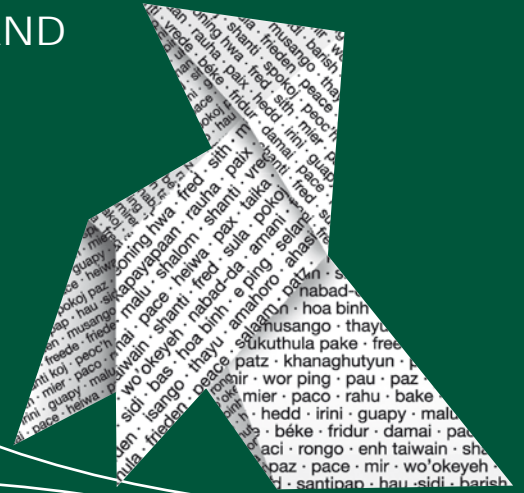


MATERIALS OF PEACE AND  
HUMAN RIGHTS, 16



INTERNATIONAL JUSTICE, PLUNDER IN  
WAR, HUMAN RIGHTS AND  
MULTINATIONALS

Jordi Palou Loverdos



Generalitat de Catalunya  
Departament d'Interior,  
Relacions Institucionals i Participació  
**Oficina de Promoció de la Pau  
i dels Drets Humans**



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## **ABSTRACT**

This study analyses old and new forms of war and their impact on human rights, posing questions that are considered essential. It also considers the impact on contemporary military conflicts not just of states, but also of non-state actors, particularly multinational companies, rebel groups and other informal international criminal organisations. Particular reference is made to the crime of pillage as a type of crime that has an acute impact on people, communities and ecosystems during international military conflicts or national conflicts with strong international links. A detailed examination is carried out of the paradigmatic case of the international crimes that have been taking place in Central Africa, particularly the Democratic Republic of Congo, in the last twenty years. Finally, some suggestions are offered whose intention is to contribute towards the improvement of systems for the protection of human rights and the prevention and handling of contemporary military conflicts.

«The saint's own bodily form has been annihilated and he has become a mirror; within it are reflected the faces of others.

If you spit, you spit in your own face; if you strike the mirror, you strike yourself».

Rumi, Sufi mystic

«True peace is not merely the absence of tension. It is the presence of justice».

Martin Luther King Jr.

## **1. INTRODUCTION**

In tackling this subject, the author combines empirical knowledge of humanitarian situations resulting from the actions of non-state actors and multinational companies gained whilst working as a conflict mediator in the African Great Lakes region. For this reason it has been decided to use a methodology that is predominantly inductive. The author offers proposals based on practical experience of the law and the peaceful resolution of conflicts. These aim to make progress with the protection of fundamental human rights, the eradication of impunity, and the establishment of the responsibility of non-state actors and multinationals that appear to be responsible for international crimes and pillage. Although certain analyses are specific to this part of Central Africa, many of them may be used to understand the conflicts and wars that are currently under way on our planet and how the dynamics of our interconnected world's violent conflicts affect all of us.

When consideration is given to the various wars of recent decades, alongside old forms of violent conflict emergent variants can be seen. Certain recurring themes can also be observed amongst the conflicts, leading to the suspicion – or even to evidence – that the full picture about contemporary conflicts is not readily available and that some aspects have been intentionally obscured. These hidden aspects are increasingly related to interests in the planet's natural resources, some of which are very valuable or strategic. The management of land and, above all, the natural resources that it holds is becoming a key question not only within states, but also from a geopolitical, geostrategic and geoeconomic point of view. That is how it was in the past and it is also how it is in our times of global impacts, which sometimes take on new forms, make use of new tactics and follow new patterns.

In recent centuries the decisive interventions of state actors in military or violent conflict have been clearly visible, whether such conflicts have been internal or on the international level. However, those central to wars have changed greatly in the last century: non-state actors now play a key role in wars and in all stages of violent conflicts, from the preparation for a war through



its execution to managing the period following the conflict. As is well known, there has been a significant change in who comprises the victims of military conflict. At the start of the twentieth century the main victims of wars were soldiers who had been enlisted forcibly or voluntarily to serve during the conflict. Late in the last century, however, this tendency was reversed, with the civilian population becoming the predominant target of violent attack. This change has occurred in the context of humanity's increased efforts to analyse, study, regulate and protect the human rights that are considered fundamental by humanity; an event whose sixtieth anniversary was recently celebrated.<sup>1</sup>

This study will attempt to analyse these old and new forms of armed conflict, the various actors involved in wars and their varying levels of influence over those wars, the visible events, the hidden events and the significant and apparent interests involved in violent incidents, and how all this affects individuals and groups, especially indigenous peoples, and their inherent human rights. The responses of international systems and those of the Spanish state will be examined, along with their potential in tackling this new reality. This study will not deal with the various international instruments for controlling the conduct of multinational companies outside of the context of conflict and the obligations derived from the international instruments of human rights and humanitarian law.<sup>2</sup> The article does, however, highlight advances in international law, as well as discoveries relating to crimes perpetrated by these actors in the region in question, whether directly or indirectly. These advances derive from both official United Nations documents and current investigations that are part of the current legal proceedings in the Spanish courts, under the principle of universal jurisdiction, for genocide, crimes against humanity, war crimes and other connected crimes, including pillage, and the destruction of property and heritage.

The focus will be on the influence of natural resources on armed conflicts, as the submerged part of the enormous iceberg that such conflicts constitute, and on how non-state actors intervene – often dramatically – in this complex chessboard. The question will be asked of whether national and international justice systems and the idea of international crimes are useful tools for confronting this reality. Proposals will then be offered for how to make the different answers to these questions more effective in practical situations. Last but not least, ways will be studied to more come up with more effective peacebuilding strategies, either by adapting current perspectives or by offering new routes, in order to transform violent conflicts into peaceful or, as a bare minimum, less harmful ones.

The article is, therefore, divided into two broad sections. In the first part, details required for context will be considered; the actions that took place in these countries will be described, the events that classify the crimes as 'violent', and their relationship with the pillage that took place in the aforementioned countries. The second part of the article will analyse the legal framework and international justice's challenges when faced with non-state actors.

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1. Sixty-one years ago the General Assembly of the newly created United Nations adopted a resolution of incomparable importance: the Universal Declaration of Human Rights (adopted and proclaimed by the General Assembly in Resolution 217 A III of 10 December 1948), the first sentences of whose Preamble refer directly to this situation: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people; Whereas 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 [...]" See <http://www.un.org/es/documents/udhr/>, visited 11/3/2010.

2. For all of these, see Olga MARTÍN ORTEGA, *Empresas multinacionales y Derechos Humanos en Derechos Internacional* (Multinational Companies and Human Rights in International Law). Barcelona, Bosch Editor, 2008, p. 135 onwards; Felipe GÓMEZ ISA, "Empresas transnacionales y derechos humanos: desarrollos recientes" (Transnational Companies and Human Rights: Recent Developments), *Lan Harremanak. Relaciones Laborales* (School of Labour Relations. Labour Relations), special edition, *Propuestas locales para otra globalización* (Local Proposals for Globalisation in a Different Way), San Sebastian, Servicio editorial universidad del País Vasco, 2006, [www.lan-harremanak.ehu.es](http://www.lan-harremanak.ehu.es).

## 2. OLD AND NEW FORMS OF ARMED CONFLICT AND HUMAN RIGHTS WITH, PARTICULAR EMPHASIS ON THE NEW ACTORS INVOLVED IN MODERN CONFLICTS AND THE PILLAGE OF NATURAL RESOURCES

In the past, irrespective of time and place, empires, kingdoms and, eventually, states dedicated a large proportion of their human and material resources to making themselves richer and more powerful. They conquered territories and countries, causing the death of their peoples and communities, subjugating the survivors in order to increase their wealth and, above all, their power over people, whilst also taking control of animals and natural resources. Looking back over history it can be observed that sooner or later all empires – from the smallest to the mightiest – eventually succumb;<sup>3</sup> later on another empire wishes to occupy the ceded territory or expand the limits of either its territory or its influence, attempting to show outsiders that this new power has been ‘chosen’ by heaven or history. This has always been the case on both the local and the global scales. Despite the existence of the Universal Declaration of Human Rights, all this has taken place with complete impunity, against a backdrop of systematic human rights violations.<sup>4</sup>

### 2.1 Old and new forms of war.

It seems that it is difficult to bring this pattern of aggression to an end.<sup>5</sup> It also seems that the benefits to be derived from this pattern always outweigh any potential loss, so various types of aggression continue to expand: waves of destruction, tsunami-like.<sup>6</sup>

One of the new forms of aggression is disguised as necessary preventative measures aimed at ‘protecting people from dictators’, ‘saving humanity from massive nuclear attacks’, ‘setting people free’, ‘spreading freedom, democracy and human rights’ or other similar expressions. Some of these actions have taken place with the approval of the United Nations and others without, these last following the well known principle of unilateralism.

Other new forms of internal or international aggression are less visible and are carried out by organisations that are not, strictly speaking, military. Nevertheless, they use new systems of exploitation based on blackmail – to the point of simply being mafiosi organisations – that lead to the total destruction of the social and economic fabric of certain states or communities. Some of these organisations feed off resources that are official, semi-public or parallel to the state; others are supplied by powerful multinational companies, using justifications such as ‘necessary mutual development’ or ‘cooperation for economic growth’. On occasions, particularly in areas where state structures are weak or practically non-existent, subtle but effective means of coercion are used to obtain the desired natural resources without the need for military aggression, causing

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3. The image offered by Carl Jung is very illustrative. He presents the archetype of the “Hero Myth” as one who apparently conquers everything within reach, but whose triumph is only apparent and limited in time: the hero eventually succumbs to their own hubris, or unrestrained ambition, egotism and pride. Carl G. JUNG, *El hombre y sus símbolos* (Man and his Symbols, Spanish-language edition), Barcelona, Luis de Caralt Editor, 1975, pp. 109-110.

4. See in particular Articles 1 to 30 of the Universal Declaration of Human Rights (<http://www.un.org/es/documents/udhr/>, visited 5/10/2009.)

5. It is worth noting how difficult it is to reach agreement on the definition and possible reach of the prohibition of ‘aggression’ at international level. Even despite recent efforts to restrict and prohibit aggression, it is clear that the international community still has no effective tool to bring this pattern of aggression to an end. Attempts to include the crime of ‘aggression’ under Article 5,1.d) of the Statute of the International Criminal Court, the drawing up of which was one of the most recent global movements, have faltered because neither the crime itself nor the conditions under which it may be seen to have been committed have yet been defined.

6. Can these waves of destruction be considered ‘natural’ and therefore a fact of life? These waves of destruction can be considered to come from nature, specifically human nature. Must we accept that we can do very little – or nothing – to prevent wars and military aggression? Must we accept them as ‘natural disaster cycles’, when their causes – principally blind hunger for power, domination and/or resources – and consequences – the death of individuals and communities, as well as irreparable environmental and cultural losses – are well known?

profound problems that are difficult to overcome. In most cases, this is done with complete disregard for fundamental human rights, both individual and collective.

In the past, however, pillage was considered the conqueror's right during wartime;<sup>7</sup> a means of compensating some of the losses in battle, as well as a way of pleasing the soldiers and satisfying 'some' of their needs. In recent times, as will be discussed below, pillage and the plundering of natural resources are not permitted and are considered war crimes. Nonetheless, the new *conquistadores* still make use of similar practices, pillaging or illegally exploiting in old or new ways – some of them strategically obscured – in most cases with complete impunity.

The in-depth study of these dynamics leads to an understanding that the old strategies and tactics for destructive domination are taking on new forms. Contemporary 'empires' and 'kingdoms' are not necessarily the same entities as modern states. Some of them are powerful, structured states, of course. However, the changes – political, economic and social; civilian and military – that have occurred in the last century have facilitated the emergence of new and powerful organisations that are playing the role of the new emperors in the global game of chess. A large number of multinational companies have greater power, greater influence, greater resources and a greater impact at the local and global levels – in both economic and environmental terms – than many African, Asian or South American states. Although, clearly, not all multinational companies carry out international crimes or illegal exploitation, a not-insignificant number of them are focused on 'conquering new territory' to increase their economic power. Instead of this power being used fairly to benefit individuals, communities and economic structures, priority is given to providing for shareholders, subjugating individuals and communities or using them as mere tools for the benefit of the company, appropriating natural and human – in other words, artificially manufactured – resources with uncommon voracity and often with a manifest lack of respect for the shared environment.

It is important to keep in mind – more detailed consideration is given to it in relation to Central Africa below – how some multinational companies provide economic and/or political aid, sometimes even going as far as logistical and military aid, for the wars or exploitative systems based on extortion. This is especially true of multinational companies that focus on the export or import of energy resources: occasionally before the 'invasion', sometimes during the subsequent military conflict or illegal exploitation, and/or even after the conflict or the post-conflict reconstruction stages. Some of these multinational companies are present at all three levels of intervention.

On the other hand, it should be stressed that we are also witnessing the modernisation of the classic structures of armies alongside the new military or security organisations, some state-run, some semi-public and others entirely private-funded. Some of the traditional functions of states' armies are being subcontracted to private soldiers or specialised security multinationals. In addition, these 'new mercenaries' offer themselves for hire on the world market and are being contracted, sometimes by states themselves, sometimes by multinational companies. In the latter case, this might be done directly or through state or semi-public organisations, or through different types of rebel group.

There are also new types of weapon emerging that, until recently, were either unknown or unused. In recent decades an enormous amount of money and resources – both financial and 'scientific' – have been channelled into the creation and production of all sorts of new weapons. New, 'intelligent' weapons are made available on the world arms market to be used both for military or violent conflict and for terrorist attacks, as many of them include means of controlling them over short and long distances.

The importance of the media should also be pointed out, as they sometimes have enormous influence and impact on the manufacture, coverage and 'resolution' of military conflicts. It is now commonly accepted that wars are fought not just on the battlefield but also – and above all – in

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7. Roy GUTMAN and David RIEFF, *Crímenes de Guerra: lo que debemos saber* (Crimes of war: What the Public Should Know, Spanish-language edition), Barcelona, Grupo Editorial Random House Mondadori SL, 2003, p. 361.

the media: within the framework of media lobbies, of international news agencies, of television, press, radio and internet multinationals; all in a geometric progression from the second third of last century onwards. Much of the time the media create – or at times simply give publicity to – partial, self-interested, manipulated or remote-controlled versions of conflicts; these versions are repeated *ad nauseum* until they become the official version. Sometimes they are presented in Manichean terms, representing one side as the principle or only victims (identified as ‘the good guys’) and the other as largely criminals (identified as the ‘bad guys’). On other occasions the media serve as a means for reporting the hidden events, reporting them faithfully and accurately. On top of this, mention must be made of the following: the recent preponderance of international facilitators and mediators, who often have a preset agenda and clear interests over which possible solution to choose, which sometimes win out; the enormous number of international experts who present their contributions as objective, scientific and well founded, although in reality they take sides; the interventions of non-governmental organisations – often linked to and in the service of governments and public funds, or independent but infiltrated by intelligence services – assisting and cooperating in and reporting on conflicts, and speaking up or keeping quiet about events. Given all these, the global map of conflict coverage seems to be a veritable labyrinth in its complexity.

As states or communities, and even as humanity, we may therefore ask ourselves if we are really prepared to confront this complex reality and if the political, legal, economic, military and social instruments available to us are not merely adequate but sufficiently effective. Attempts will now be made to offer some proposals in this area. Finally, the question should be posed of whether humanity has reached the limits of its suffering and self-destructiveness, or whether there is still leeway to go further with this suffering. We all accept in principle that we live in a world that is globalised or ever more interconnected in some respects: it is possible that this concept is in the minds and thoughts of a few million people, but is the concept of ‘humanity’ understood, experienced and felt to be real by all six billion of us who are sharing our existence on this planet?

## **2.2 From wars between states to intrastate military conflicts.**

It is said that during the last century the reality of war changed profoundly on practically all levels. There has been a movement away from wars between sovereign states towards those within states, between different parties or different groups belonging to these states. There is probably now greater diversity in types of destruction than there was in the past: classic interstate aggression; military interventions under the auspices of national or international organisations; intrastate conflicts (some led by outside forces or with their participation, whether said forces be states and/or multinational companies and/or rebel groups); wars in self-defence (such as military intervention in the ‘war on terror’); ‘preventative military actions’ against nuclear or biological weapons or other weapons of mass destruction; and the prolonging of interethnic conflicts by outside forces (through military ‘intelligence’ services, the provision of weapons in exchange for resources and/or political power, etc.).

