

ACHPR, Democratic Republic of the Congo v. Burundi, Rwanda and Uganda

Case prepared by Ms. Margherita D'Ascanio, LL.M., student at the Geneva Academy of International Humanitarian Law and Human Rights, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

African Commission on Human and Peoples' Rights, Democratic Republic of the Congo v. Burundi, Rwanda and Uganda, (2004) AHRLR 19 (ACHPR 2003), Communication 227/99

[Source: ACHPR, Democratic Republic of the Congo v. Burundi, Rwanda and Uganda, 2003; footnotes omitted; available at <http://www.achpr.org/communications/decision/227.99/>]

[...]

Summary of facts

[...]

2. The communication is filed against the Republics of Burundi, Rwanda and Uganda [...]. It alleges grave and massive violations of human and peoples' rights committed by the armed forces of these three countries in the Congolese provinces where there have been rebel activities since 2 August 1998 [...]. In support of its complaint the Democratic Republic of Congo states that the Ugandan and Rwandan governments have acknowledged the presence of their respective armed forces in the eastern provinces of the Democratic Republic of Congo under what it terms the 'fallacious pretext' of 'safeguarding their interests'. The complaint

states, furthermore, that the Congolese government has 'sufficient and overwhelming evidence of Burundi's involvement'.

3. In particular, the Democratic Republic of Congo asserts that on Monday, 3 August 1998, 38 officers and about 100 men of the Congolese forces were assassinated, after being disarmed, at Kavumu airport, Bukavu, in the Congolese province of South Kivu. Relatedly, on Tuesday, 4 August 1998, over 50 corpses were buried in Bukavu, about twenty of them near the fuel station at the Nyamwera market opposite Ibanda mosque. Other corpses (mostly civilians) were found at the military camp called 'Sa'Yo camp' in Bukavu. On 17 August 1998, the Rwandan and Ugandan forces that had been on Congolese territory for many weeks, besieged Inga hydroelectric, in Lower Congo province, a wholly civilian facility. The presence of these forces disrupted the lives of millions of people and the economic life of the Democratic Republic of Congo. It also caused the death of many patients including children in hospitals, due to the cutting off of electricity supply to incubators and other respiratory equipment.

4. On Monday, 24 August 1998, over 856 persons were massacred in Kasika, in Lwindi chiefdom, and Mwenga. The bodies found over a distance of 60 kilometres from Kilungutwe to Kasika (in South Kivu province) were mainly those of women and children. The women had been raped before being killed by their murderers, who slashed them open from the vagina up to the abdomen and cut them up with daggers. On 2 September 1998, in a bid to ambush the men of the Congolese army based in Kamituga, the Rwandan and Ugandan forces in Kitutu village massacred 13 people. [...] From 30 December 1998 to 1 January 1999, 612 persons were massacred in Makobola, South Kivu province. All these atrocities were committed by the Rwandan and Ugandan forces which invaded territories of the Democratic Republic of Congo [...].

5. The Democratic Republic of Congo also claims that the forces of Rwanda and Uganda aimed at spreading sexually transmitted diseases and committing rape. To this end, about 2 000 AIDS suffering or HIV-positive Ugandan soldiers were sent to the front in the eastern province of Congo with the mission of raping girls and women so as to propagate an AIDS pandemic among the local population [...].

6. The Democratic Republic of Congo avers that since the beginning of the war in its eastern provinces, the civilian population has been deported by the Rwandan and Ugandan armies to [...] Rwanda. [...]

7. The Democratic Republic of Congo also accuses Rwanda and Uganda of carrying out systematic looting of the underground riches of the regions controlled by their forces, just as the possessions of the civilian population are being hauled away to Burundi, Rwanda and Uganda. [...]

The Complaint

8. The Democratic Republic of Congo claims, among other things, that it is the victim of an armed aggression perpetrated by Burundi, Rwanda and Uganda; and that this is a violation of the fundamental principles that govern friendly relations between states, as stipulated in the Charters of the United Nations and the

Organization of African Unity [...]. It emphasises that the massacres and other violations of human and peoples' rights [...] are committed in violation of the provisions of articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the African Charter on Human and Peoples' Rights [available online at: <http://www.achpr.org/instruments/achpr/>].

