



# DR CONGO: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL JUDICIAL RESPONSES TO THE MASS ATROCITIES

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## ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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## EXECUTIVE SUMMARY

Heinous mass atrocities have been committed during the armed conflicts in the Democratic Republic of the Congo (DRC). Only a few of them have been subject to judicial proceedings: Five high ranking commanders are pursued by the International Criminal Court (ICC) in The Hague for atrocities committed in the DRC and, on the national level, atrocities are addressed by Congolese military courts. But the military courts only deal with a relatively small amount of cases, and are internationally criticized for lacking judicial independence and violating due process. In addition, thus far, most of the defendants before military courts were low-ranking soldiers. Hence, the combined impact of the national and international judicial responses to the atrocities is sub-optimal.

This report posits that, given the limited capacity of international courts in terms of the number of perpetrators they can prosecute, an effective fight against impunity requires that the international community adopt a comprehensive approach which promotes the utilization of international and national accountability processes in parallel. Calibrating international and national trials would also ensure that legal norms developed by international courts are applied in national trials. In the case of the DRC, it is particularly important that international trials are complemented by (fair and genuine) national proceedings, given that atrocities are still being committed on a daily basis by members of government and non-state forces.

While the international community has not attempted to calibrate international and national trials in the DRC, the ICC has still had some impact on Congolese courts. Elements of this impact are identified and assessed in this report, which also offers ways to maximize any positive impact identified. To identify ICC impact on the DRC, the author analyzed various documents and conducted in-depth interviews with 16 core professionals affiliated with the ICC or the DRC justice system.

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## LIST OF ABBREVIATIONS

ASF	Avocats Sans Frontières
CNDP	Congrès National pour la Défense du Peuple
DRC	Democratic Republic of the Congo
EDF	European Development Fund
FARDC	DRC armed forces
FDLR	Forces Démocratiques de Libération du Rwanda
FNI	Front des Nationalistes et Intégrationnistes
FPLC	Forces Patriotiques pour la Libération du Congo
FRPI	Force de Résistance Patriotique en Ituri
HRW	Human Rights Watch
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
LRA	Lord's Resistance Army
MLC	Movement for the Liberation of the Congo
MONUC	United Nations Organization Mission in the DRC
MONUSCO	United Nations Organization Stabilization Mission in the DRC
OSI	Open Society Initiative
OTP	Office of the Prosecutor of the ICC
RCD/ML	Congolese Rally for Democracy/Liberation Movement
RCD/N	Congolese Rally for Democracy/National
RCN	Réseau des Citoyens Network
Rejusco	Programme for the Restoration of the Judicial System in Eastern Congo
TRC	Truth and Reconciliation Commission
UNDP	UN Development Programme
UNHRC	UN Human Rights Council
UNOHCHR	UN Office of the High Commissioner for Human Rights
UNSC	UN Security Council
UPC	Union des Patriotes Congolais
WIGJ	Women's Initiatives for Gender Justice

# 1. INTRODUCTION

Millions of civilians died in the succession of armed conflicts that plagued the Democratic Republic of the Congo (DRC) over the last two decades. The deaths resulted either directly from the violence or from its indirect effects such as starvation and diseases. In addition, scores of civilians have been sexually tortured, forcefully displaced, and subjected to other heinous acts by countless armed perpetrators. The latest of the DRC conflicts, which commenced in August 1998, has been considered the “most devastating to civilians since the Second World War”.<sup>1</sup> The conflict officially ended in June 2003. However, local hostilities continue to this day in the DRC, especially in the country’s eastern provinces of Orientale, North Kivu and South Kivu.

The DRC is a party to the Rome Statute which established the International Criminal Court (ICC). In April 2004, the DRC requested the ICC to investigate and prosecute the atrocities committed on its territory. In parallel, Congolese military courts have prosecuted some of the atrocities on the national level (see section 5.2 below). Defendants before military courts have included both government soldiers and members of non-state armed groups. However, the military courts have addressed only several out of numerous atrocities in the DRC, and have been internationally criticized for lacking judicial independence and violating minimum fairness standards (see section 5.3 below).

The ICC has thus far charged five militia leaders with atrocities committed in the DRC. Trials commenced against three of them, for crimes allegedly committed in the Ituri district of the DRC’s Orientale province (see section 6.2 below). The ICC can only address crimes committed after 1 July 2002, the date on which the Rome Statute entered into force.<sup>2</sup> The ICC Prosecutor has acknowledged that crimes committed in the

*The ICC Prosecutor has acknowledged that crimes committed in the DRC since 2002 include thousands of deaths by mass murder and summary execution, a pattern of rape, torture, forced displacement and the illegal use of child soldiers. In Ituri alone, he added, at least 5,000 civilians have died as a direct consequence of the violence between July 2002 and September 2003*

<sup>1</sup> ICC, ‘Second Assembly of States Parties to the Rome Statute of the International Criminal Court: Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo’ (8 September 2003) <[http://untreaty.un.org/cod/icc/asp/2ndsession/ocampo\\_statement\\_8sep\(e\).pdf](http://untreaty.un.org/cod/icc/asp/2ndsession/ocampo_statement_8sep(e).pdf)> accessed on 9 March 2011 (hereinafter: “ICC Prosecutor’s Statement of 8 September 2003”), p. 3.

<sup>2</sup> Earlier atrocities committed in the DRC were identified in a report published in October 2010 by the UN Office of the High Commissioner for Human Rights (UNOHCHR). The report lists over 600 events where atrocities were committed



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Thus, while the ICC pursues five suspects for atrocities committed in the DRC, and Congolese military courts prosecute a handful of crimes in trials of questionable quality, the vast majority of perpetrators associated with the atrocities in the DRC enjoy total impunity. Some notable high level suspects such as Bosco Ntaganda and Jean-Pierre Biyoyo were even given senior positions in the Congolese military (see section 4.1 below).

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## 1.1 OBJECT OF REPORT

International courts are created in the aftermath of mass atrocities to promote accountability through fair trials.<sup>4</sup> But they can only prosecute a handful of perpetrators, which in mass atrocity cases represents a small fraction of the criminals. Therefore, even if they try the highest level perpetrators, international courts have a greater chance to establish accountability if their process is complemented by national atrocity-related prosecutions in the countries they address.<sup>5</sup> Otherwise, an accountability gap would

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in the DRC between March 1993 and June 2003. It recommends creating a hybrid court to prosecute the top perpetrators. See UNOHCHR, 'DRC: Mapping human rights violations 1993-2003' (October 2010) <<http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx>> accessed on 12 January 2011 (hereinafter: "UNOHCHR Mapping Report"). Since the present report is concerned with the interaction between existing international and national proceedings, it will not address the proposed hybrid tribunal.

<sup>3</sup> ICC Press Release, 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', ICC-OTP-20040623-59 (23 June 2004) <<http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB>> accessed on 19 August 2010. In citing these allegations, the ICC Prosecutor was relying on reports by states, international organizations and NGOs.

<sup>4</sup> International courts have other goals as well, but this report focuses on their goal of establishing accountability through fair trials.

<sup>5</sup> In principle, national trials can also take place in third states, under the principle of universal jurisdiction. However, it is unlikely that many such prosecutions would take place in the absence of the suspects and evidence in such third states. Even when suspects are present in third states, these states may not be legally able or politically willing to prosecute them. Furthermore, fair prosecutions before the domestic courts of the state of the crimes could also enhance the legitimacy of the post-conflict government and judiciary, and be more sensitive to local nuances than prosecutions by third states. It is noted that while the principle of universal jurisdiction is not accepted everywhere, it has been used to try German, Yugoslav and Rwandan suspects. For references to some of these universal jurisdiction cases see Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University

remain which could prevent the eradication of impunity.<sup>6</sup> Even where national trials are held, an accountability gap may remain if they are too sporadic or poor in quality.

The ICC was established through the Rome Statute, a multilateral treaty which reiterates the obligation of states to investigate and prosecute atrocities. While lacking strong enforcement powers to ensure that states fulfill this obligation, the Rome Statute encourages states to investigate and prosecute atrocities by threatening that otherwise the ICC will do so in their stead (at least in relation to the gravest crimes).<sup>7</sup> But even when the ICC becomes involved, due to its limited resources it can only prosecute a few perpetrators in each case.<sup>8</sup> Thus, national justice processes will still be necessary to bridge the accountability gap.

The position of this report is that, in the wake of atrocities, the international community must adopt a comprehensive approach which actively promotes the parallel utilization of international and national accountability processes. Until then, accountability may not be achieved even when the ICC intervenes. While such a comprehensive approach can (and should) be implemented through a variety of means, one way to encourage fair and genuine national accountability processes is to ensure that the ICC and its normative framework have a positive impact on domestic procedures.<sup>9</sup>

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Press, 2004), pp. 86-219. For arguments opposing the principle of Universal Jurisdiction see, e.g., George P. Fletcher, 'Against Universal Jurisdiction', 1 J. Int'l Crim. Just. 580 (2003). For arguments supporting the principle of Universal Jurisdiction see, e.g., Albin Eser, 'For Universal Jurisdiction: Against Fletcher's Antagonism', 39 U Tulsa L.R. (2004) 955.

<sup>6</sup> The phenomenon described by the phrase "accountability gap" is sometimes described as an "impunity gap". See, e.g., ICC, 'Paper on Some Policy Issues before the Office of the Prosecutor' (Sept 2003), p. 3 <[http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf)> accessed on 20 December 2010 (hereinafter: "ICC OTP Paper on Some Policy Issues").

<sup>7</sup> The Rome Statute, in Article 17, clarifies that the ICC can exercise its jurisdiction over atrocities only when no State is willing and able to prosecute them. This organizing principle, according to which states have the primary jurisdiction to prosecute atrocities and the jurisdiction of the ICC is residual or complementary to state jurisdiction, is commonly referred to as the "principle of complementarity". For a more detailed discussion of this principle and relevant literature see note 130 below and accompanying text.

<sup>8</sup> One of the fundamental principles of the Prosecutorial Strategy of the ICC Prosecutor is the principle of "focused investigations and prosecutions". See ICC, 'Prosecutorial Strategy 2009-2012' (1 February 2010) <[http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorial\\_Strategy20092013.pdf](http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorial_Strategy20092013.pdf)> accessed on 5 March 2011 (hereinafter: "ICC Prosecutorial Strategy 2009-2012"), paras. 15,18-21.

<sup>9</sup> The official policy of the ICC Prosecutor is to encourage genuine national proceedings where possible. This policy has been termed as "positive complementarity". See relevant discussion in section 8.2 below.

As this report will show, the ICC and the Rome Statute already had some positive impact on domestic atrocity-related procedures in the DRC. The object of this report is to identify elements of this impact and inspire policy makers to maximize them.<sup>10</sup> The report identifies the ICC's domestic impact on the DRC in the following four

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areas: (1) the domestic application of international norms in atrocity-related proceedings; (2) rates of and trends in domestic prosecutions of atrocity crimes; (3) domestic sentencing practices in relation to atrocity crimes; and (4) national capacity to handle domestic atrocity-related proceedings. These four areas of focus were chosen as indicators of whether the ICC has encouraged domestic accountability processes in the DRC. It is stressed that the report focuses on the ICC's impact on *formal* and *criminal* national procedures, rather than alternative justice means such as truth commissions or traditional (customary) judicial processes.<sup>11</sup>

## 1.2 STRUCTURE AND METHODOLOGY

The present report is a case-study of the ICC's impact on domestic atrocity-related proceedings in the DRC. The cut-off date for collecting information for the report was 20 October 2011, and the report therefore does not evaluate or refer to subsequent developments. As a case-study, the report provides a broad preliminary analysis of the four areas described in section 1.1 above, rather than an in-depth thematic analysis.<sup>12</sup> Parts 2 and 3 of the report provide a general background on the DRC and its conflicts and atrocities. In part 4, the report outlines the political and legal conditions in the DRC, in an attempt to identify the willingness and ability of the local authorities to prosecute the

<sup>10</sup> Not all potential domestic impacts of international courts are desirable. For example, the holding of trials by an international court may provide an excuse for national courts (or other accountability mechanisms) to remain inactive. That is a negative impact, if we accept the above theory that the parallel activation of international and national accountability processes is desirable. A positive impact would be the encouragement by an international court of national justice procedures which are fair, and address perpetrators that are not handled by the international court.

<sup>11</sup> Customary courts applying customary law reportedly settle around 75% of disputes in the DRC. I thank Dunia Zongwe for drawing my attention to this matter.

<sup>12</sup> Other reports under the DOMAC Project provide more comprehensive analyses of each of these areas of impact. See, e.g., Antonietta Trapani, 'Normative Impacts of the ICC in the DRC' <<http://www.domac.is/reports/>> (DOMAC Report, forthcoming) (hereinafter: "Trapani DRC Report"); Yael Ronen, 'Report on Domestic Atrocity-Related Proceedings in the DRC' <<http://www.domac.is/reports/>> (DOMAC Report, forthcoming) (hereinafter: "Ronen DRC Report"); Alejandro Chehtman and Ruth Mackenzie, Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice, September 2009 <<http://www.domac.is/reports/>> accessed 20 October 2011.

atrocities. Parts 5 and 6 describe the international and national judicial responses to the atrocities, namely, the ICC proceedings regarding the DRC and the national atrocity-related trials by Congolese military courts. In part 7, the cooperation between the ICC and the DRC is discussed. Part 8 is the core of the report – it assesses the ICC’s impacts on the national response to the atrocities, in the four areas described in section 1.1 above. Part 9 concludes the report and recommends ways to maximize the ICC’s positive impact on the DRC.

In identifying ICC impact, the report adopts a qualitative methodology based on the analysis of in-depth interviews with 16 core professionals affiliated with the ICC or the DRC justice system. The interviewees were selected based on their key positions within the ICC or their knowledge of the DRC justice system. The interviews were conducted by the author in The Hague, Brussels, the DRC, Rwanda and Tanzania, between July 2008 and August 2010. Most of the interviewees did not want the information they provided to be attributed directly to them, hence they are cited in this report with generic references, such as “an ICC official” or “a Congolese military judicial official”. In addition, information used in this report was gathered from credible secondary sources, including UN documents, international and national case law, academic and news articles, NGO reports, etc. Finally, a draft of this report was reviewed by five legal professionals familiar with both the ICC and the DRC justice system, and their comments were taken into account.

A methodology based on interviews was utilized to gain a better understanding of the interrelationship and interaction between the international tribunals and domestic processes, and to supplement existing data. While this methodological approach is limited in that observations are based on perceptions of interviewees, the report explicitly notes which information is based on interviews and relies on published documents where such documents are available.

## 2. COUNTRY BACKGROUND

### 2.1 GENERAL<sup>13</sup>

The DRC is the second largest country in Africa, covering an area of 2,344,858km<sup>2</sup> (more than half the size of the European Union). It borders Angola, Burundi, Central African Republic, Republic of the Congo, Rwanda, Sudan, Tanzania, Uganda, and Zambia. The country's capital city is Kinshasa. The DRC is rich in natural resources, including cobalt, copper, niobium, tantalum, petroleum, industrial and gem diamonds, gold, silver, zinc, manganese, tin, uranium, coal, hydropower, and timber. However, decades of conflict and mismanagement adversely affected the DRC's economy.

The DRC's population of about 70.9 million includes members of over 200 African ethnic groups, the majority of which are Bantu.<sup>14</sup> The prevailing religions are Roman Catholic (50%), Protestant (20%), Kimbanguist (10%), Muslim (10%), and other beliefs, including syncretic and indigenous faiths (10%). Administratively, the country is divided into the City of Kinshasa and 10 provinces (Bandundu, Bas-Congo, Equateur, Kasai-Occidental, Kasai-Oriental, Katanga, Maniema, Orientale, North Kivu and South Kivu).<sup>15</sup> The DRC's languages include French (official), Lingala (lingua franca), Kingwana (a dialect of Swahili), Kikongo, and Tshiluba. The life expectancy at birth in the DRC is 54.73 years.

Established as a Belgian colony in 1908, the Republic of the Congo gained its independence on 30 June 1960. Following five years of political and social instability, Colonel Joseph Desiré Mobutu seized power through a coup and declared himself president in November 1965. He subsequently changed the name of the country to Zaire (which would remain its formal name until 1997) and his own name to Mobutu Sese Seko. Mobutu retained his position for 32 years. He systematically used Congo's mineral

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<sup>13</sup> The information in this section is based on the following two sources: CIA World Fact Book <<https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>> accessed on 30 August 2010 (hereinafter: "CIA World Fact Book"), and International Crisis Group, 'Conflict History: DR Congo' <<http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/dr-congo.aspx>> accessed on 21 July 2010 (hereinafter: "ICG, DRC Conflict History").

<sup>14</sup> The four largest tribes in the DRC are the Mongo, Luba, Kongo (all Bantu), and the Mangbetu-Azande (Hamitic). These four tribes make up about 45% of the population.

<sup>15</sup> Kinshasa has the status of a province. According to the new Congolese Constitution which was adopted in 2006, the DRC is to be re-divided administratively into the city of Kinshasa and 25 provinces, but this plan has not yet been implemented. See Constitution of the Democratic Republic of the Congo (18 February 2006) <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=193675](http://www.wipo.int/wipolex/en/text.jsp?file_id=193675)> accessed on 5 March 2011 (hereinafter: "DRC Constitution of 2006"), Article 2.

wealth to consolidate power, co-opt potential rivals and to enrich himself and his allies by developing a massive patronage system.

In May 1997, Mobutu was ousted by a rebellion led by Laurent Desiré Kabila and backed by Rwanda and Uganda. Kabila became president, and renamed the country the Democratic Republic of the Congo. In August 1998, his regime was challenged by a second insurrection. Kabila's former allies, Rwanda and Uganda, turned against him and supported the insurrection. Angola, Namibia and Zimbabwe intervened to support Kabila. A cease-fire was signed in July 1999 but fighting continued. In January 2001, Laurent Desiré Kabila was assassinated and his son, Joseph, was named head of state (for further details about the DRC conflicts see section 3.1 below).

In October 2002, the new president Joseph Kabila was successful in negotiating the withdrawal of Rwandan forces from eastern DRC. Two months later, the various factions involved in the DRC conflict signed a peace agreement in Pretoria, South Africa (Pretoria Peace Agreement).<sup>16</sup> This was followed by the establishment of a transitional power-sharing government in June 2003. While the Pretoria Peace Agreement brought relative peace, local hostilities between the DRC's armed forces (FARDC) and rebel groups, and among rebel groups, continued in various regions of the country.

## 2.2 POLITICAL AND LEGAL SYSTEMS<sup>17</sup>

The DRC is a presidential democratic republic, with a bicameral legislature consisting of a Senate (108 seats) and a National Assembly (500 seats). A transitional government was set up in July 2003, with Joseph Kabila as president and four vice presidents representing the former government, former rebel groups, the political opposition, and civil society. The transitional government held a successful constitutional referendum in December 2005, and on 18 February 2006 a new Constitution was adopted. Under the new Constitution, the president is elected by popular vote for a five-year term and is eligible for a second term. He appoints the Prime Minister and national Ministers.

