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An analysis of the implication of the ICC mandate on the consolidation of democracy in the DRC

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Introduction

The DRC political history has been that of periods of dictatorship, violence, and conflict. But the DRC political history is also that of a Congolese unfading quest for freedom, liberty and democracy. Not long ago the country was again in the spotlight of international media and drew the attention of the international community as a whole following the nature, intensity, and atrocity of the conflict which erupted in 1998 and claimed more than 3 millions of civilian lives in a very short period of time. Some pockets of Congolese resorted to the use of force in this latest episode to compel the resilient president Laurent Kabila to implement democracy. In this context, the successful holding of the 2006 elections provided by the conclusions of the Inter-Congolese Dialogue (ICD), was highly regarded as the turning point rewarding the Congolese people's resilience in their quest for democracy.

The International Criminal Court (ICC) created to end impunity for individuals accused of committing crimes of concern to the international community, indicted Jean-Pierre Bemba, Senator and leader of the opposition to president Joseph Kabila, of command responsibility for crimes allegedly committed by his troops in the Central African Republic (CAR). The ICC also indicted Bosco Ntaganda, a leader of the *Congrès National pour le Development du Peuple* (CNDP) who was instrumental in ending violence in the eastern Democratic Republic of Congo (DRC), for enlisting children and sending them to combat.

This research report focuses on the implications of the exercise of the ICC mandate on the consolidation of democracy in the DRC. It attempts to answer the following question: What impact does the ICC processes bear on the consolidation of democracy in the DRC? The focus here is to examine whether the ICC processes are rebounding to obstruct and unravel political processes under way in the DRC. The thesis proposes to examine the effects of the ICC on the consolidation of democracy in the DRC through the examination of the impact of the court's processes on the viability of the political opposition in the DRC.

Rationale

The ICC elicited a number of publications from its inception to date as scholars begun to gain understanding of the new mechanism of international criminal justice. However, the core of these publications on the Court mainly concentrated on its functionality, on its impact on the peace process, and on the dialectic of retributive vs. restorative justice, the question of whether justice should be served at all cost or whether it should be sacrificed in the interest of peace. Little attention was given to the impact of the ICC mandate on early political processes after a peace deal was signed. This study hopes to add to a body of research that endeavors to fill the scholarship gap in this regard by focusing on a case study where a peace deal was signed, democratic process and consolidation are enacted, and the ICC has exercised its mandate.

Though in 2006 the DRC held its first "democratic elections", nearly half a century of its existence, democracy is still in its early stage of development in the country. The fact that the DRC's early democratic attempts unraveled and slipped into one of the most vicious authoritarian regime on the continent leads us to approach the ongoing process with caution. Our cautious approach even finds justification as in the fact that in Africa, even when countries have engaged in a democratization process, it has been very hard to achieve long-lasting and sustainable results, as there are cases where newly elected regimes show signs of slipping back into authoritarian practice.[1] It is therefore interesting to find out what beneficial role the ICC plays and what influence does it bear on the DRC's democratic process in light of its activities in that country. Moreover, this case study is based on recent events, and therefore will allow for valuable insight into the role the ICC plays in Africa especially during this period of democratization processes and consolidation.

[1] Hyslop, J.: *African Democracy in the era of Globalization*, Witwatersrand University Press, 1999, p.4

Aim of the study

This study will attempt to examine the impact that the exercise of the ICC mandate bears on the consolidation of democracy in the DRC. The Democratic Republic of Congo has emerged from two devastating wars through a series of agreements signed between belligerents (rebel movements, Rwanda, Burundi, Uganda, and the DRC government). These agreements served two purposes: Firstly, they aimed at creating conditions conducive to peace between the DRC and its neighboring countries involved in the conflict, and secondly, at enabling national reconciliation and the establishment of the new political dispensation in the country. The agreements reached at the conclusion of the Inter Congolese Dialogue (ICD) succeeded in establishing favorable conditions for peace, as well as at creating a de facto balance of power in Congolese politics, which continued in the aftermath of the 2006 general elections in the form of the balance of power between government and opposition. It is no secret that the opposition plays a crucial role in furthering democratization in a country. It shapes policy agendas, conducts civic education, fights corruption, and provides the electorate with electoral alternatives.[2]

The impact of the ICC mandate on the ongoing consolidation of democracy in the DRC will be assessed by exploring the opposition politics in the DRC in order to find out whether the ICC indictments of opposition leaders in the country has had an adverse effect on the effectiveness and efficiency of the opposition and therefore has impacted negatively on the integrity of the consolidation of democracy in the DRC. In this perspective the study will examine:

- Whether the ICC does not observe stipulations of peace agreements which often create the climate of a de facto balance of power;
- Whether the ICC is used as a tool of government against the opposition when preference is given to self-referral mechanism above all other referral mechanisms at the court's disposal;

[2] Kiiza, J., The role of opposition parties in democracy, paper presented at the Regional conference on political parties and democratization in East-Africa, 25-27/08/2005, p.1 available at http://kasyp.net/fileadmin/kasyp_files/Documents/reused/PP_the-role-of-opposition-parties-in-a-democracy_1_.pdf

• Whether the ICC display signs of bias in its selection of cases as it is accused of avoiding investigating any case where the incumbent government is strongly linked to atrocities under the court's jurisdiction.

Methodology

Research methods and Data collection

This study will make use of qualitative case study research method. A case study is an empirical inquiry that investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used.[3] Case study research exclusively focuses on a particular case or on several cases (in a multiple case study) and uses hosts of evidence regarding that case. Evidence might include existing documents, observations, and interviews…

The research method best fit this project for it allows for focus on one case where hypothesis can be assessed and inference be made. In effect, the present research project is devoted to the analysis of the implications of the exercise of the ICC mandate on the consolidation of democracy in the DRC. A democratic regime is considered to be consolidated, when it is likely to endure, when it is predicted to last well into the future.[4]

The DRC recovered from the plight of war through negotiated settlements which also reengineered its political landscape. The country transitioned from dictatorship to democracy, and is also the one where the ICC indicted opposition leaders for the commission of various offenses that fall under its jurisdiction.

The research proposes to assess the main hypothesis by examining the politics of opposition in the DRC before and after the indictments of opposition leaders in that

[3] Yin, R: *Case study Research: Design and Methods*. Beverly Hills, CA: Sage, 1984, p.23
[4] Guillermo, O. D: Illusions about Consolidation, *Journal of Democracy (*7) 2, April 1996, p.34-51

country. Democracy calls for institutional checks on power as the mere consciousness of institutional checks improves the behavior of government officials;[5] the opposition is one such democratic institution that provides institutional checks on power. To this end the study will make use of qualitative research method in social science. Research information will be drawn from a variety of primary as well as secondary sources. The primary sources are mainly the ICC Statute, the agreements between conflicting parties, such as the Luanda Accord (1999), the Lusaka Accord (2002), the Pretoria Accord (2002), and the agreements reached at the conclusion of the Inter-Congolese Dialogue (2002 and 2003). Also reports on governance from institutions such as the UN and the World Bank will be used. Secondary sources include books, articles, and academic journals found in the libraries of the University of the Witwatersrand and various online resources. These sources are supplemented by media reports from radio stations such as Radio Okapi, *Radio France Internationale* (RFI), the *British Broadcasting Corporation* (BBC), and allafrica.com.

Data analysis

This section is concerned with the actual manipulation of processed data to help find answers to the research question. To this end the research project will make use of process tracing method. Alexander George and Andrew Bennett define process tracing as the "method that attempts to identify the intervening causal process, the causal chain and causal mechanism between an independent variable (or variables) and the outcome of the dependent variable."[6] This method will help in uncovering the causal mechanisms that connect our dependent and independent variables.

Democracy here is measured by using the Economist intelligence Unit's index (EIU). "This index is a weighted average based on the answers of 60 questions, each one with either two or three permitted alternative answers."[7] The index is based on 60 indicators grouped in five different categories (electoral process and pluralism, civil

[5] Mayerfeld, J: *The democratic legacy of the International Criminal Court*, The Fletcher forum of world affairs, 28(2) Summer 2004, p. 155
[6] Alexander, G. and Bennett, A: *Case Studies and Theory Development in the Social Sciences*. Cambridge, MA and London, England: MIT Press, 2005, p. 206
[7] Kekic, L: The Economist Intelligence Unit's Index of democracy, the world in 2007, http://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf, p.2

liberties, functioning of government, political participation, and political culture). Each category has a rating on a 0 to 10 scale with 0 to 3.9 representing an authoritarian regime, 4 to 5.9 representing an hybrid regime, 6 to 7.9 a flawed democracy, and 8 to 10 a full democracy. "Countries are categorized in four categories in accordance with their scores: full democracies, flawed democracies, hybrid regimes, and authoritarian regimes."[8] The present work will focus more on the political rights side of the indicators with an emphasis on political opposition.

I hypothesize that the ICC process has negative implications on early political transformation. I suggest four causal mechanisms that might account for negative implications of the ICC process on early political transformation. These are: The ICC's disregard of peace process stipulations, the ICC's timing of prosecutions, the politicization of the ICC by an incumbent government, and the ICC's selection of cases.

I would expect the ICC process to have a negative impact on democracy if the process translates into the decline or deterioration of political participation in the country under observation. If the Court's process does not translate in the decline or deterioration of any of the EIU Index, the conclusion would be that the ICC has no negative impact on the consolidation of democracy in the DRC and at that point the reasons for the lack of consolidation of democracy have to be sought elsewhere. The causality would be measured by assessing democracy before and during the ICC processes in the country under observation.

Timeline

This research report covers data from the period starting from the year 2006 up to 2011. The year 2006 marks the beginning of the current democratic process set in motion by the holding of the first ever national democratic elections in DRC since independence, and also to the first transfer of suspects of crimes of concern to the international community to The Hague. The year 2011 corresponds with the holding of the second national democratic elections in the DRC. The thesis will also make

[8] Kekic, L: *Op Cit*, p.2

extensive use of the DRC's rich political history as a guide to understanding the cause of democracy project failure in the DRC.

Research structure

This study comprises four chapters. The first chapter covers the Liberal institutionalism theory as studied in International Relations. The objective here is to build a theoretical framework for the analysis of the impact of the ICC actions on political processes in the DRC. The second chapter provides a background history on the politics in the DRC. In this chapter, the focus is on the DRC's many attempts to achieve democracy in order to source possible reasons for the failure of democracy project in the country. The third chapter is dedicated to the International Criminal Court. This chapter deals with trigger mechanism, its position concerning the granting of amnesties, its strategies in selecting cases for prosecution, and ends by looking at the court's activities in the CAR as well as in the DRC. The fourth chapter looks at the implications of the ICC activities on the consolidation of democracy in the DRC.

Chapter I: Liberal Institutionalism theory

Introduction

This chapter intends to outline Liberal Institutionalism theory as studied in the discipline of International Relations (IR). A theory is some kind of "simplifying device that allows one to decide which facts matter and which do not."[9] It can be defined as "a set of generalized principles that have descriptive, explanatory, and predictive value."[10] In this perspective, IR theory is simply a way of systematizing, describing and understanding world politics.

Liberal Institutionalism has its roots in Liberalism theory. This theory builds around a set of assumptions on world politics. The first core assumption of Liberal theory is that the fundamental actors in world politics are members of domestic society, understood as individuals and privately constituted groups seeking to promote their independent interests.[11] In this perspective, the study of IR ultimately seeks to grasp the understanding of, and explain the relations of individuals and privately constituted groups living in different states. This perspective therefore, views states as representative of individuals and privately constituted groups from which they owe their existence. Second, Liberal theory assumes that "the state interacts with these actors (individuals, and privately constituted groups) in a complex process of both representation and regulation."[12] And thirdly, Liberal theory assumes that "the nature and intensity of state preferences, determined as the aggregation of the preferences of individual and group actors represented in a particular state, will determine the outcome of state interactions."[13] Thus, Liberal IR theory is of the view that the relationship between states and the surrounding domestic and transnational society in

[9] Baylis , J and Smith, S, *The Globalization of World Politics: An Introduction to International Relations,* New York: Oxford University Press, 1997,p.3**.**
[10] Bennett, A: *International Organizations: Principles and issues,* 6th edition, Upper Saddle River, NJ: Prentice Hall, 1995, p.15
[11] Slaughter, A. M.: *International Law in a world of Liberal states*, p.508 available online at http://www.ejil.org/pdfs/6/1/1310.pdf,
[12] *Ibid*, p. 508
[13] *Ibid*, p.508

which they are embedded critically shapes state behaviour by influencing the social purposes underlying its preferences." [14]

Liberal Institutionalism, a variant of Liberal theory and which is the focus of the present chapter, developed in the aftermath of the Second World War following the proliferation of international institutions in political, military and economic fields purposed at serving political, economic or security interests of their promoters. This period witnessed the emergence of institutions such as the United Nations (UN), the North Atlantic Treaty Organization (NATO), the Bretton Woods institutions (IMF, BIRD), the General Agreement on Tariff and Trade (GATT); each specializing in one or more of the above mentioned issue-areas. This variant of Liberalism thus emerged to account for the new phenomenon; how institutions emerge, how they are maintained and what is their impact on the functioning of the international system.

Discussions in this chapter will focus around Liberal Institutionalism theory, especially around its main assumption that institutions matter in world politics.

1.1 Liberal Institutionalism theory

Liberal institutionalists theorists work from the premise that "institutions play the main mediating role and act as the principal means to achieve and maintain cooperation between states."[15] They assert that cooperation is more extensive, in large part because of institutions' influence. Although there is no widely agreed upon definition around the concept institution, Liberal institutional theorists have attempted to provide operational definitions in order to dispel the vagueness that the mention of the concept evokes in common parlance, and even among people with vested interest in the study of IR. In this effort Douglass North defines institutions as "rules enforcement characteristics of rules, and norms of behavior that structure repeated human interactions."[16] March and Olsen on their side define institutions as "frozen

[14] Moravcsik, A: Taking Preferences Seriously: A Liberal Theory of International Politics, *International Organization*, 51(4), Autumn, 1997, p.1
[15] Axelrod, R; and Keohane, R. O: Achieving cooperation under anarchy: Strategies and Institutions, *World Politics*, 38(1), October 1985, pp226-254
[16] North, D. C.: *Institutions and Economic growth: An historical Introduction*. University of Minnesota, Minneapolis, 1987, p.6

decisions", or as "history encoded into rules."[17] Keohane defines institutions as "persistent set of rules that prescribe behavioural roles for actors, besides constraining activities and shaping expectations."[18] And Krasner defines them as "a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of International Relations."[19] All these definitions suggest the existence of a kind of script that prescribe behaviour and from which outcome can be anticipated.

Unlike Realists who perceive the anarchic nature of world politics as inhibiting cooperation, Liberal institutionalists view the possibility of cooperation taking place in world politics with the help of international institutions. These institutions, Liberal institutional theorists claim, help states to overcome the logic of competition imposed on them by the anarchic nature of world politics and thus allow cooperation to take place among self-interested actors. Cooperation has not to be confused with harmony which suggests "the situation where actors' policies pursued in their own self-interest without regards for others automatically facilitate the attainment of other's goals"[20] but Liberal Institutionalists assert that cooperation can only take place where the interests of actors are not in complete harmony, but "where these interests contain a mixture of conflicting and complementary interests."[21] Cooperation, therefore, requires that "the actions of separate individuals or organizations, which are not in pre-existent harmony, be brought into harmony with one another through a process of negotiation which Liberal institutionalists often referred to as policy coordination."[22]

To explain the usefulness of institutions in helping states achieve cooperation in an anarchic setting of international relations, Liberal Institutionalists use game theories such as Prisoners' Dilemma. This theory is a game in strategic form between two

[17] March, J. and Olson, J.: The new Institutionalism: Organizational Factors in Political Life, *American Political Science review*, 79, 1984, p.741
[18] Keohane, R. O.: International Institutions: Two approaches, *International Studies Quarterly*, 32(4), December 1988, p 386
[19] Krasner, S. D.: Structural cause and regime consequences: Regimes as intervening variables, *http://instituty.fsv.cuni.cz/~plech/Krasner%20Regimes.pdf,* , p.186
[20] Keohane, R.O.: *After hegemony cooperation and discord in the world political economy*, Princeton University Press, New Jersey, 1984, p.51
[21] Axelrod, R. and Keohane, R. O.: "Achieving Cooperation under anarchy: Strategies and Institutions", *Neorealism and Neoliberalism: The contemporary debate*, ed, Baldwin, D. A., Columbia University Press, New York, Chichester, West Sussex, 1993, p.85
[22] Kehoane, R. O.: *Op. Cit.,* 1984, p.51

players where each player has two strategies, called "cooperate" and "defect". In a single play of the game, Liberal institutionalists argue, the best choice of each actor is to defect no matter what option the other actor takes. Given the actors' propensity to serve their own selfish interests, mutual defection is as the obvious outcome of the game.[23] Liberal institutionalists contend that both players would do better if they preferred mutual cooperation to mutual defection. But given that mutual defection continues to be the natural outcome of the game, and the fact that this dilemma cannot be solved through an agreement between actors not to defect since they are not given the chance to discuss their options, international institutions are seen as key instruments that these players can use to overcome this dilemma and achieve mutually benefiacial results.

