



# COMPLEMENTARITY IN THE CONGO: THE DIRECT APPLICATION OF THE ROME STATUTE IN THE MILITARY COURTS OF THE DRC

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**DOMAC/12, NOVEMBER 2011**

## ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

**THE DOMAC PROJECT** is a research program funded under the Seventh Framework Programme for EU Research (FP7) under grant agreement no. 217589. The DOMAC project is funded under the Socio-economic sciences and Humanities Programme for the duration of three years starting 1st February 2008.

**THE DOMAC PARTNERS** are Hebrew University, Reykjavik University, University College London, University of Amsterdam, and University of Westminster.



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## ACKNOWLEDGEMENTS

The author would like to thank her colleagues who provided helpful comments, and especially to Prof. Harmen van der Wilt for his continued and insightful critique throughout the process. The author would also like to thank Mr. Dunia Zongwe for his invaluable comments.

This paper represents not the collective views of the DOMAC, but only the views of its author

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Published by DOMAC

Reykjavik University

Menntavegi 1, 101 Reykjavik

Iceland

[www.domac.is](http://www.domac.is)

## EXECUTIVE SUMMARY

For over a decade, the Democratic Republic of the Congo (DRC) has been plagued by violent clashes between government and rebel forces. The violence that has scarred the country has also given rise to massive violations of international humanitarian law. Since the DRC became a party to the Rome Statute in 2002, a growing light has been shed upon the need to challenge impunity for the mass atrocities committed since war first broke out in 1996. While the International Criminal Court has been the venue for a handful of cases from the region, the onus for prosecuting violations of international humanitarian law lays with the national courts. At present, the civilian national court system of the DRC is not functioning at a capacity to deal with the needs of the prosecuting for international crimes, thus the military court system has become the primary venue for such cases. The military system faces a myriad of difficulties and complications in this quest to exact justice in the face of international offences. This report analyzes the legislative evolutions and existing case law in order to draw a picture of the domestic legal structure in place to challenge impunity and its subsequent progress and frustration. The crux of the analysis centers on how international courts and jurisprudence have played a part in the current national prosecutions and to what extent they have acted in a normative capacity.

One of the most notable normative functions international jurisdictions have had upon the national prosecutions in the DRC is in the direct application of The Rome Statute by a handful of the military courts. Despite becoming a party to the Rome Statute almost a decade ago, the DRC has yet to adopt implementing legislation into its national legal coda. The existing military penal legislation for international offences defines them in a manner not in accordance with the Rome Statute and in a manner that courts have found confusing and difficult to apply. Some courts have thus responded by directly applying the Rome Statute to proceedings. The result on an individual case basis has been a move toward defining crimes more in line with international norms as perceived through the Rome Statute, and an increase in the use of international jurisprudence to support judicial decision making. The result in a general sense has been a national system that lacks uniformity in its application of international law to mass atrocity crimes. Ultimately, the picture of the DRC national system that emerges is one that has experienced a certain limited growth toward incorporating international norms, but

remains plagued by a lack of resources and cohesive structure that begs a dependence on international systems in order to meet the goal of challenging impunity for violations of international humanitarian law.

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## LIST OF ABBREVIATIONS

ADF.....	Allied Democratic Forces
ADP.....	Alliance Democratiques des Peuples
AFDL.....	Alliance des Forces Démocratiques pour la Libération du Congo-Zaire
ASF.....	Avocats Sans Frontières
BIH.....	Bosnia and Herzegovina
DRC.....	Democratic Republic of the Congo
EOC.....	Elements of Crimes of Rome Statute
FAC.....	Forces Armées Congolaise
FAR.....	Forces Armeés Rwandaises
FARDC.....	Forces Armées de la République Démocratique du Congo
FAZ.....	Forces Armées Zaïroises
FDLR.....	Democratic Forces for the Liberation of Rwanda
FNI.....	.....Front for National Integration
FRPI.....	Front for Patriotic Resistance in Ituri
HRW.....	Human Rights Watch
ICG.....	International Crisis Group
ICJ.....	International Court of Justice
ICTR.....	International Criminal Tribunal for Rwanda
ICTY.....	International Criminal Tribunal for the Former Yugoslavia
IRC.....	.....International Rescue Committee
LRA.....	Lord’s Resistance Army
MLC.....	Mouvement de Libération du Congo
MONUC...	United Nations Organization Mission in the Democratic Republic of the Congo
MRLK.....	Mouvement Révolutionnaire de Libération du Katanga
MSF.....	Medecines Sans Frontieres
NGO.....	Non-Governmental Organization
OHCHR.....	Office of the High Commissioner for Human Rights
PRP.....	Parti de Révolution Populaire
PUSIC.....	Parti Pour L’Unité et la Sauvegarde de l’Intégrité du Congo
RCD.....	Rassemblement Congolais pour la Démocratie
RPA.....	Rwandan Patriotic Army
UN.....	United Nations



UNJHRO..... United Nations Joint Human Rights Committee

UPC..... Union of Congolese Patriots

UPDF..... Uganda Peoples Defense Forces

## 1. INTRODUCTION

The period between 1996 and 2003 in the Democratic Republic of the Congo (DRC) was marked by the violence of two successive wars. The First War (1996-1997) resulted in the overthrow of then president Mobutu Sese Seko by rebel leader Laurent-Desiré-Kabila, backed by Uganda and Rwanda, and the establishment of the DRC (formerly known as Zaire). The Second War (1998-2003) saw allies become enemies, as Rwanda and Uganda vied for control of areas of the eastern Ituri region of the DRC. The impact of the violence on the Congolese population has been immense and has continued long past the signing of various cease-fire and peace agreements. In 2008, the International Rescue Committee (IRC) estimated that 5.4 million people had died during the war and its aftermath, mostly due to rampant disease and malnutrition.<sup>1</sup> Violations of humanitarian law also contributed to the devastation on the population. In September 2009, the United Nations Joint Human Rights Office (UNJHRO) released two reports detailing the mass atrocities carried out by government and rebel forces in eastern DRC in 2008, claiming that both forces committed violations of international humanitarian law.

## 2. METHODOLOGY

This report examines the normative influence of international law and jurisprudence on the domestic prosecutions for mass atrocity crimes in the DRC. To that end, the report deals primarily with an examination of the domestic legislative structure and its application in judicial proceedings. The report examines the relevant criminal codes and proceedings dealing with crimes of an international nature. Due to geographic and resource limitations, case analysis does not cover all of the cases that have been adjudicated in national courts of the DRC. Therefore, the selection is representative, not exhaustive, and provides an illustrative basis for some of the key legal and normative issues that are present in the current judicial system. The number of mass atrocity cases that have been prosecuted within the national courts in the DRC is slight. The selection chosen for the report is based upon those verdicts available to the author and public, and primarily include acts committed up to the period of the close of the Second War.

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<sup>1</sup> Joe Bavier, 'Congo War-Driven Crisis Kills 45,000 a Month – Study' *Reuters* (Kinshasa 27 January 2008) <<http://www.alertnet.org/thenews/newsdesk/L22802012.htm>> accessed 18 August 2009.

## 3. CONFLICT BACKGROUND

### 3.1 FIRST WAR (1996-1997)

In the early 1990's, President of Zaire, Mobutu Sese Seko, bowed to pro-democracy pressure and nominally relinquished the one party system that had ruled over the country for the better part of three decades.<sup>2</sup> The intended transition, however, was never properly realized as Mobutu held tightly to power and undermined efforts at achieving a proper transitional democratic government. Mobutu's actions had a destabilizing effect on both the government and the people. The disarray of the Mobutu regime had drastic effects on the government armed forces, Forces Armées Zaïroises (FAZ). Disorganization, lack of structure, pay, etc. led to disunity among ranks and a lawless military seeking retribution in attacks against civilian populations.<sup>3</sup> Adding to this precarious situation was the influx of Rwandan refugees that flooded the eastern border regions of Zaire in the wake of the 1994 Rwandan genocide. Amongst the deluge of refugees were members of the Forces Armées Rwandaises (FAR), the former government forces who committed the gravest crimes in Rwanda, and other militia members who had participated in the genocide. The refugee camps that had been setup by international organizations provided perfect shelter for many of the former FAR troops to regroup and attempt further attacks on Rwanda. The government in Kigali, aware of the rearming of forces in the refugee camps, intimated that the situation would lead to war.<sup>4</sup>

The chaos of the failed transition effort and growing instability gave rise to various rebel movements aimed at overthrowing Mobutu's government. The Rwandan Patriotic Army (RPA), the armed forces of the government of Rwanda, utilized this growing anti-

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<sup>2</sup> HRW, 'Zaire: Transition, War and Human Rights' (Report) (1997) <<http://www.hrw.org/legacy/reports/1997/zaire/>> accessed 10 December 2009.

<sup>3</sup> HRW reported that government mismanagement at the hands of Mobutu led to an economic crisis that saw government forces go without pay or provisions for months. The crisis led to a collapse in military discipline. Beginning in January 1993, military forces began massive pillaging campaigns against civilians. My March of that year, the transition process promised by Mobutu collapsed.

<sup>4</sup> Prior to the Rwandan genocide, there existed in Zaire ethnic tension against the Zairians of Rwandan descent known as the Banyarwanda. According to HRW, nationality laws passed in 1972 and 1981 effectively withdrew citizenship from all ethnic Rwandans in Zaire. In 1993, Zairians of other ethnic groups attacked the Banyarwanda, killing as many as 7,000 people. By 1995, the parliament passed laws specifically targeting the Rwandan Tutsi's – the Banyamulenge – living in Zaire. The Banyamulenge sought training and arms across the border. By 1996, as predicted, the tensions came to a head in the Kivu's with the Banyamulenge rebels, as well as, the Hutu genocidaires playing a role in the conflict.

Mobutu sentiment and allied itself with the rebel groups. In 1996, foreign and anti-government forces nominally joined together when the rebel political movement known as the Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre (AFDL) was formed by an agreement between Deogratias Bugera of the Alliance Démocratiques des Peuples (ADP), Laurent Désiré Kabila of the Parti de Révolution Populaire (PRP), Anselme Masasu Nindaga of the Mouvement Révolutionnaire pour la Libération du Zaïre, and André Kisase Ngandu of the Conseil National de Résistance pour la Démocratie.<sup>5</sup> The AFDL formed an alliance with the RPA and in October of the same year, both groups acting in concert with one another launched attacks against refugee camps in North Kivu and South Kivu in the eastern region of Zaire.<sup>6</sup> Then RPA General Paul Kagame swiftly denied the RPA's involvement in the October attacks on refugee camps. However, less than a year later, Kagame admitted that the Rwandan government had "planned and directed" the rebellion against Mobutu and that RPA troops led the rebel forces in their actions.<sup>7</sup> He stated that RPA forces helped train rebel forces prior to the campaign to overthrow Mobutu and that the RPA had captured four cities throughout the fighting, including the capital of Kinshasa.

Throughout this time, Rwanda was not the sole foreign force involved with the armed activities in the DRC in an effort to overthrow Mobutu. The Allied Democratic Forces (ADF), a Ugandan rebel group opposed to the Ugandan government and supported by Sudan, maintained bases in the border region of Zaire. Fearing that the ADF was utilizing its bases to conduct cross border attacks, the government of Uganda made the decision to enter Zaire to stop the ADF.<sup>8</sup> By November of 1996, Ugandan government forces, called the Uganda Peoples Defense Forces (UPDF), were crossing into North Kivu to get to ADF strongholds.<sup>9</sup> In the process, the UPDF extended support to the growing AFDL. By early 1997, the AFDL had gained immense strength due, in

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<sup>5</sup> Gérard Prunier, *From Genocide to Continental War: The 'Congolese' Conflict and the Crisis of Contemporary Africa* (Hurst & Company, London 2009) 113.

<sup>6</sup> Rwandan officials denied Rwandan involvement in Zaire and claimed that the situation was purely an internal affair. Ibid 116-18.

<sup>7</sup> John Pomfret, 'Rwandans Led Revolt in Congo' *Washington Post Foreign Service* (9 July 1997) <<http://www.washingtonpost.com/wp-srv/inatl/longterm/congo/stories/070997.html>> accessed 13 April 2010.

<sup>8</sup> Prunier (n 5) 120-121.

<sup>9</sup> Ugandan President Yoweri Museveni publicly denied Ugandan presence in Zaire and blamed violence on dissident groups that had taken up arms despite the fact that the presence of the UPDF along the border was known and documented by other international forces present in the area. Ibid, 117-18.

part, to the support of both Rwandan and Ugandan forces.<sup>10</sup> The pro-Mobutu forces could not stand up to the combined rebel forces who ultimately took control of many of the towns from the Kivus down to Katanga. By 1997 the forces had taken Kinshasa and Mobutu was overthrown and Laurent Kabila, the nominal leader of the AFDL, was appointed as the president of the newly named Democratic Republic of the Congo.

The attacks carried out by the alliance of Zairian rebels and Rwandan and Ugandan forces emptied the refugee camps. While many refugees returned to Rwanda, others scattered to the forests of the Kivu. The alliance forces, who had killed many refugees during the attacks, utilized the situation to continue killing refugees who had remained in the Kivu. They waited for human rights organizations to draw the refugees out the forests and then proceeded to attack and kill again. Medecines Sans Frontieres (MSF) referred to the acts of the alliance forces as a "...policy of extermination of refugees, including women and children."<sup>11</sup> Regardless of whether the acts may be categorized as a policy of extermination, it is clear that violations of the laws of war took place throughout that time. Human Rights Watch (HRW) similarly reported that throughout the period of overthrow violations of the laws of war were committed by all of the factions involved in the conflict.<sup>12</sup> According to HRW, victims of violence by both government and the AFDL included refugees from the Rwandan genocide – mostly Hutu that were targeted by the AFDL and their allies – and civilians who were reportedly killed, raped and displaced by soldiers from all sides of the conflict.<sup>13</sup>

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<sup>10</sup> The United Nations Office of the High Commissioner (OHCHR) documented the cooperative efforts between Rwanda, Uganda and the forces in the DRC working to overthrow Mobutu. According to their report, armed units from Zaire received military training from the Rwandan army, who also supplied military and logistical support inside the DRC. Additionally, after the formation of the AFDL, forces from Rwanda, Uganda and Burundi, acting under the banner of the AFDL, participated in capturing the provinces of North and South Kivus and the Ituri district. Additionally, the OHCHR asserted that by the later half of 1995, the Rwandan and Ugandan authorities were cooperatively working toward a military intervention in Zaire under the guise of a domestic rebellion; 'Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003', OHCHR, made public 10 August 2010 <[http://www.ohchr.org/Documents/Countries/ZR/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf)> accessed 1 September 2010.

<sup>11</sup> Medecines Sans Frontieres (MSF), 'DRC 1997 – Forced flight: Brutal Strategy of Elimination' (Report) (27 November 1992) <[http://www.msf.org/msfinternational/invoke.cfm?component=report&objectid=A63A4532-BEAO-4BB1-A7AE1EEB4BD27AC7&method=full\\_html](http://www.msf.org/msfinternational/invoke.cfm?component=report&objectid=A63A4532-BEAO-4BB1-A7AE1EEB4BD27AC7&method=full_html)> accessed 7 May 2010.

<sup>12</sup> See HRW Report (n2). HRW reported that throughout the first war the violence committed by all sides included: attacks by FAZ and militia against Banyamulenge villages in South Kivu that included raping, torturing and killing villagers; attacks by AFDL and its allies against refugee camps that led to the violence described above; and, attacks against non-Kinyarwanda speakers by armed groups from all sides the conflict.

<sup>13</sup> HRW, 'Attacked by All Sides' Civilians and the War in Eastern Zaire' (Report) (1 March 1997) <<http://www.unhcr.org/refworld/docid/3ae6a80d0.html>> accessed on 14 September 2009.

