



avocats sans frontières

Case Study

THE APPLICATION OF THE ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT BY THE COURTS
OF THE DEMOCRATIC REPUBLIC OF CONGO

MANDATE OF AVOCATS SANS FRONTIERES

Avocats Sans Frontières (ASF) is an independent non-governmental organisation with a mission to contribute towards the development of fair and equitable societies, in which the law and its institutions serve the most vulnerable groups and individuals. ASF mainly intervenes in post-conflict situations.

Avocats Sans Frontières pursues the following objectives at both the international and national levels:

- Provide efficient and effective legal aid to the vulnerable groups and individuals and contribute to the development of a legal system capable of protecting them
- Promote the respect for fundamental human rights, including the right to counsel and fair trial
- Promote responsibility and accountability of public and private actors, in the social and economic sphere.
- To work towards poverty reduction through the promotion of access to social justice in the spirit of an international redistribution of resources and skills.

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PREFACE

I. Context

Currently, the military courts in the Democratic Republic of Congo (DRC) have exclusive jurisdiction over cases involving what are termed as international crimes (war crimes, crimes against humanity and the crime of genocide), even if the defendant is a civilian. The military court structure consists of the *Tribunaux militaires de garnison* (Military Garrison Tribunals, MTG), at first instance, the *Cours Militaire* (Military Courts MC) and the *Haute Cour Militaire* (Military High Court, MHC) as the final court of appeal.¹

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In the past, the military courts solely relied upon the provisions of Title V of the Military Penal Code to try international crimes. It was not until 2006 that Congolese judges invoked the provisions of the Rome Statute in their judgments in accordance with the Constitutional provision stating that “*duly concluded treaties and international agreements have [...] superior authority to that of laws [...]*” This welcome development in the practice of the national courts has led to advances in the case-law concerning international crimes as evidenced in the case of *Songo Mboyo*. In this case, the judges adopted a progressive interpretation of Congolese law to include acts committed against male victims within the definition of rape.

Nevertheless, the direct application of an international instrument such as the Rome Statute by national judges remains a source of persistent challenges in the DRC. Crucially, the complexity of international criminal law and the difficulty of applying the entire corpus of concepts and rules to the very specific context of the DRC; a country destroyed by successive wars involving a myriad of armed forces and groups. Thus, while many of the decisions of the Military Courts reflect remarkable effort and a respectable level of understanding of the subject matter as well as knowledge of the case-law of the ad hoc International Tribunals, some of the following major difficulties cannot be overlooked:

- Irregularities which mar the process of incorporation of the Treaty into the domestic legal system and the absence of implementing legislation that would resolve problems involving the hierarchy of laws in the event

¹ In accordance with Article 104 of the Military Justice Code, the personal jurisdiction of the military courts is determined by the status and rank of the person due to be tried at the time of commission of the criminal acts or at the time of his appearance. If the defendant is a civilian, he shall be tried by the MTG at first instance and by the MC in the event of appeal of the decision. If the defendant is a soldier, he shall be tried according to the same system as mentioned before, unless he holds a particular rank. A ranked military officer, on the other hand, shall be tried before the MC or the MHC depending on the nature of his rank. For details on the rules of jurisdictional competence of the military courts relating to rank, see Articles 120 to 122 of the Military Justice Code.

² Article 215 of the Constitution of the Democratic Republic of Congo of 18 February 2006, *Journal Officiel* special edition dated from 18 February 2006 (“Constitution of 2006”).

of a conflict. For example, there are significant differences between the definitions contained in the Rome Statute and the Congolese Military Penal Code with respect to the offences of war crimes and crimes against humanity.

- Weak or poor legal reasoning by the judges: Few decisions provide the kind of legal reasoning required, especially, given the seriousness of the crimes in question. In most cases, the judges either fail to transpose the constituent elements of the offences to the facts of the particular case or they fail to consider the elements constituting the crime altogether.
- The courts fail to analyse each piece of incriminating evidence so as to assess its probative value and neglect to indicate the specific evidence that served as the basis of their decision. If the matter at issue was, for example, a murder constituting a war crime or a crime against humanity, few judgments formally identify the evidence retained to establish the death, the causes of death and to identify the perpetrator.

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The shortfalls of the Congolese national courts are attributable to multiple factors: The absence of a law implementing the Rome Statute aimed at harmonising national and international provisions, the lack of qualification and independence on the part of judicial actors on a subject as complex as international criminal law and the lack of material, financial and human resources to successfully manage complex procedures, are all factors responsible for these pitfalls.

The above-mentioned weaknesses constitute significant obstacles to the effective application of the Rome Statute by Congolese judges. In order to overcome these difficulties, it is essential that a number of concrete measures be taken, such as the enactment of the long awaited implementing legislation of the Rome Statute, transfer of jurisdiction over international crimes³ to the civilian courts, and the training and provision of adequate resources to judges. These measures should be taken as soon as possible with the co-operation and support of the Congolese authorities and the international community.

II. Purpose of the study:

Avocats Sans Frontières decided to conduct this case study in order to:

- Identify the challenges and problems faced by Congolese judges when dealing with international crimes;
- Provide a detailed analysis of the laws and judicial practice in the DRC relating to the

³ This was envisaged in the 2005 and March 2008 legislative bills..

punishment of international crimes. Particularly, to expose the reasoning adopted by the judges when determining the international character of unlawful acts and when resorting to the provisions of the Rome Statute and the other supplementary texts of the legal arsenal of the ICC (*Elements of Crimes and Rules of Procedure and Evidence*);

- To contribute towards a better understanding of the laws, rules of procedure and case-law, in the field of international criminal law in the DRC, among judges, lawyers, academics, students, members of the bar as well as the national authorities concerned;
- To highlight the need for the improvement of the capacity of the judicial system and the quality of decisions made in the DRC, particularly with regards to international crimes. The recommendations made to this end include in particular the passing of the draft implementing legislation, the training of judges and the allocation of adequate resources to the judicial sector.

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III. Methodology

Avocats Sans Frontières (ASF) is an international NGO whose mission is to contribute to the achievement of a just and equitable society in which the law is available and accessible to the most vulnerable individuals and groups. ASF's presence in the DRC began in 2002 and has developed since 2005 into, among other things a comprehensive programme of international and transitional justice consisting of:

- Capacity-building of Congolese actors playing a role in judicial proceedings conducted domestically and before the ICC against alleged perpetrators of international crimes. The above includes organising training programmes and round-table meetings for lawyers, magistrates and NGOs on international criminal law and procedure;
- Legal advice, assistance and support to NGOs and other Congolese civil society organisations engaged in helping victims of international crimes in the exercise of their rights before the Congolese courts and ICC;
- Free legal representation for the benefit of victims and/or defendants of international crimes.

The study relies on Congolese legal texts, relevant decisions of the military tribunals and courts, legal instruments of the ICC, fundamental principles of international criminal law, and on the case-law of the international criminal tribunals.

In short, the study was prepared based on:

- a review of the national judgments involving international crimes and national laws relating thereto;
- a critical analysis of the substantive legal aspects of the decisions of the Congolese military courts;
- research and field interviews, in order to (i) identify areas of Congolese criminal law and international criminal law which pose a problem for judges and/or lawyers, and (ii) to prepare the necessary recommendations in relation to the difficulties arising from the application of the provisions of the Rome Statute by the Congolese courts;
- Carrying out legal research on Congolese law, international criminal law, and the case-law of the international tribunals with regards to international crimes.

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It is important to note that the study only covers judgments handed down before July 2008 and were accessible to the researcher at the time of the publication. Decisions subsequent to this date are reported for strictly reference purposes in Annex 1 in the presentation of the cases studied.

In the introduction, the study seeks to set out the basis for the application of the Rome Statute in the DRC and addresses its acceptance in the Congolese legal system, the direct application of the Statute by the national courts and the hierarchy of norms. The analysis of how the Congolese military courts have applied the Rome Statute in practice will be addressed in the first chapter. The second chapter will deal with issues relating to the grounds for exclusion of criminal responsibility and extenuating or aggravating circumstances. Finally, the third chapter discusses the civil responsibility of the state.

In each of these chapters, the relevant provisions of the Rome Statute, the case-law of the international criminal courts, Congolese national law and relevant Congolese case-law will be analysed. The study concludes with a general summary of the important findings and a set of recommendations for the future.

INTRODUCTION: THE BASIS OF THE APPLICATION OF THE ROME STATUTE IN THE DRC

Having been subject to many successive wars since 1994, the DRC faces the challenges of reconstruction and the establishment of the rule of law, which requires, among other things, putting an end to impunity. Since January 2006, Congolese military courts, presented with cases involving international crimes, decided to apply the provisions of the Rome Statute in place of the national Military Penal Code. The Military Tribunal of the Garrison (MTG) of Mbandaka was the first tribunal to do this in a provisional judgment in the case of *Mutins de Mbandaka*.⁴ This ground-breaking ruling has been confirmed by the final judgment⁵ and on appeal⁶. The direct applicability of the Statute was once again pronounced by the same tribunal in April 2006 (the case of *Songo Mboyo*)⁷ and confirmed on appeal before the Military Court (MC) of Equateur⁸. At the same time, the MTG of Ituri embarked on this route in the cases of *Bongi*⁹, *Kahwa*¹⁰ and *Bavi*¹¹ and saw this approach confirmed on appeal by the Military Court of the Eastern Province in the cases of *Bavi*¹² and *Kahwa*.¹³

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In light of these decisions and the relevant legal provisions, it is important to refer to the conditions and procedure required to invoke and directly apply the Rome Statute before the Congolese courts and to examine whether they were respected by the judges. It is indeed for the domestic courts to determine whether the Statute has been incorporated into domestic law, if the provisions contained in this treaty are directly applicable and can be invoked before the courts and, in the event of conflict between these provisions and national legislation, if they have superior status to national law.

4 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, 12 January 2006, RP 086/05.

5 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, 20 June 2006, RP 086/05 - RP 101/06.

6 CM de l'Equateur, *Affaire Mutins de Mbandaka*, 15 June 2007, RPA 615/2006.

7 TMG de Mbandaka, *Affaire Songo Mboyo*, 12 April 2006, RP 084/05.

8 CM de l'Equateur, *Affaire Songo Mboyo*, 7 June 2006, RPA 014/06.

9 TMG de l'Ituri, *Affaire Bongi*, 24 March 2006, RP 018/06.

10 TMG de l'Ituri, *Affaire Kahwa*, 2 August 2006, RP 039/06.

11 TMG de l'Ituri, *Affaire Bavi*, 19 February 2007, RP 101/06.

12 CM de la Province Orientale, *Affaire Bavi*, 28 July 2007, RP 101/06 – RPA 003/07. The judgment does not contain the reasoning for the direct application of the Rome Statute but invokes Article 8 of the Rome Statute, relating to war crimes, for justifying its decision.

13 CM de la Province Orientale, *Affaire Kahwa*, 28 July 2007, RP 039/06 – RPA 023/07.

1. The acceptance of treaties in the Congolese legal system

The Rome Statute was signed by the DRC on 8 September 2000 and the “Legislative Decree no. 003/2002 authorising the ratification of the Rome Statute of the International Criminal Court”¹⁴ was issued by the President of the Republic on 30 March 2002. On the other hand, the ratification instruments, were deposited on 11 April 2002.¹⁵

As a country traditionally ranked among states with a monist legal tradition, the Democratic Republic of Congo does not require implementing legislation for a treaty to acquire the status of law at the national level.¹⁶ Constitutions and other fundamental instruments adopted successively since 1994 have almost always provided that treaties and international agreements regularly concluded have upon publication, higher authority than national laws¹⁷. Accordingly, Article 215 of the 2006 Constitution is no exception to the rule.¹⁸ In order to determine whether the Rome Statute has been properly received in the legal system of the DRC, in accordance with Art 215 and provisions that preceded it; it is necessary to analyse whether the treaty has been ratified by the competent Congolese authorities, whether the Statute has been published in the Official Journal and whether the treaty was subject to reciprocal application.

Without going into technical detail, it should be noted that the judges did not engage in the requisite analysis to strictly check compliance with these conditions as evidenced by the sentences pronounced and the reasoning in the aforementioned decisions which is often very brief.

With respect to the legality of ratification, the Congolese military courts were restricted to referring to the legislative decree of 30 March 2002 by the President of the Republic

14 Legislative decree no. 003/2002 of 30 March 2002 approving the ratification of the Rome Statute of the International Criminal Court of 17 July 1998, *Journal Officiel* of 5 December 2002 (special edition “International and regional instruments relating to human rights ratified by the Democratic Republic of Congo”).

15 <http://www.icc-cpi.int/asp/statesparties/country&id=5.html>.

16 Traditionally in the area of the law of treaties, the literature distinguishes between the monist and dualist States. In a dualist system, the domestic and international legal systems are two distinct legal areas. A transposition of the contents of the treaty by a law is necessary for its incorporation into the domestic legal system. Conversely, in a monist system, the legal system is perceived as a whole without there being a distinction between domestic and international law. Ratified treaties are directly incorporated into the domestic legal system without the need for any law of transposition. The TMG of Ituri in the *Affaire Blaise Bongi* confirmed the existence of a monist system with primacy of international law in the DRC (Decision of 24 March 2006, *op. cit.*).

17 Article 112 of the Constitutional Act of Transition (1994), Article 193 of the Transitional Constitution of the Democratic Republic of Congo of 4 April 2003, *Journal Officiel*, special edition of 5 April 2003 (“Constitution of 2003”), Article 216 of the Constitution of the Democratic Republic of Congo of 18 February 2006, *Journal Officiel*, special edition of 18 February 2006 (“Constitution of 2006”).

18 Article 215 of the Constitution provides that “duly concluded treaties and international agreements have, upon publication, a higher authority than laws subject, for each treaty or agreement, by its application by the other party”.

authorising the ratification of the Statute,¹⁹ in exclusion of any analysis of its compliance with constitutional provisions in force at the time of ratification. Accordingly, reference was only made to the 2006 Constitution²⁰ after ratification.

Reference to the relevant constitutional provisions would have identified whether the President, the government or the Parliament have the power to ratify a treaty. Accordingly, some authors argue that the procedure followed in this case violated Congolese law and that consequently, ratification was unlawful in the absence of parliamentary consent.²¹

The Constitutions of 2006, 1967, 1965, as well as the Constitutional Act of the Transition of 1994 required Parliament to authorise the ratification of treaties pertaining to peace, international organisations, the resolution of international conflicts, the status of persons, public finances, amendments to existing laws, modifications to the exercise of jurisdiction and trade agreements. Conversely, the constitutional decree 003 of 28 May 1997, “relating to the organisation and exercise of power in the Democratic Republic of Congo”, abrogated the 1994 Constitution and in Article 29, recognised the President’s right to exercise executive and legislative power through decree and legislative act. The Constitutional decree was changed in 1998 to require, among other things, parliamentary consent for agreements relating to international organisations (Art. 111). However, some believe that the *Constituent and Legislative Assembly*, which was to assume legislative power by the decree of 1998, never existed,²² and furthermore, that a new legislative decree made on 1 July 2001 re-conferred the ratification procedure to the statutory power.²³

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As can be seen, it is difficult for Congolese lawyers to agree on the constitutional law in force at the time of signing and ratifying of the Rome Statute. In the absence of consensus, it must nonetheless be noted that if the ratification of the Statute was irregular, for want of

19 This applies to all the judgments analysed, except the judgment of the Military Court in the *Affaire Kahwa* which fails to mention the same and is based directly on the articles of the Statute (Decision of 28 July 2007, *op.cit.*)

20 With the exception of the provisional judgment of the TMG de Mbandaka which refers to the Transitional Constitution of 2003 (Decision of 12 January 2006, *op.cit.*)

21 See M. Wetsh’okonda Koso, « Le malaise soulevé par l’application directe du Statut de Rome par le jugement n° RP 084/2005 du 12 avril 2006 du Tribunal Militaire de Garnison de Mbandaka », *Revue « Horizons »*, n°2, 2006, p. 177-201; and for an opposing view, see P. K. Kambale, « L’application du Statut de Rome était-elle correctement faite ? Une brève réplique à Marcel Wetsh’okonda », *Revue « Horizons »*, n°2, 2006, pp. 202-203.

22 From the reading of several writings on the subject, it appears that the *Constituent and Legislative Assembly* has never served its full term, leaving the Legislature in the hands of the President. It also appears that the legislative decree of 1998 as a whole has only had a potential existence. Preparations for Inter Congolese dialogue which only refers to the legislation of 1997 are shown without citing the constitutional provisions amending it. See also the conclusions of the Brussels meeting of 15-17 January 2002 titled *Concertation informelle entre les composantes « Opposition politique » et « Forces vives » aux négociations politiques intercongolaises* (Informal Consultation between Members of the Political Opposition and Major Actors on Inter Congolese political negotiations), available at: www.diplomatie.be/viennafr/posts/fr/press/homedetails.asp?TEXTID=65

23 According to P.K. KAMBALÉ, *op.cit.*, p. 202, Article 5 of the legislative decree 096-200 of 1st July 2001 provides that the President of the Republic “negotiates and ratifies the international treaties and agreements on behalf of the Democratic Republic of Congo”.

authorisation by the legislative power, Article 153 of the Constitution requires that “the civil and military courts and tribunals apply duly ratified international treaties [...] as far as they comply with the laws...” However, thus far, no judge has rejected the application of the Statute of the ICC on this basis. In any event, Congolese military courts do not have the power to determine the legality of the ratification of the Rome Statute. The analysis of constitutionality of an international instrument is within the mandate of the Congolese Supreme Court.²⁴ Thus, if a party to proceedings raises the question of legality of the act of ratification, the military court is required to refer the question to the Supreme Court.²⁵ However, in the DRC, there is “a strong presumption of legality in favour of laws published in the Official Journal”²⁶ making it unlikely that the issue would be referred to the Supreme Court.

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With regards to publication, the Statute of the ICC was published in the Official Journal of the DRC on 5 December 2002;²⁷ nearly eight months after its ratification. An analysis of the decisions cited show that Congolese judges almost always failed to check whether the Statute had been published in the Official Journal at the time of the criminal acts.²⁸ However, the issue is of some importance, as in principle, treaty provisions can only be invoked against nationals if they have been communicated to them. This issue assumes particularly crucial importance when the provisions in question concern the criminalisation of conduct in domestic law. In theory, the principle of *legality* requires that one may only be sentenced according to a specific and clear law, accessible and foreseeable to all. The principle (*Nullum crimen sine lege*), although recognised internationally, including under the Universal Declaration of Human Rights (Article 11(2)) and the International Covenant on Civil and Political Rights, has been subject to certain exceptions in relation to the punishment of international crimes. There is an understanding among international criminal lawyers and judges that, in the absence of positive laws, the perpetrators of such crimes can be sentenced on the basis of customary international law establishing the conduct as a crime.

In accordance with Article 215 of the Constitution, a treaty is superior to national legislation “subject to each treaty or agreements application by the other party.” This condition of reciprocity, although inscribed in most constitutional systems, must be considered in context in the case of multilateral agreements or where they concern compliance with mandatory norms. While it is logical to include such a clause in a bilateral covenant where

²⁴ See Article 160 of the Constitution which provides that “the Constitutional Court is responsible for monitoring the constitutionality of laws and acts having the force of law” and Article 76 paragraph 4 of the Congolese Military Judicial Code which provides that “[the military courts] are incompetent to rule on the constitutionality of laws and acts having the force of law. The exceptions raised to this effect are brought before the Supreme Court of Justice which rules as a Constitutional Court on all cases dropped”.

²⁵ Article 162 of the Constitution provides that “the Constitutional Court shall decide with the exception of unconstitutionality raised before or by a court.”

²⁶ See P.K.KAMBALE, *op.cit.*, p. 202.

²⁷ *Journal Officiel de la République démocratique du Congo, instruments internationaux et régionaux relatifs aux droits de l’homme ratifiés par la République démocratique du Congo*, 43rd year, special edition dated 5 December 2002, pp. 169-243.

²⁸ Only the judges in the Bavi case mention the date of publication of the legislative decree of 2002 (but not that of the Rome Statute) in the Official Journal of the Republic, *TMG de l’Ituri*, decision of 19 February 2007, *op.cit.*, page 48.

the rights and obligations of the Contracting States are interdependent, the logic seems less acceptable for an agreement between most of the member states of the UN. In addition, international instruments concerning the protection of human rights in general, cannot be excluded by virtue of a lack of reciprocity.²⁹ In fact, it ought to be taken into account that these agreements must be applied objectively by each State, regardless of the conduct of the other States Parties.

In general, compliance with the requirement of a date of entry into force of a treaty replaces the need for the above condition. Although, the above criterion may make it unnecessary to check whether the treaty has been applied by the other members, the central idea is similar: it seeks to reassure the State in question that it is not the only one forced to apply the signed treaty. The entry into force of the treaty therefore often depends on the signatures of a minimum number of States.

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The drafters of the Rome Statute have thus anticipated, under Article 126, that the Statute would come into force “*on the first day of the month following the sixtieth day after the introduction date of the sixtieth instrument of ratification...*” The minimum threshold of 60 States was reached on 11 April 2002. Consequently, at the time of ratification by the DRC and by nine other States, the Statute actually entered into force at an international level on 1 July 2002, requiring *ipso facto* parties to enforce it in good faith. The judgments of military courts analysed as part of this study do not mention the promulgation of the Rome Statute under international law.

Finally, many questions can be raised from an academic perspective concerning the legality of the introduction of the Rome Statute in the Congolese legal system. However, the fact that no objections concerning the legality of DRC’s ratification of the Statute and the applicability of the latter were raised before the ICC suggests the existence of a general consensus on the validity of the ratification in 2002. Indeed, the above argument has never been invoked by the parties or the judges in the cases that are currently pending before the Court. However, it is important to note the possible errors and omissions made by the judges in order to draw viable lessons for the future and help improve the quality of judicial decisions and reasoning.

Thus, it is of crucial importance for judges in applying the Rome Statute, to refer to legislative decree no. 003/2002 of 30 March 2002 authorising the ratification and to the validity of the ratification under the constitutional provisions in force at the time. They may also need to cite, as a legal basis, the constitutional decrees of 1997 and 1998 and not the Transitional Constitutions of 2003 or 2006.

²⁹ Article 60 of the Vienna Convention on the Law of Treaties (adopted on 23 May 1969), provides a suspension of the operation of a treaty in case of breach by other parties; exception is made for provisions relating to the protection of the human person.

As regards to the requirement of publication, it is also essential that the decisions refer to the publication of the Rome Statute in the Official Journal of 5 December 2002 and compare the date of the facts of the case with that of the publication in the Official Journal to determine the applicability of the Statute.

2. The direct application of the Rome Statute by national courts

The acceptance of a treaty in domestic law must be distinguished from its potential direct application by national courts. While acceptance concerns the technical or formal terms of ratification/publication/promulgation leaving minimal room for interpretative comments, the question of direct application is often a source of debate. At the international level, the criteria for determining the immediate application of a treaty or of some of its provisions are not standardised and are subject to multiple interpretations.

Accordingly, much of the discussion and controversy revolves around the self-executing character of a treaty.³⁰ An international instrument is regarded as such when the international rule is sufficiently clear and precise to confer rights or obligations on individuals in domestic law without states having to adopt implementing measures. A treaty assumes this status if two cumulative conditions are fulfilled, where the person entitled to the right must be specifically targeted by the international rule (*personal criterion*) and the rule must be sufficiently precise and clear so as to not require national measures of implementation (*material criterion*).

To fulfil the *material* criterion, the interpretation of the provisions of the treaty must be straightforward, leaving minimal leeway in the implementation of the contents of the instrument. Such provisions are thus classified as *self-sufficient*, since no internal measure or law of transposition is necessary for their implementation.³¹

To fulfil the *personal* criterion, a treaty must create rights and obligations which individuals can enforce directly before the national courts to their benefit. As individuals were not traditionally considered the main subjects of international law, few international

³⁰ The *self executing* character of an international convention is an American invention of case-law. See J.A. FROWEIN, K. OELLERS-FRAHM, “The application of the treaties in the domestic legal system”, p. 24, in *The integration of International and European Community law in the National Legal Order*, edited by P.M. EISEMANN, La Haye, Kluwer Law International, 1996, 587p.

³¹ It is important to note that this review of “objectivity” cannot be done in respect of a treaty as a whole. Each provision shall be subject to such control in order to determine whether it is sufficiently clear and precise. For example, we may refer to the European Convention on Human Rights, in which some articles have been recognised as self-sufficient and others not.

conventions, are considered *ipso facto* as self-executing.³² Accordingly, many authors argue that this condition of subjectivity must also be considered in context.³³

In applying the principles set out above, even if the Rome Statute does not assume the said status in its entirety, it can nevertheless be presumed that a significant number of provisions do not require national measures of implementation. From the moment that a judicial body - the International Criminal Court - has been established to prosecute individuals on the basis of the Statute, without any other implementing measures, the instrument can be considered as self-executing. Indeed, the majority of articles are sufficiently clear and precise for the Court to conduct fair trial within a reasonable time. Moreover, the Rome Statute provides sentences for the perpetrators of the stated crimes.³⁴ This instrument therefore respects the principal of legality of crimes and sentences in criminal cases, satisfying the conditions of clarity and precision.³⁵

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However, it is undeniable that the entire legal arsenal of the ICC does not lend itself to direct application by national courts. For example, we may refer to the Rules of Procedure and Evidence of the ICC, which concerns proceedings before the Court and not before national courts.³⁶ The Rules, which were adopted and entered into force on 9 September 2002, mention explicitly that the instrument “does not affect the procedural rules for any national court or legal system for the purpose of national proceedings.”³⁷ Even if this Article reflects the intention of the States Parties not to interfere in national rules of procedure, it does not prevent judges from drawing on the Rules of Procedure and Evidence in the event of loopholes within domestic law. It is precisely this issue that the MTG of Mbandaka decided in the case of *Songo Mboyo*.³⁸ However, it is necessary to bear in mind that contrary to the Statute, the Rules had not specifically been “received” in the Congolese legal system. Therefore, one might ask whether, like the Statute, if they were enforceable under Congolese law. Article 52 of the Statute addresses this issue by stating that “the Rules of Procedure and Evidence shall enter into force upon adoption by the Assembly of States Parties ...” We can, therefore, conclude that accession to the Statute constitutes acceptance of the Rules by a State Party. Does the same

32 Since multilateral treaties are concluded by both monist and dualist countries, and rarely provide for directly applicable rights and obligations, this condition seems somewhat obsolete.

33 The subjective test may be useful for monist countries, especially when explicit clauses encouraging (or preventing) direct application are provided for by the treaty. It may also take into consideration the intention of the drafters of the treaty. Thus, according to the terms used, the role reserved for the States and their courts to give full effect to the treaty is shown.

34 See Article 77 of the Rome Statute.

35 The lack of punishment is an argument often invoked to deny the direct application of conventions relating to international criminal law. For example, the Convention on Torture explicitly requires States Parties to enact legislation implementing and making provision for the criminalisation of torture and the inclusion of a sentence in their legislation.

36 See also Article 88 of the Rome Statute, which explicitly encourages States Parties to include in their legislation procedures facilitating the achievement of cooperation with the International Criminal Court.

37 Rules of Procedure and Evidence (RPE), adopted by the Assembly of States Parties, New York, 9 September 2002, Explanatory note of the title, paragraph 2.

38 *TMG Mbandaka, Affaire Songo Mboyo*, op.cit., p. 28.

reasoning also hold for the *Elements of Crimes*³⁹ of the Rome Statute? It is interesting to note, that in the *Songo Mboyo* case, the MTG of Mbandaka delivered a broader interpretation of the crime of rape, consistent with the *Elements of Crimes* rather than with Congolese law. Under Congolese law, the offence of rape can only be perpetrated against a woman but under the *Elements of Crimes*, both men and women could be victims of rape.⁴⁰

Overall, none of the judgments analysed in this study mention the *self-executing* character of the Rome Statute. In almost all cases, the courts mention the legislative decree of 2002 authorising ratification and are satisfied to declare direct applicability of treaty provisions by referring to Article 153 of the Congolese Constitution of 2006, which states that “civil and military courts implement duly ratified international treaties...”

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Reference to the self-sufficient character of the Statute, even when the acceptance of the treaty into domestic law has been mentioned, should be specified in order to strengthen the legal foundation of judgments. Furthermore, it is for the judges to determine whether for each Article (or each set of Articles) invoked, the conditions of direct application are fulfilled through the examination of the sufficiently clear and precise character of the Article.

3. Hierarchy of laws

As discussed above, when a treaty has been duly accepted by domestic law and its provisions are sufficiently clear and precise to warrant direct application, the courts may invoke it. However, it may be the case that the treaty provisions are inconsistent with the domestic law of a State Party. It should be noted that irrespective of the precise solution adopted by domestic law to resolve the conditions of direct application of a treaty by national courts the obligations of the State to ensure the application of the treaty and fulfil its international responsibility remain unaffected. The principle of primacy of international law over domestic law in fact prohibits States from citing their national legislation as an excuse to avoid their conventional obligations under international law. Thus, while a State may be free to determine the legal system governing the relationship between international law and domestic law, it is nonetheless required, as far as international law is concerned, to enforce in good faith its treaty obligations, as is recognized by the principle “*Pacta sunt servanda*.”

If we refer to the constitutional laws of 2003 and 2006, which were in force during the period of the judicial proceedings reviewed, treaties that are duly ratified, published, and

³⁹ *Elements of Crimes*, adopted by the Assembly of States Parties in New York, on 9 September 2002 and entered into force on the same date (ICC-ASP/1/3). It should be noted that Article 9 of the Rome Statute provides that the *Elements of Crimes* shall assist the Court interpreting and applying Articles 6, 7 and 8 (crimes of genocide, crimes against humanity and war crimes) and that they are explicitly regarded as “compliant” with the Statute.

⁴⁰ TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit., p.27.

promulgated enjoy a status superior to that of domestic laws but inferior to that of the Constitution.⁴¹ In the event of conflict between national and international law, the latter body has, in accordance with the last two Congolese constitutions, superior status in the hierarchy of Congolese laws.