Institutions, therefore Liberal institutionalists argue, arise because "actors forgo independent decision making in order to deal with the dilemma of common interests and common aversions."[24] In effect, there is no lack of incentives in the anarchic setting of international relations to compel actors to accept the behavioural constraints associated with institutional arrangements. Example of these can be found from theoretical studies of collective action problems, difficulties associated with the use of common properties, security dilemmas, as well as from empirical studies of protectionist measures, trade, wars, arms races, amongst other.

Liberal institutionalists argue that institutions "facilitate cooperation by providing states with information or by reducing their information costs."[25] Martin and Keohane argue that "institutions provide information, reduce transaction costs, make commitments more credible, establish focal points for coordination, and in general facilitate the operation of reciprocity."[26]

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[23] Hasenclever, A; Mayer, P; and Rittberger, V: Interests, Power, Knowledge: The study of international Regimes, *Mershon International Studies Review,* 40 (2), 1996, p.185
[24] Stein, A: Coordination and collaboration: Regimes in an anarchic world, *Neorealism and Neoliberalism: The contemporary debate*, ed, Baldwin, D. A., Columbia University Press, New York, Chichester, West Sussex, 1993, p.41
[25] Keohane, R. O.: *Op. Cit,* 1984, p.97
[26] Keohane, R. O. and Martin, L. L.: The promise of institutionalism theory, *International Security*, 20 (1), 1995, p. 42

Liberal institutionalists believe that making information about others' compliance readily available helps states overcome the uncertainty about their partners' objectives and commitments, and thus reduces the fear of being cheated as the probability of being caught becomes more likely with the availability of information. Institutionalists argue that "global politics is increasingly organized around institutions that foster cooperation by providing information and organizational structure, promoting norms and common belief systems, and reducing transaction costs."[27] Keohane elaborates more on this institutionalist claim and suggests three ways through which international institutions are credited with the ability to increase the likelihood of cooperation among states. The first, he argues, is by providing information about the behaviour of others through the monitoring of members' behaviour and reporting on their compliance. The second is by institutionalizing cooperation. He argues that the setting up of permanent structures reduces the cost of setting them up on an ad hoc basis and thus reduces the cost of future agreements. The reduction of costs of reaching an agreement increases the likelihood of future cooperation. The third way through which institutions can help states achieve cooperation is by generating the expectation of cooperation among members. This is achieved through the provision of standards of behaviours against which perfomrmance can be measured. In doing so, "institutions increase the importance of reputation and raised the cost associated with nonconmpliance."[28] International institutions therefore promote cooperation between states by reducing the lack of trust and fear, which are two of the biggest problems associated with the absence of a commitment enforcer authority at the international level.

Stressing on reputation, one could infer that states comply with their international commitments, even with those that have become inconvenient to them in a world devoid of a centralized, commitment enforcer authority, because they are more concerned with their reputation. States obsession to safeguard their reputation by keeping their international commitments sometimes places them in front of a dilemma and often gives rise to what Tom Ginsburg terms "clash of commitments"[29] as realpolitik considerations some times compel states to explore other possible venues

[27] Ruggie, J. G.: The False Promise of Realism," *International Security*, 20 (1), 1995, pp. 62-70
[28] Hanseclever, A; Mayer, P; and Rittberger, V: *Op. Cit,* p.186
[29] Ginsburg, T: The clash of commitment at the International Criminal Court, Public Law and legal theory working paper, no 251 available at http://www.law.uchicago.edu/files/files/pl251.pdf

to find lasting solutions to their issues, be it internationally or domestically related to the area of cooperation.

1.2 The Realist challenge

The assumption that international institution play a significant role in the anarchic setting of international relations in helping states achieve cooperation, positions Liberal Institutionalism on a direct collision course with realists theorists. Realism, undoubtedly the most prominent school of thought in IR since its inception, builds around a set of assumptions on world politics. Firstly, Realists assume that the international system is anarchic.[30] Anarchy in realists' view far from meaning disorder or chaos, invokes an "ordering principle which asserts that the system comprises independent political units with no central rules enforcing authority above them."[31] Secondly, they assume that "states inherently possess some offensive military capability, which gives them the wherewithal to hurt and possibly to destroy each other."[32] Thirdly, realists assume that "states are unitary political actors that rationally pursue distinctive goals within an anarchic setting."[33] Fourthly, Realists assume that "states' preferences are fixed and uniformly conflictual."[34] And fifthly, they stress that "states can never be certain about the intentions of other states."[35] Specifically, "no state can never be certain that another state will not use its offensive military capability against the first."[36]

The main point of contention between Realists and Liberal institutionalists on international institutions is not whether or not they can play a role in world politics however small it might appear to be, but rather about whether institutions markedly affect the prospects for international cooperation. Do institutions have an independent impact, a life of their own, in world politics or are they just instruments of statecraft?

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[30] Axelrod, R; and Keohane, R. O: Achieving cooperation under anarchy: Strategies and Institutions, *World Politics*, 38(1), October 1985, pp226-254
[31] Donnelly, J: *Realism and International Relations,* University Press, Cambridge, 2000, p. 10
[32] *Ibid*, p.7
[33] Legro, J.W.; and Moravcsik, A: Is anybody still a Realist? *International Security*, Vol. 24(2), Fall 1999, p. 12
[34] Powell, R: Anarchy in International Relations Theory: The neorealist debate, *International Organization*, 48 (2), Spring 1994, pp. 313-344
[35] Donelly, J: *Op Cit*, p7
[36] Mearsheimer, J: False promise of international institutions, *International Security*, 19 (3), Winter 1994-1995, p.10

From the onset, Realists are pessimistic about the prospects for international cooperation taking place in the anarchic setting of international relations and thus the capabilities of international institutions to foster such cooperation. Realist theorists refute the tenet of Liberal institutionalists and argue that international institutions are unable to mitigate anarchy's constraining effects on interstate cooperation.[37] They hold that international anarchy is the principal force shaping the motives and actions of states.[38] In the anarchical environment characteristic of world politics, they argue, states are only preoccupied with power and security and thus more predisposed toward conflict and competition and often fail to cooperate even in the face of common interests.[39] Institutions, realists argue, are basically a reflection of the distribution of power in the world, and that their emergence is based on the self-interested calculations of the great powers, but they have no independent effect on state behaviour.[40] Charles Glaser echoes this argument saying that institutions are the product of the same factors: states' interests and the constraints imposed by the system that influences whether states should cooperate.[41] In this order, international institutions are viewed as instruments or tools that states design to serve their egotistic interests, and thus have no life of their own and have no influence in affecting states' patterns of behaviour. Realists' stress that states will establish institutions if and only if they seek the goals that the institution will help them reach.[42]

Instead of giving credit to institutions in their role of mitigating the constraining effects of anarchy on cooperation, realist theorists recognize power as playing the central role in shaping the calculation and preference of states. They stress that it is only based on their position of power and by forming balances of power that states maintain peace and security. The balance of power, they argue, is the independent variable while institutions are merely an intervening variable with limited capacity to

[37] Grieco, J. M.: Anarchy and the limits of cooperation: A Realist critique of the newest Liberal Institutionalism*, International Organization, 42(3),* 1988, p.116
[38] Keohane, R. O.: Anarchy in International Relations: *International Organization*, 48(2), Spring 1994, p.330
[39] *Ibid*, p.330
[40] Mearsheimer, J.J: O*p. Cit*, p.7
[41] Glaser, C. L.: Realists as optimists: Cooperation as self help*, International Security*, 19 (3), Winter 1994-1995, p. 85
[42] Jervis, R: Realism, Neoliberalism, and Cooperation, understanding the debate, *International Security*, 24 (1), p.54

promote cooperation, peace and security.[43] Realists believe that rules, which institutions set, are only effective inside the walls of these institutions and that they only last as long as other systems support them.[44] Institutions as catalysts of international cooperation and peace, as claimed by Liberal institutionalists, thus takes a back seat in realist assessments.

However, realists do not claim that cooperation among states is impossible, rather, the point they emphasize is that international cooperation is difficult to achieve and sustain.[45] They also focus on a serious problem which they believe inhibits cooperation: the problem of relative gains.[46] Relative gains problems encourage the retention of a zero-sum culture in international relations where states might forego perceived gains if other states make greater gains. This, realists argue, discourages cooperation. They argue that the general insecurity of international anarchy leads states to worry not simply about how well they fare themselves but how well they are compare to other states.[47] It is this security anxiety, they argue, that inhibits cooperation. In the event that international institutions affect the prospects for cooperation, realists argue that they do so only marginally and hold little promise for promoting peace.[48] Realists, therefore, downplay the role of international institutions. They argue that international institutions are epiphenomenal.[49]

1.3. The neoliberal response

A variant of Liberal Institutionalism labelled Neo-Liberal Institutionalism, which accepts some of the core realist premises, offers to address all concerns raised by realists in their contention of Liberal institutionalists' assessment of international relations and the capabilities of institutions to facilitate cooperation taking place

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[43] Mearshemeir, J.J.: *Op.Cit*, p.7
[44] Carr, E. H.: *International Relations Between the Two World Wars, 1919-1939*, Basingstoke, Hampshire UK: Palgrave Macmillan, 1990, p.153
[45] Nuuruzaman, M: Liberal Institutionalism and Cooperation in the World post 9/11, p.3, *available at http://www.cpsa-acsp.ca/papers-2006/Nuruzzaman.pdf*
[46] Grieco, J. M.: O*p. Cit*., p.118
[47] Snidal, D: Relative gain and the pattern of international cooperation, *Neorealism and Neoliberalism: the contemporary debate*, ed, Baldwin, D. A., Columbia University Press, New York, Chichester, West Sussex, 1993, p. 172
[48] Mearshemeir, J.J.: *Op .Cit*, p.13
[49] Stein, A. A: Neoliberal Institutionalism, in Reus, S and Snidal, D, (eds), *the Oxford handbook of international relations*, Oxford University Press, New York, 2006, p. 206

among sovereigns. They begin by accepting several key Realists' assessment of international relations with regard to their emphasis on the key actor of the international system, and on their emphasis on anarchy to explain states' behaviour. Neoliberal Institutionalism assumes that (I) the global system is anarchical in nature, (II) that states are the primary actors in international relations although international non-states institutions do play a significant role, (III) that states are rational-unitary actors, but do share complementary interests with other states, (IV) that cooperation among states is possible and this cooperation often occurs under the auspices of international institutions' ability to diminish cheating, create repetition, and reduce transaction costs, (V) that hegemony is not a necessary factor for the formation or the maintenance of a cooperative institution, and (VI) that in pursuing their interests states seek absolute, not relative gains.[50] Neoliberal institutionalists discount Realists' assessment with regard to the possibilities for international cooperation in the anarchic setting of international relations, and the capacities of international institutions to play a meaningful role in helping states work together.[51]

On the debate concerning relative gains, Neoliberal institutionalists hold that the inhibiting effect of relative gains on cooperation is conditional on factors such as the number of major actors in the system.[52] Relative gains, they argue, is a significant argument in the case where only two players with perfectly conflicting interests exist. In this condition, they acknowledge, institutions have no significant role to play. But they contend that relative gains are unlikely to have much impact on cooperation if the potential for absolute gains from cooperation are substantial, or in the context involving more than two states.[53] Neo-liberal institutionalists argue that the relative gains debate has made distributional and bargaining issues conspicuous than ever and has thus render institutions more prominent. They argue that states are often faced with two challenges when they attempt to cooperate: the fear of being cheated on, and that of unequal gains from cooperation. The role of institutions come into prominence in these cases as they are able to mitigate the fears of being cheated, and by helping

[50] See Keohane, After Hegemony, Robert Axelrod and Robert Keohane achieving cooperation under anarchy, and Robert Kehoane: Institutional theory and realists' challenge after the Cold War
[51] Grieco, J. M.: *Op. Cit,* p.122
[52] Powell, R.: Absolute and relative gains in international relations theory, *Neorealism and Neoliberalism: The contemporary debate*, ed, Baldwin, D. A., Columbia University Press, Chichester, West Sussex, 1993, p. 323
[53] Snidal, D.: *Op.Cit*, pp.701-726

settle the distributional conflict through the provision of information on others' compliance and assurances on the equitable distribution of gains over time.[54]

On realists' claim that institutions have no independent effect on the patterns of states' behaviour but they rather only mirror the distribution of power in the international system, Neoliberal institutionalists disagree with this realists' assessment, and draw into the debate a number of empirical studies conducted on different issues, including security, and which back their election to differ with realists' on this point. In effect, these studies have shown that institutions have a wide range of effects on the patterns of states' behaviour. The findings showed that "institutions change the incentive to cheat, reduce transaction costs, link issues, and also provide focal points for cooperation." [55] Therefore in Neoliberal institutionalists' view institutions are considered as independent variables having significant impact on state behaviour in terms of formulating or reformulating states' preferences.

Conclusion

This chapter has looked at the Liberal Institutionalism theory as studied in the discipline of IR. Unlike realist theorists who paint a very gloomy picture of international relations especially with regard to the prospects of cooperation taking place among independent political units (states) in an 'anarchic' international system, liberal institutionalists are more optimistic about international relations and the prospects of cooperation taking place among states with the help of international institutions. The ICC is such an institution that emerged to help states overcome the problem of cooperation in apprehending and prosecuting individuals accused of committing international crimes. Opponents to institutionalists (realists) suggest that states control institutions and that the latter do not have a life of their own. Liberal Institutionalists, however, insist that institutions shape the preferences of states no matter how powerful those states are. The reluctance of the USA to join the ICC for instance, may be interpreted as an expression of their unwillingness to have their preferences shaped by the institution. The emergence of the ICC exemplifies the fact

[54] Keohane, R. O. and Martin, L.L.: *Op. Cit*, p.45
[55] *Ibid* p.49

that international institutions are growing in number, and its entry into force shows that states are willing to join them.

The next chapter will provide an overview of the DRC's politics in which it focuses on the 1991 democratisation process, the 1996 AFDL civil war and the end of the Mobutu regime, and the 1998 civil war.

Chapter II: Background history on the politics of the D.R.C.

This chapter aims at providing a background history to the politics of the DRC. It begins by briefly looking at the DRC's politics at independence and quickly moves to look at the country's politics under President Mobutu. It then moves to look at the 1991 Sovereign National Conference, the 1997 AFDL revolution, the 1998 civil war and subsequent negotiations intended at bringing about peace in the country.

