

The Democratic Republic of the Congo

International Judicial Structures, Domestic Courts, and Confronting the Human Rights Abuses Against Children in the Recent Congolese Wars

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After the United Nations released a mapping report on October 1st, 2010 that provided evidence of extensive human rights violations in the Democratic Republic of the Congo (DRC), it became apparent that some form of justice was necessary to ensure that those responsible were held accountable and that such abuses could be prevented in the future. Indeed, the recorded human rights abuses against children were horrific, and it is difficult to imagine the next generation being able to cope with the memories of the death and violence during the civil wars extending from 1993 to 2003. There are numerous international treaties and conventions applicable to these human rights violations. However, while the DRC's judicial structures contain sections allowing prosecution under imperatives of international human rights law, the process of enforcing sentences upon individuals after conviction is flawed and virtually non-existent at this point in time. The currently weak political system of the DRC requires transitional justice mechanisms, particularly international judicial bodies, to combat the problem of impunity and address the human rights abuses committed against children. While a number of transitional judicial bodies exist to aid in developing of a culture of justice, including the International Criminal Court, international criminal tribunals, and hybrid courts, hybrid courts appear to offer the greatest ability to strengthen state judicial systems in the post-conflict period.

BACKGROUND: ABUSES AGAINST
CHILDREN IN THE DRC FROM 1993-2003

The United Nations released a controversial

mapping report that documented the most serious violations of human rights and international humanitarian law committed within the DRC between March 1993 and June 2003. This report was highly contested by the states of Rwanda and Uganda, whose armies were accused of involvement in the extensive human rights abuses that occurred. The period between 1993 and 2003 comprises the failure of the democratisation process, the First Congolese War, the Second Congolese War, and the political transition period between President Laurent-Désiré Kabila's death in 2001 and the succession of his son, Joseph Kabila, 10 days later.¹

A large section of the UN mapping report is devoted to outlining the human rights abuses against children, including being victims of widespread attacks on civilian populations, victims of ethnic violence, victims of sexual violence, as well as suffering from high infant mortality and vulnerability to anti-personnel mines. The report describes horrific incidences of violence, including: the massacres of children in "a large number of schools, hospitals, orphanages and the premises of several humanitarian organisations;"² the murder of ethnically targeted children "with blows from hatchets or with their head smashed against a wall or tree trunk,"³ and sexual relations with children, which superstition says can "cure certain diseases (HIV/AIDS) or make the perpetrator invulnerable."⁴ Of additional concern in the DRC is that, in 2003, "Oxfam estimated that, in some regions, one-quarter of all children were dying before their fifth birthday... [which]

¹ For further information, see: Nest et al. *The Democratic Republic of the Congo: Economic Dimensions of War and Peace*. Boulder, Colorado: Lynne Rienner Publishers, Inc., 2006; Scherrer, Christian P. *War in the Congo*. Moers: Institute for Research on Ethnicity and Conflict resolution (IRECOR), 2001

² United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," [New York, NY], 2010: 338, http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf

³ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 339

⁴ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 341

make[s] the DRC one of the three most dangerous countries in the world in which to be born.”⁵ The fact that children, those most dependent on others for their survival, are unable to develop in a safe and secure environment, should be an enormous concern for officials both in the DRC and any state that agrees with and adheres to the principles in the Universal Declaration of Rights and Freedoms.

Additionally, there was widespread use of children in armed groups and forces during the time of the conflict, despite the DRC’s ratification of international treaties that specifically prohibit child recruitment. Children in armed groups were “subjected to indescribable violence, including murder, rape, and torture, cruel, inhuman and degrading treatment, forced displacements and the destruction of their villages, and were deprived of all their rights.”⁶ Children are specifically recruited because “of their availability and malleability in a drawn-out conflict.”⁷ Colonel Ntambo Mutchail of the AFDL/APR stated clearly why children are used so extensively in conflict:

They are the best. At this age there is total obedience. They are not distracted. They haven’t yet experienced a private life. They are devoted to one thing: to the Alliance. They have nothing else in their hands. They are not worried by morals. They are devoted to the Alliance.⁸

Children are thus exploited through military recruitment due to their vulnerability and susceptibility to the rebels’ indoctrination.

