LEGAL AND INSTITUTIONAL FRAMEWORK FOR PROSECUTING INTERNATIONAL CRIMES IN THE DEMOCRATIC REPUBLIC OF CONGO

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A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAW IN INTERNATIONAL CRIMINAL JUSTICE

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CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance by the Open University of Tanzania a dissertation entitled: "**Legal and Institutional framework for prosecuting international crimes in the Democratic Republic of Congo"** in partial fulfillment of the requirements for the award of degree of Master of Laws in International Criminal Justice (LLM-ICJ) of the Open University of Tanzania.

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I, **Ally Said,** declare that, the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used references have been provided. It is in this regard that; i declare this work as originally mine. It is hereby presented in partial fulfillment of the requirement for the degree of Master of Laws in International Criminal Justice (LLM-ICJ) of the Open University of Tanzania.

……

Signature

……

Date

DEDICATION

This dissertation is dedicated to my father, Said Babu. I appreciate the support, encouragement and tolerance I got from you. In recognition and appreciation, I do dedicate this work to you.

ACKNOWLEGMENT

I humbly and with respect give thanks to Almighty God, for granting me health and opportunity of life during the writing of this useful dissertation.

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ABSTRACT

The rate of international crimes committed in the Democratic Republic of Congo is high when compared to the cases that have been reported. There are international crimes that are not critically prosecuted within the national and International Instruments. The study appraises the mechanism of the legal frame work of the Democratic Republic of Congo on how it deals with international crimes as well the collaboration of international instruments such as Criminal Courts on how it participate on the prosecutions of the cases.

The main objective of this study is to comply with the legal and institutional framework of the DRC with respect to its effectiveness in prosecuting international crimes committed on its territory.

The study used doctrinal legal research methods in conjunction with international agreements that D.R. Congo ratified as being relevant to their judicial jurisdictions.

The research identified that the D.R. Congo must do domestic prosecutions against persons who bear lower responsibility based on its national laws. This is essential as it will fill the impunity gap which is left by the International Criminal Court strategy.

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LIST OF ABBREVIATIONS

DRC	Democratic Republic of Congo
ICC	International Criminal Court
CAP	Chapter.
ICJ	International Court of Justice
ICL	International Criminal Law
ECCC	Extraordinary Chambers within the Courts of Cambodia
UN	United Nations
USA	United States of America.
OAU	Organization of African Union
SADC	Southern African Development Community
ICD	Inter-Congolese Dialogue
PTC	Pre-Trial Chambers
TC	Trial Chambers
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
OCHA	Office for the Coordination of Humanitarian Affairs
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
ATS	Alien Tort Statute
MONUC	United Nations Organization Mission the Democratic Republic of Congo Congo
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for Yugoslavia
SCSL	Special Court for Sierra Leon.
ASP	Assembly of State Parties
WWI	World War One
CAH	Crimes against Humanity
ILC	International Law Commission
JSC	Judicial Service Council
MNC	Movement National Congolese
MPC	Military Penal Code
UNGA	United Nations General Assembly
FARDC	Force Army Republic Democratic of Congo
AMO	Auditorat Military Operations
LRA	Lord Resistance Army
NGO's	Non-Governmental Organization
UNJHRO	United Nations Joint Human Rights Office
OHCHR	Office of High Commission Human Rights
CMO	Court Militaire Operations
UPC	Union des Patriots Congolais
UPC/RP	Union des Patriots Congolais Reconciliation et paix
FPLC	Patriotiques pour la Liberation du Congo
FRPI	The Front for Patriotic Resistance in Ituri
FNI	Front des Nationalistes et Integrationnistes
ICTJ	International Center for Transitional Justice
TMC	Tobias Michael Carel Asser institute

CICC	Coalition for the International Criminal Court
OSISA	Open Society Initiative for Southern Africa
NRM	National Resistance Movement
MoU	Memorandum of Understand
UNSC	United Nation Secretary Council
DDRRR	Disarmament Demobilizing Repatriation Reintegration and Resettlement.
SSR	Started Security Area
CSAC	Superior Council for Audiovisual and Communication
UPC	Universite Protestante du Congo
ULK	Universite Libre de Kinshasa
UNIKIN	Universite de Kinshasa
UNILU	Universite de Lubumbashi
ONA-DRC	Ordre National des Avocats de la Republic Democratic des Congo
WWII	World War Two
MPC	Militaire Penal Code
DDR	Disarmament, Demobilization and Reintegration
IDP	Inside Displaced People
ABAKO	Kasavubu of the Alliance of Bakongo
AFDL	Alliance of Democratic Forces for the Liberation of Congo
ICD	Inter-Congolese Dialogue
LCA	Lusaka Ceasefire Agreement

COL	Colonel
FDLR	Democratic Forces for the Liberation of Rwanda
RCD	Congolese Rally for Democracy
AMG	Auditorat Militaire de Gamison
OPS	Operations
M23	March 23 Movement.

CHAPTER ONE

INTRODUCTION

1.1 Preamble

President J. Kabila assured the citizens of the Democratic Republic of Congo that the "*drive for unity should not compromise justice. He stressed that without safeguarding rights and upholding justice, any efforts towards compromise are meaningless".* Then President noted that the people of Congo have suffered from international crimes committed by various rebel groups in recent years and emphasized the importance of ensuring that justice is served. [1]

To secure peace and stability, accountability of those who committed international crimes through investigation, prosecution, and trial is vital. This necessitates a transparent legal system that can fulfill the need for justice. Despite its commitment to bringing violators to justice, the government of Democratic Republic of the Congo has failed to guarantee the legal rights and protections of its citizens during two decades of conflict. Hence, it is crucial for the government to establish a just and efficient legal system to address these exceptional circumstances.

The guarantee to fight impunity in Democratic Republic of Congo, as well its criticalness, has been confirmed in different peace agreements marked since 1999. The 1999 Lusaka Ceasefire, [2] the 2002 Pretoria Accord on transition,[3] the 2003 Sun City Agreement,[4] and the later 2009 Goma Peace Agreement[5] all restricted

[1] President Joseph Kabila, Speech to the National Parliament Convening in Congress (Oct. 23, 2013.
[2] U.N. Security Council, "Letter Dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council," U.N. Doc. S/1999/815.
[3] Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo (Dec. 16, 2002) ["Pretoria Agreement"]. Part III, art. 8 prohibits the granting of amnesty for war crimes, crimes against humanity, and genocide
[4] Inter-Congolese Political Negotiations: The Final Act (Apr. 2, 2003), annex 1(35).

absolution for serious violations and guaranteed arraignment of those liable for these violations.[6] However, up to now, Congolese policy makers have neglected to satisfy these responsibilities.

The regional level commitment to peace, security and collaboration is embodied in the framework agreement for the Democratic Republic of Congo and its surrounding region. This agreement, which was backed by 11 nations in the Great Lakes region on February 24, 2013 in Addis Ababa, aims to prevent further violence in eastern Democratic Republic of Congo. To enforce the agreement, the signatories made a pledge to not shield individuals accused of international crimes and to aid the administration of justice.[7]

In September 2013, the member states of the country adopted benchmarking and indicator systems to assess the implementation of the System Agreement setting September 2014 as a deadline. One of these indicators is the "number of individuals accused of war crimes, crimes against humanity, the crime of aggression, and genocide who have been arrested and prosecuted." Following that indicator, the number of arrests and indictments of such individuals by September 2014 would demonstrate the effectiveness of the regional effort.

At the local level, the government of the D.R. Congo re-affirmed its commitment to ending impunity and ensuring the prosecution of international crimes through the

[5] Peace Agreement between the Government and le Congrès National de Défense du Peuple (CNDP), Democratic Republic of the Congo-CNDP, Mar. 23, 2009.

[6] See Loi No 14/006 of DRC on the Amnesty for Acts of Insurrection, Acts of War and Political Offenses (Loiportantamnistie pour faits insurrectionnels, faits de guerre et infractions politiques), February 11, 2014, www.leganet.cd/ Legislation/Droit Penal/divers/Loi.11.02.2014.

[7] Addis Ababa Agreement, art. 5 (“For the region”).

conclusion of the Kampala Accord and the signing of the 2013 Nairobi Declaration.[8] The 2014 Amnesty Law was received in thought of both the System Assentation and the Nairobi Declaration.[9] It prohibits amnesty for international crimes, grave and enormous human rights infringement[10], In addition, this has been emphasized on the Rome statute for the whole member state.

In making sure that there is prohibition of amnesty for international crimes, International Criminal Court that creates specialized court chambers, with the aim of providing justice to victims of international crimes, is a critical step. If passed by the legislature, these legal advancements would signal progress towards fulfilling the obligations under the Framework Agreement and help turn the Democratic Republic of Congo into a rights-respecting state determined to end impunity. The commitments made under the Framework Agreement present a unique opportunity to actively engage in the fight against impunity, building on limited previous advancements and lessons learned from past efforts. Thus, a path towards transitional justice is slowly opening in the DRC. Strengthening the state's ability and capacity to address international crimes and gross human rights violations is a crucial and necessary step towards restoring victims' rights, establishing the rule of law, and ensuring the non-recurrence of abuse. To achieve this, parties to the Rome Statute, including the DRC, must have a proper legal system and capable, independent, and accountable judiciary. This thesis aims to provide an objective assessment of the

[8] Declaration of the D.R.Congo Nairobi Declaration, art. 8.4,12/12/2013.
[9] ICGLR-SADC Final Communiqué on the Kampala Dialogue 12/12/2013.
[10] Amnesty Law"]. Art. 1 provides an amnesty for acts of insurrection, acts of war, and political offenses committed in the DRC between February 18, 2006 and December 20, 2013. However, art. 4 excludes amnesty for, among other things, genocide, crimes against humanity, and war crimes.

state's response — at both the regulative and legal levels to universal violations within the DRC between 2009 2014 and offers suggestions tended to the Congo's official, legal, and assembly as well as universal accomplices on how to progress it.

This dissertation focuses on International Criminal Law (ICL), which governs the prosecution of international crimes. International Criminal Law is a system of binding rules found in treaties,customs and is a part of public international law. It is designed to prohibit certain types of conduct that are widely viewed as serious atrocities and to make those who engage in such conduct criminally liable. The report provides an objective assessment of the Democratic Republic of Congo's response to international crimes between 2009 and 2014, both at the legislative and judicial levels. It offers recommendations to the Congo's government, judiciary, legislative body, and international partners on how to advance ICL in the country. DR-Congo's President's recent efforts to adopt laws that implement the Rome Statute of the International Criminal Court and create specialized court chambers are crucial steps towards fulfilling the commitments made under the Peace, Security, and Collaboration Framework Agreement. Strengthening the state's ability and capacity to address international crimes and gross human rights violations is a key step towards restoring victims' rights and establishing the rule of law.[11]

The Law deals with the criminal responsibility of individuals for the most serious human rights and international humanitarian violations. The main categories

[11] Benvenuti, P (2008) R the International Criminal Court.

of international crimes are war crimes, crimes against humanity, genocide, and the crime of aggression.[12]

The focus is on the individual, since the issue of universal law was first recognized in the Nuremberg Judgment of 1945.[13] Not only delivered the judgment, lift the shroud of state sway but rebutted the conventional see that as it were states may well be held capable under international laws.[14] Appropriately, any commission of crimes which undergo on international law is ascribed to the person culprit and not his or her state, they face the law's hand as individuals. These wrongdoings are divided into four areas: war Crimes, violations against humankind, genocide and the wrongdoing of animosity.[15]

The International Criminal Court is prosecuting individuals accused of committing crimes within their countries, as outlined by the Rome Statute and the International Criminal Court, due to ongoing conflicts. In conflict-ridden countries such as Democratic Republic of Congo, Mali, and Central Africa, the humanitarian crisis has led to numerous deaths. Warring ethnic groups have committed crimes against humanity, including rape, killings, child soldier recruitment, and attacks on civilians. The domestic legal systems in these countries are either unable to address the

[12] ICRC, what is International Humanitarian Law

[13] IMT, Judgment of 1 October 1946, in *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22 (hereafter "Nuremberg Judgment")

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

[15] See Cassese (2008: 12)

impunity due to collapse or lack of power against warlords. Thus, the International Criminal Court was established in 2002 to address these atrocities, and over 50 individuals have been tried by the court so far. The ICC has opened investigations in countries such as Darfur, Sudan, Uganda, Kenya, Libya, Central Africa, Cote d'Ivoire, Georgia, Burundi, Palestine, Venezuela, Philippines, Democratic Republic of Congo, Ukraine, Myanmar, and Bangladesh.

The purpose of this study is to critically evaluate the Democratic Republic of Congo's (DRC) participation in the prosecution of international crimes and identify the factors that impede such prosecution in Africa. The study will be structured into five chapters, each aimed at addressing these issues.

1.2 Background to the Problem

The Democratic Republic of the Congo (DRC) has faced numerous major political crisis, wars, and ethnic and regional conflicts since 1993, making it the deadliest conflict since World War II with millions of war-related deaths. Despite this widespread violence, very few victims of international crimes such as mass murder, sexual and gender-based crimes, forced displacement, and pillage have received justice. The few cases that have been brought to court have taken place primarily in military courts, indicating a failure by the DRC government to pursue accountability and bring about equity. For years, victims have been calling for justice at the national and international levels.[16] The issue with the judicial system in the Democratic

[16] United Nations Office of High Commissioner for HR on Serious Violations of HR and IHL done within D.R.C between 03/1993 and 06/2003.

Republic of the Congo (DRC) is that it lacks the capability and credibility to effectively fight against impunity for the numerous violations of fundamental rights that have been committed. This is due to factors such as limited engagement by authorities in strengthening the rule of law, tolerance of interference by political and military authorities in judicial affairs, and poor judicial practices in military courts and tribunals. To overcome this, efforts must be made to fortify the rule of law and ensure access to justice for victims.

Access to justice should be seen in a wide context, encompassing access to trial, access by those within the trial, and access by the community to the trial. This is crucial in changing the legacy of human rights abuse and restoring the pain and harm caused.[17]Central to achieving the broad concept of access to justice is the cooperation of victims. As noted by Hobbs, victim support can play a crucial role in engaging survivors, promoting personal healing, and rebuilding trust in society, thereby advancing responsibility and the rule of law in post-conflict transitioning societies.'[18]The legal system of the Democratic Republic of the Congo (DRC), as is typical in countries following the civil law tradition, grants extensive participatory rights for victims in criminal proceedings. However, until recently, the power to prosecute serious violations of international human rights law such as genocide, crimes against humanity, and war crimes was only exercised by the country's military courts. With the adoption of legislation in 2016 that revises the Congo Criminal

[17] R Henham 'Conceptualizing access to justice and victims' rights in international sentencing' (2004) 13 Social and Legal Studies 48.
[18] H Hobbs 'Victim participation in international criminal proceedings: Problems and potential solutions in implementing an effective and vital component of justice' (2014) 49 Texas International Law Journal 3.

Code and the Code of Criminal Procedure, effectively incorporating the Rome Statute into national law, it remains unclear how victim participation will be implemented once local courts start prosecuting these international crimes. This article aims to address these concerns and is divided into four parts. First, it highlights the importance of victim involvement as a post-conflict justice tool. Next, it explores international and regional human rights standards related to the rights of victims to participate in criminal proceedings for serious human rights violations. Third, it examines the DRC's domestic legal system and the subsequent statute arising from the military tribunals, highlighting the more limited participatory rights available to victims within the military justice system.

Finally, the article looks at the Extraordinary Chambers within the Courts of Cambodia (ECCC) in an attempt to anticipate any potential shortcomings in the DRC's domestic system when trying to accommodate the rights of what could amount to many victims. The Democratic Republic of Congo is divided into 250 ethnic groups with distinct linguistic affiliations.[19]

The current Democratic Republic of Congo is composed of 250 different ethnic groups, a result of the 1884-1885 partitioning of Africa by European powers that was based on arbitrary regional divisions. Some of these ethnic groups are divided by these boundaries, including the Hutu and Tutsi who can be found in the DRC, Rwanda, and Burundi. This system of ethnic division has had dangerous

[19] Ntalaja, G (2002) The Congo from Leopold to Kabila: A People's History, Zed Books Ltd: New York., p 14-15

consequences in the post-colonial DRC, as evidenced by the ongoing conflict. Currently, in eastern DRC, for example, rebel groups based on Ngiti, Hema, or Lendu ethnic origins are fighting each other, with the control of natural resources in the region dominated by each ethnic group.[20]

The Belgian Congo gained independence on June 30, 1960, following an election in which a nationalist movement, the National Congolese Development (MNC) led by Patrice Lumumba, emerged victorious and established the government. Lumumba became the first elected Prime Minister of the newly independent multiparty country, while Joseph Kasavubu of the Alliance des Bakongo (ABAKO) was chosen by the Parliament as the President of the entire nation. However, a leadership crisis arose soon after independence, when the president dismissed Patrice Lumumba from office on September 5, 1960, a move that Lumumba deemed to be unconstitutional.[21]

At the same time, an uprising broke out in the Katanga region, requiring the intervention of the UN. The crisis escalated when Lumumba was arrested and killed on January 17, 1961 by the rebels in the Katanga region who were allegedly supported by Belgium and the United States of America (USA). Amid this confusion and chaos, four short-lived governments succeeded each other between 1961 and 1965.

In 1965, Mobutu Sese Seko wa Zabanga, who was head of the military, led a coup that overthrew President Kasavubu. The Parliament, in an extraordinary session, endorsed him by a vote of confidence. Both the Parliament and the people believed

[20] *Human Rights Watch, published (2003: 5 et seq.).*
[21] Young, C (1966) 'Post-independence Politics in the Democratic Republic of Congo' 26 Transition 34-41.

that this new government would bring political and economic stability after the tumultuous start of the first democratic government. The new regime was recognized by the international community, particularly the Organization of African Unity (OAU). Moreover, the regime enjoyed the recognition, support, and security of the USA and Western European nations, who viewed Mobutu as an indispensable partner in their fight against communism, as opposed to Lumumba, whom they had branded a socialist. Mobutu took advantage of this support and transformed the government into an authoritarian regime. He began by stripping the Parliament of most of its powers in March 1966, before suspending it for two months. In May 1966, through a presidential declaration, he assumed "full powers" and abolished the office of the Prime Minister, thereby becoming the head of both state and government.[22]

The Mobutu regime was in power for three decades and ruled through fear, suppressing or co-opting political opponents. Political repression, assassinations, betrayals and arbitrary executions were used to maintain control, while the economy was ravaged by personal wealth accumulation through massive looting of national resources. This abuse of power is directly linked to the current conflict as it fueled grievances and wars of resistance.

The fall of communism and the end of the Cold War in 1989 weakened the dictatorship as its close ties with western allies became obsolete. Pressure for democratization grew from various sources, including former allies, but Mobutu

[22] Gondola, D. (2002). The History of Congo New York, Greenwood Press: p 134

refused to surrender to the call for democratic change, both domestically and internationally, even as his grip on power started to weaken.[23]

The fall of communism marked the end of the Cold War in 1989 and dealt a blow to the Mobutu regime, which lost the support of its Western partners. Calls for democratization increased from various sources, including former allies, but Mobutu did not respond to these demands. Despite the weakening of his grip on power, he refused to give in to the pressure for democratic reforms. This led to the First Congo War, which was sparked by anti-Mobutu groups motivated by ethnic differences. These groups came together to form the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL), led by Laurent Kabila and supported by Rwanda and Uganda. The AFDL, along with the Banyamulenge, a Tutsi military group based in Congo, successfully overthrew the dictatorship regime.[24] In May 1997, the AFDL successfully took control and Laurent Kabila became the de facto President. He established the government and rewarded the Rwandan Tutsis with high-ranking positions in the DRC military.[25]

However, the belief that the new government would avoid the atrocities committed by its predecessor turned out to be a myth. Kabila showed signs of a one-man rule by delaying the democratic process and centralizing executive, administrative, and military control within his office. Military courts were now used to try politically

[23] At http://en.wikipedia.org/wiki/First_Congo_War (accessed on 8 September 2021).
[24] See Turner (2007: 5).
[25] *Ibid*

active civilians.[26] Human rights violations became widespread under the new regime, including brutal, cruel, and degrading treatment, torture, and execution. Political opposition, media, civil society organizations, and freedom of speech were suppressed in the DRC. The country was plunged into a second war from May 1998 to 2002 due to the removal of Rwandan Tutsis from the army, which was seen as a betrayal by former allies. This led to the formation of alliances between outside powers, particularly Uganda and Rwanda, and local groups aimed at overthrowing the Kabila government. Zimbabwe, Angola, and Namibia supported the DRC government, giving the conflict a multi-state character.[27] The civil population suffered the most in the conflict, with an estimated 3 million deaths between 1998 and 2002, and a significant rise in the number of displaced people. The killing of Laurent Kabila in January 2001 resulted in his son, Joseph Kabila, taking over. Despite the signing of a peace agreement in 2002, conflict continued in northern and eastern regions, such as in Ituri and Kivu. The situation in the DRC led to self-referral to the ICC and investigations into crimes committed after the peace agreement was signed.

The involvement of foreign states in the conflict in the Democratic Republic of Congo violated international laws and standards. According to international norms, it is forbidden for a foreign state to interfere in the internal affairs of another state without consent. The support provided by Uganda to DRC rebels and its presence in DRC territory was ruled as a violation of these norms by the International Court of

[26] Savage, T and Vanspauwen, K (2008) 'The Conflict in the DR Congo
[27] Supra note 105

Justice (ICJ) and the DRC was awarded compensation as a result. The DRC government also accused Uganda of violating human rights and International Humanitarian Law within its territory. In response, the ICJ declared that Uganda was, at one point, the occupying power in the Ituri region, which put it under the obligations of an occupying power as outlined in the Hague Regulations of 1907. Additionally, the ICJ deemed the presence of Burundi and Rwanda in the DRC to be illegal and in violation of international law on the same grounds.[28] The ICJ only holds states accountable and does not impose individual responsibility for crimes committed. Despite the ICJ's finding of serious human rights and humanitarian law violations in the DRC, individual culprits were not held accountable. The ICJ's verdict did not address the issue of impunity and the violations continued. The nature of the conflict in the Democratic Republic of Congo was shaped by the diverse motivations of the involved parties. Both wars were portrayed as civil wars, international efforts to overthrow dictatorship, a continuation of the 1994 Rwandan Hutu-Tutsi conflict pursued in the DRC, wars over resources, and self-defense wars by Angola, Uganda, and Rwanda. The primary reason for the first war that led to a regional rebellion was the removal of the dictator. The ongoing conflict in the eastern part of the country is both a resource and ethnic war.

The conflict between the Lema and Lendu in the Ituri area is often portrayed as just tribal and ethnic, but it's actually driven by control over the region's gold and other natural resources. Rwanda, Uganda, and Angola claim they intervened for security

[28] The Democratic Republic of Congo v. Rwanda): Application instituting the proceeding filed on 23 June 1999: On Burundi, the Democratic republic of Congo v. Burundi): Application instituting the proceeding filed on 23 June 1999.

reasons, to stop guerrilla groups based in the DRC and backed by the Mobutu regime. However, this only holds true for the initial war when Seseko wa Zabanga was in power. Rwanda and Uganda's continued involvement in the DRC conflict from 1998 onwards is primarily for financial gain, to exploit the country's resources. Both countries have been reported to make substantial profits from illegal trade activities, especially in gold, coltan, diamonds, and timber from the areas they control. Meredith provides insight into how each player is profiting from the chaos.

Like vultures feeding on a corpse, all sides were engaged in a race for the spoils of war. The Congo conflict became not only self-sustaining but highly profitable for the elite groups of military officers, politicians, and businessmen exploiting it. In their quest to overthrow Laurent Kabila from Kinshasa, Rwanda and Uganda turned eastern Congo into their own personal domain, looting it for gold, diamonds, timber, coffee, colton, cattle, cars, and other valuable products.[29] Therefore, it is accurate to argue that the fighting groups in the DRC are motivated, beyond ethnicity, by greed and grievances deeply rooted in the politics of the time in the DRC and its neighboring states.[30]

In 1999, both local and international organizations attempted to restore peace in the DRC. Representatives from the Southern African Development Community (SADC), the OAU, the UN, the warring parties, and rebel leaders gathered in Lusaka from June 29th to July 7th, 1999 and reached a ceasefire agreement.[31]

[29] Meredith (2005: 540)
[30] Olsson and Fors (2004: 322).
[31] International Crisis Group (2001: 1)

The Lusaka Ceasefire Agreement was the first step in ending the second Congo war. It was signed on July 10, 1999 by the DRC, Namibia, Angola, Uganda, Rwanda, and Zimbabwe. The treaty included three key pillars: a ceasefire and a plan for the withdrawal of foreign troops; the disarmament of armed groups operating in the DRC; and the establishment of a rapid Inter-Congolese Dialogue (ICD) to facilitate, among other things, the formation of a government of national unity as a temporary step towards democratic elections. They also agreed on the integration of the rebels into the Congolese army. Despite signing the ceasefire agreement, Rwanda and Uganda did not withdraw their troops. They agreed to do so only if the DRC government demonstrated its commitment to cooperation in trade and security matters. Rwandan troops stayed in the DRC until 2002, when another divided peace agreement, the Pretoria Peace Agreement, was signed. Under this agreement, the DRC committed to neutralizing the Intarahamwe militias attacking Rwanda from its soil.[32]

The Inter-Congolese Dialogue, on its own, did not progress quickly due to a lack of political will on the part of President Laurent Kabila, who expressed a lack of trust in the OAU mediator, Sir Ketumile Masire. As a result, the peace process remained stagnant until it resumed at a slow pace following Kabila's death in January 2001.

