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THE FIGHT AGAINST IMPUNITY IN THE DEMOCRATIC REPUBLIC OF CONGO BETWEEN JUSTICE AND RECONCILIATION

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In the Democratic Republic of Congo, one of the most conflict-affected country in Africa, many perpetrators of war crimes and crimes against humanity have enjoyed a good deal of impunity, at least until the entry into force of the Rome Statute on 1th July 2002. The ICC's establishment has raised hopes that they would be finally punished, even if the impact of the Court has been hampered by Congo's vast size and successive conflicts, high number of communities which claimed to be victims, complex cooperation with Congolese authorities and limited resources available. Consequently national jurisdiction must play a more proactive role in truth-seeking and in finding the right balance between peace and justice. The adoption of amnesty laws not accompanied by incisive institutional reforms, criminal prosecution and reparation of the victims has not been so far an effective mean to promote peace and reconciliation. Beyond the mixed perceptions of ICC's impact, it is significant that the accused in ICC's first trials are either DRC's nationals or suspects of crimes committed in Congo. Despite the difficulties, that is the evidence that justice is gaining momentum and that perpetrators of past and future international crimes can be arrested anywhere and transferred to The Hague.

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The Congolese wars

The Congolese wars have been probably the deadliest since World War II with estimates that over 5 million related deaths have occurred between 1998 and 2007. During this period and to a less extent thereafter a high number of violations of international humanitarian laws have occurred, as war crimes and crimes against humanity, including targeting civilians for murder, torture, rape and other forms of sexual violence, forced displacements, recruiting child soldiers and abducting civilians. However, armed conflict cannot be considered in isolation from the long period of Mobutu's autocratic rule and from the role played by neighbouring countries.

The end in 2006 of political transition took place after a decade of heavy conflict that began with Laurent Desire Kabila campaign to liberate, with Rwandan and Ugandan support, the country (then called Zaire) from 32 years of autocratic rule. The first Congolese war intersected with the Rwandan genocide and lasted from 1996 to 1997, until the instalment of Kabila as President of Democratic Republic of Congo. Eventually Rwanda and Uganda's alliance proved short-lived as Kabila sought to reduce the influence of his sponsors. As result, a new conflict marked in 1998 the beginning of the second Congolese war. Rwanda and Uganda decided to remove the new President from power and sent troops back across the border into the East, initiating also new rebellions with support of Congolese allies. The two invaders had the implicit support of Burundi. Kabila was saved by the speedy interventions of Angola, Chad, Namibia and Zimbabwe which sent troops into the country to support his government. Likewise two main rebel groups emerged in the eastern provinces, namely the Congolese Assembly for Democracy(RCD) and the Movement for the Liberation of Congo (MLC). The MLC, led by **Jean-Pierre Bemba**, was initially formed by a proxy for Uganda but had also close ties with members of the former regime. The RCD was Rwanda's surrogate, drawing support from the Banyamulenge (Congolese-Tutsi) population of the East.

In July 1999 the Lusaka Agreement was signed by the states parties to the conflict, providing for the withdrawal of all foreign troops, the disarmament of Interhamwe (Rwandan-Hutu militia authors of the genocide) in Congo, the establishment of an inter-Congolese dialogue under the auspices of the Organisation of African Unity (OAU) and the creation of a UN Mission (MONUC).

In 2001 Laurent Kabila was assassinated in mysterious circumstances and replaced by his son Joseph. The younger Kabila adopted a more conciliatory approach and successfully negotiated the withdrawal of foreign forces occupying eastern DRC.

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With the signing of Lusaka Accords and subsequent installation of a transitional government the country made political progress, paving the way for the peaceful holding of general elections in 2006. As for presidential elections the poll was inconclusive, with no winner with more than 50% of the votes. A run off between President Joseph Kabila and Bemba, his main opposition challenger, was held on October 2006. As result, Kabila was announced the winner of the presidency with 68% of the vote (around 9.4 million), over Bemba's 42% (around 6.8 million).

Despite peace deals and amnesty laws, from 2007 until very recently rebel groups continued to threaten peace in eastern provinces with a further proliferation of acts of violence committed by all sides to the conflict against civilian population and its vulnerable groups.

A framework agreement on the DRC was finally signed on February 2013 in Addis Ababa from 11 African nations as a comprehensive approach to sustainable peace in the Great Lakes region and paved the way for the most recent peace deal between the DRC's government and the latest insurgent group in the Kivus.

Local conflicts

As a consequences of wars two local conflicts were fought in rich-mineral north-eastern Ituri district of the Oriental province and in eastern provinces of North and South Kivu.

In both contests the national dynamics was exarcebated by tensions among local ethnic groups, struggle for the allocation of natural resources, positioning in national politics, security concern and foreign interference. The armed forces of Uganda and Rwanda lent support to ethnically-aligned militias, strengthening their military capacity and setting the stage for the serious crimes committed in Ituri. More particularly the conflict was characterised by the tensions between the agriculturist Lendu and pastoralist Hema ethnic groups and by high level of human rights violations, including massacres, sexual violence and recruitment of child soldiers.

