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## Prosecuting Congolese War Crimes

JAMES TSABORA

In August 2010, the United Nations Office of the High Commissioner for Human Rights (OHCHR) published a Mapping Exercise Report (MER) documenting serious violations of human rights and international humanitarian law during the Democratic Republic of Congo (DRC) conflicts between 1993 and 2003. The Report relied on various reports of the United Nations (UN) Secretary-General, reports of the United Nations Mission in Congo (MONUC), reports of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC, and also reports by nongovernmental organizations (NGOs) such as Human Rights Watch, Amnesty International, *Médecins Sans Frontières*, Global Witness, and International Peace Information Service (IPIS). In addition to giving an overview of the main features of the DRC conflicts from a human rights perspective, the MER (Report) also gave particular focus on the commission of serious crimes of international concern such as war crimes, crimes against humanity, and possible instances of genocide during the conflicts, particularly in the period between 1997 and 2003.

The Report further identified the perpetrators and victims of the crimes, the social and warlike context in which they were committed, and the impact and implications of the general criminal atmosphere to the achievement of peace and justice in the DRC. Apart from this, the Mapping Exercise Report also comprehensively explored the nature of the conflict, the activities that prolonged its duration, and the nature of legal, judicial, and administrative responses to some of the gross violations and breaches of domestic and international law in general.

One very important conclusion reached in the Report was the morbidity of the DRC's criminal justice system and its general inability to respond to serious international crimes committed during the conflict. By so doing, it indirectly called into question the appropriateness of continuing the search for justice through domestic mechanisms and suggested that international prosecution should be considered. The immediate question to ask in light of this observation is whether international criminal prosecution is the way to go and if so, which international criminal justice option offers the best hope.

As with various African conflicts, the priority in resolving the DRC conflicts has been the restoration of lasting peace and the establishment of a democratic government that would safeguard that peace. The quest for justice during the bedlam of war in African conflicts is usually overwhelmed by the deafening call for cessation of the conflict and peace negotiations. Once relative and delicate peace is achieved, the call for justice fails to rise above the pressing need to secure the fragile peace. With regard to the DRC, however, the gradual cementing of peace led to a revival of calls for prosecution of those involved in the commission of serious war crimes and crimes against humanity. It thus became inescapable that prosecutions for war crimes had to be done to pacify an important sector of both Congolese and African society. The major challenge that needed to be confronted was how to continue the search for justice without disturbing or interfering in the fragile peace achieved with so much difficulty.

The DRC has a long history of brutal conflicts rooted in its characteristically unique geopolitical, social, and economic conditions. From the time of Leopold II's Congo Free State (1885–1908) to Belgian Congo (1908–1960), and throughout the post-colonial dictatorship of Mobutu (1965–1997) to this day, the quest for political control, as well as the control for the country's vastly rich mineral resources, has provided the stage for bitter contestation between government and antigovernment forces, such as various rebel outfits. Although external forces and elements have also played a critical part in most of the DRC's conflicts, local political groups cannot be exonerated, rallying to take maximum advantage of the cyclical conflict situations to drive their own political agendas and ambitions, albeit at the expense of peace. The most unfortunate consequence of this is that only vulnerable local Congolese in military zones are caught in the crossfire, becoming victims of mass rape, mass killings, torture, kidnapping and abductions, internal displacement, and pillage. These criminal activities have characterized virtually all of the DRC's conflicts since colonial times but for reasons of space, this discussion will be limited to the period between 1996 and 2004, which is the period where massive violations of international humanitarian law and commission of war crimes and crimes against humanity took place. Further, it is in this period that the DRC's conflicts reached their peak, prompting international actions and intense efforts at finding ways to achieve peace.

One of the major causes for the micro-conflicts fought among rebel groups and major battles between state armies in the DRC's wars was the need for control and exploitation of the DRC's vast mineral resources. The Mapping Exercise Report observes that control over natural resources was established and maintained by force, giving rise to extortion at mining sites, along main roads and transportation routes, the imposition of formal and semi-formal systems of taxation, licenses, and fees, as well as frequent requisitioning of stockpiles of precious minerals.

