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An African Marshall Plan: Changing U.S. Policy to Promote the Rule of Law and Prevent Mass Atrocity in the Democratic Republic of the Congo

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Gregory S. Gordon

Abstract

This Article discusses what the United States can do to promote the rule of law and human rights in DR Congo. This Article contends that U.S.-DR Congo policy has been formulated in dribs and drabs, limited in quantity relative to the enormity of the crisis, and without an overarching plan for promoting legal coherence and yielding long-term, systemic change. To be effective, U.S.-Congolese policy must be crafted and executed with a holistic approach—security, disarmament, infrastructure, food assistance, and health care must all undergird greater efforts to establish the rule of law. In effect, the United States must initiate an “African Marshall Plan”—a massive resource and assistance infusion to bring about wide-ranging, organic change and secure the benefits of DR Congo’s free elections and the recent Nairobi/Goma peace process. To implement such an African Marshall Plan this Article advocates both procedural and substantive changes in U.S. policy toward DR Congo. Part I of the Article will place current U.S. policy in context by examining the United States’ role in Congo’s post-independence human rights debacle—its support of Mobutu and its shifting alliances in the African Great Lakes Region after the Cold War. Part II will consider DR Congo’s continuing human rights problems after elections in 2006 and recent American piecemeal efforts to contribute to the country’s peace and rebuilding process. Finally, Part III will analyze recommended changes in U.S. policy necessary to curb the ubiquitous violence and ingrained culture of impunity in DR Congo. These recommended alterations are both procedural and substantive.

ARTICLES

AN AFRICAN MARSHALL PLAN: CHANGING U.S. POLICY TO PROMOTE THE RULE OF LAW AND PREVENT MASS ATROCITY IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Gregory S. Gordon*

INTRODUCTION

Beginning in 1998, the Democratic Republic of the Congo ("DR Congo") became engulfed in a five-year war that turned out to be the deadliest armed conflict since World War II.¹ In fact, many have referred to it as Africa's "First World War."² A 2007 mortality report from the International Rescue Committee says that as many as 5.4 million people have died from war-related causes in DR Congo since 1998.³ Despite a 2003 peace deal and the country's first elections in over forty years being held in 2006,⁴ a staggering 45,000 people continue to die each

* © 2009. Assistant Professor, University of North Dakota School of Law. This Article was drafted in connection with the 2008 International Peace Research Association's Annual Meeting at K.U. Leuven in Belgium. It was presented at a round-table on the Democratic Republic of the Congo ("DR Congo") organized by K.U. Leuven Researcher Jean Migabo Kalere. I am indebted to K.U. Leuven and Mr. Kalere, as well as K.U. Leuven Professors Luc Reyckelès (Secretary-General of IPRA) and Stephen Parmentier (Head, Dep't of Criminal Law and Criminology). I am equally grateful to my talented Research Assistant, Justin Keppinger. I would also like to thank Diana Ohlbaum and Dolph Hellman for their invaluable commentary.

1. See *Conflict in Congo Deadliest Since World War II, Says the IRC*, INT'L RESCUE COMM., Apr. 8, 2003, http://www.theirc.org/news/conflict_in_congo_deadliest_since_world_war_ii_says_the_irc.html (last visited Apr. 19, 2009).

2. See Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 970 (2005) (indicating that Madeleine Albright and others have referred to the ongoing five-nation bloodbath in Congo (Kinshasa) as Africa's "First World War").

3. See INT'L RESCUE COMM., *MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS* 16 (2007), available at http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf; see also *IRC Study Shows Congo's Neglected Crisis Leaves 5.4 Million Dead*, INT'L RESCUE COMMITTEE, Jan. 22, 2008, <http://www.theirc.org/news/irc-study-shows-congos0122.html> (last visited Apr. 19, 2009).

4. See Franco Henwood, *The DR Congo: Moving Beyond the Bullet and Ballot Box*, in *THE DEMOCRATIC REPUBLIC OF CONGO: FROM PEACE RHETORIC TO SUSTAINABLE POLITICAL STABILITY?* 31 (Jidefor Adibe & Henri Boshoff eds., 2007).

month, both from the conflict and the related humanitarian crisis.⁵ Women are being raped in unimaginable numbers—as many as 4000 reported cases per year⁶—while militia groups fight amongst one another and torture, enslave, and murder civilians for control and exploitation of mineral resources.⁷ The years of warfare have forced six million from their homes.⁸ The United Nations High Commissioner for Refugees has estimated “the huge central African country has 1.1 million internally displaced people and a further 400,000 have fled abroad.”⁹

Thirty-eight years before the outbreak of this humanitarian disaster, the country had been trying to imagine a bright future after holding its first free elections as an independent nation.¹⁰ Patrice Lumumba was elected Prime Minister and began to steer the country on a course of reform after seventy-five years of disastrous Belgian colonial rule.¹¹ But Lumumba, who sought aid from the Soviet Union,¹² was considered a threat to the United States’ regional interests in the Cold War.¹³ And so with American and Belgian direction and backing, Lumumba was overthrown and killed.¹⁴ Army Colonel Joseph Mobutu (who would

5. See Chris McGreal, *War in Congo Kills 45,000 People Each Month*, *GUARDIAN* (London), Jan. 23, 2008, at 19.

6. See World Food Programme, *Information Note on WFP Assistance to Internally Displaced Persons in the Democratic Republic of the Congo*, ¶ 7, WFP Doc. WFP/EB.1/2004/6-B/2 (Feb. 23-27, 2004), available at <http://documents.wfp.org/stellent/groups/public/documents/eb/wfp024428.pdf>; see also Chris McGreal, *Hundreds of Thousands Raped in Congo Wars*, *GUARDIAN* (London), Nov. 14, 2006, at 19.

7. See Aaron Ezekiel, *The Application of International Criminal Law to Resource Exploitation: Ituri, Democratic Republic of the Congo*, 47 *NAT. RESOURCES J.* 225, 227 (2007) (noting that crimes “include forced labor, kidnapping, mass rape and sexual slavery, mutilation, and mass murder (possibly meeting the definition of genocide in some ethnically based instances).”).

8. See *Six Million Congolese Displaced by War—Minister*, *REUTERS*, July 29, 2007, available at <http://uk.reuters.com/article/latestCrisis/idUKL2936739920070729>.

9. *Id.*

10. See GEORGES NZONGOLA-NTALAJA, *THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE’S HISTORY* 94 (2002).

11. See *id.* For a discussion on Belgium’s colonial rule over present-day Democratic Republic of the Congo and the ensuing Congolese resistance, see *id.* at 13-54.

12. Contrary to popular belief, Lumumba at first sought aid from the United States, not the Soviet Union. See SEAN KELLY, *AMERICA’S TYRANT: THE CIA AND MOBUTU OF ZAIRE* 28 (1993). To extricate the country from colonial control, however, Lumumba approached the Soviet Union for assistance. *Id.* at 29. Lumumba did not embrace communism. *Id.* at 49. In fact, he believed his country should avoid picking sides between East and West because he rejected both colonialism and communism. *Id.*

13. See *id.* at 106.

14. See *id.* at 95.

later change his name to “Mobutu Sese Seko”) eventually took control of the government and launched a three-decade reign of tyranny and kleptocracy from which the country is still trying to recover.¹⁵ As noted above, it has been mired in armed conflict ever since.¹⁶

Independent elections in 2006¹⁷ and peace initiatives that concluded last year in Nairobi¹⁸ and Goma¹⁹ have improved the situation and given the country a modicum of hope for an end to the violence and the development of the rule of law.²⁰ But this fragile state of affairs has not ended the mass atrocity and it will not hold without significant outside assistance.²¹ In this regard, the United States, under the leadership of new President Barack Obama, must play a decisive role.²² Other potential do-

15. *See id.* at 141.

16. *See generally* Laurence Juma, *The War in Congo: Transnational Conflict Networks and the Failure of Internationalism*, 10 GONZ. J. INT'L L. 97 (2006) (describing the history of conflict in DR Congo).

17. Joseph Kabila was elected president of DR Congo as a result of these elections. *See After Violent Decades, Congo Finally Installs an Elected Leader*, N.Y. TIMES, Dec. 7, 2006, at A15.

18. The “Nairobi Communiqué,” signed on November 9, 2007, is the joint document signed by the Governments of DR Congo and the Republic of Rwanda for a common approach to end the threat posed to peace and stability in both countries and the Great Lakes Region. *See* Letter from the Secretary-General to the President of the Security Council U.N. Doc. S/2007/679 (Nov. 21, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/609/65/PDF/N0760965.pdf?OpenElement> (containing the Nairobi Communiqué); *see also* Alan Doss, A Briefing on the Congo by SRSG [Special Representative of the United Nations Secretary General in DR Congo] Alan Doss (Apr. 16, 2008), <http://www.wilsoncenter.org/ondemand/index.cfm?fuseaction=Media.play&mediaid=C57D0038-DD0E-4CD8-4109AF103870EB5F> (video available on website) [hereinafter Congo Briefing].

19. The “Goma Agreement” was the result of the Goma conference on peace, security, and development for the Kivu provinces held this past January. The Acts of Engagement which provided for an immediate ceasefire among the armed groups in the area, demobilization of militias, and the acceleration of the peace process were signed on January 23, 2008 by the DR Congo government and the armed groups. *See Ban Ki-Moon Hails Agreement to End Violence in Eastern DR Congo*, U.N. NEWS SERVICE, Jan. 23, 2008, <http://www.un.org/apps/news/story.asp?NewsID=25384&Cr=drc&Cr1>.

20. *See* UNICEF HUMANITARIAN ACTION, DEMOCRATIC REPUBLIC OF CONGO IN 2007, at 2 (2006), available at <http://www.unicef.org/har07/files/DRC.pdf> [hereinafter UNICEF DRC].

21. The primary assistors would likely be the United States, the European Union (“EU”), the African Union and the United Nations (“U.N.”). *See* Congo Briefing, *supra* note 18.

22. *See* Stewart Patrick, Policy Planning Staff Member, U.S. Dep’t of State, The Role of the U.S. Government in Humanitarian Intervention, Remarks to the 43rd Annual International Affairs Symposium, The Suffering of Strangers: Global Humanitarian Intervention in a Turbulent World (Apr. 5, 2004), available at <http://2001->

nors do not have the same capacity to deliver the necessary aid.²³ The European Union ("EU"), for example, due to various bureaucratic and financial restraints, is limited in the extent of effective assistance it can render.²⁴ The African Union has been trying to keep the peace in Darfur, but has been lacking sufficient money and supplies.²⁵ It is in no position to shoulder the massive burden in DR Congo. Nor is the United Nations ("U.N."), which is overextended in the field of humanitarian assistance.²⁶

While the United States has at times exerted a positive influence in the DR Congo peace and rebuilding process in recent years,²⁷ its involvement has not been sufficient to bring about

2009.state.gov/s/p/rem/31299.htm (suggesting the dominant role played by the United States in humanitarian assistance given that the United States alone was responsible for one-third of all global humanitarian assistance in 2003).

23. It might be argued that, with current commitments in Iraq and Afghanistan, the United States is already stretched too thin to take on this commitment. *See, e.g.*, Jack Spencer, *Stretched Too Thin*, HERITAGE FOUND., Aug. 7, 2003, <http://www.heritage.org/press/commentary/ed080703b.cfm>. However, even under former President George W. Bush there were good indications the United States would be pulling out of Iraq in the near future. *See, e.g.*, Elisabeth Bumiller, *Bush and McCain Seem to Diverge in Foreign Policy*, WASH. POST, July 26, 2008, at A14. And President Obama has signaled his intent to withdraw American troops from Iraq as soon as possible. *See* Peter Baker, *With Pledges to Troops and Iraqis, Obama Details Pullout*, N.Y. TIMES, Feb. 28, 2009, at A6. In any event, many experts are calling for a renewed U.S. foreign policy that looks beyond Iraq and Afghanistan and focuses on other regions in greater need of assistance. *See generally* John Edwards, *Reengaging with the World: A Return to Moral Leadership*, 86 FOREIGN AFF. 19 (2007), available at <http://www.foreignaffairs.org/20070901faessay86502/john-edwards/reengaging-with-the-world.html>.

