingly bring their disputes to the bar of justice.[17]

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[13] Slomanson, W (2004), 'Historical Development of Arbitration and Adjudication,' *Miskolc Journal of International Law*, Vol.1, No.2, pp. 238-241.

[14] The origin of arbitration can be traced back to the 1794 *Jay Treaty* between Great Britain and the United States. See also Boczek, *supra* note 3.

[15] Due to the consensual and non-binding nature of these methods, states could still engage in war as no formal adjudicator supervised the outcome of the settlement processes.

[16] The provision of good offices has often been referred to as "quiet diplomacy" since the process often involves entrusting the dispute to personalities with special qualification on whom both parties agree. This might involve, for example, heads of states or the Secretary-General of the United Nations, or their designees.

[17] Mangone, G. (1954) *A Short History of International Organizations*, New York: McGraw-Hill Book Company, p.12.

Unlike other previous methods, judicial settlement of disputes involves the reference of disputes to permanent tribunals for a legally binding decision. Serious legal scholarship on the possibility of establishing a recognized tribunal culminated in the establishment of the Permanent Court of International Justice (the PCIJ)[18] under the Covenant of the League of Nations in 1921. This tribunal, authorized under Article 14 of the Covenant of the League of Nations, functioned until April 1946.

The history of the PCIJ during the inter-war period was generally a satisfactory one.[19] In twenty-five years, it heard sixty-five cases and rendered thirty-two decisions and twenty-seven advisory opinions.[20] Nonetheless, while the court contributed immensely to the rule of law in international affairs by its existence, operation, and decisions, it faced problems similar to those experienced by arbitral bodies. It never developed a code to be used in the judging of cases, and nations did not entrust major problems to it for settlement. These weaknesses were compounded by its lack of authority to uphold decisions and by attitudes about states' sovereignty which kept issues involving vital interests, national honour, and independence outside of the realm of this form of justice.[21]

The demise of the League of Nations at the aftermath of the Second World War and the subsequent establishment of the United Nations went hand in hand with the disappearance of the PCIJ and the establishment of the International Court of Justice[22], (hereinafter referred to as ICJ or the Court). The Court, which is composed of fifteen judges who are elected for nine-years terms[23] came into existence with the election of the first members in February 1946, inheriting not only the premises and archives of the pre-war Permanent Court, but also, so far as possible, its jurisdiction.[24]
The ICJ was established, not as an independent body from the United Nations, as the case was with its predecessor with the League of Nations, but as an integral part--the principal judicial organ of the United Nations.[25] Its seat is in the Peace Palace at the Hague in the Netherlands.

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[18] The first standing International Judicial body established in 1922 to decide disputes between states.
[19]Hugh, T (2003), 'The International Court of Justice' in Evans, M. (Ed.), *International Law*, New York: Oxford University Press, p. 561.
[20]Riggs, R and Plano, J. (1998) *The United Nations: International Organisation and World Politics*, California: Brooks/Cole Publishing Co., p.194.
[21]For example, in the 1960s and 1970s, less and less states seemed inclined to bring their disputes before the ICJ.
[22] Established under Chapter XIV (Articles 92–96) of the UN Charter and the Statute of the Court, which although it is not incorporated into it forms an integral part of the Charter and elaborates certain general principles laid down in Chapter XIV of the Charter on the operation of the Court.
[23] *See* Article 3 of the Statute of International Court of Justice, 1945 (hereafter referred to the ICJ Statute). *See also* Hugh, *supra* note 19, p.562.
[24]*See* Article 59 and 60 of the ICJ Statute.
[25] The ICJ is one of the six principal organs of the UN listed under Article 7 of the UN Charter; Others are the General Assembly, the Security Council, the Economic and Social
Council, the Trusteeship Council and the Secretariat.

Under its mandate, the Court serves a dual role: first to resolve legal disputes submitted to it in accordance with international law;[26] second, to provide advisory opinions on questions of international law referred to it by other international bodies.[27] The first function is, however, limited to only those disputes submitted by states, excluding non-state entities such as individuals, intergovernmental organisations, multilateral organisations or non-governmental organisations.[28] This is one among the Court's significant jurisdictional limits.

According to Article 93 of the UN Charter, all United Nations member states are automatically parties to the Court's Statute, and even non-UN members may also become parties under Article 93(2) of the Charter of the United Nations. However, being a party does not automatically give the Court jurisdiction over disputes involving those parties. The key principle is that the ICJ exercises jurisdiction only on the basis of consent. Article 36 outlines four bases on which the Court's jurisdiction may be founded.[29] First, parties to a dispute may refer cases to the Court on their specific consent in that particular dispute (jurisdiction founded on "special agreement" or "*compromis*"). This method is based on explicit consent rather than true compulsory jurisdiction. It is, perhaps, the most effective basis for the Court's jurisdiction because the parties concerned have a desire for the dispute to be resolved by the Court and are thus more likely to comply with the Court's judgment.

Second, the Court has jurisdiction over "matters specifically provided for in the UN Charter or in treaties and conventions in force".[30] Some of the treaties contain compromisory clauses, providing for dispute resolution by the ICJ. Cases founded on compromissory clauses have not been as effective as cases founded on special agreement, since a state may have no interest in having the matter examined by the Court and may refuse to comply with a judgment. For example, during the Iran hostage crisis, Iran refused to participate in a case brought by the USA based on a compromissory clause contained in the Vienna Convention on Diplomatic Relations,[31] nor did it comply with the judgment. Since the 1970s, the use of such clauses has declined substantially. Many modern treaties set out their own dispute resolution regime, often based on forms for arbitration.

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[26] *See* Article 38 of the ICJ Statute.
[27] *See* Article 96 of the UN Charter; *See also Ibid*, Article 36.
[28] *See Ibid.*, Article 38.
[29] See elaborations on compromisory clauses and jurisdiction of the Court in Article 36 of the ICJ Statute.
[30] *See* Article 36(1) of ICJ Statute.
[31] Done at Vienna on April 18, 1961. Entered into force on April 24, 1964. *See* United Nations, *Treaty Series*, vol. 500, p. 95.

Thirdly, Article 36(2) allows states to make optional clause declarations accepting the Court's jurisdiction. The tag of "compulsory" which is sometimes placed on Article 36(2) jurisdiction is misleading since declarations by states are voluntary. Therefore, the provision applies only between states that have made the optional declaration, but for them it extends the Court's jurisdiction to all legal disputes concerning:

a. The interpretation of a treaty;
b. Any question of international law;
c. The existence of any fact, which, if established, would constitute a breach of an international obligation;
d. The nature or extent of the reparation to be made for the breach of an international obligation.[32]

Furthermore, many declarations contain reservations, such as excluding from jurisdiction certain types of dispute ("*ratione materiae*").

The principle of reciprocity may further limit jurisdiction. As of April 2008, sixty-six states had declarations in force.[33] Out of the five permanent members of Security Council, only the United Kingdom has made such a declaration.[34] In the Court's early years, most declarations were made by developed countries. However, since the *Nicaragua* case, declarations made by developing countries have increased, reflecting a growing confidence in the Court since the 1980s. Developed countries, however, have sometimes increased exclusions or removed their declarations in recent years. Examples include the USA, as will be further explained later, and Australia, which modified its declaration in 2002 to exclude disputes on maritime boundaries, most likely to prevent an impending challenge from East Timor which gained its independence two months later.

Finally, Article 36(5) provides for jurisdiction on the basis of declarations made under the Statute of the Permanent Court of International Justice. Article 37 of the ICJ Statute similarly transfers jurisdiction under any compromissory clause in a treaty that gave jurisdiction to the PCIJ. In addition, the Court may have jurisdiction on the basis of tacit consent (*forum prorogatum*). In the absence of clear jurisdiction under Article 36, jurisdiction will be established if the respondent accepts its jurisdiction explicitly or simply pleads to the merits. This latter situation arose in the

[32] See Article 36 (2) of the ICJ Statute and also Riggs & Plano, *supra* note 20, p.196.
[33] Available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>, last visited, September 9, 2009.
[34] Alexandrov, S. (2006) 'The Compulsory Jurisdiction of the International Court of Justice: How Compulsory', *Chinese Journal of International Law*, vol. 5, No. 1, pp. 29–38.

Corfu Channel Case[35] in which it was held that the letter from Albania stating that it submitted to the jurisdiction of the ICJ was sufficient to found jurisdiction.

As can clearly be seen from the foregoing, the Court's jurisdiction is usually compromisory, consensual and in most cases, optional. This consensual nature of the Court's jurisdiction has led, at times, to some significant failures of justice. This issue will be revisited later with more details in this chapter. Suffice it to say here, that the creation of the Court represented the culmination of a long development of methods for the pacific settlement of international disputes, the origins of which can be said to go back to classical times.

Despite its shortcomings, the role of the Court in the peaceful settlement of international disputes has generally been greatly significant over the period of its operation. After an initial period of uncertainty that led to a resolution by the General Assembly in 1947 concerning the need to make greater use of the Court, the Court's work at first assumed a tempo comparable to that of the PCIJ. Then, starting in 1962, all the signs were that the States which had created the ICJ were now reluctant to submit their disputes to it. The number of cases submitted each year, which had averaged two or three during the fifties, in the sixties fell to none or one.[36]

In the 1970s, at a time when the level of the Court's activity was in a marked decline, the United Nations Secretary-General, in the introduction to his annual report, felt obliged to recall the importance of judicial settlement and 12 States suggested that a study should be undertaken of the then current obstacles to the satisfactory functioning of the International Court of Justice, and ways and means of removing them, including additional possibilities for use of the Court that had not yet been adequately explored. The General Assembly placed on its agenda an examination of the Court's role and, after several rounds of discussions and written observations, it adopted a fresh resolution concerning the ICJ on 12 November 1974.[37]

Since 1986, the Court has experienced a significant increase in the number of cases referred to it. Over a period of some ten years, it has been asked to deal with 19 contentious cases and four requests for advisory opinions. At the end of July 1996, nine contentious cases were pending before

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[35] *Corfu Channel Case*, (*United Kingdom* v *Albania*), I.C.J Reports, 1949, p. 459–60.
[36] From July 1962 to January 1967 no new case was brought, and the situation was the same from February 1967 until August 1971.
[37] See UNGA Res 3232 (XXIX) of November 12, 1974; Positive changes were then witnessed soon as from 1972 the number of new cases brought to the Court increased, and between 1972 and 1985 cases averaged from one to three each year.

the Court. In its resolution, the General Assembly declared the period 1990–1999 as the United Nations Decade of International Law, and considered that one of the main purposes of the decade should be "to promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice."[38]
Thus, beginning in 1999, the number of cases coming before the Court has risen dramatically. Between 1990 and 1997 they averaged eleven cases and the number continued to grow to twenty-three cases which were pending before the Court in the year 2000. Generally, from May 1947 to November 2009, 144 cases were entered in the General List.[39] Their subject-matter is varied, ranging from land and maritime boundaries disputes between neighbouring countries, territorial sovereignty, diplomatic relations, the right of asylum, to nationality and economic rights.

Legally speaking, once a state has consented to the jurisdiction of the Court, it must accept and comply with its judgment, which is also final and without appeal.[40] As clearly stipulated, each member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party.[41]

The very essence of adjudication in any legal system, international legal system inclusive, is the capacity of the system to ensure compliance with the final decision of the judicial organ in question: hence, enforcement mechanisms. Under normal circumstances, drawing from national legal systems, there is a complete system of judicial settlement of disputes, including compliance and enforcement systems. In criminal cases for example, the executive branch has the inherent and exclusive power to enforce Court judgments in national legal systems. Similarly in civil litigation, unless compliance is voluntary by the losing party, the domestic court has power to issue an execution order which can be enforced by the court's approved agents with the assistance of the executive in some instances.[42] Judicial settlement of disputes in this instance therefore, creates some degree of certainty so far as the outcome of the court's decision is concerned.

At the international system of adjudication however, there is no clearly established enforcement system analogous to that of domestic judicial systems. This has led some international legal

[38] General Assembly resolution No.44/23 of November 17, 1989.
[39] Available at <http://www.icj-cij.org/docket/index.php?p1=3>, last visited, September 8, 2009.
[40] *See* Article 59 and 60 of the ICJ Statute.
[41] Article 94(1) of the UN Charter.
[42] Warioba, J (2001) 'Monitoring Compliance with and Enforcement of Binding Decisions of International Courts,' *Max Planck Yearbook of United Nations Law*, vol. 5, pp. 41–52.

scholars to go as far as arguing that as there are no clearly established enforcement mechanisms for binding decisions in international adjudication; international law is not law at all.[43] Others counter this contention by arguing that non-compliance with decisions of judicial bodies alone does not make a particular legal system non-existent.

The hoped-for results of the ICJ's decisions therefore, though clearly binding, are jeopardized by the absence of clearly established enforcement mechanisms. In the same way that jurisdiction is consensual and compromisory, so is compliance.

Under the framework of the UN Charter, responsibility for ensuring compliance is not within the ICJ's mandate, but rather, with the principal political organ for maintaining peace and security–the UN Security Council. Article 94(2) provides:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

This clearly manifests the strong link between the ICJ and the Security Council as institutions with related but decidedly different competencies in the settlement of international disputes; the ICJ is tasked with allocating rights and responsibilities and assessing competing legal claims among willing member states while the Security Council is tasked, upon judgment, to give effect to that decision, should the debtor state refuse to comply.

A number of subtle points are discernible from the text quoted above: first, only 'judgments' of the ICJ are subject to Article 94 enforcement. Secondly, only the judgment creditor state has the right to seek recourse from the Security Council. (Note that this was not the case with the League of Nations and Permanent Court).[44] Thirdly, the Security Council appears to retain discretion both as to whether it shall act to enforce at all and, if so, what concrete measures it decides to take. Clearly, therefore, the enforcement of ICJ judgments involves quintessentially political acts by both parties and the Security Council, in which the Court itself has little involvement and over which it has no power. Furthermore, this provision does not confer any additional power to the Security Council, and as such, the judgments of the Court have mostly been considered as principally declaratory of rights and duties of the parties and no more.[45]

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[43] O'Connel, M. (1995) 'Enforcement and the Success of International Environmental Law', *Indiana Journal of Global Legal Studies*, vol. 5, No.1, pp. 47-64.

[44] Art. 13(4) of the League of Nations Covenant suggested that ' proceedings were to be automatically launched irrespective of any formal complaint by the judgment creditor ' : This difference has no practical relevance, however, for the League of Nations Council never took action on its own initiative on the basis of Art. 13(4), whereas the Security Council can take action *propio motu* if there is a threat to the peace.

[45] O'Connel, *supra* note 43.

That is why, the fact that the judgment is binding on the parties does not mean that they may not, by agreement between themselves depart from it, unless the decision is founded on one of the rules of *jus cogens*.[46] These are some of the challenges that one must be aware of when examining the outcome of the 2005 ICJ decision against Uganda.

5.3 Background to the Armed Activities on the Territory of the DRC

The DRC conflict, which has occasionally been described as Africa's World War,[47] and which led to the armed activities undertaken by Uganda and its allies in the territory of the DRC, is an extremely complex one. It is in fact an intertwined convergence of several conflicts on local, national and regional levels, which are focused primarily on the eastern half of the country, and it is one of the situations in which the international community has witnessed the internationalisation of an internal warfare.

The complexity of this conflict is highly illustrative of justice issues faced today by the international community in the aftermath of human rights atrocities. Domestic and state actors were entangled in a web of interests, which must be addressed fully to lay the foundations of sustainable peace. Interestingly, the present discussion about justice for the DRC revolves around the usual combination of trials and truth commissions.[48] Although the Congolese government has taken steps to hold its neighbouring states responsible before the International Court of Justice, much is yet needed if justice is to be seen to have been done.

This chapter argues that the attribution of crimes to state actors is vital for reconciliation on a regional level and for long-term stability in the Africa's Great Lakes Region. Although it is evident that the mechanisms for holding states responsible for crimes under international law are still evolving and that they do not at present provide very effective tools,[49] something beyond the 2005 ICJ's decision has to be done that will help fill the gaps in the international justice system.

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[46] Hugh, *supra* note 23, p. 580.
[47] Hawkins, V (2004) "Stealth Conflicts: Africa's World War in the DRC and International Consciousness." in *The Journal of Humanitarian Assistance*, <http://www.jha.ac/articles/a126.htm> last visited, September 8, 2009.
[48] Huls, V. (2006) 'State Responsibility for Crimes under International law: Filling the Justice Gap in the Congo', available at <http://www.lawanddevelopment.org>, last visited, September 8, 2009.
[49] *Ibid.*

In reality, the DRC conflict was and still is a humanitarian catastrophe of virtually unfathomable proportions, which has raged across more than half of a country almost the size of the whole Western Europe, and has seen eight African countries[50] being directly involved in military activities in the DRC. Not only is it the deadliest war in the world today, it is the deadliest since World War II, having resulted in an estimated 4 million conflict-related deaths since fighting broke out in August 1998.[51]

It all started as the direct effect of the 1994 Rwandan Genocide[52], to which it is closely connected. But it also has its origins in the colonial and post colonial legacy (in terms of citizenship rights and land ownership) of forced migrations of Rwandan-speaking people under Belgian colonialism,[53] in internal divisions exacerbated by decades of misrule under the US-backed Mobutu[54], in decades of ethnic conflict and refugee flows culminating in the 1994 Rwandan genocide, and in the spillover of four years of civil wars deep into the DRC territory.

The relationship between the 1994 Rwandan Genocide and the DRC conflict is clearly visible. Some of the remnant forces of the ex Hutu-led government which was defeated in 1994 (*The Forces Armees Rwandaise*, FAR), now called ex-FAR and members of the genocidal *Interahamwe* militias, responsible for killing some 800,000 ethnic *Tutsis* and moderate *Hutus* during the Genocide, fled across the border to the DRC and continued occasional launching of attacks on Rwanda from the DRC territory.[55]

Rwanda wanted the Congolese Government, then under Mobutu Seseko, himself a notorious dictator of his time, to stop these *Interahamwe* militia's activities. (Later, there was suspicion that the militia received full support from the Congolese Government).[56]
At the same time, the then rebels Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL) led by Laurent Kabila, taking advantage of the complex situation in the DRC, invaded the Eastern DRC in 1996 in a bid to fulfilling his long time desire of seizing power from Mobutu.

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[50] Notably the DRC itself, Uganda, Rwanda, Burundi, Zimbabwe, Namibia, Angola and Chad.
[51] Hawkins, *supra* note 48.
[52] Mpangala, G. (2000) *Ethnic conflicts in the Region of the Great Lakes: Origins and Prospects*, , Dar Es Salaam: Dar Es Salaam University Press, p.90.
[53] Hochschild, A. (1998) *King Leopold's ghost. A story of Greed, Terror and Heroism in Colonial Africa*, London: Macmillan, p. 141.
[54] Mobutu *Sese Seko Nkuku Ngbendu wa Za Banga* was the president of Zaire (now the DRC) for 32 years (1965–1997).
[55] Mpangala, *supra* note 52.
[56] Kamukama, D. (1997) *Rwanda Conflict: Its Roots and Regional Implications*, Kampala: Fountain Publishers, p.63.

When Mobutu fled, Laurent Kabila assumed presidential power in the DRC with the support of Rwanda and Uganda, but the new government of Laurent Kabila soon fell out with Rwanda and Uganda's interests. A year later, in August 1998, they (Uganda, Rwanda and Burundi), allying with new sets of domestic groups opposed to the Kabila regime tried to replace their former ally and new leader, Laurent Kabila, accusing him of now backing the remnants of the *Interahamwe* forces.[57] In this new development, Rwandese forces occupied large parts of the territory of the eastern Congo while Ugandan forces occupied the territory in the Northeast of the country. They all had the same mission, another attempt to remove their former ally, Laurent Kabila, from power. But this time, they were blocked by troops from other neighbouring countries of Angola, Zimbabwe, Chad and Namibia and a four-year stand-off ensued in a conflict which then developed a highly international and very complex character.[58]

The DRC was effectively split into three parts, the government with its supporters held the West, while East was divided between Rwanda forces on the one part, and Uganda and Burundi forces on the other. Each of the players in the conflict – the DRC government, the numerous rebel groups (and their often opposing factions), the local militias, and the foreign countries which have intervened militarily – has or has had different objectives and agenda.
The hostile operations of rebel movements from bases in the DRC provided much of the initial rationale for intervention by Rwanda, Uganda and Burundi. The DRC's relations with rebel movements from Angola and the Sudan also weighed heavily on their decision to intervene. Later on however, access to resources in the DRC became the key factor in foreign involvement on both sides, with deals between the DRC and Zimbabwe and Namibia in particular proving critical in securing their intervention.

Various Peace Agreements have been signed since 1999 for the withdrawal of foreign military forces involved in the hostility and by the main Rwandan and Ugandan proxies – the Rally for Congolese Democracy (RCD) and the Movement for the Liberation of the Congo (MLC), but were never implemented.[59] The UN Security Council established an observer mission, which was later transformed into a peacekeeping mission (known by its French acronym as MONUC)[60]. The full deployment of the MONUC was repeatedly delayed, and its role remains relatively negligible against the backdrop of the conflict on the ground.

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[57] *Ibid*, p.65.
[58] Mpangala, *supra* note 52, p.93.
[59]These agreements were the Lusaka, Kampala and Harare Peace Accords of 1999.
[60] *Mission de l' Organisation des Nations Unies en République démocratique du Congo*.

In January 2001, Laurent Kabila was assassinated and succeeded by his son, Joseph Kabila,[61] under whom peace negotiations successfully enabled the withdrawal of foreign forces and the signing of peace agreements with all major rebel groups.[62] This move has stabilized the present situation to some degrees.

All in all, the DRC war has intensified and worsened the Africa's Great Lakes region conflict generally. More particularly, it had serious negative impacts on the people and property of the DRC. Competing armed groups violated international human rights law and international humanitarian law by carrying out large scale ethnic massacres of unarmed civilians, deliberate and arbitrary killings, extra-judicial executions, torture including rape and other forms of sexual abuse, *incommunicado* detentions, and the use of child soldiers. All of these seem to be the norm during the war in this mineral-rich corner of Congo.[63] For instance, a local conflict between Hema and Lendu ethnic groups allied with national rebel groups and foreign backers, particularly Uganda and Rwanda, has claimed over 60,000 lives since 1999, according to the United Nations estimates.[64]

The DRC war in many ways is more reminiscent of organized crime and gang warfare than conventional armed conflict.[65] Security reasons claimed by the initiators of the conflict, Uganda and Rwanda, initially may have been just but provided cover for other real intentions. The actual reasons for the involvement of Uganda, Rwanda and Burundi in the Congo war have been divided in three main areas of concerns. The first actual concern was the intention to overthrow Laurent Kabila and install a puppet regime that would serve their security as well as their economic interests including the exploitation of mineral resources.[66] The second area constitutes the concept of "Hima-Tutsi Empire" according to which Uganda and Rwanda have a long term strategic plan of 'conquering' the whole Great Lakes Region and establishing the "Hima-Tutsi Empire" or at least installing leaders of Hima-Tutsi origin or blood in all the countries of the Africa's Great Lakes Region.[67] In addition to the two missions above, the third area of concern has been the protection of

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[61] Talbot, C. (2001) 'Congo Peace talks Revived after Kabila's assassination' in *World Socialist Website*, February 23, 2001, published by the International Committee of the Fourth International (ICFI).
[62] The "Sun City Agreement'' signed in South Africa in December 2002 formed an "all Inclusive'' interim government which has so far maintained some degree of stability.
[63] UN Commission on Human Rights, 'Making Human Rights Work: Time to Strengthen the Special Procedure' *See* <http://www.hrw.org>, last visited, September 8, 2009.
[64]United Nation Security Council, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth in the DRC in 2002* (S/2001/357), 12 April 2001.
[65]Huls, *supra* note 49.
[66] Mpangala, *supra* note 52, p.96.
[67] *Ibid*.

economic, financial and geostrategic interests of neo-colonial powers particularly the US.[68] Whatever the actual reasons, the ultimate results were commission of war crimes, genocide, crimes against humanity and all other sorts of infliction of suffering to the Congolese population,[69] issues which, far beyond the scope of this study, need to be investigated further for judicial purposes.

In the case of Zimbabwe, Angola and Namibia, which joined the war in support of Kabila, their main argument was that they were acting collectively under Article 51 of the Charter of the United Nations in self-defense against an armed attack on their neighbour and fellow member of the United Nations and SADC. It has, however, been argued that these countries also have had some economic interests in joining the war.[70]

5.4 The Role of the ICJ in the DRC Conflict

The history of the proceedings leading to the 2005 ICJ Judgment on the *Case Concerning Armed Activities on the Territory of the Congo* portrays a long struggle towards accessing the international justice system.

On June 23 1999 the DRC filed in the Registry of the Court three Applications instituting proceedings against Burundi, Uganda and Rwanda, respectively, for acts of armed aggression perpetrated in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity (OAU). In its Applications, the DRC contended that the invasion of Congolese territory by Burundian, Ugandan and Rwandan troops on August 2, 1998 (an invasion claimed to have involved fighting in seven of the DRC provinces) constituted a violation of its sovereignty and of its territorial integrity, as well as a threat to peace and security in central Africa in general and in the Great Lakes region in particular. The DRC accused the three States of having attempted to capture Kinshasa through Bas-Congo, in order to overthrow the Government of National Salvation and assassinate President Laurent Desire Kabila, with the object of establishing a Tutsi regime or a regime under Tutsi control. The DRC also accused these States of violations of international humanitarian law and massive human rights violations, and of the looting of large numbers of public and private institutions. It further claimed that the assistance given to the Congolese rebellious groups and the issue of frontier security were mere pretexts designed to enable the aggressors to secure for themselves the assets of the territory invaded and to hold to ransom the civilian population.

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[68] *Ibid*.
[69] Numerous *Human Rights Watch Reports* available at <http://www.hrw.org> last visited, September 8, 2009.
[70] See generally Huls, *supra* note 48.

The Democratic Republic of Congo accordingly asked the Court to declare that Burundi, Uganda and Rwanda are guilty of acts of aggression; that they had violated and continued to violate the 1949 Geneva Conventions and their 1977 Additional Protocols; that, by taking forcible possession of the *Inga* hydroelectric dam and deliberately and regularly causing massive electric power cuts, they made themselves responsible for very heavy losses of life in the city of Kinshasa and the surrounding areas; and that, in shooting down a Boeing 727 aircraft on 9 October 1998, the property of the DRC Airlines, and thus causing the death of 40 civilians, they violated certain international treaties relating to civil aviation.

The DRC further requested the Court to declare that the armed forces of Burundi, Uganda and Rwanda must forthwith vacate the territory of the Congo; that the said States should secure the immediate and unconditional withdrawal from Congolese territory of their nationals, both natural and legal persons; and that the DRC is entitled to compensation in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to the States concerned. In its Application instituting proceedings against Uganda, the DRC invoked as a basis for the jurisdiction of the Court the declarations by which both States have accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation.[71]

For the proceedings against Burundi and Rwanda, the DRC invoked Article 36(1), of the ICJ Statute[72] the UN Convention against Torture[73] and the Civil Aviation Convention,[74] as well as the Rules of the Court.[75]

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[71] Article 36(2) of the ICJ Statute. *Uganda*, October 3, 1963:
"I hereby declare on behalf of the Government of Uganda that Uganda recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, and on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with paragraph 2 of Article 36 of the Statute of the Court."
Democratic Republic of the Congo, February 8, 1989:
"...in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice:
The Executive Council of the Republic of Zaire recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.
It is understood further that this declaration will remain in force until notice of its revocation is given."
[72] The relevant provision states that the jurisdiction of the Court comprises all cases, which the parties refer to it, and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
[73] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984.
[74] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of September 23, 1971.

At this juncture the parties were in a situation which this chapter seeks to elucidate. One state had filed an application against another state which did not accept the jurisdiction of the Court.[76]

In the two cases: *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v *Burundi*) and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v *Rwanda)*, the respondent States (Burundi and Rwanda) informed the Court at the outset of their intention to raise preliminary objections to the jurisdiction of the Court and the admissibility of the Applications. When the position of Burundi and Rwanda was made clear, the DRC withdrew the cases against the two states, on jurisdictional limitations of the ICJ against them, but resubmitted a case against Uganda later in 2002.

On purely justice reasons, an assessment of the discontinuation of the cases against the two states is worth looking at, before embarking on a discussion of the final decision against Uganda. This is because the preliminary proceedings in this case reveal the shortfalls of the ICJ structure and the mandate it has when dealing with the responsibility addressing, under international law, crimes committed by states.[77]

As often happens in the ICJ cases, the grounds for the discontinuation of the cases against the two states were purely jurisdictional. As pointed out early in this chapter, the ICJ's authority to render judgments in contentious cases depends on the consent of the parties, and to adjudicate upon a dispute without such consent would run counter to this well-established principle of international law as embodied in the Court's Statute.[78] Whereas the DRC, then Zaire, accepted the ICJ jurisdiction without condition in 1989, and Uganda did so at independence in 1962 with the condition of reciprocity,[79] the two states (Rwanda and Burundi) had neither accepted the compulsory jurisdiction in all cases, nor acceded to a treaty providing for jurisdiction in specified circumstances. Therefore, the case against them was inadmissible.

To make things more complex, when the DRC, applying the procedure provided for under the Court's Statute requested for the indication of provisional measures against the presence of Rwandase forces in its territory, the question of jurisdiction was also invoked. The DRC's desperate efforts to establish the Court's jurisdiction on the basis of treaty provisions also proved futile. The

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[75] Article 38(5) of the ICJ Rules of the Court.
[76] See this comment available at <http://www.icj-cij.org>, last visited, September 8, 2009.
[77] Huls, *supra* note 48.
[78] *See also Monetary Gold Removal from Rome* Case in 1943, I.C.J Reports 1954, p.32.
[79] A list of the commitments by states parties to the ICJ Statutes is available at <http://www.212.153.43.18/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>, last visited, September 8, 2009.

DRC invoked several treaties,[80] particularly the Genocide Convention[81] which under its Article IX provides for recourse to the ICJ as a dispute settlement mechanism. Unfortunately, as Rwanda had filed a reservation to Article IX of the Convention when it acceded to it, the Court denied jurisdiction under the Convention. Congo then went as far as pointing out the violation of e*rga omnes* obligation by Rwanda, an argument that any legal counsel struggling to establish the Court's jurisdiction, especially when none is clear, would have raised. But the Court also rejected this line of argument, stating that there is a difference between the e*rga omnes* character of a norm and the rule of consent to jurisdiction.[82] In the final analysis therefore, the Judges decided that the Court lacked the necessary *prima facie* jurisdiction. However, denial of jurisdiction as was observed by the Court in this case raises a number of international law issues, which require some consideration. The most significant of these issues relate to the law on unilateral act of reservations to Article IX of the Genocide Convention. The DRC made submissions that Rwanda's reservations were incompatible with rules of *jus cogens* and with the purpose and object of the Genocide Convention. However, without examining in detail whether the object and purpose of the Genocide Convention actually allows such a reservation, the Court simply, in one sentence, submitted that because the Court's jurisdiction is consensual and because Article IX is a procedural provision, the reservation to it does not contradict with the object and purpose of the Convention. Without further qualifications, such a legal position would open the door for unpredictable situations.[83]

This case is a graphic example of the international legal system's inability to do justice in ordinary cases. Except in those cases where special tribunals are created by the UN Security Council or by mutual agreement, international disputes-resolution through judicial bodies are impeded with restrictions and limitations that prevent them from addressing the full scope of the disputes brought before them.

One of the Judges in the case, Judge Nabil Elaraby, shared the same view in the separate opinion. Although voted with the majority on jurisdictional issues, the Judge argued that the case highlighted a major weakness in the contemporary international legal system:

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[80] Including the Genocide Convention, 1948 etc. Although the Court may have no jurisdiction over a state under its statute, it can still be a dispute settlement body if it is so defined by a treaty signed.
81 General Assembly resolution No.260 (III) A of December 9, 1948.
[82] *Monetary Gold Removal case, supra note* 78, *para* 46.
[83] Ibid. See also the ICJ Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep 1951 at p. 15, where compatibility with the object and purpose of the Convention was considered as the condition precedent to acceptance of a reservation.