When Joseph Kabila took power in 2001, he showed his willingness to restart the Inter-Congolese Dialogue. Before it started, the parties met to reaffirm the status of all signatories of the LCA and sign the ‘Declaration of Principal Standards of the

[32] Peace Agreement between the Governments of the Republic of Rwanda and the DRC on the Withdrawal of the Rwandan Troops from the Territory of the DRC.

Inter-Congolese Political Negotiations,' which repeated the terms of the dialogue. A preparatory assembly was held in Gaborone. The delegates agreed on two main things: an immediate and unrestricted withdrawal of foreign troops and the signing of a "Republican Pact" reaffirming national unity, integrity, and sovereignty. The second assembly for the Inter-Congolese Dialogue was scheduled in Addis Ababa in October, 2002. However, before the assembly in Addis Ababa, there was a signing of separate agreements between the major parties outside the ICD, indicating that the parties had some preconceived positions even before the dialogue. As a result, the Addis Ababa meeting failed to move the dialogue forward. The subsequent meetings planned in Addis Ababa did not take place due to financial constraints. South Africa intervened by offering to partially funded dialogue.[33]

The ICC is a means of addressing these atrocities on a global level. One way the ICC can be invoked is through the referral of the alleged violations to the ICC for prosecution. This referral can be made by a state party to the Rome Statute of the International Criminal Court.[34] The ICC is one of the avenues that can address the exception at the international level. One of the ways in which the ICC's jurisdiction can be invoked is through referral of the events suspected of violating human rights to the ICC for prosecution. The referral can be made by a state party to the Rome Statute of the International Criminal Court. Before the official referral of the situation in the DRC, the ICC Prosecutor received complaints from both individuals and NGOs. The complaints brought to his attention the alleged atrocities and human

[33] *Ibid*

[34] ICC Statute, Art. 13(a) read *intandem* with Art. 14(1). ICC's jurisdiction can also be triggered under Article 13(b) of the Statute by referral of the situation by the UNSC under Chapter VII of the Charter of the UN: ICC Prosecutor using the *proprio-motu* powers under Art. 15 of the ICC Statute

rights violations being committed in the country.[35] Based on these complaints, the Office of the Prosecutor of the ICC announced in July 2003 that it would investigate the allegations as needed to determine the situation on the ground.[36] In September 2003, the Prosecutor informed the Assembly of State Parties at its second meeting that they may need to seek the ICC's permission to initiate an investigation using their own initiative powers granted under the ICC statute.[37] However, he believed that a formal referral from the DRC government would provide his office with the necessary support and make his work easier. On March 3, 2004, the DRC government, acting under Article 14 of the ICC Statute, referred the situation in the DRC to the Prosecutor regarding crimes allegedly committed anywhere in the DRC since July 1, 2002. In this referral, the DRC government asked the Prosecutor to initiate an investigation of the situation to determine if one or more individuals should be charged with such crimes.

On June 23, 2006, the Prosecutor decided to initiate investigations in the interests of justice and the victims. As a result, on July 5, 2006, the situation in the DRC was officially referred to the Pre-Trial Chamber.[38] The ICC has, so distant, issued four warrants of arrest against *Thomas Lubanga* (2006),[39] *Mathieu Ngudjolo Chui* (2007),[40]*Germain Katanga* (2007)[41] and *Bosco Ntaganda* (2006).[42] Until March 2021

[35] ICC press release dated 19 April 2004.
[36] The press release in note 9 above.
[37] Ibid
[38] Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I ON 16/03/2010
[39] Prosecutor V Thomas Lubanga Dyilo (Warrant of Arrest).
[40] Prosecutor v.Mathieu Ngudjolo Chui (Warrant of Arrest).
[41] *Prosecutor v Germain Katanga (Warrant of Arrest)*.
[42] See *Prosecutor v Bosco Ntaganda (Warrant of Arrest)*.

three of the accused persons had been imprisoned and one was acquitted.[43]The PTC conducted a preliminary hearing of evidence in arrange to decide in case the prosecution had sufficient prove to set up significant grounds to consider them criminally dependable.[44]The PTC affirmed the charges in 2009,[45] preliminaries for atrocities and violations against humanity are presently *sub judice* before the Preliminary Chamber.[46]

In summary, the situation in the Democratic Republic of the Congo has been under scrutiny by the Office of the Prosecutor (OTP) since July 2003, with a focus on violations committed in the Ituri region. In September 2003, the Prosecutor indicated that he may seek permission from the Pre-Trial Chamber (PTC) to initiate an investigation using his own powers but stated that a referral and cooperation from the DRC government would assist his work. The government of the DRC invited the involvement of the ICC in a letter in November 2003.

On April 19, 2004, the President of the Democratic Republic of the Congo made a referral to the ICC Prosecutor regarding alleged crimes committed within the country's jurisdiction. The Prosecutor was tasked with conducting investigations to determine if one or more individuals should be charged. On June 23, 2004, the Prosecutor announced that he would open a preliminary investigation into the serious

[43] Ruling of the case Prosecutor v Thomas Lubanga, Germain Katanga and Bosco Ntaganda was convicted and sentenced while Mathieu Ngudjolo Chui was acquitted
[44] Provided under Art. 61 of the ICC Statute.
[45] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC Pre- Trial Chamber decision of December 30, 2008.
[46] Prosecutor v Lubanga on 26 January 2009 and against Katanga and Chui jointly on 24 November 2009.

crimes reportedly committed in the DRC since July 1, 2002. The decision to investigate was made after careful consideration of the requirements of the Rome Statute and was deemed to be in the best interest of justice and the victims.

Since the beginning of the war, over 5 million people have died and over a million have been displaced in the North and South Kivu provinces of Eastern Congo. There are reports of widespread rape, torture, forced relocation and the use of child soldiers. At least 60,000 women and girls had been reportedly raped by militia groups or national army officers in the Congo.

On January 23, 2008, a ceasefire agreement was signed by the government and 22 armed groups but there has been no evidence of any significant improvement for the hundreds of thousands of people still at risk, as reports of violence, disappearances, and assaults persist. It has been many years since the government of the Democratic Republic of Congo referred the situation within the DRC to the International Criminal Court.[47] Since then, the court has delivered two verdicts, one acquittal and one decision not to pursue charges. A new trial is about to commence, and one arrest warrant remains outstanding.[48]

The results could be seen as unsatisfactory when compared to the amount of resources invested in the process. Specifically, the proceedings were slow, complex, and expensive, and the court's operations faced significant criticism. For Congolese civil society, the view is more mixed or even negative.

[47] On March 2004 the government of the DRC referred to the ICC for investigation.
[48] The case against Bosco Ntaganda took place on February 10-14, 2014 on June 9, 2014.

1.3 Statement of the Problem

The topic of International Criminal Law highlights that African states have ratified numerous international instruments with mandatory provisions that they are obligated to uphold. However, despite honoring these provisions, cooperation and participation among states towards the International Criminal Court (ICC) often proves to be ineffective due to non-compliance. This study focused on the Democratic Republic of Congo as a case study, as the state has ratified a number of international treaties, including the Rome Statute,[49] the Geneva conventions and the Additional Protocols,[50] The Rome Statute sets a mandatory obligation for state parties to honor its provisions. Despite ratifying several international instruments, the Democratic Republic of Congo (DRC) has failed to participate in various situations. This study sought to assess the reasons behind the DRC's non-participation.

1.4 Literature Review

The researcher presents his opinions based on both library research and empirical study, with the former being referred to as the theoretical review of literature and the latter as the empirical review of literature. It is important to note that the literature available on the subject of state participation in the prosecution of international crimes before the ICC, the impact of international criminal law in the world, and the significance of ICL in contemporary societies is limited. Hence, the researcher has analyzed and evaluated previous studies in this field:

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[49] Initially circled as record A/CONF.183/9 of 17 July 1998 and rectified by procès-verbaux of 10 November 1998, 12 July 1999, and 30/11/1999, 8/05/2000, 17/01/2001 and 16/01/2002. The changes to article 8 recreate the text contained in depositary warning C.N.651.2010 Deals 6 while the alterations with respect to articles 8 bis, 15 bis and 15 terreplicate the text contained in depositary notice C.N.651.2010 Arrangements 8; both depositary correspondences are dated 29 November 2010.

[50] Provided for under the Common Article 3 of the Geneva Conventions.

Sassoli[51] focuses on the use of ICL and attempts to highlight the challenges faced by this branch of law. He argues that since ICL applies to armed conflicts as well as International Humanitarian Law, it is crucial to ensure that states advance the existing instruments for its use. However, the author believes that gaining respect for ICL is especially difficult, due to the many challenges posed by the law's enforcement and the doctrines, jurisprudence, and promises of states. These challenges often result in non-compliance with the law. However, the author did not concentrate on how states can improve the use of ICL and International Humanitarian Law, or how the international community can guarantee a high level of respect for International Criminal Law despite these obstacles. More specifically, author falls short in explaining the challenges that hinder the prosecution of international crimes, particularly in African states. This dissertation fills the gap left by the aforementioned author by addressing this issue.

Eliss[52] states the argument that the ICC asserted jurisdiction due to underutilization. This assertion outlines the author's stance on the matter. Once the admissibility of the case is established, the prosecution must establish the individual criminal responsibility of the accused. This requires determining the accused's role in committing the crime. Some of the previous works cited were written prior to the ICC asserting jurisdiction over any cases, making them theoretical in their approach to the modes of criminal liability. This study, however, is not theoretical, addressing the subject directly from the perspective of the ICC itself in its first two cases. It

[51] Sassoli, M.(2018)/ Year book of International Humanitarian Law, vol. 10, p. 45-73.
[52] Ellis, M and Goldstone (2018), Iderate Press: New York. p 23

should be noted that the ICC explicitly ruled out any automatic transfer of precedents from the ad hoc tribunals to its system. The author of the present work has covered the ICC's perspective but has failed to address the challenges faced by states in prosecuting international crimes, a gap which this dissertation has filled by discussing the situation in the Democratic Republic of Congo.

Inman *et al*[53] argues that in order to address the human rights abuses and restore the harm caused in the Democratic Republic of the Congo, access to justice should be viewed in a wider context. A key aspect of this wider view of access to justice is victim participation. The DRC's legal system provides various participatory rights for victims in criminal proceedings. However, until recently, the authority to prosecute serious violations of international human rights law such as genocide, crimes against humanity and war crimes was held solely by the DRC's military courts. With the passage of legislation in 2016 amending the Congolese Criminal Code and the Code of Criminal Procedure, it remains unclear how victim participation will be implemented when domestic courts begin prosecuting these international crimes. The purpose of this dissertation was to address these concerns, which the author did not address.

International Committee of the Red Cross (ICRC),[54] comments that International Criminal Law and Universal Humanitarian Law are among the foremost effective instruments of the universal community. Typically since customarily human beings

[53] D Inman & PM Magadju (2018)'*Prosecuting international crimes in the Democratic Republic of the Congo*:18 *African Human Rights Law Journal* 293-318 p 3

[54] International Committee of the Red Cross. (2018). "IHL: The Basics of IHL", ICRC.Geneva, Switzerland.

more often than not lock in in clashes and so, ICL sets rules that tend to center on the assurance of individuals and guaranteeing security, respect, and regard of individuals in times and at all cost.

According to ICRC, ICL and IHL, sets limits to the ways of wars at whatever point they happen, it looks for to protect a degree of humanity in the midst of strife, with the directing rule that indeed in war there are limits. That's to say, ICL is among the branches of law that are continuously to be well organized since the destiny of humanity lies upon it.

In this commentary, the ICRC did not center on the genuine circumstance on the ground, to see in truth how these principles of ICL and IHL are being executed by states, for illustration, talking of the principle of distinction how is it executed on the ground, are the combatants totally recognized from the civilians in all circles counting the setting of the military bases. The researcher found this relevant to the study that it has pinpointed about the principles under IHL & ICL but the author did not focus on the challenges that facing the states in prosecuting International Crimes whereas the dissertation has covered that by dealing with the DRC.

Michèle L, *et al*[55] was of the view that, most criticisms of the court relates to the prosecutorial and investigative technique of the Office of the Prosecutor. One of the essential reactions of the ICC's examinations within the DRC cases is that they need representativeness, reflecting, as it were, portion of the strife, in terms of both

[55] Michèle L, *et al* (2019). *Reflections on ICC Jurisprudence Regarding the Democratic Republic of the Congo:* Drawing Lessons from the Court's First Cases, p2

influenced casualties and worldly scope. The procedures moreover uncovered lacks in regard of reasonable trial standards, particularly those related to the rights of litigants. These standards, considered principal in national and worldwide law, are ensured by the Rome Statute of the ICC and the ICC's Rules of Strategy and Prove (RPE), specifically those directing prove.[56] When these principles are damaged, the results can be disastrous for the defense as well as the indictment, and they can weaken the reasonableness of the whole trial. Any infringement of reasonable trial standards can in this way cause intrusions and delays and indeed block the arraignment of charged culprits for the entirety of their crimes. In fact, this happened within the DRC cases, when the gathering of prove, utilize of middle people, and application of the exception of privacy and nondisclosure were called into question.

The researcher found this work relevant to the research as it has pointed out the violation of fair trial principles as the way to which can lead to undermine the fair trial. Nonetheless, the author falls short as they have not included what hinders the participation of African states to prosecute international crimes.

O'toole M[57] asserts that where the official domestic retributive justice components are insufficient, remedial justice mechanisms like a truth commission and traditional conflict settlement methods have been seen as helpful within the DRC. However, the knowledgeable authors do not discuss ICC indictments as a vital and significant part of retributive justice in addition to any domestic criminal prosecutions.

[56] See ICC Rules of Procedure and Evidence

[57] O'Toole, M, (2019) "Africa and the International Criminal Court: Behind the Backlash and Toward Future Solutions" Honors Projects . 64. Retrieved from https://digitalcommons.bowdoin.edu/honorsprojects/

The literature also shows that the complementarity concept generally came before the enthusiasm around the DRC trials at the ICC. This rule makes the ICC a supplemental forum for retributive justice by giving it a sense of auxiliary jurisdiction. Given that the DRC courts or national courts of other states parties to the ICC Statute were basically the first ward of the offenses committed there, the ICC lacked original jurisdiction over those violations.[58] However, the author has not presented in his work on the subject of what it is that hinders the participation of African states to prosecute international crimes. The researcher has found this work relevant to the research at hand as it has pointed out that, the ICC lacked original jurisdiction over the violations executed within the DRC which were essentially beneath the first ward of the DRC courts or national courts of other states parties to the ICC Statute.

Rachel G *et al*[59] argue that finding ways of reconciling the interface of society, the denounced and the casualty has continuously been a troublesome endeavor. Human rights law, for its portion, has endeavored to address this issue by emphasizing that the adherence to the run the show of law and the proper to a compelling cure incorporates the rights of casualties to take an interest in criminal procedures, especially when arraigning net human rights infringement. The arraignment of international crimes, however, has apparently not been a high priority for the DRC government. Rashly reacting to the unsatisfactory degrees of impunity, the DRC approved the Rome Statute but for a long time slowed down in receiving the

[58] Ofei (2008)
[59] Rachel G *et al* (2011) *International Criminal Justice in Africa:* Neo-colonial Agenda or Strengthened Accountability, ATJRN Brief

essential implementation enactment that would transpose the pertinent international criminal law arrangements into the DRC's domestic legal system. Essentially, activities to make transitory specialized tribunals, demonstrated after the ECCC, fizzled to materialize without any government authorities giving persuading contentions as to why this was the case. Unfortunately, in case casualties were privileged sufficient to get to justice mechanisms, it may be done through military tribunals, where the participatory rights of the casualties were obliged when compared to conventional criminal procedures. With the later appropriation of enactment that alters the Congolese Criminal Code and the Code of Criminal Procedure, viably transposing the Rome Statute into national law, presently allowing casualties to start procedures themselves and allowing a right of appeal, it is trusted that the level of impunity will begin to diminish. The researcher found this study relevant to the study as it has canvassed with the domestic legal system casualties of DRC but the author has failed to say whether the same casualties lead to the challenges that facing the states in prosecuting International Crimes whereas the current study has covered that by dealing with the DRC and provides challenges therewith together with the solutions therewith.

1.5 General objective of the study

The study asses how the legal framework in the Democratic Republic of Congo participates on the investigation and prosecution of the international crimes (war crimes, crimes against humanity) that happens often due to the insecurity of the area (War) so as establish what contributes on hindrance of the investigation and prosecution of the International Crimes.

1.6 Specific Objectives of the Study

The study at hand sought to attain the following objectives:

i. Analyze the origins of the armed conflict in the Democratic Republic of Congo that began in 1996.
ii. Evaluate the Democratic Republic of Congo's involvement in the prosecution of international crimes.
iii. Offering practical suggestions and address on ongoing issues in the DRC.

1.8 Research Question

The following research questions guided this study.

i. What is the historical background of the armed conflict in Democratic Republic of Congo?
ii. What is the effectiveness of the legal and Institutional Framework of DRC in prosecuting international Crimes?
iii. What are the possible recommendations to address the problems?

1.8.1 Significance of the Study

The study is significant as it seeks to shed light on the reasons for DRC's lack of participation in prosecuting international criminal cases, and to evaluate the impact of the prosecutor's approach on the scope of the court's decisions. In Africa, there is a common perception that the ICC is biased and seeks to colonize African states. The study aimed to address this concern by examining the extent to which the ICC's decisions are comprehensive and representative, given that if the prosecution is focused on a narrow set of regions, crimes, or suspects, the court may fail to provide

a full picture of the complex conflict in the DRC. This could potentially alienate some civil society groups and victims, compromising the credibility of the ICC. The the current study provides recommendations to the international community, Africa, and the DRC on ways to address the existing challenges.

1.9 Research Methodology

This investigation was carried out as desk research (doctrinal methodology research). The ICC's website and those of other organizations dealing with issues of human rights, international criminal law, and transitional justice were the primary sources for more crucial material. Additionally, the two PTC rulings upholding the charges for Lubanga, Chui, and Katanga were widely applied. Books, diary entries, and daily newspapers were used as sources of supplemental data.

1.9.1 The Research Philosophy

The research philosophy refers to a set of beliefs and assumptions about the advancement of knowledge. Despite the fact that this may sound trivial, it is what one is doing when embarking on research: creating new knowledge in a specific field. The knowledge generation one is undertaking may not be as exciting as a new theory of human motivation, but by still addressing a specific issue in a specific way, one is still producing new information.

In this research, the researcher believes that criminal prosecutions serve the vital purpose of focusing attention on impunity. International criminal prosecutions have increased awareness among both leaders and the public that Africa is not a conflict-

free zone where atrocities go unpunished. Africa will be better served if the attention and momentum generated by international criminal prosecutions translate into broader and more determined efforts to address the underlying social factors that drive violence.

1.9.2. Research Design

This study was designed to utilize a case study design. It began with a brief overview of the reasons for the non-participation of the Democratic Republic of Congo (DRC) in prosecuting international crimes. The selected case study area was the DRC, representing African countries with low participation in prosecuting international crimes. The researcher analyzed both international criminal laws and local laws to develop generalizations from the findings. Both doctrinal research (based on analysis of laws and reasoning) and non-doctrinal research (empirical) were used. Observational research was also used to capture non-legal factors that contributed to the non-participation of the DRC in prosecuting international crimes.

The researcher collected data from respondents on their attitudes and perceptions towards the enforcement of environmental laws in mining regions through random sampling.

1.9.3. Study area

The study took place in Democratic Republic of Congo because the area has political conflict and international crimes are committed, hence the study assess the contributions of investigations and prosecution in dealing with international crimes..

1.9.4. Data collection methods

The method of data collection involved library research and field research.

1.9.5. Library Research

For the library research, the researcher visited public and private libraries such as the Open University Library main campus Dar-Es-Salaam, Lubumbashi Public Library, Goma Library, Beni Library North Kivu whereby the examination of the problem was done through statutes, cases, course readings, journal articles, reports on other related study, online data materials and other important materials anticipated to be found therein because they provided broad information concerning international crimes.

1.9.6. Electronic Sources

Web search was utilized by which the researcher surfed significant websites and natural look motors with important and relevant data on natural things, online diaries, reports and other valuable materials was visited.

1.9.7. Field Research

The field research was conducted through the following ways:

1.9.7.1 Data collection instruments

The following instruments were used for data collection:-

1.9.7.2 Content/Data analysis

The collected pieces of information were inspected in detail before planning for their

analysis. This was vital to the analyst to decide whether the collected information backed both the defined theory and the objectives of the study. The analysts utilized subjective information investigation in analyzing the collected information. Subjective information examination included truthful and coherent elucidation; comparison and clarification of ponder discoveries. By utilizing this strategy, the data collected were broken down into smallest important units of analysis. Those units that were set into fitting categories at that point were then analyzed in detail by substance investigation. Substance investigation was done by analyzing the typical substance of any communication. The intention of utilizing substance investigation was to decrease the whole substance of communication to a few set of categories that fit the objectives of the study.

1.9.7.3 Limitations of the Study

Some of the components prevented the researcher in getting some data relating to the investigate issue are as clarified hereunder:

1.9.7.4 Accessibility of the respondesnts.

Some of the respondents were active in their day to day activities, which lead to put off and non-reply of the surveys sent to them. However, in a few regions it was unsafe for the respondents to provide the needed information. Some respondents were anxious to supply data with suspecting that the researcher may be a spy who was sent to investigate certain information.

1.10 Scope of the Study

The focus of the research was on Congo as a representative case study for other

signatory states to international criminal law conventions and treaties. This is because, due to constraints in time and resources, the researcher was only be able to focus on one state.

In addition the completion deadline for the research paper is approximately one year, and this may limit the availability of information from other states. As a result, the researcher concentrated solely on Congo, where data can be collected effectively and efficiently.

1.11 Limitation of the Study

This research is expected to be conducted in D.R. Congo which one amongst dangerous locations in the world when it comes to researchers and foreigners to be very precise due to the political instability and insecurity, D.R Congo is highly affected by frequent armed conflicts, which results to millions of people being killed to include both natives and foreigner. Therefore, the researcher was subjected to a situation where he was able to move around freely in the process of data collection.

1.12 Overview of the Study

This dissertation is divided into five chapters. Chapter 1 provides an overview and introduction to the study. Chapter 2 focuses on the conceptual framework, including relevant concepts related to the research. Chapter 3 explores the legal and institutional framework surrounding the armed conflict in the Democratic Republic of Congo (DRC), including international and domestic instruments and mechanisms for addressing international crimes. This chapter also examines the efforts to re-establish peace and the outcome of the situation in the DRC being referred to the

International Criminal Court (ICC). Chapter 4 covers the prosecution of international crimes in the DRC, including the mechanisms used both domestically and internationally. Chapter 5 summarizes the key findings and results of the study and provides a critical analysis of the collected data. Finally, Chapter 6 concludes the study by presenting the lessons learned from the DRC case and the author's recommendations based on the research findings.

1.13 Conclusion

In summarizing this chapter, the conflict in the Democratic Republic of the Congo is multifaceted, internal and external influences. This has motivated efforts to put an end to the conflict through various tactics, including political agreements, the passage of amnesty legislation, and opposition from other nations and geographical allies. Despite all of these efforts, the conflict that started in the eastern half of the country in 1996 continues today. Civilians continue to suffer and have become victims of serious war crimes and crimes against humanity, which the DRC has been powerless to stop or take measures to punish. In that regard this dissertation in its introductory part has shown the roadmap of the whole dissertation.

CHAPTER TWO

CONCEPTUAL FRAMEWORK

2.1 Introduction

The chapter presents various concepts underpinning the present study. It provides classical and changing nature of the key concepts in international criminal law and prosecution of international crimes. It aimed at covering consideration on the definition of key study concepts and relevant theory(s) directing the study.

2.2 Universal Jurisdiction

The Universal Jurisdiction is a legal principle that allows states or international legal organizations to prosecute crimes committed against individuals, regardless of where the crime took place.[60] The International Criminal Court (ICC) has the Universal Jurisdiction over international crimes, while national courts have jurisdiction over international crimes within their territory. Crimes prosecuted under Universal Jurisdiction are considered to be crimes against humanity. Some opponents, such as Henry Kissinger, argue that Universal Jurisdiction undermines the sovereignty of the countries concerned.

The concept of Universal Jurisdiction is based on the idea that international standards are owed to all nations (erga omnes), as well as the idea of jus cogens, which holds that certain international law obligations are binding on all states, regardless of whether they are signatories to the Rome Statute or not and the prosecutor may initiate investigation to the territory[61]. In 2005, the International Criminal Court

[60] Article 1 of the Rome Statute of the International Criminal Court
[61] Article 54(2) of the Rome Statuteof the International Criminal Court

(ICC) in the Hague started an investigation on alleged crimes in Darfur, Sudan. However, Sudan is a non-party state to the Rome Statute which formed the basis for the establishment of the ICC.

The principle of universal jurisdiction is classically defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim.[62]

United States of American courts have used the concept of Universal Jurisdiction since the 19th century, to justify the regulation of piracy on the high seas example of the case is, United States v. Smith, 18 US(5 Wheat) 153,161 (1820), referring to piracy as an offence against the universal law of society, a pirate being deemed an enemy of the human race.