24. *See* OPEN EUROPE, EU AID: IS IT EFFECTIVE? 4 (2007), <http://www.openeurope.org.uk/research/euaid.doc> (reporting that, due to slow delivery of aid and mismanagement of funds, the European Union's foreign aid office, the European Commission, has been described as "the worst development agency in the world"); *see also* KRISTIN ARCHIK & PAUL GALLIS, CRS REPORT FOR CONGRESS, NATO AND THE EUROPEAN UNION 21 (2008), available at <http://fas.org/sgp/crs/row/RL32342.pdf> (noting that EU members have scarce defense budgets); Stephen Castle, *Patten Threatens Cuts to EU's Foreign Aid Budget*, INDEP. (London), May 17, 2000, at 16 (indicating that the EU does not have sufficient staff and expertise to distribute foreign aid money effectively).

25. *See* Colum Lynch, *African Union Force Low on Money, Supplies and Morale*, WASH. POST, May 13, 2007, at A17.

26. *See* Dr. Subhash Kapila, *United Nations Organisation at the Crossroads* 1-2 (S. Asia Analysis Group, Working Paper No. 1168, 2004), available at <http://www.southasiaanalysis.org/%5Cpapers12%5Cpaper1168.html> (noting that the U.N. has deviated from its primary role of preventing conflicts and overextended into various fields, including humanitarian assistance).

27. *See Exploring the U.S. Role in Consolidating Peace and Democracy in the Great Lakes Region: Hearings Before the S. Subcomm. on African Affairs of the S. Comm. on Foreign Rela-*

lasting positive change.²⁸ Many commentators have called on the United States, with its contribution to the problems in DR Congo and its enormous wealth and influence, to do much more for the rule of law and respect for human rights to take firm root and spread throughout this gargantuan, fractured polity²⁹—one that is the size of all of Western Europe.³⁰ And with Barack Obama poised to take U.S. foreign policy in new directions, the time is ripe.³¹

But what exactly can the United States do to promote the rule of law and human rights in DR Congo? This Article contends that U.S.-DR Congo policy has been formulated in dribs and drabs, limited in quantity relative to the enormity of the crisis, and without an overarching plan for promoting legal coherence and yielding long-term, systemic change. To be effective, U.S.-Congolese policy must be crafted and executed with a holistic approach—security, disarmament, infrastructure, food assistance, and health care must all undergird greater efforts to establish the rule of law. In effect, the United States must initiate an “African Marshall Plan”—a massive resource and assistance infusion to bring about wide-ranging, organic change and secure

tions, 110th Cong. 3-6 (2007) [hereinafter Frazer] (statement of Jendayi E. Frazer, Assistant Sec’y for Afr. Affairs, Dep’t of State).

28. See Pierre Englebert, *Life Support or Assisted Suicide? Dilemmas of U.S. Policy Towards the Democratic Republic of Congo*, in *SHORT OF THE GOAL: U.S. POLICY AND POORLY PERFORMING STATES* 53, 75 (Nancy Birdsall, Milan Vaishnav & Robert L. Ayres eds., 2006) (“To some extent, the United States has tried to strengthen the Congolese state ever since the early 1960s and has little to show for it.”); Letter from Cynthia McKinney, Member of Cong. and Member of the H. Comm. on Int’l Relations (now H. Comm. on Foreign Affairs) and H. Comm. on Nat’l Sec. (now defunct), to President William J. Clinton (Aug. 31, 1999), available at <http://www.inshuti.org/mckinney.htm>.

29. See, e.g., CTR. FOR AM. PROGRESS, *EASTERN CONGO POLICY STANDARD* 1 (2008), available at <http://www.enoughproject.org/files/Congo%20Policy%20Standard.pdf> [hereinafter *POLICY STANDARD*] (urging the United States “to increase funding for stabilization programs”); Princeton N. Lyman, *MONUC: A Case for Peacekeeping Reform*, COUNCIL ON FOREIGN RELATIONS, Mar. 1, 2005, available at <http://www.cfr.org/publication/7881> (“The United States should invest much more diplomatically and with its resources in support of the tenuous peace process under way.”); Thomas Turner, *War in the Congo*, FOREIGN POLICY IN FOCUS, Apr. 2000, at 2, available at <http://www.fpiif.org/pdf/vol5/10ifcongo.pdf> (“The U.S. bears significant responsibility for the conflict in the Congo and therefore has an obligation to participate in its resolution.”).

30. See Johann Hari, *Congo’s Tragedy: The War the World Forgot*, INDEP. (London), May 5, 2006, at 2.

31. See Katharine Zaleski & Hanna Ingber Win, *Obama Foreign Policy Changes: World Reactions*, HUFFINGTON POST, Jan. 22, 2009, http://www.huffingtonpost.com/2009/01/22/obama-foreign-policy-chan_n_159983.html.

the benefits of DR Congo's free elections and the recent Nairobi/Goma peace process.³² To implement such an "African Marshall Plan,"³³ this Article advocates both procedural and substantive changes in U.S. policy toward DR Congo.

Part I of the Article will place current U.S. policy in context by examining the United States' role in Congo's post-independence human rights debacle—its support of Mobutu and its shifting alliances in the African Great Lakes Region after the Cold War. Part II will consider DR Congo's continuing human rights problems after elections in 2006 and recent American piecemeal efforts to contribute to the country's peace and rebuilding process. Finally, Part III will analyze recommended changes in U.S. policy necessary to curb the ubiquitous violence and ingrained culture of impunity in DR Congo. These recommended alterations are both procedural and substantive.

With respect to the procedural side, U.S. policy is currently formulated by a smorgasbord of agencies in an *ad hoc* manner.³⁴ Creation of a single Congo working group or agency with an integrated agenda and a presence on the ground will bring much needed reform. It will allow the United States to formulate benchmarks in assessing the human rights situation in the country and better identify potential external partners, such as the EU, to end the atrocity crime wave in DR Congo. Moreover, using a U.S. ombudsman to assure that assistance is distributed by non-corrupt persons in an effective manner on the ground will

32. The "Marshall Plan"—more formally known as the "European Recovery Program"—was a project instituted by the United States after World War II to foster economic recovery and promote peace in Europe. It took its form in a June 5, 1947 speech when U.S. Secretary of State George Marshall urged European countries to make decisions regarding their "economic needs so that material and financial aid from the United States could be integrated on a broad scale." *Marshall Plan*, in *THE COLUMBIA ENCYCLOPEDIA* 106 (5th ed. 1993). The following year, President Truman created the Economic Cooperation Administration to administer the program. From 1948-51, over US\$12 billion was dispersed to western European countries under the program. The Marshall Plan greatly contributed to the economic recovery of Europe and helped promote peace and stability in the region. *See id.*

33. This would certainly not be an exact replica of the original Marshall Plan but the term is used here to convey the notion of large-scale, holistic assistance to a region that has recently been devastated by war. Although the entire continent would not receive assistance under the plan, it is referred to as an "African" Marshall Plan because of the geographic and political centrality of DR Congo to the entire continent.

34. *See* Robert A. Kagan, *Trying To Have It Both Ways: Local Discretion, Central Control, and Adversarial Legalism in American Environmental Regulation*, 25 *ECOLOGY L.Q.* 718, 724-25 (1999).

also be a necessary part of the reform effort. Finally, to guarantee proper local coordination and efficiency, the United States should establish a permanent cadre of expert on-the-ground staff to sustain U.S. engagement in curbing human rights abuses and establishing the rule of law.

Substantively, three important features of U.S. policy in promoting the rule of law must be addressed: (1) eliminating the so-called “negative forces” in the region, which entails militia disarmament, military integration of dissident groups, repatriation of extremist Hutu forces, inclusion of Rwanda in the process, and control of arms smuggling and illegal resource exploitation; (2) building up essential institutions in DR Congo, which includes expanding, reforming and participating in the U.N. peacekeeping mission (known by its French acronym, “MONUC”),³⁵ creating a DR Congo domestic human rights advisor office and a new Truth and Reconciliation Commission, and building up civil society, especially in the justice sector; and (3) ending impunity, which involves supporting the International Criminal Court (“ICC”), domestic and possibly hybrid tribunal prosecution efforts, and generally ensuring enforcement of human rights and humanitarian law.

As Western Europe needed a massive infusion of American assistance to lift itself from misery after World War II, DR Congo needs such an investment now. Anything short of that will leave it mired in its current predicament—the post-independence cycle of violence and suffering.³⁶ This would ultimately plunge the Great Lakes region of Africa,³⁷ if not the entire continent, further into the abyss. In this increasingly interconnected world, it is clearly in the interests of the United States to prevent that outcome. With the new administration of President Barack Obama

35. MONUC refers to the U.N. Mission in DR Congo, established by the U.N. Security Council under Chapter VII of the U.N. Charter. MONUC is the French acronym for *Mission de l'Organisation des Nations Unies en République démocratique du Congo*. See MONUC Mandate, <http://www.monuc.org/News.aspx?newsID=11529&menuOpened=About%20MONUC> (last visited Apr. 19, 2009).

36. See generally NZONGOLA-NTALAJA, *supra* note 10.

37. The term “African Great Lakes region” is typically used to describe the area in the Great Rift Valley, lying between northern Lake Tanganyika, western Lake Victoria, and Lakes Kivu, Edward and Albert. This roughly comprises Burundi, Rwanda, DR Congo, Uganda, Kenya and Tanzania. See *The Insider's Guide to Africa's Great Lakes*, CNN, Dec. 15, 2006, <http://www.cnn.com/2006/WORLD/africa/12/14/insider.africagreatlakes/index.html>.

poised to reformulate U.S. foreign policy, the time is ripe for a new American initiative in DR Congo.

I. BACKGROUND: MOBUTU, AFRICAN WARS AND THE PEACE PROCESS

A. The Cold War and the Rwandan Genocide

From the 1960s through the 1980s, U.S. policy in DR Congo (known as Republic of Zaire from 1971-97), which entailed support of dictator Mobutu Sese Seko, was shaped by the exigencies of the Cold War.³⁸ Support for Mobutu was disastrous for the country, however. Resource extraction for personal gain, rampant corruption, formation of a brutal police state, and the complete disintegration of infrastructure were the result of thirty-two years of Mobutu's autocratic rule.³⁹

The end of the Cold War changed the U.S. political calculus in the region and Mobutu looked to the French for support,⁴⁰ while the United States began to consider the potential of other partnerships in the Great Lakes Region—ultimately forming ones with Uganda and Rwanda.⁴¹ By the beginning of 1994, Rwanda had become the regional focus as two decades of rule by Rwandan President Juvenal Habyarimana (also a French client)⁴² was coming apart under the weight of economic problems and ethnic pressure from a conflict between the majority Hutus and the minority Tutsis—sparked by armed incursions by the Rwandan Patriotic Front (“RPF”), an expatriate Tutsi military force from Uganda.⁴³

Although the two sides attempted to form a compromise government through the Arusha Accords, powerful extremist Hutus were against this solution and an extremist Hutu militia,

38. See Henwood, *supra* note 4, at 30.

39. See Thierry Vircoulon, *Beyond the Transition: The Agenda of Reconstruction and Governance in the Democratic Republic of Congo*, in *THE DEMOCRATIC REPUBLIC OF CONGO: FROM PEACE RHETORIC TO SUSTAINABLE POLITICAL STABILITY?* 35 (Jidefor Adibe & Henri Boshoff eds., 2007).

40. See Craig R. Whitney, *As Mobutu Totters, France Ponders Options*, N.Y. TIMES, Apr. 15, 1997, at A4.

41. See Gérard Prunier, *Uganda: Nearly a Miracle*, LE MONDE DIPLOMATIQUE, Feb. 1998, available at <http://mondediplo.com/1998/02/10uganda>.

