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State Responsibility for Crimes under International Law

Filling the Justice Gap in the Congo

Volker Hüls

Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionally strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

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For queries write to:

The Editor
lawanddevelopment.org
P.O.Box 1106
Nairobi 00502
Kenya

info@lawanddevelopment.org

www.lawanddevelopment.org

Table of Contents

I Introduction

The international legal system has long struggled to deal with crimes in its realm. After the attempts to outlaw war and aggression by states in the late 19th and early 20th century, the focus has gradually shifted to individual responsibility for crimes under international law.

Landmarks in this needs-driven development of law have been the Nuremberg Trials and the tribunals for the Former Yugoslavia and Rwanda. Major progresses were made in attributing breaches of internationally recognised rules to individuals and in prosecuting and trying thes perpetrators in international courts. These cases did provide certain satisfaction to the global community and to the victims, although they often fell short of fully addressing the scope of the violations. When whole states acted criminally, either internally or externally, other mechanisms were needed to provide much wanted information about the crimes and to attribute responsibility. As a result alternatives to individual trials have evolved; truth commissions with a variety of mandates have worked in the aftermath of repressive regimes in South Africa, and South American Countries. They often achieved a higher public satisfaction by exposing the workings of the regimes in more detail than criminal trials could. Countries where both systems complemented each other arguably dealt with the past more comprehensively.
These setups, however, were appropriate for post-conflict situations or successor governments. It is infinitely more difficult to address the violations perpetrated by a government still in power. A case in point is Cambodia, where for decades no suitable solution to deal with the crimes committed by the Khmer Rouge was found. It seems there is a limit to justice when the responsible are part of a recognised government. This brings international law back to its origins, when before World War One it mostly dealt with the liability of states.

This paper will lay out the perceived gaps in international responsibility by looking at the example of the war in the Congo[1]. 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 Congo revolves around the usual combination of trials and truth commissions. Although the Congolese government has taken steps to hold its neighbouring states responsible before the International Court of Justice, this does not feature in the current discourse. I argue that, contrary to this perspective, the attribution of crimes to state actors is vital for reconciliation on a regional level and for long-term stability in the Great Lakes. However, it becomes evident that the mechanisms for holding states responsible for crimes under international law are still evolving and at present do not provide very effective tools. By analysing the state of affairs in this section of international law I conclude that practice must follow recent codification and that only when used complementary with other instruments will state responsibility help to fill the gaps in international justice.

[1] The conflict is in the territory of the former Zaire, now the Democratic Republic of Congo (DRC). The paper follows the practice of the media to refer to it colloquially as "the Congo", which makes for easier reading. It is not, however, intended to confuse it with the neighbouring Republic of the Congo (usually called "Congo-Brazzaville")

II Justice in the "Heart of Darkness"[2] ?

A unique conflict

The Congo conflict, which started in Zaïre with the overthrow of the Mobutu regime and continued in the now Democratic Republic of Congo (DRC) has a complexity far exceeding other recent wars in Africa. The major factor is the size and the artificial composition of the country. The Congo, which is the territory conquered by the private forces of the Belgian King Leopold, became Zaïre after a brief period of Belgian colonial rule. The post-independence government of President Mobutu always had difficulties in projecting sufficient power into the remote provinces[3], especially into the East. This part of the Congo shares the ethnic composition of the Great Lakes Region around Rwanda. Inevitably, the influx of fugitives and refugees from post-genocide Rwanda in 1994 destabilised the region and gave opportunity to the local rebel groups to rise up against the government. With the assistance of the Rwandan military, which sought alliance with these groups to pursue *genocidaires* on Congolese territory, they overthrew Mobutu in 1997[4]. The new government of Laurent Kabila, however, soon fell out with Rwanda.
Discontent with the Kabila government spawned new rebel movements in the East and the Rwandan army found a new ally in the now dominant *Rassemblement Congolese pour la Démocratique (RCD)*. Still after *genocidaires* and Interahamwe militia, Rwanda occupied large territories of the Congo in 1998[5]. In the same year, the Ugandan Forces, under an agreement with Rwanda, occupied territory in the Northeast of the country[6].

With support for the government by Angolan and Zimbabwean forces the conflict developed a highly international and very complex character. The Congo was effectively split into three parts, the government with Angolan and Zimbabwean support held the West, while the East was divided between Rwanda and Uganda[7]. A peace agreement signed in 1999 provided for cessation of hostilities and the withdrawal of all foreign forces, but was not implemented[8]. In January 2001 Laurent Kabila was assassinated and succeeded by his son Joseph. Under Joseph Kabila, peace negotiations resumed and in February 2001 Rwanda and Uganda began to withdraw their troops. Peace talks with all rebel groups ensued and led to a peace agreement that to the present day has certain stability.[9]

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[2] The title of the 1899 novel by Joseph Conrad, which describes quite accurately the situation in the Congo under the rule of King Leopold of Belgium's private enterprise, is again widely used to express the inhumanity of the present atrocities in the Congo
[3] (Wrong 2001)
[4] (Savage 2003)
[5] ibid.
[6] (Clark 2001)
[7] (Savage 2003)
[8] The "Lusaka Accord" involved all nations participating in the war, but was not effective in preventing further fighting (Savage 2003)
[9] The "Sun City Accord" was signed in South Africa between most rebel groups in December 2002 and an interim government was formed. However, the recent (27th March 2004) coup attempt shows the fragility of the present situation.

