

Challenges of protecting refugees in armed conflicts: The case of Rwandan refugees in the Eastern DR Congo

Par Serge BALAGA ESSASI[♦]

Summary

Rwandan refugees live in protracted situation marked by massive human rights violations in the Democratic Republic of the Congo, itself confronted with armed conflicts affecting local communities. Their repatriation process questions the fundamental principles of the Voluntary nature of repatriation and Non-refoulement. This article examines their situation in Eastern DRC, by confronting legal and institutional mechanisms with challenges that affect them as much as local communities. Throughout a critical overview of the role of States and non-State actors involving in armed conflicts, focus is made on the advocacy which should lead to the ratification by the DRC of all International Instruments protecting refugees, and their incorporation into the national legal framework in order to guarantee respect of human rights, key for access to a better protection environment for refugees in the asylum country, and to a safe return to the country of origin.

Key words: Refugee; Armed conflict, International Humanitarian Law, Human Rights, crimes, 1951 UN Convention, voluntary repatriation; Non-refoulement; Democratic Republic of Congo, Rwanda.

[♦] Licence en Droit (Bac+5/ULPGL-Goma). Balaga is a former Senior Protection Associate at UNHCR Goma from 2002 to June 2017. Avocat au Barreau de Bukavu et Directeur Général Adjoint-Institut de Droit de l'Environnement et Développement Durable- IDED/Goma- Nord Kivu. Email: serby75@hotmail.com

Résumé

Les réfugiés rwandais vivent dans une situation prolongée marquée par des violations massives des droits de l'homme en République Démocratique du Congo, elle-même confrontée aux conflits armés affectant les communautés locales. Leur rapatriement interroge quant aux principes fondamentaux du caractère volontaire du rapatriement et celui du Non-refoulement.

Cet article examine leur situation à l'Est de la RDC, en confrontant les mécanismes légaux et institutionnels aux défis qui les affectent autant que les communautés locales. Par un aperçu critique sur le rôle de l'Etat et celui des acteurs non étatiques dans les conflits armés de l'Est, focus est fait sur le plaidoyer qui devrait aboutir à la ratification par la RDC de tous les instruments internationaux protégeant les réfugiés, et à leur incorporation dans le cadre juridique national afin de garantir le respect des droits de l'homme, clé pour l'accès à un meilleur environnement de protection des réfugiés dans le pays d'asile et à un retour sûr dans le pays d'origine.

Mots clés : Réfugiés ; Conflits armés, Droits de l'homme, crimes, rapatriement volontaire ; principe de Non-refoulement; République Démocratique du Congo.

1. Introduction

In mid-1994, Rwandan refugees (RwaRef) entered in eastern Democratic Republic of Congo (DRC), including the former Rwandan Armed Forces (ex-FAR: *Forces Armées Rwandaises*) and *Interahamwe* militia¹ who involved in the genocide, staying in

¹ Former *Forces Armées Rwandaises* are to be distinguished with *Interahamwe* which is a Hutu paramilitary organization formed in 1990 as the youth wing of the National Republican Movement for Democracy and Development (MRND), the then-ruling party of Rwanda, and enjoyed the backing of the Hutu Power government. The *Interahamwe* militias were the main perpetrators of the Rwandan genocide along with

refugee camps in the application of the 1951 United Nations Convention relating to the Status of refugee (The 1951 UN Convention) and the 1969 Organisation of African Unity Convention governing the specific aspects of refugee problem in Africa (The 1969 OAU Convention).² Two decades later, the Eastern DRC experienced 3 majors cycles³ of non-international and internationalized armed conflicts⁴, during which, serious violations of international humanitarian law and the breach of principles established by the 1951 UN Convention and the 1969 OAU Convention,⁵ for instance, the right to a fair protection environment, the right to a voluntary repatriation process or the protection against *refoulement* have been violated by actors involved.⁶

These armed conflicts put RwaRef in a complex situation: Firstly, for the DRC Government and because of insecurity, mainly

the Rwandan national army under President Juvenal Habyarimana killed in the crash of his plane- the event that marked the start of the Genocide in 1994)

² J. CRISP, «The Refugees Crisis in the Great Lakes Region of Africa», in *Refugee Survey Quarterly* 17(2), Centre for Documentation and Research, UNHCR, Geneva, 1998, p.vi.

³ The first Congo war (1996-7), the Second war (1998-2003), the period of generalized destabilization in the East, especially by M23 and FDLR

⁴ According to art. 1 of the Additional Protocol II, non-international armed conflicts are all armed conflicts which take place in the territory of high contracting party between its armed forces and dissident armed forces or other organised armed groups fighting each other. See Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. The term “Internationalised armed conflict” describes internal hostilities that are rendered international. It includes war between two internal factions, both of which are backed by different states and war involving a foreign intervention in support of an insurgent group fighting against an established government. See SP TUNAMUSIFU, « The right to justice: A challenge for survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo », (2015) 15 *African Human Rights Law Journal*, pp. 473-495.

⁵ J. CRISP, «The Refugees Crisis in the Great Lakes Region of Africa», p.vi.

