

---

# Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC

Laura Davis and Priscilla Hayner

5 Hanover Square, 24th Floor  
New York, NY 10004  
Tel + 1 917 637 3800  
Fax + 1 917 637 3900

### **Acknowledgements**

The authors would like to thank those institutions that provided support for the research and production of this paper: the Norwegian Ministry of Foreign Affairs, an anonymous donor at Rockefeller Philanthropy Advisors, and the US Institute of Peace and International Peace Institute. The research was also done in conjunction with the European Commission-funded Initiative for Peacebuilding project. The authors would like to thank Mohamed Dansoko and Léonard Graf for their research assistance, and readers who kindly commented on earlier drafts.

### **About ICTJ**

The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

## CONTENTS

<b>Executive Summary</b>	<b>3</b>
<b>1. Introduction</b>	<b>5</b>
<b>2. A Difficult Context</b>	<b>7</b>
2.1. A Difficult History	7
2.2. The Role of Internationals	10
2.3. Ten Years of Peacemaking: 1999–2008	12
<b>3. Justice Issues in the Peace Talks</b>	<b>15</b>
3.1. Respecting the Principle of a Limited Amnesty	16
3.1.1. Amnesty Agreements from Lusaka to Goma	17
3.2. Other Forms of Justice in the Peace Talks	20
3.2.1. Criminal Justice	20
3.2.1.1. A Truth and Reconciliation Commission	21
3.2.2. Other Justice Measures at Goma: Reparations and DDR	23
3.2.3. Addressing Root Causes	23
<b>4. Criminal Justice in the DRC</b>	<b>25</b>
4.1. Prospects for Criminal Justice at the National Level	25
4.2. The Role and Impact of the International Criminal Court	27
4.2.1. The ICC’s Impact on Children	30
4.2.2. Peace and Justice	32
<b>5. Beyond Prosecutions: An Assessment of other Transitional Justice Measures</b>	<b>34</b>
5.1. Reparations	34
5.2. Demobilization and Security System Reform	34
5.3. UN Mapping Exercise	35
<b>6. The Role of Civil Society</b>	<b>36</b>
<b>7. Conclusions</b>	<b>38</b>
7.1. Lessons from the DRC	39

### **About the Authors**

**Laura Davis** joined the ICTJ in 2006, as Deputy Director of Development, based in Brussels. In 2007 and 2008 she was based in Kinshasa as Senior Associate and then acting director of the ICTJ DRC office. Since January 2009 she has served as Senior Advisor to ICTJ's Europe and Africa programs, based in Brussels. She has worked on European affairs, advocacy and fundraising for non-profits for more than ten years; first with the Federalist Movement (she was Secretary General of the Young European Federalists) and then with the conflict prevention/peacebuilding sector, primarily with Search for Common Ground. She was co-chair of the Human Rights and Democracy Network of NGOs, and chair of Funding for Peace, a working group of the European Peacebuilding Liaison Office. She has published on European integration, transitional justice and peacebuilding, and the DRC. She holds degrees from Somerville College, University of Oxford, in Modern History.

**Priscilla Hayner** is a cofounder of the International Center for Transitional Justice (ICTJ), and currently the Director of the ICTJ Geneva office and Peace and Justice Program. She has undertaken extensive research on how justice issues are addressed in peace negotiations, with publications on the peace processes in Liberia and Sierra Leone, and involvement in additional studies in Indonesia and Nepal. In March 2008, Ms. Hayner served as human rights advisor for the Kenyan National Dialogue and Reconciliation, at the request of Kofi Annan and the Panel of Eminent African Personalities. Ms. Hayner is an expert on truth commissions and has written widely on official truth-seeking in political transitions, publishing *Unspeakable Truths*, a comparative study of over twenty such commissions, in 2001. She was previously a consultant to the Ford Foundation and the UN Office of the High Commissioner for Human Rights, and Program Officer for the Joyce Mertz-Gilmore Foundation, New York. She holds a masters degree in international affairs from Columbia University.

## Executive Summary

At the end of 2008, the Democratic Republic of Congo leapt back into the international headlines as fighting resumed in the East. Neighboring states and the broader international community joined the difficult search for peace. There were reports of war-related atrocities and hints of possible compromise with warlords complicit in some of the worst of abuses.

These developments are familiar to many who have watched Congo for years. Indeed, this must be understood against a backdrop of more than a decade of war in the region, and numerous peace and ceasefire agreements brokered with many belligerent groups. While these agreements have often been successful in their immediate aims of ending fighting in specific regions or with specific groups, conflict has usually continued elsewhere or picked up again later in much the same place. Meanwhile, the broader factors driving the conflict have generally been left unaddressed.

A consistent challenge in all peacemaking efforts has been to respond to the high level of abuses during the war and the deep impunity that has existed in the country. Human rights defenders and other civil society organizations have repeatedly called for justice. Important efforts to highlight basic justice principles in the course of peace talks, by both national and international actors, are notable. But ultimately the justice-related effects have been minimal.

There have been multiple peace or ceasefire agreements in the past ten years, with many different warring groups (as well as with neighboring states). The accords of Lusaka (1999); Sun City, South Africa (2002); Ituri (2006); and Goma (2008) show general consistency on issues of war crimes and accountability. The agreements all included clauses promising amnesty to the warring parties, but on the whole the agreements respect international guidelines and best practices regarding amnesties, explicitly prohibiting the application of amnesty to crimes against humanity, war crimes, or genocide. International representatives involved in the talks have insisted that any amnesty must exclude these serious crimes.

However, little else has been included in the talks or the accords that might lead to an accounting for massive crimes, and most agreements have remained silent on broader transitional justice measures. A truth commission was agreed in 2002, but was based on a misguided policy framework, with the warring parties directly appointing members to the commission. This flawed model was ineffective; the commission was in existence for two years but ended without any success. Rebels associated with widespread atrocities have been freely incorporated into the national army. The army remains unreformed and continues to be the main perpetrator of abuses against civilians. There has never been even serious consideration of a national victim reparations program.

Meanwhile, the limitations specified in the amnesty agreements have had little effect, as the national prosecuting authorities have shown very little initiative in prosecuting accused perpetrators in national courts.

The International Criminal Court's engagement in the country, since 2004, is thus quite important. Four Congolese have been arrested under an ICC arrest warrant and transferred to The Hague (one of these for alleged crimes in the Central African Republic, not Congo). Serious crimes have continued during recent fighting, suggesting a limited deterrent effect. However, warlords are aware of the ICC. Its invisible presence has changed their behavior in some ways – such as in their attempts to conceal evidence of ICC crimes. In some cases this has had unexpected effects, such as when warring groups try to hide their use of child soldiers, making it difficult to demobilize children and for child services agencies to assist them.

The past ten years of peacemaking in Congo are sobering: there has been little justice for rampant crimes, but also little in the way of sustainable peace. Learning from the challenges, missteps, and the few successes of this experience might assist future negotiations in Congo, as well as peacemaking in other protracted conflicts.

## 1. Introduction

In October 2008 the Democratic Republic of Congo (DRC) lurched back into war. Rebels attacked towns and villages and threatened Goma, a major city in the East; the army quickly retreated, and United Nations forces struggled to protect civilians. The fighting forces on all sides, including the national army, were again reported to be raping, looting, and blatantly committing widespread abuses against the civilian population, who again were caught in the middle.

The new fighting seemed to follow a tragic pattern of the DRC, where cycles of war, interspersed with serious and at least temporarily successful efforts at brokering peace, stretch back more than 10 years. The fighting involved the same or similar actors and virtually the same issues, and it was unfolding in much the same places.

With luck, as well as strong international pressure, the DRC will find a way back to peace soon and thus spare the people of Congo even more suffering. Probably an end to the fighting will again require peace talks, a peace agreement, and massive international engagement to try to address the root causes of the conflict more effectively.

Peace brokers will have considerable experience to draw from, following rounds of cease-fire and peace talks in the DRC dating back to 1999 and extending through the conclusion of the most-recent major peace accord for Eastern Congo in January 2008. One of the main signatories of the latest accord, Laurent Nkunda, was a central protagonist in the renewed fighting.

Negotiating a cessation of armed conflict has never been a linear process in the DRC, where the conflict has always included local, national, and international dimensions and actors. Mediation efforts to resolve these conflicts have focused on the international and national levels and been ill-equipped to address conflicts at the local level. Root causes of conflict, as well as the role of national and international actors in stoking localized conflicts, have not been sufficiently prioritized, although there have been some important efforts to address these issues.<sup>1</sup>

Accountability for the crimes in these wars has been extremely limited, with a widespread presumption of impunity. The peace talks have addressed these issues only to a limited degree. The justice efforts that have developed, such as by the International Criminal Court, have largely spared high-level national and international perpetrators of crimes committed during the Congo wars.

---

<sup>1</sup> See for example: *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo* UN Security Council S/2003/1027, 23 October 2003; *Final Report of the Group of Experts on the Democratic Republic of the Congo*, UN Security Council S/2008/773, 12 December 2008.

This report tracks the progress and nature of peace negotiations in the DRC since 1999. It focuses on the way issues of justice and accountability have been addressed in peace talks and the impact or implementation of justice initiatives after each agreement has been concluded. Our aim is to draw lessons that could enhance the prospects for justice in future peace agreements, both in the DRC and more generally in other peacemaking contexts around the world.

We deal primarily with the peace agreement of 2002, negotiated in Sun City, South Africa, and the agreement of 2008, concluded in Goma, Eastern Congo. These must be placed in the context of the other peace agreements signed in the interim, particularly the Ituri Agreements of 2006 and the Nairobi Communiqué of 2007. Although narrower in scope and attracting less international and domestic attention, these agreements are also critical to this history.

We interviewed dozens of participants who have been closest to these talks: national and international facilitators, members of civil society, expert observers, representatives of belligerent forces who participated in the talks, government representatives, and members of the international community, which advocated for and funded the talks and the implementation that followed. The interviews took place in Kinshasa, Goma, Europe, and the United States between April and June 2008. The remainder of this report covers events and developments through June 2008.



## 2. A Difficult Context

The Democratic Republic of Congo is a vast territory. Often described as a country-continent, it has a complex and diverse social fabric and an equally complex history of repression and conflict.

The human cost of Congo's war is enormous: an estimated 5.4 million people have died since 1998 from war-related causes.<sup>2</sup> The economy is largely destroyed, and about 80 percent of the population lives on less than US\$1 per day.<sup>3</sup> The conflicts have forced an estimated 1.4 million people to flee widespread, gross human rights violations. Sexual crime has been endemic, with women often bearing the brunt of the violence and widespread impunity. The direct or indirect effects of the conflict—including disease and displacement—still claim many victims every day.

