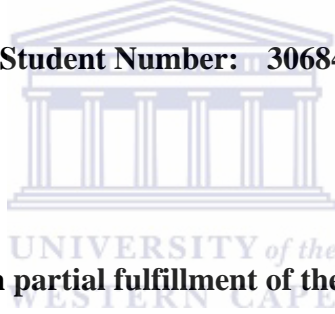


**The Prosecution of International Crimes in respect of the Democratic Republic of the
Congo: Critical Evaluation of the Factual Background and Specific Legal
Considerations**

By

SOSTENESS F. MATERU

Student Number: 3068463



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Faculty of Law, University of the Western Cape

Supervisor: Prof. G. Werle, Faculty of Law, Humboldt University

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<i>Table of Contents</i>	<i>ii</i>
<i>Key Words</i>	<i>vi</i>
<i>Abstract</i>	<i>vii</i>
<i>Dedication</i>	<i>viii</i>
<i>Declaration</i>	<i>ix</i>
<i>Acknowledgements</i>	<i>x</i>
<i>Abbreviations and Acronyms</i>	<i>xi</i>
CHAPTER ONE.....	1
INTRODUCTION AND OVERVIEW OF THE STUDY.....	1
1.1 Introduction to the Study.....	1
1.2 Background to the Study.....	2
1.3 Objectives of the Study.....	4
1.4 Literature Survey.....	5
1.5 Hypothesis.....	9
1.6 Research Methodology.....	9
1.7 Overview of Chapters.....	10
CHAPTER TWO.....	11
HISTORICAL FRAMEWORK AND FACTUAL BACKGROUND OF THE DRC CONFLICT.....	11
2.1 Introductory Remarks.....	11
2.2 Historical Roots of the Conflict.....	12
2.2.1 Colonialism and Ethnicity.....	12

2.2.2	First Congo Republic (1960-1965): A Ray of Hope?	13
2.2.3	Dictatorship Regime (1965-1997).....	14
2.3	The Current Conflict.....	16
2.3.1	First Congo War (November 1996 - May 1997).....	16
2.3.2	Second Congo War (1998 - 2002).....	17
2.3.3	Participation of Foreign States: State Responsibility	18
2.3.4	Why Conflict?.....	19
2.3.5	Nature of the Conflict.....	21
2.4	Attempted Peace Process.....	22
2.4.1	The Lusaka Ceasefire Agreement (1999).....	22
2.4.2	The Inter-Congolese Dialogue: Kick Off.....	23
2.4.3	Transitional government.....	24
2.5	Violation of International Criminal Law.....	25
2.6	Dealing with the Past.....	26
2.6.1	Amnesty laws.....	27
2.6.2	Truth and Reconciliation Commission.....	28
2.7	Intervention of the ICC.....	29
2.8	Concluding Remarks.....	30
CHAPTER THREE.....		31
AN OVERVIEW OF A CONFIRMATION HEARING UNDER ICC STATUTE WITH BEARING ON THE DRC CASES.....		31
3.1	Introductory Remarks.....	31
3.2	Notion of Confirmation of Charges.....	32

3.2.1	Meaning Confirmation of Hearing.....	32
3.2.2	Outcome of Confirmation Hearing.....	33
3.3	Material Facts for Confirmation in DRC Cases.....	33
3.3.1	<i>Prosecutor v Thomas Lubanga Dyillo</i>	33
3.3.2	<i>Prosecutor v Germain Katanga and Mathieu Chui</i>	35
3.4	Relation between the Two DRC Cases.....	37
3.5	Concluding Remarks.....	38
CHAPTER FOUR.....		39
SPECIFIC LEGAL CONSIDERATIONS FROM THE DECISIONS OF THE PTC ON THE CONFIRMATION OF CHARGES AGAINST LUBANGA, KATANGA AND CHUI.....		39
4.1	Introductory Remarks.....	39
4.2	Admissibility of the DRC Cases.....	39
4.2.1	Principle of Complementarity.....	39
4.2.1.1	Meaning of Unwilling to Prosecute.....	41
4.2.1.2	Was the DRC Unwilling to Prosecute?	42
4.2.1.3	Meaning of Inability to Prosecute.....	44
4.2.1.4	Was the DRC Unable to Prosecute?	45
4.2.2	Meaning of ‘Inaction’.....	48
4.2.2.1	Does ‘Inaction’ Violate Complementarity?	49
4.3	Individual Criminal Responsibility in the DRC Cases.....	54
4.4	PTC’s Interpretation of Article 25(3)(a).....	55
4.4.1	Control over the Crime Test.....	55

4.4.1.1	Joint Control over the Crime (Co-perpetration).....	56
4.4.1.2	Control over the Will (Indirect Perpetration).....	57
4.4.1.3	Indirect Co-perpetration.....	57
4.4.1.3.1	Horizontal Level of Responsibility.....	58
4.4.1.3.2	Vertical Level of Responsibility.....	58
4.5	Evaluation of PTC's Interpretation.....	59
4.6	Concluding Remarks.....	63
CHAPTER FIVE.....		64
GENERAL OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS.....		64
5.1	Lessons from the DRC Cases	64
5.2	Conclusions.....	65
5.2.1	The DRC Conflict.....	65
5.2.2	The ICC's Intervention in the DRC.....	65
5.2.3	Complementarity.....	66
5.2.4	Modes of Participation.....	67
5.3	Recommendations.....	67
5.3.1	Retributive Justice.....	67
5.3.2	Restorative Justice.....	68
REFERENCES.....		70

KEY WORDS

Complementarity

Co-perpetration

Crimes against humanity

Democratic Republic of the Congo (DRC)

International Criminal Court (ICC)

Inability to prosecute

Inaction

Modes of participation

Unwillingness to prosecute

War Crimes



ABSTRACT

Since 1996 approximately 5.4 million citizens of the Democratic Republic of the Congo (DRC) have lost their lives as a result of the humanitarian crisis currently going on. Various warring ethnic groups have been committing terrible crimes against international law. War crimes and crimes against humanity such as rape, murder, recruitment of child soldiers and indiscriminate attacks on the civilian population have caused unspeakable suffering to civilians, especially in the eastern part of the country.

Domestic institutions, the judiciary and the prosecution department, have not been able to address impunity because of being either in a state of total collapse or too weak to confront the strong warlords. As a result, when the International Criminal Court (ICC) became operational on 1 July 2002, the DRC authorities revived their desire to address the atrocities. Consequently, the crimes were referred to the ICC in 2004 and three DRC citizens are now undergoing trials at the ICC in two cases.

The first part of this study evaluates the historical events that led to the referral of the DRC situation to the ICC. This includes the background of the conflict and the extent to which international crimes have been committed. Both regional and domestic attempts and initiatives to address the conflict are discussed, with specific reference to peace agreements and restorative justice mechanisms. The second part of the study deals with the prosecution of the perpetrators by the ICC. It examines the approach of the Pre-Trial Chamber to two legal issues, the principle of complementarity and modes of criminal participation as part of the ICC Statute. In this regard, the study makes a critical evaluation of two preliminary decisions confirming the charges against Lubanga, Katanga and Chui before the cases proceeded to the trial stage.

DEDICATION

To my mother Melania Msise, who raised us single-handedly in the most challenging circumstances after the untimely demise of our father in 1983;

To my late niece Evelyne Mkunde, whom we all loved but God loved more;

To my sister Judith Maisha, whose constant love to us, her young brothers and sisters, is beyond comparison.



DECLARATION

I, Sosteness Francis Materu, declare that “**The Prosecution of the International Crimes in respect of the Democratic Republic of the Congo: Critical Evaluation of the Factual background and Specific Legal Considerations**” is my work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted have been duly acknowledged.

Student: Sosteness F. Materu

Signature: _____

Date: _____



Supervisor: Prof. Gerhard Werle

Signature: _____

Date: _____

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ABBREVEATIONS AND ACRONYMS

AC	Appeals Chamber
ABAKO	<i>Alliance des Bakongo</i>
ADP	<i>Alliance démocratique de peuples</i>
AFDL	<i>Alliance des Forces Démocratiques pour la Liberation du Congo-Zaire</i>
CNDP	National Congress for the Defence of the People
CNRD	<i>Council national de résistance pour ladémocratie</i>
DRC	Democratic Republic of the Congo
FNI	<i>Front des Nationalistes et Intégrationnistes</i>
FPLC	<i>Forces Patriotiques pour la Liberation du Congo</i>
FRPI	<i>Force de Résistance Patriotique en Ituri</i>
ICC	International Criminal Court
ICD	Inter-Congolese Dialogue
ICJ	International Court of Justice
IMT	International Military Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
LCA	Lusaka Ceasefire Agreement
MLC	<i>Mouvement de Liberation du Congo</i>
MNC	<i>Mouvement National Congolais</i>
MRLZ	<i>Mouvement révolutionnaire pour la liberation du Zaire</i>
OAU	Organization of African Unity

PTC	Pre-Trial Chamber
PRP	<i>Parti de la Révolution populaire</i>
RCD	<i>Ressement Congolais Pour la Democratique</i>
TC	Trial Chamber
TRC	Truth and Reconciliation Commission
SADC	Southern African Development Community
UPC	<i>Union des Patriots Congolais</i>
UPC/RP	<i>Union des Patriots Congolais/Réconciliation et Paix</i>
UPDF	Ugandan People's Defence Forces
UN	United Nations Organization
USA	United States of America



CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Introduction to the Study

The current corpus of international criminal law overlaps two other full-fledged branches of international law, the international humanitarian law and human rights law. Both humanitarian and human rights law impose obligations on states in respect of certain types of conduct and standards. International criminal law imposes obligations on an individual and, on that account, creates individual criminal liability.¹ The focus on the individual as the subject of international law was, for the first time, witnessed in the Nuremberg Judgment of 1945.² The judgment not only lifted the veil of state sovereignty but rebutted the traditional view that only states could be held responsible under international law.³ Accordingly, any commission of crimes under international law is attributed to the individual perpetrator and not his or her state.⁴ These crimes are classified into four categories as war crimes, crimes against humanity, genocide and the crime of aggression.⁵ It is on this basis that the International Criminal Court (hereafter “the ICC”) is prosecuting individuals indicted for crimes allegedly committed in the

¹ Cassese (2008: 3).

² IMT, Judgment of 1 October 1946, in *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22 (hereafter “Nuremberg Judgment”).

³ The Judgment enforced the provisions of the Charter of the International Military Tribunal at Nuremberg (hereinafter “Nuremberg Charter”) of 8 August 1945. Article 6 of the Charter established individual criminal responsibility for crimes against peace, war crimes and crimes against humanity which were committed by the Axis Powers during the Second World War. For a detailed discussion on the revolutionary achievements of the Nuremberg Charter and the judgment, see Tomuschat (2006: 830 et seq.) and Sadat (2007: 491 et seq.).

⁴ Nuremberg Judgment, p. 447.

⁵ See Cassese (2008: 12).

Democratic Republic of the Congo (hereafter “the DRC”) during the ongoing armed conflict.

1.2 Background to the Study

It is the interest of the international community that impunity for crimes against international law is put to an end. Such crimes transcend state boundaries and, consequently, pose a threat to the peace, security and well-being of the entire world.⁶ The ICC is one of the avenues which can address this impunity at international level. One of the ways in which the ICC’s jurisdiction can be invoked is through referral of the events suggestive of commission of the crimes (technically called “a situation”) to the ICC for prosecution.⁷ The referral can be done by a state party to the Rome Statute of the International Criminal Court (hereafter “the ICC Statute”).⁸

Before the official referral of the situation in the DRC, the Prosecutor of the ICC (hereafter “the Prosecutor”) had received complaints from both individuals and non-governmental organizations. The complaints called his attention to war crimes and crimes against humanity that were allegedly being committed in that country.⁹ On the basis of these complaints, in July 2003, the Office of the Prosecutor announced that it would keenly follow-up the allegations, as the Prosecutor wanted to make the situation a

⁶ See para. 3 of the Preamble to the Rome Statute for the Establishment of the International Criminal Court; also see Werle (2009: 29-30).

⁷ See ICC Statute, Art. 13.

⁸ ICC Statute, Art. 13(a) read *intandem* with Art. 14(1). ICC’s jurisdiction can also be triggered under Article 13(b) of the Statute by referral of the situation by the United Nations Security Council when acting under Chapter VII of the Charter of the United Nations or by the ICC Prosecutor using the *proprio motu* powers under Art. 15 of the ICC Statute.

⁹ See ICC press release dated 19 April 2004 at <<http://www.icc-cpi-int/Menu/ICC/Situations+and+Cases/>> (accessed on 8 March 2010).

priority.¹⁰ Subsequently, in September 2003, the Prosecutor informed the Assembly of States Parties at its second session that he might be forced to seek consent of the ICC to start an investigation using his *proprio motu* powers vested in him under the ICC Statute.¹¹ He, however, thought that a voluntary referral by the DRC authorities would guarantee his office an active support and facilitate its work.¹²

On 3 March 2004, the DRC government, acting under Article 14 of the ICC Statute, referred the situation in the DRC to the Prosecutor in respect of crimes allegedly committed anywhere in the DRC since 1 July 2002. In this referral, the DRC government asked the Prosecutor to investigate the situation in order to determine if one or more persons should be charged with such crimes.¹³ On 23 June 2006, the Prosecutor made the decision that he would open investigations in the interest of justice and the victims.¹⁴ Subsequently, on 5 July 2006, the situation in the DRC was officially assigned to the Pre-Trial Chamber (hereafter “the PTC”).¹⁵ The ICC has, so far, issued four warrants of arrest against Thomas Lubanga (2006),¹⁶ Mathieu Ngudjolo Chui (2007),¹⁷ Germain Katanga (2007)¹⁸ and Bosco Ntaganda (2006).¹⁹ Until now, (October

¹⁰ See the press release in note 9 above.

¹¹ See the press release in note 9 above.

¹² See report of the second session of Assembly of ICC’s states parties available at <<http://untreaty.un.org/cod/icc/asp/second.htm>> (accessed on 8 March 2010).

¹³ See the press release in note 9 above.

¹⁴ See the ICC press release dated 23 June 2004 at <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>> (accessed on 8 March 2010).

¹⁵ *Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I* (categorized as Public Document) at <<http://www.legal-tools.org/en/doc/218294/>> (accessed on 16 March 2010).

¹⁶ *Prosecutor V Thomas Lubanga Dyilo (Warrant of Arrest)*, available at <<http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/Lubanga-Warrant-of-arrest.pdf>> (accessed on 16 March 2010) (hereafter “*Lubanga Case-warrant of Arrest*”).

¹⁷ *Prosecutor v. Mathieu Ngudjolo Chui (Warrant of Arrest)* available at <http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/Ngudjolo_warrant-arrest.pdf> (accessed on 16 March 2010).

¹⁸ *Prosecutor v Germain Katanga (Warrant of Arrest)*, available at <<http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/Katanga-Warrant%20of%20arrest.pdf>> (accessed on 16 March 2010).

2010) three of the accused persons are in detention and one is still at large.²⁰ The PTC conducted a preliminary hearing of evidence in order to determine if the prosecution has sufficient evidence to establish substantial grounds to hold them criminally responsible.²¹ The PTC confirmed the charges in 2009,²² and trials for war crimes and crimes against humanity are now *sub judice* before the Trial Chamber (hereafter “the TC”).²³

1.3 Objectives of the Study

The study takes three important facts into consideration: first, the armed conflict in the DRC started in 1996 while the ICC’s jurisdiction is limited to cover the conflict only from 1 July 2002;²⁴ secondly, the trials derived from the DRC situation mark the first two cases since the inception of the ICC, hence they are the yardsticks for the application of the ICC Statute since its adoption; and thirdly, the decisions of the PTC confirming the charges indicate that the Court will function differently from its predecessor *ad hoc* Tribunals namely, the International Criminal Tribunal for Rwanda (hereafter “the ICTR”) and the International Criminal Tribunal for the former

¹⁹ See *Prosecutor v Bosco Ntaganda (Warrant of Arrest)*, available at <<http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/Ntaganda%2C-Warrant-of-Arrest.pdf>> (accessed on 16 March 2010).

²⁰ Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo Chui are in custody while Bosco Ntaganda is still at large.

²¹ This procedural requirement is provided under Art. 61 of the ICC Statute. See its explanation in chapter three of this study.

²² See *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Confirmation of Charges)*, ICC Pre-Trial Chamber decision of 30 December 2008 (hereafter *Katanga and Chui Case (Confirmation of Charges)*) and *Prosecutor v Thomas Lubanga (Confirmation of Charges)*, ICC Pre-Trial Chamber decision of 29 January 2007 (hereafter *Lubanga Case (Confirmation of Charges)*).

²³ Trials commenced against Lubanga on 26 January 2009 and against Katanga and Chui jointly on 24 November 2009.

²⁴ ICC Statute, Art. 126. The article limits the jurisdiction *ratione temporis* of the ICC to commencing on or after the date the Statute entered into force on 1 July 2002.

Yugoslavia (hereafter “the ICTY”). Basing on these factors, the aims of this study are to trace the origins and factual background of the DRC conflict and the attempted peace process; to discuss two specific legal issues arising from the PTC's decision on confirmation of the charges namely, the complementarity nature of the ICC and modes of participation leading to individual criminal responsibility; and lastly, to consider the foreseeable possible contribution of the two cases to the development of the future jurisprudence of the ICC.

1.4 Literature Survey

A lot has been written about the history of the conflict in the DRC. There is also a substantial body of literature on the application of the ICC Statute and the functioning of the Court itself. Of particular relevance to this study is the discussion on the complementarity of the ICC *vis-a-vis* the domestic jurisdiction of states and the modes of criminal participation that form the basis of individual criminal responsibility.

The available literature indicates that the background to conflict in the DRC cannot be divorced from some historical, external and internal factors. Such factors link directly to the control of natural resources, especially the minerals and the natural forests in the northern and eastern part of the DRC. This natural wealth has not only sparked the proliferation of internal rebel groups, but has also been used as a source of finance to the conflict itself and as loot by external forces supporting the rebels. As a result, the rebel groups have remained as the sources and propagators of ethnic clashes in the area.²⁵ The

²⁵ See Pottier (2003) at <<ftp://ftp.fao.org/docrep/fao/Meeting/009/ae515e.pdf>> (accessed on 11 March 2010); also see Human Rights Watch (2003) at <<http://www.hrw.org/en/reports/2003/07/07/covered-blood>> (accessed on 11 March 2010).

commission of international crimes against the civilian population is shown to be directly linked to these factors, ranging from the use of child soldiers and sexual violence to other horrific crimes.²⁶

Ntalaja²⁷, Gondola²⁸ and Turner²⁹ in their separate works, ably, give an in-depth history of the Congo and the origins of the conflict as it ensues from the colonial era. They paint a complete picture of the crimes incidental to the conflict and assess the peace process attempts. The relevance of their works to this study is only in creating an understanding of the factual background of the conflict. This is because they incline more to the history of the grievances and the causes of the conflict without addressing the need for punishment for the crimes committed in the course of the conflict. Savage and Kambala,³⁰ on their part, contend that while the ICC's intervention has got an impact, though a limited one, the domestic prosecutions are incapable, inchoate and inadequate to address the atrocities. They, as an alternative to the ICC, argue for a hybrid court as an ideal break-through, drawing an analogy from the Special Court of Sierra Leone. Their work, though very current, does not give any consideration on the current proceedings at the ICC and any impact such proceedings might have on the

²⁶ See United Nations Security Council (2007) at <http://www.adhgeneva.ch/RULAC/pdf_state/DRC.SGreportchildrenAC.2007.pdf> (accessed on 13 March 2010); Amnesty International (2004) at <http://www.amnesty-eu.org/static/documents/DRC_main.pdf> (accessed 13 March 2010); UN report on independence of judges and lawyers (2008) at <http://www.adh-geneva.ch/RULAC/pdf_state/DRC.HRC.violence.womenandchildren.pdf> (accessed on 14 March 2010); UN report on the human rights of the internally displaced persons (2008) at <http://www.adhgeneva.ch/RULAC/pdf_state/DRC.SituationofHR.HRC2008.pdf> (accessed on 13 March 2010); UN report on violence against women (2008) at <http://www.adh-geneva.ch/RULAC/pdf_state/DRC.HRC.violence.womenandchildren.pdf> (accessed on 14 March 2010).

