

AIMS OF INTERNATIONAL PROSECUTION: DETERRENCE AND
INTERNATIONAL CRIMINAL COURT

A Master's Thesis

by

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Ankara

June 2010

To my family

AIMS OF INTERNATIONAL PROSECUTION: DETERRENCE AND
INTERNATIONAL CRIMINAL COURT

The Institute of Economics and Social Sciences
Of
Bilkent University

By

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In Partial Fulfillment of the Requirements for the Degree of
MASTER OF ARTS

In

THE DEPARTMENT OF INTERNATIONAL RELATIONS
BILKENT UNIVERSITY

ANKARA

June 2010

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ABSTRACT

AIM OF INTERNATIONAL PROSECUTION: DETERRENCE AND INTERNATIONAL CRIMINAL COURT

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International community while establishing international mechanisms to prosecute and punish perpetrators of war crimes, crimes against humanity and the crime of genocide assumed that international prosecution would have a deterrent effect on potential perpetrators. Thus, this thesis aims to analyze the extent of contribution by international justice mechanisms to the prevention of grave human rights violations in an ongoing conflict. In other words, this thesis tries to figure out whether the predetermined purpose of deterring future crimes is realized or not by international criminal courts. After examining the scope of international criminal justice system and deterrence theory in criminology literature, a discussion on the applicability of deterrence theory to the international context is provided. The main argument of this thesis is that if an international criminal court gets actively involved in a conflict, it would have deterrent effect on potential perpetrators. In order to test this hypothesis a case study on the conflict in Democratic Republic of Congo and the involvement of International Criminal Court is conducted.

Keywords: International Criminal Court, International Humanitarian Law, International Criminal Law, Criminology, Deterrence Theory, Armed Conflict, Democratic Republic of Congo

ÖZET

ULUSLARARASI KOVUŞTURMANIN AMACI: CAYDIRICILIK VE ULUSLARARASI CEZA MAHKEMESİ

Çil, Deniz

Yüksek Lisans, Uluslararası İlişkiler Bölümü

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Haziran 2010

Uluslararası toplum savaş suçları, insanlığa karşı işlenen suçlar ve soykırım suçu faillerini kovuşturmak ve cezalandırmak için uluslararası mekanizmalar kurduğu sırada, uluslararası kovuşturmanın muhtemel failler üzerinde de caydırıcı bir etkisi olacağını öngörmüştü. Bu nedenle, bu tez uluslararası adli mekanizmaların devam etmekte olan çatışmalardaki insan hakları ihallerini önlemekteki katkısını incelemeyi amaçlamaktadır. Bir başka deyişle, bu tez önceden belirlenmiş caydırıcılık amacının uluslararası ceza mahkemelerince gerçekleştirilip gerçekleştirilmediği ortaya koymaya çalışmaktadır. Uluslararası ceza sisteminin kapsamını ve kriminoloji literatüründeki caydırıcılık teorisini incelendikten sonra, caydırıcılık teorisinin uluslararası bağlamda uygulanabilirliği üzerine bir tartışma sunulmaktadır. Bu tezdeki ana argüman eğer bir uluslararası ceza mahkemesi bir çatışmaya aktif olarak müdahale ederse, muhtemel failler üzerinde caydırıcı bir etkisinin olacağı yönündedir. Bu hipotezi test etmek için Uluslararası Ceza Mahkemesi'nin Demokratik Kongo Cumhuriyeti'ndeki çatışmaya müdahalesi incelenmektedir.

Anahtar Kelimeler: Uluslararası Ceza Mahkemesi, Uluslararası İnsancıl Hukuk, Uluslararası Ceza Hukuku, Kriminoloji, Caydırıcılık Teorisi, Silahlı Çatışma, Demokratik Kongo Cumhuriyeti

ACKNOWLEDGMENTS

First and foremost I would like to express my deepest gratitude to Prof. Dr. Yüksel İnan who has not only supervised my thesis with his invaluable comments and suggestions but also supported me throughout my undergraduate and graduate studies. With his warm attitude and recommendations I spend my thesis writing period without any stress. I would also like to thank Asst. Prof. Nil S. Şatana for allocating her precious time to review and enhance my thesis as well as for her support during my graduate studies and future career plans. I also owe thanks to Assoc. Prof. Tuğrul Katoğlu who have accepted to read my thesis and joined my defense committee with his constructive comments.

I am indebted to my mother Handan Çil and to my father Mehmer Çil for their support throughout my entire life. I could not accomplish my achievements in my career path without their endless support.

I would like to express my thanks to my friends and colleagues B. Toygar Halistoprak, Seçkin Köstem, Filiz Akgün, Çiğdem Akın and B. Nazlı Üstünes for their friendship throughout my graduate studies. In addition, I would like to thank Pınar Kılıçhan Şener and B. Yasemin Özbek for their patience in answering my questions about administrative processes and for their help in performing my departmental duties.

Finally, because of the scholarship that helped me to finance my graduate studies, I would like to express my thanks to TUBİTAK for providing me such an opportunity.

TABLE OF CONTENTS

ABSTRACT	iii
ÖZET	iv
ACKNOWLEDGMENTS	v
TABLE OF CONTENTS	vi
LIST OF FIGURES	viii
LIST OF ABBREVIATIONS	ix
CHAPTER I INTRODUCTION	1
CHAPTER II THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM.....	7
2.1. Laws of Armed Conflict and International Humanitarian Law	8
2.2. International Humanitarian Law and International Human Rights Law	10
2.3. Sources of International Humanitarian Law	11
2.3.1. International Conventions Establishing Rules Recognized by States	12
2.3.2. International Custom as Evidence of a General Practice Accepted as Law.....	25
2.4. Enforcement of International Humanitarian Law	31
2.4.1. National Enforcement	33
2.4.2. International Enforcement.....	36
CHAPTER III THEORY OF DETERRENCE	45
3.1. Classical Theory of Deterrence.....	46
3.2. Re-conceptualization of the Theory	48
3.3. Testing Theory of Deterrence	57
CHAPTER IV APPLICATION OF THE THEORY TO THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM.....	67
4.1. Divergent Views on the Deterrent Effect of International Criminal Justice System ...	68
4.2. The Applicable Premises of Deterrence Theory	76
4.3. Conceptualization, Operationalization and Hypotheses	80
4.4. Methodology and Case Selection.....	83
CHAPTER V CASE STUDY AND ANALYSIS.....	86

5.1. Democratic Republic of Congo (DRC).....	86
5.1.1 History of the Conflict in DRC.....	89
5.1.2. ICC's Involvement in DRC.....	97
5.1.2.1. 2004 – 2006: Passive Involvement	97
5.1.2.2. 2006 Onwards: Active Involvement	101
5.2. Analysis of the Case.....	115
CHAPTER IV CONCLUSION	121
SELECT BIBLIOGRAPHY	126
APPENDICES	135
APPENDIX A	136
APPENDIX B	137
APPENDIX C	139
APPENDIX D	140
APPENDIX E	141

LIST OF FIGURES

1)	Relation between the implementation of laws and deterrent effect of legal sanctions.....	80
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LIST OF ABBREVIATIONS

ADFL	Alliance des Forces Démocratiques pour la Libération du Congo (Alliance of Democratic Forces for Liberation)
CNDP	Congres National pour la Défense du Peuple (National Congress for the Defense of People)
DRC	Democratic Republic of Congo
FADCR	Forces Armées de la République Démocratique du Congo (Democrat Republic of Congo Armed Forces)
FAR	Forces Armées Rwandaises (Rwandan Armed Forces)
FAZ	Forces Armées Zairoises (Zairian Armed Forces)
FDLR	Forces Démocratique de Libération du Rwnada (Democratic Forces for the Liberation of Rwanda)
FNI	Front des nationalists et integrationnistes (Nationalist and Integrationist Front)
FPLC	Forces Patriotiques pour la Libération du Congo (Patriotic Forces for the Liberation of Congo)
FRPI	Force de résistance patriotique en Ituri (Patriotic resistance force in Ituri)
HRW	Human Rights Watch
ICG	International Crisis Group
ICISS	International Commission on Intervention and State Sovereignty
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IDP	Internally Displaced People
IMT	International Military Tribunal
IISS	International Institute for Strategic Studies
LRA	Lord's Resistance Army
MLC	Mouvement de Libération du Congo (Congo Liberation Movement)
MONUC	Mission des Nations Unies au Congo (United Nations Organization Mission in DR Congo)
MRC	Mouvement Révolutionnaire Congolais (Revolutionary Movement of Congo)
NGO	Non-governmental Organization
RCD	Rassemblement Congolais pour la Démocratie (Rally for Congolese Democracy)
RPF	Rwandese Patriotic Front
UPC	Union des Patriotes Congolais (Union of Congolese Patriots)

CHAPTER I

INTRODUCTION

The history of international prosecutions of war crimes and crimes against humanity goes back to the end of the Second World War with the establishment of *ad hoc* international military tribunals (IMT) in Nuremberg and Tokyo to try German and Japanese war criminals of the Second World War. Especially the atrocities committed by the Nazi Germany in the European front of the war and the discovery of the detention camps established for Jewish citizens of Germany, which brought the genocide of Jewish people into light, triggered massive reactions in the international community. “Never again” was the motto of world politicians at those times. IMTs at Nuremberg and Tokyo were unprecedented in the sense that it was the first time that war criminals were being tried and punished by an international authority. This also underlined the understanding in the world community that war time atrocities and humanitarian law violations are topics of concern to the humanity. Prior to World War II, war criminals were to be tried and punished by either military or civil national courts. These had not attracted that much public attention because of the insignificant numbers and locality of prosecutions.

Right after the Second World War, there were also efforts initiated by the United Nations (UN) to establish an international criminal court, which proved

fruitless in the wake of political confrontation in the United Nations Security Council due to the Cold War. Therefore, approximately 50 years passed without any real incentive to establish an international court to prosecute international crimes, namely war crimes, crimes against humanity and genocide in particular. However, the end of the Cold War as well as the need to address the atrocities in the Former Yugoslavia and Rwanda paved the way of creating international criminal justice mechanisms. International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) could also be considered as unprecedented since they are different from IMTs of the Second World War. These were completely civil institutions involved in armed conflicts, which were not international. Especially in the case of ICTY, the Tribunal was established while the conflict was still going on in the territory of Former Yugoslavia with the assumption that prosecution of perpetrators would contribute to the restoration and maintenance of peace while ensuring that international humanitarian law violations were halted and redressed.

In addition to the establishment of ICTY and ICTR, hybrid courts such as the Special Court for Sierra Leone, the Ad hoc Human Rights Court for East Timor and Extraordinary Chambers in the Courts of Cambodia or Iraqi Special Tribunal are the recent examples of the developments in the execution of international humanitarian law. The proliferation in the numbers of international judicial bodies proves that the idea of individual accountability for grave human rights and humanitarian law violations has evolved potently in the international politics. Besides the issue of accountability, international criminal courts are currently considered in the peace making and peace building strategies for conflict torn societies. The logic behind the

establishment of these international criminal courts is that an international judicial body, even in a case of ineffectiveness or reluctance of domestic criminal courts of the countries concerned, would act as a deterrent for future crimes. The references to the deterrence argument could easily be observed in the documents that establish those courts especially the ones that were to be involved in an ongoing conflict.

Most recently and explicitly, in the preamble of Rome Statute of International Criminal Court, it is stated that the creation of an International Criminal Court would contribute to the termination of culture of impunity for the grave violations of human rights and to the prevention of such violations in the future. Some international lawyers and scholars also supported the deterrence argument in international criminal justice system and argued that the more perpetrators are prosecuted, the more they would establish precedents for others who would be deterred of committing such crimes because of the risk of prosecutions and trials by the international community. Moreover, the proponents of this idea suggest that since all the crimes punishable by international criminal justice system require planning and organization to some extent either committed by governments or by militias, prosecutions and trials would increase the risks and change the calculations of individuals before committing those crimes. Therefore, the prosecution of especially high profile perpetrators such as leaders, heads of states and commanders who bear the greatest responsibility of planning and commanding would set up a general deterrent effect.

The view of prevention of international crimes through the deterring impact of international criminal justice is widely supported among policy makers, international law scholars and human rights activists. Moreover, the report of the

International Commission on Intervention and State Sovereignty, entitled “the Responsibility to Protect”, states that legal measures could also be employed as a mean of direct prevention efforts and argues that the establishment of international criminal courts would lead the potential perpetrators of crimes against humanity, war crimes etc. to concentrate on the risks of international prosecutions (ICISS, 2001: 24). Nevertheless, there is limited work on the real impact of the international criminal tribunals on an ongoing conflict. Most literature on international and humanitarian law focuses on issues such as the legal basis of jurisdiction, the definition of crimes, or the applicability of international humanitarian and criminal law rules to certain cases. On the other hand, the literature on civil conflict mainly focuses on the interventions in the form of military interventions, economic assistance, and peace operations. Nevertheless it does not pay sufficient attention to the involvement of international criminal justice mechanisms and their effect on the course of the conflict. In that sense, this research intends to make a contribution first to the international law literature by focusing on the impact of the practices of international criminal courts on an ongoing conflict instead of discussing jurisdictional and definitional matters, and secondly to the literature on civil conflict by examining involvement of justice mechanisms. Therefore, this research tries to answer the question of “how do the activities of international criminal justice mechanism contribute the prevention of grave human rights violations in an ongoing conflict?” In addition, the activities of international criminal tribunals in the scope of this research are categorized under two headings, passive involvement and active involvement. The former is defined by the referral of a case to the tribunal and opening of investigations by the Office of Prosecutor. Regarding the latter, for an

international criminal court to be considered as actively involved in a conflict there is also a need to secure the custody of indictees and commence trials. Bearing in mind the two types of involvement, the main methodology of this research in examining the impact of international criminal tribunals on conflicts is a single case study with a comparison of the passive involvement of ICC in DRC between 2004 and 2006 and the active involvement 2006 onwards. Although probably it is not the best way to make generalizations, a single case study seems to be the most suitable one when the scope of this research and available data are considered.

Since deterring future crimes and ending atrocities as well as the culture of impunity are predetermined aims in establishing international criminal courts, this research intends to examine whether international criminal justice mechanisms will contribute to the prevention of atrocities through deterring violations of humanitarian law in ongoing conflict situations. Therefore, the second chapter of this thesis aims to scrutinize the extent of the international criminal justice system, its evolution and enforcement with references to the sources of international humanitarian law and examples of national and international enforcement mechanisms as well as the aims of prosecutions. The Chapter 3 examines deterrence theory in criminology literature for domestic criminal systems since the deterrence argument in international criminal justice system is incorporated from the criminology literature. Therefore, the third chapter, while explaining the classical deterrence theory and its assumptions also focuses on the recent deterrence theories as well as the studies that test the validity of deterrence theory. The fourth chapter provides a merger of the two former chapters on international criminal justice and theory of deterrence and discusses the applicability of deterrence theory to the international context. This chapter also

presents divergent views on the applicability of deterrence theory to the international criminal justice system as well as the main assumptions in this research. The fifth chapter analyzes the case of the Democratic Republic of Congo (DRC) where currently the International Criminal Court (ICC) is involved with an aim to reveal the impact of the ICC's activities in the conflict in this country. This analysis also includes a brief history of the conflict. Finally, the last chapter presents the concluding remarks of the research.

CHAPTER II

THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

The current chapter will provide a detailed analysis of the international criminal justice system. The aim of this analysis is to examine the scope, evolution and the enforcement of the international criminal justice system which is essential to scrutinize before any attempt to study the impact of the system through enforcement mechanisms in ongoing conflict situations.

International criminal justice system refers to the norms and rules of the international humanitarian law, human rights law and to the mechanisms that are empowered to execute these norms and rules. However, the substantive element of law in international criminal justice system mainly stems from the international humanitarian law in which international crimes are mostly determined. “International Humanitarian Law is [...] concerned with international crimes and includes genocide and crimes against humanity, whether committed in times of war or in times of peace [and] also concerned with the trial and the punishment of those who have committed such crimes” (Goldstone and Smith, 2009: 10). The crime of genocide, crimes against humanity and war crimes have been defined and codified by the international humanitarian law norms through several conventions and international agreements as well as by the statutes of international tribunals, and interpreted by the judgments of

those tribunals. Before proceeding with the criminal aspect of the system, the following section will try to analyze the substantive part of the international humanitarian law and its place in the laws of armed conflict and in international law in general.

2.1. Laws of Armed Conflict and International Humanitarian Law

The international humanitarian law is a branch of the laws of armed conflict which is concerned with the protection of the victims of armed conflicts who are not active in conflict due to injury, sickness, capture or who are civilians (McCoubrey, 1990: 1). The laws of armed conflict are an important part of public international law (Pictet, 1988: xix) and go back to the history of war aimed to maintain the control, discipline and efficiency of military forces and to limit the impact of violence and destruction¹ (Bouchet-Saulnier, 2007: 212). Although sometimes international humanitarian law and laws of armed conflict are utilized interchangeably by many scholars, there is a widely acknowledged categorization of laws of armed conflict which divide the body of the rules governing armed conflict as *jus ad bellum* and *jus in bello*.

Jus ad bellum is the term used for the body of rules that sets limits to the use of armed forces as a means of conduct in international relations (McCoubrey and White, 1992: 1). This category deals with the use of force as a state practice, which is

¹ The laws of war were existent even in the era of knights as chivalric codes. Examples can be given from Thirty Years' War and the *Articles of War* issued by Swedish King Gustavus Adolphus in 1621 or from 19th century's Lieber Code released on 24 April 1893 by Abraham Lincoln which is officially known as "the Instructions for the Government of Armies of the United States in the Field". It is further possible to trace the humanitarian concerns in military doctrines far back to 500-200 BC, for example the *Art of War*, Chinese Classic on military strategy written in 500 BC by Sun Tzu and the *Indian Code of Manu* developed between 200 BC and 200 AD (See, Goldstone and Smith, 2009: 15 – 17; Beigbeder, 1999: 4-6).

prohibited by the Charter of the United Nations Article 2 paragraph 4.² The only exception to use force in the UN Charter is “self-defence” that should be in accordance with Article 51 of the Charter, which states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Therefore, *jus ad bellum* is applicable before an armed conflict is initiated and concerned with the legality of use of force which is beyond the scope of this research.

Jus in bello, on the other hand, refers to the rules and norms applicable during an armed conflict and is not concerned with the nature or legality of war, rather aims to protect the victims of war (McCoubrey, 1990: 5). *Jus in bello* has also two subdivisions which are generally known as the Hague Conventions of 1907 and the Geneva Conventions of 1929 and 1949. The appellation of the sub-divisions comes from the places that the international conventions were signed. Hague Conventions of 1907 govern and limit the means and methods of warfare, which include weapon types and usage, tactics and general operational conduct (McCoubrey and White, 1992: 189). Whereas, Geneva Conventions of 1949 have the purpose of protecting the victims of armed conflict or at least ameliorating their conditions (McCoubrey

² Charter of the United Nations, June 26, 1945, art.2 para.4, <http://www.un.org/en/documents/charter/index.shtml> [hereinafter the U.N. Charter].

and White, 1992: 189). Initially, the term international humanitarian law used to refer the Geneva Conventions because of the humanitarian concerns of the provisions; however, it should be noted that the Hague Conventions have also humanitarian concerns. Likewise the Geneva Conventions have also provisions regarding the means and methods of warfare. Therefore, the distinction is not a straight one and the humanitarian law should include both (McCoubrey, 1990: 2). Especially after the adoption of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, (Protocol I), which have provisions on the methods and means of warfare under Part III, the distinction between Geneva Conventions and Hague Conventions has blurred to a greater extent (Pictet, 1988: xx). Therefore, it is possible to argue that the current usage of international humanitarian law as a concept refers to the entire body of laws of armed conflict that become operational during the conflict (Meron, 2006: 1). While trying to define the international humanitarian law and its place in laws of armed conflict and international law in general, it would be better to make a reference to the body of international human rights law and its distinction from the humanitarian law to provide a more lucid understanding of the scope of international humanitarian law.

2.2. International Humanitarian Law and International Human Rights Law

Unlike human rights law, international humanitarian law does not establish universal rights applicable to all people in all times of either peace or war (Bouchet-Saulnier, 2007: 214). The Geneva Conventions, as the official names of the conventions also suggest, are protecting certain categories of people. There are 4

categories of people, which are wounded, sick, prisoners of war or civilians. On the other hand, human rights law aims to guarantee that all individuals benefit from basic rights and freedoms and deals with the relationship between the state and its own subjects as opposed to the humanitarian law which is regulating the relation between the state and enemy subjects (Pictet, 1988: xxi). Moreover, international humanitarian law tolerates the killing and wounding of innocents such as civilian victims of the lawful collateral damage, or permits certain deprivations of freedom without any judicial processes as in the case of prisoners of war, or allows limitations on appeal rights of detained persons which are, on the contrary, regarded as fundamental rights of people that should be protected under the human rights law (Meron, 2006: 8). Therefore, international human rights law and international humanitarian law are two distinct systems in regard to their applicability and fundamental principles but have interactions with each other.

2.3. Sources of International Humanitarian Law

The sources of international humanitarian law are several international conventions and the statutes of courts, tribunals, and special chambers etc. that have jurisdiction over war crimes, crimes against peace, crimes against humanity and genocide. However, the customary international law, general principles of law and judicial decisions that interpret and clarify the terms and scope of international humanitarian law should also be considered as legitimate sources, since the Statute of International Court of Justice lists all of them as the sources that shall be applied by the Court in an hierarchical manner while giving its decision. Therefore, I will try to

examine the sources of international humanitarian law abiding by the ordering of the International Court of Justice, which is:

- 1) International conventions, whether general or particular, establishing rules recognized by [...] states;
- 2) International custom, as evidence of a general practice accepted as law;
- 3) The general principles of law recognized by civilized nations;
- 4) [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of rules of law.³

2.3.1. International Conventions Establishing Rules Recognized by States

Besides the efforts to codify laws of armed conflict by individual states, the first international convention is the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field signed on 22 August 1864 which is also widely known as Geneva Convention of 1864.⁴ This convention was based on the observations of Henry Dunant from the Battle of Solferino (Goldstone and Smith, 2008: 17). By accidentally arriving at the battlefield in the village of Solferino where forces of Napoleon III and Austria were confronting (Destexhe, 1996: 50), Henry Dunant witnessed the conditions of the wounded and wrote his memoirs, which led to the adoption of the Geneva Convention of 1864 and the creation of today's International Committee of Red Cross (Goldstone and Smith, 2008: 17). The Convention was predictably limited in scope when compared to its successors since it was dealing with the immediate issues arising from the Battle of Solferino however, it established the fundamental principles of neutrality of humanitarian aid

³Statute of the International Court of Justice, June 26, 1945, art. 38, ICJ Basic Documents, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

⁴Convention for the Amelioration of the Condition of the Wounded in Armies in the Fields, August 22, 1864, International Committee of Red Cross (ICRC) Treaty Database, <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> [Hereinafter Geneva Convention of 1864].

(McCoubrey, 1990: 11-12). Geneva Convention of 1864, which can be argued as the first example of *jus in bello* regulating the conditions of victims of war, was followed by an international conference which produced the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight on 11 December 1868.⁵ Commonly referred as St. Petersburg Declaration, this declaration is considered to be the first modern international humanitarian law since it aimed to prohibit certain means and methods of warfare with a purpose of limiting unnecessary suffering (Goldstone and Smith, 2008: 18). Although the declaration was concerned with a very specific context of arms limitation, the doctrine of “unnecessary suffering” has become a significant principle in the modern *jus in bello* (McCoubrey and White, 1992: 225). These two conventions were succeeded by several conventions on the issues of means and methods of warfare, naval and airfare, cultural property and victims of warfare. Some of them were adopted for limited purposes such as the ones germane to asphyxiating gases⁶ or expanding bullets,⁷ or such as the ones relative to the laying of automatic submarine contact mine,⁸ whereas some others established more comprehensive rules of armed conflict. There are over a hundred of international conventions forming the regime of the laws of armed conflict. However, the most important ones that are cited also in the statutes of the international tribunals are the Hague Conventions of 1907, particularly the Forth Hague Convention of 1907 regulating laws and customs of war on land and the

⁵Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight, December 11, 1868, ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> [Hereinafter St.Petersburg Declaration].

