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**INTERNATIONAL CRIMINAL LAW AND ATROCITIES IN  
THE DEMOCRATIC REPUBLIC OF THE CONGO: A  
CRITICAL ANALYSIS**

By

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Submitted in Fulfilment of the Requirements for the degree Doctor Legum (LLD)

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## Declaration

I, the undersigned, hereby declare that the work contained in this study for the degree of Doctor of Laws at the University of Pretoria is my own independent work and that I have not previously in its entirety or in part submitted it at any University for a degree. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with University requirements. I am aware of University policy and implications regarding plagiarism.

6 June 2012

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Ngoie Ngalingi Joseph Antoine Ngoto

## **Dedication**

Dedicated to all victims of international crimes in the Democratic Republic of the Congo, to my wife Elvine Ngoto Mikalo Bonyale and my children Joseph Roger Ngoto Ngalingi, Charlie Ngoto Yadunga, Josiane Ngoto Ngoie Tangalingi, Christiane Ngoto Mobimbi and Annick Ngoto Loda.

## Summary

Since its independence in 1960, the Democratic Republic of the Congo has undergone egregious violations of human rights and humanitarian law. This study appraises the responses to international crimes in the Democratic Republic of the Congo between 1990 and 2010.

It appears from the study that mass atrocities have taken place recurrently during the above period. Millions of people have either died or forcibly fled from their homes as a result of international crimes. This study distinguishes two eras: pre-ICC and post-ICC in relation with the entry into force of the Rome Statute of the International Criminal Court (ICC) 1 July 2002.

For the pre-ICC era, it argues that criminal prosecutions (though possible) are no longer opportune, but suggests a focus on the issue of reparation for victims. It mentions that the DRC was unwilling rather than unable to prosecute international crimes prior to the ICC era. It recalls that the UN does not need to appoint an *ad hoc* tribunal because it has restored peace by non-coercive means.

As for the post-ICC era, this study questions the ability of the DRC, the ICC and the UN to counter international crimes. The deterrent effect of national prosecution is lower than that of the ICC, but the ICC suffers from congenital weaknesses, hampering its efficacy. The study highlights the UN's failure to protect civilians. The study suggests a focus on the guarantee of non-repetition as genuine response to post-ICC crimes. It suggests a strengthening of traditional institutions aimed at protecting civilians (including states and the UN). Furthermore, it suggests the enhancement of judicial bodies at both domestic and international level, including by a lowering of political involvement in judicial matters.

**Key terms:** amnesty, reparation, duty to prosecute, transitional justice, transitional justice, International Criminal Court, international crimes, United Nations, responses to international crimes, the Democratic Republic of the Congo.

## Opsomming

Sedert onafhanklikheid in 1960 het die Demokratiese Republiek van die Kongo gebuk gegaan onder skendings van menseregte en humanitêre reg. Hierdie studie beoordeel die reaksie op die internasionale misdade in die Demokratiese Republiek van die Kongo tussen 1990 en 2010.

Dit blyk uit die studie dat massa-gruweldade van tyd tot tyd gedurende bogenoemde tydperk plaasgevind het. Miljoene mense het gesterf, of is met geweld uit hul huise gedwing as gevolg van internasionale misdade. Hierdie studie onderskei twee tydperke, naamlik die voor-ICC en die post-ICC met verwysing na die inwerkingtreding van die Statuut van die Internasionale Strafhof op 1 Julie 2002.

Vir die voor-ICC era word argumenteer dat strafregtelike vervolgings (hoewel moontlik) nie meer die gepaste respons is nie. Die studie plaas eerder die fokus op die kwessie van vergoeding vir slagoffers. Dit wys daarop dat die DRK in die voor-ICC era nie in staat was om die internasionale misdade te vervolg nie, eerder as om onwillig te gewees het. Dit wys weer eens daarop dat dit nie vir die VN nodig was om 'n *ad hoc*-tribunaal in te stel nie, aangesien die VN vrede op 'n nie-gewelddadige wyse herstel het.

Soos vir die post-ICC era ondersoek hierdie studie die vermoë van die DRK, die Internasionale Strafhof en die VN om internasionale misdade te voorkom. Alhoewel die afskrikingswaarde van plaaslike vervolgings laer is as vervolgings deur die Internasionale Strafhof, het die internasionale hof egter sekere inherente swakpunte wat die doeltreffendheid daarvan belemmer. Die studie beklemtoon die VN se versuim om die burgers te beskerm. Die studie plaas ook die fokus op waarborge om die herhaling van die misdade in die

post-ICC era te voorkom. Die studie ondersoek die versterking van tradisionele instellings (insluitend ander state en die VN) wat gemik is op die beskerming van burgers. Verder word die versterking van beide plaaslike en internasionale juridiese instansies bepleit, onder andere deur 'n verlaging van politieke betrokkenheid in regsangeleenthede.

**Slutelsterme:** amnestie, herstel, plig om te vervolg, oorgangsgeregtigheid, die Internasionale Strafhof, internasionale misdade, die Verenigde Nasies, reaksies op internasionale misdade, die Demokratiese Republiek van die Kongo.

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**Ngoie Ngalingi Joseph Antoine NGOTO**

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## Abbreviations and Acronyms

<b>ADP</b>	Alliance Démocratique des Peuples <sup>1</sup>
<b>AFDL</b>	Alliance des Forces Démocratiques pour la Libération du Congo <sup>2</sup>
<b>AIDS</b>	Acquired Immune Deficiency Syndrome
<b>ALIR</b>	Army for the Liberation of Rwanda
<b>ANC</b>	Armée Nationale Congolaise <sup>3</sup>
<b>APR</b>	Armée Patriotique Rwandaise
<b>ASP</b>	Assembly of States Parties (to the ICC Statute).
<b>AU</b>	African Union
<b>BDK</b>	Bundu Dia Kingo
<b>CAR</b>	Central African Republic
<b>CIAT</b>	Comité International d'Accompagnement de la Transition <sup>4</sup>
<b>CNDP</b>	Congres National pour la Défense du Peuple <sup>5</sup>
<b>CNS</b>	Conférence Nationale Souveraine <sup>6</sup>
<b>COLTAN</b>	Columbite-Tantalite
<b>CONADER</b>	Commission Nationale de la Démobilisation et Réinsertion <sup>7</sup>
<b>CONAKAT</b>	Confédération des Associations Tribales du Katanga <sup>8</sup>
<b>DDR</b>	Disarmament, Demobilization and Reintegration
<b>DDRRR</b>	Demobilization, Disarmament, Repatriation, Resettlement and Reintegration
<b>DFID</b>	Department for International Development

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<sup>1</sup>Democratic Alliance of People is the translation for this.

<sup>2</sup>Alliance of Democratic Forces for the Liberation of Congo is the translation for this

<sup>3</sup>Congolese National Army is the translation for this.

<sup>4</sup>The International Committee Accompanying the Transition is the translation for this.

<sup>5</sup>National Congress for the Defence of the People is the translation for this.

<sup>6</sup>National Sovereign Conference is the translation for this.

<sup>7</sup>National Commission for Demobilisation and Reintegration is the translation for this.

<sup>8</sup>Confederation of Tribal Associations of Katanga is the translation for this.

<b>DRC</b>	Democratic Republic of the Congo
<b>FAA</b>	Forces Armées Angolaises <sup>9</sup>
<b>FAC</b>	Forces Armées Congolaises <sup>10</sup>
<b>FAP</b>	Force d'Auto-défense Populaire <sup>11</sup>
<b>FAR</b>	Forces Armées Rwandaises <sup>12</sup>
<b>FARDC</b>	Forces Armées de la République Démocratique du Congo <sup>13</sup>
<b>FAZ</b>	Forces Armées Zaïroise <sup>14</sup>
<b>FENADEC</b>	Fédération Nationale des Démocrates Chrétiens <sup>15</sup>
<b>FNI</b>	Front des Nationalistes et Intégrationnistes <sup>16</sup>
<b>FRPI</b>	Forces de Résistance Patriotique en Ituri <sup>17</sup>
<b>HIV</b>	Human Immunodeficiency Virus
<b>HRW</b>	Human Rights Watch
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICC</b>	International Criminal Court's Statute
<b>ICJ</b>	International Court of Justice
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>ILC</b>	International Law Commission
<b>IMT</b>	International Military Tribunal
<b>INERA</b>	Institut National de Recherches Agricoles <sup>18</sup>
<b>JMC</b>	Joint Military Commission
<b>JUFERI</b>	Jeunesse de l'Union des Fédéralistes et Républicains Indépendants <sup>19</sup>
<b>LRA</b>	Lord's Resistance Army

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<sup>9</sup>Angolan Armed Forces is the translation for this.

<sup>10</sup>Congolese Armed Forces is the translation for this.

<sup>11</sup> Popular Self-defence Force is the translation for this.

<sup>12</sup>Rwandan Armed Forces is the translation for this.

<sup>13</sup>Armed Forces of the Democratic Republic of Congo is the translation for this.

<sup>14</sup>Zairian Armed Forces is the translation for this.

<sup>15</sup>National Federation of Christian Democrats is the translation for this.

<sup>16</sup>Nationalist Integrationist Front is the translation for this.

<sup>17</sup>Patriotic Resistance Front in Ituri is the translation for this.

<sup>18</sup>National Institute of Agricultural Research is the translation for this.

<sup>19</sup>Youth Union of Federalists and Independent Republicans is the translation for this.

<b>MAGRIVI</b>	Mutuelle des Agriculteurs et Eleveurs du Virunga <sup>20</sup>
<b>MER</b>	Mapping Exercise Report
<b>MLC</b>	Mouvement de Libération du Congo <sup>21</sup>
<b>MONUC</b>	Mission de l'Organisation des Nations Unies en RD Congo <sup>22</sup>
<b>MONUSCO</b>	Mission de l'Organisation des Nations Unies pour la Stabilisation en RD Congo <sup>23</sup>
<b>NGO</b>	Nongovernmental Organisation
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>OTP</b>	Office of The Prosecutor
<b>PDSC</b>	Parti Démocrate et Social Chrétien <sup>24</sup>
<b>PNC</b>	Police Nationale Congolaise <sup>25</sup>
<b>PNDDR</b>	Programme National de Désarmement Démobilisation et Réintégration <sup>26</sup>
<b>PRI</b>	Parti des Républicains Indépendants <sup>27</sup>
<b>PTC</b>	Pre Trial Chamber
<b>PUSIC</b>	Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo <sup>28</sup>
<b>RCD</b>	Rassemblement Congolais pour la Démocratie <sup>29</sup>
<b>RPE</b>	Rules of Procedure and Evidence
<b>RMP</b>	Registre du Ministère Public <sup>30</sup>
<b>RP</b>	Rôle Pénal <sup>31</sup>
<b>RPF</b>	Rwandan Patriotic Front
<b>TMG</b>	Tribunal Militaire de Garnison <sup>32</sup>
<b>TRC</b>	Truth and Reconciliation Commission
<b>TFV</b>	Trust Fund for Victims

<sup>20</sup>Mutual of Farmers and Breeders of the Virunga is the translation for this.

<sup>21</sup>Movement for the Liberation of Congo is the translation for this.

<sup>22</sup>Mission of the United Nations in DR Congo is the translation for this.

<sup>23</sup>Mission of the Organization of the United Nations Stabilization Mission in DR Congo is the translation for this.

<sup>24</sup>Democratic and Christian Social Party is the translation for this.

<sup>25</sup>Congolese National police is the translation for this.

<sup>26</sup>National Program of Disarmament, Demobilisation and Reintegration is the translation for this.

<sup>27</sup>Party of Independents Republicans is the translation for this.

<sup>28</sup>Party for Unity and Safeguarding of the Integrity of Congo is the translation for this.

<sup>29</sup>Congolese Rally for Democracy is the translation for this.

<sup>30</sup>Registry of the Public Prosecution is the translation for this.

<sup>31</sup>Penal Registry is the translation for this.

<sup>32</sup>Military Tribunal of Garrison is the translation for this.

<b>UDPS</b>	Union pour la Démocratie et le Progrès Social <sup>33</sup>
<b>UFERI</b>	Union des Fédéralistes et Républicains Indépendants <sup>34</sup>
<b>UN</b>	United Nations
<b>UNCC</b>	United Nations Compensation Commission
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNITA</b>	União Nacional para a Independência Total de Angola <sup>35</sup>
<b>UNJHRO</b>	United Nations Joint Human Rights Office
<b>UNSC</b>	United Nations Security Council
<b>UNVF</b>	United Nations Victims Funds
<b>UPC</b>	Union des Patriotes Congolais
<b>USAID</b>	United States Agency for International Development
<b>WFM-IGP</b>	World Federalist Movement-Institute for Global Policy

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<sup>33</sup>Union for Democracy and Social Progress is the translation for this.

<sup>34</sup>Union of Independent Federalists and Republicans is the translation for this.

<sup>35</sup>National Union for the Total Independence of Angola is the translation for this.

## Introductory Part

This part is consistent of a general introduction to the thesis and a conceptual framework.

## Chapter 1: Introduction and conceptual framework

### 1.1 General introduction

### 1.2 Explanation of key words

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#### 1.1. General introduction

##### 1.1.1 Context of the Research

The situation of mass atrocity in the Democratic Republic of the Congo is one of the most alarming of the history humankind. It claims more than four million of deaths, another four million of displaced persons and thousands of victims of sexual violence. The DRC has been undergoing a large scale of international crimes.

Some of these international crimes occurred before the entry into force of the Rome Statute of the International Criminal Court (hereafter ICC).<sup>1</sup>The United Nations urged the DRC to bring to justice those allegedly guilty of international crimes and the DRC either denied the commission of international crimes or claimed its inability to handle any prosecutions. Ideas of an *ad hoc* tribunal for the DRC started to emerge from 1998. First a United Nations fact-finding commission suggested the extension of the competence of the International Criminal Tribunal for Rwanda (ICTR) to the DRC. Secondly, during the peace negotiations in Sun City (South Africa), the forces of the Congolese nation decided to apply for an international criminal tribunal mirroring the ICTR. Following that recommendation, the Congolese President expressed the need for such a jurisdiction at one of the UN General Assembly. Thereafter, the civil society in the DRC has been strongly

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<sup>1</sup> The ICC entered into force on 1 July 2002 upon the submission of the sixtieth instrument of ratification.

advocating the implementation of an International Criminal Tribunal for the Democratic Republic of Congo (ICTDRC).

It is appropriate to analyse the relevance of the DRC's statement in relation to those crimes, as well as the feasibility of an International Criminal tribunal for the DRC. Since there has been a focus on the alleged perpetrators of crimes to the detriment of victims, it is also relevant to consider the problem of reparation.

Other crimes occurred after the entry into force of the ICC. The DRC has referred them to the ICC. On the one hand the latter has started investigations and prosecutions; on the other hand, the former conducted its on proceedings. The relationship between the DRC and the ICC has raised two issues. The first one is the issue of complementarity, appearing in the concurrent proceedings before the ICC and national courts. The second is the issue of cooperation characterised by the DRC's refusal to surrender a suspect to the ICC. The DRC stated that the suspect contributed remarkably to the peace building.

If the simultaneous proceedings (before the ICC and domestic courts) have not generated comments, the refusal to surrender Bosco Taganda has seriously undermined the local legitimacy of the ICC in the DRC.<sup>2</sup>This picture brings to mind the question of the nature of concurrent proceedings<sup>3</sup>and that of the effectiveness of the ICC. One must also underscore the UN's presence in the DRC. It has been performing tasks pertaining to its original mandate and assisting the ICC, but it faces the criticism of failing to protect civilians from international crimes. Therefore, it is appropriate to assess the UN's behaviour in relation to the crimes committed in the DRC after the entry into force of the ICC.

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<sup>2</sup>The ICC's local legitimacy is also undermined by the long lasting and costly proceedings.

<sup>3</sup>It is appropriate to determine whether they are conflicting or not with the principle of complementarity between the ICC and states.

### **1.1.2 Thesis Statement**

Reviewing the responses provided for international crimes committed before the entry into force of the ICC, this thesis will prove the unwillingness rather than the inability of the DRC to prosecute the alleged offenders. It will identify the double standard used by the UN in responding to allegations of international crimes in the Great Lakes region as the main trigger of international criminality in the DRC. The thesis will criticise the absence of reliable reparation mechanisms (for victims of international crimes) at both national and international level.

As for the responses provided to international crimes committed after the entry into force of the ICC, this thesis will commend the efforts started by the DRC to handle criminal cases, as well as efforts by the ICC to work towards reparation for victims. It will consider the simultaneous proceedings before Congolese courts and the ICC as an expression of work division rather than a violation of the complementarity principle. The thesis will argue that the ICC suffers from congenital weaknesses, affecting its local legitimacy in the DRC. It will commend the support of the UN to the ICC, but will also highlight its failure to protect civilians against international crimes.

### **1.1.3 Explanation of Suggested Title**

My suggested title is 'A Critical Appraisal of Legal Responses to International Crimes Committed in the Democratic Republic of the Congo.'

I prefer the term appraisal, because it includes the assessment of existing responses as well as the suggestions of responses where there is not a response at all, or where the existing response appears to be inadequate. The term response refers to prosecutions, truth-telling processes, reparations and peace-making, as well as silence.

#### **1.1.4 Research Methodology**

This research is a theoretical study based on a literature review and survey of the following materials:

1. Human rights and humanitarian law treaties;
2. Soft law as developed by reports of UN agencies, UN treaty bodies, resolutions of the UN General Assembly and Security Council;
3. DRC's national legislation;
4. Case law of international judicial bodies as well as national courts;
5. Peace agreements;
6. Reports of UN commissions; and
7. Letters from governments of the Great Lakes Region to the UN.

Therefore, the study will follow a research methodology based on a study of historical literature, legal analysis and reported case law.

#### **1.1.5 Literature review**

My acquaintance with the present relies on my previous works. I have written two dissertations dealing with the International Criminal Court. I have learnt that there is not much written in the academic world about the international crimes committed in the DRC. There are only few books and articles related to my thesis.

#### **1.1.6 Brief explanation of outline**

##### **Chapter 1: Introduction**

This chapter provides an introduction to the thesis and sets the conceptual background by explaining at a glance some key words.

##### **Part I: Analysis of responses to international crimes committed before the entry into force of the Rome Statute**

This part deals with legal responses to international crimes committed in the DRC between 1990 and the 1<sup>st</sup> July 2002 (date of the entry into force of the Rome Statute).

### **Chapter 2: Historical background**

This chapter aims at drawing the context in which the crimes under examination occurred. It describes when, where and how the crimes occurred, as well as by whom they were allegedly committed. It summarises the main episodes of crimes. It focuses on ethnic conflicts (in Katanga, North and South Kivu) as well as on the conquest and decline of the AFDL.

### **Chapter 3: Responses from the United Nations**

This chapter assesses the responses provided by the United Nations including supporting the peace-making processes (3.1), military responses (3.2), fact-finding missions (3.3), appointment of international tribunals (3.4) and calls for accountability at the domestic level (3.5). In the last resort, it deals with the question of an *ad hoc* tribunal for the DRC (3.6).

### **Chapter 4: Review of responses from States**

This chapter reviews the responses provided by states to international crimes committed on the territory of the DRC, before the entry into force of the ICC. It deals with the responses from third states (4.1) and the responses from the DRC (4.2).

### **Part II: Analysis of responses to crimes committed after the entry into force of the Rome Statute.**

This part will focus on the work of the ICC and evaluate the ability of the parties to the complementarity relationship to deliver justice. It will assess the complementarity between the ICC and the DRC.

## **Chapter 5: Background**

This chapter provides an overview of the international crimes committed in the provinces of Bas-Congo (5.1), Equateur (5.2), Katanga (5.3), North Kivu and South Kivu (5.4) and in the Orientale Province (5.5). It does not present the detailed account of the events in which crimes occurred, but focuses on the major ones.

## **Chapter 6: Appraisal of responses provided by the Democratic Republic of Congo**

This chapter reviews the main responses of the DRC to international crimes committed on its territory after 1 July 2002, including the new military penal code (6.1), the referral of the situation to the ICC (6.2), proceedings before domestic courts (6.3), DDR (6.4), peace agreement concluded with rebels (6.5) and the bill related to the adaptation of the Congolese ordinary laws to the Rome statute (6.6).

## **Chapter 7: Analysis of the ICC's role in the Congolese context**

This chapter analyses the outcomes and shortcomings of the ICC in the context of the Congolese crisis. To this end, it analyses the principle of complementarity between the ICC and the DRC (7.1), as well as the ICC's attitude towards individuals' concerns (7.2).

## **Chapter 8: Responses provided by the United Nations.**

This chapter analyses the responses provided by the UN to international crimes committed in the DRC after the entry into force of the ICC. To this end, it distinguishes between the responses pertaining to the ICC's mandate (8.1) and the responses falling under the UN's general mandate (8.2). In the last instance, it assesses the UN's action in relation with the crimes committed in the DRC after 1 July 2002 (8.3).

## Chapter 9: Concluding remarks

This chapter summarises the main findings and suggestions of this thesis.

### 1.2. Conceptual framework

#### 1.2.1 Amnesty

Amnesty is an act of sovereign power (executive or legislative) forgiving a past offence. The amnesty is either general (when it covers all classes of offenders) or particular (when it applies only to specific groups). It can be granted either on conditions imposed on the prospective beneficiaries, or recipients, must satisfy before it becomes effective or unconditional.<sup>4</sup> Furthermore, amnesty can be either blanket (when it covers all class of offenders) or partial (when it only covers a category of offences). They can be official (when there is a sovereign's measure thereabout) or de facto (when a State does not prosecute).

Unlike a pardon,<sup>5</sup> amnesty concerns persons standing for trial but not yet convicted or those whose trial has not started yet. Amnesty generally aims at promoting human rights, healing after conflicts and a return to or consolidation of democracy.<sup>6</sup>

The question as to whether amnesty for international crimes is legal or illegal has been subject to a long and lively debate. A state can grant amnesty for international crimes committed in an internal armed conflict as long as it contributes to restore peace. It cannot grant amnesty for international crimes committed during international conflicts.

The opponents of amnesty for international crimes generally rely on three main arguments including the duty to prosecute, the victims' fundamental

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<sup>4</sup> See N Weisman 'A history and discussion of Amnesty' (1972) 4 *CHRL* 529.

<sup>5</sup> It refers to the exemption of criminals from serving all or part of their sentences but do not expunge the conviction.

<sup>6</sup> See E/CN.4/Sub.2/1985/16 para 7.

right to justice and the acknowledgment of the necessity of criminal justice in post conflict societies as support for the rule of law.<sup>7</sup>

If the prohibition of amnesty for genocide<sup>8</sup> and war crime<sup>9</sup> clearly emerges from international instruments, there is no consensus on the amnesty for crimes against humanity. This is probably why many States have granted amnesty for crimes against humanity at the end of non-international conflicts.<sup>10</sup>

As for the ICC, it does not mention amnesty. However, it is appropriate to mention that an amnesty for crimes under international law does not affect the admissibility of a case before the ICC. The prosecution has the discretion in the appreciation of the opportunity to prosecute after the granting of an amnesty.<sup>11</sup>

The duty to prosecute international crimes committed in the context of international conflicts does not leave any room for amnesty.

However, one should note a significant attenuation of the duty to prosecute contained within the basic principle of reparation for victims of international crimes. The state only has the duty to prosecute if there is sufficient evidence. This precision is indispensable for the case of international crimes committed on a large scale whereby the perpetrators usually work hard to destroy the evidences.<sup>12</sup>

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<sup>7</sup>See RC Slye, 'The legitimacy of Amnesty under International Law and General Principles of Anglo-American Law: is a legitimate amnesty possible?'(2002) 43 *Virginia Journal of International Law* 182.

<sup>8</sup> It can be inferred from the articles I, IV and V of the genocide convention that States should refrain from granting amnesty to perpetrators of genocide and take effective measures for their prosecution.

<sup>9</sup> The article 6(5) of Additional Protocol II clearly outlaws the amnesty for persons accused or convicted for war crimes.

<sup>10</sup> This includes South Africa that has granted amnesty for apartheid crimes. For details see ICRC, customary IHL database at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter44\\_rule159#Fn1](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule159#Fn1)

<sup>11</sup>See G Werle *Principles of International Criminal Law* (2005) 66.

<sup>12</sup>For instance, The UN Secretary General investigative team in the DRC mentioned the destruction of evidence of mass killings of Hutu refugees. It reported that testimonies indicated the removal of bodies from a mass grave in Mbandaka just before the investigative team's deployment in the region and that similar efforts to destroy

A state can pretext the lack of sufficient evidence to justify its choice not to prosecute. For international crimes committed before 1 July 2002, the universal jurisdiction recognised to a third state can correct such an abuse of the prosecutorial discretion. But, where a state has sufficient evidence and decides to prosecute, it is necessary to recall that, no prosecutorial body can avoid selectivity in the situation involving the commission of international crimes on a large scale.

This raises the question of the nature of the decision not to prosecute some alleged perpetrators for which there exists sufficient evidence of involvement in the commission of crimes. One may suggest that sometimes prosecutorial choices not to prosecute mount to blanket amnesty. The problem for international crimes is less the recognition of the proscription of amnesty than strategies aimed at granting blanket amnesty.

It is, therefore, important given the importance of the question to rethink the formulation of the duty to prosecute alleged perpetrators of international crimes. The term duty to bring to justice<sup>13</sup> is more suitable than the duty to prosecute. In fact, this term will allow the use of complementary mechanisms to criminal prosecution or alternative forms of accountability. For instance, the transitional justice mechanisms such as the Truth Commissions before which the alleged perpetrators will appear and will have to acknowledge their wrongness, apologise publicly and, where applicable, undertake to provide other form of reparation.<sup>14</sup> Civil litigation will also be possible and often easily accessible to victims. As responses to international crimes should be able to ensure the reestablishment of public order and ensure its maintenance for a long time. In other words, a genuine response should contribute to build long lasting peace. The UN Security Council has implicitly acknowledged the

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evidence occurred in other regions of the country. But, the team acknowledged that there was not sufficient evidence to support the statement about the destruction of evidence in other regions. For details see S/1998/581 para 89.

<sup>13</sup> This term is already used in most of the UN documents.

<sup>14</sup> See A/RES/60/147 II 3 (b).

inability of criminal prosecutions to build long lasting peace. Therefore, it has stated the necessity of complimenting them with other measures such as truth and/or reconciliation commissions.<sup>15</sup>

### 1.2.2 Reparation

Reparation can refer either to the claim procedure or to its outcomes. The first involves the institutional framework for reparation (courts or other competent bodies), and the second refers to the relief afforded to the successful claimant.<sup>16</sup> States have the obligation to act against perpetrators on behalf of victims. The right to reparation belongs to victims who are the persons who personally encountered the wrongness or, when they decease, their relatives.<sup>17</sup> In some situations, the State of the victim can claim reparation on his or her behalf.<sup>18</sup> The United Nations and some regional organisations have defined the right to a remedy and reparation for victims.<sup>19</sup> The main kinds of reparation are restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>20</sup>

It is necessary to overview the achievements (1.2.2.1) and the challenges of this mechanism (1.2.2.2).

#### 1.2.2.1. Achievements

At the international level, two achievements deserve attention including the adoption by the United Nations of basic principles of reparation for victims of international crimes (1.2.2.1.1) and the establishment of the United Nations Compensation Commission (hereinafter UNCC) to compensate victims for

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<sup>15</sup>See S/RES/1593 (2005) para 5.

<sup>16</sup> See D Shelton *Remedies in International Human Rights Law* (2006) 7.

<sup>17</sup> See A/RES/40/34, A (1)(2). See also A/RES/60/147 V (8)

<sup>18</sup> See R Pisillo-Mazzeschi 'International obligation to provide for reparation claims?' in A Randelzhofer and C Tomuschat (eds) *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (1999) 152-154.

<sup>19</sup> See UDHR article 8. See also A/RES/60/147 VII (11)

<sup>20</sup> See A/RES/60/147 IX.

damages resulting from Iraq's liability caused by the unlawful invasion of Kuwait <sup>21</sup>(1.2.2.1.2).

### **1.2.2.1.1 Adoption of basic principle of reparation**

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law constitute a notable achievement in the history of reparation.

### **1.2.2.1.2. Establishment of the UNCC**

In early 1990s, Iraq invaded Kuwait. Responding to that situation, the UN affirmed that Iraq was liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.<sup>22</sup> Therefore, it decided to create a fund to pay compensation for claims resulting from Iraq's liability and a commission to administer the fund.<sup>23</sup>

The UN exercised a monitoring on all operation of exportation of petroleum by Iraq. The amount flew into an escrow account administered by the UNCC which kept the Iraq's government informed.<sup>24</sup> 30 per cent of the amount in the escrow account served for the functioning of the UNCC.<sup>25</sup> In 2003, the Security Council terminated the monitoring function of the UNCC on Iraq's sales and reduced the participation to the Compensation Funds from 30 to 5 per cent.<sup>26</sup> Despite these notable achievements, the reparation machinery is still facing some crucial challenges.

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<sup>21</sup> S/RES 687(1991); See also (n 16 above) 404-412

<sup>22</sup> See S/RES/687 (1991), Para 16.

<sup>23</sup> See S/RES/687 (1991), Para 18 and S/RES/692 (1991).

<sup>24</sup> See S/RES/986 (1995).

<sup>25</sup> See S/RES/705 (1991) para 3.

<sup>26</sup> See S/RES/1483 (2003) para 20.

### 1.2.2.2. Challenges

The most serious challenge in terms of reparation for victims of international crimes committed before the entry into force of the ICC statute is their access to justice.

On the one hand, a state can be liable for its failure to fulfil its duties with regard to human rights protection.<sup>27</sup> In most of the cases, victims do not have access to justice either because they are not sufficiently informed on the mechanisms of complaining or because they cannot afford the costs of long lasting claim processes.

On the other hand, victims do not have the right to participate in the proceedings before the international criminal tribunals in their personal capacities or to receive reparation for the damage suffered. This is probably because it was the necessity of punishing perpetrators of international crimes that prompted the establishment of ad hoc tribunals. The judges of both the ICTY and the ICTR seriously considered the question and recommended to the UN the amendments of the statutes of their respective jurisdictions as to allow the awarding of reparation to victims. They referred to the evolution contained in the ICC and suggested the creation of a victims' reparation funds.<sup>28</sup>

### 1.2.3 The responsibility to protect

The International Commission on Intervention and State Sovereignty (ICISS) has drafted the guidelines for the United Nations in relation to the responsibility to protect.<sup>29</sup> ICISS affirms that the UN's responsibility to protect entails the responsibility to prevent, to react and to rebuild.<sup>30</sup>

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<sup>27</sup> See DJ Harris and S Livingstone (eds) *The Inter-American System of Human Rights* (1998) 151.

<sup>28</sup> See S/2000/1063, Para 46 to 48 and S/2000/1198 Para 13 to 15. See also C Ferstman 'The Reparation Regime of the International Criminal Court: Practical Considerations' 15 *LJIL* (2002) 670-677.

<sup>29</sup> See ICISS (2001).

<sup>30</sup> See WFM-IGP (2001) 4 Available at <http://responsibilitytoprotect.org/R2Psummary.pdf>

The effective prevention requires knowledge of the fragility of the situation and the risk associated with it (so called early warning). It also requires the understanding and availability of measures aiming at addressing the roots of serious conflicts (so called preventive toolbox). Such measures may address the following:

- Political concerns: reinforcing democracy, respecting the separation of power sharing, guarantying the press freedom and the rule of law, promoting the civil society.<sup>31</sup>
- Legal concerns: reinforcement of the rule of law, ensuring the judiciary's independence, protecting vulnerable groups and support for organizations advancing human rights.<sup>32</sup>
- Military concerns: enhancing education and training, strengthening citizen control mechanisms, promoting the accountability of security services, promoting arms control, disarmament and non-proliferation.<sup>33</sup>

To meet political concerns, the UN may use several measures including:

- Fact-finding missions.
- Friends groups.
- Eminent persons' panel.
- Dialogue and mediation through good offices.
- International appeals.
- Unofficial dialogues and problem-solving workshops.
- Political sanctions.
- Diplomatic isolation.
- Travel and asset restrictions on targeted persons.
- Naming and shaming.<sup>34</sup>

Legal concerns may necessitate relevant measures such as:

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<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> *Id 5.*

<sup>34</sup> *ibid.*

- Mediation and arbitration.
- Investigation via ad hoc jurisdiction, domestic courts or the ICC.
- Monitoring of human rights.

Military measures may include:

- Preventive deployment.
- Threat of use of force.
- Use of force in extreme cases.
- Arm embargo.<sup>35</sup>

As for the responsibility to react, it requires that appropriate responses be given to situations whereby human rights are at risk. These measures may include peaceful measure or coercive measures. The collection of evidence and information requires greater use of impartial nongovernmental sources for accurate, reliable reports and greater use of independent fact-finding missions by Security Council or the Secretary-General.<sup>36</sup>

The military intervention for human protection purposes must only take place in last recourse as an exceptional and extraordinary measure. The extraordinary circumstances justifying such measures may be:

- The need to halt or avert large scale loss of life (resulting either from deliberate state action, or state neglect or inability to act, or from state's failure).
- The need to halt or avert large scale ethnic cleansing.<sup>37</sup>

The Security Council of the United Nations has the exclusivity of competence for authorising military interventions for humanitarian purposes.<sup>38</sup> The ICISS recommends that Permanent Five members of the Security Council agree not to apply their veto power (in matters that do not affect their vital state

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<sup>35</sup> Ibid. See also S/RES/1533 (2004) as example for arm embargo.

<sup>36</sup> See WFM-IGP (2001) 6.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid. See also A. Orford *International Authority and the Responsibility to Protect* (2011) 13-16.

interests) in order not to obstruct the vote of resolutions authorizing military intervention for human protection purposes.<sup>39</sup>

The responsibility to rebuild entails principally security concern. After mass atrocity, the state or the international community should grant a minimum of security and protection to the entire population, without discrimination based on ethnic origin or relation to the previous regime. To this end they should work at disarmament, demobilization and reintegration of armed groups and at rebuilding of new national armed forces and police, with integration, as far as possible, elements of formerly competing armed factions.<sup>40</sup>

In 2005, heads of states convened a World Summit in order to formalise the responsibility to protect. They unanimously affirmed states' responsibility to protect their populations from international crimes.<sup>41</sup> They agreed on the assistance of the international community to states in the exercise of the responsibility to protect and in building their capacities. They also agreed on the necessity of UN's timely and decisive action in case of a state's failure to fulfil its responsibility to protect.<sup>42</sup>

The Secretary General suggests a three pillars approach for the implementation of the responsibility to protect including:

- Pillar one: state's responsibility to protect its population from international crimes and their incitement;
- Pillar two: the readiness of the international community to assist states in meeting their obligations related to the RtoP.
- Pillar three: the UN's responsibility to respond in a timely and decisive manner when a state is either unable or unwilling to fulfil its RtoP.<sup>43</sup>

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<sup>39</sup> See WFM-IGP (2001) 7.

<sup>40</sup> Ibid.

<sup>41</sup> See A/RES/60/1 para 138.

<sup>42</sup> See Id para 139.

<sup>43</sup> See ICRtoP (2011) 1.

## 1.2.4 The duty to prosecute

In order to provide a clear understanding of the duty to prosecute international crimes, this point identifies its legal basis (1.2.4.1) and its problems (1.2.4.2).

### 1.2.4.1. Source of the duty to prosecute<sup>44</sup>

There are three sources of the duty to prosecute including international conventions (1.2.4.1.1), customary International Law (1.2.4.1.2) and United Nations Resolutions (1.2.4.1.3).

#### 1.2.4.1.1. International Conventions

Three conventions clearly provide for a duty to prosecute the international crimes including the Geneva Conventions of 1949,<sup>45</sup> the Genocide Convention,<sup>46</sup> and the Torture Convention.<sup>47</sup> They deny the practice of immunity and the granting of amnesty for those crimes.

#### 1.2.4.1.2. Customary International Law

The Charter of the Nuremberg International Military Tribunal was the first codification for crimes against humanity. The International Military tribunal faced the objection of *ex post facto* law from the defence.

But after the Nuremberg trial, the UN admitted the Law of Nuremberg as part of customary international law. It adopted the so-called '*Nuremberg principles*'. The Nuremberg principles are a set of principle of international criminal law recognised by the Nuremberg charter. The first of these principles institute the duty to prosecute.<sup>48</sup>

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<sup>44</sup> For details, see M Scharf 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' *Law and Contemporary Problems* (1996) 59 No. 41,61. See also G Werle (n 11 above) 61-65.

<sup>45</sup> See Geneva Convention IV art 146.

<sup>46</sup> See Genocide Convention article IV.

<sup>47</sup> See Torture Convention article 7.

<sup>48</sup> See Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal. Available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf)

### **1.2.4.1.3. United Nations Resolutions**

The United Nations' Charter allows the Security Council to take exceptional measures in order to maintain or restore the peace. The tragedies in the *Balkans* and Rwanda have prompted the Security Council to use its exceptional powers in order to create International Criminal Jurisdictions.

In the case of Rwanda, the Security Council provided that the states have a duty to prosecute the crimes of the ICTR's competence.<sup>49</sup>

The UN General Assembly also provided for the duty to prosecute. In its resolution on the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, the General Assembly established a duty to prosecute<sup>50</sup> or extradite<sup>51</sup> the perpetrators of international crimes.

### **1.2.4.2. Problems of the duty to prosecute**

In practice, the duty to prosecute is not easily apprehended. On the one hand, it might be inferred from the new practice of peacekeeping through judicial means that the UN also has a duty to prosecute. On the other hand, there are some impediments to the fulfilment of the duty to prosecute. This subsection analyses the ownership of the duty to prosecute (1.2.4.2.1) and its challenges (1.2.4.2.2).

#### **1.2.4.2.1. The ownership of the duty to prosecute**

The wordings of the conventions overviewed above, of the first principle of Nuremberg and the resolution of the victims' right to a remedy clearly indicate that the state is the first bearer of the duty to prosecute.<sup>52</sup>

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<sup>49</sup> See ICTR Statute art 8.

<sup>50</sup> See A/RES/60/147 4.

<sup>51</sup> *Id* 5.

<sup>52</sup> The obligation rests principally with the states having territorial (state of the commission of the crime) or personal jurisdiction (state of the nationality of the victim or state of the nationality of the perpetrators). But it is

However, a recent practice has shown that, in the hypothesis of a collapse of the national judiciary or its unwillingness, the UN Security Council may establish an international criminal jurisdiction in order to try the persons responsible for international crimes. One should note that these jurisdictions have a duty to prosecute in the limits of their mandates.<sup>53</sup> The Security Council does not have a duty to prosecute or a duty to create international criminal jurisdiction.<sup>54</sup>

If the overtaking of the ICC can be analysed as a sanction against an unwilling state, there is no sanction for a state failing to prosecute the international crimes committed before the entry into force of the ICC statute.<sup>55</sup>

#### **1.2.4.1.1. Challenges of the duty to prosecute**

It is appropriate to mention two main impediments to the fulfilment of the duty to prosecute including the large number of alleged perpetrators of international crimes (1.2.4.2.2.1) and the immunities of foreign suspects (1.2.4.2.2.2).

##### **1.2.4.1.1.1. The large number of alleged perpetrators**

In the case of international crimes committed on a large scale, there are obviously a large number of alleged perpetrators. It is clear that a state judiciary can be overloaded if it decides to prosecute all of them. Usually, the strategy of selectivity serves as a palliative.<sup>56</sup> In most of the cases, the prosecutorial strategy focuses on those who bear the greatest responsibility.

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admitted that the principle of universal jurisdictions empowers third states. For details, see for example G Werle (n 11 above) 63-65.

<sup>53</sup>The ICC has been created to avoid the need of a future *ad hoc* tribunal. This permanent criminal court has a duty to prosecute whenever a state party fails to comply with its duty to prosecute either because it is genuinely unable or simply unwilling (see ICC art 17 a). The ICC also bears a duty to prosecute whenever the Security Council triggers it (see ICC art 13 b).

<sup>54</sup> The Security Council has discretionary powers and none is entitled to judge its management of such powers.

<sup>55</sup> In the case of international crimes committed in the DRC before the entry into force of the ICC statute, the Security Council ordered the governments of DRC and Rwanda to prosecute their respective nationals. The government of Rwanda made it clear that it would not organise any trial because it did not recognise the findings of the UN investigative team. The Security Council did not sanction Rwanda for its position.

<sup>56</sup> The selectivity is based, *inter alia*, on the idea that 'some justice is better than no justice at all'.

The idea of putting the greatest responsibility on those who give orders and set plans can be questionable. One must bear in mind that there cannot be international crimes if foot soldiers do not follow those orders. Furthermore, the prosecution of those who deemed to bear the greatest responsibility can send a terrible message to executives. They can believe that they would never be prosecuted because criminal proceedings only target superiors.

#### **1.2.4.1.1.2. The immunities of foreign suspects**

The duty to prosecute international crimes does not admit the immunity for suspects. However, the practice has demonstrated that the principle of immunities of foreign officials is stronger than the duty to prosecute.<sup>57</sup>

The practice has shown that the duty to prosecute is often sacrificed for the interest of a good relationship between the states. States receiving international arrest warrants for officials of other states usually warn them not to travel. Such a practice seriously undermines the rule of law.

#### **1.2.5 Transitional Justice**

The UN Secretary General analyses the concept of transitional justice as a set of processes and mechanisms by which society attempts to deal with a legacy of large-scale past abuses. These processes aim at ensuring accountability, serve justice and achieve reconciliation. He identified possible elements of such a set, including judicial and non-judicial mechanisms, criminal prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination of these elements.<sup>58</sup>

It is appropriate to mention that the concept of transition varies from one society to another. The commission of crimes may have ceased long before the transition (e.g. Spain); it may have taken place up until the transition (e.g.

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<sup>57</sup>See the Yerodia case, Pinochet case and the Spanish indictment putting aside the Rwandan acting President, Paul Kagame.

<sup>58</sup> See S/2004/616 para 8.

East Timor, Rwanda) or it may continue during the transition (Uganda and DRC).<sup>59</sup>

### 1.2.6 International Criminal Court

The efforts to build a permanent international criminal court reportedly started in 1919, after the World War I.<sup>60</sup> On 1 November 1943 the Allies stated their determination to prosecute the Nazi for War crimes. The United Nations<sup>61</sup> appointed a commission for the investigation of War crimes in order to prepare post-war prosecution. Finally, the resolution of the London conference (held in 1945) prevailed. On 8 August 1945, the four key powers<sup>62</sup> agreed on the prosecution of leading war criminals. They created the International Military Tribunal (IMT) whose statute was an annexe to the agreement.<sup>63</sup>

The IMT had its seat in Nuremberg whereas the International Military Tribunal for the Far East created to try the Japanese had its seat in Tokyo.<sup>64</sup> The two international military tribunals faced the criticism of partiality. They appeared as victors' justice.<sup>65</sup> It is probably to avoid that criticism that the United Nations adopted the principles comprised in the Nuremberg charter.<sup>66</sup> They became principles of international criminal law. The UN labelled them as principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.<sup>67</sup> Thereafter, the UN tasked its International Law Commission (ILC) with the elaboration of a draft statute for a permanent

<sup>59</sup> D Đukic 'Transitional justice and the International Criminal Court: in the interest of Justice?' (2008) 89 *International Revue of the Red Cross* 692-693. See also Louise Mallinder 'Can Amnesties and International Justice be Reconciled?' (2007) 1 *International Journal of Transitional Justice* 208-230.

<sup>60</sup> See MC Bassiouni *Statute of the International Criminal Court: A documentary history* (1998) 3.

<sup>61</sup> At that time the term referred to a group of 26 nations committed at fighting together the axis power (see <http://www.un.org/aboutun/unhistory>, Accessed on 22 February 2012).

<sup>62</sup> They are: France, United Kingdom, United States and the Soviet Union.

<sup>63</sup> See WA Schabas *An introduction to the International Criminal Court* (2007) 5.

<sup>64</sup> See (n 60 above) 5.

<sup>65</sup> See J Crawford 'The drafting of the Rome Statute', in P Sands (ed) *From Nuremberg to The Hague* (2003) 128.

<sup>66</sup> The Nuremberg charter was the statute of the IMT. The IMTFE charter mirrored it.

<sup>67</sup> The text was adopted by the International Law Commission at its second session, in 1950 and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report also contains commentaries on the principles, A/CN.4/SER.A/1950 para 97.

international criminal court. However, the cold war prompted the cessation of the ILC work on the draft statute in early 1950s. The states feared that one ideological bloc against the other would use the court for political purposes.<sup>68</sup> In 1968, the UN adopted a resolution outlawing the statute of limitation for war crimes and crimes against humanity.<sup>69</sup> That resolution expressed the hope that missing means for the repression of those crimes would be found one day.

In 1989, the Trinidad and Tobago Prime minister (Arthur Robinson) suggested to the UN General Assembly the creation of an international criminal court with jurisdiction over (inter alia) individuals and entities involved in trafficking narcotic drugs across national borders. The General Assembly adopted the motion on 4 December 1989. It tasked the ILC with the examination of the question at its earliest meeting on the draft code of offense against Peace and Security of Mankind.<sup>70</sup>

Early in 1990s, mass atrocities were committed in the former Yugoslavia and Rwanda. The UN seriously considered the matters. It appointed expert commissions to examine the possibility of bringing to justice the perpetrators of international crimes. It successively created the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>71</sup> One should note, in the case of the ICTR, that Rwanda asked the UN Security Council to appoint an international criminal tribunal to try the criminals.<sup>72</sup>

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<sup>68</sup> See BN Schiff *Building the International Criminal Court* (2008) 38.

<sup>69</sup> The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968. It entered into force: 11 November 1970, in accordance with its article VIII.

<sup>70</sup> See (n 68 above) 37. See also (n 60 above) 16.

<sup>71</sup> See S/RES/808(1993) for ICTY. See S/RES/955 (1994) for ICTR. See also W.A Schabas *The UN International criminal Tribunals* 13-34 (for both).

<sup>72</sup> See S/1994/1115, Page 4 (The Rwanda representative to the Un wrote: 'We request the international community to reinforce government efforts by (c) Setting up as soon as possible an international tribunal to try the

As the cold war was over, the ILC's work on the draft statute for a permanent international criminal court resumed in 1994.<sup>73</sup>

The ILC dealt with three issues in relation to the creation of a permanent international criminal court. There were an institutional problem, the rule of law problem and the problem of acceptability of the court by states. The institutional problem concerned the gap between domestic courts and the forthcoming international criminal court. The former enjoyed the advantage of territoriality (police force and executive powers for the prosecution) which the latter would lack.<sup>74</sup>

The rule of law problem concerned standards established by international law for criminal proceedings. Would the ICCPR and other human rights instruments bind the international criminal court?<sup>75</sup>

The last issue pertains to the acceptance of the forthcoming court by states. It was about identifying the best approach guaranteeing states' acceptance of the court's jurisdiction.

To resolve the last issue, the ILC adopted the consensual approach. The court would be created by consenting states. It is obvious that those states would accept its jurisdiction. The ILC foresaw an exception to states' consent. It suggested the Security Council's habilitation to trigger the court even for non-party states. Such exception avoids the creation of other ad hoc international criminal tribunals. The ILC limited the discretion of the court's prosecutor to the admissibility framework. This limitation of the prosecutorial discretion aimed at respecting states' sovereignty. The prosecutor would only enjoy discretionary powers where the pre-trial chamber satisfies itself that the

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*criminals*).