In recent years, the Alien Tort Statute (ATS) has been used in U.S. courts as a form of Universal Jurisdiction for cases involving serious human rights violations committed outside the U.S. In 2004, the U.S. Supreme Court in Sosa v. Alvarez-Machain held that the ATS grants federal courts jurisdiction over claims based on specifically defined, universally accepted international law norms, upholding the connection between the ATS and Universal Jurisdiction. While the Supreme Court later placed some limitations on the extraterritorial reach of the ATS (in Kiobel v. Royal Dutch Petroleum Co. (2013)), it left a window open for ATS claims involving

[62] See. Kenneth C. Randall, 'Universal jurisdiction under international law', Texas Law Review, No. 66 (1988), pp. 785–8; International Law Association Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences', 2000, p. 2. It should be noted that the principle of universal jurisdiction is not per se limited to criminal jurisdiction and could be extended, for instance, to civil responsibility. This is e.g. the case in the United States with the Alien Tort Act (28 U.S.C. para. 1350) and the well-known decision Filartiga v. Pena-Irala

extraterritorial conduct that sufficiently "touch and concern the territory of the United States.

2.3 Customary International Law

Customary international law refers to the set of international obligations that arise from the consistent and general practice of states, performed out of a sense of legal obligation. A prime example of customary international law is the doctrine of non-refoulement, which states that an individual has the right to seek asylum in another country if they face a threat to their life due to factors such as race or religion in their home country. The United States legal system recognizes customary international law as those parts of international law that become binding on countries through widespread recognition as a matter of legal obligation. The standards of regulation that states have started to follow as a custom are the primary sources of customary international law.[63]

2.4 Proprio Motu

It refers to a unilateral legal action taken without the request of another authority or party. In the context of international criminal law, the International Criminal Court's (ICC) powers to conduct investigations and issue arrest warrants are clearly defined in Articles 13(c), 15, and 53(1) of the Rome Statute. The ICC can prosecute individuals for international criminal acts that are prohibited by law, without the approval of the Security Council or the United Nations General Assembly. For example, on March 31, 2010, the ICC initiated an investigation, proprio motu, case

[63] https://definitions.uslegal.com/c/customary-international-law/accessed on 25 June 2021

number ICC-01/09 brought forward by the Prosecutor Luis Moreno Ocampo, under the judges Ekaterina Trendafilova, Hans-Peter Kaul, and Cuno Tarfusser in the United Republic of Kenya, whereby two offences where alleged, crimes against humanity committed in the context of post-election violence in Kenya in 2007/2008 that happened in Six of the eight Kenyan Provinces: Nairobi, North Rift Valley, Central Rift Valley, South Rift Valley, Nyanza Province and Western Province and offences against administration of justice. The suspects involved where Uhuru Kenyata, the former president of Kenya, also involved charges against Francis Kirimi Muthaura and Mohammed Hussein Ali, Henry Kiprono Kosgey and current president of Kenya William Samoei Ruto[64]. However the cases were aquitted and case dismissed due to lack of evidence hence the prosecutor may bring back the case after having enough evidence.

This was the first situation in which the Prosecutor opened an investigation Proprio Motu, rather than by receiving a referral.

2.5 Ne Bis in Idem

The principle of ne bis in idem is a Latin maxim that means no person should be tried or punished twice for the same crime. It ensures fairness for defendants by providing them with the assurance that the verdict will be final and protects against inconsistent or malicious prosecution at both domestic and international levels. Additionally, it ensures that investigations and prosecutions are carefully initiated and completed. It's important to note that the application of ne bis in idem at the international level depends on its inclusion in the relevant resolutions of international tribunals. For

[64] International Criminal Court case number ICC-01/09

example, the resolutions of the International Criminal Courts for the former Yugoslavia (ICTY) and Rwanda (ICTR) state that no national court can try an individual for acts already tried before the international tribunals, although under specific conditions the international tribunal can try an individual that a national court has already tried. The ICC's application of the ne bis in idem principle is slightly different in that an individual can be tried at the national level for conduct that was previously the basis of a conviction by the ICC.[65] The ICTY, ICTR and ICC statutes all accommodate the chance of attempting a person for conduct that was at that point the subject of procedures at public level where the procedures were intended to protect the individual from criminal obligation at international level (article 10(2) (b), ICTY Rule; Article 9(2) (b), ICTR Resolution; Article 20(3) (a), ICC Statute).

In the case of SERGEY ZOLOTUKHIN V. RUSSIA application number 14939/2003 where by the applicant complained under article 4 of protocol No. 7 that he had been prosecuted twice in the connection with the same offence. The Chamber found that, as regards the applicant's conviction under Articles 318 and 319 of the Criminal Code for insulting and threatening violence against public officials, this part of the conviction had been based on acts separate from and subsequent in time to those on which his conviction of "disorderly acts" had been founded.

On the other hand, the charge of "disorderly acts" under Article 213 of the Criminal Code brought against the applicant had referred to the same facts as those forming

[65] ICRC – Advisory Service on International Humanitarian Law number 03/2014

the basis for his conviction under Article 158 of the Code of Administrative Offences. Given that the offence of "minor disorderly acts" as defined in Article 158 and that of "disorderly acts" under Article 213 had the same essential elements, namely disturbance of public order, the Chamber concluded that the applicant had been prosecuted for an offence of which he had already been convicted previously.[66]

2.6 Nullumcrimen, Nullapoena Sine Lege

Nullumcrimen Sine Lege, Nulla Poena Sine Lege is a Latin phrase meaning "no crime or punishment without a law." This fundamental legal principle states that there can be no crime committed and no punishment imposed unless there is a violation of a penal law that existed at the time of the offense. This principle is enshrined in international criminal law, including Article 15 of the International Covenant on Civil and Political Rights. It means that no one can be convicted or punished for an act or omission that was not considered a crime under the law in force at the time it was committed[67].

For a crime to exist, there must be a law that defines the act as a crime, and for a punishment to be imposed, the law in force at the time of the offense must provide for that specific punishment. The purpose of this principle is to ensure that laws are clear and consistent so that individuals can reasonably predict the legal consequences of their actions.

[66] Case of sergey zolotukhin v. Russia application number 14939/2003 the judgement of 10 February 2009 in Strasbourg.
[67] Article 15 of the International Covenant on Civil and Political Rights

The ICC Resolution includes a specific provision on the principle of legality (Article 22). This principle is linked to the non-retroactivity principle, the explicitness principle, and the prohibition of analogy. The non-retroactivity principle states that the law criminalizing an act must have existed before the act took place. The explicitness principle requires that the definition of the prohibited act be clear, while the prohibition of analogy requires that the definition be understood.[68]

In the case of Prosecutor V. Enver HADZIHASANOVAC, Mehmed ALAGIC and Amir KUBURA Case number IT-01-47-AR72 offences committed in the territory of Yugoslavia. The interlocutory appeal presentys two issues. These concern challenges by the appellants on: 1) The responsibility of a superior for the acts of his surbodinates in the course of an armed conflict which was not international in character. 2) The responsibility of the superior for commited before he became the superior of the persons who commited them.

This was seen valid by the appeleate judges and in view of the appeals chamber, the matter rests on the dual principle of the responsible command and its corollary responsibility[69]. Hence a person can be liable to the offences he/she commits.

2.7 International Criminal Law

International criminal law is a branch of law that criminalizes specific acts considered to be serious crimes and governs the processes of investigation, prosecution, and punishment of those crimes. The suppression of serious violations

[68] ICRC Advisory Service on International Humanitarian Law number 03/2014, available at www.icrc.com

[69] The case of Prosecutor V Enver HADZIHASANOVAC, Mehmed ALAGIC and Amir KUBURA Case number IT-01-47-AR72 offences committed in the territory of Yugoslavia

of international humanitarian law is crucial for maintaining respect for this aspect of law, especially for atrocities which pose a threat to the global community as a whole. There are several fundamental principles upon which international criminal law is based, and as international crimes increasingly have extraterritorial elements, it is becoming increasingly important for states to uphold these principles while also respecting their own national standards of criminal law and the principles established in the instruments of regional bodies to which they are party[70].

In the case of AKAYESU, Jean Paul V. Prosecutor case number ICTR-96-04 in International Criminal Tribunal for Rwanda held in Arusha Is the clear example of the International crime happened in Rwanda in 1994 and prosecuted in Arusha, Tanzania. Whereby the diffendant was found guilty of participating in Rwanda Genocide and was sentenced life imprisonment affirmed on the appeal on 01 June 2001.

2.8 Prosecuting International Crimes

The focus of this concept lies in the methods used to ensure that perpetrators of international crimes are held accountable. The researcher explores various arguments put forth by prominent authors on this topic. Supporters of international criminal trials argue that they contribute to restoring social balance and are crucial in the

[70] General principles of the International Criminal Law published by International Commettee of the Red Cross number 03/2014

international community's efforts to tackle the culture of impunity that threatens to undermine Africa.[71]

Protagonists of international criminal indictments and those associated with the International Criminal Tribunal for Rwanda (ICTR) present four fundamental reasons for international criminal indictments: discouragement, debilitation, ethical education and substitution for vigilantism.[72] Jack Snyder and Leslie Vinjamuri present a comprehensive overview of the three primary arguments put forth by supporters of international criminal trials to justify their demand for these trials: Firstly, trials serve as a strong deterrent by sending a message to potential perpetrators of atrocities that they will be held accountable for their actions. Secondly, trials reinforce the rule of law by educating both leaders and the general public that conflicts should be resolved through impartial justice. Thirdly, trials pinpoint the guilt of specific individuals, reducing the likelihood of future cycles of violence between ethnic groups."[73]

International criminal indictments emphasize the requirement for responsibility in a culture mired in exemption.[74] Researchers, human rights advocates, and United Nations' authorities all appear to concur that long term steadiness of Africa, extending the rule of law, and killing the culture of impunity, can only be ensured by holding culprits of evil responsible for their transgressions." The nature of some

[71] The preamble to the ICC Statute captures the reasons for the establishment of the court. The preamble, *inter alia*, "determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes." *See* ICC Statute,
[72] Martha M, (1998), Between Vengeance *and Forgiveness* at page 122
[73] Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principles and Pragmatism in Strategies of International Justice*, 28 Ir'LSECURITY5, 17 (2003)
[74] C, P Maina, (2014) *The International Criminal Tribunal for Rwanda: Bringing the Killers to Book,* 37 IN-r'LREv. RED CROSS (No. 321) 695.

violations and the circumstances of their commission request the consideration and inclusion of the international community.[75] The conditions in Africa-weak and dysfunctional institutions, ethnic pressures, corruption, and a central government incapable or unwilling to address the atrocities of previous leaders make the foundation of international criminal tribunals legitimized, and maybe fundamental.[76] Most post-conflict societies are wistful about prosecuting evildoers but the reality is that many fledgling democracies have simply not had the power, popular support, legal tools, or conditions necessary to prosecute effectively. Post-conflict societies, for a variety of reasons ranging from lack of political will, security concerns, dysfunctional judicial infrastructure to corruption,[77] are either unable or unwilling to prosecute perpetrators of evil.[78] Even when they can prosecute, scholarship and research show that governments in those states are inflicted with corruption and a lack of basic infrastructure that make it for them to administer justice that meets universally accepted standards of a fair trial.[79] Government authorities who make the choices whether or not to indict culprits of fiendish tend to be liberal toward their companions and supporters and effortlessly control the legitimate handle to attain pre- appointed results."[80] Attempts by such states to indict culprits of evil regularly attract complaints and reactions, particularly from litigants and their supporters who

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[75] Bartram S. (1998) *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals,* 23 YALE J. INT'L L. 383, 401

[76] Danilo Z (2004), *Peace Through Criminal Law*,2 J. INT'L CrIM. JUST. 727, 730 with Jane E. (2007), *Pursuing Accountability after Conflict: What Impact on Building the Rule of Law,* 38GEo.J. INT'L L. 251, 252

[77] Christina M. Carroll, An Assessment of the Role and Effectiveness of the ICTR and the Rwandan National Justice System in Dealing With Mass Atrocities of 1994

[78] Ivan S, (2004); Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses, 29 YALE J. INT'L L. 343, 356-57

[79] Amnesty Int'l, Rwanda: The Troubled Course of Justice, Al Index AFR 47/10/ 00, Apr. 2000

[80] Richard, S (2007) Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template, 12J. CONFLICT &SECURITY L. 65, 71

charge the government of utilizing the machinery of justice to settle ancient scores, and to threaten political adversaries.[81] In a few cases, top government authorities bear a few complicity within the violence that compromises their capacity to reasonably and equitably provide justice to the society.[82] Efforts to advance responsibility regularly lead to "pretense trials by undependable administrations involved within the exceptionally atrocities adjudicated or political appear trials by successor regimes bent on retaliation rather than justice.[83]

Most of the states currently develop the mechanism for entertaining the International Criminal matters on the local courts. National prosecution seems not to be much considered on international prosecutions. However, it is very important. Professor Ward Ferdinandusse of International Criminal Law at University of Groningen and a Prosecutor in the Dutch Department of Prosecutions stated that, “There is by all accounts a longstanding international agreement, communicated dominatingly in delicate regulation instruments, for example, states ought to collaborate in the investigation and prosecution of the center violations. Simultaneously, settlement arrangements directing that collaboration between states for massacre, atrocities, and violations against mankind are restricted and obsolete. Practice shows that a multilateral deal on common lawful help for massacre, violations against mankind, and atrocities could give a significant reinforcing of the international legitimate system expected to indict the culprits of such crimes'

[81] David Wippman, Atrocities, Deterrence and the Limits of International Justice, 23 FORDHAM INT'L L.J. 473, 483
(1999)
[82] Patricia M. Wald, International Criminal Courts-A Stormy Adolescence, 46 VA. J. INT'L L. 319, 331 (2006)
[83] Jose E. Alvarez, (1999) Crimes of State/Crimes of Hate: Lessons from Rwanda, 24 YALE J. INr'L L. 365, 370.

2.9 International Humanitarian Law

International humanitarian laws structure a significant part of public international law and contains the principles which, in the midst of outfitted struggle, look to safeguard individuals who are not or are no longer participating in the threats, and to limit the strategies and method for fighting utilized. International Humanitarian law pertinent in equipped contentions is international treaty or customary rules which are exceptionally planned to determine matters of compassionate concern emerging straightforwardly from furnished clashes, whether of a worldwide or non-international nature; for humanitarian reasons those rules limit the right of the gatherings to a contention to utilize the techniques and method for fighting, and safeguard individuals and property impacted or at risk to be impacted by the contention.[84]

Therefore, International law is binding upon the States only if they agree upon them, except in cases of Customary International Law and Jus Cogens. IHL applies to armed conflicts. However, it does not regulate whether a State may use force against another State; this is governed by an important, but distinct, part of international law set out in the United Nations Charter. This law on the use of force or legality of the use of force is known as jus ad bellum. The use of force between States is presently prohibited by Article 2(4) of the United Nations Charter. After the new regime of prohibition, jus ad bellum has changed into jus contra bellum, which means law on the prevention of war. The exception of the prohibition is admitted in cases of

[84] International committee of the red cross October 2002

individual and collective self-defense under Article 51 of the United Nations Charter.[85]

2.10 International Criminal Court

The ICC was established on 1 July 2002, at The Hague. The treaty which established ICC is known as Rome Statute, which was signed by states at the Rome in 1998 which is the ICC's foundational and governing document. Currently there are 123 states which are involved with the Rome statute and in this way individuals from the ICC. The ICC has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes, and crime of aggression. ICC is created with the consent of those who will themselves be subject to its jurisdiction. Jurisdiction and admissibility are distinct concepts according to the Rome Statute. Two requirements must be completed for a case to be prosecuted before the ICC, The court should, first and foremost, have jurisdiction and, secondly, admit admissible evidence. According to the jurisdiction criterion, the ICC will only bring charges against a person if one of the four crimes listed in the ICC Statute is committed. i.e. genocide, war crimes, crimes against humanity and crime of aggression. The crime should have been committed after the establishment of the ICC, i.e. after 1 July 2002 for a person to be arraigned by the Court either regional purview or individual jurisdiction should exist. Hence, an individual must be indicted if they have either (1) committed crime inside the regional locale of the Court or (2) committed a crime while a national of a state, that is inside the regional purview of the Court.

[85] International Humanitarian Law notes written compiled by Edward Madziwa,

The admissibility requirement concerns whether matters over which the Court properly has jurisdiction should be litigated before it. As per the admissibility clause, The Court is empowered to refuse to hear a case that 'is not of sufficient gravity' even if it has jurisdiction over the crime.

The Court is required to rule a case inadmissible when it is appropriately dealt with by a national justice system. This is known as 'complementarity principle' However, the court can opt to take up the case if the state concerned is unwilling or unable genuinely to investigate or prosecute. The right to decide whether a case is admissible or not, is within the privilege of court.

Numerous highlights of the ICC are distinct from the ICTY and ICTR, including its part as a complementary, as contradicted to the primary, legal institution with regards to national courts. The ICC is a court of "last resort" and is based on the guideline of complementarity that the primary responsibility for exercising jurisdiction over universal violations rests with domestic purviews which the ICC cannot act unless the country with jurisdiction over the case isn't investigating and arraigning or is "unwilling or incapable genuinely" to do so.[86]

The International Criminal Court (ICC) has a structure similar to the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). However, it has some key differences: The ICC has pre-trial chambers in addition to trial and appeals chambers, unlike the ICTY and ICTR. The court also includes the semi-autonomous Office of the Defense Counsel

[86] Rome Statute, Preamble. *See also* Rome Statute, Art. 17 and article 20, paragraph 3

and the Office of Public Counsel for Victims, both of which fall under the Registry. The ICC is also subject to regulatory oversight by the Assembly of States Parties. Another notable difference between the ICC and other tribunals is that victims have the right to participate in proceedings, as they do at the Extraordinary Chambers in the Courts of Cambodia. The ICC has jurisdiction over the most serious international crimes, including genocide, crimes against humanity, war crimes and aggression committed after the Statute went into effect (July 1, 2002).[87] The ICC Statute defines the crimes under its jurisdiction with great precision to ensure certainty and avoid issues with the principle of legality. The ICC Elements of Crimes, which can be used by the court in interpreting and applying the law, provide additional definition to the crimes.[88] Currently, the ICC has jurisdiction over the crime of aggression, but it is unable to exercise this jurisdiction at present.

The ICC's jurisdiction can only be exercised in three ways: 1) A state party to the Rome Statute refers a case to it; 2) The UN Security Council refers a case to it under its Chapter VII powers; 3) The prosecutor starts an investigation with the authorization of the Pre-Trial Chamber.

The ICC's jurisdiction is limited to cases where the crime was committed on the territory of a state party, if the accused is a national of a state party, or if a non-state party has accepted the ICC's jurisdiction for the crime in question..[89] In case the ICC

[87] Rome Statute, Arts. 5(1), 11(1)-(2).
[88] *Ibid.*, Arts. 9, 21.
[89] *Ibid.* Article 12(2). *See also* Rome Statute, Article 124 (stating "notwithstanding Article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this Article

is referred to a situation by the UN Security Council, the restrictions of its jurisdiction do not apply and it can hear cases of crimes regardless of where they occurred or who committed them, even if the state or individual involved is not a party to the Rome Statute. Under its Chapter VII powers, the UN Security Council can also request the ICC to initiate an investigation or prosecution for renewable periods of up to twelve months in situations posing a threat to peace, breach of peace, or acts of aggression.[90]

2.11 International Crimes

These crimes have been characterized over time in a extend of international conventions and agreements, starting with the Traditions primary Hague at the conclusion of the 19th century, which set up rules for military conduct amid wartime. These understandings amplified criminal obligation not fair to the coordinate culprits of a specific wrongdoing, but moreover to those who commanded, arranged or allowed the crimes to require place.[91]

International crimes have been arraigned by a range of international and local courts—the International Criminal Court, established by the Rome Statute[92]. Genocide is defined as "the intention to destroy, in whole or in part, a national, ethnical, racial or religious group" (Rome Statute, Article 6), while war crimes are

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may be withdrawn at any time. The provisions of this Article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1").

[90] *Ibid.*, Art. 16.

[91] Open society Foundations, (2016) Fact Sheet p 2.

[92] Of 1998 (signed so far by 123 countries) and based in The Hague, has jurisdiction over all of them

“serious violations of the laws and customs applicable” in international and no international armed conflicts (Article 8).

In instances of mass abominations, individuals who complete the crime might not have arranged or prompted the viciousness. A killing might be done by troopers or soldiers, or by individuals from a gang drug, yet requested by a senior commandant, a cartel chief or a legislator. Subsequently, charging the individual or individuals who did the killings the immediate culprits with "simple" violations can miss examples of guiltiness that ensnare more senior culprits who requested the crimes to be carried out or neglected to forestall or rebuff their bonus. Lawfully, this idea is known as the regulation of order liability: a prevalent is liable for violations perpetrated by his/her subordinates and for neglecting to forestall or rebuff those crimes.[93]

This principle can applied to any organized body – including both “state actors” such as the armed forces of police, and “non-state actors,” such as a rebel group, a militia or even an organized crime group[94]. The following are the International crimes criminalized under international laws;-

2.11.1 War Crimes

It was during the end of world war one (WWI) when the notion of war crimes was introduced into international practice and legal discourse.Art.228 of the Versailles Peace-Treaty introduced the concept of war crimes (Initially known as violations of the laws and customs of war).

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[93] *Supra* note 52
[94] *Ibid*

That peace-treaty, however, did not have the definition of such violations. This notion was then introduced in the Charter of the International Military Tribunal at Nuremberg (Art.6) and the Charter of the International Tribunal at Tokyo (Art.5). Further development of this concept were seen in the Four Geneva Conventions which termed these violations as "grave breaches." The Additional Protocol I, however, use the term war crimes as provided for under Art.85 (5).

Further development was seen in the statutes establishing the ICTY and ICTR.

The statute of ICTY contains two provisions on war crimes-provision on 'grave breaches of the Geneva Conventions' and 'violations of the laws or customs of war'

The statute of ICTR provides for violations of Common Art.3 to the Geneva Conventions and violations of the provisions of Additional Protocol II. The Statute of the ICC provides under Art. 5 a list of crimes falling under its jurisdiction. Among such crimes are War crimes further elaborations are provided under Art. 8 of the Rome Statute[95] Generally, Art. 8 of the Rome Statute[96] categorize war crimes into four categories': i) Violations of the Geneva Conventions in times of International Armed Conflict; ii) Violations of general IHL in times of International Armed Conflict; iii) Violations of the Geneva Convention (Common Art. 3) in times of non-international armed conflict, and, iv) Violations of general IHL in times of non-international armed conflicts.

In order to constitute a violation of the laws of war (war crimes), an act or omission must be relevant in terms of a rule of the laws of war that, there should be a connection with an armed conflict as well, the conduct must have been taken place in

[95] [1998]
[96] [1998]

the context of and was associated with an armed conflict. In the case of *Prosecutor v. Tadic*[97] the Trial Chamber of the ICTY stated that, for a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of IHL. The mental element required is knowledge of the circumstances which establish the existence of an armed conflict.

An atrocity is an infringement of the laws of war that leads to individual criminal obligation regarding activities by soldiers in real life, like purposefully killing regular people or deliberately killing detainees of war, torment, taking prisoners, superfluously obliterating non-military personnel property, misdirection by dishonesty, wartime sexual brutality, ravaging, and for any person that is essential for the order structure who arranges any endeavor to carrying out mass killings including slaughter or ethnic purging, the giving of no quarter in spite of give up, the enrollment of kids in the military and ridiculing the legitimate differentiations of proportionality and military need.[98]

2.11.2 Crimes against Humanity

Crime against humanity (referred to as C.A.H) first appeared in the Nuremberg Charter[99] Art. 6(c) defined them: namely, murder, extermination, oppression, extradition, and other uncaring acts committed against any civilian populace, sometime recently or amid the war; or abuses on political, racial or devout grounds in

[97] of 7 May 1997,
[98] World of Warcraft: War Crimes a 2014 book by Christie Golden
[99] Nuremberg Charter on 1945

execution of or in association with any wrongdoing inside the ward of the Tribunal, whether or not in infringement of the household law of the nation where executed at Nuremberg; acts that we would nowadays be characterized as genocide (especially the Holocaust against the Jews) were arraigned as CAH instead of genocide the crime of genocide did not yet exist at that time.

CAH is an older crime than genocide in customary international law. The Nuremberg Tribunal did not purport to invent new crimes (to avoid breaching the legality principle) but only to prosecute people for committing pre-existing crimes – and that it predates the Nuremberg Charter during the Nuremberg trials. CAH was linked to crimes against peace (aggression) and war crimes. As a result there was a nexus between CAH and armed conflict. In 1950 the International Law Commission (ILC) made the first attempt to codify the Nuremberg principles. In 1950 Code established the principle that just because something is not a crime under domestic law does not mean that crime doesn’t constitute a crime giving rise to individual criminal responsibility under international law.

