LUMUMBA'S DEATH, A WAR CRIME IN AN INTERNATIONAL ARMED CONFLICT?

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Abstract: *The family of Patrice Lumumba is planning to lodge a complaint in Belgium against twelve Belgian officers who allegedly participated in his murder. How does, or rather how did, international humanitarian law deal with such a crime? Since Lumumba died more than fifty years ago, this complaint could only trigger Belgian Courts' jurisdiction if his death was found to be a war crime given the imprescriptible nature of such crime. As in 1961 war crimes could only occur in international armed conflict, the determination of the international or the non-international character of the conflict is crucial. Will the characterisation of the conflict be an easy task for the judge? This paper illustrates the difficulties a national judge may face in applying notions of international humanitarian law given the principle of non-retroactivity, the need to carefully identify the parties involved in the conflict and the uncertainties surrounding the concept of "internationalised non-international armed conflict". Why examine this issue now? If Lumumba's death may seem far away, it is still a highly sensitive issue in Congo and in Belgium. Furthermore, the growing interest for the right to truth may likely lead to the excavation of such other unresolved and controversial crimes elsewhere.*

Key Words: *Characterisation (of an armed conflict), internationalisation, Lumumba, war crime*

LUMUMBA'NIN ÖLÜMÜ: ULUSLARARASI SİLAHLI ÇATIŞMADA BİR SAVAŞ SUÇU MU?

Özet: *Patrice Lumumba'nın ailesi, cinayetinde suç ortağı oldukları iddia edilen on iki Belçikalı polis memuruna karşı Belçika'da bir şikâyette bulunmayı planlıyor. Uluslararası İnsani Hukuk böyle bir cinayeti nasıl ele alıyor veya almıştır? Lumumba öleli elli seneden fazla olduğu için, ölümü*

böyle bir cinayetin sürekli durumuna dayanarak bir savaş suçu olarak görülürse bu şikâyet sadece Belçika Mahkemelerinin yargısını tetikleyebilmektedir. 1961 yılında savaş suçları sadece uluslararası silahlı savaşlarda meydana gelebilirdi; savaşın uluslararası olup olmadığını saptamak ise çok kritiktir. Savaşın nitelendirilmesi hâkim için kolay bir görev mi olacaktır? Bu makalemizde, kanunların geriye yürüyememeği ilkesine, savaşla ilgisi olan tarafların dikkatlice saptanması zorunluluğu ve "uluslararasılaşmış uluslararası olmayan silahlı savaşı" kavramına ilişkin belirsizliklere dayanarak ulusal bir hâkimin uluslararası insani hukukun kavramlarını uygularken karşılaşabileceği zorluklar ele alınmıştır. Bu konuyu neden şimdi inceliyoruz? Lumumba'nın ölümü çok uzak gibi görünse de Kongo ve Belçika'da hala oldukça hassas bir konudur. Aynı zamanda, doğruyu öğrenme hakkına dair artan ilgi büyük ihtimalle başka yerlerde diğer çözümlenmemiş ve tartışılır cinayetleri ortaya çıkaracaktır.

Anahtar Kelimeler: *Uluslararasılaşma, Lumumba, savaş suçu*

1. Introduction

On 23rd June 2010, a Belgian newspaper announced that the family of Patrice Lumumba was planning to lodge a complaint in Belgium against twelve Belgian officers who allegedly participated in his murder.[1] Patrice Lumumba was the first Prime Minister of Congo, after Congo gained its independence from Belgium on 30th June 1960. On 17th January 1961, he was murdered in Katanga. The twelve suspected Belgians would have participated in this crime. Lumumba's family asserts this act was a war crime committed in an international armed conflict.

Could such crime trigger Belgian's Courts jurisdiction? This complaint would not be based on universal jurisdiction. Indeed, the alleged perpetrators are Belgians, live in Belgium and the prosecutions would occur in Belgium. Consequently, Belgian law would be the law to be applied and not international law. However, as Belgian law refers to notions of international humanitarian law without defining these terms, Belgian judges resort to international law to apply these notions. But how does, or rather how did, international humanitarian law deal with such a crime?