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<sup>16</sup> Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo, Signed in Pretoria (Republic of South Africa) on 16 December 2002 <<http://www.reliefweb.int/library/documents/2002/gov-cod-16dec-02.pdf>> accessed on 3 September 2010 (hereinafter: "Pretoria Peace Agreement of 2002"). The Agreement was signed by the Government of the DRC, the Movement for the Liberation of the Congo (MLC), the political opposition, civil society, the Congolese Rally for Democracy/Liberation Movement (RCD/ML), the Congolese Rally for Democracy/National (RCD/N), and the Mai-Mai, before representatives of the UN and the President of South Africa and the serving President of the Organization of the African Unity. It was negotiated and concluded within the framework of the "Inter-Congolese Dialogue: Political Negotiations on the Peace Process and on Transition in the DRC".

<sup>17</sup> The source for this section, unless stated otherwise, is the CIA World Fact Book (n 13).



Elections for the presidency, National Assembly, and provincial legislatures were held on 30 July 2006 (with a run-off on 29 October 2006). The elections, considered by outside observers to be relatively free and fair, confirmed Joseph Kabila as president (after a second election round, Kabila received 58% of the votes and his competitor Jean-Pierre Bemba Gombo received 42% of the votes).<sup>18</sup> The National Assembly was installed in September 2006 and Joseph Kabila was inaugurated president in December 2006. Provincial assemblies were constituted in early 2007, and elected governors and national senators in January 2007. The next elections are set for 27 November 2011.

The legal system in the DRC is primarily based on the Belgian civil law system.<sup>19</sup> The court system includes military and civilian courts. The highest court in the DRC is the Supreme Court, followed by the State Security Court, the Court of Appeals (*Cour d'Appel*), the Tribunal de Grande Instance and lower magistrates' courts.<sup>20</sup> The Congolese Constitution of 2006 contemplates the replacement of the Supreme Court with three new courts – the Constitutional Court, the Court of Cassation (or Court of Appeals) and the Council of State. But these three high courts have not yet been established.<sup>21</sup> Until the reform is completed, the Supreme Court continues to operate.<sup>22</sup> In April 2002, the DRC joined the Rome Statute. As of October 2011, a draft law on the domestic implementation of the Rome Statute is before the DRC National Assembly.<sup>23</sup>

The military courts in the DRC include the Military Garrison Tribunals, Military Courts and the Military High Court.<sup>24</sup> These military courts, under Congolese law as of October 2011, have exclusive jurisdiction in the DRC over the international crimes of genocide,

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<sup>18</sup> It is noted that Bemba received more votes than Kabila in the Kinshasa region. His supporters claim that he won the national elections and that Kabila's victory was fraudulent. See BBC, 'Kabila named DR Congo poll winner' (15 November 2006) <<http://news.bbc.co.uk/2/hi/africa/6151598.stm>> accessed on 11 January 2011.

<sup>19</sup> Traditional customary law provides a second basis of the Congolese legal system. I thank Dunia Zongwe for drawing my attention to this matter.

<sup>20</sup> Dunia Zongwe, Francois Butedi and Clement Phebe, 'The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview', Hauser Global Law School Program, New York University School of Law (December 2007) <[http://www.nyulawglobal.org/globalex/democratic\\_republic\\_congo.htm](http://www.nyulawglobal.org/globalex/democratic_republic_congo.htm)> accessed on 30 January 2011 (also noting that disputes at the community level can be settled by traditional leaders according to customary law).

<sup>21</sup> I thank Dunia Zongwe for drawing my attention to this matter.

<sup>22</sup> DRC Constitution of 2006 (n 15), Art. 223 ("*En attendant l'installation de la Cour constitutionnelle, du Conseil d'Etat et de la Cour de cassation, la Cour suprême de justice exerce les attributions leur dévolues par la présente Constitution*").

<sup>23</sup> See "*Proposition de Loi de mise en oeuvre du Statut de Rome de la Cour pénale internationale*", March 2008, by parliamentarians Nyabirungu Mwene Songa and Crispin Mutumbe Mbuya (copy with author) (hereinafter: "DRC Draft Law on Domestic Implementation of the Rome Statute").

<sup>24</sup> The decisions of the Military High Court can be appealed to the Court of Cassation (and until its establishment, to the Supreme Court). See DRC Constitution of 2006 (n 15), Art. 153 ("*Il est institué un ordre de juridictions judiciaires, composé des cours et tribunaux civils et militaires placés sous le contrôle de la Cour de cassation*").

war crimes and crimes against humanity to military courts.<sup>25</sup> However, the draft law on the domestic implementation of the Rome Statute proposes to transfer the exclusive jurisdiction over international crimes to the civilian court system.<sup>26</sup>

## 3. CONFLICT BACKGROUND

### 3.1 THE CONFLICTS

Forces led by Laurent Desiré Kabila fought the Mobutu government since 1993. In 1994, the tensions were further fueled by the massive inflow of refugees fleeing the conflicts in Rwanda and Burundi. In November 1996, Kabila's forces, backed by neighboring Rwanda and Uganda, brutally dismantled the refugee camps in the North and South Kivu provinces, where Rwandan Hutus settled in the aftermath of the 1994 Rwandan genocide. The rebel movement progressed toward Kinshasa. In May 1997, still backed by Rwanda and Uganda, Kabila's forces victoriously ousted the Mobutu regime and Kabila became the president of the DRC. Kabila subsequently requested the Rwandan and Ugandan militaries to leave the country, but they remained. In August 1998, war broke out again in the DRC, with Rwanda and Uganda this time fighting against Kabila in support of a local insurrection. Angola, Namibia and Zimbabwe intervened on behalf of Kabila.<sup>27</sup> Given the involvement of several countries in the conflict and its impact on the African continent, this second DRC war is sometimes called "Africa's World War".<sup>28</sup>

In July 1999, a ceasefire was agreed upon. In 2000, the UN established a peacekeeping mission in the DRC, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).<sup>29</sup> In January 2001, Laurent Desiré Kabila was assassinated and his son Joseph became president. Rwandan and Ugandan forces

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<sup>25</sup> The subject matter jurisdiction of military courts is regulated by the DRC Military Criminal Code, Act No. 024-2002, 18 November 2002 (hereinafter: "DRC Military Criminal Code"). Article 161 of this code provides that military courts have exclusive jurisdiction over the international crimes of genocide, war crimes and crimes against humanity.

<sup>26</sup> DRC Draft Law on Domestic Implementation of the Rome Statute (n 23).

<sup>27</sup> ICG, DRC Conflict History (n 13).

<sup>28</sup> Gerard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press, 2010). Also see US Government Accounting Office, 'U.N. peacekeeping executive branch consultations with Congress did not fully meet expectations in 1999-2000' (2000) <<http://fas.org/irp/gao/d01917.pdf>> accessed on 25 August 2010, p. 52 ("[on] 2000 January 24 [the] U.N. Security Council met to consider the conflict in the Democratic Republic of the Congo. At the meeting, the U.S. Secretary of State asserted the Congo conflict could be called "Africa's first world war," because of the Democratic Republic of the Congo's location and size and the number of states involved...").

<sup>29</sup> On 1 July 2010, MONUC was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).



withdrew in late 2002, but proxies of these states, in the form of rebel groups, remained in the DRC, where they committed massive human rights violations and illegally exploited and smuggled the DRC's natural resources. In December 2002, all Congolese belligerents and political groups signed the Pretoria Peace Agreement, pursuant to which a transitional power-sharing government was instituted in June 2003 and national elections were held in 2006.<sup>30</sup>

*In December 2002, all Congolese belligerents and political groups signed the Pretoria Peace Agreement...*

Although a relative peace was achieved, regional hostilities prevailed in the eastern parts of the DRC, especially in the Ituri district of Orientale province and in the North Kivu and South Kivu provinces, and to a certain degree also in Katanga province.<sup>31</sup> On 23 January 2008, a peace agreement was signed in Goma between the government and 22 rebel groups in eastern DRC (Goma Peace Agreement).<sup>32</sup> However, armed hostilities between the FARDC and rebel groups and among rebel groups continue in eastern DRC to this day.<sup>33</sup> In Orientale province, in addition to local armed groups, the Ugandan rebel group Lord's Resistance Army (LRA) is currently active.<sup>34</sup> In North Kivu and South Kivu provinces, numerous

*Although a relative peace was achieved, regional hostilities prevailed in the eastern parts of the DRC, especially in the Ituri district of Orientale province and in the North Kivu and South Kivu provinces, and to a certain degree also in Katanga province.*

<sup>30</sup> ICG, DRC Conflict History (n 13).

<sup>31</sup> In Katanga province battles between the Mai Mai militia and the national army led to widespread abuses of the civilian population between 2003 and 2006, but the province is relatively stable today.

<sup>32</sup> News24, 'DRC Peace Deal Just a Start', 24 January 2008 <<http://www.news24.com/Africa/News/DRC-peace-deal-just-a-start-20080124>> accessed on 30 July 2010 (hereinafter: "News24, DRC Peace Deal").

<sup>33</sup> See, e.g., UN Doc. A/HRC/13/63 (8 March 2010), UN Human Rights Council, 'Technical Assistance and Capacity-Building - Second Joint Report of Seven United Nations Experts on the Situation in the Democratic Republic of the Congo' <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-63.pdf>> 30 July 2010 (hereinafter: "UNHRC 2010 Expert Report on DRC"), para. 106. Also see HRW 2009 World Report (events of 2008) <<http://www.hrw.org/en/world-report-2009>> accessed on 17 August 2010 (hereinafter: "HRW 2009 World Report"), p. 61 ("Early in 2008 a peace agreement brought hope to eastern Congo, but combat between government and rebel forces resumed in August. During the year, hundreds of civilians were killed, thousands of women and girls were raped, and a further 400,000 people fled their homes, pushing the total number of displaced persons in North and South Kivu to over 1.2 million.")

<sup>34</sup> After 2002, Ugandan forces continued to operate in the DRC, claiming to be pursuing the LRA. The DRC claimed Uganda was seeking access to resources in east DRC. In 2005 the ICJ ruled that the Uganda has illegally used force against the DRC, committed violations of international humanitarian law, and illegally exploited Congolese natural resources. The LRA continues to operate in Orientale Province to this day. See, e.g., P. Vinck, P. Pham, S. Baldo and R. Shigekane, 'Living With Fear - A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo' (August 2008), a survey conducted by the Berkeley-Tulane Initiative on Vulnerable Populations and the ICTJ <<http://hrc.berkeley.edu/pdfs/LivingWithFear-DRC.pdf>> accessed on 26 August 2010 (hereinafter: "Berkeley-Tulane Initiative, Living With Fear").

rebel groups are active including the *Forces Démocratiques de Libération du Rwanda* (FDLR) and the *Congrès National pour la Défense du Peuple* (CNDP).<sup>35</sup> It is important to mention in this context that the illegal exploitation of natural resources in the DRC, including by multinational corporations, has fueled the conflict and has been considered one of the main causes of human rights abuses in the DRC.<sup>36</sup>

### 3.2 THE MASS ATROCITIES

Atrocities against civilians have been committed by all sides to the DRC conflicts, including FARDC soldiers and non-state actors. The atrocities include rape and other forms of sexual and gender-based violence, recruitment of child soldiers, murder, abduction, forceful displacement of civilians, arbitrary arrest and detention, forced labour, summary executions, as well as torture and other cruel, inhuman or degrading treatment.<sup>37</sup>

*Atrocities against civilians have been committed by all sides to the DRC conflicts, including FARDC soldiers and non-state actors. The atrocities include rape and other forms of sexual and gender-based violence, recruitment of child soldiers, murder, abduction, forceful displacement of civilians, arbitrary arrest and detention, forced labour, summary executions, as well as torture and other cruel, inhuman or degrading treatment*

Between August 1998 and April 2007, according to the International Rescue Committee, around 5.4 million people died in the DRC either directly from the violence or as a result of war-related diseases and starvation.<sup>38</sup> In 2007

<sup>35</sup> It is noted that hostilities were recently reported in the Western province of Equateur, including a massacre in Mbandaka city, but these are isolated incidents of a different nature than the hostilities in the east. See ICG, DRC Conflict History (n 13).

<sup>36</sup> See, e.g., UNHRC 2010 Expert Report on DRC (n 33), para. 78, relying on UN Doc. S/2009/603' (23 November 2009), UN Security Council 'Report of the Group of Experts submitted through the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo' <[http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2009/603](http://www.un.org/ga/search/view_doc.asp?symbol=S/2009/603)> accessed on 11 February 2011.

<sup>37</sup> See, e.g., UNHRC 2010 Expert Report on DRC (n 33), paras. 18, 23.

<sup>38</sup> International Rescue Committee, "Mortality in the Democratic Republic of Congo: An ongoing crisis" (2007) <[http://www.theirc.org/sites/default/files/resource-file/2006-7\\_congoMortalitySurvey.pdf](http://www.theirc.org/sites/default/files/resource-file/2006-7_congoMortalitySurvey.pdf)> accessed on 17 August 2010, Executive Summary, pp. ii-iii ("Based on the results of the five IRC studies, we now estimate that 5.4 million excess deaths have occurred between August 1998 and April 2007. An estimated 2.1 million of those deaths have occurred since the formal end of war in 2002 ... While insecurity persists in the eastern provinces, only 0.4 percent of all deaths across DR Congo were attributed directly to violence. As with previous IRC studies in DR Congo, the majority of deaths have been due to infectious diseases, malnutrition and neonatal- and pregnancy-related conditions"). This is consistent with the ICC's estimation that from 1998 to 2003 between 2.5 and 3.3 million people died in the DRC from war-related causes. See ICC Prosecutor's Statement of 8 September 2003 (n 1), p.3 ("The estimated total number of deaths from the beginning of the conflict in DRC varies in different reports, ranging between 2.5 and 3.3 million people"). But other sources indicate a lower number of conflict-related deaths in the DRC. See, e.g., BBC, 'DRC Country Profile' (10 August 2010) <[http://news.bbc.co.uk/2/hi/africa/country\\_profiles/1076399.stm](http://news.bbc.co.uk/2/hi/africa/country_profiles/1076399.stm)> accessed on 17 August 2010 ("The war claimed an estimated three million lives"); Simon Fraser University, 'The Shrinking Costs of War: Human Security Report Project', Canada (2009) <[http://www.hsrgroup.org/docs/Publications/HSR2009/2009HumanSecurityReport\\_Complete.pdf](http://www.hsrgroup.org/docs/Publications/HSR2009/2009HumanSecurityReport_Complete.pdf)> accessed on 17 August 2010 (demonstrating that the true death toll is far smaller than the estimation of the International Rescue Committee).

and 2008, more deaths and atrocities were recorded.<sup>39</sup> In 2009, the situation deteriorated further, in particular with respect to the sexual violence.<sup>40</sup> A UN expert report from 2010 stresses that the sexual violence crimes committed in eastern DRC in 2009 nearly doubled in comparison to 2008, and were mainly committed by FDLR troops.<sup>41</sup> It adds that the LRA has also been committing sexual violence crimes in Orientale province, in their reprisals for government military operations.<sup>42</sup> Regarding the use of children in active hostilities, the report states that “[i]n addition to the recruitment of children, FARDC and armed groups continue to be cited for other grave child rights violations, including the direct involvement of children on the front lines, the killing and maiming of children and sexual violence.”<sup>43</sup> Atrocities continued to be committed in eastern DRC throughout 2010. For example, from 30 July to 2 August 2010, about 200 members of three non-state armed groups committed a series of attacks on the civilian population in Walikale, North Kivu, raping at least 303 civilians, looting hundreds of houses and shops, and abducting 116 people who were forced to carry the loot.<sup>44</sup> It is noted that MONUC and its successor UN peacekeeping force in the DRC, MONUSCO, have occasionally been criticised for not intervening to protect civilians from mass atrocities.

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<sup>39</sup> See, e.g., HRW 2009 World Report (n 33), p. 61 (reporting that, in 2008, in the Kivus “hundreds of civilians were killed, thousands of women and girls were raped, and a further 400,000 people fled their homes”).

<sup>40</sup> HRW 2010 World Report (events of 2009) <<http://www.hrw.org/en/reports/2010/01/20/world-report-2010>> accessed on 17 August 2010 (hereinafter: “HRW 2010 World Report”), p. 98 (“Violence and brutal human rights abuses increased in the Democratic Republic of Congo throughout 2009. Two military campaigns by the Congolese army, in the east and north, resulted in a dramatic increase in violence against civilians by both rebel and government forces. At least 2,500 civilians were slaughtered, over 7,000 women and girls were raped, and more than 1 million people were forced to flee their homes. This pushed the total number of displaced people to over 2 million, the vast majority with limited or no access to humanitarian assistance, often forcing them to return to insecure areas to find food. United Nations peacekeepers supported Congolese army military operations and struggled to give meaning to their mandate to protect civilians.”) While highly destructive to the civilian population, it is noted that the above military operations weakened the FDLR and led to the integration of the CDNP into the FARDC, allowing the Congolese government to extend its authority in eastern Congo and decreasing the intensity of the conflict between the FARDC and rebel groups. I thank Dunia Zongwe for drawing my attention to this matter.

<sup>41</sup> UNHRC 2010 Expert Report on DRC (n 33), para. 27 (“The United Nations Population Fund has recorded 7,500 cases of sexual violence against women and girls across North and South Kivu in the first nine months of 2009, nearly double the figures for the same period in 2008. An increase in cases of sexual violence is also reported by health counselling centres near conflict zones. FARDC continues to be the major perpetrator of sexual violence. In North Kivu, an assistance provider for victims of sexual violence recorded a total of 3,106 cases between January and July 2009; half of these cases were perpetrated by FARDC members”).

<sup>42</sup> *Ibid.*, para. 29 (“Sexual violence against women and girls is also pervasive in revenge massacres perpetrated against civilians by LRA in Orientale province in the aftermath of the Government’s military operations”).

<sup>43</sup> *Ibid.*, para. 37.

<sup>44</sup> UN News Centre, ‘Preliminary UN report confirms over 300 rapes by rebels in eastern DR Congo’ (24 September 2010) <<http://www.un.org/apps/news/story.asp?NewsID=36129&Cr=democratic&Cr1=congo>> accessed on 9 March 2011.