> "[In the instant case, the Court was precluded, by virtue of the nature and limitations of the international legal system as it exist today, from the appropriate administration of justice. As a result, the Court has not been able to examine the merits of the claims of the DRC. This inability is compounded by the fact that the case forms part of a series of cases brought before the Court by the DRC relating to armed activities of neighbouring states on its territory. Although these cases are related and, to a considerable extent, the facts, circumstances and situations at issue overlap, they are nonetheless distinct cases, each brought upon its own grounds for jurisdiction and giving rise to its own legal considerations.
> The promise and possibilities of the Court, as the principal judicial organ of the United Nations entrusted with the responsibility of settling disputes, requires that states submit their disputes to the Court and accept its jurisdiction. The duty of states to settle their disputes peacefully and in accordance with international law is emphasized in a number of important provisions enshrined in the Charter of the United Nations. Some built-in limitations of the Statute, resonant of limitations of the international legal system generally, are relics of the past era which need to be revisited. The case before the Court today represents a clear reflection of these limitations. It serves as a reminder to the international community in the twenty-first century of the imperative of actively seeking to overcome hurdles in establishing jurisdiction. The Court may thereby play a stronger role in the peaceful settlement of international disputes and in enhancing respect for international law among states]" [84]

Such a proposal for universal acceptance of the Court's jurisdiction which the Judge seems to advocate in the above passage is unlikely to come into existence any time soon. In the meantime, the final outcome of the collapsed DRC cases against Rwanda and Burundi makes it critical for the international community to step into the reconstruction process.

With the DRC's withdrawal of the two cases, the case against Uganda proceeded alone, leaving the other alleged perpetrators of the war crimes and property looting to go untouched. In its detailed application against Uganda, the DRC contended that the armed aggression committed by Uganda in its territory had involved *inter alia* violation of the principles of non-use of force, including the prohibition of aggression, the obligation to settle international disputes exclusively by peaceful means, sovereignty and territorial integrity of the DRC, violations of international humanitarian law and massive human rights violations. The DRC then sought to secure the cessation of the acts of aggression directed against it, and compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to it. The DRC sought to reserve the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed.

[84] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v *Rwanda), see also* <http://www.worldlii.org/int/case/ICJ>, last visited, September 8, 2009.

The case went to full hearing stage and on December 19, 2005; the Court issued its final judgment in what came to be known as the *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v *Uganda*). The Court held that the armed activities of Uganda in the Democratic Republic of Congo between August 1998 and June 2003 violated the international prohibition against aggressive use of force as well as international human rights and humanitarian law, among others. It stated:

> *The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.*[85]

The Court ordered Uganda to pay reparations to the DRC, noting under prior precedent it is "well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act".[86]

The ICJ did not however, device the amount of reparation. Rather, the amount to be paid in reparation was to be determined through bilateral negotiations between Uganda and the DRC.[87] In the Court's own words, it is not for the court to determine the final result of these negotiations, although in the event the parties fail to reach a settlement, the amount of reparations will be determined by the Court and such determination will be final and binding on all parties.[88]

Initially Ugandan government top officials contested the case, consistently denying the claims saying Uganda only acted to protect national security.[89]

The question still is open about what should be done should Uganda refuse or fail to pay the amount assessed by the ICJ. Although in its decision the Court left the door open for the parties to refer the matter to the Court in case they fail to agree on the amount of reparation, it is likely that the matter would end up before the United Nations Security Council which is authorized to make recommendations aimed at ensuring compliance with the ICJ's decisions.[90] The UN Security

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[85] Para 220 of the Court Judgment.
[86] Para. 259 of the Court Judgment.
[87] Paras. 260 and 261 of the Court judgment.
[88] *See* General Assembly resolution No.260 (III) A of December 9, 1948.
[89] Joram, J. (2006, April 11). 'Uganda to explain Killing and Invasion of the DRC Congo in The Hague' in *The Monitor*, p.8.
[90] *See* Montreal Convention, *supra* note 74.

Council's powers in this respect as pointed out early in this study have been equated with its broader powers in the enforcement of international peace and security.

While coercion is unlikely, possible measures may include a resolution calling on Uganda to pay such reparation, or one imposing economic sanctions and/or calling on other UN member states to freeze Uganda's assets in their territories.

Two crucial points need be considered at this stage, however. First, the UN Security Council is merely authorized, and not obligated, to make any such recommendations aimed at enforcing the ICJ's decisions. Secondly, the Council is a political, not a judicial, organ, meaning that the ultimate enforcement is therefore a political rather than a legal matter.[91] These two factors imply that not only may the UN Security Council ignore decisions of the ICJ, but that it will (assuming it chooses to act) be motivated by political, and not legal, considerations. In other words, while there is no room for judicial appeal against ICJ decisions, there may be an option of a "political" appeal before the UN Security Council. In the latter case however, a decision by the Security Council to enforce compliance with a judgment rendered by the court is a procedural matter, subject to the veto power of permanent members and thus depends on the members' willingness not only to resort to enforcement measures but also to support the original judgment. Enforcement may therefore be unlikely if, for instance, Uganda decides to look for one member of the Security Council to *veto* (object to) any recommendations aimed at enforcing the ICJ's decision.[92]

In the absence of such enforcement measures by the Security Council, if Uganda, for whatever reasons, decides not to comply with the current ICJ's decision, it will not be setting its own precedent as several instances of non-compliance with the Court's binding decisions already exist. States' practices with regards to compliance with ICJ judgments, starting from the *Corfu Channel* case in the late 1940s to the *Arrest Warrant* Case[93] decided in 2002, indicate particular trends. A perception developed during the 19th century that binding decisions of international judicial bodies were something for small countries. In that respect, the "major powers" tend to accept international adjudication only when their interests are not threatened.[94] A few examples of cases where the Court issued a final order and the debtor state defaulted to comply with such orders will substantiate

[91] Brack, D. 'International forums for no-compliance and dispute settlement in environment-related Cases', <http://www.riiw.org/Research/eep/eep.html>, last visited, September 8, 2009.
[92] Bagenda, E 'There is a Catch in Enforcing the ICJ's Recommendations', *Africa Files:* available at <http://www.africafiles.org/article.asp>; last visited, September 8, 2009.
[93] *Arrest Warrant* (*Democratic Republic of Congo* v *Belgium),* I.C.J Reports 2002.
[94] Warioba, *supra* note 42, p. 45.

this argument. To start with, the 1946 *Corfu Channel* Case [95] itself arose from incidents that occurred in October 22, 1946, in the Corfu Strait, where two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. The United Kingdom submitted an application to the ICJ, accusing Albania of being responsible for the explosions, and claimed compensation for the losses sustained therefrom. In its final Judgment the Court decided that Albania was responsible and ordered compensation to be paid. Albania refused to comply with the Court's decision, and the case was unresolved for more than forty years. It was only in 1992, after the fall of its communist regime that Albania agreed to terms, eventually resolving the case in 1996. With the legal principle that justice delayed is justice denied, a settlement agreement which came 47 years late raises a question whether the decision in this case should really be considered one which was ever complied with.

In the 1974 *Nuclear Test* Case,[96] both Australia and New Zealand instituted proceedings against France over its atmospheric nuclear tests in the Pacific. France refused to appear or abide by the Court's interim orders of cessation of the tests, and in its letter of January 10, 1974 to the Secretary-General of the United Nations, the French Government withdrew France's acceptance of the compulsory jurisdiction of the Court under Article 36 (2) of the ICJ Statute. Although France initially made a unilateral declaration that it will stop its tests, making the ICJ to interpret such a declaration as a legally binding commitment, it was only after it had completed its nuclear tests and had no more interests with the project that France ceased to ignore the Court’s decision.

The United States' rejection of the ICJ decision in the *Nicaragua* Case[97] is also relevant in the case at hand. Nicaragua instituted proceedings against the United States before the ICJ accusing that the US financed, trained, equipped, armed and organized military operations launched by the *contra* force against the Nicaragua government for purposes of overthrowing the latter.

On June 27, 1986 the Court delivered its judgment on the merits of the case. It found the United States to have breached a number of its obligations under customary international law and its 1956 Treaty of Friendship, Commerce and Navigation with Nicaragua. It also held that “the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations, is under an obligation to make reparation to the

[95] *Corfu Channel* Case, *supra* note 35.
[96] *Nuclear Tests* Case (*Australia* v. *France*), Judgment, I.C.J Reports 1974, p.253
[97] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), I.C.J Reports 1986, p.14 (hereafter referred to as *Nicaragua* Case).

Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law and of the Treaty of Friendship, Commerce and Navigation."[98]

Although the United States, like any other party to the Statute, is bound by the decisions taken by the Court, it refused to participate in the proceedings, and it subsequently withdrew its consent to be bound by the compulsory jurisdiction of the Court. This case went even a step further as Nicaragua sought to explicitly invoke the provisions of Article 94(2), to seek considerations of the Security Council to enforce compliance by the United States of its obligations stemming from the judgment of the Court. Although other members of the Council voted in favour, the adoption of the resolution against the United States failed because of the obvious veto of the US as a permanent member.

This brief history of states' reactions to adverse ICJ decisions indicates that non-compliance does not necessarily justify the Security Council's sanctions as envisaged under the UN Charter and general international law. Worse than all is the fact that the actions of non-compliance with the Court's final decisions by such major powers as the United States and France, which claim leadership in international affairs, is a big blow to the confidence in the Court.
All along, the author has been trying to reflect the possibilities that are apparent with regard to the 2005 ICJ Judgment in the *Case Concerning the Armed Activities in the Territory of the Congo.*

The foregoing analysis makes it clear that three methods have been applied by losing parties as tools in avoiding compliance with the Court's final decision; namely, deliberately avoiding being involved in litigation, delaying techniques and direct non-compliance, especially in highly politically sensitive cases.
Nonetheless, perhaps the question of compliance, non-compliance or even enforcement of the current ICJ decision might not have any important relevance if one asks oneself the question, "Is that all?" Even though ICJ judgments ordering reparations to be made to the injured states (the Democratic Republic of the Congo in this case) may carry some weight, it is clear that the ICJ is incapable of fully holding states responsible for crimes under international law. And even if Uganda ultimately complies with the current judgment, a fact that remains to be seen, can the judgment be said to have remedied the injustices committed in the territory of the Congo?
An answer in the negative means that other ways to ensure that states act responsibly need to be explored.

[98] *Ibid.*

5.5 International Criminal Adjudication

Over the last few decades, a new trend in international criminal justice has emerged.[99] Increasingly, international courts and tribunals are resorted to in establishing the guilt or innocence of individuals charged with serious international crimes. The main reasons for the current blossoming of international criminal justice reside in various convergent factors: the spread of human rights doctrines and the increasing feeling that the most effective means of enforcing respect for such rights lies in prosecuting and punishing their violators; the failure of national courts to bring to trial the alleged authors of egregious breaches amounting to international crimes; and the objective merits of international judicial mechanisms, as compared to national courts.[100]

Furthermore, as universal jurisdiction of national courts is only proving workable to a limited extent, the other alternative avenue, that is, resort to international criminal adjudication remains the relatively more effective way out. International criminal adjudication or international judicial intervention is a third and new dimension in international relations, following diplomacy and the use of force as organising principles of international action by states. It has taken the recognition of individuals as subjects, not as objects, of international law to new heights by establishing as a new reality of our time, the accountability of individuals for crimes in which humanity itself is the victim. These crimes are genocide, crimes against humanity and violations of the Geneva Conventions and the laws and customs of war.[101]

What is the aim of this new endeavour? It is not solely individualistic, the punishment of violations of individual victims of mass crime. Its ultimate aim is to heal fractured societies and help establish peace and reconciliation by addressing the root cause of such destabilization- impunity since international criminal adjudication addresses mass crimes which inevitably dislocate societies.

Impunity may be defined as the absence of accountability and of the rule of law within states or other formal organizational structures; a situation in which coercive power, not rules, regulations or law, is the organizing principle. But if impunity is absence of accountability, then it follows that the establishment of a culture of accountability is necessary to eradicate it. Thus, it is necessary to introduce an element of accountability in order to secure a long-term resolution and reconciliation

[99] Cassese, A. (2009) *The Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press, p. 123.
[100] Ibid.
[101] For a thorough discussion of these crimes and the elements, see generally Mettraux, G. (2005). *International Crimes and the Ad Hoc Tribunals*, Oxford: Oxford University Press.

of the conflicts that are inevitably generated by situations of impunity. Accountability in a complete sense is not, and should not be subject to subjective definitions. It means legal responsibility and punishment for criminal illegal acts or omissions. It does not mean “truth telling” for mass atrocities without the consequences of responsibility, which is what justice is all about. This is so, although other goals, including establishment of truth and reconciliation commissions, may be conceived as the end result of that process.

The question is: What is the best way to reach peace and reconciliation? Is it truth commissions aiming at uncovering the past by, sometimes, promising amnesty to individuals prepared to confess their crimes, or is it courts and tribunals whose task is criminal prosecution and that therefore may dissuade some involved in the subject of inquiry from cooperating to create a complete picture of the events in question? It is argued here that justice for mass atrocities, as dispensed by international criminal justice bodies, is a fundamental, though not the only, component of reconciliation, and that these choices are not mutually exclusive. The general merits of international criminal adjudication are many.

Firstly, international courts proper may be more impartial than domestic bodies for they are made up of judges having no link with the territory or the state where the crimes have been perpetrated. When national territorial tribunals, including truth commissions conduct proceedings, national feelings may impede the administration of justice. Secondly, international judges, being selected on account of their competence in the area of international humanitarian law and international criminal law, are better suited to pass judgements over crimes that markedly differ from ordinary criminal offences within national jurisdictions, such as theft, murder, assaults etc. Thirdly, they also are better equipped to deal with crimes that may involve nationals or territories of more than one state and in a better position to benefit from the cooperation of the various states involved. Fourthly, international judicial bodies have greater visibility than national judges. They may thus have a greater impact on the world public opinion and better contribute to international efforts against impunity. Fifthly, international crimes are gross offences against universal values. They do not only break moral and legal values prevailing in the local community directly affected by such crimes. They also infringe values that are transnational and of concern for the whole world community. Hence, only international judicial bodies, expression of the whole international community, can appropriately pronounce on such crimes.

Finally, such judicial bodies apply international principles and rules, and are thus unbound by national approaches and traditions. They thus ensure greater uniformity than national courts in adjudicating international crimes.[102]

5.5.1 State 'Criminality' and International Criminal Adjudication

One obvious result of conflicts is gross human rights violations– massacres, persecutions, killings, rapes, genocides. The responses to these violations have varied throughout history: (i) *revenge*, (ii) *forgiving* and *forgetting*, or (iii) *bringing perpetrators to justice* through international judicial or quasi-judicial bodies. International criminal adjudication deals with the last option: bringing the perpetrators before international judicial bodies, facing them with charges, deciding upon their responsibility and eventually punishing them.[103] This approach was first introduced by an (unsuccessful) attempt to try Kaiser Wilhelm II after World War I, then continued after World War II in Nuremberg and Tokyo trials concerning war criminals responsible for most heinous atrocities committed during that war, through the various recent judicial forms–*ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and international Criminal Tribunal for Rwanda (ICTR), as well as the permanent International Criminal Court (ICC) at the Hague.

Enthusiasm for international criminal adjudication steadily rose over the latter half of the twentieth century, culminating in the entry into force of the Rome Statute of the International Criminal Court (Rome Statute), which created the International Criminal Court (ICC) in July 2002.[104] It is, however, unfortunate that the current legal regime on international criminal adjudication does not precisely attribute criminal responsibility to states, rather to individuals. A quick look at the recent practice is sufficient to realize that state responsibility and individual criminal liability are considered as distinct in international law.[105] The ICJ has recently observed that the duality of state and individual responsibility continues to be a constant feature of international law.[106]

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[102]Cassese, *supra* note 99, p. 127.

[103] See, *e.g.*, Meron, T. (1995) 'International Criminalization of Internal Atrocities', *American Journal of International Law*. Vol. 89, No. 3, pp. 554-577.

[104] *Rome Statute; See also* Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3. In March 2003, eighteen judges were sworn in, and a prosecutor was named in April. Chris Lombardi, *Hot Seat: New Prosecutor Will Be Key in Building Credibility for International Criminal Court*, A.B.A. J., July 2003, at 16; Marlise Simons, *Court with a Growing Docket, But No Chief Prosecutor Yet*, N.Y. TIMES, Mar. 16, 2003, International, at 4. The Court's first investigation involves war crimes in the Congo. *War-Crimes Panel to Take on Congo Case*, N.Y. TIMES, Jan. 28, 2004, at A5.

[105] See Cassese; *supra* note 99, p. 16.

[106] See this observation in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), February 26, 2007; available at <http://www.icj-cij.org/docket/index.php?p1=3&case=91>, last visited, September 8, 2009.

The *Draft Articles on Responsibility of States for Internationally Wrongful Acts,*[107] which have been developed by the International Law Commission (ILC) may be worthy of mention. The Articles do not specifically deal with states' criminal responsibility and therefore not much can be drawn from them, yet they are the first step towards codification for this area of international law. Although the notion of states' responsibility for crimes under international law was initially sought to be introduced in the ILC Draft Articles in the first reading, it was later rejected and set aside altogether.[108] Likewise, the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the ILC in 1996[109] (hereinafter referred to as the "ILC Draft Code") bears clauses similar to those found in the *Draft Articles,*[110] exempting states from criminal responsibility under international law.[111] Such clauses are fairly illustrative of the way in which the two forms of responsibility have evolved lately. The long codification process of state responsibility attests to the difficulties of adjusting the old fashioned and rather rudimentary responsibility schemes--as they have emerged particularly as regards the treatment of aliens--to the evolving realities of international law.[112]

It has been argued however that this does not prevent international law from responding to different kinds of breaches and their different impacts on other states, on people and on international order.[113] According to Article 19 of the Draft Articles and its commentary, the concept of crimes of states hinges on three basic elements: first, the existence of a special class of rules that are designed to protect fundamental values and consequently lay down obligations *erga omnes*;[114] second, the granting of the right to claim respect for those rules not only to the state that may suffer damage from a breach, but also to other international subjects; third, the existence of special regime of responsibility for violations of those obligations,[115] in other words, the fact that the legal response to breaches is not merely a request for reparation but may embrace a wide range of sanctions, or

[107] Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC on 10 August 2001 and recommended for the attention of Governments in General Assembly resolution No. 56/83 of 10 December 2001 (hereafter referred to as "the Draft Articles").
[108] Crawford, J and Olleson, S. (2003) 'The Nature and Forms of International Responsibility' in Evans, *supra* note 19, p. 452.
[109] 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996); See further *Yearbook of the International Law Commission*, 1996, vol. II (Part Two), at p. 23.
[110] See Article 58 of the ILC Draft Articles.
[111] See for example Article 4 of the ILC Draft Code
[112] *See generally* Crawford, J (2002), *The International Law's Articles on State Responsibility: Introduction, Text and Commentary*, Cambridge: Cambridge University Press.
[113] *Ibid*.
[114] Obligation which is regarded as owed to the whole international community. See further Evans, *supra* note 19, p. 142; Reference is also made to rules of *jus cogens*.
[115] Under Article 40(2) of Draft Articles, "A breach is serious if it involves a gross or systematic failure by the responsible State to fulfill such an obligation".

remedies.[116] As regards the first two elements underlying the concept of crimes of states, there has undisputedly been a departure from the traditional approach to state responsibility; under the old law the consequences of international delinquencies were only a private business between the tortfeasor and the claimant and no distinction was made as regards the importance of the primary rule breached. Today, however, many customary and treaty rules lay down obligations that states regard as being of fundamental importance; in addition those rules confer on broad categories of international subjects the right to demand their observance. Thus, the breach of one of them has become a public affair involving not only the two parties directly concerned, but also the world community at large.[117]

International responsibility of a state under the Articles arises from the commission by that state of a wrongful act. An internationally wrongful act presupposes that there is a conduct consisting of an act or omission that (a) is attributable to a state under international law and (b) constitutes a breach of international obligation of the state. In principle, the fulfillment of these conditions is a sufficient basis for international responsibility as has been consistently affirmed by international courts and tribunals.[118]

International law then distinguishes between states' responsibility arising out of the context of direct state-to-state wrongdoing, and responsibility arising in the context of diplomatic protection, with the conclusion that in the former case, responsibility is *prima facie* engaged. Aggression is one among the international crimes currently envisaged by customary international law. Aggression was first regarded as an international crime involving individual criminal liability in the London Agreement that established the International Military Tribunal for the Major War Crimes (hereinafter "the IMT Charter"), Nuremberg.[119] According to the IMT Charter, Crimes Against the Peace, namely planning, preparation, initiation or waging war of aggression or war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing, are crimes for which there shall be individual responsibility.[120] It is important to note that wars of aggression were only one of the subcategories of the broad category of 'crimes against the peace'.

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[116] Cassese, A. (2008). *The Human Dimension of International Law: Selected Papers*, Oxford: Oxford University Press, p. 403.
[117] Ibid, p. 404.
[118] *See* the PCIJ Decision in *Phosphates in Morocco* case (*Italy* v *France*), PCIJ General List No.71 (A/B Series No.74), p.10; The ICJ in the *USA Diplomatic and Consular Staff in Tehran*, ICJ Rep. 1980,p.3; *Nicaragua* Case, *supra* note 97, p.14.
[119] Nuremberg Trial Proceedings Vol. 1, London Agreement of August 8th 1945.
[120] Article 6 (a) of the IMT Charter, annexed to the London Agreement.

However, for various reasons, no state has been held criminally responsible for the crime of aggression since 1940s although States have engaged in acts of aggression, and in some few cases, the UNSC have confirmed so.[121] Although there have been controversies on the definitional aspect as to jurisdiction of international judicial bodies since 1946 to the present, the crime of aggression has so far developed as customary rule of international law[122] entailing states' criminal responsibility under international law.

There is now precedent that human rights atrocities including genocide and war crimes have been extensively addressed in the international level from the Nuremberg tribunal, the Yugoslav and Rwanda Tribunals to the current International Criminal Court. However, the structural impediments in the international judicial system makes it difficult to directly hold states criminally responsible in international law, and as such, responsibility of states for such crimes has so far not been addressed sufficiently to establish legal custom.[123] It is not surprising therefore that the DRC Government opted for a more traditional judicial method recognized in international law in holding states responsible for their internationally wrongful acts, the ICJ without exploring any other possibilities for more effective remedies for the injustices committed in its territory.

The Bosnia-Herzegovina case,[124] which has recently ended before the ICJ[125] presents a novel development in this area of international law. On March 20, 1993, Bosnia and Herzegovina initiated proceedings before the ICJ against the Federal Republic of Yugoslavia, (later Serbia and Montenegro) for, *inter alia*, crimes committed by the latter (and their antecedent state, Yugoslavia) during the Balkan wars of the 1990s, particularly genocide of Bosnian Muslims. The main allegation in the case was therefore violation of the Genocide Convention. It seemed clear, however, that attempting to prove that Yugoslavia, at a state level, intended to destroy at least part of the non-Serb population in Bosnia was a challenge for the Sarajevo lawyers.

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[121] The UNSC has defined as acts of aggression certain actions or raids by South Africa and Israel; see for instance resolution 573 of October 1985 on Israeli attacks on PLO targets and resolution 577 of December 1985 on South Africa's attack on Angola; and many more recent resolutions.
[122] *See* for instance the same argument by the ICJ in the *Nicaragua case*.
[123]*See* Huls, *supra* note 48, p. 9
[124] Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), General List No.91 February 26,2007; first filed as *Bosnia and Herzegovina* v. *Yugoslavia* in 1993.
[125] In its verdict issued on February 26, 2007, the Court found by 13 votes to 2 that Serbia had not committed or conspired to commit genocide. *See* ICJ Press Release 2007/8.

The ICJ judgment of February 26, 2007 noted that, genocide is a crime under international law, and reaffirmed the norm prohibiting genocide as *jus cogens*. It held that genocide requires intent to destroy at least a "substantial part" of a protected group, and that the intent may be to destroy a group within a geographically limited area. The Court finally held that, while the respondents (Serbia and Montenegro) were not responsible for the genocide committed,[126] they were in violation of the Genocide Convention[127] in that they did nothing to prevent the genocide from occurring and afterwards did not punish the perpetrators.

This was the first time that a state has been found in violation of the Genocide Convention. As a landmark case, this case serves to probe the applicability, capacity and validity of the ICJ to enforce the Genocide Convention in this case and in the future ones. The case also raises several philosophical issues, one of which is the concept of whether the whole state can be held criminally responsible, in this case, for genocide.

Be it as it may, it is in fact possible to establish state responsibility for a crime like genocide precisely by looking at the actions and mindsets of senior officials, irrespective of whether these actions were supported or even known about by the population as a whole.[128]

5.5.2 Individual Criminal Liability and International Criminal Adjudication

Although development of rules on individual criminal responsibility was in process in the 1990s,[129] the concept of attribution of criminal responsibility to individuals is not a completely novel issue in international law.[130] Some international crimes such as piracy and slavery have been regulated since the 1800s, with these regulations developing later into customary international law.

The first serious attempt to establish individual criminal responsibility in international law was undertaken after the First World War, where the ex-German Emperor, *Kaiser Wilhelm II* was to be held responsible for crimes termed "the supreme offence against international morality and the sanctity of treaties and war crimes".[131] He was, in fact, not tried. Historically, the turning point for

[126] *See para* 180 of the Court judgment.
[127] General Assembly resolution No.260 (III) A of December 9, 1948
[128]Cobban, H. (2006)'Bosnia vs. Serbia/Montenegro at the ICJ' in *Transitional Justice Forum*, February 2006, available at <http://www.tj-forum.org/archives/001761.html>, last visited, September 8, 2009.
[129] The seriousness came with the setting-up of the two ad hoc Tribunals for the prosecution of crimes committed, respectively, in the former Yugoslavia (ICTFY) and in Rwanda (ICTR).
[130] See Cassese, A (2003). 'International Criminal Law' in Evans, *supra* note 19, p. 735.
[131] See Article 227 and 228 of the Versailles Treaty of 1919.

the development of individual criminal responsibility came with the establishment of the International Military Tribunal at Nuremberg [132] and Tokyo[133] after the Second World War. The prosecutions in these early *ad hoc* criminal tribunals established an important precedent to the effect that individuals, regardless of their ranks, could be held responsible for offences amounting to war crimes, crimes against the peace, and crimes against humanity, and that individual responsibility was enforceable at the international level.

The Nuremberg and Tokyo Military Tribunals, together with the adoption of the *Genocide Convention* in 1948,[134] provided an inspiration for the subsequent establishment of the two *ad hoc* tribunals for the prosecution of crimes committed respectively, in the former Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia (ICTY)[135] and in Rwanda, the International Criminal Tribunal for Rwanda (ICTR).[136] The former held its seat in The Hague, Netherlands, while the latter was located in the northern town of Tanzania, Arusha**.**

While there have been various criticisms (and at times genuine ones) against the work of these tribunals, it is argued that the two tribunals represent major progress towards institutionalized international criminal adjudication. They have marked the first time the modern international community has sanctioned broadly international criminal bodies to hold individuals responsible for the alleged perpetration of three core categories of international crimes: war crimes, genocide, and crimes against humanity. Moreover, they represented at the time and still represent an adept legal response to the changing nature of warfare, insofar as they also dealt with non-international armed conflicts rather than solely the traditional legal and political paradigm of interstate conflicts. At the same time, the tribunals have also provided clarification as regards the substance of what is becoming a sort of international criminal code, in the sense envisaged by the UNGA resolution 95 (1) of 1946.[137]

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[132] Established under the Charter of the International Military Tribunal, 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945). See further Shattuck, J. (2006), 'The Legacy of Nuremberg: Confronting Genocide and Terrorism through the Rule of Law' *Gonzaga Journal of International Law,* vol. 10, No 1, pp 6-16. 'Who would have thought that the city most often associated with Nazi Germany would later become the birthplace of the modern human rights movement?'

[133] See The International Military Tribunal for the Far East, proclaimed at Tokyo, January 19, 1946.

[134] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 UNTS. 277, *entered into force* Jan. 12, 1951.

[135] Established under the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

[136] Statute of the International Criminal Tribunal for Rwanda, 1994, adopted by SC. Res. 955, UN. SCOR, 49th Sess., 3453d mtg. at 3, UN. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

[137] In resolution 95 (1), the UNGA affirmed Principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal ("The Nuremberg Principles"). See text in Schindle, T (1998). *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, 3rd Edn., Dordrecht/Geneva: Martinus Nijhoff/Henry Dunant Institute, p. 5.

Although these two tribunals have, in addition, responded to the traditional criticism of lack of international enforcement mechanism for the laws of war, other serious second-hand criticisms soon emerged about their likely effectiveness and consequences. [138] Critics of the efficacy of the tribunals point to the fact that they were politicised and selective, in the sense that they were established for Bosnia and Rwanda but not for the numerous other similar situations. For example, following the gravity of human rights atrocities and war crimes in the DRC conflict, there have been frequent calls for the establishment of the International Criminal Tribunal for the Democratic Republic of Congo.[139] Accordingly, one solution proposed for bringing the perpetrators of crimes against international humanitarian law to book in the DRC would be for the UNSC to establish a new *ad hoc* tribunal, modelled after the ICTY and ICTR. However, none of the resolutions on the DRC thus far have even hinted in this direction. Instead, the UNSC has consistently stressed the responsibility of the parties to the conflict to bring the violators to book. No new *ad hoc* tribunal has been established after the ICTR despite calls for such measures, for example, by Burundi. The prospects for a new *ad hoc* tribunal for the DRC must therefore be considered to be very bleak.

There is an obvious nexus between the 1994 genocide in Rwanda and the more recent conflict in the DRC. Thus, another hypothetical solution for addressing crimes against international humanitarian law in the DRC conflict could be to extend the present mandate of the ICTR to include war crimes and crimes against humanity committed in the DRC.[140] For various reasons, however, this would also not be a feasible way forward. Besides the political and legal difficulties involved in amending the mandate, the ICTR would need enhanced capacity to tackle such a task.[141]

Irrespective of this, however, it is crucial to make an assessment of the efficacy or otherwise of the ICTR as a post-conflict criminal adjudication model, before one can put too much hope in the establishment of another, similar tribunal for the DRC conflict.

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[138] Price, R & Zacher, M (Eds.), (2004). *The United Nations and Global Security*, New York: Palgrave Macmillan, p. 125.

[139] See Ratner, S., Abrams, J. & Bischoff, J. (2009), *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd Ed., Oxford: Oxford University Press, p.107.

[140] In fact, this solution has been suggested by the UN Committee on the Elimination of Racial Discrimination, Decision 1 (52) of 19 March 1998, UN Doc. A/53/18, paragraph IIA1.

[141] See this discussion in Friman, H. (2001). 'The Democratic Republic of Congo: Justice in the Aftermath of Peace?' in *African Security Review*, Vol.10 No.3, p. 221-302.

5.5.3 Assessing the efficacy of the International Criminal Tribunal for Rwanda (ICTR)

In the circumstances that befell Rwanda, an International tribunal was required because the crime of genocide appealed for a collective response from the international community.[142] On November 8, 1994, having determined that "genocide and other systematic, widespread and flagrant violations of international humanitarian law committed in Rwanda constitute a threat to international peace and security,"[143] the UNSC adopted resolution 955 whereby it formally established the ICTR. The tribunal is perhaps the best well-known international adjudicatory effort in resolving conflict in one of the Africa's Great Lakes country, Rwanda.[144] However, unlike the resolution on the ICTY which was passed unanimously, the November 1994 resolution passed with Rwanda voting against it and China abstaining.[145] The Rwandan government (made up of members of the Rwandan Patriotic Front (RPF), the Tutsi rebel group that defeated the government forces and ended the genocide in July 1994) initially objected to the ICTR principally because of its inability to order the death penalty to those who would be convicted of genocide, its limited jurisdiction and concerns that its seat would be far from Rwanda. The decision to locate the trial chambers' seat in Arusha Tanzania, and the Tribunal's intended focus allayed some of these concerns.

The ICTR's mandate is the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1 to December 31, 1994.[146] It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territories of neighbouring states during the same period.[147] Furthermore, it is to judge persons accused of genocide, crimes against humanity, violations of article 3 common to the Geneva Conventions and

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[142] See UNGA Resolution 260 of December 9, 1948: "Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (1) dated December 11, 1946 that genocide is crime under international law; contrary to the spirit and aims of the United Nations and condemned by the civilized nations world; Recognizing that at all periods of history genocide has inflicted great losses on humanity; and Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required; Hereby agree as hereinafter provided."

[143] UNSC Res.955, UN Doc. S/RES/955 (1994).

