

Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court

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Executive Summary

The Democratic Republic of Congo (DRC or Congo) presents a critical test for the International Criminal Court (ICC). All of the accused in current ICC trials are from DRC. This paper addresses the Court's role in DRC regarding complementarity, peace, justice, victims, and affected communities.

At this juncture, the impact of the ICC's activities in the country has been restricted by a number of factors including the limited number of cases it is pursuing, the nature of the charges addressed in those cases, and the fact that the Court's efforts thus far have only targeted local militia leaders operating in the Ituri region. Experience thus far indicates the Rome Statute and particularly the concept of complementarity can be used to help break the cycle of impunity in this war-torn country—but much more remains to be done to invest in domestic justice efforts. This should include implementation of the Rome Statute.

DRC's failure to cooperate in the arrest warrant against Bosco Ntaganda, a militia leader who has since been integrated into the Congolese army, contributes to a perception that the government is using the ICC for its own purposes. While former presidential candidate and opposition leader Jean-Pierre Bemba is also on trial, which is significant for the region, this remains controversial in DRC as Bemba is charged only with crimes committed in the Central African Republic (CAR). Because of these perceptions, victim communities have displayed only limited support for the Court thus far, yet increased outreach by the Court could have a positive impact.

The Court should consistently improve its outreach to address these perceptions of its work. Furthermore, more prosecutions should be pursued for DRC crimes both at the international and domestic levels.

Introduction

The complexities of the Congolese conflict defy quick or easy successes for the ICC. National elections in 2006 capped a decade of war that began with Laurent Desire Kabila's 1996-1997 campaign to liberate the country (then called Zaire) from the repressive rule of Mobutu Sese Seko. Because the most violent period of Congo's wars occurred from 1996 to 2003, many serious crimes fall outside the Court's temporal jurisdiction. While the armed conflict formally ended with the signing of a peace agreement in 2002, fighting has continued unabated in the north and east, marked by the commission of additional mass atrocities.

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About the Authors

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The wars in eastern Congo have been described as the deadliest since World War II with estimates that 5.4 million conflict-related deaths have occurred between August 1998 and April 2007. All sides have committed flagrant violations of international humanitarian law, including targeting civilians for murder, rape and other forms of sexual violence, forced displacement, recruiting child soldiers, and abducting civilians. Armed conflict in the Congo has assumed both an international and domestic character at different times. High-ranking officials from DRC and neighboring countries, many of whom continue to serve in positions of power, are alleged to have been involved. Perpetrators enjoy near total impunity.

DRC ratified the Rome Statute on March 30, 2002, and referred crimes committed in its territory for investigation and prosecution to the ICC on April 19, 2004. The Court is now conducting two trials: one for Thomas Lubanga,¹ and the other for Germain Katanga and Mathieu Ngudjolo Chui.² Both cases address the conflict in Ituri, a district in northeastern DRC. The Court's fourth detainee, Jean-Pierre Bemba, is also a Congolese national. But unlike the other three, Bemba is a prominent public figure; he lost in the 2006 presidential election to the incumbent, Joseph Kabila, by only six percent. Bemba was serving as a senator when he was arrested in Belgium and transferred to The Hague in June 2008. He is charged with crimes allegedly perpetrated by his Mouvement pour la Libération du Congo (MLC) forces in CAR.³ Bemba's trial is set to open in July 2010.

Complementarity

Jurisprudence of the Court

Since the Lubanga and Katanga/Ngudjolo cases are the first to be tried in the ICC, they have been instrumental in defining jurisprudence on complementarity. Lubanga and Katanga were arrested by Congolese authorities pursuant to criminal investigations by Congolese military courts. Lubanga was already in Congolese custody when the ICC issued an arrest warrant on February 10, 2006, for charges related to enlisting, conscripting, and using child soldiers.⁴ Lubanga challenged the admissibility of his case before the Pre-Trial Chamber, but the latter found that in order for such a challenge to succeed, "[n]ational proceedings must encompass both the person and the conduct which is the subject of the case before the Court."⁵ This test narrows the general scope for admissibility challenges to succeed.

