



**UNIVERSITY OF
KWAZULU-NATAL**

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**THE ICC'S JURISDICTIONAL LIMITATIONS AND THE
IMPUNITY FOR WAR CRIMES IN THE DRC: A PLEA
FOR THE ESTABLISHMENT OF A SPECIAL
CRIMINAL TRIBUNAL**

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**The ICC's jurisdictional limitations and the impunity for war crimes
in the DRC: *a plea for the establishment of
a Special Criminal Tribunal***

A dissertation

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A plea for the establishment of a Special Criminal Tribunal

“Believe in peace as the most powerful weapon in search for a lasting solution.”

(Nelson Mandela: *Conversations with Myself*, London: Macmillan: (2010) 409)

Dedication

To my Almighty God Yahweh;
To my beloved mother Rebecca M`Katatira;
To my dear brother Jean-Daniel Kabati;
To all the victims of wars in the world.

Declaration Statement of the origination:

I, Christian Kabati Ntamulenga, hereby declare that this dissertation is a product of my own work except where otherwise stated and expressly acknowledged, and that it has not been previously presented either in part or in its entirety at any other university for the award of a degree.

Signature:..... Student N°.....

Date:.....

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Abstract

The cruelty and scope of the widespread criminality of humans in the world, which was a feature of the past century, was fuelled by scientific progress, egoism and humanity's power of destruction. The criminal consequences of the many imperialistic, hegemonic and barbarous wars in that century were immeasurable in terms of violations of human rights.

Notwithstanding the emergence of international criminal justice through the experience of the International Criminal Military Tribunal of Nuremberg and Tokyo and later the *ad hoc* International Criminal Tribunal for former Yugoslavia and Rwanda, globally, impunity for egregious crimes continues.

The establishment of the International Criminal Court (ICC) at the end of the 20th century was saluted as a major step forward in the evolution of international criminal justice. While previous tribunals were *ad hoc*, the ICC is permanent and has large territorial jurisdiction. This raises hope among the many Congolese victims of the first African World War, who view the ICC as a paradigm change that will put a stop to impunity for crimes against humanity and the crimes of genocide and war.

In the Democratic Republic of the Congo (DRC), the past decades have been marked by instability and horrible armed conflicts (1996-97 and 1998-2003) which left several million people dead, and which were marked by gross war crimes. The negative consequences of those atrocities persist until today. While the ICC initiated the prosecution of some war criminals in 2004, most crimes committed before 2002 remain unpunished, because the ICC's jurisdiction is limited to after that time.

It is therefore imperative to examine other mechanisms to deal with impunity for various grave crimes, including war crimes, perpetrated between 1996 and 2002. Thus the aim of this research is to contribute to the fight against impunity for crimes in the DRC by examining how other modes of jurisdiction such as the principle of universality can be applied, and to assess the need for the establishment of a specific tribunal for the DRC.

Considering the inability and incapacity of the Congolese judicial apparatus, this study concludes by recommending the establishment of a Special Criminal Tribunal which can put an end to impunity for serious crimes committed in the DRC.

List of abbreviations and acronyms

AFDL	Alliance des Forces Démocratiques Pour la Libération du Congo-Zaïre(Alliance of Democratic Forces for the Liberation of Congo-Zaïre
ANC	African National Congress
CICR	Comité international de la Croix-Rouge (International Committee of the Red Cross, ICRC)
DRC	Democratic Republic of the Congo
FAR	Forces Armées Rwandaises (Rwandan Armed Forces)
FAZ	Forces Armées Zaïroises (Zairian Armed Forces)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
MLC	Mouvement de Libération Congolais (Movement for the Liberation of Congo)
MONUC	Mission d' Organisation des Nations au Congo (United Nations Organization Mission in the Democratic Republic of the Congo)
MONUSCO	Mission d' Organisation des Nations Pour la Stabilization du Congo(United Nations Mission in the Democratic republic of the Congo)
NATO	North Atlantic Treaty Organisation
OAU	Organization of African Unity
PRP	Party of the People's Revolution (DRC)
RCD	Rassemblement Congolais pour la Démocratie (Congolese Rally for Democracy)
RCD-ML	RCD /Mouvement de Libération (RCD-Liberation Movement)
RCD-N	RCD/ National
RPA	Rwandan Patriotic Army (APR: Armée Patriotique Rwandaise)
RPF	Rwandan Patriotic Front
SADC	Southern African Development Community
UFC	Use of Force Committee
UN	United Nations
UNOHCHR	United Nations Office for High Human Commissioner of Human Rights

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Chapter 1: Introduction

1.1 Background

The emergence of international criminal justice, aimed at prosecuting odious (mass atrocities) crimes committed during the numerous terrible wars in the twentieth century, culminated in the creation of the International Criminal Court (ICC) at the dawn of the third millennium. The ICC is designed to end the culture of impunity for crimes of concern to the international community.¹

Since 1960, the DRC has been subjected to diverse and multiple conflicts² which have resulted in a massive loss of lives. The situation is fuelled “by the vicious cycle of the illegal exploitation of natural resources on one hand, often to fund the illegal

¹ See Preamble of the Rome Statute as adopted on 17 July 1998 and entered into force on 1 July 2002, see, W W Burke-White „Proactive complementarity: The International Criminal Court and national courts in the Rome System of International Justice“ (2008) 49 (1) *Harvard International Law Journal* 53-54 available at <http://www.heinonline.org/HOL/Page?handle=hein.journals/hilj49&id=1&size=2&collection=journals&index=journals/hilj>, accessed on 10 Jan 2011; L Moreno-Ocampo „The International Criminal Court: Seeking Global Justice“ (2007-2008) (40) (1 & 2) in *Case Western Reserve Journal of International Law* 215-216 available at <http://www.heinonline.org/HOL/Page?handle=hein.journals/cwrint40&id=1&size=2&collection=journals&index=journals/cwrint>, accessed on 21 Jan 2011; P Kirsch & J T Holmes „The birth of the International Criminal Court: the Rome Conference“ (1998) *Canadian Yearbook of International Law* 3-5 available at <http://www.heinonline.org/HOL/Page?handle=hein.journals/cybil36&id=1&size=2&collection=journals&index=journals/cybil>, accessed on 20 Jan 2011; P M Wald „International Criminal Courts – a stormy adolescence“ (2006) 46 (2) in *Virginia Journal of International Law* 319-320 available at <http://www.heinonline.org/HOL/Page?handle=hein.journals/vajint46&id=1&size=2&collection=journals&index=journals/vajint>, accessed on 23 Jan 2011. Note: in this study the expression „international community“ is used to name nation states acting together because it is commonly used and well known, even if its definition is controversial. The expression „international society“ reflects the reality of contradictions between states on the international scene. For more comments, see M Schuman „Is there an international community?“ available at <http://americanfuture.net/?p=1122>, accessed on 23 March 2011; K Annan „The meaning of international community“ (2007) available at <http://www.unis.unvienna.org/unis/pressrels/1999/sg2478.html>, accessed on 23 March 2011.

² T Kanza *Conflict in Congo, the rise and the fall of Lumumba* (1972) 265-323; F Fanon *Toward the African Revolution* (1980) 191-197; C Braeckman *Lumumba: un crime d'Etat* (2002) 57-69. As noted by MONUC (MONUSCO since 1 July 2010): “Congo is emerging from a difficult past: a long colonial period, followed by a birth and infancy in the midst of Cold War, then several decades of chronic instability, followed by two wars over a five-year period. Overall, it has suffered a history of some four decades of autocratic rule and economic mismanagement“. *Overview of the roles and responsibilities of the components of the United Nations Organisation Mission in the DR Congo* (2006) 4.

importation of arms on the other. The result has too often been egregious human rights abuses and widespread violence”.³ The scope of the recent two wars (1996-97 and 1998-2002) was so wide, that they were described by some as “Africa’s first world war”.⁴ These two conflicts saw the direct involvement of six African countries’ armed forces and had a devastating impact in many respects: human,⁵ material,⁶ environmental,⁷ political,⁸ economical,⁹ judicial,¹⁰ social,¹¹ and cultural.¹² There has been a gross, serious and systematic violation of human rights, particularly in the eastern part of the DRC where in some places systematic sexual violence was generalised and used as an instrument of war against the civilian population.¹³ According to MONUC:

³ MONUC (note 2 above) For more updated data, see UNOHCHR (2010) „Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003” (2010) available at http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf, accessed on 22 March 2011.

⁴ N Ngoma „Hawks, doves or penguins? A critical review of the SADC military intervention in the DRC” (2004) (ISS Papers) available at <http://www.iss.co.za/uploads/PAPER88.PDF>, accessed on 20 February 2010; M Sassoli & A Bouvier *Un droit dans la Guerre?* (2003) Vol II 1695; H Ngbanda Nzambo :*Crimes organisés en Afrique centrale: révélations sur les réseaux rwandais et occidentaux* (2004) 25.

⁵ Oxfam, Save the Children Fund et Christian Aid *Aucune perspective en vue, la tragédie humaine du conflit en République Démocratique du Congo* (2001) 1 and following.

⁶ G Lynda „Civil wars and looting in the Congo: how the poor pay the bill” (2005) 5 (2) in *African Journal on Conflict Resolution* 7-31 available at http://www.accord.org.za/downloads/ajcr/ajcr_2011_2.pdf, accessed on 30 March 2011.

⁷ A Malonga Mulenda *De la Responsabilité Internationale des acteurs impliqués dans les guerres de 1996 et 1998 en République Démocratique du Congo au regard des violations liées au droit international de l’environnement* (2007-2008) (unpublished Masters dissertation) available at <http://www.memoireonline.com/08/09/2602/De-la-Responsabilite-Internationale-des-acteurs-impliques-dans-lesguerres-de-1996-et-1.html>, accessed 30 March 2011.

⁸ K Masire „The Lusaka Agreement: prospects for peace in the Democratic Republic of Congo” (2001) (10) (1) *African Security Review* available at <http://www.issafrika.org/pubs/ASR/10No1/Masire.html>, accessed on 30 March 2011; T Ngoy *L’Accord de Lusaka et la paix en RDC: une autre lecture* 2 ed. (2002) 192-203.

⁹ Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo available at <http://www.un.org/News/dh/latest/drcongo.htm>, accessed on 18 April 2011; Rapport des travaux de la Commission spéciale de l’Assemblée Nationale chargée de l’examen de la validité des conventions à caractère économiques et financiers conclues pendant les guerres de 1996-1998 et de 1998-2003 (26 June 2005); J M Bokongo *République Démocratique du Congo Richesse et développement la solution?* Available at http://www.congovison.com/livres_bokongo.html, accessed on 31 March 2011.

¹⁰ H Friman *The Democratic Republic of Congo Justice in the aftermath of peace?* Vol 10 (3) *African Security Review* (2001) available at <http://www.issafrika.org/pubs/ASR/10No3/Friman.html>, accessed on 28 March 2011; N M Songa „Droit pénal dans la tourmente” (2004) (1) in *Revue Pénale Congolaise* 4-19.

¹¹ T Trefon „Reinventing Order” in T Trefon (ed) *Reinventing order in the Congo: how people respond to state failure in Kinshasa* (2004) 1-19.

¹² M Wrong *In the footsteps of Mr Kurtz living on the brink of disaster in the Congo* (2000) passim.

¹³ J Muthangai Katusya „The Rape Ordeal in Eastern Democratic Republic of Congo (DRC)” 2011 available at http://www.iss.co.za/iss_today.php?ID=1250, accessed on 21 March 2011; S Kirchner

The DRC is one of the world's greatest living tragedies: 3.8 million¹⁴ dead as result of the war; a further 2.4 million internally displaced; 388,000 refugees outside of the country; 17 million malnourished; 1.3 million stricken with HIV/AIDS; and more than 2000 victimised by landmines since 1998. It is a bitter irony that one of Africa's potentially richest countries is one of the world's poorest; ranked 167 out of 177 countries in the 2005 UNDP human development index.¹⁵

Comparing Congolese atrocities to the Jewish Holocaust, Jewish Rabbis noted: "The people of the Democratic Republic of the Congo have for over 11 years endured violence, war crimes, corruption, humanitarian crisis, looting and rape on a scale that defies comprehension".¹⁶

To date, those responsible for these mass atrocities and crimes remain unpunished. Although the war was said to have ended in 2003,¹⁷ impunity for these wars crime is an ongoing issue. Worse still, some of the alleged war criminals hold senior positions in society¹⁸ and are involved in ongoing crimes.

„Wartime rape. Sexual terrorism in the Eastern Provinces of the Democratic Republic of Congo – international law and human rights“ (2008) available at <http://www.hausarbeiten.de/faecher/vorschau/118118.html>, accessed on 15 May 2011.

¹⁴ This number is approximate and needs to be updated. In 2010 Christoph wrote about roughly 7 million deaths – see N D Kristof *The world capital of killing* (06 February 2010) *New York Times* available at <http://www.nytimes.com/2010/02/07/opinion/07kristof.html?src=twr>, accessed on 10 May 2010. In the same vein, in a letter to the *Guardian*, Jewish Rabbis recalled the 5,4 million death toll given by the International Rescue Committee in DRC in April 2007, and note that „This horrific figure continues to rise at a rate of 45,000 a month. The additional consequences of disease and malnutrition has resulted in a rise in the death toll to at least 7 million, not to mention the millions of refugees“ – see „We must not forget the victims of the war in Congo“ (Friday 23 April 2010) *Guardian* available at <http://www.guardian.co.uk/world/2010/apr/23/victims-of-war-in-congo>, accessed on 05 March 2010. However those numbers are not unanimous – for more information read UNOHCRH (note 3 above).

¹⁵ MONUC (note 2 above).

¹⁶ Jewish Rabbis (note 14 above).

¹⁷ In spite of the official end of the Second War in 2003 the aftermath is not easy; some parts of the DRC especially in the East, are still affected by fighting between rebel groups who are committing rapes, murders and other numerous crimes, see, H Soysal „The situation in DR Congo“ (2011) available at http://www.rcimun.org/SC_1.pdf, accessed on 10 March 2011. The violence phenomenon seems to have attained the complex process of escalation described by P Waldmann which leads to the independisation, privatisation and commercialisation of violence – see „Civil wars: dynamics and consequences“ (1999) in *World Encyclopedia of Peace* Volume I 2 ed 208-212.

¹⁸ Observatoire National des Droits de L'Homme *Actes du Forum National sur les droits de l'homme en République Démocratique du Congo*, «Etat de lieux de la situation des droits de l'homme en République Démocratique du Congo» (2004) 18.

This research study aims to examine the necessity of instigating the prosecution of those serious crimes and other grave violations of human rights perpetrated in the recent Congolese armed conflicts.

Although some individuals¹⁹ are being prosecuted by the ICC for a number of crimes committed in the DRC during the war periods, many serious crimes, and notably war crimes perpetrated before 2002, remain unpunished.

This study aims to answer the following questions:

- Were war crimes really committed in the DRC between 1996 and 2002?
- Why do the perpetrators of these crimes remain unpunished today?
- How can the perpetrators of those crimes be prosecuted and punished effectively?

1.2 Statement of the problem

The study intends to investigate war crimes committed in the DRC, which remain unpunished and cannot be prosecuted by the ICC. Article 11 (1) and (2) of the Rome Statute,²⁰ provides that the jurisdiction of the ICC may only be exercised after the entry into force of the Statute, or, for any State which becomes a party to the Statute, after the entry into force of the Statute for that state, except if the latter declares otherwise.²¹ The DRC signed the Statute on 8 September 2000 and ratified the Statute²² with effect from 11 April 2002. Hence, the ICC may only exercise its

¹⁹ Such as Thomas Lubanga, Germain Katanga, Mathieu Ngudjolo, Bosco Ntaganda, Callixte Mbarushimana. See „Situation in the Democratic Republic of the Congo“ available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/>, accessed on 14 May 2011. Have alleged committed crimes after July 2002 the year of Inter -Congolese Dialogue period during which, war was almost finished. It is an irony that the entry into force of the Rome Statute coincides with the official end of the war in the DRC, and it is a tragedy that it cannot act retroactively.

²⁰ The founding document of the ICC adopted in Rome by 120 states on 17 July 1998 entered into force in the DRC on the 1st July 2002, the DRC being the 60th state to ratify it. The term Rome Statute is the most commonly used to describe this foundation instrument of ICC, however it would be more logical or correct to call it Rome Treaty or Rome Convention or ICC Statute.

²¹ According to article 12 paragraph 3 of the Rome Statute, if the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

²² See „Democratic Republic of Congo: signature status; ratification and implementation status“ available at

jurisdiction in terms of crimes committed in DRC after the entry into force of its Statute, which was effective from July 2002. Unfortunately, many gross and serious crimes in the DRC were perpetrated during the course of armed conflicts prior to this date.

Therefore, notwithstanding the referral by the DRC authorities in March 2004 to the Office of Prosecutor of the Congolese situation,²³ the Court is unable to prosecute war crimes committed in the Congo between 1996 and 2002 during the last two armed conflicts.²⁴ The dilemma of impunity resulting from this is unacceptable²⁵ and raises the necessity of looking for a mechanism to combat it, whether at the national or international level. Since the Congolese judicial machinery has failed to try those war criminals, universal jurisdiction is examined and the argument for a Special Criminal Tribunal is explored.

Hence this study intends to:

- demonstrate that odious international crimes and specifically war crimes were perpetrated in the DRC on a large scale between 1996 and 2002;

<http://www.icccpi.int/Menus/ASP/states+parties/African+States/Democratic+Republic+of+the+Congo.htm>, accessed on 11 April 2011.

²³ „Prosecutor receives referral of the situation in the Democratic Republic of Congo“ available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB>, accessed on 14 May 2011.

²⁴ There is no doubt that many other war crimes were committed before 1996 during the pre-colonial, colonial and Mobutu regime. However, while a longer extension of jurisdiction is preferable, it could be unrealistic and inefficient. Hence this research focuses on war crimes committed during the period 1996 to 2003. As for crimes committed before that time frame, other mechanisms can be investigated to indict those responsible. The recent complaint filed by the Lumumba family under Belgian criminal jurisdiction to try 12 Belgians suspected to be involved in the plot to assassinate Lumumba 50 years earlier, is an example in this respect. See *Procès de l'assassinat de P.E Lumumba Ludo De Witte: "C'est sous la responsabilité des officiers belges que P.E. Lumumba a été torturé et, finalement, exécuté"* (09 Jan 2011). Interview with Ludo De Witte available at <http://kilimandjoro.blogs.dhnet.be/archive/2011/01/09/congo-kinshasa-belgique-proces-de-l-assassinat-de-p-e-lumumba.html>, accessed on 15 February 2011; *Le Potentiel Lumumba c'est maintenant le temps de la vérité judiciaire* (27 December 2010). Interview with Annemie Schaus and Christophe Marchand available at http://universeprod.com/home/index.php?option=com_content&view=article&id=110:lumumba-cest-maintenant-le-temps-de-la-verite-judiciaire&catid=40:politique&Itemid=135, accessed on 15 February 2011; CADTM Communiqué de Presse (24 June 2010) <http://www.cadtm.org/Militant-inlassable-contre-l>, accessed on 15 February 2011.

²⁵ Relating to impunity in the DRC see C Kabati Ntamulenga „Réflexion sur les mécanismes de lutte contre l'impunité des crimes internationaux en RDC“ (2010) *Paroles de Justice Revue Annuelle de Doctrine* 137-147.

- show the inadequacy and/or incapacity of the Congolese judicial system to punish those crimes;
- demonstrate the limits of the *ratione temporis* jurisdiction of the International Criminal Court and the universal jurisdiction mode to prosecute those crimes committed in the DRC;
- unravel the socio-political reasons why the international community remains unconcerned about those serious crimes despite their severe consequences (approximately seven million deaths);²⁶
- protect the DRC as well as the international community from the adverse effects of those crimes on their perpetrators and victims;
- denounce the impunity for those odious crimes as a negative example for future generations; and
- explore the best legal way to establish a special criminal tribunal for the DRC.

This research analysis will be based on four principle theories.

The first relates to transitional justice. Guided by this theory, this thesis examines the transition process from a war-torn society to a unified and peaceful one. The outcomes of the serious crimes committed during the war in the post-conflict context are discussed. This raises a fundamental question: how to reconcile the need for justice on the part of victims with the numerous risks that a penal approach could cause to a society that has just achieved peace by means of political negotiations. Democracy in the DRC is young and its foundations are weak. One of the consequences of delay and/or absence of justice is that sometimes victims themselves become perpetrators of heinous crimes.²⁷ This leads to an analysis of the options: are judicial mechanisms or extra-judicial mechanisms, such as amnesty or a truth and reconciliation commission, the best way forward?²⁸ In terms of the threat of ongoing crimes in the country, and the negative impact of the impunity precedent, there is a

²⁶ N D Kristof (note 14 above).

²⁷ UNOHCHR(note 3 above). In the Foreword, Navanethem Pillay, commenting on the situation related to the incapacity of justice in Congo, observes that “In some cases, victims became perpetrators, while perpetrators were themselves sometimes subjected to serious violations of human rights and international humanitarian law, in a cycle of violence that has not yet abated”.

²⁸ For instance South Africa’s experience of the TRC seems interesting and insightful in certain respects. See the Most Revd Archbishop Emeritus D Tutu in Foreword South Africa Department of Justice *Truth and Reconciliation Commission of South Africa Final Report* (1998) Vol 5: 6.

need for justice, which could act as a deterrent to criminals and restore victims' sense of self-worth. In order to enhance national cohesion, this study examines how extra-judicial mechanisms can be applied to some types of crimes, with the criminal justice system being applied to others. The option of a complementary approach of a range of transitional solutions is considered.²⁹ Without justice,³⁰ there can be no true reconciliation and sustained peace; justice is a pillar of democracy. However the exercise of good justice must take into account the safeguarding of the social order.³¹

The second theory is based on the deterrent effect of criminal justice. Criminal law plays a crucial role in protecting the values³² of human society, by using a range of sanctions to prevent community members from violating the rule of law. Either at the national or international level, criminal justice must be a deterrent to criminals.³³ This theory will help to examine how effective the criminal process set up by the ICC in the DRC is.

The third theory is grounded on the principle of universality: *judex deprehensionis*. While many national judicial systems have failed to curb the commission of serious crimes, which have become more and more transnational, the transformation of the world to a global village also encompasses justice. The establishment of a global judicial system is a beacon of hope for victims of odious crimes and promises the promotion of justice and human rights. This theory focuses on the right of domestic

²⁹ M Du Plessis & J Ford *Justice and Peace in a New Zimbabwe. Transitional Justice Options*, (2008) available at <http://www.iss.co.za/pgcontent.php?UID=3059>, accessed on 28 April 2010; Luzolo Bambi Lessa *Justice transitionnelle et nouvel ordre politique en République Démocratique du Congo* (2003) 9.

³⁰ Luzolo Bambi Lessa „L'impunité: Source de violations graves et répétitives des droits de l'homme en République Démocratique du Congo" in *Actes du Forum National sur les Droits de l'homme en République Démocratique du Congo* (2004) p 159. This author states: „Il n'ya pas de paix sans réconciliation nationale, pas de réconciliation nationale sans justice, pas de justice sans réparation, pas de réparation sans vérité et pas de vérité sans pardon" which we translate as „there is no sustainable peace without national reconciliation, no reconciliation without justice, no justice without reparation, no reparation without truth, and no truth without forgiveness".

³¹ The recent ICC intervention in the Libyan crisis illustrates how a suitable solution can be compromised by the administration of justice. See A Louw „Africa should work with, not against the ICC in resolving the Libyan crisis" available at http://www.iss.co.za/iss_today.php?ID=1323, accessed on 27 July 2011.

³² J Burchell & J Milton *Principles of Criminal Law* 2 ed (2005) 9; N M Songa *Traité de droit pénal général congolais* 2 ed (2007) 15; L Bolongo *Droit Pénal Spécial Zaïrois* 2 ed (1985) 12.

³³ D Kuwali „From promise to practice: towards universal jurisdiction to deter commission of mass atrocities in Africa" in *Africa Security Review* 2010 (19) (1) 48-61; R Ali Shalan *The international Criminal Court: is it a deterrent to international crimes?* (unpublished Masters dissertation) University of KwaZulu-Natal (2005) 40-90, 107, 150; N M Songa (note 32 above; 347).

justice to prosecute and adjudicate criminals“ arrest in a given country for breach of law, wherever these acts are committed and regardless of the nationality of the criminal or the victims. It also examines how this jurisdiction, based on articles 49 and 146 of the Geneva Conventions of 12 August 1949 can be used to effectively combat impunity in the DRC.

The fourth theory is based on the sovereign equality of states. It submits that, in the international judicial order, states have the same rights and must be treated in the same way. This is proclaimed in article 2 of the Charter of the United Nations (UN) of 1945. Considering that the DRC is a sovereign and independent member of the UN, the study will examine why the DRC“s need for a special criminal tribunal is still unfulfilled while at the same time such courts have been established for other states with similar circumstances such as Rwanda, Yugoslavia, Sierra Leone and Lebanon.

1.3 The significance of the study

A focused examination of ways to combat this impunity for war crimes in the DRC could offer a worthwhile model. This research study adopts a holistic approach in its scrutiny of the principles of international humanitarian law, international criminal law and Congolese criminal law related to the prosecution of war crimes committed in the DRC. It will hopefully enhance the understanding and appraisal of the efficiency of international criminal justice against the impunity for serious crimes committed on the African continent.³⁴ As Kabange notes “Practically, the OAU has served as talking shop for African states but has displayed considerable reluctance in intervening in systematic human rights abuses by various regime in the region”.³⁵ In the same vein

³⁴ In connection with crimes on the Africa continent read D Kuwali (note 33 above; 48-61); M Meredith *The state of Africa: a history of fifty years of independence* (2006) 312 passim; M Ogunlana „Effective strategies for conflict prevention in West Africa“ in *Proceeding of the eleventh annual conference* (1999) 334; O N Rurihose „Problématique des droits de l’homme et des peuples en Afrique“ in *Philosophie et droits de l’homme: actes de la 5e semaine philosophique de Kinshasa du 26 avril au 1er mai 1981* (1982) 139; D Kalindye Byanjira *Nécessité de l’Etat de Droit dans la promotion des droits de l’homme au Zaïre* (unpublished PhD dissertation) Catholic University of Lyon (1995) 23; G Basue Babu Kazadi *L’action internationale en faveur de la démocratie en Afrique: le cas du Zaïre* (unpublished PhD dissertation) University of Nancy (1999) 2 ; S Mugangu Matabaro “Les Droits de l’Homme dans la Région des Grands Lacs Bilan et Perspectives“ in *Les Droits de l’Homme dans la Région des Grands Lacs Réalité et Illusions*(2003)419,419-426 .

³⁵ C J Kabange Nkongolo „Protection of human rights in Africa: Africa human rights in comparative perspective“ (2011) in *Journal Officiel de la République démocratique du Congo* available at <http://www.leganet.cd/Doctrine.textes/Droitpublic/DH/kabange.II.pdf>, accessed on 27 July 2011.

du Plessis points out that “several of Africa’s leaders in the fights for independence led their newly liberated nations into totalitarianism with an ineffectual OAU doing little to put a stop to this African malaise”.³⁶

This research is required in the academic arena, considering that limited studies have been conducted on this topic in the DRC. It will also contribute towards an understanding of current discourse on the relevance of the ICC in Africa.³⁷

This analysis will hopefully serve as a tool in the search to restore justice in a country where war crimes have been committed, but the perpetrators are walking free, despite the consequences of recurring wars and the alleged serious crimes committed by them in the DRC.³⁸ For, as Kuwali³⁹ notes “mass atrocities crime is facilitated by a „culture of impunity“. If potential perpetrators think that they can get away with impunity, they are more likely to resort [to] such crimes in pursuit of their political or economic goals”. Justice is a tool to build and consolidate peace, security, and development in the African Great Lakes Region. As MONUC points out:

Once stable, the DRC presents real opportunities for intra-regional economic cooperation, foreign investment, and sustained growth and development. But a DRC in decay, vulnerable to plunder and susceptible to violence, is a threat to itself, and to the region with negative implications for the entire continent.⁴⁰

In the same vein Frantz Fanon asserted “Let us be sure never to forget it: the fate of all us is at stake in the Congo”.⁴¹

³⁶ M Du Plessis „The African Union“ in J Dugard *International law: a South African perspective* 3 ed (2005) 546, 549-550.

³⁷ M Du Plessis „Africa and the International Criminal Court“ (2005) available at <http://www.csvr.org.za/wits/confpaps/duplessis.htm>, accessed on 01 April 2010; „The International Criminal Court and its work in Africa“ (2008) available at <http://www.iss.co.za/pgcontent.php?UID=3078>, accessed on 27 April 2010; Kofi Annan „The ICC represents hope for victims of atrocities“ (2009) *New African* 68-69.

³⁸ I Mpinga Tshibasus „Note introductive“ *Actes du Forum National sur les Droits de l’homme en République Démocratique du Congo* (2004) 4. Also Kenneth Roth „DR Congo: UN Report exposes grave crimes“ available at www.hrw.org/fr/news/2010/10/01/rd-c, accessed on 02 October 2010.

³⁹ D Kuwali (note 33 above).

⁴⁰ MONUC (note 3 above).

⁴¹ F Fanon (note 2 above; 197).

Visiting refugees in the Congo in 2003, Goodwill Ambassador for the United Nations High Commissioner for Refugees and actress Angelina Jolie observed a *ripple of genocide* and concluded “I believe I am right in saying that here peace would not just stop the killing but begin to give hope and stability to all Africa”.⁴²

The stakes are high in the Congo and a sustained solution requires a comprehensive approach. This study examines the judicial aspects of such a solution.

1.4 Research approach and methods

This study is a desk top research exercise.

Data has been collected from primary sources related to the ICC such as:

- the Rome Statute (18 July 1998);
- the Element of Crimes and The Rules of Procedure and Evidence of the ICC (10 September 2002), as well as other documents on the basis of which the ICC was established;
- the Constitution of the DRC (18 February 2006 as revised on 20 January 2011);
- Interim Accords on Cooperation and Immunity of the ICC in the DRC or *Accords Provisoires de Coopération des Privilèges et Immunité de la Cour Pénale Internationale en RDC* (13 October 2004);
- the Congolese code on organization and jurisdiction of the judiciary (31 March 1982); and
- Congolese criminal military law (18 November 2002).

The above has been systematized and clarified by doctrinal research or the „black-letter law“ approach.⁴³

To understand the gap between „law in book“ and „law in action“ the study has utilised the socio-legal studies methodology, which is complementary to doctrinal research.

⁴² A Jolie & J Prendergast „Ripples of genocide Journey through Eastern Congo“ available at <http://www.ushmm.org/museum/exhibit/online/congojournal/download/transcript.pdf>, accessed on 10 May 2011.

⁴³ M McConville & W Hong Chui „Introduction and Overview“ in M McConville & W Hong Chui *Research methods for law* (1988) 3-4.

This study takes into account The Hague (29 July 1899 and 18 October 1907) and Geneva (12 August 1949) Conventions on the laws of war and international humanitarian law. Consideration has been given to cases of war crimes such as the *Prosecutor v Thomas Lubanga Dyilo* case (ICC, 2006), the *Prosecutor v Jean-Pierre Bemba Gombo* case (ICC, 2009), and similar cases such as the *DRC v Uganda* case (ICJ, 2005) the *Yerodia* case (ICJ 2002), the *Tadic* case (TPIY, 1995), and the *Akeyesu* case (TPIR, 1998), where the comparative and international approach⁴⁴ have been applied. On a national level cases such as the *Songo Mboyo* case (Mbandaka Military Tribunal of Garrison, judgment of 12 April 2006) and the *Milobs* case (Ituri military Tribunal of Garrison, judgement of 19 February 2007) has also been considered.

Secondary sources include textbooks, journals, reviews, reports, and critical and evaluative works on the primary data. Several works have been considered, including *The African Stakes of the Congo War* (J F Clark, 2002); *Crimes organisés en Afrique Centrale* (H Ngbanda, 2004); *The International Criminal Court: Seeking Global Justice* (L Moreno-Ocampo, 2008); *Proactive complementarity: The International Criminal Court and National Courts in the Rome System of International Justice* (W W Burke-White, 2008); *The International Criminal Court that Africa wants* (Max du Plessis, 2010); *From promise to practice: towards universal jurisdiction to deter the commission of mass atrocities in Africa* (D Kuwali, 2010); *The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview* (D Zongwe F Butedi & P M Clement, 2010); *The Pitfalls of Universal Jurisdiction* (H Kissinger, 2001); *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, Mapping Report* (UN, 2010); and *Amnesty International Report 2001 The State of the World's Human Rights* (Amnesty International, 2011) etc.

⁴⁴ S Hall „Researching International Law“ in M McConville & W Hong Chui *Research methods for law* (1988) 181-183.

1.5 The structure of the research

The first chapter covers the research design, and presents background information related to the research project.

Chapter 2 focuses on armed conflicts in the DRC. This chapter will examine the causes of war and crimes committed during the course of war.

Chapter 3 examines the effectiveness of the Congolese judiciary's jurisdiction to try these war crimes.

Chapter 4 will consider the contribution of the ICC to bringing war criminals in the DRC to trial.

Chapter 5 presents the limitations of the ICC's jurisdiction and the impunity for war crimes in the DRC.

Chapter 6 argues for the establishment of a special tribunal for the DRC, as a mechanism to combat impunity.

Chapter 7, the final chapter, will draw conclusions from the study and make recommendations that could be implemented to help fight impunity for crimes in general and particularly war crimes in the DRC.

Chapter 2: The armed conflicts in the DRC

“What I am opposed to is a dumb war. A rash war. A war based not on reason but on passion,
not on principle but on politics”

(Hussein Barack Obama *Remarks against going to war with Iraq* 2 October 2002 Chicago)

War is a plague that has afflicted humanity for countless centuries. In order to understand armed conflict in the DRC, this chapter begins by examining the contours of the concept of armed conflict by means of an analysis of the notion of armed violence, and the definition and characteristics of armed conflict. Later in the chapter, the two deadliest wars in the recent past of the DRC are examined. In terms of violations of human rights, loss and destruction, these remain some of the most dramatic events in world history in the past decades. The impunity of those responsible for the deaths of several million people in the DRC is unacceptable.

2.1 Notion of armed conflict

The illegitimate use of force has contributed to several forms of abuse in human history. From the times of antiquity and the violence⁴⁵ of battles fought with stones and iron weapons, to the use of nuclear weapons⁴⁶ during the contemporary period, the scourge of violence has presented itself as a real challenge to human civilization⁴⁷

⁴⁵ Analyzing conflict and violence in the history of KwaZulu-Natal, for example, A V Minnaar notes that several factors (warriors ethnic conflict, land policies etc.) played their part in creating tensions between groups within tribes, or between tribes or clans and even within families and led to the social conditions which encouraged the eruption of violence and explained how violence can become widespread and endemic. See *Conflict and violence in Natal/KwaZulu: historical perspectives* (1991) 1 and 52, and R Jolly *Cultured violence, narrative, social suffering, and engendering human rights in contemporary South Africa* (2010) 1-36.

⁴⁶ It is regrettable that those weapons of mass destruction were used at Hiroshima and Nagasaki during World War II by the so called „modern“ and „civilized“ nations. See an interesting comment by A Cassese *Violence and law in the Modern age* (1988) 1-29; M N Shaw „Nuclear weapons and international law“ in Istvan Pogany (ed) *Nuclear weapons and international law* (1987) 1-21.

⁴⁷ The eruption of violence is general and observable at all levels (family, local structure, intrastate or interstate) whether in African, American, Asian or in Western societies/civilizations. It is shameful and ironic to use the term civilization as long as wars are a daily reality in the world several decades after its prohibition by international modern law. The essence of warfare is a flagrant denial of humanity. See, article 38 (c) of ICJ Statute and article 3 (1) (d) of; Geneva Convention of 1949 (I); „Reservation

and a threat to the whole planet. War is most often the source, if not the pinnacle, of diverse armed violence. According to Grotius.⁴⁸

War is the State or Situation of those who dispute by Force of Arms. The Etymology of the Word; for the Latin Word *Bellum* (war) comes from the old Word *Duellum* (a Duel) as bonus *Duonus*, and *Bis* from *Duis*. Now *Duellum* was derived from *Duo*, and thereby implied a Difference between two persons, in the same sense as term Peace Unity (from *Unitas*) for a contrary reason.⁴⁹

Hence, war denotes the idea of opposition, for most conflict is a result of various contradictions between different parties. The consequences of warfare are of great concern to peace and security worldwide.

Boister notes: “Armed conflict is the most anarchic of human conditions. Societies at war discard many of the mores that restrain human behavior in peacetime”.⁵⁰

Indeed, it is important to note that as long as war exists, the regulation of warfare will be necessary to avoid chaos. Although war has been outlawed in international relations, the advent of numerous incidents where force is used does not ensure that our society is totally protected from the consequences of war.⁵¹

What exactly does the term „armed conflict“ mean? Does it refer to the same reality as war? Can these two terms be used interchangeably?

As noted above the term „war“ – *bellum* in Latin – is not recent in world history. In classical international law there was a distinction between *yus ad bellum* and *yus in*

to the Convention on Genocide Advisory opinion I.C.J. Reports 1951, p15” (23) available at <http://www.icj-cij.org/docket/files/12/4283.pdf>, accessed on 05 April 2011; J M White „Equity – a general principal of law recognised by civilised nations?” in *QUTLJJ* (2004) 4 (1) 103-116 available at <http://www.law.qut.edu.au/ljj/editions/v4n1/pdf/White.pdf>, accessed on 05 April 2011; articles 1 & 2 of the Kellogg Briand-Pact of 1929; Article 2 (4) of UN Charter; G Best *Humanity in warfare: the modern history of the international law of armed conflicts* (1980) 2.

⁴⁸ According to J Dugard, Grotius is acclaimed as the “father of international law”. See J Dugard *International law: a South African perspective* 3 ed (2005) 11.

