

**THE UN MAPPING REPORT ON INTERNATIONAL CRIMES
COMMITTED IN THE DEMOCRATIC REPUBLIC OF CONGO
BETWEEN 1993 AND 2003.
FROM THE RESPONSIBILITY TO REMEMBER
TO A RESPONSIBILITY TO REACT**

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Résumé

La région des grands lacs d'Afrique centrale en général et la République Démocratique du Congo en particulier ont été pendant plus qu'une décennie le théâtre d'un enchevêtrement complexe de conflits où les crimes de droit international les plus graves ont été commis à très large échelle.

Cet article veut d'abord expliquer le conflit et montrer comment la communauté internationale l'a abordé pour ensuite analyser le rapport sur le 'mapping' des crimes commis en RDC entre 1993 et 2003 publié en octobre 2010 par le Haut Commissariat des Nations unies pour les droits de l'homme et qui documente un grand nombre de crimes commis et fait des suggestions aux autorités congolaises afin d'y répondre d'une manière adéquate.

1. INTRODUCTION

The Great Lakes region of Central Africa in general and the Democratic Republic of the Congo (DRC) in particular belonged for the last two decades to the most volatile and conflict-ridden parts of the world. The region has been the scene of a dramatic post-Cold War readjustment followed by a complex tangle of intertwined conflicts fought on the territory of the DRC. It became the African battlefield where several states as well as foreign and national armed movements simultaneously fought their own wars and where all kinds of diplomatic efforts seemed to bring no solutions at all, to the extent that reference was being made to the first African world war. It is estimated that between 4 and 4.5 million people lost their lives directly or indirectly as result of the conflict.¹

Various official reports have been published documenting the crimes. The Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003 (UN mapping report) issued in October 2010 by the Office of the UN High Commissioner for Human Rights is the most recent and comprehensive of this series of official reports. The publication of the report led to quite some controversy because it not only confronted us again with the gravity of the crimes committed but also pointed to the role of state and non-

¹ See ROBERTS, L., "Mortality in Eastern Congo. Results from Five Mortality Surveys by the International Rescue Committee May 2000", Bukavu, International Rescue Committee, 2000; COGHLAN, B., BRENNAN R. *et al.*, "Mortality in the Democratic Republic of Congo: Results from a Nationwide Survey Conducted April-July 2004", Melbourne/New York, Burnet Institute, International Rescue Committee, 2004.

state actors. However, compared to most previously published official reports, its aim was not only to reveal the extent of the atrocities but also to push the reflection further by tabling the question of how to deal with these crimes and proposing possible avenues to address them. The UN High Commissioner for Human Rights stated that the report is “expected to be the first and only comprehensive United Nations report documenting major human rights violations committed within the territory of the DRC between 1993 and 2003. In this regard, the report should be of fundamental importance in the context of efforts devoted to protecting human rights and combating impunity.”² Documenting what has happened is one thing; another is the responsibility to react. Having been for long an absentee in the conflict, the ‘international community’ owes it to the victims to push for peace and reconciliation. And that has an aspect of confronting the truth but equally relevant is the aspect of accountability.

This contribution will first briefly explain the recent history of the country and show how the international community responded to a crisis that had started with demands to open up the political space at the end of the Cold War but was later caught by a regional conflict with ramifications far beyond Central Africa. After this historical overview, the contribution will analyze the main findings of the report and where relevant add a critical note.

2. A SYNOPSIS OF THE CRISIS IN THE DRC AND THE REACTION OF THE INTERNATIONAL COMMUNITY

The UN mapping report focuses on the decade 1993-2003.³ It is therefore relevant to first briefly give an overview of the political events of this recent period and explain how the international community reacted to them.⁴

All started with the end of the Cold War and the subsequent ‘fragilization’ of regimes whose existence had for too long been extended due to their key position in Cold War strategies. The Mobutu regime, once an important bastion against communist influence in Central and Southern Africa, had understood too late that in the post-Cold War period these historical ties with the West meant little in a world where the US remained the sole superpower. In an attempt to maintain power in a context of growing popular dissent and diminishing foreign backing, the patrimonial and predatory networks through which the regime manipulated all sections of state and

² UN Mapping Report, para. 91.

³ March 1993 was chosen as the start date for the mapping exercise because of the Ntoto market massacre in North Kivu, which triggered wider ethnic conflict in the province. June 2003 corresponds to the establishment of a transitional government of ‘national unity’.

⁴ This part is partly based on SMIS, S., OYATAMBWE, W., “Complex Political Emergencies, the International Community & the Congo Conflict”, 93-94 *Review of African Political Economy*, 2002, pp. 403-430 and SMIS, S., KINGAH SEVIDZEM, S., “EU’s Unassertive Inter-regional Approach in Conflict Management in the DRC”, in SÖDERBAUM, F., STÅLGREN, P. (eds.), *The European Union and the Global South*, Boulder, Lynne Rienner Publishers, 2010, pp. 205-223.

society were stretched to their limits and resulted in undermining state institutions including those that were needed to maintain the ruling elite in power. The UN mapping report saw this period as the first of a quadripartite in which the country slowly descended into total chaos and increasingly became receptive to the most serious international crimes to be committed.

Imploding from within, the regime collapsed when as a result of the Rwandan genocide and the subsequent refugee crisis the country was dragged into a regional conflict with many faces. The first part of the war commenced in 1996 when Rwanda, Uganda and to a lesser extent Burundi attacked refugee camps in Zaire. The camps had become a security threat due to the rearmament and reorganization of the defeated *Interahamwe* militias and former *Forces Armées Rwandaises* that after the 1994 Rwandan genocide had joined the numerous Rwandan refugees crossing the Zairian border. The refugee camps were dismantled with extreme brutality. Reports allude to many thousands who were indiscriminately killed.⁵ What started as an attack to destroy the refugee camps led to a broader war and finally resulted in the ousting of President Mobutu in May 1997. This first war corresponds to the second period in the UN mapping exercise and is qualified as the most brutal with most of the international crimes being committed on a very large scale. The report confirms what had already been revealed in earlier UN⁶ and NGO reports⁷ that acts qualified as war crimes, crimes against humanity and possibly genocide had been committed.