2.1 The First Republic (30 June 1960-24 November 1965)

Judging by its size, the DRC is the third largest country on the African continent just after Algeria and Sudan. It was colonized by the Kingdom of Belgium and achieved independence in 1960. At independence the DRC inherited democratic structures of government and the provisional constitution adopted a month before independence by the Belgian Parliament; "*la loi fondamentale*" provided for all basic democratic rights to all citizens. It also provided for a division of executive powers between the head of state, the president of the republic, and the head of government, the prime minister. The premier and a cabinet known as the Council of Ministers were both responsible to the bicameral legislature on all matters of policy. Under the same constitution, the Congo was organized in six provinces, each with its own legislature and government.[56]

Upon independence, Patrice Emery Lumumba became the prime minister and Joseph Kasa-Vubu the president of the Republic as a result of their coalition of parties winning the majority of seats in the newly created parliament. But hardly a month into independence, the DRC erupted into turmoil when the armed forces mutinied, and separatist movements and intertribal conflict threatened to split the country. In September 1960, conflict broke out at the highest level of government with the prime minister and the president both attempting to remove one another from office.[57] It is

[56] Ndikumana, L and Emizet, K: The economics of civil war: The case of the Republic Democratic of Congo, *Political Economy Research Institution*, University of Massachusetts Amherst, 2003, P.10 available at http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_51-100/WP63.pdf

[57] Metz, S : Reform, conflict, and security, p. 6 available at

worth noting that the DRC achieved independence more as a geographic expression than a national political unit.[58] The complete absence of any kind of civic culture in the Congolese society pre and post independence hindered the evolvement of democratic governance. The new state went through a period marred by political and social instability commonly referred to as the "Congo crisis of 1960-1965" which ended with the military coup of the 24th of November 1965 led by the national army commander in chief Lieutenant General Desiré Mobutu, supposedly to safeguard the dearly acquired independence that the military perceived was endangered by what they perceived as careless and short sighted politicians hell-bent on ascending to political power at the expense of the state's stability, peace and unity.[59]

2.2 The Second Republic (24 November 1965- 24 April 1990)

Mobutu put an end to the democratic experiment of the first five years of independence and established personal rule.[60] Mobutu's coup and institution of military regime, and later the one party system, was in a sense an attempt to put an end to political bickering, instability and to restore the climate of national unity that prevailed before independence as President Mobutu summed up the record of the first republic as one of "chaos, disorder, incompetence and negligence."[61] President Mobutu's decision to take over politicians running the country can therefore be assumed to have been motivated by his desire to safeguard national unity after his assessment of politicians' inability to put the country's best interests above their endless struggle for power. It is with this in mind that once in power, Mobutu first undertook to forge a sense of national identity in the Congo, something that the colonizers deliberately resisted during their rule. In effect, president Mobutu correctly identified the lack of normal bases of nationhood as the root cause of the country's misfortune and so undertook to invent a Congolese national identity by blending elements of local traditions with components of the emerging ideology of Pan-

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http://www.strategicstudiesinstitute.army.mil/pdffiles/pub203.pdf

[58] Rivkin, A: *Nation-building: Problem and prospects*, Rutgers University Press, New Brunswick, New Jersey, 1969, p.179

[59] Schatzberg, M. G.: Beyond Mobutu: Kabila and the Congo, Journal of Democracy 8(4) available at http://www.wioc.wisc.edu/events/2007-MMSD/readings/africa-kabila.pdf

[60] Nzongola-Ntalaja, G: From Zaire to the Democratic Republic of the Congo, *Current African Issue*, 8, Nordiska Afrikainstitutet, Uppsala, 2004, p.8

[61] Michel,T: Mobutu roi du Zaire, *Film de la passerelle*

Africanism to overcome this handicap.[62] His desire found expression in the creation of the MPR

The creation of the *Mouvement Populaire de la Revolution, MPR* (Popular Movement of the Revolution) in 1967 is undoubtedly the most significant of all of the second republic's institutional cosmetics as it marked the emergence of a politically organized nation around a leader. In effect, the M.P.R. was intended to be a broad church that would bring together all Congolese under one roof and bring reconciliation and healing to the nation torn by the endless first republic's political bickering. This pretext helped Mobutu's regime to put under its control all the sectors from which an opposition was likely to emerge.

Between 1967 and 1973 the regime undertook steps to further neutralize any source of uncontrolled power by introducing significant administrative reforms. The regime began this by formally putting an end to the existence of provincial governments in place since independence, replacing them with a public servant only accountable to the central government in Kinshasa. The second reform was intended to ensure the fusion between the administrative and political structure by making each administrative leader the head of the corresponding section of the party.[63] Both the constitutional and administrative reforms thus secured a total dominance of the M.P.R. on the political scene in the DRC. The party became the exclusive and the legitimate instrument of life in the DRC, blurring any difference between social and political organization in the process.[64] The party extensively used co-optation as a tool of incorporating key social sectors of the society into its matrix. The press, labor movements, churches (with exception of the Roman Catholic Church), women associations, and other institutions were all brought under the party. Three trade unions merged to form the UNTZA (National Union of Workers of Zaire) whose function, according to the N'sele manifesto, was to transform the role of trade union from the negative perception of being a force of confrontation to that positive image

[62] Metz, S: Reform, *Op. Cit*, p.7
[63] Mbambi, N: *Op. Cit*, p.35
[64] *Ibid*, p. 34

of an organ of support for government policy by providing a communication link between the working class and the state.[65]

Party and state administrative responsibilities were merged into a single framework, thereby automatically extending the role of the party to all administrative organs at the central and provincial levels, and also to other organizations such as trade unions, youth movements and student organizations.[66] The dominance of the party over politics also extended to the voting procedures. Instead of directly electing the president of the republic, voters confirmed the choice made by the MPR for its chairman, who automatically became the head of state and head of the government. This new reality also resulted in the state and civil society sharing porous boundaries in which the former enjoyed a comfortable control over the latter.[67] The emergence of the MPR thus officially introduces a one party system in the DRC prevalent in Africa during the 1960s. In a sense, the MPR was indeed a way to end competition for power that characterized the democratic setting of the first republic by uniting Congolese from every tribe, province, political persuasion, and creed under one political umbrella to help foster national identity.

The party became the alpha and omega of politics in the country, and quickly turned into an effective and efficient apparatus of oppression at the service of what will be known as one of the most vicious dictatorship on the African continent. Opposition was not welcomed during Mobutu's reign. He found quite an original way of quelling any opposition to his regime. In effect, in the early years of his reign, Mobutu consolidated power by publicly executing political rivals, secessionists, coup plotters, and other threats to his rule. Four prominent politicians became the first victims of the government clampdown on opposition and perceived threat as they became the first to be hanged before large audiences in 1966 in what will be sadly known as the Pentecost hangings.[68] Mobutu moved quickly from the heinous way of dealing with

[65] See the N'sele Manifesto
[66] Mbambi, N: O*p.Cit*, p. 34
[67] Willame, J.C. et al: ZAIRE Predicament and Prospects: A Report to the Minority Rights Group (USA), available at http://dspace.cigilibrary.org/jspui/bitstream/123456789/14902/1/Zaire%20Predicament%20and%20Prospects.pdf?1
[68] Conference Nationale Souveraine, Rapport de la Commission Assassinats et Crimes, available at http://congodiaspora.forumdediscussions.com/t770-les-pendus-de-la-pentecote#10033

opposition to the tactic of co-opting political opponents through bribery, offering of cabinet portfolios to would be and perceived to be opponents to his regime. Thus, Mobutu used patronage and fear as his primary tools for concentrating political power in his own hands. Loyalty was lucrative but opposition brought exclusion from opportunities for personal enrichment, often exile, and sometimes torture or death.[69] Thus the president met practically no political opposition during the first years of his tenure insofar as all possible opponents were neutralized very early, and insofar as the new system, with its party the MPR, was designed to systematically reduce to nothing any tendency to opposition. Mobutu was also able to turn most opposition into submission through patronage; those he could not, he dealt with forcefully.

It has to be said that Mobutu's successes in dealing with the opposition were facilitated by the prevailing international politics of the Cold War from which he was a commodity of Western power politics and considered an effective ally in Sub Saharan Africa. The demise of the Cold War therefore removed his strategic importance to the West and placed his regime under intense pressure to reform, given that the West was no longer eager to continue supporting him, and internal opposition became gradually more vocal in its demand for more political rights and the democratization of the state apparatus.[70] Mobutu eventually yielded to the pressure and consequently made some concessions. These took the form of freedom to form political parties, of promised elections, of the installation of transitional governments, and a National Sovereign Conference. The president formally declared an end to single party rule in the DRC and announced the beginning of a transition to democracy on April 24, 1990. He originally announced the creation of two new parties, both of which reflected his own political philosophy and were to join with his own MPR, but the opposition rejected this proposition. He then announced the introduction of multiparty democracy. His pronouncement opened the floodgate for political competition absent from Congolese political landscape for more than twenty-five years, and had given hope to thousands of ambitious but politically starved Congolese to venture in politics. This resulted in the formation of scores of political parties emerging to challenge the MPR's supremacy in the DRC's politics.

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[69] Metz, S: *Op.Cit*, p.8

[70] Tshiyoyo, D: Democratic Republic of Congo: Road to political transition, EISA, p.4 available at http://www.eisa.org.za/PDF/drc2006background.pdf

2.3 First attempt at transition to democracy (24 April 1990- 17 May 1997)

Following a precedent which had been set in Benin and had become popular elsewhere in French-speaking Africa, Mobutu convened in August 1991 a broad-based national conference tasked with the drafting of the transitional charter designed to define the structure of the new democratic institutions that would govern the country during the transition period and prepare the way for multiparty elections and progress towards democracy. The National Sovereign Conference convened some 2,842 delegates representing a cross section of society and of which only 900 delegates represented the opposition.[71]

In August 1992, the Sovereign National Conference passed the Transitional Act to serve as a provisional constitution, created a provisional legislature called the High Council of the Republic (HCR), offered Mobutu a power-sharing arrangement, and elected Etienne Tshisekedi wa Mulumba of the Union for Democracy and Social Progress (U.D.P.S.) as the transitional prime minister.[72] Mobutu countered by forming a new government under his control and dismissing Etienne Tshisekedi in December 1992.

While the National Sovereign Conference experience proved successful elsewhere in Africa where the incumbents accepted, at least at the time the conferences were being held, the decisions and the consequent transfers of power, in the DRC's experience it was evident from the outset that Mobutu had convened the conference out of expediency rather than a commitment to democratic principles as he relentlessly used every opportunity to manipulate the CNS in his own interest and systematically used force when the political manipulations proved inefficient.[73] On several occasions President Mobutu suspended the conference, but it continued to meet. It often failed to arrive at a consensus. But when it did, Mobutu thwarted its decisions. Also, neither

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[71] Metz, S: *Op. Cit*, p.13
[72] U.S. Department of State Country Report on Human Rights practices 1995- Democratic Republic of Congo (Formerly known as Zaire), available at http://www.unhcr.org/refworld/country,USDOS,COD,3ae6aa3220,0.html
[73] Metz, S: *Op. Cit*, p.12

side (the alliance of presidential majority or the opposition) was in a hurry to see an end to the conference and get on with political reforms because the conference allowed Mobutu to delay real political competition, while conferees saw in the perpetuation of the conference an opportunity to enrich themselves as they received a handsome per diem for their attendance.[74]

The fact that the opposition was so heavily devoted to the Sovereign National Conference processes despite the many disruptions by the Mobutu regime showed that it was extremely legalistic in its approach to gaining power, almost ignoring the fact that Mobutu still had complete control over the military and police forces, and the finances.[75] Also, the fact that the most important demonstration ever staged in the DRC during the seating of the CNS in disapproval of the government's decision to suspend proceedings of the Sovereign National Conference was not organized by the opposition parties but by Catholic priests, gives a clear indication that the opposition rejected violence as a form of struggle to compel institutional change.[76] It was therefore not surprising that despite the exertion of internal and external pressures, Mobutu and his state were still able to sail through the storm and survive. The classical political practices prevalent in democratic settings proved inadequate to bring about institutional reforms that everybody in the DRC was hoping to see. Therefore, the use of paramilitary organizations became the only viable option available to the opposition in the attempt to coerce Mobutu's regime into implementing the promised reforms. This was provided by the spillover of Rwanda's events into the DRC which proved to be the breeding ground for the rise of internal armed opposition to President Mobutu's regime.

2.4 The first war and the ascension of Kabila to the helm (1997-2001)

The Rwandan conflict of 1994 and the spillover of its effects unto the Congolese territory (then Zaïre) and the noticeable weakness of Mobutu's regime provided an

[74] Democratic Republic of Congo, history, p.3 available at http://www.nationsencyclopedia.com/Africa/Congo-Democratic-Republic-of-the-DROC-HISTORY.html#b
[75] Weiss, H: War and peace in the Democratic Republic of Congo, p.4 available at http://www.africafederation.net/War_Peace.htm
[76] *Ibid*, p.5

opportunity to the new Rwandan regime and to all of those who had come to despise president Mobutu to vent their rancor. In effect, a significant number of the nine countries sharing borders with the DRC had legitimate grievances, with respect to the Mobutu regime's sympathy, and in some instances active support, for their respective rebels, to seek the demise of Mobutu's regime.[77] Rwanda in particular wanted to see the end of the Mobutu regime because of the support that the latter was providing to *ex-FAR* soldiers and *Interahamwe* militant that found refuge in the Eastern DRC in the wake of the 1994 Rwandan genocide and were using the Congolese territory as a launching pad for raids against the new regime in Kigali. To invade the DRC, Rwanda and its regional and international allies concealed their action under the guise of a Congolese internal uprising by supplementing their effort with the creation of a Congolese alliance, the *Alliance des forces Démocratique pour la Libération du Congo* (A.F.D.L.) led by Laurent Désiré Kabila, an old foe to Mobutu's regime. The AFDL introduced a new dimension in the Congolese politics. The era of armed opposition in the DRC which at the end, proved efficient in compelling regime change in the DRC.

On the 17th of May 1997 the AFDL put an end to Mobutu's long years of dictatorship in the country, a thing that the unarmed opposition to the regime and years of negotiation in the framework of the National Conference failed to deliver. Its leader, Laurent Desire Kabila, proclaimed himself president of the country that he renamed the DRC from Zaïre.

2.4.1 The second war (1998-2003)

Kabila's reign was short lived as he quickly failed to live up to his backers' expectations, especially the Rwandans and Ugandans. Using president Kabila's request for the withdrawal of all foreign troops present on Congolese soil as a pretext, Rwandan and Ugandan troops begun the second war on the 2nd of August 1998. The conflict drew belligerents from at least eight different countries some entering for their legitimate claim to security threatened by rebels using the Congolese territory as the launching pad of raids against their regimes, while others were perhaps simply

[77] Ntalaja, N: from Zaïre to the Democratic Republic of Congo, Second revised edition, *Current African issues*,(28), Nordiska Africainstitutet, Uppsala, 2004, p.13

motivated by the need to balance the regional hegemonic aspirations of the first group. It is partly due to presence of this web of belligerents that some lucid minds dubbed the DRC conflict "Africa's world war".[78] Rwanda and Uganda sent their troops into the DRC under the guise of worries over security along their borders with the Congo. Rwanda claimed that its troops were seeking Hutu militias wanted for Genocide, while its ally Uganda entered under the pretense of combating the *Lord Resistance Army* (L.R.A.). Angola, Zimbabwe, and Namibia went in to support the DRC government and in a way, to counter the hegemonic aspiration of the former group.

To discredit the claim of invasion repeatedly made by Laurent Desiré Kabila's government in their attempt to get the international community's attention and thereby compel the withdrawal of Rwandan and Ugandan's troops from the Congolese soil, Rwanda and Uganda changed their tactics by fighting the DRC government through their local proxies, the same tactics used in the demise of Mobutu's regime.

The resulting effect of the use of this tactic is that all three main actors in the Congolese second war (Rwanda, Uganda, and DRC) relied on the services of rebel movements to advance their interest and counter one another's progress on the ground. To ensure the effectiveness and efficiency of services rendered to their clients, DRC rebel movements in turn engaged in the sponsoring, funding, and training activities of a number of local militia groups as the way to expand their own base of power in the DRC or as bargaining power in the country's politics. The availability of political and military support from external actors, whether national governments or rebel movements, encouraged local leaders to form new groups, generally based on ethnic loyalty.[79] This situation resulted in the emergence of a web of armed groups with shifting allegiances as the changing circumstances and their interests dictated.