²⁷ Ntalaja (2002).

²⁸ Gondola (2002).

²⁹ Turner (2007).

³⁰ Savage and Kambala (2008)

conflict. In other studies like Kawimbi,³¹ Vanspuwen and Savage,³² restorative justice mechanisms like a truth commission and traditional mechanisms of dispute settlement have been considered as being useful in the DRC where the formal domestic retributive justice mechanisms are inadequate. However the learned authors do not discuss prosecutions by the ICC as an important and impactful component of the retributive justice in complementing any domestic criminal prosecutions.

The literature also indicates that the entertainment of the DRC cases at the ICC was, as a matter of principle, dependent on the complementarity principle. This principle gives the ICC only a secondary jurisdiction making it a complementary forum for retributive justice. This being the case, the ICC lacked original jurisdiction over the crimes perpetrated in the DRC which were primarily under the original jurisdiction of the DRC courts or national courts of other states parties to the ICC Statute.³³ Benvenuti and Latanzi point out that this arrangement could save three important goals, namely, to respect DRC's original jurisdiction and sovereignty, to avoid ineffectiveness of the ICC due to overload and lastly, to discourage the DRC and other national courts from avoiding their primary responsibility in repressing international crimes. Thus before the ICC assumes jurisdiction, it must be assured that it is really justified.³⁴ Some other works entail a doubt as to whether, in view of the complementarity principle, it is possible for a case to be referred back to the national criminal jurisdiction after it has been declared admissible by the ICC, especially when there have been changes on the

³¹ Kawimbi (2008)

³² Savage and Vanspauwen (2008).

³³ Ofei (2008) at <<http://www.up.ac.za/dspace/bitstream/2263/8094/1/ofei.pdf>> (accessed on 16 March 2010).

³⁴ Benvenuti (1999); Latanzi (1999).

ground that have impacted on the state's inability or unwillingness, as some authors claim to have been the case in the DRC.³⁵

The works in the preceding paragraph entail a controversy because there is a disagreement among the authors as to whether, in the case of the DRC, the complementarity principle was met before the cases could be admitted. The disagreement is on whether there was any unwillingness or inability to prosecute on the part of the DRC in order to justify the admissibility of the cases by the PTC. Some of the authors argue that there were indicators to show that the judiciary in the DRC had made a positive step to regain its ability to prosecute and, in fact, charges had been laid against Lubanga in the domestic courts. ElZeidy, for instance, argues that the ICC assumed the jurisdiction out of desperation, as it was underemployed.³⁶ This study critically addresses this issue and gives the author's position on this controversy.

When the admissibility of the case has been confirmed, the prosecution must establish the perpetrator's individual criminal responsibility. This must be determined by considering the manner in which the accused person participated in the commission of crime.³⁷ Some of the works referred above were written before the CC assumed jurisdiction over any case. Therefore, they are only speculative of how the Court would approach the modes of criminal participation, and some derived their inferences from the ICTR and ICTY. In contrast, this study is not speculative. It addresses the subject directly from the reasoning of the ICC itself in its first two cases, noting that the ICC has

³⁵ Kleffner (2008); ElZeidy (2008).

³⁶ El Zeidy (2008).

³⁷ Werle (2009: 165 et seq.); Cassese (2008: 187 et seq.).

expressly ruled out any mechanical transfer of precedents from the *ad hoc* Tribunals to its system.³⁸

In establishing the factual background of the conflict and the situation in general, the study relies much on the resolutions of both the United Nations General Assembly and the Security Council on the DRC and the books by Gondola, Ntalaja and Turner. On the legal considerations, apart from the ICC Statute, the study draws much from Werle's Principles of International Criminal Law³⁹ and Cassese's International Criminal Law.⁴⁰ Indeed, the two decisions of the PTC on confirmation of charges against Kabanga, Chui and Katanga form the core points of reference from which the issues emanate and on which the arguments are centered.

1.5 Hypothesis

The study is based upon the assumption that, the self-referral of the situation in the DRC is a result of the DRC's inability or unwillingness to investigate, prosecute and punish the perpetrators of the crimes under international law.

1.6 Research Methodology

This study was conducted as a desktop research. It relied on the library and the internet for primary and secondary information. Primary information was obtained mainly from the web pages of the ICC and other organizations dealing with human rights, international criminal law and transitional justice issues. Also, the two decisions

³⁸ See *Katanga and Chui Case (Confirmation of Charges)*, para. 508.

³⁹ Werle (2009: 165 et seq.).

⁴⁰ Cassese (2008: 187 et seq.).

of the PTC confirming the charges for Lubanga, Chui and Katanga were largely used. Books, journal articles and newspapers were used as sources of secondary information.

1.7 Overview of Chapters

This study is presented in five chapters. Chapter one carries the general introduction. Chapter two lays the historical framework and factual background of the conflict in the DRC. It traces its historical origins, participants and effects. It briefly explores the efforts to restore peace and reconciliation which were attempted before and after the referral of the DRC situation to the ICC. Chapter three bears a discussion on the notion of confirmation of charges under the ICC Statute. It highlights the material facts of the two DRC cases which were confirmed by the PTC. Chapter four is devoted to the consideration of the legal issues which ensued from the PTC' decisions on the confirmation of charges. It particularly addresses PTC's approaches about admissibility of the DRC cases and the modes of criminal participation. Chapter Five concludes the study. It embodies some observation on the lessons from the two DRC cases, particularly their possible future relevance in the jurisprudence of the ICC. It also contains the author's recommendations based on the findings of the study.

CHAPTER TWO

HISTORICAL FRAMEWORK AND FACTUAL BACKGROUND OF THE DRC CONFLICT

2.1 Introductory Remarks

The armed conflict in the DRC has been in existence since 1996. It has, so far, claimed the lives of 5.4 million people, including about 50 thousand civilians in Ituri district alone.⁴¹ Children under the age of five account for about 50% of this number. On average, 5% of these deaths are a direct result of the conflict, while the rest are caused by malnutrition and communicable diseases as indirect consequences of the conflict.⁴² Consequently, the conflict is regarded as the most deadly armed conflict in terms of deaths of civilians since the Second World War.⁴³ The violence has internally displaced thousands of civilians and caused a total collapse of important services.⁴⁴ At one point in time, at least nine countries have been directly involved in the conflict, thus giving it an international dimension. Domestically, there has been a proliferation of warring ethnic militia groups, some of which are breakaways from the existing ones, thus giving the conflict its ethnic element. The conflict has resulted in complete fragmentation of the DRC politically, economically, socially and territorially. In order to fully comprehend the source and the nature of the atrocities committed in the DRC, and generally, the

⁴¹ See report of the International Rescue Committee (2008) at <<http://www.theirc.org/sites/default/files/resource-file/IRCDRCMortalityFacts.pdf>> (accessed on 6 May 2010) (hereafter "IRC report"); also see report of the Amnesty International (2006) at <<http://www.crin.org/resources/infoDetail.asp?ID=7774&flag=news>> (accessed on 16 March 2010).

⁴² See IRC report (note 41 above).

⁴³ See Amnesty International report (note 41 above).

⁴⁴ See IRC report (note 41 above).

situation as referred to the ICC, this chapter gives, albeit briefly, the complete picture of the conflict as rooted in the DRC's leadership history.

2.2 Historical Roots of the Conflict

2.2.1 Colonialism and Ethnicity

The current DRC is ethnically divided into 250 linguistically related groups.⁴⁵ This resulted from the partition of Africa in 1884-1885 among the European powers, which was done by arbitrary demarcation of territorial boundaries. Some of these ethnic groups found themselves split across the boundaries, including the Tutsi and Hutu who are found in the DRC, Rwanda and Burundi.⁴⁶ The DRC was placed under Belgian colonialists. Due to its natural resources, the Congo basin was one of the areas which experienced intensive scramble by the European powers. However, the over-ambitious king Leopold II of Belgium was able to get the area as his personal colony, having guaranteed the other scrambling powers free navigation in the Congo River.⁴⁷ He thus assumed his arbitrary control over the DRC in 1885 without the DRC people being consulted.⁴⁸ Violations of the rights of the people living in the Congo started in this period in the form of heinous inhumane acts whose consequences have been described as the “first holocaust” of the Congolese people.⁴⁹ From 1908, the Belgian Parliament snatched the colony from the king and placed it under effective rule of the elected

⁴⁵ Ntalaja (2002: 14-15).

⁴⁶ Ntalaja (2002: 14-15).

⁴⁷ Ntalaja (2002: 14-15).

⁴⁸ Ntalaja (2002: 8).

⁴⁹ Estimate of the death toll resulting from the inhumane acts of the Belgians was 10 million. The acts were committed in a widespread manner and included forced labour. The villagers who failed to meet their daily quotas of production were subject to arson, bodily mutilation, rape and murder. See Ntalaja (2002: 22-23).

Belgian government.⁵⁰ This did not have any significant difference to the lives of the people of the Congo.

From 1920, the German colonies of Rwanda and Burundi were given to Belgium. From this time the Belgians resorted to the system of indirect rule, which used African chiefs as day to day overseers of their effective control.⁵¹ The system strengthened existing ethnic divisions, using the chiefs as popular puppets, and eventually, accorded different treatment to each group. Further, the country was divided into provinces and sub-regions to simplify exploitation of the abundant natural resources and minimize resistance.⁵² This system of ethnic division had deadly consequences in the post-colonial DRC as its features clearly manifest themselves in the ongoing conflict. Currently, in eastern DRC, for instance, the rebel groups, organized along the lines of Hema, Ngiti or Lendu ethnic origins are fighting one another with the view of each ethnic group dominating a portion of the natural resources in the area.⁵³

2.2.2 First Congo Republic (1960 - 1965): A Ray of Hope?

The Belgian Congo got its independence on 30 June 1960, following an election in which a nationalist movement, the *Mouvement National Congolais*, MNC, under Patrice Lumumba, won and formed the government. Lumumba became the first executive Prime Minister of the independent multiparty state, while Joseph Kasavubu of

⁵⁰ Ntalaja (2002: 24).

⁵¹ Belgian occupation over Rwanda and Burundi was confirmed under the League of Nations' mandate in 1919 when the two states were removed from Germans' occupation by the Versailles Treaty of 1919. The system of indirect rule was copied from the Germans who were using it in these two former colonies. See Turner (2007: 28).

⁵² Turner (2007: 28).

⁵³ See Human Rights Watch, (2003: 5 et seq.).

the *Alliance des Bakongo* (ABAKO) was elected by the Parliament as President.⁵⁴ A leadership crisis started shortly after independence, when the president dismissed Patrice Lumumba from office on 5 September 1960, a measure which was objected by Lumumba as being unconstitutional.⁵⁵ At the same time, a mutiny happened in the Katanga province which necessitated the intervention of the UN.⁵⁶ The crises worsened when Lumumba was kidnapped and assassinated on 17 January 1961 by the rebels in the Katanga province, who were allegedly assisted by Belgium and the United States of America (the USA).⁵⁷ Amidst this confusion and chaos, four short-lived weak governments succeeded one another between 1961 and 1965.⁵⁸

2.2.3 Dictatorship Regime (1965 - 1997)

In 1965, Mobutu Sese Seko, who was chief of staff of the new army, led a coup which overthrew president Kasavubu. The Parliament, in an extraordinary session, approved him through a vote of confidence.⁵⁹ Both the Parliament and the people thought that this new regime would bring political and economic stability after the chaotic beginning of the first independent government.⁶⁰ The new regime got recognition by the international community, particularly, the Organization of African

⁵⁴ See this at <http://en.wikipedia.org/wiki/Democratic_Republic_of_the_Congo#cite_ref-11> (accessed on 8 May 2010).

⁵⁵ Young (1966: 34).

⁵⁶ Turner (2007: 32-33).

⁵⁷ Turner (2007: 32-33).

⁵⁸ Turner (2007: 32-33).

⁵⁹ Gondola (2002: 133).

⁶⁰ Gondola (2002: 133).

Unity (OAU).⁶¹ The regime also enjoyed an absolute recognition, support and protection of the USA and the western European countries, who regarded Mobutu as the best ally in their fight against communism, as opposed to Lumumba whom they had categorized as a communist.⁶² Mobutu abused this support and turned the government into a totalitarian regime. He started by stripping the Parliament of most of its legislative powers in March 1966, before suspending it for two months. Then, in May 1966, through a presidential Decree, he assumed “full powers” and abolished the office of the Prime Minister, thus making himself the head of both state and government.⁶³

This regime was in power for 32 years. In these three decades, Mobutu embarked on leadership by terror in which political opponents were either co-opted or repressed.⁶⁴ Political assassinations, torture, betrayals and arbitrary execution of opponents were used as tools to consolidate power.⁶⁵ The economy was completely ruined by personal accumulation of wealth which was conducted through massive plunder of the national resources.⁶⁶ This abuse of power has a direct link to the current conflict as it triggered grievances and wars of opposition explained below.

⁶¹ For example, Mobutu was invited to attend the OAU summit convened in Kenya in 1966 and was assured political and economic ties by the East and Central African states in 1967. See Gondola (2002: 134-135).

⁶² See Hochschild (2001: 287-288); Turner (2007: 32); Hartung and Moix (2000) at <<http://www.worldpolicy.org/projects/arms/reports/congo.htm>> (accessed on 8 May 2010). The authors indicate that the USA prolonged the rule of the Zairian dictator, Mobutu, by providing more than \$300 million in weapons and \$100 million in military training.

⁶³ Gondola (2002: 135).

⁶⁴ Gondola (2002: 135).

⁶⁵ Gondola (2002: 135). The author refers, among other things, to the arrest of the former Prime Minister, Evariste Kimba and other three cabinet ministers, on grounds of conspiracy to overthrow the government and assassinate Mobutu. Their trial by the military court took ten minutes only, and all were sentenced to death by hanging. They were publicly executed before 50,000 spectators. The first Republic leaders, including the overthrown President, were detained, murdered, exiled, internally deported or confined to their home villages.

⁶⁶ Mobutu plundered about \$ 4 billion which was discovered in Swiss banks and other European countries after his overthrow. See Hochschild (2001: 288).

2.3 The Current Conflict

2.3.1 First Congo War (November 1996 - May 1997)

The fall of communism, which marked the end of the cold war in 1989, came as a blow to the dictatorship regime in which western allies lost interest. Mobutu's intimacy with his god-fathers in the western bloc was rendered obsolete, despite the honour he had previously enjoyed from them. Pressure for democratization mounted from different sides, including the former allies. The dictator would not easily succumb to the pressure for democratic transition from both internal and international sources, although his control started to weaken.⁶⁷ This, however, did not stop the efforts to end the dictatorship by all means, thus the first Congo war.

The war was sparked by the emergence of anti-Mobutu groups, mobilized on ethnic grounds and organized into several dissidents and minority groups in Goma and Kivu. They formed a grand anti-Mobutu coalition, the Alliance of Democratic Forces for the Liberation of Congo-Zaire (in French, *Alliance des Forces Démocratiques pour la Liberation du Congo-Zaire, AFDL*).⁶⁸ The AFDL, led by Laurent Kabila jointly with a Rwandan Tutsi militia group based in Congo, the *Banyamulenge*, supported by Rwanda and Uganda, overthrew the dictatorship regime.⁶⁹ In May 1997 the AFDL

⁶⁷ See this at <http://en.wikipedia.org/wiki/First_Congo_War> (accessed on 8 May 2010).

⁶⁸ Members of this coalition included the People's Revolutionary Party (*Parti de la Révolution populaire, PRP*) under Laurent Kabila, the National Resistance Council for Democracy (*Council national de résistance pour ladémocratie, CNRD*), the Democratic Alliance of the Peoples (*Alliance démocratique de peuples, ADP*) and the Revolutionary Movement for Liberation of Zaire (*Mouvement révolutionnaire pour la liberation du Zaire, MRLZ*). See Turner (2007: 4).

⁶⁹ Rwandan president alleged that his Country planned and directed the rebellion for security purposes. Alleging the same reason, Angola backed the AFDL from 1997 to stop Mobutu's regime from supporting the UNITA rebels. See Turner (2007: 5).

seized power and Kabila, who became the *de facto* President, formed the government and rewarded the Rwandan Tutsis with high ranking posts in the DRC army.⁷⁰

2.3.2 Second Congo War (1998 - 2002)

Both the people in the DRC and the international community laboured under a misconception that the new government would avoid the atrocities committed by its predecessor regime. However, democratic reform became a myth. Kabila showed all signs of one-man's rule: he postponed the reform and centralized executive, legislative and military power in his office, and military courts could now try politically active civilians.⁷¹ No respect was given for human rights, since “cruel, inhumane and degrading treatment, torture ... and ... execution became widespread.”⁷² The new regime suppressed political opposition, the press, civic groupings and the human rights organizations present in the DRC.⁷³ The country fell into the second war from May 1998 to 2002.⁷⁴ The unexpected removal of the Rwandan Tutsis from their positions in the army was perceived by the former allies as a betrayal. As a result, alliances were hatched between foreign powers, specifically Rwanda and Uganda, and local groupings to overthrow Kabila's government.⁷⁵ Zimbabwe, Angola and Namibia joined in support

⁷⁰ Turner (2007: 5).

⁷¹ Savage and Vanspauwen, (2008: 328).

⁷² Savage and Vanspauwen, (2008: 328).

⁷³ Savage and Vanspauwen, (2008: 328).

⁷⁴ This war has been described as Africa's world war because of the big number of the countries involved and its grave consequences. See Turner (2007: 6).