In this particular case, accurate qualification is crucial since only the imprescriptible nature of a war crime could trigger Belgian Courts' jurisdiction. Indeed, Lumumba's death occurred more than fifty years ago. Yet the longest statutory limitation in Belgian law is of thirty years. The characterization of the conflict in which the crime was committed is also of paramount importance since the idea that war crimes could be committed in

1 C. Braeckman, *L'assassinat de Lumumba s'invite à la fête,* Le Soir, 23 June 2010

a non-international armed conflict started to be accepted only with the development of the case law of the International Criminal Tribunal of Former Yugoslavia (ICTY).[2] Until that decision, the main opinion was that violations of humanitarian law in internal armed conflicts did not amount to war crimes *per se*, for such crimes could only be perpetrated within the context of an international armed conflict.[3] Furthermore, Belgian criminal law introduced the concept of individual responsibility for a crime committed in a non-international armed conflict only in 2003.

Due to the restrictive scope of this paper, I focus on the first issue the Belgian judge will have to solve, namely the characterization of the conflict in which Lumumba's death took place. This analysis is divided in two parts. The first one concerns the determination of the nature of the conflict, i.e. whether the conflict reaches the threshold to be qualified as a non-international armed conflict within the meaning of Common Article 3 to the Geneva Conventions. Indeed, in January 1961, no foreign army was involved strictly speaking in the conflict in Congo so that the characterisation of "international armed conflict" within the meaning of Article 2 Common to the Geneva Convention can be dismissed.[4] The second part examines whether this non-international armed conflict could be seen as internationalised by the Belgian influence in the conflict.

Will the characterisation of the conflict be an easy task for the judge? They will have to face three issues. First, the judge will have to pay attention to one of the key principles of criminal law, namely the principle of non retroactivity. This principle implies the case will have to be analysed according to the law applicable in January 1961 in order to respect the principle *nullum crimen sine lege*. One has to assess whether an act such as Lumumba's death could entail individual criminal responsibility according to the state of international law in January 1961.[5] References will nevertheless be made to the case law of the International Criminal Tribunal for Former Yugoslavia (ICTY), of the International Criminal Tribunal for Rwanda (ICTR) and of the International Court of Justice (ICJ) since case law is supposed to reflect customary law. However I will examine whether this case law was also considered a custom at that time. Secondly, the identification of the parties involved in the conflict is not as straightforward as it may seem because Lumumba's death occurred in a particular context involving many different actors.[6] Yet, as the ICTY held, "the determination

2 D. Fleck, *Shortcomings of the grave breaches regime,* J. Int'l Criminal Justice, 836-838, (2009); W. Schabas, *Punishment of non-state actors in non-international armed conflict,* 26 Fordham Int'l L. J., 917-918 (2002-2003)

3 A. Cassese, *International Criminal Law,* 46-47 (2008)

4 Article 2 : "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties"

5 Cassese (n3) 43; E. LaHaye, *War Crimes in Internal Armed Conflicts,* 329 (2008)

6 Only the relevant actors for this paper will be examined

as to whether the conflict is international or internal has to be made on a case- by-case basis, that is, each case has to be determined on its own merits"[7] so that the parties have to be carefully identified. Third, the concept of "internationalised non international armed conflict" is a matter of interpretation and is therefore not easy to use, especially since this concept is far from being unanimously accepted.

Due to these issues, the qualification of the conflict can lead to several interpretations, especially if a point has to be made to, for example, trigger the Belgian Courts' jurisdiction. This paper will point out these different interpretations but I will put forward my own point of view and reject the interpretations I judge less relevant. However, the aim of this paper is not to assess whether Lumumba's death was a war crime and whether the twelve suspected Belgians should be punished[8] but only to present the reasoning I think the judge should start with before making this assessment.

The scope of this paper does not allow me to enter into the details of the events that took place in Congo at that time. I only focus on the events which are crucial for the legal analysis. For the same reason, I do not dwell on every controversy surrounding around each notion used and will only mention those relevant for the scope of this analysis.

2. A Non-international Armed Conflict?

2.1. General Principles

The key provision of international humanitarian law applicable to an armed conflict of non-international character is Article 3 Common to the Geneva Conventions. This article was and is widely recognised as Customary International Law.[9] In January 1961, Congo had not signed the Geneva Conventions yet but, as a former colony, Congo was bound by the treaties concluded by Belgium.[10] Be that as it may, in February 1961, both governments of Leopoldville and of Elisabethville reaffirmed the applicability of the Geneva Conventions.[11]

Common Article 3 simply refers to " the case of armed conflict not of an international character occurring in the territory of one of the High

7 *Dario Kordic and Lario Cerkez Case*, (Decision Appeals Chamber) ICTY (17 December 2004) § 320.