The Ituri region, where a longtime animosity exists between two ethnic groups, the Hema and the Lendu over land ownership, quickly became the epicenter of the DRC

[78] Hawakins, V: Stealth Conflicts: Africa's World War in the DRC and International Consciousness, The journal of Humanitarian assistance, Feinstein International Center, January 2004 available at http://sites.tufts.edu/jha/archives/71

[79] Van Woudenberg, A: Ethnically targeted violence in Ituri, p.191 available at http://www.issafrica.org/pubs/Books/CoPBookMay04/Woudenberg.pdf

conflict with Rwanda, Uganda, the DRC government and each of the main Congolese rebel group siding with one or the other ethnic group in their attempt to gain territorial advantages over the other belligerents in and around Ituri. Until the Sun City agreement, the DRC government played little role in the Ituri region. It began to play a meaningful role in the region after the signing of the Sun City agreement in 2002 by working with the RCD-ML, and through it, with the Lendu\Ngiti and other ethnic groups.[80] The DRC government relied on the services of the APC a Lendu/Ngiti militia, the Mayi-Mayi, and groups of local combatants of various ethnic groups united in their common goal of expelling outsiders.[81] The Rwandan government operated in the DRC through the RCD-Goma and sided with the Hema whom they view as an ethnic group related to the Tutsi and as a threatened minority.[82] In this regards, the Rwandan government also helped the UPC, which is the Hema military wing, with advice, training, and supplies of ammunitions.[83] The Ugandan involvement in the DRC conflict was more complex than that of Rwanda. Uganda was directly involved in the administration, and the politics of territories under their control. Uganda exploited the Hema/Lenda dispute to their advantage, and sided with either of the parties as circumstances and their interests dictated.[84] The government of Uganda manipulated several political links simultaneously. They worked with the RCD-ML led by Mbusa Nyamwisi through which it cooperated with locally based armed groups. But the Ugandan government also cooperated directly with locally based armed groups some of which it helped create. Ugandan meddling in Ituri has in fact stimulated the formation of new political parties and militia groups which received directives from Kampala.[85]

The increase in the number of armed groups in and around Bunia has been matched by an increased flow of arms to Ituri as outside actors attempt to ensure victory for their local allies.[86] This greater availability of arms has contributed to more casualties

[80] Van Woudenberg, A, p.196
[81] *Ibid*, p.197
[82] Beni, Bunia and Kampala*,* Human Rights Watch interviews with local analysts, February 2003. Available at http://www.hrw.org/sites/default/files/reports/DRC0703.pdf
[83] Thomas Lubanga, Bunia, *Human* Rights Watch interview February 14 2003, available at http://www.hrw.org/sites/default/files/reports/DRC0703.pdf
[84] A Short Report, Uganda in Eastern DRC: Fuelling Political and Ethnic Strife, UNHCR, March 2001 available at http://www.unhcr.org/refworld/country,,HRW,,COD,,3ae6a87e8,0.html
[85] Van Woundenberg, A: *Op. Cit*, p.200
[86] *Ibid*, p 193

in Ituri, including civilians.[87] The weapons of war employed to destroy and gain psychological advantage over the enemy included mutilation, rape, and starvation.[88] Strikes were carried out on a daily basis on innocent civilians, and included murdering, torturing, plundering, and destroying. "Children as young as seven, were given a mix of Kalashnikovs, machetes, drugs, and used as killing machines."[89] All these atrocities were committed with the implicit or explicit complicity of the various armed groups backers (Rwanda, Uganda, DRC).

The war was stalemated as neither of the side (government, Rwanda, Uganda and the numerous rebel groups) was able to marshal enough power to impose a military victory over the other.[90] As a result, initiatives to solve the stalemate and restore peace and thus facilitate the establishing of effective institutions of governance for national reconstruction and the transition to democracy in the DRC were undertaken at the regional as well as international level.

The complexity of actors, issues involved and the dimensions of the conflict (regional, national, and local) hindered attempts at finding prompt solutions to the conflict in the DRC. The difficulty also came from the fact that despite the seemingly common front presented by the opposition to the government in Kinshasa, the various actors involved in the Congolese conflict had entered the conflict out of often unrelated interests. In effect, the Rwandan and Ugandan governments' grievances are utterly different from those of the various rebel movements they founded and supported. The Rwandan and Ugandan presence in the DRC for instance was first and foremost justified for their security concerns along their borders with the DRC, whilst the justification for the various rebel movements would have come from their disillusionment with Laurent Kabila after they had discovered that he could not stand as the apostle of democracy. Despite this handicap, peace initiatives have nevertheless

[87] Van Woundenberg*, Op Cit,* p. 193
[88] Africa Resource: The Civil War in the Democratic Republic of Congo, Available at http://www.africaresource.com/index.php?option=com_content&view=article&id=306:the-civil-war-in-the-democratic-republic-of-congo&catid=36:essays-a-discussions&Itemid=346
[89] *Ibid*
[90] Kasaija, P: "Rebels and militias in resource conflict in the eastern Democratic Republic of Congo", Militias, Rebels and Islamist Militants: Human insecurity and state crises in Africa, eds. Okumu, W and Ikelegbe, A, *Institute for security studies*, Pretoria, 2010,P.188

been discreetly and persistently mounted throughout the duration of the conflict by mediators appointed by either the African Union or the United Nations.[91]

2.4.2 Negotiating peace and the path to democracy in the DRC (1999-2003)

The first of these peace initiatives came just days after the second Congo war broke out, but failed to produce any significant result owing to the fact that some key actors to the conflict were completely left out of the negotiations, and to the intransigence of other actors to change their initial demands. In 1999, the six states involved in the DRC conflict convened in Lusaka and signed a Ceasefire accord which was also signed the following month by two of the main rebel movements, the RCD and MLC.[92] The 1999 Lusaka ceasefire agreement brought corrections to mistakes made in earlier mediation efforts in the DRC as it took into account the grievances of every party involved in the conflict and advocated the need for direct talks between the warring parties, the withdrawal of foreign forces and the need for an inter-Congolese political arrangement.[93] In accordance with the Lusaka agreement the United Nations, authorized by a UNSC resolution, started to monitor the ceasefire in the DRC. But the limited resources at the mission's disposal combined with its very limited mandate cast a shadow on any prospect of success of the peacekeeping mission. The UN mission therefore struggled to monitor the observance of the ceasefire and thus stop rebel fighting. In January 2001 President L.D. Kabila was assassinated and his son Joseph Kabila succeeded him at the helm of the country. The arrivals of Joseph Kabila to power in the Democratic Republic of Congo changed the political landscape and brought a new breath for the resumption of negotiations aborted due to the intransigence of his late father. These negotiations were held in the framework of the Inter-Congolese Dialogue as provided by the Lusaka agreement.[94]

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[91] Rogier, E: The Labyrinth to Peace in the Democratic Republic of Congo, Working Paper 23, Clingendael Institute, July 2003, p.2

[92] Koko, S: The Lusaka Ceasefire agreement and stability in the DRC, *conflict trends*, p.33 available at kms1.isn.ethz.ch/serviceengine/Files/ISN/.../en/Chapter+6.pdf

[93] Rogier, E: *Op.Cit*, p.2

[94] Kasaija, P.: The politics of conflict resolution in the Democratic Republic of Congo: The inter-Congolese dialogue process, p.69 available at kms1.isn.ethz.ch/serviceengine/Files/ISN/98094/.../Chapter5.pdf

The Inter-Congolese dialogue was provided for by the Lusaka ceasefire agreement which was signed by all states parties to the Congo conflict, and latter joined by the *Rassemblement des Congolais pour la Democratie* (RCD) and the Mouvement pour la Libération du Congo (MLC) who initially refused to sign.[95] The objective of the Inter-Congolese Dialogue was to establish a transitional administration in 90-270 days pending the holding of democratic elections.[96] The ICD was meant to be a forum where all segments of the society in the DRC, including the government, the rebels, the political opposition and members of the civil society, were to enjoy equal status during the negotiations.

The ICD officially opened its plenary sessions in Addis Ababa on the 15th of October 2001 but failed to achieve any result due to disagreements over participation.[97] In February 2002 the ICD reconvened at Sun City, a touristic resort in South Africa. As it was the case during the Addis Ababa round, disagreements continued among key players in the DRC conflict convened at the Sun City conference. But the disagreement did not prevent delegates from achieving some result, however small they might appear to be. In effect, the ICD Sun City round managed to produce some meaningful resolutions intended at guiding the country in its quest for peace. In effect, at the Sun City negotiations delegates expressed their intention at establishing institutions such as a Truth and Reconciliation Commission purposed at healing the nation bruised by years of violence, and also negotiated institutions to provide the basis for a durable peace in the country.[98] Despite notable advances made at this stage of negotiations, it is worth noting that the Sun City I conference failed to land an all-inclusive agreement expected to pave the way for a new political dispensation in the DRC.

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[95] Koko, S: *Op.Cit*, p.33

[96] Gambari, I: Perspectives on current conflicts in Africa: Verifying the special nature of today's African conflicts. Democratic Republic of Congo and the conflict in Central Africa, The Symposium on Africa Japan Institute of International Affairs Tokyo, February 15-16 2001, p.5 available at www.jiia.or.jp/pdf/gambari.pdf

[97] The inter Congolese Dialogue: Political negotiations or game of bluff? Africa Report no37, 16 November 2001, *International Crisis Group* available at http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/037-the-inter-congolese-dialogue-political-negotiation-or-game-of-bluff.aspx

[98] Resolution no: ICD/CPR/04, Inter-Congolese political negotiations, the final Act, Annex 1 available at http://www.iss.co.za/AF/profiles/DRCongo/icd/finalact.pdf

The resulting political stalemate and the renewed and escalating violence in the eastern DRC prompted the appointment of two UN special envoys more knowledgeable about the Great Lakes region's geopolitics to try and help broker a peace deal. As a result of these UN envoys' involvements together with an active participation of the South African President Thabo Mbeki, the Pretoria agreement was signed in December 2002.[99] The agreement laid the foundation for a transitional political dispensation in the DRC. It provided for a transitional president assisted by four vice presidents drawn from the government and unarmed political opposition, MLC, and RCD-G (RCD Goma).[100] A transitional legislature composed of 500 members of a National Assembly[101], and 120 members of a Senate[102], the creation of a national army made of elements drawn from government forces, the RCD-G forces, MLC forces, RCD-Liberation movement, RCD- N, and the Mai-Mai.[103]

The signing of the Pretoria agreement paved the way for the resumption of talks at the Sun City tourist resort in April 2003, talks also known as Sun City II during which the Final Act was signed.

2.4.3 Amnesty specifications

As per the December 2002 Global and All-Inclusive Agreement on transition reached in Pretoria, the DRC transitional government passed an amnesty law granting amnesty for engaging in acts of war, political breaches of the law, and crimes of opinion for the period stretching from 2 August 1998 to the 4th of April 2003. But war crimes, genocide, and crimes against humanity were excluded from the reach of the amnesty law.[104] In 2005, the Congolese transitional parliament passed another amnesty law codifying an amnesty over the crimes enumerated in the 2003 amnesty law, but

[99] Kasaija, P.: The politics of conflict resolution in the DRC: The Inter-Congolese Dialogue process, P.65 available at kms1.isn.ethz.ch/serviceengine/Files/ISN/98094/.../Chapter5.pdf
[100] The Pretoria agreement, article V (1), (C), (h)
[101] The Pretoria agreement, article V (2), (b)
[102] The Pretoria agreement, article V (2) (f)
[103] The Pretoria agreement, article VI (a) and (b)
[104] Presidential decree no 03-001 of April 15, 2003 available at http://www.unhcr.org/refworld/pdfid/48abdd680.pdf

altered its timeframe to include acts committed from August 20, 1996 to June 20, 2003.[105]

But despite the explicit omission of international crimes from these amnesty laws, individuals with a known record of human rights abuses were integrated into the government and the army.[106] Some such individuals were even promoted to higher ranks in the new Congolese army despite the existence of well-documented evidences linking them to heinous crimes committed in territories they controlled during the war. The rationale behind the integration of these individuals with abusive records into the new Congolese army, according to the DRC government, was to remove them from areas where they wrecked havoc and held positions of influence and thus making it easier to end fighting there.[107] But the granting of blanket amnesty to individuals with known record of human rights abuses were ineffective in achieving the government's objective of ending the fighting and therefore bringing peace to an area plagued by violence as it rather seemed to play the opposite effect as it provided incentives to other individuals to venture into rebellion, hoping that the adventure would land them in the Congolese army or in a governmental position.

2.5 Emergence of New Rebel Movements and their leaders

In the years following the 2003 Pretoria peace agreement that established Congo's transitional government, new armed groups emerged in North and South Kivu provinces with some of the leaders seeking positions in government or the Congolese national army or a distribution of power at local level.[108] Laurent Nkunda, Bosco Ntangada, Jules Mutebutsi are just a few of the prominent figures in the new batch of armed groups that emerged in the eastern DRC after the signing of the 2003 Pretoria peace deal.

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[105] Amnesty must not equal impunity, Focus 2009 DRC amnesty Law, *International Center for Transitional justice*, available at http://ictj.org/sites/default/files/ICTJ-DRC-Amnesty-Facts-2009-English.pdf

[106] Selling Justice short: Why accountability matters for peace, *Human Rights Watch*, 1-56432-508-3, July 2009, p.45 accessible at http://www.hrw.org/sites/default/files/reports/ij0709webwcover_1.pdf

[107] "DR Congo warlord generals accused" BBC News Online, January 14, 2005, http://news.bbc.co.uk/2/hi/africa/4174811.stm, accessed November, 3, 2011, "Now we need peace in our country and we decided to appoint them because we can't condemn them before judgment"

[108] Selling justice short: Why accountability matters for peace, *Human Rights Watch*, 1-56432-508-3, July 2009, O*p. Cit*, p.50 available at http://www.hrw.org/sites/default/files/reports/ij0709webwcover_1.pdf

In 2003, citing concerns over his own safety, Laurent Nkunda refused to take up the DRC government's offer to join the new Congolese army and decided to join forces with Jules Mutebutsi and launched an assault on Bukavu in 2004, claiming that this operation was motivated by the desire to defend his people, the banyamulenge, against any form of political marginalization.[109] But instead of sticking to their objectives, troops under his command ended up killing civilians and carrying out widespread sexual violence during their operation.[110] The United Nations mission in the DRC (MONUC) was unable to contain Nkunda's offensive on Bukavu and the resulting crisis nearly derailed the transitional government and thus the peace process.[111] In 2006, Laurent Nkunda founded the National Congress for the Defense of the People (CNDP) with a clear program of preventing the exclusion of Tutsi from national political life and assuring their security.[112] The CNDP extended its influence in the Kivu regions throughout 2006-2007, and indulged in human rights abuses against civilians, especially in retaliation to government failed attempts to take back the areas under its control.[113] The government's inability to defeat Nkunda militarily ushered in a diplomatic solution to the conflict materialized in the signing of a peace agreement between the government, the CNDP, and several other armed groups operating in the eastern DRC on January 23 2008.[114]

But the peace deal between the government and CNDP did not hold due to Nkunda intransigence. However, the prospect of lasting peace in the Eastern DRC found new breath in 2009 with the downfall of Laurent Nkunda in which Bosco Ntaganda was instrumental. But like Laurent Nkunda, Bosco Ntaganda's track record is also one of widespread human rights abuses. In effect, charges against Bosco Ntaganda for the violation of human rights go as far back as when he was in charge of military operations for the UPC in Ituri region where his troops are accused of brutally

[109] Democratic Republic of Congo: War crimes in Bukavu, Human rights Watch briefing paper, June 2004, p.2 available at http://www.hrw.org/sites/default/files/reports/2004_DRCongo_WarCrimesinBukavu.pdf
[110] *Ibid*, p.1
[111] *Human Rights Watch*, July 2009, *Op.Cit*, p.51
[112] Congrès National pour la defense du people, available at http://www.cndp-congo.org/index-fr.php?subaction=showfull&id=1220528453&archive_&start_from_&ucat=6&, retrieved on the 3rd of November 2011
[113] World report, available at http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf
[114] Crayannis, T: The challenge of building sustainable peace in the DRC, Centre for Humanitarian dialogue, July 2009, p.5 available at www.hdcentre.org/files/DRC%20paper.pdf

slaughtering hundreds of civilians in the gold mining town of Mongbwalu.[115]Bosco Ntaganda's troops are also believed to be responsible for the killing of hundreds of civilians in Kiwanja in North Kivu in 2005 when Ntangada was acting as military chief of the CNDP.[116] He also stands accused by the UN for the killing of a Kenyan peacekeeper in January 2004 and for kidnapping a Moroccan peacekeeper later that year.[117] Despite his poor human rights track record, and despite the fact that he is sought by the ICC for enlisting and conscripting children under the age of 15 and using them in hostilities between 2002 and 2003 in Ituri,[118] the DRC government struck a peace deal with him and rewarded him with the post of general in the Congolese army,[119] dramatically failing in its obligation before the court to arrest and transfer him to The Hague and thus showing, thereby, that Congolese authorities have chosen to prioritize the necessity for peace, stability and security in the Eastern DRC over the imperative of justice. The 2009 signing of another amnesty law for former rebels, which also saw the CNDP transform into a political party, provided further evidence in the DRC government intention to seek peace, stability and security at the expense of justice. Bosco Ntaganda reportedly served as a high-ranking advisor to the UN peacekeeping forces on their operations in the DRC despite the ICC's arrest warrants hanging over his head.[120] Since the downfall of Laurent Nkunda, the incorporation of Ntaganda in the Congolese national army, and the transformation of the CNDP into a political party, the Eastern DRC is at relative peace.