Local civil society and church groups have extensively documented human rights violations in the DRC since the 1990s, facilitating similar monitoring and reporting by international organizations despite fierce opposition from and repression by rebel and government authorities alike. Congolese human rights defenders courageously persist in their denunciations at great risk to themselves, as repression and mass atrocities, as well as political instability and renewed confrontations, continue unabated in the country. So although work remains to be done in consolidating, archiving, and securing the documentation already gathered, it is not a lack of information that has stymied attempts to obtain justice in and beyond the courtroom.

The DRC has been negotiating peace or implementing the most recent cease-fire or peace agreement for nearly 10 years, since 1999. This process has included numerous rounds of agreements signed between the government and various rebel forces. But even with the most optimistic reading of each agreement, it has always been clear that central issues have remained outstanding in the move toward making a firm peace in the country. Some armed groups have always remained outside each agreement, for example. Nevertheless, each agreement was seen to be, and often was, critical for stopping—if not resolving—certain aspects of the ongoing war.

### 2.1. A Difficult History

Congo has a long history of unaddressed legacies of mass atrocities since the colonial era. King Leopold II of Belgium brutally ruled it as his privately controlled territory from 1877, before transferring it to Belgium as a colony in 1908. Congolese independence from Belgium in 1960 was followed by years

---

2 International Rescue Committee, Fifth Mortality Report on the DRC, January 2008; [www.theirc.org](http://www.theirc.org).

3 African Economic Outlook, OECD Development Centre, African Development Bank, and United Nations Economic Commission for Africa, May 11, 2008, 254; [www.undp.org](http://www.undp.org).

of political turmoil. A coup d'état in 1965 by Mobutu Sese Seko—backed by Belgium and the United States—inaugurated decades of oppression, kleptocracy, and state collapse. With the end of the Cold War in 1989, Mobutu lost the support of his key Western allies.

In 1994 genocide in neighboring Rwanda spilled into eastern Zaire, as the country was then called, and the resulting upheaval made it impossible for Mobutu to continue to suppress internal opposition. This opposition comprised a vibrant pro-democracy movement led by civil society and faith-based groups. Mobutu had attempted to hold onto power by stage-managing a move to multiparty democracy, including a participatory “Sovereign National Conference” in 1991–92, but this failed. In 1996, rebel leader Laurent-Desiré Kabila, backed by Rwanda and Uganda, attacked. Mobutu soon fled, and Kabila entered Kinshasa in May 1997 to become president of the country, which he promptly renamed the Democratic Republic of Congo.

The end of this first war was facilitated by the first international mediation effort. South African President Nelson Mandela arranged for Mobutu's safe exit and the departure of his key supporters just before Kinshasa's fall. This arrangement between a victorious rebel group and a defeated government, both responsible for massive abuses, gave no attention to accountability for these crimes.

After the first war the country remained highly fragmented and divided along ethnic and geographic lines. President Laurent Kabila faced considerable internal opposition, not least from those who had benefited from Mobutu's considerable patronage. He soon cut off his former allies, Uganda and Rwanda, and removed Rwandan officers from the army in an attempt to curb their growing dominance. The move triggered Congo's second war in 1998. Uganda and Rwanda transformed their military presence in the eastern half of the country into an outright military occupation and vigorously aided a hastily-assembled rebel group, the Congolese Rally for Democracy (RCD), in its failed attempt to overthrow Laurent Kabila's government in Kinshasa. Based in Eastern Congo, the RCD gained control over large areas of the country.

Competition between Rwanda and Uganda for control of the rebel movement and Congo's rich mineral resources led the former allies to fight each other in mid-1999. The RCD soon splintered into several competing factions controlled by either Uganda or Rwanda. Uganda also backed the Movement for the Liberation of Congo (MLC) which controlled the vast Equateur province. Meanwhile, Zimbabwe, Namibia, and Angola backed the Kabila government. Several other African states and militias were engaged in the war at various times. By 1999 the war had reached a military stalemate, and the country was divided into four zones, one controlled by the government and three distinct areas controlled by rebel forces. A ceasefire was brokered in Lusaka in 1999, but this did not stop the fighting.

President Laurent Kabila was assassinated in January 2001 and replaced by his son, Joseph Kabila. Peace talks opened in Sun City, South Africa, in 2002, under the banner of the Inter-Congolese Dialogue, with the participation of the warring factions, civil society, and the unarmed political opposition. At the end of 2002, the parties signed a “Global and All-Inclusive Agreement” to end the war, which laid the foundation for a constitution that would guide a political transition.

The transitional government included four vice-presidents representing the Kinshasa government, the two main rebel armed groups, and the political opposition. Representing an imperfect political compromise, most of the main rebel forces were integrated directly into the national army, the FARDC (Armed Forces of the DRC). No questions were asked about individuals' past practices in relation to serious rights violations. In addition to creating a common army, the transitional government was to prepare for national elections with UN assistance. Voter turnout for the election of 2006 was massive, and Joseph Kabila was elected president.

Yet fighting continued in Ituri, in the east of the country, where armed groups that had not participated in the Sun City talks were still active. The army did not have the capacity or the morale to defeat these notoriously abusive warlords. Thus the best solution seemed to be to offer them senior ranks in the army in exchange for the demobilization of their fighters. The government signed separate agreements, facilitated by the UN, with the three major Ituri militia leaders in 2006.

Armed groups have continued to proliferate in Eastern Congo, particularly in the regions of North and South Kivu, where local conflicts over land and identity have local, national, and international proportions. The situation is further complicated by extremely profitable, often illegal, resource extraction from the region's many mines.

Armed groups are still active in this region; the most prominent are the FDLR (Democratic Forces for the Liberation of Rwanda)<sup>4</sup> and the CNDP (National Congress for the Defense of the People).<sup>5</sup> The FDLR was formed in 2000 by primarily Hutu forces that had fled Rwanda after the 1994 genocide. Some are presumed to have been involved in the genocide. The FDLR now includes many others, such as their children, as well as Congolese and non-Hutus. Although most FDLR members have been repatriated to Rwanda over the years, a group of several thousand remains active mainly in South Kivu. The Rwandan government suspects the FDLR of planning a second genocide, and Rwanda is insistent on bringing to justice those involved in the genocide of 1994. In November 2007 the Rwandan and Congolese governments agreed to address jointly the problem of the FDLR, spelling out details in an agreement known as the Nairobi Communiqué.

Fighting resumed in North Kivu in late 2006, between the army and the CNDP, led by Laurent Nkunda, a former rebel leader in the Congo war of the late 1990s. Nkunda had joined the army following the Sun City agreement. After serving briefly as a colonel and then a general, he left to form a new rebel group, the National Congress for the Defense of the People (CNDP). The CNDP claimed that the Tutsi population was not adequately protected in the DRC, particularly from the FDLR. Rwanda has provided the CNDP with rhetorical support and, as detailed in a recent UN report, probably material support as well.<sup>6</sup> Until late 2007, the government sought to bring the CNDP to heel by force, including by supporting other local armed groups. This effort ultimately failed when the government faced military humiliation after attempting to attack the CNDP directly in late 2007. The government then decided, finally, to go to the negotiating table.

The Goma talks were hurriedly organized, taking place over three weeks in January 2008 and resulting in the Goma ceasefire agreements. Fighting ended and implementation of the agreements slowly began. But details of disarmament and integration of rebel forces—in particular, Nkunda's—remained a stumbling block to full or rapid implementation of the accord. Behind this difficulty lay the festering problem of the FDLR forces, providing a constant (and some would say, convenient) justification for Nkunda to resist disarming.

The national Congolese army is ill-disciplined, poorly trained, and badly paid, and the police are incapable of installing law and order. The army, police, and irregular armed groups all inflict extensive human rights violations on the population, particularly on women and girls. Human rights monitors from the UN and independent human rights groups report that the army, police, and armed groups engage in arbitrary killing, sexual crimes, extortion, illegal detention, and other abuses. Armed groups, including Nkunda's CNDP and the FDLR, also forcibly recruit, enlist, and use child soldiers.

---

4 In French, the *Forces Démocratiques de Libération du Rwanda*.

5 In French, the *Conseil National pour la Défense du Peuple*.

6 *Final Report of the Group of Experts on the Democratic Republic of the Congo*, UN Security Council S/2008/773, 12 December 2008.

Broad-brush descriptions tend to mask a multitude of local conflicts in the DRC, not least over land and access to rich natural resources. A complex web of alliances has formed to advance economic, political, and personal interests. For example, commanders in the national army and the FDLR reportedly collaborate to profit handsomely from mineral extraction.<sup>7</sup>

## 2.2. The Role of Internationals

Just as the wars in Congo have been internationalized, efforts to end hostilities and build peace have also included international engagement. The Organization of African Unity (OAU, now the African Union) played a key role in facilitating the Sun City talks, selecting the former president of Botswana, Ketumile Masire, as the chief mediator. The Southern Africa Development Community (SADC) was also important, since many of its member states had an interest in resolution of the conflict. As incoming president of both the OAU and the SADC, and as the geographic host of the talks, South Africa played a central role.

Many of the same intergovernmental bodies had been critical to the Lusaka agreement of 1999, when SADC took the lead role, appointing Zambian President Frederick Chiluba as mediator. The OAU and UN also played important roles, and the European Union provided financial support.

The most visible international actor in recent years has been the United Nations, which established MONUC, the United Nations Mission in the Democratic Republic of Congo, in 1999.<sup>8</sup> MONUC soon became the largest peacekeeping operation in the world. Between 1999 and mid-2008 the Security Council passed 50 resolutions that pertained directly to the DRC.<sup>9</sup> Many of them related to the peacekeeping mission in the country; others went further and began to make specific reference to other needs and programs.

As early as 1997 the UN Secretary General established an investigative team to probe reports of massacres and other violations in the 1996–97 war.<sup>10</sup> In 2000 the Security Council called for another international investigation into massacres in the DRC, asking all parties to bring to justice those responsible for genocide, war crimes, or crimes against humanity.<sup>11</sup> In 2007 a Security Council resolution called on the Congolese authorities to establish a vetting mechanism that would take into account individuals' human rights records when appointing officials in the army and other security services.<sup>12</sup>

The level of UN participation in Congolese peace talks has varied. In some of the less-elaborate negotiations, such as in Ituri and Nairobi, the UN played a central role, with senior officials helping to facilitate the talks and witnessing the accords. At Goma senior staff, rather than top diplomats, represented the UN during most of the negotiations, in contrast to the US or EU representatives (this was, in part, due to the views of some of the armed groups that MONUC was not, by nature of its mandate, a neutral party). The UN generally did not directly involve its own human rights experts in the high-level negotiations nor as direct advisers to those who participated. However, at Goma, for example, a representative of the MONUC human rights office was present at the larger conference and attended some of the smaller expert and debriefing meetings.