9. It also claims violation of the provisions of the International Covenant on Civil and Political Rights, the Geneva Conventions of 12 August 1949 and of the Additional Protocol [...] (Protocol I) of 8 June 1977.

[...]

The procedure

[...]

22. During the session [...] the delegation of Rwanda transmitted to the Secretariat of the Commission, a submission, which stated that [...] that the matters addressed by the communication were pending before competent authorities of the Organization of African Unity and other international bodies like the UN Security Council and ECOSOC. Finally, Rwanda refuted allegations of human rights violations made against it by the Democratic Republic of Congo and justified the presence of its troops in this country on grounds of security, while accusing the Democratic Republic of Congo of hosting groups hostile to Rwanda.

[...]

24. In October 2000, the Secretariat of the Commission received from Uganda a submission [...] in which the respondent state recognised and justified the presence of its troops in the Democratic Republic of Congo. The troops were said to be in the Democratic Republic of Congo to prevent Ugandan rebels from attacking the Ugandan territory.

[...].

27. The submission further states that after Mobutu's overthrow in 1997, the Kabila government invited Uganda to enter eastern Congo to work together to stop the activities of the anti-Uganda rebels and that Ugandan armed forces remained in the Democratic Republic of Congo at the request of President Kabila, since his forces 'had no capability to exercise authority' in the remote eastern region. [...]

28. According to Uganda, President Kabila revoked the [...] agreement in August 1998 as a new rebellion started in the Democratic Republic of Congo (when the coalition that had overthrown Mobutu disintegrated) and blamed this 'internal rebellion', on the invasion of Uganda and Rwanda. The Democratic Republic of Congo then started looking for allies in its struggle against the rebels and it turned to forces hostile to the governments of Rwanda and Uganda, specifically the Allied Democratic Force and pro-Idi Amin groups.

Uganda said it therefore had no option but to keep its troops in the Democratic Republic of Congo, in order to deal with the threat of attacks posed by these foreign-sponsored rebel groups.

[...]

30. In its submission, Uganda also points to the lack of evidence implicating it in the alleged human rights violations [...].

32. Regarding payment of reparations, Uganda points to the lack of documentation on this issue and, concerning the illegal exploitation of the Democratic Republic of Congo's natural resources, Uganda denied involvement [...].

[...]

34. Uganda also noted that the Democratic Republic of Congo has accused Uganda in several other fora: the UN Security Council, the ICJ, [...] and the OAU. According to the respondent state, these actions 'present a dilemma to the conduct of international affairs', undermining the credibility of these institutions and the Commission as divergent opinions may be reached.

[...]

Law Admissibility

51. [...] [T]his is the first inter-state communication brought before the African Commission on Human and Peoples' Rights.

52. It is to be noted that Burundi, a respondent state was provided with all the relevant submissions relating to this communication [...]. But neither did Burundi react to any of them nor did it make any oral submission before the Commission regarding the complaint.

[...]

62. The Commission is mindful of the requirement that it can consider or deal with a matter brought before it if the provisions of article 50 of the Charter and rule 97(c) of the Rules of Procedure are met, that is if all local remedies, if they exist, have been exhausted [...].

63. [...] In the circumstances, the Commission finds that local remedies do not exist, and the question of their exhaustion does not, therefore, arise.

64. The effect of the alleged activities of the rebels and armed forces of the respondent states parties to the Charter, which also back the rebels, fall not only within the province of humanitarian law, but also within the

mandate of the Commission. The combined effect of articles 60 and 61 of the Charter compels this conclusion; and it is also buttressed by article 23 of the African Charter.

66 [...] In communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [...], the Commission held that the African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even war cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter. [...]

The merits

66. The use of armed force by the respondent states, which the Democratic Republic of Congo complains of contravenes the well-established principle of international law that states shall settle their disputes by peaceful means in such a manner that international peace, security and justice are not endangered. [...]