The marriage of convenience at the head of the Congolese state did not last and very quickly disagreement between Laurent Kabila and his Rwandan and Ugandan backers split the coalition that toppled Mobutu. Both eastern neighbours launched a new war against Kinshasa in 1998 and supported Congolese rebels who quickly controlled a considerable part of the country. The Congolese government on its part obtained military assistance from members of the Southern African Development Community (SADC) such as Angola, Namibia and Zimbabwe. As the African saying holds, “when the elephants fight it is the grass that suffers most.” And in this case the grass suffered extremely. This is confirmed by the mapping report, which concluded that the civilian populations were victims of serious violations of human rights and international humanitarian law allegedly by all parties in the conflicts and throughout the whole territory, but especially in North and South Kivu,

⁵ See the *Report from the joint mission tasked with investigating allegations of massacre and other violations of human rights in eastern Zaire (currently the DRC) from September 1996* (UN Doc. A/51/942) and the *Report of the Investigative Team of the Secretary General on serious violations of human rights and international humanitarian law in the DRC* (UN Doc. S/1998/581).

⁶ *Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission resolution 1998/61*, UN Doc., E/CN.4/1999/31 (8 February 1999).

⁷ See, e.g., HUMAN RIGHTS WATCH, *What Kabila is Hiding. Civilian Killings and Impunity in Congo*, 1 October 1997.

Orientale Province (in particular in Ituri), Katanga, Équateur and also Bas-Congo.

For a long time the West and the UN Security Council remained silent and by default Africa had to lead the mediation and find ways to drag the belligerent out of their 'trenches'. SADC and South Africa started initiatives that after many setbacks finally resulted in the Lusaka agreement signed on 10 July 1999. As a result, the UN Security Council agreed to authorize an operation with a limited mandate involving up to 90 military liaison staff and personnel affected to their security.⁸ At the same time, an inter-Congolese dialogue (ICD) was to be held during which the Congolese would agree on the political future of the country. However, even though the agreement brought about a lull in the conflict, in spite of this there were intermittent skirmishes between the Rwandan backed rebels of the *Rassemblement congolais pour la démocratie-Goma* (RCD-Goma) and the *Mouvement pour la libération du Congo* (MLC) supported by Uganda, on the one hand, and government forces on the other. Moreover, Rwanda and Uganda allies in the fight against the Kabila regime, fought each other with heavy weapons for the control of the diamond rich city of Kisangani. The second phase of the conflict came to an end without much progress on the implementation of the Lusaka agreement when Laurent Kabila was assassinated in January 2001 and was quickly replaced by his son Joseph Kabila. For the UN mapping report this event initiated the fourth and last part of its period under review: the transitional period.

The final part of the conflict in reality commenced with the signing of the Pretoria Agreement on power-sharing in a transition government pending the holding of elections. This 'Global and All-Inclusive Agreement', signed in Pretoria on 17 December 2002, ensured that all the main Congolese belligerents would hold the important cabinet positions. The arrangement was known as the '1+4' agreement, whereby President Joseph Kabila had to rule the country alongside four vice presidents representing the main political forces. A *Comité d'accompagnement de la transition* (CIAT) was created to 'assist' the country in its democratic transition. Most important partners of Congo were represented in this committee.

The Global and All-Inclusive Agreement was formally reconfirmed when on 2 April 2003 the participants in the ICD signed the Final Act of the inter-Congolese political negotiations in Sun City. This Final Act was a package of agreements aimed at restoring peace and national sovereignty during a transition period of two years. The Transitional Constitution was promulgated on 4 April 2003 and Joseph Kabila was sworn in as President for the transition period on 7 April. However, with the '1 + 4' formula, the situation on the battlefield was frozen and translated into a political system in which all parties could camp on their positions to defend own and foreign interests without having to make too many concessions awaiting the end of the

⁸ UN SC Res. 1258 (1999) of 6.8.1999.

transition when a new constitution and national and local elections would institute a new system.

Meanwhile the UN mission saw its mandate expanding considerably. From a classical ceasefire observation mission it was transformed into a more robust one with a troop strength steadily increasing to reach a number of around 20.000 military and police personnel accompanied by a large number of civilian personnel and as such becoming the largest and most expensive UN operation. The broad mandate put the DRC in a situation of a semi international tutelage and created considerable tensions with the Congolese authorities who often maintained that MONUC (and later its successor MONUSCO) seriously infringed upon their sovereignty. In spite of the fact that MONUC forces were present in the country, ethnic skirmishes and massive human rights violations persisted mainly in Eastern Congo. In June 2003 and to quell the mounting tension, the EU agreed to launch a short but effective EU military operation led by France to ensure peace in the Ituri region.⁹

For the international community the peace process had to lead to general elections considered by many as a necessary step to the reconstruction of the state. However, the path to these elections was filled with hurdles and on many occasions, almost collapsed. The country was far from unified, instability remained and human rights violations continued unabated. Elections were finally organized at the end of 2006. On 6 December 2006 Joseph Kabila was sworn in as president of the DRC. The international community celebrated. An important milestone in the peace process seemed to have been taken.

President Kabila started his five-year term promising to put the state back on wheels but realities have evolved differently: the presidential entourage controls the country's resources and the whole state apparatus including the army, government, parliament and the judiciary. Institutional reforms in the security and judicial sectors are slow to materialize, promised decentralization has been put on the hold and insecurity has become almost endemic in vast parts of the territory.

This succinct historical overview shows that the conflict was an extremely complex one and has developed into a situation where massive violations of human rights and rules of humanitarian law have become almost the order of the day with all the forces showing little respect for life and property. Even though the mapping exercise focuses on the decade 1993-2003, stability and a normalization of the functioning of the state apparatus has in the post transition period not fully been restored and this greatly affects the question of accountability.

⁹ See ULRIKSEN, S., GOURLAY, C., MACE, C., "Operation Artemis: the shape of things to come?", *International Peacekeeping*, Vol. 11, No. 3, 2004, pp. 508-525; HOMAN, K., "Operation Artemis in the Democratic Republic of Congo", in NETHERLANDS INSTITUTE OF INTERNATIONAL RELATIONS CLINGENDAEL, *European Commission: Faster and more united? The debate about Europe's crisis response capacity*, May 2007, pp. 151-155.