---

7 Global Witness, 'Control of mines by warring parties threatens peace efforts in eastern Congo', September 10, 2008; [www.globalwitness.org](http://www.globalwitness.org). This is also supported by the UN Group of Experts report. *Ibid.*

8 MONUC was first established to "forcibly implement" the Lusaka cease-fire agreement. Its mission now also includes *monitoring and the reporting of any cease-fire violations; contributing to the DDRRR (disarmament, demobilization, repatriation, resettlement, and reintegration) process; and organizing elections. MONUC operates under chapter VII of the UN Charter, authorizing it to use all means necessary to protect civilians under imminent threat of physical violence and to contribute to the improvement of security conditions. See [www.monuc.org](http://www.monuc.org).*

9 The DRC accounts for more than 8 percent of all UN Security Council resolutions from 1999 to mid-2008.

10 The Congolese government, however, did not allow the UN investigative team to enter the country, thus considerably limiting its reach.

11 UN Security Council resolution 1291 (2000).

12 UN Security Council resolution 1794 (2007).

During the various rounds of negotiations, senior MONUC mediators generally prioritized ending the fighting and were concerned that an emphasis on accountability during talks would prevent an agreement. But they also pushed for justice when the situation allowed, such as after an agreement was signed. The civil society-led campaign against rape and sexual violence in the DRC, which many major media outlets across the world covered from 2006 to 2008, pressured MONUC and others to address the major issue of impunity for sexual crimes.<sup>13</sup> By early 2008 this pressure helped focus the UN's attention more formally on combating the problem of impunity and specifically on addressing the problem of widespread sexual abuse—a problem that continued at a high level even during periods when the formal armed conflict abated.

The United States generally has had a lower profile than some of the other key international actors in the DRC, especially since the genocide in Rwanda in 1994. For more than a decade, many in Congo felt that Washington saw its policy toward the DRC as secondary to, and defined by, its relationship with and policies toward Rwanda. In mid-2007, however, there was a palpable shift toward a more “Congo-centric” US policy.<sup>14</sup>

US diplomatic engagement with the peace process in the East increased significantly with the appointment in mid-2007 of Timothy Shortley as Senior Adviser for Conflict Resolution in the US Department of State, specifically focusing on the conflicts of Central Africa.<sup>15</sup> Shortley pushed hard for progress in the peace process in Eastern DRC. US engagement was also seen as important for ensuring Rwanda's commitment to the process. At the same time, he was willing to incorporate justice concerns and independent, expert legal input. Many of those centrally involved in the process have noted the critical importance of this high-level US engagement, and particularly the impact of the new ‘Congo-centrism’ in creating the political space for the Goma process.

Another central international actor in the talks was the European Union. Many of the European Union's 27 member states have a diplomatic presence in the DRC, but Belgium, France, the Netherlands, Sweden, and the United Kingdom have the strongest diplomatic representation and the largest bilateral donor programs. Throughout the talks in Goma and Nairobi, the EU's Special Representative, Ambassador Roeland van de Geer, was actively involved in pushing for progress; he also set out clear guidelines to avoid any prospect of impunity. Belgian Special Envoy Jozef Smets also played a key role at Goma, but Belgium chose not to witness the agreements bilaterally, preferring to reinforce the role of the European Union Special Representative to act on behalf of all the member states.

The African Union was represented at the Goma talks and on the facilitation team but lacked the resources for sustained engagement. Thus it was not seen to play a central role in the facilitation group. International facilitators called the absence of the representative of the International Conference on the Great Lakes Region regrettable.<sup>16</sup> South Africa, which hosted the 2002 talks and played a central role at Sun City, also could not be present at Goma as their key official was engaged in Zimbabwe.

Thus, the UN, US and EU were the main international participants in the most recent talks. In some ways there was an uncomfortable relationship between the international community and the Congolese authorities, a discomfort that extends beyond the peace talks. Although the government has allowed in-

---

13 Parts of the global campaign against sexual violence in the DRC later became controversial when developed by activists who were not based in the country. But the strength of the original campaign, led by a coalition of national and international civil society actors, was remarkable in bringing about policy change at the international level and drawing deserved attention to the plight of women and girls in Congo.

14 Interviews, US, UN, and European officials, Kinshasa and Goma, May 2008

15 Tim Shortley, Senior Adviser to Assistant Secretary Frazer for Conflict Resolution, represented US Assistant Secretary of State for African Affairs Jendayi Frazer.

16 Interviews, US and European officials, Goma, June 2008

international human rights investigations and cooperated with the International Criminal Court, it remains sensitive to any real or perceived interference in matters that it considers the preserve of national sovereignty, including human rights.

### 2.3. Ten Years of Peacemaking: 1999 to 2008

The following are the primary agreements signed among warring parties in Congo over the past 10 years, with key elements, as well as impact, noted:

#### 1999 *Addressing the Regional Dimensions: The Lusaka Cease-fire Agreement*

The Lusaka agreement was an attempt to end the second Congolese war, which had taken on regional dimensions and directly involved half-a-dozen African nations. Representatives of Angola, Namibia, Rwanda, Uganda, Zimbabwe, and the DRC signed the agreement in July 1999 in Lusaka, Zambia. South Africa, the Organization of African Unity, Zambia, and the UN signed as witnesses. In August representatives of the two main rebel groups, the MLC and the RCD, added their signatures.

The Lusaka agreement was an important first step of the peace process that unfolded during the following years. It established a global cease-fire and mandated the withdrawal of foreign troops and the disarmament of militias (or “negative forces,” as they were called). It also called for a UN peacekeeping mission. The UN reacted immediately by setting up the MONUC mission in August 1999. It also addressed some political aspects of the peace process, calling for an Inter-Congolese Dialogue and setting up a timeline for elections.

#### 2002 *Addressing the National Dimensions: The Global and All-Inclusive Agreement (Sun City Accord)*

The Inter-Congolese Dialogue was intended to be a more-inclusive peace conference, including civil society representatives and addressing broader concerns beyond the cease-fire. Talks in Sun City and Pretoria, South Africa, resulted in a Global and All-Inclusive Agreement in December 2002.<sup>17</sup>

Often referred to as the Sun City Accord, this agreement laid out the architecture of a postwar political transition. It established a transitional government and active international engagement led by the UN, which would prepare the way for democratic elections in 2006. The accords set up a power-sharing arrangement for the warring factions with civil society involvement. The signatories—the warring factions, the political opposition, and civil society—were also represented proportionally in the transitional government, National Assembly and Senate. The armed factions were to be integrated into the national army.

The agreement included an amnesty for all combatants for acts of war and political crimes but, in keeping with standing UN guidelines, explicitly excluded crimes against humanity, war crimes, and genocide.

The agreement also included a Truth and Reconciliation Commission and a call for the creation of a new “International Criminal Court” specifically for the DRC to address crimes in the

---

<sup>17</sup> In addition, the DRC government signed separate agreements with Rwanda and Uganda (known as the Pretoria and Luanda Agreements, respectively, signed in July and September 2002). These set out agreements for the withdrawal and Rwandan and Ugandan troops from Congo.

country between 1960 and the transition. But the truth commission membership was to include representatives of the warring factions, a grave error, and thus had little chance of success. The agreement for an international tribunal was never acted on. Meanwhile, granting significant political power to many of the worst abusers and integrating all the fighting forces with no provision for excluding human rights violators served to entrench a culture of impunity.

In addition to the truth commission, the Sun City Agreement established four other “institutions to support democracy”: commissions on the media, corruption, elections, and human rights monitoring. Each was to be headed by a civil society representative, but each also included representatives of the warring factions. The Independent Elections Commission was successful, but the others were very weak.

#### **2006** *Ituri Agreements*

Three armed groups in the Ituri region that were not parties to the Sun City Accord signed agreements with the government to demobilize their troops and join the national army in mid-to late 2006. The UN facilitated these agreements, which were first signed as two-page handwritten documents.

One of these agreements awarded a “general amnesty” to the fighters. At first it was unclear what this amnesty covered. A final framework agreement, signed in November 2006, limited the amnesty to non-international crimes. No other justice-related measures were included in the agreements.

#### **2007** *Nairobi Communiqué*

The governments of Rwanda and the DRC met in Nairobi, under UN facilitation and with representatives of the United States and the EU present, to address the continuing problem of the FDLR’s armed presence in Congo, as well as Congolese illegal armed groups. Neither the FDLR nor CNDP was directly represented. The agreement, reached in one meeting, commits the governments of the DRC and Rwanda to cooperate in bringing to justice those accused of committing war crimes, crimes against humanity, or genocide, among other things. The agreement also commits the government of the DRC to arrest and hand over to Rwanda and the International Criminal Tribunal for Rwanda those suspected of genocide, crimes against humanity, or war crimes connected to the Rwanda genocide of 1994.

#### **2008** *Goma Accord*

After a failed military assault on the CNDP in December 2007, the government of the DRC committed itself to a national peace conference for the Eastern Congo that would provide an opportunity to negotiate a peace agreement with the CNDP.

The Goma process, which took place over three weeks in January 2008, comprised two parallel processes. The more high-profile event was a large conference attended by some 1,200 people. This meeting gave all parties, including civil society and almost 20 self-proclaimed armed groups, the opportunity to make public statements and demands. The conference produced two working-group reports, one for South Kivu and one for North Kivu, as well as a more general report.<sup>18</sup> These reports were accepted by the conference as a whole but are understood as recom-

---

18 These are available at [www.amanileo.org](http://www.amanileo.org).

mendations and have no legal weight per se. They outline several thoughtful, justice-related recommendations, including vetting, truth-seeking, and victim reparations. The conference was led by highly-respected Kinshasa-based Kivutiens: Abbé Malumalu, head of the Independent Electoral Commission, and Vital Kamerhe, president of the National Assembly.

Separate from this public conference, quiet, high-level negotiations were taking place in a neighboring hotel, primarily between the government and the CNDP. The US, the UN, and the EU served as the primary international facilitators, and a representative from Belgium was also actively involved. The final documents—two nearly identical agreements, one for South Kivu and one for North Kivu—were signed by numerous armed groups and the government, with the international facilitators signing as witnesses.<sup>19</sup> These agreements were known as the Actes d'Engagement (statements of commitment). They were in substance cease-fire agreements, quite short and focusing mostly on security issues. They included a commitment to amnesty, explicitly excluding international crimes.

It was expected that broader issues would be handled in an ambitious follow-on “Amani Program,” which would consider and implement the recommendations from the conference working groups. The Amani Program was slowly being put in place in the months following Goma, and Abbé Malumalu was trying to raise the significant funds needed for development, reconciliation, and reform programs; but little had been implemented by mid-2008.