Successive Panel of Experts Reports identified three major ways in which illegal resource exploitation activities were carried out during the DRC conflict. First, looting activities included external governments' armies and rebel groups directly taking control of mineral-rich areas and directing mineral extraction, production, and commercialization activities. In a judgment delivered by the African Commission on Human and People's Rights, pursuant to a communication from the DRC, the Commission noted that Rwanda and Uganda adopted this method extensively when their armies were in occupation of the DRC's territory. Second, the plunder took the form of exchange of mineral resources with military support between the DRC's government and its military allies, particularly Zimbabwe. Third, there were activities such as subcontracting, laundering, and joint-venture schemes of transnational criminal gangs, elite networks, and "shadow economic groups" operating outside formal state systems, but aided by links to the international trade and financial systems. According to Juma, these conflict networks clearly found cover from and utilized a complex system of political and economic alliances involving powerful political figures, multinational companies, and international institutions. An unquestionable fact arising out of this is that the serious war crimes and crimes against humanity committed needed a transnational legal remedy that covered this intricate network of actors. As already demonstrated, the transnational character of the actors and their interconnectedness meant that the collapsed criminal justice system and corresponding security apparatus of the DRC was impossible to enforce.

Regarded as the kingpin of the international legal system, the UN took a number of practical measures to end the war and alleviate the suffering of millions of Congolese victims. Its involvement in the DRC, as in various other conflict situations, has always been for the purpose of peaceful resolution of disputes and, accordingly, its responses were limited to this objective. It has, however, noted in various Security Council resolutions the grave breaches to international humanitarian law and human rights and also the extreme suffering of vulnerable population groups, as well as the developing culture of impunity. In addition to this, it has added its own weight of pressure to growing calls by the international society, local and international civil society, and local NGOs to prosecute those who committed grave breaches during the conflicts. Thus, despite having to confront extremely serious challenges during its infancy, the post-transition government was compelled to begin prosecuting some of the well known persons accused of war crimes, crimes against humanity, and genocide. By August 2010, a dozen cases had been successfully prosecuted. Military courts have also carried out prosecutions for war crimes, crimes against humanity, and genocide.

The Mapping Exercise Report noted that, despite the few cases prosecuted across the country, the DRC's civilian and military justice system generally failed to ensure substantial justice. This observation is confirmed by

earlier assessments of the DRC's justice system tabled before the UN General Assembly (for example, A/HRC/10/59). The cases brought before the courts have been few and far between, and in some provinces, no prosecutions have commenced. The Mapping Exercise Report noted that Congolese domestic criminal law appears not sufficiently equipped to prosecute war crimes and crimes against humanity committed during the conflicts. The manner in which the few cases were prosecuted demonstrated the limitations not only of the DRC justice administration system, but also of the corpus of the DRC's substantive criminal law. Last, the lack of political will by the DRC's political leadership has meant that the justice departments are constantly underfunded and understaffed with justice only served after exertion of considerable pressure from the international community, civil society, and local pressure bodies.

It is beyond doubt that fundamental obstacles in the pursuit for justice, as with the search for peace in the DRC, have to do with the nature of the conflict itself. A problematic component of the DRC's wars, particularly the second war, was the emergence of various rebel groups in most parts of the country. As noted earlier, although most of these groupings had semi-legitimate democratic concerns, the fact that the main rebel groups owed their creation and allegiance not to the DRC's indigenous forces but to external interests such as Rwanda and Uganda made it difficult to separate their legitimate democratic grievances from the security and economic interests of their external supporters. The involvement of these rebel groups in the massacre of civilians, mass rape and torture, plunder and pillage, as well as abductions has been well documented in the aforementioned reports. The prosecution of these non-state actors is definitely crucial in the quest for justice, particularly to those communities that were victims of their wanton depredations. With the number of rebel groups exceeding a dozen at the peak of the DRC conflicts, the number of persons expected to be prosecuted is definitely huge, extending to rebel leaders, commanders, and other top officers with command responsibilities in the ranks of rebel armies.