⁷⁵ New rebel (anti-Kabila) groups emerged in Goma, namely, the Congolese Rally for Democracy (*Ressemblement Congolais Pour la Democratique, RCD*), backed by Rwanda and the Congo Liberation Movement (*Mouvement de Liberation du Congo, MLC*) which was backed by Uganda. This was a manifestation of the determination of the former allies of Kabila to replace him by a leadership which would safeguard their interests in DRC. See Turner (2007: 6).

of the DRC government, and this gave the war its multi-state character.⁷⁶ The most affected people were civilians. The number of civilian death toll between 1998 and 2002 is estimated to be 3 million people, and those internally displaced raised dramatically.⁷⁷ Laurent Kabila was assassinated in January 2001 and Joseph Kabila, his son, took over power. This war was supposedly ended by the signing of a peace agreement in 2002.⁷⁸ However, the conflict continued in the northern and eastern parts of the DRC, specifically in the districts of Ituri and Kivu. Indeed, the DRC's self-referral of the situation to the ICC and the Prosecutor's investigations are in respect of atrocities which were mostly committed subsequent to the signing of this particular peace agreement.

2.3.3 Participation of Foreign States: State Responsibility

The participation of foreign states in the DRC conflict breached their international obligations. Under public international law, it is against the principles of sovereignty and territorial integrity for a foreign state to interfere in the internal affairs of another state uninvited. Both the backing of the DRC rebels by Uganda and its presence in the territory of the DRC were declared by the International Court of Justice (ICJ) to have contravened these novel principles and, on this basis, the DRC was granted reparations.⁷⁹ The DRC government also accused Uganda for violation of human rights

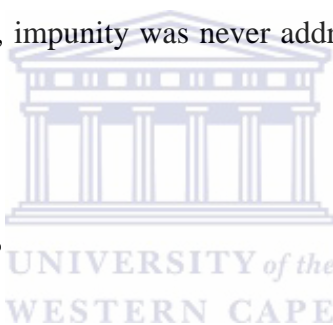
⁷⁶ Savage and Vanspauwen, (2008: 328)

⁷⁷ Olsson and Fors (2004: 321).

⁷⁸ The Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo signed in Pretoria on 16 December 2002.

⁷⁹ See *Case Concerning the Armed Activities on the Territory of Congo (the Democratic Republic of Congo v. Uganda)*, ICJ Judgment of 19 December 2005, available at <<http://www.icjij.org/docket/files/116/10455.pdf>> (accessed on 11 May 2010) (hereafter *DRC V Uganda (Judgment)*); For a commentary on this judgment see Tzatzaki (2008: 235).

and International Humanitarian Law on the territory of the DRC.⁸⁰ On this claim, the ICJ ruled that Uganda was, at one point in time, the occupying power in Ituri district - a fact which placed it under all the obligations of an occupying power under the Hague Regulations of 1907.⁸¹ The ICJ also was called upon to declare Burundi and Rwanda's presence in the DRC to be manifestly unlawful and in contravention to international law on the same grounds.⁸² The ICJ, however, operates at states level, and hence, does not attribute responsibility to individuals. Its findings on the existence of grave violation of human rights and humanitarian law in the DRC do not hold the individual perpetrators responsible, although they serve as a clear indication that some individual criminal responsibility exists. Thus, impunity was never addressed by the ICJ and the violations continued.



2.3.4 Why the Conflict?

The nature of the conflicts in the DRC has been influenced by the various motives of the parties involved. Both wars have been described as civil wars; international conflicts designed to overthrow a dictatorship; a continuation of the 1994 Rwandan Hutu-Tutsi conflict, pursued on the DRC soil; war over resources; and wars of

⁸⁰ See *Armed Activities on the Territory of the Congo (The Democratic Republic of Congo v. Uganda)*: Application instituting the proceeding filed on 23 June 1999, p. 5, available at <<http://www.icj-cij.org/docket/files/116/7151.pdf>>, (accessed on 12 May 2010).

⁸¹ *DRC V Uganda* (Judgment), paras. 178-180.

⁸² On Rwanda, see *Armed Activities on the Territory of the Congo (New application: 2002) (The Democratic Republic of Congo v. Rwanda)*: Application instituting the proceeding filed on 23 June 1999, available at <<http://www.icj-cij.org/docket/files/117/7071.pdf>> (accessed on 12 May 2010); also see *Armed Activities on the Territory of the Congo (New application:2002) (The Democratic Republic of Congo v. Rwanda)*: Jurisdiction and the Admissibility of the case: ICJ Judgment of 3 February 2006, available at <<http://www.icj-cij.org/docket/files/126/10435.pdf>> (accessed on 12 May 2010); On Burundi, see *Armed Activities on the Territory of the Congo (New application:2002) (The Democratic Republic of Congo v. Burundi)*: Application instituting the proceeding filed on 23 June 1999, available at <<http://www.icj-cij.org/docket/files/115/7127.pdf>> (accessed on 12 May 2010).

self defence with reference to Rwanda, Uganda and Angola.⁸³ Obviously, the motive of the first war which led to a domestic rebellion was the removal of the dictator. The persistence of the conflict in the eastern part is clearly both a resource and an ethnic war. The mutual murder between Lema and Lendu in Ituri district has been described as purely tribal and ethnic, but in reality, it also revolves around the control of gold and other natural resources in the area.⁸⁴ Rwanda, Angola and Uganda claimed to have security reasons, namely, to stop insurgent groups which were based on the DRC soil and allegedly backed by the Mobutu regime.⁸⁵ This argument is valid only as far as the first war was concerned, when Mobutu was still in power. Uganda's and Rwanda's continued involvement in the DRC conflict from 1998 is largely for economic reasons i.e. to plunder the resources of the DRC.⁸⁶ Both Uganda and Rwanda are reported to have made super profits from illegal business activities, especially trade in gold, coltan, diamonds and timber plundered in the areas they controlled.⁸⁷ Meredith gives an explanation of how each participant has been fishing in the troubled waters:

Like vultures picking over a carcass, all sides were engaged in a scramble for the spoils of war. The Congo imbroglio became not only self-financing but highly profitable for the elite groups of army officers, politicians and

⁸³ Turner (2007: 8).

⁸⁴ Turner (2007: 8).

⁸⁵ Rwanda justified its presence in the DRC as being to fight the Hutu militia group (*Interahamwe*) which comprised the perpetrators of the 1994 genocide who allegedly had sought refuge in the DRC, thereby launching attacks on Rwanda from there. Uganda and Angola claimed to be fighting the LRA and the UNITA rebels respectively, who were launching attacks from the territory of the DRC. See Ericksen (2005:1098-1107); also see Antesserre (2006: 6).

⁸⁶ Turner (2007: 8).

⁸⁷ Rwanda and Uganda recorded increase in exports of these minerals since 1998, although there was no any evidence of domestic production. Profit from the war for Rwanda was estimated to be USD 250 million for the year 1999 only. Annual production of gold in Uganda rose from 0.0015 to 11.45 tons between 1994 and 2000 without any significant domestic production. For this observation and more information on the plunder of DRC resources see Olsson and Fors (2004: 326); Hochschild (2001: 288); and Ericksen (2005: 1098-1107).

*businessmen exploiting it...For their part, Rwanda and Uganda, having failed to dislodge [Laurent] Kabila from Kinshasa, turned the eastern Congo into their own fiefdom, plundering it for gold diamonds, timber, coltan, coffee, cattle, cars and other valuable goods.*⁸⁸

It is, for this reason, correct to argue that the fighting groups in the DRC are also motivated, apart from ethnicity, by greed and grievances, deeply rooted in the politics of the time in both the DRC itself and the neighbouring states.⁸⁹

2.3.5 Nature of the Conflict

It is confusing whether the armed conflict in the DRC is of an international or non-international character. The confusion is hinged on the involvement of foreign countries in the conflict supporting either the rebels or the government of the DRC, although, on its face, the conflict appears domestic. In this regard, the ICJ concluded that the conflict in the DRC was of an international character, because of Uganda's occupation of Kibali-Ituri province which it created within the DRC in 1999 and installed its own military administration.⁹⁰ The PTC has also ruled that the conflict acquired its international character in Ituri district from July 2002 to 2 June 2003, when Uganda was the occupying power,⁹¹ and resumed a non-international character from 2 June 2003 to December 2003.⁹² At this juncture, it can be concluded that, with regard to its nature, the conflict in the DRC is a mixed armed conflict.

⁸⁸ Meredith (2005: 540).

⁸⁹ Olsson and Fors (2004: 322).

⁹⁰ *The DRC v. Uganda* (Judgment), paras. 173-176.

⁹¹ *Lubanga Case (Confirmation of Charges)*, para. 220.

⁹² *Lubanga Case (Confirmation of Charges)*, paras. 227-237.

2.4 Attempted Peace Process

Both regional and international organizations embarked on an attempt to restore peace in the DRC in 1999. Representatives of the Southern African Development Community (SADC), the OAU, the UN, the states parties to the conflict and rebel leaders met in Lusaka from 29 June to 7 July 1999 and agreed on a ceasefire agreement.⁹³

2.4.1 The Lusaka Ceasefire Agreement (1999)

The Lusaka Ceasefire Agreement was the initial process to end the second Congo war. It was signed on 10 July 1999 by the DRC, Angola, Namibia, Rwanda, Uganda and Zimbabwe.⁹⁴ In the agreement, the parties agreed on three important pillars: a stop to hostilities and procedures for the withdrawal of foreign troops;⁹⁵ neutralization of armed groups operating in the DRC;⁹⁶ and establishment of a rapid Inter-Congolese Dialogue, ICD which would, *inter alia*, facilitate the formation of a government of national unity as an interim measure toward democratic elections. They also agreed on the integration of the rebels into the Congolese army.⁹⁷ Despite signing the ceasefire agreement, Rwanda and Uganda did not withdraw their troops. They agreed to do that on condition that the DRC government should show its commitment to participation in

⁹³ International Crisis Group (2001: 1) (hereafter “ICG African Report”). In this agreement, the UN, OAU, SADC and Zambia signed as witnesses.

⁹⁴ See article 1 of Chapter 1 of annex A which provides for the modalities for the implementation of the ceasefire.

⁹⁵ Lusaka Ceasefire Agreement, Art. 12; also see Annex B to the same Agreement which provides for the modalities for the withdrawal of the foreign forces.

⁹⁶ Lusaka Ceasefire Agreement, Art. 22.

⁹⁷ Lusaka Ceasefire Agreement, Arts. 19 and 20.

the dialogue and security matters.⁹⁸ Rwandan troops remained in the DRC until 2002 when another separate bilateral peace agreement, the Pretoria Peace Accord, was signed by which the DRC committed itself to destroying the *Interahamwe* militias attacking Rwanda from its soil.⁹⁹ The Inter-Congolese Dialogue, on its part, did not take off immediately for lack of political will on the side of President Laurent Kabila, who claimed to have no confidence in the OAU mediator, Sir Ketumile Masire.¹⁰⁰ Thus, the peace process remained at a standstill until the dialogue started again at a snail's pace after Kabila's assassination in January 2001.

2.4.2 The Inter-Congolese Dialogue: Kick off

When Joseph Kabila came into power in 2001, he showed his willingness to revive the Inter-Congolese Dialogue.¹⁰¹ Before it started, the parties met for reaffirmation equal status of all signatories of the LCA and signing of the 'Declaration of Fundamental Principles of the Inter-Congolese Political Negotiations',¹⁰² which restated the terms of the dialogue.¹⁰³ A preliminary meeting was called in Gaborone.¹⁰⁴ The delegates agreed on two basic things, an immediate and unconditional withdrawal of foreign troops and the signing of a "Republican Pact" reaffirming national unity,

⁹⁸ ICG African Report p. 2.

⁹⁹ *Peace Agreement between the Governments of the Republic of Rwanda and the DRC on the Withdrawal of the Rwandan Troops from the Territory of the DRC and the Dismantling of the Ex-FAR and Interahamwe Forces in the DRC*, available at http://www.usip.org/files/file/resources/collections/peace_agreements/drc_rwanda_pa07302002.pdf (accessed on 18 May 2010).

¹⁰⁰ ICG African report, p. 2.

¹⁰¹ ICG African report, p. 3.

¹⁰² "*Declaration des principes fondamentaux des négociations politiques inter-congolaises*", Lusaka, 4 May 2001.

¹⁰³ ICG Africa report, p. 4.

¹⁰⁴ These included delegates from the DRC government, armed rebel groups of RCD and MCL, civil society, unarmed political opposition and the dissident factions of the RCD and MLC. As required by Art. 5(2)(a) of Annex A to the Lusaka Ceasefire Agreement.

integrity and sovereignty.¹⁰⁵ The second meeting for the Inter-Congolese Dialogue was scheduled in Addis Ababa in October 2002. However, before the meeting in Addis Ababa, there emerged a signing of separate treaties between the major parties outside the ICD.¹⁰⁶ This indicated that, the parties had some pre-conceived positions even before the dialogue. As a result, the Addis Ababa meeting failed to move the dialogue an inch.¹⁰⁷ The remedial meetings scheduled in Addis Ababa could not take place due to financial constraints.¹⁰⁸ South Africa unilaterally intervened by offering to partly sponsor the dialogue.¹⁰⁹

2.4.3 Transitional Government

The Inter-Congolese Dialogue reached what seemed to be a tremendous achievement with the signing of the Global and Inclusive Agreement in Pretoria on 17 December 2002 (hereafter “Pretoria Agreement”), in which the parties agreed on the structure of the transitional institutions, namely, the executive, the legislature and the army.¹¹⁰ The so-called “1+4 formula” was adopted to accommodate the major parties in the conflict.¹¹¹ The agreement was confirmed on 2 April 2003 when participants in the Inter-Congolese Dialogue signed the 'Final Act of the inter-Congolese Political

¹⁰⁵ ICG Africa Report pp. 5-7.

¹⁰⁶ E.g. the RCD-Goma and the MLC met in Goma in a meeting attended by Rwanda and Uganda in order to “co-ordinate” the positions of the parties before the meeting. The Goma meeting called for vacation of all political positions, including the presidency of the DRC, before the dialogue continued. See Rupiya and Boshoff (2003: 32-33).

¹⁰⁷ Rupiya and Boshoff (2003: 32-33).

¹⁰⁸ Rupiya and Boshoff (2003: 32-33).

¹⁰⁹ Rupiya and Boshoff (2003: 35).

¹¹⁰ See The Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo, signed in Pretoria on 16 December 2002, at

<<http://www.iss.co.za/AF/profiles/drcongo/cdreader/bin/6global.pdf>> (accessed on 18 May 2010).

¹¹¹ According to '1 + 4' formula, the transition would be led by an interim president as head of state and supreme commander of the armed forces and four vice-presidents. See Smis and Trefon (2003: 672).

Negotiations' in Sun City (hereafter “Sun City Agreement”).¹¹² The Agreement provided that Kabila should remain the transitional President to be assisted by four Vice Presidents, one from each of the participating groups - the DRC government, the RCD-Goma, the MLC and the non-armed political opposition.¹¹³ A transitional Constitution was drafted to incorporate this arrangement.¹¹⁴ The new constitution was adopted in January 2006, followed by democratic elections in July 2006 which marked the end of the political transition, with Kabila winning the presidency.¹¹⁵ However, the conflict continued in the north-eastern part of the country.

2.5 Violation of International Criminal Law

Throughout the conflict, there has been widespread and systematic violation of international criminal law. Civilians have been the main victims of the atrocities committed by the warring sides. For example, the ICJ confirmed that there were violations committed by the Ugandan People’s Defence Forces (UPDF) and its allies from 1999. These include murder, torture and other forms of inhumane treatment of civilian population, destruction of villages and civilian buildings, failure to distinguish between civilian and military targets and to protect civilian population when fighting with other combatants, training of child soldiers and failure to take measures to respect human rights and international humanitarian law in the occupied territories.¹¹⁶ Combatants from the Congolese army and the militia groups, have been attacking,

¹¹² Smis and Trefon (2003: 672).

¹¹³ Pretoria Agreement, Art. II.

¹¹⁴ See the draft constitution at <http://www.chr.up.ac.za/hr_docs/constitutions/docs/DRC.pdf> (accessed 18 May 2010).

¹¹⁵ VoA (2006).

¹¹⁶ *The DRC v. Uganda* (ICJ Judgment), para. 211.

murdering and raping civilians, including the Nyabyondo massacre in December 2004.¹¹⁷ There are also various reports of international organizations documenting commission of terrific international crimes against civilians.¹¹⁸ The conflict and the violations continued even after the Pretoria Agreement which was supposed to end the conflict, and this has remained a big concern of the Security Council.¹¹⁹

2.6 Dealing with the Past

Throughout the Inter-Congolese Dialogue, the main focus was to bring the conflict to an end. As a result, prosecution of serious violations of humanitarian law and human rights law was never addressed adequately. In order for the fragile transition process to go smoothly, no one was held accountable for the breach of international law.¹²⁰ The negotiators placed more emphasis on the restorative justice, which never addressed impunity. After the Inter-Congolese Dialogue, the following transitional justice mechanisms were attempted, but no significant achievement has been recorded.

¹¹⁷ Savage (2008: 331-333). On recruitment of child soldiers, see *Thomas Lubanga case (Confirmation of Charges)*, para. 267.

¹¹⁸ Human Rights Commission (2000), at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/87cbe9be9dc541db802568b300561be2?OpenDocument> (accessed on 21 June 2010); Report on the UN mission in the DRC of 2000, at <http://www.un.org/Docs/sc/reports/2000/sgrep00.htm> (accessed on 21 June 2010). This report concluded that Rwandan and Ugandan armed forces “should be held accountable for the loss of life and the property damage they inflicted on the civilian population of Kisangani”.

¹¹⁹ The Security Council has expressed its concern over the continuing violations even after the conclusion of the peace process in 2002. See for example, the following Security Council Resolutions: S/RES/1468 (2003); S/RES/1555 (2004); S/RES/1565 (2004); S/RES/1592 (2005); S/RES/1596 (2005); S/RES/1621(2005); S/RES/1649(2005) and S/RES/1799 (2008).

¹²⁰ Vanspauwen and Savage (2008: 397).

2.6.1 Amnesty Laws

The first provision on amnesty was in the Lusaka Ceasefire Agreement, whereby the parties to the agreement were given freedom to grant amnesty to members of their armed groups present in the DRC.¹²¹ The amnesty would not cover the crime of genocide, if committed.¹²² This means, therefore, war crimes and crimes against humanity could be covered by the amnesty, if granted. It is not clear why the amnesty clause excluded only genocide which was not as evident as war crimes and crimes against humanity. The Pretoria Agreement, as well, contained a provision which provided that the transitional government should grant amnesty for “acts of war, political and opinion breaches of law”, but excluded the crimes of genocide, war crimes and crimes against humanity.¹²³ This provision was included in Article 199 of the Transitional Constitution and promulgated by a Presidential Decree in 2003 and by an Act of Parliament in 2005.¹²⁴ In an attempt to stop the violence which continued in the eastern part of the country, the DRC government signed another amnesty law to benefit a rebel group, the National Congress for the Defence of the People (CNDP) in 2009.¹²⁵ This law granted amnesty to Congolese citizens living in the DRC or abroad for acts of war and insurrection committed in the provinces of North and South Kivu since 2003 to the date of the signing of the law.¹²⁶ This amnesty, as well, did not apply to the core

¹²¹ Lusaka Ceasefire Agreement, Art. 22.