8 On this issue, Commission Lumumba (Belgium), *Les secrets de l'affaire Lumumba* (2005); L. de Witte, *The Assassination of Lumumba* (2002).

9 A. Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law,* 183 Military L. Rev., 81 (2005).

10 D. McNemar, *The Postindependence War in the Congo,* 259 (1971).

11 *Ibidem*, 259-260.

Contracting Parties" and foresees minimum rules to be followed in this kind of conflict. It thus requires the existence of an armed conflict to be applied.[12] The definition of armed conflict is therefore crucial but no definition is to be found in this article or in any other convention.[13] Nevertheless, it is widely accepted that Common Article 3 presupposes the existence of sufficiently serious and prolonged armed hostilities in the territory of one of the High Contracting Parties, between the regular military forces and some organised armed groups, or between these groups.[14] In 1977, Additional Protocol II adopted a more restrictive definition.[15] However, this definition is not relevant for this paper since it is subsequent to the impugned event and since it does not apply to conflicts between armed groups.

Although there is no present-day definition of what an armed conflict might entail in conventions, scholars unanimously refer to the one given by the ICTY in its famous *Tadic* case. It stated that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[16] The trial chambers have then used various factors to assess the intensity of the conflict, especially emphasizing the need of minimal organisation of the armed groups and the need of a certain control over the territory. The Rome Statute of the International Criminal Court adopted a similar definition. The definition of the ICTY can be used in this particular case since this definition adopts the same approach as in 1961, as shown above.

The first requirement is thus the "resort to armed force" or to "protracted armed violence" and the second concerns the identification of the parties to the conflict. The Commentaries of the Geneva Conventions give a list of some criteria that can be used to assess whether the threshold of an armed conflict is reached.[17] This list is very useful since it was written between 1952 and 1959 so that it reflects the interpretation of that particular time. All the criteria in the list concern the involved parties in the concerned conflict, such as their organisation and their control of a territory. Consequently, it is necessary to first identify these parties since it helps to assess whether the threshold of an armed conflict is reached.

12 E. David, *Principes de droit des conflits armés,* 101 (2008).

13 *Ibidem,* 123.

14 *Ibidem,* 123-131 (2008).

15 Article 1 of Additional Protocol II to the Geneva Conventions (1977).

16 *Tadic Case* (Decision Appeals Chamber) ICTY (2 October 1995) § 70.

17 J. Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (1952).

2.2.2 Application of These Principles to the Lumumba's Case

- General Context

A general presentation of the context is needed in order to assess the situation in January 1961.[18] On 30th June 1960, the "Congo belge" obtained its independence from Belgium and became the "Republic of Congo". Joseph Kasa Vubu was then appointed as President and Patrice Lumumba as Prime Minister following elections held in May 1960. Soon after, troubles such as uprising in army camps broke out in many parts of the newly independent state. On 11th July 1960, Belgium decided to intervene and sent its army claiming that its nationals were at risk. That same day, Moïse Tshombe, the leader of the province of Katanga, proclaimed the secession of its province. Consequently, Patrice Lumumba asked for the intervention of the United Nations in order to restore the order in the state endangered by the Belgian army intervention and the secession of Katanga. UNOC, the United Nations peacekeeping force, arrived on 16th July. On 8-9th August, Albert Kalonji, the leader of the province of South Kasai, proclaimed the independence of this province. After several calls of the international community and the Security Council, the last Belgian army units left Congo at the end of August. On 5th September, a political crisis burst out when President Kasa Vubu dismissed Prime Minister Lumumba who then himself revoked the President. A part of the population of Congo, especially in Stanleyville, remained faithful to the Prime Minister, while another, mostly in Leopoldville, supported the President. Colonel Mobutu, who would later lead the country, stood by the President and intervened with the army to try restoring order.

Between September 1960 and Lumumba's death, armed confrontations occurred between Kasa Vubu's supporters and those of Lumumba, between Kasa Vubu's supporters and those of Tshombe, between Kasa Vubu's supporters and those of Kalonji, and between Lumumba's supporters and those of Tshombe. Since Lumumba was held in captivity most of the time between September and January, Antoine Gizenga was the leader of his supporters. As for the UNOC, it was deployed in the main areas of the country, especially in Katanga province.