3. THE UN MAPPING EXERCISE

3.1. Establishment, mandate and methodology

The crisis that took place on the territory of the DRC has extensively been discussed by official bodies,¹⁰ policy makers¹¹ and the scientific world¹² even though much of what actually happened still needs to be revealed to the larger public. It was in other words already quite clear that mass violations of human rights and the rules of armed conflicts had taken place in the country by all parties involved. Reacting to the discovery of mass graves in North Kivu in 2005, UN Secretary General Kofi Anan indicated in his 21st report on MONUC that he intended to “dispatch a human rights team to the Democratic Republic of the Congo to conduct a mapping of the serious violations committed between 1993 and 2003”,¹³ an intention he confirmed in the two following reports to the Security Council.¹⁴ In May 2007 the terms of reference were approved and a team could be appointed under the responsibility of the UN High Commissioner for Human Rights and with the financial support of interested partners¹⁵ to

conduct a mapping exercise of the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003;
 assess the existing capacities within the national justice system to deal appropriately with such human rights violations that may be uncovered; and
 formulate a series of options aimed at assisting the Government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation and reform, taking into account ongoing efforts by the DRC authorities, as well as the support of the international community.¹⁶

¹⁰ See the numerous resolutions, presidential statements and mission reports of the UN Security Council, the various resolutions of the UN General Assembly, the reports by the UN Secretary General on the UN mission in the DRC and the various reports by UN human rights bodies.

¹¹ See the reports and other publications from the International Crisis Group, the Africa Institute of South Africa, and the Institute for Security Studies.

¹² See, e.g., CLARK, J. F. (ed.), *The African Stake of the Congo War*, New York, Palgrave Macmillan, 2004; TURNER, T., *The Congo Wars. Conflict, Myth and Reality*, London/New York, Zed Books, 2007; REYNTJENS, F., *The Great African War: Congo and Regional Geopolitics 1996-2006*, Cambridge, Cambridge University Press, 2009; PRUNIER, G., *From Genocide to Continental War: The “Congolese” Conflict and the Crisis of Contemporary Africa*, London, C. Hurst, 2009.

¹³ *Twenty-first report of the Secretary-General on MONUC*, UN Doc. S/2006/390, para. 54.

¹⁴ *Twenty-second and twenty-third reports of the Secretary-General on MONUC*, UN Doc. S/2006/759 and UN Doc. S/2007/156 and Corr.1.

¹⁵ Austria, Belgium, Canada, Germany, the Netherlands, the Republic of Korea, the United Kingdom, Sweden, Switzerland and the MacArthur Foundation.

¹⁶ UN Mapping report, para. 89.

The Security Council pledged its full support and requested the Congolese authorities to do the same.¹⁷ The team led by Luc Côté, a Canadian attorney and specialist in international crimes, started its mission on 17 July 2008. From October 2008 to May 2009 the team composed of 25 human rights experts travelled the country gathering documents and interviewing witnesses and resource persons to document the crimes committed in the period referred to in the terms of reference. The team submitted its findings to the UN High Commissioner for Human Rights in June 2009 after which the report was transmitted to the government of the DRC for observations and comments. The countries named in the report were also given the opportunity to give their views and feedback. These official reactions were publicized when the report was issued.

A year after the report was submitted and in a context of suspicion that the report was being hidden or ‘cleaned up’ under pressure of discontented states, a draft version was leaked to the French newspaper *Le Monde*, which published the draft days before the report had to be made public at the end of August 2010. Speculations followed. Rwanda reacted furiously and threatened to withdraw its troops involved in the peacekeeping mission in Darfur if the report was to be published unchanged.¹⁸ UN Secretary-General Ban Ki-moon had to pay a visit to Kigali in early September to appease the tensions before the report was finally issued on 1 October (the cover of the report, however, mentions August 2010 as date of release).

Following the controversies surrounding the report, the specific aims and objectives of the mapping exercise (namely to give a broad and well analyzed framework allowing the Congolese authorities to take the required steps to address the situation) were almost lost. The exercise did not have the objective to investigate all the crimes nor did it have the means and time to come up with evidence as would be required in criminal proceedings where the threshold used is whether facts are being established ‘beyond reasonable doubt’.

To document or map it was thought sufficient to use the rigorous yet lighter criteria of ‘reasonably suspecting that the incident did occur’ and therefore evaluating “the reliability and credibility of the source and then the validity and veracity of the information itself.”¹⁹ This also explains why the identity of the victims and the alleged perpetrators of the crimes have not been revealed for this would require a more stringent court room approach. This methodology has strongly been criticized by the Rwandan government which described the report as “a creation of the authors themselves, [it] is deeply flawed and one-sided... [t]he scope of the mapping exercise, the quality of its sources, the standard of proof and the lack of transparency presents serious

¹⁷ UN SC Res. 1794 (2007) of 21.12.2007.

¹⁸ BBC, “UN report says DR Congo killings ‘may be genocide’”, 1 October 2010.

¹⁹ UN Mapping Report, paras 101-102.

questions about the credibility and reliability of its conclusions.”²⁰ The approach might be subject to criticism; it nevertheless documented more than 600 violent incidents (617 exactly), some having been revealed before, others being reported for the first time and by this it gave an accurate indication of what had actually happened on the ground.

3.2. Findings and responsibilities

The UN mapping report approached the violent incidents through the triptych ‘war crimes, crimes against humanity and genocide’ and thereafter gave special attention to three types of crimes that run as patterns in the region: violence committed against women and sexual violence, violence committed against children and violence linked to the exploitation of natural resources. On the said crimes the UN mapping report concluded that

the vast majority of the 617 listed incidents constitute crimes under international law, if judicially investigated and proven. These were war crimes committed during armed conflict, either internal or international, or crimes against humanity committed in the context of a generalised or systematic attack against a civilian population, or in many cases both. The issue of whether the many serious acts of violence committed against Hutus in 1996 and 1997 constitute crimes of genocide can only be decided by a competent court.²¹

Without entering into the details of the specific incidents that were reported, a short description is given of the three categories of international crimes to understand what distinguishes them.

3.2.1. War crimes

War crimes are serious violations of international humanitarian law (the law applicable in armed conflicts) for which individual criminal responsibility applies. Humanitarian law has a long history and has mainly been codified in a number of Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949 and their Additional Protocols of 1977. Humanitarian law aims at protecting a number of key values,²² violations of

²⁰ REPUBLIC OF RWANDA, MINISTRY OF FOREIGN AFFAIRS AND COOPERATION, *Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC*, para. 33.