Various types of war or military dynamic are evident now, within a complex, international framework: state-owned armies, whether traditional or with new, contemporary forms; regional military organisations; hybrid peacekeeping forces run by collectives of international organisations and states; rebel groups; mercenaries; powerful arms-trafficking organisations; multinational companies (the areas of business of which might be energy, natural resources, the media, security facilities and/or services, weapons, financial resources, international transport, industry, or infrastructure, amongst others, or all of these at the same time); national and/or international military and/or security movements resulting from new discoveries of valuable or strategic resources (new discoveries in the use of technological resources for military purposes), etc. In short, a vast array of possible varieties of military conflict, that in many cases, although classified as ‘intrastate’, demonstrate a large number of international links and elements (arms, interests,

aid and benefits, to give but a few examples). Within this tangled web, numerous contradictory efforts and forces coexist: diplomacy;<sup>8</sup> international interests; the interests of multinational companies; geopolitical and geostrategic interests; United Nations missions,<sup>9</sup> United Nations bodies, international institutions<sup>10</sup> and the missions of international organisations, international tribunals,<sup>11</sup> etc. Are these concepts still useful when dealing with intrastate wars? Are the instruments currently available to us to confront the international crimes of genocide, crimes against humanity and war crimes effective, when these are committed by soldiers, as well as rebel forces, mercenaries, private security bodies and/or forces, criminal organisations and multinationals? When a given state begins a war against another state, is that international actor the only one that may/should be considered to be involved in the war? Equally, when a rebel group begins a war within a state, should that always be considered a civil war or an internal matter, without links to the outside or an international intervention? The lines have become blurred and international criminal organisations – even those responsible for the gravest crimes and human rights violations – are seeking and finding means of carrying out their activities and getting what they want in the context of the greatest possible impunity. It is also possible that, with regard to war and violent conflicts, the solid structures of the past are becoming more liquid, continuously changing shape depending on the adversary, what is at stake, the moment and the context. If this were the case, would our own ‘solid structures’ be prepared to tackle war and international crimes of this ‘liquid’<sup>12</sup> pattern for contemporary violent conflicts?

### 2.3 Wars and challenges for the systems of human rights and international law.

The challenges faced by international law, and international criminal law in particular, when dealing with contemporary events, patterns and wars can be summarised as follows:

- *Changes to the status of military actors and their acquisition of legitimacy.* A new situation emerges when their acquisition of power turns non-state actors and rebel groups into state actors. This is often achieved through military force or various violent means, using different types of weapon. Often, in order to achieve power – and one of the very means of achieving that power – they commit crimes of aggression, crimes against humanity, war crimes and crimes of genocide (both before and after becoming state actors, as well as at the time of violently taking power).<sup>13</sup>
- *Situations of neo-slavery.* Despite the official abolition of slavery, new – and, sometimes, even large-scale – situations in which people are used to all intents and purposes as

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8. Official diplomacy, institutional diplomacy and citizen diplomacy: for explanations of these last two, see Louise DIAMOND, *Multitrack Diplomacy: a systems approach to peace*, Connecticut, USA, Kumarian Press, 1996; see also Kreddha, *International Peace Council for States, Peoples and Minorities* (<http://www.kreddha.org/>); the Centre for Humanitarian Dialogue (<http://www.hdcentre.org/>); the Carter Center (<http://www.cartercenter.org/homepage.html>). Recent efforts by organisations for the nonviolent intervention of civilians are worthy of mention: the Austrian Centre for Peace and Conflict Resolution (<http://www.aspr.ac.at/aspr/>), Peace Brigades Internacional (<http://www.peacebrigades.org/>), or Nonviolent Peaceforce (<http://nonviolentpeaceforce.org/es>), to give but a few examples.

9. Note the combination of two means: firstly, through conflict-mediation, peacebuilding or peacekeeping initiatives and, secondly, the power to authorise the use of force by virtue of Chapter VII of the United Nations Charter.

10. World Bank, International Monetary Fund, etc.

11. Nuremberg, Tokyo, Rwanda, Yugoslavia, Sierra Leone, Cambodia, the International Court of Justice, the Inter-American Court of Human Rights, the International Criminal Court, to give but a few examples.

12. Zygmunt BAUMAN. *Tiempos líquidos: vivir en una época de incertidumbre* (Liquid Times: Living in an Age of Uncertainty, Spanish-language edition). Barcelona, Tusquets Editores, 2007.

13. The violent conflicts in Rwanda and the Democratic Republic of Congo constitute an illustrative example of how a non-state actor (the Rwandan Patriotic Front or *Front Patriotique Rwandais* – FPR) and a non-state army (the Rwandan Patriotic Army – RPA) used military, logistical and financial aid from third countries and multinational companies to invade Rwanda in the first place, take power within four years and become the ‘legitimised’ power (state actor), and later twice invade the Democratic Republic of Congo (without in fact ever having left that country according to the most recent United Nations report on the illegal exploitation of natural resources, which will be referred to more below), as will be examined later in this study.

slaves for a variety of forced activities are emerging. These are often in subhuman conditions, without any form of pay or safety conditions and sometimes use children or those not of legal age. The use of prisoners for forced labour or in conditions of slavery shows some number of cases of people (men women and children; not just soldiers) who, in a complete lack of legal process, were 'freed' from prison after spending years in deplorable conditions under the condition that they work as slaves in mines or the extraction or exploitation of other mineral resources, especially in the eastern part of the Democratic Republic of Congo.<sup>14</sup> Some of these situations are accompanied by the sexual exploitation of both minors (boys and girls) and adults (particularly young women).

- *The manipulation of differences, especially racial, ethnic and/or religious.* State actors and their agencies (such as, for example, military and/or civilian intelligence services) as well as non-state actors use the already existing differences within a given area or between given human communities as tool for creating deep divisions, fostering or stimulating mistrust between individuals and/or communities that have differences, promoting hate and violence as a means of resolving differences and, in the end, even provoking conditions or situations of chaos that facilitate the taking control of land, territory, people, natural resources, weapons, economic structures, political power, etc.
- *Significant change in the victims of wars and violent episodes.* Until the last century, the majority of the victims of wars and violent conflicts were military personnel, although they did affect a large number of settlements. It is now widely known and well documented that the great victim of war is civil society – the civilian population – which, most of the time, takes no part in the hostilities. This has created millions of internally displaced persons (IDP) and refugees throughout the world and caused serious humanitarian crises in various parts of the planet, causing all sorts of serious problems, not just in the affected state or states, but also in their neighbouring states and, much of the time, major political, ethical and logistical problems for regional or global international organisations, amongst others.
- *Crimes against children and damage to generational stability.* The continual recruitment of child soldiers leads to the perpetuation of violent conflicts not only in the state in which they were recruited, but also in vast parts of the region. Systematic sexual aggression – especially against women and those not of legal age – as a war crime, a crime against humanity or even a crime of genocide, is used as a means of humiliation, domination and exploitation. In short, these acts propagate hatred for generations to come.<sup>15</sup>
- *The destruction of the cultural fabric and damage to the ecosystem.* The pillage and illegal exploitation of natural resources not only erodes the ecosystem in relation to present and future generations, but it also perverts and corrupts the relationships between people and communities, some of which have racial and ethnic differences (this situation is often intentionally sought out in order to be able to pillage or illegally exploit resources, taking advantage of the fragility of the situation, the induced weakness of communities or of actual splits between communities with differences).<sup>16</sup>

14. Coltan (columbium and tantalum) or diamond mines in the eastern Democratic Republic of Congo, statements obtained by the author.

15. Very recently, on 30 October 2009, the United Nations Security Council adopted a Resolution specifically relating to this subject, following Resolutions 1325 (31 October 2000) and 1820 (19 June 2008, see S/RES/1820-2008, [http://www.ifuw.org/advocacy/docs/UN\\_SC\\_Resolution1820.pdf](http://www.ifuw.org/advocacy/docs/UN_SC_Resolution1820.pdf)), in constituting the political framework for incorporating the gender perspective into the prevention management, and solution of armed conflicts. Measures were also adopted measures at states' own internal level (for those relating to Spain, see [http://www.un.org/womenwatch/feature/wps/Spain\\_National\\_Action\\_Plan\\_en.pdf](http://www.un.org/womenwatch/feature/wps/Spain_National_Action_Plan_en.pdf)).

16. Later on, reference will be made to the various reports of the United Nations Panel of Experts on the illegal exploitation of resources and its impact on the system of the protection of universal human rights.

- *The financing of war as a vicious circle.* Both state actors and non-state actors are continuously feeding the vicious circle of war, which also feeds into itself. The circle can be started from anywhere: greed for power and wealth; violent acts or aggression; crimes against people and the pillage of natural resources; actions aimed at increasing power and wealth; violent acts to keep hold of power and/or wealth once they have been obtained; new crimes; etc. This pattern may continue for days, weeks, months, years, decades or generations. The following are all integral parts of this circle, but are only some of the variables that contribute to its destructive potential: the arms industry; arms trafficking (and the complex web of organisations, people, relationships, transportation, exchanges, relationships with armies, guerrillas, mercenaries, rebel groups, terrorist groups, etc.); multinational companies (natural resources, the media, industry, etc.); hunger for power and wealth; the alliance of international and national interest groups centred on exclusion; geopolitical and/or geoeconomic and/or geostrategic movements aimed at inciting or carrying out violent, and, in the vast majority of cases, clandestine, acts; the international media's manipulation for the ends of private interests; the exploitation of differences and capitalising on negative emotions (such as, amongst others, hatred, fear, avarice, selfishness and envy); or the combination of all these. This vicious circle increases in speed and power, expanding both centrifugally and centripetally. Bearing all this in mind, there are some 'common-sense' questions that need to be asked. For example, who is benefitting from the war? Who is taking advantage of the destruction caused, induced or carried out or has done so? As well as, what can be done – on both the macro and micro levels – to prevent violence from being profitable?<sup>17</sup> Following the example of Central Africa, it is well known today that the last two wars in the Democratic Republic of Congo<sup>18</sup> have been self-financing on the basis of previously pillaged natural resources.<sup>19</sup> Although it is known that it is not always like that – since there are wars that do not appear to be 'great business' for the supposed 'winners' – this is not the first case.

Giving special consideration to all these issues and challenges, what role do human rights have in this planetary 'party', at which the cake – quite apart from seeming and actually being limited – leaves an increasingly bitter taste in the mouth? Following the effort that has been made by the international community over the last 300 years – and especially the last century – to build this fundamental system of guarantees, protection of human rights and limitation of absolute or arbitrary power, are we going to extinguish the light of the international rule of law,<sup>20</sup> its conception and guarantees, and the system of human rights – possibly keeping it as some sort of ornament –

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17. Arguments are often used to create confusion, generate fear and aggression, and justify this vicious circle: some suggest that not all states, not all non-state actors, not all companies, not all communities and not all individuals can achieve total satisfaction on a planet with limited resources. According to this line of reasoning, those who are fastest, most powerful, most influential and best informed end up in the best position to achieve this incomplete satisfaction of their needs. In other words, 'one small cake for the many – too many – people invited to the party'. In war or violent conflict – assuming a short-term point of view – there have to be winners and losers; some people have a 'natural right' to the cake, whilst some are 'naturally' cut off from eating it, limited to the crumbs left by others or, even, 'uninvited' to what is presented as a 'private party'. It is also often argued that such a situation has always existed between groups of humans, that human nature is like that and cannot be changed, that history has always followed the same pattern and that issues of land will always be the same. Nevertheless, if we adopt a long-term perspective – particularly with reference to military conflict – it is not difficult to determine who comes out of wars as winner or loser. Ultimately, the destructive boomerang – as with the creative boomerang – comes back with the same force as was originally used to launch it.

18. As will be seen below, there have been two wars in the last decade in the Democratic Republic of Congo: one in 1996-1997, and another from 1998 to the present. It has been rare for these wars – as is the case with other military or violent conflicts in Africa or Asia – to gain much coverage in the mainstream media.

19. UN Report S/2001/357, paragraph 114, pp. 28-29: "All military experts consulted suggested that the official defence budget of Rwanda cannot alone cover the cost of their war and their presence in the Democratic Republic of Congo. The Panel concurs with President Kagame, who described the conflict in the Democratic Republic of Congo as a 'self-financing war'".

20. The application of the idea known as 'extraordinary rendition' (or generalised abandonment of the legal system in the favour of unilateral applications exercised by power without monitoring from the rule of law) or the systematic exploitation of people and resources with no regard for fundamental international legislation – especially that relating to fundamental human rights – certainly points toward a situation of little hope, in which the faint light seems to be subject to attempts to draw a dark veil over it, with unpredictable results.

or are we going to keep it shining brightly and raise it up high to facilitate the effective application of said system of guarantees against states and the new local and international actors, to allow equitable relationships locally and across the world, that have respect for individuals, communities and the environment?

Taking all of the above into account, it is essential to analyse the role of international justice and the response of international law on this matter. This subject will be tackled in later paragraphs, after an analysis of the specific case of Central Africa.

### **3. MULTINATIONALS AND OTHER NON-STATE ACTORS: THE LINK BETWEEN VIOLENCE AND PILLAGE. THE CASE OF THE DEMOCRATIC REPUBLIC OF CONGO**

The following brief analysis offers contextual information on the armed conflicts that have been occurring in the Democratic Republic of Congo<sup>21</sup> (formerly Zaire) to give an insight into the complexity of these conflicts, the global interests at stake, the abuse of the exercise of power, the massive human rights violations and the perpetration of international and geoeconomic crimes. The contemporary forms of warfare visible in the conflicts of Central Africa have been developing in the post-Cold War period that started when geopolitical balance that apparently existed prior to the fall of the Berlin Wall in 1989. That event led rapidly to the attempted geostrategic repositioning of many state and non-state actors across the world.

Some of the conflicts in Central Africa – which would later become fighting – are not new, of course. Nonetheless, it is possible to make out some new patterns: contemporary forms of warfare that have been developing over the last ten years.

#### **3.1 Focus on the conflicts in the Democratic Republic of Congo.<sup>22</sup>**

Many international experts explain the conflict in Rwanda<sup>23</sup> and the subsequent conflict in the Democratic Republic of Congo as a conflict of a tribal nature between ethnicities that loathe each other, with little or accidental external or international intervention. On in-depth examination of these violent conflicts, old human passions may be observed under new forms of war and exploitation. It is no coincidence that eastern part of the Democratic Republic of Congo – which has been scene of one of the most tragic military conflicts of recent decades – is one of the of the planet's richest areas in terms of valuable natural resources: minerals of vital strategic importance, such as coltan, diamonds, copper, cobalt, gold, tin, zinc, manganese and timber, to name but a

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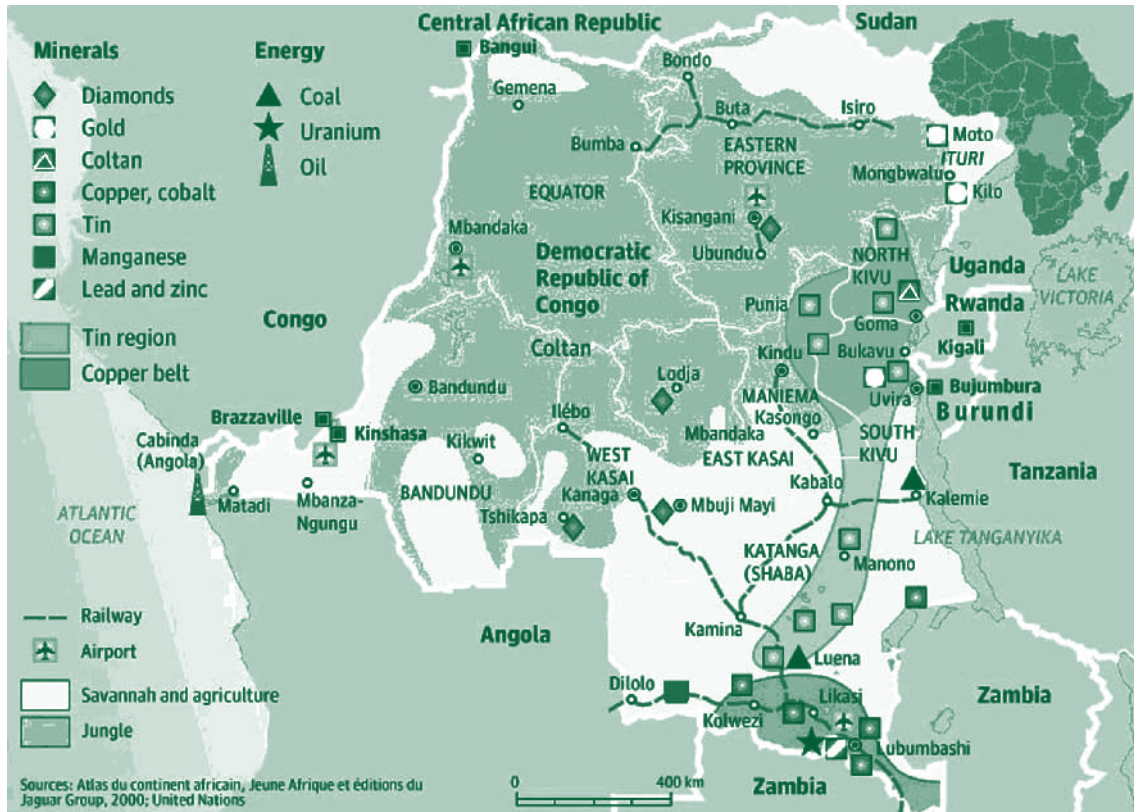
21. One of the conflicts currently under way in the world that, in this author's view, demonstrates most eloquently the old and new ways of making war. It is a conflict that has received scant coverage from the international media (and coverage it does receive is often biased). Naturally, the limited length of this study imposes the use of an artificial approximation: however, even though it is a brief analysis – and therefore necessarily incomplete – it aims to be useful in gaining an understanding with perspective of some key points relating to war, violent conflict, global interest groups, the exercise of power and other important issues. Much of the information that will be highlighted below is based on the content that the Order of Indictment of the *Juzgado Central de Instrucción* (National Pre-Trial Examining Court) No. 4 of the *Audiencia Nacional* (Spanish courts) decided to make public through the Order of Indictment dated 6 February 2008 within the framework of instruction for international crimes committed in those areas between 1990 and 2002, stressing the rational signs of criminality that have appeared in the research phase and in full respect for the presumption of innocence, without oral proceedings having been held yet. Order of Indictment dated 6 February 2008: ([http://www.veritasrwandaforum.org/dosier/resol\\_auto\\_esp\\_06022008.pdf](http://www.veritasrwandaforum.org/dosier/resol_auto_esp_06022008.pdf), in Spanish).