42. See Craig R. Whitney, *Panel Finds French Errors in Judgment on Rwanda*, N.Y. TIMES, Dec. 20, 1998, at 17.

43. See ALISON DES FORGES, HUM. RTS. WATCH, *LEAVE NONE TO TELL THE STORY* 48-51, 137-40 (1999).

the *Interahamwe*, was being recruited, organized and armed with machetes.⁴⁴ On April 6, 1994, Habyarimana's airplane was shot down as he returned from negotiations in Arusha and Hutu extremists launched a well-planned genocide that resulted in the murder of approximately 800,000 Tutsis within a hundred days and sent shock waves throughout the region.⁴⁵

As the genocide was taking its grim course, the RPF (which began to receive U.S. support)⁴⁶ was winning on the battlefield and the Rwandan Armed Forces (assisted by the French)⁴⁷ began to retreat.⁴⁸ Eventually, a mass exodus of Rwandan Hutus poured over the borders into neighboring countries⁴⁹ with a large portion ending up in Zaire.⁵⁰ Sprawling refugee camps, funded by international aid agencies, crawling with *Interahamwe* mass murderers, and controlled by *génocidaire* leaders, mushroomed along the Rwanda-Zaire border.⁵¹ In the meantime, relying in part on assistance from the United States,

44. See *id.* at 123-30.

45. See *id.* at 181-85, 199-216; MANUS I. MIDLARSKY, *THE KILLING TRAP: GENOCIDE IN THE TWENTIETH CENTURY* 5 (2005).

46.

The U.S., the most influential actor in Rwanda, provided relatively little financial aid, \$7.6 million in development assistance and \$500,000 for military training in 1998. But it gave steady political support that was highly valued by Rwandan authorities. U.S. soldiers were training Rwandan troops just before the RPA [Rwandan Patriotic Army] crossed into the DRC [DR Congo] in 1996 and again in 1998.

HUM. RTS. WATCH, *HUMAN RIGHTS WATCH WORLD REPORT 1999*, at 66 (1998), available at <http://www.hrw.org/legacy/reports/1999/rwanda/>. The Rwandan Patriotic Army is the military division of the Rwandan Patriotic Front. See ALAN J. KUPERMAN, *LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA* 9 (2001).

47. See DES FORGES, *supra* note 43, at 116-22.

48. See HUM. RTS. WATCH, *HUMAN RIGHTS WATCH WORLD REPORT 1995*, at 40, 59 (1994), available at <http://www.hrw.org/legacy/reports/1995/WR95/ASIA-01.htm>.

49. The Hutu refugees were helped by the French who established evacuation corridors as part of "Opération Turquoise." See DES FORGES, *supra* note 43, at 668-90. This mass exodus precipitated what is known as the "Great Lakes Refugee Crisis." See Amnesty Int'l, *Great Lakes Region: Refugee Crisis Far From Over*, AI Index AFR 02/09/97, Sept. 2, 1997, available at <http://www.amnesty.org/en/library/asset/AFR02/009/1997/en/4def6fa8-919c-44c1-8c89-1dbf941ded7c/afr020091997en.pdf>.

50. See Gerald Caplan, *Rwanda: Walking the Road to Genocide*, in *THE MEDIA AND THE RWANDA GENOCIDE* 20, 32 (Allan Thompson ed., 2007); see also DES FORGES, *supra* note 43, at 685.

51. See ORG. OF AFR. UNITY, EXECUTIVE SUMMARY: OAU INT'L PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS ¶¶ E.S.53-56 (2000), <http://www.issafrika.org/AF/profiles/rwanda/IPEPRwanda.pdf> [hereinafter OAU EXECUTIVE SUMMARY].

the RPF consolidated its control over Rwanda.⁵² Also during this time, the refugee camps in Zaire became armed bases for cross-border killing missions into Rwanda, where *génocidaire* leaders hoped to carry on their eliminationist mission, silence witnesses, and destabilize RPF control over the country.⁵³ In due course, these leaders began to prepare for an invasion of Rwanda that would defeat the RPF and restore to them control over the country.⁵⁴

B. *The First Civil War: 1996-1997*

At the same time, new ethnic tensions were flaring up in the eastern part of Zaire. *Banyamulenge* Tutsi (Zairian/Congolese Tutsi) were coming under attack from the Hutu refugee camps and were being subjected to various human rights violations by the Zairian government, including loss of property, arrest, and murder.⁵⁵ Armed and assisted by the RPF (again, with U.S. support), the *Banyamulenge* launched attacks against the camps, which ultimately resulted in their being dismantled, and then they carried the fight towards Kinshasa.⁵⁶ They were joined by other disaffected groups, including leftists who had supported Patrice Lumumba, as well as ethnic and regional minorities opposed to the dominance of the Kinshasa region.⁵⁷

Laurent Désiré Kabila, an ethnic Katangese, former Lumumba lieutenant, and leftist political leader, had been fighting the Mobutu government for decades and became the leader of the uprising that was starting to control large swaths of terri-

52. See ROBERT E. GRIBBIN, IN THE AFTERMATH OF GENOCIDE: THE U.S. ROLE IN RWANDA 86 (2005).

53. See OAU EXECUTIVE SUMMARY, *supra* note 51, ¶ E.S.56.

54. See Oluoch-Ojiwah Fred, *The Congo-Rwanda Bilateral Framework in the Last 30 Years*, NEW TIMES (Rwanda), Feb. 26, 2009 (available on Lexis-Nexis).

55. See THOMAS TURNER, CONGO WARS: CONFLICT, MYTH & REALITY 89 (2007); J.L. Collins, *Congo/Zaire*, FOREIGN POLICY IN FOCUS, June 1997, at 1, available at <http://www.fpif.org/pdf/vol2/37ifcong.pdf>; see also OAU EXECUTIVE SUMMARY, *supra* note 51, ¶ E.S.56.

56. See Guy Fiti Sinclair, Don't Mention the War (on Terror): Framing the Issues and Ignoring the Obvious in the ICJ's 2005 Armed Activities Decision, 8 MELBOURNE J. INT'L L. 124, 126 (2007); see also OAU EXECUTIVE SUMMARY, *supra* note 51, ¶ E.S.57.

57. See NZONGOLA-NTALAJA, *supra* note 10, at 225; David Orr, *Guide to the Zaire Crisis: Why We are Sending Thousands of Soldiers to Help Save the Refugees*, INDEP. (London), Nov. 16, 1996, at 10.

tory in its march toward Kinshasa.⁵⁸ Known as the *Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre* ("AFDL"), the rebellion was supported, militarily and financially, by Rwanda and Uganda,⁵⁹ which, in turn, were both supported by the United States.⁶⁰ In the end, the AFDL toppled Mobutu and the country's name was changed back to the "Democratic Republic of the Congo."⁶¹

The *Banyamulenge* and their Rwandan, Burundian, and Ugandan allies counted on the Rwandan military for protection against hostile armed groups operating in the eastern part of DR Congo.⁶² These groups included:

- (1) The *Interahamwe*;
- (2) The former Rwandan Armed Forces ("RAF"), which had fought the RPF during the Rwandan genocide;
- (3) The Mai Mai, a rag-tag coalition of traditional Congolese local defense forces, which opposed the Rwandan incursion;
- (4) The Alliance of Democratic Forces ("AFDL"), consisting of Ugandan expatriates who were fighting their motherland with the support of the government of Sudan; and
- (5) Various Burundian Hutu groups fighting the Tutsi-controlled government of Burundi.⁶³

The United States at first backed Kabila's government.⁶⁴ But the support did not last. After gaining power, Kabila sought independence from Rwanda and Uganda and asked them to remove their military contingents.⁶⁵ Both countries refused.⁶⁶

58. See Cindy Shiner, *Kabila: Despot or Democrat? Accounts of Kabila's Odyssey Contradictory*, WASH. POST, May 19, 1997, at A1.

59. See generally BUREAU OF AFR. AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: DEMOCRATIC REPUBLIC OF THE CONGO (2009), available at <http://www.state.gov/r/pa/ei/bgn/2823.htm> [hereinafter BACKGROUND NOTE].

60. See NZONGOLA-NTALAJA, *supra* note 10, at 227.

61. See OAU EXECUTIVE SUMMARY, *supra* note 51, ¶ E.S.57. At independence from Belgium, present-day DR Congo was known as the "Republic of Congo." In 1971, Mobutu changed the name to Zaïre. See KEVIN C. DUNN, IMAGINING THE CONGO: THE INTERNATIONAL RELATIONS OF IDENTITY 110 (2003).

62. See Congo Civil War, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/war/congo.htm> (last visited Apr. 19, 2009) [hereinafter Congo Civil War].

63. *Id.*

64. See TURNER, *supra* note 55, at 150.

65. See NZONGOLA-NTALAJA, *supra* note 10, at 228.

66. See Congo Civil War, *supra* note 62.

Rwanda felt it needed to deal with ongoing *Interahamwe* and RAF attacks launched from DR Congo⁶⁷ and Uganda was honoring its alliance with Rwanda and also believed that the AFDL still posed a serious threat as it was using DR Congo as a base.⁶⁸ So Kabila's relationship with the Rwandans and Ugandans, as well as their backers from the United States, deteriorated.⁶⁹

C. *The Second Civil War: 1998-2003*

War broke out again in 1998.⁷⁰ This time, Kabila allied himself with Zimbabwe, Angola, and Namibia—and to a certain extent with Chad, Libya, and Sudan.⁷¹ Facing them were Rwanda and Uganda—along with Burundi, to a certain extent—and the rebel groups these countries supported.⁷² The Rwandan-backed rebel group known as the *Rassemblement Congolais pour la Démocratie* ("RCD"), immediately went on the offensive.⁷³ After its initial advance on Kinshasa was turned back, it retreated to the eastern portion of the country, where it instituted effective control over expanses of that region and continued to fight the DR Congo Army and its foreign allies.⁷⁴ In February 1999, Uganda supported the establishment of an armed faction called the *Mouvement pour la Libération du Congo* ("MLC"), led by Jean-Pierre

67. See Richard W. Bogosian, *Africa at the Crossroads: Current Themes in African Law: Current Legal Issues in the Great Lakes Region of Africa: Introduction*, 10 U. MIAMI INT'L & COMP. L. REV. 37, 39 (2001); see also *Timeline: Rwanda*, BBC NEWS, June 25, 2008, <http://news.bbc.co.uk/1/hi/world/africa/1070329.stm> ("1998 - Rwanda switches allegiance to support rebel forces trying to depose Kabila in the wake of the Congolese president's failure to expel extremist Hutu militias.").

68. See John F. Clark, *Explaining Ugandan Intervention in Congo: Evidence and Interpretations*, 39 J. MODERN AFR. STUD. 261, 271 (2001). Certain commentators believe Rwanda and Uganda were motivated only by Congolese resource exploitation concerns and the reasons cited were mere pretext. See, e.g., NZONGOLA-NTALAJA, *supra* note 10, at 227.

69. See NZONGOLA-NTALAJA, *supra* note 10, at 227.

70. See TURNER, *supra* note 55, at 40.

71. See Phillip Apuuli Kasaija, *Africa at the Crossroads: Current Themes in African Law: Current Legal Issues in the Great Lakes Region of Africa: International Law and Uganda's Involvement in the Democratic Republic of the Congo*, 10 U. MIAMI INT'L & COMP. L. REV. 75, 77 (2001); Corey Flinoff, *Shades of Congo's Troubled Past Appear*, NAT'L PUB. RADIO, Nov. 26, 2007, <http://www.npr.org/templates/story/story.php?storyId=16614235>.

72. See INT'L CRISIS GROUP, *HOW KABILA LOST HIS WAY: THE PERFORMANCE OF LAURENT DESIRÉ KABILA'S GOVERNMENT 2* (1999), available at http://www.crisisgroup.org/library/documents/report_archive/A400036_21051999.pdf.

