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International adjudication and resolution of armed conflicts in the Africa's great lakes: A focus on the DRC conflict

Andrew Mollel

Faculty of Law, Economics and Business Administration, University of Joensuu, Finland. E-mail: andemollel@yahoo.com. Tel.: +358 13 251 111. Fax: +358 13 251 4112.

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The duty of states to settle their disputes peacefully and in accordance with international law is emphasized in a number of important provisions enshrined in the Charter of the United Nations and state practices. Adjudication is one among a range of existing means of pacific settlement of disputes. This article analyses the role of international adjudication in conflict resolution. With the focus on the DRC conflict, the article critically examines the role of such international judicial bodies as the ICJ, the ad hoc International Criminal Tribunals-the ICTFY and ICTR, the International Criminal Court (ICC), and other judicial bodies involved in resolving armed conflicts. The ICJ decision in the Case Concerning Armed Activities in the Territory of the Congo, the ongoing case of Thomas Lubanga before the ICC, and cases from other international judicial tribunals were taken as case studies, to argue that much as the adjudicatory role of international judicial bodies is a crucial method in pacific settlement of international disputes, it is unlikely to suit armed conflicts situations. The article points to the preclusion of the ICJ from adjudicating the other cases brought by the DRC against Rwanda and Burundi as an illustration of jurisdictional limitations of judicial bodies in adjudication of armed conflicts situations. It however, stresses that the very outcome of the 2005 ICJ decision in the *Democratic Republic of Congo vs. Uganda* case is another clear limb of such shortcomings. Without getting into detailed discussions of theories of compliance with international law, the article further discusses the question of compliance with decisions of international judicial bodies, in the light of previous state practices. Since there are no established enforcement mechanisms in the international system akin to those in national legal systems, the question whether such decisions are complied with, remains at the mercy of condemned states. In the final analyses, the author points to the current weaknesses and limitations of the international legal system as a whole, in the administration of justice generally, and in the adjudication of armed conflicts in particular.

Key words: International adjudication, great lakes, democratic republic of Congo, armed conflict.

INTRODUCTION

Adjudication or judicial settlement of disputes is one among a range of existing UN-Charter based mechanisms to resolve conflicts [See Article 33 of the Charter of the United Nations, 1945 (hereafter referred to as the "UN Charter"). The provisions of Article 33 (1) are hereunder reproduced: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice"], recognized and practiced by states

in international law from classical times [The other is arbitration in which states themselves set up a tribunal to decide their dispute (s)]. It is a general term referring to settlement of disputes by all sorts of international judicial bodies variously known as Courts, tribunals, commissions or committees, and in particular permanent global and regional courts of general or specialized jurisdictions established pursuant to a treaty in which independent judges render legally binding decisions on the basis of International law (See this definition in Boczek, B. (2005). *International Law: A Dictionary*, the Scarecrow Press Inc., Oxford, p. 365).

Adjudication generally refers to processes of decision making that involve a neutral third party with the authority to determine a binding resolution through some form of judgment or award [Douglas (1999), *The Dictionary of Conflict Resolution*, Jossey-Bass Publishers, San Francisco, p. 5]. Adjudication is carried out in various forms, but most commonly occurs in the court system. It can also take place outside the court system in the form of alternative dispute resolution processes such as arbitration, private judging, and mini-trials. However, court-based adjudication is usually significantly more formal than arbitration and other ADR processes. The development of the field of alternative dispute resolution has led many people to use the term adjudication to refer specifically to litigation or conflicts addressed in court (Heidi and Burgess, 1997). *Encyclopedia of Conflict Resolution*, Denver: ABC-CLIO, p. 2. This excerpt of the Burgess' book includes a helpful discussion of the key differences between court-based adjudication and alternative dispute resolution processes). Therefore, court-based adjudication will be the main focus of this paper.

Various approaches have been used to resolve the DRC conflicts, including adjudication. This paper is a critical examination of the role of adjudication in the resolution of armed conflicts. It therefore addresses all judicial means of dispute settlements that have relevance in the conflict resolution processes in the DRC. So, attention will be centered on the role of such international judicial bodies as the International Court of Justice (ICJ) [Established as one of the Six Principal Organs of the United Nations. See Article 7 (1) of the UN Charter], the ad hoc International Criminal Tribunals [the International Criminal Tribunal for the Former Yugoslavia (ICTFY) [The United Nations Security Council (hereinafter referred to as "the UNSC"), acting under Chapter VII of the UN Charter, and by Security Council resolution No. 827 and 808 (1993) established the International Criminal Tribunal for the Former Yugoslavia for the sole purpose of prosecution of persons responsible for serious violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. See preamble to the Statute for the International Criminal Tribunal for the Former Yugoslavia, 1993] or the International Criminal Tribunal for Rwanda (ICTR) (Having been established by the UNSC acting under Chapter VII of the UN Charter, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. See UNSC resolution 955 (1994) of 8 November 1994 as amended by Security Council resolutions 1165 (1998) of 30 April 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002), the International Criminal Court (ICC) (The International Criminal

Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. See Article 1 of the Rome Statute of the International Criminal Court, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter "the Rome Statute"], and mention will be made of the Nuremberg Tribunal (Was an International Military Tribunal established for the trial and punishment of major war criminals of the European Axis. The trials were held in the city in the city of Nuremberg In Germany, from 1945 to 1949. See Article 1 of the Charter of the International Military Tribunal, August 1945) and other judicial bodies involved in settling disputes on the international level [This may also include such other judicial bodies as the International Center for Settlement of Investment Disputes (ICSID), International Tribunal for the Law of the Sea (ITLOS), etc.]. In relation to the ICJ, the paper makes a critical examination of the role of the Court in the light of the 2005 ICJ judgment on the Case Concerning Armed Activities on the Territory of the Congo [Application instituting proceedings filed in the registry of the Court on 23 June 1999, General list No. 116. See also order on request for indication of provisional measures: I.C.J Press Communiqué 2000/24 (1 July, 2000). On this, see also Kristiotis, D Case Note (2001) 50 ICLQ, pp.662-9; for further discussion on this case, see Alexander, O. (2006) 'Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda) in *International and Comparative Law Quarterly*. Vol. 55, No. 3, pp. 753-763(11)]. The discussion in the article will therefore mainly focus on the decision of the ICJ in that case, as a lesson to be learned in future on the role of the ICJ in settling armed conflicts in international law. The main argument is that much as the adjudicatory role of the ICJ as the principal judicial organ of the UN is a crucial method in pacific settlement of international disputes, it is unlikely to suit armed conflicts situations. Jurisdictional limitations of the ICJ in adjudication of armed conflicts situations are pointed out. The paper points to the preclusion of the Court from adjudicating the other cases brought by the DRC against Rwanda and Burundi as an illustration of one limb of such limitations. It however, stresses that the very outcome of the 2005 ICJ decision in the Democratic Republic of Congo v Uganda case is another clear limb of such shortcomings.

Without getting into detailed discussions of theories of compliance with international law, the article further discusses the question of compliance with the current ICJ decision in the light of previous state practices. Since there are no established enforcement mechanisms in the international system akin to those in national legal systems, the question whether decisions of international judicial bodies (the ICJ in this case) are complied with, remains at the mercy of condemned states. In the final analysis, the author points to the current weaknesses and

limitations of the international legal system as a whole, in the administration of justice.

More importantly, even if the Ugandan government, in this case, is to comply with the current ICJ's decision, one may still pose a question: is that all? Couldn't we think of more justice for remedies to the DRC and its people through further responsibility in international law? Does the 2005 ICJ's judgment provide an effective remedy for the human rights atrocities, war crimes, war of aggression and crimes against humanity committed by the military and paramilitary forces organised by Uganda and its allies in the territory of the DRC from 1997 to early 2002? These questions and many others, bring us to the discussion on the desperate jurisdictional limitation faced in judicial settlement of armed conflicts by the ICJ under its Statute, particularly in dealing with states responsibility for crimes and wars crimes generally under international law.

To achieve the above goal, the present paper will be divided into six (6) parts. Part 1 will be an introductory part, introducing the subject under discussion and pointing out the aim and structure of the paper. Part 2 will dwell on the historical development of the concept of adjudication in international law, tracing this development from the time of the PICJ to the current ICJ, looking at the mandate of the Court, the nature and legal effects of its decisions generally, as well as the enforcement mechanisms for such decisions under its Statute and general international law. Part 3 will be devoted to the background to the Armed Activities on the Territory of the Congo by Uganda and its allies with the resultant serious negative effects on the population and property of the DRC. Part 4 will be an assessment of the history of the proceedings leading to the 2005 ICJ decision, jurisdictional limitations of the Court and compliance with its decisions by the condemned states, in the light of past experience of states practices. Part 5 is concerned with international criminal adjudication where we examine the concept "State's criminality" and individual criminal liability. While we use the Bosnia-Herzegovina case to elaborate on the role of the ICJ in former, we take reference of the Lubanga case to examine the role of ICC in the latter. The last part, part 6 will bring forth some conclusions, pointing out the main argument of this chapter, namely the inefficacy of international adjudication in dealing with armed conflict situations in international law. This part will also provide for some recommendations on the way forward.

Development of adjudication in international law

Before the twentieth century, international disputes were usually resolved by diplomatic negotiation, occasionally by arbitration, and often by war. Negotiations did not always subdue the use of force, which unfortunately remained the ultimate instrument of diplomacy [Slomanson, W (2004), 'Historical Development of Arbitration and

Adjudication,' *Miskolc Journal of International Law*, Vol.1 (2004) No.2, pp. 238-241]. While this trend continued until recent days, with the concept "humanitarian intervention" gaining momentum as a sort of legitimizer, the basic presumption of international law according to Articles 2 (4) and 2 (7) of the UN Charter, is that the use of force is illegal, except for self-defence and/or collective security. Thus, diplomatic means of settling conflicts, including adjudication, remain central to the maintenance of global security.

Historically, judicial settlement of disputes developed from arbitration, the latter being the oldest of all known legal methods of disputes settlement in international law (The origin of arbitration can be traced back to the 1794 Jay Treaty between Great Britain and the United States. See also Boczek, *supra* note 3). With time though, many pacifists perceived the limitations and weaknesses of arbitration and sought to fill in other ways the gap through which nations could still plunge to war. They emerged with another plan-conciliation. Those issues, which governments would not submit to arbitration, should be referred to another kind of third party whose recommendations would not be binding. This principle, however, like arbitration, had its limitations and thus it also failed to avert the First World War.