[...]

68. The Commission finds the conduct of the respondent states inconsistent with [...] the UN Declaration on Friendly Relations, which is implicitly affirmed by the Charters of the UN and OAU, and which the Commission is mandated by article 23 of the African Charter on Human and Peoples' Rights [right of peoples to national and international peace and security] to uphold. [...] Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law. [...] The conduct of the respondent states also constitutes a flagrant violation of the right [...] of the peoples of the Democratic Republic of Congo to self-determination provided for by article 20 of the African Charter [...].

69. The complainant state alleges grave and massive violations of human and peoples' rights committed by the armed forces of the respondent states in its eastern provinces. [...] As noted earlier on, the series of violations alleged to have been committed by the armed forces of the respondent states fall within the province of humanitarian law. [...]

70. The combined effect of articles 60 and 61 of the African Charter enables the Commission to draw inspiration from [...] general principles recognized by African states as well as legal precedents and doctrine. By virtue of articles 60 and 61 the Commission holds that the four Geneva Conventions and the two Additional Protocols [...] constitute part of the general principles of law recognized by African states [...].

71. It is noted that article 75(2) of the First Protocol of the Geneva Conventions of 1949, prohibits the following acts at any time and in all places whatsoever, whether committed by civilian or by military agents: (a) violence to life, health, or physical or mental well-being of persons, in particular: i) murder; ii) torture of all kinds, whether physical or mental; iii) corporal punishment and iv) mutilation (b) outrages upon personal dignity, in particular, humiliating and degrading treatment; enforced prostitution and any form of indecent

assault.

72. The complainant state alleges the occupation of the eastern provinces of the country by the respondent states' armed forces. It alleges also that most parts of the affected provinces have been under the control of the rebels since 2 August 1998, with the assistance and support of the respondent states. [...]

[...]

76. The Commission [...] disapproves of the occupation of the complainant's territory by the armed forces of the respondent forces and finds it impermissible [...] and therefore in contravention of article 23 of the Charter. [...]

[...]

79. The Commission finds the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the respondent states' armed forces were still in effective occupation of the eastern provinces of the complainant state reprehensible and also inconsistent with their obligations under part III of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol I [...].

80. They also constitute flagrant violations of article 2 of the African Charter, such acts being directed against the victims by virtue of their national origin; and article 4, which guarantees respect for life and the integrity of one's person and prohibits the arbitrary deprivation of rights.

81. The allegation of mass transfer of persons from the eastern provinces of the complainant state to [...] Rwanda [...] is inconsistent with article 18(1) of the African Charter, which recognises the family as the natural unit and basis of society and guarantees its appropriate protection. It is also a breach of the right to freedom of movement, and the right to leave and to return to one's country guaranteed under article 12(1) and (2) of the African Charter respectively.

[...]

83. [...] [T]aking article 56 [of Additional Protocol I] [...] into account, and by virtue of articles 60 and 61 of the African Charter, the Commission concludes that, in besieging the hydroelectric dam in Lower Congo province, the respondent states have violated the Charter.

84. The siege of the hydroelectric dam may also be brought within the prohibition contained in The Hague Convention (II) [correctly: the Regulations annexed to Hague Convention (IV) [...]] which provides in article 23 that '[b]esides the prohibitions provided by special conventions, it is especially prohibited ... to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities

of war'. [...]

85. The case of Zejnir Delalic [...] and Esad Landzo (the Celebici judgment, International Criminal Tribunal for the former Yugoslavia, 16 November 1998 at paragraph 587) is supportive of the Commission's stance. It states, inter alia, that international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party. The basic norms in this respect, which form part of customary international law [include] the fundamental principle that private property must be respected and cannot be confiscated ... [p]illage is formally forbidden.

86. The raping of women and girls [...] is prohibited under article 76 of the first Protocol Additional to the Geneva Conventions [...]. It also offends against both the African Charter and the Convention on the Elimination of All Forms of Discrimination Against Women [...].