On the other hand, the constitutional decree of 1997, in force at the time of the commission of some of the crimes under consideration, remains silent on this point. If a court decided to refer to this decree, it should define the position of international treaties in the hierarchy of laws. To this end, the court may be guided by the Constitutions of 2003 and 2006, which presume the same hierarchy as the Constitutional Act of 1994. The repeated reaffirmation of the latter position by the different constitutional acts could arguably, persuade the courts to uphold the same.

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In practice, the reasoning upon which the direct application of the Rome Statute is based, in place of the Congolese legislation, varies somewhat from one court to another. A review of the rulings reveals various arguments for basing the superiority of the Rome Statute vis-à-vis Congolese law. While some judgments, such as the judgment in the *Kilwa* case,⁴² do not at all address the issue of conflict of laws, most of them are explicitly based on the constitutional provisions of 2006, which give precedence to international treaties.⁴³ In the case of MILOBS, the MTG of Ituri concluded that “substantive Congolese law introduced into its legal arsenal such as the Statute of the International Criminal Court, becomes a legal instrument that forms an integral part of Congolese penal law”.⁴⁴ The MTG of Mbandaka in turn referred to the Transitional Constitution of 2003 in the judgment on the *mutins de Mbandaka*.⁴⁵

For some judges, on the other hand, the existence of certain gaps or inconsistencies in Congolese law justifies recourse to the provisions of the Rome Statute. For example, there are important differences between the Statute and the Congolese Military Penal Code regarding the definition of war crimes and crimes against humanity. The definition of crimes against humanity under Article 166 of the Congolese Military Penal Code includes a number of offences constituting war crimes under the Rome Statute.⁴⁶ In the case of *Mutins de Mbandaka*, the court found that the Military Penal Code “creates confusion between crimes against humanity and war crimes which is clearly defined by the Rome Statute of the International

41 See for example Articles 215 of the Constitution of 2006 and 193 of the Constitution of 2003.

42 CM de Katanga, *Affaire Kilwa*, 28 June 2007, RP 010/2006, p. 30. The Military Court was satisfied to refer to the Rome Statute without citing the constitutional provisions or principles which justify its application. See also the decisions of the Military Court of the Eastern Province in the cases of *Kahwa* and *Bavi*.

43 For example, the MTG de l’Ituri based his reasoning on the Constitution of 2006 for each of its judgements. See in particular the *Kahwa*, 2 August 2006, op.cit., page 24 and the *Affaire Milobs*, 19 February 2007, RP 103/2006, p. 11.

44 TMG de l’Ituri, *Affaire MILOBS*, op.cit., p. 11.

45 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, 20 June 2006, p. 16.

46 Article 166 of the Act no.024/2002 of 18 November 2002 concerning the Military Penal Code, *Journal Officiel* special edition dated 20 March 2003 (“Military Penal Code”). See *infra*, chapter I.

Criminal Court.”⁴⁷ In its provisional ruling on the case of *Songo Mboyo*, the same court once again found differences between the definition of crimes against humanity in the Statute and that of the Military Penal Code.⁴⁸ The definition of war crimes under Article 173 of the Military Penal Code is far removed from that of the Statute and the main instruments of international humanitarian law.⁴⁹ Both the MTG of Mbandaka,⁵⁰ and that of Ituri, noted the existence of this conflict. In the case of *Bavi*, the military judges relied on the Constitution of 2006 and the previous decisions delivered by the military courts to dismiss the national criminal provisions and to apply “with complete safety, the key provisions of the Rome Statute on crimes against humanity and war crimes.”⁵¹ Moreover, the Military Penal Code omits some of the criminal acts constituting crimes against humanity under the Statute, such as enforced disappearance,⁵² war crimes, the recruitment of child soldiers and wilful killing.⁵³

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As regards to penalties, important issues of hierarchy of laws arise. The Military Penal Code provides no penalties for war crimes. In order to compensate for this “omission”, some judges have chosen to apply the Rome Statute. Thus, in the case of *Bongi*,⁵⁴ the MTG of Ituri, appraised the acts constituting war crimes and noted the “glaring omission” of the Military Penal Code by holding that “the Congolese legislator had no intention of letting this atrocious crime go unpunished; the seriousness of which it recognised by ratifying the Treaty of Rome”. Therefore, it concluded that the absence of sentencing guidelines was “evidently a material error” and that there was a need to “fill the gaps in domestic legislation by gaining support from the Treaty of Rome”. Mindful of not violating the principle of legality,⁵⁵ which prohibits imposing a sentence that was not prescribed by law at the time of the crime, the court held that “the ratification by the DRC of the Statute included it as part of the arsenal of laws of the DRC subject to the primacy of international law and in accordance with the monist legal tradition” of the DRC. Thereby it was considered appropriate to directly apply the material elements of war crimes and the

47 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, 20 June 2006, op.cit., p. 16.

48 TMG Mbandaka, *Affaire Songo Mboyo*, 12 April 2006, op.cit., p. 12.

49 Article 173 of the Military Penal Code.

50 TMG Mbandaka, *Affaire Mutins de Mbandaka*, provisional judgment, op.cit, p.6; and TMG Mbandaka, *Affaire Mutins de Mbandaka*, 20 June 2006, op.cit., p.16.

51 TMG de l’Ituri, *Affaire Bavi*, 19 February 2006, pp. 36-37.

52 Article. 7.1. i) of the Rome Statute.

53 Article 8.2. a) i) of the Rome Statute.

54 TMG de l’Ituri, *Affaire Bongi*, 24 March 2006, op.cit., pp. 10-11.

55 Given the absence of a sentencing guideline for war crimes which the Congolese, Congolese judges had somewhat assumed the role of a legislature leading to distortions in the application of the principle “*nulla poena sine lege*”. This principle of customary international law is recognised by the Congolese Constitution and national laws, Article 2 of the Military Penal Code in particular. See L. MUTATA LUABA, *Droit pénal militaire congolais. Des peines et des incriminations de la compétence des juridictions militaires en RDC*, Éditions du Service de Documentation et d’Études du Ministère de la Justice et Garde des Sceaux, Kinshasa, p. 572.

penalties provided for by the Rome Statute.⁵⁶ The MTG of Ituri, therefore, presumed that the legislator had not intended to shield war criminals from fair punishment and that it was appropriate to apply the provisions of the Rome Statute to meet the objectives of the ratification of the Treaty by the DRC.⁵⁷

Finally, while the Military Penal Code provides that the death penalty may be pronounced in certain circumstances to punish crimes against humanity,⁵⁸ the maximum penalty provided for by the Statute is life imprisonment. Some courts have, therefore, relied on this fact to avoid sentences proscribed by Congolese legislation by invoking the general principle of *Lex Mitior*; or the application of a lesser sentence in the event of the conflict of laws. In accordance with this reasoning, Article 77 of the Statute once again prevails over the provisions of the Military Penal Code.⁵⁹

Thus, in *Mutins de Mbandaka*, the judges noted that: “the Rome Statute, being less severe to the defendants, seemed more appropriate when using protective measures for the rights of victims (...) moreover, in the presence of two conflicting laws, the law more favourable to the defendant shall apply.”⁶⁰ The court in the case of *Songo Mboyo*⁶¹ used the same reasoning as the basis for its decision.

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56 In order to reinforce this position, the judges mention the opinions of the Congolese criminal law experts, including Me Franck Mulenda, *TMG de l’Ituri, Affaire Bongji*, op.cit., p.11. This suggests that the description of war crimes in Congolese law differs so much from that included in the Rome Statute, that there are actually two lists of different crimes and that the issue of conflict of law does not even arise. In accordance with the Rome Statute, it is necessary not only to apply the physical elements of war crimes of the Statute, but also the sentences provided for by Article 77 of the Rome Statute.

57 The criminalisation of conduct must include two distinct components: the definition of the crime (*mens rea* and *actus reus* of the offence) and the imposition of a sentence. The Preamble of the Rome Statute reminds the States that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level” and “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. The States are therefore under a duty to take all necessary national measures to this end. The absence of sentences for war crimes in Congolese law prevents the DRC from meeting its obligations since the criminal triptych of deterrence/prevention/punishment is not fulfilled. See I. FICHET-BOYLE, M. MOSSÉ, « L’obligation de prendre des mesures internes nécessaires à la prévention et à la répression des infractions », pp. 871-886, in *Droit international pénal*, sous la direction de H. Ascensio, E. Decaux, A. Pellet, Paris, Pedone, 2000.

58 Article 167. paragraph 2 of the Military Penal Code.

59 However, it should be noted that the judges’ decision not to sentence to death is not required under the provisions of the Rome Statute, since Article 80 a) has instead been designed to allow the States to apply their national sentences and capital punishment in particular. This provision is a compromise between the States in favour of abolishing the death penalty and those opposing it, such as the Arab countries, some Caribbean countries, and even Rwanda has just abolished the death penalty which it campaigned for at the time. Thus, although the Statute provides a maximum penalty of life imprisonment, it does not prohibit the States Parties from applying the death penalty for international crimes, if this sentence is provided for in their national legislation. On this subject, see W. A. SCHABAS, “Penalties”, p. 1505, in *The Rome Statute of the International Criminal Court: a Commentary*, A. CASSESE et al (eds.), Oxford, Oxford University Press, vol. II, 2002.

60 *TMG de Mbandaka, Affaire Mutins de Mbandaka*, provisional judgment, op.cit., p. 6 and 20 June 2006, p. 16.

61 *TMG Mbandaka, Affaire Songo Mboyo*, 12 April 2006, op.cit., and the provisional judgment, 20 January 2006, op.cit., p. 12. This reasoning is confirmed on appeal on 7 June 2006 by the Military Court of Equateur, op.cit., p. 25.

It can be seen in the two judgments that the military court also based its decision on taking greater account of victims' rights as required by the Statute. The Military Court of the Eastern Province for its part in the Bongi case held that “the provisions of the Treaty of Rome are more humanising and less severe in terms of punishment such that capital punishment is unrecognised, contrary to the Military Penal Code... and for these reasons the Military Court (...) decided to apply the Treaty of Rome.”⁶²

Accordingly, it is important that the judges refer to the hierarchy of Congolese laws, as defined by the Constitution and the Congolese case-law in question. In any event, in case of conflict between the Congolese legislation and the Rome Statute, especially in relation to the definition of offences contained in Articles 6 to 8 of the Rome Statute, the latter must prevail and be directly applied.

It is also important for the DRC legislature to provide adequate penalties for the war crimes enumerated under the Military Penal Code in line with its international commitment and the purposes of the Statute.

62 CM de la Province Orientale, Affaire Bongi, 4 November 2006, RPA 030/06, pp. 15-16.

CHAPTER 1

CRIMES AGAINST HUMANITY AND WAR CRIMES

One of the main challenges facing judges dealing with cases involving international crimes, such as those committed in the DRC, is establishing the constituent elements of the relevant crimes. The judges have to decide whether the facts presented before them constitute crimes against humanity, war crimes or ordinary criminal law violations. This chapter analyses the judgments of the military courts on the basis of the classification of offences maintained by them, while also looking at some of the judgments where the international character of the relevant facts have not been upheld.

1.1 Crimes against humanity

As noted in the introduction, the definition that the Military Penal Code provides for crimes against humanity is different from that of the Statute of the International Criminal Court. This difference is a source of conflict which requires judicial determination of the provisions (national or international) that are to be applied to the facts. Crucially, such a determination should be supported by clear and precise reasoning. Beyond the choice of law to be applied, the differences in the definition of crimes against humanity between the Rome Statute and the Military Penal Code carry significant consequences to the classification of the relevant acts and their criminalisation.

In this section, we shall look into the definitions adopted by the Statute and the Military Penal Code (1.1.), the interpretation of the general constituent elements of crimes against humanity (1.2.), as well as those constituent crimes of murder (1.3.) and of rape (1.4.) in international jurisprudence and by Congolese military courts.

1.1.1 Definition of crimes against humanity

A. The Statute of the ICC

The crime against humanity is defined by Article 7 of the Rome Statute:

“1. For the purposes of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack against any civilian population with knowledge of the attack:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to physical or mental health.”

The Elements of Crimes provide a more detailed description of the conduct, consequences and circumstances associated with each offence. The authors of this instrument attach great importance to the seriousness of crimes against humanity, “defined among the most serious crimes of concern to the international community as a whole.”⁶³ It is worth noting that it is through their ‘inhuman’ character that this conduct represents a violation of common values of humanity. This degree of seriousness strengthens the application of the principle of strict interpretation of criminal law.

B. The Congolese Military Penal Code

In Congolese law, crimes against humanity are governed by Articles 165 to 172 of the Military Penal Code (MPC). Reading these Articles immediately exposes the definitional confusion between and within the offences of crimes against humanity and war crimes.

⁶³ Article 7. Introduction.1 of the Elements of Crimes. As a reminder, they were adopted in order to assist the Court in interpreting and applying Articles 6, 7 and 8 of the Rome Statute.

Article 165 defines crimes against humanity as “serious violations of international humanitarian law committed against any civilian population before or during war”, while pointing out that “crimes against humanity are not necessarily related to the state of war.”⁶⁴ This reference to humanitarian law is troubling as, in essence, a serious violation of humanitarian law is related to the state of armed conflict while a crime against humanity may be committed outside of a situation of armed conflict.⁶⁵

Article 166 of the Military Penal Code incorporates the definition of crimes against humanity into a great number of offences constituting war crimes under the Rome Statute. Article 169, which also defines the crime against humanity, takes the main elements of Article 7 of the Statute while omitting certain acts criminalised by the Statute, such as enforced disappearance or the crime of apartheid.⁶⁶ On the other hand, the same Article criminalises conduct not provided for by Article 7 of the Statute such as the “serious devastation of wildlife, plant life, soil and subsoil resources” and the “destruction of the world natural and cultural heritage”. Finally, this same provision attempts to criminalise the *crime of aggression*, which remains undefined by the States Parties to the Statute; as an attack directed against “the Republic.”⁶⁷

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Given this situation, one wonders if this “confusion of genres”, coupled with the absence of sentences to punish war crimes reflects a lack of will on the part of the drafters of the Military Penal Code to expose their fighting forces to sanctions which could be considered too severe. This hypothesis must clearly be seen in the context of the war which was going on in the DRC at the time of the adoption of the Penal Code in 2002. These contradictions and gaps complicate the work of judges who opt for the provisions of the Rome Statute when dealing with conduct that is said to constitute international crimes.

1.1.2. The general constituent elements

To define crimes against humanity, both Article 7 of the Statute, and Article 169 of the Military Penal Code, refer to a “widespread or systematic attack”, against a “civilian population”. “Knowledge of the attack” is the requisite mental element under the two provisions.

64 *Ibidem*.

65 On this subject, see the case-law of the ICTY in the *Affaire Tadic*: “The absence of a link between crimes against humanity and an international armed conflict is now an established rule of customary international law”, ICTY, *Prosecutor v Tadic*, Appeals Chamber, 2 October 1995, paragraph 141 and for more information, also see E. DAVID, *Principes de droit des conflits*, Brussels, Bruylant, Edition 1999, pp. 643-645.

66 Article 7.1. i) and j) respectively of the Rome Statute.

67 Preamble of Article 169 of the Military Penal Code.

A. The context: a “widespread or systematic attack”

Widespread or systematic character is without any doubt one of the most difficult elements to establish in the context of the prosecution of crimes against humanity. There are differences in this respect between the case-law of the *ad hoc* tribunals and the Statute of the ICC. According to the Statute, the commission of a crime against humanity requires “apart from a state of war, at least a general situation of disturbances and tensions characterised by serious and multiple violations of human rights committed in a planned or concerted way.”⁶⁸

The Statute of the ICC and the case-law of the *ad hoc* tribunals

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The Statute of the ICTY does not make any reference to the condition of “widespread” and/or “systematic” attack in defining crimes against humanity.⁶⁹ The original French version of the Statute of the ICTR requires, for its part, that the attack be widespread and systematic, unlike the English version of this Statute, which states that the attack must be widespread or systematic.⁷⁰

In the *Kunarac* judgment on appeal, the ICTY held that:

“The assessment of what constitutes a ‘widespread’ or ‘systematic’ attack is essentially a relative exercise in that it depends upon the civilian population which allegedly was being attacked. [A Court] must therefore first identify the population which is the object of the attack, and in light of means, methods, resources and the result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, or any identifiable pattern of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a “widespread” or “systematic” attack vis-à-vis the civilian population”⁷¹”

In the cases of *Akayesu*⁷² and *Bagilishema*, the ICTR confirmed, in accordance with the English version of the Statute of the Court, that one of the two conditions is sufficient. To constitute a crime against humanity, “the attack must be at least widespread or systematic, but need not be

68 E. DAVID, *Principes de droit des conflits*, op.cit., § 4.125, p. 645.

69 Article 5 of the Statute of the ICTY, annex to the UN Security Council Resolution S/RES/827, adopted at its 3217th meeting on 25 May 1993.

70 Article 3 Statute of the ICTR, annex to the UN Security Council Resolution S/RES/955 at its 3453rd meeting on 8 November 1994.

71 ICTY, *Prosecutor v Kunarac et al*, Appeals Chamber, 12 June 2002 (IT-96-23&23/1), § 95.

72 ICTR, *Prosecutor v Akayesu*, Ch. 1st inst. I, 2 September 1998, (ICTR 96-4-T), § 579 and added note 143: “It is a condition *sine qua non*: the act must be part of a widespread or systematic attack and should not be an isolated act of violence. However, it does not require that it assumes this double character. Note 143: “In the original French version of the Statute, these requirements are cumulative: ‘as part of a widespread and systematic attack’, which is more or less the threshold for application of this provision. To the extent that customary international law merely requires that the attack is widespread or systematic, there is every reason to believe that the French version has been mistranslated.”

both.”⁷³ In reality, what matters is that “each of these conditions will serve to exclude isolated or random inhumane acts committed for purely personal reasons”.⁷⁴ The ICTY has subsequently upheld this position.⁷⁵

The Statute of the ICC, for its part, does not harbour any ambiguity. Article 7 clearly states “a widespread or systematic attack”. It defines the attack as “conduct involving the multiple commissions of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State policy or organizational policy to commit such attack.”⁷⁶ The Elements of Crimes specifies that the acts need not necessarily constitute a military attack.⁷⁷

It is therefore necessary to consider what is meant by a widespread or systematic attack but unfortunately, the criteria to define each of the two situations are not always easy to determine.

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In the case of *Blaskic*, the ICTY held that:

*“In practice, these two criteria are often difficult to separate from each other: an attack of such magnitude which is directed at a large number of victims is usually based on some form of planning or organisation. The quantitative criterion is not in fact objectively definable: neither the international treaties, nor case-law, whether international or national, can provide the threshold from which crimes against humanity can be met.”*⁷⁸ Many authors have also stressed that an act committed against a single person could constitute a crime against humanity.⁷⁹

In the judgment of *Akayesu*, the ICTR stated that:

*“The concept of ‘widespread’ may be defined as massive, frequent, large scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.”*⁸⁰

In summary, it can be argued that a widespread attack is a large-scale, frequent attack carried out collectively while being directed against a multiplicity of victims, versus a systematic attack which is one that is perpetrated on the basis of a policy or a preconceived plan.

73 ICTR, *Prosecutor v Bagilishema*, Ch. I 1st inst. 7 June 2001, (ICTR-95-1A-T), §77.

74 ICTR, *Prosecutor v Kayishema and Ruzindana*, Ch. 1st inst., 21 May 1999, (ICTR-95-1), §123

75 ICTY, *Prosecutor v Jelicic*, Chamber I 1st inst., 14 December 1999, (IT-95-10-T) §§ 53-57 and *Prosecutor v Blaskic*, Ch. I 1st inst., 3 March 2000, (IT-95-14), § 207 which refers to different judgments of the ICTR, *Akayesu* amongst others.

76 Article 7.2. a) of the Rome Statute.

77 Article 7. Introduction. 3 of the *Elements of Crimes*.

78 ICTY, *Prosecutor v Blaskic*, op. cit., §.207.

79 See in particular E. DAVID, *Principes de droit des conflits armés*, op. cit., §. 656.

80 ICTR, *Prosecutor v Akayesu*, op.cit., §580 and confirmed in the case of *Prosecutor v Kayishema and Ruzindana*, op.cit., §123.

One may wonder what is meant in practical terms by the policy or the preconceived plan of a State or organisation.

In the case of *Akayesu*, the ICTR held that it is a question of policy “involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.”⁸¹ The ICTY confirmed that it was not necessary that the policy be “formalized.”⁸²

According to Mario Bettati, it must be established that beyond all reasonable doubt, the act committed expresses an intention, shows calculation, “reveals a political, ideological or dogmatic premeditation ... a deliberate objective.”⁸³ Eric David for his part, noted that “any policy requires consultation and prior planning.”⁸⁴

In accordance with the Elements of Crimes of the ICC Statute, “it is understood that ‘policy to commit such attack’, requires that the State or organization actively promote or encourage such an attack against a civilian population”. A footnote states:

“A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such an attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”⁸⁵

We shall examine below how the Congolese military courts have interpreted the provisions of the Statute concerning the widespread or systematic character of an attack in light of the case-law of the international criminal tribunals.

The case-law of the Congolese military courts

In the case of *Songo Mboyo*, the defence requested the MTG of Mbandaka not to qualify the relevant act as a crime against humanity on the grounds that rape would not have been committed “to enforce or further the policy of the Democratic Republic of Congo or the National Liberation Movement or any other organisation. It was rather the result of military unrest ...” The judges did not follow this reasoning. Basing their arguments on the key principles identified by the *ad hoc* international courts, they determined that:

⁸¹ ICTR, *Prosecutor v Akayesu*, op.cit., § 580.

⁸² ICTY, *Prosecutor v Tadic*, Ch. II 1st inst., 7 May 1997, (case no.IT-94-1), §.653.

⁸³ M. BETTATI, *Crimes against humanity*, pp.300-301, in *International Criminal Law*, edited by H. ASCENSIO, E. DECAUX, A. PELLET, op.cit.

⁸⁴ E. DAVID, *Principes de droit des conflits armés*, op. cit., § 4.136a, p. 657.

⁸⁵ Article 7.Introduction, §3 and footnote no.6 of the Elements of Crimes.

“Widespread attack must be distinguished from systematic attack; in fact, the first is of massive character due to the plurality of victims and assumes extraordinary gravity when carried out collectively, the latter, for its part, implies the need for a preconceived plan or a policy [...] An attack is widespread because of the plurality of victims, and is systematic because the act is carefully organised following a regular pattern to enforce a common policy involving substantial public or private resources [...] There is no quantitative criterion or a threshold from which crimes against humanity are met. It is for the trial and appeal court to assess.”⁸⁶

Thus, they concluded that “in the case under consideration, the plurality of victims taken in the context of carrying out the crime is sufficient to characterise the widespread aspect of the attack.”⁸⁷

On appeal, the Military Court of Equateur confirmed the widespread character of the attack, recalling “that it was found that the widespread nature may result from the fact that the act possesses a massive and frequent character, and that, carried out collectively, it is of considerable seriousness and is directed against a multiplicity of victims (court of first instance, 6 December 1999, page 69, MUSOMA, ICTR).”⁸⁸

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Like the MTG and the Military Court, we must recognise that the considerable number of victims and the fact that the perpetrators acted as a group, establishes, *de facto*, the massive and collective character of the attack. On the other hand, the “frequency” criterion used to define a widespread attack was not considered by the Congolese judges, since in this case, all the crimes were committed on the same night.

In the case of the *Mutins de Mbandaka*, the Military Tribunal of the Garrison, basing their arguments on the case-law of the ICTR, said that “The attack must be widespread or systematic, not both at once [...] The widespread character is due to the fact that the act possesses a massive and frequent character [...] carried out collectively [...] and directed against a multiplicity of victims”⁸⁹. On appeal, the Military Court of Equateur adopted the same definition of the widespread character of the attack.⁹⁰

In both cases, the Congolese judges sought to define whether the attack was widespread or systematic. In this case, they considered that the *widespread* character should be taken into account; however, they did not cite any specific evidence to support their decision. They were satisfied to show that in the absence of any quantitative criterion of a minimum number of victims, it was for the judge to decide without appeal. None of the aforementioned judgments tell us anything about the specific elements, such as the number of victims or number of attacks that have been identified and adopted to qualify the attack.

⁸⁶ TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit., p. 34.

⁸⁷ Ibid., p. 34.

⁸⁸ CM de l’Equateur, *Affaire Songo Mboyo*, op.cit., p. 27.

⁸⁹ TMG de Mbandaka, *Affaire Mutins de Mbandaka*, op.cit., p. 23.

⁹⁰ CM de l’Equateur, *Affaire Mutins de Mbandaka*, p. 14.

Instead, in the case of Kahwa the MTG of Ituri showed greater precision on this issue by detailing some material elements to establish the *widespread* attack:

“The conduct of the PUSIC (Party for Unity and Safeguarding of the Integrity of Congo) militia was part of a *widespread* attack [...] the magnitude of the attack was extensive and large-scale [...] against the civilian population [...] the element of a *widespread* attack is taken into account here in relation to the large-scale of the attack carried out by the number of heavy weapons, small arms, the number of men dressed in military uniform and holding motorolas [...], making the force of the PUSIC militia [...] the large scale of the attack is also embodied by the high number of victims[...] as denounced here by the testimony of the victims at the hearing and a report by the NGO Human Rights [Watch] appended to the file of the public prosecutor.”⁹¹

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In this case, the conditions of *widespread* attack appear to be fulfilled. The court could also refer to the frequency of attacks, as documented from the facts.

It should be noted incidentally that the judgments of *Songo Mboyo*⁹² and *Mutins de Mbandaka*⁹³ wrongly refer to “*means used by the agents*” as a constituent element of war crimes. It can be assumed that the judges made this mistake because they were driven by the need to take into consideration the means used in order to establish an attack. Fortunately, this mistake no longer appears in the decisions on appeal.

As regards to the existence of an element of planning, it has already been seen that in the case of *Songo Mboyo*, the Court dismissed the argument by the defence that the attack must lie within the plans or policy of a State or organisation in order to be *widespread*.⁹⁴

The MTG of Ituri followed similar reasoning in the case of *Mutins de Mbandaka*. On appeal, the Military Court of Equateur was more detailed than the court of first instance in its reaction to an argument raised by the defence stressing “*the absence of an organisation having such an attack as its purpose*.”⁹⁵ It held that an “*organisation emerges from the actions taken to achieve the aim, notably the breaking in of the depot of weapons of camp Bokala to launch a widespread attack against the population. This is an ad hoc organisation linked to the death of Sergeant Alia Charles*.”⁹⁶ This flexible interpretation vis-à-vis the concept of *organisation* refers to the case-law of the ICTY in the case of *Tadic* which stated that “*policy*” need not be expressed formally and suggested that in certain circumstances, the existence of a policy can be inferred from the way the acts were carried out.⁹⁷ The revolt of militaries at Mbandaka certainly does not have the same degree of planning as the ethnic cleansing policy in the former Yugoslavia. However, it is important to note that the position adopted by the Military Court which investigated the elements

91 TMG de l’Ituri, *Affaire Kahwa*, op.cit., pp. 25-26.

92 TMG de Mbandaka, *Affaire Songo Mboyo*, op. cit., p.26.

93 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, op.cit., p.19.

94 TMG de Mbandaka, *Affaire Songo Mboyo*, op. cit., p. 34.

95 CM de l’Equateur, *Affaire Mutins de Mbandaka*, p. 13.

96 Ibid., p. 14.

97 ICTY, *Prosecutor v Tadic*, op.cit., § 653.

establishing the “organised” character of the attack, was more in line with Article 7.2.(a) of the Rome Statute which states unequivocally the requirement: “pursuant to or in furtherance of a State or organised policy to commit such attack”.

Finally, the decision for referral of a Mai-Mai Militia leader, *Gédéon* before the MTG of Haut-Katanga for crimes against humanity and war crimes⁹⁸ may be cited here. Details of the charges made against the defendant and the description of frequent crimes involving a very large number of victims leave little doubt that the military prosecutor rightly considered that these events were part of a widespread or systematic attack.

In conclusion, it should be noted that the Congolese courts did not, based on a strict analysis of the facts show that the attack was carried out “pursuant to or in furtherance of a State or organised policy to commit such attack” in accordance with Article 7(2) of the Statute. Even in the case of *Kahwa*, where the facts undoubtedly allow a form of planning to be inferred, the judges did not expose this planning through in-depth analysis; whether at first instance or on appeal.

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Accordingly, Congolese judges may have to pay more attention to this condition in exploring the constituent elements of crimes against humanity. Identification by the judges of evidence establishing the existence of an organisation whose methods and means would suggest some form of planning, would lead to greater precision and grounding of their decisions.

Finally, when presented with a set of criminal acts that do not seem to meet the “widespread and systematic attack” test, prosecutors may have to consistently check if those acts were committed within the context of armed conflict, which could allow prosecutions for war crime in lieu of crimes against humanity.

B. Directed against the civilian population

The Statute of the ICC and the case-law of the *ad hoc* Tribunals

Article 7(1) of the Rome Statute states that the attack must be directed against “a civilian population” to constitute a crime against humanity. Article 7(2) states that it may be “any civilian population”.

Firstly, it should be noted that the term “population” means crimes of a collective nature, excluding individual or isolated attacks.⁹⁹

⁹⁸ Military prosecutor at the TMG de Haut-Katanga, *Affaire Gédéon*, 10 July 2007, RMP No. 0468/MAK/2007.

⁹⁹ P. CURRAT, *Les crimes contre l’humanité dans le Statut de la Cour Pénale Internationale*, Faculty of law in Geneva, Bruylant/LGDJ/Schulthess, 2006, p. 106 and list of judgments in the footnote on pages 64 and 65.