Conclusion

In 1997, Laurent Kabila and his AFDL movement ended more than a quarter of a century of Mobutu's unchallenged rule over the DRC formerly known as Zaïre. The scenes of joy and jubilation that had accompanied Kabila and his AFDL during their

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[115] *Human Rights Watch*: "Ituri covered in blood" pp23-27 available at http://www.hrw.org/sites/default/files/reports/DRC0703.pdf

[116] *Human Rights Watch*, Democratic Republic of Congo- Killing in Kiwanja: The UN's inability to protect Civilians, 1-56432-422-2, December 2008,http:www.hrw.org/sites/default/files/reports/drc1208web.pdf,p10

[117] http://www.hrw.org/en/news/2009/02/o2/urge-congolese-government-enforce-icc-arrest-warrant-war-crimes-charges, accessed on the 3rd November 2011

[118] ICC case No-01/04-02/06, Decision to unseal the Warrant of Arrest Against Bosco Ntaganda, http:www2.icc.cpi.int/iccdocs/doc/doc305330.pdf accessed 0n the 15 October 2011

[119] *Human Rights Watch*, *Op. Cit,* p.53

[120] " Congo ex-Rebel working with UN, BBC News Online, April 29,2009, Available at http://news.bbc.co.uk/2/hi/africa/8023978.stm accessed September 20, 2011

months of long and arduous advance toward Kinshasa were indications that the people saw, in Mobutu's overthrow, a glimpse of hope to augur a new era, the era of democratic governance. But the people's expectations soon turned into a bitter disappointment as Laurent Kabila too banned political parties and failed to get back on track a country that had been destroyed by years of corruption and bad governance.

The war broke out in 1998 to compel Laurent Kabila to sail the DRC towards democracy. But the nature, intensity, and the magnitude of the conflict resulted in more than three million civilian deaths and scores of human rights atrocities committed by all sides to the conflict.

The cost of peace compromise reached by granting amnesties and incorporating rebel leaders into government and the army.

Chapter three is dedicated to the International Criminal Court. Discussions in this chapter gravitate around the court's trigger mechanisms, its position with regard to the granting of amnesties, the court's case selection strategy, and the chapter ends with the examination of the court's involvement in the DRC and the CAR, two cases where the court's activities have potential bearing on the DRC political processes.

Chapter III: The International Criminal Court

The ICC is the outcome of many years of preliminary negotiations in the framework of the UN Diplomatic Conference called by the United Nations General Assembly. It is the world's first permanent international criminal tribunal, and draws inspirations from the lessons and legacies of globalized criminal justice initiatives set up in response to particular conflicts since 1945.[121] In effect, since the end of the Second World War, the international community has been actively trying to devise a credible, fair, and effective institutional mechanism to deal with alleged perpetrators of mass crimes committed during armed conflicts. In this sense the Nuremberg and Tokyo tribunals for Nazi and Japanese extremists laid the basis for an institutional response to war crimes and equivalent acts by the international community as a whole.[122] The legacies of these tribunals informed the creation of various ad hoc tribunals in the wake of the Cold War, such as those for the former Yugoslavia, Rwanda, and Sierra Leone, which further reinforced the need for a permanent tribunal to adjudicate criminality under international law. In essence, the court represents a renewed commitment by the majority of the international community to put an end to impunity through coordinated efforts of strengthened national judicial systems, and a new international criminal jurisdiction, especially against the backdrop of the sharp increase in internal conflicts, prevalent in the aftermath of the Cold War, that have left a trail of human rights abuses in scores of countries. The fact that both the tribunal for the former Yugoslavia and that for Rwanda were created by the United Nations Security Council acting under Chapter VII of the UN Charter is a recognition that failure to formally and effectively deal with serious crimes of international concern was likely to be a source of ongoing grievance which could undermine efforts for sustainable peace.[123]

This chapter provides an historical background overview of the International Criminal Court, describes the jurisdiction and the triggering mechanisms of the court. The

[121] Ford, J: Bringing fairness to international justice, *Institute for security studies*, 2009, p.11
[122] *Ibid,* p. 12
[123] *Ibid*, p. 13

chapter then moves to present the ICC's activities in the DRC and the CAR with particular attention paid on the Bosco Ntaganda and Jean Pierre Bemba cases which have potential bearing on political processes in the DRC.

3.1 An overview of the International Criminal Court

As stated earlier, the ICC represents the culmination of work that has been accomplished over the past many years with regards to the prosecution of war criminals, and has been viewed by many as arguably the most complex international instrument ever prepared as it eradicates the culture of impunity perpetrators were once accustomed to into a culture of accountability.[124] Although the idea of a permanent international court can be traced back from the draft of the genocide convention, its development was hindered by ideological tensions, characteristic of the Cold War, and remained dormant until the late 1980s when the UN General Assembly revived the idea and asked the Internal Law Committee (ILC) to draft a statute for the court.[125] In 1994, the ILC submitted their draft statute to the UN General Assembly which, four years later, presented it for adoption at the UN Conference of the Plenipotentiaries in Rome. After tense negotiations, the state parties in attendance adopted the Rome Statute in an overwhelming vote of 120 to 7, with 21 abstentions. The adoption and entry into force of the Rome Statute is a truly remarkable achievement for the international community. It is a notable achievement not only for the body of international law, but also for the individual as it constitutionalizes the principle of individual criminal responsibility under the body of international law, defines standards to which individuals must conduct themselves but also identifies the state's responsibility to investigate crimes that violate those defined standards. [126]

The International Criminal Court (ICC) is a treaty based, permanent international criminal court established by the Rome Statute to provide justice to individuals and communities who are victims of genocide, crimes against humanity, war crimes and

[124] Schabas, W, A: ICC the Secret of its success, p.416 available at http://www.springerlink.com/content/lapa5ajlwr9h6y6a/fulltext.pdf
[125] International Criminal Court: Capturing public attention, the Academic Council on the United Nations System, informational Memorandum no 78, Spring 2009 available at www.acuns.org/download/.../the-international-criminal-courtpdf?...1
[126] Rome statute, art 25

aggression when national judicial systems fail. Though created in 1998, the court came into existence in 2002 when the required 60 states ratified the treaty.[127] The overarching objective of the Rome Statute is to establish an independent permanent International Criminal Court that will guarantee lasting respect for and the enforcement of international justice.[128] The provisions contained in art 5 of the Rome Statute circumscribe the Court's jurisdiction around the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[129] The ICC exercises complementary jurisdiction to national courts by deferring to them if a case is being investigated or prosecuted by a state that has jurisdiction over it, unless the state which has jurisdiction over a case that falls into the ICC jurisdiction is unwilling or genuinely unable to carry out the investigation or prosecution.[130] The temporal jurisdiction of the Court is restricted over crimes that occurred after the Statute came into force on July 1, 2002, or, in the case of a new state party, 60 days after it deposits an instrument of ratification.[131]

3.2 The ICC trigger mechanism

One of two general preconditions has to be met for the ICC jurisdiction to be activated. First, the ICC may only undertake investigation or prosecution if the crime took place in a state that is party to the Rome Statute.[132] This is referred to as the principle of territoriality. Second, investigation can only commence if the accused is a national of a state that is party to the Statute.[133] This is also referred to as the principle of nationality. Thus, the presence of elements of either nationality or territoriality is a necessary precondition to the exercise of the ICC jurisdiction. However, these two preconditions may be waived, when the Security Council refers a situation to the ICC

[127] Dutton, Y. M.: Commitment to the International Criminal Court: Do states view strong enforcement mechanisms as a credible threat? One earth future working paper, October 2009,p.4 available at http://www.oneearthfuture.org/siteadmin/images/files/file_43.pdf
[128] Rome Statute, supra note 1, at Preamble
[129] Rome Statute, art 5
[130] Rome Statute art 17 (1) a
[131] Seils, P and Wierda, M: International Criminal Court and conflict mediation, *International Centre for transitional justice,* June 2005, p.4 available at http://www.peace-justice-conference.info/download/119.pdf
[132] Rome Statute, art 12 (a)
[133] Rome Statute, art 12 (b)

Prosecutor,[134] and when a non-party state accepts the Court's jurisdiction by lodging a declaration to this effect.[135]

The Rome Statute contains three possible mechanisms to trigger the Court's jurisdiction. The first mechanism relates to a complaint lodged by a state party or a group of states parties to the Rome Statute, often referred to as self-referral mechanism, in which they request the prosecutor to investigate any crimes falling under the court's jurisdiction committed on their territories.[136] In this case, the state referring the matter to the ICC may be the state party to the Rome Statute on whose territory the act was committed, the state on whose territory the alleged offender is present, the state of the nationality of the victims, or the state of the nationality of the alleged offender, as long as the above requirement of territoriality and nationality are fulfilled.

While this mechanism is encouraged by the ICC prosecutor because of desirability in terms of ensuring a state's cooperation, the fact that a state invites the ICC to investigate crimes committed on its own territory does not go well with everybody. The self-referral mechanism is sometimes surrounded by suspicion as to the true motive of governments' haste to refer a situation to the ICC instead of exercising prerogatives afforded to them by the Rome Statute to initiate investigations and prosecutions of situations that have happened on their territories. In effect, a referral from a State Party carries with it the risk of political manipulation as one party to a conflict, usually the government, may seek to use a referral to de-legitimize an opponent.[137] The self-referral mechanism also raises questions concerning the independence and impartiality of the court in conducting investigations and prosecutions in inviting states.

The second mechanism to activate the court's jurisdiction relates to a situation referral by the UN Security Council acting under the provisions provided by chapter VII of the UN Charter. In effect, the UN Security Council acting under its mandate to maintain peace and security in the world may refer a situation to the ICC prosecutor if

[134] Rome Statute, art 13
[135] Rome Statute, art 12 (3)
[136] Rome Statute, art 14(1)
[137] Seils, P and Wierdal, M: *Op. Cit*, p.5

it believes that one or more of the crimes within the Court's jurisdiction have been committed anywhere in the world.[138] The UN Security Council referral, by virtue of its claim to universality, expands the ICC jurisdiction to include non-state parties to the Rome Statute. In effect, the Security Council may refer the matter to the Court even if it occurred in a state that is not a party to the treaty or allegedly was carried out by nationals of a non-State Party, eliminating the territoriality and nationality requirement.[139]

Although the situation referral by the UN Security Council is credited with the ability to expand the court's jurisdiction to states not party to the Rome Statute, the mechanism is not well received by a number of states especially by those deprived of the privileges enjoyed by the five permanent members of the council. The inclusion of the UNSC referral as a mechanism to trigger the ICC jurisdiction raised concerns among states with regard to the possible politicization of justice given the political nature of the UN Security Council and especially the use of veto power by the five permanent members to prevent any situation detrimental to their interests from taking its course. The skeptics fear that the ICC becomes a pawn of the UN Security Council as a result of this provision of the Rome Statute.

The third possibility to trigger the court's jurisdiction relates to a referral by the prosecutor acting on his own initiative. In effect, provisions contained in the Rome Statute allow the Prosecutor, based on information on crimes within the jurisdiction of the Court made available to him, to bring a matter before the court by initiating investigation "*proprio motu*" (on one's own initiative).[140] The prospect of an independent prosecutor presents some advantages, but has also stirred fear in some states. In effect, some countries have argued that an independent prosecutor is necessary for an independent and effective court, whilst others, more skeptical, were of the view that an independent prosecutor would eventually abuse his power and turn the ICC into a political instrument. But in reality the Rome Statute did not leave the prosecutor's power to initiate investigations on his own accord unchecked. This power is subjected to review by the pre-trial chamber which ultimately grants or

[138] Rome Statute, art 13 (b)
[139] Rome Statute, art 12
[140] Rome Statute art 15 (I)

declines the prosecutor's request to launch investigation as the Rome Statute enjoins him to gain the authorization of the pre-trial chamber of the Court before launching investigations and to show that there are sufficient grounds to do so.[141]

3.3 The ICC and the granting of amnesties

The granting of amnesty as a political tool in a peacemaking process is common practice. An offer of amnesty may be a necessary bargaining chip in a process intended at ending rebellion or where the violators are to relinquish power.[142] Amnesties come in different forms and shapes and can be framed differently in legal terms, but they are all intended at blocking prosecutions of past violations.

The Rome Statute of the International Criminal Court does not contain provisions on amnesty.[143] It is not explicitly settled as to whether a national amnesty law, or an amnesty granted as a result of a peace deal barring the prosecution of persons accused of crimes falling within the jurisdiction of the ICC would be recognized by the Court or whether the Prosecutor could disregard such amnesty and continue with an investigation and prosecution of a person subject to the amnesty. The uncertainty is further reinforced by the notion that the granting of amnesty to individuals accused of crimes falling within the Court's jurisdiction for the purpose of advancing political processes is in itself incompatible with the "raison d'être" of the court since its primary objective is to end impunity for the perpetrators of the most serious crimes of concern to the international community by ensuring their effective prosecution.

Also, the fact that the ICC is a treaty-based international organization casts doubt over the possibility for the court to comply with the spirit and the letter of granted national amnesties even further. In effect, as a treaty-based international organization the International Criminal Court is technically not bound to national amnesty laws.[144] Furthermore, an individual beneficiary of amnesty in a given ICC member state can

[141] Rome Statute art 15 (4)
[142] Friman, H: Democratic Republic of Congo: Justice in the aftermath of peace? *African Security Review*, 10(3), 2001,p.8
[143] Naqvi, Y: Towards the universal implementation of the ICC Statute, Peace and justice initiatives, available at http://www.peaceandjusticeinitiative.org/implementation-resources/amnesties-and-the-icc
[144] Peace and Justice initiative, *Op.Cit* available at http://www.peaceandjusticeinitiative.org/implementation-resources/amnesties-and-the-icc

still be prosecuted in another country based on the provision of international law which dismisses conflict between national laws and state's obligation under a binding treaty.[145] It is therefore expected that state parties to the ICC would resist any amnesty awarded to individuals by their respective states but honor their international obligations under the Rome Statute. States are under the obligation to prosecute genocide and grave breaches of international humanitarian law under both treaty law and customary law. Furthermore, customary international law entitles all states to prosecute perpetrators of other serious violations of the laws and customs of war and crimes against humanity.[146] Though the granting of amnesty is recognized to be contrary to the intent to bring criminals to justice, a nation recovering from the effects of crimes of concern to the international community might find it in its interest to grant amnesties rather than try to prosecute the alleged perpetrators for the purpose of cementing peace and stability.

However, a number of provisions contained in the Rome Statute are interpreted as allowing the recognition of certain amnesty laws. In effect, according to article 17 (1) b of the Rome Statute the court is unable to exercise its jurisdiction if "a situation has been investigated by a State which has jurisdiction over it and that the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."[147] In this case, unless the decision not to prosecute resulted from the unwillingness or inability of the State to genuinely prosecute a case over which it has jurisdiction, the ICC will declare it inadmissible because the state that has jurisdiction over the case has investigated and decided not to prosecute the accused.

Another instance that is interpreted as allowing amnesty emanates from the determination of the Prosecutor that there is no reasonable basis to proceed to an investigation under Article 53(2)(c) based on the consideration that there are substantial reasons to believe that an investigation would not serve the interests of

[145] Peace and Justice initiative*, Op Cit,* p.1
[146] Navqui, Y*: Op. Cit,* p.1
[147] Rome Statute Article 17(1) (a)

justice.[148] But what the full legal scope of the term "in the interests of justice" is not available as yet in ICC jurisprudence.