The Congo War in many ways is more reminiscent of organised crime and gang warfare than of conventional armed conflict. Three key patterns underline this perception. Firstly, although security interests were claimed by Rwanda and Uganda, the war, and their involvement in it, was soon driven by a strong economic interest[10]. The Congo has immense natural resources, and there is abundant evidence for an explicit interest of all warring parties in their exploitation[11]. Secondly, besides direct military action, a sophisticated system of action and control through proxies developed under the occupation by Rwanda and Uganda. These gangs of paramilitary troops displayed certain thuggish qualities[12]. Thirdly, reports about the behaviour of the foreign troops and their allies on Congolese soil include all facets of crimes against humanity[13]. These do not seem to be only *ultra vires* actions of badly controlled soldiers, but essentially strategic elements in the fight for influence[14].

[10] (Samset 2002)
[11] ("Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo" 2002)
[12] ibid.
[13] numerous Human Rights Watch (www.hrw.org) reports document this as well as the UN report (see note 11)
[14] ibid.

Crimes under International Law and their Perpetrators

The built-up of control over the East of the Congo was exercised through three processes. Each of these is connected to human rights atrocities, similar to an extent. They are described briefly, followed by a summary of two illustrative situations. Both examples highlight the 'organised crime' structure of the hold Rwanda and Uganda have over Congolese territory through their proxies. It is not, however, intended to establish proof for these crimes and the responsibility of the perpetrators. The issues have been extensively reported, but obviously need to be investigated further for judicial purposes.

Direct Military Action The military intervention of Rwanda and Uganda in the Congo was allegedly driven by security concerns. While Rwanda claimed military action against *genocidaires* in the region as their main objective[15], the Ugandan government cited as its goal protection from a Sudan-based rebel group operating from Congolese territory[16]. However, both forces were involved in fighting with government troops and their supporters[17], which makes their actions essentially a war of aggression. Additionally, evidence points to a mostly economic interest[18]. During the military intervention human rights atrocities were allegedly committed by troops of both states[19].

Enforcement of Economic Interests The East of the Congo is extremely rich in rare minerals. Particularly interesting for the global markets are diamonds, gold, and the rare composite Coltan[20]. While gold and diamonds are well known for their links with conflicts, Coltan brought a new global economic link into the war. It is essential for modern electronic systems, and has attracted the attention of international firms. The 2002 report of the UN panel of experts describes these links in detail, naming the companies that deal with the exploitation of the mineral in Congo[21]. These companies, according to the report, are linked with Rwandan and Ugandan government interests, and protected by their forces. The report, addressing the alleged security interest of the two countries, identifies evidence to the contrary[22]. In pursuit of their control of resources the troops allegedly raided and burned villages to seize local mines and ensure a supply of captive labour.

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[15] (Savage 2003)
[16] (Clark 2001)
[17] (Savage 2003)
[18] see the following section, also note 11
[19] see note 11
[20] (Jackson 2001)
[21] see note 11
[22] The UN Panel Report quotes an Interahamwe combatant stating "*In any case, they aren't here in the Congo to chase us, like they pretend. I have seen the gold and Coltan mining they do here, we see how they rob the population. These are the reasons for their being here*"

Military and other armed action by proxy The most complex issue in the conflict is the conduct of the numerous rebel groups and their splinter factions in the region[23]. Some of them pursue private interests, some act on behalf of companies exploiting the resources, and some have a political agenda. Rwanda and Uganda have both been clearly implicated in supporting these groups with weapons, training and, in the case of Rwanda, advisers or even military leaders[24]. The crimes committed by these groups are serious and widely documented[25].

The establishment of a proxy structure to pursue the economic and political interests of the neighbours is the basis of the present situation in the region, which as recently as last year has sparked intense conflict in Bunia, triggering international military intervention. This incident and the mutiny in Kisangani in 2002 are presented here to show the impediments for justice and reconciliation in the Congo.

Bunia[26]

Bunia is the capital of the North Eastern Ituri district and close to the border with Uganda. Two ethnic groups, the Hema and the Lendu, dominate the area. Uganda has since the occupation been supporting its Hema allies, who represent their economic interest in the region[27]. A conflict between Hema and Lendu initiated partly from these commercial activities, when claims over land clashed. To protect their access to the natural resources in the district, the Ugandan Army trained and equipped the Hema militia. The strengthened Hema attacked Lendu villages, which in turn counterattacked. The situation got out of control in 2003, when the city of Bunia itself was the location of fighting, with reports about serious and atrocious Human Rights Violations, including ritual cannibalism. Intention of ethnic cleansing, even genocide, by the Hema was alleged by observers.

[23] (Jackson 2002) and (Samset 2002)

[24] In a personal observation, in Goma, the regional headquarters of the RCD, English speaking military personnel were encountered as late as 2002 (when Rwandan Forces had allegedly withdrawn completely). In the region, which is completely *francophone*, English speaking Army personnel usually belong to the Rwandan Army, trained and exiled in Uganda until the genocide. Also: ("War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny" 2002)

[25] ibid. and Note 11

[26] Summarised from: ("Ituri: “Covered in Blood” Ethnically Targeted Violence In Northeastern DR Congo" 2003)

[27] see note 11

Kisangani[28]

Rwandan Forces occupied the third largest city in the Congo between 1998 and June 2001 when they officially declared their withdrawal. Their Congolese ally, the RCD, retained control of the city. In May 2002 soldiers and police officers rebelled against the RCD forces, and after taking over the radio station called for a hunt of "Rwandans". Six persons thought to be Rwandan were killed. Loyalist RCD soldiers put down the mutiny, and started indiscriminate killings of civilians and summary executions of military personnel. Accounts were given of numerous rapes, beatings of civilians and looting of property.
Human Rights Watch point out that direct involvement of the Rwandan military cannot be established beyond reasonable doubt, but argue conclusively that the links between the RCD and the Rwandan Army are established; they trained RCD forces, provided them with weaponry, and seconded personnel.