---

<sup>19</sup> The FDLR did not take part in the Goma conference or talks.



### 3. Justice Issues in the Peace Talks

As with many peace processes, negotiations in the DRC have focused more on power sharing and the political spoils of the peace than on accountability for serious crimes. But justice issues have been present in one form or another, sometimes prominently, in each round of talks.

A review of this experience reveals two stark facts. First, surprisingly, with the partial exception of the Lusaka agreement in 1999, each round of talks resulted in the correct language on amnesty from the perspective of international law and best-practice standards. There was one additional exception to this, in an interim agreement in Ituri, but this seeming error was quickly corrected, as described below. Despite the presumptive interest in impunity by the parties negotiating these accords, each agreement for amnesty since 2002 has explicitly excluded serious international crimes.

The limitations prescribed in these amnesty agreements have had little impact on the likelihood of prosecutions, however. Despite the Congolese government's obligations under international law, few prosecutions for crimes committed during the wars have been taken to court at the local or national level, and a weak and compromised national judicial system has failed to bring any high-ranking or well-connected suspects to account. At least, though, the government has held to its commitments to the International Criminal Court (ICC), and the national amnesties have not compromised its ability or willingness to date to take action on ICC requests for the arrest or transfer of accused persons to The Hague.

The second striking fact is that agreements for justice or accountability have otherwise been quite weak. They received minimal attention during the drafting, and in some cases resulted in a misguided policy framework, such as the truth commission agreed to in the Sun City Accords. International observers and facilitators concerned about justice focused their considerable energies on ensuring that no amnesty was granted for serious crimes. National civil society was often pushing for broader accountability, and an agreement for an international court for the DRC did appear in the Sun City accord. But most agreements have remained silent on broader transitional justice measures. Such issues have generally been left for consideration in the post-agreement phase; but during these periods there has been little opportunity to gain a political commitment for such measures.

The section below addresses the record of amnesty agreements in these peace and cease-fire agreements and explores how and why they excluded serious international crimes. This is followed by an analysis of other justice issues that have been addressed in the peace talks.

### 3.1. Respecting the Principle of a Limited Amnesty

The DRC cease-fire or peace agreements in 2002, 2006, and 2008 all included clauses promising amnesty to the warring parties. A presidential decree in 2003 and a law passed by Parliament in 2005 put the first amnesty into law. The legislature extended the existing amnesty law in mid-2008 to additional armed groups. In each case the exclusion of international crimes is stated clearly.

Preserving the possibility of prosecutions for serious international crimes is often presumed to be among the most difficult aspects of peace negotiations. It is assumed that the warring parties are likely to demand broad immunity from prosecution. But international law is increasingly clear that certain crimes—war crimes, crimes against humanity, and genocide—have taken on the character of international crimes and cannot be amnestied. In most cases such an amnesty would violate the country's international legal obligations to investigate and bring to trial crimes of this nature, as set out in treaties and customary international law. The UN has been most explicit in directing its representatives to avoid sanctioning any amnesty that crosses these lines.<sup>20</sup>

In the context of massive rights violations, and with few national initiatives to counter impunity, the DRC is an important case for understanding how the amnesty exclusion, prohibiting immunity for serious international crimes, has been consistently retained. The story of how these amnesty arrangements were reached shows the position of key members of the international community (in particular the EU, the UN, and the US), as well as the role of expertise and advocacy provided by independent human rights experts.

In each of the peace talks, the rebel leadership put forward initial proposals for broad amnesty covering even the worst crimes. But the government strongly opposed granting any immunity to the rebels, finding it politically unacceptable. The government position on amnesty was generally even stricter than prevailing international standards, as amnesty for crimes such as insurrection and treason is acceptable and even encouraged in international law, such as in the context of dismantling armed groups through DDR processes. Meanwhile, the government did not request amnesty for crimes committed by its own forces. (This may be partly because no prosecutorial action has ever been taken against the high-level members of the Congolese armed forces or government, and very few cases brought against even the lower ranks.)

National civil society argued strongly against amnesty for serious crimes during the Sun City negotiations, although it ultimately had little leverage against the strong-arm tactics of the warring parties. At Goma much of national civil society insisted, like the government, that no amnesty at all should be provided to rebel armed groups.

In this rapidly developing field, the positions of various international participants on this issue show marked progress and can be seen to strengthen from 1999 to 2008. UN representatives were clear in most cases throughout this period about the limitations that must be included in any amnesty arrangement.

For the Goma negotiations in 2008, other international participants also developed clear policies on amnesty, and they were consistent with one another, which was useful. The EU representative sought and received clear guidance from headquarters, which directed that the EU could never sign, even as a witness, an agreement that included an amnesty for genocide, war crimes or crimes against humanity. This position was influenced by both the UN guidelines and the Rome Statute establishing the ICC (which by then had been ratified by 25 of the 27 EU member states). The EU representative considered this position to be non-negotiable. The US representative sought guidance from independent experts and set out a clear position consistent with international law.

---

20 The UN policy on amnesty, which directs its representatives to avoid supporting any amnesty for international crimes, can be found for example in the UN Secretary General's *Report on Transitional Justice and the Rule of Law in Post-Conflict States*, 2004.

### 3.1.1. Amnesty Agreements from Lusaka to Goma

The 1999 Lusaka Cease-fire Agreement signals only a partial limitation of any future amnesty, stating that measures to promote the repatriation of forces “may include the granting of amnesty in countries where such a measure has been deemed beneficial. It shall, however, not apply in the case of suspects of the crime of genocide.”<sup>21</sup> This provision referred to forces in the DRC that had come from Rwanda and participated in the 1994 genocide.

From 2002 the limitations to amnesty were much firmer. The Sun City Accords of December 2002 include the following clause:

To achieve national reconciliation, amnesty shall be granted for acts of war, political breaches of the law and crimes of opinion, with the exception of war crimes, genocide and crimes against humanity. To this effect, the transitional national assembly shall adopt an amnesty law in accordance with universal principles and international law. On a temporary basis, and until the amnesty law is adopted and promulgated, amnesty shall be promulgated by presidential decree-law. The principle of amnesty shall be established in the transitional constitution.<sup>22</sup>

This presidential decree was promulgated in 2003 and kept the exclusion in place. In December 2005 the amnesty was signed into law. After setting out the crimes covered, including acts of war and political infractions, the amnesty law simply states, “The present amnesty does not apply to war crimes, genocide, and crimes against humanity.”<sup>23</sup>

The 2005 amnesty was quite controversial in Parliament, partly because of a concern that it would be applied too broadly, and specifically that the men serving time for the assassination of President Laurent Kabila could benefit from the amnesty and be released. The Supreme Court later ruled that amnesty could not be applied to their case.

The next agreement for amnesty came in 2006 in the negotiations between the government and three militia leaders in the Ituri region of Eastern Congo, with the UN serving as facilitator. But here the handling of the amnesty issue suffered a temporary glitch. The first bilateral agreements were signed in July 2006. One of these, signed with Mathieu Ngudjolo of the MRC, sets out a provision for “general amnesty for all members of the MRC engaged in the process.”

In November, two of the militia leaders signed amendments to their previous agreements. Both of these amendments emphasize “the necessity to formalize the amnesty (including the withdrawal of international arrest warrants).” When these agreements were released publicly at a press conference in November, human rights advocates cried foul. The Human Rights Watch representative for the DRC, Anneke van Woudenberg, protested directly to the UN in Kinshasa. She understood “general amnesty” to mean a blanket amnesty, probably violating both national and international law as well as UN policy directives.<sup>24</sup>

Those involved in drafting the agreements insisted that this interpretation was a question of translation or emphasis. The “general amnesty” was never intended to include serious crimes, they said, but referred to the amnesty then “generally” available in Congolese law (i.e. the law that, following the Sun City Accords,

---

21 Cease-fire Agreement, Lusaka, July 1999, Article 1(22).

22 Inter-Congolese Dialogue, *Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo*, Pretoria, December 16, 2002, Section III(8).

23 Official Journal of the DRC, Law No. 05/023, December 19, 2005, Section 3.

24 Interviews with UN, Belgian, and international civil society representatives, 2008. This controversy was also reported in the press at the time; Van Woudenberg of Human Rights Watch told the *Christian Science Monitor* that the agreements were “rewarding war criminals rather than holding them to account.” See “Measures to keep peace in Congo draw fire,” *The Christian Science Monitor*, September 5, 2006.

absolved armed groups for the crime of taking up arms against the state, but which explicitly excludes serious international crimes). Those directly involved in the talks described detailed discussions with the armed groups in the course of the talks that made clear that international crimes would be excluded, referring to the 2003 and 2005 amnesty language. But these limitations were not in the text. This error resulted at least partly from a rush to draft and sign the agreements under tight time constraints, participants recounted.<sup>25</sup>

The reference to international arrest warrants might also be misunderstood: It related not to the ICC, but to national Congolese arrest warrants that had been issued internationally (i.e. had been transmitted to neighboring countries) and remained outstanding against some of the signatories. The government often classified such warrants as international to allow the arrest of militia leaders who might cross into a neighboring state.<sup>26</sup>

The UN officials involved in these talks were keen to clarify the reach and intent of the amnesty. Ten days after the agreement with the third militia leader was signed, a framework agreement was concluded between the government and all three armed groups, with the UN again signing as witness. The first article of this agreement sets out the government's commitment to "propose an amnesty law for all members of the signatory groups." It then adds, "This law will be presented to Parliament, as soon as the Parliament has been established, in similar terms to that passed in 2003," making it clear that the exclusion of international crimes would be retained.

Human rights observers, such as Human Rights Watch, took away a lesson from this experience: the importance of having experts present where possible while the talks are under way. When peace talks in Goma were announced in late 2007, for example, Human Rights Watch was present from the start and stayed throughout, becoming part of an informal team of experts who assisted the international facilitators.<sup>27</sup> On the other hand, many national human rights actors in the DRC were reluctant to engage in these talks, as they feared they might be manipulated.

The Goma talks, therefore, can be distinguished from earlier rounds of negotiations by the level of expertise and advocacy present on the subject of amnesty. The UN and EU representatives felt that their institutional policies were already clear and non-negotiable. For others, actors such as Human Rights Watch provided useful expertise on the international legal landscape. And influencing all of this was the government, which continued to resist granting any amnesty at all for the rebels.

