PROSECUTION OF GRAVE VIOLATIONS OF HUMAN RIGHTS IN LIGHT OF CHALLENGES OF NATIONAL COURTS AND THE INTERNATIONAL CRIMINAL COURT: THE CONGOLESE DILEMMA.

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW
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DECLARATION

I, **Yav Katshung Joseph**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information obtained and used has been duly acknowledged in this dissertation.

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DEDICATION

This dissertation is dedicated to my loved family and to the millions of known and unknown people who have died in the Democratic Republic of Congo (DRC) conflicts and are still waiting for justice.

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Inch' Allah.

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights (African Charter)
AJIL	American Journal of International Law
Art.	Article
ASIL	American Society of International Law
CAT	Convention Against Torture
CRC	Convention on the Right of The Child
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CERDH	*Centre d'Etudes et de Recherche en Droits de l'Homme et Démocratie*
DRC	Democratic Republic of Congo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EJIL	European Journal of International Law
FIDA	Federation of Women Lawyers Association
GAOR	General Assembly Official Records
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICC Statute	Statute of the International Criminal Court (17 July 1998, UN Doc. A/CONF.183/9)
ICD	Inter-Congolese Dialogue
ICESCR	International Covenant On Economic Social Cultural Rights
ICJ	International Court of justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHRL	International Human Rights Law
ILM	International Legal Materials
IMT	International military Tribunal at Nüremberg
IRRC	International Review of the Red Cross
MLC	Movement for the Liberation of the Congo
MONUC	UN Organisation Mission to the Democratic Republic of Congo (DRC)
NGO	Non-Governmental Organisation
NHRO	National Human Rights Observatory

OHCHR	Office of High Commissioner For Human Rights
RCD	Congolese Rally for Democracy
RCD/ML	Congolese Rally for Democracy/ Liberation Movement
RCD/N	Congolese Rally for Democracy/ National
Res.	Resolution
SAJIA	South African Journal of International Affairs
SC	Security Council
SC. Res.	Security Council Resolution
Sess.	Session
SYNAMAC	*Syndicat Autonome des Magistrats de la République Démocratique du Congo*
TRC	Truth and Reconciliation Commission
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNTS	United Nations Treaty Series

TABLE OF CONTENTS

Chapter One

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Over the past ten years, the international community has played a leading role in devising systems and strategies to bring justice and reconciliation to victims of genocide, crimes against humanity, and war crimes in conflict areas around the world.

Attracting universal revulsion, it was the atrocities committed during the conflicts in the former Yugoslavia[1] and in Rwanda[2] that ultimately provoked the international community to rethink the necessity to end the culture of impunity.[3] National courts[4], *ad hoc* international tribunals[5], various hybrid courts[6], truth and reconciliation mechanisms[7] and the International Criminal Court (ICC)[8] are among the host of tools being used to provide a reckoning for those who commit these crimes, with varying degrees of success and lasting consequences.

Although the United Nations (UN) has often been pivotal in forging the international response to serious human rights crimes in such settings, the justice gap in country such as the Democratic Republic Congo (DRC) (the focus of this study) underscores the need for more systematic U.N. efforts. The war in the DRC has resulted in one of the world's worst humanitarian crisis with over 3.4 million displaced persons scattered throughout the country.[9] An estimated 3.5 million people have died as a result of the war.[10]

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1 The most widely accepted estimate of war deaths in the former Yugoslavia exceeds 200,000 civilians and soldiers. Cary, P 'War Casualties: Bosnia by the Numbers' *US. News & World Report* (1995) at 53, 53.

2 The result of the genocide in Rwanda was the killing of an estimated 800,000 (primarily Tutsi), See Mugwanya, G 'Introduction to the International Criminal Tribunal for Rwanda (ICTR)' in Heyns, CH (ed) 1 *Human rights Law in Africa (2004*) Leiden: Nijhoff 60

3 These events consolidated a determination to revive the legacy of Nüremberg and to end the culture of impunity that has prevailed since and beyond international and domestic trials of the perpetrators of crimes against humanity and war crimes during the Second World War. See Dugard, J (1998) 'Bridging the gap between human rights and humanitarian law: The punishment of offenders' *IRRC* 445-453.

4 In October 1998, the United Kingdom arrested former President Augusto Pinochet on a Spanish warrant charging the former dictator with human rights crimes committed in Chile. Also, in Chad, victims were emboldened by international efforts to indict former dictator Hissène Habré, leading them to bring cases before their national court against former Habré associates.

5 The ICTY in 1993 and the ICTR in 1994

6 East Timor, Kosovo and, Sierra Leone

7 South Africa, Sierra Leone, Cambodia, East Timor, Bosnia,

8 DRC (Ituri) and Uganda (North Uganda) See 'The ICC: How NGOs can contribute to the prosecution of war criminals' *Human Rights* Watch September 2004 1

9 3.4 Million Displaced in DRC as of end of 2003'<http: // www.idpproject.org> (accessed on 31 August 2004)

10 A report from the International Rescue Committee found that 3.5 million people had died in the DRC since 1998 from direct and indirect violence, making this the most deadly war in the world in terms of a civilian death toll since World War II. See International Rescue Committee 'Mortality in the DRC: Results from a Nationwide Survey,' April 2003.

This armed conflict has been characterised by appalling widespread and systematic human rights violations, including mass killings, ethnic cleansing, rape and the destruction of property.[11] The most pressing need to be addressed is the question of justice and accountability for these human rights atrocities in order to achieve a durable peace in the country and also in the Great Lakes region (Rwanda, Burundi, Uganda, Angola and the DRC, to name just a few). In this respect, this study will address the grave human rights violations committed in the DRC and the mechanisms for dealing with them. It is particularly true in post-conflict situations where justice systems have been either partially or completely destroyed, that national courts are not capable of arriving at a uniform stance, or willing to provide justice for atrocities in the immediate future. As a result, international justice seems to be a crucial and last resort that must continue to be fortified against efforts to undermine it.

However, even if the ICC achieves its full potential, it faces a number of challenges. Firstly, it is realistically not able to address all situations in which national courts are unwilling or unable to prosecute perpetrators. Secondly, there are temporal and other jurisdictional limitations on what cases the ICC can hear. Accordingly, the ICC will only have the power to try people accused of the gravest human rights violations[12] committed after 1 July 2002; the date the Rome Statute which established the ICC took effect. As a result, only a small number of individuals responsible for the atrocities committed will be tried by this Court. Thirdly, is the establishment of the Truth and Reconciliation Commission (TRC)[13], one of the civilian institutions that emerged from the peace talks, meant to end impunity or to cover up gross violations of human rights committed in the DRC? It remains to be seen how it will function and interact with the courts.

1.2 RESEARCH QUESTIONS

This study seeks to address the following questions:

1. States are obliged by international law to prosecute perpetrators of grave violations of human rights. To what extent are the Congolese national courts capable to address these serious human rights violations?
2. The ICC may be an answer to crimes committed in the DRC, but what will happen to crimes committed between 1998 and July 2002, (beyond the scope of the ICC).
3. How possible is it to establish a mechanism to end impunity for crimes committed in the DRC since 1998?

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[11] At least seven national armies and 21 irregular armed groups have been involved. See Håkan, F 'The DRC: Justice in the aftermath of peace?' 10 *African Security Review* (2001).

[12] Including war crimes and crimes against humanity.

[13] The TRC is a different kind of mechanism that focuses on forgiveness rather than punishment.

1.3 HYPOTHESES

This study proceeds on the following hypotheses:

- Accountability for serious past crimes is the foundation for post-conflict reconstruction based on the rule of law and respect for human rights;
- The lack of justice and accountability perpetrates a climate of impunity, which undermines the rule of law as well as exacerbates a sense of injustice and discrimination within targeted communities.
- it should remain the rule that national courts have jurisdiction, because any lasting solution must come within the state itself. But in the DRC's case, national courts are not yet capable of handing down impartial justice or are materially unable to function.
- The ICC is realistically not able to address all situations in which national courts are unwilling or unable to prosecute perpetrators. Therefore, the ghost of impunity continues to haunt the DRC.

1.4 OBJECTIVES

The objectives of this study are as follows:

- In the first place, this study is of academic interest. In this regard, it seeks to contribute to the ongoing debate on accountability. It does so by analysing the mechanisms that might bring justice and end impunity in the DRC;
- secondly, as international human rights law, humanitarian law, and criminal law are not, merely a set of academic disciplines, this study seeks also, to interrogate the hard and complex questions that confront the DRC in trying to come to terms with the grave human rights situation in the Great Lakes region; and,
- thirdly, to propose ways of addressing the issue of accountability to avoid impunity.

1.5 LITERATURE REVIEW

The fora for holding individuals accountable for gross human rights abuses represent an amalgam of the old, the new and the speculative, each with its promise and drawbacks. The subject of prosecution of grave violations of human rights has evoked a considerable amount of comments by academics and human rights activists.

A number of books, articles, reports and press releases have been written on the broad subject of accountability for human rights abuses and mechanisms to end impunity.

In spite of this, it is not easy to find literature that addresses the precise issue raised by this dissertation. This is not to say that there is no relevant literature in this field. In this respect, the existing literature, in terms of books, articles, reports and internet sources are helpful.

Naomi Roht- Arriaza's book[14] looks at what should be done and what is being done to combat the problem of impunity, or lack of sanctions, for certain serious violations of human rights. This book moves from a general consideration of the theories of punishment and redress that shape and underlie the fight against impunity, to a detailed overview of the conventional and customary international law that defines state obligations to investigate, act against, and provide redress for victims of at least the most serious violations of human rights.

For Steven Ratner and Jason Abrams[15], more than a half century after the Nuremberg and Tokyo trials, nations around the world are increasingly grappling with the need to hold individuals accountable for human rights atrocities. This book includes development since 1997, domestic prosecutions and truth commissions, the work of the UN's Yugoslavia and Rwanda tribunals, and the ICC.

For William W. Burke-White[16], the emerging system of international criminal justice can be conceived as a community of courts, a set of adjudicatory bodies in interdependent, self-organizing relationships. These emergent community courts are engaged in a common endeavour: ensuring accountability for serious international crimes. Within the community, courts, both national and supranational, interact in numerous ways. Their jurisdictions often overlap, they are linked both horizontally and vertically, they apply common set of laws. This Article argues that, for political reasons, the future of international criminal law enforcement will largely be at the domestic level. It anticipates the emergence of a community of courts, domestic, semi-internationalised, and supranational.

Kritz Neil[17] on his part, discusses how a new society can redress past abuses without creating new injustices, while peacefully integrating the victims and the perpetrators. In many countries, this dilemma is a recurring source of tension, raising theoretical as well as practical questions about such issues as criminal trials, compensation and rehabilitation, 'truth commissions', retribution versus impunity, and the consequences of all these decisions for long-term stability.

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[14] Roht- Arriaza, N (ed) (1995) *Impunity and Human Rights in International Law and Practice* New York: Oxford University Press.

[15] Ratner, S & Abrams, J (2001) *Accountability for human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* New York: Oxford University Press.

[16] Burke-White, W 'A Community of Courts: Toward a System of International Criminal Law Enforcement' (2003) 24 *Michigan Journal of International Law.*

[17] Kritz, N (ed) (1995) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* Washington: US. Institute of Peace Press 780

Håkan Friman[18] in is article discusses the available processes for justice in the DRC. According to him, whatever the solution, it is important that crimes committed during the conflict be investigated as soon as possible, maybe by an international commission of inquiry. Furthermore, if different processes are chosen, these will have to be carefully co-ordinated with one another. This is a challenging task.