In article 7 of the Rome statute, Crimes against Humanity have been analyzed as the systematic or widespread attack which is pointed to the civilians or population with the knowledge of destroying them. The acts which have been stated on the statute include enforcement disappearance, murder, and torture. Characterizing atrocities as violations against humanity implies that large-scale violence is different from ordinary domestic crime: it requires examining systems and patterns of crime in

order to better identify and to know their origins, particularly where there is an evidence of state orchestration or involvement.[100]

2.11.3 The Genocide

Genocide was first introduced into international law in 1948 in the Genocide Convention. Its signature element is the intentional killing (with the intent to destroy) of all or some members of specially protected groups. The term ‘genocide’ was coined in 1944 by the Polish lawyer, Rafael Lemkin, the 1948. Genocide Convention provides; Under Art.2 acts which constitutes crime of genocide, means of commission under Art.3, the provision that official status is not a bar to prosecution. The ICTY, ICTR, and ICC statutes define obligations on states to pursue criminal charges or grant extradition; the prohibition of genocide is a long-standing principle of international law. The groups protected are; National, Ethnic, Racial, Religious, the ICTR, in Prosecutor v. Jean Paul Akayesu[101], stated; “Massacre is particular from different violations because it exemplifies an extraordinary goal or dolus specialis (Intend to destroy). Extraordinary plan of a wrongdoing is the particular aim, expected as a constitutive component of the wrongdoing, which requests that the culprit obviously tries to deliver the demonstration charged. Consequently, the unique expectation in the wrongdoing of massacre lies in 'the purpose to obliterate, in entire or to some extent, a public, ethnical, racial or religious group.

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[100] Open society foundations in 224 west57th street, New York. Also see opensocietyfoundations.org

[101] Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998, para. 498, See also ICTR, Musema, (Trial Chamber), January 27, 2000, para. 164; ICTR, Rutaganda, (Trial Chamber), December 6, 1999, para. 59

'The mens rea must be formed prior to the commission of the crime as stated in the case of Kayishema and Ruzindana[102], intent however need not be actual. It can be inferred from the nature of the conducts. This was stated in Rutaganda's case[103]

"Intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused."[104]

It is very difficult to establish intent in the absence of the accused person's confession. However the Trial Chamber in Prosecutor v Jean-Paul Akayesu[105] listed the following factors to be taken into consideration: the common setting of the execution of other at fault acts efficiently coordinated against that same bunch, whether. Committed by the same guilty party or by others; the size of outrages committed, the overall idea of the monstrosities committed in a locale or a country, the reality of purposely and efficiently focusing on casualties by virtue of their participation of a specific gathering, while at the same time barring the individuals from different groups, the overall political doctrine which led to the acts, the reiteration of horrendous and oppressive/discriminatory acts or the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list but which are committed as part of the same pattern of conduct. In the Kayishema and Ruzindana case, the Trial Chamber stated that the following could be indicators of

[102] (ICTR Trial Chamber), May 21, 1999, para. 91
[103] (ICTR Trial Chamber), December 6, 1999, para. 61-63;
[104] See also ICTR, Musema, (Trial Chamber), January 27, 2000, para. 167; ICTR, *Semanza*, (Trial Chamber), May 15, 2003, para. 313; ICTR, *Bagilishema*, (Trial Chamber), June 7, 2001, para. 63

[105] September 2, 1998, para. 523-524

genocidal intent: The number of group members affected, the physical targeting of the group or their property, the use of derogatory language toward members of the targeted group, the weapons employed and the extent of bodily injury, the methodical way of planning, the systematic manner of killing; and the relative proportionate scale of the actual or attempted destruction of a group. This is traditionally recognized as a supreme international crime-the worst of all international crimes.

The UNGA in 1950 termed it as the gravest of all crimes against peace and security throughout the world. Today, no here can such hierarchy be seen. Crime of aggression remains to be one of the serious international crimes. There has been no acceptable universal definition of crime of aggression. However, it is simply understood as an invasion of one state to the territorial sovereignty. When the Rome statute of the International Criminal Court was adopted in 1998 and even when it came into force, the ICC had no jurisdiction over this crime because it was not defined under the statute. However, the June 2010 Kampala Conference for review of the Rome Statute adopted amendments to the ICC statute which, inter alia, define the crime of aggression.

The amendments were adopted, by consensus, in the 13th plenary meeting held on 11th June 2010-Review Conference Resolution no.6. The Kampala conference has four major parts; The preamble which recalls the commitment of the State parties to activate the ICC's jurisdiction on crime of aggression, Annex I which amends the Rome Statute Annex II which amends the Elements of the Crimes, Annex III which gives the general understanding of the amendments, Resolution 6 introduces the new

Art. 8bis and deletes Art. 5(2) of the *Rome statute*.[106]Art.8bis (1) which gives a definition of the crime of aggression to mean; The arranging, preparation, initiation or execution, by an individual in a position viably to exercise control over or to coordinate the political or military activity of a State, of an act of animosity which, by its character, gravity and scale, constitutes a manifest infringement of the Charter of the United Nations. Art.8bis (2) lists down a number of acts which constitute acts of aggression. These include; The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, in any case brief, coming about from such attack or assault, or any addition by the utilization of constrain of the territory of another State or part thereof; Bombardment by the military of a State against the district of another State or the use of any weapons by a State against the locale of another Express; The barricade of the ports or shores of a State by the military of another Express; An assault by the military of a State on the land, ocean or flying corps, or marine and air armadas of another Express; The utilization of military of one State which are an inside the area of one more State with the understanding of the getting State, in negation of the circumstances accommodated in the arrangement or any expansion of their presence in such domain past the end of the arrangement; The activity of a State in permitting its region, which it has set at the removal of another State, to be utilized by that other State for executing a demonstration of hostility against a third Express; The sending by or for a Condition of equipped groups, gatherings, irregulars or hired soldiers, which complete demonstrations of furnished force against one more Condition of such gravity as to add up to the demonstrations recorded above, or its significant contribution in that.

[106] Iternational Criminal Court 1998

The adoption of the definition of the crime of aggression in the Kampala conference is one step toward having this crime punishable by the ICC. Nevertheless, the new amendments have some limitations: The amendments do not forthwith trigger the jurisdiction of the ICC on this crime; The amendments require acceptance or ratification of the amendments of not less than thirty state parties in order to come into effect; The jurisdiction of the ICC shall not be exercised until after the decision that will be made on 1 January 2017;The amendments give room for the Security Council's influence in determination of whether the crime or acts of aggression have been committed-See Art.15*bis* and Art.15*ter* The amendments limit the scope of criminal liabilities only to such persons who are in superior/command position.

It can generally be said, Resolution 6 is just laying down the foundation towards having the crime of aggression punishable by the ICC The ICTY in Tadic's Case[107] stated that; Most of these violations do not result from the criminal affinity of single individuals but constitute signs of collective guiltiness: the crimes are regularly carried out by bunches of people acting in compatibility of a common plan. Disregarding the way that a couple of people of the bundle may genuinely execute the lawbreaker act the cooperation and commitment of the individuals from the gathering is in many cases crucial in working with the commission of the offense being referred to. It follows that the ethical gravity of such support is frequently no less-or for sure the same as that of those really completing the acts being referred to.

[107] Appeals Chamber, 15 July 1999

2.12 Conclusion

The definition of essential study topics, pertinent theory(s) driving the investigation, pertinent empirical literature on the issue, and identification of knowledge gaps have all been covered in this chapter. The researcher has observed that the main study has been addressed by different authors and commentators. The researcher found those to be relevant as they have addressed different issues relating to IHL, ICL and International crimes. However, since specifically the challenges that hinder the prosecution of international crimes before the ICC have not provided on, this becomes the main target to this dissertation.

CHAPTER THREE

NATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK

3.1 Introduction

This chapter delves into the legal and institutional framework regarding the ability of the Democratic Republic of the Congo (DRC) to prosecute International Crimes observed on the previous chapters. A lack of a clear framework can hinder the effectiveness of the DRC in pursuing such crimes and fail the prosecution. To provide a comprehensive understanding for the research, it is important to examine the DRC's legal and institutional framework in relation to the prosecution of international crimes. In the DRC, the law regarding serious violations has been loosely enforced by the Congolese military courts.

These courts have made inconsistent use of the Rome Statute while implementing existing national laws on serious offenses. This framework and its implementation are thoroughly analyzed in section one of this chapter. In section two, there is an overview and discussion of the initiatives taken by Congolese lawmakers to address the shortcomings of the current legal system.

3.2 National Institutional Framework

A well-designed legal and institutional framework is crucial for the realization of the right to social protection. A comprehensive legal framework clearly outlines rights and provides individuals who are eligible for benefits a means to make claims and seek redress if their rights are violated. It also protects individuals from arbitrary or discretionary decisions and ensures access to healthcare and fairness in treatment.

Moreover, legal and institutional frameworks play a key role in defining the roles and responsibilities of the various actors involved in designing, managing, delivering, and enforcing social protection programs. This helps to prevent overlaps, duplications, extensions, or gaps in the system and is essential for its efficient operation. Most countries have national institutional frameworks that address international crimes, with many institutions acting as watchdog organizations to provide information and oversight.

Military courts and tribunals have personal jurisdiction over personnel of the army and national police, as stated in article 156 of the Constitution.[108] However, a number of provisions also apply to people who are not affiliated with the armed forces or the national police. Throughout a war [109] expanding military authority to include combating civilians[110] Any civilians who, although being unrelated to the military, "cause, engage in, or aid one or more soldiers or persons substantially similar thereto to commit an offense under military law or regulation are subject to military

[108] Article 156 of the Constitution limits the competence of military courts to infractions by members of the armed forces and the police: "Les juridictions militaires connaissent des infractions commises par les membres des Forces armées et de la Police nationale. En temps de guerre oulorsquel'état de siègeoud'urgenceestproclamé, le Président de la République, par unedécisiondélibéréeenConseil des ministres, peutsuspendresur tout oupartie de la République et pour la durée et les infractions qu'il fixe, l'actionrépressive des Cours et Tribunaux de droitcommun au profit de celle des juridictionsmilitaires. Cependant, le droitd'appel ne peutêtresuspendu" ["Military jurisdictions are aware of offences committed by members of the armed forces and the police. In times of war or when a state of siege or emergency is declared, the President of the Republic, by way of a decision made in the Council of Ministers, may suspend, in all or part of the Republic and for a period of time and over a set of offences that the President shall determine, action to suppress civilian courts and tribunals in favour of military jurisdictions. However, the right to appeal shall not be suspended"].

[109] Constitution, art.156.

[110] MJC (2002), art. 115: "Les juridictions de droitcommunsontcompétentesdèslorsquel'un des coauteursoucomplicesn'est pas justiciable des juridictionsmilitaires, sauf pendant la guerre oudans la zone opérationnelle, sous l'état de siègeoud'urgence, oulorsque le justiciable civil concernéestpoursuivicommecoauteuroucompliced'infractionmilitaire."

jurisdiction during peacetime"[111] "who violate the Army, National Police, National Service, their equipment, their property, or while they are members of the Army, National Police, or the National Service"[112] and "who use weapons of war to perpetrate crimes without becoming soldiers"."[113] Due to these jurisdictional exclusions, military courts are able to hear cases involving offenses that would often be handled by regular civil courts.

Military courts now have broad jurisdiction after being selective until April 2013, which has caused a lot of controversy. First off, military equity is a "justice of exception" that addresses misdeeds committed by military personnel while they were using their skills. Serious offenses cannot ever be properly regarded as having been committed while serving in the military due to their very nature.[114]

3.2.1 The Constitution of the Democratic Republic of Congo

The Democratic Republic of Congo's Constitution recognizes that international treaties have precedence over domestic law. Hence, a legal system comprising both national and international law offers a lawful solution to serious crimes. The DRC is a signatory to several treaties that call for the prosecution of significant offenses..[115]

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[111] Marcel Wetsh'okondaKoso, "Républiquedémocratique du Congo: La justice militaire et le respect des droits de l'homme – L'urgence du parachèvement de la réforme" (2009), 47: "Thus, the military courts have jurisdiction in respect of any person connected with the army by any link whatsoever, including for belonging to the armed forces or having been in their service by some other link, or for having infringed their property."

[112] MJC (2002), art. 112(7)

[113] MJC (2002), art. 112(7)

[114] Art. 7 of the African Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, June 27, 1981) states that military jurisdiction is based on the executive branch's discretion, which jeopardizes the tribunal's impartiality in violation of art. 7.

[115] See Marcel Wetsh'okondaKoso, Afri MAP, Open Society Initiative for Southern Africa, "République démocratique du Congo: La justice militaire et le respect des droits de l'homme -

It adopted the 1949 Geneva Conventions, the two 1977 Extra Protocols, the 1954 Hague Convention, and the 1948 Convention on the Prevention and Punishment of the Crimes of Mass Murder.[116] Notably, the DRC ratified the Rome Statute on 11 April 2002, after signing it on September 8, 2000.[117]

A big step forward was made with the adoption of the Law on the organization, functioning, and jurisdiction of the Courts in April 2013.[118] Interestingly, it appointed jurisdiction over serious violations to non-military personnel courts, making the Courts of Allure/Appeal able for atrocities, violations against humanity, and massacre.[119] Military courts already have limited jurisdiction over crimes against humanity, atrocities, and massacres under the 1972 Military Justice Code.[120]

Military tribunals have subject-matter jurisdiction over all MPC violations under article 207 of the MPC.[121] Additionally, Article 161 states that military tribunals have jurisdiction over any offense "connected" to or "unified" from a significant violation, regardless of whether it involves an ordinary citizen.[122]

3.2.2 The Military Penal Code

In combating transnational crimes DR Congo employs the Military Penal Code

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L'urgence du parachèvement de la réforme" (2009), p. 27, for a list of the treaties that the DRC has ratified.

[116] UN Mapping Report, 391–393.

[117] International Criminal Court's Rome Statute (2187 U.N.T.S. 90, Jul. 17, 1998).

[118] LOJC. Art. 91

[119] *Ibid*

[120] Important Institution of a Military Justice Code [MJC], Ordinance-law No. 72/060 of September 25, 1972 (Zaire) (Dem. Rep. Congo).

[121] Refer to MPC, Title V. The MPC covers both mixed and military offenses. Also see MJC (2002), articles 76 and 79.

[122] MPC, art. 161: "Encasd'indivisibilitéou de connexitéd'infractions avec des crimes de génocide, des crimes de guerre ou des crimes contrel'humanité, les juridictionsmilitairessontseulescompétentes" ["Should crimes be indivisible from or related to crimes of genocide, war crimes or crimes against humanity, the military courts shall have sole jurisdiction"].

(referred to as MPC), since the introduction of the Military Penal Code in 1972, atrocities such as genocide and crimes against humanity have been defined by military law.[123] The customary Congolese Penal Code doesn't contain arrangements connecting with serious offences. In light of the DRC's endorsement of the Rome Statute[124] Through administrative modification, the parliament attempted to alter the definitions of genocide, crimes against humanity, and atrocities in military law. In 2002, the revised Military Penal Code (MPC) was approved but the modified definitions don't exactly correspond to the Rome Statute definitions.[125]

The MPC confuses the definitions of war crimes and crimes against humanity to begin with. It reiterates that major breaches of international law regulations against populations of ordinary citizens that do not require the presence of a condition of armed conflict constitute offenses against humanity.[126]

However, the MPC mischaracterizes crimes against humanity as grave breaches against those protected by the Geneva conventions and additional protocols in the

[123] Ordonnance-loi No 72/060 of DRC on Establishing a Code of Military Justice, September 25, 1972 ["MJC (1972)"]

[124] Exposé des motifs de la Loi n° 023/2002 du 18 novembre 2002 portant Code judiciairemilitaire et loi n° 024/2002 du 18 novembre 2002 portant Code pénalmilitaire (entered into force on 25 March 2003).

[125] See Avocats Sans Frontières, "Etude de jurisprudence: L'Application du Statut de Rome de la CourPénaleInternationale par les Juridictions de la RépubliqueDémocratique du Congo" (2009), 25–71, for a thorough comparison of the distinctions between the definitions of crimes in domestic Congolese law and the Rome Statute.

[126] MPC, art. 165 (crimes against humanity): "Les crimes contrel'humanitésont des violations graves du droit international humanitairecommisescontretoutes populations civilesavantou pendant la guerre. Les crimes contrel'humanité ne sont pas nécessairementliés à l'état de guerre" ["Crimes against humanity are grave violations of international humanitarian law committed against civilian populations before or during war. Crimes against humanity are not necessarily related to a state of war"].

following provisions, even though the conventions only identify and address situations involving international and non-international armed conflicts.[127]

Second, compared to the Rome statute, the MPC's list of crimes that include a transgression against humanity is not quite as comprehensive.[128] Apartheid, forced disappearances, and other heinous actions of a similar type were excluded from the MPC."[129] The MPC defines war crimes quite broadly as "any infractions of the Republic's law committed during conflict and not excused by the laws or traditions of war.".”[130]

The MPC does not list the prohibited behaviors or acknowledge regional and global issues.[131] Therefore, any act that is illegal under local law can qualify as an atrocity if it is committed when a war is in progress. Judges who are required to interpret and

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[127] *Ibid.,* art. 166 states: “Constituent des crimes contrel’humanité et répriméesconformément aux dispositions du présent Code, les infractions graves énumérées ci-après portantatteinte, par action ou par omission, aux personnes et aux biens protégés par les Conventions de Genève du 12 août 1949 et les ProtocolesAdditionnels du 8 juin 1977, sans préjudice des dispositions pénales plus graves prévues par le Code Pénalordinaire” [“Constituting crimes against humanity and punished in accordance with the provisions of this Code, the grave breaches listed below, by the commission or omission, against individuals and properties protected by the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977, without prejudice to any more severe penalty provided by the ordinary Penal Code”]. Article 166 then itemizes 18 offences that constitute a crime against humanity, followed by a further 10 offences in art. 169. In the Mutins de Mbandaka case, the court has noted that the MPC “entretientune confusion entre le crime contrel’humanité et le crime de guerre qui du resteestclairementdéfini par le Statut de Rome de la CourPénaleInternationale” [“creates confusion between crimes against humanity and war crimes that are for the rest clearly defined by the Rome Statute of the International Criminal Court”]; see “Avocats Sans Frontières, “Etude de jurisprudence: L’Application du Statut de Rome de la CourPénaleInternationale par les Juridictions de la République Démocratique du Congo” (2009), 21.

[128] Article 7, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (U.N publication, Sales No. E.03.V.2 and corrigendum), part II.B; Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010

[129] MPC, art. 166 and 169. See Antonietta Trapani, DOMAC, “Complementarity in the Congo: The Direct Application of the Rome Statute in the Military Courts of the DRC” (2011), 23–24

[130] MPC, art. 173: “Par crime de guerre, ilfaut entendre toutes infractions aux lois de la Républiquecommises pendant la guerre et qui ne sont pas justifiées par les lois et coutumes de la guerre” [“War crimes mean all offenses against the laws of the Republic committed during war and which are not justified by the laws and customs of war”].

[131] *Ibid*

apply the MPC are not provided with sufficient guidance by the MPC's lack of specificity and imprecision, which fails to accurately reflect international law.

The MPC appears to mimic the definition of genocide in the genocide treaty, but includes "political group" among the protected classifications a violation of both the Rome legislation and the genocide convention.[132]

Thirdly, the MPC has a contradictory approach to condemning. The MPC does not adequately denounce atrocities, in violation of the principle of nulla poena sine lege ("no penalty without a law"). However, it accommodates capital punishment for culprits of massacre and violations against humanity, albeit a ban, is presently set up against death penalty.[133]

Finally, the MPC does not provide an obligation technique that corresponds to the definition of order liability under article 28 of the Rome Statute. In accordance with Congolese law, the superior is considered a co-defendant or accomplice for tolerating the actions of their subordinates, but only to the extent that those subordinates are also charged.[134] This implies that the military commander might face charges if their subordinate is charged, but only as a co-defendant or accessory, not as the main offender.

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[132] *Ibid*

[133] Article 164 of The Congolese Constitution

[134] MPC, art 175: "Lorsqu'unsubordonnéestpoursuivicomme auteur principal d'un crime de guerre et quesessupérieurshiérarchiques ne peuventêtrerecherchéscomme co-auteurs, ilssontconsidéréscommecomplicesdans la mesureoùilsonttoléré les agissementscriminels de leursubordonné" ["When a subordinate is prosecuted as the main

Due to these flaws and anomalies, military tribunals have occasionally had to make creative decisions regarding whether to charge severe violators under local or international law.

3.2.3 National Police of Congo

The National Police of Congo was formed in 1997,. It was established by the legislation decree-law N*002-2002 on organization, institution and functioning of the Congolese National Police on 26 January 2002. The major role of the national police is to provide security of people and their properties, apprehend, and prosecute the criminals.

The National Police of Democratic Republic of Congo, due to its security instability, comprised of the combination of members of ex-militia groups; retired officers and ex-military personnel. The ex-combatants were integrated into the police through the program of National Integration as a matter of political convenience and without specific training.

All along, the DRC new Democratic Republic of the Congo's (DRC) new disarmament, demobilization and reintegration (DDR) program was sent off as a key cycle that would carry harmony and security toward the eastern DRC, and supportable dependability in the African Extraordinary Lakes district. For the beyond twenty years, the locale has stayed entangled in a ceaseless dangerous conflict that has killed countless individuals and expanded the quantity of evacuees and inside displaced people (IDPs), and the multiplication of outfitted rebel bunches has proceeded unabated. Through its Resolution 20981 and 2147, 2 the Unified

Countries Security Gathering (UNSC) upheld the improvement of a through DDR and disarmament, demobilization, repatriation, reintegration and resettlement (DDRRR) program.

The United Nations also approached the DRC government to maintain its obligation to the started security area change (SSR), and that the UN Organization Stabilization Mission in the DRC (MONUSCO) needed to offer help and guidance for the program's implementation.[135]

The police force is separated into an administrative branch (police administrative) and a legal branch (police judiciary), both of which work with the judiciary to prosecute offences.[136] Due to a lack of training and incompetent staff, the combination contributes to the failure of transparent prosecution of foreign crimes, which is a major duty of the police.

3.4 DRC Legal and Court System, with Jurisdiction to Deal with International Crimes

The mother law in the Democratic Republic of the Congo is the legal system established by its constitution. Each jurisdiction's jurisdictions have been examined, although the judiciary's organizational structure is in transition. One must make a distinction between the judiciary as it already exists (the 1982 Judicial Organization Code) and as it is envisioned under the 2006 Congolese Constitution in order to understand it and the projected organization of the judiciary in the DRC.

[135] Accord conflict trends 2016/4 written 16 February 2017

[136] Forum for African Policing Civilian Oversight (2008) The Democratic Republic of the Congo is included in an African Police Oversight Audit (p. 19).

The legal systems in French countries differ with the English colonized country. DRC falls under the French legal system as the colonies where French speakers. On this part, we shall look on the legal system, court systems with jurisdictions to deal with international crimes and there jurisdiction.

3.4.1. An Overview of DRC Legal System

The DRC may be a civil law country, and as such, the majority of its private law systems can be ultimately linked to the Napoleonic Civil Code of 1804. More specifically, Belgian law serves as the foundation for the Congolese legal system. Since the Democratic Republic of the Congo received its legal system from Belgian colonialists, the legal frameworks of both countries share many similarities.

Customary law or tribal law is another basis of the legitimate framework of the DRC, where 56% of the populace lives in country ranges. Neighborhood standard laws direct both individual status laws (like marriage and separate laws) and property rights, especially the legacy and arrive residency frameworks, within the different conventional communities of the nation. Indeed in spite of the fact that the Constitution subordinates customary laws to state laws, customary laws settle 75% of disputes within the Congo.[137]'Customary law does not allude to a body of rules simply stemming from utilizations and hones that have procured over time the character of law. Alternativel, it probably alludes to a common regulating framework ordered by genuine law-making organs (i.e. patriarchs, family

[137] Le Sort des Tribunal aux Coutumiers se Discute à l'Assemblée Nationale,Radio Okapi (Dem. Rep. Congo), June 9th, 2010.

committees, clan chambers, and conventional or tribal chiefs). That governing framework is customary, not because it derives from conventional traditions but rather because it manifests itself in or through them.[138]

In other words, customary laws are independent of the individuals whose behavior they govern and obtain their legitimacy from a valid law-making body. This feature of standard laws implies that, unlike state laws, ethnographic inquiries, as limited to the conventional (i.e., doctrinal) legitimate inquiry concerning techniques, are essential to uncover the substance of a certain standard run the show. In addition, standard laws don't have widespread application because they essentially only apply to the traditional communities from whence they originally came.

The judiciary's structure is changing. One must make a distinction between the legal as it already exists (the 1982 Judicial Organization Code) and as it is intended by the 2006 Congolese Constitution in order to understand the current and anticipated organization of the law inside the DRC. The judiciary's structure is changing. One must make a distinction between the legal as it already exists (the 1982 Judicial Organization Code) and as it is intended by the 2006 Congolese Constitution in order to understand the current and anticipated organization of the law inside the DRC.

3.4.2. The Supreme Court (Cour Suprême de Justice)

This was the DRC's highest-ranking court. The three divisions of the High Court were legislative, administrative, and executive (Judiciary). The examiners from the

[138] Kampetenga Lusengu, B.M., Droit Coutumier Congolais 4 (University of Lubumbashi, Lecturer Kampetenga's Class Notes, 2006).