INTERNATIONAL TREATIES AND CONVENTIONS VERSUS DOMESTIC LEGAL PROVISIONS

International treaties and conventions are regularly signed and ratified by states, and

represent the initiation of change in the state towards the values contained therein. Treaties represent a form of empowerment to both the states and the individuals within the states who have ratified them, as they “help local actors set priorities, define meaning, make rights demands, and bargain from a position of greater strength than would have been the case in the absence of their government’s treaty commitment.”⁹ Thus, it is important to discuss the international treaties and conventions signed and ratified by the DRC that hold relevance to the aforementioned human rights abuses against children.

The United Nations Declaration of the Rights of the Child was signed and ratified by the DRC in 1990. The declaration states that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”¹⁰ The rights and freedoms of a child are declared in fifty-four articles, and include such principles as: the right to life; the right to be raised by parents; the right to play and rest; the right to basic social security; and the right to legal help and fair treatment in the justice system. All of these have been violated during the DRC conflict through the orphaning and murder of civilian children, the lack of human security, the inability to access social security due to threats of rebel invasion and violence, and the lack of accountability for those who were convicted of crimes within the DRC.

Similar to the UN Convention on the Rights of the Child is the African Charter on the Rights and Welfare of the Child¹¹. In 48 articles, the Charter sets out the rights of the African child, with the recognition that “the child occupies a unique and privileged position in the African society and that

⁵ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 342

⁶ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 357

⁷ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 346

⁸ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 346

⁹ Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009), 126.

¹⁰ United Nations, General Assembly, *Declaration of the Rights of the Child*, [Geneva, Switzerland], 1959: 2, <http://www.cirp.org/library/ethics/UN-declaration/>

¹¹ Adopted by the Organization of African Unity in 1990, entered into force Nov. 29, 1999

for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding.”¹² The Charter additionally notes that because of “the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child’s physical and mental immaturity he/she needs special safeguards and care.”¹³ The DRC ratified this treaty in 2001, thereby reiterating their recognition of the rights of a child within their state. Despite ratifying this treaty, the DRC has had immense difficulties in ensuring that such safeguards are realized within the domestic judicial system, and instead, a culture of impunity has led to such violence as described in the UN Mapping Report.

It is likewise important to note the treaties signed and ratified by the DRC that prohibit the use of child soldiers in times of conflict. The Optional Protocol to the Convention on the Rights of the Child¹⁴ on the involvement of children in armed conflict furthers the previous convention by ensuring that “states parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”¹⁵ Additionally, the Rome Statute of the International Criminal Court, under article eight, explicitly prohibits the “conscripting or enlisting [of] children under the age of 15 years into the national armed forces or

using them to participate actively in hostilities.”¹⁶ Child soldiers are thus forbidden under the international treaties and conventions of which the DRC is a part, and both the state and the international community are thus obliged to take immediate action to ensure that measures are taken to prevent recruitment of children in the future.

In assessing the legal structures of the DRC, it is important to note that the DRC has codified international treaties and conventions within the domestic legal structure of the state. Under the Congolese Constitution, the human rights of DRC citizens, including “civil and political; social, economic and cultural; and peoples’ rights,”¹⁷ are protected. The DRC’s Constitution of 2006 states:

“Les Cours et Tribunaux, civils et militaires, appliquent les traités internationaux dûment ratifiés, les lois, les actes réglementaires pour autant qu’ils soient conformes aux lois ainsi que la coutume pour autant que celle-ci ne soit pas contraire à l’ordre public ou aux bonnes mœurs.”¹⁸

Additionally, the Constitution states: “les traités et accords internationaux conclus ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité ou accord, de

¹² OAU, *African Charter on the Rights and Welfare of the Child*, [Addis Ababa, Ethiopia], 1999: 1. http://www.africa-union.org/official_documents/Treaties_Conventions_Protocols/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf

¹³ OAU, *African Charter on the Rights and Welfare of the Child*, 1.