²¹ UN Mapping report, para. 464.

²² The most important values humanitarian law aims to protect are that: non-combatants are to be spared as much as possible from the consequences of war; combatants must distinguish enemy combatants from civilians and only attack military objectives; when attacking military objectives measures must be taken not to cause excessive damage to the civilian population; and the means and methods of warfare are restricted in order to prevent unnecessary suffering and respect humanitarian principles.

which often also amount to individual responsibility and are therefore considered as war crimes.²³

Originally war crimes were prosecuted by national courts and tribunals but with the Nuremberg and Tokyo International Military Tribunals (IMT) after World War II a precedent was established to organize prosecution also at the international level. Today the various international criminal law courts and tribunals have a competence to prosecute individuals for war crimes even though their statutes do not necessarily define war crimes identically.

In order for a criminal offense to be considered a war crime, there must be a link between the offence and an armed conflict whether international or internal in nature.²⁴ War crimes can be perpetrated by armed forces against enemy forces or civilians, or by civilians against enemy armed forces or civilians. Put otherwise, war crimes can only be committed between enemies.²⁵ Crimes committed against own forces do not therefore qualify as war crimes. Not all violations of international humanitarian law constitute war crimes; only the most serious ones have been criminalized.

In the Tadić case the ICTY developed a ‘test’ to ascertain whether a certain conduct constitutes a war crime: “(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.”²⁶

Since not all violations of international humanitarian law constitute war crimes, it is through delving into the jurisprudence of national and international courts and tribunals, statutes of international courts and tribunals and if necessary military manuals, national legislation, resolutions of international organizations etc. that one gets a proper answer whether a specific infringement of the law of armed conflicts also constitutes a war crime.²⁷ If the Statute of the International Criminal Court (ICC) might be an indication (the list of fifty offences is strictly speaking only applicable for the Court)²⁸ of the internationally recognized war crimes for reasons that the drafters intended the

²³ Humanitarian law is in principle addressed to states and belligerent forces and if violated leads to state responsibility. Some of the violations of humanitarian law also lead to individual criminal responsibility for those who have committed the violation and are for this purpose called war crimes.

²⁴ ICTY, *Tadić*, A.Ch. 2.10.1995.

²⁵ CASSESE, A., *International Criminal Law*, Oxford, Oxford University Press, 2008, p. 82.

²⁶ ICTY, *Tadić*, A.Ch. 2.10.1995, para. 94.

²⁷ See CASSESE, *op. cit.*, p. 85.

²⁸ The ICC list does therefore not necessarily list all the existing war crimes nor does it affect the future developments in international law in this domain.

provision to reflect customary international law,²⁹ one could distinguish half a dozen broad classes of war crimes:

- (1) crimes committed against persons not taking part, or no longer taking part, in armed hostilities;
- (2) crimes against enemy combatants or civilians, committed by resorting to prohibited methods of warfare;
- (3) crimes against enemy combatants and civilians, involving the use of prohibited means of warfare;
- (4) crimes against specially protected persons and objects;
- (5) crimes consisting of improperly using protected signs and emblems; and
- (6) conscripting or enlisting children under the age of fifteen years or using them to participate actively in hostilities.³⁰

As with all crimes, the person who committed the prohibited action will only be accountable for the crime if he had the required mental frame. Sometimes the required mental element is specified in the rules criminalizing the conduct but often not. As a general rule, however, intention, knowledge or recklessness is required.

The mapping report documented acts such as murder, wilfully causing great suffering, or serious injury to body or health, rape, intentional attacks on the civilian population, pillage, and unlawful and arbitrary destruction of civilian goods, including some which were essential to the survival of the civilian population. If proven in a court of law, the majority of the violent incidents analyzed in the report constitute war crimes.

3.2.2. *Crimes against humanity*

When discussing the concept of war crimes above, it has been shown that war crimes are built around grave violations of international humanitarian law. Crimes against humanity, however, are as a category of international crimes today mainly based on massive violations of human rights law. The term 'crimes against humanity' was used for the first time in relation to the massacre of Armenians by the Ottoman Empire in 1915. The first prosecutions for crimes against humanity, however, took place in the context of the Nuremberg IMT. Confronted with the problem that war crimes did not refer to crimes committed by the Nazi government against German citizens, the major Allied powers defined crimes against humanity in Article 6(c) of the Charter of the IMT so as to respond to this major shortcoming:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in

²⁹ CRYER, R., FRIMAN, H., ROBINSON, D., WILMSHURST, E., *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2010, p. 289.

³⁰ CASSESE, *op. cit.*, pp. 88-92.

execution of or connection with any crimes within the jurisdiction of the Tribunal (i.e. crimes against peace or war crimes); whether or not in violation of the domestic law of the country where perpetuated.

It was at that time too early to dissociate crimes against humanity from the conduct of hostilities and therefore it required a connection with the two other crimes under the jurisdiction of the Nuremberg IMT (war crimes and crimes against peace).³¹ A significant number of persons have been convicted for crimes against humanity in the context of World War II. Even though the UN General Assembly, in its Resolution 95(I), and later the International Law Commission, in its draft of international code of crimes, confirmed the Nuremberg *acquis*, it was in reality, with some exceptions, set aside to pass the hurdle of practical application again when the UN Security Council, reacting against the shocking events in Ex-Yugoslavia and Rwanda during the 1990s, created the International Criminal Tribunal for ex-Yugoslavia (ICTY) and its counterpart the International Criminal Tribunal for Rwanda (ICTR). The statutes of both *ad hoc* tribunals referred to crimes against humanity even though in a slightly different wording.³² The case law of the two tribunals, however, shows that there is a broad consensus as to the constituent elements of the crime so that it might be assumed that Article 7 of the ICC Statute is to a great extent a reflection of customary international law when it states that a crime against humanity is one of the acts enumerated in the provision³³ “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

There is no need anymore to show a connection with an armed conflict as required in the Nuremberg Charter nor the requirement of a discriminatory animus as was still the case with the definition of the crime in the ICTR Statute. Everything turns around the notion of a “widespread or systematic attack”.