¹²² Lusaka Ceasefire Agreement, Art. 22.

¹²³ Pretoria Agreement, Art. III(8). Further, the article provided that, as an interim measure pending the adoption and promulgation of the amnesty law by the Parliament, the law would be promulgated by a Presidential Decree.

¹²⁴ Presidential Decree No. 03-001 of 2003 and Law No. 05/023 of 2005. The amnesty granted covered crimes committed between 1996 to June 20, 2003.

¹²⁵ B.B.C (2009).

¹²⁶ Section 1.

crimes of genocide, war crimes and crimes against humanity.¹²⁷ The exclusion of core crimes from the scope of the amnesty laws clearly indicates the recognition, by both the negotiators and the DRC, of the obligation to investigate, prosecute and punish the crimes. However, the mere exclusion, without effectively prosecuting the crimes cannot be said to address impunity.

2.6.2 Truth and Reconciliation Commission

The Pretoria Agreement and the subsequent transitional constitution listed the *Commission Vérité et Réconciliation* (Truth and Reconciliation Commission, hereafter “TRC”) as one of the institutions to support democracy.¹²⁸ The TRC was established on 4 April 2003.¹²⁹ Its mission was to establish truth and promote peace, justice, reparation, forgiveness and reconciliation.¹³⁰ However, the commission has failed to investigate human rights violations and instead has only done some few conciliation activities. Its failure, which was admitted by its chairperson, was due its long investigation timeframe (40 years), budget deficiencies, bad composition and limited mandate.¹³¹ At this juncture, it must be noted that investigations and proceedings of a truth commission, however good its composition or mandate, do not meet the standard required under international law, nor do they replace the state’s duty or the role of the national courts in prosecuting international law crimes. However, depending on the fragility of the situation, some regard can be given to the work of a TRC if it is internationally accepted

¹²⁷ Section 3.

¹²⁸ Pretoria Agreement, Article. 4(a); also see the Transitional Constitution, Articles 154-160.

¹²⁹ Law No. 04/018 of 30 July 2004.

¹³⁰ Savage and Kambala (2008: 346); also, see United State Institute of Peace website at http://www.usip.org/resources/truth_commissions_democratic_republic_congo (accessed on 17 May 2010).

¹³¹ Savage and Kambala (2002: 346-348).

as being genuine and more suitable at the time. This could be the case, for instance, where it can only grant a conditional amnesty or it is mandated to commit those whose crimes meet certain threshold of gravity to normal courts for trial. In the case of the DRC this cannot be said to have been the case. The TRC did not even commence any investigations. Consequently, it was not able to respond to the atrocities committed, and did not address impunity in any way.

2.7 Intervention of the ICC

The failure of the above domestic mechanisms to address impunity necessitated the intervention of the ICC in 2004, after the referral of the situation to it by the DRC.¹³² Even before the self-referral by the DRC government, the Prosecutor had already decided to investigate the situation in the DRC, as a reaction to the atrocities which were being committed,¹³³ and his office had expressly stated that the DRC conflict was “the most urgent situation to be followed”.¹³⁴ The self-referral, however, was more welcome because the Prosecutor had indicated that the referral would ensure his office a higher level of co-operation from the DRC.¹³⁵ This materialized with the signing of the provisional memorandum of understanding on privileges and immunities to facilitate the activities of the ICC on the DRC territory,¹³⁶ pending DRC’s ratification of the

¹³² See Letter of Joseph Kabila to the Prosecutor of 3 March 2004 para. 2, at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxB1_French.pdf (accessed on 26 May 2010).

¹³³ Moreno-Ocampo (2006: 9).

¹³⁴ ICC Prosecutor as quoted in the American Coalition for the International Criminal Court, ACICC (2006: 6) (hereafter “ACICC Paper”).

¹³⁵ Moreno-Ocampo (2006: 9).

¹³⁶ *The Provisional Memorandum of Understanding on the Privileges and Immunities between the International Criminal Court and the Democratic Republic of Congo*, available at

<http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/2004/provisional%20memor>

Agreement on the Privileges and Immunities of the ICC (APIC).¹³⁷ In the following chapters, this study deals with the conflict at the level of the ICC.

2.8 Concluding Remarks

In this chapter, the study has traced the origin of the conflict in the DRC. It has been shown that, although the current conflict started in 1996, it cannot be divorced from the country's leadership history prior to that period. The motivating factors for the conflict have been shown to be greed and grievances deeply rooted in the DRC itself and the surrounding states. The conflict, classified as having international and non-international character, entails both state and individual responsibility. The violations continue despite the signing of the peace agreements and coming into power of the democratic government. The transitional justice measures attempted domestically, including the formation of the TRC and the exclusion of the core crimes from the scope of the amnesty provisions, have not addressed impunity by holding the perpetrators accountable. As a result, the situation was referred to the ICC in 2004 in order to fill the impunity gap created by domestic mechanisms.

[andum%20of%20understanding%20on%20the%20privileges%20and%20immunities%20between%20the%20international%20c>](#) (accessed on 31 August 2010)

¹³⁷ See the Memorandum of understanding, (note 136 above).

CHAPTER THREE

AN OVERVIEW OF A CONFIRMATION HEARING UNDER ICC STATUTE WITH BEARING ON THE DRC CASES

3.1 Introductory Remarks

As stated earlier, the objective of this study is to deal with two important aspects as regards the DRC conflict. The first aspect of the conflict, the factual background of the conflict, has been dealt with in the preceding chapter. The second aspect, to evaluate some specific legal aspects of the first two cases arising from the conflict, is dealt with in the next chapter. Particularly, the second objective is to deal with the cases at their pre-trial (preliminary) stage by evaluating the decisions by the PTC on confirmation of the charges. In this regard, the current chapter sets the foundation for a better understanding of the essence of chapter four which is the one that deals with the issues arising from these two decisions. To achieve this aim, this chapter outlines the meaning of the notion of confirmation of charges as required by the ICC Statute and traces its legal basis under the relevant provisions of the Statute. Secondly, it gives the material facts on the basis of which the PTC confirmed the charges. Thirdly, from the facts of the two cases, the nature of the charges is discussed and the relationship between the two cases manifests itself at this stage.

3.2 Notion of Confirmation of Charges

3.2.1 Meaning of Confirmation Hearing

Confirmation of charges in the DRC cases was regulated under article 61 of the ICC Statute. This is the first procedure that must be followed by the PTC within a reasonable time after the accused person is arrested or makes a voluntary appearance before the ICC.¹³⁸ It should be noted that, a hearing for confirmation of charges is limited in scope and purpose and is neither a trial nor a mini-trial.¹³⁹ Although the ICC Statute requires that both the Prosecutor and the person charged or his counsel be present, no pleadings take place at this stage.¹⁴⁰ At the hearing, the Prosecutor is obliged to present the charges against the accused person and argue in support of each charge/crime he alleges.¹⁴¹ The aim of this hearing is for the PTC to assess the charges against the available evidence and decide whether or not the case merits going further for trial.¹⁴² It does not, at this stage, go into the merits of the case to establish the innocence or guilt of the accused person.¹⁴³ At the confirmation stage, the ICC Statute sets the evidentiary value to be below that of beyond reasonable doubt. The prosecution is required to present evidence which can only establish “substantial grounds to believe” that the person charged committed the crimes.¹⁴⁴ The accused person at this stage is

¹³⁸ ICC Statute, Art. 61(1).

¹³⁹ Katanga and Chui case (Confirmation of Charges), para. 64.

¹⁴⁰ See note 139 above. Note that a confirmation hearing may be done *ex parte* in circumstances set out under Art. 61(2). This happens when there is a waiver on the part of the accused person of his or her right to be present, or when all reasonable steps to secure his appearance have failed.

¹⁴¹ ICC Statute, Art. 61(4).

¹⁴² This process is equivalent to indictment in common law whose aim is to ensure that before the trial commences, prosecution have a *prima facie case* so that time and resources of the court are not misused, and the rights of the accused person are defended against a case which may not be founded. See *Katanga and Chui case (Confirmation of Charges)*, para.63; also see the article by the AMICC available at <http://www.amicc.org/docs/KatangaNgudjolo.pdf> (accessed on 27 August 2010).

¹⁴³ *Katanga and Chui case (Confirmation of Charges)*, para. 63.

¹⁴⁴ *Katanga and Chui case (Confirmation of Charges)*, paras. 62-63.

entitled to all the other rights of a fair trial besides legal representation. Thus, the accused person must be availed with the document containing the charges, the evidence to be presented against him/her and other disclosures that the PTC deems fit to issue.¹⁴⁵ The accused person is allowed to object to the charges, challenge the evidence presented by the Prosecutor and present his own evidence against confirmation of the charges against him or her.¹⁴⁶

3.2.2 Outcome of a Confirmation Hearing

A confirmation hearing may result in one of the two outcomes: the charges may be confirmed on the basis of the evidence adduced, in which case the accused person will be committed to the TC for actual trial;¹⁴⁷ or the charges may not be confirmed for lack of sufficient evidence required under article 61(5),¹⁴⁸ thereby, the accused person is released.¹⁴⁹ In the two DRC cases, the PTC confirmed the charges against the accused persons on the basis of the facts and the preliminary evidence adduced by the Prosecutor. These facts are set out below.

3.3 Material Facts for Confirmation in DRC Cases

3.3.1 Prosecutor v Thomas Lubanga Dyilo

Thomas Lubanga was the leader of a militia group (predominantly of Hema ethnicity) called the *Union des Patriotes Congolais* (UPC), later renamed as the *Union*

¹⁴⁵ ICC Statute, Art. 61(3).

¹⁴⁶ ICC Statute, Art. 61(6).

¹⁴⁷ ICC Statute, Art. 61(7)(a).

¹⁴⁸ ICC Statute, Art. 61(7)(b). However, the Prosecutor may subsequently reinstitute the charges for confirmation if sufficient evidence is obtained.

¹⁴⁹ ICC Statute, Art. 61(10)

des Patriots Congolais/Réconciliation et Paix (UPC/RP).¹⁵⁰ From September 2002 and throughout 2003 he was the Commander-in-Chief of the UPC's armed military wing called the *Forces Patriotiques pour la Liberation du Congo* (FPLC), which took control of Bunia and some parts of Ituri district in August 2002.¹⁵¹ He and other militia leaders were arrested by Congolese authorities following the murder, on 25 March 2005, of 9 UN peacekeepers of Pakistani origin.¹⁵² He was indefinitely held in Kinshasa, as it was not certain whether a Congolese court or an international tribunal would try him.¹⁵³ While under detention, the Office of the Prosecutor had opened investigations in Ituri region, since June 2004. The Prosecutor then applied for an arrest warrant against him, which was issued under seal on 10 February 2006, and unsealed on 17 March 2006.¹⁵⁴ He was transferred to the ICC for confirmation of the charges against him before he could be tried. He was indicted for crimes under article 8(2)(e)(vii) of the ICC Statute, namely, war crimes of conscripting and enlisting children under the age of 15 into the FLPC, and using them to participate actively in the hostilities in Ituri, from September 2002 to 13 August 2003, both in the context of international and internal armed conflict.¹⁵⁵ He was charged under article 25(3)(a) of the Statute, as a co-perpetrator, for jointly committing the crimes with other FPLC officers and UPC members.¹⁵⁶ The charges were confirmed as preferred.

¹⁵⁰ *Thomas Lubanga Case (Confirmation of Charges)*, para. 8.

¹⁵¹ *Thomas Lubanga Case (Confirmation of Charges)*, para. 8.

¹⁵² Musila (2009: 21).

¹⁵³ Musila (2009: 21).

¹⁵⁴ *Lubanga Case (Confirmation of Charges)* para. 16.

¹⁵⁵ *Lubanga Case (Confirmation of Charges)*, para. 9.

¹⁵⁶ *Lubanga Case (Confirmation of Charges)*, para. 9.

3.3.2 Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui

Germain Katanga was a top commander of a militia group (predominantly of Ngiti ethnicity) called the *Force de Résistance Patriotique en Ituri* (“the FRPI”).¹⁵⁷ Mathieu Ngudjolo Chui was also a military leader of a different militia group (predominantly of Lendu ethnicity) known as the *Front des Nationalistes et Intégrationnistes* (the FNI).¹⁵⁸ Both groups were based in Ituri district in eastern DRC. In 2002, the two commanders organized their groups as FRPI and FNI, to jointly fight the Lubanga’s UPC and its military wing, the FPLC in Ituri.¹⁵⁹ The two leaders were jointly charged with several war crimes and crimes against humanity allegedly committed between 2002 and 2004,¹⁶⁰ during the attack on Bogoro village, on 24 February 2003, where 200 civilians were murdered.¹⁶¹ The charges as they appear in the decision on confirmation of the charges contain several counts as follows:

- (a) Crimes against Humanity under article 7:
 - (i) Murder - article 7(1)(a);¹⁶²
 - (ii) Sexual slavery - article 7(1)(g);¹⁶³ and
 - (iii) Other inhumane acts - article 7(1)(k).¹⁶⁴
- (b) War Crimes under article 8 (in the alternative contexts of international or internal armed conflict):
 - (i) Inhuman treatment - article 8(2)(ii) or 8(2)(c)(i);¹⁶⁵

¹⁵⁷ Para. 12.

¹⁵⁸ Para. 12.

¹⁵⁹ Paras. 13-14.

¹⁶⁰ Paras. 15-31.

¹⁶¹ Paras. 15-31.

¹⁶² Para. 20.

¹⁶³ Para. 25.

¹⁶⁴ Para. 22.

- (ii) Using children to participate actively in hostilities - article 8(2)(b)(xxvi) or 8(2)(e)(vii);¹⁶⁶
- (iii) Sexual slavery - article 8(2)(b)(xxii) or 8(2)(e)¹⁶⁷
- (iv) Rape - article 8(2)(b)(xxii) or 8(2)(e)(vi);¹⁶⁸
- (v) Outrages upon personal dignity - article 8(2)(b)(xxi) or 8(2)(c)(ii);¹⁶⁹
- (vi) Intentionally directing an attack against a civilian population - article 8(2)(b)(i) or 8(2)(e)(i);¹⁷⁰
- (vii) Pillaging - article 8(2)(b)(xvi) or 8(2)(e)(v);¹⁷¹ and
- (vii) Destruction of property - article 8(2)(b)(xiii) or 8(2)(e)(xii).¹⁷²

Initially, the confirmation proceedings against them were scheduled to be conducted separately. The decision for the joinder of charges was the result of the Prosecutor's application. The reason being the two accused persons were both charged for the same crimes ensuing from the same incident i.e. the attack on Bogoro village, allegedly committed jointly and the same witnesses would testify.¹⁷³ They are charged under Article 25(3)(a) of the ICC Statute as (i) co-perpetrators i.e. jointly committing the crimes and (ii) as perpetrators of the crimes through their subordinates.¹⁷⁴ All the charges, with an exception of the crime against humanity of inhumane treatment, were confirmed.

¹⁶⁵ Para. 23.

¹⁶⁶ Para. 24.

¹⁶⁷ Para. 26.

¹⁶⁸ Para. 28.

¹⁶⁹ Para. 29.

¹⁷⁰ Para. 30.

¹⁷¹ Para. 31.

¹⁷² Para. 32.

¹⁷³ *Prosecutor v Mathieu Ngudjolo Chui -Decision on the Joinder of Cases against Germain Katanga and Mathieu Ngudjolo Chui*, decision of the Pre-Trial Chamber of 10 March 2008.

¹⁷⁴ *Decision on the Joinder of Katanga nad Chui cases*, paras. 33-36.

3.4 Relationship between the Two DRC Cases

The decisions on the confirmation of charges against Lubanga, Katanga and Chui show a close relationship between the two cases which is relevant for purposes of this study. First, there is a similarity centered on the charging section upon which the charges were confirmed. As it will be shown in the subsequent chapter, in both cases the PTC confirmed the charges on the basis of article 25(3)(a) which gives rise to principal liability for co-perpetration and perpetration-by-means, forming commission as a mode of participation in crime.¹⁷⁵ According to the PTC, confirmation of the charges in both cases could also have been sought under articles 25(3)(b) to (d) or article 28 which create forms of accessorial liability.¹⁷⁶ Secondly, the PTC adopted the same approach regarding the question of admissibility of the cases before the ICC. In both cases, admissibility was based on a reason not expressly set out in the ICC Statute. This, for several reasons, has become a subject of controversy between the PTC and the parties during the confirmation hearing¹⁷⁷ and, subsequently, among different academic scholars.¹⁷⁸ These two issues, the confirmation of the charges under article 25(3)(a) and the controversial issue of admissibility are reserved for critical examination in the following chapter.

¹⁷⁵ See the reasoning of the PTC in *Lubanga Case (Confirmation of Charges)* paras. 317 et seq. and *Katanga and Chui case (Confirmation of Charges)* paras.466 et seq.

¹⁷⁶ *Lubanga Case (Confirmation of Charges)* paras. 320-321; and *Katanga and Chui case (Confirmation of Charges)* para. 471.

¹⁷⁷ This led to an interlocutory appeal against the decision of the PTC. See *Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of the Trial Chamber II of 12 June 2009 on the Admissibility of the Case* of 25 September 2009, at

<http://www.docstoc.com/docs/DownloadDoc.aspx?doc_id=12628401> (accessed on 29 May 2010) (hereafter *Prosecutor v. Katanga (Interlocutory Appeal Decision)*).

¹⁷⁸ See, for instance, Arsanjani and Reisman (2005: 391 et seq.). At p. 397, the authors argue that “the long-term consequence of the innovative allowance of self-referrals” [on ground of inaction] may take the ICC into areas where the drafters of the Rome Statute had not wished to tread”.

3.5 Concluding Remarks

This chapter has discussed the notion of confirmation of charges as required under the ICC Statute in reference to DRC cases. It has been shown that a confirmation hearing is a mandatory procedure in terms of article 61 of the ICC Statute, but is not tantamount to a trial. It is a mere pre-trial hearing with the view of ascertaining that the Prosecutor has a *prima facie* case i.e. a case with founded charges that merits a trial. In reference to the DRC cases, the PTC confirmed the charges in respect of war crimes and crimes against humanity. As pointed out, the confirmation hearing of the DRC cases has indicated a close relationship between them in respect of the admissibility and modes of criminal participation. The next chapter evaluates the legal issues from the confirmation decisions.



CHAPTER FOUR

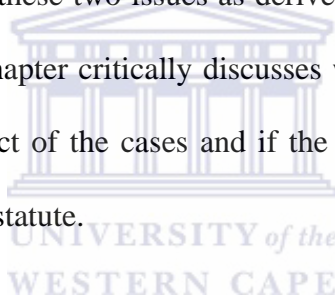
SPECIFIC LEGAL CONSIDERATIONS FROM THE DECISIONS OF THE

PTC ON THE CONFIRMATION OF CHARGES AGAINST LUBANGA,

KATANGA AND CHUI

4.1 Introductory Remarks

This chapter discusses two important legal issues that were considered by the PTC in the confirmation decisions, complementarity and modes of criminal participation. It discusses these two issues as derived from the ICC Statute and applied on the DRC cases. The chapter critically discusses whether the requirements under the Statute were met in respect of the cases and if the PTC's decisions applied them in a manner compatible to the statute.