- Identification of the Involved Parties

As the ICTY held, "the determination as to whether the conflict is

18 See *Onze mois de crise politique au Congo,* Courrier Hebdomadaire 2 (1961); *Evolution de la crise congolaise,* Chronique de politique étrangère 565 (1961); J. Gérard-Libois, *Congo 1960* (1960); C. Hoskyns, *The Congo since Independence: January 1960 – December 1961* (1965); B. Verhaegen, *Congo 1961* (1961).

international or internal has to be made on a case- by-case basis".[19] Consequently, it is important to examine in which specific context Lumumba's death occurred and to which conflict it was linked in order to identify the parties involved. According to the ICTY, "the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed."[20] There is no reason why this reasoning should not be applied in 1961.

In this particular case, on 1st December 1960, the army that supported Kasa Vubu arrested Lumumba. He was then transferred to Katanga where he was killed. Consequently, Lumumba's death is undoubtedly linked to the conflicts opposing, on the one hand, his supporters and Kasa Vubu, and on the other hand, his supporters and Tshombe. Even if Kasa Vubu was not directly involved in Lumumba's death since it happened in Katanga, it is nonetheless important to consider in this analysis Kasa Vubu and his supporters as a party. Indeed, his decision to transfer Lumumba led to Lumumba's death, which could not have happened in this way without the arrest of Lumumba by Kasa Vubu's forces and his following transfer. However, as the complaint would be lodged against Belgians acting in Katanga, the main relation is the one between Lumumba and Tshombe. Kasa Vubu's intervention is more a side-story since Lumumba's death happened in Katanga in presence of Katangans and Belgians. Consequently, this relation will not be examined for the issue of the internationalisation of the conflict. I do not consider the UNOC as a party in this particular case despite its presence in Katanga at that time. Indeed, in January 1961, the UNOC had not received the mandate to use force yet[21] and was not involved in any armed confrontations yet. Furthermore, the Security Council held several times UNOC could not become a party to the conflict.

To me, these three parties, Lumumba's supporters, Tshombe's supporters and Kasa Vubu's supporters have to be identified as armed groups and not as representatives of the legal government. Admittedly, Kasa Vubu's government was the one recognised by the General Assembly of the United Nations on 24th November 1960, under western pressure who saw Lumumba as a communist danger. Yet both Kasa Vubu and Lumumba claimed to be the legitimate government and they both were elected in May 1960.[22] The constitutionality of the act of revocation of Lumumba by Kasa Vubu is not undisputed. Thus, on 7-8th September, the Congolese Chamber and the Senate rejected Kasa Vubu's act and on 13th September, a joint meeting of

19 *Kordic Case* (n7) § 320.

20 *Kunarac Case*, (Decision Appeals Chamber) ICTY (12 June 2002) § 58.

21 The UNOC's mandate changed in February 1961.

22 *Evolution de la crise congolaise* (n18) 568-570; McNemar (n10) 274-275.

both Chambers gave full powers to Lumumba's government. The Parliament was dissolved the day after by Kasa Vubu. Furthermore, the recognition of Kasa Vubu's government by the General Assembly has no legal consequences and after Lumumba's death, many African states recognised the government led by Gizenga, Lumumba's political heir. Tshombe may also not be recognised as representing a legal government since Katanga's secession was never recognised as effective by anyone. Had the secession be recognised as effective,[23] the conflict would have been directly an international one as Katanga would have been considered as a foreign state. Nevertheless, Katanga's secession was only temporary and it reintegrated the central state in January 1963.

Consequently, for all these reasons, I think the concerned conflict is a conflict between armed groups and not one between a legal government and armed groups. For that matter, the scholar Eric David rightly said that an organised armed group may allege to represent the state and therefore become a high contracting party. To him, it would be contrary to the principle of non-intervention in internal affairs to deny this right of the armed group when the "legitimate government" appears unable to control all of its territory.[24] This reasoning is applicable in this particular case. Indeed, Congo was in January 1961 a failed state. Kasa Vubu controlled most of the national army and Leopoldville but Lumumba, through Gizenga, controlled oriental and Kivu provinces, North Kasai and some parts of Katanga, which means he controlled nearly half of the Congolese territory. As for Tshombe, he controlled the main parts of Katanga and had his own army.[25] Be that as it may, if the qualification of Kasa Vubu's supporters as an armed group and not as the legal government could possibly be criticised, as shown before, this party to the conflict is not the one the Belgian judge would really take into account.