Because both arbitration and conciliation possessed some limitations (Due to the consensual and non-binding nature of these methods, states could still engage in war as no formal adjudicator supervised the outcome of the settlement processes), it became necessary to devise other ideas to resolve disputes peacefully or to stop wars after they began. These involved mediation, good offices (The provision of good offices has often been referred to as "quiet diplomacy" since the process often involves entrusting the dispute to personalities with special qualification on whom both parties agree. This might involve, for example, heads of states or the Secretary-General of the United Nations, or their designees) and inquiry, but one of the proposals, which seemed most attractive was that associated with the creation of an International Court of Justice. A permanent legal tribunal, which would operate under commonly accepted practices and perhaps even statutes, and it would thus be distinctive in its procedures and authority. The main idea was that if nations could agree to establish rules of behaviour and a genuine judicial court, they would then willingly bring their disputes to the bar of justice [Mangone (1954) *A Short History of International Organizations*, McGraw-Hill Book Company, New York, p.12].

Unlike arbitration and other previous methods, judicial settlement of disputes involves the reference of disputes to the permanent tribunals for a legally binding decision.

However, it was not until the nineteenth century that legal scholars did progress in this work, culminating in the establishment of the Permanent Court of International Justice (the PCIJ) (The first standing International Judicial body established in 1922 to decide disputes between

between states) under the Covenant of the League of Nations in 1921. This tribunal, authorized under Article 14 of the Covenant of the League of Nations, functioned until April 1946.

The history of the PCIJ during the inter-war period was generally a satisfactory one (Merrills, J. (2003) 'The Means of Dispute Settlement' in Evans, M. (ed.), *International Law*, Oxford University Press, Oxford. New York, p. 561). In twenty-five years heard sixty-five cases and rendered thirty-two decisions and twenty-seven advisory opinions (Riggs, R and Plano, J. (1998) *The United Nations: International Organisation and World Politics*, Brooks/Cole Publishing Co. California, p.194). Nonetheless, while the court contributed immensely to the principle of international law by its existence, operation, and decisions, it faced problems similar to those experienced by arbitral bodies. It never developed a code to be used in the judging of cases, and nations did not entrust major problems to it for settlement. These weaknesses were compounded by its lack of authority to uphold decisions and by those attitudes of sovereignty, which kept issues involving vital interests, national honour, and independence outside of the realm of justice (In the 1960s and 1970s, less and less states seemed inclined to bring their disputes before the ICJ).

The demise of the League of Nations at the aftermath of the Second World War and the subsequent establishment of the United Nations went hand in hand with the disappearance of the PCIJ and the establishment of the International Court of Justice (Established under Chapter XIV (Articles 92–96) of the UN Charter and the Statute of the Court, which although it is not incorporated into it but forms an integral part of the Charter and elaborates certain general principles laid down in Chapter XIV of the Charter on the operation of the Court), (hereinafter referred to as ICJ or the Court). The Court, which is composed of fifteen judges who are elected for nine years, terms [See Article 3 of the Statute of International Court of Justice, 1945 (hereafter referred to the ICJ Statute). See also Hugh, T. (2003) 'The International Court of Justice' in Evans, *supra* note 19, p. 562] came into existence with the election of the first members in February 1946, inheriting not only the premises and archives of the pre-war Permanent Court, but also, so far as possible, its jurisdiction (See Article 59 and 60 of the ICJ Statute).

The ICJ was established, not as an independent body from the United Nations, as the case was with its predecessor with the League of Nations, but as an integral part, and principal judicial organ of the United Nations (The ICJ is one of the six principal organs of the UN listed under Article 7 of the UN Charter; others are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat. Note further that, the ICJ Statute is an extension of the UN Charter). Its seat is in the Peace Palace at the Hague in the Netherlands.

The Court presents its mandate as serving a dual role -

first to resolve legal disputes submitted to it in accordance with international law (See Article 38 of the ICJ Statute) and second to provide advisory opinions on questions of international law referred to it by other international bodies (See Article 96 of the UN Charter; See also *Ibid*, Article 36). The first function is however limited to only those disputes submitted by states, excluding non state entities such as individuals, intergovernmental organisations, multilateral organisations or non-governmental organisations (See *Ibid*, Article 38). This is one among the Court's jurisdictional limits. The sources of international law to be applied by the Court, as enumerated in Article 38 of the Statute include international treaties and conventions; international customs; general principles of law; and the subsidiary sources, that is, decisions of tribunals and opinions of jurists.

According to Article 93 of the UN Charter, all United Nations member states are automatically parties to the Court's Statute, and even non-UN members may also become parties to the Court's Statute under Article 93(2) of the Charter of the United Nations. However, being a party does not automatically give the Court jurisdiction over disputes involving those parties. The key principle is that the ICJ exercises jurisdiction only on the basis of consent. Article 36 outlines four bases on which the Court's jurisdiction may be founded (See this information available at <www.en.wikipedia.org> last visited, April 7, 2006). First, parties to a dispute may refer cases to the Court on their specific consent in that particular dispute (jurisdiction founded on "special agreement" or "compromise"). This method is based on explicit consent rather than true compulsory jurisdiction. It is, perhaps, the most effective basis for the Court's jurisdiction because the parties concerned have a desire for the dispute to be resolved by the Court and are thus more likely to comply with the Court's judgment.

Second, the Court has jurisdiction over "matters specifically provided for in the UN Charter or in treaties and conventions in force" [See Article 36 (1) of ICJ Statute]. Most modern treaties will contain a compromissory clause, providing for dispute resolution by the ICJ. Cases founded on compromissory clauses have not been as effective as cases founded on special agreement, since a state may have no interest in having the matter examined by the Court and may refuse to comply with a judgment. For example, during the Iran hostage crisis, Iran refused to participate in a case brought by the USA based on a compromissory clause contained in the Vienna Convention on Diplomatic Relations (Done at Vienna on April 18, 1961. Entered into force on April 24, 1964. See United Nations, Treaty Series, vol. 500, p. 95, nor did it comply with the judgment. Since the 1970s, the use of such clauses has declined substantially. Many modern treaties set out their own dispute resolution regime, often based on forms for arbitration.

Thirdly, Article 36 (2) allows states to make optional clause declarations accepting the Court's jurisdiction. The

tag of "compulsory" which is sometimes placed on Article 36 (2) jurisdiction is misleading since declarations by states are voluntary. Therefore, the provision applies only between states that have made the optional declaration, but for them it extends the Court's jurisdiction to all legal disputes concerning:

- (1) The interpretation of a treaty.
- (2) Any question of international law.
- (3) The existence of any fact, which, if established, would constitute a breach of an international obligation.
- (4) The nature or extent of the reparation to be made for the breach of an international obligation [See Article 36 (2) of the ICJ Statute and also Riggs and Plano, *supra* note 20, p.196].

Furthermore, many declarations contain reservations, such as excluding from jurisdiction certain types of dispute ("ratione materiae").

The principle of reciprocity may further limit jurisdiction. As of December 2005, sixty-five states had declarations in force. Out of the five permanent members of Security Council, only the United Kingdom has made such a declaration [Alexandrov, S. (2006) 'The Compulsory Jurisdiction of the International Court of Justice: How Compulsory', 5:1 Chinese Journal of International Law, 2006, pp. 29 – 38].

In the Court's early years, most declarations were made by developed countries. However, since the Nicaragua case, declarations made by developing countries have increased, reflecting a growing confidence in the Court since the 1980s. Developed countries however have sometimes increased exclusions or removed their declarations in recent years. Examples include the USA, as will be explained more lately and Australia which modified its declaration in 2002 to exclude disputes on maritime boundaries, most likely to prevent an impending challenge from East Timor which gained its independence two months later.

Finally, Article 36(5) provides for jurisdiction on the basis of declarations made under the Statute of the Permanent Court of International Justice. Article 37 of the ICJ Statute similarly transfers jurisdiction under any compromissory clause in a treaty that gave jurisdiction to the PCIJ. In addition, the Court may have jurisdiction on the basis of tacit consent (*forum prorogatum*). In the absence of clear jurisdiction under Article 36, jurisdiction will be established if the respondent accepts its jurisdiction explicitly or simply pleads to the merits. The notion arose in the Corfu Channel Case (*Corfu Channel Case*, (United Kingdom v Albania), I.C.J Reports, 1949, p. 459 - 60) in which it was held that the letter from Albania stating that it submitted to the jurisdiction of the ICJ was sufficient to found jurisdiction.

As it can clearly be seen from the foregoing, the Court's jurisdiction is more of a compromissory, consensual and in most cases, optional. This consensual nature of the

Court's jurisdiction led, at times to a total failure of justice in the whole idea of judicial settlement of international disputes. This issue will be revisited later with more details in this paper. Suffice it to say here, that the creation of the Court represented the culmination of a long development of methods for the pacific settlement of international disputes, the origins of which can be said to go back to classical times.

The role of the Court in the peaceful settlement of international disputes generally, has been greatly significant over the period of its operation. From 1946 to 2004, the Court dealt with about 80 contentious cases between States and delivered about 68 judgments (Hugh, *supra* note 19, p. 561). It also gave about 25 advisory opinions (Hugh, *supra* note 19, p. 561). After an initial period of uncertainty that led to a resolution by the General Assembly in 1947 concerning the need to make greater use of the Court, the Court's work at first assumed a tempo comparable to that of the PCIJ. Then, starting in 1962, all the signs were that the States which had created the ICJ were now reluctant to submit their disputes to it. The number of cases submitted each year, which had averaged two or three during the fifties, fell to none or one in the sixties (From July 1962 to January 1967 no new case was brought, and the situation was the same from February 1967 until August 1971).

In the 1970s, at a time when the level of the Court's activity was in a marked decline, the United Nations Secretary-General, in the introduction to his annual report, felt obliged to recall the importance of judicial settlement and 12 States suggested that a study should be undertaken of the obstacles to the satisfactory functioning of the International Court of Justice, and ways and means of removing them including additional possibilities for use of the Court that have not yet been adequately explored. The General Assembly placed on its agenda an examination of the Court's role and, after several rounds of discussion and written observations; on 12 November 1974 it adopted a fresh resolution concerning the ICJ (Positive changes were then witnessed soon as from 1972 the number of new cases brought to the Court increased, and between 1972 and 1985 cases averaged from one to three each year).