4.2 Admissibility of the DRC Cases

4.2.1 Principle of Complementarity

DRC cases would not be admissible to the ICC unless it was for complementarity reasons. The ICC does not exercise primary jurisdiction, nor does it have primacy over national courts.¹⁷⁹ It exercises jurisdiction based on the principle of

¹⁷⁹ This is different from the *ad hoc* Tribunals which have jurisdiction over the crimes under their statutes as a matter of primacy over national jurisdictions. See Art. 9(2) of the ICTY Statute and Art. 8(2) of the ICTR Statute which, in similar wording, provide that the two Tribunals “shall have the primacy over the national courts” and that at any stage they may ask national courts to defer to the Tribunals' competence. For detailed discussion on the difference between the principles of complementarity and primacy see Elzeidy (2008: 403 et seq.); also Pichon (2008: 187).

complementarity.¹⁸⁰ Philippe defines complementarity as “a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primary jurisdiction.”¹⁸¹ According to article 17 of the ICC Statute, the ICC can exercise its jurisdiction over a case only where there is unwillingness or inability to exercise jurisdiction on the part of states with jurisdiction. Under this principle, the ICC jurisdiction does not replace the national jurisdiction but supplements it. National jurisdictions take precedence as a rule, unless the jurisdictional states are unwilling or unable to genuinely carry out the investigation or prosecution.¹⁸² Therefore, complementarity, in this study, is based on the recognition that the DRC' exercise of national criminal jurisdiction over the crimes committed in its own territory was not only a primary right but also a duty.¹⁸³

As it has been explained above, complementarity entails two important components – unwillingness and inability to genuinely carry out investigation or prosecution. Let us now examine each component with reference to the two DRC cases.

¹⁸⁰ ICC Statute, Preamble para. 10 and Art. 1. They provide that the jurisdiction of the ICC shall be complementary to national criminal jurisdictions.

¹⁸¹ Philippe (2006: 382).

¹⁸² Werle (2009: 83, marginal no. 230). On the meaning and rationale of the complementarity nature of the ICC, see Blakesley (2009: 435-436); Ellis (2008: 85 et seq.); Robinson (2008: 143-148); Benvenuti (2008: 59 et seq.); Delmas-Marty (2008: 73 et seq.).

¹⁸³ Para.4 of the Preamble to the ICC Statute recalls that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes”. Furthermore, both customary and conventional international law obligate the state in which any crimes under international law have been committed (the state of commission) to investigate the crimes and prosecute the perpetrators. This duty extends to third states as well, by way of the principle of *aut dedere, aut judicare*, for war crimes in an international armed conflict. Consequently, a third state in custody of a perpetrator(s) of war crimes in the territory of another state is obligated to try the perpetrator(s) itself or hand them over to a state that is willing to prosecute. For an extensive discussion on the duty of states to prosecute see Werle (2009: 68-72, marginal nos. 192-202).

4.2.1.1 Meaning of Unwillingness to Prosecute

Article 17(2) of the ICC Statute contains the grounds for the determination of the unwillingness of a state to investigate a case or carry out prosecutions. Unwillingness can be inferred from the following three forms of conduct of the state. The first indication is where, after investigations are done, a national decision is reached not to prosecute or the prosecution is done but not genuinely. In these circumstances, the state will be deemed unwilling only if either the decision not to prosecute or the concluded proceedings were done to shield the person responsible from criminal responsibility.¹⁸⁴ In such scenario, even the principle of *ne bis in idem* (no double jeopardy) will not apply if the ICC or any other jurisdictional state decides to reopen the prosecution.¹⁸⁵ Secondly, unwillingness can also be inferred where there have been unjustified delays in the proceedings of the national court which imply lack of intention to bring the perpetrator to justice.¹⁸⁶ The third indication of unwillingness is where the proceedings were or are not being conducted independently or impartially.¹⁸⁷ Additionally, the grant of an absolute amnesty in respect of the crimes may also be an indication of unwillingness to punish the crimes. The reason being absolute amnesties tend to completely bar any judicial action against the beneficiaries, terminate any ongoing proceedings, and/or nullify any sentence which might have been passed in respect of the crimes covered.¹⁸⁸

¹⁸⁴ ICC Statute, Art. 17(2)(a).

¹⁸⁵ ICC Statute, Art. 20. The principle requires that a person who has been tried by the ICC or any domestic court for a crime over which the ICC has jurisdiction and for which he has been convicted or acquitted cannot be tried again by the ICC. See Ofei (2008: 10).

¹⁸⁶ ICC Statute, Art. 17(2)(b).

¹⁸⁷ ICC Statute, Art. 17(2)(c); also see Werle (2009: 89, marginal nos. 250-251).

¹⁸⁸ Philippe (2006: 383).

4.2.1.2 Was the DRC Unwilling to Prosecute?

According to article 17(2) of the ICC Statute, the starting point when determining unwillingness is the existence of investigations or proceedings in a domestic court - past or present - against the alleged perpetrator. The PTC indicates that this existence alone is not enough: it is “a *conditio sine qua non* the national proceedings encompass both the person and the conduct which is the subject of the case before the ICC.”¹⁸⁹ Although Mr. Lubanga had been arrested before being handed over to the ICC, the PTC observed that the arrest warrants against him did not encompass the conduct for which he was indicted at the ICC i.e. the offence of conscripting and enlisting children under the age of fifteen years into FLPC and using them to participate actively in the hostilities.¹⁹⁰ Further, in relation to Katanga and Chui, no proceedings had been commenced in domestic courts with respect to the Bogoro attack.¹⁹¹ Thus, according to both the PTC and the AC, in the absence of any domestic proceedings which met the “same-person-same-conduct” test, it was not possible to refer to unwillingness in the case of DRC. There was no national decision not to prosecute after investigation nor were there any concluded or ongoing proceedings from which to infer DRC’s intention to shield them. So, the PTC concluded that the admissibility of the two cases cannot be said to have been based on unwillingness.

The PTC’s interpretation of article 17(2) on the need for existence of investigation or prosecution is welcome, and accordingly, unwillingness was not the

¹⁸⁹ See *Lubanga Case (Confirmation of Charges)*, para. 31.

¹⁹⁰ Mr. Lubanga had been arrested and detained in DRC pursuant to two warrants of arrest issued on 19 March 2005 and 29 March 2005. The first warrant was based on charges of genocide and crimes against humanity contrary to the DRC Military Criminal Code. The second warrant charged him with crimes of murder, illegal detention and torture. See *Lubanga Case (Confirmation of Charges)* para. 33.

¹⁹¹ *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 52.

case in the DRC. This is because whether or not the DRC acted genuinely could only be inferred from its decision, if any, or from its conduct regarding such investigation or prosecution. However, the “same-conduct” test that the PTC applied, though accepted in the context of the Lubanga case, is an innovation which seems to be, in my view, too open-ended as it stands now. For instance, in the Lubanga case the PTC applied this test by defining the conduct as one entailing a specific offence in the ICC Statute, i.e. conscripting and enlisting children into the army and using them in the hostilities. This is clearly defined and its boundaries are confined to the ICC Statute. However, in the Katanga and Chui case, the conduct which was not investigated or prosecuted was the “Bogoro incident”.¹⁹² As the charges show, the “Bogoro incident”, unlike the conduct in the Lubanga case, covered 8 individual counts, and each count, for instance murder, could be collective of several isolated incidents against specific victims. As a result, the scope of this test is likely to be very wide as one may also think of it being extended to “same-victim” test. For instance, assuming the charges in respect of the Bogoro incident had been preferred in the domestic courts and specific individual victims were not covered in the investigations, could the case be admissible if the Prosecutor argued on the basis of the “same-victim” test? The reason being each criminal act, such as rape or murder, which was committed in that incident is, in principle, a separate crime, which could be charged as a separate count or be a case on its own.¹⁹³ The author acknowledges the individual peculiarities of cases since each case can be judged in its own merits. However, since this test is liable to vagueness, we humbly submit in favour of the need for a more objective and clearly defined criterion or standard of the “same-

¹⁹² *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 80.

¹⁹³ See the position under common law in David (2004: 199 et seq.) at <http://www.austlii.edu.au/au/journals/DeakinLRev/2004/8.html> (accessed on 21 August 2010).

conduct test”. The reason being this test cannot conspicuously be traced in the Statute, and eventually, it is capable of receiving preferentially wide or narrow interpretations as shown above.

4.2.1.3 Meaning of Inability to Prosecute

To determine if the state with jurisdiction is unable to prosecute, the ICC has to consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.¹⁹⁴ In determining this, the ICC must consider instances such as lack of central government,¹⁹⁵ existence of a state of chaos due to the conflict or crisis or public disorder leading to the collapse of national systems which prevents the state from discharging its duties.¹⁹⁶ Due to this state of affairs, the state might have lost control over the police force or the prosecutorial machinery might have totally collapsed.¹⁹⁷ Moreover, even a perfectly functioning national judicial system can be explained as unavailable within Article 17 (3) due to obstacles which are factual or legal including, for instance, an absence of an incorporating legislation or provision that authorizes the national courts to exercise jurisdiction over international crimes.¹⁹⁸ Inability could be inferred in this case only if

¹⁹⁴ ICC Statute, Art. 17(3).

¹⁹⁵ In this case the law enforcement mechanisms may be completely unavailable. Example of such a state was Somalia in 1990s after the overthrow of Sayed Bare. See Williams and Schabas (2008: 463, marginal no. 33); also see Ofei (2008: 9).

¹⁹⁶ See ICC Prosecutor’s paper on policy issues (2003: 4) (hereafter “Policy Paper”) at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25_60AA962ED8B6/143594/030905_Policy_Paper.pdf (accessed on 22 May 2010).

¹⁹⁷ Ofei (2008: 10).

¹⁹⁸ Meissner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* 86 cited in Ofei (2008: 10).

the absence of an incorporating legislation is, for instance, due to a legislative blockage of attempts to pass such a law. But if the state has not taken any initiative to have such a law or provision in place, thereby purporting to rely on this omission, this would, in my opinion, be a clear case of unwillingness.

4.2.1.4 Was the DRC Unable to Prosecute?

As stated above, the DRC's inability to prosecute can only be established if it is attributable to a total or substantial collapse in its national judicial system, investigation or the prosecution machinery, which, in turn, paralyzed its capacity to carry out its proceedings.¹⁹⁹ When the DRC referred the situation to the ICC, it stated that it was unable to conduct or investigate the cases on its own.²⁰⁰ In his letter of referral, the DRC President asserted:

*En raison de la situation particulière que connaît mon pays, les autorités compétents ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale.*²⁰¹

It should be noted that a mere assertion by a state about its inability to investigate or prosecute the crimes cannot by itself be a justification for admissibility.

¹⁹⁹ ICC Statute, Art. 17(3).

²⁰⁰ *Lubanga Case (Confirmation of Charges)*, para. 35. The DRC's inability to prosecute at the time of referral was due to the ineffectiveness in the judiciary personnel, legal framework, policing and investigation and judicial infrastructure. A detailed discussion on this observation can be found in Burke-White (2005: 575-586).

²⁰¹ Letter of Joseph Kabila to the Prosecutor dated 3 March 2004 Doc. No. ICC-01/04-01/06-39-US-AnxB1_French para. 2, available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxB1_French.pdf> (accessed on 30 May 2010). Its English translation can be found as appendix 1 in Musila (2009: 79). It states: "because of the exceptional situation in my country, the competent authorities are unfortunately not capable of conducting investigations of these aforementioned crimes, nor are they able to conduct the necessary prosecutions without the participation of the International Criminal Court".

The ICC must apply the objective criteria under the ICC Statute to decide if the assertion is anything to rely on. As regards the DRC, the assertion of inability to investigate or prosecute at the time of referral is justifiable. For instance, there were very few courts able to conduct trials of such magnitude, the judiciary was extremely understaffed and judges did not have the required knowledge for lack of adequate training.²⁰² Also, the prosecution is said to have been corrupt to the extent of ‘diluting’ the charges by indicting serious offenders for minor offences which did not reflect the gravity of their conduct.²⁰³ The judiciary and the prosecution were not reliable, they lacked neutrality and some of their members were implicated in the same atrocities. For instance, the former chief prosecutor of the military tribunal was convicted of murder by a new tribunal and sentenced to death in October 2004.²⁰⁴

However, later, the DRC regained its ability to conduct the investigations. The ICC and the Prosecutor confirmed that, subsequent to the referral, the DRC’s national judicial system underwent significant changes which had a positive impact on its ability to investigate and prosecute the crimes.²⁰⁵ These include the opening of the *Tribunal de Grande Instance* in Bunia, the capital of Ituri district, which was able to issue two warrants of arrest against Thomas Lubanga for other crimes, some of which were within the jurisdiction of the ICC.²⁰⁶ Moreover, the investigative authorities were able to arrest Lubanga and detain him at the *Centre Penitentiaire et de Reeducation de Kinshasa*.²⁰⁷ In view of these changes, when issuing the arrest warrant against Lubanga, the PTC

²⁰² ACICC Paper, p. 11.

²⁰³ ACICC Paper, p. 11.

²⁰⁴ ACICC Paper, p. 11.

²⁰⁵ *Thomas Lubanga Case (Warrant of Arrest)*, para. 36.

²⁰⁶ These were genocide, crimes against humanity including murder, illegal detention and torture. See *Lubanga Case (Confirmation of Charges)* para. 33; also see note 190 above.

²⁰⁷ *Thomas Lubanga Case (Warrant of Arrest)*, para. 36.

concluded that the Prosecution's general assertion of continued inability under article 17(1)(a) to (c) and 17(3) was not correct because it did not "wholly correspond to the reality any longer."²⁰⁸ This means, therefore, the Lubanga case and any subsequent cases could be rendered inadmissible on this ground as the DRC had regained its ability. My observation would also be supported by the AC's observation that a case that was originally admissible may be rendered inadmissible by a change of circumstances and the arising of new facts which "negate the basis on which the case had previously been found admissible under article 17."²⁰⁹ This notwithstanding, the PTC and the AC continued to hold that the two cases were admissible.

Hitherto it is clear that the grounds for admissibility of a case to the ICC under article 17 of the ICC Statute were not met in respect to the DRC cases - inability or unwillingness did not apply. This finding, therefore, renders null the original hypothesis upon which this study was based. Further, this could imply two things: either (a) by admitting the cases, the PTC violated the complementarity principle, or (b) it had a justifiable ground other than those mentioned under article 17, but which was consistent with the complementarity principle. It is important at this point to recall the chapeau of article 17 which insists that when determining admissibility of a case, the ICC must have regard to paragraph 10 of the Preamble and Article 1 of the ICC Statute. These two provisions reiterate the complementary nature of the ICCs' jurisdiction to the national criminal jurisdictions. Mindful of this requirement, the PTC admitted the two DRC cases on the ground of 'inaction'.

²⁰⁸ *Thomas Lubanga Case (Warrant of Arrest)*, para. 36.

²⁰⁹ *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 56.

4.2.2 Meaning of ‘Inaction’

The ICC assumed jurisdiction over the two cases on the ground that no state was acting on them. ‘Inaction’, also referred to as ‘inactivity’, as a ground of admissibility is not mentioned under article 17 of the ICC Statute. It arises when no state with jurisdiction over the case has taken any initiative to investigate or prosecute it.”²¹⁰ The expression “state with jurisdiction” should be understood as not to be restricted to the state of commission, in our case the DRC. The reason being most of the crimes charged in the DRC cases formed part of customary international law and were prosecutable by any third state under the principle of universal jurisdiction.²¹¹ The tricky question that one could pose is whether the ICC would be bound, for complementarity reasons, to refrain from admitting the DRC cases if there was a third state acting on these cases, a state that is not party to the ICC Statute. The answer, in my view, would depend on the assessment of the genuineness of the motives of that state against the spirit and intention of the states parties to the ICC Statute. Since this was not the case I will not dwell on this question any further.

The AC has endorsed and set the boundaries of inaction as a third ground of admissibility of cases before the ICC. Thus, inaction applies if: (i) at any time before or during the proceedings (at the ICC) no state with jurisdiction over the case carries out any investigations²¹² - this includes the same conduct test;²¹³ or (ii) where the state with

²¹⁰ See the AC’s ruling in *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para 2. The AC endorsed “inaction” as first adopted by the PTC in the Lubanga case.

²¹¹ This is the principle of customary international law which gives right to every state to prosecute crimes under international law regardless of where they took place, who the victims were or whether or not any link with the prosecuting state exists. For detailed discussion on the meaning and applicability of this principle on the crimes under the ICC Statute see Werle (2009: 62-68, marginal nos. 183-191).

²¹² *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 80.

primary jurisdiction, though it may or may not have conducted some investigations, makes a justifiable decision that the accused person should be prosecuted, but before the ICC (i.e. relinquishment of jurisdiction).²¹⁴ The cases from the DRC were admitted on these two bases. This means that the PTC and the AC declared the cases admissible on grounds other than unwillingness or inability which are the only ones mentioned under Article 17 of the ICC Statute. Accordingly, the ICC has interpreted the ICC Statute to embody an additional ground for admissibility other than those under article 17 by which it can exercise jurisdiction.²¹⁵ The logical question is whether the complementarity principle was adhered to.

4.2.2.1 Does 'Inaction' Violate Complementarity?

There had been a disagreement as to whether admissibility on ground of 'inaction' as first endorsed by the PTC is compatible with the principle of complementarity under article 17.²¹⁶ But the decision of the AC has confirmed it as being part of the ICC Statute and in line with complementarity.²¹⁷ The AC applied the

²¹³ Williams and Schabas (2008: 616, marginal no. 23). The PTC has also assumed jurisdiction on ground of inaction in the cases arising from the Uganda and Sudan situations. See the *Prosecutor v Ahman Harun & Ali Kushayb, Decision on the Prosecution Application under article 58 (7)* available at <http://www.iclklamberg.com/Caselaw/Sudan/HarunandKushayb/PTCI/ICC-02-05-01-07-1-Corr_English.pdf> (accessed on 15 October 2010). The PTC pointed out that "the investigation undertaken by the Sudanese authorities did not encompass the same conduct which is the subject of the application before the Court." Also, at para. 23 the Court said that there was no indication that Ahmad Harun was under any investigation nor was there any indication that any prosecution had been initiated against him before the national jurisdictions for any crimes relating to the situation in Darfur, Sudan; also see *the Situation in Uganda, Warrant of Arrest for Joseph Kony*, para. 37, available at <<http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF>> (accessed on 15 October 2010).

²¹⁴ *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, paras. 81-82.

²¹⁵ Williams and Schabas (2008: 616, marginal no.23).

²¹⁶ Arsanjani and Reisman (2005: 391 et seq.). Particularly, at p. 397 the authors argue that "the long-term consequence of the innovative allowance of self-referral [on grounds of inaction] may take the ICC into areas where the drafters of the Rome Statute had not wished to tread".

