

Between rhetoric and action

The politics, processes and practice of
the ICC's work in the DRC

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Monograph 164
July 2009

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Acknowledgements

The author wishes to thank most sincerely various individuals in the Democratic Republic of the Congo and elsewhere who assisted in various ways to make this study a reality. These include Robert Illunga Numbi (national president), Merry Shembo and Huguette Lepele, all of Les Amis de Nelson Mandela pour les Droits de l'Homme (ANMDH); Maître Serge Makaya, (University of Kinshasa); Professor Emmanuel-Janvier Luzolo, University of Kinshasa, legal adviser in the presidency and now the Minister of Justice of the DRC; Nancy Lumanji (MONUC-Kinshasa); Gillaume Mbwebe, national coordinator of Idasa in the DRC; Phelly Diengo of Association Africaine de Droits de L'Homme (ASADHO); Christian Hemedi Bayolo, DRC national coordinator, NGO Coalition on the ICC (CICC); Paul Madidi, ICC Kinshasa office; Georges Kapiamba, (vice president, ASADHO); Missak Kasongo, Securitas Congo; Sabin Banza of Ligue des Electeurs; and Clement Phebe, Wits University, Johannesburg. My sincere thanks go to Dr Joseph Yav Katshung, coordinator of the UNESCO Chair for Human Rights, Democracy, Good Governance, Conflict Resolution and Peace at the University of Lubumbashi, DRC, and Lynn Gentile, formerly of the International Criminal Court, who formally peer-reviewed the monograph. Thanks to my colleagues at the International Crime in Africa Programme, Anton du Plessis and Antoinette Louw, for their useful comments, edits and insights.

DISCLAIMER

In representing and commenting on views about the work of the ICC in the DRC, the author has made an attempt to be critically constructive in discussing various aspects of that important relationship. The views expressed in this monograph in no way bind the individuals or institutions listed above; neither does it necessarily reflect the views of Institute for Security Studies.

Abbreviations and acronyms

ACIDH	Action contre l'impunité pour les droits humains
AFDLC	Alliance des forces démocratiques pour la libération du Congo (Alliance of Democratic Forces for the Liberation of Congo)
ARC	L'Association pour la renaissance au Congo
ASADHO	L'Association africaine des droits de l'homme
ASF	Avocats sans frontières
ASIL	American Society of International Law
ASP	Assembly of States Parties (of the ICC)
CERDH	Centre d'Etudes et de Recherche en Droits de l'Homme, Democratie et Justice Transitionnelle
CICC	NGO Coalition for the International Criminal Court
CIHR	Congolese Initiative for Justice and Human Rights
CNDP	Congrès National Pour la Défense du Peuple (National Congress for the People's Defence)
CVR	Commission Vérité et Réconciliation
DRC	Democratic Republic of the Congo
EU	European Union
FARDC	Forces Armées de la République Démocratique du Congo (Armed Forces of the Democratic Republic of the Congo)
FDLR	Forces Démocratiques de Libération du Rwanda (Democratic Liberation Forces of Rwanda)
FIDH	Fédération International de Droits de l'Homme (International Federation of Human Rights)
FPLC	Forces Patriotiques pour la Libération du Congo (Patriotic Forces for the Liberation of Congo)
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice

IWPR	Institute for War and Peace Reporting
LdE	Ligue des Électeurs
MLC	Mouvement de libération du Congo (Movement for the Liberation of Congo)
MLTC	Mouvement pour la Libération Totale du Congo
MONUC	Mission de l'Organisation des Nations Unies en République Démocratique du Congo (United Nations Organisation Mission in the Democratic Republic of the Congo)
MRC	Mouvement Révolutionnaire Congolais (Revolutionary Movement of Congo)
NDPP	National Director of Prosecutions
OTP	Office of the Prosecutor
PGR	Procureur Général de la République
RCD	Rassemblement congolais pour la démocratie
RCN	Réseau de Citoyens/Citizens' Network
TRC	Truth and Reconciliation Commission
UN	United Nations
UNSC	United Nations Security Council
UPC	Union des patriotes congolais (Union of Congolese Patriots)

Executive summary

This monograph attempts to respond to some of the questions raised in respect of the work of the International Criminal Court (ICC) in the Democratic Republic of the Congo (DRC). In this regard, it has three main objectives. First, by focusing on a State Party where the ICC's Office of the Prosecutor is currently conducting investigations, it considers the cooperation relationship between the ICC and the DRC. In this regard, it appears that, irrespective of the lack of legislation implementing the Rome Statute in that country, the DRC continues to cooperate with the ICC in its investigations. In view of erroneous positions taken by some states and commentators that only those countries where crimes have been perpetrated, in particular those in respect of which investigations are ongoing, have immediate obligations in relation to the ICC's work, the monograph seeks to outline and illustrate broader obligations for member states in general. It demonstrates that the work of the ICC in places like the DRC engages the duties of 'non-situation states' in various ways. Second, by examining the practice of the Court since the situation was referred to it, the monograph considers the role of politics – domestic or otherwise – in the work of the ICC. Third, it examines the perceptions around the work of the ICC in various sectors of Congolese society, including government, victims, civil society and the general public. By extension, it addresses some of the questions that the work of the ICC in Africa has raised, including the allegation that the ICC is 'targeting' African countries and that somehow these countries are unwilling participants in the process.

By identifying and discussing the various factors that informed the referral of the situation by the DRC, the monograph seeks to discredit the single-factor explanations of the circumstances under which the ICC became engaged in the DRC. In this regard it explores various factors that influenced those events and continue to have a bearing on current perceptions and operations of the

Court. These influences include the role of victims and non-governmental organisations (NGOs); international pressure, in particular from the United Nations (UN) and European Union (EU); the transition from conflict and the new government's will to rebuild the country governed by rule of law and respect for human rights; the absence of reliable and ready domestic mechanisms; and the continuing conflict in the east of the country.

The study makes a set of findings, conclusions and recommendations. On the issue of cooperation between the DRC and the Court, the monograph concludes that the ICC cannot succeed in its work without effective and reliable cooperation and assistance from member states, in particular states where investigations are ongoing. Such a relationship has to be given effect by some instrument – usually implementing legislation. In the absence of this, the DRC has signed the Agreement on Judicial Cooperation in terms of which the relationship between the Court and the country is regulated. In outlining the relevant provisions of the Agreement on Judicial Cooperation, which stipulates in detail the framework for cooperation and the granting of assistance to the Court, it became apparent that for the DRC to meet these obligations, a well-resourced Office of the Attorney General and Director of Prosecutions, both equipped with the necessary capacities, is essential. The monograph notes that these elements are for the most part lacking and that, despite the existence of political will to assist the Court, complaints have emerged on the ground that the 'ICC is too demanding'. In view of ill-equipped law enforcement agencies, the various forms of assistance – for the most part of a technical character – impose heavy burdens on existing structures.

The study finds that perceptions of the ICC in different sectors of Congolese society are varied. It also notes that these perceptions have been influenced by several factors, which have varied with the prevailing political circumstances.

With respect to government, the study finds that the government views the role of the ICC in prosecuting serious crimes as an important one, not only in fighting impunity and doing justice for victims but also in sending a message to those who are still actively involved in armed conflict and various forms of violence that they have to choose the path of peace. It is noted that having received numerous complaints from victims regarding crimes committed in the DRC, the Office of the Prosecutor worked to persuade the government that a referral would be appropriate. While perhaps assigning too much responsibility to the ICC, the government sees its work as crucial in the fight against impunity.

The failure of the Truth and Reconciliation Commission (Commission Vérité et Réconciliation) to achieve anything significant in the two years it was in existence, and weaknesses in the criminal justice system, including lack of independence in the judiciary, informed the decision to involve the ICC.

The government has responded to insinuations that it is working with the ICC to target political enemies by emphasising that the Court is an independent institution and that the government has no influence whatsoever on the Court and its various organs. The monograph found that allegations of impropriety seem unjustified in the absence of evidence pointing to any improper dealings between the Court and the government. However, the unconditional political support afforded by the government to the Court and its Office of the Prosecutor in particular seems unmatched by actual capacities on the ground to execute various requests for assistance and cooperation.

The monograph finds that, as the ICC's work has evolved, the government has found itself in the unenviable position where its pursuit of peace in the Kivus ran into its commitments to the ICC and the fight against impunity generally. This has had the effect that the government's options in the ongoing peace initiatives have been constrained. The more attractive, albeit unlawful option of amnesty that would extend to serious crimes committed by rebels has not been available to the government. The government has had to limit amnesty declared as part of the recent Goma Agreement with several armed groups to the yet undefined notions of 'acts of war and rebellion'. While the position in international law on amnesty relating to international crimes is clear, the fact that the ICC is on the ground in the country and may soon be turning its investigative efforts to the Kivus adds to the emphasis. This has left the government frustrated.

The study finds that civil society has been a strong and consistent player in the work of the Court. Civil society has been involved at various stages of the Court's work in the country, including ratification and domestication campaigns, training and awareness, as well as organising victims to participate in the ongoing cases. However, it emerged that lack of funding, as well as the Court's relatively restrained approach and its low profile, have limited the contribution civil society can make in the process. Some NGOs have been dissatisfied with the apparent lack of information on various aspects of the ICC's operations, in particular in relation to victims. They have also expressed their reservations about the Office of the Prosecutor's charging policy, which

has limited current investigations to Ituri and, with respect to the Lubanga case, resulted in the exclusion of ‘blood crimes’.

With respect to victims, the monograph finds that victims viewed the Court with high expectations, expressing optimism that they would finally receive justice for atrocities suffered. It is noted that these expectations are rather high in view of the modest achievements that the Court may actually reach. It emerged that victims’ inflated expectations do not seem to be managed at all through awareness campaigns, which thus far have been very limited. Interviews with some victims and NGOs revealed that, in general, victims do not seem to be aware of the roles they could play in the proceedings. Those who have received information on participation seem dissatisfied with the established procedures for their involvement, which limit those who may participate to only a few victims.

1 Introduction

The adoption of the Rome Statute on 17 July 1998 and its coming into force in 2002 were celebrated as historical moments of great significance for the fight against impunity and international justice in general. It was argued that, in establishing the permanent International Criminal Court (ICC), the community of states had finally bequeathed to itself and future generations one of the most important institutions hitherto missing in the international arrangement. Soon thereafter, the ICC assumed jurisdiction over the situations in Uganda, the Democratic Republic of the Congo (DRC) and Central African Republic, all through self-referrals to the Court by the respective states. This was followed, in 2005, by the referral of the situation in Darfur, Sudan, by the United Nations (UN) Security Council.

Since its establishment, a number of questions relating to how the ICC works continue to be posed by various commentators. In particular, since the ICC began to issue indictments against individuals for various international crimes – that of Thomas Dyilo Lubanga from the DRC being the first one – questions have been raised about how the Court relates to states in general, and states under investigation in particular, and about the politics involved. Other questions about how the Court works have related to dynamics at the national

level in the relevant state. As an international institution without an enforcement mechanism of its own, the ICC relies heavily on a number of entities in its work, not least the States Parties to the Rome Statute. In this regard, the following questions, among others, have been raised:

- How may a state be required to cooperate with and assist the Court (and vice versa)
- Which government or law enforcement officials at the national level are responsible for particular aspects of cooperation, with the potential for politicisation if certain members at this level were involved
- What forms of domestic capacities are required to offer the requisite assistance to the Court

OBJECTIVES OF THE MONOGRAPH

This monograph considers various aspects of the work of the ICC in the DRC since it became engaged in that country. It attempts to respond to some of the questions posed above. The study has three general objectives. First, it examines the cooperation relationship between the Court and the government of the DRC as well as various other relevant players in that country, including civil society and the UN Mission in the country (known by its French abbreviation, MONUC). Second, it examines the role of politics – domestic or otherwise – in the work of the ICC in the DRC. Third, it examines perceptions around the work of the ICC in various sectors of Congolese society: government, victims and civil society. By extension, it addresses some of the broader questions that the work of the ICC in Africa has raised, including the proposition that the ICC is ‘targeting’ African countries.

ARRANGEMENT OF CHAPTERS

The monograph is divided into five chapters, including this chapter, which serves as an introduction to the study. Chapter 2 lays the foundation by introducing some general issues, including an overview of the Court. The chapter then provides an overview of the conflict in the DRC, the general obligations on states to cooperate with the ICC and the role of politics in international justice in general. Chapter 3 outlines the process through which the DRC situation

came to the ICC, from ratification until the referral of the situation by President Joseph Kabila. The chapter also discusses the individual cases arising from the DRC situation: that of Thomas Lubanga, Germain Katanga and Kundjolo Chui. In view of its significance, and partly because the alleged perpetrator is a DRC national of significant standing in the politics of that country, the chapter also discusses the case of Jean-Pierre Bemba, who is charged with crimes committed in the Central African Republic. With a focus on the above cases, it considers specific aspects of cooperation between the ICC and the DRC. Chapter 4 analyses perceptions in the DRC of the work of the ICC among three main constituencies: the DRC government, civil society as well as victims and the general public. It highlights the role of civil society in the work of the ICC in the DRC. Chapter 5 sums up the study by integrating the findings and concludes with a number of recommendations.

METHODOLOGY

The views expressed in the study are a distillation of interviews conducted in the DRC with various government officials, a select number of representatives of civil society and a limited number of victims in the months of June and July 2008. The study in no way represents or pretends to represent these views as reflective of those sectors of Congolese society as a whole; however, it captures the perspectives of some of the main players, both in government and civil society. With respect to civil society, representatives of some of the main non-governmental organisations involved in issues of victims, human rights, international justice and the ICC in particular are represented. The monograph does not refer by name to those interviewed. However, an attempt has been made to accurately represent those views. In addition to the interviews, research from other published sources has been used to support or clarify some of the assertions made.

2 Establishing the context for the study

INTRODUCTION

To lay a foundation for the study, this chapter introduces some of the broad conceptual issues, including an overview of the International Criminal Court (ICC), the ICC cooperation regime, a general overview of the conflict in the Democratic Republic of the Congo (DRC) that led to the intervention by the Court, a brief discussion of the role of politics in the work of international criminal tribunals and ways in which politics is relevant in the work of the ICC.

AN OVERVIEW OF THE ICC

Unlike the ad hoc international criminal tribunals, such as the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL),¹ the ICC is a treaty body created by the Rome Statute.² It was established to prosecute persons for the most serious crimes of international concern – genocide, war crimes and crimes against humanity – and later the crime of aggression.³ In keeping with the practice of the ad hoc international tribunals, the Prosecutor of the ICC has so far focused on those considered to bear the greatest responsibility for these crimes.

The crime of genocide refers to certain acts committed against a national, ethnic, racial or religious group, such as murder and causing serious bodily or mental harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (article 6 of the Rome Statute).

Crimes against humanity consist of various acts, including murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, or torture when committed ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’ (article 7 of the Rome Statute).

War crimes are acts that are prohibited during international and non-international armed conflicts in terms of various instruments of international humanitarian law, in particular the Geneva Conventions of 12 August 1949 (article 8 of the Rome Statute). With respect to crimes committed during an international armed conflict, two categories of violations are regarded as war crimes: various serious breaches (grave breaches) of the four Geneva Conventions (article 8(2) (a) of the Rome Statute), and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law (these violations are drawn from various sources, including Additional Protocol I to the Geneva Conventions). With respect to crimes committed within an internal armed conflict or conflict ‘not of an international character’, two categories of violations are regarded as war crimes: serious violations of article 3 common to the four Geneva Conventions (article 8(2) (c)), and other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law (article 8(2)(e), drawn from Additional Protocol II to the Geneva Conventions).

Three trigger mechanisms – ways in which the ICC assumes jurisdiction over the specified crimes – are provided for under the Statute. These are:

- Referral by a State Party (including self-referral, as in the case of Uganda, the Central African Republic and the DRC)
- Referral by the Security Council in exercise of its powers under Chapter VII of the UN Charter (for example, Darfur, Sudan)
- Investigation initiated by the Prosecutor of the ICC of his own accord⁴

The fourth possibility is where a state that is not a party to the Rome Statute makes a declaration allowing the Court jurisdiction over acts committed on its territory.⁵ It is possible – for example, in the case of Côte d’Ivoire where a UN commission of inquiry found that serious crimes had been committed during the armed conflict in that country⁶ – for authorities in that country to make a declaration by which the ICC Prosecutor would be allowed to investigate the crimes and try the perpetrators. At the time of publication, it is reported that Côte d’Ivoire had indeed made the requisite declaration, although the Prosecutor was yet to announce official commencement of investigations. Since its creation, the ICC has been conducting investigations in the four African countries named above and is said to be monitoring the situation in various other countries, including Cambodia, Afghanistan, Kenya and Georgia.⁷

With respect to the DRC, the ICC is investigating crimes committed in that country after 1 July 2002 when the Rome Statute establishing the Court came into force. The DRC signed the Statute on 8 September 2000 and ratified it on 11 April 2002. On 19 April 2004, President Joseph Kabila referred the situation in the DRC dating from 1 July 2002 to the ICC for investigation. Since the Prosecutor commenced investigations, three former militia leaders from Ituri have been indicted and surrendered⁸ to the Court: Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui. Jean-Pierre Bemba, a DRC national charged with crimes committed in the neighbouring Central African Republic, was arrested in Belgium in May 2008 and surrendered to the Court. The ICC has issued an arrest warrant against a fifth DRC national, Bosco Ntaganda, from Ituri. He is yet to be arrested.

THE CONFLICT IN THE DRC: CONTEXT TO THE ICC’S WORK

In late 1997, when the negotiations in Rome on the establishment of the ICC were entering their last lap, the DRC, previously Zaire, was descending into violent and prolonged armed conflict. Laurent Desiré Kabila, the newly installed president whose Alliance of Democratic Forces for the Liberation of Congo (AFDL) had ousted the dictator, Mobutu Sese Seko, with the assistance of Ugandan and Rwandan troops, was soon facing a rebellion at home. War broke out on 12 August 1998 when Uganda and Rwanda refused to disengage and began to back rebels fighting to depose President Kabila. Later, military

intervention from Zimbabwe, Namibia and Angola kept Kabila in power until his assassination in January 2001.

Kabila was succeeded by his son, Joseph Kabila, who soon commenced negotiations to bring the war to an end. At its height, the conflict involved troops from the countries listed above; Congolese rebel groups, such as Bemba's Movement for the Liberation of Congo (MLC); Rassemblement congolais pour la démocratie (RCD-Goma), which later split into three with the formation of the RCD-Kisangani and RCD-National; several local militia groups; and Congolese government forces. UN intervention saw the withdrawal of foreign forces by December 2002. President Kabila and the dominant rebel formations signed the Sun City Accords in South Africa in 2002 that established a transitional government with President Kabila and four vice presidents representing various belligerents in the 1998-2002 conflict.⁹

However, the withdrawal of foreign forces and the installation of the transitional government did not end the violence or atrocities committed against civilians. Fighting between various armed groups and militias continued in the mineral-rich east and northeast. Some of these formations eventually signed agreements with Kinshasa that resulted in many being demobilised or absorbed into the regular Congolese army (Armed Forces of the Democratic Republic of the Congo – FARDC). However, some, notably Laurent Nkunda's Congrès National Pour la Défense du Peuple (CNDP) and the Maï Maï militia, continue to operate in the Kivus. Rwandan Hutu rebels, as part of the Democratic Liberation Forces of Rwanda (FDLR), still maintain a presence in the region.¹⁰

As a result, the situation in the east of the country remains very volatile. Armed confrontations between various groups continue to happen routinely, with civilians bearing the brunt of this violence. Between 1997 and 2007 serious human rights violations were committed by all sides to the conflict. Widespread killings, torture, pillage and rape and other forms of sexual violence have been documented.¹¹ Indeed, rape has been one of the most pervasive crimes during the war.¹² It is estimated that the conflict has claimed more than four million people directly or indirectly through starvation, disease and displacement induced.¹³

STATE PARTY COOPERATION WITH THE COURT

In terms of article 86 of the Rome Statute, States Parties to the Rome Statute have an obligation to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Article 87 regulates the modalities and channels of cooperation between the Court and states as well as international organisations, and provides for the consequences of non-cooperation for states. To facilitate such cooperation, States Parties are obligated to ensure that there are procedures available under their national law for all the forms of cooperation that may be required of them in terms of the Statute (article 88). This would require both formal and informal arrangements. National legislation authorising relevant state agencies to offer specific forms of cooperation are necessary. Cooperation requests from the ICC may relate to a number of issues:

- Information and documents, subject to state security considerations (article 72). The State Party may deny a request for assistance, in whole or in part, if the request concerns the production of any documents or disclosure of evidence that relates to its national security. Where possible, arrangements may be made for partial compliance or compliance at a later date
- Arrest or provisional arrest of suspects
- Surrender to the Court of suspects on the territory of the requested state or permission for transit if the suspect has to pass through another country (article 87)
- Specific forms of assistance in relation to ICC investigations or prosecutions (article 93 of the Rome Statute):
 - (a) The identification and whereabouts of persons or the location of items
 - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court
 - (c) The questioning of any person being investigated or prosecuted
 - (d) The service of documents, including judicial documents
 - (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court
 - (f) The temporary transfer of persons as provided in paragraph 7

- (g) The examination of places or sites, including the exhumation and examination of gravesites

Requests for assistance must be executed in accordance with the relevant procedure under the law of the requested state. The requested state may establish specific procedures and designate persons authorised to give effect to the request in order for it to be valid (article 99 of the Rome Statute). Costs related to the execution of assistance requests are to be borne by the requested state, except those: (a) associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody; (b) of translation, interpretation and transcription; (c) travel and subsistence costs of the judges, the Prosecutor, the deputy prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court; (d) any expert opinion or report requested by the Court; and (e) associated with the transport of a person being surrendered to the Court by a custodial state. Following consultations, extraordinary costs that may result from the execution of a request may also be borne by the Court (article 100 of the Rome Statute).

It is noteworthy that the cooperation relationship between the Court and states goes both ways, although the balance is weighted in favour of the Court. While states' cooperation obligations are expressed in obligatory terms, a State Party conducting an investigation or prosecution of individuals for genocide, war crimes or crimes against humanity or any other serious crime under national law may request cooperation from the ICC, which may provide assistance to a state (article 93 (10)). The Court will, in arriving at a decision, consider article 68 of the Statute relating to the protection of victims and witnesses as well as the protection of confidential or sensitive information of interest to a state. A state may request that the Court takes necessary measures in respect of such information.

What are described above are general obligations for all States Parties to the Rome Statute. One can foresee that states in respect of which investigations and prosecutions are ongoing, such as the DRC, will have other special obligations that arise from those specified. Apart from the obligations described above, the state may be required to cooperate with the Court in ways specified under different procedures in the Rome Statute, including executing forfeiture orders related to the property of an accused; playing a role in witness protection; and giving effect under national procedures to orders from the ICC to freeze the

assets of an accused person, which may eventually be used to pay reparations to victims. This is so in all the cases before the Court, in which the Court has requested states to trace and freeze assets held by the accused.¹⁴ The authorities in Kinshasa, in particular the minister of justice and the attorney general of the DRC, have executed asset-freezing orders from the Court.

POLITICS AND INTERNATIONAL CRIMINAL TRIBUNALS

This study does not discuss in detail the problematic and controversial question relating to the role of politics in international law and international criminal justice in general.¹⁵ The focus is rather on the workings of the relationship between the ICC and the DRC. In this regard, it is important to understand the interplay between politics and the work of the ICC more generally to set the stage for this discussion. The aim is to place a number of key issues in context: the ratification; the referral to the ICC; cooperation between the Court and the DRC in respect of ongoing cases; and future prospects for the Court's work in that country. Before doing so, a broad overview of the issue is necessary.

While views may differ, many commentators seem to agree that the realistic view of international law and politics as totally separate concerns is no longer tenable, especially with regard to international institutions such as the ICC.¹⁶ The law always operates closely with politics. Generally, their relationship is a reciprocal one. In international criminal law, this relationship is pertinent – although not always evident – in at least two areas: the establishment of relevant institutions, and the specific operations of those institutions.

Although undertaken in historically distinct circumstances, the decision to establish the ICC by the community of states – like the decisions to establish the International Military Tribunal at Nuremberg, the ICTR, ICTY and the SCSL – was a political one, albeit a different kind of politics. The process of adopting a statute (a legal document) that, among others: (1) defines crimes and delineates roles for various players, including the Prosecutor, the judges and the UN Security Council; (2) regulates the relationship between the two legal spheres – the international and national; and (3) attempts to harmonise legal traditions, is a richly political process.¹⁷ It should not be surprising, therefore, that debates relating to the place of politics in the ICC have continued beyond the adoption of the Rome Statute in 1998. The experience of the ad hoc tribunals shows that politics has always played a role in the establishment of

such international institutions – and perhaps, by extension, in how they operate. As a permanent institution created by the agreement of a broad community of states, the ICC was meant to banish some of the problems associated with UN Security Council initiatives, which seem rather heavily steeped in politics and which have been rightly criticised for selectivity.¹⁸ In addition, states sought to establish a permanent infrastructure with the ability to monitor crimes and act accordingly as the need arose.

On the issue of selectivity in the creation of international tribunals in cases of mass atrocities, legitimate questions have been raised relating to why similar situations such as Cambodia and the DRC did not, in the eyes of the UN, merit the establishment of a criminal tribunal as in the case of Yugoslavia, Rwanda and Sierra Leone. It is notable that, after more than 30 years, a special court was finally created by agreement between the UN and the government of Cambodia to prosecute crimes allegedly committed by or linked to Pol Pot and other members of his regime in the late 1970s.

Besides the context of selectivity in the establishment of tribunals, one particular case in which politics played itself out is in the establishment of the Rwanda tribunal. The fact that Rwanda, which requested the UN Security Council to help deal with the mass atrocities perpetrated during the 1994 genocide, later withdrew support for the plans to create a tribunal in part over the Security Council's decision to situate the court in Tanzania and to exclude the death penalty, continued to dog the tribunal's operations for years.

Does politics matter in the work of the ICC?

While politics played an important role in the establishment of the ICC, this is not an issue of concern to us at the moment since the ICC is a *fait accompli*. Beyond its creation, the role of politics in how the Court operates – particularly how it interacts with states – is important. Although the ICC is a criminal court and not a criminal body, the fact that it operates in a 'political environment' necessarily means that it is not entirely immune from political considerations.