<sup>73</sup> See (n 65 above) 113.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Id.* 131.

case is admissible either because the state is unable or unwilling to deal with it, or because the Security Council has referred it.

To resolve the rule of law issue, the ILC has included procedural guaranties into the draft statute.

As for the institutional issue, the ICL adopted the complementarity principle. According to this principle, the court would be only competent when the state normally competent is either unable or unwilling to proceed. The ILC foresaw that the court would seek states' cooperation to enforce orders of arrest and surrender.<sup>76</sup>

In 1995, the ILC submitted its report on the ICC to the UN. The later established the Preparatory Committee on the Establishment of an International Criminal Court. In December 1997, the General Assembly convened a diplomatic conference on the establishment of an International Criminal Court. That conference took place in Rome (Italy) from 15 June to 17 July 1998.<sup>77</sup>

The Rome diplomatic Conference ended with the adoption of the ICC statute on 17 July 1998. The statute scheduled its entry into force for the sixtieth day after the submission of the sixtieth instrument of ratification. It entered into force on 1 July 2002. The main features of the ICC are the prevention, repression and deterrence of international crimes.<sup>78</sup> It does only have jurisdiction over crimes committed on or after its entry into force. It sets the irrelevance of the official capacity.

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<sup>76</sup> Id 139.

<sup>77</sup> See (n 60 above) 18.

<sup>78</sup> See O Triffterer 'The preventive and repressive function of the ICC' in M Politi and G Nesi (eds) *The Rome statute of the International Criminal Court: A challenge to impunity* (2001) 137-146.

This dissertation will respond to the question as to whether the ICC (in the Case of the DRC) has reached its objective and if all the policies contained in its statute are relevant.

### 1.2.7 International Crimes

On an objective and subjective point of view, any crime is consistent with two elements including an '*actus reus*' and a '*mens rea*'. The *actus reus* is the action or omission violating a specific violation prescribed by a rule. The *mens rea* is the psychological element required by the law in order to determine the blameworthiness of the *actus reus*. This is true in domestic law as well as in international law.<sup>79</sup>

One should note that there are no fixed criteria for international criminalisation. M. Cherif Bassiouni<sup>80</sup> lists five criteria applicable to the policy of international criminalisation including:

1. The prohibited conduct affects a significant international interest, in particular, if it constitutes a threat to peace and security;
2. The prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values shocking to the conscience of humanity;
3. The prohibited conduct has transnational implications in that it involves or effects more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;
4. The conduct is harmful to an international protected person or interest;
5. The conduct violates an internationally protected interest but it does not rise to the level required by (1) or (2), however because of its

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<sup>79</sup>See A. Cassese *International Criminal Law* (2008) 53.

<sup>80</sup>He has deeply and authoritatively examined the question of international crimes.

nature, it can best be prevented and suppressed by international criminalisation.<sup>81</sup>

He then determines the criterion for international crime in international conventional law. He lists ten penal characters whose presence (even singularly) infers an international crime. They are:

1. Explicit or implicit recognition of the proscribed conduct as constituting an international crime, or a crime under international law, or a crime;
2. Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish or the like;
3. Criminalisation of the proscribed conduct;
4. Duty or right to prosecute;
5. Duty or right to punish the proscribed conduct;<sup>82</sup>
6. Duty or right to extradite;
7. Duty or right to cooperate in prosecution, punishment (including judicial assistance in penal proceedings);
8. Establishment of a criminal jurisdiction basis (or theory of criminal jurisdiction or priority in criminal jurisdiction);
9. Reference to establishment of an international criminal court or an international tribunal with penal characteristics (or prerogatives);
10. Elimination of the defence of superior orders.<sup>83</sup>

He mentions the existence of 267 conventions containing one or more of the 10 criteria just listed. Finally he classifies 28 international crimes, including:

1. Aggression;
2. Mercenarism;
3. Genocide'
4. Crimes against humanity;

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<sup>81</sup>See MC Bassiouni *International Criminal Law* (2008) 133.

<sup>82</sup>See *ibid.*

<sup>83</sup>*Id.* 134.

5. War crimes (including the unlawful possession or use of emplacement of weapons);
6. Nuclear terrorism;
7. Theft of nuclear material;
8. *Apartheid*;
9. Slavery and slave-related practices; Torture and other forms of cruel, inhumane or degrading treatment;
10. Unlawful human experimentation;
11. Piracy;
12. Aircraft hijacking and unlawful acts against air safety;
13. Unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas;
14. Threat and use of force against internationally protected persons;
15. Crimes against United Nations and associated personnel;<sup>84</sup>
16. Taking of civilian hostages;
17. Use of explosives;
18. Unlawful use of the mail;
19. Financing of terrorism;
20. Unlawful traffic in related drugs and drug offenses;
21. Organised crime;
22. Destruction and/theft of national treasures;
23. Unlawful acts against certain internationally protected elements of the environment;
24. International traffic in obscene materials;
25. Falsification and counterfeiting;
26. Unlawful interference with submarine cables; and,
27. Bribery of foreign public officials.<sup>85</sup>

The present dissertation will only deal with the so-called 'core' international crimes including war crimes, crimes against humanity and genocide.<sup>86</sup> The

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<sup>84</sup>Ibid.

<sup>85</sup>Id 135.

'core' crimes are also referred to as *jus cogens* crimes.<sup>87</sup> *Jus cogens* rules or norms of international law do not admit any derogation and bind all states and/or persons regardless of their consent. It is appropriate to mention that there is no agreement on rules or norms of international law deemed *jus cogens*. The core crimes are deemed *jus cogens* because they threaten essential values of the society (such as peace and security) and deserve an urgent attention from the international community.<sup>88</sup>

Numbers of scholars are of the view that of the three 'core' crimes, war crimes are of lesser gravity and that genocide is the gravest.<sup>89</sup> Before reviewing the 'core' crimes, it is appropriate to mention that none addresses the overlaps between them.<sup>90</sup>

### 1.2.7.1 War crimes

A war crime is basically a violation of Laws and/or customs of war. Bassiouni enumerates 71 relevant instrument (dating from 1854 to 1998) related to war crimes.<sup>91</sup> He states that the incrimination of war crimes (which has a larger scope than the other core crimes) is essentially rooted in the four Geneva conventions and their two additional protocols as well as in the so-called Law of The Hague.<sup>92</sup>

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<sup>86</sup>See R. Cryer et al *International Criminal Law and Procedure* (2007) 2.

<sup>87</sup>See (n 81 above) 142-144.

<sup>88</sup>See C Than and E Shorts *International Criminal Law and Human Rights* (2003) 10

<sup>89</sup>M Frulli 'Are crimes against humanity more serious than war crimes?' (2001) EJIL 349-350. See also OA Olusanya 'Do crimes against Humanity deserve a higher sentence than war crimes?' (2004) 4 *International Criminal Law Review* 472-473. AM Danner 'Constructing a hierarchy of crimes in international law sentencing' (2001) 3 *Virginia Law Review* 462-463.

<sup>90</sup>See (n 81 above) 143.

<sup>91</sup>Id 142.

<sup>92</sup>See Convention with Respect to the Laws and customs of war on Land (First Hague, II, dated July 29, 1899) and Convention Respecting the Laws and customs of war on Land (Second Hague, II, dated October 18, 1907). See (n 81 above) 142-143.

Common Article 3 of the Geneva Conventions reads as follow:

*“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

*(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

*To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*

*(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*

*(b) Taking of hostages;*

*(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;*

*(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilised peoples.*

*(2) The wounded and sick shall be collected and cared for.*

*An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.*

*The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.*

*The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”*

As for the Hague Convention IV, it enumerates the following violations of the laws or customs of war:<sup>93</sup>

- (a) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) Seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) Plunder of public or private property.

Other international texts organizing the prosecution of war crimes have referred to common article 3 of the Geneva Conventions and The Hague Convention 4 of 18 October 1907 respecting the Laws and Customs of War on Land, namely the ICTY Statute,<sup>94</sup> the ICTR Statute<sup>95</sup> and the ICC Statute.<sup>96</sup>

### **1.2.7.2 Crimes against humanity:**

There is a controversy on the origin of the term. Bassiouni states that it first appeared in the IMT statute,<sup>97</sup> whereas Antonio Cassese mentions that the term emerged for the first time in the joint declaration (from French, British and Russian governments) condemning the massacres of Armenians by Turkey.<sup>98</sup>

There is no specific convention on crimes against humanity. The IMT statute is the first ever codification at the international level of crimes against

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<sup>93</sup> This provision has been inserted verbatim in ICTY statute article 3.

<sup>94</sup> See ICTY statute articles 2 and 3.

<sup>95</sup> See ICTR statute art 4.

<sup>96</sup> See ICC statute art 8.

<sup>97</sup> See (n 81 above) 142.

<sup>98</sup> See (n 79 above) 101.

humanity.<sup>99</sup>The incrimination has remarkably evolved from Nuremberg to The Hague. The IMT statute required a nexus with the initiation and the conduct of the war. The ICTY and ICTR statutes removed the nexus requirement. Finally, the ICC specified the incrimination and rendered it less restrictive.<sup>100</sup>

The crime against humanity includes (but is not limited to) following the acts:<sup>101</sup>

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

### 1.2.7.3 Genocide<sup>102</sup>

The Genocide convention is the first ever codification of genocide. Its spirit is still present in all the subsequent codifications. The convention defines genocide as the fact of:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>103</sup>

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<sup>99</sup>See (n 81 above) 142. See also A. Cassese, op cit, 104.

<sup>100</sup>See Id 143.

<sup>101</sup> See ICTY statute art 5, ICTR statute art 3 and ICC art 7.

<sup>102</sup> On the question, see the application of the United Convention on the prevention and punishment of the crime of genocide to events which occurred during the early twentieth century: legal analysis prepared for the International Centre for Transitional Justice; see also Origins of Genocide ([http://www.genocidetext.net/gaci\\_origins.pdf](http://www.genocidetext.net/gaci_origins.pdf)).

The statutes of the International Criminal Tribunals for Rwanda<sup>104</sup> and the former Yugoslavia,<sup>105</sup> as well as the new Statute of the International Criminal Court<sup>106</sup> imported verbatim the article 2 of the genocide convention. The statute of the UN tribunals and the ICC endorsed the principal weakness of the genocide convention namely the failure to incorporate social and political groups amongst the protected groups (they only limit to ethnic, religious and national groups).<sup>107</sup>

### 1.2.8 United Nations

The creation of the United Nations dates of 1945 after World War II. It replaced the Society of Nations. In relation with this study, it is appropriate to mention that the UN cares for human rights and humanitarian law. It does not bear a duty to prosecute international crimes.

The United Nations has played a key role in the development of the international criminal law. Early after the trial of leading war criminals it raised the principles contained in the IMT statute to the dignity of international law principles.<sup>108</sup> Thereafter, it adopted a convention on Genocide.<sup>109</sup> From 1950s to 1997, it overwhelmingly prepared the creation of the International Criminal Court. Meanwhile, it responded to mass atrocities committed in the former Yugoslavia, Rwanda and Sierra Leone by creating internationalized criminal jurisdictions. Since the creation of the ICC, the United Nations is no longer enthusiastic with the creation of further ad hoc tribunals. The ICC grants it the right to trigger the jurisdiction of the court. To date, the UN has used this prerogative by referring the situation in Darfur to the ICC.<sup>110</sup>

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<sup>103</sup>See genocide convention art 2.

<sup>104</sup> See ICTR Statute art 2.

<sup>105</sup> See ICTY Statute art 4.

<sup>106</sup> See ICC art 6.

<sup>107</sup>See (n 81 above) 142.

<sup>108</sup> See (n 48 above).

<sup>109</sup>Convention on the Prevention and Punishment of the Crime of Genocide Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

<sup>110</sup> See S/RES 1593 (2005).

The United Nations bears the responsibility of maintaining international peace and security.<sup>111</sup> To this end, it focuses on the question of elaboration of the 'Responsibility to Protect'.<sup>112</sup> Through its history, the UN has sent peace keeping missions to several countries. The UN has set principles of reparation for victims of international crimes.<sup>113</sup> One of its greatest realisations in the field of reparation was the setting of the compensation commission for Iraq.<sup>114</sup>

### 1.2.9. Responses to international crimes

Reisman has analysed the question of answers to international crimes. According to him, a genuine system of response to international crimes should cumulate the following seven goals:

1. The prevention of public order violation;
2. The suspension of an on-going violation of public order;
3. The deterrence of potential future public order violation;
4. The restoration of public order after its violation;
5. The correction of the behaviour causing the violation of the public order;
6. The rehabilitation of victims;
7. The reconstruction in a large social sense to remove the likelihood of generation of public order violation.<sup>115</sup>

He mentions the reestablishment of the public order and the creation of low expectation of public order violation as the common denominator to the above goals.<sup>116</sup> Further, he enumerates the eight institutional practices and arrangements aimed at accomplishing the identified goals including:

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<sup>111</sup> See Charter of the United Nations Chapter VII.

<sup>112</sup> See supra 1.2.3

<sup>113</sup> See A/RES/60/147.

<sup>114</sup> See supra 1.2.2.1.2

<sup>115</sup> See WM Reisman 'Legal Responses to Genocide and Other Massive Violations of Human Rights' (1996) 59 No. 4 *Law and Contemporary Problems* 75-76.

<sup>116</sup> Id 76.

1. Human Rights law (which comprises the law of state responsibility and the developing law of liability without fault);
2. International Criminal Tribunals;
3. The principle of universal jurisdiction for international crimes;
4. The refusal to allow violators the beneficial consequences their unlawful acts;
5. The incentives in the form of foreign aid or other rewards;
6. The Commissions of inquiry or Truth Commissions;
7. The Compensation commissions;
8. Amnesties.

He explains that each and every one of the above practices and institutional arrangements deals with a different aspect of the problem and may not be appropriate for all circumstances.<sup>117</sup>

One may summarise the seven goals in one, namely the public order and the eight responses in three, including prosecutions, amnesties and reparation. It is appropriate to mention that in 2006 the UN General Assembly adopted Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>118</sup>

That resolution includes the main goal of law in relation with international crimes, namely the public order. It sets for states an obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law.<sup>119</sup> Such an obligation entails for a state the duty to take appropriate legislative and administrative and other appropriate measures to prevent violations.<sup>120</sup>

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<sup>117</sup> Id 77.

<sup>118</sup> See A/RES/60/147.

<sup>119</sup> Id I.

<sup>120</sup> Id II.

As for responses, the resolution under review insists on the duty to prosecute alleged perpetrators of international crimes. It also mentions the victims' right to remedy for the harm suffered.<sup>121</sup> The resolution does not mention the controverted issue of amnesty for international crimes.

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<sup>121</sup> Id V-IX.

## **Part 1: Critical appraisal of legal responses to international crimes committed in the DRC before the entry into force of the ICC Statute**

This part will review the background to international crimes committed in the DRC before the entry into force of the ICC (chapter 2). It will then appraise responses from the United Nations (chapter 3) and from states (chapter 4). It will end with a short conclusion.

### **Chapter 2: Background**

#### **2.1. Ethnic conflicts**

#### **2.2. Conquest and decline of the AFDL**

Several incidents amounting to international crimes occurred in the DRC before the entry into force of the ICC statute (ICC). The Mapping Exercise Report on Gross violations of Human Rights and/or International Humanitarian Law committed in the DRC between March 1993 and June 2003 (hereafter MER) has listed over 600 of them. This chapter summarises the main circumstances that led to mass atrocity before the entry into force of the ICC including the ethnic conflicts (2.1.) and the conquest and decline of the AFDL (2.2.).

#### **2.1. The ethnic conflicts**

The arbitrary division of Africa caused the repartition of several ethnic groups of the DRC over different countries.<sup>1</sup> Furthermore, the import of workers from one location<sup>2</sup> to another under the colonial rule has contributed to create large communities of some ethnic groups far from their original

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<sup>1</sup>For example : *Ngbandi* are located in DRC (Equateur Province) and in the Central African Republic, *Nande* are located in DRC (North Kivu province) and in Uganda, *Lunda* are located in DRC (Katanga Province) and in Angola, *Tshokwe* are located in DRC (Katanga province) in Angola as well in Zambia, *Bemba* are located in DRC (Katanga province) and in Zambia, *Kongo* are located in DRC (Bas-Congo province) and in the Republic of Congo, *Teke* are located in DRC (Kinshasa), in the Republic of Congo as well as in Gabon.

<sup>2</sup>For example the *Banyarwanda* from Rwanda and *Kasaian* from eastern and western Kasai provinces were recruited by the Belgian to work in the mines of the Katanga province.

location.<sup>3</sup> Surprisingly, the new 'comers' have reproduced faster than the indigenous. Therefore, they have been more popular, more educated and more powerful on an economical point of view. Their puissance (demographic, intellectual and economic) has forced the indigenous to deny them political rights. In all cases, the manipulation of politicians has aggravated the conflicts and led to violent confrontations.

This section reviews the circumstances surrounding the perpetration of international crimes committed during the ethnic conflicts in Katanga (2.1.1) and those committed during the ethnic conflict in Kivu (2.1.2).

### **2.1.1. Ethnic conflict in Katanga**

The Katanga province is DRC's richest in copper, cobalt and zinc production. In 1992, its population was estimated at 5 million of which approximately 1.5 million was believed to be from Kasai.<sup>4</sup>

The ethnic conflict in Katanga mainly targeted the people from the Kasai province ('*Kasaian*'). This point summarises the origins of the conflict between Katangese and *Kasaian* (2.1.1.1), the ethnic cleansing (2.1.1.2) and qualification of the facts (2.1.1.3).

#### **2.1.1.1. The origins of the conflicts**

During the colonisation, the Kingdom of Belgium brought Kasaian to work in the mines in the Katanga province. At independence, the politicians exploited the situation and created tensions between the communities. Moise Tshombe, the leader of CONAKAT promised to the people that he would obtain more power for the indigenous of Katanga in the provincial administration as well as in the local companies. Eleven days only after the independence of the Congo, he proclaimed the secession of the

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<sup>3</sup>See Africa Watch (2003), Zaire: inciting hatred, Violence against Kasaians in Shaba, 2-3.

<sup>4</sup>See E/CN.4/1995/67, para 104.

Katanga.<sup>5</sup> The hatred against Kasaian exacerbated when they decided to support the Congolese central government chaired by Patrice Emery Lumumba and not to accept the authority of the secessionist government. The Katanga's home affairs minister, Godefroid Munongo,<sup>6</sup> planned and executed the first ethnic cleansing operations. Those operations targeted not only Kasaian, but also Luba from Katanga given their historic links.<sup>7</sup> The UN evacuated much of the Kasaian community from the Katanga province<sup>8</sup> and lost its then Secretary General, Dag Hammarskjold, in the peace making process.<sup>9</sup>

In 1990, after 23 years of a unique political party,<sup>10</sup> Mobutu liberalized the political life and authorised the creation of several political parties. The Union for democracy and Social Progress (UDPS)<sup>11</sup> could then become official after height years of underground operations. Gabriel Kyungu Wa Kumwanza<sup>12</sup> left UDPS and created the National Federation of Democrats and Christians (FENADEC) whereas Jean Nguz Karl-I-Bond created the Independent Republican Party (PRI). They decided to fusion their parties and created the Union of Independents Federalists and Republicans (UFERI) under the

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<sup>5</sup>DD Mwembu 'L'épuration ethnique au Katanga et l'éthique du redressement des torts du passé'(my own translation: Ethnic cleansing in Katanga and the ethic of redressing past torts) (1999) 2/3 Canadian Journal of African Studies 484-487. Moise Tshombe proclaimed the independence of Katanga and entered into secession on 11 July 1960, 11 days after the independence of the Congo.

<sup>6</sup>He nicknamed himself 'MUNONGO 'Kifyakiyo' (The broom). That nickname inferred his 'task' of cleansing the province from the Kasaians.

<sup>7</sup>DD Mwembu (n 5 above) 488.

<sup>8</sup>Crisis Group (2006), Katanga, the Congo's forgotten crisis, Africa Report, 5.

<sup>9</sup>Dag Hammarskjold, the then UN secretary General, was heading to Ndola in order to meet Moise Tshombe and discuss a peace plan. His plane crashed four minutes before landing in Ndola and he died. The Belgian authorities were suspected to have caused the crash because they were supporting the Katangese secession. But the hypothesis of an optical illusion seemed plausible and prevailed. See B Rosio 'The Ndola Crash and the Death of Dag Hammarskjold' (1993) 4 *Journal of Modern African Studies* 662-665.

<sup>10</sup>The *Mouvement Populaire de la Révolution* (my own translation: the Popular Movement for Revolution) was created on 20 May 1967. On 15 August 1974, it became an institution. Each and every Congolese was member of the MPR by birth. The national president of the MPR was *de facto* president of the République.

<sup>11</sup>UDPS was the first opposition party in Zaire. It was created by the 13 Members of Parliament who wrote a virulent letter to Mobutu (on 31 December 1979) urging him to provide the people of Zaire with democracy and human rights. The security services inflicted on them and their families cruel and degrading punishments. They were relegated into their homes villages to avoid the spread of their ideas. Yet, several people adhered to their program.

<sup>12</sup>A charismatic leader from Katanga, he was also amongst the 13 deputies who signed the aforementioned letter (see above) and thereafter created the UDPS in October 1982.

chairmanship of Jean Nguz Karl-I-Bond while Gabriel Kyungu Wa Kumwanza was in charge of the Katanga province. The UFERI sided with UDPS and the Party of Christian Socio-Democrats (PDSC) and created the Sacred Union of Opposition in Zaire. This union seriously undermined Mobutu's leadership and went as far as to constrain him to negotiate for power sharing before election and to impose Tshisekedi as Prime minister.<sup>13</sup>

Mobutu convened a constitutional conference in order to review the constitution and adapt it to the insertion of political pluralism.<sup>14</sup> Instead, the opposition forced him to convene a National Sovereign Conference in order to analyse the history of the Country and think of its future. Mobutu revoked the constitutional conference and appointed the National Sovereign Conference.<sup>15</sup> Mobutu was seriously criticised in most of the speeches at the CNS tribune.

As an experienced Machiavellian,<sup>16</sup> Mobutu divided the opposition and took with him the UFERI.<sup>17</sup> He appointed UFERI's leader as Prime Minister and its provincial president in Katanga, Kyungu Wa Kumwanza, was appointed Governor. According to Kyungu Wa Kumwanza, the CNS was Kasaian dominated because the prime minister who prepared it originated from Kasai.<sup>18</sup> Nguz suspended the CNS in Kinshasa while Kyungu was busy explaining his fellow Katangese that *Kasaians* were working hard towards Nguz's failure. Kyungu Wa Kumwanza claimed that *Kasaian* had stolen

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<sup>13</sup>Tshisekedi is from the province of eastern Kasai, one of the 13 deputies and cofounder of the UDPS.

<sup>14</sup>See the ordinance 91-010 of 6 March 1991 convening a Constitutional Conference.

<sup>15</sup>See ordinances 91-093 and 91-097 of 11 April 1991 appointing the National Sovereign Conference and determining its mission (defining fundamental options for the third republic, elaborating a constitution draft and elaborating an electoral act). See also E/CN.4/1995/67, para 32.

<sup>16</sup>See M McNulty 'The collapse of Zaire: implosion, revolution or external sabotage?' (1999) *Journal of Modern African Studies* 67.

<sup>17</sup>At the beginning, most Kasaian and Katangese delegates to the National Sovereign Conference (CNS) were united under the opposition front known as the '*Union Sacrée de l'Opposition*' (sacred union of the opposition) for the overthrow of President Mobutu. In November 1991, however, President Mobutu managed to prompt the Union of Federalists and Independent Republicans (UFERI) shifting from the opposition to the presidential camp. See MER para 134.

<sup>18</sup>Chrispin Mulumba Lukoji chaired the preparation committee of the CNS.

Katangese jobs. He promised that their expulsion would bring a better life to Katangese.

The CNS reopened and reached an agreement on the election of a prime minister. On 15 August 1992, Etienne Tshisekedi won the election and became prime minister. In Katanga, Kyungu started preparing the youth of his party to a reprisal against the people of Kasai. UFERI did not stand the fact that the Kasaian was celebrating the election of Tshisekedi. The Kasaian in the euphoria went as far as to tie two dogs and write on them Kyungu and Nguz.<sup>19</sup> The Katangese retaliated in a very severe manner by cleansing most of the cities from Kasaians.

#### **2.1.1.2. Cleansing of the cities**

Starting from the last quarterly of 1991, the UFERI's Youth (JUFERI) imposed several restriction on Kasaian people (in the cities of Luena, Kamina, Kolwezi, Sandoa and Likasi) aiming at forcing them to flee to their home provinces.

From September to November 1992, JUFERI intensified its pressing and clarified its demand. The Kasaian people of Likasi were force to leave. As their home and business were looted and burned, almost 60,000 Kasaian took refuges in the train station and in high schools awaiting either for the restoration of peace or for the provision of a train to drive them away from Likasi.<sup>20</sup>

On 20 February 1993, in the mining town of Kolwezi, Kyungu Wa Kumwanza held a public rally in his capacity of governor. He urged the Katangese to follow the example of Likasi in driving the Kasaian people out of Gecamines and taking over the management positions in the firm. One month later, following the Governor's call, the JUFERI (with the support of the gendarmerie) forced the Kasaian people to flee from the mining town of

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<sup>19</sup>See Africa Watch (1993), Zaire: inciting hatred, Violence against Kasaians in Shaba, 12.

<sup>20</sup>See MER para 137.

Kolwezi. Armed with machetes, knives and fuel cans, the JUFERI circulated to the home of Kasaian people to give the last warning for leaving immediately and without resistance the town of Kolwezi. As a result, more than 50,000 Kasaian took refuge in the train station of Kolwezi, the post office, the Impala Hotel and the high schools. The JUFERI established identity checks points over the town and killed any Kasaian who was found on the street instead of being in the shelters.<sup>21</sup>

After the cleansing of several cities in the Katanga province, Governor Kyungu Wa Kumwanza announced in a public rally that having finished to clean the bedrooms (Likasi and Kolwezi) it was time to consider cleaning the living room (he was referring to Lubumbashi, the capital of the province). Thought events of Likasi and Kolwezi did not reproduce in Lubumbashi. But the Kasaian lived with fear for several months. Many lost their jobs just for being Kasaian.<sup>22</sup>

### **2.1.1.3. Legal classification of the acts of violence against Kasaian people**

It is reported that several people died as a result of persecution, starvation, diseases, lack of food and medicine in the shelters for the sole town of Kolwezi.<sup>23</sup> However, it was difficult to determine the number of deaths for the town of Likasi.<sup>24</sup> While there are no reliable statistics of people who died as a result of the incidents in the Katanga province, the UN has 1.230.000 Kasaians that were forcibly displaced from Katanga.<sup>25</sup>

The mapping exercise suggests that multiple acts of violence perpetrated against the Kasaians from March amount to crimes against humanity committed during an unarmed conflict. It identifies several counts of crimes

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<sup>21</sup>Id para 138.

<sup>22</sup>Id para 147.

<sup>23</sup>Id para 142.

<sup>24</sup>Id para 145.

<sup>25</sup>See E/CN.4/1995/67 para 108.

against humanity that were committed against the Kasaians, including murder, deportation or forcible transfer of the population and persecution intentionally causing great suffering, or serious injury to body or to mental or physical health. The Kasaians were targeted for political and ethnical reasons.<sup>26</sup> It continues that the violence occurred in a widespread and systematic attacks directed against the Kasaian population.<sup>27</sup>

However, one may object that these acts were constitutive of genocide instead of crimes against humanity. The main difference between the two international crimes is the specific intention to destroy whole or a part of an identified group.<sup>28</sup>

In the violence committed against the Kasaian people in Katanga, the intention of destroying a part of the Kasaian community was clear enough. The public rallies of the Governor calling for a cleaning of the home from the insects are evidence. In order to get rid of insects, one has obviously to kill them. One may infer that the governor clearly called the JUFERI to kill the Kasaian. The intention of destroying the group of the Kasaian ethnic group which lived in Katanga by that time was clear.<sup>29</sup>

### **2.1.2. Ethnic conflict in Kivu**

The Northern Kivu province of the DRC (in which the main incidents occurred) borders on Rwanda and Uganda. By 1994, it had a population estimated to three million inhabitants. The indigenous population was estimated to 50 per cent and the remaining Banyarwanda estimated to the remaining 50 per cent. In the sectors of Masisi and Bwito, the Banyarwanda were believed to form 80 per cent of the population.<sup>30</sup>

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<sup>26</sup>See MER para 493.

<sup>27</sup>Id para 494.

<sup>28</sup>See MER para 500.

<sup>29</sup>The JUFERI in Likasi had even named one of its sections Gestapo (to recall the German Gestapo that played a key role in the Genocide committed on the Jews by the Nazi).

<sup>30</sup>See E/CN.4/1995/67 para 85.

As earlier, this subsection analyse the origin of the ethnic conflict in the Kivu (2.1.2.1) , the outbreak of violence (2.1.2.2.) and the legal qualification of the acts of violence (2.1.2.3).

### 2.1.2.1. The origins of the conflicts

The '*Banyarwanda*' (people from Rwanda) arrived in Congo through successive waves of migration since 1885.<sup>31</sup> Their number increased as well as their economic wealth. The local communities of the North Kivu<sup>32</sup> started considering them as a threat. They accused them of stealing their lands in complicity with their political supporters in Kinshasa and of violating the ancestral rights of their tribal chiefs. The hatred exacerbated with the granting of the Zairian citizenship to *Banyarwanda* by a 1972 law.<sup>33</sup>

In 1980, President Mobutu repealed the law.<sup>34</sup> Instead of clarifying the situation, this repeal of the Zairian citizenship aggravated the polemic. In practice, however, the *Banyarwanda* kept their Zairian identity card and none attempted to remove them from their possession. Nevertheless, they were considered as refugees and immigrants by other communities, and were deemed not to deserve the same rights as the indigenous.<sup>35</sup>

In 1989, a large majority of *Banyarwanda* was denied the right to participate in the local elections by indigenous. This denial caused violent incidents and forced the Government to postpone the elections in North Kivu.<sup>36</sup> In reaction, the Hutu formed the Virunga Farmers and Herders Association (MAGRIVI).<sup>37</sup> At the liberalisation of political life in 1990, indigenous communities of Kivu contested the political and land rights of the *Banyarwanda*. In reaction, the

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<sup>31</sup>For details, see E/CN.4/1997/6/Add.1, Report on the situation of human rights in Zaire, prepared by the Special Rapporteur, Addendum Para 14 to 21.

<sup>32</sup>It includes the Hunde, Nyanga, Tembo, Kumu and Nande.

<sup>33</sup>See Ordinance-Law No 71-020 of 26 March 1971 on the acquisition of the Zairian citizenship by the persons originating from Rwanda-Burundi and established on the territory of Zaire before 30 June 1960.

<sup>34</sup>See Law No 81-002 of 29 June 1982.

<sup>35</sup>See E/CN.4/1995/67 para 89.

<sup>36</sup>See MER para 152.

<sup>37</sup>E/CN.4/1997/6/Add.1 para 31. MAGRIVI stands for *Mutuelle des Agriculteurs et Eleveurs du Virunga*. The literal translation for this is 'Association of farmers and breeders of Virunga'.

MAGRIVI, which was initially a cultural association of Hutu-*Banyarwanda* farmers, included a political and military agenda. It organised small-armed groups to prevent any attack from the indigenous.<sup>38</sup> The indigenous, on their part, created tribal self-defence militias including the Ngilima for the Nande and the Mayi-Mayi for the Hunde and Nyanga. In 1992 the tension culminated to clashes between indigenous and Banyarwanda militias.<sup>39</sup>

In 1994, the Rwandan Genocide changed the equation of the ethnic violence on the Zairian territory. Around 1.2 million Rwandan refugees came to the Kivu province. Most of them were involved in the Rwandan genocide and crossed the border with their weapons and assets stolen from the government.<sup>40</sup>

#### **2.1.2.2. The outbreak of violence**

In the beginning, the ethnic violence did not pay special attention to Tutsis; only Hutus were targeted. After the collapse of the Habyarimana regime, the Tutsi genocide and the taking over of by the Tutsi dominated FPR in Rwanda, the situation of Tutsi changed in the then Zaire. The fragile solidarity between Hutu Banyarwanda and Tutsi Banyarwanda in Zaire collapsed.<sup>41</sup> They were attacked by both indigenous and Hutu militias.

The ambiguous role of the FAZ in the ethnic Kivu conflict is also to be noted. In the beginning, it protected the Banyarwanda (Hutus and Tutsis) from the indigenous militias. Thereafter, it sided with the indigenous militias and harassed Hutu. After the collapse of the Habyarimana regime and the taking over of the RPF, the FAZ joined forces with Hutu militias to harass the Tutsis.<sup>42</sup>

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<sup>38</sup>The military wing of MAGRIVI is even said to have participated in the Genocide of Tutsis in Rwanda in the course of 1994. See Id para 31, 35, 36 and 42.

<sup>39</sup>See MER para 152.

<sup>40</sup>See E/CN.4/1997/6/Add.1 para 34.

<sup>41</sup>It is reported that this solidarity was more apparent than real. Many Tutsi Banyarwanda were recruited by the RPF to fight the Habyarimana regime. Meanwhile, many Hutu Banyarwanda were collaborating with Rwandan security forces to prevent the RPF from recruiting Tutsi Banyarwanda in Zaire. See MER para 158.

<sup>42</sup>See E/CN.4/1997/6/Add.1 para 75 to 80.

It is important to illustrate the violence against Hutus (2.1.2.2.1) and then the violence against Tutsis (2.1.2.2.2).

#### **2.1.2.2.1. Violence against Hutus**

On 20 March 1993, the MAGRIVI protested against the arrest of one of its leaders. The indigenous militias launched attacks respectively in Masisi, Walikale (by Mai-Mai) and in Rutshuru, Lubero (by Bangirima).

The then-governor of North Kivu, Jean-Pierre Kalumbo Mboho, publicly questioned the nationality of Banyarwanda and urged the security forces to assist the indigenous' militia in exterminating Banyarwanda. The governor was suspended in July 1993. From March 1993, indigenous clashed with Hutu militias in North Kivu. This clash affected sectors of Masisi, Bwito, Lubero and Walikale.<sup>43</sup>

In 1995, MSF estimated at between 6,000 and 15,000 the number of people who had died between March and May 1993, and at 250,000 the number of those who were displaced as a result of the armed conflicts.<sup>44</sup>

#### **2.1.2.2.2. Violence against Tutsis**

It is reported that, once the Tutsi dominated Patriotic Front took power in Kigali, the Tutsis in the then Zaire began to shift voluntarily to Rwanda. During his investigative mission, the UN Special Rapporteur on Human Rights in Zaire was told that a total of 7,726 people of Tutsi origin had returned to Rwanda between 1 and 10 November 1994.<sup>45</sup>

In May and June of 1995, the Tutsi present in North Kivu were caught in the crossed fire from the indigenous and Hutu militias. Both sides of the

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<sup>43</sup>See MER para 153. See also E/CN.4/1995/67 para. 90.

<sup>44</sup>MSF cited in the MER para 155 under note 119.

<sup>45</sup>See E/CN.4/1995/67 para 95.

traditional ethnic conflict (namely indigenous and Hutus) targeted them. They killed them, pillaged and burned their homes.<sup>46</sup>

Both indigenous and Hutu have insisted that Tutsi leave Zaire and go to Rwanda which was regarded as a Tutsi-land. The Hutu claimed that the North Kivu should be left for them.<sup>47</sup> The violence aimed at forcing Tutsi to leave Zaire for Rwanda. As of June 1996, the UNHCR is said to have estimated at 17,233 the number of Tutsi who fled from Zaire to Rwanda and sought asylum.<sup>48</sup>

The indigenous militia, the *interahamwe* and the soldiers of the Zairian army (FAZ) used several means to force Tutsi to flee to Rwanda. They pillaged their belongings (livestock, household goods). Some of the victims had claimed that they were stripped even of the clothes they were wearing. A part from pillaging, they also destroyed Tutsi's homes and urged them to leave for Rwanda.<sup>49</sup> They told victims (that were weeping during pillage) to cry for their blood rather than their cattle.<sup>50</sup>

### 2.1.2.3. Legal classification

The widespread and systematic attacks against Hutu civilian populations by indigenous militias (aided and abetted by Zairian government's forces), the mass killings of Tutsi, the campaigns of discrimination and forcible expulsion orchestrated against Tutsi in Zaire as well as the multiple act of systematic violence against them clearly amount to crimes against humanity.<sup>51</sup>

However, the intervention of ex-FAR and *interahamwe* increased the organisation of Hutu militia and internationalised the conflict. Therefore, the

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<sup>46</sup>See HRW/FIDH (1996), Zaire: Forced to flee: Violence against the Tutsis in Zaire, 15 to 17.

<sup>47</sup>See Ibid.

<sup>48</sup>See HRW/FIDH (1996), Zaire: Forced to flee: Violence against the Tutsis in Zaire, 17.

<sup>49</sup>See Id, 21

<sup>50</sup>See Id 22.

<sup>51</sup>See MER para 495 and 498.

massive murders and pillages committed as of December 1995 by indigenous and Hutu militias should be classified in the category of war crimes.<sup>52</sup>

## 2.2. Crimes related to the AFDL conquest and decline

In 1996, the UN was seriously concerned with the humanitarian catastrophe that occurred in the then Zaire.<sup>53</sup> Meanwhile, the rise of AFDL worsened the situation.

The AFDL was an alliance of four parties including the Party of Popular Revolution (PRP, led by Laurent desire Kabila), the Council of Resistance for Democracy (CRD led by Kisase Ngandu), the Revolutionary Movement for the Liberation of Zaire (MRLZ led by Masasu Nindaga) and the Democratic Alliance of Peoples (ADP led by Deogratias Bugera, a Tutsi from Masisi). Laurent Desire was designated as spokesperson in respect for his long opposition to Mobutu.<sup>54</sup>

Initially the AFDL claimed to advocate for the rights of the '*Banyamulenge*.'<sup>55</sup> Shortly after, it appeared to be an international alliance (comprising Uganda, Rwanda, Burundi, Angola, Zimbabwe, Tanzania, Zambia and Eritrea)<sup>56</sup> aiming at overthrowing the regime of Marshal Mobutu in Zaire. The later was accused of having aided and abetted the UNITA

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<sup>52</sup>Id para 478.

<sup>53</sup>In the aftermath of the Rwandan genocide, an estimated two million Rwandan Hutu refugees fled into Zaire whereby they were cared for by the UN and other international relief agencies in a series of camps located near the border. The Mobutu regime started a campaign to send them back to Rwanda and Burundi. The refugees faced illness and starvation that reportedly killed 1,000 people a day. See Walter C.S and Briggs ED (2008), Humanitarian crises and intervention: reassessing the impact of mass media, 175-177.

<sup>54</sup>See Ngolet F (2000), African and American Connivance in Congo-Zaire Africa Today, 68.

<sup>55</sup>The *Banyamulenge* are said to be Rwandan Tutsis who have immigrated into the Congo (Zaire) and established in the South Kivu as of 1797 (before the colonisation). They speak a variation of *Kinyarwanda* and have usually had good relationship with the indigenous tribes of the South Kivu province. In 1996 they were estimated 400,000 individuals, all identifying themselves as Zairian. For details, See E/CN.4/1996/66 Economic and Social Council official records 1996 supplement no 3 para 33 to 35.

<sup>56</sup>Crisis States Working Papers Series No.2, Working Paper No. 26: Development as State-Making: Drivers of change in the DRC: the rise and decline of the state and challenges for reconstruction, 15.

rebellion in Angola<sup>57</sup>, the Ugandan rebellion<sup>58</sup>, the Habyarimana regime and the *interahamwe* rebellion in Rwanda. The exchange money for the support of Uganda and Rwanda to AFDL was the elimination of the strategic basis for the ex-FAR/*Interahamwe* and Lord's Resistance Army (LRA).<sup>59</sup>

Ngolet also underscores the US indispensable support to the AFDL. He cites the ties between the US diplomats in the region with the AFDL as well as the support of US companies to the rebellion through important contracts.<sup>60</sup>

Having lost the military battle against the AFDL and after the failure of the peace talk under the auspices of the then South African President Nelson Mandela, Marshal Mobutu left Kinshasa on Friday 16 May 1997. One day later, Laurent desire Kabila proclaimed himself President of the country that he renamed The Democratic Republic of Congo (DRC). But shortly after his inauguration, he disagreed with his Rwandan and Ugandan allies and urged them to withdraw their forces from the DRC. That was the fall of the AFDL.<sup>61</sup>

This section reviews international crimes committed during the conquest (2.2.1) and decline (2.2.2) of the AFDL.

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<sup>57</sup>President Mobutu was said to have destabilised Angola since its independence. He allegedly served as backup to the UNITA rebellion. He disposed ports of Boma and Matadi in Bas-Congo province (bordering Angola) for the delivery of arms shipments for UNITA from US, South Africa and Israeli. President Dos Santos seized the occasion of AFDL attack to take his revenge over an old enemy. He assisted in the seizure of Kinshasa and Bas-Congo province. For details see M McNulty (n 16 above) 77. See also Ngolet (n 54 above) 68-70.

<sup>58</sup>Addressing the Security Council in reaction to the report issued by the UN Secretary General investigative team on the crisis in the DRC, the representative of Uganda explained that the former Zairian government had backed the *génocidaires* in their reorganisation for the recapture of power in Rwanda. He continued that Zaire also collaborated with the National Islamic Front regime in Sudan in the commission Rwandan genocide and in the destabilisation of Uganda as to prevent it from supporting Rwanda. He concluded that the precedent reasons led Uganda to intervene on the Zairian territory in self-defence and later on to support the AFDL rebellion. For details, see UN Security Council, 13th Supplement – Chapter VIII, Items related to the DRC, advanced version, 28 to 30.

<sup>59</sup>See S/1999/205 para 10.

<sup>60</sup>For details see Ngolet (n 54 above)70-71.

<sup>61</sup>He once told the press that the AFDL was '*a conglomerate of adventurous people*'.

### **2.2.1. Crimes committed during the AFDL's conquest**

This subsection reviews international crimes committed during the AFDL's conquest by warring forces including the AFDL and its allies' troops (2.2.1.1), FAZ soldiers (2.2.1.2) and Ex FAR and *interahamwe* militias (2.2.1.3). It ends with a legal classification of the crimes committed during the AFDL conquest (2.2.1.4).

#### **2.2.1.1. Crimes committed by AFDL troops and allies**

When AFDL and allies took control of the eastern Zaire, they obstructed the delivery of humanitarian assistance to the refugees by specialised agencies.<sup>62</sup> Under the commands of Rwandese officers, the AFDL summoned Hutu who were located in different refugees' camps in the eastern Zaire to go back to Rwanda whereby other Hutu were facing massacres. The AFDL troops reportedly killed massively those who refused to go back to their home Country.<sup>63</sup>

The UN Secretary General's investigative team mentioned that tens of thousands of Rwandan Hutus disappeared as a result of the attacks on the refugees' camps of Amisi, Tingi-Tingi, Kasese, and Obilo. The killings were reportedly committed by AFDL troops under the effective commands of the Rwandan Patriotic Army.<sup>64</sup> It continues that, when they arrived in Mbandaka, the AFDL and RPA could not wait to see the Hutu refugees. They asked for their location, joined them and started to kill them. The same behaviour was observed in the neighbourhood of Kisangani.<sup>65</sup>

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<sup>62</sup>See MER para 209 and para 513. See also Human Right Watch (1997) 'Attacked by all Sides' Civilians and the War in Eastern Zaire, 17.

<sup>63</sup>See Amnesty International's memorandum to the UN Security Council: Appeal for a commission of inquiry to investigate reports of atrocities in eastern Zaire, AFR 62/11/97, 4.

<sup>64</sup>See S/1998/581 para 86.

<sup>65</sup>Human Rights Watch cites the Wall Street Journal of June 6, 1997 which reported that RPA had stated in Mbandaka that 'fighting Mobutu's soldiers was less important for them than killing Hutu refugees'. See Human Rights Watch (1997), What KABILA is hiding, Civilian Killings and Impunity in Congo, October 1997 Vol. 9, no. 5 (A), 21.

The team also reported the removal of several minors and their adults caretaker from a hospital in Lwiro whereby they were receiving medical treatment for malnutrition.<sup>66</sup>

Amnesty international expressed strong concerns about the possible massacre of the 15,000 refugees who were located at Kalima. It also mentioned the possible massacre of 33 priests and eight *Benebikira* congregation nuns who fled in November 1996 with other Rwandese refugees from INERA and Kashusha.<sup>67</sup>

One month after taking the control of Kinshasa, the FAC/APR sent the ex-FAZ who surrendered to Kitona in order in order to receive ideological training and re-education.<sup>68</sup> They sent between 35,000 and 45,000 FAZ soldiers from all over the country to the Kitona military base whereas the base was constructed to accommodate only 10,000 people. Due to the lack of maintenance during the Mobutu regime, the base could no longer accommodate the 10,000 people it was intended to.

During their stay at Kitona, the ex-FAZ soldiers were kept in inhumane conditions including lack of food, unhygienic conditions and lack of appropriate medical care. FAC/APR allegedly conducted summary executions of several ex-FAZ soldiers. They also regularly submitted a large majority to cruel, inhumane and degrading treatment, such as whipping and public torture. Five to ten people reportedly died daily during the first two month of internship at the Kitona military base before the conditions could improve.<sup>69</sup>

Meanwhile, in the Kinshasa military camps, the FAC/APR units allegedly raped a large number of wives and daughters (sometimes minors) of ex-FAZ

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<sup>66</sup>See S/1998/581 para 88.

<sup>67</sup>See Amnesty International's memorandum to the UN Security Council: Appeal for a commission of inquiry to investigate reports of atrocities in eastern Zaire, AFR 62/11/97, 5.

<sup>68</sup>See MER para 300.

<sup>69</sup>Id para 307.

soldiers who were following ideological training and re-education at the Kitona military base. They made sexual enslavement and obliged some to carry out domestic chores for them.<sup>70</sup>

#### **2.2.1.2. Crimes committed by FAZ soldiers**

In essence, from the launching of the AFDL offensive to its seizure of power on 17 May 1997, the FAZ soldiers committed lootings of civilian belongings, rapes and killings of civilians. These crimes were often committed during their retreats from the cities fearing the AFDL approach.<sup>71</sup>

According to Human Right Watch, the FAZ had interfered with the delivery of humanitarian aid to Rwandan refugees. They regularly commandeered aircraft and trucks needed for the transportation of humanitarian aid to the refugees' camps. They limited amount of fuel available to UNHCR and other organisations, and reduced their ability to use the vehicles available to them. Furthermore, they had periodically limited access to refugees' camps.<sup>72</sup>

From July 1996, the Tutsi armed units started infiltrating the province of South Kivu. FAZ soldiers reportedly killed a large number of Tutsi and submitted them to cruel, inhumane and degrading treatment. They looted their goods before sending some of them back to Rwanda.<sup>73</sup>

#### **2.2.1.3. Crimes committed by ex-FAR and Interahamwe Militia**

The former Rwandan Armed Forces (ex-FAR) joined their forces with the *Interahamwe* militia in the DRC. The ex-FAR and *Interahamwe* sheltering in refugees' camps in North and South Kivu provinces reportedly discouraged the Rwandan refugees to go back to Rwanda. They killed those who attempted to return to Rwanda as well as numerous Congolese

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<sup>70</sup>Id para 300 and 306.