Since 1986, the Court has experienced a significant increase in the number of cases referred to it. Over a period of some ten years, it has been asked to deal with 19 contentious cases and four requests for advisory opinions. At the end of July 1996, nine contentious cases were pending before the Court. In its resolution, the General Assembly declared the period 1990–1999 as the United Nations Decade of International Law, and considered that one of the main purposes of the Decade should be "to promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice (General Assembly resolution No.44/23 of November 17, 1989)."

Legally speaking, once a state has consented to the jurisdiction of the Court, it must accept and comply with its judgment, which is also final and without appeal (See Article 59 and 60 of the ICJ Statute). As it is provided, each member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party [Article 94 (1) of the UN Charter].

The very essence of adjudication in any legal system, international legal system inclusive, is the capacity of the system to ensure compliance with the final decision of the judicial organ in question: hence, enforcement mechanisms. Under normal circumstances, drawing from national legal systems, there is a complete system of judicial settlement of disputes, including compliance and enforcement systems. In criminal cases for example, the executive branch has the inherent and exclusive power to enforce Court judgments in national legal systems. Similarly in civil litigation, unless compliance is voluntary by the losing party, the domestic court has power to issue an execution order which can be enforced by the court's approved agents with the assistance of the executive in some instances (Warioba, J (2001) 'Monitoring Compliance with and Enforcement of Binding Decisions of International Courts', 5 Max Planck Yearbook of United Nations Law, pp. 41 - 52). Judicial settlement of disputes in this instance therefore, creates some degree of certainty so far as the outcome of the court's decision is concerned.

At the international system of adjudication however, there is no clearly established enforcement system analogous to that of domestic judicial systems. This lead some international legal scholars to go as far as arguing that as there is no clearly established enforcement mechanisms for binding decisions in international adjudication, international law is not law at all (O'Connell, M. (1995) 'Enforcement and the Success of International Environmental Law', 5 Indian Journal of Global Legal Studies, 1995, p. 47 - 69). It is however argued that non compliance of decisions of judicial bodies alone, does not make a particular legal system non existent.

The legal effects of the ICJ's decisions therefore, though clearly binding, are daunting as there are no clearly established enforcement mechanisms. In the same way as the question of jurisdiction is consensual and compromisory, so is compliance of its decisions often with convincing approaches than direct enforcement.

Where a condemned state fails, or deliberately default in complying with the Court's decision, the other party may have recourse to the United Nations Security Council, which may, if it deems necessary, make recommendations or decide on measures to be taken to give effects to the judgment [See Article 94(2) of the UN Charter). This provision does not confer any additional power to the Security Council, and as such, the judgments of the Court have mostly been considered as principally declaratory of rights and duties of the parties and no more (O'Connell, *supra* note 43).

That is why, the fact that the judgment is binding on the parties does not mean that they may not, by agreement between themselves depart from it, unless the decision is founded on one of the rules of jus cogens (Hugh, *supra* note 19, p. 580). These are some of the challenges that one must be aware of when examining the outcome of the 2005 ICJ decision against Uganda.

Background to the armed activities on the territory of the DRC

The DRC conflict, which has invariably been described by others as the Africa's World War [Hawkins, (2006) 'Stealth Conflicts: Africa's World War in the DRC and International Consciousness'. <www.jha.ac/articles/a126.htm>, last visited: April 9, 2006] and which led to the armed activities undertaken by Uganda and its allies in the territory of the DRC is an extremely complex one. It is in fact an intertwined convergence of several conflicts on local, national and regional levels which are focused primarily on the eastern half of the country, and it is the first situation in which the international community has witnessed the internationalisation of an internal warfare.

The complexity of this conflict is highly illustrative of justice issues faced today by the international community in the aftermath of human rights atrocities. Domestic and state actors are entangled in a web of interests, which must be addressed fully to lay the foundations of sustainable peace. Interestingly, the present discussion about justice for the DRC revolves around the usual combination of trials and truth commissions [Huls, (2006) 'State Responsibility for Crimes under International law: Filling the Justice Gap in the Congo', available at <www.lawanddevelopment.org>, last visited April 9, 2006]. Although the Congolese government has taken steps to hold its neighbouring states responsible before the International Court of Justice, much is yet needed if justice is to be seen to be done.

This paper argues that, the attribution of crimes to state actors is vital for reconciliation on a regional level and for long-term stability in the Africa's Great Lakes Region. Although it is evident that the mechanisms for holding states responsible for crimes under international law are still evolving and that they do not at present provide very effective tools [Huls, (2006) 'State Responsibility for Crimes under International law: Filling the Justice Gap in the Congo', available at <www.lawanddevelopment.org>, last visited April 9, 2006], something beyond the 2005 ICJ's decision has to be done, that helps to fill the gaps in the international justice system.

In reality, the DRC conflict was a humanitarian catastrophe of virtually unfathomable proportions, which has raged across more than half of a country almost the size of the whole Western Europe, and has seen eight African countries (Notably the DRC itself, Uganda, Rwanda, Burundi, Zimbabwe, Namibia, Angola and Chad) being directly involved in military activities in the DRC. Not only

is it the deadliest war in the world today, it is the deadliest since World War II, having resulted in an estimated 3.3 million conflict-related deaths since fighting broke out in August 1998 (Hawkins, *supra* note 47).

It all started as the direct effect of the 1994 Rwandan Genocide [Mpangala, (2000) *Ethnic conflicts in the Region of the Great Lakes: Origins and Prospects*, Dar Es Salaam University Press, Dar Es Salaam, p. 90], to which it is closely connected. It also has its origins in the colonial and post colonial legacy (in terms of citizenship rights and land ownership) of forced migrations of Rwandan-speaking people under Belgian colonialism [Hochschild, (1998) *King Leopold's ghost. A story of Greed, Terror and Heroism in Colonial Africa*, Macmillan, London, p. 141], in internal divisions exacerbated by decades of misrule under the US-backed Mobutu [Mobutu Sese Seko Nkuku Ngbendu wa Za Banga was the president of Zaire (now the DRC) for 32 years (1965 - 1997)], in decades of ethnic conflict and refugee flows culminating in the 1994 Rwandan genocide, and in the spill over of four years civil wars deep into the DRC territory.

The relationship between the 1994 Rwandan Genocide and the DRC conflict is clearly visible. Some of the remnant forces of the ex Hutu-led government which was defeated in 1994 (The Forces Armees Rwandaise, FAR), now called ex-FAR and members of the genocidal Interahamwe militias, responsible for killing some 800,000 ethnic *Tutsis* and moderate *Hutus* during the Genocide fled across the border to the DRC and continued occasional launching of attacks on Rwanda from the DRC territory (Mpangala, *supra* note 52).

Rwanda wanted the Congolese Government, then under Mobutu Seseko, himself a notorious dictator of his time, to stop these Interahamwe militia's activities, which who later suspected of receiving full support from the Congolese Government [Kamukama, (1997) *Rwanda Conflict: Its Roots and Regional Implications*, Fountain Publishers, Kampala, p. 63]. In addition, Congolese armed forces had attacked local *Tutsis* (*Banyamulenge*) in Eastern DRC, an event which prompted Rwanda and Uganda in 1997, to give full support to the rebel groups in the DRC in their fight against former President Mobutu, as a way of neutralizing armed activities by the Interahamwe and other armed forces.

At the same time, the then rebels Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL) led by Laurent Kabila, taking advantage of the complex situation in the DRC at the time, invaded the Eastern DRC in 1996 in a bid to fulfilling his long time desire of seizing power from Mobutu. When Mobutu fled, Laurent Kabila assumed presidential power in the DRC with the support of Rwanda and Uganda, but the new government of Laurent Kabila soon fell out with Rwanda and Uganda's interests. A year later, in August 1998, they (Uganda, Rwanda and Burundi), allying with new sets of domestic groups opposed to the Kabila regime tried to

replace their former ally and new leader, Laurent Kabila, accusing him of now backing the remnants of the *Interahamwe* forces [Kamukama, (1997) *Rwanda Conflict: Its Roots and Regional Implications*, Fountain Publishers, Kampala, p. 63]. In such an attempt, Rwandese forces occupied large parts of the territory of the eastern Congo while Ugandan forces occupied the territory in the Northeast of the country.

They all had the same mission, another attempt to remove their former ally, Laurent Kabila from power. But this time, they were blocked by troops from other neighbouring African countries of Angola, Zimbabwe, Chad, Sudan and Namibia and a four-year stand-off ensued in a conflict which then developed a highly international and very complex character (Mpangala, *supra* note 52, p. 93).

The DRC was effectively split into three parts, the government with its supporters held the West, while East was divided between Rwanda, Uganda and Burundi forces. Each of the players in the conflict – the DRC government, the numerous rebel groups (and their often opposing factions), the local militias, and the foreign countries which have intervened militarily – has or has had different objectives and agenda.

The hostile operations of rebel movements from bases in the DRC provided much of the initial rationale for intervention by Rwanda, Uganda and Burundi. The DRC's relations with rebel movements from Angola and the Sudan also weighed heavily on their decision to intervene. Later on however, access to resources in the DRC became the key factor in foreign involvement on both sides, with deals between the DRC and Zimbabwe and Namibia in particular proving critical in securing their intervention.

Various Peace Agreements were signed since 1999 for the withdrawal of foreign military forces involved in the hostility and by the main Rwandan and Ugandan proxies – the Rally for Congolese Democracy (RCD) and the Movement for the Liberation of the Congo (MLC), but were never implemented (These agreements were the Lusaka, Kampala and Harare Peace Accords of 1999). The UN Security Council established an observer mission, which was later transformed into a small peace-keeping mission (known by its French acronym as MONUC) (Mission de l' Organisation des Nations Unies en République démocratique du Congo). The full deployment of the force was repeatedly delayed, and its role remains relatively negligible against the backdrop of the conflict on the ground.

In January 2001, Laurent Kabila was assassinated and succeeded by his son, Joseph Kabila [Talbot, (2001) 'Congo Peace talks Revived after Kabila's assassination' in World Socialist Website, February 23, 2001, published by the International Committee of the Fourth International (ICFI)], under whom, peace negotiations successfully enabled the withdrawal of foreign forces and signing of peace agreements with all major rebel groups (The "Sun City Agreement" signed in South Africa in December

2002 formed an "all inclusive" interim government which has so far maintained some degree of stability). This move has stabilized the present situation to some degrees.