[144] The ICTR is the international community's attempt, given its scandalously passivity (and even complicity according to more radical observers), during the 1994 Genocide, to (1) help in the process of national reconciliation in Rwanda, (2) bring the (high-ranking) architect of the genocide to justice and (3) contribute to preventing such atrocities from happening again.

[145] See this discussed in details in Ratner, *et al*, *supra* note 139, p.224.

[146] Article 1 of the ICTR Statute. It is instructive to note that, it was not the massive of and systematic scale of the human rights violations as such which triggered the UNSC to action, but rather, the determination that such violations, constituted a "threat to international peace and security" as required by Chapter VII of the UN Charter. See Article 39 of the UN Charter. For an overview of the establishment of the Rwanda Tribunal, see Akhavan, P. (1996), 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' *in American Journal of International Law*, vol. 90, No.3, pp. 501-510.

[147] *Ibid*

Protocol II additional to the Conventions.[148] It is accorded jurisdiction over persons of whatever nationality accused of committing such crimes in Rwanda and over Rwandese charged with such crimes in neighbouring states as well.[149]

The challenge of the tribunal is to prove that international criminal justice can contribute to the creation of lasting peace in the aftermath of social breakdown resulting from armed conflicts. In other words, the question is whether and to what extent can an *ad hoc* international criminal tribunal contribute to the reconciliation process in the wake of conflict.[150] Supporters of the tribunal tend to argue that its fundamental contribution to reconciliation lies in the notion of individualizing guilt. As judge Richard Goldstone explained with respect to the International Military Tribunal at Nuremberg:

> "The trials of war criminals ensured that guilt was personalized – when one looks at the emotive photographs of the accused in the dock at Nuremberg, one sees a group of criminals. One does not see a group representative of the German people –the people who produced Goethe or Heine or Beethoven. The Nuremberg trials were a meaningful instrument for avoiding the guilt of the Nazis being ascribed to the whole German people. Then too, the Nuremberg trials played an important role in enabling the victims of the Holocaust to obtain official acknowledgement of what befell them."[151]

As far as this goes, it is an attractive and plausible idea. But the argument is more ambiguous than it may at first appear. Although the tribunal has had great contributions in the development of international law rules, especially those relating to international criminal law, the same has been the object of stinging criticism, which has come mainly from two sources: the current RPF-led government of Rwanda and the Western countries, led by the United States. The Rwandan government opposed the very creation of the Tribunal in the first place, citing two main reasons. To begin with, the most severe punishment to be meted out by the Tribunal would be imprisonment and not death (for the government, those proved to have been involved in the genocide deserved the death penalty, which still existed in Rwanda at the time of the establishment of the Tribunal). Secondly, the Rwandan government argued, it was unrealistic to limit the Tribunal's temporal jurisdiction to the period 1 January to 31 December 1994 since equally serious crimes had been committed before then and these crimes were related to the ones perpetrated in 1994. Other reasons included the likelihood that judges from countries which had been in some way or another involved

[148] Articles 2, 3 & 4 of the ICTR Statute.
[149] Article 5 of the ICTR Statute.
[150] See also Preamble to the ICTR Statute.
[151] See this in Goldstone, R '50 Years after the Nuremberg: A New International Criminal Tribunal for Human Rights Criminals' in Jongman, A. (Ed.) (1996) *Contemporary Genocides: Causes, Cases, Consequences*, Leiden: PIOOM/University of Leiden.

in the war would show bias, and the fact that those found guilty would serve their sentences in countries offering prison facilities and not in Rwandan jails.[152] In the eyes of the Rwandan government, therefore, the Tribunal would be ineffective. Moreover, it would serve no useful purpose since it would not meet the expectations of the Rwandan people.

At most, it would be used to appease the conscience of the international community, which had stood by while the genocide took place and had made no effort to stop it. The government has continued to take a very hostile attitude towards the Tribunal, whose personnel in Kigali have reportedly been subjected to harassment and even manhandled in the course of their work.[153]

Further criticism has been directed at the Tribunal as part of the broader criticism of the United Nations system as a whole in handling conflicts. Among other things, it is alleged that it is not making any headway and that it is generally dysfunctional. As a result, Dr Adede, the Tribunal's Registrar, and Deputy Prosecutor Honoré Rakotomanana, a retired Chief Justice from Madagascar, have been dismissed.[154] Prunier makes it worse: his disdain towards the Tribunal brings him to the conclusion that it managed to combine the worst aspects of the UN bureaucratic inefficiency with mere political manoeuvring involving nepotism and corrupt practices.[155] The ICTR has spun out its procedures, hired suspected *genocidaires* as investigators, taken on personnel from non-Francophone countries when 80% of all the documentation it dealt with was in French. It has been criticized of having been confused, incompetent, and has lost files. The tribunal has gone for years without simultaneous translation even though most witnesses could not speak the languages of the judges. Compared with the Nuremberg trials, which judged 24 Nazis in one year, hanging 10 of them,[156] as of late 2008, (about 15 years since it was created), the ICTR has convicted only twenty-nine persons, five were acquitted and two were referred to national courts while majority of suspects are still waiting their trials.[157] Thirteen indictees remain at large, including an important businessman accused of bankrolling the genocide. The Tribunal's annual budget exceeds $ 127

[152] At present six countries have indicated their willingness to provide prison facilities for persons convicted by the Rwanda Tribunal: Austria, Belgium, Denmark, Norway, Sweden and Switzerland.

[153] See Peter, C.M (1997), 'The International Criminal Tribunal for Rwanda: Bringing the Killers to Book' in *International Review of the Red Cross*, vol. 321, pp. 695-704.

[154] Agwu Ukiwe Okali (Nigeria) was appointed as the new head of the Registry, and Bernard Acho Muna (Cameroon) as the new Deputy Prosecutor

[155] Prunier, G. (2009). *From Genocide to Continental War: The Congo Conflict and the Crisis of Contemporary Africa*, London: Hurst & Company, p. 349.

[156] See Cassese (2009), *supra* note 99, p. 16.

[157] See UN, *Report on the completion strategy of the International CriminalTribunal for Rwanda*, UN Doc. S/2008/726, Annex A.

million and its staff exceeds 1,000.[158] Hence, the prosecutors appointed by the UN simply failed to carry out their mandate, and the ICTR was allowed to fall into the hands of the vengeful Rwandan government. The whole enterprise was, as Prunier believes, a farce: how could a court staffed with 87 nationalities, using modern legal practice, deal with a genocide organised largely by word-of-mouth - particularly when the ICTR staff were so corrupt that they made every effort to go slowly so as to be able to steal more? The ICTR continues to meander expensively along. According to the *Completion Strategy* submitted to the General Assembly and the Security Council of the United Nations, the ICTR would complete hearing cases at first instance by 31 December 2008 and the Appeals Chamber will complete hearing Appeals by 31 December 2010.[159]

Other problems are the ineffectiveness of investigations in Rwanda itself and the limited nature of the mandate. Some crimes have been committed by those now in power in Rwanda and the attempts for the Prosecutor to investigate RPF crimes led in 2002 to a sour relationship between the Tribunal and the Rwandan government where the latter refused to grant documents for witnesses to travel to Arusha and withheld investigators' access to evidence and crime cites. The non-indictment of the RPF leaders who might have been involved in the genocide leaves the Tribunal open for criticism and the danger of this "selective justice" poses a serious obstacle to reconciliation and reconstruction. The defeat of the Hutu regime, resulted in something like victors' justice,[160] and the ICTR remained as accidental implementer of the Tutsi revenge and retaliation against the Hutus who outnumber the latter as *genocidaires* before the tribunal.
With these realities in mind, the establishment of an international criminal tribunal for the DRC does not promise much either.

5.5.4 International Criminal Adjudication and the Congo Conflict

The two tribunals discussed above (the ICTY and the ICTR) are widely accredited with giving the necessary impetus to the establishment of the International Criminal Court (ICC), in July 1998.[161] The ICC remains the only avenue available for individual criminal responsibility for the Congo conflict. After all, the ICC was established as an independent, permanent court that tries persons

[158] See <http://www.ictr.org> (containing various lists of statistics); see further Rapp, S. (2007) 'Achieving Accountability for the Greatest Crimes: The Legacy of the International Tribunals,' in *Drake Law Review*, vol. 55, pp. 269-70.
[159] UNSC Res 1824 (2008) of July 18, 2008.
[160] See Reydams, L. (2005). 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' in J*ournal of International Criminal Justice*, Vol. 3, No. 4, pp. 977-988.
[161] Established under the *Rome Statute.*

accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.[162]

Unlike the two *ad hoc* tribunals, whose jurisdiction was generally limited, both temporarily and geographically, the ICC is an organ of global jurisdictional reach and thus potentially able to respond to violations occurring anywhere.[163] Issues of jurisdiction under the ICC take several forms, each of which must be considered separately. They are temporary (*ratione temporis*) jurisdiction, personal (ratione personae) jurisdiction, territorial (or *ratione loci*) jurisdiction, and subject-matter (*ratione materiae*) jurisdiction.[164]

Although the establishment of the ICC comes as an ultimate success in international criminal adjudication, criticisms by its opponents are as plentiful as laudatory praises of its proponents.[165] Among the controversies that have arisen are: (1) the accusation that the Court represents an undue usurpation of state sovereignty because of its jurisdictional reach; (2) whether domestic amnesties will be take into account by the ICC; (3) fears that the ICC will provide an opportunity for the developed world to dominate developing countries whose national legal systems are more likely to be unable or unwilling to undertake successful prosecutions; (4) and also the opposite view that weaker countries will try and use it for political motivated prosecutions against the powerful. Yet, besides the adamant reluctance of the US to date, many countries around the world have ratified the Rome Statute,[166] an indication of a decisive seriousness of the international community to create a permanent international criminal adjudication mechanism.

However, even if the ICC achieves its full potential, it faces a number of challenges. Firstly, it is realistically not able to address all situations in which national courts are unwilling or unable to prosecute perpetrators. Secondly, there are temporal and other jurisdictional limitations on what types of cases the ICC can hear. Accordingly, the ICC will only have the power to try people accused of the gravest human rights violations committed after 1 July 2002; the date the Rome Statute which established the ICC took effect. As a result, only a small number of individuals responsible for the atrocities committed will be tried by this Court. Thirdly, is the establishment of the Truth and Reconciliation Commission (TRC), one of the civilian institutions that emerged from

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[162] *See* Article 1 of the *Rome Statute*.
[163] Cassese, A. (2003). *International Criminal Law*, Oxford: Oxford University Press, p. 341.
[164] For a thorough discussion of each of these forms of jurisdiction, see Schabas, W. (2007). *An Introduction to the International Criminal Court*, 3rd Ed, Cambridge: Cambridge University Press, pp. 65-82.
[165] Price and Zacher, *supra* note 138, p. 131.
[166] Status of ratification as on February 2009 indicates that signatories are 139 and parties are 108

the peace talks, meant to end impunity or to cover up gross violations of human rights committed in the DRC? It remains to be seen how it will function and interact with the local courts.

5.5.5 Lubanga case

The DRC ratified the *Rome Statute* on April 11, 2002, enabling the sixtieth ratification to be achieved and the Statute to enter into force.[167] As a result, the Court has jurisdiction over the territory of the DRC from the beginning of its operations, that is, over the acts taking place subsequent to July 1st 2002. As early as July 2003, the ICC chief Prosecutor had indicated that the *Ituri* Region of the DRC was his first priority. His initial analysis was founded on the potential use of his *proprio motu* powers, in accordance to the Rome Statute.[168] This changed in March 3, 2004, when the DRC followed Uganda's example and referred the situation in Ituri region to the ICC.[169]
On February 10, 2006 the Prosecutor's application for an arrest warrant directed at Thomas Lubanga Dyilo, filed before the ICC a month earlier on January 13, 2006, was granted. This followed an *exparte* hearing on February 2, 2006. Lubanga had apparently been in custody in Kinshasa in the DRC for nearly a year prior to the issuance of the warrant of arrest. Mr. Lubanga, a native of the DRC,[170] is alleged founder of the *Union des Patriotes Congolais* (UPC), a political party, and its military wing, Patriotic Forces for the Liberation of Congo.[171] He was arrested on March 17, 2006[172] for charges of war crimes of conscripting children into armed groups, enlisting children into armed groups and using children to participate actively in hostilities. Each of these charges constitutes a crime under the Rome Statute.[173]

The fact remains that Lubanga was being brought to justice by the courts of the country where his alleged crimes had been committed, and the International Criminal Court might well have been more cautious before intervening. It is certainly not obvious that when an individual is held for nearly a year in pre-trial detention that there is a serious problem of impunity. Both the Prosecutor and the Pre-Trial Chamber seem to have been a bit impetuous in this case, perhaps anxious to have

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[167] According to Article 126 (1) of the Rome Statute, the Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of 60th instrument of ratification, acceptance, approval or accession.
[168] See Article 15 of the Rome Statute.
[169] Authorization of self-referral flows from a creative interpretation of Article 14 of the Rome Statute. See further Schabas, *supra* note 164, p. 42.
[170] *The Chronology of the Thomas Lubanga Dyilo Case*, *ICC NEWSLETTER* (The Hague, Neth.), Nov.2006 at p. 1. Available at <http://www.icc.cpi.int/libarary/about/newsletter/10/en_01.html> last visited, September 8, 2009.
[171] *Forces patriotiques pour la liberation du Congo* (hereinafter referred to as "the FPLC). See further Kritz, N (1996), 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,' *Law and Contemporary Problems*, vol. 59, No.4 (1996), pp. 127-152.
[172] *ICC NEWSLETTER* (The Hague, Neth.), Nov.2006 at p. 2
[173] See Article 25 (3) (a) and Article 8 (2) (e) of the *Rome Statute*.

a real defendant before the Court. But in so doing, they have offered an interpretation of the *Statute* which is arguably more intrusive with respect to the criminal justice of States than was ever intended. This may well have an impact on future ratifications of the *Rome Statute*. Many States are carefully studying the first cases at the Court, to see whether its promise to defer to national prosecutions will be respected.

In *Lubanga*, the Pre-Trial Chamber did not indicate the crimes with which the accused was charged in the DRC, but they were presumably serious enough to warrant his preventive detention for nearly a year. They might well have been *more* serious than those with which he was being charged by the Court. In such a context, where an accused person is also being prosecuted by national authorities, the determination of admissibility cannot be reduced to a mechanistic comparison of charges in the national and the international jurisdiction, in order to see whether a crime contemplated by the *Rome Statute* is being prosecuted directly or even indirectly. It must involve an assessment of the relative gravity of the offences tried by the national jurisdiction put alongside those of the international jurisdiction. Recruitment of child soldiers is serious enough, but maybe Lubanga was being prosecuted in Congo for large-scale rape and murder. We are simply not given this information.

The Pre-Trial Chamber considered the issue of gravity of the *Lubanga* case, but in isolation, and not with regard to the pending charges within Congo. The *Rome Statute* requires the Court to declare a case inadmissible when it is 'not of sufficient gravity to justify further action by the Court.'[174] The Pre-Trial Chamber set out its perspective on its assessment of this aspect of admissibility. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes (which are defined by both contextual and specific elements) included within the material jurisdiction of the Court. Second, in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community. In the Chamber's view, this factor is particularly relevant to the Prosecution's Application due to the social alarm in the international community caused by the extent of the practice of enlisting into armed groups, conscripting into armed groups and using to participate actively in hostilities children under the age of fifteen.[175]

[174] Article 17 (1) (d) of the Rome Statute.
[175] *Prosecutor v. Lubanga* (ICC-01/04-01/06-8).

The Pre-Trial chamber added that the gravity threshold at the admissibility stage was 'intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation.'[176] Focusing on the leaders would enable the Court to play a deterrent role.[177] In this context, the Court referred to recent changes to the law of the *ad hoc* tribunals as part of their 'completion strategies.'[178] It bears mentioning that these provisions owe their provenance to initiatives of Judge Jorda, President of Pre-Trial Chamber I, who in an earlier incarnation was President of the International Criminal Tribunal for the former Yugoslavia. The ICTY provisions were intended to tame the Prosecutor, who initially resisted attempts by the judiciary to encroach upon her discretion in selecting cases.[179]

The decision of Pre-Trial Chamber I to issue the arrest warrant was challenged by duty counsel Jean Flamme, in a notice dated March 24 2006. In the notice of appeal, he argued that the Pre-Trial Chamber erroneously applied article 17 of the *Rome Statute*, and that it should have ruled the case inadmissible.[180] However, there was a procedural problem with the notice of appeal. Article 19(6) of the *Rome Statute*, which is invoked in the notice of appeal, says that 'decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82'. But the context indicates that the provision refers to appeals from challenges to admissibility which have been submitted under article 19, which an accused is entitled to file under article 19(2). In other words, the proper recourse for Lubanga is probably to challenge admissibility, and not to appeal the issuance of the arrest warrant.

While the Prosecutor worked with the authorities of DRC in order to ensure the accused person's transfer to The Hague, the *Lubanga* arrest warrant remained under seal.[181] The Registrar formally transmitted the request for arrest and surrender of Lubanga on March 14, 2006. Lubanga was apparently brought before a Congolese judicial authority, which authorised his surrender and transfer to the International Criminal Court. Lubanga was promptly brought to The Hague by

[176] Ibid, para 50.
[177] Ibid, para 54
[178] Ibid, paras 55-60. For example, the Court noted UNSC resolution No.1134 (2004), and Rules 11 bis and 28 (A) of the Rules of Procedure and Evidence. On the completion strategies, of the ad hoc tribunals, see Schabas, W (2006). *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge, p. 57.
[179] On the situation at the ad hoc tribunals, see for instance, Brubacher, M. (2004). 'Prosecutorial Discretion within the International Criminal Court' in *Journal of International Criminal Justice*, vol. 2, No. 1, pp. 71-95.
[180] *Prosecutor v. Lubanga* (ICC-01/04-01/06-57-Corr).
[181] It was made public once Lubanga was in the Court's custody: *Prosecutor v. Lubanga* (ICC-01/04-01/06-37), decision to unseal the warrant of arrest against Mr. Thomas Lubanga Dyilo and related documents, March 17, 2006.

French military aircraft. On March 20, 2006, Lubanga appeared before the Pre-Trial Chamber, for the purpose of establishing that he had been informed of the crimes he was alleged to have committed, and that he knew of his rights under the Statute, including the right to apply for interim release. A hearing to confirm the charges must be held within a reasonable time, in accordance with article 61 of the *Rome Statute.* The Pre-Trial Chamber set June 17, 2006 for the hearing. On January 29, 2007, the Pre-Trial Chamber confirmed charges against Lubanga, as brought by the Prosecutor, allowing the case to be set for trial.[182] In accordance with the Rome Statute, and Rules of Procedure and Evidence of ICC,[183] certain victims, represented by Counsel, played an active role in this hearing.[184]

Besides suggesting that there are problems with the admissibility of the case, the fact that Lubanga was detained for a prolonged period in the DRC before issuance of the arrest warrant raises questions of arbitrary detention for which the Court itself may be responsible. Lubanga had been in detention for approximately one year, and possibly longer. His detention was well-known to international NGOs so it seems reasonable to presume that the Prosecutor was also aware of the situation. The Prosecutor only proceeded to seek an arrest warrant when it appeared that the detention was coming to an end, and that there was the possibility Lubanga would be released. This was specifically invoked in the application for the arrest warrant, and helped to persuade the Pre Trial Chamber.[185] While subject to procedural restrictions, such as the inability to call their own witnesses,[186] the legal representatives of the victims made their presence known through forceful opening[187] and closing[188] remarks, as well as numerous document requests and even a question posed to the witness.[189] This hearing set the precedent for victims to play an important role in international criminal proceedings as they seek closure for the harms committed against them.[190]

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[182] *Prosecutor v. Lubanga* (ICC-01/04-01/06), Hearing: Decision of the Pre-Trial Chamber Following the Confirmation of Charge Hearing, available at <http://www.icc.cpi.int/cases/RDC/c0106/c0106_hs.html> last visited, September 8, 2009.

[183] See Rules of Procedure and Evidence, Rule 89, U.N. Doc. PCNICC/2000/1/Add.1, Nov.2, 2000 (hereinafter referred to as the ICC Rules of Procedure and Evidence), available at <http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf>, last visited, September 8, 2009.

[184] Nov.9, 2007. Confirmation of Charges Hearing, *supra* note 178.

[185] *Prosecutor v. Lubanga* (ICC-01/04-01/06-8). Decision on the Prosecutor's Application for a Warrant of Arrest, February 10, 2006, *paras* 98-102.

[186] ICC Rules of Procedure and Evidence, supra note 18, at Article 89. The inability of victims to call their own witnesses is a reflection of the administrative and logistical constraints of the ICC as well as deference to the procedural rights of the defendant.

[187] *Prosecutor v. Lubanga, supra* note 182.

[188] *Ibid.*

[189] *Ibid.*

[190] Will, M. (2007). 'A Balancing Act: The Introduction of Restorative Justice in the International Criminal Court's Case of the Prosecutor v. Thomas Lubanga Dyilo' in *Journal of International Law and Policy*, vol. 17, No.1 pp. 85-120.

It would appear that the Prosecutor might have been content, for a protracted period, to let Lubanga remain in the Congolese prison while he proceeded to prepare his case, and that implies a degree of complicity with the detention within the DRC prior to issuance of the arrest warrant. Similar issues have been raised before the International Criminal Tribunal for Rwanda, where the Appeals Chamber has manifested considerable unease when suspects have been held in prisons in different African countries, under dubious legal pretexts while the Prosecutor continued to investigate.[191]

On January 29, 2009 the trial of Thomas Lubanga commenced before the ICC. As the Prosecutor has repeatedly charged, Mr. Lubanga is allegedly responsible, as co-perpetrator, of War crimes consisting of:

• Enlisting and conscripting of children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003;[192]

• Enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 2 June 2003 to 13 August 2003.[193]

As this case proceeds before the ICC, I am of the view that the ICC ought to have charged Lubanga of more serious international crimes (mass killings, rape, torture etc) as widely committed in the Ituri Region of the DRC by forces under Lubanga's direct command.

The case may not provide the true justice required by the Congolese in the aftermath of the conflict. First, Lubanga is just one among the many culprits ought to be brought before the ICC or before any other effective justice forum. Second, more victims, including those of rape, and those whose relatives and beloved ones were murdered in the course of the conflicts, may not see the types of charges levelled against Lubanga as restoring their grievances.

Nevertheless, the uniqueness of this case in international criminal justice cannot be over emphasised. It stems not only from being the first case before the permanent international criminal court, the ICC, but also from being the first case where an international criminal tribunal, the ICC in this matter has recognised the importance of granting the victims of mass atrocities a forum in which to be heard and perhaps healed. More importantly it has provided for the international criminal adjudication of the Congo conflict, eradicating the culture of impunity, which has reigned for too long in this complex and deadly conflict.

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[191] See for instance, *Prosecutor v. Barayagwiza*, (Case No. ICTR-97-19-AR72), Decision, November 3, 1999.
[192] Punishable under article 8(2)(b)(xxvi) of the Rome Statute.
[193] Punishable under article 8(2)(e)(vii) of the Rome Statute.

5.6 Conclusion

This chapter has attempted to analyze international adjudication as a method in resolving armed conflicts alongside its general role of disputes settlement in international law.

In this analysis, the 2005 ICJ Judgment in the *Case Concerning the Armed Activities in the Territory of the Congo* and the ongoing case of Lubanga before the ICC were taken as case studies. The historical development of adjudication has been examined, with particular reference to the ICJ. The mandates of the Court as well as compliance and enforcement of its final binding decisions against condemned states have been re-examined.

In the final analysis, I join hands with Merrill's[194] who sees clear limits to the role of international adjudication or rather judicial dispute settlement. In his view, international adjudication has been most effective in resolving strictly bilateral disputes. In actual practice, it has proved less suited for the satisfactory settlement of international armed conflicts or highly politicized disputes, for which other appropriate paths and forums remain to be explored. Even as international criminal adjudication is examined, it is realized that it has likewise missed the main point, namely to respond to the actual roots of the conflicts.

The overall conclusion from this discussion is therefore a rather cautious note, epitomized in the statement that, while there is positive view of the role of judicial bodies in ensuring respect for international law, it is difficult to apply this role in armed conflicts situation where there are a number of justice issues to be addressed.

The most important point to be remembered however is that judicial settlement of international disputes is but a tiny aspect of the process of disputes settlement systems in international relations. Most disputes are resolved on the basis of agreements which contain provisions to the effect that binding adjudication is a method of last resort when diplomatic means have failed.

The legal approach to international dispute settlement will become more effective only if the weaknesses in the international legal system are remedied. The main shortcomings in the current system may be summarized thus:

a. The law is often uncertain, and in some areas it reflects earlier power relationships that have become anachronistic in a world no longer centered on the West;
b. The system has no effective contemporary lawmaking body;

[194] Merrills, J. (1998) *International Dispute Settlement*, 3rd ed. Cambridge: Cambridge University Press, p. 296.

c. Although international judicial bodies are the main interpreters of international law, there is no general compulsory jurisdiction to ensure legal settlement of disputes that evade a negotiated solution;
d. The system lacks effective procedures to bring offenders to justice and to ensure compliance with judgments.[195]

The importance of adjudication cannot however be overemphasized here. It lies in the development and strengthening of international law. In other words, the decisions of international judicial bodies contribute enormously to the development of new global values, which will make it easier to accept rules without the need for enforcement.

To address today's limits and more difficult environment, the development of a system of international justice to limit impunity for serious human rights crimes must be seriously worked out. It is therefore stressed that it is critical to refine the international justice system so that perpetrators of the most serious crimes such as those committed in the DRC are increasingly held to account. This may entail revisiting the general jurisdictional limitations of such important international judicial bodies with a view to strengthen their role in international adjudication. More specifically, filling the gap that stands in the way of justice in holding states as such criminally responsible for crimes committed in their organised and directed command structures may provide a long lasting solution. The effects that such a gap has created in the case of human rights atrocities committed in the Congo may not wait for such long-lasting solutions, since this is an urgent matter which needs an immediate attention of the international community.

[195] See Riggs and Plano, *supra* note 20, p.199.

6 SYSTEMIC INTEGRATION OF HUMAN RIGHTS AND CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION

6.1 Introduction

This chapter assesses the extent to which incorporation of human rights in dealing with conflict situations may create an alternative conflict prevention mechanism.[1] Traditionally, state responsibilities during times of conflict have fallen within the domain of humanitarian law, with states being able to derogate from certain human rights norms under human rights treaties during times of war or other public emergency.[2] This dichotomy between humanitarian and human rights law,[3] which also characterizes regional setups, is often apparent in trying to manage or resolve conflicts, when steps to prevent them have failed.[4] The United Nations discussed for the first time the issue of human rights in regard to armed conflicts during the International Conference on Human Rights in Teheran in 1968. This was the very first step of taking into consideration Humanitarian Law within the Human Rights system. It was at this conference that a brand new term, *human rights in armed conflict,* was introduced. In the first period, scholars did not generally accept this new development.[5] Nevertheless, the title of the resolution adopted on May 12, 1968 is "Human Rights in Armed Conflict."[6] This document is considered as establishing a link between

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[1] For a thorough discussion on conflict prevention mechanisms, see generally, Adedeji, A. (1999). *Comprehending and Mastering African Conflicts: The Search for Sustainable Peace and Good Governance*, London: Zed Books; Lund, M (1997), *Preventing Violent Conflicts*, US Institute of Peace Press, Washington; Bozeman, A. (1976). *Conflict in Africa: Concepts and Realities*, Princeton: Princeton University Press; Mazrui, A. (1995). 'Towards Containing Conflict in Africa: Methods, Mechanisms and Values,' *East African Journal of Peace and Human Rights*, vol. 2, pp. 81 – 90.; Mekenkamp, M., Van Tongeren, P and Van de Veen, H. (1999). *Searching for Peace in Africa. An Overview of Conflict Prevention and Management Activities*, Utrecht: European Platform for Conflict Prevention and Transformation.

[2] *See*, for example, Fleck, D. (Ed.). (1995). *Handbook of Humanitarian Law of Armed Conflicts*, Oxford: Oxford University Press, p. 77; Meron, T. (1983) 'On the Inadequate reach of Humanitarian and Human Right Law and the Need for a New Instrument' in *American Journal of International Law*, vol. 77, No. 3, pp. 589-606; Solf, W. 'Human Rights in Armed Conflict: Some Observations on the Relationship between Human Rights Law and the Law of Armed Conflict,' in Han, H. (Ed.), (1979) *World in Transition: Challenges to Human Rights Development and World Order*, Washington DC: University Press of America, pp.41 – 53.

[3] A discussion of an interface between human right and humanitarian law during armed conflicts is found in Watkin, K. (2004). 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' in *American Journal of international Law*, vol. 98, No. 1, pp. 1–34. Watkin argues that the unique threat posed by non-state actors, combined with the lack of consensus on legal categorization of conflict, creates conditions where enforcement and armed conflict paradigm overlap. This overlap in turn, directly affects the applicability of human rights law, which is most commonly associated with enforcement, and humanitarian law, which applies during armed conflict.

[4] Thus, the AU has called for training, for example, for troops on the 'concept and conduct of peace support operations', and such training should include international humanitarian law, but has not made any specific reference to human rights. See, 'Report of the Second Meeting of the Chief of Defence Staff of the Central Organ of the OAU Mechanism for Conflict Management and Resolution', OAU/CHST/CO/RPT (II), *para*. 34.2; Dugard, J. (1998). 'Bridging the Gap between Human Rights and Humanitarian Law: The Punishment of Offenders', *International Review of the Red Cross*, No. 324, p. 445 – 453.

[5] Kart, J. (1995). 'Human Rights and Humanitarian Law', *Encyclopedia of Public International Law*, Vol. 2, Max Planck Institute for Comparative Public Law and International Law, dir. Rudolf Bernhardt, p.910.

[6] Resolution XIII (UN Doc. A/CONF. 32/41).

these two human oriented laws. The motive was armed conflict in the Near East, and the reason for linking the discussion of these two parts of International Public Law can be found in the newly emerging perspective that the force used in armed conflict by itself might be considered as the background for violation of Human Rights. As two commentators/scholars/legal experts noted regarding the resolution/situation on this occasion: "Peace is the underlying condition for the full observance of human rights, and war is their negation."[7]

In this chapter, I focus on the relationship between the fields of human rights and conflict management as a means to prevent conflict.[8] The complexities of their being both contradictory and complementary are discussed, and it is argued that the interaction between these fields should take place to a far greater extent than is currently the case.

Exploring the relationship between human rights and conflict management, Michelle Parlevliet[9] notes that the two fields are often perceived as being in contradiction or competition. Nevertheless, human rights actors and conflict management practitioners have a common interest in promoting sustainable peace with justice. They also frequently operate in the same environment, as many conflicts involve human rights violations of some sort, and activities by actors in the one field may impact efforts by actors in the other field. It is therefore necessary to explore the relationship between human rights and conflict management in more depth, and to examine whether and how they can contribute positively to one another.

The interaction between human rights and conflict has been portrayed by many as a complex and dynamic one.[10] This chapter explores that relationship, examining its powerful dynamics from

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[7] Louise, D and Sylvain, V. (1993). 'International Humanitarian Law and Human Rights Law' *International Review of the Red Cross*, No. 293, pp. 94–119.

[8] Issues of human rights and conflict interact in multiple ways as discussed in Ramcharan, B. (2004). 'Human Rights and Conflict Resolution', in *Human Rights Law Review*, vol. 4, No. 1 pp. 1-18; Summer, D. and Schnabel, A. (2003). *Conflict Prevention: Path to Peace or Grand Illusion*, UNU, Tokyo; Thoolen, H. (2001). 'Early Warning and Prevention,' in Alfredsson, G, et al. (Eds.), (2001). *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller*, The Hague: Martinus Nijhoff Publishers, p. 301; Mahoney, L. (2003). 'Unarmed Monitoring and Human Rights Field Presences: Civilian Protection and Conflict Protection,' *The Journal of Humanitarian Assistance*, August 2003, at <http//www.jha.ac/articles/a122.htm> last visited, September 8, 2009; Lutz, E., et al., (2003). 'Human Rights and Conflict Resolution from the Practitioners' Perspective,' *The Fletcher Forum of World Affairs*, 27(1) (Winter/Spring); Saunders, J. (2002). 'Bridging Human Rights and Conflict Prevention: A Dialogue between Critical Communities,' Carnegie Council on Ethics and International Affairs, at <http//www.cceia.org/ viewMedia.php/prmTemplateID/1/prmID/161> last visited, September 8, 2009; O'Flaherty, M (2004). 'Sierra Leone's Peace Process: The Role of the Human Rights Community,' in Human Rights Quarterly, *vol. 26, No.* 4, pp. 983-1027.; O'Flaherty, M. (2003). 'Future Protection of Human Rights in Post-Conflict Societies: the Role of the United Nations,' in *Human Rights Law Review*, vol. 3 No. 1, pp. 53-76.