### 3.2 SECOND WAR (1998-2003)

The cooperation between Kabila's regime and forces from Rwanda and Uganda that had been so central to Kabila gaining power during the first war began to wane by the end of 1997.<sup>14</sup> In-fighting and a growing animosity toward Kabila fostered led to a breakdown with Rwandan authorities. By 28 July 1998, President Kabila, aware of the growing animosity and threat of foreign forces in the DRC, issued a statement to the press calling specifically for the termination of Rwandan military presence and the "...end of the presence of all foreign military forces in the Congo."<sup>15</sup> Following the statement, both Rwanda and Uganda increased their force presence in order to begin to seize more territory within the border region of the DRC and on 2 August 1998, Tutsi soldiers who had once been loyal to the Forces Armées Congolaise (FAC), with the help of forces from APR, UPDF, the Burundi army and ex-FAZ mounted a rebellion in an attempt to overthrow Kabila.<sup>16</sup>

War was once again a reality in the DRC. The central conflict was between the FAC and the various rebel groups that were growing and thriving on anti-Kabila sentiment. In the wake of the rebellion, anti-Kabila rebel forces, primarily from Rwanda, Uganda and Burundi, unified and on 16 August 1998, they came together and publicly announced the formation of the Rassemblement Congolais pour la Démocratie (RCD). Within weeks, the RCD had taken control of main towns in North and South Kivu, Orientale Province and North Katanga.<sup>17</sup> It is, however, an oversimplification, to say that the war to a conflict just between government forces and one organized group of anti-government rebels. The reality of the situation was that many other players were engaged in the conflict, creating an intricate and difficult web of connections and rivalries. An International Crisis Group (ICG) report from August 1998 illustrated the wide

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<sup>14</sup> On 27 April 1998, the DRC and Uganda signed a Protocol on Security Along the Common Border which recognized the cooperation between the countries in securing the common border from insurgency by rebel groups. See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Merits) [2005] ICJ para 46.

<sup>15</sup> *Ibid* para 49.

<sup>16</sup> UN Mapping Report (n 10) para 308. The relationship between Kabila, Rwanda, and the Tutsi soldiers once loyal to the FAC had deteriorated primarily because the Rwandan authorities and certain Congolese Tutsi soldiers had accused the Congolese president of favoring his Katanga clan, failing to respect his commitments in relation to recognising the right of the Banyamulenge to Congolese nationality and being too conciliatory towards the ex-FAR/Interahamwe and Mai-Mai militias, which were hostile to the presence of the APR in the Congo.

<sup>17</sup> UN Mapping report (n 10) para 309.

list of players engaged in conflict in the Kivus.<sup>18</sup> The report lists involvement, *inter alia*, of Mai Mai rebels,<sup>19</sup> former Rwandan government forces,<sup>20</sup> UPDF, and RPA.

Again, a key factor in the second war in the DRC was the involvement of forces outside of the DRC, most importantly, Rwanda and Uganda. Throughout the second war, it was very clear that allegiances had shifted and Uganda and Rwanda were no longer acting in concert with the Kabila regime. While both Uganda and Rwanda continued to deny involvement in the conflict, they both maintained a presence and were central to forming the RCD forces against Kabila. Additionally, Ugandan and Rwandan forces were considerable enough to occupy and control provinces and regions throughout the DRC.<sup>21</sup> Thus, it was clear that Rwandan and Ugandan forces were, again, active in committing violations of human rights law committed against civilian populations. Indeed, the RCD, supported by regular troops from Rwanda, Uganda and Burundi, were reportedly responsible for abuses against civilian populations, including killings, arbitrary arrests and detentions, crimes against women, and recruitment of child soldiers.<sup>22</sup> Furthermore, The International Court of Justice (ICJ) noted, for example, the extent of the engagement of Uganda in the 1998 border conflicts, stating that, “Uganda was not in August 1998 engaging in military operations against rebels who carried out cross-border raids. Rather, it was engaged in military assaults that resulted in the taking of the town of Beni...the town of Bunia....and the town of Watsa.”<sup>23</sup>

On July 10, 1999 the heads of state of the parties to the conflict signed the Lusaka Ceasefire Agreement in order to end hostilities.<sup>24</sup> The RCD signed the agreement one month after. The agreement called for a cessation of all attacks, the

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<sup>18</sup> International Crisis Group (ICG), ‘North Kivu, Into the Quagmire? An Overview of the Current Crisis in North Kivu’ (Report) (13 August 1998), <[http://www.crisisgroup.org/library/documents/report\\_archive/A400221\\_13081998.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400221_13081998.pdf)> accessed 9 April 2010.

<sup>19</sup> In the first war, the Mai Mai were members of the AFDL forces that helped bring Kabila to power. Following the war, they abandoned the AFDL and returned to their own bases in North Kivu. They are an elusive rebel group in terms of allegiances thus, in the second war, it was difficult to pin down a side the Mai Mai were allied with.

<sup>20</sup> Following the genocide in Rwanda, members of the Interahamwe militia and the former Forces Armées Rwandaises (ex-FAR) took refuge in North Kivu and carried out cross border attacks. Following the 1996 attacks on the refugee camps that expelled some of these force, many returned to the border areas and managed to maintain bases in the DRC. The presence of these forces added to the tense situation in the Kivus.

<sup>21</sup> UN Mapping Report (n.10) para. 310.

<sup>22</sup> See HRW, ‘DRC Casualties of War: Civilians, Rule of Law, and Democratic Freedoms’ (Report) (1 February 2009), <<http://www.hrw.org/en/reports/1999/02/01/casualties-war>> accessed 9 April 2010.

<sup>23</sup> *Democratic Republic of the Congo v. Uganda* (n 14) para 110.

<sup>24</sup> UN Mapping Report (n.10) para 310.

deployment of a peacekeeping force to maintain the transition out of war, and demanded the final withdrawal of all foreign forces within the territory of the DRC. As signatories to the agreement, Rwanda and Uganda implicitly recognized the presence of their forces in DRC territory and their duty to withdraw said forces.

The Second Congo War left in its wake further violence and destruction to an already devastated country. The acts of no side to the conflict were without offense in committing acts that could incur liability under international criminal law. In a 2009 report, HRW recorded that both the government forces of the FAC and the rebel forces of the RCD have committed a myriad of abuses that include killing, arbitrary arrest and detention, displacement and disappearances, sexual violence against civilian women, and the conscription of child soldiers.<sup>25</sup>

### 3.3 THE VIOLENCE CONTINUES

The Lusaka Agreement was supposed to usher in a time of transition from war. While it did allow for the UN to establish the UN Mission to the Democratic Republic of the Congo (MONUC) in an effort maintain the ceasefire, despite the agreement and the presence of UN forces, violence continued to thrive in certain areas, primarily in North and South Kivu of the Ituri region.<sup>26</sup> Amidst the continuing violence, states parties gathered out the inter-Congolese dialogue mandated by the Lusaka agreement. Furthermore, both Rwanda and Uganda signed additional peace agreements promising withdrawal of troops and movement toward reestablishing peace in the conflict torn Ituri region.

More than six years after the nominal end of the second war in the DRC, violence between government and rebel groups, particularly in the eastern part of the DRC, has continued. Despite negotiations and attempts at peace accords in certain regions of the DRC, the toll of civilian casualties due to ethnic and rebel conflict continues to climb. In July 2009, HRW reported massive human rights violations being committed against civilians in North and South Kivu by government forces and the Ugandan-backed rebel

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<sup>25</sup> HRW Report (n 22).

<sup>26</sup> According to the UN Security Council, between the time of January 2002 and December 2003, 8,000 civilians lost their lives in the Ituri region due to killings or indiscriminate use of force. UNSC 'Special Report on the Events in Ituri, January 2002-December 2003' (16 July 2004) Report S/2004/573.



forces of the Lord's Resistance Army (LRA), as well as, the Hutu militia known as the Democratic Forces for the Liberation of Rwanda (FDLR).<sup>27</sup>

## 4. THE INVOLVEMENT OF UGANDA AND RWANDA IN THE CONGO WARS – A CLOSER LOOK

While the story of conflict in the DRC is one that on its face tells a tale of internal rebellion and civil war, the reality is that the country has been the locus of cross border rebellion that has exacerbated an already tenuous state of being. The evidence gathered by the governmental and nongovernmental monitoring groups as well as the international agreements that have transpired throughout the periods of conflict point toward involvement by many various foreign forces. Significantly, Ugandan and Rwandan forces played influential roles in the conflicts within the DRC. It is clear that there was a significant contribution by forces from both countries in, first, overthrowing the Mobutu regime and, later, aiding rebel groups in their fight against Kabila's forces. By 2000, the Security Council, with the passage of resolution 1304, affirmed the presence of both Rwanda and Uganda in the DRC by stating that both countries had violated the sovereignty and territorial integrity of the country and demanding the withdrawal of forces from the territory of the DRC.<sup>28</sup> Similarly, reports of Secretary-General on the UN Mission in the DRC detailed the extent to which Rwandan and Ugandan troops were involved in particular clashes within the territory and noted evidence by local NGOs of their engagement in regular acts of violence, the systematic use of torture, rape and robbery, the restriction and movement and enforced deportation.<sup>29</sup>

From the legal perspective, the presence and participation of Rwandan and Ugandan forces pose a myriad of questions regarding the nature of the conflict within the territory of the DRC and the effects the classification of the conflict has upon the proper

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<sup>27</sup> HRW 'DR Congo: Massive Increase in Attacks on Civilians' (News Release) (2 July 2009) <<http://www.hrw.org/node/84241>> accessed 7 December 2009.

<sup>28</sup> UNSC Res 1304 (16 June 2000) UN Doc S/RES/1304.

<sup>29</sup> See UNSC 'Second report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (18 April 2000) Report S/2000/330; UNSC 'Third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (12 June 2000) Report S/2000/566; UNSC 'Fourth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (21 September 2000) Report S/2000/888.

application of relevant international criminal law. In particular, the categorization of the conflict will be important in discerning applicable laws prescribing war crimes. The report will take a closer look at how the courts in the DRC address the question and whether there are similarities and discrepancies between the different courts.

First, taking a look at the presence of foreign forces within the borders of the DRC raises questions of whether there existed any justifiable reason for the those forces to take part in actions within the DRC. Although a handful of foreign forces played roles in the conflict in the DRC, the report is limited to the roles of Rwanda and Uganda as the main foreign presence in the conflicts. Both Ugandan and Rwandan forces entered into DRC territory under the auspices of protecting themselves from rebels and militias setting up and arming across the borders. However, once within the territory of the DRC, it is clear that the forces joined with rebel groups formed to combat the government in clashes that led to violations against civilian populations. The actions of Uganda and Rwanda, thus would not find justification in a declaration of self-defense against attacks by border rebels. Indeed, in the case of Uganda, the ICJ found that their actions did not amount to self-defense.<sup>30</sup> Additionally, the actions of the Ugandan and Rwandan forces could not be justified on the basis that their involvement was predicated on aiding the implementation of a democratic regime and ensuring the protection of human rights. The ICJ ruled that use of force by the foreign intervener could not be used in the name of protection of human rights.<sup>31</sup> Thus, there seemed no legal justification for the presence of both Uganda and Rwanda in the DRC during the time of the conflicts. While this report primarily deals with individual responsibility for the commission of international crimes and less with state responsibility, it is important to have an understanding of the framework of involvement by internal and international players. The involvement of Uganda and Rwanda in the DRC conflicts created a certain dynamic in the territory whereby it was possible to classify the conflict in terms of internal or international. At face value, the first and second wars were part and parcel of a series of internal rebellion against authoritative regimes. At some point, the cooperative efforts of Rwanda and

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<sup>30</sup> *DRC v. Uganda* (n 14) para 146-7. The Court determined that there was no evidence of involvement by the DRC in cross-border attacks.

<sup>31</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* [Merit] (1986) The ICJ determined, under customary international law, that use of force by a foreign intervener is only allowable as part of an act of collective self-defense against an armed attack and at the request by the State that has declared itself attacked. paras 187-201.

Uganda became legally unjustifiable interventions by foreign forces that were tantamount to acts of aggression. The question then is whether and to what extent the classifications as of the conflicts as an internal civil war or an international conflict affect the application of law in individual criminal cases?

#### 4.1 INTERNATIONAL VERSUS INTERNAL CONFLICT

The historic model of international law and armed conflict revolved around conflict and relations between states. This model is embodied in The Geneva Conventions and Additional Protocol I which both apply to “...all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>32</sup> For conflicts that are not categorized as international Modern warfare has led to an alteration of the traditional model for conflict, notably veering away from inter-state conflict to allow for more complex scenarios involving intra-state hostilities and the involvement of foreign states in ways that are difficult to define under the traditional model. To that end, Article 3 Common to the Geneva Convention (Common Article 3) and the Additional Protocol II govern the laws determining punishment for crimes committed during conflicts or attacks not of an international nature.

The Geneva Convention regime, as well as, current international humanitarian law distinguish international armed conflict by the classic model of two or more states engaged in an armed conflict, while internal armed conflict is defined as fighting between government forces and non-government armed groups or just between armed groups. Furthermore, internal armed conflict should be prolonged, exhibit a minimum level of intensity and the parties involved should be organized to a minimum degree in order to rise above classification as internal unrest, internal tensions or banditry.<sup>33</sup> Thus, internal actions that rise to the classification of internal armed conflict are brought under the Geneva Convention Regime via Protocol II and Common Article 3, while internal acts that do not rise to this classification will be brought under the national criminal law of the DRC.

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<sup>32</sup> Article 2.

<sup>33</sup> *Prosecutor v. Dusko Tadic* (Judgment) ICTY-94-1-T (7 May 1997 para 562).

Determining the classification of an armed conflict as either internal or international has become increasingly complex. The facts surrounding recent conflicts reveal situations that do not exclusively fit one or the other classification but take from both classifications. The situation in the DRC encompasses this cross categorization. The conflict in Bosnia and Herzegovina (BiH) provides a comparison and an example of how the international court analyzed the situation that involved elements of both internal and international conflict. Thus looking at how the ICTY dealt with determining the nature of the conflict in BiH provides an example of the legal ramifications inherent in the determination. The ICTY Trial Chamber, in the Tadic case, determined that the conflict in Bosnia was both internal and international in nature and this was reflected by the Security Council in the adoption of the Statute of the Tribunal. The Chamber determined that prior to may 19 May 1992, the conflict was of an international nature but that following that date the conflict had become internal in nature.<sup>34</sup> The Chamber relied upon the ICJ ruling in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* in order to establish the criteria for determining whether the conflict was international or internal in nature.

While it is ultimately the role of the courts to determine whether the armed conflict is of an internal or international nature, the UN has monitored the conflicts in the DRC and offered advice as to the classification of the conflict throughout the time of both wars and after. The OHCHR stated that the parties involved in the armed activities within the DRC were organized to a degree that would that, at the very least, the conflict rises to the classification of an internal armed conflict.<sup>35</sup> The parties were either regular state controlled troops or armed rebel groups that were supported by the forces of the neighboring Rwandan and Uganda or the government in Kinshasa. Additionally, the OHCHR stated that the conflict, depending on the time and place, could be classified as both an internal and international armed conflict.<sup>36</sup>

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<sup>34</sup> Ibid para 607. The marker date of 19 May 1992 was used by the Chamber because that was the date of withdrawal of the Yugoslav People's Army (JNA) and prior to that time Bosnian Serb troops served in the JNA while after that date, they were transferred into the newly formed Army of the Republika Srpska (VRS). Ibid (dissenting opinion), para. 587. Judge McDonald dissented from this view and suggested that the majority had misapplied the *Nicaragua* test and the true test is one of dependency and control and not effective control. Judge McDonald considered this threshold to be met, therefore, the grave breaches regime of the Geneva Conventions should be applied to the relevant counts.