## 4. POST-WAR CONDITIONS IN THE DRC

### 4.1 POLITICAL WILL TO PROSECUTE THE MASS ATROCITIES

The Pretoria Peace Agreement of 2002 called for an end to impunity. At the same time, the Agreement granted an amnesty covering “acts of war [and] political and opinion breaches of the law” but explicitly excluding from its ambit the international crimes of war crimes, genocide and crimes against humanity.<sup>45</sup> The amnesty, as eventually codified, covers acts committed between 20 August 1996 and 20 June 2003.<sup>46</sup> Amnesty was also called for in the Goma Peace Agreement of 2008 and was codified on 7 May 2009.<sup>47</sup> It also excludes international crimes, but covers “acts of war and insurrection” committed in North and South Kivu between June 2003 and May 2009.<sup>48</sup>

To address past atrocities, the Pretoria Peace Agreement called for a Truth and Reconciliation Commission (TRC).<sup>49</sup> The TRC was indeed established and operated in the DRC during the transition period (until the 2006 national elections). However, it was eventually criticized as ineffective and not credible.<sup>50</sup> The Pretoria Peace Agreement also

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<sup>45</sup> Pretoria Peace Agreement of 2002 (n 16), Section III, point 8 (“To achieve national reconciliation, amnesty shall be granted for acts of war, political and opinion breaches of the law, with the exception of war crimes, genocide and crimes against humanity. To this effect, the transitional national assembly shall adopt an amnesty law in accordance with universal principles and international law. On a temporary basis, and until the amnesty law is adopted and promulgated, amnesty shall be promulgated by presidential decree-law. The principle of amnesty shall be established in the transitional constitution.”) In accordance with the above provision, Presidential Decree No. 03-001 was adopted in the DRC on 15 April 2003, stipulating that “pending adoption of an amnesty law by the National Assembly and its promulgation, all acts of war, political crimes and crimes of opinion committed during the period from 2 August 1998 and 4 April 2003, are provisionally amnestied, excluding war crimes, genocide and crimes against humanity.” See ICTJ, ‘A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of the Congo’ (2004) <<http://www.ictj.org/images/content/1/1/115.pdf>> accessed on 28 February 2011 (hereinafter “ICTJ, A First Few Steps”), p. 23.

<sup>46</sup> ICTJ, ‘Amnesty Must Not Equal Impunity’ (2009) <[ictj.org/static/Factsheets/ICTJ\\_DRC\\_amnesty\\_fs2009.pdf](http://www.ictj.org/static/Factsheets/ICTJ_DRC_amnesty_fs2009.pdf)> accessed on 3 September 2010 (explaining that Law No. 05/023, as adopted by the DRC government on 19 December 2005, codified the amnesty provided in the Pretoria Peace Agreement of 2002 (n 16) but changed its temporal scope to cover acts committed between 20 August 1996 to 20 June 2003).

<sup>47</sup> Ibid (including an English version of the 2009 DRC Amnesty Law).

<sup>48</sup> Ibid (in particular, see Articles 1, 3 and 5 of the 2009 DRC Amnesty Law). Also see News24, DRC Peace Deal (n 32).

<sup>49</sup> Pretoria Peace Agreement of 2002 (n 16), Section V, point 4 (a) (“The following Institutions supporting democracy shall be created: ... the Truth and Reconciliation Commission ...”).

<sup>50</sup> See, e.g., ICTJ, A First Few Steps (n 45) (“A law establishing the truth and reconciliation commission (TRC) in the DRC was adopted on July 30, 2004. There was a lack of sufficient consultation in the country prior to the adoption of this law, which resulted in weak legislation and frustration among important sectors of civil society. The members of the TRC were appointed through a highly politicized process, which resulted in serious doubts among the international community and local Congolese activists as to whether the TRC can become an independent, credible institution. In an effort to address these criticisms, the revised law expands the membership of the commission, although it still allows political parties to maintain overall control of the appointments.”) Also see Berkeley-Tulane Initiative, Living With Fear (n 34), p. 7 (“Among the institutions specifically mandated to address past atrocities and injustices, the Truth and Reconciliation Commission that operated during the transition period leading to the 2006 elections and a National Observatory of Human Rights have been criticized as being neither credible nor effective. These institutions were established by ruling elites without consulting the victims of abuses and were dominated by former belligerents, who



recommended that an ad hoc international tribunal for the DRC be established by the international community, but no such measure was adopted.<sup>51</sup> According to some sources, the recommended tribunal was never set up due to lack of funding.<sup>52</sup> A Congolese human rights activist suggested that this recommendation was made without the intention that it be adopted; otherwise, the DRC would have made further appeals to the international community.<sup>53</sup> But recent international and local public pressure revived the discussions about an ad hoc international or hybrid court mandated to prosecute atrocities committed in the DRC before the Pretoria Peace Agreement.<sup>54</sup>

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have insured that no credible investigations of past violations would occur”).

<sup>51</sup> AfriMAP and The Open Society Initiative for Southern Africa, ‘The Democratic Republic of Congo, Military Justice and Human Rights – An Urgent Need to Complete Reforms’ (2009) <[www.afriMAP.org/english/images/report/AfriMAP-DRC-MilitaryJustice-DD-EN.pdf](http://www.afriMAP.org/english/images/report/AfriMAP-DRC-MilitaryJustice-DD-EN.pdf)> accessed on 30 July 2010 (hereinafter: “OSI/AfriMAP, DRC Military Justice and Human Rights”), p. 3 (“The global peace agreement, concluded in December 2002 in the framework of the Inter-Congolese Dialogue...also recommended the establishment, with the support of the international community, of a special International Criminal Court for the DRC”); Institute for War & Peace Reporting, ‘Congolese Activists Call for International Tribunal in DRC’, (By Héritier Maila, 23 July 2010) <<http://iwpr.net/report-news/congolese-activists-call-international-tribunal-drc>> accessed on 3 September 2010 (hereinafter: “IWPR, Congolese Activists Call for International Tribunal in DRC”) (quoting the DRC justice minister stating that “an inter-Congolese dialogue has already recommended the establishment of an international criminal tribunal as a way of examining all those macabre incidents”). It is noted that while the recommendation to set up an ad hoc international tribunal was made in the framework of the Inter-Congolese Dialogue, it does not appear in the text of the Pretoria Peace Agreement itself.

<sup>52</sup> Centre for Conflict Resolution, Cape Town, South Africa, ‘Post-Conflict Reconstruction in the Democratic Republic of the Congo’, Policy Advisory Group Seminar, 04 Policy Brief (Cape Town, 19-20 April 2010) <[www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/CJUE-86VHFD-full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/CJUE-86VHFD-full_report.pdf)> accessed on 3 September 2010 (“Funding constraints prevented the Congolese government from establishing a Special International Court, as recommended by the Inter-Congolese Dialogue of 2002”); OSI/AfriMAP, DRC Military Justice and Human Rights (n 51), p. 3 (“... a special International Criminal Court for the DRC...was never actually created, chiefly due to a lack of funding”).

<sup>53</sup> Interview notes with author. Also see IWPR, Congolese Activists Call for International Tribunal in DRC (n 51) (“...although the government claims to want the same kind of tribunal that they have been campaigning for, officials are in reality doing very little to set up such a court in the country”).

<sup>54</sup> See, e.g., UNOHCHR Mapping Report (n 2), para. 61 (“Based on these observations, the report concludes that a mixed judicial mechanism - made up of national and international personnel - would be the most appropriate way to provide justice for the victims of serious violations”); UNHRC 2010 Expert Report on DRC (n 33), para. 62 (“The experts reiterate the importance of transitional justice measures to address the massive violations which took place between 1993 and 2003. They recall their recommendation that joint benches, comprising national and international judges and sitting in national courts, might be an appropriate transitional justice tool that can be combined with truth-seeking initiatives.”). In addition, the international NGO ICTJ has been advising the Congolese government on various possible transitional justice mechanisms, including a vetting process and an ad hoc (international, hybrid or local) tribunal to address pre-2003 atrocities. See ICTJ, ‘Accountability and Peace for the DRC’ (2008) <[http://www.ictj.org/static/Factsheets/ICTJ\\_DRC\\_fs2008.pdf](http://www.ictj.org/static/Factsheets/ICTJ_DRC_fs2008.pdf)> accessed on 7 March 2011. Also local activists are calling for an international court which would prosecute atrocities while based in the DRC. See IWPR, Congolese Activists Call for International Tribunal in DRC (n 51) (“The [Congolese NGO New Civil Society of the Congo] says that their ideal outcome would be a court based in DRC resembling the International Criminal Tribunal for Rwanda”).

As for atrocities committed after the conclusion of the Pretoria Peace Agreement, some of them are subject to ICC proceedings (see section 6.2 below). Other post-Pretoria atrocities have been prosecuted by Congolese military courts, which, at the time of writing, have exclusive jurisdiction in the DRC over war crimes, genocide and crimes against humanity, or any other crime related to these international crimes (see section 5.1 below). But the ICC and the Congolese military courts, combined, address only a handful of perpetrators while impunity is the general rule in relation to the vast majority of perpetrators.<sup>55</sup> Some major perpetrators have even been accorded high positions in the DRC army, including Bosco Ntaganda who was indicted by the ICC, and Jean-Pierre Biyoyo who was previously convicted by a Congolese military court for recruiting child soldiers but escaped from jail.<sup>56</sup> Moreover, the DRC military justice system has been criticized for its lack of independence, limited fairness and restricted ability to prosecute senior military officials (see section 5.3 below), yet the government has thus far not transferred

*...the ICC and the Congolese military courts, combined, address only a handful of perpetrators while impunity is the general rule in relation to the vast majority of perpetrators. Some major perpetrators have even been accorded high positions in the DRC army...*

<sup>55</sup> See, e.g., UNHRC 2010 Expert Report on DRC (n 33), para. 49 (“The experts note with appreciation that a number of trials have been initiated against officers and soldiers of FARDC, some resulting in convictions. Overall, however, impunity remains pervasive, especially with regard to crimes committed by powerful figures in the security forces. It is regrettable that command responsibility, while being an essential aspect in this context, is still rarely the subject of investigation by military prosecutors. Information received suggests that commanders continue to protect soldiers under their command against investigations and deliberately obstruct the course of justice. The high numbers of escapes from military and civilian prisons that have occurred throughout the year – many of them under suspicious circumstances – continue to be a major challenge in the fight against impunity.”)

<sup>56</sup> HRW 2010 World Report (n 40), p. 104 (“The fight against impunity [in the DRC] was seriously undermined by the promotion of Bosco Ntaganda to the rank of general, despite an ICC arrest warrant for war crimes he committed in Ituri between 2002 and 2004. Other known human rights abusers were also integrated into the army, including Jean-Pierre Biyoyo, who previously had been convicted by a military court for the recruitment of child soldiers but had escaped from custody soon afterwards. The government justified its failure to make arrests of senior army officers by claiming it prioritized peace over justice. Local and international human rights groups protested the policy.”); UNHRC 2010 Expert Report on DRC (n 33), para. 50 (“The fight against impunity is undermined by an apparent lack of political will to arrest and prosecute certain high-profile suspects, including Bosco Ntaganda, against whom the International Criminal Court issued an arrest warrant for war crimes”), para. 64 (“In January 2009, Bosco Ntaganda was promoted to the rank of general in the context of the rapprochement with CNDP, even though nine months earlier the International Criminal Court had published an arrest warrant for war crimes against him. During the Human Rights Council’s universal periodic review in November and December 2009, the Government explicitly rejected the recommendation that Ntaganda should be arrested and transferred to the International Criminal Court. Despite Government assurances that Ntaganda no longer exercises command functions within FARDC, reports indicate that he remains involved in the FARDC command structure, including in the context of the Kimia II operation.”), para. 65 (“In March 2009, the Government appointed Jean-Pierre Biyoyo as a colonel in FARDC. Two years earlier, Biyoyo had been found guilty of recruiting child soldiers by a Congolese military court and later escaped from prison.”)

jurisdiction over international crimes to the civilian courts system.<sup>57</sup> In light of these realities, it is doubtful whether the DRC has the political will to prosecute the war's atrocities. This conclusion is further strengthened in light of the extremely limited resources that the government allocates to the underdeveloped Congolese justice sector.<sup>58</sup>

*... the DRC military justice system has been criticized for its lack of independence, limited fairness and restricted ability to prosecute senior military officials, yet the government has thus far not transferred jurisdiction over international crimes to the civilian courts system*

## 4.2 CAPACITY OF THE LEGAL SYSTEM TO PROSECUTE THE MASS ATROCITIES

As highlighted by the above analysis, impediments to domestic atrocity prosecutions in the DRC include the national amnesty laws, exclusive jurisdiction of military courts over war-related crimes, and a depleted justice sector. Further compromising the DRC's capacity to prosecute atrocities is a serious shortage of magistrates, the limited legal knowledge of judicial professionals, the lack of an independent judiciary, high levels of corruption in the judiciary, the absence of a witness protection system and poor security conditions. The following paragraphs elaborate further on these matters.

*...impediments to domestic atrocity prosecutions in the DRC include the national amnesty laws, exclusive jurisdiction of military courts over war-related crimes, ... a depleted justice sector ... a serious shortage of magistrates, the limited legal knowledge of judicial professionals, the lack of an independent judiciary, high levels of corruption in the judiciary, the absence of a witness protection system and poor security conditions.*

According to a study published in April 2010, the DRC has only 2,000 magistrates.<sup>59</sup> Given that the population of the DRC is around 70 million, this means that there is only one magistrate for every 35,000 people. According to the same

<sup>57</sup> It is recalled that the DRC Draft Law on Domestic Implementation of the Rome Statute (n 23) proposes such transfer of jurisdiction to civilian courts. See note 26 above and attached text.

<sup>58</sup> UNHRC 2010 Expert Report on DRC (n 33), para. 54 ("The State [DRC] needs to increase the financial, logistical and human resources that it provides to the justice system. The Government has decreased spending on the judicial sector to 0.24 per cent of the 2009 budget, which is far below the 2-6 per cent of national budget that most other countries dedicate to justice").

<sup>59</sup> Afrique Avenir, 'DRC has low ratio of magistrates to the population, says Justice Minister' (20 April 2010) <<http://www.afriqueavenir.org/en/2010/04/20/drc-has-low-ratio-of-magistrates-to-the-population-says-justice-minister/>> accessed on 30 August 2010. However, it is likely that this figure does not take into account traditional "lay" judges who preside over customary courts and apply customary laws. It is recalled that customary law and customary courts settle most disputes in the DRC (see note 11 above). I thank Dunia Zongwe for drawing my attention to this matter.

study, the acceptable world average is one magistrate for every 5,000 people.<sup>60</sup> The NGO Avocats Sans Frontières (ASF) reported that the “total number of judicial personnel [in the DRC] is clearly insufficient to cover the whole range of crimes and territory”.<sup>61</sup> This was also confirmed by interviewees, who gave the example of Shabunda, a region the size of Rwanda, in South Kivu, where there are no magistrates.<sup>62</sup> This shortcoming is compounded by the limited legal knowledge of judicial professionals in the DRC. ASF reports that few Congolese judges, prosecutors, inspectors and judicial policemen are sufficiently trained to handle atrocity related proceedings.<sup>63</sup> A MONUC official also noted that judges and lawyers in the DRC do not receive enough legal training.<sup>64</sup>

Another major weakness in the DRC’s capacity to prosecute international crimes is the lack of independence of the military justice system (which currently has exclusive jurisdiction over these crimes).<sup>65</sup> According to interviews, civilian courts in the DRC also lack judicial independence.<sup>66</sup> Thus, even if Congolese law would be amended to transfer jurisdiction over international crimes to civilian courts, the lack of an independent judiciary will remain a concern. One interviewee noted that attempts by civil society to promote a national law ensuring the independence of the judiciary were blocked by Congolese politicians.<sup>67</sup>

The high level of corruption associated with the Congolese justice system is another serious problem. Interviewees explained that policemen arrest and release people based on bribes and that cases do not reach the court when the judges and prosecutors are paid off. Legal and law enforcement professionals in the DRC are aware of their due process obligations, but extremely low salaries lead them to breach these obligations in exchange for bribes.<sup>68</sup>

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<sup>60</sup> Ibid.

<sup>61</sup> Avocats Sans Frontières, ‘Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo’ (2009) <[http://www.asf.be/publications/ASF\\_CaseStudy\\_RomeStatute\\_Light\\_PagePerPage.pdf](http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf)> accessed on 4 May 2010 (hereinafter: “ASF 2009 Study”), p. 95.

<sup>62</sup> Interview notes with author.

<sup>63</sup> See ASF 2009 Study (n 61), pp. 94-95.

<sup>64</sup> Interview notes with author.

<sup>65</sup> This issue is addressed in further detail in section 5.3 below.

<sup>66</sup> Interview notes with author.

<sup>67</sup> Interview notes with author.

<sup>68</sup> Interview notes with author. On the corruption of the Congolese judges see, e.g., Institute of War and Peace Reporting, ‘Corruption Alleged in East Congo Land Disputes - Judiciary accused of taking bribes to order property transfers’ (10 June 2011) <<http://iwpr.net/report-news/corruption-alleged-east-congo-land-disputes>> accessed on 20 October 2011.



A further weakness of the DRC's judicial capacity is the lack of a national witness protection system.<sup>69</sup> One interviewee, a representative of an international NGO, stressed that women in the North Kivu city of Goma are afraid to seek justice for rape because there is no witness protection system.<sup>70</sup>

Finally, the ongoing hostilities and serious security concerns in eastern Congo make it difficult for judicial professionals to investigate and prosecute atrocities, and compromise logistical, transport, communication, archiving and recording capacities. While the lack of security is not a judicial capacity issue per se, it seriously impedes atrocities-related proceedings.<sup>71</sup>

### 4.3 JUDICIAL CAPACITY BUILDING EFFORTS IN THE DRC<sup>72</sup>

In 2006, the European Union (EU) approved a contribution of 7.9 million Euros to the "Programme for the Restoration of the Judicial System in Eastern Congo" (Rejusco).<sup>73</sup> According to an EU press release, the Rejusco program "covers all aspects of criminal law [and] is intended to reinforce not only the judicial institutions (police, courts, prisons), but also those professionally involved (criminal police, judiciary, lawyers, court registrars, prison officers) and to offer guarantees to other interested parties (witnesses, defendants, victims)."<sup>74</sup> This EU-coordinated program, explained Rejusco officials, was

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<sup>69</sup> OSI, Putting Complementarity Into Practice (n 69), p. 31.

<sup>70</sup> Interview notes with author.

<sup>71</sup> In a hearing before the ICC, on 1 June 2009, a senior DRC judicial authority stressed that the security conditions in Ituri make it difficult for the central authorities in Kinshasa to investigate crimes in that region. He noted also the lack of a witness protection system and relevant expertise. See ICC Case No. ICC-01/04-01/07, *Prosecutor v. Katanga and Ngudjolo*, Trial Transcript 1 June 2009, pp. 78-79 (Colonel Muntazini Mukimapa, the DRC Advocate General at the Supreme Military Court and director of cabinet of the Auditor General: "The time period is February 2003 ... There's a general sense of insecurity in Ituri. Victims are not accessible, because the victims quite rightly feared for their safety ... Witnesses were anxious, and they were sometimes the victims of acts of violence. There was the lack of a good protection system for victims and witnesses as to destruction of the judicial structure as a result of the war ... There was a lack of expertise when it comes to dealing with mass crimes and when it comes to gathering evidence and preserving evidence. So as a result of all these factors, the DRC did not have the capacity of successfully carrying out investigations into the crimes that were committed in Bogoro. Unfortunately, the situation has not improved since then.")