As the Rome Statute was coming into force in 2002, violence in Ituri reached alarming proportions, with hundreds of thousand people displaced and afflicted by hunger and diseases. Against this appalling backdrop, an emergency mission of 1800 European Union personnel (Operation Artemis) was sent in mid-2003 to protect civilians in danger as preparation were made to reinforce MONUC.

News of serious crimes committed in the district set also in motion the ICC's Office of the Prosecutor (OTP), which in September 2003 announced it was preparing to initiate *motu proprio* an investigation. Following the

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OTP's announcement, the Congolese government formally referred in 2004 the situation to the ICC, paving the way for the launching of investigation in the DRC.

Having been left out of the overall national process, Ituri district returned in recent years to a relative calm, following the initiatives of the Pacification Commission, which brought together all the ethnic and armed groups, and the work of UN peacekeepers.

Unlikely Ituri, North and South Kivu have been a permanent battlefield; ever since 1994 thousand of Interhamwe and Hutu government figures fled from Rwanda in the two provinces. The militias reorganized themselves as Democratic Forces of Liberation of Rwanda (FDLR), with the objective of opposing Tutsi dominated government of Paul Kagame installed in Kigali.

A few years later the General Laurent Nkunda, an ethnic Tutsi, left the army with many former RCD troops loyal to him and began a further rebellion, claiming to be defending Congolese Tutsis from the FDLR and fighting the government of Joseph Kabila. The fight resulted in a new humanitarian catastrophe and an international arrest warrant was issued for Nkunda in 2008 by the Congolese authorities, seeking his arrest for war crimes and crimes against the humanity.

Unexpectedly Nkunda was arrested on January 2009 by Rwandan authorities in an apparent deal struck between Kinshasa and Kigali which saw Rwandan troops enter the DRC to conduct a joined military operations against the FDLR rebels. It was at this time that **Bosco Ntaganda**, also an ethnic Tutsi, former militia leader in Ituri and former General of the armed forces (FARDC) before joining Nkunda's rebels in the Kivus, claimed to have ousted the latter from the military command of National Congress for the People's Defence (CNDP) established by Nkunda. Despite the arrest of Nkunda, who so far has not been delivered by Rwanda to Congolese authorities, peace and security in the Kivus remained fragile as another rebellion launched by the so called M23, a rebel group named after the Goma peace agreements of 23 March 2008, allegedly backed by Rwanda and mostly composed of soldiers who mutinied in April 2012 from the Congolese national army, slided back into new conflict and disorder until the most recent battlefield successes of the Congolese Armed Forces, supported by UN special intervention brigade, and the signing of said peace deal between the government and the M23 finalized on last December in Nairobi.

It was at this time that Bosco Ntaganda, also an ethnic Tutsi, former militia leader in Ituri and former General of the armed forces (FARDC) before joining Nkunda's rebels in the Kivus, claimed to have ousted the latter from the military command of National Congress for the People's Defence (CNDP) established by Nkunda

Results of ICC's investigations

To date five cases related to the DRC have been brought before the relevant Chambers of the ICC, namely those against: **Thomas Lubanga**

Dylo, German Katanga and Mathieu Ngudjolo Chui, Bosco Ntaganda, Callixte Mbarushimana and, Sylvestre Mudacumura. The first four arrest warrants and the two trials have focused on Ituri.

As first person to be transferred to the ICC, Thomas Lubanga, a DRC citizen and allegedly former rebel leader of the Union of Congolese Patriots, relied primarily on the support of the Hema and aligned ethnic groups in Ituri. His trial commenced in January 2009 and the ICC trial Chamber convicted him on March 2012 to 14 years of imprisonment for the war crime of enlisting, conscripting and using children under of the age of 15 to participate actively to hostilities in Ituri.

Two other DRC's citizens, German Katanga, the alleged Commander of the Front for Patriotic Resistance in Ituri and Mathieu Ngudjolo Chui, allegedly leader of the Nationalist and Integrationist Front, two armed groups associated with the Lendus, have been charged with several war crimes. After Pre-Trial Chamber joined both cases, ICC judges decided to separate them.

Lubanga and Katanga were already in Congolese custody, pursuant to criminal investigations by military courts, when the ICC issues arrest warrants for them. Ngudjolo Chi was acquitted on December 2012 for insufficient evidence of war crimes and crimes against humanity and released from the ICC custody. The verdict against German Katanga is still pending.

A third case was prepared against Callixte Mbarushimana, a Rwandese national and Executive Secretary of the FDLR (Democratic Forces of Liberation of Congo) for alleged crimes committed in North and South Kivu. He was released on December 2011 due to insufficient evidence of the charges against him.

The fourth case is against the former rebel leader Bosco Ntaganda, who after two arrest warrants for alleged crimes committed in Ituri, in 2012 surrendered him voluntary to the Court. He is now in the ICC's custody, waiting for the result of the ongoing confirmation of the charges hearing.