<sup>71</sup>See S/1998/581 para 90. See also Human Rights Watch (1997), 24.

<sup>72</sup>See Human Right Watch (1997), 'Attacked by all Sides': Civilians and the War in eastern Zaire, 17.

<sup>73</sup>See MER para 184 to 190.

civilians.<sup>74</sup> Furthermore, they committed pillages to sustain themselves.<sup>75</sup> The ex-FAR and *Interahamwe* militia were present in several provinces of the DRC and terrorised the civilian population on their way to the DRC.<sup>76</sup>

#### **2.2.1.4. Legal classification of acts committed.**

The international character of the AFDL conquest is beyond any doubt. Acts committed by the FAZ, by ex-FAR/*Interahamwe* and by the AFDL troops (backed by the armies of Burundi, Rwanda and Uganda) amount to war crimes.<sup>77</sup> Furthermore, the allegations of acts imputed to APR troops on Hutu refugees in Mbandaka amount to genocide.

#### **2.2.2. Crimes committed during the AFDL's decline.**

In August 1998, after an allegedly aborted assassination attempt planned by his Rwandan and Ugandan, Laurent desiré Kabila decided to dismiss General James Kabarebe<sup>78</sup> and ordered the return of RPA elements to their country.<sup>79</sup> The governments of Rwanda<sup>80</sup> and Uganda<sup>81</sup> allegedly sent columns of soldiers to the DRC. On their way to Goma, the RPA elements hijacked an aircraft that they forced to land in Kitona with the intent to ally the ex-FAZ soldiers who were following their ideological training and re-education in order to attack Kinshasa and overthrow President Kabila.<sup>82</sup> The governments of Angola and Zimbabwe sent a strong and very dissuasive response to impeach the fall of Kinshasa. This was the DRC's official explanation of the causes of the second war which rapidly spread over several provinces of the DRC.<sup>83</sup>

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<sup>74</sup>See Human Right Watch (1997), 'Attacked by all Sides': Civilians and the War in eastern Zaire, 18.

<sup>75</sup>See MER para 167.

<sup>76</sup>For details see MER para 269 to 299.

<sup>77</sup>Id para 480.

<sup>78</sup>He was a citizen of Rwanda and acting chief of Staff of the Congolese Army since the AFDL's seizure of power on 17 May 1997.

<sup>79</sup>See S/1999/205, para 11.

<sup>80</sup>Id para 13.

<sup>81</sup>Id para 17 and 18.

<sup>82</sup>See Id, para 16.

<sup>83</sup>See Id, para 19.

However, some analysts went far in explaining the real causes of the conflicts. According to them, Kabila failed to respect his engagements towards the American corporate<sup>84</sup> that funded his war in exchange of mining concessions in the DRC. He underestimated the price of the military assistance from his Great Lakes allies that were also expecting to benefit from the DRC's natural resources, beyond the security issues with their rebels running into the DRC.<sup>85</sup>

Lacking a reliable military force after the disagreement with his Great Lakes supporters and the ill treatment of the ex-FAZ, Laurent Desire Kabila recruited around 10,000 Rwandan Hutu *Interahamwe* militias and soldiers of the former Rwandan army.<sup>86</sup>

The government of Uganda patronised the MLC in the Equateur province, whereas the government of Rwanda patronized the RCD in North Kivu. It was the second war during which several international crimes were committed.

This sub-section will examine the crimes committed by the FARDC (2.2.2.1), by the Rwandan and Ugandan Armies (2.2.2.2), by the RCD (2.2.2.3), by the MLC (2.2.2.4), by the Ugandan army (2.2.2.5). It will end with the legal classification of crimes committed after the AFDL's decline (2.2.2.6).

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<sup>84</sup>For example the Canadian-owned Tenke Mining Corp won a contract of \$50 million to exploit the world's largest copper and cobalt deposits whereas the America's Mineral Fields (AMF) signed a contract of \$1 billion with the ADFL. They contributed for millions of dollars to AFDL's war effort. But once he took office as President of the DRC, Laurent Desire Kabila did not respect the terms of the contracts. For more details see Ngolet F (2000), 70, 71 and 75.

<sup>85</sup>See R Lemarchand 'Patterns of state collapse and reconstruction in Central Africa: Reflections on the crisis in the Great Lakes region' (1997) 2 *Africa Spectrum* 175. See also S/1999/205 para 19.

<sup>86</sup>After the collapse of AFDL/APR/UPDF alliance on 2 August 1998, Laurent Desire Kabila and FDLR entered into negotiations from August 1998 to 10 September 1998. They agreed to join their forces to avoid a new occupation of the FPR as well as new massacres of Hutus. FDLR provided him with 10,000 soldiers. Laurent Desire Kabila was more or less comfortable with this agreement because on one hand he was being blamed by the Garretton commission for tolerating the massacres of Hutus by his Tutsis allies, on the other hand he did not have a reliable army to counter the APR and UPDF after the ill-treatment of the ex-FAZ. For details, see Crisis Group, *Rwandan Hutu Rebels in the Congo: a New Approach to Disarmament and Reintegration ICG Africa Report N°63*, 23 May 2003, 5- 6.

### 2.2.2.1. Crimes committed by the FAC, FAA and ZDF

During the armed confrontation that followed the collapse of the alliance of AFDL and its Ugandan and Rwandan patrons, in August 1998, the ZDF reportedly used heavy weapons to bombard some municipalities of Kinshasa. Those bombing killed 50 civilian and wounded around 300 civilians.<sup>87</sup>

The FAA reportedly killed civilian, committed rapes and pillaged homes as well as hospital during their progression in the Bas Congo Province. For example, it is reported that on 23 August 1998 when they took control of Moanda, the FAA raped at least 30 women and girls. They went as far as to oblige the family members of their victims to applaud during the rapes, on penalty of execution.<sup>88</sup> The FAC and governmental security forces carried out a policy of repression of political opponents and members of the civil society including summary and extrajudicial executions and acts of tortures.<sup>89</sup> On 16 June 2001, the FAC arrested and executed without judgment 11 Lebanese whom they suspected to be involved in the assassination of President Laurent Desire Kabila one day before.<sup>90</sup>

The FARDC committed several acts of sexual violence including the following:

1. Massive rapes when capturing towns, when stationed in certain regions or when retreating fleeing from the enemy's attacks;
2. Sexual enslavement of women;<sup>91</sup>
3. Rape of women bearing physical resemblance to Tutsis or suspected of connexion with the rebellion;<sup>92</sup>
4. Subjection of men to sexual violence as means of torture and degrading treatment;<sup>93</sup>

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<sup>87</sup>For details see MER para 334.

<sup>88</sup>Id para 332.

<sup>89</sup>Id para 456.

<sup>90</sup>Id para 456.

<sup>91</sup>Id para 577 and 578.

<sup>92</sup>Id para 579.

<sup>93</sup>Id para 580.

5. Rapes as reprisal either against women whose husband had refused to give them money or against those who demonstrated publicly;
6. Rapes of children separated from their families as a result of war. Sometimes, the FARDC forced their victims to undress in public.<sup>94</sup>

In the Katanga province The FAC carried out several killings of the civilian population without any specific reason.<sup>95</sup> In Mbuji-Mayi, the FAC and ZDF<sup>96</sup> killed or seriously wounded hundreds of civilian people, who clandestinely entered the mining concession of the MIBA to look for diamonds.<sup>97</sup> In North Kivu province, the FAC reportedly bombarded several localities surrounding Goma as well as some municipalities in Goma, killing and wounding around ten civilians.<sup>98</sup>

#### **2.2.2.2. Crimes committed by the RCD**

The RCD's armed forces aided and abetted by the Rwandan army committed several massacres of the civilian population. For example, it is reported that on 24 August 1998, as means of reprisal for the killing of 20 of their colleagues, the ANC/APR soldiers massacred over 1,000 civilians, including women, babies and children in the neighbourhood of Bukavu. Most of the victims were reportedly raped, tortured and subjected to genital mutilation. They carried out unnumbered acts of tortures, inflicted cruel, inhumane or degrading punishments on civilian populations and killed several civilian.<sup>99</sup> Between 1998 and 2002, their security services are said to have arrested and tortured civilians who criticised their policy including traditional

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<sup>94</sup>Id para 581.

<sup>95</sup>For example, on 27 February 2002, elements of the FAC burned 11 civilians alive. They arrested them while they were coming back from their fields. They tied them up and took them to the village of Kilumba Kumbula, where they burned them. Those who attempted to escape were shot dead. For more details, see Id, para 430 and 431.

<sup>96</sup>The Zimbabwean army (ZDF) was present at the MIBA concession alongside with the FAC.

<sup>97</sup>For example, on 21 February 2001 they surprised around 30 illegal diggers in the mine and opened fire on them. They also blocked up the entrance to the gallery where some of the diggers had hidden causing their death by suffocation. For details, see MER, para 461.

<sup>98</sup>See Id, para 340.

<sup>99</sup>See for illustration Id, para 353

leaders, administrative officials, political opponents and members of civil society.

The ANC/APR killed soldiers out of combats. On 3 August 1998, they allegedly killed 38 officers and around 100 FAC soldiers who rendered out of combat at Kavumu airport, north of Bukavu. Those FAC members found wise to surrender without combat given their numerical inferiority. However, the ANC/APR reportedly disarmed them, laid them down on the airport runway and then ordered the child soldier in their group to fire on the officers and soldiers.<sup>100</sup>

They have also been involved in the illicit exploitation of DRC's natural resources.<sup>101</sup>

### **2.2.2.3. Crimes committed by the MLC**

In November 1998, Jean-Pierre Bemba Gombo<sup>102</sup> launched a rebellion in the province of Equateur, the Movement for the Liberation of Congo (MLC). In the beginning, the movement was composed of one battalion mainly formed by ex FAZ. After it took control of several localities in the province of Equateur, the MLC recruited more ex FAZ. During all its existence the MLC rebellion was openly supported by the UPDF.<sup>103</sup>

The MLC financed its war efforts through the exploitation of the DRC's natural resources. It granted mining concessions in exchange of military support with the government of Uganda, and sold diamonds to neighbouring countries such as the Central African Republic.<sup>104</sup>

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<sup>100</sup>See Id, para 351.

<sup>101</sup>See S/2002/1146, para 73 to 89.

<sup>102</sup>He had served previously as financial advisor to President Mobutu and now facing the ICC in The Hague for his alleged crimes in the Central African Republic.

<sup>103</sup>See MER para 381.

<sup>104</sup>Id para 769.

The ALC<sup>105</sup>/UPDF reportedly killed soldiers out of combats including an ALIR member and several prisoners. They inflicted cruel, inhumane and degrading punishment to their enemies such as cutting off their lips.<sup>106</sup>The ALC also recruited child soldiers in the province of Equateur and sent them to the front line.<sup>107</sup>

#### **2.2.2.4. Crimes committed by the ALIR**

The ALIR was an alliance composed by Mayi-Mayi, *Interahamwe* militia and ex-FAR.<sup>108</sup>They gain the full financial and logistical support of the DRC's government.<sup>109</sup>Instead of protecting the civilian population as they pretended to, the ALIR committed several exactions.

For example, in January 2000 they killed around 100 civilians in the village of Luke whom they accused of association with the ANC/APR forces. They also pillaged the localities that had fallen under their control.<sup>110</sup>

#### **2.2.2.5. Crimes committed by Rwandan and Ugandan Armies**

Apart from the crimes committed alongside with their Congolese rebel allies, the Rwandan and Ugandan Armies committed serious acts of violence in Kisangani. The APR and UPDF adopted a demilitarisation plan for the town of Kisangani.<sup>111</sup>While they were withdrawing under the observation of a team of UN observers, they clashed during six days.

They conducted indiscriminate attacks with heavy weapons killing between 244 and 760 more than 1,000 wounded. They forced thousands of people to flee from their home and destroyed more than 400 private homes; they

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<sup>105</sup>The Army for the Liberation of the Congo was the military wing of the MLC.

<sup>106</sup>See MER para 385.

<sup>107</sup>Id para 697.

<sup>108</sup>This alliance was form to resist the ANC/APR whose brutality was said to be intolerable.

<sup>109</sup>Id para 341 and 342.

<sup>110</sup>Id para 341 and 343.

<sup>111</sup>See S/2000/416, para 54, 55 and 61.

damaged several public institutions, churches, commercial properties and schools.<sup>112</sup>

#### **2.2.2.6. Legal classification of crimes committed after the AFDL's decline**

The acts imputed to all warring parties clearly amount to war crimes.<sup>113</sup>

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<sup>112</sup>Id para 363.

<sup>113</sup>Id para 482 to 484.

## **Chapter 3: Responses from the United Nations**

### **3.1 Supporting the peace-making processes**

### **3.2 Military responses**

### **3.3 Fact finding missions**

### **3.4 Appointing internationalized tribunal**

### **3.5 Calling for accountability at the domestic level**

### **3.6 International Criminal Tribunal for the DRC**

### **3.7 Silence on the reparation issue**

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In peace time, the United Nations has implemented mechanisms for monitoring and reporting human rights and humanitarian law violations. These include, amongst others, special rapporteurs, working groups and the commission on human rights.<sup>1</sup> But, upon threat to the peace or breach of the peace, the UN is entitled to take exceptional measures for the preservation or restoration of the peace.<sup>2</sup>

The UN has paid special attention to the situation in the DRC. It has provided numerous responses including supporting the peace-making processes (3.1), military responses (3.2), fact finding missions (3.3), appointing internationalized tribunal (3.4) and calling for accountability at the domestic level (3.5). But still, there is still a need for an internationalised tribunal specially appointed for the DRC to prosecute international crimes committed before the entry into force of the ICC. This chapter appraises the responses provided so far and analyses the feasibility of an *ad hoc* tribunal for the DRC (3.6).

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<sup>1</sup>See SN Rodley (2003), the UN machinery and international criminal law, in M Lattimer and P Sands QC (eds), *Justice for crimes against humanity*, 372.

<sup>2</sup>See UN Charter, chapter VII, articles 39, 41 and 42.

### 3.1. Supporting the peace processes

In 1999, the UN Secretary General appointed his special envoy in the Great Lakes Region in order to promote peace in the DRC.<sup>3</sup> The Security Council expressed its concern in relation with the worsening of the situation in the DRC, characterised by the continuing of fighting and the presence of forces of foreign states.<sup>4</sup> It called for an immediate halt to the hostilities<sup>5</sup> and for the immediate signing of a ceasefire agreement in order to allow the withdrawal of foreign forces and the reestablishment of the Congolese government's authority over the entire territory. It called for a political dialogue in order to build a long lasting peace.<sup>6</sup>

Following the Security Council's call, the warring parties signed a ceasefire agreement on 10 July 1999 in Lusaka.<sup>7</sup> In essence, the agreement mentioned the following:

1. Immediate cessation of hostilities;<sup>8</sup>
2. Establishment of a Joint Military Commission (JMC), composed of the belligerent parties to investigate cease-fire violations, elaborate mechanisms to disarm the identified militias, and monitor the withdrawal of foreign troops according to an established calendar;<sup>9</sup>
3. Deployment of a UN chapter 7 force tasked with disarming the armed groups, collecting weapons from civilians and providing humanitarian assistance and protection to the displaced persons and refugees;<sup>10</sup>
4. Initiating of a Congolese National Dialogue intended to build a new political order in the DRC;<sup>11</sup>

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<sup>3</sup>S/1999/379, Letter dated 1 April 1999 addressed to the President of the Security Council by the Secretary General. By means of this letter, the Secretary General informed the President of the Security Council of the designation of Excellence Moustapha Niasse (Senegal) as his Special Envoy for the Peace process in the DRC.

<sup>4</sup>See S/RES/1234 (1999), para 2.

<sup>5</sup>See *Id.*, para 3.

<sup>6</sup>See *Id.*, para 4.

<sup>7</sup>See S/1999/815.

<sup>8</sup> *Id.* article I.

<sup>9</sup> *Id.* article III para 11 b.

<sup>10</sup> *Id.* article III para 11 a.

<sup>11</sup> *Id.* article III para 18 to 20.

5. Establishment of a mechanism aimed at disarming militias and armed groups, including so called '*genocidal*' forces;<sup>12</sup>

Another Security Council strategy in the Congolese situation is consistent with the organisation of an international conference on the Great Lakes region of Africa. In 1994 the Security Council decided the convening of an international conference on the Great Lakes region of Africa<sup>13</sup> and tasked the UN Secretary General with the preparation thereof.<sup>14</sup>

The Security Council's call for an international conference on the Great Lakes is based on the following ideas related to the region:<sup>15</sup>

1. The regional dimension of the conflict in the DRC;
2. The multidimensional (social, economic, cultural and linguistic) link between the people of the Great Lakes Region of Africa making a conflict in one country producing effects in other countries of the region;
3. The necessity of a regional response to the DRC crisis;

In 1996 and 1997 the Secretary General asked his Special Envoys for the Great Lakes Region to explore the possibility of convening an international conference on peace, security and development in the region. In 1999 he appointed a Special Representative based in Nairobi to consult with the leaders of the region on the feasibility, objectives and organisation of such a conference.<sup>16</sup>

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<sup>12</sup>Id article III para 22.

<sup>13</sup>S/PRST/1994/59 and S/PRST/1997/22. See also S/RES/1457 (2003) para 6 and S/RES/1493 (2003) para 30.

<sup>14</sup>S/2003/1099 para 2.

<sup>15</sup>S/2003/1099 para 3

<sup>16</sup>Id para 5.

The core Countries of the region (DRC, Rwanda and Uganda) agreed to the proposed international conference aimed at discussing and adopting a pact of stability, security and development in the region.<sup>17</sup>

To this end, the Secretary General made all the necessary efforts to make the forthcoming regional conference as inclusive as possible. He had ensured the participation of the core countries of the region as well as other stakeholders, including representatives of the civil society in those countries, neighbouring countries and friends of the region, and international development partners.<sup>18</sup>

### **3.2. Military responses**

In relation with the DRC, it is appropriate to mention two military operations authorised or conducted by the Security Council under chapter VII of the UN Charter including the operation assurance (3.2.1) and the MONUC (3.2.2).

#### **3.2.1. The operation ‘Assurance’**

After the Rwandan genocide a million of Hutu fled to the neighbouring DRC (then Zaire). The fact that several former members of the Rwandan army and *interahamwe* militia were in the refugees’ camps jeopardised the situation of all refugees. The Rwandan backed AFDL rebellion threatened to clean up the refugees’ camp from ‘*génocidaires*’.

It blocked the humanitarian aid destined to the refugees. That situation led to a humanitarian catastrophe characterised by a growing number of deaths due to the precariousness of the situation in refugees’ camps. The situation exacerbated when the Rwandan army (RPF) started executing the threat. It launched attacks on the refugees’ camp with the objective of tracking down the ‘*génocidaires*’ and preventing a further genocide. This strategy was actually aimed at forcing other refugees to return to Rwanda. A lively debate took place at the Security Council on the opportunity of a military intervention

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<sup>17</sup>Id para 8.

<sup>18</sup>Id para 10.

for humanitarian purposes. Great Britain and USA were reluctant given the controversies generated by the French '*operation turquoise*' that was considered as an ultimate attempt to support the Hutu dominated regime of Juvenal Habyarimana in Rwanda. France pointed the Anglo-Saxon support to Kagame and the AFDL.<sup>19</sup>

The Security Council finally authorised (under Chapter VII of the UN Charter) the deployment of the '*Operation Assurance*' a force of fifteen thousand composed by elements from the United States, Great Britain, Canada, and France (later to be augmented by African forces) under command of a bilingual Canadian, General Maurice Baril.<sup>20</sup> The operation was mandated with the use of commensurate force to secure specific humanitarian objectives including delivering short-term humanitarian assistance and shelter to refugees and displaced persons in eastern Zaire, assisting the United Nations High Commissioner for Refugees with the protection and voluntary repatriation of refugees and displaced persons as well as establishing humanitarian corridors for the delivery of humanitarian assistance and assisting the voluntary repatriation of refugees after carefully ascertaining their effective will to repatriate.<sup>21</sup>

The operation was never deployed given the positive evolution of the situation on the ground. The success on the AFDL-RPF attacks against Hutu armed elements forced them to flee from the refugees camps and prompted the return of approximately 500,000 people to their natal Rwanda.<sup>22</sup>

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<sup>19</sup>WC Soderlund et al *Humanitarian crises and interventions: reassessing the impact of mass media* (2008) 177.

<sup>20</sup>See S/RES/1080 (1996) para 3 and 5.

<sup>21</sup>See S/RES/1078 (1996) para 10(a).

<sup>22</sup>See WC Soderlund and ED Briggs, 178.

### 3.2.2. MONUC

After the signing of the Lusaka ceasefire agreement between the warring parties in the DRC, the Security Council appointed the MONUC and tasked it with:

1. Establishment of contacts with the signatories to the Ceasefire Agreement at their headquarters levels, as well as in the capitals of the States signatories;
2. Liaison with the Joint Military Commission and provision of technical assistance in the implementation of its functions under the Ceasefire Agreement, including in the investigation of ceasefire violations;
3. Provision of information on security conditions in all areas of its operation, with emphasis on local conditions affecting future decisions on the introduction of United Nations personnel;
4. Planning for the observation of the ceasefire and disengagement of forces;
5. Maintaining liaison with all parties to the Ceasefire Agreement to facilitate the delivery of humanitarian assistance to displaced persons, refugees, children, and other affected persons, and assist in the protection of human rights, including the rights of children.<sup>23</sup>

MONUC monitored the ceasefire violations. As of 14 January 2002, it listed 187 complaints amongst which 84 per cent came from the RCD against armed groups that were not signatories of the ceasefire agreement. MONUC investigated 92 complaints and found that 71 of them could not be proved.<sup>24</sup> MONUC took serious steps to the disarmament demobilization, repatriation, resettlement and reintegration of adult combatants. It worked closely with the Congolese government to that end.<sup>25</sup> As of June 2002 it was in the process of demobilising 1,981 adult combatants originating from Rwanda.

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<sup>23</sup>See S/RES/1279 (1999) para 5.

<sup>24</sup>See S/2002/169 para 36.

<sup>25</sup>Id para 57 to 62.

MONUC advocated for the demobilisation of child soldiers. As of February 2002, it obtained the accord of the RCD for the demobilisation of 2,600 child soldiers and that of the Congolese government on the demobilisation of 4,000 child combatants.<sup>26</sup>

MONUC was not indifferent about the serious humanitarian crisis faced by the DRC and characterised by chronic food insecurity, population displacement, and outbreaks of infectious disease (such as cholera, malnutrition and meningitis).<sup>27</sup> The mission of humanitarian agencies was seriously hampered by the insecurity prevailing in several areas of the country before the entry into force of the ICC.<sup>28</sup> MONUC secured the humanitarian agencies and where needed, it provided them with logistical support in order to allow them reaching remote areas of the country to meet humanitarian needs.<sup>29</sup>

MONUC substantially helped UNHCR and local authorities to implement measures aimed at reducing the likelihood of humanitarian problems. For example, they separated the former military personnel of the Central African Republic from the civilians in order to provide humanitarian assistance to the latter.<sup>30</sup>

As for the human rights point of view, MONUC has substantively contributed to the reinforcement of local capacities. It has provided local human rights activists with relevant training in drafting human right reports and monitoring human rights situations.<sup>31</sup> It has advocated for the liberation of several human right activist detained for their work. It played

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<sup>26</sup>Id para 64.

<sup>27</sup>Id Para 71.

<sup>28</sup>Id Para 72.

<sup>29</sup>Id 52.

<sup>30</sup>Id Para 76

<sup>31</sup>See S/2002/621 para 41.

a key role in the abolition of the Court of Military Order instituted by the AFDL regime after its seizure of the power in 1997.<sup>32</sup>

### **3.3. Fact finding missions**

The United Nations has conducted two major fact finding missions to the DRC including the inquiry commission to investigate the allegations of mass atrocity (3.3.1) and the mapping exercise in order to document the allegations of human rights and humanitarian law violation between 1993 and 2003 (3.3.2).

#### **3.3.1. Inquiry commissions to investigate the allegations of mass atrocity**

By its resolution 1994/87 of 9 March 1994, the UN commission on Human Rights appointed a Special Rapporteur to report on the situation of human rights in Zaire. Further, by its resolution 1997/58 of 15 April 1997, the Commission on Human Rights appointed a joint mission to investigate allegations of massacres and other issues affecting human rights which had arisen from the situation prevailing in eastern Zaire since September 1996.

The joint commission could never work until its mandate expired. The main reasons for this were the objections from the Congolese government regarding the presence of Mr Roberto Garreton<sup>33</sup> in the joint commission and the starting date for the investigations.<sup>34</sup>

The UN Secretary General did not renew the mandate of the commission but appointed another investigative team tasked with the investigation from 1993. On the ground, the joint commission faced strong opposition from the government. It later found several alibis to refrain the commission from

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<sup>32</sup>Id para 43.

<sup>33</sup>It can be inferred from this objection that the Congolese government did not appreciate his previous reports highlighting the international crimes committed by AFDL forces. For details on the disapprobation of Mr Garreton's work, see S/1998/582, para 14 to 16. By means of this letter, the representative of the DRC submitted his country's observation on the findings of the investigative team appointed by the Secretary General.

<sup>34</sup>The Congolese government suggested that the investigations start with 1993 instead of 1996.

performing independently its mandate. For example, the government went as far as prompting people to demonstrate on street against the commission, arresting witness approached by the commission and humiliating the members of the commission by members of the government and other civil servants<sup>35</sup>.

It is noteworthy that, from the few testimonies it could collect, the commission suggested either the investigation of the allegation of international crimes by national authorities or the appointment of an international criminal tribunal therefore.<sup>36</sup> In the later regard, it suggested the extension of the ICTR's competence from 31 December 1994 to 31 December 1997.<sup>37</sup>

One of the features of the team's report was the revelation on a possible 'counter genocide'. The team reported that when it reached the town of *Mbandaka*, the Rwandan Patriotic Army searched and killed Hutu refugees.<sup>38</sup> The report suggested that if proved before a judicial body, those killings could be qualified as genocide.<sup>39</sup> It suggested the extension of the temporal competence of the ICTR in order to investigate into the allegations of massacres of Hutus.<sup>40</sup>

The governments of the DRC and Rwanda denied the allegations of massacres of Hutus on the territory of the DRC.<sup>41</sup> Instead of appointing a neutral judicial body, the UN urged the aforementioned countries to investigate the allegations of massacres.<sup>42</sup> As one could expect (given the fact that they denied the findings of the report), no investigation took place at the domestic level.

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<sup>35</sup>For details, see S/1998/581 para 21 to 56. By means of this letter, the Secretary General transmitted the report of his investigative team in the DRC.

<sup>36</sup>See S/1998/581 para 97.

<sup>37</sup>Id 26 recommendation 4.

<sup>38</sup>Id para 41 and 87

<sup>39</sup>Id 2 and 7.

<sup>40</sup>Id 26 recommendation 4.

<sup>41</sup>See S/1998/582 para 35, 70 and 90. See also S/1998/583 letter dated 25 June 1998 from the permanent representative of Rwanda to the United Nations addressed to the Secretary-General.

<sup>42</sup>See S/PRST/1998/20, statement by the President of the Security Council issued on 13 July 1998.

### 3.3.2. The Mapping Exercise

In light of the recommendations of the Security Council urging the DRC to bring to justice the alleged authors of international crimes,<sup>43</sup> the Secretary General decided to send a human rights team to the Democratic Republic of the Congo. The team's mission was threefold including:<sup>44</sup>

- Conduct a mapping exercise 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.
- Assess the existing capacities within the national justice system to deal appropriately with such human rights violations that may be uncovered.
- Formulate a series of options aimed at assisting the Government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation and reform, taking into account on-going efforts by the DRC authorities, as well as the support of the international community.

Complying with the Security Council requirement, the Government of the DRC supported the Mapping Exercise.<sup>45</sup> The Mapping Exercise was not mandated to identify the perpetrators of violations and make them accountable for their actions.<sup>46</sup> In order to fulfil its mandate, the Mapping Exercise followed three axes including the inventory of international crimes committed in the DRC from March 1993 to June 2003 (3.3.2.1), the assessment of the ability of the Congolese justice system to deal with the allegation of the international crimes listed (3.3.2.2) and the formulation of recommendation in the field of transitional justice (3.3.2.3).

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<sup>43</sup>Ibid.

<sup>44</sup>See MER para 2.

<sup>45</sup>Ibid para 3.

<sup>46</sup>Ibid para 7 and 8.

### **3.3.2.1. Inventory of international crimes committed in the DRC between March 1993 and June 2003**

The Mapping Exercise analysed 617 most serious incidents in which acts of violence were committed between 1993 and 2003.<sup>47</sup> It suggested that, if those acts were investigated and proven in a judicial process, they would be qualified as international crimes including War crimes, Crimes against humanity and Genocide.<sup>48</sup>

One should note that the Mapping Exercise has not disclosed the identity of the majority of the alleged perpetrators of the international crimes listed. It has kept them in a confidential project database submitted to the UN Commissioner for Human Rights.<sup>49</sup>

Chapter II of this thesis has dealt with the above allegations of international crimes.

### **3.3.2.2. Assessment of the capacity of the national justice system to deal with the allegations of international crimes**

The report assessed the efficiency of the Congolese Justice system as to know the extent to which it could deal adequately with the serious crimes described in the inventory in order to begin to combat the problem of impunity.

The report found that there is a significant body of legal norms and provisions both in international law and domestic law, which is sufficient to begin to tackle impunity in respect of the international crimes documented.<sup>50</sup> It acknowledged that the former code of Military Justice that had been in force

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<sup>47</sup>Id from para 127 to 524.

<sup>48</sup>Id from Para 22 to 33.

<sup>49</sup>Id para 104.

<sup>50</sup>See MER para 892. The report was certainly referring to the Military Penal Code enacted in November 2002 after the ratification the signature of the Rome statute by the DRC. One should note that this code cannot be applied to the international crimes committed before its entry into force.

between 1972 and November 2002 defined the international crimes but did not set any penalty for them.<sup>51</sup>

The Mapping Exercise highlighted the weakness of the Congolese judiciary. This weakness is due to several causes amongst which the most important are the lack of judicial independence (3.3.2.2.1), the insufficiency of human resources and the lack of specialisation (3.3.2.2.2) to the insufficiency of financial means (3.3.2.2.3) and to the exclusivity of the military courts' jurisdiction over international crimes (3.3.2.2.4).

#### **3.3.2.2.1. The lack of judicial independence**

The Mapping Exercise recalled the description of UN Special Rapporteur on the independence of judges and lawyers about the lack of independence in the DRC. The Special Rapporteur mentioned the hindrances of the executive in the judiciary despite the separation of power provided by the constitution of the DRC.<sup>52</sup> He illustrated his point by the case of 315 magistrate illegally dismissed in 1999 by President Laurent Desire Kabila and the case of the 92 magistrates forced to retire by President Joseph Kabila. The magistrates operate in a permanent fear of the remonstrance from the executive.<sup>53</sup>

#### **3.3.2.2.2. The insufficiency of human resources and lack of specialisation**

The number of tribunals and magistrates (judges and prosecutors) in DRC has been insufficient for a very long time. As of 2007, the country only had 2030 magistrates. The Ministry of Justice estimated that the DRC had an average of only 1 magistrate per 30,000 square kilometres. It mentioned that 30 per cent of this number was affected in the sole town of Kinshasa creating a serious lack in the other provinces.<sup>54</sup>

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<sup>51</sup>See the Ordinance of 1972 implementing a code of Military Justice in the Republic of Zaire arti 505.

<sup>52</sup>See the Constitution of the DRC arti 149. See also MER para 143.

<sup>53</sup>See MER para 907.

<sup>54</sup>Id para 905 and 907. One should note that since 2010, the Government has recruited 2000 magistrates.

### **3.3.2.2.3. Insufficiency of financial means**

The Congolese justice sector is not allocated sufficient financial means to perform its duties. Unlike most of the countries (that allocate 2 to 6 per cent of their National Budget to the justice sector) the DRC only allocate 0.6 per cent of its budget to the Justice sector. Such a situation undermines the rule of law in the country.<sup>55</sup>

### **3.3.2.2.4. Exclusivity of Military Courts' jurisdiction over international crimes**

The Mapping exercise mentioned that the DRC does not comply with the international standard limiting the jurisdiction of military courts to the military offences, to the offences linked to the requirements of military services or committed out duty. While it is admitted that the international crimes do not fall in the precedent category, the DRC still confer the exclusivity of jurisdiction over international crimes to the military courts.<sup>56</sup>

### **3.3.2.3. Formulation of options in the field of Transitional Justice**

The report examines the DRC's experience in transitional justice and formulated recommendations for a suitable transitional justice. These recommendations are formulated to help the DRC achieving truth, justice, reparation and reform. The most important recommendations deal with judicial mechanisms (3.3.2.3.1), Truth and Reconciliation Commission (TRC) (3.3.2.3.2) and Reparation (3.3.2.3.3).

#### **3.3.2.3.1. Judicial mechanisms**

The report mentions that, given the weakness of the Congolese judiciary,<sup>57</sup> it would be inappropriate to let it handle the prosecution of alleged perpetrators

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<sup>55</sup>Addressing himself to the newly appointed magistrates, President Joseph Kabila said that the precariousness of their professional situation should not constitute an excuse either for inactivity or for corruption. See also MER, para 900 and 901.

<sup>56</sup>Id para 947 to 949.

<sup>57</sup>Id para 804 and 898.

of international crimes.<sup>58</sup> It suggests the implementation of a mixed judicial mechanism (including national and international personnel) in order to give some legitimacy to the prosecutions.<sup>59</sup>

Given the large number of alleged perpetrators, it suggests a focus on those bearing the greatest responsibility.<sup>60</sup> It also recommended the application of a set of principles aimed at insuring a fair trial including, *inter alia*, the rejection of officials' immunities, amnesty and the death penalty, and the non-implication of military courts.<sup>61</sup>

The report insisted on the fact that the hybrid court will need the full cooperation of invited states (Rwanda, Burundi and Uganda) in order to establish the extent to which their nationals (military commanders, backers and those who gave orders) have been responsible.<sup>62</sup> Such a suggestion is somehow naïve. The Mapping team should have remembered that Rwanda, Burundi and Uganda signed the Lusaka ceasefire agreement. The agreement allowed them to grant amnesty to their citizens, with the exception for those who faced accusation of genocide. It is difficult to envisage cooperation from these states with any jurisdiction prosecuting their citizens allegedly responsible of international crimes.

#### **3.3.2.3.2. Truth and Reconciliation Commission (TRC)**

The MER acknowledged the limited capacities of the judicial process in term of responding to the majority of victims' need for the truth. It presents a TRC as a necessary compliment to the judicial process in the efforts of understanding all the motives of the large scale crimes.<sup>63</sup>

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<sup>58</sup>Id para 1017.

<sup>59</sup>Id para 1036 to 1052.

<sup>60</sup>Id para 59.

<sup>61</sup>Id para 63 and 1054.

<sup>62</sup>Id para 64.

<sup>63</sup>Id para 65.

Learning the lessons from the failure of the previous TRC and welcoming the idea of a 'New TRC' it recommended adjustments amongst which the most important are:<sup>64</sup>

- Conducting broad consultation involving victims and representatives of the civil society in order to define the parameters of a future TRC, to ensure good public understanding of its functioning, and to secure its credibility and legitimacy with the Congolese population;
- Empowering the commission as to make it able to cross-examine witnesses, compel their appearance before the Commission, to protect them, and guarantee that their testimony will not be used against them in judicial proceedings.

### **3.3.2.3.3. Reparation**

The report suggest the implementation of a reparation program (modelled after the ICC's funds for victims) that will rely on funds coming from the Congolese Government, from the foreign states bearing responsibility for international crimes committed in the DRC and from the assets seized from the alleged perpetrators of crimes committed in the DRC. It mentions the determination of who is entitled to reparation as the greatest challenge. Given the large number of victims, the mapping exercise suggests the focus on collective reparations.<sup>65</sup>

The Mapping Exercise appointed by the UN was noteworthy in that it documented the situation of international crimes committed in the DRC before the entry into force of the ICC, built a database for any future investigative body and it formulated recommendations on the domestic responses.

However, its mandate was misleading to some extends. One may recall that the UN appointed a Special rapporteur on the situation of Human Rights in

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<sup>64</sup>Id, para 68.

<sup>65</sup>Id, para 70 to 75.

the former Zaire whose mandate covers the period of 1990 to 1997.<sup>66</sup>The Secretary General's investigative team work covered the period of 1993 to 1998.<sup>67</sup>Therefore, there was no need of starting the investigation in 1993. The Exercise should have started with the 1999 events. Furthermore, as the ICC statute entered into force on 1 July 2002, there was no need of going up to 2003. The Exercise should have limited its investigation to the crimes committed before 1 July 2002.

### **3.4. Creation of internationalized tribunal**

On 8 November 1994,<sup>68</sup> the UN Security Council established the International Tribunal for Rwanda in order to prosecute persons responsible for serious violations of international humanitarian law<sup>69</sup> committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States<sup>70</sup> between 1 January 1994 and 31 December 1994.<sup>71</sup>

The ICTR only have jurisdiction over natural persons<sup>72</sup> and does not recognise any immunity related to the official capacity of the defendants.<sup>73</sup> The ICTR and national courts have concurrent jurisdiction. But the ICTR statute establishes a primacy of the ICTR over the latter.<sup>74</sup> The ICTR statute foresees a possibility of pardon or commutation of sentences.<sup>75</sup>

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<sup>66</sup>By his letter A/52/496 dated 17 October 1997, the Secretary-General transmitted to the General Assembly the report of the Special Rapporteur charged with investigating the situation of human rights in the Republic of Zaire (now Democratic Republic of the Congo), pursuant to Commission on Human Rights resolution 1997/58 of 15 April 1997.

<sup>67</sup>See S/1998/581 1.

<sup>68</sup>See S/RES/955(1994) implementing the ICTR.

<sup>69</sup>Including Genocide (see article 2 of the ICTR statute), Crimes against Humanity (see article 3 of the ICTR statute) and war crimes (see article 4 of the ICTR statute).

<sup>70</sup>One should note that the DRC is one of the neighbouring countries to Rwanda. Unnumbered Rwandan fled to the DRC after the Rwandan Genocide. Subsequently, numerous sources alleged that international crimes have been committed on them.

<sup>71</sup>See ICTR statute art 1.

<sup>72</sup>Id art 5. .

<sup>73</sup>Id art6.

<sup>74</sup>Id art 8.

<sup>75</sup>Id art 27.

Since 1995 the ICTR has been relying principally on the cooperation of the Rwandan government. Its partiality was seriously undermined in 2002 when its former Prosecutor Carla del Ponte considered investigating the allegations of crimes committed by the other side of the Rwandan conflict, namely the Tutsi dominated RPF.

The Rwandan government threatened and moved to end the cooperation with the ICTR as means of retaliation.<sup>76</sup> It is reported that some western diplomats were of the view that Del Ponte's investigation over the RPF officers would jeopardize the peace talk in the DRC.<sup>77</sup>

The government of Rwanda and the Office of the ICTR Prosecutor entered in an opened conflict. Carla Del Ponte reported the Rwandan refusal of cooperation to the UN Security Council. In counter offensive, the government of Rwanda accused Carla Del Ponte of underestimation of the Rwandan genocide and connivance with the Hutus involved in the genocide.<sup>78</sup>

It is reported that her commitment towards the prosecution of RPF officials prompted the Security Council to dismiss Carla Del Ponte.<sup>79</sup> One of the suspects<sup>80</sup> refused to appear before the ICTR arguing that he did not want to be an instrument of a show trial. He considered that the ICTR was the expression of the victor's justice. He fustigated the dependence of the ICTR on the Tutsi dominated Rwandan government and its failure to indict RPF officers.<sup>81</sup>

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<sup>76</sup>See V Peskin *International Justice in Rwanda and the Balkans, Virtual justice and struggle for state cooperation* (2008) 209, 211 to 214. See also C Mahony 'The justice sector afterthought: Witness protection in Africa' <http://www.iss.co.za/siteimages/WitnessProt.pdf> (accessed 3 May 2011).

<sup>77</sup>See V Peskin (n 76 above) 211.

<sup>78</sup>Id 218 to 221.

<sup>79</sup>Id 221. See also R Cryer *Prosecuting international crimes: selectivity in International criminal Law* (2005) 221.

<sup>80</sup>Jean Bosco Barayagwiza.

<sup>81</sup>See WA Schabas *The UN International Criminal Tribunal, the Former Yugoslavia, Rwanda and Sierra Leone* (2006) 421.

The establishment ICTR was a good idea. The only one mistake from the Security Council was its failure to facilitate the investigation of the other side of the Rwandan conflict, namely the Tutsi side. This undermined the image of the ICTR which has been considered as an international consecration of the '*vae victis*'<sup>82</sup> by the Hutu community.

On a positive note the ICTR have conducted fair and expeditious trials. During its first mandate (1995-1999), it delivered judgements in respect of 25 accused. The trial of 25 other accused is still on-going. The ICTR has rendered judgment constitutive of impressive jurisprudence and making notable contribution to the evolution of international criminal justice.<sup>83</sup>

Today, it is appropriate to foresee the future of the ICTR. After several years of work, this *ad hoc* tribunal is 'landing' and ready to close its doors. Given the greatest likelihood of commission of international crimes in Africa, it would be appropriate to seriously consider the 'adoption' of the ICTR by the African Union and its upgrading to a continental criminal court.<sup>84</sup>

### **3.5. Calls for accountability**

The Security Council has called for accountability at the domestic level (3.5.1) as well as at the international level (3.5.2).

#### **3.5.1. The call to the DRC's Government to bring to justice the alleged perpetrators of international crimes**

The Security Council required the observations of the governments of the DRC and Rwanda to the report of the Secretary General's investigative team. The government of Rwanda found that the report was emotive and lacked reliable evidence. Therefore, the government of Rwanda denied any

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<sup>82</sup>This Latin maxim literally means 'sorry for the losers'. It is the expression of victors' justice.

<sup>83</sup>See E Mose 'Main Achievements of the ICTR' (2005) 1 *Journal of International Criminal Justice* 1.

<sup>84</sup>A further research can properly analyse the possibility of turning the ICTR in an African criminal court that will be competent for crimes related to civil and political rights, international humanitarian law as well as socio economic right (money laundering and corruption).

involvement of its soldiers in the commission of international crimes on Rwandan citizens in the DRC.<sup>85</sup>

As per the DRC's government, it considered the report as a plagiarism of previous report from Roberto Garreton whom it considered to be partial.<sup>86</sup> It responded to all his reports. In essence, the government denied any implication of the AFDL troops in the commission of international crimes on its way to Kinshasa. It acknowledged the responsibility of the key figures of the Mobutu regime that were living peacefully in the rich countries. It stated that only the international community could arrest them, unless they were extracted to be tried in the DRC. The DRC's government rejected the idea of prosecution before the ICTR that it deemed incompetent due to its slowness. It suggested the assistance of the international community in order to rebuild its judicial system.<sup>87</sup>

On 13 July 1998, the Security Council condemned the massacres and other international crimes committed in the DRC as described in the Secretary General's investigative team report. It recognised the necessity of further investigation of the international crimes as suggested by the report under examination. To this regard, it welcomed DRC's commitment to try its national allegedly responsible of international crimes and its application for international assistance in order to rebuild its judicial system. Furthermore, the Security Council expressed its readiness to consider at any time other steps towards the prosecution of the alleged responsible of the international crimes highlighted in the report. It urged the governments of DRC and Rwanda to investigate without delay the allegations of international crimes contained in the report.<sup>88</sup>

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<sup>85</sup>See S/1999/583.

<sup>86</sup>See S/1998/581 para 9.

<sup>87</sup>Id para 108 and 109.

<sup>88</sup>See S/PRST/1998/20.

The Security Council call to the government of DRC and Rwanda for the prosecution of the alleged perpetrators of the international crimes highlighted in the Secretary General investigative team's report was not a genuine response.

The Security Council should have considered the unwillingness of these governments to try their agents who were involved in the commission of international crimes.<sup>89</sup> It should have then taken necessary measures to organise criminal prosecutions. The investigative team was right and foresaw that the Congolese and Rwandan governments would never bring their agents to justice; that was why it recommended the extension of the temporal competence of the ICTR. The Security Council should have considered at that time the possibility of following that recommendation. Its attitude amounted to an undue delay in the response to the question. Furthermore, it has printed the image of 'double standard' in responding to international crimes committed in an ethnic conflict, prosecuting Hutus and leaving Tutsi untouched.

### **3.5.2. Call for an international investigation and Condemnation of third states**

Reacting to the worsening of the situation in the DRC after the clash between the Rwandan and Ugandan armies in the city of Kisangani, the Security Council urged the implementation of an international investigation with a view of bringing to justice the perpetrators.<sup>90</sup> It did not make a precise recommendation to the Secretary General or take further step towards the implementation of the urged investigation commission.

In the same context than above, the Security Council acknowledged that Uganda and Rwanda had violated the sovereignty and territorial integrity of

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<sup>89</sup>The DRC's government only acknowledged the necessity of prosecuting the agents of the precedent regimes (claiming that its own agents were clean) whereas the government of Rwanda denied all the allegations.

<sup>90</sup>See S/RES/1304 (2000) para 13.

the Democratic Republic of the Congo. It ordered the withdrawal of all their forces withdraw all their forces from the territory of the Democratic Republic of the Congo in conformity with the Lusaka ceasefire agreement.<sup>91</sup>

The Security Council further ordered that the Governments of Uganda and Rwanda make reparation for the killings of civilian population in Kisangani as well as for the property damage caused. It requested the Secretary General to evaluate the damage in order to determine the extent of reparation to be made by the Governments of Uganda and Rwanda.<sup>92</sup> But so far, the Secretary General has not submitted the requested evaluation and the question of reparation remains pending.

In condemning the governments of Rwanda and Uganda for their armed activities in the Congolese city of Kisangani and ordering them to provide reparation for the DRC, the Security Council has opened a way to a genuine response to the international crimes committed in the DRC.

One may suggest that the Secretary General be urged to carry out the evaluation of the reparation as required by the Security Council. Furthermore, instead of limiting reparation to the sole case of Kisangani, it is recommendable that the Security Council orders the Secretary General to evaluate the extent of the liability of the governments of DRC, Rwanda, Burundi and Uganda in the international crimes committed in the DRC and suggest an amount for reparation.

The Security Council's resolution is a logical consequence of the adoption by the UN of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>93</sup>

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<sup>91</sup>Id para 4.

<sup>92</sup>Id para 14.

<sup>93</sup>See A/RES/60/147, Resolution adopted by the General Assembly at its Sixtieth session on 21 March 2006.

### 3.6. The question of an ad hoc tribunal for the DRC

For a long time Congolese have been seeking for an international Criminal Tribunal for the DRC. During the political negotiation in Sun City (South Africa), the negotiators recommended that the transitional government applies for an international criminal tribunal for the DRC before the UN. Such a jurisdiction was expected to prosecute the perpetrators of international crimes during the period preceding the entry into force of the ICC.