⁶ MEDECINS SANS FRONTIERES, « The Hunting and Killing of Rwandan Refugees in Zaire-Congo, Speaking Out Cases Studies », MSF 2014, available at <https://www.msf.org/speakingout/hunting-and-killing-rwandan-refugees-zaire-congo-1996-1997> (last visited on 19 May 2020)

in the East (North-Kivu and South Kivu Provinces), the major challenge is the possibility to organize census and other demographic surveys to determine statistics of refugees. As of 2014, around 245, 000 RwaRef are still living in the eastern Congo according to the DRC Government.⁷ In 2015, the National Commissioner for Refugees- *Commission Nationale pour les Réfugiés* (CNR) assisted by the UNHCR organised a census of RwaRef with mixed results. Secondly, politics and local community perceive RwaRef as parts of the Rwandan Hutu rebel group - *Forces Démocratiques pour la Liberation du Rwanda*- Democratic Forces for the Liberation of Rwanda (FDLR) members.⁸ Indeed, targeted by the *Forces Armées de la RD Congo* (FARDC- DRC Armed Forces) along with Rwanda Defence Forces (RDF) military operations, and politically isolated by the international community, FDLR has since January 2009 started a reprisal campaign against the population of the Kivu provinces, threatening at the same time the security of Rwanda.⁹ Thirdly, the presence of RwaRef in the East has disturbed the demographic, social, economic balance in a security situation already impacted by the regional context, raising at the same time question on global solution including the Cessation clause of Rwandan refugees' status.¹⁰

⁷ J. PALUKU KAHONGYA, « Déclaration du Gouverneur de la Province du Nord Kivu sur le recensement des réfugiés rwandais », *Radio France Internationale* (RFI), 20 Aug. 2014, available at <http://www.rfi.fr/afrique/20140820-rdc-refugies-rwandais-recensement-Nord-Kivu> (last visited 21 Mar.2018)

⁸ THE ENOUGH PROJECT, « How to Dismantle a Deadly Militia-Seven Non Military Tactics to help end the FDLR threat in Congo », available at <http://www.enoughproject.org/blogs/new-report-how-dismantle-deadly-militia> , 18 November 2014. (last visited on 18 May 2020)

⁹ F. GRIGNON, « les FDLR doivent désarmer », available at <https://www.crisisgroup.org/fr/africa/central-africa/rwanda/les-fdlr-doivent-desarmer> , 18 September 2009 (last visited on 27 July 2020)

¹⁰ According to UNHCR, a favourable protection environment is one where the causes and demographics of displacement are well known, the rights of refugees and other asylum-seekers are recognized in national law, there is adequate administrative capacity

Therefore, the armed conflict context involving FDLR beside other Congolese Hutu militias has made RwaRef perceived as a source of insecurity, posing at the same time a questionable application of the 1951 UN Convention and the 1969 OAU Convention.¹¹ Yet, in the last years, RwaRef are still exposed in areas controlled by armed groups or by the FARDC, facing the violations of the 12 August 1949 Geneva Conventions provisions, and their human rights as non-combatants in armed conflicts.¹²

From the above, major issues are raised by the presence of RwaRef in the DRC: What is their current situation and problems affecting them? How legal and institutional mechanisms, International and regional, the DRC national legal framework address problems affecting RwaRef in this hosting country conflict context? Are the voluntary repatriation and the *Non-refoulement* core principles of International refugee law effective principles about them? What is the impact of such situation on the local community, including in armed conflicts. Lastly, how can the DRC Government ensure that these instruments are incorporated in the national law and effective for the critical situation of refugees?

to oversee affairs regarding refugees and asylum-seekers, protection issues are jointly addressed by all relevant stakeholders, local populations are receptive to refugees and asylum-seekers, and where the needs and potential contributions of refugees are acknowledged and form part of national and regional development strategies.(UNHCR, Protection Gaps Framework for Analysis, Enhancing Protection of Refugees, Strengthening Protection Capacity Project (SPCP), Division of International Protection, UNHCR, Geneva, 2006, p.3

11 *Article 3, 1969 OAU Convention Governing the Specific Aspects of Refugee problem in Africa*, Addis- Ababa, 10 September 1969 (Entry into force on 20 June 1974)

12 *According to article 1 of the additional Protocol II, non-international armed conflicts are all armed conflicts which take place in the territory of a high contracting party between its armed forces and dissident armed forces or other organized armed groups fighting each other. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). At that time, the regular Defence forces (Forces Armées Zaïroises-FAZ) were fighting against AFDL*

To carry out this work, a qualitative methodology was adopted based on in-depth interviews with RwaRef living in the North Kivu province. The interviews were conducted in Goma, North Kivu Province, between July 2018 and August 2019.¹³ In addition, relevant information were gathered from credible secondary sources, including UN documents and Security Council resolutions, academic papers and news papers, Non-Governmental Organisations reports among others.

2. The origin and situation of Rwandan refugees in DRC

This section explains who RwaRef and for which reasons; where are they located two decades later.

When they crossed the border to seek refuge in the DRC in 1994, following the genocide in their country, the international community assisted RwaRef, even when camps were under the control of the ex-FAR and *Interahamwe* and militias in North Kivu and South Kivu,¹⁴ violating at the same time the civil character of refugee camps.

In 1996-1997, AFDL rebels led by Laurent-Desire Kabila attacked refugee camps in South-Kivu and Nord-Kivu under the pretext that these camps served as sanctuaries for those who have committed genocide in Rwanda, and reportedly committed serious

¹³ *Most of the interviewees did not want the information they provided to be attributed directly to them, hence for ethical clearance, they are cited in this article with generic references, although their name were codified for research purposes.*

¹⁴ OAU, “Rwanda: The preventable genocide”, (OAU, Addis Ababa, 2000), paras 19.18, 19.21.

violations of human rights against¹⁵ thousands of refugees¹⁶ who tried to escape in the bush.¹⁷ The Roberto Garreton Report on Human Rights violations in DRC in 1997 indicated that thousands of them had been dead, killed by rebels or starvation.¹⁸ *Médecins Sans Frontières* (MSF) estimates that of the 340,000 refugees who remained in Zaire, the location of at least 190,000 refugees has remained unknown.¹⁹

The activism of armed groups such as on one hand, Mayi-Mayi and the ex-FAR/Interahamwe who became FDLR in 2002,²⁰ and on another, the *Rassemblement Congolais pour la Démocratie*-Congolesse Rally for Democracy (RCD), the National Congress for

¹⁵ OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, Report of the mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, New York, *United Nations*, 2010, paras 211-235.