The UN was represented on a day-to-day basis by senior staff members of the political affairs division of MONUC, who traveled from Kinshasa. A UN staff member representing the human rights office participated in the parallel national conference and sometimes attended the daily briefings on the talks. Neither of the two primary staff members who participated could stay throughout the three week period of the talks, however, and others saw this as reducing their influence. Still, when the subject of amnesty came up, the UN representative present made it very clear that the UN would not go along with an amnesty for the three excluded categories of international crimes.

---

25 The Ituri agreements were not sent to headquarters for clearance before being signed by a UN representative. The talks took place in a small hut in the woods in the middle of rebel-held territory; the agreements were handwritten documents signed at the end of the day. As darkness approached, security concerns about return travel by the visiting officials dictated the tight timing. The parties insisted that the UN sign as witness to the fact that the talks and the signing had taken place, rather than with the intention of sanctioning the content of the hastily drafted document. (Interviews UN officials Kinshasa May 2008.)

26 These international arrest warrants were not necessarily fully authorized as international warrants by INTERPOL.

27 The same concern did not arise in the context of the mid-2007 Nairobi accord. As expected, that agreement does not mention amnesty. It commits the governments of both Rwanda and the DRC to "cooperate in bringing to justice those accused of having committed war crimes, crimes against humanity, and genocide."

The US representative was the main interlocutor with CNDP's Nkunda, although always in close communication and consultation with the UN and EU representatives. Over the course of several days, several proposals in relation to amnesty emerged from Nkunda or his CNDP team. They asked that the government lift arrest warrants issued by international tribunals, which was clearly understood to be in relation to a widely rumored, sealed warrant from the ICC against the second-in-command of the CNDP, Bosco Ntaganda. The CNDP dropped this demand in the face of strong opposition (and in fact, neither the government nor international facilitators had the power to lift or otherwise influence an ICC warrant).

The CNDP also insisted that the existing national arrest warrant for Nkunda, issued by Congolese courts several years earlier, be lifted. This became a point of difficulty in the final days of the talks, but it was finally determined that the warrant had officially lapsed, and it was accepted as legally void.

However, despite the wrangling over several related points, none of the international facilitators remembers the amnesty as being a particular sticking point. When the international facilitators presented the exclusion of international crimes from the amnesty to Nkunda as non-negotiable, Nkunda accepted it with a shrug and without argument, several direct participants recounted.

While the amnesty exclusion was never at great risk, one facilitator noted, the internationals sometimes "had to insist." But many participants remembered other issues as much more difficult.<sup>28</sup> When pressed on the question of why Nkunda and other armed groups did not push harder for an amnesty for serious crimes—given that they had considerable power at the negotiating table and many were well known for their involvement in serious atrocities—one participant described the dynamics at play. It is not likely that anyone would explicitly demand immunity for genocide and other atrocious crimes, he said, as it would be taken as admitting to such crimes. In addition, it was not a difficult conversation because everyone was insisting that other groups but not they themselves were guilty of atrocities. At least one of the international facilitators emphasized to the parties that they could not request such an amnesty because it would be asking the Congolese government to act in contravention of international law, which would be an unpatriotic request.

Ultimately the *Actes d'Engagement* agreed at Goma committed the government to "present to Parliament a law to provide amnesty for acts of war and insurrection, covering the period of June 2003 to the date of the promulgation of the law, which will not cover war crimes, crimes against humanity, and genocide."<sup>29</sup>

As in 2005, awarding an amnesty to rebels in 2008 was politically sensitive for President Kabila. It was controversial partly because the president and his supporters worried that the amnesty might be applied to those aligned with opposition leader Senator Jean-Pierre Bemba, in exile in Portugal since the post-election violence of early 2007. Such an amnesty could allow Bemba to return to the country more easily, his opponents worried. A warrant for his arrest was based on charges of treason, and so it seemed he might benefit from the new amnesty law. As Parliament began to consider an amnesty bill in 2008, this issue became highly controversial. Bemba's party insisted that the law cover the post-election violence, a suggestion that President Kabila strongly resisted. Shortly thereafter Bemba was arrested in Belgium at the request of the International Criminal Court, thus removing the key figure from this dilemma.<sup>30</sup> Ultimately the proposed amnesty law was explicitly limited to acts of war and insurrection in the provinces of North and South Kivu between 2003 and 2008.

---

28 Other issues remembered as particularly difficult included the CNDP's demand for a broad political dialogue with the government, which the government rejected, and whether the government would sign the agreement as a party. In the end the government did sign the agreement, but it was the armed groups, and not the government, that committed themselves to the *Actes d'Engagement*, with the "solemn engagement" of the international facilitators and the government.

29 *Acte d'Engagement*, Article IV, para. 1.

30 Bemba was arrested on suspicion of crimes committed in the Central African Republic, not the DRC.

There is an interesting final twist to this story. Despite the intense focus on getting the language of the DRC amnesties correct, one category of crimes, which UN policy states should also be excluded from any amnesty, was left out. Since 2004 the UN has extended categories for exclusion to include “gross violations of human rights.” This is a broader category of crimes that would include, for instance, individual acts of abuse that were not part of a widespread or systematic attack (as required to be classified as a crime against humanity) or that did not take place in the context of war (unlike war crimes). In 2004 a report by the UN Secretary General stated, “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity, or gross violations of human rights.”<sup>31</sup>

Since then this policy has been consistently restated, including in guidelines from the Secretary General distributed to UN representatives in 2006. But it is clear that this expanded policy was not widely known by many UN officials, certainly as of early 2008. The idea that the UN should insist on the exclusion of amnesty for this fourth category of gross human rights violations was unknown by the UN personnel involved in the Goma and Ituri processes and also by representatives of the UN human rights office, which later reviewed the accords.<sup>32</sup> These participants set a firm red line for genocide, war crimes, and crimes against humanity, but gross human rights violations were not mentioned. Nor did independent human rights organizations raise this issue.

### 3.2. Other Forms of Justice in the Peace Talks

Despite the intense focus on the amnesty and the care to preserve correct, rights-respecting language, other issues of justice and accountability received relatively little attention in negotiations from Sun City to Goma. In a society emerging from conflict or authoritarian rule, criminal prosecutions can only bring to trial a limited number of perpetrators of serious and systematic human rights violations before domestic, international, or hybrid tribunals. In the DRC the abysmal state of the national justice sector makes the prospect of domestic prosecutions particularly unlikely. A range of complementary measures could help address this “impunity gap” for massive human rights abuse. These include non-judicial truth-seeking measures, the best known form of which is a truth commission; reparations for victims; and justice-sensitive reform of public institutions, particularly in the security sector.

The signed agreements include little in relation to a variety of non-judicial forms of accountability and justice, such as victim reparations, memorials, apologies, criminal justice reform, or excluding persons from the security service based on their human rights record. However, a Truth and Reconciliation Commission was established at Sun City and suggested again at Goma.

#### 3.2.1. Criminal justice

An explicit commitment to prosecution emerged in the Sun City deliberations. The agreement called for the UN to set up an International Criminal Court for the DRC to try cases of alleged “genocide, crimes against humanity, war crimes, and mass violations of human rights committed or presumed committed since 1960, as well as during the two wars of 1996 and 1998.”<sup>33</sup> Despite the clarity of this language, the government never submitted a formal request to the UN Security Council, and this component of the agreement did not move forward.

---

31 *UN Secretary General’s Report on Transitional Justice, 2004.*

32 In other contexts, such as Kenya in 2008, the Office of the UN High Commissioner for Human Rights has threatened noncooperation with institutions that would exclude the three best-known international crimes but retain the possibility of recommending amnesty for gross human rights violations.

33 Resolution No DIC/CPR/05.

### 3.2.2. A Truth and Reconciliation Commission

The Constitution of the Transition, put in place in 2003 in accordance with the Global and Inclusive Agreement, established a Truth and Reconciliation Commission as one of five “institutions to support democracy”.<sup>34</sup> The TRC was constrained from the start by its composition: as with the other newly created commissions, its executive committee included representatives of the signatories to the Sun City Accord.<sup>35</sup> Thus, the interests of the warring parties were firmly ensconced within the structure of the TRC itself. The presence in the TRC of representatives of groups known to have committed egregious human rights abuses—in some cases men believed to have been directly involved in serious abuses—was an obvious impediment to investigating and revealing the truth about these crimes.

People who were either present in Sun City or were close observers have different explanations of how it was agreed that the belligerents would be represented on the truth commission. The civil society grouping at Sun City originally agreed that the “political” institutions should be divided up amongst the belligerents, while the institutions to support democracy should be composed of civil society representatives. Whether this was ever a realistic political option is open to question, but some five years after the agreement there was still considerable animosity among civil society actors on this question. Some suspect their colleagues succumbed to offers of political positions in exchange for agreeing that the belligerents be represented in the institutions to support democracy, including the TRC. One participant claimed that the language in the final draft of the agreement had been changed without the knowledge of the civil society signatories, and thus they approved this provision unknowingly.<sup>36</sup>

Delegates to Sun City recall the influence of the South African Truth and Reconciliation Commission in their deliberations.<sup>37</sup> Ngoma-Binda and Muanda Vuidi, former vice-president and member of the TRC respectively, cite the South African experience as influential in creating the Congolese TRC.<sup>38</sup> An amnesty provision in the Congolese TRC was explicitly limited to acts of war, political crimes, and crimes of opinion, however, an important difference from the South African model.<sup>39</sup> But the larger story of how the South African TRC influenced the creation of the Congolese TRC at Sun City suggests the danger of copying characteristics of a transitional justice process elsewhere and grafting them onto a different process in a different context while ignoring the underlying principles and processes of transitional justice mechanisms such as national consultation.

The TRC was established in law in 2004, based on the framework provided by the Sun City Accord. Its mandate was twofold:

- **Truth-seeking:** to establish the truth of crimes and human rights violations committed between independence (1960) and the end of the transitional government (2006) and to identify victims and perpetrators, individually and collectively;
- **Reconciliation:** to reestablish national unity on the basis of acknowledging the facts, asking and receiving pardon, and providing reparation and rehabilitation for victims.<sup>40</sup>

The temporal mandate, reaching back to Independence, partly reflected political interests: The govern-

34 Constitution of the Transition, article 154 (2003). Delays in passing necessary implementing laws and bylaws meant the TRC was not ready to begin work until February 2005.

35 Constitution of the Transition, article 157 (2003).

36 Interview, civil society representative, Kinshasa, May 2008.

37 Interviews, civil society representatives, Kinshasa, April and May 2008.

38 Prof. Ngoma-Bindi and Maître Nuabda Vuidi «Justice Transitionnelle en R.D Congo. L'expérience de la Commission Vérité et Réconciliation», *Congo-Afrique*, 2007.

39 Loi No. /04/018 du Juillet 30 2004 portant sur l'organisation, attributions et fonctionnement de la Commission Vérité et Réconciliation, article 8g.