All in all, the DRC war has intensified and worsened the Africa's Great Lakes region conflict generally, and more particularly, it had serious negative impacts on the people and property of the DRC. Competing armed groups violated international human rights law and international humanitarian law by carrying out large scale ethnic massacres of unarmed civilians, deliberate and arbitrary killings, extra judicial executions, torture including rape and other forms of sexual abuse, incommunicado detentions, the use of child soldiers and the use of death penalty, all these seem to be the norm during the war in this mineral-rich corner of Congo (UN Commission on Human Rights, 'Making Human Rights Work: Time to Strengthen the Special Procedure' See <www.hrw.org>, last visited, April 10, 2006). A local conflict between Hema and Lendu ethnic groups allied with national rebel groups and foreign backers, particularly Uganda and Rwanda, has claimed over 60,000 lives since 1999, according to the United Nations estimates [United Nation Security Council, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth in the DRC in 2002 (S/2001/357), 12 April 2001]. These losses are just one part of an estimated four million civilians dead throughout the Congo, a toll that makes this war more deadly to civilians than any other since World War II.

The DRC war in many ways is more reminiscent of organised crime and gang warfare than conventional armed conflict (Huls, *supra* note 48). Security reasons claimed by the initiators of the conflict, Uganda and Rwanda, were just but in disguise, the actual reasons being more than just security. The actual reasons for the involvement of Uganda, Rwanda and Burundi in the Congo war have been divided in three main areas of concerns. The first actual concern being the intention to overthrow Laurent Kabila and install a puppet regime that would serve their security as well as their economic interests the exploitation of mineral resources (Mpangala, *supra* note 52, p.96). The second area constitutes the concept of "Hima-Tutsi Empire" according to which Uganda and Rwanda have a long term strategic plan of conquering the whole Great Lakes Region and establishing the "Hima-Tutsi Empire" or at least installing leaders of Hima-Tutsi origin or blood in all the countries of the Africa's Great Lakes Region (Mpangala, *supra* note 52, p. 96). In addition to the two missions above, the third area of concern was the protection of economic, financial and geostrategic interests of neo-colonial powers particularly the US (Mpangala, *supra* note 52, p.96). However, with whatever actual reasons, the ultimate results were commission of war crimes, genocide, crimes against humanity and all other sorts of infliction of suffering to the Congolese population (Numerous Human Rights Watch Reports available at <www.hrw.org> last

visited, April 10, 2006), issues which, far beyond the scope of this paper, need to be investigated further for judicial purposes.

In the case of the Zimbabwe, Angola and Namibia, which joined the war in support of Kabila, their main argument was that they were acting collectively under the Article 51 of the Charter of the United Nations in self-defense against an armed attack on their neighbour and fellow member of the United Nations and SADC. It however, been argued that these countries also have had some economic interests in joining the war (See generally Huls, *supra* note 48).

The role of the ICJ in the DRC conflict

The history of the proceedings leading to the above judgment portrays a long struggle towards accessing the international justice system.

On 23 June 1999 the DRC filed in the Registry of the Court three Applications instituting proceedings against Burundi, Uganda and Rwanda, respectively, for "acts of armed aggression perpetrated in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity (OAU)." In its Applications, the DRC contends that the invasion of Congolese territory by Burundian, Ugandan and Rwandan troops on 2 August 1998 (an invasion claimed to have involved fighting in seven of the DRC provinces) constitutes a violation of its sovereignty and of its territorial integrity, as well as a threat to peace and security in central Africa in general and in the Great Lakes region in particular.

The DRC accused the three States of having attempted to capture Kinshasa through Bas-Congo, in order to overthrow the Government of National Salvation and assassinate President Laurent Desire Kabila, with the object of establishing a Tutsi regime or a regime under Tutsi control. The DRC also accuses these States of violations of international humanitarian law and massive human rights violations, and of the looting of large numbers of public and private institutions. It further claims that the assistance given to the Congolese rebellious groups and the issue of frontier security were mere pretexts designed to enable the aggressors to secure for themselves the assets of the territory invaded and to hold to ransom the civilian population.

The Democratic Republic of Congo accordingly asks the Court to declare that Burundi, Uganda and Rwanda are guilty of acts of aggression; that they have violated and continue to violate the 1949 Geneva Conventions and their 1977 Additional Protocols; that, by taking forcible possession of the *Inga* hydroelectric dam and deliberately and regularly causing massive electric power cuts, they have made themselves responsible for very heavy losses of life in the city of Kinshasa and the surrounding area; and that, in shooting down a Boeing 727 aircraft on 9 October 1998, the property of the DRC Airlines, and thus causing the death of 40 civilians, they have violated certain international treaties relating to civil

aviation.

The DRC further requests the Court to declare that the armed forces of Burundi, Uganda and Rwanda must forthwith vacate the territory of the Congo; that the said States shall secure the immediate and unconditional withdrawal from Congolese territory of their nationals, both natural and legal persons; and that the DRC is entitled to compensation in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to the States concerned. In its Application instituting proceedings against Uganda, the DRC invokes as a basis for the jurisdiction of the Court the declarations by which both States have accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation [Article 36(2) of the ICJ Statute].

For the proceedings against Burundi and Rwanda, the DRC invoked Article 36(1), of the ICJ Statute (The relevant provision states that the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force) the UN Convention against Torture (UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984) and the Civil Aviation Convention (Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of September 23, 1971), as well as the Rules of the Court [Article 38 (5) of the ICJ Rules of the Court]. It is at this juncture that the situation where a State files an application against another State, which has not accepted the jurisdiction of the Court, is contemplated (See this comment at <www.icj-cij.org>, last visited, April 10, 2006).

In the two cases: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Burundi)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, the respondent States (Burundi and Rwanda) informed the Court at the outset of their intention to raise preliminary objections to the jurisdiction of the Court and the admissibility of the Applications. Later in 2001, the DRC withdrew the cases against the two states, on jurisdictional limitations of the ICJ against them, but resubmitted a case against Uganda later in 2002.

On purely justice reasons, an assessment of the discontinuation of the cases against the two states may be worthy of looking at, before embarking on the final decision against Uganda. This is because the preliminary proceedings in this case, reveal the shortfalls the ICJ structure and mandate has when dealing with the responsibility of states for crimes under international law (Huls, *supra* note 48).

As it often happens in the ICJ cases, the grounds for the discontinuation of the cases against the two states as can be seen above were purely jurisdictional. As pointed out early in this paper, the ICJ's authority to render judgments in contentious cases depends on the consent of

the parties, and to adjudicate upon a dispute without such consent would run counter to this well-established principle of international law as embodied in the Court's Statute (See also *Monetary Gold Removal from Rome Case* in 1943, I.C.J Reports 1954, p. 32). Whereas the DRC, then Zaire, accepted the ICJ jurisdiction without condition in 1989, and Uganda did so at independence in 1962 with the condition of reciprocity (A list of the commitments by states parties to the ICJ Statutes is available at <www.212.153.43.18/icjwww/basicdocuments/basictext/basicdeclarations.htm>, last visited, April 19, 2006), the two states (Rwanda and Burundi) had neither accepted the compulsory jurisdiction in all cases, nor acceded to a treaty providing for jurisdiction in specified circumstances. Therefore, the case against them was inadmissible.

To make things more complex, when the DRC, applying the procedure provided for under the Court's Statute requested for the indication of provisional measures against the presence of Rwandese forces in its territory, the question of jurisdiction was also invoked. The DRC's desperate efforts to establish the Court's jurisdiction on the basis of treaty provisions also proved futile. The DRC invoked several treaties (Including the Genocide Convention, 1948 etc. Although the Court may have no jurisdiction over a state under its statute, it can still be a dispute settlement body if it is so defined by a treaty signed), particularly the Genocide Convention (General Assembly resolution No.260 (III) A of December 9, 1948) which under its Article IX provides for recourse to the ICJ as a dispute settlement mechanism. Unfortunately, as Rwanda had filed a reservation to Article IX of the Convention when it acceded to it, the Court denied jurisdiction under the Convention. Congo then went as far as pointing out the violation of *orga omnes* obligation by Rwanda, an argument that any legal counsel struggling to establish the Court's jurisdiction, especially when none is clear, would have raised. But the Court also rejected this line of argument stating that there is a difference between the *orga omnes* character of a norm and the rule of consent to jurisdiction. In the final analysis therefore, the Judges decided that the Court lacked the necessary *prima facie* jurisdiction. However, denial of jurisdiction as was observed by the Court in this case raises a number of international law issues, which require some consideration. Most significant in these relate to the law on unilateral act of reservations to Article IX of the Genocide Convention. The DRC made submissions that Rwanda's reservations were incompatible with rules of *jus cogens* and with the purpose and object of the Genocide Convention. However, without examining in details whether the object and purpose of the Genocide Convention actually allows such a reservation, the Court simple, in one sentence, submitted that the because the Court's jurisdiction is consensual and because Article IX is a procedural provision, the reservation to it does not contradict with the object and purpose of the Convention. Without further qualifications, such a legal position would open

the door for unpredictable situations.

This case is a graphic example of the international legal system's inability to do justice in ordinary cases. Except in those cases where special tribunals are created by the UN Security Council or by mutual agreement, international disputes-resolution judicial bodies are hedged with restrictions and limitations that prevent them from addressing the full scope of the disputes brought before them.

One of the Judges in the case, Judge Nabil Elaraby shared the same view in the separate opinion. Although voted with the majority on jurisdictional issues, the Judge argued that the case highlighted a major weakness in the contemporary international legal system:

"[In the instance case, the Court was precluded, by virtue of the nature and limitations of the international legal system as it exist today, from the appropriate administration of justice. As a result, the Court has not been able to examine the merits of the claims of the DRC. This inability is compounded by the fact that the case forms part of a series of cases brought before the Court by the DRC relating to armed activities of neighbouring states on its territory. Although these cases are related and, to a considerable extent, the facts, circumstances and situations at issue overlap, they are nonetheless distinct cases, each brought upon its own grounds for jurisdiction and giving rise to its own legal considerations.