¹⁴ Adopted by United Nations General Assembly in 25 May 2000, entry into force 12 Feb 2002

¹⁵ United Nations, Office of the United Nations High Commissioner for Human Rights, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, [Geneva, Switzerland], 2002: 1, <http://www2.ohchr.org/english/law/crc-conflict.htm>

¹⁶ United Nations, *Rome Statute of the ICC*, [New York, NY], 1999, <http://untreaty.un.org/cod/icc/statute/rome-fra.htm>

¹⁷ Dunia Zongwe, Francois Butedi and Clement Phebe, “The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview,” GlobaLex, http://www.nyulawglobal.org/Globalex/Democratic_Republic_Congo.htm.

¹⁸ “The courts and tribunals, both civil and military, shall apply duly ratified international treaties, laws and regulatory acts, provided they are in accordance with the laws and with custom.” The Democratic Republic of the Congo, *Constitution de la République Démocratique du Congo*, [Kinshasa, DRC], 2006, http://democratie.francophonie.org/IMG/pdf/Constitution_de_la_RDC.pdf

son application par l'autre partie."¹⁹ Both of these declarations assert that the DRC courts hold the power to implement the rights guaranteed under international law upon those crimes committed within the nation of the DRC itself. Such a legal framework provides the initial structure needed to prevent future human rights violations against children.

However, the aforementioned legal imperatives were only written down and implemented in 2006, leaving the period before this time subject to different legal precedents. For example, until 2009 the recruitment and use of children in times of conflict "was not established as a crime in the DRC's criminal code."²⁰ Although in June 2000, a decree "ordered the demobilisation and family or socio-economic reintegration of children associated with the armed forces or groups, girls and boys, under the age of 18,"²¹ this decree does not prevent these children from being re-recruited for military parties involved. The re-recruitment of child soldiers is furthermore a common occurrence in zones of civil and interstate conflict, as in the case of the DRC between 2000 and 2003, where the demobilisation and reintegration of child soldiers was supposed to occur. Additionally, there is no guarantee that those children who are reintegrated into society are actually safer, due to the immense violence, ethnic conflict, and attacks on refugee camps that were occurring over this period.²²

¹⁹ "Duly concluded international treaties and agreements shall have, following publication, higher authority than laws, provided each treaty or agreement is applied by the other." The Democratic Republic of the Congo, *Constitution de la République Démocratique du Congo*.

²⁰ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 345

²¹ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 345

²² See Singer, P. W. *Children at War*. New York: Pantheon Books, 2005; Wessells, Michael. *Child Soldiers: From Violence to Protection*. Cambridge, Massachusetts: Harvard University Press, 2006; Thomas, Virginia. 2008. "Overcoming Lost Childhoods: Lessons Learned from the Rehabilitation and Reintegration of former Child Soldiers in Colombia." *Y Care International*.

THE STATE OF DOMESTIC JUDICIAL STRUCTURES IN THE DEMOCRATIC REPUBLIC OF THE CONGO

An adequate legal framework currently exists within the DRC to allow for criminal prosecutions of human rights abuses under international law. However, the problem in the DRC is "less a problem of inadequate provisions in criminal law than a failure to apply them."²³ There are a number of examples where people were convicted but never penalized for their involvement in the abuses between 1993 and 2003. For example, Jean-Pierre Biyoyo, of the Congolese Army, was promoted to Lieutenant-Colonel "after receiving a death sentence from a military court in March 2006 for desertion and fleeing abroad in times of war, organizing an insurrection movement, and the arbitrary arrest and illegal detention of children."²⁴ This example clearly demonstrates a divide between the sentencing and implementation of that sentence within the DRC's judicial sector. However, the impunity problem apparent in the justice system is due to a number of factors, all of which need to be addressed before the courts can effectively investigate, prosecute and try criminals under the existing framework.

The lack of resources and capacity of the DRC is one factor that is perpetuating the impunity within the DRC state. Between 2004 and 2006, the government spent a mere 0.6 per cent per year on justice, "while most countries spend between [two per cent] and [six per cent] of their national budgets on justice."²⁵ The underfunding of the judicial system leads to a number of consequences, including lower wages for judicial employees, inadequate infrastructure and buildings, insecurity in the transportation and protection of witness, insufficient training for those currently in the legal profession, and the poor functioning of the prison system. Of

²³ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 422.