40 Loi No. /04/018 du Juillet 30 2004 portant sur l'organisation, attributions et fonctionnement de la Commission Vérité et Réconciliation, articles 4, 8.



ment and belligerent groups would not contemplate an inquiry that might put them or their constituencies under the microscope while records from the Mobutu era went unchallenged.<sup>41</sup> A mandate on this scale, coupled with the inaccessibility of vast swathes of the country because of poor infrastructure and security risks, would have posed a serious challenge to even the best-intentioned truth commission.

The Congolese TRC suffered a number of critical problems from the start: The selection process for commissioners was not transparent, and many observers felt that the resulting membership as a whole was weak, and in particular it lacked strong leadership. There was no process of consultation with the population on the design, purpose, or even aim of the TRC, beyond the deliberations at Sun City, and certainly no attempt to engage the population in the process of designing the TRC. As a result of these weaknesses international donor support was not forthcoming. Although the TRC attempted to contribute to some inter-communal mediation efforts in the East, these efforts did not include any truth-seeking component. The TRC ended in June 2006 without success, having failed to investigate a single case.

The idea of a new truth commission resurfaced at the Goma conference in January 2008. At the closing ceremony President Kabila mentioned the possibility of a new TRC, saying that it could complete the work begun in Goma.<sup>42</sup> The conference had become a platform for catharsis, with different communities expressing their experiences of the conflict. The reports of the conference working groups included explicit demands regarding formal truth-seeking processes. The North Kivu report requested a TRC for the province.<sup>43</sup> The South Kivu working group called for an independent mixed (international and national) commission of inquiry to identify the crimes committed there since 1996, to identify the perpetrators, and to propose sanctions against them.<sup>44</sup> The South Kivu report also recommended restructuring and reactivating the national TRC after an evaluation of its work.<sup>45</sup> These demands reflect the desire for a genuine process to establish the truth of what happened in the country, and recognize the weakness of the first TRC.

In March 2008 the former president of the TRC, now Senator Monsignor Kuye, presented a proposal for a new truth commission to the Senate. But this proposal looks very similar to the previous TRC, and many observers expect that it would even have some of the same members and thus the same limited results. Unfortunately, this proposal does not take into account calls by the delegates at Goma for a redesign of the concept or incorporation of international best practices, not least concerning truly consultative processes in the design stage of such a mechanism.

Based on international best practice, a genuine truth commission would put the needs of the victims at the heart of its considerations, consult with the population on its objectives, principles, and working methods, and above all, it would respect the dignity of victims and seek to contribute to building a common historical narrative for society.

Questions remain about the power any new truth commission may have to grant amnesty. Amnesty remained theoretical for the previous TRC, since it did not consider a single case; but in any event it was for a limited category of crimes. However, the March 2008 proposal stipulates that a new TRC would

---

41 Interviews, civil society representatives Kinshasa, March and May 2008.

42 "After many years of war, peace will not flourish without dialogue and forgiveness. The conference has addressed this, and the Truth and Reconciliation Commission that you requested will complement the work that has already been initiated," President Joseph Kabila, remarks at the closing ceremony of the conference on peace, security, and development in the provinces of North and South Kivu, January 22, 2008 (translation by the authors of this report).

43 Report from the North Kivu working group, Goma conference on peace, security, and development in the Kivus, Section 3, Conflict Management and Resolution, recommendation 1.5.7.

44 Report from the South Kivu working group, Goma conference, recommendation e) 2.

45 Ibid., recommendation f) 1, 2. « L'atelier préconise la restructuration et réactivation de la Commission Vérité et Réconciliation après avoir procédé à l'évaluation du travail abattu. »



“receive all demands for amnesty, examine their legitimacy, and grant or refuse it.”<sup>46</sup> This suggests a far-reaching provision that does not exclude international crime, going beyond the limits of both Congolese law and the amnesty agreed at Goma. If a new TRC were to be created, the question of amnesty and its implications would have to be examined in considerably more depth than they have been to date.<sup>47</sup>

### 3.2.3. Other Justice Measures at Goma: Reparations and DDR

The Lusaka, Sun City, Ituri, and Nairobi agreements did not address other forms of non-judicial accountability. At Goma, however, the conference reports refer to reparations and suggest openings for justice-sensitive approaches to security system reform.

The South Kivu workshop report that emerged from the Goma conference made specific recommendations for reparations. It called for a commission to identify victims of the conflicts, determine appropriate levels of compensation, and compensate the victims. The funds would come from the stabilization plan for the Kivus.<sup>48</sup> It also called for dignified funerals and symbolic memorials for victims of the war.<sup>49</sup> To date, there has been no follow-up to these recommendations.

The conference workshop reports also include very specific recommendations for vetting, to prevent those guilty of committing massacres and sexual violence or inciting hatred from holding positions of responsibility.<sup>50</sup> But the final conference report, based partly on the workshop recommendations, did not mention vetting, suggesting a disconnect between popular demands and the view of the leadership.

In the side-negotiations leading to the Actes d’Engagement, the details of how DDR would be implemented were contentious and remained so after the signing of the accord: they were still not agreed on in any meaningful detail as of mid-2008. Thus, DDR was only agreed to in broad terms in the Actes and did not include any reference to reform.

The possibility of vetting was never raised in these direct talks with the CNDP. International participants at Goma and Ituri generally saw the possibility of vetting as an issue to be explored after an agreement was signed and disarmament and reintegration took place. Once militia groups were out of the bush and in the army, observers reasoned, the government would have the power to hold them to account for their crimes, including through a possible vetting program. But the question of how such a vetting program could take place and who would implement it remained open. It would be necessary, of course, to apply it to the government forces as well as to those who had fought in militias — something that could prove politically very difficult.

### 3.2.4. Addressing Root Causes of Conflict

The Goma conference drew attention to some of the root causes of the conflict in the Kivus, such as land, natural resource extraction, and identity and nationality. These issues remain unaddressed and unresolved. They continue to fuel intercommunal strife and can only exacerbate tensions when refugees and displaced persons return to their homes.

Some of the questions about land ownership and access cannot be resolved easily through the courts, even if an effective and fair administration is put in place. Although the issue of land redistribution probably

---

46 Article 8.7, *Projet de loi portant organisation, attribution et fonctionnement de la Commission Nationale Vérité et Réconciliation*. See also Article 8.8.

47 This was also a recommendation the ICTJ and others made in 2004, during the formulation of the first TRC. It clearly has not been addressed in more recent proposals for a new TRC. See Federico Borello, *A First Few Steps: A Long Road to a Just Peace in the Democratic Republic of the Congo*, ICTJ, October 2004.

48 Report of the South Kivu working group, recommendations I e) 5, 6.

49 Ibid., recommendations I a) 16.

50 Ibid., recommendations III c) 3; Report of the North Kivu working group, recommendations III 3. A. 1.

would overburden a truth commission, a truth process can help to set the parameters and relevant history of such conflicts. A dedicated mechanism, such as a land commission, perhaps geographically focused, could draw on a truth-seeking process and begin to address some of these festering causes of ongoing conflict.

## 4. Criminal Justice in the DRC

The amnesty agreed to in Goma excluded war crimes, crimes against humanity, and genocide in accordance with international law. But international law also requires governments to investigate and prosecute perpetrators of these crimes. Without prosecution, how can the amnesty exclusion be in good faith? And can a TRC bring a sense of justice to victims if no perpetrators are held accountable through the criminal justice system?

A discussion of justice issues in peace agreements should be placed in the context of the justice sector, and an assessment of the sector should inform discussions at peace talks. For the DRC international justice is also an important element; given that the International Criminal Court is active in the country, the possibility of justice in the international sphere has been an invisible but very influential factor in all negotiations since 2002.

### 4.1. Prospects for Criminal Justice at the National Level

In general the Congolese justice sector is unable to deliver day-to-day rule of law for the population, let alone tackle massive rights abuses. The infrastructure of the justice system has collapsed almost completely; the European-funded Rejusco project has made considerable strides in improving the infrastructure but is geographically limited to the East. On the whole, magistrates are poorly trained, ill-equipped (often lacking basic Congolese legal texts), and badly paid. The DRC does not lack the necessary legislation, but it faces serious problems in implementing laws and delivering justice.<sup>51</sup>

The judiciary is also not independent, as basic international standards would require. In 2007 a draft law, which could address some of these problems, was developed, including mechanisms for appointment, dismissal, and promotion of the magistracy. Progress remains slow in establishing the Conseil Superior de la Magistrature, the judiciary's intended governing body according to the constitution. There is no legal provision for a personnel selection mechanism, vital for an independent judiciary. In February 2008 President Kabila dismissed 89 magistrates and appointed 28 others (including a new chief justice of the Supreme Court and a prosecutor-general). In response the main magistrates' union called a strike, and many NGOs and human rights organizations protested the interference.

Moreover, most human rights cases are tried by military tribunal. Although the DRC has ratified the Rome Statute establishing the International Criminal Court, it has yet to adopt the necessary implementing legislation, which would put all cases pertaining to international crimes under civilian jurisdiction.

---

<sup>51</sup> However, as described below, the DRC has yet to adopt implementing legislation pertaining to the ICC.

Ironically, however, the military tribunals have made the most progress in trying human rights cases and referring to the Rome Statute in rulings. But military jurisdiction is far too extensive in the DRC, covering any crime committed using a “weapon of war” regardless of the nature of the crime or status of the suspect.<sup>52</sup> One problem is that sitting military judges are not, as in other military jurisdictions, awarded ex-officio rank (of, for example, general) to allow them to try senior officers. As a result, few military tribunals can hear a case against an officer ranking higher than major, and there is an inherent risk of interference from those higher up the chain of command.

Corruption is rife throughout the system, and political interference with judicial processes represents an enormous challenge in any attempt to bring a well-connected suspect to trial, particularly if accused of serious crime. Independent observers of key trials, such as the trial of the accused murderer of human rights defender Serge Maheshe or of alleged war criminal Gédéon Mutanga, have expressed concern about political interference.<sup>53</sup>

Another notorious case is that of Iturian militia leader Yves Kahwa, accused of numerous killings and of burning down schools and clinics. Sentenced to 20 years in prison in 2006 for crimes against humanity, he had his sentence overturned on appeal in February 2008. In a widely-criticized ruling, the judge re-categorized Kahwa’s crime as murder and then applied the amnesty law. Many suspect that a bribe might have been paid, as is not uncommon. However, justice might still be done, as military justice authorities have transferred the case to the Kinshasa jurisdiction.

Political interference can also be inferred from the unbalanced nature of cases brought against suspects: Despite evidence of human rights violations by high-ranking individuals in the military establishment, no high-ranking officer has been charged. On the other hand, those considered political opponents, including human rights defenders, are regularly detained on a variety of charges.