[9] *See* Parlevliet, M. (2002). 'Bridging the Divide: Exploring the Relationship Between Human Rights and Conflict Management' in *Track Two*, vol. 11 No. 1, pp.8-43

[10] Mertus, J. & Helsing, J (Eds.). (2006). *Human Rights and Conflict: Exploring the Links Between Rights, Law and Peacebuilding*, Washington DC: United States Institute of Peace Press, p.3.

several angles and showing that the relationship is also dialectical. The chapter asserts that the two fields are far from being mutually exclusive. It argues that human rights and conflict management practitioners ought to understand one another's fields much better than they do at present; that dialogue and interaction is needed between the fields; and that insights, skills and practices from the one field can strengthen activities in the other field. The main argument is that a natural synergy exists between the two fields which, if left untapped, complicates and undermines processes that work towards peace, justice, and reconciliation. With regard to conflict management, the chapter argues that without a proper understanding of the human rights dimension in conflicts, conflict management is bound to be unsustainable. Not only are efforts to protect and implement human rights essential to the constructive management of conflict, but institutionalized respect for human rights is also a primary form of conflict prevention.[11] Moreover, processes that aim to resolve conflict must take place within a framework in which fundamental rights and freedoms are considered non-negotiable. Concerning the human rights field, this chapter argues that conflict management can contribute to the protection and promotion of human rights in a variety of ways. There is wide scope for dialogue, negotiation and accommodation in dealing with conflicts. Conflict management can offer alternative and innovative methods of addressing conflicts over rights issues, and can also enhance the capacity of human rights actors to protect rights effectively.

The overall aims are therefore twofold. The first is to highlight the importance of considering the fields of human rights and conflict management in conjunction with one another when dealing with conflicts in the world generally and in the Africa's Great Lakes region in particular. The second is to point out that the relationship between conflict and human rights is both short-term and long-term in nature. In the short term, violent and destructive conflicts can lead to human rights violations. In the long term, a sustained denial of human rights can lead to conflicts, as fundamental needs of human beings are frustrated.

The protection of rights is therefore of utmost importance if conflicts are to be dealt with in an effective, constructive, and sustainable manner. Just as denying basic rights fans the flames of conflicts, helping to guarantee those rights can prevent conflicts from arising in the first place. It is the argument of this chapter, however, that this direct relationship between rights and conflict has been generally under-explored in trying to resolve the Africa's Great Lakes conflicts. Most of the

[11] Patten, C. (2001, May 28 and 29). 'Role of Human Rights and Democratization in Conflict Prevention and Resolution,' *Human Rights Forum*, Brussels: p. 6.

methods applied to resolve conflicts in the region have focused on political dynamics with very little attention to the main source, namely a sustained human rights abuse.

To achieve the above aims, the present chapter explores the subject through various subsections, which address the nature of the relationship between human rights and conflicts. It first looks at the tensions between the two fields and explains why they are not better integrated. The chapter then focuses on the relationship between human rights and conflict management through six analytical propositions that highlight the complementarities between the fields. They are the following:

- Human rights abuses are both symptoms and causes of violent conflict.
- A sustained denial of human rights is a structural cause of high-intensity conflict.[12]
- Institutionalised respect for right and structural accommodation of diversity is a primary form of conflict prevention.
- For the effective and sustainable resolution of intra-state conflict, the prescriptive approach of human rights actors must be combined with the facilitative approach of conflict resolution practitioners.
- Whereas human rights and justice *per se* are non-negotiable, the application and interpretation of rights and justice are negotiable in the context of a negotiated settlement.
- Conflict management can function as an alternative to litigation in dealing with rights related conflicts.

The last section of the chapter highlights two practical implications of the relationship between human rights and conflict management: the relevance of human rights training for conflict resolution practitioners and the relevance of conflict resolution training for human rights actors.

6.2 The Relationship Between Human Rights, Conflicts and Conflict Management

6.2.1 Principles and Standards

In the event of a conflict, particularly a violent one, there is often of a response from both human rights institutions and conflict resolution mechanisms, either jointly or separately seeking to find a solution. In the short term, they both attempt to prevent the escalation of violence and advocate for

[12] In the classification used by the Interdisciplinary Research Program on Causes of Human Rights Violation (PIOOM) based in Leiden (the Netherlands,) "high- intensity conflict" refers to open warfare among rival groups and / or mass destruction and displacement of sectors of the civilian population, in which 1000 or more people are killed in a 12 – month period. See this elaborated in Jongman, A. (2000). *The World Conflict and Human Rights Map 2000: Mapping Dimension of Contemporary Conflicts and Human Rights Violations.* Interdisciplinary Research Program on Causes of Human Rights Violations (PIOOM), Leiden: Leiden University: The terms "intensity", "violent" and "destructive" conflict are used here interchangeably.

an end to the violence and killings. In the long term, they seek to rebuild a society founded on the respect for human rights and institutionalise non-violent means of addressing future conflicts.[13] In reaching these goals human rights institutions and conflict resolution mechanisms employ different strategies based on their normative backgrounds and perspectives of a particular conflict with the result that their approaches to a solution may be contradictory or mutually exclusive.[14] This section looks at both points of convergence and tensions between human rights and conflict resolution in terms of their normative standards and objectives.

6.2.2 International Normative Standards of Human Rights

The toll of human suffering and gravity of human rights abuses experienced as a result of the two major World Wars and the formation of the United Nations (UN) marked a turning point in the development of normative standards for human rights.[15] In the preamble to the UN Charter,[16] the founding members aspired, among others, to 'save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights'.[17]

The UN set out in its principles and purposes to maintain international peace and security and collectively take effective steps to remove threats to peace, suppress any forms of aggression and to settle by peaceful means and in accordance with principles of justice and international law any international disputes.[18] Although the Charter itself does not spell out human rights provisions, it has nevertheless served as the institution under which many international human rights instruments have evolved, beginning with the Universal Declaration of Human Rights (UDHR),[19] adopted by the UN General Assembly on December 10th 1948. The Declaration presents in one document both civil and political rights on the one hand and economic, social and cultural rights on the other. Most of the provisions of the UDHR have developed into customary international law binding on states.[20]

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[13]Lutz, E *et al*, (2003) 'Human Rights and Conflict Resolution from Practitioners' Perspectives' *The Fletcher Forum of World Affairs*, vol.27, No.1, pp. 173-93 at p. 179.
[14] *Ibid*
[15]Mugwanya, G (2003) *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, New York: Transnational Publishers, p. 16. The author also notes that international law, prior to the formation of the UN recognised some form of international human rights protection including state responsibility for injury to aliens, humanitarian intervention and the protection of minorities, however, the establishment of the UN represented a 'qualitative leap' in the internationalisation of human rights protection and a recognition of the individual as a subject of international legal protection against human rights violations.
[16] Para 1 of the Preamble to the UN Charter.
[17] *Ibid*.
[18] See Article 1 (1) of the UN Charter.
[19] UNG.A Res. 217A (III), U.N. Doc A/810 at 71 (1948).
[20] Alfredsson, G and Eide, A. (Eds.) (1999) *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague: Martinus Nijhoff, p. xxvii.

It has been incorporated in the constitutions of many states and serves as a source of inspiration to judges in domestic and international tribunals.

Almost three decades after the adoption of the UDHR, two principal covenants, which expanded the rights stipulated in the UDHR and added new ones, entered into force. These were the Covenant on Civil and Political Rights (CCPR)[21] with its two Optional Protocols and the Covenant on Economic, Social and Cultural Rights (CESCR),[22] also with an Optional Protocol adopted in December 10, 2008. Both instruments place obligations on states to respect and ensure the rights contained in them to all persons within their territory and subject to their jurisdiction.[23]
Both instruments provide for supervisory bodies, namely, the Human Rights Committee under the CCPR and the Committee on Economic, Social and Cultural Rights under the CESCR. These two institutions ensure the compliance of states parties to the Conventions through the consideration of periodic reports submitted by states and an inter-state complaints procedure under the CCPR. The First Optional Protocol to the CCPR however provides for an individual complaints procedure.

Other human rights treaties dealing with specific rights include the Convention Relating to the Status of Refugees (1951), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1969), monitored by the Committee on the Elimination of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) and its Optional Protocol (2000), monitored by the Committee on the Elimination of Discrimination of Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1987) and its Optional Protocol (opened for signature on 4th February, 2003 and yet to enter into force), monitored by the Committee against Torture; the Convention on the Rights of the Child (CRC) (1989) and its two Optional Protocols on the Sale of Children, Child Prostitution and Pornography (2002) and on the Rights of the Child on the involvement of children in armed conflict (2002), monitored by the Committee on the Rights of the Child; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC) (adopted by General Assembly on December 18, 1990) and monitored by the Committee on Migrant Workers. In addition to these

[21] UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS. 171, entered into force on March 23, 1976.
[22] UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 UNTS UNTS. 3, entered into force on January 3, 1976.
[23] See common Article 2 of the ICCPR and ICESCR.

documents, there is a plethora of Declarations, Principles, Recommendations and Guidelines[24] that guide the member states of the UN in their conduct concerning the respect, protection, promotion and fulfilment of human rights.

6.2.3 Normative Standards of Human Rights in Africa

In Africa, the primary human rights norm-setting instrument is the African Charter on Human and Peoples Rights.[25] The ACHPR is hailed as the first human rights instrument to have incorporated first, second and third generation rights in one document.[26] It also provides for duties alongside the rights it protects. In accordance with Article 30 of the ACHPR, the African Commission was established on November 2, 1987 'to promote human and peoples' rights and ensure their protection in Africa'.[27] Mugwanya[28] notes that the ACHPR also takes inspiration from the UDHR when it clearly makes reference to universal human rights norms in its Preamble and in Articles 60 and 61. Furthermore, Articles 60 and 61 require the Commission to draw inspiration from international law on human and peoples' rights, among others, as provided in the UN Charter, the UDHR and other human rights instruments adopted by and under the auspices of the UN and the OAU.

Under Article 62, the ACHPR requires states to submit reports biennially to the Commission on the legislative and other measures they have taken towards the realisation of the rights recognised and guaranteed by the ACHPR as well an interstate and individual communications procedure under Articles 47 and 55 respectively. In 1998 the OAU adopted a Protocol to the ACPHR on the Establishment of an African Court on Human and Peoples' Rights to complement the African Commission in the protection and enforcement of human and peoples' rights. The Protocol entered into force on 25th January 2004.

The ACHPR is complemented by a number of instruments and declarations that guarantee human rights, namely the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (1969); the Cultural Charter of Africa (1976); the African Charter on the Rights and Welfare of the African Child (1990); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (not yet in force); and the Grand Bay (Mauritius) Declaration

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[24] See generally, 'Office of the United Nations High Commissioner for Human Rights' <http://www.ohchr.org/english/law> last visited, September 8, 2009.

[25] Adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 (hereinafter referred to as "the ACHPR").

[26] Heyns, C. (2004) 'The African Human Rights System: the African Charter' *Penn State Law Review*, vol *108*, No. 3, pp. 679 – 702; Mutua, M. (2000) 'The *African Human Rights System: A Critical Evaluation*', *Human* Development Report 2000, background paper, United Nations, New York.

[27] See Article 30 of ACHPR.

[28] See Mugwanya, *supra* note 15, p. 190.

and Plan of Action (1999). The Constitutive Act of the AU also incorporates, as part of its objectives and principles, the promotion and the protection of human rights.[29] The NEPAD will also assess the development of human rights in member states through the APRM in the broader context of sustainable development and good governance.[30]

These international and African regional human rights norms and standards set out in the instruments mentioned above provide the launch pad for human rights institutions and advocates to qualify and quantify the level of human rights abuses occasioned as a result of conflicts. These standards may also be used to seek the commitment of parties to a conflict to put an end to violence and human suffering and to negotiate peace.

6.2.4 Principles of Conflict Resolution

Conflict resolution cannot boast of a codified and elaborate set of normative standards in comparison to the field of human rights. There is still argument over certain key concepts such as 'peace' itself and the relationship of peace to justice.[31] Lutz[32] *et al.*, however, argue that there is an implicit set of principles that guide any conflict resolution efforts. The first of these principles is participation. The authors argue that the most effective negotiation and decision-making processes are those that actively engage the principal stakeholders who have a prime interest in the outcome. The fundamental aim of any conflict resolution effort is therefore to bring the feuding parties and relevant stakeholders into some *ad hoc* or institutionalised forum where their input will be considered. This process, however, is easier said than done, and Bell[33] reinforces this point when she notes for example in the context of pre-negotiation agreements, that:

> Parties move from violent to less violent forms of addressing conflict when they perceive that they can potentially gain more at the table than they can away from it. However, often, from the point of moving towards the negotiating table, the process is one of 'trial and error' for each actor, and the process is characterized by stops and starts, progress and breakdown.[34]

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[29] OAU Doc. CAB/LEG/23.15 (2001): Available at <http://www.africa-nion.org/About_AU/AbConstitutive_Act.htm>, last visited, September 8, 2009.
[30] Heyns, *supra* note 26
[31] Sunders, J (2001), 'Bridging Human Rights and Conflict Resolution: A Dialogue Between Critical Communities. Report on a July 16 –17, Carnegie Council Workshop' available at <http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/161>, last visited, September 8, 2009.
[32] Lutz, supra note 13, p. 177.
[33] *Bell*, C. (*2000*). *Peace Agreements and Human Rights*, Oxford: Oxford University Press, p. 21.
[34] *Ibid.*

The second principle is inclusion. Inclusion, though similar to participation, differs in terms of the fact that it considers *who* participates rather than *how* the participation is directed. Thus, the authors argue that in resolving a conflict, it is better to include as many stakeholders as possible, including elements that may prove to be disruptive of the process, because to ignore them would 'be a greater incentive to undermining any agreement that is reached.'[35]

The third principle is empowerment. This principle considers the unequal bargaining positions that parties to a conflict may bring to the negotiating table ranging from a lack of experience to resources. The mediators in the conflict therefore have to be mindful of such disparities and may incorporate teaching, training and coaching to maximize the effectiveness of the parties to reach a settlement and also to provide a basis for genuine negotiations to proceed.

The fourth principle is cultural sensitivity. Here Lutz *et al*. note that most cultures have their own mechanisms for handling conflicts and, for that reason, the adoption of culturally familiar practices and solutions will thrive long after the mediators have departed. Knowledge of such methods will be useful not only to resolve the conflicts but also to develop such indigenous mechanisms.

The fifth principle is equity. This principle requires the mediator to treat all parties to the conflict with equal respect, giving equal attention and time to each side in spite of the imbalance in power and bargaining positions. To respect and give equal concern to the contributions made by each side to the negotiation makes 'the forum more suitable to constructive discussion and problem solving.'[36]

6.2.5 Points of Convergence and Divergence

It is important to get a clear understanding of the fact that human rights violations both cause and result from violent conflicts, and can fundamentally alter the course of conflicts.[37] While this dialectical relationship has been mentioned in the preceding sections, the relationship between human rights and conflict management needs to be looked at closely here.

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[35] *Ibid*
[36] *Ibid.*
[37] For examination of the myriad causes of conflicts, including human rights abuses as well as their various phases and evolving dynamics, see generally Siriram, C and Wermester, K. (2003). *From Promise to Practice: Strengthening UN Capacities for the Prevention of Violent Conflict*, Boulder: Lynne Rienner.

The lack of integration between the fields of human rights and conflict management is due to a variety of factors. Actors in both arenas have traditionally operated separately in conflict situations, largely because they view conflict from different perspectives. Human rights actors are generally concerned with the application of objective standards to determine issues of justice and establish the extent to which parties have upheld or violated such standards. Conflict management practitioners, on the other hand, seek to reconcile the needs, interests, and concerns of disputant parties in a constructive way, rather than trying to determine who is right and who is wrong. This fundamental difference in perspective creates certain tensions between the two fields. It also leads the two types of actors to emphasis different values, goals, and strategies in their approach to peace and conflict.[38]

Arguably, the best known in this context is the "peace versus justice" debate, which has unfolded in various cases all over the world. Conflict management practitioners generally prioritise peace as a basis for justice, arguing that the cessation of violence and resolution of intra-state conflict is a precondition for the establishment of a viable and enduring system of justice. They usually accept that this may necessitate negotiating with parties responsible for atrocities. Human rights actors, however, focus more directly on justice as the foundation for a lasting peace.[39] Their primary concerns are holding perpetrators accountable, restoring the rule of law, and building democratic institutions. While many conflict resolution practitioners share these concerns, the two fields often differ on the relative priority and importance attached to the various imperatives. As Baker puts it, "they share a common concern to end conflict, but favour different strategies in achieving it."[40]
The peace versus justice debate played itself out dramatically in the context of Bosnia Herzegovina, when an anonymous author in a leading human rights journal accused the international human rights movement of prolonging the Balkan war. He claimed that the human rights community had been increasing the death, suffering and destruction in its pursuit of perfectly just and moral peace that would bring "justice for yesterday's victims of atrocities,' but instead made "today's living the dead of tomorrow".[41] Soon after this, an influential human rights scholar hit back, rejecting the charge that human rights actors disrupt peace processes. She argued the human rights community's

[38] Kent, A. (1998). 'Exploring the Relationship between Human Rights and Conflict Resolution' *FORUM*, National Institute for Dispute Resolution: pp.1-5. *See* further Kunder, J. (1998). 'How Can Transitional Human Rights be Integrated into Peace Processes?' Conference Report. Washington DC: Fund for Peace.
[39] Said, A. and Lerche, C. (2006). 'Peace as a Human Rights: Towards an Integrated Understanding' in Meritus and Helsing, *supra* note 10, p. 129.
[40] Baker, P. (1996). 'Conflict Resolution versus Democratic Governance: Divergent Paths to Peace?' In Crocker, C. and Hampson, F. (Eds.). (1996). *Managing Global Chaos: Sources of and Responses to International Conflict*, Washington DC: United States Institute of Peace, p. 563.
[41] Anonymous, (1996). 'Human Rights in Peace Negotiations' *Human Rights Quarterly*, vol. 18, No. 2, pp. 249-259 at p. 252.

articulation of concern, identification and analysis of the facts, and pressure for protection against abuses cannot be subject to the vagaries of international politics or the particulars of negotiations. The moral and strategic dilemma of how to balance peace and justice is now a regular feature of discussions where a settlement is being negotiated in intra-state conflict.[42]

Human rights actors and conflict management practitioners also differ in their approaches to dealing with conflict. Because of their focus on human rights standards that bind parties to specific behaviour and impose obligations on states to respect rights, human rights actors often adopt an adversarial approach in seeking redress for grievances, and explicitly point out the wrongs committed by states and non-state actors. They may seek recourse through the legal system, and/or may denounce parties in public. In contrast, many conflict management practitioners utilize more co-operative approaches with a view to maintaining or restoring relationships between parties and reaching mutually agreeable outcomes. The normative orientation of human rights actors also means that they may attribute blame, whereas conflict management practitioners usually refrain from judging disputing parties. In addition, human rights actors can be strict or rigid in their endeavours to uphold and abide by human rights norms, whereas conflict management practitioners are more flexible in their search for a resolution that meets the needs and interests of different parties.

Overall, human rights actors are more focused on principles, whereas conflict management practitioners are more pragmatically oriented. Baker has also suggested that the difference between the two sets of actors is one of outcome versus process. In her view, conflict management practitioners are primarily concerned with processes that facilitate dialogue between the parties, whereas human rights advocates are preoccupied with the contents of the parties' agreements.[43] However, it would be far-fetched to argue that conflict management practitioners are not concerned with the outcome of negotiation processes. Rather, the difference lies in human rights actors being more prescriptive, and conflict management practitioners being more facilitative, in their respective approaches to outcomes. In this sense the former could be considered “outcome advocates" in that they advocate a particular type of outcome (one that emphasizes constitutionalism and the legal protection of rights). The latter, on the other hand, could be termed "process advocates" as they favour a specific kind of process in reaching an outcome (one that is facilitative, all-inclusive, participatory, and develops trust between parties).

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[42] Gaer, F. (1997). ‘Reflections on Human Rights in Peace Negotiations,’ *Human Rights Quarterly*, vol. 19, No. 1, pp. 1-8.

[43] Baker, *supra* note 40, p.568. See also Bell, C. (2006). ‘Human Rights, Peace Agreements and Conflict Resolution: Negotiating Justice in Northern Ireland’ in Mertus and Helsing, *supra* note 10, 345.

Differences between the two sets of actors may also arise over the question of whether and how human rights concerns should be raised in negotiations. Conflict management practitioners aim to make the negotiation process as inclusive as possible in order not to alienate any party that has the potential to derail the process, irrespective of that party's human rights record. Experience indicates that any peace process that does not include all stakeholders is less likely to hold firm.[44] The decision by former South African President Mandela to involve two armed factions in Burundi in the Arusha peace process of 2000, in spite of their earlier exclusion, was based on this concern.[45] Human rights actors, on the other hand generally wish to exclude perpetrators from such processes, because their inclusion may grant them undue legitimacy and political influence in the post-conflict situation. This, for example, was the motivation for excluding the then President of the *Republika Srpska* (the Bosnian Serb Republic), Radovan Karadzic, and the chief military commander of the Army of the *Republika Srpska*, Ratko Mladic, from the *Dayton Peace Process* in 1996, following their indictment by the International Criminal Tribunal for the Former Yugoslavia.[46] Human rights actors are keen to raise rights abuses as issues that need to be addressed in a negotiation process and the resulting settlement, whereas conflict management practitioners may try to frame such concerns in ways that make the parties concerned less defensive. In the eyes of human rights activists, however, such an approach may render a negotiation process illegitimate, because justice is deemed non-negotiable and because it may put potential and former victims at continued risk.

A final difference relates to the roles that the actors play in times of conflict and how they position themselves in relation to conflicting parties. Human rights actors are geared towards advocacy, monitoring, and investigation, whereas conflict management practitioners tend to play a more facilitative role in bringing parties together and assisting them to communicate with each other. Actors in both arenas have to take care to ensure that the functions they fulfil and the activities they undertake are in line with their primary roles, combining roles that are contraception in specific processes, especially if the different roles have conflicting principles or objectives. Indeed, the mediating role of a conflict management intervenor may be compromised if he or she is perceived

[44] An example of the exclusion of the dissident General Laurent Nkunda from the initial Peace Processes in the DRC has left continued fighting in the volatile North Kivu province.

[45] Mandela has been quoted as saying " this should be all inclusive – not only government, National Assembly and political parties, but also rebel groups on the ground … these are the people slaughtering civilians …and unless we include them in the negotiation it will be difficult to stop the violence." See <http://www.usinfo.state.gov/regional/security/a0022203.htm>, last visited September 8, 2009.

[46] In Africa, the debate on whether or not to exclude parties responsible for gross human rights violation has been particular heated regarding Sierra Leone and the leader of the Revolutionary United Front, Foday Sankoh. See further Holbrooke, R. (1998). *To End a War*, Random House New York; Human Rights Watch, (1999). 'Sierra Leone: Getting Away with Murder, Mutilation, Rape,' July (HRW: A1103/6/99) Washington DC.

to criticize or blame a particular party because of human rights concerns. For example, the Burundian peace process was put under severe pressure when the mediator, former South African President Mandela, incurred the wrath of the Burundian government through his harsh criticisms concerning political prisoners and their conditions in jail.[47]

It should be acknowledged that neither human rights actors nor conflict resolution practitioners are neutral where issues of rights and justice are concerned. However, while the latter may express their values, they ought to refrain from publicly criticizing parties if they wish to maintain all the parties' trust and involvement in a negotiation process. As a rule, conflict resolution practitioners carefully guard their impartiality so as to ensure their acceptability to all parties. In contrast, human rights actors will not only express their values, but may also denounce parties guilty of human rights violations. In this sense, they have no compunction about taking sides in a conflict, something conflict resolution practitioners are keen to avoid. The differences between the two fields in goals, values, roles, focus, and strategies are summarized in the table below.

The above discussion indicates that several major differences between human rights actors and conflict management practitioners hinge on their different interpretation of moral issues in terms of strategies, focus, and approach. In the words of Nherere and Ansah-Koi, "human rights complicate the conflict resolution process by either bringing in or exacerbating the moral dimension in a conflict."[48] To conclude from the above, however, that the fields of human rights and conflict management are necessarily in contradiction or competition with one another would be wrong. Here, this chapter starkly contrasts the two perspectives for illustrative purposes. In reality, the two groups often overlap and share many objectives. Peace processes generally reflect elements of both approaches and often include aspects of both in the form of power-sharing arrangements, institution-building, and mechanisms to uphold accountability.[49]

There is also an increasing awareness that peace and justice are inextricably linked. As Baker puts it, "peace is no longer acceptable on any terms; it is intimately linked with the notion of justice. Conflict resolution is not measured simply by the absence of bloodshed; it is assessed by the moral quality of the outcome."[50] Nathan posits "the establishment of peace with justice" as the primary

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[47] "Mandela Steps up Pressure for Building to Realized Political Prisoners," June 13, 2000; and "Mandela Leaves Burundi with Prison Issue Unresolved," both from *Hirondelle News Agency*, June 14, 2001; at <http//www.hirondelle.org>, last visited, September 8, 2009.

[48] Nherere, P. and Ansah-Koi, K. (1990). 'Human Rights and Conflict Resolution' in Lindgren, G., Wallensteen, P. and Nordquist, K. *Issues in Third World Conflict Resolution.* Uppsala: Uppsala University, p. 3.

[49] Kunder, *supra* note 38.

[50] Baker, *supra* note 40, p.566.

goal of efforts to prevent and end civil wars.[51] Moreover, the reality of intra-state conflict necessitates a combination of the two perspectives. If, for example, the hard-line position–that those responsible for rights abuses cannot be involved in negotiations–was adhered to, there could be no negotiated settlements in civil wars. After all, it is in the nature of civil wars that no one party can be absolved from responsibility for human rights violations. Consequently, no party would qualify as a legitimate participant in peace negotiations. Yet, resolving intra-state conflict without their involvement is impossible. South Africa and Mozambique are obvious examples in this regard.

The tension discussed above explains why it would be difficult to merge the two fields and why there are strong arguments to keep them separate. Nevertheless, this analysis underscores the importance of building greater mutual understanding, since actors in both fields have interest in achieving sustainable peace with justice. Their differences provide all the more reason for exploring the relationship between the fields and examining how co-operation between them can help to promote their goals. Moreover, knowledge of each other is necessary for actors in both disciplines to constructively manage the tensions that exist between them.

[51] Nathan, L. (2000). 'The four horsemen of the Apocalypse: The Structural Causes of Conflicts in Africa' in *Peace & Change*, vol. 25, No. 2, pp 188- 207.

Table 1: Differences between human rights actors and conflict management practitioners (adapted from Baker)[52]

Goal	**Conflict management practitioners**	**Human rights actors**
	Peace as the pre-condition for systemic justice (justice through peace)	Transitional justice as pre-condition for sustainable peace (peace through justice
	Aiming for the cessation of violence and resolution of conflict so that relationship between parties can be repairing and structural causes of conflict can be addressed	Aiming for holding perpetrators accountable, restoring the rule of law, and building the democratic institutions
Approach strategies	Co- operative	Adversarial
	Include all relevant parties in the peace process	Exclude parties responsible for gross human rights violations from the peace process
	Flexible: conflict resolution is negotiable – negotiated outcome must be acceptable to local actors and appropriate to local conditions	Strict: justice is not a negotiable-outcome must be in line with international human rights standards
	Refrain from judging and criticizing parties, especially in public	Judge parties and attribute blame
	Focus on needs, interests, concerns of parties in order to reach mutually agreeable outcome	Focus on protection of rights and the extent to which parties have upheld international, regional and domestic human rights standards
Focus	Pragmatic focus	Focus on principles
	Facilitative approach towards outcome and issues	Prescriptive approach towards outcome and issue
	Process advocate; concerned with relationships and dialogue	Outcomes advocate; concerned with constitutionalism and protection of rights
Roles	Facilitator, convener, reconciler, mediator	Advocate, monitor, investigator, lawyer
Values	Need to remain impartial with respect to all parties	Need to speak out against justice and human rights violations and denouncing parties responsible

[52] The table provided in this chapter is more intensive than Barker's and organizes the information in several categories. Baker distinguishes between " conflict managers " and democratizers", and identifies the following differences: importance of cultural values/universal human rights values and standards; inclusive process/exclusive process; goal is reconciliation/goal is justice; pragmatic, confidence-building/principles institutionalizing law to build trust in the system; emphasis on process/emphasis on outcome; moral equivalence of belligerents/attributing blame; conflict resolution as negotiable/justice as non-negotiable; political neutrality of outside actors/outside mediators cannot be morally neutral. *See* Baker, *supra* note 40, p.567.

6.3 Human Rights and Conflict: The Interface

6.3.1 Human Rights Violation as Both Causes and Manifestations of Violent Conflict

The relationship between rights abuses and conflict is a useful starting point for assessing how human rights and conflict management are linked. Violent and destructive conflict can lead to gross human rights violations, but violations can also result from a sustained denial of rights over a period of time.[53] In other words, human rights abuses can be a cause as well as a consequence, or symptom of violent conflict. In the most general sense, grievances over the denial or perceived denial of rights can generate social and political conflicts.[54] Systematic discrimination, differential access to education or health care, limits on freedom of expression or religion, denial of rights to political participation are just some of the instances. Armed conflicts may also emerge where there are more serious incidents of human rights abuses--illegal detentions, extra judicial executions, disappearances, torture, widespread killing or even genocide. Here, it is unlikely that peaceful resistance will have much effect, so it is extremely likely that groups will take up arms to defend themselves. What is important in these instances is that human rights violations are an important, underlying cause of conflict. This means that once war has erupted, it is unlikely that merely negotiating an end to violence, engaging in peacekeeping and peace building etc., will suffice.[55] Any serious attempt at conflict resolution will also have to address the underlying sources of the original conflict, or else violence is likely to re-emerge once third party intervention has ended.[56]

When violent conflicts erupt, the rights of a large section of the population, particularly members of the vulnerable groups are frequently violated. The 1994 genocide in Rwanda stands as one of the most chilling illustrations of the scope of atrocities that conflict can generate. The protracted conflicts in the DRC and Sudan demonstrate that this kind of abuse not only flares up in the short-term; in both countries, the population has experienced decades of human rights violations resulting from the wars taking place. Conflicts over access to resources, such as diamond in Sierra Leone,

[53] See a more elaborate account of this argument in Lutz, E. (2006). 'Understanding Human Rights Violations in Armed Conflicts' in Mertus and Helsing, *supra* note 10, p. 26. In this regards, Ellen Lutz argues that human rights violations are an integral part of every armed conflict, and that abuse of human rights also spawned many wars of liberation against colonial powers, and wars waged by leftist guerilla insurgents against corrupt or dictatorial government regimes.

[54] Widespread human rights abuses that developed since the time of King Leopold II in the present DRC and human rights violations on ethnic grounds since independence in Burundi came to be the main sources of violent conflicts in both countries to date. On the entrenchment of a culture of human rights abuse in Congo, see generally Hochschild, A. (1998). *King Leopold's Ghost. A story of Greed, Terror and Heroism in Colonial Africa*. London: Macmillan.

[55] Annan, K. (1998). 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa.' Report of the Secretary-General to the United Nations Security Council. Document A/52/871-S/1998/318, United Nations, New York.