First, the manner in which the Court assumes jurisdiction is important. When the Security Council refers a situation to the Court in terms of article 13(b) of the Rome Statute, there is always a risk – as the case of Darfur demonstrates – that the politics in the Security Council and the UN are imported into debates on functions of the Court. Accusations of selectivity on the part of the Security

Council are likely to arise.¹⁹ It is noteworthy that although the decision to refer a situation is a political one, the Prosecutor makes a decision to initiate an investigation based on the legal criteria set out in the Statute. In other words, the trigger (in the case of referrals) is the result of a political process, but subsequent decisions made at and by the Court, such as the issuing of arrest warrants, are judicial rather than political in character.

Accusations of selectivity against the Security Council are unlikely to arise in cases where the situation is referred by a state (self-referral). However, as demonstrated by the case of the DRC, a different kind of politics – domestic politics – may be at play, although this always has the potential of developing an international dimension. The selectivity argument is unlikely to arise, but, when it does, it will be levelled against the referring state – and perhaps by extension the Prosecutor – depending on who gets indicted or prosecuted by the Court, and at what time that indictment comes. This argument is prevalent in debates relating to the ICC's work in Uganda, where questions about why only the leaders of the Lord's Resistance Army have been indicted still linger. One can maintain, however, that in view of ongoing investigations the indictment of members of the Ugandan People's Defence Forces is still a possibility.

Second, in the implementation of other specific aspects of the Statute itself, politics remains important. The ICC's prosecutorial policy – like that at national level – while guided by legal, objective criteria, necessarily considers other factors, including political ones.²⁰ The Prosecutor is not just a legal player. He/she is also a political player in the sense that, in applying the Statute and its Rules, he/she must navigate a treacherous political terrain while remaining independent and effective. The process of commencing investigations (especially when on his/her own initiative), indicting individuals and proffering charges against suspects are processes regulated by the Rome Statute and indeed subject to Pre-trial Chamber oversight²¹ but potentially vulnerable to political considerations. The Prosecutor must have evidence to sustain a charge either of genocide, war crime(s) or crime(s) against humanity. But he or she need not, and cannot for practical reasons, indict everyone against whom there is evidence. As has been the case for previous international tribunals, it is justifiable that the Prosecutor pursues those considered to bear the greatest responsibility for crimes. Further, the test of gravity (of crimes committed) set by the Statute has to be met in respect of crimes allegedly committed by the accused.²² The case of Jean-Pierre Bemba discussed in the next chapter illustrates how politics could

be considered to play a role in the process of indictments. When the Prosecutor indicted Bemba in 2008 (while he was in exile in Europe and thus removed from his strong base in the DRC where his potential for political destabilisation was great), and not in 2006 (when he was still in a position of power in the DRC) political factors must have influenced the making of the decision to indict. This is no different from what happens at national level. When the Prosecutor indicts a rebel leader today and a former president seven years later (say, after leaving power) for crimes arising from the same factual situation, political considerations – domestic and international – may be at play.

Third, the ICC interacts with states within the cooperation and complementarity frameworks. The two frameworks are sites where the Court interplays with domestic politics in various ways. In attempting to address the main objectives of the study, the monograph discusses the specific political considerations that inform the Court's work in the DRC. It examines whether such considerations have the effect of rendering the Court less effective or partial, or whether its work is prejudiced in any other way for these reasons. It is interesting as well to establish whether this informs the perceptions of the Court discussed in Chapter 4.

Finally, it is important to note here that while these examples – and others that emerge in our discussions in subsequent parts of this study – demonstrate the place of politics in the work of the ICC, the ICC is a criminal court, which operates on fairly strict legal rules and procedures. It cannot be otherwise. What must, however, be avoided is a situation where non-legal considerations take centre stage. While such extraneous considerations have their place, the Statute and Rules have sufficient inbuilt mechanisms to ensure that the Court and the rights of accused are not abused for other ends. For instance, the Pre-trial Chamber of the Court exercises varying degrees of control over the Prosecutor with respect to a range of decisions, including investigation, charging and prosecution. For instance, the confirmation-of-charges hearing – an innovation of international criminal procedures – serves the function of protecting the accused and preventing abuse of power by the Prosecutor by ensuring in advance that the Prosecutor has sufficient evidence to prove charges brought before the trial proper begins.²³ Once again, the monograph does not discuss in detail the controls exercised by the Pre-trial Chamber, except to reiterate that important functions of the Prosecutor – indictment, charging and investigations – are subject to strict judicial oversight and control.

The introduction to the 102nd Annual Meeting 2008 of the American Society of International Law, which focuses on ‘the politics of international law’, is perhaps a fitting summation of the discussion on the role of politics in the work of the ICC in general:²⁴

International institutions, from the WTO to the World Bank, from the ICC to the World Court, are creatures of politics as well as law. The decisions of governments to participate in those organisations or other international law initiatives are often based on domestic politics – one thinks of the Kyoto Protocol and the International Criminal Court. Yet the politics of international law are not only a reflection of domestic concerns. As international law becomes more pervasive and intrusive on previously sovereign domains, and as international institutions wield more influence, more people are examining and questioning the politics of those institutions.

While discussing the work of the ICC in the DRC, this monograph is guided by the twin considerations alluded to in the statement above: (1) that the ICC is a creature of politics and that the decision by states to join it is influenced by (domestic) politics, which may play out in its work; and (2) that the ICC is vested with a specific mandate, and operates within a system of international law in which means of recourse and manner of action by states are not unlimited. Accordingly, the study attempts to address the question whether politics, either negatively or positively, has influenced the ICC–DRC relationship. In addition, the study considers the extent to which perceptions of the ICC’s work in the DRC, among victims, government and civil society, have been influenced by a perceived role of political considerations.

PAVING THE WAY FOR THE ICC IN THE DRC

As noted already, the DRC became a party to the Rome Statute by depositing the instruments of ratification on 11 April 2002. On 3 March 2004, President Joseph Kabila triggered the jurisdiction of the Court with respect to the situation in that country by a letter addressed to the ICC.²⁵ The Prosecutor announced official commencement of investigations on 23 June 2004. To enable the ICC to commence investigations on DRC territory and compel various authorities

in the DRC to cooperate with the Court, an Accord on Judicial Cooperation (L'Accord de coopération judiciaire) and the Interim Protocol on Privileges and Immunities of the ICC were signed between the Office of the Prosecutor and DRC authorities. The Accord on Judicial Cooperation, which is necessary in the absence of a law implementing the Rome Statute at the national level, was renewed on 12 March 2006. The DRC Parliament adopted a law on 6 March 2006 ratifying the Agreement on Privileges and Immunities of the International Criminal Court, which, among other things, requires the protection of ICC staff operating in the DRC and exempts them from judicial process.

As early as 2002, the DRC had prepared draft legislation implementing its obligations under the Rome Statute of the ICC.²⁶ The bill was revised in 2003 after consultation with a variety of entities, including civil society. In September 2005, a later version of the draft legislation was published.²⁷ The bills were prepared by the Ministry of Justice and the Permanent Law Reform Commission following a number of expert meetings supported by Human Rights First, Human Rights Watch, the NGO Coalition for the International Criminal Court, and the African Association for the Defence of Human Rights, a Congolese non-governmental organisation. Two seminars were organised in Kinshasa and Lubumbashi in October 2002.²⁸ The draft law was forwarded to the DRC Permanent Law Reform Commission. The commission modified the text before submitting it to the then minister of justice. Human Rights First and Human Rights Watch issued comments on the draft, stressing their remaining concerns and suggesting alternative language on a number of provisions.²⁹ Despite campaigns by various organisations, including Human Rights First and Human Rights Watch, urging that the ICC bill be passed into law, as at 1 October 2008 this is yet to happen.³⁰

The delay in passing the law may be attributed to at least two reasons. First, this law has not been considered a priority in view of other issues that have occupied the government and legislators' time. In this regard, the organisation of the historic elections held in the DRC in 2006 took up most of the government's time and efforts. Second, the legislative process seems to have been overtaken by the signing of the comprehensive Agreement on Judicial Cooperation between the government and the ICC Prosecutor in 2004. The fact that the ICC has continued its investigations in the absence of enabling legislation seems, in the opinion of the government, to have obviated the need for that process to be concluded. There is no indication that legislation will be passed soon.

While the lack of domestic legislation is not problematic at an operational level, the fact that the National Assembly has not participated in adopting relevant agreements with the ICC – which would be the case if they passed the law – raised legitimacy concerns. One suspects that the failure of deputies and the wider public to participate in the process could be contributing to speculation and current perceptions among some people that the ICC’s work in that country is a project of the executive, directed at destroying its political enemies.

3 The DRC situation: Cases before the ICC

INTRODUCTION

This chapter provides a broad overview of the ICC investigations in the Democratic Republic of the Congo (DRC) and the individual cases stemming from the DRC situation.³¹ It also briefly outlines the role of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) as it relates to these cases and the promotion of justice in general.

On 23 June 2004, the ICC Prosecutor, Luis Moreno-Ocampo, announced the Court's first formal investigation into alleged atrocities committed in the DRC. In September 2003, the Prosecutor had announced that he would afford priority to the Ituri region in his initial investigations, where crimes were committed in the fighting between various groups since 2002. Presently, two cases from Ituri are before the ICC: that of Thomas Lubanga and the joint case of Germain Katanga and Mathieu Ngudjolo Chui. The arrest warrant issued against Bosco Ntaganda, now a senior member of Laurent Nkunda's National Congress for the People's Defence (CNDP) rebel movement, is yet to be executed. The fourth case, that of Jean-Pierre Bemba, relates to events in Central African Republic in 2002–03.

GETTING DOWN TO BUSINESS

The situation in the DRC presented the ICC with an opportunity to try its first case(s). Since the widely celebrated adoption of the Rome Statute in 1998, many people had been waiting for years for the Court to take action. Although the Statute only came into force on 1 July 2002, the fact that it could not legally take up any cases before that date was not widely understood, and certainly not by victims of the many conflicts around the continent who had seen the Court's establishment as an immediate avenue of recourse. Two years after the Statute came into force, the Court still had little to show for it. Seen within a wider context, this reality was amplified by the fact that in the first situation to be referred to the ICC, in 2003 – that relating to Uganda – the Court was unable to procure the custody of Joseph Kony and the rest of the Lord's Resistance Army leadership, who have been indicted for crimes committed in Uganda.³²

It is notable that the stance since adopted by Kampala has not been helpful to the Court. Having commenced peace negotiations with the Lord's Resistance Army to bring the conflict in northern Uganda to an end, Kampala has become less enthusiastic about handing the indicted rebel leaders to the Court if they are arrested. The government's initial support for the ICC investigations in Uganda has waned considerably. One can take the view that, at the outset, the ICC faced the challenge of establishing itself in the international legal order as a strong, relevant and credible institution.³³ For this reason, it would appear that the DRC situation – the second to be referred to the Court – assumes greater significance in the Court's mission in view of its failure so far, despite various efforts, to obtain custody of those indicted in the Uganda situation.

Prosecutor v. Thomas Lubanga Dyilo

Thomas Lubanga Dyilo became the Court's first detainee, on 17 March 2006, after the Prosecutor opened investigations centred on Ituri. He is charged with war crimes consisting of conscripting and enlisting children under the age of 15 into the Patriotic Forces for the Liberation of Congo (FPLC), the military wing of the Union of Congolese Patriots (UPC), and using them to participate actively in hostilities in Ituri, from September 2002 to 13 August 2003, both within the context of international and internal armed conflicts.³⁴ At the material time when the crimes are said to have been committed, the involvement of foreign

forces, in particular Uganda, is said to have internationalised an otherwise internal armed conflict. Lubanga and other militia leaders were arrested by Congolese authorities following the murder, on 25 March 2005, of nine UN peacekeepers of Pakistani origin. Together with others, he was held indefinitely in Makala, Kinshasa, as it was not certain which court would try the accused, whether a Congolese court or an international tribunal. While Lubanga was in detention, the Office of the Prosecutor had opened investigations centred on the Ituri region, in June 2004. The Prosecutor proceeded to issue an arrest warrant under seal against Lubanga on 10 February 2006.³⁵ The warrant was unsealed on 17 March 2006.³⁶ He was transferred to the ICC in The Hague on the same day.

While the arrest and surrender of Lubanga to the ICC was celebrated, the decision by the Prosecutor to limit the charge against him to conscription, enlisting and use of child soldiers, turned out to be very controversial. A number of non-governmental organisations (NGOs) and victims argued that the scope of crimes should have been broader. One such group, Women's Initiative for Gender Justice, an international women's human rights organisation that advocates for gender-inclusive justice, requested leave from the Court on 7 September 2006 to file a brief in relation to the Lubanga confirmation hearing. They proposed to argue in favour of broad supervisory powers for the Pre-trial Chamber under article 61(7)(c)(i) of the Rome Statute, which in their view enabled the Court to request the Prosecutor to carry out further investigations in relation to a particular charge. They took the view that the Chamber could determine whether, in so doing, the Prosecutor had properly exercised his discretion in all relevant circumstances, which included 'the fact that there is information publicly available to the effect that other crimes such as murder and sexual violence were committed specifically by [Lubanga's] UPC/FPLC'. The Prosecutor successfully opposed the application. He claimed that the amicus arguments were irrelevant and hypothetical and that the applicant in effect was requesting the Court to go beyond its powers.³⁷

Confirmation of charges

In terms of article 61 of the Rome Statute, the Court (relevant Pre-trial Chamber) is required to hold a hearing within a reasonable time after the accused's surrender or voluntary appearance before the Court in order to confirm the

charges on which the Prosecutor intends to seek trial. At the hearing, the Prosecutor is obliged to support each charge with sufficient evidence to establish substantial grounds to believe that the accused committed the crime(s) as charged. The confirmation hearing aims to ensure that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime(s) with which he/she is charged.

On 29 January 2007, the ICC Pre-trial Chamber confirmed the charges against Lubanga, paving the way for the ICC's first trial.³⁸ The Chamber ruled that there were substantial grounds to believe that Lubanga – the president of the UPC and the commander-in-chief of its former military wing, the FPLC – was responsible for committing war crimes in the Ituri region of the (DRC) in 2002 and 2003.

Specifically, the Chamber confirmed that there were substantial grounds to believe that Lubanga was responsible, as co-perpetrator, for the conscription and enlistment of children under the age of 15 years into the FPLC, from the beginning of September 2002 until 2 June 2003, in violation of articles 8(2)(b) (xxvi) and 25(3)(a) of the Rome Statute; and from 2 June 2003 to 13 August 2003 in violation of articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute. These charges relate to enlisting, conscripting and using children in hostilities. Initially, the Prosecutor had only characterised the conflict in which these crimes were committed as internal. However, the Court took the view that, at all material times, the armed conflict had the character of an international as well as an internal armed conflict. As discussed in the next chapter, the decision by the Office of the Prosecutor to limit the charge against Lubanga to enlistment, conscription and use of child soldiers and not to proffer any charge related to 'blood crimes' has been criticised in particular by victims' groups whose attempts to influence the process were unsuccessful. The Prosecutor enjoys discretion in relation to the selection of offences for the purposes of charging, subject only in limited circumstances to the review/control powers of the Court.

Challenges facing the prosecution

After the decision of Pre-trial Chamber I confirming charges on 29 January 2007, various proceedings were brought by both by the defence and the prosecution on a range of substantive and procedural issues, which occupied the Chamber for more than a year. On 2 July 2008, Trial Chamber I ordered

the release of Lubanga, igniting a heated controversy over the ICC's first trial. The defence argued that the failure by the Office of the Prosecutor to divulge potentially exculpatory evidence severely prejudiced Lubanga's right to a fair trial. The Statute and Rules oblige the Prosecutor to investigate evidence that goes to show the guilt of an accused as well as evidence that may prove his/her innocence and to disclose such evidence when it tends to show that the accused has not committed the crime. Lubanga argued that the Prosecutor apparently had evidence (documents) in his possession, obtained from the UN and NGOs under assurance of confidentiality and which could not, therefore, be published although the information is exculpatory in character. The judges agreed with Lubanga and determined that failure to disclose relevant documents made a free and fair trial impossible.³⁹ The judges gave the Prosecutor an opportunity to disclose the relevant documents to them.

On 13 July 2008, the Trial Chamber rendered another decision on the consequences of non-disclosure of exculpatory materials covered by confidentiality agreements (under article 54(3)(e) of the Rome Statute). It found that the manner in which the Prosecutor used this provision when negotiating agreements with information providers was improper as it had the effect of depriving the accused and the Chamber access to potentially exculpatory evidence. More broadly, the Court took issue with the fact that the Office of the Prosecutor had used article 54(3)(e) of the Rome Statute to gather rather than to generate evidence (which would subsequently be subject to disclosure). The Trial Chamber decided to indefinitely halt the case against Lubanga.⁴⁰

On 3 September 2008, the Trial Chamber stated that the information provided by the Prosecutor in response to the Chamber's earlier decision was inadequate and that it was still not satisfied with the Prosecutor's proposals aimed at solving the problem of disclosure in respect of potentially exculpatory evidence.⁴¹ The Chamber considered that these new proposals still infringed on the rights of the accused to a fair trial. On 4 September 2008, the trial was postponed again. In the meantime, Lubanga remained in custody as the final determination of these issues was awaited. This was enabled by the decision of the Appeals Chamber that suspended the commencement of the five-day deadline given to the Prosecutor to launch an appeal against the decision to release Lubanga.⁴²

The Appeals Chamber rendered its much-awaited decision on the Office of the Prosecutor's appeal to the decision made by Trial Chamber authorising the

unconditional release of Lubanga.⁴³ In its judgment, the judges of the Appeals Chamber dashed Lubanga's hopes of immediately walking free by remanding (returning) the matter to the Trial Chamber that authorised his release for proper consideration. The Appeals Chamber reversed the Trial Chamber's decision to unconditionally release Lubanga. It held that the decision of the Trial Chamber to release him was erroneous because the Trial Chamber, when ordering the unconditional release, failed to take into consideration the fact that the stay it had imposed on proceedings, on 20 June 2008, was *conditional* in character. This led the Trial Chamber to fail to consider all the options at its disposal. This in turn led the Trial Chamber to wrongly conclude that the unconditional release of Lubanga was inevitable. Agreeing with the Prosecutor that it would be premature to release Lubanga, the Appeals Chamber sent back the matter to the Trial Chamber for a new determination 'as to whether or not Mr. Lubanga Dyilo should remain in the custody of the Court, or whether he should be released, with or without conditions, taking into account all relevant factual developments at the time of the new determination'. The Appeals Chamber further ruled that Lubanga was to remain in custody pending the new determination by the Trial Chamber.

The prospect that Lubanga could walk free after the Trial Chamber's controversial decision disappointed many victims in the DRC. On hearing the news, many expressed the view that they felt 're-victimised' and 'abandoned by the international community'.⁴⁴ Additionally, fears were that the possible return of Lubanga to Ituri could further inflame relations between local ethnic groups, in particular the Hema and Lendu who have waged a bloody conflict against each other.⁴⁵ The judges may be said to have rightly criticised the Office of the Prosecutor for its approach in this case, in particular giving assurances to information providers that it would not disclose the information, resulting in a seemingly blanket exclusion of exculpatory evidence from free scrutiny by the judges and disclosure to the accused.

As the case continues to unfold, it appears that the controversy arises from a disagreement between the Office of the Prosecutor and the UN regarding documents that the latter does not want made public. Their motives aside, one can question whether the dogged objections by the UN to the use of the documents at issue in this case are made with an understanding of how a criminal court such as the ICC functions, and with sensitivity to the potentially damaging effect of failure in this case. As an important partner in the work of

the ICC in matters of international justice and by extension international peace and security, a mutually beneficial relationship foreseen in the Relationship Agreement of October 2004 between the UN and the Office of the Prosecutor has to be upheld.

At the time of publication, Lubanga's trial was in its earliest stages, having begun on 26 January 2009.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

Germain Katanga, who was surrendered to the Court by DRC authorities on 17 October 2007, is a former leader of the Patriotic Resistance Force in Ituri (FRPI). He is charged with six counts of war crimes⁴⁶ and three counts of crimes against humanity.⁴⁷ The charges include murder, sexual slavery and using children under the age of 15 to participate actively in hostilities. Katanga was appointed general of the DRC army on 11 December 2004 together with six other former militia leaders as part of the peace agreement signed with the government. He was arrested in early March 2005 by the DRC authorities together with eight other former militiamen from various Ituri armed groups and held in Kinshasa in connection with the killing of UN peacekeepers in Ituri on 25 February 2005.⁴⁸ While in detention in Kinshasa, the Prosecutor presented evidence to Pre-trial Chamber II, linking him to an attack on Bogoro village in Ituri on 24 February 2003 in which 200 civilians were killed. On 2 July 2007, Pre-trial Chamber II found that there were reasonable grounds to believe that Katanga bore individual criminal responsibility for war crimes and crimes against humanity committed during an attack on the village of Bogoro in Ituri, and issued a sealed warrant for his arrest. Katanga became the ICC's second detainee after Lubanga.

For his part, Ngudjolo Chui was surrendered to the ICC in February 2008 following an arrest warrant related to the Bogoro attack mentioned above.⁴⁹ He is charged with the same crimes as Germain Katanga: six counts of war crimes⁵⁰ and three counts of crimes against humanity.⁵¹ Ngudjolo is said to have held senior positions in a number of rebel groups involved in the conflict in Ituri since 2002, including the National Integrationist Front (FNI), Katanga's FRPI and the Congolese Revolutionary Movement (MRC).⁵² On 23 October 2003, he was apprehended by MONUC troops and surrendered to Congolese

authorities. He was charged in connection with the killing of another rebel, but was subsequently acquitted and released.⁵³ On 1 November 2005, a UN Security Council committee imposed a travel ban and asset freeze on him for violating an arms embargo.⁵⁴ On 24 February 2003, he is said to have led an attack on the village of Bogoro in which rebels under his command killed at least 200 civilians, imprisoning survivors in a room filled with corpses, and sexually enslaving women and girls.⁵⁵ Subsequently, he was appointed a colonel of the Congolese army in 2006 on signing a peace deal with the government. He was arrested in Kinshasa in January 2008 while attending training for officers and surrendered to the ICC.

Joinder and confirmation of charges

Katanga made his initial appearance before Pre-trial Chamber I on 22 October 2007, during which the confirmation hearing was scheduled to start on 30 January 2008. The Court decided to postpone the confirmation hearing to a future date to be determined by it. Following this, Ngudjolo Chui made his initial appearance on 11 February 2008, during which the confirmation hearing was scheduled to start on 21 May 2008. On 12 February, the Court held a hearing about the possibility of joining the cases. The Prosecutor motivated the joinder with the argument that the intention of the Office of the Prosecutor had always been to prosecute the two for their joint participation in the same attack. On 10 March 2008, Pre-trial Chamber I decided to join the cases.⁵⁶ The hearing on the confirmation of the charges in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, previously scheduled to start on 21 May 2008, was postponed to 27 June 2008.

The Prosecutor has alleged that Germain Katanga and Mathieu Ngudjolo Chui were responsible for deliberately planning and executing the attack against the village of Bogoro in Ituri on or around 24 February 2003. Arising from this attack and subsequent events, he has charged them with four counts of crimes against humanity⁵⁷ and nine counts of war crimes.⁵⁸

On 26 September 2008, Pre-trial Chamber I issued its decision on the confirmation of charges in this case.⁵⁹ In relation to the nine charges of war crimes, the Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui jointly committed eight war crimes:

The crime of using children under the age of fifteen to take active part in the hostilities, under article 8(2)(b)(xxvi) of the Statute, by using them personally as body guards and as combatants during the attack against the village of Bogoro, on or about 24 February 2003.

In the 24 February 2003 attack on Bogoro village, Germain Katanga and Mathieu Ngudjolo Chui jointly committed, through other persons, within the meaning of article 25(3)(a) of the Statute, the war crimes of:

- Directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i) of the Statute;
- Willful killings under article 8(2)(a)(i) of the Statute;
- Destruction of property under article 8(2)(b)(xiii) of the Statute; and
- Pillaging under article 8(2)(b)(xvi) of the Statute.

Further, the majority of the Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui, during and after the 24 February 2003 attack on Bogoro village, jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the war crimes of sexual slavery and rape under article 8(2)(b)(xxii) of the Statute.

The Chamber rejected the charge that Germain Katanga and Mathieu Ngudjolo Chui jointly committed, through another person, during the 24 February 2003 attack on Bogoro, crimes of inhuman treatment, as provided for in article 8(2)(a)(ii) of the Statute, and outrages upon personal dignity, as provided for in article 8(2)(b)(xxi) of the Statute.

In relation to the four charges of crimes against humanity presented by the Prosecutor:

- The Chamber confirmed the crimes against humanity of murder under article 7(1)(a) of the Statute, committed jointly through other persons in terms of article 25(3)(a) of the Rome Statute
- The majority of the Chamber confirmed the crimes against humanity of rape and sexual slavery under article 7(1)(g) of the Statute, also committed jointly through other persons in terms of article 25(3)(a) of the Rome Statute

- The majority of the Chamber declined the charge of ‘other inhumane acts’ as a crime against humanity within the meaning of article 7(1)(k) of the Statute, on the basis of article 61(7)(b) of the Statute

Consequently, the Chamber decided to commit Katanga and Ngudjolo for trial on the charges confirmed. It is possible that there will be appeals to specific aspects of the confirmation decision, which will have to be decided before the case finally goes to trial.

Jean-Pierre Bemba Gombo

Although Bemba is charged with crimes committed in Central African Republic, the fact that the case has generated widespread interest in the DRC warrants some discussion. Bemba is a former vice president in the transitional government in the DRC and runner-up in the last presidential elections held in that country in 2006. He was arrested on 24 May 2008 by the Belgian authorities following the Court’s warrant of arrest issued under seal on 23 May 2008. The ICC Pre-trial Chamber III’s request, on 10 June 2008, that Belgium surrender Bemba to the Court in The Hague was honoured on 3 July 2008, when the Belgian authorities surrendered and transferred him to the Court. On this occasion, Prosecutor Moreno-Ocampo welcomed the transfer of Bemba, noting that:

Justice is coming for the victims, for the victims of the Central African Republic, for the victims of massive sexual violence worldwide. We listened to them, and we transformed their painful stories into evidence. There will be no impunity. Jean-Pierre Bemba was a Vice-President and is a Senator, but has no immunity before the International Criminal Court; he will face justice.⁶⁰

Bemba, a national of the DRC and president and commander-in-chief of the Movement for the Liberation of Congo (MLC), is alleged to be criminally responsible, jointly with another person or through other persons in terms of article 25(3)(a) of the Rome Statute, for five counts of war crimes: rape, torture, murder, pillage and committing outrages upon personal dignity,⁶¹ and three counts of crimes against humanity: rape, torture and murder,⁶² all committed

on the territory of Central African Republic from 25 October 2002 to 15 March 2003.

