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**Legal Analysis on Protection of Children under International Armed Conflict: Democratic Republic of Congo Case**

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**ABSTRACT**

The law of armed conflict is one of the most comprehensively regulated areas of international law, since the first international treaty on the subject, the 1864 convention for the amelioration of condition of the wounded in armies in the field, states have adopted dozens of treaties regulating the conduct of armed conflict, covering the conduct of hostilities, the treatment of civilians and captured combatants permissible weapons and protection of cultural property. A hallmark of nearly all of these treaties and conventions is the obligations of states that became parties to the treaty or convention to inform and educate their both military and civilian regarding the rights and obligations enshrined in the treaties in question.

Children suffered from many challenges during Congo wars, although the war in the DRC officially ended in 2003, internal displacement and movement into neighboring countries seems to continue as thousands of children have been in active combat.<sup>3</sup>

Twelve thousand five hundred girls have been forced to join the rebel forces for support and sexual roles. Sometimes states do not realize their responsibility to protect, to promote, to respect and to fulfill the rights of children as human beings. Therefore, the responsibility of the state, a group or an individual part to the conflict must be established in order to obtain the reparation of those violations. In this paper we will discuss on the applicability of the Geneva Convention on Congo case.

**Keywords:** International humanitarian law, Democratic Republic of Congo, Child rights, Geneva Conventions

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<sup>3</sup> C.Clifford 'Examples of the Use and Abuse of Girl Child Soldiers' (2011) available at <http://children.foreignpolicyblogs.com/?s=DRC> accessed 11 June 2016.

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### **Introduction**

Article 6 para 1&2 of the international convention of the right of the child, States Parties recognize that every child has the inherent right to life and shall ensure to the maximum extent possible the survival and development of the child.

Basing on the article 24 of the international convention on the right of the child, States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Again in the article 27 of the above stated convention, States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Article 28 of the international convention on the right of the child which calls upon the state parties to recognize the child's right to education on the basis of equal opportunity,

Following the article 38 of 1977 protocol 1 to the Geneva convention, States have an obligation to ensure that child under does not take direct part in hostile whether in the war or international civil war. This also emphasized in the article 4 of the additional protocol 2 of the Geneva Convention.

Article 1 of the Convention on the Rights of Child has defined a child as every human being below the age of 18 years and it considers a child as a subject of rights whose involvement in all capacities must be respected according to article 5 and 14 (2) of the Convention on the Rights of Child.<sup>4</sup> Children need special protection and care because they are the most vulnerable in society and they suffer many of the same human rights violations as adults. Certainly in every armed conflict, children are affected in different ways; they are not less affected by events because of their supposed resilience or naivety.<sup>5</sup> Nevertheless, in the situation of armed conflicts, they face many violations of their rights including the right to health care, to education, adequate housing and to life. For instance during armed conflicts, children are seriously affected by what happens

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<sup>4</sup> R .Hodgkin & P .Newe, *Implementation handbook for the Convention on the Rights of the Child* (2007) 1.

<sup>5</sup> S .Singer, *protecting children during armed conflict situations* (May-June 1986).

to adults in their lives: as teachers are targeted and killed, schools close down ; as health care workers are killed or flee, clinics also close their doors or offer only basic services.<sup>6</sup>

For example, the four 1949 Geneva Conventions and their 1977 Additional Protocols include provisions obligating the High Contracting Parties to the Conventions/Protocols to disseminate the Conventions/Protocols as widely as possible in times of both war and peace<sup>7</sup>. In order to fulfill their obligations under this provision, States must ensure that the law of armed conflict is taught to both the military and the civilian populations<sup>8</sup>. As such, courses should be included at universities and at military academies especially to ensure that the military and the wider civilian population are aware of State and individual responsibilities under the law of armed conflict. The idea behind such provisions is that ‘education is a better guarantee of respect for these rules of the law of armed conflict] than any sanction could ever be’. The more aware the civilian and military populations are regarding the law of armed conflict, the more likely they are to abide by it and to prevent violations of the law or to react when violations occur<sup>9</sup>.

## **I. ANALYSIS OF PROTECTION OF CHILDREN IN DRC ARMED CONFLICT**

### **I.1: Lack of special protection of children under International Humanitarian Law**

The main thrust of this research is to examine and evaluate the rules relating to the protection of children among civilians who are perhaps the most vulnerable section of the society that suffers devastating inhuman miseries as a result of armed conflict.

#### **I.1.1. Protection of children**

Here we look at the general protection of children during international armed conflict with it relevant legal protection.

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<sup>6</sup> D. Mazurana & K. Carlson ‘The girl child and armed conflict: Recognizing and addressing grave violations of girls’ human rights’ Florence Italy 25-28 September 2006.

<sup>7</sup> *Geneva Convention* of 12<sup>th</sup> August 1994.

<sup>8</sup> *Ibid*

<sup>9</sup> L. Green, *the contemporary law of armed conflict*, New York, 2008.

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### I.1.1.1. General Protection of Children

Children in war benefit from the general protection of international humanitarian law as civilians or combatants. But there are also special provisions that recognize their particular vulnerability and needs in armed conflicts.<sup>10</sup>

Children are still recruited by national armed forces. Over the past few decades the recruitment of children by armed groups, especially in Africa, became a serious humanitarian problem. In many situations children carry arms and actively take part in the fighting. But they can also be used in supporting roles, such as carrying supplies or providing military intelligence that puts them in great danger. In the event of an international armed conflict, children not taking part in the hostilities are protected by GCIV relative to the protection of civilians and by API. They are covered by the fundamental guarantees that these treaties provide, in particular the right to life, the prohibitions on coercion, corporal punishment, torture, collective punishment and reprisals (Art. 27-34 GCIV and Art. 75 API) and by the rules of API on the conduct of hostilities, including both the principle that a distinction must be made between civilians and combatants and the prohibition on attacks against civilians (Art. 48 and 51).

In the event of non-international armed conflict, children are also covered by the fundamental guarantees for persons not taking direct part in the hostilities (Art. 3 common to the GC and Art. 4 APII). They are further protected by the principle that «the civilian population as such, as well as individual civilians, shall not be the object of attack » (Art. 13 APII).<sup>11</sup>

The 1977 Additional Protocols to the Geneva Conventions were the first international treaties to try and tackle these situations. They prohibit the recruitment and participation in hostilities of children under the age of 15. In international armed conflicts, the first Additional Protocol also requires military recruitment of 15 to 18 year olds to prioritize the oldest.<sup>12</sup>

The 1989 Convention on the rights of the child, which has achieved almost universal ratification, also included the 15 age limit. An optional protocol to this Convention, in May 2000, lifted the age for compulsory recruitment to 18 and called on States to raise the minimum age for

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<sup>10</sup>K.Bonney ,*International humanitarian law note*, pg 14,2015

<sup>11</sup> International convention of red cross, *Legal Protection of Children in Armed Conflict*,geneva,February,2003

<sup>12</sup> *Additional protocol to the Geneva convention*,geneva,1977

voluntary recruitment above 15. It insisted that armed groups should not use children under 18 in any circumstances and called on States to criminalize such practices.<sup>13</sup>

Recognition of a universal age limit of 18 by the international community has still not been achieved. The ICRC and its partners in the Red Cross and Red Crescent Movement are pressing for such a limit through further development of both international and national law.<sup>14</sup>

In the field, the ICRC assists the demobilization of child soldiers and provides psychological and other support to enable their reintroduction to a normal child's life.<sup>15</sup> Children not involved in an armed conflict face a whole range of dangers for which IHL and relevant children's rights instruments provide special protection. They are guaranteed the general protection of non-combatants, but their special needs for medical help, food, shelter and clothing are recognized by the Geneva Conventions and the 1977 Protocols.

Children who are orphaned or separated from their families must be identified, protected and provided with special facilities that ensure their physical safety. Their educational needs must also be provided for. At the same time, all appropriate steps must be taken to facilitate the reunion of families temporarily separated. Children who are detained as the result of an armed conflict must be treated humanely. They should be kept with their family group. If this is not possible, they should be separated from adult prisoners or detainees.