On the other hand, it is not necessary that the whole population is affected. The ICTY delivered a ruling to this effect in the judgment of *Stakic* said:

“ [...] It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was directed against a civilian population, rather than against a limited and randomly selected number of individuals. In addition, the phrase ‘directed against’ should be interpreted as meaning that the civilian population was the primary object of the attack.”¹⁰⁰

It should also be noted that the term “civilian population” must be broadly interpreted¹⁰¹ and that the presence of non-civilians does not diminish the character of the offence.¹⁰²

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Finally, it is clear from the case-law of the *ad hoc* courts that combatants and persons belonging to a resistance movement who are no longer taking part in hostilities, such as soldiers who were taken prisoners or wounded, are also to be treated as civilians.¹⁰³

The case-law of the Congolese military courts

Congolese judges have interpreted the concept of civilian population in similar terms in relation to crimes against humanity. Yet, even when it is established that the attacks were clearly directed against the said category of the population, few judgments demonstrate a serious effort to apply the interpretation to the precise facts of the case.

The *Songo Mboyo* judgment thus stated:

“Civilian population means people who do not directly take part in hostilities including members of armed forces who have laid down their arms and those who are hors de combat. The reference to civilian population is linked to crimes of a collective nature and excludes individual criminal acts under domestic law, which do not rise to the level of seriousness of a crime against humanity.”

In applying this interpretation to the facts, the judges are content to state that “in the cases under consideration, the victims of rape by SONGOMBOYO, by their nature and by the execution of the crime meet the definition of civilian population; or object of the attack.”¹⁰⁴ On appeal, the Military Court of Equateur did not consider whether the attack had specifically targeted the civilian population, even though it mentioned that it was a relevant question pertaining to a constituent element of the crime against humanity.¹⁰⁵

¹⁰⁰ ICTY, *Prosecutor v Stakic*, Ch. II 1st inst., 31 July 2003, (IT-97-24), § 624.

¹⁰¹ P. CURRAT, *Les crimes contre l’humanité dans le Statut de la Cour Pénale Internationale*, op. cit., p.107.

¹⁰² ICTY, *Prosecutor v Blaskic*, op.cit., §214. This case-law is based on Article 50 para. 3 of the Protocol I Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts.

¹⁰³ ICTY, *Prosecutor v Jelusic*, op.cit., § 54 and *Prosecutor v Tadic*, op.cit., §639. The ICTR adopted the same position in the cases of *Prosecutor v Akayesu*, op.cit., § 582 and *Prosecutor v Kayishema*, op.cit., § 128.

¹⁰⁴ TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit., p. 35.

¹⁰⁵ CM de l’Equateur, *Affaire Songo Mboyo*, p. 26.

In the case of *Mutins de Mbandaka*, the judgment confirmed that “civilian population means people who do not directly take part in hostilities including members of Armed Forces who are hors de combat.”¹⁰⁶ Again, the judges did not consider whether the facts of the case corresponded precisely to that interpretation. However, the judgment noted that “the term civilian must be interpreted broadly to include the population of a country or town like the districts of BONGONDJO and MBANDAKA II, districts surrounding CBR/BOKALA.”¹⁰⁷ On appeal, the Court was more explicit in noting that different acts of rape were committed on “the female population” of certain districts.¹⁰⁸

The judgment of *Kahwa* at first instance was also content to state that the attack “was committed against a civilian population which did not take part in hostilities, i.e. which should not be regarded as a target, having no arms, container and not defending any military or military target.”¹⁰⁹

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For the future, therefore, it is hoped that the judges provide a better analysis of the evidence establishing that the attack was directed against a civilian population in their judgments.

C. The knowledge of this attack and the intention to participate

The Statute of the ICC and the case-law of the *ad hoc* International Criminal Tribunals

Article 30 of the Rome Statute defines the mental (psychological) element of crimes:

- “1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - a) In relation to conduct, the person means to engage in the conduct;
 - b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.”

The mental element includes two complimentary aspects: intention and knowledge.

To establish these two conditions in furtherance of a crime against humanity, it is necessary to establish a link between the criminal act of the perpetrator and the widespread or

¹⁰⁶ TMG de Mbandaka, *Affaire Mutins de Mbandaka*, op.cit., p. 24.

¹⁰⁷ Ibid.

¹⁰⁸ CM de l’Equateur, *Affaire Mutins de Mbandaka*, op.cit., p. 12

¹⁰⁹ TMG de l’Ituri, *Affaire Kahwa*, op.cit., p. 27.

systematic attack against a civilian population.¹¹⁰ The following conditions must be met:

- The criminal act must be part of the attack;
- The perpetrator must have intended to engage in criminal conduct;
- The perpetrator must have knowledge that the attack is directed against the civilian population.

Article 7 of the Statute includes an explicit reference to “a State or organisational policy”. Knowledge or intention of the perpetrator must therefore also include this element.¹¹¹ The perpetrator must have known that the attack was conducted by a State or organisation having the same objective, and the policy or plan of the said State or organisation.¹¹²

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The ICTR has held that the perpetrator of the crime must have committed the crime knowingly, i.e. that he must understand the overall criminal context within which his act takes place.¹¹³ They also held that while the accused must intend to commit the offence,¹¹⁴ his motives for taking part in the attack need not be taken into account. In other words, he does not need to “share” the objectives of the attack.¹¹⁵ The question of whether the perpetrator had directed his act against a population or just against his victim is irrelevant because it is the attack and not the acts of the accused, which must be directed against the civilian target population. The accused must only know that his act is part of the attack.¹¹⁶ In order to convict a suspect for crimes against humanity, therefore, it is necessary to prove that the crimes were linked to the attack on a civilian population and that the accused knew of this causal connection.¹¹⁷ Knowledge of the risk that his act could be part of such an attack is sufficient irrespective of his knowledge of the details thereof.¹¹⁸

The Case-law of the Congolese military courts

The judgments analysed in this study show fairly good theoretical knowledge of the elements of intent and knowledge. However, in their rulings concerning the material elements of the offence, the judges tend to omit mentioning the specific evidence that they considered relevant.

In the case of Songo Mboyo, the judges noted:

¹¹⁰ P. CURRAT, *Les crimes contre l'humanité dans le Statut de la Cour Pénale Internationale*, op. cit., pp.111-112.

¹¹¹ Ibid, p. 112.

¹¹² Ibid, p.115.

¹¹³ ICTR, *Prosecutor v Kayishema and Ruzidana*, op.cit., §§133-134.

¹¹⁴ ICTY, *Prosecutor v Vasiljevic*, Ch. 1st inst., 29 November 2002, (IT-98-32), § 37.

¹¹⁵ ICTY, *Prosecutor v Tadic*, Appeals Chamber, 15 July 1999, (case no. IT-94-1-A), §§ 248 and 252, and confirmed in the *Affaire Prosecutor v Kunarac, Kovac and Vokovic*, Appeals Chamber, 12 June 2002, (IT-96-23&23.1), § 103.

¹¹⁶ Ibid.

¹¹⁷ ICTY, *Prosecutor v Tadic*, Appeals Chamber, op.cit., § 271.

¹¹⁸ ICTY, *Prosecutor v Kunarac, Kovac and Vokovic*, op.cit., § 102.

“There is intention, within the meaning of the present Statute, if a person meant to engage in the conduct in relation to a given consequence, if the person intended to produce the consequence or was aware that it will occur in the ordinary course of events; [...] The agent must be aware that his act was part of a widespread attack directed against a civilian population or expected that it would be part thereof. In fact, the perpetrator of the crime against humanity must have acted knowingly. That is to say, that the agent must understand the general context in which his act takes place.”¹¹⁹

In order to verify that these elements were met in this case, the judges briefly state that “in the case under consideration, each of the defendants knew that the inhuman acts referred to were part of the widespread attack launched by the elements of the 9th Infantry Battalion against the civilian population of SONGOMBOYO.”¹²⁰ The judgment provides no information on the evidence which was used to draw this conclusion. On appeal, the Military Court did not find weakness in the reasoning of the judges and, like the lower court, it did not identify the evidence relied upon to establish the mental element.

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The judgment delivered in the case of *Mutins de Mbandaka* follows the same reasoning, in finding that “the perpetrator of a crime against humanity must have acted knowingly and freely”. The court relied on the fact that “each of the defendants was found to have knowledge that the acts performed by them were part of the widespread attack directed by insurgents against the civilian population.”¹²¹ On appeal, the Court stressed that planning is a constituent element of the crime and noted that “the appellants (...) admitted having been part of the military insurgents which attacked the civilian population (...) they admitted to having carried arms which they used to attack civilians.”¹²² This statement is taken to constitute an admission allowing the judges to establish the requisite elements.

In the judgment of *Kahwa*, the judges did not address this aspect of intent and instead, only conducted a verification of the facts pertaining to knowledge:

“In this case, the defendant *Kahwa* was aware of the attack on *Zumbe*, as he controlled the entire sector; his position as a group leader and Leader of the PUSIC militia, after having been Minister of Defence of another militia, the UPC (Union of Congolese Patriots), is unlikely to put him in a position of ignorance of the attack committed by the members of the PUSIC on *Zumbe*; above all, the defendant’s advisers confirm that this attack of *Zumbe* was in the context of a widespread attack organised and ordered by the defendant.”¹²³

Consequently, it is important to highlight the need to establish the existence of the mental element when examining evidence as to whether the elements of intent and knowledge are satisfied and to elaborate on the reasoning and evidence upon which they relied with clarity.

¹¹⁹ TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit., p. 35.

¹²⁰ Ibid.

¹²¹ TMG de Mbandaka, *Affaire Mutins de Mbandaka*, op.cit., p. 25.

¹²² CM de l’Equateur, *Affaire Mutins de Mbandaka*, op.cit., p. 14.

¹²³ TMG de l’Ituri, *Affaire Kahwa*, op.cit., p. 26.

1.1.3. Murder as a crime against humanity – constituent elements

A. The Statute of the ICC, the “Elements of Crimes” and the case-law of the International criminal Tribunals

Article 7 of the Rome Statute cites murder as an act constituting a crime against humanity. The Elements of Crimes specify, for its part, the conditions to establish and confirm the position adopted by the *ad hoc* courts:

1. “The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population,”

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It is also stated, in a footnote, that “the term ‘killed’ is interchangeable with the term ‘caused death’. This footnote applies to all elements which use either of these concepts”. It is also to be noted that even if the perpetrator is required to have intended to participate in the attack against the civilian population as part of a general plan, it is not necessary that he had planned the murder of the victim or that he himself had carried out the killing.

With regard to the element of intent, Article 30 of the Statute requires intent and knowledge. In the case of murder, the perpetrator must have intended to engage in the conduct with the knowledge that his/her conduct will cause the death of the victim in the ordinary course of events. It is unlikely that a person who intentionally inflicts serious bodily harm on a victim without the awareness that his acts may cause the death of that victim can be convicted of murder.¹²⁴ The element of intent and *widespread* or *systematic* attack shall not be discussed further since they have been examined in the previous section.

The case-law of the ICTR is somewhat unclear on the constituent elements of murder owing in part, to discrepancies between the English and French versions of the ICTR Statute.¹²⁵ In the Akayesu case, the Trial Chamber defined murder as “the unlawful, intentional killing of a human being.”¹²⁶ In *Prosecutor v Kayishema and Ruzidana*, on the other hand, the judges ruled that, for an accused to be considered guilty of murder, as part of the unlawful conduct, he must have: (1) caused the death of a victim, (2) by a premeditated act or omission, (3) with the intent to kill a person or with the intent to cause serious bodily injury to a person.¹²⁷

¹²⁴ P. CURRAT, *op. cit.*, p. 149.

¹²⁵ Article 3(a) of French version of the Statute of the ICTR, uses the term “*assassinat*”, whereas the English version uses the terms “*murder*”. It is known that, unlike murder, assassination requires an element of premeditation.

¹²⁶ ICTR, *Prosecutor v Akayesu*, *op.cit.*, § 589.

¹²⁷ See in particular ICTR, *Prosecutor v Kayishema and Ruzidana*, *op.cit.*, §§136-140.

The Tribunals have underscored in a number of rulings that the element of premeditation is required to establish that there is a crime against humanity but that prior intent need not have existed well in advance; as a moment of quiet reflection is considered sufficient.¹²⁸ The existence of intent to kill civilians during the course of the widespread or systematic attack by the accused is sufficient.¹²⁹ However, this position is contradicted by another ruling which held that under customary international law, it is murder, and not assassination, which constitutes a crime against humanity.¹³⁰

The case-law of the ICTY also retains murder, and not assassination, as constituting a crime against humanity. In *Blaskic*, for example, the Trial Chamber maintained the constituent elements of murder to be:

- “the death of the victim;
- the death must have resulted from an act of the accused or his subordinate
- the accused or his subordinate must have been motivated by the intent to kill the victim or to cause grievous bodily harm in the reasonable knowledge that the attack was likely to result in death.”¹³¹

Accordingly, there must be intent to kill or inflict serious bodily injury to a victim without regard for his or her life.¹³²

B. The Congolese Military Penal Code

Article 169 of the Military Penal Code cites murder as an act constituting a crime against humanity when committed as part of a “widespread and systematic attack directed deliberately against the Republic or against the population”.

¹²⁸ ICTR, *Prosecutor v Kayishema and Ruzidana*, *ibid.*, §§137-140 and *Prosecutor v Semanza*, Chamber of 1st inst., 15 May 2003, (ICTR-97-20-T), §§ 334-339.

¹²⁹ ICTR, *Prosecutor v Semanza*, *op.cit.*, §§ 334-339.

¹³⁰ ICTR, *Prosecutor v Akayesu*, *op.cit.*, § 588.

¹³¹ ICTY *Prosecutor v Blaskic*, *op. cit.*, § 217.

¹³² P. CURRAT, *op. cit.*, p. 148.

C. The case-law of the Congolese courts

In the Songo Mboyo case, the defendants were convicted for crimes against humanity for acts of rape, not murder. However, the appeals decision noted in particular that according to the report of a gynaecologist commissioned by the Ministry of Human Rights, “a number of women were raped and, one of them, named EUGENE BONYOLE died as a result of the rape.”¹³³ In view of the contents of the Elements of Crimes (“having caused the death”), the perpetrators of rape in this case could also have been prosecuted for murder if it was established that they could not reasonably have been unaware that their conduct could cause eventual death. In this regard, the fact that the perpetrator of the rape knew that he was infected with HIV could have led to a murder conviction since the virus can cause death.

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In the case of Mutins de Mbandaka, after having noted that “murder, on the other hand, can be understood as the intentional killing of a human being by the agent”, the MTG stated that “in the case under consideration the evidence, information, as well as the exhibits added to the file sufficiently proved the death of several people including BOONGO NDJOLI (...)”¹³⁴. The Tribunal then stated that although “murder is established when there is a combination of the intellectual and material elements”; the former is not always required in international law.¹³⁵ This judgement refers explicitly to the case of *Banovic*,¹³⁶ in which the ICTY Trial Chamber held that murder is established even when the intent to kill is absent. The interpretation of this international case-law by the Congolese judges should be qualified, however, since the mental element is present in the perpetrator’s knowledge that he was participating in a widespread or systematic attack against a civilian population.

However, on appeal, the Military Court did not take the acts of murder into consideration to establish crimes against humanity.¹³⁷ The court does not explain the “omission”, even though it noted that “at the time of this attack, the death of the following people including [names of victims] were deplored and that the aforementioned defendants knew that in using weapons of war to avenge one of their own, they would kill civilians.”¹³⁸

133 CM de l’Equateur, *Affaire Songo Mboyo*, op.cit., p. 17.

134 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, p. 19.

135 Ibid.

136 ICTY, *Prosecutor v Banovic*, Trial Chamber., 28 October 2003, (IT-02-65/1-3), note 93: “It goes without saying that the specific intent to kill is not an element required for an accused to be convicted of murder as a crime against humanity under customary international law. See for example the Judgment of Vasiljevic, para. 205; Judgment of Krnojelac, para. 324; The Prosecutor v Kvočka and al, Judgment, case no. IT-98-30/1-T, 2 November 2001, para. 132; The Prosecutor v Krstic, Judgment, case no. IT-98-33-T, 2 August 2001, para. 485; The Prosecutor v Kordic and Cerkez, Judgment, case no. IT-95-14/2-T, 26 February 2001, para. 235 and 236; Judgment of Kupreskic, para. 560 and 561; The Prosecutor v Blaskic, Judgment, case no. IT-95-14-T, 3 March 2000, para. 217; The Prosecutor v Jelusic, Judgment, case no. IT-95-10-T, 14 December 1999, para. 35; Judgment Celebici, para. 422 and 439.”

137 “Indeed in this case, these are the different rapes committed en masse on the female population of the area (...) which constitute the offence of crime against humanity”, CM de l’Equateur, *Affaire Mutins de Mbandaka*, op.cit., p. 12.

138 Ibid., p. 14.

In the case of *Kahwa*, the main defendant was prosecuted for having committed a crime against humanity by murder. In this case, the Tribunal noted that: “the defendant was not seen by the victims while committing the killings but the militiamen who came to attack them at ZUMBE on 15 and 16 October 2002 were members of the PUSIC militia commanded by the defendant KAWA [...] as the attack on that day came from three directions [...] areas that were under the control of the militia of the defendant and it was indicated in the indictment that several civilians were killed on that day.”¹³⁹

In this case, the status of the militia commander who controlled the area where the attacks originated led the Tribunal to convict the main defendant for the murders. Even if the judges were able to further clarify the evidence establishing that the militiamen indeed committed the murders and acted under the command of the defendant, it may be noted with interest that the judges held that the defendant was the perpetrator of acts which caused the death of the victims, even if he did not carry them out himself.

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In conclusion, it should be noted that even though the Congolese judges refer to developments in the case-law of the *ad hoc* International Tribunals, few judgments specify with clarity the evidence considered to establish death, the causes of death, and the identity of the perpetrator.

Needless to say that Judges must ground their rulings on a careful examination of evidence, including testimony, material and expert evidence, such as autopsy reports. It is worth nothing, here that according to the case-law of the ICTY, the body of the victim need not be found or identified in order to establish death.¹⁴⁰ Yet, it is the responsibility of the judges to ensure that all the constituent elements as listed in Article 7 of the Statute and the Elements of Crimes are met and satisfy themselves beyond reasonable doubt that the defendant is guilty of the crime charged.

1.1.4. Rape as crimes against humanity – constituent elements

A. The Statute of the ICC and the “Elements of Crimes”

Article 7 of the Statute does not provide any detail on the definition of rape. It is again the Elements of Crimes which fulfil this role by drawing on the definition established by the ICTR in the case of *Akayesu*.¹⁴¹

“1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

¹³⁹ TMG d’Ituri, *Affaire Kahwa*, op.cit., p. 25.

¹⁴⁰ ICTY, *Prosecutor v Krnojelac*, Ch. 1st inst., 15 March 2002, (IT-97-25), § 326.

¹⁴¹ ICTR, *Prosecutor v Akayesu*, op. cit, §§ 596-598.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread of systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”¹⁴²

Rule 70(a) of the Rules of Procedure and Evidence of the ICC provides that the consent cannot be inferred from the victim’s silence, lack of resistance, words or conduct, where that victim’s ability to give free and genuine consent has been undermined through coercion, the threat or use of force. Rule 70(b) also states that “credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred” from his prior or subsequent sexual conduct.

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With regards to the use of force, the case-law of the *ad hoc* International Tribunals and the literature on the subject recognise that a coercive environment may be sufficient to constitute the use of force. However, a coercive environment is presumed where the rape was committed as part of a widespread or systematic attack as to constitute a crime against humanity.¹⁴³

Article 169 of the Congolese Military Penal Code, on the other hand, cites rape as an act constituting a crime against humanity, when committed as part of a “widespread or systematic attack deliberately directed against the Republic or against the population”. On 20 July 2006, new provisions were introduced into the Military Penal Code for the punishment of crimes of sexual assault and rape.¹⁴⁴ This legislation was adopted in response to the “need to prevent and severely punish offences relating to sexual violence” and with a view to integrating, under Congolese law, the “rules of international humanitarian law on the subject of sexual violence.”¹⁴⁵ Importantly; the legislation provides that official status is not a ground for excuse. Additionally, this legislation criminalises and notably defines indecent assault, rape, incitement of minors to debauchery, forced prostitution, child prostitution, sexual slavery, and sexual mutilation.

While the definition of rape under the above legislation is not identical to that contained in the *Elements of Crimes* of the ICC, it allows for a broader interpretation of the offence of rape than previous legislations, notably by including sexual violence committed against a male person within the definition. The law also imposes heavier sentences when the rape is committed under aggravating circumstances including through threats using weapons or when committed against prisoners or by public officials abusing their position of authority.

¹⁴² Article 7(1)(g)(1) Rape, *Elements of Crimes*.

¹⁴³ On this subject, see P. CURRAT, *op. cit.*, p. 396.

¹⁴⁴ Law no. 06/18 of 20 July 2006, *Journal Officiel*, no. 15 of the 1st August 2006.

¹⁴⁵ See *Ibid*, exposition of motives.

The principle of non-retroactivity of criminal law does not allow judges to refer to this legislation for events prior to its entry into force.

B. The case-law of the Congolese courts

In October 2005, the MTG of Kindu delivered a judgment in the case of *Kalonga*,¹⁴⁶ in which it sentenced to death a Mai-Mai combatant who had ordered and participated in the abduction and rape of ten women. The judges applied the offence of crime against humanity, as defined by the Military Penal Code and did not apply the Rome Statute. It should be noted, however, that not only was the list of constituent elements identified are full of errors but also that the judges relied solely on the defendant's admission without any corroboration from the testimony of victims or any potential material evidence.

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In *Songo Mboyo*, the accused were prosecuted for crimes against humanity for having “committed mass rape of women.”¹⁴⁷ The judgment stands out due to the quality and rigour of the reasoning of the judges. The judges made great effort to establish the four constituent elements of rape as stipulated by the *Elements of Crimes* of the Rome Statute. Accordingly, the judgment recognised that “rape as an inhuman act is defined differently under domestic law and international law. In fact, the interpretation included in the *Elements of Crimes*, a supplementary source to the Rome Statute, greatly extends the scope of rape thus including any inhuman act with gender-specific connotations.”¹⁴⁸ The direct application of the Rome Statute in the case of *Songo Mboyo* has therefore enabled the MTG of Mbandaka to deliver a broader interpretation of the crime of rape than that previously provided for by Congolese law.¹⁴⁹

After having recalled the constituent elements of Rape, the Tribunal stated that, in this case, “rape concerned the sexual union [intercourse], the intromission of a virile organ by agent into the vaginal parts of victims.”¹⁵⁰

The defence objected to the rape charge by pleading lack of evidence. In response, it is worth reporting in full that the Tribunal developed a rather remarkable reasoning on the difficulty of producing evidence in rape trials and on the sensitive situation of victims:

“Considering that contrary to the defence’s position, sexual assault is one of the most difficult things to report due to the socio-cultural context. In almost all societies, a woman, a man or

¹⁴⁶ TMG de Kindu, *Affaire Kalonga*, RP 011/05, Decision of 26 October 2005.

¹⁴⁷ TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit., p. 9.

¹⁴⁸ Ibid., p. 27.

¹⁴⁹ This does not mean it should automatically agree on the fact that the TMG directly applied this rider “*Elements of Crimes*” in domestic law. Indeed, this document has not been incorporated into the Congolese legal system as we have described in the terms above. However, it appears that nothing prevents the Statute of Rome from being interpreted as the International Criminal Court is encouraged to do so, even if only for the sake of consistency between the interpretation at international and national level.

¹⁵⁰ Ibid.

a child who brings allegations of rape, violence or sexual humiliation has a lot to lose and risks being subject to enormous pressures or being ostracised by members of their immediate family and society in general;

In light of its intimate character and humiliation, it appears very difficult to gather as much evidence as possible for the execution of the crime, thus, given this difficulty, the victim of the offence acts as the first witness as he or she experienced the very fact;

Regarding the fallibility of some of the testimony given by the victims of sexual assault, it is true victims are known to omit certain things so as to avoid reliving the painful, embarrassing or shameful moments or face even more enormous difficulties in recalling accurately certain memories of what they experienced as they often confuse places, dates or add other details which come to mind as they recall the incident . This attitude may give the wrong impression that the witnesses are not reliable or even that they are not credible. The same is true of those who may feel the need to add as much as possible to their story in order to create a strong impression and portray the cruelty. It is therefore for the court ruling on the facts of the case to filter through the evidence by getting rid of the exaggerated elements”¹⁵¹.

Concerning the evidence presented, the Tribunal stated:

“The public prosecutor [...] bases his allegation on the evidence of the victims and those of their spouses and family members. Moreover, the public prosecutor also relies on the medical report produced by Doctor LUBAGA, a gynaecologist commissioned by the Ministry of Human Rights as well as on information drawn from the investigation of this case [...] According to the medical report prepared by Dr LUBAGA, [...] despite the passage of time since the event, the injuries are still present in the victims of which more than 80% suffer from sexually transmitted diseases”¹⁵².

The use of a medical expert to certify the injuries and to identify their causes is welcomed, despite the lack of clarity from the pronouncement of the judgment as to whether it was heard in open court.

The judges then conducted an analysis of the evidence introduced against each defendant. Accordingly, the relevant extracts of the judgment state: “It appears from testimony provided by the victim (...), the information drawn from the investigation and from the medical certificate obtained that there is evidence of the alleged rape by the accused.”¹⁵³ “The parental or marital status revealed does not prevent the commission of the crime where the constituent elements of the crime are satisfied.”¹⁵⁴

On the other hand, concerning the defence’s attempt to establish the incapacity of the accused on grounds of impotence, the judgement refers to the testimony of prosecution witnesses who described “with consistency, the virile organ of the defendant [...] the military uniform [...] his deep voice imitated by several victims” and noted the birth of a child whose date of conception

¹⁵¹ Ibid, pp. 27-28.

¹⁵² Ibid.

¹⁵³ Ibid. p. 29.

¹⁵⁴ Ibid., p. 30.

testifies to the fact that the defendant was not impotent at the time of the events.

The Tribunal also held that the superior who, himself has raped another victim, can be convicted as the indirect perpetrator “*auteur moral*” for an act of rape committed by “*a soldier who follows his example*”, because the superior’s conduct “*constituted, for his subordinates, an incitement to do the same.*”¹⁵⁵

The Tribunal has also rejected, citing the definition provided under the *Elements of Crimes*, the defence’s argument that rape cannot be committed against a male person.¹⁵⁶

In relation to an apparent contradiction in the testimony provided by one of the victims, the Tribunal held that “*the need felt by the victim to increase the number of the aggressors in order to create a strong impression on the case and convince the judges does not necessarily mean that the witness was telling lies and it is up to the judge to assess the merits of the evidence by filtering out the exaggerated parts. In the case under consideration, the court only holds the rape committed by the defendant as true, [...] dismissing the remarks and additions [...] [that were the] subject of contradiction.*”¹⁵⁷

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Finally, the judgment noted that “*the material act of rape was committed by force in a manifestly coercive environment. In fact, in addition to the fact that, as soldiers, each of the defendants possessed a weapon of war [...] had pre-empted the possibility of resistance on the part of the vulnerable victims.*”¹⁵⁸ A slight omission to be noted in the judgment is the classification of some of the defendants as “*guilty of crimes against humanity*” without referring to the specific crime of rape.

On appeal, the Military Court additionally found that “*rape committed by the military in the present context constitutes a form of torture for purposes of humiliation.*”¹⁵⁹ In terms of evidence, the judges held that “[...] *the declaration made by the victims in a complete manner could constitute proof against the defendants as long as they are corroborated by similar testimony of others.*”¹⁶⁰ The Court also stressed that “*the commission of rape does not require sexual satisfaction on the part of the agent. It is necessary and sufficient that there is intromission of the male organ into the female organ.*”¹⁶¹

In the case of *Mutins de Mbandaka*, the Tribunal reaffirmed the definition of rape that was upheld in the *Songo Mboyo* judgment.¹⁶² The victims did not identify their assailants among the defendants throughout the procedure because the perpetrators had disguised their faces when they committed the act.¹⁶³ While it was possible to prove that rape had been committed, it was more difficult to prove the responsibility of the defendants.¹⁶⁴ The judges convicted the

¹⁵⁵ TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit., p. 31.

¹⁵⁶ Ibid., p. 32.

¹⁵⁷ Ibid., p. 34.

¹⁵⁸ Ibid., p. 34.

¹⁵⁹ CM of Equateur, *Affaire Songo Mboyo*, op.cit., p. 27.

¹⁶⁰ Ibid.

¹⁶¹ Ibid., p. 28.

¹⁶² TMG de Mbandaka, *Affaire Mutins de Mbandaka*, op.cit., p. 19.

¹⁶³ Ibid., p. 10.

¹⁶⁴ Certificates and medical reports were introduced into evidence showing 6 deaths, 12 cases physical injury and 46 cases of rape. See Ibid., p. 10.

majority of the perpetrators on the basis of testimonies of the victims. However, for one of the presumed perpetrators, they decided that “in the case under consideration, the physical description of the defendant given by the victims was not enough to identify the defendant among many others [...] and that in this situation, the court is faced with doubts, which, as a matter of principle can only be used in favour of the defendant.”¹⁶⁵ While the rigour of the judges in examining the responsibility of this individual is to be recognised, it is regrettable that they employed sweeping language to partially justify their decision. They held that “with respect to the victims of sexual assault, the declarations of the victims identifying their attackers must be taken with great caution as it has been sufficiently demonstrated that virtually all of them tended to be more wrong than right.”¹⁶⁶

On appeal, the Tribunal upheld the reasoning of the tribunal regarding the definition of the crime of rape, recognising the probative value of the testimony of the victim:

“It appears from the medical evidence provided by the doctors of different hospitals and clinics which have treated the victims that there has been penetration of the male sexual organ into that of the female (...) this has been confirmed by the victims during their hearing at the preliminary investigation stage, and, according to the Rome Statute, it is rather the rape victim who is the witness of the act.”¹⁶⁷

Yet, neither the Statute nor other instruments of the Court allow such a principle to be inferred with regards to the relevance and admissibility of different forms of evidence. The above might be a mistaken reading of Rule 63(4) of the Rules of Procedure and Evidence, which provides that “a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”

Finally, in its decision to refer Gédéon to the MTG of Haut-Katanga, the military prosecutor also made reference to the constituent elements of rape,¹⁶⁸ pursuant to the definition of rape provided by the *Elements of Crimes*.