<sup>35</sup> UN Mapping Report (n 10).

<sup>36</sup> Ibid.

## 5. NATIONAL PENAL LEGISLATION IN THE DRC

Three mechanisms are in place in the DRC to facilitate the prosecution of serious human rights violations: international law as defined under DRC law, international crimes as defined in international law, and ordinary crimes under DRC law.<sup>37</sup> In terms of obligations arising from international law, the DRC is party to numerous international treaties that impose obligations under international human rights law and international humanitarian law, including, inter alia; the International Covenant on Civil and Political Rights (ICCPR),<sup>38</sup> the Genocide Convention,<sup>39</sup> the Geneva Conventions,<sup>40</sup> and the Rome Statute.<sup>41</sup> The DRC is a monist legal system and the Constitution of 2006 stipulates the primacy of duly ratified international law over domestic law.<sup>42</sup> Therefore, in accordance with the Constitution, the crimes prescribed by the international treaties that the DRC are a party to are directly incorporated into the domestic legal code. Additionally, certain obligations arise under the customary rules of international humanitarian law.<sup>43</sup> Such customary rules are, furthermore, extended to application to internal conflicts as well as international conflicts. Thus, there exists an obligation under conventional and customary international law for the DRC to challenge impunity for certain crimes committed throughout the conflicts described above.

In terms of obligations arising from domestic law, the DRC has transposed many of the norms of international criminal law into their corpus of domestic law. The domestic law breakdowns as follows; prescription of ordinary crimes is covered under the Code

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<sup>37</sup> Frederico Borello, 'A First Few Steps. The Long Road to a Just Peace In the Democratic Republic of the Congo' International Center for Transitional Justice (October 2004).

<sup>38</sup> Ratified on 1 November 1976.

<sup>39</sup> Ratified on 31 May 1962.

<sup>40</sup> Ratified on 24 February 1961.

<sup>41</sup> Ratified on 11 April 2002.

<sup>42</sup> Article 153 states:

"The courts and tribunals, both civil and military, shall apply duly ratified international treaties, laws and with custom, provided this is not contrary to public order or good morals..."

Article 215 states:

"Duly concluded international treaties and agreements shall have, following publication, higher authority than laws, provided each treaty or agreement is applied by the other party."

<sup>43</sup> See *Democratic Republic of the Congo v. Uganda* (n 14); The ICJ ruled that both the DRC and Uganda were bound by customary international law in following the principle set forth in certain conventions that neither state were a party to.

Penal Congolais<sup>44</sup> (Ordinary Criminal Code), while international crimes are prescribed under the Code Penal Militaire<sup>45</sup> (Military Criminal Code) and Military Judicial Code. Additionally, pursuant to its ratification of the Rome Statute in 2002, the DRC has composed Draft Legislation for the Implementation of the Rome Statute (Draft Legislation). The Draft Legislation has not yet been adopted by parliament and, therefore, international crimes as defined by the Rome Statute are not yet part of the written coda of the DRC. However, the military courts in the DRC are turning more and more to a direct application of the Rome Statute for cases involving international crimes. Thus, the substantive law governing the primary violations of international humanitarian law during the time of conflict in the DRC can be derived from more than one source. It is, therefore, important to take a look at how the relevant instruments define the main international crimes, taking particular note of comparisons between the Military Code and the Rome Statute. As both instruments are utilized within the military court system to try major international crimes, it is important to examine note similarities and discrepancies between the crimes as defined by each in order to understand whether and to what extent the various courts are in line with prevailing tenets of international law.

## 5.1 THE MILITARY CODE OF THE DRC

In 2002, the legal framework regarding international and military justice in the DRC went through changes with the ratification of the Rome Statute and the adoption of a new Military Criminal Code and Military Judicial Code. Prior to the adoption of these instruments, prescription for the primary international crimes was found in the 1972 Military Justice Code. Thus, according to the law of the DRC, crimes of genocide, crimes against humanity and war crimes committed during the conflict periods occurring before 2003 should fall under the 1972 Military Justice Code, and those crimes committed from 2003 to the present should fall under the 2002 Military Criminal Code and Military Judicial Code, or, as some courts have determined, the Rome Statute.

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<sup>44</sup> Code Penal Congolais 1940 <<http://www.leganet.cd/Legislation/JO/2004/JO.30.11.2004.pdf>> accessed 10 September 2009.

<sup>45</sup> Law N° 024/2002 <<http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.024.2002.18.11.2002.pdf>> accessed 5 October 2009.

## Genocide

The 1972 Military Justice Code, while recognizing the obligation of the DRC as a signatory to the Genocide Convention, provided a definition of the crime that was not in accordance with the convention. The domestic definition was more limited in scope than the international treaty, leaving out certain enumerated acts and defined groups.<sup>46</sup> The 2002 codes amended the definition to be in line with the definition provided by the Genocide Convention and, in turn, the Rome Statute. Furthermore, genocide under the 2002 Military Criminal Code includes political groups within its scope of protected groups. Therefore, the DRC domestic legislation on genocide has moved more toward the accepted definition under international law, even going beyond it to include a protected group argued for but ultimately not included within the purview of the Rome Statute.

## Crimes against humanity

The earliest version of crimes against humanity under DRC law defined it as, “Any inhuman act committed against civilian populations before or during the war, such as: murder, extermination, enslavement, genocide.”<sup>47</sup> The current Military Code prescribes crimes against humanity in a wider, if not more complex fashion. The Code seemingly merges the current normative understandings of crimes against humanity and war crimes in international law under one heading. Article 165 states that crimes against humanity include grave violations of international humanitarian law against civilian populations during times of war, however, the offences are not necessarily bound to commission during states of war in order to be considered as such. Article 166 particularly confuses in that further defines crimes against humanity as serious crimes [against]...the people and property protected by the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977.” The article also provides a list of 18 prohibited acts that are inclusive of acts recognized under treaty and custom as war crimes. Furthermore, Article 169 lists offences similar to those enumerated under Article

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<sup>46</sup> The 1972 Military Justice Code enumerated some means of committing genocide, such as: physical - ie. killing, biological – ie. preventing births or imposing sterilization methods on the population, and intellectual – ie. gradual elimination of ethnic and cultural characteristics. Thus, the domestic definition omitted certain acts enumerated under the Genocide Convention, including; causing serious bodily harm to and forcibly transferring children. Additionally, the Military Justice Code only referred to ethnic, religious or political groups as protected groups.

<sup>47</sup> 1972 Military Justice Code.

7 of the Rome Statute, however, the Military Code omits the offences of “enforced disappearance of persons,” “apartheid” and “other inhumane acts.” Additionally, it includes the offences of grave devastation of wildlife and nature and the destruction natural heritage and universal culture as crimes against humanity. Thus, the domestic law of crimes against humanity in the DRC is not as clearly defined as the current norm of international law. Looking at the Rome Statute definition as the understanding of current international law, the definition of crimes against is more concise and more inclusive of human rights violations against persons,

### War crimes

The current Military Criminal Code defines war crimes as “...all offences of the law of the Republic committed during war and that are not justified by the laws or customs of war.” This is only a slight derivation from the 1972 code, which defined the crime in the same way but without the explicit assertion that the crimes must be committed during a war. Neither code provides a list of enumerated acts that constitute war crimes nor do they distinguish between international or internal conflicts. However, interpreting the definition of war crimes from the literal text of both codes creates an inclusive definition. Essentially, any act that is a crime under the domestic law of the DRC (or the previously recognized Republic of Zaire) as well as those acts criminal under the laws and customs of war can be considered a war crime. Thus, any application of domestic law on war crimes could seemingly apply the Criminal Code as well as conventional and customary international law. This, of course, differs from the Rome Statute, which provides a specific list of enumerated acts under war crimes. In terms of the current Military Penal code, *Avocats Sans Frontières (ASF)* have criticized the way in which domestic DRC law constructs crimes against humanity and war crimes, stating that the code does not comport with international standards on the issue and is confusing to courts in terms of deciphering which offences constitute crimes against humanity and which offences constitute war crimes.<sup>48</sup> In addition to NGOs, some of the active military courts have echoed these criticisms as a supportive reason for directly applying the Rome Statute to their cases.

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<sup>48</sup> *Avocats sans Frontières*, “Etude de Jurisprudence: L’Application du Statut de Rome de la Cour Pénale Internationale par les Juridictions de la République Démocratique du Congo” (Report) (March 2009) <[http://www.rdc-humanitaire.net/IMG/pdf/ASF.RDC.Rapport\\_Jurisprudence\\_Rome.pdf](http://www.rdc-humanitaire.net/IMG/pdf/ASF.RDC.Rapport_Jurisprudence_Rome.pdf)> accessed 18 September 2009.



Despite the extant confusion of the DRC's national legislation, the substantive breadth of codes on international crimes in toto is fairly inclusive. However, one particularly glaring omission from the Military Code of the DRC is the absence of the offence of conscripting or enlisting minor children into the armed forces as a war crime. The offence is not enumerated under the definition of war crimes nor is it included within the long list of enumerated acts under crimes against humanity. Conscripting of minors has been a particularly grievous practice by all sides of the conflict, including government forces, throughout the years of war. By 2007, an estimated 30,000 children had been demobilized from the armed forces and the various parties to the conflict.<sup>49</sup> Conscripting of child soldiers has continued despite the nominal end of war. As violence continues to be a way of life in the eastern part of the DRC, so too is the reality of children being brought into the conflict, particularly within the ranks of the Mai Mai rebel forces in the Kivu region. The constitution of the DRC prohibits exploitation of children the forming of a child army,<sup>50</sup> however, it does not provide a legal age of minority as a guideline. Additionally, within the last decade, the DRC has passed a handful of national laws that attempt to address the distinct problem of conscription of minors in the armed forces. The 2002 Labor Code includes provisions that proscribe the worst forms of labor for children, including the "forced or obligatory recruitment of children with a view to using them in armed conflict.;" the 2004 Defense and Armed Forces Law prohibits the maintenance of a subversive group of youth or a youth army; and, 2009 Child Protection Act defines the state's responsibility for demobilizing and reintegrating children who have been conscripted into armed groups and for guaranteeing protection, education and care to all children affected by armed conflict. Part of that responsibility defined within the act is to punish for the recruitment and use of children in armed forces or armed groups.

In terms of applicable international conventional law, the DRC has also ratified the Convention on the Rights of Child and its Optional Protocol on the involvement of children in armed conflicts, which prohibits the recruitment or use in hostilities by armed groups of persons under the age of 18.<sup>51</sup> Thus, the DRC legal framework currently

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<sup>49</sup> Coalition to Stop the Use of Child Soldier, 'Congo, Democratic Republic of the' (Global Report 2008), <<http://www.child-soldiers.org/regions/country?id=50>> accessed 30 September 2009.

<sup>50</sup> Article 190.

<sup>51</sup> Coalition to Stop the Use of Child Soldiers, 'Mai Mai Child Soldier Recruitment and Use: Entrenched and Unending' (Briefing Paper) (February 2010).

contains obligations under both national and international law in regard to the conscription of child soldiers. As will be discussed at a further point in this report, the courts have not utilized the national legislation on child recruitment. Criticism has been lodged against the courts for their failure to adequately challenge impunity for the crime of conscription of minors. In one case that will be examined, the court directly applied the Rome Statute in lieu of relying on the application of relevant national or international law valid in the DRC.

### 5.3 INDIVIDUAL CRIMINAL RESPONSIBILITY AND MODES OF LIABILITY

The Military Criminal Code punishes the individual criminal responsibility of perpetrators and co-perpetrators,<sup>52</sup> accomplices,<sup>53</sup> and perpetrators of attempted crimes.<sup>54</sup> Additionally, in terms of international crimes, the code addresses modes of liability such as superior responsibility. Article 175 of the Military Code states that a superior can be tried as an accomplice to crimes committed by a subordinate when the subordinate is prosecuted as the main perpetrator. The superior is considered an accomplice for having tolerated the criminal acts of the subordinate. Comparatively, this is a limiting definition of responsibility than found under statutes within the ICC and ad-hoc tribunals in that it expressly states that a subordinate must be found guilty of committing the underlying crime in order for the superior to incur any responsibility. In general, the Rome Statute offers a more comprehensive definition that better elucidates the requisite elements that must be proved.<sup>55</sup>

In summary, the Military Code and the Rome Statute diverge from one another in defining international crimes to an extent that has encouraged some courts to directly apply the Rome Statute despite the fact that the Draft Legislation has not yet been implemented into the domestic coda of the DRC. The most consequential differences stem from the Military Code's omission of certain key offences such as conscription of

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<sup>52</sup> Article 5.

<sup>53</sup> Article 6.

<sup>54</sup> Article 4.

<sup>55</sup> Article 28 of the Rome Statute states that military commanders are responsible for the crimes committed by their subordinates over whom the commander has effective control if he knew or should have known the crimes were to be committed and failed to prevent or punish the commission of those crimes. Additionally, the Statute also defines the responsibility of those superiors not under military hierarchy.

minors, and the confusion created by the integration into crimes against humanity of offences that are recognized under the Rome Statute as war crimes. Thus, the direct application of the Rome Statute in courts in the DRC acts as a normalizing force that fills in the lacunae present in the current national legal structure regarding international crimes and brings the national legal coda in closer harmony to the ICC and the recognized “norms” of international criminal law as recognized by the international community.

#### **5.4 LAW N° 06/018 AND THE MODIFICATION OF THE LAWS PROHIBITING RAPE AND SEXUAL VIOLENCE**

Sexual violence committed against members of the civilian population has been a particularly brutal and widespread facet of the violence in the DRC. In 2005, the World Health Organization estimated that almost 40,000 persons had been raped in the Kivu region since the start of the first war,<sup>56</sup> with all sides in the conflict perpetrating acts of sexual violence. In the years following the wars, sexual violence has continued to be a major aspect of the recurring violence within the DRC.<sup>57</sup>

In 2006, the parliament of the DRC implemented Law No. 06/018 into the Penal Code of the DRC. Recognizing the Penal Code’s inability to properly deal with the gravity and prevalence of sexual violence crimes perpetrated by parties to the conflict, the government implemented the new law in order to further prescribe offences of sexual violence and aid in meeting the demand posed by the events of the conflict. The preamble of the law specifically states that the wars of 1996 and 1998 presented the need for modification in the Penal Code in order that it provide protection to the most vulnerable persons, notably those women, children and men who are victims of sexual violence, and that it provide a definition of rape that is in keeping with applicable international norms. To that end, the law provides modifications to the articles under Chapter Six: Offences Against the Family, the chapter that prescribes rape and sexual violence against persons. Law 06/018 amended the Penal Code by, inter alia, raising the

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<sup>56</sup> UN Integrated Regional Information Networks, “DRC: Focus on Rampant Rape, Despite End of War” (Kinshasa 8 March 2004) <<http://www.aegis.com/news/irin/2004/IR040313.html>> accessed 5 October 2009.