⁶Declaration concerning the Asphyxiating Gases, July 29, 1899, ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/FULL/165?OpenDocument>

⁷Declaration concerning Expanding Bullets, July 29, 1899, ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/FULL/170?OpenDocument>

⁸Convention relative to the Laying of Automatic Submarine Contact Mines, October 18, 1907, ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/FULL/215?OpenDocument>

four Geneva Conventions of 1949 and two additional Protocols signed on 8 June 1977. The Forth Hague Convention on the Laws and Customs of War articulated the laws of armed conflict and set rules on the conduct of warfare in the annex to the convention.⁹ The Forth Hague Convention of 1907 was adopted to substitute for an earlier version of the Hague Convention of 1899, while it was stated that “the Convention of 1899 remained in force as between the Powers which signed it, and which do not ratify the present Convention.”¹⁰ On the date of codification, the regulations set in the Forth Hague Convention of 1907 were envisaged to be applicable for the parties to the Convention and the violation of the regulations by a party would be liable to pay compensation for the acts committed by the personnel of its armed forces.¹¹ It is clear from the above cited articles of the Convention that the understanding of individual criminal responsibility was not present at the beginning of the 20th century, which evolved in time. In addition, in time the rules of the Forth Hague Convention of 1907 became a part of customary international law meaning that it is now considered to be binding for all states regardless of their status as a signatory or non-signatory to the Convention, which will be dealt in the following section.

On the other hand, Geneva Conventions of 1949 and the two additional Protocols of 1977 constitute a greater part of contemporary international humanitarian law in regard to the protection of victims of war, which deserves a

⁹Convention respecting the Laws and Customs of War on Land, October 18, 1907, ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument> [Hereinafter The Forth Hague Convention of 1907].

¹⁰The Forth Hague Convention of 1907, art. 4.

¹¹The Forth Hague Convention of 1907, art. 2 and art. 3.

detailed examination. The First Geneva Convention of 1949¹² is concerned with the protection of the wounded and sick in armed forces in the field whereas, the Second Geneva Convention of 1949¹³ aims to protect wounded and sick in armed forces in naval war. These two Conventions compile the rules and regulations on the condition of wounded and sick that had been adopted by states back in the 19th century. In addition to the category of wounded and sick as the victims of war, the Third Geneva Convention of 1949¹⁴ delineate the rules regarding the treatment of prisoners of war, which is a more comprehensive and detailed Convention with 143 articles compared to other three Geneva Conventions of 1949. Finally, the Forth Geneva Convention of 1949 pertains to the protection of civilians in time of armed conflict.¹⁵ The Forth Geneva Convention of 1949 has a significant place in the regime of international humanitarian law, in the sense that it is the first convention recognizing the civilians as the victims of war.

The scope and applicability of these four Geneva Conventions of 1949 are described in their 2nd and 3rd articles. Article 2 common to Geneva Conventions of 1949 states that the provisions shall be applicable “to all cases of declared war or of other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” The key point in the Common Article 2 is the wording of the article about the applicable situations.

¹²Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31. [Hereinafter the First Geneva Convention of 1949].

¹³Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85. [Hereinafter the Second Geneva Convention of 1949].

¹⁴Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135. [Hereinafter the Third Geneva Convention of 1949].

¹⁵Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287. [Hereinafter the Forth Geneva Convention of 1949].

The compatibility of the provision with all cases of other armed conflict in addition to the cases of declared war certainly extended the scope of the international humanitarian law.

“Armed conflict” could be interpreted as any hostilities taking part between the parties to the Geneva Conventions of 1949 which brought a factual definition of war instead of a technical definition (McCoubrey, 1990: 24). The *Kawasaki Kisen Kabushiki Kaisha v. Bantam Steamship Company* case is an illustration of how the existence of war should be interpreted. This case is also significant in the sense that it shed light to the codification of provisions of Geneva Conventions of 1949 about the applicable situations. Bantam Steamship Company was a shipping company which hired one of its ships to a Japanese shipping company under the condition that the contract would be cancelled if a war breaks out involving Japan. After the invasion of Manchuria by Japan in 1937, the British Company sought to cancel the contract because of the outbreak of war between the Republic of China and the Japanese Empire. Although the Japanese Empire stated that the situation in China was indeterminate and there was no existent state of war, the English Court dealing with the case decided that the date of hostilities and acts should be the starting point in determining whether a state of war exists or not, instead of the words used by states or governments (McCoubrey and White, 191-192). Therefore, a declaration of war is not the only criteria to apply norms of international humanitarian law (McCoubrey and White, 1992: 192). The rules and norms of international humanitarian law applicable to international armed conflicts have been extended with the Additional

Protocol I to the four Geneva Conventions of 1949.¹⁶ The Additional Protocol I “supplements the Geneva Conventions of [...] 1949 for the protection of war victims [and applies to] the situations stated in Article 2 common to those Conventions.”¹⁷ In addition, the Additional Protocol I further broadens the scope of international humanitarian law by incorporating “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”¹⁸ The controversial issue of colonial wars’ status as wars of self-determination and the applicability of international humanitarian law to these situations have been resolved by the adoption of Additional Protocol I (McCoubrey, 1990: 25). Apparently, the Common Article 2 of the Geneva Conventions of 1949 is applicable for all armed conflicts which have an international character whereas the common Article 3 of Geneva Conventions of 1949 is applicable only to non-international armed conflicts.

Therefore, the common Article 3 of the Geneva Conventions declares that:

In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including the members of armed forces who have laid down their arms and those placed *hors de combat* [unable to take further part in fighting] by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other, similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

¹⁶Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 4. [Hereinafter Additional Protocol I].

¹⁷The Additional Protocol I, art.3.

¹⁸The Additional Protocol I, art.4.

- a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b. Taking hostages;
 - c. Outrages upon personal dignity, in particular humiliating and degrading treatment;
 - d. The passing of sentences and carrying out of executions without previous judgment pronounced by a regular constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- 2) The wounded and sick shall be collected and cared for.

Common Article 3 is important since it is the first provision referring to internal armed conflicts. Common Article 3 is so significant that it is sometimes called as a “Convention in Conventions” or “a Convention in miniature” and its mere existence is a major step forward in the existing international humanitarian law regime (Abi-Saab, 1998: 221). The first paragraph of the article enumerates all the categories of the victims of armed conflict; wounded, sick, prisoners of war and civilians, who should be treated humanely in internal armed conflicts. However, the Additional Protocol II to the Geneva Conventions of 1949¹⁹ for the first time codified the rules solely applicable to non-international armed conflict and provided a broader definition of armed conflict that is not international. By developing and supplementing the Common Article 3 of the Geneva Conventions of 1949, the Additional Protocol II applies to all armed conflicts, which are not in the scope of the Additional Protocol I and which are:

taking place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.²⁰

¹⁹Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 610. [Hereinafter Additional Protocol II].

²⁰The Additional Protocol II, art. 1, para.1.

In addition, Additional Protocol II further clarifies the cases by asserting that the provisions of the Protocol are not applicable to all “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature”, which are not considered as armed conflict.²¹

There are important interpretations on the definition and distinction of international armed conflict and non-international armed conflict, which were made by the ad hoc International Criminal Tribunals for Former Yugoslavia and for Rwanda as well as the International Court of Justice. Since those interpretations contributed to the clarification of Convention provisions, it is crucial to refer the related judgments in explaining the scope of the international humanitarian law.

In the *Nicaragua vs. United States of America* case held before the International Court of Justice, the Court in its judgment evaluated the applicability of international humanitarian law norms in non-international armed conflicts and stated in its final judgment that the conflict between the *contras* and the Nicaraguan Government have a character of non-international armed conflict, whereas the acts of United States in and against Nicaragua state is under the category of an international armed conflict.²² However, the Court expressed its opinion that since the minimum rules applicable to the international and non-international are identical; it is pointless to question whether the conflict should be considered according to one category or the other. By referring to a previous decision on the Corfu Channel²³ International Court of Justice once more affirmed that the rules of the Geneva Conventions of

²¹The Additional Protocol II, art.1, para.2.

²²Case Concerning the Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua v. United States of America*), 1986 I.C.J. 14 (June 27), para. 219. [Hereinafter the *Nicaragua Case*].

²³The Corfu Channel Case, (*United Kingdom of Great Britain v. Northern Ireland*), 1949 I.C.J. 4 (April 9) [Hereinafter the *Corfu Channel Case*].

1949 establish “elementary considerations for humanity” regardless of the nature of the conflict as international or internal.²⁴

Another significant interpretation of the scope of international humanitarian law in regard to the nature of the conflict was provided by the International Criminal Tribunal for Former Yugoslavia. The defendant, Dusko Tadic, brought the decision of the Trial Chamber II dated August 10, 1995 to the Appeal Chamber of International Criminal Tribunal for Former Yugoslavia. One of the reasons of the appeal was the lack of the subject-matter of jurisdiction of the Tribunal on the case.²⁵ The Appellant claimed that even if the alleged crimes are proven, they were committed in the context of an internal armed conflict to which the jurisdiction of the Tribunal does not extend.²⁶ However, instead of a literal interpretation of the related provisions in the Statute, the Tribunal had chosen to bring a teleological interpretation to the forefront with an aim to reveal purposes behind the enactment of the Statute of the Tribunal.²⁷ After the evaluation of the nature of the conflict, which had both an international and internal nature even before the establishment of the Tribunal, the Tribunal concluded that the members of Security Council had considered both aspects of the conflict while adopting the Statute and intended to empower the Tribunal to adjudicate violations of international humanitarian law in either context.²⁸ In addition to the teleological interpretation, the Tribunal further clarified the extent of the Statute by interpreting specific articles of the Statute and evaluating international customary law, and concluded that the Tribunal has

²⁴The Nicaragua Case, para. 218.

²⁵Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Prosecutor v. Dusko Tadic a/k/a “Dule”), 1995 I.C.T.Y. (October 2) [Hereinafter the Tadic Case on Appeal]

²⁶The Tadic Case on Appeal, para. 65.

²⁷The Tadic Case on Appeal, para. 71.

²⁸The Tadic Case on Appeal, para. 77.

jurisdiction over violations of international humanitarian law, such as the acts alleged in the indictment for Dusko Tadic, despite the fact that either they occurred in internal or international armed conflict.²⁹ Furthermore, the Tribunal went beyond the legal explanations and clarifications of the Statute and enumerated the reasons why the application of international humanitarian law should be in the concern of the international community. The Tribunal asserted that since civil wars became more frequent and increasingly cruel as well as protracted, the international community could not ignore the legal regime applicable to these conflicts. The destabilizing effects of these conflicts on regional and international peace and security due to the increasing interdependence of states are another reason of why the international community should be concerned with the legal regime of these conflicts, according to the Tribunal. In addition, violence of a great magnitude in these conflicts dwindled the difference between the international and internal armed conflict and when human beings are concerned, the distinction between two types of conflict further loses its value.³⁰

Another court judgment on the scope and applicability of international humanitarian law norms is the judgment of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia, on the Mucic Case on Celebici Camp.³¹ The grounds of the appeal, like in the Tadic Case, were based on the nature of the conflict and the competence of the Tribunal to prosecute and punish individuals for alleged crimes. The Appeals Chamber upon the investigation of relevant parts of the Statute of the Tribunal and the scope of the international humanitarian law,

²⁹The Tadic Case on Appeal, para. 137.

³⁰The Tadic Case on Appeal, para. 97.

³¹Prosecutor v. Zejnil Delalic, Zdravko Mucic (a/k/a “Pavo”), Haz’m Delic and Esad Landzo (a/k/a “Zenga”), 2001 I.C.T.Y. (February 20) [Hereinafter the Mucic Case on Appeal].

concluded that since the majority of conflicts in the contemporary world are internal, it is contrary to the nature of the Geneva Conventions of 1949 to make a distinction between the legal regimes applicable to international armed conflict and internal armed conflict, and between criminal consequences of these legal regimes. The main purpose of these Conventions is to protect the human dignity, which goes beyond any technical distinction between the nature of the conflicts.³²

Instead of the above cited court judgments, there are many examples of interpretation again from the International Criminal Tribunal for Former Yugoslavia and from the International Criminal Tribunal for Rwanda, which could not be cited individually in the scope of this research. However, even the above examples prove that the body of international humanitarian law evolves and extends through the contribution of these legal mechanisms. In this sense, it is important to point out that these judicial decisions also constitute precedents for future cases, since they also accepted as the sources of international law by the Statute of the International Court of Justice, Article 38.

Under the sub-category of international conventions, agreements etc. as the sources of international humanitarian law, the Statutes of prior tribunals, either military or ad hoc, as well as the Rome Statute of the International Criminal Court which were enacted through international agreements are worth mentioning since they precisely codified the elements of international crimes that could be prosecuted and punished by those international enforcement mechanisms.

International Military Tribunal at Nuremberg was established upon the

³²The Macic Case on Appeal, para. 172.

London Agreement of August 8th, 1945 to try and punish the major war criminals of the European Axis in the Second World War and the charter of the Nuremberg Tribunal was annexed to the London Agreement.³³ In the following year, another international military tribunal was established to try offenders of war crimes in the Pacific sphere of the Second World War. International Military Tribunal for Far East was established upon a special promulgation by the Supreme Commander of Allied Powers, General Douglas MacArthur, who acted in response to the directive of US State, War and Navy Coordinating Committee, which had been approved by all the occupying states later (Boister and Cryer, 2008: 22-25). Almost identically, two military tribunals were entitled to exercise jurisdiction over crimes against peace, war crimes and crimes against humanity in their charters, in Article 6 and Article 5 respectively. The same articles also enumerated which acts constitute these crimes. Since they are the first international mechanisms to prosecute and punish major war criminals, the definition of the crimes in their statutes became a source for the latter *ad hoc* criminal tribunals.

The *ad hoc* International Criminal Tribunal for Former Yugoslavia and for Rwanda further clarified and extended the definition of the international crimes and their elements. The International Criminal Tribunal for Former Yugoslavia³⁴ has jurisdiction over the grave breaches of the Geneva Conventions of 1949 (Article 2 of

³³Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, August 8, 1945, ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument> [Hereinafter the Charter of Nuremberg Tribunal].

³⁴Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, May 25, 1993, ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/FULL/555?OpenDocument> [Hereinafter the Statute of the Tribunal for Former Yugoslavia]

the Statute of the Tribunal for Former Yugoslavia), violations of the laws or customs of war (Article 3), genocide (Article 4), crimes against humanity (Article 5). Inspired by the definitions provided for the crimes against humanity and acts that violate customs and laws of war provided by the Statute of the Nuremberg Tribunal, the Statute of the Tribunal for Former Yugoslavia established a more comprehensive and inclusive set of definitions for each crime. In addition, the International Criminal Tribunal for Rwanda³⁵ was empowered with jurisdiction over the crime of genocide (Article 2 of the Statute of the Tribunal for Rwanda), crimes against humanity (Article 3), and violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (Article 4).

Instead of giving all the details about the elements of crimes defined in the statutes of the above mentioned international criminal tribunals, it would be logical to refer to the international crimes defined by the Rome Statute of the International Criminal Court,³⁶ since it is the first permanent enforcement mechanism of international criminal law without any restriction on its jurisdiction *ratione loci* [in terms of the place –i.e. territorial jurisdiction] as opposed to *ad hoc* Tribunals. In addition, Rome Statute is a valuable source in the sense that it compiles all the definitions and elements of crimes and establishes a single system of modern international humanitarian law and international criminal law. Therefore, the crimes within the jurisdiction of the Rome Statute are the crime of genocide, crimes against

³⁵Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January and 31 December 1994, November 8, 1994, ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/FULL/565?OpenDocument> [Hereinafter the Statute of the Tribunal for Rwanda]

³⁶ The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3. [Hereinafter Rome Statute].

humanity, war crimes and the crime of aggression.³⁷ Three major international crimes, crime of genocide, crimes against humanity and war crimes are no doubt defined under the light of international customary law in the sixth, seventh and eighth articles of the Rome Statute, respectively.

After explaining the primary sources of international humanitarian law, by respecting the ordering of Article 38 of the Statute of the International Court of Justice, the following section will analyze the customary rules in international humanitarian law.

2.3.2. International Custom as Evidence of a General Practice Accepted as Law

International custom is used to refer to a comprehensive and uniform repetition of behavior for a long period of time with the belief that this behavior has become obligatory for all states (Verri, 1992: 38). Therefore, international customary law is the oldest source of international law because states in the international arena create norms not only by their expressions through international conventions but also

³⁷Article 5, paragraph 1 of the Rome Statute enumerates the crimes within the jurisdiction of the Court, however the second paragraph of the article explains that the Court will exercise jurisdiction once a provision is adopted about the definition of the crime of aggression. The crime of aggression could not be defined during the United Nations Diplomatic Conference Plenipotentiaries on the Establishment of an International Criminal Court which were concluded by the signature of the Rome Statute due to the divergence of views among states on the definition and elements of crimes that will fall under the concept.

“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with the articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” (Rome Statute, art. 5, para. 2).

With the adoption of the Resolution 6 as a result of the 13th plenary meeting on 11 June 2010, Crime of Aggression was defined by consensus in accordance with the article 5, paragraph 2 of the Rome Statute. The definition of crime of aggression and the exercise of the jurisdiction by the Court was inserted to the Rome Statute as articles 8 bis, 15 bis and 15 ter respectively. According to articles 15 bis and 15 ter “the Court shall exercise jurisdiction only with respect to crime of aggression committed one year after the ratification or acceptance of the amendments by thirty State Parties”.

(ICC, Resolution RC. Res. 6, The Crime of Aggression, June 11, 2010.
http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf)

by their repetitive and persistent conduct, eventually adding a legal ground to a certain type of conduct (Bouchet-Saulnier, 2007: 64). Consequently, the customary law has two features, which are general patterns of behavior, and general acceptance as law (Paust et al., 1996: 4). The reason of reliance on customary norms is either to clarify treaty provisions or to fill the gaps in these provisions (Cassese, 2003: 28).

When the issue comes to the customary international humanitarian law, the importance of customary rules becomes even more vital, since although there is a wide range of treaties, conventions or agreements that constitute the substantive element of humanitarian law comprehensively, there are still grave breaches of humanitarian law norms in many international and non-international armed conflicts. The general belief among the experts of international humanitarian law is that non-compliance with the norms does not drive from the inadequacy of written rules; instead the reasons are the unwillingness to respect the norms, ineffectiveness to enforce them and vagueness in certain provisions' applicability (Henckaerts, 2005: 176). Especially, two important problems occur in the application of humanitarian law norms. The first one is the applicability of the conventions to solely signatory states that have ratified the conventions. This situation brings an ambiguity in implementation since different conventions might be operative in different conflicts in accordance with the states as parties to the conflict (Henckaerts, 2005: 177). The second impediment for the implementation of rules is the distinction between international and non-international armed conflict and the lack of adequate and detailed provisions for internal armed conflicts as opposed to international armed conflicts (Henckaerts, 2005:176). However, certain provisions of humanitarian law have universal concerns in terms of protecting the lives of individuals, and the

violations of them have consequences for all humanity which make humanitarian law a universal custom, binding for all states regardless of their ratification or non-ratification of a particular treaty or convention (Kasto, 1994: 40-41). Non-ratification or non-recognition of the rules of humanitarian law do not jeopardize the universally binding nature of them as being customary law norms accepted as law by the majority of states (Kasto, 1994: 42).

Since customary norms are believed to apply to all people and binding for all states even if a particular state is not a party to a convention, to delineate the scope of customary international humanitarian law is very essential to avoid any legal gap that would benefit the perpetrators of humanitarian law violations.

There are two features of customary international law, general pattern of behavior or state practice and general acceptance as law or *opinio juris*. In regard to customary humanitarian law, state practice could be determined by taking into account both physical and verbal acts of states. Battlefield behavior, use of certain weapons, treatment of different categories of people could be counted under physical acts, whereas verbal acts are military manuals, national legislation, instructions to security and armed forces, statements in the international fora, government positions on conventions and resolutions adopted by international organizations (Henckaerts, 2005: 179). General acceptance as law, or *opinio juris*, on the other hand, is more intricate to determine compared to state practice especially in the area of humanitarian law. Many provisions of humanitarian law actually forbid certain conduct in warfare, and to claim that there is a general acceptance as law for these provisions, it should be proved that any avoidance from such prohibited acts is a

consequence of legal conviction instead of a coincidence (Henckaerts, 2005: 182). However, it should be noted that the importance of proving the existence of *opinio juris* diminishes when there is abundant uniform state practice. On the contrary, if there is an ambiguity and inharmony in state practice, the existence of *opinio juris* becomes vital to claim that certain conduct and prohibition of it is custom (Henckaerts, 2005: 182). The existence of general acceptance as law could be derived from several convention provisions and court judgments interpreting the scope of humanitarian law.

In the Preamble of the Second Hague Convention of 1899, it was stated that;

Until a more complete code of the laws of war issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usage established between civilized nations, from the laws of humanity, and the requirements of the public conscience³⁸

This clause is also known as “the Martens Clause”, taking its name from the Russian Delegate to the Hague Peace Conference, jurist F.F. de Martens, who had proposed the inclusion of this clause in the convention (Meron, 2006: 17). The Clause is important in the sense that it aims to cover situations that are not provided in the Convention and to avoid undermining the customary law status of matters (Meron, 2006: 18). Especially in humanitarian law, it is highly significant to prevent any case in which a person could not benefit from protection and assistance of norms because of any omissions in the written law (Bouchet-Saulnier, 2007: 65). So the

³⁸Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, ICRC Treaty Database <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument> [Hereinafter Second Hague Convention of 1899].

place and importance of customary international law is worth emphasizing repeatedly. The Martens Clause also included in the Forth Hague Convention of 1907 with only minor changes in its wording. Later, the fundamentals of Martens Clause, i.e. usages established among civilized people, the laws of humanity and the requirements of public conscience were adopted by the four Geneva Conventions of 1949. Article 63 of the First Geneva Convention of 1949 asserts that:

Each of the High Contracting Parties shall be at liberty to denounce the present Convention. [...] The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.³⁹

The aim under the incorporation of the Martens Clause to the four Geneva Conventions of 1949 is to ensure that even if a party denounces the Conventions, it will still have duties and obligations according to the customary international law norms (Meron, 2006: 19). Therefore, the clause underlines the value of norms of humanitarian law as generally accepted rules and as a part of customary international law. A similar clause, emphasizing the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience has been incorporated to the Additional Protocol I to the Geneva Conventions of 1949 to safeguard the protection of victims of warfare in cases not covered by the Protocol.⁴⁰

In addition to the above convention articles, there are important court

³⁹First Geneva Convention, art. 63. ; Second Geneva Convention, art. 62; Third Geneva Convention, art. 142 and Forth Geneva Convention, art. 158.

⁴⁰The Additional Protocol I, art. 2.

judgments that shed light to the question of customary law status of international humanitarian law norms. The very first example is the judgment of the International Military Tribunal in Nuremberg.⁴¹ While evaluating the law relating to war crimes and crimes against humanity, contrary to the opposition by defense that Hague Conventions of 1907 and Geneva Conventions of 1929 are not applicable in German case because of the fact that the belligerents were not a party to these conventions, the Tribunal declared that “by 1939 these rules laid down in the Conventions were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.”

Another court interpretation of the customary status of humanitarian law is the decision of the Appeals Chamber of International Criminal Tribunal for Former Yugoslavia on Tadic case. The Tribunal asserted that many provisions of the Additional Protocol II to the Geneva Conventions of 1949 could be regarded “as declaratory of existing rules or as having crystallized emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles”.⁴² This decision is consequential in the sense that it acknowledges customary rule status of many provisions of the Additional Protocol II, which is a relatively novel convention compared to the Geneva Conventions of 1949. Another example could be the judgment of the International Criminal Tribunal for Rwanda on Kayishema Case.⁴³ The Tribunal asserted that the crime of genocide is considered as

⁴¹Judgment of the International Military Tribunal for the Trial of German Major War Criminals, October 1, 1949, The Avalon Project http://avalon.law.yale.edu/subject_menus/judcont.asp [Hereinafter Nuremberg Judgment].