However, this dissertation does not and cannot address all the developments in this subject area. Its specifically address the situation of grave human rights violations and the need of accountability through prosecution in the Great Lakes region and, in particular, in the DRC.

1.6 IMPORTANCE OF THE STUDY

Neither national unity nor democracy can be built on the back of abuse and impunity.
This study is relevant in so far as it intends to discuss the mechanisms of accountability through prosecution and punishment of authors of grave human rights violations and compensation for victims. It is believed that this study will look at the challenges in addressing impunity for the horrific crimes that have been committed in the DRC since 1998 and contribute to the ongoing debate to end of impunity in the DRC and the Great Lakes region.

1.7 METHODOLOGY

The research shall mainly be library based with documented facts on the DRC being explored and Internet sources.

1.8 SCOPE OF THE STUDY

This study looks at the challenges in addressing impunity for the horrific crimes that have been committed in the DRC since 2August 1998 (beginning of the war) to the purported end
of the war in June 2003 with the establishment of a government of national unity.[19]

[18] (n11 above)

[19] In April 2003 the warring parties finally agreed to share power and signed the All Inclusive Agreement on the Transitional Government, meant to settle interim political arrangements while the country moves toward elections. This agreement and the subsequent swearing in of the Government of National Unity is a significant step forward, but the transition is fragile.

1.9 OVERVIEW OF CHAPTERS

Chapter one will set out the content of the research, identify the problem and outline the methodology. Chapter two will discuss the state obligations in international law to prosecute gross violation of human rights and gives a summary of the human rights violations situation during the Congolese war. Chapter three will discuss the available national mechanisms for Accountability in the DRC. It will discuss if national courts and TRC are able to deal with these atrocities committed in the DRC.

Chapter four will analyse the extent to which the ICC could deal with the Congolese case and challenges. Chapter five will discuss the trends towards accountability in the DRC and the way forward. Chapter six will draw a conclusion on how to break the cycle of impunity in the DRC.

Chapter Two

THE CONGOLESE WAR AND STATE OBLIGATION IN INTERNATIONAL LAW TO INVESTIGATE AND PROSECUTE GROSS VIOLATIONS OF HUMAN RIGHTS.

2.1 INTRODUCTION

Any study of individual accountability must begin with an examination of the substantive law.[20] Hereinafter, this chapter examines the international law on the subject of investigation and prosecution of those grave human rights violations and gives a summary of the human rights violations situation during the five years war in the DRC.

2.2 THEORETICAL BASIS OF STATE OBLIGATIONS IN INTERNATIONAL LAW

The following paragraphs will concentrate on laws and practice to investigate and prosecute gross violations of human rights.

Until recently, a state's treatment of its own citizens was not considered a proper concern of international law. Only in the wake of widespread revulsion against the crimes committed immediately before and during World War II, did nations finally begin to accept limits on their virtually absolute sovereignty regarding the human rights of those residing within their jurisdiction. Building on several strands in earlier law, the trial of the Nazi war criminals at Nuremberg established that certain grave human rights violations by a government against its citizens are a matter of international concern and action.[21] International law may be found in treaties among states and in nontreaty-based law, including custom and general principles of law.[22]

A series of widely subscribed multilateral instruments now define many of the obligations of a government to its own citizens. Three different types of provisions in post-World War II multilateral treaties provide support for a state's obligation to investigate violations of personal integrity, take action against those responsible, and provide redress to victims.

First, a series of treaties specify the obligation of states to prosecute and punish perpetrators of acts defined as crimes under international law.

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20 (n 15 above) xliv

21 (n 14 above)13

22 The Statute of the ICJ, in the most widely recognised formulation, lists the sources of international law in art. 38.

Second, authoritative interpretations of broad human rights treaties hold that states parties fail to 'ensure and respect' the substantive rights protecting individuals' physical integrity if they do not affirmatively investigate, prosecute, and provide redress. Third, the right to a remedy included in many human rights instruments provides a strong basis for inferring an obligation to investigate, prosecute, and provide redress.[23]

2.2.1 The State's *duty to guarantee*

International human rights law imposes two major classes of obligation on the State: on the one hand, the duty to abstain from infringing upon human rights, and on the other, a duty to guarantee respect of these rights. The *first* is composed of a set of specific obligations related directly to the duty of the State to abstain from violating human rights, which in itself implies ensuring the active enjoyment of such rights. The *second* refers to obligations incumbent on the State to prevent violations, to investigate them when they occur, to process and punish the perpetrators and to provide reparation for damages caused. Within this framework, the State is placed in the legal position of serving as guarantor of human rights, from which emerges essential obligations related to the protection and ensuring of such rights.

It is on this basis that jurisprudence and legal doctrine has elaborated the concept of the *duty to guarantee* as a fundamental notion of the legal position of the State as concerns human rights. The *duty to guarantee* can be summarised as a set of obligations to guarantee and protect human rights and consists of the duty to prevent conduct contravening legal norms and, if these occur, to investigate them, judge, punish the perpetrators and indemnify the victims.

The *duty to guarantee* is an element confirmed expressly in various human rights agreements: the ICCPR, and the CAT, among others. Likewise, various declaratory texts reiterate this duty, such as the Declaration on the Protection of All Persons from Enforced Disappearance and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions. The jurisprudence of international human rights tribunals as well as of quasi-jurisdictional human rights bodies, such as the Human Rights Committee of the UN and the Inter-American Commission on Human Rights, coincide in affirming that this *duty to guarantee* is composed of four main international obligations, which it is, the responsibility of the State to fulfil: the obligation to investigate; the

[23] (n14 above) 24

obligation to prosecute and punish those responsible; the obligation to provide fair and adequate reparation to the victims and their families; and the obligation to establish the truth of the facts.[24]

The obligations of the *duty to guarantee*, are by nature complementary and are not alternatives or substitutes. The first two components of this fourfold obligation constitute in themselves, the most effective deterrent for the prevention of human rights violations. The recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation.

Thus, the obligation to prosecute and punish those responsible for human rights violations is closely related to that of investigating the facts. It is not possible for the State to choose which of these obligations it is required to fulfil. Even if they can be fulfilled separately one by one, this does not free the State from the duty of fulfilling each and every one of these obligations.
However, this Chapter focuses only on the obligation to investigate, to prosecute and punish those responsible and their challenges, because it is closest to our work.

2.2.2 Obligation to prosecute and punish

The obligation to prosecute and punish the perpetrators of human rights violations, as an expression of the *duty to guarantee*, has its juridical basis in the ICCPR[25], in the ACHR[26] as well as in the ECHR.[27] The non-fulfilment of this obligation amounts in practice to a denial of justice and thus to impunity, the latter being understood as the total lack of investigation, prosecution, trial and conviction of those responsible for violations of the rights.
The ICCPR points to this obligation to prosecute and punish those responsible for human rights violations.

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[24] *Velasquez Rodriguez* Case, Inter-American Court of Human Rights (Ser. C), No.4 (1998) (Judgement), para.174. See also *McCann and others v. United Kingdom*, ECHR (Ser. A), No.324 (1995) (Judgement), para.161. See also Report of the Human Rights Committee, Vol.I, UN GAOR, 51st Sess. Supp. No.40, at 37, 41, UN Doc. A/51/40 (1996)
[25] Art. 2(2)-(3), 9(5) and 14(6)
[26] November 22, 1969, art. 1(1), 10 et 25
[27] November 4, 1950, art. 1 and 5(5)

Thus the Human Rights Committee has recalled that:

> *the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular, forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified.*[28]

There undoubtedly exists an obligation to legally prosecute and punish the perpetrators of human rights violations. This obligation is regulated not only by the ICCPR but also by other international instruments, including most importantly the CAT, among others. This obligation is not solely of a conventional character. The natural connection between the right to justice and the obligation to impart justice is evident. The duty to impart justice, incumbent on the State, has its basis not only in conventional norms but also in the character of human rights as being a subject of judicial action. As the UN Expert on the right to restitution, indemnisation and rehabilitation has expressed it, 'it is difficult to imagine a judicial system which protects the rights of the victims while at the same time remaining indifferent and inactive with regard to the flagrant offences of those who have violated such rights.'[29]

The responsibility of the State is compromised not only when it encroaches upon the rights of an individual through the active or omissive conduct of its agents, but also when the State neglects to exercise appropriate actions with regard to investigating the facts, prosecuting and punishing those responsible and providing reparation, or when it obstructs the work of justice. Thus, the transgression or non-observance by the State of this *duty to guarantee* compromises its international responsibility.

> *The responsibility of the State can be compromised by a lack of vigilance in the prevention of the damageable acts, but also through lack of diligence in the criminal prosecution of the offenders. It is recognised that in general, repression of the offences is not only a legal obligation of the competent authorities but also an international duty of the State.*[30]

In maintaining the impunity of human rights violations, the State violates its international obligations and compromises its international responsibilities.

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[28] See 'Question of impunity of perpetrators of human rights violations (civil and political): Revised final Report' prepared by Mr Joinet pursuant Sub commission Decision 1996/119, 2Oct.1997 UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 paras.16-30; *HRW* 'Special Issue: Accountability for Past Human Rights Abuses' No.4 (1989); Orentlicher D (1991) 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' 100 *Yale Law Journal* 2537; Méndez, J (1997) 'Accountability for Past Abuses' 19 *Human Rights Quarterly* 255.

[29] E/CN.4/RES/1998/43 & E/CN.4/RES/1999/33, <http://www.unhchr.ch/huridoca/huridoca.nsf/Framepage/Restitution> (accessed on 20 September 2004)

[30] The arbitration decision pronounced on May 1, 1925 by Prof. Max Huber in the case of the British claims for damages caused to British subjects in the Spanish zone of Morocco.

2.2.3 The incompatibility of amnesties and obligation of states in international law.

The existence of an international law obligation to investigate, prosecute, and provide redress for at least certain human rights violations raises but does not solve a host of thorny legal issues.[31] Both in the context of international conflicts and civil war, political motivations may often lead states to prefer amnesty to prosecution.[32] The Human Rights Committee has held that:

> *Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy including compensation and such full rehabilitation as may be possible.*[33]

Amnesties and other similar measures which impede the perpetrators of human rights violations from being brought to trial, judged and punished, are incompatible with the obligations which international human rights law imposes on States. On one hand, such amnesties are incompatible with the obligation to investigate, judge and punish those responsible for human rights violations. On the other hand, these amnesties are incompatible with the obligation of the State to guarantee every person an effective recourse and the right to be heard by an independent and impartial tribunal for the determination of his rights.

2.2.4 State obligations under the *Universal Jurisdiction* principle

The notion that certain crimes are so universally abhorred that they constitute crimes against international law is now widely recognised. War crimes, crimes against humanity, genocide and torture are examples of such crimes. The need to hold individuals accountable for such atrocities has also become an accepted part of international law. Since the Nuremberg and Tokyo trials following World War II, the principle that it is the right or even the duty of states to bring to justice those responsible for international crimes when they are not prosecuted in their own countries has gathered momentum.

Certain international treaties place states parties under a duty to ensure that suspects who come within their borders are brought to justice, either by prosecuting them in their own courts or by extraditing them to stand trial elsewhere. This duty to either prosecute or extradite is contained in the four Geneva Conventions of 1949. States parties to the Geneva Conventions are obliged to seek out

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31 (n14 above)

32 For discussion on the validity of amnesty/impunity for gross violations of human rights in international law. See (n28 above) 2537

33 UN Human Rights Committee General Comment No. 20 in relation to Art. 7 of the ICCPR

and either prosecute or extradite those suspected of having committed 'grave breaches ' under those Conventions.[34]

'Grave breaches', as defined in the Conventions, include wilful killing, torture or inhuman treatment, causing great suffering or serious injury to body or health, and other serious violations of the laws of war.[35] A serious weakness in the Conventions is that they only require the exercise of universal jurisdiction for offences committed in international armed conflict, and not in internal armed conflict.