¹⁶ It is estimated that over 340,000 remained in Zaire, hiding in the hills and forests of the Kivu region, in areas controlled by the AFDL, or fleeing north-west, ahead of the advancing front-line. According to MSF and UNHCR, the exact number of refugees is almost impossible to ascertain, due to uncertainty about original camp censuses, possible multiple registrations, and the inexact estimates of returning refugees during the massive repatriation of November-December, 1996: available at <https://msf.fr/Forced flight- A brutal-strategy of elimination-in-eastern-zaire>, April 1997 (last visited on 19 May 2020)

¹⁷ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEE (UNHCR), The State of the World's Refugees 2000, Fifty years of Humanitarian action, *UNHCR, Oxford University Press*, 2000, p.263

¹⁸ R. GARRETON, « Report on the Situation of Human Rights in Zaire », *UN Commission on Human Rights, Resolution 1996/77*, Geneva, Economic and Social Commission, 28 January 1997; OHCHR Report of the mapping exercise, OHCHR, p. 213

¹⁹ MEDECINS SANS FRONTIERES, Forced flight- A brutal strategy of elimination in eastern Zaire, MSF, 1997, available at <https://www.msf.fr/sites/https://msf.fr/Forced flight- A brutal-strategy of elimination-in-eastern-Zaire>, April 1997 (Last visited on 19 May 2020)

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THE ENOUGH PROJECT, « How to Dismantle a Deadly Militia-Seven Non Military Tactics to Help End the FDLR threat in Congo » , available at <https://www.enoughproject.org/blogs/new-report-how-dismantle-deadly-militia> (Last visited on 20 April 2020)

the Defence of the People- *Congrès National pour la Défense du Peuple* (CNDP) and March 23 Movement- *Mouvement du 23 Mars* (M23) , as well as the Rwanda Defence Forces (RDF) and the FARDC military operations/joint military operations in 2009 pushed most refugees into remote areas controlled by FDLR.²¹ As results of these two decades (1999-2018), DRC armed conflicts characteristics met criteria defining by the Article 3 common to the Geneva Conventions of 12 August 1949²² and by article 1 of the Protocol II Additional to the Geneva Convention²³. This means that the situation reaches a level which distinguishes it from other forms of violence to which the international humanitarian law does not apply, such as situation of tension, internal disturbances, such as riots, isolated and sporadic acts of violence and others analogue acts²⁴. In such situation, refugees become victims of violence, extrajudicial killings, and arbitrary or unlawful repatriation by government forces (both DRC and Rwanda Government) or caught in armed groups' confrontation.²⁵ Moreover, involving actors failed to distinguish refugees from members of the ex-FAR and the *Interahamwe*, responsible for the genocide. In fact, RwaRef can be classified into three groups: First, those who are civilians and do not have any direct connection with combatants but they live in areas

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THE ENOUGH PROJECT, « How to Dismantle a Deadly Militia—Seven Non Military Tactics to Help End the FDLR threat in Congo». available at <https://www.enoughproject.org/blogs/new-report-how-dismantle-deadly-militia> (Last visited on 20 April 2020)

²² Article 3 common to the 1949 Geneva Conventions applies in armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.

²³ Article 1 of the Protocol II Additional to the Geneva Conventions

²⁴ S. VITE, « Typology of armed conflicts in international humanitarian law: legal concepts and actual situations », in *International Review of the Red Cross*, Vol. 91, N° 873, mars 2009, pp. 69-94. available at <https://www.icrc.org/fr/doc/assets/files/other/irrc-873-vite-fre.pdf> (Last visited on 2 June 2020)

²⁵ OHCHR, « Report of the mapping exercise », (OHCHR, 2010) paras 191 ss.

under the FDLR control to escape from military attacks; secondly, refugees who are hiding within the Congolese population; Thirdly, they are FDLR's relatives, unarmed and living under the control of the FDLR²⁶.

Following this classification, the Rwandan Civil Society organisation in DRC (SOCIRWA) asked on several occasion, to the DRC Government and the UNHCR to make possible the re-establishment of camps to settle refugees in secure conditions²⁷ under the State authority. This point of view rejoined the Enough Project recommendation to the UN Special Envoy Said Djinnit, the U.S Special Envoy Russ Feingold, and Special Representative of the UN General Secretary in DRC Martin Kobler asking to work with the UNHCR to set up protected camps for refugees in eastern DRC and to ensure that MONUSCO provides security for the camps.²⁸ But, for the DRC Government, the voluntary repatriation of Rwandan refugees is a key priority and the sole solution to the issue.

The refugees have faced many obstacles for their local integration and have been accused of causing ethnic conflicts; the Government statement also asserts that they live in remote areas where their protection is quite impossible.²⁹ Furthermore, none of the International Community or government has supported the

²⁶ S. WINDSOR, C. MVANO, « Rwandan refugees in Congo in search of protection », Rights in Exile, 27 Feb.2015, available at : <http://rightsinexile.tumblr.com/post/112292429657/rwandan-refugees-in-Congo-in-search-of-protection> (last visited 21 Jul.2016)

²⁷ SOCIRWA/RDC, « Il n'est jamais trop tard pour mieux faire », SOCIRWA/RDC Communiqué N°016/027, Goma, Goma-RDC, 7 Nov.2016.

²⁸

THE ENOUGH PROJECT, « How to Dismantle a Deadly Militia—Seven Non Military Tactics to Help End the FDLR threat in Congo». available at <https://www.enoughproject.org/blogs/new-report-how-dismantle-deadly-militia> (Last visited on 20 April 2020)

²⁹ UNHCR-CNR, Project Partnership Agreement, Rapatriement volontaire des réfugiés rwandais, COD01/2016/0000000540/000, Geneva, UNHCR, 2016

Enough Project proposal to reinforce the protection of thousands of Rwandan refugees by establishing refugees' camps as solicited by the SOCIRWA.³⁰

It is in this scope that, from 1999 to 2017, 172 053 refugees have been repatriated to Rwanda but as of 2019, 214.473 RwaRef are living in DRC according to the government, among them 75,709 refugees verified by the CNR and UNHCR.³¹ Some are still under the FDLR's influence, which constitute a potential obstacle to their repatriation and discourage those refugees willing to return to their home country. Therefore, the RwaRef voluntary repatriation is a challenge for all stakeholders, and at first, refugees themselves. Furthermore, as they are caught under cross fire between different armed groups or armies, RwaRef are at risk or victim of *refoulement* to Rwanda, in violation of principle of International instruments.³² In the following section, we will analyse problems affecting RwaRef protection in DRC.