²⁴ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 345-46

²⁵ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 424

additional concern is the state of vulnerability in which insufficient funding leaves judicial agents, who are then more willing to accept bribes when deciding court cases.

Of particular note is that the DRC judicial system is plagued by a completely insufficient number of judges and magistrates for the population in question, likely due to budgetary constraints and the difficulties of pursuing higher education during the ten years of conflict. The UNDP and Ministry of Justice estimated that in 2007, “there were 2030 magistrates, or one per 30 000 of the population, and only 230 jurisdictions and offices.”²⁶ This is compared to the global average of one magistrate or judge per 15 000 inhabitants.²⁷ The lack of courts and magistrates has resulted in magistrates being backlogged with all the cases referred to them, as well as being unable to reach the quorum required in order to sit. Evidently, this has resulted in a national scramble to find and secure people employed in the legal profession. In 2007, the Ministry of Justice “estimated that there was a shortfall of nearly 2500 magistrates nationwide, and that 1000 needed to be recruited urgently.”²⁸ However, as mentioned earlier, it is difficult to find those who have attained high enough forms of education to achieve a legal degree. Additionally, many areas of the province remain extremely dangerous for inhabitants, and as such, it is difficult to find people who would want to relocate to these regions. As a result, rural inhabitants are left without accessible legal aid, and are often ruled under local figures “who tend to abuse their administrative, economic and customary powers when ruling on lawsuits put before the courts.”²⁹ Thus, the lack of judicial

personnel is an enormous problem within the DRC, and must be solved before domestic justice can be established.

The interference of political and military figures in the judicial process is another significant concern that aids the cycle of impunity in the DRC. Throughout the history of the DRC, there have been incidents where “military and civilian judges and prosecutors were threatened and attacked by armed group members and sometimes even members of the armed force to intimidate them, disrupt criminal proceedings and ensure impunity.”³⁰ As such, many cases favour the more powerful citizens within the state, and the rule of law is not applied universally. This violates the basic right to a “fair and public hearing by an independent and impartial tribunal”³¹ guaranteed in article 10 of the Universal Declaration of Human Rights. Despite attempts to correct these historical malpractices through the new constitution, which guarantees separation of powers into three jurisdictional orders, the Congolese judicial system remains corrupted by political and military malfeasance.

Another important flaw in the DRC’s judicial system is that the military courts hold exclusive jurisdiction over prosecuting criminals under international law. This poses a significant conflict-of-interest, as the majority of human rights violations in the previous conflicts were committed by those holding high positions in military command. This resultant lack of independence of the courts and tribunals is again slowing down the judicial process and resulting in unfair and closed trials. Indeed, by unfavourably prosecuting military personnel who are accused of

²⁶ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 426

²⁷ Mark Shaw, Ian van Diik, and Wolfgang Rhomberg, “Determining Trends in Global Crime and Justice: An Overview of Results from the United Nations Surveys of Crime trends and Operation of Criminal Justice Systems,” *Forum on Crime and Society* 3, no.1 (2003): 21.

²⁸ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 426

²⁹ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 427

³⁰ United Nations, Human Rights Council, *Combined report of seven thematic special procedures on Technical Assistance to the Government of the DRC and urgent examination of the situation in the east of the country*, [Kinshasa, DRC], 2009: 17, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.59.pdf>

³¹ United Nations. Universal Declaration of Human Rights. [Paris, France], 1948 : 10. <http://www.un.org/en/documents/udhr/index.shtml>

severe human rights violations within a military court; these courts “deny the victims and their relatives the right to an effective remedy and the right to know the truth.”³² Indeed, the jurisdiction of military courts over international law goes against article 37 of the UN Convention on the Rights of the Child, which states that “every child deprived of his or her liberty shall have... the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”³³ Additionally, under the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, it states clearly that “the only purpose of Military Courts shall be to determine offences

“the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel” and that “military courts should not in any circumstances whatsoever have jurisdiction over civilians.”

of a purely military nature committed by military personnel” and that “military courts should not in any circumstances whatsoever have jurisdiction over civilians.”³⁴ Thus, it is vital that the role of military courts be revised, so

that crimes under international law are tried in ordinary courts and guarantee that conflicts-of-interest do not affect the outcome of the trial.