²¹⁷ *Prosecutor v Germain Katanga, (Interlocutory appeal decision)* para. 84.

interpretation of the principle as adopted by the group of experts²¹⁸ and subscribed to by the Prosecutor.²¹⁹ This interpretation, though not binding on the ICC,²²⁰ is welcome as it serves the rationale explained below:

First, it seeks to ensure that the ICC Statute is interpreted as a whole, and in doing so, its spirit, inferred from the intention of the states parties, is not defeated. Secondly, it takes into account that the ICC is treaty-based. Consequently, interpretation of the ICC Statute (Rome Treaty), like any other international treaty, is governed by the Vienna Convention on the Law of Treaties²²¹ which requires that a treaty should be contextually construed in the light of its objective and purpose.²²² The principal objective and purpose of the Rome Treaty is to end impunity. This is derived from the whole spirit of the Rome Treaty which is to ensure that “the most serious crimes of concern to the international community as a whole do not go unpunished”.²²³ Thirdly, admissibility for inaction takes into account that the essence of the complementarity principle is to strike a balance between the primacy of domestic jurisdictions *vis-à-vis* the ICC and the primary goal of the ICC Statute i.e. to put an end to impunity.²²⁴

Accordingly, a case would be admissible for inaction in any of its two scenarios explained below:

²¹⁸ Informal Expert Paper on the principle of complementarity presented to the ICC in 2003 (hereinafter Informal Expert Paper) paras. 17-19 as quoted in and Schabas (2008: marginal no. 22).

²¹⁹ Policy Paper, p. 4.

²²⁰ Article 21(2) of the CC Statute provides that “[t]he Court may apply principles and rules of law as interpreted in its previous decisions”. Therefore, the ICC can derogate from its own precedents when necessary.

²²¹ Adopted on 23 May 1969.

²²² Vienna Convention, Art. 31(1). Also, Art. 31(2) requires that the context of a treaty must be inferred from its text, the preamble and any annexes.

²²³ ICC Statute, Preamble, para. 4.

²²⁴ *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 85.

The first case is where no jurisdictional state has initiated any investigation. Thus, there is no need to examine the factors of unwillingness or inability because Article 17 does not apply.²²⁵ It is important to note that the ICC Statute makes it a duty for states to punish the crimes but does not have the power to order them to open investigations or conduct prosecutions domestically.²²⁶ It, therefore, cannot assume that declaring a case inadmissible would result in an inactive state opening investigation.²²⁷ Where the states do not or cannot voluntarily investigate and, where necessary, prosecute, the ICC must be able to do that in the spirit of fighting impunity.²²⁸ The justification of admissibility on this ground cannot be appreciated better than in the following words of the Appeals Chamber:

*The court would be unable to exercise its jurisdiction over a case as long as a state is **theoretically** willing and able to prosecute the case, even though the state has no intention of doing so. Thus, a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court. Impunity would persist unchecked and thousands of victims would be denied justice.*²²⁹ (Emphasis added).

²²⁵The Prosecutor supports this ground arguing that “there is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action....There may also be cases where a third State has extra-territorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum. In such cases there will be no question of “unwillingness” or “inability” under article 17. See the Policy Paper, p. 4.

²²⁶ ICC Statute, Preamble para. 6; also see *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 86.

²²⁷ Batros (2009: 32).

²²⁸ *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 85.

²²⁹ *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 79.

The second arm of inaction is where the state's duty to prosecute²³⁰ is read in a manner consistent with the obligation of *aut dedere aut judicare*.²³¹ In such a scenario, the state is allowed to “decline to exercise jurisdiction (relinquishment of jurisdiction) in favour of prosecution before the ICC as a step taken to enhance the delivery of effective justice, and is...consistent with both the letter and the spirit of the Rome Statute. This is distinguishable from a failure to prosecute out of apathy or desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity”.²³²

This formulation suggests that even a state which is able or willing to prosecute can be allowed to relinquish its jurisdiction in favour of the ICC and still the case becomes admissible, provided that its motive is not to protect the perpetrators or avoid its duty under international law. Circumstances which may necessitate this situation may include: (i) where there is a deeply divided nation and only the perceived impartiality and fairness of the ICC can avoid politicization of post-conflict justice and hence contribute to national reconciliation,²³³ (ii) where domestic prosecution can worsen the volatile security situation. This includes, for instance, prosecution of a powerful leader or warlord which could destabilize the government or threaten the resumption or worsening of the violence²³⁴ and (iii) where, due to limited financial resources and

²³⁰ Para. 6 of the Preamble to the ICC Statute, provides that “it is the duty of every state to exercise its jurisdiction over those responsible for international crimes”.

²³¹ This is a principle under the Geneva Conventions that obliges a state party which has custody of perpetrators of war crimes to try them itself or hand them over to a state that is willing to prosecute (i.e. prosecute or extradite). See Werle (2009: 70, marginal no.198).

²³² Informal expert paper, p. 19.

²³³ Akhavan (2010: 110).

²³⁴ A real case was the transfer of the trial of Charles Taylor from the seat of the hybrid Special Court for Sierra Leone in Freetown to The Hague.

complexity of the trial, it is unlikely that the domestic trial will meet international standards.²³⁵

This principle is susceptible to abuse and it can be used by states for revenge by referring government's opponents to the ICC. However, in our case, the right of the DRC under the ICC Statute was only to refer the whole situation to the ICC, and had no control over it thereafter. The Prosecutor has the discretion to choose which perpetrator to prosecute, including possible perpetrators from the rebel groups as well as the agents of the government. This reduces the fear of ICC being used as an avenue for settling of scores. The ICC itself is aware of this possibility and has cautioned that, admissibility in cases of relinquishment of jurisdiction is not automatic and is restricted to prevent such possible abuses by states, especially those making self-referrals like the DRC.²³⁶

From the discussion above, one can conclude that, the ICC's affirmation of its jurisdiction over the DRC cases for inaction sought to fill the impunity gap which would have otherwise been created, as unwillingness and inability could not practically apply.²³⁷ Further, inaction has been acceptable for these two cases as a ground for admissibility by analyzing the DRC's motives rather than its actions.²³⁸

4.3 Individual Criminal Responsibility in the DRC Cases

²³⁵ Akhavan (2010: 111).

²³⁶ *Prosecutor v. Katanga (Interlocutory Appeal Decision)*, para. 85. The AC clearly pointed out that such cases are not automatically admissible. It stated that "the Appeals Chamber is mindful that the Court, acting under the relevant provisions of the Statute and depending on the circumstances of each case, may decide not to act upon a State's relinquishment of jurisdiction in favour of the Court". According to the AC, admissibility in this case depends, *inter alia*, on the fulfillment of the gravity threshold (Article 17(1)(d), the rule against double jeopardy (Art. 20(3) and Art. 53 of the ICC Statute. The AC's use of the phrase "depending on the circumstances of each case" suggests that even when the Court realizes that the state relinquished its jurisdiction not for *bona fide* reasons, including the intention to avoid its duty to prosecute the crimes, the case cannot be admissible for relinquishment of jurisdiction, but it seems it may still be admitted if no state with jurisdiction is acting on it (the 'inaction' ground).

²³⁷ Benvenuti (2008: 63-65).

²³⁸ Williams and Schabas (2008: marginal no. 22).

In confirming the charges in both cases the PTC relied on Article 25(3)(a) of the ICC Statute although the charges were drawn in the alternative.²³⁹ The article refers to commission as a mode of criminal participation to found individual liability. The reasons for this are: first, this mode gives rise to principal liability unlike the modes in the other articles which entail accessorial liability;²⁴⁰ second, it constitutes the gravest form of criminality and may serve as an indicator of the highest degree of responsibility;²⁴¹ and third, principal liability may have more serious implications during the sentencing stage.²⁴² For ease of reference the article is reproduced below.

Article 25(3)

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.

4.4 PTC's Interpretation of Article 25(3)(a)

²³⁹ Katanga and Chui were charged in the alternative under Art. 25(3)(b) for ordering the commission of the crimes. In both cases the PTC indicated that the charges could also be preferred under Arts. 25(3)(b)-(d) and Art. 28. See *Lubanga Case (Confirmation of Charges)* paras. 317-321; and *Katanga and Chui case (Confirmation of Charges)* para. 470.

²⁴⁰ *Lubanga Case (Confirmation of Charges)* paras. 320-321; and *Katanga and Chui case (Confirmation of Charges)* para. 471.

²⁴¹ Werle (2009: 170, marginal no. 449).

²⁴² Werle (2009: 170, marginal no. 448).

According to the PTC, the individual responsibility under this article depends entirely on the perpetrator's control over the crime. Once control is established, principal liability arises on the side of the controller irrespective of the possibility that he or she was not present at the scene of the crime; or did not physically carry out the objective elements of the crime; or did not even physically know the physical perpetrators.²⁴³

4.4.1 Control over the Crime Test

This test incorporates a combination of some elements of the objective²⁴⁴ and the subjective approach²⁴⁵ for distinguishing between principals and accessories to crimes, but in principle, it does not take into account such distinction.²⁴⁶ It combines an assessment of the facts which enabled the perpetrator to exercise control over the crime and the awareness of the facts which led to such control.²⁴⁷ The PTC has identified three types of control under article 25(3)(a) of the ICC Statute. These are, control over the action,²⁴⁸ control over the crime itself and control over the will of those who the commit

²⁴³ *Lubanga Case* (Confirmation of Charges) paras. 330-338; *Katanga and Chui Case* (Confirmation of Charges) paras. 480 et seq.

²⁴⁴ According to the objective approach, principals to the crime are only those who physically carry out one or more objective elements of the crime, while accessories are those who contributed to the crime in any other way. The ICC Statute makes this approach inapplicable by including the notion of commission of crime through another person as rising principal liability. See *Lubanga Case* (Confirmation of Charges) paras. 328 and 333

²⁴⁵ The subjective approach requires that principals to the crime be only those who contribute to the commission of the crime with intent to have the crime as their own deed. Those who contribute to its commission but without the intent to have the crime as their own become accessories. See *Lubanga Case*, ibid para 329; also see Alosolo (2009: 267-268), footnote 18. Art. 25(3)(d) of the ICC Statute makes this approach inapplicable. See *Lubanga Case* (Confirmation of Charges) para. 334.

²⁴⁶ *Lubanga Case* (Confirmation of Charges), para. 333.

²⁴⁷ *Lubanga Case* (Confirmation of Charges), para. 331; *Katanga and Chui Case* (Confirmation of Charges), para. 484; also see Alosolo (2009: 267).

²⁴⁸ Control over the action, also called direct commission, entails the situation where the perpetrator committed the crime directly/physically/individually. See *Lubanga Case* (Confirmation of Charges), para.

the crime.²⁴⁹ According to the PTC, the DRC cases involved joint control over the crimes and the will of the actual perpetrators. Before giving my observation on the PTC's application of the two control tests, we first set out below the tests as interpreted by the Chamber.

4.4.1.1 Joint Control over the Crime (Co-perpetration)

In this scenario, the objective elements of the crime are realized by a joint control over the crime by several persons.²⁵⁰ Each of such persons has control only if he has the ability to frustrate the commission of the crime by, for instance, not carrying out his or her task.²⁵¹ Six elements of co-perpetration have been identified by the PTC as follows: (i) it involves a plurality of persons,²⁵² (ii) it entails an existence of an express or implied agreement in the form of a common plan,²⁵³ (iii) each co-perpetrator makes an essential contribution in realization of the objective elements of the crime,²⁵⁴ (iv) the co-perpetrator commits the specific crime with the knowledge and intent required under article 30 of the ICC Statute,²⁵⁵ (v) the co-perpetrators are mutually aware of the result of their plan and accept it, so that their individual contributions can be attributed to each other,²⁵⁶ and (vi) each co-perpetrator knows the essential nature or implication of his

332; *Katanga and Chui Case (Confirmation of Charges)* para. 488. However, this was not applicable to the two DRC cases because the charges were based on joint commission, not individual commission.

²⁴⁹ *Lubanga Case (Confirmation of Charges)*, para. 332.

²⁵⁰ *Lubanga Case (Confirmation of Charges)*, para. 332.

²⁵¹ *Lubanga Case (Confirmation of Charges)*, para. 342.

²⁵² *Lubanga Case (Confirmation of Charges)*, para. 343.

²⁵³ *Lubanga Case (Confirmation of Charges)*, paras. 343 and 345.

²⁵⁴ *Lubanga Case (Confirmation of Charges)*, para. 346. This contribution can be done at any stage of the plan before or during the execution stage. See *Katanga and Chui case (Confirmation of Charges)* para. 526

²⁵⁵ *Lubanga Case (Confirmation of charges)* paras. 349-367.

²⁵⁶ *Lubanga Case (Confirmation of charges)*, paras. 361-362.

joint control of the plan, that is, by refraining from exercising his task, he has the ability to frustrate the commission of the crime.²⁵⁷

4.4.1.2 Control over the Will (Indirect Perpetration)

This entails the perpetration of the crime(s) through another person,²⁵⁸ in which case, the perpetrator does not physically carry out the objective elements of the crime, but instead exercises control over its commission by dominating the will of a physical perpetrator whom he uses as a tool or instrument.²⁵⁹ It is irrelevant whether the physical perpetrator is liable or not.

4.4.1.3 Indirect Co-perpetration

The PTC has indicated that article 25(3)(a) incorporates yet another form of commission which combines the features of co-perpetration and indirect perpetration. It is based on the scenario whereby military leaders who have control over different organizations, e.g. militia groups in the DRC case, direct their organizations to implement a common criminal plan.²⁶⁰ Of particular essence in this scenario is the superior-subordinate relationship which is created by the hierarchical structure of the organization. The superior must have control over the organization which enables him to secure the implementation of his orders to commit a crime by any of his subordinators

²⁵⁷ *Lubanga Case (Confirmation of charges)*, paras. 365-366.

²⁵⁸ This is also referred to as perpetration by-means or perpetration behind perpetrator.

²⁵⁹ *Lubanga Case (Confirmation of charges)*, para. 332..

²⁶⁰ *Katanga and Chui Case (Confirmation of Charges)* paras. 540 et seq; also see Alosolo (2009: 269).

by way of automatic compliance.²⁶¹ From the PTC decision, two levels of attributing the responsibility can be deduced - horizontal and vertical levels.

4.4.1.3.1 Horizontal Level of Responsibility

This arises out of the horizontal relationship between the senior leaders of different organizations who set and agreed on the common plan. This makes them individually accountable as co-perpetrators if their common plan is implemented.²⁶²

4.4.1.3.2 Vertical Level of Responsibility

This level is two-fold. First it creates individual criminal responsibility to the leader (controller) of each organization for the crimes he indirectly commits through his own subordinates whom he uses as instruments within his own control. Second, the crimes committed by the subordinates of each co-perpetrator in their different organizations are mutually attributable to each of them.²⁶³ It is irrelevant that none of the indirect co-perpetrators, i.e. the commanders, could command obedience from the subordinates of the other commander, for implementation of his orders.²⁶⁴

²⁶¹ *Katanga and Chui case (Confirmation of Charges)*, para. 519.

²⁶² This is the fact in the *Katanga and Chui case*, in which the two accused persons, in their capacity as leaders of their different militia groups, are alleged to have set a common plan to jointly attack and wipe out Bogoro village. See *Katanga and Chui case (Confirmation of Charges)* paras. 540 et seq.

²⁶³ *Katanga and Chui case (Confirmation of Charges)* paras. 519-520.

²⁶⁴ The PTC ruled that the principle of mutual attribution of the crimes could still be applied although it found that there was substantial evidence that FRPI soldiers would obey only orders issued by FRPI commanders, and similarly, FNI soldiers would only obey orders issued by the FNI commanders. See *Katanga and Chui Case (Confirmation of Charges)*, para. 560.

4.5 Evaluation of PTC's Interpretation

One notes that the PTC's interpretation of the notion of the joint commission under article 25(3)(a) of the ICC Statute as applicable to the DRC cases contains some novelty. This novelty does not correspond with the related notion of Joint Criminal Enterprise (JCE) used mainly in the ICTY's jurisprudence which was argued for by Katanga.²⁶⁵ Thus, the PTC defied the application of JCE in the DRC cases. This is acceptable considering the variations introduced by the ICC Statute which make the two notions different.

First, under the third form of JCE²⁶⁶ the accused person could be held liable even if he did not share the specific intent in the crime, provided the crime was naturally foreseeable as an incidental consequence of the common plan, and he, nevertheless, took the risk.²⁶⁷ In contrast, under article 30 of the ICC Statute each co-perpetrator must fulfill all the subjective elements (*mens rea*) of the crime in his or her own person before he can be held criminally liable.²⁶⁸ In relation to a consequence, mere foreseeability is not enough: the perpetrator must be aware that such consequence will occur in the

²⁶⁵ Notably, Katanga's defence objected the interpretation of joint commission under Art. 25(3)(a) to be based on control test as first done in the Lubanga case. He argued that the provision incorporates ICTY's notion of JCE into the ICC Statute and should therefore be interpreted accordingly. See *Katanga and Chui Case (Confirmation of Charges)* para. 474.

²⁶⁶ The notion of JCE is also based on common purpose/plan to commit a crime by a plurality of persons. It comprises three forms, namely, basic form, systemic form and extended form. The basic form entails a scenario where two or more people agree on a common criminal plan and each of them executes it with *mens rea*, in which case, they all become liable as perpetrators. Under the systemic form, the perpetrator becomes liable if he or she actively participates at any stage of a criminal plan or design which is implemented in a systemic way of repression or ill-treatment. It is enough if the perpetrator knew about the systemic design and willingly performed his tasks as part of its furtherance. The typical example is so-called concentration and detention camp cases in Germany where a system of torture and inhumane treatment was organized and implemented by the Nazis. The extended form of JCE holds the perpetrator criminally liable even for actions that were not within the contemplation of the common plan, provided they form a naturally foreseeable consequence of the plan. See Werle (2009: 174-175, marginal nos. 459-462); also see Cassese (2008: 189 et seq.).

²⁶⁷ Werle (2009: 175, marginal no. 462); also see Cassese (2008: 199-205).

²⁶⁸ Werle (2009: 177, marginal no. 471).

ordinary course of events.²⁶⁹ Consequently, this third form of JCE is incompatible with the ICC Statute.²⁷⁰ Second, JCE distinguishes principal liability from accessorial liability on the bases of objective and subjective approaches.²⁷¹ The argument by Katanga's defence in favour of JCE was, therefore, intended to lower the degree of criminal responsibility. This is because if the objective approach of JCE was applied, Katanga and Chui could not be held liable as principals since they did not commit the crimes physically, but by means of their subordinates. This would be incompatible with the third alternative of article 25(3)(a) which establishes principal liability even if the perpetrator committed the crime "through another person".²⁷² Thus the PTC's decision that the jurisprudence of the ICTY in this regard cannot be mechanically transferred to the ICC is welcome.²⁷³

However, one may express skepticism on the reasoning of the PTC on the principle of indirect co-perpetration in the Katanga and Chui case. Of specific reference in this case is the mutual attribution of liability to Katanga and Chui at vertical level, thereby making each responsible for crimes committed by the subordinates of the other. It should be recalled that, indirect co-perpetration, as the name suggests, encompasses a combination of two alternatives of commission as a mode of participation. As a result, it is important that the individual elements of each alternative be fulfilled separately before "joint commission through another person" is confirmed. In this regard, the PTC's reasoning is not completely flawless. The challenge is set below:

²⁶⁹ ICC Statute, Art. 30(2)(b). This article excludes the applicability of *dolus eventualis* and recklessness as basis of *mens rea* in respect of consequences of the accused person's conduct. See Werle (2009: 155, marginal no. 413).