Another category of non-state actors implicated in, at least contributing to, the gross human rights abuses and commission of serious crimes includes multinational corporations. There is no doubt that this group sipped with the devil, purchasing the DRC's plundered economic resources from rebel leaders and other criminal groups. Foreign companies in the DRC deliberately exploited the advantage of the "grey" zone under which they operate in international law to descend into the DRC and transact with various groups involved in the conflict. The lack of a transnational regime of international law governing extra-territorial activities of multinational corporations thus gave them a free hand when operating in war-torn regions that are characterized by collapsed legal systems. Clearly, it is highly unlikely that the agents of these multinational companies and their subsidiaries in the DRC and the

region were ignorant of the state of war, lawlessness, and criminal conditions that led to the commission of serious international crimes in the DRC. These multinational companies indicated a willingness to adhere to human rights standards in their operations while not committing themselves to stop transacting with unknown corporate entities that were involved in shady deals with rebel groups. A study carried out in Canada by the Canadian Centre for the Study of Resource Conflict found that about sixty percent of the activities of mining companies in war-torn areas such as the DRC contributed to the flaring of community conflict. This in itself suggests that not only should the liability of multinational companies be investigated from a human rights perspective, but also from an international criminal law angle.

In addition to armed rebel groups and multinational corporations, formal state armies have also directly been implicated in the commission of war crimes and crimes against humanity. In particular, the armies of the four states with armies in the DRC such as Zimbabwe, Rwanda, Uganda, and Burundi, entreated and formed alliances of convenience with different rebel groups against a common adversary. In his book, *The Great African War*, Filip Reyntjens explores the manner in which these armies supplied friendly rebel groups with light weapons and ammunition, training, and military equipment. Apart from doing this, the formal armies also committed various abuses and breaches of humanitarian law on their own, for instance in their quest to plunder the DRC's vast resources.

The greatest problem with the search for justice in postwar DRC is that international legal regimes applicable in the context of armed conflicts do not directly cover all the groups implicated in the commission of war crimes during the conflicts. As a body of law, international humanitarian law was conceived to regulate only the conduct of state armies during war and not the activities of non-state entities such as transnational conflict networks, multinational corporations, and militias. Thus, the law of war has traditionally placed emphasis on the distinction between internal armed conflict and international armed conflict, with the result being that the former has, until recently, been insulated from international sanction. Atrocities and other serious criminal activities committed during internal conflicts were, accordingly, left to the conflict state for resolution and redress. Fortunately, the 1997 Tadic decision has done away with this distinction in international humanitarian law. Serious crimes committed by armed rebels in the DRC war can no longer be treated as purely internal matters within the domestic jurisdiction of state and outside the purview of international legal regulation. Armed rebel leaders implicated for committing war crimes should now be prosecuted in international courts. The same cannot be said of other non-state actors identified earlier, such as multinational corporations, "invisible" transnational conflict networks, and arms brokers.

The only international legal regime whose criminal jurisdiction seems to cover activities of state and non-state actors alike is the international criminal law regime established by the Rome Statute of the International Criminal Court (ICC). The ICC can, without doubt, offer the best practical avenue to prosecute serious war crimes and crimes against humanity committed during the DRC conflict. For the past decade, the ICC has made significant progress in bringing powerful individuals within the ambit of international criminal sanctions, and this has included a number of individuals implicated for war crimes during the DRC's conflicts. Besides the ICC being useful in the prosecution of combatants and non-combatants that international humanitarian law previously excluded, the Court also contains progressive and practical mechanisms for witness and victims protections and payment of reparations to victims of wrongs and abuses.

A more disturbing problem, however, is not the legal regime for prosecution but developments on the African continent. Despite extensive support for the ICC during its formation and early years in operation, African states have now decided to gradually withdraw their support and co-operation, and have now become increasingly less enthusiastic of the institution since 2009. According to Max du Plessis (*The ICC that Africa Wants*), the reasons for this are various, but the major cause for this negative attitude against the court is its seemingly exclusive focus on Africa, its prioritization of justice over peace in Africa, and most importantly, the indictment of the Sudanese sitting head of state in 2009. Ever since the indictment of Sudan's Omar al Bashir, the African Union (AU) has refused to co-operate with the ICC. So serious is the opposition against the ICC that at the twelfth and thirteenth Ordinary sessions of the Assembly of the AU held in Ethiopia and Libya in 2009, an idea for the establishment of an alternative African criminal court was discussed.

At both sessions, the AU passed decisions and resolutions expressing concern at the indictment of a sitting head of state, the president of Sudan, and the unfortunate consequences of the indictment to the achievement of peace in Sudan. The AU also castigated the abuse of the principle of universal jurisdiction by some non-African states, and further expressed deep discomfort that European states have continued to issue indictments against African leaders and personalities. In light of these developments, the AU resolved to task the AU Commission, in consultation with the African Court on Human and People's Rights, "to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity."