⁴²The Tadic Case on Appeal, para. 117.

⁴³The Prosecutor v. Clement Kayishema and Obed Ruzindana, 1999 I.C.T.R. (May 21) [Hereinafter Kayishema Case].

part of customary international law and a norm of *jus cogens*⁴⁴, meaning that any other international law inconsistent with prohibition of genocide will be void (Paust et al., 1996: 5). The last but not least example of a court decision confirming the customary law status of humanitarian law is the judgment of the International Criminal Tribunal for Rwanda on Akayesu Case.⁴⁵ The Tribunal argued that the status of the common Article 3 of the Geneva Conventions of 1949 is accepted as customary international law by most states through citing the interpretation of International Criminal Tribunal for Former Yugoslavia in the Tadic Case.⁴⁶

After delineating the scope of the international humanitarian law, in treaty law and in customary law, the following section will try to focus on the implementation and enforcement of the international humanitarian law norms and the criminal aspects of international law.

2.4. Enforcement of International Humanitarian Law

Enforcement refers to the criminal processes such as the prosecution, trial and punishment of individuals responsible for violations of international humanitarian law norms. Therefore, the enforcement of these norms falls under the category of international criminal law. Although there is not a plain distinction between international humanitarian law and international criminal law, and although these two concepts most of the time are used interchangeably, in the scope of this research, international criminal law is defined as follows;

⁴⁴Kayishema Case, para. 88.

⁴⁵The Prosecutor v. Jean-Paul Akayasu, 1998 I.C.T.R. (September 2) [Hereinafter Akayasu Case].

⁴⁶Akeyasu Case, para. 608.

“International Criminal Law is a body of rules designed both to proscribe international crimes and to impose upon states the obligation to prosecute and punish at least some of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes.” (Cassese, 2003: 15).

Throughout the evolution of the humanitarian law norms towards criminalization, the international criminal law emerged as a convergence of two disciplines; which are the international aspects of national criminal law and the penal aspects of international law (Paust et al., 1996: 3). International aspects of national criminal law are enforcement obligations assumed by individual states through customary law and international treaties. There are two options available to states to realize their obligations. They would either domesticate international legal provisions by ratifying conventions and then prosecute individuals and assist other states or directly incorporate international law for criminal proceedings to their national criminal system (Paust et al., 1996: 15). The penal aspects of international law, on the other hand includes the international crimes that are created by treaties and customary law and the enforcement of these rules directly by international mechanisms (Paust et al., 1996: 3). However, prosecution of violations of international humanitarian law requires individual criminal responsibility assigned to international crimes (Goldstone and Smith, 2009: 13). The early codification efforts on humanitarian law, i.e. the 1899 and 1907 Hague Conventions did not have any provision appointing individual criminal responsibility for the breaches of provisions (Wolfrum, 1995: 519). Although there were early examples of prosecution, the responsibility of individuals in those early prosecutions were not the same as the individual responsibility in today’s modern international criminal law. Prior to

Second World War, individuals were convicted not because of responsibility as an individual but as a representative or legal personification of state (Goldstone and Smith, 2009: 14). It was after the Nuremberg proceedings, which will be examined below, and after the prosecution of German war criminals that individual responsibility for international crimes evolved in the system of international criminal justice. Trying to rely upon the above definition of international criminal law, this section evaluates the enforcement of humanitarian law provisions under two sub-categories, national enforcement and international enforcement.

2.4.1. National Enforcement

Recalling from the above explanations, national implementation stands for the duty and obligation of individual states to prosecute and punish grave breaches of humanitarian law. State responsibility to prosecute, try and punish individuals derives from the four Geneva Conventions of 1949, in which it was stated that;

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* (evidence) case.⁴⁷

It is evident from the first two paragraphs of the article that international

⁴⁷First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, 146.

criminal law was enforceable by only states party to the Geneva Conventions of 1949. Especially, the second paragraph of the article indicates that it is not only the duty of the home state to the transgressions of humanitarian law but also “the ability to investigate and prosecute is left open to [all] other states” (Wolfrum, 1995: 523). When reading the above article, the emphasis should be put on the words “regardless of their nationality.” The phrase is important in the sense that it signifies the universality of state jurisdiction over international crimes. The principle of universality could be defined as the empowerment of any state to bring individuals to trial regardless of their nationality and of the place where the alleged crimes committed (Cassese, 2003: 284). In addition, this power of individual states stems from the nature of the crime since certain international crimes are believed to be under universal jurisdiction because the perpetrators are *hostes humani generis* [enemies of humankind] (McCoubrey and White, 1992: 333).

A well-known example of the exercise of universal jurisdiction is the Eichmann Case.⁴⁸ Adolf Eichmann was captured in Argentina and brought to trial in Israel. He was tried under the Nazi Collaborators (Punishment) Law; in which it was stated that persons who committed a crime against the Jewish people, a crime against humanity, war crimes are liable to death penalty (Oliver, 1962: 805). When the crimes considered under the Nazi Collaborators Law of Israel National Criminal Law, it is apparent that Israel, as envisaged in the Geneva Conventions of 1949, enacted necessary legislation to try individuals accused of international crimes. Thus, Israel brought the case before its national court regardless of the nationality of the

⁴⁸The Attorney General of the Government of Israel v. Eichmann, 1961 District Court of Jerusalem (December 11) [Hereinafter Eichmann Case].

offender and the location of the crime. The Court, upon the rejection of Counsel for Eichmann on the jurisdiction of Israel, declared that the state of Israel has the power to exercise jurisdiction because of the universal character of the crime and because of the universality of the authority to try these crimes under international law (Oliver, 1962: 808).

Another illustrious example of universal jurisdiction is the Pinochet Case. Augusto Pinochet was indicted by Madrid's National Courthouse by a Spanish judge, Baltasar Garzon on the charges of torture, terrorism and genocide. Judge Garzon demanded Pinochet's extradition from England (Lagos and Munoz, 1999: 26). The warrant of arrest was based on a domestic criminal code of Spain; the appeals chamber of the Audencia Nacional upon the discussions on the validity of the jurisdiction of the Spanish court affirmed that Spain has the authority to exercise jurisdiction because of the alleged crime in the case i.e. genocide (Goldstone and Smith, 2008: 116-117). The House of Lords, a part of the parliament and also the United Kingdom's highest court, dealt with the case and interpreted the jurisdiction of the United Kingdom to realize the extradition of Pinochet to Spain and concluded that the extradition could be proceeded (Goldstone and Smith, 2008: 117-118). However, due to the poor health of Pinochet, the British Home Office, which is the institution to give the final decision in the extradition matter, declared its decision that Pinochet was free to turn to Chile in March 2000 (Goldstone and Smith, 2008: 118). Regardless of the result, the arrest and extradition proceedings of Pinochet in England were a proof of the exercise of the universality of jurisdiction (Meron, 2006: 92). Next I examine international enforcement in more detail since the main purpose of this research is to find out the impact of international mechanisms on

implementing international criminal law.

2.4.2. International Enforcement

In the early 20th century, convention provisions on the repression of violations of humanitarian law were declarative and enforceable by only states whereas after the end of Second World War, we have witnessed a more progressive approach in the enforcement of humanitarian law by the establishment of International Military Tribunals. Consequently, International criminal law became binding on states, individuals and other actors and enforceable directly by international tribunals (Paust et al., 1996: 12). When the provisions of international conventions on the humanitarian law are examined, the first reference of an international tribunal was made in Genocide Convention of 1948.⁴⁹ It was stated that persons charged of genocide or other acts in the conventions shall be tried by a competent court of a State or by an international penal tribunal.⁵⁰

At the end of the First World War the prosecution and punishment of war criminals was an agenda item at the preparatory meetings of the Paris Peace Conference, and the Treaty of Versailles had some provisions on the punishment of individuals, particularly Germans and their allies, by a military tribunal of the Allied Powers. However, the German Emperor, *Kaiser* was not to be prosecuted in a criminal sense because of the opposition mainly by the United States that the responsibility of Heads of States to such a greater extent is unprecedented and

⁴⁹Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, ICRC Treaty Database <http://www.icrc.org/ihl.nsf/FULL/357?OpenDocument> [Hereinafter Genocide Convention of 1948].

⁵⁰Genocide Convention of 1948, art. 6.

against national sovereignty (Beigbeder, 1999: 28). Rather, *Kaiser* was to be charged with an offence against international morality and the trial would be a political one, not a judicial one as we have observed in the modern enforcement mechanism of international criminal law (Beigbeder, 1999: 28). However, this attempt failed due to the refusal of the German government to surrender perpetrators of war crimes; instead they were tried and punished by the Supreme Court of the German Reich (Wolfrum, 1995: 520).

The following years, there were attempts to establish an international criminal court by the League of Nations, but due to political pressure and lack of interest, these attempts ended up fruitlessly (Goldstone and Smith, 2008: 29). So many draft statutes of the proposed international criminal court were prepared either by the League of Nations' organs or non-governmental organizations. For example, in 1920 "Advisory Committee of Jurists" proposed that the Permanent Court of Justice to be established should also be empowered to try crimes that are "breaches of international public order or against the universal law of nations" (Cassese, 2003: 328). However, the proposal was repudiated by the Assembly of League of Nations (Cassese, 2006: 329). Examples of other attempts by non-governmental organizations in the inter-war period could be the draft statutes prepared by Inter-Parliamentary Union or International Law Association (Cassese, 2003: 329). Unfortunately, only after the devastation of Second World War, the enforcement of international humanitarian law norms was seriously brought to the agenda of international community, which produced the result of the establishment of two international military tribunals. The International Military Tribunal at Nuremberg and its charter are so significant that they preceded all later international mechanisms

both in terms of jurisdiction and in rules and procedures. The historical development of war crimes trials at Nuremberg was composed of several intergovernmental conferences between the Allied Powers, especially between the United States, United Kingdom and Soviet Union. The Tehran Conference in 1943 and the Yalta and Potsdam Conferences of 1945 set up the foundations of the International Military Tribunal at Nuremberg (Goldstone and Smith, 2008: 42). At the last meeting between the non-heads of states in London, the Charter of the International Military Tribunal was released on 8 August 1945, which was also known as London Charter or Nuremberg Charter⁵¹ (Goldstone and Smith, 2008: 42). As also mentioned in the previous section, the International Military Tribunal for Far East, which was established upon the executive order of Supreme Commander of Allied Powers and release of the Charter of the Tribunal in 1946 (Cassese, 2003: 332). These two international military tribunals, along with the criticisms directed at the establishment, procedures and jurisdiction of them, were successful in demonstrating that international crimes could be punished by international mechanisms. In addition, Nuremberg Trials established a common understanding in the international criminal law that individuals who planned, executed or assisted international crimes are accountable as the ones who committed them. Consequently, orders from superior authorities could not be accepted as an excuse for the commission of crime (McCoubrey, 1990: 217). Furthermore, Nuremberg Trials set a precedent for future trials and contributed to the preparation of the draft statute of the International Criminal Court by the International Law Commission (Beigbeder, 1999: 49).

⁵¹Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, August 8, 1945 ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument> [Hereinafter Nuremberg Charter].

The Cold War period was also an infertile era for the enforcement of international criminal law. Apart from some abortive attempts of the International Law Commission to draft a statute of international criminal court in 1950s, the whole Cold War years passed with some examples of national prosecutions of international crimes without any realization of an international mechanism to prosecute and punish those crimes. (Cassese, 2003: 334). Decades passed without any incentive to prosecute and punish perpetrators of large scale human rights violations and this created a culture of impunity and “indeed impunity became a rule rather than exception.” (Mennecke, 2007: 321). For example, Idi Amin (Ugandan Head of State between 1971 and 1979), Mengistu Haile Mariam (Ethiopian Head of State between 1971 and 1991), Pol Pot (Cambodian Prime Minister between 1975 and 1979) and many other tyrants in the Cold War era were not held accountable for their crimes. (Akhavan, 2001: 13). One reason for small number of prosecutions even after the end of the Cold War could be attributed to the fact that “impunity became the political price to secure an end to the violent conflicts.” (Bassiouni, 1996: 12).

Immediately after the end of the Cold War, ethnic conflicts in the Balkans and Africa again diverted the attention of the international community to the atrocities in these conflicts and grave breaches of international humanitarian law provisions. To address the atrocities in the territory of Former Yugoslavia, the United Nations Security Council adopted Resolution 827 for the establishment of an international tribunal for prosecuting the persons responsible for violations of humanitarian law.⁵² This resolution is worth examining in many aspects. First of all,

⁵² S.C. Res. 827, May 25, 1993.

it was the first in the history of international enforcement of humanitarian law that an international mechanism was established in the actual time of conflicts, as opposed to the previous examples of Nuremberg and Tokyo, which were established at the end of hostilities. Another significant point is that the Security Council considered the situation in the Former Yugoslavia under article 2, paragraph 7 and Chapter 7 of the United Nations Charter to maintain international peace and security, which had been threatened by the conflicts in Balkans. Instead of establishing such an organ by an international agreement, upon the Secretary General's advice, the Security Council chose to establish the Tribunal with a resolution in order not to waste time with negotiations for an international agreement. This is also another important aspect since it set a precedent regardless of the debates on the powers of Security Council to establish such an organ because of the wide support among member states for the Tribunal (Alpkaya, 2002: 41). However, even more importantly at the beginning sentences of the resolution, the Security Council declared its aim to put an end to violations of humanitarian law and argued that the establishment of an *ad hoc* international tribunal and prosecution of individuals would realize the achievement of this aim and contribute to restoration of peace. Therefore, at the initial stage of establishment, there was the aim of ending atrocities with an implicit assumption that the existence of the tribunal would deter future violations of humanitarian law. In line with the same argumentation, the Security Council again by Resolution 955 established the International Criminal Tribunal for Rwanda considering the issue under Chapter 7 of the United Nations Charter.⁵³ While aiming to put an end to atrocities and bring the persons accused of international crimes committed in the

⁵³ S.C. Res. 955, November 8, 1994.

territory of Rwanda to justice, the implicit conviction was that the existence of the tribunal would serve to terminate atrocities and deter future ones. It was asserted in the Resolution that “the prosecution of persons responsible for the genocide and other violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively addressed.” In addition to the predetermined impact, i.e. deterrence, of the *ad hoc* Tribunals at the establishment stage, the Tribunals themselves asserted the intention to have a deterrent effect while sentencing the criminals. In the Kayishema Case, International Criminal Tribunal for Rwanda asserted that the Tribunal imposes sentences on convicted persons for retribution, deterrence, rehabilitation and to protect the society. In addition, for deterrence the Tribunal seeks to dissuade the ones who would tempt to commit such crimes.⁵⁴ In Akeyasu Case Sentencing Judgment, the Tribunal argued that the penalties should be imposed upon the individual for retribution and for discouraging the ones who would have an intention to commit such crimes by referring to the aims of the Security Council in establishing the Tribunal explicitly.⁵⁵

The International Criminal Court for Former Yugoslavia also makes references to the purpose of deterrence in Sentencing Judgments. To illustrate, in Erdemovic Case, the Tribunal expressed that in sentencing it believes the most important concepts are deterrence and retribution along with stigmatization of the offender.⁵⁶ Another example could be the Sentencing Judgment of the Tadic Case. The Tribunal expressed its opinion that retribution and deterrence are the primary

⁵⁴ The Kayishema Case, Sentencing Order, art. 2.

⁵⁵ The Prosecutor v. Jean-Paul Akayesu, 1998 I.C.T.R. (October, 2).

⁵⁶ The Prosecutor v. Drazen Erdemovic, 1996 I.C.T.Y. (29 November).

purposes of sentence.⁵⁷

While the international community was trying to respond to the atrocities on an *ad hoc* basis in the Former Yugoslavia and Rwanda, throughout 1990s, the ideas of establishing a permanent international criminal court were retrieved. In 1989, the United Nations General Assembly, asked the International Law Commission to address the establishment of an international criminal court, which was followed by the General Assembly's request of the preparation of a draft statute for the international criminal court from the International Law Commission in 1993 (Goldstone and Smith, 2008: 110). Already continuing efforts to address the establishment of an international criminal court had been accelerated by the establishment of International Criminal Court for Former Yugoslavia which signified the desirability of an international criminal court and existence of political will to establish an international criminal court and by the above referred request of the General Assembly (Hebel, 1999: 30). International Law Commission finished the draft statute and recommended to the General Assembly to convene an international conference to discuss the issues arising from the statute and to adopt a Statute for ICC, however, only a minority of states welcomed a Diplomatic Conference in 1995, instead majority of states argued that before a conference to be convened there should be some preparatory work (Hebel, 1999: 31). Therefore, the General Assembly established an *ad hoc* Committee to review the issues in the draft statute and Annual Preparatory Meetings were held, which prepared the grounds of the assembly of the Rome Conference in 1998 (Goldstone and Smith 2008: 111). On 15 June 1998 the Diplomatic Conference on the Establishment of International Criminal

⁵⁷ The Prosecutor v. Dusko Tadic, 1999 I.C.T.Y. (November 11).

Court was opened in Rome by the participation of 160 states and some working committees were established to discuss different aspects of the Statute (Hebel, 1999: 36-37). On 17 July 1998 by the assenting votes of 120 states, the Rome Statute was adopted and on 1 July 2002 the Rome Statute entered into force after the ratification of 60 states. As of 21st July 2009, 110 states ratified and became part to the Rome Statute.⁵⁸ The reason of abortive attempts to establish a permanent international criminal court over the past 50 years was obviously the understanding of sovereignty and independence among states that closely correlates the power to prosecute and punish and sovereignty. Therefore, states were unwilling to hand over their power and limit their sovereignty to an international body till the beginning of 21st century (Aksar, 2003: 217).

Deterrence was also an objective in the establishment of the International Criminal Court. United Nations Office of Legal Affairs declared in the establishment process of the Court that “effective deterrence is the primary objective” whereas United Nations General Assembly’s president at the ceremony of the entry into force of Rome Statute stated that “a permanent institution will provide stronger deterrence to potential offenders” (Mennecke, 2007: 322).

In the preamble of the Rome Statute of International Criminal Court it was also avowed that the state parties to the Rome Statute are “determined to put an end to impunity for the perpetrators of [international] crimes and thus to contribute to the prevention of such crimes.”⁵⁹ The reference was again made to the retributive and

⁵⁸ICC at a Glance, The Establishment of the Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Establishment+of+the+Court.htm>.

⁵⁹ Rome Statute, Preamble.

deterrent aspects of punishment as an aim of international enforcement.

Therefore, the primary goal of international criminal justice system is to address atrocities and retribution, while the secondary goal is to manage conflict and reduce the likelihood of future violations by deterring potential offenders (Rudolph, 2001: 656). However, it should be noted that there are also other aims of prosecution at the international level, such as ensuring justice, respecting international law, avoiding or preventing personal vengeance, de-legitimizing leaders and national reconciliation but for many legal scholars, practitioners and policy makers; deterrence is the most important aim of the international criminal justice system (Wippman, 1999: 474). Therefore, it is essential to refer to the criminology literature to reveal the assumptions of the deterrence theory for national criminal justice system, since all above aims of international enforcement mechanisms are a reflection of domestic criminal systems.

CHAPTER III

THEORY OF DETERRENCE

As discussed above, the main purpose of the international community in establishing international courts as a response to grave human rights violations and atrocities committed against civilians during either an international or a civil war was to deter probable future atrocities. The Security Council resolutions establishing International Criminal Tribunal for Former Yugoslavia and Rwanda and the Rome Statute have references to the deterrence objective. In addition, contrary to the Nuremberg and Tokyo Military Tribunals, the *ad hoc* tribunals for Yugoslavia and Rwanda and since 2004 the International Criminal Court have been involved in ongoing conflicts and is expected to have a deterrent effect and to contribute to the reduction of human rights violations during war time. However, the question of punishment and its deterrent effect on potential or actual *de facto* offenders is an issue which has been widely discussed in “the literature of criminology”.

Before trying for an attempt to answer the question of whether the mechanisms of international criminal justice system have a deterrent effect in averting probable future atrocities, it is essential to scrutinize the theory of deterrence. Moreover, besides this necessity, deterrence theory also provides policy

implications for the suppression of crimes and prevention of them, which might be operative in improving the future implementation of international humanitarian law.

3.1. Classical Theory of Deterrence

Cesare Beccaria (1738-1794) and Jeremy Bentham (1748-1832) are considered to be the founders of the theory of deterrence who were both utilitarian and concerned with the formulation of legal and penal reform instead of an explanation of criminal behavior (Akers and Sellers, 2009: 17). Among different theories of punishment, Bentham and Beccaria are cited under utilitarian approaches to punishment since they tried to lay down the purpose of punishment and conditions that a punishment can be considered as legitimate. Both authors stated that the legitimacy of punishment depends on the benefit that this punishment provides to the society (Donmezer, 1965: 60-61). Plus, the benefit of the punishment is implicit in its deterrent effect for future crimes through intimidation (Donmezer, 1965: 57).

There are also works of political economists who have contributed to the theory of deterrence in criminology such as Becker (1968) and Harris (1970) who had explained the involvement in crime and decision making process in accordance with the rational actor in economics. So, the classical deterrence theory presupposes individual as a rational actor and assumes that before committing a crime an individual goes through a rational decision making process and makes a choice between the costs and benefits of his/her prospective action and decides whether to commit that crime. Therefore, the main rationale behind deterrence theory is that actors commit crime if they think that committing crime is to their advantage or in

other words; the benefits of crime exceeds the costs, legal consequences and risks of committing it (Cullen and Agnew, 2001: 293).

There are three important components of deterrence theory, which are the severity, certainty and the celerity of punishment. The severity of punishment does not involve an underlying idea of “an eye to eye, tooth to tooth” but assumes that the punishment should be severe enough to eliminate the gain or benefit offered by the commission of crime (Akers and Sellers, 2009: 18). The basic assumption of the theory, then, is that there is a negative relation between the crime rates and severity of punishment. Moreover, the theory also assumes the same negative relation between the certainty of punishment and crime rates. The certainty of punishment refers to the probability of arrest and imposition of punishment (Akers and Sellers, 2009: 19). Lastly, the celerity of punishment is germane to the swiftness with which the punishment is imposed after the committal of crime and again the theory assumes that the more swift the punishment the more deterrent it would be (Akers and Sellers, 2009: 19). As a result, the classical deterrence theory claims that the best way to prevent or control punishment is to increase severity, certainty and celerity of punishment.

There is also a commonly accepted distinction between general and specific deterrence in the literature. Specific deterrence puts forward the idea that “apprehended and punished offenders will refrain from repeating crimes if they are certainly caught and severely punished” (Akers and Sellers, 2009: 19). The general deterrence, on the other hand, represents the idea that punishment of an offender would serve as an example to those in general public who have not committed a

crime and would create sufficient fear to deter them from committing a heinous act (Akers and Sellers, 2009: 19). Pioneer scholars of the theory of general deterrence such as Pufendorf and Feuerbach argued that the respect for the laws and norms in a society is attained through the threat that punishment presents (Donmezer, 1965: 60). The specific deterrence theory aims to prevent offenders from recidivism whereas general deterrence aims to prevent emergence of new offenders. Morris (1966: 632) made the distinction between specific and general deterrence by stating that “specific deterrence thus considers punishment in the microcosm of the group of convicted criminals [whereas] [g]eneral deterrence looks to the macrocosm of the society as a whole”. However, it is possible to claim that both types of deterrence theory try to change the behavior of individual by the unpleasant consequences of legal sanctions which Zimring and Hawkins (1973: 75) explained as simple deterrence. Also Beccaria stated that the punishment should be in accordance with the crime and should have the power to change the behavior of an individual, who has an inclination to commit the same crime (Becarria, 1764: 213-214). Therefore, as Toroslu indicated punishment not only assumes a role of regulator and protector of the social order, but also has a role in affecting and changing the social life (Toroslu, 2008: 18-19).

