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The Accountability Landscape in Eastern DRC

Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)

With the signing of the Peace, Security and Cooperation Framework Agreement for the Democratic Republic of the Congo and the Region in 2013, 11 states committed to take concrete steps to “put an end to recurring cycles of violence” and facilitate the administration of justice through regional judicial cooperation.¹ In September 2013, the states also agreed on standardized benchmarks and indicators to measure the implementation of the agreement, representing a new opportunity to seriously engage in the fight against impunity in the DRC.

This executive summary presents the findings of an ICTJ report on the domestic judicial response to serious crimes in the DRC. It is based on research and interviews conducted by ICTJ with justice stakeholders, including investigators, prosecutors, judges, lawyers, members of national and international civil society organizations, and personnel from MONUSCO and UN agencies. It integrates a preliminary review of available reports, including academic research and UN and NGO reports, with an analysis of DRC laws and draft laws relevant to the prosecution of serious crimes in the DRC’s domestic courts.

Normative Framework and Application of the Rome Statute

Following the DRC’s ratification of the Rome Statute of the International Criminal Court in 2002, legislative reform sought to address incongruities between the DRC’s domestic military law and provisions of the Rome Statute. However, the Military Penal Code, which was passed that same year, falls short of providing adequate definitions for common elements of crimes and prohibited acts, in accordance with the Rome Statute. For example, it conflates the definitions of crimes against humanity and war crimes by referring to crimes against humanity as grave breaches against persons and objects protected by the Geneva Conventions and its additional Protocols (which are only relevant with regards to crimes related to an armed conflict).²

Moreover, the Military Penal Code fails to provide a mode of liability equivalent to command responsibility, as required under Article 28 of the Rome Statute. Instead, it provides that a superior will only be prosecuted if his or her subordinates are also prosecuted and that in such an event he or she would be considered a co-perpetrator or accomplice, not a principal perpetrator.³ Further, it does not impose penalties for war crimes, an omission in direct conflict with the principle of legality; problematically, it also provides the death penalty for persons convicted of genocide or crimes against humanity.⁴

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¹ Framework Agreement for Peace, Security and Cooperation in the Democratic Republic of Congo and the Region, Addis Ababa, February 25, 2013, para. 5 (“For the region”).

² Loi No 024/2002 of DRC on the Military Penal Code (Loi portant Code pénal militaire), November 18, 2002 (entered into force March 18, 2003), www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf, Articles 165, 166 and 169.

³ Ibid., Article 175.

⁴ Ibid., Article 164 (Genocide) and article 167 (Crime against humanity).

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About the Authors

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Because the constitution provides for the primacy of international treaty law over domestic law, Congolese military judges have reconciled situations in which national law and international criminal law conflict by directly applying the Rome Statute.⁵ However, courts have yet to formulate clear criteria for circumstances in which the Rome Statute should be invoked over domestic law, and vice versa. Consequently, the attempts by judges to remedy shortcomings in domestic law have led to fragmented and unpredictable jurisprudence on serious crimes.

Legislation Combatting Impunity for Serious Crimes

Historically, the prosecution of serious crimes in the DRC has been handled by military courts.⁶ However, in April 2013, Parliament passed the Law on the Organization, Functioning and Jurisdiction of the Courts (LOCJ), granting civilian courts (specifically, Courts of Appeals) jurisdiction over the prosecution of serious crimes.⁷

A draft law on the establishment of specialized chambers within the Courts of Appeals has long been discussed by the DRC's Executive, yet it still faces significant political resistance in Parliament. In June 2014, the National Assembly found it inadmissible,⁸ mainly because the type of law under which it was submitted (ordinary law) cannot modify an organic law, like the LOCJ. Additionally, members of Parliament were reluctant to allow foreign judges to join the specialized chambers, as had been proposed. This provision led them to conclude that the draft law was an initiative of the international community, lacking Congolese resonance. More substantial objections were raised against the possibility of affording civilian courts the power to try members of the military and police services—that is, giving civilian courts mixed military and civilian jurisdiction.