In one of his speeches at the UN General Assembly's tribune, President Kabila asked for the creation of an international criminal tribunal for the DRC.<sup>94</sup> The new civil society launched a campaign in favour of the establishment of such a jurisdiction.<sup>95</sup> After the release of the Mapping Exercise Report, the human rights activists insisted upon the creation of such a jurisdiction.<sup>96</sup> All these developments on the ground have printed in the Congolese collective mind, the picture of 'a denial of justice' from the United Nations. It is appropriate to justify the UN's attitude towards the question of an ad hoc tribunal for the DRC.

One can identify four reasons justifying the UN's attitude:

The first reason is that the DRC has never formally applied in time for the establishment of an International Criminal Tribunal. One should note that the Republic of Rwanda applied therefore.<sup>97</sup> Instead of addressing its request to the General Assembly, the DRC should have written a formal demand to the Security Council that is competent for the establishment of International Criminal tribunals.

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<sup>94</sup>See [http://www.huffingtonpost.com/amb-ileka-atoki/post\\_976\\_b\\_746003.html](http://www.huffingtonpost.com/amb-ileka-atoki/post_976_b_746003.html).

<sup>95</sup>See <http://iwpr.net/report-news/congolese-activists-call-international-tribunal-drc>.

<sup>96</sup>See communiqué de presse (press release) N° RDC/RENADHOC/04/2011.

<sup>97</sup>The Security Council mentioned that it had received a request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. See S/RES/955(1994) para 1. This is probably the explanation as to why the Security Council has never considered extending the temporal jurisdiction of the ICTR.

The second reason is the circumstances justifying the creation of an ad hoc tribunal. The exceptional circumstances that justified the creation of UN tribunal entailed the collapse of the state apparatus, or at least the collapse of domestic judiciary.<sup>98</sup>In the DRC, the state apparatus did not collapse even though its authority did not cover the entire territory at certain periods of time due to the seats of rebel movements. The Congolese judiciary can still investigate those crimes.<sup>99</sup>

The third reason is the aim of the *ad hoc* tribunal. The UN tribunals have been created as means of restoring peace.<sup>100</sup>In the DRC, the UN has restored peace by other means.<sup>101</sup>

The fourth reason is the existence of the ICC. One should remember that the ICC has been created in order to avoid the creation of further ad hoc tribunals. Should the need arise (non-party states to the ICC) the UN Security Council has the power of triggering the ICC. For the latter reason, the ICC is considered as a two court in one, including a permanent court and a potential ad hoc tribunal.<sup>102</sup> There is no need to create an *ad hoc* tribunal for the DRC on the ground that such a means of fighting impunity will deter potential criminals. The ICC is already fulfilling the deterrence mission for the future.

### 3.7 Silence on the reparation issue

The MER is highly commendable in that it reviews the responses to international crimes committed in the DRC before 1 July 2002. However, it

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<sup>98</sup>In the resolution creating the ICTR, the Security Council stressed the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regarded in particular the necessity for those courts to deal with large numbers of suspects.

<sup>99</sup>See *infra*.

<sup>100</sup>The preambles of the resolutions creating the ICTY and ICTR, the Security Council stated its conviction that in the particular circumstances of Yugoslavia/Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace. See S/RES/827(1993) and S/RES/955(1994).

<sup>101</sup>See 3.1 above.

<sup>102</sup>See GP Fletcher and JD Ohlin 'The ICC: two courts in one?' *Journal of International Criminal Justice* (2006) 4 *Journal of International Criminal Justice* 430.

fails somehow to explore the possibility of UN's role in reparation for victims. This section aims at figuring out a scheme whereby the UN will play a significant role in reparation for victims.

It is appropriate to recall that reparation entails compensation for victims as well as a guarantee of non-repetition. If the former is clearly understandable, the latter deserves further explanation. The guarantee of non-repetition can be provided either by deterring potential criminals through exemplary punishment (after fair prosecutions) or by reducing the likelihood of recurrence of crimes.

This author believes that the guarantee of non-repetition falls under the scope of UN's duty to maintain peace or prevent any breach of the peace. Therefore, the UN has a significant role to play in reparation for victims. It did so in the Kuwait crisis. The UN ruled that Iraq was liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait. Therefore, it decided to create a fund to pay compensation for claims resulting for Iraq's liability. It established a commission to administer the fund. In sum, the UN exercised a monitoring on all operation of export of petroleum by Iraq. The amount was deposited into an escrow account administered by the UNCC which kept the Iraq's government informed. 30 per cent of the amount deposited in the escrow account was dedicated to the functioning of the UNCC. In 2003, the Security Council terminated the monitoring function of the UNCC on Iraq's sales and reduced the participation to the Compensation Funds from 30 to 5 per cent. As for the Congolese case, one may suggest that, the Security Council adopts a resolution ordering the control of the DRC's natural resources for 15 years through a United Nations Victims Funds (UNVF) modelled after United Nations Compensation Commission (UNCC) created for the victims of Iraq's invasion of Kuwait. The revenues can be dispatched as follows:

- 45 per cent can be paid into the Victim Fund and dedicated for compensation purposes;
- 30 per cent affected to the functioning of the commission;
- 25 per cent oriented to the national budget.

After three to five years, the UN may consider reducing the part devoted to compensation and augmenting the one destined to the national budget. The management of the DRC's natural resources through a UNVF will help realising compensation and providing a guarantee of non-repetition.

### **3.7.1 Compensation**

The main reason for avoiding compensation for victims is the question of financial means to afford it. In the Kuwait situation just discussed earlier, the UN considered the Iraq's petrol as a reliable source of funds. In the Congolese case, it may confidently rely on COLTAN.<sup>103</sup>

Nowadays, COLTAN bears an exceptional value. It is the most significant component of cellular phones. Some NGOs believe that China manufactures 500 million cellular phones and receives its essential COLTAN from the eastern DRC. The monitoring of the exploitation of Congolese COLTAN by the UN will provide money for compensation. It is appropriate to precise that victims include nationals of DRC as well as nationals of Rwanda and Burundi.

### **3.7.2 Guarantee of non-repetition**

A UN panel underlined the link between the illegal exploitation of Congolese natural resources fuels conflicts in the eastern DRC.

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<sup>103</sup>COLTAN stands for Columbite. It is a dull metallic ore found in major quantities in the eastern areas of Congo. When refined, coltan changes into metallic tantalum which is a heat-resistant powder that can hold a high electrical charge. These features justify its vitality in the creation of capacitors (which are the electronic elements that control current flow inside miniature circuit boards). Tantalum capacitors are used in almost all cell phones, laptops, pagers and many other electronics. Due to the recent technology boom, the price of coltan has raised to as much as US \$400 a kilogram. For further details, see <http://www.un.int/drcongo/war/coltan.htm>

The supervision of Congolese COLTAN's exploitation will reduce the lust of non-state actors on Congolese natural resources. The UNVF may consider hiring former combatants for exploitation of COLTAN. The hiring of former combatants will undoubtedly solve the issue of demobilisation and reinsertion and reduce the likelihood of recurrence of armed conflicts, as men will prefer working in the extractive industry than risking their life in the battlefield. The battle to survive has prompted the engagement of several men in militias.

The advantage of such a reparation scheme under the auspices of UN is that it will succeed to solve the crucial issue of peace. Victims will gain compensation. The governments of Rwanda and Burundi will no longer fear for their security, as the likelihood of armed conflict will decrease. The DRC will finally benefit from its COLTAN.

## Chapter 4: Critical appraisal of responses from States

### 4.1. Responses from third states

### 4.2. Responses from the DRC

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The state of the commission of international crimes has the duty to respond thereto.<sup>1</sup> Other states can be competent by virtue either of the universal jurisdiction or the personal competence. This chapter critically reviews the responses provided by states to international crimes committed on the territory of the DRC, before the entry into force of the ICC. It deals with the responses from third states (4.1) and the responses from the DRC (4.2).

#### 4.1. Responses from third states

This section reviews the responses provided by third states to crimes committed in the DRC by virtue of the principle of universal jurisdiction (4.1.1) and the responses by virtue of personal competence (4.1.2).

##### 4.1.1. Responses in virtue of the principle of universal jurisdiction

Three countries have initiated prosecuting against alleged perpetrators of crimes committed in the DRC including Belgium<sup>2</sup> (4.1.1.1), The Netherlands (4.1.1.2) and Spain (4.1.1.3).

###### 4.1.1.1. Belgium

On 11 April 2000, judge Damien Vandermeersch,<sup>3</sup> issued an arrest warrant against Mr Abdoulaye Yerodia Ndongbasi the then Congolese Minister of foreign affairs.<sup>4</sup> Yerodia was accused of having declared that 'Tutsi' were a virus that must be eradicated, insects that must be killed. He was acting in his capacity of principal assistant to President Laurent desire Kabila. His call was

<sup>1</sup>This is one of the articulations of the duty to prosecute.

<sup>2</sup>In 1993, Belgium passed a law on Universal jurisdiction. This law was featured by the irrelevance of official capacity, the triggering of the criminal jurisdiction by the simple civil claim and by the unlimited power of the judge no matter where the crime was allegedly committed or where the criminal is located at the time of the pursuits.

<sup>3</sup>He was then investigating judge at the Brussels *Tribunal de premiere instance*.

<sup>4</sup>The arrest warrant against Mr Yerodia is available at <http://www.ulb.ac.be/droit/cdi/fichiers/MandatVdm.html>

largely followed. In Kinshasa and Bas-Congo provinces, official radio urged the Congolese population to carry machetes and kill Tutsi inhabiting.<sup>5</sup> According to Judge Damien Vandermeersch, there were serious grounds to believe that by his speeches Yerodia has incited to racial hatred and has prompted the commission of crimes against humanity and war crimes. Therefore, given the fact that he did not have a residence in Belgium, he issued an international arrest warrant on him.<sup>6</sup>

The DRC challenged the warrant before the International Court of Justice (ICJ) on the legal grounds that it violated the principle according to which a state may not exercise its authority on the territory of another state, the principle of sovereign equality among all members of the UN and the diplomatic immunity attached to the person of a foreign ministry of a sovereign nation.

The ICJ received the application of the DRC and ruled that it was successful. It ordered that, by means of its own choosing, the kingdom of Belgium should cancel the warrant and inform the authorities to whom it had been circulated.<sup>7</sup> The ICJ ruling in the case of the arrest warrant has revealed that the principle of universal jurisdiction is weaker than the principle of diplomatic immunities. It has inspired the Spanish judge who decided not to indict General Paul Kagame until he leaves the Presidency of Rwanda.<sup>8</sup>

This decision reveals the inconsistency of the Vienna principles with the evolution of the international criminal law. It can be inferred from the ICJ's

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<sup>5</sup>See the arrest warrant against Mr Yerodia, 6.

<sup>6</sup>Id 23.

<sup>7</sup>The court found that the issue and the international circulation of the arrest warrant against Mr Abdoulaye Yerodia Ndombasi violated a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that that it failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law. See Case The Democratic Republic of the Congo v. Belgium (14 February 2002)(2002) ICJ Reports 32.

<sup>8</sup>See Commentator 'The Spanish Indictment of High-ranking Rwandan Officials' (2008) 6*Journal of International Criminal Justice*1003.

ruling in the aforementioned case that states may perform the arrest of a foreign official when it is ordered by an international criminal jurisdiction. They cannot enforce an arrest warrant circulated by another state. Such a view is controversial with the evolution of international law denying immunities for international crimes. One may suggest an updating of the Vienna Convention on diplomatic immunities in order to allow states arresting of foreign official accused of international crimes.

However, the Belgian indictment of the then DRC's acting foreign minister is questionable to some extents. Firstly, one may ask why the Belgian investigation did not look into the direction of the former FAZ officials,<sup>9</sup> AFDL leaders and Rwandan officials who were pointed as author of international crimes in the DRC by the UN Secretary General's investigative team. Secondly, one may ask why the Belgian prosecution did not reissue its arrest warrant after Mr Yerodia left the foreign Ministry.<sup>10</sup> Thirdly, the fact that the Belgian government warned the Rwandan authorities on the Spanish arrest warrant contrasts with its stated willingness to prosecute international crimes committed in the Great Lakes Region.

#### **4.1.1.2. The Netherlands**

On 7 April 2004, Sebastien Nzapali, a former colonel in the Civil Guard of the DRC (then Zaire) known as "*Roi des bêtes*" (literally: King of the beasts) was sentenced to a two years imprisonment for having committed acts of tortures on a customs agent in October 1996 in Matadi (Bas-Congo province).<sup>11</sup> He was also tried for rape and physical abuses amounting to crimes against

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<sup>9</sup>Most of them sought and were granted asylum in Belgium. Making its observations on the Secretary General's investigative team's report on the international crimes committed in the DRC, the DRC's government mentioned that it was upon the 'rich countries' to prosecute the key figures of the Mobutu regime that were living on their territories. For details see S/1998/582 para 106.

<sup>10</sup>One should note that after the foreign ministry, he was permuted to the ministry of national education. But at the conclusion of the Pretoria peace agreement, he was sworn in as deputy President of the DRC and served for three years. This quality of deputy Head of state could have constituted an impediment only up to 2006.

<sup>11</sup>It is reported that he went to the customs at the beach of Matadi to take a car from Europe without paying the fees. As the director of the customs service tried to dissuade him, he tortured him and forced him to walk naked in front of thousands of people at the Matadi beach.

humanity. Due to a lack of proof, he was acquitted from the charges of crimes against humanity.<sup>12</sup>

The Dutch initiative is less questionable than the Belgian. It has prosecuted a key figure of the Mobutu regime for international crimes whilst he was seeking asylum. All countries should follow this example in order to deprive the perpetrators of international crimes from safe havens.

#### 4.1.1.3. Spain

On 6 February 2008 a Spanish judge issued an arrest warrant for 40 high-ranking officers of the Rwandan army for, amongst other reasons, their alleged involvement in the commission of international crimes in the DRC. The indictment stated that the RPF invaded the DRC twice and systematically exterminated an undetermined number of Rwandan refugees and civilian Congolese. It further mentioned that the RPF created a criminal network of exploitation and pillage of the DRC's mineral resources in order to finance its wars, maintain its geo-strategic power and pursue its plan of extermination and domination.<sup>13</sup>

As the Spanish system does not allow trials *in absentia*, the success of the proceedings is largely dependent of the cooperation of the States to which the arrest warrant has been circulated. It is reported that only one of the 40 indicted has been arrested and tried. The African Union has considered the arrest warrant as a violation of 'sovereignty and territorial integrity' of Rwanda and has called all its members to reject the Spanish arrest warrant.<sup>14</sup>

The reaction of Belgium is noteworthy. It is reported that, the Kingdom of Belgium refused to grant a visa to one of the indicted and sent a confidential

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<sup>12</sup>See MER para 303 and 1029.

<sup>13</sup>The indictment mentions that General Paul Kagame cannot be prosecuted as long as he holds the position of President of the Republic of Rwanda. See Commentator(n 8 above) 1005. See also MER para 1029.

<sup>14</sup>See (note 8 above) 1009.

letter to the government of Rwanda whereby it explained that its refusal was linked to the issuance of an arrest warrant against him by a Spanish judge. It is also important to note that the government of Rwanda recalled its military attaché in Washington just after the issuance of the Spanish arrest warrant.<sup>15</sup> Furthermore, the Spanish arrest warrant caused the United Nations to request from the government of Rwanda the replacement of the Deputy Force Commander in the UN/AU peacekeeping force in the Darfur.<sup>16</sup>

The response from Spain deserves attention. One may suggest that Spain complains to the ICJ against the Kingdom of Belgium for obstruction to the administration of justice for international crimes. It is also appropriate to mention that there should be sanctions against the states refusing to cooperate in the prosecution of international crimes.

#### **4.1.2. Responses in virtue of the principle of personal competence**

The third states of which the armies intervened in the DRC and are accused to have been involved in the commission of the international crimes are competent to try them in virtue of the principle of personal competence. However, until now, no prosecution has taken place in those countries.<sup>17</sup> This is probably because, despite all existing evidences, these states have preferred to reject any allegation related to the involvement of their nationals in the commission of crimes in the DRC. For this reason, this subsection will review the responses from the Republics of Rwanda (4.1.2.1), Burundi (4.1.2.2) and Uganda (4.1.2.3).

##### **4.1.2.1. Rwanda**

In reaction to the report of the investigative team appointed by the UN Secretary General, the government of Rwanda claimed that the findings were incomplete and biased. It strongly denied the perpetration of international

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<sup>15</sup>Id 1009 and 1010.

<sup>16</sup>Id 1011.

<sup>17</sup>See MER para 1016.

crimes on the territory of the DRC (then Zaire) by its military on Rwandan or Congolese civilian.<sup>18</sup>

However, the Lusaka ceasefire agreement that was endorsed by Rwanda contains a provision amounting to an implicit recognition of the involvement of Rwandan soldiers in the atrocities that occurred in the DRC. In the paragraph 22 of the agreement, the countries of origin of members of armed groups committed themselves to take all necessary measures to facilitate their repatriation including *inter alia* the granting of amnesty.<sup>19</sup>

Recently, invited to give its impressions on the draft report of the Mapping Exercise on the grave violations of human rights and humanitarian law committed in the DRC between 1993 and 2003, the Government of Rwanda recommended its rejection. The Government of Rwanda argued that the report misrepresented the facts. It explained that, in the aftermath of the 1994 genocide, approximately 1.000.000 of Rwandese including the former military (APR) and *interahamwe* militia fled to the former Zaire. The latter used refugees' camp to reorganize militarily and plan the destabilisation of the new government. That was why Rwanda acted in self-defence. It further explained that the deaths mentioned in the report resulted from diseases and starvation not from killing by Rwandan patriotic Army.<sup>20</sup>

#### **4.1.2.2. Burundi**

The UN Secretary General's investigative team underscored the killing of Hutu refugees on the territory of the former Zaire by the Burundian army. It

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<sup>18</sup>See S/1999/583.

<sup>19</sup>The agreement excluded the alleged perpetrators of Genocide from the benefit of any amnesty. For details, see letter from the permanent representative of Zambia to the United Nations addressed to the President of the Security Council on 23 July 1999. By means of this letter, the permanent representative of Zambia transmitted the text of the Lusaka ceasefire agreement and sought that the agreement be brought to the attention of the members of the security Council and be circulated as a Security Council document. Accordingly, the document was recorded under the number S/1999/815 8.

<sup>20</sup> See Official government of Rwanda's comments on the draft UN Mapping Report on the DRC (552/16/OHCR/VS/ka/10.), available at <http://rwandinfo.com/eng/official-govt-of-rwanda-comments-on-the-un-mapping-report-on-the-human-rights-violations-in-dr-congo-1993-2003>.

mentioned that the latter dumped their bodies in Ruzizi River and Lake Tanganyika.<sup>21</sup> Invited to comment the report, the representative of Burundi said nothing about the latter statement, called upon the immediate cessation of the armed hostilities in the DRC, and recalled the commitment of his country for a peaceful settlement of the conflict in the DRC.<sup>22</sup>

Recently, reacting to the draft of the Mapping Exercise Report, the government of Burundi was of the view that it contains numerous false statements related to Burundi including:

1. The involvement of the Burundian armed groups<sup>23</sup> in the DRC's armed conflicts;
2. The crossing of the Burundian territory by Rwandan and Ugandan army on their way to the DRC;
3. The alliance between the Burundian armed groups with either the Rwandan Patriotic Army or the Congolese armed groups.

The government of Burundi relies on the facts that it has never been associated either with the Congolese peace talks or with the three-part talks convened by the USA. Further, like the government of Rwanda, the government of Burundi mentioned the poor standard of evidence and recommended its removal from the list of the countries involved in the commission of international crimes in the DRC.<sup>24</sup>

#### **4.1.2.3. Uganda**

Reacting to the report of the UN Secretary General's investigative team, the representative of Uganda stated their commitment to the peaceful and negotiated resolution of the conflict in the DRC. He stated that Uganda

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<sup>21</sup>For details see S/1998/581.

<sup>22</sup>See Items relating to the Democratic Republic of the Congo The situation concerning the Democratic Republic of the Congo 1998 13<sup>th</sup> supplement chapter VII 30.

<sup>23</sup>This includes Ex FAB (*Forces Armées du Burundi*, which can be translated by Armed Forces of Burundi) and ex FDD (*Forces de Défense Nationale* which can be translated by National Defence Force).

<sup>24</sup> See Official government of Burundi's comments on the draft UN Mapping Report on the DRC (204.01/302/RE/2010) [http://www.ohchr.org/Documents/Countries/ZR/DRC\\_Report\\_Commetnts\\_Burundi.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_Report_Commetnts_Burundi.pdf) (accessed on 9 April 2011)

intervened in the DRC in *self-defence* as the government of Zaire forged alliance with the National Islamic Front regime in order to destabilize Uganda and refrain it from supporting Rwanda. He noted that this action contributed to the collapse of the Mobutu regime in the then Zaire.<sup>25</sup>

On 23 June 1999, the Democratic Republic of the Congo filed an application in the Registry of the International Court of Justice instituting proceedings against the Republic of Uganda in respect of a dispute concerning the armed activities of Uganda on the ground that they violated the United Nations Charter and of the Charter of the Organization of African Unity.

In essence, the DRC accused Uganda:

1. To have been involved in the seizure of Kitona after the issuance of the DRC Presidential statement ordering the withdrawal of Rwandan and Ugandan forces from the DRC;
2. To have let its soldiers commit international crimes on a large scale and especially during their confrontation with the Rwandan army in Kisangani;
3. To have been involved in the illegal exploitation of its natural resources.

For its part, Uganda denied all the accusations and objected that the ICJ could not be competent on the matter related to the events of Kisangani in absence of Rwanda.<sup>26</sup> The ICJ ruled that Uganda was liable for the international crimes as well as for the illegal exploitation of DRC's natural resources committed by its forces. It ruled that Uganda should make reparations to the DRC.<sup>27</sup>

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<sup>25</sup>See UN Security Council Items relating to the Democratic Republic of the Congo Advance version 13th Supplement-Chapter VIII 28.

<sup>26</sup>See Case Democratic Republic of the Congo v. Uganda (19 December 2005) (2005) ICJ General List 1-6.

<sup>27</sup>Id 101-104.

Recently, like the governments of Rwanda and Burundi, the government of Uganda recommended the rejection of the Mapping Exercise Report. It argued that:

1. The authors of the report failed to contact them during their two years of investigations;
2. The authors of the report acted controversially by recognising the poor standard of evidence of their findings and considering anyway publishing them and making judgement on such a weak basis.
3. The publication of such a report would seriously undermine the efforts towards a normalisation of the relations in the sub region.<sup>28</sup>

The refusal of these governments to initiate criminal prosecutions against their nationals involved in the commission of international crimes in the DRC clearly amount to a denial of justice for victims of those crimes. That is why it is appropriate to establish their liability therefore and to enforce the resolution of the Security Council ordering them to make reparation for victims of their armed activities in the DRC.<sup>29</sup>

#### **4.2. Responses from the DRC**

The DRC bears the responsibility to protect its citizens and other inhabitants on its territory against violations of human rights and humanitarian law. When those rights are violated, it is bound by the duty to prosecute. But, for the crimes committed before the entry into force of the ICC, it has shown a reluctance to prosecute the alleged perpetrators. These responses include the publication of white papers highlighting the international crimes committed by the 'aggressors' (4.2.1), reaction of the DRC to the Mapping exercise Report (4.2.2), the judicial responses (4.2.3) and the transitional justice mechanism (4.2.4).

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<sup>28</sup> See Official government of Uganda's comments on the draft UN Mapping Report on the DRC (GVA/UN/TECH/48) [http://www2.ohchr.org/english/bodies/cedaw/docs/list/list\\_Uganda47.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/list/list_Uganda47.pdf) (accessed on 9 April 2011).

<sup>29</sup>See S/RES/1304 (2000) para 13.

#### 4.2.1. Publication of white papers highlighting the international crimes

In 1999, after the outbreak of violence consecutive to the collapse of the alliance between the SFDL and the governments of Rwanda, Burundi and Uganda, the government of the DRC sent to the Security Council a white paper denouncing the international crimes committed by its former allies.<sup>30</sup>

The government stated that its white paper was intended to recall what was already clear namely the commission of international crimes on a large scale in the eastern DRC by the forces of Rwanda, Burundi and Uganda.<sup>31</sup>

In essence, the paper:

1. Considered the insurrection of the soldiers from Rwanda, Burundi and Uganda was an act of insurrection<sup>32</sup> and a violation of the sovereignty of the DRC<sup>33</sup> and sought an acknowledgment therefore by the UN Security Council. It further sought the Security Council to order the withdrawal of the aggressors' forces and order to stop committing international crimes.<sup>34</sup>
2. Denounced a strategy of victimisation adopted by the Tutsi to justify the international crimes they commit. It explained that they want everyone to believe that each and every act of violence committed on a Tutsi amount to a genocide<sup>35</sup>. It rejected any allegation of Tutsi genocide.<sup>36</sup>
3. Denounced several violations of human rights and/or international humanitarian law.<sup>37</sup> For example, it mentioned the envoi of 2000 Ugandan soldiers suffering from AIDS/HIV in the DRC's oriental

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<sup>30</sup>See S/1999/205, letter dated 24 February 1999 from the permanent representative of the DRC to the United Nations addressed to the President of the Security Council. By means of this letter, the permanent representative of the DRC transmitted a document intituled 'White paper on massive violations of human rights and of the basic rules of international humanitarian law by the aggressor countries (Uganda, Rwanda and Burundi) in the eastern part of the Democratic Republic of the Congo.

<sup>31</sup>See S/1999/205 para 90.

<sup>32</sup>Id para 34 and 35.

<sup>33</sup>Id para 36.

<sup>34</sup>Id para 76.

<sup>35</sup>Id para 53.

<sup>36</sup>Id para 58.

<sup>37</sup>The pages 24 to 54 of the white paper comprise a list of the acts of violence and the identification of the legal instrument violated.

province in order to spread the disease.<sup>38</sup> It urged that a legal action be taken against the Presidents Kagame, Bizimungu and Museveni for war crimes, crimes against humanity and trivialisation of genocide.<sup>39</sup>

One may assume that the DRC's white paper intentionally did not refer to the allegation of involvement of the soldiers from Rwanda, Burundi and Uganda in the commission of international crimes during the AFDL conquest.

#### **4.2.2. Reaction of the DRC to the Mapping Exercise report**

In a press communication consecutive to the release of the MER, the DRC's Minister of Justice and Human Rights gave the position of his government. He recalled the fact that the MER would not have been possible without the cooperation of his government.<sup>40</sup> He mentioned that the MER is an information document on the possible reform of the Congolese justice sector and therefore its recommendations are not mandatory. The justice Minister then mentioned the weaknesses (4.2.2.1) of the report and its excesses (4.2.2.2).

##### **4.2.2.1. Weaknesses and omissions of the report**

According to the DRC, the reliability of the MER is undermined by the following:<sup>41</sup>

1. The use a double standard by referring to states involved in the commission of international crimes in the DRC without quoting them on the one hand and by omitting the reference to corporation involved in the commission of the crimes under examination on the other hand.
2. The omission of the international crimes committed by the MONUC members whereas the seat agreement foresees their criminal liability.

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<sup>38</sup>See S/1999/205 para 45.

<sup>39</sup>Id para 56.

<sup>40</sup>See DRC/Ministry of Justice and Human Rights, Press release of 2 October 2010, 2.

<sup>41</sup>Id 2 and 3.

3. The arbitrariness in the choice of sources: the MER only referred to private sources (NGO), whereas the DRC's government had published several books documenting the commission of international crimes on its territory.
4. The emphasis on the foreign victims to the detriment of the Congolese ones.
5. The report seems to insinuate that the DRC's government had condoned the violations documented.
6. The report starts with the violations committed in 1993 whereas it should have started with 1991 or with 1881.
7. The Mapping Exercise team fixed a short time to the DRC for its observation whereas the redaction of the report took three years.

#### **4.2.2.2. Excesses of the report**

The DRC is of the view that the Mapping Exercise Team has exceeded its mission in doing the following:<sup>42</sup>

1. Referring to case posterior to 2003;
2. Releasing the identity of some suspects whereas the terms of reference of the Mapping Exercise clearly mentioned that the report should not quote the identity of persons suspected to have been involved in the commission of the violation documented.
3. Insinuating that the investigations conducted by the government of the DRC were questionable and that the rulings of the domestic courts on the matters were not genuine.

#### **4.2.3. Judicial responses**

The DRC has shown its preference for a judicial response to the international crimes under examination. Early at the beginning of its transition, it sought an international criminal tribunal from the UN<sup>43</sup> (4.2.3.1). Awaiting a response

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<sup>42</sup>See DRC/Ministry of Justice and Human Rights, Press release of 2 October 2010, 4.

<sup>43</sup>One should remember that such a demand is questionable given the fact that the Congolese government did not use the appropriate procedure therefore. See supra 3.6

from the UN, it filled claims before the International Court of Justice (4.2.3.2). Having realised that the UN would never appoint an international criminal tribunal to investigate the crimes committed on its territory, the DRC's government submitted to the national parliament a bill creating specialized chambers within the Congolese jurisdiction in order to investigate the aforementioned crimes (4.2.3.3). This subsection reviews all the above steps.

#### **4.2.3.1. Seeking the establishment of criminal proceedings by the UN**

One should note that the different Congolese peace talks referred (implicitly or explicitly) to the criminal prosecutions against the alleged authors of international crimes.

The Lusaka ceasefire agreement insisted on the necessity of a mechanism for disarming militias and armed groups, including the genocidal forces. In this context, all Parties undertook to the process of locating, identifying, disarming, and assembling all members of armed groups in the DRC. Countries of origin of members of the armed groups, committed themselves to taking all the necessary measures to facilitate their repatriation. The agreement mentioned that such measures may include the granting of amnesty in countries where such a measure would have been deemed beneficial. It clearly mentioned that the amnesty could not apply in the case of suspects of the crime of genocide.

Pursuant to the Lusaka ceasefire agreement, the Republic of South Africa hosted, under the UN/AU auspices, the Inter-Congolese Dialogue (ICD) focused on political negotiations on the peace process and on transition in the DRC. This dialogue ended in a Global and Inclusive Agreement in the DRC which (*inter alia*) provided for the necessity of an amnesty law for acts of war, political offences and offences related to the opinion. This resolution excluded

war crimes, genocide and crimes against humanity from the scope of the amnesty law to be promulgated.<sup>44</sup>

This left the option for criminal prosecution of the international crimes. In September 2003, the President of the DRC<sup>45</sup> addressed the general Assembly of the UN and recalled the necessity of creating an International Criminal Tribunal for the DRC.<sup>46</sup>

The idea of the DRC lacking the legal means to prosecute international crimes committed before the entry into force of the ICC is irrelevant. Even though the code of military justice in force over that period did not mention any penalty for international crimes, the DRC is still able to prosecute those crimes.<sup>47</sup> The DRC penal legislation provides that the offences to which the legislation did not attach any penalty will expose their authors to two months imprisonment.<sup>48</sup> One might question the insignificance of such a penalty compared to the gravity of international crimes. However, the Congolese jurisdictions still have the latitude of prosecuting alleged perpetrators of international crimes and (if found guilty) sentence them to heavier penalty. This can be justified by article 15 of the ICCPR.<sup>49</sup> The alleged perpetrators

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<sup>44</sup>See the Global and Inclusive Agreement on the transition in the DRC, signed in Pretoria on 16 December 2002, Para III, 8.

<sup>45</sup>General Major Joseph Kabila.

<sup>46</sup>See JY Katshung 'Prosecution of Grave Violations of Human Rights in Light of Challenges of National Courts and the International Criminal Court: The Congolese Dilemma' (2006)*Human Rights Review*16.

<sup>47</sup>It is appropriate to recall at this stage the Principle II of Nuremberg adopted by the UN and reading as follow: *'The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law'*.

<sup>48</sup>See Décret du 6 août 1922 sur les Infractions à l'égard desquelles la loi ne détermine pas de peines particulières, art 1. My own translation: Decree of 6 August 1922 about offences for which the law does not determine particular sanction, art 1.

<sup>49</sup>Reading as follow:

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*

2. *Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

were aware of the criminal character of their conduct and of the sentence they are exposed to upon the Nuremberg trial whose outcomes have been adopted by the United Nations and therefore constitute principles of law recognised by the community of nations.

Therefore, it appears that the DRC lacked the willingness rather than legal means to prosecute alleged perpetrators of the international crimes under examination.

#### **4.2.3.2. Claims before the International Court of Justice**

The DRC filed in the registry of the ICJ a claim concerning the armed activities of the Republic of Uganda on its territory.<sup>50</sup> On 23 June 1999, the DRC filed in cases for same reasons<sup>51</sup> against the Republics of Rwanda<sup>52</sup> and Burundi.<sup>53</sup>

The Republics of Rwanda and Burundi challenged the jurisdiction of the ICJ over the matter. While the ICJ was awaiting its counter memorial, the DRC notified the court of its intention to discontinue the proceedings and its reservation of the right of filing another claim on the basis of new grounds. The ICJ accepted the DRC's demand and removed the cases from its list.<sup>54</sup>

As for Uganda, the ICJ unanimously found that it is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused by its armed activities on the territory of the latter. The ICJ ruled that failing agreement between the Parties, the question of reparation due to the Democratic Republic of the Congo shall be settled by the Court.<sup>55</sup>

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<sup>50</sup>See n 26 above.

<sup>51</sup>The claim was based on the armed activities of their militaries on the territory of the DRC.

<sup>52</sup>See case *The Democratic Republic of the Congo v. Rwanda* (21 October 1999) (1999) ICJ Reports 1025.

<sup>53</sup>See case *The Democratic Republic of the Congo v. Burundi* (19 October 2000) (2000) ICJ Reports 176.

<sup>54</sup>See case *The Democratic Republic of the Congo v. Burundi* (30 January 2001) (2001) ICJ Reports 3.

<sup>55</sup>See case *The Democratic Republic of the Congo v. Uganda* (n 26 above) 230.

#### 4.2.3.3. Bill on mixed chambers within the Congolese jurisdictions

The government of the DRC recently sent to the national parliament a bill related to the implementation of specialised chambers for the prosecution of international crimes committed on the territory of the DRC from 1993 to 2003.<sup>56</sup>

The preamble of the proposition explains that the government has taken this option as a palliative to the silence of the United Nations to its quest for an International Criminal Tribunal. The government fully understands the UN reticence with the creation of new *ad hoc* tribunals given the disappointments caused by the ICTY and the ICTR.<sup>57</sup>

The main innovations of the bill under examination are:

1. The exclusive competence of the chambers over international crimes<sup>58</sup> including Genocide, Crimes against Humanity and War Crimes as defined by the Rome Statute of the ICC and other international instruments;<sup>59</sup>
2. The admission of foreign professionals (including magistrates and registrars) in order to enhance local capacities;<sup>60</sup>
3. The creation of an appeal chamber for each Court;<sup>61</sup>
4. The proximity of the jurisdiction with location of the commission of the crimes;<sup>62</sup>
5. The increase of the number of the judges from 3 to 5.<sup>63</sup>
6. The recognition of the criminal liability of the legal persons, with the exception of the state.<sup>64</sup>
7. The irrelevance of the official capacity.<sup>65</sup>

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<sup>56</sup> See the Bill related to the specialised chambers for the repression of grave violation of international humanitarian law.

<sup>57</sup> See the Bill related to the specialised chambers for the repression of grave violation of international humanitarian law, 2.

<sup>58</sup> The chambers will only deal with the crimes committed in the DRC between 1990 and 2003. See *Id* art 19.

<sup>59</sup> *Id* articles 1, 2 and 15.

<sup>60</sup> *Id* articles 3, 4, 5 and 8.

<sup>61</sup> *Id* art 55.

<sup>62</sup> *Id* articles 1 and 2.

<sup>63</sup> *Id* 5.

<sup>64</sup> *Id* art 24.

8. The denial of amnesty, statute of limitation and pardon for international crimes.<sup>66</sup>

This choice is irrelevant for three reasons:

The first reason is the inconsistency with the DRC's stated policy. In his speech held at the occasion of the release of the Mapping Exercise report, the Congolese Justice Minister criticised the choice of 1993 as starting point for the investigations. He said that the Mapping exercise should have started either with 1991<sup>67</sup> or with 1881 as suggested by the SADC.<sup>68</sup> One may ask why after these criticism on the starting point, the Justice Minister prepared a bill starting with 1990 instead of '1881' as he suggested in his reaction to the MER.

The second reason is the inconsistency with the Rome Statute duly ratified by the DRC. The DRC's government is reproducing, in its bill under examination, the Mapping exercise's mistake. It is suggesting the delimitation of the temporal jurisdictions of the proposed specialised chamber to 2003 whereas the ICC have jurisdiction over the crimes committed since 1 July 2002.<sup>69</sup>

The third and main reason is the existence in the Congolese legislation (and in the principle of law recognised by the community of nations) of legal means to prosecute alleged perpetrators of international crimes committed before the entry into force of the ICC.

The Congolese parliament rejected the bill under examination.

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<sup>65</sup>Id art 27.

<sup>66</sup>Id art 28.

<sup>67</sup>He was referring to the pillaging orchestrated by the military in protestation against its bad treatment by the Mobutu regime.

<sup>68</sup>See DRC/Ministry of Justice and Human Rights, Press release of 2 October 2010, 4.

<sup>69</sup>See ICC art 11 (Jurisdiction *ratione temporis*)

### 4.3. Transitional justice mechanisms

Following the recommendations of the Inter-Congolese Dialogue, the DRC established a TRC<sup>70</sup> (4.3.1) and passed an amnesty law<sup>71</sup> (4.3.2). This section reviews these two transitional justice mechanisms and underlines the lack of reparation policy (at the domestic level) for the crimes committed before the entry into force of the ICC (4.3.3).

#### 4.3.1. The Truth and Reconciliation Commission (TRC)

The Congolese Constitution of the Transition enacted in 2003 established a TRC.<sup>72</sup> In 2004, a law organised the TRC<sup>73</sup> and delineated it terms of reference including truth-seeking and reconciliation.

The TRC's first mission was the establishment of the truth<sup>74</sup> about crimes and human rights violations committed from independence (1960) to the end of the transitional government (2006) and to identify victims and perpetrators, individually and collectively.<sup>75</sup> In that regard, the TRC was aimed at re-establishing the truth, at promoting peace, justice, reparation, forgiveness and reconciliation, in order to consolidate the national unity. Its second mission was the prevention and the management of conflicts during the transition. To fulfil this mission, it was allowed to use mediation.<sup>76</sup>

The TRC was also tasked with the reestablishment of the national unity on the basis of acknowledging the facts, asking and receiving pardon, and providing reparation and rehabilitation for victims.<sup>77</sup> The TRC comprised 21 members including the 8 forming its staff. The staff members came from the

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<sup>70</sup>(Truth and Reconciliation Commission) see Global and all inclusive dialogue signed in Pretoria on 16 December 2002 para V 4(a).

<sup>71</sup>Id para III 8.

<sup>72</sup>See DRC Constitution of the Transition art154.

<sup>73</sup>See Law No 04/018 of 30 July 2004 related to the organisation, competence and functioning of the truth and Reconciliation Commission.

<sup>74</sup>Id art 4 para 1.

<sup>75</sup>Id articles 6 and 7.

<sup>76</sup>Id art 5.

<sup>77</sup>Id art 7 para 1.

main camps that participated in the Inter-Congolese Dialogue.<sup>78</sup> They were designated in respect of the principle of power sharing agreed during the negotiations<sup>79</sup> and enacted in the constitution of the transition<sup>80</sup>. The other members came from religious confessions, educational and research associations, women associations and from other sectors pertaining to the TRC's mandate.<sup>81</sup>

The TRC ended in June 2006.<sup>82</sup> It did not investigate a single case in relation with the truth seeking. The TRC paid more attention to the reconciliation. It conducted several mission of mediation in the Kivu province.<sup>83</sup>

The TRC failed to achieve its mandate in terms of truth seeking. This was due to its controversial composition<sup>84</sup> and to the unrealism of its mission in terms of Truth seeking. The unrealism of the truth seeking mandate appears with the obligation to investigate political, socioeconomic and other events that had disturbed the peace in the DRC from 1960 to 2006.<sup>85</sup> The TRC should have been tasked with the investigation of the period from 1992 to 2006 given the fact that the National Sovereign Conference had already documented the causes of conflicts from 1960 to 1992. The future TRC, if implemented, should have a precise and concise mandate.<sup>86</sup>

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<sup>78</sup>The participants to the ICD came from five camps including the Government, the MLC, the RCD, the non-armed opposition and the civil society.

<sup>79</sup>See Global and all inclusive dialogue signed in Pretoria on 16 December 2002, para III, 6. In essence, this paragraph provided that the principles of inclusiveness and equitable sharing (between the various elements and entities involved in the Inter-Congolese Dialogue) should drive the division of responsibilities within transitional institutions and at different State levels.

<sup>80</sup>See DRC Constitution of the Transition art 157.

<sup>81</sup>See Law No 04/018 of 30 July 2004 art 9.

<sup>82</sup>The transition ended 30 June 2006.

<sup>83</sup>See MER para 1063.

<sup>84</sup>We recall that based on the principle of inclusiveness, the TRC comprised the representatives of all warring parties. See also MER para 1064.

<sup>85</sup>See article 8 of the TRC law. See also ICTJ, *Confronting Past Crimes at the National Level*, working paper focused on central African region 2009 2.

<sup>86</sup>This mandate could be focused on the period ranging between 1998 and 2002. This period represent the duration of the conflict consecutive to the AFDL's collapse.

#### 4.3.2. The amnesty law

The President of the DRC signed a “*Decret-loi*” entailing the amnesty, on a provisional basis (awaiting the adoption of an amnesty law by the parliament and its promulgation) of all the acts of war, political offences and offences related to opinion committed between 2 August 1998 and 4 April 2003. The international crimes were explicitly excluded from the scope of the “*Decret-loi*” under examination.<sup>87</sup>

#### 4.3.3. Lack of reparation Policy

One may infer from the review of the responses from the DRC that the Congolese government has not so far considered seriously the question of reparation for victims. It refers in its bill related to the specialised chambers to leave the question of reparation to a reparation fund modelled after the ICC’s fund for victims.

Such a choice amounts to evil imitation. In the past, several structures of the DRC’s law have been imported from elsewhere and have revealed to be unproductive in the DRC since the contexts in which they were implemented in their original location is generally different from the Congolese context.<sup>88</sup>

The international crimes under examination have forced around three million people to flee from their homes (in most of the cases they have lost their belongings) and they have caused millions of death as well as wounded persons. So far, the displaced persons, the wounded and the family members of the deceased persons have not been recompensed for the wrongness suffered. For some events viewed, reparation has been ordered<sup>89</sup> but is still not enforced. One may mention that the DRC has preferred to focus on regional stability rather than on reparation for victims. It is appropriate (as

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<sup>87</sup>See *Décret-loi numéro 003/001 du 15 avril 2003 portant amnistie pour faits de guerre, infractions politiques et d’opinion*.

<sup>88</sup>This the example of the TRC imitated from the South African TRC.

<sup>89</sup>The UN ordered to the governments of Rwanda and Uganda to make reparation to the DRC for the damages resulting from their armed activities in Kisangani. The ICJ also ordered Uganda to make reparation for the same reasons.

mentioned in the previous chapter), to consider the possibility for the United Nations to appoint a Compensation Commission mirroring the UN Compensation Commission for the victims of the Kuwait's invasion by Iraq. The DRC's responsibility can be justified by its failure to comply with the responsibility to protect and its unwillingness to settle the question of reparation ordered by the UN<sup>90</sup> and the ICJ.

## **Conclusion to part 1**

This part has overviewed international crimes committed before the entry into force of the ICC (chapter 2). It has critically reviewed the responses from the UN (chapter 3) and states (chapter 4).

It has commended the UN's efforts in connection with finding and gathering of evidence through the Mapping Exercise. It has highlighted the UN's failure to investigate allegations of international crimes in Katanga and eastern DRC (in the aftermath of the Rwandan genocide).

It argues that although possible, criminal prosecutions for crimes committed before 1 July 2002 are no longer opportune because the restoration of peace occurred through peaceful means. It stands for a focus on the reparation issue. It suggests the implication of the UN in reparation for victims of international crimes committed before the entry into force of the ICC. To this end, it suggests the implementation of a United Nations Compensation Commission. Such a commission will mirror the UNCC created for compensation in connection with Iraq's invasion of Kuwait. Such a commission will receive its funds from the sale of Congolese natural resources and frozen assets belonging to individuals and corporates involved in the DRC's conflict.

This part argues that victims of the ethnic cleansing (in 1992) Katanga and

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<sup>90</sup>See S/RES/1304 (2000) para 13.

nationals of Rwanda and Burundi should benefit from reparation states of the Great Lakes Region are not ready to acknowledge their responsibility in the unending mass atrocity occurring in the DRC. There is no much to expect from them in terms of reparation for victims.

Furthermore, it has demonstrated that the DRC was unwilling, rather than unable, to prosecute international crimes under examination.

## **Part 2: Critical appraisal of legal responses to international crimes committed in the DRC after the entry into force of the ICC Statute**

This part will review the background to international crimes committed in the DRC after the entry into force of the ICC (chapter 5). It will then appraise responses from the DRC (chapter 6), the ICC (chapter 7) and the United Nations (chapter 8). It will end with a short conclusion.

### **Chapter 5: Background to International Crimes Committed in the DRC after 1 July 2002**

#### **5.1 International crimes committed in Bas-Congo**

#### **5.2 International crimes committed in Equateur**

#### **5.3 International crimes committed in Katanga**

#### **5.4 International crimes committed in North Kivu and South Kivu**

#### **5.5 International crimes committed in the Orientale Province**

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The international community's efforts to set a permanent international criminal court resulted in the adoption of the statute of the ICC (ICC) in Rome, July 1998. The ICC entered into force on 1 July 2002. The impunity of alleged perpetrators of mass atrocity committed in the DRC so far seems to have prompted further atrocity. This chapter provides a background of international crimes committed in the DRC after the entry into force of the ICC. To this end it overviews the international crimes committed in the provinces of Bas-Congo (5.1), Equateur (5.2), Katanga (5.3), North Kivu and South Kivu (5.4) and in the Orientale Province (5.5). It does not present the detailed account of the events in which crimes have been committed. It focuses on the major ones.

### 5.1. Bas-Congo

In 2006, the DRC organised democratic elections.<sup>1</sup> Thirty two candidates participated into the first round of the presidential elections. The sitting president (Joseph KABILA) arrived in the first position of the first round. Since he did not reach the prescribed majority, the two candidates bearing the best scores had to compete in a second round.

Joseph Kabila concluded an electoral alliance with the PALU (*Parti Lumumbiste Unifié*)<sup>2</sup> and the UDEMO (*Union des Démocrates Mobutistes*).<sup>3</sup> This alliance aimed at maximising Joseph KABILA's chances in the western DRC whereby he appeared to be unpopular. The choice of his allies was very appropriate given their popularity in the western DRC at that time. Jean-Pierre BEMBA GOMBO concluded an alliance with most of the other losers of the first turn of presidential elections. The alliance was called *Union pour la Nation (UN)*.<sup>4</sup> This alliance appeared to have a poor impact given the weak scores of the allies at the first turn of presidential elections.<sup>5</sup>

Joseph Kabila won the second round of the presidential elections. Early in 2007, the country organised provincial elections to elect members of provincial assemblies. These regional deputies had to elect the members of the Senate<sup>6</sup> and the governors of different provinces. The AMP-UDEMO-PALU won the elections in the eastern DRC whereas the UN won them in the western DRC.