<sup>72</sup> Although national actors, such as universities, contribute to strengthening the DRC's legal capacity, this section focuses on capacity building efforts by international actors, which are presently better resourced and may therefore have a bigger impact on national judicial capacity than the poorly funded local universities and education sector in general. For information about capacity building efforts by national actors, as well as additional information about capacity building efforts by international actors see OSI, Putting Complementarity Into Practice (n 69).

<sup>73</sup> EU Official Website, 'The European Commission Contributes to the Restoration of Justice in the East of the Democratic Republic of Congo' (26 June 2006) <[http://www.eu-un.europa.eu/articles/en/article\\_6062\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_6062_en.htm)> 31 July 2010 (also noting that "[t]he REJUSCO programme...is financed from the resources of the 9<sup>th</sup> European Development Fund (EDF) allocated to the DRC and it will be implemented in collaboration with the Netherlands, the United Kingdom and Belgium, which are all contributing to the overall financing of the project (€11.5 million)").

<sup>74</sup> Ibid. The press release adds: "The REJUSCO programme is an extension of an initial pilot project for the restoration of the judicial system in the town of Bunia". Indeed, interviewees explained that the Rejusco program took over a

designed to rehabilitate both the civilian and military criminal justice systems in eastern DRC. Among its other projects, Rejusco supported military and civilian criminal trials in the Ituri district, including atrocities-related trials.<sup>75</sup> The project has since closed down, and, according to interviews, some of its tasks were taken over by UNDP and MONUSCO.<sup>76</sup>

MONUC/MONUSCO assisted Rejusco by providing security and other services. The UN peacekeeping force also has its own judicial capacity building programs in the DRC, which are not exclusively confined to the eastern parts of the country.<sup>77</sup> Additional international organizations involved in capacity building in the DRC include the UN Development Programme (UNDP), the American Bar Association and NGOs such as Global Rights, ASF, Open Society Initiative (OSI), and the International Center for Transitional Justice (ICTJ).<sup>78</sup> But interviews suggested that the EU-led Rejusco program has been the most influential capacity-building initiative so far, with a significant impact in Orientale province.<sup>79</sup>

*...interviews suggested that the EU-led Rejusco program has been the most influential capacity-building initiative so far, with a significant impact in Orientale province.*

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previous justice rehabilitation project which operated in Bunia from 2004 until April 2006, funded by the European Commission and implemented by the Belgian NGO Réseau des Citoyens Network (RCN). Interview notes with author.

<sup>75</sup> Interview notes with author. The Rejusco officials who were interviewed stressed that the Rejusco program did not exclusively focus on investigation and prosecution of international crimes, but rather addressed criminal justice issues in general. Rejusco held trainings for local magistrates, prosecutors, clerks, investigators, judicial police, including those working in military tribunals. It also organizes civilian or military “mobile courts”, in far-away areas where there are hardly any magistrates. Rejusco was also active in building awareness to the importance of an independent judiciary, and lobbied the Justice Ministry in Kinshasa to increase the number of magistrates and prosecutors in the country. In addition, Rejusco promoted the replacement of customary judges with “justices-of-peace”, with a mandate to investigate low level crimes and pronounce sentences of up to 5 years imprisonment.

<sup>76</sup> Interview notes with author. It also seems that the EU will soon launch a successor program to REJUSCO. See OSI, Putting Complementarity Into Practice (n 69), p. 48 (“REJUSCO’s successor Program to Support the Reform of Justice in the East (Programme d’appui à la réforme de la justice à l’est – PARJE – also known as Uhaki Safi, or “good justice” in Swahili) will launch in the first or second quarter of 2011”).

<sup>77</sup> UN Security Council (UNSC) Resolution 1925 (2010), UN Doc. S/RES/1925 (28 May 2010), p. 6 (mandating MONUSCO to “develop and implement ... a multi-year joint United Nations justice support programme in order to develop the criminal justice chain, the police, the judiciary and prisons in conflict-affected areas and a strategic programmatic support at the central level in Kinshasa”). Also see UNHRC 2010 Expert Report on DRC (n 33), para. 58 (“The experts are pleased to note that MONUC began supporting joint investigation teams. The United Nations Joint Human Rights Office submits information to military prosecutors on human rights violations by FARDC or PNC and provides additional technical support to increase the investigative and prosecution capacity of the military justice system”). It is noted that the EU is also supporting Kinshasa-based justice programs. See OSI, Putting Complementarity Into Practice (n 69), p. 48 (“A separate, entirely EC-funded Program to Support Governance (Programme d’appui à la gouvernance, or PAG) running from 2009 to 2011 devotes €9 million to strengthening the administration of justice (the Ministry of Justice, CSM, and Prosecutor General’s office) and the Kinshasa courts”).

<sup>78</sup> It is noted that Global Rights closed their program in the DRC in 2010. For further information about capacity building efforts by international actors (as well as information about capacity building efforts by national actors) see OSI, Putting Complementarity Into Practice (n 69).

<sup>79</sup> Interview notes with author. It is noted that future judicial capacity building efforts in the DRC may be initiated in light of recommendations made in the UNOHCHR Mapping Report (n 2).

## 5. NATIONAL JUDICIAL RESPONSE TO THE MASS ATROCITIES

### 5.1 JURISDICTIONAL AND NORMATIVE FRAMEWORKS

#### *Jurisdiction over Atrocity-Related Proceedings*

Despite the DRC's limited political will and judicial capacity to prosecute atrocities, some atrocity-related trials took place in the country's military courts. Under Congolese law, military courts have exclusive jurisdiction over war crimes, crimes against humanity and genocide (see section 2.2 above), even when the defendants are civilians or rebels fighting the regular army.<sup>80</sup> Military courts also have exclusive jurisdiction over charges that are characterized as domestic crimes but are related to the above international crimes.<sup>81</sup>

*Under Congolese law, military courts have exclusive jurisdiction over war crimes, crimes against humanity and genocide, even when the defendants are civilians or rebels fighting the regular army. Military courts also have exclusive jurisdiction over charges that are characterized as domestic crimes but are related to the above international crimes.*

Thus, if civilian courts were to initiate proceedings regarding such crimes (domestic crimes related to international crimes), military courts would take over the case. In any case, regardless of the court hearing the case, if crimes remain characterized as domestic crimes their prosecution may be frustrated by the national amnesty regime (see section 4.1 above). Thus, the Military Court in Kisangani acquitted Chief Mandro Kahwa Panga (aka Chief Kahwa) from domestic criminal charges on the basis that "all charges against him were covered by the extended amnesty law".<sup>82</sup> The charges included

<sup>80</sup> The personal jurisdiction of military courts is addressed by the DRC Military Justice Code, Act No. 023-2002, 18 November 2002 (hereinafter: "DRC Military Justice Code"), which authorizes military courts to judge civilians. It was explained in an interview that such a broad personal jurisdiction was granted to military courts in relation to the above international crimes because the individuals who may commit such crimes are soldiers or members of armed groups, and these crimes are committed through a weapon or method of war. Interview notes with author. Still, four years after the enactment of the DRC Military Justice Code, a provision was included in the DRC Constitution of 2006 (n 15) which restricts the personal jurisdiction of military courts to members of the armed forces and police forces only (although the Constitution recognizes the power of the president of the republic to replace civilian courts with military courts in times of war and under certain conditions). However, the DRC Military Justice Code of 2002 has not yet been amended to conform to the DRC Constitution of 2006 (n 15). See OSI/AfriMAP, DRC Military Justice and Human Rights (n 51), p. 5.

<sup>81</sup> Article 161 of the DRC Military Criminal Code (n 25) ("En cas d'indivisibilité ou de connexité d'infractions avec des crimes de génocide, des crimes de guerre ou des crimes contre l'humanité, les juridictions militaires sont seules compétentes").

<sup>82</sup> This was ruled in an appeal against Chief Kahwa's conviction by a lower military court. See UNSC, UN Doc. S/2008/218 (2 April 2008) 'Twenty-fifth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo', para. 5 <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202008%20218.pdf>> accessed on 9 March 2011. However, Chief

multiple murders of civilians committed in connection with the war, which could have probably amounted to war crimes or crimes against humanity but were characterized as domestic crimes.<sup>83</sup> Moreover, prosecution of domestic crimes may be precluded by the ten-year statute of limitations, which applies even to the most serious domestic crimes in the DRC.<sup>84</sup>

In 2004, based on interviews it conducted throughout the DRC, including with the Attorney-General in Kinshasa, the ICTJ reported that there were no ongoing trials in civilian courts for conflict-related mass human rights violations in the entire DRC.<sup>85</sup> According to available information, no such trials have been held in civilian courts since then either. However, the draft law on the domestic implementation of the Rome Statute, which is presently before the Congolese National Assembly, proposes to transfer the exclusive jurisdiction over international crimes to the civilian court system (see section 2.2 above). But until such law is adopted, under the DRC Military Criminal Code of 2002, only military courts are authorized to prosecute international crimes.<sup>86</sup>

#### *Normative Framework for Atrocity-Related Proceedings*

The DRC Military Criminal Code of 2002 criminalizes war crimes and crimes against humanity. It defines war crimes as “any violation of the laws of the Republic committed during the war which are not justified by the laws and customs of war”.<sup>87</sup> The Code defines crimes against humanity as “grave violations of international humanitarian law committed against civilian populations before or during the war”,<sup>88</sup> but also provides that “crimes against humanity are not necessarily linked to the state of war”.<sup>89</sup>

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Kahwa has since been re-arrested following charges by the military prosecutor and will face another trial in a military court. See ASF 2009 Study (n 61), Annex. Also see note 168 below, as far as it concerns the *Chief Kahwa* case.

<sup>83</sup> Institute of War and Peace Reporting, ‘Chaos in the Courts’ (27 February 2008) <<http://iwpr.net/report-news/chaos-courts>> accessed on 3 September 2010 (hereinafter: “IWPR, Chaos in the Courts”). Also see related discussion in Trapani DRC Report (n 12).

<sup>84</sup> ICTJ, *A First Few Steps* (n 45), p. 22.

<sup>85</sup> *Ibid.*, pp. 18-19.

<sup>86</sup> DRC Military Criminal Code (n 25), Article 161.

<sup>87</sup> *Ibid.*, Article 173.

<sup>88</sup> *Ibid.*, Article 163.

<sup>89</sup> *Ibid.*, Article 165.

Thus, the definitions of crimes against humanity and war crimes under Congolese law are somewhat ambiguous and do not fully correspond to the Rome Statute's definitions of these crimes. One reason for this inconsistency is that the Rome Statute, which was ratified by the DRC in 2002, has still not been implemented domestically.<sup>90</sup> But even without a law domesticating the Rome Statute, as shown in section 8.1 below, Congolese military courts have sometimes applied Rome Statute provisions in their judgements.<sup>91</sup>

*...the definitions of crimes against humanity and war crimes under Congolese law are somewhat ambiguous and do not fully correspond to the Rome Statute's definitions of these crimes. But even without a law domesticating the Rome Statute Congolese military courts have sometimes applied Rome Statute provisions in their judgements*

## 5.2 MILITARY TRIALS: DESCRIPTION

A study published by ASF in 2009 identifies 13 atrocity-related trials which were held by DRC military courts between 2004 and early 2009.<sup>92</sup> They concerned a total of 188 Congolese defendants belonging either to the regular army (soldiers) or to non-state armed groups (rebel groups and local "Mai Mai" militias that intermittently fight the military).<sup>93</sup> The trials were held throughout the DRC, in the provinces of Orientale (5 trials in Bunia/Ituri), Katanga (4 trials), Equateur (2 trials in Mbandaka), South Kivu (1 trial), and Maniema (1 trial).<sup>94</sup> After the ASF 2009 study was published, Human Rights Watch (HRW) identified two additional atrocity-related military trials, held in the DRC's North

<sup>90</sup> It is noted that the Rome Statute does not require states to implement nationally its definitions of crimes.

<sup>91</sup> While this subject is discussed in detail in section 8.1 below, for the purposes of this section it is noted that Articles 153 and 215 of the DRC Constitution of 2006 (n 15) provide a legal basis for directly applying international treaty provisions in national cases. Also see related discussion in Trapani DRC Report (n 12).

<sup>92</sup> ASF 2009 Study (n 61). The study's main objective was to identify and assess instances where the Rome Statute was directly applied by Congolese courts. It examines not only how the national military courts deal with definitions of international crimes, but also with principles such as command responsibility, excuses and justification, and sentencing practices. It also includes a section on the "civil responsibility of the state", where the DRC's practices of victim participation and compensation is discussed in light of provisions of the Rome Statute.

<sup>93</sup> One of the trials (the *Kilwa* case) also involved three civilian foreigners who worked for a mining company (they were accused together with 9 DRC soldiers). All three foreign civilians were acquitted. See ASF 2009 Study (n 61), Annex.

<sup>94</sup> The 5 trials in Orientale province were the *Mutins de Bunia* case involving 17 accused (soldiers who mutinied); the *Blaise Bongji* case involving 1 accused (a soldier); the *Gety Bavi* case involving 15 accused (soldiers); the *Chief Kahwa* case involving 1 accused (a PUSIC rebel); and the *Milobs* case involving 7 accused (FNI rebels). The 4 trials in Katanga province were the *Ankoro* case involving 27 accused (soldiers); the *Mitwaba* case involving 4 accused (soldiers); the *Kilwa* case involving 12 accused (9 soldiers and 3 foreign civilians working for a mining company); and the *Gédéon* case involving 24 accused (Mai-Mai fighters). The 2 trials in Equateur province were the *Mutins de Mbandaka* case involving 62 accused (soldiers who mutinied) and the *Songo Mboyo* case involving 12 accused (soldiers who mutinied). The 2 trials in North Kivu province were the *Walikale* case involving 11 accused (soldiers) and the *Kipanga* case involving 1 accused (a soldier). The trial in South Kivu province was the *Biyoyo* case involving 6 accused (FSP rebels). The trial in Maniema province was the *Kalonga Katamasi* case involving 3 accused (Mai-Mai fighters). See ASF 2009 Study (n 61), Annex.



Kivu province in 2009, involving a total of 12 accused.<sup>95</sup> In some of the above cases, particularly since 2006, the Congolese military courts have directly applied Rome Statute norms, pursuant to constitutional provisions enshrining the DRC's monistic approach to international law (see section 8.1 below).<sup>96</sup> Besides the above 15 trials involving 200 defendants, there may have been additional atrocity-related trials in the DRC. However, the present section does not aim to identify all domestic atrocity-related trials in the DRC. Rather, it describes cases and assesses trends in accordance with publicly available material at the time of writing, as representative of the total amount of domestic atrocity-related trials in the DRC.<sup>97</sup>

Various reports have identified the *Ankoro* trial, held in 2004 by the Military Court of Katanga in the city of Lubumbashi, as the first atrocity-related trial in the DRC since the Pretoria Peace Agreement was concluded in 2002.<sup>98</sup> According to the ICTJ, the trial attracted a great deal of interest as the first trial for crimes against humanity to take place since the beginning of the transition.<sup>99</sup> Over 20 army soldiers were charged in these proceedings with atrocities committed against civilians in the town of Ankoro, in November 2002, including the killing of more than 60 people, the burning and destroying of more than 4,000 homes, and the pillaging of more than 170 buildings.<sup>100</sup> The ICTJ, in a report published before the judgement was issued, noted that holding the trial so far from Ankoro prevented victims and witnesses from testifying and has created a suspicion that the trial is being held in order to set the prisoners free.<sup>101</sup> The judgement may have

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<sup>95</sup> HRW 2010 World Report (n 40), p. 104. Both trials involved charges of sexual violence crimes. In addition, since late 2008 or early 2009, the DRC has been seeking the extradition of former CNDP leader Laurent Nkunda from Rwanda, in order to prosecute him in the DRC for war-related crimes. See BBC, 'DR Congo seeks Nkunda extradition' (23 January 2009) <<http://news.bbc.co.uk/2/hi/africa/7847639.stm>> accessed on 31 July 2010.

<sup>96</sup> According to the ASF 2009 Study (n 61), in addition to referring to the Rome Statute, the military courts have at times referred to the "Elements of Crimes" document (which was adopted by the States Parties pursuant to Article 9 of the Rome Statute in order to assist the ICC in interpreting and applying the Rome Statute definitions of international crimes). In some of the cases, the DRC military courts have referred to the jurisprudence of the International Tribunals for the former Yugoslavia and Rwanda. Also see related discussion in Trapani DRC Report (n 12).

<sup>97</sup> A separate report under the DOMAC Project will compile and analyze additional documentation of atrocity-related proceedings in the DRC. It will refer to numbers of suspects investigated or prosecuted by Congolese military courts for war-related crimes, analyze trends of atrocity-related proceedings in the DRC, and use a statistical approach to identify correlations between the ICC process and domestic prosecution and sentencing trends in the DRC. The preliminary findings of that report, according to conversations with its author, indicate that, in addition to the above 200 defendants involved in the abovementioned 15 trials, up to 150 more suspects were subject to atrocity-related proceedings (including pre-trial investigations) in the DRC. See Ronen DRC Report (n 12).

<sup>98</sup> See, e.g., ASF 2009 Study (n 61), Annex; ICTJ, *A First Few Steps* (n 45), p. 19.

<sup>99</sup> ICTJ, *A First Few Steps* (n 45), p. 19.

<sup>100</sup> ASF 2009 Study (n 61), Annex.