³² Frederico Andreu-Guzmán, *Military jurisdiction and international law: Military courts and gross human rights violations* (vol. 1), [Châtelaine, Geneva]: International Commission of Jurists, 2004: 12, http://www.ecoi.net/file_upload/87_1184764886_trib-mil-eng-part-i.pdf

³³ United Nations, General Assembly, *Convention on the Rights of the Child*, [New York, NY], 1989, <http://www2.ohchr.org/english/law/crc.htm>

³⁴ African Commission on Human and Peoples' Rights (ACHPR), *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, [Banjul, The Gambia], 1994, http://www.afrimap.org/english/images/treaty/ACHPR_Principles&Guidelines_FairTrial.pdf

Accordingly, it is clear that due to the lack of resources and capacity, lack of judicial personnel, and the role of the military over matters of international law that the DRC's legacy of impunity will continue if the crimes outlined in the UN Mapping Report are tried under domestic law. The DRC will require a number of years of corrective measures, revision of laws, and retraining of legal aid before its current judicial structure will be able to effectively prosecute criminals under international law and combat the current state of impunity. Until this is achieved, international involvement is needed to further set a precedent within the state to ensure that justice and the rule of law are established.

THE NECESSITY OF THE ICC IN DRC'S TRANSITIONAL JUSTICE

The authority of international law within states is a complex issue, and raises serious questions regarding concepts such as state sovereignty and universality. On one side, scholars argue that treaties “violate the right of a state to the exclusive adjudication of matters that affect only its own citizens and that take place within its borders.”³⁵ The rule of state sovereignty, affirmed in the UN Charter, is thus violated through the intrusion of outside actors in domestic affairs. However, on the other side of the debate are those who argue “there is no state so powerful that it may not sometime need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many sovereign nations united against it.”³⁶ Thus, while “the real politics of change is likely to occur at the domestic level,”³⁷ it may be necessary for outside actors to assist states when its judicial capacity is weakened. Of vital importance in the debate, as it relates to the DRC, is the recognition that “children in the DRC have suffered far too much and, if this situation is allowed to continue, there is a risk that a

³⁵ Larry May, *Crimes Against Humanity: A Normative Account*, (Cambridge: Cambridge UP, 2005), 11.

³⁶ May, *Crimes Against Humanity: A Normative Account*, 10.

³⁷ Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 126.

new generation will be created that has known nothing but violence, and violence as a means of conflict resolution, thus compromising the country's chance of achieving lasting peace."³⁸ If for no other reason, it is imperative that punitive measures be taken so that a sense of justice is set in the minds of the future generation, and so that they are aware that future atrocities will not go unpunished.

At the present time, due to the continued state of impunity and violence in the DRC, it may be necessary to address post-conflict stress through transitional justice, which comprises "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."³⁹ The International Criminal Court has already been pursued as one option in prosecuting offenders under international law. The President of the DRC stated in 2004 that "because of the exceptional situation in my country, the competent authorities are unfortunately not capable of investigating the [crimes under international law] or of carrying out the required prosecutions without the contribution of the International Criminal Court."⁴⁰ Several cases have already been brought forward to the Court, including the Lubanga trial, which opened in January 2009, and the issuing of an arrest warrant for Bosco Ntaganda in 2006. However, Ntaganda is still at large and the government has stated that "it has no intention of arresting Bosco Ntaganda, at least for the moment."⁴¹ This leads to an important flaw in the ICC, which is its reliance on states to cooperate in the arrest of war criminals. However, the

alternative of forcibly arresting international criminals appears equally unappealing due to its infringement of state sovereignty and the fact that this would require the ICC to have a police force or military. Therefore, despite the ICC's drawbacks, its presence has established a legal precedent within the state that "any individual, irrespective of their rank or level of political responsibility, can be held accountable for the most serious crimes,"⁴² a precedent which can give some hope to the victims of the human rights violations for the future of its judicial system.