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<sup>1</sup>These elections constituted a major event in the Country given the fact that the last ones were organized 41 years before, under Joseph Kasa-Vubu's Presidency (he was the first president of the DRC). Mobutu came to power in November 1965. He organized elections out of which he was always elected by hundred percent of votes. He was always the only one candidate as his services could let none challenge him.

<sup>2</sup>This can be translated by Unified Lumumbist Party. It was led by Antoine Gizenga Fundji. He was a former ally of Patrice Lumumba in the 1960s. He originates from the province of Bandundu in the western DRC. He was the third after the first round of presidential elections and 80 years old.

<sup>3</sup>This can be translated by Democrats Mobutist Union. It was led by *Francois Joseph Mobutu Nzanga Ngbabawe* a son of the late President *Joseph Desire Mobutu Sese Seko Kuku Ngbendu Wa Zabanga*. He originates from the province of Equateur as Jean Pierre Bemba Gombo of whom he married the young sister.

<sup>4</sup>This can be translated by Union for the Nation.

<sup>5</sup>Most of the UN allies earned less than one per cent of the suffrages at the first round of the presidential elections.

<sup>6</sup>The Congolese parliament has two chambers including the Senate and the National Assembly.

The UN won majorities of seats at the provincial assembly. It aligned a ticket formed by Leonard Fuka Unzola (from MLC) and Ne Mwanda Nsemi (the BUNDU DIA KONGO's <sup>7</sup> leader) respectively as candidate for the governorship and the vice-governorship of the Bas Congo province. The AMP-PALU-UDEMO supported the ticket of Mbatshi Mbatsha and Deo Gratias Nkusu respectively as candidate for the governorship and the vice-governorship of the Bas Congo province.

Despite its majority of seats at the provincial assembly, the UN lost the gubernatorial elections for the province by 14 votes to 15 (for the AMP-PALU-UDEMO). Ne Mwanda Nsemi then called the inhabitants of the Bas-Congo province to protest the corruption<sup>8</sup> through a "*journée morte*"<sup>9</sup> on 1 February 2007.<sup>10</sup> Meanwhile he challenged the results proclaimed by the electoral commission.

The Bas Congo Court of Appeal issued a verdict in favor of the Fuka Unzola and Ne Mwanda Nsemi. It ruled that the gubernatorial elections had been marked by serious irregularities and that the proclaimed winners did not obtain a clear majority. It prescribed a new election. Mbatshi Mbatsha and Deo gratias Nkusu appealed the decision before the Supreme Court of the

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<sup>7</sup>The *Bundu dia Kongo* (in Kikongo the local language of the Bas-Congo province) means The Church or Assembly of the Kongo). It is a religious movement founded in 1986 by Zachary Badiengeli a bachelor of chemistry who turned spiritual leader and renamed himself *Ne Muanda Nsemi*. The BDK advocates a return to African authenticity and bases its teachings on visions revealed to Ne Mwanda Nsemi by the spirits of his ancestors. The latter writes extensively and has published a periodical booklet since 1986 in both French and Kikongo on the religion, culture, history, and politics of the Bakongo people. See Human Rights Watch (HRW) 'We Will Crush You', the Restriction of Political Space in the Democratic Republic of Congo', November 2008, 68. Available at <http://www.hrw.org/reports/2008/11/25/we-will-crush-you-0> (accessed on 9 October 2011).

<sup>8</sup>International Crisis Group reported that the bribes ranged between 1000 and 10.000 usd. Some unsuccessful candidates publicly demanded their money back. See International Crisis Group, 'Congo: Consolidating the Peace,' Report No. 128, July 5, 2007, 10.

<sup>9</sup>This can be literally translated as dead day and stands for general strike. This appellation originates from the 1990s when the opposition to President Mobutu used to call for protest in paralyzing all the activities to demonstrate its forces. In Kinshasa, the calls were often followed and none used to go to work on *journees ville morte* (literally dead town days).

<sup>10</sup>See Human Rights Watch (HRW) 'We Will Crush You', the Restriction of Political Space in the Democratic Republic of Congo', November 2008, 70.

DRC which overturned the decision from the Court of Appeal and confirmed the results proclaimed by the electoral independent commission.<sup>11</sup>

A turning point was 31 January 2007 when the BDK clashed 50 police officers in Matadi when they came to search Nsemi's house. They claimed that the house contained arms and ammunitions. The police shot and stabbed to death 15 BDK adherents and injured 18 others. BDK supporters stoned one police officer to death and injured another. No weapons were found at Nsemi's house. During the events, the BDK reportedly killed nine police officers and two civilians by beating them to death whereas the police and soldiers reportedly killed 104 BDK.<sup>12</sup>

It is reported that state agents did their best to destroy the evidence of the atrocities. For instance, they are said to have dumped some bodies in the Congo River, buried secretly other in mass graves, or otherwise disposed of. Soldiers and policemen were reportedly tasked with the guard of morgues and burial sites and the blocking of the UN officials, human rights monitors and family members of the dead or missing from approaching these areas. Hospitals are said to have been instructed not to provide information on the numbers of persons killed or injured.<sup>13</sup>

## **5.2. Equateur**

In the equatorial province the members of the Congolese army committed international crimes during two major occasions including the Songo-Mboyo<sup>14</sup> events (5.2.1) and the Bokala mutiny (5.2.2).

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<sup>11</sup>Id 72.

<sup>12</sup>Id 71.

<sup>13</sup>Id 78.

<sup>14</sup>Songo Mboyo is a village in the territory of Bongandanga, in the district of Mongala, in the province of Equateur.

### 5.2.1. The Songo-Mboyo events<sup>15</sup>

During the rebellion, the MLC set its defensive (formed by the ninth battalion of the ANC) head quarter in Songo-Mboyo. The population of that village reportedly suffered from that presence. Following the Pretoria peace agreement, the military hierarchy decided to send all the military in mixing centres. Soldiers located in Songo-Mboyo were requested to go to Basankusu in order to get ready for the mixing process in Mbandaka.<sup>16</sup> They were also informed (to their great satisfaction) of the increase of their salary up to five times the one they were receiving during the rebellion. However, the military command in Songo-Mboyo did not agree on the modality of paying the salaries. Meanwhile, captain Ramazani<sup>17</sup> was requested to go to Basankusu in order to collect the money destined to the salary of the soldiers. When he came back, he took up to five days before starting paying the soldiers. When he started paying them, he submitted them to a regime of instalment consistent of half the salary in Songo-Mboyo and the other half in Basankusu. He pretended to avoid the escape of soldiers after receiving their salary.

At nine in the evening, after prayer at the '*Assemblée des Saints*' church, the soldiers started claiming their money from captain Ramazani. The later ordered his body guards to make dissuasive shots in the air in order to disperse the protesters. Instead of being intimidated, the protesters disarmed his body guards. Following orders from Lieutenant Vonga wa Vonga, they started committing acts of violence including rape of women and pillaging. They raped 31 women and pillaged several private belongings. One woman remembered to have been raped by 15 men. Eugenie Bonyole, wife of captain Ramazani, died after being raped.<sup>18</sup>

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<sup>15</sup>See *TMG of Mbandaka, Affaire Songo Mboyo, jugement du 12 avril 2006, RP 084/05*, 8-10.

<sup>16</sup>Mbandaka is the capital city of the equatorial province in the DRC.

<sup>17</sup>He was in charge of social settlements of the battalion.

<sup>18</sup>See *TMG of Mbandaka, Affaire Songo Mboyo, jugement du 12 avril 2006, RP 084/05*, 10.

### 5.2.2. The Bokala munity

On 3 and 4 July 2005 a mutiny took place at Bokala.<sup>19</sup> It is reported that mutineers committed acts of murder and rape as well as other inhumane treatments over civilian population. A total of six people had been killed, 12 injured and 46 were victims of rape.<sup>20</sup> Lastly, it is reported that over the night of 19-20 February 2006 members of army and police committed violence on civilian including acts of rape, torture and cruel, inhumane and degrading treatment, and that 120 households had been looted and looting.<sup>21</sup>

### 5.3. Katanga

In the Katanga province, acts amounting to international crimes were committed at three occasions including the Gedeon Kyungu's rebellion (5.3.1), the Ankoro incident (5.3.2) and the Kilwa incident (5.3.3).

#### 5.3.1. The Gedeon Kyungu's rebellion

The Mai-Mai in Katanga originates from Laurent desire Kabila's efforts to prevent the Rwandan army from reaching his Kamina military base and the provincial capital, Lubumbashi, and so isolate him from his home region and important mineral resources. He set up armed groups, including the Popular Self-Defence Forces (FAP), the *Moyo wa Chuma*<sup>22</sup> and the Mai-Mai.<sup>23</sup>

Gedeon Kyungu Mutanga joined the *Mai-Mai* and followed the 'Kizaba' initiation ritual<sup>24</sup> and was tasked with the command of one of the six FAP battalions (in the Northern Katanga) under the command of MAKABE. The FAP combatted along with the national army.

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<sup>19</sup>A locality situated 6 kilometres from Mbandaka, the capital city of the Equateur Province.

<sup>20</sup>See MER para 864.

<sup>21</sup>Id, para 865.

<sup>22</sup>This Swahili name can be translated by Hearts of Steel.

<sup>23</sup>See International Crisis Group, Africa Report N°103 9 January 2006, Katanga: the Congo's forgotten crisis, 2.

<sup>24</sup>The ritual is consistent with a bath into magical water that is said to confer invulnerability over bullets and other ammunitions. This ritual is common to all *Mai-Mai* militias. *Mai* means water in most of the Congolese languages. According to their tradition, when one takes a magical bath, they become invulnerable to bullet and ammunition just by screaming repeatedly '*Mai-Mai*' (literally Water-Water).

But the complexity of the conflict and the international mediation prompted the government to accept a peaceful settlement of the conflict. The government dissolved the parallel armed groups above cited. In February 2003, MAKABE conveyed all his militiamen and asked them to lay the guns down. He took away all the magical power received from him. Gedeon followed Makabe's call and gave back 12 guns received from him.<sup>25</sup>

Later on he started his own militia called '*Force d'intervention populaire Tabernacle de Jeovah- force de Dieu*'.<sup>26</sup> He launched a campaign of abduction and seriously punished those who refused to follow the '*Kizaba*' ritual.<sup>27</sup> This militia was definitely the cruellest in the DRC. It committed unthinkable atrocities in the Northern Katanga. For instance, after killing a member of the national army, they burned his body, took his widow as a sexual slave and forced her to cook the rest of her late husband and eat it with them.<sup>28</sup> At one occasion, they opened the stomach of a pregnant woman (who refused to submit her children to the magic ritual), extracted two fetuses and presented them to their commander Gedeon so that he could eat them and reinforce his magical powers.<sup>29</sup>

In 2003, they killed several members of the National army and attacked military barracks in northern Katanga in order to seize arms and ammunitions.<sup>30</sup>

In 2004, they tortured and killed several civilian and traditional chiefs that they accused of supporting the members of the national army. They went as far as to cut off their private parts and their hearts before burning them.<sup>31</sup>

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<sup>25</sup>See TMG du Haut Katanga, affaire Gedeon Kyunguet consorts, jugement du 5 mars 2009, RP 01347/07 and RP 0182/09,43.

<sup>26</sup>The literal translation for this is 'Force of Popular Intervention JEHOVAH'S TABERNACLE-God's force'.

<sup>27</sup>See TMG du Haut Katanga, affaire Gedeon Kyunguet consorts, jugement du 5 mars 2009, RP 01347/07 and RP 0182/09,43.

<sup>28</sup>Id 7-8.

<sup>29</sup>Id 8, 12 and 46.

<sup>30</sup>Id 44.

They burned several villages, enlisted children and used them to take part in the hostilities. They used the women as sexual slaves, attacked several localities where they killed inhabitants after looting their belongings.<sup>32</sup>

In 2006, for example, they committed atrocities against those who were found in possession of an electoral card.<sup>33</sup> The acts just summarised amount to international crimes including war crimes and crimes against humanity.<sup>34</sup>

### 5.3.2. The Ankoro incident<sup>35</sup>

As explain previously, the endorsement of the Sun City peace agreement by the Congolese government and the lack of an appropriate policy towards *Mai-Mai* militia undermined peace in the North of Katanga. The relationship between the members of FAC and former FAP rapidly deteriorated.

On Saturday 9 November 2002, the members of the FAC arrested and tortured a *Mai-Mai* militiaman who was accompanying his two wives to their farm. In retaliation, the *Mai-Mai* militiamen captured and tortured a member of the FAC the following day. The latter action prompted the commander of the 93<sup>rd</sup> battalion of the FAC to order mass atrocity in Ankoro. They started looting, burning homes and shooting randomly. They burned around 1200 homes, Killed more than 100 persons, destroyed and pillaged the public local hospital, looted the warehouse were the World Food Program stored the aid to victims of war. These acts lasted for eight days and forced more than 75000 persons to flee from their homes.<sup>36</sup>

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<sup>31</sup>Id 46.

<sup>32</sup>Id 45.

<sup>33</sup>Id 12.

<sup>34</sup>Id 12-29.

<sup>35</sup>This locality is politically important in the sense that it is the home village of former President Laurent-Desire Kabila and therefore of the current president, Joseph Kabila. The former is the son of the later.

<sup>36</sup>See Report of the United Nations High Commissioner for Human Rights to the Security Council on the situation of human rights in the Democratic Republic of the Congo (S/2003/216) para 16.

### 5.3.3. The Kilwa<sup>37</sup> incident

On 14 October 2004 a group of 6 or 7 people led by Alain Kazadi Makalayi<sup>38</sup> attacked and briefly occupied Kilwa. The insurgent almost faced no resistance as the military forces based in Kilwa were redeployed i just few days before the attack. They managed to convince some policemen and officers of the army to join their ranks.<sup>39</sup> They claimed to have the support of the local commander of the FARDC (Colonel Ademar Ilunga) and of the President of the Republic. The local commander moved heavy weapons and his family out of Kilwa few days before the attacks. The insurgent addressed the population and promised to liberate the other localities of the province from the reign of Joseph Kabila and Katumba Mwanke<sup>40</sup> that they accused of being only interested in making money from mining contracts instead of promoting agriculture and fishing in the Katanga province.<sup>41</sup>

The insurgent forcibly recruited civilians to whom they gave arms. The latter started shooting in the air causing the population to flee from Kilwa.<sup>42</sup> They entered the installations of Anvil Mining<sup>43</sup> and sought logistic support.<sup>44</sup> The day following the insurrection, the 62<sup>nd</sup> brigade of Pweto under the command of Colonel Ademar Ilunga launched a counteroffensive. It bombed the town, causing the destruction of around six houses.<sup>45</sup> They arrested Alain Kazadi.<sup>46</sup>

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<sup>37</sup>Kilwa is a mining town of 48,000 inhabitants situated on the border with Zambia on Lake Moero (territory of Pweto, district of Upper Katanga, Province of Katanga) located 350 kills north of Lubumbashi the capital city of the Katanga province. See MONUC, Report on the conclusions of the Special Investigation into allegations of summary executions and other violations of human rights committed by the FARDC in Kilwa(Province of Katanga) on 15 October 2004 para 1.

<sup>38</sup>A fisherman of around twenty years of age, native of Pweto, he claimed to be the General-in-chief of the Revolutionary Movement for the Liberation of Katanga (MRLK). See Id, para 10.

<sup>39</sup>Id para 11.

<sup>40</sup>The late Katumba Mwanke was one of the keys counsellors of President Joseph Kabila. He is a deputy and had previously served as Governor of Katanga, Minister attached to the Presidency of the DRC

<sup>41</sup>Id para 13.

<sup>42</sup>Id para 14.

<sup>43</sup>Anvil mining is a Canadian company operating in the mining sector; it has a branch in Kilwa.

<sup>44</sup>Id para 15.

<sup>45</sup>Id para 17.

<sup>46</sup>Leader of the insurgents, he stated that he had been betrayed by Colonel Ademar Ilunga. He died in detention.

The FARDC reportedly caused several deaths. They summarily killed more than 100 civilians that they suspected to be linked to the insurgents. Before entering Kilwa, soldiers received the order to shoot whatever would be moving since all civilians had supposedly fled.<sup>47</sup> They also arbitrarily detained several people<sup>48</sup> and looted civilian belongings.<sup>49</sup>

The Anvil Mining Company also faced accusation of violation of human rights. The company is accused of having provided the FARDC with the logistical support to commit their abuses. The FARDC used the company's vehicles during the operations and its planes to transfer the so called 'rebels' to Lubumbashi.<sup>50</sup>

#### **5.4. North Kivu and South Kivu**

The mass atrocity in the Kivu provinces followed the waxes of contestation of the peace agreements concluded in South Africa. The provinces faced recurrent fights whereby international crimes were committed on a large scale. The three major events are the dissidence in the RCD (5.4.1), the CNDP offensive (5.4.2) and the joint military operations to dismantle the FDLR (5.4.3).

##### **5.4.1. The dissidence in the military ranks of the RCD Goma**

Two RCD's officers refused to join the unified national army in 2004 including General Laurent Nkunda based in Goma (North Kivu) and Colonel Jules Mutebutsi based in Bukavu (South Kivu). On 26 May 2004, they clashed in Bukavu with the pro-government forces of the newly created Tenth Military Region under the command of General Mbuza Mabe. One soldier from pro-government forces was killed in the fighting.<sup>51</sup>

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<sup>47</sup>Id para 4.

<sup>48</sup>Id para 30.

<sup>49</sup>Id para 33-35.

<sup>50</sup>Id para 36.

<sup>51</sup>See Human Rights Watch, D.R. Congo: War Crimes in Bukavu, briefing paper, June 2004, 1.

The pro-government forces started violence and killings of civilians in reprisal of the death of their colleague. Apparently the Banyamulenge were targeted given their ethnic link with the insurgent Colonel Mutebutsi. Then, the dissident Brigadier General Laurent Nkunda moved some one thousand of his forces south to support Colonel Mutebutsi in taking control of Bukavu on 2 June 2004 and claimed to protect his people from the Banyamulenge ethnic group.<sup>52</sup>

The insurgency reportedly received important support from Rwanda. The Congolese government denounced the attitude of the Rwandan government that helped the insurgent to take the control of Bukavu. Rwanda denied the accusation from the Congolese government, but MONUC documented its involvement in the region.<sup>53</sup>

Here again, all the belligerents committed international crimes. The pro-government forces reportedly killed several Banyamulenge between 26 and 28 May 2004 in Bukavu. They are said to have summarily executed civilian and Banyamulenge soldiers after having captured, undressed and beaten them publicly.<sup>54</sup> They also inflicted rape, looting and other inhumane treatment on members of Banyamulenge ethnic group. They targeted humanitarian workers. They shot one woman and raped another in their offices before stealing money and phones. The UNHCR evaluated to 3000 the number of Banyamulenge that fled to Rwanda to escape the violence and killings by pro-government forces.<sup>55</sup>

In retaliation of violence and killings inflicted by the pro-government forces, the insurgent forces under the command of Brigadier General Laurent Nkunda and Colonel Jules Mutebutsi killed, raped, looted and tortured people

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<sup>52</sup>Rwanda reportedly exaggerated the information in pretending that there was a genocide being planned against Banyamulenge. This misinformation was probably aimed at justifying the action of the insurgent officers that it was backing. See n 51 above 2.

<sup>53</sup>Id 6.

<sup>54</sup>Id 3.

<sup>55</sup>Id 4.

along their way from Goma to Bukavu. Women and girls were forced to seek refuge in local churches to hide from rapists. The insurgent forces raped several girls aged two and three years letting untouched the adults who were with them.<sup>56</sup> The insurgents repeated that until Banyamulenge will be accepted as Congolese Bukavu will never be quiet.<sup>57</sup>

#### 5.4.2. The Kiwanja<sup>58</sup> incident

According to the UN, the Kiwanja incident occurred in the context of generalized fighting in North Kivu between the Congolese Tutsi-led rebel group CNDP<sup>59</sup> and the Congolese National Armed Forces (FARDC - *Forces Armées de la République Démocratique du Congo*) supported by other forces such as different local defence militias called Mayi-Mayi and the Rwandan-Hutu militia FDLR.<sup>60</sup> The CNDP was occupying the third of the North Kivu province and took control of Kiwanja almost without resistance as of the end of October 2008. Early November 2008, the Mayi-Mayi militia took the control of Kiwanja. The CNDP launched a counteroffensive in order to regain control of Kiwanja.

The UNJHRO<sup>61</sup> and HRW<sup>62</sup> separate investigations over the incident led to the conclusion that all the belligerents committed international crimes. In essence, the CNDP reportedly committed the following abuses:

1. Summary executions: Once they regained the control of Kiwanja, CNDP combatants went house to house, searching for young men and

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<sup>56</sup>Id 5.

<sup>57</sup>Id 6.

<sup>58</sup>Kiwanja is a village localised in the vicinity of Goma.

<sup>59</sup>The CNDP (*Congrès National pour la Défense du Peuple* – National Congress for the Defence of the People) was, at the time of the incident, a Congolese politico-military movement led by General Laurent Nkunda and his military Chief of Staff was General Bosco Ntaganda. It claimed to protect the interests of the Congolese-Tutsi minority and other Rwandophones in the Kivus that it saw as threatened by the presence of FDLR militias in Congolese territory. See Human Right Watch, Killings in Kiwanja: The UN's Inability to Protect Civilians, December 2008, para 24.

<sup>60</sup>See UNJHRO, consolidated report on investigations conducted by the United Nations Joint Human Rights Office (UNJHRO) into grave human rights abuses committed in Kiwanja, North Kivu, in November 2008, para 19.

<sup>61</sup>Ibid.

<sup>62</sup>See Human Right Watch, Killings in Kiwanja: The UN's Inability to Protect Civilians, December 2008.

teenage boys whom they suspected of being Mai-Mai combatants. Human Right Watch conducted field interview that revealed the killings of approximately 150 people on November 4 and 5 in Kiwanja. HRW noted that most victims had bullet wounds to the head or wounds caused by machete, spear or club. HRW sees that such signs as evidence of summary execution.<sup>63</sup>

2. Sexual violence: CNDP militiamen have reportedly raped at least 16 women and girls in their homes, on their farms or on the roads in the weeks following their takeover of Kiwanja and Rutshuru.<sup>64</sup> Six of the victims of sexual violence were raped inside the camp for displaced people at the MONUC base in Kiwanja on 27 November 2008.<sup>65</sup>
3. Forced recruitment and abduction of adults and children: The CNDP is accused of having forcibly recruited dozens of young men and boys into military service. It is reported that other men and boys often accused of being Mai-Mai sympathizers, were abducted by the CNDP and have not been seen since.<sup>66</sup>
4. Destruction of camps and forced return: It is reported that before CNDP takeover of Kiwanja some 27,000 displaced people were registered in camps for the displaced people and in unofficial sites (such as schools, churches or mosques in and around Rutshuru and Kiwanja) and more than 25,000 other displaced people were living with host families. Many of these displaced people are said to have fled Kiwanja during the CNDP's advance.

CNDP officials reportedly said in a public meeting that they would not permit displaced people's camps in their territory, that all displaced people must

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<sup>63</sup>Id 8. See also UNJHRO, UNJHRO, consolidated report on investigations conducted by the United Nations Joint Human Rights Office (UNJHRO) into grave human rights abuses committed in Kiwanja, North Kivu, in November 2008 para 48-51.

<sup>64</sup>See Human Right Watch, Killings in Kiwanja: The UN's Inability to Protect Civilians, December 2008, 11. See also UNJHRO, UNJHRO, consolidated report on investigations conducted by the United Nations Joint Human Rights Office (UNJHRO) into grave human rights abuses committed in Kiwanja, North Kivu, in November 2008, para 52.

<sup>65</sup>See Human Right Watch, Killings in Kiwanja: The UN's Inability to Protect Civilians, December 2008, 12.

<sup>66</sup>Id 12.

return home, and that the camps would be destroyed. It is also reported that following that statement, CNDP combatants went directly to the Kasasa and Nyongera camps and instructed Kiwanja residents to dismantle them and to keep the spoils (plastic sheeting, wooden frames and any belongings left behind by the displaced people). Testimonies say that CNDP combatants either participated in the destruction or stood by and watched.<sup>67</sup>

As for Mai-Mai, they committed the following:

1. Summary executions, killings and abductions: during their short control of Kiwanja on November 4-5 when Mai-Mai combatants reportedly deliberately killed civilians, either because they suspected them of supporting the CNDP or because they wanted to rob them.<sup>68</sup>
2. Use of child soldiers: the Mai-Mai reportedly recruited child soldiers and actively used them into the hostilities.<sup>69</sup>

The members of the Congolese army, as in many other localities, looted civilians belonging during their withdrawal, fearing the advance of the enemy.<sup>70</sup>

#### **5.4.3. Military operations to dismantle FDLR**

The fighting between the Congolese army and the CNDP in the North Kivu province reportedly resulted in the killing of at least 415 civilians, and the wounding of over 250 civilians and in the forced displacement of approximately 250,000 people.<sup>71</sup> The UN Security Council ordered the belligerents to ceasefire.<sup>72</sup>

The UN Secretary General persuaded the leaders of Rwanda and DRC to negotiate as he was of the view that there could not be a military solution to

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<sup>67</sup>See n 64 above, 13-15. See also n 60 above, para 55.

<sup>68</sup>See n 64 above 18-19. See also n 60 above para 57 and 59.

<sup>69</sup>See n 64 above 20. See also n 60 above para 58.

<sup>70</sup>See n 64 above 21. See also n 60 above para 59.

<sup>71</sup>See n 64 above 5

<sup>72</sup>See statement by the President of the Security Council issued on 29 October 2008 (S/PRST/2008/40).

the crisis under examination.<sup>73</sup> Responding to the mediation initiative,<sup>74</sup> the governments of Rwanda and DRC agreed to join their force in order to dismantle the FDLR. The Congolese army participated in two joint operations including operation '*Umoja Wetu*'<sup>75</sup> conducted with Rwandan military forces, and the operation '*Kimia II*'<sup>76</sup> conducted with the direct support of United Nations peacekeeping troops. One should mention that the CNDP forces integrated the Congolese army.<sup>77</sup>

Mass atrocities have been perpetrated by the two sides to the conflicts including the Congolese army and the FDLR. The civilian population paid for its alleged support to the opposite camp: the FDLR punished the population for the Congolese army's choice to breach the alliance with them whereas the Congolese army punished civilians for their alleged support to the FDLR.<sup>78</sup>

According to Human Rights Watch more than 1,400 civilians have been killed between January and September 2009. It documented over 7,500 cases of sexual violence against women and girls over the first nine months of 2009. It reported that in addition to killings and rapes, thousands of civilians have been abducted and pressed into forced labour to carry weapons, ammunition, or other baggage by government forces and FDLR militia as they deploy from place to place. These forces killed civilians who refused. Other civilians died due the overload of the baggage. The military operations forced almost a million of civilians to flee from their homes.<sup>79</sup>

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<sup>73</sup>The reason for this approach was the fact that Rwanda claimed that the DRC was hosting the FDLR that seeks the destabilisation of the democratic institutions of Rwanda. On its part, DRC accused Rwanda to aid and abet the CNDP.

<sup>74</sup>See infra 8.2.5.

<sup>75</sup>This Swahili code stands for 'Our Unity'.

<sup>76</sup>This Swahili code stands for 'Quiet II'. A first operation '*Kimia*' took place sometimes ago.

<sup>77</sup>See Human Rights Watch, "You Will Be Punished" Attacks on Civilians in Eastern Congo, December 2009, 10.

<sup>78</sup>This reality on the ground has prompted Human Right Watch to entitle its report (cited above) 'You will be punished'.

<sup>79</sup>Id 10.

According to HRW, between January and September 2009, the FDLR deliberately killed at least 701 civilians in North and South Kivu. They killed them by different means including chopping to death by machete or hoe, shooting and burning to death in their homes.<sup>80</sup>

The Congolese army reportedly failed to protect the civilians. They even targeted civilians that they suspected of collaborating with FDLR. They did not give appropriate warning in order to allow civilians to flee in due time and avoid to be caught in the fighting. HRW reported that between January and September 2009, the joint forces of the Congolese and Rwandan armies deliberately killed at least 732 civilians, including 143 Rwandan Hutu refugees.<sup>81</sup> Between 16 and 18 March 2009, the soldiers of the 85<sup>th</sup> brigade of infantry committed odious acts in the territory of Walikale. They pillaged the population and committed sexual violence on a large scale. They forced the victims of pillage to carry for them their own belongings to the location where they were ordered to shift by the operational command. These items included goats, chickens, mattresses and money. The rapes committed on women were aggravated by the circumstances. Some women were raped in the rain, others in presence of their relatives and almost all women were raped by more than one soldier. The soldiers were allegedly looking for '*Kilemba*', a talisman allowing its bearer to disappear whenever he wants. The soldiers believed that having sex with a pygmy woman confers magical powers.

They did not only rape women. They also inflicted humiliating and degrading treatment to the population. For instance, they arrested the chief of Kissa village, undressed him in the presence of his children and introduced their fingers in his anus. One of them, Sadiki Muhindo (alias Saddam), who was speaking Kinyarwanda and presenting himself as an FDLR member, went to fetch the wife of the Kissa village from the river whereby she was bathing. He

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<sup>80</sup>Id 12. See also 51-70 for more details.

<sup>81</sup>See n 77 above 13-15.

brought her naked in front of the population, laid her down and inserted his fingers in her private parts.

## **5.5. Orientale Province**

The northern Orientale province faced a violent interethnic conflict in the district of Ituri. After the pacification of the latter district, the Congolese government sent its soldiers to maintain peace. Instead of ensuring the security of the civilians, they committed serious violation of their human rights. The northern Orientale province also faced the violence from the LRA. This point summarises the circumstances of these mass atrocities. It overviews the interethnic violence in the Ituri district (5.5.1) and the atrocity committed by the Lord's Resistance Army (5.5.2).

### **5.5.1. Interethnic violence in the Ituri district**

The district of Ituri is one of the richest in the Congo with deposits of gold, diamonds, oil and timber. It is also home to 18 different ethnic groups, with the Hema, Gegere,<sup>82</sup>Lendu and Ngiti communities representing about 40 per cent of the population.

According to historians, Lendu arrived in Ituri around 1600 whereas Hema came around 1800. The former are cultivators and the latter are farmers. The question of vital space has triggered their recurrent conflicts.<sup>83</sup>

The divorce between the Congolese government and its Ugandan and Rwandan former allies prompted several rebel movements in the eastern DRC. After their rupture with Kinshasa, Rwanda and Uganda did not make a long way together. They started suspecting each other. The former supported the RCD whereas the latter backed the MLC.

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<sup>82</sup>Gegere are people born from the union of a Hema and Lendu.

<sup>83</sup>See HRW, July 2003, Vol. 15, No. 11 (A), 17.

The recurrent clashes between the Lendu and Hema people prompted these ethnic groups to seek for military support from foreign countries. As they were literally dominated on the battle field by the Lendu, the Hema sought assistance from Uganda. But three years later, they felt misunderstood by Uganda and turned to Rwanda. This country provided them with a full military support including heavy ammunition and technical assistance.<sup>84</sup> Yet the Hema leaders became concerned with the fact that Rwanda was using Ituri as its rear basis against Uganda. The Hema formed the UPC under the political leadership of Thomas Lubanga Diyilo, who had a military wing (the FPC). Ugandan and Congolese government reportedly backed the Lendu/Ngiti. The latter received military support from RCD/ML (that was reportedly acting on behalf of the Congolese government) as well as from the Ugandan government itself.

The conflict in Ituri rapidly turned into a humanitarian catastrophe whereby reportedly more than 60,000 people were killed since 1999 and more than 500,000 were forced to leave their homes. The violence opposed the three main ethnic groups including Lendu, Ngiti<sup>85</sup> and Hema. Each ethnic group had its own militia including FRPI for Lendu,<sup>86</sup> FNI for Ngiti<sup>87</sup> and UPC for Hema.<sup>88</sup>

The FRPI and FNI joined forces to combat the UPC because they considered the Hema as their common enemy. All the militias forcibly recruited children and used them to take active part in the hostilities. They committed deliberate killings of unarmed civilians on a mass scale. They also carried out summary killings of captured combatants, torture and arbitrary arrests, rape and other

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<sup>84</sup>This is probably the explanation as to how Bosco Taganda who is believed to be a citizen of Rwanda found himself involved into the commission of international crimes in the Ituri district. See the ICC arrest warrant on him.

<sup>85</sup>The Ngiti are considered to be Lendu from the South.

<sup>86</sup>The FRPI was commanded by Germain Katanga "Simba" (The Lion).

<sup>87</sup>The FNI's political branch was under the leadership of Floribert Ndjabu whereas the military branch was commanded by Mathieur Ngudjolo "Chui" (The Leopard).

<sup>88</sup>The UPC was under the chairmanship of Thomas Lubanga; the military branch was commanded by Floribert Kisembo deputed by Bosco Tanganda who is believed to be a national of Rwanda and allegedly sent to FPC by the Rwandan government to provide military support to the Hema who are believed to have same roots with Tutsi.

direct assaults. The FRPI/FNI members committed sexual enslavement. The traditional ethnic conflicts have reportedly been exploited by Rwanda and Uganda in their attempt to control strategic sites, including gold mines and lucrative activities.

In 2004, the fourth integrated brigade of the national army was sent to Ituri with the mission of neutralising the militia and securing civilians during the elections. The former opposed militia including FRPI, UPC, PUSIC and FNI will enter into a coalition in order to counter the national army. On 12 October 2005, they attacked several positions of the national army in Ituri and committed several abuses on civilians. In their counter offensive, the soldiers of the national army also committed several atrocities on civilians.

For instance, Captain Blaise Bongi Masaba ordered the soldiers under his command to arrest several high school pupils, alleging that they were collaborating with the militiamen. He ordered the victims to carry the goods pillaged from civilians for him and his soldiers. They walked up until the Awi Mountain that Captain Blaise Bongi Masaba had renamed 'Golgotha Mountain'. Captain Masaba then ordered his soldiers to shoot them and bury them in a mass grave. These acts amount to war crimes.<sup>89</sup>

### **5.5.2. LRA's atrocities**

The Lord's Resistance Army (LRA), is an armed rebel group led by Joseph Kony. It has been fighting the Ugandan government since 1987. It started in northern Uganda and evolved to become a regional threat operating in the remote border areas between southern Sudan, the Democratic Republic of Congo and the Central African Republic (CAR).

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<sup>89</sup>See Tribunal Militaire de Garnison de l'Ituri; case RP 018/2006, 5 to 7.

It has been responsible for numerous atrocities, including massacres, summary executions, torture, rape, pillage and forced labour. It is also known for its massive abduction of children and their use in combat operations.<sup>90</sup>

When the LRA moved to the DRC, in 2006, it did not target the Congolese people. It only started violence on Congolese civilian in September 2008. Its first wave of attacks apparently aimed at punishing local communities who helped the defectors to escape.<sup>91</sup>

For instance, between December 14 and 17, 2009, the LRA carried out a horrific attack in Makombo, a remote area in the Haut-Uele district in Orientale province of the DRC. During this carefully planned operation, the LRA killed more than 321 civilians and abducted more than 250 others, including around 80 children. The majority of those killed were adult men. The LRA combatants first tied them up and then either hacked them up to death with machetes or crushed their skulls with axes or heavy wooden sticks. They killed the abductees who walked too slowly, refused or were unable to carry the heavy loads, or who tried to escape.<sup>92</sup> During their captivity, the abducted children were taught to kill. The LRA forces them to undergo a so called military training and the end of which nine to 15-year-old boys and girls are able to kill without hesitation. Thereafter, they follow a ritual to consecrate their affiliation with the LRA and make them 'invulnerable' from bullets.<sup>93</sup> Most of the abducted girls were subjected to sexual slavery. They were assigned as wife to LRA commanders who usually tortured them<sup>94</sup>. Women underwent the same treatment, and along with men, they were used as porters.<sup>95</sup> The LRA atrocity in the DRC clearly amount to war crimes and crimes against humanity in the sense of the ICC.

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<sup>90</sup>See Human Rights Watch, March 2010, 13.

<sup>91</sup>See Human Rights Watch, February 2009, 20.

<sup>92</sup>See n 90 above, 18.

<sup>93</sup>Id 39

<sup>94</sup>Id 40.

<sup>95</sup>Id 41.

## **Chapter 6: Appraisal of responses provided by the DRC**

### **6.1 Legislative efforts towards the implementation of the ICC**

#### **6.1.1. The new military penal code**

#### **6.1.2. Law on the protection of children**

#### **6.1.3. Bill implementing the ICC**

### **6.2. Judicial responses**

#### **6.2.1. The referral of the situation to the ICC**

#### **6.2.2. Proceedings before domestic courts**

### **6.3 Fulfilment of the Responsibility to Protect**

#### **6.3.1. Peace agreement concluded with rebels**

#### **6.3.2. DDR**

#### **6.3.3. Military operations to dismantle rebels**

The principal concern about international crimes committed before the entry in force of the ICC pertained to the lack of judicial response. There was no international criminal tribunal to prosecute the alleged perpetrators and the DRC stated its legal inability to try those crimes.

The DRC ratified the ICC on 11 April 2002.<sup>1</sup> It passed a law incorporating the international crimes defined in the ICC<sup>2</sup> and referred the situation prevailing on its territory to the ICC. Following the Pretoria peace agreement, the DRC endeavoured to disarm, demobilise and reintegrate former militias. The domestic courts conducted the prosecution of alleged perpetrators of international crimes. Meanwhile, the ICC requested and obtained the surrender of some Congolese suspects. Failing to secure a military victory on the battlefield against rebels, the DRC concluded peace agreements with rebel forces and clearly refused to surrender some other suspects in order to consolidate the fragile peace concluded after delicate negotiations.

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<sup>1</sup>The decree-law 03/002 of 30 March 2002 authorised the ratification of the ICC. This ratification (together with those of Bulgaria, Ireland, Cambodia, Romania, Mongolia, Niger, and Slovakia) is historical, because it occurred on the day when the statute reached the 60 instruments of ratifications needed for its entry into force.

<sup>2</sup>*Loi N° 024/2002 DU 18 novembre 2002 portant Code Pénal Militaire* (Law number 024/2002 of 18 November 2002 implementing the military criminal code).

Meanwhile, the parliament received a bill adapting the Congolese legislation to the ICC.

This chapter analyses the main responses of the DRC to international crimes committed on its territory after 1 July 2002. To this end it reviews legislative efforts towards the implementation of the ICC (6.1), judicial responses (6.2) and actions performed in fulfilment of the DRC's Responsibility to Protect (6.3).

### **6.1. Legislative efforts towards the implementation of the ICC**

Despite the monist orientation of the Congolese law,<sup>3</sup> there is a need for a law implementing the ICC in the DRC. This section reviews the legislative efforts in this regard.

#### **6.1.1. Implementation of the military criminal code**

The *Loi numéro 024/2002 du 18 Novembre 2002* implementing the military criminal code replaced the 1972 law implementing the Code of Military Justice.<sup>4</sup> The main features of the 2004 law (in relation to the current research) are the incorporation of ICC crimes (6.1.1.1) and the consecration of the irrelevance of the official capacity for international crimes (6.1.1.2). However, the law is silent on the penal majority (6.1.1.3) and establishes the priority of military courts in the prosecution of international crimes (6.1.1.4). Lastly, this section provides the justification for the need of law adapting the Congolese legal system to the ICC (6.1.1.5).

##### **6.1.1.1. The incorporation of ICC Crimes**

The new military penal code sets the crime of genocide,<sup>5</sup> crimes against Humanity<sup>6</sup> and war crimes.<sup>7</sup> The law mirrors the ICC Statute on the counters

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<sup>3</sup> The Congolese constitution provides that international and treaties are superior to national law upon their ratification and under the condition of their application by the other part. See Congolese constitution, article 215.

<sup>4</sup> This law foresaw international crimes, but it did not foresee any penalty for them. It just provided that they were not subject to nay statute of limitation. See *Décret-loi numéro 72/060 du 25 septembre 1972*, articles

<sup>5</sup> See *Loi N° 024/2002 DU 18 novembre 2002 portant Code Pénal Militaire article 164*.

of crimes.<sup>8</sup> However, the main difference resides in the penalties. The military penal code sets the death penalty<sup>9</sup> whereas the life imprisonment is the highest penalty in the ICC statute. However, there is a serious controversy on the penalty for War Crimes. Some opinion thinks the law did not foresee a penalty for War Crimes.<sup>10</sup> The other opinion is of the view that War crimes are punished by the same penalty with the crimes against humanity. This argument is based on the wording of the article 162, providing that: '*Les crimes contre l'humanité sont poursuivis et réprimés dans les mêmes conditions que les crimes de guerre*'.<sup>11</sup>

#### **6.1.1.2. The irrelevance of official Capacity**

The law sets the irrelevance of the official capacity of suspects in case of prosecution for war crimes and crimes against Humanity.<sup>12</sup> This provision mirrors the article 27 of the ICC statute. However, it does not include Genocide. One may assume that it was a technical mistake. Hence, it should therefore be corrected by an amendment of the law inserting Genocide amongst crimes for which the official capacity does not constitute an impediment for criminal prosecutions.

Furthermore, learning the lesson from the Yerodia case before the ICJ,<sup>13</sup> it will be appropriate to precise that the official capacity is only irrelevant for nationals of the DRC and the foreign officials who do not enjoy diplomatic

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<sup>6</sup>Id art 165.

<sup>7</sup>Id art 166.

<sup>8</sup>See ICC articles 6,7 and 8 respectively for Genocide, crimes against Humanity and war crimes.

<sup>9</sup>It is the only one penalty set for the crime of genocide (see article 164) and applies to crimes against humanity when they either cause death or seriously damage bodily integrity of victims (see articles 167, 168 and 170).

<sup>10</sup>

<sup>11</sup>This can be translated as follow: crimes against humanity and war crimes are prosecuted and punished in the same conditions.

<sup>12</sup>See *Loi N° 024/2002 DU 18 novembre 2002 portant Code Pénal Militaire*, article 164.

<sup>13</sup>See Case *The Democratic Republic of the Congo v. Belgium* (14 February 2002) (2002) ICJ Reports 32.

immunity. For the foreign authorities enjoying the diplomatic immunities, the law should clearly provide that the case should be referred to the ICC.<sup>14</sup>

#### **6.1.1.3. The silence on Penal majority**

The law under consideration does not specify the penal majority. However, at the time of its implementation, the penal majority was 16 years old by virtue of the Congolese ordinary penal code, whereas the ICC statute set the majority at 18 years. One might assume that the dilemma of child soldiers has motivated that silence. Probably the legislator wanted to make an opening for a future prosecution of former child soldiers for past actions.

The issue of penal majority in the DRC has progressed. In 2009, the Country passed a law protecting the Childhood.<sup>15</sup> This law institutes the majority at 18 years old and implemented jurisdictions for Children. It has removed the children from the jurisdiction of military courts.

#### **6.1.1.4. The priority of Military courts' jurisdiction over war crimes**

The Military Penal Code establishes the exclusive jurisdiction of military courts for war crimes. The military courts are empowered against whoever served the enemy or one allied of the enemy at the moment of the commission of crimes in any capacity including civil servants, judicial agents, and military.<sup>16</sup>

#### **6.1.1.5. Limits of the military criminal law and military judicial code in light of the ICC statute**

The implementation of the law under consideration might suggest that the DRC has fulfilled its duty of enactment of the ICC. However, the DRC still has

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<sup>14</sup>Such a provision will consecrate the diplomatic immunities of foreign official as ground of genuine inability of domestic courts for prosecuting international crimes. It is appropriate to mention that the ruling of the ICJ intervened in 2002 after discussion and adoption of the ICC. The ruling of the ICJ should be regarded as the genuine position of the community of nations on the question of diplomatic immunities.

<sup>15</sup>Loi numéro 09/001 du 10 janvier 2009 portant protection de l'enfant.

<sup>16</sup> See *Loi N° 024/2002 DU 18 novembre 2002 portant Code Pénal Militaire article 174.*

to adapt its legal system to the ICC. The justification for that is twofold.

On the one hand, the two pieces of legislation do not reflect the intent of adapting the military procedures to the Rome statute of the ICC. For instance, there is no provision either for cooperation with the ICC or arrest and surrender to the ICC. On the positive side, it settled the issue of penalties for international crimes and adopted the provisions of the ICC statute related to the definition of international crimes.

On the other hand, the jurisdiction of military courts over civilians and international crimes does no longer comply with international standards in terms of military justice. According to these standards:

1. Jurisdiction of military courts to try civilians: Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.<sup>17</sup>
2. Trial of persons accused of serious human rights violations: In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.<sup>18</sup>

### **6.1.2. Law on the protection of children**

The article 94 of the law under consideration provides that the court for children is only competent for persons under the age of 18. Though the preamble of the law does not refer to the ICC, one may conclude that this

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<sup>17</sup>See Economic and Social Council, civil and political rights (including the question of independence of the judiciary, administration of justice, impunity), Issue of the administration of justice through military tribunals Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, adopted by the Commission on human Rights at its 62th session on 13 January 2006 (E/CN.4/2006/58), principle No. 5, 10. The so called 'Decaux principles' owe their name to the Special Rapporteur who drafted them.

<sup>18</sup>See E/CN.4/2006/58, principle No. 9, 13.

article corrects the mistake of the Military Penal Code, which is silent on the question of penal majority.

### 6.1.3. Bill implementing the ICC<sup>19</sup>

Despite the commendable work of military courts in connection with the prosecution of international crimes, one should remember that the UN standards are against their jurisdiction over international crimes. This is the main justification for the need of a law adapting the ordinary criminal justice.<sup>20</sup> Two members of the 2006-2012 parliament<sup>21</sup> have submitted the *Proposition de loi modifiant et complétant le code pénal, le code de procédure pénale, le code de l'organisation et de la compétence judiciaires, le code judiciaire militaire et le code pénal militaire en vue de la mise en œuvre du statut de Rome de la Cour Pénale Internationale*.<sup>22</sup>

This section analyses the proposition of enactment of the ICC in the Congolese legal system. To this end, before examining the features and the deficits of the proposition, it highlights the impediments to the discussion of the bill under examination. As the current legislature is closing, this section suggests a strategy for the conservation of the legislation. Therefore, this section will explore the impediments to the analysis of the bill (6.1.3.1), the principal features of the proposition (6.1.3.2), the important weaknesses of the proposition (6.1.3.3), and the future of the proposition (6.1.3.4).

#### 6.1.3.1. Impediments to the analysis of the proposition

The question of the death penalty is a crucial one in the DRC. The country was already heading towards the abolition of the capital punishment when the course of its history suddenly changed. On 16 January 2001, after the

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<sup>19</sup>This bill will be referred to hereinafter as 'Projet de loi NYABIRUNGU/MUTUMBE'.

<sup>20</sup>The term ordinary makes the difference from the military justice.

<sup>21</sup>This includes honourable Nyabirungu Mwene Songa and honourable Mutumbe Mbuya. Both of them lost the 2011 parliamentary elections.