87. The Commission condemns the indiscriminate dumping of, and / or mass burial of victims of the series of massacres and killings perpetrated against the peoples of the eastern province of the complainant state while the armed forces of the respondent states were in actual fact occupying the said provinces. The Commission further finds these acts barbaric and in reckless violation of Congolese peoples' rights to cultural development guaranteed by article 22 of the African Charter [...]. Such acts are also forbidden under article 34 of the first Protocol [...].

88. The looting, killing, mass and indiscriminate transfers of civilian population, the siege and damage of the hydro-dam, stopping of essential services in the hospital, leading to deaths of patients and the general disruption of life and state of war that took place while the forces of the respondent states were occupying and in control of the eastern provinces of the complainant state are in violation of article 14 guaranteeing the right to property, articles 16 and 17 (all of the African Charter), which provide for the rights to the best attainable state of physical and mental health and education, respectively.

89. Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, particularly in article 27, provides for the humane treatment of protected persons at all times and for protection against all acts of violence or threats [...]. Further, it provides for the protection of women against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Article 4 of the Convention defines a protected person as those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.

90. The complainant state alleges that between October and December 1998, the gold produced by the Okimo firm and by local diggers yielded US\$ 100 000 000 to Rwanda. By its calculation, the coffee produced in the region and in North Kivu yielded about US\$ 70 000 000 to Uganda [...]. Furthermore, Rwanda and Uganda took over control of the fiscal and customs revenue collected respectively by the Directorate General

of Taxes. The plunder of the riches of the eastern provinces of Congo is also affecting endangered animal species such as okapis, mountain gorillas, rhinoceros, and elephants.

91. [...] [T]he African Commission has evidence that some of these facts did take place and are imputable to the armies and agents of the respondent states. In fact, the United Nations have acknowledged that during the period when the armies of the respondent states were in effective control over parts of the territory of the complainant state, there were lootings of the natural resources of the complainant state. [...]

[...]

94. The Commission therefore finds the illegal exploitation/looting of the natural resources of the complainant state in contravention of article 21 of the African Charter [...].

95. The deprivation of the right of the people of the Democratic Republic of Congo [...] to freely dispose of their wealth and natural resources, has also occasioned another violation - their right to their economic, social and cultural development [...] guaranteed under article 22 of the African Charter.

96. For refusing to participate in any of the proceedings although duly informed and invited to respond to the allegations, Burundi admits the allegations made against it.

97. Equally, by refusing to take part in the proceedings beyond admissibility stage, Rwanda admits the allegations against it.

98. As in the case of Rwanda, Uganda is also found liable of the allegations made against it.

[...]

Discussion

I. General questions

1. Is the African Commission a judicial body? Are its findings binding? What are the tools that the Commission has for enforcement? Do you think they are effective?
2. Who must pay compensation for violations of IHL? Who is entitled to receive such compensation? Is this the same for international and non-international armed conflicts?
3. (*Para. 51*) Why does the Commission state that local remedies do not exist in the present case? Are “remedies” absent during armed conflicts? What do you think the Commission meant by this statement?

II. Classification of the situation

4. (*Para. 25 – 28*) How would you classify the conflict in DRC before 1997? After?
5. In the present case, is the law of occupation applicable? Why/Why not? Does the Commission give any justification in this regard? Does the Commission use Convention IV to define occupation? Do all the provisions contained in Part III, Section III, of Convention IV entitled “Occupied Territories” apply only to

situations of occupation complying with Art. 42 of the Hague Regulations? If not, which articles could apply to broader situations of occupation? (GC IV, Part III, Section III)

6. (*Para. 2*) How could one determine whether particular acts of the different rebel groups were attributable to Burundi, Rwanda or Uganda? What indicators do you think would be helpful in making such a determination? [See **Case No. 153**, ICJ, *Nicaragua v. United States*, p. 1306; See Case No. 211, ICTY, *The Prosecutor v. Tadic*, p. 1810]