22. Although the Democratic Republic of Congo and Rwanda are two sovereign states that have been separated by a frontier since the Conference of Berlin, the histories of the two territories are interconnected and their peoples are linked by ties of blood and culture.

23. Above all what has become known as the 'Rwandan genocide' with reference only to certain notable criminal acts that occurred in April to July 1994.



few. The map that follows shows the distribution of resources in this part of Central Africa, according to United Nations sources.<sup>24</sup>



Desire to illegally exploit the natural resources of this part of Central Africa is, of course, nothing new. In 1879 and following the 1885 Conference of Berlin, Leopold II of Belgium proposed the administration of the colony as a company. Years later, on 40 June 1960, once the Congo had achieved political independence, the recently elected Prime Minister of the Congo, Patrice Lumumba, reclaimed his country's economic independence.<sup>25</sup> Already in his first public appearances he was warning of the danger that foreign powers would appropriate this country's natural resources, placing a puppet at the head of the newly formed state. On 17 January 1961, only months after his speech on Independence Day, Lumumba was assassinated; the

24. Published in *Le Monde Diplomatique*, <http://mondediplo.com/maps/congo2006>.

25. Extract from his speech of 30 June 1960, Independence Day: "[...] We are proud of this struggle, of tears, of fire, and of blood, to the depths of our being, for it was a noble and just struggle, and indispensable to put an end to the humiliating slavery which was imposed upon us by force. This was our fate for eighty years of a colonial regime; our wounds are too fresh and too painful still for us to drive them from our memory. We have known harassing work, exacted in exchange for salaries which did not permit us to eat enough to drive away hunger, or to clothe ourselves, or to house ourselves decently, or to raise our children as creatures dear to us. We have seen that the law was not the same for a white and for a black, accommodating for the first, cruel and inhuman for the other [...] We have witnessed atrocious sufferings of those condemned for their political opinions or religious beliefs; exiled in their own country, their fate truly worse than death itself [...] The Republic of the Congo has been proclaimed, and our country is now in the hands of its own children [...] We are going to show the world what the black man can do when he works in freedom, and we are going to make of the Congo the centre of the sun's radiance for all of Africa. We are going to keep watch over the lands of our country so that they truly profit her children. We are going to restore ancient laws and make new ones which will be just and noble. We are going to put an end to suppression of free thought and see to it that all our citizens enjoy to the full the fundamental liberties foreseen in the Declaration of the Rights of Man [...] And for all that, dear fellow countrymen, be sure that we will count not only on our enormous strength and immense riches but on the assistance of numerous foreign countries whose collaboration we will accept if it is offered freely and with no attempt to impose on us an alien culture of no matter what nature [...] The Congo's independence marks a decisive step towards the liberation of the entire African continent [...] I call on all Congolese citizens, men, women and children, to set themselves resolutely to the task of creating a prosperous national economy which will assure our economic independence."

circumstances of his death have never been fully cleared up.<sup>26</sup> In 1965, there was a *coup d'état*.<sup>27</sup> Joseph-Désiré Mobutu took power with the objective of exploiting Zaire and using it as a commercial company for his own personal profit, as well as those of the foreign states and companies that were providing him with aid. By contrast, the majority of the population of this extremely rich country has lived and continues to live in absolute poverty.

Later, the fall of the Berlin Wall on 9 November 1989 brought large-scale changes. The resources of eastern Zaire continued to be coveted under the 'new world order' that emerged after the fall of the Wall, but from another angle. As has been seen recently in Iraq, as well as in Palestine, the intelligence services of the United States of America have recently declassified documents using which it can be verified that internal conflicts have been intentionally fomented in certain countries. By taking advantage of already existing divisions, conflicts have been fostered between rival ethnicities and factions, making use of them for their own geopolitical and geoeconomic strategies.<sup>28</sup> It seems that a strategy was drawn up to take control of the most important resources of eastern Zaire using a variety of instruments, including military ones.<sup>29</sup> In achieving these goals it was deemed more appropriate not to do through direct involvement: it was preferable to undertake this in stages, step-by-step. Rwanda was first. As a direct result of the events of 1994 in that country, many people abandoned their homes and land for camps for internally displaced persons and more than a million Rwandans – mainly from the Hutu ethnicity – fled their country and established themselves in refugee camps, the great majority of which were in the country then known as Zaire (currently the Democratic Republic of Congo) and other countries bordering Rwanda. The great majority of the refugee camps in Zaire were in the eastern part of the country, many of them in areas that rich with mineral deposits. See the map below.<sup>30</sup>

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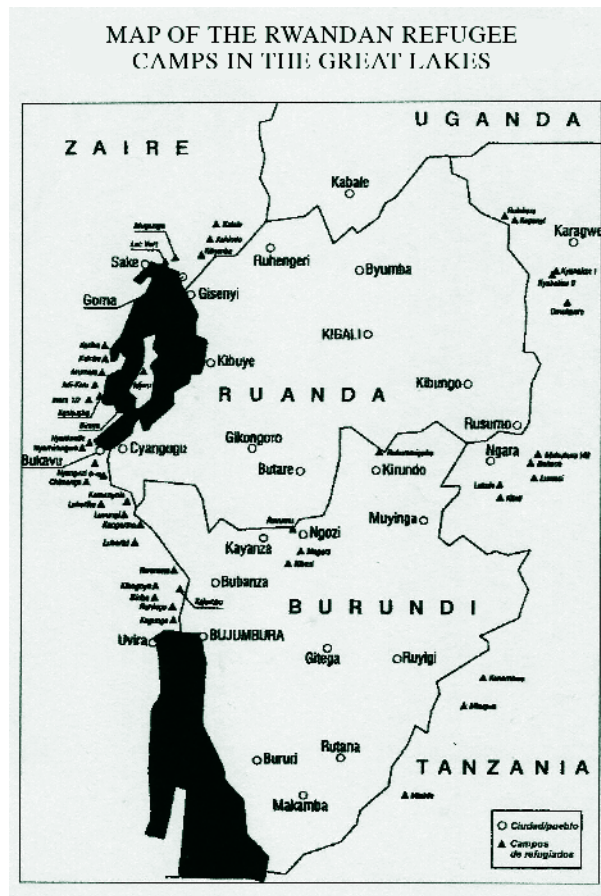
26. Although the circumstances surrounding the assassination of the democratically elected Prime Minister of the Congo have never been cleared up, some researchers have highlighted the intervention of the military and civilian intelligence services of foreign powers, as well as the intervention of representatives of international organisations. For all of these, see, Frattini, Eric. *ONU, historia de la corrupción* (The UN: A Story of Corruption), Espasa Calpe, Madrid, 2005, pp. 97-115.

27. A *coup d'état* apparently prompted, aided and facilitated by foreign powers, amongst which the United States of America and Belgium are mentioned (*ibid.*).

28. Recently the People's Republic of China has also been taking advantage of these chaotic situations. Ignoring the international crimes committed in both countries as well as systematic human rights violations, China is also taking up strategic positions by signing contracts relating to infrastructure in Rwanda or to the securing of the strategic natural resources of the Democratic Republic of Congo (for all of these, see "China outdoes Europeans in Congo" en *Asia Times*, 12/2/2008, [http://www.atimes.com/atimes/China\\_Business/JB12Cb01.html](http://www.atimes.com/atimes/China_Business/JB12Cb01.html)).

29. These wars could also be viewed as wars fought remotely between some influential powers, such as the United States of America, the United Kingdom, Canada, France, the Netherlands, Belgium and, more recently, China – as well as some of the main multinational corporations based in these states – to give just a few examples. Instead of fighting direct wars to control Central Africa with each other, they have preferred to take part in them through state and non-state actor intermediaries; this way less of the victims are nationals of the actor countries, and it is more difficult to discover who is really behind the conflicts. It can be objectively asserted that Central Africa, a region that two decades ago was predominantly francophone, has become one in which English is spoken and Anglophone powers are influential. Even Rwanda, which is traditionally French-speaking, has formally requested acceptance into the Commonwealth (Rwanda seeks to join Commonwealth, BBC 21/12/2006, <http://news.bbc.co.uk/2/hi/africa/6200027.stm>).

30. Source: *Dialogue*, 191, June-July 1996.



Although from that time until the present day – without exception – the Rwandan regime has expressed its concern about the security of its border with the then Zaire, objectively the reality is that control over this strategic area and its valuable mineral resources has proved to be at the heart of two wars that have left a huge number of victims. While some of these have been Rwandans, the majority have been Congolese. The wars have also involved various state actors from Central Africa and their armies, as well as key non-state actors, some military and logistical, some involved in the extraction, transportation and distribution of valuable natural resources. In the years 1996 and 1997, the RPA/FPR proceeded to systematically attack the Hutu refugee camps in the east of the then Zaire, killing hundreds of thousands of Rwandans and Congolese, and organised the pillage of mineral resources such as diamonds, coltan and gold, amongst other things. It set up a complex web of operations, directed by the ‘Congo Desk’, the Directorate of Military Intelligence, the External Security Office (military-intelligence services deployed outside Rwanda), and Rwandan companies aided by multinationals and Western powers,<sup>31</sup> continuing

31. Regarding this, see pp. 97, 101, 118, 134 and 135 of the Order of Indictment dated 6/2/2008 op. cit. ut supra in which explicit reference is made to the reports by the United Nations Panel of Experts incorporated into the legal case: Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Report S/2001/357 incorporated into the letter to the President of the Security Council (of the United Nations) from the Secretary-General (of the United Nations), dated 12 April 2001 – see <http://www.globalsecurity.org/military/library/report/2001/357e.pdf>, as well as the final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Report S/2002/1146 incorporated into the letter to the Secretary-General (of the United Nations) from the President of the Security Council (of the United Nations), dated 15 October 2002 – see <http://www.un.org/News/Press/docs/2003/sc7642.doc.htm>. In both reports by the Panel of Experts, not only are detailed analyses undertaken of the pillage and exploitative activities carried out in the DR Congo, but a full list is annexed of individuals and multinationals from various African, North American, European and Asian countries relating to whom/which there is tangible evidence of their involvement in said criminal activities. As will

these activities in a second military invasion from 1998 onwards.<sup>32</sup> Massacres and pillage in the eastern Democratic Republic of Congo have continued until the present day.

Regarding the preparations for the war that would take place in Zaire, it should be mentioned that, according to the previously mentioned Spanish Order of Indictment,<sup>33</sup> elements of the Rwandan military had already contacted the so-called Banyamulenge<sup>34</sup> in 1995. They provided the Banyamulenge with covert military training throughout 1995 until mid 1996, in both Rwanda and Zaire. It never ceases to be surprising how a regime change is organised and takes place, particularly when in the case of indisputably dictatorial or authoritarian regimes – such as Mobutu’s regime in Zaire – and how that ‘regime change’ is organised and carried out by the employees of states and multinational companies, with the knowledge and support of people in financial, economic, political and military circles. In this case discreet comments about possible ‘regime change in Zaire’ circulated in certain political circles in the United States of America in the mid 1990s. In mid 1996 rumours emerged regarding the intention to bring about ‘regime change’ in Zaire and, amongst other people, the then United States Congresswoman, Cynthia McKinney<sup>35</sup> decided to travel to the country on a fact-finding mission. The most significant of all the important meetings that she had was that held in Lubumbashi (south-eastern Zaire) with Laurent-Désiré Kabila at a time when he was a rebel leader. According to the Congresswoman’s statement,<sup>36</sup> the aircraft that transported her to Zaire was chartered by a Canadian multinational mining company called American Mineral Fields.<sup>37</sup> On that first flight to Zaire – which apparently took place just before the outbreak of fighting – the United States Congresswoman was on the same aeroplane as representatives of the company’s management and discovered that there were other people aboard who were not part of the company; she was surprised to note that amongst these, there were some arms traffickers.<sup>38</sup> At about the same time, the strongman of the new Rwandan regime,

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be seen below, the Spanish courts have requested this evidence from the United Nations in order to make use of it in the legal proceedings.

32. It must be highlighted that during the course of the second war in DR Congo another Central African president was assassinated: Laurent-Désiré Kabila, who had become President of Zaire in July 1997, changing its name to the Democratic Republic of Congo, was murdered on 16 January 2001. Once again, the circumstances of the death of this president have never been cleared up. It was recently made public that the investigation carried out by the Spanish courts obtained important statements that would apparently allegedly implicate Rwanda’s high authorities in financing and carrying out the assassination. See *Un ex-agente de Ruanda implica a su Gobierno en el asesinato de Kabila* (Ex-Rwandan Agent Implicates their Government in Kabila’s Assassination), *Un testigo protegido detalla en la Audiencia Nacional el plan para matar al líder congoleño en 2001* (Protected Witness Details the 2001 Plan to Kill the Congolese Leader in the Audiencia Nacional), [http://www.elpais.com/articulo/internacional/ex/agente/Ruanda/implica/Gobierno/asesinato/Kabila/elpepiint/20081221elpepiint\\_7/Tes](http://www.elpais.com/articulo/internacional/ex/agente/Ruanda/implica/Gobierno/asesinato/Kabila/elpepiint/20081221elpepiint_7/Tes), El País, 21/12/2008.

33. See the Order of Indictment dated 6/2/2008 *op. cit.*, p. 19 and related.

34. ‘Banyamulenge’ is how the inhabitants of the Mulenge area, located in the east of the then Zaire, are known. The area housed many Rwandan refugees – mainly from the Tutsi ethnicity – who did not accept the social revolution or the results of the referendum organised by the UN in Rwanda in the early 1960s, leading large numbers to adopt Congolese nationality or demand recognition as Congolese.

35. Cynthia McKinney, an Afro-American politician descended from African slaves, was elected to the US House of Representatives in 1993 to 2003 and 2005 to 2007.

36. See the Order of Indictment dated 6/2/2008 *op. cit.*, p. 97.

37. For further information on the company American Mineral Fields (AMFI), see Deneault, Alain, Abadie, Delphine and Cacher William. *Noir Canada, pillage, corruption et criminalité en Afrique* (The Dark Side of Canada: Pillage, Corruption and Criminality in Africa), Les Editions Ecosociété, Montréal, Québec, 2008, pp. 56-62. This Canadian company, backed by capital from the US, amongst other places, is cited in the reports of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo to which mention has been made above. See Report S/2002/1146 of 16 October 2002, <http://www.un.org/News/Press/docs/2003/sc7642.doc.htm>, p. 41.