The promise and possibilities of the Court, as the principal judicial organ of the United Nations entrusted with the responsibility of settling disputes, requires that states submit their disputes to the Court and accept its jurisdiction. The duty of states to settle their disputes peacefully and in accordance with international law is emphasized in a number of important provisions enshrined in the Charter of the United Nations. Some built-in limitations of the Statute, resonant of limitations of the international legal system generally, are relics of the past era which need to be revisited. The case before the Court today represents a clear reflection of these limitations. It serves as a reminder to the international community in the twenty-first century of the imperative of actively seeking to overcome hurdles in establishing jurisdiction. The Court may thereby play a stronger role in the peaceful settlement of international disputes and in enhancing respect for international law among states]" (Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda), see also <www.worldlii.org/int/case/ICJ>, last visited, April 10, 2006).

Such a proposal for universal acceptance of the Court's

jurisdiction which the Judge seems to advocate in the above passage is unlikely to come by soon.

In the meantime, the final outcome of the collapsed DRC cases against Rwanda and Burundi makes it critical for the international community to step into the reconstruction process.

Consequently, the case proceeded against Uganda alone, leaving the other alleged perpetrators of the war crimes and property looting to go untouched. In its detailed Application against Uganda, the DRC contended that the armed aggression committed by Uganda in its territory had involved *inter alia* violation of the principles of non-use of force, including the prohibition of aggression, the obligation to settle international disputes exclusively by peaceful means, sovereignty and territorial integrity of the DRC, violations of international humanitarian law and massive human rights violations. The DRC then sought to secure the cessation of the acts of aggression directed against it, and compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to it, in respect of which the DRC reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed.

The case went to full hearing stage and on 19 December 2005, the Court issued its final judgment in what came to be known as the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda). The Court held that the armed activities of Uganda in the Democratic Republic of Congo between August 1998 and June 2003 violated the international prohibition against aggressive use of force as well as international human rights and humanitarian law, among others. It stated:

The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory (Para 220 of the Court Judgment).

The Court ordered Uganda to pay reparations to the DRC, noting under prior precedent it is "well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act" (Para. 259 of the Court Judgment).

The ICJ did not however, sanction any amount of reparation. Rather, the amount to be paid in reparation is to be determined through bilateral negotiations between Uganda and the DRC (Paras 260 and 261 of the Court

judgment). In the court's own words, it is not for the court to determine the final result of these negotiations, although in the event the parties fail to reach a settlement, the amount of reparations will be determined by the Court and such determination will be final and binding on all parties [See General Assembly resolution No.260 (III) A of December 9, 1948].

Initially Ugandan government top officials contested the case, consistently denying the claims saying Uganda only acted to protect national security (Joram, J 'Uganda to explain Killing and Invasion of the DRC Congo in the Hague' in *The Monitor*, 11 April 2005).

Nevertheless, should Uganda refuse or fail to pay the amount assessed by the ICJ, the matter will likely end up before the United Nations Security Council which is authorized to make recommendations aimed at ensuring compliance with the ICJ's decisions (See Montreal Convention, *supra* note 74). The UN Security Council's powers in this respect as pointed out early in this paper have been equated with its broader powers in the enforcement of international peace and security.

While coercion is unlikely therefore, possible measures may include a resolution calling on Uganda to pay such reparation, or one imposing economic sanctions and or calling on other UN Member states to freeze Uganda's assets in their territories. Two crucial points need be considered at this stage, however. First, the UN Security Council is merely authorized, and not obliged, to make any such recommendations aimed at enforcing the ICJ's decisions. Secondly, the Council is a political, and not a judicial organ, meaning that the ultimate enforcement is therefore a political, rather than a legal matter hardly surprisingly, given the fact that the Court deals with relations between states (Brack, D. 'International forums for non-compliance and dispute settlement in environment-related Cases', <www.riiw.org/Research/eep/eep.html>, last visited April 17, 2006). These two factors imply that not only may the UN Security Council ignore decisions of the ICJ, but it will (assuming it chooses to act) be motivated by political, and not legal, considerations. In other words, while there is no room for judicial appeal against ICJ decisions, there may be an option of a "political" appeal before the UN Security Council. In the latter case however, a decision by the Security Council to enforce compliance with a judgment rendered by the court is a procedural matter, subject to the veto power of permanent members and thus depends on the members' willingness not only to resort to enforcement measures but also to support the original judgment. Uganda may thus, only seek to get at least one member of the Security Council to *veto* (object to) any recommendations aimed at enforcing the ICJ's decision (Bagenda, E 'There is a Catch in Enforcing the ICJ's Recommendations', Africa Files: available at <www.africafiles.org/article.asp>; last visited, April 13, 2006). In the absence of such enforcement measures by the Security Council, if Uganda, for whatever reasons decides not to comply with the current

ICJ's decision, it will not be setting its own precedent as several instances of non-compliance with the Court's binding decisions already exist. States practices with regards to compliance with ICJ judgments, starting from the *Corfu Channel* case in the late 1940s to the Arrest Warrant Case [(Democratic Republic of Congo v Belgium), I.C.J Reports 2002] decided in 2002 indicate particular trends. The perception that developed during the 19th century where binding decisions of international judicial bodies were regarded as something for small countries may be cited here. In that respect, the "major powers" accepted international adjudication only when their interests are not threatened (*Warioba, supra* note 42, p. 45). A few examples of cases where the Court issued a final order and the condemned state defaulted to comply with will substantiate this argument. To start with, the 1946 *Corfu Channel Case (Corfu Channel Case, supra* note 34) itself arose from incidents that occurred on 22 October, 1946, in the Corfu Strait, where two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. The United Kingdom submitted an application to the ICJ, accusing Albania of being responsible for the explosions, and claimed compensation for the losses sustained there from.

In its final Judgment the Court decided, that Albania was responsible and ordered compensation to be paid. Albania refused to comply with the Court's decision, and the case was unresolved for more than forty years. It was only in 1992 after the fall of its communist regime that Albania agreed to terms, eventually resolving the case in 1996. With the legal principle that justice delayed is justice denied, a settlement agreement, which came 47 years late, raises a question whether the decision in this case should really be considered one, which was ever complied with.

In the 1974 Nuclear Test Case (Nuclear Tests Case (Australia v. France), Judgment, I.C.J Reports 1974, p. 253), both Australia and New Zealand instituted proceedings against France over its atmospheric nuclear tests in the Pacific. France refused to appear or abide by the Court's interim orders of cessation of the tests, and in its letter of 10 January 1974 to the Secretary-General of the United Nations the French Government withdrew France's acceptance of the compulsory jurisdiction of the Court under Article 36 (2) of the ICJ Statute. It was only after it had completed its nuclear tests and had no more interests with the project that France ceased to ignore the Court's decision.

The United States' rejection of the ICJ decision in the Nicaragua Case [Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J Reports 1986, p. 14 (hereafter referred to as Nicaragua Case)] is also relevant in the case at hand. Nicaragua instituted proceedings against the United before the ICJ accusing it to have financed, trained, equipped, armed and organized military operations launched

by the *contra* force against the Nicaragua government for purposes of overthrowing the latter.

On 27 June 1986 the Court delivered its judgment on the merits of the case. It found the United States to have breached a number of its obligations under customary international law and its 1956 Treaty of Friendship, Commerce and Navigation with Nicaragua. It also held that "the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations, is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law and of the Treaty of Friendship, Commerce and Navigation" [Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986, p. 14 (hereafter referred to as Nicaragua Case)].

Although the United States, like any other party to the Statute, is bound by the decisions taken by the Court, it however refused to participate in the proceedings and it subsequently withdrew its consent to be bound by the compulsory jurisdiction of the Court. This case went even a step further as Nicaragua sought to explicitly invoke the provisions of Article 94(2), to seek considerations of the Security Council to enforce of compliance by the United States of its obligations stemming from the judgment of the Court. Although other members of the Council voted in favour, but as was expected, the adoption of the resolution against the United States failed because of the negative vote of a permanent member.

This brief history of states reactions to adverse ICJ decisions indicates that non-compliance does not necessarily justify the Security Council's sanctions as envisaged under the UN Charter and general international law. Worse than all, is that the actions of non-compliance with the Court's final decisions by such major powers as the United States and France, which claim leadership in international affairs, is a big blow to the confidence in the Court.

All along, the author has been trying to reflect the possibilities that are apparent with regard to the 2005 ICJ Judgment in the Case Concerning the Armed Activities in the Territory of the Congo.

From this analysis, three methods have been applied by loosing parties as tools in avoiding compliance with the Court's final decision; namely, refusing to participate in the Court's proceedings, delaying techniques and direct non-compliance, especially in highly politically sensitive cases.

Nonetheless, perhaps the question of compliance, non-compliance or even enforcement of the current ICJ decision might not have any important relevance if one asks oneself a question, is that all? In other words, even if Uganda will ultimately comply with the current judgment, a fact that remains to be seen, can the judgment be said to have remedied the injustices committed in the territory of the Congo?

Furthermore, the ICJ judgments ordering reparations to be made to the injured states (the Democratic Republic of the Congo in this case) may carry some weight, though it is incapable of fully holding states responsible for crimes under international law. More avenues for more responsibility need to be explored.

INTERNATIONAL CRIMINAL ADJUDICATION

State 'Criminality' and international criminal adjudication

One obvious result of conflicts is gross human rights violations—massacres, persecutions, killings, rapes; genocides....all took place since the time of the World War II. The responses to these violations have varied throughout history: (i) revenge, (ii) forgiving and forgetting, or (iii) bringing perpetrators to justice through international judicial or quasi-judicial bodies. International criminal adjudication deals with the last option: bringing the perpetrators before international judicial bodies, facing them with charges, deciding upon their responsibility and eventually punishing them. This approach was firstly introduced by an (unsuccessful) attempt to try Kaiser Wilhelm II after World War I, then continued after World War II in Nuremberg and Tokyo trying war criminals responsible for most heinous atrocities committed during that war and finalised (today) through various judicial forms—*ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and international Criminal Tribunal for Rwanda (ICTR), as well as the permanent International Criminal Court (ICC) at the Hague.

But enthusiasm for international criminal adjudication steadily rose over the latter half of the twentieth century, culminating in the entry into force of the Rome Statute of the International Criminal Court (Rome Statute), which created the International Criminal Court (ICC) in July 2002 (Rome Statute; See also Marlise Simons, Without Fanfare or Cases, International Court Sets Up, N.Y. TIMES, July 1, 2002, at A3. In March 2003, eighteen judges were sworn in, and a prosecutor was named in April. Chris Lombardi, Hot Seat: New Prosecutor Will Be Key in Building Credibility for International Criminal Court, A.B.A. J., July 2003, at 16; Marlise Simons, Court with a Growing Docket, But No Chief Prosecutor Yet, N.Y. TIMES, Mar. 16, 2003, International, at 4. The Court's first investigation involves war crimes in the Congo. War-Crimes Panel to Take on Congo Case, N.Y. TIMES, Jan. 28, 2004 at A5). It is, however, unfortunate that the current legal regime on international criminal adjudication does not precisely attribute criminal responsibility to states, rather to individuals.