The examples illustrate the difference in the projection of power by Uganda and Rwanda. Uganda, who had links to the region even under the Mobutu government[29], has built up a strong, commercially based, proxy system. While Rwanda still seems to use military advisers seconded to RCD forces[30], Uganda apparently fully withdrew and exerts influence through military training in Uganda of militia and the provision of arms[31].

The greater picture, however, is the same; both countries have set up structures to benefit from the ongoing political instability in Eastern Congo, and act through proxy military groups to enforce their interests. The human rights atrocities committed by these troops are therefore linked to the actions of both governments, which is clearly stated by observers. Attributing them beyond reasonable doubt to these states will be the major task faced by Justice.

[28] Summarised from: ("War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny" 2002)
[29] (Clark 2001)
[30] see note 11
[31] see note 11

Justice and Reconciliation for the Congo ?

The need for a sustainable peace in the Congo is evident. Never since the exploitation by King Leopold's private enterprise has it enjoyed a free society with full protection of human rights. History has certainly aggravated the current situation, and today Congo and the international community face one of the most difficult cases for justice and reconciliation. It is not, however, that the crimes are much different from other conflicts, it is their combination and the structure in which they took place that pose a unique challenge to international justice.

Precedent exists for trials of individuals for most of the crimes observed in the Congo. The involvement of private companies in criminal activities during conflict was on trial in Nuremberg, as were "criminal organisations" such as the SS[32]. Massive human rights atrocities, including ethnic cleansing and genocide, have been extensively addressed in the tribunals in Nuremberg, The Hague and Arusha. Yet the responsibility of states for such crimes has so far not been addressed sufficiently to establish legal custom. Consequently, human rights actors and academics have explored the possibilities for justice in the Congo mostly along the tradition of individual responsibility.

Support for the national justice system has been proposed[33]. The judiciary, owing to a repressive regime under Mobutu and no investment afterwards, has lost most of its independence and thus credibility. Major reforms are urgently needed, and even basic infrastructure needs to be rebuilt. National courts could certainly play a substantial role in trying individual perpetrators of Congolese origin, and for local reconciliation this seems to be essential.

With the peacemaking efforts the issue of amnesties has surfaced[34]. Granting amnesties has been a tool for peace building recently used in Sierra Leone. Although amnesties tend to facilitate negotiations between hostile groups, they can generate serious credibility problems as observed in several South American countries[35].

For internationally driven justice, two parallel ways have been suggested. The International Criminal Court (ICC) has announced that it will investigate the crimes reported from the Ituri district, including the responsibility of private firms [36]. The Congolese government has drafted legislation to incorporate the ICC objectives and the links to national judiciary into municipal law. The main problem here is one of jurisdiction, per the Rome statute the ICC only has jurisdiction from 1st July 2002, and can therefore just cover a fraction of the crimes committed in Congo since 1997. To address the remaining period, the government of the DRC has called for an international tribunal[37].

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[32] (Taylor 1993)
[33] ("Democratic Republic of the Congo: Confronting Impunity" 2004)
[34] (Friman 2001)
[35] (Hayner 2002)
[36] The Prosecutor in his statement referred to Nuremberg as precedent for cases against private enterprises ("The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri, DRC" 2003)
[37] ("Democratic Republic of the Congo: Confronting Impunity" 2004)

This pragmatic approach of adapting proven mechanisms to a new situation has its merits. However, to restrict the justice in the aftermath of this particular conflict to judicial process against individuals, whether in national or international courts, here appears as insufficient.

Firstly, the scale and the organisational level of the atrocities, where crimes were committed under a command structure, cannot be dealt with only on an individual basis. Previous tribunals have struggled with too many perpetrators[38], and individual trials often do not go far beyond personal responsibility.[39]
Secondly, East Congo, ethnically, economically and politically, has always been closer linked to the Great Lakes Region than to the rest of the country[40]. In the light of increasing economic integration in the region, Rwanda and Uganda are important partners in the further development of this part of the Congo[41]. If the channels of influence are not exposed and blocked, the Congo cannot become an equal partner in the region. For this purpose individual trials seem insufficient. Adding to that, trials would, for legal and political reasons, find it difficult to indict serving government officials[42]. Holding instead the whole state responsible therefore seems a procedurally, but also politically[43] more acceptable solution
Thirdly, the war has devastated large areas socially, economically and environmentally. Reparations are needed to rebuild the country. Only states can be requested to make commitments for reparations, if not in cash then in kind. Individual trials would fail to enforce such commitment due to their jurisdiction.

[38] The experience of Rwanda shows clearly that mass atrocities easily overwhelm a weak national, but also a well financed international judicial system

[39] In trials in Nuremberg, The Hague and Arusha substantial background to individual crimes was uncovered and reported, however, only as an accessory to the case findings due to the limited jurisdiction of the tribunals

[40] Personal observation, the major share of import goods to the East of the Congo come by truck through the "Northern Corridor", the road linking the Kenyan port in Mombasa with the Great Lakes Region. Also, Swahili, the common language of East Africa, is spoken widely in Eastern Congo, but not in other parts of the country. This, more than anything else, indicates the economic ties.