<sup>101</sup> ICTJ, *A First Few Steps* (n 45), p. 19 (referring to a suspicion expressed by the local human rights group ASADHO/Katanga). Lubumbashi is 800 kilometres from Ankoro, which is too long a distance for victims and witnesses to travel. The ICTJ report adds that although the court eventually agreed to travel to Ankoro to gather evidence, it did

confirmed this suspicion: In December 2004, the court acquitted about half of the defendants and sentenced the rest to less than two years imprisonment, which led to their immediate release as they had spent over two years in pre-trial detention.<sup>102</sup>

Another landmark military trial in the DRC, incidentally also held in Katanga province, was the *Gédéon* trial. In that trial, Mai Mai commander Kyungu Mutanga Gédéon and over 20 Mai Mai fighters were tried for atrocities committed in Katanga between 2003 and 2006, including mass rape, use of child soldiers in active hostilities, cannibalism, use of firearms, creating a rebel movement, pillaging and destruction of property.<sup>103</sup> In a decision from March 2009, Gédéon was sentenced to death for crimes against humanity, insurgency and terrorism. Six other defendants were convicted for crimes against humanity and also sentenced to death.<sup>104</sup> According to HRW, the trial lasted for 19 months and was the country's largest trial involving charges of crimes against humanity.<sup>105</sup> Additional atrocity-related trials held by Congolese military courts in various provinces are discussed in section 8.1 below.<sup>106</sup>

It is noted that there have also been cases where suspects were detained for atrocities but have either been released without being tried or are still in pre-trial detention (sometimes for lengthy periods). For example, eight individuals were arrested by the DRC authorities in early 2005, in connection with the killing of nine Bangladeshi UN peacekeepers in Ndoki, Ituri.<sup>107</sup> While one of these suspect, Germain Katanga, has since been transferred to the ICC for trial (see section 6.2 below), the other seven co-accused remain in pre-trial detention. In mid 2009, over four years after their arrest, senior DRC officials publicly indicated that “the case is still not in a state such as it could be referred to a court”.<sup>108</sup> As of August 2011, their case has not proceeded to trial in the

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not move the trial to Ankoro, and therefore has not “dispelled ASADHO’s suspicion”.

<sup>102</sup> ASF 2009 Study (n 61), Annex. Also see related discussion in Trapani DRC Report (n 12).

<sup>103</sup> HRW, “DR Congo: Militia Leader Guilty in Landmark Trial” (10 March 2009) <[www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial](http://www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial)> accessed on 31 July 2010 (hereinafter: “HRW, Militia Leader Guilty in Landmark Trial”). Also see related discussion in Trapani DRC Report (n 12).

<sup>104</sup> *Ibid.* In addition, 14 defendants were convicted of insurgency (3 of them were also convicted of terrorism), and 5 defendants were acquitted (4 due to insufficient evidence and one because he was a minor at the time the crimes were committed). Also see related discussion in Trapani DRC Report (n 12).

<sup>105</sup> *Ibid.* Also see related discussion in Trapani DRC Report (n 12).

<sup>106</sup> These trials are also discussed in another report under the DOMAC Project. See Trapani DRC Report (n 12).

<sup>107</sup> ICC Case No. ICC-01/04-01/07, *Prosecutor v. Katanga and Ngudjolo*, Trial Transcript 1 June 2009, pp. 78-80 (discussing the Congolese domestic proceedings in RMP Case No. 0121/0122/MBT/05 which were initiated in early 2005 against Germain Katanga, Goda Supa, Ndjabu Ngabu, Mbodina Iribi Pitchou, Masudi Bin Kapinda, Lema Bahati Delo, Manono Filemon, and Bede Ndjokaba Lambi).

<sup>108</sup> *Ibid.*, p. 78.

DRC.<sup>109</sup>

### 5.3 MILITARY TRIALS: ASSESSMENT

According to the ASF 2009 study, Congolese military courts have been applying the Rome Statute haphazardly and inconsistently, without attempting to harmonize their approach with those adopted in other atrocity-related cases.<sup>110</sup> ASF also reported that some of the judgements provide weak legal reasoning, do not identify the elements of the crimes for which they are convicting, fail to properly analyze the evidence or to indicate on which evidence they base their findings.<sup>111</sup>

Procedural irregularities have also been reported. The ASF 2009 study explains that the rules of procedure before the military courts emphasise speed and exemplarity, which do not always guarantee respect for due process and fair trial rights of the accused.<sup>112</sup> A study conducted by the OSI and AfriMAP, reveals that “[i]n addition to its institutional weaknesses reflected by an objective inability to bring a large number of cases to trial, military justice [in the DRC] is also rendered ineffective by a legislative framework that is totally anachronistic and contrary to constitutional and international standards on the right to a fair trial.”<sup>113</sup> The OSI/AfriMAP study also expresses concern that civilians are tried in military courts, noting that this practice is contrary to international standards applicable in the DRC.<sup>114</sup> In 2009, the ICTJ conducted a study of five international crimes trials before DRC military courts and found that minimum fair trials standards had been violated in all of them.<sup>115</sup> The ICTJ also complained that most convicted perpetrators subsequently fled from prison.<sup>116</sup> On this matter, UN experts

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<sup>109</sup> However, it is noted that three of them have been transferred to The Hague in early 2011 to testify as defence witnesses before the ICC. Although their testimony was concluded, they remain in the Netherlands due to their pending asylum request filed with the local authorities in May 2011. See ICC Case No. ICC-01/04-01/07, *Prosecutor v. Katanga and Ngudjolo*, ‘Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350’, 24 August 2011.

<sup>110</sup> ASF 2009 Study (n 61). Also see related discussion in Trapani DRC Report (n 12).

<sup>111</sup> ASF 2009 Study (n 61), p. 6.

<sup>112</sup> *Ibid.*, p. 94.

<sup>113</sup> OSI/AfriMAP, DRC Military Justice and Human Rights (n 51), p. 1.

<sup>114</sup> *Ibid.*

<sup>115</sup> ICTJ, ‘Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court’ (May 2010) <[http://www.ictj.org/static/Publications/ICTJ\\_DRC\\_RSRC-ImpactofICC\\_bp2010.pdf](http://www.ictj.org/static/Publications/ICTJ_DRC_RSRC-ImpactofICC_bp2010.pdf)> accessed on 28 February 2011 (hereinafter: “ICTJ, Impact of the Rome Statute in the DRC”), p. 3.

<sup>116</sup> *Ibid.*, p. 3 (also noting, in relation to these trials, that “as of May 2010, the government had not paid court-ordered civil damages to victims”).



noted that many convicts escape from prisons “under suspicious circumstances”.<sup>117</sup>

Another major weakness of the Congolese military justice system is its lack of independence from the executive branch. For example, a 2010 UN report notes that the DRC military justice system “remains weak and susceptible to executive interference by military or political decision makers”.<sup>118</sup> The above OSI/AfriMAP study further confirms that the independence of the DRC military justice system is constantly undermined by the growing control that the military command exercises over its functioning as well as by political interference in its decisions.<sup>119</sup> ASF also reported that military commanders and political authorities interfere in the functioning of the DRC military justice system.<sup>120</sup> Finally, it is noted that some military judges lack formal legal education, potentially increasing the risk of political influence on judicial proceedings.<sup>121</sup>

Complaints are also made that high ranking military officers in the DRC are not prosecuted for their atrocities, as a result of both the procedural limitations and the lack of independence of the military justice system.<sup>122</sup> HRW, in a report highlighting the successes of the *Gédéon* trial, stated that:

Investigations and legal proceedings against Congolese army commanders who also committed abuses in Katanga during the same period have not been equally successful, however. There have been only four convictions of soldiers, for failing to assist persons in danger, despite the evidence of serious crimes including summary executions and rape. One of those convicted was the military commander of the Congolese army's operations against the Mai Mai, Major Andre Ekembe Monga

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<sup>117</sup> UNHRC 2010 Expert Report on DRC (n 33), para. 49. Also see ASF 2009 Study (n 61), p. 94.

<sup>118</sup> UNHRC 2010 Expert Report on DRC (n 33), para. 58.

<sup>119</sup> OSI/AfriMAP, DRC Military Justice and Human Rights (n 51), p. 1.

<sup>120</sup> ASF 2009 Study (n 61), p. 94 (“Under the present system military commanders at different levels interfere in the functioning of military justice either on their own initiative or under the influence of political authorities affects. These often put considerable pressure on the lay judges who sit in judgment but do not have the necessary qualifications in law”). The ASF 2009 Study (n 61), in the same paragraphs, adds that “[v]ictims are placed under heavy pressure to withdraw their complaints whereas many cases of executive interference with judicial independence, influence peddling, escape of convicted persons from prison, as well as, refusal to prosecute high ranking officers or treating such officers too leniently have been observed. For example, in ‘Mitwaba’, a Major accused of imprisoning 95 people in inhumane conditions in three small cells while depriving them of food, was merely convicted of ‘failure to assist persons in danger’ and sentenced to 15 months in prison”.

<sup>121</sup> According to a study by OSI/AfriMAP, while in the past the presiding judge of a military trial in the DRC could have been an officer who was not legally qualified, this has changed and “the presiding role in the constitution of military courts was progressively entrusted to military judges rather than officers who were not qualified judges”. However, the study remains silent with regard to ordinary members of the bench, a silence which suggests that these positions can still be filled by officers who are not legally qualified judges. See OSI/AfriMAP, DRC Military Justice and Human Rights (n 51), p. 7. In addition, a Congolese human rights activist confirmed that some judges on military benches lack legal qualification. Interview notes with author.

<sup>122</sup> See, e.g., ICTJ, Impact of the Rome Statute in the DRC (n 115), p. 3 (“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”).

Yamba, but he was sentenced to only 15 months in prison.<sup>123</sup>

Against this background, it is interesting to note that the 15 military trials identified by ASF and HRW (and mentioned in section 5.2 above) involved more government soldiers than non-state actors: Out of 200 Congolese defendants, 159 were soldiers of the national army. However, a close examination reveals that the trials involving government forces have typically targeted only low level soldiers and high ranking military officers

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were rarely prosecuted (with the exception of two lieutenant-colonels and a major who were tried). This is not the case with respect to trials addressing crimes committed by non-state actors, which often involve senior militia leaders. Further, it is noted that more than half (over 90) of the government soldiers who were tried were prosecuted for crimes committed in the context of mutinies.<sup>124</sup> This worrying trend – that senior military officers are rarely brought to justice – is compounded by the fact that certain well-known suspects such as Bosco Ntaganda and Jean-Pierre Biyoyo currently hold senior positions in the military (see section 4.1 above).

The political interference in military judicial proceedings, mentioned above, could partly explain why military courts have rarely prosecuted high ranking military officers. Further, according to a MONUC human rights officer, the military judicial authorities believe that government forces are fighting a ‘just cause’ which justifies their acts, and accordingly do not usually initiate proceedings against military officials.<sup>125</sup> Other

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interviewees stressed that benches in Congolese military court must include judges who have an equal or a higher rank than the defendants, making it difficult to compose

<sup>123</sup> HRW, Militia Leader Guilty in Landmark Trial (n 103).

<sup>124</sup> See note 94 above.

<sup>125</sup> Interview notes with author. This proposition was supported by perceptions expressed by a Congolese military judicial official based in Goma, North Kivu, who was interviewed in late 2008. The interviewee explained that soldiers have not been arrested until then for international crimes committed in or around Goma, simply because they have not committed such crimes. Interview notes with author. (It is noted that since the interview there have been some atrocity-related proceedings against soldiers in North Kivu province.)

benches authorized to try senior military commanders.<sup>126</sup>

In light of the above, it seems highly problematic that atrocities in the DRC are exclusively prosecuted by military courts. Hopefully, the DRC will soon adopt the draft law transferring jurisdiction over international crimes to civilian courts.<sup>127</sup> Granting such jurisdiction to civilian courts may not be an end-all solution given that their independence has also been criticized (see section 4.2 above), but their greater transparency and legally qualified judges may provide better safeguards against due process violations than those provided by military courts. Further, civilian courts may be in a better position than military courts to handle proceedings against high military officials.

## 6. INTERNATIONAL JUDICIAL RESPONSE TO THE MASS ATROCITIES: THE ICC

### 6.1 ICC BACKGROUND<sup>128</sup>

The ICC, based in The Hague, is the first permanent international criminal court mandated to help end impunity for the most serious crimes of concern to the international community. The ICC was established by the Rome Statute, a multilateral treaty which was adopted by 120 states on 17 July 1998, and which entered into force on 1 July 2002 after ratification by 60 states. Thus the ICC is a treaty-based international organization which is independent from (although cooperative with) the UN. As of 20 October 2011 as many as 119 states are party to the Rome Statute.

The Rome Statute grants the ICC jurisdiction over genocide, crimes against humanity and war crimes committed on the territory of a State Party or by its nationals, on or after 1 July 2002 (the date in which the Statute entered into force).<sup>129</sup> However, when a case has been referred to the ICC by the UN Security Council, it can concern the territory or nationals of any UN Member State. In addition, the ICC is mandated to

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<sup>126</sup> Interview notes with author. Also see OSI/AfriMAP, DRC Military Justice and Human Rights (n 51), p. 4 (“due to the hierarchical principle according to which a member of the armed forces may only be judged by judges of a rank equal to or higher than their own rank, higher ranking officers have generally escaped prosecution, which has mainly focused on enlisted members of the armed forces or militia and a few former heads of armed factions. Out of 13 cases studied by ASF/LWOB, only three involved prosecution of high-ranking officers”).

<sup>127</sup> DRC Draft Law on Domestic Implementation of the Rome Statute (n 23).

<sup>128</sup> The source of the information in this section, including the footnotes, is the ICC official website: <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>129</sup> The Rome Statute has recently been amended to cover the crime of aggression, but the amendment will only enter into force when several conditions are met and not before several years from now.

address only the gravest crimes. The ICC is a court of last resort and is complementary (or residual) to the jurisdiction of national courts. It will not act if the case concerned is investigated or prosecuted at the domestic level, unless the national proceedings are not genuine (for example if they are intended to shield a person from prosecution by the ICC). This is referred to as the “principle of complementarity”.<sup>130</sup> Pursuant to the Rome Statute, the Office of the Prosecutor of the ICC (OTP) can initiate an investigation *proprio motu* (on his own initiative),<sup>131</sup> or on the basis of a referral from the UN Security Council or from a State Party to the Rome Statute.<sup>132</sup>

## 6.2 ICC CASES CONCERNING THE DRC<sup>133</sup>

In April 2002, the DRC ratified the Rome Statute of the ICC. In July 2003, based on information it had received from individuals, international organizations and NGOs, the OTP decided to closely follow the situation in the Ituri district of the DRC, where the violence had reached catastrophic magnitude.<sup>134</sup> Later that year, the ICC Prosecutor expressed his intentions to seek the authorization of an ICC Pre-Trial Chamber to start an investigation in the DRC *proprio motu*.<sup>135</sup> But he eventually did not need to resort to *proprio motu* powers: On 19 April 2004, the Congolese government requested the ICC to investigate crimes committed throughout the DRC.<sup>136</sup> Following this request, on 23 June 2004, the OTP opened an investigation into crimes in the DRC.<sup>137</sup> This was the ICC’s

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<sup>130</sup> Article 17 of the Rome Statute enshrines the principle of complementarity by providing that a case is inadmissible before the ICC when it is being investigated or prosecuted by a state which has jurisdiction over the case and which is willing and able to genuinely carry out the proceedings, or when the case has been investigated by such a state but a decision was made not to prosecute the suspects (and such decision did not result “from the unwillingness or inability of the State genuinely to prosecute”). For a comprehensive study of the historical development and contemporary interpretation of the principle of complementarity, see Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers, 2008). It is noted that Article 17 of the Rome Statute provides two additional grounds of inadmissibility: (i) when the case is insufficiently grave to be addressed by the ICC, (ii) when the suspect has already been tried for the alleged crimes.

<sup>131</sup> Initiation by the OTP of a *proprio motu* investigation is subject to the authorization of the ICC Pre-Trial Chamber.

<sup>132</sup> A *proprio motu* investigation or a State Party referral must be in relation to ICC-crimes committed on the territory or by the national of a State Party. These restrictions do not apply where the UNSC refers to the ICC a situation, which may concern any UN Member State.

<sup>133</sup> The source of the information in this section, unless stated otherwise, is the ICC official website: <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>134</sup> ICC Press Release, ‘Communication Received by the Office of the Prosecutor of the ICC’, ICC-OTP-20030716-27 (16 July 2003), pp. 2-4 <[http://www.icc-cpi.int/NR/rdonlyres/9B5B8D79-C9C2-4515-906E-125113CE6064/277680/16\\_july\\_english1.pdf](http://www.icc-cpi.int/NR/rdonlyres/9B5B8D79-C9C2-4515-906E-125113CE6064/277680/16_july_english1.pdf)> accessed on 9 March 2011.

<sup>135</sup> ICC Prosecutor’s Statement of 8 September 2003 (n 1), p.4 (“If necessary, however, I stand ready to seek authorisation from a Pre-Trial Chamber to start an investigation [in the DRC] under my *proprio motu* powers.”)

<sup>136</sup> ICC Press Release, ‘Prosecutor receives referral of the situation in the Democratic Republic of Congo’, ICC-OTP-20040419-50 (19 April 2004) <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Press+Releases/Press+Releases+2004/>> accessed on 9 March 2011.

<sup>137</sup> ICC Press Release, ‘The Office of the Prosecutor of the International Criminal Court opens its first investigation’,

very first investigation. As of the time of writing, the ICC has charged five militia leaders for crimes committed in the DRC: Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, Bosco Ntaganda and Callixte Mbarushimana.<sup>138</sup> Trials have thus far commenced against three of them – Lubanga, Katanga and Ngudjolo – in connection with crimes committed in Ituri.

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The trial against Lubanga is the first trial in the history of the ICC.<sup>139</sup> Lubanga is the alleged former leader of the *Union des Patriotes Congolais* (UPC) and the *Forces Patriotiques pour la Libération du Congo* (FPLC). He is charged by the ICC with war crimes committed in Ituri, in particular, enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities. The arrest warrant against Lubanga was issued by the ICC under seal on 10 February 2006. Lubanga was already under arrest in Kinshasa at the time. On 17 March 2006 he was transferred by the DRC authorities to the ICC in The Hague and his arrest warrant was unsealed by the ICC. Lubanga's trial before the ICC commenced on 26 January 2009, the closing arguments were heard on 25 and 26 August 2011, and a judgement is expected shortly.

The second DRC case at the ICC is the joint trial of Katanga and Ngudjolo.<sup>140</sup> Katanga is the alleged commander of the *Force de Resistance Patriotique en Ituri* (FRPI), and Ngudjolo is the alleged former leader of the *Front des Nationalistes et Integrationnistes* (FNI). Katanga and Ngudjolo are accused of crimes committed in connection with the attack of 24 February 2004 on the village of Bogoro, in Ituri, where 200 people died and many atrocities were committed. In particular, they are jointly charged with the crimes against humanity of murder, other inhumane acts and sexual slavery, and the war crimes of willful killing, inhumane treatment, using children under the age of fifteen to participate actively in hostilities, intentionally directing attacks against

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ICC-OTP-20040623-59 (23 June 2004) <<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation>> accessed on 9 March 2011.

<sup>138</sup> The ICC also indicted a Congolese national for crimes committed in the Central African Republic, and that his trial has also commenced (see note 148 below).

<sup>139</sup> ICC Case No. ICC-01/04-01/06, *The Prosecutor v. Thomas Lubanga Dyilo*.