⁴⁹ H Grotius *The rights of war and peace* (R Tuck & K Haakonssen (eds) Book 1 (2005) 134-135.

⁵⁰ N B Boister *International legal protection for combatants in the South African armed conflict* (unpublished Masters Dissertation) University of Natal (1988) 2.

⁵¹ D Schindler and J Toman (eds) *The laws of armed conflicts: a collections of conventions, resolutions and other documents* 2 ed (1981) VIII.

bello. The first means the right to resort to force. It is related to the regulation of cases in which resort to force by states is allowed. The latter means international humanitarian law or legal rules that bind belligerent parties during a war.⁵² In spite of the prohibition on war in modern international law, war has not yet been eradicated from the globe.⁵³

The Use of Force Committee of the International Law Association notes that the terms „war“ and „armed attack“ are of particular significance. With respect to „war“, in classic pre-Charter *jus ad bellum*, this was the international law term used to describe the situation of armed conflict between states, and it is still in use today. It has undergone a particular resurgence in public discourse in the context of the so-called „war on terror“.⁵⁴

The terms „war“ and „armed conflict“ have almost⁵⁵ the same meaning but the former is less frequently⁵⁶ used and the expression „armed conflict“ is preferred because it appropriately reflects several realities relating to armed violence and combat on the ground, and has been adjusted to the evolution of international law.⁵⁷

⁵² M Freeman „International law and international armed conflict: clarifying the interplay between human rights and humanitarian protection“ available at <http://www.jha.ac/articles/a059.htm>, accessed on 05 April 2011; G Best (note 47 above) 8-16; J Dugard (note 48 above; 526).

⁵³ Examining violent conflicts over time, the Use of Force Committee identified three periods (1945-1980, 1980-2000 and 2000-2010) and observed that: “The majority of armed conflicts since 1945 have in fact been internal armed conflicts, often with the intervention of outside powers. Numerous inter-state conflicts have occurred as well [...] Cherif Bassiouni identifies 313 such conflicts during the period 1945 to 2008 [...]” The Committee cites M Cherif Bassiouni (ed) *The pursuit of international criminal justice: world study on conflicts, victimization, and post-conflict justice* 79 (1) 2010. See Use of Force Committee of the International Law Association *Final Report of the Hague conference on the meaning of Armed Conflict in International Law* (2010) 7 available at www.ila-hq.org/download.../2176DC63-D268-4133-8989A664754F9F87, accessed on 01 April 2011. For more relating to the rate of conflict in the world see UCDP Uppsala Conflict Data Program available at http://www.pcr.uu.se/digitalAssets/18/18070_armedconflicts_2009.pdf, accessed on 15 May 2011.

⁵⁴ *Ibidem* 7; As noted in N Balendra relating to the war against terrorism: “The emergence of non-State groups as a major threat to international peace and security and the U.S. decision to characterize the events of September 11 as an act of war and the many strands of the U.S. reaction to those events as an armed conflict have rendered the definition of armed conflict even more controversial” in „Defining armed conflict“ in *New York University Public Law and Legal Theory working papers* Paper 63 (2007) 2471 available at http://lsr.nellco.org/nyu_plltwp/63, accessed on 15 May 2011.

⁵⁵ Relating to the distinction between these concepts, I Detter Delupis notes: “Naturally not all armed conflicts amount to war, so armed conflict may not be war. Since the subjective meaning of war has been [...] the distinction between war and conflict is not really fruitful and is not one of type but one of scale and degree”. See I Detter Delupis *The Law of War* (1987) 18.

⁵⁶ *Ibidem* (note 55 above) 1 and 33, 10-11; S Naljik „Précis abrégé de droit international humanitaire“ (1948) in *Revue Internationale de la Croix Rouge* 7.

⁵⁷ CICR „Commentary on Geneva Conventions“ available at <http://www.icrc.org/ihl.nsf/COM/365-570005?OpenDocument>, accessed on 01 April 2011.

2.1.1 Definitions

Despite war being such a major feature of history and current world circumstances, there is no authoritative legal definition of war or armed conflict. There is also a dichotomy perpetuated in international instruments between definition of international and non-international wars. When a situation exists, such as in the DRC, in which there are components of both international and non-international war, this lack of clarity can lead to confusion regarding jurisdiction and applicable laws and conventions. For this reason, the definitions of war and armed conflict will be discussed in detail here in order to lay the basis for the definition of war crimes which will be discussed in Chapter 4.

Article 2 (4) of the Charter of the UN proclaims: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. This article merely prohibited⁵⁸ war but doesn’t define what an armed conflict is. Even in the four Geneva Conventions of 12 August 1949 and their two Additional Protocols⁵⁹ of 8 June 1977 there is no definition. In article 2 of all the Conventions, we read: “The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”. Instead of providing a definition, this article sets out the scope of its application.⁶⁰

Article 8 of the Rome Statute related to war crimes, makes several references to war, to the Geneva Conventions, and to armed conflicts, whether of an international or

⁵⁸ Although there is a formal prohibition on war, the resort to arms is allowed in the Charter in case of individual or collective self-defence (article 51) or by/with Security Council approval (Chapter VII).

⁵⁹ Since 8 December 2005 a Third Protocol has been added to the Geneva Convention of 12 August 1949 relating to the adoption of an additional distinctive emblem. See <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>, accessed on 03 April 2011.

⁶⁰ It is obvious that the primary goal of these Conventions is first and foremost humanitarian; therefore a strict legalistic definition of armed conflict might shrink the scope of their applicability.

local character, but doesn't provide a definition of armed conflict in any of its provisions (see article 8 (2) (a) (b) (c) (d) (e) (iii) (f)).⁶¹

In its quest for a definition, the Use of Force Committee searched international law, and examined both primary and secondary sources, but the Committee did not find any common conventional definition of armed conflict at a multilateral level. The Committee then decided to consider the meaning of armed conflict as provided in customary international law, demonstrated by state practice, *opinion juris*, jurisprudence and doctrine.⁶²

At the level of jurisprudence, an overview of the decisions of judicial bodies and especially the International Criminal Tribunal for Former Yugoslavia (hereinafter ICTY) is helpful and might lead to a definition of armed conflict.

In the *Tadic* case for instance it was stated that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.⁶³

This definition is not perfect but it is a step in the right direction. It was considered by the Chamber of the International Criminal Tribunal for Rwanda (hereinafter ICTR) in the *Akeyesu* case⁶⁴ and more recently the Pre-trial Chamber of the ICC in *Thomas Lubanga Dyilo* case⁶⁵ referred to it.

⁶¹ Even in the Elements of Crimes which help in the interpretation and application of article 8 there is no definition. See the commentary of the Pre-trial Chamber I Case *The Prosecutor v Thomas Lubanga Dyilo* decision on the confirmation of charges N.: ICC-01/04-01/06 29 Jan 2007 para 205 available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>, accessed on 06 April 2011); A Cullen „The definition of non-international armed conflict in the Rome Statute of the International Criminal Court: an analysis of the threshold of application contained in Article 8 (2) (f) *Journal of Conflict and Security Law* (2007) 12 (3) 419-445.

⁶² Use of Force Committee (note 53 above; 5).

⁶³ *Prosecutor v Tadic*, Case No.IT-94-1-I, Decision on Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 para 70. Available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> accessed on 05 April 2011.

⁶⁴ *Prosecutor v Akeyesu*, ICTR-96-4-T, Judgement, 2 September 1998, para 619 available at <http://www.unicttr.org/tabid/128/Default.aspx?id=18&mnid=4>, accessed on 06 April 2011.

⁶⁵ Pre-trial Chamber I Case *Prosecutor v Thomas Lubanga Dyilo* (note 61 above) para 287. See also the *Prosecutor v Jean Pierre Gombo* Case Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo 15 June 2009 para 229 available at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>, accessed on 12 June 2011.

In an attempt to define armed conflict various suggestions have been made. To paraphrase Pietro Verri,⁶⁶ the general term „armed conflicts“ is applied to different types of clashes, that may occur between two or more state entities, between a state entity and a non-state entity, between a state entity and a dissident faction, or between two different ethnic groups within a state entity.

This definition is a further development of the concept, but it is not complete. The detailed definition of Cherif Bassiouni looks more promising and is compatible with the understanding of armed conflict proposed by the Use of Force Committee.

Clashing of interests (positional differences) over national values of some duration and magnitude between at least two parties (organized groups, states, groups of states, organizations) that are determined to pursue their interests and achieve their goals and/or a „contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is a state, results in 25 battle-related deaths“ and „protracted armed conflict between such groups“.⁶⁷

This definition is sophisticated, but too long. Hence this study uses the concise definition by the ICRC, which defines armed conflict as follows:

International armed conflicts exist whenever there is resort to armed force between two or more States Non-International armed conflicts are protracted armed confrontations occurring between governmental armed forces and forces of one or more armed groups, or between such groups arising on the territory of a State. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.⁶⁸

⁶⁶ P Verri *Dictionnaire de droit international des conflits armés* (1988) 36-37.

⁶⁷ Cherif Bassiouni (ed.) *The Pursuit of International Criminal Justice: A Word Study on Conflicts, Victimization, and Post-Conflict Justice* (2009) 79 1) cited by the Final Report on the Meaning of Armed Conflict in International Law of the Use of Force Committee of the International Law Association, Hague, 2010 (10). See a detailed definition of armed conflict proposed by Uppsala Universitet, Department of Peace and Conflict Research available at http://www.pcr.uu.se/research/ucdp/definitions/definition_of_armed_conflict/, accessed on 06 April 2011.

⁶⁸ See the paper of the ICRC posted in 2008 on its Website, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* 5 available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armedconflict](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armedconflict), accessed on 06 April 2011, cited by Use of Force Committee (note 53 above; 19).

This definition utilizes a typology that sets up two kinds of conflicts – an international one and a non-international one. However, this classification⁶⁹ seems insufficient, arbitrary, limited and outdated.⁷⁰ There are other, more complex conflicts such as internationalized ones⁷¹ and so called „war against terror“.

What exactly is the meaning of international armed conflict and internal conflict (non-international conflict) and what is the difference between these terms?

2.1.2 International armed conflict

Article 8 of the Rome Statute of the ICC refers to two types of conflict, of which one is international armed conflict but, as demonstrated above, there are no definitions of armed conflict or international conflict. Therefore to analyze international armed conflict it is necessary to consult the Geneva Conventions, which constitute a summary of the core principles of international humanitarian law applicable in the case of the eruption of armed conflict.

A close analysis of the Geneva Conventions reveals that, most of their pertinent provisions seem to be related more to the regulation of war between States than within States.⁷²

According to article 2 common to these Conventions they “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”. The Convention “shall also apply to all cases of partial or total occupation of

⁶⁹ Delupis’ classification of wars distinguishes four types of war as follows: 1) Geographical war: Inter-State war, Civil war, Internal war, Internationalized war; 2) Programmatic war: Liberation war, Resistance or partisan war, Revolutionary war, Separatist war, Preemptive war; 3) Unequal war; 4) Methodological war: guerilla war (note 55 above) 33-53.

⁷⁰ S Bula-Bula „Droit international humanitaire“(1999) in *Droits de l’homme et droit international humanitaire, séminaire de formation cinquantenaire de la DUDH, 18 novembre-10 décembre, 1998*, 131, 145.

⁷¹ J Mrazek „Armed conflict and use of force“(2010) 87, 90; J G Stewart „Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict“(2003) 314-315 available at http://www.icrc.org/eng/assets/files/others/irrc_850_stewart.pdf, accessed on 31 March 2011).

⁷² J G Stewart (note 71 above; 317).

the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.

A meticulous analysis of this article reveals two dimensions. On one hand, there is the international aspect and on the other, the military aspect.

Hence, international conflict can be considered in general as combat between two or more than two states.⁷³ However, an elaborated definition in jurisprudence⁷⁴ will not be sought, because today there is a trend towards a single definition of international and non-international conflict.

Classically, interstate warfare is named international armed conflict and non-international armed conflict is considered as an armed conflict between a state and an armed group within its territory. However there is a trend to apply International Humanitarian Law even to conflict not engaging governmental authorities. The case of the territory of a collapsed state is illustrative. There is a tendency to adopt a single and simple conception of regulation of armed conflict either in the decision-making structures of international judicial bodies, or in international instruments, or in State practice.⁷⁵

2.1.3 Local armed conflict

By outlawing the resort to force in international relations, the United Nations Charter inaugurated a new age in 1945. But the provisions of this important international

⁷³As part of interstate conflict, wars of national liberation are also considered international armed conflict. M Freeman considers the latter as “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination”. For instance, the ANC in South Africa was considered as a Movement of National Liberation. See Tom Farer “Humanitarian law and armed conflicts: toward a definition of “international armed conflict”” (1971) 71 (1) *Columbia Law Review* 37, 53. See also M Freeman „International law and internal armed conflicts: clarifying the interplay between human rights and humanitarian protections available at for comment“; J Dugard et al. (note 48 above; 523).

⁷⁴ In the *Tadic* case for instance: It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out in the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State. See *Prosecutor v Tadic*, T-94-1-A Judgement, 15 July 1999 para 84.

⁷⁵ Use of Force Committee of International Law Association (note 53 above; 8-9).

convention and numerous others seem limited only to protecting the international order from the consequences of war, and seem less applicable to internal State order. It is therefore not surprising that “the majority of armed conflicts since 1945 have in fact been internal armed conflicts, often with the intervention of outside powers”.⁷⁶

For Bouchet-Saulnier a non-international armed conflict is an armed conflict whose theatre of combat is the territory of a state, and is a conflict between the state’s armed forces and dissident armed forces or organized armed groups, which, under the guidance of a responsible command, utilize a part of the state’s territory to carry out sustained and concerted military operations.⁷⁷

Of course, these types of conflicts are all too frequent in modern times. But they are not new; they have taken place since antiquity and are regulated in national law. Today even international humanitarian law is applicable to them. This is an evolution, for initially international humanitarian law proposed the regulation of conduct and damage caused during interstate war rather than conflict within the territory of a State. Internal conflict was regarded as an essentially domestic matter and was not subject to international conventions. For instance, the provisions of the Hague Conventions (1899 and 1907) are exclusively applicable to international armed conflict.⁷⁸

Article 8 of the Rome Statute makes reference to non-international armed conflict. However, this concept seems not well regulated in international law. For instance the provisions related to internal armed conflict in the Geneva Conventions at their common article 3 and their Additional Protocol II of 1977 (article 1) have prompted criticism.

James, who is a brilliant defender of a single definition of armed conflict, makes the following observation about these provisions:

More intricate anomalies are myriad even in instances of overlap between the two systems. For example, while common Article 3 prevents a combatant from being

⁷⁶ Ibidem 9-10.

⁷⁷ F Bouchet-Saulnier *Dictionnaire pratique du droit humanitaire* 2 ed (2000) 92-93.

⁷⁸ J G Stewart (note 71 above; 316-317).

tortured, it does not prevent him or her from being executed for treason The uncomfortable overlap was also reinforced by the Rome Statute of the International Criminal Court (ICC Statute), which perpetuates the cumbersome international/non-international legal dichotomy. The Statute limits the grave breaches regime to international conflicts ... and, despite similarities ... the serious violations provisions of common Article 3 that are applicable in „armed conflicts not of an international character“ are both different and less comprehensive than their international counterparts.⁷⁹

In fact there is seemingly no serious reason for different laws to regulate international armed conflict and internal armed conflict. For international humanitarian law to be applied, the qualification of a situation of warfare as international or non-international is strict.⁸⁰ Hence this situation may lead to limitations on the applicability of certain important provisions of laws of armed conflict.

As noted above, the value of a dichotomist classification of conflict is debatable, for an internal conflict can be internationalized. There are other more complex types of conflict, which exhibit internal and external aspects.

For Pietro Verri⁸¹ three situations can lead to the internationalization of an armed conflict:

- a) when the state whose territory there is an insurrection admits the belligerent status of the insurgents;
- b) if the armed forces of one or several foreign states intervene, each to support respectively one of the parties in conflict; and
- c) The armed forces of two foreign states intervene, each to support one party in conflict.

Therefore internalized armed conflict refers to internal armed violence, which escalates to an international level due to several internationalization factors as demonstrated above. Among the most clear cases of internationalization of an armed

⁷⁹ J G Stewart (note 71 above; 321).

⁸⁰ J G Stewart (note 71 above; 316)

⁸¹ P Verri *Dictionnaire de droit international des conflits armés* (1988) 37-38. See also *Tadic Case* (note 63 above; 84).

conflict in the past decades, has been NATO's involvement in the war between the Federal Republic of Yugoslavia and the Kosovo Liberation Army in 1999 and the involvement of several African⁸² countries in the DRC war theatre during the second war of 1998-2003.⁸³

It is also noteworthy⁸⁴ that when the UN forces take part in an armed conflict, it may be considered as international and subject to international humanitarian law. Relating to the criminal responsibility and prosecution of members of a UN force before a Criminal Court, the analysis provided by Du Plessis⁸⁵ and Stephen is insightful and pose a serious question: "Who guard the guards?"

2.1.4 Characteristics of armed conflict

Notwithstanding the developments noted above, it is necessary to clarify the intrinsic elements that distinguish an armed conflict from other violent movements in order to lay the basis for an analysis in Chapter 4 of the concept of war crimes.

According to article 1 (1) and (2) of Protocol II of the Geneva Convention, the Protocol "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts".

The aim of the protocol is to protect victims from the scourge of hostility between States "armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations".

From the above, it is clear that all use of armed force cannot qualify as armed conflict.

In jurisprudence, a close consideration of the decision of the ICTY might be useful.

⁸² Rwanda, Uganda, Angola, Zimbabwe, Namibia.

⁸³ J G Stewart (note 71 above; 315).

⁸⁴ T Farer (note 73 above; 72).

⁸⁵ M du Plessis & S Peté *Who guards the guards?* (2006) ISS Monograph available at <http://www.iss.co.za/uploads/121FULL.PDF>, accessed on 12 June 2011.

In the *Tadic* case for instance, the Chamber of Appeal indicates that:

We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁸⁶

This Decision of Appeal Chamber of the ICTY has inspired the consideration of other judicial jurisdictions. For instance, in line with that decision, a Decision of the ICC Chamber considered that to be defined as an internal armed conflict, the activities of an armed band must attain a certain threshold of organisation which can lead to the planning and sustainability of operations.⁸⁷

In this analysis we focus on the characterization of conflict and whether it is of a national or international character. As Antonio Cassese points out: “there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts”.⁸⁸

The above analysis leads to the following conclusion on the characterisation of the armed conflict: to have an armed conflict there must exist a certain number of criteria, which can be mainly summarised in two characteristics:

- organised parties or groups; and
- a degree or intensity of armed conflict.

⁸⁶ *N Tadic* case (note 63 above; para 70).

⁸⁷ *Thomas Lubanga Dyilo* case (note 65 above; para 233).

⁸⁸ J G Stewart (note 71 above; 322).

Commenting on these criteria, the report of the Use of Force Committee notes that, historically, armed conflicts have been characterized by several elements, but organisation and intensity remain the most distinctive differences between an armed conflict and other violent situations, such as incidents, border clashes, internal disturbances, tensions and riots, isolated and sporadic acts of violence, banditry, unorganised and short-lived insurrections or terrorist activities and civil unrest, and single acts of terrorism.⁸⁹

Regardless of its definition there is no doubt that war is inhuman and if humans could behave as *Homo Sapiens* instead of as *Lupus*, the money allocated to costly military⁹⁰ budgets could be channelled to development projects for the welfare of humankind. Unfortunately armed conflict is still raging in several places⁹¹ in the world today, with numerous, horrific consequences.

2.2 Armed conflicts in the DRC

War has not spared the DRC. The history of the country is marked by numerous violent and armed conflicts during the pre-colonial, colonial and post-colonial and/or neocolonial periods.

Notwithstanding the DRC having gained its independence from Belgium on 30 June 1960, more than half a century later, it is infamous for its numerous bloody armed conflicts. Although the Congo is endowed with all kinds of natural resources and riches, its inhabitants remain among the poorest on the planet and are victims of various destructive, multifaceted crises. The collapse of the DRC's political system is due to decades of mismanagement, corruption, and lack of social cohesion and economic development.⁹²

⁸⁹ Use of Force Committee (note 53 above; 28).

⁹⁰ G Harris „Studying conflict, violence and peace in African universities“ available at http://www.icon.org.za/documents/seminar_papers/Studying%20conflict,%20violence%20and%20peace%20...%20Oct%202008.pdf, accessed on 10 July 2011; S P Magee & T G Massoud „Openness and internal conflict“ (2011) in *Journal of Peace Research* 59, 60 available at <http://jpr.sagepub.com/>, accessed on 4 June 2011.

⁹¹ Since the beginning of this century, Africa has been shaken by numerous armed conflicts, including Cote d'Ivoire, Somalia, Tunisia, Egypt, and Libya.

⁹² E Kisiangani „Conflict in the Democratic of the Congo: political and profit interests“ (2009) (2) *Conflict Trends* 38; see also E M'Bokolo „Apport des universités à la résolution des crises politiques en

Analyzing the origins of the Congo war, McCalpin⁹³ observes that the root of Congolese interethnic violence can be traced back to the fifteenth century when the people of the Kongo Kingdom met Europeans, especially the Portuguese navigators. This contact with Western world “laid the basis for a fragmented society shaped by the complexities of ethnic divisions and dependent economic relations. Rivalries developed along the trading posts, and some ethnic groups were afforded more access to trade than others”.⁹⁴

Bokongo⁹⁵ notes that in 1482 a young Portuguese captain Diego Cao, discovered the mighty river, which he named Congo, the name of the small kingdom located at its mouth. The Portuguese engaged in the slave trade, selling African people in America. This was the first exploitation of the Congo’s resources. Bokongo adds that the Congo’s natural resources have always ignited wars and lust. However that wealth has never benefited the Congolese, but rather foreign companies and tyrants.

After the Portuguese, the rule of Belgium’s King Leopold II (1885-1908) was the worst. Instead of promoting civilization as he had promised western governments in November 1884 at the Berlin Conference, he committed numerous atrocities. About 10 million people were exterminated, a truly forgotten holocaust, or what one author calls “Congolocide”.⁹⁶

Bobb comments that although the Belgian Government (1908-1960) intervened with “avowed intentions to improve human rights abuses in the Congo, the harsh labor laws persisted until the 1920s and numerous rebellions, eternally put down, were recorded”.⁹⁷ An immensely wealthy country, Congo has attracted the attention and interest of its neighbors and many others states across the world, from the Portuguese

République démocratique du Congo” (2007) in *Elections, paix et développement en République Démocratique du Congo* 11-22 ; Schatzberg, M. *The dialectics of oppression in Zaïre* (1988) passim.

⁹³ J O McCalpin „Historicity of crisis: the origins of the Congo war” in J F Clark (ed) *The African stakes of the Congo war* (2002) 33-34.

⁹⁴ J O McCalpin (Note 93 above; 34).

⁹⁵ J Bokongo (note 92 above) for more on Congo history, read also I Ndaywel *Histoire générale du Congo: de l’héritage ancien à la République Démocratique du Congo* (1998) passim.

⁹⁶ S Bula-Bula *L’ambigüité de l’humanité en droit international* (1999) 14; A Hochschild *King Leopold’s Ghost: a tale of greed, terror, and heroism in Colonial Africa* (1999) 3, 225-234.

⁹⁷ F Scott Bobb *Historical Dictionary of Zaïre* (1988) 349.

in the 15th century, to Western powers at Berlin, the King of the Belgians, the Belgian Government, superpowers, multinational firms etc.

Located in the heart of Africa, the DRC is the second largest country on the continent and the 11th biggest in the world with an area of 2 345 000 square kilometers⁹⁸ of territory, roughly the same size as the European Union. Inhabited by an estimated 70 million people,⁹⁹ it shares borders with nine countries and possesses enormous natural resources. Stakes in this country are high in many respects – politically, geopolitically, strategically, economically, and in terms of energy (approximately 40 percent of the world's hydro-electric potential).¹⁰⁰

Instead of a rational exploitation of those resources, for a long period the DRC was the theatre for a political fight, which divided it; the failure of the leadership of the country and its ethnic diversity exacerbated the divisions. These divisions seem to extend beyond the DRC; on a continental level, African leaders were dynamic, but were divided during colonization and after independence. Nationalism caused even more divisions. Anglophone and Francophone took up opposing positions. Due to a lack of agreement between the radicals and the moderates, Congo was placed at the mercy of global predators and the capitalist western block on the one hand, and the Communism Eastern bloc on the other.¹⁰¹

The long crisis in the DRC reached its height during the recent two wars (1996-97, and 1998-2002) whose consequences are estimated as the worst since World War Two.¹⁰² Rather than representing a simple struggle for power, those conflicts are the outcome of a long, complex and deterministic process, which was exacerbated by

⁹⁸ According to the CIA the area of DRC is 2,344,858 sq km available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>, accessed on 28 April 2011. See also *Whitaker's Almanack* 2011, 798-800.

⁹⁹ This number also is approximate. According to some sources it may be more than this, and the population could be around 71; see (note 98 above).

¹⁰⁰ H Campbell „Democratisation, citizenship and peace in the Congo“ in M Baregu (ed) *The crisis in the Democratic Republic of Congo* (1999) 21, 26.

¹⁰¹ K Masire (note 8 above). See also J F Clark „Causes and consequences of the Congo war“ in J F Clark (ed) *The African stakes of the Congo war* (2002) 1-3; M du Plessis (note 36 above).

¹⁰² C Hemedi dans la note de présentation du livre de L' Association Pour la Renaissance des Droits Humains au Congo, *Cour pénale internationale*, 2^e éd (2004) 1.

several¹⁰³ regional states and the impact on Africa of the bipolarization¹⁰⁴ of the world at the international level.

2.2.1 The First War, 1996-97

The end of the Cold War and the fall of the Berlin Wall in 1989 ushered in a new world era. For the African Great Lakes Regions in general and Congo-Zaire in particular, the winds of *perestroika*, which required the democratization of African States led to profound transformations.¹⁰⁵

Western fear of the extension of Soviet influence in Africa fell away and therefore there was no reason to support Mobutu's costly and useless dictatorship in the region. The latter was obliged to set up a democratic government and to found his power on stable internal structures, which he failed to do during the first transition process (1990-1996).¹⁰⁶ Rejected by his old western masters, Mobutu became "persona non grata" in almost all western countries.¹⁰⁷ The ground on which the Mobutu regime was built was henceforth shaky. Furthermore, the instabilities and conflicts in its neighboring countries of Rwanda, Uganda, Angola, and Sudan, threatened the Congo's security on sub-regional level.

In fact, the advent of the Rwandan genocide in 1994 is one of the most important factors which explains, historically, the cause of war in the Eastern part of the Congo and other neighboring countries. During the past decades the African Great Lakes

¹⁰³P Biyoya Makutu „Le role des acteurs externes dans les conflits en République Démocratique du Congo" in *Elections, Paix et Développement en République Démocratique du Congo* (2007) 89: 89-94); Analyzing the context of this war, Young recalled the famous remark of Frantz Fanon: "Africa has the shape of a pistol, with Congo-Kinshasa resembling the trigger housing". See C Young „Contextualising Congo conflicts: order and disorder in postcolonial Africa" (2002) in J F Clark (ed) *The African stakes of the Congo war* (2002) 13-29; L Callige „Les deux guerres du Congo et leurs conséquences géopolitiques" (1999) n7 *L'Observateur des Nations Unies* 8 ;F Reynjens *La guerre des grands lacs: alliances mouvantes et conflits extraterritoriaux en Afrique centrale* (1999) passim

¹⁰⁴ P Biyoya Makutu (note 103 above).

¹⁰⁵ Responding to international political changes, in his historical democratization speech of 24 April 1990, Mobutu announced numerous institutional transformations see V Lunda-Bululu *Conduire la première transition au Congo-Zaire* (2003) 13-15; J A Carty „Changing models of the international system" in W E Butler (ed) *Perestroika and international law* (1990) 13 ,17.

¹⁰⁶ H Campbell (note 100 above: 21-27); V Lunda-Bululu (note 105 above: 17, 247); L Devlin *Chief of Station, Congo: fighting the cold war in a hot zone* (2007) 266-267.

¹⁰⁷ J F Clark (note 101 above; 3); T R Essolomwa Nkoy *La fin d'un zombie* (2005) 116-117.

Region has been subjected to political struggles leading to many deaths,¹⁰⁸ divisions that never happened elsewhere in the recent history of the African continent.

Protected by the French,¹⁰⁹ officials of the Kigali regime got away with genocide; in the meantime genocidal killing was continuing even against Tutsi employees of the French Embassy. French police allowed genocidal forces to escape, crossing the Congo's borders and providing financial and military support to help them regroup again in Rwanda. Taking advantage of the Congo's hospitality, from refugee camps where they were installed in Kivu, they began to organize themselves, to fight the Tutsi regime in Kigali. As described by Nzongola-Ntalaja, "For two years and half, the Mobutu Kengo regime and the international community watched and did nothing to stop this, while the UN and donor community continued to be more preoccupied with feeding the refugees, rather than trying to remove the killers among them and find a lasting solution to the whole crisis".¹¹⁰

One aspect of war which affected Africa in general and Congo in particular, was that civilian populations were displaced¹¹¹ or migrated from their home country to another, often without any means of subsistence, provoking a humanitarian catastrophe. The Mobutu regime opened the Congolese borders on humanitarian grounds to roughly 2,000,000 people, amongst them armed groups without requiring its French ally to disarm them or to put any serious security measures in place in the country.

Was it safe to play the humanitarian card with an armed group? Or was it a poisoned gift from the international community?¹¹²

It is clear that the Mobutu regime committed a number of errors both at an internal level (no elections six years after transition, numerous abuses, corruption of the army,

¹⁰⁸ Considering the immense human cost of conflict in the Great Lakes Region, Young notes at least 200,000 lives lost in Burundi since 1993, 800,000 in Rwanda plus 300,000 Hutu refugees slaughtered in Congo in 1997 and more than a million in DRC since 1998. See C Young (note 103 above; 13-14).

¹⁰⁹ Operation turquoise 1994: humanitarian intervention approved by UN led by French forces (June-August) in Rwanda after the genocide. This French intervention was criticized as unhelpful – see G Nzongola-Ntalaja *The Congo from Leopold to Kabila: a people's history* (2003) 224.

¹¹⁰ G Nzongola-Ntalaja (note 109 above; 215-224).

¹¹¹ J Murison „The politics of refugees and internally displaced persons in the Congo war“ in J F Clark (ed) *The African stakes of the Congo war* (2002) 225-229; O Sichone „Refugees and migration in Africa“ (1999) in M Baregu (ed) *The crisis in the Democratic Republic of Congo* 73-75.

¹¹² Read Essolomwa's interesting comments (note 107 above; 116-118).

the failed CNS = *Conférence Nationale Souveraine* = Sovereign National Conference:)¹¹³ and external level (corruption of its intelligence and security services, porous borders which offered entry to Angolan, Sudanese and Ugandan Burundian rebels). However the most fatal was to offer its support to Ex-FAR, amongst whom were the *interahamwe* (translated as those who work together), a militia largely considered responsible for the genocide in Rwanda.

The armed conflict in 1996 in the Eastern DRC put an end to Mobutu who was weakened by disease and his incapacity to satisfy the will of his Western patrons. Backed by the US-proclaimed „new breed“ of African leaders, L D Kabila¹¹⁴ led the rebellion that overthrew Mobutu in 1997.¹¹⁵ A last attempt to save the Mobutu regime on the part of its old friend, the French Government, was stymied by Anglo-American action.¹¹⁶

The war in the Eastern territory eventually extended to the whole DRC. After a couple of months, Mobutu fled and his corrupt regime collapsed, surprisingly without much resistance. Some saw this conflict as a Banyamulenge war.¹¹⁷ The statement by the then provincial authorities¹¹⁸ which required Banyamulenge community members, estimated at around 300 000, to leave Zaire within a week is regarded as the event that

¹¹³ G Nzongola-Ntalaja (note 109 above; 192-193).

¹¹⁴ Since the assassination of Lumumba on 17 January 1961, Kabila led different rebellions in the Eastern part of the Congo. In order to survive he ran small businesses in neighboring countries. See A Mbata „The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter“ (2003) *African Human Rights Law Journal* 235, 236.

¹¹⁵ A Mbata (note 114 above).

¹¹⁶ Convinced by the French of concerns relating to the war in Zaire and the need to send a multinational force, Koffi Anan faced opposition from America and Britain in the UN Security Council meeting held on 10 and 11 March 1997. See T R Essolomwa Nkoy (note 107 above; 161).

¹¹⁷ T R Essolomwa (note 107 above; 141). The term Banyamulenge was first used in 1976 by Gisaro Muhoza as a designation for Tutsi warrior farmers of Rwandan origin (banyarwanda) who migrated to certain parts of DRC at different periods of time. The expression was drawn from a small Congolese village Mulenge, a locality of the Kigoma group in *collectivité-Chefferie* of Bafuliru, in the territory of Uvira, District of South, Province of South Kivu where the traditional authority of Bafuliro had installed some of them in 1921. The Banyamulenge are Tutsi farmers and warriors; most of their young people in exile have received military training in Uganda and enlisted in the ARR. See T Ngoy (note 8 above; 132-133). From time to time in the history of Congo there have been clashes between the Banyamulenge and other indigenous tribes such the Babembe and others. However the Congo has more than 200 ethnic groups which have all been subjected to tension and fighting. Interethnic conflict in the DRC is instrumental to politicians who use it to advance their own political agenda at the expense of the population. See N Obotela Rashidi „Ethnicité et géopolitique identitaire en République démocratique du Congo“ in *Elections, Paix et Développement en République Démocratique du Congo* (2007) 37-46; O Ndeshyo Rurihose „Préface“ in Hakiza Rukatsi, B. *L'intégration des immigrés au Zaïre le cas de personnes originaires du Rwanda* (2004) 11-13.

¹¹⁸ The Deputy Governor of the South Kivu Province Lwabanji.

triggered the escalation of the violence. Instead of leaving, the Banyamulenge decided to resist, and counter attack. They directed their assault against the Lemera Hospital on 10 October 1996 in South Kivu. Together with Kabila, they took up arms under the auspices of the armed movement under the umbrella body, the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL).¹¹⁹

From 21 October 1996, these armed forces advanced rapidly and reached important and strategic regions. Several villages, cities, towns and provinces¹²⁰ fell into the hands of the rebels. In a short period of time they reached Kindu, situated approximately 320 kilometers from the rebellion's starting point, and finally attained Kinshasa, about 2 000 kilometers further on, to realize their ultimate goal.¹²¹

However, a simple internal Banyamulenge rebellion does not explain how and where the rebels could get the human, financial, technical, logistic means to run and win such a war so easily. Moreover, even if the Banyamulenge theories¹²² are correct, it appears that Banyamulenge became a pretext, which was instrumentalized for an external end. It served to mask an external invasion.

Therefore, it was clear that, supported by certain western and African countries Rwanda and Uganda had evaded an independent country, Zaire.¹²³ Even though they denied this at first, they admitted¹²⁴ later to having sent military troops into Zaire, but claimed that this was due to the need to ensure security on the Congo's eastern

¹¹⁹ AFDL (or ADFL Alliance of the Democratic Forces for the Liberation of Congo-Zaire) comprised primarily four opposition forces, Kabila (PRP) *Parti Pour la Révolution du Peuple*, The *Conseil de la Résistance pour la Démocratie* (CRD) led by A K Ngandu, The *Mouvement Révolutionnaire pour la libération du Zaire* (MRLZ) led by Masasu Nindaga, and the *Alliance Démocratique des peuples* (ADP) led by Deogratias Bugera. However K C Dunn observes that the rebels were actually a loose alliance of several opposition forces which were largely orchestrated by the Kagame regime in Rwanda. See K C Dunn „Lessons of the father, passed down to the son“ in J F Clark (ed) *The African stakes of the Congo war* (2002) 53, 56.

¹²⁰ Uvira, Bukavu, Goma, Bunia, Walikale, Butembo and Lubero etc see H Solomon, „Recent initiatives in addressing gender violence in South Africa: some reflections on the crisis in Zaire“ (1997) available at http://www.iss.co.za/uploads/Paper_15.pdf, accessed on 05 April 2011.

¹²¹ Ibidem.

¹²² T R Essolomwa Nkoy (note 107 above; 71, 99 & 122); Kevin C Dunn (note 119 above; 53, 55-56); Y Tandon „Globalization & the Great Lakes regional crisis“ in M Baregu (ed) *Crisis in the Democratic Republic of Congo* 42, 44-45 (42-45).

¹²³ Rwanda, Uganda, and Burundi were directly cited as implicated in this war. However, according to H Ngebanda, Chad, Eritrea and Angola were also involved (note 4 above; 25); and P Biyoya adds to that list – Tanzania, South Africa and Zimbabwe (note 103 above; 89).

¹²⁴ Kevin C Dunn (note 122 above; 56-57); Sabiti Makara „An assessment of Ugandan foreign policy on the DRC“ in Baregu (ed) *Crisis in the Democratic Republic of Congo* 125-128.

borders. Meanwhile they were at Kinshasa, more than 2 000 kilometres to the west. The legal basis of this argument was very weak, as shall be demonstrated.

To others, the war was a liberation war, since it aimed to end the long, oppressive Mobutu regime and heal Zaire. This explains the civilian population's support and low resistance against the older rebel, Kabila. For Essolomwa¹²⁵ the Eastern War, as it was known at the beginning, became a liberation war *par la force de chose*.

The situation in the former Zaire could be considered one of the best illustrations of the current African illness. The Mobutu regime was founded on corruption, kleptocracy, nepotism, ethnic violence, foreign interference, a crisis of democracy, and mismanagement of the country's economic fabric and environment. As noted by Solomon, "It is thus important to understand the unfolding crisis in Zairian state: as a microcosm reflecting the larger continent's problems, understanding Zaire means understanding Africa".¹²⁶

However this war brought not only so-called liberation, but numerous crises and human misery. According to numerous sources, hundreds of thousands of Hutu refugees installed in the Eastern Camps of the Congo were massacred.¹²⁷

The failure to promote the rule of law and the numerous contradictions which characterised the so-called liberation could not continue, and led the country to a second conflagration.