[41] Which, incidentally, is shown by their very commercial interest in the country

[42] (Nollkaemper 2003)

[43] It is certainly more realistic to demand of a state to admit responsibility than to mark a serving head of state as a criminal, as morally right as this may be. As it is unlikely that the governments in Rwanda and Uganda change soon, peace and stability in the region will depend on how their responsibility is addressed.

A truth commission may be able to address some of these needs. When it comes to the exposure of criminal structures and their public condemnation, such commissions have proven to be a more useful tool than individual trials[44]. By allowing more information to be given by perpetrators and victims than a criminal trial procedure would allow, they perform better in uncovering events and mechanisms. A truth commission for the Congo could at least partly close the gap individual trials leave. A commission has been agreed upon under the Sun City Peace Accord of April 2002 and is in the process of formation[45]. It has jurisdiction over a period from 1960 to 2003, and therefore would be able to cover not only the recent conflict, but also most of the underlying issues. There has been critique of this commission though, in particular directed at its composition[46]. Considering these doubts about its impartiality, the commission may not have the standing to deal with the crucial exposure of interests in this conflict.

It seems that the proven mechanisms, as effective as they may be in their individuality, fail to cover the whole range of problems justice has to deal with in the Congo. Ways to hold the involved states responsible, which would address the shortfalls of individual justice and the lack of standing of the proposed truth commission, should be explored.

The Congo itself has pursued its options for holding its neighbours liable for their involvement. It has applied to the ICJ for proceedings against Rwanda and Uganda[47]. The ICJ at present is the only suitable international forum for such cases[48] and could in principle at least provide some remedy as far as reparations and public exposure is concerned. This brings back the concept of state responsibility, which in the following will be further explored to establish whether it can indeed fill the justice gap in the Congo.

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[44] (Hayner 2002)

[45] ("Democratic Republic of the Congo: Confronting Impunity" 2004)

[46] Worse, some proposed commission members have been accused of having committed crimes themselves (see note 45)

[47] (Armed Activities on the Territory of the Congo (Congo v Uganda, Application), 1999; Armed Activities on the Territory of the Congo (Congo v Rwanda, Re-Application), 2002)

[48] The ICJ, often dubbed the "World Court", is the only international court that allows proceedings of one state against another. Other similar courts exist on a regional level, though. (Thirlway 2003)

III Towards more responsibility in the International Community

Holding states responsible – the theory[49]

The concept of state criminality has received some attention with the development of the "*Articles on Responsibility of States for internationally wrongful Acts*" by the International Law Commission (ILC). These articles are the first step towards a codification for this area of international law, and they incorporate existing principles, state and judicial practice as well as customary law. They do not, however, specifically deal with crimes committed by states, but attempt to address the wider field of responsibility in general. Therefore, before looking at the limited codification and some practice in imputing crimes to states, the background of the concept of state responsibility necessitates description.

Holding a state responsible for a crime has certain advantages, as pointed out for the Congo situation. First of all, any acts of aggression or human rights atrocities on a large scale cannot simply be attributed to individuals, especially when they have been organised and directed through a command structure. Then, due to immunity, and political considerations, it is mostly impossible to hold individual trials of state officials still in power. Consequently, all post World War Two tribunals have only dealt with former state officials[50]. Thirdly, in a post-conflict situation only a state can come up with the amount of financial compensation required to cover the damage to infrastructure and the economy.

The legal theory underlying state responsibility has been likened to the principles of holding corporations liable as entities on a national level. This follows the observation that international criminal law has evolved along the principles of municipal criminal law, and provides a certain baseline for dealing with states as entities who can commit crimes. As much as this analogy seems suitable, a major critique of state responsibility is that it applies collective punishment, and implies collective guilt. While shareholders of a corporation are usually free to sell their stocks when the company is sentenced to pay financial compensation, the citizens of a country cannot just leave. In international practice, however, collective punishment is already an accepted consequence of economic sanctions imposed by the UN.

[49] Unless otherwise stated, this part in its factual contents relies on a recent book on the subject of state responsibility (Jørgensen 2003)

[50] Although Slobodan Milosevic was indicted by the ICTY while he was still in power, he was only arrested after he stepped down as president of Yugoslavia.

Yet the corporate analogy provides a good understanding of the process of attribution. The state must act through its agents, natural persons who can be held criminally responsible. However, the state is still responsible for their actions. Clearly, when the state gives specific instructions, for example through policy like the Nuremberg Race Laws, the actions of an agent under these instructions can be imputed to the state. If the action is *ultra vires*, to a certain extent the state stays responsible, especially if the law or the instructions did not set clear limits to the extent of the actions to be taken under them[51]. This goes along with the general theory of corporate responsibility and is reflected in the codification of state responsibility. This may not, however, automatically also imply criminal responsibility of the state[52], but certainly provides leverage for compensation claims.

Which crimes can be attributed to states ? The current thinking on state responsibility seems to be a mixture of natural and positive law thinking. From a Natural Law background comes the idea of "Crimes against Humanity". Genocide, due to its seriousness, has a separate standing. These crimes have been agreed to be of such graveness that de facto an *erga omnes* obligation exists for their prevention and punishment, and they are often on an organisational level that must involve state structures.
From the Positive Law perspective sources for defining a crime as a crime of state are the codified humanitarian law, and the UN definition of a "Threat to International Peace and Security". In humanitarian law, in particular the Geneva Conventions, state actors are bound to a certain conduct in conflict, quite obviously the breach of this is indicative of a lack of state control over its armed forces. Similarly, when the UN Security Council declares an act of state as a "*Threat*" under its Chapter VII; the resolution is indicative of state responsibility for crimes committed in such circumstances.
Crucial in defining the role of the state is the intention of the perpetrator, which is clearly reflected in the Genocide Convention. Also, the massiveness of the criminal act is indicative. Arguably, if an agent of the state commits a minor crime, holding him or her individually responsible seems sufficient, especially when *ultra vires* action was involved. However, when the crime is an expression of state policy, and is not an isolated but a widely observed practice, then even minor crimes may be attributed to a state under the massiveness test.