<sup>57</sup> HRW has reported that since January 2009 and the start of the UN-backed military operations in the eastern DRC, there has been a massive increase in sexual violence against civilians committed by government and rebel forces alike. See HRW, “Clinton Should Highlight Rape and Justice Issues” (Goma 10 August 2009). <<http://www.hrw.org/fr/news/2009/08/10/drc-clinton-should-highlight-rape-and-justice-issues>> accessed 5 October 2009.

age of majority in rape from 14 to 18 years old and providing for a more thorough definition of the crime of rape.<sup>58</sup>

## 5.5. THE DRAFT LEGISLATION IMPLEMENTING THE ROME STATUTE

The DRC ratified the Rome Statute on 11 April 2002 pursuant to the *Décret-Loi, 00/3/2000* of 30 March 2000 and the subsequent publication in the *Journal Officiel de la RDC*.<sup>59</sup> The DRC is a monist legal system; however, implementing legislation for the Rome Statute was required to give the procedural foundation to the prosecutions of international crimes. To that end, the DRC formulated the Draft Legislation on the Implementation of the Statutes of the International Court (the Draft Legislation). The original Draft Legislation was created with the participation of the Commission de Revue le Loi Congolaise and various NGOs. An amended version was proposed by parliamentarians in 2005 and sent to parliament two years later. The Draft, however, has yet to be put on the parliamentary agenda. Despite having not yet adopted the implementing legislation, many courts have opted to apply the Rome Statute directly. The direct application of the Rome Statute to proceedings will be discussed at more length in Section 6.2. The legislative basis for such an application may be derived from constitutional provisions. Article 215 of the constitution provides that international treaties and accords, upon publication, have authority over domestic laws. Additionally, article 153 provides that courts may apply duly ratified international treaties so long as they comply with law and custom. As elucidated above, the Military Code and the Rome Statute differ on substantive levels that may call in to question the compliance of the international treaty with the national laws. However, as will be illustrated, the constitutional provisions have been utilized as support for the direct application of the Rome Statute.

Substantively speaking, the Draft Legislation defines genocide, crimes against humanity and war crimes along the lines of, but with some derivation, from the Rome Statute. For example, under the crime of genocide, the enumerated act of forcible

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<sup>58</sup> Article 170 of the Criminal Code defined rape as the act committed either with, inter alia, the aid of violence, by trickery, with abuse to the person who is in the effects of illness or alteration of faculties. The amendment to the article provides for additional circumstances, including a coercive environment, and further defines the act of rape in the vain of international criminal law – ie. "...the penetration, however slight, of the sexual organ or the female or male with another part of the body or with a foreign object."

<sup>59</sup> Journal Officiel de la République démocratique du Congo, instruments internationaux et régionaux relatifs aux droits de l'homme ratifiés par la République démocratique du Congo, 43<sup>rd</sup> year, special edition, 5 December 2002.

transfer of children has been modified to read the forcible transfer of any member of a group, making the scope of the act broader than the written in the Rome Statute. The chapeau and remaining enumerated acts of genocide correspond to the Rome Statute. Crimes against humanity under the Draft Legislation are expanded slightly from their basis in the Rome Statute by the creation of broader definitions for certain acts. The Draft Legislation defines the crime of apartheid as institutionalized oppression and domination not only on racial grounds, but also on political, national, ethnic, cultural, religious, sexist and other grounds. Similarly, the definition of sexual violence as a crime against humanity is broadened to include sexual abuse and harassment. Finally, the Draft Legislation expands the war crime of willfully causing great suffering or serious injury to health to include mental as well as physical integrity. The Draft Legislation follows the standards of international criminal law by setting out sentencing guidelines for all of the crimes that include life sentence as the highest punishment allowable.

## 5.6 AMNESTY LAWS

The DRC has passed a series of amnesty laws covering various geographical and temporal periods from the beginning of the first war. The first amnesty of note was granted in 2003 by temporary executive order and covered acts of war, political breaches of the law, and crimes of opinion for the period of 2 August 1998 to 4 April 2003.<sup>60</sup> The decree excluded acts of genocide, crimes against humanity, and war crimes. Two years later, the transitional government passed a similar law that provided amnesty for the same crimes enumerated under the previous Presidential Decree but increased the temporal scope to cover acts committed from 20 August 1996 to 20 June 2003.<sup>61</sup> The law also allowed for the retroactive pardon and commutation of convictions for acts falling under the law.

President Joseph Kabila enacted the most recent amnesty law on 7 May 2009.<sup>62</sup> The law provides amnesty over actions committed in the eastern regions of North and South Kivu from June 2003 to the day of signing. The Law grants amnesty over Congolese living in the territory of the DRC or abroad for acts of war and insurrection.

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<sup>60</sup> Presidential Decree N°03-001 (15 April 2003). See ICTJ 'Amnesty Must Not Equal Impunity' (Factsheet) (2009) <[http://www.ictj.org/static/Factsheets/ICTJ\\_DRC\\_amnesty\\_fs2009.pdf](http://www.ictj.org/static/Factsheets/ICTJ_DRC_amnesty_fs2009.pdf)> accessed 15 December 2009.

<sup>61</sup> Law N°05/023 (19 December 2005).

<sup>62</sup> ICTJ (n 60).

Acts of war under the law are considered military operations authorized by the laws and customs of war, and acts of insurrection are acts of collective violence likely to endanger the institutions of the Republic or to impair the integrity of the national territory. As with the others, this amnesty does not apply to the offences of genocide, crimes against humanity and war crimes.

## 6. NATIONAL RESPONSE TO CHALLENGING IMPUNITY FOR INTERNATIONAL CRIMES

The past decade has born witness to tremendous violence in the DRC and the recognition that war crimes and crimes against humanity were and continue to be committed on Congolese soil. The ICC has answered the call by investigating and prosecuting individuals for serious crimes of international law in four current cases that are in both pre-trial and trial stages.<sup>63</sup> However, the jurisdiction of the ICC only allows for prosecution of crimes committed after 2002. Thus, the national courts of the DRC bear the brunt of prosecuting for the majority of crimes committed during the two civil wars. However, fighting impunity for international crimes committed in the DRC has proved a challenging task for the national courts for a myriad of reasons. The pre-transition era was marked by trials that did not comport with recognized fair trial standards. While the post transition period has made some strides in fighting impunity, problems continue to plague the national system. Thus far, only a handful of cases prosecuting for crimes against humanity or war crimes have appeared before the national courts, two of which dealt with crimes committed before the transition of 2003 and the rest have dealt with crimes committed after the transition period. Additionally, in a marked contrast to current international standards, all of the cases have been heard before military courts.

Despite the existence of functioning civilian courts, the military courts of the DRC have exercised exclusive jurisdiction over the prosecution of international crimes. The reasons for the current primacy of the military courts include questions as to the capacity of the civilian courts to prosecute the cases, a history of corruption in the national courts, and the fact that the draft legislation for the implementation of the Rome Statute has yet

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<sup>63</sup> *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo* ICC-01/04-01/07; *The Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06; *The Prosecutor v. Callixte Mbarushimana* ICC-01/04-01/10.

to be adopted so the international crimes are yet to be defined under any civilian penal legislation.

The military courts have come under scrutiny for their performance in prosecuting for international crimes. The biggest concerns seem to revolve around the lack of sufficient and effective prosecutions and lack of consistency in prosecuting policy. One example of inconsistency among the courts is reflected in the fact that some military courts have opted to directly apply the Rome Statute in prosecuting for international crimes while other courts have relied on the jurisdiction of the Military Code over such matters. Additional inconsistencies include lack of prosecutions in courts of areas that have been the site of the majority of crimes and the lack of prosecutions for alleged perpetrators of the highest rank in the armed forces due to the fact that officers may not be prosecuted by judges who bear an equal or lower rank in the military.<sup>64</sup>

This section of the report will examine the jurisdiction of the military courts and examine the prosecutions taking place within their purview. It will take a keen look at to what extent the direct application of the Rome Statute and the influence of international courts on the construction of the application and definition of law acts as a normative function within the military courts. The question that hopes to answer is to what extent the normative influence can resolve the inconsistencies listed above.

## 6.1 JURISDICTION OF THE MILITARY COURTS

The transitional government of the DRC faced the enormous task of rebuilding a judicial system that has fallen into almost complete collapse following the mass violence of the war period. Challenging impunity for the myriad of crimes committed throughout that time and beyond has proven difficult with the system left in disarray. Furthermore, the judicial system of the DRC throughout the pre-war period was not without difficulties. The history of the judicial system has been marred by political influence and the over broad power of the executive. Outside influence has rendered the system's capacity for fair and effective trial proceedings less than adequate. Keenly tied to the difficulties of the DRC judicial system is the prevalence and primacy of the military courts located throughout the

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<sup>64</sup> Open Society Initiative for Southern Africa 'The Democratic Republic of Congo: Military justice and human rights – an urgent need to complete reforms' (Discussion Paper) (2009); ASF (n 48), ASF reports that there have only been 13 cases involving serious crimes effectively prosecuted before military courts in the DRC and of those 13 cases, only 3 have involved the prosecution of high-ranking officers.

various regions. The military courts are a part of the pre-war history that has prevailed to the present day. Former President Laurent Kabila established a special Military Court known as the *Cour d'Ordre Militaire* on 23 August 1997. Although the Military Court was established for the prosecution of soldiers, the jurisdiction of the Court was extended over time to include civilians have been accused of international crimes as well. Furthermore, the administration of the Military Court was not fully in line with many international fair trial standards. For example, the Court did not allow appeal to a higher jurisdiction nor access by the accused to defence counsel, it administered the punishment of death penalty, and only president Kabila held the power to commute penalties of death.<sup>65</sup> The *Cour d'Ordre Militaire* was abolished in 2004 during the reform of the military justice system at the hands of then President Joseph Kabila. Currently, there exist both civilian and military courts in the various regions of the DRC.

The current Constitution of the DRC entered into force on 18 February 2006. The Constitution outlines the intended structure for the present day judiciary. It establishes a Court of Cassation in order to provide judicial review of final judgments in both civil and military courts and a Constitutional Court for the review of constitutionality of laws. The ordinary courts include a court of appeals for each province and civilian and military courts. Although the Constitution vests military courts with jurisdiction over offences committed by members of the armed forces and the national police only, as it stands today, the military courts remain the situ for prosecutions of mass atrocity crimes. The subject matter jurisdiction over international crimes vests to the military courts through the 2002 Military Justice Code.<sup>66</sup> The Military Justice Code provides that “should crimes be indivisible from or related to crimes of genocide, war crimes or crimes against humanity, the military courts shall have sole competence.”<sup>67</sup>

Jurisdiction of the military court over the person is also stipulated within the Military Justice Code. It vests jurisdiction to the military courts over members of the

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<sup>65</sup> Amnesty International, 'Imminent Executions' (29 April 1998) AI-Index AFR 62/19/98; International Commission of Jurists, 'Congo-Attacks on Justice 2000' (13 August 2001) <[http://www.icj.org/news.php3?id\\_article=2564&lang=en](http://www.icj.org/news.php3?id_article=2564&lang=en)> accessed 24 August 2009.

<sup>66</sup> Prior to the 2002 Military Justice Code, subject matter jurisdiction over crimes under international law vested to the military courts through the 1972 Military Justice Code. Thus, in so far as international crimes have been recognized under DRC law, they have been governed by the military criminal legislation, The passage of the Draft Legislation implementing the Rome Statute would vest the subject matter jurisdiction over international crimes to the Civil Court of Appeal.

<sup>67</sup> Article 161.



armed forces, the police,<sup>68</sup> and, under specific circumstances, civilians. Article 112 extends personal jurisdiction over additional persons such as, prisoners of war, members of rebel groups, those not in the army who provoke, engage, or assist one or more soldiers to commit a crime that is against the law, and those not in the army who commit crimes against the army or national police force. Additionally, Article 117 allows jurisdiction over civilians for any offence included within the Military Code. Accordingly, civilians charged with international crimes, all of which are included under the Military Code, fall within the jurisdiction of the military courts. Thus, despite the presence of a civilian criminal court system and legislation that will eventually place jurisdiction over international crimes within realm, the current system has relied upon the Military Code and Military Justice Code as justification for vesting jurisdiction over civilians with the military courts. This practice has drawn criticism by the UN and NGO trial monitors for many reasons including, unconstitutionality of military jurisdiction over civilians, issues of fair trial in military court proceedings, and the failure of the Military Code to define international offences in keeping with the Rome Statute and recognized norms of international criminal law.<sup>69</sup> It has been indicated that jurisdiction over civilians who commit international crimes will transfer to civilian courts with the implementation of the Draft Legislation to the Rome Statute.

## 6.2 DIRECT APPLICATION OF THE ROME STATUTE IN DRC MILITARY COURTS

The decision by the handful of national courts in the DRC to directly apply the Rome Statute in prosecuting for international crimes is the exercise of a relatively novel practice. The historical assumption has been that implementing legislation is required in order for a domestic

*The decision by the handful of national courts in the DRC to directly apply the Rome Statute in prosecuting for international crimes is the exercise of a relatively novel practice*

<sup>68</sup> Article 106.

<sup>69</sup> See generally UN Mapping report (n 10); Afrimap and the Open Society Initiative for Southern Africa, 'The Democratic Republic of Congo Military justice and human rights – A urgent need to complete reforms' (Discussion Paper, South Africa, 2009) <<http://www.afrimap.org/english/images/report/AfriMAP-DRC-MilitaryJustice-DD-EN.pdf>> accessed 18 January 2010.

court to recognize the principles of international criminal law.<sup>70</sup> Many courts have rejected application of international treaties absent legislation implementing the treaty into domestic law.<sup>71</sup>

Despite the reluctance of some courts to advocate for the direct application of the Rome Statute, the argument for the practice gains teeth from a systemic perspective. For example, Ward Ferdinandusse posits that there are three systemic implications to the direct application of the Rome Statute in a domestic court; a. it provides a mechanism for states to fulfill the duty to enforce international criminal law, b. it provides a litmus test for the quality and development of international criminal law, and c. it may further the coherence and systemization of international criminal law.<sup>72</sup> Indeed, in the case of the DRC, the Rome Statute has been utilized in certain domestic courts where existing domestic law was lacking. The Rome Statute has filled in the lacunae of punishable crimes before the domestic courts, for example, by providing a more comprehensive definition of crimes against humanity and expanding definitions of sexual violence crimes to be more in tune with the norms of international criminal law. Thus, direct application can be an aid to the DRC in fulfilling its obligations under international treaties to try individuals who commit violations of international humanitarian law by providing an expanded legal lexicon that encompasses a broader spectrum of international crimes. Additionally, it can be said to provide a window into the development of international law by showing how it has encouraged certain innovations such as the expansion of the definition of crimes to include acts that have become more duly recognized in the international arena.

The following section will analyze cases that have appeared before military tribunals, some of which have directly applied the Rome Statute to proceedings and others that have utilized only the national penal legislation. Comparisons may be drawn

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<sup>70</sup> See Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford 2003) 303-04.

<sup>71</sup> For example, The Federal Court of Australia dismissed a claim lodged by members of the Aboriginal community against the Prime Minister and Deputy Prime Minister alleging the commission of acts amounting to genocide against the aboriginal people based upon the fact that Australia had not passed legislation implementing the 1948 Genocide Convention into domestic law and, therefore, lacked jurisdiction over the crime of genocide. The court acknowledged that the prohibition of genocide is a peremptory norm of customary international law and that, as such, the state has an obligation to prosecute or extradite those individuals, found on its territory, suspected of committing acts of genocide. However, the court held that the obligation does not override where the state lacks domestic legislation granting the courts jurisdiction over the offense even if, as in the case at hand, the state has ratified the international treaty in question. *Nulyrimma v. Thompson* 96 FCR 153, [1999] FCA 1192.

<sup>72</sup> Ward Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (University of Amsterdam 2005) 16.

between cases in order to further understand to what extent the direct application of Rome Statute has affected the national prosecutions and had aided the DRC in fulfilling its obligations to enforce international criminal law.

## 7. PROSECUTIONS BEFORE THE MILITARY COURTS

The prevailing sentiment regarding the DRC and mass atrocity crimes is that perpetrators of serious violations of international humanitarian law have almost categorically enjoyed impunity for their actions. Despite the years of violence and the thousands of victims who have suffered at the hands of government and rebel forces alike, prosecutions remain few and far between. According to the UN, only 12 cases have been identified within the DRC national courts as dealing with war crimes or crimes against humanity<sup>73</sup> and none of the jurisdictions of the third party states involved in the conflict have brought charges against nationals suspected of perpetrating crimes.<sup>74</sup> One of the methods employed in the DRC to greater deal more extensively with challenging impunity for mass atrocity crimes has been the utilization of “mobile courts,” or open-air military courts that travel to areas where other forms of judicial mechanisms are difficult to find.<sup>75</sup> This report will not examine the work of the mobile courts as the information regarding their cases is not readily available, however, it will take a closer look at a handful of trials that have taken place in the standing national military courts. The picture that emerges from the cases examined is one in which the normative influence of international law and international jurisprudence is in its infancy but has started to make change in the legal reasoning of the courts. Where international influence is seen, a greater comportment to international standards and standards of fair trial are found. The steps are small at this point but, nevertheless, they are noticeable.