Katanga also challenged admissibility after his arrest in 2009, arguing that he should be tried before Congolese courts pursuant to an investigation pending against him related to the killing of Bangladeshi UN peacekeepers. On September 25, 2009, the ICC Appeals Chamber confirmed his case was admissible. It held that the ICC could go forward in prosecuting Katanga for his alleged responsibility in crimes committed during the Bogoro massacre of February 2003 because the Congolese courts had not filed any charges against him related to this incident.

In both cases, the Congolese justice system had initiated domestic proceedings against the accused. Nonetheless, in Katanga's case the ICC seemed to accept the DRC government's arguments regarding its lack of capacity to prosecute the Bogoro massacre at face value. The Court's decisions blur the distinction between the government's unwillingness to investigate and prosecute some cases and its inability to do so in others. To avoid this confusion, more scrutiny of the Congolese judicial system's potential to investigate and prosecute would have been optimal.

Domestic Justice Efforts

Fundamental reform and investment in DRC's justice system are essential to help the government fulfill its obligations to repress international crimes and to contribute to an effective

long-term fight against impunity. Such steps are crucial: the ICC can pursue only a handful of cases, but violations in the DRC have been of extreme severity and breadth.

Domestic barriers to accountability are strong. Shortly after DRC ratified the Statute the Congolese Parliament amended the country's military criminal codes, and granted military courts exclusive jurisdiction over international crimes.⁶ While the preamble to the revised code acknowledged that DRC had ratified the Rome Statute, it did not adopt the Statute's definitions of genocide, war crimes, and crimes against humanity; instead the code proposed alternate, unclear definitions.

Yet the Statute has shown some tentative signs of domestic impact. As a monist system, the DRC courts can apply international treaties, and several military courts in different provinces have directly invoked the Rome Statute.⁷ More than a dozen such trials were held between 2005 and 2008.⁸ Perhaps the best known is that of Songo Mboyo,⁹ in which the courts applied the Rome Statute for the first time to convict soldiers of mass rape and sexual violence as crimes against humanity.¹⁰ Several additional trials of international crimes have been initiated since military operations surged in eastern DRC late in 2008.

An ICTJ study conducted in 2009 of five international crimes trials before Congolese military courts reveals both the challenges and to a more limited extent the potential for DRC to respect its obligations to investigate and prosecute international crimes.¹¹ Victims participated either as witnesses or through legal representatives. They expressed satisfaction at seeing perpetrators on trial and in seeing the government exercise its potential to render justice to promote the rule of law.¹² These positive reactions, however, were offset by two important facts. First, most convicted perpetrators subsequently fled from prison. Second, as of May 2010, the government had not paid court-ordered civil damages to victims.

The trials also suffered other fundamental problems. Given the general challenges facing DRC's justice system, it is not surprising that the Congolese military courts did not respect certain minimum fair trial standards in all of the trials. Furthermore, national prosecutions in the military courts have failed to target high-ranking military officials, due in large part to procedural limitations, as well as a lack of safeguards of judicial independence.

Implementation of the ICC Statute and the Possibility of Positive Complementarity

Given persistent concerns about the fairness and efficiency of DRC military courts, there is an urgent need for the Congolese Parliament to implement the ICC Statute into domestic law. Two members introduced a bill to this end in March 2008.¹³ The bill would not only transfer jurisdiction over international crimes to civilian courts, but also incorporate the Rome Statute's definitions of international crimes into national law and improve victim participation and due process guarantees in national proceedings.¹⁴

Beyond this legislation, further efforts are necessary to reform the justice system encompassing both military and civilian courts, reinforce all stages of the criminal justice process including strengthening the penitentiary system, and promote fair trials. The international community has an important role to play in assisting the Congolese legal system to meet its obligations to investigate and prosecute international crimes.