On the concept of state criminal responsibility, the Draft Articles on Responsibility of States for Internationally Wrongful Acts [Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC on 10 August 2001 and recommended for the attention of Governments in General Assembly resolution No. 56/83

of 10 December 2001 (hereafter referred to as “the Draft Articles”)), which have been developed by the International Law Commission (ILC) may be worthy of mention. The Articles do not specifically deal with states criminal responsibility and therefore no much can be drawn from them, yet they are the first step towards codification for this area of international law. Although the notion of states responsibility for crimes under international law was initially sought to be introduced in the ILC Draft Articles in the first reading, it was later rejected and set aside altogether [Crawford and Olleson, (2003) ‘The Nature and Forms of International Responsibility’ in Evans, *supra* note 19, p. 452]. It has been argued however that this does not prevent international law from responding to different kinds of breaches and their different impacts on other states, on people and on international order [Crawford and Olleson, (2003) ‘The Nature and Forms of International Responsibility’ in Evans, *supra* note 19, p. 452]. According to Article 19 of the Draft Articles and its commentary, the concept of crimes of States hinges on three basic elements: first, the existence of a special class of rules that are designed to protect fundamental values and consequently lay down obligations *erga omnes*; (Obligation which is regarded as owed to the whole international community. See further Evans, *supra* note 19, p. 142) second, the granting of the right to claim respect for those rules not only to the State that may suffer damage from a breach, but also to other international subjects; third, the existence of special regime of responsibility for violations of those obligations [Under Article 40(2) of Draft Articles, “A breach is serious if it involves a gross or systematic failure by the responsible State to fulfill such an obligation”], in other words, the fact that the legal response to breaches is not merely a request for reparation but may embrace a wide range of sanctions, or remedies [Cassese, (2008). *The Human Dimension of International Law: Selected Papers*, Oxford University Press, Oxford, p. 403]. As regards the first two elements underlying the concept of crimes of States, there has undisputedly been a departure from the traditional approach to State responsibility; under the old law the consequences of international delinquencies were only a private business between the tortfeasor and the claimant and no distinction was made as regards the importance of the primary rule breached. Today however, many customary and treaty rules lay down obligations that states regard as being of fundamental importance; in addition those rules confer on broad categories of international subjects the right to demand their observance. Thus, the breach of one of them has become a public affair involving not only the two parties directly concerned, but also the world community at large [Cassese, (2008). *The Human Dimension of International Law: Selected Papers*, Oxford University Press, Oxford, p. 403].

International responsibility of a state under the Articles arises from the commission by that state of a wrongful

act. An internationally wrongful act on the other hand presupposes that there is a conduct consisting of an act or omission that (a) is attributable to a state under international law and (b) constitutes a breach of international obligation of the state. In principle, the fulfillment of these conditions is a sufficient basis for international responsibility as has been consistently affirmed by international courts and tribunals (See the PCIJ Decision in *Phosphates in Morocco case (Italy v France)*, PCIJ General List No. 71 (A/B Series No. 74), p. 10; The ICJ in the *USA Diplomatic and Consular Staff in Tehran*, ICJ Rep. 1980, p. 3; *Nicaragua Case*, *supra* note 95, p.14).

International law then distinguishes between states responsibility arising out of the context of direct state-to-state wrongdoing, and responsibility arising in the context of diplomatic protection, with the conclusion that in the former case, responsibility is *prima facie* engaged. Aggression is one among the international crimes currently envisaged by customary international law. Aggression was first regarded as an international crime involving individual criminal liability in the London Agreement that established the International Military Tribunal for the Major War Crimes (hereinafter “the IMT Charter”), Nuremberg (Nuremberg Trial Proceedings Vol. 1, London Agreement of August 8th 1945).

According to the IMT Charter Crimes against the Peace, namely planning, preparation, initiation or waging war of aggression or war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing, are crimes for which there shall be individual responsibility [Article 6 (a) of the IMT Charter, annexed to the London Agreement]. Thus wars of aggression were only one of the subcategories of the broad category of ‘crimes against the peace’.

However, for various reasons, no state has been held criminally responsible for the crime of aggression since 1940s although States have engaged in acts aggression, and in some few cases, the UNSC have confirmed so (The UNSC has defined as acts of aggression certain actions or raids by South Africa and Israel; see for instance resolution 573 of October 1985 on Israeli attacks on PLO targets and resolution 577 of December 1985 on South Africa’s attack on Angola; and many more recent resolutions). Although there have been controversies on the definitional aspect as to jurisdiction of international judicial bodies since 1946 to the present, the crime of aggression has so far developed as customary rule of international law (See for instance the same argument by the ICJ in *ibid.*) entailing states criminal responsibility under international law.

The roles of the Ugandan, Rwandan and Burundian states in the DRC war fulfill the two conditions analysed above, so that crimes committed there are clearly attributable to them. It needed the wronged state’s courage and determination to have realized that fact in the choice of an appropriate forum to raise the matter.

Precedent exists that human rights atrocities including genocide and war crimes have been extensively addressed in the international level from the Nuremberg tribunal, the Yugoslav and Rwanda Tribunals to the current International Criminal Court. However, the structural impediments in the international judicial system makes it difficult to directly hold states criminally responsible in international law, and as such, responsibility of states for such crimes has so far not been addressed sufficiently to establish legal custom (See Huls, *supra* note 48, p. 9). It is not surprising therefore that the DRC Government opted for a more traditional judicial method recognized in international law in holding states responsible for their internationally wrongful acts, the ICJ without exploring any other possibilities for more effective remedies for the injustices committed in its territory.

The Bosnia-Herzegovina case (Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), General List No.91 February 26, 2007; first filed as Bosnia and Herzegovina v. Yugoslavia in 1993) which has ended before the ICJ (In its verdict issued on February 26, 2007, the Court found by 13 votes to 2 that Serbia had not committed or conspired to commit genocide. See ICJ Press Release 2007/8) present a novel development in this area of international law. Bosnia and Herzegovina have filed a case against Serbia and Montenegro for; *inter alia*, crimes committed by the latter (and their antecedent state, Yugoslavia) during the Balkan wars of the 1990s, particularly genocide of Bosnian Muslims. It seemed clear however, that attempting to prove that Yugoslavia, at a state level, intended to destroy at least part of the non-Serb population in Bosnia was a challenge for the Sarajevo lawyers.

The ICJ decided ultimately on 26 February 2007 that, while the respondent (Serbia and Montenegro) were not responsible for the genocide committed (See *para* 180 of the Court judgement), they were in violation of the Genocide Convention [General Assembly resolution No. 260 (III) A of December 9, 1948] in that they did nothing to prevent the genocide from occurring and afterwards did not punish the perpetrators. This is the first time that a state has been found in violation of the Genocide Convention.

As a landmark case, this case serves to probe the applicability, capacity and validity of the ICJ to enforce the Genocide Convention in this case and in the future ones. The case also raises several philosophical issues, one of which is the concept of whether the whole state can be held criminally responsible, in this case, for genocide.

Be it as it may, it is in fact possible to establish state responsibility for a crime like genocide precisely by looking at the actions and mindsets of senior officials, irrespective of whether these were supported or even known about by the population as a whole [Cobban, (2006)

'Bosnia vs. Serbia/Montenegro at the ICJ' in Transitional Justice Forum, February 2006, available at <www.tj-forum.org/archives/001761.html>, last visited, April 17, 2006).

Individual criminal liability and international criminal adjudication

Although development of rules on individual criminal responsibility had taken serious pace only in the 1990s (The seriousness came with the setting-up of the two *ad hoc* Tribunals for the prosecution of crimes committed, respectively, in the former Yugoslavia (ICTFY) and in Rwanda (ICTR)), the concept of attribution of criminal responsibility to individuals is not a completely novel issue in international law (See Cassese, A (2003). 'International Criminal Law' in Evans, *supra* notes 19, p. 735). Some international crimes such as piracy and slavery were regulated since the 1800s with these regulations developing later into customary international law.

The first serious attempt to establish individual criminal responsibility in international law was undertaken after the First World War, where the ex-German Emperor, Kaiser Wilhelm II was to be held responsible for crimes termed "the supreme offence against international morality and the sanctity of treaties and war crimes" (See Article 227 and 228 of the Versailles Treaty of 1919). However, the turning point for the development of individual criminal responsibility came with the establishment of the International Military Tribunal at Nuremberg (Established under the Charter of the International Military Tribunal, 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945). See further Shattuck, (2006), 'The Legacy of Nuremberg: Confronting Genocide and Terrorism through the Rule of Law' 10 Gonzaga Journal of International Law 6. 'Who would have thought that the city most often associated with Nazi Germany would later become the birthplace of the modern human rights movement?') and Tokyo (See The International Military Tribunal for the Far East, proclaimed at Tokyo, January 19, 1946) after the Second World War. The prosecutions in these early *ad hoc* criminal tribunals established an important precedent to the effect that individuals, regardless of their ranks, could be held responsible for offences amounting to war crimes, crimes against the peace, and crimes against humanity, and that individual responsibility was enforceable at the international level.

The Nuremberg and Tokyo Military Tribunals, together with the adoption of the Genocide Convention in 1948 (Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 U.N.T.S. 277, entered into force Jan. 12, 1951), provided an inspiration for the subsequent establishment of the two *ad hoc* tribunals for the prosecution of crimes committed respectively, in the former Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Established under the Statute of the International Tribunal for the Prosecution of

Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993)) and in Rwanda, the International Criminal Tribunal for Rwanda (ICTR) (Statute of the International Criminal Tribunal for Rwanda, 1994, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994)). The former held its seat in the Hague Netherlands while the latter was located in the Northern Town of Tanzania, Arusha.