Parquet général de la République (Public Office of the Public Investigator) held the right to appear in front of the Supreme Court's careful eye. The establishment of arraignments in criminal cases and the consideration of the public interest in particular common cases were the responsibilities of prosecutors. A law passed in 1982 listed the components of the High Court system.

Second, the Court of Appeal (Cour d'appel) comprises two divisions: Administration and Judiciary (Legal Executive). Under the watchful eye of the Court of Requests, investigators from the Parquet général, the overall office of the public prosecutor, reserve the right to appear. The Council de Grande Occurrence, a court with broad subject-matter jurisdiction, is the third factor.

Fourth, since investigators don't appear before magistrate courts (tribunaux de paix), they are the only ones with the authority to conduct investigations. Magistrate courts also have jurisdiction over recent conflicts that have not been fully resolved by traditional courts (tribunaux de zone). Finally, although they are not a part of the formal legal system, traditional leaders (chefs coutumiers) are connected to the mediation and resolution of cases (disputes) in traditional networks. The law authorizes regular courts to operate in various regions of the nation while awaiting the establishment of judges' courts. In actuality, conventional courts in the Congo intervene and settle about 66% (two thirds) of all conflicts.

Military courts are set up according to the 2002 Military Judiciary Code. The Military High Court is the highest court (Haute cour militaire). The lowest military

courts are the tribunaux militaires de garnisons, tribunaux militaires de police, cours militaires et cours militaires opérationnelles, in the descending order of jurisdictional reach. Criminal cases brought against members of the army and national police are decided by military courts. Even if the accused is a civilian, they equally decide cases of war crimes and crimes against humanity.

The Congolese Constitution of 2006 reorganizes the law significantly. A judicial service council, or Conseil supérieur de la magistrature, is responsible for organizing justice in accordance with the Constitution. In the Judicial Service Council, open prosecutors and legal professionals are represented. The legal benefit committee is also managed by the Protected Court President. Benoit Bindu Luamba serves as the country's Chief Justice and President of the Constitutional Court.

In order to progress viability, specialization, and expedient justice, the Constitution partitions the judicial framework in three partitioned progressions of specialized courts, the ordre de juridiction (which can be translated as ‘court system’), to mind the ordinary (civil and criminal), the authoritative and protected court frameworks. The most noteworthy court in ordinary (including military) things is the Court of Cassation (Cour de cassation); the most noteworthy court in open law or authoritative things is the Chamber of State (Conseild’État); and the most elevated court in sacred things is the Constitutional Court (Cour constitutionnelle).

The right to testify in court is granted by the Constitution to certain public prosecutors (procureurs, magistrats de parquet, and auditeurs militaires). The Procureur Généralprès la Cour Constitutionnelle, the Procureur Généralprès la Cour

de Cassation, and the Procureur Généralprès le Conseild'État are each given the authority by the Constitution to appear before the Sacred Court, the Court of Cassation, and the Committee of State, as the case may be.

3.4.3 The Judicial Service Council

The Judicial Service Council (Conseil supérieur de la magistrature) is capable for the organization of justice. The Parliament ordered a natural law on the Legal Benefit Council in August 2008. The Judicial Service Council (JSC) law declares that the JSC guarantees the usage of protected instruments that serve as a counterweight to all three powers (i.e. official, administrative and legal). The JSC law engages the JSC to form proposals with respect to the designation, advancement, retirement, renunciation, evacuation and restoration of legal officers, and to conduct disciplinary hearings against legal officers. In any case, the Congolese President remains the individual exclusively authorized to designate, advance, resign, expel and rehabilitate judicial officers.

The JSC law organizes the JSC around a General Assembly, a Bureau, disciplinary chambers and a permanent Secretariat. The JSC law places these structures under the direction and coordination of the Chief Equity (Chief Président de la Cour constitutionnelle), who is by law the president of the JSC. The JSC is broadly composed of public prosecutors and judicial officers, representing all the court levels and sorts of the DRC. Like in French law, prosecutors are legal officers and, as a result, portion of the legal in Congolese law. The JSC plans and oversees the compensation and running costs budgets of the legal. In any case, the money related

administration of the JSC is subject to control by the Service of Finance's Office of the Reviewer Common (Review générale des accounts), the Cour des Comptes (the Review Court) and the Parliament.

National and provincial disciplinary chambers entertain disciplinary hearings. People may bring complaints against particular judges before the disciplinary chambers. This complaint method could be a reflection of the guideline that the freedom of the legal is more a crucial right of people than an entitlement of judges.

3.4.4 The Constitutional Court

Article 157 of the 2006 Congolese Constitution established the Constitutional Court. The government initiated and passed in October 2013 an organic law on the Constitutional Court. Set up in 2013, the Constitutional Court got an authority to be operational in 2015.

3.4.5 The Jurisdiction

The Constitutional Court is the most noteworthy court in constitutional issues. It isn't the highest court within the DRC but, given that the Constitution is the supreme law of the land, the Constitutional Court is practically the court defining and settling the foremost essential issues within the nation. Additionally, the Court may listen to requests from the Board of State and the Court of Cassation on jurisdictional questions. In that sense, the Protected Court performs within the Congo the work that the Tribunal of Clashes fills in France: choosing inside which court framework a case falls.

The Constitutional Court includes an order as wide and significant as the Constitution itself. The center work of the Constitutional Court is to check the constitutionality of laws and conduct with lawful results. Anybody may seize the Court to call into address the legality of an Act of Parliament or direction. The Court checks the legality of natural laws and directions some time soon after their proclamation. It checks the legality of the rules of arrange of the Parliament, the Free Constituent Commission, and the CSAC. Any act the Court finds conflicting with the Structure is invalid and void. The choices of the Sacred Court are last and executory and tie all courts and people within the nation.

The Court translates the Constitution upon demand by the president of the Republic, the government, the Leader of the Senate or the Speaker of the National Assembly, one tenth of the person(s) of both of the two parliamentary houses, Lead representatives (governors), and leaders of provincial assemblies. It settles debates on referenda and presidential and authoritative decisions, clashes over the conveyance of powers between the government and the Parliament and between the central and common governments. The Court moreover listens to criminal cases against the President of the Republic and the Prime Minister, after two thirds of the congress have voted in favor of indictment.

Upon conviction, the Court expels the President or Prime Serve from his or her office. The International Criminal Court works out complementary jurisdiction in cases of war crimes and violations against humankind.

3.4.6 Membership and Tenure

The Constitutional Court is comprised of the nine judges designated by the President of the Republic. The President chooses three judges for appointment as Constitutional Court judges; the congress (i.e., Senate and National Assembly, voting collectively) and the JSC each prescribe three Constitutional Court judges. Designated in July 2014, the primary nine judges of the Constitutional Court were Eugène Lwape Banyaku, Jean-Louis Kangashe Esambo, Yvon Kele Oma Kalonda, Noël Ngozi Mala Kilomba, Luamba Bindu, Emmanuel-Janvier Bambi Lessa Luzolo, Mpunga Sungu, Félix Vunduawe Te Pemako, and Corneille Nsongo Wasenda.

Two thirds of the judges must be lawyers from the seat, the bar or academia, with at slightest 15 years of involvement in law or politics. Constitutional Court judges serve for a non-renewable term of nine years. One third of the Court is reestablished each three years. Judges select who among them will be the Chief Justice. Once chosen by his colleagues, the Chief Justice is formally hoisted to the position of Chief Justice by the Congolese President by means of an ordinance. The Chief Justice serves for a once renewable term of three years. The Chief Justice, by time of this study, is Benoît Bindu Luamba.

3.4.7. The Court of Cassation

Article 153 of the Democratic Republic of Congo Constitution makes the Court of Cassation (Cour de cassation) and puts respectful and military courts under its control. In other words, the conventional court framework is headed by the Court of Cassation. In April 2013, the Congolese Parliament passed an organic law on the

conventional court framework, which is the tremendous private and criminal law court framework that envelops the magistrates' courts (tribunaux de paix), military courts, the Tribunal de Grande Occasion, commercial courts, Courts of Offers, the Military Tall Court and the Court of Cassation. Conventional courts intervene the broad run of gracious and criminal case; they are the heart of the legal framework.

The Court of Cassation is made up of "first president" or chief judge (Chief Président), relate judges (présidents), and advisors (conseillers). Jérôme Kimpele Kitoko (during the time of this study) was serving as the President of the Court of Cassation. The Court of Cassation is partitioned in four chambers: one chamber for civil matters, another for commercial matters, a third chamber for social matters and a fourth one for criminal matters. Each chamber has five individuals. The Parliament signed enactment on the method before the Court of Cassation in February 2013.

The Court of Cassation is the court of final resort. It listens to appeals from decisions and judgments made by civil and military courts and tribunals. However, when a case is appealed to the Court of Cassation, the Court does not choose the case itself; it chooses the legitimate questions alluded to it. The Court either maintains the decision from a lower court or quashes it. When the latter is the case, the Court will remand the case for reexamination to the lower court within the light of the Court of Cassation's choice on the legitimate questions.

One exemption exists, that, in spite of the fact that the Court of Cassation has original and appellate jurisdictions in criminal cases against senior government

officers. It chooses both the facts and the lawful question(s) in criminal cases against individuals of Parliament, government individuals other than the Prime Minister, individuals of the Constitutional Court, judges of the Court of Cassation and prosecutors showing up before that Court, individuals of the Committee of State and prosecutors showing up before the Chamber, individuals of the Court des Comptes and prosecutors showing up some time recently that Court, the chief judges of courts of requests and the prosecutors showing up some time recently those courts, the chief judges of regulatory courts of requests and the prosecutors showing up some time recently those courts, the Governors and vice-governors, common priests, and the presidents of provincial assemblies.

3.4.8 The Council of State

Article 154 of the DRC Constitution unfolds a framework of the administrative courts, formed by the Council of State (Conseild'État), the Administrative Court of Appeals, administrative courts and tribunals. Unlike the Council of State in France, the Council of State within the DRC is portion of the legal, not portion of the executive branch of government. The Congolese Council of State listens to and decides cases brought against the acts, controls and choices of national authoritative bodies and authorities. It listens to offers against choices of regulatory courts of offers. In occasions where there are no competent courts to listen to claims for harms caused by measures taken or requested by the state, the Board arbitrates. It bases its decisions on value taking under consideration of all circumstances important to the parties. Félix VunduaweTePemako (by the time of this study, was serving as the President of the Council.

3.4.9 Special Courts

These are courts that deal with the specific matters and disputes in the territory. Matters brought before these courts must be of relevance to the court in question. Their jurisdiction lies or deal only with relevant cases and disputes.

3.4.9.1 Commercial Courts

A 2001 law analyzes and establishes commercial courts within the Congo. Situated inside a Tribunal de Grande Instance, a commercial tribunal (tribunal de commerce) seat is composed of three people: one permanent judge (designated by the minister dependable for the administration of justice) and two business persons acting as lay judges, in spite of the fact that the judge directs over the court. Commercial courts sit and provide judgments of cases involving bankruptcy, organizations, unjustifiable competition and commercial papers.

3.4.9.2 Labor Courts

Another law, enacted in 2002, makes labor courts. Arranged inside each Tribunal de Grande Instance, a labor court (tribunal de travail) seat is composed of three judges: one permanent judge and two lay people (assessors), one representing employers and the other representing employees. The minister responsible for the administration of justice chooses among judges of the Tribunaux de Grande Instance those who will direct over labor courts. Labor courts sit in judgment of disputes between representatives and employers emerging from a work contract, a collective agreement, labor laws or directions, and social security.

3.4.9.3 Legal Education

Legal training within the DRC takes five years to complete. Hence, most students enrolled in law faculties at Congolese colleges and universities are between 17 and 21 years of age. Law students have a common educational program, the first two years of their legal education and have in later years more opportunity to select the courses for which they would like to specialize. Law teachers do not utilize the Socratic technique. Instead, they give legal knowledge in a definitive way with lesser interaction with the students. In expansion, assessment comprises in composing examinations planned for the conclusion of the semester, the year or a shorter period, depending on the availability of lecturers.

After completion of the first three years, law students get a degree (graduat), which permits the holders of the degree to appear in court, from the Tribunal de Grande Instance down, on sake of individuals as public protectors (défenseurs judiciaires).
Unlike a few civil law nations, the Congolese legal education is not well organized in two isolated specializations, specifically the avocatory (specialization to be gotten to be an advocate) and the magistrates (specialization to become a judge). The essential law degree (permit), earned after five a long time of formal training, entitles its holders to hone as judges or advocates, as they may wish. Universities offering law degrees incorporate include Université de Bandundu, Université de Kinshasa, Université Protestante, Université de Lubumbashi, Université Libre de Kinshasa, UniversitéLibre des Pays des Grands Lacs, au Congo, and Université William Booth.
Since April 28, 1989, the Congolese government ministry of education has recognized and allowed higher education. This recognition means that private

universities, like the Université 4Protestante du Congo (UPC), UniversitéLibre de Kinshasa (ULK) and Université William Booth can offer Bachelor of Law (Degrees in Law.) In theory, law graduates from any university within the DRC can legally work in the judiciary. In practice, however, for appointments as judges, the government seems to prefer law students from state universities, notably the Université de Kinshasa (UNIKIN) and the Université de Lubumbashi (UNILU).

3.4.9.4 The Bar

To represent clients in court, law graduates must be conceded to the Bar in advance. Authoritatively called the Ordre National des Avocats de la RD Congo, the national bar posts a list of conceded legal practitioners. On that, roll of lawyers are recorded in in sequential order and arrange all legitimate specialists conceded to hone within the DRC. The roll of lawyers is an electronic database, permitting clients to look the database for authorized legal counselors. Tharcisse Kamba Mutu Matadiwamba was, at the time of this study,the President of the national bar (bâtonnier national).

3.4.9.5 Courts with Jurisdiction to deal with International Crimes

The appropriation of the Law on the Organization, Working and Jurisdiction of the Courts in April 2013 accomplished a vital breakthrough.[139] For the first time, it relegated jurisdiction over genuine violations to civilian courts, making the Courts of Appeal competent to entertain cases for war crimes, violations against humanity, and genocide.[140] Previously, the 1972 Military Justice Code had given military courts

[139] LOJC. Art. 91
[140] *Ibid*

with exclusive jurisdiction over violations against humanity, war crimes, and genocide.[141] Under article 207 of the MPC, military courts have subject-matter jurisdiction over all infractions of the MPC.[142] Further, article 161 gives that any crime "related" to, or "indivisible" from, a genuine crime falls beneath the subject-matter jurisdiction of military courts, notwithstanding of whether it is civilian in nature.[143]

According to article 156 of the Constitution, military courts and tribunals hold individual jurisdiction over members of the armed force and national police.[144] However, several provisions extend this personal jurisdiction over persons who are not linked to the army or the national police. During a war,[145] military jurisdiction expands to include civilians involved in fighting.[146] In peacetime, military jurisdiction also covers any civilians "who, although unrelated to the military, cause, engage in or assist one or more soldiers or similar, to commit an infraction under military law or regulation;"[147] "who, regardless of whether not part of the military,

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[141] Ordonnance-loiPortant Institution d'un Code de Justice Militaire [MJC], Ordonnance-loi N° 72/060 du 25 septembre 1972 (Zaire) (Dem. Rep. Congo).
[142] MJC (2002), art. 76, 79.
[143] MPC, art. 161: "Encasd'indivisibilitéou de connexitéd'infractions avec des crimes de génocide, des crimes de guerre ou des crimes contrel'humanité, les juridictionsmilitairessontseulescompétentes" ["Should crimes be indivisible from or related to crimes of genocide, war crimes or crimes against humanity, the military courts shall have sole jurisdiction"].
[144] Article 156 of the Democratic Republic of Congo Constitution limits the competence of military courts to infractions by members of the armed forces and the police: "Les juridictionsmilitairesconnaissent des infractions commises par les membres des Forces armées et de la Police nationale. En temps de guerre oulorsquel'état de siègeoud'urgenceestproclamé.
[145] Constitution, art.156.
[146] MJC (2002), article 115: "Les juridictions de droit commun sont compétentesdèslorsquel'un des coauteursoucomplicesn'est pas justiciable des juridictionsmilitaires, sauf pendant la guerre oudans la zone opérationnelle, sous l'état de siègeoud'urgence, oulorsque le justiciable civil concernéestpoursuivicommecoauteuroucompliced'infractionmilitaire."
[147] Marcel Wetsh'okondaKoso, AfriMAP, Open Society Initiative for Southern Africa, "République démocratique du Congo: La justice militaire et le respect des droits de l'homme – L'urgence du parachèvement de la réforme" (2009), 47:

commit infractions against the Military, National Police, Public Assistance, their tool (equipment's), their premises or inside the military, the Public Police or the National Service"[148] and "who, without being soldiers commit crimes using weapons of war."[149] These jurisdictional exemptions give military courts capability over violations that would some way or another be settled by regular civilian courts.

3.4 Municipal Legal Framework

Within the DRC, the applicable law on serious violations has been conflictingly connected by Congolese military courts. Whereas applying existing national law on genuine violations, military courts have too made broad however conflicting coordinate utilize of the Rome Statute. This standardizing framework and its application are analyzed in detail in area one of this portion of the report. It is taken after, in area two, by an overview and discourse of the most activities presented by Congolese administrators to progress and address the deficiencies of the current legal framework.

The Congolese Constitution accommodates the power of international arrangement regulation over local laws (regulation).[150] Thus, a legal framework involving international and local laws (regulation) illuminates the lawful and legal reaction to serious offences. The DRC is involved with various agreements that accommodate

[148] MJC (2002), art. 112(7).
[149] *Ibid*
[150] Article 215 of the Constitution states: International treaties and agreements duly concluded have, upon publication, a superior authority than that of laws, subject for each treaty or agreement, to its application by the other party. Moreover, art. 153 provides that: "Les Cours et Tribunaux, civils et militaires, appliquent les traitésinternationauxdûmentratifiés" ("Courts and tribunals, civil and military, apply international treaties duly ratified"). Constitution de la RépubliqueDémocratique du Congo, February 18, 2006, as modified by Loi No 11/002 of DRC on Revising Some Articles of the Constitution.

the indictment of significant violations.[151] It confirmed the Geneva Convention of 1949 and the two additional protocols of 1977, The Hague Convention of 1954, and the Show on the Counteraction and punishment of the crime of genocide of 1948.[152] Significantly, the DRC signed the Rome Statute on September 8, 2000, and ratified it on April 11, 2002.[153]

Since the reception of the Military Justice Code in 1972, military regulation has characterized genocide, violations against humanity, and atrocities.[154] The conventional Congolese Penal Code doesn't contain arrangements connecting with serious violations. In light of the DRC's confirmation of the Rome statute,[155] the parliament looked to alter the meanings of massacre, violations against humanity, and atrocities in military law (regulation) through legislative reform. The new Military Penal Code (MPC) was sanctioned in 2002. However, the altered definitions don't precisely compare to the Rome statute definitions.[156]

First, the MPC conflates the definitions of war crime and crime against humanity. It reaffirms that crimes against humanity are defined as grave violations of

[151] For the list of treaties ratified by the DRC, see Marcel Wetsh'okondaKoso, AfriMAP, Open Society Initiative for Southern Africa, "Républiquedémocratique du Congo: La justice militaire et le respect des droits de l'homme – L'urgence du parachèvement de la réforme" (2009), 27

[152] UN Mapping Report, 391–393.

[153] Rome Statute of the International Criminal Court (2187 U.N.T.S. 90, Jul. 17, 1998) ["Rome Statute"].

[154]Ordonnance-loi No 72/060 of Zaire (DRC) on Establishing a Code of Military Justice (Ordonnance-loiPortant Institution d'un Code de Justice Militaire), September 25, 1972 ["MJC (1972)"]

[155]After the ratification of the Rome Statute, the DRC opted to revise the military law rather than adopt a law implementing the Rome Statute. See Exposé des motifs de la Loi n° 023/2002 du 18 novembre 2002 portant Code judiciairemilitaire et loi n° 024/2002 du 18 novembre 2002 portant Code pénalmilitaire (entered into force on 25 March 2003).

[156] For a detailed comparison of the differences between the definitions of crimes in Congolese domestic law and the Rome Statute, see Avocats Sans Frontières, "Etude de jurisprudence: L'Application du Statut de Rome de la CourPénaleInternationale par les Juridictions de la RépubliqueDémocratique du Congo" (2009), 25–71.

international law against civilian populations that do not require the existence of a state of armed conflict.[157] However, in ensuing arrangements, the MPC confusingly characterizes crimes against humanity as grave breaks against people and objects protected by the Geneva conventions and the additional protocol, when the shows just address circumstances of internationally and non-internationally furnished armed conflict.[158]

Second, the MPC's rundown of criminal acts that contain a crimes against humanity are not generally as thorough as the one gave in the Rome statute.[159] The MPC failed to include certain acts, notably, enforced disappearance, apartheid, and "other inhumane acts of a similar character."[160] In terms of war crimes, the MPC defines them very expansively as "all offences of the law of the Republic committed during war and that are not justified by the laws or customs of war."[161]

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[157] MPC, art. 165 (crimes against humanity): Crimes against humanity are grave violations of international humanitarian law committed against civilian populations before or during war. Crimes against humanity are not necessarily related to a state of war.

[158] *Ibid*. art. 166 states: "Constituting crimes against humanity and punished in accordance with the provisions of this Code, the grave breaches listed below, by the commission or omission, against individuals and properties protected by the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977, without prejudice to any more severe penalty provided by the ordinary Penal Code. Article 166 then itemizes 18 offences that constitute a crime against humanity, followed by a further 10 offences in art. 169. In the Mutins de Mbandaka case, the court has noted that the MPC "entretientune confusion entre le crime contrel'humanité et le crime de guerre qui du resteestclairementdéfini par le Statut de Rome de la CourPénaleInternationale" ["creates confusion between crimes against humanity and war crimes that are for the rest clearly defined by the Rome Statute of the International Criminal Court"]; see "Avocats Sans Frontières, "Etude de jurisprudence: L'Application du Statut de Rome de la CourPénaleInternationale par les Juridictions de la RépubliqueDémocratique du Congo" (2009), 21.

[159] Article 7, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B; Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala,

[160] MPC, art. 166 and 169. See Antonietta Trapani, DOMAC, "Complementarity in the Congo: The Direct Application of the Rome Statute in the Military Courts of the DRC" (2011), 23–2431 May -11 June 2010

[161] Military Penal Code, art. 173.

The Military Penal Code neither identifies the restricted acts nor recognizes international and national contentions.[162] In this way any act that is an offense under local laws can comprise a war crime whenever carried out during a period of war. Such absence of detail and imprecision doesn't precisely reflect global regulation and doesn't give sufficient direction to judges who are expected to decipher and apply the MPC. For destruction, the Military Penal Code apparently recreates the meaning of genocide in the genocide convention, yet incorporates "political group" among the safeguarded classifications, which doesn't follow the genocide convention or the Rome statute.[163]

Third, the MPC takes an inconsistent approach to sentencing. Contrary to the principle of nulla poena sine lege (“no penalty without a law”), the MPC doesn't give material condemning to atrocities. However, it accommodates capital punishment (death penalties) for culprits of genocide and crimes against humanity, albeit a ban is right now set up against capital punishment (death penalty).[164]

Finally, the MPC doesn't accommodate a method of risk identical to the meaning of order liability (command responsibility) under article 28 of the Rome Resolution. Under Congolese regulation, order liability gives that the predominant will be viewed as a co-culprit or accessory for having endured the activities of their

[162] *Ibid*
[163] Ibid. art. 164: The Direct Application of the Rome Statute in the Military Courts of the DRC” (2011), 23.)
[164] *Ibid*. art. 164 (genocide) and 167 (crimes against humanity)

subordinates, but just to the degree that those subordinates are likewise indicted.[165] This infers that the military commander might be indicted in the event that their subordinate is arraigned, and just as a co-culprit or associate not as an essential culprit. Considering these irregularities and deficiencies, the tactical appointed authorities have needed to choose some of the time imaginatively, whether to apply local or international law to indict culprits of serious violations.

"Military judges have had to decide, sometimes creatively, whether to apply domestic or international law to prosecute perpetrators of serious crimes."(Emphasis is mine)

Parliament presently can't seem to pass a regulation carrying out the Rome Statute that would blend domestic laws (regulation) with international laws definitions. Without even a trace of such a regulation, Congolese military appointed authorities have, on different events straightforwardly applied the Rome Statute.[166] However, all in all, judges have neglected to recognize clear measures to make sense of their choice for utilizing homegrown regulation over global regulation, as well as the other way around. The reasons given by military Judges to straightforwardly apply the Rome Statute have been conflicting. Judges don't necessarily in all cases allude to the arrangement of the Constitution that lays out the supremacy of international law versus national laws; judges have, all things considered, referenced the Constitution

[165] MPC, art 175: "Lorsqu'unsubordonnéestpoursuivicomme auteur principal d'un crime de guerre et quesessupérieurshiérarchiques ne peuventêtrerecherchéscomme co-auteurs, ilssontconsidéréscommecomplicesdans la mesureoùilsonttoléré les agissementscriminels de leursubordonné" ["When a subordinate is prosecuted as the main perpetrator of a war crime and his or her hierarchical superiors cannot be investigated as co-perpetrators, they are considered accomplices if they tolerated the criminal actions of their subordinate"].