However, the Statutes of the ICC and the ICTR do specifically give jurisdiction for these courts over violations committed in an internal armed conflict.[36] Parties to the CAT are similarly obliged to either extradite or prosecute alleged torturers who come within their borders.[37] In addition to these treaties which impose obligations on states parties in relation to specific offences, it is widely recognised that customary international law permits the exercise of universal jurisdiction for genocide[38] and crimes against humanity,[39] and possibly for serious violations of the law of war in internal armed conflicts.[40] All of these are within the jurisdiction of the ICC under the Rome Statute of July 1998, and this may encourage states to provide for universal jurisdiction for these offences.[41]

Over the past decade, there is a growing state practice with regard to the national prosecutions of foreigners for international crimes committed abroad. This is based upon the principle of universal jurisdiction. The *Pinochet* extradition case in the United Kingdom represents a prime example that sets in motion a debate on the limits of the immunities of current and former heads of state.[42]

However, although some states continued to meet their obligation to prosecute the most serious international crimes through their national courts, the application of universal jurisdiction laws also has been scaled back. While there are a number of pending cases involving mid-level officials before national courts in Europe, there has been no increase in prosecutions of senior officials. Other

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34 Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field…

35 For instance, Art. 147 of the Fourth Geneva Convention

36 Art. 8.2(c) of the ICC Statute and 4 of the ICTR Statute

37 Art. 7.1

38 Restatement (Third) of the Foreign Relations Law of the United States, para.404

39 UN General Assembly Resolution 95(1) of 1946, reiterating the principles in the Nuremberg Charter and Judgment.

40 This is suggested in the *Tadic* case, where the Appeals Chamber of the ICTR held that customary international law did impose criminal liability for serious violations of Common Article 3 of the Geneva Conventions, which relate to internal armed conflict. Judgment of 2 October 1995 para.137, 35 ILM (1996) 32.

41 Rome Statute of the ICC, adopted 17 July 1998

42 Reed, B & Ratner, M *The Pinochet Papers: The Case of Augusto Pinochet in the British and Spanish Courts* Kluwer (2000), See also: *HRW* 'The Pinochet precedent: How victims can pursue human rights criminals abroad', <www.hrw. org/campaigns/chile98/precedent.htm> (accessed on 12 August 2004)

examples are the arrest in early 2000 in Senegal of *Hissène Habré*,[43] the former head of state of Chad, and the international arrest warrant for 'grave violations of international humanitarian law', issued by a Belgian judge against the DRC's then Minister of Foreign Affairs, Yerodia Adboulaye.[44] In this case, on February 2002, the ICJ held that a sitting foreign minister was immune from prosecution in another country's court system regardless of the seriousness of the crimes with which he was charged. Although the ICJ noted that such officials would not be immune to prosecution before international criminal courts where these courts have jurisdiction, its decision went against recent trends to deny immunity for serious human rights crimes.[45]

These different developments taken together have formed the components of a new, fragile, yet unprecedented system of international justice and promise an end to the impunity that perpetrators of some of the world's worst crimes have long enjoyed.

2.3 SERIOUS HUMAN RIGHTS VIOLATIONS COMMITTED DURING THE CONFLICT IN THE DRC.

Since 2 August 1998, fighting in the DRC has dramatically endangered the lives of millions of civilians. This armed conflict has spread swiftly - both in terms of the number of governments and armed groups involved in the fighting, and in terms of the devastating impact the conflict has had on local populations. Initially sparked by President Laurent-Desire Kabila's expulsion of Rwandans and other foreign troops, the conflict has rapidly involved other regional governments and armed opposition groups from the DRC and neighbouring countries which support either side of the main protagonists.

Widespread human rights abuses have been committed in the DRC in recent years. All parties to the conflict have been responsible for violations, either directly or through exercising control over groups that commit them. Among the worst violations are killings of civilians, forced recruitment of child soldiers, destruction of villages, internal displacement, rape and torture.[46]

These atrocities, and countless others, have occurred in the DRC since war began. It is too reprehensible and appalling to imagine that in the five year period between 1998 and 2003, approximately 3.5 million people died in the DRC in a bloody conflict, largely ignored by the

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[43] Reed, B 'The Prosecution of Hissène Habré : An 'African Pinochet' (2001) 35 *New England Law Review* 321-335

[44] A this date, he is one of the four Vice-President of the DRC.

[45] Dicker, R & Keppler, E 'Beyond The Hague: The Challenges of International Justice' **(2004)** *HRW* **<**http://www.hrw.org> (accessed on 20 August 2004), See *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)* <http://www.icjcij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (accessed on 7 September 2004)

[46] See the report of the High Commissioner for Human Rights (S/2003/216) and the oral report of the Special Rapporteur on the situation of human rights in the DRC and in the HRW Report, July 2003, Vol.15, No. 11(A)

international community, in which all parties have shown little respect for human life and dignity.[47] Most of those who died were civilians, killed as a result of war, starvation or disease. Despite steps toward peace in the country, armed groups continue to launch violent attacks on civilians.

The scale, number and seriousness of human rights violations, which were committed, together with their systematic nature, clearly amount to serious crimes under international law; crimes that the international community as a whole, has pledged to work together to prevent and punish. Armed groups have committed war crimes, crimes against humanity, and other violations of international humanitarian and human rights law on a massive scale in DRC.[48] According to one estimate, this war has directly or indirectly cost more than three million civilian lives, making it the most deadly war for civilians since World War II.[49] According to *Oloka-Onyango* if the conflict in the DRC were to occur in another part of the world; it would have been called a 'world war'.[50] This conflict is probably the most important crisis Africa has experienced in its post-colonial history, and one of the most complex and perplexing events that the post-cold war world has seen,[51] with 'effects beyond the sub-region to afflict the continent of Africa as a whole.'[52] For Howard Wolpe, the US Special Envoy to Africa's Great lakes region, the DRC war was 'the most widespread interstate war in modern African history.'[53] It was also considered by some analysts the 'African equivalent of World War I' and labelled 'African War.'[54]

Since the start of this war in August 1998, and despite the atrocities, which have been widely decried, no-one has been prosecuted, found guilty or, much less, sentenced either as perpetrator or joint perpetrator of serious crimes against the civilian populations. This situation is reinforcing the reign of impunity, and encouraging perpetration of odious crimes. Thus, impunity arises from a failure by the DRC to meet its obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.

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47 In a demographic study published in 2003, the International Rescue Committee estimated that approximately 3.3 million people died as a result of war <http:// www.theirc.org> (Accessed on 25 June 2004)

48 As above

49 (n11 above)

50 Oloka-Onyango 'Gender and Conflict in Contemporary Africa: Engendering the Mechanisms for the Promotion of Human Rights and Conflict Resolution'; Paper presented at the African Women Lawyers Conference organised by FIDA, Uganda on 9-11 *Kampala* Uganda

51 Breytenbach, W *et al* 'Conflicts in the Congo: From Kivu to Kabila' (1998) 8 *African Security Review* 33

52 Extract from the Report on the UN Secretary-General Kofi Annan on 'UN Deployment in the DRC' (2000) 7 *SAJIA* 183

53 Wolpe, H 'The Great Lakes Crisis: An American View' (2000) 7 *SAJIA* 27

54 Naidoo, S 'Rebels without a pause: Diplomacy in the DRC conflict' (1999) 6 *SAJIA* 155

2.4 CONCLUSION

International human rights law imposes a duty on states to investigate and prosecute violations committed within their jurisdictions, and the primary duty to end impunity rests with the state authorities where the violation is committed. However all too often, violators are not brought to justice in their own countries. The sight of large scale human suffering and mass violations of human rights and humanitarian law in recent years has given new impetus to international determination to bring violators to justice. Accountability for international crimes is increasingly viewed as a matter of concern for the international community as a whole, and there has been a trend towards the establishment of international mechanisms for criminal justice. International criminal tribunals were established by the UN Security Council in response to the conflicts in former Yugoslavia and Rwanda, and in July 1998, states agreed to establish a permanent international criminal court to try perpetrators of war crimes, crimes against humanity and genocide.

Despite these important moves to create a system of international criminal justice, for the foreseeable future there will still remain a role for national courts in prosecuting those suspected of international crimes who come within their borders.[55] The effective exercise of universal jurisdiction is one important tool in the struggle to end impunity for international crimes. The following chapter attempts to analyse the possibility for the DRC to address gross human rights violations during the five years war.

[55] Art 9 of the ICTY Statute, states that 'The International Tribunal and national courts shall have concurrent jurisdiction ... The International Tribunal shall have primacy over national courts...' The Statute for the Rwanda Tribunal contains similar terms. The Rome Statute for the ICC, Art. 1, states that the Court shall be complementary to national criminal jurisdictions.

Chapter Three

NATIONAL MECHANISMS FOR ACCOUNTABILITY: NATIONAL COURTS AND TRUTH AND RECONCILIATION COMMISSION (TRC)

3.1 INTRODUCTION

There are many ways to address gross human rights violations during a period of political transition. Generally speaking, however, these fall into two basic categories: *judicial mechanisms and non-judicial mechanisms*.[56] Furthermore, transitional justice aims to halt human rights crimes by investigating the crimes, identifying and sanctioning those responsible; such justice aims also to provide reparation to victims, to prevent future human rights crimes and to preserve and enhance peace and democracy. Another modern trend in societies in transition to democracy or in the aftermath of civil war is the institution of truths-seeking mechanisms and institutions, such as formal truth commissions. The most elaborate example is probably the Truth and Reconciliation Commission in South Africa (TRC), but other prominent examples can also be found in different parts of the world.[57]

In the context of the DRC, the challenge is how to pursue these objectives in a situation where one is confronted with the realities of a weak justice system, a large number of perpetrators, a very large number of victims, and the need to consolidate a fragile peace process. There is a clear link between efforts to establish accountability and establish or re-establish the rule of law for the future. The serious shortcomings in the administration of justice, and the impunity of human rights violators prevail today. The aim of this chapter is to provide an overview of current challenges of justice in the DRC associated with transitional justice issues.

3.2 JUDICIAL MECHANISM: NATIONAL COURTS AS THE FORUM OF FIRST RESORT

Domestic prosecution of the perpetrators of crimes against humanity, genocide and other gross violations of human rights is extremely rare, largely because these crimes were, hitherto, not recognized in domestic legislation. In Greece in 1974, after the fall of the generals, national tribunals tried some of the top military. In Argentina in 1985, a few junta leaders and army officers were brought before the courts, but because of heavy pressure from the army proceedings stopped after two years.

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[56] Some authors refer to extra judicial mechanisms.

[57] See paragraph on the non-judicial mechanism.

A more recent example is the prosecution of the suspected Rwandan *génocidaires*[58] in national tribunals in Kigali.

Although the international legal process has elaborated a corpus of law providing individual criminal responsibility for various atrocities in peace and war, domestic legal systems remain the primary fora for holding individuals accountable for grave human rights violations. National courts have the principal responsibility for such trials, as part of a state's duty to uphold the rule of law. Moreover, because such tribunals are closest to the scene, the perpetrators, and the victims of atrocities, they represent the starting point for considering accountability options.