<sup>22</sup>This can literally be translated by 'the bill modifying and completing the penal code, the code of criminal procedure, the code of organisation and competences of the judiciary, the code of military judiciary and the military penal code in view of the enactment of the Rome statute of the International Criminal Court.

assassination of the head of state, and his son took over. The military special court organised a trial and the culpable were tried<sup>23</sup> and sentenced to death.

The Sun City agreement decided the granting of amnesty for all act of war and political offences with the exception for genocide, crimes against humanity and war crimes. The proposition of the amnesty law raised a serious concern as to whether the assassination of a sitting head of state is a political offence or not. The discussion of the proposition took place without the presidential group at the parliament. They boycotted the talks. After the law's adoption, the President of the Republic referred the matter to the Supreme court of Justice in order to see whether (on a legal point of view) the *assassination* of a sitting head of state is a political offence or not. The Supreme Court ruled that it was incompetent to rule over the matter.

Responding to a question on the possible amnesty of persons convicted for the aforesaid assassination, President Joseph Kabila mentioned assassinations of sitting head of states in the US and asked whether the assassins had enjoyed amnesty or not.

It might be inferred from his response that President Joseph Kabila is not favourable for the amnesty of persons convicted for murder of a Head of State. Deputies of the presidential majority reportedly expressed their determination to stop any bill containing the abolition of the death penalty.

It was in such an atmosphere that the transitional government submitted to the parliament a bill adapting the provisions of the ICC statute to Congolese legislations. The transitional parliament never examined the bill until the end of its term.

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<sup>23</sup>The justification for such a statement must be found in YERODIA ABDOULAY's statement on Laurent Desire Kabila's death. He stated that those who were convicted are not the real assassins of 'Mzee', but they cannot be freed. One must provide for an alternative before claiming their freedom (Yerodia, in the movie '*La vérité sur l'assassinat de Laurent Désiré Kabila*').

After the 2006 elections, Joseph Kabila's coalition won the majority of seats at the parliament. Despite the principle of continuity of state affairs, the newly established government did never remember the aforementioned bill.

A Member of Parliament from the Congolese Rally for Democracy (André Mbata Mangu) submitted a bill abolishing the death penalty. The proposition faced strong opposition of the members of parliament from the eastern DRC. They argued that passing such a law would condone the mass atrocity committed by former rebel movements especially the RCD. The 2006-2011 parliament rejected the law.

Meanwhile, a joint bill adapting the provision of the ICC statute to the Congolese legislation emerged. One of the co-authors of the joint proposition stated the uselessness of a law abolishing the death penalty because the bill enacting the ICC addressed the matter. The 2006-2011 parliament never discussed the proposition. Given the aforementioned background, one may understand why.

#### **6.1.3.2. Principal features of the bill**

The bill under examination is noteworthy in that it legalises several norms (contained in the ICC statute) that were so far only admitted in the Congolese system as general principles of law and in that it enacts important recommendations from the UN. This point highlights those insights including the amendments to the 30 January 1940 decree implementing the ordinary penal Code (6.1.3.2.1), amendments to the decree of 6 August 1959 on penal procedure (6.1.3.2.2), the amendments to the Ordinance law n° 82/021 of 31 March 1982 on the Judiciary's organisation and competence (6.1.3.2.3) and the outlawing of the jurisdiction of military courts over international crimes (6.1.3.2.4).

#### **6.1.3.2.1. Amendments to the 30 January 1940 decree implementing the ordinary penal Code<sup>24</sup>**

The proposition under consideration entails the passing of the principles carried by the constitution of 18 February 2006 including:

1. The legality of incrimination and sanctions;
2. The presumption of innocence;
3. The respect of the sacred nature of human life;
4. The elimination of all type of sexual violence in general and violence to the women in particular;
5. The irrelevance of any defence based on an order manifestly illegal

The proposition also suggests:

1. The incorporation of the crimes defined by the Rome Statute in the ordinary Penal Code;
2. The consecration of the principles recognised by the Rome Statute of the ICC including the benefit of the lighter penalty for the accused, the non-retroactivity of the penal legislation, the *Ne bis in idem*, and the causes of exoneration from criminal liability;<sup>25</sup>
3. The consideration of the age of penal majority (18years old).

#### **6.1.3.2.2. Amendments to the decree of 6 August 1959 on penal procedure<sup>26</sup>**

The proposition includes adjustments aimed at meeting ICC standards of defendants' rights. The Proposition sets the mechanism of cooperation between the Congolese jurisdictions and the ICC.

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<sup>24</sup>See projet de loi NYABIRUNGU/MUTUMBE, 3.

<sup>25</sup>So far the principles are applied in the Congolese law as a general principle of law. Such a conception can be wrong when one considers that those principles have been set by international instrument dully ratified by the DRC. Therefore, they should be superior to the laws of the DRC by virtue of the principle consecrated by the constitution of 18 February 2011.

<sup>26</sup>See n 19 above, 4.

### **6.1.3.2.3. Amendments to the Ordinance law n° 82/021 of 31 march 1982 on the Judiciary's organisation and competence<sup>27</sup>**

In relation to the organisation of the judiciary and its competences, the bill's main features are:

1. The choice of the Court of Appeal as the competent jurisdiction for international crimes;<sup>28</sup>
2. The reinforcement of the bench of the Court of Appeal (from 3 to 5 judges) for the international Crimes;<sup>29</sup>
3. The insertion of military judges in trials of members of the army.

### **6.1.3.2.4. Outlawing the jurisdiction of military court over international crimes<sup>30</sup>**

In compliance with the UN Principles Governing the Administration of Justice through Military Tribunals,<sup>31</sup> the proposition recommends the removal of international crimes from the jurisdiction of military courts.

### **6.1.3.3. Important weaknesses of the proposition**

The bill under scrutiny contains some provisions that need to be either motivated otherwise or reformulated. In connection with international crimes,

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<sup>27</sup>Id 5.

<sup>28</sup>The proposition suggests the tasking of four court appeals (amongst the twelve composing the Congolese judiciary). They will be grouped by three. The Court of Appeal is preferred by the authors of the proposition given the experience of the magistrates employed at that level of the judiciary. However, regarding the experience of military jurisdictions (whereby the magistrates of the level of the *tribunal of grande instance* have demonstrated a good command of the law of international crimes), one might recommend the choice of the *tribunal of grande instance*. Such a choice will enable the victims with the capacity of seizing the jurisdiction whenever they believe that the prosecutor is unwilling to do so.

<sup>29</sup>One should note that the Court of appeal seats with five judges when it examines the appeal of decisions issued by the *tribunal of grande instance* in first resort. The gravity of international crimes is probably the determining element of such a choice. It is not as relevant as such because the ICC itself seats with three judges as well as the Congolese Court of Appeal when examining criminal matters in first resort.

<sup>30</sup>See n 19 above, 5.

<sup>31</sup>See U.N. Doc. E/CN.4/2006/58 at 4 (2006), principle 10. This principle was inspired by the UN General Assembly's declaration on the protection of all individuals from enforced disappearance. The Para 2 of the article 16 provides that the persons suspected to have caused enforced disappearance should be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts (see UN General Assembly's Resolution 47/133 of 18 December 1992).

one may consider the provisions related to the referral of cases to the ICC (6.1.3.3.1) and the privileges and immunities (6.1.3.3.2).

#### **6.1.3.3.1. Referral of cases to the ICC**

The bill suggests that in application of article 14 of the ICC statute, the President of the Republic may, upon a decision deliberated by the government, refer to the ICC a situation whereby it appears that international crimes occurred on the Congolese territory or by Congolese citizens.<sup>32</sup>

On the one hand, the formulation of this provision narrows the scope of the competence of the DRC. It excludes situations whereby, for instance, the crimes might be committed on board a vessel or aircraft registered with the DRC. On the other hand, the empowerment of the executive seems to violate the constitutional principle of separation of powers. Being a judicial matter, the power referring a situation to the ICC should remain with the judicial authority handling the prosecutorial discretion in the country. This is important given the distinctiveness of international crimes that can be sponsored by members of the executive. It will be relevant to enable the judiciary with the role of referring the matter to the ICC. Such a development will ensure the independence and security of the judiciary.

#### **6.6.3.2. Privileges and immunities**

The bill foresees the irrelevance of any privilege and immunity of persons suspected to have committed international crimes.<sup>33</sup> Such a provision is irrelevant for two reasons. On a domestic point of view, the so-called privilege de jurisdiction does not aim at granting impunity to the perpetrators of offences to the criminal legislation. It aims at avoiding any negative impact of the social or political position of the suspect on the mind of magistrates in charge of their prosecution and judgment. On an international point of view, the DRC should learn the lesson of the ICJ ruling in the Arrest warrant case.

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<sup>32</sup>n19 above, article 121-9.

<sup>33</sup>Id article 94.

Domestic courts are not competent for the prosecution of foreign official enjoying diplomatic immunities. If such a position is questionable for state parties to the ICC statute,<sup>34</sup> it is defensible for non-party states to the ICC statute because they have not renounced to the Vienna convention on diplomatic immunities.

#### **6.1.3.4. Future of the bill**

The 2006-2011 legislature never discussed the project under consideration. According to a usage in the Congolese parliament, it is not possible to keep legislative backlogs from tenure to another. They should be resubmitted, provided that their authors are part of the new tenure. Both co-authors of the proposition lost the 2011 elections.

In his inaugural speech as president of the 2012-2016 National Assembly, Honourable Aubin Minaku Ndjalandjoko mentioned that this legislature would endeavour to settle the legislative backlogs left by the preceding legislature. One may expect that his personal passion for International Criminal Justice might lead to opening the political blockade on the discussion of the proposition of legislation under consideration.

Honourable Aubin Minaku Ndjalandjokore presented the DRC at the Rome Conference in 1998 and signed the Rome Statute on behalf of the DRC. He is currently writing a doctoral thesis on international criminal justice in the DRC.

## **6.2. Judicial responses**

Judicial responses encompass proceedings before the ICC (6.2.1) and before domestic courts (6.2.2).

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<sup>34</sup>One may conclude that upon the ratification of the ICC statute they have renounced to the diplomatic immunities of their agents in case of suspicion of involvement in the perpetration of international crimes.

### 6.2.1. Proceedings before the ICC

It is appropriate under this point to review the DRC's referral to the ICC (6.2.1.1) and its cooperation with the ICC (6.2.1.2).

#### 6.2.1.1. Analysis of the DRC's referral to the ICC

In his letter dated of 29 March 2004 addressed to the OTP, the President of the DRC stated that '*...les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale.*'<sup>35</sup>

For a good understanding of the possible incentives for such a statement, it is necessary to scrutinise the background to the referral letter.

William W. Burke-White (who has thoroughly analysed the relationship between the ICC and the DRC) doubted of president Kabila's willing to perform justice by referring the case to ICC. He analysed the referral letter as a way of silencing his potential challengers including Jean Pierre BEMBA and Azarias Ruberwa.<sup>36</sup> He explains that their possible involvement in the perpetration of international crimes would have prompted President Kabila to transfer them to the ICC. Their removal from the political landscape would have secured him a room for the presidential elections.<sup>37</sup> He underlines the fact that the letter was not the expression of the willingness of the entire government of the DRC. He provides examples of significant figures of the

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<sup>35</sup>This can be translated as follow: 'Due to the situation prevailing in my country, the competent authorities are unfortunately unable either of carrying out investigations over the above mentioned crimes or of starting appropriate prosecutions without the participation of the International Criminal Court.' See Sharon A. Williams/William A. Shabas, article 17, in Otto Triffterer (Ed), Commentary on the Rome statute of the international Criminal Court- observers' notes, article by article, 615. See also William Shabas, Complementarity in Practice: some uncomplimentary thoughts, in Criminal Law Forum (2008), 19, 10-11.

<sup>36</sup>Upon the Pretoria peace agreement (entailing a power sharing between the former belligerents), they were appointed deputy President of the Republic respectively in charge of economics and finance and in charge of Politics, defence and security.

<sup>37</sup>See WW Burke-White 'Complementarity in Practice: the International Criminal Court as Part of a system of Multi-level Global Governance in the Democratic Republic of Congo'(2005) 18 *Leiden Journal on International Law* 569-570.

government who pleaded the enhancement of the capacities of national Courts so that they could deal with international crimes.<sup>38</sup>

One can see (upon developments of the situation in the DRC) that by mentioning the willingness of silencing potential challengers of President Kabila, William W. Burke-White did not get a convincing hypothesis on the motivation of the referral letter from the president of the DRC to the ICC. The idea of targeting Ituri's warlords seems plausible.

One should remember that the three main armed groups of Ituri were not parties to the Sun City Agreement.<sup>39</sup> This prompted a dialogue between the governments of DRC and Uganda as Uganda was supporting the aforementioned armed forces. They met in Luanda (Angola) and agreed on a ceasefire. Uganda undertook to withdraw its forces from the DRC<sup>40</sup> and put an end to its support to the rebel forces in Ituri.<sup>41</sup>

Despite the withdrawal of the Ugandan support, they continued to commit atrocities. On 25 February 2005, their militiamen went as far as to kill 9 blue helmets from the Bangladeshi contingent of the MONUC. These killings occurred during a systematic attack against that section of MONUC committed to the protection of 8,000 civilians already forced to flee from their homes by the militias. The CIAT clearly condemned the killings and raised its concern about the regain of violence in Ituri. It clearly mentioned Floribert Ndjabu, Goda Sukpa, Etienne Lona, Thomas Lubanga, Bosco Taganda and Germain Katanga. The CIAT warned the warlords for their subversive

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<sup>38</sup>He cites the deputy Presidents Jean Pierre Bemba and Azaria.

<sup>39</sup>See L Davis and P Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, International Center for Transitional Justice, Mach 2009, 13.

<sup>40</sup>See Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Cooperation and Normalisation of Relations between the Two Countries, signed at Luanda on 6 September 2002, article 1.

<sup>41</sup>See n 19 above, article 2(2).

activities.<sup>42</sup> Yet the Security Council raised its awareness on the situation in Ituri and urged the Congolese government to bring to justice those responsible of international crimes.<sup>43</sup>

It can be inferred from that background that the objective of the presidential letter was twofold. It includes showing the willingness of the Congolese judiciary to prosecute international crimes. It also includes threatening the Ituri warlords who remained in the margin of the newly established political order. Despite the controversial nature of such a strategy, one can observe that it paid. On the one hand, the international community commended the referral of the situation in the DRC to the ICC.<sup>44</sup> On the other hand, the Ituri warlords shifted to Kinshasa whereby they started negotiating peace (in exchange of amnesty for their past) and positions in the political order and the military.<sup>45</sup>

#### **6.2.1.2. The DRC's cooperation with the ICC**

The DRC had fully cooperated with the ICC when it requested the Ituri warlords including Lubanga, Katanga and Ngudjolo. During the armed confrontation with the CNDP, the ICC issued an arrest warrant on Bosco Taganda who acted in Ituri as deputy chief of staff of the FPC and was acting as deputy chief of staff of the CNDP. The DRC could not arrest him because the CNDP was stronger than its army on the battlefield. The DRC negotiated a peace agreement with the CNDP and appointed Bosco Taganda as deputy commander of a military operation of pacification of the Kivu provinces.

NGO started urging the Congolese government to arrest and transfer Bosco

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<sup>42</sup>See the CIAT press release of 28 February 2005, available at <http://reliefweb.int/node/167158> (accessed 9 October 2011).

<sup>43</sup>UNSC, Press Release SC/8327/Rev.1 dated 2 March 2005

<sup>44</sup>MC Bassiouni, 'The ICC- *Quo Vadis?*' 4 (2006) *Journal of International Criminal Justice* 425.

<sup>45</sup>This is an explanation of why Lubanga, late Floribert Kisembo (the chief of staff of Lubanga's militia) Katanga and Ngudjolo were in Kinshasa at the time of their arrest by Congolese judicial authorities. Floribert Kisembo and Germain Katanga were raised to the rank of General in the *Forces Armées de la République Démocratique du Congo* (My own translation: The Armed Forces of the Democratic Republic of Congo) whereas Mathieu was Colonel.

Tanganda for whom the ICC has issued an arrest warrant.<sup>46</sup>The Democratic Republic of Congo seems to have adopted a policy prioritizing peace. It only considers justice as a tool for the restoration and/or the maintenance of peace. This is an indication of the discretion of the government in the DRC towards legal matters pertaining to peace and security. Such an approach clearly emerged from the declaration of the DRC's president to New York Times. President Joseph Kabila stated that the priority for his government was peace and that it is appropriate to avoid justice that can cause conflict. He explained that Bosco Tanganda played a key role in the recovering of peace in the DRC. He mentioned that he was not yet ready to surrender him and that his government was not going for justice that brings war.<sup>47</sup>In the same interview, he clearly mentioned that Laurent Nkunda who did not lessen the burden of the Congolese government in peace building should respond for his crimes.

From this interview, one can conclude that the DRC only surrendered to the ICC its nationals considered as a threat to the fragile peace in the DRC.

### **6.2.2. Proceedings before domestic courts**

This section presents an overview of different proceedings at the domestic level in the DRC (6.2.2.1) and a summary of the main issues raised by those proceedings (6.2.2.2).

#### **6.2.2.1. Overview of proceedings before domestic courts**

The Congolese domestic courts conducted proceedings on the cases related to international crimes committed in the provinces of Equateur (6.2.2.1.1), Katanga (6.2.2.1.2), North Kivu (6.2.2.1.3) and South Kivu (6.2.2.1.4) and in the eastern province (6.2.2.1.5). The following points do not reproduce an

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<sup>46</sup>See Human Right Watch's letter dated 1 February 2009 addressed to His Excellency President Joseph Kabila Kabange of the DRC. By this letter, HRW was recommending the arrest and surrender of Taganda to the ICC.

<sup>47</sup>The interview with New York Times is available at available at <http://www.nytimes.com/2009/04/04/world/africa/04kabilatranscript.html?pagewanted=all> (accessed on 20 August 2011).

exhaustive list of the cases dealt with by the domestic courts. It reviews only the main ones.

#### **6.2.2.1.1. Proceedings related to the Equateur province**

In relation with the Songo Mboyo events, the military tribunal of garrison of Mbandaka prosecuted (for crimes against humanity through rape and pillaging) the members of the former brigade including lieutenant Bokila Lolemi, vice lieutenants Vonga wa Vonga and Mahombo Mangbutu, adjutants Yangbanda Dumba and Mambe Soyo, sergeants Motuta Alondo and Mombanya Nkoy.<sup>48</sup> It convicted them and sentenced them to life imprisonment.<sup>49</sup>

The tribunal identified 30 surviving victims and one deceased victim of rape.<sup>50</sup> It ruled that the DRC was liable for the damages caused by its agents.<sup>51</sup> It ordered the convicted, and the DRC to make reparation to the victims as follow:

1. 10.000 us dollars for the deceased victim of rape;
2. 5.000 us dollars for each and every surviving victim of rape;
3. 500 us dollars for the owner of the goods pillaged.<sup>52</sup>

#### **6.2.2.1.2. Proceedings related to the Katanga province**

The military tribunal of garrison of Kipushi prosecuted Gedeon Kyungu Mutanga, his wife Ilunga Monga Nkuma and 24 of his militiamen.<sup>53</sup>

The indictment mentioned:

- 1) Crimes against humanity through imposition of inhumane and degrading

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<sup>48</sup>See *TMG of Mbandaka, Affaire Songo Mboyo, jugement du 12 avril 2006, RP 084/05,1.*

<sup>49</sup>Ibid 38.

<sup>50</sup>Ibid 10.

<sup>51</sup>Ibid 38-39

<sup>52</sup>Ibid.

<sup>53</sup>His elder brother and his two sons were part of the accused. See *TMG du Haut Katanga, affaire Gedeon Kyungu et consorts, jugement du 5 mars 2009, RP 01347/07 and RP 0182/09.*

treatments, unlawful imprisonment, massacres and mutilation during a systematic attack against the civilian population;<sup>54</sup>

2) War crimes through the perpetration of various acts violating the common article 3 to the Geneva conventions of 1949 including the deliberate attack of the civilian population, the pillaging and destructions of the villages Katshikala, Kilozi, Mbwe, Kilumb, Kasenga, Shele, Mijebo, Pradiso, Kapando and Kamukumbi.<sup>55</sup>

The tribunal dismissed the charges of war crimes. It argued that the atrocities committed by Gedeon Kyungu and his militia occurred after the signature of the Lusaka ceasefire agreement. There was no more war and no reason to maintain the war crimes charges.<sup>56</sup>

It acquitted four accused<sup>57</sup> and convicted others<sup>58</sup> to sentences ranging from seven years imprisonment to the capital punishment.<sup>59</sup>

The tribunal also ruled on the civil action. It held the DRC liable for carelessness in the conclusion of alliances with civilians and their supplying in arms. It also relied on the DRC's negligence in disarming militia. The tribunal ruled that the state should make reparation to victims.<sup>60</sup> It dismissed 72 claims for the irregularity of power of attorneys produced by counsels.<sup>61</sup> It ordered the Congolese state to pay reparation to 53 victims in proportions ranging from 50.000 us dollars to 300.000 us dollars.

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<sup>54</sup>The indictment referred to articles 7(1)(a)(e)(k) and (g), article 7(2)(a) and article 77 of the ICC.

<sup>55</sup>Id 7. The indictment referred to articles 8(2) and 77 of the ICC.

<sup>56</sup>Id 61.

<sup>57</sup>Id 68.

<sup>58</sup>Gedeon and his wife were amongst them.

<sup>59</sup>Id 68 to 75.

<sup>60</sup>Id 66.

<sup>61</sup>Id 76-77.

### **6.2.2.1.3. Proceedings related to the North Kivu province**

The military tribunal of the garrison of Goma prosecuted lieutenant Baseme and ten other officers of the Congolese army.<sup>62</sup> The tribunal admitted 23 victims.<sup>63</sup>

The accused faced charges related to crimes against humanity through rape and pillaging against the civilian population.<sup>64</sup> The Indictment mentioned that, on 18 and 19 March 2009, they had committed rape against women in the villages of Karuma, Chabora, Kasoni and Kisa in the Walikale territory (North Kivu province).<sup>65</sup> The tribunal identified 19 victims of rape.

The tribunal found them guilty, convicted them for crimes against humanity through rape and pillaging and sentenced them to life imprisonment and dismissal from the army.<sup>66</sup> It ordered them together with the Congolese state, to make reparation of 150.000 us dollar to each and every victim of their acts.<sup>67</sup>

### **6.2.2.1.4. Proceedings related to the South Kivu province**

#### **6.2.2.1.4.1. The Balimusa and al case<sup>68</sup>**

The Cour Militaire du Sud Kivu<sup>69</sup> prosecuted members of the first battalion of the former 85th based at Katasomwa in the South Kivu including:

1. Lieutenant-colonel BALUMISA MANASSE alias 'Dix Mille',<sup>70</sup>
2. Major Elya Mungemba Eugide;
3. Captain Makanyaka Kizungu Kilalo;

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<sup>62</sup>See TMG de Goma, cause Baseme et consorts, jugement du 10 mars 2008/ RP 356/2009,1-2

<sup>63</sup>Id 1.

<sup>64</sup>The indictment referred to article 7(4) (IV) of the ICC and to articles 165,166, and 169 of the Congolese military penal code.

<sup>65</sup>Id 2.

<sup>66</sup>Id 10.

<sup>67</sup>Id 11.

<sup>68</sup>See Cour Militaire du Sud Kivu, affaire Balimusa et consort jugement du 9 mars 2011, RP n° 038.

<sup>69</sup>The literal translation for this is 'The Military Court of South Kivu'.

<sup>70</sup>The literal translation for this is ten thousands.

4. Captain Chongo Musemakweli alias Kota na Boloko;<sup>71</sup>
5. Captain Beni Mutakato;
6. Captain Ekofo Petea Desire;
7. Lieutenant Zihindula;
8. Lieutenant Justin Matabaro;
9. Deputy lieutenant Kanabo;
10. Deputy lieutenant Lybie Mirasalo.

One should note that the trial of some accused took place in absentia including Jean-Claude Senjishi, Chongo Musemakweli, Ekofo Petea Desire, Beni Mutakato, Zihindula, Justin Matabaro, Kanabo Lybie Mirasalo.

The accused went to South Kivu province to counter the FDLR that was committing mass atrocity against civilians. Instead of protecting the population, they followed FDLR's steps and committed same atrocities. Furthermore, they seized the assets stolen by the FDLR and misappropriated them.

All the accused (excepted Jean-Claude Senjishi) faced the charge of crimes against humanity through:

1. Rape for having committed (between 26 and 29 September at Katasomwa (a village in the south Kivu province), during a systematic attack against civilian) rape on several women including Mwaminyi Kanyamanzi, Mapendo Habimana, Baseme Ndahoturaba, Mukamusonyi Semafaranka, Tuyambaze Twisenge, Zawadi Bererimana, Bahati Makala and Funu Faida Mwachimbembe. The indictment referred to articles 5, 6 of the Congolese military penal code and 7(1)(g) of the ICC.<sup>72</sup>
2. Inhumane acts causing immense suffering, including pillaging of

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<sup>71</sup>These Lingala (language spoken in the western DRC and in the Congolese military) words can be literally translated by 'enter in jail'.

<sup>72</sup>Id 5.

civilians' belongings. The indictment referred to articles 5, 6 and 64 of the Congolese military penal code as well as to article 7 (1)(e) of the ICC.<sup>73</sup>

176 victims participated in the proceedings. The court was of the view that the Congolese state did not care about their level of education and failed to train those soldiers and to provide them with a classical military training. As a result of the state's negligence, most of them ignore the military rules. The court observed that the state has to be held responsible for the tort committed by its agents.

The court convicted all the accused of crimes against humanity and sentenced those who appeared to 15 years imprisonment whereas it sentenced those who fled to life imprisonment. It ordered the state to pay 200 us dollars to each and every victim for reparation.

#### **6.2.2.1.4.2. The Baraka trial<sup>74</sup>**

The military court of South Kivu prosecuted Lieutenant-colonel Kibibi Mutuare Daniel and soldiers Sido Bizimungu, Bahati Lisuba Chance, Mundande kitambala, Haruna Bovic Abdul, Sezibera Lucien, Shumbusho Eric Kenzo, Bwira Justin Kambale, Muhindo Kisa, Amani Muyamaraba and Ndagijimana Pascal. They faced charges related to international crimes through rape,<sup>75</sup> imprisonment and tortures.<sup>76</sup> In retaliation to the execution of a corporal of the national army, they conducted a systematic attack against the civilian population and raped several women and girls in most of the cases in the

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<sup>73</sup>Id 6.

<sup>74</sup>See Cour Militaire du Sud Kivu, affaire Baraka et consort jugement du 21 février 2011, RP n° 043.

<sup>75</sup>The indictment referred to Article 5, 6 and 169 of the Congolese military penal code as well as to article 7(1)(k) of the ICC.

<sup>76</sup>The indictment referred to Article 5, 6 and 169 of the Congolese military penal code as well as to article 7(1)(e) of the ICC.

presence of their relatives.<sup>77</sup>

They arrested several people and detained them unlawfully. During their detention, they submitted them to severe torture and other inhumane and degrading treatment.<sup>78</sup> For instance, they arrested one victim and forced him to walk naked from his place of arrest to the place of detention.<sup>79</sup> 91 victims participated in the proceedings. The court convicted the accused for crime against humanity and sentenced them to between 10 and 20 years imprisonment.<sup>80</sup>

As for the Congolese state, the court ruled that it did not care of the level of education and failed to train the accused and to provide them with a serious military training. As a result of the government's negligence, most of them break the military rules. The court observed that the state has to be held responsible of the tort committed by its agents.<sup>81</sup>

The court ordered the Congolese state, and the convicted persons to pay the following reparation to the victims:

- 1) 10.000 US dollar for each and every victim of rape;
- 2) 1.000 US dollar for each and every victim of imprisonment;
- 3) 200 US dollar for each and every victim of torture and (or) inhumane treatment.<sup>82</sup>

#### **6.2.2.1.4.3. The FDLR case<sup>83</sup>**

The *Tribunal Militaire de Garnison de Bukavu* prosecuted and convicted Maniraguha Jean Bosco alias Kazungu and Sibomana Kabanda alias

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<sup>77</sup>Id 7.

<sup>78</sup>Id 8.

<sup>79</sup>Id 25.

<sup>80</sup>Id 34-42.

<sup>81</sup>Id 33.

<sup>82</sup>Id 2.

<sup>83</sup>See *Tribunal Militaire de Garnison de Bukavu, affaire Kazunguet consort, jugement du 16 Aout 2011, RP 275/09 et 521/10.*

Tuzargwana, both FDLR militiamen and Rwandese. The latter was serving as bodyguard of the former.<sup>84</sup>

The indictment targeted other suspects including Vatican, Rasta, Freddis, Gitamisi, Ndegitera and MONUC not identified otherwise. It sought their condemnation in absentia, but the tribunal ruled that it could not proceed against them, as it did not know their names,<sup>85</sup> whereas the Congolese legislation requires that parties to the trial should be identified by their surnames and names.

Maniraguha Jean Bosco alias Kazungu faced charges related to crimes against humanity through murder and rape.<sup>86</sup> The indictment mentioned that he had, between June and July 2006 and January 2007, caused the death of mister Mbimbi, burned 56 houses in the Rwamikundu village and caused the death of 52 other people.<sup>87</sup>

The two accused (Maniraguha and Sibomana) faced charges of crimes against humanity through:

1. Imprisonment as a way of deprivation of physical liberty for having brought several people (including five girls, ten women and several other females) in the bush and kept them in captivity therein;
2. Torture: for having (in the villages of Kafuna, Hungu, Bunyakiri, Kalangi, Chea, and many other villages in the South Kivu province) ill-treated, beaten, and bound several persons. The indictment mentions that they undressed mister Lushombo and whipped him in front of his children; they ground Mister Mikali Mushaka's private parts. They raped several women in inhumane conditions including while they were attached, and

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<sup>84</sup>Id 27.

<sup>85</sup>Id 38.

<sup>86</sup>The indictment referred to articles 165 to 167 of the Congolese military penal code and article 7(28) (77) of the ICC. Id 12.

<sup>87</sup>Id 12-13.

(or) while they menstruated.<sup>88</sup> 400 victims participated in the proceedings for their civil claims.<sup>89</sup> The Tribunal sentenced the accused to 30 years imprisonment for crimes against humanity through murder and 30 years imprisonment for crimes against humanity. It retained the counts of imprisonment and other forms of deprivation of physical liberty. The tribunal pronounced one penalty, the highest, 30 years imprisonment in compliance with article 78(3) ICC.<sup>90</sup>

As for the civil claim, the tribunal ordered to the Congolese government to pay reparation to victims as follow:

- 1) 700 \$ US (seven hundred US dollars) to each and every victim of rape;
- 2) 550 \$ US (five hundred fifty US dollars) to each and every victim of torture;
- 3) 400 \$ US (four hundred US dollars) to each and every victim of imprisonment and other form of deprivation of physical liberty;
- 4) 5800 \$ US (five thousand and eight hundred US dollars) to each and every victim of murder.<sup>91</sup>

The reason for DRC's condemnation is its failure to fulfill its responsibility to protect as prescribed by the article 52 of the Congolese constitution.<sup>92</sup>

#### **6.2.2.1.5. Proceedings related to the oriental province**

It is appropriate to distinguish between the prosecution of Ituri warlords and the trial of members of the national army.

In reaction to the acts of violence against the peacekeepers that culminated in the killing of nine MONUC members, the UN prompted prosecutions of Ituri warlords.<sup>93</sup> The conclusion of peace in Pretoria and Luanda prompted the former rival militias to enter into an alliance and impede the pacification of

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<sup>88</sup>Id 13-14

<sup>89</sup>Id 1-12.

<sup>90</sup>Id 53.

<sup>91</sup>Id 54.

<sup>92</sup>Id 48.

<sup>93</sup>See ReliefWeb report — <http://reliefweb.int/node/167158> (accessed on 11 October 2011) .

Ituri. They were hoping to be called for further negotiation and be offered a position in the political landscape. The military justice arrested most of them in Kinshasa. It prosecuted them for charges related to the assassination of MONUC members, crimes against humanity and genocide. Upon the ICC's request, it surrendered three of them including Lubanga, Katanga and Ngudjolo.

The department of public prosecutions concluded the investigations and sent the case to the high military court for trial. However, given the lack of judge of appropriate rank at the high military court, the latter ruled in a provisional judgment that it was unable to seat until the appointment of new judges.<sup>94</sup> Despite the appointment of a new judge at the Military High Court, the situation did not develop because the aforesaid judge dealt with the case while serving as a member of the military department of public prosecution and cannot rule on the case as a judge.

As a result of this situation, the detainees remain under custody in a flagrant violation of the Congolese rules of temporary detention. The issue here seems more unwillingness than inability. The detainee who posed the problem was General Germain Katanga. After his transfer to the ICC, the military department of public prosecution should have disjoined the prosecutions and defer the detainees present in the DRC before the military high court.

The members of the national army who committed international crimes in Ituri faced trial before the Tribunal Militaire de Garnison de l'Ituri (Military court of Garrison of Ituri).<sup>95</sup> Captain Blaise Bongi Massaba faced war crimes charges before the court.<sup>96</sup> The Court ruled that the lack of punishment for war crimes in the military penal code is a technical mistake. It concluded that the

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<sup>94</sup>See provisional judgement P.D. no. 001/06, 12 May 2006.

<sup>95</sup>See *Tribunal Militaire de garnison de l'Ituri, jugement du 24 mars 2006, RP/018/2006*

<sup>96</sup>Id 1-3.

Congolese legislator did not intend to leave war crimes unpunished. Referring to the ruling of the Tribunal Militaire de Garnison de Mbandaka, it decided to apply the provisions of the ICC that are clearer and more respectful of accused's rights. It motivated this option by the provision of the Congolese constitution according to which the treaties and international agreements duly concluded are superior to Congolese laws upon their publication. The court convicted Captain BlaiseBongi Massaba for war crimes<sup>97</sup> and sentenced him to life imprisonment.<sup>98</sup> The court also ruled that the Congolese state was liable for the tort caused by its servant, Captain BlaiseBongi Massaba. It prescribed the Congolese state to pay us dollar 75.000 to each of the four families of the victims killed following the orders of the accused.<sup>99</sup>

#### **6.2.2.2. Main issues of trials by the military courts**

The trials by military courts have revealed the main weaknesses of the Congolese judicial system including the inherent incapability of the Congolese judiciary to deal with international crimes (6.2.2.2.1), the lack of independence of the judiciary (6.2.2.2.2) and the enforcement of judicial decisions (6.2.2.2.3).

##### **6.2.2.2.1. Congenital incapability of the Congolese judiciary to deal with international crimes**

UN reports have thoroughly described the weaknesses of the Congolese judiciary. In essence, the investigations on the viability of the Congolese judicial system have highlighted the insufficiency of financial and logistical resources. The budget allocated to the judiciary is too insignificant to ensure a fair distribution of the justice.

However, one should note, in relation to the international crimes that the main concern is safety. So far, it is beyond reasonable doubts that there has been

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<sup>97</sup>The court referred to article 8 (2)(e)(v) and (2)(C)(i)(1) of the ICC. See *Id*, 2-3.

<sup>98</sup>See *Id*, 18.

<sup>99</sup>See *Id*, 19.

involvement of governments in support of the perpetrators of international crimes. The extent of support is extremely difficult to determine, but the Congolese government has issued numerous declarations denouncing the assistance of the rebels by some of its neighbours.<sup>100</sup>

The security issue relates to victims as well as to magistrates themselves. The prosecution against Ngudjolo in Ituri reportedly ended in his acquittal. That acquittal was a result of the retraction of victims who testified against him during the investigation. They must have received threats from the accused's supporters.<sup>101</sup> Unidentified persons reportedly kidnapped a military magistrate in Kinshasa. People believed that the kidnapping was a result of his role in Lubanga's transfer to the ICC. This is probably the reason of the relatively low rate of prosecution initiated against international crimes. Instead of prosecuting those who bear the greatest responsibility for international crimes, the Congolese judiciary has dealt with those who were handy.

#### **6.2.2.2.2. The lack of independence of the military judiciary**

The lack of independence of the military judiciary appears through the government's veto over the prosecutions of international crimes. The Congolese government has a right of appreciation of the opportunity of prosecution in the cases deemed sensitive.<sup>102</sup> In this regard, the head of the department of public prosecution (either civil or military) should inform the Minister of Justice<sup>103</sup> and/or the Minister of Defence<sup>104</sup> of the opening of an investigation. The two ministers have the right of deferring investigations.

They have reportedly used that privilege at two occasions in the investigation of international crimes in the DRC. In 2006, the Minister of Defence asked the

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<sup>100</sup>for details, see F Reyntjens, *Waging (Civil) War Abroad: Rwanda and the DRC*, in S Straus and L Waldorf (eds) (2011) *Remaking Rwanda*, 132-145.

<sup>101</sup>See MER, Para 873 and 874.

<sup>102</sup>Arrêté d'Organisation Judiciaire du 20 aout 1979, article 143 a 147.

<sup>103</sup>That obligation bounds both the Procureur Général de la République (head of the civilian department of public prosecution) and the Auditeur General des Forces Armées de la République Démocratique du Congo (head of the military department of public prosecution).

<sup>104</sup>This obligation binds the sole head of the military department of public prosecution.

head of the military department of public prosecution to defer prosecution against the heads of the armed groups in Ituri who agreed to lay down their arms and join the national army.<sup>105</sup> In 2009, the Minister of Justice ordered the suspension of prosecution against militia leaders.<sup>106</sup> The suspension of pending cases may lead to the conclusion that no prosecution will continue before the Congolese courts. These injunctions from the Ministers of Justice and Defence constitute a significant thermometer for the Congolese willingness to provide a legal response to international crimes.

#### **6.2.2.2.3. The enforcement of judicial decisions**

The trials conducted by the military courts in the DRC have sentenced the perpetrators to criminal penalties and have ordered reparation for victims. The enforcement of the penalties raises practical issues. The death penalty recognised by the military criminal code<sup>107</sup> cannot be enforced due to a moratorium decided by the government in 2001. As for the life imprisonment, it has not been organised yet by the Congolese legislation.

The most critical question is reparation. On the one hand, most of the perpetrators do not have sufficient resources to secure the reparation ordered by the courts. On the other hand, it is almost impossible to enforce the reparation ordered against the Congolese state.<sup>108</sup>

After this rather poor picture of the Congolese judiciary, it is appropriate to evaluate the process of adoption of the adaptation legislation of the ICC Statute.

### **6.3 Fulfilment of the Responsibility to Protect**

#### **6.3.1. Peace agreement concluded with rebels**

The peace agreement concluded in Pretoria did not stop mass atrocities and

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<sup>105</sup>See MER para. 970.

<sup>106</sup>*Ibid.*

<sup>107</sup>*Id* articles 164, 167 to 169.

<sup>108</sup>See MER para 1089 and 1090.

conflict in the Kivu. Since it focused only on the main rebel factions, the remaining militia totally ignored it on the ground.

In 2005, under the auspices of the Saint Egidio community, the Congolese government concluded a peace agreement with the FDLR in Rome. The latter undertook not to continue with their armed activities in the DRC and returning to Rwanda. The agreement did not reach its objectives, and the FDLR continued its activities. In 2007, the president of the DRC convened a conference on peace, security and development in the northern and southern Kivu provinces.<sup>109</sup>

The Conference objectives are essentially ending the war and insecurity and setting the basis for long lasting peace and integral development in the northern and southern Kivu provinces.<sup>110</sup>

After the negotiations involving all the forces of the Kivu provinces, the conference adopted several resolutions related to peace. Those resolutions appear in a pact of undertaking between 22-armed groups that were operating in the provinces of North Kivu and South Kivu and the Congolese government. The agreement encompassed specific commitments including the decision on the termination of hostilities<sup>111</sup> and reestablishment of the government's control over the provinces of Kivu. To this end<sup>112</sup> it decided the dismantlement of the armed groups either by their incorporation in the national army or their enlisting within the national program on disarmament, demobilisation and reinsertion.<sup>113</sup> The government undertook to provide political and judicial guaranties for the execution of the agreement. It

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<sup>109</sup>See the *Ordonnance N° 07/075 du 20 décembre 2007 portant convocation de la conférence sur la paix, la sécurité et le développement dans les provinces du Nord-Kivu et du Sud-Kivu* (ordinance 07/075 of 20 December 2007 convening the conference on peace, security and development in the provinces of North-Kivu and South-Kivu).

<sup>110</sup>*Ibid* art 2.

<sup>111</sup>See *acte d'engagement dans la province du Nord Kivu* (Undertaking in the North Kivu province), article 1. See also *acte d'engagement dans la province du Sud Kivu* (Undertaking in the South Kivu province), article 1.

<sup>112</sup>*Ibid* art 2.

<sup>113</sup>*Ibid*.

promised to integrate militiamen in the national army<sup>114</sup> and pass an amnesty law covering all acts of war excluding international crimes.<sup>115</sup> Thereafter, the government signed another peace agreement with the CNDP lead by Bosco Taganda who had just overthrown the revolutionary General Laurent Nkunda. The so-called Ihusi agreement contained a similar provision in connection with amnesty.

These agreements raised some concerns. Firstly, the Congolese government has reportedly raised Bosco Taganda to the rank of General in the National army and appointed him as deputy commander of the Umoja Wetu<sup>116</sup> operation.

The agreement and the amnesty law excluded the international crimes, but in practice, the execution of the peace agreements has severely hampered the prosecution of international crimes. The MER highlights an injunction from the Minister of Justice hampering prosecutions. The Minister reportedly ordered a slowing down in prosecution of signatories of peace agreements. He required prosecutorial authorities not to introduce new cases against them and keep on those that have already been initiated. This instruction does not distinguish between prosecutions for crimes under international law and those for acts of war or insurrection.<sup>117</sup>

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<sup>114</sup>Ibid.

<sup>115</sup>Id 4.

<sup>116</sup>These Swahili words stand for Our Unity.

<sup>117</sup>See MER para 971.

### 6.3.2. Demobilisation, disarmament and reintegration<sup>118</sup>

Following the recommendations of the Pretoria peace agreement, the Congolese government established in December 2003, an interdepartmental committee tasked with the conceptual and political aspects of the National Program of Disarmament, Demobilisation and Reintegration (PNDDR). It also created a national DDR commission (CONADER) for the execution and the coordination of the programme, in all its phases. Disarmament was carried out in the Regrouping Centres, the verification and orientation, while integration was carried out in the Integration and Training Centres.

The PNDDR had three objectives, including:

1. The substantial reduction of the number of illegal weapons in the country and every region;
2. The reintegration of demobilized combatants as well as their dependents in the community;
3. The professionalization and modernisation of the national army by the creation of an initial 15 integrated Brigades regrouping troops from the former Congolese army and the rebel forces.

The programme also included the governments of the states of the Great Lakes region.

As of 8 September 2006, CONADER had demobilized more than 91,806 ex-combatants, including 27,346 children. It faced financial difficulties given the fact that the budget of some \$200 million provided by donors ended quickly.

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<sup>118</sup>Amnesty International, *Democratic Republic of Congo: Disarmament, demobilization and reintegration (DDR) and reform of the army*, 25 January 2007, AFR 62/001/2007, available at <http://www.unhcr.org/refworld/docid/45b99e572.html> [accessed 21 November 2011].

The government conceived the Disarmament and Community Reintegration (DCR) process to address the disarmament and socio-economic reintegration of non-signatory militia. Conceived as a palliative to the absence of a legal framework with the non-signatories of the Pretoria peace agreements, the DRC focused on Ituri. In May 2003, most of the militia operating in Ituri signed among them the Dar es Salaam (Tanzania) Act by which they committed to engaging in the DCR process. The Congolese Government and MONUC signed as an observer.

Unlike the DDR, the DCR programme met the needs of the civilian population in providing them as well as to ex-fighters with humanitarian aid. As of 8 September 2006, the DCR managed to disarm and reintegrate only 4,758 militia elements of approximately 15,000 fighters operating in the Ituri District.

## **Chapter 7: ANALYSIS OF THE ICC'S ROLE IN THE CONGOLESE CONTEXT**

### **7.1 The complementarity between the ICC and the DRC**

#### **7.2 The ICC's attitude towards individuals' concerns**

The establishment of a permanent International Criminal Court was a turning point in the history of the humankind. The means that were lacking so far for the prosecution of perpetrators of international crimes were set up.<sup>1</sup> Furthermore, it satisfied those who questioned the ad hoc tribunals as 'victors' justice'.

This chapter analyses the outcomes and shortcomings of the ICC in the context of the Congolese crisis. To this end, it analyses the principle of complementarity between the ICC and the DRC (7.1) as well as the ICC's attitude towards individuals' concerns (7.2).

#### **7.1. Critical thoughts on the complementarity between the ICC and the DRC**

To assess the complementarity principle in the DRC, this section will analyse the admission of the Congolese situation before the ICC (7.1.1), the ICC and peace building in the DRC (7.1.2) and the local legitimacy of the ICC in the DRC (7.1.3). Lastly, it will suggest a redefinition of complementarity upon the experience of the DRC (7.1.4).

##### **7.1.1. Critical review of the admission of the situation in the DRC before the ICC**

Shortly after taking office, despite his 'proprio motu' powers, the ICC Prosecutor<sup>2</sup> began to encourage certain states to refer the situations (related

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<sup>1</sup>See BN Schiff *Building the International Criminal Court* (2008) 222.

<sup>2</sup>Luis Moreno Ocampo is the first ICC Prosecutor.

to the commission of international crimes on their territories) to the newly established International Criminal Court.<sup>3</sup>

On 3 March 2004, following the Prosecutor's call, the President of the DRC wrote a critical letter to the ICC. He essentially mentioned that the Congolese judicial authorities were unable to investigate the allegation of international crimes committed in the DRC without the participation of the ICC. Thereafter, the ICC PTC 1 analysed the admissibility of the situation in the DRC before the ICC and ruled that the situation was admissible.<sup>4</sup> It issued warrants of arrest for some Congolese warlords including (but not limited to) Thomas Lubanga,<sup>5</sup> Germain Katanga,<sup>6</sup> Mathieu Ngudjolo<sup>7</sup> and Bosco Tanganda.<sup>8</sup>

Meanwhile, the Congolese domestic courts investigated allegations of international crimes and in most of the cases convicted the suspects according to the Rome Statute of the ICC.<sup>9</sup>

This point critically reviews the admission of the situation in the DRC by the ICC. To this end, it answers the question of whether the DRC was unable or unwilling (7.1.1.1) and it reviews the prosecutorial strategy in the Congolese situation (7.1.1.2).

#### **7.1.1.1. The DRC: Unable or unwilling**

The question as to whether the DRC was unable or unwilling is extremely useful. In its decision on admissibility, the PTC did not mention either unwillingness or inability to motivate its decision. Rather, it referred to

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<sup>3</sup>WA Schabas 'Complementarity in practice: some uncomplimentary thoughts' (2008) 19 *Criminal Law Forum* 9. See also WA Schabas 'Complementarity in practice: creative solutions or a trap for the court?' in M Politi and F Gioa (eds) *The International Criminal Court and national jurisdictions* (2008) 28.