[51] The commentary to ILC Article 7 (Excess of Authority) refers to state practice in defining that states are usually responsible for the actions of their agents, even when these are in excess of authority or contravention of instructions.
[52] The concept of state criminality is still very undefined, therefore responsibility may only extend to compensation or obligation to punish the perpetrator (see also note 66)

What consequences can be brought upon states ? States in the past have often been condemned publicly of committing human rights atrocities and crimes under international law. The human rights movement has surely contributed to this culture of political attribution. However, while for example Security Council resolutions usually condemn the state as an entity, public opinion tends to focus on leaders and high-ranking politicians. Certainly, making the criminal acts of states public, even if only by focussing on their leaders, is a form of punishment. It may have a considerable effect on investor confidence, trade and tourism, and may therefore be of a certain punitive value. Security Council resolutions under Chapter VII can impose sanctions and even military action against a state and are the ultimate international tool to punish a state for criminal acts. These are, however, only political measures and are not based on a judicial process, simply because this would take too long.

After a crime has been committed by a state, current jurisprudence differentiates between compensatory and punitive measures. While compensatory measures, such as reparations, are certainly the main argument for holding states responsible for crimes, punishment beyond reparations is a discussed concept. The motive for punishment, just like in municipal criminal law, is deterrence. However, while reparations are straightforward to implement, it is often difficult to determine how a state could be punished beyond that. Economic, political or socio-cultural sanctions are an option, like for ongoing criminal acts, and tougher measures as per the UN charter. Punitive damages, a concept accepted in corporate law, would be another possibility[53]. However, punishing a state has limitations, as at the same time reintegration into the international community, just like in municipal law, should be the main objective[54].

[53] In the *Rainbow Warrior* Case New Zealand was awarded damages of an amount that could certainly indicate a punitive intent by the court (Jørgensen 2003)

[54] Like in the case of Germany, where the Morgenthau plan, with strong elements of collective punishment, was rejected and efforts made to reintegrate the country while still requiring the payment of certain reparations

The codification and practice of holding states responsible

The need for a positive law of the responsibility of states was recognised by the international community, and the International Law Commission was requested to draft articles codifying legal thinking and international custom. In its Fifty-third session the Commission finalised draft articles[55] and presented them with comments to the UN General Assembly. The Assembly officially took note of the Articles and they were annexed to a resolution recognising the contents[56]. Pending further debate, the Articles have thus reached a certain acceptance[57] and will surely be the underlying basis for future institutions dealing with state responsibility.

The Articles address the issues identified earlier, in particular the attribution of conduct of agents of the state[58], the question of *ultra vires* actions[59] and the violation of peremptory norms[60]. They provide for the legal consequences of wrongful acts in the form of cessation and reparations[61], and specify forms of reparation. The Articles then go on to define the objects and limits of countermeasures, where they specifically require proportionality[62]. A further key element is the explicit statement that the "*articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a state*"[63] which is vital for the integration of such proceedings into other measures under international law.

The concept of crimes of state has been the contentious point in drafting the Articles[64]. Initially codified to a certain extent in Article 19 in a previous draft, they were completely removed from the text. In the current form, Chapter III defines *"Serious breaches of obligations under peremptory norms of general international law"*, with Article 40 defining such breach as serious, when it *"involves a gross or systematic failure by the responsible state to fulfil the obligation"*. As much watered down as this seems to be, it is still a codification of the responsibility of states for crimes under international law[65]. The commentary to Article 40 includes examples of the *jus cogens* violations referred to, namely slavery, genocide, racial discrimination, apartheid, torture and the suppression of the right to self-determination.

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[55] (Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001)
[56] A/RES/56/83 of 28th January 2002
[57] As demonstrated by the interest in the academic literature, for example a whole issue of the European Journal of International Law (Vol. 13, No. 5) has been devoted to the subject.
[58] Part One, Chapter II
[59] Article 7, *"Excess of authority or contravention of instructions"*
[60] Part Two, Chapter III, Articles 40 and 41
[61] Part Two, Chapter II
[62] Part Three, Chapter II, Article 51
[63] Part Three, Chapter II, Article 57
[64] (Jørgensen 2003)
[65] (Wyler 2002)

These articles provide much needed codification for dealing with international crimes of states. As argued before, there is a limit to how individual officials of existing states can be held responsible while at the same time maintaining reasonable relations and stability. However, the establishment of the crime committed by these individuals is vital to invoke the responsibility of their government[66]. The legal relationship between the crimes and the state is therefore the essential hinge of state responsibility. This will be the challenge in the Congo, where the establishment of the relationship between the rebel groups and the governments of Rwanda and Uganda is central to the case against them.

Previous case law shows how this can be dealt with, namely the *Tadic* case before the Yugoslavia Tribunal, and the *Nicaragua* case before the ICJ[67]. In *Tadic*, the prosecution had to establish a link between the actions of the Bosnian-Serb authorities and the Federal Republic of Yugoslavia. Only if the Bosnian-Serb Army could be seen as acting for the state of Yugoslavia an international conflict could be assumed. This, in turn, was required for the prosecution to invoke the provisions of the Geneva Conventions concerned with grave breaches – they are only applicable in international armed conflict. Therefore, although the responsibility of the state of Yugoslavia was not in question in this case, it had to be imputed to make the case admissible.

