

# Protecting the Forgotten Heroes in Non-International Armed Conflict: A Review of Bosco Ntaganda's Disobedient Belligerents

Zedy Malaika

Tutorial Assistant in The Faculty of Law, University of Iringa

## Abstract

Non-International Armed Conflicts have continued to erupt around the globe and much of the acts are taking place in Africa. Irrespective of the fact that some laws allow belligerents to not obey the superior orders in situations where such orders are in conflict with the laws of war, nevertheless, such laws consider parties who are to disobey orders and be able to be protected by the laws to be soldiers only whose qualifications differs with those who partake in non-international armed conflict. In reality, some belligerents whose role in the battle field are not different from those of soldiers are not afforded such an opportunity as a result their rights to be protected as other human beings who in the protection of laws of wars disobeys unlawful orders from their superiors. It is with this backdrop, this article brings to light the forgotten heroes i.e. disobeying belligerents in NIACs who in the battle field are sometimes ordered to carry out unlawful acts but refuses to do so and as a result ends up being killed or tortured. A lens is used in Bosco Ntaganda's case to determine the legality of such an approach. The article carries with it a reformatory agenda as far as international humanitarian laws are concerned.

**Keywords:** belligerents, non-international armed conflict, Congo, Bosco Ntaganda, international humanitarian law

## 1.0 Introduction

International Humanitarian Law, also known as the law of war, law of armed conflict or the *jus in bello*, is the body of international law that applies in armed conflict. IHL accepts that parties to an armed conflict will need to use force to 'win the war' and that this will likely result in some death and destruction.<sup>1</sup> To minimise this likely harm, International Humanitarian Law regulates how wars are fought.

International Humanitarian Law is a non-politicised, neutral body of law, and does not consider the legitimacy of why an actor has resorted to violence. International Humanitarian Law applies to all parties to a conflict, regardless of the reasons leading to the conflict or the political affiliations of the actors concerned.<sup>2</sup>

The practical focus of International Law is to assist the military to know what actions it can lawfully take during armed conflict. International Humanitarian Law applies only in the context of an armed conflict,

---

<sup>1</sup> International Humanitarian Law: A Handbook for Commonwealth Parliamentarian, at <http://www.icrc.ac.com> (accessed on 16<sup>th</sup> September, 2023).

<sup>2</sup> Idem

although it creates certain obligations for states to perform in peacetime (for example, to educate the armed forces and the public on what International Humanitarian Law requires).<sup>3</sup>

International Humanitarian Law is a distinct body of law from international refugee law, international human rights law and international criminal law, although International Humanitarian Law often apply alongside these bodies of law. Moreover, International Humanitarian Law applies alongside national law, in particular constitutional law, criminal law and military law, this is particularly important regarding non-international armed conflicts.<sup>4</sup>

International Humanitarian law applies in two types of armed conflict, that is;

- **International Armed Conflict (IAC):**

An international armed conflict arises whenever one or more states resort to the use of military force against another state or states. There is no minimum level of force required so any violence between states will engage the rules of International Humanitarian Law. There is no need for a formal declaration of war.<sup>5</sup> This may include, for example, the situation where one state detains soldiers from a neighbouring state who have inadvertently crossed a border.

- **Non-International Armed Conflict (NIAC):**

A non-international armed conflict (NIAC) is any armed conflict that is not between two or more states. This means at least one of the parties to the conflict will be a non-state Organised Armed Group.<sup>6</sup> This requires looking at the level of organisation of an armed group, for example, whether the organisation has formed itself into a military-like structure with defined units and insignia and has an established command structure and an internal disciplinary system. Unlike an international armed conflict, there is a minimum threshold of intensity of violence for a NIAC to exist and for International Humanitarian Law to apply.<sup>7</sup>

International Humanitarian law is basically strengthened by different basic principles as follows;

### **The principle of Distinction**

Parties to a conflict must distinguish at all times between civilians and civilian objects and combatants and military objectives. International Humanitarian Law prohibits both deliberate attacks on civilians and indiscriminate attacks. The civilian population and civilian objects must not be the target of direct attack. Parties to a conflict should direct attacks only at combatants and military objectives. Civilians may be attacked only if they are directly participating in hostilities

### **The principle of proportionality**

Where a party directs an attack against a lawful target, the party must also ensure that the injury to civilians and civilian property is not excessive in relation to the concrete and direct military advantage anticipated by the attack. International Humanitarian law thus requires an assessment of the military advantage likely to be gained from a particular attack compared to the likely injury to civilians and civilian objects.<sup>8</sup>

---

<sup>3</sup> Idem

<sup>4</sup> Solf, A, The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice, 4<sup>th</sup> ed, U.L.Rev Press, 2014,21.