3. Problems affecting refugees' protection in DRC:

What are international, regional and national instruments protecting refugees in armed conflicts? How have they been applied or may be applied, what are their nature, scope and values to guarantee a

³⁰ SOCIRWA/RDC, "Il n'est jamais trop tard pour mieux faire", SOCIRWA/RDC Communiqué N°016/027, Goma, Goma-RDC, 7 Nov.2016.

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UNHCR, Statistiques du rapatriement volontaire des réfugiés rwandais, République Démocratique du Congo, *UNHCR Factsheet*, 30 novembre 2019.

³² The principle of non-refoulement (Art. 33 of the 1951 Convention) is a strong refugee-specific right against forced return to a country or territory where life or freedom of refugees would be threatened on account of the reasons enumerated by the 1951 Convention. Cfr Achilles SKORDAS, "General provisions on article 7 of the 1951 Convention", in *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, a commentary*, Andreas ZIMMERMANN, Oxford University Press, New York, 2011, p. 733

fair protection environment to address the plight of Rwandan refugees.

Furthermore, some measures have been adopted by the Executive Committee for the High Commissioner's Program (UNHCR) to reinforce the national legal framework.³³ We will confront critical challenges of the protection of refugees in DRC conflict context and how should be the DRC compliance to its international commitment, as well for the International Community.

3.1 Legal and Institutional mechanisms at the Global and Regional level.

Application of universal international conventions protecting refugees and civilians

In 69 years (from 1951 to 2020) of the 1951 Convention related to Refugees and its 1967 Protocol, the world is facing challenging issues on the matter of refugees and displaced people. Migrations,

³³ The Status of the Office of the United Nations High Commissioner for Refugees was adopted by the General Assembly on the 14 December 1950 as Annex to Resolution 428 (V). In the Resolution, the General Assembly called upon Governments to co-operate with the High Commissioner (HC) in the performance of his functions. The HC reports annually to the General Assembly through the Economic and Social Council. Pursuant to paragraph 4 of the Statute, an Advisory Committee on Refugees was established by the Economic and Social Council (Resolution 393 (XIII) B of 10 September 1951) and was later reconstituted as the United Nations Refugees Fund (UNREF) Executive Committee (Economic and Social Council Resolution 565 (XIX) of 31 March 1955 adopted pursuant to General Assembly Resolution 832(IX) of 21 October 1954). The latter was replaced in 1958 by the Executive Committee of the High Commissioner's Programme –Ex Com- (General Assembly Resolution 1166 (XII) of 26 November 1957 and Economic and Social Council Resolution 672 (XXV) of 30 April 1958). Under its terms of reference, the ExCom, inter alia, approve and supervises the material assistance programme of the High Commissioner's Office and advises the High Commissioner at his request on the exercise of his functions under the Statute. The ExCom was originally composed of 24 States. In 2007 its membership was extended to 72 States (General Assembly Resolution 61/136 of 23 January 2007) so as to achieve a wider geographical representation. See Collection of International Instruments and Legal Texts Concerning Refugees and others of Concern to UNHCR -Vol. 1 International Instruments, UNHCR, 2007, p. 5

traffic of human being and other crimes are impacting the global environment in which the protection of refugees must be granted.

In a report on Fifty years of Humanitarian action published in 2000, the United Nations High Commissioner stated that Violations of basic economic, social and cultural rights often lead to political instability and violence, which in turn can cause forced displacement.³⁴ In the following lines, the most important instruments that established the link between human rights and protection of refugees are commented.

(A) *The 1951 Convention relating to the Status of Refugees (The 1951 Convention) / The 1967 Protocol relating to the Status of refugees (the 1967 Convention)*, based on the world community's strong will to ensure that the trauma caused by the persecution and destruction of war³⁵, both texts provide fundamental rights of refugees.³⁶

Nonetheless, the 1967 Protocol had been adopted to broaden the scope of the 1951 Convention, specifically the humanitarian character of asylum guaranteed by the fundamental principle of *non-refoulement*³⁷ and the voluntary character of repatriation³⁸.

However, this convention is challenged by profound changes: systematic human rights violations increasingly form part of the

³⁴ UNHCR, *The State of the World's Refugees 2000*, (New York, Oxford University Press, 2000), p.150.

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P. WEIS, « The refugee Convention, 1951, The *travaux préparatoires* analysed with a Commentary » available at <https://www.unhcr.org/4ca34be29.pdf> (Last visited 23 May 2020)

³⁶ A. ZIMMERMANN, *The 1951 Convention relating to the status of refugees and its 1967 Protocol, a commentary*, (New York, Oxford University Press, 2011), preface, p.v

³⁷ Article 33, *The 1951 Convention relating to the Status of refugees*, United Nations, *Treaty Series*, N°2545, vol. 189, p. 137

³⁸ Article 1, *The 1967 Protocol relating to the Status of refugees*, United Nations, *Treaty Series*, N°8791, vol.606, p.267

environment in which refugee protection must be ensured. In this regard, Erika Feller argues that in spite of this far reaching refugee's protection regime, the reality is that the needs of millions of refugees are unaddressed and they remain unable to exercise the basic rights to which they are entitled.³⁹

To illustrate this situation in Africa, Georges Okoth-Obbo remarked that Africa has been the arena for some of the most biting failures in the protection of refugees of recent times.⁴⁰

In DRC, the authorities raised their concern that no solution has been found to the situation of RwaRef. Also, the 1951 UN Convention's legal, political and ethical scope goes beyond the specific terms it contains:

- **Legal**, it defines the basic standards and principles for the protection of refugees;
- **Political**, it constitutes an recognised universal framework within which States can cooperate and share the responsibilities; And
- **Ethical**, it is a commitment of all 141 States Parties to defend and protect the rights of refugees.⁴¹

As parts of the rule of International Customary law and Conventional International law, standards laid down by the 1951 Convention are considered as a norm of *jus cogens* that create obligations *erga omnes* binding all states. All these rules must be

³⁹ E. FELLER, « Protection Gaps Framework for Analysis Enhancing Protection of Refugees », in *Strengthening Protection Capacity Project* », UNHCR, 2006, Forward.