As these are key elements in the definition of crimes against humanity, it is useful to analyze how this recently developed requirement has been given content by the jurisprudence of the *ad hoc* tribunals. To start with, one has to remark that “widespread and systematic” is not considered a cumulative requirement and the fact that the French version of the ICTR Statute refers to

³¹ A similar definition was used by the Tokyo Tribunal.

³² See Art. 5 and Art. 3 of the Statute of the ICTY and ICTR respectively.

³³ Art. 7 ICC Statute refers to the following acts: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

“*généralisée et systématique*” [emphasis added] does not reflect the intention of the drafters and certainly not how it has been interpreted by the *ad hoc* tribunals.³⁴ The term “widespread” refers to the “large-scale nature of the attack and the number of victims”³⁵ even though no threshold has been advanced. This is a question to be appreciated by the judge. Invoking a ‘large-scale attacks’ test will often mean in practice that reference will be made to crimes against humanity if it is based on a series of inhuman acts but the case law has also accepted that a single but massive act may be considered a crime against humanity.³⁶ The term “systematic” relates to the degree of organization behind the commission of the crimes. While in some cases the Tribunals set a high threshold³⁷, in others they were more lenient and referred to notions such as “pattern or methodological plan”,³⁸ “organized nature of the acts”,³⁹ “organized nature of the acts of violence and improbability of their random occurrence”.⁴⁰ Attack must not be interpreted as the use of armed force but, as the ICC Statute and the case law of the *ad hoc* Tribunals suggest, refers to “a course of conduct involving the multiple commission of (the incriminated acts committed) against any civilian population.”⁴¹ This attack must be directed against a civilian population. In other words, the victims must be a larger group (not an individual)⁴² and may of course not be combatants. No further limitation is given. It therefore relates to both crimes committed against enemy nationals as well as the state’s own subjects.

As to the mental element, it is always a combination between the mental element required for the particular offence referred to in the definition and the awareness or the knowledge of the “broader context in which his actions occur”.⁴³ The perpetrator must, in other words, be aware that his acts are committed as an attack directed against a civilian population.

Since the violent incidents documented in the report, if proven in a court of law, show to have been committed in the context of widespread or systematic attacks, apparently carried out in an organized fashion and resulting in numerous victims, most crimes documented could also be considered as crimes against humanity.

³⁴ See ICTR, *Akayesu*, T. Ch. I (2.9.1998), para. 579.

³⁵ See ICTY, *Tadić*, T. Ch. II (7.5.1997), para. 206; ICTY, *Kunarac*, T. Ch. II (22.2.2001), para. 428; ICTR, *Nahimana*, A. Ch. (28.11.2007), para. 920.

³⁶ ICTY, *Blaškić*, T. Ch. I (3.3.2000); para. 206; ICTY, *Kordić*, T. Ch. (26.2.2001), para. 176.

³⁷ See ICTR, *Akayesu*, T. Ch. I (2.9.1998), para. 580 (reference was made to “thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources”) and *Blaškić*, T. Ch. (3.3.2000), para. 203.

³⁸ ICTY, *Tadić*, T. Ch. II (7.5.1997), para. 648.

³⁹ ICTY, *Kunarac*, T. Ch. II (22.2.2001), para. 429.

⁴⁰ ICTR, *Ntakirutimana*, T. Ch. I (21.2.2003), para. 804.

⁴¹ Art. 7(2)(a) ICC Statute. See also *Kunarac*, T. Ch. II (22.2.2001) para. 415; ICTY, *Krnjelac*, T. Ch. II (15.3.2002), para. 205.

⁴² The reference to the term ‘population’ means that the crime must be of a collective nature. See ICTY, *Tadić*, T. Ch. II (7.5.1997), para. 644; ICTY, *Kunarac*, T. Ch. II (22.2.2001), para. 425.

⁴³ See ICTY, *Tadić*, A. Ch. (15.7.1999), para. 248; ICTY, *Kupreškić*, T. Ch. II (14.1.2000), para. 134.

3.2.3. *Genocide*

Genocide is often referred to as “the crime of the crimes”. The term was invented by a Polish lawyer, Raphael Lemkin, in the context of the World War II holocaust⁴⁴ but only later entered the domain of popular speech. This explains why the Charter of the Nuremberg Military Tribunal did not refer to the crime even though, as the ICTR mentioned, “the crimes prosecuted by the Nuremberg Tribunal, namely the holocaust of the Jews or the ‘Final Solution’, were very much constitutive of genocide but they could not be defined as such because the crime of genocide was not defined until later.”⁴⁵ However, when referring to crimes against humanity the Nuremberg Charter mentioned “murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population” and “persecution on political, racial or religious ground”. The IMT therefore prosecuted those responsible for the extermination of Jews and other ethnic or religious groups under the heading crimes against humanity. This also means that a connection with war was still needed (see *supra*). With the adoption of the Genocide Convention in 1948, genocide also acquired an autonomous significance (detached from crimes against humanity) and left aside the nexus with a war.⁴⁶ The Convention entered into force in January 1951 and very quickly became binding to all states when the International Court of Justice stated that the prohibitions contained in the Convention must be considered as belonging to the domain of customary international law.⁴⁷

The Genocide Convention provides that a person who has committed the crime must be prosecuted and tried by the judicial authorities of the state where the crime has been committed or alternatively by an international criminal court.⁴⁸ It is not before the establishment of the *ad hoc* tribunals in the 1990s that this option became available. Both tribunals were established with a competence to prosecute individuals for genocide. The case law being very limited before the 1990s, the Akayesu case before the ICTR constitutes an important precedent. Many cases have since followed so that practitioners and commentators now have a good view of how genocide and the obligations contained in the Genocide Convention must be interpreted. The Genocide Convention not only prohibits genocide itself but also the planning and all forms of preparation of the crime.⁴⁹ It is not irrelevant to remark here that states also have duties under the Genocide Convention: besides the duty to prevent

⁴⁴ LEMKIN, R., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for International Peace, 1944, p. 79.

⁴⁵ ICTR, *Kambanda*, T. Ch. I (4.9.1998), para. 16.

⁴⁶ See Genocide Convention, Art. I.

⁴⁷ ICJ, *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1951, p. 23.

⁴⁸ Genocide Convention, Art. VI.