²⁷⁰ Cassese (2008: 212).

²⁷¹ See notes 241 and 242 above.

²⁷² *Lubanga case (confirmation of charges)* para. 333.

²⁷³ *Katanga and Chui Case (Confirmation of charges)* para.508.

First, as per the PTC's own formulation, perpetration through another person under the ICC Statute entails perpetrator's "control over the organization",²⁷⁴ of an apparatus of power which enables him *inter alia* to secure the execution of the crime by almost automatic compliance of his orders by the subordinates.²⁷⁵ Since the subordinates of Katanga and Chui could only comply with orders from their own leaders, then, neither of the two commanders could be said to exercise control over the will of the subordinates of the other. This diminished the ability of each leader to exercise full control over the manner and type of crimes committed by the subordinates of the other. Attributing the crimes of subordinates of Katanga to Chui and vice versa is, in my view, an overstretching of indirect perpetration under the third alternative of article 25(3)(a).

Second, the PTC's interpretation of article 25(3)(a) to incorporate the notion of indirect co-perpetration is welcome. However, this, in my view, could exclusively apply in situations where the indirect co-perpetrators control the same hierarchical structure, in which case each of them would exercise authority over the direct perpetrators. Consequently, PTC's interpretation would not be debatable if both Katanga and Chui agreed on their common plan to wipe out Bogoro village, being leaders of the same militia group. This is because, in such a case, each would be able to control the will of their common subordinates and the application of the PTC's indirect co-perpetration formulation would justifiably apply.

²⁷⁴ *Katanga and Chui case (Confirmation of Charges)* para. 498. The most common scenario involves the control exercised by means of organized hierarchical structure (*Organisationsherrschaft* in German jurisprudence). In such a structure, the superiors are able to exercise control over the conduct of the subordinates. Both seniors and subordinates are criminally liable. See Werle (2009: 179, marginal no. 476).

²⁷⁵ *Katanga and Chui case (Confirmation of Charges)* paras. 500-518.

There is no doubt the case against Katanga and Chui clearly suited the notion of perpetration-by-means. The disputable part of the PTC's reasoning as regards vertical level of liability would have been solved in two ways: (i) the charges should have been confirmed based on indirect perpetration and not indirect co-perpetration. In this case, only crimes committed by the subordinates of Katanga and Chui would be attributed to them separately. Thus, the Prosecutor would have to apportion the crimes accordingly, in which case, for instance, the 200 murders of civilians in Bogoro village would not be sought to be attributed to each of them. This, however, might not have been very easy for the Prosecutor. He could, however, go for the following second option: (ii) since perpetration-by-means in the case of Katanga and Chui involved the scenario of superior-subordinate relationship in a military set up, the PTC could, instead of overstressing indirect co-perpetration, confirm the charges under article 25(3)(b) for ordering the commission of the crimes or under article 28 as responsibility of commanders, even though this would lower the degree of criminal responsibility.²⁷⁶

At this stage suffices it to say that some aspects of the concept of indirect co-perpetration as applied specifically to the Katanga and Chui case are likely to be contestable issues at the trial or appeal stage (if any). Whether the PTC's interpretation will be upheld in the future cases also remains to be seen.

²⁷⁶ It should be noted that, even the Prosecutor had preferred the charges under article 25(3)(a) and in the alternative under article 25(3)(b) or 28. The PTC acknowledged that the charged could be also confirmed under these two articles. It noted, however, that article 25(3)(a) entails principal liability while the others- 25(3)(b) to (d) and 28 entail only accessorial liability. As a result, confirmation of charges under article 25(3)(a) renders the others moot because article 25(3)(a) involves the highest degree of criminal responsibility under the ICC Statute. See *Katanga Case (Confirmation of Charges)* para.4721; also see Werle (2009: 178, marginal no. 474).

4.6 Concluding Remarks

This chapter critically discussed two legal issues arising from the PTC decision on the DRC cases. The first issue is the admissibility of the cases. In this regard, it has been argued that such admissibility was, as a matter of principle, dependent on the fulfillment of the complementarity principle. As it has been shown, the DRC cases were admissible for ‘inaction’ as a ground additional to unwillingness and inability to prosecute provided for under article 17 of the ICC Statute. The issue has been concluded that admissibility on this ground has not violated the principle of complementarity and was a good cause in the fight against impunity. The second legal issue addressed is commission as a mode of criminal participation in crime. In this regard, it has been asserted that under the ICC Statute, the perpetrator’s mode of participation is determined by his control over the crime and not by subjective or objective tests. The interpretation of article 25(3)(a) by the PTC has been welcomed, although the author has expressed some reservation to some aspects of the notion of vertical mutual attribution of liability in the circumstances specific to Katanga and Chui case. In the following chapter the study highlights, among other things, the importance of the DRC cases in the ICC’s jurisprudence.

CHAPTER FIVE

GENERAL OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Lessons from the DRC Cases

Like the landmark IMT judgment of the Nuremberg Tribunal in 1946, the two decisions in the two DRC cases have their own significance and a history to make. Notwithstanding the preliminary nature of the proceedings from which they emanate, the two decisions are an indication that the ICC has started to develop its own jurisprudence which is independent from that of the predecessor *ad hoc* Tribunals. This jurisprudence will mostly be shaped by the interpretation of the ICC Statute and not the international customary law or a mechanical transfer of judicial precedents from the *ad hoc* Tribunals. In this regard, this study has identified some novelty in the first two cases at ICC. First, in the DRC cases, the ICC has applied the principle of perpetration-by-means which is a new in international law.²⁷⁷ Second, the notion of joint commission under the ICC is similar but not the same as that of joint criminal enterprise which features most prominently in the jurisprudence of the ICTY. Third, principal liability under the ICC Statute is determined exclusively by the control of the crime test and not by the objective or subjective test adopted by the ICTY. In this regard, the PTC leaves no doubt as to the willingness of the ICC to explore its own path to develop its own

²⁷⁷ According to Werle (2009: 169, marginal no. 447), the concept of perpetration-by means has no direct basis in customary international law. Its inclusion in the ICC Statute and its application on the DRC cases is, therefore, a new development.

jurisprudence.²⁷⁸ The path to ICC's own jurisprudence has, therefore, started with the two DRC cases, and will definitely continue to shape subsequent cases.²⁷⁹

5.2 Conclusions

5.2.1 The DRC Conflict

The study reveals that the conflict in the DRC is multi-dimensional based on leadership history, ethnicity, greed and external influence. This has led the attempts to end the conflict through several methods such as political agreements, passing of amnesty laws and interference of international and regional stakeholders. Despite all these efforts, the conflict which started in 1996 still exists to date in the eastern part of the country. The civilian population has fallen victim of grave war crimes and crimes against humanity which the DRC has not been able to stop or punish.

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5.2.2 ICC's Intervention in the DRC

The intervention of the ICC in the DRC conflict is a timely response to the serious violation of international criminal law. It is meant to achieve the spirit of the states parties to the Rome Statute to put an end to the impunity which persists in the DRC. However, this intervention is not sufficient in its own to adequately address the impunity. This is due to its limitedness in terms of jurisdiction. ICC's jurisdiction over the DRC situation is limited by time, such that it can be exercised only over the crimes

²⁷⁸ Weigend (2008: 478).

²⁷⁹ At first, the Lubanga decision shaped the Katanga and Chui decision on the question of modes of participation. N.B. the notion of 'inaction' as a basis of admissibility has been used by the PTC in subsequent cases. See note 213 above.

committed after 1 July 2002.²⁸⁰ As a result, crimes committed during the first and second Congo wars fall outside the mandate of the ICC.

5.2.3 Complementarity

As the study shows, complementarity demands that primary jurisdiction of prosecuting and punishing international crimes committed in the DRC be left to domestic jurisdictions. The ICC can only have a secondary jurisdiction as the court of last resort when it is established that the domestic jurisdictions cannot fulfill this obligation. On this basis, the ICC is not meant to replace but to supplement the obligation of states in the fight against impunity. The study shows that, the principle of complementarity must, therefore, be interpreted in a manner which is consistent with the spirit of the Rome Statute i.e. to ensure that crimes against international law do not go unpunished. Consequently, this principle should not be used as an escape route by perpetrators of international crimes by confining it to the interpretation of “unwillingness” and “inability” under article 17 of the ICC Statute. When it is evident that such crimes have been committed and no state is actively prosecuting them (“inaction”), the prosecution by the ICC will be justified and will not violate the principle of complementarity.

²⁸⁰ ICC Statute, Art.126. This is also referred to as limitation of jurisdiction *ratione temporis* of the ICC; also see Werle (2009: 86, marginal no. 238).

5.2.4 Modes of Participation

The study also addressed commission as a mode of criminal participation under the ICC Statute. In doing so, the study confined itself to the reasoning adopted by the PTC when confirming the charges against Lubanga, Katanga and Chui as regards perpetration and indirect perpetration. It has been indicated that, this is the preliminary position taken by the ICC at the pre-trial stage.²⁸¹ Much of its formulation is welcome, although the author has expressed skepticism about the PTC's innovation on vertical attribution of liability in the specific circumstances of the Katanga and Chui case.

5.3 Recommendations

5.3.1 Retributive Justice

It is clear that due to jurisdictional limitations, the ICC cannot prosecute perpetrators who committed crimes in the DRC prior to 1 July 2002. However, the violation of international criminal law committed prior to this date should not go unpunished. Apparently, the international law crimes under the ICC Statute are not completely a new invention. Most of them constituted codified crimes under customary international law before the ICC Statute was adopted.²⁸² They are, on this ground, prosecutable under the principle of universal jurisdiction or that of *aut dedere aut judicare*. The principle of legality²⁸³ is not an obstacle to grounding criminality in

²⁸¹ The ICC's final position on this matter will be known when the Trial Chamber issues its final decisions of the cases and any decisions on appeals (if any) by the Appeals Chamber.

²⁸² E.g. the Geneva Convention (IV) of 12 August 1949 and the additional Protocols to the Geneva Conventions of 8 June 1977 had already codified customary international law of war crimes into international treaty law. See Werle (2009: 14, marginal no. 42).

²⁸³ Notably, the principle itself is a part of customary law. According to it, no crime can be punished or sanction imposed unless, at the time of commission of the crime, the conduct entailed was criminal and

customary law.²⁸⁴ It is, therefore, recommended to third states to proceed on these bases and exercise their right and obligation to prosecute crimes under international law. This will make it possible for other perpetrators from outside the DRC to account for their crimes committed on the territory of the DRC. The ICC does not intend to prosecute all the perpetrators of crimes in the DRC. Its strategy and ability is to prosecute a few perpetrators who bear the most responsibility for the crimes.²⁸⁵ Therefore, the DRC must conduct domestic prosecutions against those who bear lower responsibility based on its domestic laws. This is important as it will fill the impunity gap which is left by the ICC strategy.

5.3.2 Restorative Justice

Apart from domestic and international prosecutions, the DRC has other options of dealing with its past. Notably, the experience from other similar conflicts shows that a criminal justice strategy alone cannot address such a looming impunity gap as the one in the DRC. In Sierra Leone, for instance, the parallel existence of an international criminal justice mechanism, the Special Court of Sierra Leone and the Sierra Leone TRC proved to be effective options in addressing post-conflict justice.²⁸⁶ A similar option was adopted by post-apartheid South Africa which embarked on the reconciliation process through a TRC to which prosecutions, conditional amnesties and reparations were

the sanction had been prescribed by an existing law (*nullum crimen sine lege, nulla poena sine lege*). See Werle (2009: 37, marginal no. 104).

²⁸⁴ Werle (2009: 51, marginal no. 141).

²⁸⁵ See the Policy Paper, p. 3.

²⁸⁶ Schabas (2001: 21 et seq.).

tied.²⁸⁷ Besides prosecutions, justice demands that victims of the crimes in the DRC have the right to know the truth about what happened and, where possible, be compensated for their suffering.²⁸⁸ On this ground, it is recommended that the DRC authorities reconsider the use of restorative justice mechanisms. These would include establishment of another fully mandated TRC and special schemes for reparations to the victims of the conflict. Such efforts will supplement ICC's work on the DRC and ensure that neither justice nor peace is compromised.

(20,450 words)



²⁸⁷ Werle (1996: 58 et seq.). For a detailed discussion on the relationship between restorative and retributive justice see Yav Kashtung (2005: 1 et seq.).

²⁸⁸ Adjami and Mushiata (2005: 6).

REFERENCES

A PRIMARY SOURCES

i Agreements, Treaties, Conventions and Resolutions

Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Annex 1 to Resolution RC/Res.6 adopted at the 13th Plenary Meeting of Assembly of State Parties on 11 June 2010 (not yet in force); available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [accessed on 16 July 2010].

Charter of the International Military Tribunal at Nuremberg appended to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War adopted on 12 August 1949 and entered into force on 21 October 1950.

Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo signed in Pretoria on 16 December 2002; available at <http://www.iss.co.za/AF/profiles/drcongo/cdreader/bin/6global.pdf> [accessed on 18 May 2010].

Lusaka Ceasefire Agreement between the Democratic Republic of Congo, Namibia, Angola, Zimbabwe, Uganda and Rwanda signed on 10 July 1999; available at

<<http://www.iss.co.za/af/profiles/drcongo/cdreader/bin/2lusaka.pdf>> [accessed on 16 May 2010].

Peace Agreement between the Governments of the Republic of Rwanda and the DRC on the Withdrawal of the Rwandan Troops from the Territory of the DRC and the Dismantling of the Ex-FAR and *Interahamwe* Forces in the DRC signed in Pretoria on 30 July 2002; available at

<http://www.usip.org/files/file/resources/collections/peace_agreements/drc_rwanda_pa07302002.pdf> [accessed on 18 May 2010].

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, adopted on 8 June 1977 and entered into force on 7 December 1978.

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict, adopted on 8 June 1977 and entered into force on 7 December 1978.

Rome Statute of the Establishment of the International Criminal Court, A/CONF.183/9 adopted on 17 July 1998 and entered into force on 1 July 2002.

Statute of the International Criminal Tribunal for the Former Yugoslavia, UN DOC S/RES/827 (1993) adopted on 25 May 1993.

Statute of the International Criminal Tribunal for Rwanda, UN DOC S/RES/955 (1994) adopted on 8 November 1994.

United Nations Security Council Resolution Number S/RES/1468 (2003) adopted on 20 March 2003; available at <[http://www.undemocracy.com/S-RES-1468\(2003\).pdf](http://www.undemocracy.com/S-RES-1468(2003).pdf)> [accessed on 26 May 2010].

United Nations Security Council Resolution Number S/RES/1555(2004) adopted on 29 July 2004; available at <[http://www.undemocracy.com/S-RES-1555\(2004\).pdf](http://www.undemocracy.com/S-RES-1555(2004).pdf)> [accessed on 20 May 2010].

United Nations Security Council Resolution Number S/RES/1592 (2005) adopted on 30 March 2005; available at <<http://www.worldlii.org/int/other/UNSCRsn/2005/12.pdf>> [accessed on 25 May 2010].

United Nations Security Council Resolution Number S/RES/1596 (2005) adopted on 3 May 2005; available at <<http://www.worldlii.org/int/other/UNSCRsn/2005/19.pdf>> [accessed on 25 May 2010].

United Nations Security Council Resolution Number S/RES/1621(2005) adopted on 6 September 2005; available at <<http://www.worldlii.org/int/other/UNSCRsn/2005/41.pdf>> [accessed on 25 May 2010].

United Nations Security Council Resolution Number S/RES/1649(2005) adopted on 21 December 2005; available at <<http://www.worldlii.org/int/other/UNSCRsn/2005/69.pdf>> [accessed on 25 May 2010].

United Nations Security Council Resolution Number S/RES/1799 (2008) adopted on 15 February 2008; available at <[http://www.undemocracy.com/S-RES-1799\(2008\).pdf](http://www.undemocracy.com/S-RES-1799(2008).pdf)> [accessed on 25 May 2010].

Vienna Convention on the Law of Treaties adopted on 23 May 1969 and entered into force on 27 January 1980.

ii Cases

Armed Activities on the Territory of the Congo (The Democratic republic of Congo v. Uganda), ICJ: Application instituting the proceeding, filed on 23 June 1999.

Armed Activities on the Territory of the Congo (New application: 2002) (The Democratic republic of Congo v. Rwanda), ICJ: Application instituting the proceeding, filed on 23 June 1999.

Armed Activities on the Territory of the Congo (New application: 2002) (The Democratic republic of Congo v. Rwanda), Jurisdiction and the Admissibility of the case, ICJ Judgment of 3 February 2006.

Armed Activities on the Territory of the Congo (New application: 2002) (The Democratic republic of Congo v. Burundi), ICJ: Application instituting the proceeding, filed on 23 June 1999.

Case Concerning the Armed Activities on the Territory of Congo (the Democratic Republic of Congo v. Uganda), ICJ: Judgment of 19 December 2005.

Decision on the Prosecutor's Application for a Warrant of Arrest (Thomas Lubanga), Article 58, Doc. No. ICC-01/04-01/06; Pre-Trial Chamber decision of 10 February 2006.

Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, (Classified as Public Document), Doc. No. ICC-01/04-1; Decision of ICC Presidency of 5 July 2004.

Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Appeal of Mr. Germain Katanga against the Oral Decision of the Trial Chamber II of 12 June 2009 on the Admissibility of the Case), Doc. No. ICC-01/04-01/07-1497, Appeals Chamber decision of 25 September 2009.

Prosecutor v Thomas Lubanga (Confirmation of Charges), Doc. No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I decision of 29 January 2007.

Prosecutor v Thomas Lubanga Dyilo (Warrant of Arrest) (Issued under Seal), Doc. No. ICC-01/04-01/06-2-tEN, Pre-Trial Chamber I decision of 10 February 2006.

Prosecutor v Thomas Lubanga (Decision on the prosecutor's Application for a Warrant of Arrest) (issued under Seal), Doc. No. ICC-01/04-01/06-8-US-Corr, Pre-Trial Chamber I decision of 10 February 2006, annexed to Doc. No. ICC-01/04-01/06-8-Corr (Public Document); Pre-Trial decision of 24 February 2006.

Prosecutor v. Mathieu Ngudjolo Chui (Warrant of Arrest) (Issued under Seal), Doc. No. ICC-01/04-02/07-1-tENG; Pre-Trial Chamber I decision of 6 July 2007.

Prosecutor v Germain Katanga (Warrant of Arrest) (Issued under Seal), Doc. No. ICC-01/04-01/07-1-US-tENG; Pre-Trial Chamber I decision of 2 July 2007.