3.4 ICC case selection

The ICC decision about which criminal situations to investigate and which case to prosecute finds guidance in the principle of complementarity. This principle holds that states have the primary responsibility to prosecute crimes under the court's jurisdiction, but where they fail to do so, the ICC has the obligation to step in.[149] So as long as the state that has jurisdiction on a given situation is able to investigate and prosecute, the ICC will recuse itself from it. The Rome Statute does not give guidance as to how the prosecutor should select and prioritize situations referred to the court. However, article 53 of the Rome Statute gives guidance as to how the court's prosecutor initiates investigations based on information made available to him/her. Dispositions contained in article 53 of the Statute endow the prosecutor with the mandate to deliver meaningful justice for crimes of concern to the international community as the responsibility to decide whether to prosecute or not to prosecute primarily rests with him. Notwithstanding the absence of guidance on how cases should be selected and prioritized, the ICC prosecutor's decisions in selecting and prioritizing cases should seek guidance from the principles of impartiality and independence if his investigations and prosecutions have to resonate with concerns of victims and affected communities.[150] It is crucial that investigations are conducted against all parties involved in hostility without fear or favor because the manner in which cases are selected and prioritized can substantially affect the way in which the justice process is received by victims and communities affected by the crimes. It is equally important that the prosecutor undertakes his duty free from any external or internal influence because perceptions of impartiality and independence have critical bearing on the court's credibility, legitimacy and, in turn, its ability to fulfill its mandate to deliver meaningful justice.[151] The prosecutor should resist any temptation to select cases to gratify some presumed wishes of any external party, or to ensure

[148] Rome Statute art 53 (2)(c)
[149] Rome Statute, art 17 (a) and (b); also preamble
[150] Human Rights Watch 1-56432-810-4, Unfinished Business: Closing Gaps in the Selection of ICC Cases, September 2011, available at http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf
[151] Human Rights Watch 1-56432-810-4, *Op.Cit,* p.*5*

cooperation of any particular party. This view was echoed in 2006 by the office of the prosecutor in its draft policy paper on "*criteria for selection of situations and cases*" when they stressed that "the selection process is independent of the cooperation-seeking process."[152] Failure to uphold these two principles in all investigations and prosecutions is therefore likely to work against the ICC in its endeavor to put an end to impunity for crimes of concern to the international community, and also likely to undermine its credibility as a credible deterrent for future atrocities.

Following the Rome Statute's silence on how cases should be selected and prioritized, the Office of the Prosecutor (OTP) has developed broad strategies for case selection. One of these strategies is to focus investigations on perpetrators who bear the greatest responsibility for crimes committed in any given referred situation. In this perspective, individuals situated at high level of the chain of command are most likely to face prosecutions for crimes under the ICC jurisdiction committed by their subalterns.[153] The OTP also indicated that it would encourage national jurisdiction to close the potential "impunity gap" left by the ICC focus, in prosecuting minor offenders by any other justice mechanism.[154] And lastly, the OTP indicated that it would be inclined to only undertake situations where evidence gathered provides strong prospects for a successful investigation." This last strategy hints at the prospects of the ICC declining to initiate investigations and prosecutions in cases where there is lack of substantial evidences of alleged crimes to successfully convict the alleged perpetrator or situations where such enterprise will significantly destabilize the social and political situations in the states concerned.[155]

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[152] Office of the Prosecutor, International Criminal Court (OTP), Criteria for Selection of Situations and Cases, draft policy paper on file with Human Rights Watch, June 2006, pp. 1-2 available at http://www.haguejusticeportal.net/eCache/DEF/10/344.html

[153] Office of the Prosecutor, "Paper on Some Policy Issues before the Office of the Prosecutor", The Hague: ICC, September 2003, p.3. available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf%20at%204

[154] Office of the Prosecutor. *O.p. Cit,* p.*3*

[155] See, Office of the Prosecutor, "Remarks by the ICC Prosecutor Luis Moreno Ocampo at the 27th Meeting of the Committee of Legal Advisers on Public International Law (CADHI*),* Held in Strasbourg, on 18-19 March 2004", The Hague: ICC, 19 March 2004, p.4.

3.5 The ICC activities in the DRC and the CAR

The ICC began its activities in the DRC in 2004, following a referral by the Congolese government requesting the Prosecutor to investigate crimes under the Court's jurisdiction committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002.[156] From 1996 to 2003 the DRC was plighted by two waves of devastating armed conflicts which have claimed millions of lives and were characterized by horrific attacks on civilians, including murders, widespread rape, torture, and the use of child soldiers.[157] It is worth noting here that all armed groups who have operated in the Kivus, both foreign and domestic, have been responsible for serious human rights abuses.[158] However, the challenge for the ICC in the DRC context is that much of the conflict that plighted the country is beyond the court's temporal jurisdiction as the first wave of conflict broke out in 1996, and the second in 1998 long before the Rome Statute came into force. One might therefore argue that it is this temporal constrain that has informed the prosecutor's decision to focus on the Ituri region as the outbreak of violence in this region is covered by the court's temporal jurisdiction. In effect, although the DRC government referral made no specific reference to Ituri, it is in that region that the most serious violations within the court's temporal jurisdiction have been perpetrated.[159] Political considerations might also have weighted in the prosecutor's decision to focus investigations on Ituri. In effect, compared to other regions of the DRC where the former government and other major armed groups involved in the national transitional government were involved, the Ituri region bore less political cost and thus "the potential for derailing the peace process was considered less likely compare with the possible political impact of investigations in other regions of the country."[160]

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[156] Prosecutor receives referral of the situation in the Democratic Republic of Congo, Press release ICC-OTP-20040419-50 available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB

[157] *Human Rights Watch* World Report 2004: Human Rights and armed conflict, 1564322947, United States, 2004, p. 3

[158] You Will be Punished: Renewed Crisis in North Kivu, Human Rights Watch, October 2007, (19) 17 A, available at www.child-soldiers.org/document/get?id=1260

[159] Seils,P and Wsierda, M: p.10: Internationa Criminal Court and conflict mediation, *International Centre for transitional Justice*, June 2005

[160] *Ibid*, p.10

The office of the Prosecutor opened its investigations in the region looking into crimes committed by the *Union of Congolese Patriots* (UPC), leading to arrest warrants being issued for Thomas Lubanga Dyilo and his former chief of staff for military operations, Bosco Ntaganda.[161] Another arrest warrant was issued against two other militia leaders, Germain Katanga, Chief of staff of the Ituri Patriotic Resistance Forces and Mathieu Ngudjolo Chui, former Chief of staff of the Nationalist Integrationist Front.[162]

As stated earlier this research report will only focus on two cases which are likely to have significant bearing on political processes in the DRC. The focus will be on the Bosco Ntaganda case and that of Jean-Pierre Bemba from the Central African Republic (CAR) referral.

3.5.1 The Bosco Ntaganda case

Bosco Ntaganda is sought on an arrest warrant from the ICC for the war crime of the enlistment of children under the age of fifteen; the conscription of children under the age of fifteen; and using children under the age of fifteen to participate actively in hostilities in 2002 and 2003 in the Ituri district of eastern Congo. [163] Mr Ntaganda is a Congolese national and was the deputy chief of the General Staff of the *Forces Patriotiques pour la Libération du Congo* (FPLC), military wing of *" l'Union des Patriotes Congolais*"(UPC), a militia operating in the Ituri district during the second wave of the Congolese conflict. It is during this period that the alleged crimes took place. Ntaganda is the prime suspect as "he had authority over the FPLC training camp commanders and used his authority to actively implement policy adopted at the FPLC's higher level."[164]

[161] Unfinished business: Closing the Gap in the selection of ICC cases, Human Rights Watch,1-56432-810-4, available at http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf

[162] *Ibid*, p.10

[163] The Prosecutor V. Bosco Ntaganda, ICC-01/04-02/06, available at http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/

[164] The case of the Prosecutor v. Bosco Ntaganda at the International Criminal Court, AMICC, available at http://www.amicc.org/docs/Ntaganda.pdf

In 2005, in an attempt to end the conflict in Ituri, the transitional government of the DRC enticed Bosco Ntaganda with the position of General in the newly constituted Congolese army. But citing concerns over his security, Bosco Ntaganda turned down the offer and a year later he left the FPLC and joined Laurent Nkunda's Congrès National pour la Défense du Peuple (CNDP), a movement that emerged in the Kivu province supposedly to protect the Rwandophone minority "marginalized" in the DRC politics. This movement wrecked havoc in the eastern part of the DRC during the transitional period to democracy. "In 2008, the DRC government signed a peace agreement in Goma, North Kivu, with 22 armed groups, including the CNDP."[165] But the latter had misgivings about the peace deal signed with the DRC government and thus continued to threaten peace in the eastern Congo.

With the help of military authorities from Rwanda, Ntaganda ousted Laurent Nkunda from the leadership of the National Congress for the Defense of the People (CNDP) in January 2009.[166] After taking over the leadership of the CNDP, Bosco Ntaganda announced that he was ending the rebellion, and indicated that he would integrate the rebel troops into the Congolese national army. This gesture earned him a place in the Congolese army where he occupies the rank of General despite an ICC arrest warrant hanging over his head. The Congolese authorities explained their lack of complying with their obligations under the Rome Statute to cooperate with the court in arresting and referring any person wanted by the court, contending that "Ntaganda was needed to keep the former CNDP troops integrated in the Congolese army"[167], and thereby guaranteeing peace in the Eastern part of the country.

3.5.2 The Jean Pierre Bemba case

In the CAR, a conflict broke out when a rebel movement led by the country's former military chief, Francois Bozizé, attempted to overthrow the democratically elected President Ange-Felix Patassé. In 2002 the government of the CAR invited Jean-Pierre Bemba's MLC to put down a rebellion movement led by François Bozizé

[165] Thousands of Congolese cling to hope that Goma peace agreement ends suffering, BBS News, April 23, 2008, available at http://bbsnews.net/article.php/20080423085626463.
[166] A brief introduction to the conflict in the DRC (1998-2011), P.19 available at http://www.grip-publications.eu/en/siteweb/images/LIVRES_DU_GRIP/livres_couvertures/Pages%2014-67.pdf
[167] Democratic Republic of Congo: ICC indicted war criminal implicated in assassination of opponents, p.4 available at http://www.unhcr.org/refworld/country,,HRW,,COD,,4cb8269aa,0.html

which, at that time was attempting to overthrow the CAR government. It is during this period of intervention that it is alleged that MLC combatants waged a campaign of rape, torture and pillage in the CAR.[168]

However, Bemba and his troops failed to quell the rebellion and in March 2003. President Ange-Felix Patassé was ousted, and the new regime in place pressed charges against him and his rescuer, Jean-Pierre Bemba in September 2004.[169] International arrest warrants were issued, but because the new government was unable to serve its own arrest warrant and have Bemba arrested, the situation was referred to the International Criminal Court (ICC) in 2005.[170] On May 22, 2007, ICC prosecutor Luis Moreno-Ocampo decided to open investigations into crimes committed in the CAR.[171]

Jean-Pierre Bemba was arrested near Brussels on 24 May 2008 on the basis of an arrest warrant issued by the ICC.[172] Bemba is held for command responsibility for crimes that his troops committed in the CAR during their intervention in an attempt to save President Patassé's regime. He was originally charged with three counts of crimes against humanity and five counts of war crimes in October 2010.[173] The charges were, however, reduced to two counts of crimes against humanity and three counts of war crimes.[174] Jean-Pierre Bemba is held criminally responsible under article 25(3)(a) of the Statute, for: rape as a crime against humanity, punishable under article 7(1)(g) of the Statute; rape as a war crime, punishable under article 8(2)(e)(vi) of the Statute; torture as a crime against humanity, punishable under article 7(1)(f) of the Statute; torture as a war crime, punishable under article 8(2)(c)(i) of the Statute; committing outrages upon personal dignity, in particular humiliating and degrading

[168] Waigarala, W: Central African Republic, War Prosecution Watch, (6) 6, June 20, 2011, pp.6-14 available at http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol06_issue06.html
[169] Hague referral for Africa pair, available at http://news.bbc.co.uk/2/hi/africa/4908938.stm
[170] International criminal Court, ICC- 01/05 Situation in the Central African republic, accessible at http://www.icc-pi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/situation%20icc-0105?lan=en-GB
[171] *Ibid*
[172] Coalition for the International Criminal Court: ICC secures first arrest in CAR situation, accessible at http://www.iccnow.org/?mod=newsdetail&news=2668
[173] Allafrica.com: The Bemba trial will be the ICC's first stemming from its investigation of serious crimes in the Central African Republic *(CAR).* Accessible at http://allafrica.com/stories/201011191101.html
[174] *Ibid*

treatment, as a war crime, punishable under article 8(2)(c)(ii) of the Statute; pillaging a town or place as a war crime, punishable under article 8(2)(e)(v) of the Statute.[175]

The accused, Jean-Pierre Bemba is a DRC national, leader of the Movement for the Liberation of the Congo (MLC), a rebel group which turned political party subsequent to the ICD agreement in 2003. As a rebel movement, the MLC and its leader controlled a large part of the Northeastern and Northwestern Congo from 1998 to 2003. As per the ICD agreement which ended the war in the DRC, Bemba became one of four vice-presidents in the transitional government of the DRC from the 17th of July 2003 to December 2006.[176] He ran in the 2006 first ever democratic elections organized in the DRC since independence in which he was the runner-up to President Kabila in the race to the presidency of the republic. His 2006 defeat to President Joseph Kabila turned him into Congo's most prominent opposition leader, the role he was prepared to assume when he declared that 'he would participate in the system by leading the political opposition to preserve peace and to save the country from chaos and violence."[177] In 2007, he ran for a senatorial seat and was elected senator. However, Jean Pierre Bemba was forced into exile to Portugal that same year, following a bloody street battle between his bodyguards and President Kabila's guards in Kinshasa. Serving an arrest warrant issued against Jean Pierre Bemba by the ICC following the CAR government's referral of situations within the court's jurisdiction, Belgium authorities arrested and transferred Jean Pierre Bemba to The Hague where he stands trial for command responsibility for atrocities committed by his troops in the CAR when attempting to quell rebellion against president Felix Patassé.

Conclusion

The ICC emerged as the credible instrument to deter future commission of crimes of concern to the international community by prosecuting, arresting, and convicting

[175] See, ICC: Situation in the Central African Republic in the case of Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08, 23 May 2008

[176] Le Marchand,R: comsociationalism and power sharing in Africa: Rwanda, Burundi, And Democratic Republic of Congo, *African Affairs*, (106) 422, available at http://afraf.oxfordjournals.org/, p.13

[177] Radio Katwe, Bemba arrest overshadows Army Council meeting**,** available at http://radiokatwe.com/bembameshikwa080602.htm

individuals accused of the commission of such crimes. But the ICC does not have autonomous enforcement mechanism to carry out its mandate and thus relies heavily on states parties to enforce its decisions. The court's heavy reliance on states members to carry out its mandate in turn impacts negatively on its integrity, as it has to trade carefully and avoid to irritate incumbent governments in order to secure cooperation from them. The indictments of Jean-Pierre Bemba, Bosco Ntaganda, and the Lord's Resistance Army (LRA) leadership all seems to give credit to this observation. In this context, the instrumentalization of the ICC for political goals by incumbents is a possibility.

The following chapter will attempt to gauge the effect of the ICC processes on the nascent and frail democracy in the DRC.

Chap IV: Is the ICC process rebounding to obstruct and unravel democratic processes in the DRC?

This chapter is dedicated to the analysis of the impact of the ICC processes on the consolidation of democracy in the Democratic Republic of the Congo, highlighted in 2006 with the successful holding of the first ever democratic elections in the country since independence. To this end, we propose to look at the state of democracy before the ICC began its activities in the DRC, and move on to look at the state of democracy during the ICC intervention. The Economist Intelligence Unit's Index of democracy will assist us in monitoring any variance in democracy between these two periods. The impact of the ICC processes on the DRC's democracy will be assessed with regards to its case selection strategy, self-referral mechanism, timing of prosecutions, and its strategy with regards to peace agreements stipulations.

The July 2006 elections are regarded as the turning point from dictatorship and years of violence to a more promising era of democratic governance. But what constitutes a democracy, however, is a matter of contention in the academic world as the concept is solicited by a myriad of definitions due to the absence of consensus as to how to measure it. Although there is no consensus on what democracy is, scholars agree that at a minimum, the fundamental features of a democracy include government based on majority rule and the consent of the governed, the existence of free and fair elections, the protection of minorities and respect for basic human rights.[178] Despite the contention surrounding the concept of democracy as to what its true meaning is, indexes purposed at measuring it are not in short supply.