In 2008 the ICC Prosecutor announced that he would open a third investigation into crimes committed in the ongoing conflict in the eastern DRC provinces of North and South Kivu,¹⁵ and that pursuant to "positive complementarity," his office would explore sharing information about its investigations with Congolese judicial authorities. Since the announcement, the OTP has provided few details about the status of this third investigation, due to the complex security situation in those provinces. Congolese authorities that have cooper-

ated with the ICC have expressed the interest and need to build their capacity, but they feel that so far this cooperation has not yet been mutual.¹⁶ Further exploration of how the ICC and others can fulfill the aspiration of positive complementarity is needed.¹⁷

Peace and Justice

Both peace and justice continue to elude DRC despite the intervention of the ICC. If the ICC does not pursue more cases in DRC, there is a risk it will be perceived as pursuing a selective justice policy that serves the interests of President Kabila. Skeptics cite the timing and circumstances of the cases against Lubanga, Katanga, Ngudjolo, Bemba, and Bosco Ntaganda, who remains at large.

DRC has a mixed record of cooperation with the ICC, depending on the case. The government's initial cooperation with the Court in respect to the Ituri investigations was exemplary and in line with its international obligations. But the Ituri conflict involved ethnic militias that served as proxy rebels backed by occupying Ugandan forces. Shortly after DRC ratified the Rome Statute, Uganda—which had been occupying northeastern DRC illegally—signed the Luanda Agreement on September 6, 2002, and withdrew its troops. But the worst fighting in Ituri continued into 2003, as Uganda continued to back rival Congolese ethnic militias to maintain access to the district's natural resources. The ICC then began investigating the atrocities committed there, focusing on those that occurred in 2002 and 2003. Congolese military justice officials, UN peacekeepers (MONUC), and Congolese intermediaries cooperated with the Court in developing the ICC cases against Lubanga, Katanga, and Ngudjolo. Likewise, DRC and MONUC were instrumental in arresting and transferring those suspects to The Hague.

This should be contrasted to the case of Bosco Ntaganda, subject of a fourth and outstanding ICC arrest warrant for crimes allegedly committed in Ituri alongside Lubanga from 2002 to 2003. Ntaganda joined another rebel group, the Congrès National pour la Défense du Peuple (CNDP), which fought against the government in North Kivu. When the ICC's warrant for Ntaganda was under seal, DRC requested MONUC's assistance in arresting Ntaganda, but MONUC did not take any action in cooperating with this request. The ICC then unsealed its arrest warrant in April 2008. By September 2008, a tentative peace deal unraveled and the CNDP committed more atrocities, including a massacre in Kiwanja in November 2008 carried out allegedly under Ntaganda's command.

In January 2009, DRC and Rwanda reached a political deal pursuant to which Ntaganda replaced the CNDP leader. This paved the way to agreements between the government and the CNDP that resulted in Ntaganda's integration into the Congolese army. Since then, DRC has not just reversed its position by declaring that it would not pursue Ntaganda's arrest in the interests of peace; it has named Ntaganda a senior commander in ongoing military operations. As Ntaganda has demonstrated that he is not deterred by a pending arrest warrant, the status quo is a tenuous peace at best. The Congolese government should be held accountable for its failure to cooperate in his case. Moreover, the ICC should consider expanding the charges against Ntaganda to include the alleged crimes committed when he was CNDP's chief of staff and since he has been a commanding officer of the Congolese military since 2009.

Bemba's case also highlights tensions between the ongoing conflict, peace efforts, and the fledgling democratic process in DRC. His arrest and transfer to The Hague angered some in DRC because of his prominence as Kabila's leading political opponent. The fact that Bemba's arrest was carried out by Belgian authorities pursuant to a sealed arrest warrant constituted an important precedent for international cooperation with the ICC, but also raised ques-

tions in DRC of whether the Court and Belgium were supporting Bemba's political neutralization. A large segment of the Congolese population remains hostile to the ICC's arrest of Bemba. As his supporters hail from western Congo, including DRC's capital of Kinshasa, the mainstream media has been indifferent to the ICC.¹⁸

The fact that the ICC is prosecuting Bemba, while investigations and prosecutions of serious violations committed by the government remain limited, further reinforces the perception that the current strategy is one-sided and beneficial to Kabila. The men were once military as well as political rivals.¹⁹ Both were leading figures of opposing forces during the Congo wars, Bemba at the head of the MLC and Kabila first as deputy chief of staff of the Congolese armed forces, then chief of staff, and then with supreme command when he inherited the presidency from his father in January 2001. Congolese, international, and UN human rights reports covering the wars reveal serious allegations of international crimes perpetrated by all sides to the conflict, including those under Bemba's and Kabila's commands. Furthermore, the Congolese armed forces and police have continued to commit serious violations that could be crimes against humanity and war crimes.²⁰ The ICC should continue its investigations in DRC to look at all sides of the conflict.