- An Armed Conflict Within the Meaning of Common Article 3?

As the parties are now identified and as there are armed confrontations between them, the question is whether they fulfil the criteria enunciated by the Commentaries on the Geneva Conventions. Each of the four criteria seems to be met since each armed group has the characteristics of a state. Each group has control over persons within a territory, an organized military force, an authority responsible and the means to respect and ensure respect for the conventions. Furthermore, the conflict was on the agenda of the Security Council, as seen with the sending of the UNOC, which also is one of the criteria.

23 David (n12) 198.

24 *Ibidem,* 139.

25 E. Clinton, *The United Nations and the Congo* 47 A.B.A.J. 1080 (1961).

From these considerations, I think there was an armed conflict in Congo in January 1961 between the three identified parties and that this conflict reached the required threshold of Common Article 3 common. Indeed, there were armed confrontations between the three parties and all of these parties met all the indicative criteria enunciated by the Commentaries whereas these did not necessarily need to be cumulative. Consequently, Article 3 was applicable in Congo in January 1961. Lumumba's death was unequivocally linked to this armed conflict since he represented one of its prominent parties and since he was eliminated in order to win the conflict.

It is interesting to note that until February 1961, most commentators spoke about the "Congo Crisis" but never used the expression "armed conflict". Before February 1961, no one, not even the ICRC or the Security Council in its Resolutions,[26] was referring to international humanitarian law and instead preferred talking about the respect of international human rights law. It is only since February 1961 that the ICRC asked the parties to apply international humanitarian law, without any more precision, and that the Special Representative to the Secretary General spoke about civil war.[27]

3. An Internationalised Non-international Armed Conflict?

3.1. General Principles

The question is now to assess whether this non-international armed conflict may be internationalized since the lawyer of Lumumba's heirs seems to refer to a war crime committed in an international armed conflict,[28] probably due to the intervention of Belgium. The internationalisation of a non-international armed conflict leads to the application of the four Geneva Conventions and not only of Common Article 3.[29] Nowadays, the issue of distinguishing between international armed conflict and non-international armed conflict may seem less relevant because of Customary International Law but, in 1961, the states were not ready to give up this distinction.[30]

In this particular case, this issue is crucial because Lumumba's heirs want to hold individuals criminally responsible. Yet the notion of war crime in a non-international armed conflict was not accepted in 1961. Until that decision, the main opinion was that violations of the humanitarian law of internal armed conflict do not amount to war crimes *per se*, for such crimes

26 SC Resolution 143, SC Resolution 145, SC Resolution 146.

27 *L'ONU et le Congo,* Chronique de politique étrangère (1962).

28 Braeckman (n1).

29 R. Bierzanek, *Quelques remarques sur l'applicabilité du droit international humanitaire des conflits armés aux conflits internes internationalisés* 283-285 (1984).

30 David (n12) 132.

could only be perpetrated within the context of an international armed conflict.[31] Besides, Belgian criminal law introduced the concept of individual responsibility for a crime committed in a non-international armed conflict only in 2003.

For some scholars, the intervention of a foreign state next to one of the armed groups is a sufficient factor to internationalise the whole conflict.[32] However, the experts and the states were clearly against this interpretation when the ICRC proposed it in 1971.[33] For others, it is necessary to sequence the conflict into pairs of opponents and see if each pair is internationalised.[34] Sequencing the conflict may lead to absurd consequences since different rules would be applied to the different parties in the same conflict. In other words, one same act committed by different parties in the same conflict would be allowed for some actors while forbidden for others.[35]

Nevertheless, the International Court of Justice (ICJ) applied the sequencing method in the Nicaragua Case by distinguishing the conflict between the United States and Nicaragua and between the contras and the government of Managua.[36] The ICTY also held that the fact an internal conflict in a particular area was internationalised did not necessarily mean that another internal conflict in another area was also internationalised.[37] I will not enter into this debate since the Belgian judge will mainly focus on the relationship between Lumumba and Tshombe in which the potential indicted Belgians were intervening and not in the Lumumba/Kasa Vubu relation.