In sum, in order for Congolese judges to enter a conviction for rape as a crime against humanity, all the constituent elements stipulated under the relevant provisions of the law of 20 July 2006 on sexual violence and/or Article 7 of the Statute and the Elements of Crimes must be satisfied. The judges must also systematically articulate the evidence that enabled them to establish those elements. Moreover, it is crucial that particular attention is given to the testimony of rape victims, who are often the only source of evidence, taking into account their psychological state and social difficulties.

¹⁶⁵ Ibid., p. 22.

¹⁶⁶ Ibid.

¹⁶⁷ CM de l'Equateur, *Affaire Mutins de Mbandaka*, op.cit, p.15.

¹⁶⁸ Military Prosecutor at the TMG de Haut-Katanga, op.cit., citing the “intrusion of an object into the genitals” of the victim.

1.2. War crimes

1.2.1 Definition of war crimes

A. The Statute of the ICC

War crime is defined under Article 8 of the Rome Statute. The *Elements of Crimes* provide a detailed description of the conduct, consequences and circumstances associated with the individual acts constituting war crime.

B. The Congolese Military Penal Code

War crimes are governed by Articles 173 to 175 of the Congolese Military Penal Code. Article 173 defines war crimes as “all offences committed against the laws of the Republic during war time which are not justified by the laws or customs of war.”¹⁶⁹ The reference to laws and customs of war could be taken as a clear reference to *Jus cogens* norms and the courts are empowered to apply the same.¹⁷⁰ Yet, in reality, the definition seems to be limited to conducts criminalised under Congolese national law and does not correspond at all to that of Article 8 of the Rome Statute. The wording of Article 174 is also ambiguous suggesting that the individuals, who can be prosecuted for war crimes, as defined by Article 173, are exclusively those serving the enemy.¹⁷¹ Another problem with the Military Penal Code is that it does not distinguish between internal and international conflicts.

Moreover, as we have previously noted, Article 166 of the Code incorporates into the definition of crimes against humanity a large number of offences constituting war crimes in the Rome Statute.¹⁷² These and related flaws in the national laws seem to have led the Congolese judges to resort to the provisions of the Rome Statute. Accordingly, in *Mutins de Mbandaka*, the MTG held that the Military Penal Code “creates confusion between crimes against humanity and war crimes which are nevertheless clearly defined by the Rome Statute of the International Criminal Court.”¹⁷³ Similarly in the case of *Bavi*, the MTG of Ituri decided to reject the provisions of national law and apply, according to the Tribunal, “in all certainty, the key provisions of the Rome Statute on crimes against humanity and war crimes.”¹⁷⁴

169 Art. 165 §1 of the Military Penal Code.

170 See the study conducted by the ICRC on this subject: J.M. HENCKAERTS and L. DOSWALD-BECK, *Customary International Humanitarian Law*, ICRC, Cambridge, Cambridge University Press, 2005.

171 “Are prosecuted before the military courts, [...] those who, when committing the acts, were at the service of an enemy or an ally of an enemy, in any capacity whatsoever, particularly in the capacity as officials of the administrative or judicial order, soldiers or similar, agents or subordinates of an administration or members of any training group or were employed by them to any mission [...]”

172 Article 166 of the Military Penal Code.

173 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, op.cit., p. 16.

174 TMG d’Ituri, *Affaire Bavi*, op.cit., pp.36-37.

Finally, as noted in the introduction of this study, the Military Penal Code does not provide penalties for war crimes; a gap that some of the Tribunals had sought to fill by resorting to the Rome Statute.¹⁷⁵

1.2.2. The constituent elements of war crimes

A. The context: domestic or international armed conflict

Under international humanitarian law, the Statute of the ICC and the case-law of the *ad hoc* International Tribunals.

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According to the *Elements of Crimes*, in order for the enumerated acts to constitute war crimes, they must be committed “in the context of and in association with” armed conflict.

In his commentary on the Geneva Conventions, Jean Pictet observes that the term “armed conflict” was chosen so as to avoid the controversies of the term “war.”¹⁷⁶ The existence of an armed conflict is principally determined by factual considerations and internal disturbances and tensions such as riots or isolated and sporadic acts of violence are usually not considered armed conflicts. Therefore, in principle, international humanitarian law does not apply to situations that do not rise to the level of intensity of an armed conflict.

In order to determine the existence of an armed conflict, therefore, judges must consider a number of factors including the intensity, duration and the level of organisation of the opposing forces.¹⁷⁷ In the above respects, a number of useful, though not exhaustive criteria, have been suggested in relation to Article 3 common to the Geneva Conventions.¹⁷⁸ In relation to opposition groups, for example, the existence of an organised military force with a command structure, the exercise of control over a given territory and ability to enforce the Geneva Conventions, are relevant factors. Other relevant considerations include whether the government concerned is forced to resort to the use of its regular military forces against insurgents, whether there is recognition or declaration of war, and whether the conflict has been brought to the agenda of the Security Council or General Assembly of the United Nations as a threat to international peace and security or an act of aggression.

International humanitarian law recognises international and non-international armed conflicts. The international or non-international character of a conflict is a central question for the judge because it determines which rules of international humanitarian law are applicable to the situation.

¹⁷⁵ TMG d’Ituri, *Affaire Milobs*, op.cit, p. 12.

¹⁷⁶ It is argued that “It is sufficient, in order for the Convention to be applicable, that there is in fact an armed conflict. It remains to be seen what is meant by “armed conflict” It is purposely done to replace the word “war” by this much more general expression”, J. PICTET, *Commentaire des Conventions de Genève* of 12 August 1949, ICRC, Geneva, 1952, vol. II, p.28.

¹⁷⁷ ICTR, *Prosecutor v Akayesu*, op.cit., § 620.

¹⁷⁸ For more information, see J.PICTET, op.cit, Article 3, Para. 1, applicable provisions.

The two protection regimes provided under international humanitarian law are outlined below.

1) With respect to international armed conflicts, the Geneva Conventions of 1949 and Additional Protocol I of 1977 extend protection to every individual or category of individuals who are not or no longer actively involved combat. These are:

- Wounded or sick military personnel in land warfare, and members of the armed forces' medical services;
- Wounded, sick or shipwrecked military personnel in naval warfare, and members of the naval forces' medical services;
- Prisoners of war;
- The civilian population, including :
 - Foreign civilians on the territory of parties to the conflict such as refugees;
 - civilians in occupied territories;
 - civilian detainees and internees;
 - medical and religious personnel, or civilian defence units.

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2) *In context armed conflicts of non-international character*, only Article 3 common to the four Conventions and Additional Protocol II of 1977 is applicable.¹⁷⁹ The latter extends the application of international humanitarian law to members of armed groups, whether regular or not, that are party to the conflict and protects individuals who are not actively involved in hostilities. These include:

- wounded or sick combatants;
- people deprived of their freedom as a result of the conflict;
- the civilian population; and
- medical and religious personnel.

The Rome Statute maintains a similar distinction between internal and international armed conflicts. The character of the conflict determines the nature of the charges that can be brought against alleged perpetrators although recent developments seem to reduce the differences between the rules applicable to international conflicts and those applicable to internal conflicts.¹⁸⁰ As such, it is important to discuss the factors considered to qualify a conflict as being of an international or non-international character.

An international armed conflict generally involves a confrontation between the armed forces of different States, an intervention by the armed forces of a State on the territory of another or the occupation of all or part of the territory of a State.¹⁸¹ A non-international armed

¹⁷⁹ It should be noted that the conditions of application of Protocol II are stricter than those provided by Article 3.

¹⁸⁰ On this subject, see in particular E. DAVID, *Principes de droit des conflits armés*, op.cit., § 1.44, pp. 95-96.

¹⁸¹ Article 2 common to the four Geneva Conventions of 12 August 1949.

conflict, on the other hand, concerns hostilities between the armed forces of a government and organised armed groups or between such groups within a State.¹⁸²

The Rome Statute does not define international armed conflict but it provides, under Article 8(2)(f), a description of armed conflicts of non-international character, as, “[...] *armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups*”.

If the armed forces of a State intervene in a conflict taking place on the territory of another State between government forces and one or more armed groups or between armed groups, the conflict may take on an international dimension. The intervention of troops from a number of African States, including Uganda, the Angola and Rwanda, in the conflict in the DRC is a case in point.

While it may be relatively easier to establish the international character of a conflict in cases where the armed forces of a foreign state fight along side one or more of the parties to a conflict, the situation is more complicated where the involvement of the said state concerns financial or technical assistance. In such cases, the international or non-international character of the conflict depends on the level of intervention of the foreign state and there is no clear consensus on the determination of the latter. In *Nicaragua v United States*, the International Court of Justice (ICJ) held that the conflict assumed an international dimension even though there were no American troops alongside the *Contra* rebels when the United States supported them financially, technically and contributed to the mining of ports.¹⁸³ In the case of *Tadic*, the ICTY upheld the criterion of *control* exercised by a foreign state in armed groups, by considering the need for the state to play a role in the organisation, coordination and planning of the military actions in addition to financing, training, equipping and providing it with operational support.¹⁸⁴

The question of foreign state support to some rebel groups fighting on the territory of the DRC, therefore, requires a case by case examination in order to determine the international or non-international character of the conflict. The Pre-Trial Chamber of the ICC did exactly this in its decision to confirm the charges against Thomas Lubanga when it stated that the exercise of control by Uganda over some armed groups operating in Ituri has given the conflict an international character.¹⁸⁵

The intervention of UN peace-keeping forces may also have an impact on the character of a conflict. In principle, such forces are not deployed to take part in the conflict and, as noted

¹⁸² Article 1 of the Additional Protocol II to the Geneva Conventions of 12 August 1949; see also ICTY, *Prosecutor v Tadic*, Appeals Chamber, *op.cit.*, § 70.

¹⁸³ On these issues, we may refer particularly to E. DAVID, *Principes de droit des conflits armés*, *op.cit.*, § 1.44, pp. 92-181 and ICJ, *Nicaragua v United States*, Military and Paramilitary activities in Nicaragua, 27 June 1986.

¹⁸⁴ ICTY, *Prosecutor v Tadic*, Appeals Chamber, *op.cit.*, § 84.

¹⁸⁵ ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Preliminary Chamber I, decision of 29 January 2007, (ICC-01/04-01/06), §§ 200-237.

by Professor Eric David, “the mere presence of peace-keeping forces by the UN on the territory of a State torn apart by armed conflict is not sufficient to internationalise the conflict.”¹⁸⁶ However, citing the confrontation between the UN forces and the Katangan secessionist forces in 1962 and 1963, as an example, he argued that when the Security Council authorises UN peace-keepers to use force against one or more parties to the conflict, the UN becomes a party to the conflict; which assumes an international character as a result.¹⁸⁷ The mandate of the UN Mission in the Democratic Republic of Congo (MONUC), which is authorised to use force in some circumstances, leads to similar questions concerning the internationalisation, at least in part, of the conflict in the DRC.

The judge facing the task of determining the international or internal character of conflict will have to take into account the situation that prevailed at the time when the events that gave rise to the case occurred. The question of whether there was such a conflict at the precise area where the event occurred appears less important. The International Criminal Tribunals have ruled that once the existence of an armed conflict is established, the application of international humanitarian law extends throughout the territory of the belligerent States.¹⁸⁸ In the case of internal conflicts, the law applies throughout the territory under the control of a Party, whether or not actual fighting was taking place, at least until a peace agreement is effectively implemented or a peaceful resolution has been reached otherwise.

Accordingly, while judges must ensure that there is a link between the criminal conduct and the armed conflict in question; this link does not necessarily mean that the offence was committed at the place where the hostilities took place. However, the conflict must have played a substantial role in the commission of the crime. This may relate to the perpetrator’s capacity to commit the crime, the decision to commit the crime, the manner in which the crime was committed and the objectives pursued. In *Kunarac*, for example, the Judges at the ICTY, have identified a set of considerations that are deemed relevant in establishing the link between the crime and an armed conflict.¹⁸⁹

In the above respects, one can expect that the Thomas Lubanga trial may provide further clarification of the characteristics of the conflict in question, which would benefit Congolese judges who have to try crimes committed in Ituri. The question was already addressed in some detail, in the Pre-Trial Chamber’s decision confirming the charges against Thomas Lubanga.¹⁹⁰ The Chamber held that the intervention of Uganda in the conflict as an

186 E. DAVID, *Principes de droit des conflits armés*, op. cit., § 1.103, p. 146.

187 Ibid, § 1.101, p. 143.

188 ICTR, *Prosecutor v Rutaganda*, op.cit., §§ 102-103; *Prosecutor v Akayesu*, op.cit., § 635; *Prosecutor v Kayishema and Ruzidana*, op.cit., §§ 182-183; *Prosecutor v Bagilishema*, op.cit., § 101 and ICTY, *Kordic and Cerkez*, Ch 1st inst., 26 February 2001, (IT-95-14/2-T), § 32; *Prosecutor v Kunarac, Kovac and Vokovic*, op.cit., § 57.

189 These include: the status of the perpetrator and the victim, respectively, as a combatant and non-combatant, the fact that the victim belonged to the enemy camp and that the perpetrator committed the crime within the context of his official functions and the fact that there was an underlying military objective. *Prosecutor v Kunarac, Kovac and Vokovic*, ICTY, op.cit., §§ 58-59.

190 ICC, *The Prosecutor v Thomas Lubanga Dyilo*, op.cit., §§ 200-237.

occupying power has given the conflict an international character by citing, among others, the fact that Uganda had appointed a governor and even intervened to release Lubanga, who was detained by another militia. However, the Pre-Trial Chamber has underscored that the conflict had lost its international character after the withdrawal of the Ugandan troops in June 2003 and shall be treated thereafter as a non-international armed conflict. The Chamber based its reasoning on Article 2 common to the Geneva Conventions, which defines international armed conflict, Additional Protocol II to the Conventions and on Article 8(2)(f) of the Rome Statute. It also referred to the ICJ Judgment of 19 December 2005 in the case between the DRC and Uganda concerning the occupation of Ituri. The Court held that Uganda had illegally resorted to force and could be considered as an occupying power. The decision of the Pre-trial Chamber also refers to several testimonies, confirming the direct intervention of Uganda in the conflict. This well documented decision and the ICJ ruling may, therefore, help the Congolese judges in the determination of the character of the conflict in Ituri.

The case-law of the Congolese military courts

In the Bongi case, the MTG of Ituri noted that, in its analysis of the constituent elements of pillaging and wilful killing, the Public Prosecutor invoked the provisions of the Statute which referred to “conduct which took place in the context of and in association with an international armed conflict”,¹⁹¹ but failed to prove the international character of the conflict. It added that the Prosecutor merely evokes “the widespread attack between the two armed domestic militia, the FARDC (Armed forces of the RDC) and the FRPI (Front for Patriotic Resistance of Ituri), thus erasing the international character of the aforementioned armed conflict.”¹⁹² The Tribunal then re-qualified the offences on the basis of the provisions of the Rome Statute. Noting that the Rome Statute does not define armed conflict of an international character, the judges developed a lengthy analysis concluding “that in this case all hypotheses of war crimes committed in the context of an ‘international armed conflict’ are dismissed as the FRPI, the UPC army, the FNI army (Nationalist Integrationist Front), the PUSIC army are in fact only militias or internally organised armed groups who fight against the FARDC.”¹⁹³ However, in describing the conflict in Ituri, the Tribunal elsewhere noted that “the foreign armies including that of Uganda and others have exacerbated this situation by supplying war materials, finance or personnel to either one of these armed groups.”¹⁹⁴

On appeal, the Military Court of the Eastern Province confirmed this interpretation by the lower court stating that “the conduct took place in a context which was associated with an armed conflict of an international character” and dismissed the classification of internal disturbances as “the clashes between the FARDC and the FRPI which constituted non-international armed conflicts when taking into account their intensity, organisation and duration of engagement in these conflicts.”¹⁹⁵

¹⁹¹ TMG d’Ituri, *Affaire Bongi*, p. 12.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*, p. 13-14.

¹⁹⁴ *Ibid.*, p. 5.

¹⁹⁵ CM Eastern Province, *Affaire Bongi*, 4 November 2006, RPA 030/06, p.19.

In Kahwa, the defendant was convicted of war crimes for having led an attack against property. Regarding the characteristics of the conflict, the Tribunal held that “the conduct took place in the context of and was associated with a conflict of a non-international character, in this case, with the Hema and Lendu militias fighting among themselves.”¹⁹⁶ The judgment, nevertheless, referred to the fact that the defendant “was organised by leading the armies of Uganda and Rwanda [...] to fight the enemies which threatened his HEMA community with genocide.”¹⁹⁷ If the judges had the evidence establishing an intervention showing foreign troops on Congolese territory before them, they would have been able to decide that there was a conflict of an international character.

In the case of Bavi, the main defendant challenged the charges of war crimes claiming that “Article 29 of the Military Penal Code states that war time does not begin until a day decided by the President of the Republic for the mobilisation of armed forces, a condition unfulfilled in this particular case.”¹⁹⁸ The Tribunal appropriately replied that “these provisions were adopted as aggravating circumstances of some offences” but had “no connection with the offence of ‘war crime’ which simply required the existence of an armed conflict for an act to be qualified as a war crime.”¹⁹⁹ In establishing the existence of a conflict, the Tribunal noted that “according to the investigation during the period from [...], to [...], the Armed Forces of the Democratic Republic of Congo were in armed conflict with an armed militia commanded by a certain COBRA MATATA (following the description of the place)”²⁰⁰ and that “the battalion to which all the defendants belonged was in hostilities with the armed group commanded by Mr COBRA Esquire [...]”,²⁰¹ Referring to the case-law of the ICTR, the Tribunal opined that there must be a link between the criminal conduct and the armed conflict but that this link does not necessarily mean that the offence was committed at the place where hostilities were taking place. On appeal, the Military Court upheld the judgment stating that the murder, rape, and pillages took place with the said context, “namely that of an armed conflict of a non-international character, i.e. between the Battalion intervention of the 1st Integrated Brigade and an armed militia from Ituri commanded by someone called COBRA MATATA.”²⁰²

In the case of MILOBS, the MTG of Ituri confirmed its case-law by holding that the conflict was of a non-international character, stating that “in this case, the FNI militia is in armed hostility with another named UPC [...]. the defendants turned so violent because of an attack on the village of MUNGWALU by the UPC armed militia commanded by someone called Thomas LUBANGA.”²⁰³

Many other decisions, on the other hand, have not upheld the war crimes charges or applied the Rome Statute, even though the constituent elements of the relevant crimes appear to have been satisfied.

¹⁹⁶ TMG d’Ituri, *Affaire Kahwa*, op.cit., p. 29.

¹⁹⁷ Ibid.

¹⁹⁸ TMG d’Ituri, *Affaire Bavi*, op.cit., p. 37.

¹⁹⁹ Ibid, pp. 37-38.

²⁰⁰ Ibid, p. 38.

²⁰¹ Ibid, p. 41.

²⁰² CM de la Province Orientale, *Affaire Bavi*, 28 July 2007, RPA 003/07, p. 30.

²⁰³ TMG d’Ituri, *Affaire Milobs*, op.cit., pp. 14-15.

In the case of Ankoro,²⁰⁴ the Military Court of Katanga declined to uphold the category of war crimes, even though the facts suggested that the crimes had been committed as part of an armed conflict between, amongst others, the FARDC and Mai-Mai militias. This was also the claim advanced by the civil parties.²⁰⁵ What's more the description of events contained in the rulings refer to the large-scale of the armed confrontation suggesting a certain degree of organisation and to offences that appear to constitute war crimes. The court, for example, holds that “the defendant knew that the villages [...], accommodated the Mai-Mai and Hutu mixed with the civilian population [...], it is deliberately to ensure the destruction of its enemies that he dropped bombs in this direction hoping to reach the enemies, bombs that reached civilians who were not involved in this war”²⁰⁶.

In dealing with the issue of the civil responsibility of the Congolese State, the Military Court of Katanga also declared that despite the state of war: “some soldiers of the 95th Brigade [...], killed people not involved in hostilities and wounded others.”²⁰⁷ Nevertheless, the Court decided to dismiss the application for the requalification of the offence as war crime on the basis of a reasoning that it has nothing to do with the definition of war crimes.²⁰⁸

In the case of Mitwaba, on the other hand, the same Court upheld a conviction for the offence of failure to assist a person in danger, despite the fact that the facts as described in the charges left doubts on the existence of an armed conflict and the commission of war crimes. The lawyer for the civil parties requested a requalification of the charges accordingly²⁰⁹ and the request contains the allegations quoted below.

“On 17 March 2005, the 632nd Infantry Battalion based at Konga was attacked by the Mai-Mai insurgents [...], the 632nd Inf Bn was reorganised quickly for the counter-attack and took over the town of Konga on 18 March 2005 [...] and following the guerrilla warfare carried out by the Mai-Mai insurgents by entering into the towns that they wanted to attack by infiltration into the civilian population, the Major [...], decided to track them down and to arrest them [...], this arrest operation of the Mai-Mai infiltrators began on 18 March 2005 (...) and 95 Mai-Mai were arrested and detained in the central prison of Mitwaba [...], being grouped into three cells of three meters by two meters, where 17 died one after the other due to poor conditions such as disease, deprivation of food and drinking water; the survivors were released after intervention by the ICRC.”²¹⁰

204 CM de Katanga, Affaire Ankoro, 20 December 2004, RP 01/2003 and RP 02/2004.

205 ACIDH (Action Contre l'Impunity Pour les Droits de l'homme), « Procès de la Cour militaire du Katanga sur les crimes commis à Ankoro », Rapport final, Lubumbashi, mars 2005, p. 27 and 57.

206 Ibid., p. 58.

207 CM de Katanga, Affaire Ankoro, op.cit. and ACDH, op.cit., p. 63.

208 ACDH, op. cit., p. 57.

209 CM de Katanga, Affaire Mitwaba, 25 April 2007, RP 011/2006, p. 7. Curiously, the public prosecutor had requested the requalification of the offence as a crime against humanity, assuming without doubt that there was no armed conflict.

210 CM de Katanga, Affaire Mitwaba, op.cit., p. 6.

The reasoning of the Court in dismissing the existence of armed conflict is unpersuasive. It held:

“the evidence in the file and the investigations during the hearing show that among the 95 Mai-Mai, importantly, there were civilians comprising of women and children, who were not Mai-Mai [...] The Court notes that the war crime and crime against humanity proposed, respectively, by the civil parties and by the public prosecutor [...] do not square with the acts the defendants are charged with [...] it re-qualifies the acts of non assistance to persons in danger.”²¹¹

The account of events leaves no doubt that the crimes were committed as part of an internal armed conflict. The conflict involved the regular army and an armed faction, was a continuation of older conflicts, it had a reasonable level of intensity and demonstrated remarkable organisation. The intervention of the ICRC in demanding for the release of prisoners also suggests that the detainees were actually prisoners of war or civilian internees, deprived of liberty as part of the armed conflict. Therefore, at least several counts of war crimes could have been found including murder and inhumane treatment.²¹² Moreover, the fact that some victims were civilians does not diminish the character of the offences as war crimes. In fact, the Court could even have adopted the above as aggravating circumstances since some of the detainees were minors.

As previously noted, in *Mutins de Bunia*, the MTG of Ituri did not uphold the war crime charges or resort to the Rome Statute, even though the evidence showed many acts of pillaging had been committed by the Congolese armed forces when Ituri was embroiled in the armed conflict.²¹³ In *Kilwa*,²¹⁴ the public prosecutor had asked for the conviction of several defendants, including the representatives of the mining company Anvil Mining, for war crimes committed as part of a “counterattack”, during which a brigade of FARDC bombarded the town of Kilwa with mortars causing house fires.²¹⁵ They had also allegedly executed civilians and committed rape, torture and pillaging. The Military Court of Katanga did not follow the submissions of the public prosecutor citing lack of sufficient evidence against the defendants. The judges did not go into the determination of whether there existed an armed conflict and did not decide on the classification of the offences in question.

In his referral of the case of the Mai-Mai leader, *Gédéon*, before the MTG of Haut-Katanga for crimes against humanity and war crimes,²¹⁶ the military prosecutor provided a description of the particulars of the offence that contain a reference to both the grave breaches provisions of the Geneva Conventions of 12 August 1949 and violations of Article 3 common to the four Geneva Conventions. Accordingly, it states that that the latter rules did not apply to internal

²¹¹ Ibid., p. 8.

²¹² Art. 8.2. c) i) of the Rome Statute.

²¹³ TMG d’Ituri, *Affaire Mutins de Bunia*, 18 June 2007, RP 008/2007.

²¹⁴ CM de Katanga, *Affaire Kilwa*, 28 June 2007, RP 010/2006, p. 30.

²¹⁵ Anvil Mining was accused of providing transportation for member of the Army involved in the alleged crimes.

²¹⁶ Military prosecutor at TMG de Haut-Katanga, *Affaire Gédéon*, op.cit.

disturbances and tensions, which confirms that the prosecutor has rightly considered that the relevant events were committed within the context of an armed conflict, thereby constituting war crimes. Among the offences charged, was the recruitment of children under the age of 15 in an armed movement, an offence punishable under Articles 8(2)(b) (xxvi) and 8(2)(e) (vii) of the Rome Statute.

The classification of conflict(s) in the DRC remains a central issue for Congolese judges. There are a number of complex question that have not been adequately addressed by the courts: How does one determine the date on which a given conflict has lost its international character? Does the signing of peace agreements amount to the cessation of an internal armed conflict? Given the continuation of different forms armed conflicts in parts of the country, can one consider that the provisions of international humanitarian law are applicable throughout the territory?

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In conclusion, the judges have occasionally refused to uphold the existence of an armed conflict, or have dismissed the classification of war crime on grounds that appear mistaken, as seen in the case of *Mitwaba*.

Moreover, the judges have frequently characterised the armed conflicts as internal even where they referred to the intervention of foreign troops in their judgments. These omissions have limited consequences in relation to the cases studied so far, since the crimes in question can be committed in the context of both internal and international armed conflicts. It is worth noting, however, that the most of the war crimes provisions of the Statute apply to crimes committed within the context of international armed conflicts. The body of rules available to the Congolese is, therefore, much smaller where the underlying conflict is characterised as internal. In addition, the status of protected persons or property is one of the constituent elements of war crimes listed under the *Elements of Crimes*, as shall be reviewed at a later stage; whereas the protection offered by the body of rules that are applicable to cases of international armed conflict is considerably larger.

B. Knowledge of the existence of an armed conflict

The *Elements of Crimes* require that the perpetrator had “knowledge of the circumstances and facts establishing the existence of an armed conflict”, without needing to establish that the perpetrator legally determined the existence of an armed conflict or the international or non-international character of the conflict.²¹⁷The discussion below looks at how the Congolese military courts have interpreted these constituent elements.

In Bongi, the MTG had held that “Captain Blaise BONGI MASSABA [...], by qualifying students

²¹⁷ See the introduction concerning Article 8 and point 5 of Article 8(2)(a)(i) of the *Elements of Crimes*, for example.

brought to his custody as PRISONERS of war, knew of the existence of an armed conflict.”²¹⁸ On appeal, the Military Court stated that “the defendant Blaise Bongi Massaba knew that his unit was engaged in the offensive launched to break up pockets of resistance of the militias [...] the defendant could not have ignored the existence of hostilities in the area where his unit was deployed.”²¹⁹

In the judgment of *Kahwa*, the Tribunal noted that the defendant had knowledge of the circumstances establishing the existence of an armed conflict, “he was organised to such an extent that he led the armies of Uganda and Rwanda [...] in order to fight the enemies that threatened his HEMA community with genocide.”²²⁰

In the case of *Bavi*, the judges linked the knowledge of the factual circumstances establishing the existence of an armed conflict with the existence of a written order by the superiors.²²¹ While this was commendable, it is regrettable that the Tribunal failed to cite the relevant contents of the order when examining the constituent elements of the offence.²²² On appeal, the Military Court did not deal with the issues any further and stating that “the defendant, himself being commander in chief of the said battalion had knowledge, as much as the other co-defendants and members of the same battalion, of the existence of an armed conflict.”²²³

In order to establish the constituent elements of the war crime of murder, the judges in the case of *MILOBS* relied on the fact that the victims’ vehicle “was marked with the sign MONUC and was white in colour”²²⁴ and concluded the perpetrators had, therefore, knowledge of the existence of an armed conflict. This reasoning appears a bit flimsy to establish knowledge of an armed conflict.²²⁵ The judges, however, advanced a more persuasive argument in relation to the war crime charge of attack against the personnel of a peace-keeping mission noting that “all the defendants knew perfectly well that they were in full armed conflict with the armed group UPC.”²²⁶

C. Protected persons and objects

Knowing that the victim or the property enjoys special protection under the law of armed conflicts is a constituent element of war crimes. The *Elements of Crimes* also require that the perpetrator had knowledge of the circumstances of the facts establishing the status of person or protected property.²²⁷

218 TMG d’Ituri, *Affaire Bongi*, op.cit., p. 19.

219 CM Eastern Province, *Affaire Bongi*, op.cit., p. 23.

220 TMG d’Ituri, *Affaire Kahwa*, op.cit., pp. 28-29.

221 TMG d’Ituri, *Affaire Bavi*, op.cit., pp. 25 et 41.

222 Ibid., p. 21.

223 CM de la Province Orientale, *Affaire Bavi*, op.cit., p. 30.

224 TMG d’Ituri, *Affaire Milobs*, op.cit., p. 14.

225 See note 185 supra.

226 Ibid., p. 16.

227 See for example point 3 of Article 8(2)(a)(i) of the *Elements of Crimes*.

Under international humanitarian law, protected persons are those covered by a particular Convention offering them a system of protection when they are in the hands of the opposing belligerent party. In a broader sense, protected persons are those to whom conventional and customary humanitarian law provides protection, particularly civilians, combatants placed *hors de combat* (such as the wounded, sick and shipwrecked), prisoners of war and other detainees (including civilians), medical and religious personnel, as well as personnel participating in emergency assistance and civil protection.

Similarly, customary or conventional international law extends protection to certain types of property against attacks or other hostile acts, including destruction, retaliation, capture and confiscation in the event of armed conflict. Such protected objects include civilian property and objects dedicated to education and health care and cultural objects.