3.2. Re-conceptualization of the Theory

However, more recent studies of deterrence have started to deliberate on the role of the perceptions of individuals on the certainty and severity of punishment rather than actual certainty in terms of arrest rates or actual severity in terms of years of punishment in sentence, fines etc. The main reason of investigating the

perceptions of certainty and severity is that the individuals' behavior is mostly influenced by the perceptions rather than actual certainty and punishment because as Buikhuisen (1988: 185) also indicates, there might be and usually there is a lack of knowledge in the public about the actual punishment and there is a gap between the actual punishment and expected punishment. The extension of deterrence theory with the incorporation of perceptions as a determining factor in individual behavior and decision making process was realized in the 70s and 80s and attracted much more scholarly attention in the consequent years. The primary hypothesis on perceptions predicts an inverse relationship between perceptions on severity and certainty of punishment and the involvement in crime; as it was the same case in the relationship between actual severity and certainty of punishment and deterrent effect of punishment in classical theory.

Williams and Hawkins' (1986) re-conceptualization of deterrence theory by making a distinction between legal and extra-legal sanctions offered an expansion in the theory that goes beyond the seldom consideration of legal sanction threats. While examining preventive mechanisms of sanctions, Williams and Hawkins suggested that stigma of arrest (social degradation and loss of respect due to being caught), commitment costs (cost of arrest for future goals) and attachment costs (loss of friends due to being caught) are perceptual factors, which can be seen as part of a deterrent effect in criminal involvement (Williams and Hawkins, 1986: 562). Therefore the consideration of these extra-legal influences affects the decision making process in committing a crime. The divergence from the deterrence theory stems from authors' suggestion that even if there is low severity and certainty perception of punishment, an individual might still refrain from committing a crime

because of his/her anticipation of stigmatizing reactions from others (Williams and Hawkins, 1986: 563). Also concerns about future employment, education or marriage opportunities again intervene in the decision making process, which are labeled as commitment costs. General deterrence occurs when these concerns about the future are thought to be jeopardized (Williams and Hawkins, 1986: 565). In addition, the perception of how the relationship with close friends and relatives would be affected is the last term that should be examined when understanding criminal involvement and deterrence according to the authors. They argued that when arrest is perceived to damage relations with others, then it would have deterrent effect (Williams and Hawkins, 1986: 564). Therefore, the authors concluded that these three indirect consequences (stigma, commitment and attachment) promote deterrence, thus, theory of deterrence should be expanded and enhanced in this direction (Williams and Hawkins, 1986: 568).

Since the deterrence process is mostly characterized by the evaluation of the actor as a rational calculator of risks and benefit, some of the studies of deviance and policy options for crime control centered on rational choice theory. Cornish and Clarke's (1987) article is another contribution to the literature of criminology which presents a reconsideration of rational choice theory and its implication for deterring crime. According to the authors; "decision process and the factors that are taken into account are likely to vary greatly at the different stages of decision making and among different crimes" and consequently they proposed a crime-specific analysis of criminal choices as well as an assessment of decisions at different stages of involvement separately (Cornish and Clarke, 1987: 933). Cornish and Clarke suggested that specific crimes are committed for specific purposes and the decision

to offend is affected by both the characteristics of the offender and the offences in which the interaction of these characteristics plays an important role in the calculation of risks and benefits (Cornish and Clarke, 1987: 935). Therefore, especially the properties of offenses which are the type and the amount of payoff, perceived risk and skills needed become the factors that structure the choice of the offender (Cornish and Clarke, 1987: 935). Authors labeled these factors as “choice structuring properties” which they defined as “a relational concept designed to provide an analytic tool for increasing an understanding of the interaction between personal variables and arrays of behaviors [...] [and] to specify more closely offenders and the offenses they commit” (Cornish and Clarke, 1987: 943).

On the other hand, Nagin and Pogarsky proposed a new model for the traditional deterrence theory which incorporates impulsivity and extralegal sanctions too (Nagin and Pogarsky, 2001: 865). In formulating their model, authors aimed to test an integrated deterrence theory with its all components of certainty, severity and celerity (Nagin and Pogarsky, 2001: 870). Their predictions in the model were as follows; the greater the certainty and severity is, the more they would have a deterrent effect and the longer the delay to the punishment the less it would deter (Nagin and Pogarsky, 2001: 873). The authors also tested their model with a survey among undergraduate students whose details will be provided in the next section.

Another important and robust re-conceptualization of deterrence theory was made by Stafford and Warr (1993). The authors aimed to re-conceptualize specific and general deterrence and proposed new variables that are effective in deterrence process such as; *punishment avoidance and direct vs. indirect/vicarious experiences*.

They stated that the key factor in the conception of deterrence in the literature of criminology is the conventional distinction between the general and specific deterrence and argued that the general deterrence in the literature is defined as the effect of punishment on the general public and specific deterrence is defined as the effect of punishment on the offenders (Stafford and Warr, 1993: 123). Stafford and Warr (1993: 124) challenged this distinction between the general and specific deterrence and claimed that “the conventional distinction between general and specific deterrence rests on faulty logic and it has done little to clarify the deterrence process”. The authors argued when considering general deterrence on people who have never suffered from punishment the researchers ignore the fact that there are two groups of people under this category; one group is the people who have never committed a crime and so never faced a punishment and the other group involves the people who have committed a crime but avoided punishment (Stafford and Warr, 1993: 124). For the second group of people who have never faced punishment but actually committed a crime, authors used the concept of *punishment avoidance* and claimed that these people have actually an experience with punishment avoidance and this affects their perception of certainty of punishment (Stafford and Warr, 1993: 124). They also asserted that it is possible that punishment avoidance encourages the committal of crime more than the experience with punishment discourages it (Stafford and Warr, 1993: 125).

In addition to punishment avoidance as a factor in deterrence process, authors also introduced a distinction between the experiences of individuals about the punishment and punishment avoidance which is the distinction between the direct and indirect experiences. Stafford and Warr (1993: 126) claimed that many scholars

considered the direct experiences punishment as the only operative factor in future crime involvement. However, they argued that individuals have a mixture of direct and indirect experiences of punishment and punishment avoidance in the sense that they would also acquire knowledge or have a belief about the situation and experiences of others who have committed the same crimes (Stafford and Warr, 1993: 126). They claimed that indirect experiences of punishment or punishment avoidance play also a determining role in one's calculations of the possibility of arrest. They illustrated this effect with a hypothetical situation in which the arrest of a fellow offender would lead a conclusion that the risk of arrest has increased (Stafford and Warr, 1993: 127).

Depending upon these new enhancements in deterrence theory, Stafford and Warr (1993: 127) re-conceptualized general and specific deterrence as follows: “general deterrence refers to the deterrent effect of indirect experience of punishment and punishment avoidance whereas specific deterrence refers to the deterrent effect of direct experiences of punishment and punishment avoidance”.

Stafford and Warr also elaborated on the possible application of this new conceptualization in deterrence research. They argued that this new conceptualization acknowledges that both general and specific deterrence might be relevant for any individual from any categorization either from the category of the ones who have never faced punishment or from the category of the ones who have experienced punishment (Stafford and Warr, 1993: 127). The introduction of punishment avoidance as a variable in the deterrence research was another contribution according to authors because “although deterrence researchers treat criminal behavior as a consequence of the perceived certainty of legal punishment, it

is possible that criminal behavior may be the cause of such perceptions” (Stafford and Warr, 1993: 129). Lastly, Stafford and Warr concluded that it is unnecessary to have two separate theories of general and specific deterrence; rather it is possible to have a single theory focusing on the direct and indirect experiences of individuals with punishment and punishment avoidance (Stafford and Warr, 1993: 133).

Paternoster and Piquero (1995) have elaborated on the recent reconceptualization of Stafford and Warr. They tried to clarify their hypotheses on the one hand and to expand the theory on the other hand. Paternoster and Piquero also provided a preliminary empirical test of Stafford and Warr’s theory which will be dealt in the following section. Firstly, Paternoster and Piquero stated that they would use the terms “personal experiences” for direct experiences with punishment and punishment avoidance and “vicarious experiences” for indirect experiences with punishment and punishment avoidance (Paternoster and Piquero, 1995: 253). Authors provided very substantial clarification of the theory of Stafford and Warr. For example, relying on the assumption that individuals have a combination of experiences and these experiences play an important role in deterrence process, Paternoster and Piquero illustrated under which conditions the effect of one type of experience (personal or vicarious) may be intensified or soothed by the effect of the other (Paternoster and Piquero, 1995: 254). In order to make it clear, authors presented a hypothetical situation and argued that when an individual successfully breaks a law, then his/her personal experience with punishment avoidance would tell him/her that the sanctioning system is working improperly and if this individual observes that others who committed the same crime also escaped punishment

(vicarious experience with punishment avoidance), then his/her perception of the risk of sanctioning would further decrease (Paternoster and Piquero, 1995: 254).

Moreover, authors tried to elucidate a common obfuscation in the literature about deterrence and non-deterrence variables which was an issue in the reconceptualization of Stafford and Warr. Paternoster and Piquero agreed with Stafford and Warr on the fact that personal and vicarious experiences can be deterrence variables to the extent that they influence perceptions of sanction threat and the involvement in crime so; they should be incorporated to the research of deterrence process (Paternoster and Piquero, 1995: 259). However, Paternoster and Piquero went beyond this argument and expanded the theory by stating that there are other personal and vicarious experiences except the experiences with punishment and punishment avoidance that could also be deterrence variables by causing fluctuations in the risk perceptions of individuals. They enumerated these other experiences other than punishment and punishment avoidance as; the amount of informal surveillance one experience, one's moral evaluation of each act and the closeness of emotional bonds with others (Paternoster and Piquero, 1995: 263). To briefly explicate each point, for the amount of surveillance; Paternoster and Piquero claimed that close supervision or monitoring by family members, parents, friends or relatives etc. would cause an individual to think that his/her possibility of committing a crime without detection is low and would increase his/her perception of the risk of being caught (Paternoster and Piquero, 1995: 258). For moral evaluation; authors argued that strong views about the immorality of the act would cause an individual to think that such abhorrent behaviors would be punished effectively which is another factor that augments the perceptions of risk (Paternoster and Piquero, 1995: 263).

Another expansion of Stafford and Warr's theory was made by Piquero and Pogarsky (2002). After elaborating on the re-conceptualization of Stafford and Warr, Piquero and Pogarsky pointed out the role of impulsivity as another factor that should be considered as influential in determining the effect of personal and vicarious experiences (Piquero and Pogarsky, 2002: 160). Authors stated that previous researches on impulsivity and offending affirm that impulsive individuals do not weigh the consequences of their behavior and consequently less restrained by the sanction threats (Piquero and Pogarsky, 2002: 160). According to these premises, Piquero and Pogarsky (2002: 160) claimed that "impulsivity may also affect the relative weight placed on punishment and avoidance experiences in the formation of sanction risk perceptions". In addition, impulsive individuals supposed to be self-reliant and less dependent on the information from others in assessing risk and as a result they should be affected mostly by personal experiences especially by the experiences with punishment avoidance (Piquero and Pogarsky, 2002: 161).

The last but not the least, Buikhuisen (1988: 182) listed the dynamics of deterrence with reference to various conditions that are emphasized in the literature as important elements which should be taken into account to comprehend the decision making process of an individual prior to commit a crime. In order to give a summary of the above literature review, these conditions can be enumerated as follows; items referring to the legal aspects of the behavior concerned (classical deterrence theory), items referring to the prosecution (actual certainty of punishment), items referring to knowledge and perception of the sanctions concerned (perceived certainty and severity of punishment), items referring to the sensitivity to sanction (avoidance learning), items referring to the condition of the subject at the

time he is about to commit crime (probable interferences in the rational decision making process), the meaning of the act to the potential offenders (deterable individuals, impulsivity) and lastly items referring to the characteristics of the situation in which the illegal act takes place (situational factors that possibly affect decision making process) (Buikhuisen, 1988: 182-187).

Almost all of these different variables in deterrence theory are considered by various authors in their research to reveal whether in practice, punishment (perceived or actual) with its various components (certainty, severity, celerity) has a deterrent effect on criminal behavior. In the following part, examples of some research testing the premises of the deterrence theory will be given in order to illustrate the divergent views in the literature about the deterrent effect of punishment.

3.3. Testing Theory of Deterrence

Most of the studies conducted in 1970s to test the deterrent effect of perceived certainty and severity of punishment concluded that they had found an inverse relation between perceived certainty/severity of punishment and involvement in crime. Thus they supported the hypotheses of the theory on high perceptions of risk of being caught and its deterrent effect on criminal activity (Anderson, Chiricos, and Waldo, 1978; Burkett and Jensen, 1975; Erikson and Gibbs, 1979; Grasmick and Milligan, 1976; Grasmick and Appleton, 1977; Jensen, Erikson and Gibbs, 1978; Kraut, 1976).

On the other hand more recent studies testing deterrence hypotheses concluded that there is little or no effect of severity and certainty of punishment

either perceived or actual. For example, Paternoster concluded from the results of previous perceptions research that there may be little relationship with perceived certainty and severity of the punishment and the individual behavior (Paternoster, 1987: 214). He also stated that perceived severity may have even a weaker casual effect than perceived certainty (Paternoster, 1987: 189). He further emphasized the instability in perceptions of individuals and criticized prior research on deterrence because of neglecting this instability, having inadequate research designs in terms of methodology and data selection, and assuming every individual as rational which might not be the real case (Paternoster, 1987: 214). In another study, Paternoster and Iovanni examined the effect of informal properties of sanctions (loss of respect in social, family and occupational relations) and compare them with the legal/formal properties of sanctions (arrest and punishment) in a research done with high school students for crimes of petty theft, vandalism, drinking alcohol under age and marijuana use (Paternoster and Iovanni: 1986: 754). They found out that “social control works primarily through informal processes and; that once these are controlled, perceptions of severity and certainty of punishment have no affect on [...] behavior” (Paternoster and Iovanni, 1986: 769). This finding is also consistent with the findings of Tittle (1977: 595) who argued that the impact of general or legal sanctions has a minor or moderate level of deterrent effect when compared with the fear of interpersonal loss of respect. Tittle derived this conclusion upon a survey conducted on 1993 individuals whose age are 15 and above and asked for 8 rule violations including taking something that does not belong to you worth about \$5, taking something that does not belong to you worth about \$50, smoking marijuana, gambling illegally, physically harming somebody on purpose, lying to your spouse or

sweetheart, cheating on your income tax, remaining seated during National Anthem and a role specific deviance for those self-employed, employees, students and for homemakers separately (Title, 1977: 580).

Another research that supports the idea of a more deterrent effect of the informal sanctions is the Green's study of "Measures in Illegal Behavior in Individual Level Deterrence Research" with a sample of adults for driving while intoxicated. Green incorporated perceived certainty of arrest, perceived severity of punishment and moral commitment to legal norm, social disapproval by the others and social demographic features as independent variables (Green, 1980: 259-260). He concluded that informal threats of sanctions are the most important predictor for engaging in crime and moral commitment to legal norm as well as social demographic features such as being single or married; age etc. also have a moderate predictive power (Green, 1989: 267). In line with the above argument on the effect of personal traits and demographics Greg Pogarsky conducted a research to test the deterrent effect of certainty and severity of punishment but made a distinction between deterrable individuals and others (Pogarsky, 2002: 432). He identified 2 groups of people who are insensitive to legal sanction threats; one is *acute conformists* who are influenced by extra-legal effects and *committed offenders* who are incorrigible and then placed deterrable individuals between these two extreme groups of people (Pogarsky, 2002: 433). And upon the analysis of the data he collected by a survey on undergraduate students in which a hypothetical scenario of driving to home while under the influence of alcohol was presented, he concluded that contrary to the findings of previous studies severity of sanction has more

deterrent effect than certainty of sanction for deterrable individuals (Pogarsky, 2002: 445).

Additionally, Anderson, Chirocos and Waldo's (1978) research on perceived severity and certainty of both formal and informal sanctions their deterrent effect; produced results that support the premises about the greater influence of informal sanctions at the deterrence process. Authors, performed interviews with college students and tried to figure out the relation between formal and informal sanction perceptions and marijuana use (Anderson, Chirocos and Waldo, 1978: 106). They found out that there is a strong inverse relation between perceived certainty of punishment and marijuana use but a weaker relation between the perceived severity of punishment and the illegal act (Anderson, Chirocos and Waldo, 1978: 108). Moreover, their results illustrates that the relative impact of friends' use/non-use or approval/disapproval has a greater impact than perceived certainty of punishment (Anderson, Chirocos and Waldo, 1978: 110-111). Upon these findings, authors concluded that perception of certainty and informal sanctions are independently and strongly associated with involvement in illegal act and when they operate together, their impact is greater than their impact separately (Anderson, Chirocos and Waldo, 1978: 113). Their conclusions support the assumptions about the effect of informal sanction threats on decision making process when committing crime.

Despite the research examined above, Grasmick and Appleton tried to answer the question whether threat of legal punishment is more effective when there is an existent threat of social stigma by using a sample of adults with a dependent variable of speed law violations (Grasmick and Appleton, 1977: 20). Their analysis suggests

that perceived threat of legal punishment regardless of the level of perceived social stigma has an effect on the frequency of crime (Grasmick and Appleton, 1977: 25).

Authors concluded that “[their] data tend to support the view that an increase in the certainty of legal punishment, with no change in the level of threat of stigma, would result in the less frequent violations” (Grasmick and Appleton, 1977: 25).

In addition, Grasmick and Bryjak performed a research on 400 adults and asked the involvement of these individuals in eight illegal activities which are theft of something worth less than 20 dollars, theft of something worth equal or more than 20 dollars, gambling illegally, physically hurting someone on purpose, cheating on tax returns, use of fireworks in the city limits, driving while under the influence of alcohol (Grasmick and Bryjak, 1980: 478). They conducted this research with the assumption that perceived severity of punishment at relatively high levels of perceived certainty has a significant deterrent effect (Grasmick and Bryjak, 1980: 471). Authors concluded that “perceived severity of punishment if arrested is a significant variable in the social control process, having an inverse effect on involvement in illegal behavior” (Grasmick and Bryjak, 1980: 486). They also argued that the perceived certainty of arrest alters according to the level of perceived severity of punishment (Grasmick and Bryjak, 1980: 486). The reason behind the opposite result of their study from the previous examples lies behind their different conceptualization of perceived severity which put emphasis on consequences of punishment felt by the individual rather than determined by the researcher in terms of the time served in prison etc. Grasmick and Bryjak (1980: 475) persuasively argued that when measuring perceived severity, the researchers should pay attention to the

individual's values because "a person may not necessarily consider a fine less severe than the time spent in jail". The interaction of severity and certainty in Grasmick and Bryjak's formulation actually supports an earlier study of Tittle (1969). Tittle argued that the crucial question that should be asked about the severity of punishment is not its deterrent effect but the conditions under which the severity of sanctions is likely to deter (Tittle, 1969: 411). Tittle (1969: 417) found a negative and substantial association for only homicide rate and severity of punishment and interpreted that association as "severity might act as a deterrent only when there is *high* certainty of punishment". However, Tittle also acknowledged that official penalties should not be only variable in measuring offense rates; there must be other variables such as character of socialization and sanctions of an informal and interpersonal manner (Tittle, 1969: 422).

Furthermore, Nagin and Pogarsky (2001) tested their model of integrated deterrence with its three components as well as impulsivity and extra-legal sanction threats. They conducted a survey among undergraduate students and presented a scenario of driving while drunk (Nagin and Pogarsky, 2001: 874). They concluded that certainty and severity of punishment have an effect on predicting the involvement in crime however; celerity of punishment does not have the same significant effect (Nagin and Pogarsky, 2001: 877). In addition, upon the results of their survey, authors found support for the hypothesis of equal effect of extra-legal sanctions and legal sanctions in deterrence process (Nagin and Pogarsky, 2001: 879). Moreover, the severity of punishment is attenuated if an individual is present-oriented or impulsive (Nagin and Pogarsky, 2001: 881-882). Another result of their

research was that the certainty has a greater effect than the severity of punishment (Nagin and Pogarsky, 2001: 883).

Besides the ongoing discussions in the literature on whether the certainty or severity of punishment or informal sanction threats have a deterrent effect on criminal involvement, there are studies which argue that both the severity and certainty of punishment should be given equal weight. Mendes' (2004) analysis can be an example of this view. The author questioned the role that preferences, especially risk, play in deterrence strategies with an aim to provide policy implications for crime control (Mendes, 2004: 61). The final analysis of Mendes (2004: 71) illustrated that "the functional effects or weights of the probabilities of arrest and conviction, and the severity of punishment do not really vary" as much as the previous studies suggested.

In addition; a recent test of deterrence theory has integrated association with delinquent peers and tried to figure out its conditioning effect on perceived certainty (Matthews and Agnew, 2008: 94). The hypothesis tested in this research is that people having an association with delinquent peers are less likely to be deterred from the certainty of punishment because "they are more likely to be rewarded for engaging in crime, be sanctioned for not engaging in crime, view the consequences of detection as less threatening, temporarily reduce their perceived certainty of detection and/or give less thought to the likelihood of detection" (Matthews and Agnew, 2008: 96). A survey was conducted on a sample of high school students and involvement in crimes of damaging property, shoplifting, using marijuana and drinking liquor under age was measured. The conclusion of the analysis supports the

premise indicated above, and perceived certainty has a deterrent effect for people with no or some delinquent peers (Matthews and Agnew, 2008: 109).

On the other hand, Paternoster and Piquero (1995) provided a preliminary test of the theory of Stafford and Warr (1993). They themselves stated that their research provides a preliminary test of the theory because they could not differentiate the effect of vicarious experience with punishment and punishment avoidance with the existing data in their hand (Paternoster and Piquero: 1995, 281). The collected data through a survey conducted on a group of 10th grade students and measured the variables of personal and vicarious experiences with punishment and punishment avoidance for the crimes of drinking liquor under age and marijuana use (Paternoster and Piquero, 1995: 259-260). They found support for the theory of Stafford and Warr, especially the operation of personal and vicarious experiences in the deterrence process at the same time (Paternoster and Piquero, 1995: 281).

The last but not the least example of studies testing deterrence theory is Piquero and Pogarsky's (2002) research on the premises of Stafford and Warr's reconceptualization. They conducted a survey on university students in which a scenario of driving while drunk was presented to the students. The authors found strong evidence that supports Stafford and Warr's (1993) hypothesis on punishment avoidance and confirms the prediction of the effect of punishment avoidance on risk perceptions, in other words the direction of the relationship between the experience variable and perceived certainty is opposite (Piquero and Pogarsky, 2002: 178). Piquero and Pogarsky (2002: 178) also concluded that their analysis demonstrated a

partial support for the operation of a mixture of direct and indirect experiences in decision making process.

All of the researches cited above have divergent conclusions on the deterrent effect of perceived certainty and severity of punishment, extralegal station threats, moral commitments and prior experiences (direct or indirect) with punishment or punishment avoidance. However, except a few studies (Grasmick and Brjyak, 1980; Title, 1969; Green, 1989) in which samples of adults were used to test the theory; most of the authors proceeded their research and conduct surveys on samples of high school and undergraduate students. Many authors admitted the weakness of their sample and its limited representation of the population and called for new researches with more representative samples. This concern is valid especially when different situational and perceptual properties of teenagers are considered. High school and university students may involve in an illegal behavior to achieve acceptance in a group or they may not so rationally calculate cost and benefits of their behavior. Moreover, they may not be so sensitive to punishment or perceive certainty and severity of punishment relatively low when compared to adults because of the lack of knowledge and experience. Also, they may not have strong moral commitments and concerns on informal sanction threats as some studies suggest.

Another weakness of these research is that most of them operationalize types of crimes with a wide range of minor offenses, however, they neglect more serious offences like homicide except Tittle (1969). Driving while intoxicated, petty theft, shoplifting, using drug or illegal substance, damaging property and drinking alcohol under the age of 18 are the examples of crimes which are used to test the deterrence

theory. This is a crucial point since more serious crimes may involve more rational premeditation and the potential offenders of these crimes may be more sensitive to legal sanctions and may have a high perception of certainty and severity of punishment because of the seriousness of the crime. It is possible to argue that the more serious a crime is i.e. murder, the more resources allocated to arrest the offender and convict him/her. So this rationalization may well affect the perceived certainty of punishment.