It is not so easy to assess whether a foreign intervention is sufficient to internationalise a conflict when the foreign army does not intervene as such in the conflict, as was the case in Congo in January 1961. Indeed, since August 1960, there were officially no more Belgian army units in Congo.[38] However, on 21st February 1961, the Security Council ordered in a resolution "the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and paramilitary personal and political advisers not under the UN command and mercenaries".[39] It means that Belgium was still intervening through military and paramilitary staff and political advisers but not through its national army.

31 Cassese (n3) 46-47.

32 David (n12) 173; LaHaye (n5) 15.

33 Bierzanek (n29) 256-258.

34 H. Meyrowitz, *Le droit de la guerre dans le conflit vietnamien* AFDI 156 (1967).

35 David (n12) 174; J. Stewart, *Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict,* 85 Int'l Rev. of the Red Cross 313 (2003).

36 *Nicaragua Case* ICJ (27 June 1986) § 219.

37 *Kordic case* (n7) § 320.

38 de Witte (n8) 68.

39 SC Resolution 161.

To assess whether the presence of this Belgian staff is sufficient to internationalise the conflict, it is important to examine the position of the ICJ and of the ICTY on this matter even if their positions are subsequent. Indeed, as Antonio Cassese held, the ICTY's position was supported by case law and practice.[40] Nonetheless, both jurisdictions do not have exactly the same opinion. For the ICJ, an overall control of the foreign state would not be enough for the imputability of the foreign state to be held. To the ICJ, the foreign state would have to order or impose the perpetration of the violations. Nonetheless, the ICJ held this reasoning to determine the imputability of the United States for Contra's actions and thus not in the context of an individual responsibility to determine issue.[41] However, in the *Tadic* case, the ICTY held that an overall control over organised and hierarchically structured groups was sufficient to internationalise the conflict. The foreign state must have a role in organising, coordinating or planning the military actions of the military group but must not necessarily give specific orders or direction of each individual operation. The group just has to act *de facto* for the foreign state.[42] Nevertheless, in the genocide case, the ICJ admitted the 'overall control' test resorted to in *Tadic* was relevant when determining whether an armed conflict is international.[43] Antonio Cassese highly criticised the ICJ's view regarding to the imputability of the state for the acts of an armed group and demonstrated, convincingly to me, that the ICTY's position reflects case law and state practice.[44] I will not enter in this debate since it is not the topic of this paper and because the ICJ has finally accepted the ICTY's view for the determination of the nature of the conflict, which is what this paper deals with.

3.2. Application of These Principles to the Lumumba's Case

In this particular case, Tshombe, the leader of Katanga, was considered by many as a puppet manoeuvred by the Belgians. It was admitted that without Belgian help, the Katangan "state" could not survive.[45] For example, the Katangan *Gendarmerie*, i.e. the Katangan army, counted 200 Belgian officers. By 31st December 1960, the officer corps counted a third of Katangans but the core commandant remained within Belgian hands. In theory, Belgian officers were Congolese officials of Belgian nationality but

40 A. Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia,* 18 EJIL 657 (2007).

41 *Nicaragua Case* (n36) §115.

42 *Tadic Case* (n16) § 118-120, 131, 137, 141-144; Y. Arai-Takahashi, *Disentangling Legal Quagmires: The Legal Characterisation of the Armed Conflicts in Afghanistan since 6/7 October 2001 and the Question of Prisoner of War Status,* 5 Yearbook of International Humanitarian Law, 61 (2002); David (n12) 166; LaHaye (n5) 321-322.

43 *Genocide Case* ICJ (18 November 2008) §385-389, 392, 400-401.

44 Cassese (n40) 657.

45 de Witte (n8) 68.

in practice, they received orders from the Belgian Ministry of African Affairs and were paid by Brussels. Furthermore, some of the Belgian officers with other political Belgian advisers formed the "bureau conseil", a shadow government composed only by Belgians. This "bureau conseil" reported directly to the African Affairs Minister in Belgium. No important strategic decision was held without the consent and the advice of this "bureau conseil".[46]

At first sight, it seems the "overall control" is met since these Belgians gravitating around Tshombe's government gave advises for strategic and technical choices and played a role in organising, coordinating or planning the military actions of the gendarmerie. The ICTY's "overall control test" concerns the organised and hierarchically structured groups. I think that the "bureau conseil" and the other Belgians advising Tshombe can be considered as such a group but this view could be criticised.