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As for the degree of knowledge required on the part of the perpetrator regarding protected persons and property, it is not necessary to establish that he was aware of the legal basis of the protection enjoyed by the victim or the property in question. Knowledge of the factual circumstances establishing the protected status would suffice. With those preliminary considerations, we will now consider how the military courts in the DRC have handled the question.

In *Ankoro*,²²⁸ the court, which did not apply the Rome Statute, has failed to characterise the offence as war crime or examine whether the defendants had knowledge of the status of the victims. It was, however, apparent from the facts of the case that the crimes were committed against protected persons and property. The attack was directed against the civilian population, creating numerous victims. Buildings, such as hospitals, schools, churches and several thousands of houses, were also destroyed and pillaged.

A similar problem can be observed in *Mitwaba*,²²⁹ where the judges failed to look at the status of the victims, who qualified as protected persons by virtue of their detention irrespective of their status as soldiers or civilians.

In the case of *Kilwa*, the top military prosecutor had specifically charged the defendants for having summarily executed civilians who had “not taken part in the fighting.”²³⁰ However, as noted earlier, the defendants were not convicted for war crimes.

Similarly, in the case of *Biyoyo*,²³¹ the MTG of Bukavu did not uphold the charge of child recruitment into armed groups, even though it was clear that children under the age of 15 years fall into the category of persons protected under humanitarian law.

228 CM de Katanga, *Affaire Ankoro*, op.cit.

229 CM de Katanga, *Affaire Mitwaba*, op.cit., 2007.

230 Military Court of Katanga, *Affaire Kilwa*, op.cit., p. 3.

231 TMG de Bukavu, *Affaire Biyoyo*, 17 March 2006, RP 096/2006 and RP 101/2006.

The MTG of Ituri, on the other hand, points out that the accused had arrested civilians and students, who were preparing to go to school.²³² In the ruling, the Tribunal held that there was no doubt that the defendants knew of the special status reserved for prisoners of war, although it did not specifically state individuals were legally protected and that the defendant could not have been unaware.²³³ On appeal, the Military Court appeared more rigorous. It first defined “protected persons” within the meaning of Article 3 common to the four Geneva Conventions, referring to the provisions applicable to non-international conflict. Subsequently; the Court examined whether, in this particular case, the victims of Captain Bongi fell into this category and whether he knew it:

“In the case under consideration, the five students fall into the first category like any civilian not directly involved in the hostilities; the students were fleeing the war [...] even if they were militias [...] as the defendant claimed they enjoyed the protection of the Conventions [...] being placed hors de combat having been captured and disarmed [...] The defendant could not be mistaken on the status of the 5 people [...] dressed in school uniform [...] By virtue of his training and position, the defendant is supposed to know international humanitarian law.”²³⁴

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It is necessary to highlight the two principles underscored by the Court in the above rulings, which should serve as useful precedent for the future. First, it affirms that, even the victims were considered combatants would still be protected as they were “hors de combat”. Secondly, the Court held a senior officer cannot ignore the basic rules of humanitarian law.

In Kahwa, while the MTG of Ituri convicted the defendant for crimes against humanity rather than war crimes although it found that “the attackers [...] killed a number of civilians who were not involved in these hostilities.”²³⁵ What is more, in its description of the constituent elements of war crimes as described by the Elements of Crimes, the Tribunal had noted:

“according to the statements of the victims, the attack [...] was aimed at the buildings of the health centre [...] the Church [...], the primary school [...] As such, by attacking all these objects, the men of Kahwa knew that these objects were not military objects [...] and in fact, there was no military target to claim that they attacked this building because it was occupied by armed men.”²³⁶

In Bavi, the MTG noted that the criterion of protected person was met since “in the present case, these individuals were civilians and hors de combat, as they were caught, identified and then killed.”²³⁷ The judges referred to the case of Akayesu recalling that it involved “people who were not or no longer involved in hostilities”. Another noteworthy point in the above judgment concerns a presumption that members of the army should know the prohibition of attacks against civilians and reads as follows:

232 TMG d’Ituri, *Affaire Bongi*, op.cit., p. 6.

233 Ibid., p. 19.

234 CM de la Provence Orientale, *Affaire Bongi*, pp. 22-23.

235 TMG d’Ituri, *Affaire Kahwa*, op.cit., p. 16

236 Ibid., pp. 28-29.

237 TMG d’Ituri, *Affaire Bavi*, op.cit., p. 40.

*“The Case-law provides that it is sufficient that the offence was committed by the officer in the course of his functions, even if he disregarded the orders of the superior [...] which in this case, is the general order known to all FARDC soldiers that people who do not participate directly in hostilities (civilians, prisoners of war, etc.) should not be killed.”*²³⁸

The above reasoning follows the reasoning upheld in the case of Bongji.²³⁹

In MILOBS, MTG of Ituri dealt with the question of the protection of individuals and objects involved in peacekeeping mission. The Tribunal ruled:

*“In the present case the vehicle was the property of MONUC, an international peace-keeping mission of the UN which is entitled to the protection of international law [...] There is no doubt, in this particular case, regarding the defendant’s knowledge that the vehicles of MONUC are protected under international law.”*²⁴⁰

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While the above reasoning is valid, the judges should have referred to the status of the personnel who were after all the principal targets of the attack. This was done in Tribunals ruling on charges concerning the war crime of murder, holding that: *“in this case, these two military observers of MONUC were not taking part in the hostilities [...] as members of an armed group, the FNI-FRPI all the defendants knew, that the two MONUC officers, who were very popular in MUNGWALU, were not participating in hostilities.”*²⁴¹

In determining the status of protected persons, it would be useful that judges strive to systematically examine and refer to the status of victims at the material time to ensure that these persons fall within the category of protected persons under the Geneva Conventions or customary humanitarian law.

It is also important to establish that the defendant knew or had reason to know the status in question. A similar analysis is also required with regard to protected objects or property.

²³⁸ Ibid., p. 47.

²³⁹ TMG d’Ituri, Affaire Bongji, op.cit., p. 17.

²⁴⁰ TMG d’Ituri, Affaire Milobs, op.cit., p. 13.

²⁴¹ Ibid., pp. 14-15.

1.2.3. Murder as war crime

Under Article 8 of the Rome Statute, the term murder is used only in relation to armed conflicts of a non-international character without, however, defining it.²⁴² The provisions relating to international armed conflict use the term *wilful killing* instead.²⁴³

According to the *Elements of Crimes* the killing of one or more persons is a requisite element of both wilful killing and murder and “the term ‘killed’ is interchangeable with the term ‘caused death’”.²⁴⁴ As in the case of crimes against humanity, it is not necessary to establish that the perpetrator had planned or personally carried out the murder. It suffices to show that perpetrator had knowledge of the factual circumstances that establish the existence of an armed conflict and the protected status of the victim. A superior can therefore be convicted for a murder committed by one of his subordinates.

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In the case-law of the International Criminal Tribunals, on the other hand, murder as war crime is treated in the same manner as murder as crimes against humanity, which was discussed earlier. Accordingly, the constituent elements of both are:

- the death of the victim;
- resulting from an unlawful act or omission by the accused or his subordinate;
- when the accused or his subordinate was driven by the intent to kill the victim or to cause serious injury to his body, which he could reasonably foresee was likely to cause death.²⁴⁵

The tribunals have also held premeditation is not a requisite element of murder whereas intention is.²⁴⁶

When we look at the Case-Law of the Congolese Courts, we find that, in *Bongi*, the MTG methodically refers to the five constituent elements of murder provided for in the *Elements of Crime* and links them to the facts of the case. The relevant parts of the judgement read as follows:

- “1) The perpetrator killed one or more persons, in the case under consideration, Captain BMM killed 5 persons, named[...]
- 2) [...] the said persons were hors de combat or civilians [...], in this particular case, they were students from secondary school [...];

²⁴² Art. 8(2)(c)(i) of the Statute. The ICTY stated that the constituent elements of murder are similar to those of wilful killing, except that under Article 3, the crime need not have been committed against a ‘protected person’ but against a person ‘who is not actively involved in hostilities’, *Prosecutor v Kordic and Cerkez*, op.cit., § 233.

²⁴³ Art. 8(2)(a)(i) of the Rome Statute.

²⁴⁴ See Art. 8(2)(a)(i) – Wilful killing and Art. 8.(2)(c.)(i)(1) – Murder, the respective footnotes

²⁴⁵ ICTR, *Prosecutor v Musema*, Trial Chamber, 27 January 2000, (ICTR-96-13), § 215.

²⁴⁶ ICTR, *Prosecutor v Semanza*, op.cit., § 373.

- 3) The author was aware of the factual circumstances that established this status, in this particular case, Captain BMM, who learned the law of war again in the camp [for the integration of former rebels into the Army], moreover teacher training [...] saw some victims in school uniform [...] taken on the road to school carrying school note books; he also had plenty of time to identify them, as he stopped them of his own accord;
- 4) The conduct took place in the context of and was associated with an armed conflict of a non-international character, in this particular case captain BMM ordered the military in the middle of carrying out the attack against the pockets of armed resistance in Ituri [...] ;
- 5) The perpetrator was aware of the factual circumstances that established the existence of armed conflict; himself being the commander of a brigade. He knew he was in the middle of armed conflict against the armed militias of the FRPI and other armed militia, against which he organised combat patrols.”²⁴⁷

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Unfortunately, the judgement does not shed any light on the evidence used to establish the facts. On the other hand, it is noteworthy that the judges took into account the fact that the defendant benefited from training on the rules of the law of war, when he was in a training centre for troops.

On appeal however, the reasoning of the judges made up for the above mentioned omission by the lower court in that it mentioned that the defendant had “*acknowledged having given the order to the team [...] to swiftly execute the students who had all brought pillaged objects.*”²⁴⁸ The appeals judgement also cites the identity of the victims. Furthermore, the judges have rejected the defence of superior order advanced by the accused recalling that, in accordance with Article 28 of the Constitution of the DRC, “*No-one is required to execute a manifestly unlawful order*” and that “*the illegality of the order that Major FK would have given would not have been in doubt and the defendant [...] would have had to refuse to execute if such an order had indeed been given.*”²⁴⁹

In the Bavi case, by contrast, the MTG of Ituri was satisfied to hold that “*the facts have proved that the defendants [...] killed a total of 30 people.*”²⁵⁰ When we look into the facts of the case, however, we find details of the identity of the possible victims, the discovery of a mass grave that the defendant tried to hide during the investigation and statements from the NGO that denounced the arrests and disappearances. The judgment, however, barely refers to contents of these statements or on how the Tribunal was able to establish that the bodies found in the grave were actually those of the victims. It appears that the testimony provided by a sergeant who had knowledge of the murders was crucial in linking the different pieces of evidence and establishing the direct responsibility of the main defendant. The name and rank of this witness was referred to in the judgment, qualifying him as a “*witness within the meaning of Article 249 of the Military Penal Code*”,²⁵¹ which suggests that he was heard in

²⁴⁷ TMG d’Ituri, *Affaire Bong*, op.cit., p. 15.

²⁴⁸ CM de la Province Orientale, *Affaire Bong*, op.cit, p. 21.

²⁴⁹ Ibid., p. 21.

²⁵⁰ TMG d’Ituri, *Affaire Bavi*, op.cit, p. 40.

²⁵¹ Which refers to a testimony given at trial on authorisation by the President.

open court. Crucially; it was unfortunate that the Tribunal did not question the witness's account of the facts, particularly given the lack of an autopsy or medical report establishing the identity of the bodies found.

On appeal, the Military Court sought to resolve this evidentiary problem by relying on the confessions of all the co-defendants.²⁵² Yet, the case deserves further examination in light of the facts established during the investigation as quoted below.

“Clearly, this type of execution of civilians was a habit within the military unit where the defendant Captain François MULESA MULOMBO instilled in his men, particularly the soldiers of his bodyguard, the idea that any person of “NGITI” tribal origin was a militia member to shoot at any cost; a potential enemy to kill, irrespective of age, sex or profession”²⁵³

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If indeed the investigation was able to establish the above, the principal accused could have arguably been charged with the crime of genocide, as provided for under Article 6 of the Rome Statute and Article 164 of the Military Penal Code. By virtue of these provisions, the murder of group members constitutes a crime of genocide *“when committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group.”²⁵⁴* The tribal group hardly differs from an ethnic group in the relevant sense since members of such group also share a common language and culture. Tribal groups also meet the characteristics of *“a stable and permanent group”* which the Genocide Convention was originally designed to protect.²⁵⁵ If we look at the case-law of the International Criminal Tribunals, on the other hand, we find a preference for subjective approach which would easily apply to the groups under consideration. Accordingly, the protected group is defined as *“a group whose members share the same language and culture; or a group identified as such (self-identification); or a group recognised as such by others, including perpetrators of crimes (identification by third parties.”²⁵⁶*

252 CM de la Province Orientale, *Affaire Bavi*, pp. 26, 28 and 29.

253 *Ibid.*, p. 32.

254 Article 6 of the Rome Statute.

255 This explains the exclusion of political and economic groups of the international instruments as regards the crime of genocide.

256 ICTR, *Prosecutor v Kayishema and Ruzindana*, *op.cit.*, § 98.

1.2.4. Rape as war crime

Rape as a war crime is provided for under Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

As in the case rape as a crime against humanity, the *Elements of Crimes* of the relevant provisions are inspired by the definition established by the ICTR in the *Akayesu* Judgement.²⁵⁷ Accordingly:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed in the context of and was associated with an international armed conflict / conflict not of an international character.
4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

Again, the Statute provides that rape may be committed by and against men and women. The case-law of the International Criminal Tribunals clearly states that the coercive element may be inherent in certain circumstances such as an armed conflict or military presence.²⁵⁸

Rule 70 of the *Rules of Procedure and Evidence* of the ICC, as indicated in the discussion on rape as crimes against humanity, provides that the consent of a victim may not be inferred from silence, lack of resistance, words or conduct, where the victim's ability to give genuine consent was undermined through the use force, threat or due to a coercive environment. Furthermore the credibility, integrity or sexual availability of a victim or witness may not be inferred from his prior or subsequent sexual conduct.

There are limited cases specifically involving rape as war crimes in the DRC at the time of this writing. In *Bavi*, the commander of FARDC battalion was charged with the “rape committed by his soldiers against five women among 18 people arrested on that day, who were to be killed after the rape.”²⁵⁹ The defendant was accused, on the basis of Articles 5 and 6 of the Military Penal Code, of having given instructions to commit rape. The initial charge relied on the Rome Statute but without mentioning the applicable provision.²⁶⁰ This error was subsequently

²⁵⁷ Ibid.

²⁵⁸ ICTR, *Prosecutor v Akayesu*, op.cit., § 688.

²⁵⁹ TMG d'Ituri, *Affaire Bavi*, op.cit., p. 10.

²⁶⁰ The Charges cite Article 8(2)(c)(i) while it is Article 8(2)(e)(vi) which should have been referred to, *ibid.*, p. 10.

corrected²⁶¹ when the Tribunal examined the constituent elements. Regarding the first two elements specified under the *Elements of Crimes* to establish the commission of rape as a war crime in the context of a non-international armed conflict,²⁶² the Tribunal noted:

“1. [...] that in this case the blood which flowed from between the legs of one of the girls raped on the ground in the tent next to that of the defendant, Captain MULESA, the derisory remarks made by the latter toward the defendant lieutenant ASSANI: [...] [saying] ‘enter the tent and see the exploits of your soldiers,, the response of one of these women to the question asked by lieutenant MAKUNDIKILA on the reason for the haemorrhage, showed that there was rape”

“2. [...] in this case the women and girls raped were arbitrarily arrested and the existence of the armed conflict constituted a coercive environment.”²⁶³

While the judges tried to identify the evidence establishing rape as a war crime, they barely mentioned the source of the accounts cited or, at the very least, identify each victim.

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The Military Court of Katanga did not find the soldiers accused in the case of *Kilwa* guilty of war crimes. It is nevertheless interesting to note that, regarding acts of rape, the Court found “that no medical document or report by the OPJ (*Officier de Police Judiciaire – Judicial Police Officer*) confirms the rape or hospitalisation of the late KUNDA (...); that no complaint was registered at any state service for this; that she resumed her life as an adult woman normally and died in Lubumbashi, many months later, during childbirth.”²⁶⁴

1.2.5. Recruitment of children into armed forces or groups as war crimes

Using children under the age of 15 to participate in hostilities is a violation of the rules of international humanitarian law.²⁶⁵ The Rome Statute established this prohibition on war crimes, whether committed in the context of an international and non-international armed conflict. Thus, it penalises the act of conscripting or enlisting children under the age of 15, using them to actively participate in hostilities in the national armed forces²⁶⁶ or in the armed forces or other armed groups, in the context of non-international armed conflicts.²⁶⁷ Conscripting refers to forced recruitment or enlisting as a “voluntary” procedure. The preparatory works of the Statute specifies that participation may be direct and indirect participation²⁶⁸

261 *Ibid.*, p. 42.

262 Article 8(2)(e)(vi)(i) of the *Elements of Crimes*.

263 *Ibid.*, pp. 42-43.

264 Military Court of Katanga, *Affaire Kilwa*, *op.cit.*, p. 23.

265 For an overview of the laws protecting children in armed conflicts, see R. GALAND and I. KÜNTZIGER, “Quels règles et mécanismes internationaux pour protéger les enfants dans la guerre?”, pp. 127-147, in *La guerre enfants admis*, Grip-Éditions Complexe, Bruxelles, 2001.

266 Article 8(2)(a) (i) of the Rome Statute.

267 Article 8(2)(a) (i) of the Rome Statute.

268 R. GALAND and I. KÜNTZIGER, *op. cit.*, foot note page 18, p. 132. This is why the terminology EAFGA (*Enfants associés aux forces et groupes armés – Children Associated with Armed Forces and Groups*) should be preferred as it reflects better the different forms of using children in hostilities.

The Elements of Crimes list five constituent elements:

1. “The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict / conflict not of an international character²⁶⁹.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”

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The case of Lubanga, currently before the ICC, concerns the recruitment of children within the FPLC army; an armed branch of the UPC;²⁷⁰ and the proceedings and rulings in that case can be instructive for Congolese judges.

The Congolese Military Penal Code, on the other hand, does not specifically criminalise the forced or voluntary recruitment, of children in armed forces and groups. Accordingly only a few decisions of the military courts concern the recruitment of children in armed forces or groups.

In the case of Biyoyo,²⁷¹ although the facts show that there was a recruitment of children, the MTG of Bukavu, failed enter a conviction under the relevant provisions of the Rome Statute, convicting the accused instead for the crime of abduction by deceit under Congolese law. The particulars of the case cited below, however, do not correspond to the above ruling.

“The Comd KBJ had transformed the said mission by also recruiting demobilised child soldiers [...] the Comd. KBJ would use trickery to take the demobilised child soldiers from Kadutu [...] take them and so many other demobilised child soldiers back by force and move them to MULU for retraining [...] 407 demobilised child soldiers were brought together [...] and the Comd KB would oppose any inspection of this site by non governmental organisations for the protection of children.”²⁷²

The judgment also mentions the use of threats of arrest for recruitment.²⁷³ The defendant tried to justify himself by asserting that he had arrested and abducted demobilised child soldiers on the grounds that “it was they who brought terror.”²⁷⁴

Even if the judgment does not specify the age of the children, all the other constituent elements of the war crime of conscripting or enlisting children are fulfilled. It appears that

269 Respectively under Article 8.2. b) xxxvi) or Article 8.2.e) vii) of the Rome Statute.

270 ICC, *Prosecutor v Thomas Lubanga Dyilo*, 29 January 2007, op.cit., §§ 242-258.

271 *TMG de Bukavu, Affaire Biyoyo*, op.cit.

272 *Ibid.*, p. 7.

273 *Ibid.*, p. 9.

274 *Ibid.*, p. 10.

the Tribunal could have convicted the defendant on this basis rather than for the ordinary offence of abduction and sentencing him to only five years in prison. The defendant, however, was sentenced for another offence although he has subsequently escaped from prison and remains at large. ²⁷⁵

The charges in the case of *Gédéon* before the MTG, on the other hand, mention that he was prosecuted notably for “having enlisted in his movement approximately 300 children under the age of 15 among whom 270 were identified and demobilised by CONADER [...] and amongst them were: KNR, recruited at 14 years, [...]” ²⁷⁶. The military prosecutor referred to the relevant provisions of the Rome Statute and made a point of mentioning the age of the children again.

²⁷⁵ Ibid

²⁷⁶ Military prosecutor at the TMG de Haut-Katanga, *Affaire Gédéon*, op.cit., p. 5.

CHAPTER 2

CRIMINAL RESPONSIBILITY, GROUNDS FOR EXCLUSION OF RESPONSIBILITY AND EXTENUATING OR AGGRAVATING CIRCUMSTANCES

International criminal responsibility is defined as “the rule of international criminal law under the terms of which any perpetrator of an act constituting an international crime is responsible in and liable to punishment that is delivered by a domestic court or an international criminal court as appropriate.”²⁷⁷ However, international and national criminal law recognise certain grounds for exclusion of criminal responsibility, as well as extenuating and aggravating circumstances which have the effect of altering the nature and degree of criminal responsibility. The subsequent sections will look at these issues.

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2.1. The criminal responsibility of superiors

Individual criminal responsibility is a principle that has seen a significant evolution in international criminal law in recent years. One of the developments relate to the responsibility of superiors for crimes committed by their subordinates. We shall examine below the relevant provisions of the Rome Statute and the Military Penal Code, as well as, the case-law of the International Criminal Tribunals and analyse, accordingly how the Congolese military courts have addressed this issue.

2.1.1. The Rome Statute, the Congolese Military Penal Code and the case law of the International Criminal Tribunals

A. The Rome Statute

Article 25 of the Rome Statute provides for the principle of individual criminal responsibility stating that “A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute”²⁷⁸. It then outlines the different forms of participation in the commission of crimes, under Article 25(3). Accordingly, “A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

²⁷⁷ J. SALMON, Dictionnaire de droit international, Paris, Bruylant, 2001, p. 998.

²⁷⁸ Article 25(2) of the Rome Statute.

- c) For the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - ii) Be made in the knowledge of the intention of the group to commit the crime;
- e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the persons intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

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The Statute addresses the issue of superior responsibility under Article 28 which reads as follows:

“In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution;
- b) With respect to superior and subordinate relationships not described in paragraph a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

- ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

B. The case-law of the International Criminal Tribunals

The International Criminal Tribunals have contributed to the development of a wealth of jurisprudence on the subject, which could inform judges and practitioners.²⁷⁹The Statutes of both the ICTY and the ICTR provide for superior criminal responsibility in identical language, under article 7(3) and 6(3), respectively. Accordingly, a superior is responsible for acts committed by his subordinates “if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

The judgements rendered by both Tribunals have elaborated on the requisite elements of superior responsibility, as provided under the statute, which consist of: the existence of a superior-subordinate relationship involving effective control between the accused and the perpetrator of the crime, knowledge on the part of the superior that the crime was about to be or had been committed and failure to take the “necessary and reasonable” measures to prevent, stop or punish the crime.²⁸⁰

It is also worth noting that the principle of superior responsibility applies to civilian authorities, which may be relevant in the context of the DRC in relation to the responsibility of senior civil servants, ministers, and other government officials.

C. The Congolese Military Penal Code

The provisions of the Congolese Military Penal Code concerning the responsibility of superiors are much less detailed than those contained in Article 28 of the Statute. Article 175 of the Military Penal Code provides that “when a subordinate is prosecuted as the main perpetrator of a war crime and his superiors cannot be pursued as co-perpetrators, they are considered accomplices insofar as they tolerated the criminal acts of their subordinates”. Accordingly, a military leader may only be convicted for war crimes if one of his subordinates is also found guilty. Further,

²⁷⁹ A very useful source on the case-law of the ICTY and ICTR: Human Rights Watch, *Genocide, War Crimes, and crimes against humanity: topical digest of the case law of the international criminal tribunal for Rwanda and the international criminal tribunal for the former Yugoslavia, 2004*, available at the website: <http://www.hrw.org/reports/2004/ij/>.

²⁸⁰ See in particular ICTR, *Prosecutor v Bagalishema*, op.cit., § 38; *Prosecutor v Kayishema and Ruzindana*, op.cit., §§ 217-231; *Prosecutor v Musema*, op.cit., §§ 141-148 and ICTY judgements see, *Kordic and Cerkez*, op.cit., § 401 and *Blaskic*, op.cit., § 294.

the superior will be held responsible as co-perpetrator or accomplice but not as the main perpetrator.²⁸¹ The superior will be held responsible not for the criminal act committed by his subordinate but for the breach of his obligations to command and control his subordinates. This is confirmed under Article 165 of the Military Penal Code which provides:

“The serious crimes listed below, resulting from action or omission, against persons or property protected by the Geneva Conventions of 12 August 1949 and the additional protocols of 8 June 1977, constitute crimes against humanity and are punished in accordance with the provisions of this Code, without prejudice to the more serious penal provisions provided for by the ordinary penal code.”

Interestingly, Article 4 of the Military Penal Code states that “the attempt to commit a crime is punishable in the same manner as the perpetrated crime”. Even if none of the decisions analysed here involve an attempted war crime or crime against humanity, it remains a theoretical possibility under the Military Penal Code.

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2.1.2. The case-law of the Congolese military courts

The Military Court of Katanga was the first Court that had the opportunity to apply the principle of superior responsibility in the case of *Ankoro*.²⁸² Unfortunately, however, it had failed to do so. In that case, more than 20 combatants “from the rank of lieutenant colonel to that of (...) commander of the Mai-Mai militia”²⁸³ were accused of having launched or participated in an attack against the civilian population, causing the death of many people who were not involved in the fighting as well as the destruction of public buildings and thousands of homes. The Court decided not to uphold the charges of crimes against humanity against the main defendant, who was a colonel who commanded the troops of the FARDC during the offensive, the ground that “no soldier has admitted to having acted on the order of Lieutenant Colonel Emile TWABANGU.”²⁸⁴ It also held that:

“it was consistently shown that the defendant TWABANGU, in his status as brigade commander did everything he could to prevent clashes and that other claimants and Mai-Mai leaders were saved through his personal intervention (...) TWABANGU ordered searches of the soldiers’ homes to locate and recover property from pillaging as soon as he was aware of the criminal acts.”²⁸⁵

However, the judgment gives no indication of the evidence used by the Court to arrive at the above conclusion. Moreover, even assuming that the defendant had tried to avoid clashes and

²⁸¹ The concepts of participation as co-perpetrator or accomplice are explained in Articles 5 and 6 of the Military Penal Code.

²⁸² CM of Katanga, *Affaire Ankoro*, op.cit.

²⁸³ ACIDH (Action Contre l’Impunity Pour les Droits de l’homme), « Procès de la Cour militaire du Katanga sur les crimes commis à Ankoro », Rapport final, Lubumbashi, mars 2005, p. 11.

²⁸⁴ Ibid., p. 19.

²⁸⁵ Ibid., p. 57.

took measures to recover property pillaged by his soldiers, it does not mean that the colonel did everything within his power to prevent the bombing of civilians, pillaging, punishing or reporting those responsible to his superiors.

The civil parties in the case had argued, in relation to their application for damages, that the accused should be held responsible for war crimes under Article 175 of the Military Penal Code, which provides that a commanding officer can be held responsible as an accomplice if he had tolerated the actions of his subordinates.²⁸⁶ The judges, however, did not accept this argument.

The Court, on the other hand, rejected the charges of crimes against humanity, stating that “the law, testimonial evidence, the civil parties, the information[facts] did not make it possible to identify any of the defendants as co-perpetrators or accomplices in burning a house or in the death of a particular person.”²⁸⁷ A close reading of the wording of the judgment suggests that the Court considered the lack of evidence of direct participation of superiors in the arson, pillaging, and murder, as sufficient to acquit them of superior responsibility.

It may be recalled that under Article 175 of the Military Penal Code (and a fortiori to Article 28 of the Statute), it is sufficient to prove “that they tolerated the criminal acts of their subordinates” to be convicted as accomplices. Accordingly the Court should not have had to require evidence establishing that they themselves were directly involved in the crimes or that they ordered them, as the judgment implies.

During the trial, the Congolese NGO, ACIDH noted:

“General KYABU KANIKI of the former 4th military region (Lubumbashi) and General MABIAL of the former 9th military region (Kamina) were regularly cited by the defendants as having been at the scene of command during the events of Ankoro. Their presence was reported from 12 November 2002 onwards. This explained their solidarity with the 95th brigade in that they neither punished nor brought the presumed perpetrators before a competent court.”²⁸⁸

The report of this NGO provides a number of other relevant details on the course of events that took place:

“On 12 November, the generals (...) arrived by FAC helicopter at Ankoro. At night, they held two meetings, firstly with the Commander in Chief of the 95th brigade and later with the political authorities; on 13 November, the two generals visited Ankoro and noted the extent of the damage caused by their forces; on 15 November 2002, heavy artillery was used again in order to disarm their militia allies.”²⁸⁹

²⁸⁶ Ibid., p. 27.

²⁸⁷ Ibid., p. 55.

²⁸⁸ ACIDH (Action against Impunity for Human Rights), Final report, op.cit, p. 12.

²⁸⁹ Ibid., p. 72.

The report also notes that “the generals were cited during the hearings by the defendants as having taken command (...) Even though their testimony was necessary to establish the truth about the crimes against humanity; no proceedings were initiated against them.”²⁹⁰ It can therefore be assumed that they were neither summoned, nor heard as witnesses let alone face prosecution. At the very least, they could have been questioned, if only to dispel any doubt as to their potential responsibility.

At the end of the trial, the Court acquitted the senior officers and convicted the lower ranking soldiers and officers for ordinary crimes, although some of the conduct constituted *prima facie* crimes against humanity or war crimes.

The first court to actually address the issue of responsibility of commanders is the MTG of Mbandaka in the *Songo Mboyo* judgment. In denying its civil responsibility, the lawyer for Government of DRC pleaded that this should be conditioned on the responsibility of “Captain R [who is] the superior hierarchically per Article 28 of the Rome Statute of the International Criminal Court which provides that the military commander (...) is criminally responsible for crimes committed by forces under his command and effective control.”²⁹¹ The Tribunal considered the argument as a delaying tactic rejected it recalling that “Article 28 of the Rome Statute of the International Criminal Court, referring to the criminal responsibility of the superior does not provide that the responsibility of the forces under the control of the superior is subordinated to that of the superior.”²⁹² However, it is interesting to note, in passing, that the Congolese government had conceded the applicability of the Rome Statute before domestic courts.