Even after perpetrators of serious crime are sentenced, they manage to escape from prison at a remarkably high rate. The penitentiary system is almost completely dysfunctional. On the one hand jails are overcrowded with petty criminals and the poor, languishing while awaiting trial; on the other hand the system is incapable of holding those found guilty of the most serious crimes, who often find their way out of jail if they have a little money or influence. The conditions are so dire that most prisons pose a serious health risk, and prisoners have to rely on family members buying access to feed them. In Mbuji Mayi Central Prison in Kasai Orientale, 18 prisoners starved to death in January and February 2008, for example.<sup>54</sup>

Public opinion of the judiciary is negative. Interestingly, when President Kabila unilaterally removed the magistrates from office in early 2008, public opinion was divided on the matter, with many calling for a further “cleansing” to rid Congo of “arbitrary judges,” indicating a considerable lack of faith in the judiciary.<sup>55</sup>

The treatment of rape and sexual violence is particularly indicative of the failures of the justice system. Rape and sexual violence are outlawed in the DRC by the constitution and by military, civilian, and international law. The 2006 update of the 1940 penal code concerning rape and sexual violence is a very sophisticated piece of legislation.<sup>56</sup> But it is rarely implemented by judges in the few cases that come to court. Judges routinely encourage out-of-court settlements to avoid bringing perpetrators to justice, and many judges also implicitly or explicitly blame the victim for the rape. There is no provision for witness

---

52 A term not defined in Congolese jurisprudence.

53 On Serge Maheshe, see, for example, International Freedom of Expression Exchange, “Murder appeal marred by rights violations,” May 27, 2008; [www.ifex.org](http://www.ifex.org). On Mutanga, see *Supplément au périodique des Droits de l’Homme*, SPDH 006, June 2008, ASADHO/Katanga.

54 MONUC Human Rights Monthly Assessment, February 2008.

55 *Le Potentiel*, February 18, 2008.

56 Law No. 06/018, July 20, 2006.

protection under Congolese law, and victims and witnesses genuinely fear reprisal. Not only are the police not trained to investigate sexual violence, but many women fear reporting rape, afraid of being raped again at the police station. The costs involved in bringing a case to court also put justice well beyond the reach of most women.

In 2006, 12 soldiers were found guilty of crimes against humanity by a military tribunal for the gang-rape of 119 women and girls in 2003. Known as the Nsongo Mboyo case, it raised expectations for implementation of the rule of law and for some justice for victims of rape. But all those found guilty were low-ranking officers (the most senior was a captain), doing little to affect the broader culture of impunity. Moreover, all those convicted escaped from jail and are now at large.

Addressing impunity for rape and sexual violence has become an urgent priority in the DRC and will require extensive and radical reform of the justice system. In fact, the years of impunity for sexual crimes in the armed conflict has reportedly contributed to rape and sexual violence now occurring at epidemic levels across society as a whole. The report of the South Kivu working group at Goma even called for a special tribunal for cases of sexual violence.<sup>57</sup> However, despite the welcome attention given sexual violence in the context of the war in the East, the state is doing very little to address the broader enabling environment, the extent of violence against women and girls, entrenched impunity for perpetrators of these crimes, and the dismal economic and social position of women in society.

The state of the criminal justice system was discussed at both Sun City and Goma. The report of the North Kivu working group from the Goma conference provides insight into how the justice sector is perceived in the province. On questions of justice the report makes numerous recommendations to the judicial authorities for improving the local magistracy, including improving disciplinary mechanisms, fighting impunity, punishing all those found guilty without exception, and assuring the effective execution of judicial rulings.<sup>58</sup> The working group goes on to recommend that “a mechanism be put in place to try suspected perpetrators of war crimes, crimes against humanity, and genocide,” again reflecting a lack of faith in the national system.<sup>59</sup>

The failings of the national system are not lost on human rights defenders (nor, presumably, on human rights abusers) in the DRC. Thus, many eyes turn to international justice to help address impunity for massive human rights abuse.

#### **4.2. The Role and Impact of the ICC**

The DRC was an early party to the treaty establishing the International Criminal Court. It signed the Rome Statute in September 2000 and ratified it in April 2002. The ICC became legally operational on July 1, 2002, and has jurisdiction only over acts that took place after that date.

In 2004, partly in response to domestic civil society as well as international pressure, the transitional government made a self-referral to the ICC (one of the three ways the ICC may exercise jurisdiction). The government has cooperated with the Court, although observers question whether that cooperation will continue should the Court investigate suspects connected to the government or national army.

In the first years the ICC prosecutor focused on crimes that had taken place in the Ituri region, the most active conflict at the time the ICC began investigations in the country. Between March 2006 and Febru-

---

<sup>57</sup> Recommendations III.,c.2.

<sup>58</sup> Recommendations I.2.4.

<sup>59</sup> Recommendations III.1.A2.

ary 2008, three persons, all former militia leaders in Ituri, were arrested and transferred to The Hague at the request of the ICC.<sup>60</sup> An arrest warrant for a fourth, Bosco Ntaganda, was unsealed in April 2008 (although its existence, technically under seal and confidential, had been rumored for some time).<sup>61</sup>

The circumstances of the arrest and transfer of the three individuals are noteworthy. Two of these former militia leaders (Germain Katanga and Mathieu Ngudjolo) had been integrated into the national armed forces, serving as general and colonel, respectively, when they were arrested. Two (Katanga and Thomas Lubanga) had already been arrested and detained by Congolese authorities in 2005, charged with war crimes and crimes against humanity. They were awaiting trial when arrest warrants from the ICC were unsealed, and they were transferred to The Hague. Some observers have wondered whether these cases therefore meet the test, required for the ICC to exercise jurisdiction, of the state being unwilling or unable to investigate or prosecute.<sup>62</sup>

The third person to be transferred to The Hague, Mathieu Ngudjolo, was arrested while participating in a military training course in Kinshasa on the subject of command and control. The course was given by military personnel of a key partner state. When Congolese authorities arrested Ngudjolo at the request of the ICC, international observers worried that two other prominent former militia leaders, who were in the very same training course, might flee back to the bush. In fact, those two individuals, Peter Karim and Cobra Matata, had been the primary signatories, together with Njugolo, of the Ituri Agreements just fifteen months earlier. At that time they had each commanded a different militia, and they were then integrated into the national army.<sup>63</sup> It was feared that Karim and Matata might even take up arms again to protect themselves against any threat of arrest. In fact they did disappear from the training for a day or two. But they were far from their home base, and with little in the way of support networks in Kinshasa they returned to the course. Neither of these two individuals has yet been subject to ICC action.

The impact of the unsealing of the warrant against Bosco, Nkunda's chief of staff in the CNDP, has been less clear. The warrant issued against him is for crimes committed in Ituri when Bosco was fighting with a different armed group, and it is not connected to Nkunda or the CNDP. During 2008, Nkunda did not seem likely to turn him over for prosecution, as Bosco was understood to have the loyalty of a large part of the CNDP military forces, thus making such action difficult for Nkunda. After the unsealing of the warrant on 28 April 2008, Bosco was no longer present in meetings that international diplomats held with Nkunda, but at the time of writing it is not clear whether or how this development has affected his

60 Thomas Lubanga Dyilo was the first person ever to be transferred to the ICC. He is charged with war crimes, specifically conscripting and enlisting children and using them in combat. Germain Katanga is accused of war crimes and crimes against humanity, including recruitment and use of child soldiers and sexual crimes. Mathieu Ngudjolo Chui is also accused of war crimes and crimes against humanity, including recruitment and use of child soldiers and sexual crimes. Katanga and Ngudjolo will be tried together.

61 In addition, as noted above, former DRC Vice-President Jean-Pierre Bemba was arrested in Belgium in May 2008 at the request of the ICC and transferred to The Hague. This arrest was for alleged crimes in the Central African Republic, where Bemba's forces had fought in 2002–03, and was not related to events in the DRC.

62 In 2008, for example, Oxford University analyst Phil Clark wrote:  
Ituri provided the ICC with a simpler legal task than other provinces. Of the conflict-affected provinces of the DRC, Ituri has the best-functioning local judiciary, which has already shown adeptness at investigating serious crimes, including those committed by Lubanga, Katanga and Ngudjolo. It is therefore unclear whether the ICC can adequately justify its involvement in Ituri, given the capacity of domestic institutions to investigate and prosecute major crimes. . . . The OTP was given a head-start by the fact that when it opened its investigations into the Lubanga and Katanga cases, the major militia leaders were already in custody and significant evidence of crimes had already been gathered by the local civilian and military courts, working closely with MONUC.

Phil Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," in Nicholas Waddell and Phil Clark, eds., *Courting Conflict: Justice, Peace and the ICC in Africa*. London: Royal African Society (2008), p. 40.

63 Peter Karim's alleged crimes include taking hostage eight UN peacekeepers, one of whom was killed. Cobra Matata was a senior commander when his forces carried out the largest massacre in eastern Congo in recent years, which took place at Nyakunde in September 2002.

relationship with Nkunda or his role and influence within the CNDP generally.<sup>64</sup>

After the unsealing of the warrant against Bosco, at Nkunda's request the international facilitation team sent a message to the ICC that Nkunda would like to meet with representatives of the Court. The facilitation team also printed out from the Internet and provided to Nkunda a copy of Bosco's arrest warrant. But after that the facilitators declined to play any further role in brokering this communication, feeling that too close a relationship would not be appropriate.

Observers have criticized the ICC prosecutor's strategic approach to the DRC on several grounds. They argue:

**The Court is not targeting the highest-level perpetrators.** Many of the militia groups in eastern Congo have operated with the direct support of the political leadership in neighboring countries. But the ICC prosecutor has shown no intention to investigate this higher level of involvement. In 2006 Human Rights Watch argued: "Chief prosecutor Ocampo should also investigate those who armed and supported militia groups operating in Ituri, including key players in power in Kinshasa, Kampala and Kigali. The crimes committed in Ituri are part of a broader conflict in the Great Lakes region, and the Court should finally pierce the veil of impunity that stretches beyond Congo's borders."<sup>65</sup>

**Its geographic reach within Congo is too limited.** In addition, critics regret that the singular focus on Ituri during the Court's first four or five years in the country has raised questions about its role and impact. The fighting in Ituri is less connected to the ruling elite and least implicates the government, compared to events in the Kivus and elsewhere. The judiciary is considered to be stronger in Ituri than in other areas of conflict because of intensive international engagement. Partly because local authorities had done some substantive investigation of the cases the ICC selected for prosecution, they are generally considered the easier cases. The density of international peacekeeping troops was highest in Ituri, and so it is possible that the prosecutor chose the location safest for his investigating staff as well as witnesses.