Bemba's arrest surprised and shocked many in the DRC. Coming just over a year after the hotly contested election in which Bemba was pitted against President Kabila in the 2006 presidential run-off, the arrest shook the Congolese political scene. While the arrest was celebrated mostly by victims, people wondered why the charges against Bemba relate to events in Central African Republic and not the DRC, where Bemba's MLC is said to have committed atrocities during the 1998–2003 war. While this may be true, it would be difficult to link Bemba to crimes committed after 1 July 2002, when the Rome Statute came into force. It does not make a difference that the DRC ratified the Statute on 11 April 2002.

Many wonder why only Bemba has been 'targeted' by the ICC while other political leaders in the country, some of who may be in government, are alleged to have committed crimes. The MLC, Bemba's party, condemned the arrest, suggesting that the ICC 'is meddling in the internal affairs of the DRC' and that, somehow, the Court is doing Kinshasa's bidding. They had unsuccessfully called on the Court to provisionally release him to take up his position of senator and official leader and spokesperson of the opposition (*porte parole de l'opposition*) in the DRC's National Assembly. Further reactions to this arrest are discussed in the next chapter on perceptions. The confirmation hearing in the case *Prosecutor v. Jean-Pierre Bemba Gombo*, originally scheduled for 14 November 2008, was eventually held between 12 and 14 January 2009, after some delay.

MONUC AND ITS ROLE IN PROMOTING JUSTICE IN THE DRC

MONUC was established in November 1999 and is currently the largest UN peacekeeping mission in the world. It consists of up to 17 030 military personnel, 760 military observers, 391 police personnel and six police units comprising up to 125 personnel each. MONUC has a wide mandate as stipulated in UN Security Council Resolution 1794 (2007). The mandate extends to:

- Peace and security
- Facilitation of humanitarian assistance

- Disarmament, demobilisation and reintegration of combatants
- Promotion and protection of human rights

MONUC is an important player in the work of the ICC and in the promotion of justice in general. It is relevant to the ICC in specific ways. First, in maintaining peace and security, it enables the ICC to conduct its functions in the country, for the time being in the east where conflict still simmers. The Agreement on Judicial Cooperation signed between the DRC and the ICC clearly foresees a role for MONUC on matters of security. The agreement stipulates that the designated person in the attorney general's office on issues of security may consult with MONUC about the provision of security for ICC personnel and others on the ground.⁶³ ICC investigators need to operate in a safe environment in order to collect evidence and interview witnesses and victims. Those who collaborate with the Court need the confidence that they are not endangering themselves and their families in doing so. Ituri is still very much a region in armed conflict. This presents particular problems related to security, which MONUC with its policing capacities, together with relevant local authorities, help address. Clark (2008: 40) notes that MONUC has been crucial to the ICC's 'security calculations'.

Second, MONUC's role in the protection of human rights touches on justice issues in general and the work of the ICC in particular. In accordance with its mandate, MONUC's Human Rights Division has been tasked with assisting the government in the promotion and protection of human rights, with particular attention to women and children. The Human Rights Division has shaped its functions in accordance with UN Security Council resolutions 1565 (2004) and 1628 (2005).⁶⁴ The division is tasked with putting an end to impunity and ensuring that those responsible for serious violations of human rights and humanitarian law are brought to justice. Through its field offices, the Human Rights Division monitors and documents incidents of human rights violation across the country on a daily basis, and maintains a human rights caseload database, which could be a useful source of information for the ICC. The ICC Prosecutor is said to have obtained various documents from the UN and MONUC, some of which have raised controversy in the Lubanga case referred to earlier.

Third, MONUC has played a role in the arrest and transfer of suspected perpetrators to the relevant authorities, including the ICC, through established

channels. MONUC was involved in the arrest of Lubanga as well as Katanga.⁶⁵ With respect to the fight against impunity generally in the DRC, MONUC has worked hand in hand with local judicial authorities in the east of the country. A few illustrative cases reported by MONUC itself can be cited. Jean-Pierre Biyoyo, ex-commander of an armed group, was apprehended by MONUC and was sentenced by a military tribunal in the DRC to five years' imprisonment for recruiting child soldiers, a crime committed in South Kivu in April 2004.⁶⁶

In another example of MONUC's role in the fight against impunity, in Kisangani it led a joint mission with Congolese authorities between 21 and 26 July 2008 to Lieke Lesole, a village in Tshopo district in Orientale Province with the aim of assisting law enforcement officials in their investigation and gathering of evidence in relation to mass rapes, looting and torture committed in the area in July 2007 by a group of Mai Mai militia.⁶⁷ Magistrates from Kisangani Military Court who accompanied the group took statements and testimonies. Two lawyers who advised victims in relation to their rights travelled with the group.⁶⁸

MONUC and national agencies: overlapping mandates?

It appears that although the Agreement on Judicial Cooperation between the ICC and the DRC seems to recognise only a security role for MONUC, and despite the lack of an ICC-specific component in MONUC's mandate stipulated by the UN Security Council, MONUC has emerged as an important player in the work of the ICC. The same applies to the fight against impunity in general in the DRC. MONUC's prominence is due in part to its better-resourced forces (when compared to Congolese law enforcement). Further, such an outcome is perhaps inevitable in view of the fact that MONUC has large swathes of territory in the east under 'its jurisdiction'.

For MONUC to complement the work of Congolese law enforcement in support of the ICC, good working relations and collaboration is required. It appears that the relationship between government (or law enforcement) and MONUC has not been without friction. Questions of inertia have emerged in relation to the case of Bosco Ntaganda, who has been indicted by the ICC and is currently under Laurent Nkunda's protection in the Kivus. It seems to be the view in government that MONUC is unwilling, or has not done enough, to

apprehend Ntaganda, who is in 'MONUC's jurisdiction'. MONUC's position in relation to the matter is unclear. One is not sure if this critique of MONUC is justified in view of its previous role in the Lubanga and Katanga cases. However, this case illustrates the problems associated with overlapping mandates of various entities in relation to cooperation with the Court. In spite of the apparent lack of clarity about MONUC's ICC-specific role, the UN Mission will remain relevant to the ICC's operations as long as the force remains in the DRC with its current broad mandate. A better relationship both with the DRC authorities and the ICC will have to be worked out.

4 Perceptions of the ICC's involvement in the DRC

INTRODUCTION

Perceptions of the International Criminal Court (ICC) and its work in the Democratic Republic of the Congo (DRC) vary from one group to another, ranging from a very positive, optimistic assessment of what the Court can achieve to the harsh and downright negative. There are those in the middle who, while recognising the important role the ICC is playing in the fight against impunity, take issue with the manner in which specific proceedings have turned out and how its work has so far been conducted in that country. Broadly, this chapter considers the views of selected members of four sectors of Congolese society: government, civil society, victims and independent commentators, including the media, and African commentators at continental level.

DRC GOVERNMENT PERCEPTIONS

The mood, perceptions and stance of the government towards the ICC seem to have shifted somewhat from enthusiastic and positive at the time the referral was made to the ICC, to a more guarded and hesitant assessment in recent

times as incidents of violence against civilians continued unabated, irrespective of various peace agreements and the presence of the Court on the ground. Since 2003, several peace agreements, including the Nairobi Accord (November 2007) and the Goma Agreement (January 2008), have not brought peace in the east. While not suggesting that the referral was necessarily conceived by Kinshasa as a means of eliminating the armed threat posed by groups that continued to cause trouble in the east, the fact that the ICC's presence and arrests in Ituri have not persuaded others to lay down arms seems to have convinced some government officials that there is a need to engage the remaining groups outside the ICC. This aspect is discussed below as part of the government's recent proposals on amnesty.

Before examining this and other more recent influences on the government's perceptions of the ICC, the reasons that have been advanced for involving the ICC are considered. These reasons continue to inform current government attitudes and perceptions of the Court.

Reflecting on the reasons for ratification and the referral of the situation to the ICC

The factors that informed the ratification and referral of the situation to the ICC are relevant. These factors, which have a bearing on current government perceptions of the ICC, include ideas about sovereignty and ownership, lack of appropriate domestic mechanisms to deal with crimes, and the post-war project of establishing the rule of law and democracy. These are discussed in turn.

Sovereignty and ownership

The ratification process is important in understanding government motivations and, by extension, perceptions of the Court. As suggested by one government official interviewed, ratification of the Rome Statute was a sovereign act, which indicated the will of the government to participate in the ICC, an international institution. One government official scoffed at suggestions that the DRC ratified the Rome Statute and referred the situation to the Court 'in a hurry', insinuating a hidden agenda on its part or external pressure. In the view of one official, no pressure was brought to bear on the government to act as it did. The official noted that the attention that the ratification by the DRC received arose

perhaps from the fact that its ratification, on 11 April 2002, was the 60th. This ratification triggered the Rome Statute's entry into force on 1 July 2002.

In the view of officials interviewed, the government's support for the ICC – like the referral of the situation to the Court – is premised on the supposed role the Court could play in the stabilisation of the country by promoting the rule of law and democracy after many years of armed conflict. The government thus considered the ICC as integral to the post-conflict renewal project. A largely failed criminal justice system, the absence of effective and independent judicial institutions in view of partisan leanings in the judiciary, and lack of resources informed the decision to refer the situation to the Court. Ongoing support for the Court is informed by the same considerations. Questions related to motives ultimately allude to the role of politics – domestic or international – in the ratification of the Statute and referral of the situation to the Court.

Absence and unsuitability of domestic justice mechanisms

Having just emerged from many years of decay and war, the judicial system, like many sectors of Congolese society, has suffered the ills associated with neglect, mismanagement and partisanship. The government did not consider the courts sufficiently independent to conduct impartial trials of crimes associated with the war. The summary dismissal by Laurent Kabila of 315 magistrates in 1998 for alleged failure of the judiciary 'to perform its functions' continued to trouble the new regime until their reinstatement by Joseph Kabila more than five years later.⁶⁹ In his letter referring the matter to the ICC for investigation, President Kabila noted that it appeared that crimes over which the ICC has jurisdiction had been committed in the DRC since 1 July 2002 (when the Statute came into force), and that, in view of the situation prevailing in the country, the competent authorities are not able to conduct investigations into these crimes and to commence necessary criminal proceedings without the assistance of the ICC.⁷⁰

The referral is justified on account of the lack of capacity to investigate and to prosecute alone. In fact, in terms of the Rome Statute any other motivations on the part of the referring government appear irrelevant. In terms of article 17 of the Statute, what is required is the *inability* or *unwillingness* of the relevant (state) government to genuinely investigate and prosecute perpetrators. Since the transition, the judiciary's situation has continued to be worrying. In an environment of impunity, corruption and interference by the executive are

widespread. For instance, the International Commission of Jurists reports that in 2003 and 2004, 1 700 magistrates were intermittently on strike, clamouring for the independence of the judiciary, and that attacks against lawyers have continued to occur regularly.⁷¹

Another aspect of ‘ability’ relates to resources. The government reckoned that trials would require huge amounts of resources that were not readily available. While various courts have prosecuted individuals for crimes committed during the war, especially in Ituri, these were for the most part limited to special military courts (*Cour d’ordre Militaire*), which ordinarily try members of the army in terms of the *Code Militaire* but can also prosecute civilians when a state of emergency has been declared. Such was the case at the time. The state of emergency declared in most of the DRC in 1999 was eventually lifted. As a result, military courts no longer have the power to try civilians.⁷²

The conduct and outcome of the Truth and Reconciliation Commission (*Commission Vérité et Réconciliation – CVR*) established during the transition left much to be desired and further motivated intervention by an external tribunal. As part of the Sun City Accords signed in 2003, the Transitional Constitution (article 154) established the truth commission as one of the institutions supporting democracy. Its mandate was to ‘consolidate national unity through reconciliation among Congolese’ by, in part, inquiring into the gross human rights violations committed in the armed conflict since 1998 (article 155). Like the South African Truth and Reconciliation Commission before it, the CVR was empowered to grant amnesty, in return for full disclosure, for crimes committed for political ends.⁷³

Despite the hopes entrusted to it, the CVR failed to deliver for a number of reasons:⁷⁴

- It was composed of appointees of the various antagonists in the transition government, who had fought against one another. There was no real desire to uncover the past, which could reveal rather unpalatable truths⁷⁵
- It lacked credibility and legitimacy in the eyes of the public
- It lacked the resources to run its programmes
- It suffered from a lack of leadership, which, coupled with a lack of political will, doomed the project from the start

For the above reasons, it is no wonder that the CVR failed to achieve anything during the entire period of its existence. In addition, the CVR lacked credibility and was not well resourced. Together with the lack of an effective law enforcement system, the inability of the CVR to contribute in any way to post-conflict justice and national reconciliation in the DRC convinced the government that it was necessary to involve the ICC in the investigation and prosecution of crimes in that country.

Post-war renewal project and strengthening the rule of law

The government has justified the invitation extended to the ICC to investigate the situation in the country in terms of its new vision, which also informed the Inter-Congolese Dialogue in Sun City: to establish a new state founded on democratic principles, rule of law and respect for human rights.⁷⁶ The government considered the trial of those who committed and continued to commit serious crimes to be a necessary step in achieving this vision. A senior government official interviewed noted that ‘the problem with the DRC is deep-seated impunity that has rooted itself in society since independence, perhaps before that. We do not expect the ICC to eliminate it in one day, or through these trials, but we thought that it is necessary to send a message that things have changed. We had to start somewhere.’

Coming in the middle of the transitional period in 2004 when distrust still prevailed among various factions in government – most of whom still maintained private armies – the referral must be considered a monumental and courageous feat. Asked whether any high-ranking members of the transitional coalition saw this development as a threat to them in view of allegations that all armed formations had committed atrocities, a government official noted that, at the time, while there were concerns, none of the senior people ever thought they would be called to account before the ICC. This perhaps explains the anxiety expressed in opposition quarters in the DRC about the arrest of Jean-Pierre Bemba, one of the four vice presidents in the transition government and loser to President Kabila in the 2006 presidential elections. Clark has suggested that President Kabila knew that the ICC might never pursue him, especially if relevant events predate 1 July 2002, when the Rome Statute came into force.⁷⁷ Whatever President Kabila’s calculations at the time, he seemed to have acted on principle – to uphold the resolutions of the Inter-Congolese Dialogue.

The view that, because of weak national institutions, the ICC has a crucial role to play in forging a new ethos for the country is one of the considerations that have continued to inform the government's favourable view of the ICC.

The effect of external pressure

The DRC is said to have come under considerable international pressure after ratifying the Rome Statute to refer the situation to the ICC.⁷⁸ However, government officials interviewed for this study denied that any pressure of this kind was brought to bear on the government. The fact that the signing of the peace accords and formations of a transitional government had not brought violence to an end, especially in the embattled east where crimes continued to be committed, galvanised public opinion around the need to involve the Court. This public pressure sought to invoke the power of public opinion, which, one would presume, would make an impression as it did on a newly installed and fragile regime. This pressure was partly triggered by statements from the Court itself. Soon after the Prosecutor had received various complaints from victims from the DRC and other countries, he spoke at the ICC Assembly of States Parties in New York, in September 2003, inviting states to refer cases to the Court. That invitation increased international pressure on the DRC to refer cases of mass crimes to the ICC.⁷⁹ Together with the other motivations discussed above, it is possible that these views could have raised expectations in government that the ICC would intervene effectively in that country by prosecuting perpetrators and serving as a deterrent to others.

Continuing war in the east and the emergence of new movements: the 'Nkunda-Lubanga factor'

With the departure of foreign forces and the signing of the Sun City Accords, the main rebel formations and their leaders – RCD-Goma, MLC and RCD-Kisangani – were accommodated in the transition government. However, this agreement, although considered as 'all-inclusive', did not persuade the leaders of smaller movements to join government or abandon their armed campaigns, and neither did it prevent the emergence of new ones. Nkunda, who is said to represent and 'defend' the interests of ethnic Tutsis in the east, emerged as a replacement for Azarias Ruberwa's movement. Other formations, such as that

of the then-unknown Thomas Lubanga, emerged. The Maï Maï and other militia became prominent in the scheme of warring parties in the region. One government official noted that these new rebel movements and militia were considered a ‘nuisance’ that should be dealt with by all means, hence the involvement of the ICC. With the leaders of the main rebel movements (Movement for the Liberation of Congo – MLC, and various Rassemblement congolais pour la démocratie – RCD – factions) in government, possible prosecution of the likes of Nkunda and Lubanga did not seem to pose a significant threat to the stability of the transitional government.

Conclusions on motivations and government perceptions

At least two inferences can be drawn from the discussion on the motivations behind the government’s decision to ratify the Rome Statute and to refer the situation to the ICC for investigation. First, the discussion reveals that in view of circumstances prevailing in the country, such as the lack of an appropriate law enforcement system, the lack of resources and the need to establish the rule of law, the government’s motivations in making the referral to the ICC are justified. The ICC can play an important role in the fight against impunity and, by extension, in entrenching the rule of law by prosecuting perpetrators. Second, while recognising the importance of the ICC in fighting impunity in the DRC, it is obvious that the government has lumped too much responsibility on the Court. One cannot make the assumption that the ICC will do everything, especially in a country like the DRC where human rights violations have been so pervasive. It would appear that there is no coherent plan to ensure that the perpetrators who do not face justice in The Hague – and these will be the majority – are prosecuted in the DRC. It was noted that trials before military courts around the country are few and far between. The need to systematically address the question of justice in the DRC is clear, but it requires concerted effort from government.

Examining current influences on government perceptions

This section considers two of the more recent influences on government perceptions about the work of the ICC: the peace-justice debate and the continuing war in the Kivus and the government’s amnesty proposals. It

also addresses perceptions related to the practical aspects of the cooperation relationship between the Court and the DRC.

The peace-justice debate and government perceptions

The often complex and difficult relationship between peace and justice has played itself out at various stages of the ICC's work in the DRC, thereby injecting domestic political considerations into the process. Having ratified the Rome Statute in 2002, President Kabila is said to have become somewhat reluctant to refer the situation to the ICC, in part out of fear that an ICC investigation would compromise the delicate power-sharing agreement signed in 2003. The Office of the Prosecutor issued the first indictment in 2006, two years after the referral.

It is not clear why the indictments were delayed. With the benefit of hindsight, this was probably a welcome development. It is not difficult to see what would have become of this delicate peace had the various leaders of military and political groupings been immediately implicated in ICC investigations. Most of their respective supporters were still armed at the time. If one considers the two-year 'delay' in issuing the first indictment and the results that it has brought as a success for the ICC – as it clearly is – the Office of the Prosecutor's approach, whether deliberate or not, may be characterised as 'constructive avoidance'. By this approach, where the Office of the Prosecutor would hold back indictment until the moment is opportune, is perhaps the best approach to take.

Arguably, in the case of the DRC, it allowed for consolidation of peace during the transition period while leaving the door open to indictments of powerful individuals at a future date. However, delays will not always serve the prosecution as this may result in the loss or corruption of important evidence through, for instance, the intimidation of witnesses, and witness fatigue. Nevertheless, those who suggest that the Prosecutor is exclusively focusing on a particular group, or on 'minnows', may be speaking too early. The arrest of the political heavyweight Bemba, although for crimes committed abroad, illustrates this point well.

Apart from the possibility of 'constructive avoidance', which results in the bringing of proceedings at a time elected by the Office of the Prosecutor, 'delay' is also a function of the difficulty of overcoming enormous challenges, including:

- Mounting an investigation in the midst of an armed conflict or protracted instability
- The complexity of the crimes, compounded by the sheer number of victims and other witnesses
- Other issues which have a bearing on operations, such as having foreign investigators on the ground who are not familiar with the local language taking testimony from witnesses, complete with the legal terminology required, in a language in which certain legal terms may not exist
- Ensuring that arrangements to protect witnesses are available prior to making contact with them

After the ICC became engaged in the Ituri region in the eastern part of the DRC, it continued to operate in an evolving political climate. The still-delicate political process was gearing towards the first elections to be held in 2006. The government and the international community began to regard the Court's work through this new lens. It became imperative that its work, although focused on Ituri, did not compromise these positive developments in the political arena. It would appear that pressure was brought to bear upon the Prosecutor by the UN and European Union to avoid causing political instability in the lead-up to the July 2006 elections.⁸⁰ While this pressure did not result in the halting or stalling of the Office of the Prosecutor's investigations, the low profile assumed by the Court, characterised by limited visibility on the ground, is arguably attributable to these influences, which have been widely criticised by victims and non-governmental organisations (NGOs).

Continuing conflict in the Kivus and the amnesty debate

Related to the peace-justice dynamic discussed above, the manner in which the continuing conflict in the east of the DRC has shaped government perceptions of the ICC and international justice in general deserves special attention. It appears that government has become frustrated with the continuing conflagrations in that part of the country, which seem to be defying the logic of deterrence often associated with prosecutions or the threat of criminal prosecutions. As noted above, government hoped that the entry of the ICC into the picture would persuade belligerents who had refused to abide by the peace agreement to do so. This has not happened. Various armed formations remain active and continue

to endanger the peace and to commit atrocities. Laurent Nkunda, the National Congress for the People's Defence (CNDP) leader, has vowed not to surrender Bosco Ntaganda, his deputy, to the ICC in respect of whom an arrest warrant has been issued.

With a view to bringing to an end the violence in that part of the country, the government has recently decided to grant amnesty to belligerents. The law passed by Parliament with an overwhelming majority on 12 July 2008 grants amnesty to rebels for 'acts of war and rebellion'.⁸¹ At the time of publication, it was yet to be approved by the Senate in order to be assented to by the President. The amnesty was a condition imposed by 22 rebel groups for signature of the Goma Peace Accord reached on 23 January 2008. It has been argued that this is perhaps the only way to bring an end to the conflict. There is some doubt, however, that this will be achieved in view of the fact that there were clashes between the CNDP, the Democratic Liberation Forces of Rwanda (FDLR) and the Maï Maï only a few days after the Goma signing. The latest round of clashes between Armed Forces of the Democratic Republic of the Congo (FARDC) and CNDP fighters erupted at the end of August 2008. In October 2008, Nkunda announced the creation of the Mouvement pour la Libération Totale du Congo (MLTC) whose aim is 'the total liberation of Congo.' This seems to be an attempt by Nkunda to give a national outlook to the CNDP, hitherto known primarily as a Tutsi (Banyamulenge) movement.

While the amnesty is limited to 'acts of war and rebellion' and does not extend to the crimes of genocide, war crimes and crimes against humanity, the distinction between 'an act of war' and a war crime is not clear. If the understanding is that an 'act of war' extends to any of those crimes listed, the DRC's pursuit of peace in the Kivus would not be in keeping with its commitments under the Rome Statute. After initial speculation that the government was opposed to granting amnesty to certain individuals, in particular Nkunda, whose criminal exploits since 2004 are well publicised, the Speaker of the National Assembly, Vital Kamerhe, was forced to clarify that the law would apply to all.⁸²

Whatever the outcome of the process, it is clear that Kinshasa is caught between the need to bring to an end the violence in the east and its commitments to ensure that perpetrators of crimes are prosecuted, either in the DRC or in The Hague. It is noteworthy that an amnesty granted by the DRC would not protect individuals from prosecution by the ICC at a later date. The Rome Statute does

not expressly make provision for amnesty, neither does it provide for how the Court would deal with amnesty, should that need arise. The Court has so far not been presented with an opportunity to pronounce itself on the question.

While it is possible to argue otherwise, at face value there is a strong indication that amnesty is not applicable under the Rome Statute. The ICC has jurisdiction over the most serious international crimes in respect of which states have an obligation to prosecute and punish perpetrators. The main objective of the ICC is to prosecute such perpetrators when states are unable or unwilling to genuinely investigate and prosecute. This leads one to conclude that the Rome Statute does not intend to authorise amnesty for any of the crimes over which the ICC would have jurisdiction, and that an amnesty would not count before the ICC. This view is in keeping with the principles of general international law, in terms of which prohibitions against the granting of amnesty for serious crimes such as torture, grave breaches of international humanitarian law (war crimes), genocide and crimes against humanity exist. These principles could be imported into argument by the ICC through article 21 of the Rome Statute (the sources-of-law provision). In terms of article 21(b) of the Rome Statute, the Court is to apply, ‘in addition to the Statute, Elements of Crimes and its Rules of Procedure and Evidence, where appropriate, applicable treaties and the *principles and rules of international law*, including the established principles of the international law of armed conflict’.

While the Prosecutor of the ICC has been categorical insofar as amnesties are concerned, considering them inconsistent with the letter and spirit of the Rome Statute,⁸³ an argument could be made that the ‘type’ of amnesty is an important consideration. Since, within the complementarity framework, states will deal with the bulk of the cases in respect of a situation under investigation by the ICC, one cannot rule out various mechanisms short of mandatory prosecutions to be deployed by states. It is arguable that an amnesty that entails some form of accountability and is accompanied by reparations to victims could enjoy a greater measure of legitimacy and consideration than a blanket one.

Domestic capacity and DRC cooperation with the ICC

Several government officials interviewed for this monograph confirmed the willingness of the DRC to cooperate with and assist the ICC in its work. In the absence of legislation, the Agreement on Judicial Cooperation, signed between

the Prosecutor and the DRC on a provisional basis in 2004, constituted the first practical expression of such will. However, the seemingly positive cooperation relationship at the political level belies the often difficult and challenging relationship at the practical level. This arises in part from an apparent lack of capacity at the technical level to respond effectively and quickly to requests from the Court.