<sup>140</sup> ICC Case No. ICC-01/04-01/07, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.



civilians, and pillaging. Katanga, like Lubanga, was already in custody in the DRC when the ICC issued the arrest warrant against him. He was surrendered to the ICC on 17 October 2007.<sup>141</sup> Ngudjolo was arrested in Kinshasa following the ICC arrest warrant, while attending a military training as a colonel in the national army,<sup>142</sup> and he was surrendered to the ICC on 7 February 2008.<sup>143</sup> On 10 March 2008, the Pre-Trial Chamber decided to conduct Katanga's and Ngudjolo's trials jointly. Their joint trial before the ICC started on 24 November 2009.

The third DRC case at the ICC concerns Bosco Ntaganda.<sup>144</sup> He is charged by the ICC in connection with war crimes committed in Ituri, in particular, enlisting and conscripting children under the age of fifteen into the FPLC and using them actively in hostilities. Ntaganda allegedly committed these crimes when he was the former leader of the FPLC. He later became the Chief of Staff of the CNDP, a pro-Rwandan armed group active in North Kivu province. At the time of writing, Ntaganda is still at large, and evidence suggests that he has been appointed to a senior position in the DRC army.<sup>145</sup>

In its fourth DRC case, the ICC has charged alleged executive secretary of the FDLR, Callixte Mbarushimana, with a number of war crimes and crimes against humanity allegedly committed in the North and South Kivu provinces.<sup>146</sup> Mbarushimana

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<sup>141</sup> Katanga was arrested by the Congolese authorities on 26 February 2005 and was held in detention in the DRC for investigation purposes, without being formally charged. An additional 7 persons were arrested with Katanga in the DRC, and are still held in detention there without formal charges (see notes 108-109 above and attached text). The ICC arrest warrant against Katanga was issued under seal on 2 July 2007 and unsealed on 18 October 2007, a day after he was surrendered to the ICC by the DRC authorities.

<sup>142</sup> Nonetheless, according to an interview with an ICC official, Ngudjolo had been tried previously by DRC courts in Bunia in 2003 in connection with the murder of a UPC member. He was acquitted by a tribunal in Bunia but the prosecutor in Bunia opened a new investigation on the day he was acquitted and he was thus kept in detention. In September 2004, Ngudjolo was transferred to Kinshasa "for security reasons", with around 20 other detainees. He was released three months later. Subsequently, the national authorities captured and arrested him upon the request of the ICC, and transferred him to the ICC. Interview notes with author.

<sup>143</sup> Ngudjolo's ICC arrest warrant was issued under seal on 6 July 2007 and unsealed on 7 February 2008, the day of his surrender to the ICC.

<sup>144</sup> ICC Case No. ICC-01/04-02/06, *The Prosecutor v. Bosco Ntaganda*.

<sup>145</sup> HRW 2010 World Report (n 40), p. 104 ("The fight against impunity [in the DRC] was seriously undermined by the promotion of Bosco Ntaganda to the rank of general, despite an ICC arrest warrant for war crimes he committed in Ituri between 2002 and 2004."); UNHRC 2010 Expert Report on DRC (n 33), para. 64 ("In January 2009, Bosco Ntaganda was promoted to the rank of general in the context of the rapprochement with CNDP, even though nine months earlier the International Criminal Court had published an arrest warrant for war crimes against him. During the Human Rights Council's universal periodic review in November and December 2009, the Government explicitly rejected the recommendation that Ntaganda should be arrested and transferred to the International Criminal Court. Despite Government assurances that Ntaganda no longer exercises command functions within FARDC, reports indicate that he remains involved in the FARDC command structure, including in the context of the Kimia II operation"). The ICC issued a sealed warrant of arrest against Ntaganda on 22 August 2006. The warrant was unsealed on 28 April 2008. The DRC claims that Ntaganda is crucial to the peace process and therefore this is not the right time to arrest him.

<sup>146</sup> ICC Case No. ICC-01/04-01/10, *The Prosecutor v. Callixte Mbarushimana*. The Pre-Trial Chamber issued a sealed warrant of arrest against Mbarushimana on 28 September 2010, which was unsealed on 11 October 2010, the day he was arrested by the French authorities.

is a Rwandan national, who was recently arrested in France and surrendered to the ICC.<sup>147</sup> In addition to the above cases, a DRC national is on trial before the ICC in connection with crimes committed in the Central African Republic.<sup>148</sup>

## 7. ICC – DRC COOPERATION

### 7.1 COOPERATION OF THE DRC WITH THE ICC

The DRC, as a State Party to the Rome Statute, is obligated under Part 9 of the Statute to cooperate with the ICC. To meet this obligation, the DRC concluded a cooperation agreement with the ICC, an agreement on privileges and immunities for ICC members, and agreed that MONUC will assist its national authorities in executing ICC warrants of arrest.<sup>149</sup> An OTP official added that the DRC designated its Prosecutor General as the official focal point for ICC judicial cooperation. This means that the OTP is required to channel its requests for cooperation from Congolese authorities through the Kinshasa-based office of the Prosecutor General. However, the OTP sometimes contacts provincial and other local prosecutors in the DRC directly since the office of the Prosecutor General of the DRC lacks basic communication equipment, such as fax machines, and has no means by which to transfer requests to local authorities. Similarly, the OTP sometimes liaises directly with the DRC Military Prosecutor General, although the latter is not an official focal point for cooperation with the ICC. In both cases, the OTP notifies in parallel the Prosecutor General of the DRC.<sup>150</sup>

<sup>147</sup> Mbarushimana was arrested in France on 11 October 2010 and transferred to the ICC on 25 January 2011. Coalition for the ICC, 'New Suspect in Custody at the International Criminal Court' (25 January 2011) <[http://www.iccnw.org/documents/MA\\_CICC\\_Callixte\\_Mbarushimana\\_Transfer\\_25Jan2011\\_Final.pdf](http://www.iccnw.org/documents/MA_CICC_Callixte_Mbarushimana_Transfer_25Jan2011_Final.pdf)> accessed on 28 February 2011; Radio Netherlands Worldwide, 'Rwandan Rebel Transferred to ICC This Month' (5 January 2011) <<http://www.rnw.nl/international-justice/article/rwandan-rebel-transferred-icc-month>> accessed on 11 January 2011.

<sup>148</sup> The Congolese national who was indicted by the ICC in connection with crimes committed in the Central African Republic is Jean-Pierre Bemba Gombo (the presidential candidate who ran against Joseph Kabila in the DRC presidential elections of 2006 and received 42% of the votes in the second round; see note 18 above).

<sup>149</sup> This was explained by a senior DRC judicial authority in a hearing before the ICC on 1 June 2009. See ICC Case No. ICC-01/04-01/07, *Prosecutor v. Katanga and Ngudjolo*, Trial Transcript 1 June 2009, pp. 76-77 (Advocate General of the Republic: "Our country wanted to show its desire to cooperate fully with the ICC, and we signed a certain number of agreements to this effect, interim cooperation agreement, the 6th of October, 2004, and the DRC said that it would fully cooperate with the ICC by establishing mechanisms for assistance, by carrying out investigations rapidly and by ensuring that the OTP could carry out prosecutions. Our country also ratified on the 3rd of July, 2007, the agreement on privileges and immunities for members of the ICC whereby these individuals have guarantees to carry out their mission without hindrance in the territory of the DRC. And finally, there was the agreement on judicial assistance dated the 8th of November, 2005, which refers to the seat of the MONUC agreement. This gives MONUC the mandate to assist DRC authorities when it comes to operations of assistance, transport, and secure transfers to the ICC of persons who are being sought by the ICC").

<sup>150</sup> Interview notes with author.

The OTP official indicated that, with rare exceptions, the DRC has been routinely cooperating with the OTP, for example by granting OTP requests for search and seizure or access to specific national files. The ICC official added that the OTP sometimes seeks updates from the national authorities about domestic proceedings, in order to ascertain the scope of ongoing or potential national investigations in view of the principle of complementarity. Such requests are usually granted by the Congolese authorities. The DRC also cooperates with the ICC in the area of witness protection, by helping the ICC in managing its witness protection programs in the DRC.<sup>151</sup>

*Notwithstanding its generally good record of cooperation, the DRC has not cooperated with the ICC's request for the arrest and transfer to The Hague of Bosco Ntaganda, the alleged former senior leader of the FPLC and the CNDP, who was indicted by the ICC in 2006.*

Notwithstanding its generally good record of cooperation, the DRC has not cooperated with the ICC's request for the arrest and transfer to The Hague of Bosco Ntaganda, the alleged former senior leader of the FPLC and the CNDP, who was indicted by the ICC in 2006 (see section 6.2 above).

## 7.2 COOPERATION OF THE ICC WITH THE DRC

Aside from exceptional cases, the OTP gathers evidence without involving the DRC authorities. This is consistent with Articles 99 (1) and 99 (4) of the Rome Statute, and is done to protect the confidentiality of the ICC's ongoing investigations, its witnesses and the preservation of evidence, and to avoid influencing local proceedings.<sup>152</sup> For similar reasons, when the OTP requests assistance from the DRC authorities, it does not inform them of the subject matter of its investigations.<sup>153</sup>

However, Article 93 of the Rome Statute allows the ICC to assist a state in conducting national trials or investigations, upon the request of that state and subject to the fulfillment of certain requirements such as witness protection guarantees and third

<sup>151</sup> Interview notes with author.

<sup>152</sup> Based on an interview with an OTP official. Interview notes with author.

<sup>153</sup> This was explained by the OTP during a hearing before the ICC, on 1 June 2009. See ICC Case No. ICC-01/04-01/07, *Prosecutor v. Katanga and Ngudjolo*, Trial Transcript 1 June 2009, pp. 54-55 (Prosecutor Eric MacDonald: "When we meet with the authorities from the DRC or from other countries who have referred a situation, that is, being investigated to the court, the approach is always the same. We do not inform the authorities about what we are investigating. The first reason is that we do not want to be perceived as trying to influence the local authorities when it comes to pursuing their legal affairs. And the Chamber will also understand that the Prosecution always bears in mind its obligations when it comes to the security and protection of witnesses pursuant to Article 54 or 68").



party consent when relevant.<sup>154</sup> The national proceedings which the ICC may assist must relate to “conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State”.<sup>155</sup> The forms of assistance the ICC can offer include, but are not limited to, “questioning of any person detained by order of the Court”, and “transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court”.<sup>156</sup> On 22 January 2007, the DRC made a formal request for information from the ICC.<sup>157</sup> The OTP considered the request but rejected it, noting that:

... security, confidentiality and witness protection considerations prevented it from disclosing to the DRC authorities information derived from OTP investigative sources. As an alternative, and in the interests of supporting domestic efforts to the extent possible, the OTP offered to provide summaries of the information concerned subject to certain undertakings of confidentiality. The DRC authorities did not respond.<sup>158</sup>

An ICC official explained that the OTP, in principle, seeks to assist national proceedings to the extent possible, subject to the fulfillment of the requirements set out in Article 93 of the Rome Statute. He noted that over the last several years, the OTP has had lengthy consultations with the DRC authorities about assisting their national judicial proceedings, and has offered to share information provided that they met the Rome Statute conditions. However, as the quote above indicates, the DRC did not respond regarding the fulfillment of these conditions, and the discussions eventually terminated.<sup>159</sup>

*...the cooperation between the ICC and the DRC has so far been in one direction – the DRC assisting the ICC. However, noted an ICC official, the OTP has contributed to numerous trainings aimed at assisting the DRC authorities with national investigations*

<sup>154</sup> According to Article 93(10)(b)(ii) of the Rome Statute, third state consent must be provided “[i]f the documents or other types of evidence have been obtained with the assistance of a State”, and witness protection guarantees must be provided “[i]f the statements, documents or other types of evidence have been provided by a witness or expert”. It is noted that while most of the articles in Part 9 of the Rome Statute address the obligations of states to cooperate with the ICC, Article 93 provides for cooperation in the opposite direction.

<sup>155</sup> Article 93(10)(a) of the Rome Statute.

<sup>156</sup> Article 93(10)(b)(i) of the Rome Statute. It is noted that under Art 93(10)(c) assistance can be granted to a non-State Party.

<sup>157</sup> ICC Case No. ICC-01/04-01/07, *Prosecutor v. Katanga and Ngudjolo*, ‘Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)’, filed on 30 March 2009, para. 29 (“On 22 January 2007, the AGM, through the Procureur-General of the DRC, sent an official request for assistance to the OTP in the matter of the Accused and his co-suspects”).

<sup>158</sup> *Ibid*, para. 35.

<sup>159</sup> Interview notes with author.

Thus the cooperation between the ICC and the DRC has so far been in one direction – the DRC assisting the ICC.<sup>160</sup> However, noted an ICC official, the OTP has contributed to numerous trainings aimed at assisting the DRC authorities with national investigations. In addition, the OTP has investigated at least one incident in Ituri with the aim of handing over the information gathered. More recently, according to the ICC official, the OTP has directly assisted investigations in the DRC’s North and South Kivu provinces. It has also invited DRC judicial authorities on several occasions to participate in trainings in The Hague.<sup>161</sup>

*...recently, according to the ICC official, the OTP has directly assisted investigations in the DRC’s North and South Kivu provinces. It has also invited DRC judicial authorities on several occasions to participate in trainings in The Hague.*

It should also be noted in this context that the OTP is considering coordinating its investigations in the DRC’s North and South Kivu provinces with local authorities. An ICC official explained that the OTP is working with the DRC authorities to try to identify practical options to work in a coordinated way on some investigations (not necessarily sharing everything but finding a way to investigate together).<sup>162</sup>

## 8. IMPACT OF THE ICC ON THE NATIONAL RESPONSE

This part of the report addresses the impact of the ICC, and its normative framework, on domestic formal judicial proceedings in the DRC in the following four areas: (i) norms applied in domestic atrocity-related cases; (ii) rates of and trends in domestic atrocity-related prosecutions; (iii) sentencing practices in atrocity-related cases; and (iv) national

<sup>160</sup> That the cooperation between the ICC and the DRC was only in one direction was confirmed in interviews with ICC and Congolese lawyers. Interview notes with author. Also see G. Mattioli and A. van Woudenberg, ‘Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo’, in *Courting Conflict? Justice, Peace and the ICC in Africa* (Ed. N. Waddell and P. Clark, 2008) (hereinafter: “Global Catalyst for National Prosecutions”), p. 58 (“National judicial officials in Ituri and Kinshasa report that they have not received any assistance from the OTP. Human Rights Watch researchers were told that the interaction between the OTP and national judicial officials in Ituri and Kinshasa has been functional, but only in relation to ICC investigations and cases. OTP staff have requested access to local investigative dossiers and have secured other forms of assistance. National judicial officials expressed disappointment and frustration that cooperation has, to date, been in only one direction.” Footnotes omitted.)

<sup>161</sup> Interview notes with author. Also see section 8.4 below.

<sup>162</sup> Interview notes with author. The ICC official further explained that the OTP, in considering whether and how to collaborate with local authorities, is assessing national capacity levels and existing capacity building programs operating in the Kivus. The OTP is interacting with actors involved in local capacity building initiatives in the Kivus, including NGOs as well as UN and EU bodies.

capacity to handle atrocity-related cases. These four areas of focus were chosen as indicators of whether the ICC has encouraged domestic accountability processes in the DRC. The present report is a case-study which provides a broad preliminary analysis of the above areas rather than an in-depth thematic analysis (see section 1.2 above). The report does not discuss the ICC's impact on traditional or alternative justice means in the DRC (see section 1.1 above).

## 8.1 NORMATIVE IMPACT

### *Direct Application of Rome Statute Substantive Norms*

The Congolese Constitution of 2006 enshrines the country's monistic approach to international law by authorizing "civil and military courts [to] implement duly ratified international treaties",<sup>163</sup> and by providing that "duly concluded treaties and international agreements have ... superior authority to that of laws".<sup>164</sup> On this basis, since 2006, Congolese military courts have been directly applying Rome Statute provisions.<sup>165</sup> For example, in the *Mutins de Mbandaka* case of 2006, the Military Garrison Tribunal of Mbandaka referred to the Rome Statute in convicting soldiers for crimes against humanity.<sup>166</sup> In the *Bavi* case of 2007, the Military Garrison Tribunal of Ituri rejected national norms in favor of "key provisions" of the Rome Statute.<sup>167</sup> In the *Bongi* and *Chief Kahwa* cases,

*The Congolese Constitution of 2006 enshrines the country's monistic approach to international law by authorizing "civil and military courts [to] implement duly ratified international treaties", and by providing that "duly concluded treaties and international agreements have ... superior authority to that of laws". On this basis, since 2006, Congolese military courts have been directly applying Rome Statute provisions.*

<sup>163</sup> DRC Constitution of 2006 (n 15), Article 153.

<sup>164</sup> Ibid, Article 215.

<sup>165</sup> It is recalled that in the DRC only military courts have jurisdiction over international crimes, even when the accused is a civilian (see section 5.1 above).

<sup>166</sup> Global Catalyst for National Prosecutions (n 160), pp. 59-60 ("...in June 2006, the military tribunal of Mbandaka cited the Rome Statute in sentencing 42 soldiers after convictions on counts of crimes against humanity"). According to the ASF 2009 Study (n 61), over 60 army soldiers were tried in the *Mutins de Mbandaka* case in connection with a mutiny they committed in July 2005 in the province of Equateur. During the mutiny, the soldiers broke into a weapon store and swarmed the streets, pillaging everything in their path, killing 6 people, raping 46 others and committing other crimes including torture. On 20 June 2006, the Military Garrison Tribunal of Mbandaka sentenced 9 defendants to life imprisonment for crimes against humanity, one defendant to 20 years imprisonment, two others to 5 years, and 29 defendants to prison terms of between 12 and 24 months. The rest were acquitted. On 15 June 2007, the appellate court confirmed 8 of the convictions, only 3 of them for crimes against humanity. See ASF 2009 Study (n 61), Annex. Also see Trapani DRC Report (n 12).

<sup>167</sup> MGT of Ituri, *Bavi* case, op. cit., pp. 36-37, as cited in ASF 2009 Study (n 61), p. 43. According to the ASF 2009 Study (n 61), in the *Bavi* case, 15 army soldiers were accused of involvement in a massacre between August and

the military courts of Ituri defined war crimes in accordance with the Rome Statute rather than domestic law.<sup>168</sup> In the *Songo Mboyo* and *Gédéon* cases, military courts in Equateur and Katanga provinces, respectively, applied the Rome Statute definition of rape as a crime against humanity.<sup>169</sup> In the *Milobs* case of 2007, the Military Garrison Tribunal of Ituri explicitly ruled that “substantive Congolese law introduced into its legal arsenal ... the Statute of the International Criminal Court, [which] becomes a legal instrument that forms an integral part of Congolese penal law”.<sup>170</sup>

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September 2006 near Bunia. The victims were tortured and raped before being killed and others were buried alive in a mass grave. The mass grave, containing over thirty bodies of men, women and children, was discovered in the hills of Gety and Bavi (60 km from Bunia) in October 2006. The main accused was Captain Mulesa Mulombo “Bozize”. On 19 February 2007, 13 of the 15 defendants, including Captain Bozize, were sentenced to life imprisonment for war crimes. Another captain who was charged, and who confessed, was sentenced to 180 days in prison. One defendant was acquitted. The appellate court confirmed the decision of the lower court as regards the main defendant Captain Bozize. It reduced the sentences of the other defendants to between 10 and 15 years of imprisonment for extenuating circumstances related to psychological pressure and collaboration with justice. See ASF 2009 Study (n 61), Annex. Also see Trapani DRC Report (n 12).