On the merits, the decision treats the issue of criminal responsibility from the perspective of Congolese law. The position of the Prosecution was that the defendant bears criminal responsibility on account of his failure to prevent the theft of arms and munitions by the insurgents while he had the means to do so. The judges rejected this argument holding that:

“Congolese law, like Belgian law does not accept inaction, even intentional, as an element of participation in a crime. However, certain omissions vividly reveal manifestations of a dangerous criminal intent, [...], thus in military criminal law, the responsibility of the supervisor is always presumed for his inaction in relation to acts constituting war crimes committed by his subordinates. In the case under consideration, however, the acts committed by the rebels do not constitute a war crime to incur the responsibility of the defendant E.N., then a commander”²⁹³.

Accordingly, even though the Tribunal rejected the argument of the military prosecutor, it had noted that, when it comes to war crimes, failure by the commanding officer is punishable. More over, as discussed in the first chapter, the Tribunal has upheld the responsibility of the

290 Ibid., p. 79.

291 TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit, p. 5.

292 Ibid., p. 6.

293 TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit., p. 20.

superior as a “moral perpetrator” for an act of rape committed by a soldier belonging to his unit for he had encouraged his subordinates by committing a similar act.²⁹⁴

In Bongi, the MTG of Ituri developed a line of reasoning on superior responsibility that is worth mentioning here. The Tribunal held that, under international criminal law, “... the superior can be held responsible for the criminal acts of his subordinates.”²⁹⁵ Referring to the case law of the ICTR, namely, the Bagalishema judgment, it referred to the three conditions that need to be met in order to establish such “imputed criminal responsibility”. Unfortunately, the Tribunal only cites one referring “the relationship of subordination placing the perpetrator of the crime under the effective control of the defendant.” Still, the judges have demonstrated a remarkable effort at establishing the elements superior responsibility citing Articles 85 to 87 of the Additional Protocol I to the Geneva Convention and Article 28 of the Rome Statute, as well as, relevant international case-law.²⁹⁶ Accordingly, in connection with the issue of superior-subordinate relationship, the judges reasoned:

“It is clear from examination of the case that the fact that the defendant [...] included his own body guard in the platoon of patrol [...] the Tchekele village, establishes sufficiently the [level of] subordination required to establish the offence [...] That the relationship of subordination can be assessed relative to the rank of the defendant BM, the secondary culprit vis-a-vis the soldiers under the command of KW, the original culprits [...]”²⁹⁷

Concerning the superior’s ability to prevent and punish the crimes and failure to do so, on the other hand, the court found:

“the defendant was functionally superior, that is, a real capacity to prevent and punish violations of humanitarian law [...] Given that when the pillaged property was returned, instead of punishing the pillagers, the defendant [...] appropriated the property saying, to his wife and even in his pleading even in his claim that it was the spoils of war [...]”²⁹⁸ The court also holds elsewhere, that “finally the defendant [who] had the control and authority over the pillagers neither referred the case to a competent court, nor opened disciplinary action”;²⁹⁹

In connection with the element of knowledge of the crimes on the part of the superior, the court stated:

“The defendant not only had reason to know but also, particularly, to ascertain that his soldiers were about to pillage, and have subsequently pillaged the town of Tchekele [...] therefore the defendant should share the responsibility with his soldiers, authors of the pillage.”³⁰⁰ Referring

294 Ibid., p. 31.

295 Military Court of the Eastern Province, *Affaire Bongi*, op.cit., p. 19.

296 We go back to the order in which the tribunal listed them.

297 Military Court of the Eastern Province, *Affaire Bongi*, op.cit., p. 20.

298 Ibid., p. 20.

299 Ibid., p. 21.

300 Ibid., p. 20.

to Article 28 of the Statute, the court further noted that “the defendant [...] knew very well that these troops were about to commit the pillaging, which is why his body guard VALAKA and his informer had to join this patrol to safely return the pillaged property”³⁰¹

Finally, the court also held that the accused also bears direct responsibility stating that “he himself also organised this pillage by taking into account information received (...) who had to lead the patrol to the address already identified.”³⁰²

Similarly, in Kahwa, the MTG of Ituri held that the accused had tolerated “the violations committed by his men during the attack from 15 to 16 October 2002; that his troops, in fact, operated in the territory controlled by him in his capacity as group leader, acts that he cannot claim not to have known.”³⁰³ Referring to Articles 85 to 87 of Additional Protocol I and Article 28 of the Rome Statute, the judges concluded that “in this case, Kahwa, in his capacity as leader of the HEMA militia and group leader (...) attacking the LENDU, did nothing to prevent these tragedies; ...his silence constituted thus an approval, or an implicit order.”³⁰⁴ Even if the judgment does not methodically disclose the evidence on which the findings are grounded, the Tribunal’s reasoning addresses the constituent elements of superior responsibility finding that accused was the commander, that he had the necessary knowledge or reason to know and that he had allowed his subordinates to commit the crimes.

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The Mitwaba case, on the other hand, dealt with the responsibility of superiors for the “crime of failing to assist a person in danger.”³⁰⁵ In establishing the responsibility of the officers who ordered the imprisonment the victims who have died in prison, the Military Court of Katanga cited “the failure and omission of defendants to ward off the danger to which the prisoners were exposed” and added:

“ That in fact the defendants [...] did not draw up any minutes of the statements of the prisoners [...] did not take any steps to release the non Mai-Mai [...] did not organise any medical visits [...] so as to prevent diseases or to treat them; [...] knowing that anyone living in these conditions of imprisonment would die; they nevertheless maintained these unhealthy and indecent conditions for several days, kept the prisoners in jail despite their physical impairment and only after the first death recorded, they reluctantly released the other prisoners.”³⁰⁶

Even if the Court did not uphold the war crime charges, it has qualified the defendants’ conducts as failure to act, which corresponds to the language of Article 28(a) of the Rome Statute, recognising the said conduct as a form of commission. It is also worth noting that

301 Ibid., p. 21.

302 Ibid., p. 21.

303 TMG d’Ituri, *Affaire Kahwa*, op.cit., p. 29.

304 TMG d’Ituri, *Affaire Kahwa*, op.cit., p. 31. It is interesting to note here that the reference to the Additional Protocol I implies the existence of an international armed conflict, whereas, in this particular case, the court did not classify the conflict as international. Moreover, the expressions quoted in the ruling do not correspond to the wording of the articles in question.

305 In actual fact, constituting a war crime, as seen in Chapter II of this study.

306 CM of Katanga, *Affaire Mitwaba*, pp. 8-9.

that the officers who carried out the order were also convicted, although they were given less severe sentences.

In *Mutins de Bunia*, the Tribunal convicted the commander lieutenant Aboti, not for war crimes or crimes against humanity, but for “inciting soldiers to commit acts contrary to duty or discipline.”³⁰⁷ It held that the defendant having “invited the lower ranking soldiers of the same first integrated brigade to go and pillage so as to get paid at the expense of the individuals [civilians].”³⁰⁸ In this case, even though the Rome Statute was not invoked, the responsibility of the accused was established on the basis of solicitation or encouragement to commit crimes, in line with the language of Article 25(3)(b) of the Statute.

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Finally, in the *Kilwa* case, Colonel Ilunga Adémar, who commanded the troops that pillaged a town, was prosecuted as “perpetrator, co-perpetrator or accomplice” of war crime. In particular, it was alleged that accused “by abusing his power and authority ordered his men”, amongst others things, to bomb the city, “summarily execute civilians” and to arbitrarily arrest and detain civilians.³⁰⁹ As has been seen previously, the Military Court did not accept the war crimes charges and instead convicted the colonel for the murder of two students.

In Congolese criminal procedure, the responsibility of commencing criminal proceedings against military personnel rests with the military prosecutor who, upon completion of the investigation, may “refer the accused to this [the military court] if he considers that the act in question constitutes an offence under the jurisdiction of the military court and that the charge is sufficiently established,....”³¹⁰ The military courts generally assume jurisdiction either on the basis of the Military Prosecutor’s referral decision or when the accused is brought before without prior referral.³¹¹

The provisional ruling delivered in *Bavi* addresses the above issue of referral in relation to a request filed by the counsel for the principal accused, Bozizé. The Tribunal raised the role of a colonel who was not named in the referral by the Prosecutor was said to have been informed by his intelligence officer, a lieutenant, of acts and crimes committed by the principal accused.

During the proceedings before the MTG, the said lieutenant stated “that he would have kept the colonel E. informed, long in advance, of these crimes perpetrated in the field by the intervention Battalion; but, on the contrary, this Colonel, instead of proceeding to verify these serious accusations would have purely and simply, merely to be polite, in turn informed the defendant Captain FMM of these accusations.”³¹²

³⁰⁷ TMG d’Ituri, *Affaire Mutins de Bunia*, op.cit., p. 30.

³⁰⁸ Ibid., p. 26.

³⁰⁹ Military Court of Katanga, *Affaire Kilwa*, op.cit, pp. 2-3.

³¹⁰ Article 200 of the Military Justice Code, Law no. 023-2002 establishing the Military Justice Code of 18 November 2002.

³¹¹ Article 214 of the Military Justice Code. In French, the relevant text reads, « par voie de traduction directe ou par décision de renvoi émanant de l’auditeur militaire près la juridiction compétente »

³¹² TMG d’Ituri, *Affaire Bavi*, op.cit, p. 28.

The ruling also emphasises the fact that, in a letter addressed to the military prosecutor, the Colonel has, at least partially, acknowledged having spoken with the lieutenant who informed him of his desire to leave his post for fear of being killed by Bozize.³¹³ The Tribunal noted that the colonel considered the lieutenant's "desertion" more severe than "the charges of serious crimes of which the Intervention Battalion, under his superior authority, was accused."³¹⁴ The Tribunal further noted that the Colonel had in fact punished the lieutenant by deducting his wages for seeking to abandon his unit "without the slightest inclination to initiate in earnest an investigation" into the defendant's claim of the threat of death.³¹⁵

Despite those damning findings, the military prosecutor had failed to initiate proceedings against the colonel.

Moreover, the investigation has revealed that a general commanding the whole operation in the region was also alerted by a local NGO of the same crimes but no investigation has been ordered. Again, the military prosecutor had failed to initiate proceedings against the high ranking officer, despite the relevant findings of the judges.³¹⁶

In both of the above cases the provisions of the Military Criminal Procedure Code did not allow for prosecution of the two officers on the basis of the evidence available to the prosecutor. Therefore, Tribunal held:

*"That the referral to the military courts as the military procedural law currently stands belongs only to the public prosecutor; that the responsibility of these superiors for war crimes under Article 175 of the Military Penal Code ... may only be established if it is proven at the end of a trial to what extent they have tolerated the criminal acts of their subordinates."*³¹⁷

Accordingly, the Court concluded:

*"that in this case, the court competent to determine whether or not Colonel EM or General M tolerated the actions of the defendant Captain M and those like him in this case and that Colonel N or Captain GU refrained from reporting the criminal acts of these same defendants can only be the court to which the public prosecutor will refer if he considers that these allegations are justified."*³¹⁸

At the time of publication of this study, no prosecution has been initiated against any of these officers. The evidence gathered by the Tribunal which convicted the subordinates is however in the hands of the military prosecutor. The failure of the military prosecutor to initiate proceedings against them under Article 175 of the Military Penal Code, or by invoking the direct application of Article 28 of the Rome Statute, leaves open the theoretical

³¹³ Ibid., p. 29.

³¹⁴ Ibid., p. 29.

³¹⁵ Ibid., p. 30.

³¹⁶ Ibid., pp.27-28:

³¹⁷ Ibid., p. 39.

³¹⁸ Ibid., p. 40.

possibility of a prosecution before the International Criminal Court.

It is clear that military prosecutors are exposed to strong pressure, particularly when it comes to the investigation high ranking or influential officers and soldiers. In the absence of a procedure for automatic referral in Congolese law³¹⁹ especially for international crimes other mechanisms could be explored in an attempt to get around any potential “reluctance” by the examining magistrate. One possible option in the event of inaction on the part of a military prosecutor may be requesting the intervention of his superiors who could give him an order to investigate and prosecute.³²⁰ The ministers of Justice and Defence also have the prerogative to order the opening of an investigation or prosecution.³²¹ But what can be done in the event of complete inaction by the entire hierarchy?

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If the public prosecutor himself does not prosecute superiors against whom there is evidence or probable cause, rather than waiting for the military prosecutor to take action, the courts ruling on the facts of the case could initiate proceedings under Article 219 of the Military Justice Code. The latter provides that “the military court to which the case is referred may, if the preliminary investigation appears incomplete or if new facts are revealed since the closure, order of the investigation which it considers necessary. These investigations shall be conducted in accordance with the provisions relating to the preliminary investigation by the military prosecutor” Among the investigative powers mentioned, which are similar to those of those of an investigative judge,³²² we find the power to charge an accused. The judge could thus theoretically use all the traditional means of investigation and, where appropriate, charge a superior who would not be prosecuted by the public prosecutor.

Some might argue that Article 219 is located in the section of the Judicial Code dedicated to “procedure prior to proceedings”³²³ and does not apply to the situation under consideration. However, if one looks beyond the title and at the language of Article 219, it would seem that law is designed to allow for the completion of an inquiry that would otherwise be incomplete, which is arguable in case here.

A legislative amendment authorising direct filing by civil parties before the lower courts could be a way of avoiding the military prosecution from blocking investigations or suits involving military personnel. In order to mitigate the risk that the courts end up overwhelmed, this possibility could be limited to certain crimes, such as the crimes of genocide, war crimes, crimes against humanity and other serious and massive violations of human rights.

319 Exception made as regards contempt of court. According to Article 214 of the Military Judicial Code, when an offence is committed in the court-room and during a court hearing, automatic referral is possible.

320 In all cases, it is the general prosecutor of the Armed Forces, as supervisor of all the public prosecutors, who has the military power to “order investigating military judges, to prosecute or to refrain from prosecuting”. (Article 42 of the Military Justice Code)

321 See Articles 47, 162 and 130 of the Military Judicial Code.

322 Article 170 of the Military Judicial Code.

323 Titre II, Chapter I, Section 2 of the Military Judicial Code.

In conclusion, a reference to the Rome Statute would provide judges with more comprehensive guidelines on different forms of participation when dealing with cases involving superior responsibility. With respect to crimes that are committed by members of organised groups such as the armed forces, militias, public services, or political parties, it is important that the judges carefully determine the extent to which superiors or those in authority ordered, encouraged, supported, or tolerated the criminal conduct. The reconstruction of the entire chain of command in connection with the criminal acts is the only way for identifying “Who issued the order? Who transmitted the order and how? Who knew or ought to have known about it? Who took action or should have taken action?”

In the event that the perpetrators and their superiors are identified but it is not shown that the superior ordered the commission of the crime, the judges may wish to consider:

1. the existence of a superior-subordinate relationship involving the exercise effective control by the superior over the perpetrator;
2. the knowledge of the superior that a crime was about to be committed or had been committed and his ability to prevent and punish the crimes;
3. the failure of the superior to take measures to prevent, stop, punish, or report the crime.

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2.2. Grounds for excluding criminal responsibility

2.2.1. Principles of criminal law, the Rome Statute and the Congolese Military Penal Code

A. The principles of criminal law

Criminal law generally classifies the grounds for the exclusion of criminal responsibility in two main categories, namely, justifications and excuses.

Justifications are grounds that tend to negate the very criminal character of the act in question and include self-defence, necessity and, in certain cases, the command or prescription of the law. Excuses, on the other hand, are defences that would remove the culpability of the agent but not the criminal character of the act. Such defences include minority, insanity, and duress.

B. The Rome Statute

Article 31(i) of the Rome Statute stipulates a number of grounds for excluding criminal responsibility:

“In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

- a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
- c) The person acts reasonably to defend himself or herself, or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
- d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - i) Made by other persons; or
 - ii) Constituted by other circumstances beyond that person’s control.

It is worth noting that the Statute’s recognition of distress and, more importantly, of military necessity, as a justification for war crimes and crimes against humanity has invited criticisms.³²⁴ The severity of these crimes prompts us to question whether they should be justified on grounds of military necessity and self-defence.

Article 32 of the Statute, on the other hand, provides that a mistake of fact or law may also be a ground of exemption if it negates the mental element of crime. Pursuant to article 33, an order of a superior or the command of the law may exonerate the perpetrator of a war crime of

³²⁴ See E. DAVID, *Principes de droit des conflits armés*, op. cit., § 4.184c, p. 692 and F. DELOOZ and R. GALAND, « L'article 31 du Statut de la Cour Pénale internationale, synthèse des débats de l'atelier de la commission consultative de droit humanitaire », *Revue Internationale de la Croix-Rouge*, Genève, n°842, Juin 2001.

his criminal responsibility but under certain strict and cumulative conditions. Accordingly, the person must have been under a legal obligation to obey, he did not know that the order was unlawful and the order was not manifestly unlawful. The Statute presumes that the order to commit a crime against humanity or genocide is manifestly unlawful and thus excludes the possibility of invoking the defences in question.

Article 27 specifically excludes the immunities attached, under domestic and international law, to the status of officials. The Statute also states that these posts do not constitute a ground for reduction of sentences.

Finally, Article 29 states very clearly that “the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”. By extension, it may be argued that those crimes are not eligible for amnesty. Indeed, in international law, the non-applicability of statutes of limitation to a crime implies that it may not be subject to an amnesty, since the consequences the latter are even more extensive than those of prescription. Prescription, unlike amnesty, does not totally remove the possibility of legal action against the alleged perpetrator but requires that such actions be taken within a certain time frame.³²⁵

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C. The Congolese Military Penal Code

Congolese law does not provide for a specific body of rules governing grounds for the exclusion of criminal responsibility. Therefore, one has to rely on a cumulative reading of several legal instruments in order find out the grounds that are recognised under domestic law.

Concerning superior order, Article 28 of the Constitution of the DRC is unambiguous:

“Nobody is obliged to perform a manifestly unlawful order. Any individual or agent of the State is relieved from the duty of obedience, when the order received constitutes a manifest attack on the respect for human rights, civil liberties and moral standards. The onus is on the person who refuses to perform the order to prove the manifest unlawfulness of the order”.

Article 163 of the Military Penal Code, on the other hand, provides that “the immunity attached to the official status of a person shall not exclude him from prosecution for war crimes or crimes against humanity”. Curiously however, the article does not refer to the crime of genocide, even though it may be argued that genocide is the most serious form of crime against humanity.

Regarding prescription, Article 10 of the Military Penal Code clearly states that crimes of genocide, crimes against humanity and war crimes are not subject to statutes of limitation. Article 11 of the same Code also provides for the applicability of statutes of limitation to sentences in the event of conviction by default.

³²⁵ See particularly E. DAVID, *op. cit.*, § 4.212, p. 714.

The law of amnesty adopted on 19 December 2005, which repeals the legislative decree No. 003/001 of 15 April 2003, provides amnesty for acts of war and political offences committed between 20 August 1996 and 30 June 2003, dates regarded as marking the end of the transition. Article 3 clearly stipulates that “This Act does not concern war crimes, crimes of genocide, and crimes against humanity”.

2.2.2. The case-law of Congolese military courts

In *Songo Mboyo*, MTG of Mbandaka provided a rather remarkable analysis of the principles governing justifications and excuses in light of the evidence before it.³²⁶ After noting that all the elements of crimes against humanity were established in case against the defendants, the judgment went on to define the main defences and excuses to check whether in this case, the defendants may rely on them.

Concerning justifications, the Tribunal cites self-defence, the order of the law, a command of legitimate authority and the state of necessity. In relation to excuses, the Tribunal identified insanity, duress, under age and mistake of law. In the final analysis, it held that none of those are applicable in the case under consideration. The following are excerpts from the decision, which are considered most informative:

- In relation to self defence, the Tribunal held that “self-defence may only be upheld insofar as it is proportional to the attack of which the agent was a victim. In the case under consideration, the defendants may not justify their conduct as they do not provide proof of the attack of which they were victims of part of the population”;
- In relation to the defence the command of the law or a superior, it found that “the defendants acted on their own accord without order from any one, who, in any event, may incur criminal responsibility due to the manifestly unlawful character of such an order”;
- On necessity: “the delay recorded in payment of wages, on the grounds of the revolt of the soldiers, may not constitute a situation of imminent danger capable of justifying the offences” ;
- Finally, on the issue of mistake of law, the Tribunal held:

“in the case under consideration, having been instructed to protect persons and their property, the defendants may not rely on the mistake of law for the manifestly unlawful acts committed by them in *Songo Mboyo*, which moreover constitute a shift in the primary mission that they cannot claim ignorance of.”³²⁷

This last finding on mistake of law is particularly interesting in that it underlines the fact

³²⁶ TMG de Mbandaka, *Affaire Songo Mboyo*, op.cit.

³²⁷ Ibid., p. 36.

that a soldier, by the very nature of his occupation, cannot ignore his mission to protect the population. It may also be noted that the judgement places the burden of proof on regarding self-defence on the accused, who claimed that they were attacked by the civilian population.

Article 31 of the Rome Statute is often invoked in several of the cases studied, particularly by the defence and for reasons unrelated to the definition of grounds for the exclusion of responsibility.

In *Bongi*, the defence referred to the exclusion of criminal responsibility based on the intoxicated state of the main defendant at the time of the acts. After noting “that the defendant had been drinking and had intoxicated the soldiers charged by him to execute the students”, the Court wisely concluded “that it relates to voluntary intoxication which cannot be invoked as a justification; making this ground ineffective, insofar as the defendant BBM was voluntarily intoxicated and had intoxicated his soldiers to give them the courage to do his dirty work.”³²⁸

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Also in the same case, the MTG of Ituri had to rule on the defendant invoking the order of a superior in an attempt to justify the killing of five civilians. The Tribunal rightly rejected this argument on the basis of Article 28 of the Constitution stating that: “the illegality of the order which would have been given by Major Faustin KAKULE is not questionable but the defendant [...] should have refused to carry it out even if such an order had truly been given.”³²⁹

In *Mutins de Mbandaka*, the counsel for one of the main defendants attempted to invoke the inability of his client to commit an act of rape because of his impotence. Curiously, the Tribunal noted “that in relation to temporary impotence, the Rome Statute of the International Criminal Court in Article 31 retains illness as one of the grounds for excluding criminal responsibility”³³⁰. It would appear that the Tribunal has adopted an erroneous interpretation of Article 31, which excludes a person from criminal responsibility if he was suffering “from an illness (...) that destroyed the capacity to appreciate the unlawfulness or the nature of his conduct.”³³¹ Sexual impotence does not in the least correspond to this definition and, at any rate, the argument was not upheld by the judges in the end.

Regarding amnesty laws, the Military Court of the Eastern Province in the case of *Kahwa* invoked the law of amnesty of 19 December 2005 and the legislative decree No. 003/001 of 15 April 2003, considering that the judge of first instance should have raised the issue on its own motion. Accordingly, the Military Court reversed the decision of the MTG convicting *Kahwa* for the offence of rebel movement and of possession of weapons of war on the basis of the Amnesty Law. The court also held the referral by the public prosecutor of the charges relating war crimes and crimes against humanity was unlawful for procedural reasons and

³²⁸ CM de la Province Orientale, *Affaire Bongi*, op.cit., pp. 24-25.

³²⁹ TMG d’Ituri, *Affaire Bongi*, op.cit., p. 22.

³³⁰ TMG de Mbandaka, *Affaire Mutins de Mbandaka*, op.cit., p. 31.

³³¹ Article 31(1)(a) of the Rome Statute

remanded the case.³³²The Court, however, did not extend the application of the amnesty law to crimes against humanity and war crimes stating “that war crimes and crimes against humanity are not subject to statutes of limitations and may at any time be prosecuted by the public prosecutor.”³³³

An arrest warrant was issued on 1 March 2008 against Kahwa by the chief military prosecutor and military prosecutor of Bunia for, among others, crimes against humanity, war crimes, murder, assault, and grievous bodily harm. Moreover, the senior military prosecutor of Kisangani filed an appeal before the Military High Court against the judgment of the Military Court of the Eastern Province, on the grounds that the amnesty law cannot apply to offences of rebel movement and the offence of unlawful possessions of weapons of war, since the acts were committed after the period covered by the said law. The Military High Court granted the request of the senior military prosecutor in its judgment of 9 September 2008, annulling the decision of the Military Court of Kisangani and remanding the case to the same court but comprised of different judges.

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2.3. Extenuating or aggravating circumstances (grounds of excuse)

Extenuating circumstances are conditions or factors that may allow the judge to lower the sentence to be imposed on the offender on grounds of fairness or tolerance but do not excuse or justify criminal conduct. Conversely, aggravating circumstances are factors related to conditions in which an offence was committed or to specific aspects concerning the perpetrator or victim of criminal conduct which may have the effect of increasing the sentence up to the maximum provided by law. In practice, the extenuating or aggravating circumstances are taken into account at the time of sentencing and must be stated in the judgement.

2.3.1. The Rome Statute and the case-law of the International Criminal Tribunals

Article 78(1) of the Rome Statute provides that, in the determination of sentences, “the Court shall, in accordance with the Rules of Procedure and Evidence, take account of considerations such as the gravity of the crime and the personal situation of the convicted person”.

In the jurisprudence of the ICTR, the ground most frequently invoked as an extenuating circumstance is collaboration with justice, which includes having facilitated investigations and expedited procedures through confession or testimony.³³⁴ ICTR judgments also

³³² According to the MC, “The public prosecutor never made it known to the defendant (...) the arrest warrant” and “the defendant Kahwa was never heard by the public prosecutor on the preventions of war crime, crimes against humanity, assassination and grievous bodily harm carried out by him.” CM de la Province Orientale, *Affaire Kahwa*, op.cit., pp. 10 and 15.

³³³ Ibid., p. 11.

³³⁴ See also ICTR, *Prosecutor v Kambanda*, Trial Chamber, 4 September 1998, (ICTR-97-23), §§ 36-37, 56-58, 61-62; *Prosecutor v Kayishema and Ruzindana*, op.cit, §§ 19-23; *Prosecutor v Ruggiu*, Trial Chamber, 1st June 2000, (ICTR-97-32), §§ 53-80.

recognised as extenuating circumstances the fact of having extended protection to victims,³³⁵ repentance or expressions of remorse towards victims³³⁶, ill health³³⁷ and the absence past history of criminality.³³⁸ On the other hand, the judges generally consider that the existence of aggravating circumstances usually annuls the benefit of extenuating circumstances.³³⁹ It should also be noted that Article 6(4) of the Statute of the ICTR provides that the fact that an accused acted on the order of a superior or a government does not exclude him from criminal responsibility but may be considered instead as a ground for mitigating the sentence.

In *Erdemovic*, the ICTY Trial Chamber distinguished between two categories of extenuating circumstances: those that are “contemporary with the commission of the criminal act”, which may include the accused mental state, duress, his position in the military hierarchy, and circumstances relating to the period “after the commission of acts.”³⁴⁰ The latter include, among others, remorse and cooperation with the office of the Prosecutor.

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2.3.2. The Congolese military justice and case-law

Article 255 of the Congolese Military Justice Code provides that “each aggravating circumstance; each ground of excuse invoked shall be the subject of a separate issue” to be approached by the judges. Furthermore, Article 261 §1 of the same Code states that “if the defendant is convicted, the President [of the court] must ask whether there are extenuating circumstances”. In actual fact, neither the Military Justice Code nor the Military Penal Code³⁴¹ provides adequate guidelines on the kinds of circumstances that may be considered as extenuating factors. The courts have thus considerable discretion on the subject.

In the *Ankoro* case, it was reported that “the military prosecutor asked the Court to take into account the wide range of extenuating circumstances in respect of the defendants who would be found guilty in any event”³⁴². The Court has also appeared lenient towards the accused. With respect to one of the defendants, who was found guilty for murder but acquitted of the charges of war crimes and crimes against humanity on doubtful grounds, the Court considered that “he may benefit from extenuating circumstances due to his status as first offender, his young age, his professional inexperience and the good services he may render to the army”³⁴³. For the other convicted person, the Court noted the same circumstances as well as “the recovery of all the goods” by the victims of the pillaging.

335 ICTR, *Prosecutor v Niyitegeka*, Trial Chamber, 16 May 2003, (ICTR-96-14), §§ 495-498.

336 ICTR, *Prosecutor v Kayishema and Ruzindana*, op. cit.; *Prosecutor v Musema*, op.cit, §§ 1005-1008.

337 ICTR, *Prosecutor v Ntakirutimana and Ntakirutimana*, Trial Chamber, 21 February 2003, (ICTR 96-10; ICTR 96-17), §§ 908-909.

338 ICTR, *Prosecutor v Ruggiu*, Trial Chamber, 1st June 2000, op. cit.

339 See in particular ICTR, *Prosecutor v Kambanda*, op. cit., and *Prosecutor v Musema*, op. cit.

340 ICTY, *Prosecutor v Erdemovic*, Trial Chamber, 29 November 1996 (IT-96-22), § ?

341 Articles 35 and 38 of the Military Penal Code refers to the possibility of taking into account extenuating circumstances and to reduce, if allowed, the sentence imposed.

342 ACIDH, « Procès de la Cour militaire du Katanga sur les crimes commis à Ankoro », op.cit., p. 20.

343 Ibid., p. 59.

In *Songo Mboyo*, the court decided that the “aggravating circumstances surrounding the commission of crimes by the two defendants [...] largely prevailed over the extenuating circumstances which plead in their favour.”³⁴⁴ The extenuating factor referred to is the defendants’ age. The judgment, however, gave no indication of the circumstances that it considered as aggravating.