¹²⁵ T R Essolomwa Nkoy (note 107 above; 5).

¹²⁶ H Solomon (note 120 above).

¹²⁷ May we heal genocide wound by another genocide? The estimated number killed in this counter genocide is more than 200,000. See Young (note 103 above; 13). The Rwandan Patriot Army and its western allies created a climate of terror among the Zairian civilian population. Massacres, violence, arbitrary executions, humiliation, assassinations, amputations, persecution, and the displacement of village populations were the order of the day. Charles Onana in préface H Ngbanda Nzambo *Crimes organisés en Afrique centrale, révélations sur les réseaux rwandais et occidentaux* (2004) 5

2.2.2 The Second War, 1998-2002

Fourteen months after the fall of the Mobutu regime, Zaire, renamed the DRC, plunged anew in a terrible war for so-called liberation again, this time from the newly established dictatorship.

The contentions of the parties can be summarized as follows:¹²⁸ On one hand the supporters of the Kabila regime asserted that there was a Rwandan and Ugandan military invasion of the DRC territory. To mask this foreign aggression, the invader put in place a puppet rebellion. This invasion and false rebellion derailed the democratization process which was on track – it was too early to assess Kabila’s unwillingness to set up democracy; there were no mistakes on Kabila’s side, which could justify such a violent overthrow; the dispute could be resolved peacefully instead of resorting to armed violence; the legitimate government must be supported to defeat and avoid its removal by force.

On the other hand, Kabila’s opponents pointed out that the Congolese conflict was basically domestic and did not need foreign forces; the conflict was a result of the absence of a democratic programme. There was no political freedom. Kabila was a totalitarian and the Kabila regime was not democratic but dictatorial; there was a need to stop this despotic trend by using all means necessary to topple the regime.¹²⁹

While the Kabila regime may have failed to implement the recommendations of the CNS (1991-1992) regarding political rights,¹³⁰ and forbade political parties from functioning, in regard to international law none of the arguments advanced above can justify such deadly war. Symptomatic of this is that, in contrast to the first war, the population was in general hostile to the famous war against dictatorship.

¹²⁸ See M Baregu Preface of *Crisis in the Democratic Republic of Congo i-v*.

¹²⁹ M Baregu (note 128 above).

¹³⁰ Although political support was given initially to Kabila’s rebellion, the leader of the opposition E Tsthisekedi wa Mulumba (and historical political party UDPS *Union pour la Démocratie et le Progrès Social*) was arrested and exiled to his mother province of Kasai Oriental. Other opposition members such as Arthur Z’ahidi Ngoma and Joseph Olengankoy were arrested and sent to jail.

As stated by Afoaku the armed conflict, which erupted on 2 August 1998, virtually months after the fall of the Mobutu Regime “heralded the beginning of the second war of liberation in the DRC, this time against the regime of Laurent Kabila”.¹³¹

Kabila’s former partners, the Banyamulenga, had turned against him, protesting against bad governance and the establishment of a banana republic. Supported by neighboring countries, notably Rwanda and Uganda, rebels put into place structures such as the RCD¹³² and later MLC¹³³ to organize their struggle.¹³⁴

According to Nzongola,¹³⁵ Rwanda, Uganda, and Burundi exploited the institutional instability and the crisis in the armed forces to “create territorial spheres of interest within which they could plunder the Congo „riches””.¹³⁶ But, since Kabila refused to support their agenda any longer, they looked to hide their unlawful intervention in the DRC by establishing a false rebellion, which would protect their economic and security interests in Eastern DRC.¹³⁷

Some considered that the anti-Kabila rebellion had been artificially created by the Rwandan and Ugandan authorities, whose hostility toward Kabila’s politics was exacerbated by an ambiguous understanding of national interests. Furthermore the suppression of civil and political rights by the then Kinshasa authorities facilitated the

¹³¹ Osita Afoaku „Congo’s Rebels: their origins, motivations, and strategies” in J F Clark (ed) *The African stakes of the Congo war* (2002) 109.

¹³² The RCD *Rassemblement Congolais pour la Démocratie* (Congolese Rally for Democracy) had been divided into several other rebel movements, namely RCD-National, RCD- Mouvement de Libération.

¹³³ The MLC *Mouvement pour la Libération du Congo* (Movement for the Liberation of Congo).

¹³⁴ A Mbata (note 114 above; 236-237).

¹³⁵ G Nzongola-Ntalaja (note 109 above; 227).

¹³⁶ *Ibidem*.

¹³⁷ Relating to the rationale behind several illegal interventions of Rwanda and Uganda and even Burundi in the DRC there are numerous theories: Demographic – those countries are overpopulated, their respective Tutsi leaders entertained a dream to build a vast empire Hima-Tutsi in the Great lakes region between Uganda, Rwanda, Burundi, and east of the DRC; Economic – there are no natural resources and agriculture is the principal economic activity; Security – a fear of rebel attacks from the borders of neighboring countries. For many their lust of DRC natural resources is obvious because their armed forces had controlled all the territory of the DRC for several months. Why did they not during that time, end the rebellion? Illegal exploitation and plundering of Congo was manifest. Beyond Rwanda and Uganda, this pillage benefited other persons and countries. See M Koyame and J F Clark „The economic impact of the Congo war” 12-223 and T Longman „The complex reasons for Rwanda’s engagement in Congo” 129-141, 144 and J F Clark „Museveni’s adventure in the Congo war” in J F Clark (ed) *The African stakes of the Congo war* (2002) 145-161, 165); T R Essolomwa (note 107 above; 132-134).

advent of opposition, whether armed or non-armed, on a national level.¹³⁸ Therefore instead of simply being military support for a Congolese rebellion to end the Kabila regime, the Rwandan and Ugandan intervention in Congo was considered in general as truly a conspiracy, which had been conceived several months¹³⁹ before the outbreak of the second war on 2 August 1998. Hence: “Kabila’s decision in July 1998 to dismiss the Rwandan contingent of FAC¹⁴⁰ thus served as a catalyst to a crisis that was already underway”.¹⁴¹

As Nzogola remarks, three factors were instrumental in the Congo aggression. Firstly, the eruption of conflict on 2 August 1998 was cleverly depicted as an internal war in which neighboring countries were involved on the rebels’ side merely to secure their own borders. Secondly, unconditional Anglo-American support to Rwanda and Uganda politics contributed significantly to the indifference of other members of international community. Thirdly, “the logic of plunder in the new era of globalization, which has to do with the growing tendency of states, Mafia groups, offshore banks and transnational mining companies to enrich themselves from crises”.¹⁴²

This resistance of Kabila to any kind of neo-colonialism from his neighboring countries and western powers exploded in a tragic, deadly conflict, the worst since the Second World War. Numerous actors including, states, non-states, and intergovernmental and non-governmental forces were involved. The lust for riches would transform the DRC into a theatre of conflict between six armies of African countries¹⁴³ and several armed groups, which would lead to the occupation on 31 August of virtually 60% of national territory. Mbata writes that “This conflict is probably the most important crisis Africa has experienced in its post-colonial history,

¹³⁸ Osita Afoaku (note 131 above; 109).

¹³⁹ According to Nzogola-Ntalaja in February 1998 there were several suspect military activities in different countries of the Great Lakes Regions and suspicious contact between some members of AFDL and neighboring countries. See G Nzogola-Ntalaja (note 109 above; 227).

¹⁴⁰ FAC: *Forces Armées Congolaises* (Congolese Armed Forces).

¹⁴¹ Osita Afoaku (note 131 above; 109).

¹⁴² Nzogola-Ntalaja (note 109 above; 227).

¹⁴³ According to Mbata, the most recent conflict in the DRC involved several foreign rebel groups allegedly based in the DRC and launching attacks against their respective governments. At the climax of the conflict, at least seven other African countries had regular troops in the DRC. Angola, Namibia, Zimbabwe, and Chad lent support to President Kabila, while Rwanda, and Uganda backed the rebels. See A Mbata (note 114 above; 237).

and one of the most complex and perplexing events that the post-Cold War world has seen,” with effects beyond the sub-region to afflict the continent of Africa as a whole”.¹⁴⁴

Regarding the geo-strategic position of the DRC, the extent of the alliance and its implications, some classify this conflict as the first African world war.¹⁴⁵ In addition this armed conflict has been labeled as liberation, rectification, internal, international, mixed, imperialistic, hegemonic, irredentist, opportunistic, economic, and invasion.¹⁴⁶

Examining the recent armed conflict in Congo, Mamdani concluded that it was purely and simply aggression¹⁴⁷ which was the source of all kinds of crime and violations of the law. There is no doubt that the nexus between war and the law is one of the most internal contradictions of humankind.

Whatever the causes, the results of that horrible war were dramatic and unacceptable.

2.2.3 The outcomes and consequences of wars in the DRC

The unjust wars in the DRC had dramatic and incalculable consequences.

These included the deaths of several millions Congolese caused directly or indirectly by conflict, environmental pollution and destruction, the systematic looting of numerous natural resources, the pillage and demolition of basic and economic infrastructure, an escalation of a culture of hatred and violence, and political instability and insecurity. Obviously it is not possible here to assess all aspects of the „first African World War“, in terms of short, medium and long term (in time and space) aspects. Such endeavor may require a new special study.

¹⁴⁴ A Mbata (note 114 above; 237); D W Nabudere „The continental nature of the conflict in the DRC“ in M Baregu (ed) *Crisis in the Republic Democratic of Congo* (1999) 79-81.

¹⁴⁵ Y Bangura „Comments on regional security and the war in Congo“, in M Baregu (ed) *Crisis in the Republic Democratic of Congo* (1999) (10); A Mbata (note 114 above).

¹⁴⁶ Analyzing the role of external actors in conflict in DRC P Biyoya observed that the Congo has been the theatre for numerous armed conflicts and local, regional, international and world political conflicts (note 103 above; 89); M Baregu „The DRC war and the Second Scramble for Africa“ in M Baregu (ed) *Crisis in the Democratic Republic of Congo* (1999; 36-41).

¹⁴⁷ M Mamdani „From Zaire to the Democratic Republic of the Congo“ in M Baregu *Crisis in the Democratic Republic of Congo* (1999) 45-48.

However the following extract¹⁴⁸ of the testimony on the suffering and despair relating to the humanitarian crisis in the Congo given on 17 May 2001 before the Subcommittee on International Operations and Humans Rights of the Committee on International Relations of US House of Representatives is insightful:

A few reports by international agencies have documented the extent of this humanitarian disaster. In a recently released report following a survey of death rates in Eastern Congo, the International Rescue Committee concludes that the death rate due to the conflict in Eastern Congo is “shockingly high”. It estimates the number of excess deaths since the beginning of current war at 2.5 million, of which 350,000 were deaths since the beginning of the current war at 2.5 million, of which 350,000 were deaths directly resulting from the violence. A UN official, Ms Caroline McAskie of the Office of Humanitarian Coordination stated during a meeting of the UN Security Council that about 16 million people, or about a third of the DRC’s total population, are directly affected and impacted by fighting.

Among some of the most atrocious consequences of this war on the civilian population are:

A series of massacres occurred, among which the massacre at Kasika is most often talked about (1 099 casualties, all civilians). Other massacres have been committed in Makobola, Lusenda, Kilungutwe, Kamituga and Katogota.

Internal displacement of the civilian population: for instance, entire villages are displaced and continually in motion between Bukavu and Kindu, fleeing from the terror of war. By our estimates, at least 1.5 million Congolese are internally displaced as a result of the war.

Far from their houses and fields, the civilian population dispersed in the dense equatorial forest are left without food, medicines, drinking water, and exposed to all sorts of epidemic outbursts and inclement weather conditions.

¹⁴⁸ J B Bahala „Suffering and despair: humanitarian crisis in the Congo” available at http://commdocs.house.gov/committees/intlrel/hfa72638.000/hfa72638_0f.htm, accessed on 10 July 2011.

The war has occasioned the crumbling of the educational system, with extremely high school dropout rates, and these youths being recruited into militias, and other armed groups.

As confirmed by Congressman Frank Wolf who visited the region in January 2001, the situation of women is particularly precarious. “Women live in fear. Soldiers – regardless of whom they owe allegiance to – often treat them as prey. I heard horrific stories of rape, abuse and torture. Women are being raped in front of their husbands and children. One woman had her hands cut off after being raped; she now has a child she cannot care for. We were told that just two days before I arrived in Bukavu, a woman was raped in the marketplace at 10 a.m. and no one intervened”.

As a result of this widespread use of sexual violence, the spread of AIDS is a real concern, especially since it is said that 70% of soldiers fighting in Congo are HIV positive and have been accused of raping women indiscriminately.¹⁴⁹ Congolese human rights groups have documented hundreds of cases of rape perpetrated by soldiers.

Human Rights Watch even reported on a case of a Congolese woman being raped and forced to stand in a pit full of water in which a dead infant (foetus) was already floating from another woman who had miscarried earlier during her torture.

In a recent article analyzing the chaotic situation resulting from the wars in the DRC, Kristof¹⁵⁰ notes that the indifference of the international community is questionable, considering the repugnance which greeted events such as the Holocaust, that caused the brutal killing of six million Jews. No one could imagine that another holocaust or similar massacres might be tolerated. The atrocities perpetrated during the recent conflict in the Congo are in many respects comparable with and even worse than¹⁵¹ the Holocaust. “A peer-reviewed study put the Congo war’s death toll at 5.4 million as of April 2007 and rising at 45,000 a month. That would leave the total today, after a dozen years, at 6.9 million”.¹⁵²

¹⁴⁹ T Ngoy notes how rape by HIV positive soldiers was used as weapon against Congolese women to propagate disease (Note 8 above; 179).

¹⁵⁰ N D Kristof (note 14 above).

¹⁵¹ Considering the time frame and the number killed.

¹⁵² “What those numbers don’t capture is the way Congo has become the world capital of rape, torture and mutilation” see N D Kristof (note 14 above).

It is unbelievable that those events took place under the eye of the international community, which did little to prevent the Congo war from gaining a world record in terms of atrocities.¹⁵³

Prendergast notes that the Congolese war is estimated to have led to the deaths of three million people since 1996. No conflict since World War Two has produced as many casualties.¹⁵⁴

This had led some¹⁵⁵ to wonder if lust and greed for Congo minerals resources may be what underlies such a massive killing of Congolese people. Exploitation¹⁵⁶ of those riches could enhance the development of many countries across and beyond the African continent. Instead of orthodox exploitation, there is an endless cycle of conflicts, which are internationally renowned for their gross and systematic breach of the rule of law.

2.3 Breaches of the rule of law

There have been grave violations of national as well as international law by the different parties. Grotius¹⁵⁷ observed that: “Peace is glorious and advantageous, when we give it in our Prosperity; it is better and safer, than a hoped-for Victory. For [we] must consider, that the success of War ... is uncertain”. War and the law are naturally contradictory. If the law can regulate war, it is merely to reduce its negative effects, for war by nature is lawless. This is why, in accordance with international modern law, war must be outlawed anytime and everywhere.

¹⁵³ See N D Kristof and Jewish Rabbis (note 14 above). According to a US medical report 1,100 women are raped every day. For more read France 24 International News „1,100 women raped every day“ (11 May 2011) available at <http://www.france24.com/en/20110511-thousand-1100-women-raped-every-day-american-public-health-report-un-democratic-republic-congo>, accessed on 10 June 2011.

¹⁵⁴ A Jolie & J Prendergast (note 42 above).

¹⁵⁵ Charles Onana (note 127 above); C Braeckman *Les nouveaux prédateurs: politiques des puissances en Afrique centrale* (2003) passim.

¹⁵⁶ Memorandum of Congolese priests to the UN in J-P Fofe Djofia Malewa *La Cour Pénale Internationale: une institution nécessaire aux pays des Grands Lacs Africains* (2006) 98-99.

¹⁵⁷ H Grotius (note 49 above) Book III 1641.

In the DRC, the violations of law caused by those armed conflicts fueled by numerous actors (local, regional international) were a daily reality.

At a national level, several pertinent provisions of constitutional, criminal, civil, economical and social law were widely violated. Mbata¹⁵⁸ notes that the conflict resulted in the violation of almost all the rights in the African Charter.

On the international level there was violation of international law and its different branches, notably human rights and international humanitarian law.

2.3.1 Breaches of the core principles of international law

One of most important characteristics of international law is its conventional aspect, however it is founded on a certain core of norms regarded as imperative (*yus cogens*) for all states. Amongst these sacrosanct principles of the law of nations are:

- co-operation;
- pacific settlement of disputes;
- non-resource to force;
- non-interference in the domestic affairs of a state; and
- respect of territorial integrity.¹⁵⁹

Those responsible for the conflict in the Congo seem to have ignored these principles, which everybody is presumed to know.

An analysis of the first war (1996-97) under the lens of international law reveals a flagrant violation of international law.

The wide engagement on Zairian territory of armies of foreign countries was obvious. At first, it was hidden behind rebellion but later the presence of non-invited armies in the DRC was incontestable. The authors of the war took advantage of internal

¹⁵⁸ A Mbata (note 114 above).

¹⁵⁹ See articles 1 & 2 of Kellogg-Briand Pact of 1929; Preamble and Article 2 (1)(3)(4) of the UN Charter, article 4 (b) (e) (f) (g) (i) (p) of the Constitutive Act of the African Union.

opposition to foment an aggressive war on behalf of a puppet rebellion. Therefore the integrity of the territory of a sovereign member of the UN was violated under the screen of an indifferent and politicized international community without any public condemnation or any official denunciation, even from the UN.¹⁶⁰

That this was an act of aggression is clear. When the war erupted in 1996, Kabila did not appear to have his own independent, well-oiled resistance movement, which could deliver a plan for the political liberation of the entire country. The process which led him to take power was handled from outside. Most ordinary Congolese citizens didn't comprehend the different forces operating at regional level. The creation of the AFDL after the eruption of the war illustrates the involvement of external forces.¹⁶¹

General Kagame himself has admitted and boasted about the important role Rwanda played in the 1996-97 war.¹⁶²

Essolomwa noted that the war was perceived initially and correctly as a Tutsi plot, as well as external aggression on the part of Rwanda, Burundi and Uganda supported by the Western powers.¹⁶³

Even though internal opposition might have existed, external aggression played a significant role. There is a tendency in the countries of Great Lakes Region to consider that "their internal problems are generated by external interference. However, what has occurred in the Congo is an invasion not just a case of interference".¹⁶⁴

The eruption of another war (1998-2002) of liberation or rectification a few months later clearly demonstrated the strategies of aggression and the unlawful nature of those wars.

¹⁶⁰ T Ngoy (note 8 above; 173).

¹⁶¹ G Nzongola-Ntalaja (note 109 above; 225). He notes that the AFDL was created on 18 October 1996 at Lemera in South Kivu, roughly two months after the beginning of the attack from Rwanda.

¹⁶² G Nzongola-Ntalaja (note 109 above; 226).

¹⁶³ T R Essolomwa (note 107 above; 5).

¹⁶⁴ M Mamdani (note 147 above; 45-47).

Analyzing the complex reasons for Rwanda's engagement during the Second Congo War, Timothy Longman remarked on the sense of entitlement and invincibility, which marked the Rwandan military intervention. The blinding triumphalism within members of the RPF staff affected even Tutsi perceptions. Arrogance spurred the RPF to action, which resulted in horrendous consequences and fuelled the "anti-Tutsi sentiments, as well as for other Congolese who have supported the two rebellions. This arrogance of power also contributed to the eventual break between Rwanda and Uganda, as ultimately RPF leaders could not usurp the role of puppet master that they rightly saw as their own".¹⁶⁵

Rwanda and Uganda argued that their motive was security of their borders. However, this argument cannot be advanced endlessly for, as Bahala¹⁶⁶ notes, during the first war the Rwandan forces took control of all the Congo's territory, so that they could secure their borders if they really wanted to.

The legal argument of right of hot pursuit upon which Rwandan and Ugandan military intervention in the DRC was supposedly based is very debatable in international law and cannot justify such repetitive cross-border raids. Indeed the right of hot pursuit is related to law of the sea and not on the land. Article 111 (1) of the United Nations Convention on Law of the Sea of 10 December 1982 states: "The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State". Arising from the violation of laws in maritime zones, the coastal States may rightly pursue and arrest that ship on the high seas. As Mbata asserts, the Rwanda and Uganda's use of „right of hot pursuit“ was unfortunate and a misuse of the term.¹⁶⁷ Dugard concludes that the right of "hot pursuit on land is not recognized by international law. If a state wishes to justify cross-border raids, it must do so in terms of the right of self-defence or possibly, reasonable reprisal action".¹⁶⁸ There is no use in analyzing in-depth reprisals because their illegality in international law is clear.

¹⁶⁵ T Longman „The complex reasons for Rwanda's engagement in Congo“ in J F Clark (ed *The African stakes of the Congo war* (2002) 129-139.

¹⁶⁶ J B Bahala (note 148 above).

¹⁶⁷ A Mbata (note 114 above; 241).

¹⁶⁸ J Dugard et al. (note 48 above; 511).

As for the self-defence argument, or even so called „anticipatory self-defence“, none of those arguments can “be used to justify the occupation of the Congolese territory, the exploitation of the Congolese natural resources, the commission of gross human rights violations and the establishment of a puppet government in Kinshasa under the false pretences of helping the Congolese people to establish democracy”.¹⁶⁹

Indeed, with regards to the state of war in the DRC the UN Security Council adopted Resolution 1234 on 9 April 1999, in which it made a distinction between invited powers and non-invited powers and deplored the fact that combat was still going on. The Resolution proclaimed that the presence of foreign states’ armed forces in the DRC was incompatible with the principle of the UN Charter and requested those states to remove their forces, which were non-invited.

This UN Resolution did not use the term „aggression“ to describe military action on the part of foreign armies against the DRC. However, the recognition that this was aggression was implicit in the Resolution. The use of foreign armies against the territorial integrity of a politically independent country was a flagrant violation of article 2 (2)-(4) of the UN Charter. Although the Security Council did not clearly recognize the aggression in terms of article 39 Chapter VII of the Charter, it remains evident that the element of aggression cannot be denied if we consider the relevant provisions of Resolution 3314 of the UN Assembly General of 14 December 1974. Among the acts that this Resolution considered acts of aggression is the use by a State of its armed forces against the sovereignty, territorial integrity, or political independence of another state or in any other manner incompatible with the UN Charter.

The crime of aggression committed in the DRC by Rwanda, Uganda and Burundi’s armed forces is obvious.

¹⁶⁹ A Mbata (note 114 above; 241).

This was confirmed in the jurisprudence of the International Criminal Court in its recent decision relating to the *DRC v Uganda* case (ICJ, 2005), in which the Court condemned Uganda for its illegal military activity in the DRC.¹⁷⁰

Aggression is a crime against peace and there is no doubt that it is the mother of all crimes. The collateral consequences of this illegal use of force are numerous and include *inter alia* grave violations of human right and international human rights law.

2.3.2 Breaches of human rights

In general, the situation regarding human rights in Africa is of great concern. In the DRC it was made worse by neocolonialism, the long Mobutu dictatorship and the two wars under discussion.

During the conflict, the civilian population was systematically submitted to atrocious acts and perilous situations in violation of their human rights.

Indeed, although international human rights law guarantees the protection of the rights of all people, everywhere at all times, most of the provisions of humans rights conventions were violated by different protagonists in the territory under their control.

Individual as well as collective rights were violated. Civil, political, economic, social and cultural rights have been denied to the population of the DRC. Fundamental rights to life, to food, housing, health, freedom, justice, peace, development, and to a good environment were all trodden on. In terms of who was responsible for this state of affairs, many violations may be attributed to Government, RCD-Goma, MLC, RCD-ML, and UPC.¹⁷¹

¹⁷⁰ See *DRC v Uganda* case (ICJ, 2005) 280, 116 available at <http://www.icj-cij.org/docket/files/116/10455.pdf>, accessed on 24 March 2011.

¹⁷¹ D Kalindyé Byanjira *Civisme, développement et des droits de l'homme conditions d'instauration d'un Etat de droit en République Démocratique du Congo* (2003) 18-19; M Sassoli & A Bouvier *Un droit dans la guerre?* Vol. 2 (2003) 1698-1699.

The situation of women and children was extremely grave. Women and children belong to a special category of vulnerable people and a number of Conventions recommend their protection.¹⁷²

Women were regarded as prey and were terribly abused.¹⁷³ Without any distinction in terms of age tens of thousands of women were raped and are still being raped by members of the different armed forces. Those rapes resulted in numerous cases of fistulae and the dissemination of sexual transmitted infections. The violence used against women in Congo took a particular form, as it was used as war weapon; this meant that women were double victims of the war.¹⁷⁴

Children were killed, while others were abandoned in the streets without any kind of protection and assistance, deprived of their right to fundamental education, and worst still, enlisted in the armed forces.¹⁷⁵

Relating to this situation, the “Inventory made by UN of the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003” is very insightful. The Report noted 782 cases, of which the team was able to verify 71% (563),¹⁷⁶ which were confirmed quasi-entirely.¹⁷⁷ While the violence was particularly intense in the eastern part of the country, several incidents occurred in the west, north and south involving the arbitrary detention and summary execution of several people, pillaging and looting (e.g. in Uvira, Bukavu, Goma, Kinshasa, Kisangani, Anthropophagy).¹⁷⁸

The Mapping Report concluded that this period was

¹⁷² J G Gardam & M J Jarvis *Women, armed conflict and international law* (2001) 53-87, 135-175.

¹⁷³ S Kirchner (note 13 above).

¹⁷⁴ L Banza Mbombo & C Hemedi Bayolo *Conflits armes en R.D. Congo: violences sexuelles contre les femme, crimes sans châtement 2001-2004* (2004) 24, 25.

¹⁷⁵ UNOHCRH (note 3 above; 324-332).

¹⁷⁶ For several reasons, including difficulty in gaining access to the place where the crime was committed, time constraints, and lack of testimonies, 29% (219) incidents were not covered. Mapping Report 45.

¹⁷⁷ UNOHCRH (note 3 above; 44).

¹⁷⁸ L Banza Mbombo & C Hemedi Bayolo (note 174 above; 28-39).

... one of the most tragic chapters in the recent history of the Democratic Republic of Congo (DRC), if not the whole of Africa. Indeed, the decade was marked by a string of major political crises, wars and multiple ethnic and religious conflicts that brought about the deaths of hundreds of thousands, if not millions, of people. Very few Congolese and foreign civilians living on the territory of the DRC managed to escape the violence, and were victims of murder, maiming, rape, forced displacement, pillage, destruction of property or economic and social rights violations.¹⁷⁹

Numerous other crimes were perpetrated directly by armed forces against the non-combatant population and civilian installations during the hostilities in flagrant violation of the Geneva Conventions and their additional protocols.

2.3.3 Breaches of international humanitarian law (war crimes)

The laws on international human rights must be respected at all times. Furthermore, during warfare all the parties to the conflict are specifically bound to scrupulously respect the rule of international humanitarian law as proclaimed in the Geneva Conventions and established in international custom, state practice and the decisions of judicial bodies.

During the conflicts in the DRC, little effort was made by the fighting forces to protect non-combatants and to distinguish civilians from the military, as required by international humanitarian law.

Several of the acts perpetrated can be classified as war crimes.

For instance, it is reported that following incident took place: During the mobilization of the Uvira population, on 9 September 1996, in order to force the Tutsis from the former Zaire territory, a certain number of people, especially of Tutsi extract, namely the Banyamulenge were arrested by Mobutu's FAZ. Army members pillaged numerous civil and private institutions such as local churches and NGOs. The same

¹⁷⁹ UNOHCHR (note 3 above; 48).

army, in collaboration with young people, is accused of having executed 15 Banyamulenge at the beginning of October 1996, in a village called Sange.¹⁸⁰

Far away from Uvira, in Kinshasa ill treatment was observed against people from Rwanda, especially the Tutsi, during October 1996, while students were demonstrating against the Rwandans presence in the former Zaire.¹⁸¹

At Lemera, in South Kivu, on 6 October 1996, the Banyamulenge rebels attacked a hospital and randomly killed around 30 people. Several civilians and soldiers who were hospitalized lost their lives. On 1 and 2 November 1998 in the neighboring area of Burundi Border, the coalition of armed forces consisting of AFDL, APR, and FAB carried out indiscriminate killing at Ndunda. Roughly 250 people were killed, mostly refugees and civilians.¹⁸²

On 22 April 1997, AFDL/APR units allegedly opened fire indiscriminately on the Biaro refugee camp, killing close to 100 people, including women and children. The soldiers then went in pursuit of those who had managed to escape into the forest, killing an unknown number of them. They also requisitioned a bulldozer from a Kisangani-based logging company to dig mass graves. Witnesses saw AFDL/APR units transporting wood in trucks. This wood was then used to build pyres and burn the bodies.¹⁸³

Several others act in violation of law and the customs of war were committed, which will long remain in the memory of the Congolese people, such as the killing of the Archbishop of the Catholic Church, Christophe Munzihirwa on 29 October 1997; the attack on the Inga hydro electric power plan by armed forces and the power station in Bas-Congo on August 1998; the massacre of hundreds of military at Kavumu on 4

¹⁸⁰ UNOHCRH (note 3 above; 73 and 75).

¹⁸¹ Ibidem 77.

¹⁸² Ibidem 75 and 83. According to the same sources, on the night of 25 to 26 October 1996, AFDL/APR soldiers bombarded the Kibumba camp with heavy weapons, allegedly killing an unknown number of refugees and destroying the camp's hospital. Around 194,000 refugees fled Kibumba and headed towards the Mugunga camp.

¹⁸³ UNOHCRH (note 3 above; 109, 207, 224). These sources indicate further that, in January 1997, AFDL/APR units killed at least thirty Rwandan and Burundian refugees, mostly with knives, on the Bukavu to Walungu road, around 16 kilometres from the city of Bukavu. The victims had been arrested as part of a mopping up operation. Before killing the victims, the soldiers often tortured and maimed them.

August 1998; the massacres at Kasika of more than 1300 people on 23 August 1998; at Makobola of at least 800 people in December 1999; the killing of several thousand Hema and Lendu in 2000; the indiscriminate bombardment of the civilian population at Goma, Kisangani, Libenge, Uvira, and Zongo, which resulted in numerous deaths; violence against women and rape; and the enlistment of children in the armed forces.¹⁸⁴

There were gross and systematic violations of Conventions on the protection of children.

All of these war crimes perpetrated against an innocent population are unacceptable and require the punishment of their perpetrators and reparations for their victims.

2.4 Conclusion

It is regrettable that the OAU did not do enough to prevent the wars in the DRC.¹⁸⁵ It is also obvious that grave crimes were committed on DRC territory during the wars and that these constituted a serious threat to peace and security, not only in the region but in the world as a whole. Thus the necessity of justice being seen to be done, is extremely important.

Prior to analyzing what kind of justice can be pursued at an international level, it is pertinent to first examine what kind of justice can be delivered at the national level.

¹⁸⁴ A Bulambo Katambu *Mourir au Kivu: du génocide tutsi aux massacres dans l'Est du Congo-RDC* (2001) 88-97; Migabo Kalere, *Génocide au Congo? analyse des massacres des populations civiles* (2002) 1-42; Médecins sans Frontières *RD Congo, silence on meurt: témoignages* (2002) 5-78; T Ngoy (note 8 above; 178-184); M Sassoli & A Bouvier (note 171 above; 1700-1701); L Banza Mbombo & C Hemedi Bayolo (note 174 above; 24-59).

¹⁸⁵ M Du Plessis (note 36 above; 546, 549).

Chapter 3: The jurisdiction of the Congolese judiciary to try war crimes

“Historically, the prosecution of war crimes was generally restricted to the vanquished National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases” (W A Schabas *An introduction to International Criminal Court* 2 ed 1).

In the light of the numerous international crimes perpetrated in the DRC, which remain unpunished, this chapter examines the jurisdiction of the Congolese judiciary. An overview of the Congolese judicial machinery is provided, which sheds light on its organization, functioning and *modus operandi*, which will enable its merits and weakness to be assessed in terms of efficiency in the prosecution of war crimes.

The structure and organization of Congolese judicial system will be presented first, followed by an examination of the jurisdiction and procedure to prosecute war crimes. Finally, the effectiveness of the Congolese judiciary in the fight against impunity for war crimes perpetrated in the country will be assessed.

3.1 Origin and organization of the Congolese judicial system

The judiciary as an institution is not a recent development in the DRC. Its origins can be traced back to pre-colonial, colonial and postcolonial times.

The pre-colonial period was characterized, essentially, by customary law.¹⁸⁶ However, some written sources of law had existed centuries before, such as documents related to the diplomatic relations established between the Kongo Kingdom and the Portuguese and the Vatican (15th, 16th and 17th centuries). It seems, however, that

¹⁸⁶ The system was grounded entirely on customs. “Prior to European occupation, the customary law of the Bantus consisted of a mixture of legislative enactments by the native rulers, of traditional tribal usages, and rules coming from decisions by natives tribunals.” J H Crabb *The legal system of Congo-Kinshasa* (1970) 24.

writing was used more to communicate with Europe than to codify local customs for judicial purposes.¹⁸⁷

There was a distinction between the judicial jurisdiction and the political function even if not to the same degree as the well known principle of separation of powers of Charles de Secondat.¹⁸⁸ Judges were appointed according to *inter alia*, their level of wisdom and credibility in society. The jurisdiction of tribunals was limited¹⁸⁹ depending on the human structures (clan, tribe, kingdom, empire).

According to Crabb, “Where the tribal unit was cohesive, especially to the point of functioning as kingdoms and empires, systems of appeal existed, creating as many as four levels of courts”.¹⁹⁰

On their arrival the Europeans did not remove the traditional legal system they found; they kept it to manage the indigenous areas.

But in preserving the customary law, the Europeans subordinated it to their own legal systems, which they added and superimposed on the country. Apart from minor and local considerations, the “public law” in the continental sense was entirely European, and customary law had little scope outside its traditional “private law” categories.¹⁹¹

Apart from the customary law system in place, the advent of colonization (Leopold II 1885-1908 and after this, Belgium 1908-60) brought the (new) written law to the Congo. The Congolese legal system was dualistic, a mixture of, on the one hand, customary law¹⁹² or indigenous law for the local population, and on the other hand

¹⁸⁷ E Wamba dia Wamba „Relations Diplomatiques Du Royaume Kongo: Lecons A Tirez” available at <http://kimpavitapress.org/2009/02/relations-diplomatiques-du-royaume-kongo-lecons-a-tirez/>, accessed on 28 May 2011; Mbelelo Ya Mpiko „L’Écrit et son impact dans la communication interculturelle au Royaume Kongo au xvii^e siècle: le cas du catéchisme kikongo de 1624 (2004) 18” Colloque international de bibliologie de l’Association internationale de Bibliologie available at <http://www.aib.ulb.ac.be/colloques/2004-kinshasa/fulltext/12.pdf>, accessed on 17 May 2011.

¹⁸⁸ Montesquieu *De l’esprit des lois* (1748) Deuxième Partie (1748) Livre XI a XI 53 available at http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_2/de_esprit_des_lois_2.html, accessed on 10 June 2011.

¹⁸⁹ J H Crabb (note 186 above; 24-24).

¹⁹⁰ Ibidem 25.

¹⁹¹ Ibidem 27.

¹⁹² See for instance, article 1 of Ordinance of General Administrator of Congo of 14 May 1886 regarding principles to apply in judicial decisions in *Codes Larquier* 262.

written law or European law for Europeans and others people assimilated with them. This situation continued until independence in 1960. After independence, alongside the new Constitution,¹⁹³ Royal Decrees, ordinances, and legislative measures like Statutes and Acts were not abrogated and were still applicable. Although there is a strong legacy of written law and its institutions in the post-independence period, customary law has not disappeared from the Congolese judicial system.

In article 207 (1) (2) of the Constitution of the Third Republic, the authority of the traditional¹⁹⁴ customs is recognized, insofar as they do not contradict the Constitution, legislation, public policy and good conduct.

While some efforts have been made to unify written and customary law, the influence and impact of the latter has declined¹⁹⁵ as a consequence of Europeanization. For the purposes of this research project, it is deemed more appropriate to consider the Congolese written law (which can be classed as a Roman Dutch system).¹⁹⁶

It is worth noting that, “The techniques and institutions of the European or written law provide the form and direction for the legal systems as a whole of ... society”.¹⁹⁷ There is a primacy of written law.

3.1.1 The judicial apparatus

Article 68 of the Constitution relating to the organization of powers in the DRC cites the courts and tribunals as part of the institutions of the Republic.¹⁹⁸

¹⁹³ Loi Fondamentale of May 19, 1960 on the Structures and the Institutions in the Congo.

¹⁹⁴ See E Boshab *Pouvoir et droit coutumiers à l'épreuve du temps* (2007) passim.

¹⁹⁵ This does not mean that the customary law system which is different from customs is less important or condemned to perish, for the system is immutable but is adaptable to new trends in society and its decisions might be reported in written form to allow for its conservation and greater accessibility. See J H Crabb (note 186 above; 20-21); E Boshab (note 194 above).

¹⁹⁶ J H Crabb divides Africa into two categories, the former British area under Anglo-American Law (British variant) and the rest of the African countries under a civil law system. The written law applied in Congo was inspired by Belgian and Napoleonic French law J H Crabb (note 186 above; 30).

¹⁹⁷ J H Crabb (note 186 above; 29).