In the next chapter, I elaborate on the question of to what extent the premises of the deterrence theory are applicable to the mechanisms of international criminal justice especially when they operate under an ongoing civil conflict situation. In other words, I will identify which hypothesis is more relevant for crime prevention at an international level and in a conflict situation where there is a lack of stability in the society and lacunae in the domestic judicial system.

CHAPTER IV

APPLICATION OF THE THEORY TO THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

Recalling from Chapter II of this thesis, that examines the scope, evolution and enforcement of the international criminal justice system, the current chapter scrutinizes the deterrence theory in an international context. The purpose of this chapter is to discuss the applicability of deterrence theory to the international criminal justice system after presenting the main assumptions in this research that stem from the application of the theory of deterrence to the international criminal justice system.

As discussed above, the main aims of divergent mechanisms of international criminal justice can be enumerated as follows: deterring future crimes, ending the culture of impunity (i.e. retribution), helping reconciliation and facilitating peace processes. Deterrence and retribution could be categorized as short-run aims whose effects are expected to be immediate in the course of an ongoing conflict whereas the aims concerning reconciliation and peace process have their effects in the long-run, which means that they are observable in post-conflict process. However, the effect of international criminal system and its mechanisms in post-conflict periods is not in the scope of this research. The main question of this research is that “How do the

mechanisms of international criminal justice system contribute to averting grave human rights violations in civil conflicts?” Therefore, this research focuses on ongoing conflict situations. In other words, the primary concern in this research is to find out whether the short-run aims predetermined by international community in establishing several mechanisms to implement international humanitarian law are hitherto realized or not. The following section will reflect divergent views on the deterrent effect of international criminal justice system, which will be followed by the prospects of applicable premises of deterrence theory to the international context.

4.1. Divergent Views on the Deterrent Effect of International Criminal Justice System

The proponents of deterrence argument in the international context argue that the enforcement of international humanitarian law and prosecutions of major war criminals would contribute to the transformation from a culture of impunity to a culture of accountability (Mennecke, 2007: 328). The logic behind this argument is that the prosecution of high-level officials such as political leaders, heads of states and/or military commanders who are responsible for violation of humanitarian law norms “send a message that costs of ethnic hatred and violence as an instrument of power outweighs its benefits” (Akhavan, 2001: 7-8).

In addition, Liberal Institutional view of international institutions and regimes posits that conflict in the international system can be overcome by international cooperation, which can be achieved through well-designed institutions. Therefore states engage in regimes and institutions to gain from cooperation. For international criminal justice system, the goal of the regime is to alleviate political

and identity-based conflicts (Rudolph, 2001: 658). Furthermore, for international criminal justice system, not only cooperation and coordination, but legalization is important and required for compliance and deterrence, since Institutionalist point of view claims that a well-structured atrocities regime will not only hold perpetrators of human rights violations accountable but also deter future crimes and facilitate the mitigation of tension in conflict regions (Rudolph, 2001: 359). In that argumentation, the emphasis is given to the hard law aspect of international regimes, i.e. enforcement, since supporters of hard law argue that hard law enhances deterrence and enforcement by “signaling credible commitments and maximizing compliance pull through increased legitimacy” (Rudolph, 2001: 659). To define an institution or a regime as having the feature of “hard law”, institutionalist approach refers to the precise and legally binding obligations as well as an authority to interpret and implement the law in that regime, and argues that “hard law” restricts behavior of actors in the regime (Abbott and Snidal, 2000: 421-422). Since international criminal justice system have all three components of hard law or hard legalization, which are obligation, precision and delegation it is considered to be the high ideal type of legalization (Abbott et al, 2000: 401-406).

Contrary to above assertions, there is also abundant literature opposing the asserted deterrent value of the international criminal system. On the one hand, there are opposing views on the very nature of the deterrence argument indicating the inherent theoretical problems in the theory of deterrence. Mennecke questioned whether it is possible to transfer the correlation between deterrence and punishment from national legal system to international legal system (Mennecke, 2007: 323). The author, while acknowledging the fact that lack of empirical study to reveal this

correlation at the international context does not necessarily nullify the effect of the international criminal justice system, stated that deterrence is considered to be successful if violations of human rights cease to occur. However, to identify the exact reason of any absence of violation is difficult to determine, which theoretically poses problems (Mennecke, 2007: 324). While Mennecke's reservation for the logic of deterrence and punishment could be rebutted by referring to the examples of empirical research in the criminology literature, his examination on the applicability of deterrence theory at the international level should be addressed. When the crimes that are punishable under international criminal law are considered, (i.e. genocide or crimes against humanity) which are part of a plan or policy involving many individuals, it is implausible to expect that this diverse body of perpetrators would be equally deterred as in the case of national criminal systems (Mennecke, 2007: 325).

Another impediment for deterrence to be effective at the international level is the nature of the crime which dehumanizes the victim group and murder becomes a part of a larger project instead of a crime (Mennecke, 2001: 326). According to a survey conducted by International Committee of Red Cross, although parties to a conflict are aware of the limitations on the conduct of warfare, they do not regard their acts as wrongful due to the high degree of societal involvement and perception of the conflict as a total war which make the distinction between combatant and non-combatant blur (Wippman, 1999: 477-478). There is also the belief that their attacks on civilians are acts of retaliation, since the other side is doing the same and they are defending their own society (Wippman, 1999: 478). When these motivations are considered, Wippman argued the risk of future prosecution and punishment seems slight at the international context (Wippman, 1999: 479). Aukerman, in line with the

above argumentation, questions the “ordinary crime analogy” in transferring the prosecution aims, i.e. deterrence, to international context. She argued that ordinary crime is committed usually for non-political reasons whereas extraordinary crime or international crimes has political purposes and questioned the goals of prosecution at the international level (Aukerman, 2002: 41-43). She further argued that even if a consensus is reached in the international community on the preventive effect of punishment for extraordinary crimes, the extent that an international strategy would meet the needs of victims is unclear and while addressing atrocities a strategy should establish a balance between the goals of victimized society and international community (Aukerman, 2002: 46). Instead of the priority given to deterrence as a purpose of international criminal justice system, she claimed that political and cultural factors of a particular society should be taken into consideration when formulating a strategy to address atrocities (Aukerman, 2002: 47). Although general deterrence argument in preventing future violations of international humanitarian law justifies selective prosecution which focuses on the punishment of high-level officials and does not require the punishment of all offenders, she emphasized that the deterrent effect depends on context, certainty and severity of punishment, the extent of public knowledge and the degree to which crime and offender is deterrable (Aukerman, 2002: 67). Furthermore, she stated that there is still the possibility that the offenders may choose to commit crime by deciding that risks are not that much high to outweigh the gains from the commission of crime (Aukerman, 2002: 69). However, as cited above, she acknowledged the consequences of an international arrest warrant may be as fearful as punishment for dictators and heads of states since

they would be liable for arrest in every country which would make it difficult to hold power and to be recognized in the international fora (Aukerman, 2002: 69).

In an analysis of collective violence, Mark A. Drumbl also questioned the contradiction between the extraordinary nature of the crime at the international context and the theories of sentencing and processes of determining guilt which remains ordinary (Drumbl, 2004: 541). He criticized the international criminal justice system on grounds that only selected individuals are prosecuted and punished for systemic levels of violence and “the enemy of all of humankind is punished no differently than a car thief, armed robber or cop killer” (Drumbl, 2004: 542). Additionally, the author referred to the group component of international crimes, which makes the acts of individuals in that group less deviant in place and time although these acts deviate from the international humanitarian law norm (Drumbl, 2004: 567). Since perpetrators of international crimes usually belong to a group “that shares a mythology of ethnic, national, racial or religious superiority, perhaps even infallibility” and consequently, the ones who commit extraordinary crimes may be the ones who conform social norms in that particular group and in the context of a societal breakdown (Drumbl, 2004: 567-568). So the author suggested that the influence of the group as a social agent should be recognized in international criminal system and any ignorance of the unique nature of the crime restrain the enhancement of effective methods to address atrocities and to promote accountability (Drumbl, 2004: 568). Although the author admitted the fact that after the recent developments in the institutionalization of the international criminal justice, the possibility of apprehension is higher for heads of states or high-level officials, he criticized the rational actor assumption of the deterrence logic especially by referring

to the group component and its applicability to the international context (Drumbl, 2994: 589-590).

However, when the objective of genocide is considered, it is possible to claim that there is a cost-benefit analysis and calculation at least on the part of the planners, since it is evident that such massive violations of human rights require the implementation of a well-designed program (Beigbeder, 1999: 79). Therefore, the objectives of genocide or other kinds of mass killing could include one or several of the following;

- 1) To eliminate a real or potential threat against the perpetrators' population, their institutions, their religion, their lives, their property, their ambitions, in a self-proclaimed preventive defence exercise.
- 2) To acquire economic wealth or territory, in an effort to augment the country's power and wealth.
- 3) To implement a belief, a theory or an ideology, or to eliminate a belief, a theory or an ideology considered hostile to the perpetrators' beliefs and objectives. The ultimate purpose is to enforce conformity and social equality, to purify the race, to strengthen a new political regime in eliminating all potential, imagined or real political opponents, or, more drastically, in eliminating all social classes which do not conform with the new regime's theories and objectives (Beigbeder, 1999: 79).

For example, the conflict in Former Yugoslavia, especially in Bosnia Herzegovina and Kosovo was systemic and planned as well as the conflict in Rwanda was not spontaneous outbreak of ethnic violence as a result of hatred⁶⁰ (Akhavan, 2001: 10-11). Therefore, it still is possible to expect that threat of punishment can increase the costs of pursuing a policy of inciting ethnic hatred and

⁶⁰The systematic and carefully organized large scale military attacks against villages, internment of tens of thousands in concentration centers, torture, rape by military and police forces as well as deportation of millions were the evidences of planned ethnic cleansing in Former Yugoslavia. In addition the role of Radio-Television Libre des Milles Collines and other media organs in the incitement of genocidal acts in Rwanda through targeting population with no access to other resources was major (Akhavan, 2001: 10-11).

violence to gain and sustain power (Akhavan, 2001: 12). Although there is an opportunity to influence planners' cost-benefit analysis by threat of punishment, once the ethnic violence is initiated, due to the extraordinary nature of crimes discussed above, it would be very hard to deter individuals with threat of future punishment, whereas there is the possibility of preventing these violations before they occur or at least inhibiting the resumption in that particular society (Akhavan, 2001: 12).

On the other hand, it would be naive to expect any effect of these institutions on the course of the conflict immediately after they are established or involved, since it would be very hard to transform the deep-rooted culture of impunity to an accountability culture at the first hand (Akhavan, 2001: 9). One of the classical criticisms of the ineffectiveness of International Criminal Tribunal for Former Yugoslavia in deterring future crimes is that although the Tribunal was created in early 1993, the Srebrenica massacre⁶¹ happened in 1995, while the Tribunal was active. (Meernick, 2005: 278). This example is given to indicate that criminal tribunals had no effect on the course of conflict; however a thorough analysis of the situation in the Tribunal would show otherwise. In the first two years of establishment, the court had no person in custody, while there were indictments and only in late 1995 some of the indicted individuals started to appear in front of the court⁶² (Barria and Steven, 2005: 356). In the case of International Criminal Tribunal for Rwanda, the assumed deterrent effect was even more arduous to achieve, not only

⁶¹Srebrenica Massacre refers to the events that took place in July 1995 in which thousands of Bosnian Muslims especially men were killed by Bosnian Serb forces and which was also accepted as a "genocide" by both International Criminal Tribunal for Former Yugoslavia and International Court of Justice.

⁶²Dusko Tadic was the first detainee of International Criminal Tribunal for Former Yugoslavia, who was arrested in 1994 and transferred to the Tribunal on 24 April 1995 (ICTY, Dusko Tadic, Case Information Sheet, http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf).

because the difficulties in securing arrests but also the limited jurisdiction. International Criminal Tribunal for Rwanda was established to try and punish crime of genocide and other violations of international humanitarian law committed between 1 January 1994 and 31 December 1994, which means that the individuals who committed crime before and after this time interval are immune from legal consequences.⁶³ In both cases, in Former Yugoslavia and Rwanda, the countries were also reluctant to cooperate with the tribunals although they were under the obligation to cooperate and comply with the Tribunals' orders and requests for assistance according to the Security Council Resolutions establishing these courts.⁶⁴ In the case of Rwanda, several African countries refused to extradite indicted individuals and accepted refugees from Rwanda, among whom there were also genocide planners (Barria and Roper, 2005: 360). So the initially asserted aim of deterrence could not be realized at the first hand because of the difficulties in arresting individuals. Prosecutors of the Tribunals also admitted that true deterrents are not investigations and/or indictments but the execution of arrests (Rudolph, 2001: 373). Therefore there is still room for the deterrence at the international level as Theodor Meron indicated that the failure of deterrence is not because it is inevitable but because "the prosecutions of war crimes on both national and international planes are so exceptional that criminals do not believe that they are likely to be prosecuted or punished" (Meron, 1995: 110). Therefore, it is possible to claim that tribunals were ineffective in deterring enough number of individuals to have a visible impact on the course of conflict where there is high-level of atrocities, but there is anecdotal evidence that the possibility of prosecution made some individuals abide by the

⁶³The Statute of the Tribunal for Rwanda, art. 1.

⁶⁴S.C. Res. 827, May 25, 1993, para. 4; S.C. Res. 955, November 8, 1994, para. 2.

provisions of international humanitarian law in the case of Former Yugoslavia (Wippman, 1999: 475). Finally, there are more recent reports indicating that there is to some extent a deterrent effect of the involvement of international criminal tribunals in conflict situations. For example, after the referral of the situation in Darfur to International Criminal Court by UN Security Council, Human Rights Watch reported that people started to talk about The Hague and they are worried that they might go to The Hague (Mennecke, 2007: 324). In addition, there is not any study on the deterrent effect of those mechanisms on the course of conflict although there are studies indicating their impact on the post-conflict processes, societal peace and effectiveness in ensuring justice (Meernik and King, 2001; Meernik, 2005; Akhavan, 2001; Barria and Roper, 2005). In addition, some arguments presented above on the ineffectiveness of the tribunals in deterring future crimes are mostly based on the event-specific examples of Former Yugoslavia and Rwanda instead of a comprehensive analysis of the course of conflict. In this regard, while on the one hand bearing in mind the reservations of several scholars about the applicability of the theory to the international level, the following section will lay down the framework for this research to examine any deterrent effect of international criminal justice system on the course of an armed conflict.

4.2. The Applicable Premises of Deterrence Theory

When the crimes that are under the jurisdiction of international criminal justice mechanisms and the special conflict situation under which these mechanisms operate are considered, it would not be sensible to expect validity of all the presumptions about the factors that influence individuals' decisions to involve in

international crimes. To illustrate, there are many authors (Williams and Hawkins, 1986; Paternoster and Iovanni, 1986; Tittle, 1977; Green, 1980; Anderson, Chiricos and Waldo, 1977; Nagin and Pogarsky, 2002) who argue that extra-legal/informal threats of sanctions have an important deterrent effect on individuals who are about to commit crime. However, for a civil war situation where there are most probably ethnic tensions and several rival groups fighting for different purposes, individuals would probably not be concerned about their reputation in the society and the disapproval coming from family, friends, relatives and society in general. It is likely that a potential human rights violator would fear incarceration more than any other extra-legal/informal sanction threats (Aukerman, 2002: 69). This assumption actually depends on the fact that in civil conflict situations where the mechanisms of international criminal justice system operate, it is very hard to speak of a regular society with its norms and values.

On the other hand, research on criminology focuses on certainty and severity of punishment either actual or perceived. In addition, a substantial amount of literature in deterrence theory gives much more importance to perceptions of individuals about the severity and certainty of punishment to explain the deterrence process in decision making. Moreover, several scholars (Paternoster, 1987; Nagin and Pogarsky, 2001; Grasmick and Bryjak, 1980; Tittle, 1969; Matthews and Agnew, 2008; Piquero and Pogarsky, 2001) working on perceptions of severity and certainty of punishment and their deterrent effect argue that the perceived certainty of punishment has a greater deterrent effect when compared with the deterrent effect of perceived severity. Recalling from the assumptions of Grasmick and Bryjak (1980) and Tittle (1969), it is sensible to postulate that the severity of punishment might

have a deterrent effect when there is a high level of certainty of punishment. Furthermore, as Grasmick and Brjak (1980) in their research about the perceptions of certainty and severity argued, there should be a more intricate theory on the perceived severity of punishment since a fine may be as severe as several years spent in jail for an individual. Therefore, studies conceptualizing the severity of punishment by years of imprisonment are inadequate in reflecting the perceptions of individuals. However, the penalties in international criminal system do not vary as much in domestic criminal systems. For example, in the statute of International Criminal Tribunal for Former Yugoslavia in Article 24, the penalty imposed by the Tribunal is limited to imprisonment whose terms should be in accordance with the general practice regarding the prison sentences in the courts of Former Yugoslavia.⁶⁵ Identically, in Article 23 of the statute of International Criminal Tribunal for Rwanda, the penalties are restricted to imprisonment which should be in line with the general practice in Rwandan Courts. Both tribunals have the power to demand the return of the property and proceeds acquired by the criminal act.⁶⁶ It is also possible to observe almost the same kinds of punishment when the articles concerning the penalties in the Rome Statute are examined. In Article 77 paragraph 1, there are two options for the judges of the Court regarding imprisonment. The Court may impose imprisonment for a specified number of years which may not exceed a maximum of 30 years or life-time imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.⁶⁷ The second paragraph of the same article lays down the penalties other than imprisonment which could be a

⁶⁵Statute of the Tribunal for Former Yugoslavia, art.24

⁶⁶Statute of the Tribunal for Rwanda, art.23

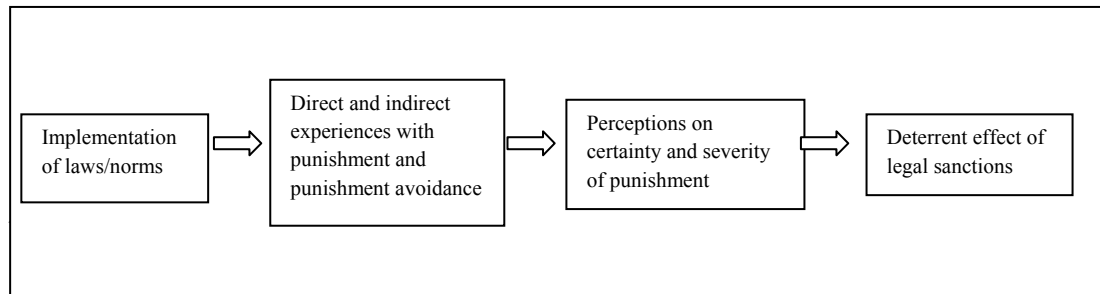
⁶⁷Rome Statute, art.77

fine under the criteria provided for in the Rules of Procedure and Evidence and a forfeiture of proceeds, property and assets derived directly or indirectly from that crime. As above examples illustrate, the penalties in international criminal system are not very divergent, therefore the concerns about measuring severity of punishment in terms of the severity felt or perceived by the offender would not be a crucial concern in the application of the deterrence theory to international criminal justice system. It is possible to expect more or less similar perceptions about the severity of punishment. Moreover, as demonstrated above, severity is an operational factor in decision making when there is a high certainty of punishment. For that reason, in this research, certainty of punishment will be emphasized to a greater extent compared to severity. After stating the preference of perceived certainty over perceived severity, the question of determining perceptions on certainty of punishment comes into light.

Although there is abundant explanations about defining, determining and measuring perceptions, Stafford and Warr's (1993) reconceptualization of deterrence theory provides a credible and practical formulation for explaining perceptions about the certainty of punishment which will be employed in this research. Therefore, the answer for the question of where these perceptions about punishment certainty stem from is individuals' personal experiences and their knowledge about others' experiences (indirect experiences) with punishment and punishment avoidance. Apparently, direct and indirect experiences with punishment and punishment avoidance are gained as a result of individuals' observation of the implementation and enforcement of rules and norms. Consequently, it is also possible to argue that there is a direct, relation between actual certainty of punishment and perceived certainty of punishment assuming that perceptions are influenced by direct and

indirect experiences with punishment and punishment avoidance The below figure demonstrates this relation;

Figure 1.1 Relation between the implementation of laws and deterrent effect of legal sanctions



The figure implies, it is possible to expect a directly proportional relation between the implementation of international humanitarian law and its deterrent effect, in the sense that more effective and decisive implementation of international humanitarian law in ongoing civil conflict situations would impel perpetrators of human rights violations to comply with the norms of international humanitarian law. As assumed in the literature of deterrence theory, the logic behind this reasoning is that individuals would experience and/or gain knowledge on the consequences of any gross violations of human rights and inhuman treatment of civilians which would lead them to consider that there is a high possibility of being arrested and punished for their crimes.

4.3. Conceptualization, Operationalization and Hypotheses

As noted above, the main question is to reveal the extent of the contribution by the mechanisms of international criminal justice system in averting grave human rights violations in ongoing conflict situations. Therefore, the independent variable is

the mechanisms of international criminal justice system and their practices whereas the dependent variable is the prevention of grave human rights violations in conflicts.

The mechanisms of international criminal justice system defined as the international courts, tribunals and special chambers which are established either by the international community, i.e. the United Nations, or by international agreements and which have jurisdiction to prosecute and punish international crimes under the international humanitarian law. On the other hand, grave human rights violations are considered to be war crimes, crimes against humanity and the crime of genocide, which are defined in the Rome Statute's provisions on elements of crimes. Therefore, war crimes are the violations of the laws of war which include but not limited to willful killing, torture or inhumane treatment, willfully causing great suffering, extensive destruction and appropriation of property, ill-treatment of prisoners of war, intentionally directing attacks against civilian population or against the personnel, installations, material or vehicles of humanitarian assistance units or peacekeeping missions.⁶⁸ The crime of genocide, on the other hand, includes actions such as killing members of a national, religious, racial or ethnic group, causing serious bodily or mental harm to the members of group, deliberately inflicting on the group conditions of life, imposing measures to prevent births or forcibly transferring the children of the group to another one.⁶⁹ Lastly the acts of murder, extermination, enslavement, deportation of population, torture, rape, sexual slavery etc. constitute the crimes against humanity.⁷⁰

⁶⁸Rome Statute, art. 8.

⁶⁹Rome Statute, art. 6.

⁷⁰Rome Statute, art.7.

The practices of international criminal courts in an ongoing conflict are operationalized in regard to two types of involvement: active and passive. Active involvement includes the stages of the investigations of crimes, the issue of arrest warrant, surrender to the court or arrest and the commencement of trial. Passive involvement, on the other hand, covers only stages of investigations and issue of arrest warrants, but excludes the stages of surrender/arrest and commencement of trials.

The contribution of international criminal courts to the prevention of gross human rights violations will be measured by looking at the change in intensity of human rights violations and in the number of groups involved in the conflict. These two factors are important in determining the effect of international tribunals. Any decrease in the intensity of human rights and humanitarian law violations because of the possibility of prosecution and punishment would imply the deterrent effect. Additionally, any decrease in the number of groups in the conflict through isolation of a particular group because of arrests would serve a general deterrent effect by changing the perceptions on the certainty of punishment and a specific deterrent effect by incapacitation.

Therefore, it is possible to claim that with passive involvement where there are low perceptions of certainty because of direct and indirect experience with punishment avoidance it would be very hard to expect a deterrent effect. On the other hand, with active involvement where the perceived certainty of punishment would be higher because of the direct and/or indirect experiences with punishment, it is possible to suppose a deterrent effect of threat of punishment.