4.1 The Economist Intelligence Unit's Index of democracy as indicator of overall democracy in the DRC

There is no shortage of instruments to measure democracy in the academic world. The abundance of instruments seeking to account for democracy makes the choice

[178] Kekic, L: The Economist Intelligence Unit's Index of democracy, the world in 2007, p.1 available at http://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf

very difficult. The choice of the Economist Intelligence Unit's index as the measure for democracy in this report is informed by the index ability to encompass more features such as the elements of political participation and the functioning of government, that determine the substance and the quality of democracy. The Economist Intelligence Unit (EIU) provides a snapshot of the current state of democracy in the world for 165 independent states and two territories.[179] Since 2006, the institution has published reports on the state of democracy in the DRC.

The democracy index published by the EIU is a "weighted average based on the answers of 60 questions, each one with either two or three permitted alternative answers. The index is based on 60 indicators grouped in five different categories (electoral process and pluralism, civil liberties, functioning of government, political participation, and political culture). Each category has a rating on a 0 to 10 scale with 0 to 3.9 representing an authoritarian regime, 4 to 5.9 representing an hybrid regime, 6 to 7.9 a flawed democracy, and 8 to 10 a full democracy. Countries are categorized in four categories in accordance with their scores: full democracies, flawed democracies, hybrid regimes, and authoritarian regimes."[180]

According to the EIU report published in 2006, the year of the holding of the first ever democratic elections since independence, the DRC ranked 144th out of 167 countries surveyed and fell in the "authoritarian" category as the overall score was only 2.76, while it scored 2.78 in political participation, 4.58 in electoral process and pluralism, 0.36 in the functioning of government category, 3.75 in political culture, and 2.35 in civil liberties.[181] The report is quite reflective of the overall political situation in which the DRC found itself in the year 2006, a situation of a country coming out of years of dictatorship followed by years of violence, and which the holding of the 2006 elections portended the inauguration of a new era, the era of democracy. But the successful holding of the first ever democratic elections did not turn the DRC from dictatorship to democracy. However, the popular enthusiasm and yearning for democracy translated in a very interesting score in the "electoral process and pluralism" category.

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[179] Kekic, *L: Op cit,* p. 3
[180] *Ibid,* p. 2
[181] *Ibid,* p.5

The report published in 2008 shows that the DRC slid down to 154th place in the countries ranking with regards to democracy, with a score of 2.2 in the overall score category, 3 in electoral process and pluralism, 0.71 in the functioning of government, 2.22 in the political participation, 3.13 in the political culture, and 2.35 in the civil liberties category.[182] This report showed that the DRC democratic aspiration was already in trouble just two years after the 2006 elections. It went 10 places down compared to the 2006 ranking, and was also losing ground with respect to all other categories.

The report published in 2010, shows that the DRC lost one more place from the countries ranking as it slipped to 155th place out of 167 countries surveyed, ranking it 11 places down compared to the position it occupied in 2006. The overall score dropped to 2.15 while it scored 2.58 in electoral process and pluralism, 1.07 in the functioning of government, 2.22 in political participation, 3.13 in political culture, and civil liberties dropped to 1.76.[183]

The report published in 2011 shows that the DRC remained at the position occupied in 2010, which is 155th of 167 countries surveyed with the scores in the different categories remaining unchanged.[184] This quick look at the 2011 EIU reports shows that the DRC's democratic aspiration really declined compared to 2006.

4.2 State of democracy in the DRC before the ICC processes

Before the ICC began its activities in the DRC, the country was engaged in the democratic process which began on 25 April 1990 when President Mobutu announced a series of reforms, including the end of one party rule, opening up to a multiparty system, the separation of state powers, and setting a transitional period to democratic rule,[185] but Mobutu thwarted all attempts to introduce the announced reforms.

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[182] Economist Intelligence Unit's index of democracy, the world in 2008 available at http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf

[183] Economist Intelligence Unit's index of democracy: The world in 2010 available at http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf

[184] Economist Intelligence Unit's Index of democracy: the world in 2011 available at http://www.sida.se/Global/About%20Sida/Så%20arbetar%20vi/EIU_Democracy_Index_Dec2011.pdf

[185] Ngoma, P. B, and Otemikongo, J. M, Moswa Mombo, L: Democratic Republic of Congo: Democracy and political participation: An assessment of the first steps into the 3rd Republic discussion and advocacy paper, p.2

However, serious attempts at introducing reforms intended to pave the way to democracy in the DRC were made at the Inter-Congolese Dialogue (ICD) as provided by the Lusaka peace agreement and held in 2002 in South Africa, where delegates from civil society and political parties were invited to take an active part. The ICD conference led to the signing, by all participants, of the Global and Inclusive Agreement (GIA) which triggered a transitional process towards democracy, by establishing transitional institutions, the institutional framework for the organization of elections and the process for drafting and adopting a new constitution.

Nevertheless, the process was meant to restore the basis of legitimacy destroyed by the failure of reaching agreement at the 1991 national conference and by the subsequent unseating of the Mobutu regime by the AFDL movement, and thus to bring healing to the country.

Thus before the year 2004 which corresponds to the beginning of the ICC activities in the DRC, the country was engaged in a series of processes intended at laying the groundwork for the establishment of democracy.

4.3 State of democracy during ICC processes

From Mark E. Warren's definition of democracy which he defines as a "political system whose leaders are elected in competitive multi-party and multi-candidate process in which opposition parties have legitimate chance of attaining power or participating in power,"[186] I observe that the DRC's true attempt at democracy culminated in the year 2006 with the holding of the first ever free and fair elections in the country since independence in which all parties participated and had a legitimate chance to attain power. These elections were provided for in the February 2006 constitution adopted through a referendum organized a year earlier in 2005.

The 2006 constitution laid the foundation for a democratic framework which allowed for citizens participation in the country's political life, ensured an effective separation

[186] Warren E. M: What can democratic participation means today? *Political Theory*, Vol. 30(5), Oct., 2002, p.677

and proper functioning of power among the three traditional powers. It also provided for institutions that support democracy and are responsible for ensuring compliance with democratic oversight mechanisms, and for strengthening the conditions of political participation and the conducting of transparent elections.[187] To date, these constitutional guarantees have only resulted in declarations of good intents as the government has so far failed to translate them into practice. The 2006 elections have failed to infuse new blood into the executive branch of the DRC which has thus contributed to the perpetuation of undemocratic practices of the past. The position of the executive was further reinforced by the ICC involvement in the CAR situation which, as stated above, has significant bearing on the DRC politics with the indictment and later the arrest and transfer to The Hague of Jean-Pierre Bemba, Senator and leader of the opposition to president Kabila. By removing Jean-Pierre Bemba, the leader of the opposition in the DRC, from the sight of the incumbent government in the DRC, the ICC process has contributed to the weakening of an institution which in democracy is tasked with holding the government to account for its omissions or commissions and is therefore harmful to the healthy functioning of democracy.

4.3.1 Implications of the ICC's non-observance of peace agreements stipulations on the consolidation of democracy in the DRC.

The successful holding of the 2006 elections and the installation of the first ever democratically elected government did not halt fighting in the eastern part of the DRC especially in the Kivu region where a rebel movement known as the National People's Congress (CNDP) continued to wreck havoc and to contest the legitimacy of the elected government in Kinshasa under the guise of protecting the interests of Congolese of Tutsi origin in the whole of the DRC. Plans to resolve the conflict in the Kivu by emphasizing a military solution were failing. Democracy cannot function in a war zone. It requires a minimum of stability for the people to be able to exercise their democratic rights. Realpolitik imperatives dictated that the DRC government in

[187]Ngoma-Binda, P; MandefuYahisule, J; and Moswa Mombo, L: Democratic Republic of Congo: Democracy and political participation: An assessment of the first steps into the 3rd Republic, *discussion paper, Open Society Initiative for South Africa*, 2010, p.2

Kinshasa had to find a way of entering into negotiations with the CNDP leadership in order to put an end to violence in the eastern DRC and therefore, safeguard the fragile democracy. The opportunity was provided by the secretly signed agreement between president Kabila and president Kagame which resulted in the launched of operation "*Umoja wetu*" (our unity), a combined military operation against remnants of the Rwandan rebel *Forces démocratiques de libération du Rwanda* (FDLR, Democratic Forces for the Liberation of Rwanda), and which also allowed the opening of direct negotiations between the CNDP and the Kinshasa government.[188] Stating that Laurent Nkunda was hindering peace in the eastern DRC, Bosco Ntaganda removed him from the CNDP leadership in January 2009.[189] On the 16th of January 2009, the CNDP signed the declaration of the cessation of hostilities and announced the integration of their combatants into the Congolese army.[190] In March the same year, the CNDP signed a political agreement with the Congolese government which provided its troops with amnesty for acts of war and insurgency, release of political prisoners, and political participation in Congo's government.[191]

Bosco Ntaganda is sought on an arrest warrant from the ICC for war crimes committed in Ituri between 2002 and 2004.[192] Human Rights activists as well as the ICC call on the DRC government to arrest and surrender Bosco Ntaganda to The Hague to stand trial. Under the Rome Statute, the DRC government, as party to the Statute, has the obligation to arrest and refer Bosco Ntaganda to the court. But for the DRC government, any attempt to discharge its responsibility under the Statute would result in a clash of commitment as it is caught between two commitments with opposing ends. The prosecutorial strategy of the ICC is to hold accountable those most responsible for the most serious crimes under international humanitarian law, whilst the peace agreement signed with the CNDP and the ensuing amnesties intended to forego retribution for the past wrong in the interest of peace and stability which are

[188] Congo in conflict, *International crisis group*, available at http://www.crisisgroup.org/en/key-issues/conflict-in-congo.aspx
[189] Kanyunyu, J: Dissident says Nkunda obstructing east Congo peace, *Reuters*, January 8, 2009 available at http://www.reuters.com/article/2009/01/08/idUSL8560924._CH_.2400
[190] Congo: Five priorities for a peace building strategy, *Africa Report No150*, 11 May 2009,p.8 available at http://www.observatori.org/paises/pais_57/documentos/150_congo____five_priorities_for_a_peacebuilding_strategy.pdf
[191] You will be punished: Attacks on civilians in Eastern Congo, *Human Rights Watch*, p.42 available at http://www.hrw.org/sites/default/files/reports/drc1209webwcover2.pdf
[192] Ibid, p.41

two important ingredients necessary for the consolidation of democracy. Therefore, the ICC normative claim which proffer neutrality, judicial fairness, expertise and policies that seek accountability without regard for political circumstances and implications[193] to make its threat credible and thus prove its value, has the potential to derail political processes.

4.3.2 Implications of the ICC case selections on the consolidation of democracy in the DRC

The analysis of cases currently under investigation or before the ICC shows signs of bias against the opposition and in favor of incumbents. In effect, despite claims that the OPT case selection is solely guided by the desire to deliver justice to victims of mass atrocities, the ICC has, so far, been careful in selecting only cases that are less likely to irritate the incumbent government or the prominent group in a power-sharing setting to secure cooperation from the state. This was evident in Uganda, the DRC, the CAR, and it is evident today in the Côte d'Ivoire case where only the ousted president is indicted and transferred to The Hague even though there is plenty evidence that suggest that atrocities were committed by all the sides to the Ivorian conflict. This display of bias in ICC case selection partly explains why the incumbents are not hesitant in referring matters to the ICC.

Two activities are involved in the ICC processes to discharge its mandate: selection, and enforcement. The ICC selection activity suggests its determination to enforce its mandate to end impunity for perpetrators of mass atrocities. The enforcement activity in turn requires the presence of cooperation between the court and member states given the fact that the court does not have a police force to carry out its warrants of arrest. The court relies heavily on states cooperation in this regard. Speaking about cooperation, Fearon argues that international cooperation involves two interlinked stages: bargaining and enforcement.[194] He argues that much of the hard work which fosters international cooperation occurs at the first stage, the bargaining stage. Thus

[193] Brown, S: The anti politics of transitional Justice: Lessons from Rwanda, *Peace building and rule of law in Africa: Just Peace?* eds, Chandra Lekha Sriram, Olga Martin Ortega, and Johanna Herman, London, Routledge, 2010, p.2

[194] Fearon, J: Bargaining, Enforcement, and International Cooperation, *International Organization,* 52, 1998, p. 269

understanding the enforcement capability of the ICC requires attention to the bargaining activity between the institution and the state (or states), bargaining which occurs before and after a warrant of arrest has been issued. Even in cases in which the suspect resides in an ICC member state, the Court must secure the apprehension and the surrender of the suspect from state authorities.[195] It is therefore very reasonable to assume that cooperation had taken place between the ICC and the DRC government before and after the warrant of arrest against Mathieu, Katanga, and Germain were issued, cooperation at which mutually profitable bargaining took place between the institution and the state. The same reasoning can be applied the CAR's self-referral. What is not clear however, is the bargaining between the CAR and DRC government given that Jean-Pierre Bemba is a DRC citizen.

There is a general agreement among scholars and representatives of international organizations with vested interest in humanitarian matters that all parties to the DRC conflict were implicated in the commission of serious human rights atrocities committed during years of conflicts in the DRC. However, the OTP decision to focus its investigations solely on crimes committed in Ituri has divided scholars and puzzled human rights activists and led them to question the rationale of such a decision given the dispersion of victims throughout the Congolese territory. There is no doubt that the Ituri conflict is among the sites where gravest atrocities were committed during the conflict, but the Ituri region is by no means the only one where such atrocities were committed and therefore fails to justify the OPT's decision to solely confine investigations there. There is a perception that the Ituri case selection was dictated more by political calculations rather than by the need to apprehend culprits, provide justice to victims of the conflict, and thus put an end to the culture of impunity as professed by the Rome Statute. The Ituri region was carefully chosen to avoid the ICC from getting involved in a head-on collision with the government in Kinshasa, and especially with President Kabila as the institution is desperate to secure the DRC's cooperation with it.

[195] Roper, D. S, and Barria, A. L: State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects, *Leiden Journal of International Law*, 21, 2008, p. 458

Compared to other members of the transitional government, in the famous 4+1 (4 vice-presidents + 1 President) power-sharing transitional government setting, who were militarily very active in the eastern part of the DRC either as political leader or as military commander of their respective rebel movements, Kabila's presence and influence in the Ituri region was minimum or even inexistent thus decreasing the prospects of any arrest warrant being issued against him or his immediate circle. Therefore, the ICC process had no potential to elicit a negative response from Joseph Kabila, as he had less to fear from it compared to some of his colleagues in the 4+1 transitional government.[196] Furthermore, the ICC process turned out to be an extremely profitable currency for Joseph Kabila[197] as its processes had the potential of weakening his opponents and consequently strengthening his power, as all his adversaries had a cloud of potential court prosecutions hanging over their heads should the court decide to go ahead with investigations. The Ituri conflict is also the most removed from the political arena in Kinshasa, limiting the damage the investigation could cause to the fragile transitional government and signaling a more politically cautious approach from the OTP.[198]

In the mutually beneficial climate, the DRC provided the ICC with its first cases to prove its value and bolster support among member states. Thomas Lubanga, of the Union of Congolese Patriots (UPC); Germain Katanga, chief of staff for the Patriotic Force of Resistance in Ituri (FRPI); Mathieu Ngudjolo, a Lendu chief of staff for the Front for National Integration (FNI) and then a colonel in the Armed Forces of the Democratic Republic of the Congo (FARDC); and Lubanga and Katanga who had been in DRC custody since 2005 in relation to the killing of nine UN peacekeepers, were easily transferred to The Hague to stand trial for the alleged crimes committed in the Ituri region.

In contrast to the above-mentioned indictments, the April 2008 unsealing of the arrest warrant against Bosco Ntaganda strained the collaboration between Kabila and the

[196] Geis, J and Mundt, A: When to indict? The impact of timing of international criminal indictment on peace processes and humanitarian action, *The Brookings Institution-University of Bern Project on Internal Displacement*, University of Bern, Netherland, February 2009, p.8 available at http://www.brookings.edu/papers/2009/04_peace_and_justice_geis.aspx
[197] Cruvellier, T: ICC joins the Congolese Chess Game, July 05, 2004 available at www.justicetribune.com/v2_print.php/page=v2_article&mode=print.
[198] Geis, J and Mundt, A: *Op.Cit*, p.9

ICC.[199] Bosco Ntaganda is sought by the ICC for alleged crimes committed during his tenure as a UPC deputy in Ituri. At the time the warrant was unsealed, Ntaganda was Laurent Nkunda's National Congress for the Defense of the People (CNDP) chief of staff in his native North Kivu.[200] Though it is not clear as to what role Bosco Ntaganda played in the arrest and the subsequent demise of Laurent Nkunda, it is however likely that he played a meaningful role in the recent efforts to bring peace in the North Kivu province which is one of the provinces that continued to escaped from the control of the DRC government in Kinshasa long after the 2006 elections. The DRC government has so far refused to discharge its obligations under the Rome Statute, to arrest and transfer the suspect to the court. The observed break of cooperation between the DRC government and the ICC on Bosco Ntaganda shows that the two parties failed to find a common ground at the bargaining stage which in turn impedes the enforcing ability of the ICC, evidenced in Bosco Ntaganda remaining at large despite the arrest warrant hanging on him.