A draft law on the implementation of the Rome Statute would allow for the harmonization of Congolese substantive and procedural laws with international criminal law.⁹ The last version of this law provided for the complete transfer of jurisdiction over prosecution of serious crimes to the Courts of Appeals, as enabled by the LOCJ. In order to enable the implementation of this exclusive jurisdiction, the draft law introduces definitions of serious crimes into the ordinary Criminal Code and provisions on cooperation with the ICC in the Code of Criminal Procedure.¹⁰

The two draft laws (the first concerning the establishment of specialized chambers and the second concerning the implementation of the Rome Statute) should not be understood as being in conflict.¹¹ In fact, they potentially complement each other. The draft law on the implementation of the Rome Statute would bring the normative framework of Congolese law up to international standards, while the draft law on specialized chambers would establish an institutional framework to efficiently prosecute international crimes. In this regard, President Joseph Kabila's endorsement of the adoption of the two laws represents a significant step towards necessary legislative and institutional reform.¹²

5 Constitution, Article 215; see also Constitution, article 153(4); and Elena Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks," *Boston College Law Review* 50(1) (2009): 4.

6 Ordonnance-loi No 72/060 of Zaire (DRC) on Establishing a Code of Military Justice (Ordonnance-loi Portant Institution d'un Code de Justice Militaire), September 25, 1972.

7 Projet de loi modifiant et complétant la loi organique No 13/011-B of April 11, 2013 portant organisation, fonctionnement, et compétences des juridictions de l'ordre judiciaire en matière de répression des crimes de génocide, des crimes contre l'humanité et des crimes de guerres, April 2014.

8 Ibid., article 4 referring to article 91.7 of the LOCJ.

9 Proposition de loi modifiant et complétant le code pénal, le code de procédure pénal, le code judiciaire militaire et le code pénal militaire en vue de la mise en œuvre du Statut de Rome de la Cour Pénale Internationale, submitted by the Honorable Balamage N'kolo, on September 6, 2012.

10 The first draft bill on the implementation of the Rome Statute was in 2003. Two additional draft bills were submitted to the Parliament respectively in 2005 and 2008, but were not adopted.

11 In 2011, when the Minister of Justice submitted a draft law on the establishment of a Specialized Court, the Senate sent the proposed legislation back to the government for revision, indicating that some elements of the draft law were already included in the draft law implementing the Rome Statute.

12 Speech of President Joseph Kabila to the National Parliament, October 23, 2013.

“The number of open investigations related to serious crimes remains very limited compared to the magnitude of the atrocities committed in the DRC.”

Analysis of Open Investigations

Research and interviews conducted by ICTJ found that between January 2009 and December 2014 judicial authorities in the DRC had opened 39 cases related to events that had occurred between 2002 and 2014 in eastern DRC (Ituri, North Kivu, and South Kivu). These cases all involved incidents that military prosecutors and judges qualified as international crimes; indeed, they were connected with an armed conflict or committed as part of a widespread or systematic attack against civilian populations.¹³

The number of open investigations related to serious crimes remains very limited compared to the magnitude of the atrocities committed in the DRC during that time period. Political factors have interfered with the administration of justice and the selection of cases involving serious crimes committed by foreign and domestic armed groups as well as by the Armed Forces of the DRC (FARDC), including proceedings being blocked when special interests are at stake or political pressure is applied. Although the majority of cases compiled by ICTJ concern members of the FARDC (24 out of 39 cases), there is still a high number of crimes committed by the FARDC that remain unaddressed.

In interviews, judicial authorities often cited difficulties in accessing conflict areas as well as poor reporting and recording of evidence as contributing to the low number of proceedings against foreign armed groups. The government of Rwanda has yet to honor its commitment under the Framework Agreement to cooperate with the DRC’s judiciary regarding crimes perpetrated by members of armed groups within its borders, including the National Congress for the Defence of the People (CNDP) and the March 23 Movement (M23).

The degree of international attention paid to cases involving serious crimes varies widely. Cases of sexual crimes amounting to international crimes, like the Minova case,¹⁴ tend to generate the most international pressure on the Congolese judiciary to respond. No cases dealing with serious crimes that are equally common in eastern DRC, such as enlistment, conscription or use of children to participate actively in hostilities, and pillaging of natural resources, were initiated for the period under analysis.

Support for the Congolese Judicial System: Capacity Building or Substitution

Investigations of serious crimes conducted by the Congolese judicial system are consistently precipitated by interventions of international partners (such as MONUSCO, UN agencies, and nongovernmental organizations), which provide initial information and bring cases to the attention of the DRC’s military justice. The Congolese judicial system relies on this external information due to its limited access to areas where serious crimes are committed, especially areas that are controlled by armed groups and/or beyond the state’s control. As a consequence, whenever crimes occur outside of the realm of an international partner’s field of intervention, little or no information is gathered and no investigations or prosecutions are initiated.