To facilitate response to cooperation requests and interaction with the Court, the government has designated two focal points – one political and the other technical. Subject to future domestic legislation, the Agreement on Judicial Cooperation between the ICC Prosecutor and the DRC,⁸⁴ the attorney general (the Procureur Général de la République) is the technical focal point and is mandated to execute requests for assistance from the ICC. Specifically, the attorney general:

- Is in charge of communications between the Court and the DRC, and the ICC Prosecutor communicates directly with him/her
- Receives and follows up on requests for cooperation and assistance
- Coordinates all facets of cooperation between the Court and the DRC

Requests from the ICC relating to the arrest or surrender of an individual(s) to the Court and other forms of cooperation in terms of Chapter IX of the Rome Statute are to be addressed to the National Office/Directorate of Prosecutions (Parquet Général de la République).⁸⁵

The fact that the Agreement on Judicial Cooperation vests the attorney general with overall responsibility over cooperation and thus excludes the minister of justice is significant. It rightly restricts these functions within a technical milieu and thus reduces the possible role political considerations could play with regard to fairly technical issues. Similarly, the designation of the National Directorate of Public Prosecutions with respect to arrest and surrender requests seems to exclude improper political influence in all practical aspects of inter-ICC-DRC cooperation. This suggests that requests related to the ICC are to be dealt with differently from the usual cases of extradition (to another country) that usually reserve an important role for the relevant minister, usually the minister of justice.

The Agreement on Judicial Cooperation also deals with assistance expected of the DRC in relation to investigations conducted on its territory, either by its

authorities (at the request of the ICC Prosecutor) or by the ICC's Office of the Prosecutor. The DRC commits itself in this regard to:⁸⁶

- Allowing free, unimpeded access and movement of ICC personnel on its territory to conduct investigations
- Providing necessary documents and to allow access to national archives when necessary to facilitate investigations by the Office of the Prosecutor in the DRC
- Assisting in the identification, tracing and contacting of witnesses
- Assisting in the collection and production of evidence by witnesses and in the signing of documents
- Facilitating transport, Office of the Prosecutor's communication and identification of interpreters
- Assisting and giving advice to the Office of the Prosecutor on the identification of sites (for investigations and collection of evidence) around the country
- Providing protection of witnesses from intimidation; guaranteeing confidentiality of information and preservation of evidence
- Assisting the Office of the Prosecutor to establish offices on its territory aimed at facilitating investigations
- In consultation with the Office of the Prosecutor, taking all appropriate measures to assure security of personnel and sites. In this regard, the DRC is required to designate a contact person in charge of security and movement around the country

In the second chapter of this monograph, various aspects of cooperation and concerns over which the Court may seek assistance in terms of the Rome Statute were covered. The provisions of the Agreement on Judicial Cooperation outlined above complement, in more specific ways, the Statute's provisions on cooperation. It is clear that to meet these obligations, expertise in a range of disciplines, including state security, banking and affiliated fields, and specialised investigators are required. Coordination of these functions is crucial. Clearly, effective and reliable cooperation requires a fairly technical capacity in law enforcement, judicial and other relevant structures.

When interviewed about the issue of cooperation, a high-ranking government official noted that 'the ICC is very demanding' and that the DRC

lacks capacity to respond to many types of assistance requests by the Court. He observed that the drafters of the Rome Statute, in particular its cooperation provisions summarised in chapter 2 of this monograph, contemplated a well-endowed and developed judicial and law enforcement system with relevant capacity that one would not easily find in the majority of African countries. The fact that the DRC is just emerging from a long dictatorship and armed conflict further complicates matters. He suggested that if the ICC is to succeed in its work on the continent, the Rome Statute has to be amended to reflect the realities on the ground.

Conclusions on current influences on government perceptions

The discussion above demonstrates challenges facing the ICC in the DRC. It shows that the government has come to the realisation that the ICC is no less a panacea to all problems related to peace as it is to concerns of justice in the country. The fact that the armed conflict in the east has continued irrespective of the ICC presence on the ground has led the government to contemplate other approaches that may be inimical to the work of the ICC. In this regard, the government's decision to pass a law granting amnesty to belligerents for 'acts of rebellion' would seem to demonstrate the waning confidence the government has in the work of the ICC.

With respect to cooperation with the Court, while it is not clear what the government thought its contribution to the work of the ICC would be, the discussion reveals that the shortfalls in the capacity of law enforcement agencies in that country have elicited negative sentiment from these agencies, whose members feel 'burdened' by a 'demanding' Court. In view of the fact that President Kabila's referral letter to the ICC Prosecutor in essence requested the Court to 'assist' the DRC in investigating and prosecuting crimes committed in that country, it would seem that the obligations and burdens that the Court's work would impose on domestic law enforcement agencies were not well appreciated.

CIVIL SOCIETY PERCEPTIONS

Non-governmental organisations have played an important role in the protection of human rights and in the fight against impunity in the DRC. As a result,

members of civil society, especially those who work in the field of human rights, tend to be more informed about the ICC. Most of those interviewed, while not entirely well versed in all aspects of the work of the Court, see a positive role for the ICC in the DRC. They cite impunity as one of the most serious concerns in the country today and welcome any efforts to address it. They state that such efforts fall squarely within the country's own mission of self-renewal and restoration of democracy and rule of law after decades of misrule and war.

Before considering the perceptions of the ICC in this sector of Congolese society, it is important to examine what role they have so far played in the work of the ICC and criminal justice more generally. A number of NGOs have been independently and collaboratively involved in various aspects of the ICC's work. These include Citizen's Network (Réseau de Citoyens – RCN), L'Association pour la renaissance au Congo (ARC), Congolese Initiative for Justice and Human Rights (L'Association africaine de défense des droits de l'homme – ASADHO), Lawyers Without Borders (Avocats sans frontières – ASF), Action contre l'impunité pour les droits humains (ACIDH), Centre d'Etudes et de Recherche en Droits de l'Homme, Democratie et Justice Transitionnelle (CERDH), Ligue des Électeurs, Groupe Lotus, International Federation for Human Rights (Fédération International de Droits de l'Homme – FIDH) and the International Center for Transitional Justice (ICTJ).⁸⁷

The ARC has served as the focal point in Kinshasa for the NGO Coalition for the ICC (CICC). Ligue des Électeurs, Groupe Lotus and ASADHO have long collaborated with the FIDH, one of the main international supporters of the ICC's work. These and others have conducted awareness campaigns in the DRC on issues of human rights, justice and, to a limited extent, the ICC. The ARC has published two guides destined for NGOs: a summarised Rome Statute and a practical guide for trainers on the ICC. It also published a compilation of the texts of the Interim Accord on Judicial Cooperation between the ICC and the DRC and the Provisional Protocol on Immunities of the ICC. The ASADHO, which has a wide national reach, has been involved in early initiatives to adopt legislation implementing the Rome Statute. It participated in all stakeholders meetings in this regard, and produced a 'model' Rome Statute law alongside that drafted by government and its collaborators.

NGOs such as the FIDH, the ASADHO, Ligue des Électeurs and Groupe Lotus have in the past documented human rights violations in the DRC.⁸⁸ Through its Judicial Action Group (*Groupe d'action Judiciaire*), the FIDH

started an initiative of victim support and representation before the ICC, and its lawyers have made representations to the Court, mostly on issues concerning victims.⁸⁹ Before this, in 2004, the FIDH and its partners undertook a mission of inquiry to the DRC to interview various actors, including victims, who would be potentially involved with the ICC when cases began. In May 2005, the first six applications by victims to participate in the Lubanga case were made with the legal support and representation of the FIDH in terms of rule 89(1) of the ICC Rules of Procedure and Evidence.⁹⁰

While various NGOs have availed themselves to work in partnership with the ICC and independently on issues related to its work, they have expressed frustration in recent years over the deliberate choice by the Court to keep a low profile, in particular during the political transition period, soon after it began investigations in that country. During this period the feeling has been that justice issues were relegated to second place. The ICC's seemingly pragmatic stance, although much lamented by NGOs who have daily contact with victims, was supposedly informed by the need not to prejudice the delicate transitional arrangement.

While the ICC's outreach strategy is in the public domain, NGOs have felt that the ICC has failed to provide them with relevant information and that, as a result, the NGOs are not always well informed on specific aspects of the Court's work relevant to the DRC at any one time. NGO representatives note that they also find themselves uncertain about what to tell victims or their stakeholders, particularly on the question of victim participation since the Lubanga and Katanga/Chui cases began. One could attribute this in part to the ICC's decision to maintain a low profile and in part to what appears so far to be resistance from the Office of the Prosecutor to the participation of victims and apparent disagreement in the early days between various organs of the Court on how to deal with victims.⁹¹

A study conducted in 2007 among NGO representatives in the DRC notes that the prominent view among them was that 'the Court is afraid of victims'.⁹² As confirmed by recent interviews conducted in the DRC, it would appear that this situation does not seem to have changed. NGOs suggest that they still struggle to readily obtain current information on issues concerning the ICC's work in the DRC.

Further, NGOs who plunged themselves into this work independently or in collaboration with the ICC, with the misplaced expectation that the Court

would channel funds to their work or at least facilitate donor contacts, have been left disappointed. They suggest that their ability to contribute to achieving the objectives of the ICC has been greatly diminished. Coupled with the perceived reticence on the part of the Court to engage them readily, many seem to have lost enthusiasm for the Court and its work.

Conclusions on civil society perceptions

The discussion above demonstrates that NGOs have been forceful actors in the DRC on issues of justice and the ICC in particular. They have supported ratification efforts and campaigned for the referral of the situation to the ICC and domestication of the Rome Statute. Further, their awareness-raising campaigns and direct work with victims are crucial aspects of the Court's work in the DRC. However, it would appear that the initial high expectations were lowered over time as it became apparent that the Court's work would be slowed by a range of factors. The hope among some of these NGOs for material support from the ICC for their programmes has not been realised. Although such hopes may have been misplaced, it is noteworthy that the ICC is unlikely to succeed in the DRC without support from such organisations.

The potential of NGOs to contribute to various aspects of the Court's work is enormous, not least among victims. Apart from raising awareness, various NGOs have the structures that could be deployed to reach victims should reparations programmes be implemented by the Court or its Trust Fund for Victims. It is worth noting that the possibility exists, in terms of rule 98(4) of the Court's Rules for the Court and Trust Fund, to use both national and international organisations in the implementation of mass reparations schemes. Rule 98(4) provides that 'the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund'. For these reasons, the desire by NGOs to be assisted financially by the Court or by donors solicited by the Court, while premature – insofar as reparations issues will definitively be resolved at the end of trial proceedings – is not entirely unfounded.

While some of the complaints voiced by NGOs over the ICC's reticence in engaging them are justifiable, it could be suggested that the Prosecutor's main concern in dealing with NGOs is the threat to his prosecutorial discretion in the conduct of an investigation. This is a valid issue in that, once there is a perception

that his ability to decide his strategy (and, by extension, his independence) is compromised, his office will be even more vulnerable to the charge that he cannot be partial or apolitical. The fact that the Rome Statute and the Rules go to great lengths to protect the independence of the Office of the Prosecutor is crucial. In its dealings, either with NGOs or other interlocutors, the right balance should be struck in practice to preserve the Office of the Prosecutor's independence and prosecutorial discretion.

PERCEPTIONS AMONG VICTIMS

From interviews with, and media reports on, NGOs working with victims and on victims' issues, perceptions among victims about the ICC and its work in the DRC are mixed. They range from elation brought about by the prospect that victims will eventually receive justice, to indifference and harsh critique, informed largely by the perceived failure of the justice system – whether international or domestic – to effectively address serious atrocities committed in the country since 1998. Doubts about the ICC among victims have also begun to emerge following developments in some of the cases before the Court, in particular the Lubanga case. The perceived impotence of international mechanisms to address their plight as well as the continuation of the conflict and unabated violations (sexual violence, killings, torture and pillaging) in the east of the country adds to people's scepticism about the ICC and other justice mechanisms in general. Some of the influences that inform victim perceptions are discussed below.

Before addressing these influences it is important to outline briefly the role of victims in bringing about ICC investigations in the DRC. Contrary to views that victims and victim organisations in the DRC are latecomers to the ICC proceedings in that country, victims played a key role in triggering the referral by the DRC to the ICC.⁹³ Acting through various NGOs, including the FIDH and its local partners in the DRC – the ASADHO, Groupe Lotus and Ligue des Électeurs – victims had on various occasions in 2003 conveyed communications to the Prosecutor of the ICC, informing him of crimes in Ituri.⁹⁴ Relying on article 15(1) of the Rome Statute, they requested the Prosecutor, given the absence of a referral by a State Party or the Security Council, to initiate investigations in Ituri with a view to bringing perpetrators to justice.

Article 15(1) of the Rome Statute empowers the Prosecutor to initiate investigations on his own initiative (*proprio motu*) on the basis of information relating to crimes within the jurisdiction of the Court. On the basis of this information and that from other sources such as the media and reports from various sources, the Prosecutor is said to have approached the DRC government to find a way forward. According to a government source, the fact that victims had approached the ICC partly influenced the government's decision to make a referral to the Court.

Absence of other viable avenues of justice

Here, victims' perceptions seem to resonate with those of the government on this subject. The current disappointment among victims seems to be informed by the fact that, initially, they (victims) pinned all their hopes on the Court to deliver justice in the absence of other viable avenues in the DRC. According to one NGO representative, many victims' hopes were raised following Bemba's high-profile arrest in May 2008. The event renewed the belief among victims that the ICC could still be expected to bring justice to many of them.

Lack of knowledge and ignorance of the ICC's work

Lack of knowledge and ignorance of the ICC's work and the role victims could play in the process seem to inform the perceptions of victims about the Court. Sensitisation efforts done by the ICC, NGOs and other partners have been very limited and have not helped to improve the situation. In fact, the ICC's engagement in the DRC and the NGO involvement described above has targeted almost exclusively the educated sectors of society such as media, functionaries, judicial officers and the army, to the exclusion of the wider population who are perhaps most affected by atrocities under inquiry.

As a result of lack of awareness, many victims do not understand the potential role they could play in the ICC. In particular, they seem largely unaware that the Rome Statute affords certain rights to victims: the right to participate in the Court's proceedings (article 68 of the Rome Statute) and the right to receive reparations (articles 75 and 79). In a historic decision on 17 January 2006, Pre-

trial Chamber I affirmed the right of victims to participate at all stages of the proceedings and decided to allow the first applicant victims to participate at the investigation stage in the Lubanga case.⁹⁵

From the above, it would appear that victims' expectations of the Court have been rather high. Those who have some knowledge of their right to participation – largely a result of NGO campaigns – seem to have been under the impression that the process of participation would be open to all who could and were willing to do so. Victims also seem unaware of the limits of what the ICC as a criminal court can achieve: in terms of the number of perpetrators who will eventually be tried in The Hague and the fact that only a few victims can participate in any particular case (proceedings) or benefit from reparations individually.

To illustrate the lack of knowledge and what appears to be overblown expectations, NGO representatives and victims themselves (at recent outreach sessions organised by the ICC in Ituri) expressed dissatisfaction with how the ICC has conducted its activities so far in Ituri.⁹⁶ They seem particularly unhappy with the mechanisms of identifying and selecting victims to participate in the proceedings and the permissible modes and scope of participation in these proceedings, which according to them are very limited.⁹⁷ Victims seem to be coming to the painful realisation that only a few of them can participate in any process. It is noteworthy that while victims have a right to participate at all stages in ICC proceedings, the Court applies strict criteria under article 68 of the Rome Statute to determine who participates. Individuals have to show that:

- They are victims as defined in the Rules (rule 85)
- Their personal interests are affected, for instance, that they want to make a request for reparations
- It is appropriate to participate, for instance, their participation does not pose efficiency problems for the Court
- Their participation does not prejudice the accused's rights by inordinately delaying the proceedings

It appears that victims may have been under the illusion that the ICC process would be an open process where they will all have a voice. Such misconceptions underscore the need for more extensive information campaigns, not only to inform but also to manage expectations of victims, which are high. In general,

victims have lamented the slow pace with which the ICC's judicial processes are proceeding. While judicial processes tend in general to take long, the complexity of international trials and the further delays they may occasion have to be explained to impatient victims and the public. Involvement by NGOs with the relevant knowledge of these elements would help where the ICC Outreach Unit has limited or no reach.

Perceived selectivity and partiality of the Court

First, victims have raised questions relating to the Office of the Prosecutor's selection of cases. Some victims have wondered why individuals like Laurent Nkunda, whose Rwandan-backed rebel fighters are alleged to be responsible for serious crimes, have not been indicted. Nkunda, against whom a Congolese court issued an arrest warrant for war crimes, crimes against humanity and insurrection in September 2006, has until recently operated actively in eastern DRC's Kivu region. At the time of publication, Nkunda is in custody in Kigali after Rwandan soldiers arrested him on 22 January 2009 for allegedly opposing the joint Rwanda-DRC operation against the FDLR rebels in the Kivus. His possible extradition to the DRC has been raised.

Second, some victims have also expressed concern about why the ICC seems to 'target only the small people' while the high-ranking members of the Congolese political class, who were once antagonists during the war, still walk free. It appears that in general, victims seem unable to separate the Court's process from domestic Congolese politics. The idea that President Joseph Kabila's referral to the ICC was somehow linked to his desire to destabilise and 'fix' his political opponents, in particular Jean-Pierre Bemba, ahead of general elections at the end of the transition government, seems to linger in peoples' minds.⁹⁸ More recently, the protestations by MLC (Bemba's party) members at the time of his arrest – that they saw Kinshasa's hand in these events – while not necessarily based on the facts, reflect the continuing view that the ICC and the Kinshasa regime are bedfellows. To those holding these views, it seems to make no difference that Bemba's charges are linked to crimes committed in Central African Republic and not the DRC.

Although such potentially harmful views about the Court's work would demand aggressive campaigns to counter the negativity, the Court does not seem to have consistently met the challenge. When a reaction to such views

has been forthcoming, the Office of the Prosecutor's response has been that investigations are ongoing in the Ituri region; that the current cases are but the first ones, and that the Court's focus will soon widen to include crimes allegedly committed in the Kivus and elsewhere in the DRC. However, it appears that this message is not heard on the ground in affected communities.⁹⁹ One must note, however, that such efforts face enormous challenges in view of ongoing clashes in the Kivus.

A general, and perhaps speculative, response to such concerns is that it is likely that indictments against other individuals in the DRC could already have been issued and are awaiting the opportune moment to be made public. It has been the practice of the Court so far to issue arrest warrants under seal to maintain the 'confidentiality' of the process, and for the Office of the Prosecutor to request for the same to be lifted when the need arises. So far, all warrants have been issued under seal. In the case of Bemba, he was arrested on the basis of a provisional arrest warrant issued under seal on 23 May 2008, which was later certified and made public after his arrest on 24 May 2008. In the Bosco Ntaganda case, the Court prepared the arrest warrant under seal, which was only lifted when he crossed over to join Nkunda's CNDP forces in Ituri.

Access to the Court

Many victims as well as victim NGOs find the location of the Court in The Hague problematic as it poses serious problems of access for victims. It is noteworthy that article 3(3) of the Rome Statute provides that while the permanent seat of the Court is in The Hague, the Court may sit elsewhere (*in situ* hearings). States Parties to the ICC have in the past, recognising the value of *in situ* hearings, emphasised that the ICC should take every opportunity to hold hearings in affected areas.¹⁰⁰ The ICC's Strategic Plan of 2006 recognised that '[h]olding proceedings closer to situations where the crimes occurred may increase the accessibility of proceedings to affected populations, the efficiency of the Court's different activities and the extent to which the Court can fulfil its mission'.¹⁰¹

However, some victims and victim NGOs do not seem enthusiastic about the ICC relocating, when the need arises, to hold hearings in the DRC. Emphasising their faith in the independence of the Court and at the same time expressing lack of the same in Congolese institutions, some expressed fear – however ill

informed – that the ICC sitting in the DRC could be co-opted by politicians for their own ends. Immediate references were made to the failure of the CVR to achieve its mandate as well as the inability of a judicial system to fully and independently address war-related crimes. They suggested that to avoid this, or at least the perception of co-option by the government, it might be necessary for the ICC to sit in one of the neighbouring countries. It is questionable, however, whether such action would enhance access to the Court, especially by victims.

One must note further that having the ICC sit in the DRC (or a neighbouring country) to conduct hearings related to crimes committed in eastern DRC would be a great awareness-raising opportunity. However, in view of the past and present role of some of the neighbouring countries in the conflict in the DRC, there may be intricate political questions to resolve before the Court could consider holding hearings in any of these countries. Further, logistical issues relating to availability of proper facilities for the Court and security for those involved, including judges, court officers and witnesses, may present serious problems. Offering protection to court officials and witnesses in the context of ongoing conflict is a major consideration. One NGO representative interviewed rightly suggested that testifying in The Hague might offer greater protection to witnesses. In the DRC, witnesses would be in the full glare of those who may want to harm them on account of their testimony before the Court. It is noteworthy that the ICC had indeed considered holding part of Lubanga's trial in the DRC but abandoned the idea after the government cited security concerns. The decision not to sit in the DRC was made public on 12 March 2008.¹⁰²

Increasing visibility by the ICC

A number of NGO representatives emphasised that many victims are unaware of the ICC's operations in the DRC, although it has field offices in Kinshasa and Bunia, Ituri. Some respondents were unsure what these offices do, in view of their limited engagement with the public, while others expressed their frustration at the 'lack of an aggressive awareness raising programme by the ICC' and limited engagement with the public and victims.¹⁰³

The ICC seems to be responding to this challenge. In a recent development, the Court's Outreach Unit, on the ground in the DRC since 2006, seems more open to engage the population and has launched awareness campaigns in

eastern DRC. On 7 and 8 September 2008, the Outreach Unit organised two days of awareness for local populations of the villages of Mwanga and Gongo, located more than 25 km south of Bunia in Ituri. The meeting was attended by more than 280 people, including women victims, NGO members and clergy. It was the first time such a session has been organised to brief the general public on the work of the ICC in the DRC, and Ituri in particular.¹⁰⁴ On 13 September 2008, another meeting targeting women who have suffered sexual violence was held in the village of Iga Barrière.¹⁰⁵ It appears that the Outreach Unit seems to have adopted an approach that targets particular victim groups in its current campaigns, including victims of sexual violence and child soldiers.

The widely publicised arrest of Bemba, so far the most high-profile indictee, is another event that seems to have raised the profile of the ICC in the DRC. The fact that the ICC has obtained custody of such a high-profile individual, who cast a wide shadow on Congolese political and social life, has raised hopes among victims that the ICC can indeed bring to justice perpetrators of crimes. The ICC Prosecutor hailed the arrest and transfer of Bemba as a victory for victims. He stated in his 3 June 2008 statement that ‘we cannot bring back those who were killed or died of AIDS after being violated, but I am hopeful that we will bring justice for the victims’.¹⁰⁶

For some, the mere arrest of Bemba is recognition of their suffering. One NGO representative recounted the story of one woman who appeared with her 20-year-old daughter, both of who were allegedly raped by MLC fighters and contracted HIV in the process. She reportedly could not hide her elation, stating that: ‘The arrest of Bemba is justice for us. Even if I die, I can die happily now.’ Other victims are said to remain sceptical, believing that, somehow, Bemba will find a way to escape being tried. In view of the fact that Bemba’s arrest came just after the ICC had ordered Lubanga’s release, many are not comforted by the mere fact that Bemba is in custody.

Conclusions on perceptions of victims

From the discussion above, it emerged that victims’ perceptions about the ICC are shaped by their initial high expectations of the Court in a country where few other avenues of pursuing justice exist. It was noted that, for the most part, views among victims arise from their lack of knowledge about the ICC: with respect to what the Court can reasonably be expected to achieve and what their

roles as victims could be before the Court. A fair amount of responsibility rests with the ICC, which appears to have had, until recently, limited contact with communities and victims on the ground. It is important that the Court, in collaboration with NGOs and other community-based organisations, manages these expectations through rigorous awareness-raising campaigns and other forms of engagement in order to maximise the impact of its work in affected communities. Alluding to the apparently distant profile of the ICC vis-à-vis victims, Richard Dicker, the international justice programme director at Human Rights Watch, stated recently that the ICC had made real headway in bringing justice to the victims of horrible abuses in the face of daunting obstacles, but that the Court should tackle real shortcomings so that its work resonated in the communities most affected by major international crimes.¹⁰⁷

THE MEDIA AND OTHER OBSERVERS

In view of the fact that perceptions of the ICC by government, civil society and victims are often carried and reflected in the media, a brief sampling of perspectives in this sector is useful. While a more detailed survey is required to properly gauge such perspectives, a snapshot could be equally telling.¹⁰⁸ Views in the media – although not always accurate and well informed on specific aspects of the ICC’s work – have been critical of the ICC and its work in Africa and the DRC in particular. Certain sections of the media have amplified the suggestion that the ICC seems to be selective in its approach and that it has been used for partisan purposes in the DRC. These claims are often reiterated by pointing to the fact that not one member of the current government in Kinshasa has been indicted by the ICC, or that the arrest of Lubanga should have been followed by others who are equally liable for crimes in Ituri.¹⁰⁹

The legacy of the war and the nature of the recent political transition have resulted in the politicisation of almost every facet of Congolese life. The media’s reporting on issues of justice often reflects political bias. However, not all reporting on the ICC has been biased or uninformed. In the last few years, the media, including the MONUC-run Radio Okapi, which tends towards more balanced reporting, has focused most reporting on the political process, with the elections taking up most of the time. A sampling of newspapers in Kinshasa reflected that ICC issues – for instance, Bemba’s indictment – often make front-page news. However, it would appear that most reporting on ICC

issues is concentrated on the Internet, which has provided in-depth reports and wider coverage.¹¹⁰

Some NGO representatives interviewed suggested that the limited and speculative reporting on ICC issues is perhaps attributable to the fact that the Court has not been very visible on the ground. Further, it would appear that the Court has not taken advantage of the full potential that the media offers in creating awareness of its work, correcting misinformation and reaching the masses, and victims in particular. Bemba's indictment and arrest by the ICC in May 2008 has reignited media interest in the ICC, with wide coverage of the process so far. The increasing visibility of the ICC through its Outreach Unit in the east of the country is likely to change the current situation and, perhaps, with it media interest.