From the above follows that the ICC case selection either favors the incumbents as it weakens or threatens to weaken the opposition, or threatens to derail a political process with important bearing on the consolidation of the fragile democracy in the DRC.

4.3.3 Implications of the ICC self-referral mechanism on the consolidation of democracy in the DRC

Self-referral mechanism features among the few mechanisms through which the ICC jurisdiction can be enacted. It consists of the state party to the Rome Statute declaring itself unable or unwilling to prosecute and thus enacting the court's complementarity function as provided by the Statute. The Chief Prosecutor of the ICC encourages the use of this practice by states members probably to gain their cooperation and thus ensure the security of investigators on the ground as well as the success and effectiveness of operations which have a bearing on the value of the court itself. But is has to be said that the self-referral mechanism is viewed with suspicion by many of those who were thrilled by the prospects of the emergence of an independent

[199] *Ibid*, p.10
[200] Geis, J and Mundt, A*: Op Cit,* p.10

International Criminal Court. Why should a state invite the ICC to investigate situations on its own territory if this entails negative repercussions for the very government which invited the Court? States' extensive use of the self-referral mechanism to enact the ICC jurisdiction thus suggests the existence of some kind of deal between the referring state and the court in which the former is reassured by the latter that the procedure will not carry harmful repercussions on its officials.

The DRC claimed that its resort to the self-referral mechanism was based on the fact that its judiciary system and the police force were malfunctioning, thereby unable to address mass crimes committed in the country during the period within the temporal jurisdiction of the ICC.[201] But the OPT choice to focus its investigation on the Ituri region which, of all the conflict-affected provinces of the DRC offered the best-functioning local judiciary, which had already shown adeptness at investigating serious crimes, including those committed by Lubanga, Katanga and Ngudjolo,[202] contradicts the government's claim. Since situations in which the ICC can be interested are not in short supply in a country plagued by years of conflict with unspeakable atrocities committed by all sides to the conflict, the court could focus its investigations elsewhere in the DRC, just to silence its critics and assert its independence from states parties and thus put to rest all speculations about politics meddling with legal matters. Given the capacity of domestic institutions to investigate and prosecute major crimes, the ICC involvement in the Ituri region only contributed to fuel speculations and debate around the true intention behind government self-referring situations to the court.

The three cases in which the self-referral mechanism has been used to enact the court's jurisdiction so far show that the ICC has proceeded with care in selecting cases to prosecute by targeting individuals outside the sphere of government. In Uganda the ICC indicted the LRA leadership, in the CAR the ICC indicted Jean-Pierre Bemba, and in the DRC the court targeted only activities in the region removed from Kinshasa's involvement. We know that democracy enterprises were not successful in Africa partly due to the crackdown on political opposition by

[201] Clark, P: Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda, Courting Conflict? *Justice, Peace and the ICC in Africa,* p. *42*
[202] *Ibid*, p. 40

incumbents. Thus the self-referral mechanism presents states with an opportunity to reinvent the crackdown on the opposition, be it armed or unarmed, and thus bears negative implications on fragile political processes undertaken in those countries as they tend to strengthens incumbents and weaken the opposition.

4.4 Analysis of the impact of the ICC processes on the consolidation of democracy in the DRC

The research report attempts to analyze the impact of the ICC processes on the consolidation of democracy in the DRC. As defined in earlier lines, democracy is said to be consolidated when it is expected to last well into the future. "The survival prospects of political regimes are not material objects beyond mental and linguistic apprehension" [203] , but rather "represent intersubjective opinions on future development which we form on drawing on certain factual evidence, past as well as present."[204] In this context, democracy consolidation is not a material object, but an argument, a conclusion reached on the basis of evidence and reasoning.

Signs of democracy illness are not in short supply in the DRC politics since the adoption of the new constitution and the successful holding of he 2006 elections. For example, as per the All- Inclusive Agreement reached in the framework of the ICD, the new constitution provided for independent democracy supporting institutions to oversee and manage the electoral process, to monitor respect for freedom of expression and ensure equal access to the public media for all political parties, and to promote ethics and combat corruption. So far, these institutions have struggled to play their intended role. Not long ago the DRC Parliament introduced a law that restores the authority of the executive over the Higher Magistrates council and therefore, reduces the effectiveness of the independence of the judiciary. [205] Moreover, "legislative and administrative mechanisms are used to reduce the autonomy of institutions supporting democracy, including through the composition of these

[203] Giovanni, S: Guidelines for Concept Analysis, in *Social Science Concepts: A Systematic Analysis,* ed. Giovanni Sartori, Beverly Hills: Sage, 1984, pp.15–85
[204] Shedler, A: Measuring democratic consolidation, *Studies in Comparative International Development,* (36) 1, Spring 2001, p.67
[205] Ngoma-Binda, P; MandefuYahisule, J; and Moswa Mombo, L: *Op.Cit*, p.5

institutions or the retention of resources necessary for their operation."[206] The Law on the Independent National Electoral Commission (INEC), which was to replace the Independent Electoral Commission (IEC), and the nomination of its members by president Joseph Kabila, are just some of the instances that would exemplify the regained supremacy of the executive over the legislative and the judiciary.

Moreover, Jean-Pierre Bemba was forced out of the capital Kinshasa after a violent street confrontation between his bodyguards and the "Republican guards", in fact Joseph Kabila's private militia. The mysterious death of a prominent human rights activist, Floribert Chebeya in June 2010, and the mystery around Armand Ntongulu's death point to the fact that the DRC has relapsed into some kind of repressive regime.

For a country without a strong tradition of democratic majority rule and which has witnessed years of dictatorship and violence like the DRC, the introduction of free elections alone does not suffice to achieve a transition from dictatorship to democracy. A wider shift in the political culture and gradual formation of the institutions of democratic government are also needed to attain democracy. The political opposition is such an institution recognized in a democracy as an indispensable tool apt at contributing in the achievement of the shift in political culture. In a democracy, it is common practice that the largest minority party in the parliament constitutes the official opposition to the ruling party. The common belief in democracy is that a "healthy parliamentary opposition is essential for the sound working of democracy."[207] This belief implies that unless there is a vibrant opposition, constantly on the alert and ever watchful of the government's policies and actions, the ruling party would tend to get complacent and may transform or relapse into authoritarian practices. But, when there are well-informed critics, ever ready to expose the wrongs committed by the government, and to bring to light its acts of omission and commission, the ruling party can hardly afford to be slack and negligent in the performance of its duty towards the country.[208] A healthy political opposition is thus necessary to sustain democracy and contribute to the consolidation of democratic practices.

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[206] *Ibid*, p.5
[207] Short essay on the role of opposition parties in democracy, preserve articles, available at http://www.preservearticles.com/201105267171/role-of-opposition-parties-in-democracy.html
[208] *Ibid*

The new DRC constitution recognizes the place and role of political opposition in the country's politics. In effect, while article 7 of the new constitution outlaws the institution of monopartyism on the whole or portion of the DRC territory, article 8 of the same constitution recognizes the existence of political opposition in the DRC as well as it aspiration to ascend to power democratically.[209] In spite of the formal recognition of opposition in the state's political life, the presence of any opposition does not always go well with incumbents in the DRC.

Jean-Pierre Bemba, indicted by the ICC from the CAR referral for alleged atrocities committed by his troops in that country when they were attempting to quell a rebellion there, was a key figure in DRC politics as an elected senator, and leader of the largest opposition party and perhaps the most serious challenger to incumbent President Kabila. While there is no evidence that the DRC and the CAR governments collided to have Jean-Pierre Bemba removed from the DRC political equation through the means of an ICC indictment, it is however curious to notice that the ICC which claims to bring a new era where the long perpetuated culture of impunity would come to an end, has not charged him with crimes his troops committed in the DRC, or announce an investigation into crimes possibly committed by François Bozizé's troops for crimes committed in the CAR. The East-West divide witnessed during the 2006 elections which can be translated into Swahili speaking vs Lingala speaking[210] has shown that the DRC electorate voted, not on issues but rather individuals they identified with. In this context, the arrest and transfer to The Hague of Jean-Pierre Bemba has weakened the opposition as in the DRC political culture context he was the embodiment of the opposition to president Kabila in the wake of the 2006 elections.

Empirical examples of where the ICC case selection, anti-politics stance, and self-referral mechanism were used so far clearly show bias in favor of incumbents to the detriment of the opposition or anybody associated with it. By avoiding undertaking

[209] Article 7 & 8 of the Democratic Republic of Congo Constitution, Kinshasa, February 2006 available at http://www.constitutionnet.org/files/DRC%20-%20Congo%20Constitution.pdf
[210] Kabungulu Ngoy-Kangoy,H: The political role of the ethnic factor around elections in the Democratic Republic of the Congo, p.228 available at kms1.isn.ethz.ch/serviceengine/Files/ISN/98416/.../Chapter9.pdf

any activity that would otherwise irritate the government from which support is needed to arrest, and transfer the suspect to stand trial, the ICC has not shown impartiality in carrying out its mandate. And in the context of states with no record of well functioning democracy, but engaged in a democratic process, the targeting of opponents works wonders for the incumbents who can rely on an international institution to answer their prayers of unsettling the opposition and thus impacts negatively on the consolidation of democracy.

4.5 The Liberal Institutionalism approach to the ICC's effects in the DRC

This report has focused on the impact of the ICC on the consolidation of democracy in the DRC and has made use of liberal institutionalism theory as the appropriate approach to assess the effect of the ICC on domestic political processes.

In light of Liberal institutionalism theory as outlined in chapter one of this report, institutions like the ICC are expected to play a meaningful role in terms of allowing cooperation or coordination to take place among self-interested entities (states) in a given policy area. The ICC emerged as a response to address international community's inefficiency in punishing perpetrators of international crimes following the surge of internal conflicts in the aftermath of the Cold War. In effect, the conflicts in Bosnia in 1992 and Rwanda two years latter in 1994 exposed the weaknesses and inadequacies of the collective security regime to adapt to the new types of conflicts prevalent in the aftermath of the Cold War and to ensure peace, security and the well being of the world. The establishment of a centralized mechanism to punish those responsible for the commission of international crimes was therefore needed and believed to be useful to deter future commission of international crimes and thereby expected to contribute to the preservation of peace and security in the world.

Liberal Institutionalism theory predicts many ways through which the ICC can allow cooperation to take place among states. As a permanent international criminal court, the ICC is seen through Liberal Institutionalism lenses as encouraging cooperation to take shape between states through the reduction of high transaction cost associated with operating ad hoc criminal tribunals every time there is a pressing need for

establishing one. The ICC is also believed to foster cooperation among self-interested entities by raising the reputation cost of members.

The court is tasked with the responsibility to end impunity by prosecuting individuals accused of crimes of concern to the international community. To this end the ICC has to ensure the "carrying out of investigations and prosecutions against the most serious offences, and to prompt national states to overthrow the considerations of expedience and realpolitik that have so often led to a trade of justice for impunity and peace."[211] There is no country in the world that would like to be regarded as a black sheep of the international community because of harboring criminals or condoning their acts. On this basis cooperation taking place among state with the help of the ICC is predictable and inevitable. Allowing cooperation to take place by raising the cost of reputation of member states infers that states would comply with their international commitments, even if carrying out their international obligations is likely to impact negatively on other domestic processes simply because they are more concerned with safeguarding their reputation internationally. This state of affairs sometimes place state members in front of a dilemma which the theory failed to predict. In effect, sometimes the state has to choose between two equally important alternatives. It has to make a choice between commitments that would discredit and tarnish its reputation internationally and commitments that would preserve its international reputation even at the expense of undermining equally important domestic political processes.

The Bosco Ntaganda case best exemplifies the dilemma of commitments in which states, sometimes, find themselves. The DRC government had to choose between preserving its image as a country respecful of its international commitments by arresting and transferring Bosco Ntaganda to The Hague without consideration to the implications that such act may bear on its domestic processes; and the imperative of realpolitik that dictated that the government had to place peace and security considerations ahead of its commitment to the ICC, sign a peace deal with the CNDP and resist calls to arrest and surrender Bosco Ntaganda to The Hague.

[211] International Criminal Courts and Tribunals in the Concept of Transitional Justice and their Impact on Post-Conflict Societies: a comparative study, p.100

Conclusion

The DRC is still nursing its wounds inflicted by years of dictatorship and wars with unspeakable atrocities. For a country without a strong tradition of democratic majority rule, time, and a lot of it, is needed to master, perfect and create a tradition of democratic practices in the country. But the ICC cannot afford to let the time pass by before it makes its first intervention since only a successful track record of interventions and subsequent prosecutions would bolster support for the court among signatories and prove its value as a legitimate actor and a credible deterrent force. Therefore the court's determination to seek an effective application of the Rome Statute does not allow for political consideration when deciding on a situation to investigate. This impacts negatively on early political processes as it has the propensity of breaking the fragile political balance of power established in the form of government and opposition, like the one that emerged in the aftermath of the 2006 Congolese elections where an elected government and the political opposition were clearly identified.

CONCLUSION

This research report has looked at the implications of the ICC processes on the consolidation of democracy in the DRC.

Though the DRC inherited structures of democratic governance at independence, the democracy project never took off in the country. The short period of political crisis was succeeded by what will be known as three decades of dictatorship which completely destroyed all structures upon which the democratic project was premised to take off. The destruction of political opposition features among the noticeable achievements of the second republic. This achievement sealed the fate of democracy in the DRC during that period.

Political opposition found a way back in the DRC politics with the liberalization of political space in April 1990. However, president Mobutu, once again, found an ingenious way to hamper the work of the opposition and thus, thwart the democratic project from taking off. President Mobutu weakened the work of political opposition through the creation and funding of hundreds of bogus opposition political parties in order to be able to control the outcome of the liberalization process.

The ascension of Laurent Kabila to power in 1997 revived hopes for the restoration of multiparty democracy in the DRC. But just a few months in power, Laurent Kabila also banned political parties with the exception of his own. This situation was reminiscent of the second republic's politics which witnessed the emergence of the MPR credited with the ushering and cementing of dictatorship. As a consequence of the situation, some groups resorted to the use of arms to compel political transformation.

The 2006 elections provided by the conclusions of the ICD finally set in motion the illusive multiparty democracy in the DRC. The democratic process held a particularity in the fact that the majority of the process stakeholders were directly or indirectly implicated in the commission of crimes falling within the jurisdiction of the ICC.

I find that the ICC activities in the DRC have impacted negatively on the consolidation of democracy as its involvement has so far only targeted individuals in the opposition which tends to weaken the opposition as it realizes its vulnerability. Democracy in the DRC was reintroduced on the background of violence that resulted in million of civilian deaths, and scores of atrocities committed by all major stakeholders to the process. While the emergence of the ICC, as a credible deterrent to end impunity for individuals accused of crimes of concern to the international community, is welcome as its presence is expected to deter future commission of heinous crimes and thus contribute to the consolidation of democratic values, the empiric observation of its activities in the DRC suggests the opposite for several reasons: The political history of the DRC has shown that the country has no strong tradition of democratic rule, and has just recovered from years of conflicts which ended not because the incumbents decided to transform into democrats, but because they were unable to impose their will by the force of arms. The ICC plays the incumbents' game by privileging self-referral mechanism above all other mechanisms to enact its jurisdiction. The court is nervous to state its authority in carrying out its mandate, but does not have enforcement capacity of its own, and therefore depends on states member in this regard. The court enforcement deficiency has so far informed its strategy in case selection which has so far advantaged the incumbents. Moreover, the ICC urgency to state its authority also impacts on its timing of prosecutions does not allow for early political processes to cement before the Judiciary takes its course.

This research is only an eye opener in the context of the implications of the ICC on early political processes. For time constraint and immediateness of events did not allow for a thorough and more accurate analysis. Time would allow for future researches to elaborate more accurately on the correlation between the ICC processes and domestic politics, and especially democracy.

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