[56] This author is of the view that the continuing violent conflicts in Africa's Great Lakes region has much to do with the fact that the underlying causes of conflicts are not addressed or inadequately addressed.

timber in Liberia, coltan in the Democratic Republic of Congo, and oil in Sudan have all not only had a great toll in the cost to human life on the battlefield, but have also caused the vast of harm to civilians as direct victims. In the case of Congo, violations included torture, murder and disappearances, rape, war crimes and crimes against humanity.[57] One could argue that a culture of human rights abuse has become entrenched.[58] At times, specific human rights abuses have deliberately been used as a strategy of war to fight and intimidate opponents and terrorize civilians. The mutilation and amputation of people's hands and other body parts by the rebels of Foday Sankoh's Revolutionary United Front in Sierra Leone is a case in point, as was the systematic use of rape in "ethnic cleansing in Bosnia.[59] Human rights may also be affected in more indirect ways, through, for example, the destruction of people's livelihoods or the refusal of belligerent parties to allow humanitarian relief activities in areas under their control.[60]

The causal nature of human rights violations, on the other hand, can be illustrated by the case of South Africa under the former apartheid regime. A sustained denial of human rights gave rise to high-intensity conflict, as the state's systemic oppression of the civil and political liberties of the majority of the population, and its restraints on their social, economic, and cultural rights, resulted in a long-lasting armed liberation struggle. Numerous other conflicts have been caused by human rights issues such as limited political participation, the quest for self-determination, limited access to resources, exploitation, forced acculturation, and discrimination.[61] For example, the conflict in Burundi resulted largely from exclusionary measures and denial of the rights of certain ethnic groups in society (the Hutus in this case), to fully participate in the country's political affairs.[62] Rights-related concerns also motivated the uprising of the *Banyamulenge* Tutsi Minorities in Eastern Zaire in 1996 and their overthrow of Mobutu.[63] These concerns include, among other things, discrimination at the hands of Mobutu's regime over three decades, the decision of a

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[57] Montaque, D. (2003) 'Stolen Goods: Coltan and Conflict in the Democratic Republic of Congo' *SAIS Review*, vol. 22, No. 1, pp. 103-118.

[58] Lamb, G. (2000). 'Putting belligerents in Context: The Case of Namibia and Angola' in Chesterman, S. (ed.), *Civilians in War*, Colorado: Lynne Publishers, pp 25 – 43.

[59] On Sierra Leone, see *Human* R*ights Watch*, *supra* note 46 International Crisis Group. (1999). 'Sierra Leone: A New Beginning? Situation Analysis, March 18, 1999; on Bosnia see International Criminal Attribution for the Former Yugoslava. (1996). *Foca Indictment, Case number IT* – 96 -23. Initial indictment June 26, 1996; first amended indictment October 7, 1999; found at <http:/www.icty.org/indictment/English>, last visited, September 8, 2009, and Amnesty International (1993). 'Bosnia – Herzegovina. Rape and sexual abuse by Armed Forces', London: A1 International Secretariat.

[60] The Somalia Case.

[61] Nherere and Ansah-Koi, *supra* note 48.

[62] Personal interviews from Burundi indicated that such exclusionary and discriminatory policies which were instigated since colonial times have resulted into denial of various rights ranging from the right against discrimination to equality before the law; from right to equal ownership of property to the rights to education and so on.

[63] For a detailed and comprehensive discussion of the matter, *see* Mollel, A. (2008). 'Minority Rights, Nationality Laws and Conflict Prevention: Rethinking the *Banyamulenge* in the Democratic Republic of Congo' in *Journal of African and International Law*, vol. 1, No.1, p. 51 –82.

provincial governor to expel this minority group from Zaire where they had lived for more than a century, and Mobutu's support for Hutus *Interahamwe* (militia) who had been involved in the Rwandan genocide.[64] It should be noted here that denial of human rights does not only occur through active repression, but can also come about through the inability of the state to realize the rights of its citizens, especially in the socio-economic domain. Such passive violation also deepens social cleavages and rivalries, thus enhancing the potential for destructive conflict. In several African countries, this is reflected in the way in which access to the political system is highly contested in societies marked by abject poverty. Control of the state is often the only way to achieve economic security.[65]

For both human rights actors and conflict management practitioners, it matters whether gross human rights violations resulting from conflict is the main concern, or whether the focus is on conflict resulting from a denial of human rights. The problems to be addressed are different and so are the desired outcomes. If human rights violations as a symptom of conflict are the issue, the primary objective is to protect people from further abuses. International humanitarian law is an important instrument in this regard, as it seeks to limit the excesses of war and to protect civilians and other vulnerable groups.[66] Activities of intermediaries are then aimed at mitigating, alleviating and containing the destructive manifestation of conflict. They include peacekeeping, peacemaking, peace-enforcement, humanitarian intervention, humanitarian relief assistance, human rights monitoring, negotiating cease-fires, and the settlement of displaced persons.[67]

On the other hand, when human rights violations are causing violent conflict, the main objective of activities by both human rights and conflict management actors is to reduce the level of structural violence through the transformation of the structural, systemic conditions that give rise to violent conflict in a society. Galtung[68] introduced the term *structural violence* to refer to situations where injustice, repression, and exploitation are built into the fundamental structures in society, and where individuals or groups are damaged due to differential access to social resources built into a social system.[69] As explained further below, human rights standards are primary instruments in this

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[64] Nathan, *supra* note 51, p. 192.

[65] Examples including Malawi, the Democratic Republic of Congo, ANGOLA, Mozambique, and Zambia. See also Annan, *supr*a note 55, *para*. 12.

[66] Serone, J. (2006). 'Holding Military and Paramilitary Forces Accountable' in Mertus and Helsing, *supra* note 10, p.217.

[67] Most of these terms are also discussed in *An Agenda For Peace Preventive Diplomacy, Peacemaking And Peace-Keeping*, A/47/277 - S/24111, June 17, 1992.

[68] Galtung, J. (1976), *Peace, War and Defense: Essays in Peace Research*, Vol. II, Copenhagen: Ejlers, p. 446.

[69] Galtung argues that violence exists when human beings are prevented from meeting their full potential. Direct or personal violence occurs when there is an actor that commits this violence (i.e., rape, murder and assault), and structural violence occurs where there is no such actor (i.e , poverty, homelessness and lack of health care.) in the latter case, unequal access to power and resources is built into the social system, leading to unequal life chances for individuals or

regard, as the protection and promotion of human rights are essential in addressing structural causes of conflict. Thus, whereas direct, physical violence is the main concern when one focuses on human rights violations as a cause relates to structural symptoms of destructive conflict, considering rights violations as a cause relates to structural violence. The desired outcome of the former is peace in the sense of an absence of direct violence–a so-called *negative peace*. However, in the case of the latter, the goal is to achieve positive peace. This refers to the absence of structural violence, or, framed differently, the presence of social justice, including harmonious relationships between parties that are conducive to mutual development, growth, and the attainment of goals.[70] The above discussion is summarized in Table 2 below.

Table 2: The causal relationship between human rights violation and conflict (Adapted from Parlevliet)[71]

	Human rights abuses as symptom	**Human rights abuses as cause**
	Gross human rights violations as a consequence of violent conflict	Violent conflict as a consequence of sustained denial of human rights.
	DIRECT VIOLENCE	STRUCTURAL VIOLENCE
Problem to address	Protecting people from gross human rights violations stemming from destructive conflict	Addressing the structural problems that give rise to destructive conflict
Activities	Peacekeeping, peacemaking, human rights monitoring, settlement of displaced people, humanitarian assistance	Peacemaking, peace building, reconciliation, institution-building, development and reconstruction, protection of rights, accommodation of diversity.
Desired outcome	Cessation of hostilities, end to or prevention of abuses, cease-fire agreements.	Negotiated settlement, political and socio-economic justice, mechanisms to manage societal conflict constructively.
	NEGATIVE PEACE	POSTIVE PEACE

groups. See also Webb, K. (1986). 'Structural Violence and the Definition of Conflict,' in Pauling, L.,Laszlo, E. and Jong, Y.Y. *World Encyclopedia of Peace.* Vol. 2. Oxford, New York, Beijing, Frankfurt; Pergamon Press: pp. 431-434, for a further discussion of structural violence.

[70] See from Galtung, J. and Wirak, A. (1977). 'Human Needs and Human Rights: A Theoretical Approach,' *Bulletin of Peace Proposals*, Vol. 8:pp 251-258; Yarn, D. (1999). *Dictionary of Conflict Resolution*. Jossey-Bass Inc. Publishers, San Francisco: Yarn defends positive peace as a situation where state or non- state groups continuously engaged in the non- violent, constructive management of their differences with the goal of mutually satisfying relations. Yarn also argues that the notion is closely linked to "security" (lack of violence or civil disorder and stable relations among stable societies) and "justice " (the stability is far equitable and cognizant of fundamental human rights.)

[71]Parlevliet, *supra* note 9.

The table above shows that the distinction between human rights violations as a symptom and as a cause of destructive conflict, with specific focus on the aims of interventions does not depict different scenarios. In other words, both aspects of the human rights/ conflict relationship can be present in the same situation, as in fact is generally the case in civil wars.

It is important to note that these aspects are closely related in a number of ways, even though the distinction between causes and symptoms is made here for analytical purposes. The ways in which human rights abuses as both a cause and a symptom of violent conflict are related are briefly mentioned here and will be discussed further below. First, violent, high-intensity conflicts are largely manifestations of deeper-lying, structural problems. If the latter are not addressed, peoples' frustration, anger, and dissatisfaction may rise to such an extent that they mobilize to confront real or perceived injustice. In other words, in situations where human rights violations occur as a consequence of conflict, a sustained denial of rights often lies at the heart of that conflict (as exemplified by the case of Rwanda in the aftermath of the 1994 Genocide). Second, activities aimed at conflict mitigation and alleviation can have an impact on the prospects for longer-term efforts towards peace-building and conflict resolution. If the symptoms of conflict are effectively and constructively addressed, this can provide a basis for parties to work on the more structural issues, particularly if trust has developed between them. Third, the desired outcomes for human rights abuses as a cause or symptom of destructive conflict influence one another. Negotiated agreements that address the symptoms of violent conflict (i.e. ones that pursue negative peace) must include provisions for further processes towards institution-building and transformation if they are to be sustainable. If they are merely concerned with ending hostilities but do not address the core causes underlying the conflict, they will only be of temporary value. Fourth, efforts to achieve positive peace are fundamentally tied to the ability of parties to end hostilities and to prevent violations of human rights. Peace-building processes and efforts to alter structural conditions in society are long-term undertakings. Securing negative peace is necessary to create the space and stability for such processes to take effect.

6.3.2 A Sustained Denial of Human Rights as a Structural Cause of High-Intensity Conflict

Having observed that a sustained denial of rights generally leads to conflict, it is necessary to analyze why it is a cause of rebellion and civil strife. One conflict management perspective on human rights, put forth by Galtung and Wirak,[72] provides an important theoretical explanation in

[72] Galtung and Wirak, *supra* note 70: pp 251-258.

this regard. This explanation is based on human needs theory as propounded by Burton[73] and applied by Azar[74] in his analysis of protracted social conflict.[75] Burton and Azar focus on the question of how the frustration of human needs generates conflict. Needs, defined by Burton as universal motivations that are an integral part of human beings, relate in this perspective to both material and non-material concerns. They include not only goods such as food and shelter but also identity, recognition and personal growth.[76] Burton distinguishes needs from values and interests. He defines values as the "norms, customs and beliefs associated with particular social communities" and interests as the "vocational, political and economic aspirations of individuals or groups."[77] The primary difference between these three concepts lies in their degree of negotiability. Interests are negotiable; one can bargain over them and they can be exchanged against one another. However, values and needs are generally not negotiable; they cannot be traded or bargained away. Thus, whereas interests tend to be transitory in nature, needs and values have a more permanent character. Needs constitute universal drives for the motivation and mobilization of people, and values are closely related to the identity of individuals or groups. Needs are so fundamental to human survival, subsistence and development that people will consistently seek ways of meeting them– even if they are frustrated or oppressed. In other words, when individuals or groups find that their needs and values are denied, they will behave in ways that express their frustration, or they will refuse to submit to practices and policies that are not acceptable to them.[78]

In the human rights field, the concept of needs has mostly been considered in relation to socio-economic rights. Needs are primarily conceived of in terms of material and social goods such as food, shelter, clothing, medical care, and schooling.[79] As indicated above, however, they are understood in a broader sense in the conflict management field. Galtung and Wirak[80] have highlighted the relevance of this conceptualization of human needs for human rights in a way that is

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[73] Burton, J. (1990). *Conflict Resolution and Prevention*, Macmillan, London.
[74] Azar, E. 'Protracted international conflicts: Ten Propositions.' in Azar, E and John, B (Eds.) (1986), *International Conflict Resolution: Theory and Practice*, Boulder, CO: Rienner, pp. 28-39.
[75] Miall, *et al*, (1999), *Contemporary Conflict Resolution*, Cambridge: Polity Press.
[76] *Ibid.*
[77] *Ibid.*
[78] It must be noted that human needs theory has been criticized in the conflict management field. The criticism relate to, among other things, the "testability " of basic human needs and their existence cannot be proven. It has also been questioned whether needs are truly universal and fundamental in the sense of not changing over time and in different contexts and whether a needs hierarchy exist. For critical commentaries on needs in theory. *See*, for example, Mitchell, C. (1990). 'Necessitous Man and Conflict Resolution : More Basic Questions about Basic Human Needs Theory' in Burton, (ed.). (1990), *Conflict: Human Needs Theory*, St. Marten's Press, New York: pp . 149- 176; Roy, R. (1990). 'Social Conflicts and Needs Theories: Some Observations' in Burton, *Ibid*, p. 148.
[79] Claude, R. and Weston, B. (Eds.). (1992). *Human Rights in the World Community: Issues and Action*, 2nd edition. Philadelphia, University of Pennsylvania Press, pp. 137 – 211.
[80] Galtung and Wirak, *supra* note 70.

further explained by human rights scholars.[81] Galtung and WIrak suggest that needs relate to security, welfare, freedom, and identity. Security-and identity-related needs have an individual and a collective dimension. Security-related needs pertain to protection against attack and destruction, as well as physical and mental preservation. Needs involving welfare fall within the physiological, ecological, and socio-cultural domain (e.g., food, shelter, clean environment, education, cultural preservation), whereas freedom-related needs are concerned with self-expression, self-actualization, affection, association, support, and recognition.[82] This conceptualization of needs largely corresponds with the view of Max-Neef[83] who identifies nine fundamental human needs in the context of human development: subsistence, protection, affection, understanding, participation, leisure, creation, identity, and freedom.

This approach helps to shed light on the relationship between human rights and basic human needs. From this perspective, all needs give rise to certain rights, which help secure the goods or services necessary to meet these needs. As Gultung and Wirak[84] put it, "human rights are instrumental to the satisfaction of needs."

A comparison of the needs listed above with rights contained in the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, shows that all rights relate to several needs. Rights can be seen as the means to satisfy fundamental human needs; their implementation address such needs. For example, the right to take part in the cultural life of a community would meet needs of participation, affection, identity, and understanding. Self-determination, usually conceived of in terms of rights, is a collective need for identity, freedom, and security.[85] In the words of Osaghae[86], "human rights are an instrument of individual and collective

[81] Claude and Weston, *supra* note 79.
[82] Claude and Weston, *Ibid*, pp: 138- 144 elaborate on these categories of needs.
[83] Max -Neef, M. (1991). *Human Scale Development Conception, Application and other Reflections*, New York and London: The Apex Press, p.17.
[84] Galtung and Wirak, *supra* note 70, p.254.
[85]The appropriateness of understanding rights in relation to needs is also reflected by considering the human rights model of Mc Doungal, Lasswel and Chen, discussed in Claude and Weston, *supra* note 79, pp. 5-6. This model emphasizes the value of respect, power, wealth, enlightenment, well being, skills, affection and rectitude as underlying human rights. These values closely relate to basis human needs as conceptualized in this Chapter.
[86] Osaghae, E. (1996). 'Human Rights and Ethnic Conflict Management: The Case of Nigeria.' *Journal of Peace Research*, vol. 33,No. 2, pp. 171-188.

struggle to protect core interests".[87] Here he echoes Galtung's and Wirak's[88] conclusion that "the rights are the means, and the satisfaction of needs is the end."[89]

The direct relationship between rights and needs explains why a sustained denial of rights may cause violent conflict in a society: such denial means a long-term frustration of needs, and people will persist in seeking ways to address their needs if these are not met. If this is possible through peaceful and constructive avenues, individuals or groups will generally engage in conventional forms of political action in order to bring about change. If, however, they are marginalized or excluded, they may eventually resort to armed resistance in the belief that this is the only way to bring about the transformation of society. It is important to note that such exclusion or victimization can be either real or perceived as such by groups. The latter is often the case when groups experience frustration in realizing their political and economic expectations. Such perceived deprivation can also make groups more disposed to violence as a way of achieving their goals.[90]

Deprivation of needs through the sustained denial of rights is a structural cause of violent conflict, because it is generally embedded in structures of governance, in terms of how the state is organized, institutions operate, and society functions. For example, a particular social group may, on the basis of its identity, be systematically barred from participating in the political process through certain laws or policies.[91] Or a state may be characterized by a consistent lack of development in those regions where the majority of inhabitants are members of a social group other than the politically dominant group. Long-standing grievances over land and other resource allocations can also constitute structural causes of destructive conflict.[92] Nathan identifies four critical structural conditions in Africa: authoritarian rule, exclusion of minorities from governance, socio-economic deprivation combined with inequity, and weak states that lack the institutional capacity to manage conflicts constructively.[93] The former United Nations Secretary–General, Kofi Annan, lists the following as key structural risk factors that fuel violent conflict: Inequity (disparities amongst

[87] Note that Osaghae does not distinguish between interests and needs as I have done, following Burton and Azar. He uses the term "core interests" in referring to what have been called "needs " in this chapter.
[88] Galtung and Wirak, *supra* note 70, p.258.
[89] They highlight that the relationship is not a simple one :one single need may be satisfied through the implementation of several rights, and one right may satisfy several needs. This underscores the indivisible and interdependent nature of rights.
[90] Gurr, T. (1970). *Why Men Rebel?* Princeton, NJ: Princeton University Press, p.23.
[91] This has been the case with the *Banyamulenge* minority groups in the eastern DRC, resulting in the long sustained conflict in that part of the country. See for further discussion on the marginalization of the *Banyamulenge*, Mollel, *supra* note 63.
[92] IRIN, (2004). 'Great Lakes: Land Reform cited as Key to Issue in Conflict Management' Nairobi, available at <http://www.jamboweb.com/ctnt/index.cfm?icontent_id=691&isection_id=19> last visited, September 8, 2009.
[93] Nathan, *supra* note 51, p.192.

identity groups), inequality (policies and practices that institutionalize discrimination), injustice (lack of the rule of law, ineffective and unfair law enforcement, inequitable representation in institutions serving the rule of law) and insecurity (lack of accountable and transparent governance and human security).[94] Each of the causes highlighted by these authors can be traced back to human rights concerns related to security, identity, well-being and freedom as discussed by Galtung and Wirak.[95] Osaghae thus argues that "the human rights approach to conflict management recognizes that conflict arise from inequalities, discrimination, domination, exclusion and injustices which attend the competition among people and groups for scarce political, social, and economic resources and benefits."[96] The role of the state and issues of governance must come under discussion in this regard because the way the state is organized determines whether needs are frustrated or satisfied: it allows or denies groups access to the resources or processes necessary to address their needs. The state may deny needs out of unwillingness (because it perceives calls for wider political participation, autonomy, or self-determination as a threat) or inability (due to weak state structures, poor societal infrastructure, or lack of resources).

According to Nathan, these structural conditions create tensions in society that provide fertile grounds for violent conflict. He suggests that they give rise to a societal propensity to violence and as such pose a fundamental threat to human security and the stability of the state.[97] This propensity stems from the non-negotiable character of needs and is enhanced if several structural problems are present simultaneously (e.g. when discrimination in one area coincides with marginalization in another). A pattern of negative interaction between social groups–as manifested in hostility, fear, prejudices, and violent skirmishes occurring over a period of time–can also contribute to a propensity to violence.

In other words, the absence of justice is often the primary reason for the absence of peace. The presence of justice, on the other hand, can lead to both positive and negative peace.[98] Thus, a sustained denial of human rights can be a fundamental cause of high-intensity conflict. Violence manifested in such conflict often is evidence that needs are frustrated, legitimate aspirations are denied, and obvious injustices are present.

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[94] Annan . K. (2001). *Prevention of Armed Conflict*. Report of the Secretary – Generally to the United Nations General Assembly and Security Council. Document A/55/985 – S/2001/174. New York: United Nations, p.24 para 100.
[95]Galtung Wirak, *Supra* note 70.
[96] Osaghae, *supra* note 86, p. 173.
[97] Nathan, *supra* note 51, p. 194.
[98] Harris, P and Reilly, B. (Eds.). (1998). *Democracy and Deep-Rooted Conflict: Options for Negotiators*. International Institute for Democracy and Electoral Assistance (IDEA.), Stockholm, pp. 21-22.

6.4 Human Rights and Conflict Management: Contradictory or Complementary?

Human rights advocates and conflict resolvers share similar goals when responding to conflicts. However, to achieve their goals each group uses different methods based on different underlying assumptions. As a result, both groups occasionally adopt contradictory or even mutually exclusive approaches to the same conflict problem in the same conflict situation. For example, conflict resolvers, eager to achieve a negotiated settlement to a conflict with minimum loss of life, may fail to give sufficient weight to the relevance of human rights to the long-term success of their work. Human rights advocates, on the other hand, may undervalue the pressures under which mediators operate to bring about an immediate end to loss of life. If they limit their activities to shaming, negative publicity, and judicial condemnation of criminals, human rights activists may miss opportunities for improvements in the human rights situation that could be achieved through the use of the negotiation and diplomatic techniques upon which conflict resolvers rely.

Despite these dilemmas, preventing conflicts and massive human rights violations, and rebuilding societies in the aftermath, requires an approach that incorporates the perspectives of both human rights advocates and conflict resolution practitioners.

6.4.1 Respect for Human Rights as a Primary Form of Conflict Prevention Mechanisms

Modern principles of rights protection and promotion as a form of conflict prevention were recognized in the preamble to the Universal Declaration of Human Rights. It states, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law…"[99] The analysis above explains why this is the case. If the sustained denial of rights is a structure cause of highly – intensity conflict, it follows that the sustainable protection of rights is essential for dealing with conflict constructively. It is especially critical to the effective prevention of destructive conflict, because it avoids the structural injustices and inequalities in society that rise to violent conflict.

As the discussion above highlights, it is more important to focus on the structural causes of violence than on violence itself if we are to prevent violent conflict in any way. Violence, however significant from a humanitarian point of view, is invariably the outward manifestation of a structure crisis. As long as destructive structural conditions remain in place in a society, the potential for violence remains.[100] In its efforts to prevent violent conflict, the international community generally

[99] Preamble to the Universal Declaration of Human Rights, United Nations General Assembly Resolution 217 A (III), UN Doc A/810 1948), (hereinafter referred to as “the Universal Declaration”).
[100] Nathan, *supra* note 51, p. 195.

seek to keep a close eye on events that may have a destabilizing impact on particular societies such as a crop failure, significant currency devaluation, an influx of weapons, or strikes. Extensive databases are thus constructed for the purpose of "early warning" and this monitors a range of factors and events that may trigger or escalate a conflict, so–called accelerators.[101] However, single events may have very different consequences in different contexts, depending on the structural conditions present. For example, a crop failure or the arrest of a political opponent may lead to the outbreak of violence in some states but go largely unnoticed in others, because they intensify the structural tension in the former but not in the latter.[102] In other words, focusing on emergencies or crises where violence has started to occur is not sufficient to prevent violent conflict. Relevant in this regard is the distinction the Carnegie Commission for the Prevention of Deadly Conflict has made between operational and structural prevention of violent conflict.[103] The former entails actions that can be employed when violence is imminent, and includes diplomatic interventions, fact – finding missions, and preventive deployment of military and civilian contingents. Operational prevention therefore aims to prevent latent conflict with the potential for violence from degenerating into serious armed conflicts. Structural prevention, on the other hand, is meant to address the deep–rooted socio–economic, cultural, environmental, institutional and other structural causes that underlie the immediate political symptoms of violent conflicts.[104] In the case of operational prevention, prevention amounts to fire–fighting; structural prevention means removing the logs that catch fire.[105]

The protection and promotion of human rights addresses structural causes of violent conflict by working towards the satisfaction of basic needs. Institutionalizing respect for human rights (through, for example, constitutional endorsement of fundamental human rights, the independence of the judiciary, and an independent human rights commission) may ensure that such protection is sustainable over a period of time and becomes a matter of policy. It helps prevent high-intensity conflict by limiting the power of the state, affording citizen protection against abuse of rights, and allowing them a large measure of freedom and participation. It should be noted that some degree of structure tension exists in all complex and heterogeneous societies, but the effect thereof are largely determined by the extent to which a specific society has effective and appropriate coping

[101] See for example Davis, J and Gur, T. (1998). *Preventative Measures. Building Risk Assessment and Crisis Early Warning Systems*, Rowman and Littlefield Publishers Inc, Maryland.
[102] Annan (2001), *supra* note 94 , p.7 para 7.
[103] See Carnegie Commission for the Prevention of Deadly Conflict. (1997). '*Preventing Deadly Conflict'*: Final Report. Washington DC, pp. 39– 102. The United Nations Secretary – General adopted this distinction in his report on prevention of armed conflict. See Annan (2001), *supra* note 94.
[104] Annan, *Ibid*, p.2.
[105] Carnegie Commission, *supra* note 103, p.96.

mechanisms. This is related to, among other things, the available resources and source norms for dealing with dissatisfaction and dissent. Where transparent and representative system of governance exists with legitimate institutions, there is a greater capacity to manage such tensions in a constructive way.[106] Therefore, institutionalized respect for human rights also means that mechanisms are developed within state structures that provide consensual and acceptable ways for dealing with discontent, thus limiting the need to resort to violence. Respect for rights thus enhances the capacity of the state to engage in constructive conflict by facilitating dialogue and participatory decision-making.

Specific attention must be devoted to the structural accommodation of diversity, which means formally incorporating inclusiveness and respect for diversity in the political system, state institutions, and the law.[107] This is particularly important because identity groups tend to be the primary actors in intra-state conflict. A strong sense of identity is often the core around which social groups are mobilized in order to raise grievances related to needs deprivation. The former High Commissioner for National Minorities (HCNM) of the Organization for Co-operation and Security in Europe (OSCE), Max van der Stoel, emphasized that "the protection of persons belonging to national minorities has to be seen as essentially in the interests of the state and of the majority. As a rule, peace and stability are best served by ensuring that persons belonging to national minorities can effectively enjoy their rights".[108] It is interesting to note his acknowledgement that his work as High Commissioner involved many human rights aspects, and that his activities "may have some positive effect on implementing the rights of persons belonging to national minorities and building respect for human rights in general."[109] He emphasized, however, that that was not the purpose of the HCNM's work, which is to try to prevent violent conflict. Nevertheless, he was effectively working towards conflict prevention through ensuring that minorities could enjoy their rights. This goes to show how the protection of rights is an essential form of conflict prevention. It also highlights how closely linked the fields of human rights and conflict management are in reality.

The accommodation of diversity must entail more than a mere recognition of formal equality between various groups in society. Efforts to treat people from different groups equally can amount to systematically precluding members from disadvantaged groups. If, for instance, political parties

[106] see Webb, *supra* note 69, p. 431.
[107] Nathan, *supra* note 51, pp. 200-201.
[108] Van der Stoel, M. 'The Role of the OSCE High Commissioner in Conflict Prevention.' in Crocker, C., Hampson, F. and Aall, P. (Eds.) (1999) *Herding Cats: Multiparty Mediation in a Complex World*, Washington DC: United States Institute of Peace, p.73.
[109] *Ibid*, p. 69.

are organized along ethnic lines and the political system is based on a "winner-takes-all" approach, minorities will be completely and permanently excluded from governance in a formal democracy. In such situations of democratic majoritarianism, minorities may come to believe that political institutions and processes do not sufficiently meet their needs and interests, making them more inclined to violence as a means of expression and objection.[110] The perception of marginalization will be even more enhanced in contexts where political power implies privileged access to economic opportunities and resources, which, as the former UN Secretary-General Kofi Annan[111] has pointed out, is the case in many African countries. Indeed, the fact that the state is often not neutral, but rather controlled by a particular group pursuing its own interests, highlights the need to ensure that respect for the rights of identity groups is institutionalized. Structural accommodation of diversity protects identity groups against biased use of the state machinery by those who control the state.

There are various mechanisms available to this end. These include constitutional rights regarding language, religion, and culture, forms of power-sharing (such as federalism, proportional representation, decentralization in which the local or regional units have a large degree of autonomy), and so on. As the OSCE High Commissioner for National Minorities points out, realizing the aspirations of identity groups does not necessarily require a territorial arrangement (i.e., secession), but can be realized through legislation providing for the preservation of identity in the areas of culture, education, and language. Other measures include guarantees of effective participation in public decision-making processes, and carefully constructed electoral processes.[112] At the very least, respect for diversity must be ensured through the formal acknowledgement that identity groups have a right to exist, a right to protect their language and culture, and to participate in public affairs on an equal basis with others. In sum, the process of institutionalizing respect for human rights should be concerned not only with individual rights, but also with group rights.

6.4.2 Combining the Prescriptive Approach of Human Rights Actors with the Facilitative Approach of Conflict Management Practitioners

The previous discussion had highlighted how the human rights perspective is deeply concerned with substantive issues related to the distribution of political power and economic resources, security, and identity. In the context of negotiation processes aimed at ending a long-term violent conflict in

[110] Eide, A. (1995). *Peaceful and Constructive Resolution of Situations Involving Minorities*. Tokyo: United Nations University, p.100.
[111] Annan (2001), *supra* note 94, p.3 para 12.
[112] Van der Stoel, *supra* note 108.

a society; this generally translates into a prescriptive approach towards the outcome or product of negotiations. The outcome must be in line with human rights standards and must embrace constitutionalism and the legal protection of rights. While these are also concerns of conflict management practitioners, the latter generally adopt a more facilitative approach towards the outcome. Their emphasis tends to be more on a particular kind of process--one that is aimed at establishing dialogue, developing relationships, and building trust between the parties. There is great awareness within the conflict management field that the quality of the outcome depends on the process used to achieve it. A process that is flawed in the eyes of involved parties contaminates the product by making its legitimacy questionable, hence undermining its sustainability. If, for example, some parties have experienced a peace process as exclusive, they will not feel that their concerns have been heard, nor will they feel confident that their interests have been taken into account in the settlement reached. Consequently, they have little incentive to co-operate with the implementation of that settlement, and may be inclined to obstruct it. They are also more likely to resort to violence in order to guarantee attention for their case. The point here is not that one aspect is more important than the other; rather, that process and product are so intertwined that they impact on one another, both negatively and positively, and should therefore both be given careful consideration. The sustainability of an agreement depends both on the substance of the outcome and on the process by which it was agreed upon.

The process used in resolving issues between parties is especially significant in the context of intra-state conflict where many groups, all with different needs, values and interests, co-exist within the same territory. The conflictual nature of their relationships may originally stem from their different access to political and economic resources, but it is deepened by feelings of hostility, mistrust, and fear that have become entrenched over long periods of time. In some cases, such polarization and enemy images become a driving dynamic in fuelling continuous conflict, with violence countering violence, leading Sisk to speak of the "self-perpetuating nature of civil wars."[113] Others have also recognized the significant role of perceptions, emotions, and relationships in contemporary conflicts. Nathan stresses that high-intensity conflict evokes and is fuelled by a range of strong emotions, including fear, insecurity, anger, a sense of grievance, and suspicion. These emotions make the parties resistant to negotiations and inhibit progress once talks are underway because parties view their differences as irreconcilable and fear that a settlement will entail unacceptable compromises. They lack confidence in negotiations as a means of achieving a satisfactory outcome,

[113] Sisk, T. (1997). 'Mediating Africa's Civil Conflicts – a User's Guide.' in Sorbo, G. and Vale, P. (Eds.)., *Out of Conflict. From War to Peace in Africa*. Nordiska Africa institute, Uppsala: p. 187.

even if they are unlikely to gain an outright victory on the battlefield. Nathan therefore speaks of the "psycho-political dynamics" of civil conflict, a term that reflects that the subjective dynamics of conflict originate from objective conditions related to power and political relationships, such as exclusion, marginalization, and persecution.[114]

Because the negative character of relationships between groups is both a product and a further cause of conflict, attention needs to be devoted simultaneously to addressing root causes and building positive relationships between parties. As long as relationships remain fiercely adversarial, parties locked in positions of fear and suspicion will be reluctant to engage in negotiations towards a settlement. The development of trust between parties in the course of negotiations is therefore essential; as three authors have put it, "negotiations tend to focus on issues, but their success depends on people."[115]

Process issues relate to questions of who participates in negotiations; ground rules for talks; the time-table; the structure of the discussion; the size of negotiating delegations and how representation is organized; how deadlocks are addressed; how decisions are made; where the process takes place; and what to do about issues that fall beyond the scope of the process. Whether intervention by a third party is required is also an important consideration. Depending on the outcome of this assessment, questions arise about whether such an intervening body should be of a governmental, intergovernmental, or non-governmental nature,[116] and about the facilitation techniques the intervenor will use. For example, many interventions in African civil wars have been conducted by intergovernmental organizations, both regional and global. These have often relied on a top-down approach where the leaders of parties are coaxed and bullied into negotiations through the use of "carrots and sticks". Nathan has argued, however, that the use of power and coercion by external intervenors in civil wars is problematic.[117] It may well increase the

[114] Nathan, *supra* note 51, pp. 19-20. See also Ledarach, J. (1997). *Building Peace. Sustainable Reconciliation in Divided Societies*. Washngton DC: United States Institute of Peace. Lederach considers social – psychological perceptions to the dynamic that drives current conflict. Other scholars who have written on the social psychological dynamics of conflict war include Volkan, V. 'Psychological processes in unofficial diplomacy meetings.' in Volkan, V., Montville, J. and Julius, D. (Eds.), (1991) *The psychodynamics of International relationships*: *Unofficial diplomacy at work*, Lexington, MA: Lexington Books.
[115] Bloomfield, D., Nupen, C. and Haris, P. (1998). 'Negotiation Processes,' in Harris and Reilly, *supra* note 98, p. 63.
[116] See the role of the Mwalimu Julius Nyerere Foundation, an NGO that played an informal intermediary role (Track Two Diplomacy) by supporting the former Tanzania president, Julius Nyerere in his efforts in mediating the Arusha peace negotiations for Burundi conflicting parties. See also generally Mpangala, G and Mwansasu, B (Eds.) (2004), *Beyond Conflict in Burundi*, Dar es Salaam: The Mwalimu Nyerere Foundation.
[117] See Nathan, *supra* note 51, p. 19.

intransigence of parties by heightening their insecurity and causing resentment towards solutions that are imposed on them.