Finally, there is confusion in Congo as to why Bemba is being prosecuted for alleged crimes committed by his troops in CAR. All conflicts in the Central African region have had transnational dimensions. But beyond the decision of the International Court of Justice,²¹ there has been no accountability for the role of Ugandans or Rwandans in DRC. Lubanga, Katanga, and Ngudjolo were all leaders of local militia operating in Ituri, a conflict limited in time and scope against the backdrop of the DRC's protracted and multiple wars over the last two decades. More will be needed to set a standard in the fight against impunity in Congo in terms of considering the involvement of regional actors in the conflict.²²

Impact of the ICC on Victims and Affected Communities

Given DRC's vast size and successive conflicts, many communities identify themselves as victims. This inevitably makes it challenging for the ICC's targeted investigation of a handful of crimes to contribute to a widespread sense that justice is being served.

Before Lubanga's trial began, few people in DRC were aware of the Court. According to "Living with Fear,"²³ a survey that ICTJ and the Berkeley-Tulane Initiative on Vulnerable Populations conducted in late 2007 in Ituri and the Kivus, fewer than 30 percent of the people in these areas had heard of the ICC or the Lubanga trial, which was about to begin. Two-thirds expressed a preference for pursuing criminal accountability for suspected war criminals, while a third favored nonjudicial measures to achieve peace. With respect to criminal justice options, most respondents favored national trials (45 percent). In contrast, only 7 percent favored trying suspected Congolese war criminals abroad, and 8 percent did not support trials at all. Of those who had heard of the ICC, only 16 percent had heard of the Trust Fund for Victims. These figures confirm the results of a 2007 ICTJ study that concluded the Court's outreach strategy in DRC from 2003 to 2006 needed to be expanded.²⁴

The ICC Registry then undertook several measures to improve its outreach strategy through the Outreach Unit of the Public Information and Documentation Section (PIDS). For the Lubanga trial,²⁵ PIDS hired additional outreach staff in DRC. It has targeted Ituri communities in particular by diffusing multimedia summaries of the trial there.²⁶ Ituri victim groups positively received the visits of the ICC Prosecutor and President in 2009.

Still, further outreach efforts are necessary. In particular, the ICC should vary its messaging strategy to address different perceptions across ethnic communities within Ituri, as well

as at the regional and national levels throughout DRC. The conflict in Ituri involved rival Hema and Lendu ethnic groups. Lubanga, a Hema, is on trial for recruiting and using child soldiers, while Katanga and Ngudjolo—who are Lendus—are being tried for war crimes and crimes against humanity committed in the Bogoro massacre of Hema in 2003. It might appear that the Prosecutor has sought to strike a balance by targeting alleged suspects from both Hema and Lendu communities. But the Lendu remain skeptical about the Court's work since the victims in the Lubanga trial are children from Lubanga's Hema ethnic group, rather than Lendu civilians.²⁷

Fighting in DRC has continued until recently, but the ICC is not seen to have an impact yet outside of Ituri. Victims in North and South Kivu have questioned why the ICC is limiting its actions to Ituri. While the ICC has opened a third investigation into crimes committed in the Kivus, some human rights organizations there say the Court has not contributed to the fight against impunity.²⁸ They believe that the ICC is unwilling to investigate cases in ongoing conflicts, where they view that justice should be playing a role in halting atrocities.

Finally, the Congolese conflicts have been marked by the widespread use of rape and sexual violence. Some women's groups have been disappointed that the Lubanga case did not encompass such charges. While sexual violence charges have been included in the cases against Katanga, Ngudjolo, and Bemba, further efforts should be undertaken to support high-level prosecutions for charges of rape and sexual violence.