However, national courts cannot exercise jurisdiction over all offences regardless of where they were committed. Rather, the jurisdiction of national courts is governed by the domestic law of the state concerned and by international law principles of jurisdiction.[59] For serious violations of human rights, the universality principle permits a state to exercise jurisdiction over perpetrators of certain offences considered particularly heinous or harmful to mankind, regardless of any nexus the state may have with the offence, the offender, or the victim.[60]

The notion behind this principle is that the nature of such offences dictates that all states have an interest in exercising jurisdiction over them. Nevertheless, when the territorial state is willing and able to carry out a *bona fide* prosecution, other states should generally defer to it.[61] Universality may arise under treaty or customary law.[62] Regarding crimes under International Law, both treaties and customary law have envisaged domestic courts as the primary arena for the trials of those accused of acts incurring individual responsibility under international law.[63] Many international agreements, especially those of more recent origin, impose an obligation on states to extradite or prosecute offenders *aut deudere aut judicare.*[64]

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58 This French word mean perpetrators of genocide.

59 Randall, K 'Universal Jurisdiction Under International Law' (1988) 66 *Tex. Law Review* 785

60 Stern, B 'A propos de la Compétence Universelle' in Yakpo, E & Boumedra, T (eds) (1999) *Liber Amicorum Judge Mohammed Bedjaoui* 735 Kluwer.

61 Art.17 of the ICC Statute; see also Joyner, C. 'Arresting Impunity: The Case for Universal jurisdiction in Bringing War Criminals to Accountability' (1997) 59, *Law and Contemp. Probs*. 153

62 (n15 above) 162

63 The provisions in treaties and customary vary widely from crime to crime; they may require a state to prescribe and apply domestic law on the subject under some combination of accepted bases of jurisdiction; or merely permit states to do so.

64 Bassiouni, C. & Wise, E (1995) *Aut Deudere Aut Judicare: The Duty to Extradite or Prosecute in International Law* Martinus Nijhoff 21, 25

3.2.1 The Congolese national courts and prosecution of human rights abuses

The DRC and other states involved in the conflict are parties to a number of important international treaties. For example, the DRC is party to the 1948 Genocide Convention, the 1949 Geneva conventions and additional protocol I relating to the Protection of Victims of International Armed Conflict, but not to additional protocol II relating to the Protection of Victims of Non-International Armed Conflict. Furthermore, the DRC is party to the ICCPR, the ICESCR, the CAT, the CERD, the CRC, the ACHPR and the Rome Statute. Hence, the DRC is under international obligation to take legal action against many of the crimes that have been committed in the conflict. The DRC and the other parties to the Lusaka Agreement[65] have explicitly stated that 'mass killers and perpetrators of crimes against humanity' shall be brought before national courts (or, where applicable, the ICTR), while 'other war criminals' might be dealt with differently.

However, satisfactory national prosecutions require sufficient capacity. The existing judicial system in the DRC has been heavily criticised. In one of the reports to the Security Council, the Secretary-General has even concluded that:

> *The human rights situation is further aggravated by a justice system controlled at every level by the State, and unable to grant defendants the most elementary procedural guarantees.* [66]

3.2.2 The functioning of the Judicial system

Because the primary onus of accountability for the violations of human rights committed in the DRC rests with the Congolese government, domestic trials constitute an important potential mechanism for accountability. Indeed, beyond the moral and political obligations upon the Congolese government are legal obligations as well, most notably the requirement under international law to prosecute and punish perpetrators of gross violations of human rights.

Moreover, national prosecutions will yield benefit only if the judicial system is generally fair and effective. In this respect, a fair and effective judiciary requires four fundamental conditions: a workable legal framework through well-crafted statutes of criminal law and procedure; a trained cadre of judges, prosecutors, defenders, and investigators; adequate infrastructure, such as courtroom facilities, investigative offices, record-keeping capabilities, and detention and prison facilities; and, most importantly, a culture of respect for the fairness and impartiality of the process and the rights of the accused.[67] In many countries, these conditions are woefully lacking, though, a concerted program with

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65 The Agreement on a cease-fire in the DRC signed in Lusaka on 10, 30 and 31 July 1999.

66 *Third Report of the Secretary-General on the MONUC*, S/2000/566, 12 June 2000, para.48. See also reports by the Special Rapporteur, Mr Roberto Garretón, E/CN.4/1998/65, paras32-37, E/CN.4/1999/31

67 (n15 above)

foreign assistance to prosecute human rights abuses can help develop these conditions. At the same time, these four conditions must be seen in the context of a state's overall economic and political condition. To demand identical sorts of prosecutions in poor states or those emerging from civil strife as would occur in rich or stable countries would defy reality. Although prosecutions within an inadequate system may have a detrimental impact on both accountability and the rule of law in a country, the standard for justice must acknowledge these factors.

The Congolese judiciary presently meets none of the key criteria for a fair and effective judiciary, a workable legal framework; a trained cadre of legal advocates, decision-makers, and investigators; adequate infrastructure; and a culture of respect for due process. Instead, like those of many countries emerging from national traumas, it is a disorganised, ineffective, and unfair system, currently failing to mete out criminal justice, notwithstanding the laudable aid programmes of the UN, foreign governments, and NGOs,.[68]

In this regard, it has been pointed out that, the DRC's national justice system is in a state of disarray. It will likely take years to establish a functioning, independent, impartial, and fair judiciary. Yet, in the long term, it is the national justice system that provides the best hope for the protection of human rights and an end to the culture of impunity in the DRC. In the short term, the challenges for rebuilding a national justice system are enormous and will require extraordinary measures in the coming years to end the systematic and widespread abuses of human rights that characterize the DRC.[69] Also, lack of confidence in the judiciary's administration of justice is widespread. In the DRC, it is estimated that only a very small percentage of disputes end up in courts of law, not because parties to the disputes have better options, but because they are so suspicious of the judiciary that they prefer other means, including the police, security services, the military, or traditional arbitration in rural areas. Victims of human rights abuses are generally reluctant to utilize judicial mechanisms for redress.[70]

Below is the discussion of some key deficiencies in the DRC justice system that undermines its capacity to bring justice for serious past crimes. These include lack of independence of the judiciary, training, adequate investigations, protection of fair trial standards and rights of the accused.
In other words, the judiciary remains '*underfunded, inefficient, ineffective, and subject to corruption and executive influence*.'[71]

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68 (As above) 312

69 *HRW Briefing Paper* 'DRC: Confronting Impunity' January 2004, see <http://hrw.org/english/docs/2004/02/02/congo7230.htm> (Accessed on 18 May 2004)

70 As above

71 U.S. State Department 'Country Reports on Human Rights Practices – 2003' 25 February 2004.

a. Lack of independence of the judiciary

Post-independence constitutions of the DRC, including the current transitional constitution, have asserted the principle of separation of powers and recognized three branches of government.[72] But, despite clear references to judicial independence, the constantly growing power of the executive since the mid-1970s has resulted in *de facto* subordination of the judiciary to the executive branch. The judiciary has lost the relative independence it once enjoyed in the late 1960s and the early 1970s.[73]

The situation has not changed under the current Government of National Unity. The *Syndicat Autonome des Magistrats de la RDC*, SYNAMAC, the principal union of magistrates and judges, recently noted, 'the judges of our country have been wrongly and unjustly reduced to the rank of simple public functionaries of the state.'[74] In their memorandum prepared for the government, SYNAMAC asked for a significant increase in judges' salaries to help ensure their independence from economic, ethnic, and political special interests. The lack of independence suggests that this option would not only require new laws, additional resources and training, but also the establishment of a new judicial culture and maybe also a new breed of prosecutors and judges.[75]

b. Lack of training

The lack of well-trained personnel has always been one of the most serious problems plaguing the Congolese judiciary. At independence in 1960, there was not a single trained Congolese lawyer in practice. The government recruited foreign judges from Africa and Haiti to fill the vacuum left on the bench by the Belgians. It was not until 1962-1963 that the first graduates of Congolese law schools joined the bench. The last figures released by the Ministry of Justice show that as of 1998, there were only 1448 judges and prosecutors in the entire country, with over 70 percent of these concentrated in the cities of Kinshasa, Lubumbashi, Kisangani, and Goma.[76]

The judicial system in the DRC is based on a career magistracy where judges and prosecutors are appointed directly from law school without prior experience as lawyers. They enter a hierarchical structure where they depend on their superiors for job assignments and promotion. For this system to work there must be specialized training for judges and a self-regulatory mechanism to oversee discipline and promotion. Such specialized training was provided in the early 1960s through the *Ecole*

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72 Art.110 -153 of the Transitional Constitution.
73 (n69 above)
74 *Mémorandum du Syndicat Autonome des Magistrats de la RDC*, Kinshasa, 25 August 2003.
75 (n11 above)
76 (n69 above)

Nationale de Droit et d'Administration, a judicial college which lasted only a few years. Since that time, there have been no effective training programmes for judges and prosecutors.[77] Therefore, they lack special skills to work with victims and witnesses of crimes committed during the war.

c. Lack of adequate investigative capacity

In the DRC, criminal cases are in general poorly handled. Pre-trial investigation is usually one-sided or in some cases, does not take place at all. Unlike many countries in Francophone Africa and most civil law countries, the investigative functions are not separate from the functions of prosecution. The state prosecutor in the DRC both investigates and prosecutes. For such a system to work, the prosecutor and the defence must be put on an equal footing, at least formally. They both must be able to investigate and have the opportunity to present the results of their investigations. Evidence must be disclosed to each other; no side must be allowed to conduct a trial by ambush.[78]

However, this is not the case in the DRC. There is no mechanism to ensure fairness and independence of the investigation. The prosecutor enjoys large discretionary powers, called the *opportunité de poursuite*, to decide whether a particular crime warrants investigation. However, neither a *juge d'instruction*, an investigating magistrate in a civil law system, nor rules of disclosure exist to counter-balance the one-sided investigation by the prosecutor. This discretionary power may only be overruled by a complaint filed directly before the court by the victim of the crime.[79]

3.3 NON-JUDICIAL MECHANISM: TRUTH AND RECONCILIATION COMMISSION (TRC)

In the DRC, the transitional Constitution provides for the establishment of a TRC[80] to tackle the issues of impunity and promote national reconciliation and a state based on the rule of law. Given the inadequacies of a purely judicial or retributive approach to transitional circumstances, truth commissions have become a crucial part of the response to transitional demands.

Yet truth commissions are also limited in the range of strategies they may deploy to address transitional demands. To assess the limitations of a truth commission, however, requires a detailed assessment of the specific transitional circumstances it is called upon to address.

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77 As above
78 (n69 above)
79 As above
80 As well as a National Human Rights Observatory (NHRO) which aims to promote and protect human rights.

The understanding of truth commissions, as one mechanism of transitional justice, has changed in the last few years.[81] In the past, truth commissions were largely understood as investigative mechanisms with the primary aim of publishing an authoritative and factual report on human rights violations committed in a country. The societal impact of gathering information was given little attention. However, currently, 'the possibility of holding public hearings, advancing societal and individual healing, and taking part in or promoting a process of reconciliation has opened wide the question of means, independent of the final end reached'.[82]

The social utility of truth commissions, and concepts such as healing and reconciliation, has become a core part of the critical discussion about the impact of such bodies. Whether transitional justice mechanisms, in this case, truth commissions, should be concerned with concepts such as healing is a point for debate. That said, the potential for truth recovery mechanisms to contribute to healing and reconciliation has been ubiquitously asserted. This is the case in societies as diverse as South Africa,[83] Northern Ireland,[84] Sierra Leone[85] and East Timor.[86]

This is particularly interesting considering the degree to which truth commissions have proliferated. There have been over twenty truth commissions in the last two decades.[87] It is difficult to locate the precise reason for the political popularity of such mechanisms. The question one may ask is, does the trend for truth commissions as a primary transitional justice mechanism rest on their proven ability to play a role in uncovering the truth, promoting healing and fostering reconciliation?[88] Or, from a more cynical perspective, is the notion of 'reconciliation' a complex modern foil used to market unfavourable compromises made during political negotiations?