IHL aims to limit the impact of war on children. Regrettably, the very nature of today's conflicts means that even greater efforts need to be made on the ground, by the ICRC and others, to save children from the horrors of war and to help them rebuild their lives once the conflict is over.<sup>16</sup>

#### **I.1.1.2. Protection against Effects of Hostilities**

According to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, in its Article 51 which related to the Protection of the civilian population

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<sup>13</sup> *Convention on the rights of children*, geneva, 1989

<sup>14</sup> *International convention of red cross*, geneva, 2003

<sup>15</sup> *Ibid*

<sup>16</sup> <https://www.icrc.org/eng/war-and-law/protected-persons/children/overview-protected-children.htm> access on 26 june, 2016

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1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - (a) Those which are not directed at a specific military objective;
  - (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
  - (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
  - (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
6. Attacks against the civilian population or civilians by way of reprisals are prohibited.
7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.<sup>17</sup>

### **I.1.2. Participation of Children in the Armed Conflict and lack of evacuation of Children to Demilitarized Zones**

In this case we look at the participation of children during armed conflict and lack of evacuation of children to demilitarized zones

#### **I.1.2.1. Participation of Children in the Armed Conflict**

Based on the information contained in this report, the Coalition to Stop the Use of Child Soldiers believes that more than 120,000 children under 18 years of age are currently participating in armed conflicts across Africa. Some of these children are no more than 7 or 8 years of age. The countries most affected by this problem are: Algeria, Angola, Burundi, Congo-Brazzaville, the Democratic Republic of Congo, Liberia, Rwanda, Sierra Leone, Sudan and Uganda. Furthermore, Ethiopian government forces engaged in an armed conflict against Eritrea, and the clans in Somalia, have both included an unknown, though probably not substantial, number of under-18s in their ranks. In internal armed conflicts in the Comoros, Guinea-Bissau, and Senegal, on the other hand, there has been little or no recorded use of under-18s by government or armed opposition forces, and there are almost certainly no under-15s participating in hostilities in these three situations.<sup>18</sup> It is estimated that 250,000 children are fighting in wars all over the world. Recruited by force or lured by the false promise of an escape from poverty. They are living a life no child should ever lead. Peace Direct funds local peace builders who rescue children from a life of killing. Taking them away from violence, reuniting them with families and giving them back their childhood . 250, 000 children are thought to be involved in armed conflict. Some estimates put the figure as high as 300,000. It is thought that 40% of child soldiers are girls.

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<sup>17</sup> <https://www.icrc.org/ihl/WebART/470-750065>

<sup>18</sup> <http://www.peacedirect.org/child-soldiers?gclid=CPjKs4u4-M0CFVEo0wodO00AtgChild Soldiers>

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Evidence suggests that child soldiers are active in at least 14 countries: Afghanistan, Burma, Central African Republic, Chad, Colombia, DR Congo, India, Iraq, Philippines, Somalia, South Sudan, Sudan, Thailand and Yemen. Children are more easily manipulated than adult fighters. Many children will fight on the frontlines. Not all fight, they may be given jobs such as couriers. Girls are often forced into sexual slavery.

Many are recruited by force stolen from their families and forced to fight. In some cases children are made to kill their relatives so they can never return home. Others join voluntarily, driven by poverty and the hope of a regular meal.

Recruitment of child soldiers by more than two dozen armed groups as well as the Congolese army continues to be of concern. The Democratic Republic of Congo remains on the United States State Department list of countries using child soldiers. The Congolese army has long recruited children, sometimes forcibly, for use as fighters, porters, and escorts. While the numbers of child soldiers recruited by the Congolese army has significantly decreased with only two cases of recruitment documented by the United Nations in 2014 numerous armed groups continue to recruit and use child soldiers and the state still needs to fully implement its plan to end use of child soldiers. Furthermore, some army officers have supported armed.

There are an estimated 3500 children in the ranks of armed groups in DRC, most of them in the two Kivu provinces. The recent cessation of hostilities and consequent peace agreements between the Congolese Government and prominent rebel groups has facilitated increased levels of child demobilization since January, with approximately 478 children being released in the first two months of 2009.<sup>1</sup> However, only 15 were girls.<sup>2</sup> It is of concern that armed groups are reluctant to release the young girls that have been kidnapped and forced to become soldiers' wives against their will. Furthermore, the total number of children in armed groups remains quite high, and there is ongoing child recruitment, especially related to the LRA crisis in Oriental Province.<sup>19</sup>

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<sup>19</sup> Peace Direct funds local peace builders

### **I.1.2.2.Lack of evacuation of Children to Demilitarized Zones**

The Convention (Art.17 of IV Gen. Con.) provides that the parties to the conflict shall Endeavour to conclude local agreements for the removal from besieged or encircled areas of children and maternity cases along with wounded, sick etc. and for the passage of ministers of all religions, medical personnel and medical equipment.<sup>20</sup> The use of words ‘the parties to the conflict shall Endeavour’ in Article 17 may indicate that it is not mandatory to conclude agreements for the removal of persons like children and maternity cases. Belligerents should, nevertheless regard this provision as a very strong recommendation for the safety and survival of the most vulnerable sections of civilian population. It may also be argued that parties to a conflict are morally bound to protect the civilians, who do not take part in hostilities, from the effects of war particularly the weaker sections of civil society, consequently they are bound to conclude agreements in this regard. However the method of evacuation should be arranged by means of local agreements concluded between the belligerents concerned. These agreements should deal with such points as the number of people to be evacuated, means of transport and the route to be taken.

These rules are further elaborated by Art. 78 of Prot I which prescribes that no party to a conflict shall arrange for evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation and that too for compelling reasons of health or medical treatment and safety of children. But in any case, even in these cases, the written consent of parents or legal guardians would be needed.<sup>21</sup> If these persons cannot be found, the written consent of persons, who by law or custom are primarily responsible for the care of the children, will be needed.<sup>22</sup>

Any such evacuation shall be supervised by the Protecting Power in agreement with the parties concerned; namely the party arranging for the evacuation, the party receiving the children and any parties whose nationals are being evacuated. In each case, all parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

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<sup>20</sup> Article 17 of Geneva convention IV

<sup>21</sup> *Article 17 of protocol I*

<sup>22</sup> *ibid*

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### **I.1.3. Abduction of Children in Armed Conflict of DRC and Internal Displacement**

Here we look at the kidnap of children during armed conflict and internal displacement.

#### **I.1.3.1. Abduction of Children in Armed Conflict of DRC**

Recent U.N. reports have estimated that between 15 and 30 percent of all newly recruited combatants in the Congo are children under eighteen years of age, and a substantial number are under twelve years old.<sup>23</sup> The number recruited by the government and by each armed faction is unknown. In the RCD-Goma training camp of Mushaki in Masisi, the U.N. estimates that of the over 3,000 newly recruited young soldiers, more than 60 percent are under the age of eighteen.<sup>24</sup>

According to a resident of Rutshuru, RCD-Goma and RPA soldiers abducted children from his community on or about November 17, 2000. "They come into the houses and take all the young children between thirteen and twenty and say they are to go and be soldiers. They also take young girls. It is done day or night, on operations [house to house] or by taking groups of children," he said.<sup>25</sup>

Both because children and young men have taken to sleeping away from home, as mentioned above, and because recruitment can be more quickly done in public places, soldiers raid for potential recruits at schools, on the roads, and at markets.

In one case reported to Human Rights Watch three students of the Kashofu Institute, aged fifteen and sixteen, from Idjwi Island were picked up on November 29, 2000 as they returned home from school at midday.<sup>26</sup> Soldiers in a motorized canoe with another twenty-six young men on board drew alongside.<sup>27</sup> They took the students by force and threw them into the canoe. In the process, the students threw their schoolbooks to other younger children who were watching the scene. They were taken to the north end of the island where they were put with 170 other boys

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<sup>23</sup>Sixth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2001/128, February 12, 2001, paragraph 65.