<sup>5</sup> Idem

<sup>6</sup> Ibid, 24.

<sup>7</sup> Idem.

<sup>8</sup> Idem

### Precautionary Principle

Linked to the requirement for an attack to be proportionate is the obligation on the parties to a conflict to take all feasible precautions to minimise the likely harm to civilians and civilian objects. This may include confirming intelligence that an object is a legitimate target, issuing a warning to the civilian population that an attack is imminent and allowing an opportunity to leave, or attacking at times when civilian casualties will be lower.<sup>9</sup>

Taking into consideration all hereinabove explanation, it is important to note that the international humanitarian law is basically build up by its fundamental principles, applies mostly in two types of armed conflict. Non-international armed conflict being a hub cycle of the discussion, it is crucial to note that though belligerents in the non-international armed conflict seem to be unequal enjoying the humanitarian protection compare to those of international armed conflict but all are bound by the principles of International Humanitarian law.<sup>10</sup>

### 2.0 Bosco Ntaganda's case

On June 9, 2014, ICC Pre-Trial Chamber II unanimously found substantial grounds to believe that Bosco Ntaganda committed 18 counts of war crimes and crimes against humanity in the Ituri region of eastern DRC in 2002 and 2003. Ntaganda is charged with the war crimes of murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; rape and sexual slavery of child soldiers; and enlisting and conscripting child soldiers under the age of fifteen years and using them to participate actively in hostilities.<sup>11</sup>

Ntaganda is also charged with the crimes against humanity of murder and attempted murder; rape; sexual slavery; persecution; and forcible transfer of population. The pre-trial chamber found that there are substantial grounds to believe that Ntaganda bears individual criminal responsibility pursuant to different modes of liability for different crimes. Ntaganda is charged with direct perpetration and indirect perpetration under Rome Statute article 25(3)(a) and with ordering and inducing the commission of a crime under article 25(3)(b). Ntaganda is also charged with any other contribution to the commission or attempted commission of crimes under Rome Statute article 25(3)(d). Under article 28(a) of the Statute, Ntaganda is charged as a military commander for crimes committed by his subordinates. The charges against Ntaganda pertain exclusively to his involvement in the war in Ituri between 2002 and 2003.<sup>12</sup>

Over the course of 248 hearings, the Chamber heard 80 witnesses and experts called by the Office of the International Criminal Court Prosecutor, *Ms Fatou Bensouda*, 19 witnesses called by the Defence team lead by *Mr Stephane Bourgon* and three witnesses called by the legal representatives of the victims participating in the proceedings, as well as five victims who presented their views and concerns.<sup>13</sup>

A total of 2129 victims, represented by their legal counsels from the International Criminal Court Office for Public Counsel for the Victims, participated in the trial after having been authorised by the Chamber to do so.

---

<sup>9</sup> Idem

<sup>10</sup> M.C, Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, UK, 2011, 104.

<sup>11</sup> Idem.

<sup>12</sup> De Brouwer, A.M, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the practice of the ICTY and ICTR*, 4<sup>th</sup> ed, Intersentia Publishers, Netherlands 2021. Pg.96

<sup>13</sup> Idem

The Trial Chamber issued 347 written decisions and 257 oral decisions during the trial phase. 1791 items were admitted into evidence. After the presentation of evidence, the Chamber received written closing submissions from the parties and the Legal Representatives of Victims. Trial Chamber VI of the International Criminal Court (ICC) found Mr Bosco Ntaganda guilty, beyond reasonable doubt, of 18 counts of war crimes and crimes against humanity, committed in Ituri, Democratic Republic of the Congo (DRC), in 2002-2003.<sup>14</sup>

### **Consequences of not obeying Ntaganda's orders**

The atrocious acts committed to them by Ntaganda are still alive in their minds, thereby, causing them to live with the pain throughout their lives, narrated by one of the mutineers (belligerent) of the Ntaganda's armed group before the International Criminal Court in favor of the Prosecution side.<sup>15</sup> Before adhering to another concept of Ntaganda's charges before the International Criminal Court, it is important to also have an overview of the violations and suffering that Ntaganda did to his belligerents for the refusal or disobeying of his command. The violations include killings, serious bodily and mental harm, and Starvation.<sup>16</sup>