38. Cynthia McKinney travelled to Zaire a second time in mid-1997 as the special envoy of the then President, Bill Clinton, in an official US delegation led by the then Ambassador Bill Richardson, which went in order to negotiate the conditions under which Laurent-Désiré Kabila would take power in Zaire (officially negotiated as the “the peaceful transfer of power” in the former Zaire, which Kabila then renamed the Democratic Republic of Congo). It should be pointed out that on 13 December 1996, whilst the military conflict was ongoing, President Clinton nominated Bill Richardson Permanent Representative of the United States of America to the United Nations, a member of the President’s Cabinet and member of the National Security Council. Ambassador Richardson was sworn into the post on 13 February 1997 by Vice-President Al Gore; one year later – specifically on 31 August 1998 – President Clinton nominated him Secretary of State for Energy. On 31 August 1999 Cynthia McKinney sent a letter to President Clinton, which is reproduced below: “Mr President, I have just come back from the Democratic Republic of Congo, where I have met people guilty of all manner of things in all manner

Paul Kagame, also met with high officials from the Pentagon and those in the US Administration responsible for affairs in Central Africa. In October 1996, barely two months after these meetings, the armies of Rwanda, Uganda and Burundi –with the support of the US and significant military and logistical aid<sup>39</sup> – invaded the territory of the then Zaire, along with Banyamulenges grouped together under the name Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL); this force was presented internationally as fighting a ‘war of liberation’. According to documents published by the United Nations and other international organisations, between 250,000 and 375,000 Rwandan refugees<sup>40</sup> – almost all of them Hutus – were murdered in systematic massacres carried out with heavy and light weapons.<sup>41</sup> Hundreds of thousands were forced to flee and were pursued into the jungles of Zaire; those that survived eventually travelled some 2,000km on foot<sup>42</sup> following various routes, mainly through Zaire.<sup>43</sup> Of the many accounts, the balanced and brave testimony published by the sociologist Béatrice Umutesi stands out.<sup>44</sup> She was a Rwandan refugee who survived these massacres and she vividly describes the suffering of an entire people: children, women, men and the elderly decimated by arms fire, disease, hunger, systematic sexual aggression or a combination of all of the above. Whilst this going on, not only did the United Nations High Commission for Refugees (UNHCR) fail to provide the correct support, but it

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of places. Unfortunately, I feel obliged to inform you that crimes against humanity are being committed in the Democratic Republic of Congo and Africa, apparently with the support of your Administration [...]”.

39. Several recently declassified documents have shown how much logistical and military support was provided, under cover of humanitarian aid. Aerial photographs taken by the US Navy above the areas of Bukavu, Goma, Sake, Numbi, Kilambo and Mihanda in November 1996 are now publically available. These photographs match the statements of Rwandan refugees, who relate how they were often subjected to monitoring from the air whilst they were fleeing on foot from the heavy-arms attacks of the APR’s Rwandan army, the Ugandan army and the AFDL in eastern Zaire. These attacks took place immediately after the aforementioned reconnaissance flights, which were apparently for humanitarian purposes (for all of these, Umutesi, Marie Béatrice, *op. cit. ut infra*). As well, prominent Congolese have highlighted the systematic use of Western aircraft to transport weapons, sometimes hidden amongst packages of humanitarian aid (see Bruno MITEYO, Director of Caritas DR Congo, *La Vanguardia* 25/3/2009, <http://www.lavanguardia.es/internacional/noticias/20090325/53666900347/bruno-miteyo-denuncia-llegan-armas-desde-europa-en-airbus-congo-kinshasa-jean-pierre-bemba-joseph-ka.html>, in Spanish)

40. The number of Rwandan refugees in Zaire, after repatriation – sometimes voluntary, others forced – of some of the 1,110,000 of them who found themselves in Zaire in September 1996 became a point of great humanitarian and political debate, as it was in the interest of certain parties to claim that that figure had never been verified. Whilst on 21 November the UNHCR offered the figure of 746,000 Rwandan refugees in Zaire after the end of the repatriation operations, the Rwandan authorities never accepted this figure and limited themselves to saying that the vast majority had returned, with only a limited number of genocide criminals remaining. The lack of will to clarify this point or the desire to deliberately hide the facts by some states and important figures in international organisations and international NGOs led to the suspension of the deployment of an international force that had been approved by the UN Security Council by Resolution 1080 of 15 November 1996. This embryonic international force was withdrawn to Uganda in late 1996 for this reason. See UNHCR: <http://www.unhcr.org/3ebf9bb60.pdf>, p. 24.

41. See Report of the Secretary-General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of Congo, (S/1998/581) dated 29 June 1998: <http://www.undemocracy.com/S-1998-581.pdf>. Despite the demands of the Secretary-General’s Investigative Team and of the Secretary-General himself for these international crimes to be investigated in order to break the cycle of impunity and set up an International Tribunal, the crimes have never been investigated by an international justice tribunal. The only judicial investigation relating to these crimes is taking place in the Spanish courts, pursuant to the principle of universal justice.

42. An Investigative Team was named by the UN Secretary-General to investigate the serious human rights and international law violations in the Democratic Republic of Congo, especially with regard to these events. Although this team was unable to complete its work, a large amount of evidence was gathered on these massacres (evidence that is kept under secure conditions at the United Nations). The report was eventually published and sent by the Secretary-General to the President of the UN Security Council, Report S/1998/581, dated 29 June 1998, <http://www.undemocracy.com/S-1998-581.pdf>. Following international pressure, the Investigative Team modified the final terminology used from possible “crimes of genocide” to possible “acts of genocide”, which has still not been whose legal definition has not been finalised. The Spanish judge Fernando Andreu, who, as has been said, is carrying out an international investigation into these crimes pursuant to the principle of universal justice, has issued international letters rogatory to the Geneva-based United Nations High Commission for Human Rights – whose High Commissioner was M. Louise Arbour – urging the submission of this evidence deposited with the United Nations to the Spanish authorities. As yet, the UN has not responded to the international letters rogatory.

43. See UNHCR source: <http://www.unhcr.org/3ebf9bb60.pdf>, p. 20

44. Marie Béatrice UMUTESI, *Surviving the Slaughter: the ordeal of a Rwandan refugee in Zaire*, Madison, Wisconsin, USA, The University of Wisconsin Press, 2004.

exceeded its mandate by carrying out forced repatriations, in the knowledge that many of the people repatriated to Rwanda were being imprisoned without trial,<sup>45</sup> recognised criminal charge – they were accused *en masse* of genocide – or legal representation; in other cases they simply disappeared.<sup>46</sup> At the end of Béatrice Umutesi's account, in the chapter *My Life for Ten Dollars*, she describes her tragic flight from attacks by soldiers across the jungles of Zaire, from Bukavu (on Zaire's eastern border) to Mbandaka (on the western border) and how, exhausted and very ill, she was on the point of being forcibly repatriated by the UNHCR, a United Nations organisation that was offering ten dollars per head to local Congolese to reveal the location of Rwandan refugees.<sup>47</sup>

### 3.2 Pillage during the wars in the Democratic Republic of Congo.

Some experts attached to the UN, international organisations or the USA have pointed out the links between these violent episodes and geopolitical, geostrategic and geoeconomic interests in the eastern part of the Democratic Republic of Congo.

The contradictory interests of the various sovereign states often become clear from the structure and decisions of the United Nations, particularly in the Security Council. In the case of the violent conflicts in Rwanda and, later, in Zaire/the Democratic Republic of Congo, these contradictory interests were obvious and tragically significant. Nevertheless, the United Nations provided the international community with important tools, use of which must still be made. The Panels of Experts nominated and sent by the United Nations Secretary-General prepared several conclusive reports<sup>48</sup> showing in detail that it was largely the APR/FPR and the Ugandan army, as well as other military groups, that were responsible for the pillage of strategic minerals during the last two wars: that of 1996-1997, and that which started in 1998 and has still yet to finish.<sup>49</sup>

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45. See Maurice NIWESE, *Le peuple Rwandais: un pied dans la tombe* (The Rwandan People: One Foot in the Grave), Paris, L'Harmattan, 2001.

46. These points are under investigation by the Spanish courts and explicit reference is made to in them in the Order of Indictment dated 6 February 2008 *Juzgado Central de Instrucción* No. 4 of the Spanish *Audiencia Nacional* (see: [http://www.veritasRuandaforum.org/dossier/resol\\_auto\\_esp\\_06022008.pdf](http://www.veritasRuandaforum.org/dossier/resol_auto_esp_06022008.pdf) (in Spanish), pp. 21, 81-86.

47. Marie Béatrice UMUTESI, *Huir o morir en el Zaire: testimonio de una refugiada ruandesa* (Surviving the Slaughter: the ordeal of a Rwandan refugee in Zaire, Spanish-language version), Editorial Milenio, 2001 305-306, "[...] there was no let up in the attempts by the UNHCR to recover the refugees, wherever they were hiding, in the villages or the jungle. If they were unable to reach all the places in which the refugees had taken shelter, they set up a system of financial rewards for any Zairian who brought them refugees. The 'premium' went as high as ten dollars for each refugee handed over. A manhunt was organised. The hunting of Rwandan refugees became a lucrative activity. Bands of premium hunters were formed. They arrived in the villages with ACNUR circulars asked the local authorities to give them work [...] Many peasants agreed to hand over children and young people – men and women – whom they had been sheltering since April 1997 [...]"

48. The first of these expert reports, issued by a commission headed by the Ivorian diplomat Safiatou Ba-N'Daw, marked a turning point, although vital parts of it have yet to be released by the United Nations: United Nations Security Council, Report S/2001/357, dated 12 April 2001: <http://www.undemocracy.com/S-2001-357.pdf>. The subsequent reports by panels of experts: Report S/2001/1072 of 13 November 2001, Report S/2002/1146 of 16 October 2002, Report S/2003/1027 of 23 October 2003. Very recently, on 12 December 2008, the most recent report by a panel of experts was published, in which evidence from testimonies and documentation directly implicates the Rwandan authorities and the Rwandan Defence Forces (the new name of the Armée Patriotique Rwandaise/Rwandan Patriotic Army) in the violence that took place in the eastern DR Congo and in providing the rebels of the National Congress for the Defence of the People (CNDP) with financial and logistical support (see <http://www.undemocracy.com/S-2008-773.pdf>). See also the contribution made by Asimila-Manto Papaioannou in his study "The Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: a case study on corporate complicity in human rights abuses", in De Schutter, Olivier, *Transnational Corporations and Human Rights*, Hart Publishing, Oxford, 2006, pp. 264-284.

49. To give just a couple of examples, Rwanda Metals and Grands Lacs Metals, both of which companies are under the direct control of the APR/FPR and are based in Rwanda. They are specifically mentioned in the aforementioned expert reports, according to which they are companies that participate in the trading of illicit coltan obtained in the Democratic Republic of Congo. The United Nations Panel of Experts also names the Banque du Commerce, du Développement et d'Industrie, and, in particular, Tristar Investments Sarl. This last is the parent company of most of the companies linked to the FPR and its senior officials, with President Paul Kagame at its head (see paragraphs 82 and 86, pp. 18-19 of the first UN expert report, S/2001/357, dated 12 April 2001).

The first report of the United Nations Panel of Experts:

25. The illegal exploitation of resources by Burundi, Rwanda and Uganda took different forms, including confiscation, extraction, forced monopoly and price-fixing. Of these, the first two reached proportions that made the war in the Democratic Republic of the Congo a very lucrative business.
26. Illegal exploitation by foreigners aided by the Congolese began with the first “war of liberation” in 1996. The AFDL rebels, backed by Angolan, Rwandan and Ugandan soldiers conquered eastern and south-eastern Zaire. As they were advancing, the then AFDL leader, the late Laurent-Désiré Kabila, signed contracts with a number of foreign companies. Numerous accounts and documents suggest that by 1997 a first wave of “new businessmen” speaking only English, Kinyarwanda and Kiswahili had commenced operations in the eastern Democratic Republic of the Congo. Theft of livestock, coffee beans and other resources began to be reported with frequency. By the time the August 1998 war broke out, Rwandans and Ugandans (top officers and their associates) had a strong sense of the potential of the natural resources and their locations in the eastern the Democratic Republic of the Congo. [...] <sup>50</sup>

The expert reports also make it clear that Western multinationals have been responsible for the pillage and illegal exploitation of those resources.<sup>51</sup> These actions have served to finance the war, as well as perpetrating the perpetration of crimes against humanity and systematic human rights violations.<sup>52</sup> Some of these companies are multinationals<sup>53</sup> and others operate at the national and local levels. As has very recently been made public, the Spanish courts have formally requested the judicial cooperation of the United Nations Secretary-General on criminal matters and the

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50. Report of the Panel of Experts entrusted with examining the issue of the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of Congo, UN Report S/2001/357, II, Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, paragraphs 25-26, pp. 6-7.

51. “[...] The role of the private sector in the exploitation of natural resources and the continuation of the war has been vital. A number of companies have been involved and have fuelled the war directly, trading arms for natural resources [...]” (See UN Report S/2001/357, paragraph 215, p. 42). The British NGO Oxfam published a press release to accompany the fourth United Nations report: “The United Nations Security Council must insist that Member States immediately begin investigations relating to the participation of multinational companies accused of profiting from the war in the Democratic Republic of the Congo[...] On Monday the Security Council will examine the fourth and final report of a Panel of Experts that it established in June 2000 to examine the illegal exploitation of resources in the DRC. The Security Council has failed in its actions relating to the panel’s previous reports, which demonstrate the link between the activities of multinational companies and the armed groups guilty of massacres and other atrocities. It is estimated that the war in the Democratic Republic of the Congo has caused the death of more than three million people, the greatest number of deaths in terms of civilian lives since the Second World War. According to the Panel of Experts, control over natural resources was one of the main reasons for the war. The Security Council can no longer ignore the clear evidence of the link between the exploitation of resources and the war in the Congo”, it said to non-governmental organisations. “It must be insisted that Member States hold involved individuals and companies responsible, including those companies that are based in Western countries.” Oxfam press released, dated 27 October 2003 ([http://www.oxfam.org/en/news/pressreleases2003/pr031027\\_drc\\_corporate.htm](http://www.oxfam.org/en/news/pressreleases2003/pr031027_drc_corporate.htm) ). Unfortunately, despite the evidence collected by the United Nations Panel of Experts, neither the United Nations nor any of its Member States have taken effective – or legal – action against those responsible for these international crimes; it has limited itself to publishing the results of the investigation.

52. The fourth of the reports by United Nations Panel of Experts for the Security Council, Report S/2002/1146, dated 16 October 2002: <http://www.undemocracy.com/S-2002-1146.pdf>

53. The following are just some of the companies of whose involvement in pillage against a backdrop of military activity the UN Panel of Experts says it has solid evidence: Finmining Ltd, Cogem, Sogem, Cogecom (Belgium), Affirmex, Anglo American Plc, De Beers (United Kingdom), Chemie Pharmacie Holland (Netherlands), Finconord (Pakistan), Raremet (India), African Trading Corporation, Banro Corporation, Iscor, Orion Mining Inc, Track Star Trading Ltd (South Africa), America Mineral Fields, Eagle Wings Resources International, OM Group Inc, Trinitech International Inc (United States of America), Eagle Wings Resources International, Great Lakes General Trade, Great Lakes Metals, Rwanda Metals, Tristar Holding (Rwanda), George Forrest Group. Special consideration of the company Iscor: it is interesting to note that another company, Industrial Development Corporation of South Africa Ltd, is a shareholder of Iscor Ltd, one of the companies included on the list of the United Nations Panel of Experts in Report 2002/1146 (see p. 43). The multinational company Industrial Development Corporation of South Africa Ltd appears as a production company in the credits of the well known film Hotel Rwanda (see <http://www.imdb.com/title/tt0395169/companycredits> ), which follows the official version of events, with the end of the film showing the supposed liberation of Rwanda by soldiers of the Rwandan Patriotic Front/Rwandan Patriotic Army, which has already been shown not to match this official version.

handing over of material evidence relating to the alleged involvement of specific individuals and the representatives of specific multinational companies<sup>54</sup> identified by the United Nations Panel of Experts in their reports cited in relation to the investigation into illegal exploitation of mineral resources in the Democratic Republic of Congo. At the time of publication of this paper, the United Nations had not responded to this request.

Similarly to the United Nations, organisations such as Global Witness<sup>55</sup> or the International Peace Information Service<sup>56</sup> have carried out investigations and found evidence of pillage or complicity in crimes against humanity. United Nations experts demonstrated the exportation of diamonds by Rwanda, a country which neither produces nor exports them officially.<sup>57</sup> It had also been able to obtain a profit of 250 million dollars in just one year through the sale of pillaged and illegally exploited coltan to, at least, the United States; this sum is believed to have been sufficient to finance the military presence of the FPR/APR in Zaire and, subsequently, the new Democratic Republic of Congo.

It should also be briefly considered – both because this is an enormous, submerged iceberg, and because of information from Wayne Madsen, who is an investigator from the United States and ex-member of the National Security Agency – that the US company Kellogg Brown & Root (a subsidiary of the company Halliburton,<sup>58</sup> managed at the time by Dick Cheney) was apparently involved in training the forces of the FPR/APR, allegedly providing logistical support in Zaire.<sup>59</sup> Whilst the invasion and massacres were going on, the systematic pillage of coltan – a material that is much sought-after because of the size of the market for mobile telephones, laptop

54. See *El País*, 15/3/2009, "Coltán, sangre y armas en el Congo" (Coltan, Blood and Weapons in the Congo). [http://www.elpais.com/articulo/internacional/Coltan/sangre/armas/Congo/elpepiint/20090315elpepiint\\_6/Tes](http://www.elpais.com/articulo/internacional/Coltan/sangre/armas/Congo/elpepiint/20090315elpepiint_6/Tes), in Spanish

55. International NGO based in the United Kingdom. See one of its reports, entitled *S.O.S: Same Old Story, a background study on natural resources in the Democratic Republic of Congo*, dated June 2004, [http://www.globalwitness.org/media\\_library\\_detail.php/118/en/same\\_old\\_story](http://www.globalwitness.org/media_library_detail.php/118/en/same_old_story).