<sup>24</sup> Human Rights Watch interview, Goma, December 7, 2000.

<sup>25</sup> Name withheld to protect identity, *written communication to Human Rights Watch*, January, 2001

<sup>26</sup> Human rights watch report, idjwi island, 7 December, 2000

<sup>27</sup> *ibid*

and young men brought earlier from the south of the island.<sup>28</sup> On December 3, 2000 they were taken to Goma on a boat called "Karisimbi." The next day they were taken to Mushaki training camp where there were another 200 young people, including a girl, they said. One of them tried to escape but was caught and severely beaten. The trainers, who were RPA soldiers, stole one of the victim's trousers, shoes, and shirt. The boys managed to escape a short while after in late 2000.<sup>29</sup>

In 2014, armed groups abducted 108 children (65 boys, 43 girls), 55 per cent out of whom were below the age of 15. At least 11 abductees were used as combatants and 22 girls were subjected to sexual slavery. Congolese police, under the direction of General Celestin Kanyama, summarily killed at least 51 youth and forcibly disappeared 33 others during an anti-crime campaign, "Operation Likofi," which lasted from November 2013 to February 2014. Human Rights Watch documented how uniformed police, often wearing masks, dragged *kuluna*, or suspected gang members, from their homes at night and executed them. The police shot and killed the unarmed young men and boys outside their homes, in the open markets where they slept or worked, and in nearby fields or empty lots. Many others were taken without warrants to unknown locations and forcibly disappeared.

### **I.1.3.2. Internal Displacement**

**Displacement:** Fighting between armed groups both state and non-state in eastern DRC, continues to target civilian populations resulting in killings, lootings, and mass displacements. The security situation continues to cause large-scale humanitarian needs, in particular for the more than 2 million displaced civilians<sup>30</sup> and their host communities. Since April 2012, it is estimated that fighting has caused tens of thousands of new displacements, totaling close to 300,000 since November<sup>31</sup>. Fighting in Masisi and Rutshuru continue to cause new displacements daily. As many as 8,200 refugees have crossed the border into Rwanda<sup>32</sup>. In 2012

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<sup>28</sup> *ibid*

<sup>29</sup> *ibid*

<sup>30</sup> UNHCR, Press Release, 10 June 2016, Eastern DR Congo displacement "disastrous": UN High Commissioner for Refugees Guterres

<sup>31</sup> UNHCR, Press Release, 16th May 2012, Eastern DR Congo displacement "disastrous": UN High Commissioner for Refugees Guterres

<sup>32</sup> UNHCR, Press Release, 10 June 2016, Eastern DR Congo displacement "disastrous": UN High Commissioner for Refugees Guterres

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the Humanitarian Action Plan only aimed to cover the needs of 1.9 million displaced persons, 920,000 returned IDPs and 154,000 host families<sup>33</sup>, and with more than this number currently displaced.

### **I.1.4. Non respect of protection from sexual and gender based violence of children and recruitment into armed forces**

Here we look at how the protection from sexual and gender based violence of children and recruitment into armed conflict are not respected.

#### **I.1.4.1. Lack of protection from Sexual and Gender Based Violence**

Sexual and gender-based violence has become widespread in the Congo during the two successive wars in the 1990s.<sup>34</sup> Sexual violence continues throughout Congo today, but is particularly endemic in the east.<sup>35</sup> The military operations since early 2009 have led to a further dramatic increase in gender based assaults in conflict areas.<sup>36</sup> Since the conflicting groups attack and rape civilians during military operations, waging a proxy war more often than battling each other directly, some have argued that sexual violence is being used as a weapon of war in Eastern DRC.<sup>37</sup> Even though military offensives have slowed down this year, extensive sexual violence persists due to the region's continued high insecurity.<sup>38</sup>

Sexual and gender-based violence in Eastern DRC is also linked to the exploitation of natural resources. In illegally controlling mining activities, military elements and rebel groups commit serious abuses against the population, including murder and rape.<sup>39</sup> The revenues from these mining activities have also incentivized different armed groups and military units to create a

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<sup>33</sup> *Plan d'Action Humanitaire, Democratic Republic of Congo, United Nations, 2012*

<sup>34</sup> Harvard Humanitarian Initiative, *Characterizing Sexual Violence in the Democratic Republic of Congo*, August 2009, p. 22; DRC 1993-2003, UN Mapping Report, August 2010, par. 531; Human Rights Watch, *Soldiers who Rape, Commanders who Condone*, July 2009, p. 15.

<sup>35</sup> In 2010, there were more than 2500 incidents of sexual violence in both North and South Kivu only, while in most other provinces their number was below 1000: statistics on sexual violence incidents in the DRC in 2010, UNFPA; Human Rights Watch, *Soldiers who Rape, Commanders who Condone*, July 2009, p. 15.

<sup>36</sup> Human Rights Watch, *You Will Be Punished*, December 2009, p. 143; Harvard Humanitarian Initiative, *Now the World is Without Me*, April 2010, p. 33.

<sup>37</sup> Harvard Humanitarian Initiative, *Now the World is Without Me*, April 2010, pp. 37-38; Human Rights Watch, *You Will Be Punished*, December 2009, pp. 53 and 79. No systematic research exists that shows that sexual violence is used as a weapon of war—as a deliberate, systematic military strategy—in Eastern DRC. However, most agree that sexual violence has strategic uses, such as retaliation, for armed groups.

<sup>38</sup> IPIS interview, UNFPA, Goma, 7 October 2011.

<sup>39</sup> Global Witness, *Congo's Minerals Trade in the Balance*, May 2011, pp. 8-9.

volatile environment, through human rights abuses, that ensures the continuation of the status quo. While sexual violence in Eastern DRC is pervasive, precise numbers of its extent are unfortunately rare. Existing data tends to be under-reported because of the insecurity and the remoteness of many places, the inadequate health care and weak justice systems, and the sensitivity of the issue and the associated stigma.<sup>40</sup> Nevertheless, some estimates have been put forward. The United Nations Population Fund (UNFPA) concluded that more than 8000 cases of sexual violence took place yearly in 2009 and 2010 in Eastern DRC,<sup>41</sup> counting 5485 cases in North Kivu and 2928 in South Kivu last year.<sup>42</sup> Numbers for this year are in the same range for both provinces, with 1339 cases in South Kivu the first semester alone.<sup>43</sup>

Wartime sexual violence in Eastern DRC is characterized by its worst forms. Sexual assaults include gang rape,<sup>44</sup> which represents the majority of all cases, rape in public or in presence of family members, rape with instruments, genital mutilation, and forced incest.<sup>45</sup> Gang rape is predominantly perpetrated by men wearing military uniforms.<sup>46</sup> The majority of perpetrators are armed men or men in some kind of military uniform—this includes armed men identified or unidentified with a specific armed group or the military.<sup>47</sup> According to UNFPA, last year, 44% of perpetrators were civilians and 49% armed men in North Kivu. In South Kivu, civilians were slightly less with 33% of all actors.<sup>48</sup> The Harvard Humanitarian Initiative concluded similarly that 38% of sexual assaults were committed by civilians and 46% by armed combatants in South Kivu in 2008.<sup>49</sup> It is widely believed that ex-combatants make up most of these civilians who

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<sup>40</sup> Harvard Humanitarian Initiative, *Characterizing Sexual Violence in the Democratic Republic of Congo*, August 2009, p. 7; NYT, *Congo study sets estimate for rapes much higher*, 11 May 2011.

<sup>41</sup> More than 8,000 women raped last year by fighters in Eastern DRC, UN News Center, 9 February 2011.

<sup>42</sup> Statistics on sexual violence incidents in North Kivu in 2010, UNFPA.

<sup>43</sup> Ibid; IPIS interview, UNFPA, Goma, 7 October 2011.

<sup>44</sup> Gang rape is defined as by more than one perpetrator.

<sup>45</sup> Harvard Humanitarian Initiative, *Characterizing Sexual Violence in the Democratic Republic of Congo*, August 2009, p. 6; Harvard Humanitarian Initiative, *Now the World is Without Me*, April 2010, pp. 12 and 16; International Alert, *War is Not Yet Over*, November 2010, p. 12.