The Yugoslavia Tribunal, at Appeal level, referred to *Nicaragua*, a case concerning the support for rebels in the country by the United States. In *Nicaragua*, the court had to decide whether the acts of the *Contras* were attributable to the US. The court found against it, in accordance with Article 4 of the ILC Articles, which defines what an organ of a state is – a test the *Contras*' organisational link to the US failed to fulfil in the Court's opinion.
The Appeals Chamber at the Yugoslavia Tribunal, however, tested the case under the content of Article 8 of the ILC Articles, which defines *"Conduct directed or controlled by a State"*. The Article sees attribution of the acts of a person or group of persons as an act of a state *"if the person or group…is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct"*. The Appeal Chamber went further and stated that groups should be judged differently; action *ultra vires* by a person may not be as attributable as by a group, because *"if [the group] is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State"*[68].
This sets important precedent for the Congo. The actions of the various groups must be attributed to the states that direct them to invoke their responsibility, the essential test for extending criminal justice from individual to state level[69].

[66] Which raises a separate issue that will not be explored here but should be mentioned. There is general agreement that the attribution of the crime of a state official to the state entails the state's obligation to prosecute this individual. (Nollkaemper 2003) see also note 52
[67] (De Hoogh 2001)
[68] ibid.
[69] (Nollkaemper 2003)

Actual cases dealing with state's criminal responsibility are few, mostly for structural reasons. Yet it is this judicial practice that is needed to elevate the concept of state responsibility to the status of customary law. The main hindrance appears to be structural. As such there is no judicial body that can hear a case of the "international community" against a state for criminal conduct, the existing bodies are shaped to provide equitable dispute settlement between states[70]. The International Court of Justice, however, like in *Nicaragua* and *Rainbow Warrior*, hears cases concerning crimes committed by states, brought by the injured country. Currently this makes it the only international judicial body available to hold states responsible for crimes. It has been proposed to include a section for criminal cases against states into the ICJ structure, to address its institutional lack of investigative capacity. Equally, the International Criminal Court, which has such capacity, could be mandated to adjudicate cases against states[71]. Politically the latter surely is the least feasible, as the jurisdiction of the court was highly contentious even without including state responsibility. But structurally it makes better sense as the ICJ is too much based on state consent for its decisions to be of serious benefit for criminal proceedings against states. This is certainly very evident in the cases regarding the Congo.

[70] (Thirlway 2003)
[71] (Jørgensen 2003)

The ICJ cases against Rwanda and Uganda[72]

In 1999 the DRC brought three cases concerning armed activities on Congo territory before the ICJ, against Burundi, Rwanda and Uganda. It withdrew the cases against Burundi and Rwanda in 2001, but resubmitted a case against the latter in 2002. The preliminary proceedings are highly revealing of the shortfalls the ICJ structure has when dealing with the responsibility of states for crimes. Its jurisdiction is based on consent, which is likely to be opposed by a state that is supposed to be held responsible for alleged criminal acts.
The court can only adjudicate cases between state parties that have accepted its jurisdiction, either on a case by case basis or "*as compulsory* ipso facto *and without special agreement, in relation to any other State accepting the same obligation"*[73]*,* with or without conditions of reciprocity, or for a certain time. The DRC, then Zaïre, accepted the ICJ jurisdiction without conditions in 1989, while Uganda did so at independence in 1969, with the condition of reciprocity[74]. Any case covered by Article 36 of the court statute can therefore be brought by either country against the other. Rwanda, on the other hand, although a state party to the Court's statute through Article 93 of the UN Charter, has never accepted its compulsory jurisdiction[75]. Consequently, while the case against Uganda was procedurally straightforward, the case against Rwanda had to prove to the court that jurisdiction exists. Rwanda denied this.

Adding complexity, Congo requested for the indication of provisional measures against both Respondents, a procedure provided for in the Courts statutes. It can be invoked when a situation requires urgent action, but must not preclude a decision of the court over the merits of the case.
In the case against Uganda, the Court ordered immediate compliance with obligations under international law, *"pending a decision in the proceedings"*. There was no question of the jurisdiction of the court.

In the case against Rwanda, the jurisdiction question formed the basis of the Court's decision over provisional measures. To prove jurisdiction, Congo invoked several treaties[76], including the genocide convention, which as a dispute settlement element in its Article IX provides for recourse to the ICJ. As Rwanda had filed reservations to Article IX, the court denied jurisdiction under the convention. Congo then pointed out the general violation of *erga omnes* obligations by Rwanda, which the Court also rejected. It stated that there is a difference between *"the* erga omnes *character of a norm and the rule of consent to jurisdiction"*.

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[72] the facts and statements quoted in this section are taken from the proceedings of the cases: (Armed Activities on the Territory of the Congo (Congo v Uganda, Application), 1999; Armed Activities on the Territory of the Congo (Congo v Rwanda, Re-Application), 2002)
[73] (Thirlway 2003)
[74] A list of the commitments by the state parties is available from the ICJ at http://212.153.43.18/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm
[75] ibid.
[76] Although the court has no jurisdiction over a state under its statute, it can still be dispute settlement body if so defined in a treaty this state has signed. An example is the United States, which withdrew recognition of the court after the *Nicaragua Case* in 1986, but in 1996 had to accept its jurisdiction in the *Iran Oil Platform Case*, where it was bound by a treaty stipulating the role of the court in disputes.