56. International NGO based in Belgium. See one of its reports, entitled *Supporting the war economy in DRC. European companies and the coltan trade*, dated September 2002. [http://www.ipisresearch.be/publications\\_reports.php](http://www.ipisresearch.be/publications_reports.php).

57. "[...] Uganda and Rwanda have been exporting diamonds, and that this activity is hidden and does not appear in the statistics they disseminate. They do not produce diamonds, nor do they officially export this mineral. It is probable that these minerals are coming from the Democratic Republic of the Congo and would constitute the basis for the re-exportation economy [...]" (see Report S/2001/357, paragraph 107, p. 28). To accompany this, the previously cited Order of Indictment of 6/2/2008 (p. 132) includes an important direct testimony regarding the pillage of natural resources in Zaire by officers of the Rwandan Patriotic Army during the first war. Reference is made to the continued pillage of a stock of diamonds in mid 1997, transported in secret from a small airport near to Lubumbashi (southeast of the Republic of Zaire), to Kanombe airport in Kigali (Rwanda), diamonds heading for the External Security Office (government facilities of 'Congo Desk' in Kigali, Rwanda) and the facilities of the company Gomair Rwanda (also closely linked to the current president, Paul Kagame). According to this protected witness, this operation was personally supervised by James Kabarebe, the officer in charge of all the APR battalions in Zaire and Paul Kagame's right-hand man. The general strategy for pillage is explicit: firstly the APR's regular army takes control of a given area. Once it has been confirmed that there are reserves of minerals or other natural resources, the *Garde Republicaine* assigned to President Paul Kagame's High Command or another major member of the military-intelligence services of the Directorate for Military Intelligence (DMI) takes control of the situation and from that point on organises the pillage, the extraction and/or transportation of these natural resources to strategic locations in Rwanda. On top of this, the protected witness also has knowledge – in this case indirect – of enormous operations to plunder Congolese bank funds allegedly carried out by APR soldiers, confirming the dynamic of pillage described in the report of the United Nations Panel of Experts (see paragraph 37, p. 8 of the first United Nations report S/2001/357, dated 12 April 2001 *op. cit. ut supra*).

58. Still in the context of war, this time the 'war on terror', some years later in 2002, this division of Halliburton sealed a 9.7 million dollar contract to build a new internment and detention centre at the naval base in Guantanamo Bay, Cuba to house Al-Qaida suspects and Taliban prisoners (see Reuters, Saturday, 27 July 2002, <http://www.commondreams.org/headlines02/0727-02.htm>). In 2005 the same division of Halliburton won a 30 million dollar contract to build a new, permanent prison for terrorism suspects in Guantanamo Bay. As almost the entire world knows, the prison at Guantanamo Bay Naval Station has played an important role in the war against terror declared by the United States after suffering the attacks of 11 September 2001 in New York and Washington. More than 3,000 people died in those attacks, on top of the uncountable victims of the subsequent military and antiterrorist reaction. The possible crimes of systematic torture in Guantanamo Bay – as well as in Afghanistan and Iraq – are currently under investigation.

59. Wayne MADSEN, *Genocide and Covert Operations in Africa, 1993-1999*, Washington DC, Edwin Mellen Press, 1999. Hearing before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives (Capitol Hill), seventh Congress, first period of sessions, 17 May 2001, Serial No. 107-16, pp. 12-19. Also cited in *op. cit. Noir Canada, pillage, corruption et criminalité en Afrique*, p. 55 onwards.



computers, satellites, etc. – as well as gold, diamonds, copper and cobalt was taking place. Keith Harmon, another US investigator, states that, at times, Western multinational companies supplied logistical support and military materials in exchange for mining concessions in key territories, as in the case of the Zairian gold mines at Kilo-Moto.<sup>60</sup>

In this context, in 1998, one year after the first war had ended with Laurent-Désiré Kabila taking power, the armies of Rwanda and Uganda occupied the Democratic Republic of Congo for a second time.<sup>61</sup> As Luis Moreno Ocampo, Prosecutor of the International Criminal Court has pointed out, this conflict has led to more deaths than any other since the Second World War.<sup>62</sup> As has been documented by the US organisation International Rescue Committee,<sup>63</sup> the UN and the European Union, 5.4 million people have lost their lives in this conflict in the last ten years.

It must be made clear that the pillage, plunder and illegal exploitation of minerals has been carried out by an anonymous mass of Africans working through contemporary slavery systems, with the complicity of African and Western actors. In many mines children work from sunrise to sunset in subhuman conditions. Many prisoners from Rwanda's jails have been transported – in a huge violation of their human rights – to the neighbouring Democratic Republic of Congo to work in mineral extraction;<sup>64</sup> their sentences are commuted and then 'served' working in the mines. They

60. Wayne MADSEN, *Genocide and Covert Operations in Africa, 1993-1999*, Washington DC, Edwin Mellen Press, 1999. Hearing before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives (Capitol Hill), seventh Congress, first period of sessions, 17 May 2001, Serial No. 107-16, pp. 20-30, and statements obtained by the author of this document.

61. Some people have labelled these violent episodes the "African First World War" because of the intervention of at least nine African countries: on one side Rwanda, Uganda and Burundi, along with some rebel groups; on the other the army of the new country called the Democratic Republic of Congo, led by Laurent-Désiré Kabila, supported by those of several African countries, such as Zimbabwe, Angola, Namibia, Sudan and Chad, as well as by some rebel groups. In addition to these, the participation of local and foreign mercenaries has also been recorded, through the state and through paramilitary organisations, as well as through both Western and African multinationals who supported one side or the other.

62. In 2004, two years after becoming active, the International Criminal Court (ICC) announced its first investigation on the basis of reports of serious crimes in the Democratic Republic of Congo and requests by that country. The ICC's Prosecutor, Luis Moreno Ocampo, informed the international community of this (see BBC News, 23 June 2004, <http://news.bbc.co.uk/1/hi/world/africa/3834599.stm>). Some months later Moreno Ocampo gave notice of the investigation into the use of 'blood diamonds' that have helped to finance the civil war in the Democratic Republic of Congo. Prosecutor Moreno Ocampo now considers the mass murders in the Democratic Republic of Congo to be the "most important case since the Second World War" and is aiming to make it the ICC's inaugural trial (see 28 October 2004, [newsdesk.org, http://www.newsdesk.org/archives/003225.html](http://www.newsdesk.org/archives/003225.html)). In June 2008 there are four cases under investigation by the ICC: the situation in the Democratic Republic of Congo, the situation in Uganda, the situation in Darfur and Sudan, and the situation in the Central African Republic (see [http://www.icc-cpi.int/organs/chambers/chambers\\_decisions.html](http://www.icc-cpi.int/organs/chambers/chambers_decisions.html)). As regards the case of the Democratic Republic of Congo, three people are in custody: Thomas Lubanga, Germain Katanga and Mathieu Ngujolo. There is also another, Bosco Ntaganda, who, as Military Chief of Staff for Laurent Nkunda's National Congress for the Defence of the People (CNDP), has been the subject of an international arrest order but has still not been detained (even though only a few weeks ago he joined up with the Congolese armed forces), on the basis that peace takes precedence over justice. The last person detained by the ICC was the ex-Vice-President of the Democratic Republic of Congo, Jean-Pierre Bemba Gombo, for crimes allegedly committed in the Central African Republic (not the DR Congo); his criminal charges include – as well as alleged rapes, acts of torture, and attacks on personal dignity – the crime of pillage in three locations (see ICC-01/05-01/08 dated 23 May 2008, Pre-Trial Chamber III, [http://www.fidh.org/IMG/pdf/mandat\\_Bemba\\_cpi\\_2008.pdf](http://www.fidh.org/IMG/pdf/mandat_Bemba_cpi_2008.pdf)).

63. A study by the International Rescue Committee has found that 5,400,000 people have died in the Congo either as a result of the war or of related causes since 1998 (see [http://www.theirc.org/resources/2007/2006-7\\_congomortalitysurvey.pdf](http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf)). These wars that have led to more than seven million Rwandan and Congolese victims have also had numerous non-African victims, including Canadians, Belgians, Britons, Italians, Croats and Spaniards: two Catalans, one Basque, one Andalusian and five people from central Spain met their violent ends in the course of their mission to bring aid to people in need. For more information on crimes committed in Rwanda and the Democratic Republic of Congo, please visit [www.veritasrwandaforum.org](http://www.veritasrwandaforum.org).

64. "[...] In particular, Rwanda utilized prisoners to dig coltan in exchange for sentence reduction and limited cash to buy food. The Panel was recently informed that there is a presence of 1,500 Rwandan prisoners in Numbi, in the area of Kalche. According to the same report, these prisoners were seen mining coltan while guarded by RPA soldiers. Human Rights Watch also reported the same information in March 2001. This recent report confirms numerous other reports and eyewitness accounts of the involvement of prisoners, some of whom are former refugees [...]. Report of the Panel of Experts entrusted with examining the issue of the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of Congo, Report S/2001/357 of 12 April 2001, paragraph, p. 12.

are offered nothing more than exit from the institution in which they were incarcerated, the majority of them without trial or being charged with anything other than a generic accusation of 'genocide'.

Apart from the limited number of sentences issued by the International Criminal Tribunal for Rwanda, a few other proceedings under national jurisdictions, and the application of the Gacaca community courts, which are widely criticised for their lack of impartiality, including by the Expert Reports of the United Nations itself,<sup>65</sup> this wide-ranging web of international crimes and crimes against humanity by geoeconomic and geostrategic interests continues to enjoy total impunity. In the present-day Democratic Republic of Congo the situation of impunity relating to the systematic violation of the civilian population's human rights is manifest. UN experts have been repeatedly demanding the investigation and charging of the people responsible for these crimes since 1998, when the then UN Secretary-General, Kofi Annan, denounced this vicious cycle of human rights violations and revenge, fed by impunity,<sup>66</sup> particularly in the territory of the former Zaire. In spite of what the United Nations Secretary-General himself pointed out, and the recommendations of the Panel of Experts nominated for the purpose, the UN has not established an *ad hoc* international tribunal to investigate and try these crimes, committed either by individuals or by the representatives of non-state actors and/or multinationals, nor has it decided to extend the jurisdiction of the International Criminal Tribunal for Rwanda. Nor have the national courts of justice of the Democratic Republic of Congo investigated the international crimes –whether crimes against people or the pillage of resources – that have been occurring in the country, particularly from October 1996 to the present.<sup>67</sup>

### 3.3 Impact and handling of the wars, with particular reference to Central Africa.

Several factors have caused unprecedented humanitarian crises in Central Africa, including: the handling of these wars and violent conflicts by state actors,<sup>68</sup> non-state actors, the international community in general, international institutions,<sup>69</sup> regional institutions,<sup>70</sup> multinational corporations, along with the mercenaries, the plundering on a huge scale, and the international trafficking of various resources and people. The impact of the unstoppable and destructive boomerang that its effects constitute is still very much being felt throughout Africa and, in the context of a globalised world, is expanding beyond the continent's borders. Zygmunt Bauman gives a lucid description of this 'humanity in motion'<sup>71</sup> and points to the new exclusions in the world and the generation of non-recyclable remains, including 'human remains'.

There follows a list of examples that demonstrate graphically how, in addition to these violent conflicts, which are often identified as 'local or national conflicts, as well as obscuring important international connections at all levels, are expanding beyond their borders, with an enormous impact on various areas of the globalised world:

65. See Human Rights Committee Expert Report for the United Nations Security Council HR/CT/704 dated 18/3/2009: <http://www.un.org/News/Press/docs/2009/hrct704.doc.htm> .

66. A letter from the Secretary-General to the President of the Security Council, dated 29 June 1998 clearly says "[...] As they read the report of my Investigative Team, the members of the Council will encounter one of the root causes of the recent conflicts in the Great Lakes region of Africa: a vicious cycle of violations of human rights and revenge, fuelled by impunity. This cycle has to be brought to an end if lasting peace and stability are to be restored to the region [...]". See the letter of the UN Secretary-General attached to Report S/1998/581, dated 29 June 1998 from his Investigative Team in the Democratic Republic of Congo at: <http://www.undemocracy.com/S-1998-581.pdf> .

67. Currently, other than the specific cases mentioned above that are being investigated by the International Criminal Court, only in the Spanish courts are there investigations under way, pursuant to the principle of universal justice, into crimes committed in Rwanda after 1994 and crimes committed in the Democratic Republic of Congo between 1996 and July 2002, in which year, as is well known, the jurisdiction of the International Criminal Court begins.

68. In, amongst others, the United States of America, China, the United Kingdom, Belgium, France, the Netherlands, Rwanda, Uganda, Burundi, Zaire/the Democratic Republic of Congo, Tanzania, Kenya, Sudan, as well as their national governments.

69. Such as, amongst others, the United Nations and its bodies, the World Bank and the International Monetary Fund.

70. Such as, amongst others, the European Union and the African Union.

71. Zygmunt BAUMAN, *op. cit.*

- a) *Rwanda*: In 1994 the 'regime of President Habyarimana' had around 5,000 registered soldiers. In less than a decade, specifically in the year 2001, the 'regime of President Kagame' had ten times as many registered; in other words, 50,000 soldiers. Local sources have stated that, taking into account the wars being fought in Zaire/the Democratic Republic of Congo, there are 100,000 additional soldiers that are not registered; these are paid as a direct result of the pillaging of that country. 150,000 active soldiers is a number that is clearly disproportionate for a small country like Rwanda. The 'regime of President Kagame' has officially sent a large number of soldiers – constituting the second largest contingent after Nigeria's<sup>72</sup> – to UNAMID, the hybrid United Nations/African Union peacekeeping force in Darfur (Sudan), whose operations formally started on 31 December 2007. The number of active troops is expected to increase from 9,000 on 31 December 2007 to approximately 26,000. Rwanda has a special position in the force: it contributes 1,500 soldiers<sup>73</sup> and has offered a further 800. More recently, in July 2008, Rwanda threatened to withdraw the 3,000 soldiers it currently has in Sudan if Major General Karenzi Karake – who Rwanda had proposed – were not confirmed in his post as Deputy Commander of UNAMID,<sup>74</sup> following his prosecution in the Spanish courts. In late September 2008, after having received 20 million dollars (USD 20 million) from the US State Department<sup>75</sup> intended for the Rwandan Defence Forces (RDF; previously the RPA) deployed in Darfur, Major General Karenzi Karake,<sup>76</sup> who commands the RDF in Sudan, was confirmed by the United Nations Secretary-General himself as Deputy Commander of UNAMID for an additional period of six months.<sup>77</sup>
- b) *Uganda*. Some ex-soldiers of the Rwandan Patriotic Army that have been demobilised and are staying in Uganda are beginning to employ at least two different resettlement strategies. Either they attempt to claim asylum or refugee status in Africa or European countries, or they are contracted by US private security firms to serve in the Iraq conflict.<sup>78</sup>
- c) *Democratic Republic of Congo*: Thousands of Rwandan refugees, both Tutsi and Hutu, have left Rwanda in recent decades because of the violent interethnic conflicts. These refugees are both the perpetrators and the victims of new violent episodes, especially in the eastern part of the Democratic Republic of Congo. Enormous population displacements are occurring (hundreds of thousands of affected people and families) because of the military conflicts, both within the Democratic Republic of Congo and in neighbouring countries. Congolese ethnic groups such as the Hema (of similar origins to the Tutsi) and the Lendu (of similar origins to the Hutu), to give but two examples, have also been participating in the violent conflicts. The violent conflicts continue to spread, including large-scale, systematic sexual aggression against women and girls by all the forces involved. The presence of Rwandan refugees and soldiers in the Democratic Republic of Congo is often used as a pretext and justification for the continuation of military operations.
- d) *Rwandan and Congolese refugees in other countries*: The violent conflicts in Central Africa have spread, leading to an enormous number of refugees in Central Africa and Africa in general, Europe, and North America, leading, in turn, to migratory pressures at the least in numerous countries on at least three different continents.

72. See the deployment of Rwandan soldiers for the hybrid UN/African Union peacekeeping force (UNAMID) in Sudan: <http://www.un.org/Depts/Cartographic/map/dpko/unamid.pdf>.

73. See <http://www.globalsecurity.org/military/library/news/2007/10/mil-071026-afpn02.htm>

74. See "Rwanda Threatens Darfur Pullout if U.N. Removes General", *Washington Post*, 24/7/2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/23/AR2008072303610.html>.

75. Source: US State Department, 3/9/2008, [http://rwanda.usembassy.gov/u.s.\\_embassy\\_donates\\_equipment\\_to\\_the\\_rwanda\\_defense\\_forces](http://rwanda.usembassy.gov/u.s._embassy_donates_equipment_to_the_rwanda_defense_forces)

76. This Rwandan official was named Head of Military Intelligence in Rwanda from July 1994 to March 1997. In this period massive crimes were committed against the civilian populations of Rwanda and the then Zaire.