<sup>46</sup> Harvard Humanitarian Initiative, *Characterizing Sexual Violence in the Democratic Republic of Congo*, August 2009, p. 16.

<sup>47</sup> Ibid; International Alert, *War is Not Yet Over*, November 2010, p. 22; Harvard Humanitarian Initiative, *Now the World is Without Me*, April 2010, pp. 12 and 14; IPIS interview, Centre Olame, Bukavu, 10 October 2011.

<sup>48</sup> Statistics on sexual violence incidents in North Kivu in 2010, UNFPA.

<sup>49</sup> Harvard Humanitarian Initiative, *Now the World is Without Me*, April 2010, p. 19.

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have reintegrated into civilian life without proper rehabilitation measures and who thus continue to have a wartime mentality and conduct.<sup>50</sup>

Sexual violence is often accompanied by other acts of violence. Gang rape and rape in public are frequently committed as whole villages are attacked and looted.<sup>51</sup> Most sexual assaults happen after dusk in the victim's own home, followed by attacks in the forest and fields.<sup>52</sup> Women and girls of all ages,<sup>53</sup> civil status, and ethnic groups are victims of sexual violence.<sup>54</sup> Violent sexual assaults have obvious health and psychological consequences and often result in stigmatization and rejection of the victims by their families and communities.

### **I.1.4.2. Recruitment into armed forces**

The security situation in the eastern Democratic Republic of the Congo (Ituri, North Kivu and Tanganyika) remained volatile in 2015 and was marked by military operations by the Armed Forces of the Democratic Republic of the Congo (Forces armées de la République démocratiques du Congo FARDC) against the Forces démocratiques de libération du Rwanda (FDLR), the Allied Democratic Forces (ADF), the Forces de résistance patriotiques en Ituri (FRPI) and other armed groups. The situation also deteriorated owing to the activities of armed groups and intercommoned clashes. The United Nations verified 2,549 violations against children, a significant increase compared with 2014. Nearly 40 per cent were attributed to FDLR. Children took the opportunity of military operations to escape from armed groups, resulting in a spike in the number of separated children.

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<sup>50</sup>IPIS interview, UNFPA, Goma, 7 October 2011; UN Human Rights Council, Mission to the DRC, 28 February 2008, par. 15; International Alert, *War is Not Yet Over*, November 2010, p. 21; Human Rights Watch, *Soldiers who Rape, Commanders who Condone*, July 2009, p. 15.

<sup>51</sup> Harvard Humanitarian Initiative, *Characterizing Sexual Violence in the Democratic Republic of Congo*, August 2009, p. 16.

<sup>52</sup> Harvard Humanitarian Initiative, *Now the World is Without Me*, April 2010, pp. 12 and 35.

<sup>53</sup> E.g. statistics for North Kivu in 2010: 5% of victims were younger than 10 years, 30% between 10 and 17 years, 22% between 18 and 24 years, 37% between 25 and 49, and 5% were older than 50 years (and 1% was not determined). 1.5% of all counted victims were male. Statistics on sexual violence incidents in North Kivu in 2010, UNFPA. It has to be noted, however, that it is widely believed that sexual violence against men, including rape, is under-reported. See IRIN, *Rape as a "weapon of war" against men*, 13 October 2011.

<sup>54</sup> Harvard Humanitarian Initiative, *Characterizing Sexual Violence in the Democratic Republic of Congo*, August 2009, p. 6; Harvard Humanitarian Initiative, *Now the World is Without Me*, April 2010, pp. 16 and 35.

The United Nations verified the new recruitment of 488 children (26 girls), of whom 30 per cent were under 15 years of age when recruited. This is more than twice the number of documented cases in 2014. Of the recruitment and use, 89 per cent occurred in North Kivu, and almost half of the children were recruited by FDLR (219), followed by Raia Mutomboki (89), Nyatura (69) and other groups (111). In July, 10 boys who had been recruited in 2013 and 2014 were separated from FARDC and reported that they had participated in military operations in North Kivu in the year of their recruitment. The United Nations engaged with FARDC, which indicated that it had suspended the suspected commanding officers and initiated an investigation, which was continuing at the time of writing (March 2016).<sup>55</sup>

Despite the overall release of many of 30,000 child soldiers since the height of the armed conflict, many children continue to be recruited to the ranks of FARDC units, particularly those former CNDP units and to the ranks of non-state armed groups<sup>56</sup>. Since the defections began, the CNDP have allegedly abducted at least 149 boys and young men into its forces. At least 7 boys died during these abductions<sup>57</sup>. The Child Protection Code prohibits the recruitment and use of children by armed forces, and there has been some progress made by the FARDC in the release of child soldiers from their ranks, but this has mostly come from those units involved in joint operations with MONUSCO forces. Far too many children still remain in the uniform. Progress has also been made to rehabilitate and reintegrate the tens of thousands of child soldiers previously involved with non-state armed groups, but these have left too many ex child soldiers with little options for alternative livelihoods, and have traditionally forgotten the numerous girl children. These programs have been funded and implemented mostly through international partners. There have been prosecutions against perpetrators of these crimes, but more is needed to ensure the systematic implementation of this law at all levels of authority.

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<sup>55</sup> United Nations, *Report of the Secretary-General on children and armed conflict (A/70/836-S/2016/360)*, New York, 20 May, 2016.

<sup>56</sup> Child Soldiers Global Report, DRC 2004

<sup>57</sup> Human Rights Watch, <http://www.hrw.org/news/2012/05/15/dr-congo-bosco-ntaganda-recruits-children-force> accessed on 15th June 2016

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### **I.1.5. Violation of Children ‘Rights by Non Combatants in DRC and Starvation of Children in Armed Conflict of DRC**

Here we look at how the violation of children’s right is violated by non combatant in DRC and how the Children are affected by hunger during armed conflict in DRC.

#### **I.1.5.1. Violation of Children ‘Rights by Non Combatants in DRC**

Children in DRC have faced so many violations by non combatants especially in as far as their neglect and abuse in concerned. Children have suffered physical or mental violence, injury or abuse, neglect on negligent treatment, maltreatments or exploitation including sexual abuse while in care parents legal guardians or any other persons who has the care of the child.<sup>58</sup>

As the preceding sections on both FARDC and rebel group activity indicate, civilians in the DRC have been subjected to an onslaught of human rights abuses over the past two decades. According to the Enough Project, rape as a weapon of war in the DRC “exists on a scale seen nowhere else in the world.” Accordingly, Special Representative Wallström declared the DRC the “rape capital of the world” in 2010, a statement which was supported by the UN’s estimation that 15,000 women had been raped in eastern Congo in 2009 alone.<sup>59</sup> This claim was further substantiated by the increase in reported sexual violence cases from 4,689 in 2011 to 7,075 in 2012, according to UN data.<sup>60</sup>

In its 2008 Global Report, the Coalition to Stop the Use of Child Soldiers estimated that 7,000 child soldiers remained in government forces and armed groups. Indeed, children have often been recruited from refugee camps and used as combatants, sexual slaves, guards, and porters. In 2012, the UN accused the M23 rebels in particular of recruiting child soldiers. Though the UN subsequently announced the release of more than 500 child soldiers in eastern DRC provinces in September 2013, approximately 1,500 children remained mobilized in the areas in question.<sup>61</sup>

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<sup>58</sup> International relations, www.house.gov. accessed 20 july,2016

<sup>59</sup>Special Representative Wallström declaration ,2012

<sup>60</sup> UNITED NATION report, New York,2001

<sup>61</sup> *Global report of 2008*

Alarming, the Internal Displacement Monitoring Center stated that 2.75 million total Congolese have been displaced and 509,000 more have become refugees as of January 2013. Based on previous calculations of the death rate and toll in the DRC, Caritas International also estimates that some 6.9 million Congolese have now died since the outbreak of conflict in 1998.<sup>62</sup>

### **I.1.5.2. Starvation of Children in Armed Conflict of DRC**

The Democratic Republic of Congo continues to suffer the consequences of armed conflict, massive population displacement and a persistent economic crisis. After years of weak governance, corruption and loss of state authority, the Government faces huge challenges in alleviating poverty and in preventing and responding to humanitarian emergencies. In 2012, DRC ranked last in the United Nations Development Program's Human Development Index.