⁴⁰ G. OKOTH-OBBO, « Thirty Years on: A legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problem in Africa », in *Refugee Survey Quarterly* 20 (2001-1), p. 79,83 cited by J. VAN GARDEREN and J. EBENSTEIN, « Regional Developments: Africa », in *The 1951 Convention relating to the status of refugees and its 1967 Protocol, a commentary*, edited by Andreas ZIMMERMANN, (New York, Oxford University Press, 2011), p. 186

⁴¹ R. LUBBERS, A. JOHNSON, *Protection des réfugiés : Guide sur le droit international relatif aux réfugiés*, Union Interparlementaire, UNHCR, 2001, avant-propos.

respected by all actors, and in the case of DRC, state and non-state actors including foreign armies and members of armed groups enjoy impunity in the violation of the 1951 UN Convention principles, thus exposing the lives of civilians including refugees.

Other international instruments are relative to the International Humanitarian Law (IHL), which are linked to the protection of refugees.

(B) The Geneva Convention Relative to the Protection of Civilian Persons in time of war (Fourth Geneva Convention), 1949, The Protocols Additional to the Geneva Convention of 12 August 1949: When violations of the IHL occur, States are under an obligation to prosecute alleged offenders. Domestic courts therefore play an important role in the reinforcement of IHL and limiting impunity.⁴²

During their military operations, involving actors in armed conflicts affecting the Eastern DRC have not always or not at all respected restrictions laid down by the 1949 Geneva Conventions.

In 2017, the International Committee of the Red Cross (ICRC) was particularly concerned about the triage of the 7 million people in need of emergency assistance, more than half of whom have been displaced by the fighting. Repeated violence and armed clashes cause immense human suffering in several provinces of the Democratic Republic of Congo (DRC).⁴³ As they live within local communities in areas affected by armed conflict, RwaRef, they are also impacted by these violence and armed clashes.

⁴² The 1949 Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949 (Excerpts), United Nations, *Treaty series*, n°973, vol.75, p.287.

⁴³ INTERNATIONAL COMMITTEE OF RED CROSS (ICRC), « RDC: millions displaced and at risk from stark rise in violence », *News release*, ICRC, 11 October 2017 available at <https://www.icrc.org/en/document/drc-millions-displaced-and-risk-stark-rise-violence>, (last visited on 17 May 2020)

Throughout 1997, Médecins Sans Frontières (MSF) publicly denounced the massacres and human rights violations against Rwandan refugees by AFDL and APR troops during hostilities opposing armed groups to Zairian government.⁴⁴

Congolese national institutions are obliged to prosecute all violences against civilians including refugees in time of armed conflicts.

Application of Regional International Conventions level

The African Union has established numerous instruments in relation to refugees in Africa, while Great Lakes region States initiative and efforts to re-establish peace and security in the region led to some other mechanism to reinforce their commitment to International refugee and Humanitarian law. Above is analysis of their application in DRC.

(1) *The 1969 Organization of African Unity Convention governing the specific aspects of refugees' problems in Africa* (the 1969 OAU Convention) makes some legal innovations: It expanded the 1951 definition of who is a refugee. It extends the definition of refugee to people fleeing in mass exodus their home country, as it was in 1994 for RwanRef. They have been recognized on "*prima facie*" status basis non on individual refugee status.⁴⁵ This status led to the confusion between refugees and members of FDLR as armed group because refugees were not identified or registered to facilitate the distinction between them and armed combatants.

⁴⁴ MEDECINS SANS FRONTIERES, «The Hunting and Killing of Rwandan Refugees in Zaire-Congo , Speaking Out Cases Studies», MSF, 2014, available at <https://www.msf.org/speakingout/hunting-and-killing-rwandan-refugees-zaire-congo-1996-1997>(last visited on 19 May 2020);

⁴⁵ Group determination on a *prima facie* basis means in essence the recognition by a state of refugee status on the basis of the readily apparent, objective circumstances in the country of origin given rise to the exodus. Its purpose is to ensure admission to safety, protection from *refoulement* and basic humanitarian treatment to those patently in need of it

Also, the 1969 Convention established : (a) the "absolute" prohibition of *refoulement* whereas in the 1951 Convention it is only limited but not absolutely prohibited; (b) the prohibition for refugees to engage in any subversive activities against any member states; (c) The de-politicization of the concept of asylum as a peaceful and humanitarian act which shall no longer be perceived by member states as an unfriendly act; (d) Finally, the principle of voluntary repatriation was first codified.⁴⁶ As it will be demonstrated in the section 4, RwanRef seemed to have been victims of forced repatriation or *refoulement*, and some of them have been accused to participate in subversive activities against their home country.

On 24 February 2013, the International Conference for the Great Lakes Region (ICGLR) member states noted that the Eastern DRC has continued to suffer from recurring cycle of conflicts and persistent violence by armed groups, both Congolese and foreign. Acts of sexual violence and serious violations of human rights were used regularly and almost daily as weapon of war indistinctive toward local population or refugees.⁴⁷

These commitments also imply the protection and durable solutions for forced displaced people including refugees. But it is as fact that ICGLR did not achieve its objectives and still the eastern DRC is facing insecurity due to armed group's activism.