<sup>168</sup> ASF 2009 Study (n 61), pp. 55, 57. It is recalled in this context that the definitions of crimes against humanity and war crimes under Congolese law differ from their definitions in the Rome Statute (see section 5.1 above). In the *Bongi* case, according to the ASF 2009 Study (n 61), military commander Captain Blaise Bongi Massaba was charged in connection with an attack on the civilian population in the village of Tshekele in Ituri on 20 October 2005. The charges against him included looting civilian property, forcing five civilians to carry the looted goods, and subsequently killing them in the village of Bussinga. On 24 March 2006, the accused was sentenced to life imprisonment for war crimes. On 4 November 2006, the appellate jurisdiction reduced his sentence to 20 years imprisonment. Captain Bongi escaped from Bunia prison in March 2007. See ASF 2009 Study (n 61), Annex. In the *Chief Kahwa* case, the leader of the rebel group PUSIC, Kahwa Panga Mandro, was sentenced in August 2006 to 20 years imprisonment for killing ten people after setting fire to a health centre, schools and churches southeast of Bunia in October 2002. In July 2007 he was acquitted on appeal by the Military Court of Kisangani, on the grounds that a national amnesty law was applicable to the charges. See IWPR, *Chaos in the Courts* (n 83). However, according to the ASF 2009 Study (n 61), on 1 March 2008, another arrest warrant was issued against Kahwa for crimes against humanity, war crimes, murder, assault and grievous bodily harm in relation to facts different from those for which he was acquitted. See ASF 2009 Study (n 61), Annex. Also see Trapani DRC Report (n 12).

<sup>169</sup> ASF 2009 Study (n 61), pp. 39-42. Also see Global Catalyst for National Prosecutions (n 160), pp. 59-60 (“... in April 2006 a military tribunal in Songo Mboyo directly cited the Rome Statute in sentencing seven members of the Congolese army to life in prison for collective rape. For the first time, a court in the DRC designated collective rape as a crime against humanity”); HRW, *Militia Leader Guilty in Landmark Trial* (n 103) (“The [*Gédéon*] military trial was also significant because the judges applied the definition of crimes against humanity as found in the Rome Statute of ICC”). For a description of the *Gédéon* case see notes 104-105 above and the attached text. The *Songo Mboyo* case, according to the ASF 2009 Study (n 61), involved 12 army soldiers (including two lieutenant-colonels) who were tried in connection with a mutiny committed in the village of Songo Mboyo on 21 December 2003, during which the soldiers perpetrated a series of mass rapes (including against the wives of senior army officers). On 12 April 2006, the lower military court sentenced 7 defendants to life imprisonment for crimes against humanity and other military offenses, and acquitted the 5 other defendants. On 7 June 2006, the appellate court upheld the decision of the lower court concerning 6 defendants and reversed the conviction of the 7th defendant. See ASF 2009 Study (n 61), Annex. Also see Trapani DRC Report (n 12).

<sup>170</sup> ASF 2009 Study (n 61), pp. 16-17. The *Milobs* case, according to the ASF 2009 Study (n 61), concerned 7 FNI militia members charged with the murder of two MONUC military observers (a Malawian and a Jordanian) in May 2003 in Mungwalu, Bunia. The first instance military court issued its judgement on 19 February 2007. The appeal judgement was rendered on 12 November 2007 (confirming the lower court’s conviction of 6 out of the 7 defendants, and its imposition of life sentences in relation to 4 of them, as well as 20 and 10 years imprisonment in relation to the other two). See ASF 2009 Study (n 61), Annex.

### *Definition of Rape under Domestic Law*

The *Songo Mboyo* case of 2006 was the first case in the DRC to regard rape as a crime against humanity.<sup>171</sup> After the trial, the DRC adopted a new law on sexual violence crimes which “modifies and completes the Congolese Criminal Code by integrating norms of international humanitarian law which relate to sexual violence crimes.”<sup>172</sup> This law defines rape in broader terms than previous Congolese provisions. For example, it acknowledges that males may be victims of rape. It also imposes heavier sentences than those previously imposed under DRC law for sexual violence. An ICC official has noted that the definitions of rape and other sexual crimes in the new Congolese law were inspired by (although not identical to) the Rome Statute's definitions of these crimes.<sup>173</sup>

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### *Potential Impact on Procedural Norms*

As illustrated by the discussion above, the Rome Statute has had some impact on the substantive norms applied by DRC courts. However, the available materials make it difficult to conclude that the ICC or the Rome Statute have had such an impact on the domestic application of *procedural* norms. This is unfortunate, especially given that Congolese military courts have been internationally criticized for violating minimum due process standards (see section 5.3 above). One commentator, who reiterated the assessment that Congolese military courts frequently violate due process standards, also noted that their judgements in atrocity cases “do not discuss in detail the procedures that were followed in these cases so it is impossible to provide assessment of this issue”.<sup>174</sup> Still, she identified one case where a Congolese military court has used Rome Statute norms to correct a situation where applying national law would have violated the

<sup>171</sup> Global Catalyst for National Prosecutions (n 160), pp. 59-60.

<sup>172</sup> *Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais*, published in the Official Journal of the DRC, 47<sup>th</sup> year, Volume no. 15, 1 August 2006 (copy with author). The translation was made by the author. The original French text reads: “Ainsi, la présente loi modifie et complète le Code pénal congolais par l'intégration des règles du droit international humanitaire relatives aux infractions de violences sexuelles.”

<sup>173</sup> Interview notes with author.

<sup>174</sup> Elena A. Baylis, ‘Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks’, U. of Pittsburgh Legal Studies Research Paper No. 2008-06 (March 2008) <[ssrn.com/abstract=1105244](http://ssrn.com/abstract=1105244)> accessed on 5 March 2011.



rights of the accused.<sup>175</sup> But this is the exception to the general tendency of these courts to violate due process standards. Nonetheless, an ICC official explained that international procedural norms may soon permeate into the Congolese justice system due to the international involvement in the country's ongoing legal reform. Existing informal contacts between the OTP and Congolese officials may also help such permeation of international procedural norms.<sup>176</sup>

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At the same time, the ICC must try to avoid having a negative impact on due process standards in the DRC. As noted in section 5.2 above, seven individuals who were arrested in the DRC in early 2005, following the killing of UN peacekeepers in Ituri, have since then been in provisional detention without proceeding to trial. In mid 2010, an interviewee with knowledge of local developments in the DRC indicated that the Congolese authorities told local defence lawyers that the seven individuals were kept in detention in case the ICC would ask to investigate them (although the Congolese authorities never publicly admitted that they are keeping the suspects in detention in case the ICC would request them).<sup>177</sup> An ICC official, also interviewed in 2010, stressed that these suspects were detained as part of a national investigation which is unrelated to the ICC, and that the ICC had informed the DRC that it did not intend to investigate them. He suggested that the government's reluctance to release them may relate to pressure from MONUC/MONUSCO and the UN Security Council to investigate the killing of UN peacekeepers.<sup>178</sup> Nonetheless, it is interesting that in early 2011 (so after the above interviews), three of the seven suspects were transferred from the DRC detention facilities to The Hague, in order to testify before the ICC as defence witnesses. While the OTP may not have been aware that ICC defence

<sup>175</sup> Ibid, at p. 39 (referring to the *Bongi* case described in note 170 above). In that case, Congolese law did not attach a penalty to some of the crimes with which the accused was charged, and the court regarded this as a due process violation which it "fixed" by following the penalty structure of the Rome Statute. It is noted, however, that the court also applied the Rome Statute definitions of the crimes. In this context, see note 200 below and the attached text.

<sup>176</sup> Interview notes with author. The interviewee clarified that, while the OTP is not actively involved in the Congolese legal reform, it has informal discussions about it with Congolese parliamentarians and ministry officials.

<sup>177</sup> Interview notes with author.

<sup>178</sup> Interview notes with author. The interviewee added that difficulties associated with composing an appropriate bench may contribute to the delay in commencing the trial (judges in military trials must have an equal or a higher rank than the defendants – see section 5.3 below).



teams would call these witnesses, still, their transfer to The Hague suggests that their prolonged provisional detention in the DRC may have been connected to an anticipated ICC request to call them as witnesses. If this is true, then the ICC is inadvertently providing an excuse for local authorities to violate minimum due process standards. This effect is of course not intended by the ICC, and, indeed, it is recalled that the ICC has informed the DRC that it does not seek to investigate these individuals. Such an announcement by the ICC, while not creating a legal obligation on the DRC, should have at least encouraged the DRC to be more diligent in this case. Still, to more successfully discourage due process violations, the ICC could have supplemented the announcement with subsequent (and perhaps more explicit) communications.

## 8.2 PROSECUTION RATES

While the (substantive) normative impact of the Rome Statute in the DRC may be impressive, it relates to very few cases. Only a few hundred suspects have been tried in the DRC since 2002, and for only a handful of atrocities. This is a drop in the ocean when considering the timeframe and geographical scope of the violence in the DRC, and the gravity and widespread nature of the atrocities. Further, this is hard to reconcile with the Rome Statute's central goal of encouraging national prosecution of atrocities.

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The Rome Statute reiterates the obligation of states to investigate and prosecute atrocities, and “threatens” them that the ICC will become involved if they fail to do so. But even when the ICC decides to initiate proceedings, it is important that national proceedings take place in parallel, since the ICC's limited jurisdiction and capacity prevents it from prosecuting more than a few perpetrators in any given case. ICC officials explained that the Court cannot directly participate in domestic investigations or prosecutions, but it can encourage other actors, such as the EU or development agencies, to promote domestic proceedings.<sup>179</sup> The OTP even officially adopted a policy of “positive complementarity”, which requires it to “encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or

<sup>179</sup> Interview notes with author.

financial or technical assistance.”<sup>180</sup>

An OTP official noted that his office assisted the EU-led Rejusco justice rehabilitation program based in eastern DRC (for information about Rejusco see section 4.3 above). By doing so, he felt the OTP had encouraged national proceedings. The official added that the constant interactions between the ICC and Congolese national authorities, as well as other entities involved in the country, have ultimately encouraged donor States to focus on developing Congolese judicial solutions.<sup>181</sup> In his view, therefore, the number of judicial proceedings in the DRC would have been even lower if it were not for the ICC’s intervention.<sup>182</sup>

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Other OTP officials have indicated that they encourage national prosecutions by providing some degree of technical assistance to states, as well as through discussions with national authorities, public documents, statements, interviews and diplomatic efforts aimed at incentivizing states to initiate national proceedings.<sup>183</sup> It is also noted that the ICC may further contribute to national proceedings if the contemplated joint national-international investigations take place in North and South Kivu (see section 7.2 above). In the long run, the ICC may also encourage national proceedings through its capacity building impacts in the DRC (these impacts are discussed in section 8.4 below).

<sup>180</sup> ICC Prosecutorial Strategy 2009-2012 (n 8), para. 17. Also see paras. 15-16 therein; ICC OTP Paper on Some Policy Issues (n 6), p. 2 (“To the extent possible the Prosecutor will encourage States to initiate their own proceedings”); ICC Press Release ICC-CPI-20100603-PR537 (3 June 2010), ‘Review Conference: ICC President and Prosecutor participate in panels on complementarity and co-operation’ <<http://www.icc-cpi.int/Menus/ASP/ReviewConference/PressReleaseRC/Review+Conference+ICC+President+and+Prosecutor+participate+in+panels+on+complementarity+and+co+oper.htm>> accessed on 5 March 2011 (“ICC Prosecutor Luis Moreno-Ocampo highlighted that ‘Positive complementarity is about States assisting one another, receiving additional support from the international Criminal Court itself as well as from civil society to meet Rome Statute obligations’”).

<sup>181</sup> See section 4.3 above for a discussion on judicial capacity building projects in the DRC.

<sup>182</sup> Interview notes with author. This was also confirmed by a Congolese legal professional who reviewed this report.

<sup>183</sup> Interview notes with author.

Further, the ICC may also be inspiring national proceedings by conveying a message that certain acts are prohibited and demonstrating that justice can be achieved in their aftermath. For example, a Congolese military judicial official based in Goma, North Kivu, has explained that as a result of the ICC's *Lubanga* case, the Congolese public and authorities have become aware that certain acts amount to crimes under international law.<sup>184</sup> Indeed, the crime of using child soldiers in active hostilities has been prosecuted domestically in the *Gédéon* case (see section 5.2 above), following the ICC's charging of *Lubanga* for similar acts. Perpetrators also gained awareness of the international prohibition of such acts: A representative of an international NGO confirmed that war lords in eastern DRC fear prosecution by the ICC for using child soldiers. While some of them simply hide the fact that they are using child soldiers, others have been separating the children from the armed groups.<sup>185</sup>

Interestingly, the limitations of the ICC may also have an encouraging effect on national atrocity-related proceedings in the DRC: UN experts and NGOs have been calling for the creation of a mixed national-international tribunal to address pre-2003 atrocities, which cannot be prosecuted by the ICC due to its limited temporal jurisdiction.<sup>186</sup> Recently, the Congolese Justice Minister supported the idea of creating

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“Specialized Chambers” within the Congolese court system, involving national and international elements, to prosecute pre-2003 atrocities.<sup>187</sup> In addition, activists who were disappointed that the ICC did not charge Lubanga with sexual violence crimes are

<sup>184</sup> Interview notes with author. The official stressed, however, that although the military authorities in Goma know that international crimes are being committed by rebels in the area, the authorities are too scared to apprehend the perpetrators. Interview notes with author.

<sup>185</sup> Interview notes with author.

<sup>186</sup> See note 54 above.

<sup>187</sup> The Democratic Republic of the Congo, Minister of Justice and Human Rights, Press Release of 2 October 2010 <<http://www.justice.gov.cd/j/dmdocuments/02102010.pdf>> accessed on 5 March 2011. Also see UNSC, ‘Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo’, UN Doc. S/2011/20 (17 January 2011) <<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20s-2011-20.pdf>> accessed on 5 March 2011, para. 49 (“Following the issuance of the report on the mapping exercise documenting serious human rights violations committed in the Democratic Republic of the Congo between 1993 and 2003, the Minister of Justice and Human Rights indicated in a press release issued on 2 October that the Government of the Democratic Republic of the Congo favoured establishing specialized chambers of a mixed character within Congolese jurisdiction. On 29 and 30 November, the Ministry of Justice and Human Rights organized a workshop in Kinshasa on specialized chambers and non-judicial mechanisms of transitional justice.”)

advocating for the prosecution of such crimes by other means, including domestic courts.<sup>188</sup>

Rejusco representatives have indicated that the recent pressure to set up a hybrid court is partly a result of the failures of the ICC.<sup>189</sup> But it can equally be argued that by showing that it is possible to prosecute the atrocities committed in the DRC, the ICC is inspiring discussions about accountability for crimes which are beyond its reach.

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Before concluding this section, it should be noted that unless it is careful, the ICC may inadvertently discourage national atrocity-related proceedings. In the *Katanga and Ngudjolo* case, an admissibility challenge was made by the accused Germain Katanga, who had been under the custody of the DRC national authorities since 2005 and until he was transferred to the ICC in 2007 (see section 6.2 above). The ICC judges have accepted the Congolese authorities' claim that they were unable to pursue the case domestically. Accordingly, the ICC considered the case admissible.<sup>190</sup> This ruling was confirmed on appeal, with the Appeals Chamber stressing that the ICC became involved in the first place because the DRC authorities were inactive.<sup>191</sup> An ICC official suggested that without the involvement of the ICC, the accused Katanga would have either still been detained in Kinshasa, with no prospect of a trial, or he would have been released without trial.<sup>192</sup> While this may be true in the case of Germain Katanga, the ICC must do its utmost to refrain from providing incentives to national authorities to remain

<sup>188</sup> A recent OSI report states that the Women's Initiatives for Gender Justice (WIGJ), an international women's human rights organisation which advocates for the prosecution of gender-based crimes in ICC cases, "may become more involved in assisting domestic courts in investigating and prosecuting sex crime cases, which could include international crimes". See OSI, *Putting Complementarity Into Practice* (n 69), p. 27. It is noted that the WIGJ has been one of the main NGOs complaining that the ICC did not charge Lubanga with sexual violence crimes. See, e.g., *The New York Times*, 'For International Criminal Court, Frustration and Missteps in Its First Trial' (by Marlise Simons, 21 November 2010) <<http://www.nytimes.com/2010/11/22/world/europe/22court.html?pagewanted=1& r=1>> accessed on 7 March 2011 ("Congo has among the highest sexual violence in the world – it's unfathomable that they brought no such charges [in the Lubanga trial]," said Bridgid Inder of the Women's Initiative for Gender Justice, one of the rights groups following the trial").

<sup>189</sup> Interview notes with author.

<sup>190</sup> ICC Case No. ICC-01/04-01/07, *Prosecutor v. Katanga and Ngudjolo*, 'Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case', 16 June 2009.

<sup>191</sup> ICC Case No. ICC-01/04-01/07, *Prosecutor v. Katanga and Ngudjolo*, 'Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', 25 September 2009.

<sup>192</sup> Interview notes with author.

inactive about cases they can prosecuted domestically, by signaling that the ICC will pursue the case.<sup>193</sup>

### 8.3 SENTENCING PRACTICES

The DRC Military Criminal Code of 2002 grants Congolese military courts discretion to impose the death penalty with respect to the offenses of genocide and crimes against humanity, as well as certain war crimes such as reprisals, use of prisoners as human shields, and pillage in times of war.<sup>194</sup> In some of the cases involving these crimes, Congolese military courts have avoided imposing the death penalty by giving precedence to Rome Statute sentencing norms (which exclude the death penalty) over domestic provisions.<sup>195</sup> This was the approach of the courts in the *Songo Mboyo* case, which involved crimes against humanity.<sup>196</sup> This approach was also adopted in the *Mutins de Mbandaka* case, where, in addressing crimes against humanity, the military court held that “in the presence of two conflicting laws, the law more favourable to the defendant shall apply.”<sup>197</sup> But this has not always been the case in crimes against humanity cases, as was recently shown when capital punishment was imposed in the *Gédéon* case (see section 5.2 above).<sup>198</sup>

*Congolese military courts have avoided imposing the death penalty by giving precedence to Rome Statute sentencing norms (which exclude the death penalty) over domestic provisions.*

Moreover, Congolese military courts have given precedence to Rome Statute sentencing norms in cases of war crimes which carry the death penalty under national law. For example, in the *Bongi* case, the Military Court of Orientale province held that “the provisions of the Treaty of Rome are more humanizing and less severe in terms of punishment such that capital punishment is unrecognised, contrary to the Military Penal Code ... and for these reasons the Military Court ... decides to apply the Treaty of

<sup>193</sup> Whether the national authorities have the necessary political will to prosecute the case is another question.