Inaccurate reporting on the ICC is reflected at a broader continental level. In this regard, commentators on the Court tend to amalgamate the work of the ICC in the four situation countries – the DRC, Central African Republic, Uganda and Sudan – in claiming that the ICC seems to have an eye for perpetrators in Africa and not elsewhere. These commentators point to situations in far-flung places such as Iraq, Afghanistan, Palestine and Israel to support the argument that if the ICC were truly impartial it would have similarly moved to act in those situations.¹¹¹ The recent indictment of the president of Sudan has been cited as yet another example of the ICC's 'targeting' of Africans. These arguments raise issues beyond the scope of this monograph.¹¹² However, they point to a number of propositions that are worth noting here.

First, these suggestions indicate a serious lack of understanding of the facts in a number of respects. In this regard, the fact that three out of four African situations before the ICC today are self-referrals is often glossed over. Second, they illustrate the fact that the ICC – by virtue of being an international institution of which states are members – will always be cited in the politics reminiscent of international relations, diplomacy and global power relations. The challenge is for the ICC to remain above the fray and endeavour to forcefully and consistently present the correct position in its interactions with interlocutors. Third, and related to this, is the reality that the ICC cannot entirely extricate itself from national politics in countries where it operates. While applying set legal criteria in its work, the success of the ICC, and the Office of the Prosecutor in particular, may necessarily lie in that office navigating a mined political terrain. However, it is suggested that although,

in view of limited resources at the ICC, the level of perpetrators to indict is important, the exercise of discretion should not necessarily be on *who* to indict or not to charge but on *when* to do so. In the DRC, as opposed to Uganda, the current political mood seems overwhelmingly in favour of ICC prosecutions. The timing is right. Fourth, the relative novelty of the institution, coupled with lack of awareness, may be partly responsible for the ill-informed views about the Court and its activities.

5 Summary of findings and recommendations

FINDINGS AND CONCLUSIONS

The monograph set out to discuss the work of the ICC in the DRC from the referral of the situation to the current state of relations between the Court and the DRC. Owing to the much-lamented role of politics in such processes, the study sought to identify to what extent, if at all, political considerations have influenced inter-ICC-DRC relations. It also examined perceptions of the Court and its work in various sectors of Congolese society. The findings outlined below highlight the challenges and opportunities for the ICC in relation to its work in the DRC, and perhaps, by extension, in Africa more broadly. The recommendations that follow relate directly to these challenges and opportunities.

To begin with, it was noted that the intervention of the ICC in the DRC was timely. Many years of war generated, directly or indirectly, several million victims of human rights violations and mass atrocities. Serious crimes such as rape, murder, torture and pillage have come to mark the brutality of the armed conflict. During the course of the war, various belligerent groups routinely conscripted and used children in the conduct of hostilities. Even though the

conflict among the main parties was brought to an end with the Global All-Inclusive Agreement in 2002, widespread violence against civilians and their property continued unabated in several parts of the country.

While the need to address the situation by prosecuting at least the most serious perpetrators of these atrocities and addressing the concerns of victims was obvious, various factors prevented such an undertaking. A near-collapsed law enforcement system, lack of resources and polarisation that significantly diminished the possibility of an independent judiciary that could administer impartial justice were, and still are, serious concerns. Although the referral by the DRC of the situation in that country does not solve these problems, it ensures that the existing domestic mechanisms are complemented by the ICC in dealing with the seemingly entrenched problem of impunity in that country.

On the ICC and DRC situation generally

The monograph addressed several misconceptions and misgivings about the work of the Court in Africa, and the DRC in particular. By identifying and discussing the various factors that informed the referral, it discredits the single-factor explanations of the circumstances under which the ICC got involved in the DRC. In this regard, factors that influenced those events, and continue to have a bearing on current perceptions and operations of the Court, were discussed. These include the role of victims and non-governmental organisations (NGOs); international pressure, in particular from the United Nations (UN) and European Union; the transition from conflict and the new government's will to rebuild the country governed by rule of law and respect for human rights; the absence of reliable and ready domestic mechanisms; and the continuing conflict in the east of the country.

An overview of the situation and cases before the ICC was provided in chapter 3. It was noted that while the DRC government has been willing and supportive of the Court's work, the presence of the more operationally able and better-resourced MONUC, vested with human rights and security mandates, has been indispensable to the current achievements of the Court.

It was observed that, with the exception of Bemba, the accused currently before the Court – Lubanga, Katanga and Chui – are fairly low-level individuals

in the greater scheme of the Congolese conflict, which perhaps made them 'easy' targets for the Court. The summary of perceptions below addresses this point further.

The proceedings so far in the Lubanga case have raised some controversy and generated heated debates about the Prosecutor's strategy and the conduct of proceedings arising from the Court's decision to order Lubanga's release. It would seem that the Office of the Prosecutor's strategy of running a clean and quick one-issue trial might have been misguided. At a fundamental level, it appears that the possibilities of proffering more than the charge of conscription and use of child soldiers should have been explored. The technicalities of using the disputed confidential information aside, it is possible that the Office of the Prosecutor could have abandoned the 'problematic' charges without entering a potentially damaging and protracted tussle with the defence, such as the one we have witnessed.¹¹³ For now there is only three one-issue charges to uphold, which leaves the Office of the Prosecutor in a difficult position should it become necessary for the current charges – all related to child soldiers – to be dropped.

There are important lessons to be learnt from the Lubanga case. For a start, the charges proffered in the Katanga/Ngudjolo case, as well as the Bemba case, reflect more accurately the actual events and crimes committed in the respective conflicts to which they relate. However, the prosecutorial strategy adopted may be considered problematic more generally. As the discussion of perceptions of the ICC shows, while the Office of the Prosecutor may be justified in wanting to obtain convictions in the shortest time and as efficiently as possible, there should be recognition that the objectives of the Court as an institution extend beyond prosecuting and convicting perpetrators. It is true that the ICC is first and foremost a criminal court, and this means that its primary responsibility is to prosecute perpetrators. However, as noted already, the Court has a special mandate relating to victims. More broadly, the Court's real impact in the DRC and the affected communities in particular will depend on whether its work is embraced on the ground. For legitimacy of the Court, and impact on the ground, the prosecutorial strategy adopted should seek, as much as possible, to represent a cross-section of the major crimes committed over which the Court has jurisdiction.

On cooperation between the DRC and the Court

The ICC cannot succeed in its work without effective and reliable cooperation and assistance from member states, in particular states where investigations are ongoing. The obligations to cooperate with the Court as stipulated by the Rome Statute were outlined. It was noted that in the absence of implementing legislation, the DRC signed the Agreement on Judicial Cooperation in terms of which the relationship between the Court and the DRC is regulated.

It is clear, therefore, that while it is a necessary step to be undertaken by all states that have ratified the Rome Statute, the absence of such legislation neither precludes nor prevents ICC investigations going ahead once the situation has been referred to the Court. Involvement by parliament through its legislative function does have the effect of lending legitimacy to a process – to the extent that such agreements are signed between the executive and the Court – that would otherwise enjoy limited legitimacy among the general public.

The monograph briefly outlined the relevant provisions of the Agreement on Judicial Cooperation. The fairly extensive catalogue of obligations undertaken by the DRC with regard to investigations was outlined. It became apparent that for the DRC to meet these obligations, a well resourced Office of the Attorney General and Director of Prosecutions equipped with relevant capacities is necessary. It was noted that these elements are for the most part lacking and that, despite the existence of political will to assist the Court as much as possible, complaints have emerged on the ground that the ‘ICC is too demanding’. In view of ill-equipped law enforcement with basic staff, the various forms of assistance – for the most part of a technical character – impose heavy burdens on available structures.

On perceptions of the ICC's work

The study found that the perceptions of the ICC in different sectors of Congolese society are varied, although there seems to be a convergence of views in a number of respects. It also noted that these perceptions have been influenced by a range of factors that have varied with the prevailing political circumstances.

Government

The government views the role of the ICC in prosecuting serious crimes as an important one, not only in fighting impunity and doing justice for victims but also in sending a message to those who are still actively involved in armed conflict and various forms of violence that they have to choose the path of peace. While perhaps assigning too much responsibility to the ICC in this regard, the government sees its work as crucial in the fight against impunity. The failure of the Truth and Reconciliation Commission to achieve anything significant in the two years it was in existence, the lack of independence in the judiciary and the inability of the criminal justice system in general to conduct prosecutions informed the decision to involve the ICC.

The government has responded to attacks and insinuations that it works with the ICC to target political enemies by emphasising that the Court is an independent institution and that the government therefore has no influence whatsoever on the Court and its various organs. It appears that the perceptions of such improper dealings between the Court and government do not seem to be informed by facts. This illustrates the need for sensitisation campaigns to address such potentially damaging views of the Court's operations that are not necessarily well informed.

The unconditional political support afforded by the government to the Court and its Office of the Prosecutor in particular seems unmatched by actual capacity on the ground to execute various requests for assistance and cooperation. This has given rise to complaints about the demanding nature of the relationship between the Court and DRC law enforcement.

As the ICC's work has evolved, the government found itself in the unenviable position where its pursuit of peace in the Kivus conflicted with its commitments to the ICC and the fight against impunity generally. This has had the effect that its options in that process have been limited. The more attractive option of amnesty that would extend to serious crimes committed by rebels has not been available to the government. The government has had to limit amnesty declared as part of the recent Goma Agreement to the yet undefined notions of 'acts of war and rebellion'. While the position in international law on amnesty relating to international crimes is clear, the fact that the ICC is on the ground in the country and may soon be turning its investigative efforts to the Kivus adds to the emphasis. This has left the government frustrated.

Civil society

It was noted that civil society has been involved at various stages of the Court's work in the DRC. Non-governmental organisations were involved in ratification and domestication campaigns, training and awareness as well as organising victims to participate in the ongoing cases. However, it emerged that lack of funding, as well as the Court's relatively low profile, have limited the contribution civil society can make in the process. Some NGOs have been unhappy with the apparent lack of information on the ICC's operations, in particular in relation to victims. Reservations have been expressed about the prosecutorial and charging policy, which has limited current investigations to Ituri and, with respect to the Lubanga case, resulted in the exclusion of 'blood crimes'.

Victims

Victims have high expectations of the Court and hope that it will ensure that they receive justice. It emerged that these expectations do not seem to be managed through awareness campaigns, which have so far been very limited. In general, victims do not seem to be aware of the roles they could play in the Court. Those who have received information so far on participation are unhappy with the established procedures for their involvement. It appears that the Court is unsure of how to deal with victims, who may well number thousands in Ituri alone.

RECOMMENDATIONS

1. The government has to sustain the current support afforded to the Court as the earliest cases enter crucial stages. As the ICC expands the scope of crimes charged against particular suspects, and as it broadens the scope of its investigations to other parts of the country, the workload and related demands on cooperation agencies in the DRC will certainly increase.
2. There is a need to improve, possibly in collaboration with the Court, the capacity of those agencies to respond within required time frames to the increasing workload. Without the relevant technical capacity in countries where the ICC is conducting investigations, the Court will encounter serious

- problems related to cooperation. Capacity building, driven both by the Court or appointed partners as well as other entities and NGOs, is a necessity.
3. The Court should make better use of the fairly extensive network of relevant NGOs in the country that are willing to participate in various aspects of its work. Rather than establishing parallel structures to those already in existence, the ICC should tap into options offered by such organisations. This may require channelling funds appropriately through such organisations. Further, these organisations and other social networks that operate within these communities offer useful structures for the implementation of large-scale (communal) reparations schemes. As noted in the discussion relating to the role of civil society above, such possibility is founded in rule 98(4) of the Court's Rules of Procedure and Evidence. These organisations could be instrumental in implementing the projects for victims that the Trust Fund for Victims is said to be planning for Uganda, Central African Republic and the DRC.
 4. The ICC needs to improve interactions with communities – at least those affected by crimes over which the Court has jurisdiction. The Court's outreach programme has to be implemented more broadly in an attempt to reach such communities. Although this process started slowly, current efforts to sensitise the wider populations in the east must be applauded. But more needs to be done. It makes sense that such efforts should not be haphazard but structured to target specific sectors of society where investigations are ongoing while not losing sight of a broader campaign aimed both to keep the work of the Court in the mind of the public and to prepare specific areas for future involvement. Beyond the 'transitional' or 'formative' years of the ICC, the argument that keeping a low profile is beneficial for the Court – except in circumstances where security or other considerations require a more clandestine or cautious approach – is no longer tenable.
 5. While engaging victims and broader communities, the Court has to do more to manage the expectations of the public in relation to its work. From interviews with victims, it emerged that they have an unrealistic view of what the Court may achieve. Victims need to be better informed, through ICC outreach as well as through NGOs, about their possible roles and their rights to participation and reparations. It appears that there is lack of clarity about the possible scope of such participation, in particular the fact that

- only a small percentage of victims may actually participate at one stage or other in the proceedings.
6. The Office of the Prosecutor needs to expand the geographical scope of its investigations and ensure that appropriate crimes are charged. The fact that its investigations have been limited to the Ituri region has fuelled perceptions that the Court is focusing on the 'politically safe' and 'easy' cases while avoiding ongoing atrocities in the Kivus where its work could have a real impact. While the decision to focus on Ituri allowed the Court to establish its credibility by commencing its first cases, it needs to broaden its reach.
 7. Irrespective of the government's intentions in referring the situation to the ICC, the Court's work seems to have momentum. It is important that this be maintained, while, of course, benefiting from cooperation and assistance from the government and other partners.
 8. The ICC role in the fight against impunity in the DRC cannot be disputed. For it to succeed, effective and sustained cooperation by the Congolese authorities and support from other partners, such as the UN and NGOs, is crucial. At the national level, political support needs to be sustained and unwavering. The capacity of national law enforcement agencies has to be strengthened to be able to respond to the fairly detailed and technical requests for assistance from the Court. Importantly, national mechanisms of accountability must be activated to support the work of the ICC.
 9. For its part, the ICC has to be open to collaboration with all those who could contribute to its objectives. While recognising that it operates in a political environment, both nationally and internationally, it is crucial that it functions above the political fray in order to maintain its legitimacy. Understanding that perceptions among various sectors of society have a bearing on its work, the Court must endeavour to maintain a public face and to lead efforts aimed at raising awareness and reaching affected communities and the general public.
 10. The Prosecutor should seek to be seen to be impartial by ensuring that his selection of targets cuts across the political spectrum. In the case of Darfur, for instance, while the first individuals to have arrest warrants issued against them are linked to the government, the investigation has turned to other actors in Sudan, in particular the rebel formations. This approach has at least two advantages: it demonstrates that the Prosecutor is even-handed and recognises the reality that perpetrators almost never belong to one

group; and it makes possible an accurate representation of the range and pattern of criminality in the situation as a whole.

Notes

- 1 The ICTR (UN Security Council resolutions 935 and 955 of 1994) and ICTY (UN Security Council Resolution 827 of 1993) were established by the Security Council pursuant to its Chapter VII powers, while the SCSL was established by agreement between the UN and the government of Sierra Leone.
- 2 The Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998, came into force on 1 July 2002.
- 3 Articles 1, 5, 6, 7 and 8 of the Rome Statute.
- 4 Article 13 of the Rome Statute.
- 5 Article 12(3) of the Rome Statute.
- 6 See the United Nations, *Côte d'Ivoire: Rapport de la Commission d'Enquête internationale*, 1.
- 7 For a comprehensive general analysis of the work of the ICC since its establishment, see generally Human Rights Watch, *The landmark International Criminal Court's first years*, 1. The report examines the ICC's accomplishments and shortcomings since it began operations in 2003.
- 8 'Surrender' is the process through which a person who has been indicted is brought into custody at the Court for trial from the relevant national jurisdiction. The term 'extradition', which refers to the transfer of individuals from one (domestic) jurisdiction to another, is not used with respect to international tribunals.
- 9 On the wars and transition in the DRC, see generally Turner, *The Congo wars: Conflict, myth and reality*, 1; Vinck, Pham and Shigekane, *Living with fear*, 10–14; Alusala, *The Democratic Republic of Congo*, 93.
- 10 For more recent developments in eastern DRC, see generally Boschoff and Hoebeke *Peace in the Kivus?*, 1.
- 11 UN reports, NGOs and others have documented atrocities committed and which continue to be committed (in the east) over the years. See, for instance, Vinck, Pham and Shigekane, *Living with fear*, 13 describing continuing atrocities by Nkunda's forces and the Congolese army (FARDC).

- 12 For a discussion of this phenomenon, see generally Mbombo and Bayolo, *Conflicts armés en RDC: Violences sexuelles contre les femmes*, 1.
- 13 See International Rescue Committee and Burnet Institute 2007.
- 14 With respect to Lubanga, see Pre-trial Chamber I decision ICC-01/04-01/06-8-US-Corr, 10 February 2006, paragraph 136.
- 15 The relationship between the law and politics continues to occupy commentators. In international law, the struggle for an international rule of law is regarded as a fight against politics. See Butterfield, *Western values in international relations*, 122.
- 16 On the changing relationship between international law and international politics (international relations), see generally Reus-Smit, *The politics of international law*, 1-14 at 1-3.
- 17 For a treatment of the relationship between politics and law through an examination of major issues that divided mostly the US and the majority of states during the negotiations of the Rome Statute, see generally Wippman, *The international Criminal Court*, 151-188.
- 18 On selectivity and the ad hoc tribunals, see Griffin, Ending impunity of perpetrators of human rights atrocities, 838 and Meron, *The case of war crimes trials in Yugoslavia*, 1144.
- 19 The indictment of President Al-Bashir of Sudan prompted allegations from Sudan that the ICC is selective and is only targeting weak states. Some other commentators seem to share this view. See for instance Agence France-Presse, *African rights groups praise ICC on Sudan but ask for fairness*, 1. See also Mahmood Mamdani who argues that the ICC and what it stands for 'is being turned into an assertion of neo-colonial domination'. See generally Mamdani, *Saviours and survivors*, 1.
- 20 The Prosecutor's prosecutorial policy is guided by the complementarity framework; the requirement that 'the most serious crimes' be prosecuted and the criterion of gravity; and the concept of 'interests of justice' in terms of which prosecutorial discretion is to be exercised. For detail, see ICC Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, 1 and ICC Office of the Prosecutor, *Policy paper on interests of justice*, 1.
- 21 The control role of the Court is provided for in several instances, including the decision by the Prosecutor to commence investigations, indict an individual, and in respect of charges to proffer. See articles 54, 57 and 61 of the Rome Statute.
- 22 See article 17(1)(d) of the Rome Statute.
- 23 About confirmation of charges, see article 61 of the Rome Statute.
- 24 American Society of International Law, *The politics of international law*.
- 25 See Appendix 1.
- 26 Projet de loi de la RDC portant mise en œuvre du Statut de Rome de la Cour pénale internationale 2002. See Appendix 2.

- 27 See Loi modifiant et completant certaines dispositions du code penale, du code d'organisation et de la competence judiciaires, du code penal militaire et du code judiciaire militaire, en application du statut de la cour penale internationale.
- 28 The participants included prominent experts at the national level, such as the minister of justice, Ngele Masudi; M. Yenyi Olungu, deputy general prosecutor; Zénon Mukongo, first counsellor at the Permanent Mission of DRC to the UN; and Professor Luzolo, president of the Permanent Congolese Law Reform Commission. International experts included Philippe Kirsch, until March 2009 the president of the ICC; and M. Diallo, deputy director of the Criminal Affairs Division of the Ministry of Justice of Senegal; as well as representatives from international NGOs such as Human Rights First, Human Rights Watch and the Coalition for the International Criminal Court.
- 29 See Human Rights First, *Implementation in the Democratic Republic of Congo*.
- 30 See Amnesty International, *DRC: Parliament must reform and enact International Criminal Court bill* and Amnesty International, *Open letter to parliamentarians*.
- 31 'Situation' means the overall factual context over which the ICC may exercise its jurisdiction and from which individual cases may be developed. 'Situation', used in contradistinction to 'case', may cover an entire country (as in the case of Central African Republic, the DRC and Uganda) or a particular time period or geographical space (Côte d'Ivoire and Darfur). Cases against specific individuals are drawn from the situation.
- 32 See International Criminal Court, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*.
- 33 Noting that the ICC faces enormous challenges, Grono and O'Brien have argued that the ICC has to secure convictions to establish credibility. See Grono and O'Brien, *Justice in conflict?*, 17.
- 34 International Criminal Court, *Thomas Lubanga Dyilo Arrest Warrant*.
- 35 Ibid.
- 36 A warrant issued under seal, or 'sealed warrant', means that it is not a public document. Such a course of action would be taken if there was a risk of flight of the accused if his or her impending arrest was made public. The court issues an order on request to 'unseal' the warrant and make it public.
- 37 See Victims' Rights Working Group, *ICC victims' rights* legal update 2006 and 2007. See also IRIN news, *DRC: Opinion split in Ituri over rebel's indictment*.
- 38 International Criminal Court, 'Situation in the Democratic Republic of the Congo in the case between *Prosecutor v. Thomas Lubanga Dyilo*, Decision on confirmation of charges ICC-01-04-01/06'.

- 39 International Criminal Court, 'Situation in the Democratic Republic of the Congo, In the case between *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the release of Thomas Lubanga Dyilo 2 July 2008 ICC-01/04-01/06-1418'.
- 40 International Criminal Court, '*Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04/01/06-1401'.
- 41 The new proposal negotiated with the UN by the Office of the Prosecutor allows the judges to see the material in their own office, but still prevents them from making copies. The defence is not allowed access. Notes made by the judges must be redacted, and the documents will not remain at the ICC. This means that only the Trial Chamber will have seen the evidentiary material and will not be able to compare details later when evidence is presented by the parties at the trial. Further, the judgment by the Trial Chamber will have to refer to evidence unseen by the accused and his defence. At the appeal stage, the Appeal Chamber will not be able to see the documents, and will have to rely completely on the Trial Chamber in this respect. The proposal is problematic in one further sense – it ignores the reality that a criminal trial is continuously developing with new evidence coming up, other evidence being withdrawn, witnesses coming and going, new insights into situations and relations growing, and in need of being weighed against earlier evidence.
- 42 See International Criminal Court, 'Appeals Chamber Decision in Situation in the Democratic Republic of the Congo *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the request of the Prosecutor for suspensive effect of his appeal against the "Decision on the release of Thomas Lubanga Dyilo" ICC-01/04-01/06 OA 12, 7 July 2008'.
- 43 International Criminal Court, 'Situation in the DRC, *The Prosecutor v. Thomas Lubanga Dyilo* Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo"'.
- 44 See Coalition for the International Criminal Court, *Latest ICC press release on The Prosecutor v. Thomas Lubanga Dyilo Case*.
- 45 See generally Bemba, *Le choix de la Liberté*, who has described the origins of the turbulent inter-Lendu-Hema relations that predated the 1997 war.
- 46 These are willful killing; inhuman treatment or cruel treatment; using children under the age of 15 to participate actively in hostilities; sexual slavery; intentionally directing attacks against civilians; and pillaging. See International Criminal Court, 'Warrant of arrest for Germain Katanga 2 July 2007, ICC-01/04-01/07'.
- 47 These are murder, inhumane acts and sexual slavery.
- 48 International Criminal Court, *Combined factsheet: Germain Katanga and Mathieu Ngudjolo Chui*.

- 49 International Criminal Court, 'Warrant of Arrest for Mathieu Ngudjolo Chui 6 July 2007, ICC-01/04-02/07-1'.
- 50 These are willful killing; inhuman treatment or cruel treatment; using children under the age of 15 to participate actively in hostilities; sexual slavery; intentionally directing attacks against civilians; and pillaging. See International Criminal Court, 'Warrant of arrest for Germain Katanga 2 July 2007, ICC-01/04-01/07'.
- 51 These are: murder, inhumane acts and sexual slavery.
- 52 International Criminal Court, *Combined factsheet: Situation in the Democratic Republic of the Congo: Germain Katanga and Mathieu Ngudjolo Chui*.
- 53 Ibid.
- 54 Security Council committee established pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo (7 November 2007). List of individuals and entities subject to the measures imposed by paragraphs 13 and 15 of Security Council Resolution 1596 (2005).
- 55 International Criminal Court, *Combined factsheet: Situation in the Democratic Republic of the Congo: Germain Katanga and Mathieu Ngudjolo Chui*.
- 56 International Criminal Court, Situation in the Democratic Republic of the Congo, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui ICC-01-04-01-07-257.
- 57 These are murder – article 7(1)(a); inhumane acts – article 7(1)(k); sexual slavery – article 7(1)(g); rape – article 7(1)(g).
- 58 These are murder or willful killing – article 8(2)(a)(i) or 8(2)(c)(i); cruel or inhuman treatment – article 8(2)(a)(ii) or 8(2)(c)(i); using children under the age of 15 to participate actively in hostilities – article 8(2)(b)(xxvi) or article 8(2)(e)(vii); sexual slavery – article 8(2)(b)(xxii) or article 8(2)(e)(vi); intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities – article 8(2)(b)(i) or 8(2)(e)(i); pillaging a town or place even when taken by assault – article 8(2)(b)(xvi) or article 8(2)(e)(v); rape – article 8(2)(e)(vi) or 8(2)(b)(xxii); outrage upon personal dignity – article 8(2)(c)(ii) or 8(2)(b)(xxi); destruction of property – article 8(2)(e)(xii) or 8(2)(b)(xiii).
- 59 International Criminal Court, 'Decision of 30 September 2008 on the confirmation of charges in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-716-Conf'.
- 60 International Criminal Court, *OTP on Jean-Pierre Bemba surrender: This is a day for the victims*.
- 61 Rape (article 8(2)(e)(vi)); torture (article 8(2)(c)(i)); committing outrages upon personal dignity, in particular humiliating and degrading treatment (article 8(2)(c)(ii)); pillaging a town or place (article 8(2)(e)(v)); and murder (article 8(2)(c)(i)) of the Rome Statute.