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<sup>73</sup> UN Mapping Report (n 10) para 856

<sup>74</sup> Ibid. para 1016.

<sup>75</sup> See Lisa Clifford, ‘Open Air Justice in DR Congo’ *Radio News Netherlands* (16 March 2011) <<http://www.rnw.nl/africa/article/open-air-justice-dr-congo>> accessed 16 March 2011. The courts are set up as part of an initiative by the American Bar Association Rule of Law Initiative and Open Society Initiative of Southern Africa and part of its mandate is to particularly address and challenge impunity for crimes of sexual violence. According to the article, the courts have adjudicated 186 cases in South Kivu in 2010, 115 of which were for rape crimes.

*The Earliest Cases: The Ankoro Trial<sup>76</sup> and The Milobs Trial<sup>77</sup> and the Move Towards Direct Application of the Rome Statute*

The first serious trial for human rights violations that took place in the DRC began in the *Cour d'Ordre Militaire* on 19 April, 2003.<sup>78</sup> Violence erupted in Ankoro, located in the southern DRC, on 10 November 2002 during an argument between FAC soldiers and militia known as the Mai Mai.<sup>79</sup> The violence led to a reported 100 civilian deaths and the displacement of thousands of residents. In the aftermath of the violence, 28 FAC soldiers were arrested in connection with serious violations of human rights. The original trial before the *Cour d'Ordre Militaire* was suspended and, following the reform of the military justice system, the trial resumed in a military court in Lubumbashi. Finally, seven of the original 28 arrested were charged with international crimes pursuant to the 1972 Military Code, namely; serious violence and ill-treatment towards the civilian population including looting, burning, injuring and killing, and crimes against humanity for inhuman acts against the civilian population, burning houses and massacring them with shells and bombs.<sup>80</sup> ASF reported that although there was evidence that would support a charge of war crimes, the courts did not do so.<sup>81</sup> It is difficult to tell why exactly the court did not charge war crimes, however, it is clear that the court was not going beyond charging for ordinary crimes under the 1972 Code. The Court acquitted six of the accused and sentenced the final accused with a minimal sentence of 20 months imprisonment for murder. The UN and NGOs alike recorded problems of impartiality and independence with the subsequent decision of the court.<sup>82</sup> Monitors determined that there was pervasive prejudice in favor of impunity for government forces that was belied by

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<sup>76</sup> RMP 004/03/MMV/NMB – RP 01/2003, RMP 0046/04/NMB – RP 02/2004; See UN Mapping Report (n 10) paras 857-58.

<sup>77</sup> RP 103/2006; See UN Mapping Report (n 10).

<sup>78</sup> Borello (n **Error! Bookmark not defined.**).

<sup>79</sup> Mark Dummett, 'Congo Government Troops Kill 100 Civilians' *Reuters* (21 November 2002).

<sup>80</sup> The accused were charged under Article 472 for "serious violence and ill-treatment towards the civilian populations...burning looting, injuring and killing members of the civilian population" and under Article 505 for crimes against humanity, including "...inhuman against the civilian population, burning almost all of their houses and massacring them with shells and bomb." UN Mapping Report (n 10).

<sup>81</sup> ASF suggests that evidence showed that there existed an armed conflict, namely between the FARDC and Mai Mai militias. For example the descriptions of events given in the courts ruling refer to large scale conflicts that belie a certain level of organization. Additionally, by the court's own admission, the defendant knew that the villages bombed were populated with civilians. According to ASF, this evidence is enough to establish the presence of an armed conflict and, therefore, make war crimes an applicable charge, ASF Report (n 48).

<sup>82</sup> UN Mapping Report (n 10) para 858.

delinquent standards at trial, such as placing an undue burden of proof on the victims to provide positive identification of the forces who bombarded their villages and not finding in favor of liability through superior responsibility for those that directed and oversaw the actions.<sup>83</sup>

The *Milobs* case, like the *Ankoro* case, involved crimes committed during the pre-transition period. In this case, six members of a militia active in the Ituri region were charged with torturing and killing two MONUC peacekeepers. Distinguishing itself from the military court in Katanga in *Ankoro*, the military court in Bunia applied both the 2002 Military Criminal Code and the Rome Statute in sentencing the six accused to life imprisonment for war crimes.<sup>84</sup> The court relied upon international jurisprudence to establish the constituent elements of war crimes and to provide a basis for their conclusion that, at the time of the indictment, there existed an internal armed conflict as well as a link between the crimes alleged and said conflict.<sup>85</sup> The UN noted the convictions in the case as a step forward for challenging impunity in the region.<sup>86</sup> Compare, for example, to the *Ankoro* case, wherein the court relied upon the 1972 code and did not support a finding of war crimes. The *Ankoro* court, facing a myriad of difficulties, potentially exacerbated problems from the point of view of subjective legal standards by not applying the more recent and precise definitions. The result was what many have referred to as an unsupported verdict in favor of the accused.<sup>87</sup> The *Milobs* court took a very different approach. The court's direct application of the Rome Statute and reliance upon international jurisprudence were an important step forward in allowing the court a more precise and supported definition of the crimes alleged. Several factors were surely at play in the *Milobs* court that differentiated its outcome from the *Ankoro*

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<sup>83</sup> Ibid.

<sup>84</sup> According to the ASF, the Ituri court in the *Milobs* case supported the direct application of the Rome Statute because it had become a valid part of Congolese law, presumably through the 2006 Constitutional provision which gives primacy to international treaties that have been duly ratified. ASF Report (n 48), p 17; UN Mapping Report (n 10), para 859.

<sup>85</sup> Ibid.

<sup>86</sup> UNGA 'Twenty-third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo' (20 March 2007) UN Doc S/2007/156, para 36; UN Mapping Report (n 10), para 859.

<sup>87</sup> The UN claimed that the *Ankoro* Case revealed a lack of impartiality and independence, noting that issues surrounding the trial included, inter alia, the application of an overly demanding burden of proof upon the victims, the failure of the court to place liability upon the commanders of the operation, and a bias toward the government forces and against the Mai Mai rebels. UN Mapping Report (n 10) para 858 (citing ASADHO/Katanga, 'Report on the Ankoro Trial, Supplement to the Human Rights Periodical' SPDH No. 7, February 2005).

court, the use of recognized international law and international jurisprudence was certainly part of the equation.

*The Military Court at Mbandaka: The Mutins de Mbandaka<sup>88</sup> case and the Songo Mboyo Case and the court's use of the Rome Statute*

In 2006 the Military Tribunal of the Garrison of Mbandaka made an unprecedented ruling by allowing for the direct applicability of the Rome Statute in the prosecution of core crimes in the military court. The court's ruling was the first of its kind in the DRC and paved the way for other military courts in the state to follow suit. The case *Mutins de Mbandaka* involved crimes committed in the course of a mutiny of MLC soldiers in the province of Equateur. On 30 June 2005, an MLC soldier was killed after disobeying a general order for all soldiers to remain in barracks. The death of the soldier spurred his comrades into a three day violent mutiny that resulted in the death of 6 people, the rape of 46 others, and mass pillage of the area. 62 soldiers were tried in the first instance for crimes against humanity for acts of murder and rape.<sup>89</sup> The court determined that application of the Rome Statute rather than the Military Penal Code was appropriate.

The court directly applied the Rome Statute to the crimes alleged pursuant to provisions in the Transitional Constitution. Article 193 of the Transitional Constitution states that, "regularly concluded international treaties and agreements have, when published, greater authority than the law, provided that each treaty or agreement is implemented by the other party." As stated previously, the DRC published the Rome Statute in its official journal in 2002, subsequent to its ratification. Thus, the military court determined that the provisions of the Transitional Constitution were satisfied and that the Rome Statute could be applied directly as the greater authority over the Military Penal Code, despite the lack of implementing legislation to transform the Statute into domestic law. Additionally, the military court cited the discrepancies between the definitions of crimes against humanity and war crime found in the Military Penal Code and the Rome Statute as justification for applying the Statute. According to the judges, the Military Penal Code creates confusion in the understanding of the two offences and such

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<sup>88</sup> RPO86–RP 101.

<sup>89</sup> UN Mapping Report (n 10) para 864.

confusion in easily clarified by the definitions provide within the provisions of the Rome Statute.<sup>90</sup>

Additionally, the court cited a discrepancy between the Military Criminal Code and the Rome Statute regarding penalty structures.<sup>91</sup> The Military Criminal Code provides that the death penalty may be handed down as a penalty to certain crimes against humanity while the highest penalty provided under the Rome Statute is life imprisonment. Following the principle of *lex mitior*, the court determined that the Rome Statute should prevail over the Military Penal Code because in the face of two conflicting penalty schemes, the statute provided for the one that is most favorable to the defendant.<sup>92</sup>

The decision by the military court of Mbandaka to rely upon the provisions of the Transitional Constitution as a basis for applying the Rome Statute reveals an inconsistency amongst the military courts that have followed the practice of direct application. Subsequent rulings in various military tribunals that have applied the Rome Statute have relied upon different legislative provisions or have remained ambiguous in their reasoning. The difficulty lies in the fact that three different constitutional provisions have been in force at various times since the beginning of the breakout of war, thus making it difficult to uniformly rely upon the same provisions for offences that took place throughout that period. The current Constitution of the DRC contains a provision identical to the one from the Transitional Constitution stating the primacy of international treaty law.<sup>93</sup> The Constitutional Decree of 1997 that was in force prior to the Transitional Constitution makes no provision regarding hierarchy of national and international treaty law. In the case at hand, the acts in question were committed while the Transitional Constitution was in force, thus the court was able to rely upon its provision on international treaty law. However, it is important to note that some courts are also prosecuting for acts that occurred before the current or transitional constitutions were in force, thus, it is arguable as to whether they are able to justify direct application of the

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<sup>90</sup> ASF Report (n 48) (citing Mutins de Mbandaka verdict, 20 June 2006, p. 16) 18.

<sup>91</sup> *Ibid* 19.

<sup>92</sup> *Ibid*.

<sup>93</sup> Constitution of the DRC, Article 215.

Rome Statute through a supremacy provision. This opens the door to discrepancies between the courts on the justification for direct application.

Incorporating international definitions of crimes is facilitated by the direct application of the Rome Statute. In the *Mbandaka* case, the court did apply international definitions of the crimes alleged pursuant to the Rome Statute and Elements of Crimes. However, the court did come up short by not fully addressing how the facts of the case necessarily fit into the definitions provided. For example, the court defined crimes against humanity in line with international norms but failed to support that definition with the facts of the case. The court recognized the existence of a widespread against a civilian population, and determined that "...the widespread character is due to the fact that the act possesses a massive and frequent character...carried out collectively...and directed against a multiplicity of victims."<sup>94</sup> One may posit that the definition provided by the military courts draws its foundations from the similarly worded definition provided by the ICTR Trial Chamber in the judgment of *Prosecutor v. Jean-Paul Akayesu*.<sup>95</sup> However, the court does not explicitly provide the jurisprudence upon which it relied for this definition. Additionally, the military court does not delve further into the acts committed and how they relate or fulfill the definition provided. The lack of evidentiary support makes it difficult to further discern how the court has precisely defined and applied the general elements of crimes against humanity, as well as, whether and to what extent it has been influenced by international jurisprudence.

The Court charged both murder and rape as underlying crimes of crimes against humanity. Again, in defining the underlying acts, the Court adopted the definitions provided under international law and explicitly relied upon international jurisprudence in supporting the definition of murder as a crime against humanity.<sup>96</sup> Similarly, the definition of the underlying crime of rape was defined in terms parallel to the definition provided by the Rome Statute and the constituent elements pursuant to the Elements of Crimes.

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<sup>94</sup> ASF Report (n 47) 27.

<sup>95</sup> (Judgement) ICTR-96-4-T (2 September 1998) para 580: "The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy"

<sup>96</sup> The Court relied upon the ICTY Trial Chamber in *Prosecutor v. Banovic* in determining that the intent requirement is not always required to prove murder as a crime against humanity under international law. However, as ASF noted, the court did not further qualify this by stating that the mental element is present in the perpetrator's knowledge of participation in a widespread or systematic attack against a civilian population., ASF Report (n 48) p. 36.



Thus, the Court did go further in establishing the application of international law than in previous courts by utilizing international definitions and jurisprudence to support their findings. However, upon appeal, the court of Equater quashed the conviction of three of the men convicted for crimes against humanity and reclassified the offences as ordinary crimes.<sup>97</sup> The appeals court did uphold the definitions established by the first instance verdict, however, ASF has noted some inconsistencies in the verdict as well as questionable interpretations of international norms.<sup>98</sup> It is important for the development of law that the final word on court renderings reflects a fair and just process. It is also important for the development of international law in national courts the last instance courts renderings reflect a legally and factually supported outcome. The UN has charged that the second instance verdict handed down by the Military Court of Equater was poorly supported,<sup>99</sup> particularly in its decision to overturn the conviction of the three of the accused. Thus, a further step in solidifying the development of substantive international law in the domestic courts would be to encourage properly supported verdicts in the second instance.

The Military Court of Mbandaka has shown a comparatively open internationalist approach by applying the Rome Statute and relying upon the jurisprudence of the international ad-hoc tribunals to aid in defining the offences under law. The first instance verdict in the *Songo Mboyo* case was handed down in the same year as the *Mutins de Mbandaka* case and reflected a similar influence of the Rome Statute, the Elements of Crimes, and the jurisprudence of the international ad-hoc tribunals in defining the charged offences.

The facts of case involved seven members of the Congolese military (FARDC) guilty of crimes against humanity for committing mass rape of 119 women. The trial was significant in two respects; it was the first time that rape as a crime against humanity was charged and prosecuted in the DRC and it was the first time that members of the military were put on trial for such a crime. Sexual violence has permeated all sides of the mass violence committed in the DRC and the FARDC is alleged to have been one of the main perpetrators of such atrocities. In 2007, MONUC reported that 54 percent of all sexual

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<sup>97</sup> UN Mapping Report (n 10) para 864.

<sup>98</sup> ASF Report. (n 48).

<sup>99</sup> UN Mapping Report (n 10) para 864.

violence cases reported in the first half of the year were committed by FARDC soldiers.<sup>100</sup> Thus, the prosecution of members of the FARDC for rape and sexual violence went further in sending an important message that governmental forces as well as rebel forces cannot escape judicial consequences for participating in mass atrocity crimes in the DRC.

The events in question took place on the evening of 21 December 2003, in the district of Mongala, locality of Songo Mboyo.<sup>101</sup> For five years previous to that date, the 9<sup>th</sup> Infantry Battalion of the militia group the Mouvement de Libération du Congo (MLC), had located itself in the region and benefited from the service of the local civilian population. In December 2003, the local commander, Colonel Ramzani, had informed the group that they would have to leave the area to be integrated into the national army (FARDC) and that integration would allow them to receive a salary five times higher than they were getting under the MLC. In the wake of failure to meet the promise of increased payment, the newly transitioned officers rebelled against their commanding officers and attacked the villages of Songo Mboyo and Bongandanga. In the process of the attacks, the officers destroyed the homes of civilians in both villages and committed mass rape of civilian women.<sup>102</sup>

Twelve members of the FARDC were ultimately charged with crimes against humanity for the rape of 31 women, as well as, military violations pursuant to the 2002 Military Code.<sup>103</sup> In prosecuting for charge of rape as a crime against humanity, the military court opted to apply Article 7(1) of the Rome Statute to the offence rather than

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<sup>100</sup> HRW, 'Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of the Congo' (Report) (2009) <<http://www.hrw.org/en/reports/2009/07/16/soldiers-who-rape-commanders-who-condone-0>> accessed 14 December 2009.