[166] Elena Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks", Boston College Law Review 50(1) (2009): 4.

only as an optional legitimization to utilize international law over local laws. An essential explanation referred to by certain adjudicators is the "better" of the Rome Statute in contrast with local laws, as the previous contains better arrangements to the blamed, casualties, and witnesses.[167] For example, regarding sentencing, military courts have most often opted for the Rome Statute to justify ignoring the requirement in domestic law to impose the death penalty.[168]

Military courts, in any case, have not saved domestic law's provisions through and through. All things being equal, they have utilized various sources to illuminate their choices: the national military penal code, the Rome Statute, and the law of international tribunals. As needs be, military appointed authorities have discontinuously utilized the arrangements of the Rome Statute to fill holes in homegrown regulation. As referenced, military judges have fundamentally involved the Rome Statute to increment securities for casualties and witnesses, who are insufficiently safeguarded under domestic laws.[169] They have additionally acquired key ideas that stay missing from the MPC, remarkably individual and subsidiary for officers and other superior.[170]

In spite of the endeavors of military judges to cure the deficiencies of homegrown regulation and increment securities for parties, the current law stays divided, conflicting and, thusly, flighty for those brought before Congolese courts.

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[167] See the following cases: MC SK, Lt. Col. Balumisa Manasse at al. (Mar 9, 2011), RP 038/RMP 1427/NGG/2009 RMP 1280/MTL/09 ["Balumisa case"] (which includes a general reference to the "greater quality" afforded to victims and defendants' rights; the absence of the death penalty; and a clearer definition of crimes against humanity); MC SK, Lt. Col. Daniel KibibiMutware et al. (Feb. 21, 2011), RP 043/11 RMP 1337/MTL/2011 ["Kibibi case"]

[168] *Ibid*

[169] In Kazungu case, 34, the MGT of Town Bukavu Rome Statute, art. 68.

[170] For example, in MGT Bunia, Rome Statute, art. 28.

3.5 Framework of Collaboration Between International Institutional and National institutions in the Democratic Republic of Congo.

Most of the countries have rectified the Rome Statute and cooperate with national institutions such as local courts in the prosecution of the international crimes. Article 87(1) (a) states that the ICC shall have the power to request for the cooperation from the national courts or state parties.

3.5.1 The International Criminal Court (The ICC)

The International Criminal Court may be a lasting independent court found within The Hague, The Netherlands. Taking after World War I, authorities examined the possibility of making a special tribunal to arraign and punish German pioneers for uncaring acts against other countries. In spite of the fact that this was examined, the thought never materialized. However, after WWII, two ad hoc intended to serve a specific purpose— military tribunals, The International Criminal Tribunal for the Former Yugoslavia in 1993 and the International Tribunal for Rwanda in 1995 were made to prosecute those who damaged international humanitarian law.

The creation of these ad hoc tribunals highlighted the need for a changeable international criminal court. Earlier, until the creation of the Universal Criminal Court and the ad hoc tribunals, the international community had no way of prosecuting national and transnational violations at the worldwide level. On July 1, 2002, The Rome Statute, which sets out the rules and strategies for the ICC, came into drive after years of negotiation. This statute came from the 1998 Rome Gathering (Conference) during which various worldwide entertainers, including

states, groupings of states (counting the European Union and the Southern African Development Community), non-legislative associations, criminal attorneys, and others met up to make this global deal. Through the five-week conference, the substances talked about issues of purview, the criminal system, and the job of the Security Board with regard to this future global Court. Panels established that sixty states should sign on to become gatherings to the Rule before it could come full circle. This happened a lot quicker than anticipated, and the Court was formally settled on July 1, 200. [171] According to the Rome Statute, the Court was created "as a response to 'unimaginable atrocities that deeply shock the conscience of humanity,"[172] such as genocide, war crimes, crimes against humanity, and crimes of aggression. It was established in order to "help end impunity for the perpetrators of the most serious crimes of concern to the international community.[173]

One of the most common criticisms of the ICC stems from the idea that the fair and impartial nature of the Court has been over-ridden by international politics. Critics such as Onan Acana and Baker Ochola, assert that a legal institution should operate on legal principles alone and be completely free from political influence. Moreover, these critics believe that the legitimacy of the Court is undermined due to the political machinations of actors and nations that play roles in various cases. However, in the context of the ICC, other scholars believe it is unreasonable to separate law from politics. For instance, David Bosco and Alex Whiting argue that politics and law do not work in opposition, and it makes more sense to view their

[171] Cryer, Robert, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst. An Introduction to International Criminal Law and Procedure. 2nd ed. Cambridge: U, 2010. 144-49. Print.
[172] Bosco, David. Rough Justice: The International Criminal Court in a World of Power Politics. Cary, NC, USA: Oxford University Press, USA, 2013. ProQuestebrary. Web. 21 October 2014. 17
[173] "About the Court." International Criminal Court. N.p., n.d. Web. 12 Oct. 2014. <http://www.icccpi.int/en_menus/icc/about%20the% 20court/Pages/about%20the% 20court.aspx>.

existence simultaneously. In an attempt to strengthen the International Criminal Court's image and legitimacy, the Court itself refuses to acknowledge its political aspects; however, the Court is, in fact, bound by politics in many respects. These various stances on the political aspects of the Court will be examined further in later chapters. The Rome Statute provides for jurisdiction and admissibility of cases before such court. Actually jurisdiction refers to the legal parameters of the Court's operations in terms of subject matter.

Furthermore, admissibility comes into play at a later stage. It seeks to set up whether things over which the Court has legitimate jurisdiction should be arbitrated some time recently it. The address of jurisdiction bargains with the Court's consideration of a 'situation' in which a wrongdoing has been committed, in that by the time issues of acceptability is being inspected, the indictment will fundamentally have progressed to the identification of a 'case'.

By invoking Article 14 of the Rome Statute of the ICC, the government of the Democratic Republic of Congo referred the situation in Ituri to the ICC in 2004.[174] Article 14 of the Rome Statute expresses that: A State Party might allude to the Examiner a circumstance where at least one offence inside the locale of the Court seems to have been perpetrated mentioning the Investigator to research what is going on to decide if at least one explicit people ought to be accused of the commission of such violations.[175]

[174] Michael E. Kurth, "The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber"s Findings on Issues of Active Use, Age and gravity." (2013): Goettingen Journal of International Law: (431-453).
[175] Of 1998

There are different ways in which a circumstance can show up before the ICC. As said prior, as it were, States that have marked on to the Rome Statute can elude circumstances to the Court. A state can elude itself or its claim individuals. Moreover, the Security Chamber has the control to allude (and concede) a circumstance to the ICC, which a few recommend contributes to the political aspect of the institution. Critics claim that the Security Council has likely its own interests and political concerns in mind when making referrals. Moreover, an alternative means of initiation is a referral by the Prosecutor herself with the Pre-Trial Chamber's authorization.[176] There are various other rules and confinements input to dictate ICC operations, though it is frequently through the start of procedures and questions of ward where numerous political reactions of the Court are focused. This coincides with the preparatory questions that the Court must inquire when it decides which cases to require on and which people to put on trial. There's a lawful system inside which the Court makes its choices; in any case, it cannot operate totally impartially.

3.6 Conclusion

In this chapter the researcher has discussed the kinds of methods and philosophy he employed in the completion of the research at hand, the researcher has esured that the methods employed would be useful in obtaining data and collection of information, whereas the researcher opines that the other researchers should not hesitate to employ the same as he did.

[176] Cryer, Friman, Robinson, and Wilmshurst, page 163-164

CHAPTER FOUR

PROSECUTION OF INTERNATIONAL CRIMES COMMITED IN THE DEMOCRATIC REPUBLIC OF CONGO

4.1 Introduction

The existence of mechanisms for dealing with international crimes is a common feature among most countries, and it can involve a domestic mechanism, an international mechanism, or a collaboration between the two. The inception of the Rome Statute of the International Criminal Court on July 1, 2002 marked a new era in international criminal justice. The establishment of a robust international court with the jurisdiction to try individuals for the most heinous crimes such as genocide, crimes against humanity, and war crimes represent a significant achievement.

The ICC serves as a supplementary system to national jurisdiction and only steps in when states are unable or unwilling to prosecute serious crimes. This means that the majority of cases will be handled by local authorities in national courts. This has a major impact on the advancement of international criminal law and its implementation at the national level, requiring the police to investigate, issue warrants, provide protection, or arbitrate on related issues, and offer support to the ICC.

4.2 Charges or International Crimes

The Rome statute article 6 to article 8, have analyzed clearly the international crimes which are recognized worldwide (Genocide, Crimes against humanity, War crimes, Crime of aggression). The following are the International crimes analyzed under International laws.

4.2.1 War Crimes

The concept of war crimes was first introduced into international law after World War I through Art.228 of the Versailles Peace Treaty, which did not provide a definition of these crimes. Later, the notion of war crimes was developed in the Charter of the International Military Tribunal at Nuremberg (Art.6) and the Charter of the International Tribunal at Tokyo (Art.5), and further defined as "grave breaches" in the Four Geneva Conventions. The Additional Protocol I uses the term war crimes as provided in Art.85 (5). The ICTY and ICTR statutes also contain provisions on war crimes, with the ICTY statute including "grave breaches of the Geneva Conventions" and "violations of the laws or customs of war", while the ICTR statute covers violations of Common Art.3 of the Geneva Conventions and provisions of Additional Protocol II. The ICC, under Art. 5 of its statute, provides a list of crimes under its jurisdiction, including war crimes, which are further explained in Art. 8 of the Rome Statute.[177]

The Rome Statute under Art. 8 categorizes war crimes into four types: violations of the Geneva Conventions during international armed conflicts, violations of general IHL in international armed conflicts, violations of the Geneva Convention (Common Art. 3) in non-international armed conflicts, and violations of general IHL in non-international armed conflicts. To be considered a war crime, an act or omission must have a connection to a rule of the laws of war and be linked to an armed conflict. The mental element required is knowledge of the existence of an armed conflict. The ICTY in the case of Prosecutor v. Tadic stated that to fall within the jurisdiction of

[177] The additional protocol I article 85.

the International Tribunal, a sufficient connection must be established between the alleged offense and the armed conflict, which triggers the applicability of IHL.

4.2.2 Crimes Against Humanity(Referred to as CAH)

The Nuremberg Charter Art. 6(c) introduced the concept of Crime Against Humanity (CAH), which included acts such as murder, extermination, oppression, deportation, and other inhumane acts committed against civilian populations during war or on the basis of political, racial or religious grounds. At the Nuremberg Trials, acts of genocide, such as the Holocaust against Jews, were prosecuted as CAH as the crime of genocide did not yet exist at that time. Crime Against Humanity (CAH), which was defined as including acts such as murder, extermination, oppression, deportation, and other inhumane acts committed against civilian populations during war or based on political, racial, or religious grounds, is an older crime in customary international law. The Nuremberg Tribunal did not aim to create new crimes but only to prosecute individuals for committing pre-existing crimes in order to avoid violating the legality principle. CAH predates the Nuremberg Charter.

The Nuremberg Trials linked Crime Against Humanity (CAH) to crimes against peace (aggression) and war crimes, creating a connection between CAH and armed conflict. In 1950, the International Law Commission made its first effort to formalize the principles established at Nuremberg. The 1950 Code established the principle that an act can still be considered a crime under international law, leading to individual criminal responsibility, even if it is not considered a crime under domestic law.

Principle II of the 1950 Code established that an act considered a crime under international law still carries individual criminal responsibility, even if it is not considered a crime under domestic law. Principle VI defined CAH, which included violations against humanity such as murder, extermination, oppression, deportation, and other cruel acts committed against civilian populations, or mistreatments on political, racial, or religious grounds when carried out in association with any wrongdoing against peace or any atrocity.

The development of CAH's definition went through several stages, including the 1951 Draft Code of Offences against the Peace and Security of Mankind, the 1954 Draft, the 1991 Draft, and the 1996 Draft. The 1996 Draft, in Art.21, provided a list of offenses that fall under CAH. The provision stated that a crime against humanity implies any of the accompanying acts, when serious in a precise way or for a huge scope and impelled or coordinated by an Administration or by any organization group: Murder, Elimination, Torture, Oppression, Mistreatment on political, racial, religious or ethnic grounds, Standardized separation on racial, ethnic or strict grounds including the infringement of key common liberties and opportunities and coming about in genuinely disadvantaging a piece of the populace; Erratic extradition or effective exchange of populace; Erratic detainment; Constrained vanishing of people; Assault, implemented prostitution and different types of sexual maltreatment, Other heartless demonstrations which seriously harm physical or mental uprightness, wellbeing or human pride, such as mutilation and extreme bodily harm. The formulation of Art. 21 of the 1996 Draft Code was highly influenced by the jurisprudence of the ICTY and ICTR.Art.5 of the ICTY statute stated;

> *"The International Tribunal has the authority to prosecute individuals responsible for serious crimes committed during armed conflict, whether international or internal in nature, and directed against a civilian population. These crimes include murder, extermination (genocide), enslavement, deportation, detention, torture, persecution on political, racial and religious grounds, and other inhumane acts as listed in Article 3 of the ICTR statute*[178]

The International Tribunal for Rwanda has the authority to bring to justice individuals who committed the following offenses as part of a widespread or systematic assault against a civilian population based on national, political, ethnic, racial, or religious grounds: murder, extermination, enslavement, deportation, imprisonment, torture, rape, and persecutions based on political, racial, or religious grounds, and other inhumane acts. Unlike the International Criminal Tribunal for the former Yugoslavia (ICTY), the ICTR does not require a connection to armed conflict. The definition of Crimes Against Humanity (CAH) is provided in Art. 7 of the Rome Statute. According to this definition, CAH encompasses any of the following acts committed as part of a widespread or systematic attack against any civilian population with knowledge of the attack: murder, killing, enslavement, deportation or forced transfer of population, detention or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or other forms of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, social, religious, gender as defined in section 3, or other grounds that are universally recognized as impermissible under international law, and other inhumane acts. Additionally, CAH can include enforced disappearance of persons,

[178] Article 3 of the ICTR statute

the crime of apartheid, and other gross acts of a similar nature causing intentional severe physical or mental suffering. This means that in order to qualify as a CAH, the underlying crime must be committed as part of a widespread or systematic attack against a civilian population and with knowledge of the attack. CAH does not require a nexus with armed conflict, unlike International Humanitarian Law (IHL), which applies in times of armed conflict.

4.2.3 Genocide

The concept of genocide was established in international law in 1948 through the Genocide Convention. The defining feature of genocide is the intentional killing of members of a specific group with the intention of destroying that group. The term "genocide" was coined by Polish lawyer Rafael Lemkin in 1944. The 1948 Convention defines the crime of genocide in Art.2 and the means of commission in Art.3. It also states that official status is not a defense and requires states to pursue legal action or allow for extradition. The provisions of the ICTY, ICTR and ICC all fall under the definition of genocide. This prohibition against genocide is considered a customary norm in international law. The protected groups include those based on national, ethnic, racial, and religious identities. The ICTR in the case of Prosecutor v. Jean Paul Akayesu stated that genocide is distinct from other crimes because it encompasses a specific intention or dolus specialis. The unique purpose of a crime is the particular intention that is a constitutive component of the crime and requires the perpetrator to actively seek to commit the crime.

The specific intention in the crime of genocide lies in the aim to destroy, in whole or in part, a national, ethnic, racial, or religious group.

The formation of mens rea, or intent, is a key element in the commission of the crime of genocide, as stated in the Kayishema and Ruzindana case. Intent can be inferred from the evidence, including the pattern of conduct by the accused, as noted in the case of Rutaganda. However, it is difficult to establish intent without a confession from the accused. In the Prosecutor v. Jean-Paul Akayesu case, the Trial Chamber listed several factors to consider in determining genocidal intent, including the coordination of acts against the targeted group, the size of the atrocities, the targeting of group members, the use of derogatory language, and the systematic planning and execution of the killings. The Kayishema and Ruzindana case also listed factors such as the number of group members affected, the weapons used, and the methodical planning as indicators of genocidal intent. The crime of genocide is traditionally recognized as one of the worst international crimes, and the UN General Assembly in 1950 referred to it as the gravest of all crimes against peace and security. While the crime of aggression is also considered a serious international crime, the hierarchy between the two is not recognized today.

The absence of a universally accepted definition of the crime of aggression has long been a challenge, with it being commonly understood as an invasion of one state's territorial sovereignty. When the Rome Statute of the International Criminal Court was adopted in 1998 and took effect, the ICC had no jurisdiction over this crime as it was not defined in the statute. However, the 2010 Kampala Conference for the review of the Rome Statute, held in June, adopted amendments to the ICC statute

that defined the crime of aggression among other things. The amendments were passed unanimously in the 13th plenary meeting on June 11, 2010 through Review Conference Resolution no. 6. The Kampala conference was composed of four key parts, including: The Rome Statute was amended at the June 2010 Kampala Conference for review to include a definition of the crime of aggression. The conference adopted the amendments, including Resolution 6, through consensus at the 13th plenary meeting held on June 11th, 2010.

The amendments are comprised of four parts: the preamble, which acknowledges the State parties' commitment to the ICC's jurisdiction over the crime of aggression; Annex I, which amends the Rome Statute; Annex II, which updates the Elements of the Crimes, and Annex III, which provides general understanding of the amendments. Resolution 6 introduces the new Art. 8bis and removes Art. 5(2) of the Rome Statute. Art. 8bis(1) defines the crime of aggression as any act of hostility, characterized by its seriousness, gravity, and scale, carried out by an individual in a position of power to command or coordinate the political or military activities of a State. Art. 8bis (2) lists several acts that qualify as acts of aggression, including but not limited to: attack or invasion by one state's military against another state's territory, siege of a state's territory, blockading of a state's ports or banks, military assaults on another state's land, sea or air forces, the use of one state's military within another state's territory, and the involvement of one state in allowing its territory to be used for a hostile act against a third state.

These include: The invasion or attack by the armed forces of one state on another state, or any temporary occupation resulting from such invasion or attack, or the

expansion of one state's control over another state's territory or part thereof; The siege by the military of one state against the territory of another state or the use of weapons by one state against the territory of another state; The blockading of ports or coasts by the military of one state against another state; An attack by the military of one state on the land, sea, or air forces, or marine and air fleets of another state; The deployment of military from one state within the territory of another state, against the terms agreed upon in the arrangement, or any extension of their presence beyond the end of the agreement; The act of one state allowing its territory, which it has placed at the disposal of another state, to be used by that other state for conducting an act of hostility against a third state; and The dispatch by or on behalf of a state of armed groups, forces, rebels, or mercenaries who carry out acts of armed force against another state of such severity as to equate to the acts listed above, or its significant involvement in these acts.

The Kampala conference's adoption of the crime of aggression definition is a step towards ICC prosecution of this crime. However, the amendments have limitations since they require ratification by at least 30 state parties before they come into effect and they would not be exercised by the ICC until a decision was made on January 1, 2017. The Security Council has influence over the determination of whether aggression has been committed, as seen in Art.15bis and Art.15ter. The amendments limit criminal liabilities only to individuals in superior or commanding positions. Resolution 6 is merely laying the foundation for ICC prosecution of the crime of aggression.

The ICTY stated in Tadic's Case that crimes often result from the collective guilt of a group of individuals acting in accordance with a common plan, and the cooperation and commitment of the group is often essential in committing the crime. The ethical gravity of such cooperation is often no less, or even equal to, those actually committing the acts. Additionally, there are statistical data on international crimes committed in the DRC as summarized in table 1.0

Table: 4:1 Statistical Data on International Crimes Committed in DRC

LOCATION	NATURE OF INTERNATIONAL CRIME	CASES IN TERMS OF NUMBERS	STATUS BEFORE THE COURT	CASES AGAINST M23	NUMBER OF CASES AGAINST OTHER ARMED GROUPS	COMMENTS
SOUTH KIVU	1.War Crimes 2. Crimes Against Humanity	122 212	118 not dealt with 211 not dealt with	117 cases 210 cases	15 cases 22 cases	Many cases have been interrupted
NORTHEN KIVU	Crimes Against Humanity	15	3adjudicated 3 under inv. Others not yet	1 adjudicated case 3under inv.	2 adjudicated Others have no status	Cases with no status caused with the justice system being inoperative
ITURI	Crimes Against Humanity	14	No any case adjudicated or investigated	15 Cases	No status	Cases with no status caused by ineffective of legal framework

Source: Data Collected from MONUSCO 2015

4.3 Participation of DRC in Prosecuting International Crimes

Between January 2009 and December 2014, 39 cases were brought forth by legal authorities involving international crimes committed in the eastern regions of the DRC, including Ituri, North Kivu, and South Kivu. This determination was made after extensive examination and consultation with experts, investigators, judges, lawyers, public and international NGOs, MONUSCO, UN staff, and other justice partners. These cases were characterized as international crimes and were either linked to organized conflict or part of a widespread or planned attack against the general population..[179] In South Kivu, military judicial officials opened 22 cases. [180] FARDC was cited in fourteen cases, three of which were first-instance decisions.,[181] two are appealing,[182] Eight are still being looked into investigation,[183] and one got cut off[184] ;Three cases were linked to FDLR or foreign armed groups, one of which

[179]U.N. Joint Human Rights Office, "Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo, 9 April 2014, para. 41.

[180]Two additional cases of serious crimes initiated before the military jurisdiction of South Kivu were not included in the Appendix due to a lack of sufficient information on the context and nature of the crimes: AMS-SK, Col. Gwigwi Busogi et al. (Jun. 5, 2013), RMP 1473/BKL/13 ["Gwigwi case"]; and AMS-SK, Lt. Col. Maro Ntumwa (Aug. 11, 2014), RMP 1539/BKL/2014 ["Maro case"].

[181]CM-SK, Lt. Col. BediMobuliEngangela, RP 083/14 RMP 1377/MTL/11, 15 December 2014 (Col. 106 case)

[182]CM-SK, 1er sergent Christophe KamonaManda et al, (7 November 2011)

[183]AMS SK and AMG-Uvira, Lt. Col. Mukerenge (Jun. 21, 2010), RMP 1298/PEN/10 "[Mukerenge case"]; AMS SK, Commander RupongoRogatien John and ShakaNyamusaraha (Oct. 25, 2011), RPM 1373/WAV/11 ["Kikozi case"]; AMS SK, Major Safari Kateyateya et al. (Sept. 30, 2013), RMP 2605/KK/2012 RMP 1486/BKL/13 ["Lwizi–FARDC case"]; AMS SK, Col. Sebimana et al. (Jun. 19, 2012), RMP 1421/BKL/12, ["Katalukulu case"]; AMS-SK, Maj. Mabiala (Aug. 26, 2013), RMP 1482/KK/13 ["Mirenzo case"]; AMS SK, Col. Ilunga Jean Jacques Birungurungu (Feb. 22, 2013), RMP1463/WAV/13/NDM/KK/2013 RMP 2678/KMC/12 ["Birungurungu case"]; AMS SK, Lt. Col AngaliMukumbwa et al. (Sept. 9, 2009), RMP 1245/MTL/09/Bukavu ["Lulingu case"]; AMS SK, Maj. KayumbaNyenyereVenance et al. (Jun. 17, 2014), RMP 1526/BKL/2014 ["Mutarule case"].

[184]AMS SK, Col. Kulimushi alias Kifaru (Jun. 24, 2011), RMP 1358/MTL/11 "[Fizi II, Nakiele case"]. While two investigation missions were led in the area and 121 victims were interviewed, doubts arose about the credibility of some of the testimonies. Therefore, the binvestigation was suspended. See, also, U.N. Security Council, "Letter dated 29 November 2011 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council," U.N. Doc. S/2011/738 (Dec. 2, 2011), para 641A.

was decided in the first instance.,[185] one case under appeal,[186] and one was (at the time of this study) still under investigation[187] and five instances were linked to domestic armed groups (including two cases linked to former RCD members who later joined the FARDC and were still being investigated).,[188] two cases—one of which was resolved—involved members of the Mai-Mai group. [189] Classé sans suite (it was filed away)[190] and one that's being looked into investigation,[191] and one example where actions were found to have been committed by an armed organization Kyat Hend Dittman formed.[192]

During that time, the military courts in North Kivu began ten serious crime prosecutions.[193] These were made up of three cases decided by the Military Operational Court (CMO) and six cases assigned to the FARDC[194] and three cases that the Auditorat Général Operationnelle (AMO) was looking into, one of which also involved APCLS members.[195] Additionally, there was one case before the CMO against CHEKA and FDLR members.[196] Investigations were ongoing in one case involving M23[197] one opposing Raia Mutomboki, Mai-Mai and Nyatura group

[185]TMG-BKV, Sabin KizimaLenine, RP 702/11 RMP 1901/KMC/2010, 29 December 2014 (Sabin KizimaLenine case).
[186]MC SK, Maniraguha and al. (Oct. 29, 2011), RPA 0177 (Appeal) RP 275/09 521/10
[187]AMG Bukavu, AMG Uvira, Singabanza et al. (Jan. 23, 2012; Mar. 17, 2012)
[188]AMG Uvira, Lulinda and Lusenda, RMP 0940/KMC/2010
[189]AMS SK, OmbeniMatayo (Apr. 5, 2012), RMP 1282/KM/09 ["OmbeniMatayo case"].
[190]The legal basis for classé sans suite is art. 199 MJC
[191]AMG Uvira, Eben-Ezer, RMP 2128/MPL/12
[192]AMG Uvira, Eben-Ezer, RMP 2128/MPL/12. 123 MC SK,
[193]AMS OPS NK Maj. BweteLandu et al. (Sept. 6, 2012), RMP 0155/MLS/09
[194]MC OPS NK, Minova-Bweremana (May 5, 2014), RP 003/2013 RMP 0372/BBM/01
[195]AMS OPS NK, Miriki, Bushalingwa and Kishonja, Lubero and Walikale Territories, RMP 026/2009 (Miriki/Lubero case); AMS OPS NK, Maj. Dario.
[196]MC OPS NK, Lt. Col. Mayele and al., RP 055/2011 RMP 0223/MLS/10
[197]AMS OPS NK, Col MakengaSultani et al. (Jun. 27, 2012), RMP 0297/BBM/2012

components,[198] and one each against FDLR, APCLS, and Mai Mai CHEKA.[199] Seven cases continued to be under investigation by the AMO, while two cases had already been arbitrated and one case was to be heard soon by the CMO. All instances involving international wrongdoings in the ward of North Kivu have been coordinated to AMO and the COM since the CMO was established. The Auditorat Militaire de Garnison (AMG), Military Post Court (MGT), AM, and CM had overseen all cases, including significant wrongdoings, in South Kivu and Ituri.