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M. SHARPE, « The 1969 African refugee Convention : Innovations, Misconceptions, and Omissions », in *McGill Law Journal* (2012), p. 101

⁴⁷

ADDIS-ABEBAS AGREEMENT, Peace, Security and Cooperation Framework for the DRC and the Region, Addis-Abeba, 24 February 2013

Legal and Administrative protection framework, migration policies and refugee protection principles

DRC recognize the right to asylum under article 33 of the 2006 Constitution amended in 2011, but this right is subject to national security.⁴⁸

In the legal framework, there is a National Law on Refugees Status⁴⁹ and the one creating the National Commissioner for Refugees (CNR)⁵⁰. The CNR is responsible for assessing claims for asylum seekers and coordinating assistance to refugees. But, the CNR is still struggling to identify and register Rwandan refugee who are in remote areas of the country through the Biometric registration program which started in 2014. This challenge is due to the lack of state authority in some areas where Rwandan refugees are settled.

The critical challenges of the protection of refugees in the DRC conflict context and consequences on RwaRef:

Despite existing legal instruments and mechanisms on refugees' protection, it is a fact that the plight of Rwandan refugee is still a challenge for the DRC and international community. Indeed, the Congolese national framework relating to the protection of refugees is challenged by three mains issues:

(1) *The lack of State authority in some areas where RwaRef are settled*: Although the 2006 DRC Constitution reaffirmed the principle of eliminating any lawless area by enshrining the

⁴⁸ See article 33 of the DRC Constitution, which provides (in French): “ *Le droit d'asile est reconnu.* »

⁴⁹ No 021/2002 “Portant statut des réfugiés en République Démocratique du Congo” du 16 octobre 2002

⁵⁰ Décret No 14/03 of 05 August 2003 “portant organisation et fonctionnement de la Commission Nationale pour les Réfugiés

principle of absolute territoriality⁵¹, respect for human rights still remains a major challenge for the DRC, particularly in the East. In fact, the article 60 of the DRC 2006 Constitution stipulates that the respect for human rights and fundamental freedoms is binding on the public authorities and everyone.⁵² Since 1990's, Eastern DRC is characterized by armed groups activism including foreign defence forces (RDF, UPDF) involvement in armed conflict. In that context, the DRC Government had no effective control on this part of the national territory to ensure, among other things, that human rights and protection of refugees are ensured. Therefore, considering this period, until recently, Congolese authorities were unable to ensure the effective protection of RwaRef. Concretely, this means that they were not able either to make the registration of refugees acceding to the DRC territory, neither to anticipate to any further movement of refugees within the territory nor to give them any refugee card as recommended by International Conventions on refugees.⁵³ Even when RwaRef were recognized on the basis on *Prima facie* status, *id est*, refugee status recognized “as it appears at first sight without investigation.”⁵⁴ Its purpose is to ensure admission to safety, protection from *refoulement* and basic humanitarian treatment to those patently in need of it.⁵⁵ Gaps in

⁵¹ BALINGENE KAHOMBO, « Les activités minières et le respect des droits de l'homme au Kivu », *Recht in Afrika – Law in Africa – Droit en Afrique* 22 (2019), p.207

⁵² See article 60 of the DRC, which provides (in French): « Le respect des droits de l'homme et des libertés fondamentales consacrés dans la Constitution s'impose aux pouvoirs publics et à toute personne ».

⁵³ Article 27 of the 1951 UN Convention relating to the Status of Refugees: “ The contracting States shall issue identity papers to any refugees in their territory who does not possess a valid travel document”

⁵⁴ REFUGEE STATUS CENTER, *Prima facie* determination of refugee status, an overview and its legal foundation, Working Paper Series, N°55, June 2010, p.5, available at <https://www.rsc.ox.ac.uk/files/files-1/wp55-prima-facie-determination-refugee-status-2010.pdf>, (last visited on 5 August 2020)

⁵⁵ Excom Global Consultations on International Protection, « Protection of refugees in mass influx situations : Overall protection framework, EC/GC/01/4, 19 February 2001

effectiveness of States authorities in Eastern DRC led to another challenge related to durable solutions.

(2) Concerns about durable solution for RwaRef:

Indeed, it would have been necessary for the RwaRef to be better identified with refugee cards, and therefore for the Congolese authorities to be in a position to recommend durable solutions for RwaRef : voluntary repatriation, local integration and resettlement. Since 1999, UNHCR has supported the country's authorities to organize the voluntary repatriation of RwaRef to their country, which depends on the security conditions in the asylum country.

But with the invocation of the cessation clauses by Rwanda, the situation became more complex. At the 60th ExCom held in October 2009, UNHCR announced a comprehensive strategy to a proper closure of the RwaRef situation.⁵⁶In the same vein, the Rwandan authorities invoked the cessation clauses to put an end to the long standing RwaRef situation by the 30th of June 2013. Following this decision, two points of view reacted in favour or not of the application of cessation clause on RwaRef. On one hand, those who agree with the application of the cessation clauses arguing that: (a) Circumstances following which Rwandan refugees fled to DRC have ceased to exist; (b) Twenty years after 1994, there is no reason for these refugees to stay in DRC or abroad. For the Rwandan government, security conditions have evolved and the new social and political environment is ideal to promote the

⁵⁶ UNHCR, Implementation of the Comprehensive Strategy for the Rwandan refugees situation, including UNHCR's recommendations on the application of the ceased circumstances cessation clauses, UNHCR-IOM/FOM/094/2011: The strategy has four components: (i) Enhancing promotion of voluntary repatriation and reintegration of Rwandan refugees in Rwanda; (ii) pursuing opportunities for local integration or alternative, legal status in countries of asylum; (iii) continuing to meet the needs of those individuals unable to return to their country of origin for protection-related reasons; and (iv) elaborating a common schedule leading to the cessation or refugees status, foreseen to commence as of 31 December 2011.