77. See "U.N. Offers To Keep Rwandan In Darfur. Commander Is Charged With 1990s War Crimes", *Washington Post*, 3/10/2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/02/AR2008100203598.html?nav=emailpage>

78. Statement obtained by the author of this study.

## 4. THE RESPONSIBILITY OF NON-STATE ACTORS, ESPECIALLY MULTINATIONAL COMPANIES, FOR HUMAN RIGHTS VIOLATIONS AND INTERNATIONAL CRIMES

Despite the efforts of the international community and the growing case law of the international criminal tribunals, there is a notable feeling of impunity with relation to the gravest international crimes committed against people or communities. When the focus is on crimes of pillage, the perception is one of almost total impunity. There are almost no examples of open legal proceedings or sentences for the international crime of pillage at international or national level, as is analysed in the following paragraphs. Even where such cases are open, non-state actors – be they rebel groups, paramilitaries, semi-public organisations, multinationals, criminal gangs, or mafiosi organisations – are rarely investigated.

Owing to the increasing involvement of these actors, especially multinational companies, on the international scene, it has become necessary to develop their criminal responsibility in international law. This is especially true when they are active in conflict areas.

Nonetheless, the pillage of natural resources is not a new concept, with charges brought against some German businessmen for crimes against peace in the Nuremberg trials.<sup>79</sup> Following Nuremberg, various national courts tried and sentenced officials or businessmen for their direct or indirect participation in war crimes. Although it is true that in these cases the defendants were convicted on the basis of their actions as individuals (individual criminal responsibility), this arose out of their participation in commercial activity with war criminals. So, for example, in the Farben and Krupp<sup>80</sup> cases both US tribunals sentenced the defendants – both employees and managers of the companies – for committing acts of plunder and subjecting civilians or prisoners of war to slave labour. In the Washio Awochi case, a Japanese businessman was condemned for the war crime of forced prostitution.<sup>81</sup> More recently, in May 2009, it emerged that a US court has opened proceedings against the Anglo-Dutch oil company Shell, which is accused of complicity in human rights violations against the Ogoni people and the execution of the activist Ken Saro-Wiwa in Africa, specifically Nigeria (the country with the tenth-largest oil reserves in the world).<sup>82</sup>

### 4.1 The responsibility of companies or multinationals for international crimes in contexts of armed conflict. Human Rights Legislation.

The Inter-American Commission on Human Rights states that “The entire system for protecting human rights is designed on the basis of the State’s acknowledgement of itself as a party to a fundamental legal contract on the matter of human rights”.<sup>83</sup> This means that the state is the duty bearer with regard to the obligations to respect, protect and comply with human rights. According to the Human Rights Committee, the state’s obligation to respect and guarantee the rights included under Article 2 of the International Covenant on Civil and Political Rights of all the people under

79. Chatham House, International Law Discussion Group Summary, *What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?*, February, London 2006, p. 1, [http://www.chathamhouse.org.uk/files/9575\\_ilp230206.pdf](http://www.chathamhouse.org.uk/files/9575_ilp230206.pdf).

80. In the Farben case, the convicted individuals had exploited the people imprisoned in concentration camps (Auschwitz amongst others) for forced labour in occupied industrial facilities. In the Krupp case, it was prisoners of war and people from Eastern Europe who were subjected to forced labour in French and Dutch factories. In Chatham House, International Law Discussion Group Summary, *What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?*, February, London 2006, p. 1. [http://www.chathamhouse.org.uk/files/9575\\_ilp230206.pdf](http://www.chathamhouse.org.uk/files/9575_ilp230206.pdf).

81. Chatham House, International Law Discussion Group Summary, *What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?*, February, London 2006, p. 1. [http://www.chathamhouse.org.uk/files/9575\\_ilp230206.pdf](http://www.chathamhouse.org.uk/files/9575_ilp230206.pdf) (visited on 23 January 2009).

82. See *Diario Público*, 25/5/2009, Isabel Coello <http://www.publico.es/internacional/227697/shell/juicio/abusos/delta/nigeria>.

83. Annual Report of the Inter-American Commission on Human Rights, 1990-1991, Chapter V. Document OEA/Ser.LV/II.79.rev.1, of 22 February 1991. See <http://www.cidh.oas.org/annualrep/90.91eng/TOC.htm>

its jurisdiction and within its territory gives rise to the state's obligation to investigate, try and punish violations of individual rights and freedoms.<sup>84</sup> As a consequence, when a state fails to meet these obligations, whether because it fails to prevent or actively participate in preventing violations, or because it fails to observe the prohibitions imposed on it by international human rights law, it is held responsible in accordance with those same laws.

The state is also responsible for crimes committed by both state and non-state agents, on the basis that they were not prevented,<sup>85</sup> and, in the case of bringing those who committed the crime before justice and punishing them, the state may bear subsidiary civil liability for such crimes committed within its territory.<sup>86</sup> As part of its obligation to prevent the perpetration of such crimes – called crimes of importance to the international community or crimes in international law<sup>87</sup> – states are obliged to enact laws and implement all measures necessary for their prevention.

As regards the crimes of importance to the international community set out in international treaties, states are obliged, once these treaties have been ratified, to include types of criminal activity covered by their national legislation. Crimes under international law directly impose an individual criminal responsibility,<sup>88</sup> irrespective of whether a state has classified the act as a crime in its internal legislation. States are required, therefore, to take proactive measures to prevent and investigate such crimes, as well as establish, where applicable, the corresponding criminal and civil responsibility relating to the applicable human rights and procedural guarantees.

Human rights must be respected by states and individuals,<sup>89</sup> and related legislation is applicable to all circumstances.<sup>90</sup> Nevertheless, in certain situations – states of emergency or war – states may suspend or limit the exercise of some rights.<sup>91</sup> However, this suspension may not affect the so-called 'nucleus' of irrevocable, customary rights: the right to life, to not be subjected to torture or cruel, inhuman or degrading treatment or punishment, and to not suffer slavery or servitude.<sup>92</sup> Moreover, the prohibition of subjecting people to slavery and acts of torture constitute peremptory norms, or *ius cogens*, in international law.<sup>93</sup>

84. See General Comment Recommendation No. 3 (Article 2), Document UN HRI/GEN/1/Rev.7 at 140 (1981), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/414/96/PDF/G0541496.pdf?OpenElement>; and Communication No 821/1998, Chongwe v. Zambia, of 9 November 2000, Document CCPR/C/70/D/821/1998 (observations adopted 25 October 2000), [http://www.bayefsky.com/pdf/105\\_zambia821.pdf](http://www.bayefsky.com/pdf/105_zambia821.pdf).

85. It is a general principle of international law that states are solely responsible for both the actions of the authorities and their failure to act. See Inter-American Commission on Human Rights, Report No. 53/96, Case 8074, Guatemala, December 6, 1996, <http://www.cidh.org/annualrep/96eng/guatemala8074.htm>.

86. In the Spanish case, Articles 120 and 121 of the Criminal Code refer to subsidiary civil liability in criminal law. For example, in the case of a homicide that took place in a prison and was a direct result of the prison officials' failure to effectively prevent the entry of weapons, as is their obligation because of their position as guarantors of the life, integrity and health of prisoners (Art. 3.4 General Penitentiary Organic Law). In the case of torture, whichever Public Administration were the employer of the public servants responsible would also be sentenced, under Article 121 of the Criminal Code. See the Supreme Court rulings of 20 December 1989 and 23 April 1990. There is still no provision in the Spanish legal system for the authority of the Spanish courts to declare – in the context of cases tried under the principle of universal jurisdiction – subsidiary civil liability of a state which failed to prevent a crime committed in its territory.

87. There are innumerable ways of classifying the crimes. See, for example, Amnesty International, *España: Ejercer la jurisdicción universal para acabar con la impunidad* (Spain: Exercising Universal Jurisdiction to Bring Impunity to an End), Index EUR 41/017/2008, October 2008, pp. 10-31.

88. See Antonio CASSESE, *International Criminal Law*, Oxford, Oxford University Press, 2003, p.23.

89. See Report on Human rights and human responsibilities, Commission on Human Rights, document UN E/CN.4/2002/107, of 19 March 2002, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/e413d84b25dd7ac7c1256b9e003765c9/\\$FILE/G0211472.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/e413d84b25dd7ac7c1256b9e003765c9/$FILE/G0211472.pdf).

90. Although, because it is *lex specialis*, international humanitarian law takes full force, irrespective of the intensity of the conflict, its application is expressly excluded from situations of internal tension or disturbances, in which case international human rights law will remain in force. They are, then, complementary bodies of law/legislation.

91. The Human Rights Committee has made declarations on the subject on many occasions. See, for example, (CCPR/C/79/Add.76, paragraph 25 (1995), (CCPR/CO/71/SYR, paragraph 6 (2001), CCPR/C/70/Add.90, paragraph 8 (1998)), and CCPR/C/79/Add.78, paragraph 10 (1997).

92. See Article 4.2 of the International Covenant on Civil and Political Rights.

93. M. Ch. BASSIOUNI, "International Crimes: *Jus cogens* and *Obligatio Erga omnes*", *Law and Contemporary Problems*, Vol. 59, No. 4, Accountability for international Crimes and Serious Violations of Fundamental Human Rights, North Carolina, USA, Duke Law School, Durham, 1996.

What, however, happens when such conduct is carried out by a non-state actor with legal personality?

As has been seen above, this issue emerged both in the context of the Nuremberg and later on and, although it was resolved with charges against individuals – as representatives or employees of companies – it also came to be established that legal persons had violated certain laws of war.<sup>94</sup> However, the Statute of the Nuremberg Tribunal did allow groups or organisations to be declared ‘criminal’, making membership of such organisations an offence. The Tribunal focused on the concept of conspiracy and on ‘common purpose theory’ when dealing with the participation of such groups in crime.<sup>95</sup>

During the preparatory meetings for the Conference of Rome, the proposal to include the criminal responsibility of legal persons under the jurisdiction of the International Criminal Court was debated. There were, however, objections to the proposal. One of the arguments employed against such an extension referred to the impact that the decision would have on the principle of complementarity.<sup>96</sup> By virtue of this principle, where jurisdictions overlapped the Rome Statute would give preference to national jurisdictions over those of the ICC, provided that certain requirements set out in Article 17 are met. The detractors’ concern about the inclusion of the criminal responsibility of legal persons in the Statute has to do with the fact that those states that do not recognise such responsibility would not have the opportunity to exercise their jurisdiction first and carry out the mandatory investigation first, imposing punishments where applicable.<sup>97</sup> Therefore, the involved states were, in order to meet their obligations under the Rome Statute, forced to develop the issue of the criminal responsibility of legal persons under their own legal systems.<sup>98</sup>

In the case of the Democratic Republic of Congo, the Panel of Experts assembled by the United Nations Security Council to prepare the 2001 Report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo made it clear that that country’s natural resources (particularly diamonds, gold, cobalt, copper, timber and coffee) are being pillaged. The Panel concluded that the illegal exploitation of these resources in the country was being carried out fundamentally by political, military and commercial interests of the governments of Rwanda and Uganda, with those of the DR Congo, Zimbabwe, Angola and Namibia also participating. It also concluded that numerous multinational companies based in Africa, North America, Europe and Asia were heavily involved in the pillage. Furthermore, it concluded that there was a link between this exploitation and the continuation of the conflict in the country.<sup>99</sup>

The report highlights how mineral extraction was carried out either by the occupying soldiers themselves or, as has already been shown, by imported labour. These workers were often Rwandan prisoners who in this way had their sentences reduced; many of these prisoners had been refugees.<sup>100</sup> A key aspect of the report is that it states that the link between the conflict and the exploitation of resources would have been impossible without the participation of some non-

94. Chatham House, International Law Discussion Group Summary, *What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?*, February, London 2006, p. 4. [http://www.chathamhouse.org.uk/files/9575\\_ilp230206.pdf](http://www.chathamhouse.org.uk/files/9575_ilp230206.pdf).

95. Chatham House, International Law Discussion Group Summary, *What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?*, February, London 2006, p. 4. [http://www.chathamhouse.org.uk/files/9575\\_ilp230206.pdf](http://www.chathamhouse.org.uk/files/9575_ilp230206.pdf) (Visited on January 23, 2009)].

96. See Article 17 of the Rome Statute of the International Criminal Court. Document UN, A/CONF.183/9 (1998).

97. Joanna KYRIAKAKIS, ‘Corporations and the International Criminal Court: The complementarity objection stripped bare’. *Criminal Law Forum* 19, Vancouver, Canada, 2008, pp. 116-119.

98. Chatham House, International Law Discussion Group Summary, *What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?*, February, London 2006, p. 4. [http://www.chathamhouse.org.uk/files/9575\\_ilp230206.pdf](http://www.chathamhouse.org.uk/files/9575_ilp230206.pdf) (Visited on January 23, 2009).

99. Either the produce of such pillage and illegal exploitation served to finance the acquisition of weapons, or mining concessions were awarded in exchange for weapons through the creation of joint ventures. Report S/2001/357 of 12 April 2001, p. 29. See also Report S/2002/1146, of 16 October 2002, p. 6 onwards.

100. Report S/2001/357 of 12 April 2001, pp. 8-12.

state actors. The report even says that bilateral and multilateral donors had facilitated the exploitation, and that the role of private companies had been vital and includes a list of more than 39 international companies connected to these networks and that had, therefore, contributed in some way to prolonging the conflict and plundering natural resources.<sup>101</sup>

#### 4.2 Responsibility within the framework of humanitarian law.

In addition to international human rights law there is another corpus, international humanitarian law, whose purpose is to regulate the behaviour of belligerent forces during times of armed conflict and protect the civilian population.<sup>102</sup> It is applicable to armed forces (as state agents), armed groups and non-state agents. Thus, international humanitarian law allows fundamental human rights legislation to be applied to armies and non-state groups, so the aforementioned irrevocable nucleus of human rights and those included under Common Article 3 of the 1949 Geneva Conventions, which are applicable to all armed conflicts,<sup>103</sup> are the same.

With this in mind it should be recalled that it is those acts that are crimes under international law – which would include, for example, war crimes,<sup>104</sup> crimes against humanity and genocide – for which international law itself directly imposes individual criminal responsibility.<sup>105</sup> The principle by which the authors of violations of international law, or those who have ordered them to be committed, will be held to have an individual criminal responsibility is, therefore, extremely widely recognised.

Article 6 of the Statute of the Nuremberg Tribunal established that the Tribunal would have authority to try and punish anyone who, whether acting for themselves or as members of organisations acting in the interests of Axis countries, had committed crimes against peace, war crimes and crimes against humanity.<sup>106</sup> Amongst the violations laws and customs were: the ill-treatment or confinement of the civilian population of an occupied territory or people who happened to be there for the purposes of forced labour or any other reason; the murder or ill-treatment of prisoners of war; the plunder of public or private property; the wanton destruction of cities, towns or villages; and devastation not justified by military necessity. As has been indicated in this section, the Nuremberg Tribunal's prosecutors tried to implicate German businessmen, but it was not until after the Nuremberg Trials that they were convicted of pillaging or plundering companies and/or factories in the occupied territories and the use of civilians or prisoners of war for forced labour in these facilities.

101. Report S/2001/357 of 12 April 2001, pp. 37 onwards and 46-47. The same Panel's 2002 Report increased the number of implicated companies to 85 (Annex III). The Panel also identified 29 companies on which it recommended the imposition of financial restrictions (Annex I). See Report S/2002/1146, of 16 October 2002.

102. See Françoise BOUCHET-SAULNIER, *Dictionnaire pratique du droit humanitaire* (Practical Dictionary of Humanitarian Law), Paris, Editions la Découverte, 2006, p. 214 onwards. Similarly, for wartime criminal law, La Rosa, Anne-Marie, *Dictionnaire de Droit international pénal* (Dictionary of International Criminal Law), Presses Universitaires de France, Paris, 1998, pp. 27-28.

103. According to Common Article 3 "the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

104. War crimes – as sanctioned by the Geneva Conventions, which are sixty years old this year – are recognised as such by almost every country of the world, including Israel (1951), Congo (1961), Rwanda (1964), Iraq (1956), Afghanistan (1956), the USA (1955), China (1956), Guatemala (1952), and Spain (1952), to name but a few. This should be stressed in particular in relation to the attacks on the civilian population, in violation of international law: Article 146 of the Fourth Convention relative to the Protection of Civilian Persons in Time of War establishes the obligation of Parties to "[...] search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts [...]". Article 8 of the Rome Statute, by which the International Criminal Court (ICC) based in The Hague, accepts this legislation as suitable.

105. Antonio CASSESE, *International Criminal Law*, Oxford, Oxford University Press, 2003, p.23.

106. See Marie-Claude ROBERGE, "Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide", *International Review of the Red Cross*, No. 321, pp. 651-664 (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57jnz3>).