73. See TURNER, *supra* note 55, at 92-95.

74. See generally BACKGROUND NOTE, *supra* note 59.

Bemba.⁷⁵ Uganda and the MLC then exerted control over the northern third of the country.⁷⁶

Eventually, DR Congo was partitioned into three more or less separate zones with the RCD/Rwanda largely controlling the country's eastern sector, the MLC/Uganda occupying its northern third, and Congolese forces and their foreign allies asserting dominion over the balance.⁷⁷ A stalemate ensued.⁷⁸

1. The Lusaka Accord

In July 1999, in Lusaka, Zambia, all six main belligerents (Angola, DR Congo, Namibia, Rwanda, Uganda, and Zimbabwe) agreed to a cease-fire that was signed by the end of August.⁷⁹ In addition to the cease-fire, the Lusaka Accord called for: (1) deploying a U.N. peacekeeping operation ("MONUC")⁸⁰; (2) withdrawing foreign troops; (3) establishing a Joint Verification Commission (financed by the United States and designed to track compliance with the Accord); and (4) launching an "Inter-Congolese Dialogue" with the objective of forming a transitional government leading to elections.⁸¹ The Lusaka Accord signatories "failed to fully to implement its provisions in 1999 and 2000."⁸² In the meantime, the international community became increasingly critical of Laurent Kabila's efforts to thwart full deployment of MONUC troops, block attempts to engage in a meaningful Inter-Congolese Dialogue, and stifle any burgeoning political movements within the country.⁸³

2. Illicit Resource Exploitation

In June 2000, in response to reports of widespread illicit resource exploitation, U.N. Security Council President Jean-David Levitte asked U.N. Secretary-General Kofi Anan to establish a

75. See *id.*; see also NZONGOLA-NTALAJA, *supra* note 10, at 231.

76. See generally BACKGROUND NOTE, *supra* note 59.

77. See *id.*, Congo Civil War, *supra* note 62; see also *Democratic Republic of Congo: Key to the Crisis in the Great Lakes Region: Hearing Before the H. Subcomm. on Afr. of the H. Comm. on Int'l Relations*, 108th Cong. 72 (2003) (statement of Francois Grignon, Cent. Afr. Project Dir., Int'l Crisis Group).

78. See Congo Civil War, *supra* note 62.

79. *Id.*

80. See Kagan, *supra* note 34 and accompanying text.

81. Frazer, *supra* note 27, at 2; Kagan, *supra* note 34, at 2.

82. Congo Civil War, *supra* note 62.

83. *Id.*

“Panel of Experts” on the illegal exploitation of DR Congo’s natural resources and other forms of wealth.⁸⁴ He also requested the Panel to research and analyze the links between the resource exploitation and the continuation of the conflict in DR Congo.⁸⁵ Although DR Congo’s abundant resources include commodities such as petroleum and timber, much of the exploitation involved the country’s vast mineral wealth, which includes gold, copper, cobalt, uranium, diamonds, coltan, and cassiterite.⁸⁶ Ultimately, the Panel systematically documented the ways in which massive exploitation of natural resources was linked to the military conflict, arms trafficking, and human rights abuses in the country.⁸⁷

3. Laurent Kabila’s Assassination and the Sun City Accord

In the meantime, the conflict dragged on. Then, in January 2001, Laurent Kabila was assassinated by one of his own bodyguards.⁸⁸ His son Joseph became DR Congo’s president and the fighting continued.⁸⁹ By 2002, however, with U.S. prodding, the Inter-Congolese Dialogue had commenced in earnest in South Africa.⁹⁰ This gave rise to an all-inclusive power-sharing agreement—including a Third-Party Verification Mechanism, once again financed by the United States⁹¹ which was signed by delegates in Pretoria on December 17, 2002.⁹² By this point, all Angolan, Namibian, Rwandan, and Zimbabwean troops had withdrawn from DR Congo.⁹³ The Pretoria Accord was formally

84. *Id.*

85. *Id.*

86. See BACKGROUND NOTE, *supra* note 59; Dustin Blitchok, *Congolese Children Work, Fight and Die for Our Cell Phones and Diamonds*, S.F. BAY VIEW, Oct. 24, 2008, <http://www.sfbayview.com/2008/congolese-children-work-fight-and-die-for-our-cell-phones-and-diamonds/>. Coltan and cassiterite are used to manufacture, among other electronic appliances, cell phones. See GLOBAL WITNESS, UNDERMINING PEACE: THE EXPLOSIVE TRADE IN CASSITERITE IN EASTERN DRC 13-14 (2005), available at http://www.globalwitness.org/media_library_get.php/238/1234512380/Under-Mining%20Peace.pdf.

87. See TURNER, *supra* note 55, at 163.

88. See *id.* at 7.

89. See *One Year On: Kabila Assassination*, BBC NEWS, Jan. 16, 2002, <http://news.bbc.co.uk/2/hi/africa/1763444.stm>.

90. See *DR Congo: Rwanda-Backed Rebels Continue Seeking Diplomatic Support for Peace*, BBC WORLDWIDE MONITORING—AFRICA, May 31, 2002 (available on Lexis-Nexis); Congo Civil War, *supra* note 62.

91. See Frazer, *supra* note 27, at 2.

92. See Congo Civil War, *supra* note 62.

93. See *id.* Ugandan troops officially withdrew from DR Congo in May 2003. *Id.*

ratified by all parties on April 2, 2003 in Sun City, South Africa (it is thus also known as the “Sun City Accord”).⁹⁴ The United States played an important role in the diplomacy that culminated in this agreement.

The agreement provided the framework for DR Congo’s transition to democracy,⁹⁵ including establishment of a much criticized Truth and Reconciliation Commission that failed to provide for adequate representation of the belligerent parties and the most prominent victim group—women and girls.⁹⁶ During this time, the United States also took the lead in the U.N. Security Council and became one of the largest financial contributors to MONUC (which continues today).⁹⁷

4. The Transitional Period

On June 30, 2003, after each of the signatory groups designated candidates, President Joseph Kabila formally announced the transitional government lineup, which would consist of a president and four vice presidents (forming a so-called “pentarchy”).⁹⁸ Representing various groups involved in the conflict, the four vice presidents—Azarias Ruberwa, Arthur Z’ahidi Ngoma, Abdoulaye Yerodia Ndombasi, and Jean-Pierre Bemba—took the oath of office on July 17, 2003.⁹⁹ Most of the incoming cabinet members assumed their new functions within days thereafter.¹⁰⁰

D. *Human Rights Violations Continue: 2003 to Present*

DR Congo endured a difficult period between the formation of the transitional government in 2003 and the scheduled elections ultimately held in 2006. Although armed conflict had supposedly come to an end, from 2003 through 2005 gross human rights violations continued to be perpetrated in eastern Congo.¹⁰¹

94. *Id.*

95. See Frazer, *supra* note 27, at 3.

96. See INT’L CTR. FOR TRANSITIONAL JUSTICE, THE DEMOCRATIC REPUBLIC OF CONGO: ICTJ ACTIVITY (2008), <http://www.ictj.org/en/where/region1/646.html> (last visited Apr. 19, 2009) [hereinafter ICTJ ACTIVITY].

97. See Frazer, *supra* note 27, at 3.

98. See BACKGROUND NOTE, *supra* note 59.

99. See *id.*

100. See *id.* Thirty-five cabinet positions were created. *Id.*

101. See Congo Civil War, *supra* note 62.

1. The *Interahamwe*

The remaining *Interahamwe* feared returning to Rwanda, convinced they would be targeted by vengeful Tutsi.¹⁰² These Hutu extremists “remained in the forests of east Congo, preying on villages for food and money.”¹⁰³ In May 2005, for example, it was reported that *Interahamwe* based in eastern Congo were responsible for hundreds of summary executions, rapes, beatings and civilian hostage-taking in the territory of Walungu, South Kivu Province.¹⁰⁴ In the meantime, Rwandan incursions into DR Congo, designed to clear out these militia forces, “disrupted the fragile government and [led to further] instability.”¹⁰⁵

2. Laurent Nkunda

In addition, one of the groups that had been fighting in the war, the Rwandan-backed Rally for Congolese Democracy-Goma (“RCD-Goma”), was committing war crimes and crimes against humanity in eastern DR Congo’s Kivu region.¹⁰⁶ RCD-Goma soldiers, commanded by Laurent Nkunda, refused to integrate into the Congolese army and clashed with other Congolese army forces in South Kivu.¹⁰⁷ Nkunda and his troops took control of the South Kivu town of Bukavu on June 2, 2004, claiming this action was necessary to stop genocide of the *Banyamulenge*.¹⁰⁸ During the fighting, Nkunda’s troops, alleged by some to be taking orders from Rwanda,¹⁰⁹ reportedly carried out war crimes, killing and raping civilians and looting their property.¹¹⁰ Nkunda, whose Tutsi rebel faction renamed itself the National Congress for the Defense of the People (“CNDP”), was indicted for war crimes by the Congolese government in September

102. *See id.*

103. *Id.*

104. *See* Amnesty Int’l, *Democratic Republic of Congo: North-Kivu: Civilians Pay the Price for Political and Military Rivalry*, AI Index AFR 62/013/2005, Sept. 26, 2005, available at <http://www.amnesty.org/en/library/asset/AFR62/013/2005/en/domAFR620132005en.html>.

105. *See* Congo Civil War, *supra* note 62.

106. *See* Declan Walsh, *While His Soldiers Rape and Pillage, the Rebel General Insists: ‘We Come in Peace’*, INDEP. (London), June 5, 2004, at 35.

107. *See id.*

108. *See id.*

109. *See, e.g., id.*; Jacques Kahorha, *Nkunda Responds to Possible ICC Indictment*, INST. FOR WAR & PEACE REPORTING, Feb. 9, 2008, http://www.iwpr.net/?s=f&o=342745&p=acr&l=EN&apc_state=hena_3_kahorha____publish_date_10_compact.

110. *See, e.g.,* Walsh, *supra* note 106.

2005.¹¹¹

3. Ethnic Massacres in Ituri Province

Also during this 2003-2005 period, rival militias backed by Rwanda (supporting the Union of Congolese Patriots ("UPC")) and Uganda (sponsoring the Nationalist and Integrationist Front ("FNI")) created instability in the northeastern region of Ituri, as they battled over border trade and mining of mineral resources.¹¹² At the same time, Ituri also experienced mass ethnic violence between the region's agriculturalist Lendu and its pastoralist Hema ethnic groups.¹¹³ The Lendu ethnicity was largely represented by the FNI militia, while the UPC militia claimed to be fighting for the Hema.¹¹⁴ The violence between these groups was intensified by a "borrowing" of ethnic ideology from the Hutu-Tutsi conflict in Rwanda. Lendu began thinking of themselves as kin to the Hutu, while the Hema identified themselves with the Tutsi.¹¹⁵ Five militia leaders who were operating actively in Ituri during this period, including Nkunda associate Bosco Ntaganda,¹¹⁶ former UPC leader Thomas Lubanga Dyilo, and former DR Congo Vice President Jean-Pierre Bemba, have been indicted by the ICC for war crimes.¹¹⁷

111. See Hum. Rts. Watch, *D.R. Congo: Arrest Laurent Nkunda for War Crimes*, Feb. 1, 2006, http://hrw.org/english/docs/2006/01/31/congo12579_txt.htm.

112. See HUM. RTS. WATCH, *CURSE OF GOLD: DEMOCRATIC REPUBLIC OF CONGO 20-53* (2005) [hereinafter *CURSE OF GOLD*]; see also INT'L CRISIS GROUP, *CONGO CRISIS: MILITARY INTERVENTION IN ITURI 14-15* (2003), available at <http://www.crisisgroup.org/home/index.cfm?id=1626>.

113. See *CURSE OF GOLD*, *supra* note 112, at 20-53; see also HUM. RTS. WATCH, *COVERED IN BLOOD 15-16* (2003), available at <http://www.hrw.org/en/reports/2003/07/07/covered-blood>.

114. See *CURSE OF GOLD*, *supra* note 112, at 1.

115. See Press Release, Hum. Rts. Watch, *Background to the Hema-Lendu Conflict in Uganda-Controlled Congo* (Jan. 2001), available at <http://www.hrw.org/legacy/backgrounder/africa/hemabckg.htm>.