¹⁹⁸ See also part 3 of the *Exposé des motifs* of the Constitution

Indeed, the Congolese justice system, as provided in article 149 of the Constitution, is a complex judicial machinery whose critical mission is to render justice throughout the national territory on behalf of the Congolese people.¹⁹⁹

The judiciary is the guarantor of individual freedom and fundamental rights. When they exercise their function, judges are submitted under law as the only authority.²⁰⁰ The political authorities are not allowed to interfere in the jurisdiction of a judicial magistrate to settle disputes or to oppose the execution of a justice decision. This applies equally to interference from members of Parliament. Hence any law, which aims to intervene in the course of judicial proceedings, is null and void.²⁰¹

The Statute of Magistrates is fixed by law²⁰² and is managed by the Superior Judicial Council.²⁰³

In accordance with article 149 (1) of the Constitution, the judicial power is independent of the legislative and executive powers. It devolves upon the following courts: the Constitutional Court, the Cassation Court, the State Council, the High Military Court, and the civil and military Courts and Tribunals. Since the revision of the Constitution of 20 January 2011, prosecutors appointed to all these jurisdictions are no longer permitted to exercise judicial power.²⁰⁴ This is the novel shape of the judiciary in the Congo ushered in by the current constitution, on 18 February 2006.

¹⁹⁹ But the Decisions, Judgments and Ordinances of the Courts and Tribunals are executed in the name of the President of the Republic (article 149 of the Constitution).

²⁰⁰ Article 150 of the Constitution.

²⁰¹ Article 151 of the Constitution.

²⁰² According to article 150 para 3 of the Constitution, the organic law regulates the magistrates' statute, see, Loi organique numéro 06/020 of 10 October 2006 relating to the magistrates' statute.

²⁰³ Article 152 para 1 and 6 of the Constitution . The Superior Judicial Council is regulated by a statute. See, Loi organique numéro 08/013 of 05 August 2008 relating to the organization and functioning of the Superior Judicial Council. Article 152 of the Constitution provides that the Superior Judicial Council is composed of: 1. President of Constitutional Court; 2. Attorney General before the Constitutional Court; 3. First President of the Cassation Court; 4. Attorney General before the Cassation Court; 5. First President of State Council; 6. Attorney General before the State Council; 7. First President of High military court; 8. Judge advocate General before the High Military Court; 9. First President of Court of Appeal; 10. Attorneys General before the Court of Appeal; 11. First Presidents of Administrative Courts of Review; 12. Attorneys General before the Administrative Courts of Review; 13. First Presidents Military Court; 14. Superior Military prosecutors; 15. Two magistrates sitting in respect of each Court of Appeal , elected for a mandate of three years by other magistrates; 16. Two magistrates standing or prosecutor before the Appeal Court , elected for a mandate of three years by other magistrates; 17. One magistrate sitting for each military Court; and 18. One magistrate standing for each military Court.

²⁰⁴ See the revision of article 149 of the Constitution of 20 January 2011.

Contrary to the former constitutional provision there is no longer a system of courts, including one Supreme Court of Justice, a Court of Review, and Military Courts and Tribunals.²⁰⁵

Currently there are, on the one hand, the jurisdictions of the „judicial“ order and, on the other hand, the jurisdictions relating to the administrative order.

The latter consists of a hierarchy as follows: A State Council located in the capital city (Kinshasa), an Administrative Court for each province²⁰⁶ and the administrative tribunals. Those jurisdictions are competent to settle administrative disputes.²⁰⁷

In conformity with article 153 of the Constitution, the first order of jurisdiction is under the control of the Cassation Court and consists of civil and military jurisdictions. They apply duly ratified international treaties, laws, acts of administrative authority and customs, insofar as the latter conform to the laws and to the public policy of the State. The organization, functioning and the competences of jurisdictions of the judiciary order are determined by an organic law.²⁰⁸

The Congolese judiciary is organized by the Code on Organization and Jurisdiction of the Judiciary of 31 March 1982.²⁰⁹ This provides for different levels of jurisdiction in the judicial system in the DRC. Thus, according to their degree of competence these are civil jurisdiction, the tribunal of peace, the tribunal of first instance, the court of review (appeal) and at the top, the Cassation Court.²¹⁰

²⁰⁵ See article 148 (1) of the Transitional Constitution in DRC of 4 April 2003.

²⁰⁶ Apart from Kinshasa, currently only 10 provinces are operational in the DRC, although there is a constitutional proposal to divided Congo territory in 25 provinces. See article 2 of the Constitution.

²⁰⁷ See articles 154 and 155 of the Constitution. Most of these judiciary reforms introduced by the current constitution remain literal and are not yet applicable. Thus, the old judicial jurisdiction still exists. For instance, the jurisdiction of the State Council is actually exercised by the Supreme Court of Justice in its Administrative Division.

²⁰⁸ Article 153 (6) of the Constitution.

²⁰⁹ The Code on organization and jurisdiction of the judiciary in Congo as created on 31 March 1982 by Ordonnance-Loi 82-020 of 31 March 1982 in *Codes Larcier T I* (2003) 262-273. This code is however outdated and needs to be adjusted to reflect the current judiciary reform in DRC. A new code has been proposed. For doctrinal commentary see Bayona-Ba-Meya „Initiation judiciaire“ 1998 in *Revue Interdisciplinaire Lukuni Lwa Yuma* 9-18; P Akele Adu *Le citoyen justicier, la justice privée dans l'Etat de droit* (2002) passim; G Ngbanda Te Boyiko *Précis d'organisation et de compétence judiciaries* (2005) passim; D Zongwe, F Butedi & P M Clement „The legal system and research of the Democratic Republic of Congo (DRC): an overview“ available at http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.htm, accessed on 10 June 2011.

²¹⁰ Articles 21, 31, 36 and 51 of the Congolese Code on Organization and Jurisdiction of Judiciary.

Relating to the concern of the present thesis, which is war crimes, this study focuses on the tribunals' statutory competence to exercise their jurisdictions to prosecute these crimes.

A close examination of national criminal law²¹¹ reveals that in the DRC military jurisdictions remain the only competent jurisdiction to try war crimes.²¹² Hence, this research project specifically considers the military Courts and Tribunals as provided for in the Congolese judicial system.

However it is important to note *prima facie* that, military jurisdictions are normally designed to try crimes committed by members of the Army and members of the National Police.²¹³ In the criminal military code, another category made up of members of the national services namely the *bâtisseurs de la nation* is mentioned.²¹⁴

This jurisdiction of military justice is, however, problematic, because war crimes can be perpetrated not only by soldiers, but also by many others civilians involved in war at several levels and whose responsibility may be obvious in the occurrence of atrocities.

The prosecution of these civilians for war crimes by a military court could be unconstitutional according to article 156 (1) and 19 (1) of the Constitution; for military justice will run the risk of violating the principle of natural justice for civilians.

The prosecution of certain categories of war criminal (civilian) before a military tribunal might lead to irregularities. They should instead be brought before the civil justice authorities, except during a war or when the President of the Republic

²¹¹ See Ordinary Criminal Code created by Décret of 30 January 1940. In *Codes Larcier* T II (2003), 1-23; Military Criminal Code created by Loi 024-2002 of 18 November 2002 in *Codes Larcier* T II (2003) 42- 60.

²¹² Article 173 of the Military Criminal Code.

²¹³ Article 156 (1) of the Constitution.

²¹⁴ Article 106 of Judiciary Military Code created by Loi 023-2002 of 18 November 2002 in *Codes Larcier* T I (2003) 393-421.

proclaims a state of siege or emergency.²¹⁵ But even this situation can be perilous in terms of human rights. Hence, there is a need to reform the Congolese judicial system.

According to the national legislation in the DRC, the jurisdictions competent to try international crimes in general and war crimes in particular remain the military Courts.²¹⁶

In conformity with articles 6, 12, 18, 21 and 23 of the judicial military code in the DRC, military justice is rendered by the High Military Court; the Military Courts and Operational Military Courts; the Military Tribunals of Garrison; and the Police Military Tribunals.

3.1.2 Structure

The Congolese judiciary is made up of magistrates. The magistrature is split into two categories: judges (*magistrature assise* = sitting judges) and the Prosecutor (*magistrature debout* = standing judges). The last are organized in Parquet²¹⁷ for civil magistrates, and in *auditorat* = Office of Judge Advocate for military magistrates. They are attached to each jurisdiction from the Police Military Tribunal to the High Military Court.²¹⁸ However, according to article 17 (2) of Congolese Code on the organization and jurisdiction of judiciary, judges may exercise functions as both judge and prosecutor in the Tribunal of Peace. For a good understanding of the structure of military justice, it is important to consider the common Congolese judiciary, because certain general principles applicable in the military Court are drawn from the common Congolese code on the organization and jurisdiction of judiciary. This is asserted in article 2 (2) of the Judiciary Military Code.

²¹⁵ Such a decision must result from an Ordinance deliberated in the Ministries Council and be submitted to the Constitutional Court for perusal of its constitutionality (article 45 of the Constitution). This decision may suspend the competence of common tribunals and courts to adjudicate certain crimes in all or part of the national territory for a period of time, and confer such competence on military jurisdictions (article 156 of the Constitution).

²¹⁶ According to article 161 of the Military Criminal Code, military judges are competent to try those responsible of crimes of genocide, war crimes, and crimes against humanity.

²¹⁷ The French word Parquet referred to the place where the Prosecutor was installed during a trial in France in ancient times see C Kabati Ntamulenga „La problématique de l'intervention du parquet dans le recouvrement de la créance”(2009) 61, 68 in *Paroles de Justice Revue Annuelle de Doctrine*

²¹⁸ Articles 10 (3), 17 (1), 20 (2), 22 (3), 26, 40, 41 and 42 of the Judiciary Military Code.

Military judiciary personnel are constituted of magistrates, agents (functionaries) of judiciary order and agents of the judiciary police attached to the office of the Prosecutor. They have a military status.²¹⁹

Military magistrates can be listed as follows, for sitting military magistrates:

First president, president and advisors of the High Military Court; first president, president and advisors of the Military Courts and the Military Operational Court; and presidents and judges of the Military Tribunal of Police. And for standing magistrates: Judge Advocate General of the armed forces; first general advocates of the armed forces; and general advocates of the armed forces; military superior prosecutors; general military advocates; substitutes of military superior prosecutors; prosecutors, first substitutes and substitutes of prosecutors.²²⁰

Magistrates play a crucial role in the distribution of justice. To function effectively, they are dispatched at different levels of the judicial structure. Apart from magistrates, other officials make a significant contribution; amongst these are (*greffiers* = clerks), registrars, inspectors, judicial officers, police and other administrative personnel (*huissiers* = bailiffs), experts.²²¹

The interaction of all these agents with magistrates contributes to the functioning of justice. Although they are not members of the judiciary, barristers play a noble role in the better administration of justice. They are organized in a Bar Council at each Review Court and in a National Council Bar at national level.²²² When they appear before the military justice system, the accused are assisted by registered barristers or

²¹⁹ Article 2 of the Judiciary Military Code .

²²⁰ Article 1 (2) of the Judiciary Military Code.

²²¹ Articles 53-64 of the Military Judiciary Code. A 2010 study provided statistics on military justice personnel as follows: Judges 112, Prosecutors 232, judicial police inspectors 265, Registrars 92, Secretaries 66, Bailiffs 44 with a total of 881. However this number needs to be updated due to the recent recruitment of new magistrates, which will hopefully resolve the problem of the shortage of magistrates in the Congo. See, M Wetsh'okonda Koso „Democratic Republic of Congo military justice and human rights: an urgent need to complete reforms“ (2010) 61-62 available at http://afrimap.org/english/images/report/AfriMAP_DRC-MilitaryJustice_full_EN.pdf, accessed on 24 March 2011.

²²² See article 4 of Ordonnance-Loi 79-028 of 28 September 1979 relating to bar organisation and body of *défenseurs judiciaires* in *Code Larcier* VI (2003) 308, 318.

défenseurs judiciaires or military officials approved by the president of the jurisdiction.²²³

The military tribunals and courts are tasked with prosecuting and convicting individuals who have infringed the military criminal code in conformity with article 39 book II. Among others crimes, which are punishable in terms of this code are crimes of genocide, and war crimes.²²⁴

In the DRC the military jurisdiction is organized according to degree of competence as described below.

3.1.2.1 High Military Court

The Court comprises two or several Chambers, which may be composed of five members amongst which are two career magistrates or three in the case of an appeal. The jurisdiction of the Court is extended to the entire national territory.²²⁵

This Court adjudicates in the first and last resort certain categories of high-ranking military and police officers, military magistrates, and other high-ranking personnel who are officers in the Congolese army.²²⁶ It is the jurisdiction of appeal for decisions rendered in a Military Court. The decision of the High Military Court is not susceptible to appeal but rather opposition, as provided for in ordinary jurisdictions.²²⁷

This High Military Court can correct or rectify material errors contained in its decisions. However in a case where they violate the Constitution, an application for recourse may be lodged against them before the Constitutional Court. The latter is not yet established; hence the current Supreme Court of Justice might be able to

²²³ Article 61 (1) of the Military Judiciary Code .

²²⁴ Article 161 of the Military Criminal Code .

²²⁵ Article 10 (1) (2) (5); article 6 (2) of the Military Judiciary Code .

²²⁶ Article 120 (a) (b) (c) of the Military Judiciary Code .

²²⁷ Article 224 of the Military Judiciary Code and Articles 88-95 of the Code of Criminal Procedure created by the Décret of 6 August 1959 in *Codes Larcier* VI (2003) 288-299.

provisionally adjudicate constitutional matters. In such a case, all sections²²⁸ of the Court sit in a joint session to examine constitutional issues.²²⁹

The ordinary seat of this high court is based in Kinshasa, the capital of the DRC. However, in certain circumstances it can be deployed elsewhere in the territory. This is determined by the Head of State. The Court may hold mobile chambers in operational zones during period of war.²³⁰

3.1.2.2 Military Court

There are one or two Military Court(s) for each province, plus the city of Kinshasa, which doubles as the capital of the country and a province²³¹.

The High Military Court has two or several chambers. It is made up of five members, of whom two are career magistrates. The jurisdiction of the Court is provincial. It is an appeal jurisdiction of decisions rendered by the Military Tribunal of Garrison.²³²

The seat of the Court is located in a provincial capital in the same venue as the headquarters of the military region. The President of the Republic may, however, move it to another place and in certain exceptional conditions; the Minister of Defense may decide to do so.²³³

3.1.2.3 Operational Military Court

When there is danger to the nation due to insurrection, rebellion, a threat of war or actual war, the Operational Military Court is established, which accompanies the troops within the operational war zone.

²²⁸ There are three sections: Section judiciaire (article 155), Section administrative (article 158), Section de legislation 159 (319-273).

²²⁹ Article 83 (3) of the Military Judiciary Code; Article 160 (1) of the Code on Organization and Jurisdiction of the Judiciary; article 131-135 of Ordonnance-LOI 82-017 of 31 March 1982 relating to the procedure before the Supreme Court of Justice in *Codes Larcier* vol I (2003) 319-335.

²³⁰ Article 7 (1) of the Military Judiciary Code.

²³¹ It is considered not only a city but also a province.

²³² Article 16 (1) and article 278 (2) and article 12 (1) of the Military judiciary code.

²³³ Article 12 (2) of the Military judiciary Code .

The Court is composed of five members, of whom at least one must be a career magistrate.²³⁴

The implementation of this jurisdiction is undertaken by the President of the Republic, who determines the operational zones.²³⁵

The Operational Military Court prosecutes all crimes committed by the military, even beyond their territorial jurisdiction.

3.1.2.4 Military Tribunal of Garrison

Within each district, city, garrison or military base there are one or several Military Tribunals of Garrison. These tribunals prosecute at first resort, certain military officers. It is the jurisdiction of appeal against judgements of the Police Military Tribunal. Its composition is the same as the Operational Military Court.²³⁶ Its seat may be located in the capital of the district or in the city where the staff of the garrison are located, or any other place determined by the President of the Republic.²³⁷

3.1.2.5 Military Tribunal of Police

The Military Tribunal of Police is situated at the base of the pyramid of the military judiciary in the DRC. It is competent to prosecute in general, low-ranking soldiers. The jurisdiction of this tribunal is located in the same area as the Tribunal of Garrison. It is made up of one career magistrate, plus two others members who need not necessarily be magistrates.²³⁸

²³⁴ Article 18 (1) of the Military Judiciary Code.

²³⁵ Article 18 (2) of the Military Judiciary Code.

²³⁶ Articles 21 (1) and 22 (2) of the Military Judiciary Code.

²³⁷ Article 2 of the Military Judiciary Code.

²³⁸ Articles 23 and 24 (1) of the Military Judiciary Code.

3.1.2.6 Judge Advocate's Department

As indicated above almost all the principles of the ordinary judiciary apply to the military system of justice.

Hence at each level of those jurisdictions, there are magistrates, judges, and prosecutors (*Ministère Public*).

The latter assure the protection of public policy and play a crucial role by actively prosecuting criminals before the Court, where he/she ensures the application of the law and penalties against those found responsible for crimes. If they are found guilty, the Prosecutor is also responsible for carrying out the penalty imposed on the criminal by the Court.²³⁹ It is important to note that victims of crimes (or civil parties) may intervene in penal proceedings to claim reparations for damages as a result of the crime.

3.1.2.7 Judge Advocate General of the Army Forces

The function of Prosecutor is exercised before the High Military Court by the Judge Advocate General of the Army's Forces, who is the chief of all the magistrates acting as prosecutors before the Military Courts. He/she may exercise his/her functions in every military jurisdiction established in the national territory. All the other military magistrates act under his/her orders and control.²⁴⁰ The Judge Advocate General executes the decisions of the High Military Court; he/she reports to the Minister of Defence on necessary measures for the good administration of justice and/or safeguarding defence interests. The Minister of Defence has the right to give instructions to military magistrates relating to the prosecution proceedings.²⁴¹

²³⁹ Articles 40 and 41 of the Military Judiciary Code.

²⁴⁰ Articles 42 and 43 of the Military Judiciary Code.

²⁴¹ Articles 45, 46, and 47 of the Military Judiciary Code.

3.1.2.8 Superior Military Prosecutor

A Superior Military Prosecutor is established at each Military Court and acts under the supervision and the control of the Judge Advocate General. He/she exercises the function of prosecutor before the Military Court and all other judicial institutions under its jurisdiction.²⁴²

3.1.2.9 Military Prosecutor

Under the order of the Superior Military Prosecutor, the function of prosecution is assumed before the Military Tribunal of Garrison by the Military Prosecutor. The latter also exercises the function of prosecutor before the jurisdiction of the Military Tribunal of Police, where he/she is represented by his/her first substitute or substitute.²⁴³

Alongside military magistrates, there are registrars or clerks, who help to write and process files during procedures of the Military Courts.

3.1.3 Jurisdiction

The military judiciary through its different degrees of jurisdiction outlined above exercises its competence in the whole national territory of the DRC to prosecute and judge infringements as provided for and defined in the Military Criminal Code.

Beyond infractions of a military nature they may also try soldiers responsible for diverse crimes or violations of the Ordinary Criminal Code.²⁴⁴

Military Courts are also competent to interpret and ascertain the legality of some executive acts, when procedure requires it. However they are unable to judge issues

²⁴² Article 48 (1) (2) (3) of the Military Judiciary Code.

²⁴³ Article s 51(1) (2) 52 of the Military Judiciary Code.

²⁴⁴ Article 76 of the Military Criminal Code.

relating to unconstitutionality and are not competent to pursue disciplinary action, which is left to the military authorities.²⁴⁵

When no military persons are liable for infractions defined in the Military Criminal Code, the military jurisdiction are competent towards authors, co-authors, and accomplices, except if there is a special derogation.²⁴⁶

If a crime which falls within the jurisdiction of the Congolese judiciary is committed abroad but one of its characteristic elements have been committed within the territory of the DRC, the Congolese Courts may be competent to try those responsible for such a crime, which is regarded as committed in the national territory.²⁴⁷ The Congolese territory encompasses its maritime space and air space.

When a crime is perpetrated in the DRC, the Military Tribunal where the crime has been committed and/or where the criminal is arrested is competent to judge the suspect. But if the latter has committed an infraction at several different places, only one tribunal shall exercise its jurisdiction. If the same ranking Courts are seized of the matter and may exercise their territorial jurisdiction at the same time , the court which is first seized of the matter will be preferred.²⁴⁸

The military judiciary exercises its jurisdiction essentially in terms of the military such as police and *batisseurs de la nation* and in certain conditions, civilians.

To determine the competent jurisdiction, criteria such as military status, military ranking or grade are considered during the commission of crimes and during the prosecution before the Court.²⁴⁹

For instance, the High Military Court is competent to judge: General officers of army forces, members of the National Police and National Service of the same rank, military magistrates, members of the High Military Court, members of the Office of

²⁴⁵ Article 76 (2) and 78 of the Military Criminal Code.

²⁴⁶ Article 79 of the Military Criminal Code.

²⁴⁷ Articles 100 and 97 of the Military Criminal Code.

²⁴⁸ Article 98 (1) (2) of the Military Judiciary Code.

²⁴⁹ Articles 104, 106 and 115 of the Military Judiciary Code.

the Judge Advocate General, members of the Military Courts as well as members of the Operational Military Court and their respective prosecutors.²⁵⁰

As for the Military Court, it is competent to try superior officers of the Congolese Army, members of the National Police and National Service of same rank, high functionaries of the Defense Ministry, of the National Police, of National Service and services affiliated to it, military magistrates of Tribunals of Garrison and their respective prosecutors.²⁵¹

Members of the forces mentioned above and ranked lower than major may be tried by the Military Tribunal of Garrison. The Police Military Tribunal may judge only members of the armed forces of a lower rank than major who committed infringements for which the maximum penalty is imprisonment for one year.²⁵²

While the Congolese judiciary is competent to punish numerous military infractions in general, including some international crimes such as the crime of genocide, crimes against humanity and war crimes, this study focuses on the prosecution of war crimes committed in the DRC.

3.2 Prosecution of war crimes

As demonstrated above, the consequences of the wars in the DRC were the commission of numerous horrendous crimes. In terms of the nature, characteristics, and the scope of these crimes, there is an urgent necessity to prosecute those responsible. In terms of both national legislation and international conventions ratified by the DRC such crimes cannot go unpunished.²⁵³

²⁵⁰ Article 120 of the Military Judiciary Code.

²⁵¹ Article 121 of the Military Judiciary Code.

²⁵² Article 122 of the Military judiciary Code.

²⁵³ The DRC has ratified numerous international conventions, which impose an obligation to prosecute crimes. The most often cited of those conventions and their dates of ratification are: *Accord de coopération judiciaire entre la République démocratique du Congo et le Bureau du Procureur de la Cour pénale internationale* (Judicial cooperation agreement between the Democratic Republic of Congo and the Office of the Prosecutor of the International Criminal Court), 6 October 2004; Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I), 3 June 1982; Additional Protocol to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 30 March 2001; African

The next section analyzes Congolese legislation, examining how war crimes are defined and how the proceedings to prosecute such crimes are organized.

3.2.1 Definition of war crimes

The legal definition as well as expert comments will be considered in this analysis.

3.2.1.1 Legal definition

The DRC has ratified the Rome Statute on the ICC, which provides a broad definition of war crimes in its article 8. The draft of the integration of this convention into the Congolese legislation has not yet been adopted by Parliament. However the current Military Criminal Code defines war crimes as “all offences against the laws of the republic committed during the war and which are not justified by the laws and customs of war”.²⁵⁴ This definition is generic; a skeleton which leaves many lacunae, compared with the crime of genocide or crimes against humanity, defined in the same Code in articles 164 and 165. Furthermore, the definition of crimes against humanity is to a certain extent debatable for its constituent elements seem to match better with the definition of war crimes than crimes against humanity, to the point that it appears that the crimes have been confused with each other.²⁵⁵

Charter on Human and Peoples’ Rights, 20 July 1987. Agreement on the Privileges and Immunities of the International Criminal Court, 3 July 2007; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 March 1996; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 31 May 1972; Convention on the Prevention and Punishment of the Crime of Genocide, 31 May 1962; Convention on the Rights of the Child, 28 September 1990; First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 24 February 1961; Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 24 February 1961; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 12 November 2001; Rome Statute of the International Criminal Court, 11 April 2002. See M Wetsh’okonda Koso (note 221 above; 26 49-50); V Lunda-Bululu V „Les juridiction congolaises et l’application des conventions internationales relatives aux droits de l’homme” in Salmon, A. *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon*(2007) passim; P Akele Adau & A Sita Muila Akele *Les crimes contre l’humanité en droit congolais* (1999) 14-16.

²⁵⁴ Article 173 of the Military Criminal Code.

²⁵⁵ See articles 165 to 172 of the Military Criminal Code for more details relating to the definition of crimes against humanity. See also M Wetsh’okonda Koso (note 221 above; 49-50). Except for some proposals, so far there is no domestic legislation for integration of the Rome Statute into the Congolese legal system. Regarding domestic legislation, South Africa seems a good example in Africa.

It is clear that this definition needs to be improved in order to be applied by the courts. Amongst the criticisms are the absence of sentences for the crimes dealt with by the Code and “we should also emphasize that among other lacunae, the war crime of forced recruitment of children, for which Thomas Lubanga Dyilo is being prosecuted before the ICC, is not included in the Military criminal Code”.²⁵⁶

3.2.1.2 Doctrinal considerations

There is, unfortunately a paucity of commentary relating to the definition of war crimes in respect of Congolese criminal law. Furthermore, there are numerous difficulties and imperfections in the Congolese criminal law, especially the military criminal law, which regulates war crimes. The rare comments that are available direct their comments at war crimes as defined in the Rome Statute rather than in national legislation.²⁵⁷

According to article 215 of the Constitution, international treaties prevail over national legislation if they are duly concluded and published. Considering that the Congolese system is silent on many issues, the tendency to refer to international law is justified.²⁵⁸ However, while it seems necessary to domesticate the Rome Statute in national legislation to allow for suitable prosecution, so far there is no law of integration of the Rome Statute in the Congolese legal system, which could harmonize different legislation at a national level.

3.2.2 Procedure

First and foremost it is important to recognize that it is not easy to analyze the criminal military procedure required by military justice to prosecute war crimes in a few pages. However, the following section provides broad guidelines on how this system of justice operates. Except for some peculiarities related to the military

Read M. S. Du Plessis „South Africa’s International Criminal Court Act: countering genocide, war crimes and crimes against humanity” (2008) available at <http://www.iss.co.za/uploads/PAPER173.PDF>, accessed on 28 April 2010.

²⁵⁶ Ibidem 50.

²⁵⁷ L Mutata Luaba *Traité de crimes internationaux* (2008) 274-351.

²⁵⁸ D Zongwe F Butedi & P M Clement (note 209 above).

character of this kind of trial, the procedure before the military courts is based roughly on the same principles as procedure before the ordinary courts.

In the DRC, the criminal process in the prosecution of war crimes as with military crimes in general constitutes three stages of procedure: preliminary investigation, preparatory instruction and instruction before the Court. However, there is overlap between the first and the second steps so that it is more practical to examine both in the same rubric.

3.2.2.1. The preparatory instruction

This step is led or carried out by Magistrate or the Public Prosecutor. Its instruction may be preceded by the preliminary investigation of police officers, who operate under its order and supervision. During the preliminary investigation, the Police Judicial Officer looks for evidence of offences in the place where the crimes were committed. He/she investigates the means used to commit the crime, and seeks to find out more about the criminal, and, if he/she is hidden, how to arrest him/her.

The superior prosecutor may give written instructions to Military Police Judicial Officer to undertake an investigation even at night in a military installation or other places. Common Police Judicial Officers are competent in certain conditions to ascertain military crimes committed in their respective territorial jurisdiction.²⁵⁹

They may also receive claims and denunciation from victims, or interested parties. Where necessary, they can arrest suspects where there is evidence of flagrant violations.²⁶⁰ Non-military suspects arrested because the charge of criminality against them was serious and obvious, must without delay be presented to the judicial authority competent to launch proceedings. When Judicial Officers of Police arrest a suspect, they must in accordance with ordinary criminal procedure code state in their report the dates, and hours of the beginning and the end of such detention measures.²⁶¹

²⁵⁹ Article 139 and 140 of the Military Judiciary Code.

²⁶⁰ Article 145 of the Military Judiciary Code.

²⁶¹ Articles 158 and 155 of the Military judiciary Code .See also Code of Criminal Procedure of 6 August 1959 by the Décret of 6 August 1959 in *Codes Larcier* Vol I (2003)288-299.

A suspect may not be detained for more than two days without being brought before the magistrate competent to instruct the case.²⁶² The report on the outcome of the investigation is presented to the Prosecutor, who will determine whether the evidence against the suspect is sufficient to pursue prosecution.

The opinion of the Judge Advocate General is required by the Minister of Justice or Defense during wartime, in respect to all decisions related to the outcome of the eventual prosecution.²⁶³

When the Magistrate decides to prosecute as a result of the police report he/she received, a complaint, a denunciation or at his/her own initiative (when he/she was witness to a crime) he/she informs the commander of the Unit the suspect is attached to.

An order to prosecute can also come from the Defense Ministry. This order cannot be appealed and is given by the Judge Advocate General of Army Forces.²⁶⁴

The prosecutor is not bound by the investigation of the Police Judicial Officer. He/she can directly interview the suspect and interrogate him/her.

Depending on the attitude (collaboration or resistance) of the suspect and the seriousness of charge against the suspect, the prosecutor can issue an invitation or a warrant of arrest (*mandat de comparution, mandat d`amener or mandate d`arrêt*).

Any warrant must precisely specify the suspect's identity and bear the date and signature of the magistrate who has issued it as well as the seal of the office. Further infraction and their legal basis must be mentioned. The Commandant of the Unit that the suspect is attached to must be notified. Warrants are applicable in all the national territory of the Republic and are reinforced (executed) in all circumstances by Public Force agents in conformity with ordinary criminal procedure.²⁶⁵

²⁶² Articles 146, 148 and 149 of the Military Judiciary Code.

²⁶³ Article 162 of the Military Judiciary Code.

²⁶⁴ Articles 164 and 165 of the Military Judiciary Code.

²⁶⁵ Articles 183, 184 and 185 of the Military Judiciary Code and article 162 of the Code of Ordinary Criminal Procedure.

The procedure launched by the Prosecutor at this stage is essentially secret²⁶⁶ and inquisitorial. But the right to defense of the suspect is constitutionally guaranteed, even if they are not often respected.²⁶⁷ After preparatory instruction, the Instructor Magistrate can release the suspect if it appears that there is no infraction, transfer the case to the civilian judiciary, or confirm the charge and then send the file to the Prosecutor (*auditeur*) who will seize the military court.

The indictment of the presumed perpetrator of the crime by the Court may be required by the Standing Magistrate him/herself, the Commandant, the Ministry of Defense or the victim (the civil party, which may claimed reparations for damages). During the prosecution before the Court the charges against the defendant are supported by the Public Prosecutor (*Ministère Public*). The prosecution of war crimes and other international crimes cannot be dismissed because of long delays; war criminals are subject to trial at any moment without limitation.²⁶⁸

3.2.2.2 Instruction before the Court

This part of the procedure is crucial in the criminal process. The judge may be seized directly by the plaintiff, by the Prosecutor and sometimes by the defendant if he/she accepts to stand voluntarily before the court in a case of which he/she had not been previously and regularly notified.²⁶⁹

The commencement of the trial is characterized by the verification of rules of form, the jurisdiction of the Court, the regularity of the seize, and the quality of parties by the composition of members of the bench. After this they proceed to the instruction of the case under examination. Parties are allowed to argue the exception relating to form before examination of the matters in depth. They may ask the Prosecutor for

²⁶⁶ Article 132 of the Military Judiciary Code.

²⁶⁷ Article 19 (4) of the Constitution.

²⁶⁸ Article 204 of the Military Judiciary Code.

²⁶⁹ Article 216 of the Military Judiciary Code.

further²⁷⁰ preparatory instruction; they hear public accusations, witnesses, and the prosecutor who requires the application of law in its written form (*requisitoire*).

All debates during the hearing are recorded by the *greffier* (registrar).²⁷¹ The victim may intervene in the process at any time as a civil party and claim reparations for damages. After instruction, the judge deliberates and votes regarding the case, and what sentence to apply.

The judgment must be signed jointly by the chair of the Court and the registrar. It is written by a professional Magistrate affiliated to the jurisdiction. He/she indicates the names of the judges and judge assessors (who are not professional or career magistrates) who adjudicated the case. The name of prosecutor and the registrar, as well as the full identity of the different parties and their advocates must be recorded. Judgment must be motivated and the charges against the accused must be listed. A summary of procedure and the deposition of adverse parties must also be provided.²⁷²

When the Court pronounces acquittal, it immediately releases the accused if they were detained. But if the accused is found guilty, there is the possibility that he/she may accept and acquiesce to his/her indictment or otherwise opt for recourse and appeal.

Two kinds of recourse can be distinguished: the ordinary recourse and the extraordinary one.

The ordinary recourse is composed of appeal and opposition and the extraordinary is made up of annulations (cancellation) and revision (review).

3.2.2.2.1 The ordinary recourse

This recourse essentially comprises appeal and opposition as provided for in the Military Judiciary Code. The Code asserts that, except for decisions of the Military

²⁷⁰ Article 219 of the Military Judiciary Code.

²⁷¹ Article 273 of the Military Judiciary Code.

²⁷² Articles 274 and 275 of the Military Judiciary Code.

Operational Court, the decisions and judgments of the military court and tribunals are susceptible to opposition and appeal.²⁷³

The opposition is an option offered to the accused that was absent from the court during the debate and found guilty in *absentia*. It can be exercised within five days after the notification of the verdict of the Court. The appeal is the right offered to the accused to exercise recourse against judgment before the immediate superior jurisdiction within five days after the pronouncement of Judgment when the other party has been notified.²⁷⁴

3.2.2.2.2 The extraordinary recourse

The judgment and decision of the Military Court and Tribunal are subjected to *annulation* and review. Those recourses are also not applicable to decisions rendered by the military operational court.

For *annulation*, an interested party or prosecutor may within five days after the day of their notification, require the annulations of decisions and judgments rendered by the Court and tribunal. The High Military Court annulates a decision that is not rendered in accordance with the law. Violation of the rules may consist of: 1) incompetence; 2) abuse of power by the military jurisdiction; 3) wrong application or false interpretation of the law; 4) non-conformity with the law; and 5) violation of the prescribed forms, which inobservance is sanctioned by nullity.²⁷⁵

A review may be required against the decisions rendered by any Court whatever its jurisdiction. Therefore, any party prosecuted for crime in the military jurisdiction may exercise this resource when: 1) after a condemnation there is a new fact which may establish the innocence of the condemned; 2) after a condemnation a new judicial decision for the same criminal fact, is contradictory and provides evidence that the accused is not guilty; 3) after the condemnation for homicide, new evidence is presented that demonstrates that the person presumed dead is alive; and 4) one of the

²⁷³ Article 276 of the Military Judiciary Code.

²⁷⁴ Article s277 and 278 of the Military Judiciary Code.

²⁷⁵ Articles 280 and 281 of the Military Judiciary Code.

witnesses have been previously heard, prosecuted and indicted for making false accusations against the accused.²⁷⁶

The next section highlights the Military Courts' activities in the DRC.

3.2.3 Some judicial decisions

International crimes, especially war crimes as defined above, pose a real threat to peace and security. The perpetration of these crimes on a high scale in the DRC has negatively affected the society up until today, underlining the need to effectively try the perpetrators of these crimes through an efficient justice system.

Given the fact that the military criminal code is imperfect there is a real need to reform and adjust it. However, to allow impunity to prevail just because there is a lack of clear definition, and because the military criminal code is imperfect, is unacceptable. Magistrates must make efforts to check national or international law for relevant legal provisions that may be applied. The ambiguities in the law are challenging in the DRC, as the legality of offences is crucial to allow judges to try criminals.

It is highly regrettable that from 1972 until 2003 there was no prosecution of the perpetrators of war crimes, notwithstanding the gross violations of human rights, and the mass atrocities crimes committed during the Mobutu dictatorship.²⁷⁷

Nonetheless, as the Report of the Mapping Team notes:

It cannot be denied that the DRC has a legal and jurisdictional framework that can curb war crimes, crimes against humanity and crimes of genocide, both by criminalising these acts in national law, and by virtue of the fact that the DRC has ratified the most important Conventions concerning human rights and international humanitarian law.²⁷⁸

²⁷⁶ Article 310 (1) (2) (3) (4) of the Military Judiciary Code.

²⁷⁷ UNOHCHR (note 3 above) 411.

²⁷⁸ *Ibidem*.

Ever since the entry into force of the new Military Criminal Code of 18 November 2003 and as a result of the reform, which commenced in 2003, there have been very rare cases of²⁷⁹ prosecution for international crimes in general and for war crimes in particular.

Although Congolese courts have rendered some decisions, none amongst these can really be cited as the prosecution of war crimes. There are a number of criticisms of the way the four cases that are most often cited as the first steps towards justice against impunity in the DRC have been conducted.²⁸⁰

3.2.3.1 The *Ankoro* case

This case is related to crimes committed in Katanga at Ankoro from 10 to 22 November 2002 during clashes between the Congolese army and the Mayi-Mayi,²⁸¹ which resulted in the killing of numerous innocent civilians, looting, and the destruction of public and private property. The soldiers involved were arrested and tried. Curiously of the seven alleged suspects, six were acquitted and only one was convicted of murder and arson and sentenced to just a few months imprisonment. The shift from the application of the military code to ordinary codes, as well as the decision to release the six other persons indicted is really questionable in this case. Therefore this case can hardly be regarded as a reference in terms of decisions.²⁸²

3.2.3.2 The *Khawa* case

In this case, Khawa Panga Mandro Ives of the Party for Unity and the Safeguarding of Congo's Unity was prosecuted for having allegedly committed war crimes at Zombe

²⁷⁹ The few cases that have been prosecuted were essentially the result of pressure exerted by NGOs and thanks to the MONUC, which provided the necessary logistic and material means for the transportation of magistrates. See UNOHCRH (note 3 above; 398); M Wetsh'okonda Koso (note 255 above; 12).