While there have been various criticisms (and at times genuine ones) against the work of these tribunals, we argue that the two tribunals represent major progress towards institutionalized international criminal adjudication. They have marked the first time the modern international community has sanctioned broadly international criminal bodies to hold individuals responsible for the alleged perpetration of three core categories of international crimes: war crimes, genocide, and crimes against humanity. Moreover, they represented an adept legal response to the changing nature of warfare, insofar as they also dealt with non-international armed conflicts rather than solely the traditional legal and political paradigm of interstate conflicts. At the same time, the tribunals have also provided clarification as regards the substance of what is becoming a sort of international criminal code, in the sense envisaged by the UNGA resolution 95 (1) (See text in Schindle, T (1998). *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff/Henry Dunant Institute, Dordrecht/Geneva, 3rd ed., p. 5).

Although these two tribunals have, in addition responded to the traditional criticism of lack international enforcement mechanism for the laws of war, other serious second-hand criticisms soon emerged about their likely effectiveness and consequences (Price, R and Zacher, M (Eds.), (2004). *The United Nations and Global Security*, Palgrave Macmillan, New York, p. 125). Critics of the efficacy of the tribunals point to the fact that they were politicised and selective, in the sense that they were established for Bosnia and Rwanda but not for the numerous other similar situations. For example, following the gravity of human rights atrocities and war crimes in the DRC conflict, there have been frequent calls for the establishment of the International Criminal Tribunal for the Democratic Republic of Congo. This call is however, long overdue as such a tribunal was supposed to have been put in place in the time of King Leopold II for war crimes he committed when he misruled the Congo as his private possession (Hochschild, *supra* note 53, p. 77). Accordingly, one solution for bringing the perpetrators of crimes against international humanitarian law to book in the DRC would be for the UNSC to establish a new *ad hoc* tribunal, modelled after the ICTY and ICTR. However, none of the resolutions on the DRC thus far have even

hinted in this direction. On the contrary, the UNSC has consistently stressed the responsibility of the parties to the conflict to bring the violators to book. No new *ad hoc* tribunal has been established after the ICTR despite calls for such measures, for example, by Burundi. Instead, the trend has been to elaborate new types of special tribunals. The prospects for a new *ad hoc* tribunal for the DRC must therefore considered being very bleak.

There is an obvious nexus between the 1994 genocide in Rwanda and the more recent conflict in the DRC. Thus, another hypothetical solution for addressing crimes against international humanitarian law in the DRC conflict could be to extend the present mandate of the ICTR to include war crimes and crimes against humanity committed in the DRC [In fact, this solution has been suggested by the UN Committee on the Elimination of Racial Discrimination, Decision 1 (52) of 19 March 1998, UN Doc. A/53/18, paragraph IIA1]. For many reasons, however, this would also not be a feasible way forward. Besides the political and legal difficulties involved in amending the mandate, the ICTR would need enhanced capacity to tackle such a task (See this discussion in Friman, (2001). 'The Democratic Republic of Congo: Justice in the Aftermath of Peace?' in *African Security Review*, Vol.10 No.3, 2001, p. 221-302).

Irrespective of this, however, the warring parties have committed themselves, through the Lusaka agreement, to hand over "mass killers and perpetrators of crimes against humanity," and thus to co-operate with the ICTR. Other critics have suggested that overtly political considerations were paramount when the ICTY refused to launch an investigation of NATO's bombing of Serbia (See Mandel (1999). 'Complaint to the International Criminal Tribunal for the Former Yugoslavia' Toronto, May 6, 1999, available at <http://juris.law.pitt.edu/icty.htm>, last visited, May 22, 2006), charges echoed in the accusations of "victors' justice."

International criminal adjudication and the Congo conflict

The two tribunals discussed above are widely accredited with giving the necessary impetus to the establishment of the International Criminal Court (ICC), in July 1998 (Established under the Rome Statute). The ICC remains the only avenue available for individual criminal responsibility for the Congo conflict. After all, the ICC was established as an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes (See Article 1 of the Rome Statute).

Unlike the two *ad hoc* tribunals, whose jurisdiction was generally limited, both temporarily and geographically, the ICC is an organ of global jurisdictional reach and thus potentially able to respond to violations occurring anywhere [Cassese, (2003). *International Criminal Law*, Oxford University Press, Oxford, p. 341]. Issues of juris-

diction under the ICC take several forms, each of which must be considered separately. They are temporary (*ratione temporis*) jurisdiction, personal (*ratione personae*) jurisdiction, territorial (or *ratione loci*) jurisdiction, and subject-matter (*ratione materiae*) jurisdiction [For a thorough discussion of each of these forms of jurisdiction, see Schabas, (2007). An Introduction to the International Criminal Court, 3rd Ed, Cambridge University Press: Cambridge, pp. 65-82].

Although the establishment of the ICC comes as an ultimate success in international criminal adjudication, criticisms by its opponents are as plentiful as laudatory praises of its proponents (Price and Zacher, *supra* note 125, p. 131). Among the controversies that have arisen are: (1) the accusation that the Court represents an undue usurpation of state sovereignty because of its jurisdictional reach; (2) whether domestic amnesties will be taken into account by the ICC; (3) fears that the ICC will provide an opportunity for the developed world to dominate developing countries whose national legal systems are more likely to be unable or unwilling to undertake successful prosecutions; (4) and also the opposite view that weaker countries will try and use it for political motivated prosecutions against the powerful. Yet, besides the adamant reluctance of the U.S to date, many countries around the world have ratified the Rome Statute (Status of ratification as on February 2009 indicates that signatories are 139 and parties are 108), an indication of a decisive seriousness to of the international community to create a permanent international criminal adjudication mechanism.

Lubanga case

The DRC ratified the Rome Statute on April 11, 2002, enabling the sixtieth ratification to be achieved and the Statute to enter into force [According to Article 126 (1) of the Rome Statute, the Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of 60th instrument of ratification, acceptance, approval or accession]. As a result, the Court has jurisdiction over the territory of the DRC from the beginning of its operations, that is, over the acts taking place subsequent to July 1st 2002. As early as July 2003, the ICC chief Prosecutor had indicated that the *Ituri* Region of the DRC was his first priority. His initial analysis was founded on the potential use of his *proprio motu* powers, in accordance to the Rome Statute (See Article 15 of the Rome Statute). This changed in March 3, 2004, when the DRC followed Uganda's example and referred the situation in *Ituri* region to the ICC (Authorization of self-referral flows from a creative interpretation of Article 14 of the Rome Statute. See further Schabas; *supra* note 133, p. 42).

On February 10, 2006 the Prosecutor's application for an arrest warrant directed at Thomas Lubanga Dyilo, filed before the ICC a month earlier on January 13, 2006, was

granted. This followed an *ex parte* hearing on February 2, 2006. Lubanga had apparently been in custody in Kinshasa in the DRC for nearly a year prior to the issuance of the warrant of arrest. Mr. Lubanga, a native of the DRC (The Chronology of the Thomas Lubanga Dyilo Case, ICC NEWSLETTER (The Hague, Neth.), Nov.2006 at p. 1. available at http://www.icc.cpi.int/library/about/newsletter/10/en_01.html last visited on February 16, 2009), is alleged founder of the *Union des Patriotes Congolais* (UPC), a political party, and its military wing, Patriotic Forces for the Liberation of Congo (Forces patriotiques pour la liberation du Congo (hereinafter referred to as "the FPLC). See further Kritz, N (1997), 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', 59 Law and Contemporary Problems, vol. 127, No.128 (1997). He was arrested on March 17, 2006 (ICC NEWSLETTER (The Hague, Neth.), Nov. 2006 at p. 2) for charges of war crimes of conscripting children into armed groups, enlisting children into armed groups and using children to participate actively in hostilities. Each of these charges constitutes a crime under the Rome Statute [See Article 25 (3) (a) and Article 8 (2) (e) of the Rome Statute].

The fact remains that Lubanga was being brought to justice by the courts of the country where his alleged crimes had been committed, and the International Criminal Court might well have been more cautious before intervening. It is certainly not obvious that when an individual is held for nearly a year in pre-trial detention that there is a serious problem of impunity. Both the Prosecutor and the Pre-Trial Chamber seem to have been a bit impetuous in this case, perhaps anxious to have a real defendant before the Court. But in so doing, they have offered an interpretation of the statute which is arguably more intrusive with respect to the criminal justice of States than was ever intended. This may well have an impact on future ratifications of the Rome Statute. Many States are carefully studying the first cases at the Court, to see whether its promise to defer to national prosecutions will be respected.

In *Lubanga*, the Pre-Trial Chamber did not indicate the crimes with which the accused was charged in the DRC, but they were presumably serious enough to warrant his preventive detention for nearly a year. They might well have been *more* serious than those with which he was being charged by the Court. In such a context, where an accused person is also being prosecuted by national authorities, the determination of admissibility cannot be reduced to a mechanistic comparison of charges in the national and the international jurisdiction, in order to see whether a crime contemplated by the Rome Statute is being prosecuted directly or even indirectly. It must involve an assessment of the relative gravity of the offences tried by the national jurisdiction put alongside those of the international jurisdiction. Recruitment of child soldiers is serious enough, but maybe Lubanga was being prosecuted in Congo for large-scale rape and murder.

We are simply not given this information.

The Pre-Trial Chamber considered the issue of gravity of the *Lubanga* case, but in isolation, and not with regard to the pending charges within Congo. The Rome Statute requires the Court to declare a case inadmissible when it is 'not of sufficient gravity to justify further action by the Court' [Article 17 (1) (d) of the Rome Statute]. The Pre-Trial Chamber set out its perspective on its assessment of this aspect of admissibility. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes (which are defined by both contextual and specific elements) included within the material jurisdiction of the Court. Second, in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community. In the Chamber's view, this factor is particularly relevant to the Prosecution's Application due to the social alarm in the international community caused by the extent of the practice of enlisting into armed groups, conscripting into armed groups and using to participate actively in hostilities children under the age of fifteen [Prosecutor v. Lubanga (ICC-01/04-01/06-8)].