<sup>101</sup> Auditeur Militaire v. Ngoy et al, No. RMP 154/PEN/SHOF/05, RP 084/2006, Tribunal Militaire de Garnison Mbdanka (12 April 2006).

<sup>102</sup> Ibid.

<sup>103</sup> The violations included military conspiracy, inciting to take up arms against the civilian population, outrage upon a superior, usurping command, misuse of arms and munitions, and pillage.

Article 169 of the Military Code.<sup>104</sup> The Court had established that The Rome Statute was applicable pursuant to Article 215 of the DRC Constitution.<sup>105</sup>

The court established that in order to establish that rape as a crime against humanity was committed, it must be proved that a widespread or systematic attack against a civilian population occurred.<sup>106</sup> The defence argued against any finding of crime against humanity due to the fact that the offences charged were not committed in furtherance of a policy of the DRC or any other organization acting in the conflict.<sup>107</sup> The court rejected this argument. In defining the chapeau elements of crimes against humanity, it explicitly relied upon the ICTR Trial Chamber decision in *Prosecutor v. Akayesu*, holding that an attack may be considered “widespread” in nature due to the multiplicity of victims of the attack, and may be considered “systematic” in nature if it is carefully organized in a regular pattern pursuant to a common policy implemented by public or private resources.<sup>108</sup> The court held that the plurality of victims targeted by the FARDC forces and their status as civilians constituted a widespread attack.<sup>109</sup> Additionally, the accused were found to have possessed the requisite mental element of the crime against humanity; in this case, the accused knew that the acts perpetrated were part of a widespread attack by their battalion (Battalion 9) against the civilian population of Songo Mboyo.<sup>110</sup>

In terms of the underlying crime of rape, the court differentiated between the definition of rape as a crime against humanity at the international level and the national level.<sup>111</sup> Accordingly, the Elements of Crimes of the Rome Statute (EOC) provides for a

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<sup>104</sup> The Military Court applied both the Rome Statute and the Military Penal Code to the offences alleged. The court differentiated certain military offences including, military conspiracy, inciting military to arm themselves against population, insult to superior, usurpation of command, and dissipation of weapons and munitions. The Rome Statute was applied to the offences determined to be underlying acts of crimes against humanity.

<sup>105</sup> *Songo Mboyo* First Instance Verdict (n 96) p. 8. Note that the same Military Court at Mbandaka in the *Mutins de Mbandaka* verdict relied upon provisions of the Transitional Constitution to support its direct application of the Rome Statute while in the instant case, the court has relied upon provisions of the current DRC Constitution. As stated previously in this report, the military courts of the DRC that have chosen to directly apply the Rome Statute have not been uniform in their legal justifications for doing so.

<sup>106</sup> *Ibid* p. 20.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid* (citing *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998 para. 580).

<sup>109</sup> *Ibid*. Again, the court relied upon the definition of a “civilian population” recognized in the *Akayesu* Judgment.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid* p. 18.

broader definition than the applicable national legislation because it is inclusive of more inhumane acts of a sexual nature. Thus, for example, the broader definition of rape established by the EOC allowed the charge against one of the officers for the commission of rape against a male victim. The defence had argued that the offense of rape was instituted to protect female victims and was not applicable to male victims.<sup>112</sup> The court denied the argument based upon the fact that it was applying the Rome Statute and the broader definition of rape provided in the EOC was inclusive of rape of male victims.<sup>113</sup> Thus, by applying the international statute to the national context, the court was able to prosecute an act of rape that may not have been allowable under applicable national law.<sup>114</sup>

*Thus, for example, the broader definition of rape established by the EOC allowed the charge against one of the officers for the commission of rape against a male victim.*

*Thus, by applying the international statute to the national context, the court was able to prosecute an act of rape that may not have been allowable under applicable national law.*

The remainder of charges against the accused were classified as military offences and were charged pursuant to the Military Penal Code. The result of this splitting of offences is that some possible confusion emerges with regard to modes of liability. The prosecution charged defendant Elwin Ngoy with abuse of arms and munitions pursuant to Article 74 of the Military Penal Code based upon his failure to prevent the theft of arms and munitions by the insurgents under his command. The defense argued that under Congolese law, intentional inaction by the accused cannot be grounds for personal responsibility. The court noted that Congolese law does indeed abstain from establishing liability for inaction of the accused. However, the court went on to posit that some omissions revealed a dangerous criminal intent and that the responsibility of the military leader is presumed when acts that constitute war crimes are committed by subordinates.<sup>115</sup> However, in the instant case, the acts were not considered war crimes so the court adhered to the Congolese law.

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<sup>112</sup> Ibid p. 21.

<sup>113</sup> Ibid.

<sup>114</sup> It should be noted that the reform of the law of rape and sexual violence that took place in 2006 does amend the Penal Code to include acts of rape against both male and female victims, however, the events of the instant case took place before the enactment of the amendments and, therefore, do not fall within their subject matter jurisdiction.

<sup>115</sup> *Songo Mboyo Verdict* (n 96).

The difficulty in the reasoning of the court lies in the fact that it doesn't seem to solely rely on either the Military Code or the Rome Statute. Instead, it turns the national stance that there is no criminal responsibility for an omission on its ear and makes allowances for omissions committed within a military hierarchy in cases of war crimes. Unfortunately, this understanding may lead to confusion as to whether the responsibility vests only in military commanders or may be incurred by non-military personnel acting in a position of superiority as well. The Military Courts decision to apply both the Rome Statute and the Military Penal Code may have been motivated by the fact that the constituent elements for an armed conflict were not present and war crimes could not be charged, thus certain acts that could not be brought under crimes against humanity would go unpunished. Applying the Military Penal Code allowed for such acts to be charged as military crimes. However, in this case, the application of both national and international law gave rise to potential for confusion in terms of modes of liability. Certainly, it then begs the question as to whether different modes of liability would be applicable to the various offences charged under the same indictment based upon their classification as a crime under national or international law? It is possible. It is also possible that this could lead to certain accused not being charged with crimes as a superior while others, in similar positions, could be charged as a superior depending on the classification of the crime. It is clear that the Military Court in the instant case could have supplied a more thorough explanation and/or differentiation between the applicable modes of liability in the case.

The court held that seven of the twelve men brought to trial were guilty of crimes against humanity and sentenced them to life imprisonment. From the perspective of challenging impunity for international crimes in the DRC, the case is significant for its prosecution of officers transitioned into the governmental forces. From the substantive legal perspective, the case is significant in that it takes an international approach and applies the Rome Statute directly in order to expand the definition of the offence of rape.

*Kilwa Trial*<sup>116</sup>

On 14 October 2004, a small group of men, recognizing themselves as members of a previously unheard of rebel group known as the Mouvement Révolutionnaire de Libération du Katanga (Revolutionary Movement for the Liberation of Katanga, MRLK) attempted to occupy the small town of Kilwa in the Province of Katanga.<sup>117</sup> The following day, members of the 62<sup>nd</sup> Infantry Brigade of FARDC arrived at Kilwa and launched a counter offensive against the rebels. In the weeks that followed the attack, MONUC officers conducted investigations in Kilwa and issued a report detailing human rights violations perpetrated by FARDC during the counter attack including, the summary execution of an estimated 28 civilians, illegal detention of suspected insurgents and rampant looting of civilian homes and markets.<sup>118</sup> NGOs and human rights groups monitoring inside the DRC heavily advocated for the government to act regarding the events of Kilwa and ensure no impunity for the perpetrators of human rights violations at Kilwa. By October 2006, the military prosecutor in Katanga had charged nine FARDC members including, Colonel Ademar Ilunga, the commander of the 62<sup>nd</sup> Brigade of the FARDC, and three members of the Anvil Mining, a local mining company that was implicated in the events of the counter-attack. The nine soldiers were charged with war crimes, arbitrary arrests and detentions, torture, and murder and the three employees of Anvil Mining were charged with aiding and abetting the crimes of the FARDC soldiers.

The military court of Katanga prosecuted for war crimes in accordance with three different penal codes; the Penal Code of DRC, the Military Code of DRC and the Rome Statute of the ICC. The heart of the proceedings revolved around the alleged summary executions of civilians by FARDC members at the order of Colonel Ilunga. The court prosecuted for the executions pursuant to articles 173 and 174 of the Military Code and article 8 paragraph 2 of the Rome Statute. The judgment of the military court of Katanga shed very little light on the application of both the Military Code and the Rome Statute to the offence. The court provided no legal justification for its direct application of the Rome

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<sup>116</sup> RMP 0064/NMB/2005–RP 010/2006.

<sup>117</sup> See Global Witness and others, 'Kilwa Trial: a Denial of Justice. A Chronology October 2004 – July 2007' (17 July 2007) <[http://www.globalwitness.org/media\\_library\\_detail.php/560/en/kilwa\\_trial\\_a\\_denial\\_of\\_justice](http://www.globalwitness.org/media_library_detail.php/560/en/kilwa_trial_a_denial_of_justice)> accessed 8 December 2009.

<sup>118</sup> MONUC, 'Report on the conclusions of the Special Investigation into allegations of summary executions and other violations of human rights committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004.' (October 2005) <[http://www.trial-ch.org/fileadmin/user\\_upload/documents/trialwatch/MONUC\\_report\\_oct05.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/MONUC_report_oct05.pdf)> accessed 8 December 2009.

Statute. Thus it is not known which legal maxims or provisions the court relied upon in accepting the Rome Statute – ie. Constitutional provisions, the Military Judicial Code, etc. As one of the first handful of cases in the DRC to directly apply the Rome Statute to proceedings, the courts reasoning for such an application would surely have been useful to lay a foundation for future prosecutions on international crimes within the military courts.

Furthermore, the court did not discuss the specific underlying acts of the offence and the constitutive elements that make up those acts. Thus, it is difficult to discern how the court defined the offences vis-à-vis the Rome Statute. For example, the court never specified which underlying acts under Article 8 of the Rome Statute were applicable to the events alleged. Furthermore, the court failed to discuss modes of liability for the offences alleged. The court seemingly applied Articles 5 and 6 of the Military Code as a means of defining relevant modes of liability in the case, however, further discussion would have proven useful particularly in regard to charges alleged against Colonel Ilunga as commander of the FARDC forces involved in the Kilwa incident.

The *Kilwa* trial was scrutinized by trial monitors in part because of the vagueness of the judgment. The court ultimately acquitted all of the accused on the war crimes charges and convicted two, Colonel Ilunaga and Captain Sadiaka, of the accused on charges of arbitrary detention and murder for unrelated events that took place in the town of Pweto. The court reasoned that civilians had been killed in the course of fighting between rebels and FARDC forces and not, as the prosecutor alleged, by summary executions. Again, this reasoning of the court drew criticism by trial monitors and NGOs who argued that testimony and evidence given at trial did not reflect such a verdict.<sup>119</sup> The UN High Commissioner expressed concern over the outcome of the trial for similar reasons and urged that the findings be re-examined upon appeal with the hope that the court would determine that deliberate killings had taken place.<sup>120</sup> However, the case was appealed to the High Military Court and the sentences of both Ilunga and Sadiaka were

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<sup>119</sup> Global Witness (n 117).

<sup>120</sup> “I am concerned at the court’s conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations”, UN High Commissioner for Human rights, Louise Arbour; UNHCR ‘High Commissioner for Human Rights Concerned at Kilwa Military Trial in Democratic Republic of the Congo’ (Press Release) (4 July 2007).

reduced to five years imprisonment.<sup>121</sup> Therefore, despite the direct application of the Rome Statute to the crimes alleged, the *Kilwa* case is seen as an extreme example of the inability of the national judiciary to comply with international standards. The clear prejudice of the fact finders in favor of the accused and the court's failure to supply reference to or reasoning supporting the application of international law as it pertains to war crimes has engendered much criticism by trial monitors. Additionally, the UN High Commissioner for Human Rights, in reference to the *Kilwa* case, criticized the military court system and urged the Parliament to pass the draft legislation of the Rome Statute and move cases involving international crimes within the jurisdiction of the civilian courts.<sup>122</sup>

### *Bongi Massaba*<sup>123</sup>

The Ituri district in the Orientale Province has been one area that has born witness to some of the most intense fighting and atrocity throughout the time of conflict.<sup>124</sup> In 2005, the FARDC in the region were in conflict with a handful of different militia groups. The facts of the case revolve around the events that took place in October 2005; members of the FARDC were sent on a patrol mission to secure populations in the Ituri district.<sup>125</sup> . On 24 October, soldiers under the command of Captain Blaise Bongi Massaba, violated their mandate by going on a campaign of looting civilian homes in the district.<sup>126</sup> During this campaign, the soldiers arrested five students for the purpose of carrying the goods stolen from the civilian population. Upon completion of this task, Massaba ordered the

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<sup>121</sup> See Global Witness, 'The Kilwa Appeal – A Travesty of Justice' (5 May 2008) <<http://www.globalwitness.org/library/kilwa-appeal-travesty-justice>> accessed 10 December 2010.. Immediately following the judgment of the military court, a formal appeal was lodged by the assistant military prosecutor as well as Colonel Ilunga. The 144 parites civilies also lodged appeals. Less than a month later, a second appeal was lodged by another military prosecutor who had not been involved in the original trial. This appeal did not follow proper, formal channels The second appeal effectively blocked a full review of the case. What ensued was as appeal process rife with political interference and trial irregularities.

<sup>122</sup> See Press Release (n 120): "It is inappropriate and contrary to the DRC's international obligations for military courts to try civilians. While military personnel can in principle be charged by court martial, civilians may not – they should be tried before the fair and independent civilian courts", UN High Commissioner for Human Rights, Louise Arbour.

<sup>123</sup> RP no. 018/RMP212/PEN/2006, Bunia <[http://www.oxfordlawreports.com/subscriber\\_article?script=yes&id=/oril/Cases/law-ildc-387cd06&recno=2&module=ildc&category=Congo,%20the%20Democratic%20Republic%20of%20the](http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-387cd06&recno=2&module=ildc&category=Congo,%20the%20Democratic%20Republic%20of%20the)>.

<sup>124</sup> Ibid. para 2.

<sup>125</sup> Ibid. para 15.

<sup>126</sup> Ibid. para 17.



students killed by his men, claiming that they were members of the armed militias of the area.<sup>127</sup>

The Military Court in Ituri directly applied the Rome Statute to the case at hand. The court determined that applying only the Military code would create a gap in what acts may be charged, namely those acts that could be charged as war crimes. The court specifically noted the failure of the Military Code to enumerate a punishment scheme for war crimes. Article 2 of the Military Penal code stipulates that, “no offence may be punished by a penalty that had not been laid down by the law before the offence was committed.” Thus, the court determine that in reading Article 2 in conjunction with the articles prescribing war crimes, there exists a gap in the national legislation that would be filled by relying upon the Rome Statute.<sup>128</sup> The legal justification for application of the Rome Statute lay in Article 215 of the Constitution, which stipulates that international treaties, once duly ratified and published, have authority over national law. Additionally, the court relied upon previous findings in the court in Mbdanaka to support the direct application of the Rome Statute, noting the previous court’s decision that the Rome Statute was better suited, more clearly defined and contained provisions that allowed for better protection of victims and no recognition of the death penalty, in line with standards of international law.<sup>129</sup>

The courts reliance upon a previous judgment of a DRC Military court is a novel development in the jurisprudence of the national courts and rarely seen in other judgments. This is arguably a step forward in legitimizing the application of the Rome Statute and the legal reasoning utilized as support. Certainly, when the legal lexicon of the national jurisdiction is able to rely upon its own court’s decision, a normative force is at play.<sup>130</sup> However, while this

*The courts reliance upon a previous judgment of a DRC Military court is a novel development in the jurisprudence of the national courts and rarely seen in other judgments. This is arguably a step forward in legitimizing the application of the Rome Statute and the legal reasoning utilized as support.*

<sup>127</sup> Ibid. paras 20-21.