While Lubanga, Katanga and Ngudjolo were prosecuted with the cooperation of the Congolese government, this has not been the case for Ntaganda. In fact Kinshasa's authorities decided not to pursue the Ntaganda's arrest warrants issued by the ICC, following a deal made with Rwanda to neutralize the chief of CNDP, Laurent Nkunda, and to replace him with Ntaganda. In this case the Congolese concern for peace in the Kivus apparently prevailed over the fight against the perpetrators of crimes in Ituri.

The fifth case concerns the alleged Supreme Commander of the FDLR, Sylvestre Mudacumura, a Rwandese national, against whom the ICC

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issued a warrant arrest on July 2012 for alleged crimes committed in the Kivus. He remains at large.

Bemba's case

Another Congolese national, Jean Pierre Bemba, the former guerrilla leader, Vice President of Republic during the political transition, presidential candidate and opposition leader at the 2006 elections and eventually member of the Senate, is on trial at the ICC for alleged crimes committed by his militia in the Central Africa Republic. Unlike the chief rebels of Ituri and the Kivus, Bemba was a prominent national figure at the moment of his arrest carried in Belgium and of his subsequent transfer in June 2008 to The Hague. His forced departure from active politics has contributed to change the course of events in Congo, as he was Joseph Kabila's leading opponent in peace time, after that both were leading figures of opposing forces during the Congolese wars. Bemba enjoyed popular support in the western provinces, including the capital, and his arrest was controversial, as his supporters interpreted it as the price to pay for having challenged Kabila and lost the presidential race. Thus has not helped to dissolve among segments of the population the impression of an international justice meant to serve the interest of the winners.

The fact that the ICC is prosecuting Bemba, while investigations and prosecutions of serious violations committed by the government remain limited, further reinforces the perception that the current strategy is one sided and beneficial to Kabila. Congolese protracted denial to cooperate with the Court in the case against Ntaganda has raised also questions about the political use of international justice made by the government. The Bemba's trial is ongoing and given the second arrest warrant issued on November 2013 by the Court for him and other four individuals for offences against administration of justice allegedly committed in connection with his case, it appears improbable that the MLC's leader will be released anytime soon.

Conclusion

Congo was one of the first 60 states parties which contributed to the entry into force of the Rome Statute. It was also the first to grant military courts exclusive jurisdiction over international crimes and to send its nationals to the ICC.

However, the country has not yet adopted the necessary legislation to incorporate the Rome Statute crimes and cooperation obligations into its domestic legislation and must take up challenges to find the right balance between peace and justice. To date the concern for peace has been

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prevalent, as it was the case for crimes committed before the entry into force of the Rome Statute and for a number of amnesties granted for acts of war and insurrection committed in the last decade in the eastern provinces. The latest amnesty law has just been adopted by the Congolese Parliament and covers the act of insurgency, acts of war and political offenses committed in the DRC from the date of promulgation of the Constitution (18 February 2006) to the date of approval of said law by the Government (20 December 2013).

The legislation excludes amnesty for crimes as genocide, crimes against humanity and war crimes, whose definitions in the DRC's military code are alternate to those of the Rome Statute.

It was adopted following the long awaited accord between the Congolese Government and the M23 rebels. The agreement also called on other armed groups to lay down their weapons and to join the political process of national reconciliation. Senior United Nations officials welcomed parliamentary approval of the amnesty law, while human rights defenders expressed concern and regret, for fear that the law could understate the gravity of human rights violations committed in the DRC since 2006. Indeed so far amnesty laws have not reached the intended purpose of promoting peace and reconciliation. In the last decade rebel groups have proliferated unabated and contrary to general expectations, disarmament, reintegration process and amnesties did not succeed to end the armed conflicts. Most likely these measures, although conceived as support to peacekeeping efforts, have contributed to nurture a culture of impunity and to protract the collapse of law and security.

Therefore, time has come for a comprehensive approach to the fight against impunity. First at all international and national actors must join efforts to pressure Congolese authorities not to delay further the incorporation of the Rome Statute. An effective reform of the security systems (armed forces, police and judiciary) is also urgent to promote the physical and legal security and to create an enabling environment for peace and stability. The limitations of the Congolese justice system can be overcome with international support if the government has the political will to preserve the autonomy of judges, to reinforce both in quality and quantity the capacities of military and civil courts and to refrain from using justice for political purposes as mean to maintain the status quo.

The international justice has set effectively in motion the fight against impunity and it is now up to the Congolese authorities to adopt the Rome Statute Implementation Bill, to reinforce the role of domestic jurisdiction and to prosecute more cases against suspects for serious crimes, no matter whether rebels or officials. Long term commitment to democracy, rule of law and respect of human rights is key to fight against impunity. Finally

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keeping justice high on the government agenda, through incisive institutional reform, criminal accountability, and reparations of the victims is crucial for promoting peace and reconciliation, advancing fight against impunity and avoiding that serious crimes s committed in the past could be perpetrated again.