<sup>4</sup>See SA William/WA Schabas 'Article 17, issues of admissibility' in O Triffterer (ed) *Commentary of the Rome statute of the International Criminal Court-observers notes article by article* (2008) 615.

<sup>5</sup>Warrant of arrest No.: ICC-01/04-01/06 of 10 February 2006.

<sup>6</sup>Warrant of arrest No ICC-01/04-01/07 of 02 July 2007.

<sup>7</sup>Warrant of arrest No ICC-01/04-01/07-260 of 06.07.2007.

<sup>8</sup>See ICC-01/04-02/06.

<sup>9</sup>See supra 6.3.

inactivity.<sup>10</sup> Therefore, it is appropriate to examine the factual circumstances that prevailed on the ground at the time of the admission of the case by the ICC.

The presidential letter to the ICC (about domestic prosecutions)<sup>11</sup> constitutes evidence of DRC's willingness to prosecute international crimes. They also prove that the DRC somehow lacked the resources to achieve this goal. Therefore, it can be inferred that the DRC was genuinely unable to prosecute the situation in Ituri. That inability lies not only with the collapse of the judiciary in Ituri, but from the rank of one suspect, namely Germain Katanga.<sup>12</sup>

At the moment of the referral, the district of Ituri was out of Congolese government's control and hence the judiciary collapsed in that part of the territory. Therefore, the DRC could not get the suspects. This is the effective scenario of article 17 (3) of the ICC.<sup>13</sup> This can be the reason for the participation of the ICC mentioned in the referral letter.

At the time of the OTP's application for authorisation to open investigations in the DRC,<sup>14</sup> the Congolese judiciary faced legal impediments regarding the prosecution of some suspects. The main obstacle concerns the rank of the members of the military forming the court. According to the Congolese code of military justice, the members of the bench shall be either higher in rank or older in the same rank than the suspect.<sup>15</sup> The case related to the district of

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<sup>10</sup>See SA William/WA Schabas (n 4 above) 615.

<sup>11</sup>See supra 6.3.

<sup>12</sup>See supra 6.3.1.5.

<sup>13</sup>The article 17 (3) ICC reads as follow: In order to determine inability in a particular case, the Court shall consider whether, 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.

<sup>14</sup>ICC-OTP-20040623-59 Press Release of 23.06.2004 by means of which the Office of the Prosecutor of the International Criminal Court announced the opening of its first investigation.

<sup>15</sup>See Law 023/2002, articles 33 to 35.

Ituri involved a General of the Congolese Army and the Military High Court was competent. However, only one member of this jurisdiction is a General. There was a possibility of completing the court with other members of the military of the same rank with the defendant or older in the same rank than the suspect. However, the difficulty persisted as long as the Law requires that at least two members of the bench shall be magistrate. The presidency has to appoint a member of the Military High Court to a higher rank than the suspect, but it could not function without following the procedure that was extremely long given the sensitivity of the matter.<sup>16</sup> In such circumstances, the DRC was genuinely unable to prosecute.

#### **7.1.1.2. Review of the OTP's strategy in the Congolese situation**

The OTP sought and obtained an arrest warrant against Lubanga on the charge of war crimes of enlistment of children under age of fifteen, war crimes of conscription of children under age of fifteen and the war crimes of using children under age of fifteen to participate actively in the hostilities.<sup>17</sup> The OTP sought and obtained an arrest warrant against Bosco Ntaganda on the same grounds.<sup>18</sup> It charged Katanga with several counts of different crimes including:

1. Murder as crime against humanity;
2. Wilful killing as a war crime;
3. Inhumane acts as crime against humanity;
4. Inhumane treatment as crime against humanity;
5. War crimes of using children under age of fifteen to participate actively in the hostilities;

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<sup>16</sup>The President had to convey the High Council of the Defence (including Himself and the four deputy Presidents). But at that time, given the circumstances in the transition, it was difficultly foreseeable. At a later stage, the president appointed another general to the Military High Court. The jurisdiction would have been able to prosecute the suspect if only the newly appointed judge had never dealt with the case as Military prosecutor. The law 023-2002 implementing the code of military justice requires that members of the bench should not have known the case in any capacity. This includes the capacity of member of the prosecutorial body. See article 68 of the law under examination.

<sup>17</sup>See ICC-01/04-01/06.

<sup>18</sup>See ICC-01/04-02/06. Bosco Taganda was the deputy chief of the military staff of FPC, the military wing of UPC lead by Thomas Lubanga.

6. Sexual slavery as crime against humanity;
7. The war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
8. Pillaging a town or place even when taken by assault as a war crime.<sup>19</sup>

It is appropriate to mention the fact that, at the time of his transfer to The Hague, Lubanga was facing charges related to genocide and crimes against humanity in the DRC.<sup>20</sup> Commenting the Lubanga arrest warrant, the ICC prosecutor acknowledged that the Congolese judiciary was doing greater job in charging the suspects with offences of greater gravity.<sup>21</sup> The question coming to mind is why the prosecutorial strategy (especially in the Lubanga case) did not charge him with the gravest offences retained by Congolese judicial authorities against him.<sup>22</sup> In adopting a charge of less gravity whereas, the OTP strategy probably aimed at avoiding a dismissal of the case on the ground that the domestic judiciary was already handling it.<sup>23</sup>

However, one may argue that the OTP should have acted otherwise. It should have considered the fact that the domestic judiciary was unable to obtain reliable evidence on the matters. Such an inability resulted from the absence of the government's control over the district at the time of the hostilities.<sup>24</sup> It could also have referred to the genuine inability of the Congolese jurisdictions to prosecute a key suspect in the situation, namely Germain Katanga.

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<sup>19</sup>See ICC-01/04-01/07.

<sup>20</sup>WA Schabas (n 3 above) 11. See also MM El Zeidy 'The gravity threshold under the statute of the International Criminal Court' (2008) 19 *Criminal Law Forum* 41.

<sup>21</sup>See WA Schabas, (n 2 above) 42.

<sup>22</sup>See C Ryngaert 'The principle of complementarity: a means of ensuring effective international criminal justice' in MA Drumbl (ed) *Atrocity, Punishment and International Law* (2007)154.

<sup>23</sup>See ICC art 17 (1) (a). See El Zeidy (n 20 above) 42.

<sup>24</sup>See ICC art 17 (3).

### 7.1.2. The ICC and peace building in the DRC

The DRC is facing a bloody conflict which reportedly caused millions of death and forced hundreds of thousands people to flee from their homes.<sup>25</sup> The Congolese government was unable to stop the mass atrocity. It was weaker than the rebels allegedly backed by neighbouring countries.<sup>26</sup> Its own military committed atrocities whilst fighting. One must even mention that the Congolese government almost collapsed as the rebels controlled a broader part of the territory. Realising that criminal prosecutions were overwhelming, the government preferred to negotiate peace. It is appropriate to mention that the United Nations prompted the peace processes.<sup>27</sup> The DRC passed an amnesty law that clearly excluded international crimes. In practice, it appeared that the government referred to the peace agreements to stop the lawsuit against former rebels. President Kabila mentioned that peace is better than justice. One may infer from that statement that ICC's cases<sup>28</sup> might impede the peace building efforts in the DRC.

This section analyses the relationship between the ICC and the peace building process in the DRC. To this end, it reviews the relationship between peace and justice (7.1.2.1) and the impact of the peace process in the DRC on the ICC's activities (7.1.2.2).

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<sup>25</sup>See The office of the Prosecutor of the International Criminal Court Press Release of 23 06 2004.

<sup>26</sup>The UN working group on the arms embargo has received numerous allegations that CNDP received shipments of ammunition through neighbouring countries, including Rwanda and Uganda. But the Group has not been able to corroborate those allegations. However, it has found evidence that the Rwandan authorities have been complicit in the recruitment of soldiers, including children, have facilitated the supply of military equipment, and have sent officers and units from the Rwandan Defence Force (RDF) to the Democratic Republic of the Congo in support of CNDP. See Letter dated 10 December 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council (S/2008/773) para 29 and 61.

<sup>27</sup>See statement by the President of the Security Council issued on 29 October 2008 (S/PRST/2008/40). See also UN Secretary General, Press encounter upon return from four-nation visit to Asia, held, in New York on 3 November 2008, available on <http://www.un.org/apps/sg/offthecuff.asp?nid=1222> (accessed on 9 October 2011).

<sup>28</sup>Namely those directed against Bosco Taganda.

### 7.1.2.1. The relationship between peace and justice

Nowadays, the transitional justice literature is dominated by a lively debate on the relationship between peace and justice.<sup>29</sup>

The first position opposes peace to justice. It considers justice as an impediment to peace. Such a conception underpinned the peace-building process in Chile, Argentina and South Africa. Responding to international crimes committed by the overturned regimes these countries preferred (with the support of the United Nations) to grant amnesty in exchange of the truth as they believed that justice was difficult to realise. This position has prevailed for a long time.<sup>30</sup> The second opinion sees in justice a way to restore peace. This view prevailed at the time of the appointment of the UN ad hoc tribunals including the ICTY and the ICTR.<sup>31</sup>

It is appropriate to examine the relationship between the ICC and peace. Beyond this perception (of the ICC as an obstacle to peace-building), one may observe that the ICC legal framework is not totally opposed to peace-building. There are two possible rooms for approval of national decisions not to prosecute. They are the prosecutorial discretion in the interest of the victims and the Security Council's discretionary power. In the case of the interest of the victims, the OTP can consider that inactivity serves the victims' interest more than judicial proceedings and therefore, abstain from initiating investigations.<sup>32</sup> As per the Security Council, it has the ability to appreciate that a peace agreement is better than judicial proceedings in the interest of international peace and defer the ICC's action. Such a measure can only last

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<sup>29</sup>See JN Clark 'Peace, justice and the International Criminal Court' (2011) 9 *Journal of International Criminal Justice* 1.

<sup>30</sup>MP Scharf 'Trading justice for peace: the contemporary law and policy debate' in E Hughes et al (eds) *Atrocities and international accountability: beyond transitional justice* (2006) 248.

<sup>31</sup>The preambles of the UNSC resolutions establishing the ICTY and ICTR mentioned that the Security Council was convinced that in the particular circumstances of Yugoslavia/Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace. See resolution 827 (1993) adopted by the Security Council at its 3217th meeting on 25 May 1993 and resolution 955 (1994) adopted by the Security Council at its 3453rd meeting on 8 November 1994.

<sup>32</sup>See ICC art 53(c).

for 12 months but, it can be renewed on a permanent basis.<sup>33</sup> Brubacher sees in the construction of article 53 of the ICC permission for the prosecutor in exceptional circumstances to balance the needs for prosecution with countervailing facts and circumstances particular to the situation. He considers the victims' interest as one fact capable of prompting the prosecutor to avoid the pursuit of justice as to preserve their safety in the community. However, he is of the view that the interest of justice must not be interpreted as the interest of peace as the article 16 ICC aims at resolving the conflict between peace and justice.<sup>34</sup>

In his report on the Rule of Law and transitional justice in conflict and Post-conflict societies, the UN Secretary-General mentioned that Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. He declared that the advancement of all these three objectives in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. He was of the view that any approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective.<sup>35</sup> The UN Secretary General's view on the relationship between peace and justice is relevant.

#### **7.1.2.2. The impact of the ICC's proceedings on the Congolese peace process**

The ICC has faced several criticisms in connection with the Congolese situation.<sup>36</sup> On a bright side, it is appropriate to mention that the warlord expressed their fear of the ICC.

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<sup>33</sup>See ICC art 16.

<sup>34</sup>See M Brubacher 'Development of prosecutorial discretion in international criminal courts' E Hughes et al (eds) *Atrocities and international accountability: beyond transitional justice* (2006) 150.

<sup>35</sup>See Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), summary.

<sup>36</sup>See 7.1.3

In the armed conflict of the Ituri district, notable reactions emerged upon the entry into force of the ICC and then on the occasion of the DRC's referral of the situation to the ICC.

Thomas Lubanga reportedly said that the ICC constituted a constraint on the political actors who were killing people. He recognised that the ICC prompted people stopping with violence. Another leader in that area, Xavier Ciribanya reportedly said that many in the region feared the court. He said they feared about what the court was planning to do and what it would do.<sup>37</sup> Upon the referral of the situation to the ICC, warlords reportedly came to Kinshasa to negotiate peace against a waiver of criminal prosecutions. One should remember that the Ituri's armed group were not parties to the Sun City Accord. In 2006, they signed agreements with the government to disband their troops and join the national army. The parties (government and warlords) signed these agreements as two-page handwritten documents. One of them awarded a general amnesty to the fighters. It is only in November 2006 that a formalised agreement limited the amnesty to non-international crimes.<sup>38</sup>

After the release of his arrest warrant by the ICC, Bosco Taganda<sup>39</sup> overthrew the revolutionary General Laurent Nkunda from the chairmanship of the CNDP and entered into peace talk with the Congolese government. The government reportedly appointed him as General in the national army and deputy commandant of *Amani Leo*.<sup>40</sup>

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<sup>37</sup>See BN Schiff (n 1 above) 213.

<sup>38</sup>See L Davis and P Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, International Center for Transitional Justice, March 2009, 13.

<sup>39</sup>He had acted previously in the Ituri conflict as deputy commander of Lubanga's forces.

<sup>40</sup>'Peace today' can literally translate *Amani Leo*.

In my view, the ICC's arrest warrant has prompted Bosco Taganda to negotiate the peace agreement.<sup>41</sup> Such an approach reduces his chances to be surrendered to the ICC and guarantees peace. The case of Laurent Nkunda is indicative. Since there was no arrest warrant pending on him, he refused to endorse peace agreements. This can be cleared with one of President Kabila's interview about the situation in the Kivu.

On 4 April 2009, President Joseph Kabila had an interview with the *New York Times*. Interrogated on the performance of the arrest warrant issued against Taganda by the ICC, he said that the DRC has cooperated with the ICC like no other country has. He continued that to be reasonable and pragmatic he had to avoid justice that brings out war, turmoil, violence and suffering. He mentioned that his priority was peace rather than justice as without that peace no justice can take place. He then mentioned that he bears in mind that the ICC wants Taganda but for the time he commanded his collaboration for peace and granted him the benefit of doubt (presumption of innocence). As for Nkunda, he mentioned that there was no warrant for him but that he should respond for his crimes.<sup>42</sup>

The government acknowledged his prominent role in the peace process and promised not to transfer him to the ICC for the moment. Such a strategy probably aims at suggesting him not to restart with violence otherwise he will go to the ICC.

### **7.1.3. The ICC's local legitimacy in the DRC**

It is appropriate to indicate the common perception of the ICC's work in the DRC. On the one hand, the ICC faces serious criticisms pertaining to the

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<sup>41</sup>This view can be questionable to some extent. Beyond the need to save Taganda's skin, the cessation of hostilities from CNDP might be a strategy for Rwanda that has been accused to back the rebels and undermine peace in the DRC. President Kagame stated once that the problem was broader than Nkunda who could be removed from the scene at any time. Following that declaration, Nkunda was invited to Rwanda and arrested. Bosco Taganda took over and endorsed the peace agreements.

<sup>42</sup> <http://www.nytimes.com/2009/04/04/world/africa/04kabilatranscript.html?pagewanted=all> (accessed on 20 August 2011)

manipulation of the sitting government to a focus on merest responsible peoples (7.1.3.1). On the other hand, the ICC has widely impacted on the domestic courts' work though in the absence of an implementation law (7.1.3.2).

### **7.1.3.1. Criticism of the ICC's policy**

The ICC faced accusation of helping the sitting government in the DRC to silence its opponents.<sup>43</sup>

President Paul Kagame of Rwanda raised that issue during the cold war between the republics of Rwanda and Congo (DRC). Jean Pierre Bemba's defence (in the situation of Central Africa Republic) mentioned it before the ICC. Some scholars regarded the DRC's referral as a political calculation of President Kabila. They argue that he has no much to fear in connection with the crimes committed within the ICC's temporal jurisdiction.<sup>44</sup>

Underlining the difficulty to handle a large number of suspects in the case of mass atrocity, the ICC OTP stated that it would focus on those who bear the greatest responsibility. In the Congolese situation, the choices of the ICC raise the issue of compliance with the strategy of focusing on the most responsible suspects. However, from their personal histories, nobody could imagine that they were able to afford the cost of the war that they fought.<sup>45</sup> Lubanga holds a bachelor degree in psychology. He was selling beans in Bunia to survive. Katanga had just completed his high school and was jobless. Ngudjolo held a diploma in medical sciences and served as a nurse in Ituri. Taganda reportedly served in the Rwandan Army by the time of the war in Ituri.<sup>46</sup> It is clear that they received substantial supports from some

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<sup>43</sup>See Human Rights Watch, November 2008, 6.

<sup>44</sup>See WW Burke-White'Complementarity in Practice: the International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo'(2005) 18 *Leiden Journal of International law* 565-567.

<sup>45</sup>They could not afford the costs of military equipment such as uniforms, guns and ammunitions etc.

<sup>46</sup>This is probably why the ICC's arrest warrant refers to him as a citizen of Rwanda (See Warrant of Arrest for Bosco Ntaganda, No.:ICC- 01/04- 02/06 issued under seal on 22 August 2006).

sponsors. The ICC faces the accusation of focusing on the merest responsible suspects. It reportedly failed to look into the direction of the aiders and abettors of the warlords, whereas they are more responsible than their agents who acted on the ground. The ICC seems to focus on the leaves instead of the roots of crimes. Its selectivity seems to be based, not on those who bear the greatest responsibility, but on those who are easily reachable.<sup>47</sup> The case of Germain Katanga is illustrative of the previous critic. For example, responding to ICC judge's questions on the Aveba Command Structure, Katanga responded that Kakado was at the top of the Walendu-Bindi hierarchy, and Kasaki was next. He acted as Kasaki's main bodyguard, and the latter markedly trusted him. He testified that he acted only as a coordinator. In relation to the Bogoro attack, he said that everything fell in a well elaborated plan which involved an impressive ranking carrying of men, uniforms, weapons, and rations.<sup>48</sup> One may question why Kakado has never been indicted by the ICC. The ICC should also have asked Katanga to identify all the people on top of him in the ranking of the militia as well as the financial sponsors.

The ICC has indicted Callixte Mbarushimana for international crimes committed during widespread and systematic attacks launched by the FDLR against the civilian population in the North Kivu province during 2009. Those attacks have reportedly resulted on the death of 384 persons, 135 cases of sexual violence, 521 abductions, 38 cases of torture and 5 cases of mutilation.<sup>49</sup>

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<sup>47</sup>Lubanga for example is reported to have been transferred for the reason of political marketing. The ICC's Prosecutor is said to have sought his transfer to the ICC (on charges of less gravity than the ones he was facing before the Congolese judiciary) in order to show that the court was already in action and dissuade those who believed that it would never start. The DRC for its part is believed to have surrendered Lubanga to silent him and in order to display a good image in terms of human rights.

<sup>48</sup>See <http://www.katangatrial.org/2011/10/germain-katanga-completes-testimony-before-the-icc/> (accessed on 10 May 2012).

<sup>49</sup>See Warrant of Arrest for Callixte Mbarushimana, No.: ICC- 01/04- 01/10 issued under seal on 28 September 2010.

The ICC appears to have applied a double standard in choosing not to prosecute the CNDP leadership. CNDP is reportedly responsible for the killing of at least 415 civilians, of the wounding of 250 civilians and the forced displacement of over 250.000 civilians.<sup>50</sup> The ICC did not insist on the surrender of the CNDP leader (Bosco Taganda) already wanted for his involvement in the perpetration of international crimes in the Ituri district along with Thomas Lubanga.

One may also assume that the ICC has refrained itself from undermining peace agreements concluded between the Congolese governments. It concluded those agreements with the Rwandese government on the one hand<sup>51</sup> and the CNDP on the other hand.<sup>52</sup> It appears to have condoned the CNDP's activities and refused to interfere with the UN's diplomacy in the peace-making process.<sup>53</sup>

Such an approach is controversial and not of the nature of promoting a long lasting peace in the region. It is exaggerated to state that the Congolese government manipulates the ICC. However, from the preceding development, one may conclude that the compliance between ICC's choices and the Congolese government's peace plan is neither hazardous nor innocent.

It is appropriate to suggest that the ICC looks in the direction of the sponsors of atrocities in order to discourage them. Focusing on their agents does not help sufficiently. The sponsors may always help other people when the first

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<sup>50</sup>Human Rights Watch, Killings in Kiwanja: The UN's Inability to Protect Civilians, December 2008, 5.

<sup>51</sup>See Accord de Paix Entre les Gouvernements de la République du Rwanda et de la République Démocratique du Congo Sur le Retrait des Troupes Rwandaises du Territoire de la République Démocratique du Congo et le Démantèlement des Forces Des Ex-FAR et des Interahamwe en République Démocratique du Congo (RDC). (My translation for this is Peace agreement between the governments Rwanda and DRC about the withdrawal of Rwandan troops from the DRC and the dismantlement of Ex-FAR and Interahamwein the DRC). Available at [http://www.usip.org/files/file/resources/collections/peace\\_agreements/drc\\_rwanda\\_frpa07302002.pdf](http://www.usip.org/files/file/resources/collections/peace_agreements/drc_rwanda_frpa07302002.pdf)

<sup>52</sup>See *Acte d'engagement dans la province du Nord Kivu* (Undertaking in the North Kivu province).

<sup>53</sup>See Report of the Secretary-General on Preventive Diplomacy: Delivering Results (S/2011/552), para 19.

ones leave the scene. The roots will make other leaves when the previous have fallen or are cut-off.

### **7.1.3.2. Impact of the ICC on the domestic courts**

It appears from the preceding chapter that the ICC proceedings have impacted on the domestic proceedings.<sup>54</sup>The ICC prosecutor has personally commanded the work of domestic courts.<sup>55</sup> However, it seems appropriate to rethink the principle of complementarity in light of the Congolese situation.

### **7.1.4. Rethinking the complementarity between the DRC and the ICC**

The concurrent proceedings before the ICC and Congolese domestic courts have been erroneously regarded as a conflicting situation. From the previous development, one may infer that in his referral letter, the DRC's president was seeking a task division between the ICC and the domestic courts. The ICC would deal with the cases in which domestic courts had failed to obtain the suspects or to secure serious evidence whereas the domestic courts would deal with the case that they really master. Such a division of tasks may require an *ad hoc* memorandum of understanding.

Furthermore, the ICC statute should be revisited in order to determine the national authority competent for referring situations or cases to the ICC. In this regard, the judicial authority holding the command of public prosecution at the national level should be preferred to anyone else. Such an amendment will promote the separation of power (especially the judicial from the executive). The separation of power is very important when one considers the likelihood of involvement of members of the executive into the commission of international crimes. They should not be in position of judges and parties. The judicial authorities should be vested with the power of seizing the ICC. In this

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<sup>54</sup>See for example EP Mendes *Peace and Justice at the International Criminal Court* (2010) 140.

<sup>55</sup>See WA Schabas (n 3 above) 25.

regard, the ICC statute (or the rule of procedure and evidence) should guaranty them confidentiality for security reasons.<sup>56</sup>

## **7.2. The ICC and individuals' concerns**

Before Nuremberg and Tokyo, the international justice only dealt with legal persons. The consideration of individuals prompted the necessity of safeguard of their fundamental rights. This section reviews the concerns pertaining to the rights of defendants (7.2.1) and victims (7.2.2).

### **7.2.1. The ICC and the defendants<sup>57</sup>**

In connection with defendants, three concerns deserve attention including the inapplicability of official capacity, the trial in the presence of the accused and the rejection of the death penalty. The ICC does not allow any privilege or immunity pertaining to the official capacity of the defendants.<sup>58</sup> It requires that they be present at the trial.<sup>59</sup> This point reviews these options in order to show how they jeopardise the effectiveness of the court and urge their redefinition.

#### **7.2.1.2. The irrelevance of official capacity under the ICC<sup>60</sup>**

The irrelevance of the official position is consistent with the denial of any immunity and privilege pertaining to the official capacity of the defendant. However, one should note that this question is undoubtedly one of the most crucial of the ICC. It jeopardises the effectiveness of the court.

The statutes of the post-world war international tribunals provided for the irrelevance of officials' capacity.<sup>61</sup> It is appropriate to mention that, the IMT

<sup>56</sup>In the DRC, for example, it is reported that a member of the office of the Military General attorney was kidnapped for his involvement in the prosecution of Thomas Lubanga in the DRC. This magistrate was broadcasted during Lubanga's transfer to the ICC.

<sup>57</sup>The term defendants seem more appropriate when considering proceedings before the ICC in general. However, one should not that at the pre-trial stage, defendants are called suspects. Once the charges have been confirmed against them, they become accused.

<sup>58</sup>See ICC art 27.

<sup>59</sup>Id 63.

<sup>60</sup>It is appropriate to mention that so far, the question of irrelevance of official capacity does not affect the situation in the DRC.

never found Hitler at the time of the trial and the IMTFE never tried the Japanese emperor despite his availability.

The following years witnessed a lively controversy on the immunity of foreign officials for international crimes before domestic courts. The debate was about whether or not foreign agents can face charges related to international crimes before domestic courts of a third state. The ICJ ruled that only international criminal jurisdictions could refuse diplomatic immunities.<sup>62</sup>

The negotiations and adoption of the ICC took place before the ICJ ruling. According to article 27 of the ICC, nothing can prevent states parties from prosecuting or arresting (and surrendering to the ICC) officials when they have allegedly committed international crimes. One may assume that states parties revoke the immunities contained in the Vienna Convention on diplomatic immunities upon ratification of the Rome statute. If the arrest and surrender by virtue of an ICC arrest warrant can be easily understandable, it is difficult to foresee the prosecution of officials before domestic courts (especially when they emerge from non-party states).

Since the signing of the ICC Statute, two attitudes require attention in the world, including the bilateral agreements on immunities and the warning of officials targeted by the ICC.

On the one hand, the US has reportedly entered into bilateral agreements with more than 80 states parties to the ICC statute in order to prevent them from arresting and surrendering any US soldier wanted by the ICC for international crimes.<sup>63</sup> On the other hand, states parties have been warning

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<sup>61</sup>Cite the provisions. This principle was adopted by the UN. The Nuremberg Principle III provides that the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

<sup>62</sup>See Case The Democratic Republic of the Congo v. Belgium (14 February 2002) (2002) ICJ Reports 32.

<sup>63</sup>Such an agreement is reported to be a consequence of the American Service member Protection Act (ASPA). The paragraph 6 of the resolution referring the situation in the Darfur to the ICC seems to save US interest. It provides that nationals, current or former officials or personnel from a contributing State outside Sudan which is

foreign officials target by the ICC. Apparently they do not want to go through the difficulty of arresting an official. The case of the Sudanese president targeted by an ICC arrest warrant is indicative. Most of his colleagues warned him not to visit their countries in order to avoid the embarrassment of an arrest in execution of the ICC warrant.

From this evolution, one can conclude that the reasons that motivated the irrelevance of immunities do no longer exist. At the Rome diplomatic conference for the creation of a permanent international criminal court, states decided to set principles that would bind all of them. However, the attitude of the USA must have affected the will of other state. Realistically speaking, nobody can undertake to arrest and surrender a head of state when it is overwhelming to do so with an ordinary American foot soldier. The warning of targeted official is a polite refusal of cooperation.

The attitudes just described seriously affect the effectiveness of the ICC. Therefore, it is appropriate to rethink the ICC attitude towards officials. It is relevant to support the denial of immunity in case of international crimes. However, for more efficacy of the ICC, it is appropriate to consider procedural privileges for officials. For example, the statute can specify that they must not be deprived of their liberty unless convicted in the last resort of proceedings. They can also be allowed to attend the hearing via video conference or be allowed to be represented at the trial by their counsels. Such an amendment will indubitably facilitate the work of the court and avoid unnecessary delay in the instruction of cases involving officials.

### **7.2.1.3. The presence of defendants for trial before the ICC**

The importance of this question is twofold.

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not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State; See Resolution 1593 (2005), adopted by the Security Council at its 5158th meeting, on 31 March 2005.

On the one hand, the fact that no trial shall take place in the absence of the defendant means that the member states to the ICC have to implement this provision in their national systems. One may assume that, upon the ratification of the ICC the member states accept for the outlaw of trial in absentia. This clearly appears in the provisions describing the grounds for states' genuine inability.<sup>64</sup>

On the other hand, the interdiction of trial in absentia jeopardises the ICC's effectiveness. The accused will choose to stay at large as long as they know that the court will be unable to get them.<sup>65</sup> It is appropriate to rethink the policy of the ICC at this point in order to strengthen the deterrent effect of the ICC's proceedings.<sup>66</sup> It is appropriate to recall the history of the interdiction before suggesting any amendment to it.

#### **7.2.1.3.1. Background to the interdiction of trials in absentia before the ICC**

The ICCPR grants accused persons the right to be tried in their presence.<sup>67</sup> However, Bassiouni has questioned the essential character of such a right. The investigation that he conducted on the issue of trials in absentia revealed that of 139 nations analysed only 25 nations ban trials in absentia. Furthermore, all the nations establish exceptions whereby trials outside the presence of the accused may occur. He concluded that the right to be tried in one's presence is not a core international human right.<sup>68</sup>

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<sup>64</sup>See ICC art 17 (3).

<sup>65</sup>It is reported that after the release of the ICC arrest warrant against him, the Sudanese President Omar Al Bashir told the ICC off; he said that the ICC people '*should eat their arrest warrant*'. In the case of the DRC, as long as he is at large the ICC cannot start the trial against Bosco Taganda who is believed to have played a key role in the mass atrocity committed in Ituri.

<sup>66</sup>See the ICC, the jurisdiction of last resort.

<sup>67</sup>See ICCPR art 14 (2) (d).

<sup>68</sup>According to him, the core rights are the right to life, liberty and security of person; recognition and equal protection before the law; freedom from arbitrary detention; freedom from torture; right to be presumed innocent; right to a fair and speedy trial; right to assistance of counsel; right to appeal; right to be protected from double jeopardy; and protection against ex-post facto laws. See Bassiouni M.C. cited by DJ Brown 'The International criminal Court and Trial in absentia'(1998-1999) 3 *Brook Journal of International Law*763-769, 778 (available on Hein Online). See also S Trechsel *Human rights in criminal proceedings* (2005)255.

As per the ICC, three perspectives reportedly emerged on the question of the presence of the accused for trial during the making of the ICC. The first position deemed trials in absentia impermissible in all cases, except where the accused disrupted the trial. This opinion argued that trials in absentia would degenerate into show trials and would soon compromise the ICC. The second opinion estimated that trials in absentia were of little practical value because the accused would have the right to a new trial upon the appearance before the court. The third opinion believed that, given the nature of the crimes in the statute, it would generally be difficult to compel the appearance of the accused. Therefore, for the court to promote peace, justice, and reconciliation, it would be necessary to conduct trials in the absence of the defendants. The first view prevailed.<sup>69</sup>

The ICC Statute allows the Pre-trial chamber to seat, under certain circumstances, without the defendants being present.<sup>70</sup> The presence of the accused at their trial is a right.<sup>71</sup> This right is one of the components of the right to a fair trial. It requires that the accused persons participate in an effective way to all stages of their trial. The physical presence is the best way of ensuring effective participation to the trial.<sup>72</sup> Furthermore, it is one of the three rights secured by the CCPR.<sup>73</sup>

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<sup>69</sup>Human rights watch report on trials in absentia to the Secretariat of the Rules and Procedure Committee Extraordinary Chambers of the Courts of Cambodia, available at [www.hrw.org](http://www.hrw.org), accessed on 18 September 2009. See also RS Lee *The International Criminal Court, the making of the Rome statute, issues, negotiations, results* (1999) 255.

<sup>70</sup>The article 61(2) of the ICC reads as follow : *'The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:*

*(a) Waived his or her right to be present; or*

*(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.*

*In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice'.*

<sup>71</sup>See ICC Statute, articles 61 (2) and 67 (1) (d).

<sup>72</sup>See G-JA Knoop *Defenses in contemporary international criminal law* (2007) 262-263.

<sup>73</sup>ICCPR, articles 9 (3) and 14. See also Trechsel (n 69 above) 253.

In the ICC's context, the introduction of a trial in absentia presents an obvious risk of undue delay. Some of the accused persons will endeavour all efforts to remain at large fearing a sentence after a trial.

For increase effectiveness, and to increase the deterrent effect, one may suggest the waiver of their rights by the accused persons (7.2.1.1.2) and/or imagine the possibility of sanctioning of an abuse of the right to be present at their trial (7.2.1.1.3).

#### **7.2.1.3.2. Waiver of right to be present at the trial**

One can imagine a situation whereby the accused persons expressly waive their right to be tried in their presence. The disposition of article 61 (2) of the ICC statute can be applied 'mutatis mutandis' to the trial stage. Therefore, article 63 (2) (a) will read as follow:

*'The Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the accused person when the person has: (a) waived his or her right to be present;'*

The ICTR faced a similar situation. Its statute granted accused persons the right to be tried in their presence. During the Barayagwiza trial, the accused decided to stop attending hearings explaining that he would not be involved in a show trial. The ICTR did not stop the proceedings. It continued the hearing, ruling that the accused Barayagwiza was allowed to attend the hearing at any stage.<sup>74</sup>

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<sup>74</sup>The Trial chamber said that 'Barayagwiza was entitled to be present during his trial and has chosen not to do so, and the trial would proceed nonetheless. The chamber also stated that he would be free to attend whenever he changed his mind'. See ICTR, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, *Judgement*, 3 Déc. 2003, para. 83. Cited by WA Schabas 'Article 63' in O Triffterer (ed) *Commentary of the Rome statute of the International Criminal Court-observers notes article by article* (2008) 1197.

### **7.2.1.3.3. Sanctioning the abuse of the right to be present at the trial**

The scenario of sanctioning the abuse of the right to be present before the ICC emerges from article 61 (2) (a) related to the proceedings before the Pre-Trial Chamber.<sup>75</sup>

These provisions can be applied ‘mutatis mutandis’ to the trial itself when the ICC is of the view that the accused persons are abusing their right to be present. One may imagine an article 63 (2) (b) reading as follow:

*‘The Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:*

*(a) Fled or cannot be found, and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges that have been confirmed against him or her.’*

Such amendment will offer the advantage to avoid undue delay in investigating case deemed admissible before the ICC. Since the right to be tried in one’s presence is not a core human right, it can be waived. The adjustment just proposed will reflect the state of the majority of all criminal legislations that either allow trial in absentia or admit exception to their interdiction.

### **7.2.2. The ICC and victims of international crimes**

In the ICC’s legislation, victims include:

1. Natural persons that have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
2. Organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science

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<sup>75</sup>In the situation in Uganda, the ICC has proceeded in the absence of the suspect on the ground that they were not found. It appointed defence counsel and confirmed the charges. See the case the Prosecutor against Joseph KONY.

or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.<sup>76</sup>

The Trust Fund for Victims (hereinafter TFV) has been established by the ICC Statute. It has a twofold mandate including the administration of reparation ordered by the ICC against convicted persons and the use of other resources for the benefit of victims of international crimes of the ICC's competence.<sup>77</sup>

Pursuant to article 79 of the ICC Statute, the Assembly of States Parties decided at its third plenary meeting, on 9 September 2002, by consensus to establish a trust fund for the benefit of victims of international crimes falling within the ICC's jurisdiction. It decided that the TFV shall be funded by diverse sources including:<sup>78</sup>

1. Voluntary contributions from Governments, international organizations, individuals, corporations and other entities;
2. Money and other property collected through fines or forfeiture transferred to the TFV if ordered by the ICC pursuant to the article 79 (para 2) of its Statute;
3. Resources collected through awards for reparations if ordered by the ICC pursuant to rule 98 of the Rules of Procedure and Evidence;

Such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the TVF.

So far the ICC has not ordered any reparation for victims upon condemnation of accused persons in the Congolese situation. But the TFV has been remarkably active in the DRC in regard to its second mandate namely the use of other resources for the benefit of victims of international crimes of the ICC's competence.

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<sup>76</sup>See ICC Rules of Procedure and Evidence, rule 85.

<sup>77</sup>See ICC statute, article 79.

<sup>78</sup>See Resolution ICC-ASP/1/Res.6 of the Assembly of States Parties.

The TFV has been supporting three defined categories of assistance including Physical Rehabilitation, Psychological Rehabilitation and Material Support. The Physical Rehabilitation includes reconstructive surgery, general surgery, bullet and bomb fragment removal, prosthetic and orthopaedic devices, referrals to services like fistula repair and HIV and AIDS screening, treatment, care and support.

As for the Psychological Rehabilitation, it encompasses both individual and group based trauma counselling. The TFV uses music, dance and drama groups to promote social cohesion and healing as well as community sensitization workshops and radio broadcasts on victims' rights, information sessions through large-scale community meetings.

Material Support is consistent with safe shelter, vocational training, and reintegration kits, microcredit support, education grants, and classes in accelerated literacy.<sup>79</sup>

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<sup>79</sup>See ICC-ASP/9/2, pp. 1-2.

## **CHAPTER 8: Responses Provided by the United Nations to International Crimes Committed after 1 July 2002.**

### **8.1 Responses related to the ICC's mandate**

### **8.2 Responses related to the UN's general mandate**

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This chapter analyses the responses provided by the UN to international crimes committed in the DRC after the entry into force of the ICC. To this end, it distinguishes between the responses pertaining to the ICC's mandate (8.1) and the responses falling under the UN's general mandate (8.2). In the last instance, it assesses the UN's action in relation to the crimes committed in the DRC after 1 July 2002 (8.3).

#### **8.1. Responses pertaining to the ICC's mandate**

This section overviews the legal framework of the relationship between the UN and the ICC (8.1.1) before analysing the responses provided by the UN in relation with the situation in the DRC before the ICC (8.1.2).

##### **8.1.1. Legal framework of the relationship between the UN and the ICC**

The relationship between the UN and the ICC is principally governed by the ICC and the rule of Procedures and Evidences (8.1.1.1) as well as by the negotiated relationship agreement between the International Criminal Court and the United Nations (8.1.1.2).

###### **8.1.1.1. The ICC and Rule of Procedures and Evidences**

The Security Council has been acknowledged the power of triggering the ICC.<sup>1</sup>This power is justified by the UNSC's special competences with regard to the maintenance and restoration of peace under the chapter VII of the UN Charter. The UNSC can seize the ICC even if the state concerned by the referral is not party to the Rome statute of the ICC. An example of this is

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<sup>1</sup> See ICC art 13 b and RPE, rule 105.

given by the referral of the situation in the Darfur, Sudan being a non-party state to the ICC.<sup>2</sup>

Empowering the UNSC with the triggering capacity has provoked a lively debate amongst delegations at the Rome diplomatic conference. The supporters of the idea argued that such a power would remove the need of creating a future *ad hoc* tribunal. Whereas the detractors claimed that such a power would undermine the credibility of the Court as it amounts to subjecting the ICC's functioning to a political organ. The first view prevailed.<sup>3</sup>

The UNSC can also defer the investigations or prosecutions by the ICC for a period of 12 months. This period can be renewed.<sup>4</sup>

As for the referral issue, the deferral issue was amongst the most controversial at the Rome diplomatic conference. The ILC draft contained the interdiction for the court to take any action in a situation being dealt with by the Security Council.<sup>5</sup> This idea faced the opposition of the majority of the delegations at the Rome diplomatic conference. The principal argument was that such a power would interfere with the functioning of the court and undermine its independence. They inferred from the ILC formulation that the court's action could be hampered by a *veto* from any permanent member of the Security Council or by the simple fact of putting a situation on the Security Council's agenda. In view of preserving the court's independence, some delegations suggested that the deferral power be limited to cases referred by the Security Council.

Singapore's suggestion was noteworthy in that it suggested a reliable compromise to the deadlock. It suggested that the court's proceedings be

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<sup>2</sup>See S/RES/1593 (2005).

<sup>3</sup> See L Yee 'The International Criminal Court and the Security Council: article 13(b) and 16' in RS Lee (Ed) *The International Criminal Court, the making of the Rome statute, issues, negotiations, results* (1999) 146.

<sup>4</sup> See ICC art 16.

<sup>5</sup> See ILC draft art 23(3).

only stopped by a formal decision of the Security Council. It explained that requirement of at least nine positive votes out of the 15 for the adoption of a Council's resolution will not ease the impeachment of the court proceedings. This requirement necessitates broad negotiations amongst the members of the Council given the fact that even the unanimity of permanent members does not suffice to vote a resolution. This means that whenever the Council will reach a resolution to stop the court's proceedings, it would have seriously handled the question.<sup>6</sup> Canada suggested the insertion of the temporal limitation of such interdiction.<sup>7</sup>

The UNSC can refer to the PTC whenever the OTP decides not to open investigations or conduct prosecution in order to have the PTC asking the OTP to reconsider its decision.<sup>8</sup>

The UN can make financial contribution (subject to approval of the ASP) to the ICC in relation with the expenses incurred due to referrals by the Security Council.<sup>9</sup>

The ICC may invite the UN to submit written or oral observation on an issue that a chamber deems appropriate.<sup>10</sup>

#### **8.1.1.2. The Negotiated Relationship Agreement between the International Criminal Court and the United Nations**

The UN and the ICC have agreed to cooperate closely and consult each other on matters of mutual interest in compliance with the provisions of the UN charter and the ICC.<sup>11</sup> The ICC undertook to invite a UN representative to

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<sup>6</sup> See L Yee (n 3 above) 150.

<sup>7</sup> Id 151.

<sup>8</sup> See ICC art 53(3) and RPE rule 107 (4).

<sup>9</sup> See ICC, art 115 (b).

<sup>10</sup> See RPE rule 103. The RPE does not mention the UN as such.

<sup>11</sup> See The Negotiated Relationship Agreement between the International Criminal Court and the United Nations, art 3.

attend public hearings in the cases interesting the UN.<sup>12</sup> On its part, the UN agreed to invite a representative of the ICC whenever it discusses matters related to the Court.<sup>13</sup> The two parties agreed on an exchange of information of mutual interest.<sup>14</sup>

The UN accepted to provide the ICC's magistrates and staff/officials with the UN *Laissez passer* in order to ease their mobility and thereby the ICC's work.<sup>15</sup> The agreement also provides that the financial matters referred to by the article 115 of the ICC should be settled in separate arrangements.<sup>16</sup>

The agreement emphasised the UN's disposition to cooperate with the ICC.<sup>17</sup> In this regard, the UN undertook to waive its personals' obligation of confidentiality whenever they are required to testify before the ICC.<sup>18</sup> The agreement formalise the referral and deferral of situations by the UN as provided for in articles 13 (b) and 16 of the ICC.<sup>19</sup>

The agreement underlines that the UN personals enjoy privileges and immunities necessary to the fulfilment of UN mission. But the UN undertakes to waive such immunities whenever the ICC is of the view that a UN member is involved in the commission of international crimes of its jurisdiction.<sup>20</sup> Such a provision is very controversial when one considers the provision of article 27 of the ICC on the irrelevance of official capacity. This provision suggests that the ICC cannot proceed against a UN member as long as the UN has not waived their immunity and privilege. It constitutes a double standard for the

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<sup>12</sup> Id art 4(1)

<sup>13</sup> Id art 4(2)(3)

<sup>14</sup> Id art 5

<sup>15</sup> Id art 11

<sup>16</sup> See n 11 above art 13.

<sup>17</sup> Id art 15

<sup>18</sup> Id art 16

<sup>19</sup> Id art 17

<sup>20</sup> Id art 19

UN personnel.<sup>21</sup> It is also questionable if the ICC presidency or OTP have the capacity of endorsing agreements entailing breaches of the ICC.

But on the bright side, such a provision together with the provision of article 98 of the ICC<sup>22</sup> plead in favour of the idea that the irrelevance of the immunity and privilege attached to suspect's official capacity is not absolute and should be loosen in order to ensure more effectiveness to the ICC.

The UN agreement also organises the protection of confidentiality of documents in the custody of the UN. The UN shall, before communicating information about such documents to the ICC, seek the waiver of the confidentiality by the state or organisation from which the documents originate. If it fails to obtain the waiver it will inform the ICC.<sup>23</sup>

### **8.1.2. UN's in relation to the situation in the DRC before the ICC**

The UN's action towards the ICC's work in the situation related to the DRC is noteworthy. It has helped the ICC through MONUC's assistance (8.1.2.1) and the submission of an *amicus curiae* observation in the Lubanga case (8.1.2.2).

#### **8.1.2.1. MONUC's assistance to the ICC**

Pursuant to articles 10 and 18 of their relationship agreement, the UN and the ICC have concluded a Memorandum of Understanding (MoU) concerning

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<sup>21</sup> One should note that MONUC officers have faced accusation of sexual exploitation and abuse. The Secretary General has deployed an investigative team to follow up the case of MONUC members concerned by such accusations. The investigation team has concluded that some allegations were founded. For instance, one MONUC member was found in possession of pornographic of female minors. He was removed from office and sent to his country to face criminal prosecution. See S/2004/1034, para 65 and 67.

<sup>22</sup> The article 98 of the ICC deals with the Cooperation with respect to waiver of immunity and consent to surrender.

<sup>23</sup> See n 11 above art 20.

Cooperation between the UN Mission in the Democratic Republic of the Congo (MONUC) and the ICC.<sup>24</sup>

In essence this MoU organises the military support (8.1.2.1.1), the financial and logistical assistance (8.1.2.1.2), as well as the legal assistance (8.1.2.1.3).

#### **8.1.2.1.1. Military Support**

Recalling that the Congolese government bears the primary responsibility of providing the military support to the ICC, the parties agreed that the MONUC can provide such a support upon the ICC's request and with the prior written consent of the Congolese government. Such a support will be provided for the purposes of facilitating the OTP's investigations in the areas where the MONUC is deployed.<sup>25</sup>

#### **8.1.2.1.2. Administrative and logistical services**

The parties agreed that any support granted to the ICC will be done on a reimbursable basis.<sup>26</sup>

The MOU covers:

1. administrative and logistical support including access to MONUC's information technology facilities, engineering and construction assistance, storage for items of Court owned equipment or property on a space-available basis, access to MONUC's vehicle maintenance facilities for the purpose of first line maintenance of the Court's vehicles, the sale at prevailing market rates of petrol, oil and lubricants the sale at prevailing market rates of emergency rations and water,

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<sup>24</sup> See Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court (hereafter MoU).

<sup>25</sup> Id art 9

<sup>26</sup> This is because the UN did not refer the situation in the DRC to the ICC. See Id, article 4.

- temporary or overnight accommodation for staff/officials of the Court on MONUC premises;<sup>27</sup>
2. Medical Service in case of emergency including on-site medical support to the staff/officials of the Court concerned, and transportation to the nearest available appropriate medical facility (emergency medical evacuation services to an appropriate country);<sup>28</sup>
  3. Transportation including passenger services to staff/officials of the ICC on a space-available basis on board MONUC aircrafts, special flights upon the ICC's request, provision by MONUC of transportation in its motor vehicles to staff/officials of the ICC on a space-available basis and provision of transportation for suspects or accused persons for the purpose of their transfer to the Court as well as provision for transportation for witnesses who have received a summons from the competent authorities of the DRC to attend for questioning in any location of this country.<sup>29</sup>

#### **8.1.2.1.3. Cooperation and legal assistance**

Cooperation and legal assistance including access of the ICC to document and information held by MONUC<sup>30</sup>, interview of MONUC members by the ICC<sup>31</sup>, testimony of members of MONUC<sup>32</sup>, assistance in tracing witnesses<sup>33</sup>, assistance in respect of interview,<sup>34</sup> assistance in the preservation of physical evidence<sup>35</sup> as well as arrest, searches, seizure and securing of crime scenes.<sup>36</sup>

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<sup>27</sup>See n 24 above 5.