116. See *supra* notes 112-15 and accompanying text.

117. See *Conflict History: DR Congo*, INT'L CRISIS GROUP, July 2008, http://www.crisisgroup.org/home/index.cfm?action=conflict_search&l=1&t=1&c_country=37 (last visited Apr. 19, 2009). Lubanga's trial began on January 26, 2009. See Laurie Goering, *Congo Militia Leader's Trial Starts at the Hague; Thomas Lubanga's Child-Soldier Case is the International Criminal Court's First*, L.A. TIMES, Jan. 27, 2009, at A4. For a discussion regarding the International Criminal Court's ("ICC") indictment against Bosco Ntaganda, see *infra* note 132 and accompanying text. For details regarding Bemba's arrest, see Jean-Pierre Bemba, *Former Congo Warlord, Arrested in Belgium*, INT'L HERALD TRIB. ONLINE., May 25, 2008, <http://www.ihl.com/articles/ap/2008/05/25/europe/EU-GEN->

4. The Tripartite Process

In 2004, to stem the tide of regional violence and instability during this period, the United States helped launch the so-called "tripartite process," resulting in the creation of the "Tripartite Plus Joint Commission," consisting of Burundi, DR Congo, Rwanda, and Uganda.¹¹⁸ The Commission was formed to help these countries work together cooperatively to resolve their problems and to support and enhance regional security.¹¹⁹

5. Elections

After suffering through this difficult period, general elections were held in DR Congo on July 30, 2006, the first multiparty elections in the country in forty-six years.¹²⁰ Congolese citizens went to the polls to elect both a new president and National Assembly, the lower-house of the Parliament.¹²¹ A run-off contest was then held on October 29, 2006 and Joseph Kabila was elected as DR Congo president.¹²² The United States provided the initial support to launch the Congolese Independent Election Commission and it sent observers to both rounds of national elections.¹²³

II. CONGO IN THE AFTERMATH OF ELECTIONS AND U.S. POLICY DURING THIS TIME

A. Post-Election Human Rights Violations

Although the official end of the war and elections brought a certain degree of peace to DR Congo, in many respects the war never ended.¹²⁴ The post-2003 armed conflict and large-scale human rights abuses already described were symptomatic of the kind of violence that continued to rage throughout the country,

War-Crimes-Bemba.php. Notably, Bemba's current indictment alleges Movement for the Liberation of Congo crimes committed in the Central African Republic. *See id.*

118. *See* Frazer, *supra* note 27, at 2.

119. *See id.*

120. *See* Jeffrey Gettleman, Congo Votes in Its First Multiparty Election in 46 Years, *N.Y. TIMES*, July 31, 2008, at A3.

121. *See id.*

122. *See* Eddy Isango, *Kabila Promises New Era for Congo; Nation Inaugurates First Freely Elected Leader Since 1960*, *WASH. POST*, Dec. 7, 2006, at A23.

123. *See* Frazer, *supra* note 27, at 2, 5.

124. *See generally* *Conflict History: DR Congo*, *supra* note 117.

especially in its eastern region.¹²⁵ Numerous militias, such as Nkunda's CNDP, various Mai Mai fighting groups (such as the Congolese Patriotic Resistance), and former *Interahamwe* (transforming themselves into the AFDL and its splinter groups) never put down their arms.¹²⁶

Early in 2007, combatants loyal to Nkunda were integrated into the national army in a process called "mixage."¹²⁷ Unfortunately, the newly established "mixed" brigades killed scores of civilians and committed rapes and other abuses in their operations against the AFDL.¹²⁸ By August 2007, the political agreements had collapsed and many of Nkunda's former troops returned to his control. Renewed clashes between Nkunda's troops and government soldiers followed.¹²⁹

In the latter part of 2008, after a brief respite, Nkunda launched a new offensive against government forces that resulted in the eventual encirclement of Goma.¹³⁰ The fighting forced more than a quarter of a million people from their homes.¹³¹

In early January 2009, Nkunda was ousted from the CNDP by his Chief-of-Staff, General Bosco Ntaganda.¹³² Nkunda was captured by Rwandan forces a couple of weeks later.¹³³ It is not clear whether Rwanda "will be willing to hand him over to their former rivals [DR Congo] and risk damaging revelations about their past relationship."¹³⁴

Despite efforts at a cease-fire and the capture of Nkunda in

125. See generally *id.*

126. See INT'L CRISIS GROUP, CONGO: BRINGING PEACE TO NORTH KIVU 1, 8, 17 (2007), available at <http://www.crisisgroup.org/home/index.cfm?id=5134>.

127. *Id.* at 30.

128. *Id.* at 11.

129. *Id.* at 13.

130. See Jeffrey Gettleman, *In Congo, a Little Fighting Brings a Lot of Fear*, N.Y. TIMES, Nov. 2, 2008, at A6.

131. See Peter Grete, *Nkunda's Spectacular Fall*, BBC NEWS, Jan. 23, 2009, <http://news.bbc.co.uk/2/hi/africa/7846940.stm>.

132. See *id.* General Ntaganda was recently indicted by the ICC. See Michael Deibert, *DR Congo: Rebel Leader Indictment Made Public*, HUM. RTS. TRIB., May 2, 2008, http://www.humanrights-geneva.info/spip.php?page=pint_article&id_article=3065. In its indictment, the ICC alleges that, prior to his joining the National Congress for the Defense of the People, Ntaganda "committed war crimes of enlistment and conscription of children under the age of 15" and used the children "to participate actively in hostilities in Ituri . . . from July 2002 until December 2003." *Id.*

133. See Grete, *supra* note 131.

134. *Id.*

the first part of 2009, fighting has not ceased.¹³⁵ In fact, the specter of mass violence continues to loom over the battle-scarred east Congolese landscape:

[Nkunda's capture] doesn't mean the war is over. In fact UN diplomats have warned that it could even deteriorate in the short term. The new joint Congolese-Rwandan force is yet to take on the Hutu militias every bit as ruthless as the Lord's Resistance Army which has killed at least 600 civilians in reprisals for a similar multi-national offensive further to the north. And eastern Congo is—still—a bewildering patchwork of war-lords who will scramble to fill the vacuum. Gen Nkunda's arrest takes one element out of the problem, but it by no means solves it.¹³⁶

And as just indicated, the region has been plagued by fresh atrocities from a new force: Uganda's rebel group the Lord's Resistance Army ("LRA").¹³⁷ The LRA have been fighting government forces in Uganda and committing atrocities against civilians there for decades.¹³⁸ Its top leaders, including chief Joseph Kony, have been indicted by the ICC for crimes against humanity and war crimes.¹³⁹ As the LRA's operating space in Uganda has increasingly shrunk, it has turned its attention to DR Congo, where, since late December 2008, it has murdered over 500 people and forced over 100,000 to flee their homes to avoid attacks while it abducts children to serve as soldiers.¹⁴⁰

Issues lying below the surface, including questions about militia disarmament, army reform, justice for atrocity victims, and the illegal exploitation of mineral wealth have not been effectively resolved and continue to wreak havoc.¹⁴¹ In many respects, mineral exploitation and its attendant problems have been most responsible for fueling the ongoing violence.¹⁴² So has weapons smuggling. Despite arms embargos imposed on the

135. *See id.*

136. *Id.*

137. *See LRA Rebels Commit New Atrocities*, BBC NEWS, Jan. 16, 2009, <http://news.bbc.co.uk/2/hi/africa/7834242.stm>.

138. *Id.*

139. *Id.*

140. *Id.*

141. Hum. Rts. Watch, *Democratic Republic of Congo Q & A*, Apr. 25, 2008, <http://www.hrw.org/en/news/2008/04/25/q-democratic-republic-congo> [hereinafter *Q & A*].

142. *Id.*; *see* Ezekiel, *supra* note 7, at 227.

country by U.N. Security Council resolutions in 2003, 2005, 2006, 2007, and 2008,¹⁴³ weapons are freely smuggled into its borders and circulated internally.¹⁴⁴ And embargoed material is stockpiled.¹⁴⁵ These weapons are further promoting the violence.¹⁴⁶

As a result, over a million Congolese people in North and South Kivu provinces are still displaced and remain too frightened to go home.¹⁴⁷ The situation for women and girls has been especially dire. At least 60,000 Congolese females along the entire age spectrum have been raped by militia groups or soldiers from the DR Congo army.¹⁴⁸ Sadly, little girls have in no way been spared. Four-thousand of the rape victims in one province, for example, consisted of children. Armed groups also continue to press children into military service.¹⁴⁹ Consequently, DR Congo has among the highest numbers of child soldiers in the world.¹⁵⁰

B. *The Nairobi-Goma Peace Process*

In November 2007, the United States helped facilitate an accord between DR Congo and Rwanda (known as the "Nairobi Communiqué") that is designed to tackle problems related to the presence of the AFDL in the Kivus.¹⁵¹

On January 23, 2008, after weeks of negotiation, a ceasefire agreement ("Goma Agreement") was signed by DR Congo government officials and twenty-two armed groups in the eastern town of Goma.¹⁵² As before, United States participation was critical to the successful outcome.¹⁵³ The Goma Agreement put in

143. See Press Release, Security Council, Security Council Extends Arms Embargo on Democratic Republic of Congo, U.N. Doc. SC/9248 (Feb. 15, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9248.doc.htm> (referencing U.N. Security Council Resolutions 1493 (2003), 1596 (2005), 1698 (2006), 1771 (2007), and 1799 (2008)).

144. See Elizabeth Powers, *Greed, Guns and Crist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. REV. 383, 404 (2008).

145. *Id.*

146. *Id.*

147. See *Q & A*, *supra* note 141.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

place the “Amani Program,” an eastern Congo peace transition initiative headed by Abbé Apollinaire Malu Malu, a Catholic priest.¹⁵⁴

The Agreement also established a Joint Technical Committee on Peace and Security (“Goma Committee”), a monitoring body that will help iron out certain details related to troop disengagement.¹⁵⁵ The Committee, which held its first official meeting on April 3, 2008, has fielded representatives from all the armed factions in the conflict.¹⁵⁶ It is jointly chaired by the Congolese government and representatives of the international community, including the United States.¹⁵⁷

In addition, International and Congolese non-governmental organizations seek to create an independent special advisor for human rights. This office could play an essential role in assisting the Committee as it tackles the thorny human rights issues that will inevitably arise during implementation of the Goma Agreement.¹⁵⁸

C. Humanitarian Assistance Efforts

1. The DR Congo Relief, Security and Democracy Promotion Act

Recent U.S. efforts to establish peace in DR Congo have also involved assistance in alleviating suffering and fortifying the country’s civil institutions. On December 22, 2006, Congress enacted the Democratic Republic of the Congo Relief, Security and Democracy Promotion Act of 2006 (“DR Congo Act”).¹⁵⁹ The DR Congo Act established fifteen policy objectives aimed at addressing a range of concerns regarding humanitarian assistance, social development, economic and natural resource exploitation, governance and security issues.¹⁶⁰ Without coordinating between and among each other, in fiscal years 2006 and 2007,

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. Pub. L. No. 109-456, 120 Stat. 3384 (2006); see U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-662T, THE DEMOCRATIC REPUBLIC OF THE CONGO: MAJOR CHALLENGES IMPEDE EFFORTS TO ACHIEVE U.S. POLICY OBJECTIVES; SYSTEMATIC ASSESSMENT OF PROGRESS IS NEEDED 1 (2008), available at <http://www.gao.gov/new.items/d08562t.pdf> [hereinafter GAO REPORT].