Conclusion

It is significant that the first trials before the ICC hail from Congo, the site of one of the world's most devastating conflicts since World War II. But both the ICC and the Congolese government must do more to break the cycle of impunity in DRC.

For its part, the ICC should consider expanding its prosecutorial strategy, or its impact might remain limited. The Court can do so first by expanding the scope of its investigations and increasing the number of cases it pursues in DRC. Apart from its third investigations into North and South Kivu, it should also consider crimes committed in other regions of DRC, including those allegedly committed by government forces. Most importantly, just as the ICC is prosecuting Bemba for his role in crimes committed in CAR, the ICC should explore further the role of regional actors in DRC.

The Congolese Parliament should adopt the Rome Statute Implementation Bill immediately. Combined with international support for the Congolese justice system, this legislation could assist the delivery of criminal justice to victim communities and respond to ongoing violations by government security forces and armed rebel groups before Congolese courts.

Beyond the ICC's jurisdiction, the massive scale and serious nature of past crimes committed in DRC leave a looming impunity gap that a criminal justice strategy alone will not be able to address. What is required is a comprehensive approach for addressing DRC's legacy of mass atrocities in order to establish the rule of law and address victims' diverse needs for truth, justice, reparations, and institutional reform.

Endnotes

1. Thomas Lubanga is the subject of the ICC's first trial, which began on Jan. 26, 2009. He is charged with two counts of war crimes for enlisting and conscripting children younger than 15 and using them actively to take part in hostilities.

2. The trial of Germain Katanga and Mathieu Ngudjolo Chui began on Nov. 24, 2009. They are charged with three counts of crimes against humanity (murder, rape, and sexual slavery) and seven counts of war crimes (willful killings, rape, sexual slavery, pillaging, destruction of property, directing an attack against civilians, and using children younger than 15 to actively participate in hostilities).
3. On June 15, 2009, the Pre-Trial Chamber confirmed two charges of crimes against humanity (murder and rape) and three charges of war crimes (murder, rape, and pillaging) against Bemba alleging his responsibility as a military commander.
4. Lubanga was arrested and detained on March 19, 2005, pursuant to an arrest warrant that Congolese military prosecutors issued for charges of genocide and crimes against humanity under Congolese law.
5. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision of Pre-Trial Chamber I on the Prosecutor's Application for a Warrant of Arrest, Article 58, Feb. 10, 2006, para. 31.
6. Loi No. 023/2002 du 18 Nov. 2002 portant Code Judiciaire Militaire and Loi No. 024/2002 du 18 Nov. 2002 portant Code Pénal Militaire.
7. In monist legal systems an international treaty once ratified is considered incorporated into domestic law.
8. Avocats Sans Frontières identified 13 cases in *Etudes de jurisprudence: l'application du Statut de Rome de la Cour pénale internationale par les juridictions de la République démocratique du Congo* (March 2009). Nevertheless, given that Congolese judicial decisions are not routinely published due to the lack of resources, it is difficult to determine the exact number of trials for international crimes that have occurred to date.
9. Mbandaka Military Garrison Court, *Songo Mboyo Case*, RPA 615/2006 (April 12, 2006) (on file with ICTJ).
10. The trial and appellate court decisions in this case provided reasoned judgments, including direct references to the Statute, and cited international jurisprudence as support.
11. In June 2009, ICTJ's DRC program held an evaluation workshop focusing on five international crimes trials before Congolese military jurisdictions. For each case, a judge, prosecutor, defense counsel, victims' legal representative, and human rights and trial monitoring NGO participated. To see an executive summary of the conclusions on how those trials were conducted and recommendations for reforming the military justice system that ensued, go to www.ictj.org/static/Africa/DRC/ICTJ_DRC_Atelier_Recommandations_R2009_fr.pdf. After this conference, ICTJ interviewed victims who participated in four international crimes trials in Equateur Province and Ituri District in Province Orientale in October and December 2009 to better understand their perceptions of participating in international crimes trials in military courts. This led to another workshop in March 2010 that focused on how to improve the effective implementation of judicial damage payments for victims. A report and recommendations from that workshop are forthcoming.
12. ICTJ interviews with victims in the *Songo Mboyo and Pillages de Mbandaka* cases from Equateur Province were conducted in October and December 2009 and March 2010.
13. For more details about legislative efforts to implement the Rome Statute into Congolese legislation, see ICTJ's fact sheet on this issue (www.ictj.org/static/Factsheets/ICTJ_DRC_StatutdeRome_fs2009_fr.pdf).
14. While the Rome Statute Implementation Bill makes a major contribution to harmonizing Congolese law with its Statute obligations, Congolese human rights and humanitarian lawyers convened by ICTJ, Avocats Sans Frontières, and the Konrad Adenauer Foundation have proposed additional amendments. (See www.ictj.org/static/Africa/DRC/ICTJ_DRC_StatutdeRome_Reccs_2008_fr.pdf).
15. See *Report of the Activities of the Court to the Assembly of States Parties, Eighth Session*, para. 37, ICC-ASP/8/40 (Oct. 21, 2009).