<sup>28</sup>Id art 6

<sup>29</sup>Id art 8

<sup>30</sup>Id art 10

<sup>31</sup>Id art 11

<sup>32</sup>Id art 12

<sup>33</sup>Id art 13

<sup>34</sup>Id art 14

<sup>35</sup>Id art 15

<sup>36</sup>Id art 16

One should note that given the involvement of all warring parties in the commission of international crimes and the fact that only MONUC could access remote areas of the DRC, its role was primordial. MONUC has conducted several investigations over different events involving mass atrocities in the DRC.

#### **8.1.2.4. Submission of *amicus curiae***

Pursuant to rule 103 of the ICC-REP, Radhika Coomaraswamy, the United Nations Special Representative of the Secretary-General on Children and Armed Conflict<sup>37</sup> applied for and was granted a leave to submit written observations in the form of an *amicus curiae* brief on Trial Chamber I of the ICC.

These observations include on the one hand the definition of conscripting or enlisting children, and, bearing in mind a child's potential vulnerability, the manner in which any distinction between the two formulations (i.e. conscription or enlistment) should be approached; on the other hand, the interpretation, focusing specifically on the role of girls in armed forces, of the term 'using them to participate actively in hostilities.'

#### **8.2. Responses falling under the UN's general mandate**

In fulfilment of its general mandate the United Nations actively worked toward the disarmament, demobilization, repatriation, reintegration and resettlement of foreign combatants (DDRRR) and the facilitation of the voluntary disarmament, demobilization and reintegration of Congolese combatants

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<sup>37</sup> The mandate of the Special Representative was delineated by General Assembly resolution 51/77 of 12 December 1996. It entails advocacy to raise awareness about the plight of children in armed conflict. And a commitment to work closely with competent international bodies to ensure protection of children in situations of armed conflict. Further subsequent resolutions have extended this original mandate. In three of these (including resolution 54/149 adopted by the General Assembly at its Fifty-fourth session on 25 February 2000, resolution 57/190 adopted by the General Assembly at its Fifty-seventh session on 19 February 2003 and resolution 60/231 adopted by the General Assembly at Sixtieth session on 11 January 2006), the General Assembly recognizes the role of the ICC in ending impunity for perpetrators of crimes against children. See Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, para 2.

(DDR). It deployed fact findings teams; issued thematic reports related to the DRC and helped to reinforce capacities of local actors. Furthermore, facing as serious regain of violence, the UN engaged into a preventive diplomacy and appointed a special envoy to the great Lakes region. This point reviews these responses.

### **8.2.1. DDRRR and DDR<sup>38</sup>**

The United Nations has provided a substantial support to the implementation of the Lusaka ceasefire agreement by two major programs including the Disarmament, Demobilization, repatriation, reintegration and resettlement of foreign combatants (DDRRR) and the facilitation of the voluntary disarmament, demobilization and reintegration of Congolese combatants (DDR).

In DDRRR, the MONUC targeted foreign combatants (in majority Rwandans) in the DRC. The MONUC managed to repatriate approximately 13,000 Rwandan combatants and dependents. The majority of these belonged to FDLR. To achieve this, MONUC conducted numerous missions into the forests of eastern Congo in order to seek out the foreign combatants and encourage them to join the voluntary DDRRR process. Furthermore, with the support of DFID, USAID and the World Bank, it developed and distributed public information tools, such as a Kinyarwanda radio programme, as well as pamphlets, videos, and comics on the DDRRR process. MONUC deployed serious efforts to convince the FDLR leadership to comply with its 2005 declaration after the Rome agreement and enter the DDRRR. This diplomacy caused the FDLR split. Some of the FDLR junior commanders disobeyed the movement's leadership and went back to Rwanda. This result prompted the MONUC to state that the FDLR was no longer representing a significant military threat to Rwanda.

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<sup>38</sup> On this point See United Nations, disarmament, demobilisation and reintegration, resource centre, country programme, the DRC available at <http://www.unddr.org/countryprogrammes.php?c=25>.

As for the DDR, the MONUC was tasked by the Security Council with assisting the Government of National Unity and Transition in disarming and demobilizing those Congolese combatants voluntarily decide to enter the disarmament, demobilization and reintegration (DDR) process.<sup>39</sup> Further, the MONUC was tasked with seizing or collecting, as appropriate, arms and any related materiel whose presence in the territory of the DRC violates the measures imposed by paragraph 20 of resolution 1493, and disposing of such arms and related materiel as appropriate.<sup>40</sup>

The MONUC supported the CONADER's action including in accompanying disarmament and contributing to general security. MONUC provided logistical support to CONADER and ensured the coordination between the various DDR actors.

### **8.2.2. Fact-finding missions**

The United Nations has investigated over the allegations of human rights violations committed by the Lord's Resistance Army (8.2.2.1), the allegations of Congolese Army's abuses in the North Kivu province (8.2.2.2) and the Bas-Congo events (8.2.2.3).

#### **8.2.2.1. Missions on alleged human rights violations committed by the Lord's Resistance Army (LRA)**

Between May 2008 and June 2009, the UN sent teams of officers from the United Nations Joint Human Rights Office (UNJHRO) in the DRC<sup>41</sup>, on

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<sup>39</sup> See S/RES/1493 (2003).

<sup>40</sup> See S/RES/1565 (2004), para 5(d).

<sup>41</sup> One should note that in 1996 in accordance with the Congolese (the Zairian) government, the UN High Commissioner for Human Rights established an office in the DRC, the OHCHR/DRC tasked with the monitoring of the human rights situation in the country, the presentation of reports on human rights violations that require urgent interventions by any of the thematic Independent Experts, and the reinforcement of national institutions (both governmental and non-governmental) working on human rights issues in order to help the DRC complying with the provisions of international and regional treaties to which it is a State Party. In 2000, the UN Mission to the DRC established a Human Rights Division. The later was tasked by the UN Security Council (Resolutions 1756 of 15 May 2007, 1794 of 21 December 2007, 1856 of 22 December 2008) with the assistance in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, investigation of human rights violations with a view to putting an end to impunity, assistance in the development and

human rights violations committed by the LRA, under the command of Joseph Kony and other senior officers wanted by the ICC.

The UNJHRO conducted a total of 14 missions and held during which it held dozens of meeting, conducted site visits and collected hundreds of testimonies from victims and witnesses. The findings of the missions follow:

1. LRA had killed at least 1,200 civilians (including some women who were raped before their execution) by gunshot and knife wounds;
2. More than 100 people had been wounded by gunshot and stabbing;
3. LRA had abducted over 1,400 people including men, some of whom were executed or are missing, at least 630 children (girls and boys), and more than 400 women. LRA subjected the abductees to forced labour in the fields, by forcing them to carry looted goods or personal effects or by recruiting them into the militia. The abducted women were generally forced to marry LRA members, subjected to sexual slavery, or both;
4. The LRA looted and/or set on fire thousands of homes, dozens of shops and businesses, as well as public buildings, including at least thirty schools, health centres, hospitals, churches, markets, and traditional seats of chiefdoms;
5. Over 200,000 people were forced to flee from their homes. Those displaced faced precarious conditions due to the slow delivery of humanitarian aid. They were also subjected to human rights violations committed by FARDC soldiers, who were supposed to protect them.<sup>42</sup>

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implementation of a transitional justice strategy, and cooperation in national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law. In February 2008, the UN decided to create the United Nations Joint Human Rights Office (UNJHRO) in which the two offices have been fully integrated. The UNJHRO functions in accordance with their two traditional mandates describe above. See <http://monusco.unmissions.org> (accessed on 13 November 2011). See also S/RES/1756 (2007) and S/RES/1794 (2007).

<sup>42</sup> See MONUC/OHCHR, Summary of fact finding missions on alleged human rights violations committed by the Lord's Resistance Army (LRA) in the districts of Haut-Uélé and Bas-Uélé in Orientale province of the Democratic Republic of Congo, December 2009, para 3.

The UNJHRO stated that the LRA's attacks as well as systematic and widespread human rights violations against Congolese civilians during the armed conflict may constitute war crimes and crimes against humanity as defined by the ICC and not subject to statute of limitations under international law.<sup>43</sup> It has identified the insufficiency of preparation and coordination as reason of the failure of the military operations aimed at eradicating the LRA from the DRC.<sup>44</sup>

It mentioned the abuses committed by Congolese soldiers deployed to counter the LRA including summary executions, rape, arbitrary arrests and detentions and illegal, cruel, inhumane or degrading treatment and extortion. It highlighted the fact that the victims of LRA's atrocities have developed local self-defence groups as a palliative to the perceived indifference and negligence from the DRC and the international community.<sup>45</sup>

The UNJHRO concluded that given the LRA's ability to evade peace initiatives, to reorganise and to continue its criminal activities in the region, there should be a more comprehensive strategy to overcome it once and for all. The UNJHRO suggests new military operations focused on both civilians protection and successfully dismantling the LRA. To this end, it pleaded for

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<sup>43</sup>Id para 4.

<sup>44</sup> The operation *Rudia* (this Swahili code stands for 'Go back' and explain the determination of the mission to send the LRA back to Uganda) was conducted conjointly by the MONUC and the Congolese army. The operation 'Lightening thunder' was officially conducted conjointly by the armies of Uganda, DRC and South Sudan. It is appropriate to mention that the later operation reportedly worsened the situation on the ground. Instead of weakening the LRA (as the Ugandan army claimed), it reinforced it. LRA acquired several hundred of US weapons by disarming members of the Ugandan army of which it managed to kill between 600 and 700. The weakness of preparation and coordination in this operation appeared from its beginning. Contrary to the announced participation of the armies of DRC and South Sudan, the operation was carried out by the sole Ugandan army. After three months of overwhelming battle, it ended as surprisingly as it started. For more details, see Atkinson R, Revisiting 'Operation Lightning Thunder', in The Independent of 9 June 2009, available at <http://www.independent.co.ug/column/insight/1039-revisiting-operation-lightning-thunder-> (accessed on 13 November 2011). See also Id, para 5.

<sup>45</sup>Id para 6.

the reinforcement of the MONUC's military capacities and the urgency of arresting LRA leaders targeted by ICC arrest warrants.<sup>46</sup>

#### **8.2.2.2. Investigation report on Congolese Army's abuse in North Kivu<sup>47</sup>**

In October-November 2008, literally defeated by the CNDP, the Congolese army supposed to protect civilian retreated and allegedly committed serious human rights abuses. The UNJHRO conducted an investigation over the allegations of abuses by the Congolese army.

The investigations highlighted the cases of arbitrary killings, summary executions, sexual violence as well as looting on a massive scale committed by members of the Congolese army.

The UNJHRO formulated number of recommendations to the attention of the Congolese Government and the Parliament as well as the international community. In essence, it recommended to the Congolese government, among other, the implementation of necessary measures to investigate the serious crimes and human rights violations described in the report,<sup>48</sup> the conception of an appropriate reform of the security sector, and the establishment of a vetting mechanism to ensure that perpetrators of human rights violations are excluded from the army.<sup>49</sup> It recommended to the Congolese government the provision of necessary compensation to victims of the events who lost family members or to individuals that were raped or whose property was stolen or damaged. It suggested the consideration of other forms of community reparations when individual reparation is not

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<sup>46</sup> See MONUC/OHCHR, Summary of fact finding missions on alleged human rights violations committed by the Lord's Resistance Army (LRA) in the districts of Haut-Uélé and Bas-Uélé in Orientale province of the Democratic Republic of Congo, December 2009, para 7.

<sup>47</sup> See the Consolidated investigation report of the United Nations Joint Human Rights Office (UNJHRO) following widespread looting and grave violations of human rights by the Congolese national armed forces in Goma and Kanyabayonga in October and November 2008, dated 7 September 2009.

<sup>48</sup> See MONUC/OHCHR (December 2009), para 85 and 86.

<sup>49</sup>Id para 88.

possible.<sup>50</sup> Furthermore it insisted on the timely payment of salaries and an adequate provision of supplies for Congolese forces in terms of rations and equipment. It explained that such a precaution will prevent the forces from preying on the civilian population for their subsistence.<sup>51</sup>

It recommended to the Parliament the establishment of an independent commission to evaluate the root causes of the incidents.<sup>52</sup> The UNJHRO recommended to the international community the support to the reform of the Congolese security sector.<sup>53</sup>

### **8.2.2.3. Special investigation over the Bas Congo events<sup>54</sup>**

The MONUC carried out an investigation on Bas-Congo events. Despite the further denial of the Congolese government, the inquiry's findings corroborated the NGO reports on the events. In essence, the inquiry established that Congolese forces including the National Police and the Army committed the following:

1. Excessive use of force;<sup>55</sup>
2. Arbitrary executions;<sup>56</sup>
3. Looting and destruction of property;<sup>57</sup>
4. Mass arbitrary arrests, illegal detentions and cruel, inhumane and degrading treatment on detainees.<sup>58</sup>

MONUC urged the Congolese government to:

1. Take appropriate measures to ensure that the PNC is adequately equipped and trained to manage such situations as the one that arose in Bas Congo;

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<sup>50</sup> See MONUC/OHCHR (December 2009), para 87.

<sup>51</sup>Id para 89

<sup>52</sup>Id para 90

<sup>53</sup>Id para 91

<sup>54</sup> See MONUC *Rapport Special Bas-Congo, Mai 2008 (Bas-Congo Special report May 2008)*.

<sup>55</sup> See MONUC/OHCHR (December 2009), para 3 and 8.

<sup>56</sup>Id para 4, 7, 9 to 13

<sup>57</sup>Id para 14

<sup>58</sup>Id para 15

2. Facilitate impartial investigations in order to bring to justice the authors of serious crimes and human rights violations described in the inquiry report;
3. Grant reparation to victims who lost their welfare and/or suffered other damage during the events under examination.<sup>59</sup>

MONUC urged the political leadership of the BDK movement to acknowledge the legitimacy of the Congolese Government and authorities and take measures to ensure that its followers respect the law, and should further denounce the serious criminal offences committed by some of its followers.<sup>60</sup> However, given the fact that the government further rejected the MONUC's findings, it should have taken other measures to ensure at least the reparation to victims and deterrence of Congolese military and police. Such measures could have included a submission of communication to the ICC Prosecutor.

### **8.2.3. Thematic report**

The UN released thematic reports on the most important questions of the Congolese crisis including the illegal exploitation of natural resources and other forms of wealth of the DRC (8.2.3.1), the state of internally displaced persons in the DRC (8.2.3.2) and the remedies and reparations for victims of sexual violence in the DRC (8.2.3.3).

#### **8.2.3.1. Report on the illegal exploitation of natural resources and other forms of wealth of the DRC<sup>61</sup>**

One must remember that, at the time of the UN Panel's investigation, the DRC was divided by the war. The Panel highlighted the fact that the country

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<sup>59</sup> See MONUC/OHCHR (December 2009), para 122.

<sup>60</sup> This recommendation seems controversial when one remembers that the BDK's principal leader is an MP and clearly mentioned that his followers were using private defence to respond to what he considered to be 'an attempt of genocide'.

<sup>61</sup> See S/2002/1146.

was divided between areas controlled by the Congolese government, Ugandan government and by Rwandan government.

Given the nature of its mandate, the Panel faced serious difficulties to access information. It managed to obtain reliable information from wide variety of sources, including from Governments (civilian and military representatives), intergovernmental organizations, non-governmental organizations, businesses and private individuals.<sup>62</sup> It made considerable efforts to evaluate the information received in order to produce a reliable report.<sup>63</sup> The report uncovered the strategies adopted by different governments involved in the conflict to maintain their presence in the eastern DRC<sup>i</sup> and it provided the evidence to establish the irrelevance of these governments' allegations.

The Panel has established the link between the plunder of Congolese natural resources with the DRC. It has uncovered the links between criminal groups with the armies of Rwanda, Uganda, Zimbabwe and the DRC.<sup>64</sup> It mentioned the fact that the elites involved in the illicit exploitation of Congolese natural resources changed strategies after the Pretoria and Luanda peace agreements in order to maintain their control over the resources.<sup>65</sup>

Uganda continued to provoke ethnic conflict in Ituri in order to maintain the presence of some elements of the Uganda People's Defence Forces (UPDF).<sup>66</sup> Before agreeing to withdraw its forces from Ituri, Uganda trained a paramilitary battalion that would continue with the mining activities after the withdrawal. The report also established the link between Uganda and the rebel movements that operated in the district of Ituri as well as with the MLC of Jean Pierre Bemba.<sup>67</sup>

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<sup>62</sup>Id para 7

<sup>63</sup>Id para 8

<sup>64</sup>Id para 12

<sup>65</sup>Id para 13

<sup>66</sup> See S/2002/1146, para 14.

<sup>67</sup>Id para 101 to 140

Rwanda maintained its battalion specialised in mining activities in the Kivu province. They stopped wearing the uniform of the Rwandan Patriotic Army (RPA) and operated under a commercial label.<sup>68</sup> Rwanda has also ordered the then chief of staff of the Congolese National Army (then ANC) who came from the Rwandan backed Congolese Rally for Democracy (RCD) to incorporate RPA elements in the ANC.<sup>69</sup> The report uncovered the Rwandan strategy consisting of convincing the international community of the necessity of maintaining its armed elements in the DRC in order to ensure its security by fighting the *interahamwe* from their supposed rear basis.<sup>70</sup> The panel provided evidences of the contrary to the Rwandan security concerns claim. It mentioned a speech from Jean Pierre Ondekane<sup>71</sup> who urged all RCD-Goma's soldiers to maintain good relationship with their *Interahamwe* and *Mayi-Mayi* brothers and to let them exploit the sub-soil for their survival.<sup>72</sup> It also referred to a strong campaign of the prominent members of the Congolese Hutu community to seek for their brothers' allegiance to Rwanda in its efforts to control the eastern DRC.<sup>73</sup> It provided many evidences of the exploitation of the Congolese natural resources as the real justification of the RPA's presence in the DRC.<sup>74</sup>

As for Zimbabwe, the report acknowledges its capital role in defending the DRC's sovereignty against the attacks of its neighbouring countries<sup>75</sup>. But the report uncovered a letter from the Zimbabwean defence minister to President Mugabe suggesting the disguising of ZDF commercial interest. He suggested the creation of a joint DRC-Zimbabwe company in Mauritius in order to avoid the negative publicity generated by the UN Panel's report.<sup>76</sup>

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<sup>68</sup>Id para 15

<sup>69</sup>Id para 16

<sup>70</sup>Id para 65

<sup>71</sup> He was then First Deputy president and Chief of the Military High Command for RCD-Goma.

<sup>72</sup>Id para 66

<sup>73</sup>Id para 67

<sup>74</sup> See S/2002/1146, para 68.

<sup>75</sup>Id para 17

<sup>76</sup>Id para 18

The UNSC welcomed the Panel's report and addressed some recommendations thereto.<sup>77</sup>

It urged the foreign governments to withdraw their forces in order to ensure the Congolese government control of the country's natural resources.<sup>78</sup> It suggested the convening of an international conference on peace, security, democracy and development in the Great Lakes region in order to help the States of the region in promoting a regional economic integration, to the benefit of all the States in the region.<sup>79</sup>

The UNSC acknowledged the link between the illegal exploitation of the natural resources of the DRC and the continuation of the conflict.<sup>80</sup> It also prescribed the renewal of the panel's mandate in order to update the information gathered by the panel, review the actions taken by the governments involved in the conflict.<sup>81</sup> The UNSC further requested the panel to provide information to the Organisation for Economic Cooperation and Development (OECD) Committee on International Investment and Multinational Enterprises and to the National Contact Points for the OECD Guidelines for Multinational Enterprises in the States where business enterprises listed in annex 3 of the report as being allegedly in contravention of the OECD guidelines are registered, in accordance with United Nations established practice.<sup>82</sup>

In response to the arms flows highlighted in the report under examination, the UNSC imposed an arm embargo on the DRC. It urged all States, including the DRC, to take the necessary measures to prevent the direct or indirect supply, sale or transfer, from their territories or by their nationals, or using

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<sup>77</sup> See S/RES/1457 (2003).

<sup>78</sup>Id para 5

<sup>79</sup>Id para 6

<sup>80</sup>Id para 8

<sup>81</sup>Id para 9

<sup>82</sup> See S/RES/1457 (2003), para 14.

their flag vessels or aircraft, of arms and any related materiel, and the provision of any assistance, advice or training related to military activities, to all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive agreement, in the DRC.<sup>83</sup> The MONUC was tasked with the monitoring of the embargo.<sup>84</sup>

The Security Council established a follow-up committee in order to:

1. Review the actions taken by all States, and particularly those in the region;
2. Implement effectively the measures imposed by paragraph 20 of resolution 1493 and to comply with paragraphs 18 and 24 of the same resolution;
3. Identify to the possible extent individual and legal entities engaged in violations of the arms embargo, as well as aircraft or other vehicles used;
4. Present regular reports to the Council on its work, with its observations and recommendations, in particular on the ways to strengthen the effectiveness of the arms embargo imposed by paragraph 20 of resolution 1493.<sup>85</sup>

Having identified the persons and entities violating the arm embargo, the Security Council imposed them an assets freeze and travel restrictions (for individuals). It decided that, during the period of enforcement of the arm embargo, all States shall take the necessary measures to prevent the entry into or transit through their territories of all persons designated as violating the embargo. It mentioned that no state should be obliged to refuse entry into its territory to its own nationals.<sup>86</sup>

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<sup>83</sup> See S/RES/1533 (2004) para 20.

<sup>84</sup> Id para 25

<sup>85</sup> See S/RES/1457 (2003), para 10.

<sup>86</sup> See S/RES/1596 (2005), para 13.

The Council granted the Committee with the discretionary power of waiving the travel restriction on the grounds of humanitarian need (including religious obligation) or for the necessity of peace building.<sup>87</sup>

The Security council decided that, during the period of enforcement of the arm embargo, all states should immediately freeze the funds, other financial assets and economic resources which are on their territories from the date of adoption of this resolution, which are owned or controlled, directly or indirectly, by persons designated (or entities) as violating the arm embargo.<sup>88</sup>

The Security Council has regularly updated the list of individuals and entities subject to the measures imposed by paragraphs 13 and 15 of its resolution 1596(2005).<sup>89</sup> The list includes key persons in the Congolese crisis such as Lubanga, Katanga, Ngudjolo, Mbarushimana, Nkunda and Taganda.

#### **8.2.3.2. Report on internally displaced persons in the DRC<sup>90</sup>**

At the invitation of the Congolese authorities, the Representative of the Secretary-General on the human rights of internally displaced persons carried out an official mission to the DRC from 12 to 22 February 2008. He concluded that DRC was facing a serious protection crisis and a serious humanitarian crisis, highlighted inter alia by the very large numbers of displaced persons. He estimated to over 1 million the number of persons displaced in the country's four eastern regions.

The representative suggested that, with the substantial support of the MONUC, the Congolese government engages in the following activities:

1. Reconciliation, in particular between ethnic communities;
2. Transitional justice and efforts to combat impunity;

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<sup>87</sup>Id para 4

<sup>88</sup>Id para 15

<sup>89</sup> See S/RES/1952 (2010), para 3.

<sup>90</sup> See A/HRC/8/6/Add.3.

### 3. Settlement of land-related disputes.

He reminded the armed groups of their obligation to respect international humanitarian law, in particular the fundamental distinction between combatants and civilians, and refrain from any act prohibited by international humanitarian law. The representative also encouraged the international community to continue to provide substantial and sustained support to the displaced persons assistance and protection programmes in DRC, and to embark proactively on activities for economic reintegration, re-launching of basic services and development in regions of return.

#### **8.2.3.3. Report on remedies and reparations for victims of Sexual violence in the DRC**

In August 2010 the United Nations High Commissioner for Human Rights convened a panel in order to deal with the issue of reparation for victims of sexual violence in the DRC. The panel was tasked with hearing directly from victims regarding their needs and their perceptions of remedies and reparations available to them, assessing the functioning of existing judicial mechanisms for remedies and reparations for victims of sexual violence, and making recommendations on the strengthening of these mechanisms as well as the need for additional mechanisms, particularly to provide access to remedies for victims whose perpetrators are not known.<sup>91</sup>

In execution of its mandate, the panel conducted in-country work, travelling to Kinshasa, Bukavu, Shabunda, Bunia, Komanda, Mbandaka and Songo Mboyo, and meeting with a total of 61 victims, either individually or in groups. The victims were aged from three to sixty-one years old. They faced different problems including contraction of HIV/AIDS as a result of rape, pregnancy as a result of rape, rejection by husbands following rape, child victims of rape, seeking justice for rape before domestic courts victims and rape by civilian

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<sup>91</sup> See Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights, March 2011, para 1.

perpetrators. The panel also met with provincial and local government officials, and convened roundtables with officials in the justice sector, members of civil society and UN representatives.<sup>92</sup>

The majority of victims interviewed in the North and South Kivu (that are concerned with the recurrence of armed conflicts) have stated that the restoration of peace and security as well as the implementation of UNSC Resolution 1325 were their greatest hope.<sup>93</sup>

They expressed their concern about health care and education. On the one hand the access to health care facilities is very limited for those living in remote areas. On the other hand, they are unable to send their children to school. They called for support in form of socio-economic reintegration programmes, with attention to ensure that they are sustainable and tailored to the economic context.<sup>94</sup>

The panel highlighted the weakness of the judicial system in regard to sexual violence. The courts are far from reachable distance in most of the areas affected by massive rapes and the police unit affected thereto for sexual violence and protection of children has no vehicle.<sup>95</sup> Some victims brought their cases to court and were awarded damage and interest for the rape suffered. But they fail to recover those awards either because the perpetrators had escaped from prison or because the Congolese government (condemned *in solidum* with the perpetrator) does not execute the judgements.<sup>96</sup>

The panel stressed the responsibility of the Congolese government to grant reparation to victims in terms of restitution, compensation, rehabilitation,

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<sup>92</sup>Id para 2

<sup>93</sup>Id para 4

<sup>94</sup> See Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights, March 2011, para 5.

<sup>95</sup>Id para 6

<sup>96</sup>Id para 7

satisfaction, and guarantees of non-repetition. It mentioned the necessity for support from the international community given the transnational dimension of the conflict in the DRC.<sup>97</sup>To this end, the panel recommended the creation a fund to support reparations for victims of sexual violence in the DRC. It suggested that the fund includes representatives of the Government of the DRC, the United Nations, donors, civil society, and survivors themselves, to ensure accountability for the allocation of funding and the expenditure of funds.<sup>98</sup>

#### **8.2.4. Reinforcement of local capacities<sup>99</sup>**

The MONUC had implemented three programs aimed at reinforcing capacities of members of the army and police in human rights and humanitarian law. It had also supported the reinforcement of capacities of members of the military judiciary.

In 2006 and 2007, UNDP and MONUC's Rule of Law section organised a program entitled 'Towards better military justice'. The programme aimed at capacity building of military courts responsible for trying offences committed by FARDC and PNC members. It dealt with national and international criminal law, emphasizing such subjects as the military judiciary code and the Congolese military penal code of 2002, the Congolese Constitution of 2006 and the International Criminal Court.

In 2008, the MONUC's Rule of Section supported the training on the investigation of offences of a sexual nature for some 420 military magistrates and judiciary military police inspectors in 2008. The training focused on the issue of combating sexual violence in the context of Congolese legislation, as well as the conduct of interrogation and questioning, and the treatment of testimonies, etc.

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<sup>97</sup>Id para 8

<sup>98</sup>Id para 10

<sup>99</sup> See 'Two reasons justify the imperative necessity of a functioning military justice system'. Available at <http://monusco.unmissions.org/Portals/MONUC/militaryjusticedrc.pdf> (accessed on 11 November 2011)

In 2009, the MONUC's Rule of Law section organised a training programme entitled "Support for the Reinforcement of the Capacities of the Military Justice System." This program was consistent with a five day cycle training seminars held in the DRC's 11 provinces between February and July 2009.

These seminars provided training in military justice topics to some 650 Congolese military magistrates, police investigators, and court support personnel, members of the chain of command and civilian lawyers who act as defence counsel at military trials. The seminar was focused, among others, on the importance of dealing appropriately with issues of sexual violence, on the responsibility of members of the chain of command, and on the importance of ensuring the independence of military magistrates in the fulfilment of their duties.

The MONUC also provided training for 90 prison personnel and 31 administrative staff on issues relating to judiciary and penitentiary organisation, human rights, general penal law, security, sociology and penitentiary regulation, professional ethics, disciplinary procedures, prison punishment and labour, and military penal procedure.

#### **8.2.5. UN's preventive diplomacy in the DRC<sup>100</sup>**

In October 2008, the Goma and Nairobi agreement collapsed and fights reignited in the north Kivu between the Congolese army and the CNDP. The CNDP literally defeated the Congolese army and approached Goma. Reacting to the advance of the CNDP towards Goma and the humanitarian crisis that it entailed,<sup>101</sup> the Security Council ordered all the warring parties (including the Congolese government and the CNDP) to ceasefire.

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<sup>100</sup> See [http://www.un.org/wcm/content/site/undpa/main/issues/preventive\\_diplomacy/drc\\_prevention](http://www.un.org/wcm/content/site/undpa/main/issues/preventive_diplomacy/drc_prevention) (accessed on 9 October 2010).

<sup>101</sup> These new fighting caused the death of at least 415 civilians, the wounding of 250 civilians and forced around 250,000 people to flee from their homes. See Human Right Watch (2008), Killings in Kiwanja, the UN's Inability to Protect Civilians, 5.

It acknowledged the prompt response to the ceasefire by the CNDP and urged the Congolese government to end its collaboration with the FDLR. It called the governments of the Great Lakes' region to respect the Goma and Nairobi agreement. It acknowledged the Secretary General's efforts to facilitate the dialogue between the leaders of DRC and Rwanda and encouraged him to send a special envoy to that end.<sup>102</sup>

Following the Security Council's call, the Secretary General appointed Olusegun Obasanjo<sup>103</sup> as his special envoy for the circumstance. He tasked him with the assistance of governments of the sub region to address the challenges to peace and security posed by the continued presence and activities of armed groups in the eastern Democratic Republic of the Congo. The special envoy was required to work closely with other international partners undertaking diplomatic initiatives on these issues, and with the Secretary-General's Special Representative for the Democratic Republic of the Congo, Alan Doss, and the special envoy for LRA affected areas, Joaquim Chissano.<sup>104</sup>

Rwanda claimed that the DRC was hosting the FDLR that have a clear plan of destabilizing the democratic institutions of Rwanda. On its part, DRC accused Rwanda to aid and abet the CNDP. The two governments denied the mutual accusations. The UN Secretary General explained to the leaders of the two countries that there could never be a military solution to the crisis and insisted on a negotiated solution. The feature of this initiative is the acknowledgement by the Secretary General of the limited capacities of the MONUC to protect civilians against armed attacks.<sup>105</sup>The diplomacy ended in

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<sup>102</sup> See S/PRST/2008/40.

<sup>103</sup> He was the former President of Nigeria. See Report of the Secretary-General on Preventive Diplomacy: Delivering Results (S/2011/552), Para 19.

<sup>104</sup> He was the former President of Mozambique.

<sup>105</sup> See UN Secretary General, Press encounter upon return from four-nation visit to Asia, held, in New York on 3 November 2008, available on <http://www.un.org/apps/sg/offthecuff.asp?nid=1222> (accessed on 9 October 2011).

an agreement between the governments of Rwanda and DRC to join their forces and track down the FDLR.<sup>106</sup>

### **8.3. Appraisal of UN's action in the DRC after 1 July 2002**

It is appropriate to commend the UN's action in terms of DRRR, DDR, fact finding missions, thematic reports and local capacity building. The fact finding missions are noteworthy in that they have acknowledged the principal roots and the consequences of the crisis.

For example, the UN's panel on the Illegal Exploitation of Natural Resources in the DRC has deeply investigated over the continuing Illegal Exploitation of Natural Resources in the DRC and reported to the Security Council. Its impressively documented work has prompted the Congolese government to acknowledge the involvement of its military through criminal networks<sup>107</sup> and take necessary steps towards the demilitarisation of mining zones in the east of the country.<sup>108</sup> The shortcoming of the measure taken is justified by the poor impact of the Congolese government in the eastern DRC.<sup>109</sup> The UN should have considered the possibility of increasing its dissuasive force in the region.

However what would have made the UN's action more impacting in the context of the Congolese crisis is the protection of civilians against atrocities and the cooperation in national and international efforts to bring to justice

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<sup>106</sup>See Crisis Group, Congo: A Comprehensive strategy to disarm the FDLR, Africa Report N°151 – 9 July 2009, 3-4.

<sup>107</sup>See S/2010/596, p 3. See also annexes 40, 45, 46, 53 to 57 and 61.

<sup>108</sup> See Id, annexes 19, 28 to 32, 35 and 36.

<sup>109</sup>For example, the task force has provided a text message from a FDLR commander to Colonel Heshima (one of the commanders of the operation *Umoja Wetu* aimed at tracking down the FDLR) threatening to kill his family if he goes too quickly in operations against them. The sms reads as follow: 'Ask Heshima to calm down and not pursue his brothers, notably the refugees. If not, we will exterminate his family in Masisi. All who behave in the same way will run the same risk. Do not say that I did not warn you. Tell him to calm down and to behave himself.' See Id, annexe 41.

perpetrators international crimes. Furthermore, its preventive diplomacy rapidly revealed to have shortcomings.

But the UN has failed to protect civilians against atrocities. Despite its mandate to protect civilians and recurrent increase of its troop size, MONUC failed to protect civilians during most of the fighting whereby international crimes were committed. In some cases MONUC peacekeepers failed to reach the conflict area until several days after fighting began. The mission has been unable to gather the intelligence necessary to accurately assess the situation and formulate a strategy to protect civilians. It is reported that it lacked interpreters in some situations. The mission then relied on its civilian staffs that were often unable to travel to the theatre of hostilities.<sup>110</sup>

As for the effort of promoting the fight against impunity, MONUC has arrested and handed over some perpetrators of international crimes in the DRC for their prosecution. It has even conducted investigations in order to gather evidence for any forthcoming trial. But its attitude towards perpetrators of international crimes has appeared to be controversial at two occasions.

First, the UN has paid special tribute to the killing of nine of its members. It urged (without delay) the Congolese government to bring to justice the alleged responsible of to justice, naming amongst others Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo.<sup>111</sup> This author observes that since the surrender of the persons involved in the killings to the ICC,<sup>112</sup> the UN has been reluctant in insisting on the arrest and trial of the alleged perpetrators of international crimes. For instance, in 2007, it ignored a demand from the Congolese government in relation with the arrest and surrender of Bosco Taganda who was warranted by the ICC.<sup>113</sup> One would have expected the UN

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<sup>110</sup> Human Rights Watch (2005), Democratic Republic of Congo Civilians attacked in North Kivu, 30.

<sup>111</sup> UNSC, Press Release SC/8327/Rev.1\* dated 2 March 2005

<sup>112</sup> This includes Lubanga, Katanga and Ngudjolo.

<sup>113</sup> See Human Rights Watch, letter dated February 1, 2009.

take specific action against him since he bears great responsibility in the Congolese crisis. The same applies to Laurent Nkunda.<sup>114</sup> The UN never took a step to neutralize him. Rather, he was considered as a valued interlocutor and his alleged compliance with the UN's directive were commanded by the Security Council. The UN's action was seriously undermined by the video of the Secretary-General's special envoy dancing with Laurent Nkunda whereby he had established his advanced headquarter. Furthermore, one would have suggested that the UN triggers the ICC against the Rwandan leadership for its documented support to the CNDP whose members have committed international crimes on a large scale.

As for the preventive diplomacy, one may mention that it has not resolved much on the ground. The CNDP has integrated the Congolese army. The UN has commanded the DRC's effort to find a peaceful solution to the conflict whereas on the ground, the FDLR has been retaliating against the Congolese civilians for their government's shift in alliance. The UN did not take any action to end the suffering resulting from its preventive diplomacy.

One would have suggested that the UN triggers the ICC against the Rwandan leadership for its documented support to the CNDP whose members have committed international crimes on a large scale.

As for the LRA, the UN has acknowledged the weak organisation of its previous military operations<sup>115</sup> but did not take further action to solve the issue. The UN has failed to fulfil its responsibility to protect and take appropriate measure against the LRA. Its position against the armed groups in the Kivu has been seriously controversial. It seems to have been lenient

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<sup>114</sup> UN should have arrested Bosco Taganda as it did with Kahwa Panga Mandro whom it surrendered to Congolese judicial authorities. See <http://www.irinnews.org/Report/57743/DRC-Year-in-Brief-Jan-June-2005-A-chronology-of-key-events>.

<sup>115</sup>See S/2010/512, Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), Para 19 and 20.

with the CNDP<sup>116</sup> but very intolerant with the FDLR.<sup>117</sup> Such an attitude will not bring a long lasting peace in the DRC and therefore provide a guaranty of non-repetition for the civilians.

Another issue that the UN seems not to have addressed properly is the issue of the Congolese natural resources. Given the involvement of the states that have participated in the armed conflict in the DRC, the UN should have considered taking more appropriate action. One should note that the plunder of Congolese natural resource is constitutive of war crime of pillaging committed on the territory of a state party to the ICC. In its mandate to help bringing to justice, the UN should have considered triggering the ICC on the special question as it appears that the prosecution of those bearing the greatest responsibility in the pillaging of the natural resource will reduce the likelihood of atrocities that have been identified as prompted by the hunt of natural resources. The UN's power of triggering does not necessarily apply when a non-state party is involved. The Security Council can also trigger the ICC when the OTP appears not to act.<sup>118</sup>

To sum it up, the UN has failed to build long lasting peace in the Great lakes region. Its attitude broadens the likelihood of regain of violence in the Kivu. The international conference should necessarily include the representatives of the Hutu Community and the FDLR.

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<sup>116</sup> The UN has been accused of connivance with the Tutsi leadership since the beginning of the ICTR. Such perception continues with the CNDP widely aided and abetted by the UN.

<sup>117</sup> The UN has never considered the necessity of talking with the FDLR as it did with the CNDP. Such a double standard cannot help building a long lasting peace.

<sup>118</sup> See ICC, article 53(3)(a).

## **Conclusion to part 2**

This part has highlighted the circumstances of the commission of international crimes after the 1<sup>st</sup> of July 2002 (chapter 5).

It has reviewed the legislative efforts towards the enactment of the ICC in the DRC, noting that the UN principle outlawing the jurisdiction of military courts over civilians and international law obliges the DRC to repeal the Congolese military penal code whose enactment represents the first step toward the enactment of the ICC in the DRC. It also explains that the monist orientation of the Congolese law does not remove the necessity of an implementation law for the ICC in view of a proper harmonization. Noteworthy, it suggests the lowering of political involvement in the relationship between the DRC and the ICC through the empowerment of judicial authorities with the referral power to the ICC. Given the recurrence of mass atrocities by former rebels that either signed peace agreements with the DRC or escaped from prison after a condemnation for international crimes, it questions the efficacy of solutions provided by the DRC. (Chapter 6)

Furthermore, this part has scrutinised the ICC's role in the DRC. It has highlighted ICC's congenital weaknesses hampering its efficacy. They are: the interdiction of trial in absentia and the denial of procedural privileges for officials. It suggests a pragmatic approach allowing trials in absentia and procedural privileges to officials. It also questions the ICC's choices of those who bear the greatest responsibility in the DRC. (Chapter 7).

Lastly, this part has reviewed the UN's role in the DRC during the ICC era. In essence, it has highlighted the MONUC's failure to protect civilians despite its legal mandate thereabout. The efficacy of the UN's preventive diplomacy seems questionable given the recurrence of CNDP's rebellion. The UN's failure to protect civilians must create a duty to repair. The scheme suggested in chapter 4 for pre ICC crimes is also recommendable for post ICC crimes. The UN's failure to fulfil its Responsibility to Protect must also generate a duty

to prosecute for the UN. The UN must consider triggering the ICC for international crimes committed in the Kivu province, as the OTP seems not to focus on them. Furthermore, the UN might consider providing a substantial support to the ICC in securing suspects' attendance to trials. UN can achieve this in performing ICC's arrest warrants. (Chapter 8)

## **Chapter 9: Concluding Remarks**

The public order is a common denominator for all responses to international crimes. The essential responses are amnesty, prosecutions and reparation.

Appraising the responses provided to international crimes, this thesis has analysed amnesty, prosecutions and reparations. To this end it has distinguished between crimes committed before and after the entry into force of the ICC.

Amnesty for international crimes seems to be an unsafe topic. International law does not set clearly whether amnesty for international crimes is lawful or not. Before the ICC, the Genocide is the only one text that clearly mentioned the unlawfulness of amnesty (for genocide). International law admits that amnesty could be granted for other international crimes committed during domestic conflicts. However, the ICC does provide an answer to the question of amnesty for international crimes.

In the case of the DRC, it is appropriate to distinguish between international and domestic conflicts. Before the entry into force of the ICC, international crimes occurred during international conflict. All the belligerents denied the allegations of genocide. The Lusaka ceasefire agreement allowed warring parties to grant amnesty to their citizens with the exception for the perpetrators of genocide. As no signatory of the agreement admitted the commission of genocide, by its forces, one may infer that the agreement allowed amnesty for other crimes. They only stressed the necessity of prosecuting the perpetrators of the Rwandan genocide. DRC passed an amnesty law excluding international crimes.

However, in practice the DRC seems to grant blanket amnesty to alleged perpetrators of international crimes who sign peace agreements. Those blanket amnesties appears either in the allegations of inability to prosecute (mostly for crimes committed before the entry into force of the ICC), the

suspension of existing cases as well as the injunction not to open new cases. Criminal prosecutions generate substantial expectations in the DRC. These expectations rely on the idea that impunity is an encouragement for further perpetration of international crimes. They also emerge from the example of UN international and internationalised tribunals. The Congolese civil society has been advocating for the creation of an ad hoc tribunal for international crimes committed in the DRC before the entry into force of the ICC. The UN has never created such a jurisdiction. This is probably because UN created ad hoc tribunals for the restoration of peace, whereas in the DRC it has contributed to the restoration of peace by other means (for instance the Lusaka ceasefire agreement and the inter-Congolese dialogue). Hence, this thesis has suggested reparation for victims rather than prosecution of perpetrators of international crimes committed before the entry into force of the ICC. Though possible, the prosecution is no longer opportune due to the restoration of the public order. Furthermore, the ICC and domestic courts fulfil the deterrent function (for crimes committed on or after 1st July 2002). One must bear in mind that there are actions that can be neither punished nor forgiven.

The ICC carried ardent hope in terms of ending impunity. One must bear in mind that no criminal system can deal with mass atrocities. Selectivity is a palliative to the limited capacities to deal with a large number of perpetrators. As a rule, prosecution of international crimes focuses on those who bear the greatest responsibility. Observers have questioned the prosecutorial choices (of those who bear the greatest responsibility) in the DRC. The OTP seems to focus on the suspects who are easily reachable rather than those who bear the greatest responsibility.

This thesis has endeavoured to portray the rationale for the complementarity between the DRC and the ICC. It believes that there is a division of labour based on the prosecution of those who hamper the peace process in the DRC. This is an explanation for the DRC's decision to surrender Lubanga,

Katanga and Ngudjolo to the ICC and is reluctant to surrender Taganda whom it believes to have played a key role in the Congolese peace process. Such a rationale undermines the local legitimacy of the ICC in the DRC.

This thesis regards the concurrent proceedings before the ICC and the DRC as an expression of a labour division rather than a conflicting situation. However, it questions the deterrent effect of domestic prosecution. One may observe that the perpetration of international crimes continues in the regions covered by domestic prosecutions whereas the zone covered by ICC prosecution appears to be international crimes free.

The reparation issue is neglected in the DRC. One of the reasons might be the issue of financial means to afford compensations to victims. This thesis has suggested a reparation scheme for international crimes committed before the DRC. This reparation scheme entails the involvement of the UN and focuses on compensation for victims of those crimes. Such a compensation scheme will rely on funds generated by the sale of Congolese natural resources. A Compensation commission established by the UN can also provide funds to the ICC Trust Fund for Victims. Reparation should not stop only at compensation. It should also encompass guarantee of non-repetition. The Responsibility to Protect embodies the guarantee of non-repetition.

This thesis has also analysed underlying issues to responses provided to international crimes committed in the DRC. The most preoccupying issues are politics on the one hand and the efficacy of the ICC, on the other hand.

The failure to prosecute international crimes committed before the entry into force of the ICC is rather the result of political calculation than genuine inability. The newly established regime was uncomfortable with the prosecution of international crimes committed before the entry into force of the ICC. The main reason for this is the involvement of its own military elements facing accusations of perpetration of international crimes. Its

attitude towards the enactment of the ICC is also controversial. The government submitted a bill in 2005, but it did not insist. In 2008, two deputies from the ruling party submitted a bill enacting the ICCS. The National Assembly never analysed the proposition due to political reasons. Controversially, the Congolese government seems more preoccupied by the prosecution of crimes committed before the entry into force of the ICC than that of the crimes committed after the ICC's entry into force. By virtue of the principle of continuation of state affairs, one would have expected that the Congolese government would resubmit its bill implementing the ICC. The government overweighs the importance of prosecution of crimes committed before 1 July 2002. Without relativizing the prosecution of ICC crimes, the government prioritises peace initiatives. The sitting regime seems to avoid analysing of any bill entailing the abolition of the death penalty. Such a strategy aims at eluding the softening of the punishment of 'assassins' of the late President Laurent Desire KABILA. The thesis has suggested that the Congolese government works toward the implementation of the ICC within the Congolese legal framework.

*De lege ferenda*, the thesis has suggested the reduction of political involvement in the relationship between the ICC and domestic judiciaries. Therefore, it suggests the amendment of the ICC in order to empower domestic prosecutor with the referral power. It suggests such an innovation in the forthcoming law enacting the ICC in the DRC.

As for the ICC's efficacy, the thesis has underscored congenital undermining flaws. The irrelevance of the official capacity and the interdiction of trial in absentia are the most salient. The latter clearly prompted the reluctance of the USA to ratify the ICC. The USA passed a law protecting their service members from the arrest by the ICC. The ASPA reportedly prompted the signature of bilateral immunity agreements. This thesis agrees with the irrelevance of official capacity but sees the denial of procedural privileges to official as an impediment to the efficacy of the ICC. The thesis suggests the

granting of procedural privilege (such as hearing in camera, or via video conference) for officials. The outlawing of trials in absentia delays proceedings, as the accused will endeavour to remain at large. Trials *in absentia* would have generated a fear to be sentenced, and forced all the accused to attend their trial. The adoption of such amendments will enhance the ICC.

Nowadays, it is getting clearer and clearer that the United Nations has to overtake whenever a state fails to fulfil its responsibility to protect. In the Congolese case, the DRC has failed to protect its population. The UN has also failed. This thesis has called upon UN's responsibility in protecting civilian and assisting the ICC to fulfil its mission.

This thesis opens doors to other research themes such as the trial of ill-gotten assets in the DRC and the issue of corporate liability for international crimes. The thesis mentioned the issue, but could not elaborate on them given their importance. Further research should address these issues in future.

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