The current lack of organizational oversight and incentives to investigate and prosecute serious crimes within the Congolese judicial system contributes to a reliance on external partners to fulfill its work.

¹³ For the purposes of this study, ICTJ did not include cases that were considered international crimes by the Congolese military courts but were not connected with an armed conflict or did not amount to a widespread or systematic attack against the civilian population. Two important cases concerning crimes committed in eastern DRC were not included in this study because the proceedings were not conducted in the jurisdiction of North Kivu, South Kivu or Ituri. A delegation of the UN Security Council brought the case of General Kakwavu to the attention of the DRC President in May 2009, for crimes committed in Ituri. He was brought before the High Military Court in Kinshasa. See HMC, Gen. Kakwavu (Nov. 7, 2014), RP 004 RMP 0343. The Kahwa case was initially brought before the TMG-Bunia in 2006, but was then appealed before the CMS-Kisangani and then brought before the HCM in 2014 for crimes committed in Ituri. See HMC, Kahwa (Aug. 13, 2014), RPA 023/06, RP 039/2006, RMP 227/PEN/2006. See, also, U.N. Joint Human Rights Office, “Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo, 9 April 2014, para. 41

¹⁴ Minova Case RP 003/2013, RMP 0372/BBM/013 (May 5, 2014); Baraka, Kibibi Mutuare and all RP 043, RMP 1337/MTL/2011 (February 21, 2011) (Fizi I). The Minova case involved an attack by the 391st Unit of the FARDC against the population of Bweremana-Minova. Violations committed included the mass rape of more than 100 women.

Moreover, investigations and prosecutions often depend on the financial support of external partners; Congolese military courts receive substantial financial and technical support from various partners to conduct investigations and trials.¹⁵ Several projects and initiatives have been introduced to support national judicial authorities. Beyond logistical support, these initiatives aim to improve the technical quality of judicial proceedings. Nonetheless, to date, the technical support provided to national judicial organs has been insufficient to effectively fight impunity for serious crimes in the DRC.

Recommendations

To the President of the Democratic Republic of the Congo

1. **Appoint a focal person from the judicial sector to ensure an effective contribution from the DRC at the biannual Heads of State meeting of the Regional Oversight Mechanism of the Framework Agreement, as well as to conduct regular assessments of DRC compliance with its commitments.** That person should be responsible for collecting information regarding the fulfillment of Commitments Six and Seven of the Framework Agreement, in accordance with the appropriate indicators.
2. **Provide support and guidance to accelerate and facilitate the adoption of key legislation in the fight against impunity,** in particular, the law implementing the Rome Statute and the law on the establishment of specialized chambers.
3. **Publish regularly the progress achieved in the judicial repression of serious crimes,** in consideration of the national benchmarks and indicators in the National Oversight Mechanism.

To the Executive

4. **Designate an independent group of experts to undertake a comprehensive mapping of international crimes committed between 2003 and 2014.** Along with the Mapping Report conducted by OHCHR of serious violations of human rights committed between 1993 and 2003, the findings should be submitted to Congolese judicial and political authorities to inform the drafting of a national judicial strategy to respond to crimes committed during this period.
5. **Ensure that the prosecution of international crimes in eastern DRC is clearly identified as a priority in the implementation of the five-year plan for the justice sector.**
6. **Increase the judicial budget, ensure its effective management, and strengthen the operational capacity of relevant jurisdictions to investigate and prosecute serious crimes.**
7. **Improve recruitment processes to ensure that only qualified and experienced staff who are specially trained in the field of international crimes are appointed.**
8. **Ensure that legislative proposals on the repression of international crimes in accordance with the Rome Statute are presented to Parliament.** The Minister should ensure that the draft law on the implementation of the Rome Statute and the draft law on the specialized chambers are not in conflict, but instead reinforce each other, and are presented to Parliament as such.
9. **Ensure that new legislative proposals presented to Parliament on the jurisdiction of the civil and military courts over international crimes are harmonized, allowing a gradual, but absolute, transfer of all cases to ordinary (non-military) courts.**
10. **Ensure that an extraordinary meeting of the Justice Thematic Group is held to present data and specifically discuss the progress and challenges of the judicial response to serious crimes.**
11. **Appoint a focal person to be in charge of reviewing the laws and international agreements on judicial and criminal cooperation in force in the DRC.** That focal point should ensure implementation of the relevant provisions of the ICGLR Protocol on Judicial Cooperation.