A confidence-building approach is therefore likely to yield a more positive result, also with a view to the psycho-political dynamics of conflict referred to above. This is a style of mediation that is oriented towards raising the parties' confidence in each other, in negotiations, and in the mediator. It entails non-coercive facilitation of communication and joint problem-solving between parties by an intermediary who has their consent, is not a party to the conflict, and who seeks to facilitate an agreement in an even-handed way and on terms acceptable to the parties. Nathan argues that this approach "renders mediation a non-threatening venture and mitigates the pathology of mistrust."[118] Moreover, a process that takes place on this basis also builds norms of dialogue, accommodation, and co-operation among political actors, thus laying the foundation for future political relations between groups and individuals. In other words, the process by which the product is agreed upon should, ideally, embody the values that are to be contained in the settlement, as this will enhance its sustainability.

The emphasis on addressing root cause and building relationships given here implies that the resolution of intra-state conflict is a lengthy process. Short-term interventions are likely to be stop-gap measures with limited long-term effect. The reality of civil wars defies "quick-fixes", as the issues involved are manifold, complex, and deep-rooted, and situations have degenerated over long periods of time. This also means that local actors must play central roles in devising both the product and the process. Local ownership pre-empts the build-up of resentment against solutions imposed by foreign actors. Moreover, local actors have a deep understanding of the causes, dynamics, and issues underlying violent conflict in their context. They are most aware of the needs and interest of various parties, and can thus help to develop an agreement that is appropriate and acceptable in the local context. Most importantly, local ownerships of the process is necessitated by basic human needs such as freedom, identity, and especially participation. If such needs are not met when addressing root causes of violent conflict, the foundation is laid for renewed conflict in the future.

Combining the prescriptive focus from the human rights field with the facilitative emphasis from the conflict management field will ensure that peacemaking and peace-building processes, both in

[118] Nathan does not argue against the use of leverage in negotiation *per se*, but emphasizes that it should not be undertaken by the intervenor him/herself, but rather by outside parties. See Nathan; *supra* note 51, p. 22.

form and content, are in line with universal human rights standards, and will develop relationships between parties that provide a basis for future co-existence.

6.4.3 Integrating Human Rights and Justice Issues in Managing Conflicts

Many human rights advocates tend to consider human rights and justice as absolute concepts. Human rights and freedoms, as enshrined in the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights[119] and other human rights instruments, are fundamental and therefore not negotiable. Rights reflect internationally and /or nationally agreed-upon norms of behaviours between individuals, groups of people, and between the state and its citizens. Moreover, the close relationship between rights and needs as explained above underlines the non-negotiable character of fundamental rights and freedoms. Rights thus set the parameters for the management of conflict.

However, within this framework, there is great scope for variation in how rights are realized in terms of, for example, the electoral system, form of government, degree of autonomy of regional units, constitutional arrangements, and the precise formulation of a Bill of rights. A useful distinction in this regard is between needs and the means of satisfying them. Basic human needs are considered finite and are generally understood to be the same in all cultures and throughout time. What changes over time and across cultures is the way or the means by which those needs are satisfied. Thus, whereas basic human needs are not negotiable, the possible means to satisfy them are, and these will vary depending on the context.[120] Similarly, fundamental rights and freedoms are not negotiable, but the manner in which they are recognized is indeed negotiable. There are many different ways in which rights relating to participation, equality, freedom, identity, well-being, and security can be realized without undermining the substance and significance of those rights. Institutionalised respect for human rights, as discussed earlier, strongly points to democratic governance as the necessary basis for the sustainable and effective prevention of destructive conflict and the management of normal political and social conflict. Yet there is no single form of democracy that applies across the globe. On the contrary, the shape and form of democratic institutions have developed according to political, cultural, and historical conditions.[121]

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[119] The ACHPR, *supra* note 25.
[120] Max neef, *supra* note 83, pp. 16-28.
[121] Ludwig, R. 'Free and Fair Elections: Letting the People Decide' in Krasno, Jean (Ed.). (2004). *The United Nations: Confronting the Challenges of a Global Society*, Bouder/London: Lynner Rienner Publishers, p. 116.

The political structure of the state (i.e., federalism, decentralization), the form of the state's legislature and executive, and the electoral system are three broad areas of constitutional design that warrant examination in this regard. This entails considering different forms of power-sharing arrangements, federalism and autonomy, parliamentary versus presidential government, electoral system design, and the structure and procedures of legislative bodies, among others.[122] It is essential that the details of such structural arrangements are worked out by local actors through inclusive negotiations so as to enhance the suitability and sustainability of the mechanisms adopted. Institutions that are transplanted from other contexts or imposed by external intervenors, however democratic they may be, tend to have little staying power, because they may be inappropriate or considered illegitimate by the local population. The importance of local actors in shaping the institutions that regulate their society suggests that the implementation of rights is negotiable and depends on the context, even though the rights themselves are not negotiable.

The same argument can be applied to the concept of justice. Justice is as non-negotiable as human rights are; it is, without doubt, the foundation for a sustainable peace. Yet, the interpretation of "justice" is invariably disputed and the form in which justice is shaped in a particular case, is negotiable. Within the human rights field, there has been extensive debate on the forms justice can take in a transitional situation with regard to accountability for violations committed during the conflict. In exploring the legal, ethical, and political aspects of the quest for justice in transitional situations, questions of punishment and /or pardon, and of establishing the truth and /or establishing criminal responsibility tribunals, have received much attention. Much research has focused on various mechanisms for transitional justice-such as truth commissions, war crimes tribunals, and/or their respective virtues and drawbacks.[123]

Nevertheless, whether the discussion emphasizes retributive or restorative justice, in both cases the "justice" concerned is mainly backward-looking. This preoccupation with the past is flawed in several respects. Firstly, it hinges in part on the assumption that holding perpetrators accountable will end a culture of impunity. There is insufficient evidence to support this thesis. Secondly, the threat of prosecution and accountability can inhibit the resolution of the conflict because it can be a

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[122] Harris and Reilly, *supra* note 98, pp. 133-259.

[123] See these matters discussed in Hayner, P. (2001) *Unspeakable Truths: Confronting State Terror and Atrocity*, New York/London: Routledge; Kritz, N. (Ed.).(1994) *Transitional Justice: How Emerging Democracies Reckon with former Regimes*, Vol. I – III, Washington DC: United States Institute of Peace; Mendez, J. (1997). 'Accountability for Past Abuses,' *Human Rights Quarterly*, Vol. 19: pp. 255 – 282; Roht-Arriaza, N. (Ed). (1995). *Impunity and Human Rights in International Law and Practice*. New York: Oxford University Press; Bronkhorst, D. (1995). *Truth and Reconciliation: Obstacles and Opportunities for Human Rights*, Amnesty International, Dutch Section,

clear disincentive for actors in an armed conflict to give up their resort to violence, as Mendez acknowledges.[124] This is not to argue that a blanket amnesty is appropriate or necessary, but rather to acknowledge that the process of addressing past human rights violations must take into consideration the need to consolidate a young and volatile democracy (or other form of government) and the need to end hostilities between parties. Thirdly, it raises the impression that justice is dependent on dealing with past atrocities, whereas justice is concerned with both the past and the future. Justice does not only relate to the human rights violations committed during a violent conflict, but equally to transforming unjust structures and to entrenching respect for human rights in state institutions, and rehabilitating victims in a post-conflict society. Other measures that secure future justice should be taken as seriously and pursued as vigorously. A good example would be the South African Truth and Reconciliation Commission.[125]

Thus, while the attainment of justice is related to the pursuit of accountability for past abuses, it is also dependent on wider processes of transformation, redistribution, and reform. This was the conclusion of a conference focusing on the integration of human rights in peace processes organized by the Fund for Peace and the United States Institute of Peace in 1997. The conference emphasized that the scope and definition of human rights should be expanded to include at least four components:

- transitional justice (in the sense of prosecutions and /or truth-telling);
- mechanisms to ensure the personal freedom and security of civilians and identity groups during the transition;
- mechanisms to prevent the outbreak of future hostilities (including constitutional reforms, restructuring of the government, security forces, and judicial system);
- mechanisms aimed at broader social, political, and economic reform (targeting social and economic inequities, redistribution, discrimination, etc.).[126]

Jean Arnault, the Special Representative of the UN Secretary-General and Chief of Mission for the UN Mission to Guatemala, noted:

> [*If a "just peace" is understood as focusing on the issue of criminal or moral accountability for past abuses by the leaders of both factions, if the test is a sort of purge and sanction test, obviously the peace process in Guatemala would not meet the criteria… On the other hand, if the test…is a comprehensive blueprint*

[124] Mendez, *Ibid*, p. 273. Amsterdam.
[125] Parlevliet, M. (1998). 'Between Facilitator and Advocate: the South African Truth and Reconciliation Commission.' *FORUM*, National Institute for Dispute Resolution, December, No.36: pp. 6-15.
[126] Kunder, *supra* note 38, pp. 4-5.

that includes not only the end of war, not only human rights provisions, not only institutional changes that consolidate observation of rights, but also socio-economic issues, the bridging of the gap between the …minority and majority, if this is the test…[then] the peace process in Guatemala is one of the strongest statements that has ever emerged from the negotiation of an internal armed conflict]".[127]

This is not to deny that accountability for past abuses is important and should be given serious consideration in the context of negotiating a settlement. Past human rights violations can undermine future reconstruction by fuelling resentment, triggering, and reinforcing a message of impunity. Rather, the point here is that this is only one aspect of implementing justice, and that justice has multiple components that should be taken into account. Even if rights and justice are non-negotiable, there is no single, absolute way in which they should be applied or implemented in each context. The human rights priorities of local actors should inform their interpretation and application in each case. This approach does not diminish the critical value of human rights and justice, but ensures that these are implemented in line with the needs and circumstances of particular contexts within the internationally accepted framework of human rights. It also encourages paying more attention to the question of how justice can be built into settlements in a prospective way (ensuring the protection of rights in a structural, institutional manner) rather than overemphasizing its retrospective aspects. Admittedly, human rights actors may take issue with this approach, especially because it has taken so long for human rights issues to be explicitly accepted on the agenda in peace processes. However, it may be a matter of assessing how one makes the most progress: fighting so much over one step forward that one gets struck or taking one step in order to ensure that the path forward remains open.

6.4.4 Conflict Management as an Alternative to Litigation in Dealing with Rights- Related Conflicts

As discussed in chapter three, conflict management experts distinguish three general approaches for dealing with conflict, namely: power-based, rights-based and interest-based approaches.[128] These approaches should be assessed to determine which is most appropriate in a specific conflict.

[127] Arnault, as quoted in Ibid, p. 4.
[128] See this reference in Peck, C. (1996), *The United Nation as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflicts*, The Hague: Kluwer Law International, p. 10; Ury, W., Brett, J. and Golberg, B. (1988). *Getting Disputes Resolved. Designing Systems to Cut the Costs of Conflict*, San Francisco: Jossey-Bass Inc. Publishers, pp. 7-15.

Advantages and disadvantages may arise according to the resources that are necessary for implementing a specific approach, and the effect of a particular approach on the relationship between parties. They may also involve parties' satisfaction with the outcome, meaning how well the outcome addresses their concerns, as well as the recurrence of the dispute, referring to the sustainability of the outcome. The use of rights-based methods to deal with conflicts over rights is well-established. Cases of sexual harassment, assault, or discrimination are often settled through the use of the judicial system. In some instances, human rights actors may use power–broadly defined as mentioned above–to deal with human rights issues.[129] Letter-writing campaigns by Amnesty International on behalf of political prisoners can be seen in this regard; pressure is brought to bear on another party (a state) in order to force it to release prisoners or at least provide them with better treatment. Publishing the human rights record of a particular state or denouncing a party for its abusive practices are other ways in which human rights advocates may use their power of persuasion or pressure. Of course, in these cases, the use of "power" takes place within a human rights context. Calling public attention to torture is only possible because an international standard that prohibits the use of torture and other inhumane, degrading, or humiliating treatment exists.[130] While human rights actors are more inclined to take rights-and power-based approaches when dealing with conflict, conflict management practitioners emphasize the value of interest and needs-based methods. Because of their co-operative nature, focus on the interests and needs of parties and emphasis on joint problem-solving, these methods tend to reduce the strain on relationships and make parties more satisfied with the outcome, thus reducing the chances of renewed conflict. At times, they may also use fewer resources, both material (financial) and emotional (psychological stress).

In addressing conflict over rights, actors are not confined to using rights-based methods in order to ensure that human rights are protected. There may be constraints on the use of this approach for safeguarding rights in certain environments.

Interest and needs-based methods, such as mediation and negotiation, can assist in this regard. In the latter, parties negotiate directly with one another to seek a solution to the conflict, whereas in the former, an outside intermediary assists parties in communicating with one another and engaging in joint problem-solving. While focusing on the interests and needs of parties, such methods can ensure that parties reach an outcome that is in line with the relevant legislation, upholds the rights of parties, meets their interests, and satisfies their needs. This approach requires willingness on the

[129] The Definition of power used here is thus broader than that of realists who tend to equate power with force.

[130] See the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, U.N. Doc. A/39/51 (1984) (*hereinafter* "CAT").

part of parties to negotiate their differences and an awareness of the constitutional and legislative framework within which they must reach agreement. The parties may be assisted by a third-party who is a skilled facilitator, negotiator, and mediator. Additionally, this approach can restore, maintain, or even strengthen the relationships between parties as trust develops between them; they may discover that their interests are not mutually exclusive. It can also build their understanding of the value and meaning of rights because this approach often involves getting parties to understand why rights exist and why it is in their interests to respect rights.

Mediation and negotiation may also assist in balancing conflicting rights. If the rights of both parties are in conflict with one another, negotiation and/or mediation can be a way of reaching an outcome that meets both parties' needs and interests. For example, in the case of land redistribution to people who have been dispossessed of their land, their rights to the land must be balanced to people against those of the current land-owner. A rights-based approach to the resolution of such a conflict would involve getting a court to decide whether a rightful claim to the land exists. The court would then make a finding on the basis of evidence that is placed before it, e.g., old title deeds, oral history of the parties, whether the claimants are rightful descendants, and so on. Negotiation and mediation can play a role when it comes to determining the award to be made to the claimant, by exploring whether the underlying interests and needs of both parties can be reconciled. For example, if monetary considerations play a large role, compensation may be a feasible means of resolving this conflict. If the claimants require the land for cultural or religious reasons (for example, access to burial sites), it may be possible to provide them with access (for the purpose of visiting and tending to the graves of their ancestors, for example) without necessarily transferring the ownership of the land. No definitive answer can be given in an example like this, because the outcome of such a mediation or negotiation process depends on the needs and interests of parties from case to case. In determining an award, the outcome is negotiated or mediated within this framework. The conflict in this example is separated into two stages, in which the first (deciding on the validity of the claim) uses a rights-based approach, and the second uses an interest-based approach. In this way, the rights of both parties are balanced against one another and their interests and needs are taken into account.

It is not that interest and needs-based approaches are necessarily better than rights-based methods in dealing with conflicts over rights issues. Actors addressing rights-related conflict need not rely exclusively on a rights-based approach. Interest and needs-based methods can also promote the protection of rights. Thus, litigation and mediation should be seen as options on a spectrum of

conflict management techniques. In each case, actors must carefully consider the different approaches available and determine which is most appropriate. Moreover, as the above example illustrates, within one conflict, different approaches can be used to resolve different parts of the conflict. There may be good reasons for utilizing litigation in a particular situation. These may include the gravity of the human rights violation, the need to uphold a standard, or the precedent-setting nature of the case. The power balance between the parties may also be so skewed so as to warrant the intervention of the courts in order to protect the victim. If, on the other hand, the parties will continue to interact, interest and needs-based approaches may be more suitable, as these are less confrontational and adversarial. Furthermore, because the outcomes of interest and needs-based processes are not imposed on parties, but rather agreed upon by them, they are less likely to be resented by one party. A key point worth repeating is that negotiation or mediation of rights-related conflict takes place within set parameters consisting of constitutional and international human rights standards; these processes do not require a compromise of fundamental principles.

Negotiating over interests and needs within a human rights framework may be especially relevant on a grassroots level where the limitations of the judicial system are most acutely experienced. It also seems particularly applicable to countries where socio-economic conditions pose constraints on the use of the judicial system (although not exclusively so, as is indicated by the extensive use of alternative dispute resolution).[131] The question may arise as to whether an interest and needs-based approach to resolving rights related conflicts is mostly applicable to individual cases, rather than to situations where human rights violations are committed on a wide-spread and systematic scale or where there is a particular pattern of abuses. In the latter cases, one may seek to obtain a legal judgment that acts as a precedent and inhibits further violations of that kind. In mediations, agreements reached often only apply to a particular case and carry little weight beyond that case. No general legal rule is laid down that can prevent such abuses from recurring. In other words, agreements reached in a mediation process usually do not set a precedent, and therefore have limited deterred value. For example, if several farm owners demolish informal housing of farm workers living on their farms and each of these cases is mediated separately, there is little to stop another farm-owner from demolishing informal structures on his or her land as well. However, if one of the initial cases were taken to court, resulting in a clear judgment that the destruction constitutes a criminal act, then other farmers will think twice before trying the same thing. Another question for consideration is whether the use of mediation or negotiation in conflict over rights is

[131] A legal term for negotiation and mediation – in the United States of America, the United Kingdom, and Australia.

confined to democratic contexts. These are questions that require further examination. Generally, the use of mediation and negotiation in conflicts over rights as an alternative to judicial proceedings depends on many factors. These include the nature of the rights involved, the gravity and scale of human rights violations, the nature of the dispute, the parties involved, and the competence and legitimacy of the courts.

The six propositions laid out above have many implications for a variety of actors, including governmental bodies and intergovernmental agencies. Clearly there is a need for dialogue between the fields of human rights and conflict management in order to gain an understanding of one another's mission, guiding principles and methods, and to strengthen efforts towards peace, justice, and reconciliation. Closely related is the need to pursue an integrated approach in dealing with conflicts involving issues of rights. Many conflicts cannot be addressed solely from either a human rights or a conflict management resolution perspective. The two fields should be considered in conjunction with one another because of the close relationship between human rights and conflict management. Only a combination of the two perspectives can ensure that strategies are developed for resolving rights-related conflicts in ways that uphold the rights of various parties, while taking their needs and interests into account as well.

6.5 Capacity Building and Training Programmes

The development of individual and collective abilities or capabilities to transform the violent expression of conflict into a non-violent, positive, constructive force is highly desired in conflict management. Collectively, capacity-building also refers to the strengthening of civil institutions (local government, judiciary etc.) which allow society to address and resolve disputes non-violently. In the previous section of this chapter, I argued for the need for human rights actors and conflict management practitioners to be more familiar with each other's principal concerns and methods. In this section, I discuss training as a strategy to enhance mutual understanding between and effectiveness of both sets of actors.

6.5.1 Training Conflict Management Practitioners on Human Rights Awareness and Instruments

As argued above, there are strong reasons why actors in the conflict management field should acquire greater understanding of human rights and be more knowledgeable about human rights instruments. Conflict management must take place within a framework in which human rights are non-negotiable. While there is much scope for dialogue, negotiation, and accommodation within

that framework, practitioners must be aware of its parameters in order to ensure hat their interventions are in line with fundamental rights and freedoms. Moreover, instruments such as the Universal Declaration or the African Charter provide internationally accepted principles of freedom, fairness, and respect. Actors within the conflict management field can use such standards to gain a different perspective on possible solutions, assess different options, or lay the foundation for agreements. Human rights standards thus provide practitioners and parties to a conflict with objective measures for understanding the moral and legal consequences of their actions. Individual parties may not always realize that certain activities or practices are violating the rights of other parties. Practitioners with human rights knowledge can assist such parties in making them aware of their obligations and how respect for rights can help to resolve conflictual issues.[132] Moreover, human rights serve to protect all parties, which means that respect for human rights is pragmatically in everyone's interests (groups, individuals, and political parties). It has also been suggested that, in the context of peace process, conflict management actors can help conflicting parties understand that supporting human rights may enhance their domestic and international stature, legitimacy, and negotiation position, thus prompting their co-operation with the process.[133]

A primary reason for training conflict management actors in human rights is that they need to understand the relationship between rights and conflict, and in particular the conflict-causing potential of rights denial, or they will not act effectively. Their analysis of a conflict helps conflict management practitioners to determine an intervention strategy. If they are insufficiently aware of the conflict's human rights aspects they may focus more on the manifest, visible, issues that trigger conflict rather than on the structural causes that underlie violent conflict. As indicated earlier, such an approach is likely to be unsustainable; it may merely buy some time before destructive conflict erupts again. If, however, human rights concerns are identified early on as core causes of conflict, practitioners are more able to integrate these into a negotiation process from the outset, and can develop agreements that address structural inequities.

It should be noted that the relevance of human rights knowledge for conflict resolution practitioners does not only apply in situations where a denial of human rights is a cause of high-intensity conflict. It also applies to instances where gross human rights violations occur as a consequence of violent conflict. In these cases, intervenors must be aware of the rules and instruments that can help to

[132] Arnold K. (1998). 'Exploring the Relationship between Human Rights and Conflict Resolution.' *Forum* (National Institute for Dispute Resolution), pp.1-5.
[133]Kunder, *supra* note 38 , p. 6.

regulate or mitigate conflict. In its 1993 assessment of five large UN field operations, the international non-governmental organization, Human Rights Watch, noted that human rights were often integrated only to a limited extent into peacekeeping efforts, to the detriment of these operations. Only in El Salvador were human rights a high priority in the UN mission. According to Human Rights Watch, the deployment of human rights monitors as part of the peacekeeping mission limited human rights violations and contributed to the peace process by strengthening the prospects for a lasting peace.[134] The Sudanese People's Liberation Army (SPLA) in southern Sudan is reportedly engaged in a similar initiative; it wants to have chaplains trained in human rights standards, located throughout the territory under its control in an effort to limit and prevent abuses of rights. And in co-operation with various actors in Lesotho, the Lesotho Network for Conflict Management negotiated a National Peace Accord or "Harmony Pact" to guide the behaviour and activities of various parties–including political parties, security forces, traditional authorities, churches, labour, business, and civil society–before and during the elections in 2002.[135] The Accord is based on respect for human rights (especially civil political rights) and seeks to limit the potential for violent conflict before and during the elections[27] In this context, it is important to note that the integration of human rights concerns into efforts to regulate and mitigate violent conflict in the short term will lay the foundation for their inclusion in activities geared towards the long-term resolution of structural causes of conflict.

Knowledge of human rights and an understanding of the language of rights is also important for conflict management practitioners because they need to liaise with human rights organizations in situations where both sets of actors are involved. Human rights actors can alert conflict management practitioners if a situation seems to be deteriorating; mounting human rights violations are widely acknowledged as an early warning sign of imminent conflict. Serving as indicators of communities or states in distress, the occurrence and frequency of human rights violations signal the need for timely intervention and constructive methods to address social, political and economic inequities. Conflict management practitioners also need to assure human rights actors that their concerns will be addressed during a peace process, and how this will be undertaken; If they fail to do so, they risk critical, public statements by human rights actors that may affect the process negatively. Moreover, human rights actors are often aware of solutions used in other countries to manage certain rights issues, or they can provide lessons learned from elsewhere that may assist the

[134] Human Rights Watch. (1993). ‘The Lost Agenda. Human Rights and UN Field Operations, Human Rights Watch, Washington/London/NewYork, pp. 1–35.
[135] *See* Parlevliet, *supra* note 9.

process. Finally, conflict management practitioners need to be able to explain to human rights actors how and why a certain agreement came about, if it is "less than ideal".[136]

6.5.2 Training Human Rights Actors on Conflict Management Skills

As much as conflict management practitioners must learn about human rights, human rights actors can also benefit from training in conflict management. They often work in volatile environments characterized by tension, polarization and violence. They frequently deal with people who are coming to terms with loss, anger and fear, and who may be so distressed, anxious or afraid that facilitated communication is essential to ensure that substantive dialogue can take place about what happened. Human rights activists also often have to deal with conflict in the course of implementing their mandate. For example, gaining access to prisoners, to potential witnesses, or to sites where gross human violations have allegedly occurred, often involves some degree of negotiation. Human rights actors may also encounter officials or non-states actors who try to impede or thwart their work for fear of outside scrutiny, or because human rights activities are seen as subversive.[137] In addition, human rights actors may be called upon to intervene in conflicts or facilitate meeting with several parties, especially if they enjoy respect in communities because of their principled and independent stance.[138] Techniques for crisis intervention, negotiation and facilitation, problem-solving skills and communication skills are useful for human rights actors. Communication skills are particularly relevant, as these can help defuse tension and prevent confrontation. Conflict management training also enables human rights actors to frame rights issues in terms of interests, meaning that they can explain to others why it is in their interests to respect rights. This enables human rights actors to convey the importance of upholding rights without resorting to bland and categorical statements along the lines that rights must be protected. People are generally more willing and capable of understanding rights issues if these are explained in relation to their own needs and interests, than if they encounter a prescriptive or adversarial stance about what rules apply and what action should not be undertaken. For example, insisting to the police that they have to respect human rights may get them to comply but does not necessarily build their understanding of why this is necessary and important. On the contrary, it may cause resentment if rights are perceived as impeding their work and benefiting suspects. However, when it is explained exactly how they can benefit from rights protection, they are more likely to make a genuine effort to comply with an instruction to uphold rights. Such an explanation could include

[136] Arnold, *supra* note 132, p. 3.
[137] Donnelly, J. (1998). *International Human Rights, Second* Edition. Westview Press, Boulder, CO, p. 28.
[138] Arnold, *supra* note 132, pp. 2-3.

the following points: respecting human rights has the potential to improve their relationships with the communities in which they work; it may strengthen their service delivery; and it may limit civil claims against the police. It would also be important to stress that police officials themselves are also protected by rights. Similarly, defence forces may know that they have to abide by the Geneva Conventions[139] because that is the law, but their compliance is more likely if they understand how international humanitarian law could benefit them, should they be taken as prisoners of war, etc.

In this sense, the arguments in favour of a confidence-building approach to mediation rather than a power-based one can be extended to the realm of human rights work. Because it relies on coercion to obtain the co-operation of parties, power-based mediation often hardens the resistance of parties and leads to resentment against solutions imposed upon them. In contrast, a confidence-building approach seeks to obtain the co-operation of parties through dialogue, relationship-building and the development of trust. As such, it is more likely to secure a lasting agreement.[140] Similarly, a confidence-building approach to the protection and promotion of rights tends to make parties less defensive. This approach involves raising human rights concerns in a constructive and non-confrontational way, and developing relationships between parties. The combination of human rights education with conflict resolution stems from the realization that teaching people about their rights without building a capacity to talk about, defend and present those rights in a non-adversarial way is like giving a fisherman a net with gaping holes. Rights have to be respected and if they are not, individuals must be able to demand respect in an appropriate way, i.e. a non-violent and strategic way.[141]

In cases of mediation, such a confidence-building approach is generally preferable. In a human rights context, on the other hand, the most appropriate communication style should probably be assessed on a case-by-case basis in light of the specific situation and the objectives pursued. There may be situations in which human rights actors have to take a strong, confrontational stance in order to emphasize that certain practices are illegal and wholly unacceptable, and that universal standards have to be upheld. Training in conflict management theory and practice helps human rights actors reflect on how their attitude, behaviour and communication style can escalate or defuse conflictual

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[139] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 1949 ('Geneva I'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* 1949 ('Geneva II'); *Geneva Convention Relative to the Treatment of Prisoners of War* 1949 ('Geneva III'); and *Geneva Convention Relative to the protection of Civilian Person in Time of War* 1949 ('Geneva IV').

[140] Nathan, *supra* note 51.

[141] Utterwulghe, S. (2001). 'This also Happens in Angola: Internally Displaced People Resolving Conflicts' (unpublished paper.). On file with the Author.

situations. Based on this awareness, they can then determine how best to address certain rights concerns.

The skills mentioned above are as relevant for humanitarian agencies as they are for human rights actors. The humanitarian context is pre-eminently one where the fields of human rights and conflict management intersect. Whether their mandate is to protect refugees, internally displaced people and children, or provide immediate relief, or restore essential services, humanitarian agencies are constantly dealing with conflict. For example, extensive assistance to displaced people often provokes tension amongst local populations because of scarce resources. Aid to civilians in areas under the control of insurgents can feed suspicions of supporting the enemy or pursuing a political agenda, which need to be managed. Mass movements of people require negotiation around issues of settlement, integration, and repatriation. Conflict is also highly likely to erupt in situations where many people of different cultural, ethnic, religious and political backgrounds are thrown together in a confined area, such as a refugee camp. Many acknowledge that humanitarian intervention in war zones is inevitably politicised and that the organizations involved play a number of conflict management roles.[142]

Institutions like the United Nations High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC) may not be conflict-management organizations, but they have to manage conflict continuously in the implementation of their humanitarian mandates.[143] For example, the ICRC has had to negotiate ceasefires with belligerent parties at times in order to reach populations affected by the fighting. In 1998, a group of Namibians from the Caprivi region fled to Botswana following violent clashes with government forces, after the group had allegedly called for secession of the region. The group applied for asylum in Botswana on grounds of political persecution, but the Namibian government demanded their extradition to face charges of treason. The regional office of the UNHCR was then asked to intervene in order to resolve the situation.[144] Similarly, the UNHCR office in northern Kenya facilitated an agreement in 1997 between Oromo refugees and local communities after conflicts over livestock had led to

[142] Miall *et al*. (1999), *supra* note 75, pp. 145-147; Anderson, M. 'Humanitarian NGOs in Conflict Intervention. in Crocker, C. and Hampson, F.(Eds.), (1999) *Managing Global Chaos: Sources of and Response to International Conflict.*, Washington: United State of Institute of Peace, pp. 343-354.
[143] See, for example, Nathan, *supra* note 51.
[144] *Africa Confidential*, Vol. 40, No. 1,8 January 1999.

fighting and loss of life.[145] In other words, an organization such as the UNHCR must address certain types of conflict in order to fulfil its mandate. Thus, training in conflict management skills enhances the capacity of humanitarian bodies to perform their mandated functions and allows them to develop appropriate strategies for conflict situations that they regularly encounter in the execution of their primary humanitarian duties in complex and volatile environments.

6.6 Insights Gained from Linking Human Rights and Conflict Management in Practice

6.6.1 The Dialectical Nature of the Relationship Between Human Rights and Conflicts

The previous sections of this chapter have sought to highlight the analytical and strategic linkages between human rights and conflict management and have emphasized the importance of bridging the gap between the two fields. It has been shown how gross human rights violations can occur as a consequence of violent conflict, and how a sustained denial of human rights can lead to violent conflict. In working with various organizations in the fields of human rights and conflict management, it has transpired that the relationship between human rights and conflict is more than twofold, especially if one considers "conflict" more broadly than high-intensity conflict. For example, the protection and enforcement of human rights can also lead to conflict. Enforcing the rights of marginalized or disadvantaged groups can threaten the *status quo*, and may challenge prescribed notions of inferiority and superiority, as well as traditional power relations. The realization of women's rights in traditionally patriarchal societies constitutes a prime example in this regard.