Since the 2011 presidential election, the security situation has dramatically deteriorated in the east of the country, with rebel activity widespread in much of the region. Although the country has great agricultural potential and plentiful resources, more than 70 percent of its population remains poor. An estimated 6.4 million people are in acute and livelihood food security crisis as of June 2013. Since 2009, some 2.6 million people have been displaced, predominantly in the east.<sup>63</sup>

In 2012, some 10 million people received humanitarian assistance, of which 3.6 million benefited from WFP's food assistance.<sup>64</sup> With close to 970,000 internally displaced people, North Kivu remains the most affected province.<sup>65</sup> South Kivu hosts more than 800,000 displaced people.<sup>66</sup> Maniema province has also been affected by population's movement due to conflict. The numbers of displaced in Maniema had crossed the 200,000 mark bar by the end of June 2013 while in Katanga, activity by armed groups led to the displacement of some 370,000 people.

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<sup>62</sup> United Nation for High Commission Refugee report, on displaced people, new York,2012

<sup>63</sup>United Nation for High Commission Refugee report, on displaced people, new York,2012

<sup>64</sup> United Nation for High Commission Refugee report, on displaced people, new York,2012

<sup>65</sup> United Nation for High Commission Refugee report, on displaced people, new York,2012

<sup>66</sup> *ibid*

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The overall food security situation has deteriorated in the eastern provinces. The latest Emergency Food Security Assessment of April 2012 showed that 19 percent of the population of North Kivu is severely food insecure while 42 percent is moderately food insecure, translating into 4.4 million people affected by food insecurity. The situation has clearly deteriorated since 2012.. Most critically for the medium term, the recent surge in violence in North Kivu has coincided with both the harvest and subsequent planting seasons. Acute malnutrition is a serious public health problem in the provinces affected by armed conflict (North Kivu, South Kivu, Maniema, Katanga and Orientale) as well as in the more peaceful provinces (Kasai Oriental, Kasai occidental, Equateur, Bandundu) of the DRC.

Several nutritional surveys recently conducted showed global acute malnutrition (GAM) rates that exceed the serious threshold of 10% in more than half of the DRC's territories. Some areas show GAM rates above 15% or critical threshold for nutritional interventions. Chronic malnutrition rates (stunting) among children aged 6-59 months stands at 43.4%, a level rated as 'critical' under WHO thresholds.

In 2010, net school enrolment in DRC was low (75 percent) with significant disparities between provinces, and between urban and rural areas: 29 percent of children and adolescents (5 to 17 years) are out of school, of which 53 percent are girls. Displacement areas also have the highest percentage of out-of-school children, the highest being in North Kivu with 44 percent.

Social indicators are distressing: life expectancy is at 45 years, infant mortality remains as high as 158 per 1000 children under the age of one. Almost half of adolescent girls have at least one child. Almost half the population has no access to drinking water and only 14 percent of households have adequate sanitation. The HIV rate in 2012 was 2.7 percent, translating into 1 million people living with the virus.<sup>67</sup>

**II. STATE RESPONSIBILITY ON THE VIOLATION OF THE RIGHTS OF THE CHILD AND MEASURES TO BE TAKEN**

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<sup>67</sup> WFP on <https://www.wfp.org/countries/congo-democratic-republic-of> access on 20 July, 2016

According to International humanitarian Law and International human rights law, all states have the obligation to respect, protect and fulfill the human rights of all persons (adults and children) without discrimination of any kind, including on the bases of the age, gender, ethnic origin, birth or status.<sup>68</sup> Children rights are also considered to be human rights and must be respected, protected, promoted and fulfilled as adult's rights.

In IHL and IHRL, all state parties must distinguish military forces and civilians or those persons who are not taking part any more in a conflict; they must not deliberately attack civilians or their properties and they have to protect them during armed conflict. However, individuals who commit serious violations of the law are responsible for those violations, including those who participate in or order war crimes, or are culpable as a matter of command responsibility.

The objective of this chapter is to establish the responsibility of the DRC as a state on the violation of the rights of the child during the period of conflict. Furthermore, the responsibility on the violation of children's rights is not only a matter of state parties but also non-state actors such as rebels; for instance, Germain Katanga, Mathieu Ngudjolo Chui.

This chapter also illustrates the fact that children's victims can bring their complaints particularly in Africa's system against their offenders in order to obtain reparation of the grave violations and it also gives a multidisciplinary approach regarding the remedies of those violations.

### **II.1.State responsibility and individual responsibility**

The state often plays an important role in the commission of crimes against humanity and war crimes, given the systematic and massive nature of such crimes. In addition, individuals prosecuted for crimes against humanity or war crimes are often agents, state officials or persons acting on its behalf.<sup>69</sup>

The violation of IHL implies 'system-criminality' or 'collective wrongdoing'.<sup>70</sup> Almost by nature genocide, crimes against humanity and crimes due in armed conflict happen on a mass-

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<sup>68</sup> *International humanitarian law notes pg 10*

<sup>69</sup> *Commission of crimes against humanity and war crimes*

<sup>70</sup> *The violation of the rights of child*

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scale or in the context of grave violence such as the six grave violations affecting children established by the UN Security Council in its resolution 1612 of 2005.<sup>71</sup> By this fact, the case of the violation of the rights of the DRC's children implies in the same way: 'system-criminal'. This system invariably means a plurality of offenders, particularly in carrying out the crimes. In this chapter emphasis is to direct towards protection of children in international instruments as well as humanitarian law and HRL.

### **II.1.1. Responsibility of DRC as a state**

States and armed groups are the duty-bearers under IHRL and they are bound by the norms of IHL which create obligation for them and require for each state the primary responsibility to take care of the victims of natural or man-made emergencies in its territory.<sup>72</sup> It is important to emphasize that the responsibility of the state does not have a penal character even where its agents are responsible for criminal acts.

All human rights require state obligations to respect, to protect and to fulfil them for the interest of its citizen.<sup>73</sup> The fundamental principle set in international law on state responsibility provides that any state which violates its international obligations must be held accountable of its acts; in order words, any state which does not respect international obligations is responsible and must directly stop its actions and make reparations to the injured.<sup>74</sup> In case of violation, the state has the responsibility to ensure full reparation for the injury caused, including both material and moral damages.

Article 1 of all the GC, which constitutes the basic keys in the responsibilities of the state under international law, provides that states are responsible to respect and ensure respect of the Conventions in all circumstances.<sup>75</sup>

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<sup>71</sup> *UN security council resolution 1612*, new York, 2005

<sup>72</sup> *the norms of International Humanitarian Law*

<sup>73</sup> International convention on human rights law

<sup>74</sup> Diakonia 'what are the responsibilities of a state under international law?' available at [www.diakonia.se/sa/node.asp?node=1857](http://www.diakonia.se/sa/node.asp?node=1857) (accessed 6July 2016).