4.4 DRC's Cooperation with ICC in Prosecuting International Crimes

The objective of this study as previously analysed is to examine the cooperation between the Democratic Republic of the Congo and other countries in the prosecution of international crimes. To achieve this, the researcher evaluated two major cases from the conflict and analyzed the pre-trial stage by scrutinizing the confirmation of charges by the PT Con. This chapter serves as a foundation for a deeper understanding of the issues arising from these cases in the next chapter. The researcher explains the significance of charges being confirmed by the ICC Resolution and its legal basis according to the relevant provisions of the Rule. The chapter also provides an overview of the factual basis for the PTC's confirmation of the charges. Finally, the charges are analyzed in the context of the contemporary realities of the two cases, highlighting the relationship between them.

[198] AMS OPS NK, Ufamandu I, Ufamandu II, and Kibiti (Jul. 12, 2013), RMP 0363/BBM/12.
[199] AMS OPS NK, JanvierBuingoKarairi (APCLS) and Ntabo Ntaberi Sheka (NDC) (Aug. 15, 2011) RMP 0261/MLS/11 ["Mutongo case"].

4.4.1. Prosecutor v. Thomas Lubanga Dyilo

The Union des Patriots Congolais (UPC), later referred to as the Union des Patriots Congolais/Réconciliation et Paix (UPC/RP), was led by Thomas Lubanga and mainly comprised of Hema individuals.[200] He held the position of commander-in-chief of the FPLC, the armed military wing of the UPC, from September 2002 until 2003. During this time, the FPLC successfully captured Bunia and part of the Ituri region in August 2002.[201] He and other militia leaders were detained by Congolese authorities after 9 UN peacekeepers of Pakistani descent were killed on March 25, 2005.[202] Because it was unclear whether a Congolese court or an international tribunal would trial him, he was detained in Kinshasa indefinitely.[203] Since June 2004, while the examiner was in custody, the Examiner's Office had been holding exams in the Ituri district. Then, the Investigator requested a capture warrant against him, which was granted on 10 February 2006 under seal and released on 17 March 2006.[204] Before he could be tried, he was transferred to the ICC to have the charges against him confirmed. He was charged with crimes under article 8(2)(e)(vii) of the ICC Statute, especially with atrocities of recruiting and enlisting children under the age of 15 into the FLPC and using them to actively participate in the armed struggle in Ituri from September 2002 to August 2003.[205] He was accused of co-perpetrating the offenses with other FPLC officers and UPC members in accordance with Article 25(3) (a) of the Statute.[206] The preferred status of the charges was verified.

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[200]Thomas Lubanga Case (Confirmation of Charges), para. 8
[201]Thomas Lubanga Case (Confirmation of Charges), para. 8.
[202]Musila (2009: 21)
[203]Musila (2009: 21).
[204]Lubanga Case (Confirmation of Charges) para. 16
[205]Lubanga Case (Confirmation of Charges), para. 9.
[206]*Ibid*

4.4.2. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

The Force de Résistance Patriotiqueen Ituri ("the FRPI"), a militia force made up primarily of Ngiti people, had Germain Katanga as its top commander.[207] In addition, Mathieu Ngudjolo Chui served as the military commander of the Front des Nationalistes set Intégrationnistes, a distinct militia force (predominantly of Lendu origin) (the FNI).[208] Both organizations had bases in the eastern DRC's Ituri area. To join forces against the Lubanga's UPC and its military wing, the FPLC in Ituri, the two leaders established their units as FRPI and FNI in 2002.[209] The two leaders were accused of committing a number of war crimes and crimes against humanity during the years of 2002 and 2004,[210] during the 24 February 2003 attack on Bogoro village, which resulted in the deaths of 200 civilians.[211]

The following list of counts is included in the charges as they are stated in the decision on charge confirmation: (a) Article 7 crimes against humanity: Article 7(1)(a): Murder;[212] (ii) Article 7(1) (g) on sexual enslavement[213] and Article 7(1)(k) (iii) on other inhumane acts[214] (b) Article 8 war crimes (in the various settings of external or domestic armed conflict): Article 8(2)(ii) or 8(2)(c)(i) prohibits the use of inhumane treatment.[215] (ii) Using children as active combatants is prohibited by either article 8(2)(b) or 8(2)(e)[216] (Article 8(2)(b) or article 8(2)(e)(iii) on sexual

[207]Para. 12
[208]Para. 12
[209]Paras. 13-14
[210]*Ibid*
[211]Paras. 15-31
[212]*Para. 20*
[213]Para. 25
[214] Para 23
[215] Para 23
[216] Para 24

slavery[217](Articles 8(2)(b)(xxii) or 8(2)(e) apply to rape [218](v) Outrages upon personal dignity - article 8(2)(b)(xxi) or 8(2)(c)(ii);169 (vi) Intentionally directing an attack against a civilian population Article 8(2)(b)(i) or 8(2)(e)(i);[219](vii) Pillaging - article 8(2)(b) or 8(2)(e)[220] & Property destruction - article 8(2)(b) or 8(2)(e).[221]

The confirmation hearings against them were initially slated to take place separately. The Prosecutor's application was what led to the decision to join the charges. Because the same witnesses would testify that the two accused people committed the same offenses stemming from the same incident—the attack on Bogoro village—they were both charged with them.[222] They are accused of committing the crimes both directly and indirectly through their subordinates in accordance with Article 25(3) (a) of the ICC Statute[223] With the exception of the crime against humanity of harsh treatment, all allegations were proven.

4.5 Case Laws in Relation to DRC Prosecuting International Crimes

17 years had passed since the government of the Democratic Republic of Congo (DRC) referred the situation in the DRC to the International Criminal Court (ICC).[224] Since then, the court had rendered two convictions one of which was final one

[217]Para. 26.
[218]Para. 29.
[219]Para. 30.
[220] Para 31
[221] Para 32
[222]Prosecutor v Mathieu Ngudjolo Chui.
[223]Decision on the Joinder of Katanga Chui case, para. 33-36
[224]On March 2004 the government of the DRC referred to the ICC for investigation the events that happened in the DRC since the entry into force of the Rome Statute of the ICC, with the objective of determining responsibilities for the crimes under its jurisdiction. In the same letter, the government expressed a commitment to cooperate with the ICC.

acquittal, and one decision not to confirm charges.[225] A new trial was about to start, and one arrest warrant was still to be executed.[226]

The results of the ICC's efforts in the DRC are seen as disappointing, considering the amount of resources invested in the process. The proceedings were slow, complex, and costly, and the court's actions faced criticism. For Congolese civil society, the outlook was mixed or even negative.

The main issue with the ICC was its prosecutorial and investigative strategy. The ICC had been criticized for its selective approach in its investigations, covering only a portion of the conflict in terms of victims and time frame. Furthermore, the proceedings had exposed shortcomings in ensuring fair trial principles, particularly those related to the rights of the defendants.

The fundamental principles of national and international law are protected by the Rome Statute of the International Criminal Court (ICC) and the ICC's Rules of Procedure and Evidence, particularly those that govern evidence. When these principles are violated, the consequences can be severe for both the defense and prosecution, potentially damaging the fairness of the entire trial. Such violations can lead to delays, hindrances in the prosecution of alleged perpetrators, and the sum of their crimes. This was seen in the cases in the Democratic Republic of the Congo (DRC), where issues surrounding evidence gathering, use of intermediaries, and the

[225]See ICTJ's analysis of the Lubanga, Katanga, Ngudjolo, and CallixteMbarushima cases.

[226]The confirmation of charges hearing in the case against BoscoNtaganda took place on February 1014, 2014. On June 9, 2014, all charges against Ntaganda were confirmed and he was committed for trial before a trial chamber. SylvestreMudacumura was also the subject of an arrest warrant approved on July 13, 2012, for nine charges of war crimes for events that took place in the Kivu province from January 20, 2009, to the end of September 2010; he remains at large

application of confidentiality and non-disclosure were raised. These limitations should prompt a review of the ICC Prosecution Office's strategy and its application of criminal procedural rules for the future.

The judicial response to international crimes committed in the Democratic Republic of the Congo (DRC) led to the opening of 39 cases regarding incidents that occurred in the eastern regions of Ituri, North Kivu, and South Kivu between 2002 and 2014. This information was obtained through investigations and discussions with various legal professionals including law enforcement, prosecutors, judges, lawyers, and representatives from national and international NGOs, MONUSCO, UN staff and other stakeholders. However, the proceedings had been criticized for being slow, complex and costly.

Moreover, the Office of the Prosecutor of the International Criminal Court (ICC) had faced criticism for not adequately representing all perspectives and violating fair trial principles. This highlights the need for greater participation from civil society actors in shaping the ICC's prosecutorial policies and the need for reflection on the court's limitations and the future development of the ICC Prosecution Office's strategies and application of criminal procedural rules.[227]

4.6 Challenges/Hindrance to DRC Prosecuting International Crimes

The term "prosecution" refers to the legal process of bringing a person or persons to trial for a committed criminal offense. Successful prosecution requires a range of

[227] See ICC Rules of Procedure and Evidence: http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf

skills, knowledge, resources, and facilities. In the Democratic Republic of Congo, the increase in international crimes is due to several challenges faced in this area, as detailed below.

4.6.1 Inability to prosecute

The ICC should take into account if the state with jurisdiction is unable to proceed with its proceedings due to additional or significant collapse or inaccessibility of its national legal structure, inability to obtain the necessary evidence and declaration, or other reasons.[228] The ICC must take into account circumstances such as the absence of a central government while evaluating this [229] existence of a state of chaos caused by a war, catastrophe, or widespread unrest that causes national systems to collapse and prohibits the state from performing its tasks.[230] Because of this situation, the state may have lost control over the police or the judicial system may have completely disintegrated.[231] Furthermore, a fully functional national legal system may be declared inaccessible under Article 17(3) if there are obstacles such as real or legal counting, for example, or the absence of a corresponding law or agreement allowing the national courts to determine the location of international crimes.[232]

[228]ICC Statute, Art. 17(3).
[229]In this case the law enforcement mechanisms may be completely unavailable. Example of such a state was Somalia in 1990s after the overthrow of Sayed Bare. See Williams and Schabas (2008: 463, marginal no. 33); also see Ofei (2008: 9).
[230]See ICC Prosecutor's paper on policy issues (2003: 4) (hereafter "Policy Paper") at http://www.icccpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B2560AA962ED8B6/143594/030905_Policy_Paper.pdf> (accessed on 22 October 2021).
[231]Ofei (2008: 10).
[232] Meissner, Die Zusammenarbeitmitdem Internationalen Strafgerichtshofnachdem Römischen Statut 86 cited in Ofei (2008: 10).

4.6.2 Applying the Rome Statute to Congolese Criminal Law

In order to bring national law in line with international law definitions, the Parliament must pass a law to implement the Rome Statute. This had been a long-standing issue in the Democratic Republic of Congo, where military justices had repeatedly linked the lack of a statute implementing the Rome Statute to the absence of alignment between domestic and international law.[233] Judges had generally struggled to identify specific standards that would help them decide whether to use domestic law instead of international law and vice versa.

The application of the Rome Statute by military judges in the Democratic Republic of Congo had been inconsistent, with some judges relying on the Constitution as a secondary reason for prioritizing international law over domestic law, while others had cited the superior provisions in the Rome Statute for the accused, victims, and witnesses. The inconsistency in justification highlights the need for clear guidelines on the use of international law in the country's legal system.[234] For instance, when it comes to sentencing, military courts have frequently cited the Rome Statute as justification for defying domestic law's mandate to apply the death penalty.[235]

However, the military courts had not completely disregarded domestic legal requirements. They relied on a combination of sources such as the Rome Statute, the Statute of International Tribunals, and the local military corrective law, to inform their rulings. Military judges occasionally turned to the Rome Statute to fill gaps in

[233]Elena Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks", Boston College Law Review 50(1) (2009): 4.
[234]See the following cases: MC SK, Lt. Col. BalumisaManasse at al. (Mar 9, 2011).
[235]*Ibid*

domestic law. By doing so, they greatly enhanced the protections afforded to victims and witnesses, who might otherwise have limited protection under domestic law.[236] Despite the efforts of military judges to improve the protections offered by domestic law, the judicial process in the Democratic Republic of Congo remains fragmented and inconsistent. This unpredictability affects individuals who are facing trial in Congolese courts, as the jurisprudence is inconsistent and lacks coherence. Although military judges had adopted ideas from international law such as the individual and subsidiary accountability of commanders and superiors, which were not yet included in the Military Penal Code (MPC), the overall situation remained challenging.

4.8 Conclusion

In recent years, there has been limited progress in holding those responsible for major crimes accountable in the DRC. The number of cases is small relative to the scale of the crimes committed and legal proceedings are often blocked by political obstacles or lack of international pressure on national authorities to investigate and prosecute. Most cases seem to only be initiated and pursued due to coordinated pressure from partners. Meanwhile, efforts by Congolese legal authorities and institutions are not widely recognized or valued at the organizational or political level, but rather evaluated on an individual basis for career advancement.

[236]In Kazungu case, 34, the MGT of Bukavu, Rome Statute, art. 68.

CHAPTER FIVE

EFFECTIVENESS OF DRC's LEGAL AND INSTITUTIONAL FRAMEWORK IN PROSECUTING INTERNATIONAL CRIMES

5.1 Introduction

The researcher thoroughly examined the reasons for the DRC's non-participation in prosecuting international crimes in response to the research question. The data collected from various respondents indicated that there are several reasons for the DRC's non-participation in prosecuting international crimes. The respondents, who were obtained through both primary and secondary methods of data collection, had differing answers to the research question. The data collected aided in the findings of the study.

This chapter analyzes the findings of the research and presents the discussion organized based on the findings obtained for each research objective and question.

The two main research questions of this study aimed to determine the effectiveness of the legal and institutional framework of DRC in prosecuting international crimes and to identify potential recommendations for resolving any issues. The following is the presentation of the findings based on the questions for determination.

5.2 Effectiveness of International Prosecution

In carrying out the current study the researcher investigated the reasons for non-participation in which the respondents helped the researcher to come up with the challenges to be displayed, There are number of reasons as follows:

5.2.1 Limited Authorities in Strengthening the Rule of Law

The legal framework in the DRC is faced with several challenges, including political and military interference in legal matters, poor legal practices of military courts and tribunals over time. This had resulted in a perception among many victims that the legal framework in the DRC is not capable of enforcing justice for the numerous violations of basic rights committed against them in the past. To transform the legal framework into a tool to combat the climate of impunity, a key step would be to strengthen the rule of law. Ensuring justice for victims through prosecutions must be seen in a wider context, including access to a trial, access to those within the trial, and access to the community through the trial. Victim engagement is central to this broader understanding of justice.

Hobbs explains that victim support can empower survivors, promote healing and social trust, and advance accountability and the rule of law in post-conflict transition societies. In line with most countries following the civil law tradition, the legal system of the DRC grants wide participatory rights for victims in criminal proceedings. However, until recently, the jurisdiction to prosecute serious violations of international human rights law, specifically genocide, crimes against humanity, and war crimes, was exclusively reserved for military courts in the DRC.

The 2016 revision of the Congolese Criminal Code and the Code of Criminal Method effectively incorporated the Rome Statute into national law. However, it is unclear how victim support will be put into practice when domestic courts start prosecuting international crimes.

5.2.2 Lack of Efforts on Criminal Prosecution

The primary goal of criminal prosecution is to assign blame and impose punishment on the guilty.[237] However, criminal prosecution alone cannot address or alleviate the underlying social issues that contribute to and sustain violence. These issues, such as ethnic tension, corruption, marginalization of ethnic groups, and unequal distribution of a nation's resources are prevalent across Africa. Addressing the root causes of violence is crucial to reducing its frequency and the temptation to resort to it.[238] Criminal prosecution of individual perpetrators will not suffice; it is essential to address the cultural norms that support social imbalances for accountability to take root in Africa.[239] Combating impunity in Africa requires not only legal deterrence, but also careful social and economic development.[240]

5.2.3 Criminal Prosecution an Unfortunate for Restoring the Criminals

At the brink of chaos, where violence is perceived as an acceptable means to achieve desired objectives.[241]In a fledgling democracy, where ethnic divisions and past tensions have caused violence to be seen as a legitimate means to achieve goals, the use of international criminal charges may end up becoming a catalyst for, rather than a deterrent to, illegal acts of violence. Some warlords hold extremist views and will readily resort to violence to mould society to their vision. Faced with the prospect of prosecution, and sensing a unified global community that is determined to bring them

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[237] Wayner R. Lafave, Criminal Law 25-30 (5th ed. 2003)
[238] Todd Howland and William Calathes, The UN International Criminal Tribunal, *Is it justice or jingoism for Rwanda* (1998) P.355
[239] Rosanna Lipscomb, A search for a permanent solution in Sudan, (2006) p. 182-195
[240]Alex de Waal, *Tragedy in Darfur: On Understanding and Ending the Horror*, Bos-TON REV., Oct.-Nov. 2005.
[241]Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*,85 WASH. U. L.Q. 777, 817-27

to justice, warlords who have everything to lose may decide that it is in their best interest to fight until the end.[242]The results of indicting determined war rulers "may be proceeded by oppression or bloodshed.[243]Additionally, criminal proceedings can negatively impact relationships. They often involve accusations and counteraccusations, repetition of facts that revive old wounds and reignite passions that ultimately make reconciliation difficult.[244]

5.2.4 Violence Differ on what Leads Deviant Behavior Hence Difficult Addressing Trials

The rampant violence in Africa puts into question the efficacy of a Western-style criminal justice system and prompts critical examination of the underlying assumptions behind criminal prosecution..[245] The violence prevalent in Africa stems from complex social factors, particularly ethnic tensions. The violence witnessed in countries like Rwanda, Sudan, and Sierra Leone is not a result of individual wrongdoing, but rather a manifestation of societal pressure at its core. The belief that violence in the name of preserving ethnic identity is a moral or legal obligation fuels its persistence.[246] Decades of ethnic doubt and contentions, coupled with the central

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[242]Jeremy I. Levitt, *Illegal Practice: An Inquiry into the Legality of Power Sharing With War Lords and Rebels*, 27 MICH. J. INr'L L. 595 (2006)

[243]Eric Blumenson, *The Challenges of A Global Standard of Justice: Peace Pluralism and Punishment at the International Criminal Court*, 55CoLuM. J. TRANSNAT'L L. 801, 803 (2006)

[244]*See generally Jason* Benjamin Fink, *Deontological Retributivism and the Legal Practice of International Jurisprudence: The Case of the International Criminal Tribunal For Rwanda*, 59J. AYR. L. 101 (2005) (noting that international criminal jurisprudence often sacrifices the possibility of reconciliation for the normative framework entailed by retribution).

[245] See generally Howland &Calathes, supra note 35 (discussing the relevance of traditional theories of punishment in the context of the International Criminal Tribunal for Rwanda).

[246] William R. Ochieng, Foreword to *Conflict in Contemporary Africa* i (P. Godfrey Okoth&Bethwell A. Ogot eds., 2019) ("The flare-ups into violence, that sometimes end up in coups and rebellions in Africa, are often attempts by class, or nationality, to expropriate the little wealth that exists and to deprive others.").

government's failure to bargain reasonably with the ethnic groups, give assist impulse for the whole world destroying dynamism of violence.[247]The traditional approach of the criminal justice system falls short in addressing the complexity of violence in Africa, which is driven by deep-seated social issues such as ethnic tensions. The violence caused by these societal pressures and carried out by individuals with varying levels of responsibility cannot be effectively addressed by a criminal justice system designed to solely target individual wrongdoing.[248] The Western criminal justice system is not well-suited for dealing with situations where large numbers of individuals are involved in widespread acts of violence.[249] In these cases, the root causes of the deviant behavior are not at the individual level, but rather at the communal level, which makes it difficult to address effectively through the traditional framework of criminal proceedings.[250]

Moreover, whether international criminal prosecution actually serves as a deterrent is unclear because its effect cannot be empirically verified.[251]

5.2.5 Effectiveness International Criminal Prosecutions Depends Public and Governments

The success of international criminal trials depends on the backing of both the

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[247] William R. Ochieng, foreword to conflict in contemporary Africa (P. Godfrey Okoth&Bethwell A. Ogot eds., 2000) ("The flare-ups into violence, that sometimes end up in coups and rebellions in Africa, are often attempts by class, or nationality, to expropriate the little wealth that exists and to deprive others.").

[248]*See* Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 79 (2002).

[249] Mark R. Amstutz, *Is Reconciliation Possible After Genocide: The Case of Rwanda*, 58 J. CHURCH & ST. 551, 555 (2006).

[250]*See* Howland &Calathes, *supra* note 35, at 158.

[251]An assessment of the deterrent values of international criminal prosecutions can only be made by conjecture or speculation. As Professor Blumenson observes, "it is notoriously difficult to determine whether a past regime of punishment had subsequent deterrent effects." Blumenson, *supra* note 52, at 822.

general public and the government. However, this support has been lacking due to negative views towards the West shaped by historical events, particularly colonialism's negative impact. These views persist and see international criminal tribunals as instruments and evidence of imperialism, as well as attempts by the West to regain control over Africa. The cooperation of both the public and government is crucial for the work of international investigators who examine war crimes and human rights violations.[252]

In addition, the researcher had an opportunity to interview a high-ranking officer of OCHA in Lubumbashi, who stated that the success of international criminal proceedings also depends on support from state governments, which has been lacking. African leaders are hesitant to support the prosecution of their allies, tribesmen, or warlords who hold the potential to cause problems for their fragile governments. International criminal tribunals, whether ad hoc or permanent, based on Western ideas of justice, operating under a cloud of skepticism, amid growing disillusionment, and increasing hostility from state governments, can do very little to restore social harmony and curb the ongoing violence threatening to engulf Africa.[253]

5.2.6 Lack of capacity in the National justice system

Nick Elebe *et al* [254]On June 15, 2017,cites a lecture that was held at the Asser

[252]William R. Ochieng, *foreword to conflict in contemporary Africa* (P. Godfrey Okoth&Bethwell A. Ogot eds., 2000) ("The flare-ups into violence, that sometimes end up in coups and rebellions in Africa, are often attempts by class, or nationality, to expropriate the little wealth that exists and to deprive others.").
[253]Its long form is Coordination of Humanitarian Affairs
[254]*"Can Africa prosecute international crimes? The DRC example*" Nick Elebe, Jacques Mbokani, Emmanuel Kabengele and Franck Kamunga, Supranational Criminal Law Lectures Seriesin

Institute in The Hague as part of the Supranational Criminal Law Lecture Series. The lecture was organized by the T.M.C. Asser Institut in collaboration with the Coalition for the International Criminal Court (CICC), the Grotius Centre for International Legal Studies at Leiden University, and Open Society Foundations. After a warm introduction from Dr. Christophe Paulussen, a senior researcher at the Institute, the speakers presented the findings of a study on the implementation of the Rome Statute by the national justice system of the Democratic Republic of Congo (DRC). The speakers were Nick Elebe and Franck Kamunga from the Open Society Initiative for Southern Africa (OSISA), Jacques Mbokani, the author of the study, and Emmanuel Kabengele from the Réseau pour la Réforme du Secteur de Sécurité et Justice. Nick Elebe began by introducing the work of OSISA and the motivation behind the development of the study.[255]OSISA has been active in the DRC since 2007 and has since then tried to build and enhance a solid knowledge of the issues surrounding international criminal justice to allow the partners it works with to develop effective advocacy and outreach activities. Consolidating this knowledge is one of the reasons that render the study on the manner in which the Rome Statute is applied by the Congolese justice system of extreme importance. The study enhances the results achieved by the case law developed and raises awareness of the challenges encountered in the Congolese implementation of the Rome Statute and the fight against impunity[256].