The killings were carried out in a very brutal and traumatic manner. In most cases, machetes and clubs were used resulting in a long and painful agony. The use of machetes to kill by his subordinate after the command been given was considered to be easy since we were often used in the fields. In an attempt to escape a painful death, some belligerents were finished off with bullets instead of being gradually mutilated to death with a machete once they attempted to escape. Women belligerents were forced to have sexual intercourse with the high-ranking commanders and they have no option rather than accepting. Other belligerents were burnt alive to death in front of others for their refusal to follow orders and mostly those who seem to give information to other armed groups. In some cases, militia with relative who attempted to escape or refuse the Commanda's order was chosen to punish his relative for such refusal.<sup>17</sup>

The witness further stated that the extent and manner in which the acts of injustice were carried out during the Ntaganda's command made them live under trauma. The witnessing of killings and losing family members and other close relatives; the witnessing of rape and sexual mutilation; they lived under fear of being killed; and many other traumatic events injured the mental health of some of the belligerents.<sup>18</sup>

### **The DRC's military disciplinary regulations**

The Democratic Republic of Congo's Military Disciplinary Regulations (1986) under Article 21 provides "Obedience is the first duty of the subordinate. He loyally executes orders he receives." However, it adds: "The subordinate soldiers must not execute an order to commit an act manifestly ... contrary to the customs of war and to the international conventions."<sup>19</sup>

The laws are purely based on protecting the disobeying soldiers in the International Armed Conflict. The country as a member of the Geneva Convention, confirms with the provision of Article 77(1) of the

---

<sup>14</sup> Idem.

<sup>15</sup> D.E, Cunningham, Barriers to Peace in Armed Conflict, DRC; Cambridge University Press, UK, 2019, 33.

<sup>16</sup> Idem

<sup>17</sup> Ibid,38.

<sup>18</sup> Idem, 43.

<sup>19</sup> The Democratic Republic of Congo's Military Disciplinary Regulations of 1986 at [https://: www.icrc.org.com](https://www.icrc.org.com), accessed on 16 July, 2023.

Additional Protocol I that “No person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol”<sup>20</sup>

### **The Jurisprudence of the international criminal tribunal for the former Yugoslavia**

The International Criminal Tribunal for the former Yugoslavia (ICTY) in 2008 pronounced a judgment in *Prosecutor v Ramush Haradinaj and others*. The facts of the case were that Haradinaj and others were accused of committing crimes against humanity in Kosovo in 1998. Before delivering the judgment, the tribunal had a duty of determining if what had happened in Kosovo was a non-international armed conflict or not. The conflict involved the Serbian forces and the Kosovo Liberation Army. The tribunal endeavoured to find out the rules that were applicable in such a conflict if they were falling under international or non-international armed conflict.

Haradinaj and others were accused of being accomplices in committing crimes against humanity and non-observance of the laws of wars. The laws of war in actual sense prohibits the commission of torture, abduction, killing of civilians, rape and using weapons or methods that are not allowed during wars. Nevertheless, the prosecutor in Haradinaji’s case was of the view that the accused and his accomplices had committed such acts which necessitated the trial at the chambers.<sup>21</sup>

On its *Obita dicta*, the tribunal confirmed that the main difference between international armed conflicts and those of a non-international character is in the structural and legal asymmetry of the latter. Provided that international law is mainly drafted by States, it is particularly difficult to maintain a legal balance between the rights of the State and those of non-state armed groups that challenge its power by force. The status of combatants belonging to non-state armed groups constitutes the main political and legal problem in this type of conflict.<sup>22</sup>

### **3.0 The duty to obey and to disobey**

The Legal Obligation to Obey Under the National Military Force law in the Democratic Republic of Congo and in Uganda,<sup>23</sup> a soldier has a legal obligation to obey the orders of a superior soldier or officer.<sup>24</sup> The Defence Force Discipline Act treats failure to obey as a breach of military law, particularly in the case of soldiers who disobey the commands of their superiors.<sup>25</sup> Under Section 27, ‘Disobedience of a lawful command’, and Section 29, ‘Failing to comply with a lawful general order’,<sup>26</sup> a defence member must follow all orders and commands. Yet there are exceptions and the Military Forces tacitly recognises this. In fact, the National Army’s current recruit training regime conveys to recruits the clear understanding that they do not have to follow unlawful or illegal orders and that they have the right to disobey commands on these grounds. This appears to directly contradict the basic principles of military discipline. The aim and purpose of all forms of discipline, even the most basic foot drill, is ‘to instil instinctive obedience and reaction to words of command’.<sup>27</sup>