In the same way, by virtue of the 1951 Israeli law relating to Nazi criminal responsibility, Eichmann<sup>107</sup> was accused – in accordance with the principle of universal justice – of crimes against the Jewish people, crimes against humanity, war crimes, and membership of hostile organisations. Amongst the crimes of humanity detailed was the deportation for forced labour, or any other purpose, of civilian the population of or in occupied territory; the ill-treatment of prisoners of war or persons on the seas; the plunder of public or private property; the wanton destruction of cities, towns or villages; and devastation not justified by military necessity.<sup>108</sup>

#### 4.2.1 Corporate criminal responsibility for international crimes.

The Criminal Tribunals for the former Yugoslavia and Rwanda<sup>109</sup> have dealt with the concepts of complicity and collaboration, as well as instigation, inducement and harbouring,<sup>110</sup> in the context of war crimes and genocide. These concepts are important when establishing corporate responsibility, since companies are able contribute significantly to the capacity of governments to carry out systematic human rights violations.<sup>111</sup> There must be a material element, meaning direct complicity or collaboration, and a mental element, meaning that there must have been intent to participate; it is sufficient for it to have been foreseeable or probable that the results would be harmful.<sup>112</sup> This is what is known in criminal law as specific intent or wilful ignorance. It has also been established, in the cases of other international crimes, that an accomplice can be tried and sentenced without the principal perpetrator having been identified or that principal's guilt having been proved.<sup>113</sup> If the above reasoning is applied to the criminal responsibility of legal persons – and if there were provision under law for this – a company could be considered an accomplice to human rights abuses when it takes the decision to participate in their commission, assisting with or contributing to the perpetration of criminal acts by others. There would be no need for the principal perpetrator to have been found guilty, and it would still be possible if the company or its agents were acting under the principle of wilful ignorance.<sup>114</sup>

Furthermore, some authors assert that the concept of corporate complicity is not limited to direct participation in the commission of criminal acts by others, but may also be applied to cases in

107. In 1960 an Israeli secret agent kidnapped the Nazi SS officer Adolf Eichmann, trying him pursuant to the principle of universal justice – which serves as a precedent for most of the world – condemning him to death two years later as being responsible for crimes against humanity and for his direct involvement in the 'Final Solution' in Poland, as well as for transporting deported prisoners to German concentration camps during the Second World War.

108. See Marie-Claude ROBERGE, "Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide", *International Review of the Red Cross*, No. 321, pp. 651-664 (<http://www.icrc.org/web/eng/siteeng0.nsf/html/57jnz3>).

109. A significant case relating to individual criminal responsibility as part of a corporation is a decision by the International Criminal Tribunal for Rwanda sentencing 2 managers of the radio station RTLM for incitement to genocide (Chatham House, International Law Discussion Group Summary, *What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?*, February, London 2006, p. 2. [http://www.chathamhouse.org.uk/files/9575\\_ilp230206.pdf](http://www.chathamhouse.org.uk/files/9575_ilp230206.pdf)). However, similar actions relating to the broadcasts of Radio Muhabura during the same period of 1994 have neither been investigated nor tried.

110. Chatham House, International Law Discussion Group Summary, *What are the relevant legal principles relating to the responsibility of companies and CEOs for violations of international criminal law?*, February, London 2006, p. 5. [http://www.chathamhouse.org.uk/files/9575\\_ilp230206.pdf](http://www.chathamhouse.org.uk/files/9575_ilp230206.pdf) (Visited on January 23, 2009). The jurisdiction of the international criminal tribunals is limited to the prosecution, trial and punishment of natural persons. Likewise, it Article 25.3.d), which reads "[...] In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional [...]", should be kept in mind.

111. Andrew CLAPHAM and Scott JERBI, *Categories of Corporate Complicity in Human Rights Abuses, Based on a background paper for the global Compact dialogue on the role of the private sector in zones of conflict*, New York, 21-22 March 2001 (<http://198.170.85.29/Clapham-Jerbi-paper.htm>), p. 2.

112. Andrew CLAPHAM and Scott JERBI, *Categories of Corporate Complicity in Human Rights Abuses, Based on a background paper for the global Compact dialogue on the role of the private sector in zones of conflict*, New York, 21-22 March 2001 (<http://198.170.85.29/Clapham-Jerbi-paper.htm>), p. 3.

113. Andrew CLAPHAM and Scott JERBI, *Categories of Corporate Complicity in Human Rights Abuses, Based on a background paper for the global Compact dialogue on the role of the private sector in zones of conflict*, New York, 21-22 March 2001 (<http://198.170.85.29/Clapham-Jerbi-paper.htm>), p. 3.

114. Andrew CLAPHAM and Scott JERBI, *Categories of Corporate Complicity in Human Rights Abuses, Based on a background paper for the global Compact dialogue on the role of the private sector in zones of conflict*, New York, 21-22 March 2001 (<http://198.170.85.29/Clapham-Jerbi-paper.htm>), pp. 5-6.



which companies profit commercially or benefit from human rights abuses committed by third parties. The test case is that of several oil companies that in the 1990s formed a joint venture in Burma with that country's government and the state oil company, Myanma Oil and Gas Enterprise (MOGE). MOGE's role was to provide manpower and security services for the construction of a gas pipeline. Reports emerged that MOGE was using forced and child labour to build the pipeline, as well as other human rights violations such as torture and forced relocation. Although the main Western partner (the company Unocal) did not carry out these abuses, owing to its participation in the project, its responsibility as a result of acting alongside MOGE has been subject to investigation and trial by a United States court.<sup>115</sup>

#### 4.2.2 Special reference to the crime of pillage.

Pillage is understood to be the systematic and violent appropriation of public or private movable property effected by members of armed forces to the detriment of persons protected by the Geneva Conventions (civilians, the wounded, the sick, shipwrecked persons, and prisoners of war) or the enemy state.<sup>116</sup> First the Hague Conventions<sup>117</sup> and, later, the Geneva Conventions clearly establish that such conduct is prohibited, in both international and internal conflicts.<sup>118</sup> In its commentary on the Second Additional Protocol to the 1949 Geneva Conventions, the International Committee of the Red Cross has established that pillage "covers both organized pillage and pillage resulting from isolated acts of indiscipline. It is prohibited to issue an order whereby pillage is authorized. The prohibition has a general tenor and applies to all categories of property, both State-owned and private".<sup>119</sup>

Under the laws and customs of war, the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, is also considered to be a grave offence.<sup>120</sup> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are also prohibited, regardless of their motive.<sup>121</sup>

What is certain is that pillage and the appropriation of property within the framework of a military conflict often becomes the issue central to that conflict, even constituting one of the principle motivations for it, despite this appearing to have been intentionally obscured. Compared to crimes committed against people it often appears to be an inevitable consequence of war and something of a sideshow, when it is in fact central to the conflict. It should therefore be understood that judicial investigations being conducted into war crimes and international crimes are of equal importance, whether they focus on crimes against people or on the pillage of material property; in many cases these two aspects are inextricably linked.

115. Andrew CLAPHAM and Scott JERBI, *Categories of Corporate Complicity in Human Rights Abuses, Based on a background paper for the global Compact dialogue on the role of the private sector in zones of conflict*, New York, 21-22 March 2001 (<http://198.170.85.29/Clapham-Jerbi-paper.htm>), p. 6. There is also another US court that has, since 2001, been trying a case on the activities of the company Exxon Mobil in Aceh, Indonesia.

116. See Françoise BOUCHET-SAUNIER, *op. cit.* p. 397.

117. See Article 28 Annex to the Conventions of The Hague II, of 29 July 1899, and IV, of 18 October 1907, under which "The pillage of a town or place, even when taken by assault, is prohibited".

118. See Article 33 of the Fourth Geneva Convention and Article 4.2.g) of the Second Additional Protocol. Article 15 of the First Geneva Convention establishes, in similar terms to Article 16 of the Fourth Geneva Convention, that "At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled"; likewise Article 18 of the Second Geneva Convention.

119. See <http://www.icrc.org/ihl.nsf/COM/475-760008?OpenDocument>

120. Article 147 of the Fourth Geneva Convention. Also, Article 50 and Article 51 of the First and Second Geneva Conventions, respectively. Article 14 of the Second Additional Protocol establishes that "Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works".

121. Article 49 of the Fourth Geneva Convention. See also Article 85.4.a) of the First Additional Protocol. Article 17 of the Second Additional Protocol prohibits forced displacements.

## 5. INDIVIDUAL RESPONSIBILITY, THE RESPONSIBILITY OF LEGAL PERSONS, AND PILLAGE WITHIN THE FRAMEWORK OF SPANISH UNIVERSAL JURISDICTION

The concept of the criminal responsibility of the legal person still does not exist in the Spanish legal system. Under to Article 31 of the Criminal Code, the natural person acting as *de facto* or *de jure* administrator of a legal person, or a natural person who is the legal or voluntary representative of another, is held personally responsible. If the perpetrator of the offence is fined, the legal person in whose name and on whose behalf they acted is directly responsible for its payment. Likewise, Article 129 of the Criminal Code – part of Title VI, relating to ‘additional consequences’ – covers the ‘criminal’ consequences for companies, which would consist of their closure or dissolution, the suspension or prohibition of some or all of their activities, or intervention to protect the rights of workers.

In addition, ‘unlawful associations’ are punishable under Article 515 of the Criminal Code. These are any whose purpose is the commission of a crime, armed groups, terrorist organisations or groups, any association that employs violent means, paramilitary organisations, and any that promotes or incites discrimination, hatred or violence against individuals, groups or associations because of the ideology, religion or beliefs, ethnic, racial or national origin, sex, sexual orientation, family situation, illness or disability of their members.<sup>122</sup> Under the Criminal Code, their promoters, directors, chairpersons and founders, as well as their members, active or otherwise, may be punished with imprisonment.<sup>123</sup> Furthermore, judges may decide to dissolve an illegal organisation and apply whatever other of the additional consequences outlined in Article 129 of the Code may be appropriate.

However, on 14 November 2008, the Spanish Minister for Justice submitted the report on the draft bill for the reform of the Criminal Code to the Council of Ministers which, if passed, would regulate the criminal responsibility of legal persons. Under the proposed framework, legal persons could be held criminally responsible for any crime committed on their behalf or for their benefit, by any natural person in a position of authority therein – the perpetrator – or could only have occurred owing to failure to exercise the proper controls.<sup>124</sup> This text of this bill has still not been debated by the Congress of Deputies.

### 5.1 Pillage in Spanish law.

In this context, the investigation and trial of criminal acts relating to international humanitarian law in general and the crime of pillage<sup>125</sup> in particular become extraordinarily significant. According to Pignatelli, any manifestation of pillage is punishable. It is understood to be the robbery, seizure or plundering of the property of another without their consent, that is carried out in the context of an armed conflict and, in general, immediately following the fighting; Pignatelli states that it is normally carried out by combatants and in territory controlled or occupied by the Party commanding them,

122. Permanence and stability are characteristics of the associations covered by Article 515, as is an element of volition (being part of or participating in a criminal organisation). For example, the case law of the Supreme Court has established that “the member of an armed group [the terrorist organisations and groups of Articles 515 and 516] appears to be closer to and more united with the virulent ideology that runs permeates terrorist activity in a continuous renewal of the will to form part of the criminal undertaking that is terrorism, participating in its discourses and its activity”. See Supreme Court Rulings 785/2003, of 29 May, 1346/2001 of 28 June and 1562/2002 of 1 October.

123. Articles 516 and 517 of the Criminal Code.

124. Draft for the new Article 31 bis), paragraph 1. Bill to reform the Criminal Code in relation to the criminal responsibility of legal persons.

125. See Patricia PLAZA VENTURA, *Los Crímenes de guerra: recepción del Derecho Internacional Humanitario en Derecho Penal Español* (War Crimes: Reception of International Humanitarian Law in Spanish Penal Law), Pamplona, Ed. Universidad Pública de Navarra, 2000, p. 69 onwards: “By virtue of Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, and Article 147 of the Fourth Geneva Convention, the large-scale, unlawful and wanton appropriation of civilian property without military necessity constitutes a war crime”. The Rome Statute of 1998 (<http://www.icrc.org/ihl.nsf/FULL/585?OpenDocument>) classifies pillage as a war crime, without distinguishing between international and national conflicts (Art. 8.1.2)-a-IV, e)-XII and related).

including areas taken by assault.<sup>126</sup> Under Spanish law, investigations into pillage are on the basis of Article 613<sup>127</sup> of the current Criminal Code (Art. 613.2), in its ‘extremely grave’ category; not just a mere abstract condemnation but the subject of a fundamental legal-criminal prosecution. It enters the ‘criminal’ category when violence or intimidation is employed to obtain the movable property that does not belong to the attacker, violating – directly or indirectly – the will of the victim, whether this last be individual or collective.

## 5.2 Pillage, responsibility and multinational companies in the Rwanda/DR Congo case before the Spanish courts.

Applying the above to the Rwanda/DR Congo case in the Spanish courts resulting from the judicial investigation referred to above, it has been possible to establish that the APR/FPR – led by the current President of Rwanda, Paul Kagame – is allegedly responsible for systematic and massive crimes against Spanish, Rwandan, Canadian and Congolese civilians and that this is intrinsically linked to crimes of large-scale and systematic pillage of natural resources, particularly the Democratic Republic of Congo’s valuable and strategic minerals. It is established in the Order of Indictment issued by the Spanish *Audiencia Nacional* (National Court) that there are sufficient indications of criminality to charge Paul Kagame for participation in crimes of genocide, crimes against humanity, war crimes (including pillage), membership of a terrorist organisation, and acts of terrorism.<sup>128</sup> The results of the investigative procedure are that it would be shown, for example, that Paul Kagame allegedly ordered indiscriminate massacres of the civilian population (Article 611 of the Criminal Code) as well as that he was the Head of the High Command of the APR (and therefore responsible for the illegal actions of his subordinates – Articles 615 and 615 bis). Despite this evidence, however, given Paul Kagame’s status as President of Rwanda, the examining judge declared that the Spanish courts lack the authority to try him.<sup>129</sup> An issue of particular importance in this case is that, according to the *Audiencia Nacional*, the alleged responsibility of Paul Kagame for acts of pillage can be proved. This was either military pillage under the charge of Rwandan soldiers following the attacks on the civilian population, which is illegal under Article 613.1.e) of the Criminal Code, or it was conducted by soldiers disguised as members of organisations like the Rwandan Patriotic Front, that are ‘terrorist’ and therefore illegal (Article 515).

Although the aforementioned Order of Indictment refers to the participation of various companies in the pillage and illegal exploitation of resources, as well as the supply of arms,<sup>130</sup> the Spanish court is not, for the moment, launching an investigation into any transactions into which companies may have entered and thereby played a direct or indirect part in these crimes by obtaining wealth

126. See Fernando PIGNATELLI Y MECA, *La sanción de los crímenes de guerra en el derecho español* (The Punishment of War Crimes under Spanish Law), Madrid, Editorial del Ministerio de Defensa, 2003, pp. 591-592.

127. Article 613 of the Spanish Criminal Code: Anyone who in a time of armed conflict carries out any acts of pillage and destroys, damages or seizes items which he/she does not own, without military necessity (613.1.e) ); that is how “extremely grave” is defined (613.2). See also, Article 33 of the Fourth Geneva Convention of 12 August 1949, relating to the protection of civilians in time of war.

128. The Legal Grounds section of the Order of Indictment of 6 February 2008 sets out the list of crimes attributed to the accused. A) crimes of genocide (Article 607 of the Criminal Code), B) crimes against humanity (Article 607 bis), C) war crimes (Articles 608, protected persons; 609, ill-treatment; 610, prohibited modes of combat; 611, indiscriminate attacks; 612, violation of healthcare units; 613, attacks on heritage; 614, acts against the principles of the Treaties; and 614 bis, additional provision), D) common provisions (Articles 615 and 615 bis – they refer to the chain of command, superior orders, etc.), E) membership of a terrorist organisation (Articles 515 and 516 of the Criminal Code) and F) terrorist acts (Article 572 alongside Articles 174 and 174 bis) of the old Criminal Code of 1973, in force until 1995).

129. By virtue of the principle of immunity from prosecution for which there is provision in Article 21 of the Organic Law on Judicial Power.

130. See pp. 97, 100 and 135 of the Order of Indictment of 6 February 2008 in *Sumario* (Spanish internal procedural classification: decision of pre-trial phase judge in proceedings related to gravest criminal offences) No. 3/2008-D, *Juzgado Central de Instrucción* No. 4.

or benefit from them.<sup>131</sup> Even though there is currently no provision in Spanish legislation for the criminal responsibility of legal persons, their representatives can be prosecuted, tried and punished in Spain for crimes in international law, by virtue of the principle of universal jurisdiction. The exercise of universal jurisdiction is determined by the nature of the crime<sup>132</sup> and whether, for example, it is possible to charge the legal representative of a company with a war crime as an individual using this framework. The nature of the crime (the war crime of pillage) also has an impact, as well as the affected legal goods (whether it is in superior or supranational interests), and the international community's obligation to avoid especially grave crimes, committed on a large scale and systematically in situations of armed conflict, and not to let them go unpunished. In such cases, as has been mentioned previously, the courts of all states are capable of trying such crimes, irrespective of where they were committed and the nationality of the perpetrator or the victims, and of purely national interests.