Thus finding no treaty or general obligation that would bind Rwanda to accept a decision of the Court over the request, the judges decided that the Court did not have the necessary *prima facie* jurisdiction[77].

It seems that the ICJ is a precarious forum for adjudicating crimes of states. Too much need for consent is built into the mechanism, and the widespread reservations against the court severely limit its usefulness. It can therefore be seen as having more of an advisory role, with its opinion carrying a certain weight in the international community. This is exemplified in the Court's statement on its jurisdiction in the Rwanda case:
"Whereas, whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law…whereas the Court wishes to stress the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently".
Arguably, this is neither a legally binding statement nor a very publicly acknowledged comment. However, the practice of the court to refer not only to past decisions, but also to advisory opinions and other opinions in past cases[78], gives such statements certain weight. The Congo cases may not have a clear legal outcome, but in the absence of more than declaratory UN pressure on its neighbours[79] they are currently the only viable option for Congo to keep the issue of reparations on the international agenda. As the merits of the cases will only be heard later, there is yet no indication how the details, and in particular the issue of proxies, will be dealt with.

[77] They however denied the further request by Rwanda to remove the case from the Court's list as the request for provisional measures under the Court's statutes cannot preclude any decision on jurisdiction over the merits of the case. Both cases will therefore be heard on their merits before the court.
[78] This can be observed in numerous ICJ cases
[79] The resolutions are carefully worded and differ quite remarkably from the UN's own report (see note 11) which is very explicit (http://www.un.org/documents/scres.htm)

Beyond the ICJ cases

Although an ICJ decision or declaration may carry some weight, it seems not capable of fully addressing the need for holding states responsible for crimes under international law. It certainly has a role to play in the development of international law[80], and the fact that it allows cases that involve the responsibility of states for criminal acts, gives this notion further weight. And it can still be complemented and supported by other measures.
As mentioned previously, Security Council Resolutions are a means to deal with crimes committed by states. Although non-judicial, they may be a basis of judicial proceedings, and indeed, the ICJ refers to the relevant resolutions in its Orders on the provisional measures against Rwanda and Uganda. In addition, the resolutions provided for certain international presence in the Congo such as MONUC[81], the UN Monitoring Force deployed in Congo in 2000, it's later expansion, and, recently the adaptation of its mandate in Ituri district[82]. This is a *de facto* recognition of the alleged "Crimes against Humanity" committed there, which may support later trials, and puts more impartial observers on the ground. The resolutions also established the Panel of Experts investigating the illegal exploitation of natural resources, which clearly implicated Rwanda and Uganda and provided vital evidence for court action.[83] UN Resolutions therefore can be of a certain judicial value for proceedings.

As far as compensation for damages and reparations are concerned, Congo could resort to domestic court cases against the companies involved in the exploitation of resources. Although, strictly speaking, this would not hold the states of Rwanda and Uganda responsible, it would still contribute to establishing the case about their involvement, and, in the case of state-owned enterprises surely will affect them as legal entities[84]. The responsibility of companies for crimes has precedent in the cases against IG Farben before the Military Tribunal in Nuremberg. Equally, the gangs that were involved with these enterprises could be targeted with the principle of "criminal organisations". Although the Nuremberg cases there were against individuals, the notion of civil liability for corporate crime has been established and is a part of civil and common law jurisdictions in most countries. Such cases could generate some form of compensation.

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[80] (Shaw 1997)
[81] Mission d'Organisation des Nations Unies en RD Congo, UN Security Council Resolution 1291 of 24th February 2000
[82] MONUC under its strength and mandate was unable to deal with the violence in Bunia in 2003 and was temporarily supported by a European Force with an enforcement mandate (Security Council Resolution 1484). Subsequently, the MONUC mandate was expanded to include protection of civilians in Ituri district in Resolution 1493 of 28th July, 2003
[83] It is assumed that the report will be used as supporting evidence in the ICJ hearings on the merits of the cases against Rwanda and Uganda
[84] The report of the UN Panel of Experts states that Rwandan Army battalions were seen to be involved in quasi-commercial enterprises, and evidence points to control of the mining *comptoirs* in Congo lies with the Rwandan government. The case is less clear-cut in Uganda, where powerful individuals, often in government employ, own the companies operating in Congo. Criminal cases against the companies will, however, be able to exploit these government links and may contribute to establishing responsibility of the states.

IV Conclusion

The need for state responsibility, not only in the Congo

The war in the Congo seems to be the perfect paradigm for present-day justice after human rights atrocities. With its different layers of crimes and perpetrators, it is a very demanding test for the international mechanisms developed since the Second World War.

I have in this text analysed the present situation by applying three criteria. First, I have looked at who committed the human rights atrocities and have found that state actors are as much involved as individuals, groups and organisations. I have then examined models for justice and reconciliation that could deal with these violations and made the observation that they seem insufficient to cover all facets of accountability in this conflict. There appears to be a gap in dealing with the responsibility of the neighbouring states. Perceiving this as an essential deficiency, I have submitted that it is crucial for a sustainable peace in the region to address these wider responsibilities. The argument pointed to a need for a legal regime that can hold states as entities responsible for criminal acts, and I have presented the current state of play in this field of international law. By looking at the attempt of the Congo to hold Rwanda and Uganda responsible for their conduct in cases before the ICJ, I concluded that this form of international justice has its merits, but requires more development.
This as such is conclusive and needs no further interpretation. The system for international justice is at present still weak and lacks the support of major global players. It is a political reality that is unlikely to change soon, and the community of states will have to work with what is available.