Although there are divergent views on the deterrent effect of international criminal courts, this research intends to examine this relationship by referring to deterrence theory in criminology. In addition, another reason for examining the deterrent effect of international criminal system is that the asserted purpose of prevention of international crimes through prosecutions is widely welcomed by policy makers, which is also evident from the establishment goals of the International Criminal Court. Therefore, this research also intends to observe the impact of the International Criminal Court on the case of Democratic Republic of Congo

4.4. Methodology and Case Selection

The method utilized in this research is a single case study including a comparison of active and passive involvement within the same conflict since the main aim of the research is to examine the impact of the involvement of an international criminal court in an ongoing conflict.⁷¹ Therefore, I examine the case of Democratic Republic of Congo (DRC) where International Criminal Court is currently involved in. DRC case enables the comparison of the effect of passive and active involvement by an international criminal tribunal because the ICC opened investigations in 2004 and secured the custody of its first indictee in 2006. The years between 2004 and 2006 point to passive involvement since the action was limited to

⁷¹ Additionally, since every conflict has its own dynamics, it would be more appropriate to scrutinize the effect of an international institution in the same conflict instead of comparing two different cases and inspect any change after involvement, while bearing in mind the deficiencies that might arise when making generalizations out of a single case study. Furthermore, when the scope of this research is taken into account single case study make a more detailed analysis possible instead of a comparative one. Moreover, there is an abundant amount of data especially on the international humanitarian law violations on a yearly basis about the case of DRC when compared to the other cases that ICC is currently involved in which makes a comparison of active and passive involvement more accurate.

investigations which were carried out by the Office of the Prosecutor. On the other hand, according to the operationalization of practices of international criminal tribunals, 2006 onwards ICC's practices in DRC can be considered under the category of active involvement. Furthermore, currently three out of four military leaders,⁷² who were warranted for arrest, are arrested, transferred to the court and started to be trialed. The accused Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui are currently under the custody of ICC. The suspect Bosco Ntaganda remains at large.⁷³

Furthermore, situation in DRC was referred to the International Criminal Court by the DRC's government which is an important factor to be taken into account.⁷⁴ Referral by a state party, which is one of the ways of exercising jurisdiction of the Court, is very significant in securing the cooperation of the home state in investigations, prosecutions and arrests if the home state to the commission of alleged crimes refers the case to the Court. Since, the Court has no police or

⁷²ICC-01/04-01/06 Case *the Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/07 Case *the Prosecutor v. Germain Katanga* and *Matieu Ngudjolo Chui* and ICC 01/04-02/06 Case *the Prosecutor v. Bosco Ntaganda*

⁷³On the contrary, for example, in the case of Uganda, ICC started investigations in 2004 and issued arrest warrants for four individuals⁷³ who are the top members of Lord's Resistance Army (LRA). However, these four suspects are still at large (ICC 2009). Therefore, in the case of Uganda, ICC's involvement at the time of writing is a passive one which does not constitute an appropriate case to observe the impact of both kinds of involvement, if any.

⁷⁴ However, for example, situation in Darfur, Sudan was referred to the Court by the Security Council upon the Resolution adopted in 2005 (S.C. Res. 1593, March 31, 2005). Since Sudan is not a party to the Rome Statute, besides securing cooperation of the state for investigations etc, the exercise of jurisdiction by the Court is challenged, which is a great impediment to the proposed deterrent effect. Although states are under obligation to cooperate with the court including Sudan according to the Resolution 1593, cooperation is very hard to achieve especially when one of the indictees is the President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir.

military force to execute arrest warrant state cooperation was to be secured under the Rome Statute.⁷⁵

The following chapter, after providing a brief history of conflict in DRC, will continue with the events that happened after the involvement of ICC until 2010. While narrating the course of conflict and revealing any change in the intensity of human rights violations, the qualitative data of International Crisis Groups'(ICG) CrisisWatch Database as well as the Human Rights Watch's (HRW) Annual World Reports and International Institute for Strategic Studies' (IISS) Armed Conflict Database will be the main sources of this research. In addition to the above stated sources, I refer to Human Rights Watch's detailed reports on specific events since all the reports include witness testimonies about grave human rights violations and reflect the perceptions from the field. Finally, the recent surveys and projects of International Committee of Red Cross on the behaviors in war and experiences of people who suffer from armed conflict will constitute a baseline to understand the perceptions of people about international criminal justice system and the activities of its mechanisms.

⁷⁵ "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." Rome Statute, art. 86.

CHAPTER V

CASE STUDY AND ANALYSIS

Since this research aims to examine the impact of international criminal justice mechanisms' on conflict situations in terms of averting human rights violations, two phases of ICC's involvement in the Democratic Republic of Congo (DRC) will be compared. In addition the previously mentioned case selection criteria, DRC case has another importance in the sense that deliberate killings of civilians, rape, sexual violence and pillage have become characteristics of war. Additionally, attacks on civilians have been a fighting strategy.

Furthermore, for the conflict in DRC, United Nations' Security Council in a Resolution issued in 2003 confirmed that the sexual violence against women and girls has been used as a tool of warfare by all rebel groups as well as the atrocities against civilian population and other violations of humanitarian law.⁷⁶ Therefore, all the atrocities perpetrated in DRC undoubtedly constitute either war crimes or crimes against humanity.

5.1. Democratic Republic of Congo (DRC)

⁷⁶S.C. Res. 1468, March 20, 2003.

Democratic Republic of Congo was established as a Belgian colony in 1908 and gained its independence in 1960. After a couple of years following the independence, which passed in political and social instability, Mobutu declared himself as the president of the country after the November 1965 coup. Mobutu changed the name of the country to Zaire and retained his power for 32 years. This country of approximately 68 million population has experienced civil war, ethnic strife as well as international war after the 1994 Rwandan genocide and massive influx of refugees from Rwanda.

The war in mid-1990s in DRC is called by many specialists on Africa as the bloodiest war since the Second World War (Turner, 2007: 1). It would not be mistaken to assert that war in Congo had not achieved so much attention when compared with the wars or conflicts that occurred in recent years, i.e. Rwandan genocide, ethnic cleansing in Former Yugoslavia, civil war in Sudan etc. although there were striking reports of nongovernmental organizations indicating the gravity of humanitarian crisis in the territory of DRC. For example, in 2002 Refugees International argued that there was a slow-motion holocaust in DRC (Turner, 2007: 2). Furthermore, in 2005 the United Nations Emergency Relief Coordinator called the situation in eastern Congo as “the biggest, most neglected humanitarian emergency in the world today” which has surpassed the conflict in Darfur, Sudan.⁷⁷ Upon a nationwide mortality survey conducted during April – July 2004, it is estimated that 3.9 million people have died between the years 1998 and 2004 because of the conflict when the survey results are combined with the previous

⁷⁷UN News Center, March 16, 2005. “Eastern DR of Congo surpasses Darfur as biggest, most neglected emergency –UN relief official,”
<http://www.un.org/apps/news/story.asp?NewsID=13675&Cr=democratic&Cr1=congo>

surveys of International Rescue Committee (Coghlan et al., 2006: 49). Additionally, when the results are adjusted to a minimum and a maximum death toll, the numbers vary between 3.5 million to 4.4 million deaths (Coghlan et al., 2006: 49). Although most of the death causes are easily preventable ones such as malnutrition and infectious diseases instead of direct cause of violence, the findings of the same survey conclude that reduction in mortality is closely related with the reduction in the violence and improvements in security is the most effective way to reduce excess mortality in DRC (Coghlan et al., 2006: 50). Other research also claim that the conflicts since 1996 have cost approximately 5 million lives, more than 2 million internally displaced people and thousands of refugees in neighboring countries (Weiss, 2009: 115).

The purpose of citing different surveys and researches is to reveal the gravity of the humanitarian crisis in DRC since 1996, however, there is no such threshold for the application of international humanitarian law norms. Moreover, the responsibility of the parties (government's armed forces or rebel groups) under international humanitarian law does not depend on the number of deaths. DRC has been a party to the Geneva Conventions of 1949 since 1961 and to the Additional Protocol I to the Geneva Conventions of 1949 since 1982. Additionally, DRC became a party to the Additional Protocol II to the Geneva Conventions of 1949 in 2002 which puts forward the rules and regulations operating in armed conflicts of non-international character. In addition, as explained in the Chapter 2 on the international criminal justice system, the norms of international humanitarian law are now accepted as a part of customary law and there is no need to be a signatory to the related conventions. Furthermore, rebel groups have also responsibilities and obligations

under international humanitarian law because of the customary law status of these norms. DRC signed the Rome Statute in 2000 and ratified it on 11 April 2002 which signifies the approval of jurisdiction of the International Criminal Court by DRC. Therefore, by becoming a party to the Rome Statute, DRC accepts the jurisdiction of the ICC on its territory and on its nationals.⁷⁸ There is no doubt about the responsibilities and obligations of all parties in the conflict since the beginning of the conflicts in mid-1990s. Although the jurisdiction of the ICC covers the crimes committed after the entry into force of the Rome Statute which is 1 July 2002,⁷⁹ the following section will provide a brief conflict history to understand the gravity of human rights and humanitarian law violations as well as the entrenched culture of impunity as the years passed without any prosecution of war criminals. Thus, the following section will elaborate on the conflict starting from 1994 to June 2004 when ICC got involved with the situation in DRC by opening investigations.

5.1.1 History of the Conflict in DRC

The genocide of Tutsi people in Rwanda in 1994 had a great impact on the stability in DRC (then Zaire). Especially Tutsi genocide changed the balance of power in eastern DRC in Kivu provinces (South and North Kivu) because of the enormous influx of refugees crossing the border between Rwanda and DRC (Weiss, 2009: 116). The genocide ended when the Tutsi-led Rwandan Patriotic Front (RPF) deposed Hutu-led government who were the perpetrators of genocide and this change in power caused approximately 2 million Rwandan Hutus to flee to North and South

⁷⁸Rome Statute, art. 12.

⁷⁹Rome Statute, art. 11.

Kivu Provinces of DRC (Turner, 2007: 3). When the fact that only 45 percent of the pre-war or pre-genocide population were living in Rwanda under relatively normal conditions (not in IDP camps or in bushes/forests etc), the genocide of 1994 had undoubtedly regional impacts (Prunier, 2009: 5). However, among other countries where refugees fled in post-genocide period, DRC was the most problematic one because only the major camps in North Kivu held around 850.000 people, including more than 30.000 former fighters of FAR⁸⁰ with heavy and light arms as well as an officer corps. In the south, 650.000 refugees settled in camps around Bukavu and Uvira. In addition, majority of politicians and militias, including *Interhamwe*⁸¹ militiamen, had come to DRC (Prunier, 2009: 25). Mobutu, then Congolese President was sympathetic to the overthrown regime of Rwanda and this enabled the leadership to reorganize easily in the territory of DRC (Prunier, 2009: 25-26). Thus, the authorities of the former Rwandan regime in DRC camps found the opportunity to regroup and regain power to attack Rwandan and Congolese Tutsis (Turner, 2007:4).

In October 1994, ex-FAR soldiers attacked Rwanda from DRC and killed 36 people in Gisenyi, a city at the border of DRC and Rwanda (Prunier, 2009: 26). This started the cycle of the conflict. Between the years 1994 and 1996 the attacks from ex-FAR soldiers and *Interhamwe* to Congolese Tutsi and Rwanda continued. Finally towards the end of 1996, Rwanda entered the territory of DRC to attack Hutu refugee camps in order to attack ex-FAR and *Interhamwe* as well as Mobutu's army FAZ.⁸²

⁸⁰Forces Armée Rwandaises. The army of the former Rwandese Regime overthrown in July 1994 which is responsible for the genocide of Tutsi (Prunier, 2009: xi).

⁸¹"Those who fight together." Name of the MRND –single party of the President of Rwanda at the time of genocide- politicomilitary militia and they were at the forefront of the genocide and did most of the killing (Prunier, 2009: xxi).

⁸²Forces Armées Zairoises. The national army of Zaire (Today's DRC) which collapsed after 1996 invasion and rebellion (Prunier, 2009: xi).

Uganda and Angola joined Rwanda immediately as well as the rebels inside DRC against Mobutu's regime. Especially, ADFL⁸³ was the major Congolese rebel group whose leader was Laurent Kabila that worked together with Rwanda, Uganda and Angola to remove the Mobutu regime (Weiss, 2009: 117-118). At the end of war on May 17, 1997 Kinshasa fell and Laurent Kabila declared himself the President of DRC (Turner, 2007: 5).

However, as soon as the new regime was installed by Kabila, the reports of several NGOs and the UN on the massacres from the field started to be issued and a preliminary UN report⁸⁴ investigating the fate of Hutu refugees who were staying in camps before the attacks revealed numerous massacre sites (Turner, 2007: 5). Kabila persistently resisted the UN investigations on human rights violations and in April 1998 the investigators had to halt their work (Turner, 2007: 5). The initial year of the new government could be described as a battle between the government and UN investigation mission in which many UN investigators were arrested and briefly detained in order to frustrate them and leave DRC (Prunier, 2009: 159-161). Although UN withdrew from DRC, there were clear reports from journalists in the field that confirm the massacre sites as well as the efforts to hide the evidence

⁸³Alliance des Forces Démocratiques pour la Libération du Congo. Umbrella rebel organization created in 1996 in eastern DRC under Rwandan tutelage to fight against Mobutu regime (Prunier, 2009: viii).

⁸⁴Office of the High Commissioner for Human Rights in its 65th meeting on 15 April 1997 adopted Resolution 1997/58 and requested from the Special Rapporteurs on the situation of human rights in the Democratic Republic of Congo (then Zaire) to carry out a joint mission to investigate allegations of massacres and other issues affecting human rights since September 1996 especially in Eastern Congo. As decided by the Resolution 1997/58, the joint mission presented its report to the General Assembly in its 51st session on 2 July 1997 (*Report of the joint mission charged with allegations of massacres and other human rights violations occurring in eastern Zaire (now Democratic Republic of the Congo since September 1996*, U.N. GAOR, 51st Sess. U.N. Doc. A/51/942 (1997))

From the above explanations it is worthwhile to note that the Office of the High Commissioner's report, not a binding one, solely aims to shed light to the mandate of the General Assembly related to its task on the Democratic Republic of Congo (then Zaire).

(Prunier, 2009: 159). Kabila's relations with his initial foreign backers started to deteriorate and the tension peaked when Kabila announced in July 1998 that DRC terminated the Rwandan mission of cooperation and asked the withdrawal of Rwandan troops from DRC (Weiss, 2009: 120). This kindled a war in which many African States were involved and which was also called the "First African Continental War", because on August 4 a mutiny which started in Goma against Kabila's government resulted in the reentry of Rwandan and Ugandan troops to DRC territory (Weiss, 2009: 120). Uganda and Rwanda jointly supported RCD⁸⁵, however, Uganda later on supported another Congolese rebel movement, MLC⁸⁶ (Turner, 2007: 6). The turning point in the war was the decision of Angola to support Kabila together with Zimbabwe, against Rwanda and Uganda which turned into the war a continental one (Weiss, 2009: 120-121). Without the help of Angola and Zimbabwe, Kabila would have never succeeded in saving his regime (Prunier, 2009: 187).

However, the central control of DRC's government was very weak in the face of several rebel groups supported by foreign governments. The eastern and northeastern parts of the DRC were under rebels' control whereas other parts were under Kinshasa's control. In the parts that were controlled by the government a massacre against Tutsis of Congolese or Rwandan nationality was organized by Kabila in 1998 which was never investigated (Weiss, 2009: 121).

⁸⁵Rassemblement Congolais pour la Démocratie. RCD was created in 1998 to fight against the regime of Kabila (Prunier, 2009: xv).

⁸⁶Mouvement de Libération du Congo. MLC was also created in 1998 to fight against Kabila's regime by Jean-Pierre Bemba and turned into a political party in Congolese transition like RCD (Prunier, 2009: xiii).

The regional war ended by Lusaka Peace agreement which was signed on 31 August 1999 between 15 countries and most of the rebel groups but excluding RCD's two important fractions as well as Mayi Mayi (Mai Mai) rebel groups who were established to defend their local community from all other foreign armed groups (Prunier, 2009: 223-224). In November 1999 to monitor the implementation of the ceasefire, the United Nations Security Council established United Nations Organization Mission in Democratic Republic of Congo with 5537 troops and 500 military observers and civilian components.⁸⁷

Although Lusaka Peace Agreement seemed to end the regional war among states, it failed to contain the ongoing civil war in DRC between various rebel groups who were backed by neighboring countries either militarily or economically (Turner, 2007: 7-8). Violence in two Kivus, Maniema, and in the Province Orientale continued from where reports of skirmishes, massacres and ambushes were continuously arriving (Prunier, 2009: 227). Along with the conflict between different rebel groups, in Ituri there were clashes between Hema and Lendu ethnic groups which resulted in the death of hundreds of civilians from both group at the beginning of 2000 (Prunier, 2009: 227). The clashes in eastern DRC in the following the months of Lusaka agreement could not be defined as a war between regular armed forces or certain rebel groups but rather clashes of low military intensity but high causality figures among civilians (Prunier, 2009: 228). While as early as November 1999 UN declared situation in Ituri as a "catastrophic humanitarian situation" with an estimation of 5000 to 7000 deaths due to fighting since April and called for action,

⁸⁷S.C. Res. 1279, November 30, 1999.

As of February 2010 there are 18,645 troops, 712 military observers, 1216 police, 1,001 international civilian personnel, 2,690 local civilian staff and 629 United Nations Volunteers within the body of MONUC.

fighting between the branches of RCD and Ugandan troops continued in Ituri, Bunia as well as in North and South Kivu where 18 different rebel groups were engaged in war (Prunier, 2009: 230).

Kinshasa's control over the whole country was still very weak (almost none in some provinces), when on 16 January 2001 Laurent Kabila was assassinated by one of his bodyguards. This left the country with more uncertainty (Prunier, 2009: 249). By early 2001, the situation in the continental war had already turned into a war full of weariness; Angola, Zimbabwe and Burundi had to deal with opposition groups and their own regime's survival instead of getting involved in Congo's war. Uganda was under pressure to reduce its military budget and the government in Kampala started to lose its desire to be in the game, leaving Rwanda the only state willing and able to carry on (Prunier, 2009: 265-266).

The violence, belligerent killings, rapes, and intentional injuries to civilians continued throughout 2002 by rebel groups especially in eastern DRC although Angola and Zimbabwe withdrew its troops from DRC while Rwanda, Burundi and Uganda announced withdrawal plans (HRW, 2003a). Various parties to the conflict gathered in the Inter-Congolese Dialogue in February 2002 as envisaged in the Lusaka Agreement of 1999 and at the end of the year, government of DRC and armed/unarmed groups came to an agreement in Sun City, South Africa, which proposed the establishment of a transitional power-sharing government by June 2003 in which Joseph Kabila would share his power with four vice-presidents from rebel groups (IISS, 2002).

The report of Human Rights Watch about May 2002 Kisangani mutiny against RCD and the response of RCD to mutineers illustrates the gravity of the situation in DRC. All the witnesses interviewed confirmed that RCD attacked unarmed civilians, killed many and raped women as a reprisal (HRW, 2002: 13-19). In the same report it was also stated that RCD rebels clearly violated international humanitarian law and customary law under which they had the responsibility to treat people humanely who are not active in combat or who are civilians (HRW, 2002: 7). Furthermore, ethnic strife reoccurred between Lendus and Hemas in June 2002, which caused hundreds of civilian deaths together with the conflicts continuing between Mayi-Mayi militias, pro-Kinshasa groups and RCD in other parts of DRC (IISS, 2002). An important development in 2002 was that DRC government became a party to ICC and called for the establishment of an international criminal tribunal in order to prosecute and punish the crimes committed before the entry into force of Rome Statute (HRW, 2003a).

Throughout 2003 the violence especially in Bunia, Ituri and North Kivu Province continued without any abatement. In February large scale fighting broke out between UPC⁸⁸ forces and Ugandan forces in Bunia where over 1000 people were killed and continued till June 2003. Between May and June, rival RCD groups engaged in fighting in North Kivu while RCD's Goma fraction started to fight with Mayi Mayi militias in South Kivu in July (IISS, 2003). There were still sporadic violence in Bunia and Ituri even after the deployment of UN and EU peacekeepers and there were protests against UN by UPC rebels in Bunia where UN troops and

⁸⁸Union des Patriotes Congolais. UPC was created in September 2000 and mostly composed of people from Hema ethnicity, operating in Ituri District.

rebels exchanged fire. In November 2003 the situation again deteriorated in Ituri (IISS, 2003). Meanwhile the transitional government held its first meeting on 25 July and on August 20 military posts were distributed between Kinshasa's government army and rebel groups as well as Mayi Mayi militias in which RCD-Goma and MLC secured deputy positions. By September 30, rebel groups were also allowed to form political parties (IISS, 2003).

The HRW's report on the atrocities committed in Ituri which is based on a fieldwork conducted in February 2003 confirms the committal of war crimes, crimes against humanity and other humanitarian law violations by relying on witness testimonies (HRW, 2003b: 1-2). One of the most active groups in fighting in Ituri and Bunia was Thomas Lubanga's UPC, which is the first ethnically based political party in Ituri composed of ethnic Hemas and which pursued an anti-Lendu policy and followed a way of eliminating Lendu and Ngiti in order to end the conflict (HRW, 2003b: 21). HRW cited at least 3 massacre sites, several other skirmish areas, instances of attacks to humanitarian staff, summary executions, looting as well as rape, abduction of children to recruit as soldiers and most strikingly inhumane acts of cannibalism and deliberate mutilation of corpses (HRW, 2003b: 22-48). All these acts are the violation of Common article 3 of the Geneva Conventions of 1949 and all the rebel groups as well as Uganda, Rwanda and DRC governments because of the support that they gave those groups who are responsible for atrocities. However, there has not been any investigation for the crimes committed in Ituri immediately after the conflict (HRW, 2003b: 48-49). Meanwhile a new national army was formed

by government forces, RCD and MLC rebel groups, which was named FADCR⁸⁹ in December 2003 (ICG, 2004: no. 5).

5.1.2. ICC's Involvement in DRC

5.1.2.1. 2004 – 2006: Passive Involvement

Although since July 2003 transitional government in DRC had been in power, throughout the year of 2004 especially in eastern DRC violence, atrocities and instability continued without any significant decline in intensity (HRW, 2005a). During the conflicts between government forces and combatants, many instances were reported by Human Rights Watch in which grave violations of humanitarian law were confirmed especially in Ituri, North and South Kivu districts. Although MONUC deployed its troops in Bunia and achieved to curb atrocities in the city it failed to contain violations in rural areas. In South Kivu, in the town of Bukavu in May and June 2004 some dissident soldiers from Tutsi and Banyamulenge ethnic groups rebelled, which resulted in heavy government deployment in the town to repress the rebellion and commission of war crimes, killing and raping of civilians whom were mostly targeted on an ethnic basis (HRW, 2005a). HRW documented the war crimes committed in Bukavu in a more detailed report released in June 2004. The fighting erupted between the forces of RCD-Goma supported by the forces in North Kivu who were excluded from transitional government and pro-government forces in the newly created military region after the formation of unified Congolese army (HRW, 2004a: 1). The attacks against Tutsi and Banyamulenge civilians,

⁸⁹Forces Armées de la République Démocratique du Congo. Name of the national army which is composed of soldiers from former rebel groups and founded after the establishment of transitional government.

mostly women and children, were because of the fact that they are from the same ethnic origin with mutineers which could be considered as a kind of reprisal (HRW, 2004a: 2-3).

The effects of Bukavu Mutiny could also be observed in the massacre of 150 Banyamulenge refugees in mid-August in Gatumba refugee camp in Burundi border. Although most of the attackers were Burundian, some of them were speaking in Congolese and might be from DRC (HRW, 2005a). The attackers came from the direction of DRC border according to the eyewitnesses and they skipped Burundians and only harmed Banyamulenge or others who were in the same tents with them (HRW, 2004b: 13-14). Orders of investigation of the crimes committed in Gatumba came from the United Nations Security Council, Burundian authorities, Congolese army and arrest warrants were issued by the Burundian authorities. However, none of the perpetrators were arrested when this report was issued (HRW, 2004b: 28-29).

In March 2004, the government of DRC referred the situation in the country to ICC. The ICC prosecutor decided to open investigations, especially for the alleged crimes committed in Ituri district on 21 June 2004 (ICC, 2004a-2004b). Actually, ICC's prosecutor has been analyzing the situation in DRC since July 2003 and before referral from DRC government in September 2003 informed State Parties that he might seek authorization from the Court to initiate investigations (ICC, 2004b). Therefore, by mid-June 2004, ICC became involved in the conflict in DRC which was still ongoing in the eastern provinces of the country.