end of the long standing RwaRef situation.⁵⁷ On another hand, those who think that it early to invoke the cessation clause: (aa) the war has ended in Rwanda, but still human rights situation is not favourable to encourage people to go back home.⁵⁸ (bb) the trauma caused by the 1994-1996 is still present in the mind of Rwandan even in the home country, and it doesn't lead to the return of refugees.⁵⁹ For the DRC Government, the invocation of cessation clause of RwaRef status is a challenge considering legal aspect: local integration means that RwaRef should access to legal documentation that does not mean the access to Congolese nationality. On 2 October 2015, a Ministerial meeting at UNHCR Headquarters in Geneva was held to discuss the state of implementation of the Comprehensive Solutions Strategy for RwaRef and to review key issues.⁶⁰ This meeting explored the acquisition of an alternative legal status by waiving or reducing related fees and easing administrative requirements. The Rwanda Government commits to furnish national passports to those refugees who require them, in accordance with the law. For the DRC Government this supposes: a. the granting of resident status through the granting of a temporary residence permit with a minimum duration of 2 years renewable in the DRC. It also means that RwaRef who fulfils legal requirements may ask for the acquisition of Congolese nationality following the national law. De facto, local integration can be realized through socio-economic aspects: RwaRef have actively participated in economic life and

⁵⁷ Les programmes de rapatriement et de réintégration des réfugiés rwandais et aperçu sur les progrès socio- économiques au Rwanda, Ministère de la Gestion des catastrophes et des refugies, MIDIMAR, 2014.

⁵⁸ A. KAMUHANDA, « Clameur des refugies rwandais en détresse cantonnés à Kisangani en RD Congo », SOCIR to UNHCR, Mweso, Nord Kivu, 8 septembre 2018.

⁵⁹ RWANDESE CIVIL SOCIETY AND POLITICAL ORGANISATION (RCSP), « Memo sur la situation des refugies rwandais en RDC et les FDLRs », Memorandum N°0031/CSPOR/RE09142, 14 septembre 2014.

⁶⁰ JOINT COMMUNIQUE, Ministerial Meeting on the Comprehensive Solutions Strategy for Rwandan Refugees, UNHCR, Geneva, 2 October 2015.

they got married to several Congolese. If they would not accept repatriation, the comprehensive strategy foresees the exemption process which allows RwaRef the access to individual Refugee Status Determination to obtain an individual recognition of their refugee status. It will not be easy at all due to the fact that they live in remote areas of DRC. Despite the fact that Refugees have opportunity to present their claim to the CNR in Goma for instance (North Kivu Province)⁶¹, they wait about two or three years for a decision.

(3) *Political and Security issue*: the situation of RwaRef has always been a political issue between DRC and Rwanda. In 2010, DRC and Rwandan Governments and UNHCR signed the first Tripartite Agreement on the voluntary repatriation of Rwandan refugees in DRC,⁶² which established standards for safe return of refugees to Rwanda.⁶³ However, the voluntary repatriation process of RwaRef took place in the footprint of the repatriation and demobilisation of the FDLR and their dependents. The agreement appeared to be a consequence of joint military operations between FARDC and RDF (in 2009). Any observer could see that the two governments privileged their political interests instead of finding a solution to the refugee situation under international refugee law.⁶⁴

The security situation in Eastern DRC has had an impact on the refugees and refugees being victims of human rights violations

⁶¹ DECRET N°14/03 of 5 August 2003 portant organisation et fonctionnement de la Commission Nationale pour les Réfugiés et de la Commission Nationale des Recours-CNR, *Journal Officiel de la RDC*, Kinshasa, 2003.

⁶² Tripartite Agreement on the Voluntary repatriation of Rwandan refugees in DRC, UNHCR, February 2010

⁶³ UNHCR, UNHCR-DRC-Rwanda Tripartite Agreements, UNHCR Regional Office, Kinshasa, Feb.2010.

⁶⁴ RADIO OKAPI, Communiqué de Nairobi, February 2008, available at <https://www.radiookapi.net/sans-categorie/2008/09/02/rdc-communique-de-nairobi-des-progres-significatifs-ont-ete-realisees>, (last visited on 13 May 2020)

including sexual violence are evidence.⁶⁵ Joint military operations between FARDC and RDF were held with the objective to disarm FDLR rebels, and refugees caught in cross fires, had no choice than to accept the repatriation process to Rwanda.

These military operations against FDLR have impacted the refugees' voluntary repatriation. This may be summarized as follow:

- i. *Period of agreement between CNDP and the Congolese government and mutual trust between both Congolese and Rwandan Government through joint military operations (From 2009 to 2010):*

In 2009, Rwanda and DRC made an agreement to rout out elements of the FDLR from eastern Congo. The policy is to eliminate the FDLR, through the *Umoja Wetu* joint FARDC and RDF operation, the *Kimia II* operation, and the FARDC-MONUSCO joint operation. The *Umoja Wetu* and *Kimia II* operations were characterised by a rapidly changing and constantly evolving situation and by fluid movements of populations, including Rwandan refugees. Thus, repatriation was unique sole solution to the Rwandan Refugees; At the same time, FDLR carried out reprisals against populations following joint military operations, which were a source of insecurity along various axes in North Kivu Province, preventing RwaRef to reporting at UNHCR-CNR assembly points for repatriation. As mentioned in **Table 2** below, 14,774 Rwandan Refugees reported themselves at assembly points for repatriation in 2009, and the next year (2010) 10,806

⁶⁵ HUMAN RIGHTS WATCH, République Démocratique du Congo, “ Mettre fin à l’impunité pour les violences sexuelles, nécessité d’un nouveau mécanisme juridique pour traduire les responsables en justice, *HRW*, juin 2014 available at : <https://www.hrw.org/fr/news/2014/06/10/republique-democratique-du-congo-mettre-fin-limpunite-pour-les-violences-sexuelles>, p.33 (last visited 4 June 2020)

were repatriated to their home country. It is evident that these military operations have pushed RwaRef to choose to face the Rwandan authorities they used to fear rather than to risk their lives in the bush.