Prosecutor v Bosco Ntaganda (Warrant of Arrest), (Public Document) Doc. No. ICC-01/04-02/06-2-Anx-tENG; Pre-Trial Chamber I decision of 22 August 2006.

Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Confirmation of Charges), Doc. No. ICC-01/04-01/07-717; Pre-Trial Chamber I decision of 30 December 2008.

Prosecutor v Mathieu Ngudjolo Chui, Decision on the Joinder of Cases against Germain Katanga and Mathieu Ngudjolo Chui, Doc. No. ICC-01/04-01/07-257; Pre-Trial Chamber I decision of 10 March 2008.

Prosecutor v Ahman Harun & Ali Kushayab, Decision on the Prosecution Application under article 58 (7) of the Statute, Doc. No. ICC-02/05-01/07-1-Corr; Pre-Trial Chamber I decision of 27 April 2007.

The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Judgment of 1 October 1946.

Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005 (Public Redacted Version), Doc. No. ICC-02/04-01/05-53; Pre-Trial Chamber II decision of 27 September 2005.

iii Reports

Amnesty International (2004) *Democratic Republic of the Congo: Mass Rape - Time for Remedies: Report on the Human Rights Violations in DRC Congo*; available at http://www.amnesty-eu.org/static/documents/DRC_main.pdf [accessed on 13 March 2010].

Human Rights Commission (2000) *Report of the Special Rapporteur, Mr. Roberto Garretón on the Situation of Human Rights in the Democratic Republic of the Congo*, Doc. No. (E/CN/4/2000/42; available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/87cbe9be9dc541db802568b300561be2?Opendocument> [accessed on 18 March 2010].

Human Rights Watch (2003) *ITURI: "COVERED IN BLOOD" - Ethnically Targeted Violence in North-Eastern DR Congo*, Vol. 15 No. 11(A) - July 2003, Human Rights Watch: New York.

International Crisis Group: *The Inter-Congolese Dialogue: Political Negotiation or Game of Bluff?* Africa Report Number 37 dated 16 November 2001; available at [http://www.crisisgroup.org/~media/Files/africa/central-africa/dr-congo/The%20InterCongolese%20Dialogue%20Political%20Negotiation%20or%20Game%20of%20Bluff.ashx](http://www.crisisgroup.org/~/media/Files/africa/central-africa/dr-congo/The%20InterCongolese%20Dialogue%20Political%20Negotiation%20or%20Game%20of%20Bluff.ashx) [accessed on 21 May 2010].

International Criminal Court, *Report of the Second Session of Assembly of States Parties*; available at <http://untreaty.un.org/cod/icc/asp/second.htm> [accessed on 8 March 2010].

International Rescue Committee (2008) *Measuring Mortality in the Democratic Republic of Congo: Fifth Mortality Report on the DRC, January 2008*; available at <http://www.theirc.org/sites/default/files/resource-file/IRC_DRCMortalityFacts.pdf> [accessed on 6 May 2010].

United Nations Security Council (2007), *Report of the Secretary - General on Children and Armed Conflict in the Democratic Republic of the Congo*, S/2007/391, dated 28 June 2007; available at <http://www.adhgeneva.ch/RULAC/pdf_state/DRC.SGreportchildrenAC.2007.pdf> [accessed on 13 March 2010].

United Nations, *Third Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo of 12 June 2000*, S/2000/566; available at <<http://www.un.org/Docs/sc/reports/2000/sgrep00.htm>> [accessed on 13 May 2010].

United Nations (2008) *Promotion and Protection of all Human Rights: Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*; available at <http://www.adh-geneva.ch/RULAC/pdf_state/DRC.HRC.violence.womenandchildren.pdf> [accessed on 14 March 2010].

United Nations (2008) *Promotion and Protection of all Human Rights: Civil, Political, Economic, Social and Cultural, Including the Right to Development: Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin*

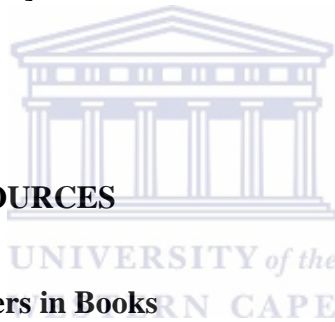
Ertürk, Distr.GENERALA/HRC/7/6/Add.4, 28 February 2008; available at

<http://www.adhgeneva.ch/RULAC/pdf_state/DRC.HRC.violence.womenandchildren.pdf> [accessed on 14 March 2010].

United Nations (2008) *Promotion and Protection of all Human Rights: Civil, Political, Economic, Social and Cultural, Including the Right to Development*: Report of the Representative of the Secretary-General on the human rights of the internally displaced persons, Walter Kälin, Distr.GENERALA/HRC/8/6/Add.3, 16 May 2008; available at

<<http://www.adhgeneva.ch/RULAC/pdfstate/DRC.SituationofHR.HRC2008.pdf>>

[accessed on 13 March 2010].



B SECONDARY SOURCES

i Books and Chapters in Books

Arnold, R (2008) 'Article 28 - Responsibility of Commanders and Superiors' in Triffterer, O (ed.) *Commentary on the Rome Statute of the International Criminal Court* 2nd ed. Verlag C.H Beck OHG: München.

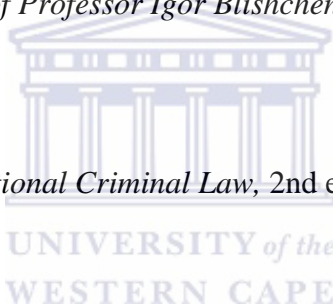
Batros, B (2009) 'The Evolution of the ICC Jurisprudence on Admissibility' in Stahn, C and ElZeidy, M (eds.) *The international Criminal Court and Complementarity: From Theory To Practice*, Cambridge University Press: London.

Benvenuti, P (1999) 'The Complementarity of the International Criminal Court to National Criminal Jurisdictions' in Latanzi, F and Schabas, W (eds.) *Essays on the Rome Statute of the International Criminal Court* Vol 1, il Sirente: Rome.

Benvenuti, P (2008) 'Complementarity of the International Criminal Court' in Ellis, M and Goldstone, R *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, IDEBATE Press: New York.

Blakesley, C (2009) 'Jurisdiction *Ratione Personae* or the Personal Reach of the Courts Jurisdiction' in Doria, J *et al.* (eds.) *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers: Boston.

Cassese, A (2008) *International Criminal Law*, 2nd ed. Oxford University Press: New York.



David, E (2009) 'Official Capacity and Immunity of an Accused before the International Criminal Court' in Doria J *et al.* (eds.) *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers: Boston.

DeGuzman, M (2008) 'Article 21 - Applicable Law' in Triffterer, O (ed.) *Commentary on the Rome Statute of the International Criminal Court* 2nd edn. Verlag C.H Beck OHG: München.

Delmas-Martty, M (2008) 'Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC', in Ellis, M and Goldstone, R *The*

International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century, IDEBATE Press: New York.

Ellis, M (2008) 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' in Ellis, M and Goldstone, R *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, IDEBATE Press: New York.

ElZeidy, M (2008) *The Principle of Complementarity in International Criminal Law: Origin Development and Practice*, Martinus Nijhoff Publishers: Boston.

Garraway, C (2009) 'The Doctrine of Command Responsibility' in Doria, J *et al.* (eds.) *The Legal Regime of the International Criminal Court Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers: Boston.

Gondola, D (2002) *The History of Congo*, Greenwood Press: New York.

Kawimbi, T (2008) 'Between Peace and Justice: Informal Mechanisms in the DR Congo' in Aertsen *et al.* (eds.) *Restoring Justice after Large –Scale Violent Conflicts: Kosovo, DR Congo and the Israel-Palestinian Case*, William Publishing: Oregon.

Kleffner, J (2008) *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press: New York.

Koops, G (2009) 'The Transposition of Military Commander's Discretion onto International Criminal Responsibility for Military Commanders: An Increasing Legal-Political Dilemma within International Criminal Justice' in Doria, J *et al.* (eds.) *The*

Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko, Martinus Nijhoff Publishers: Boston.

Latanzi, F (1999) 'The Rome Statute and State Sovereignty: The ICC Competence, Jurisdictional Links and Trigger Mechanism' in Latanzi, F and Schabas, W (eds.) *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, il Sirente: Rome.

Meredith, M (2005) *The State of Africa: A History of Fifty Years of Independence*, Free Press: London.

Musila, G (2009) 'Between Rhetoric and Action-The Politics, Processes and Practice of the ICC's Work in the DRC' *Institute of Security Studies Monograph 164*, ISS: Cape Town.

Nsereko, D (2008) 'Article 18 - Preliminary Rulings Regarding Admissibility' in Triffterer, O (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. Verlag C.H Beck OHG: München.

Ntalaja, G (2002) *The Congo from Leopold to Kabila: A People's History*, Zed Books Ltd: New York.

Robinson, D (2008) 'The Rome Statute and Its Impact on National Law' in Ellis, M and Goldstone, R *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, IDABATE Press: New York.

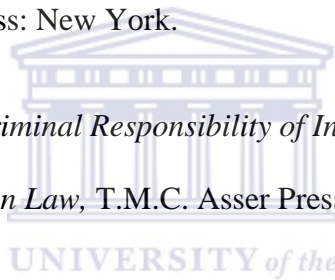
Savage, T and Kambala, O (2008) 'Decayed, Decimated, Usurped and Inadequate: the Challenge of Finding Justice through Formal Mechanisms in the DR Congo' in Aertsen

et al. (eds.) *Restoring Justice after Large –Scale Violent Conflicts: Kosovo, DR Congo and the Israel-Palestinian Case*, William Publishing: Oregon.

Savage, T and Vanspauwen, K (2008) 'The Conflict in the DR Congo: A Story of Failed Transitions and Interlocking Conflicts', in Aertsen *et al.* (eds.) *Restoring Justice after Large Scale Violent Conflict: Kosovo, DR Congo and the Israel-Palestinian Case*, William Publishing: Oregon.

Schabas, W (2001) 'The Sierra Leone Truth and Reconciliation Commission' in Roht-Arriaza, N and Mariezcurrena, J (eds.) *Transitional Justice in the Twenty-First Century*, Cambridge University Press: New York.

Sliedregt, E (2003) *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press: The Hague.



Triffterer, O (2008) 'Preliminary Remarks: The Permanent International Court-Ideal and Reality' in Triffterer, O (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. Verlag C.H Beck OHG: München.

Triffterer, O (2008) 'Article 33 - Superior Orders and Prescription of Law' in Triffterer, O (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. Verlag C.H Beck OHG: München.

Turner, T (2007) *The Congo Wars: Conflict, Myth and Reality*, Zed Books Ltd: London.

Werle, G (2009) *Principles of International Criminal Law* 2nd edn. T.M.C. Asser Press: The Hague.

Williams, S and Schabas, W (2008) 'Article 17- Issues of Admissibility' in Triffterer, O (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. Verlag C.H Beck OHG: München.

Williams, S and Schabas, W (2008) 'Article 12 - Preconditions to the Exercise of Jurisdiction' in Triffterer, O (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. Verlag C.H Beck OHG: München.

Zimmermann, A (2008) 'Article 5 - Crimes within the Jurisdiction of the Court' in Triffterer, O (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn. Verlag C.H Beck OHG: München.



ii Journal Articles

Akhavan, P (2010) 'Self-Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?' 21 *Criminal Law Forum*, 103–120.

Alosolo, H (2009) 'Joint Criminal Enterprise and its Extended Form: A Theory of Co-perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability or a Form of Partnership in Crime?' 20 *Criminal Law Forum*, 263-287.

Anteserre, S (2006) 'Local Violence, National Peace? Post-War "Settlement" in the Eastern DR Congo (2003-2006)' 49 (3) *African Studies Review*, 1-29.

Arsanjani, M and Reisman, W (2005) 'The Law-in-Action of the International Criminal Court' 99 (2) *The American Journal of International Law*, 385-403.

Burke-White, W (2005) 'Complementarity in Practice: The international Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo' 18 *Leiden Journal of International Law*, 557-590.

Ericksen, S (2005) 'The Congo Wars and Prospects for State Formation: Rwanda and Uganda Compared' 26 (7) *Third World Quarterly*, 1098-1107.

Elzeidy, M (2008) 'Form Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad hoc Tribunals' 57 (2) *The International and Comparative Law Quarterly*, 403-415.

Hochschild, A (2001) 'Congo's Many Plunderers' 36 (4) *Economic and Political Weekly*, 287-288.

Olsson, O and Fors, H (2004) 'Congo: The Prize of Predation' 41(3) *Journal of Peace Research*, 321-336.

Philippe, X (2006) 'The principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?' 88 *International Review of the Red Cross*, 375-388.

Pichon, J (2008) 'The Principle of Complementarity in the Cases of Sudanese Nationals Ahmed Harun and Ali Kushaby before the International Criminal Court' 8 *International Criminal Review*, 185-228.

Rupiya, M and Boshoff, H (2003) 'Delegates, Dialogue and Desperadoes: The ICD and the DRC Peace Process' 12 (3) *African Security Review*, 29-37.

Sadat, L (2007) 'Judgment at Nuremberg: Foreword to the Symposium' 6(491) *Washington University Global Studies Review*, 491-499.

Smis, S and Trefon, T (2003) 'Congo: Waiting for Godot' 30 (98) *Review of African Political Economy*, 671-678.

Stahn, C *et al.* (2005) 'The International Criminal Court's *Ad hoc* Jurisdiction Revisited' 99 (2) *The American Journal of International Law*, 421-431.

Tomuschat, C (2006) 'The Legacy of the Nuremberg' 4 *Journal of International Criminal Justice*, 830-844.

Tzatzaki, M (2008) 'Case Concerning Armed Activities in the Territory of Congo (The Democratic Republic of Congo v. Uganda)' 1 *Greek Law Journal*, 283-288.

Werle, G (1996) 'Without Truth, No Reconciliation. The South African *Rechtsstaat* and the Apartheid Past' 29 *Verfassung und Recht in Übersee* 58-72.

Young, C (1966) 'Post-independence Politics in the Congo' 26 *Transition* 34-41.

iii Internet Sources

Adjami, M and Mushiata, G (2005) 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court'; available at

<http://www.ictj.org/static/Publications/ICTJ_DRC_RSRC-ImpactofICC_bp2010.pdf>

[accessed on 22 September 2010].

American Non-Governmental Organizations Coalition for the International Criminal Court (2006) 'The Current Investigation by the ICC of the Situation in the Democratic Republic of the Congo'; available at <http://www.amicc.org/docs/Democratic%20Republic%20of%20Congo.pdf> [accessed on 31 August 2010].

American Non-Governmental Organizations Coalition for the International Criminal Court (2007) 'The Case of Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui at the ICC'; available at <http://www.amicc.org/docs/KatangaNgudjolo.pdf> > [accessed on 27 August 2010].

Amnesty International (2006) 'Democratic Republic of the Congo: International Criminal Court's First Arrest Must be Followed by others throughout the Country'; available at <http://www.crin.org/resources/infoDetail.asp?ID=7774&flag=news> [accessed on 16 March 2010].

Hartung, W and Moix, B (2000) 'Deadly Legacy: U.S Arms to Africa and the Congo War, Arms Trade Resource Centre, World Policy Institute'; available at <http://www.worldpolicy.org/projects/arms/reports/congo.htm> > [accessed on 8 May 2010].

Human Rights Watch (2003) 'Covered in Blood: Ethnically Targeted Violence in Northern DR Congo'; available at <http://www.hrw.org/en/reports/2003/07/07/covered-blood> > [accessed on 11 March 2010].

International Criminal Court (2003) 'Paper on some Policy Issues before the Office of the Prosecutor'; available at <http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf> [accessed on 22 May 2010].

International Criminal Court (2004) 'Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo', ICC-OTP-2004-04 19-50: Press Release dated 19 April 2004; available at <<http://www.icc-cpi-int/Menu/ICC/Situations+and+Cases/>> [accessed on 8 March 2010].

International Criminal Court (2004) 'The Office of the Prosecutor of the International Criminal Court Opens its First Investigation', Press release dated 23 June 2004; available at <<http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/>> [accessed on 8 March 2010].

International Criminal Court, *Provisional Memorandum of Understanding on the Privileges and Immunities between the International Criminal Court and the Democratic Republic of Congo*, Doc. No. ICC-CPI-20041012-79, Press release dated 12 October 2004; available at <<http://www.icccpi.int/menu/icc/press%20and%20media/press%20releases/2004/provisional%20memorandum%20of%20understanding%20on%20the%20privileges%20and%20immunities%20between%20the%20international%20c>> [accessed on 31 August 2010].

Moreno-Ocampo, L (2006) 'Lessons from the First Cases'; available at <<http://www.sbg.ac.at/salzburglawschool/Retreat.pdf>> [accessed on 26 May 2010].

Ofei, P (2008) 'The International Criminal Court and the Principle of Complementarity: A Comparison of the Situation in the Democratic Republic of Congo and Dafur'; available at <<http://www.up.ac.za/dspace/bitstream/2263/8094/1/ofei.pdf>> [accessed on 18 March 2010].

Pottier, J (2003) 'Emergency in Ituri, DRC: Political Complexity, Land and other Challenges in Restoring Food Security'; available at <<ftp://ftp.fao.org/docrep/fao/Meeting/009/ae515e.pdf>> [accessed on 10 March 2010].

Sagaga, E 'The Dilemmas of International Justice. The International Criminal Court: Justice v. Peace'; available at <<http://www.justicerights.wordpress.com/resources/papers-misc/>> [accessed on 21 May 2010].

The Hague Justice Portal, 'Situation in the Democratic Republic of Congo'; available at <<http://www.haguejusticeportal.net/eCache/DEF/6/174.html>> [accessed on 21 May 2010].

United States Institute of Peace, 'Truth Commission: Democratic Republic of Congo'; available at <http://www.usip.org/resources/truthcommissions_democratic_republic_congo> [accessed on 17 May 2010].

Wikipedia Free Encyclopedia 'The Democratic Republic of the Congo'; available at <http://en.wikipedia.org/wiki/Democratic_Republic_of_the_Congo#cite_ref-11> [accessed on 8 May 2010].

Wikipedia Free Encyclopedia, 'First Congo War'; available at
<http://en.wikipedia.org/wiki/First_Congo_War> [accessed on 8 May 2010].

Yav Kashtung, J (2005), 'The Relationship between the International Criminal Court and Truth Commissions: Some Thoughts on How to Build a Bridge across Retributive and Restorative Justices'; available at

<http://www.iccnw.org/documents/InterestofJustice_JosephYav_May05.pdf>
[accessed on 22 September 2010].

iv News Reports

B.B.C 'Amnesty Law for the DRC Militias' *B.B.C World News*, Thursday, 7 May 2009
[online]; available at <<http://news.bbc.co.uk/2/hi/africa/8037891.stm>> [accessed
on 18 May 2010].

Voice of America 'Democratic Republic of Congo to Hold Free Elections in Two
Weeks' *VoA News.Com*, 17 July 2006 [online]; available at

<<http://www1.voanews.com/english/news/africa/a-13-2006-07-17-voa34.html>>
[accessed on 18 May 2010].