<sup>128</sup> Ibid. para. 71.

<sup>129</sup> Ibid. para 73.

<sup>130</sup> Reliance upon international jurisprudence, as well, as national jurisprudence is not prevalent within the jurisprudence of the DRC military courts. In terms of international jurisprudence, Professor Elena Bayliss makes the point that resource limitations impact the DRC court’s ability in this arena. She has noted that the international jurisprudence that has been relied upon has generally reflected cases where the UN and MONUC have invested enormous resources, See Elena Bayliss (n **Error! Bookmark not defined.**).

step may solidify and clarify the use of international law in the domestic courts of the DRC, the court's legal reasoning supporting application of the Rome Statute is not necessarily airtight. Some valid arguments may be raised regarding the veracity of the claim made by the court that the existing codes create lacunae that can only be filled by the application of the Rome Statute.<sup>131</sup>

The court applied Article 8(2)(e)(v) proscribing the war crime of pillage and Article 8(2)(c)(i) proscribing the war crime of damage to life and person of another, such as murder, mutilation, cruel treatment and torture. The court noted that parts of Article 8 contained the constituent element that the acts took place within the context or associated with an international armed conflict. This prompted an analysis of the conflict in question in order to ascertain the nature of the conflict – international or internal. The court noted that the Rome Statute itself does not contain a definition of international armed conflict, however, in accordance with the Dictionary of International Armed Conflict, a conflict is international in nature when it exemplifies an armed confrontation between state entities.<sup>132</sup> Additionally, a conflict may be considered international in nature if it represents a confrontation of national liberation against a foreign regime or, in general, when a state exercises its right of self-determination. Inter-state conflicts that acquire the status of international armed conflict if the recognized victims are considered belligerents and one or more foreign entities are involved in the conflict.

In the case at the hand, the acts were within the context of the conflict in the Ituri region of eastern DRC. The parties involved included many factions of the FRPI, UPC, FNI, and PUSIC which were all determined by the court to be militia groups participating in an internal struggle with the FARDC. Thus, according to the court, the conflict could only be labelled internal and not international. The reasoning of the court in terms of the category of the conflict touches upon an important issue in the DRC conflict and the applicability of certain law. The categorization of the conflict affects the applicability of

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<sup>131</sup>See Dunia P. Zongwe, 'Analysis of Military Prosecutor v. Bongi Massaba' Oxford Reports on International Law <[http://www.oxfordlawreports.com/subscriber\\_article?script=yes&id=/oril/Cases/law-ildc-387cd06&recno=2&module=ildc&category=Congo,%20the%20Democratic%20Republic%20of%20the](http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-387cd06&recno=2&module=ildc&category=Congo,%20the%20Democratic%20Republic%20of%20the)> accessed .9 June 2011. Mr. Zongwe posits that it is questionable as to whether there exists a gap in the national legislation. Article 26 of the Military Penal Code explicitly lists the penalties that military courts may impose. Although, the Code does not specifically list what penalties are applicable to war crimes, it may be inferred from Article 26 that any of the penalties listed may be imposed by the courts. Thus, the decision to directly apply the Rome Statute in this case may actually go against the principles of subsidiarity and complementarity that define the relationship between the national courts and the ICC and that is referred to by court itself in the instant judgment.

<sup>132</sup> *Bongi Massaba Verdict* (n 120) para 82.

law. It is, in the one hand, desirable for the courts to establish such reasoning and categorizations because it grounds their decisions on applicability of law and establishes a possible guiding or persuasive decision for subsequent courts to look to. However, in the case at hand, the situation is a bit more complex. As illustrated, the conflict in the DRC and primarily in the Ituri region has been made up of a variety of different militia groups, many of whom have received some kind of material support from the neighboring countries of Uganda and Rwanda.

For example, barring the applicability of the Rome Statute, the qualification of the conflict in Ituri would impact the applicability of relevant international treaties. As stated, the DRC is a party to the Geneva Convention and its Protocols. The application of the convention is premised upon the status as an international or internal conflict. In the case of a conflict on a non-international character, two options present themselves – Additional Protocol II and Common Article 3. As previously stated, Additional Protocol II was added in 1977 as a means to greater extend the essential rules of law of armed conflict to internal conflicts from what had been established under Common Article 3.<sup>133</sup> The threshold to meet for the implementation of Additional Protocol II is higher and applies to conflicts between armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. Arguably, the situation as presented in the DRC falls within this purview particularly in light of the role of forces from Uganda and Rwanda in supporting militias who have maintained a seemingly effective hold over areas within the Ituri region.<sup>134</sup>

*Ituri District Military Prosecutor v. Kahwa Panga Mandro*<sup>135</sup>

Yves Mandri Kahwa Panga was a former member of the UPC and a founding member of the *Parti Pour L'Unité et la Sauvegarde de l'Intégrité du Congo* (Party for the Unity, Safeguarding and Integrity of the Congo, PUSIC), a Hema ethnic group that split from

<sup>133</sup> See Section 4.

<sup>134</sup> See generally UN Mapping Report (n 10) for discussion on the presence and control of forces from Uganda and Rwanda in the various provinces in the DRC throughout the conflict periods.

<sup>135</sup> *Ituri District Military Prosecutor v. Kahwa Panga Mandro*, RMP No. 227/PEN/2006. <[http://www.oxfordlawreports.com/subscriber\\_article?script=yes&id=/oril/Cases/law-ildc-524cd06&recno=1&module=ildc&category=Congo,%20the%20Democratic%20Republic%20of%20the](http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-524cd06&recno=1&module=ildc&category=Congo,%20the%20Democratic%20Republic%20of%20the)> accessed .18 January 2010.

the UPC. PUSIC was one of the members in control of zones in the northeast of the DRC, including Ituri. Between the beginning of 2002 and March 2003, conflicts between the Hema and other ethnic groups raged throughout the region. On 15 and 16 October 2002, during the course of the conflict, PUSIC members were alleged to have attacked the village of Zumbe, displacing and killing hundreds of civilians.<sup>136</sup> In 2006, the Ituri Military Court indicted Kahwa Panga for crimes against humanity and war crimes for his actions as the commander of PUSIC.<sup>137</sup>

The Ituri Military Court charged Kahwa Panga with murder as a crime against humanity pursuant to articles 5 and 6 of the Military Code,<sup>138</sup> article 23 of the Penal Code<sup>139</sup> and articles 7(1)(a) and 77 of the Rome Statute. Additionally, the court charged him with war crimes pursuant to articles 5 and 6 of the Military Code, article 23 of the Penal Code and articles 8(2)(b)(ix) and 77 of the Rome Statute.<sup>140</sup> The court directly applied the Rome Statute pursuant to Articles 215 and 153 of the constitution, which allow for primacy of duly ratified and published international treaties over domestic law.<sup>141</sup> The court found that the Rome Statute contained more comprehensive definitions of crimes against humanity and war crimes than the Military Code and cited the fact that court in Ituri previously held for the direct application of the Rome Statute in the case against Blaise Bongi Massaba.<sup>142</sup> Thus, again, a military court relied upon the decision of a previous court in support of its decision to directly apply the Rome Statute. However, despite the courts holding, some questions regarding the veracity of the constitutionality

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<sup>136</sup> Ibid. para 3. Additionally, the PUSIC attack was alleged to have resulted in the destruction of 573 homes, the firebombing of a health center, three primary schools, and some churches, as well as in the looting and burning of several civilian possessions.

<sup>137</sup> It should be noted that this was not the first trial for Kawha Panga based upon his actions as a leader and member of PUSIC. In 2005, Kahwa Panga was arrested by MONUC and tried before the Bunia County Court for murder and destruction of property.

<sup>138</sup> Article 5 defines individual criminal responsibility and article 6 defines accomplice liability.

<sup>139</sup> Article 23 provides the penalty structure for co-perpetrators and accomplices.

<sup>140</sup> Article 8(2)(b)(ix) prescribes the war crime of:

Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

The accused was also charged with insurrectional movement pursuant to article 136 of the Military Code and detention without title or right of war pursuant to article 203 of the Military Code. However, for the purposes of the report, only the international crimes recognized under both the Military Code and the Rome Statute will be discussed.

<sup>141</sup> *Kahwa Panga* verdict (n 135) para 68.

<sup>142</sup> Ibid. para 69.

of direct application of the Rome Statute have been raised, notably as to whether the direct application of the Rome Statute does not comport with the principles of complementarity and subsidiarity.<sup>143</sup>

In constructing the charge of crimes against humanity, the court determined that three constituent elements must be established; 1) the accused committed the underlying act of murder; 2) there existed a widespread or systematic attack upon the civilian population; 3) the accused knew that the conduct was part of a widespread or systematic attack against a civilian population. The court determined that Kahwa Panga's had command over the PUSIC militia during the time of the October attacks against civilians.<sup>144</sup> Additionally, the court determined that the attacks by PUSIC were widespread in nature.<sup>145</sup> An attack which constitutes a crime against humanity may be widespread or systematic, but never both at once.<sup>146</sup> To clarify the meaning of widespread attack in the context of a crimes against humanity, the Military Court in Ituri relied upon the definition elucidated in the jurisprudence of the ad-hoc tribunals. Specifically, the Trial Chamber in the Prosecutor v. Akayesu held that an attack may be considered widespread if it is massive in character, frequent and collective in scale, and indiscriminately committed against a multiplicity of victims.<sup>147</sup> The Military Court stated that the use and the effect of the heavy weapons used against the civilian population; the high number of military combatants involved in the attacks; and the several different victims at whom the attacks were aimed; and the large number of victims who suffered under the attacks were all illustrative of the characteristics provided by the Akayesu court in proving a widespread attack.<sup>148</sup>

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<sup>143</sup> See Phebe Mavungu Clément, 'Analysis of Ituri District Military Prosecutor v. Kahwa Pnaga Mandro' (03 September 2008) <[http://www.oxfordlawreports.com/subscriber\\_article?script=yes&id=/oril/Cases/law-ildc-524cd06&recno=1&module=ildc&category=Congo,%20the%20Democratic%20Republic%20of%20the](http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-524cd06&recno=1&module=ildc&category=Congo,%20the%20Democratic%20Republic%20of%20the)> accessed 20 January 2010. The principles of complementarity and subsidiarity maintain that a domestic response to international crimes is preferred over an international one. In this case, Ms. Clément argues, the domestic response under the Military Code is in keeping with these principles in that it adheres to fair trial standards and does not substantively contradict international norms. The only substantive contradiction lies in the penalty structure that allows for the death penalty, however, the court could have been legally justified to sentence the accused to life imprisonment rather than the death penalty.

<sup>144</sup> *Kawha Panga* Verdict (n 135) para 72.

<sup>145</sup> *Ibid.* para 74.

<sup>146</sup> *Ibid.* para 82, citing *Prosecutor v. Kayishma and Ruzidana* (Judgment) ICTR-95-1 (21 May 1999) para 122.

<sup>147</sup> *Ibid.* para 83, citing *Akeyesu* Judgement (n 95) para 580.

<sup>148</sup> *Ibid.* paras 75-78.

The DRC military courts do not have a common history of looking to or relying upon other jurisprudence to support legal reasoning. Thus, the Military Court in Ituri took a somewhat novel approach in utilizing the decisions of both domestic and international courts to help define the crimes and elements of the crimes charged. The result is a more thoroughly reasoned and supported verdict. Compare to previous verdicts rendered by military tribunals such as the Military Court of Mbandaka failed to provide precise and thorough evidence of their finding for a widespread attack.<sup>149</sup> In that case, the Military Court utilized the same definition of widespread and systematic attack as provided in the *Akayesu* judgement, however, the definition was not fleshed out in the same manner as in the instant case. As stated previously, such an omission makes it difficult to understand exactly how the court fulfilled the definition provided. The *Kahwa Panga* court provided a more precise definition through the use of international jurisprudence. This process, arguably exemplifies a more effective normative interplay between the international and national on this particular legal issue – the concept of widespread attack founded in the international court is duly applied and defined through the work of the national court.

The court also found that Kahwa Panga was liable as a commander for war crimes for the destruction of a church and some schools located within the villages of Zumbe and Buisa Bunyi.<sup>150</sup> The court directly applied article 8(2)(b)(ix) in prescribing the war crime of attacking well protected buildings. Additionally, the court directly applied articles 85 to 87 of additional protocol I of the Geneva Conventions and article 28 of the Rome Statute in order to construct the mode of liability of command responsibility. The court determined that Kahwa Panga was the acting commander of the militia during the attacks and that his silence as to the events that took place was tantamount to a tacit approval of the actions of his subordinates and, thus, he incurred liability.

The verdict against Kahwa Panga was appealed to the Cour Militaire of the Orientale Province. In a short but effective decision, the Cour Militaire overturned the findings of the military court of Ituri and acquitted Kahwa Panga of all charges.<sup>151</sup> The Court Militaire held that the events of October 2002 fell within the purview of the acts of

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<sup>149</sup> See discussion of the *Mutins de Mbandaka* case.

<sup>150</sup> IRIN News, 'DRC: Concerns Over Acquittal of War Crimes Convict', Kinshasa (21 February 2008) <<http://www.irinnews.org/PrintReport.aspx?ReportID=76866>> accessed 10 December 2010.

<sup>151</sup> Ibid.

war, political breaches, and crimes of opinion to which amnesty was attributable under the Presidential Decree passed in 2003 and the Law passed in 2005.<sup>152</sup>

### *Gedeon Trial*

Gédéon Kyungu Mutanga, known simply as Gédéon, is a former Mai Mai militia leader in the Katanga province.<sup>153</sup> Between 2001 and 2003, rebel forces under the control of Gédéon engaged in intense hostilities with rival Mai Mai forces as well as government forces in a bid to gain and maintain control of areas of central Katanga.<sup>154</sup> Violent acts against the civilian population including, killings, forced displacement, and rape, were perpetrated by all parties to the conflict.<sup>155</sup> Gédéon, as commander of one of the Mai Mai groups, participated in and oversaw criminal acts committed against civilians. In 2006, Gédéon surrendered to MONUC in Katanga. Gédéon and 25 other rebel participants were brought to trial before a military tribunal in Katanga for, inter alia, crimes against humanity for acts committed during the Mai Mai insurgency.

The Military Court of Haut-Katanga rendered a verdict in the trial against Gédéon et al. on 5 March 2009.<sup>156</sup> One distinguishing feature of the *Gédéon* verdict is that the military court of Haut-Katanga provided a more thoroughly written judgment than many of the previous military courts that allows for a greater understanding of the decisions of the court and the legal reasoning supporting the decisions. One of the initial decisions of the court was to establish jurisdiction *ratione personae* of the military court

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<sup>152</sup> Ibid.

<sup>153</sup> “Mai Mai” is a term used to describe militia groups that form to protect their home regions against attack from outside or foreign forces. Thus, there are many groups of Mai Mai militia acting for their own benefit and on their own behalf. Prior to 2003, the Mai Mai of central Katanga were backed by the government of then President Laurent Kabila due to the fact that the militia was considered a popular resistance to the Rwandan backed RCD rebel group. In 2003, the government largely pulled support from the Mai Mai following the end of the war and a decrease in threat of the RCD. This pull in support, coupled with the death of former Mai Mai leader Kambala, led to rivalry and infighting between Mai Mai forces and clashes with the government forces.