<sup>20</sup>First Protocol Additional to the Fourth Geneva Conventions, adopted in 1977, strengthening the protection of the International and non-international armed conflict and place limits on the way wars are fought.

<sup>21</sup> *The Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* (ICTY), IT-04-84-T, 2008.

<sup>22</sup> *Idem*.

<sup>23</sup> The Defence Force Discipline Act, 1982.

<sup>24</sup> *Idem*

<sup>25</sup> *Idem*

<sup>26</sup> *Idem*.

<sup>27</sup> The DRC The Defence Force Discipline Act, 2007.

Essentially, soldiers are trained to do what they are told, when they are told, instinctively, without questioning the command. This raises the issue of differentiation: when is a soldier expected to consider the legality of the order thus questioning it and when is the soldier expected to act instinctively.<sup>28</sup>

#### **4.0 National and International instruments on the protection of belligerents**

For belligerents rights to be successfully achieved, they must lie on a certain legal base. This part, therefore, states on various legal instruments that can be relevantly applicable in protection of belligerents' rights, from being tortured by their superior commanders for refusal to obey orders violating the law of war and human rights law during an armed conflict.

#### **4.1 International Instruments**

Belligerents' Rights during armed conflicts has been provided directly or indirectly in various legal instruments at both international and national levels. These instruments range from International Humanitarian Law instruments, international criminal law and international human rights law instruments. At national level, Belligerents' rights of protection from disobeying the commanders' order are mainly asserted as a right in constitutions and in some post-conflict States it is stated in peace accords and in military regulations, but, a State like Democratic Republic of Congo has enacted a constitution in which in some circumstances it requires a belligerent not to obey the unlawful order.<sup>29</sup>

#### **Protection of Belligerents' Rights under International Humanitarian Law and International Criminal Law**

The Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts<sup>30</sup> provides that "*No person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol.*" Belligerent parties are required by law to distinguish between military objects and civilian objects and refrain from attacking civilians and their properties. Non adherence to this rule by belligerents during international armed conflict whether by being forced by their commanders, these belligerents shall be protected but commanders shall be liable for such violation of the law.

A similar provision is also reiterated under the Hague Convention Respecting the Laws and Customs of War on Land.<sup>31</sup> Article 77 (1) of Additional Protocol I, submitted by the International Committee of the Red Cross enumerate further on protecting the belligerents' rights by waiving them from illegal acts done as enforcement of their superior commanders' order.

Both Article 3 of the Hague Convention and article 77 of Additional Protocol I impose some kind of strict liability on the part of superior commander. The articles clearly stipulate that relevant superior commander shall be responsible on every act of his belligerent acting upon his command in an international armed conflict regarding the fact that the said act was committed within the realm of military duties.

---

<sup>28</sup> Melzer, N, International Humanitarian Law, Geneva; Henry Dunant Institute, 2019 at [https://: www.icrc.org.com](https://www.icrc.org.com), (accessed on 16 July, 2023).

<sup>29</sup> The Constitution of the Democratic Republic of Congo, 2006.

<sup>30</sup> Article 77 (1).

<sup>31</sup> Article 3.

Unlike the Additional Protocol I, the Additional Protocol II to the Geneva Convention Relating to the Protection of Victims of Non-International Armed Conflict does not specifically mention about protection of belligerents' rights. It only requires insurgents to obey the laws of war with regard to civilian protection and respect. This instrument is, however, more relevant to this research as it refers to internal armed conflicts which are the subject of this research. Probably, protection of belligerents' rights is not mentioned due to the nature of the internal conflicts whereby, in most cases, normal civilians are also involved in taking up arms and, therefore, it becomes difficult to identify the parties to bear responsibility. However, the law should have clearly charged responsibility to protection of belligerents' rights from being punished by their superior commanders for disobeying orders of violating international humanitarian law.