By 2005, although it was almost the end of the 2nd year of the transitional government, the government control was still very weak in eastern region of DRC.

The agreement establishing the transitional government foresaw general elections to be held on 30 June 2005; however, the transitional government postponed the elections to the following year which caused huge demonstrations in Kinshasa. Meanwhile, some rebel groups refused to merge with the new Congolese army and kept their troops to fight with the government army. Other rebel groups and MONUC's forces and all armed groups including government forces deliberately killed, raped, and abducted civilians and looted their property (HRW, 2006). In December 2004, the result of the fighting between government forces and rebel groups was at least 100 civilians causality, while in late 2004 and early 2005 during the operations against FDLR⁹⁰, unpaid government forces raped civilians and looted their property (HRW, 2006). Human Rights Watch documented humanitarian law violations by FARDC at the end of 2004 and in the beginning of 2005 during the fighting in North Kivu. While FARDC was trying to assert control in North Kivu, they engaged in fighting with rebels loyal to RCD-Goma and in the conflict on 12 December 2004 at Kanyabayonga FARDC army committed human rights abuses which was also confirmed by eyewitnesses' testimonies of at least 136 cases of rape gathered by MONUC human rights investigators (HRW, 2005b: 17-18). The same report also documented the atrocities in the conflict between RCD-Goma and troops loyal to government, especially Mayi Mayi militias in and around Nyabyondo throughout which Mayi Mayi troops attacked Hutu villages to kill civilians. RCD-Goma responded by attacking Mayi Mayi stronghold without distinguishing between civilians and militias (HRW, 2005b: 19). Besides killings, rape of women and girls by both groups were documented (HRW, 2005b: 21-23).

⁹⁰Forces Démocratique de Libération du Rwanda. Anti-RPF, Hutu guerilla group based in eastern DRC (Prunier, 2009: xi).

In February 2005, situation in Ituri further deteriorated where fighting between Hema and Lendu militias renewed as well as between RCD-Goma and Mayi Mayi militias where 9 UN peacekeepers were also killed (ICG,2005: no. 19). MONUC launched a counter-attack against UPC who was responsible for the attacks against UN peacekeepers and arrested two leaders; Thomas Lubanga and Justin Ngole in March 2005 (IISS, 2005). In April 2005, UPC militia declared that they ended the armed struggle (ICG, 2005: no.21) DRC's Court sentenced 21 Congolese soldiers to death for the atrocities committed in December 2004 in eastern DRC (ICG, 2005, no.19). In March, another rebel group FDLR announced that they would give up armed struggle and return to Rwanda but instead got divided into smaller groups and stayed in DRC and continued killing, raping and kidnapping civilians. Especially a fraction of the FDLR rebel group, Rasta Movement, remained militarily active (HRW, 2006). At the beginning of July in South Kivu at least 40 civilians were burnt alive and 50 other were lethally injured by FDLR militias which also caused more than 30.000 people to leave the region (IISS, 2005).

MONUC initiated military operations against FDLR in North and South Kivu, and in Katanga region while the reports from the field indicated that local soldiers were attacking civilians in the ongoing conflict (ICG, 2005: no.24). July 2005 in Equateur province there were reports on the killing, raping and stealing from civilians by government forces (HRW, 2006). In the meantime, in September 2005 LRA⁹¹ which was present in southern Sudan for a long time entered DRC for the first time in its history, and went back to Sudan in October after the efforts of Congolese troops to disarm them (ICG, 2005: no.27).

⁹¹Lord's Resistance Army. Rebel group active in northern Uganda since 1987 (Prunier, 2009: xiii).

Upon the above analysis of events in 2004 and 2005, the passive involvement of ICC through investigations seems not to have any deterrent effect on the overall situation in DRC, especially in eastern DRC where humanitarian law violations in terms of killing and raping turned out to be a strategy in war and a mean of reprisal for various armed groups. This is due to violations of humanitarian law which were unpunished or uninvestigated neither by international authorities nor by the national judicial system. Because of the experiences with punishment avoidance either personal or indirect, the culture of impunity was deeply embedded in everyday life in DRC. Therefore, as hypothesized in the previous chapter, passive involvement of an international criminal justice mechanism in an ongoing conflict situation seems fruitless in terms of affecting the perceptions on certainty of punishment and deterring future atrocities.

5.1.2.2. 2006 Onwards: Active Involvement

2006 was an important year for DRC's political life and ICC's activities in DRC. General elections were held in 30 July, and President Joseph Kabila came to power as the first democratically elected president of the country in 40 years and the transitional government came to an end (HRW, 2007a). However, both government soldiers and other armed groups continued fighting and abusing human rights in the east. Fighting continued in the first months of 2006 especially between the forces of Laurent Nkunda, a former general, and government forces in North Kivu and between Mayi Mayi militias and government troops in Katanga region (ICG, 2006: no.30). In February 2006, MONUC declared that it might terminate its support to the DRC's army in its fight against rebels in the eastern DRC if the government soldiers

continue human rights violations during operations (ICG, 2006: no.31). In late 2005 and in early 2006, HRW documented attacks on villages and killings of dozens of civilians in Katanga, Ituri, North and South Kivus by government troops (HRW, 2007a). In an operation against rebel groups in Ituri, government troops killed more than 60 civilians whom they accuse of supporting rebel groups, raping women and girls, burning houses, churches, schools with the suspicion that insurgents and rebels were hiding in those places (HRW, 2007a).

In February 2006, ICC issued an arrest warrant under seal for UPC leader Thomas Lubanga and in March 17, Congolese authorities surrendered Lubanga who was under custody in Kinshasa Penitentiary and Re-Education Center. He was charged with enlisting and conscripting children under the age of 15 into FPLC⁹², the military wing of UPC, and using them armed conflict in Bunia and Ituri from September 2002 to June 2003 and from June 2003 to August 2003 respectively.⁹³

However, in Ituri MRC⁹⁴ and in Katanga Mayi Mayi militias killed, raped and abused civilians throughout 2006. In some cases, Mayi Mayi militias publicly tortured, killed and cannibalized their victims to terrorize the local population throughout 2006. In May, the leader of Mayi Mayi militias, Gédéon surrendered to the United Nations and was handed over to Congolese authorities but still not charged with war crimes (HRW, 2007a).

On the other hand, upon the HRW report many persons suspected of violations of international humanitarian law still continued in their posts or were

⁹²Forces Partiotique pour la Libération du Congo.

⁹³The Prosecutor v. Thomas Lubanga Dyilo, 2006 I.C.C. (March 20), Case Information Sheet.

⁹⁴Mouvement Révolutionnaire Congolais.

appointed to new national or local posts as well as integrated national army. An example is Peter Karim, former MRC combatant appointed as a colonel in Congolese army who was accused of killing UN peacekeepers and taking hostages (HRW, 2007a). Besides Lubanga, no other militia leader or soldiers from Congolese army or from other foreign troops in DRC, particularly from Ugandan and Rwandan armies, had not been charged for war crimes in Ituri (HRW, 2007a). However, a progress was made in Congolese courts in April 2006 when a military court found 7 soldiers guilty of mass rape of more than 100 women in 2003 and in August 2006 a militia leader, Mandro, was found guilty for war crimes committed in Ituri and was sentenced to 20 years of imprisonment (HRW, 2007a).

Although there was improvement in terms of accountability for war crimes in DRC both at international and national levels, this improvement was a minimal one when compared to the gravity of humanitarian law violations. As to the ICC' involvement, the arrest of the former leader of UPC, Lubanga, whose rebel group denounced armed struggle after the arrest of their leader by UN peacekeepers, might be considered as an active involvement in the sense that it succeeded to secure the custody of an indictee. However, it is very difficult to assert that the transfer of Lubanga to ICC had any effect on the perceptions about certainty of punishment in the field after the evaluation of the events in 2006. There might be two reasons for the lack of the supposed effect of ICC after the arrest of Lubanga; one is that since there are too many groups involved in the conflict in eastern DRC, elimination of one rebel group after the arrest of its leader might not be effective in changing the course of the conflict. The second cause could be that there was still a very low perception about the certainty of punishment because; there were dozens of other perpetrators of

atrocities that had not been charged for their crimes, and arrested, which makes the experiences with punishment avoidance incomparably enormous as regards to the experiences with punishment.

Violence against civilians, impunity and continued conflicts in the eastern DRC were also the characteristics of 2007. In early 2007, “mixage” process was initiated. With this process, integration of Nkunda’s forces to the Congolese army was aimed. Additionally those mixage brigades were to fight against FDLR in eastern Congo (HRW, 2008a). The agreement between Nkunda and Congolese authorities moderated by Rwandan military officers was reached in Kigali, capital of Rwanda but the terms of agreement were never declared publicly (HRW, 2007b: 16). The government proposed exile in South Africa for Nkunda as well as dropping war crimes charges which were issued in September 2005 for Nkunda and for Mutebutsi for the crimes committed in Bukavu in 2004, Nkunda continuously stated his preference to serve in the Congolese army (FARDC) with his integrated troops (ICG, 2007: no.42; HRW, 2007b: 16-17). Actually, Nkunda told in an interview with Human Rights Watch that he had never accepted to go on exile and a Rwandan officer confirmed that whether Nkunda would be appointed to a position in Congolese army or would leave the country was ambiguous in the agreement (HRW, 2007b: 17). Even in the first month of the process Nkunda threatened to halt the integration of his troops unless his political demands were realized (ICG, 2007: no.43). Instead of easing the conflict in the region through securing one rebel groups’ support in fight against another, mixage brigades further committed atrocities and killed dozens of civilians in their operations against FDLR. Additionally, the flawed logic behind the mixage process is well-documented by Human Rights Watch’s detailed report

about the renewed crisis in North Kivu. Soldiers which were known by the local community as renegade before the mixage process were deployed to the same places as a part of the national Congolese army and were supposed to protect people against whom they previously committed serious human right violations (HRW, 2007b: 17-18). Interviews with the local community in Rutshuru territory revealed this flawed logic more concretely. A woman who had fled a rape attempt by Nkunda's soldiers in December explained how she felt insecure when she saw the same soldiers deployed in her town a week after as a part of the Congolese army. Furthermore, a community leader explained the disappointment in the local community when they saw the perpetrators of human rights violations in January 2007 as a part of national army which caused more people to flee and brought more instability (HRW, 2007b: 18). However, in August 2007 mixage process collapsed and most of the Nkunda forces under mixage brigades rejoined Nkunda and the fighting between Nkunda and Congolese army resumed (HRW, 2008a).

Killings, crimes of sexual violence, forced displacement, theft, extortion and destruction of property continued relentlessly in the conflict between Nkunda's forces and Congolese army in late November 2006, in operations against FDLR by mixage brigades in early 2007 and in the resumed fighting between Nkunda and Congolese army in August-September 2007 (HRW, 2007b: 24). In two-week period of early 2007 *Médecins Sans Frontières* registered 181 cases of rape at clinic in Rutshuru, some of which involved multiple attackers, acts of great brutality and victims as young as 5 years old (HRW, 2007a: 25).

Although the crimes committed in eastern DRC were documented by MONUC and by human rights NGOs, the majority of them were neither investigated nor prosecuted and punished. In most cases the perpetrators and command responsibility were clear. For example, military prosecutor in Goma was dealing with 17 cases in May 2007 and most of the cases were about desertion, whereas 3 cases were about sexual violence and was also preparing a case against 4 suspects accused of killing four civilians in Rubaya (HRW, 2007b: 58-59). Furthermore, magistrates investigating the killings in Buramba on March 10, 2007 perpetrated by Bravo brigade which is a mixage brigade loyal to Nkunda conclude that soldiers who were under the control of Colonel Makenga were responsible from the atrocities. However, one of the magistrates from the investigation team said in his interview with Human Rights Watch that he was willing to issue a warrant of arrest for Makenga but it was very difficult to execute this in practice and they had to be realistic and consider what they could do and the consequences (HRW, 2007b: 59). Besides the lack of investigations and prosecutions, one Congolese lawyer summarized the situation of accountability in Congo in his interview with Human Rights Watch as follows: “In Congo, we reward those who kill, we do not punish them” (HRW, 2007b: 59).

Meanwhile, ICC unsealed the warrant of arrest for Germain Katanga in October 2007 and Katanga was transferred to the Court. He was allegedly the commander of FRPI⁹⁵ and in early 2004 had been appointed as the Brigadier-General of FARDC by President Joseph Kabila. He held his post in FARDC until his arrest

⁹⁵Force de résistance patriotique en Ituri. Formed by Lendu and Ngiti origin combatants to fight against mostly Hema ethnicity combatants, active in Ituri District.

by the DRC authorities in March 2005. He was charged with crimes against humanity and war crimes particularly but not exhaustively; murder, sexual slavery, rape, using children under 15 years old to take active part in hostilities, deliberately directing attack on a civilian population, willful killing, destruction of property committed between August 2002 and May 2003 in Ituri region.⁹⁶ Meanwhile on 29 January 2007 Pre-Trial Chamber confirmed the charges against Thomas Lubanga and scheduled the trial to commence in March 2008.⁹⁷

At the beginning of 2008, a ceasefire agreement between 22 rebel groups and government in Goma boosted hopes for peace and stability in eastern DRC. Additionally, the government initiated Amani Program to coordinate peace efforts and disarmament (HRW, 2009a). The deal included ceasefire, troop withdrawal, creation of UN “buffer zone”, and amnesty for insurgency and acts of war but not for war crimes and crimes against humanity (ICG, 2008: no.54). Only one month after the signature of the Goma agreement, Nkunda withdrew from the ceasefire commission to protest the UN allegations of the massacre of 30 Hutus around Goma between January 16 and 20 by his forces. Moreover, other groups; mainly FDLR and Mayi Mayi continued clashes (ICG, 2008: no.55). In March, this time Mayi Mayi militias withdrew from the Goma ceasefire commission as Nkunda promised to rejoin (ICG, 2008: no.56). In May, aid groups in North Kivu declared that the recent fighting displaced at least 40000 people and additional estimated 5000 were displaced in the following month when FDLR attacked on 2 civilian camps in North Kivu (ICG, 2008: no.58).

⁹⁶The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 2008 I.C.C. (March 10), Case Information Sheet.

⁹⁷The Prosecutor v. Thomas Lubanga Dyilo, 2006 I.C.C. (March 20), Case Information Sheet.

In August 2008, heavy fighting resumed between Nkunda's forces and Congolese army which had continued until early December on various locations and which had caused the death of more than 400 civilians and injury of 250 together with the exodus of 250.000 increasing the number of the displaced over one million in North Kivu (HRW, 2008b: 5). At the end of October CNDP⁹⁸ took control of Rutshuru and Kiwanja and neither government soldiers or Mayi Mayi militias nor MONUC resisted, further CNDP informed MONUC in 24 hours that they were in charge of the area (HRW, 2008b: 6). Human Rights Watch interviewed with more than 100 family members and concluded that at least 150 people were killed in 4 and 5 November in Kiwanja by CNDP soldiers in their house to house search for Mayi Mayi combatants and at least 14 of victims were children, 8 were women and 7 were elderly (HRW, 2008b: 8). Many witnesses also confirmed that CNDP soldiers were dragging dead bodies in houses and locking the doors in order to hide the dead in case of future investigations of crimes (HRW, 2008b: 10). Not only killings and summary executions continued but also sexual violence as well as the abduction and recruitment of children continued in North Kivu before, during and after the fighting erupted in August. Between January and June 2008 more than 2,200 cases of rape recorded in North Kivu and dozens of others raped after the recommencement of the combat in August, which according to estimates represents a tiny part of the unrecorded total number of cases (HRW, 2009a).

The developments in justice and accountability were two fold in 2008. At the national level, a military court in Katanga continued proceedings against Mutanga

⁹⁸Congres National pour la Défense du Peuple. Rebel group led by Laurent Nkunda and active in North and South Kivu.

and 25 other suspects accused of war crimes and crimes against humanity committed between 2004 and 2006. This was the largest war crimes trials in DRC (HRW, 2009a). At the international level, upon an arrest warrant issued by ICC on 6 July 2007 under seal, Congolese authorities arrested Mathieu Chui in February 2008 and Chui was transferred to the Court. ICC joined the case of Germain Katanga and Mathieu Chui on March 2008. Mathieu Chui was the former leader of FNI⁹⁹ and in 2006 he became a colonel in Congolese National army, FARDC. The Court joined the case because it is alleged that FNI and FRPI militias under the command of Chui and Katanga, respectively attacked Bogoro village in February 2003 to secure Lendu and Ngiti control of the town and the attacks were directed against a military camp of Hema combatants in the village, however extended to civilians of Hema origin. Moreover, it was stated by the Court that killing, displacement of civilians and also destruction of property were the strategies followed by the perpetrators to control the village which continued even after the attack. The joint indictment against Chui and Katanga also involves usage of child soldiers, killings of civilians; especially from Hema ethnicity, inhumane treatment of civilians, sexual slavery and rape as well as pillage.¹⁰⁰ Meanwhile, ICC unsealed the arrest warrant for Jean-Bosco Ntaganda on 28 April 2008 (HRW, 2009a). Ntaganda was the former Deputy Chief of Staff of the FPLC (Forces Patriotiques pour la Libération du Congo-military wing of Lubanga-led UPC) and currently he is the chief of staff of Nkunda's forces, CNDP. He was charged with war crimes of enlistment and conscription of children under age of

⁹⁹Front des nationalistes et integrationnistes. Composed of Nigiti and Lendu militias and operative in Ituri District and created to fight against the combatants of Hema ethnicity.

¹⁰⁰The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 2008 I.C.C. (March 10), Case Information Sheet.

fifteen and using children to participate actively in hostilities between July 2002 and December 2003 in the conflict in Ituri.¹⁰¹

In October 2008, the conflict in Ituri was further deteriorated by attacks of supposedly initiated by Ugandan LRA rebels and extended to the Orientale Province in November. In December 2008 the situation became worse in the Orientale Province when at least five hundred civilians were killed, villages looted and thousands displaced while LRA rebels were fleeing from a joint operation of DRC, Uganda, and Sudan. LRA was previously operating in northern Uganda and southern Sudan where they also killed, raped and abducted thousands of civilians but shifted its operations to Congo in 2006 and by September 2008 they started to attack Congolese civilians too in order to punish local communities who had helped LRA defectors (HRW, 2009b: 4-5). Between September 2008 and January 2009 it is estimated that LRA attacks caused the death of at least 1033 people and abduction of 476 children (HRW, 2009b: 5). The attacks of LRA between September and November 2008 was launched against several villages in the north of Dungu, northeast of DRC when Congolese and MONUC troops started to be deployed in Haut-Uele province for an operation against LRA headquarters (HRW, 2009b: 20). As retaliation, LRA turned to civilians and the tactic of using extreme violence against civilians was also used in DRC in northern Uganda and southern Sudan (HRW, 2009b: 20). The interviews of Human Rights Watch with captured LRA combatants revealed the command responsibility of Joseph Kony, leader of LRA, who had ordered the attacks against Congolese people that had turned against them and became their enemies and abduction of children as a part of the operation (HRW,

¹⁰¹The Prosecutor v. Bosco Ntaganda, 2006 I.C.C. (August 22), Under Seal Warrant of Arrest.

2009b: 20). However, most brutal attack of LRA in DRC territory was the attacks in 24 and 25 of December, which are also known as the Christmas massacre. When the deadline for LRA to sign the peace agreement passed in November 2008, Uganda, DRC and Southern Sudan initiated a military operation called “Lightning Thunder” to destroy LRA camps, search and destroy LRA forces, rescue abducted people and capture LRA leaders, especially the ones indicted by ICC¹⁰² (HRW, 2009b: 28). The operation was started in December 14 by the bombardment of LRA camp but Kony and other key commanders succeeded to escape and only 10 days after the bombardment, on December 24 and 25 LRA conducted coordinated attacks against 3 places in northeast of DRC as a retaliation (HRW, 2009b: 29). It is estimated that at least 850 civilians were killed in the attacks that continued until the end of January 2009 (HRW, 2009b: 29).

Throughout the first months of 2009, the violence continued in the northeastern part of DRC because of the LRA attacks together with the violence that erupted as a result of the joint Congolese and Rwandan operation against FDLR rebels in eastern Congo (ICG, 2009: no.66). Rwandan authorities put an end to a rebellion initiated by Nkunda’s forces, CNDP, and arrested Nkunda (HRW, 2010a). Nkunda was replaced by Bosco Ntaganda, who was indicted by ICC for war crimes and crimes against humanity and he agreed to integrate CNDP troops to Congolese

¹⁰²LRA, as also states in the warrant of arrest by ICC is not a rebel group operating in an unorganized manner instead it has a hierarchical structure in which high commanders have both the command and individual responsibility for the violations of international humanitarian law. Therefore, ICC unsealed arrest warrants for Joseph Kony, commander-in-chief of LRA, Vincent Otti, second-in-command of LRA, Okot Odhiambo, deputy army commander of LRA, Dominic Ongwen, commander of the Sinia Brigade of LRA on 13th of October 2005, however, all of the suspects remains at large at the time of writing. (The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, 2005 I.C.C. (July 8), Public Redacted Version Warrant of Arrest.

national army whereas his ICC indictment remained unresolved (ICG, 2009: no.66). In exchange, DRC authorities permitted Rwandan troops to enter DRC territory to chase and capture FDLR rebels (HRW, 2010a). On February 25, the 5 week-operation was halted by a formal ceremony in Goma but the results of the operation in weakening the FDLR forces were uncertain (ICG, 2009: no.67). However, the result of the operation was almost clear in terms of the civilian casualties caused by the deliberate and retaliatory attacks by the FDLR forces (HRW, 2010a). The attacks against civilians by FDLR forces continued in March and April in North Kivu and South Kivu (ICG, 2009: no.68-69). The attack on village of Busurungi in North Kivu on the night of 9-10 May by FDLR rebels exemplifies the gravity of human right violations. According to the Human Rights Watch report at one night FDLR rebels massacred at least 96 villagers with machetes or by burning to death (HRW, 2010a). Not only rebels but also Congolese army violated international humanitarian law throughout the operation against FDLR. Between April 27 and 30, Congolese armed forces attacked camps in Shalio Hill and killed at least 129 civilians most of whom were beaten to death (HRW, 2010a).

On May 21, an interim report issued by UN on the integration of rebel groups to the national army revealed the presence of parallel rebel-army command structures, child soldiers and extensive military abuses. Additionally the same report brought the evidence that Ntaganda, who is a wanted war criminal, was operating as army deputy commander (ICG, 2009: no.70). The promotion of Ntaganda to a post of general in the army was probably the result of the March 2009 agreement between CNDP and Congolese government on the transformation of the CNDP into a political party (ICG, 2009: no.68). However, the impunity for war crimes and crimes against

humanity, which was already a general characteristic of politics and conflict in DRC, became even more entrenched with the promotion of Ntaganda in spite of the arrest warrant issued by ICC that should have drastically increased the perceptions on punishment avoidance for serious human rights violations.

The military operation launched against FDLR rebels, Kimia II, on May 1 was transformed to an offensive operation from a reactive one in July and United Nations High Commissioner for Refugees declared that since the beginning of the operation 35000 civilians were displaced. Meanwhile United Nations Secretary General issued a report on 30 June in which he called MONUC to withdraw its support from Congolese national army because of the responsibility of army units in human rights abuses (ICG, 2009: no.72). Moreover, while the operation was in effect, United Nations Security Council extended the deployment of MONUC until 31 May 2010 and in the same resolution decided that MONUC military leadership shall confirm that all means had been undertaken to protect the civilian population in joint operations with the Congolese national army before providing support and MONUC shall intercede with the FARDC command if a FARDC unit receiving MONUC's support is thought to be committing grave violations human rights, and shall withdraw support from these FARDC units if they continue violations of international humanitarian law.¹⁰³

While MONUC and Congolese national army (FARDC) was engaged in operations in North and South Kivu against FDLR rebels, LRA also continued its attacks in northeastern DRC. From December 14 to 17, 2009 LRA carried out an

¹⁰³S.C. Res. 1906, December 23, 2009.

attack in Makombo area and its environs near the Sudan border where they killed at least 321 civilians and abducted more than 250 others among which 80 were children (HRW, 2010b: 18). While the Makombo massacre was the most deadly attack of LRA in its history, the attacks on civilians continued in other parts of northeastern DRC which caused the death of dozens, which is according to Human Rights Watch only a fraction of the total numbers that are unreported (HRW, 2010b: 34). Although at the end of December MONUC had already started to receive information about LRA attacks in northeast, the mission was mostly concentrated on the crisis in North Kivu and had limited resources to respond LRA atrocities. A team of investigators was eventually sent to the area to investigate the humanitarian law violations upon the amplified reports from the field in March 2010 (HRW, 2010b: 4).