<sup>75</sup> Article 1 of Geneva convention, *the basic keys in the responsibilities of the state under international law*, geneva, 1989

According to the rights of children, the obligation of the state to respect implies that state must not needlessly interfere in the private life of expecting parents, infants, young children and their guardians according to article 5 and 6 of the CRC.<sup>76</sup>

The obligation to respect requires state not to take any measures that would result in preventing children from having access to food, even in armed conflict, it is reinforced by IHL norms that the use of starvation of civilians as method of warfare is prohibited.<sup>77</sup> However, the responsibility to protect requires the state to intervene in the private life and family life expecting parents, young children when their security are at the serious risk for instance in time of armed conflict based on article 19 of the CRC.<sup>78</sup>

The responsibility to fulfil includes an obligation to facilitate which requires, for instance for the right to food, the state to adopt measures planned for improving rights-holders' access to and utilization of resources and means to ensure their livelihood and in period of war.<sup>79</sup> The state has the obligation to allow free passage to humanitarian relief and to facilitate the work of humanitarian agencies and the distributions of food aid (set in article 23 & 59(3) of the fourth GC, article 70(2) of the API and article 18 of the APII) and an obligation to provide which demand the state, in case of the right to food, to provide food whenever an individual or group is unable to do it for the enjoyment of their right.<sup>80</sup>

The obligation to provide and to facilitate education for the development of children at primary and secondary level (article 28 and 29 of the CRC) provide support services including therapy (counseling and psychotherapy) especially for those who are victims of the violations of their rights such as exploitation, sexual abuses, child recruited into the armed forces based on article 18(2) and 19(2) of the CRC.<sup>81</sup>

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<sup>76</sup> Article 5,6 of Convention on the rights of children, *democratic republic Congo responsibility*, geneva, 1989

<sup>77</sup> *International Humanitarian Law norms*

<sup>78</sup> Article 19 of convention on the right of children

<sup>79</sup> article 19 of the Convention on the rights of children, *drc responsibility* ,geneva, 1989

<sup>80</sup> article 70(2) of the Additional Protocol I and article 18 of the Additional Protocol II, the obligation of the state, geneva, 1977

<sup>81</sup> article 18(2) and 19(2) of the CRC, *the violation of the rights of child*, geneva, 1989

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The UN body has expressed grave concern in its concluding observations on the state of children's rights in Congo released on the 30th January 2009 that the Congolese government, through its military forces assume the direct responsibility for those violations and that the government has failed to protect children from rights violations by other non-state armed forces or rebel groups.<sup>82</sup> Despite the responsibility of the DRC during post armed conflict, there is also the individual criminal responsibility.

### II.1.2. the individual responsibility

The principle of the criminal individual responsibility was established for the first time in Nuremberg and Tokyo. It was affirmed later in national proceedings and it has been approved in the criminal law system of the *ad hoc* Tribunals and the ICC.<sup>83</sup> However, it was only in article 6 of the charter of the Nuremberg Tribunal and the judgment itself that set the development of the principle of individual criminal responsibility off in international law.<sup>84</sup>

The mainly recent provision on the individual criminal responsibility in international law is in article 25(3) of the ICC which indicates the conclusion of a process of differentiation in criminal participation mode since Nuremberg codified in law.<sup>85</sup>

The concept of individual criminal responsibility and the crimes as set in the ICC Statute are not defined in its constitutive elements. The only provision set up in the ICC structure defines the concept of individual criminal responsibilities in article 30 on the mental element which provides that a person can be criminally responsible and at the same time legally responsible for a crime within a jurisdiction only if the material elements are committed intentionally and with knowledge.<sup>86</sup>

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<sup>82</sup> J Kippenberg 'DR Congo: rights panel condemns abuses against children' available at [www.hrw.org/news/2009/02/04/dr-congo-rights-panels-condemns-abuses-against-children](http://www.hrw.org/news/2009/02/04/dr-congo-rights-panels-condemns-abuses-against-children) (accessed 6 July 2016).

<sup>83</sup> the *ad hoc* Tribunals and the International Criminal Court

<sup>84</sup> in article 6 of the *charter of the Nuremberg Tribunal*

<sup>85</sup> article 25(3) of the *International Criminal Court statute*,

<sup>86</sup> Article 30 of the Rome Statute of the ICC: '1. unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article,

However, it is a challenge to find recourse in others instruments which shape the concept of individual criminal responsibility outside the ICC Statute.<sup>87</sup> Therefore, the existence of individual responsibility depends on culpability and requires proof of *personal* guilt connected to one's *own* conduct.

These elements 'personal and own' allow the establishing of the difference between individual responsibility and plurality of responsibility.<sup>88</sup> Moreover, the principle of criminal responsibility is extended to all persons who contribute to the commission of crimes.<sup>89</sup>

The provision on individual criminal responsibility laid in article 25(3) of the ICC Statute requires some conditions to consider a person as criminally responsible and liable for punishment for a crime within the jurisdiction of the Court. For example, when a person perpetrates a crime recognized by the Statute, whether as an individual or jointly with another or through another person, regardless whether that other person is criminally responsible; orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.<sup>90</sup>

The grave violations of the Geneva law are described as 'war crimes' which generate individual criminal responsibility.<sup>91</sup> The grave breaches system require every state party to '(...) enact any legislation necessary to provide effective penal sanction for persons *committing or ordering to be committed* any of the grave breaches and the search for those persons in order to either bring them before its own courts or hand them over for trial to another state party.<sup>92</sup>

Therefore, this provision provides firstly while relying on national jurisdiction, the GC and the API implemented a system of individual criminal responsibility for international crimes and secondly, Geneva law is not restricted to those who perpetrate war crimes but is also for those who ordered them.<sup>93</sup>

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"knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'

<sup>87</sup> *the concept of individual criminal responsibility outside the ICC Statute*

<sup>88</sup> *individual responsibility and plurality of responsibility*

<sup>89</sup> *the principle of criminal responsibility*

<sup>90</sup> Article 25(3) of the Rome Statute.

<sup>91</sup> *The grave violations of the Geneva law*

<sup>92</sup> *The grave violations of the Geneva law*

<sup>93</sup> Geneva convention on the right of children and additional protocol ,Geneva 1977

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International crimes are almost committed not only by a person but also by a group of persons, a band and a clique. In the DRC especially in Ituri, armed groups have committed war crimes, crimes against humanity and other violations of obligations set in IHL and IHRL.<sup>94</sup> All those armed groups have committed grave violations of the rights of children such as the conscription of children, even younger than seven years old, in military services and exposing them to the risks and strictness of military operations. Germain Katanga and Mathieu Ngudjolo Chui who are Congolese militia leaders on trial at the ICC for seven counts of war crimes and three counts of crimes against humanity allegedly committed these crimes in a joint attack in Congo from January to March 2003.<sup>95</sup>

Germain Katanga reportedly is the leader of the FRPI (*Force de résistance patriotiques en Ituri*), Ngudjolo allegedly became the leader of the ethnic Lendu FNI (FNI (*Front des nationalistes et intégrationnistes*), which joined with Katanga's FPRI against the ethnic Hema whose Thomas Lubanga is a member and leader of the Union of Congolese Patriots (UPC).<sup>96</sup>

In the case of the *Prosecutor v. Germain Katanga and Mathieu Chui*,<sup>97</sup> the Prosecution alleges Katanga and Ngudjolo to be responsible for having committed (jointly with others) or ordered crimes against humanity. Those crimes are the killings according to article 7(1) (a) of the Rome Statute with guns and machetes with the intent to kill civilians including children at least 200 in Bogoro village in Ituri during and in the aftermath of the February 24, 2003 attack.<sup>98</sup>

Based on article 7(1)(g) of the Rome Statute, the prosecution alleges that they are responsible for sexual slavery, rape of girls and women that they abducted from villages or areas surrounding the camps for the purpose of using them as their "wives"; forced and threatened women and/or girls to engage in sexual intercourse with combatants and to serve as sexual slaves for combatants and commanders alike and captured and imprisoned women and/or girls to work in a

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<sup>94</sup> International Humanitarian Law and International Human Right Law

<sup>95</sup> Open Society Justice Initiative *'the trial of Germain Katanga & Mathieu Ngudjolo Chui: trial background who are Germain Katanga & Mathieu Ngudjolo Chui?* Available at [www.katangatrial.org/trial-background/who-are-katanga-and-ngudjolo-chui/](http://www.katangatrial.org/trial-background/who-are-katanga-and-ngudjolo-chui/) (accessed 10 June 2016).

<sup>96</sup> Germain Katanga reportedly is the leader of the FRPI (*Force de résistance patriotique en Ituri*)

<sup>97</sup> The *Prosecutor v. Germain Katanga and Mathieu Chui* available at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/> (accessed 17 June 2016).