7. Is occupation by proxy possible under IHL? Why/Why not?

III. Treatment of the dead and human remains

8. (*Para. 3*) Under IHL, what are the respondents' duties towards the dead? Under international human rights law (IHRL) as set out in the African Charter? Concretely, what obligations were incumbent on the respondents in this case, given the overall applicable legal framework? Under IHL, do these obligations equally benefit combatants? (GC I, Art. 15, 17; GC II, Art. 18, 20; P I, Art. 33 and 34; CIHL Rule 112, 113 and 115)

IV. Conduct of hostilities

9. (*Para. 3*) Is it lawful under IHL to kill members of the armed forces, once it has been possible to disarm them? Would you consider them as "surrendered"? In general, does IHL require parties to capture rather than kill their enemies whenever possible? In situations of occupation? Is the same true for IHRL? (P I, Art. 41)

14. (*Para. 3, 83 – 84 and 88*) Can the siege of a hydroelectric dam be considered an attack under IHL? Given the facts, would you consider the provision on the protection of works and installations containing dangerous forces relevant in the present case? Does the destruction of the hydroelectric dam through means other than attack (e.g. destruction once it is under control of a party) constitute a violation of IHL? If yes, under what circumstances? What rules of IHL would you invoke with regard to the deaths of hospital patients resulting from the siege of the hydroelectric dam (GC I, Art. 12; GC IV, Art. 16; P I, Art. 56; HR, Art. 23 (g))

V. Protection of women and deportation

15. (*Para. 4*) Does the fact that women and children were found dead imply that an attack against the civilian population occurred? Is there a basis for a presumption? How, if ever, is an alignment between women and children and victimhood problematic?

16. Does IHL prohibit rape? How? Is there any situation in which a rape committed in an armed conflict does not violate IHL? (GC I-IV, Art. 3; GC I-IV, Arts 50/51/130/147; GC IV, Art. 27(2); P I, Arts 75(2) and 76(1); P II, Art. 4(2)(a) and (e); CIHL Rules 90, 91 and 93)

18. (*Para. 5*) What rules of IHL are violated if rape is committed in order to propagate an AIDS pandemic among the population? If rape is followed by murder and brutal physical mutilation? How would International Criminal Law treat these particular allegations?

19. (*Para. 6, 81 and 88*) Is the deportation of civilians lawful under IHL? Under what circumstances? In the present case? Were the obligations of Rwanda and Uganda different? (GC IV, Art. 49)

VI. Natural resources

20. (*Para. 90 – 95*) What are the obligations of an occupying power with regard to natural resources? In what circumstances may it use those resources? (HR, Arts. 47, 53, 55; GC IV, Art. 33)

21. Are all the forms of “misappropriation” that the Commission described in para. 90 prohibited by IHL?
22. Is the exploitation by the occupying power, for economic purposes, of specific resources of an occupied territory prohibited by IHL? Limited by IHL?

VII. Human Rights

23. (Para. 64, 66, 70, 83) Why may the African Commission – itself a human rights body - analyse IHL violations? Does the Commission examine the applicability of IHL and its relation to IHRL in the present case? Why/Why not? Which legal arguments could you use in order to take into consideration IHL? Why is it relevant that the African Charter on Human and Peoples’ Rights does not allow derogations in emergency situations? Does this raise problems in practice?
25. (Para. 71) Was it necessary to classify the conflict, the territory and the persons in order to establish the violation of Art. 75 P I in the present case? Why?
26. (Para. 80) In a conflict between two states, would killing the enemy based on nationality be considered discrimination? Why/Why not? What is the relationship between the right to life under IHRL and IHL? Is the principle of non – discrimination an autonomous right (which can be violated without any link to the violation of another protected right)? How would you reconcile what the court stated in para. 80 with IHL? (African Charter on Human and Peoples’ Rights, Arts 2 and 4)
27. (Para. 81) In the present case, as far as mass transfer is concerned, which legal framework is more protective, IHL or IHRL?
28. Are the human rights mentioned by the Commission also protected by IHL? Is there any contradiction between those human rights and IHL? Relying as it does on IHRL, does the Commission reach any conclusions in this case which it would not have reached had it been applying IHL? Conversely, has the reliance on IHL permitted any conclusions that would not have been reached under IHRL?