As one form of transitional justice, the ICC could open the trials against the accused within the DRC itself to ensure that crimes are punished from a perspective of national justice as opposed to foreign justice. In 2004, after the DRC handed over Thomas Lubanga to the ICC, discussions began regarding the possibility of opening the Lubanga trial within the borders of the DRC. However, "the government quashed the idea, citing security concerns, but observers believe that many within the government were keen that the trial be as far away from Congo as possible and seen as foreign justice."⁴³ While the government's intent is questionable, there is, indeed, evidence that security concerns exist. In the 2006 Nsongo Mboyo case, for example, after seven officers were sentenced to life in prison, "all those found guilty escaped from jail and remain at large."⁴⁴ In confronting these obstacles, it may be more beneficial for the ICC to be used only for the most brutal and systematic violence that will gather broad state support for its investigations and trial procedures. Additionally, the ICC should take a stance to increase its presence within the nation itself, directing initiatives towards "exchanges of information, training sessions and possibly joint

³⁸ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 358.

³⁹ United Nations, Human Rights Commission, Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, [New York, NY], 2006: 4, <http://www.unhcr.org/4506bc494.html>

⁴⁰ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 451.

⁴¹ United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 469.

⁴² United Nations, Human Rights Commission, "Democratic Republic of the Congo, 1993-2003," 470

⁴³ Laura Davis, "Justice-Sensitive Security System Reform in the Democratic Republic of the Congo," [Brussels, Belgium]: Initiative for Peacebuilding, 2009: 21, http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf

⁴⁴ Davis, "Justice-Sensitive Security System Reform in the Democratic Republic of the Congo," 21.

investigations with Congolese judicial staff.”⁴⁵ By helping to stimulate greater capacity into the judicial sector, the ICC can have an impact which will extend beyond the present time and into the future stability of the DRC.

TRANSITIONAL JUSTICE AND THE REBUILDING OF A NATION

After extensive conflict in the DRC, it is vital that the international community not only address the present impunity, but also ensure that the future of the state judicial systems be rebuilt and improved. Transitional justice goes beyond the involvement of the ICC to setting up mechanisms that help prepare the state itself by establishing justice mechanisms in the future. Two widely considered options include international criminal tribunals and hybrid courts.

The Sun City Agreement of 2002, agreed upon by government bodies, rebel forces, and civil society groups, was ostensibly the first step in outlining an appropriate framework for transitional justice in the DRC at the end of the Second Congolese War. Five recommendations were put forth from the agreement, including: the establishment of an international criminal court for the DRC to judge crimes committed since 1960; the creation of a national Truth and Reconciliation Commission; the creation of a national human rights observatory; the abolition of the military courts’ jurisdiction to judge civilians and the recognition of the right of appeal before those jurisdictions; and the assertion of the separation of powers and the effective independence of the judiciary.⁴⁶ These mechanisms all address a number of the problems in the current judicial system in the DRC, bring attention to the abuses of the past wars, set up mechanisms that would address present inadequacies within the judicial system, and expand the capacity and training of DRC judicial personnel to combat impunity. In the search for long-term mechanisms in

upholding justice within the DRC, an international criminal court is an attractive option to investigate, prosecute, and sentence those involved in crimes against humanity. In assessing the viability of an international criminal tribunal for the DRC, one could use, as a case study, the International Criminal Tribunal for Rwanda (ICTR). The ICTR was set up in the Tanzanian town of Arusha, composed entirely of international lawyers, judges, and magistrates from around the world, and is mandated “to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States.”⁴⁷ It has aided in determining individual criminal responsibility as opposed to collective guilt, upheld the role of international law, applied impartial justice, built a record of past crimes, and helped combat impunity by holding accountability those who have been responsible for the human rights abuses of the past.⁴⁸ A similar court could have equally positive effects on the DRC.