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cooperation with Open Society Foundations, 15 June 2017, 19.00 - 20.30hrs,M.C. Asser Instituut, The Hague

[255] *"Can Africa prosecute international crimes? The DRC example*"NickElebe, Jacques Mbokani,EmmanuelKabengele and FranckKamunga, Supranational Criminal Law Lectures Seriesin cooperation with Open Society Foundations, 15 June 2017, 19.00 - 20.30hrs,M.C. Asser Instituut, The HagueAvailableathttp//:www.asser.nl, accessed on 16May2021

[256] *Ibid*

Following this introduction on the work of OSISA, Jacques Mbokani took the floor to provide the audience with an overview of the most salient aspects the study touches upon. The research involves approximately thirty judicial decisions issued by national courts in the DRC.The question that was posed was whether the Congolese decisions on Rome Statute crimes were in compliance with international standards. He reflected on the context of great political instability and conflicts in which the decisions were issued. Specific questions addressed in the study include the possibility to retroactively apply the Rome Statute, the matter of sentencing, the fairness of trials vis-à-vis the accused and the issues arising from the victims' right to participate in the proceedings and to receive reparations. He concluded, noting how, despite the challenges and the difficulties faced by the DRC's national justice system and there being room for improvement, the fight against impunity for the commission of heinous crimes is possible even in its absence.[257]

The presentation concluded that the capacity of the national justice system must be strenuously supported by those stakeholders endowed with willingness at the national level and by the international community. Support is needed for the system to progress and to become a viable alternative to the intervention of the ICC, in particular where justice must be "brought directly at the victims' doors and immediately"[258]

[257] *"Can Africa prosecute international crimes? The DRC example*"NickElebe, Jacques Mbokani,EmmanuelKabengele and FranckKamunga, Supranational Criminal Law Lectures Seriesin cooperation with Open Society Foundations, 15 June 2017, 19.00 - 20.30hrs,M.C. Asser Instituut, The HagueAvailable at http//:www.asser.nl, accessed on 16May2021
[258] *Ibid*

5.2.7 Applying the Rome Statute to Congolese Criminal Law

To align domestic law with international law definitions, the Parliament must pass a law implementing the Rome Statute. Congolese military justices have on many occasions directly linked the Rome Statute to the absence of such a statute.[259] Despite this, judges have generally been unable to specify specific standards to support their choice of domestic law above international law and vice versa.

Military justices have used a variety of justifications to specifically apply the Rome Statute. Courts have, instep, referred to the Constitution merely as a supplementary justification to use international law above domestic law; judges do not continuously mention to the arrangement of the Constitution that sets up the power of international law vis-à-vis domestic law. The "better quality" of the Rome Statute in compared to local law, as the former incorporates more favorable rules for the accused, casualties, and witnesses, is a significant factor highlighted by a few judges.[260] For instance, when it comes to sentencing, military courts have frequently cited the Rome Statute as justification for defying domestic law's mandate to apply the death penalty.[261]

In any case, domestic law provisions have not been completely disregarded by military courts. To support their judgments, they have used a number of sources, including the Rome Statute, domestic military penal legislation and international tribunal law. The provisions of the Rome Statute have been intermittently used by

[259]Elena Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks"

[260]See the following cases: MC SK, Lt. Col. Balumisa Manasse at al. (Mar 9, 2011), humanity); MC SK, Lt. Col. Daniel KibibiMutware et al. (Feb. 21, 2011), RP 043/11 RMP 1337/MTL/2011 ["Kibibi case"] (which rejectsthe application of the death penalty as not being provided for under international law); MGT Bukavu, Jean Bosco Maniraguha et al. (Aug. 19, 2011), RP 275/09 and 521/10 ["Kazungu case"] (which refers to art. 68

[261]*Ibid*

military judges to cover gaps in domestic law. Military justices have mostly used the Rome Statute, as stated, to expand assurances for casualties and witnesses who are insufficiently protected under domestic law.[262] They have also adopted important ideas that are still missing from the MPC, such as commanders' and other superiors' individual and subsidiary accountability.[263]

In spite of the endeavors of military judge's authorities to cure the weaknesses of homegrown regulation and increment assurances for parties, the current statute remaining parts-divided, conflicting and, thusly, erratic for those brought before the Congolese courts.

5.2.8 Lack of International Personnel

Due to the lack of a legislative framework and the diversity in how domestic courts apply international criminal law, the other response from a national judge stated that local judges have a common need for expertise in international criminal law.[264] The inclusion of international experts in the various specialized bodies (the chambers and investigation and arraignment units) should help to advance both consistency and quality and strengthen the specialized capacity of national judges given the urgency of moving forward with cases and the requirement of domestic legal capacity to

[262]In Kazungu case, 34, the MGT of Bukavu MGT Bukavu, Jean Bosco Maniraguha et al. (Aug. 19, 2011), RP 275/09 and 521/10 ["Kazungu (Trial) case" MC SK, Maniraguha et al. (Oct. 29, 2011), RPA 0177 (Appeal) RP 275/09 521/10 RMP 581/TBK/07 1673/KMC/10 (Trial) RP 275/09 See Rome Statute, art. 68.

[263]MGT Bunia, Kakado BarnabaYongaTshopena (Jul. 9, 2010), RP 071/09, 009/010 074/010 RMP 885/EAM/08 RMP 1141/LZA/010 RMP 1219/LZA/010 RMP 1238/LZA/010 Rome Statute, art. 28.

[264]Nyabirungu Mwene Songa, "Crime against Humanity under the ICC Statute in Congolese Law".

indict serious violations.[265]It is additionally aiming to progress legal freedom in a region where political impedances is uncontrolled.[266]

5.2.9 Lack of Prosecution Strategy and Specialized Technical Capabilities

A Congolese prosecutor who was one of the respondents provided that, while external partners and international donors have made significant investments in staff development and strengthening the capability of the national legal framework, national actors' ability to investigate and prosecute complex violations is still insufficient. The focus of national studies has consistently been on isolated incidents without connecting them to larger, well-reported criminal patterns.

Cases are constructed around specific persons who took part in or organized a clearly defined event, but it is disappointing to note the significant hierarchies, chains of command, and systems to which these individuals belong. Even if charging a low-level offender may eventually result in the punishment of the person most directly responsible for a single attack, the true criminal intent of the associated organization is never revealed, and the exact context of the violence is never made clear.

Problematically, neither investigators nor military prosecutors are well prepared to negotiate with such processes. According to a legal on-screen character, one needs to be able to see past people who fire or attack once one looks at superiors beyond the

[265] In the August 2011 version of the draft bill, an international presence is no longer required at the prosecution and defence levels, nor is an international judge required in the appeal before the Court of Cassation.
[266]UN Mapping Report, at 483–487; Koso, Marcel Wetsh'okonda.

obvious wrongdoer. Even the commander or highest reviewed person must be ignored. One needs to look for associations that aren't always obvious. The country lacks the tools necessary to find it.

The existing judicial system in the Democratic Republic of the Congo does not adhere to a thorough prosecutorial strategy; investigations are initiated on an ad hoc basis after information is supplied by external accomplices or after the detention of those responsible for severe crimes. Given that different funders, global partners, and media outlets have different priorities when it comes to the activities supported by international actors in the Democratic Republic of the Congo, this flow has resulted in an unbalanced number of cases involving sexual violence when compared to other real crimes reported (26 out of 39 cases compiled by ICTJ that includes charges of assault adding up to an international wrongdoing, see Reference section).

Other well-known significant crimes committed in the eastern Democratic Republic of the Congo, such as the enlistment of child soldiers and the theft of natural resources, were not the subject of any investigations between 2009 and 2014.[267]
While the UN Mapping Report provides an important record of violations that occurred between 1993 and 2003, accurate data on crimes that occurred between 2003 and 2014 still needs to be gathered. International crimes committed in the

[267]For example, the UN identified 910 children who were recruited and used in 2013 by armed groups, primarily Mai Mai groups (297 children) and Nyatura (338 children). See U.N. General Assembly and Security Council, "Children and armed conflict: Report of the Secretary-General," U.N. Doc. A/68/878–S/2014/339 (68th session, 69th year, May 15, 2014), para 59. On the pillage of natural resources by armed groups in Eastern DRC, see, for example, U.N. Security Council, "Letter dated 22 January 2014 from the Coordinator of the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council," U.N. Doc. S/2014/42 (Jan. 23, 2014), para. 165–169.

eastern Democratic Republic of the Congo have without a doubt not been mapped out or subject to a thorough information gathering process throughout this time. Not one or the other the Congolese legal or the official department has this information. Therefore, it is unknown what the actual history of international crimes is. But it is impossible to rationally create an efficient prosecuting strategy that enables an acceptable judicial reaction to foreign crimes without the outcomes of such a mapping exercise. Only in comparison to full information on the crimes perpetrated across the Democratic Republic of the Congo can enable the national judicial reaction to international crimes be adequately evaluated.

The national legal reaction to significant crimes is undermined by the lack of a mapping of international crimes perpetrated from 2003 to 2014 and a prosecutorial strategy, which is made worse by a dearth of specialized technical capabilities. Being unable to address specific instances of infringement, address leadership hierarchies, or establish connections between groups providing them with financial and political support and equipped entertainers prevents the state from taking the necessary steps to dismantle those organizations that aid in the commission of crimes.[268] On the off chance that a technique were taken on, it would expand the influence of the Congolese legal executive to focus on cases, beat impromptu methodologies, oppose outer strain, and work with public responsibility for commencement of cases.

[268] U.N. Human Rights Council, "Truth, justice, compensation, and guarantees against recurrence: Special Rapporteur's Report, Pablo de Greif," U.N. Doc. A/HRC/27/56 (27th session, Aug. 27, 2014), para 72.

5.2.10 General Reasons

The researcher had an interview with a Military officer who indicated that the thousands of potential cases that had seemly been investigated by the International Criminal Court (ICC), as it were, 55 people had been prosecuted, with 55 cases as of now some time recently the ICC. Assist, as it were, 15 out of the 55 had come about in a total continuing, and 9 were sentenced. Researchers within the field have not enough tended to why cases come some time recently the ICC and how this prepare may result in a full hearing and decision. Since of these gaps, empirically-informed proposals for zones of enhancement for the ICC are moreover to a great extent absent. He further proceed admitting that this came from state biases, state cooperation, and domestic politics. He finally contended that the witnesses or those people who could help in prosecution were not cooperative simply because of fear for their safety.

The researcher had an opportunity to do one to one Interview with a Judicial officer from a supreme court of Congo, (he preferred anonymity) who averred me with the following information, The courts incorporate courts of first instance, appellate courts, a Supreme Court and the Court of State Security. Numerous debates are arbitrated at the nearby level by regulatory authorities or conventional specialists. In spite of the fact that 1977 corrections to the structure and the modern structure proposed in 1992 ensure an autonomous legal, in hone the president and the government have been able to impact court decisions.

Appellate survey is managed in all cases but those including national security and genuine crimes are settled by the Court of State Security. Since August 1998, and since of the war, the president requested for a provisional court (la Cour d 'Ordre Militaire). The judges are troopers who apply the law enthusiastically, and now and then the rights of the respondents are completely disregarded.

5.3 Conclusion

This chapter has displayed the information which were collected from different workplaces. The information was collected through surveys and library material readings. The information were coded and dissected and displayed into explanations. The questions which were inquired by the researcher had coordinate deduction to the hypothesis which direct this investigate and the point of those questions were to test the speculation from the information collected. In this research, the researcher saw that the ICC is highly dependent on these factors. For instance, the researcher took note that numerous authoritarian leaders were utilizing the ICC's arraignments for their claimed political advantage, in having the ICC go after their political rivals and not those in control. For illustration, Uganda self-referred the circumstance to the ICC. Numerous scholars within the universal arrange commended this as effective and extraordinary for Uganda to construct authenticity. In any case, the researcher also found that it was inconceivable that President Museveni self-referred the circumstance to the ICC for his political advantage. For case All Ugandan cases that have been arraigned, hence distant, are Lord's Resistance Armed force (LRA) individuals, a revolt bunch contradicting Museveni and the National Resistance Movement (NRM). By bringing the LRA and other revolt bunch to the ICC, it would

keep President Museveni and the NRM in control and diminish any political resistance. In this way, Uganda collaborating with the ICC would be politically advantageous for President Museveni and those in control. Whereas the ICC can be valuable as obstruction and keeping governments from committing atrocities, the ICC can moreover be utilized as instrument to keep administrations in control and get freed of political adversaries or rebel groups.

CHAPTER SIX

CONCLUSION AND RECOMENDATIONS

6.1 Introduction

The study entitled "The legal and institutional framework for prosecuting international crimes in the Democratic Republic of Congo", aimed at appraising the challenges that hinder the prosecution of International Crimes in the country. After the discussion in the previous chapters, this chapter presents the conclusion and recommendation to the study. After a thorough discussion in the preceding propositions, here under is the conclusion of the study.

6.2 Conclusion

There can be no dought that, the focus of the thesis argued on the current national context of the fight against impunity in the Democratic Republic of Congo (DRC) and the connection between reforms in the security and justice sectors. The researcher infers that there is a situation where the population lacks trust in the authorities and sees justice as synonymous with corruption, tribalism, deceit, and irregularities. This has led to a state of uncertainty whereby those seeking justice do not know what the outcome will be. The restoration of trust in governmental institutions is deemed crucial by the researcher.

The researcher also highlights the problems that arise when a state fails to implement legal decisions and hold its forces accountable, while incorporating armed groups into the national army, further impeding the development of a sustainable rule of law in the DRC. The researcher argues that political unwillingness must be addressed

with the support of the international community and that reforms in the security sector must be linked to reforms in the justice sector.

The researcher emphasizes that delay in justice is a denial of justice and that the length of the judicial process is a real concern. The study provides useful insights into the challenges involved in prosecuting international crimes and the capacity of national justice systems. The researcher recognizes the limitations of the International Criminal Court (ICC) in delivering justice and support to victims in a timely manner and stresses the importance of having national systems that can prosecute and deliver justice for international crimes. The researcher thus argues that the state's unwillingness to provide the necessary financial and human resources to the national justice system denies justice to the people.

The capacity of the national justice system in the Democratic Republic of Congo (DRC) must be vigorously supported both by national stakeholders and the international community. This support is necessary for the system to progress and become a viable alternative to the ICC, particularly where justice must be brought directly to the victims promptly. The conflict in the DRC is complex, rooted in past leadership, ethnicity, greed, and outside influences. Despite numerous attempts to resolve the conflict, including political agreements and amnesty legislation, violence continues to ravage the country, resulting in serious war crimes and crimes against humanity committed against the civilian population.

Unfortunately, the DRC has not been able to prevent or punish these international crimes. Progress in the prosecution of serious violations has been limited, and the number of cases remains low compared to the scale of the atrocities. Without international pressure or support for analysis and prosecution, legal procedures are often obstructed by political obstruction. Most cases seem to be initiated and pursued only due to direct pressure from allies, and there are few indications that actions from Congolese legal authorities are valued or taken seriously on a political or institutional level. These actions are only evaluated at the individual level to evaluate performance for career advancement.

6.3 Recommendations

In this research, the researcher offers several recommendations that can contribute to the effective investigation and prosecution of international criminal justice and other criminal offenses. These include:

6.3.1 Change of DRC Domestic Laws to Prosecute International Crimes

It is clear that the ICC is unable to hold accountable those who committed crimes in the Democratic Republic of the Congo prior to July 1, 2002 due to jurisdictional limitations. However, the violations of international criminal law that have occurred until that time should not go unpunished. The crimes covered by the ICC Statute are not entirely new, as many were recognized as codified crimes under customary international law before the formation of the ICC Statute. These crimes are subject to prosecution through the principle of extensive jurisdiction or the aut dedere aut judicare rule. The requirement for legality does not hinder the determination of guilt

under customary law. Thus, third states have the obligation to continue on these principles and exercise their right to charge violations of international law, allowing various offenders from outside the DRC to be held accountable for their actions committed within the country. The ICC's intention is not to prosecute every perpetrator in the DRC, but instead to indict a select few who bear the most responsibility for the crimes. The DRC should then take charge of domestic proceedings against those with lower accountability according to its own laws. This is crucial in closing the exemption gap created by the ICC's approach.

6.3.1 The Stakeholders support on National Justice System

The presence of stakeholders to international crimes for a stable Africa is good not only for Africans, but also for the international community.[269]It is subsequently important for the international community to assist Africa meet the challenges of making a context in which elected officials respect and protect human rights and citizens learn to process their grievances through built up legitimate channels. Efforts and resources required to form this context are enormous. However, the failure to address the issues that make and perpetuate violence in Africa will lead to disastrous results that will increase more international crimes. The human catastrophe that haunts Democratic Republic of Congo will be tragically repetitive unless Congolese government implicit and take measures in the activities of international criminal tribunals. These measures and lessons incorporate a conclusion to impunity as well as respect for human and civil rights.

[269]Susan Rice, the New National Security Strategy: Focus on Failed States, BROOKINGS INST. POL'y BRIEF No. 116 (2003).

6.3.2 Intervention by International Criminal Court

The ICC, as an international court specializing in international crimes, should intervene in national criminal systems that have failed to prosecute these crimes. Criminal prosecutions serve the important purpose of bringing attention to the issue of impunity. International criminal prosecutions have increased awareness among both leaders and the general public that Africa is no longer a consequence-free zone where crimes go unpunished. Africa would be better served if the attention and impact generated by international criminal prosecutions translate into broader and more determined efforts to address the underlying social factors that drive violence. The limitations of the ICTR demonstrate that attempting to alter ethnic group relations or cultural norms solely through criminal indictments is not effective. Criminal prosecution will have a greater impact on the fight against impunity if it is accompanied by multi-layered efforts that promote accountability and restore social harmony.[270]

6.3.3 The Possibility to Retroactively Apply the Rome Statute

It is clear that the ICC is unable to take legal action against individuals who committed crimes in the Democratic Republic of the Congo prior to July 1st, 2002, as the jurisdiction of the ICC only extends to crimes committed after this date. However, the author believes that the ICC Statute should be revised and applied retroactively to address the crimes committed before the statue was in place.

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[270]Donald L. Hafner & Elizabeth B.L. King, Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions and Other Tools for Accountability Can and Should Work, 30 B.C. INT'L & COMP. L. REv. 91, 92-93 (2007)

6.3.4 Victim's Participation and Protection

The researcher suggests that in cases where there is limited victim participation in criminal proceedings in the Democratic Republic of Congo due to lack of protection from the government and fear of consequences, the use of victim participation can make these proceedings more meaningful for affected communities. This can be done by giving them a sense of involvement and ownership, recognizing their suffering publicly and promoting truth-finding. It should be noted that the civil law tradition in the DRC allows for a wide range of participatory rights for victims, which is based on the widely recognized right to an effective remedy and the principle of the rule of law. In other words, victim participation is an extension of the state's obligation to investigate and prosecute human rights violations, provide remedies in case of any violations, and protect the rights of victims in criminal proceedings.[271]

6.3.5 Technical support from United Nations Organization Stabilization Mission in D.R. Congo and other UN Agencies

The mission is a drive to lead the fight against impunity, with the goal of making a strong commitment to peacekeeping. The command hopes to support public and international efforts to prosecute offenders through the establishment of Indictment Backing Cells. These cells were established in 2011 as part of a partnership between the United Nations Organization Stabilization Mission in D.R. Congo and the Service of Safeguard and Previous Warriors. They aim to help with investigations and prosecutions of serious crimes, including those listed in the Rome Statute, by

[271]JC Ochoa The rights of victims in criminal proceedings for human rights violations (2013) 266

providing logistical support, planning, advice, guidance, and specialist expertise. However, the cells can only be activated with the request of the public party and have yet to provide direct assistance. The cells can be found in eight military areas: Beni, Bukavu, Bunia, Goma, Kalemie, Kindu, Kisangani, and Lubumbashi.

Assessing the success of the implementation has been challenging due to technical shortcomings in cases of major violations, which were supposed to be addressed through expert assistance. However, a 2013 evaluation revealed that the impact was limited due to delays and the hiring of workers who lacked language skills. This issue has since been resolved, but the geographic distance between the cell employees and the Congolese magistrates has reduced opportunities for capacity building. The amount of capacity building that has been contributed is unclear. Most of the experts chosen to work on the cells were recruited from public courts where they had little experience in dealing with transnational crimes.

They are familiar with domestic regulations but lack specialized knowledge in investigating major offenses and have limited understanding of international law. NGOs and allies have also noted that the cell specialists lack motivation to investigate situations beyond their assigned tasks and have limited understanding of the context of the conflict.

At the point when some information about the commitment made by the cells to progressing examinations, judges alluded only to the calculated help for coordinating missions and alluded by any means to no specialized help. According to the cells' point of view, a significant number of their individuals who were consulted by ICTJ

for this report noticed an underlying absence of certainty from Congolese judicial actors.

The UN Security Council had directed the mission under the previous MONUC format in 2004 (S/RES/1565, October 1, 2004) to assist with efforts to guarantee that individuals in charge of grave violations of human rights and international humanitarian law were brought to account. To help the Congolese government fight impunity for human rights abuses, the United Nations Joint Human Rights Office (UNJHRO) established the Joint Investigations Teams in 2009. Their mission is to "ensure that judicial authorities' investigations are carried out in compliance with the protection of victims and witnesses, as well as the sources and human rights defenders."Teams were coordinated with the interest of the workplace of the tactical examiner and significant MONUC/MONUSCO units (for example, United Nations Joint Human Rights Office (UNJHRO) basic freedoms officials, youngster security officials, and battle against sexual viciousness officials). The groups were expected to help instances of common liberties infringement in view of specific measures: the quantity of casualties; the methodical person of infringement; the focusing of people due to their orientation, social, ethnic, or strict foundation; and the unmistakable quality or rank of the culprits in question. United Nations Joint Human Rights Office (UNJHRO) contains staff with skill in basic liberties and worldwide helpful regulation and a decent comprehension of the elements of the contention (counting knowledge of furnished gatherings and their chiefs). Thusly, they appear to be in an exceptional situation to help experts in exploring and arraigning serious violations. By the idea of its command, which incorporates examining and reporting serious

basic liberties infringement, one of the main units to access data is United Nations Joint Human Rights Office (UNJHRO). Joint Examinations Groups' duties are limited to assisting evaluators on field trips; they are not responsible for obtaining arraignment evidence (not at all like the Indictment Backing Cells, which may, under the MoU, demand admittance to case information).

6.3.6 To the President to Nominate Key Representative for the D.R. Congo

The president is to choose a key representative from the legal field to ensure the DRC makes a compelling commitment at the half-yearly Heads of State meeting of the Territorial Oversight System of the Structure Understanding and to oversee regular assessments of DRC compliance with its obligations. That person should be responsible for collecting information regarding the fulfillment of Responsibilities Six and Seven of the Structure Understanding in accordance with the relevant indicators.

Support and guidance should be given to hasten and aid in the reception of important regulations in the fight against exemption, notably the law implementing the Rome S and the law establishing specific chambers.

According to the public benchmarks and markers in the Public Oversight Mechanism, routinely publish the progress made in the legal restraint of severe wrongdoings.

6.3.7 The Executive to Designate a Group of Experts

We recommend that the executive designate a group of independent experts to undertake a complete planning of worldwide crimes committed between 2003 and

2014. The discoveries should be presented to Congolese legal and political experts in order to inform the drafting of a public legal procedure to address wrongdoings committed during this time, along with the Planning Report directed by OHCHR of serious infringement of common liberties committed somewhere between 1993 and 2003, and other reports conducted from 2014 to 2020.

To ensure that the prosecution of international crimes in the eastern DRC is clearly acknowledged as essential to carrying out the five-year strategy for the justice sector. To increase the legal budget, ensure its effective management, and strengthen the practical cap of important purviews for investigating and charging major offenses. Enhancing hiring procedures is mandatory so as to make sure that only qualified personnel with relevant expertise and special training in the area of international crimes are hired.

The Executive is also advised to ensure that legislation on the Rome Rule's restrictions on international violations is brought to the Parliament. The Priest should ensure that when the draft regulations on enforcing the Rome Rule and the specific chambers are presented to the Parliament, they do not conflict but rather support one another.

6.3.9 To the Ministry of Internal Affairs

The National Police as the major security of the country must have the skilled staffs in order to conduct productive prosecutions of the international crimes and other offences. The integrations made between police officers, Military and armed groups

and deployment into the force unskilled personnel civilians only because they were militias is very dangerous to the health of the prosecution of the international crimes and other offences. When the process of Disarmament, Demobilization and Reintegration (DDR) in the Democratic Republic of the Congo is very important in maintaining peace, security and smooth prosecution of the international crimes and other offences the integration must go collinear with the military/police training. The work performance of the staffs must be of the high professionalism, efficiency, transparent and legal, to have the better result of prosecution.

6.3.10 Judicial Liberty

As the analysis demonstrates, complementarity demands that national jurisdiction be given primary responsibility for the arraignment and rejection of international crimes committed in the DRC. When it is established that the national jurisdiction is unable to fulfill this obligation, the ICC may exercise an optional jurisdiction as the court of last resort. On this premise, the ICC isn't intended to supplant to enhance the commitment of states in the battle against exemption. The assessment demonstrates that in order to ensure that crimes against international law are punished, it is necessary to interpret the complementarity principle in a way that is trustworthy with, for instance, the Rome Statute. By restricting it to the interpretation of "reluctance" and "failure" under article 17 of the ICC Rule, this criterion should not be used as a means of escape by those who commit international crimes. When it is clear that such crimes have occurred and no state is actively accusing the perpetrators

(referred to as "inaction"), the ICC's arraignment will be appropriate and won't violate the complementarity principle.[272]

[272] ICC Statute, Art.126. Also see Werle (2009:86, marginal no. 238).Also see Sostenes Materu humboldt University

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