²⁸⁰ M Wetsh'okonda Koso (note 255 above; 12); UNOHCRH (note 3 above; 410); CAD „La répression des crimes internationaux par les juridictions congolaises“ 71-72 available at http://www.iccnw.org/documents/CAD_LaRepressiondesCrimes_Dec2010.pdf, accessed on 10 May 2011.

²⁸¹ See M Wetsh'okonda Koso (note 221 above; 50).

²⁸² See *Ankoro* Case, RP n 01/2003 and RP 02/2004, decision of the Military Court of Katanga of 20 December 2004; UNOHCRH (note 3 above; 396).

village in the Ituri District, Orientale Province (DRC) on 15 and 16 October 2002, for having burnt and destroyed a school, hospital, and Catholic as well as Protestant churches at Zumbe.²⁸³

Khawa had been tried and sentenced for war crimes. In his decision of 2 August 2006, the judge had directly applied the provisions of article 8 (2) (b) XX & 77 of the Rome Statute.²⁸⁴ The plea and reasoning made by the bench in this case is very courageous and technically interesting as it may inspire other judges to look to how to fight impunity for war crimes beyond the Congolese legal framework only. However it is regrettable that the effective execution of this Decision was blocked or paralysed by several appeals and complicated by incestuous relationships between the civil and military judiciary.²⁸⁵

3.2.3.3 The *Milobs* case

Although it is related to war crimes committed after 2002, this case is interesting for the way the judge adjudicated by looking in international law, notably conventions and jurisprudence to find legislation to prosecute alleged war crimes perpetrated at Mongwalu in Ituri District, Orientale Province, by members of Militia (Integrationistes Front of Nationalists) who tortured and killed two MONUC Military Peacekeepers in May 2003.²⁸⁶ Although the accused were found guilty of war crimes in accordance with article 8 of the Rome Statute on 19 February 2007, the Decision seemed less elaborated in respect of legal criteria for the protection of UN personnel in a conflict zone.²⁸⁷

²⁸³ Khawa Case Khawa Case, RP n 039/2006, Judgement of Military Tribunal of Garrison of Ituri of 2 August 2006.

²⁸⁴ Ibidem 27.

²⁸⁵ UNOHCRH (note 3 above; 404, 405).

²⁸⁶ Milobs case RP n 103/2006, Judgement of 19 February 2007 of Military Tribunal of Garrison of Ituri, UNOHCRH (note 3 above; 397).

²⁸⁷ CAD (note 280 above; 60-62).

3.2.3.4 The *Songo Mboyo* case

In the same vein as Milob, this case is related to crimes perpetrated after 2002, more precisely acts of violence and looting committed by military personnel because their salaries had been stolen. They became angry, attacking civilians and raping several women, in the Province of Equateur at Songo Mboyo on 21 and 22 December 2003. The reasoning given in the decision of the Military Tribunal on 12 April 2006 to sentence those responsible is very insightful and worthwhile.²⁸⁸ This decision provides mechanisms for prosecuting international crimes by applying international law in a national judiciary to curb impunity for mass atrocities in the DRC.

Wetsh'okonda Koso notes that "This decision has made case law, several other military courts have since referred to it in order to apply the Statute of the ICC directly, and thereby remedy its absence in national Congolese law".²⁸⁹

However, this decision was not perfect. Although a courageous will to fight impunity for crime was demonstrated, the qualification of those acts of violence as crimes against humanity in this decision was criticised and was considered too vague.²⁹⁰ Furthermore the prosecution was hampered by delays and worst of all: "of the 78 presumed perpetrators originally identified by MONUC, only six were sentenced, and these individuals later escaped".²⁹¹

In spite of this interesting decision the effectiveness of the prosecution of international crimes remains a serious challenge for the Congolese judiciary. At this point in time there can be little hope that gross crimes in general and war crimes in particular committed between 1996 and 2002 in the DRC could be prosecuted.

Even though numerous international crimes were committed between March 1993 and June 2003 in the DRC as documented in the UN Report of Mapping "military

²⁸⁸ Songo Mboyo case RP n 084/2005, Judgement of 12 April 2006 of Military Tribunal of Garrison of Mbandaka.

²⁸⁹ Wetsh'okonda Koso (note 221 above; 51).

²⁹⁰ CAD (note 280 above; 48-49).

²⁹¹ UNOHCHR (note 3 above; 398).

tribunals only dealt with two that were classified as war crimes, one of which ended in the acquittal of all those accused”.²⁹²

3.3 Conclusion

This overview of the Congolese judicial machinery reveals that the political crisis in the Congo has been extended to all institutions. Because of the terrible conflicts the country endured, the population was subjected to grave atrocities and violations of human rights and international humanitarian law. Virtually none of those numerous war crimes committed during the wars have been prosecuted so far. With the exception of the few cases of prosecution indicated above, most of those responsible for crimes committed during the armed conflicts in 1996-98 and 1998-2002 remain free. Some even occupy official positions in society, without any fear of justice, which is considered completely under the control of politicians. The result is the highest degree of impunity and the recurrence of gross crimes. The Congolese justice system remains in a state of collapse. This has been caused by several factors, such as the judiciary’s lack of independence and political interference in its activities, lack of financial and material resources, corruption and the need for the training of magistrates, and the absence of relevant and adequate criminal legislation²⁹³ (some of those causes will be considered in depth in Chapter 5 below). To conclude, there is a need for mega judicial reform. It is fair to describe Congolese justice as a construction site.

The failure of the Congolese judiciary to try war crimes is clear. Hence the fight against impunity for war crimes in the DRC constitutes a big challenge for international justice. The following chapter examines the extent to which the International Criminal Court can help to fight against impunity in the DRC.

²⁹² see Ankoro case and Milobs case Ibidem 396 and 410. Read also *Avocats sans frontières Etude de Jurisprudence L`application du Statut de Rome de la Cour Pénale Internationale par les Juridictions de la République Démocratique du Congo* (2009) available at http://www.asf.be/publications/ASF_EtudeJurispr_StatutRome_FR.pdf, accessed on 10 September 2011.

²⁹³ Wetsh`okonda Koso (note 221 above; 67-72).

Chapter 4: The ICC's contribution to war crimes trials in the DRC

“The opening of the first investigation of the ICC [in the DRC] is a major step forward for international justice, against impunity and for the protection of victims.” Luis Moreno-Ocampo.²⁹⁴

The creation of the ICC during the Diplomatic Conference held under the auspices of UN at Rome from 16 June to 17 July 1998 was considered a milestone in the long history of the establishment of a permanent international criminal justice system.²⁹⁵ Many regard it as one of great institutional achievements of the twentieth century since the creation of the UN.²⁹⁶ It was a veritable revolutionary step forward from other international criminal jurisdictions – from the Nuremberg International Military Tribunal, to the *ad hoc* International Criminal Tribunal of the former Yugoslavia and Rwanda.

This chapter analyzes to what extent the ICC might contribute to prosecuting war crimes perpetrated in the DRC. It examines the background to the ICC, its principles, its jurisdiction with respect to war crimes in the DRC and examines some cases relating to the prosecution of war criminals, which are pending before the Court.

²⁹⁴ ICC „The Office of the Prosecutor of International Criminal Court opens its first investigation“ available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB>, accessed on 17 July 2011 (the words in brackets are those of the author, they were added to emphasize the fact that the first experience of the ICC occurred in the DRC).

²⁹⁵ K Annan „Message of the Secretary-General of the United Nations“ in M Politi & G Nesi (eds) *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) xiii; M Polity „The Rome Statute of the ICC: rays of light and some shadows“ in M Politi & G Nesi (eds) *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) 7.

²⁹⁶ P Kirsh & J T Holmes „The birth of the International Criminal Court: the 1998 Rome Conference“ in O Bekou & R Cryer (eds) *The International Criminal Court* (2004) 3, 35; W A Schabas *An introduction to the International Criminal Court* 2 ed (2004) x.

4.1 Background

As an institution, the ICC has a long history from the inception of the idea²⁹⁷ till its concretization. The ICC came into formal existence on 1 July 2002, as a judicial apparatus to prosecute serious crimes of concern to the peace and security of humankind. In this section the origins of the ICC are outlined and the law applicable before it and its *modus operandi* are presented.

4.1.1 Genesis

The phenomenon of crime is as old as human society. Criminologists tend to explain this phenomenon in terms of biology²⁹⁸ and consider it the result of the manifestation or the expression of living in society.²⁹⁹ A retrospective look at the history of human society reveals the commission of many horrendous deeds. Humans have acted as wolves to their fellow humans,³⁰⁰ to the extent that they have invented deadly weapons to kill others. The power of destruction of humans is exacerbated during wartime, when genocide occupies the mind of the warrior. The cruelty of these atrocious acts has finally pricked the human conscience. In order to curb these criminal tendencies, there have been several attempts to prosecute the authors of mass atrocities.³⁰¹ However, the actual prosecution of crimes of concern to the international community commenced only during the twentieth century.³⁰²

The past century was marked by negative as well as positive developments. Among the negative events were several bloody armed conflicts and two world wars (1914-18

²⁹⁷ M du Plessis „International Criminal Courts, the International Criminal Court, and South Africa`s implementation of the Rome Statute“ in J Dugard *International law: a South African perspective* 3 ed (2005) 174-176.

²⁹⁸ R Hopkins Burke *An Introduction to Criminological Theory* 2ed (2005) 55-73.

²⁹⁹ R Hopkins Burke (note 298 above; 188-193).

³⁰⁰ N M Songa *Traité de droit pénal général Congolais* (2007) 2 ed 33-34.

³⁰¹ W A Schabas (note 296 above; 1). According to D McGoldrick, the earliest international prosecution might have taken place in 1268 in connection with Conradin von Hofenstafen who was tried for waging aggressive war. See „Criminal trials before international tribunals legality and legitimacy“ (2004) in D McGoldrick, Rowe & Donnelly (eds) *The Permanent International Criminal Court: legal and policy issues* 1, 13.

³⁰² With the creation of the different *ad hoc* International Criminal Tribunals and the first Permanent International Criminal Court.

and 1939-45). These wars demonstrated the extent to which war crimes can affect the international community at large. Crimes against humanity, war crimes, and crimes against peace were identified as international crimes. Those crimes were a threat to peace and human security and inconsistent with the collective conscience. Hence Gustav Monnier's idea to establish a tribunal, which might exercise its jurisdiction to prosecute breaches of humanitarian law, was born.³⁰³ The first attempt, to establish a tribunal to try World War One war criminals, was almost unsuccessful.³⁰⁴ In the meantime the idea of the creation of an International Criminal Tribunal was debated, with some feeling that this was premature.³⁰⁵ The renewed atrocities perpetrated during the Second World War created the realization that impunity for such crimes could no longer be tolerated; this resulted in the establishment of the first³⁰⁶ *ad hoc* international criminal tribunal.

4.1.2 The international military criminal tribunal

Two tribunals were created to prosecute crimes perpetrated during the Second World War: the Military Tribunal of Nuremberg and later the Tribunal for the Far East.

4.1.2.1 The International Military Tribunal for Nuremberg

After the defeat of Germany, the Allied powers decided to establish a tribunal to punish crimes committed during World War Two by Nazi criminals. The Charter of the International Military Tribunal for Nuremberg was created by an Agreement

³⁰³W A Schabas (note 296 above; 2).

³⁰⁴ For instance although the Treaty of Versailles of 28 June 1919 provided for the constitution of a Special Tribunal to try former German Emperor William II, for „a supreme offence against international morality and sanctity of treaties“ consistent with article 227 of the Treaty, he was never judged up until the time of his death. See C Van den Wyngaert, G Stessens, & L Janssens *International criminal law a collection of international and European instruments* 2 ed (2000) 53-54; M Du Plessis (note 297 above; 174).

³⁰⁵ The League of Nations regarded the recommendation of Baron Descamps relating to the creation of a „high court of international justice“ as premature. In 1937 the attempt to create such a tribunal by a Treaty failed to get the required number of ratifications from States. See W A Schabas (Note 296 above; 5).

³⁰⁶ The expression is borrowed from Cyril Laucci who considers that *ad hoc* international jurisdictions can be divided into three generations from the Jurisdiction of Nuremberg to the Special Court for Sierra Leone, not forgetting the jurisdiction created by the UN Security council see C Laucci „Projet de Tribunal spécial pour la Sierra Leone: vers une troisième génération de juridictions pénales internationales?“ (2000) (9) in *L'Observateur des Nations Unies* 195-196.

signed in London on 8 August 1945.³⁰⁷ The Agreement provided for the jurisdiction of the Tribunal to be exercised for the “trial and punishment of the major war criminals of the European axis countries”, which had committed crimes against peace, war crimes,³⁰⁸ and crimes against humanity³⁰⁹ in conformity with article 6 (a) (b) (c). The provisions of this Charter provided for three international crimes. In accordance with articles 2 and 14 of the Treaty, judges and prosecutors were appointed to the tribunal to represent each initial member signatory. They appointed four in total.

The International Military Tribunal for Nuremberg focused on the trial of 24 high-ranking Nazi officials accused of war crimes. Other, low-ranking Nazi war criminals appeared before the Courts in the states where they were alleged to have committed the crimes. On 1 October 1946, the Tribunal rendered its decision as follows: three were acquitted, 12 sentenced to death, three sentenced to life imprisonment, and a range of prison terms from 10 to 20 years was imposed on four others. During the course of the trial one of the accused committed suicide, while another was declared unfit to stand trial.³¹⁰

4.1.2.2 The International Military Tribunal for the Far East (Tokyo)

As with Germany, Japan was defeated and surrendered to the Allied Powers. The Supreme Commander of the Allied Forces in Japan, General Douglas MacArthur established an International Military Tribunal in Tokyo in terms of the Charter of 19

³⁰⁷ This agreement was signed initially by: UK, United States of America, France, Union of Soviet Socialist Republics (see article 1 of the Accord) and later by others states. In total, 19 States signed, including Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxemburg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia. See C Van den Wyngaert, G Stessens, & L Janssens (note 304 above; 55-61); K Kittichaisaree *International criminal law* (2001;18).

³⁰⁸ This Treaty defines war in article 6 (b) as violation of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor for any purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity (56). It is clear that this disposition referred to the 1929 Geneva conventions relating to the protection of victims of armed conflict and the 1907 Hague Convention Relating to the Laws and Customs of War on Land. However these instruments didn't refer to the possibility of the application of criminal sanctions. For more see K Kittichaisaree (note 307 above) 18-19.

³⁰⁹ Ibidem.

³¹⁰ K Kittichaisaree (note 307 above; 18); D McGoldrick, P J Rowe & E Donnelly (eds) (note 301 above; 18).

January 1946.³¹¹ The bench of the jurisdiction consisted of 11 judges “from the names submitted by the Signatories³¹² to the Instruments of Surrender” and the Counsel who acted as Prosecutor.³¹³

As with the Nuremberg Tribunal, the jurisdiction of this Tribunal, according to article 5 (a) (b) (c) of the Act, was exerted to prosecute crimes against peace, conventional war crimes, and crimes against humanity. However, war crimes were limited to “violations of the laws or customs of war”.

While the Tribunal categorized three types of crimes, it only tried the first type. The other two types of crimes were left to national military Courts of interested States to prosecute.³¹⁴

This tribunal was largely inspired by the first, with which it shares some features. Both had the merit of exposing the individuals responsible for gross and serious crimes perpetrated during the war on behalf of sovereign states. The Tribunals represented the victory of humanitarian principles over State interests. These Tribunals laid the groundwork for future international criminal justice institutions. However, it is obvious that the justice exercised at Nuremberg was not perfect. The war was fought between two sides. Clearly, it was not only the Germans and Japanese who committed criminal acts. Many have criticized these Tribunals as representing the victors’ revenge against the vanquished parties.³¹⁵

For example, Japan was not permitted to accuse the US before the Tokyo Tribunal of the US’ dropping of atomic bomb on Hiroshima and Nagasaki, or to accuse the Soviet Union of violating the neutrality agreement of 13 April 1941.³¹⁶ Furthermore, the sacrosanct principle of the legality of crimes and punishment in the administration of

³¹¹ Ibidem 20.

³¹² US, Australia, Canada, China, France, Great Britain, Netherlands, New Zealand and the Soviet Union, India and the Philippines. See K Kittichaisaree (note 307 above; 19).

³¹³ See article 2 and article 8 of the Act in C Van den Wyngaert, G Stessens, & L Janssens (note 304 above) 63-67 and K Kittichaisaree (note 304 above; 19).

³¹⁴ Apart from Hideki Tojo, the former Japanese Primer Minister, the tribunal prosecuted 24 others. Two defendants died during the trial and one was declared mentally unfit to stand trial. K Kittichaisaree (note 307 above; 19).

³¹⁵ D D McGoldrick, P J Rowe & E Donnelly (eds) (note 301 above; 10, 15).

³¹⁶ K Kittichaisaree (note 307 above; 19).

criminal justice was not respected. There was prosecution *ex post facto*, as the punishment of crimes as defined in those statutes was not established in international law at that time.³¹⁷ To correct those weaknesses efforts³¹⁸ have been made in the UN legal framework to ensure the punishment of such odious crimes in the future. The need for the creation of an International Criminal Tribunal was asserted, but its realization was blocked by the Cold War.³¹⁹

The perpetration of gross crimes in the former Yugoslavia and Rwanda led to the establishment, respectively, of the International Criminal Tribunal *ad hoc* for Yugoslavia and the International Criminal Tribunal *ad hoc* for Rwanda, considered by some as second generation international criminal tribunals after Nuremberg and Tokyo.³²⁰

4.1.3 The International Criminal tribunals of the second generation

Two second generation tribunals were created at the end of the past century.

4.1.3.1 The International Criminal Tribunal for the Former Yugoslavia

The last decade of the twentieth century witnessed several violent clashes and gross and systematic violations of human rights and international humanitarian law.

To address crimes committed in the former Yugoslavia during armed conflicts, which took place from 1991, the United Nations decided to create a criminal jurisdiction to confront impunity for gross violations of human rights in Eastern Europe. On 25 May 1993, the UN Security Council voted in Resolution 827³²¹ for the establishment of the International Tribunal for the Former Yugoslavia.

³¹⁷ „Justice Pal, the Indian Judge of the Tokyo Tribunal, would have acquitted all the defendants on the grounds that there had been no individual criminal responsibility under international law“. See K Kittichaisaree (note 307 above; 18 and 20).

³¹⁸ What counts is the *ex post* endorsement of the „Principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal“ unanimously adopted by UN General Assembly Resolution 95 (1) on 11 December 1946. K Kittichaisaree (note 307 above; 20).

³¹⁹ P Kirsch & J T Homes (note 1 above; 3-4).

³²⁰ See C Laucci (note 306 above).

³²¹ See C Van den Wyngaert, G Stessens, & L Janssens (note 304 above; 73). This Resolution of 25 May 1993 was amended on 13 May 1998.

The Tribunal exercised its jurisdiction to prosecute war crimes,³²² the crime of genocide³²³ and crimes against humanity³²⁴ committed in the territory of “the former Socialist Federal Republic of Yugoslavia, since 1 January 1991”.³²⁵ The organs of the Tribunal consist of three Trial Chambers and one Appeals Chamber, the Prosecutor, and a Registry.³²⁶

This comment by McGoldrick regarding the Tribunal, is salutary:

The most general critique aimed at the ICTY (and the International Criminal Tribunal for Rwanda) is an indirect one. This is that the international community only established it to salve its conscience for its failure to act to stop the „ethnic cleansing“ which had taken place.³²⁷

In other words, instead of creating a Tribunal, the international community could have paid heed to the crisis in Yugoslavia earlier on and applied preventive measures to avoid a human disaster.

4.1.3.2 The International Criminal Tribunal for Rwanda

After the eruption of genocide in Rwanda in 1994 and public condemnation of inaction on the part of the UN, the UN Security Council adopted Resolution 955 on 8 November 1994 for the establishment of an International Penal Tribunal for Rwanda. The Tribunal has jurisdiction to prosecute Rwandan citizens responsible for genocide,³²⁸ crimes against humanity,³²⁹ and violations of international humanitarian law (or war crimes)³³⁰ perpetrated “between 1 January 1994 and 31 December 1994 during armed conflict in the territory of Rwanda and neighboring countries”.³³¹

³²² Instead of expressly using the term „war crimes“, the statute used the expression „all grave breaches of the Geneva convention of 1949, and the violations of laws or customs of war“ (article 2 and article 3).

³²³ Article 4 of the Statute of IPTY.

³²⁴ Article 5 of the Statute of IPTY.

³²⁵ Article 8 of the Statute of IPTY.

³²⁶ Article 11 (a) (b) (c) of the Statute of IPTY.

³²⁷ D McGoldrick, P J Rowe & E Donnelly (eds) (note301 above; 9, 24).

³²⁸ Article 2 (1) of the Statute of IPTR.

³²⁹ Article 3 of the Statute of IPTR.

³³⁰ Article 4 of the Statute of IPTR. It is obvious in the context of Rwanda, that it was armed conflict of no international character.

³³¹ Article 2 of the Statute of IPTR.

This Statute closely resembles the Statute of the International Tribunal for the Former Yugoslavia, with which it shares the same Appeal Chamber and Prosecutor.

These jurisdictions have rendered some important judgments, amongst them the *Tadic* case for Yugoslavia and the *Akeyasu* case for Rwanda. However most of the cases are moving slowly and the Tribunals are very costly (\$100 million a year budgeted for Rwanda).³³² Accordingly, UN Security Council Resolutions 1503 of August 2003 and 1534 of 26 March 2004, called on this tribunal “to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010”.³³³ However in 2009, when the UN Security Council considered the Tribunal’s report, it appeared that strategically this jurisdiction could not complete its activities in 2010. Hence, the Security Council extended the terms of the different judges, to allow them to complete the cases they were working on.³³⁴

These tribunals are not perfect³³⁵ but they are without any doubt better than the first generation of international *ad hoc* Tribunals. In contrast with the former, which were created by the Allied forces, the latter were created by the UN Security Council. As such, they are subsidiary organs of the UN.

Issues relating to the legality of *ad hoc* international tribunals were raised and answered in the *Tadic* case.³³⁶ Notions relating to the definition of certain offences, such as war crimes and crimes against humanity are well refined, thanks to those jurisdictions. It is clear that they have benefited from the experiences of the International Military Tribunals and the work of the International Law Commission, which worked on the definition of serious crimes of concern to the international community from the end of World War Two. There was also a Commission set up by

³³² D McGoldrick, P J Rowe & E Donnelly (eds) (Note 301 above; 10, 40).

³³³ Statute of ICTR (56) available at <http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf>, accessed on 10 July 2011.

³³⁴ *Ibidem* 56-57.

³³⁵ Most of the proof has been in the form of testimony which is sensitive to administration and has raised serious debate regarding their administration in the ICTR. For instance, it is not clear why most of the criminals are only from the Hutu group, while the Tutsi group were also part of the armed conflict and in the case of the ICTY why most of criminal from Serbia and Croatia are Muslim. See C Onana, *Les Secret de la Justice internationale enquêtes truquées sur le génocide rwandais* (2005) *passim*

³³⁶ In the *Tadic* Case (note 63 above; para 9-22).

the UN General Assembly for the establishment of an International Criminal Tribunal competent to prosecute such crimes.³³⁷

Those commissions put forward a proposal for the draft Statute for an International Criminal Tribunal in 1952 and for the Code on Grave Crimes, or “Code of Crimes Against the Peace and Security of Mankind”³³⁸ in 1954. Because of the Cold War, this impetus for international justice raised after World War Two waned. Some of the work continued, however, such as the definition of aggressive crimes by the UN General Assembly in 1973, the resumption of the work of the International Law Commission relating to the code of crime in 1981 and provisional adoption of a draft Code of Crime by the International Law Commission in 1991.³³⁹

Work relating to the draft of the Statute of International Tribunal resumed in 1989 in the International Law Commission, which made its first presentation in 1992, presented the draft to the UN in 1993, and completed its work in 1994. In 1996, the commission adopted the Code of Crime against the Peace and Security of Mankind.³⁴⁰

The framework and tools for the creation of an international criminal jurisdiction were in progress, under the auspices of the UN General Assembly. The *ad hoc* committee and later the preparatory committee established by the General Assembly put forward proposals upon which States’ negotiations during the conference relating to the creation of the Institution could be based.³⁴¹ To create the Court, a Diplomatic Conference of Plenipotentiaries was convened in Rome on 25 June 1998.³⁴²

After intense negotiations, the Rome Statute was adopted on 17 July, with 120 States voting in favor, seven against and 21 abstaining.³⁴³ Notwithstanding the opposition of

³³⁷ W A Schabas (note above; 8); W S Schabas „The International Criminal Court: the secret of its success” in O Bekou & R Cryer *The International Criminal Court* (2004) 69-70.

³³⁸ *Ibidem* 9.

³³⁹ *Ibidem*.

³⁴⁰ *Ibidem* 10; P Kirsch & J T Holmes (note 1 above; 3-5).

³⁴¹ A Bos „The Experience of the Preparatory committee” in M Politi & G Nesi (eds) *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) 17-27.

³⁴² W A Schabas (note 296 above; 15).

³⁴³ Mauro Politi „The Rome Statute of the ICC: rays of light and some shadows” (2002) in M Politi & G Nesi (eds) *The Rome Statute of the International Criminal Court: a challenge to impunity* 7, 9.

powerful countries such as the USA, China, and Israel,³⁴⁴ the Statute was adopted and on 11 April 2002 the required threshold of sixtieth ratification was attained to make the Court operational.³⁴⁵ The Rome Statute entered into force on 1 July 2002.

4.1.4 Definition, seat and applicable law

As demonstrated above, the establishment of the ICC has been the result of a long process of struggle against impunity by the international community. The realization of such endeavor has been broadly considered as a “Historic Step”³⁴⁶ of the international community in the quest for international criminal justice.

Indeed, the ICC is the first permanent Court competent to prosecute crimes of concern to the international community. In contrast with the International Court of Justice, which adjudicates only disputes between States, the International Criminal Court aims to prosecute individuals. Compared with the temporary, *ad hoc* tribunal, the ICC is permanent and is not limited or confined to one case or one state. Furthermore the ICC is not a subsidiary organ of the UN.

In common with many other judicial institutions the seat of the ICC is The Hague, in the Netherlands, which is its Host State by virtue of a headquarters agreement.³⁴⁷

However, as provided in article 3 (3) of the Rome Statute “the Court may sit elsewhere, whenever it considers it desirable”.

In accordance with article 21 (1) of its Statute, the ICC applies,

³⁴⁴ D McGoldrick „Political and regal Responses to the ICC“ in D McGoldrick, P J Rowe & E Donnelly (eds) *The permanent International Criminal Court: legal and policy issues* (2004) 389, 400-441.

³⁴⁵ M Du Plessis (note 297 above; 174, 177.)

³⁴⁶ D McGoldrick „The legal and Political significance of a permanent International Criminal Court“ (2004) in D McGoldrick, P J Rowe & E Donnelly (eds) *The permanent International Criminal Court: legal and policy issues* (2004) 453, 472, 478. See Headquarters Agreement between the International Criminal Court and the Host State.

³⁴⁷ See Headquarters Agreement between the International Criminal Court and the Host State. ICC-BD/04-01-08 of 1 March 2008 available at <http://www.icc-cpi.int/NR/rdonlyres/99A82721-ED93-4088-B84D7B8ADA4DD062/280775/ICCBD040108ENG1.pdf>, accessed on 20 June 2011

- firstly, the Rome Statute Element of Crimes and its Rules of Procedure and Evidence;³⁴⁸ secondly, the Court may apply international conventions, different principles and rules established in international law; and
- thirdly, the Court may apply, when necessary, general principles of law drawn from the national laws of legal systems worldwide except if they contradict the Statute, or if they are not consistent with laws, norms or standards recognized internationally.

In line with conventional law, the Court may apply or refer in its decisions to case law or judicial precedents, which may be its previous decisions or the decisions of other judicial bodies such as the *ad hoc* international criminal tribunal.³⁴⁹

However it is worth noting that any interpretation of these sources of law must be done in conformity with human rights, with no discrimination on the grounds of “age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”.³⁵⁰

4.1.5 Contribution of the Rome Statute to reforming the international criminal justice system

The ICC altogether with the ICTY, ICTR and the Special Court for Sierra Leone constitute the main institutions of the international criminal justice. However contrary to the *ad hoc* jurisdiction, the ICC is permanent and is the embodiment of current developments in international criminal law.³⁵¹ The principles of irrelevance of official capacity, the lack of immunity, individual responsibility, and participation of victims in the proceedings were integrated into the Rome Statute.

³⁴⁸ For more details about the nature of this instrument read S A Fernández de Gurmendi & H Friman „The rules of procedure and evidence of the International Criminal Court“ in O Bekou & R Cryer *The International Criminal Court* (2004) 387-390.

³⁴⁹ Article 21 (2) of the Rome Statute.

³⁵⁰ Article 21 (3) of the Rome Statute; Edwards, GE. “International human rights law challenges to the new International Criminal Court: the search and seizure right to privacy” (2001) (26) *Yale Journal of International Law* 323-412.

³⁵¹ M Cherif Bassiouni „International criminal justice in the age of globalization“ in *International Criminal Law: Quo Vadis?* (2004) 79; T Steele, The contribution of the statute of the ICC to the enforcement of international law in the light of the experience of the ICTY (2002) *South African Yearbook of International Law* (27)1-61.

4.1.5.1 Irrelevance of official capacity and lack of immunity

Amongst the revolutionary principles in international law codified in the Rome Statute are the irrelevance of official capacity and lack of immunity. All those responsible for the crimes, which fall under the jurisdiction of ICC as defined in the Rome Statute shall be prosecuted indiscriminately and equally. Therefore, Heads of States, members of Executive organs or legislative chambers or any other person occupying a public position can no longer hide behind their official capacity to escape prosecution.³⁵²

Of course those principles are not new; they were applied in prosecutions launched by the different *ad hoc* International Tribunals. However their integration into the Rome Statute was very important because they could now be applied permanently. There is, however, much debate in international law relating to official capacity and immunity.³⁵³

4.1.5.2 Rights of the victims and the accused

In the Rome Statute, the standards relating to the protection of both victims and the accused reflect a sense of equity.

Firstly, victims may intervene before the Court during the hearing.³⁵⁴ The Statute provides different measures to ensure their protection and to make sure that they receive assistance. The Registrar has, among others roles, to deal with matters

³⁵² Article 27 (1) (2).

³⁵³ *Yerodia Case* concerning the Arrest of Warrant of 11 April 2000, *DRC v Belgium* (ICJ, Judgment of 14 February 2002) para 62-71 available at <http://www.icj-cij.org/docket/files/121/8126.pdf>, accessed on 12 September 2011; L Reydam's *Universal jurisdiction: international and municipal legal perspectives* (2005) 227-231; S Bula-Bula (2004) *Les immunités pénales et l'inviolabilité du ministre des affaires étrangères en droit international* passim, Regarding different delicate issues which may be raised by the application of immunities read S Wirth „Immunities, related problems, and article 98 of the Rome Statute“ in O Bekou & R Cryer (eds) *The International Criminal Court* (2004) 329-458.

³⁵⁴ Read E Haslam *Victim Participation at the International Criminal Court: a triumph of hope ever Experience?*“ In: *D McGoldrick, P J Rowe & E Donnelly (eds) The Permanent International Criminal Court legal and policy issues* 315, 320; K R Gray „Evidence Before the ICC“ in *D McGoldrick, P J Rowe & E Donnelly (eds) The permanent International Criminal court: legal and policy issues* (2004) 287-302; W A Schabas „The place of victims in international criminal law“ in *International Criminal Law: Quo Vadis?* (2004)505.

regarding victims; there is even a special Unit in this respect.³⁵⁵ This is very different from the International Court of Justice, where a victim cannot intervene.

Hence the decision of the Court takes into account the damage caused to the victim to whom it allocates reparations. The notion that national legislation or international law could prejudice the guarantee of rights to victims should be avoided.³⁵⁶ According to article 1 (2) of the Statute “The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of victims, including restitution, compensation and rehabilitation”. Furthermore, article 79 (1) provides for the creation of a Trust Fund for the benefit of victims and their families. This is an important contribution of the Rome Statute to reforming international criminal justice. Justice as exercised by the ICC is not only preventive and repressive³⁵⁷ but also restorative.

As for the accused, several important principles relating to the guarantee of a fair trial are assured. The Statute requires the application of the principle of presumption of innocence; in case of any doubt, the interpretation of the law by the Court shall be made in favor of the accused and the prosecutor has the burden to prove that the accused is guilty.³⁵⁸ “Therefore in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”.³⁵⁹ While the right to be tried in due time is asserted in article 67 (1) (c), there are, unfortunately, sometimes long procedural delays and case overloads, which compromise this principle.³⁶⁰

4.1.5.3 Codification of international law

The Rome Statute contributed to the long overdue process of the codification of international law in general and international criminal law in particular. Several

³⁵⁵ Article 43 (6).

³⁵⁶ Article 27 (6).

³⁵⁷ O Triffterer „The Preventive and the Repressive Function of the International Criminal Court” in M Politi & G Nesi *The Rome Statute of the International Criminal Court A challenge to impunity* (2001) 137-140.

³⁵⁸ Article 66 (1) (2).

³⁵⁹ Article 66 (3).

³⁶⁰ None of the cases before the ICC have so far been adjudicated. The case of Thomas Lubanga Dyilo, for instance, has been awaiting judgement since March 2006!

sacrosanct principles of criminal law were integrated, such as the legality of crime and sanction (which requires the definition by the law of an offence and its specific punishment prior to perpetration of the crime); non-retroactivity; a case which has not yet been treated cannot be re-opened or *ne bis idem*; those responsible for crimes must be prosecuted individually;³⁶¹ and that the accused are presumed innocent until proven guilty. Immunity cannot be granted due to the official capacity of the accused. Factors such as age, mental state, error, and the power of individuals are considered to indict or not those presumed responsible for the perpetration of crimes.³⁶² Many other important principles are set out in the 128 different articles, which are not appropriate to reproduce here. In brief, the Rome Statute constitutes a large step forward in the codification of the principles of international criminal law.³⁶³

4.2 Functioning and procedures

As a judicial body the ICC is constituted of different organs to ensure that it operates smoothly. The composition of the Court will be outlined so as to highlight the interaction between the different sections.

According to article 34 of the Rome Statute, the Court shall be composed of the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor, and the Registry.³⁶⁴

The Presidency is composed of a President and two Vice-Presidents who are elected by the absolute majority of their peer judges. The administration of the Court is, except for the Office of the Prosecutor, the responsibility of the Presidency. The

³⁶¹ G Conetti „State’s crime and individuals’ crimes: what relationship?“ in M Politi & G Nesi *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) 131, 133.

³⁶² Articles 20, 22,23, 24, 25, 26, 27, 28, 30, 31, 32, 33 of the Rome Statute.

³⁶³ T Weigend „The harmonization of general principles of criminal law: the status and jurisprudence of the ICTY, ICTR, and ICC: an overview“ in *International Criminal Law: Quo Vadis?* (2004) 419-435; Arsanjani, M. “The Rome Statute of the International Criminal Court” (1999) (35) (1) *American Journal of international Law* 22, passim

³⁶⁴ One of these organs, according to article 112 is the Assembly of States Parties which plays an important role in the appointment of judges and prosecutors. It also intervenes in procedures for the amendment of the Rome Statute, the adoption of ICC regulations and „to recommend measures against States not complying with their obligations under the statute“. I Cameron „Jurisdiction and admissibility issues under the ICC Statute“ in D McGoldrick, P J Rowe & E Donnelly (eds) *The permanent International Criminal Court legal and policy issues* (2004) 5.

Presidency collaborates with the Prosecutor to deal with “all matters of mutual concern”.³⁶⁵

In conformity with article 39 (1) (2) of the Rome Statute, the Court is structured in divisions and chambers comprising judges as follows:

- the Appeals Chamber, composed of five judges, including the President, who also comprise the Appeals Division;
- the Trial Chamber, whose three judges are part of the Trial Division which is constituted of at least six judges;
- the Pre-Trial Chamber, where one or three judges of the Pre-Trial Division might be competent to act; and
- the Pre-Trial Division is comprised of at least six judges.

In other words, the judicial activities are really exercised by Chambers, which can be increased at Pre-Trial and Trial level.

Beside the Chambers, there is the Office of the Prosecutor. The latter is headed by the Prosecutor who is assisted by a number of Deputy Prosecutors and is elected by the Assembly of States Parties. He/she is independent and exercises his/her function before the Court as an independent organ. All referrals and necessary information or details relating to crimes as provided in the Rome Statute are referred to this office to be examined, investigated and eventually prosecuted before the Court. The Prosecutor may appoint advisors with specific skills to assist him/her to fulfill his tasks, for instance on violence relating to gender and children’s issues.³⁶⁶ Another structure, which plays an important role in the administration of the ICC, is the Registry. The Registry handles non-judicial administrative matters. It is directed by the Registrar who is elected by the judges upon the recommendation of The Assembly of States Parties. He/she is considered “the principal administrative officer of the Court” and as such the President of Court has some authority over him/her.³⁶⁷

The different personnel of those organs and most staff of the Court are elected or appointed on the basis of competence, integrity, and equity, representing different

³⁶⁵ Article 38 (4) of the Rome Statute.

³⁶⁶ Article 42 (2) (2) (3) (4) (5) (6) (7) (8) (9) of the Rome Statute.

³⁶⁷ Article 43 (1) (2) of the Rome Statute.

parts of the world. To prosecute a case, the Court requires the interaction of all of these organs, which work separately but with close collaboration.

When serious crimes within the jurisdiction of ICC are alleged to have been committed in the territory of state parties or by a national of a State Party, the Prosecutor shall prosecute. The procedure is applied as follows.