<sup>98</sup> article 7(1)(a) of the *Rome Statute*

military camp servicing the soldiers before, during and after the February 2003 in Bogoro.<sup>99</sup> They are also responsible for the recruitment and the use of children under the age of 15 to take part in the hostilities within their militias according to article 8(2) (b) (xxvi) of the Rome Statute.<sup>100</sup>

In the case of the *Prosecutor v. Thomas Lubanga Dyilo*,<sup>101</sup> the ICC, in its first judgment on the 14 March 2012, has found Thomas Lubanga the president of the militia group known as the UPC/FPLC responsible for conscripting, enlisting and using children in armed conflict according to the violation of the Rome Statute article 8(2)(b)(xxvi).<sup>102</sup>

The state of DRC has failed to respect the rights of children and to protect them against these violations committed by the leaders of militia in the country especially in the east during the period of armed conflict. Significantly, the reparations of the violations of the rights of the victims must be established in order to avoid this kind of crimes or to prevent the realization of these violations in the future.

## **II.2.Measures to be taken in restoring the rights of children**

### **II.2.1. Reparation of these grave violations and the multidisciplinary approach**

The term reparation refers sometimes to money damages. However, it refers generally to the variety of remedies available for non-respect of an international obligation.<sup>103</sup> The reparation of violation of international obligations may foresee restitution, for instance the re-establishment of the violated right; compensation for damages suffered in the past, example in armed conflict and assurance against future breach of international obligation, an approach of a remedial justice and deterrence.<sup>104</sup>

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<sup>99</sup> article 7(1)(g) of the *Rome Statute*

<sup>100</sup> article 8(2)(b)(xxvi) of the *Rome Statute*

<sup>101</sup> *The Prosecutor v. Thomas Lubanga Dyilo* available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed 6 July 2016).

<sup>102</sup> *the Rome Statute* article 8(2)(b)(xxvi)

<sup>103</sup> *The violation of international obligation*

<sup>104</sup> *The violation of international obligation*

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Reparation, inter alia, refer to the various means by which a state may repair the breach of international law for which it is responsible; that reparation may include individual physical and psychological injury from human rights violations.<sup>105</sup>

However in human rights instruments, the term reparation refers the state providing successful remedies for the violation of these rights.<sup>106</sup> Therefore, these remedies can be procedural by the fact that they are the process by which all claims of human rights violations are heard and decided by courts, administrative authorities or other competent bodies and substantive by the fact that they constitute the result of the proceedings.<sup>107</sup> The necessity of improving the law about the protection and the promotion of human rights is the result of the atrocities which occurred during the Second World War.<sup>108</sup> Those promotion and protection are woven throughout the United Nations Charter which the preamble notices that all member states to the charter 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.

In fact, one of the fundamental objectives of the UN is the achievement of international co-operation in promoting and encouraging respect of human rights and fundamental freedoms; and for the achievement of these purposes, the UN imposes obligations to the organizations and all member states which must be respected.<sup>109</sup>

However, in cases of grave violations recognized internationally, the law of state responsibility is applicable because such an act implies that the state has failed to respect an international obligation. Therefore, the law of state responsibility demand a state to make reparations when it has failed to achieve its obligations regarding the rights of its citizens through an act or an omission.<sup>110</sup>

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<sup>105</sup> *Human rights violation*

<sup>106</sup> *human rights instruments*

<sup>107</sup> *human rights violations*

<sup>108</sup> *the protection and the promotion of human rights*

<sup>109</sup> *United Nation charter*

<sup>110</sup> *the law of state responsibility*

According to the Rome Statute, its provisions governing reparations to victims do not specifically mention if a state may be ordered to compensate for injuries caused by its agents, which may be a question to be settled by the court in the future.<sup>111</sup> IHRL has elaborated procedures which allow all victims of human rights violations without discrimination to bring complaints immediately against the offending state.<sup>112</sup>

### **II.2.1.1. Reparation of the grave violations**

The English Magna Carta states: ‘*Nulli vendemus, nulli negabimus, auto differemus, rectum auto justicam*’ (no one will be sold, no one will be refused or deferred, rights or justice) and Coke also states that ‘every Subject... for injury done to him in *bonis, terris, vel persona*... may take his remedy by the course of the law, and have justice and the right for the injury done to him freely without sale, fully without any denial, and speedily without delay.’<sup>113</sup>

The reparation must not only be for adults but also for children as human beings and victims of the violations of their rights committed by individuals such as German Katanga, Thomas Lubanga during the hostilities which occurred in the DRC and they must immediately obtain reparation of these violations as subject of human rights.

Therefore, the ACHPR has established an African Commission on Human and Peoples’ Rights whose functions are to promote and to ensure the protection of human and peoples, rights in Africa article 30 of the Article 45(1) spells mandate of the African Commission which is to promote human and peoples’ rights through different activities such as conference, seminars and motivating national and local institutions regarding human rights.<sup>114</sup>

The best known case brought before the African Commission is *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*.<sup>115</sup> The communication alleges the violations of

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<sup>111</sup> *Rome Statute*, rome, 1989

<sup>112</sup> International human right law

<sup>113</sup> The English Magna Carta states: ‘*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justicam*’

<sup>114</sup> Article 30 and 45(1) of the *African Commission on Human and Peoples’ Rights*

<sup>115</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*

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the socio-economic rights consequences of environmental degradation in Ogoniland (in Niger Delta of Nigeria) provided in article 2, 4, 14, 16, 18(1), 21 and 24 of the ACHPR.<sup>116</sup>

There has also been an inter-state complaint lodged to the African Commission by the DRC against the Rwanda for the grave and serious violations of human rights caused its territory during the coalition of the Rwanda, the Burundi and the Uganda armies. In the case of *the DRC v Burundi, Rwanda and Uganda*, the respondent states were found guilty, violating article 12(1), 14, 16, 17, 18(1)(3), 19, 20, 21, 22 and 23 of the ACHPR.<sup>117</sup>

Most importantly, it is its mandate to protect human and peoples' rights through decisions and recommendations in the course processing mostly individual communications<sup>118</sup> set up in article 45(2)(3) of the ACHPR.<sup>119</sup>

According to this mandate, everyone within the territory of the DRC party to the ACHPR may bring a communication to the attention of the African Commission in accordance with article 56 of the ACHPR where /she may claim the violation of his or her rights set out in the ACHPR; s/he can do it by his or her own or an NGO can do it on his or her behalf with an express consent of the victim and they need not to be a citizen or be registered in the DRC.<sup>120</sup>

### II.2.1.2. Multidisciplinary approach

Children may obtain justice remedy of the injuries suffered during armed conflict. However, the state also has to deal with other impacts of these hostilities on children such as psychological and emotional traumas caused by the grave violations perpetrated on them during these periods. This reparation cannot only be successfully fulfilled with the implementation of the legal proceedings

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<sup>116</sup>C .Heyns and M. Killander *Compendium of key human rights documents of the African Union* (2007) 252.

<sup>117</sup> article 12(1), 14, 16, 17, 18(1)(3), 19, 20, 21, 22 and 23 of the *African Commission on Human and Peoples' Rights*

<sup>118</sup> A communication is one of the mechanisms employed by the Commission to ensure compliance of the states with the human rights set in the Charter. The Commission may receive complaint from states against another one or by individuals or NGOs against one or more states on alleged the violation of HR in accordance with its mandate under article 48, 49 and 55. (Centre for Human Rights and African Commission on Human and Peoples' Rights *Celebrating the African Charter at 30: a guide to the African Human Rights system* (2011) 24)

<sup>119</sup> article 45(2)(3) of the *African Commission on Human and Peoples' Rights*

<sup>120</sup> *Article 56 of ACHPR*

for their protection but also with the implementation of other disciplines such as education, psychology, sociology.

Therefore, the CRC, as a unique treaty because it has been ratified by almost all states except the United States of America and the Somali and it is an interdisciplinary document, must be studied not only from a legal perspective but it must be combined with various disciplines related to human rights and to the field of psychology.<sup>121</sup>

As we illustrated above, during armed conflict children's rights are violated and the survival and development of children jeopardized; for instance the right to life, the rights to education, and the right to be with his or her family the right to health, the interventions in such areas are very important for the interest of children affected by the war occurred in the DRC.