Transitional justice mechanisms such as truth commissions are by definition established during times of political instability or, colloquially stated, when new rules for the political game are being forged. This is inevitably characterised by a push toward political and social stability, particularly if a regime

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81 Hayner, P (2001) *Unspeakable Truths: confronting state terror and atrocity* New York: Routledge.

82 (as above) 252.

83 Kader, A et al (1994) *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* Cape Town: David Philip Publishers,); Boraine, A et al (eds) (1994) *Dealing with the Past: Truth and Reconciliation in South Africa* Cape Town: IDASA

84 'Report of the Healing Through Remembering Project' (2002) Belfast: Healing Through Remembering

85 Sec. 6(1) Sierra Leone Truth and Reconciliation Commission Act 2000, one of its objectives is 'to promote healing and reconciliation'.

86 The UN Transitional Authority in East Timor, *Regulation 2000/10 on the Establishment of Reception, Truth and Reconciliation in East Timor*. Sec. (d) says the Commission is grounded in 'the desire to promote national reconciliation and healing'.

87 (n81 above)

88 For a discussion of the different ways reconciliation was defined in the South African TRC process, see Hamber, B (2002) *Ere their story die: truth, justice and reconciliation in South Africa* 44(1) Race and Class 61,79

change is happening by negotiation and coupled with a cessation of hostilities that have dragged on for many years. This can, and generally does, involve compromise by all parties concerned.

In this context, it is legitimate to ask whether truth commissions are a fundamental part of peacemaking or peace building, or perhaps something else altogether. Some argue they are, under certain circumstances, the best way of ensuring accountability for past crime[89] by investigating the past, acting on what is uncovered and through this facilitating a break with the past. Others see them as part of the machinery that ultimately legitimises a new political order.[90]

3.3.1 Specificities of the Congolese TRC

A plan to establish the TRC for the DRC was a result of the Sun City Accord, which set up five ad-hoc commissions in April 2002. In this agreement, the signatories agreed the TRC would consider political, economic, and social crimes committed from 1960 until 2003 in order to establish truth and help bring individuals and communities to reconciliation.[91] In this line, in December 2002, a comprehensive power sharing agreement was concluded in Pretoria, South Africa (the 'Global and Inclusive Agreement on the Transition in DRC'). The Pretoria agreement provides for a two-year transition period, the establishment of *institutions of the transition*. Human rights and justice are addressed in the agreement, which provides for the establishment of a truth and reconciliation commission and of a national observatory on human rights, and specifically provides that there will be no amnesties for crimes against humanity, genocide and war crimes. On April 4, 2003, a new constitution was promulgated and provides in article 155, for the establishment of a TRC *to tackle the issues of impunity and promote national reconciliation and a State based on the rule of law*. It is one of the five institutions supporting democracy in the DRC.

The establishment of a TRC is a useful instrument for promoting reconciliation. From a Human Rights perspective, true reconciliation must be linked to accountability, justice and acknowledgment of past crimes. TRCs, in addition to creating a historical record, may conduct investigations, and take testimony from witnesses, victims and perpetrators. They may also recommend the granting of compensation to victims; and recommend reforms needed to prevent the recurrence of past abuses.

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89 Boraine, A (2000) *A Country Unmasked: South Africa's Truth and Reconciliation Commission* New York: Oxford University Press,); Tutu, D (1999) *No Future without Forgiveness* London: Rider

90 Wilson, R (2001) *The Politics of Truth and Reconciliation in South Africa: legitimising the post-apartheid state* Cambridge: Cambridge University Press

91 The long historical period that the commission is to investigate was reportedly a key requirement for the signature of the RCD-Goma, one of the Rebel groups that was left out of the initial agreement in 2002. The other groups include the former Kinshasa government, MLC, RCD-ML, RCD-N, Mai Mai, civil society, and opposition groups.

Priscilla Hayner,[92] said that a body must meet four criteria in order to be a truth commission:

· it must focus on the past;

· it must focus on a broad picture of human rights violations or violations of international law that occurred over a defined period, not on a single event;

· it must exist only for a brief period of time, and once it issues a report it must dissolve. In some instances, a commission has never issued a final report; and

· it must gain access to information held by both the outgoing regime and the new government, and it must receive the protection necessary to dig into sensitive issues.

However, every situation is different, and there is no standard model on how to establish a TRC. While there are useful lessons to be learned from other TRCs (for example in Sierra Leone and South Africa), there are many contentious issues surrounding the Commission for the DRC. These include the functions of the TRC, its composition, its mandate, and the timing of the establishment and work of the Commission.

a. Functioning of the TRC

Given the linkage to the Pretoria Accord and the law, this institution is faced with challenges which may not have been salient in other countries, and which is linked to some critical success factors, such as:

• *Independence and autonomy from government:* this institution needs to act independently from Government, from political parties and all other entities. In this regard, although article 156 of the Constitution states that 'the TRC like others institutions of support for democracy to enjoy the independence of action between them and in relation to other institutions of the Republic, the reality is not the same because of its composition. On the other hand, independence does not mean an entire lack of connection to the State - there will definitely be areas of connection for example for financing and reporting on the activities of the extra-judicial mechanisms.

• *Pluralism,* or inclusive membership, is essential for legitimacy (the need to ensure representation of all sectors of civil society).

• *Adequate power of investigation:* the investigative powers of a national institution should be guarantee and sanctions should apply when the free exercise of the institution's powers is obstructed.

[92] (n 81 above)

b. Composition

Some of the members of the bureau do not meet the requirement mentioned in the Inter-Congolese Dialogue (ICD) resolution 'DIC/CPR/04' of the Sun City agreement.[93] In fact, the selection of commissioners was very subjective (eligibility criteria were not respected at all). One of the main concerns is the integrity and suitability of the eight members of the Commission, selected by each of the signatories of the Sun City Accord. Reverend Kuye is the president of this Commission. Eight other members support the Commission, each representing one of the main parties to the peace process. Critics claim that a number of those selected have themselves been implicated in human rights abuses. Reverend Kuye, however, claims he has not received any formal complaints against any member of his Commission.[94] Whatever the justification of these allegations, the integrity of the Commission has been questioned and could undermine the whole truth and reconciliation process.

In this regard, the legitimacy of the South African TRC was central to the success of its work. In order for the DRC to follow the South African paradigm, the TRC will need to be able to marshal an equivalent degree of legitimacy. The choice of commissioners is one of the most important determinants of a Truth Commission's public legitimacy. Many observers have attributed the success of South Africa's paradigmatic TRC to the powerful figure of Archbishop Desmond Tutu, who chaired the Commission and legitimated the commission by being scrupulously even-handed in addressing the abuses of both the apartheid state and the anti-apartheid movements. This is not the case in the DRC where commissioners have been chosen from factions involved in the peace process, known as *Composantes.* There is far fewer opportunities for such demonstrations of impartiality in a Congolese commission, making the question of legitimacy all the more difficult and crucial to the commission's success.

Moreover, even the Transitional Constitution did not resolve this problem. Articles 157 and 159 of the Constitution state respectively that:

- *(Art.157) the TRC is presided over by representative of the constituent 'Forces Vives' and the other constituent and entities of the ICD from part of offices.*
- *(Art.159) the president and members of the TRC are appointed for the whole duration of the transition. However, their functions are ended by the resignation, demise, definitive impeachment, conviction for high treason, embezzlement of public funds, misappropriation or corruption. The organisation or group of the constituent from which they are derived introduces their replacement to the national Assembly for ratification, within seven days.*

[93] Resolutions of the Inter-Congolese Dialogue which took place at Sun City (South Africa) from 25 February to 12 April 2002.

[94] *HRW interview*, Reverend Kuye, president of the TRC, Kinshasa, October 7, 2003.

There is clearly a need to appoint high quality and impartial commissioners with expertise in human rights and reconciliation issues.

c. Mandate

It is apparent that the objectives of the TRC are too ambitious, and are simply not realistically achievable in a short transition period. For example, the commission is asked to look at issues since 1960. This very large temporal jurisdiction will have serious implications for the TRC's effectiveness. The mandate is also too wide in terms of the type of violations to be investigated, and it overlaps in some areas with the mandate of the NHRO.

d. Timing

The timing of the TRC is also problematic. The question is, in the context of ongoing conflict and violation of Human Rights, if the DRC is ready for a TRC. Many actors are also concerned by the speed at which the Commission is being established. In this regard, grass root organisations (mainly Human Rights NGOs) have called for the TRC process to be put on hold in order to allow more time for consultation and discussion. The law on the TRC has been developed with only minimal consultation and does not include some key safeguards for the integrity of the process.[95]
Considering the above, and the risk of having a politicised TRC as a result of the modalities of appointment of members by the Sun City signatories, it is essential to find a way forward that is both possible and acceptable to all parties.

3.4 CONCLUSION

As discussed above, the DRC justice system faces institutional problems relating to lack of independence, poor infrastructure, nonexistent training, inadequate investigations, and failure to protect fair trial standards and rights of the accused. Accordingly, it is unlikely that reliance upon the national judicial system in addressing crimes that should be prosecuted would be an unsatisfactory option, at least not without substantive international support. In some situations a TRC indeed may provide an important additional mechanism to promote transitional justice, particularly in the wake of protracted gross violations of human rights.

[95] Civil society members, the UNHCHR, and the MONUC have expressed concerns about the law. See (n69 as above)

Even an efficient national court system, can only prosecute a comparatively few individuals. In this situation a TRC can facilitate a measure of accountability and truth telling from perpetrators who escape prosecution and provide a some from of reparations for victims of the conflict. However, a TRC should never be allowed to circumvent international human rights law or, more specifically, to ignore the punitive demands of the entire community. Regarding the nature of the Congolese TRC, it may seems that it has been established to shelter perpetrators of grave crimes committed during the war and actually, in power. Therefore, the available national mechanism in the DRC seems not to be able to deal with these atrocities.

Chapter Four

THE INTERNATIONAL CRIMINAL COURT (ICC) JURISDICTION ON THE DRC AND PROSECUTION OF CRIMES BEYOND ITS SCOPE: THE CHALLENGE

4.1 INTRODUCTION

In many conflicts around the world, armies or rebel groups attack ordinary people and commit terrible human rights abuses against them. Often, these crimes are not punished by the national courts. All too often national courts are not yet capable of handing down impartial justice or are physically unable to function.[96] The challenge and limitations of prosecuting international crimes through domestic law enforcement institutions have led states, international organisations, and NGOs, periodically, to contemplate the creation of international criminal courts that could directly try individuals for such crimes. Therefore, since July 2002, an international court to handle such crimes has emerged. It is hoped that the ICC will herald a new era for the effective prosecution and punishment of serious violations of international humanitarian law wherever such abuses may occur and by whoever may perpetrate the same. In so doing, the ICC is likely to become the central pillar in the world community for upholding fundamental dictates of humanity.[97]

The DRC will become the first place where the ICC prosecutes grave crimes. On 23 June 2004, the Court's Chief Prosecutor, Louis Moreno Ocampo, announced that he was opening his first investigation in the DRC, for crimes committed since July 2002. However, the question one can table in this regard is, can the ICC be an answer to all crimes committed in the DRC and an effective mechanism to end impunity? This chapter attempts to discuss the ICC challenges related to the DRC case.