- 62 Rape (article 7(1)(g)); torture (article 7(1)(f)); and murder (article 7(1)(a)).
- 63 Chapter 6, paragraph 31, 'Agreement on Judicial Cooperation between the DRC and the ICC'.
- 64 United Nations Organisation Mission in the Democratic Republic of the Congo, *Mandate*.
- 65 ReliefWeb, *DRC 2006 elections: MONUC and the elections*; Clark, ICC and case selection in Uganda and the Democratic Republic of Congo, 39.
- 66 Ibid.
- 67 See Hougniglo and United Nations Organisation Mission in the Democratic Republic of the Congo MONUC, *MONUC supports Congolese justice*.
- 68 On various courts martial cases, see United Nations Organisation Mission in the Democratic Republic of the Congo, *Human rights monthly assessment*.
- 69 On 25 November 2003, the Transitional Government issued the Decree on Judicial Organisation No. 03/037, revoking Decree No. 144 of 6 November 1998 that had dismissed the magistrates.
- 70 See Appendix 1 (translation by author).
- 71 International Commission of Jurists, *Attacks on justice 2005*.
- 72 The Sun City Accords (Resolution No. DIC/CPJ/06 Relating to the abolition of special Courts and the reform of military justice) resolved to abolish special courts. See Mbombo and Bayolo 2004: 83. For a discussion of some of these cases, see the discussion on the role of MONUC.
- 73 Inter-Congolese Dialogue, Resolution en vue de l'institution d'une Commission Vérité et Réconciliation: 17.
- 74 For a description of some options for post-war justice in the DRC, see Savage, *In quest of a sustainable justice*.
- 75 The four vice presidents were MLC leader Jean-Pierre Bemba; Abdoulaye Yerodia Ndombasi, a close ally of President Joseph Kabila; Arthur Zahidi Ngoma, a representative of the unarmed political opposition; and Azarias Ruberwa Manywa, leader of RCD-Goma and its former secretary general.
- 76 See various resolutions in the Inter-Congolese Political Negotiations, Final Act. See also the transitional constitution of the DRC of 2003.
- 77 Clark, *ICC and case selection in Uganda and the Democratic Republic of Congo*, 40 makes reference to Ituri in particular, where current investigations are focused, Clark suggests that 'there is less clear evidence to connect President Kabila to atrocities committed in Ituri, although it is suspected that he has previously supported various rebel groups in the province, including Germain Katanga's FRPI'.
- 78 Clark, ICC and case selection in Uganda and the Democratic Republic of Congo 39.
- 79 Ibid.

- 80 See Clark, *ICC and case selection in Uganda and the Democratic Republic of Congo* 40. A recent report by the International Center for Transitional Justice on the ICC's outreach and awareness programme discusses, within this context, the public profile of the Court during this period. See generally Petit, *Sensibilisation à la CPI en RDC*. See Clark (*ibid.*), who notes that foreign donor pressure principally came from the United Nations (UN) and European Union, which invested US\$500m in the most expensive elections in the UN's history.
- 81 See Kakala, *La controverse enfle autour de l'amnistie*.
- 82 At the time of publication, Nkunda was in custody in Kigali, having been arrested by Rwanda for allegedly opposing a joint DRC-Rwanda military operation against FDLR rebels in eastern DRC. Talks concerning his possible extradition to the DRC are ongoing.
- 83 ReliefWeb, *MONUC and the elections*.
- 84 Section 3, paragraph 6, Agreement on Judicial Cooperation between the ICC and the DRC.
- 85 *Ibid.* chapter 2, paragraph 11.
- 86 *Ibid.* chapters 4, 5, 6, paragraphs 18-34.
- 87 Petit, *Sensibilisation à la CPI en RDC*, 12.
- 88 FIDH, ASADHO, Ligue des électeurs and Groupe Lotus, *Violation Massive des Droits de l'Homme en République Démocratique de Congo*.
- 89 International Federation of Human Rights, *Rapport du Groupe d'action judiciaire de la FIDH*.
- 90 *Ibid.* 9.
- 91 Despite the Court affirming on various occasions that victims have a right to participate at all stages of the proceedings, so far arguments advanced by the Office of the Prosecutor seem to be in opposition to an extensive role for victims in all proceedings. The Prosecutor had argued initially that the role of victims should be limited to the trial and that it should not extend to the investigations stage, for instance.
- 92 Petit, *Sensibilisation à la CPI en RDC*, 22.
- 93 See generally Maqungo, *Trial and error*, 129-130.
- 94 See International Federation of Human Rights, *Rapport du Groupe d'action judiciaire de la FIDH*, 4-5.
- 95 International Criminal Court, 'Situation in the Democratic Republic of the Congo, in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Participation of victims, 17 January 2006'.
- 96 See International Criminal Court, *La CPI sensibilise les victimes des conflits au sud de Bunia*.
- 97 For a discussion of the procedures on victim participation established by the ICC on the ground, see Human Rights Watch, *The landmark International Criminal Court's first years*, 186-194.

- 98 Petit, *Sensibilisation à la CPI en RDC*, 12.
- 99 See International Federation of Human Rights, *The landmark International Criminal Court's first years*; Institute for War and Peace Reporting, *Investigative strategy under fire*.
- 100 See Hon Ayua, *Nigeria statement on behalf of the African States Parties to the Rome Statute of the ICC*.
- 101 International Criminal Court Assembly of States Parties, *Strategic plan of the International Criminal Court*.
- 102 United Nations Organisation Mission in the Democratic Republic of the Congo, *Human rights monthly assessment*.
- 103 Petit, *Sensibilisation à la CPI en RDC*.
- 104 International Criminal Court, *La CPI sensibilise les victimes des conflits au sud de Bunia*.
- 105 Ibid; Telephonic interview with Nicolas Kuyaku, assistant in charge of information and awareness, Ituri.
- 106 International Criminal Court, OTP on Jean-Pierre Bemba surrender: This is a day for the victims ICC.
- 107 Human Rights Watch, *ICC: Good progress amid missteps in first five years*.
- 108 It is noteworthy that the author did not conduct any interviews with any media houses in the DRC. The brief views reflected here is the author's appreciation of perspectives drawn from mostly print media and from the views of some of those interviewed in the DRC.
- 109 See for instance Wolters, *Selective prosecutions undermine justice system*.
- 110 Other balanced reporting on the ICC can be drawn from players such as the Institute for War and Peace Reporting, which has reported widely on the ICC and justice issues in general. See also [mediacongo.net](http://www.mediacongo.net/home.asp) <<http://www.mediacongo.net/home.asp>>.
- 111 See for instance Pheku, *It seems the west's war-crimes tribunals are reserved for Africans*. See generally Mamdani, *Saviours and survivors*, who argues that the ICC and what it stands for 'is being turned into an assertion of neo-colonial domination'.
- 112 For a brief discussion of some of the myths and misconceptions about the ICC see Musila, *In the face of impunity* and a more detailed discussion, see Du Plessis, *Confronting myths about the International Criminal Court*.
- 113 The Trial Chamber has noted the prosecution would be under an obligation to withdraw any charges where non-disclosed exculpatory material has a material impact on the Chamber's determination of the guilt or innocence of the accused. See International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused' ICC-01/04-01/06-1417.

Appendices

Appendix 1

LETTER OF REFERRAL FROM PRESIDENT JOSEPH KABILA TO PROSECUTOR OF THE ICC

ICC-O 1/04-01 /06-32-US-Exp-AnxA1 12-03-2006 1/IUM

DEMOCRATIC REPUBLIC OF THE CONGO

[The Seal of the Democratic Republic of the Congo appears here.]

The President

Kinshasa, March 3, 2004

Dear Mr. Prosecutor,

In the name of the Democratic Republic of the Congo, a State Party to the (Rome) Statute of the International Criminal Court since July 1, 2002, in accordance with Articles 13, paragraph a) and 14 of the Statute, I am honoured to refer to your jurisdiction the situation that has been unfolding in my country since July 1, 2002, in which it appears that crimes that fall within the competence of the International Criminal Court have been committed, in order to determine if one or more persons should be charged with the commission of these crimes.

Because of the exceptional situation in my country, the competent authorities are unfortunately not capable of conducting investigations of these aforementioned crimes, nor are they able to conduct the necessary prosecutions without the participation of the International Criminal Court. However, the authorities in my country are prepared to cooperate with the latter in all that the International Criminal Court does in response to this request.

Please accept, Mr. Prosecutor, the assurance of my highest esteem.

Joseph KABILA

[Signed]

Appendix 2

JUDICIAL COOPERATION AGREEMENT BETWEEN THE DEMOCRATIC REPUBLIC OF THE CONGO AND THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

The Democratic Republic of the Congo and the Office of the Prosecutor of the International Criminal Court:

Whereas, the Government of the Democratic Republic of the Congo has made a firm commitment to cooperate with the Office of the Prosecutor of the International Criminal Court and to support the activities of that organ;

Whereas, Article 54, Paragraph 3, Clause d of the Rome Statute of the International Criminal Court authorises the Prosecutor of the International Criminal Court to conclude all understandings or agreements that are not contrary to the Statute that might be necessary to facilitate the cooperation of a State, an intergovernmental organisation, or a person;

Whereas, it is necessary to facilitate the cooperation of the Democratic Republic of the Congo with the Office of the Prosecutor of the International Criminal Court;

Therefore, it is hereby agreed that the provisions hereinafter shall constitute the Agreement between the Democratic Republic of the Congo and the Office of the Prosecutor of the International Criminal Court.

Part 1 General Principles

1. The purpose of this agreement is to facilitate cooperation between the Democratic Republic of the Congo and the Office of the Prosecutor within the framework of the general cooperation provided by the Rome Statute and to establish practical mechanisms of cooperation and assistance necessary for the effective and swift conduct of investigations and prosecutions

- conducted by the Office of the Prosecutor, as well as for its smooth operation within the territory of the Democratic Republic of the Congo.
2. In compliance with the provisions of Part 9 of the Rome Statute, the Democratic Republic of the Congo shall cooperate fully with the Office of the Prosecutor. In particular, the Democratic Republic of the Congo has arranged for its national law to provide for and regulate the national procedures that are required for all forms of cooperation with the International Criminal Court, and to assure that these procedures are available.
 3. The Office of the Prosecutor, as well as every person assisting or participating in the implementation of these investigative or Prosecutorial activities within the territory of the Democratic Republic of the Congo, shall in compliance with the Rome Statute and with the Rules and Regulations of Procedure and Evidence, possess the privileges and immunities stipulated in this Agreement that are not covered by Article 48 of the Rome Statute. In addition, the Democratic Republic of the Congo agrees to ratify without delay the Agreement on the Privileges and Immunities of the International Criminal Court and to apply its pertinent provisions on a temporary basis.
 4. The Democratic Republic of the Congo and the Prosecutor of the International Criminal Court may conclude any further understandings or agreements necessary to facilitate their cooperation for the implementation of the duties and objectives of the Office of the Prosecutor.
 5. No provision of this Agreement may be interpreted as limiting or affecting in any manner whatsoever the powers of the Prosecutor of the International Criminal Court, particularly pursuant to Article 54 of the Rome Statute, nor the general obligation to cooperate nor any of the obligations whatsoever of the Democratic Republic of the Congo pursuant to the provisions of Part 9 of the Rome Statute.

Part 2

Cooperation and Judicial Assistance

Section 1

Communications between the Office of Prosecutor of the International Criminal Court and the Democratic Republic of the Congo

6. Except for provisions to the contrary stated in the national legislation on the implementation of the Rome Statute, the Attorney General of the

Republic shall be responsible for communicating with and responding to requests for cooperation and assistance and shall coordinate all the cooperation between the Democratic Republic of the Congo and the Office of the Prosecutor. The Prosecutor of the International Criminal Court may address directly the Attorney General of the place where it undertakes its activities.

7. Except for provisions to the contrary, the Division of Competence, Complementarity, and Cooperation shall be responsible for communications and follow-up to requests for cooperation and assistance and shall coordinate all the cooperation between the Office of the Prosecutor and the Democratic Republic of the Congo.
8. The Parties may decide on other channels of communication that might be necessary to implement certain specific forms of cooperation. This decision may, if required, be subject to a separate agreement between the Parties.
9. All requests for cooperation shall be dealt with without delay.

Section 2 Language

10. All communications between the Democratic Republic of the Congo and the Office of the Prosecutor shall be conducted in French.

Section 3 Requests for Cooperation

11. All requests for cooperation or assistance emanating from the Office of the Prosecutor with the objective of the arrest or surrender of a person or other forms of cooperation, as well as all information provided in support of such a request shall be addressed to the Directorate of Public Prosecutions of the Republic, in the forms mentioned in Part 9 of the Rome Statute.

Section 4 Confidentiality of the Requests for Cooperation

12. The Parties to this Agreement agree to ensure that every person who is called upon to handle any request for cooperation or assistance, as well as

any information provided in support of such a request, shall be informed of the obligation to maintain confidentiality stipulated in Article 87, Paragraph 3 of the Rome Statute, and that all necessary measures shall be taken in order to act in conformity with this obligation.

Section 5

Removal of the Obligation of Confidentiality from Officials of the Democratic Republic of the Congo

13. At the request of the Office of the Prosecutor, the Democratic Republic of the Congo shall lift the obligation to maintain confidentiality of official representatives of the Government or military authorities or of any other person subject to such an obligation, in order to facilitate the provision of information, deposition, or testimony of these persons to the Office of the Prosecutor.

Part 3

Information Provided to the Office of the Prosecutor

- 14 The Democratic Republic of the Congo shall provide to the Office of the Prosecutor the information requested by the latter that is deemed necessary for the performance of its duties, in order to utilise it during proceedings before the International Criminal Court.
15. In the event that the authorities of the Democratic Republic of the Congo deem it absolutely necessary, at their request, the Prosecutor of the International Criminal Court may agree not to disclose at any stage of the proceedings those documents or information obtained in compliance with the Rome Statute under the conditions stated in Article 54, Paragraph 3, Clause e of the Rome Statute.
16. All information provided confidentially pursuant to Article 54, Paragraph 3, Clause e of the Rome Statute must be clearly identified “Confidential – Article 54, Paragraph 3, Clause e” either prior to the time it is transmitted or at the time of its transmission.
17. The Democratic Republic of the Congo and the Office of the Prosecutor may conclude any other understandings or agreements that might be necessary in order to regulate the use and handling of the information

provided, in particular, stating the specific restrictions imposed, the conditions that apply, and the channels of communication.

Part 4
Assistance within the Framework of Investigations
Conducted on Congolese Territory

18. The Attorney General of the Republic shall facilitate the execution of judicial or Prosecutorial measures necessary for the Office of the Prosecutor to perform its duties, as well as of any other request for cooperation.
19. Subject to prior notification, the Democratic Republic of the Congo agrees to authorize the Office of the Prosecutor to conduct interviews directly within its territory, without the presence of national authorities. The national authorities shall have provided for the presence of the witness in advance, if necessary.
20. In cases in which the requests for assistance are executed by the national authorities, the Democratic Republic of the Congo agrees, at the request of the Office of the Prosecutor, to allow a representative of the Office of the Prosecutor to be present during the execution of the request.
21. After forty-eight hours following the notification of the Democratic Republic of the Congo, the Office of the Prosecutor may directly, within the territory of the Democratic Republic of the Congo and without the presence of national authorities, undertake those actions that do not require coercive measures. However, in those circumstances that do not allow for notification within forty-eight hours, the Democratic Republic of the Congo may authorize the implementation of such measures within a shorter period of time.
22. The Prosecutor, the members of the Office of the Prosecutor, as well as all persons who assist or participate in the execution of the investigative or Prosecutorial activities within the territory of the Democratic Republic of the Congo shall, in compliance with the Rome Statute and the Rules and Regulations of Procedure and Evidence, be entitled to unlimited rights to enter and depart from the territory of the Democratic Republic of the Congo and complete liberty to travel throughout the entire territory. In particular, the Democratic Republic of the Congo shall grant at no cost and without delay to the Prosecutor, members of his Office, as well as

- any person assisting or participating in the execution of investigative or Prosecutorial activities within the territory of the Democratic Republic of the Congo all those documents required for their entry and their stay within the territory of the Democratic Republic of the Congo.
23. The Democratic Republic of the Congo shall endeavour to assist the Office of the Prosecutor, upon its request, in identifying, locating, and contacting witnesses, taking and producing evidence, facilitating the delivery and service of documents, facilitating transport, communications from the Office of the Prosecutor, and identification of interpreters, as well as providing its assistance and advice to the Office of the Prosecutor in order to locate premises in Kinshasa, as well as in all the provinces where the Prosecutor will have to conduct its activities, that will allow for the conduct of private interviews.
 24. The Democratic Republic of the Congo also agrees to protect witnesses, including protecting them against efforts to intimidate them, to guarantee the confidentiality of information, and to preserve evidence.
 25. Pursuant to the provisions of this Agreement, and subject to the protection of information concerning national security, in conformity with the Rome Statute, the Democratic Republic of the Congo shall provide for and facilitate access to official archives and documents when such information is necessary for the investigations and prosecutions.
 26. In those cases in which the Democratic Republic of the Congo and the Office of the Prosecutor agree on the need to request the assistance of a third State or a third party in order to facilitate the investigations or prosecutions, the Democratic Republic of the Congo and the Office of the Prosecutor, after appropriate consultations, shall take the necessary measures to facilitate the entry of the experts, their deployment, and the fulfilment of their mission on the ground.
 27. The Office of the Prosecutor may put into place a secure videoconference system within the territory of the Democratic Republic of the Congo in order to facilitate the investigations and the prosecutions.
 28. The Office of the Prosecutor shall keep the authorities of the Democratic Republic of the Congo informed of its investigative activities within their territory, unless the confidentiality of these activities is necessary for their accomplishment.

Part 5

Presence of the Office of the Prosecutor on the Ground

29. At the request of the Office of the Prosecutor, the Democratic Republic of the Congo shall help the Office of the Prosecutor to establish within its territory offices to be used to facilitate the investigations and prosecutions.
30. The Democratic Republic of the Congo and the Office of the Prosecutor may conclude separate agreements that might be necessary for the establishment and implementation of rules governing the operation of a local office and the activities of the members of the Office of the Prosecutor who are present in the Democratic Republic of the Congo.

Part 6

Safety of the Personnel and Offices

31. In consultation with the Office of the Prosecutor, the Democratic Republic of the Congo shall take the appropriate measures to ensure the safety and security of the personnel of the Office of the Prosecutor and of its offices, as well as of any person assisting or participating in the conduct of its investigative and Prosecutorial activities within the territory of the Democratic Republic of the Congo. It shall name a contact person who shall be responsible for all issues concerning the safety and movement of the official personnel of the Office of the Prosecutor as well as of any person assisting or participating in the conduct of its investigative and Prosecutorial activities within the territory of the Democratic Republic of the Congo, including points of entry into the territory of the Democratic Republic of the Congo, if necessary, in consultation with the United Nations Mission in the Democratic Republic of the Congo (MONUC).
32. At the request of the Office of the Prosecutor, the Democratic Republic of the Congo shall make available to the Office of the Prosecutor, as well as to any person assisting or participating in the conduct of its investigative and Prosecutorial activities within the territory of the Democratic Republic of the Congo, the necessary and appropriate geographical maps and transport, an armed escort, guards, and all the other logistics and personnel necessary for the safety and security of the personnel of the Office of the Prosecutor and of its offices.

33. The Office of the Prosecutor may take safety precautions that it deems necessary, including the recruitment of security personnel on an international or local basis. The security personnel thereby recruited shall act at all times in compliance with the laws and rules and regulations that are in effect in the Democratic Republic of the Congo. The Democratic Republic of the Congo shall grant, freely and without any delay, in compliance with the national laws and rules and regulations in effect, all permits or licenses necessary to allow the security personnel thereby recruited to carry a firearm throughout the entire territory of the Democratic Republic of the Congo.
34. The security personnel thus recruited shall enjoy the privileges and immunities necessary for the performance of their duties, including immunity from prosecution or suit for their spoken and written words as well as for actions taken during the performance of their official duties.

Part 7

National Procedures

35. The Democratic Republic of the Congo shall inform the Office of the Prosecutor as soon as possible of any investigation or prosecution opened or carried out by the national authorities concerning crimes that fall within the competent jurisdiction of the International Criminal Court. The Office of the Prosecutor may request the Democratic Republic of the Congo to keep it informed on a regular basis of the developments in these investigations and prosecutions. The Democratic Republic of the Congo shall respond to these requests without any delay.
36. Subject to protection of information concerning national security, the Democratic Republic of the Congo guarantees to the Office of the Prosecutor, in accordance with the Rome Statute, unlimited access to the judicial proceedings that are in progress relating to crimes that fall within the competent jurisdiction of the International Criminal Court, including those under military jurisdiction, and to all the legal records related to those proceedings, including any eventual judicial decisions.
37. In accordance with the Rome Statute and at the request of the Democratic Republic of the Congo, the Office of the Prosecutor may cooperate with national jurisdictions and provide assistance to them for those investigations, prosecutions, and any eventual trials for crimes that fall

within the competent jurisdiction of the International Criminal Court. The Office of the Prosecutor may, as far as possible, facilitate such assistance by third parties.

Part 8
Final Clauses
Section 1
Costs

38. Without prejudice to Article 100 of the Rome Statute, the responsibility for the costs associated with the fulfilment of requests for assistance and with the other forms of cooperation mentioned in this Agreement shall be determined by the parties to this Agreement on a case-by-case basis.

Section 2
Entry into Force

39. This Agreement between the Office of the Prosecutor and the Democratic Republic of the Congo, made in accordance with Article 5-1, Paragraph 3, Clause d of the Rome Statute, shall enter into effect on the date it is signed by the two Parties.

Section 3
Settlement of Disputes

40. Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by means of consultation, negotiation, or any other mutually agreed means.

Section 4
General Provisions

41. The Parties may meet at any time to amend this Agreement.
42. Each Party may terminate this Agreement by means of written notification. Such termination shall take effect six months after the date the notification is received.

In proof of which, the undersigned, duly authorised for this purpose, have signed this Agreement.

Prepared in French in two originals. *[In handwriting: Kinshasa, 06/10/2004]*

On behalf of the Office of the Prosecutor of International Criminal Court

Deputy Prosecutor

[Signed]

On behalf of the Democratic Republic of Congo

Minister of Justice

[Signed]

Appendix 3

IMPLEMENTATION OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, DRAFT LEGISLATION [DRAFT 1 OF 2001]

STATEMENT OF MOTIVES

The present draft legislation aims to integrate the norms of the Statute of the International Criminal Court into Congolese applicable law following the ratification of March 30, 2002.

This draft foresees the adoption by this Court of the provisions of the penal code, penal code regulations of organisation and judiciary competence, penal procedure, military justice and procedure before the Supreme Court of Justice.

It also organizes judicial cooperation between Congolese institutions and the International Criminal Court.

Five titles form the outline of the present law.

The first title, relative to general provisions, states the rules and basic principles of the draft legislation.

In fact, aside from the reaffirmation of a certain number of fundamental principles of our law such as the conformity of sentences and the applicable law, that of the non-retroactivity of the law, of the individual responsibility for crimes and their sentences, or of the strict nature of all interpretation of criminal law, the present draft legislation is innovative in that it increases the legal criminal age to eighteen, provides for the irrelevance of the official capacity of the accused, restates the universality of the competence of the Congolese judge for this type of infraction, organizes the motives for criminal exoneration and reaffirms the rules of criminal involvement.

The second title, which pertains to infractions and their repression, states the contents of the infractions as well as their respective rulings. Thus, the crime of genocide as intentional destruction of all or a part of a group by nationality, race, religion, or ethnicity is punishable by life imprisonment.

As for crimes against humanity, they are punishable by degree, from sentences of five years to life imprisonment. They consist of certain forms of behaviour,

which include, in the case of a generalised attack or a systematic attempt on a civil population, attempts on the lives or wellbeing of human beings or the infliction upon them of cruel, inhumane or degrading treatment.

War crimes in violation of laws and customs of war are also prohibited.

Such is the case for violations of basic international rules on human right, which insure the protection of certain categories of people and goods, those that proscribe resorting to prohibited methods and means of combat. Depending on their severity, these acts are punishable by sentences of six months to life imprisonment.

The title contains rules relative to organisation and judicial competence, as well as penal procedure.

Accordingly, the present draft legislation innovates by attributing to the Supreme Court of Justice the competence to recognize, to the first and second degree, crimes it foresees and punishes.

Thus, the judiciary section of the Supreme Court of Justice would decree first degree, its decision having been made before the same Court, with all sections in attendance, to meet the requirement of the ICC to establish the right of appeal to which the accused is entitled.

As for the fourth title, it regulates the cooperation of the Democratic Republic of the Congo with the International Criminal Court.

It is important to note that the International Criminal Court does not possess attributes of a jurisdiction within a State as it holds no territories, much less a police force to carry out its measures.

As such, the Office of the Public Prosecutor of the Republic has been established and charged with cooperation with the ICC. Thus, all requests of cooperation with this Court, along with relevant required documents, are sent to the Court by diplomatic pouch, through INTERPOL, or any competent regional organisations of that nature.

In this manner, the Attorney General of the Republic receives a request to arrest or detain someone, researches the case, orders the arrest and eventually proceeds to gather evidence. The present draft of legislation recognises the prerogative of the Attorney General of the Republic to hand over a suspect to the International Criminal Court, subject to the right of appeal of the accused before the Supreme Court of Justice presiding over preventive detention. Likewise, he can release the detainee if the relevant required documents are not transmitted within sixty days of the arrest.

Also within the domain of cooperation between the Democratic Republic of the Congo and the International Criminal Court, is the carrying out of the punishment and reparations.

Regarding the carrying out of punishment, latitude is given to the Democratic Republic of the Congo to require the individuals condemned by the International Criminal Court to serve the terms of their sentence in its prisons.

This draft grants the “Tribunal de grande instance” of Kinshasa/Gombe the power to authorize the execution of punishment by fines, confiscation, or decisions relative to sentences pronounced by the International Criminal Court.

The fifth title, devoted to final provisions, states that all subjects not legislated in the present draft are subject to the Congolese applicable law, to international customs, and to general principles of law.

Clearly, the objective of the draft of legislation is to ensure the proper implementation of the norms of the Statute of Rome within Congolese applicable law and above all, to ensure good administration of justice in accordance with the spirit and contents of said Statute.

LAW

The Constituent and Legislative Assembly, the Transitional Parliament having been adopted;

The President of the Republic promulgates the law in the following terms:

Title I General Provisions

Article 1

Purpose of the present law:

- to integrate the norms of the Statute of the International Criminal Court within criminal legislation; and as a result;
- to adapt the rules of organisation and judiciary competence, of criminal procedure as well as the code of military justice;
- to organize judicial cooperation with the International Criminal Court

Article 2

A person is not criminally responsible, by virtue of the present law, unless his behaviour constitutes a crime at the time in which it was committed.

Article 3

Penalty exists and is it pronounced by virtue of the law alone.

Article 4

Criminal law is [subject to] strict interpretation.

In case of ambiguity, it is to be interpreted in favour of the defendant.