The Rome Statute of the International Criminal Court provides for protection of belligerents' rights as a victim of international armed conflict by charging the superior belligerent commanders responsible. Under the statute, the superior commander of the belligerents is being liable for the crime committed by their subordinates under their supervision. Here the subordinate belligerents are being protected by the law since their responsibility during the armed conflict is only to receive orders and act upon, thus the statute has protected the subordinate belligerents' rights under Article 28.<sup>32</sup> Similar to the Rome Statute, the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC) also convicted the superior belligerent for the act done by his subordinated belligerents under his supervision.<sup>33</sup>

The U.N. Convention against Transnational Organised Crime<sup>34</sup> and the UN resolution on torture and other cruel, inhuman or degrading treatment or punishment,<sup>35</sup> the UN General Assembly Stresses that State superior commanders must not punish personnels who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment, for not obeying orders to commit or conceal acts amounting to torture or other cruel, inhuman or degrading treatment or punishment.<sup>36</sup> These instruments are relevant to this research because transnational organised crimes are also connected to armed conflict. Transnational organised crime includes trafficking of weapons, human beings, body parts and nuclear material. These activities become even intense during armed conflicts, thus, the belligerents who refuses to engage into this illegal business and be tortured by his superiors, is being protected and his superior shall be responsible for the act done.

### **Protection of Belligerents' Rights under International Human Right law**

International human rights law treaties provide for the right to be free from torture, cruelly, inhuman and degrading punishment. The International Bill of Rights declares the right to be free from any unfair treatment of human rights. It obliges States to make laws eradicating all these forms of torture. Therefore, this is both as a matter of treaty law and as part of the general rules of State responsibility.

Article 5 of the Universal Declaration of Human Rights (UDHRs)<sup>37</sup> provides that "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*" The International Covenant on Civil and Political Rights (ICCPR), under Article 2(3), requires its parties to "*ensure that*

---

<sup>32</sup> The Rome Statute of the International Criminal Court, 1998.

<sup>33</sup> Rules 12-25 of the Internal Rules of the Court.

<sup>34</sup> A/RES/55/25; adopted by the UN General Assembly on 8<sup>th</sup> January 2001.

<sup>35</sup> UN General Assembly, Res. 58/164, 22 December 2003,

<sup>36</sup> Article 25 of the Convention against Transnational Organised Crime adopted by the UN General Assembly on 8<sup>th</sup> January 2001.

<sup>37</sup>G. A. Res. 217A (III), U. N. GAOR, 3<sup>rd</sup> Sess., U.N. Doc. A/810 (1948).

*any person whose rights or freedoms, as recognized by it, are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity*<sup>38</sup> It also requires States to enact better laws to provide equal standards and freedoms to all.

The right to a remedy in the covenant is explained to mean a legal remedy as a result of certain violation. The Convention on the Elimination of Racial Discrimination calls for State parties to “*assure to everyone within their jurisdiction effective protection and remedies, through competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to the Convention.*”<sup>39</sup> Further, State parties are obliged to assure for the right to seek from such tribunals, just and adequate remedies for any damage suffered as a result of such discrimination.<sup>40</sup> In this regard the belligerents who have suffered any kind of torture or any discrimination from their superior commanders for refusal to obey illegal order are also falling under this protection and are being protected thereto.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>41</sup> under Article 4, calls upon States to ensure in their legal systems that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. This article becomes relevant in this research as most of the belligerents of armed conflict particular non-international armed conflict are also exposed to torture, cruel, inhuman and degrading treatment once they refuse to obey their superior commanders’ order which directly violates the law of war.

The Charter of the International Military Tribunal (Nuremberg)<sup>42</sup> under Article 8, provides for the protection of the belligerents’ rights who has acted for the purpose of executing the superior order of his commander. Beside the General Assembly of the United Nations at its first session adopted a Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.

Thus, belligerents can rely on these instruments when claiming for their right to be protected against illegal treatment for their refusal to obey orders that would violate the law and customs of war during the armed conflict. It is clearly shown that once they sustain any injuries as a result of such torture during armed conflicts fall under human rights violations, thus, it becomes logical for them to claim legal relief basing on international human rights law too.

## 4.2 Regional Instruments

This part analyses the various international instruments under Humanitarian law, international criminal law and International Human Right law adopted by member States at regional level in Africa, and other jurisdictions such as America, Europe and Asia covered legal aspect of protection of rights including belligerents’ rights from any torture by their superior commanders.