Having received information from States, NGOs, individuals³⁶⁸ or other reliable sources that is delivered to the ICC office, the Prosecutor may open an investigation into these alleged crimes to establish more information on the perpetrators of such crimes.³⁶⁹ When its investigations are concluded, the Prosecutor may ask the Court to indict those alleged to be responsible for these crimes of concern to the international community.³⁷⁰

The Court must verify if its jurisdiction can be exercised satisfactorily. Certain conditions must be fulfilled before the commencement of an investigation in the territory of a State. A State may refer a case to the Office of the Prosecutor, or the Prosecutor may launch an investigation in the State in question, on his/her own initiative³⁷¹ by exercising the ICC's jurisdiction *proprio motu* in accordance with article 15 of the Rome Statute (1).³⁷²

³⁶⁸ L Mekhemar „The status of the individual in the Statute of the International Criminal Court“ in M Politi & G Nesi *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) 123, 125.

³⁶⁹ „Neither referrals, whether by a State Party or the UN Security Council, nor private communications automatically „trigger“ the powers of the Prosecutor. In all cases the OTP must first conduct an analysis of information in order to determine whether the statutory threshold to start an investigation is met: there must be „a reasonable basis to proceed““, ICC Communications and Referrals available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referrals+and+communications/>, accessed on 02 August 2011.

³⁷⁰ Article 15 (2) of the Rome Statute.

³⁷¹ S A Fernandez de Gurmendi „The Role of the Prosecutor“ in M Politi & G Nesi *The Rome Statute of the International Criminal Court: a challenge to impunity* (2001) 55.

³⁷² „To date, there have been three state referrals from the governments of the Democratic Republic of Congo, Uganda, and the Central African Republic, two referrals from the United Nations Security Council regarding the situation in Darfur and the situation in Libya, and one investigation *proprio motu* regarding the situation in Kenya (the Côte d'Ivoire will be the second situation of investigation *proprio motu* considering the process under way since Ivorian authorities have accepted the ICC's jurisdiction in 2003 and 2010 and the authorisation of investigation by the ICC in 2011). The Office has also received over 8733 communications since July 2002 from more than 140 countries, with the majority of those communications coming from individuals in the United States of America, the United Kingdom, Germany, Russia and France available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referrals+and+communications/>, accessed on 02 August

If the State in question is not party to the Rome Statute, the Prosecutor and the Court may not have jurisdiction. In such a case there are two situations that can allow the Court to apply its jurisdiction to adjudicate the case: where the case is referred by the UN Security Council, and where the State voluntarily accepts the jurisdiction of the Court.

According to article 13 (b) of the Rome Statute, the UN may decide to act under Chapter VII of the UN Charter by referring the case to the ICC.

Currently there are two cases before the ICC that were referred by the UN Security Council: the Case of Darfur and the Case of Libya.

Although this is a way to fight impunity for crimes committed in the territory of a non-member State, it is limiting, as it cannot be applied to all non-member States. For instance, it seems impossible to use this procedure against nationals of certain powerful countries, like the US, China or Russia, because they may use their veto vote to block such action. Referral by the UN Security Council is therefore subject to the risk of politicization,³⁷³ or the application of double standards. In their current form, some UN organs appear to function in an anachronistic manner and need to be reformed to allow the ICC to operate in a democratic, rather than a Cold War, spirit.

A non-member State Party³⁷⁴ can accept the jurisdiction of the ICC, in terms of article 12 (3) of the Rome Statute, which provides that “that State may, by declaration lodged with the registrar, accept the exercise of the jurisdiction by the Court with respect to

2011; MH Arsanjani & WM Reisman “The Law-in-Action of the International Criminal Court” (2005)(99)(317) *American Journal of International Law* 385, passim.

³⁷³ R Cryer & N D White „The Security Council and the International Criminal Court: who’s feeling threatened? In O Bekou & R Cryer (eds) *The International Criminal Court* (2004) 495-521; D Sarooshi „The peace and justice paradox : the International Criminal Court and the UN Security Council” in D McGoldrick, P J Rowe & E Donnelly (eds) *The permanent International Criminal Court: legal and policy issues* (2004) 95-97; Security Council referral confirms ICC as a critical international institution (2 March 2011) available at <http://mg.co.za/article/2011-03-02-security-council-referral-confirms-icc-as-a-critical-international-institution> accessed on 07 May 2011; A Louw „Africa should work with, not against, the ICC in resolving the Libyan crisis” (21 July 2011) available at http://www.iss.co.za/iss_today.php?ID=1323, accessed on 27 July 2011.

³⁷⁴ D Akande „The jurisdiction of the International Criminal Court over nationals of non-Parties: legal basis and limits” in O Bekou & R Cryer *The International Criminal Court* (2004) 225-227.

the crime in question. The accepting State shall cooperate with the Court without any delay or exception”.

However, despite the Prosecutor acting in conformity with article 19 (1) of the Rome Statute, the jurisdiction of the Court is not automatic. This article states that “the Court shall satisfy itself that it has jurisdiction in any case brought before it .The Court may, on its own motion, determine the admissibility of a case”. But how does the Court determine its jurisdiction?

4.3 The jurisdiction of the ICC

In conformity with the requirements of the Statute, the Court has jurisdiction to prosecute persons responsible for serious crimes perpetrated in the territory of party States or by a national of a State Party. However, it should be noted that the Court’s jurisdiction is complementary to national Tribunals. This means that it is only competent to intervene if there is no efficient prosecution at national level.³⁷⁵

4.3.1 The principle of complementarity

The principle of complementarity is of the utmost importance in procedure before the ICC, to determine whether or not the Court should exercise its jurisdiction.

Indeed this principle is asserted in paragraph 10 of the preamble to the Rome Statute, which affirms, “that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”. Therefore the jurisdiction of the Court does not have primacy over national jurisdictions, which remain competent to prosecute criminals responsible for grave crimes. This principle differentiates the jurisdiction of the ICC from the jurisdiction of the *ad hoc* International Criminal Tribunal that has concurrent primacy over national jurisdictions. During the negotiations between the Plenipotentiaries at the Diplomatic Conference at Rome, States reached consensus that the International Court should not

³⁷⁵ J T Holmes „Complementarity: national courts versus the ICC” (2004) in O Bekou & R Cryer *The International Criminal Court* 667; Charney, JI. “International Criminal Law and the role of domestic courts” (2001) 95 (1) *American Journal of International Law* 144 ,171.

exercise universal jurisdiction, as this was regarded as a threat to their sovereignty, given that justice is an attribute of sovereignty.³⁷⁶

This principle may be regarded as strategic, as it could stimulate the exercise of criminal justice on a national level, which may contribute significantly to dealing with impunity for serious crimes.³⁷⁷ The target is those responsible for atrocities, whose punishment might be a deterrent to other potential criminals. The deterrence effect of the ICC is a very important contribution to the perception of justice worldwide. However, some analysts regard the application by the ICC of positive complementarity as not ideal; they are of the opinion that proactive complementarity could be more useful.³⁷⁸

The following section considers the conditions of admissibility of a case when the Court may exercise its complementary jurisdiction.

4.3.2 The admissibility of a case

The Court must examine all cases brought before it to determine if all preliminary necessary conditions were met and that there is jurisdiction for the case. When the Prosecutor intends to investigate a situation referred to its office by a State Party or in virtue of its power *proprio motu* consistent with article 15 (1) of the Rome Statute, he/she must firstly “notify all States Parties and those States of which taking into account the information available, would normally exercise jurisdiction over the crimes concerned”. Depending on the sensitivity of the case, the information given to States in the notification may be limited. In so doing, the Prosecutor verifies if there is any prosecution at national level or if any State intends to exercise its criminal jurisdiction to try the alleged criminal. After the notification, a State is given one month to “inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 of the Statute”. Hence, except in the case of a contrary opinion

³⁷⁶ H-P Kaul & C Kreb „Jurisdiction and cooperation in the Statute of the International Criminal Court: principles and compromises“ (2004) in O Bekou & R Cryer *The International Criminal Court* 191-195.

³⁷⁷ O Triffterer (note 357 above).

³⁷⁸ W W Burke-White (note 1 above).

on the part of the Court, under certain conditions a State may demand that the Prosecutor defer to it, and allow it to deal with alleged criminals under its jurisdiction. In such a case, the Prosecutor would follow up on progress with the State, and he/she can review the decision to defer six months after or at any time if there is real doubt concerning the willingness or the capacity of the State to investigate. The State may, however appeal against the decision of the Prosecutor or Pre-trial Chamber; and, *vice-versa*, the Prosecutor may also appeal. However, when the Prosecutor consents to defer a case to a State, the latter shall inform the Prosecutor when necessary on the progress of the investigation. This may be open “to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State’s unwillingness” (article 18 (3)).

Indeed, as the jurisdiction of the ICC is complementary, the knowledge of the State of investigation and prosecution processes at a national level is fundamental to determine whether or not the national jurisdiction is competent to try criminals where crimes within the jurisdiction of the ICC appear to have been committed.

4.3.3 Determining whether a case is inadmissible

The ICC may not investigate and has no jurisdiction in a case that has not yet been investigated by competent State national jurisdictions, even if the investigation by the national jurisdictions leads to the decision not to charge the suspect. However, the Court will remain competent according to article 17 (a) if the “State is unwilling or unable genuinely to carry out the investigation or prosecution”, except where the person has already been sentenced for the same crime or if the threshold of the alleged crime is not high enough.

What are the determining criteria that are considered to determine lack of will or State incapacity to bring alleged criminals to justice in a given case?

According to article 17 (b), the Court is not competent where a case has been investigated by a State which has jurisdiction over it, unless the State is unwilling or

unable genuinely to carry out the investigation or prosecution and the State has decided not to prosecute the person concerned.³⁷⁹

Notwithstanding the principles of international law relating to a fair process, according to article 17 (2) (a) (b) (c) of the Rome Statute, it can be considered that there is no will on the national level when a) the perpetrator is prosecuted simply to prevent the ICC proceeding and to allow the alleged criminal to escape sentencing; b) the state delays proceedings without good cause; and c) the State fails to launch proceedings against the suspect.³⁸⁰

A State may be considered incapacitated when “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”.³⁸¹

Although a national jurisdiction may be weakened by several factors such as political interference, corruption, lack of personnel and incompetence, it is important to note that often its partial or general collapse is due to war or armed conflict. This seems to be the case in the DRC, where a long institutional crisis has been exacerbated by several grave armed conflicts recently.

In conformity with the Rome Statute, the right to challenge either the jurisdiction of the ICC or the admissibility of a case before it is guaranteed under certain conditions to any accused, Party State or non-Party State. Before adjudicating a case, the Court is required to scrutinize the extent to which its jurisdiction may be applicable to the case. When the Court exercises its jurisdiction, different issues must be considered, such as questions relating to subject matter, the territory, and the person.³⁸²

Thus the Prosecutor is, in certain cases, required to seek a ruling from the Court relating to any question which may raise jurisdiction or admissibility issues.³⁸³

³⁷⁹ Article 17 (b) of the Rome Statute.

³⁸⁰ Article 17 (2) (a) (b) (c) of the Rome Statute.

³⁸¹ Article 17 (3) of the Rome Statute.

³⁸² Article 19(2) (a) (b) (c) of the Rome Statute.

³⁸³ Article 19 (3) of the Rome Statute.

4.3.4 Jurisdiction *ratione loci*

Although the Court aims to prosecute crimes of international concern, unfortunately, it does not have the universal jurisdiction that could have been one of its strongest tools to eradicate the culture of impunity that has plagued the welfare of humankind. The jurisdiction of the Court is limited to the territory of State Parties to the Rome Statute, although a non-Party State may accept the jurisdiction of the Court as well. Indeed, according to the article 12 of the Statute “the Court may exercise its jurisdiction towards a State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft”.

The jurisdiction of the Court is therefore confined to the territory of a State Party. It cannot prosecute crimes committed in the territory of non-State Party without the prior consent of such a State to this process. However, according to article 13 (b) of the Statute the Court may not require the acquiescence of a State when the situation is “referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”.³⁸⁴

4.3.5 Jurisdiction *ratione personae*

The Court has jurisdiction to prosecute those responsible for crime within its jurisdiction that is committed by a national of a State Party. However if a national of non-State Party commits crime on the territory of a State Party or a perpetrator of such a crime is found in such a territory, he/she can be prosecuted. Criminals who are nationals of non-Party States to the Rome Statute are therefore unable to move to other countries. However, it is important to note that the bilateral accord³⁸⁵ signed between the US and different countries to prevent the prosecution of their nationals in

³⁸⁴ E Wilmshurst „The International Criminal Court: the role of the Security Council” in M Politi & G Nesi (eds) in *The Rome Statute of the International Criminal Court: a challenge to impunity* (2004) 39-41.

³⁸⁵ Based on article 98 (b) of the Rome Statute.

other countries appears to be an affirmation of impunity and as such should be denounced.³⁸⁶

4.3.6 Jurisdiction *ratione materiae*

The Court has jurisdiction to try criminals responsible for international crimes, which, according to article 5 of the Rome Statute, are the crime of genocide, crimes against humanity, war crimes, and crime of aggression.³⁸⁷

A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5 and article 12 (1) of the Rome Statute. However, apart from these crimes, the ICC also has jurisdiction over other offences relating to the administration of justice provided in articles 70 and 71 of the Rome Statute and Rules 162-169 and 172 of the Rules of Procedure and Evidence.

³⁸⁶ D McGoldrick „Political and Legal Responses to the ICC“ in D McGoldrick, P J Rowe & E Donnelly (eds) *The permanent International Criminal Court: legal and policy issues* (2004) 390, 423.

³⁸⁷ It is very regrettable that the crime of aggression cannot be punished right now by the ICC because of a lack of definition in the Rome Statute, although this crime had been defined in article 6 (a) of the Agreement signed at London on 8 August 1945 related to the Statute of the Tribunal of Nuremberg, half century ago and in the Resolution of the Assembly General of the UN of 14 December 1974. Considering that the crime of aggression is a source of all other grave crimes and noting the proliferation of aggressive wars in the world, the definition of the crime of aggression should be a priority, if states were looking to truly promote the rule of law during the negotiations related to the draft of the ICC Statute during the Diplomatic Conference of Plenipotentiary in Rome. A few years after the adoption of the Rome Statute, the DRC (1998) was the victim of a war of aggression (see Chapter 2). The recent US war in Iraq (2003) illustrates the continuation of the crime of aggression in the twenty first century. See Richard Norton-Taylor, *Called to account: the indictment of Anthony Charles Lynton Blair for the crime of aggression against Iraq – a hearing* (2007) 89; J Dugard (note 48 above; 518-520); E A Lewis „War Law: understanding international law and armed conflict“ (2007) (48) (1) in *Harvard International Law Journal* 293-306. However relating to the crime of aggression as provided in article 5 (2) 121 and 123 of the Rome Statute, a Conference for the revision of the Statute was held in Uganda from 31 May to 11 June 2010. With respect to the definition of this crime, the Court will have jurisdiction over it possibly by 2017, as it is expected that the amendment adopted by States Parties will enter into force in 2017. See D D Ntanda Nsereko „The International Criminal Court: an overview of the basic features and recent developments“ – public lecture held on 10 May 2011 at the Faculty of Law, University of KwaZulu-Natal; A Stemmet „All’s well that ends postponed: the definition of the crime of aggression at the Rome Statute Review in Kampala“ (2010) (19) (1) *African Security Review* 3-13 available at http://pdfserve.informaworld.com/220331_751317867_930197203.pdf, accessed on 10 April 2011. Read also N Weisbord „Prosecuting aggression“ 2008 (49) (162) *Harvard International Law Journal* 161, 219-220 available at <http://www.heinonline.org/HOL/Page?handle=hein.journals/hilj49&id=1&size=2&collection=journal&index=journals/hilj>, accessed on 10 Jan 2011.

4.3.6.1 The crime of genocide

The term „genocide“³⁸⁸ was used to describe atrocities committed by the Nazis during World War Two, with the intention of eliminating various human groups, especially the Jews. The crime was later regulated in the International Convention on Prevention and Punishment of Genocide of 9 October 1948. Different *ad hoc* international criminal jurisdictions have prosecuted this crime, which is also integrated in the Rome Statute.

According to article 6 (a) (b) (c) (d) (e) of the Rome Statute the crime of genocide is committed when an individual commits one or a certain number of acts aimed at the destruction of a specific group. Amongst these acts are:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group; and
- forcibly transferring children of the group to another group.

The intention of the perpetrator must be to partially or totally destroy the group,³⁸⁹ which can be of an ethnic, national, racial, or religious character.

Although the act is committed against one or several individuals, the ultimate victim of the crime of genocide is not the individual, but the group itself. The individual is targeted because he/she is a member of the group. Therefore “membership in such

³⁸⁸ Etymologically the word derives from Greek *genos* = race, nation, tribe and Latin *cide* = killing which means, then, literally killing of a human group. This term was coined by R Lemkin „Genocide as crime under International Law“ 1947 (41) in *AJIL* 147 available at http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/ajil41&men_hide=false&men_tab=citnav&collection=journals&page=145, accessed on 10 January 2011; C Byron „The crime of genocide“ in D McGoldrick, P J Rowe & E Donnelly (eds) *The permanent International Criminal Court: legal and policy issues* (2004) 143.

³⁸⁹ “The intention must be to destroy a group „in whole or in part“. Genocide can thus be committed through the destruction of a large number of the group (a qualitative attempt at destruction) or the destruction of a limited number of the group who are targeted because of the potential impact of their destruction on the survival of the group as a whole (a qualitative attempt at destruction)”. The destruction can be demonstrated by considering the method, the gravity and the scope of destruction M du Plessis (note 297 above; 182).

groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner”.³⁹⁰

The term „group“ refers to stable groups, and does not include groups of a political, economic or cultural character.³⁹¹ The view of the drafters of the Rome Statute was that the aim was to prevent physical destruction of a group, which did not embrace cultural destruction.³⁹²

As noted by Ambos, “The crime of genocide protects the group as a social, supra-individual entity, it protects the „group as such“, while the ordinary criminal law protects the rights and legal interests of individuals”.³⁹³

Genocide is a crime against humanity,³⁹⁴ which is characterized by a special mental element³⁹⁵ on the part of the perpetrator who wants to destroy in whole or in part, a national, ethnic, racial or religious group.

4.3.6.2 Crimes against humanity

The term „crimes against humanity“ can be traced back to the past.³⁹⁶ The expression was used for the first time in its contemporary sense in 1915 to describe massacres committed by Turkish forces against their own Greek and Armenian subjects during World War One.³⁹⁷

Although these atrocities were firmly denounced by the Allied powers, those responsible for these crimes were not punished because the Treaty of Sèvres of 1920, which provided for prosecution, was replaced in 1923 by the Treaty of Lausanne

³⁹⁰ *Prosecutor v Akeyesu* (note 63 above; para 511); M du Plessis (note 297 above; 181).

³⁹¹ K Ambos „Selected issues regarding the core crimes in international criminal law“ *International Criminal: Quo Vadis?* (2004) 219, 220-221.

³⁹² M Du Plessis (note 297 above; 174, 181).

³⁹³ K Ambos (note 391 above; 241).

³⁹⁴ M Du Plessis (note 297 above; 181).

³⁹⁵ *Prosecutor v Goran Jelusic* Case No. IT-95-10-A, ICTY (Appeal), 5 July 2001, para 66 available at <http://www.icty.org/x/cases/jelusic/acjug/en/jel-aj010705.pdf>, accessed on 10 July 2011; O Triffterer „Genocide, its particular intent to destroy in whole or part the group as such“ in O Bekou & R Cryer (eds) *The International Criminal Court* (2004) 101-106.

³⁹⁶ D Robinson „Defining “Crimes Against Humanity” at the Rome Conference“ in O Bekou & R Cryer (eds) *The International Criminal Court* (2004) 111, 112-113.

³⁹⁷ M Du Plessis (note 297above; 182).

“which contained a „Declaration of Amnesty“ for all offences committed between 1 August 1914 and 20 November 1922”.³⁹⁸ A few decades later, the term was used again to condemn crimes committed by Nazi war criminals during World War Two. Crimes against humanity were amongst three crimes provided for in the Statute of the International Military Tribunals of Nuremberg and Tokyo, although there was criticism of the legality of the measures taken by those Tribunals. Crimes against humanity were later integrated in the *ad hoc* tribunal created by the UN Security Council during the last decade of the previous century. Finally they were refined in the Rome Statute.

In accordance with 7 (1) (a)-(k) of this Statute, crimes against humanity are committed under certain specific conditions through the commission of one of the following acts: 1) Murder; 2) Extermination; 3) Enslavement; 4) Deportation or forcible transfer of the population; 5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; 6) Torture; 7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; 8) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious; 9) Enforced disappearance of persons; 10) The crime of apartheid; 11) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

To be considered as crimes against humanity and not ordinary crime or other types of crime, the act must be performed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.³⁹⁹ Three elements should be taken into account: the context (widespread or systematic attack) of the commission of the act; the mental element or specific intent (with knowledge of the attack); and who the act is perpetrated against (civilian population).

It is important to note that crimes against humanity do not only take place during armed conflict; they can be perpetrated even during periods of peace. Proof of a

³⁹⁸ France, Russia and United Kingdom.

³⁹⁹ Article 7 (1) of the Rome Statute.

discriminatory motive (national political, ethnic, racial, religious) on the grounds of which the crime was committed has been eliminated.

4.3.6.3 War crimes

Since this dissertation focuses on the fight against impunity for war crimes perpetrated in the DRC, those crimes are considered in-depth. This section begins with notions related to the term and its definition as provided for in the Rome Statute.

4.3.6.3.1 Notion

The first pre-condition for the perpetration of war crimes is the existence of armed conflict. Armed conflict is defined in Chapter 2 above.

War crimes are amongst the oldest offence in the history of humankind, so that “throughout history, and in common parlance, the term „war crime“ has a number of meanings”.⁴⁰⁰ The prosecution of those responsible for war crimes has been organized in domestic law for a long time.⁴⁰¹ Indeed the first prosecution organized in international law was related to war crimes committed during World War One by German soldiers. They were convicted for “acts in violation of laws and customs of war” at Leipzig in the early 1920s, pursuant to arts 228 and 230 of the Treaty of Versailles.⁴⁰²

These prosecutions were largely inspired by the 1907 Hague Convention, which was not really suitable for the prosecution of individuals. However since the codification of war crimes in the Nuremberg Charter of 1945, and in the Geneva Conventions of 1949 and their additional Protocols of 1977, there has been important progress. The concept of war has also refined in different Statutes of the *ad hoc* International Criminal Tribunals of Yugoslavia and Rwanda. More recently, the notion has been considered in the Rome Statute, which refined the concept.

⁴⁰⁰ P Rowe „War crimes“ in D McGoldrick, P J Rowe & E Donnelly (eds) *Permanent International Criminal Court: legal and policy issues* (2004) 203; W A Schabas (note 296 above; 51).

⁴⁰¹ T Meron *War crimes law comes of age: essays* (1998) 1; W A Schabas (note 296 above; 51); M Du Plessis (note 297 above; 174, 185).

⁴⁰² M Du Plessis (note 297 above; 186); W A Schabas (note 296 above; 52).

4.3.6.3.2 Definition of war crimes in the Rome Statute

The definition⁴⁰³ of war crimes in the Rome Statute is very broad. It distinguishes between two kinds of armed conflict and two types of norms related to the conventions and customs applicable to these conflicts.

As provided in the Rome Statute, in order to be prosecuted, war crimes must reach a certain threshold in accordance with article 8 (1), which requires that the crime must have been “committed as part of a plan or policy or as part of a large-scale commission of such crimes”. Moreover as provided in article 30 (1) of the Rome Statute the mental element is required. Those responsible for such acts must have intent and knowledge when performing them.

In terms of the conventional norms applicable to armed conflict of an international character, war crimes are defined in the Rome Statute as grave breaches of the Geneva Conventions of 12 August 1949. Among specific acts which can be considered as war crimes during such armed conflict are: 1) Willful killing; 2) Torture or inhuman treatment, including biological experiments; 3) Willfully causing great suffering, or serious injury to body or health; 4) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; 5) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; 6) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; 7) Unlawful deportation or transfer or unlawful confinement; and 8) Taking of hostages. The act must have been committed against persons or property protected under the Conventions.⁴⁰⁴

⁴⁰³ According to P Rowe in general war crimes can be considered as “any breach of international law during an armed conflict either between (or among) States or within a state. It can therefore include genocide, crimes against humanity, grave breaches of the Geneva conventions of 1949 and Additional Protocol I, 1977, breach of the common Article 3 to the Geneva Conventions, 1949 and breaches of the laws or customs of war (whether incorporated into the Rome Statute 1998 of the International Criminal court or not)”. See P Rowe (note 203above). Read also commentary by K D rmann, L Doswald-Beck & R Kolb *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2004) passim.

⁴⁰⁴ Article 8 (2) (a) of the Rome Statute.

Regarding the second type of norms related to laws and customs in respect of international warfare the commission of any of the following acts may be considered as war crimes;⁴⁰⁵ 9) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; 10) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; 11) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; 12) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; 13) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; 14) Killing or wounding a combatant who, having laid down his arms or no longer having means of defence, has surrendered at discretion; 15) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; 16) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; 17) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; 18) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; 19) Killing or wounding treacherously individuals belonging to the hostile nation or army; 20) Declaring that no quarter will be given; 21) Destroying or seizing the enemy's

⁴⁰⁵ Article 8 (b) those laws customs must be within the „established framework of international law“.

property unless such destruction or seizure be imperatively demanded by the necessities of war; 22) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; 23) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; 24) Pillaging a town or place, even when taken by assault; 25) Employing poison or poisoned weapons; 26) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; 27) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; 29) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123; 30) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; 31) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" Rome Statute of the International Criminal Court; 32) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; 33) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; 34) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions; and 35) Conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities.

Protection extended by the Convention is not limited to the civilian population but is extended to "personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of

the United Nations”.⁴⁰⁶ Some types of war weapons are prohibited even though others (such as nuclear weapons) have not been comprehensively regulated. In this provision women and children are provided with particular protection, respectively against violence and abuse during warfare.⁴⁰⁷

In terms of the conventional norms, regarding internal armed conflict, war crimes are considered as gross violations in terms of article 3 common to the four Geneva Conventions of 12 August 1949.

Thus according to article 8 (2) (c) of the Rome Statute, the commission of one of the following acts may constitute war crimes: 1) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; 2) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; 3) Taking of hostages; 4) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

However to be regarded as war crimes, the victim of such acts must have not been actively involved in warfare. He/she may be a civilian or even a soldier who had abandoned the war or cannot fight due to several objective reasons.⁴⁰⁸

Regarding the norms related to laws and customs applicable in internal armed conflict, the perpetration of any of the following acts is considered as war crimes in conformity with article 8 (2) (e) of the Rome Statute: 1) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; 2) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; 3) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or

⁴⁰⁶ Article 8 (b) (iii) of the Rome Statute.

⁴⁰⁷ Article 8 (b) (xxii), Article 8 (b) (xxvi) of the Rome Statute.

⁴⁰⁸ Article 8 (2) (c) of the Rome Statute.

civilian objects under the international law of armed conflict; 4) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; 5) Pillaging a town or place, even when taken by assault; 6) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2; 7) enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions; 8) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities; 9) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; 10) Killing or wounding treacherously a combatant adversary; 11) Declaring that no quarter will be given; 12) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; and 13) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

In general, this definition is a significant codification of different sources of international humanitarian law.⁴⁰⁹ However, to comply with the principle of legality, such comprehensive detailed definition seems justified. There is important progress as well as weaknesses in the definition of war crimes outlined above. The incorporation of provisions relating to the criminalization of different forms of abuse of children and women during armed conflict is definite progress.⁴¹⁰ However, this definition is not perfect, and other acts, including the use of dangerous war weapons such as nuclear, chemical, biological weapons, etc should be criminalized.⁴¹¹ Moreover, the

⁴⁰⁹ See M Du Plessis 9 (note 297 above; 174, 184).

⁴¹⁰ See M Du Plessis 9 (note 297 above; 174, 189).

⁴¹¹ A Cassese „The Statute of the International Criminal Court: some preliminary reflections“ in O Bekou & R Cryer (eds) *The International Criminal Court* (2004) 40, 49.

distinction between two kinds of armed conflicts is not adjusted to the current evolution of international law.⁴¹²

4.4 ICC Prosecution of war crimes launched in the DRC

Since the referral of the Congolese situation to the ICC, the Prosecutor has investigated several cases, which are in process.

4.4.1 Referral of Congolese situation to the Prosecutor's Office by the Congolese authorities

Numerous grave international crimes were perpetrated during the cyclical armed conflicts in the DRC. Due to the wars, the country was torn into different parts, which were under the control of different embattled parties.⁴¹³ This *de facto* partition of the country brought about the collapse of State institutions.⁴¹⁴ War in the national territory was marked by widespread acts of terror against the civilian population. The violence continues until today, especially in the eastern part of the Country.⁴¹⁵ There have been many politics and diplomatic initiatives⁴¹⁶ aimed at solving the Congolese crisis. These resulted in a global and all-inclusive accord on power sharing in the DRC on 17 December 2002 at Pretoria in South Africa. Thanks to the end of the war, the Congo was reunited and a Government of National Unity was established. Indeed, no one won nor lost the war; all parties took part in national transition institutions (2003-2006). But this transition process raised serious questions relating to the fate of those who perpetrated serious crimes committed during the war period (1996-97 and 1998- 2003). The issue of justice in the post-conflict context is and was very sensitive, and moreover. At that time the national judiciary was weakened by the general

⁴¹² Ibidem 47.

⁴¹³ Note 171 above.

⁴¹⁴ T Ngoy (note 8 above; 192-196).

⁴¹⁵ Amnesty International *Report 2011. The state of the world's human rights* 123-126 available at http://files.amnesty.org/air11/air_2011_full_en.pdf, accessed on 18 May 2011.

⁴¹⁶ See The Lusaka agreement on ceasefire in DRC of July 1999 signed in Lusaka, Zambia; The Sun City Accord resulted from the Inter Congolese Dialogue (350 delegates from eight political group February-April 2002 Sun City RSA), The Pretoria Agreement of July 2002, The Luanda Agreement September 2002, The Global and All inclusive Agreement on the Transition in the DRC December 2002 in Pretoria RSA and final session on all agreement signed on April 2003 in Sun City/ RSA. See C Villa-Vicencio P Nantulya & T Savage *Building nations: transitional justice in the African Great Lakes Region* (2005) 53-54.

institutional crisis⁴¹⁷ which undermined its function and put it under the control of the different parties in power. The country was ruled by a presidency constituted of five persons according to the famous Mbeki⁴¹⁸ formula for sharing power: one president and four vice- presidents,⁴¹⁹ – an institutional monster with five heads! This presidency organized the historic elections of 2006.

The Office of the ICC Prosecutor had begun to track crimes in the DRC in July 2003, particularly in Ituri. After consideration of ICC jurisdiction as provided in the Rome Statute and relating to the gravity of crimes perpetrated in DRC, the Prosecutor recommended prosecution. In September 2003, the Prosecutor announced to the Assembly of State Parties that he was about to open an investigation in DRC, whether on the initiative of the ICC using its competence *proprio motu* (in which case he would require authorization of the pre-trial Chamber) or preferably by way of referral by the Congolese government.⁴²⁰ This was not good news for the different parties. Some were of the opinion that the jurisdiction of the ICC was unnecessary because the national jurisdiction could try those crimes.⁴²¹ However on November 2003 the Congolese authorities accepted the proposition and on March 2004 decided (to some this decision was instrumental)⁴²² to refer the situation in the DRC to the office of the ICC Prosecutor. The latter opened its first investigation in Ituri, which led to the arrest and surrender of some war criminals to the ICC. Currently four cases are filed before the ICC.

4.4.2 The *Thomas Lubanga Dyilo* Case

The case will first be presented, then the state of its process will be examined and lastly, the case will be assessed.

⁴¹⁷ B Kabatu-Suila *L'Instabilité institutionnelle, frein au développement* (2004) passim.

⁴¹⁸ A Mbata (note 14 above; 249).

⁴¹⁹ See Global and all Inclusive Accord V (1), (A), (B), (C).

⁴²⁰ Prosecutor receives referral of the situation in the Democratic Republic of Congo available at <http://www.icc->

[cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB), accessed on 12 June 2011.

⁴²¹ W W Burke-White (note 1 above; 105-106).

⁴²² M Du Plessis „International Criminals Court and its work in Africa confronting the myths“ (2008) (ISS Paper 173) 11 available at <http://www.iss.co.za/uploads/PAPER173.PDF>, accessed on 17 July 2011.

4.4.2.1 Presentation

Born in Jiba on 29 December 1960, Thomas Lubanga Dyilo is a native of the DRC. He is from the Ituri District in Oriental Province.⁴²³

Alleged founder of the UPC= *Union des Patriotes Congolais* (the Congolese Patriot Union) and the FPLC = *Forces Patriotiques pour la Libération du Congo* (Patriotic Forces for the Liberation of Congo),⁴²⁴ he is being prosecuted by the ICC for being responsible⁴²⁵ for the following war crimes provided for in the Rome Statute: “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostility”.⁴²⁶

In concrete terms, he is alleged to have enlisted and conscripted minors into the armed groups cited above and involved them in the hostilities between September 2002 and June 2003 during the armed conflict of an international character, and between June 2003 and August 2003 during internal armed conflict.⁴²⁷

4.4.2.2 State of the process

After the ICC Prosecutor requested for a warrant of arrest against Thomas Lubanga Dyilo on 12 January 2006, a warrant of arrest was issued on 10 February 2006 by the Court, which requested the DRC to ensure the arrest and surrender of Thomas Lubanga Dyilo on 24 February 2006.⁴²⁸ He was arrested on 17 March in DRC and finally surrendered to the ICC in The Hague where he is currently in detention.⁴²⁹

⁴²³ Under seal Warrant of arrest for Thomas Lubanga Dyilo No.: ICC-01/04-01/06 issued on 10 February 2006 available at <http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>, accessed on 10 August 2011.

⁴²⁴ „Situation in the Democratic Republic of the Congo“ available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/>, accessed on 10 May 2011.

⁴²⁵ Under Article 25 (3) (a) of the Rome Statute.

⁴²⁶ See Article 8 (2) (b) (xxvi) or 8 (2) (e) (vii) of the Rome Statute ; Under seal Warrant of arrest for Thomas Lubanga Dyilo (note 423 above).

⁴²⁷ *Prosecutor v Thomas Lubanga Dyilo*, Decision on the confirmation of charges (note 61 above) para 410 available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>, accessed on 10 June 2011.

⁴²⁸ *Prosecutor v Thomas Lubanga Dyilo* (note 427 above; para 15, 16.)

⁴²⁹ See Court’s Detention Center in The Hague Center; *Prosecutor v Thomas Lubanga Dyilo* (note 427 above; para 16).

The Chamber heard Lubanga Dyilo's case on 20 March 2006. During the hearing "the chamber satisfied itself that he had been informed of the crimes which he is alleged to have been committed and of his rights. At that hearing, the Chamber announced that the confirmation hearing would be held on 27 June 2006".⁴³⁰

On 2 August, 15 and 20 September, and 4 October 2006, the Chamber rendered four decisions on applications concerning redactions and summary evidence filed by the Prosecutor pursuant to rule 81 of the Rules.

On 29 January 2007, the Pre-Trial Chamber confirmed⁴³¹ charges of war crimes against Thomas Lubanga Dyilo and on 4 September 2007 the case was filed in the Trial Chamber I for hearing.⁴³² However, in order to ensure a fair trial, on 11 May 2010 the Prosecutor was requested by the Trial Chamber to reveal to Thomas Lubanga Dyilo the details related to intermediary 143, insofar as he will be under the protection of suitable measures.⁴³³

After review of those measures and due to implementation delays, finally on 7 July 2010, given that more protective measures had been taken, the Trial Chamber repeated its orders to the Prosecutor to disclose, within half-an-hour the identity of intermediary 143 under restrictive conditions which it deems sufficient to protect the intermediary. The Prosecutor did not disclose the identity of intermediary 143 within this time-limit⁴³⁴ and the Trial Chamber decided to stop proceedings on 8 July.⁴³⁵ A few days later on 15 July, The Chamber granted the Prosecutor leave to appeal the decision staying proceedings. It also ordered the release of Lubanga Dyilo.⁴³⁶ However, this decision of the Trial Chamber was reversed on October 2010 by the Decision of Appeal Chamber.⁴³⁷

⁴³⁰ Ibidem para 17.

⁴³¹ *Prosecutor v Thomas Lubanga Dyilo* (note 427 above) para 410.

⁴³² *Prosecutor v Thomas Lubanga Dyilo* No: ICC 01/ 04-01/06 (Trial Chamber I), 04 September 2007 available at <http://www.icc-cpi.int/iccdocs/doc/doc342296.PDF>, accessed on 10 June 2011.

⁴³³ *Prosecutor v Thomas Lubanga Dyilo*, ICC- 01/ 04-01/06 (Appeals Chamber) 8 October 2010 available at <http://www.icc-cpi.int/iccdocs/doc/doc948677.pdf>, accessed on 17 July 2011.

⁴³⁴ Ibidem para (3) 17-20.

⁴³⁵ Ibidem (3) 24-25; (4) 12.

⁴³⁶ Ibidem (4) 19-20.

⁴³⁷ Ibidem (9) 10-11.

The Trial has entered its final stages following the hearing of closing statements that took place on 25 and 26 August 2011.⁴³⁸

4.4.2.3 Assessment

This is the first trial relating to the DRC; it is therefore of the utmost importance in terms of case law for trials to come. Currently the process before the Trial Chamber is almost at an end; the different parties have made their pleadings and are waiting for the deliberations and judgment of the Trial Chamber.⁴³⁹

4.4.3. The *Germain Katanga and Mathieu Ngudjolo* Case

The similarity between the *Germain Katanga* Case and the *Mathieu Ngudjolo* Case prompted the ICC to prosecute them together.