Article 5

No one is criminally responsible for violations committed before the entry into force of the law.

If the law applicable to a case is modified before the sentencing, the law most favourable to the defendant applies.

Article 6

Criminal responsibility is individual

It is established according to the provisions of articles 21 to 23 of the penal code.

Article 7

No provision of the present law relative to criminal responsibility of the individual affects the responsibility of the of the States by International law.

Article 8

People under the age of eighteen at the time the crime they are accused of was committed, are not criminally responsible.

Article 9

The present law is applicable to all in like manner, with no distinctions made based on official capacity.

The immunities or rules of special procedures associated with persons of official capacity, by virtue of internal or international law, do not prevent the judge from exercising his/her competence with regards to the person in question.

Article 10

Unless otherwise provisioned, no one is criminally responsible nor can he be punished for any crime under the present law, unless the crime is committed with intent and cognizance.

Intent exists under present law when:

1. with respect to a behaviour, the person knows how to adopt that behaviour;
 2. with respect to a consequence, a person knows how to provoke that consequence or is aware it will occur with the normal course of events
- Cognizance exists according to present law, when a person is conscious that a circumstance exists or that a consequence will occur with the normal course of events. 'cognizance' and 'knowledge of the consequences' are interpreted as a result.

Article 11

Besides other reasons for the exoneration of criminal responsibility set forth in the Statute of the International Criminal Court, no one is criminally responsible if, at the time of the behaviour in question:

- a. he suffered from a mental illness or deficiency that prevented him from understanding the unlawful character or nature of his behaviour, or from having the ability to control it in accordance with the law.
- b. he was in a state of intoxication that prevented him from understanding the unlawful character or nature of his behaviour, or from having the ability to control it in accordance with the law, unless the intoxication

- was involuntary and in circumstances under which he knew, due to his intoxication, he would risk behaviour unlawful according to the Statute of the International Criminal Court, or if he had no notion of this risk.
- c. he behaved reasonably and in self-defence, in defence of another, or in the case of war crimes, in defence of property essential for his survival or the survival of others or essential to accomplishing a military mission, against an imminent and unlawful use of force, in a manner proportionate to the impending danger to him or others or to the protected property. A person having participated in a defensive operation lead by armed forces does not in itself constitute grounds for excluding criminal responsibility in this context.
 - d. his alleged behaviour, constituting a breach of the relevant Statute of the International Criminal Court, was adopted under threat of imminent death or serious, continuous or imminent attack of his person or of others, and if he acted by necessity and within reason to avoid this threat, on the condition that he had no intention of causing greater damage than that which was being avoided. This threat could be: 1. carried out by others 2. constituted by circumstances independent of his will

Article 12

The judge pronounces whether the grounds for excluding criminal responsibility according to the Statue of the International Criminal Court are applicable to the case in question.

During the trial, the judge may also take into consideration the grounds for excluding criminal responsibility according to internal law.

Article 13

A mistake of fact is not grounds for excluding criminal responsibility unless it removes the moral element of the infraction.

A mistake of law bearing on the question of knowing whether a given behaviour constitutes an infraction according to the present law is not grounds for excluding criminal responsibility. Nevertheless, a mistake of law may be grounds for excluding criminal responsibility if it removes the moral element of the infraction or if it raises article 14 of the present law.

Article 14

An infraction according to the present law, having been committed under orders of a government or a superior, military or civilian, does not exonerate the person having committed the infraction, of his criminal responsibility unless:

- a. the person was legally obligated to obey the orders of the government or superior in question;
- b. the person did not know that the order was illegal;
- c. the order was not manifestly illegal

Article 15

The order to commit genocide or a crime against humanity is reputedly and manifestly illegal.

Article 16

All hierarchically superior military or civilian who fails to prevent his subordinate from committing an act unlawful by the present law or who fails to restrain his subordinate who has committed the crime is punished as the author of the act committed by the subordinate.

Whoever exercises an effective power of command or direction over a group as well as an effective power of control is likened to a superior in the military hierarchy.

Whoever, in a civil organisation or an enterprise, exercises an effective power of direction or control is likened to a superior in the civilian hierarchy.

Article 17

The crimes and penalties under the present law cannot be prescribed.

They are not subject to amnesty or pardon.

Article 18

Infractions under the present law are punishable even when committed outside of the country or even when they present no ties to Congolese territory.

Title II
Violations and their suppression

Chapter 1 of Crimes of genocide and crimes against humanity

Section 1
Crimes of genocide

Article 19

Punishable by a sentence of life imprisonment is whomsoever, with the intention to destroy all or a part of a group based on nationality, race, religion or ethnicity:

1. kills one or several members of the group
2. inflicts serious attacks on the physical or mental well being of members of the group, namely partial or complete loss of vision, sense of smell, of hearing, the ability to speak or to procreate, the loss of a limb or its use, serious and permanent disfiguration, infirmity, paralysis, mental or physical handicap;
3. subjects the group to living conditions which will cause partial or total physical destruction;
4. imposes measures aiming to prevent births within the group;
5. forcibly transfers a child from one group to another

Section 2
Crimes against humanity

Article 20

Punishable by a sentence of life imprisonment is whomsoever, in the context of a generalised or systematic attack launched against a civil population:

1. kills one or more persons
2. subjects a population, with the intention to destroy all or a part of

it, to conditions which will bring about the destruction of all or part of that population.

Article 21

Sentenced to twenty-five years of imprisonment is whomsoever, in the context of a generalised or systematic attack launched on a civil population:

1. practices the commerce of human beings, particularly women and children, or reduces a person to slavery by any means;
2. proceeds to forcibly deport or transfer a person, by expulsion to another State or by any other constraining measures;
3. tortures a person placed under his guard or over whom he exercises his control in all other manners, by inflicting serious attacks upon his physical or mental well being, going beyond the consequences of the sanctions admissible by international law;
4. sexually abuses or rapes a person, forces a person into prostitution, removes a person's ability to procreate or detains a woman impregnated by force with the intention of influencing the ethnic composition of a population;
5. provokes the disappearance of a person with the intention of removing him from the protection of the law for a prolonged period:
 - a. by kidnapping or illegally depriving him of his liberty as granted by order of consent of a State or political organisation, without giving out, immediately following a request to do so, information as to the whereabouts or well-being of the captive;
 - b. by refusing, with orders or consent given by a State or political organisation or in violation of a judicial obligation, to provide immediate information as to the whereabouts and well-being of a person held captive under the conditions "indiquées sous le littera", or provides false information.

Article 22

Sentenced to twenty-five years of imprisonment is whomsoever, in the context of a generalised or systematic attack launched on a civil population:

1. inflicts serious attacks on a person's physical or mental well-being, attacks like those aimed at in article 19.2 in particular
2. illegally deprives a person of his freedom;
3. persecutes an identifiable group or community by depriving him/her of the benefits of fundamental human rights or by greatly restricting the application of those rights for political, racial, national, ethnic, cultural, religious or sexist reasons, or for other criteria recognised as inadmissible by the general rules of international law.

Article 23

Whosoever commits a crime provided in article 20.1 in the context of an institutionalized régime of systematic oppression and domination of one racial group over another, incurs a criminal sentence of at least five years, unless events are liable to more severe penalty with the application of articles 19.1 and 20.1.

Chapter 2 War crimes

Section 1: War crimes against persons protected by humanitarian law

Article 24

Persons protected by international humanitarian law during an armed conflict are:

1. persons protected under the Geneva Convention and the additional Protocol I, in particular the wounded, the sick, the ship wrecked, prisoners of war and civilians;
2. the wounded, the sick, the ship wrecked and those people who are not directly participating in the hostilities and who find themselves under the power of the opposite party;
3. the members of armed forces and combatants of the opposite party who have put down their weapons or who, for any other reason, no longer have the means with which to defend themselves.

Article 25

Whosoever kills a person protected by international humanitarian law during and armed international or non-international conflict, is sentenced to life imprisonment.

Article 26

Punishable by a criminal sentence of five to twenty years is whosoever:

1. takes hostage a person protected by international humanitarian law;
2. treats in a cruel or unusual manner a person protected by international humanitarian law by inflicting serious attacks upon the person's physical or mental well-being or serious physical or mental suffering, namely by torture or mutilation;
3. sexually abuses a person protected by international humanitarian law, forces that person into prostitution, removes that person's ability to procreate or detains a woman impregnated by force with the intention of influencing the ethnic composition of a population;
4. proceeds to forcefully enlist or enroll children under the age of eighteen into armed forces or armed groups or makes them participate in the hostilities.

Article 27

Punishable by a criminal sentence of two to ten years is whosoever:

1. proceeds to forcibly deport or transfer a person protected by international humanitarian law, by expulsion to another State or territory or by using any other coercive measures;
2. pronounces or executes a serious penalty, namely the death penalty or a penalty depriving liberty, on a person protected by international humanitarian law and having withheld trial by regular and impartial judicial procedure with the requisite judicial guarantees in accordance with international law;

3. exposes a person protected by international humanitarian law to mortal danger or serious hazards to his health:
 - a. by performing experiments on that person, who did not voluntarily or expressly give prior consent, that are neither beneficial to the health nor in the person's best interest;
 - b. by removing tissue or organs from that person with the intention of transplanting them, unless this removal is for therapeutic reasons in accordance with generally recognised principles of medicine and if that person voluntarily and expressly gave consent beforehand;
 - c. by applying treatments to that person that are not recognised in the field of medicine, that are not beneficial to the health and for which prior consent was not voluntarily and expressly given.

Article 28

Whosoever treats a person protected by international humanitarian law in a humiliating or degrading manner, is punishable by a criminal sentence of a maximum of one year.

Article 29

Whosoever during an international armed conflict, wounds a member of the armed forces or a combatant from the opposite camp who has given himself up unconditionally or who is outside the lines of combat, is punishable by a criminal sentence of a maximum of three years.

Article 30

Punishable by a criminal sentence of two to five years, is whosoever, in the context of an armed international conflict:

1. illegally detains a person protected by international humanitarian law;

2. proceeds to, as a member of an occupying force, transfer to an occupied territory a part of the civilian population to which he belongs;
3. obliges a person protected by international humanitarian law, by force or by threat, to serve in the armed forces of the enemy;
4. obliges, by force or by threat, a member of the enemy party to participate in war operations against his own country.

Article 31

If the perpetrator provokes the death of a victim by committing an act unlawful according to articles 25 to 30 of the present law, the penalty is life imprisonment.

Section 2

Crimes of war against property and other rights

Article 32

Punishable by a criminal sentence of one to ten years is whosoever, in the context of armed international or non-international conflict, pillages or destroys, appropriates or requisitions, for reasons unrelated to the exigencies of an armed conflict, property of the opposing party while in control of their camp.

Article 33

Punishable by a criminal sentence of one to ten years is whosoever, in the context of an armed international conflict, ordains the rights and beliefs of all or a part of the members of the opposing party to be abolished or suspended or to no longer be recognised in a Court of law.

Section 3

War crimes against humanitarian operations and emblems

Article 34

Punishable by a criminal sentence of six months to two years is whosoever, in the context of an armed international or non-international conflict:

1. leads an attack against persons, installations, supplies, units or vehicles belonging to a humanitarian aide or peace-keeping mission in conformity with the United Nations Charter, so long as they have the protection guaranteed by international humanitarian law to civilians and to civilian property;
2. leads an attack against persons, buildings, sanitary units or means of transportation bearing the sign (insignia) of protection of the Geneva Convention.

Article 35

Punishable by a main sentence of five to twenty years is whosoever, in the context of an armed international or non-international conflict, abuses the use of the distinctive signs (insignia) provided by the Geneva Convention, of the parliamentary pavilion or of the flag, of military uniform or the uniform of the enemy or the United Nations, and thereby causing the death or serious wounding of a person.

Section 4

War crimes using methods forbidden when conducting war operations

Article 36

Punishable by a criminal sentence of five to twenty years is whosoever, in the context of an armed international or non-international conflict:

1. leads with military means, and in full knowledge of the consequences, an attack against civil population or against individual civilians who are not directly participating in the hostilities;

2. leads with military means, and in full knowledge of the consequences, an attack against civilian property protected by international humanitarian law, namely buildings devoted to culture, education, art, sciences or public service, historical monuments, hospitals, places where groups of sick and wounded are assembled, cities, villages, undefended housing or buildings or demilitarised zones as well as installations or equipment containing dangerous substances;
3. launches a military attack intended to kill or wound civilians or to damage civilian property to a degree disproportionate to the military advantage gained;
4. uses a person protected by international humanitarian law as a shield to prevent the adversary from leading military operations designed to obtain certain objectives;
5. uses as a war tactic a procedure consisting of starving civilians by depriving them of essential objects or by interfering with deliveries of aide;
6. orders or threatens, as a military chief to “commettre le déni de quartier”;
7. kills or wounds by treachery a member of the armed forces or a combatant of the opposition.

Article 37

If by an act unlawful according to points 1 through 6 of the preceding article, the perpetrator provokes the death of a civilian or of a person protected by international humanitarian law or causes that person serious injury, he incurs a criminal sentence of ten to twenty years;

If the perpetrator voluntarily causes death, he incurs a criminal sentence of life imprisonment.

Article 38

Punishable by a criminal sentence of one to five years is whosoever, in the context of an armed international conflict, launches an attack hoping to cause

serious, wide-spread and long-lasting damage to the natural environment, disproportionate to the military advantage gained.

Section 5

War crimes using methods forbidden when conducting war operations

Article 39

Punishable by a criminal sentence of life imprisonment is whosoever, in the context of armed international or non-international conflict, makes use of poison or poisoned weapons, of biological, chemical or other prohibited weapons, bullets whose casings do not fully cover the center or that are grooved or notched.

Title III

Rules of organisation, of judicial competence and of penal procedure

Article 40

The violations foreseen under the present law “relèvent de la compétence matérielle” of the Supreme Court of Justice regardless of their perpetrators. The judicial section of the Supreme Court of Justice issues the first decree. Appeals are formed before the Supreme Court of Justice, all sections present.

Article 41

The Supreme Court of Justice is bound by article 54 first paragraph of the code of penal procedure.

Article 42

The preventive detention of persons wanted for violations of the Statute of the International Criminal Court is governed in accordance with articles 45 to 47 of the code of penal procedure.

The wanted person is assisted at all stages of instruction by an appointed legal representative.

Article 44

The judge superlatively rates all evidence submitted to him.

Title IV**Cooperation with the International Criminal Court****Chapter 1****Judicial cooperation****Article 44**

The Office of the Public Prosecutor of the Republic is charged with cooperation with the International Criminal Court.

It cooperates fully with the International Criminal Court in investigation and apprehension carried out for crimes bearing on its competence, in conformity with procedures set forth by national legislation and the provisions of the Statute of the International Criminal Court.

Article 45

The requests for cooperation coming from the International Criminal Court are addressed to the Office of the Public Prosecutor of the Republic, accompanied by all relevant and required documentation.

They are transmitted to this office by diplomatic pouch. They may also be transmitted by INTERPOL or any other regional organisation of that nature. In case of emergency, the requests can be directly transmitted by any means in the form of certified copies. The originals are then transmitted as described in the above paragraph.

Article 46

Requests of cooperation are handled by the Office of the Public Prosecutor of the Republic for the entire national territory, in the presence of, case pending [cas échéant], the Prosecutor of the International Criminal Court or the delegate thereof, or by all those mentioned in the request of the Court.

Article 47

The minutes from the carrying out of these requests are addressed to the International Criminal Court via diplomatic pouch.

In case of emergency, certified copies of the minutes can be addressed directly and by any means to the Court. The originals are then transmitted as described in the above paragraph.

Article 48

When faced with a request of the International Criminal Court that raises difficulties or may interfere with or prevent the execution of that request, the Office of the Public Prosecutor of the Republic consults, without delay, the International Criminal Court in order to solve the difficulties in question.

Article 49

When denying a request of the International Criminal Court, the Office of the Public Prosecutor of the Republic makes known its reasons, without delay, to the Court or to its Prosecutor, depending on the case.

Chapter 2: Arrest and delivery of a person

Article 50

Requests from the Court of arrest and delivery are made to the Office of the Public Prosecutor of the Republic in the manner described in article 45.

Article 51

The Office of the Public Prosecutor of the Republic responds to all arrest and delivery requests according to the provisions of Chapter 9 of the Statute of the

International Criminal Court, the Office of the Public Prosecutor of the Republic may adjourn the carrying out of the request until such time as it has been decreed.

Article 52

When the competence of the International Criminal Court is contested in accordance with articles 17 and 19 of the Statute of the International Criminal Court, the Office of the Public Prosecutor of the Republic may adjourn the carrying out of the request until it is decreed.

Article 53

When the request is approved, the Office of the Public Prosecutor of the Republic engages the research and orders the arrest. Objects and valuables are seized at the time of arrest if they can be used as evidence in an open trial by the International Criminal Court or if they bear any relevance to the crime.

Article 54

After arrest, the Office of the Public Prosecutor of the Republic issues an arrest warrant.

The warrant includes:

- a. a description of the person wanted for arrest and the charges against him;
- b. mention that the delivery of the person is requested by the Court
- c. the indication of the rights to recourse and to an attorney.

When serving the warrant for arrest and delivery, the authority should verify that the person is in fact the same person described in the warrant. The authority states conditions of delivery; listens to the personal situation and asks if there are any objections to how the warrant was served. The person's attorney may be present for this hearing.

The Office of the Public Prosecutor of the Republic orders incarceration of the person wanted for arrest.

Article 55

The warrant for arrest and delivery can be appealed before the Supreme Court of Justice, presiding over matters of preventive detention, within ten days of the notification.

The wanted person may at any time solicit his release. The Office of the Public Prosecutor of the Republic, before pronouncing a decree, should ask and take into consideration the recommendations of the International Criminal Court.

The decision of the Office of the Public Prosecutor of the Republic can be appealed before the Supreme Court of Justice, presiding over matters of preventive detention, within ten days of the notification.

Article 56

If no evidence is received, the Office of the Public Prosecutor of the Republic orders the release of the wanted person no later than sixty days after his arrest. The released person, in conformity with the preceding paragraph, may again be arrested and delivered when the evidence is subsequently handed in to the appropriate authority.

Article 57

The Office of the Public Prosecutor of the Republic authorizes the delivery of the wanted person as well as the transference of the objects and valuables seized.

If the wanted person contests the competence of the International Criminal Court, the granting of authorization is adjourned until the Court makes its decision.

The Office of the Public Prosecutor of the Republic orders necessary delivery measures, in agreement with the International Criminal Court.

Article 58

Transit through national territory of a person transferred by the International Criminal Court is authorized by the Minister of Justice, in conformity with article 89 of the Statute.

Article 59

A person arrested provisionally under the conditions described in article 92 of the Statute of the International Criminal Court, may with the Court's consent, be delivered to the International Criminal Court before the appropriate authority has received the delivery request and the evidence required as per article 91 of the Statute.

Article 60

All persons detained on national territory may, with the Court's consent, be temporarily transferred to the International Criminal Court for identification or a hearing or for compliance with any other instruction. The transfer is authorized by the Minister of Justice.

Chapter 3**The execution of penalties and fines****Article 61**

When, in accordance with article 103 of the Statute of the International Criminal Court, the Democratic Republic of the Congo accepts to receive, on its territory, a person condemned by the International Criminal Court in order for that person to serve his prison term, the verdict pronounced comes immediately into effect upon transfer of the person, for the remainder of the term to be served.

Article 62

Upon arrival on the territory of the Republic, the transferred person is presented before the Office of the Public Prosecutor of the Republic who verifies his identity and draws up the minutes.

Upon seeing the papers of agreement between the Democratic Republic of the Congo and the International Criminal Court concerning the transfer of the person in question, the Office of the Public Prosecutor of the Republic orders immediate incarceration of the condemned.

Article 63

The condemned person may place a request for conditional release before the Office of the Public Prosecutor of the Republic.

The request is communicated to the International Criminal Court without delay, along with all pertinent documents. The Court decides whether or not to grant the request of the condemned person.

Article 64

The execution of penalties of fines and confiscation or decisions concerning reparations ordered by the International Criminal Court are authorized by the “Tribunal de grande instance” of Kinshasa/Gombe, then seized by the Office of the Public Prosecutor of the Republic.

The execution is in conformity with procedure set forth by national legislation in good will and without prejudice of the rights of bona fide third parties.

The Tribunal is bound by the decision of the International Criminal Court. Nevertheless, it can take all the necessary measures allowing for the recuperation of the value of the products or goods ordered for confiscation by the Court, once it appears that the order of confiscation cannot be carried out.

Article 65

The authorization for execution granted by the Tribunal in virtue of the preceding article entails, according to the decision of the International Criminal Court, transferal of the product of the fines and goods or the product of their sale to that Court. They may also be given to victims, if the Court so decides and designates.

Article 66

Any dispute pertaining to the execution of the penalty of fines and confiscation is referred to the Court who will perform the necessary follow-up.

Title IV
Final provisions

Article 67

Matters relating to the Statute of the International Criminal Court which are not expressly legislated by the present law, are legislated in conformity with acting Congolese applicable law, the international custom or the general principles of law.

Article 68

The present law enters into force on the date of its promulgation.

Appendix 4

DRAFT LAW IMPLEMENTING THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT [DRAFT 2 OF OCTOBER 2002]

As modified by the convocation organised by the
Ministry of Justice of The Democratic Republic of the Congo
on October 21 To 23, 2002 in Kinshasa and
on October 24 and 25, 2002 in Lubumbashi

The Constituent and Legislative Assembly, the Transitional Parliament, has adopted; and

The President of the Republic hereby promulgates the law, the content of which is as follows:

Title 1

Purpose of the law

Article 1

This purpose of this law is:

- to prosecute and punish those crimes addressed by the Statute of the International Criminal Court;
- to adapt and bring to conformity the rules of the judicial organisation and competent jurisdiction, those of the penal code and of criminal procedure as well as those of the code of military justice;
- to regulate judicial cooperation with the International Criminal Court.

Title 2

General principles

Article 2

A person shall be criminally responsible pursuant to the law only if his conduct constitutes a violation at the moment it is carried out.

Article 3

Punishment shall exist and shall be pronounced only pursuant to the law.

Article 4

Criminal law shall be strictly construed.

In case of ambiguity, it shall be interpreted in favour of the person being investigated, prosecuted, or convicted.

Article 5

No one shall be criminally responsible for conduct in violation of the law prior to entry into force of the law.

If the law applicable to a case is amended prior to the judgment, it shall be the law more favourable to the person being investigated or prosecuted that shall apply.

Article 6

Criminal responsibility is individual.

It shall be established in accordance with the provisions of Articles 4, 21, and 22 of the criminal code.

By derogation to Article 23 of the Criminal Code, accomplices to offences addressed by this law shall be punished by the same penalties as the perpetrators.

Article 7

Whoever has already been tried by the International Criminal Court for crimes proscribed under this law shall not be tried again for the same crimes by national Courts.

Whoever has already been judged by the national jurisdictions for crimes proscribed under this law may not be tried again for the same crimes by the International Criminal Court unless the proceedings in the national jurisdictions:

1. Were intended to shield the person in question from his criminal responsibility for those crimes falling under the competent jurisdiction of this law; or

2. Were not conducted in an independent and impartial manner, in compliance with fair trial guarantees provided by national law and international law, but rather in a manner that, under the circumstances of the case, was incompatible with the intention to prosecute the party concerned.

Article 8

No provision of this law concerning the criminal responsibility of individuals shall affect the responsibility of the States under international law.

Article 9

A person who is less than eighteen years old, at the time the crime with which he is charged was committed shall not be criminally responsible.

Article 10

This law shall apply equally to all persons with no distinction based on official position. In particular, the official capacity as the Head of State or of Government, a member of a Government or parliament, an elected representative or official of a State shall in no case exempt a person from criminal responsibility in the eyes of this law, nor shall it constitute in of itself a ground for reduction of sentence. Those immunities or those special procedural rules that may attach to

the official capacity of a person, pursuant to the law or under international law shall not bar the jurisdictions from exercising their competent jurisdiction over that person.

Article 11

Unless there is a provision to the contrary, no one shall be criminally responsible and shall be able to be punished for a crime stipulated in the law unless the act is committed with intent and knowledge.

For the purposes of this article, there is intent when:

1. In relation to conduct, a person means to engage in the conduct;
2. In relation to a consequence, a person means to cause that consequence or is aware that the latter will occur in the ordinary course of events.

For the purposes of this article, there is knowledge when a person is aware that a circumstance exists or that a consequence will occur in the ordinary course of events.

Article 12

Without prejudice to other grounds for exemption from criminal responsibility provided by the law, no person shall be criminally responsible if, at the time of the conduct in question:

1. The person was suffering from a mental disease or defect that deprived the person of the capacity to appreciate the unlawfulness or nature of his or her conduct, or the capacity to control his or her conduct to make it conform with the requirements of the law;
2. The person was in a state of intoxication that deprived him of the capacity to appreciate the unlawfulness or the nature of his or her conduct, or to control his or her conduct to make it conform to the requirements of the law, unless the person became intoxicated voluntarily under circumstances such that the person knew that, as a result of the

- intoxication, he or she was likely to engage in conduct constituting a crime falling under this law, or he or she did not give any consideration to this risk;
3. The person acted reasonably in order to defend himself or herself, to defend others, or, in the case of war crimes, to defend property that was essential for the survival of the person or for that of another person or was essential for accomplishing a military mission, against an imminent and unlawful use of force, in a manner proportionate to the extent of the danger to himself or herself or another person or the property protected. The fact that a person has participated in a defensive operation conducted by armed forces shall not in of itself constitute a ground for exemption from criminal responsibility under the terms of this Subparagraph;
 4. The conduct which is alleged to constitute a crime falling under the scope of this law was undertaken under 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 acted by necessity and in a reasonable manner to avoid this threat, provided that he or she did not have the intention of causing a greater harm than that which he or she sought to avoid. This threat may be either made by other persons, or constituted by other circumstances beyond that person's control.

Article 13

An error of fact shall be grounds for exoneration from criminal responsibility only if it negates the moral element required for the definition of the crime.

An error of law concerning the question of whether a given conduct constitutes a crime under the law shall not be grounds for exoneration from criminal responsibility. However, an error of law may be grounds for exoneration from criminal responsibility if it negates the moral element of the offence or if it falls under Article 14 of this law.