In *Bongi*, where the main defendant was convicted of war crimes for injury to life and body, the Military Court granted him the benefit of extenuating circumstances citing his being a first offender and a father of a large family as well as his lack of experience as a commander.³⁴⁵

In *Bavi*, the judge accorded extenuating circumstances to a captain accused of having deliberately refrained from denouncing the order received from his commander to dig up and hide the bodies of victims, a conduct punishable under Article 189 of the Military Penal Code. The factors considered by the Tribunal were, his being a first time offender and his active repentance or confessions, even though the said confessions, in part, occurred during the investigation phase.³⁴⁶

On appeal, the Court granted the benefit of extenuating circumstances to almost all the co-defendants, with the exception of their commander. The main reason given for the leniency was that their admission of the facts, while being a “long overdue active repentance” nevertheless constituted “collaboration with justice.”³⁴⁷ In the pronouncement of the judgment, “psychological pressure” was also invoked as an extenuating circumstance for each of the co-defendants.³⁴⁸ It may be noted that, this last argument could have been invoked as an excuse, if the requisite elements of duress were established.

Consequently, in light of the decisions analysed, we note that aggravating circumstances are never mentioned by the judges, whereas extenuating circumstances are sometimes upheld a bit too lightly in view of the seriousness of the crimes in question. It is understandable that judges take into account “collaboration with justice”, which is necessary to expedite investigations that are often complicated, and factors such as active repentance and reparation of injuries caused to victims. However, factors such as family situation of the defendant or his inexperience should not be treated in the same manner, especially when it comes to the crimes under consideration.

In conclusion, it is important that judges carefully balance the relevant extenuating circumstances against the seriousness of crimes and, in cases of crimes against humanity or war crimes, ensure that the above useful criminal law tool is not transformed into a mechanism permitting a form of impunity.

344 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, op.cit., p. 37.

345 MC Eastern Province, *Affaire Bongi*, op.cit., pp. 24 and 30

346 TMG de l’Ituri, *Affaire Bavi*, op.cit., pp. 43 ans 52-53.

347 MC of the Eastern Province, *Affaire Bavi*, op.cit., p. 29

348 Ibid., pp. 36-38.

CHAPTER 3

CIVIL RESPONSIBILITY OF THE STATE

The State often plays an important role in the commission of crimes against humanity and war crimes, given the systematic and massive nature of such crimes. The application of a policy of a State is also one of the elements of crimes against humanity under the Rome Statute in determining whether there has been a planning of a systematic attack. In addition, individuals prosecuted for crimes against humanity or war crimes are often agents, state officials or persons acting on its behalf.

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3.1. The Rome Statute and Congolese law

3.1.1. The Rome Statute

Article 25 of the Rome Statute clearly states that the Court shall have jurisdiction over natural persons. Thus, the Statute implicitly excludes legal persons, including States, from its jurisdiction while also providing that “no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”³⁴⁹ However, it is important to emphasise that criminal offences relating to natural persons are radically different from conduct which engages the international responsibility of a State. The responsibility of the state does not have a penal character even where it’s agents are responsible for criminal acts.³⁵⁰ Moreover, the State may not avoid its international responsibility arising from violations of international criminal law by invoking the fact that it had investigated or prosecuted the perpetrators.

It is also important to note, in view of some the decisions rendered by Congolese Courts, that the Statute does condition the civil responsibility of States on the establishment of the criminal responsibility of the superiors of the agents who have committed the crimes.

The provisions of the Rome Statute governing reparations to victims do not specifically mention if a state may be ordered to compensate for injuries caused by its agents, which may be a question to be settled by the court in the near future. The Statute, however, provides that that “nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”³⁵¹ The reference to international law naturally includes international humanitarian law as well as human rights law.

³⁴⁹ Article 25(4) of the Rome Statute..

³⁵⁰ P. CURRAT, *Les crimes contre l’humanité dans le Statut de la Cour Pénale Internationale*, op.cit., p. 599.

³⁵¹ Article 75(6) of the Rome Statute.

3.1.2. Congolese Law: the Civil Code.

The rules governing civil liability are to be found in Book III of the Congolese Civil Code. Accordingly, Article 258 provides that “any act that causes harm to another requires he who was at fault for the harm to remedy it.” In the same vein, Article 260 establishes the responsibility of employers and principals for the acts of their agents: “One is responsible not only for the injury that one causes by his own act, but in addition for that which is caused by the act of persons under one’s responsibility, or by objects under one’s custody.”

There are four conditions required for the application of the above provision of the civil code:

1. the existence of a principal-agent relationship; there is such a relationship when a person has authority over another, and that the latter is a subordinate acting in accordance order or instructions of the former;
2. the damage must have been caused by the fault of the agent;
3. the damage must have occurred in the exercise of the functions for which the agent was employed;
4. the damage must have been caused to a third party.

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Generally, the courts first establish the civil liability of the direct perpetrators of the offence before establishing that of the State and, where appropriate, ordering both perpetrator the State jointly to pay compensation for damages to the victim. The judgement is often awarded in *solidum*, where each party may be asked to compensate the victim fully or in part. This form of award is highly recommended because, where the individual agents of a state or an organisation could not comply with the compensation award compensate, which is often the case, the victims will have a recourse against the institutional judgement debtors, i.e. the State or organisation condemned as the principal.³⁵²

3.2. The case-law of the courts and military tribunals

The responsibility of the Congolese State is often invoked in judgments ordering it to compensate victims or their relative for damages, on the basis of Article 260(3). The reasoning, according to both Congolese jurisprudence and the literature, is that the Congolese State is the principal or employer of individuals working for public institutions, including the police and the army and shall be responsible for their acts or omissions.³⁵³

³⁵² The courts pronounce *In solidum* liability or joint and several liability on the basis of the assumption of a bond between the co-defendants whereby acts done by one within the framework of the relationship can be held against the other.

³⁵³ K. MBIKAYI, *Responsabilité civile et socialisation des risques en droit zaïrois*, PUZ, Kinshasa, 1974, p. 152. Also refer to the judgment of the Supreme Court of Justice, RPP 137, 11 October 2002 in B.A. CSJ Kin 2004, p. 200.

The responsibility of the Congolese State was upheld by the Military Court of Katanga in the case of Ankoru, on the basis of Articles 258 and 260 of the Civil Code:

*“Some soldiers of the 95th Brigade while carrying out their traditional mission of ensuring the safety of persons and their property, set fire to dwellings and places of worship; killed persons not involved in the hostilities and wounded others; these soldiers are agents of the Congolese State, working full time for and on its behalf.”*³⁵⁴

Interestingly, the Court further states that the militias which fought alongside the regular forces must also be regarded as “agents” of the Congolese State, that the latter should be held responsible for their acts:

*“Given that the Mai-Mai combatants who were at Ankoru at the material time constituted an entity formed by the Congolese State which provided them with arms and munitions of war and used them; For this reason, they must be regarded as being agents of the Congolese State who benefited from their services; Given the Hutu refugees from Rwanda, like the Mai-Mai combatants, also constituted an armed entity supporting the FAC [the Congolese Armed Forces] in their actions against the rebel forces of the RCD and therefore are also regarded as agents of the Congolese State”*³⁵⁵.

The provision of arms and munitions, as well as the support for the militias is, therefore, considered sufficient to show the control that the Congolese State should have exercised over the militia. In this case, the Court orders only the State to pay compensation to the civil parties.

In Kalonga, the MTG of Kindu, after listing the requirements of Article 260 of the Civil Code, concluded “that the responsibility of the Congolese State was fully engaged as principal and owner of the unit of arms in order to terrorise the civilian population”³⁵⁶. The Tribunal provides little legal reasoning in condemning in solidum the State and the perpetrators. However, it is noted that the State is held responsible for crimes committed by the militias (Mai Mai), without any link being formally established between them and their “principal”.

In the case of Mutins de Mbandaka, the MTG of Mbandaka concluded “that based on Articles 258 and 260 of the Civil Code, the Congolese State remains responsible on the grounds that the defendants, all being soldiers, are its agents. Indeed, these are soldiers working full time for and on its behalf.”³⁵⁷ The Tribunal ordered the State, as principal, to pay damages to each plaintiff. However, it did not order the defendants to pay any damages.³⁵⁸ On appeal, however, the Military Court found both the State and the perpetrators responsible in solidum.³⁵⁹

354 MC of Katanga, *Affaire Ankoru*, op.cit. and ACIDH, op.cit., p. 63.

355 Ibid., p. 63.

356 TMG de Kindu, *Affaire Kalonga*, 26 October 2005, RP 011/05, p. 7.

357 TMG de Mbandaka, *Affaire Mutins de Mbandaka*, p. 41.

358 Ibid., p. 44.

359 MC of Equateur, *Affaire Mutins de Mbandaka*, op.cit., p. 21.

As mentioned under Section 2.1.2. above, in *Songo Mboyo*, the lawyer for Government of the DRC contested the claims against it stating that its civil responsibility is conditioned on that of a superior officer, who at the time was not brought before the Tribunal, citing Article 28 of the Rome Statute, rather inappropriately.³⁶⁰ The Tribunal considered the argument as a delaying tactic and declared that the provision of the Rome Statute cited does not support the Government's argument.³⁶¹ Accordingly, the Tribunal ordered the Congolese State in its capacity as principal, to pay damages to each plaintiff or civil party. It failed, however, to order the perpetrators to pay damages.³⁶²

On appeal, counsel for the civil parties asked for the defendants to be ordered to pay damages in *solidum* with the Government of the DRC;³⁶³ while the Government additionally requested the dismissal of the lower court judgment relating to damages "insofar as it orders the Democratic Republic of Congo alone to payment thereof."³⁶⁴

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The Military court qualified the lower court judgment and held the perpetrators and the State jointly and severally responsible for damages. In establishing the Government's responsibility, the court provided an interesting reasoning, citing both precedents from Congolese Military Courts and the literature on the subject. It held that "A civil action resulting from an offence may also be directed against persons responsible under Article 260 of the Congolese Civil Code Book III"³⁶⁵ and went to state that lack of oversight vis-à-vis the public service can incur civil responsibility even without there being a fault on the part of the agents.

*"This responsibility flows from the presumption of fault on the part of the administration or the State in the selection and supervision of its agents. To establish such fault, it is not necessary that the agents be at fault, it is sufficient to show a general poor administration of public service on the whole, establish its poor organisation or defective functioning; the latter notions being themselves objectively assessed by reference to what can be expected a modern public service, in its normal operation.."*³⁶⁶

It emphasises the responsibility of the State for the acts of its agents saying "As the beneficiary of activities undertaken by its agents on its behalf, , it is only logical and in accord with the principle of basic fairness that the public administration is required to compensate the damage resulting from the service from which it benefits as a principal."³⁶⁷ The Court further notes that, "in accordance with the agent-principal theory , when a state organ acts, it is the State itself that acts and therefore when an agent commits a fault in the exercise of its duties, this fault engages the whole State."³⁶⁸

³⁶⁰ TMG of Mbandaka, *Affaire Songo Mboyo*, op.cit, p. 5.

³⁶¹ Ibid., p. 6.

³⁶² Ibid., p. 38.

³⁶³ MC of Equateur, *Affaire Songo Mboyo*, op.cit., p. 13.

³⁶⁴ Ibid., pp. 13-14.

³⁶⁵ Ibid., p. 42.

³⁶⁶ Ibid., p. 43. The judges refer to a ruling by the Military High Court, *Haute Cour militaire*, 5 octobre 2004.

³⁶⁷ Ibid., p. 43. The judgement cites KABANGE NTABALA, 'Responsabilité de l'Administration Publique des services publics décentralisés du fait des actes de leurs préposés ou organes' in RJZ, Jan-Août 1976, N° 142, p.16

³⁶⁸ Ibid, citing KABANGE NTABALA, p. 158.

Recalling the responsibilities of the State to ensure the safety of its citizens and the special role of the military, the Court observes that

“... the safety of the population and of their property falls within the prerogative of the State as a public authority and it must continually attend to it [...] The Court finally notes that the soldiers in exercising their duties must be considered as an organ of the State ... whose fundamental mission is to ensure the safety of persons and their property [...] It was held that the responsibility of the State is incurred in the case of the murder of a citizen as in all other cases of aggression, attack to persons and property in which not only the soldiers but also the States is implicated for having failed in its mission to ensure the safety of individuals”³⁶⁹.

Finally, applying the above analysis to the facts of the case, it held:

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“The Court found that the soldiers of the Armed Forces of the Democratic Republic of Congo based in Songo Mboyo had, due to the breakdown of the 9th Battalion to which they belonged, failed in their primary duty to ensure the safety of the population and of its property; As far as the Court is concerned, the responsibility of the State is engaged and the action of the civil parties is rightly directed against it; Accordingly, the Military Court holds the defendants [...] in solidum with the Democratic Republic of Congo, civilly responsible”³⁷⁰.

In Bongi, the MTG of Ituri first established the individual responsibility of defendants.³⁷¹ It then held, after reviewing the conditions for application of Article 260 paragraph 3, that the principal can be held responsible even if it had given an order to its agents not to commit certain acts and the agents had acted in defiance of the order. The Tribunal held:

“The case-law provides that it is sufficient that the crime was committed by the agent in the course of his functions, even if he disregarded the order of the principal (Trib. District Haut LOMAMI, 20 May 1948, RCJB, 1949, p. 67) which, in this case, is the general order known to all the FARDC soldiers that persons who do not directly participate in hostilities (civilians, prisoners of war, etc.) should not be killed”³⁷².

Having declared that the four conditions under Article 260 of the Civil Code are fulfilled, though it cites only three, the Tribunal held the DRC “fully responsible” as a principal and ordered it to pay damages in solidum with the defendants. However, judgement provides few details on the elements that permitted the Tribunal to establish responsibility and some of the facts cited to establish murder and the defendants’ affiliation with army seem irrelevant.

On appeal, the Military Court confirmed the judgement of the lower court providing a

³⁶⁹ Ibid., p. 43-44. Referring to the decision of Haute Cour militaire, 5 octobre 2004, p. 175

³⁷⁰ Ibid., pp. 43-44.

³⁷¹ TMG de l’Ituri, Affaire Bongi, op.cit., p. 16.

³⁷² Ibid., p. 17.

reasoning similar to that of the Songo Mboyo court and relying on “the presumption of fault on the part of the administration or the State in the selection and supervision of its agents.”³⁷³ The court also provides the same analysis as in the Songo Mboyo judgement concerning public service and the role of the State building on relevant literature and case law.³⁷⁴

The Court also stated twice that “abuse of duties [on the part of the agent] is not an obstacle to the responsibility of principal”³⁷⁵. However, it is mainly the ‘failure’ of the Congolese State “in its mission to ensure the safety of individuals”³⁷⁶ that served as the basis for holding the Government civilly responsible for “the killing of five students of Tchekele by the soldiers of the third brigade on the order of the defendant BMB” and for the attacks against property.³⁷⁷

A judgement similar to that of Bongji was delivered by the MTG of Ituri in Bavi, referring to the same judgment.³⁷⁸ The judgement was confirmed on appeal by the Military Court of the Eastern Province.³⁷⁹

The Military Court of Katanga similarly ordered the Congolese State to pay damages to the victims in *solidum* with the officers responsible for the death of prisoners of Mitwaba. Relying on on Article 260 of the Civil Code, the Court held:

“The defendants were actually agents of the Congolese State by virtue of the employment contract that ties them; That the defendants acted in the exercising of the duties assigned to them by the State; (...) That they also acted in these different capacities against the 95 prisoners; That the defendants acted for and on behalf of the State which employed them”³⁸⁰.

It must be noted that the Court gives the most attention to establishing the agent-principal relationship. The government, on the other hand, had attempted to challenge its civil responsibility on the grounds that it could not answer for “the acts of the defendants who abused their power.”³⁸¹ The Court, obviously, did not allow this argument but it did not expressly address it in its ruling.

In *Mutins de Bunia*, the MTG of Ituri, after establishing the civil responsibility of the defendants on the basis of Article 258 of the Civil Code,³⁸² it examined the four conditions referred to earlier relating to agent-principal relationship under Article 260 to decide whether or not

373 MC Eastern Province, *Affaire Bongji*, op.cit., p. 27

374 Ibid., p. 28. The Court cites N. KABANGE, “Responsabilité de l’administration publique des services publics décentralisés du fait des actes de leurs préposés ou organes”, *Revue juridique du Zaïre*, janvier - août 1976 n^o 1 et 2 page 16; KALONGO, *Responsabilité civile et socialisation des risques en droit Zaïrois*, op.cit., pp. 147, 158 and 163.

375 Ibid., p. 28, §§ 6 et 8.

376 Ibid., p. 29.

377 Ibid.

378 TMG de l’Ituri, *Affaire Bavi*, op.cit., p. 47.

379 MC of the Eastern Province, *Affaire Bavi*, op.cit., pp. 34-35.

380 MC of Katanga, *Affaire Mitwaba*, op.cit., p. 10.

381 Ibid., p. 10.

382 TMG de l’Ituri, *Affaire Mutins de Bunia*, op.cit., p. 27.

the State should also be held responsible.³⁸³ As was the case with several of the judgments discussed above, the Tribunal relied on a “presumptions of fault” linked to the government’s role in the “selection and supervision” of its agents in holding the Government responsible for damages in solidum with the perpetrators.³⁸⁴ Accordingly, it held:

*“That in this case, the State should have, at least, intervened in time to prevent the defendants, indeed, its agents, from committing their crimes; That in view of the foregoing, the civil responsibility of the principal, namely the Democratic Republic of Congo, through its army (the FARDC), is fully assumed.”*³⁸⁵

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Finally, although it did not involve international crimes, the decision delivered by the Military Court of Katanga in the high profile case involving the murder of Espérance Kabila, President Joseph Kabila aunt, deserves mentioning. The Court ordered the Government of the DRC to pay 36 million dollars in damages in solidum with the perpetrator, who was an army Colonel, applying the same presumption of fault analysis.³⁸⁶ The Court also observed that “the safety of individuals is the purpose of the organisation of societies and that the State should continually attend to it.”³⁸⁷

In conclusion, a number observation can be drawn from the cases discussed above in relation to the civil responsibility of the state under Congolese law. To begin with, the courts have rightly sought to establish the responsibility of the individual responsibility of the perpetrator before moving to examine the responsibility of the State under Article 260. Such examination should include verifying carefully whether the facts of the case the conditions set out under the said article.

Secondly, many of the judgements recall the role the State in the society, namely, ensuring the safety and well being of its citizens and to ensure the safety of its citizens, and guaranteeing the proper functioning of public service by supervising the conduct of its agents. In doing you, the judges have sought to ground their legal reasoning on the Congolese jurisprudence and relevant literature.

³⁸³ Ibid., pp. 27-28.

³⁸⁴ Ibid., p. 37.

³⁸⁵ Ibid., p. 28.

³⁸⁶ MC of Katanga, 3 August 2005, RP 05/2005, p. 20.

³⁸⁷ Ibid., p. 20.

Some of the decisions reviewed have considered it relevant to examine whether not the state had attempted to intervene in time to prevent the wrongful acts of their agents. At same time, however, the courts have held that it is not necessary to establish a failure in the above respects in order to establish the responsibility of the State and that a presumption of fault on the part of the state can be inferred from the criminal conducts of its agents.

Finally, some of judgements have developed relatively novel perspectives in the jurisprudence by extending the responsibility of the State to acts committed by armed groups affiliated or backed by the government. In conclusion, it is regrettable that the willingness of the Congolese courts to award compensation to victims of serious crimes is not met by a similar commitment on the part of the government, which has shown considerable reluctance to pay compensation in execution of court orders.

CONCLUSION AND GENERAL RECOMMENDATIONS

The fight against impunity requires an active engagement on the part of states at the national level. International justice, as conceived under the Rome Statute, can only play a complementary role in that it is put to work only where the states concerned are unwilling or unable to investigate and prosecute international crimes. As shown in this study, the Congolese courts had attempted to take up the challenges of complementarity and increased the prospects for the domestic prosecution of international crimes by applying the Rome Statute of the International Criminal Court directly. In the above respects, the direct application of the Rome Statute has, to some extent, helped to fill in the gaps and inaccuracies created by the failure of the DRC to enact implementation legislation.

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However, the above positive notes should not obscure some of the deficiencies identified through out this study. Admittedly, there are chronic structural challenges facing the fight against impunity in the DRC that can't be met through a handful of prosecutions and to which some of the deficiencies can be attributed. Focusing on the more specific issue of the quality of the judgements reviewed in this study, however, the main problem, in ASF's view, concerns their lack of adequate legal reasoning and analysis. Although, Article 21 of the Constitution requires that *"all judgments shall be written and reasoned,"* judges often fail to systematically examine the constituent elements of the crimes under consideration and to identify the evidence used to support their conclusions. The impact of these limitations on the quality and fairness of the judgements and their potential to undermine the preventive and educational value of the process can not be over emphasised.

The enactment of the proposed implementation legislation is, therefore, essential to address the above and related problems and satisfy the obligations of the DRC under the Rome Statute. The legislation is an indispensable tool to give effect to the Statute and the principle of complementarity and can contribute to the emergence of a coherent system for the prosecution of war crimes, crimes against humanity and genocide.

The said law would have the following specific advantages and benefits.

- The harmonisation of the provisions of Congolese criminal law and procedure on the model of the relevant provisions of the Rome Statute and related instruments. This would also help resolve some of the confusion that exists under Congolese law concerning certain international criminal law concepts. For example, Article 165 of the Military Penal Code confuses crimes against humanity and war crimes by defining the former as *"serious violations of international humanitarian law committed against any civilian population before or during the war."* It may also be noted that the offence of enlistment and conscription or use of children under the age of 15 in hostilities are not specifically provided for by domestic law. In the only case before the Congolese courts involving the above offence, the defendant was convicted under Congolese law

for abduction by deception and unlawful confinement of a person.³⁸⁸ Finally when it comes to questioning the responsibility of a superior, Congolese law, unlike the Rome Statute, provides that the Head of Staff will be convicted of war crimes on condition that a subordinate was found responsible and can only be convicted as a co-perpetrator or accomplice and not as a main perpetrator.

- The new legislation would transfer jurisdiction to try international crimes to courts of common law and thereby ensure compliance with international legal instruments relating to human rights and fair trial guarantees and with Article 156 of the 2006 Congolese Constitution limiting the jurisdiction of the Military Courts to members of the army and the police. Under the present system military commanders at different levels interfere in the functioning of military justice either on their own initiative or under the influence of political authorities affects. These often put considerable pressure on the lay judges who sit in judgment but do not have the necessary qualifications in law. Moreover, the rules of procedure before the military courts emphasise speed and exemplarity, which do not always guarantee respect for due process and fair trial rights of the accused.
- The establishment of a coherent system of protection for victims of international crimes, which may include anonymity, confidentiality of communications, relocation and procedural facilities such waiver of court fees, simplification of procedures for the execution of judgements, and prevent the transfer of assets or the insolvency of the defendant prior to judgment.

It should, however, be noted that the adoption of this essential and long awaited legislation is unlikely to resolve all the problems related to the punishment of international crimes in the DRC. The most significant problems remain lack of political will and the limited capacity of the judicial actors to adjudicate complex crimes spanning more than two decades and committed over a vast territory by perpetrators belonging to numerous armed groups. The fact that some of the perpetrators have joined the state machinery only adds to the complexity of the challenge

The above observation is supported by the facts on the ground. The very limited number of new criminal proceedings crimes and the number of cases that have been closed, without producing convictions for international crimes, between 2007-2008 bear witness to the influence of politics and the sensitivity of such pursuits. Victims are placed under heavy pressure to withdraw their complaints where as many case of executive interference with judicial independence, influence peddling, escape of convicted persons from prison, as well as, refusal to prosecute high ranking officers or treating such officers too leniently have been observed. For example, in “Mitwaba”, a Major accused of imprisoning 95 people in inhumane conditions in three small cells while depriving them of food, was merely convicted of “failure to assist persons in danger” and sentenced to 15 months in prison.

³⁸⁸ TMG de Bukavu, *Affaire Biyoyo*, 17 March 2006 and confirmation on appeal by the Military Court on 12 January 2007.

Additionally, if Congolese judges and prosecutors, whether civilian or military, were to play a prominent role in the prosecution of international crimes committed in the DRC, few amongst them have the level of training required. The same applies to inspectors and judicial police officers when it comes to investigative techniques. It is, therefore, necessary to provide training to judicial stakeholders who would be required to master complex concepts and procedures that are less known in the national legal system. Beyond the training of judges, the judicial sector should also be provided with the financial, human and logistical resources so that it can more effectively carry out its functions. In this regard, the budget allocated to the Congolese legal system is, unfortunately, inadequate to meet the challenges. Accordingly, in 2007 only 0.75% of public expenditure was allocated to the functioning of the judiciary³⁸⁹ and the projected budget for justice in 2009 amounts to 0.6% of the total budget. Furthermore, the total number of judicial personnel is clearly insufficient to cover the whole range of crimes and territory, which has a negative impact on the handling of court cases.

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While conscious of the fact that the struggle against impunity is a process and can not be perfected overnight, *Avocats Sans Frontières* considers it important to put forth the recommendation below, parallel to the suggestions and observation made on the application of the Rome Statute.

³⁸⁹ This budget represents a slight increase compared to 0.6% of the budget in 2005 and 2006. These figures were collected by the “*Report by an independent expert on the human rights situation in the Democratic Republic of Congo*”, A/HRC/7/25, 29 February 2008, §27. As an indication in general, the Justice budget in most countries ranges between 2 and 6 %.

Recommendations

To the national government and parliamentarians:

- Put the Draft Bill on the Implementation of the Rome Statute on the agenda of the Parliament and vote the legislation into law at the next parliamentary session. This is vital for the coherent and effective application of the principle of complementarity.
- Allocate appropriate budget to the judicial system so that judicial actors have the necessary resources to effectively prosecute international crimes.
- Appoint new civilian and military judges for courts in the interior of the country, which have the most need. The appointment of new professionals on the basis of a balanced and fair geographical distribution can help address the delays and irregularities currently observed in the conduct of proceedings.

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To the international community:

- Support the DRC by encouraging it to adopt, as quickly as possible, the implementation legislation, transfer the jurisdiction over international crimes to civilian courts, allocate adequate resources to the judiciary and provide judges with the necessary training.
- To provide assistance to MONUC in the realisation of its work aimed at producing an inventory of the massive human rights violations, including war crimes and crimes against humanity, committed between 1993 and 2003.

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ANNEX 1
PRESENTATION OF CASES STUDIED (IN ALPHABETICAL ORDER)

Case of ANKORO

Facts:

Between 10 and 22 November 2002, the soldiers of the 95th brigade of the FARDC launched an attack against the civilian population of Ankoro; killing more than 60 people, setting fire to and destroying more than 4000 homes, and pillaging more than 170 houses and public buildings.

Jurisdiction and the parties

- Military Court of Katanga
- Public Prosecutor and 55 Civil Parties against 27 defendants (the main accused: Lieutenant Colonel Emile TWABANGU)

Procedure:

- **16 December 2002:** establishment of a court of enquiry headed by the Ministers of Interior, human Rights and Defence. At the end of the inquiry, 23 soldiers were arrested and referred to the Public Prosecutor's office near Lubumbashi.
- **20 December 2004:** Judgement, handing down 6 prison sentences: 20 months in prison for pillaging, 20 months in prison for murder and 2 defendants sentenced to 18 months each for possession of stolen goods. As all prisoners had already spent more than two years in prison awaiting trial, they were all released after the verdict. The Court also pronounced 13 acquittals.
- Amount of compensation awarded: 5.000\$ per death, 2.000\$ per person with an amputated limb, 50\$ per person slightly injured, 100\$ per house set on fire.

Case of BIYOYO

Facts:

Jean-Pierre Karhanga BIYOYO is the founder of the rebel movement called FSP (Front social pour le Progrès), a player in the destabilisation of the province of South Kivu. The 5 soldiers arrested were suspected of: desertion from the ranks of the national army; organising a rebel movement; recruitment of members and combatants in Uvira in two foreign countries (Rwanda and Burundi); abduction, arbitrary arrests or detention of minors, recruitment of child soldiers; and enlisting into foreign armies (for all defendants). All these acts were said to have occurred between June 2004 and July 2005.

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Jurisdiction and the parties

- 1st instance: Military Tribunal of the Garrison of Bukavu and on Appeal: Military Court of Bukavu
- Public Prosecutor against 6 defendants (5 soldiers and 1 teacher). No civil parties

Procedure:

- **17 March 2006:** Conviction of six defendants to sentences ranging from death penalty, for BIYOYO, to 5 years penal servitude for three other defendants and to 2 years penal servitude for the only civilian defendant.
- **12 January 2007:** judgment of the Military Court of Bukavu confirming the decision of the first instance.
- After being captured, Biyoyo escaped and took refuge in Rwanda before being recaptured in October 2005. He was able to escape a second time on 3 June 2006.

Case of BLAISE BONGI

Facts:

Blaise Bongi Massaba, Captain and Commander of a brigade within the 4th Brigade integrated in FARDC is accused of having pillaged the property of the civilian population (a motorcycle, a motor pump, two solar panels, a radio and two speakers) of the village of Tshekele in Ituri, during clashes between the FARDC and the FRPI militias on 20 October 2005. 5 people, all students, had been taken away to transport the spoils of pillaging then executed in the village of Bussinga.

Jurisdiction and the parties

- 1st instance: MTG of Bunia and Appeal: Military Court of Kisangani
- Public prosecutor and 4 civil parties against Captain Bongi.

Procedure:

- **24 March 2006:** Sentence of life imprisonment for war crimes. And order *in solidum* with the Congolese State to pay 75.000\$ for each victim.
- **04 November 2006:** Judgment on appeal reduces the sentence of Captain Bongi to 20 years in prison and increases the compensation for damages to up to 265.000\$ to be paid *in solidum* with the Congolese State.
- Captain Bongi escaped from Bunia prison since March 2007
- The compensation award was transmitted to the Command on 7 June 2008. The iterative command was issued on 16 September 2008.

Case of GÉDEON

Facts:

Between October 2003 and 12 May 2006, the day of his surrender, Gédéon controlled part of Katanga. During these years, he commanded a large Mai-Mai group, about 2,000 combatants who were unwilling to integrate into the national army, that destroyed a large area around Mitwaba, his hometown. Investigations by NGOs accused Gédéon and his troops of murdering the wife of the Director of Park Upemba, of having enlisted and used children in his combatant troops, cannibalism, use of firearms, creating rebel movement, pillaging and destroying and as well as mass rape in all the territories under the control of his troops.

