

Challenges in the Repression of Core International Crimes in the DRC

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1. Introduction

The Democratic Republic of Congo ('DRC') spans 2,345,000 km² and has an estimated population of 60,000,000 inhabitants. Since the creation of the State in 1885, one of its main concerns has been the organisation of the judiciary. Efforts have been undertaken with regard to legislation and the effective establishment of judicial institutions, but various constraints have hindered the development of an independent, impartial and accessible judiciary. The country has gone through various armed conflicts and political tensions, which have resulted in serious and massive violations of international human rights, some of which constitute core international crimes: war crimes, crimes against humanity, genocide and the crime of aggression. To date, many of these crimes remain unpunished, risking the commission of further crimes and leading to a lack of both remorse and deterrence among potential perpetrators. This would seem to defy the basic goals of the criminal justice process.

Indeed, the prosecution of those individuals who are most responsible requires "a judicial system entirely independent, able to resist pressure from some senior officers responsible for international crimes committed in the past. It is certainly not the case in the current state of the Congolese judicial system".¹

In the following we will try to analyse, without seeking to be exhaustive, the challenges that the repression of serious violations of international human rights is facing, by grouping them into three categories: the material and financial challenges (2.1.), the challenges related to the legal framework (2.2.), and the political challenges (2.3.). We will try, subsequently, to identify some strategies used

to circumvent or resolve them.

2. The Challenges

2.1. Material and Financial Challenges

The DRC Court of Appeal and various military courts are competent to try crimes against humanity, war crimes and genocide. As a result of the forthcoming division of the 11 existing provinces in the DRC into 26, 14 additional appellate courts will have to be established and provided with infrastructure and personnel. This judicial decentralisation could solve one of the crucial problems in the administration of justice in the DRC, namely that the judge is normally so far removed from the litigant. However, knowing the difficulties faced by the appellate and lower courts already in place, there is little hope that new courts will be better off.

The Congolese courts and tribunals are facing constraints that have been known for a long time:

The buildings housing courts and offices are generally old and not maintained [...] Some institutions are located in unsuitable buildings, such as private residences and/or do not meet acceptable conditions of work [...] The furniture already dilapidated [...] has been damaged or disappeared and has not been replaced. Judges and clerks often have to provide themselves the furniture they will use throughout their careers. Sometimes office equipment (typewriters, computers) is rented to private individuals [...] no court has a vehicle. The courts do not have sufficient documentation nor libraries that are equipped and regularly updated [...] The wages paid to the various agents of the justice system by the state are very low [...] The Congolese justice functions mainly thanks to funds raised illegally by Judges and other officials from the defendant, who ultimately supports the operating costs of the judiciary.²

1 Office of the High Commissioner for Human Rights ('OHCHR'), "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", August 2010, para. 1014.

2 Mission conjointe multibailleurs, "Audit organisationnel du secteur de la justice en République démocratique du Congo, Rapport

This diagnosis, made 11 years ago, is still valid. It is primarily caused by the lack of funds allocated to the justice sector in the State budget.

Be that as it may, the fight against impunity – and the application of positive complementarity between the Congolese courts and the ICC – will remain wishful thinking without strengthening the logistical and technical capacity of judicial staff. In a similar vein, to guarantee their adequate remuneration will ensure their independence *vis-à-vis* litigants and the two other branches of government. The bar associations should also not be forgotten in the process of strengthening the justice sector, as they offer free legal and judicial assistance to those in need, which can only be as good as the means at their disposal allow.

In short, without the material and financial means to live up to the task, the judiciary will struggle to fulfil its role as the guarantor of individual freedoms and fundamental rights of citizens, and will be exposed to corruption, the greatest ally of impunity.

2.2. Challenges to the Legal Framework

The DRC deposited its instrument of ratification with the Secretary General of the United Nations on 11 April 2002, subsequently becoming a State Party of the ICC. Since then several legislative initiatives have been taken, either as a draft or a proposed bill of law, in order to integrate into national law international principles of repression of serious violations of human rights: the irrelevance of official capacity, the protection of victims and witnesses, the effective reparation to victims, etc. None of the initiatives have succeeded.