⁴⁹ Genocide Convention Art. III refers to conspiracy, direct and public incitement, attempt and complicity. The ICC Statute which textually refers to the definition of genocide contained in the Genocide Convention does, however, not refer to conspiracy to commit genocide.

and to punish genocide,⁵⁰ they also have a similar obligation as individuals to refrain from committing genocide.⁵¹ Moreover, genocide belongs to the domain of *ius cogens*⁵² (meaning that no derogations are accepted to this prohibition and that all infringing rules and agreements must be considered as void)⁵³ and constitutes an *erga omnes* obligation for states⁵⁴ (a duty of states owed towards the whole international community) so that every single member of the international community has a corresponding right to demand that if violation occurs it be discontinued. Specifically in the context of genocide but strictly speaking also as far as the other two categories of international crimes discussed in the UN mapping report are concerned, the international community has been attributing itself a full range of options if the state where the crimes are committed fails to protect the population. Reacting against the failure of the international community to prevent the Rwandan genocide the doctrine of 'responsibility to protect' was developed readapting the principle of state sovereignty by including an aspect of responsibility.⁵⁵ It is now recognized that sovereignty includes the obligation to prevent and halt war crimes, crimes against humanity and genocide. This responsibility that could be seen as a modern form of humanitarian intervention, is articulated around three pillars: (1) the state responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing; (2) if the state is unable to protect its population, the international community has a responsibility to assist the state by building its capacity (building early-warning capabilities, mediating conflicts between political parties, strengthening the security sector, mobilizing standby forces, etc.; and (3) if a state is manifestly failing to protect its citizens from mass atrocities and peaceful measures are not working, the international community has the responsibility to intervene first through diplomatic means but if need be by the use of more coercive and even military force.⁵⁶ The doctrine has since been endorsed by both the UN Security

⁵⁰ Genocide Convention, Art. I.

⁵¹ ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, paras 162-166.

⁵² See ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda), Jurisdiction of the Court and Admissibility of the Application*, ICJ Rep. 2006, para. 64.

⁵³ See Vienna Convention on the Law of Treaties, Art. 53.

⁵⁴ ICJ, *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1951, p. 23.

⁵⁵ See EVANS, G., SAHNOUN, M., "The Responsibility to Protect", *Foreign Affairs*, Vol. 81, No. 6, 2002, pp. 99-110; STAHN, C., "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm", *American Journal of International Law*, Vol. 101, No. 1, 2007, pp. 99-120; BOISSON DE CHAZOURNES, L., CONDORELLI, L., "De la 'responsabilité de protéger' ou d'une nouvelle parure pour une notion déjà bien établie", *Revue Générale de Droit International Public*, 2006, pp. 11-18; HILPOLD, P., "The Duty to Protect and the Reform of the United Nations – A Step in the Development of International Law?", *Max Planck Yearbook of United Nations Law*, Vol. 10, 2006, pp. 35-69.

⁵⁶ See 2005 World Summit Outcome Document, UN Doc. A/60/L. 1 (15.9.2005), paras. 138-139.

Council⁵⁷ and the General Assembly⁵⁸ and its meaning has been specified by the Secretary-General in his report to the General Assembly.⁵⁹ Also the African Union confirmed that it has the power to intervene when the above mentioned crimes are committed.⁶⁰

The definition of genocide is found in Article II of the Genocide Convention. For the Convention and all subsequent international instruments referring to genocide, it is

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The Genocide definition only refers to four categories of protected groups: national, ethnic, racial and religious groups. There is no mention of cultural and political groups which might be considered an omission.⁶¹ A group is a stable construction with an almost permanent membership. The four categories of groups are, however, not defined in the Convention and are slightly overlapping which makes their application cumbersome. Confronted with this indeterminacy of the Convention the ICTR, in the Akayesu case, opted for an approach distinguishing each and every of the Convention's groups on objective criteria. Accordingly, a national group is a "collection of people who are perceived to share a legal bond based on common citizenship, couples with reciprocity of rights and duties"⁶², a racial group "is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors"⁶³, an ethnic group is "a group whose members share a common language or culture"⁶⁴ and a religious group "includes denomination or mode of worship or a group sharing common beliefs."⁶⁵ The ICTY in *Krstić* opted for a different approach defending the view that the four groups were not given a distinct meaning in the Convention:

The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly

⁵⁷ SC Res. 1674 (2006) of 28.4.2006.

⁵⁸ GA Res. 63/308 of 7.10.2009.

⁵⁹ Implementing the responsibility to protect, UN Doc A/63/677 (12.1.2009).

⁶⁰ Art. 4 Protocol relating to the Establishment of the Peace and Security Council of the African Union.

⁶¹ CASSESE, *op. cit.*, p. 130.

⁶² ICTR, *Akayesu*, T. Ch. I (2.9.1998), para. 512.

⁶³ *Ibid.*, para. 514.

⁶⁴ *Ibid.*, para. 513. See also ICTR, *Kayishema*, T. Ch. II (21.5.1999), para. 98.

⁶⁵ ICTR, *Akayesu*, T. Ch. I (2.9.1998), para. 515.

corresponding to what was recognized, before the second world war, as 'national minorities', rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.⁶⁶

A third and easier approach is taking into account as criterion for the identification of members of the group whether the perpetrators consider the victims as members of the targeted group. This view has also been defended by the *ad hoc* Tribunals. The group belonging is then made subject to self-identification by the victim or identification as a member of a group by the perpetrator.⁶⁷

For the mental element of genocide one has to distinguish the requisite intent to commit one of the prohibited acts and the special intent 'to destroy in whole or in part [one of the protected groups] as such'. This means that genocide can only be attributed to a person if he was "seeking the physical or biological destruction"⁶⁸ of "at least a substantial part of the particular group."⁶⁹ Such special intent is, however, difficult to prove.⁷⁰ It is indeed rather exceptional that documents or statements are available proving the genocidal intent. Therefore the case law of the *ad hoc* Tribunals have accepted that one deduces the special intent from factual circumstances such as the consistent and methodological way of attacking one group, directing killings to only one particular group or even all military aged men, systematic acts of rape and sexual violence committed against the same group.⁷¹

With all due caution, the mapping report suggests that the attacks directed against the camps inhabited by Hutu refugees by AFDL/APR at the beginning of the war might point to genocide, if the facts are proven in a court of law. The scale of the crimes, the large number of victims (several tens of thousands), the systematic nature of the massacres, all indicate that one might situate the killings in a context of an intention to destroy in whole or in part the Hutu population of the camps. Of course, and that is for a court of law to establish, it must be proven that the intention of the alleged perpetrators was to destroy a part of the Hutu ethnic group 'as such' and that in the absence of

⁶⁶ ICTY, *Krstić*, T. Ch. I (2.8.2001), para. 556.