Article 14

The fact that a crime covered by the law has been committed on orders from a government, a public authority, or a military or civilian superior shall not exempt the person who has committed it from his criminal responsibility unless:

1. This person had the legal obligation to obey the orders of the government, of the public authority, or of the superior in question;
2. This person did not know that the order was illegal; and
3. The order was not manifestly illegal.

Article 15

An order to commit genocide or a crime against humanity is illegal.

Article 16

Without prejudice to the other grounds of criminal responsibility in the eyes of this law:

1. A military commander or a person effectively performing the function of a military commander shall be criminally responsible for crimes covered by this law that are committed by the forces under his effective command and control, or effective authority and control, as the case may be, when he or she has failed to exercise the proper control over these forces in those cases in which:
 - That military commander or that person knew, or because of the circumstances, should have known, that the forces were committing or were about to commit such crimes; and
 - That military commander or that person did not take all necessary and reasonable measures within his or her power to prevent them or repress their commission or to submit the matter to the competent authorities for investigation and prosecution;
2. With respect to relationships between a hierarchical superior and subordinates not described in Paragraph 1, the superior shall be criminally responsible for crimes covered by this law committed by subordinates under his effective authority and control when he or she has failed to exercise the proper control over such subordinates in those cases in which:

- The superior knew that such subordinates were committing or were about to commit such crimes or deliberately neglected to take into account information that clearly indicated this;
- These crimes were related to activities falling under his effective responsibility and control; and
- The superior did not take all necessary and reasonable measures within his power to prevent them or to repress their commission or to submit the matter to the competent authorities in order to have it investigated and prosecuted.

Article 17

The crimes and punishments provided by this law are imprescriptible.
They shall not be subject to granting of amnesty or dispensation.

Article 18

Any person who, outside the territory of the Democratic Republic of the Congo, is presumed to have committed one of the crimes covered by this law, may be prosecuted and tried by the national jurisdictions.

In this case, prosecutions may take place only if the accused or one of the accused persons is found in the national territory at the time the investigation begins.

Title 3

The crimes and the punishments

Part 1

The Crime of Genocide

Article 19

Anyone who, with the intention of destroying in whole or in part a national, racial, religious, or ethnic group, commits acts such as the following shall be punished by penal servitude for life:

1. Committing a murder of one or more members of the group;
2. Causing grave bodily or mental harm to members of the group;
3. Subjecting the group to living conditions that would cause its physical destruction in whole or in part;
4. Imposing measures seeking to prevent births within the group;
5. Forcibly transferring of one or more children of the group to another group.

Part 2 Crimes against Humanity

Article 20

Punishable by penal servitude for life shall be anyone who, within the framework of a generalised or systematic attack launched against the entire civilian population:

1. Commits murder of one or more persons;
2. Imposes on a population or on part of the latter, with the intention of destroying it in whole or in part, conditions that would cause its destruction in whole or in part;
3. Exercises any one or all the powers related to property rights with respect to human beings, engages in the trafficking of human beings, particularly of women or children, or reduces a person to a condition of slavery in any manner whatsoever;
4. Engages in deportation or forcible transfer of persons, by expelling them to another region of the same country, to another State or another territory, or by using other coercive measures;
5. Tortures a person in his or her care or over whom he or she exercises control in any other manner, by inflicting on the person serious bodily or mental harm exceeding the consequences of the sanctions permitted by international law;
6. Sexually abuses or rapes a person, forces a person into prostitution, subjects a person to sexual slavery, deprives a person of the capacity to procreate, or maintains imprisoned a woman impregnated by force with the intention of influencing the ethnic composition of a population,

- or commits any other form of sexual harm or violence of comparable gravity;
7. Causes the forced disappearance of a person with the intention of removing him from the protection of the law for a prolonged period of time:
 - a. By kidnapping the person or depriving him or her of liberty under orders from or with the consent of a State or a political organisation, without the person being subsequently provided, immediately after the person has requested it, information corresponding to the truth about what will happen to him and his or her whereabouts;
 - b. By refusing, under orders from or with the consent of a State or a political organisation or in violation of a legal obligation, to provide immediately the information on what will become of the person and the whereabouts of the person deprived of liberty under the conditions indicated under Subparagraph a. or by giving false information.
 8. Inflicts upon another person serious bodily or mental harm, in particular injuries such as those mentioned in Article 19, Paragraph 2;
 9. Acts committed within the framework of an institutionalized regime of systematic oppression and domination of one racial group over any other racial group or all other racial groups with the intention of maintaining this regime are acts analogous to those covered by points 1 through 8 of this Article.

Article 21

Punishable by penal servitude for five to twenty years shall be anyone who, within the framework of a generalised or systematic attack launched against a civilian population:

1. Illegally deprives a person of liberty;
2. Persecutes a group or an identifiable community by depriving it of the benefit of fundamental human rights or greatly limiting the application of these rights on political, racial, national, ethnic, cultural, religious, or sexist grounds or on the basis of other criteria recognised as unacceptable under the general rules of international law.

Part 3
War Crimes

Section 1
Definition

Article 22

For the purposes of this law, “war crimes” means:

1. Grave breaches of the Geneva Conventions of August 12, 1949, that is, any one of the following acts directed against persons or property protected under the provisions of the Geneva Conventions:
 - a. Willful killing;
 - b. Torture or inhuman treatment, including biological experiments;
 - c. Willfully causing great suffering or serious injury to body or health;
 - d. Destruction and appropriation of property not justified by military necessity and performed on a large scale unlawfully and arbitrarily;
 - e. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - f. Willfully depriving a prisoner of war or any other protected person of the right to a fair and lawful trial;
 - g. Unlawful deportation or transfer or unlawful confinement;
 - h. Taking of hostages;
2. Other serious violations of the laws and customs applicable in international armed conflicts within the established framework of international law, namely, any one of the following acts:
 - a. Intentionally directing attacks against the civilian population as such or against civilians who are not participating directly in hostilities;
 - b. Intentionally directing attacks against civilian objects, that is, objects that are not military objectives;
 - c. Intentionally directing attacks against personnel, installations, material, units or vehicles used in a humanitarian aid 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;

- d. Intentionally launching an attack in the knowledge that it will cause incidental loss of human life or injury to civilians, damage to civilian objects, or widespread, long-lasting, and severe damage to the natural environment that would clearly be excessive in relation to the concrete and direct overall military advantage anticipated;
- e. Attacking or bombarding, by any means whatsoever, towns, villages, dwellings, or buildings that are undefended and that are not military objectives;
- f. Killing or wounding a combatant who, having laid down his arms or no longer having a means of defence, has surrendered at discretion;
- g. Making improper use of a flag of truce, of the flag or of the military insignias and uniform of the enemy or of the United Nations, as well as of the emblems specified by the Geneva Conventions, resulting in the loss of human life or serious personal injuries;
- h. The direct or indirect transfer, by an occupying Power, of part 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 the occupied territory;
- i. Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historical monuments, hospitals, and places where the sick or wounded are gathered, provided they are not military objectives;
- j. Subjecting persons of an adverse party that have fallen into one's hands to mutilation or to medical or scientific experiments of any kind which are neither for the purpose of providing medical, dental or hospital treatment nor in the interest of the persons concerned, and that cause death to or seriously endanger the health of such persons;
- k. Killing or wounding by treachery individuals belonging to the hostile nation or army;
- l. Declaring that no quarter will be given;
- m. Destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- n. Declaring abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party;
- o. A combatant's compelling the nationals of the hostile party to take

part in the operations of war directed against their country, even if they were in the belligerent's service before the commencement of the war;

- p. Pillaging a town or place, even when taken by assault;
- q. Employing poison or poisoned weapons;
- r. Employing asphyxiating, poisonous, or other similar gases, as well as all analogous liquids, materials, or devices;
- s. Employing bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not fully cover the core or is pierced with incisions;
- t. Employing weapons, projectiles, and material and methods of war that are of a nature to cause superfluous injury or unnecessary suffering or strike indiscriminately in violation of international law of armed conflict, provided that such weapons, projectiles, materials, and methods of war are subject to a comprehensive prohibition and are recorded in an annex to the Statute of the International Criminal Court, by an amendment adopted in accordance with the provisions set forth in Articles 121 and 123;
- u. Committing outrages upon human dignity, in particular humiliating and degrading treatment;
- v. Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, as mentioned in Article 20, Paragraph 6, enforced sterilisation or any other form of harm or sexual violence constituting a grave breach of the Geneva Conventions;
- w. Utilising the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations;
- x. Intentionally directing attacks against buildings, materiel, medical units and transport, and personnel utilising the distinctive emblems stipulated provided by the Geneva Conventions in conformity with international law;
- y. Intentionally using starvation of civilians as a method of warfare, by depriving them of objects indispensable to their survival, including willfully impeding the dispatch of the relief supplies stipulated by the Geneva Conventions;

- z. Conscripting or enlisting children under the age of 18 years into the national armed forces or using them to participate actively in hostilities.
3. In case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of August 12, 1949, namely, any one of the following acts committed against persons not participating directly in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause:
 - a. Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment, and torture.
 - b. Committing outrages upon human dignity, in particular humiliating and degrading treatment;
 - c. Taking of hostages;
 - d. The passing of sentences and the carrying out of executions without previous judgment pronounced by a legally constituted Court, affording all judicial guarantees that are generally recognised as indispensable.
 4. Paragraph 3 of this Article applies to armed conflicts not international in nature and thus does not apply to situations of internal troubles and tensions such as riots, isolated and sporadic acts of violence or acts of a similar nature.
 5. 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:
 - a. Intentionally directing attacks against the civilian population as such or against civilians not participating directly in hostilities;
 - b. Intentionally directing attacks against buildings, materiel, medical units and transport, and personnel using the distinctive emblems stipulated by the Geneva Conventions in conformity with international law;
 - c. Intentionally directing attacks against personnel, installations, materiel, units or vehicles used 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;

- d. 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 gathered, provided these buildings are not military objectives;
 - e. Pillaging a town or a place, even when taken by assault;
 - f. Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, as defined in Article 20, Paragraph 6, enforced sterilisation or any other form of harm or sexual violence constituting a serious violation of Article 3 common to the four Geneva Conventions;
 - g. Conscripting or enlisting children under the age of 18 years into armed forces or into armed groups or having them participate actively in hostilities;
 - h. Ordering the displacement of the civilian population for reasons related to the conflict, except in cases in which the security of the civilians involved or military imperatives so demand;
 - i. Killing or wounding a combatant adversary by treachery;
 - j. Declaring that no quarter will be given;
 - k. Subjecting persons of another party to the conflict that have fallen into one's hands to mutilation or to medical or scientific experiments of any kind that are neither for the purpose of providing medical, dental, or hospital treatment nor carried out in the interest of these persons, and that cause death to or seriously endanger the health of such persons;
 - l. Destroying or seizing the property of an adversary unless such destruction or seizure is imperatively demanded by the necessities of the conflict;
6. Paragraph 5 of this Article 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 acts of a similar nature. It applies to armed conflicts that take place in the territory of a State where there is protracted armed conflict between governmental authorities and organised armed groups or between such organised armed groups.

Article 23

Nothing in Paragraphs 3 and 5 of the preceding Article shall affect the responsibility of a Government to maintain and re-establish public order in the State or to defend the unity and territorial integrity of the State by all legitimate means.

Section 2 Penalties

Article 24

Punishable by penal servitude for life shall be anyone who is guilty of the crimes covered

- in Article 22, Paragraph 1, Subparagraphs a, b, f, and g;
- in Article 22, Paragraph 2, Subparagraphs a, c, e, f, h, i, j, k, q, r, v, x, and y;
- in Article 22, Paragraph 3, Subparagraphs a and d;
- in Article 22, Paragraph 5, Subparagraphs a, b, c, d, f, and k.

Article 25

Punishable by penal servitude for 5 to 20 years shall be anyone who is guilty of the crimes covered

- in Article 22, Paragraph 1, Subparagraphs c, d, e, and h;
- in Article 22, Paragraph 2, Subparagraphs b, d, g, l, m, n, o, p, s, t, u, w, and z;
- in Article 22, Paragraph 3, Subparagraphs b and c;
- in Article 22, Paragraph 5, Subparagraphs e, g, h, i, j, and l.

Title 3 Judicial organisation, jurisdiction and procedure

Article 26

The crimes covered by this law fall under the jurisdiction *ratione materiae* of the High Court at first instance regardless of the capacity of their perpetrators.

The Court of Appeals shall rule at the second level in accordance with ordinary procedure.

The Attorney General of the Republic shall have full power to bring criminal prosecution with respect to these crimes.

Article 27

The matter shall be pending before the High Court in the forms provided by the Code of Criminal Procedure.

Article 28

Preventative detention of persons prosecuted for the crimes covered by this law shall be governed in accordance with common law.

The person being prosecuted shall be assisted at all stages of the preliminary investigation by his counsel or by a lawyer appointed as of right.

Article 29

1. In accordance with Article 55 of the Statute of the International Criminal Court, any person suspected of having committed one of the crimes covered by this law:
 - a. Shall be assisted at the time of arrest and at all the stages of the proceedings by a lawyer or counsel of his or her choice, or, failing that, by a lawyer or counsel appointed as of right in accordance with common law;
 - b. Shall not be required to incriminate himself or herself or to confess guilt;
 - c. Shall not be subjected to any form of coercion, duress, or threat, to torture or to any other form of cruel, inhuman, or degrading punishment or treatment;
 - d. Shall, if not questioned in a language that he or she fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and all such translations as are necessary to meet the requirements of fairness; and
 - e. Shall not be subject to arbitrary arrest or detention;

2. In addition, this person shall also have the following rights, of which he or she shall be informed prior to being questioned:
 - a. To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime falling under this law;
 - b. To remain silent, without such silence being a consideration in the determination of guilt or innocence;

Article 30

Within the framework of the penalties for the crimes covered by this law, the Court hearing the action shall comply with the provisions of Article 68 of the Statute of the International Criminal Court in order to assure the protection of the victims and the witnesses.

Article 31

Within the framework of the performance of these duties, the judge shall have special protection. The following shall be punishable by a sentence of 5 to 10 years:

1. Intimidation of a judge or of the legal staff, interference with their activities, or peddling of influence in order to induce him, by duress or persuasion, not to perform, or to perform improperly, his or her duties;
2. Reprisals against a judge or the legal staff because of duties performed by them.

Article 32

The judge shall himself judge the evidence obtained legally and argued at the hearing.

Title 4
Cooperation with the international criminal court

Part 1
Judicial Assistance

Article 33

The Democratic Republic of the Congo shall cooperate fully with the Court in the investigations and prosecutions that it conducts for those crimes that fall within its competent jurisdiction, in accordance with the procedures provided by the provisions of this law and by provisions of other national laws, as well as by the Statute of the International Criminal Court.

The Attorney General of the Republic shall be responsible for cooperating with the International Criminal Court. Therefore, he shall have full authority to conduct prosecution.

Article 34

1. The Court shall enjoy, within the territory of the Democratic Republic of the Congo, the privileges and immunities required for the accomplishment of its mission.
2. The judges, the Prosecutor, the Deputy Prosecutors, and the Court Clerk shall enjoy the privileges and immunities accorded to the heads of diplomatic missions in performing their duties and in relation to these duties. After the expiry of their mandate, they shall continue to enjoy immunity against all legal proceedings for their spoken words, writings, and actions that are associated with the performance of their official duties.
3. The Deputy Court Clerk, the staff of the Office of the Prosecutor, and the staff of the Court Clerk shall enjoy the privileges, immunities, and facilities required to perform their duties, in compliance with the agreement on the privileges and immunities of the Court.
4. The lawyers, experts, witnesses, or other persons whose presence is required at the seat of the Court shall benefit from the treatment required for the smooth operation of the Court, in compliance with the agreement on the privileges and immunities of the Court.

Article 35

Requests for assistance emanating from the International Criminal Court shall be addressed to the Supreme Public Prosecutor's Office of the Republic, accompanied by all the supporting documentation.

They shall be transmitted to that office through diplomatic channels. They may also be transmitted via the International Criminal Police Organisation (INTERPOL) or through any competent regional organisation of the same nature.

In accordance with Article 87(3) of the Statute of the International Criminal Court, all the necessary measures must be taken in order to comply with the confidential character of the requests for assistance and the supporting documentation and related materials, except to the extent that the disclosure is necessary to follow up on the request.

In case of emergency, these requests may be transmitted to this office in true certified copies directly and by any means. The originals shall then be transmitted in the forms mentioned in the previous subparagraph.

Article 36

Requests for assistance shall be fulfilled by the Attorney General of the Republic throughout the national territory, in the presence of the Prosecutor of the International Criminal Court or his representative, or of any person mentioned in the request of the Court, as required.

The Congolese legal authorities shall be required to comply with the conditions with which the Court accompanies the fulfilment of the requests.

Article 37

The reports prepared as these requests are fulfilled shall be sent to the International Criminal Court by diplomatic means.

In case of emergency, true certified copies of the reports may be sent directly and by any means to the Court. The originals shall then be transmitted in the forms mentioned in the previous subparagraph.

Article 38

When a request from the International Criminal Court is submitted to it and it notes that it raises difficulties that could interfere with or hinder its fulfilment, the Attorney General of the Republic shall consult the International Criminal Court without delay in order to resolve the question.

Article 39

When it rejects a request from the International Criminal Court, the Attorney General of the Republic shall make its reasons known without delay, in accordance with the Statute, to the Court or to its Prosecutor, as the case may be.

Article 40

The Congolese jurisdictions shall have priority to take cognizance of the crimes covered by this law. The International Criminal Court shall intervene only as an alternative.

When the competent jurisdiction of the Court is implemented in accordance with Article 13 of the Statute, the Attorney General of the Republic may assert the competence of the Congolese jurisdictions pursuant to Article 18 of the Statute or, as required, contest the competent jurisdiction of the Court pursuant to Article 19 of the Statute.

Article 41

When the competent jurisdiction of the International Criminal Court is contested in accordance with Articles 17 and 19 of the Statute of the International Criminal Court, the Attorney General of the Republic may postpone the fulfilment of the request until the latter has ruled.

Part 2
Arrest and Surrender of a Person

Article 42

A requests for arrest with the objective of surrender of a person issued by the Court shall be sent to the Attorney General of the Republic in the forms mentioned in Article 35.

Article 43

The Attorney General of the Republic shall respond to any request for arrest and surrender of a person in accordance with the provisions of Chapter 9 of the Statute of the International and the procedures provided by the Code of Criminal Procedure.

Article 44

1. When the request for arrest is approved, the Attorney General of the Republic shall issue an arrest warrant, initiate the search, and order the arrest and incarceration of the accused person in jail.
2. The arrest warrant issued by the Attorney General of the Republic shall contain:
 - a. A description of the person being prosecuted and the facts of the case in which he is being accused;
 - b. An indication that the surrender has been requested by the International Criminal Court;
 - c. A specification that the person being prosecuted shall benefit from the right of appeal and the right to the assistance of counsel.
3. In accordance with Articles 89 and 92 of the Statute of the International Criminal Court, the Attorney General of the Republic shall execute the arrest warrant issued by the International Criminal Court in accordance with ordinary criminal procedure.

4. If the person is not directly arrested by the Attorney General of the Republic, but by authorities delegated by him, he must be brought before the Attorney General of the Republic within a transfer period of a maximum of thirty days.
5. During the arrest, the Attorney General of the Republic or the authority delegated by him shall have the obligation to notify immediately the person arrested of the reasons for his arrest and that he shall have the rights stated in Article 29 of this law. The objects and assets that might serve as evidence within the framework of the proceedings initiated by the International Criminal Court or which are related to the crime or the product thereof shall then be seized.

Article 45

1. Under penalty of liberation of the person, the Justice of the Peace of the jurisdiction in which the person was arrested must give a decision within 72 hours following the arrest.

To this end, he shall verify that the arrest warrant is indeed directed at the person arrested, that the latter was arrested according to legal procedures, and that his rights have been respected, failing which, the person arrested shall be released.

2. The Justice of the Peace shall hear the person arrested concerning his personal situation and ask him if he has objections to the execution of this arrest warrant.
3. The lawyer or counsel of the arrested person shall participate in this hearing.
4. The Justice of the Peace shall not be authorised to examine whether the arrest warrant was legally issued by the International Criminal Court.

Article 46

1. After the person arrested has been transferred to appear before the Attorney General of the Republic, the latter shall notify him again of the

reasons for his arrest and that he is entitled to the rights stated in Article 29 of this law.

2. As soon as the arrested person has been brought before the Attorney General of the Republic, that person may immediately and at any time during the proceedings request his release from detention.
3. In accordance with Article 59 of the Statute of the International Criminal Court, the Justice of the Peace shall advise the Pre-Trial Chamber of the International Criminal Court that a request for interim release from confinement has been made.
4. Before ruling within a period of a maximum of one week, the Justice of the Peace shall take into consideration fully the recommendations of the Pre-Trial Chamber.
5. When he takes a decision, the Justice of the Peace shall examine if, with respect to the seriousness of the alleged crimes and the urgency of the situation, exceptional circumstances justify the provisional release. In this case, he shall set the conditions that will allow him to assure that the person may be turned over to the International Criminal Court.
6. An appeal of the decision of the Justice of the Peace with respect to provisional imprisonment shall be made according to the rules of the code of criminal procedure.

Article 47

In the absence of receiving the supporting documentation, the Attorney General of the Republic shall order the release of the person being prosecuted no longer than sixty days after the arrest.

Article 48

The Attorney General of the Republic shall surrender the person being prosecuted and transmit the objects and assets seized.

If the person being prosecuted contests the competent jurisdiction of the International Criminal Court, the surrender of the person shall be postponed until the International Criminal Court has handed down its decision.

The Attorney General of the Republic shall order the measures required for the surrender of the person after agreement has been made with the International Criminal Court.

Article 49

The transport within the national territory of a person transferred to the International Criminal Court shall be authorised by the Minister of Justice, in accordance with Article 89 of the Statute.

Article 50

A person who has been arrested provisionally under the conditions stated in Article 92 of the Statute of the International Criminal Court may, if he consents to it, be surrendered to the International Criminal Court before the competent authority has received the request for surrender of the person and the supporting documents mentioned in Article 91 of the Statute.

Article 51

Any person detained within the national territory may, if he consents, be transferred temporarily to the International Criminal Court for the purpose of identification or hearing or for the performance of any other investigative action.

Part 3

Other Forms of Cooperation

Article 52

Requests for assistance emanating from the International Criminal Court related to an investigation or to prosecutions shall be addressed directly to the Attorney General of the Republic. In accordance with Article 93 of the Statute

of the International Criminal Court, these requests may include any action not prohibited by Congolese law that is conducive to facilitating the investigation or the prosecutions related to the crimes falling within the competent jurisdiction of the Court. They involve, in particular:

1. The identification and whereabouts of a person or the location of items;
2. The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
3. The questioning of persons being investigated or prosecuted;
4. The service of documents, including judicial documents;
5. Facilitating the voluntary appearance of persons giving evidence as witnesses or experts before the Court;
6. The temporary transfer of persons pursuant to the preceding Article of this law; 7. The examination of places or sites, including the exhumation and examination of cadavers buried in communal graves;
8. The execution of searches and seizures;
9. The provision of records and documents, including official records and documents;
10. The protection of victims and the witnesses and the preservation of evidence;
11. The identification, tracing, and freezing or seizure of proceeds from crimes, property, assets, and instruments that are related to the crimes, for the purpose of potential forfeiture, without prejudice to the rights of bona fide third parties.

Part 4 **Enforcement of Sentences**

Article 53

When, pursuant to Article 103 of the Statute of the International Criminal Court, the Democratic Republic of the Congo has agreed to receive a person sentenced by the International Criminal Court into its territory so that the person may serve his sentence of imprisonment, the sentence pronounced shall be directly enforceable as soon as that person is transferred, for that part of the sentence remaining to be served.

The conditions of imprisonment must be compliant with the widely accepted rules laid down in the agreements concerning the treatment of prisoners in accordance with Article 106 of the Statute.

Article 54

As soon as he or she has arrived in the territory of the Republic, the transferred person shall be presented to the Attorney General of the Republic, who will verify the person's identity and prepare an official record of it.

Upon viewing the documents establishing the agreement between the Democratic Republic of the Congo and the International Criminal Court concerning the transfer of the party concerned, the Attorney General of the Republic shall order the immediate incarceration of the convicted person.

Article 55

The convicted person may file with the Attorney General of the Republic a request for conditional release.

The request shall be communicated to the International Criminal Court with expediency, along with all the relevant documents.

The Court shall decide whether the convicted person may or may not benefit from the action requested.

Article 56

The implementation of penalties of fines and confiscation or of decisions concerning reparations pronounced by the International Criminal Court shall be effected in compliance with the procedure stipulated by the national law and without prejudice to the rights of bona fide third parties.

Article 57

The proceeds of the fines and property, or the proceeds from sale of the property shall be transferred to the International Criminal Court or to the trust fund for the victims stipulated by Article 79 of the Statute of the International Criminal

Court. They may also be awarded to the victims, if the Court has so decided and has so designated them.

Article 58

Any dispute concerning the implementation of fine and confiscation penalties or reparations shall be forwarded to the Court, which will follow up as necessary.

Part 5 **Offences against the Administration of Justice**

Article 59

Any person who commits one of the acts of offences against the administration of justice stipulated in Article 70 of the Statute of the International Criminal Court, as listed below, shall be punished with a sentence of six months to two years:

1. False testimony given by a person who has made the commitment to tell the truth;
2. Presentation of evidence that the party knows is false or forged;
3. Subornation of perjury, obstructing or preventing a witness from appearing or testifying freely, retaliation made against a witness for giving testimony, destruction or forging of evidence, or interference with the collection of evidence;
4. Intimidation of a member or official of the Court, hindering of his action, or peddling of influence for the purpose of coercing or persuading the official not to perform, or to perform improperly, his or her duties;
5. Retaliation against a member or an official of the Court because of duties performed by such a member or official or by another member or official;
6. Solicitation or acceptance of illegal payment to a member or an official of the Court within the context of his or her official duties.

Title 5
Final provisions

Article 60

Matters concerning the Statute of the International Criminal Court that are not governed expressly by this law shall be governed in conformance with positive Congolese law in effect, with international custom, or with the general principles of law.

Article 61

This law shall enter into force on the date it is promulgated.

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