160. See GAO REPORT, *supra* note 159, at 1.

respectively, U.S. agencies—the U.S. Agency for International Development (“USAID”) as well as the U.S. Departments of Agriculture, Defense, Health and Human Services, Labor, State, and Treasury—collectively allocated a total of about US\$217.9 million and US\$181.5 million for the Congolese under the DR Congo Act.¹⁶¹

About seventy percent of these funds were allocated for programs that support the Act’s humanitarian and social development objectives, while the remainder was targeted for programs and activities that support the Act’s economic, governance, and security objectives.¹⁶² For example, USAID is making available humanitarian assistance that includes emergency supplies, food, water, and sanitation improvements to vulnerable populations.¹⁶³ The Department of Treasury has worked to furnish the country with interim debt relief.¹⁶⁴ And the Department of State has been tasked with providing training and other assistance aimed at professionalizing members of DR Congo’s military.¹⁶⁵

2. December 2008 Assistance Funds

On December 18, 2008, the United States approved the release of an additional US\$6 million in aid for refugees and people displaced by the violence in eastern DR Congo.¹⁶⁶ These funds are to be used to provide emergency relief commodities, and address humanitarian protection needs.¹⁶⁷ This includes donating simple commodities such as blankets, water buckets, mosquito nets, and kitchen sets; registering and relocating people who have been displaced; and addressing the needs of women and children who have been victims of sexual violence.¹⁶⁸

Nevertheless, despite these efforts to comfort victims and establish civil society in DR Congo, and apart from the violence directly caused by Nkunda’s latest offensive, the U.N. and others have reported that over the last year scores of Congolese civilians

161. *Id.* at 2.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Bush Releases 6 Million in Refugee Aid for DR Congo*, AGENCE FRANCE-PRESSE, Dec. 19, 2008, available at <http://www.monuc.org/News.aspx?newsId=19667>.

167. *Id.*

168. *Id.*

have been deliberately killed, executed, or “disappeared,” some of them children.¹⁶⁹ Officials report that at least 500 women and girls were raped. This figure is in all likelihood much higher as the reported number only reflects those who reached a clinic for medical treatment.¹⁷⁰ By way of example, each month since January 2008 at least fifty women and girls have been reported raped in the town of Shabunda (South Kivu province).¹⁷¹ Clearly, the violence associated with the overall armed conflict and the absence of valid, functioning social institutions has persisted.¹⁷² And still this does not include the recent brutalities inflicted by the Lord’s Resistance Army, which U.S. policy has not even had a chance to address.

III. *RECOMMENDED CHANGES IN U.S. POLICY TO PROMOTE THE RULE OF LAW AND HUMAN RIGHTS*

DR Congo appears to have reached a critical juncture in its tumultuous history. After years of suffering under dictatorship and a series of devastating internal and regional armed conflicts, it has installed its first democratically elected government in more than forty years.¹⁷³ And while the United States bears significant responsibility for many of DR Congo’s past problems, the United States has partially atoned for its sins by playing an important role in the fall of the Mobutu regime and helping to negotiate the end of the post-Mobutu wars, promote regional security, facilitate elections, provide humanitarian assistance, and nurture DR Congo’s fledgling democracy. But these efforts have not achieved the desired goal of ending DR Congo’s internal armed conflicts and atrocities and establishing a stable society.¹⁷⁴

But what more can the United States do to promote peace and prosperity in DR Congo? The answer lies in both procedural and substantive changes to U.S. policy. This should lead to a massive infusion of assistance that can be thought of as an “African Marshall Plan.”

169. *Q & A*, *supra* note 141.

170. *Id.*

171. *Id.*

172. See, e.g., Editor’s Note, *Congo (Kinshasa): Still No Peace in the East*, *AFRICAFOCUS BULL.*, May 2, 2008, <http://www.africafocus.org/docs08/conk0805.php>.

173. See GAO REPORT, *supra* note 159, at 1.

174. See *id.*

A. Procedural Policy Reforms

Procedurally, the United States needs to formulate a more coherent and unified policy regarding DR Congo. Part of this will entail coordinating its various and scattered agency activities. There has been some recent progress in this regard as the National Security Council has established an interagency group, including the Departments of Defense, State, and Treasury, to help discuss DR Congo policies and approaches and coordinate certain agency activities.¹⁷⁵ However, this group does not include other agencies that contribute to U.S. assistance efforts (such as the Departments of Agriculture, Health and Human Services, or Labor) or other agencies that could make important contributions (such as the Department of Justice).¹⁷⁶

Moreover, since the U.S. government has not established a process to assess systematically its overall progress in DR Congo, it cannot accurately determine whether it has distributed its resources in the most effective manner. Nor, for that matter, can it determine whether it is earmarking sufficient resources for the Congolese. In this regard, benchmarks are essential to evaluate progress with respect to the Congolese human rights situation.¹⁷⁷ Formulation of such reference points, thus, must be an integral part of U.S. procedural policy reform.

In addition to promoting internal coherence and efficiency, the proposed coordination process could help the United States identify additional bilateral or multilateral measures that would contribute to success in its DR Congo policy. What partners would be most effective in working with the United States in effecting holistic change that will lead to the end of atrocities in DR Congo? Should the United States focus on spearheading initiatives with the EU, the African Union, the U.N., or all three? Or can other partners be identified? How can the United States best coordinate with these partners? Put simply, internal U.S. coordination will help work out these external issues and promote superior transnational coordination.

175. *See id.* at 16.

176. *See id.*

177. *See* John McKenzie, *The Limits of Offshoring—Why the United States Should Keep Enforcement of Human Rights Standards “In-House”*, 83 IND. L.J. 1121, 1122 (2008) (suggesting the value of transforming “lofty aspirations” into actual benchmarks for assessing progress in promotion of human rights).

Finally, procedural reform in delivery of U.S. assistance to DR Congo also entails effective monitoring and quality control of allocation and distribution of aid and assistance. Given the long-standing and pervasive culture of corruption in DR Congo,¹⁷⁸ successful aid delivery is currently jeopardized by the malfeasance of official Congolese recipients. An American ombudsman or other oversight mechanism should be implemented to prevent this from happening.

Similarly, the United States should have a permanent presence on the ground to coordinate its participation in all peace and stabilization efforts. It has already made some progress in that regard. In September 2007, it appointed senior conflict advisor Tim Shortley to support peace efforts in eastern DR Congo.¹⁷⁹ It should go further by establishing permanent offices in the Kivus (where a majority of human rights violations are currently taking place) and Kinshasa—with full-time staff from USAID and the Department of State, among others—to sustain U.S. engagement in curbing human rights abuses and establishing the rule of law throughout the country.¹⁸⁰

B. *Substantive Policy Reforms*

Were this procedural reform to be instituted, the United States could start to address some of the serious substantive issues plaguing its DR Congo policy. To begin with, U.S. strategy currently emphasizes humanitarian aid at the expense of law sector reform. However, there is a good argument for shifting the policy focus to rule of law and security sector reform. In the absence of legal norms and safety, the country is simply incapable of developing its civil society and the United States is in any event hindered in delivering humanitarian assistance. Law and order must be the first order of business.

But what concrete measures could the United States take to help institute law and order in this largely anarchic country and its surrounding region? As mentioned above, there are three areas in which reform could lead to significant progress: eliminat-

178. See Posting of Megan Rowling to Reuters AlertNet, *Corruption in Congo: Seeing the Wood for the Trees*, <http://www.alertnet.org/db/blogs/20316/2007/03/12-122132-1.htm> (Apr. 12, 2007, 12:21 GMT).

179. See, e.g., POLICY STANDARD, *supra* note 29.

180. See, e.g., *id.* (advocating a permanent office in eastern DR Congo).

ing the so-called “negative forces” in the region, building up essential institutions in DR Congo, and ending impunity.

1. Eliminating “Negative Forces”

In general, for those who work on DR Congo issues, the “negative forces” are the militias, rebel groups, and criminal Congolese government military and security personnel that have participated in mass murder, large-scale sexual violence (wherein tens of thousands of Congolese women and girls have been raped), and numerous other human rights violations. In the short-term, the United States must direct a large portion of its investment in DR Congo to eliminating these forces. This can be achieved through four objectives: providing additional support for the ongoing (and often ineffective) Disarmament, Demobilization & Repatriation (“DDR”) program and the military integration process; seeking Rwandan support for these initiatives; preventing the free flow of arms into DR Congo; and preventing illegal resource exploitation, which has both fueled and financed the negative forces.

a. Demilitarization & Integration

Demilitarization entails both disarming and demobilizing combatants and then reintegrating them into society.¹⁸¹ It is justified by the tendency of combatants to upset and jeopardize the peace process by initiating fresh hostilities with their former opponents or by using their weapons to perpetrate garden variety crimes.¹⁸² And an essential component of demilitarization involves providing monetary incentives to help spur combatant reintegration into society.¹⁸³ Thus, in DR Congo, combatants have been given the choice of either entering into civilian life or joining the *Forces Armées de la République Démocratique du Congo* (“FARDC”).¹⁸⁴

181. See Monika Thakur, *Demilitarising Militias in the Kivus (eastern Democratic Republic of Congo)*, 17.1 AFR. SECURITY REV. 52, 53 (2008), available at http://www.iss.co.za/dynamic/administration/file_manager/file_links/17NO1THAKUR.PDF?link_id=4057&slink_id=5819&link_type=12&slink_type=13&tmpl_id=3; see also Ruth Wedgewood, Harold K. Jacobson & Allan Gerson, *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L L. 102, 105-06 (2001) (describing the World Bank's and U.N.'s recent experience involving post-conflict demilitarization).

182. See Thakur, *supra* note 181, at 53.

183. *Id.*

184. *Id.*

Owing to the complexities of the Congolese war, the government and international community have had to deal with both Congolese and foreign armed groups and militias. Congolese armed groups have been undergoing the DDR process.¹⁸⁵ Foreign armed groups, on the other hand, have been undergoing the disarmament, demobilization, repatriation, reintegration, or resettlement (“DDRRR”) process.¹⁸⁶

Pursuant to the Nairobi Communiqué (also known as the Nairobi Action Plan) and the Goma Agreement, MONUC DDRRR teams have redoubled efforts, working jointly with Congolese authorities, to educate Rwandan combatants about the DDRRR process.¹⁸⁷ This public awareness campaign is designed to enhance combatant appreciation of the tangible social and economic opportunities open to those who surrender their weapons and choose voluntary repatriation to Rwanda.¹⁸⁸ Although it is the linchpin of efforts to restore order in eastern DR Congo, it has proceeded at a snail’s pace and lacks sufficient personnel and materiel.¹⁸⁹ Ongoing military clashes between and among the FARDC, the CNDP, the AFDL, and the Mai Mai demonstrate that the DDRRR process is far from complete and that the Congolese government still faces formidable challenges in disarming and demobilizing these volatile elements in the Kivus.

The United States, coordinating with other significant donors such as the EU, would do well to make substantial resource contributions to this effort as foreign combatants play a significant role in the current violence and human rights violations in the east. With the success of the DDRRR process, a secure eastern DR Congo will provide the basis for stabilizing the rest of the country, instituting the rule of law, and ending the large-scale human rights abuses.

But for stability to take root in eastern DR Congo (and the rest of the country, for that matter), the DDR process must also come to fruition. Remaining renegade rank-and-file Congolese troops, which also commit atrocities in eastern DR Congo and

185. *Id.* at 54.

186. *Id.*

187. *See Implementation of the Nairobi Action Plan Underway*, MONUC, May 28, 2008, available at <http://www.monuc.org/news.aspx?newsID=17443>.

188. *Id.*

189. *See* Congo Briefing, *supra* note 18.

elsewhere, must be neutralized, brought to justice (where appropriate), effectively integrated into the FARDC or returned to civilian life. It will be crucial then, to assure that stabilization efforts not focus entirely on the Kivus. Brutality still reigns in other parts of the country, such as Bas-Congo, where Congolese police have inflicted deadly violence on members of the Bundu Dia Kongo politico-religious movement since January 2008.¹⁹⁰

For those ex-combatants who choose to reintegrate into civilian life, sufficient social and economic infrastructure to absorb and sustain them will be the order of the day.¹⁹¹ This is especially true for child ex-combatants—they are the future of DR Congo and they must be properly educated and embraced by the community.

And those who opt to join the FARDC should expect to work for a professional, well-structured fighting force that respects international humanitarian and human rights law. Expending additional resources toward professionalization of the FARDC is therefore critical. There must be an appreciable increase in U.S. investment for this essential process, which has also been hindered by shortages of both men and money.¹⁹²

190. See *Peacekeeping Force in DR Congo Stretched to the Limit—Latest UN Report*, U.N. NEWS SERVICE, Apr. 8, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=26250>.