## 6. JUSTICE AND INTERNATIONAL CRIMES: SOME *DE LEGE FERENDA* IDEAS

To draw this study to a close, it is necessary to return to the initial question with regard to contemporary conflicts, human rights and justice: are national and international criminal legal systems ready to tackle international crimes and human rights violations involving multinational companies committed during violent conflicts? Although this study does not attempt to respond to the complexity of this question, there follow some proposals, with particular reference to the war crime of pillage and the plundering of natural resources.

If, despite the efforts of the international community and of international courts and tribunals,<sup>133</sup> there is a notable feeling that there is impunity for the gravest international crimes committed against individuals or communities – considering how widespread and severe these crimes that gnaw away at humanity's collective conscience are, and the proportional scarcity of arrests, charges and sentences – the perception is of almost total impunity for crimes of pillage.

The national or international conflicts in which international crimes occur cannot be resolved solely through the conventional use of force or peaceful methods of conflict resolution, such as international arbitration or justice.<sup>134</sup> There is a broad range of resources, methods, institutions and organisations that can and must make significant contributions in this regard, for the good of individuals, communities and ecosystems. There is a general awareness of the limitations of international justice in attacking impunity. International justice – alongside national justice linked to the international system – constitutes the cornerstone of the fight against impunity, and of the worldwide system of law and order; it is both indispensable and insufficient. It is well known that it must be accompanied by other measures, legal and non-legal: measures relating to investigation, dialogue, and the

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131. As been stated above, the Spanish court has limited itself for the moment to requesting the evidence deposited by the United Nations Panel of Experts at the organisation's headquarters in New York.

132. In recent months there has been an attempt in the Spanish Parliament to limit – or even prevent – the exercise of Spanish universal justice, which has been heavily criticised by numerous national and international human rights experts, as well as by the Government of Catalonia's own Office for the Promotion of Peace and Human Rights (see: [http://www10.gencat.cat/drep/AppJava/cat/ambits/Pau/documentacio/03\\_justicia.jsp](http://www10.gencat.cat/drep/AppJava/cat/ambits/Pau/documentacio/03_justicia.jsp) – in Catalan). At the time of submission of this paper, this bill is being processed by the Spanish Senate.

133. This refers to the courts and tribunals set up since the Nuremberg Tribunal, whether they be *ad hoc* tribunals created by the United Nations Security Council under Chapter VII of the UN Charter such as the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda, international mixed or hybrid courts under the auspices of the United Nations such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia or the Special Tribunal for Lebanon, or permanent international courts set up by party states such as the International Criminal Court. To these must be added the contributions of national jurisdictions, which try the gravest international crimes under the principle of universal jurisdiction, active or passive.

134. If that is true in general terms, it is even more so in the case of structurally debilitated states: those that are considered to be failed or to have grave limitations, or in which there is no rule of law.

verification and treatment of the truth; educational, philosophical, socioeconomic, and political measures; measures relating to historical memory, peacebuilding and peacekeeping; and others.<sup>135</sup>

- *The advisability of including the economic dimension of the crimes perpetrated from beginning to end of the conflict in the peace agreements.* The intercompatibility of this entire system created still needs to be studied to ensure that international and community efforts do not go to waste and that the destructive boomerang does not come back. The economic dimension of the conflict should be included in the peace talks, the negotiations and the peace agreements, as much in relation to crimes committed against individuals and communities as to crimes of pillage and other crimes of destruction of property and/or heritage. To continue with the example outlined above of large-scale pillage in the Democratic Republic of Congo, the UN Panel of Experts, after conducting a thorough investigation, made the findings of said investigation available to the United Nations by submitting a detailed report on the measures that should be taken at the international level, in the annex of which it named individuals and multinational companies involved in the plundering and subsequent illegal exploitation of the Democratic Republic of Congo's resources during the military conflict. The Panel identified individuals and multinationals from the Congo, Rwanda, Uganda, South Africa, Zimbabwe and Ghana, but also a large number of multinationals from Belgium, the United Kingdom, the United States, Canada, the Netherlands, Germany, Thailand, Switzerland, Kazakhstan, China, Japan, France and Israel, amongst other countries.<sup>136</sup> Despite the important tool offered by the UN Panel of Experts, the evidence obtained and the result of the investigation and report, these have yet to be transferred to any international court of justice or national jurisdiction competent to try international crimes. There is little chance that the important issue of pillage will make it to the peace talks, as these war crimes and the economic dimension of military conflicts are not usually included (there is no mention of them, for example, in the Lusaka Ceasefire Agreement, the Pretoria Accord or the Luanda Accord);<sup>137</sup> much less that effective justice mechanisms will be established to investigate and try the crimes committed. Eventually, in its third report, the UN Panel of Experts entrusted with examining the issue of the illegal exploitation of the Democratic Republic of Congo's natural resources and other forms of wealth concluded that:

[...] if the Panel in its report does not recommend any punitive measures to curb the illegal exploitation and trade originating in the Democratic Republic of the Congo, this will only encourage a continuation of the exploitation by different criminal organizations. This could easily lead to an increase in these activities. There must be sustained efforts to deter illicit and illegal exploitation. Restrictive measures nevertheless need to be taken vis-à-vis the role of companies and individuals involved in arms supply and resource plundering. The international and multinational dimension of these illegal activities is very important. [...]<sup>138</sup>

- *Efforts to introduce corporate criminal responsibility for international crimes in national and international legislation in order to strengthen the application of the principles of universal*

135. See Sandra LEKHA SRIRAM, Olga MARTÍN ORTEGA and Johanna HERMAN, *Just Peace? Peacebuilding and Rule of Law in Africa*, London, University of London Press, 2009. See also, Priscilla HAYNER, *Negotiating justice: guidance for mediators*, Centre for Humanitarian Dialogue and International Center for Transitional Justice, New York, 2009 ([http://www.ictj.org/static/Africa/DRC/HDCenter\\_NegotiatingJustice\\_pa2009.pdf](http://www.ictj.org/static/Africa/DRC/HDCenter_NegotiatingJustice_pa2009.pdf)).

136. United Nations reports, *op. cit. ut supra*, annexes I, II and III.

137. “[...] The illegal exploitation of natural resources, gross violations of human rights and a dire humanitarian situation are some of the consequences of four years of war and the lack of a central government in the Democratic Republic of the Congo with the authority and capacity to protect its citizens and resources. [...] The war economy controlled by the three elite networks operating in the Democratic Republic of the Congo dominates the economic activities of much of the Great Lakes region. Yet the Lusaka, Pretoria and Luanda Agreements do not address this all-important economic component of the conflict. [...] Years of lawlessness and a Government incapable of protecting its citizens have allowed the armed groups to loot and plunder the country's resources with impunity [...]”. Report S/2002/1146, paragraphs 149-152-153, pp. 28-29.

138. *Ibid.*, paragraphs 155-156, p. 29

*jurisdiction and international justice.* It has been stated from the start that examining the various international instruments for controlling the conduct of multinational companies is beyond the scope of this study.<sup>139</sup> It often appears difficult to study other non-state actors outlined above such as rebel groups, mercenaries, mafiosi organisations, or informal organisations for the trafficking of arms or natural resources, or to apply international instruments and law to them. It would be advisable to introduce new types of national and international legislation aimed at investigating and trying non-state actors if the destructive effects of impunity are not to steadily increase. Although the responsibility of legal persons is being introduced in some nations' criminal systems,<sup>140</sup> there is no provision in the majority of national legal systems or that of the International Criminal Court<sup>141</sup> for criminal acts committed by organisations or companies themselves; such investigations are limited to the natural persons that represent them. It would be advisable to reach an international agreement about these new targets of international criminal proceedings and on categories of crime for which such non-state actors may be accused of collective perpetration or of collective complicity in acts that may be tried under criminal law.

- *Improvement of legal instruments for the investigation and trial of natural persons linked to non-state actors that carry out pillage.* It would be advisable to update and adapt legislation relating to international crimes (including pillage) to make it suitable for new types of international crime, as well as national crime with international links. This needs to be done for natural persons who are in charge of or linked to transnational companies that are directly involved in military conflicts, and for those linked to other structured or informal organisations of non-state actors that are similarly involved in conflicts.<sup>142</sup> Considering all the above, it would be advisable for this adaptation to take place in both national legal systems with universal jurisdiction<sup>143</sup> – jurisdiction following the principle of

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139. On all of these, see Olga MARTÍN ORTEGA, *op. cit. ut supra*.

140. For example, the United States, the Netherlands, France, Japan and Norway. In Spain, a bill was passed during the 2004-2008 legislature in whose Article 31 bis there was, for the first time, provision for the criminal responsibility of legal persons, but it expired when the legislature ended. This bill followed the system of specific incrimination or enumeration of the crimes that legal persons could commit.

141. Article 25 of the Rome Statute establishes individual criminal responsibility (see <http://www.icrc.org/ihl.nsf/FULL/585?OpenDocument>). The preparatory studies for the establishment of the ICC considered several proposals for the inclusion of legal persons, in particular by the French delegation, which were eventually rejected (see for all of these, see Cristina CHIOMENTI, "Corporations and the International Criminal Court", in Olivier DE SCHUTTER, *Transnational Corporations and Human Rights*, Oxford, Hart Publishing, 2006, pp. 288-291).

142. Regarding this important issue of individual and collective responsibilities in carrying out typical, illegal and guilty behaviour, see the different criteria of responsibility presented by Ines TOFALO in "Overt and hidden accomplices: Transnational Corporations' range of complicity for human rights violations", in Olivier DE SCHUTTER, *Transnational Corporations and Human Rights*, Hart Publishing, Oxford, 2006, pp. 339-357. See also *Global Witness Submission to the ICJ Expert Legal Panel on Corporate Complicity in International Crimes*, November 2006, p. 4 (<http://www.globalwitness.org/>).

143. Numerous national and international texts refer to the varying capacities of national jurisdictions to investigate and try international crimes. To name but a few, see: Resolution 95 (I) of the United Nations General Assembly, of 11 December 1946, Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal (<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement>); Article 5.3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (<http://www.thefreelibrary.com/Convention+against+Torture+and+Other+Cruel,+Inhuman+or+Degrading...+a03581827>); Article 8.1 of Resolution 955 of 8 November 1994, by which the United Nations Security Council established an international tribunal for the sole purpose of prosecuting 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 (<http://www.un.org/ictt/english/Resolutions/955e.htm>); Article 9.1 of Resolution 808 (1993), of 22 February 1993, by which the Security Council decided to establish an 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 (<http://www.ohr.int/other-doc/un-res-bih/pdf/808e.pdf>); Resolution 1261 (1999) of the Security Council stressing the responsibility of all States to bring an end to impunity and their obligation to prosecute those responsible for grave breaches of the Geneva Conventions of 12 August 1949 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/248/59/PDF/N9924859.pdf?OpenElement>). In relation to the International Criminal Tribunal for Rwanda, the explicit reference to universal jurisdiction made by this Tribunal in one of its resolutions should be highlighted: "[...] the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian

passive and/or active personality<sup>144</sup> – and in international criminal courts and tribunals, whether pure or hybrid; above all it should take place with respect to the International Criminal Court, based in The Hague (the Netherlands).<sup>145</sup> Regarding this last, it would be advisable to give the greatest possible autonomy and freedom of action in relation to these crimes to the Office of Public Counsel for Victims and, in equal measure, the legal representations of victims or victims groups authorised to institute legal proceedings before the Court. It would be particularly advisable to enable the strengthening of the presence of collective victims with regard to the crime of pillage.

- *The establishment of new models for criminal sanctions for legal entities and other non-state actors.* It would be necessary to establish sufficiently well thought-out punishments for non-state actors considered guilty of international crimes. There was provision in the Spanish bill to reform the Criminal Code by introducing the criminal responsibility of legal persons for fines, for the dissolution of the organisation or for the suspension of its activities, the closure of premises, and intervention. The introduction of new types of punishment adapted to contemporary situations should be studied; some suggestions follow:
  - *Precautionary measures of a criminal nature:* Bans on exports/imports by the non-state actor in the territory where the crime is alleged to have taken place. The suspension of multinationals' subsidiaries on the ground. Administration by the courts, with expert supervision. The blocking of current accounts and/or capital flows. The provisional seizure or confiscation of stocks of goods pillaged in the area where the non-state actor or multinational subsidiary allegedly operates. Temporary suspension of membership of regional or global international organisations.
  - *Other punishments in addition to the imprisonment of their representatives:*<sup>146</sup> Temporary or permanent disqualification of the company from the use of the legal system. Provision of services or resources in kind to state companies of the region in which the crime was committed to the same value of the pillage carried out. A fine to be paid to the state or region in which the crime of pillage was carried out. Payment of compensation for profit obtained as a direct consequence of the commission of the crime. Prohibition of provision of personnel by regional or global international organisations.
- *The establishment of civil responsibility and reparation for material and moral damages; payment of national or international legal costs.* Both at the individual level, in favour of the victims, and as collective civil responsibility in favour of the community or state that was the victim of the crime. Sentencing to pay funds to the affected community to be administered by that community itself. Sentencing to pay the legal costs (Victims and Witnesses Unit, the victims' legal representation, experts and witnesses, running costs of the court).

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law [...]” (See Prosecutor v. Ntuyahaga, Case No. ICTR-98-40-T, Trial Chamber I, 18 March 1999; [http://www1.umn.edu/humanrts/instree/ICTR/NTUYAHAGA\\_ICTR-98-40/NTUYAHAGA\\_ICTR-98-40-T.htm](http://www1.umn.edu/humanrts/instree/ICTR/NTUYAHAGA_ICTR-98-40/NTUYAHAGA_ICTR-98-40-T.htm)).

144. There are still many legal difficulties and difficulties relating to evidence in establishing criminal responsibility for international crimes of this sort: the case open in the Netherlands against Guus Van Kouwenhoven, who in 1999-2003 operated a major timber concession in Liberia as chairman of the company OTC. The Court of First Instance in The Hague (the Netherlands) reached a verdict on 7 June 2006 and found him guilty of illegally importing arms to Liberia which were then used to carry out international crimes by the forces of Charles Taylor during Liberia's civil war. The United Nations Expert Report on Liberia (S/2003/779), paragraph 70 concluded that timber trafficking was carried out by government forces and rebels in exchange for arms and that the earnings from this were used to finance the conflict. Recently, on 10 March 2008, the Court of Appeal in The Hague quashed the previous verdict owing to a lack of evidence on the basis of which to convict him.

145. In a world community that strongly interconnected, it cannot be allowed that only the economic and commercial effects of globalisation are shaken off without any attention being paid to the criminal responsibilities possibly attributable to formal and informal collective structures. It is often said that contemporary states have lost economic power, influence and weight to multinationals: it would be a good economic investment on the part of the State Parties to the International Criminal Court to channel legislative efforts and financial resources into the altering international law to enable the investigation and trial by its various competent bodies these non-state actors and, in particular, transnational companies.

146. In addition to the deprivation of the liberty of natural persons who are members of these non-state actors and multinational companies.

Naturally, these and other measures should be the subject of a technical-legal study as well as of international debate, both between legal practitioners and those outside the legal profession. They have been detailed so that they may be considered, in order to harmonise, as far as possible, the social and historical reality with the applicable national and international legislation.

## 7. CONCLUSION

Unfortunately, wars continue to have a serious impact in individuals, communities and the ecosystem. Such military conflicts, which lead to massive and systematic human rights violations, take many diverse forms. Of the numerous national and international instruments for dealing with violent conflicts, the rule of law, and national and international justice systems continue to play a key role. They are not enough to peacefully resolve conflicts, but they still appear to be essential to the struggle against impunity relating to the gravest international crimes and new forms of international crime. As has been seen, most of the time war crimes and the crime of pillage by non-state actors, including major corporations and transnational companies, go unnoticed or ignored. The economic component of conflicts also seems to be sidestepped in transitional justice processes, peace agreements, truth, justice and reconciliation committees, and other initiatives aimed at dialogue, peaceful conflict resolution, or redress. There are many uncertainties about how to confront this old problem under the new forms that are emerging. The whole of humanity and the various actors of the international community have the challenge – legal, ethical and organisational – of establishing effective instruments to promote and protect human rights and fundamental freedoms, to prevent wars, and to effectively handle the crimes of aggression, crimes against humanity and pillage that still savage our world. We must continue to strive to find effective instruments and tools that may allow the transformation of the conflicts that inevitably occur in the modern world – and will, no doubt, continue to do so – in the most harmonious way possible. Despite the world's apparent desire for self-destruction, there are many people and institutions that work conscientiously and dedicatedly towards achieving this difficult goal,<sup>147</sup> which is the responsibility of us all.

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