Other aspects of the rights/conflict relationship include the possibility that conflict may arise over different interpretations of a single human right and in situations where different rights have to be balanced against one another. Moreover, when expectations about the realization of rights are not met, this can give rise to conflict. In various interviews conducted with local conflict resolution organizations, for example, participants shared their impression that human rights impoverished areas where they operated. In their view, as people became more aware of their rights, the discrepancy between the rights they were supposed to have and the lack of realization thereof, especially in the socio-economic domain, become glaringly obvious. Conflict resolution fieldworkers felt that rights education had in fact exacerbated existing tensions in these

[145] See this issue thoroughly discussed by Galaty, J. 'Time, Terror, and Pastoral Inertia: Sedentarization and Conflict in Northern Kenya' in Fratkin, E and Roth, E. (Eds.). (2005). *As Pastoralists Settle: Social, Health and Economic Consequences of Pastoral Sedentarization in Marsabit District, Kenya*, New York: Kluwer Academic Publishers.

communities by making people more acutely aware of the structural inequities and inequalities in society. While acknowledging the importance of human rights education, these fieldworkers grappled with the question of how to deal with the resulting tension and its negative manifestation (fights, threats, intimidation, etc.). They also indicated a need to discuss this potentially negative effect of such education with human rights organizations, so that joint strategies could be developed for addressing tension and ensuring that education would not take place in a vacuum.[146] These additional aspects of the rights/conflict relationship further underscore the importance of dialogue between the two fields, as they demonstrate the complexities that looking at human rights and conflict management in conjunction may reveal.

6.6.2 Targeting Actors from both Fields Separately

Human rights actors generally have a strong need to develop their capacity to deal with conflict in a constructive manner while undertaking activities towards rights protection and promotion. For them, it is important to learn how communication skills, negotiation, problem–solving, and facilitation can strengthen their work. Building their understanding of interest–based conflict resolution also enables them to frame the human rights issue in terms of the interests of parties and to assess on a case-by-case basis whether litigation or meditation would be most suitable in a particular conflict situation. The needs of conflict management practitioners, on the other hand, relate more to developing an understanding of the meaning and value of human rights for their work, and identifying human rights aspect in conflicts. They need to be familiar with the constitutional and legislative frameworks, and must be able to conduct their interventions in line with the human rights instruments relevant to the context in which they operate.

Therefore targeting actors in both fields separately is most appropriate for the purpose of capacity-building and training, because it allows for in-depth training courses that are tailored to the needs of the specific audience. Nevertheless, bringing practitioners from both fields together may be particularly relevant when developing strategies that require both human rights intervention and conflict management. Input from both perspectives is required to develop strategies for issues such as land reform, the question of tradition leadership in a constitutional democracy, xenophobia, and integrating human rights into peace processes, to name but a few.

[146] From informal interviews conducted with respondents from church organisations involved in the Congo conflict management; MONUC personnel, human rights NGOs in the DRC; and officers involved in the Burundi Peace Process under such centers as Mwalimu Nyerere Foundation; Center for the Study of Forced Migration.

In such situations, a holistic and comprehensive approach must be adopted that integrates insights, methods and values from both fields, and that ensures that conflicts are constructively addressed in ways that uphold human rights.

6.6.3 Conflict Resolution as an Imperative Aspect in Human Rights Education and Training

International human rights law defines the right to education in terms of the standard, quality and content of education.[147] Thus, education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms and, further, that education shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.[148]

From the foregoing, one may argue that human rights education promotes values, beliefs and attitudes that encourage all individuals to uphold their own rights and those of others. It develops an understanding of everyone's common responsibility to make human rights a reality in each community. It constitutes an essential contribution to the long-term prevention of human rights abuses and represents an important investment in the endeavour to achieve a just society in which all human rights are valued and respected.

Traditional human rights education generally focuses on making people aware of their rights and the various instruments and mechanisms available for the protection and promotion of human rights. However, building peoples' knowledge of rights and enhancing their capacity to identify rights is not necessarily sufficient to ensure that they will be able to enjoy those rights. They also need to gain the capacity and confidence to exercise those rights. The discussion above has already highlighted the usefulness of conflict resolution skills in the areas of negotiation, communication and meditation, in ensuring respect for human rights. Problem solving skills are also relevant, especially in contexts where serious constraints prevent the full realization of rights. Problem-solving skills enable people to identify obstacles that exist in their environment and to generate a variety of options that can be employed for the implementation of rights. They also enhance peoples' ability to assess what actions they can undertake on their own account, individually or within their communities, rather than relying solely in the state for the implementation of rights.

[147] See Lord, J and Flowers, N. 'Human Rights Education and Grassroots Peacebuilding' in Mertus & Helsing, *supra* note 10 , p.432.
[148] Article 26 of the UDHR.

Including conflict resolution in human rights training and education is not only beneficial to participants, but also to trainers.

Conflict resolution can help human rights trainers and educators to address such conflict in the training environment and to deal with extreme points of view and strong emotions generated by human rights issues. Again, it is not much use overriding peoples' opinions and telling them how they ought to feel on certain issues and what the law says, as this often simply fuels resentment and hostility. Rather, trainers and educators must engage their audience in ways that make them willing to question their own assumptions and perspective, and this is facilitated by the use of conflict resolution skills. Conflict resolution can thus build the ability and confidence of trainers and education in managing the tension and conflict that arise in the context of training and education of human rights.

6.6.4 Raising Human Rights Indirectly in Training Settings: A Strategic Approach

It is sometimes preferable to raise the issue of human rights indirectly in training, through notions of human dignity and basic human needs rather than framing issues directly in terms of rights. Participants may know of human rights, but do not necessarily have much understanding of what they mean and why they are relevant. Human rights are often seen as legal, abstract concepts with little bearing on the daily lives of people. Participants often find it easier to relate to concepts such as human dignity and basic human needs, which they can link immediately to social, political, economic and cultural concerns. These concepts thus enable human rights issues to be grounded in the experiences of participants and assist in "demystifying" human rights, as will be illustrated below.

Moreover, state officials and politicians still sometimes see human rights as subversive or problematic. For example, the people may believe that the rights afforded to individuals accused of breaking the law essentially protect criminals and complicate the maintenance of law and order. The government of a country may consider an identity group's rights to self-determination subversive, viewing it as threatening the unity of the state. The perception of rights as problematic can lead to defensiveness and hostility. Mentioning, "human rights" in certain contexts can cause participants to "shut off" and distance themselves from training and education. Engaging people in discussions about human dignity or basic human needs is generally less threatening, and may ensure that they engage more substantially in the desired training. A final reason for opting for an indirect approach to rights education relates to the claim that rights are a Western concept. When discussing rights in

an African environment, the question is often raised as to what extent human rights are Western or Northern inventions that have little relevance in Africa.[149] Concepts such as needs and "dignity", however, are easily located in the local context. Most cultures have the notion "dignity" included in their norms, custom, and worldview. These concepts are therefore helpful in illustrating that human rights are not totally unrelated to the Africa context, even though some major human rights instruments were originally drawn up in the West.

The concept of human dignity helps participants in human rights and conflict management training to reflect on any violations that they may have endured and draw out their ideas as to how people should relate to one another. Many participants relate the concept to civil and political concerns (such as respect for equality, tolerance, non-exclusion, or non-discrimination rights), but some have also linked it to social economic issues. Through the notion human dignity, a basis is created for discussing rights, the relevance of rights for the protection of peoples' dignity, the responsibilities of state and citizens, and the consequences of insufficient respect for rights. It has proven to be an excellent way of building participants' understanding of the origins of human rights instruments such as the Universal Deceleration of Human Rights, the African Charter of Human and People's Rights and others international human rights instruments.

As indicated above, the concept of basic human needs is useful in building participants' understanding of human rights. The ideas of human beings having needs that are fundamental to their survival and development generally resonate immediately with trainees. A discussion of needs can be introduced through, for example, a discussion of causes of conflict in a particular country or region, the idea of human security, or by getting participants to generate a list of what people need in order to feel safe and secure. Needs can be related to rights, and the surprise of trainees at finding the close link between rights and needs is often palpable when they compare the list of needs they have generated with an instrument like the African Charter. The idea of needs can also help trainees to grasp the relationship between direct and structural violence, or manifest and latent conflict. It enables them to recognize these dynamics in their own countries. Indeed, the concept of needs has been particularly helpful in building peoples' understanding of the consequences of denying rights in terms of increasing the potential for conflict.

The concepts of human dignity and needs thus provide a basis for talking about human rights in a way that helps participations grasp the meaning, value, and relevance of rights. Introducing rights in

[149] See this issue thoroughly discussed in Mollel, A. (2008). 'African Culture versus Human Rights: The Case of FGM among the Maasai Society in East Africa,' in *Journal of African and International Law*, vol. 1, No. 2, pp. 126-157.

such an indirect way is not meant to diffuse rights or lessen their importance. Rather, it is a strategy aimed at building understanding of and appreciation for human rights in a way that ensures that human rights education "sinks in" and does not alienate those participating in training and education.

6.7 Conclusion

The main aim of this chapter has been to lay out the differences and commonalities within the fields of human rights and conflict resolution, with the ultimate purpose of enhancing their roles in managing conflicts. The chapter introduces many practical challenges and dilemmas that face lawyers, human rights actors, conflict resolvers, policy makers and advocates in conflict situations. This chapter has shown that there are so many links between human rights and conflict management that it does not make sense to contemplate these fields in isolation from one another. Human rights are relevant in the generation, manifestation, resolution and prevention of destructive conflict, and must therefore be taken into account throughout the whole conflict management process. At the same time, skills and insights from the conflict management fields can make a contribution to the protection and promotion of rights by strengthening the capacity of human rights actors to deal with conflict over rights issues. The various propositions discussed here, as a well as their practical implications, constitute compelling reasons for actors in human rights and conflict management to explore how they can co-operate with and support one another given their common goal of reaching an enduring and just peace.

The propositions discussed undoubtedly require great specificity and nuance in different context, and they should be pursued through further research and analysis. Nevertheless, it appears that the fields of human rights and conflict management are far more complementary than contradictory. Certain tensions do indeed exist between them, to the extent that activities or attitudes by one type of actors may negatively affect efforts by actors in the other field. These tensions perhaps demonstrate that the two fields cannot or should not be merged, and that human rights actors cannot become conflict management experts and vice versa. However, these tensions should not cause actors in each field to remain withdrawn from one another as if they were competitors in the pursuit of a sustainable peace. On the contrary, these tensions should be seen as creative differences that prompt human rights actors and conflict management practitioners to interact with one another and understand the mission, methods and principles guiding each other. Tension ideally should encourage them to seek ways of contributing to one another's activities and optimising their efforts

towards peace, justice, and reconciliation. Insufficient recognition of the close relationship between human rights and conflict management is detrimental to the objectives pursued by both fields. Peace and justice are inextricably linked. The absence of justice generally leads to an absence of peace. Thus, the fields of human rights and conflict management are in reality inextricably linked. This is because, as discussed in this chapter, the success of those working to prevent, manage or resolve conflict is enhanced by incorporating human rights advocacy into their efforts. At the same time, efforts to secure greater respect for human rights and humanitarian norms are furthered when coordinated with efforts to build peace by laying the foundation for a society that is not only just, but also stable.

Ideally, human rights and conflict resolution work should be mutually reinforcing; respect for human rights is a necessary precondition of a lasting peace, and conflict resolution efforts offer opportunities for creating forward-looking mechanisms to ensure rights are respected.

In the final analysis, it can be concluded that the violations of human dignity that occur during conflicts cannot be resolved by any unitary approach that isolates human rights. International humanitarian law is always focused on armed conflict and the need to mitigate the suffering of those touched by it; however, it does not deal with the causes of war or with the question of whether one conflicting party or the other is right. In this regards, more remains to be done to explore the role of human rights in conflict management. As the two fields draw closer together, the ways in which transitional crime creates challenges requiring different strategies needs further exploration. Although the relationship between human rights and conflict management is viewed as complex and dynamic, it demands an equally dynamic response from those who work to protect human rights and who strive to bring about peace.

7 GENERAL CONCLUDING REMARKS

7.1 Lessons: Possibilities and Challenges

Having reviewed the various ways that have been used to resolve conflicts both within the UN system and beyond it, it is now possible to consider what this survey as a whole demonstrates about what challenges must be confronted and what possibilities exist when one proposes a human rights approach to conflict prevention and management. To discuss challenges and possibilities, it is necessary to consider separately some of the UN approaches to conflict resolution undertaken in resolving the Africa's Great Lakes conflicts and other recent conflicts. This chapter recalls in brief outline what this study has revealed about the successes and failures of the UN as a conflict prevention and management system in that region. The conclusion is that the challenges facing peacemakers and peacekeepers would be better met by bringing together the two fields of conflict resolution and human rights.

The successes and failures of the United Nations in conflict management have been subject to increased scrutiny in recent years. There have been countless studies conducted that have tested the abilities of the United Nations in managing conflict at the crisis level and beyond. The general conclusion derived therefrom is that, until now, the UN system has continued to put most of its eggs in the more costly basket of peace restoration, while neglecting peace maintenance and peace building.

Experience over the past few years, however, has clearly pointed out not just the costs but the dangers of ignoring prevention, given the complexities of trying to intervene at the point where conflicts are locked into a process of escalation. Indeed, the UN's successes and failures have confirmed findings about the best timing of conflict resolution. The literature has shown that third party intervention is most likely to be successful either early in a dispute or once the parties have arrived at a stalemate.[1] As previously mentioned, the UN has had major successes at the latter point, where exhaustion and deadlock have set in, but it has rarely even attempted to intervene at the former stage, when the costs to the disputants--and to the international system--have not yet begun to multiply. Of course, this does not imply that international organisations should not act to resolve full-blown conflict or to ameliorate the suffering of victims at any time when they are able to do so, but the fact that a very late stage is the least opportune moment for intervention means that there is a major flaw in the system.

[1] See Peck, C. (1996), *The United Nation as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflicts*, The Hague: Kluwer Law International, p. 263.

Scrutiny of the efficacy of the UN conflict resolution system comes as no surprise. Many people had high hopes that the United Nations, when it was formed, would be a guarantor of peace and security for the whole world. As stated in the initial provisions of the UN Charter, the organisation was expected "to maintain international peace and security, …to take effective collective measures for the prevention and removal of threats to peace, and to bring about by peaceful means adjustment or settlement of international disputes"[2] The UNSC was given the main responsibility of implementing the objectives and principles of collective security.[3] Member states were obliged to give armed forces to the UN to make it possible for the organisation to meet its responsibilities. The use of force, if other means had failed, was to be decided upon by the UNSC with the assistance of the Military Staff Committee.

Although any answer to the question whether the UN has been successful is bound to be tentative, given the fact that successes and failures are relative terms in international relations, it is still reasonable to ask the question about what conflict-resolution role the UN should play in the future.[4] Recent lessons learned from the developments in Rwanda and Srebrenica provide very vivid insights into how the UN's approach to unfolding conflicts and deadly violence has historically proven to be a failure. In both cases, the UN was present but failed to take effective action to prevent genocide from taking place. In each case there was plenty of warning of the forthcoming mass killings, but the UN mishandled them both. Seven thousand Muslim men were executed despite the fact that Srebrenica was declared a safe haven by the UN.[5] In Rwanda, the UN commander, Romeo Dallaire, had warned the UN by sending what is now referred to as the 'genocide fax' in January 1994--three months before the genocide--indicating that the Hutus were preparing lists of Tutsi to be killed, had large amounts of weapons stored, were providing training, and were turning more and more extremist.[6] The fax was ignored by the UN bureaucracy and never forwarded to the UNSC. Two reports examining these cases were finally published in late 1999. These reports assigned partial blame for the unfortunate handling by the UN of the role given to it

[2] See Article 1 (1) of the UN Charter.
[3] See generally Chapter VI of the UN Charter.
[4] Väyrynen, R. (1985) 'Is there a Role of the United Nations in Conflict Resolution?' *Journal of Peace Research*, vol.22, No.3, pp. 189-196.
[5] See UNSC Res. 819 (1993) of April 16, 1993 in which the Council demanded, "all parties and others treat Srebrenica and its surroundings as a safe area, which should be free from any armed attack or any other hostile act". It also demanded "the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica", and further demanded that "the Federal Republic of Yugoslavia immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units in the Republic of Bosnia and Herzegovina".
[6] For a detailed discussion about this early warning through the "genocide fax" see Kuperman, A. (2001), *The Limits of Humanitarian Intervention: Genocide in Rwanda*, Washington, DC: Publisher Brookings Institution Press, generally but particularly pp. 87-88.

as the key global security organisation during the Srebrenica and Rwanda genocides. These reports have assumed a high profile and could and should have a large impact on making policies for conflict prevention and conflict management in the future.

In Rwanda, there was early warning of the coming massacres. The Special UN Representative in Rwanda reported that one group was in clear violation of the peace agreement by stockpiling ammunition, distributing weapons and reinforcing positions in Kigali. Also, the now infamous cable mentioned above referred unequivocally and urgently to information about planning and practical preparations for mass killings. The problem with early warning was twofold: first, the information was not processed correctly at the UN, owing to sloppiness and wrong lines of communication at its New York headquarters; second, the lack of capacity for intelligence analysis contributed to an erroneous interpretation by the UN of the Arusha peace process and the intentions of the parties thereto. The lack of in-depth analysis of the political situation on the ground in Rwanda was clearly evidenced when no attention was paid to the alarming report by the Special Rapporteur of the Commission on Human Rights that--just two weeks before the UNAMIR mission was launched--pointed to the deteriorating human rights situation and explicitly referred to the dangers of genocide.[7]

Another lesson learned in conflict prevention is that the peace implementers should be able continually to adjust the mission mandates, rules of engagement, troop strength and military capacities of peace missions to changing realities on the ground. The Rwanda mandate changed in nature from Chapter VI to Chapter VII of the Charter at a stage in the conflict when it would still have been possible to stop the genocide. But UNAMIR II failed, in the final analysis, because of the unwillingness of UN member States to provide troops for it. Two months after the Security Council agreed to the mission, UNAMIR II still only had 550 troops instead of the agreed-upon 5,500. In the case of Srebrenica, after the Security Council had established the safe areas, the force commander requested 34,000 troops, but finally had to settle for a “light option” with a minimal troop reinforcement of around 7,600, to be defended, if necessary, by NATO air strikes.[8]

As the preceding chapters have shown, the relationship between human rights and conflict is dynamic, complex, and powerful, constantly shaping and reshaping the course of both peace and

[7] Ibid, p. 22.
[8] United Nations Protection Force, UN Department of Public Information, September 1996, see http://www.un.org/Depts/dpko /. Last visited, September 8, 2009.

war. Yet, despite its importance, the understanding of this relationship has long been fragmentary, chiefly because different schools of thought concerning human rights and humanitarian law have offered different and often contradictory perspectives. Therefore, one cannot lean on only one of these branches as the definitive means to resolve internal armed conflicts like those in the Africa's Great Lakes Region. Although human rights law continues to apply even during armed conflicts, some human rights treaties permit suspension of certain rights (e.g. freedom of movement, liberty and security, freedom of association) during public emergencies, to the extent strictly required by the situation (with the exception of a 'hard core' of human rights that may never be limited or suspended under any circumstances, not even during public emergencies or armed conflict).[9]

Since international human rights law (hereafter, *IHRL*) is designed to function in peacetime, it contains no rules governing the methods and means of warfare and it applies to only one party to a conflict. During armed conflict, IHL comes into effect as well along with any rules established by treaty or custom. The purpose of IHL is to protect the lives and human dignity of people who are not or are no longer taking part in the fighting and to set limits on conducting war. It thus aims to limit the suffering and the damage caused by war. The rules of IHL may never be restricted or suspended, precisely because they were conceived for the extreme situation of armed conflict. Thus, IHL is a set of fundamental rules to protect people affected by armed conflict, which necessarily includes the 'hard core' of human rights as well. But even with the existence of IHL rules, less is expected, especially when it comes to the non-international armed conflicts discussed in this study.

The reasons are very obvious. Embedded in the classical system of international law, a system still mostly resting on the Sovereign Equality of States doctrine,[10] and the related principle of non-intervention,[11] international humanitarian law is predominantly concerned with international (i.e. inter-state) armed conflicts as opposed to internal (i.e. intra-state) conflicts. Among the Geneva Conventions, only Common Article 3[12] expressly applies to non-international armed conflicts. Common Article 3 provides protection from only the most serious abuses.[13] While Protocol II to the

[9] See for example Article 4 of the International Covenant on Civil and Political Rights, 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967) (hereinafter referred to as the "ICCPR"); See further Fleck, D (Ed.), (1995) *Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press; Meron, T. (1983) 'On the Inadequate reach of Humanitarian and Human Right Law and the Need for a New Instrument' in *American Journal of International Law*, vol. 77, No. 3, pp. 589-606.
[10] Article 2(1) of the UN Charter.
[11] Article 2 (7) of the UN Charter.
[12] Article 3 is identical in each of the four Geneva Conventions and is thus referred to as Common Article 3.
[13] Common Article 3 prohibits the following acts against persons taking no part in the hostilities: "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; outrages upon personal integrity, in particular, humiliating and degrading treatment; and the passing of sentences and the carrying out

Geneva Conventions[14] also applies to non-international armed conflicts, and it provides significantly less protection to individuals than Protocol I which is applicable only to international armed conflicts or occupation and certain analogous situations. Application of the Hague Conventions[15] is similarly limited to situations of international armed conflicts.[16]

While neither the Hague Conventions nor the Geneva Conventions define the phrase "armed conflict," definitions in international jurisprudence for both international and non-international armed conflicts have been set forth by international criminal tribunals. According to the jurisprudence of the international criminal tribunals, an armed conflict exists "whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State."[17] As can be noted above, the traditional subject of international law and therefore international humanitarian law is the State. However, as illustrated by the research subject of this study, non-state actors through intra-state conflicts have instigated some of the dominant types of conflicts in the 20th and 21st centuries, limiting the effectiveness of international humanitarian law as a means of resolving such conflicts.

This study brings conflict resolution and human rights perspectives together to create a composite picture of the relationship between human rights and conflict. Throughout the study, the role played by human rights at different stages in a conflict cycle are captured: from human rights abuses that precipitate violence, to violent conflicts that result in human rights abuses, through third-party interventions in different forms. The study lays out the actors and issues involved and analyzes the attendant dynamics and dilemmas.

This thesis argues that violent conflicts present one of the most urgent human rights challenges in the Great Lakes Region. The region has, in recent history, experienced the first of Africa's genocides (Rwanda) closely followed by a less-acknowledged one in the Democratic Republic of the Congo. The situation in the DRC has been labelled "Africa's World War" because of the

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of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (Protocol II), 1125 UNTS 609.

[15] The Hague Convention for the Pacific Settlement of International Disputes of 1899, 1 Bevans 230; 1 AJIL 103 (1907); The Hague Convention for the Pacific Settlement of International Disputes of 1907, 1 Bevans 577; 2 AJIL Supp. 43 (1908).

[16] Note, however, that the International Criminal Tribunal for the Former Yugoslavia has greatly expanded the scope of norms applicable in non-international armed conflicts. In the *Tadic Case*, the Appeal Chamber found that certain norms of international armed conflict have evolved through customary law and now apply during non-international armed conflict as well. See *Prosecutor v. Tadic*, Appeal Decision (ICTY, Appeals Chamber, 1995).

[17] Tadic Appleal Decision, Ibid, para 70.

involvement of a host of other countries in the conflict. Burundi has experienced a civil war for most of the period since 1993, while an atrocious war has been perpetrated in northern Uganda for the last 20 years, leading to massive displacements and suffering. In addition, and partly as a result of this state of affairs, illicit weapons have proliferated in the region, aiding the escalation of conflict, crime and general human rights violations among both rural and urban communities in several countries.

The cost of these conflicts has been tremendous, since high levels of human rights violations have contributed to poverty and retardation in development. Everywhere in the region, there is a major concern for the welfare of displaced peoples and refugees, for the reconstruction and rehabilitation of infrastructure and the peoples, for care of victims of war, and for reconciliation and healing. The lasting negative impact on communities of the failure of military interventions and the high cost of peacekeeping operations and reconstruction indicate that the promotion of peace and human development in the region requires a fundamental shift from reactive-only approaches to conflict, to more proactive and preventive approaches.

Looking at the combination of old and new threats, the question addressed in this study is whether traditional instruments of negotiation, mediation, adjudication, peacekeeping, and peace enforcement are still effective in managing and resolving conflict. How can conflict management efforts and the various institutions that attempt to implement them succeed—be they intergovernmental organisations like the UN, states, coalitions of the willing, or NGOs?

As discussed in this study, multiple conflict resolution approaches have been adopted in trying to resolve conflicts in the Africa's Great Lakes Region. Some approaches have taken regional and international dimensions while others have taken a country-by-country dimension. Of the traditional approaches to conflict resolution discussed in Chapter 3, both the Charter-based and non-Charter-based have been applied. The lessons learned indicate general limitations to each of the methods, calling for an alternative approach to conflict resolution in the region.

To start with, diplomatic efforts within the SADC, OAU/AU and the UN culminated in the signing of the *Lusaka Agreement*[18] and the holding of the inter-Congolese political negotiations that ended

[18] For a detailed analysis of the Agreement itself, see International Crisis Group, '*The Agreement on Ceasefire in the DRC*,' August 20, 1999.

with adoption of the Final Act of the "*Global and All-Inclusive Agreement*"[19] and an interim Constitution of the DRC. The Inter-Congolese Dialogue (ICD), from the abortive Addis Ababa meeting, through the *Sun City* I process of February-April 2002, to the December 2002 Pretoria Agreement and then to the *Sun City* II final talks of April 2003, is just one such diplomatic attempt to resolve the Congolese Conflict, which has been just one manifestation of the Africa's Great Lakes regional conflict. Although these diplomatic approaches paved way for "peaceful" elections in 2006 and for the deployment of the MONUC, this approach has not achieved much. Initially, the Inter-Congolese Dialogue was expected to be an appropriate conflict resolution strategy that would address both the contextual factors of the Congo War (in particular the failure of Mobutu's Zaire) and the greedy motives of most belligerents. It had the foresight to indicate that the belligerent parties were not to be considered the only relevant political actors. There was an attempt to convince all actors that there was no need to continue to resort to violence. At the end of the day, however, although a few resolutions were approved at Sun City that might later reveal their peace-building value, key issues for the reconstruction of the Congo were not adequately (if at all) addressed during the whole process.

The ICD can thus be considered a failure in spite of the signing of the "global and all-inclusive" agreement. In fact, and ironically, it can be considered a failure because of the signing of this very agreement. Not only was this peace deal (and the subsequent memorandum) negotiated largely outside the framework of the Inter-Congolese Dialogue, but (because of the nature and shortcomings of the Pretoria II agreement), far from laying the foundations of a new Congo, the ICD was reduced to a bargaining forum between warlords and predatory leaders.[20] How to explain this failure? There are three main reasons.

The first reason is that, as the Congolese conflict put a serious stain on the rights of millions, it would have required a resolution that could address healing the wounds of those who had experienced such horrendous human rights atrocities by holding responsible all perpetrators of such abuses. Quite to the contrary, the ICD talks were gradually reduced to a far narrower objective and ultimately hijacked by greedy warlords for their own political ends.

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[19] See Apuuli, P. (2004). 'The Politics of Conflict Resolution in the Democratic Republic of Congo: The Inter-Congolese Dialogue Process' in *African Journal of Conflict Resolution*, vol. 4 No.1, pp.65-84.; See further the text of 'the Inter-Congolese Dialogue: Political Negotiations on the Peace Process and on Transition in the DRC *Global and Inclusive Agreement* on Transition in the Democratic Republic of the Congo' (on file with the Author).

[20] Furley, O and May, R. (2006) *Ending Africa's Wars: Progressing to Peace*, Aldershot, Ashgate, p. 111.

The second reason is that the ICD was not purely "inter-Congolese." Neighbouring countries played a major role in the Congo War and continued to exert their influence during the ICD process through their proxies. Thus, while the ICD aimed ultimately at reunifying the country and re-establishing the sovereignty of the DRC over all the Congolese territory, neighbouring countries could not be expected to support it as long as they perceived these goals would be achieved at their expense.

This study does note that UN peacekeeping as another traditional instrument used to resolve and manage the Africa's Great Lakes conflict fared no better than the ICD. Two instances where peacekeeping operations were applied to resolving the Africa's Great Lakes conflict bear witness to the above assertion. The first of these, the United Nation's initial operation in Rwanda (UNAMIR), had barely been fully deployed when on April 6, 1994, the plane carrying Presidents Habyarimana of Rwanda and President Ntaryamira of Burundi crashed under suspicious circumstances, killing everyone on board. Violence immediately erupted, primarily directed against civilians from the Tutsi minority and opponents of the Rwanda government. Following frantic efforts to evacuate foreign nationals from Rwanda, the Belgian government (the former colonial power) immediately pulled its contingent from the UNAMIR.[21] On April 20, the Secretary-General presented the UNSC with the option of adding several thousand troops to the UNAMIR and changing its mandate to give it enforcement powers under Chapter VII of the UN Charter. This was rejected by the Council, which chose the Secretary-General's second option: reducing the Force. On April 21, the UNSC reduced the authorized strength of the UNAMIR from over 2,000 to 270. The continuing horrific killings and mutilations were characterized as genocide by the Secretary-General, and estimates of the deaths reached several hundred thousands by the end of June. The ability of the UN to turn away when Rwandans were in their hour of need was shocking both within and outside Rwanda. The reality was that no one had a stomach for assertive peacekeeping, and the thought of the UN entering the fray, coming less than a year after the Somalia adventure, left the big powers feeling awkward but unmoved.[22] Even when realities later dictated, forcing the UNSC to augment the

[21] See UN Document, S/1994/446, April 15, 1994.

[22] The Council had before it that week the report of its Commission of Inquiry to look into the attacks on the United Nations in Somalia. The report included the following recommendations:

> 270. The United Nations should refrain from undertaking further peace enforcement actions within internal conflicts of states. If the United Nations decides nevertheless to undertake a further peace enforcement operation, the mandate should be limited to specific objectives and the use of force would be applied as the ultimate means after all peaceful remedies have been exhausted.
>
> 271. The United Nations should, where necessary, continue peacekeeping operations of the traditional type under its Charter, but with increased emphasis on preventive diplomacy, assistance in peaceful nation-building efforts and preparedness to respond quickly to emergencies. S/1994/653, June 1, 1994.

UNAMIR with 5,500 troops, the organization proved incapable of galvanizing member states to quickly deploy these troops as part of the peacekeeping operation. After two months, 90 percent of UNAMIR reinforcements had yet to arrive.[23] There were then and still are expectations that the United Nations could act to save lives in danger, but the delays involved in getting personnel to Rwanda exemplify the difficulty of getting the nations of the world to mobilize quickly enough to save thousands from certain misery and death.

The second UN example of a UN attempt to resolve and manage the Africa's Great Lakes conflict, the MONUC in Congo, was also disheartening. Although the mission achieved some successes, the failures were too many and too grave to be ignored. The UN peacekeeping mission in Congo, the MONUC, has been described as one of the world's largest, but least effective, peacekeeping forces. This thesis shows that effective peacekeeping in the DRC was hampered by two major problems. First, MONUC had to struggle with a vague concept of and an inconsistent approach to the concept of 'robust peacekeeping'. During key moments of the peace process, it tried to"wage peace" when it should have used force. Second, it failed to adapt to a dynamic conflict environment. Both problems actually rested on flawed assumptions about the peace process, the behaviour of local actors, and the presumed benefits of 'post-conflict' elections.