<sup>154</sup> HRW, ‘War Crimes Allegedly Committed by the Mai Mai in Katanga’ (legal submission) (2006) < <http://www.hrw.org/legacy/campaigns/drc/2006/katanga/legal.htm> .> accessed 13 January 2010.

<sup>155</sup> HRW reported an estimated 150,000 people were displaced and that the killings and violence were such that the region of central Katanga at that time was dubbed “the triangle of death.”

<sup>156</sup> *Military Prosecutor v. Kuyunga Mutanga Gédéon* (Verdict) Military Tribunal of Haut-Katanga RMP N° 0686/MAK/09 (5 March 2009).

over the accused.<sup>157</sup> According to the court, Articles 111 and 79 of the Military Judicial Code vests jurisdiction in the military courts for offences committed by non-military actors using weapons of war.<sup>158</sup> Additionally, Article 161 of the Military Penal Code specifically establishes the jurisdiction of the military courts over those individuals charged with genocide, crimes against humanity and war crimes.<sup>159</sup> Thus, the court found that in accordance with said provisions, it had jurisdiction over the accused.

The court applied the Penal Code, the Military Penal Code and the Rome Statute to the crimes alleged. The court determined that pursuant to Article 152 of the Constitution, civil and military courts were able to apply duly ratified international treaties and as the Rome Statute was ratified by the DRC in 1998, the statute was applicable in the instant case.<sup>160</sup> It also noted that the applicability of the Rome Statute presented issues of conflict in the definition of the crimes against humanity and war crimes imputed to the defendants, as well as, the penalties imposed for the commission of those crimes.<sup>161</sup> According to the court, the national law creates confusion in the definition of both crimes against humanity and war crimes. The definition of the crimes under the Rome Statute were clearly drawn and without confusion and thus should be applied.<sup>162</sup> Additionally, the Military Code and the Rome Statute differed in terms of penalties for offences. The Military Penal Code imposes the death penalty as punishment for offences such as genocide while the Rome Statute imposes life imprisonment as its strictest punishment.<sup>163</sup> Thus, in accordance with the principle of applying the law more favorable

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<sup>157</sup> Ibid 65. The court noted that pursuant to the Military Justice Code, the Military Penal Code, and in the spirit of the reform of the military judicial system of 2002, it is essential that the court assess jurisdiction, especially in the case of non-military accused appearing before a military court.

<sup>158</sup> Ibid. Article 111: "...[the military courts] are also competent to hear charges against those, not in the military, who commit offences with weapons of war."

Article 79: "When the Military Criminal code defines offences attributable to those not in the army, the military courts are competent to hear charges against those who perpetrated, co-perpetrated or acted as accomplice..."

<sup>159</sup> Ibid.

Article 161: "For the crime of genocide, war crimes or crimes against humanity, the military courts are the only competent jurisdiction."

<sup>160</sup> Ibid 69.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid 70.



to the accused, the court determined that the Rome Statute should be applied to the charges of crimes against humanity and war crimes.

Three of the accused were charged with crimes against humanity. The military court applied Article 7 of the Rome Statute in charging crimes against humanity for acts of murder, rape and sexual violence, and forced disappearance. The court presented a more thorough understanding of the offences charged than many of the previous military courts by providing more detailed explanations of the definitions and the elements of the crimes. However, the court did not engage in any analysis regarding the chapeau elements of crimes against humanity – ie. whether there existed a widespread or systematic attack against the civilian population at the time of the events of the indictment. Previous military courts offered analysis on these elements and perhaps the court in the instant case could have benefitted from a citation or their own analysis to lay the foundation for finding for crimes against humanity. Nevertheless, the court did go beyond its predecessors by providing thorough and supported definitions of the offences and by supporting each of their legal findings with factual evidence in order for a better understanding of how the offences charges fit within the perpetrated acts. For the charge of murder as a crime against humanity, the elements of crime were drawn pursuant to Article 7(1) (a) of the Rome Statute. The court noted that they were identical to the elements of voluntary homicide pursuant to Articles 44 and 45 of the national Penal Code which states that homicide with intent to kill qualifies as murder.<sup>164</sup> As factual support for conviction on the charge of murder as a crime against humanity, a non-exhaustive list of individuals killed during attacks by the Mai-Mai rebels under the command of Gédéon was supplied from evidence.<sup>165</sup>

For the crime of rape as a crime against humanity, the definition was drawn directly from the Article 7(1) (g) of the EOC.<sup>166</sup> By applying the elements as defined by

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<sup>164</sup> Ibid 77.

<sup>165</sup> Ibid.

<sup>166</sup> Article 7(1)(g)-1 Crimes Against Humanity of Rape:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

the EOC, the Haut-Katanga utilized a more expansive definition of the elements of rape and sexual violence than would be applicable under national law.<sup>167</sup> It should be noted that the offences alleged were largely committed between 2004 and 2005, thus, the 2006 modification to the law on rape and sexual violence was not applicable to the instant case. The court detailed facts given in evidence on acts committed against victims that were determined to meet the elements of crime. Importantly, the court detailed acts committed against male victim that constituted sexual violence under the EOC definition. The applicable national definition excludes acts committed against male victims, thus such an act would be excluded without the application of the Rome Statute. It is this type of action by a court that illustrates a crucial normative impact of the international courts upon the national courts; namely, that the very definition of an offence is broadened or altered by the application of the international norm.

Similar to the offence of rape and sexual violence, the court applied the definition of elements described in Article 7(1)(i) the EOC for the crime against humanity of enforced disappearance.<sup>168</sup> Again, the court provided factual evidence of the participation of the relevant accused in the disappearance of civilians to support its finding for conviction on that particular charge.

In addition to crimes against humanity, 11 were charged with war crimes pursuant to Article 8 of the Rome Statute. In response to the charges, the defense argued that the offences were not committed within the context of war as defined by the Geneva Conventions. During the temporal period covered by the indictment, no formal declaration of war had taken place. Additionally, from the perspective of national law, the Constitution of the DRC states that only the head of state of the DRC could declare a state of war.<sup>169</sup> Thus, according to the defense, under both international and national law, the acts charge in the indictment did not take place within the context of a war.<sup>170</sup> The court supported the defense argument and determined that there was no formal declaration pr war between the time of October 2003 and May 2006. The attacks carried

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<sup>167</sup> See Section 5 for comparison of definition of rape and sexual violence between national legislation and the Rome Statute of the ICC.

<sup>168</sup> *Gédéon Verdict* (n 156) 79.

<sup>169</sup> Article 143.

<sup>170</sup> *Gédéon Verdict* (n 157) 80.

out by the Mai Mai rebels took place following the cease-fire accord signed in Lusaka on 10 June 1999. Thus, Gédéon and those under his command committed offenses while part of an insurrection rather than a legal or de facto situation of war. Therefore only Articles 136-139 of the Military Penal Code, dealing with offences committed during insurrection, could be applied to the acts committed by the rebels. As a consequence of the court finding that a war did not exist at the time of the commission of the acts alleged to the rebel groups, the court was unable to charge for the war crime of conscription of minors. The offence of conscription of minors is not defined under the Military Penal Code.<sup>171</sup> Mai Mai rebel groups have been some of the most profuse in their recruitment and use of child soldiers.<sup>172</sup> According to UN reports, when Gédéon surrendered he was accompanied by 150 combatants, 76 of who were children.<sup>173</sup> Recognizing conscription of minors as a pervasive offence during the conflicts in the DRC is an important step in challenging impunity in the region. The applicable national legislation does not suffice in covering the offense. The Gédéon case illustrates a gap where the international law, based upon the determinations of the court, do not fill the gap left by the national law.<sup>174</sup>

The court convicted 21 of the accused Mai-Mai members and acquitted five members due to insufficient evidence and minor age of the accused. Gédéon was convicted of crimes against humanity, insurrection and terrorism and given the death penalty, along with six other Mai-Mai rebel members. Thus, it is important to note that while the court recognized that the Rome Statute was more favorable to the accused by prescribing life imprisonment as the highest penalty under the statute, the court opted to apply the punishment of the death penalty as prescribed by the Military Penal Code for the offence of insurrection.

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<sup>171</sup> Article 67 of the Congolese Criminal Code proscribes kidnapping and enforced detention and has been used in the military courts to convict for conscription of minors.

<sup>172</sup> See Coalition To Stop the Use of Child Soldier, 'Mai Mai Child Soldier Recruitment and Use: Entrenched and Unending' (Briefing Paper) (February 2010) <[http://www.child-soldiers.org/Mai\\_Mai\\_child\\_recruitment\\_and\\_use\\_in\\_the\\_DRC\\_-\\_February\\_2010.pdf](http://www.child-soldiers.org/Mai_Mai_child_recruitment_and_use_in_the_DRC_-_February_2010.pdf)> accessed 10 March 2010.

<sup>173</sup> UNSG 'Report of Secretary-General on children and armed conflict in the Democratic republic of the Congo' (13 June 2006) Report S/2006/389 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/386/66/PDF/N0638666.pdf?OpenElement>> accessed 10 March 2010.

<sup>174</sup> The court did convict for crimes against humanity including enforced disappearance which may include acts of kidnapping children for conscription into the rebel forces, however, this does not diminish the importance or need for the national jurisdiction to embrace the international definition of the offence. The international definition is more precise toward the occurrence of child conscription in the DRC and it gives the proper name to the offence which is, amongst other reasons, advantageous for understanding the prevalence of the crime.

The judgment in the Gédéon case was, thus far, one of the most comprehensive handed down by a national military court in the DRC in terms of substantive legal and factual reason vis-à-vis violations of international humanitarian law. While some gaps can be located in the decision, such as an absence of evidence in establishing and fulfilling the chapeau elements of crimes against humanity, the military court of Haut-Katanga went very far in providing evidence and justification for the laws applied to the offences. In a country that has been plagued with judicial misconduct and lack of faith, the Gédéon trial has been heralded as a landmark for its application of the Rome Statute to define crimes against humanity and its status as the largest trial in the DRC involving charges of crimes against humanity.<sup>175</sup> Like the Songo Mboyo case from the Equator province, the Gédéon case was aided by MONUC and international NGOs who had documented the violence in the area and had carried out investigations prior to the prosecution.<sup>176</sup>

*The judgment in the Gédéon case was, thus far, one of the most comprehensive handed down by a national military court in the DRC in terms of substantive legal and factual reason vis-à-vis violations of international humanitarian law. While some gaps can be located in the decision, such as an absence of evidence in establishing and fulfilling the chapeau elements of crimes against humanity, the military court of Haut-Katanga went very far in providing evidence and justification for the laws applied to the offences. In a country that has been plagued with judicial misconduct and lack of faith, the Gédéon trial has been heralded as a landmark for its application of the Rome Statute to define crimes against humanity and its status as the largest trial in the DRC involving charges of crimes against humanity.*

The judgment's more thorough approach in reasoning and support of the application of the Rome Statute may also take a step in further legitimizing similar normalizing impacts of international legal law and jurisprudence. At the very least, it may act as a catalyst for other courts to provide similar reasoning in their judgments in order to glean a better understanding of precisely how the national courts favor (or disfavor) the influence of the ICC. Nevertheless, the Gédéon trial illustrates a definite interplay between the legislative mechanisms of the ICC and the national courts of the DRC, with aspects of both being utilized to meet the goal of the court.

<sup>175</sup> HRW, "DRC: Military Leader Guilty in Landmark Trial" (article), 10 March 2009 <<http://www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial>> accessed 5 February 2010.

<sup>176</sup> UN Mapping Report (n 10) para 870.

## 8. CONCLUSIONS

The pervasive conclusion of most working in the judicial field in the DRC is that impunity for mass atrocity crimes still reigns in the face of a national system. There are a myriad of forces at play that have kept the DRC courts from achieving a greater record of prosecution such as, lack of resources, continuing violence in the regions affected, lack of impartiality of the military courts, and lack of comportment with standards of international law. From the normative legal perspective, the influence of international jurisprudence and law has had an influence to some degree, although, with so few prosecutions underway within the judicial system, it remains to be seen how the influence will continue. Thus far, the greatest normative influence on national courts has arisen from the direct application of the Rome Statute.

The direct application of the Rome Statute to cases involving international crimes has provided a more concise body of law. The relevant domestic legislation, namely the Military Criminal Codes of 1972 and 2002 and the Military Judicial Code of 2002, contain definitions of international crimes that are complex and seemingly difficult to follow by many of the military courts. The Ituri Court in the *Kawha Panga* case, for example, reasoned that the Rome Statute was more comprehensive in its definitions and easier to understand the existing military codes. Thus, the Rome Statute seemingly provides an element of judicial efficiency and understanding that is better than what is provided by the relevant domestic codes.

However, the direct application of the Rome Statute in DRC military courts has not occurred without some irregularities. First, the courts that have applied the statute have not done so under a unified banner of legal reasoning. Depending upon the court, provisions of the Constitution, The Transitional Constitution, and the Military Criminal and Justice Codes have been utilized to legally support direct application. While it may not pose the most problematic issue, it would lend the practice more credence to have a uniform legal reasoning. Additionally, it will expedite matters in that subsequent courts may cite the uniform legal reasoning with ease. Second, some courts have applied the Rome Statute but have failed to then provide any discussion on the underlying acts or constitutive elements of the crimes charged. The military court of Katanga in the *Kilwa* trial used the Rome Statute as well as the domestic Military Criminal Code. However, it failed to provide a detailed analysis of the elements of the crimes. This lack of legal

reasoning opens the door to questions of fairness and legitimacy. The substantive law must be applied with a reasoned argument in order for the jurisprudence of the DRC to be legitimized. Later trials, such as the *Gédéon* case, provide a more thorough legal foundation in term of discussion on the definition and elements of the crimes charged. Thus, some courts have made strides in this area but it is necessary for all of the working military courts, so long as they have jurisdiction, to follow suit.

The military courts reliance upon international jurisprudence in legal reasoning is also an important normative step taken by a few courts in the DRC. Again, citing international jurisprudence in support of legal reasoning can have a legitimizing effect on the courts findings. Specifically, in the case of the DRC, the use of jurisprudence from international ad-hoc tribunals has served some courts in greater understanding the constituent elements of armed conflict – both internal and international. Defining and legitimizing the fact that an armed conflict existed in parts of the DRC is an important legal requirement in the midst of such a quagmire of events that included participation of government, rebel and foreign forces. The court in the *Kahwa Panga* relied directly upon the *Akayesu* Chamber in finding that there is existed an internal armed conflict in the district during the time of the indictment. This enabled the court to correctly define the elements of an internal armed conflict and understand what definitions of crimes could be applied. It is this type of sound legal reasoning that is required in all judgments handed down by military courts for the sake of judicial legitimacy and efficiency.

One of the most difficult hurdles to the DRC national courts challenging impunity is the fact that so many cases and sentences are overturned or sentences are lessened upon appeal. The appeal judgments generally offer very little understanding as to the decision of the courts. Thus, any strides made by the military courts are instantly rendered mute. NGOs and governmental organizations cite military prejudice as a prime reason for this occurrence. Judicial prejudice must not color legal reasoning or create loopholes where none should exist.

Additionally, the number of cases involving prosecution for violations of international humanitarian law that have appeared before the military tribunals is startling low. The majority of the cases that have been prosecuted have occurred mainly in three provinces and in situations where MONUC and NGOs exerted specific pressure on the proceedings. Thus, steps must be taken to strengthen the internal mechanism in the courts of all of the provinces.

In conclusion, this report has detailed some of the vast difficulties and irregularities of the DRC military courts in their role of challenging impunity for mass atrocity crimes. It is clear that the normative influence of international law and jurisprudence has helped to strengthen the legislative backdrop of the country and has provided needed legitimacy to the legal reasoning of the few courts that have recognized and utilize international law. However, until more courts begin to utilize the knowledge base provided by international law and jurisprudence, the evolution of international law in the domestic courts of the DRC will be limited.



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