Forced repatriation movements, attacks on refugees' camps and other forms of coercive and military actions are not simply contraventions to international refugee law. They also have a destabilising impact on country of asylum, particularly when very large numbers of people are affected by such actions.⁶⁶ That was the reality in 1996.

- ii. *Massive repatriation due to the presence of RPF troops in North Kivu Province:* In 1999, when voluntary repatriation restarted in North Kivu province jointly with the Rwandan Government, 23,521 Rwandan refugees were repatriated with the assistance of UNHCR.⁶⁷

In 2000, figures in **Table I** showed that 16,514 Rwandan refugees were repatriated, under the same conditions as in 1999. In fact, considering the security context at that time and in particular the presence of a rebel group backed by RDF, some confusion existed around the voluntariness of the repatriation process. For the period from 1996 to 2003, many reports and studies have mentioned the obscure and complex nature of the context in which refugees were repatriated.⁶⁸ In 2000, UNHCR published its concerns on the issue of voluntariness, arguing that the principle was not in effect in reality.⁶⁹ (See Table 1)

⁶⁶ UNHCR Center for Documentation and Research, « Report on the Regional meeting on refugees issues in the Great Lakes Region of Africa », (*Refugee Survey Quarterly*, 17(2), 1998), p.5.

⁶⁷ UNHCR, *The State of the World's Refugees 2000*, New York, Oxford University Press, 2000, p. 263

⁶⁸ J.CRISP, « The refugees crisis in the Great Lakes »”(RSQ,1998) p.viii

⁶⁹ UNHCR, *the State of the World's Refugees 2000*, p. 263.

Table 1⁷⁰

<i>Figures of voluntary repatriation of Rwandan refugees from North Kivu Province</i>		
Year	Total	Remarks
1999	23,521	Repatriation organized by the North Kivu Governor
2000	16,514	UNHCR-North Kivu Governor's office partnership
2001	9,145	
2002	5,858	
2003	8,214	
2004	4,785	
2005	4,152	
2006	2,510	
2007	2,549	UNHCR-CNR partnership (since 1 Aug. 2007)

Table 2⁷¹.

Voluntary repatriation of Rwandan refugees from DRC		
Year	Total	Remarks
2008	7,992	
2009	14,774	" <i>Umoja Wetu</i> " joint military operation FARDC-RDF
2010	10,806	" <i>Kimia IP</i> " Joint military operation FARDC-MONUSCO
2011	8,338	
2012	10,773	
2013	7,133	
2014	5,645	
2015	5,203	
2016	6,066	
2017	18,075	

- iii. *Inter congolese dialogue to end the second armed conflict (from January 2001 to December 2003)*: held in Sun City, between the

⁷⁰ Figures of refugees repatriated from North Kivu province, UNHCR, Statistiques du rapatriement volontaire des réfugiés rwandais, République Démocratique du Congo, UNHCR Factsheet, Jan. –Dec. 2017.)

⁷¹ Figures of refugees repatriated from all of DRC, showing the dominance of North and South Kivu Provinces-Figures from UNHCR factsheet on the voluntary repatriation of Rwandan Refugees, updated on 31 July 2017

Government of Kinshasa and all rebel groups opposed to President Kabila and backed by the Rwanda Government and opposed to Kabila. While negotiating in South Africa, RCD rebels backed by APR continued to track Rwandan refugees in the areas under their control. Refugees had no choice but to be repatriated to Rwanda once they fell into rebel hands (see figures from 2001 to 2003 in Table 1).

- iv. *Period of low-level figures*: In 2004, Laurent Nkunda and his fellows in the CNDP launched attacks against FARDC and claimed to be fighting against the DRC Government on the ground that the FDLR continued to threaten the Tutsi community in Eastern DRC and constituted a source of instability in Rwanda. Indeed, the withdrawal of RDF in October 2002 following the terms of the Sun City agreement create an opportunity for FDLR to reinforce their alliance with some FARDC officers in Walikale. That situation led to clashes within FARDC troops, on one side, Congolese Tutsi backed by RDF which constituted the National Congress for the Defence of the People-*Congres National pour la Defense du Peuple (CNDP)* and on another side, the rest of the FARDC. In 2005, another joint military operation (FARDC–MONUSCO) was conducted to hunt down FDLR. It forced refugees to report to UNHCR-CNR assembly points in North Kivu Province. But the number of those who did so was very low (see 2004 figures in Table 1).

4. Conclusion

RwaRef in DRC have been facing challenges to access a fair protection environment that should grant the access to refugee's cards, to have the relevant choice to voluntary repatriation or local integration. In the meantime, DRC authorities are determined to put an end to a long refugee situation of RwaRef.

To improve the refugee's situation, the Congolese government should, urgently, not only improve the capacity of the existing institutions, such as courts, the CNR and local administration to deal daily with Refugee protection issues, but national mechanisms should be better prepared to face any future massive influx of refugees in the country, to set up Standard Operating Procedures (SOP) to separate armed groups with civilians in order to grant the civilian and humanitarian character of asylum. These mechanisms should be able to investigate any violation against both refugees and local population, and to deal with complaints made by refugees themselves or by Human rights NGOs. Local communities should be sensitized on the difference between local integration of refugees and the access to nationality according to the rule of law. Last, Congolese government have to be resolutely commit to restore peace and security throughout the DRC, facilitate the voluntary repatriation of RwaRef to their home country, which must be preceded by a dialogue between the Rwandan authorities and the refugees who still hesitate to return, but also advocate for a third country of asylum for resettlement.

Remaining question: How should the host country protect refugees in armed context?

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