As also noted above, the fight against impunity in 2009 was hampered to a great extent with the promotion of Ntaganda to a rank of general in Congolese army in spite of the arrest warrant by ICC. The examples of human rights abusers who were granted posts in the national army continued to proliferate as well. For instance, Jean-Pierre Biyoyo, an indicted war criminal by a military court who escaped custody, integrated to the national army (HRW, 2010a). Government's justifications that prioritize peace over justice made the situation worse (HRW, 2010a). Few national proceedings were obviously insufficient to transform the culture of impunity. On March 5, a Mayi Mayi commander and 20 fighters were accused for crimes against humanity and other charges, while also on March 11 other soldiers were convicted of rape as a crime against humanity and on July 27 Colonel Ndayambaje Kipanga was sentenced to life imprisonment for crimes against humanity in absentia because he escaped custody before the trial (HRW, 2010a).

Meanwhile ICC started the trial of Thomas Lubanga on 29 January 2009 and the trials of Katanga and Chui on 24 November 2009.¹⁰⁴

Overall, violence and human rights abuses increased in DRC in 2009 where at least, 2500 civilians were killed, over 7000 women and girls were raped, and more than 1 million people were displaced which increased the total number of IDP to 2 million (HRW, 2010a).

DRC army initiated a new operation against FDLR rebels on 1 January 2010, Ameni Leo, after the end of Kimia II operation. MONUC declared its support for the new operation. Upon the explanations by the DRC Government about the operation, army secured Dongo area in Equateur Province, however high death toll resulted because rebels resisted to the army (ICG, 2010: no.78). Meanwhile LRA attacks continued in north east and by April 2010 security situation in several provinces deteriorated, in Equateur and Orientale Provinces particularly (ICG, 2010: no.81).

5.2. Analysis of the Case

The above explanations of the situation in DRC aimed at revealing any impact of ICC's involvement in the conflict to determine whether the Court displayed a deterrent effect for possible perpetrators of human rights violations. As formulated in the previous chapter of this research, any decrease in the intensity of the conflict and international humanitarian law violations because of the fear of punishment as a result of direct and indirect experiences with punishment would

¹⁰⁴The Prosecutor v. Thomas Lubanga Dyilo, 2006 I.C.C. (March 20), Case Information Sheet; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 2008 I.C.C. (March 10), Case Information Sheet.

indicate that ICC had served its predetermined purpose of prevention of atrocities especially against civilians through deterrence. According to categorization of activities conducted by international criminal tribunals in the scope of this research, ICC's involvement in DRC between 2004 and 2006 was a passive one since only after 17 March 2006, ICC could achieve to hold custody of one of the accused persons. When the activities of ICC in DRC are compared with the activities of the Court in other countries, it is possible to state that the most active involvement of the Court was in DRC because as of May 2010 ICC secured the custody of 3 individuals and started to try them. The appendix A demonstrates the comparison of the ICC activities in different countries as of May 2010. However, although ICC was most actively involved in the conflict in DRC after 2006, the above analysis lends limited support for the hypothesis on the possible deterrent effect of international criminal justice mechanisms. There are several reasons of the lack of supposed deterrent effect of ICC in the case of DRC, which are related to the internal dynamics of the conflict and politics in the country.

First and foremost reason is the insufficient numbers of investigations and prosecutions of war crimes and crimes against humanity. When the gravity of human rights abuses in the conflict in DRC since mid-1990s is considered, the total number of individuals accused and arrested by ICC and also by national courts remains still very low compared to the numbers of perpetrators who escaped any charges of war crimes and crimes against humanity. As discussed in the previous section, the number of individuals indicted and sentenced barely amounts to a hundred by national courts and ICC in total. Therefore, it is worth noting that although technically ICC's involvement in DRC is an active one 2006 onwards within the

scope of this research, it was apparently insufficient to transform the culture of impunity that has been persistent over decades. When the conflict history in DRC is examined, it becomes acceptable not to see an immediate effect of the Court's involvement. Especially the direct or indirect experiences with punishment avoidance was so widespread among government soldiers as well as rebel combatants that the fear of punishment as a restraint on behavior is not a factor in calculations of individuals before committing atrocities.

In addition to the lack of investigations and prosecutions, most of the perpetrators of international humanitarian law violations were appointed to the posts in the national army of Congo. Above section cited only a few most well-known names who are allegedly responsible for atrocities and who are appointed to the posts in the national army although their command and individual responsibilities in many massacre sites were confirmed by eyewitnesses. The major impediment to transform the culture of impunity is the case of Ntaganda and his appointment to a post in the Congolese national army despite the fact that he is warranted for arrest by ICC. Particularly the appointment of Ntaganda was very important when trying to figure out the effect of ICC on the course of the conflict. This appointment diminished the perceptions on punishment certainty. In this regard most of the perpetrators either in the national army or in rebel groups had their indirect experiences with punishment avoidance consolidated. When the fact that there is already very low perceptions on the punishment certainty on the part of ICC, the case of Ntaganda was a perfect example of punishment avoidance and even a verification of words of a Congolese lawyer cited above; "We reward those who kill".

Furthermore, most of the reports of NGOs and human rights activists working in DRC also provided evidence for parallel command structures after the establishment of the Congolese national army in the transition period. The leaders of many rebel groups retained their influence on their combatants even after they were appointed to the posts in the national army. So such rebel groups continued to attack civilians and to clash with other groups and the national army. This was totally contrary to the logic of establishing an integrated army, which was to contain different groups and to sustain peace and stability. The main aim of retaining power and parallel command structures both in the army and in rebel groups was to gain advantage in peace talks and to threaten the government to continue fighting in case their political demands were not met. A concrete example of this situation was the “mixage” process as explained above when government and Nkunda’s forces exchanged fire several times throughout the process because of the disagreements on the situation of Nkunda. These clashes caused extreme civilian suffering since most of the attacks were directed against them as a mean of retaliation and fear of punishment seemed not effective while bargaining was on the table about integration to the army, to politics and amnesty for certain crimes.

Another impediment in DRC for ICC is that as of now none of the indictees have been punished by the Court. All three cases are at the stage of trial. Lubanga’s trial was started in January 2009, where as the joint trial of Katanga and Chui was started in November 2009. Although the Court has a heavy workload, in terms of reviewing the evidence presented by the Office of the Prosecutor, evaluating the assertions of the defense and hearing eyewitnesses, the process should be curtailed as much as possible while still abiding by the rules and procedures as well as the

general principles of law in order to demonstrate and strengthen the commitment of the international community and to affect the perceptions on the certainty of punishment.

Clearly, there is evidence that on several occasions during and after attacks, where perpetrators tried to hide themselves and evidence in order to avoid any charges in the future. In this regard, it is evident that the fear of punishment is actually existent; however, it is, at the time of writing, not so influential to affect behavior because of the low perceptions of punishment certainty.

On the other hand, when the case of DRC is examined, it is difficult to assert that ICC served its aim of general deterrence after securing custody of 3 individuals. Yet this fact does not nullify the deterrence argument at the international criminal justice system. When the peculiarities of the conflict and the variety of rebel groups involved in the conflict are considered, it is evident that the major reason for ICC's failure is the low levels of both actual and perceived certainty of punishment. To have a deterrent effect, it is evident that there needs to be an active involvement of international criminal justice mechanisms in the conflict. The case of DRC revealed that only investigations had little impact on averting human rights violations. However, the active involvement in terms of arrests and trials should be in proportion to the number of perpetrators to have a visible effect. In addition, international prosecutions should be reinforced by national proceedings to increase the overall perceived certainty of punishment by building enough precedents of arrests and trials forward.

In addition, the active involvement of ICC in DRC case served as a specific deterrent in the sense that it had achieved to prevent the continuation of atrocities by the combatants of leaders who are under the custody of ICC. Thomas Lubanga's rebel group UPC had officially declared that they had terminated armed struggle after the arrest of their leader. The rebel groups of Germain Katanga and Mathieu Ngudjolo Chui; FRPI and FNI respectively, did not engage in armed struggle or attack on civilians on a large scale since the arrest of their leaders. This can be regarded as a significant development in the conflict and a positive contribution of ICC with its active involvement in the case of DRC. Although there are still other rebel/military groups operating in the territory of DRC and although there are still violations of human rights, ICC's activities in DRC are obviously effective in containing certain individuals and rebel groups associated with them through specific deterrence and incapacitation.

CHAPTER IV

CONCLUSION

The deterrent effect of international criminal justice system has been a long debated issue. Even in the primary examples of international prosecutions, like the ad hoc IMTs at Nuremberg and Tokyo that took place after the end of the Second World War, the aim to achieve a general deterrent effect for future perpetrators was inherent. At the end of the Cold War, the establishment of ad hoc ICTY and ad hoc ICTR disclosed the understanding that judicial bodies could serve the purpose of conflict prevention through deterrence and could contribute to the efforts of bringing the violations of humanitarian law to an end in an ongoing armed conflict. Although there are other purposes of international prosecutions (such as addressing atrocities, retribution, ensuring justice, consolidating respect for human rights and rule of law, preventing vengeance, de-legitimizing leaders, and facilitating reconciliation) most scholarly and policy-oriented debate revolves around deterrence and international prosecutions. Especially, the aim in establishing ICC, as stated in the Preamble of the Rome Statute include putting an end to impunity for the perpetrators of most serious crimes of concern to the international community and contributing to the prevention

of such crimes. The value given to the deterrent value of international prosecution is clear in ICC's establishment.¹⁰⁵

In this regard, this research aimed to analyze the extent that international criminal justice mechanisms contribute to efforts of averting human rights and international humanitarian law violations through deterrence. Therefore, both international criminal justice system and deterrence theory in criminology literature were scrutinized and the applicability of the deterrence argument to the international context was examined. The main argument in this thesis is that if an international criminal court gets actively involved in an ongoing conflict, which would increase the experiences with punishment and perceptions on the certainty of punishment, the court would have a deterrent effect. As also the case study revealed, the international prosecutions first and foremost should secure the custody of indictees especially the ones who bear the greatest responsibility to change the perceptions on the fear of punishment and punishment certainty because mere investigations proved not to have any impact to change the behavior of perpetrators. However, even when the custody of indictees are secured, the entrenched culture of impunity, especially if conflict has a very long history with extreme violations of humanitarian law, could not be transformed to an culture of accountability immediately. Consequently, the perceptions on the certainty of punishment could not easily be altered in the wake of relatively small numbers of arrests when compared to the number of perpetrators who have successfully avoided punishment. Therefore, to achieve its aim of deterring future crimes, which is not an impossible, but a formidable task, an international criminal court should focus its efforts in securing custody of indictees to increase the

¹⁰⁵Rome Statute, Preamble.

experiences with punishment in the society. However, the task of deterring future crimes is challenging because ICC does not have its own police force and relies on the support of state parties as well as peace operation forces to secure the custody of indictees.

Therefore, for ICC, cooperation with state parties, international organizations and NGOs is vital to effectively perform its tasks and achieve its aims. Additionally, to have a general deterrent effect as supposed by policy makers and some scholars, international judicial mechanisms should be supplemented by the national prosecutions to increase the numbers of individuals who are prosecuted and to avoid the cases that individuals who escape punishment. It is evident from the case study that in a conflict with various parties and numerous war criminals, the fear of punishment presented by international prosecution remains at low levels, which is the major reason of the need to pursue a joint prosecution strategy by international and national mechanisms. The principle of complementarity in the Rome Statute, actually foresaw this requirement under article 17 on the issues of admissibility. The article indicates that the Court shall consider a case admissible if a State, which has jurisdiction over the case, is unwilling or unable to carry out the investigation or prosecution.¹⁰⁶ This principle is also stated in the preamble of the Rome Statute with the exact wording of “emphasizing that International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”¹⁰⁷

The Review Conference of Rome Statute that started in May 31, 2010 and continued until 11 June 2010 has assessed the Court’s activities since its

¹⁰⁶Rome Statute, art. 17.

¹⁰⁷Rome Statute, Preamble.

establishment while providing proposals to improve its efficiency on several topics as expected. Complementarity is one of the issues that were discussed under stocktaking exercise panels, at the end of which resolutions were adopted. In addition, the discussions on the principle of complementarity were planned to focus on the practical application of the principle and possible actions that could be undertaken by states in order to enhance and strengthen the capabilities to conduct investigations and trials. The Resolution adopted at the 9th plenary meeting on 8 June 2010 reaffirmed the primary responsibility of states to investigate and prosecute the most serious crimes of international concern and the desirability of strengthening the domestic capacity and cooperation between State Parties and the Court to ensure investigations and prosecutions by emphasizing the principle of complementarity and obligations of State Parties under the Rome Statute.¹⁰⁸

Another important issue that was discussed is the international cooperation and judicial assistance which is regulated in the 6th part of the Rome Statute. Under this heading the agenda of stocktaking exercise was set as follows; challenges and good practices of states' cooperation with the Court, implementation of legislation, agreements, arrangements and other forms of cooperation and assistance, cooperation of the Court with the United Nations and other organizations, and ways of enhancing knowledge, awareness and support for the Court. The declaration on cooperation distributed on 8 June 2010 summarized the roundtable discussions and emphasized the importance of the execution of arrest warrants in ensuring the effectiveness of the

¹⁰⁸ICC, Resolution RC/Res. 1, Complementarity, June 8, 2010, 9th plenary meeting. http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf

Court's jurisdiction and the primary obligation of States to cooperate with the Court especially in the enforcement of arrest warrants.¹⁰⁹

Furthermore, stocktaking exercise panels were planned to touch upon the dilemma between peace and justice by focusing on the ways to integrate peace efforts and justice efforts, the role of the Court and reconciliation processes in facilitating peace and transition.¹¹⁰ The draft moderator's summary about the penal on peace and justice distributed on 7 July 2010 indicated that all of the above agenda items were taken into consideration during the penal on peace and justice. While concluding the penal, the moderator stated that international criminal justice indeed marginalize the ones who incited war and encouraged justice efforts at domestic level so far. However, the desired deterrent effect could only be realized when justice is "perceived to the norm rather than an exceptional measure."¹¹¹

All of the issues that are in the agenda of review conference are highly important ones for the future activities of the ICC in terms of drawing a roadmap by revising the success and overall impact of the Rome Statute. Especially if the proposals that came out of the conference on the principle of complementarity and international cooperation are realized by achieving an increase in the numbers of prosecutions and arrests, ICC could reinforce its influence on conflict situations, and come closer to establishing a general deterrent effect.

¹⁰⁹ICC, Declaration DC/ Decl. 2, Declaration on Cooperation, June 8, 2010. http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf

¹¹⁰The Review Conference of the Rome Statute, 31 May-11 June, Kampala, Uganda <http://www.kampala.icc-cpi.info/stocktaking>.

¹¹¹ICC, RC/ST/PJ/1, Stocktaking of International Justice, Peace and Justice, Draft Moderator's Summary, June 7, 2010. http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-PJ-1-ENG.pdf.

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APPENDICES

APPENDIX A

CASES THAT ICC HAS INVOLVED AND THE CURRENT SITUATION AS OF MAY 2010

ICC'S ACTIVITIES	DEMOCRATIC REPUBLIC OF CONGO	UGANDA	CENTRAL AFRICAN REPUBLIC	DARFUR, SUDAN	KENYA
Referral to the Court	3 March 2004 by the Government of DRC	December 2003 by the Government of Uganda	21 December 2004 by the Government of CAR	31 March 2005 by Security Council Resolution 1593	6 November 2009 by the Presidency of ICC
Opening of investigations	21 June 2004	29 July 2004	22 May 2007	6 June 2005	31 March 2010: authorization of the Prosecutor to open investigations by Pre-Trial Chamber II
Arrest warrant	1) Thomas Lubanga 17 March 2006 2) Germain Katanga 18 October 2007 3) Mathieu Chui 7 February 2008 4) Bosco Ntaganda 28 April 2008	1) Joseph Kony 13 October 2005 2) Vincent Otti 13 October 2005 3) Okot Odhiambo 13 October 2005 4) Dominic Ongwen 13 October 2005	1) Jean Pierre Bemba Gombo 24 May 2008	1) Ahmad Muhammad Harun: 2 May 2007 2) Ali Muhammad Ali Abd- Al-Rahman: 2 May 2007 3) Omar Hassan Ahmad Al Bashir: 4 March 2009 4) Bahar Idris Abu Garda ¹¹² 17 May 2009	
Transfer to the Court	1) Thomas Lubanga 17 March 2006 2) Germain Katanga 17 October 2007 3) Mathieu Chui 6 February 2008 4) Bosco Ntaganda At large	1) Joseph Kony At large 2) Vincent Otti At large 3) Okot Odhiambo At large 4) Dominic Ongwen At large	1) Jean Pierre Bemba Gombo: 3 July 2008	1) Ahmad Muhammad Harun: At large 2) Ali Muhammad Ali Abd- Al-Rahman: At large 3) Omar Hassan Ahmad Al Bashir: At large 4) Bahar Idris Abu Garda 18 May 2009	
Commencement of Trial	1) Thomas Lubanga 26 January 2009 2) Germain Katanga 24 November 2009 3) Mathieu Chui 24 November 2009		1) Jean Pierre Bemba Gombo: scheduled for 5 July 2010		

¹¹² Summons to appear before the court, not an arrest warrant.

APPENDIX B

STATES PARTY TO THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT

State Parties	Ratification	State Parties	Ratification	State Parties	Ratification	State Parties	Ratification
Afghanistan	Feb. 2003	Brazil	May 2002	Croatia	May 2001	Georgia	Sep. 2003
Albania	Jan. 2003	Bulgaria	Apr. 2002	Cyprus	March 2002	Germany	Dec. 2000
Andorra	Apr. 2001	Burkina Faso	Apr. 2004	Czech Republic	July 2009	Ghana	Dec. 1999
Antigua and Barbuda	June 2001	Burundi	Sep. 2004	Denmark	June 2001	Greece	May 2002
Argentina	Feb. 2001	Cambodia	Apr. 2004	Djibouti	Nov. 2002	Guinea	July 2003
Australia	June 2002	Canada	July 2000	Dominican Republic	May 2005	Guyana	Sep. 2004
Austria	Dec. 2000	C.A.R.	Oct. 2001	Dominica	Feb. 2001	Honduras	July 2002
Bangladesh	March 2010	Chad	Nov. 2006	Ecuador	Feb. 2002	Hungary	Nov. 2001
Barbados	Dec. 2002	Chile	June 2009	Estonia	Jan. 2002	Iceland	May 2000
Belgium	June 2000	Colombia	Aug. 2002	Fiji	Nov. 1999	Ireland	Apr. 2002
Belize	Apr. 2000	Comoros	Aug. 2006	Finland	Dec. 2000	Italy	July 1999
Benin	Jan. 2002	Congo (Dem. Rep)	Apr. 2002	FYROM (Macedonia)	March 2002	Japan	July 2007
Bolivia	June 2002	Congo	May 2004	France	June 2000	Jordan	Apr. 2002
Bosnia-H.	Apr. 2002	Cook Islands	July 2008	Gabon	Sep. 2000	Kenya	March 2005
Botswana	Sep. 2000	Costa Rica	June 2001	Gambia	June 2002	Korea(Rep. of)	Nov. 2002

Latvia	June 2002	Mongolia	Apr. 2002	Portugal	Feb. 2002	Suriname	July 2008
Lesotho	Sep. 2000	Montenegro (Rep. of)	Oct. 2006	Romania	Apr. 2002	Sweden	June 2001
Liberia	Sep. 2004	Namibia	June 2002	Saint Kitts and Nevis	Aug. 2008	Switzerland	Oct. 2001
Liechtenstein	Oct. 2001	Nauru	Nov. 2001	Saint Vincent Grenadines	Dec. 2002	Tajikistan	May 2000
Lithuania	May 2003	Netherlands	July 2001	Samoa	Sep. 2002	Tanzania (United Rep. of)	Aug. 2002
Luxembourg	Sep. 2000	New Zealand	Sep. 2000	San Marino	May 1999	Timor-Leste	Sep. 2002
Madagascar	March 2008	Nigeria	Sep. 2001	Senegal	Feb 1999	Trinidad and Tobago	Apr. 1999
Malawi	Sep. 2002	Niger	Apr. 2002	Serbia (Rep. of)	Sep. 2001	Uganda	June 2002
Mali	Aug. 2000	Norway	Feb. 2000	Sierra Leone	Sep. 2000	United Kingdom	Oct. 2001
Malta	Nov. 2002	Panama	March 2002	Slovakia	Apr. 2002	Uruguay	June 2002
Marshall Islands	Dec. 2000	Paraguay	May 2001	Slovenia	Dec. 2001	Venezuela	June 2000
Mauritius	March 2002	Peru	Nov. 2001	South Africa	Nov. 2000	Zambia	Nov. 2002
Mexico	Oct. 2005	Poland	Nov. 2001	Spain	Oct. 2000		

Source: International Committee of Red Cross Treaty Database, Rome Statute of International Criminal Court, State Parties. <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=585&ps=P>

APPENDIX C

STATES SIGNATORY TO THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT

Signatories	Signature Date	Signatories	Signature Date	Signatories	Signature Date
Algeria	December 2000	Israel	December 2000	Seychelles	December 2000
Angola	October 1998	Jamaica	September 2000	Solomon Islands	December 1998
Armenia	October 1999	Kuwait	September 2000	Sudan	September 2000
Bahamas	December 2000	Kyrgyzstan	December 1998	Syrian Arab Republic	November 2000
Bahrain	December 2000	Republic of Moldova	September 2000	Thailand	October 2000
Cameroon	July 1998	Monaco	July 1998	Ukraine	January 2000
Cape Verde	December 2000	Morocco	September 2000	United Arab Emirates	November 2000
Cote d'Ivoire	November 1998	Mozambique	December 2000	United States of America	December 2000
Egypt	December 2000	Oman	December 2000	Uzbekistan	December 2000
Eritrea	October 1998	Philippines	December 2000	Yemen	December 2000
Guinea-Bissau	September 2000	Russian Federation	September 2000	Zimbabwe	July 1998
Haiti	February 1999	Saint Lucia	August 1999		
Islamic Republic of Iran	December 2000	Sao Tome and Principe	December 2000		

Source: International Committee of Red Cross Treaty Database, Rome Statute of International Criminal Court, State Signatories. <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=585&ps=S>

APPENDIX D

STATES THAT ARE NOT PARTY OR SIGNATORY TO THE ROME STATUTE

1. Guatemala
2. India
3. Indonesia
4. Iraq
5. Nepal
6. Pakistan
7. Peoples Republic of China
8. Turkey¹¹³

¹¹³ Although Turkey is not a signatory or party to Rome Statute of ICC, it had actively participated to the efforts to create an international criminal court and the New Turkish Penal Code, which was adopted by Turkish National Assembly on 26 September 2004, had specific articles under the titles of “Genocide” and “Crimes Against Humanity”, articles 76 and 77 respectively. Additionally, with the constitutional amendment on 7 May 2004, the last paragraph of article 38, entitled “Principles related to offences and penalties” has changed as follows; “No citizen shall be extradited to a foreign country on account of an offence except for obligations arising becoming party to the Statute of International Criminal Court.” Furthermore, Turkey upon the invitation of Germany became a member of an unofficial group named “Friends of ICC” and began participating meetings in New York and The Hague since January 2004. (Source: Republic of Turkey, Ministry of Foreign Affairs, www.mfa.gov.tr)

APPENDIX E

MAP OF DEMOCRATIC REPUBLIC OF CONGO



Source: Department of Peacekeeping Operations, Cartographic Section, United Nations January 2004 www.un.org/Depts/Cartographic/map/profile/drcongo.pdf