When comparing the ICTR with the International Criminal Tribunal for the Former Yugoslavia (ICTY), it is important to note that the ICTR experienced greater success due to clearly defined restrictions on the lifespan of the tribunal, the containment of the Rwandan conflict by the time of the commencement of the ICTR, and large state support in obtaining custody of senior level offenders. All of these were necessary to the success of the tribunal; the ICTY experienced enormous difficulties because the aforementioned conditions had not been established. Both tribunals, however, experienced backlogging due to the huge number of cases and the length of the trials. The implementation of a similar court in the DRC is, assuredly, a viable option in combating impunity in the short-term, although

⁴⁵ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 471

⁴⁶ United Nations, Human Rights Commission, “Democratic Republic of the Congo, 1993-2003,” 454

⁴⁷ United Nations, Security Council, 3453rd meeting, *The Security Council, Resolution 955*, 8 Nov 1994, <http://www.un.org/ictt/english/Resolutions/955e.htm>

⁴⁸ Antonio Cassese, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law,” *European Journal of International Law* 9, no. 1 (1998) : 9.

it is vital to have state cooperation in the arrest of political and military leaders and clearly defined goals and time schedules set for the tribunal.

Conversely, another option that could be pursued is that of a hybrid court. Hybrid courts are defined by the UN as those courts “of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred.”⁴⁹ In the DRC, these courts would prosecute offenders near the centre of the country and employ a large majority of the judges and judicial personnel directly from the DRC. This would allow for a shorter transportation distance for plaintiffs, allow for legal precedents to be set for national justice within state borders, and assist in economic development through the hiring of state employees and the building of judicial infrastructure. Furthermore, hybrid courts would address a number of concerns within the region, including the lack of capacity and resources within the DRC, a fear of bias and lack of independence in the legal system, contributing to the right to justice and effective remedy, combating the culture of impunity, and contributing to reconciliation.⁵⁰

The Special Court for Sierra Leone, set up by the government of Sierra Leone and the United Nations, is one example of this form of hybrid court. In this case, there have been several concerns, such as the wide use of international, rather than domestic, personnel, as well as a narrow base of actors who were consulted in the courts’ establishment, which the DRC can critique, revise, and improve upon to fit their needs in post-conflict restoration. With appropriate revisions and accountability mechanisms in place, “hybrid courts can have a positive impact on the domestic justice system of post-conflict States so

as to ensure a lasting legacy for the rule of law and respect for human rights.”⁵¹ While hybrid courts, like international criminal tribunals, are temporary and must therefore confine, rather than expand, themselves to a set time frame, it is an effective transitional mechanism to consider in the post-conflict region of the DRC, especially in building up the capacity of DRC’s legal personnel, widening access to the courts to the DRC citizens, and creating the infrastructure for further legal courts after the hybrid court has served its purpose.

CONCLUSION

In conclusion, the international human rights abuses against children that occurred in the DRC have serious implications on its international treaties, and these abuses must be dealt with by a strong and competent judicial body to halt the cycle of impunity. Due to the weak state of the DRC’s judicial sector, one should instead consider bringing in international aid, either exclusively or conjointly, in investigating, prosecuting, and sentencing those responsible for human rights violations. The exclusive jurisdiction of the ICC and international criminal tribunals are two options in carrying out post-conflict trials, both of which would combat impunity outside of state boundaries and involve almost exclusively judicial personnel from abroad. Hybrid courts offer the advantage of having a widely accessible court within state boundaries and utilizing the labour of the country in court trials, building the capacity of judicial personnel and raising a sense of national, rather than foreign, justice. This is likely the strongest option available to combat impunity and to raise a culture of justice in the DRC. Whichever option is pursued, the most important factor is that children are guaranteed justice and a future free of the violence and impunity they have experienced over the past decades.

⁴⁹ United Nations, Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools For Post-Conflict States: Maximizing the legacy of hybrid courts,” [New York, NY], 2008:1. <http://www.unrol.org/files/HybridCourts.pdf>

⁵⁰ United Nations, Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools For Post-Conflict States: Maximizing the legacy of hybrid courts,” 12.

⁵¹ United Nations, Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools For Post-Conflict States: Maximizing the legacy of hybrid courts,” 6.