The Pre-Trial chamber added that the gravity threshold at the admissibility stage was 'intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation' [Prosecutor v. Lubanga (ICC-01/04-01/06-8)]. Focusing on the leaders would enable the Court to play a deterrent role [Prosecutor v. Lubanga (ICC-01/04-01/06-8)]. In this context, the Court referred to recent changes to the law of the *ad hoc* tribunals as part of their 'completion strategies' (Ibid, paras 55-60. For example, the Court noted UNSC resolution No.1134 (2004), and Rules 11 bis and 28 (A) of the Rules of Procedure and Evidence. On the completion strategies, of the *ad hoc* tribunals, see Schabas, (2006). The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, Cambridge University Press, Cambridge). It bears mentioning that these provisions owe their provenance to initiatives of Judge Jordan, President of Pre-Trial Chamber I, who in an earlier incarnation was President of the International Criminal Tribunal for the former Yugoslavia. The ICTY provisions were intended to tame the Prosecutor, who initially resisted attempts by the judiciary to encroach upon her discretion in selecting cases (On the situation at the *ad hoc* tribunals, see for instance, Brubacher, (2004). 'Prosecution Discretion within the International Criminal Court' in 2 Journal of International Criminal Justice, vol. 71 at pp. 85-86).

The decision of Pre-Trial Chamber I to issue the arrest warrant was challenged by duty counsel Jean Flamme, in

a notice dated March 24 2006. In the notice of appeal, he argued that the Pre-Trial Chamber erroneously applied article 17 of the *Rome Statute*, and that it should have ruled the case inadmissible [Prosecutor v. Lubanga (ICC-01/04-01/06-57-Corr)]. However, there is a procedural problem with the notice of appeal. Article 19(6) of the Rome Statute, which is invoked in the notice of appeal, says that 'decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82'. But the context indicates that the provision refers to appeals from challenges to admissibility which have been submitted under article 19, which an accused is entitled to file under article 19(2). In other words, the proper recourse for Lubanga is probably to challenge admissibility, and not to appeal the issuance of the arrest warrant.

While the Prosecutor worked with the authorities of DRC in order to ensure the accused person's transfer to The Hague, the *Lubanga* arrest warrant remained under seal [It was made public once Lubanga was in the Court's custody: Prosecutor v. Lubanga (ICC-01/04-01/06-37)], decision to unseal the warrant of arrest against Mr. Thomas Lubanga Dyilo and related documents, March 17, 2006). The Registrar formally transmitted the request for arrest and surrender of Lubanga on March 14, 2006. Lubanga was apparently brought before a Congolese judicial authority, which authorised his surrender and transfer to the International Criminal Court. Lubanga was promptly brought to The Hague by French military aircraft. On March 20, 2006, Lubanga appeared before the Pre-Trial Chamber, for the purpose of establishing that he had been informed of the crimes he was alleged to have committed, and that he knew of his rights under the Statute, including the right to apply for interim release. A hearing to confirm the charges must be held within a reasonable time, in accordance with article 61 of the Rome Statute. The Pre-Trial Chamber set June 17, 2006 for the hearing. Presiding Judge Jorda said: 'Three months are necessary for you to become familiar with the mass of documents,' Jorda said, "in order to proceed on a fair basis.'

On January 29, 2007, the Pre-Trial Chamber confirmed charges against Lubanga, as brought by the Prosecutor, allowing the case to be set for trial [Prosecutor v. Lubanga (ICC-01/04-01/06)], Hearing: Decision of the Pre-Trial Chamber Following the Confirmation of Charge Hearing, available at http://www.icc.cpi.int/cases/RDC/c0106/c0106_hs.html last visited on February 16, 2009). In accordance with the Rome Statute, and Rules of Procedure and Evidence of ICC (See Rules of Procedure and Evidence, Rule 89, U.N. Doc. PCNICC/2000/1/Add.1, Nov.2, 2000 (hereinafter referred to as the ICC Rules of Procedure and Evidence), available at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf, last visited on February 16, 2009), certain victims, represented by Counsel, played an active role in this hearing (November 9, 2007. Confirmation of Charges

Hearing, *supra* note 151).

Besides suggesting that there are problems with the admissibility of the case, the fact that Lubanga was detained for a prolonged period in the DRC before issuance of the arrest warrant raises questions of arbitrary detention for which the Court itself may be responsible. Lubanga had been in detention for approximately one year, and possibly longer. His detention was well-known to international NGOs so it seems reasonable to presume that the Prosecutor was also aware of the situation. The Prosecutor only proceeded to seek an arrest warrant when it appeared that the detention was coming to an end, and that there was the possibility Lubanga would be released. This was specifically invoked in the application for the arrest warrant, and helped to persuade the Pre Trial Chamber [Prosecutor v. Lubanga (ICC-01/04-01/06-8)]. Decision on the Prosecutor's Application for a Warrant of Arrest, February 10, 2006, *paras* 98-102). While subject to procedural restrictions, such as the inability to call their own witnesses (ICC Rules of Procedure and Evidence, *supra* note 18, at Article 89. The inability of victims to call their own witnesses is a reflection of the administrative and logistical constraints of the ICC as well as deference to the procedural rights of the defendant), the legal representatives of the victims made their presence known through forceful opening (Prosecutor v. Lubanga, *supra* note 151) and closing (Prosecutor v. Lubanga, *supra* note 151) remarks, as well as numerous document requests and even a question posed to the witness (Prosecutor v. Lubanga, *supra* note 151). This hearing set the precedent for victims to play an important role in international criminal proceedings as they seek closure for the harms committed against them [Will, (2007). 'A Balancing Act: The Introduction of Restorative Justice in the International Criminal Court's Case of the Prosecutor v. Thomas Lubanga Dyilo' in *Journal of International Law and Policy*, vol. 17, No.1 pp. 85-120].

It would appear that the Prosecutor may have been content, for a protracted period, to let Lubanga remain in the Congolese prison while he proceeded to prepare his case, and that implies a degree of complicity with the detention within the DRC prior to issuance of the arrest warrant. Similar issues have been raised before the International Criminal Tribunal for Rwanda, where the Appeals Chamber has manifested considerable unease when suspects have been held in prisons in different African countries, under dubious legal pretexts while the Prosecutor continued to investigate [See for instance, Prosecutor v. Barayagwiza, (Case No. ICTR-97-19-AR72), Decision, November 3, 1999].

On January 29, 2009 the trial of Thomas Lubanga commenced before the ICC. As the Prosecutor has repeatedly charged, Mr. Lubanga is allegedly responsible, as co-perpetrator, of War crimes consisting of:

- Enlisting and conscripting of children under the age of

15 years into the FPLC and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003 (Punishable under article 8(2)(b)(xxvi) of the Rome Statute);

- Enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 2 June 2003 to 13 August 2003 (Punishable under article 8(2)(e)(vii) of the Rome Statute).

As this case proceeds before the ICC, we are of the view that the ICC ought to have charged Lubanga of more serious international crimes (mass killings, rape, torture etc) as widely committed in the Ituri Region of the DRC by forces under Lubanga's direct command.

The case may not provide the true justice required by the Congolese in the aftermath of the conflict. First, Lubanga is just one among the many culprits ought to be brought before the ICC or before any other effective justice forum. Second, more victims, including those of rape, and those whose relatives and beloved ones were murdered in the course of the conflicts, may not see the types of charges levelled against Lubanga as restoring their grievances.

Nevertheless, the uniqueness of this case in international criminal justice cannot be over emphasised. It stems not only from being the first case before the permanent international criminal court, the ICC, but also from being the first case where an international criminal tribunal, the ICC in this matter has recognised the importance of granting the victims of mass atrocities a forum in which to be heard and perhaps healed. More importantly it has provided for the international criminal adjudication of the Congo conflict, eradicating the culture of impunity, which has reigned for too long in this complex and deadly conflict.

Conclusion

This paper attempted to make a critical analysis of international adjudication as a method in resolving armed conflicts alongside its general role of disputes settlement in international law.

In this analysis, the 2005 ICJ Judgment in the Case Concerning the Armed Activities in the Territory of the Congo has been taken as a focal point of reference and ongoing case of Lubanga before the ICC were taken as case studies.

The historical development of adjudication has been examined, with particular reference to the ICJ. The mandates of the Court as well as compliance and enforcement of its final binding decisions against condemned states have been re examined.

In the final analysis, I join hands with; Merrill's (Merrills, (1998) *International Dispute Settlement*, 3rd ed.

Cambridge University Press, Cambridge, p. 296) who sees clear limits to the role of international adjudication or rather judicial dispute settlement. In his view, international adjudication has been most effective in resolving strictly bilateral disputes. In contrast, it has proved less suited for the satisfactory settlement of international armed conflicts or highly politicized disputes, for which other appropriate paths and forums remain to be explored. Even as we examine international criminal adjudication, we realize that it has, likewise, missed the main point, namely to respond to the actual roots of the conflicts.

The overall conclusion from this discussion is therefore a rather cautious note, epitomized in the statement that while there is positive view of the role of judicial bodies in ensuring respect for international law it is difficult to apply this role in armed conflicts situation where there is a number of justice issues to be addressed.

The most important point to be remembered however is that judicial settlement of international disputes is just, but a tiny aspect of the process of disputes settlement systems in international relations. Most disputes are resolved also on the basis of agreements, which contain provisions to the effect that binding adjudication is a method of last resort when diplomatic means have failed.

The legal approach to international dispute settlement will become more effective only if the weaknesses in the international legal system are remedied. The main shortcomings in the current system may be summarized thus:

- a.) The law is often uncertain, and in some areas it reflects earlier power relationships that have become anachronistic in a world no longer centered on Europe.
- b.) The system has no effective contemporary lawmaking body.
- c.) Although international judicial bodies are the main interpreter of international law, there is no general compulsory jurisdiction to ensure legal settlement of disputes that evade a negotiated solution.
- d.) The system lacks effective procedures to bring offenders to justice and to ensure compliance with judgments (See Riggs and Plano, *supra* note 20, p. 199).

The importance of adjudication cannot however be over-emphasized here. It lies in the development and strengthening of international law. In other words, the decisions of international judicial bodies contribute enormously to the development of new global values, which will make it easier to accept rules without the need for enforcement.

To address today's limits and more difficult environment, the development of a system of international justice to limit impunity for serious human rights crimes must be seriously worked out. It is therefore stressed that there is high need to refine the international justice system so that perpetrators of the most serious crimes such as those committed in the DRC are increasingly held to account.

This may entail revisiting the general jurisdictional

limitations of such important international judicial bodies with a view to strengthen their role international adjudication. More specifically, filling the gap that stands in the way of justice in holding states as such criminally responsible for crimes committed in their organised and directed command structures may provide a long lasting solution.

The effects that such a gap has created in the case of human rights atrocities committed in the Congo may not wait for such long lasting solutions, as this is an urgent matter, which needs an immediate attention of the international community.

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