4.2 GENERAL CONSIDERATIONS ON THE ICC

The court was established on 1 July 2002 as a permanent international tribunal which will try individuals responsible for the most serious international crimes.

The establishment of the ICC is an illustration of the emerging international consensus on the issue of transitional justice.

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96 This is the case of the DRC as seen in the previous chapter.

97 Cassesse, (2002) A. 'From Nuremberg to Rome: International Military Tribunals to the ICC' 1 *The Rome Statute of the ICC: A Commentary* New York: Oxford University Press 18

It will effectively supplant the temporary mechanisms used since World War II to prosecute crimes against humanity, such as the Nuremberg and Tokyo war crimes tribunals and the *ad hoc* UN tribunals for Rwanda and former Yugoslavia. The ICC has jurisdiction over the most serious crimes of concern to the international community. It is not designed to deal with violations of human rights unless they constitute genocide, crimes against humanity or war crimes. It will help to ensure that such serious crimes, which have long been recognized by the international community, no longer go unpunished because of the unwillingness or inability of individual countries to prosecute them.

The ICC is complementary to national jurisdictions. This *principle of complementarity* gives states the primary responsibility and duty to prosecute the most serious international crimes, while allowing the ICC to step in only as a last resort if the states fail to implement their duty, that is, only if investigations and, if appropriate, prosecutions are not carried out in good faith. *Bona fide* efforts to discover the truth and to hold accountable those responsible for any acts of genocide, crimes against humanity, or war crimes will bar the ICC from proceeding. This is meant to make it less likely for perpetrators to escape punishment for crimes because their own state is not willing to investigate and prosecute them.

In order to determine if a state is *unwilling* to genuinely investigate and prosecute a case, the Court considers whether it has taken measures to shield the suspect from criminal responsibility, whether it has unduly delayed the proceedings and whether it conducted proceedings in an independent and impartial way. In order to determine if a state is *unable* to genuinely investigate and prosecute a case, the Court considers whether it is unable to arrest the accused, to obtain the necessary evidence, and to otherwise, carry out judicial proceedings. This could be the case if the national justice system has collapsed, totally or substantially.

The ICC is different from the ICJ and other existing international tribunals. The ICJ is a civil tribunal that hears disputes between countries. The ICC is a criminal tribunal that shall prosecute individuals. The ICTY and the ICTR are similar to the ICC but have limited geographical scope, while the ICC is expected to be global in its reach. The ICC, as a permanent court, shall also avoid the delays and start-up costs of creating country-specific tribunals from scratch each time the need arises. It is expected to end the impunity often enjoyed by those responsible for the most serious international human rights crimes. It shall also provide incentives and guidance for countries that want to prosecute such criminals in their own courts and offer permanent back-up in cases where countries are unwilling or unable to try these cases themselves because of violence, intimidation, or a lack of resources or political will.

As earlier noted, the ICC is not intended to replace national courts. Domestic judicial systems remain the first line of accountability in prosecuting these crimes. The ICC will ensure that those who commit the most serious human rights crimes are punished even if national courts are unable or unwilling to do so. Indeed, the possibility of an ICC proceeding may encourage national prosecutions in states that would otherwise avoid bringing war criminals to trial.

4.3 ISSUES OF JURISDICTION OF THE ICC

The Jurisdiction of the ICC consist of the *ratione materiae* Jurisdiction, the *ratione persone and* the *ratione temporis* Jurisdiction. This research focuses only on the latter. The ICC has jurisdiction over the most serious crimes of concern to the international community, such as genocide, crimes against humanity and war crimes. It has been proposed that the Court should prosecute the crime of aggression but state parties have yet to agreed on a definition.[98]

4.3.1 Jurisdiction *ratione temporis* of the ICC

Pursuant to the provisions of its Statute, the ICC's jurisdiction is strictly prospective. The ICC's *ratione temporis* jurisdiction is limited to crimes committed after the entry into force of the ICC Statute[99], which ensures against *ex post facto* prosecutions. Regardless of the situation which could trigger the exercise of its jurisdiction[100], crimes committed before the entry into force of the ICC Statute are not included in the temporal jurisdiction. Following the entry into force of its Statute, the ICC, as a permanent institution, have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.[101]

The Statute assumes the position of automatic jurisdiction.[102] When states become parties to the Statute, they accept the jurisdiction of the ICC for the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The court does not have retroactive jurisdiction, as confirmed by article 24 dealing with non-retroactivity *ratione personae,* which ensures against *ex post facto* prosecutions. The non-retroactive application of international legal instruments is a generally recognised principle of international law codified by the 1969 Vienna Convention on the Law of

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98 The question of aggression is of great importance to the DRC because troops from Rwanda and Uganda attacked and occupied part of the DRC for several years. The Security Council stated that 'Uganda and Rwanda… have violated the sovereignty and territorial integrity of the DRC… (Resolution 1304 on 16 June 2000),

99 Art. 11 of the ICC Statute.

100 Art. 13 (as above)

101 Art. 5 (as above)

102 Art. 12(1) (as above)

treaties.[103] The general rule is that a treaty does not bind a party with retroactive effect, in other words in relation to any act or fact which took place or any situation which ceased to exist before the entry into force of the treaty for the party.[104]

The ICC's *ratione temporis* jurisdiction is subject to certain preconditions. Where the Prosecutor has initiated an investigation, on the basis of a situation referred to it by a State Party or *proprio motu*[105], the court may exercise its jurisdiction only if the state on whose territory the crime was committed or the state of which the person accused is a national, is a Party to the Statute or has made a declaration accepting the exercise of jurisdiction by the Court with respect to the crime in question.[106] Such a declaration may also be made by a state, which is a Party to the ICC Statute, for crimes committed before the entry into force of the Statute for that State.[107] The above preconditions does not apply to the *ratione temporis* jurisdiction of the Court following an investigation conducted by the Prosecutor on the basis of a situation referred to it by the Security Council acting under Chapter VII of the UN Charter.[108]

4.3.2 Comparison of the *ratione temporis* provisions of the ICC with the ICTY and ICTR

There are few similarities between the *ratione temporis* jurisdiction of the ICC and that of the *ad hoc* International Criminal Tribunals created by the Security Council pursuant to Chapter VII of the UN Charter. Besides their different origins, these jurisdictions are limited and they are intrinsically linked to a specific conflict. Hence, they can hardly be distinguished from the events which gave rise to their creation. Besides, while the ICC is a permanent institution whose jurisdiction is strictly prospective, the ICTY and ICTR are *ad hoc* institutions with various forms of retroactive jurisdiction.[109]

As for the temporal jurisdiction of the ICTY, it is limited to the period between 1 January 1991 and until the establishment of peace and security.[110]Its jurisdiction *ratione temporis* is therefore open-ended, including possible future conflicts as the case may be.[111] The ICTR, on the other hand, has jurisdiction over serious violations of international humanitarian law committed in a period beginning on the 1 January 1994 and ending on 31 December 1994.[112]

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103 Vienna Convention on the Law of Treaties, 1155 UNTS 331
104 Jennings, R & Watts, A. (eds) (1996) 1 *Oppenheim's International Law* Peace Londen: Longman 1249
105 Art. 13(a) and (c) of the Rome Statute
106 Art. 12(2) and (3) (as above)
107 Art. 11(as above)
108 Art. 12(2) and 13(b) (as above)
109 Bourgon, S 'Jurisdiction Ratione Temporis' (2002) 545 in Cassesse (eds) A *the Rome Statute of the ICC: A commentary* 1048
110 SC Res. 827 (S/RES/827 (1983)) para.2
111 (n109 above) 545
112 Statute of the ICTR, SC Res. 955 (S/RES/955 (1994)) art. 1

While it is generally recognised that Genocide took place in Rwanda from 6 April 1994, the Security Council chose 1 January 1994 as the beginning of the ICTR *ratione temporis* jurisdiction with the aim of allowing the Tribunals to take into consideration all elements leading to the Genocide.

In comparison, the temporal jurisdiction of the ICC, *stricto sensu,* is only limited by the entry into force of the Statute. It is open ended and aimed at all of the most serious crimes of international concern committed thereafter worldwide. For all these jurisdictions, another significant distinction exists between the ICC and the *ad hoc* Tribunals. This difference pertains to their relationship with the Security Council. While the Security Council created both the ICTY and ICTR, they are independent Tribunals and the Council may not influence the exercise of their jurisdiction. The ICC on the other hand, which has been created pursuant to a multinational treaty, may be barred from exercising its jurisdiction for a fixed period of time by a resolution of the Security Council.[113]

4.4 THE DRC LOOKS TO THE ICC FOR JUSTICE

Recovering from five years of conflict that were Africa's deadliest ever,[114] Congolese see a glimmer of hope for justice with the ICC's investigation into atrocities committed during the five years war. It is expected to be one possible avenue for dealing with accountability for the atrocities committed in the DRC. The ICC has jurisdiction over war crimes, crimes against humanity and genocide committed since 1 July 2002, where certain requirements as regards jurisdiction and admissibility are met.

The DRC signed the Rome Statute on 8 September 2000, and ratified it on 11 April 2002. Therefore, the Court can prosecute crimes that have been committed after 1 July 2002 on the territory of the DRC. As regards admissibility, the Rome Statute provides that the ICC's jurisdiction is complementary to national criminal jurisdictions. This means that before the Court can act, it must first determine that the national authorities concerned are unwilling or unable to investigate or prosecute the crimes. The weakened state of the justice system in the DRC due to the conflict, mentioned above, is not to be revisited here. But as mentioned in the third chapter, the DRC is currently unable to prosecute these crimes. Thus, since there is incontrovertible evidence that the DRC currently lacks capacity to adjudicate cases involving serious human rights crimes, the situation there is precisely one of the scenarios the ICC is intending to address.

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113 Art. 16 of the Rome Statute

114 This five years of conflict saw more casualties than any other conflict since World War II.

In July 2003, the ICC's Chief Prosecutor, Luis Moreno-Ocampo, announced that he had decided to '*follow closely the situation in Congo and especially in Ituri*' where up to 5,000 civilians had been killed in tribal wars since July 2002. He added that militias backed since 1998 by the governments of Uganda, Rwanda and by the DRC itself are implicated in widespread torture, rape and occasional acts of cannibalism, according to reports being considered by the Court.[115]

Recent actions in Kinshasa and the Hague suggest that the ICC is likely to play a central role in accounting for human rights abuses in the DRC. In January 2004, the ICC Prosecutor announced that the Court hoped to launch an investigation into war crimes and other violations of international law in the DRC no later than October of 2004. He specified that the probe would center on Ituri, the scene of many of the worst atrocities perpetrated during the conflict.[116] Many in the government of the DRC viewed this development as a positive step, and on the 19 April 2004, the Prosecutor of the ICC, received a letter from the President Joseph KABILA, of the DRC, referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002. By means of this letter, the DRC asked the Prosecutor to investigate in order to determine if one or more persons should be charged with such crimes, and the authorities committed to cooperate with the ICC.[117] On 23 June 2004, the ICC Prosecutor responded with an announcement of his decision to open an investigation into the serious crimes committed in the DRC, marking the Court's first prosecutorial action.[118]

4.5 CHALLENGES OF JUSTICE BY THE ICC IN THE DRCS CASE

The ICC has a mandate to prosecute international crimes committed in the DRC. However, even if the ICC achieves its full potential, it realistically will not be able to address all situations in which national courts are unwilling or unable to prosecute perpetrators. Among other factors, there are temporal and other jurisdictional limitations on what cases the ICC can hear. The ICC's jurisdiction is also restricted to cases in which the state where the crimes occurred is a party to the Rome Statute, the state of the nationality of the accused is a party to the Rome Statute, or the Security Council refers the case to it.