⁶⁷ See ICTR, *Bagilishema*, T. Ch. I (17.6.2001), para. 65; ICTR, *Rutanganda*, T. Ch. I (6.12.1999), para. 55; ICTY, *Jelistic*, T. Ch. I (14.12.1999), paras 70-71 and ICTY, *Krstić*, T. Ch. I (2.8.2001), paras 556-557 and 559-560.

⁶⁸ ICTY, *Krstić*, T. Ch. I (2.8.2001), para. 580 and *Krstić*, A. Ch. (19.4.2004), para. 25.

⁶⁹ ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, para. 198.

⁷⁰ See ICTR, *Akayesu*, T. Ch. I (2.9.1998), para 523.

⁷¹ See ICTY, *Krstić*, T. Ch. I (2.8.2001), paras 595-597; ICTY, *Krstić*, A. Ch. (19.4.2004), paras 24-38; ICTR, *Akayesu*, T. Ch. I (2.9.1998), paras. 729-733; ICTR, *Kayishema and Ruzindana*, T. Ch. I (21.5.1999), paras 531-543; ICTR, *Musema*, T. Ch. I (27.1.2000), paras 928-931.

direct evidence of the intention to destroy the group, circumstantial facts and evidence support the allegation.

Compared to previously published official UN reports which stated that the investigating teams were not in a position to judge whether genocide had been committed and that additional investigation was needed⁷², this statement of the UN mapping report constitute a strong conclusion.

3.3. Ways to address the violations referred to in the mapping report

Responding to crimes is a right but also an obligation first and foremost addressed to the state on whose territory the crimes are committed. This is one of the manifestations of state sovereignty. It is only when the state is unable or unwilling to exercise its right/obligation to prosecute and punish that alternative mechanisms can be sought.

Today, one is confronted with almost total impunity in Congo when it comes to the most serious crimes under international law. There is however a legal framework in place that should be used to provide a legal response to the atrocities committed. Congo has indeed ratified the most relevant international treaties and conventions in the area of human rights and humanitarian law. According to its 2006 Constitution these international law instruments are directly applicable in the domestic legal order and enjoy a hierarchically higher position than statutes adopted by Parliament.⁷³ Moreover, the Constitution proclaims a broad list of rights and duties of individuals and entrusts state authorities to enforce them. In 2002 a new *Code Pénal Militaire* entered into force explicitly prohibiting genocide, war crimes and crimes against humanity and giving military courts exclusive jurisdiction (to the detriment of civilian courts) to handle these crimes.⁷⁴ For these crimes there is no statute of limitations recognized under international law.⁷⁵ Even though limiting the competence to prosecute the most serious crimes to the sole military courts seems questionable,⁷⁶ there is nevertheless a legal framework capable to respond to the crimes analyzed in this contribution. And yet practice shows that so far less than twenty cases have been handled by the competent courts, only a few of them relating to the period under review.⁷⁷ The mapping report rightly concludes that “[t]he problem in the DRC is less one of inadequate provisions

⁷² See the *Report from the joint mission tasked with investigating allegations of massacre and other violations of human rights in eastern Zaire (currently the DRC) from September 1996*, UN Doc. A/51/942, para. 80, and the *Report of the Investigative Team of the Secretary General on serious violations of human rights and international humanitarian law in the DRC*, UN Doc. S/1998/581, para. 4.

⁷³ Constitution, Art. 215.

⁷⁴ Code Pénal Militaire, Art. 161.

⁷⁵ Art. 4 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

⁷⁶ See OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA, “The Democratic Republic of Congo Military justice and human rights – An urgent need to complete reforms”, 2009.

⁷⁷ The Ankoro and the MilObs cases. See UN Mapping report paras. 856-859.

in the criminal law than a failure to apply them.”⁷⁸ Many reasons contribute to this situation. One could refer to the fact that investigations are not always taken seriously or are made extremely difficult when foreign nationals are involved. What is more, there is a lack of witnesses willing to testify, victims are not well prepared to intervene in the legal proceedings, the rights of fair trial are not respected, insufficient means are allocated to the judicial system and it has a limited expertise in the area of prosecution of international crimes. Moreover, there is a problem of guaranteeing the physical protection of judges and their independence in a military hierarchical system.⁷⁹ To these findings one has to add the constant threat of instability or even a return to war if the will to prosecute is pushed too far. Various incidents prove that the spectre of war is still haunting the region.⁸⁰

The dire situation of the Congolese judicial system, the scale of the crimes committed and the participation of not only Congolese actors but also numerous foreign nationals lead to the conclusion that its formal judicial system will be unable to address the crimes committed during the last decade and therefore suggestions are made to explore alternative options in the area of transitional justice. The mapping report focuses on three suggestions: the creation of a hybrid court system, the establishment of a truth and reconciliation commission and the use of the International Criminal Court. The report, however, emphasizes that it is the exclusive responsibility of the Congolese government to choose which judicial mechanism is most appropriate.

For long the Congolese civil society has favoured the creation of a special international criminal tribunal in the image of the ICTY or ICTR to judge the crimes committed on the territory of the DRC.⁸¹ The practice of both *ad hoc* tribunals has however shown that their capacity to address large scale violations of international law is limited and that they tend to be very expensive. Various demands for setting up similar tribunals have therefore been rejected. As an alternative, one has seen the establishment or the adaptation of national

⁷⁸ UN Mapping report, para. 894.