One of the obstacles to the adoption of a law to implement the Rome Statute at the national level remains, to this date, the existence of constitutional immunities and impeachment proceedings that must be respected by the prosecutor and the national judges. To this end, a constitutional amendment is necessary so that domestic courts are able to take into account the principle of the irrelevance of official capacity for serious violations of human rights. Immunities established by an ordinary or organic law do not present a problem, since duly concluded treaties and international agreements shall, upon publication, have an authority superior to that of national laws. In this case the Rome Statute has priority. However, the Constitution of 18 February 2006, which has primacy over international treaties, had not – in its development, adoption and enactment – taken into account any potential clashes, including in this case the ratification of the Rome Statute on 11 April 2002.

Assuming that one day the law on the implementation of the Rome Statute in the DRC is adopted without constitutional revision, the consequence will be that in

some cases only the ICC will be able to try certain Congolese persons accused of international crimes. Indeed, in that case, there would be a situation of manifest unwillingness on the part of the State, whose internal procedures are inconsistent with the necessary intent to bring the person to justice as understood in paragraph 2 of Article 17 of the Rome Statute.

2.3. The Political Challenges

Serious violations of human rights are generally committed with the active or passive support of people who hold a high place in the political, military or administrative hierarchy. These people are often linked by communities of various interests to the point that they constitute a network of power and influence. A cartel is quickly created between them in order to ensure protection and to implement lobbying mechanisms to thwart any initiative of accountability for their wrongdoings.

In such a context, the adoption of certain laws is delayed, show trials are organised, doctored reports with biased conclusions are produced, intimidation and targeted killings of victims and witnesses are arranged and extraditions or transfers of the accused are blocked.

All sorts of legal and/or political justifications are invoked, with the unspoken intention to ensure impunity. This was the case with the accused *Bosco Ntaganda*, whom the Congolese Government had refused to arrest in execution of the warrant issued against him by the ICC and transfer him to The Hague, on the grounds that it was necessary to maintain peace.³

The failure of certain reforms that are necessary for the repression of serious violations of human rights is rooted in the strong emphasis – albeit not widely recognised – on political considerations that do not prioritise justice. Sovereignty is therefore used as a ground for refusing the establishment of a judicial body staffed with foreign judges.

In the international order, interests of State and sovereignty are intimately linked, and even sometimes become confused when a state disguises under the more presentable and legal concept of sovereignty, acts done in the name of State in order to often, if not always, legitimise them or at least shield them from international control, or even control by its national courts [...] sovereignty allows the State, in the international order, to oppose to any accountability demanded by the international community, other States or individuals or groups of individuals, for its internal and even international conduct, the

3 See ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber I, Warrant of Arrest, Case No. ICC-01/04/02/06, 22 August 2006 (<https://www.legal-tools.org/doc/e73e38/>); ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, Case No. ICC-01/04-02/06, 13 July 2012 (<https://www.legal-tools.org/doc/18c310/>).

d'Etat des lieux, Synthèse", May 2004, p. 26.

principle of non-intervention and non-interference.⁴

In fact, as sovereignty is exercised through the expression of the willingness and unwillingness of the State, it is only a matter of lack of political will, not an insurmountable legal obstacle. If a State is – for whatever reasons – unwilling, either because it is not in its interest or has interests to protect, sometimes including those of persons in power, sovereignty is always brandished; and when the State is willing, it will always be in the name of the same sovereignty. At times, we face conflicting situations where, in a given State during a specific time period, we agree to fight insurgents jointly with foreign troops and, at the same time, deny the award of justice by foreign judges, all in the name of the same sovereignty.

This sort of situation is common in post-conflict States where, due either to a reconciliation process or to a victory over the other party, control of political institutions and the army are in the hands of people who have a vested interest that an independent judiciary does not stir the past to dig up the bodies on which they have marched to conquer or maintain power.

This is the current situation in the DRC, which since the 1990s has experienced several political crises, rebellions and invasions of all kinds accompanied by serious violations of human rights. Several rounds of negotiations, the sharing of power between the various warring parties during the transition, the integration in the national army of groups of former belligerents, promotions and appointments in political institutions and the army and the disintegration of political alliances and political vagrancy have created an increasingly complex political landscape. This has led to a situation where, in the political majority, as well as in the opposition and in various institutions of the Republic, there are people who do not have any interest in the establishment of an independent judiciary in the DRC and who are prepared to, on some level, maintain the status quo of impunity for serious violations of human rights.