Jurisdiction and the parties

- 1st instance: MTG of Kipushi
- Public Prosecutor against 24 defendants: Commander KYUNGU MUTANGA Gédéon, his wife, his elder brother, two of his children, the agents of his bodyguard and others

Procedure:

- On remand since 19 Mai 2006 on the decision of the Chief Prosecutor
- The trial started on 07.08.2007
- On 6 March 2009 Gédéon was sentenced by the MTG to death for «war crimes, crimes against humanity, rebel movement and terrorism»; by the same decision, the Congolese State was ordered to pay compensation to 75 families of victims for having provided financial and armed support to the Mai-Mai militias.

Case of GETY/BAVI

Facts:

In October 2006, a mass grave containing more than thirty bodies of men, women and children was discovered in the hills of Gety and Bavi (60 kms from Bunia). The massacre was attributed to members of the 1st Integrated Brigade of the FARDC. Some victims would have been tortured and raped before being killed and others would have been buried alive. The acts would have taken place between August and September 2006.

Jurisdiction and the parties

- 1st instance: MTG of Bunia et Appeal: Military Court of Kisangani
- Public Prosecutor and 19 civil parties against 15 soldiers of the FARDC (including 4 captains and 4 defendants tried in absentia). Main defendant: Captain Mulesa Mulombo (alias BOZIZE)

Procedure:

- **19 February 2007:** sentencing of 13 of the 15 defendants to life imprisonment for war crimes. The captain who confessed was sentenced to 180 days in prison; whereas the last defendant was acquitted. In total, the damages amount was set to 315.000\$.
- 9 prisoners lodged an appeal immediately after the handing down of the verdict.
- **28 July 2007:** judgment confirming the decision of the 1st instance as regards life imprisonment for the main defendant BOZIZE. The convictions of the other appellants have all been reduced to 15 years and 10 years for extenuating circumstances related to psychological pressure and their collaboration with justice. The total sum of allocation of damages increased from 315.000\$ to 481.000\$.
- Notice to pay from 07 June 2008, followed by a reminder to pay on 16 September 2008
- Captain Mulesa would seem to have appealed for review of the judgment of the Military Court of Kisangani.

Case of KAHWA

Facts:

KAHWA is accused of having created a rebel movement in 2002, the “Party for Unity and Safeguarding of the Integrity of the Congo”, of having unlawfully had in his possession weapons of war, with which he would have committed war crimes and crimes against humanity, particularly during the attack of the town of Zumbe. He was arrested on 09/04/05 by the Congolese authorities and the MONUC.

Jurisdiction and the parties

- 1st instance: MTG of Ituri and on Appeal: Military Court of Kisangani
- Public Prosecutor and 13 civil parties against the defendant KAHWA
- Appeal for annulment: Military High Court (HCM)

Procedure:

- **02 August 2006:** Sentenced to 20 years in prison for all the remands imposed against him and to pay damages amounting to 500.500\$.
- The defendant lodged an appeal and the civil parties lodged a cross-appeal during the appeal hearing.
- **28 July 2007:** Acquittal by the Military Court of Kisangani, on the grounds that the defendant benefited from an amnesty for all the charges except those of war crimes and crimes against humanity. The court of appeal held that the trial judge had been wrongly apprised of the case, thereby annulling the judgment at first instance.
- **Appeal for annulment** initiated by the senior prosecutor of Kisangani, before the Military High Court.
- **9 September 2008:** judgment which annuls the decision of the Military Court of Kisangani and refers the case before the same court with newly constituted judges.
- **1st March 2008:** a warrant was issued against KAHWA by the chief military prosecutor and the military prosecutor of Bunia for crimes against humanity, war crimes, murder, assault and grievous bodily harm in relation to facts different from those for which he was acquitted. As of 2 September 2008, the HMC had confirmed his continued detention.

Case of KALONGA KATAMASI

Facts:

In 2004, in Kimanga, Maniema, the defendants (Mai-Mai militias) abducted 10 women and sexually abused them in the forest. One of the victims was forced to stay for 3 months as a sexual slave of the main defendant.

Jurisdiction and the parties

- MTG of Kindu
- Public Prosecutor and 3 civil parties against Kalonga KATAMISI, ALIMASI (at large) and an unidentified perpetrator

Procedure:

- **26 October 2005:** KALONGA KATAMASI and Alimasi were Sentenced to death and ordered to pay jointly with the Congolese State 20.000\$ in damages to victims for crimes against humanity against.

Case of KILWA

Facts:

On 18 October 2004, more than a hundred people were killed in the mining village of Kilwa during a counter-offensive by the FARDC against the rebel group MRLK who had taken the village a few days earlier but were poorly equipped and poorly organised according to MONUC. It would appear that many of the victims were arbitrarily executed and that the village was pillaged both during the attack and after the flight of many residents. The mining company Anvil Mining would have provided logistical assistance to the FARDC at the time of the attack: vehicles would have been used to transport victims to be executed, pillaged property and corpses. Excavation machinery from the company would also have been used to bury the bodies.

Jurisdiction and the parties:

- 1st instance: Military Court of Katanga in Lubumbashi and on Appeal: Military High Court of Katanga
- 1st instance: Public Prosecutor and 144 civil parties against the defendants Colonel Ilunga, 8 other soldiers, Anvil Mining and 3 of its agents (Pierre Mercier, GM of the Congolese subsidiary, Peter Van Niekerk, former head of security and Cédric?, former head of security)
- Appeal: Public Prosecutor and 1 civil party against Colonel Ilunga and captain Sadiaka.

Procedure:

- **12 December 2006:** commencement of trial. Of the 9 defendant soldiers, 7 appeared, 2 were on the run. 3 former agents of Anvil Mining absent most of the time were represented by their lawyers.
- **28 June 2007:** Judgment of the Military Court which sentenced Colonel Ilunga Ademar and Captain Sadiaka to life imprisonment for murder. All the war crimes charges were abandoned. The second lieutenant Kasongo Kayembe was sentenced to 5 years penal servitude mainly for arbitrary arrest, the second lieutenant Ilunga Kashila to one year penal servitude with a fine of 30,000 francs. The other defendants were acquitted.
- The Public Prosecutor, the 2 sentenced to life as well as the claimant seeking damages filed an appeal against the decision. The appeal process began on 7 December 2007.
- **30 October 2008:** the Military High Court confirmed the sentences against Colonel Ademar and Captain Sadiaka, but reduced sanctions by granting extenuating circumstances, so the sentences were reduced from penal servitude for life to 5 years in prison. As for the civil parties, the appeals of 4 of them were declared inadmissible, while the 5th request for appeal was declared admissible but unfounded.

Case of MILOBS

Facts:

Two military observers of the MONUC (a Malawian and a Jordanian) were murdered in May 2003 in Mungwalu (Bunia). According to the investigation carried out, this double murder would have been committed due to the hostility of members of the FNI (Front Nationaliste et Intégriste) towards MONUC, whom they suspected to be on the side of the UPC.

Jurisdiction and the parties

- 1st instance: MTG of Ituri and on Appeal: Military Court of Kisangani
- Prosecution against seven militia members of the FNI, including one escaped from the central prison of Bunia (Kwisha)

Procedure:

- **19 February 2007:** Decision to sentence 4 militias (including one *in absentia*) to life imprisonment, one to 20 years and another to 10 years in prison. The last defendant was acquitted.
- All the prisoners present appealed the decision.
- The Military Court of Kisangani sitting in an open hearing in Bunia rejected the appeal by 3 of the defendants for failing to meet the time limit for filing an appeal.
- The appeals judgment upheld the judgment of the lower court.
- **12 November 2007:** the MTG of Bunia confirms on appeal the sentence of life imprisonment which had been delivered *in absentia* against AGENONGAA Ufoyuru alias Kwisha; the latter had escaped on 12/01/07 and captured on 06/10/07.

Case of MITWABA

Facts:

As part of counter-attacks between the FARDC and the Mai-Mai in March-April 2005, soldiers of the 63rd FARDC brigade have imprisoned and tortured 95 alleged Mai-Mai civilians. 17 of them did not survive.

Jurisdiction and the parties

- Military Court of Lubumbashi
- The Public Prosecutor and 14 civil parties against 4 FARDC soldiers including Major Ekembe and Lieutenant Baseme (in absentia).

Procedure:

- The trial commenced from 21 March 2007. The four defendants were initially charged with violations of the rights guaranteed to individuals, whereas the civil parties demanded through their lawyers the requalification of the acts as war crimes.
- 25 April 2007: Conviction for failure to assist a person in danger and sentenced to 15 months of penal servitude and to payment in *solidum* with the State of 10.000\$ in damages for each victim. It sentenced BASEME, In absentia, to 10 years in prison.

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Case of MUTINS DE BUNIA

Facts:

On the night of Thursday 11 January 2007, several dozens of members of the 1st integrated brigade of the FARDC rebelled, firing automatic weapons and rocket launchers. They demanded payment of their bonus promised by the government for 2006 and valued at 50\$. During the uprising, 7 women were raped, a police officer seriously injured and several shops and houses of the Bankoko Quarter pillaged.

Jurisdiction and the parties

- 1st instance: MTG of Ituri and on Appeal: Military Court of Kisangani
- Public Prosecutor and 54 civil parties against 17 defendants (including 2 in absentia).

Procedure:

- **18 June 2007:** Conviction of all the defendants for “pillaging, dissipation of ammunition of war and violation of orders”. Three of them were sentenced to 20 years in prison and others to 10 years. The State and the soldiers were jointly ordered to pay 98.200\$ in damages to the victims.
- Appeal lodged by the prisoners and by 7 civil parties who considered the amount of damages awarded insufficient. Pending the determination of the case on appeal.
- **23 August 2008:** judgment on appeal which confirmed the convictions at first instance but reduces the sentences between 3 years and 6 years. The damages of civil parties are increased by 50%.

Case of MUTINS DE MBANDAKA

Facts:

On 30 June 2005, the date that was considered as marking the end of the transition, an order was given to the soldiers of the province of Equateur to remain in the barracks. One of them, a second lieutenant belonging to the contingent of the MLC, had refused to obey this order, went out in the night and was found dead early in the morning. His death served as a pretext for his comrades (between 3.000 and 4.000 men) to mutiny and pillage parts of the city between 3 and 5 July. They broke into the weapon store and swarmed the streets, pillaging everything in their path, killing 6 people, raping 46 others and committing other crimes, including torture within a radius of about 10 km, before being stopped by local loyalists and reinforcements sent from Kinshasa.

Jurisdiction and the parties

- 1st instance: MTG of Mbandaka and on Appeal: Military Court of Mbandaka
- 1st instance: The public prosecutor and 163 civil parties against 62 defendants including 2 escapees, 1 deceased, 3 hospitalised persons. Main defendant: Second lieutenant MOHINDO MAMBUSA. On Appeal: Public prosecutor against Appeal lodged by 10 prisoners and 25 civil parties.

Procedure:

- **12 January 2006:** provisional judgment
- **20 June 2006:** Decision on sentencing to penal servitude for life of 9 defendants for crimes against humanity. 1 soldier was sentenced to 20 years of penal servitude and two others to 5 years. 29 defendants were sentenced to between 12 and 24 months. 15 defendants were formally acquitted. The State was ordered jointly with the defendants to pay by way of damages 500 to 15.000 USD to the families of the deceased victims, the victims of rape and pillaging as well as others who have been injured.
- Appeal lodged by 10 defendants and 25 civil parties.
- **15 June 2007:** judgment on appeal which confirms 8 convictions including only 3 for crimes against humanity and acquits the 2 others. As to the claims made by the civil parties, the Court reiterated the damages pronounced at first instance. It also accepted 7 new victims, to whom it awarded damages. Ultimately, the Congolese State is required to pay a total sum of 126.000 \$.
- The judgment was served on the Congolese State through the Governor of the province of Equateur on 19 December 2007. It was followed by notice of a reminder to pay dated 17 March 2008.

Case of SONGO MBOYO

Facts:

On 21 December 2003, soldiers from the 9th battalion FARDC, based in the villages of Songo Mboyo demanded to be paid wages, which they claim were misappropriated by their superiors. They mutinied making the local civilian population the target of attacks. The troops committed a series of mass rapes; including on the wives of some senior officers of the army.

Jurisdiction and the parties

- 1st instance: MTG of Mbandaka and on Appeal: Military Court of Equateur
- 1st instance: the Public Prosecutor and 35 civil parties v. 12 soldiers (including the higher ranked are Lieutenants-colonels Eliwo Ngoy and Bokila Lolemi).
On Appeal: the Public Prosecutor and 43 civil parties against 7 defendants including Colonel Bokila Lolemi

Procedure :

- 07 March 2006: provisional judgment
- 12 April 2006: sentencing of 7 of the 12 defendants to penal servitude for life for crimes against humanity and other military offences. The 5 other defendants were acquitted.
- Appeal lodged by the 7 convicted soldiers, the civil parties, the public prosecutor and the Government.
- 7 June 2006: judgment on appeal confirming the decision of the lower court concerning the 6 defendants and acquitted the last. A total sum of 165.317USD was awarded to the 43 civil parties by way of damages, which sum should be paid jointly by the convicted persons and the Congolese State¹.
- The convicted persons had initiated proceedings to appeal on points of law but for lack of being able to obtain the appointment of a lawyer at the Supreme Court of Justice; the phase of implementation of the decision was triggered.

¹ The judges adopted the following proportion: USD10.000 for the family of a woman who died as a result of the abuse and rape she had suffered, \$5.000 to each of the other rape victims. Families whose houses have been pillaged received between \$200 and \$500 in damages.

ANNEX 2

CONSTITUTIONS OF THE DRC (EXTRACTS)

Constitutional Act of transition (1994)

TITLE VI: TREATIES AND INTERNATIONAL AGREEMENTS

Article 110:

The Government negotiates treaties and international agreements under the authority of the President of the Republic. The President of the Republic ratifies the treaties after approval by the High Council of the Republic – The Transitional Parliament ...

Article 111:

Peace treaties, trade agreements, treaties and agreements relating to international organisations and laws governing international conflict, those which engage public finances, those which amend legal provisions, those relating to the status of persons, involve exchanges trade or addition of territory, may only be ratified or approved by a legislation....

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Article 112:

Treaties and international agreements lawfully ratified or approved have, upon publication, an authority superior to that of laws subject, for each treaty or agreement, to its application by the other party.

Legislative Decree of the DRC 28 May 1997

Article I

This legislative decree remains in force until the adoption of the Constitution by the Constituent Assembly. The organisation and exercise of power belongs to the Head of State.

Article III

The institutions of the Republic are made up of the President of the Republic, the government and the courts and tribunals.

Article V

The President of the Republic exercises legislative power by legislative decrees deliberated in the council of ministers.

He is the Head of the Executive and of the Armed Forces.

He exercises his powers through decrees.

He has the right to coin money and to issue paper currency in the application of the law.

Article VIII

The government pursues the policy of the Nation as defined by the President of the Republic.
It enforces the laws of the Republic and the decrees of the Head of State.
It negotiates international agreements under the authority of the Head of State.
It uses the administration and the Armed Forces.

Article XIII

Existing laws and regulations that are not contrary to the provisions of this constitutional legislative decree remain in force until the time of their repeal.

Article XIV

All constitutional legal provisions and regulations prior to this constitutional legislative decree are repealed.

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Legislative decree 1998

Article III amended:

The institutions of the Republic are:

- The President of the Republic
- The Constituent and Legislative Assembly

Article V:

[The President of the Republic] exercises regulator power through decree.
He shall ensure the promulgation of the laws of the Democratic Republic of Congo voted by the Constituent and Legislative Assembly.

Article VIII

The Constituent and Legislative Assembly is particularly responsible for: [...] The exercising legislative power during the transition period.

Transitional constitution of the Democratic Republic of Congo (2003)

Article 191:

The President of the Republic shall ratify or approve treaties and international agreements.
The Government shall conclude the international agreements not subject to ratification after deliberation by the Council of Ministers. It shall inform the National Assembly.

Article 192:

Peace treaties, trade agreements, treaties and agreements relating to international organisations and rules of international conflict, those which engaged public finances, those which amend legal provisions, those relating to the status of persons, those involving exchanges and addition of territory may only be ratified or approved by legislation.
No cessation, exchange or addition of territory shall be valid without the consent of the populations concerned, consulted by referendum.

Article 193:

The treaties and international agreements lawfully concluded have, upon publication, an authority superior to that of laws, subject, for each treaty or agreement, to its application by the other party.

Article 194:

If the Supreme Court of Justice, consulted by the Government, the National Assembly or the Senate, declares that a treaty or international agreement contains a clause contrary to this Constitution, the ratification or approval may only occur after an amendment to the Constitution.

Constitution of the Democratic Republic of Congo (February 2006)

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Article 213:

The President of the Republic shall negotiate and ratify the treaties and international agreements.

The Government shall conclude the international agreements not subject to ratification after deliberation by the Council of Ministers. It shall inform the National assembly and the Senate.

Article 214:

Peace treaties, trade agreements and treaties and agreements relating to international organisations and the rules of international conflict, those which engage public finances, those which amend legal provisions, those relating to the status of persons, those involving exchange and addition of territory may only be ratified or approved in accordance with the law.

No cessation, exchange or addition of territory shall be valid without the consent of the Congolese people consulted by referendum.

Article 215:

Treaties and international agreements lawfully concluded have, upon publication, a superior authority to that of laws, subject, for each treaty or agreement, to its application by the other party.

Article 216:

If the Constitutional Court consulted by the President of the Republic, the Prime Minister, the President of the National Assembly or the President of the Senate, by a tenth of the members or a tenth of the senators, declare that a treaty or international agreement contains a clause contrary to the Constitution, the ratification or approval may only occur after an amendment to the Constitution.

ANNEXE 3

ROME STATUTE (EXTRACTS)

Article 7

CRIMES AGAINST HUMANITY

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- a) “Attack directed against any civilian population ” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- b) “Extermination” includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are

lawfully present, without grounds permitted under international law;

e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning difference from the above.

Article 8

WAR CRIMES

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, “war crimes” means:

a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

i) Wilful killing;

ii) Torture or inhuman treatment, including biological experiments;

iii) Wilfully causing great suffering, or serious injury to body or health;

iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

- v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - vii) Unlawful deportation or transfer or unlawful confinement;
 - viii) Taking of hostages;
- b) Other serious violations of law and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - iii) Intentionally directing attacks against personnel, installations, materiel, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
 - ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
 - xii) Declaring that no quarter will be given;
 - xiii) Destroying or seizing the enemy's property unless such destruction or seizure be

imperatively demanded by the necessities of war;

xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

xvi) Pillaging a town or place, even when taken by assault;

xvii) Employing poison or poisoned weapons;

xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering of which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by a amendment in accordance with the relevant provisions set forth in articles 121 and 123;

xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;

c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

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

ii) Committing outrages upon person dignity, in particular humiliating and degrading treatment;

- iii) Taking of hostages;
- iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;

d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature;

e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- v) Pillaging a town or place, even when taken by assault;
- vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- ix) Killing or wounding treacherously a combatant adversary;
- x) Declaring that no quarter will be given;
- xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2(c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 30

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MENTAL ELEMENT

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

- a) In relation to conduct, that person means to engage in the conduct;
- b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

Article 31

GROUNDINGS FOR EXCLUDING CRIMINAL RESPONSIBILITY

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

- a) The person suffers from a mental disease of defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of the law;
- b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of the law, unless the person has become voluntarily

intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

i) Made by other persons;

ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

MISTAKE OF FACT OR MISTAKE OF LAW

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

SUPERIOR ORDERS AND PRESCRIPTION OF LAW

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- b) The person did not know that the order was unlawful; and
- c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

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ANNEXE 4

SUMMARY OF RECOMMENDATIONS RELATING TO THE APPLICATION OF THE ROME STATUTE BY THE CONGOLESE COURTS

The table below provides suggests on the specific elements that Congolese judges may need to incorporate in their judgements when dealing with international crimes. In view of the comments made earlier, it appears that the first weakness of the judgments delivered on the basis of the application of the Rome Statute is the lack of clarity in the reasoning of judges. Despite the Constitutional requirement that “*any judgment must be in writing and be reasoned*”, few judges explain clearly the points of relevant law, the evidence which has been considered and the application of legal concepts to the facts of the particular case.

According, ASF emphasizes the fundamental importance for judges to seek to articulate the elements set out below in their judgments, and to adopt an interpretation consistent with the provisions of the Statute of the International Criminal Court.

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Application of the Rome Statute	Ratification	Publication	Self-executing character	Hierarchy of law
	<ul style="list-style-type: none"> Refer to the Statute of the ICC, as adopted in Rome, on 17 July 1998; Refer to the accession of the DRC to the Statute by mentioning the legislative decree no. 003/2002 of 30 March 2002 authorising the ratification, assuming that this is lawful with regard to the constitutional provisions in force at the time of ratification; Cite as a legal basis, the constitutional legislative decrees of 1997 and 1998 and not the Transitional Constitution of 2003 or that of 2006. 	<ul style="list-style-type: none"> Refer to the publication of the Rome Statute in the Official Journal of 5 December 2002; Compare the date of the facts of the case with that of the publication on the Official Journal to determine the applicability of the Statute. 	<ul style="list-style-type: none"> Refer to the self-sufficient character of the Statute, even when acceptance of the treaty in domestic law has been mentioned; Check that each article invoked or each category of article, if the conditions of direct application are fulfilled, i.e. that the article is clear and precise and that its direct application is not explicitly excluded. 	<ul style="list-style-type: none"> Refer to the hierarchy of Congolese laws as defined by the Constitution or by the Congolese case-law in the matter; Directly apply the Rome Statute when there is a conflict between the Congolese legislation and the Statute; Directly apply the crimes included in Articles 6 to 8 of the Statute;

Application of the Rome Statute	General constituent elements	Murder as crime against humanity	Rape as crime against humanity
<p>Crimes against humanity</p> <ul style="list-style-type: none"> • Strictly comply with Article 7(2) of the Statute that states the condition for application or for “furtherance of State or organisational policy to commit such attack”. If they do not have evidence of this policy, the judges may try to identify the elements needed to establish the existence of an organisation, including the methods and means which would allow to be concluded the existence of a form of planning with the view to committing crimes against the population; • If it is too difficult for the prosecution to establish the elements of fact which would allow to qualify the widespread of systematic attack, it is possible to determine whether the crimes were not committed as part of an armed conflict. This being sometimes easier to establish, the prosecution can prosecute the perpetrators for war crimes. • Identify the evidence which proves that the attack was directed against the civilian population; • Check if the evidence enable to establish the fulfilment of the conditions of intent and knowledge, particularly by searching in the written orders, in the testimonies of superiors, subordinates, other combatants or the civilian population, or alternatively, by deducing the attitude or actions of the perpetrators. In this case, it is particularly important that the judges explain in their reasoning clearly and evidence upon which they are based. 	<ul style="list-style-type: none"> • Establish all the constituent elements as stipulated by Article 7 of the Statute and the Elements of Crimes; • Try to establish the identity of the victims, try to certify their deaths (or to infer from the evidence), and to investigate the causes; • Ensure that it is the defendant who caused the death; • Identify the evidence which was used to establish the reasoning. 	<ul style="list-style-type: none"> • Establish all the constituent elements as stipulated by the relevant provisions of the Act of 20 July 2006 on sexual violence and/or by Article 7 of the Statute and the Elements of Crimes if it is a crime against humanity; • Identify the evidence relied upon; give particular attention to the testimony of rape victims, often the only source of evidence in this area, while taking into account the psychological state and the often fragile social status of victims. 	

War Crimes

On armed conflict	On protected persons and property	On the war crime of murder	On the war crime of rape	On the war crime of recruitment of EAFGA
<ul style="list-style-type: none"> Always check and identify the evidence used to determine the existence of an armed conflict (the intensity, degree of organisation of clashes and their duration); Determine the international or internal character of the armed conflict by taking into account the situation prevailing at the time of the acts; Ensure that there is a link between the criminal conduct and the armed conflict without necessarily implying that the offence was committed in the area where the hostilities were taking place; Draw inspiration from the international case-law, and particularly the decisions of the ICJ and the ICC concerning the DRC ; Always ensure that the defendant had knowledge of the existence of an armed conflict and mention the elements which establish this belief. 	<ul style="list-style-type: none"> Systematically check the status of the victims at the material time (civilians, prisoners of war, the wounded, minors, humanitarian personnel or personnel of a peacekeeping mission, etc.) in order to ensure that these persons were protected under the provisions of the Geneva Conventions or customary international humanitarian law; Establish that the defendant was aware of this status or could not ignore it (without having to establish that the perpetrator determined the legal protection enjoyed by the victim or the property attacked; actual knowledge of circumstances establishing protection is sufficient) ; Investigate whether the defendant received training (or at least a refresher) on the rules of the law of war (particularly in a training camp if passed) ; Regarding the property, conduct the same checks, by ensuring that they have not lost their protection because of their use for military purposes by the enemy. 	<ul style="list-style-type: none"> Establish all the constituent elements as stipulated by the relevant provisions of Article 8 of the Statute and the Elements of Crimes (according to international or non-international character of the conflict); Try to establish the identity of the victims, to certify their deaths and to investigate the causes; Ensure that it is the defendant who caused the death (even without intent to kill); Identify the evidence used to establish the reasoning. 	<ul style="list-style-type: none"> constituent elements as stipulated by the relevant provisions of the Act of 20 July 2006 on sexual violence and/or Article 8 of the Statute and the Elements of Crimes (according to the international or non-international character of the conflict) if it is a war crime; Identify the evidence used to establish this reasoning; give particular attention to the testimony of rape victims, often the only source of evidence in this area, while taking into account the psychological state and often fragile social status of victims; Keep in mind that the coercive element of rape may be inherent in certain circumstances, such as armed conflict or a military presence. 	<ul style="list-style-type: none"> Regarding the conscripting or recruitment of child soldiers, refer to the Rome Statute; Check whether the five constituent elements of this crime are met and refer to the evidence used to establish it.

Responsibility of superiors

- Refer to the Rome Statute, which is more comprehensive on the question of superior responsibility;
- When crimes are committed by perpetrators belonging to an organised body (armed forces, militias, public services, political parties, ...), determine to what extent the superiors (or those in positions of authority) have ordered, incited, supported or tolerated criminal conduct;
- Try to reconstruct the whole chain of command in connection with criminal acts. Who issued the order? Who sent it? How? Who knew? Who should have known? Who should have taken action? Who took action (and how) to prevent the crimes?
- If the perpetrators and their superiors are identified and the superior cannot be prosecuted as a principal perpetrator because he himself did not order the crime, establish:
 1. the relationship of subordination: the existence of a superior-subordinate relationship involving effective control over the perpetrator of the crime,
 2. the ability to prevent and punish crimes and the failure to do so: particularly the knowledge that the crime was about to be or had been committed or the deliberate failure to inform),
 3. the fact that the superior failed to take measures to prevent, arrest, punish or denounce the crime;
- When a superior is suspected or prosecuted for his failure to act, not only be satisfied to investigate direct evidence which would establish his “active complicity” but also to investigate the evidence used to conclude that he did everything within his power to prevent crimes, to punish them, or to denounce their commission;
- When it appears that superiors, even at high level, could be responsible, or could hold important information in order to understand the chain of responsibility, summon them and hear them as witnesses and where appropriate, charge them;
- If the public prosecutor does not prosecute the superiors himself against whom there is evidence or suspicion of responsibility, apply Article 219 of the Military Judicial Code to order all acts of useful instruction and/or Article 220 to order additional information to the public prosecutor.

Grounds for excluding criminal responsibility

- Refer to the Rome Statute, which is more comprehensive than Congolese law;
- Check the necessary conditions to establish the existence of a ground for exemption and check if, in this case (on the basis of evidence available to the judge), the defendant may rely on it;
- Never forget that war crimes and crimes against humanity are not barred by statutes of limitations and are not eligible for amnesty..

Extenuating circumstances

- Always weigh the extenuating circumstances that the judges consider to acknowledge against the gravity of the crimes.

civil responsibility of the state

- First establish the individual responsibility of the perpetrators of crimes;
- Review the conditions for applying Article 260, paragraph 3 of the Civil Code:
 1. existence of a relationship of principal and agent,
 2. evidence that the damage was caused by the fault of the agent,
 3. evidence of the appearance of damage in the exercise of the duties to which the agent was employed,
 4. the damage must be caused to a third party;
- Check the application of these conditions to the facts of the case;
- Examine the elements which were used to infer responsibility: proof of a criminal act, proof of affiliation, and proof agent-principal relationship between the perpetrator and the State;
- Recall the State's responsibility to ensure the proper conduct or proper functioning of public services (without requiring proof of wrongdoing and by recalling the doctrine that there may be a presumption of fault linked to State responsibility in the selection and supervision of agents);
- Recall the State's responsibility to ensure the safety of its citizens and the mission to protect the population from its armed forces;
- Recall that when an agent commits an offence in exercising his duties, the State should bear responsibility for damage caused because of its obligation to guarantee the safety of individuals against the harmful acts to those who carry out activity on its name and on its behalf;
- Check whether the State has at least tried to intervene in time to prevent its agents from committing their crimes;
- Consider armed groups supported by the State (equipment of arms and munitions, support by/for lawful forces) as "agents" engaging the State's responsibility; specify the evidence used to establish the link between the armed groups and the State;
- Keep in mind that the responsibility of the State does not depend on the establishment of responsibility of the supervisor;
- Consider that the State may be ordered *in solidum* with the perpetrators to pay damages to the civil parties..

Avocats Sans Frontières asbl
Rue de Namur 72
1000 Brussels
Belgium

Phone : +32 2 223 36 54
Fax : +32 2 223 36 14

info@asf.be

Avocats Sans Frontières à Kinshasa
1, Place du Marché Imm. N.B.K.
Kinshasa/Gombe
République démocratique du Congo

rdc-cmkin@asf.be

www.asf.be

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Editor

Francesca Boniotti, Rue de Namur 72 1000
Brussels

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Lawyers at a hearing in DRC

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