In the final analysis, peacekeeping as conflict resolution method in the DRC was a "mixed bag." Although the situational difficulty in the country was a daunting challenge, this paper argues that a more important impediment to peace implementation was rooted in fundamental conceptual and operational problems about the use of force in robust peacekeeping operations. For decades, the "use of force only for self-defence" has been a cornerstone of peacekeeping. Doing away with this principle in the name of robust peacekeeping requires more than rhetorical acrobatics by UN officials. Modern peacekeeping may need to look like warfare in order to wage peace.[24] Such views try to reconcile long-established principles (impartiality, the use of force only for self-defence) with modern-day requirements of peacekeeping in often-hostile environments like those in Rwanda and the DRC. Peacekeepers require precise rules of engagement that cover a large if not infinite number of scenarios that provide clear guidance in the field. Therefore, clarifying the vague concept of "robust peacekeeping" should not be left to the discretion of those conducting missions in the field. Efforts by the DPKO, the UN Secretariat, troops-contributing countries, the UNSC and other

[23] Henkin, H (Ed) (2000), *Honouring Human Rights*, The Hague/London/Boston: Kluwer Law International, p. 146.
[24] See Tull, D. (2009) 'Peacekeeping in the Democratic Republic of Congo: Waging Peace and Fighting War' in *International Peacekeeping*, vol.16, No.2, pp. 215-230.

members of the UN ought to give peacekeepers unambiguous mandates and rules of engagement. In addition, the overall approach of the international community to stabilize war-torn countries needs to be reconsidered. A self-sustaining peace requires more than elite-centered peace and transition arrangements and/or elections that too often result in a negative peace. The international community needs to pay more attention to conflict dynamics and the shifting interests of local actors, especially if efforts to bring peace stretch over many years, as is so often the case. More effective peacekeeping also requires a well-defined strategy that does not treat crucial challenges like DDR and peacebuilding as residual challenges.

On many occasions, it has been emphasized that peacekeeping cannot be a substitute for political settlement of disputes. Therefore, the United Nations should re-focus its attention on conflict prevention, which is the very raison d'être of the organization.

Another method used, is a judicial and legal process by way of adjudication as discussed in Chapter Five. Traditionally, international judicial bodies primarily adjudicated using international law. In particular, the decisions of the PCIJ and its successor court, the ICJ (often called the "World Court"), command an unrivalled respect in the field. With the advent of international adjudication, international law made an unprecedented development, catching the imagination of people beyond the traditional realm of foreign policy makers and the diplomatic elite. It was assumed that international law backed up by international adjudication would eventually create and secure a global community where recourse to force would only be permitted in the interest of the world community or, better yet, would not be encountered at all. This vision of a world of peace and prosperity was closely associated with the then recently established international adjudicative procedures which, it was hoped, would settle issues in both interstate and intra-state relationships. But the negligent treatment of the organs of the international community by those in power who, disregarding the UN, proceed to prepare for some military engagement is obvious. This happened to the League of Nations before 1939, but it also has happened in most military campaigns up to and including the intervention in Iraq by the US-British forces in 2003, the military forces acting in Kosovo (which will ironically seek to diligently enforce international adjudication procedures if it seems in their national interests to do so), or the recent Colombian military operations in Venezuela and Ecuador. This negligent treatment naturally goes together with a certain disregard for international adjudicative bodies, which are felt by some to be an embarrassment.[25] However, their existence and procedures have continued to develop impressively on the sidelines of major political

[25] The rejection by the USA to ratify the ICC Rome Statute is the case in point.

events, thriving on the surviving hope that such courts would contribute to a more peaceful and prosperous world.

This paper discusses the application of adjudication as a conflict resolution method in the DRC conflict as has been discussed with reference to two different case studies. One is the *Case Concerning Armed Activities in the Territory of the Congo* (Democratic Republic of Congo v. Uganda) and the second relates to individual criminal responsibility in the *Case of Thomas Lubanga,* which is in progress before the ICC. The first case demonstrated that jurisdictional and structural limitations seriously impede the effectiveness of international adjudication under the ICJ in resolving armed conflicts.

As to the second case study (although it is still ongoing), this study notes that the role of international criminal adjudication in the resolution of internal armed conflicts is still very limited. The criminality of acts violating the laws or customs of war in non-international armed conflicts has been somewhat obscure until quite recently. It is true that war crimes were early considered in terms of their individualized authors and that this resulted from the now-famous 'Nuremberg Resolution' thus:

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions international law be enforced."[26]

The establishment of the two international criminal tribunals, for the former Yugoslavia and for Rwanda, by the UNSC in the early 1990s and the works of these two tribunals, as well as the hybrid courts and mixed tribunals[27] which have been established since, resulted in the maturation of international criminal law into a fully accepted and important body of law.

The establishment of the International Criminal Court (ICC) is a further manifestation thereof and is considered by many as a landmark achievement in the fight against impunity. Since the first cases under the ICC are still in the inquiry stage, it is too early to make a reasoned judgement of its successes. Nevertheless, it is a timely moment to take a step back and assess the extent to which punitive justice and international criminal adjudication an appropriate means of addressing mass atrocities, especially in internal armed conflict situations.

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[26] *Trial of the Major War Criminals* (1947), vol.1, p. 223.
[27] Hybrid and mixed Courts have been established in Sierra Leone (2000), East Timor (2000), Kosovo (2000), Cambodia (2003) and Lebanon (2007).

The ICTR was established as a response to the Rwandan conflict which threatened international peace and security. The challenge of the tribunal is to prove that international criminal adjudication can contribute to the creation of lasting peace in the aftermath of social breakdown. Whether and to what extent can international criminal adjudication contribute to the reconciliation process in the wake of genocide?[28] Although the Arusha tribunal has broken new ground in international law and recorded several accomplishments that have contributed to the efficacy of international criminal justice, it has often been criticised as having tried too few numbers of people to date and for a perceived slowness in the pace of its trials. In any case, trials inevitably fail to apportion all the guilt to all those responsible.[29] The former Prosecutor of the Tribunal has already indicated that the "essential objective" of his office is "to bring to justice those most responsible both at the national and local level for the mass killings that took place in Rwanda in 1994," referring in particular to persons in positions of leadership and authority.[30] The tiny number of suspects that the court has processed so far has been a source of concern and distress.[31] Contrary to the expectations of many of the survivors, the ICTR cannot at this juncture be expected to address the bulk of Rwanda's staggering volume of genocide-related criminal cases.

Furthermore, according to Resolution 977 of the United Nations Security Council adopted on February 22 1995, the official seat of the Tribunal was established in Arusha, Tanzania.[32] This was probably an unfortunate decision. Although the tribunal was intended to establish or confirm principles that should inform behaviour worldwide, it was created to "contribute to the process of national reconciliation and to restoration and maintenance of peace."[33] This objective highlights the fact that the tribunal ultimately has a primary audience, namely, the people of Rwanda. They, more than the rest of the world, need to see the tribunal at work, to be reminded on a daily basis that the international community is committed to the establishment of justice and accountability for the

[28] *See also* Preamble, ICTR Statute.
[29] Bass, G. J& Goldsmith, J (1999) 'Pinochet and International Human Rights Litigation,' *Michigan Law Review*, vol. 97, pp. 2129-84; M Minow (1998); but *see generally* M Osiel (1997).
[30] *See*, Press Statement by the Prosecutor of the International Criminal Tribunal for Rwanda, December 12, 1995, Justice Richard Goldstone. But *see* Morris, challenging what she calls "anomalies of inversion" in which the international tribunal prosecutes (or strives to prosecute) the leaders, leaving to national governments the rest of the defendants M Morris (1997) 7(2) *Duke J. of Comp. & Int'l L.* available at <http://www.unc.edu/depts/diplomat/amdipl_6/morrisinfo.html> last visited, September 8, 2009.
[31] As of August 2000, there were 42 people detained in the ICTR's detention centre in Arusha. Five defendants have been sentenced to life imprisonment and three others to various years of imprisonment. *See* ICTR Detainees Status on 8 August 2000 available at <http://www.ictr.org/ENGLISH/factsheets/detaineess.htm> last visited, September 8, 2009.
[32] S.C. Res. 977, U.N. Doc. S/RES/977 (1995).
[33] Preamble, ICTR Statute.

heinous crimes of 1994. Particularly for a country like Rwanda, where a substantial percentage of the population cannot benefit from newspaper or television coverage of the trials, the process of justice should be accessible and visible.

Despite this, according to Payam Akhavan, a legal advisor in the prosecutor's office, "the symbolic effect of prosecuting even a limited number of such leaders before an international jurisdiction would have considerable impact on national reconciliation as well as deterrence of such crimes in the future."[34] But to say this is to say that effective reconciliation will inevitably depend on the interaction between international trials and the domestic situation. Isolated from a corresponding effort to foster justice internally, the work of the international tribunal will remain selective and unsatisfactory, its contribution to reconciliation inevitably frustrated.

International criminal adjudication is selective in the sense that achieving true justice in the aftermath of violence means looking beyond only those who actually acted to perpetrate human rights atrocities. Thus, majority of Rwandans believe that UN officials should now take responsibility for doing nothing when the genocide took place and that former colonial powers should be responsible for having created ethnic tensions in Rwanda. Furthermore, international criminal adjudication is selective in the sense that the ICTR has only indicted the Hutus and not the RPF, which definitely takes a lion's share of blame for serious human rights atrocities during and immediately after the 1994 genocide.

While human rights advocates generally promote using trials to establish post-conflict justice and accountability, this shorter-term measure in Arusha may not ultimately serve the long-term shared goals of achieving both human dignity and security. Holding trials may reinforce the perceived victory or dominance of one group over another, but in many internal conflicts like those discussed in this study, what may be best for the nation or community is not that one side win but that both sides find a way to live together in harmony. Human rights must be a critical component of such a shared future. Because this is the case, truth commissions may be more conducive to achieve a lasting peace between two or more opposed groups. Chapter 5 arrives at the conclusion that, although the adjudicatory role of international judicial bodies is a crucial method in pacific settlement of disputes, it is unlikely to suit armed conflicts situations.

[34] Akhavan, P. (1997), 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda' *Duke Journal of Comparative & International Law*, vol. 7, No. 2, pp. 325-48.

The failure of the approaches discussed in this paper does not necessarily mean that these kinds of conflict resolution strategies should be dismissed altogether. Rather, the contention is that human rights considerations should be taken into account as an important element in each of these strategies.

7.2 Enhancing Effectiveness in Conflict Prevention and Management

The discussion of the difficulties faced by those trying to resolve the conflict in the DRC and in the Africa's Great Lakes Region in general, illustrates the weaknesses and limitations of the UN in conflict resolution. It is important in this regard to recall that conflict prevention is a central feature of the United Nations Charter, which authorizes the Security Council, the Secretary-General, and the General Assembly in Chapters VI and VII to settle disputes peacefully and to prevent the outbreak of wars and other forms of armed confrontation. Chapter VI contains a series of preventive devices such as fact-finding, negotiation, mediation, conciliation, judicial settlement, and arbitration.[35]

Much of the discussion over enhancing the effectiveness of conflict prevention centers on how to design preventive action plans and strategies that accomplish the stated objectives and the desired preventive outcome. There is agreement that effective prevention must be country- context-specific, that there must be strategic coordination, and that multiple prevention measures be utilized. There should be a concerted call for basing preventive action plans on existing case studies and generalizing from the lessons learned in order to ask what methods of preventive action work best in various contexts. Several political developments have prompted the search for enhancing the effectiveness of preventive action strategies, including concerns over policy errors, failures in prevention that were based on action that was not appropriate or effective for the situation, and indirect and negative consequences of preventive action.[36]

Strengthening United Nations capacities for resolving armed conflict requires that the organization be made more effective in maintaining peace and security by giving it the resources and tools it needs for conflict prevention, the peaceful resolution of disputes, peacekeeping, and post-conflict peace-building and reconstruction. The United Nations is a uniquely global institution, with universal membership. In order to continue to act as a catalyst for change and to provide a forum for dialogue and effective action, the system will have to be renewed and modernized to cope with the

[35] For a detailed treatment of these methods, see generally Merills, J. (2005) *International Dispute Settlement*, 4th ed, Cambridge: Cambridge University Press.

[36] Lund, M. 'From Lessons to Action' in Hampson, F. and Malone, D. (2002), *From Reaction to Conflict Prevention: Opportunities for the UN System*, Boulder: Lynne Rienner.

challenges of this millennium. In particular, there is a need to strengthen the ability of the member States to work together, to extend partnerships and ensure the security of the UN staff as they carry out the mission of the United Nations.

Peacekeeping is one important aspect of the UN system where clear improvements can be made. The *Brahimi Report*,[37] a review of peacekeeping presented to and endorsed by the UNSC in 2000, contained numerous practical proposals and has already had a major impact. Among its goals is the promotion of rapid deployment of peacekeeping forces. This aim had been recognized earlier as best achieved by states earmarking units in advance for possible UN service so that, instead of having to take hasty *ad hoc* arrangements, the Secretary-General could draw on a roster of available units when a peacekeeping force was needed. The Secretary-General began reporting on these issues to the UNSC in 1994, and efforts to create a standby force have been quite successful as more than eighty states now have had such units designated.[38]
Less successful has been the attempt to ensure that peacekeeping troops are available in the numbers needed, a matter of particular concern in view of the number of UN operations currently being undertaken. When reviewing the steps needed to implement the *Brahimi Report*, the Secretary-General made the point that peacekeeping must be seen as the responsibility of all the member States and that, for performance in this area to improve, it is essential for those with the greatest capacity to move most pro-actively. Notably, the Permanent Members of the Security Council should participate in such operations by contributing troops. So far, however, the response to this call has been unenthusiastic, because the Permanent Members and the developed States in general evidently prefer to provide only financial and logistical support, leaving the actual troops to be found elsewhere. It is doubtful, however, if extensive UN peacekeeping can be sustained on this basis. A significant step forward therefore would be for the developed States to be more active.

Another issue raised by the *Brahimi Report* is the question of peacekeeping mandates. Chapter 4 demonstrates that peacekeeping operations can take many forms and that confusion over the nature of a mission (or the related phenomenon of 'mission creep,' i.e. the expansion of a mission's mandate through force of circumstances after it has begun as happened with MONUC) is highly undesirable. The *Brahimi Report*, reflecting experience with peacekeeping in Somalia, Rwanda and the former Yugoslavia over the previous decade, emphasized the need for clear, credible and

[37] Text in (200) 39 ILM, p. 1432. For discussion, see Gray, C (2000), *International Law Governing the Use of Force*, 2nd ed, Oxford: Oxford University Press, pp. 239-51.
[38] Ibid, p. 239.

achievable mandates, and its recommendations to that effect have been accepted by the UNSC.[39] For such a policy to be achieved however, it would be necessary either to develop a broad resource base for peacekeeping operations, or for the UNSC to limit its ambitions. Either way, ensuring that the UN peacekeeping always has a clear, credible and achievable mandate is another way in which the method can be improved.

7.3 Final Conclusion

The main purpose of this study has been to examine the different approaches to conflict prevention and management within the UN system to determine their efficacy in responding to contemporary conflicts in the Africa's Great Lakes region. To achieve this objective, the study examines the conflict resolution mechanisms that have been applied in resolving the Africa's Great Lakes conflicts over the last few years. Chapter 3 presents an overview of the general approaches to conflict prevention and management currently applicable in resolving conflicts. In the subsequent chapters, a few such approaches have been further analysed, focusing mainly on those applied in resolving the DRC conflicts, which have been taken as case studies within the general dimension of the Africa's Great Lakes Region. A mixture of diplomatic methods and military measures used in three actual cases were discussed. The Inter-Congolese Dialogue (ICD) political negotiations, the deployment of the United Nations Peacekeeping Mission in Congo (MONUC), and international adjudication of both the Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda) which ended in 2005 and the *Thomas Lubanga Case*, which, at the time of this writing, is pending before the ICC. Given the nature of the conflicts in the region, this examination calls for an alternative approach that integrates human rights with conflict resolution strategies.

Although the UN was established with a wide range of optional mechanisms for the prevention and resolution of conflicts, including interest-based, rights-based and power-based procedures, only a very limited part of its potential was used during its first half century. These approaches were, in fact, drastically curtailed by the various developments within the UN even as it was being founded. These developments included the all-consuming post-World-War-II bipolar power-struggle which developed between the East and the West, and the reign of terror that was brought on by the production and proliferation of nuclear weapons to the present anarchical state of affairs, characterised by unilateral actions by powerful states, especially the US, in disregard of

[39] See the UNSC Res.1327 (2000), text in (2001) 40 ILM, p. 503; and see further Gray, *supra* note 39 p. 243.

authorization of the UN as the legitimate expression of the collective will of the peoples of the world.

As demonstrated in this study, in recent years the United Nations Security Council, an organ entrusted with the role of maintaining international peace and security, has proven to be unable to solve major international crises effectively. It has become a truism that, after the demise of Cold War nationalism, religious fundamentalism and ethnic and religious hatred have spawned violence, ethnic cleansing and bloodshed. Internal conflicts have mushroomed. The Security Council has been unable to keep up with the staggering increase in violence. No one can contest its inability to react promptly and effectively or to put a stop to massacres amounting to serious threats to the peace or breaches of the peace in Somalia, Rwanda, the former Yugoslavia including Kosovo, Sierra Leone, the Democratic Republic of Congo, Ethiopia and Eritrea, the Middle East, and so on.

The argument of this paper is that, rather than creating an anarchical international society through unilateralism or "coalitions of the willing," an alternative approach should be sought if the UN traditional approaches to conflict prevention and management are as ineffective as this study has shown them to be. For this reason, this paper considers some theoretical perspectives both for human rights and conflict management. Throughout the discussion, a human rights approach has been argued for.

Chapter 1 argues that traditional conflict resolution approaches currently applied under the auspices of the UN and regional bodies such as the AU are limited in impact and sustainability when undertaken without due consideration of human rights concerns. The relationship between conflict and human rights is both short-term and long-term in nature. In the short term, violent and destructive conflicts can lead to human rights violations. In the long term, a sustained denial of human rights can lead to conflicts, as fundamental needs of human beings are frustrated.

The chapter before this one demonstrates that there are three stages in conflicts during which human rights concerns are at stake. At the early stage (i.e. that is, during conflict intensification), human rights abuses are considered as the root cause of conflicts. During the armed conflict stage, human rights standards, in the form of international humanitarian law are applicable in protecting civilians. In the post-conflict stage, human rights play a great role in peace agreements, during peacekeeping missions, and in human rights education campaigns

It has been argued in this study that human rights and conflict resolution are fields of inquiry and practice that have emerged relatively recently in human history; thus human rights doctrines and conflict resolution principles and processes are still developing. The contribution of both fields to sustainable peace and respect for human development are paramount. It is imperative that areas of tensions between the two fields in terms of methodologies and tactical objectives be viewed not as hindrances but as opportunities for further growth and understanding. This paper contends that it is possible to envisage a comprehensive framework to which practitioners of both fields could contribute by reflecting and theorizing from their own experiences. These practitioners are currently in a system-creation phase; human rights and conflict resolution partners can productively contribute to the understanding and the actualization of a true constructive synergy for peace.

The thesis has attempted to demonstrate that a rights-based approach provides much greater credibility and justification for conflict resolution and conflict prevention efforts than do interest-based or power-based approaches. Galtung and others have advocated an integrated approach which stresses a holistic understanding of conflict formation and transformation, linking the subjective and objective approaches. The newer theorists are moving beyond the disjunction between subjectivist and objectivist (or relational and structural) thinking by exploring ways in which both subjective and objective views are interpreted inter-subjectively within a culture of shared meaning, one in which the discourse of theorists and of participants in conflict plays a crucial role. This kind of exploration of new territory links closely with the emphasis on the cultural context of conflict and the appreciation that both perception of basic human needs and of acceptable methods of transformation are culturally bound.

This thesis also points to common threads from the discussion in this study, focusing in particular on those issues and factors that seem always to play a part in the dynamic interaction between the assertion of rights, the pursuit of justice and quest for peace. By doing so, it looks towards the future and, more particularly, towards the prospects for integrating the approaches typically with the human rights, humanitarian law and conflict resolution constituencies. The signs are encouraging. For example, human rights and humanitarian law advocates are increasingly interested in conflict prevention. The growing emphasis given to “conflict transformation” in the conflict-management field means that justice and peace are increasingly overlapping values, and the inclusion of human rights provisions in peace agreements and in conflict resolution and prevention initiatives is growing more common. The increased focus on the protection of civilians in all stages of conflicts

necessarily includes human rights, humanitarian law and conflict resolution, and should therefore bring actors from all the three approaches together in common cause.

However, while the common ground shared by the three approaches is gaining greater recognition, the tensions between them cannot be ignored. The priorities and baselines orientations of the three approaches differ. When hard choices must be made, these differences become especially evident. The human rights approach opts for whatever will best promote individual human dignity, the humanitarian law approach makes humane conduct in wartime the priority, and the conflict resolution approach focuses on the promotion of peace.

The diverse conflict resolution methods discussed in this study suggest that there is no single blueprint for making tradeoffs and resolving dilemmas in complex conflicts like those in the Africa's Great Lakes region. However, opportunities do exist--and have been taken—for members of the different fields to work together cooperatively and effectively. This study seeks not only to enhance understanding of how human rights and conflict interact, but also to stimulate interaction among scholars, practitioners and policymakers. All these groups have important roles to play in contributing to the quest for a world in which peace and human rights are equally respected.

In conclusion, two precautions must be taken. First, despite the results of this study, one should not be led to the conclusion that the United Nations is wholly ineffective in managing conflict. It is important that the whole story of the UN's conflict management be studied at all levels of the conflict process to see what contributed to success or lack of success. It is important that future research focus on United Nation's involvement in the earliest stages of the conflict process, including a complete look at militarised disputes, non-militarised disputes, and conflicts of interest.

Second, despite the complementarity of the two fields, as argued in this study, human rights and conflict resolution are at times in tension, especially when issues of culpability for past violations are raised. Resolving conflict mainly involves getting parties who have fought each other violently to agree to engage with each other in a non-violent and political manner. Those parties who have resorted to violence are typically those who have seriously violated human rights. It is rare that political actors who are engaged in negotiations to end war have not been involved directly or indirectly in serious violations of human rights. Yet, peace processes must seek to engage these actors and move them towards the political mainstream. It would be difficult, if not impossible, to do so if such actors were told that their willingness to move from violent politics to non-violent

politics would lead, not just to their political irrelevance, but to prison. Most facilitators thus find themselves in the position of having to make excuses for, if not politically to forgive, the perpetrators of human rights violations in order to maintain peace processes. This is true, in particular, prior to the disarmament of armed groups or militaries in peace processes.

It is from these realities that Chapter 6 endeavours to build an understanding and appreciation of the relationship between human rights and conflict management. By providing the link between causes of conflict and denial of basic human needs, it illustrates how unmet needs may lead to violations of human rights, which in turn, may heighten the potential for conflict. According to John Burton, a conflict resolution theorist, basic human needs are universal motivations that are an integral part of human beings, and they relate to both material concerns such as food, clothing and shelter, and non-material concerns such as dignity, respect and affection.[40]

The relationship between pursuing human rights and resolving conflict is usually complementary, and one generally advances the other. This is because violent conflict invariably leads to severe violations of human rights–death, torture, imprisonment, destruction of livelihoods, deterioration of health, to name but only a few. Similarly, violations of human rights, when people are imprisoned, tortured, discriminated against on the basis of class, ethnicity, or religion by the state, and excluded from political participation, can lead people to oppose the state, generating conflict. So, generally speaking, protecting human rights is good for making peace and making peace is generally good for protecting human rights. In sum, human rights can be both a cause and a consequence of violent conflict. Seen in this light, the promotion and protection of human rights should lessen the potential for violent conflict. Human rights, therefore, should be used as a mechanism or framework for conflict management.

As the fields of human rights and conflict resolution draw closer, it is important to do further research on the challenges that atrocities perpetrated during armed conflicts create. This study is an initial contribution to what is hoped will be much wider and deeper discussion about the interrelationship between human rights and conflict resolution, which is not only complex and dynamic, but which also demands an equally dynamic response from those who work to protect human rights and who strive for sustainable peace.

[40] Burton, J, (1990), *Conflict Resolution and Prevention*, London: Macmillan, pp. 37 – 38.

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APPENDICES

Appendix A: Map of the Africa's Great Lakes Region

Appendix B: Selected UN-Mandated Peacekeeping Operations, 1945-2008

LOCATION	NAME OF PEACEKEEPING OPERATION	TIME PERIOD
Middle East	United Nations Truce Supervision Organization (UNTSO)	May 1948-present
India/Pakistan	United Nations Military Observer Group in India and Pakistan (UNMOGIL)	Jan.1949-present
Egypt/Israel (Suez Canal)	First United Nations Emergency Force (UNEF I)	Nov.1956-June 1967
Lebanon	United Nations Observer Group in Lebanon (UNOGIL)	June 1958-Dec.1958
Congo (Zaire)	United Nations Operation in Congo (UNOC)	July 1960-June 1964
West New Guinea	United Nations Security Force in West Guinea (UNSF)	Oct. 1962-April 1963
Yemen	United Nations Yemen Observation Mission (UNYOM)	July 1963-Sept 1964
Cyprus	United Nations Peacekeeping Force in Cyprus (UNFICYP)	March1964-present
Dominican Republic	UN Mission of the Representative of the Secretary General in the Dominican Republic (DOMREP)	May 1965-Oct. 1966
Indian/Pakistan	UN Indian- Pakistan Observation Mission (UNIPOM)	Sept.1965-March1966
Middle East	Second UN Emergency Force (UNEF II)	Oct.1973-July 1979
Syria/Golan Heights	United Nations Disengagement Force (UNDOF)	June 1974-present
Lebanon	United Nations Interim Force in Lebanon (UNFIL)	March 1978-present
Afghanistan/Pakistan	United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP)	May 1988-May 1990
Iran/Iraq	UN Iran-Iraq Military Observe Group (UNIIMOG)	August 1988-Feb. 1991
Angola	UN Angola Verification Mission I, II, III (UNAVEM I-III)	Jan.1989-June 1997
Namibia	UN Transition Assistance Group (UNTAG)	April 1989-March 1990
Central America	UN Observer Group in Central America (ONUCA)	Nov. 1989-Jan. 1992
Iraq-Kuwait	UN Iraq-Kuwait Observer Mission (UNIKOM)	April 1991-Oct.2003
Western Sahara	UN Mission for the Referendum in Western Sahara (MINURSO)	April 1991-present
El Salvador	UN Observer Mission in El Salvador (UNUSAL)	July 1991-April 1995
Cambodia	UN Advance Mission In Cambodia (UNAMIC)	Oct.1991-March 1992
Former Yugoslavia	UN Protection Force (UNPROFOR)	Feb. 1992-March 1995
Cambodia	UN Transactional Authority in Cambodia (UNTAC)	March 1992-Sept. 1993
Somalia	UN Operation in Somalia I, II (UNOSOM I, II)	April 1992-March 1995
Mozambique	UN Operation in Mozambique (UNUMOZ)	Dec. 1992-Dec. 1994
Uganda/Rwanda	UN Observer Mission Uganda-Rwanda (UNOMUR)	June 1993-Sept. 1994
Georgia	UN Observer Mission in Georgia (UNOMIG)	Aug. 1993-present
Liberia	UN Observer Mission in Liberia (UNOMIL)	Sept. 1993-Sept. 1997
Rwanda	UN Assistance Mission for Rwanda (UNAMIR)	Oct. 1993-March 1996
Haiti	UN Mission in Haiti (UNMIH) also UNSMIH, UNTMIH, MINOPUH	Sept. 1993-March 2000
Chad/Libya	UN Aouzou Strip Observer Group (UNASOG)	May 1994-June 1994
Tajikistan	UN Observer Mission in Tajikistan (UNMOT)	Dec. 1994-May 2000
Croatia	UN Confidence Restoration Organisation in Croatia (UNCRO)	May 1995-Jan.1996
Macedonia	UN Preventive Deployment Force (UNPREDEP)	March 1995-Feb. 1999
Bosnia-Herzegovina	UN-Mission in Bosnia and Herzegovina (UNMIBH)	Dec.1995-Dec. 2002
East Slavonia	UN Transitional Administration for Eastern Slavonia (UNTAES)	Jan. 1996-Jan. 1998
Prevlaka (Croatia & FRY)	UN Mission of Observers in Prevlaka (UNMOP)	Jan 1996-Dec.2000
Guatemala	UN Verification Mission in Guatemala (MINUGUA)	Jan.1997- May 1997
Angola	UN Observer Mission in Angola (MONUA)	June 1997-Feb. 1999
Croatia	UN Police Support Group (UNPSGC)	Jan. 1998-Oct.1998
Central	African Republic UN Mission in Central African Republic (MINURCA)	April 1998-Feb. 2000

Sierra Leone	UN Observer Mission in Sierra Leone (UNOMSIL)	July 1998-Oct. 1999
Kosovo	UN Interim Administration Mission in Kosovo (UNMIK)	June 1999-present
Sierra Leone	UN Assistance Mission in Sierra Leone (UNAMSIL)	Oct. 1998-Dec. 1999
East Timor	UN Transitional Administration In East Timor (UNTAET)	Oct. 1999-May 2002
Democratic Rep. of Congo	UN Organization Mission in the Democratic Republic of Congo (MONUC)	Nov.1999-present
Ethiopia/Eritrea	UN Mission in Ethiopia and Eritrea (UNMEE)	July 2000-July 2008
East Timor	UN Mission of Support in East Timor UNMISET)	May 2002-May 2005
Liberia	UN Mission in Liberia (UNMIL)	Sept.2003-present
Côte d'Ivoire	UN Operation in Côte d'Ivoire (UNOCI)	April 2004-present
Haiti	UN Stabilization Mission in Haiti (MINUSTAH)	June 2004-present
Burundi	UN Operation in Burundi (UNOB)	June 2004-Dec.2006
Sudan	UN Mission in the Sudan (UNMIS)	March 2005-present
East Timor	UN Integrated Mission in Timor-Leste (UNMIT)	August 2006-present
Sudan/Darfur	African Union/UN Hybrid Operation in Darfur (UNAMID)	July 2007-present
Central African Republic/Chad	United Nations Mission in the Central African Republic and Chad (MINURCAT)	Sept.2007-present

Source: **(**Adapted partly from Malone, D, pp. 653-674) and http://www.un.org/Depts/dpko/home.shtml

Appendix C: Interview Questions and Questionnaire List

Research Theme: A Human Rights Approach to Conflict Prevention, Management and Resolution in the Africa's Great Lakes Region: A Focus on the DRC Conflict.

QUESTIONNAIRE

A. Respondent's Personal Profile:

1. Name (Optional)…….
2. Age…….
3. Gender…….
4. Organization/Institution……
5. Qualification……
6. Position in Organization/Institution……
7. Duration/Number of years employed…….
8. Address……
9. Telephone…….

B. Data Profile:

In trying to prevent and resolve violent conflicts in the DRC Congo, the UN Security Council established an observer mission, which was later transformed into a peacekeeping mission (known by its French acronym as MONUC).

1. How much (to what extent) do you know the MONUC?
2. For how long did you know it and in what capacity?
3. Which difficulties has the MONUC faced in the course of fulfilling its objectives?
4. The deployment of the force and its role in preventing and resolving the conflict in the DRC has been:-
    a) Very important;
    b) Significant;
    c) Insignificant;
    d) Relatively negligible
5. Would you please give your opinion on the following attributes of the failure or success of the deployment of the force in the DRC:

a) It has achieved its goals and objectives,

b) It assisted in bringing about peace in the DRC,

c) It aggravated (worsened) the conflict situation in the DRC

6. Do you consider the deployment of peace-keeping mission as an effective mechanism for conflict prevention in the Africa's Great Lakes?
7. In your opinion, do you find any achievements of MONUC on its goals and objectives?
8. To what extent has the MONUC contributed to the transition towards peace during the election in the DRC?
9. Was the deployment of the MONUC an appropriate response by the UN to the Congo crisis?

   YES-----, NO-------
10. Was the DRC ready for peacekeeping operations as an approach to conflict prevention?
11. Did the MONUC fill a crucial gap in keeping the peace in the DRC?
12. Was the MONUC strategic in developing a transition process in the DRC?
13. Peace-Keeping forces are characterised by a number of problems, including taking sides in the conflict situations. **YES-----, NO---------**
14. Has the MONUC been impartial in the DRC conflicts? (i.e. Did it take sides in the conflict?)
15. Did Members of the local communities in the DRC appreciate the presence of MONUC in their area? That is, how did they react to its deployment?
16. Is the presence of the MONUC still desirable after the "democratic" election in the DRC?
17. What do you consider to be the serious shortcomings of the MONUC in its operations in the DRC?
18. Do you consider human rights violations as one of the sources of conflicts in the Africa's Great Lakes Region?
19. Do you think there are some specific types of rights constantly being violated in the region with the resultant conflicts? Please mention a few of those rights.
20. Did the presence of the MONUC in the DRC contribute to respect for human rights and freedoms?