During armed conflict, educational facilities (staff and infrastructures) are targeted and it disrupts children's education which implies all primary school-aged children who are not in school have to struggle to find a way to attend the limited schooling options available during a crisis or to return to school at an appropriate level when it reopens. More importantly, schools often offer a sense of normality, a pattern of safety to children, where they can return to handle with the psychosocial stress inflicted on them by an emergency and ensuring that children return to school or creating an educational and play corner as soon as possible after a crisis, greatly contributes to their psychosocial well-being and development. During this period, children are witnesses, victims or perpetrators of the violations of their rights such as sexual abuses, conscription and enlisting in armed conflict and they can be emotionally, physically and verbally affected; children may develop psychological problems as a result of the hostilities. The justice remedy cannot fully help them. The need of psychology, which is the science of human mind and mental processes, especially in relation to behavior,<sup>122</sup> is very important to help those children for their development and their reintegration in their community.

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<sup>121</sup> the United States of America and the Somali and it is an interdisciplinary document

<sup>122</sup>Psychology definition available at [http:// dictionary.reference.com/browse/psychology](http://dictionary.reference.com/browse/psychology) (accessed on 29 July 2016).

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### **II.2.2. Another measures to be considered**

#### **II.2.2.1. Adopt necessary legislative measures to halt impunity, with effective punishment of sexual violence and of recruitment of children into armed conflict.**

Remedies Specific provisions regarding remedies in the case of violations of children's rights can be found in neither the CRC nor the OPAC. However, Article 44 of the ACRWC provides the African Committee of Experts on the Rights and Welfare of the Child with the power to "receive communication from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter". This makes it possible to file complaints about the violation of Article 22 of the ACRWC, on the prohibition of recruitment or use of children in armed conflicts. As early as 1948 the right of everyone "to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted" was recognized in Article 8 of the Universal Declaration of Human Rights.<sup>26</sup> This right has been elaborated in Article 2 of the International Covenant on Civil and Political Rights, which specifies "that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities" and "that the competent authorities shall enforce such remedies when granted". It can be said that within the world of human rights conventions, the right to an effective remedy is a matter of international customary law. Similar to implementation, the provision of effective remedies is firstly a responsibility of states. They should have in place, or should develop, adequate and effective procedures for claiming remedies, and implement and enforce them. These procedures should be accessible for children or their legal representatives and conducted in a child sensitive manner. In a number of countries special truth and reconciliation commissions have been established as part of the intermediary justice addressing violence committed against children.

#### **II.2.2.2. Necessity of reunification of Children and their Families**

For re-unification of children to take place in DRC several steps must be considered that is to say non government organizations and government institutions in DRC, must ensure that,

reunification to take place there should be identification, documentation ,tracing and re-unification.<sup>123</sup>

In order these institution should identify which children have separated from their families or other caregivers and may be found. for that purpose there should basic personal data from child such as their full names, date and place of birth mother names, formers address and present location, establish the identity of the child in order to facilitate however if the child is unable, it is important that clothes worn on the day the child missing should be noted, often mothers can recall what their child was wearing the last time they were seen.<sup>124</sup>

In as far as documentation is concerned; these institutions should gather additional information to meet specific needs of the child. Basically, for tracing to take place these should search for family members or legal or caregivers, in an effort to re-unity families includes confirming the validity of the relationship and identity.<sup>125</sup>

After confirming and verifying the family relation of the separated child the re-unification together the child and family so they may have a future together. Therefore supporting and monitoring children to be cared for within the community, preventing institution further by having rigorous screening mechanisms parting to non-governmental organizations on issues of separation and unaccompanied children to support coordination and implementation of appropriate policies across the region. The non government in close collaboration with government institutions puts in place mechanisms on how to get information related to children who might have separated with their families during the conflict.<sup>126</sup>

## **CONCLUSION**

The above study show how numerous provisions of international humanitarian law establish support and develop the principles of special protection for children in situation of war. These principles cover a wide variety areas and situation of different ages of children; the emphasis has

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<sup>123</sup> *ibid*

<sup>124</sup> *Unicef, www.unicef.org/reuni.last accessed 18 july,2016*

<sup>125</sup> *Unicef, www.unicef.org/reuni.last accessed 18 july,2016*

<sup>126</sup> *ibid*

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always been centered on the humanitarian aspect of the need and measures suggested meeting in war situation.

For example, it has always been kept in mind that infants and children under fifteen are kept with their families and are well provided with food, clothing and education. The children are properly identified, and even when they commit offences, their age and development of faculties are taken into consideration while awarding punishment.

Basing on article 6 of convention on rights of which that States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

But today DRC has caused massive suffering for civilians, with estimates of millions dead either directly or indirectly as a result of the fighting. There have been frequent reports of weapon bearers killing civilians, and destroying property. Those who are not subject to violence must contend with poverty, famine, and disease.

According to the protection of children during armed conflict the does not protected where we found that the child has special protection within The 1977 Additional Protocols to the Geneva Conventions were the first international treaties to try and tackle these situations. They prohibit the recruitment and participation in hostilities of children under the age of 15 and today the child soldiers under 15 years old are still recruited and used as adults one.

The most important legal instruments for the protection of children during these periods recognized in IHL and IHRL are all the GC of 1949 and its AP I and II of 1977; the CRC and its OP on the involvement of children in the armed conflict of 2000 and the Rome Statute.

However, during the civil war which occurred in the DRC especially in the eastern part of the country, grave violations such as killings, conscription or use of children in armed conflict, abduction, sexual abuse, the destruction of hospitals and schools and the denial of humanitarian aids recognized by the resolution 1612 of the UNSC were committed against children.

The grave violations perpetrated against children demonstrated that the rights of children are classified in 4 categories (the best interests of the child, the right to life, to survive and to

develop; the right to non-discrimination and the right to participation) were not respected, protected and, fulfilled by the DRC.

However, International Human Right Law has established some mechanisms which serve to allow victims to obtain reparation of the violation of their rights. These justice procedures must interfere with other disciplines such as education (to help children to learn about their rights etc.), psychology (to assist those children affected by armed conflict as victims, witnesses and perpetrators) in order to guaranty their reintegration and development in their communities.

Now the protection of children in DRC it will remaining have challenges in case DRC government and international organization does not taking the measure of protecting children affected by war by creating new method of fighting the DRC's armed group or rebellion and other difference groups of armed of other countries.

Many reports describe how the wars in the DRC were marked by the systematic use of children by all armed groups and forces involved in the conflict. Many battles were won in the DRC simply on the basis of a superiority of numbers. The armed groups therefore often recruited children to serve as cannon fodder. Some were even sent into combat without any arms... In order to force them to overcome their sensitivities and unwillingness to kill, they were brutalized by their superiors and forced to commit particularly horrific crimes. If they refused, they would be executed. On capturing an area, girls would sometimes be taken to child soldiers for them to rape in front of the villagers and adult soldiers.

This strategy of 'toughening them up' was also used in training camps, where children were forced to kill and commit atrocities in public. According to child protection agencies working in the disarmament, demobilization and reintegration of children, at least 30,000 children were recruited or used by the armed forces or groups during the conflict, giving the DRC the one of the world's worst records for such activity. These and other children were subjected to indescribable violence, including murder, rape, torture, cruel inhuman and degrading treatment, forced displacements and the destruction of their villages, and were deprived of all their rights. While some 30,000 have been demobilized since 2004, many others have been recruited in the same period. While a number of international human rights and humanitarian law treaties ratified by the DRC explicitly prohibit child recruitment, the use of children by armed forces or groups

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continues today. Noting that almost an entire generation of Congolese children has missed out on an education.

Children in the DRC have suffered far too much and, if this situation is allowed to continue, there is a risk that a new generation will be created that has known nothing but violence ... thus compromising the country's chances of achieving lasting peace.

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