⁷⁹ See, e.g., DAVIS, L., “Justice-Sensitive Security System Reform in the Democratic Republic of Congo”, International Center for Transitional Justice, Initiative for Peace building, International Alert, February 2009. The Mapping report confirms this when it refers to (i) the limited engagement of the Congolese authorities in strengthening the justice sector, (ii) the very limited resources allocated to the judicial system for tackling impunity, (iii) the acceptance and tolerance of multiple incidents of interference by the political and military authorities in court cases that confirm the system’s lack of independence, (iv) the inadequacy of the military justice system, which has sole jurisdiction for dealing with the numerous crimes under international law often committed by the security forces, (v) inadequate judicial practice and jurisprudence in this area, (vi) and non-compliance with international principles in relation to minors and the inadequacy of the judicial system for cases of rape.

⁸⁰ See, e.g., the tensions which broke out in March 2011 subsequent to the condemnations by the military court sitting in Baraka of Lt. Col. Kibibi Mutware and five others for crimes against humanity and mass rape.

⁸¹ See, e.g. interview with Jonas Tshiombela Kabiena in *Le Potentiel*, 13 July 2010. In 2003 President Joseph Kabila also invoked the option when addressing the UN General Assembly.

criminal courts to combine national and international elements. Examples are the mixed courts for Sierra Leone, Kosovo, East Timor, Cambodia, Bosnia and Herzegovina, and Lebanon. Each of them has its own particularities responding to the specific context of its establishment. The mapping report considers the creation of a hybrid Congolese court system the most appropriate way to provide justice for the victims provided that a number of requirements are taken into account.⁸² The Congolese government has responded positively to this suggestion and has proposed a bill (*Avant-projet de loi relatif aux Chambres spécialisées pour la répression des violations graves du droit international humanitaire*) which is currently being debated in Parliament. The system, modelled on the Bosnian war crimes chamber established as a national institution but with international elements,⁸³ proposes to create four specialized first instance chambers and three appeal chambers at the level of the provincial appeal courts. The specialised chambers will be fully integrated in the Congolese justice system but to reinforce the independence, the integrity and the competence of local judges, an opening is made to have the bench supplemented by foreign judges through a system of judges *ad litem*. These foreign judges will have the same powers as the national judges except that they will not be able to exercise the function of president of the chamber. Civil society organizations met in Goma on 6-8 April 2011 to discuss this bill and gave their input as to how it could be improved. They mainly plead for a more robust international presence at all levels (chambers, registry, office of the prosecutor, and investigative units), to lift the temporal jurisdiction limited to the period 1990-2003, to take the interest of victims and witnesses more into account, to strengthen the rights of the accused and not to give exclusive (to the

⁸² The UN Mapping report recommends (1) significant financial involvement and clear commitment from the Government of DRC; (2) guarantees of independence and impartiality by entrusting international stakeholders (judges, magistrates, prosecutors and those in charge of the investigation) with key roles in the various components of the mechanism; and (3) paying special attention, particularly in terms of procedure, to specific types of violence, notably sexual violence against women and children.

Such a mechanism should also: apply principles of international criminal law, including the responsibility of superiors for acts committed by their subordinates; not recognize any amnesty granted for crimes under international law does not apply in the context of this mechanism; ensure that military courts do not have jurisdiction over such crimes; have jurisdiction over all persons accused of these crimes, whether nationals or foreigners, civilians or military personnel, and who at the time the crimes were committed were aged 18 years or above; ensure that all legal guarantees for a fair trial are respected, particularly the fundamental rights of the accused; plan to provide legal assistance to the accused and to victims; plan for protection measures for witnesses and, if required, legal personnel who risk being threatened or intimidated; not include the death penalty among its sentences, in compliance with international principles; and secure the cooperation of third-party States, the United Nations and NGOs that would be capable of supporting the court's activities, particularly with the provision of defence.

⁸³ See IVANIŠEVIĆ, B., "The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court", available at <http://www.icj.org/images/content/1/10/1088.pdf>.

detriment of ordinary courts) jurisdiction to these chambers when it comes to the prosecution of international crimes.⁸⁴

The scale of the crimes, the generalized and systematic manner in which they were committed explains why the formal judicial system alone is inadequate to respond duly to a context where vast numbers of peoples are victims or offenders. The population as a whole wants to understand what has happened and what needs to be done to overcome the collective trauma. The mapping report considers this something that a truth and reconciliation commission can best address. It is however not the first time that the virtues of a truth and reconciliation commission have been praised in Congo but that the implementation has failed to attain the expected outcome. The errors made in the past must serve as lessons so that the full potential of the instrument can be exploited.⁸⁵ The bill that is currently discussed in Parliament should adequately respond to these lessons learned.⁸⁶

A third option that is available is the ICC, the statute of which was ratified by the DRC in July 2002. However, (and that shows that other paths need to be made available), for crimes committed before that date (most cases reviewed in the mapping report) the ICC does not provide an adequate answer as the jurisdiction of the ICC does not extend to crimes committed before Congo became party to its statute. Various cases have nevertheless been brought to the attention of the ICC⁸⁷ but faced with the length and complexity of the procedure the disappointment within the Congolese larger public is growing.

When developing ways to address the violent crimes, the UN mapping report emphasizes the need to think about forms of reparations, to remain receptive to reform and to adopt a policy of vetting by which government workers who are personally responsible for flagrant human rights violations, must be prevented from working in government institutions.

4. CONCLUSIONS

The UN mapping report can be commended for its contribution to documenting and revealing to the larger public that indeed grave crimes were committed on a large scale. The report is a comprehensive, well documented and balanced instrument. All parties who had their forces involved bear

⁸⁴ HUMAN RIGHTS WATCH, "DR Congo: Establishment of a Specialized Mixed Court for the Prosecution of Serious International Crimes. Common Position Resulting from the Workshop Held in Goma on April 6-8, 2011", April 2011; AFRICA FAITH AND JUSTICE NETWORK, "UN Mapping Report: 34 Congolese Organizations call for an independent and credible Special Court", April 2011.

⁸⁵ The aspects that need to be taken into account according to the UN Mapping report are developed in para.1070 of the report.

⁸⁶ UN Mapping report, para. 1071.

⁸⁷ Case *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06); Case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07); Case *The Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06).

responsibility and should be made accountable for the crimes committed. The report, however, limited itself to the regional actors and failed to point to the responsibility of those who beyond the region had significant grip on the events to change the course of action.

Facts are known and suggestions are made to address the question of impunity. It is now for the Congolese authorities, supported by willing partners, to show how serious they are when they state that justice needs to be done.

Brussels, 31 May 2011