Making the system work

However, how we work with the existing structures will make a significant difference. I can envisage two ways to make better use of the existing portfolio for international justice.

Firstly, state and judicial practice in the present institutions can *make* law as well as any positive codification. If more states pursue their options through the ICJ, more cases will set precedent for the responsibility of states for crimes under international law. Equally, cases like *Tadic* in other courts can indirectly contribute to this process. The Nuremberg trials are a case in point for such custom being an even stronger base than a positive law that is not applied.

Secondly, the example of the Congo conflict clearly shows that the tools for justice must be applied in combination, and the more flexible this is done the better it will serve the victims. It is *opinio juris* that individual criminal responsibility and responsibility of states for crimes should not be mutually exclusive[85]. The investigation by the ICC currently underway in the Congo, Rwanda and Uganda therefore could provide vital evidence for the case against Rwanda and Uganda before the ICJ. In this way two separate adjudicating bodies can complement each other. At the same time a truth commission, as flawed as it may appear at the present time, could benefit from the attribution of general responsibilities to the neighbouring states – if that is the outcome of the case - by the ICJ and may be less reluctant to speak up against criminal state practice as a consequence.

Such combination of forces increases the chance to provide some form of justice to the region, and they may be better for reconciliation than a few high profile cases against individual perpetrators. Certainly, the Congo shows that there is a need for an internationally accepted code for the "Responsibility of states for "internationally wrongful acts" as the ILC has named it. I find this a very satisfactory version of international justice that would nicely complement the trials of individuals in the ICC.

The International Community has mostly decided not to think too much about this War. Remarkably so, as in terms of inhumanity it certainly is one of a kind. Millions were killed, drugged children committed a large share of the atrocities, and rape, mutilation and cannibalism were widely reported. Such carnage certainly reminds the observer of Mr. Kurtz's evil fiefdom.

The legacy of guilt from not preventing the Rwanda genocide determines the attitude towards a major perpetrator of the bloodshed, and arguably stands in the way of justice[86]. If there is ever going be "Justice in the 'Heart of Darkness'" attitudes will have to change. The tools exist, but must urgently be supported by political will.

[85] As clearly recognized by the ILC Articles (see note 63)

[86] This has been stated in no uncertain terms in a recent report by the *International Human Rights Law Group*, titled "Ending Congo's Nightmare" (from: www.hrlawgroup.org)

V References

1. Armed Activities on the Territory of the Congo (Congo v Rwanda, Re-Application) (2002). International Court of Justice.

2. Armed Activities on the Territory of the Congo (Congo v Uganda, Application) (1999). International Court of Justice.

3. Clark, J. F. (2001). "Explaining Ugandan Intervention in Congo: Evidence and Interpretations." Journal of Modern African Studies **39**(2): 261-287.

4. De Hoogh, A. J. J. (2001). "Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia." British Yearbook of International Law **72**: 255-92.

5. "Democratic Republic of the Congo: Confronting Impunity" *Report by* ***Human Rights Watch,*** Washington, D.C., January 2004

6. Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001). International Law Commission.

7. "Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo" *Report by* ***United Nations Security Council,*** New York, 16 October 2002

8. Friman, H. (2001). "The Democratic Republic of Congo - Justice in the Aftermath of Peace ?" African Security Review **10**(3).

9. Hayner, P. B. (2002). Unspeakable Truths. New York, Routledge.

10. "Ituri: "Covered in Blood" Ethnically Targeted Violence In Northeastern DR Congo" *Report by* ***Human Rights Watch,*** Washington, D.C., July 2003

11. Jackson, S. (2001). ""Nos Richesses sont Pillees !" Economies de Guerre et Rumeurs de Crime au Kivu." Politique Africaine **84**(Decembre 2001): 117-135.

12. Jackson, S. (2002). "Making a Killing: Criminality & Coping in the Kivu War Economy." Review of African Political Economy **93/94**: 517-536.

13. Jørgensen, N. H. B. (2003). The Responsibility of States for International Crimes. Oxford, Oxford University Press.

14. Nollkaemper, A. (2003). "Concurrence between Individual Responsibility and State Responsibility in International Law." International and Comparative Law Quarterly **52**(3): 615-640.

15. "The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri, DRC" International Criminal Court, The Hague 26th September 2003

16. Samset, I. (2002). "Conflict of Interests or Interests in Conflict? Diamonds & War in the DRC." Review of African Political Economy **93/94**: 463-480.

17. Savage, T. (2003). The Democratic Republic of the Congo: Inchoate Transition, Interlocking Conflicts. Through Fire with Water: The Roots of Division and the Potential for Reconciliation in Africa. E. Doxtader and C. Villa-Vicencio. Cape Town, David Philip Publishers.

18. Shaw, M. N. (1997). "The International Court of Justice: A practical Perspective." International and Comparative Law Quarterly **46**: 831.

19. Taylor, T. (1993). The Anatomy of the Nuremberg Trials. London, Bloomsbury.

20. Thirlway, H. (2003). The International Court of Justice. International Law. M. D. Evans. Oxford, Oxford University Press.

21. "War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny" *Report by* ***Human Rights Watch,*** Washington, D.C., August 2002

22. Wrong, M. (2001). In the Footsteps of Mr. Kurtz. London, Fourth Estate.

23. Wyler, E. (2002). "From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under peremptory Norms of General International Law'." European Journal of International Law **13**(5): 1147-1160.