191. See generally Gilbert M. Khadiagala, *Contemporary Security and Development Trends in the Great Lakes Region* (Multi-Country Demobilization and Reintegration Program, Working Paper No. 4, Sept. 2008), available at http://www.mdrp.org/PDFs/MDRP_Working_Paper4.pdf.

192. See Off. of Int'l Just. & Peace, U.S. Conf. of Catholic Bishops, *Background on the Democratic Republic of Congo*, Feb. 2008, <http://www.usccb.org/sdwp/projects/200802drcongobck.pdf> [hereinafter *DRC Background*]; see also Letter from Howard J. Hubbard, Bishop of Albany, to Condoleezza Rice, U.S. Sec'y of State (Nov. 25, 2008), available at http://www.usccb.org/sdwp/international/callafrica/Hubbard_Letter-C_Rice-11-25-08.pdf. Any such assistance, however, must be in accord with the so-called "Leahy Law." The "Leahy Law" consists of a human rights rider to recent appropriations legislation that is meant to curb assistance to foreign military units that have "committed gross violations of human rights." See Foreign Operations Appropriations Act, Pub. L. No. 106-429 § 563, 114 Stat. 1900, 1900A-46 (2001). The law is known by the name of its principal sponsor, Vermont Senator Patrick Leahy. Originally part of the 1997 Foreign Operations Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996), and only pertaining to the State Department's International Narcotics Control program, it substantially expanded its scope in the 2001 Foreign Operations Appropriations Act, Pub. L. No. 106-429 § 563, 114 Stat. 1900, 1900A-46 (2000). That portion of the law reads:

None of the funds made available by this Act may be provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless

b. Rwanda

Demobilization of the Hutu combatants clearly requires the support and participation of Rwanda,¹⁹³ a participant/signatory in the Nairobi and Goma processes. Nevertheless, until recently, Rwanda was still being accused of providing covert assistance to Nkunda¹⁹⁴ and generally failing to take seriously its Nairobi Communiqué obligations.¹⁹⁵ Although its nascent cooperation with DR Congo led to Nkunda's recent arrest, it is not clear whether Rwanda intends to hand over the renegade general to face justice in Kinshasa.¹⁹⁶ For the effective functioning of the Goma/Nairobi processes in general, and the DDRRR process in particular, greater cooperation from Rwanda remains indispensable.

Moreover, the rebel Hutus must have legitimate incentives to return to Rwanda. This will require that Rwanda ensure returning Hutus are treated fairly and given social and economic opportunities (although *génocidaires* have to be brought to justice).¹⁹⁷ To the extent Rwanda requires continuing or expanded financial support for these efforts, it should be furnished by the

the Secretary determines and reports to the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.

Id. The Foreign Operations statute covers both training and assistance, such as weapons grants. In contrast, the "Leahy Law," embedded in the Department of Defense Appropriations Act, Pub. L. No. 106-259 § 8052, 114 Stat. 656, 687 (2001), pertains uniquely to training and states, in relevant part:

None of the funds made available by this Act may be used to support any training program involving a unit of the security forces of a foreign country if the Secretary of Defense has received credible information from the Department of State that a member of such unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken.

Id. The "Leahy Law" is often lauded as the most effective legal means to ensure human rights compliance in connection with U.S. security assistance programs. See Bill Quigley, *The Case for Closing the School of the Americas*, 20 BYU J. PUB. L. 1, 8 n.39 (2005).

193. See Stephanie McCrummen, *Coaxing Militiamen Out of Congo*, WASH. POST, Dec. 3, 2008, at A1.

194. See Twende Twende, *Will Peace Talks Be Enough to End Years of Conflict?*, <http://twendetwende.wordpress.com/2008/01/07/will-peace-talks-be-enough-to-end-years-of-conflict/> (Jan. 7, 2008).

195. See Congo Briefing, *supra* note 18.

196. See *DR Congo Seeks Nkunda Extradition*, BBC NEWS, Jan. 23, 2009, <http://news.bbc.co.uk/2/hi/africa/7847639.stm>; Jeffrey Gettleman, *An Interview with Joseph Kabila*, N.Y. TIMES ONLINE, Apr. 3, 2009, available at <http://www.nytimes.com/2009/04/04/world/africa/04kabilatranscript.html>.

197. See generally Khadijala, *supra* note 191.

United States. Additionally, given its long-standing alliance with and support of Rwanda, the United States is in a unique position to influence Rwanda's domestic and foreign policy to conform with all U.S. regional peace and stability initiatives, as reflected in the Goma/Nairobi processes.

c. Working to Stop Arms Transfers and Smuggling

The international community must also improve the oversight and enforcement of the free flow of arms in DR Congo and throughout the Great Lakes region. The U.N. General Assembly passed a resolution regarding a comprehensive arms trade treaty in December 2006.¹⁹⁸ Unfortunately, the United States voted against this resolution.¹⁹⁹ More recently, in a call for country views on an arms trade treaty, ninety-four countries submitted their views before the June 20, 2007 deadline.²⁰⁰ Once again, the United States abdicated responsibility by failing to submit its view.²⁰¹ Given U.S. domination of the global arms transfer industry,²⁰² such a laissez-faire approach undermines larger American peace objectives for the Congolese. In fact, the United States should be the catalyst for regional reform by developing and supporting relevant legal initiatives and by providing funding and manpower to control arms transfers and smuggling in DR Congo and neighboring countries.

d. Preventing Illegal Resource Exploitation

Much of DR Congo's armed conflict has been fueled and financed by illicit trade in minerals and other natural resources.²⁰³ Currently, much of that activity is taking place in North and South Kivu, where militias operate with the incentive

198. First Committee Res. 394, U.N. Doc. A/C.1/61/L.55 (Oct. 12, 2006), *adopted by G.A. Res. 89, 61st Sess., U.N. Doc. A/Res/61/89* (Dec. 6, 2006).

199. *UN Assembly Adopts ATT Resolution*, INT'L ACTION NETWORK ON SMALL ARMS, Dec. 2006, <http://www.iansa.org/un/2006/GAvote.htm>.

200. *More Success for the Arms Trade Treaty Campaign*, INT'L ACTION NETWORK ON SMALL ARMS, June 29, 2007, http://www.iansa.org/campaigns_events/more_att_success.htm.

201. *Id.*

202. *Arms Trade Key Statistics*, BBC News, Sept. 15, 2005, <http://news.bbc.co.uk/2/hi/business/4238644.stm>. In the United States alone, arms deliveries by private persons were valued at US\$18.5 billion in 2004. *Id.* The leading competitor, Russia, accounted for a mere US\$4.6 billion. *Id.*

203. *See generally* Ezekiel, *supra* note 7.

of personal enrichment primarily through control of mining areas and exploitation of their resources (which also pays for the internecine violence).²⁰⁴ Extracted minerals are being purchased and exploited by U.S. companies to manufacture everything from cell phones to gas turbine airplane engines.²⁰⁵ American companies that take advantage of these illicit, low-priced commodities should be fined, sanctioned, and possibly prosecuted by the U.S. government. This will go a long way toward reducing the motivation and sustenance of negative forces in DR Congo. Moreover, the United States should assist the Congolese government in creating legislative means to ensure that profits from exploitation of natural resources be equitably distributed to local communities.²⁰⁶

2. Establishing Positive Forces

In addition to backing efforts to eradicate negative forces in the region, the United States must also make significant contributions toward establishing positive forces in DR Congo. There are three primary building efforts on which to focus: expanding and strengthening MONUC, establishing a human rights infrastructure, and building up civil society.

a. MONUC

Although it runs the world's most expensive peacekeeping operation,²⁰⁷ MONUC's current force levels do not permit effective implementation of the Goma/Nairobi peace process.²⁰⁸ MONUC's resources are being stretched beyond capacity, which jeopardizes the often fragile or eroding equilibrium established in high-tension areas such as Bas Congo.²⁰⁹ Quite simply, it is

204. See *Arms Trade Key Statistics*, *supra* note 202; see, e.g., Martin Plaut, *UN Troops in Congo Gold Warning*, BBC NEWS, July 6, 2008, <http://news.bbc.co.uk/2/hi/africa/7492485.stm> (reporting that Rwandan militia allegedly were involved in gold trafficking).

205. Naomi Cahn & Anthony Gambino, *Towards a Typology of Corporate Responsibility in Different Governance Contexts: What to Do in the Absence of Responsible Country Governance?*, 39 GEO. J. INT'L L. 655, 669-70 n.63 (2008).

206. See *DRC Background*, *supra* note 192.

207. See John Heilprin, *UN Chief Defends Peacekeeping Mission in Congo*, ASSOCIATED PRESS, Feb. 28, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/02/28/international/i072035S80.DTL>.

208. See *Peacekeeping Force in DR Congo Stretched to the Limit—Latest UN Report*, *supra* note 190.

209. *Id.*

difficult, if not impossible, for a force of fewer than 20,000 to provide stability to a country the size of Western Europe.²¹⁰ Elsewhere, far more troops have been deployed in much smaller countries with similar problems. In Liberia, for example, whose entire surface area is little more than one average Congolese district, roughly 15,000 U.N. peacekeeping troops have been placed in service. And Burundi, DR Congo's postage-stamp-size neighbor to the east, has received approximately 5000.²¹¹ MONUC quite obviously needs to muster troop numbers compatible with the enormous size of DR Congo and capable of handling the commensurately large security challenges it faces.²¹²

In addition to providing extra cash for MONUC, the United States should actually contribute troops. Well trained, well disciplined American military personnel could make a significant difference in empowering MONUC to fulfill its Herculean task.²¹³ Much like the Marshall Plan, perhaps it is time to start thinking of MONUC as the beginning of a new kind of North Atlantic Treaty Organization in Africa.

Part of this should entail the United States ensuring that all MONUC personnel are properly trained and that any found engaging in violations of human rights or humanitarian laws be swiftly and appropriately punished. U.S. financing and participation should be contingent on imposition of such conditions.

Finally, resources should be consecrated to instituting effective outreach programs for MONUC to promote a positive image among Congolese civilians and those in arms. This is critical in

210. See *Congo-Kinshasa: New Military Centre Built by UN Blue Helmets Unveiled*, U.N. NEWS SERVICE, Dec. 31, 2007, available at <http://allafrica.com/stories/200712310832.html> (indicating that as of the beginning of 2008 MONUC had 18,407 total uniformed personnel).

211. *MONUC: A Case for Peacekeeping Reform*, HUM. RTS. WATCH, Mar. 1, 2004, available at <http://www.hrw.org/english/docs/2005/03/01/congo10222.htm>.

212. *Id.*

213. After the U.N.'s abject 1990s failure to stop massive internecine violence in Somalia, the former Yugoslavia, and Rwanda, conventional wisdom questioned the U.N.'s capacity to engage in effective peacekeeping operations. Others stepped in. In 1999, the North Atlantic Treaty Organization, not U.N. forces, stopped the killing of ethnic Albanians in Kosovo. Later that year a force led by Australia halted the conflict in East Timor. Soon thereafter, the quick deployment of British soldiers in Sierra Leone helped save what was then the U.N.'s largest peacekeeping mission from collapse after attacks by Revolutionary United Front rebel forces. See *Call the Blue Helmets*, ECONOMIST ONLINE, Jan. 4, 2007, http://www.economist.com/research/backgrounders/displaystory.cfm?story_id=8490163.

light of, *inter alia*, the crimes (including sexual violence) allegedly committed by MONUC personnel²¹⁴ and discontent with MONUC, as demonstrated by recent riots in eastern DR Congo.²¹⁵ A public outreach campaign will go a long way toward ameliorating public perception of MONUC and thereby make it a much more effective force.

b. Security Sector Reform

In addition to DDR, DDRRR, and integration, DR Congo needs a global approach to security sector reform that includes more than the army.²¹⁶ Of course, national and local police forces must also be given adequate training and resources.²¹⁷ In addition, the intelligence sector, border control, and customs should also be studied and upgraded to achieve internal efficacy and meaningful integration with the military and police forces.²¹⁸

c. National Human Rights Office

As mentioned previously, international and Congolese human rights and aid groups hope that an independent special advisor for human rights can be established to assist the Goma Committee deal with DR Congo's ongoing human rights issues.²¹⁹ This is an excellent idea but should be extended to the national level. Given human rights violations occurring throughout the country, including in diverse places such as Bas Congo, Kinshasa, and the Ituris, a Congolese national human rights ombudsman should be created. This office should have regional branches in various provinces and the resources and capacity, *inter alia*, to bring litigation and undertake educational programs.