<sup>194</sup> DRC Military Criminal Code (n 25), Articles 65, 164, 167, 169, 171, 172.

<sup>195</sup> According to ASF, “[s]ome [Congolese] courts have relied on this fact [that the maximum sentence provided for by the Rome Statute is life imprisonment] to avoid sentences proscribed by Congolese legislation by invoking the general principle of *Lex Mitior*, or the *application of the lesser sentence* in the event of the conflict of laws. In accordance with this reasoning, Article 77 of the Statute once again prevails over the provisions of the Military Penal Code.” See ASF 2009 Study (n 61), pages 19-20.

<sup>196</sup> ASF 2009 Study (n 61), p. 19.

<sup>197</sup> ASF 2009 Study (n 61), p. 19, quoting from TMG de Mbandaka, *Affaire Mutins de Mbandaka*, provisional judgement, op. cit., p. 6 and 20 June 2006, p. 16.

<sup>198</sup> It is noted that the Rome Statute, while excluding the death penalty from ICC cases, does not prohibit states from imposing it in national cases.



Rome".<sup>199</sup> Congolese military courts have also been guided by the Rome Statute in determining sentences for war crimes which carry no penalty under by Congolese law.<sup>200</sup>

Further, in light of the Rome Statute's exclusion of the death penalty, its domestic implementation may involve the exclusion of the death penalty on the national level, at least in relation to international crimes.<sup>201</sup> A Congolese human rights activist indicated that some DRC parliamentarians refer to the Rome Statute in advocating for the abolition of the death penalty in the DRC altogether.<sup>202</sup> If their efforts prove successful, the Rome Statute may eventually have a greater impact on domestic sentencing practices in the DRC than it already has.

*A Congolese human rights activist indicated that some DRC parliamentarians refer to the Rome Statute in advocating for the abolition of the death penalty in the DRC.*

## 8.4 CAPACITY BUILDING IMPACTS

During a visit to Kinshasa, the ICC President was asked to provide Congolese judges with training in The Hague in order to improve their capacity to handle atrocity-related trials. He responded that the ICC does not offer such training and referred the Congolese judges to other institutions which can provide these services.<sup>203</sup> While the ICC does not directly engage in capacity building activities in the DRC, this section will elaborate on some of the indirect ways in which the Court helps advance Congolese judicial capacity.

### *Assisting Capacity Building Projects*

<sup>199</sup> ASF 2009 Study (n 61), p. 20, quoting the Military Court of Orientale Province, *Bongi* case, Judgement, 4 November 2006, RPA 030/06, pp. 15-16. See note 168 above for a description of the *Bongi* case.

<sup>200</sup> ASF 2009 Study (n 61), p. 18-19. While Congolese law imposes the death penalty with regards to reprisals, use of prisoners as human shields, and pillage in times of war, it is silent regarding the penalty for other war crimes. See DRC Military Criminal Code (n 25), Articles 173-175.

<sup>201</sup> In this context see DRC Draft Law on Domestic Implementation of the Rome Statute (n 23), p. 4 ("*Certes, la réception du Statut de Rome en droit congolais remet à la surface la question de l'abolition de la peine de mort...*").

<sup>202</sup> Interview notes with author.

<sup>203</sup> Radio Netherlands Worldwide, 'DRC judges request training in The Hague' (21 December 2009, by H. Michaud) <<http://www.rnw.nl/international-justice/article/drc-judges-request-training-hague>> accessed on 6 May 2010.



In interviews, ICC officials clarified that strengthening the capacity of national justice systems is not the primary responsibility of the ICC but is rather the job of other international organizations, donor states, UN agencies, peacekeeping missions, etc.<sup>204</sup> At the same time, added a senior ICC Registry official, the Court has a stake in strengthening national capacities as it forms part of an international criminal law enforcement system whose proper functioning depends on capable national jurisdictions to which its own jurisdiction is complementary. Thus, according to the ICC official, the ICC will do the utmost within its mandate to contribute to the strengthening of national capacities, including by supporting other actors' capacity building efforts.<sup>205</sup>

*...according to the ICC official, the ICC will do the utmost within its mandate to contribute to the strengthening of national capacities, including by supporting other actors' capacity building efforts.*

Along similar lines, as noted in section 8.2 above, the official policy of the OTP is to “encourage genuine national proceedings where possible ... but without involving the Office directly in capacity building or financial or technical assistance”.<sup>206</sup> OTP officials explained that while they can assist national accountability mechanisms to some extent, they must keep a certain distance from the justice systems of states they address, to ensure their objectivity in case they must make submissions before ICC judges about the feasibility and genuine nature of those states' national proceedings. Further, if the OTP directly engages in national capacity building, it could promote an undesirable perception that it is influencing the manner in which countries choose to pursue justice. Thus, the OTP contributes to strengthening domestic jurisdictions through advising or assisting other actors who engage in national capacity building.<sup>207</sup> For example, noted one OTP official, the OTP advised the EU on designing the Rejusco program, discussed the program with the EU

*...the official policy of the OTP is to “encourage genuine national proceedings where possible ... but without involving the Office directly in capacity building or financial or technical assistance”*

<sup>204</sup> Interview notes with author.

<sup>205</sup> Interview notes with author.

<sup>206</sup> ICC Prosecutorial Strategy 2009-2012 (n 8), para. 17.

<sup>207</sup> Interview notes with author.

delegation in Kinshasa, and sent representatives to participate in Rejusco trainings on operational matters.<sup>208</sup>

OTP officials also suggested that the ICC's involvement in the DRC drew international attention to the country, leading various international actors to initiate judicial capacity building projects in the DRC over the last years.<sup>209</sup> From this perspective, some of the capacity building activities discussed in section 4.3 above can be regarded as indirect impacts of the ICC on Congolese judicial capacity.

#### *Witness Protection*

Even if the ICC does not proactively engage in capacity building, ICC officials explained that the Court helps develop local knowledge by collaborating with national authorities. For example, in setting up and running its witness protection program in the DRC, the ICC has been relying on the assistance of Congolese officials, in particular the Inspectorate of Police. The ICC has trained national officials for this purpose. Thus, as a result of the ICC's activities in the DRC, at least some Congolese officials can manage a witness protection program. However, an ICC official stressed that this capacity building impact does not guarantee that the DRC will establish functioning systems for witness protection.<sup>210</sup>

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#### *Joint National-International Investigations*

If the OTP eventually holds joint national-international investigations in the DRC (see section 7.2 above), skills will most likely be transferred from the ICC to the national authorities.<sup>211</sup> In addition, explained an ICC official, in considering whether and how to collaborate with local authorities in its investigations in the Kivu provinces, the OTP is interacting with capacity building programs managed by the UN, EU and NGOs in the

<sup>208</sup> Interview notes with author. However, it is noted that senior Rejusco staff members in eastern DRC were unaware of the ICC's involvement in the program. They indicated in an interview that "it would be nice if we had an idea about what they [ICC members] are doing and what are their projects here in the country. And sometimes we could help to give them some information". Interview notes with author. Perhaps the Rejusco employees who were interviewed lacked knowledge about the ICC's involvement in the program at the policy-making level, were new in their position, or based in a town where the ICC was not involved in trainings.

<sup>209</sup> Interview notes with author.

<sup>210</sup> Interview notes with author.

<sup>211</sup> Interview notes with author.

Kivus.<sup>212</sup> Hopefully, this will lead the ICC to adopt an even more proactive approach in terms of lending assistance to capacity building programs.

### *Information Management Capacity*

To cooperate with the ICC as the Rome Statute requires, the DRC judicial authorities must transfer information to and from the ICC, and among themselves, which forces them to enhance their information management capacities, explained an OTP official. In particular, the ICC's formal requests for cooperation require the national prosecution authorities to have proper archives and library systems, use references and databases, etc. However, noted the OTP official, this impact does not significantly influence the DRC justice system.<sup>213</sup>

*...outreach activities, explained a senior ICC official, are intended to generate understanding and acceptance of the ICC's work, and not for capacity building purposes. Nonetheless, they sensitize local authorities and lawyers to international norms, and thereby increase their capacity to handle atrocity-related proceedings.*

### *Outreach and Education Activities*

The ICC's outreach program, under the Registry, has field officers in the DRC who conduct outreach activities vis-à-vis local communities, NGOs and national authorities, informing them about the Court's goals, activities, norms and procedures. Representatives from the ICC headquarters, including the OTP and Registry, often participate in these outreach activities. Since 2010, the outreach program also began promoting seminars about the ICC in various universities throughout the DRC.<sup>214</sup> Such outreach activities, explained a senior ICC official, are intended to generate understanding and acceptance of the ICC's work, and not for capacity building purposes. Nonetheless, they sensitize local authorities and lawyers to international norms, and thereby increase their capacity to handle atrocity-related proceedings.<sup>215</sup>

Further, as noted by ICC officials, the OTP takes its own initiative to educate

<sup>212</sup> Interview notes with author.

<sup>213</sup> Based on an interview with an ICC official. Interview notes with author.

<sup>214</sup> Press Release ICC-CPI-20110201-PR624, 'Criminal Court in universities in North and South Kivu, Democratic Republic of the Congo' (1 February 2011) <<http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/outreach/democratic%20republic%20of%20the%20congo/press%20releases/>> accessed on 12 March 2011.

<sup>215</sup> Interview notes with author.

national police officers and investigators about the Court's normative framework and the ICC Registry provides similar education to Defence lawyers. Moreover, ICC judges and staff members participate in seminars organized by the UN, ICRC, NGOs, national authorities and academic institutions. The audience in such seminars occasionally include nationals of states subject to ICC proceedings.<sup>216</sup> Such initiatives do not train local professionals to investigate or prosecute atrocities, but they are valuable in that they teach about the violations that states must address and the relevant due process norms.

### *Engaging DRC Nationals*

Interviewees noted that the ICC employs staff members from all over the world, including from states subject to ICC proceedings, both in its headquarters and field offices. In addition, the ICC has engaged Congolese nationals in its internship and visiting professionals programs, allowing them to serve with an organ of the ICC for several months. The internship program enables students

*The visiting professionals program is considered by the ICC as a capacity building tool, which, at the same time, provides the ICC with a chance to learn from visiting professionals.*

and young professionals to learn about the operation of the ICC, whether or not they eventually practice at the national level. The visiting professionals program involves more established professionals who are usually practitioners back home. The program is considered by the ICC as a capacity building tool, which, at the same time, provides the ICC with a chance to learn from visiting professionals who are often specialists on war-crimes in their respective countries.<sup>217</sup>

## 9. CONCLUSION AND RECOMMENDATIONS

The DRC has seen a succession of armed conflicts since 1993, involving heinous mass atrocities. The ICC initiated investigations in the DRC in 2004. With jurisdiction limited to crimes committed from July 2002, the ICC has thus far indicted five militia leaders for

<sup>216</sup> Interview notes with author. On the ICC's participation in a regional seminar see, e.g., 'Regional seminar on the ICC starts in Yaoundé (Cameroon)' (2010) <[icc-cpi.int/NR/exeres/437F293D-6A29-4431-ADC6-FDA32A3B1827.htm](http://icc-cpi.int/NR/exeres/437F293D-6A29-4431-ADC6-FDA32A3B1827.htm)> accessed on 12 March 2011.

<sup>217</sup> Interview notes with author. It is noted that the participation of nationals from developing countries in the ICC's internship and visiting professionals programs is sponsored by the ICC, out of a fund especially created by the EU and other donors.

atrocities committed in the DRC, and began trials against three of them.<sup>218</sup> Congolese military courts have also been prosecuting atrocities, but the rates and quality of national proceedings are insufficient to effectively fight impunity in the DRC. Unfortunately, the ICC and the Rome Statute have not managed thus far to encourage and increase in rates or quality of national cases, although there may have been even fewer cases had the ICC not been involved in the DRC.

This report has shown that the Rome Statute had some impact on substantive norms and sentences applied in several Congolese atrocity-related cases (even if its provisions were implemented in a haphazard manner), and on judicial capacities in the DRC. But there is no evidence that the Statute or the ICC have thus far managed to influence national due process standards in the DRC. The ICC, if not careful, may even inadvertently provide an excuse for the Congolese authorities to hold suspects in prolonged pre-trial detention in violation of minimum due process standards (see section 8.1 above), or encourage the state to remain inactive about certain cases by providing an alternative forum for prosecutions (see section 8.2 above).

The rather limited impact of the ICC on Congolese atrocity-related proceedings can partly be explained by the relatively short duration of the Court's involvement in the DRC. But to a larger extent, it is explained by the fact that the international community did not mandate the ICC to proactively "activate" national courts, and did provide the ICC with the necessary resources for such an objective. Thus, although it publicly insists on the importance of national proceedings, the ICC has been unable to have a significant impact on rates and quality of atrocity-related trials in the DRC. Nonetheless, by collaborating with national authorities, the ICC indirectly enhances their capacity to handle complex criminal investigation, for example, in the areas of witness protection and information management (see section 8.4 above). In the long run, these impacts may encourage more robust national responses to atrocities.

More impacts may be seen in the near future. The ongoing legal reform process in the DRC may entail the permeation of international procedural norms into national law. If the DRC implements the Rome Statute domestically, ICC and local norms will be harmonized, the death penalty may be abolished, and civilian courts will start

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<sup>218</sup> It is recalled that the ICC also indicted a Congolese national for crimes in the Central African Republic, and that his trial has also commenced (see note 148 above).

prosecuting international crimes. Such developments could significantly contribute to the quality of domestic atrocity-related trials. In addition, the ICC's success in starting a process of accountability for the atrocities committed in the DRC, despite the many challenges involved, may have an encouraging effect on the creation of a hybrid tribunal to address pre-2003 atrocities committed in the DRC. Additional future impacts will likely be observed if the OTP and the DRC authorities eventually decide to coordinate their investigations in the North and South Kivu provinces. This could strengthen national capacities and encourage domestic proceedings. It may also help the ICC, which can benefit from investigators familiar with the conflict and localities.

*...the ICC can increase its domestic impacts by becoming more proactive about lending assistance to existing capacity building programs. In addition, the ICC can help national investigations by making information available to national authorities through the mechanism provided in Part 9 of the Rome Statute. By consulting with national authorities, the ICC can help raise local awareness to this information-sharing mechanism and to the conditions necessary for its operationalization. Such consultations can also help improve national due process standards.*

But even without waiting for these future impacts to materialize, the ICC can increase its domestic impacts by becoming more proactive about lending assistance to existing capacity building programs. In addition, the ICC can help national investigations by making information available to national authorities through the mechanism provided in Part 9 of the Rome Statute. By consulting with national authorities, the ICC can help raise local awareness to this information-sharing mechanism and to the conditions necessary for its operationalization. Such consultations can also help improve national due process standards. Further, noted an ICC official, not only the OTP but also the Court's Registry may hold information which is relevant to national proceedings, particularly in relation to victims' participation. Therefore, mechanisms allowing for the disclosure of such information to national jurisdictions may need to be developed.<sup>219</sup>

More basically, the ICC can encourage national proceedings by increasing its presence in the DRC and communicating more with the general public through outreach initiatives.<sup>220</sup> MONUC, Rejusco and NGO representatives all noted in interviews that the

<sup>219</sup> Interview notes with author.

<sup>220</sup> This view was expressed by a representative of an international NGO operating in eastern DRC. Interview notes with author.



ICC is not visible enough in Goma, North Kivu's capital, and that the local population is unaware of its investigations in the Kivu provinces.<sup>221</sup> A Congolese military judicial official based in Goma did not even know that the ICC was conducting an investigation there.<sup>222</sup> While the ICC may need to conduct its investigations confidentially in order to minimize risk to victims and witnesses and preserve its evidence, it can still promote greater awareness to its work through additional outreach and public information campaigns. Furthermore, the ICC can increase its education initiatives in the DRC to better inform local lawyers and law enforcement agents about its normative framework, including national obligations under the Rome Statute. The Court can also make an effort to include more Congolese nationals in its visiting professionals and internship programs. These are existing mechanisms the ICC can use to help build Congolese capacity and awareness to accountability processes.

*More basically, the ICC can encourage national proceedings by increasing its presence in the DRC and communicating more with the general public through outreach initiatives. MONUC, Rejusco and NGO representatives all noted in interviews that the ICC is not visible enough in Goma, North Kivu's capital, and that the local population is unaware of its investigations in the Kivu provinces*

International courts can only prosecute a handful of perpetrators. Even if these are the highest ranking perpetrators, in mass atrocities cases they represent a small fraction of the criminals. Therefore, to effectively fight impunity and promote the rule of law, international trials must be complemented by genuine and fair national prosecutions (or other robust accountability measures). In addition, the two processes must not compete over resources or apply widely different norms and standards, as they may undermine each other, eventually undermining their (supposed) mutual goal of establishing accountability through fair trials.

In the case of the DRC, it is particularly important that international trials are complemented by (fair and genuine) national proceedings, given that atrocities are still being committed on a daily basis by countless members of government forces and non-state armed groups. While the country's military courts have tried a few hundred suspected atrocity perpetrators, the vast majority of high and mid-level perpetrators walk

<sup>221</sup> Interview notes with author.

<sup>222</sup> Interview notes with author.

free. In this environment, the ICC's message of accountability could be significantly undermined. Furthermore, the international and national judicial responses to the DRC atrocities are developing separately, with the national trials attracting international criticism for lacking fairness and independence. This creates a risk that the combined impact of the national and international trials is sub-optimal. Even if additional national trials take place, they will not be deemed legitimate if they violate minimum fairness standards, or if they amount to sham trials or victor's justice.

If policy makers agree that one way to encourage national courts to prosecute atrocities is to maximize positive impacts of international courts on domestic procedures, they can learn from the experiences accumulated so far by the ICC and other international or hybrid tribunals. Thus, when they establish the next international or hybrid court, or when the next ICC intervention takes place, they can put in place structures of collaboration between international and national judiciaries which are aimed at encouraging national courts to effectively prosecute atrocities in parallel to international courts. Policy makers can even specifically mandate international criminal courts to encourage national trials, while equipping the international courts with the necessary resources to execute such a mandate.



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- *Sierra Leone: Interaction between International and National Responses to the Mass Atrocities*, by Sigall Horvitz, *DOMAC/3*, December 2009.
- *The ICJ Armed Activity Case – Reflections on States’ Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions*, by Thordis Ingadottir, *Nordic Journal of International Law*, Volume 78, No. 4, 2009, pp. 581-598.
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