4.4.3.1 Presentation

In common with Thomas Lubanga Dyilo, German Katanga is a Congolese from the Oriental Province. He was born in Mambasa (in Ituri District) on 28 April 1978.⁴⁴⁰ Germain Katanga is accused⁴⁴¹ under the Rome Statute⁴⁴² of: 1) “murder as a crime against humanity”;⁴⁴³ 2) “wilful killing as a war crime”;⁴⁴⁴ 3) “inhumane acts as a

⁴³⁸ „Trial Chamber I to deliberate on the case against Thomas Lubanga Dyilo“ (2011) available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/press%20releases/trial%20chamber%20i%20to%20deliberate%20on%20the%20case%20against%20thomas%20lubanga%20dyilo>, accessed on 12 September 2011. In fact, according to the above ICC press release, „over the course of 220 hearings, the Chamber heard 36 witnesses called by the Office of the Prosecutor, including 3 experts, 19 witnesses called by the Defence and 3 witnesses called by the legal representatives of the victims participating in the proceedings. The Chamber also called 4 other experts to testify. The Judges ensured the respect of the rights guaranteed by the Rome Statute to each of the parties, including the right to cross-examine the witnesses“

⁴³⁹ Relating to certain stages of this trial read, Chile Eboe-Osuji „Introductory note to International Criminal Court; Prosecutor v. Lubanga, changing characterization of crimes after commencement of trials“ (2010) (49) (2) *American Society of International Law* 474-478.

⁴⁴⁰ Under seal Warrant of arrest for Germain Katanga, No.: ICC-01/04-01/07 issued on 2 July 2007, 7 available at <http://www.icc-cpi.int/iccdocs/doc/doc349648.PDF>, accessed on 12 June 2011.

⁴⁴¹ *Ibidem* 6.

⁴⁴² Article 25 (3) (a) or Article 25 (3) (b).

⁴⁴³ Article 7 (1) (a) of the Rome Statute.

⁴⁴⁴ Article 8 (2) (a) (i) or article 8 (2) (c) (i).

crime against humanity”;⁴⁴⁵ 4) “inhumane treatment as a war crime”;⁴⁴⁶ 5) “the war crime of using children under fifteen years to participate actively in hostilities”;⁴⁴⁷ 6) “sexual slavery as a crime against humanity”;⁴⁴⁸ 7) “sexual slavery as a war crime”;⁴⁴⁹ and 8) “the war crime of intentionally directing the attack against the civilian population as such or against individual civilians not taking direct part in hostilities”.⁴⁵⁰

Germain Katanga (general of a brigade in the FRDC until his arrest in March 2005) as the highest FRPI commander, *inter alia* planned and lead with other members of the FNI & FRPI, the armed attack on February 2003 of Bogoro village, without any distinction being made between combatant and non-combatant, or of children (under the age required to participate in hostilities),⁴⁵¹ which resulted in the murder of roughly 200 civilians, sexual abuse or enslavement, looting, civilian injuries, and the arbitrary arrest and imprisonment of civilians.⁴⁵²

Because the charges against Mathieu Ngudjolo are very similar, they are not repeated here; rather he is introduced as an individual.

Mathieu Ngudjolo was born in Bunia, Orientale Province on 8 October 1970. An alleged warlord, he is the founder, leader, and the highest commander of FNI. Before his arrest on 6 February 2008 he was serving in Bunia as a Colonel in FRDC⁴⁵³ = *Forces Armées de la République démocratique du Congo*: the armed forces of the DRC. As with Germain Katanga he is being prosecuted for being responsible for war crimes and crimes against humanity (see details above related to Germain Katanga).

⁴⁴⁵ Article 7 (1) (k) of the Rome Statute.

⁴⁴⁶ Article 8 (2) (a) (ii) or article 8 (2) (c) (i) of the Rome Statute.

⁴⁴⁷ Article 8(2) (b) (xxvi) of Rome Statute or article 8 (2) (e) (vii) of the Rome Statute.

⁴⁴⁸ Article 7 (1) (g) of the Rome Statute.

⁴⁴⁹ Article 8 (2) (b) (xxii) or article 8 (2) (e) (vi) of the Rome Statute.

⁴⁵⁰ Article 8 (2) (b) (i) or article 8 (2) (e) (i) of the Rome Statute.

⁴⁵¹ Children under the age of fifteen years as required in Article 8 xxvi of the Rome Statute.

⁴⁵² Under seal Warrant of arrest for Germain Katanga (note 438 above) 5.

⁴⁵³ Under seal Warrant of arrest for Mathieu Ngudjolo Chui, No.: ICC-01/04-02/07 issued on 6 July 2007, 7 available at <http://www.icc-cpi.int/iccdocs/doc/doc453054.PDF>, accessed on 12 June 2011.

4.4.3.3 State of the process

The Prosecutor requested the issue of warrants of arrests for Germain Katanga and Mathieu Ngudjolo Chui respectively on 22 and 25 June 2007. These were issued by the Chamber on 2 July 2007 for Germain Katanga and on 6 July 2007 for Mathieu Ngudjolo Chui.⁴⁵⁴ Germain Katanga was arrested and surrendered on 17 October 2007 to the ICC, where he was heard by the Chamber for the first time on 22 October 2007. The Chamber expressed itself satisfied with the steps taken in the process and confirmed the hearing on 28 February 2008.⁴⁵⁵

Mathieu Ngudjolo was arrested in the DRC and surrendered on 6 February 2008 to the ICC, where he was heard for the first time on 11 February 2008 and it was announced that the confirmation hearing would be held on 21 May 2008.⁴⁵⁶

Initially filed in two parts, on 10 March 2008, the Chamber decided to join Germain Katanga and Mathieu Ngudjolo's cases and confirmed charges against them on 30 September 2008.⁴⁵⁷ They are being charged with being responsible for crimes against humanity and war crimes. After declining to confirm other charges against them "The chamber, unanimously commits Germain Katanga and Mathieu Ngudjolo to a Trial Chamber for trial on the charges as confirmed, pursuant to article 61 (7) (a) of the Statute".⁴⁵⁸

4.4.3.4 Assessment

Currently the case is under process before the Trial Chamber. It is necessary to await the decision of Chamber before commenting further.⁴⁵⁹

⁴⁵⁴ For commentary, see *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, No.: ICC-01/04-01/07 of 30 September 2008 para 39 and para 40 available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>, accessed on 12 June 2011.

⁴⁵⁵ *Ibidem* para 42 and para 44.

⁴⁵⁶ *Ibidem* para 45 and para 47.

⁴⁵⁷ *Ibidem* para 48 and para 279.

⁴⁵⁸ *Ibidem* para 279.

⁴⁵⁹ A Senior „Introductory note to International Criminal Court: *Prosecutor v Katanga and Chui*’ in *American Society of International Law*’ (2010) (4) (1) 45-47.

4.4.4 The *Bosco Ntaganda* Case

The case will be firstly presented, following which the state of the process will be examined and lastly, the case will be assessed.

4.4.4.1 Presentation

Of Rwandan origin,⁴⁶⁰ Bosco Ntaganda allegedly worked in different armed groups in Ituri and North Kivu as Former Deputy Chief of the General Staff of the FPLC = *Forces Patriotiques pour la Liberation du Cong* (Patriotic Forces for the Liberation of Congo) (prior to 8 December 2003), Chief of Staff of FPLC (on 8 December 2003), Commander of MRC = *Mouvement révolutionnaire du Congo* (Congo Revolutionary Movement) (2005),⁴⁶¹ and Chief of Staff of the CNDP = *Congress National pour la Defense du Peuple* (National Congress for People Defence) (current).⁴⁶²

4.4.4.2 State of the process

A warrant of arrest was requested for Bosco Ntaganda on 12 January 2006.⁴⁶³ He is being prosecuted for war crimes committed during the armed conflicts (2002-2003) in Ituri. As one of high-ranking Commanders of Staff of the FPLC, where Thomas Lubanga Dyilo was allegedly the highest Commander, he is being prosecuted on almost the same charges as Thomas Lubanga Dyilo. Details relating to crimes allegedly perpetrated by Bosco Ntaganda are to be found in the case details of Thomas Lubanga Dyilo presented above.

⁴⁶⁰ Under seal Warrant of arrest for Bosco Ntaganda, No.: ICC-01/04-02/06 issued on 22 August 2006, 5 available at <http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF>, accessed on 10 June 2011.

⁴⁶¹ Ibidem.

⁴⁶² „Situation in the Democratic Republic of the Congo“ Available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/>, accessed on 10 May 2011.

⁴⁶³ Under seal Warrant of arrest for Bosco Ntaganda (note 460 above).

4.4.4.3 Assessment

Considering the nexus between Thomas Lubanga Dyilo and Bosco Ntaganda, it should have been possible for the cases to be joined, as in the case of Germain Katanga and Mathieu Ngudjolo. Unfortunately, the procedure triggered against Bosco Ntaganda remains paralyzed, due to political reasons.⁴⁶⁴

Although a warrant of arrest was issued for Bosco Ntaganda on 22 August 2006, he remains free and the Congolese authorities seem to have no intention of arresting him or surrendering him to the ICC.⁴⁶⁵

4.4.5 The *Callixte Mbarushimana* Case

The case will be firstly presented, following which the state of the process will be examined and lastly, the case will be assessed.

4.4.5.1 Presentation

Rwandan national Callixte Mbarushimana resides in Paris, France. He was born on 24 July 1963 in Ruhengeri, Northern Province, Republic of Rwanda.⁴⁶⁶ One of the high-ranking office bearers responsible for the FDLR= *Forces Démocratiques pour la Libération du Rwanda* (Democratic Forces for Rwanda Liberation), he served as an Executive Secretary of the movement from July 2007 and is alleged to have occupied the highest decision-making position after the arrest of the president of the movement in November 2009.⁴⁶⁷

Callixte was being prosecuted⁴⁶⁸ for war crimes constituting: 1) “attacks against the civilian population”;⁴⁶⁹ 2) “acts of destruction of property”;⁴⁷⁰ 3) “acts of murder”;⁴⁷¹

⁴⁶⁴ M Wetsh’okonda Koso (note 221 above; 8, 53, 54).

⁴⁶⁵ Ibidem 69, 70.

⁴⁶⁶ Under seal Warrant of arrest for Callixte Mbarushimana, No.: ICC-01/04-01/10 issued on 28 September 2010 available at <http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf>, accessed on 10 June 2011.

⁴⁶⁷ Ibidem.

⁴⁶⁸ Article 25 (3) (d) of the Rome Statute.

4) “acts of torture”;⁴⁷² 5) “acts of rape”;⁴⁷³ 6) “acts of inhuman treatment and crimes against humanity constitute of acts of murder”;⁴⁷⁴ 7) “acts of torture”;⁴⁷⁵ 8) “inhuman acts”;⁴⁷⁶ and 9) “acts of prosecution.”⁴⁷⁷

These crimes are alleged to have been committed against the civilian population of different villages, including Busheke, Remeka, Pinga, Kipopo, Miriki, Luofu, Kasiki, Busurungi, Manje etc in North Kivu and South Kivu in 2009 during armed conflicts between the government forces and FDLR troops.⁴⁷⁸

4.4.5.2 State of the process

On 28 September 2010 the Pre Trial Chamber issued a warrant of arrest for Callixte who was arrested on 11 October 2010 by the French authorities and surrendered to the ICC in The Hague, in The Netherlands. The appearance of Callixte before the Court was made on 28 January 2011. The hearing of the confirmation of charges initially scheduled on July 2011, took place on 16-21 September 2011.⁴⁷⁹

On 16 December, the Pre-Trial Chamber declined to confirm charges against Callixte. The latter was released on 23 December 2011 from the ICC Custody.

4.4.5.3 Assessment

The case has been dismissed before the Court. This case reveals that international judicial cooperation can play an important role in fighting against the impunity of war criminals. The French authorities’ part in this case should inspire other states worldwide. The case revealed also the independence of the Court and the necessity of a good administration of evidence by the Prosecutor.

⁴⁶⁹ Article 8 (2) (b) (i) or 8 (2) (e) (i) of the Rome Statute.

⁴⁷⁰ Article 8 (2) (a) (iv) or 8 (2) (e) (xii) of the Rome Statute.

⁴⁷¹ Article 8 (2) (c) (i) of the Rome Statute.

⁴⁷² Article 8 (2) (c) (i) of the Rome Statute.

⁴⁷³ Article 8 (2) (b) (xxii) or article 8 (2) (e) (vi) of the Rome Statute, and article 7 (1) (g) of the Rome Statute.

⁴⁷⁴ Article 7 (1) (a) of the Rome Statute.

⁴⁷⁵ Article 7 (1) (f) of the Rome Statute.

⁴⁷⁶ Article 7 (1) (k) of the Rome Statute.

⁴⁷⁷ Article 7 (1) (h) of the Rome Statute.

⁴⁷⁸ See Under seal Warrant of arrest for Callixte Mbarushimana.

⁴⁷⁹ *Prosecutor v Callixte Mbarushimana* ICC-01/04-01/10 available at <http://www.icc-cpi.int/iccdocs/doc/doc1009117.pdf>, accessed on 04 March 2011.

4.5 Conclusion

The contribution of the ICC to the fight against impunity for war crimes is important⁴⁸⁰ considering the impetus it has given to confronting different problems related to the international criminal justice system, such as immunity and its correlate, impunity in the absence of a legitimate and permanent jurisdiction to prosecute crimes of international concern. Moreover, the ICC plays an important preventative, repressive, and restorative function at international level. Its complementary jurisdiction constitutes a serious mechanism to stimulate national justice to actively prosecute war criminals.

However, in relation to the Congolese situation, the options offered by the ICC justice system seem limited. On the one hand, there was the perpetration of gravest crimes at the highest level during the different armed conflicts in the DRC. On the other, due to the institutional crisis, national justice is unable to prosecute and refer these cases to the ICC. The ICC suffers from a shortage of resources, which limits its ability to deal with all cases relating to war criminals in the DRC. This is shown by the small number of cases that have come before the ICC since it announced that it would start prosecutions in the Congo in 2003.⁴⁸¹ It would also appear that the persons who are being prosecuted by the ICC are the small fish, while the big fish remain free. The jurisdiction of ICC is limited to dealing globally with impunity for war crimes committed in DRC.

⁴⁸⁰ A Cassesse (note 411 above) 67-68.

⁴⁸¹ „The Office of the Prosecutor of the International Criminal Court opens its first investigation“ available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB>, accessed on 12 June 2011.

Chapter 5: The limits of the jurisdiction of the ICC and challenges to impunity in the DRC

“Neither the legal mandate of the ICC nor the resources available to it are sufficient to allow the Court to fulfill the world’s high expectations.”⁴⁸²

The Creation of the ICC raised the hopes and interest of many people who were victims of mass atrocities. Many believed that this international judicial organization would be able to resolve the problems relating to the perpetration of grave crimes worldwide.⁴⁸³ However since it started operations in 2002, the experience of the ICC in certain countries, notably the DRC, has not been all smooth sailing.⁴⁸⁴ The ICC is limited to dealing with crimes of international concern on the African continent and especially in the DRC,⁴⁸⁵ due to political, financial, and human factors and issues of a jurisdictional character.⁴⁸⁶

In this chapter, the extent of impunity for war crimes in the DRC as the result of the limitations of the ICC’s jurisdiction is examined, as well as the universal jurisdiction’s contribution to combating unpunished crimes in the DRC.

⁴⁸² W W Burke White (note 1 above) 54.

⁴⁸³ H-P Kaul „Construction site for more justice: the International Criminal Court after two years“ (2005) (99) (317) in *American Journal of International Law* 370 (370-384).

⁴⁸⁴ Amongst the countries where the ICC is active are Central African Republic, Côte d’Ivoire, Kenya, Uganda, Sudan Libya and DRC. So far the experience of the Court in those Countries is not yet conclusive. There has been some criticism, including that it appears that the ICC was only created for the African continent, M Du Plessis „The International Criminal Court and its work in Africa confronting the myths“ (2008) (ISS paper 173) 1, 2 available at <http://www.iss.co.za/uploads/PAPER173.PDF>, accessed on 10 May 2011; M Du Plessis „The International Criminal Court that Africa wants“ (2010) (Monograph 172) vii-viii available at <http://www.issafrika.org/uploads/Mono172.pdf>, accessed on 14 March 2011. Although the Court action seems more intensive in the Congo, impunity for crime is still an enormous problem due to several factors, M H Arsanji & W M Reisman „The Law-in-action of the International Criminal Court“(2005) (99) (317) in *American Journal of International Law* (397-399) 385-403.

⁴⁸⁵ UNOHCHR (note 3 above; para 1023 to para 1026); H Friman „The Democratic Republic of Congo justice in the aftermath of peace?“ (2001) (10) (3) in *African Security Review* 11 available at <http://www.issafrika.org/pubs/ASR/10No3/Friman.html>, accessed on 10 May 2011.

⁴⁸⁶ W W Burke White (note 1 above; 54).

5.1 Limited jurisdiction *ratione temporis*

One of the big sources of the limitation of the ICC in general is the fact that it was created by a conventional mode which required the willingness and consent of States to function.⁴⁸⁷ Some of the provisions in the Rome Treaty reveal just how far States have gone to make sure that their nationals will not be covered by the ICC's jurisdiction.⁴⁸⁸ This is due to the fact that, in most cases, war crimes and other serious crimes are committed by military troops during actions initiated by the governments of their respective States.⁴⁸⁹

A State's criminal responsibility is a very sensitive issue. Although the commission of a crime such as aggression can demonstrate State criminality it remains difficult to sanction a State, which is a juristic person or a judicial fiction.⁴⁹⁰ Its penal responsibility in the perpetration of crime as such can seem questionable and the application of sanctions may be unrealistic.

Hence physical persons who act on behalf of States are often considered responsible for State wrongdoing.⁴⁹¹ States therefore took precautions to limit the ICC's jurisdiction during the heated negotiations at the Rome Conference. Apart from the limitations on the ICC's jurisdiction to try war crimes in article 124, other articles limit the Court's jurisdiction to deal significantly with all grave crimes committed in countries such as the DRC where most of the war crimes were committed several years before the advent of the ICC in 2002.⁴⁹²

⁴⁸⁷ Article 11 (1) of the Rome Statute and Article 4 (2) of the Rome Statute.

⁴⁸⁸ For instance article 124 allows a State, which becomes a party to the Rome Statute to not accept the jurisdiction of the Court over war crimes committed by its nationals or on its territory „for a period of seven years after the entry into force of the Statute for the State concerned“. This has helped to get more States to accept the last Rome Statute proposal. However it is obvious that it limits the Court's jurisdiction and encourages impunity. Read T Graditzky „War crime issues before the Rome Diplomatic Conference on the establishment of an International Criminal Court“ in O Bekou & R Cryer *The International Criminal Court* (2004) 387-390.

⁴⁸⁹ E David „Les valeurs, politiques et objectifs du droit pénal international a l'heure de la mondialisation“ in *International Criminal La: Quo Vadis?* (2004) 158, 161; D Luban „Lawfare and legal ethics in Guantanamo“ (2008) (60) (6) *Stanford Law Review* 1981-2026

⁴⁹⁰ P Akele Adau & A Sita Muila Akele *Les crimes contre l'humanité en droit congolais* (1999) 34. Read also N M Songa (note 32 above; 250-254).

⁴⁹¹ *Ibidem*.

⁴⁹² See Chapter 2 above.

5.1.1 Causes

Despite the gravity of the crimes that are provided for in the Rome Statute, according to article 11 (1) and (2), the Court shall have jurisdiction only “with respect to crimes committed after the entry into force of this Statute”. Moreover if “a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State”.

The application of this provision to the Congolese case raises the problematic issue of the retroactivity of the ICC’s jurisdiction to try crimes committed before its entry into force on 1 July 2002.

Although the DRC ratified⁴⁹³ the Statute before its entry into force, and is not concerned by the limitation, which could result from paragraph two of article 12, the major obstacle in the Congolese situation is the result of the impossibility of the ICC extending its jurisdiction to crimes perpetrated before 2002. Although crimes continue to take place, most of the war crimes committed in the DRC were perpetrated between 1996 and 2002.⁴⁹⁴

The jurisdiction of ICC is complementary to the national judiciary and will not in any way replace the national judiciary. However, the national judiciary has not been able to address these matters adequately, so the ICC has intervened although it is limited by capacity constraints such as a shortage of material, financial, and human resources.⁴⁹⁵ For instance, since the ICC officially launched its investigation in 2004, only five persons are in the process of being prosecuted, with one still at large.⁴⁹⁶ In contrast, a recent UN report relating to various grave crimes perpetrated in the DRC before 2003 found 782 cases, of which the team was able to verify 71%.⁴⁹⁷

⁴⁹³ U Mutuale Nkasa *La Cour pénale internationale au regard du système judiciaire congolais* (2009) 168.

⁴⁹⁴ UNOHCRH (note 3 above; para 125-129).

⁴⁹⁵ UNOHCRH (note 3 above; para 1026).

⁴⁹⁶ See Chapter 4 above.

⁴⁹⁷ UNOHCRH (note 3 above ; para 118).

It is clear that even if it could be possible to extend ICC jurisdiction to crimes perpetrated before 2002, given its current resources, the ICC would not be able to do so. In addition, the ICC is not intended to be an instrument of mass prosecution, but rather an instrument of selective prosecution of high profile, powerful, individuals. This serves the cause of justice as well as having a certain symbolic and deterrent effect. The concern though, is that under the current arrangements, the majority of war criminals in the DRC will remain unpunished. This may have a negative impact in terms of impunity not only in the DRC but even as far as in the Great Lakes Region. Therefore, other mechanisms need to be considered, such as a Special Tribunal for the DRC, as discussed in Chapter 6.

5.1.2 Consequences

Justice, especially criminal justice, is of the utmost importance in protecting the values of society. Not only local and national, but also universal, international values need to be protected by providing effective justice, which must be administrated in such a way that criminals are deterred.⁴⁹⁸ The failure of justice to address mass atrocities would result in impunity for these crimes, which might encourage the repeated, large-scale commission of these grave crimes.⁴⁹⁹ In the context of the DRC, the ongoing crimes which have rendered the country infamous as an international capital of killing and rape,⁵⁰⁰ (and perhaps of impunity) must not be relegated to news items, but rather be seen as a real challenge to humankind, whose life, freedom, and moral and physical integrity have lost their value. If those responsible for these odious acts are not severely punished, the recurrence of such cruelty may happen to anyone at anytime.

⁴⁹⁸ D Kuwali (note 33 above; 48-61); R Ali Shalan (note 33 above; 40-90, 107, 150); N M Songa (note 29 above; 347).

⁴⁹⁹ D Kuwali (note 33 above; 49).

⁵⁰⁰ See N D Kristof & Jewish Rabbis (note 14 above). According to a US medical report, 1,100 women are raped every day. For more read, „1,100 women raped every day“ available at <http://www.france24.com/en/20110511-thousand-1100-women-raped-every-day-american-public-health-report-un-democratic-republic-congo>, accessed on 10 June 2011.

5.2 Impunity for war crimes in the DRC

Impunity is not a new concept in the DRC, but has been a tradition since a few years after independence in 1960.⁵⁰¹ The events in the Congo demonstrate how impunity can destroy Statehood. Mismanagement, corruption, and plundering in the case of the Congo, was exacerbated by several years of dictatorship, which culminated in wars during which there were gross violations of human rights.⁵⁰² Globally, a culture of impunity is caused by political and judicial crises.⁵⁰³ However the threshold of grave violations of international humanitarian law seems too high to be neglected and to go unpunished. The situation in the DRC should interest not only victims, but also the entire world. The Congo case is a challenge to international criminal justice.

5.2.1 Political factors

The current political system in the DRC has its roots in the culture of impunity inherited from the Mobutu regime, which ended in successive violent armed conflicts (1996-98 and 1998-2003).⁵⁰⁴ As demonstrated above, the civilian population has been subjected to grave atrocities.⁵⁰⁵ However, those responsible for these crimes have so far gone virtually unpunished.⁵⁰⁶ One of main explanations for the lack of sanctions is the way the conflicts were settled.

Negotiations between the warring factions led to some political accords.⁵⁰⁷ The most important accords were the Lusaka Agreement on Ceasefire in DRC (1999) and the Global and all Inclusive Accord on Transition in DRC (2003).

⁵⁰¹ Luzolo Bambi Lessa „L'impunité: source des violations graves et répétitives des droits de l'homme en République Démocratique du Congo" (2004) *Actes de Forum National sur les Droits de l'Homme en République Démocratique du Congo* 141-152; M Kodi „Corruption and governance in the DRC" (2008) (ISS Monograph) (148) 6 Available at <http://www.iss.co.za/uploads/MONO148FULLBACK.PDF>, accessed on 1 June 2011.

⁵⁰² Muzong Kodi (note 501 above).

⁵⁰³ B Mbiango Kakese „Discours du Premier President de la Cour Suprême de Justice" (2004) (1) *Revue Pénale Congolaise* 128-136; G-C Kambaji wa Kamabaji & P Musafiri Nalwango (1997) *La crise de l'université et de la Justice au Congo-Kinshasa en mutation: diagnostic et thérapeutique* passim.

⁵⁰⁴ See Chapter 2 above.

⁵⁰⁵ Ibidem.

⁵⁰⁶ See Chapters 3 and 4 above.

⁵⁰⁷ See K Masire (note 8 above); M Malan „The UN „month of Africa" A push for actual peace efforts or a fig leaf on the DRC?" (2000) (ISS occasional paper) (44) available at <http://www.iss.co.za/uploads/paper44.pdf>, accessed on 19 June 2011; M Malan & H Boshoff „A 90 day

The issue of transitional justice has been critical during the rule of the Government of National Unity or the Transition Government, 2003-2006. Different options provided in those accords for a transitional justice were difficult to apply during that period. Considering that war crimes had been committed on both sides during the conflict, it was difficult to envisage a judicial solution.⁵⁰⁸ There was a high risk that the political reunification process would be weakened as a result.⁵⁰⁹

Hence, only extra-judicial mechanisms were applied to deal with certain crimes perpetrated during the armed conflict. Amnesty was granted and the Commission for Truth and Reconciliation was established.⁵¹⁰

The results of those transitional options are not satisfactory, and national reconciliation remains a pipedream. The amnesty did not put an end to criminal barbarity, which is going on in some locations in the eastern part of the DRC.⁵¹¹

The Truth and Reconciliation Commission did not work as well as it did in countries such as South Africa.⁵¹² Created in 2003, it never got round to hearing cases of gross violations of human rights and international humanitarian law and there is no hope that it will do so, as the Commission ended its work in 2007. This means that the truth about the crimes committed will never be known, and victims have not granted forgiveness.

plan to bring peace to the DRC? An analysis of the Pretoria agreement of 30 July 2002“(2002) (ISS paper) (61) available <http://www.iss.co.za/uploads/PAPER61.PDF>, accessed on 19 June 2011; M Malan „Renaissance peacekeeping: a Southern African solution to conflict in the DRC“(1999) (37) available at <http://www.iss.co.za/uploads/paper37.pdf>, accessed on 19 June 2011.

⁵⁰⁸ According to Chapter 9 (9) 1 of the Lusaka Agreement, the different parties agreed to surrender war criminals to the Tribunal for Prosecution. Resolutions of the Inter Congolese Dialogue annexed to the Global and all Inclusive Accord on Transition in DRC (2003) provided for the creation of an International Tribunal for Congo, whose jurisdiction should be extended to cover crimes committed in 1960. However, so far none of these provisions have been implemented.

⁵⁰⁹ Read R G Teifel *Transitional Justice* (2000) 213; N Roht-Arriaza „Combating Impunity“(1995) In: N Roht-Arriaza: *Impunity and human rights in International law and practice* 281.

⁵¹⁰ However, the amnesty provided in Law number 05-023 of 19 December 2005 was limited to war facts, political infringements and opinion infringements. War crimes, crimes of genocide and crimes against humanity were not included. See article 1 and 2 of the law above. Read also N M Songa (note 32 above; 424).

⁵¹¹ Amnesty International (Note 414 above;123-126).

⁵¹² Truth and Reconciliation Commission of South Africa (note 28 above)17-19, 106-134.

Furthermore, the victims have not received reparations and are now living in fear of fresh crimes. The situation is complicated by the fact that, due to the lack of justice, victims have become perpetrators of crime.⁵¹³

5.2.2 Judicial factors

The corruption of the political system in DRC did not spare the judiciary, which is amongst the most corrupted institutions in the country.⁵¹⁴ As noted above, although war crimes can be traced back to before 1996 in the DRC, none of these crimes have been prosecuted in the past few decades.⁵¹⁵ Several factors account for this crisis.

The years of dictatorship and war affected the justice system, which is in an almost total state of collapse.⁵¹⁶ There is a lot of interference in the decisions of magistrates, who are theoretically independent, but completely dominated by the executive power in practice.⁵¹⁷ Hierarchical structures limit the independence of military magistrates, in particular.⁵¹⁸

Inadequate budgets,⁵¹⁹ a lack of personnel in some areas of the country, and low salaries, which expose magistrates to corruption, exacerbate the problems.⁵²⁰ In some places magistrates struggle to get to work due to the lack of transportation. The physical and material conditions at the courts are poor and are a serious challenge in certain areas of the country.⁵²¹

⁵¹³ Note 27 above.

⁵¹⁴ M Kodi (note 501 above; 32).

⁵¹⁵ See Chapter 3 above.

⁵¹⁶ Matadi Nenga Gamanda, *La Question du pouvoir judiciaire en R.D.C. contribution à une théorie de réforme*, (2001) 164; M Wrong (note 12 above).

⁵¹⁷ E Boshab „Le Conseil national pour l’unité nationale et la réconciliation, une institution à promouvoir dans les institutions africaines pour la prévention des conflits ethniques et la protection des minorités: cas du Burundi” 2006 in *Liber amicorum Marcel Antoine Lihau*, 115 ,116; M Wetsh’okonda Koso (note 211 above; 67-72), UNOHCRH (note 3 above; para 955-961).

⁵¹⁸ Ibidem.

⁵¹⁹ Average of 0,6 % of the national budget between 2004 and 2009. Read UNOHCRH (note 3 above) para 901-904.

⁵²⁰ For instance more recently on 30 August 2011, hundreds of Magistrates demonstrated in Kinshasa demanding an improvement in their professional and social conditions.

⁵²¹ UNOHCRH (note 3 above: para 910-912).

As result, people have lost confidence in the justice system.⁵²² Very few of the decisions which have been rendered by different Courts can be considered as case law. Magistrates need training in general, as well as training in the investigation and prosecution of international crimes in line with international standards.

5.2.3 The challenges facing the international criminal justice system in dealing with war crimes in the DRC

The crimes that have been committed in the Congo are of international concern and cannot go unpunished. Although the ICC has attempted to prosecute some alleged war criminals, its jurisdiction is limited, as explained above.

Therefore there is a need to explore another judicial solution which could fit with the Congolese context, considering the framework, and the time and nature of the crimes that have been committed.

5.3 The attempts of the universal jurisdiction system

The perpetration of horrendous crimes during the past century prompted concerns in the international arena.⁵²³ Attempts to punish grave international crimes were made at several levels, including the different *ad hoc* international tribunals, the ICC and the principle of Universality. While the prosecution of war crimes by the ICC has posed problems the system of universal jurisdiction, which allows a State to act on behalf of the international community, presents a different picture.⁵²⁴ Attempts by national

⁵²² Fofe Djofia Malewa *Contribution à la recherche d'un système de justice pénale, plus efficient au Zaïre* T 1 (1990) (unpublished PhD thesis) 3.

⁵²³ M Du Plessis „The Universal aspirations of the International Criminal Court“ (2002) (11) (4) in *African Security Review* available at <http://www.issafrica.org/pubs/ASR/11No4/duPlessis.pdf>, accessed on 10 May 2011; Phenyio Keiseng Rakate „Towards global justice in the 21st Century?“ (occasional paper 50) (2001) available at <http://www.iss.co.za/uploads/paper50.pdf>, accessed on 10 May 2011; Vyver, J. “Universal jurisdiction in international criminal law” (1995) (24) *South African Yearbook of International Law* 107

⁵²⁴ J Dugard et al. (note 48 above; 157). Read also A J Colangelo „Constitutional limits on extraterritorial jurisdiction: terrorism and the intersection of national and international law“ 2007 (48) (1) *Harvard International Law Journal* 121-188.

judges to prosecute war crimes thus far have been criticized.⁵²⁵ However, the principle of universality is important, as it may contribute to fighting impunity if it is properly applied by States. This might address the issue of impunity in the DRC.⁵²⁶

5.3.1 Notion

The application of the embryonic principle of universality was used to fight the impunity of vagabonds, assassins, exiles and robbers, who could not be found, who had fled to other territories, or who were continuing with crime.⁵²⁷

The basic principle was *judex deprehensionis*, or the judge of arrest. The judge of place of arrest was required to prosecute the criminal in compliance with the principle *aut dedere, aut punire*, to extradite or to punish the offender. The principle of universality has evolved and been affirmed throughout history. However the first time that this principle was truly admitted in international law was the prosecution of piracy.⁵²⁸ Some have cited the *Lotus*⁵²⁹ case as the sole judicial decision relating to the right of a state to apply a broad, criminal jurisdiction.

The universal jurisdiction is classified in several types: the co-operative general universality principle, the co-operative limited universality principle or principle of representation, and the unilateral limited universality principle.⁵³⁰

The co-operative general universality considers the principle, as the national judge should apply it, where the suspect is arrested when it is not possible to extradite the

⁵²⁵ L Reydam's „Belgium reneges on universality: the 5 August 2003 Act on Grave Breaches of International Humanitarian Law“ (2003) (1) 679-681 in *Journal of International Criminal Justice*; H Kissinger „Pitfalls of Universal Jurisdiction“ available at www.globalpolicy.org/component/content/article/163/28174.html, accessed on 12 June 2011.

⁵²⁶ UNOHCHR (note 3 above; para 1027-1039); CAD (note 280 above; 15).

⁵²⁷ L Reydam's (note 353 above; 29). The ground of the right and/or duty of any national judge to prosecute those responsible for an international offence regardless of their nationality, the nationality of their victim or the place of perpetration of the crime can be traced back to the past. See N M Songa (note 32 above; 113).

⁵²⁸ N M Songa (note 32 above; 115).

⁵²⁹ See R O'Keefe „Universal jurisdiction: clarifying the basic concept“ (2004) (2) in *Journal of International Criminal Justice* 735,736; L Reydam's (note 353 above; 11). See also *Lotus case Judgement* available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm, accessed on 19 July 2011.

⁵³⁰ L Reydam's (note 353 above; 28).

suspect. The co-operative limited universality principle distinguishes between domestic and international offences. It applies only to crimes of international concern. Finally, the unilateral limited universality principle allows any national judge to exercise criminal jurisdiction to try offence of an international character even in *abstentia*.⁵³¹

While this classification may not be perfect, it illustrates the evolution of the principle under analysis, which has been subjected to several criticisms regarding its grounds in terms of legality, legitimacy, efficiency, and feasibility.⁵³²

Notwithstanding these criticisms, the principle of universality is in line with a globalized world, in which people travel more easily than in the past, and information technology has transformed the world into a global village.⁵³³ This means that the perpetrators of grave crimes are unlikely to be confined within the territory of one State.

This principle is considered by several international organizations, NGOs and human rights defendants as an important tool, which may help to fight unpunished grave crimes worldwide, and in the DRC in particular.⁵³⁴

What is the legal basis of the principle of universal jurisdiction? Is it consistent with modern international law?

⁵³¹ L Reydamas (note 353 above; 29-42).

⁵³² Note 525 above; S Bula-Bula „Senegalese jurisdiction versus Belgian Universal jurisdiction judgement of November 25 2005 of the Court of appeals of Dakar concerning the lack of jurisdiction in the extradition of Mr Hissène Habré“ (2006) 319, 333.

⁵³³ J Seroussi *Les Tribunaux de l'humanité les ajustements cognitifs dans la mobilisation pour la compétence universelle des juges nationaux* (2007) (unpublished PhD thesis) University of Paris Sorbonne 11-12 available at <http://www.cess.paris4.sorbonne.fr/dossierpdf/Les%20tribunaux%20de%20l'humanit%E9.pdf>, accessed on 10 May 2011.

⁵³⁴ See „*Universal jurisdiction*‘ available at <http://www.amnesty.org/en/international-justice/issues/universal-jurisdiction>, accessed on 12 July 2011.

5.3.2 Legal basis

As noted above it is not easy to achieve universal agreement on prosecution of different offences against the international order. For different reasons relating to imperialistic foreign policy, States regard consent to a criminal jurisdiction as a serious threat. Hence it is not surprising that until now the universal jurisdiction is not grounded on a global convention.⁵³⁵ Although several treaties exist on specific offences, extradition, and above all, the commitment of the international community to bring to justice to all those responsible for serious violations of human rights,⁵³⁶ “at present there is no global convention on criminal jurisdiction, and it seems unlikely that such an instrument will be adopted in the near future”.⁵³⁷

According to Dugard, the true universal jurisdiction applies only in the case of crimes under customary international law⁵³⁸ and signatory states to multilateral treaties may exercise a “type of quasi-universal jurisdiction”.⁵³⁹

Searching for evidence of universal jurisdiction in international Conventions, Reydams⁵⁴⁰ notes that although roughly 100 multilateral treaties relating to crime were agreed during the period before World War Two, only three deal in some way or another with the principle of universality. However after World War Two, he found about 30 international Conventions pertaining to universal jurisdiction.

International offences in respect of which any national judge may exercise universal jurisdiction are limited to piracy, slave-trading, war crimes, crimes against humanity, genocide and torture.⁵⁴¹

However this list is not exhaustive of what may constitute international crimes in terms of international criminal law. In line with the focus of this dissertation, the

⁵³⁵ L Reydams (note 353 above; 16).

⁵³⁶ *Ibidem* 17.

⁵³⁷ *Ibidem* 16.