<sup>38</sup> G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>ST</sup> Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) 999 U.N.T.S. 171.

<sup>39</sup> The International Convention on the Elimination of Racial Discrimination, 1969.

<sup>40</sup> Dec. 21, 1965, 660 U.N.T.S. 195, Article 6.

<sup>41</sup> G.A. Res. 39/46, U.N. GAOR, 39<sup>TH</sup> Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984).

<sup>42</sup> The Charter of the International Military Tribunal (Nuremberg), 1945.



## Protection of Belligerents' Rights under International Humanitarian Law and International Criminal Law

### (a) Africa

While the A.U. still amending the Protocol and Statute of the African Court of Justice and Human Rights, which is yet to enter into force pending deposition of the required ratification number. The amendments, among other things, shall extend the jurisdiction of the Court to enable it to adjudicate international crimes including war crimes, crimes against humanity and genocide.<sup>43</sup> The amendments include that of article 28 (e) of the Statute of the Court which shall deal with any question of international law. The interpretation of the Article reflects much in the Rome statute including Article 28 of which the Protocol is also aims to deal with. In that regard the Protocol is relevant to my research because in matter of protecting the belligerents' rights against torture by their superior commanders for not obeying or executing illegal order during the international armed conflict, those superior commanders will be criminally responsible for the act done by their subordinate belligerents.

### (b) Other Jurisdiction

Among the instruments adopted with the European Union on protection of belligerents' rights include the Code of Crimes against Peace and Security of mankind.<sup>44</sup> This Code under Article 3 provides for criminal responsibility of the superior for the act done by his subordinate under his supervision and under his command which basically the act itself is against the peace and security of the mankind. It is herein affirmed that this Code is relevant to this research since belligerents' rights are protected, considering the fact that his illegal act done is a result of executing his superior commanders' order.

## Protection of Belligerents' Rights under International Human Right Law

### (a) Africa

The African Charter on Human and People's Rights<sup>45</sup> does not directly provide for protection of the belligerents' rights against their superior commanders' illegal order and violations. However, under Article 7, it provides for every individual to have the right to have his cause heard. This includes the right to an appeal to competent national organs against acts violating his or her fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

Under Article 3, the Charter also provides for equality before the law and equal protection by the law. By implication, the right to protection of belligerents' rights is indirectly provided under the African Charter. When belligerents' rights abuses approach a court of law for the said abuses, he or she will definitely be seeking for remedies which *inter alia* might include protection of their rights. If a belligerent is accorded a fair trial as required under the African Charter, he or she can obtain redress for the violations suffered.

### (b) Other Jurisdiction

Though not specifically mentioning armed conflicts situations, the European Convention for the Protection of Human Rights and Fundamental Freedoms together with its protocols<sup>46</sup> provide for a right to a remedy.

---

<sup>43</sup> the Government experts and ministers of justice and attorney generals on legal matters adopted the draft protocol termed "the African Union Final Court Protocol-Amending Merged Court Protocol". When adopted the Court's name shall change to be "the African Court of Justice and Human and People's Rights" with a Criminal Law section as a third section

<sup>44</sup> Adopted by the Council of Europe on November 23<sup>rd</sup> 1983.

<sup>45</sup> Adopted on June 27<sup>th</sup> 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21<sup>st</sup> 1986.

<sup>46</sup> Rome. 4. XI. 1950; Protocols 1, 4, 6, 7, 11, 12, 13 and 14.

Article 13 gives right to an effective remedy before a national authority to everyone whose rights and freedoms enshrined in the Convention have been violated. Article 41 gives mandate to the European Court of Human Rights to award just satisfaction to human right violation. This instrument is more crucial to this research, despite from them being considered as belligerents still they carry the status of being human, thus any violation of their rights falls under the ambit of this instruments.