THE ROME STATUTE REVIEW CONFERENCE

June 2010, Kampala

The Review Conference of the Rome Statute provides a unique opportunity to evaluate the progress of the International Criminal Court and the challenges that it faces. ICTJ brings a wealth of expertise in situation countries to the discussions of complementarity, peace and justice, and the impact of the ICC on the status of victims. ICTJ has developed a briefing paper series for the conference available at www.ictj.org.

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16. This statement is based on ICTJ interviews with several Congolese military court officials who have cooperated on cases with the ICC.
17. Some recent initiatives by multilateral and bilateral justice-sector donors have begun to examine options for improving the investigation and prosecution of serious crimes. See generally *Rebuilding courts and trusts: An assessment of the needs of the justice system in the Democratic Republic of Congo*, International Legal Assistance Consortium (August 2009).
18. National media coverage of the ICC focuses more on developments in Bemba's case than on developments related to the Lubanga and Katanga/Ngudjolo cases. Some publications representing views of the political opposition, however, run sensationalist coverage that is hostile to the ICC.
19. One Belgian commentator on DRC politics said that Bemba's arrest has "decapitated" any viable political opposition. See Collette Braeckman, "Quelques questions sur le système Kabila," available at <http://blogs.lesoir.be/colette-braeckman/2010/04/10/quelques-questions-sur-le-systeme-kabila/>.
20. In addition to the ongoing crimes committed in North and South Kivu, government forces committed systematic attacks in the western Bas Congo province from 1997 to 2008. *"We will Crush you": The Restriction of Political Space in the Democratic Republic of Congo*, Human Rights Watch (Nov. 28, 2008).
21. International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Dec. 19, 2005).
22. Another potential target for the ICC should be Laurent Nkunda, the former CNDP leader whom Bosco Ntaganda deposed who has been under house arrest since January 2009 in Rwanda. The likelihood of Rwanda surrendering Nkunda to the ICC remains slim. But it is precisely because of Nkunda's high-ranking position and alleged responsibility for a series of serious international crimes in the DRC since 2002, allegedly committed with the backing of Rwanda, that Nkunda is a potentially important target for an ICC investigation.
23. This survey covered 2,620 people.
24. Petit, Franck, *Sensibilisation à la CPI en RDC: Sortir du »Profil Bas*, ICTJ, March 2007.
25. *Communications Strategy, Trial of Thomas Lubanga*, Outreach Unit, Public Information and Documentation Section (PIDS) (The Hague, January 2009).
26. *Outreach Report 2009*, ICC PIDS Outreach Unit.
27. ICTJ interviews with Lendu leaders, Ituri. July and August 2009; Lendu community memorandum to the ICC Prosecutor during his visit to Ituri in July 2009 (on file with ICTJ).
28. ICTJ interviews with human rights organizations operating in North and South Kivu, October and November 2009, and March 2010.



The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. To learn more, visit www.ictj.org

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