However, the issue whether these Belgians were organs of Belgium and were acting in this quality may be discussed since they were not official envoys of Belgium. Nonetheless, to me, the fact they were paid by Belgium and that they were reporting to the African Affairs Minister in Belgium are strong indications for them to be considered as *de facto* organs. The indication of the salary being paid by the foreign state has been interpreted by the ICTY as a sign that the conflict was internationalised.[47] The Security Council itself recognises in its resolutions that Belgium may be exercising its influence over the conflict.[48] At the same time, the UN report on the murder of Lumumba speaks about Belgian mercenaries who killed Lumumba. Yet, mercenaries cannot be considered as *de facto* organs of a state. Unfortunately, the Belgian Commission on the assassination of Lumumba does not give its opinion on this question as it rather examines the role of the Belgian government in this assassination than the one of the Belgians in Katanga. The issue of the quality of the Belgians will thus have to be carefully examined by the Belgian judge who might take a restrictive position.

In my opinion, the Belgian intervention in Katanga is sufficient to internationalise the conflict so that the whole Geneva Conventions should apply. Consequently, the Belgian judge will have to assess whether Lumumba's death could amount to a grave breach as meant by article 147 of the Fourth Geneva Convention in order to be able to hold individuals criminally responsible. At first sight, several acts could be envisaged: wilful killing, torture, or inhuman treatment; wilfully causing great suffering or serious injury to body or health; unlawful deportation or transfer of unlawful

46 de Witte (n8) 63-68; Hoskyns (n18) 143, 384.

47 *Naletilic Case* (Decision Appeals Chamber) ICTY (3 May 2006) § 195.

48 SC Resolution 161.

confinement of a protected person. Nevertheless, it must then be proven that the twelve suspected Belgians were personally involved in these acts.

Finally, one has to mention that in 1961, as shown by the UN report,[49] some would probably have been tempted to internationalise the conflict given the USSR help to Lumumba. However, historians showed that these were pure allegations and that it would not have been sufficient to internationalise the conflict anyway. In 1961, the role of the United States would also have been examined as the CIA recognised to have devised plans to assassinate Lumumba.[50] The presence of the UNOC in Katanga at the time of the murder could also have been seen as a way to internationalise the conflict. However, in January 1961, UNOC had no mandate to use force and did not participate in the murder even if its role was quite controversial.[51] UNOC was not implicated in real confrontations at that time and it is only since February 1961 that it has received the mandate to use force.[52] Therefore, to me, its presence was not seen as sufficient to internationalise the conflict.

4. Conclusion

The objective of this paper was to assess whether the allegation made by Lumumba's family that their father's death amounted to a war crime committed in an international armed conflict had any grounds in international humanitarian law. It showed the qualification of the conflict was crucial since, in January 1961, a war crime could not be committed in a non-international armed conflict so that individual criminal responsibility could not be held for such an act.

As there were armed confrontations between the armed groups led by Lumumba, Tshombe and Kasa Vubu and as all of these parties were sufficiently organised and controlled a part of the territory, I concluded that there was an armed conflict in Congo in January 1961 within the meaning of Common Article 3. Furthermore, in my opinion, the presence of Belgian officers in the *gendarmerie* and the "bureau conseil", an organised and hierarchically structured group acting *de facto* for the Belgian government, would be enough to internationalise the conflict. Consequently, the complaint by Lumumba's family could trigger the Belgian Courts' jurisdiction as a war crime committed in an international armed conflict is imprescriptible.

49 UN report of 14 November 1961 on Lumumba's death.

50 US Senate, the "Church Committee" report on alleged assassination plots involving foreign leaders, 20 November 1975.

51 de Witte (n8) 55, 96.

52 David (n12) 183; LaHaye (n5) 19-20.

This analysis relies on the interpretation of the concepts of international humanitarian law given by doctrine and the ICTY and ICJ's case law. However, since the principles given by these highly depend on the context and are not as easily applicable as it may seem, this paper reflects my personal analysis of the facts and it is not obvious whether the Belgian Courts will have the same analysis given the space let for interpretation in international humanitarian law.

All this said it must be borne in mind that this issue of Lumumba's death is still a very sensitive issue in Belgium and in the Democratic Republic of Congo as shown by the demonstration in Brussels on 16th January 2011. When Lumumba's family announced its intention to lodge their complaint just fifty years after the independence, many objections were raised about the rightfulness of such complaint so long after the events. These moral considerations are though not legally founded if Lumumba's death is ever declared to be a war crime and is, as such, thus considered as imprescriptible.

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