Even where these requirements are satisfied, like in the DRC case, the ICC will be able to prosecute only a small percentage of the highest-level alleged perpetrators.

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115 *Guardian Unlimited* 'Breaking News International' 16 July 2003.

116 *Reuters '*Congo World Court inquiry to start by Oct-official' 27 January 2004.

117 *Agence France Presse* 'DRCongo leader invokes international court on war crimes' 19 April 2004.

118 Press Release 'The Office of the Prosecutor of the ICC Opens Its First Investigation' 23 June 2004 No. ICC/OTP/2004.013-EN.

Cases of mid-level perpetrators and cases where there are numerous perpetrators bearing significant responsibility, as in many post-conflict situations, are unlikely to be fully addressed by the ICC. The Court will concentrate on those who bear the greatest responsibility for the most serious crimes. Each case demands large amounts of resources and time, and the Court will most certainly not be able to deliver justice on all such crimes committed in any particular situation. As a result the Court by itself will not be able to bring justice throughout a country such as the DRC, where more than 3 million people have died as a direct or indirect result of the war.

This is somewhat regrettable considering that notorious criminals will thus evade the ICC's jurisdiction for crimes committed in the past despite the fact that the States of which they are nationals or where their crimes occur may very well be parties to the Statute. Presuming they do, it is not clear, however, whether these State Parties could upon the 1 July 2002, express the intention to grant the ICC jurisdiction over specific crimes committed before the entry into force of the statute for their own nationals. The answer lies in the distinction which may be established between the ICC's *ratione temporis* jurisdiction and the application of the *nullum crimen sine lege* principle,[119] which provides that no person may be held criminally responsible for conduct committed prior to the entry into force of the Statute unless such conduct constituted, at the time it took place, a crime within the jurisdiction of the Court. While the prosecution of acts which took place before the entry into force of the Statute would not be barred by the *nullum crimen sine lege* principle, as long as these acts constituted crimes at the time they were committed, it would fall outside of the scope of the *ratione temporis* jurisdiction of the ICC.

Another interesting issue with respect to the application of the non-retroactivity principle and article 11 of the Rome statute is that of continuing violations. These are violations which are committed prior to the entry into force of the Statute but which have effects that continue even afterwards or violations which are commenced prior to the entry into force of the Statute and deemed to be *continued* afterwards.[120] While the ICC Statute is silent on this issue, a parallel may be established with the ICTR whose temporal jurisdiction is limited to the period from 1 January to 31 December 1994. Indeed, the ICTR Appeals Chamber has had to address this issue[121] and while it acknowledged that alleged facts which took place prior to 1994 could be useful in establishing the historical context of an indictment, it ruled that no facts pre-dating or post-dating 1994 could be used to support a court in this indictment.

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119 As a fundamental principle, it is found in a number of international legal instruments such as the United Declaration of Human Rights (art.11) and the Rome Statute (art.. 22).

120 Pangalangan, R (1999) 'Article 24' in O. Triffterer (ed.) *Commentary on the Rome Statute of the ICC* 472.

121 *Hassan Ngeze and Ferdinand Nahimana v. the Prosecutor*, Decision on the Interlocutory Appeals, 5 September 2000, ICTR-99-52-A.

Accordingly, the ICTR appeals Chamber has ordered the withdrawal of all references to facts (and crimes) prior to 1994 from specific counts of the indictment.
This decision is most interesting in the context of continuing violations in general and even more so, with respect to the crime of genocide, which requires a special intent or *dolus specialis.*[122] The intention is the key point in the definition of genocide without which the offence cannot be classified as genocide. Thus, an individual cannot be found guilty of this crime if his specific intention to destroy in whole or in part that particular group is not established.[123] Genocide being a crime which implies preparation and planning over time, the elements of this offence must be examined in the light of acts committed before the genocide itself if they help to establish the intention of the accused.

Establishing a parallel with the *ratione temporis* jurisdiction of the ICC, it appears on the basis of a literal interpretation of the statute that the same reasoning would apply. Thus, all evidence gathered previously to the entrance into force of the Statute should be admissible to establish the intention of the accused for continuing violations. Therefore, it may bee useful for the ICC to take in account this solution in trying Congolese atrocities.

4.6 CONCLUSION

The ICC's temporal jurisdiction commenced on 1 July 2002, i.e. the date when the Rome Statute entered into force. Crimes committed before that date cannot be prosecuted by the Court. For those crimes, other solutions need to be found, such as prosecution in the national justice system, in an ad hoc international tribunal such as the International Tribunal for Rwanda, or any other special tribunal such as the Special Court for Sierra Leone or before the courts of a third country where individuals could be prosecuted under universal jurisdiction. If a country ratifies the Rome Statute later than July 2002, the Court will only be able to prosecute crimes committed after the date of ratification.

Where it is unable to pursue cases involving serious crimes due to jurisdictional limitations or some other obstacle, such attention could help garner support to enhance the capacity of national courts to prosecute the highest-level perpetrators. This will maximize the ICC's catalytic effect on international support for fair and effective prosecutions at the national level.

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122 *The Prosecutor v. Jean-Paul Akayesu,* Judgement Trial Chamber I, 2 September 1998 ICTR-96-4-T

123 *The Prosecutor v. Alfred Musema,* Judgement and Sentence Trial Chamber I, 27 January 2000 ICTR-96-13-T para.164.

Hybrid mechanisms, universal jurisdiction, and other solutions will be essential to filling justice gaps where the ICC and national courts are unable to address serious crimes. The international community shall apply the lessons learned from existing hybrid mechanisms to develop new models that are able to bring justice more fairly, effectively, and efficiently. Universal jurisdiction should be applied where appropriate.

Chapter Five

TRENDS TOWARDS ACCOUNTABILITY IN THE DRC: RECOMMENDATIONS

5.1 INTRODUCTION: THE QUEST FOR JUSTICE IN THE DRC

The world is very gradually moving from a culture of impunity to a culture of justice and accountability. Countries struggling to come to terms with atrocities of the past and making transitions to democracy increasingly realise the importance of bringing perpetrators to justice. Impunity is increasingly fought.[124] This is done in different ways: through judicial and non-judicial methods of justice, depending on society's circumstances.

However, the world is not yet a place where human rights are enjoyed by each and every one of us. There are many threats and challenges. In fact, since 2 August 1998, the DRC have endured gross human rights violations on a massive scale. In each case, the perpetrators of these violations have been protected by regimes of impunity that have prevented victims from achieving any sense of justice, security or even acknowledgement. The Commission on Human Rights, the U.N. Security Council, and national and international leaders have all said grave abuses in the DRC must be punished in order to render justice to the victims and to break the impunity that has prompted recurrent violence in this region. Although convinced in principle of the need to deliver justice, many international and national leaders hesitate to demand accountability while the government is not yet solidly established. But there is no better way for the new authorities to gain legitimacy than by promoting justice and ensuring human rights. The following paragraphs attempt to recommends some mechanisms.

5.2 REBUILDING THE JUDICIAL SYSTEM: ASSISTANCE IN NATIONAL PROSECUTION

In recent years, the international response to armed conflicts and transitions to democracy has increasingly entailed assistance in the reconstruction (or establishment) of a national legal system. Rwanda, East Timor and Kosovo are prominent examples and different international organisations are developing their skills in reconstructing the legal systems.

The aim is to enable the system to provide justice where this cannot be done in accordance with international standards. Often, this has to be done from scratch. One lesson is that the swift establishment of judicial arrangements, even if of an *ad hoc* nature, is important for the creation of the

[124] The net is closing on the perpetrators of human rights atrocities. See Griffin, M (2000) 'Ending the impunity of perpetrators of human rights atrocities: A major challenge for international law in the 21st century' in 838 *IRRC* 369-389

political stability necessary for the development of democratic institutions. Other elements are the training of lawyers and the restoration of the correctional system.

The international assistance would be required to bring the perpetrators of gross violations of human rights in the DRC conflict to book. However, even with international assistance, national prosecutions are a difficult proposition. Maybe the main obstacle is that substantial resources are needed for dealing with widespread atrocities and a large number of perpetrators. An example is Rwanda where numerous suspects are awaiting trial after the genocide and where the backlog of cases is such that the system will never have the capacity to deal with it. Thus, different measures have been taken such as plea-bargaining arrangements and, recently, a system of village courts (*gacaca*) without professional judges.[125] In DRC, it is essential that the transitional government, with the support of the international community, set up a global programme to rebuild the national legal system, so that the national courts have the resources required to take cognisance of the violations of international human rights law and international humanitarian law.

The major challenge ahead is how to rebuild the national justice system for the long term while at the same time putting short-term measures in place to end the culture of impunity. Both the civilian and the military justice system must be reformed and strengthened in order to be able to deal with the vast number of serious crimes committed. To build a sphere of judicial personnel, judges, prosecutors, investigating judges, investigating officers, and others, will require training on judicial procedures and human rights.

5.3 THE CALL FOR AN INTERNATIONAL CRIMINAL TRIBUNAL FOR THE DRC

There is broad agreement in DRC that war crimes and crimes against humanity cannot go unpunished, and various segments of civil society and some in the government have begun to call for the establishment of an international criminal tribunal of some type. Therefore, one solution for bringing the perpetrators of crimes against international humanitarian law to book in the DRC may be for the Security Council to establish a new *ad hoc* tribunal, modelled after the ICTY and ICTR. However, none of the resolutions on the DRC thus far have even hinted in this direction. On the contrary, the Security Council has consistently stressed the responsibility of the parties to the conflict to bring the violators to book.

[125] (n11 above), see also Sarkin, J 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda', 21 *Human Rights Quarterly* (1999) 767- 773

An international criminal tribunal for the DRC would satisfy the goals of accountability in their fullest sense by prosecuting perpetrators of atrocities committed during war. Certainly, the *prima facie* case of guilt for severe violations of international law is manifest enough to justify use of this mechanism. More importantly, the severe difficulties of domestic trials, in particular the clear prospect of their manipulation by domestic political forces, justify an international tribunal as the best forum for achieving fair and effective justice in this case. In this regard, in her report to the fifty-ninth session of the Commission on Human Rights, the Special Rapporteur on the human rights situation in the DRC has recommended the establishment of a special jurisdiction to investigate and prosecute those responsible for war crimes and crimes against humanity perpetrated by all parties in the DRC conflict,[126] this will address the delay in delivery of justice.