The above developments no doubt paint a gloomy future for the advocates of international criminal justice as a suitable remedy to end impunity in Africa. For the DRC, this might mean that the pattern of domestic prosecutions

will most likely be followed with even less enthusiasm, governmental support, and fewer tangible outcomes. The idea of an African criminal court remains an idea and even if it materializes, it is highly unlikely to promote the cause for the search for justice in the DRC. While an analysis of the suitability of such a court to Africa is beyond the scope of this essay, an inescapable observation on African judicial and semi-judicial institutions is that those that currently exist have generally underperformed their legal mandate since the day they were established. The envisaged African criminal court will find it extremely difficult to escape from similar generational challenges that hamper the delivery of justice on the continent. Thus, as long as the impasse between African states as represented by the AU and the ICC remain unresolved, the impunity gap that had begun to narrow will start yawning again.

The best option in the search for justice in post-conflict DRC in light of the surrounding political circumstances would appear to be an internationalized criminal tribunal with features similar to the Special Court of Sierra Leone. Such a mixed criminal tribunal would necessarily have to be located in the DRC territory and staffed with international judges. An expeditious way to bring such a tribunal to fruition would be through a UN Security Council resolution passed in terms of Chapter VII of the UN Charter. With the loud calls for justice being made by the international society, it is hoped that Western donor funding and other funding from the UN, the AU, and other organizations can make the tribunal a reality. The major reason for this option is that current pessimism on international criminal justice should never entail paying a blind eye to the serious war crimes committed in the DRC. There is no doubt that failure to establish a robust and effective penalty regime on the continent means African population groups will constantly be victims of these crimes in any period of conflict. Analysis of the commission of these crimes in the DRC discloses a large number of state and non-state perpetrators. This makes the mixed tribunal more preferable since it will be cheaper to cater for the movement and detention of accused persons, investigations of cases, subpoenaing of witnesses, and also collection of evidence. A mixed tribunal situated in the DRC can also cater for a large number of accused persons in terms of detention facilities, support staff, penitentiary mechanisms, and attendant security.

The most important obstacle, however, is likely to be the lack of governmental support for such a tribunal, especially in light of recent accusations of mass rape against the DRC's top military officers. Virtually all sides committed serious breaches during the war, and moves to pursue those who committed the crimes are likely to be seen as a witch hunt by all sides involved. Prosecuting multinational companies is highly unlikely in Africa, and the DRC is no exception. Africa is dependent on foreign direct investment and reliant on multinational corporations for creation of employment, poverty alleviation, and provision of various services. Congolese political leadership is fully aware



of the economic ramifications and implications of prosecuting foreign corporate entities. The Panel of Experts Reports identified several of these entities registered in developed countries or other offshore islands. The worrying fact was the observation by the Reports of a marked reluctance by Western states to assist in creating a stricter monitoring regulatory framework to inspect activities of these companies in war-torn areas. Thus, the priority given by the DRC's political leadership to peace over justice is likely to be welcome not only to rebel leaders and other individuals implicated in war crimes, but also to the multinational companies, as well.

In conclusion, the search for both peace and justice in post-conflict DRC has proved to be a daunting challenge for the DRC's new political dispensation. As an African country in which a typically brutal, complex conflict took place, there was little doubt that the search for peace would be prioritized over that for justice. With the powerful global push to end impunity through local or international criminal justice systems, however, there was no way that the DRC's political elite could have adopted a "let bygones be bygones" approach without inviting international condemnation and withdrawal of international support by important global political and economic players. This pressure probably ruled out any amnesties or politically motivated pardons in the aftermath of the war. Currently, however, the most discomfiting fact is that the DRC's quest for justice in the aftermath of a cruel war has been affected by developments on the continent. The increasingly hostile attitude developing on the African continent against international criminal justice systems that ignore Africa's political priorities means that post-conflict DRC, with Africa's blessing, is likely to cooperate less and less with international criminal justice institutions in the near future. Since the DRC and Africa can easily defend these actions on the basis of protecting the fragile peace agreements, the calls for more justice are doomed to fall on deaf ears until they gradually diminish in both intensity and importance. This state of affairs means that prospects for a successful search for justice in "peaceful" DRC will remain constrained and gloomy, despite the fact that victims still have bitter, fresh, and inconsolable memories of war crimes and other serious crimes committed against their communities in the last wars.

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