3. Strategies

Civil society organisations (CSOs) for human rights play an important role in circumventing and resolving the challenges identified above. Their actions are not crowned with immediate success, but eventually, in the long term, they reach their assigned goals.

Lobbying is the weapon that allows them to win battles in the fight against impunity.

CSOs call for an increase of the budget for justice and for strengthening logistical and technical capacities of institutions in the justice sector. They argue for the

adoption of important legislation to ensure that the law is applied as it should be and that the affected communities and victims receive reparations for the damage they have suffered.

They monitor violations of human rights which they document, denounce and mediate in order to draw attention to the abandoned victims on the one hand and the alleged perpetrators on the other, whose impunity shock the human conscience. The hype that surrounded the visit of the President of Sudan, Omar Al Bashir, to Kinshasa from 26 to 27 February 2014 is, in this context, an example of how CSOs do not allow alleged criminals to rest on their laurels.

They unite with each other to achieve together what they cannot do alone. Thus, structures such as the Working Group for the Rights of Victims (VRWG), the National Humanitarian Development Organizations Forum (FONAHD), the Synergy of Congolese NGOs in the Fight against Sexual Violence (SYCOVIS), the Synergy of Congolese NGOs for Victims (SYCOVI) and the Network of Associations of Human Rights in Ituri (RADHIT) were established.

The League for Peace, Human Rights and Justice (LIPADHOJ)⁵ is a member of all these platforms. The organisation has been actively involved, particularly in the fight against impunity for international crimes, in Congo for almost 15 years. In this field, it focuses its activities on the documentation of facts which constituted serious violations of human rights, advocacy and victim support, psychosocial support for victims and legal and/or judicial assistance to ensure their effective and efficient participation in the proceedings.

It is a key player in the work of the ICC in the DRC, whose work LIPADHOJ supports by accompanying victims and participating in the proceedings from the stage of the investigation to that of reparations.

In order to achieve a positive and effective implementation of the principle of complementarity between the ICC and national jurisdictions, LIPADHOJ has been campaigning since 2003 for the adoption of a law to implement the Rome Statute. At the time of writing, this legislation is before the Senate after its adoption by the National Assembly in May.

4. Conclusions

Justice has always been a long-term quest. Following the determination of what the process entails, it ends up being delivered to the victims in one way or another. It was

4 Jean-François Lachaume, “Raison d’Etat et ordre pénal international”, in Simone Gaboriau and Hélène Pauliat (eds.), *La justice pénale internationale*, Pulim, Limoges, 2001, pp. 58–59.

5 LIPADHOJ is a non-governmental organization of Congolese law with headquarters in Bunia in Ituri. Its field of work covers all the provinces of the eastern Democratic Republic of Congo, where it has an office in Goma in North Kivu. Its representative office in Kinshasa serves as a focal point for its activities in the capital and in the west of the country.

more than twenty years after the facts that the Extraordinary Chambers in the Courts of Cambodia were painfully established. The “[...] process was long and arduous, so much so that this project was for a period abandoned”.⁶

The Congolese justice system is recovering little-by-little with individual and joint efforts by the Government, the Parliament, the national courts and tribunals, international organisations and organisations of international and Congolese civil society. Nevertheless, the road ahead is still long and the solutions to the challenges mentioned above therefore do not always remedy the situation in the short- or medium-term.

At the opening ceremony of the ‘General States of Justice’, organised from 27 April to 2 May 2015, the President of the Republic, Joseph Kabila, said in his address that:

I have a deep conviction that despite the advances that we have observed in the field of institutional reforms in the justice sector, the process is far from representing the interests the litigant [...] I encourage you to persevere in efforts that you all undertake daily to improve the image of our justice, whose primary mission is to ensure the equality of citizens before the law, ensure respect for individual liberties and promote human rights.

May this act of faith of the guarantor of national independence, territorial integrity, national sovereignty and respect for international treaties and agreements guide all those who support the DRC in strengthening its judicial institutions.

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⁶ Jean-Marc Sorel, “Introduction”, in Hervé Ascensio, Elisabeth Lambert-Abdelgawad and Jean Sorel (eds.), *Les juridictions pénales internationalisées*, Paris, Société de législation comparée, 2006, p. 15.



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