In September 2003, Joseph KABILA, the Congolese President asked the U.N. to establish an international tribunal for the DRC. In his speech before the General Assembly, he stated:

> *[I]n the peace of process now underway, an area which is of critical importance and an imperative is that of independent justice, whose equitable administration would mark the end of impunity. On the domestic level, the Transition Government is working to conclude successfully the reform advocated here… On the international level we believe that the major objective is the establishment, with the assistance of the United Nations, of an international criminal tribunal for the DRC, to deal with crimes of genocide, crimes against humanity, including rape as a weapon of war, and mass violations of human rights…* [127]

NGOs have made similar calls for international assistance to help the DRC deliver justice for serious violations committed during the conflict, as part of the country's transition to reconciliation and rule of law.[128]

However, prosecutions in an international forum face practical challenges. Alvarez argues that, 'Trials are undermined and not merely rendered more difficult the greater the distance between their venue and the location of witnesses and evidence.'[129]

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[126] Report of the Special Rapporteur on the human rights situation in the DRC to the fifty-ninth session of the Commission on Human Rights. See <http://www.un.org> (Accessed on 13 August 2004)

[127] 58th UN General Assembly, 23 September 2003, available at: <http://www.ods-ddsny.un.org/doc/UNDOC/GEN/N03/530/11/PDF/N0353011. (Accessed on 10 July 2004)

[128] Press release of the CERDH (Centre for Human Rights and Democracy Studies), March 2003, see <www.cerdh.tk> (Accessed on 15 June 2004)

[129] Alvarez, J (1999) 'Crimes of States/Crimes of Hate' 24 *Yale Journal of International Law* 404.

Even if such prosecutions are successful, their impact on national accountability may be diminished by their extraordinary international nature. Thus, it seems unlikely that the U.N. will be willing to establish another international criminal tribunal modelled on the ICTY and ICTR.[130] No new *ad hoc* tribunal has been established after the ICTR despite calls for such measures, for example, by Burundi. Instead, the trend has been to elaborate new types of special tribunals. The prospects for a new *ad hoc* tribunal for the DRC must therefore considered to be very bleak.

In this regard, Mbata Mangu states that:

> *[O]ver four million people reportedly died during the conflict. This is a figure much higher than the national population of many African countries and several times superior to the number of victims of the Rwandan, Yugoslav and Sierra Leonean conflicts that attracted so much attention that the Security Council eventually resolved to set up three international tribunals to prosecute and judge those persons responsible for the violation of international human rights law and humanitarian law.*[131]
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> *Despite calls from the belligerents themselves and NGOs, it is unlikely that an international criminal tribunal will ever be established for the DRC. All in all, the international response to human rights violations in the DRC was an unsatisfactory one. Even worse was the response of the African Commission. Anyone concerned with the protection of human rights should be interested in the DRC conflict which impacted so negatively on the rights of more than 50 million African people and the resolution of which constitutes a step forward in the promotion of human rights in Africa as a whole.*[132]

Also, as there is an obvious nexus between the 1994 genocide in Rwanda and the conflict in the DRC, another hypothetical solution for addressing crimes against international humanitarian law in the DRC conflict could be to extend the present mandate of the ICTR to include war crimes and crimes against humanity committed in the DRC. For many reasons, however, this would also not be a feasible way forward. Besides, the political and legal difficulties involved in amending the mandate, the ICTR would need enhanced capacity to tackle such a task.

Irrespective of this, however, the warring parties have committed themselves, through the Lusaka agreement, to hand over 'mass killers and perpetrators of crimes against humanity,' and thus to co-operate with the ICTR.

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130 Magnus, K 'Introduction to the UN and Human Rights in Africa' in Heyns, CH (ed) 1 *Human rights Law in Africa 2004* Leiden: Nijhoff, 4 –59 (With the establishment of the ICC future *ad hoc* tribunals might be avoided)

131 Mangu, M ' The conflict in the DRC and the protection of rights under the African Charter' (2003) 3 *African Human Rights Law Journal* 237

132 (As above) 238

5.4 THE OPTION OF A SPECIAL COURT FOR THE DRC

Another option might be to establish a more streamlined 'mixed' tribunal or 'hybrid' tribunal such as the Special Court for Sierra Leone,[133] which operates under a strict time-line and at less cost. The Special Court was set up on the basis of an agreement between the Sierra Leone government and the U.N., has Sierra Leonean as well as international judges and staff, and applies local as well as international law. It also has the advantage of being geographically close to the events it is trying and may be better placed to contribute to the rebuilding of the country's own legal system. Essential for the success of any tribunal, however, is that it is truly independent, pursues responsible persons from all sides, and is viewed as impartial and legitimate in the eyes of the population.

Until systemic improvement is achieved, the only option for trials that might overcome the fundamental shortcomings of the judicial system in the DRC or other similar states would involve a special judicial process. This solution would demand significant international effort to achieve credibility inside and outside the DRC.

To implement such a plan, some mechanism would be required to ensure a fair and independent set of judges and prosecutors, free from political control or pressure. This could entail the creation of a *Special Congolese Court* with foreign judges and prosecutors alongside, or instead of, local officials, as these jurists would offer the prospect of impartiality in a way that a purely Congolese Court might not.[134]

The benefits of such an approach would place the responsibility for accountability on the polity most concerned. Ordinary citizens could observe, even attend, the proceedings, which would become part of their history. Equally important, the trials could have long-term benefits for the Congolese legal and political culture. Citizens would witness how perpetrators of human rights atrocities including, public officials, can be held accountable in their own Courts for their misdeeds, thereby helping in a small way to break the cycle of impunity that still pervades the country. The national component of the hybrid mechanisms offers the potential advantage that the trials will leave a more lasting legacy in the countries where the crimes occurred. In theory, the existence of national staff working alongside internationals with expertise in adjudicating complex criminal trials could over time enhance the capacity of national courts. The proximity of the court to the site of the crimes could make the trials more accessible to victims and those in whose name the crimes were committed.

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[133] Scharf, M 'The Special Court for Sierra Leone' (2000) *ASIL Insight* 53 <www.asil.org/insights/ insigh53> (Accessed on 11 August 2004); Frulli, M (2000) 'The Special Court for Sierra Leone: Some preliminary comments' 11(4) *EJIL* 857-869.

[134] They could come from countries not associated with foreign involvement in the DRC's conflict.

Nonetheless, significant obstacles loom over such a plan. The international community might prove unwilling to make the necessary investment even in a Congolese trial, although the costs of such assistance would be for less than those of ICTY and ICTR. Also, the local component of these mechanisms also presents particular challenges. Security risks may be increased, local staff hired to work on these cases may be linked to past abuses, thereby re-traumatising victims and witnesses, and national staff may be subject to political interference or lack the expertise to ensure that cases are tried fairly and effectively.

5.5 POSSIBLE CONCURRENT JURISDICTION OF TRC AND SPECIAL COURT

The magnitude of atrocities committed in the DRC may dictated that the TRC, already established, alone could not deal with the challenges of accountability in the DRC, with the risk to cover up those atrocities by granting the perpetrators, blanket amnesties. I order to effectively deal with the situation; it may be necessary that the Congolese Special Court, discussed previously, shall complement the TRC.

Based on the Sierra Leone experience, it seems that the appropriate options for ensuring justice and accountability for the people of the DRC is the establishment of concurrent (complementary) jurisdiction of the TRC with Special Court in the DRC. This may be a clear opportunity to advance complementary process for accountability and to redress massive human rights violations during the five years war. However, this opportunity may give rise to number of practical challenges related to potential rivalry. As Kofi Annan, Secretary- General of the UN, has said in the Sierra Leone case, 'care must be taken to ensure that the Special Court … and the TRC will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.'[135]

The Court and the TRC fulfil different but compatible roles in ensuring accountability. The Special Court may intend to punish individual perpetrators, namely those who bear the 'greatest responsibility', including the planners and instigators of the terrible violence that has marred the DRC. The mandate of the TRC, on the other hand, is to investigate the causes, nature, and extent of the violence. The commission will be the main forum for victims and others to describe their experiences. These institutions thus, fulfil complementary roles in providing for justice and accountability.

[135] Kofi Annan 'Complementary of the Special Court and the TRC' Report of the Secretary-General, October 2000 (S/2000/915)

At the same time, as the commission will cover events from 1960,[136] to avoid the obvious scope for overlap between the two institutions, the Special Court may have jurisdiction over violations of international human rights and humanitarian law since 1998. In sum, the DRC deserves both an effective special court and a strong truth commission to come to terms with its past. For this reason, we propose that the relationship between the institutions remain cordial but distant to allow each to function autonomously and fulfil its potential. Regular meetings and use of liaison staff could help to ensure that interactions proceed smoothly. Much of the success of the above depends on the high calibre of the officials and staff of each institution (including the judges, prosecutor, commissioners of the TRC) and their ability to deal with the interesting challenges that will inevitably arise.

In future, the Congolese commission will need to assemble commissioners who command respect from all sectors of society, who will not be cowed by threats and who are sufficiently independent to challenge the government of the day where necessary. In selecting commissioners, it may be appropriate for them to be drawn from among respected figures in order to secure a non-partisan approach.

5.6 CONCLUSION

We witness each day massive human rights abuses and attempts by the perpetrators of these abuses to escape from justice leading to impunity, which causes numerous forms of frustration. There is a wide range of measures and techniques taken to protect human rights and for making individuals accountable for human rights atrocities and the DRC, shall take the advantage of them in order to close the net on the perpetrators of human rights atrocities.

[136] Although this chronological scope seems to be too great and may cause the Commission to become bogged down, lasting longer, gathering less meaningful evidence and causing greater polarisation of society.

Chapter Six

CONCLUSION: BREAKING THE CYCLE OF IMPUNITY

The laborious, difficult peace process of over five years has led to the establishment of a transitional government in the DRC. This step forward has inspired great hope. Yet the country remains fragile. The entire community has voiced concern about the need for reconciliation among the Congolese. But it is crucial that justice also be delivered to the millions of known and unknown people who have died in this conflict. The need for unity must take account of the duty to remember and the right to justice necessary to all credible, lasting reconciliation processes.

Accountability for human rights violations is an important instrument in breaking the cycle of impunity, and is indispensable component of the process of healing the wounds of grave violations committed in the DRC, reconciliation, reconstruction and peace. It is also the foundation for post-conflict reconstruction based on the rule of law and respect for human rights. Therefore, the lack of justice and accountability perpetrates a climate of impunity, which undermines the rule of law as well as exacerbates a sense of injustice and discrimination within targeted communities. That is true for every society, including the DRC.

Dealing with past human rights abuses is an important challenge for the DRC and any other post-conflict transition. Ultimately, the paramount concern is to avoid a return to the past. The only valid prescription is to pursue, as much as possible, the requirement for both justice and peace. It is crucial that some form of transitional justice mechanism be devised promptly, so that those responsible for gross human rights violations and crimes are prosecuted.

In this regard, with its limited capacity, the DRC judicial system cannot adequately investigate and prosecute these crimes and to end impunity. Thus, the ICC can fill the gap and fill the black holes in domestic systems. However, the ICC is realistically not able to address all situations in which national courts are unwilling or unable to prosecute perpetrators. Therefore, to avoid that the ghost of impunity continues to haunt the DRC, other solutions will need to be found to investigate and prosecute the serious crimes under international law that were committed in the DRC.

In addition, the nature and scale of the crimes as well as the varied nationalities of the perpetrators, representing several other countries as well as the DRC, necessitates international participation in the investigations and prosecutions.

Considering future courses of action, it is clear that effective judicial and national human rights protection systems will need to be put in place during the transition. Moreover, the rebuilding of the justice system should be a priority for the international community during the transitional period in the DRC. Furthermore, a special jurisdiction could be established during the transitional period in order to assist the judicial system in the DRC in ensuring that war crimes and crimes against humanity do not go unpunished.

This thesis argues for the creation of a transitional justice mechanism in the DRC that incorporates prosecutions in order to break an ongoing pattern of injustice and allow the roots of a just society to take hold. However, as eloquently put by Nelson Mandela: *We have not taken the final step of our journey, but the first step on a longer and even more difficult road. (…) I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb*.[137]

[137] Meer, F (1999) *Higher Than Hope* London: Hamish Hamilton, 54

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