214. See MONUC: *A Case for Peacekeeping Reform*, *supra* note 211.

215. See *DR Congo: Aid Activities Suspended after Riots in North Kivu*, INTEGRATED REG'L INFO. NETWORKS, June 25, 2008, available at <http://www.irinnews.org/Report.aspx?ReportId=78936>.

216. See generally Roger Kibasomba, *Post-War Defence Integration in the Democratic Republic of the Congo*, ISS Paper 119 (Inst. for Security Stud.), Dec. 2005, available at http://www.iss.co.za/dynamic/administration/file_manager/file_links/119.PDF?link_id=31&slink_id=3612&link_type=12&slink_type=23&tmpl_id=3.

217. *Id.*

218. *Id.*

219. See *Q & A*, *supra* note 141.

d. Truth and Reconciliation Commission

Experts have noted that “to restore the social fabric of the [DR Congo], some form of truth-telling will be necessary.”²²⁰ The United States should bankroll the establishment and operation of a new Truth and Reconciliation Commission (“TRC”). As alluded to above, the Sun City TRC, which never heard a single case, failed because it did not provide for proper representation of the belligerent parties and placed the perpetrators’ interests ahead of the victims’.²²¹ In particular, women and girls, who have borne the brunt of Congolese internecine civilian violence, should exercise a leadership role in setting up any future TRC and have a more prominent voice in its proceedings.²²²

e. Civil Society: An Emphasis on Judicial Sector Reform

In the absence of genuine efforts to rebuild Congolese civil society, the measures listed above will be of little to no avail. In addition to governmental, commercial, and medical infrastructure and services, civic participation at all levels must be encouraged and permitted to flourish.²²³ Internally displaced persons and refugees must be resettled and given assistance.²²⁴ Corruption must be systematically rooted out.²²⁵ Investment in a long-term development strategy is essential. This will require the maintenance, improvement, and significant expansion of such American efforts as the DR Congo Act.²²⁶

For purposes of instituting and preserving peace, enforcing the rule of law is paramount and so the judicial sector stands out as perhaps the top priority in this area. It must be furnished with adequate personnel, resources, and training. In this regard,

220. ICTJ ACTIVITY, *supra* note 96.

221. *Id.*

222. *Id.*

223. See, e.g., Jose Ayala-Lasso, *Making Human Rights a Reality in the Twenty-First Century*, 10 EMORY INT’L L. REV. 497, 504 (1996) (indicating that “rebuilding civil society and national capacities,” which strengthens democracy and the rule of law, is essential for the protection of human rights).

224. See Jude Murison, *The Politics of Refugees and Internally Displaced Persons in the Congo War*, in AFRICAN STAKES OF THE CONGO WAR 227 (John F. Clark ed., 2002).

225. See James C. Hathaway, *Forced Migration Studies: Could We Agree Just to “Date”?*, 20 J. REFUGEE STUD. 349, 360 (2007) (according to the U.N.’s Assistant High Commissioner for Refugees, “corruption [in DR Congo] is everywhere endemic and rampant.”).

226. See generally GAO REPORT, *supra* note 159.

two sections of the U.S. Department of Justice could provide invaluable assistance. The International Criminal Investigative Training Assistance Program ("ICITAP")²²⁷ could send experts to provide specialized training to various Congolese law enforcement branches.²²⁸ Similarly, the Office of Prosecutorial Development, Assistance and Training ("OPDAT") could supply a resident legal advisor to Kinshasa to help with rebuilding the justice sector.²²⁹ Together, these two agencies could team up to accomplish, *inter alia*, the following: (1) establish community justice projects that improve coordination between police, prisons, and courts; (2) institute anti-corruption programs; and (3) set up a Women's Justice and Empowerment Initiative that seeks to improve the government's ability to investigate, prosecute, and adjudicate DR Congo's rampant gender-based crimes.²³⁰

3. Ending Impunity

As the preceding paragraphs make clear, there can be no peace without justice in DR Congo. For the cycles of violence and war to abate, perpetrators of war crimes, crimes against humanity, and genocide must be held to account for their offenses. Moreover, human rights and humanitarian law must be strictly enforced to prevent commission of such crimes in the future.

227. See Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421, 430 (2006) (generally describing the International Criminal Investigative Training Assistance Program ("ICITAP")).

228. *Id.* Zagaris explains that within the "overlapping set of U.S. agencies and individuals assisting foreign police," ICITAP emerged in the 1990s as the agency with primary responsibility for coordinating U.S. assistance to foreign police forces. *Id.* Established in 1986 as a United States Department of Justice operation, ICITAP functions with policy guidance from the Department of State. *Id.* Channeling State Department money, USAID takes care of ICITAP's funding. ICITAP's primary objective is to train foreign police, prosecutors, judges, and other criminal justice personnel to further the "rule of law" in their respective countries. *Id.*

229. See Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985, 1004-05 (2007) (explaining that the Office of Prosecutorial Development, Assistance and Training ("OPDAT") was set up to provide assistance to foreign nations and to provide "the U.S. with a stronger base of foreign cooperation" in combating organized crime, illegal narcotics, terrorism, and prosecuting war crimes).

230. ICITAP and OPDAT have already partnered to establish similar programs in other parts of Africa. See U.S. Dept. of Justice, Africa and Middle East, <http://www.usdoj.gov/criminal/icitap/programs/africa-mideast/> (last visited Apr. 19, 2009).

The United States can and should play a crucial role in both regards.

a. Supporting Prosecution Efforts

i. International Criminal Court

The ICC investigations and prosecutions of Ituri warlords could represent an important step in ending the culture of impunity that has pervaded in DR Congo. By its absence from the ICC, the United States is hampering a crucial Congolese human rights initiative.²³¹ In addition to assuring more effective results for existing investigations and prosecutions, U.S. participation could help facilitate ICC investigations related to crimes in other parts of the country and committed by high-level perpetrators in the government, military, and other sectors of society. For example, it is perhaps time for the ICC to indict Laurent Nkunda given DR Congo's collapsed judicial sector. Clearly, as indicated above, Ituri is not the only area where atrocities have been committed over the past decade. Moreover, U.S. support could help the ICC in the arrest and prosecution of indicted LRA leaders, including chief Joseph Kony, whose forces have been committing atrocities in DR Congo since late last year.²³²

ii. Domestic Prosecutions

As a corollary, DR Congo domestic prosecution efforts must also be buttressed. If he is not indicted by the ICC (and extradited to DR Congo), Nkunda is the poster child for this necessity. As mentioned above, U.S. agencies such as ICITAP and OPDAT could lend significant assistance. These agencies could spearhead efforts to place resources in the proper hands for justice sector rebuilding efforts. Further, the United States could establish various programs, such as the State Department's "Rewards for Justice" program (already used effectively in Africa to apprehend Rwandan *génocidaires* on the lam) to help capture DR Congo fugitives.²³³

231. See generally Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. INT'L. L. & PRAC. 151, 156 n.16 (noting generally that U.S. policy against the ICC is obstructing one of the primary global human rights campaigns).

232. See *LRA Rebels Commit New Atrocities*, *supra* note 137.

233. The "Rewards for Justice" program has been used by the U.S. Department of State to aid in the apprehension of human rights violators. See Allison Marston Danner,

iii. Establishing a Hybrid Tribunal?

Finally, to the extent atrocity crimes have been perpetrated outside the temporal jurisdiction of the ICC (i.e., before July 2002)²³⁴ and are likewise beyond the competence of Congolese authorities to investigate and prosecute, a separate internationalized hybrid tribunal ought to be established.²³⁵ For effective and systemic eradication of the culture of impunity, pre-2002 crimes must also be dealt with.

b. Ensuring Enforcement of Human Rights & Humanitarian Law

Committing U.S. troops to MONUC would certainly help shore up enforcement of both human rights and humanitarian law in DR Congo—an essential part of imposing and sustaining the rule of law there. Even absent that, the United States should provide assistance in training MONUC and Congolese troops in the law of war. This would certainly help reduce victimization of civilians and stem a rampant culture of predation.

CONCLUSION

During the first phase of Congolese independence, U.S. policy was clearly dominated by narrow Cold War interests. But as this Article has demonstrated, that policy has evolved over the past decade. Although the United States has at times had divergent objectives (including resource exploitation) and problematic partners (including, most notably, Rwanda and Uganda) in the Great Lakes Region during the previous ten years, its goal of helping DR Congo emerge from the rubble of Mobutuism and civil war has gained greater urgency and become a more prominent and fixed part of U.S. strategy.²³⁶ Considering that 45,000 human beings still perish every month due to conflict in DR

Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 AM. J. INT'L L. 510, 535 (2003) (describing how the program has been used help bring Rwandan *génocidaires* into custody).

234. See Pascal Kambale & Anna Rotman, *The International Criminal Court and Congo: Examining the Possibilities*, CRIMES OF WAR PROJECT, Oct. 2004, available at http://www.crimesofwar.org/africa-mag/afr_05_kambale.html; see also Rome Statute of the International Criminal Court art. 11, opened for signature July 17, 1998, 2187 U.N.T.S. 90.

235. Kambale & Rotman, *supra* note 234; see, e.g., James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 *FORDHAM INT'L L.J.* 616 (2005).

236. See, e.g., James Traub, *The Congo Case*, N.Y. TIMES MAG., July 3, 2005, at 35.

Congo, it is high time that goal be completely achieved. Not only is it the right thing to do and the best policy from a humanitarian perspective, it is in the U.S. and global interest that a country the size of Western Europe, lying at the heart of the African continent, attain stability.²³⁷ As the New York Times has noted, "When Congo shakes, Africa trembles."²³⁸

This Article has made a case for the United States implementing with all due speed an "African Marshall Plan"—a mammoth infusion of resources and assistance.²³⁹ This program should be administered by a well-integrated, single agency or office within the U.S. government and use an ombudsman to insure proper allocation and distribution of resources. As the original aid initiative helped Western Europe cling to peace and democracy after the Second World War, the "African Marshall Plan" should provide the same benefits for DR Congo in the wake of Africa's "First World War." This behemoth of a country is truly at a crossroads in its history. So is the United States as it enters a new era with the presidency of Barack Obama, who was born to an African father the year Lumumba was murdered with American complicity.²⁴⁰ Perhaps the United States can now come full circle. For it is still not too late for Patrice Lumumba's vision of an independent, secure and prosperous Democratic Republic of Congo to be realized. If that is to happen, the spirit of Lumumba and Marshall must now come together for the birth of a new central Africa.

237. See Mark Bellamy, *Weak States in Africa: U.S. Policy Options in the Democratic Republic of Congo: Testimony Before the Senate Committee on Foreign Relations Subcommittee on African Affairs*, Apr. 9, 2002 (Statement of Mark Bellamy, Principal Deputy Asst. Sec'y for Afr. Aff.), available at <http://www.state.gov/p/af/rls/rm/9313.htm> (explaining that, in light of major humanitarian crisis in DR Congo destabilizing much of Africa, it is in the best interests of the United States to restore stability to the Great Lakes region, ameliorate the humanitarian crisis, promote a democratic government and respect for human rights, and promote economic development and reform).

238. See generally Gettleman, *supra* note 130.

239. See Gerald LeMelle, *Africa Policy Outlook 2008*, FOREIGN POLICY IN FOCUS, Feb. 7, 2008, available at <http://www.fpiif.org/fpiftxt/4949> (urging the United States to embrace an African strategy that invests in socioeconomic infrastructure, champions fair terms of trade for African products, and promotes sustainable economic development that addresses the aspirations and welfare of the African people).

240. See *Meet the Candidate*, Barackobama.com, http://www.barackobama.com/learn/meet_barack.php (last visited Apr. 19, 2009) (noting that Barack Obama was born in Hawaii on August 4, 1961 to a Kenyan father).