Like the European Convention, the American Convention on Human Rights also does not mention conflict situations.<sup>47</sup> However, under article 8, it guarantees fair trial to a person whose rights have been infringed. The article reads: *“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law...for the determination of his or her rights and obligations of a civil, labour, fiscal, or any other nature.”* Under article 25, the Convention further provides for a right to judicial protection against acts that violate rights provided therein and under State laws. It articulates under sub article 1 that:

*“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties”.*

### 4.3 National Level

At the national level, Protection of belligerents’ rights against violations from their superior commanders is guaranteed under the Bills of Rights of the respective national constitutions. Protection of belligerents’ rights are provided at national level is the same as at international level. Both provide for general protection of rights during armed conflict and argue their claims basing on violation of human rights as enshrined in the Bills of Rights. The Democratic Republic of Congo Constitution of 2006, however, under article 28, goes further by providing for disobedient to illegal order. Article 28 specifically guarantees for right of the belligerents who refuses to obey the illegal order of their superior commanders. The article provides thus:

*“Every agent of the State is released from the duty of obedience if the order received constitutes a manifest violation of respect for human right and public liberties and morals. Proof of the manifest illegality of the order falls to the person who refuses to execute it”*

However, from the wording of this provision, it can be seen that the protection of belligerents’ rights in the non-international armed conflict particularly those fighting their state are not well covered compared to that within the Addition Protocol I of the four Geneva Conventions which specifically covers the rights of the belligerents in the International Armed Conflict. It provides only for the welfare of the belligerents belonging to the recognized government and not those who fights against such state (insurgency belligerents), which is mainly forms the non-international armed conflict. It leaves out recognition of the rights of these belligerents who need to be recognized as belligerents having the same status as those in the International Armed Conflict.

Moreover, this denies the insurgent belligerent rights to claim any just remedy for any violation done by the state military belligerents to them compared to that of international armed conflict. Apart from this

---

<sup>47</sup> O.A.S. Treaty Series, No. 36, 1144 U.N.T.S. 123, entered into force on July 18<sup>th</sup> 1978. The European Convention on Human Rights, 1950, 213 U.N.T.S. 222, 228, 232; (Formerly, the Convention for the Protection of Human Rights and Fundamental Freedoms)

constitutional provision on the protection of belligerents' rights, the Democratic Republic of Congo has also gone further to enact laws, being the Democratic Republic of Congo's Military Disciplinary Regulations (1986) under Article 21 provides "Obedience is the first duty of the subordinate. He loyally executes orders he receives." However, it adds: "The subordinate soldiers must not execute an order to commit an act manifestly ... contrary to the customs of war and to the international conventions."<sup>48</sup> This regulation still facing the same challenge of reflecting that of Additional Protocol I of the four Geneva Convention, this still recognizes the belligerent of the recognized government (state military soldiers).

## 5.0 Conclusion

It is true that some laws allow belligerents to not obey the superior orders in situations where such orders are in conflict with the laws of war, nevertheless. these laws consider parties who are to disobey orders and be able to be protected by the laws to be soldiers only whose qualifications differs with those who partake in non-international armed conflict.

In reality, the insurgent belligerents in the non-international armed conflicts whose role in the battle field are not different from those soldiers belonging to the state army are not afforded such an opportunity as a result their rights to be protected as other human beings who in the protection of laws of wars disobeys unlawful orders from their superiors.

This article has shown the high part of how state soldiers rights are being protected between these two classes of armed conflict being international and non-international armed conflict. The situation in the Democratic Republic of Congo in the case of Bosco Ntaganda has been taken as a review to show how the insurgent belligerents are not being treated equal like those of international armed conflict, the Geneva Convention as shown hereinabove gives these belligerents in armed conflict equal status but belligerents in the international armed conflict are seem to be the one to be protected much rather that belligerents in the non-international armed conflict. Hence since the Geneva Convention seem to put much protection to the International Armed Conflict, it is also needed for the Convention to specifically guarantee same equal legal protection to belligerents of non-international armed conflict.

## References

1. Solf, A, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 4<sup>th</sup> ed, U.L.Rev Press, 2014.
2. Bassiouni, M.C, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, UK, 2011.
3. De Brouwer, A.M, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the practice of the ICTY and ICTR*, 4<sup>th</sup> ed, Intersentia Publishers, Netherlands 2021.
4. Cunningham, D.E, *Barriers to Peace in Armed Conflict, DRC*; Cambridge University Press, UK, 2019.
5. The Democratic Republic of Congo's Military Disciplinary Regulations of 1986 at [https://: www.icrc.org.com](https://www.icrc.org.com), accessed on 16 July, 2023.

---

<sup>48</sup> The Democratic Republic of Congo's Military Disciplinary Regulations of 1986 at [https://: www.icrc.org.com](https://www.icrc.org.com), accessed on 16 July, 2023.