⁵³⁸ J Dugard et al. (note 48 above; 156).

⁵³⁹ *Ibidem* 157.

⁵⁴⁰ L Reydams (note 353 above; 79).

⁵⁴¹ J Dugard et al. (note 48 above; 157).

following section will highlight the exercise of criminal jurisdiction relating to war crimes.

In terms of article 49 (2)⁵⁴² of the First Geneva Convention, all States party to the Convention shall take necessary measures to avoid war criminals going unpunished. States are obliged to try those responsible for grave breaches of that Convention regardless of their nationality before their national courts or to extradite them for trial in another party State.

Today, most States are party to this Convention. Effective exercise of this jurisdiction may help to stop impunity for serious crime all over the world, especially in the DRC. This would entail national jurisdictions acting on behalf of the international community to protect the human values common to all nations.⁵⁴³

Some are opposed to the principle of universality, arguing that it will lead to a tyranny of judges.⁵⁴⁴ For others, the exercise of universal jurisdiction may contribute significantly to the fight against impunity. But to be successful in practice, two conditions must be taken into account: reasonableness and non-interference in the internal domestic affairs of other States.⁵⁴⁵

Among the States cited as most likely to be capable in virtue of their municipal law to exercise a form of universal jurisdiction are Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, The Netherlands, Spain, Switzerland, the United Kingdom, and the United States of America.⁵⁴⁶

5.4 Assessment

Notwithstanding the consistence of the principle of universality with world development, it is not unanimously admitted in international law. Without the cooperation of all States the exercise of this jurisdiction can be very limited.

⁵⁴² And article 146 of the fourth Geneva Convention as well.

⁵⁴³ J Dugard et al (note 48 above; 157).

⁵⁴⁴ H Kissinger (note 525 above).

⁵⁴⁵ L Reydam (note 353 above; 42).

⁵⁴⁶ *Ibidem* (note 353 above; 87-219).

Several obstacles may weaken the function of this jurisdiction such as immunity, the problem of investigating and reinforcing a warrant of arrest when the criminal process was initiated in *absentia*, etc. One of the famous cases where this jurisdiction was used to try international crimes committed in the DRC is the *Yerodia* case.⁵⁴⁷

In this case the Belgian justice system issued an arrest warrant against Yerodia Abdulaye Ndombasi on 1 April 2000. Ndombasi was the then Congolese Minister of Foreign Affairs. He was charged with war crimes and crimes against humanity. The case arose from a dispute between Belgium and the DRC. The latter seized the International Court of Justice, which rendered its decision on 14 February 2002, in which Belgium was condemned for having violated international law relating to immunity of a Foreign Policy Ministry.⁵⁴⁸

In their joint independent opinion, the majority of the judges including the President rejected the exercise of universal jurisdiction in *absentia* and warned that such arbitrary use of criminal jurisdiction may favor powerful States. Instead of enhancing peace and security in the international order it may even be divisive and troublesome! Reacting to the judgment of the Court, Belgium abandoned the prosecution and abrogated its law on universal jurisdiction.⁵⁴⁹

For some the ICJ decision marked the end of the principle of universality. Although this setback related to a lack of reasonableness in process, there have been other successful cases on Europe,⁵⁵⁰ which encourages the exercise of universal jurisdiction

⁵⁴⁷ Note 353 above.

⁵⁴⁸ Ibidem para 10, 11, 12, 13.

⁵⁴⁹ L Reydam (note 353 above; 228).

⁵⁵⁰ Human Rights Watch „Universal jurisdiction in Europe: the state of the art“ (2006) (18) (5) 1-3 available at <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe>, accessed on 17 August 2011. Unlike in Europe where there have been some successful cases of application of the principle of universality, on the Africa continent the African Union remains resistant to the application of universal jurisdiction by European countries against African personalities and recommends to AU member states that they exercise such jurisdiction only under certain conditions which take into account immunities and friendly international relations and territoriality. See African Union *Report on* ; Decision on the Abuse of Universal jurisdiction DOC.EX.CL/522(XV) available at http://www.au.int/en/sites/default/files/COUNCIL_EN_24_30_June_2009_EXECUTIVE_COUNCIL_FIFTEENTH_ORDINARY_SESSION.pdf, accessed on 20 January 2012; S Bula-Bula(note 532 above) The AU point of view on the principle of universality may have some political merits but it is not helpful in dealing with the culture of impunity in Africa.

to prosecute those responsible for war crimes in the DRC who may be found in the territory, or country, where municipal law enables such jurisdiction.

However, as with the ICC jurisdiction, this jurisdiction is limited in terms of impunity in the DRC, considering that the criminal may be a high profile official who may claim immunity. Others may prefer to stay at home and not travel to a country where they run the risk of being indicted. Furthermore, in Africa, the African Union seems unenthusiastic regarding cooperation with, and enforcement of, ICC jurisdiction. Thus it is obvious that there is real need to find another judicial solution, which will fit the Congolese situation.

Chapter 6: A plea for the establishment of a special criminal tribunal for the DRC

“Nuremberg is the point in the constellation from which all legal discussion of war crimes trials proceeds or reverts.”⁵⁵¹

As result of the limitations on the ICC’s jurisdiction, as well as the principle of universality, the exercise of which remains problematic, this chapter considers other ways to move forward in the fight against impunity for war crimes in the African Great Lakes Region, where the DRC needs its Nuremberg.

Given that the Congolese national judiciary is unable to curb the perpetration of war crimes, this chapter examines the need for a special criminal tribunal for the DRC in order to find a system of justice that can deal with all war crimes perpetrated during that horrendous conflict, but which remain unpunished.

An overview of the justification, legal basis and judicial nature of such jurisdiction are examined in the Congolese context and its inception and materialization are scrutinized. Furthermore, the jurisdiction of such a Tribunal in respects of type of crime, time frame, territory, and individuals, which may be prosecuted, are discussed.

6.1 Design of *ad hoc* tribunal for the DRC

The establishment of a special criminal tribunal for the DRC is not a new concept, as this mode of criminal jurisdiction has been established under other historical circumstances, as described in Chapter 4.

Indeed, the perpetration of numerous grave crimes during the last century led to several attempts to set up judicial institutions in order to fight the impunity for serious

⁵⁵¹ D McGoldrick, P J Rowe & E Donnelly (eds) (Note 301 above; 10, 18).

crimes. These include the International Tribunal of Nuremberg to the Special Court of Sierra Leone, the Tribunals of Tokyo and the Former Yugoslavia, of Rwanda and, more recently, the Tribunal for Lebanon and the Special Chamber for Cambodia.⁵⁵² The legitimacy, legality and nature of those tribunals set an important precedent for a Special tribunal for the DRC. Regarding the nexus between the genocide in Rwanda and the wars in the DRC, some have proposed the extension of the mandate of the International Criminal Tribunal for Rwanda to the DRC.⁵⁵³

6.1.1 Context

The recent wars in the Congo had such grave implications that they were regarded as the “first African World War”⁵⁵⁴ and the first war that had consequences comparable with those of World War Two.⁵⁵⁵ Since 1996 the history of the Congo has been marked by serious armed conflicts, which still occur on a spasmodic basis in the Eastern Province, although the war officially ended in 2003. These wars led to several million deaths, the pillaging of natural resources, and the destruction of property. There have been serious and systematic violations of human rights and international humanitarian law, to the extent that it is hard to find a category of human rights that was not violated during the wars in the DRC.⁵⁵⁶

This horrendous situation has earned the DRC the questionable labels of *world capital of killing*, and *capital of rape*.⁵⁵⁷ To these the researcher would add the *world capital of impunity*. The post-conflict situation in the DRC calls for measures to deal with war crimes.

⁵⁵² There have also been *ad hoc* Courts for East Timor and Kosovo. See S Katzenstein „Hybrid tribunals: searching for justice in East Timor“ available at <http://www.law.harvard.edu/students/orgs/hrj/iss16/katzenstein.pdf>, accessed on 10 July 2011; C P R Romano A Nollkaemper & J K Kleffner (eds) *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (2005) available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/romano-nollkaemper-kleffner305.htm>, accessed on 10 July 2011.

⁵⁵³ H Friman (note 485 above; 11). This is a good solution as it may capitalise on the experience of this tribunal, but it may need to be adjusted to Congolese social, political and judicial reality.

⁵⁵⁴ Note 4 above.

⁵⁵⁵ C Hemedi (note 102 above).

⁵⁵⁶ See Chapter 2 above.

⁵⁵⁷ See Chapters 1 and 2 above.

In the light of article 4 (h) (o) of Constitutive Act of the AU, article 1 of the UN Charter and Preamble of the founding document of the ICC, there is no doubt that these grave crimes committed in DRC are a threat to peace and security for Africa as well as for the world. As with the Nazi criminals after World War Two, there is a need for justice. Peace and security worldwide will not be assured as long as those responsible for crimes in DRC go unpunished.

Political negotiations led to the establishment of a Government of National Unity in 2003, with transitional institutions. Even judicial instruments opted for transitional options.⁵⁵⁸ Amnesty was granted in order to promote reunification and reconciliation.

However, these transitional mechanisms did not reconcile the people of the Congo, nor did they deter war criminals, who continue to kill, rape and loot in the DRC.⁵⁵⁹ Although general elections were held in 2006, the human rights situation in the DRC remains very problematic. There is a clear need for justice, which on the one hand, would deter potential criminals from committing such crimes and, on the other hand, to provide redress for the numerous victims of these odious crimes. Instead of reconciliation, the extra-judicial mechanisms applied during the transition led to impunity. This cannot serve as the basis for a strong and truly united nation. It is for this reason that Binda advocates the setting up of another Truth and Reconciliation Commission, which may actually be able to reconcile people.⁵⁶⁰ However, while a Truth and Reconciliation Commission could play an important role in terms of restorative and symbolic justice, the fact remains that in the Congo, repressive justice is still important for the purposes of deterrence.

6.1.2 Legitimacy (Justification)

As demonstrated above, there is a need to prosecute war criminals in the DRC for several reasons. Since 2006 the political regime has changed. The transitional government is no more. Those in charge of official institutions are mandated by the

⁵⁵⁸ Ngoma Binda *Justice Transitionnelle en R. D. Congo : une expérience de commission vérité et réconciliation* (2008) 13-14.

⁵⁵⁹ Amnesty International (note 415 above; 123-126).

⁵⁶⁰ Ngoma Binda (note 558 above; 164).

populace through elections, and are bound by the rule of accountability and the rule of law.

Indeed, there would have been no need to conduct this research if equitable justice had been extended to the people of the DRC. It is not only the number of deaths or the level of destruction, which need to be taken into account, but the conscience of humankind and the political will to redress wrongs. With around seven million deaths since the conflict started, there are no grounds to contest the right of the victims to justice. A Tribunal was set up to investigate the deaths of six million Jews during the Holocaust and the deaths of 700 000 Tutsi and Hutu were investigated by the International Criminal Tribunal for Rwanda. Two hundred thousand deaths in the former Yugoslavia were the focus of an International Criminal Tribunal and there have been special Tribunals even for individual deaths, such as in Lebanon.⁵⁶¹

Indifference to the causalities in the DRC cannot be justified, for whatever political reasons. The Congolese situation is, of course sensitive because of the interests of multinational companies operating out of capitalist countries involved in the pillage of the natural resources of the Congo.⁵⁶² The supremacy of the politics of imperialism over the rights of the people of the Congo must be stopped.

For a long time, Congolese victims seem to have been sacrificed to satisfy capitalist interests. During the dark days of the Leopold regime around 10 million deaths were reported.⁵⁶³ With nothing done by the international community to put an end to these massacres organized by the King of Belgium, Leopold II, the stage was set for the impunity of nationals and foreigners responsible for the assassination of Lumumba in

⁵⁶¹ „The History Place. Genocide in 20th century“ available at <http://www.historyplace.com/worldhistory/genocide/index.html>, accessed on 12 May 2011.

⁵⁶² Indeed due to the political involvement of certain powers in Congo crisis, the UN Security Council seems so far unwilling to establish a Tribunal for Congo. Regarding the request of Congolese for such a Tribunal read *Separate Opinion of Judge ad hoc Bula-Bula* para 82, available at <http://www.icj-cij.org/docket/files/121/8142.pdf>, accessed on 21 January 2012 and regarding Intervention on 13 February 2003 of Permanent Ambassador of the DRC at the UN, Sir ILEKA ATOKI. For more on major capitalist powers involvement in Congo matters, see Chapter 2 above; K Masire (note 8 above)

⁵⁶³ Note 96 above read, also J Conrad *Heart of Darkness* (1998) passim.

1960 and the Mobutu regime's murderous rule, with the political and financial support of the international community.⁵⁶⁴

Some analysts have gone as far as to suggest that the indifference of the international community can be explained by a desire on their part for the extermination of the Congolese so that their territory might be occupied and its resources exploited.⁵⁶⁵

While the DRC is extremely rich in terms of strategic mineral and other resources, this is exploitation of the worst kind. If well managed, the DRC's riches have the potential to benefit the whole of Africa and indeed the whole world.⁵⁶⁶

This is why proper management of the problems in the DRC should interest everyone and why all should support efforts to put a halt to the impunity for war criminals that is fueling conflict to establish a predatory regime.

The rule of law in the DRC should begin with the accountability of those responsible for mass atrocities before an independent Tribunal.

What kind of legality would such a jurisdiction have?

6.1.3 Legality (Legal basis)

In contrast with the challenge faced by the judges before the Military Tribunal of Nuremberg regarding the anteriority of the legality of acts⁵⁶⁷ which were prosecuted as international crimes (discussed in Chapter 4 above), in the DRC, most of the acts perpetrated can be qualified as grave crimes in international criminal law, which outlaws genocide, crimes against humanity and war crimes. Furthermore there are

⁵⁶⁴ T R Essolomwa (note 107 above; 193, 205-210) ;L De Witte *The Assassination of Lumumba*. Verso Books: London,(2001)1-45;P Merriam *Congo: background to conflict* (1961) 1-10

⁵⁶⁵ Ibidem 132.

⁵⁶⁶ For instance, a recent investigation by V Noury indicated that the value of Congolese mineral resources is approximately US\$24 thousand billion. Read „Les potentialités minières de la RDC évaluées à 24 mille milliards USD“(2010) available at <http://www.mediacongo.net/show.asp?doc=16201>, accessed on 05 May 2011; T R Essolomwa (note 107 above; 210).

⁵⁶⁷ According to D McGoldrick: “That crimes against peace and crimes against humanity were retrospectively criminalized remains at best technically arguable” see D McGoldrick (note 301 above; 10, 18).

several judicial precedents of such crimes, which are even condemned in current Congolese criminal law, and in the legislation of many other countries.

A Special Criminal Tribunal would capitalize on these facts to show that dealing with Congolese war criminals on a legal basis is superior to other mechanisms.

Therefore, in keeping with the UN Charter, the UN Security Council might pass a resolution for the establishment of such a tribunal for the DRC.

6.1.4 Type and judicial (Nature of jurisdiction)

As noted above, several forms of criminal jurisdiction have been employed to prosecute the perpetrators of serious violations of human rights across the world. Most of these tribunals were adjusted to the context of the country or territory where the crimes were committed. It is obvious that the type of tribunal created in the first *ad hoc* generation of tribunals as implemented at Nuremberg and in the Far East cannot be a reference point. However the second generation *ad hoc* international tribunals for the former Yugoslavia and Rwanda offer better models in respect of their legality and legitimacy, even though they have been criticized as moving too slowly, being costly and being located far from the place where the crimes were committed (see Chapter 4 above).

Only the UN Security Council of UN, acting under Chapter VII of its Charter, has the necessary force to impose the creation of such a tribunal, which may need much political support to succeed in its mission. In terms of the difficulties arising from the limitation of capacity of the *ad hoc* second-generation tribunals, this tribunal could resemble the recently created Tribunal for Lebanon. It might focus only on prosecuting those mainly responsible for the international crimes perpetrated in the DRC during the war, to deter other criminals who remain dangerous and have the potential to continue to commit such crimes.

Despite numerous reports on the human rights situation in the DRC, the Security Council remains (for different political reasons such as the indirect involvement of

different powers in that war) insensitive to the necessity of the creation of such a Tribunal.⁵⁶⁸ This creates the need to explore other options.

The third generation tribunal, tailored to the model of the Special Court for Sierra Leone, which was created on the basis of an agreement between the UN General Assembly and the political authorities of Sierra Leone, could be considered.

This formula is interesting in terms of the mix of international and national judges. This mix may empower the national judges in the long term. As outlined above, an international tribunal for the DRC might focus only on high-level criminals who have committed crimes in the past but cannot be prosecuted by the ICC because its temporal jurisdiction is limited. However, the request for such a Tribunal will depend on the political will of the incumbent political authorities, who may not be keen on such an idea for personal reasons (such as being a warlord in the past). Some have proposed that national mechanisms should rather be set up to deal with such crimes.⁵⁶⁹ A proposal for the creation of a Special Criminal Chamber has previously been considered by the UN.⁵⁷⁰

While a Special Criminal Chamber might be appropriate to deal with the small war criminals at a national level, it does not do away with the need for a special tribunal for the Congo for several reasons. Notably, the jurisdiction of a special chamber for the DRC would be national in terms of jurisdiction, even though it might include some international judges. It therefore runs the risk of being less independent or subject to political influence; it might not easily investigate Congolese officials or criminals who now hold power. Its competence could not extend to foreign criminals involved in the Congo war. Therefore the successful formula of jurisdiction, which could significantly contribute to the fight against impunity in the DRC, seems to be a mixed Tribunal with international preponderance.

⁵⁶⁸ See note 562 above.

⁵⁶⁹ See CAD (note 280 above; 29-30); UNOHCHR (note 3 above; 465).

⁵⁷⁰ UNOHCHR (note 3 above; 471).

6.2 Jurisdiction

The special tribunal for the Congo should exercise specific criminal jurisdiction to try perpetrators of international crimes committed in the DRC during the wars of 1996-97 and 1998-2003 regardless of their nationality and wherever they may be found.

6.2.1 Jurisdiction *ratione materiae*

The tribunal may prosecute mass atrocity crimes committed in the DRC: war crimes, genocide, crimes against humanity. The definitions of most of those crimes are already available in different international instruments such as the Rome Statute.

6.2.2 Jurisdiction *ratione temporis*

The question relating to jurisdiction *ratione temporis* of such a tribunal is very important for it is one of *raison d'être* of the establishment of such a tribunal. The ICC cannot retroactively punish crimes committed before 2002.

In the DRC most of the international crimes were perpetrated during wars, which took place before that date. Therefore the new Tribunal should have jurisdiction to try crimes perpetrated before 2002.

The moot point is how far back such jurisdiction may go, given the numerous crimes, which have marked the Congo's history. There is no doubt that some would prefer the extension of the jurisdiction *ratione temporis* of the tribunal to the colonial period. However during the Intercongolaise Dialogue related to the political negotiations held in Sun City, South Africa (2002-2003), 1960 was chosen as the starting point of the temporal jurisdiction of an eventual international tribunal for the Congo.⁵⁷¹

Such extension of *ratione temporis* jurisdiction might be too broad and may require resources, which may not be available in the foreseeable future. The Mapping Report

⁵⁷¹ WOPPA.; Confessions religieuses (Organization); Switzerland. Eidgenössisches Departement für Auswärtige Angelegenheiten „Résolution No. DIC/CPR/05 relative à l'institution d'un tribunal pénal international" in *Les résolutions du dialogue intercongolais: tenu à Sun City du 1 février au 2 avril 2002 et du 1er au 02 avril 2003*. Kinshasa: WOPPA, Département fédéral des affaires étrangères, (2003) 107-108

proposes to start with crimes and grave violations of international humanitarian law committed from 1993 to 2003.⁵⁷²

This is still a broad jurisdiction. If it is accepted that the tribunal should target high-level criminals responsible for the gravest crimes for the purposes of deterrence, then the jurisdiction of such a tribunal may be limited to odious crimes perpetrated during the two recent armed conflicts in the DRC described as the first African World War (see Chapter 2 above).

As for the rest of crimes perpetrated before that date, several other judicial (such as the principle of universality, special criminals chambers) and even non-judicial mechanisms (such as a Truth Reconciliation Commission) should be promoted to deal with them. Further, the municipal judicial system in the Congo and elsewhere could be reformed to take on prosecution of these crimes. The Gacaca Courts in Rwanda could also be considered as a model. These community courts were established in 2001 because the established courts could not deal with the vast number of awaiting trial prisoners.⁵⁷³

The recent attempt to launch a prosecution against Lumumba's assassin, who is still alive and living in Belgium, is insightful in this respect.⁵⁷⁴

6.2.3 Jurisdiction *ratione loci*

The competence of such jurisdiction should be exercised to prosecute crimes within the territory of the DRC and its neighboring states. The DRC shares borders with nine countries. Most of these borders were and are porous; therefore, it seems imprudent to confine the jurisdiction to DRC territory, because during the wars there was large-scale trafficking of warriors through the different Congolese borders. However the exercise of this jurisdiction to prosecute war criminals beyond Congolese borders may face serious obstacles if a State is not willing to cooperate. This is why judicial

⁵⁷² UNOHCHR (note 3 above; para 1046).

⁵⁷³ Government of Rwanda, "Context or historical background of Gacaca Courts" available at <http://www.inkiko-gacaca.gov.rw/En/Generaties.htm> accessed on 24 January 2012.

⁵⁷⁴ Note 24 above.

cooperation between Members States of the International Conference on Peace, Security and Development in the Africa Great Lakes Region needs to be promoted to deal with such eventualities.

6.2.4 Jurisdiction *ratione personae*

Numerous actors were involved in the war in DRC, including Congolese and foreigners. Therefore the jurisdiction of this Tribunal should apply a form of the principle of active as well passive personality to make sure that all war criminals implicated in serious crimes committed during armed conflicts are actually prosecuted.

6.3 Conclusion

The creation of a Special Tribunal for the DRC is an imperative for the international community, if it really desires to deal with unacceptable impunity for grave crimes in a country, which is infamously known as the world capital of killing, the world capital of rape and the world capital of impunity. Despite the gravity of these international crimes and massacres, those responsible have largely gone unpunished and have even been promoted to official positions. The atrocities are recurrent and the collapse of the national judiciary gives little hope that they will end. The creation of an international criminal tribunal for the DRC would play a crucial role in fighting against impunity in the Congo. Unfortunately, apart from different reports on the problematic human rights situation in Congo, nothing has been done at multilateral level, especially in the UN, to mobilize the necessary resources to create such a tribunal. There is no doubt that political and economic reasons exist, which deter members of the UN Security Council, from doing so.

The political context in the Congo has changed and new leaders have been elected. It was expected that this would usher in winds of change that could change the paradigm in international policy and take into account human rights, especially on the part of the Obama⁵⁷⁵ Administration. One remains hopeful that the US will support the

⁵⁷⁵ Adekeye Adebajo (2010) *The curse of Berlin: Africa after the cold war* (2010) 288-291.

creation of such a Tribunal in time. Another possible way to bypass the delays is the creation of such a jurisdiction through the conclusion of a convention between the DRC government and the UN as was the case in the creation of the Special Court for Sierra Leone.⁵⁷⁶ The recent proposal from the Congolese Minister of Justice for the Creation of a *Cour Spécialisée pour les grands criminels* = Specialized Court for High Criminals, is a giant step forward; however for different historical political reasons some Congolese politicians remain hostile to such proposal.⁵⁷⁷

Even if such a jurisdiction is created, it will only deal with high profile war criminals and serve a deterrence purpose. Many other war criminals will remain unpunished. There is a need to reform the Congolese judiciary by creating appropriate organs such as Special Chambers, which can deal with the rest of the war criminals. Others crimes committed during the war period could be addressed by extra judicial mechanisms, whose jurisdiction could even be extended to crimes perpetrated before independence in 1960. Beyond the judicial approach, there is still a need for other non-judicial mechanisms, which can help to reconcile society by addressing aspects such as truth, reparations and forgiveness. However a future Truth and Reconciliation Commission might integrate other, local traditional mechanisms for settling disputes such as *l'arbre à palabre* during the *barza communautaire*.⁵⁷⁸

⁵⁷⁶ See „Special Court for Sierra Leone“ available at <http://www.sc-sl.org/>, accessed on 21 January 2012.

⁵⁷⁷ See S Etinga „Une Cour spécialisée contre les grands criminels“ (2011) available at <http://www.mediacongo.net/show.asp?doc=18589>, accessed on 20 August 2011; Ngandu, MD. „Rejet au Parlement du projet de loi créant une Cour spécialisée en RDC, décision désapprouvée par la Coalition pour la CPI“ (2011) available at <http://www.digitalcongo.net/article/78014>, accessed on 10 September 2011.

⁵⁷⁸ C Villa-Vicencio, P Nantulya & T Savage (note 416 above; 58-63).

Chapter 7: Conclusion and Recommendations

“The task facing countries in transition from autocratic, oppressive and in some instances genocidal rule in Africa, like elsewhere in the world, involves the political will and capacity to overcome impunity.”⁵⁷⁹

7.1 Findings

Grave, large-scale war crimes have been committed in the DRC over a long period of time. Several reports, such as the recent Mapping Report⁵⁸⁰ by the United Nations Office for the High Human Commissioner of Human Rights (OHCHR) clearly document these atrocities, which Congolese victims suffered between the two wars (1996-97 and 1998-2002) and which unfortunately continue until today.⁵⁸¹

These horrendous atrocities led to several million lives being lost, the serious destruction of the social fabric, the looting of the Congo’s natural resources, the demolition of basic infrastructure, and physical and environmental damages.⁵⁸² Most of those acts committed by different parties during the war period constitute serious and gross crimes, notably war crimes, which remain unpunished.⁵⁸³

The institutional crises due to a long period of dictatorship and two wars have plunged the country into a state of decay, which caused the collapse of the Congolese judicial system, which is weakened and undermined by different factors such as corruption, a lack of independence and political interference.⁵⁸⁴ Although international crimes such as genocide, war crimes and crimes against humanity are provided for in national criminal legislation, they have hardly ever been prosecuted by the national justice

⁵⁷⁹ C Villa-Vicencio P Nantulya & T Savage (note 416 above; v).

⁵⁸⁰ UNOHCHR (note 3 above).

⁵⁸¹ Amnesty International (note 414 above; 123-126).

⁵⁸² See references in notes 5, 6, 7, 8, 9, 10, 11 and 12.

⁵⁸³ See Chapter 5 above.

⁵⁸⁴ See M Wetsh’okonda Koso (note 221 above); CAD (note 280 above).

system. This incapacity has been obvious from the time of the war of 1996, and as far back as the Mobutu regime and the Cold War period.⁵⁸⁵

The referral by the Congolese authorities of the situation of crime in the DRC to the Office of Prosecutor before the ICC in 2004 confirmed the inability of the national judiciary to try war crimes.⁵⁸⁶

Hence, the advent of the ICC in 2002 created hope among victims of crimes in the world in general and in the DRC in particular.

The creation of the ICC at the end of the twentieth century represented a realization on the part of the international community that it is honour bound to combat impunity for grave crimes against humankind.

7.2 Conclusion

During the twentieth century, numerous odious acts were committed by human beings against humankind. To describe the degree of barbarity attained by criminals during the occurrence of these different conflicts, several terms were coined, including genocide, crimes against humanity, and crimes against peace. For the first time, it was possible to regulate and punish war crimes at an international level.

The emergence of international criminal justice was marked by several attempts to punish atrocities committed during World War One and World War Two, which had shocked the collective human conscience. This led to the creation of the first international criminal tribunal namely, the Military International Criminal Tribunal created at Nuremberg on 8 August 1945 and later at Tokyo for the Extreme Far East on 19 January 1946. Those temporal, imperfect and embryonic jurisdictions laid strong foundations for building the international criminal justice endeavour on the one hand, and catalyzed international energy to fight impunity for crimes of international concern on the other. Furthermore, to deal with the consequences of the numerous international crimes perpetrated during the last decade of twenty century, two *ad hoc* International Criminal Tribunals were established, one for the Former Yugoslavia

⁵⁸⁵ L Devlin (note 106; 259-261).

⁵⁸⁶ Note 23 above .

(1993) and one for Rwanda (1994). Even though these tribunals were as temporally and territorially limited as their predecessors, they contributed significantly in the long run to the establishment of a permanent criminal jurisdiction.

Thus, after a long process, which lasted roughly a half-century, for the first time in human history, a permanent international criminal tribunal was created as the result of the adoption of the Rome Statute on 17 July 1998. The entry into force in July 2002 of the ICC can be regarded as the greatest achievement yet of international justice in the fight against impunity for gross violations of human rights.

Considering the fact that the proposal to create the ICC was attacked by the most powerful⁵⁸⁷ states in the world such as the US, China, India and Israel, there can be no doubt that the advent of this judicial institution was a significant achievement on the part of the international community, which seems determined to end the culture of impunity for systematic human rights abuses in the world. This new era of justice is marked by the primacy of humankind's concerns in politics and international policy. It proclaimed the suppression of impunity for crimes such as immunity and official capacity. It has since become clear that no one is above the law.⁵⁸⁸

The establishment of the ICC ushers in hope for the victims of the serious crimes that one day, justice will be done. At the same time, however, those responsible for crimes regard it as bad news.

Mass atrocity crimes happen most often during wars. It is no secret that these conflicts are in general orchestrated, backed, and fuelled by external forces or world powers that will pursue their political agenda even by unlawful means.⁵⁸⁹

⁵⁸⁷ „Of course the Court has also attracted the venom of the world's superpower, the United States of America, isolated but also determined in its opposition to the institution“. See W A Schabas (Note above 296; x); J R Bolton „The United States and International Criminal Justice“ (2004b) in O Bekou & R Cryer *The International Criminal Court* 477-478; J R Bolton „The risks and the weaknesses of the International Criminal Court from America's perspective“ (2004a) in O Bekou & R Cryer *The International Criminal Court* 459, 461-462.

⁵⁸⁸ D Ntanda Nsereko (note 387 above).

⁵⁸⁹ L Devlin (note 106 above) passim; Adekeye Adebajo (note 575 above; 15).

The opposition of certain countries to the creation of the ICC is not surprising. But it is regrettable that even today, some States, even so called „old democracies“, still use war as the means to achieve their ends. There is no reason for a State, which really promotes the rule of law to fear an international tribunal.

It is important to salute the mobilization, which led world stakeholders to end the culture of impunity by voting for this change of paradigm in the international justice system. Since the advent of the ICC international policy in countries around the world has undergone changes.

The victory at Rome was the triumph of humanity against notions such as the sacrosanct sovereignty regarding the number of States required for adoption of the Statute.⁵⁹⁰

The ICC is not perfect. It is limited in terms of financial, personnel, material and even jurisdiction resources.⁵⁹¹

It is true that the creation of the ICC by the conventional mode is one of the sources of its different weakness, in so as far as it is limited by the prior consent of a State to prosecute a crime committed either in its territory or by its nationals. Its relations with the UN Security council are also very critical, for this political organ of the UN may lead the ICC to lose credibility through the political games of its members⁵⁹².

Furthermore, relating to the DRC situation, the jurisdiction of the ICC seems limited. As noted above, international crimes and especially war crimes were committed in the DRC during the war periods (1996-97 and 1998-2003). Although the Congolese situation has been referred to the ICC, it is clear that the ICC will not be able to prosecute all those responsible for war crimes committed in the Congo. Initially, the ICC was designed to exercise complementary jurisdiction and not to replace national jurisdiction. It may possibly prosecute those highly responsible for the perpetration of crimes in order to deter other potential criminals.

⁵⁹⁰ The majority of 120 States supported the Court, against seven States which were opposed and 21 abstentions.

⁵⁹¹ W W Burke-White (note 1 above).

⁵⁹² See note 373 above.

It is obvious that the ICC could not possibly prosecute all the war crimes committed in the DRC. This is confirmed by the experiences of the ICTR and ICTY. Since the ICC launched its investigation into Congo in 2004, only five cases have been filed. Even so, it appears that it is the small fish that are being prosecuted. This is explained by the biggest obstacle to ICC jurisdiction, which is grounded on the principle of non-retroactivity and does not allow the ICC to prosecute crimes committed before the entry into force of the Rome Statute on 1 July 2002. Therefore the jurisdiction *ratione temporis* is almost at the opposite of the time frame during which most war crimes were committed in the DRC (First War 1996-97 and Second War 1998-2002).

The limitation of ICC to prosecute war crimes committed in the DRC before 2002 is evident. To put an end to impunity for these international crimes, other mechanisms have been explored, notably the possibility of the prosecution of war criminals by virtue of the principle of universality. Different domestic judicial systems worldwide provide such an option in their criminal legislation. To succeed, such proceedings may require the presence of the criminal in the territory of the forum country or good judicial co-operation. Unfortunately the exercise of this jurisdiction may sometimes cause diplomatic incidents and political disputes. While this principle can hence be utilized to a certain extent, it also seems limited in dealing with the Congolese situation.

In the light of these limitations it is necessary to investigate other options to combat impunity in the Congo and to deter future potential war criminals.

Considering the specific context of the Congo war, qualified as the first African World War, which had the most dramatic consequences since World War Two,⁵⁹³ it is recommended that a special tribunal special be created for the DRC, which might be able to deal once and for all with those responsible for mass atrocities in the Congo.

This tribunal would need to be complemented by other mechanisms, notably the creation of a Special Criminal Chamber within the national judiciary system for

⁵⁹³ C Hemedi (note 102 above).

certain types of war criminals to avoid overloading the tribunal on the one hand and to create a Truth and Reconciliation Commission, which may take into account damages caused to victims in terms of reparations on the other hand.

Thus, three types of mechanisms can be utilized depending on the gravity of the crimes and the procedure required:

- A Special Tribunal for Congo might be an international tribunal comprised of both national and international judges and will focus on the prosecution of high-level nationals and foreigners responsible for war crimes.
- The Chambers would be composed of essentially but not exclusively well-trained national magistrates to deal with other types of criminals, while
- The Truth and Reconciliation Commission may deal with other type of crimes and human rights violations.

These mechanisms can work collaboratively to rebuild a reconciled society in the DRC founded on truth, justice, reconciliation and the rule of law.

Impunity for those implicated in atrocious crimes is particularly negative because it trivializes human life, and encourages criminals to continue with their behaviour, and potential criminals to join in the barbarity. Impunity tears a society apart; it feeds a culture of hatred and heinous vengeance.

Instead of the international community intervening only after the perpetration of horrific crimes, it is important to opt for a policy of prevention of the sources of future crimes. The indifference of the international community to the Congo crisis should be brought to an end and world stakeholders should put the necessary measures in place at diverse levels to bring those responsible for war crimes in the Congo to justice. The powerful members of the UN Security Council should avoid double standards and turn their attention to the victims of the Congolese war, as was the case in Yugoslavia, Rwanda and Lebanon. The crimes in the Congo resulted in far more casualties than in these countries. As a sovereign State, the DRC must not be discriminated against, but treated in the same manner as other UN member States.

7.3 Recommendations

7.3.1 The national level

7.3.1.1 Legislation

- The enactment by Congolese authorities of the Act for the Integration of the ICC Statute in national legislation is imperative to allow for the suitable prosecution of war crimes in terms of national justice.
- Congolese legislation should be adjusted to international standards to avoid unlawful situations such as the prosecution of civilians by military jurisdictions.

7.3.1.2 The judicial system

- The reform of Congolese judiciary is necessary to prepare national justice to deal with international crime.
- Penitentiary installations should be restored or their management privatized and the death penalty should be abolished.
- The selection, appointment, and promotion of magistrates must be based on the criteria of competence, integrity, and achievements instead of tribalism, regionalism, and nepotism.
- A magistrates' school should be established to provide new magistrates with the necessary professional skills and to train magistrates in general to practice consistent with international standards, and especially to know how to investigate international crimes.
- The politicization of the office of magistrate should be prevented by avoiding the involvement of judges in political activities.
- The Superior Judicial Council should be strengthened in order for it to protect magistrates who resist interference from different parties or political actors.
- The conditions pertaining to the removal of members of the judicial body should be strengthened to prevent arbitrary decisions on the part of the executive power.

7.3.3.3 The political authorities

The political authorities should make a formal request to the UN for the creation of a criminal tribunal for the DRC.

Ideally this tribunal should be created by a resolution of UN Security Council; however they could also seek an accord with the UN General Assembly for the creation of a tribunal.

The political authorities should prepare a proposal for the creation of Special Criminal Chamber and a Truth and Reconciliation Commission, which might be funded by external partners.

To promote the rule of law, the political authorities should provide the judicial system with all the means necessary to ensure the legality of acts and to render justice. This includes financial and material resources as well as other facilities.

The political authorities should also avoid appointing alleged war criminals to official positions. They should promote the principles of good governance, such as equality of all before the law and fight against any form of corruption and impunity.

7.3.2 The regional level

Different organizations such as the European Union, the African Union, Southern African Development Community, and the Regional Conference on Peace Security and Development in Great Lakes Region, should mobilize and provide the necessary support to fight against impunity for serious crimes by politically and diplomatically supporting the proposal for the creation of a special criminal tribunal for the DRC.

They should adopt resolutions relating to judicial co-operation in case of the prosecution of criminals for international crimes. To prevent future perpetration of such odious crimes on the African continent, regional judicial organs and mechanisms

to promote human rights such as an African Court of Justice and Human Rights and an African Commission on Human and Peoples' Rights should be established.

The prevention policy should emphasize an ideal approach regarding crimes. It is better to avoid genocide than to create a Tribunal.

7.3.3 The international level

As with the Former Yugoslavia and Rwanda, different States should avoid the shameful impunity for odious crimes perpetrated in the DRC by supporting the establishment of a tribunal, which might serve as an example for future generations. Hence, the members of the UN Security Council are called upon to pass a resolution relating to the creation of an international criminal tribunal for the DRC.

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Appendix 1

DEMOCRATIC REPUBLIC OF THE CONGO, 1993–2003

Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003

August 2010

Available from:

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