¹⁵ The majority of international crimes trials are held by mobile courts with hearings usually organized in the place where crimes were committed, in order to bring justice closer to victims. These mobile courts are financed exclusively by external partners. See Open Society Initiative for Southern Africa, "Helping to combat impunity for sexual crimes in DRC: An evaluation of the mobile gender justice courts" (2012).

To the Military Prosecutor General

12. **Maintain an inventory of ongoing cases related to international crimes and ensure the development of a strategy for prioritizing cases.**
13. **Develop a prosecutorial strategy, in coordination with the (civilian) Prosecutor General, based on transparent and objective criteria to ensure that all efforts to fight impunity are as complementary and comprehensive as possible.** This strategy should be made public and subject to periodic evaluations.

To the Judiciary

14. **Establish an information management system that would enable systematic and confidential information sharing with international and national partners on the commission of serious crimes.**
15. **Specifically assign judicial staff to cases of serious crimes.** Staff must receive sufficient training on international criminal law, particularly regarding the characteristics of serious crimes, such as the context of their commission, the structure and organization of perpetrators, and the responsibility of commanders. Such training should be provided by experienced practitioners in the field of international criminal law who have extensive knowledge of the Congolese context.

To the Superior Council of Magistracy

16. **Promote a series of trainings on the prosecution of international crimes for civil magistrates.** To this end, taking into account the expertise they have acquired in this area, military judges should be integrated into the teams of trainers.
17. **Support the coordination of military prosecutors and military judges with the General Prosecutor and judges of the Courts of Appeal in their investigation and prosecution of serious crimes by creating an institutional coordination mechanism.**
18. **Create a clear, fair, and transparent system of reporting through which the work of judges is assessed according to results.** Internal organizational incentives should promote a more proactive role by judicial officers in the investigation and prosecution of serious crimes. Disciplinary action should be introduced for procedural violations, corruption, and undermining cases of serious crimes.

To the Legislature

19. **Prioritize the adoption of the draft law implementing the Rome Statute.** Ensure that provisions of the draft law are integrated into the ordinary Criminal Code and the Code of Criminal Procedure, and that they strictly adhere to the Rome Statute, especially regarding the definition of crimes, modes of liability, sentencing of crimes, criminal procedure, and cooperation procedures with the ICC. Also ensure that the adopted law is fully in line with international criminal law standards regarding protecting the rights of the defendant and protecting victims, witnesses, and intermediaries.
20. **Prioritize the adoption of the draft law on the establishment of specialized chambers.** Ensure that the draft law provides criteria for a rigorous selection process for the magistrates and judicial staff that guarantees that they have sufficient expertise in trying serious crimes. The law must also effectively integrate international experts within the specialized chambers at the trial and appellate levels, as well as outline the phasing-out procedure. It should also provide for a single appellate specialized chamber to ensure judicial consistency, create special investigation units, and establish a section with the specific objective of providing assistance to victims and witnesses.
21. **Ensure that the draft law on the implementation of the Rome Statute and the draft law on the establishment of the specialized chambers are consistent and that they reinforce the complementarity of both laws.**

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To the International Community

22. **Continue to assist the judiciary with logistical, financial, and technical support, recognizing that their contribution remains critical to the prosecution of serious crimes in the DRC.**
23. **Undertake an independent evaluation of the technical support provided by the initiatives of international partners.** Assess the effective contribution of these initiatives to the quality and number of investigations and prosecutions of serious crimes.
24. **Design international assistance with the objective of strengthening judicial capacity and increasing its role in initiating investigations and prosecuting serious crimes.**
25. **Initiate and sustain investment in training and build the capacity of civilian and military judicial actors.** Such activities should strongly emphasize investigating and prosecuting serious crimes in consideration of the particular elements of these crimes, the context of their commission, the structure and organization of perpetrators and their groups, and command hierarchy.
26. **Support the designation and work of an independent group of experts to undertake a comprehensive mapping of international crimes committed between 2003 and 2014.**
27. **Support the Military Prosecutor General and the (civilian) Prosecutor General in initiating a prosecutorial strategy.** This strategy should maximize the resources allocated to the fight against impunity for serious crimes and ensure transparency and consistency in the administration of justice and the selection of cases.
28. **Support the investigation and prosecution of cases of serious crimes in accordance with criteria set out in the national prosecutorial strategy.**
29. **Support the judiciary in establishing an information management system within the military and civilian judicial sector.** Establish a system of information sharing with the judiciary that protects the confidentiality of sources and facilitates the systematic sharing of information on the commission of serious crimes.