The ICC entered as the conflict was beginning to calm down in Ituri. The more-entrenched, politically more complex, and longer-term conflict was centered in North and South Kivu. In the past year the ICC Prosecutor indicated that he might open investigations there.

**The Court seems unwilling to prosecute crimes committed by government forces.** This is particularly unfortunate, critics say, since the national army has often been cited as the worst culprit in serious rights abuses. Some observers believe that the Court is acting in a partial manner, perhaps worried that it might put at risk the political support and collaboration it currently receives from the government.<sup>66</sup> The ICC prosecutor's actions in Uganda, where arrest warrants only targeted the armed opposition, reinforced this impression, as did the arrest of Jean-Pierre Bemba, President Kabila's main political rival, for crimes allegedly committed in the Central African Republic.

**The charges are too limited.** In the Court's very first case, the charges against Thomas Lubanga focused on the use of child soldiers but made no mention of killings, sexual crimes, and other severe atrocities of which Lubanga is also widely suspected. Such a limited charge sheet is considered to "un-

---

64 In late-January 2009, after this report was completed, Laurent Nkunda was arrested as he crossed into Rwanda. While too early to assess, some observers believe that the split in the CNDP in early January 2009 (when Bosco broke from Nkunda), and the surprising arrest of Nkunda, both result in part from the difficulties Bosco faces as subject of an ICC arrest warrant.

65 Quoting Richard Dicker, Human Rights Watch, "D.R. Congo: ICC Arrest First Step to Justice," press release, March 17, 2006; www.hrw.org.

66 See Phil Clark, "Law, Politics and Pragmatism," *Courting Conflict*, p. 40. He also notes that the Court "needed to maintain good relations with Kinshasa to ensure the security of ICC investigators and other personnel working in the volatile eastern provinces." P. 40.

dercut the credibility of the ICC” as well as limiting victims’ participation, eight international human rights organizations argued in an open letter to the prosecutor in 2006.<sup>67</sup> Local rights groups and women’s organizations were especially critical of the failure to include sexual crimes in the charges against Lubanga, given the continued high occurrence of and general impunity for such crimes, especially after later arrests involved much broader charges, including sexual crimes. They strongly urged the Prosecutor to broaden his investigations.<sup>68</sup>

**The Court has done little national outreach.** Thus the public has many misconceptions about the Court’s role and powers. Although this reflects a lack of resources and insufficient in-country staff, the Chief Prosecutor has said that the limited outreach was initially intentional, to avoid jeopardizing the peace process and to protect the safety of witnesses.<sup>69</sup> Local rights advocates strongly criticized this approach, and it appeared that the Court was planning a more proactive public education program in the future.<sup>70</sup>

In addition to the limitations on the Court’s impact that may result from its own decisions, there are other surprising effects of the Court’s activity in the DRC. First, the ICC’s presence in the country could unexpectedly reduce the likelihood of national prosecutions. Despite the intention spelled out in the ICC Rome Statute to complement and give precedence to investigations and prosecutions in national courts, the national justice sector seems to use the ICC as an excuse for not pursuing such cases. UN officials working to strengthen national capacities have been frustrated when, in at least one case, a judge insisted he should not take up a case if there were a chance that the ICC might prosecute it. This may be an excuse for inaction, but some have suggested that the ICC should announce publicly that it has concluded cases from a certain region, to remove this perceived obstacle.<sup>71</sup> Of course such an announcement could have a contrary effect if the constant threat of ICC action is intended to temper criminal behavior.

The ICC’s engagement also affects the logic and perceived options of international involvement. Before the 2008 Goma negotiations, South Africa reportedly put forward an offer of exile to Laurent Nkunda several times. Sources confirm that such an arrangement had been well worked out, and Nkunda gave it serious consideration.<sup>72</sup> However, it has become more difficult for states that subscribe to international law to offer exile in good faith to persons who may be indicted for international crimes. This has been made clear by the case of former Liberian President Charles Taylor, who was in exile in Nigeria for two years before being arrested by an international court for war crimes and crimes against humanity.<sup>73</sup> In the DRC, it became increasingly clear that Nkunda could be the target of ICC investigations in the future. If the Court issued an arrest warrant for Nkunda, South Africa would be obliged to transfer him to The Hague. Not wishing to make a promise they might not be able to honor, South Africa reportedly withdrew the offer of exile, offering instead a six-month study visit.

#### 4.2.1. The ICC’s Impact on Children

Another surprising effect is related to the impact on child soldiers. As a direct result of the ICC’s work, there has been a remarkable change in the understanding and treatment of child soldiers in Eastern DRC.

67 Joint letter to the chief prosecutor of the International Criminal Court, July 31, 2006; www.hrw.org.

68 « Droits de l’homme: appels à la CPI pour punir les crimes sexuels en RDC, » Agence France Presse, December 10, 2007.

69 Frank Petit, *Sensibilisation à la CPI en RDC: Sortir du « Profil bas, »* ICTJ, March 2007; www.ictj.org.

70 The Court’s outreach report, issued at the end of 2007, addresses many of these concerns directly. Outreach Unit of the ICC, *Outreach Report 2007*, International Criminal Court, 2007.

71 Interview, UN official, Kinshasa, 2008.

72 Interviews, diplomats and UN officials Kinshasa, May 2008

73 An indictment against Liberian President Charles Taylor was unsealed in June 2003 by the Special Court for Sierra Leone. Nigeria granted him exile two months later, allowing a transitional government to take power in Liberia. In early 2006 the newly elected government of Liberia requested that he be turned over to the Special Court. After an apparent escape attempt, Taylor was apprehended in Nigeria and turned over to the Special Court. He would ultimately be tried in The Hague. See Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, Centre for Humanitarian Dialogue and ICTJ (November 2007); www.ictj.org.



Thomas Lubanga was the first to be arrested by the ICC in March 2006 on charges of the recruitment and use of child soldiers. This indictment drew considerable attention to the issue of child soldiers, not least from other rebel leaders in the country, all of whom probably had children among their forces.<sup>74</sup>

The effect was twofold. On the positive side, Lubanga's arrest had an enormous educational impact, making clear what was not previously understood: that recruiting, enlisting, and using children to fight is a war crime. In a population-based survey conducted in 2007, for example, only 22 percent of respondents in Eastern Congo believed that those who forcibly recruited children should be held accountable for their actions.<sup>75</sup> It may seem surprising from afar that the use of child soldiers is not naturally understood to be a crime; but in fact child soldiers had been part of the entourage of every senior armed leader in the DRC for some time. Laurent Kabila's kadogo troops were probably the best known. In some places in the East, parents have even "donated" their children to an armed group to help protect the community.<sup>76</sup> More commonly the conscription of children was forced—by kidnapping them from their villages, for example; but even in those cases militia and army commanders were so accustomed to the practice that they considered it a normal part of war.

The Lubanga arrest changed this. Suddenly the leaders of armed groups understood that they also could be at risk of arrest if they were caught with children in their ranks. Children's rights advocates in the DRC found the ICC's actions to have an extraordinarily positive educational impact.

However, this also presented a problem for the armed groups, as there was no apparent way to release the child soldiers into a formal system of demobilization without, in so doing, admitting to the crime. Children's rights advocates began to see a new pattern emerge. After Lubanga's arrest, armed groups entering demobilization sites no longer brought children with them. Instead, according to many who have worked on child demobilization programs, the children were abandoned—left behind in the forest or perhaps in a village. In a few cases the armed group would return the children to their families. Only a small proportion of the abandoned children would find their way to UN or other children's service agencies, whose programs were designed on the assumption that child soldiers would be released through the official demobilization process. In addition, demobilization benefits are generally available only to those demobilized through formal entry points.

This effect was seen in other ways as well. Youths entering demobilization centers who were apparently minors began to insist they were adults. They would sometimes mention the Lubanga case, saying that they "didn't want what happened to Lubanga to happen to their commander." There were reports of families that had volunteered their sons to join an armed group, which then refused to take them back, fearing this would make them complicit in a crime and put them at risk of ICC arrest. The lack of understanding of the ICC's targets and intentions began to play out clearly in these cases.

The direct relationship between this new pattern and the ICC arrest of Thomas Lubanga caused children's rights experts to refer to this phenomenon as the "Lubanga effect." This was well known among children's rights workers in Eastern Congo. Some noted that it made their job much harder, as it became much more difficult to liberate children from armed groups.<sup>77</sup> Nevertheless, the children's rights advocates interviewed for this report concluded that the educational impact of the ICC outweighed these factors, and

---

74 The national armed forces are also reported to have children within their ranks.

75 Patrick Vinck, Phuong Pham, Suliman Baldo, and Rachel Shigekane, *Living with Fear: A Population-based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo*, Human Rights Center of the University of California Berkeley, Payson Center for International Development, and ICTJ, August 2008. The respondents were in Ituri, North Kivu, and South Kivu.

76 The donation of children was more common among local Mayi Mayi groups, which were initially conceived as community-based protection forces. This practice is also not acceptable under international standards.

77 It was estimated that several thousand children remained with government forces and armed groups in the DRC as of mid-2008. Interviews, children's rights experts, Kinshasa, May 2008, Goma, June 2008.

they saw the overall effect of the ICC's action as positive.

The UN Secretary General's report to the Security Council in June 2007, based on information from MONUC and UNICEF, makes reference to this problem:

Large numbers of children are reportedly being hidden by their commanders in Masisi territory in North Kivu. . . . Throughout the mixage [DDR] process, children have been hidden by the commanders and prevented from going to mixage sites to avoid their separation by child protection agents. Some of the children interviewed mentioned that orders to hide them came directly from Laurent Nkunda and from Lt. Colonel Ngaruye Baudoin. . . . Children are given various reasons for being hidden. . . . In some instances, commanders reportedly cited the capture and trial of Thomas Lubanga by the International Criminal Court as reasons for not taking them to the mixage centres. When children are brought along with the adults to the mixage centres they are often forced to declare an age above 18 years.<sup>78</sup>

This UN report also states: "Denial of the presence of children among the ranks, active obstruction of the separation of children, and threats made against child protection agents working to separate children have become frequent in Ituri and North Kivu."<sup>79</sup>

This report also notes that the recruitment of children into the armed groups decreased slightly (by 8 percent) from June 2006 to May 2007, in the year immediately following Lubanga's March 2006 arrest. Interestingly, the various reasons the report gave to explain the decrease do not include the Lubanga arrest.<sup>80</sup> However, another report by the Coalition to Stop the Use of Child Soldiers documented an upsurge in child recruitment in January 2007.<sup>81</sup> There also seemed to be no deterrent effect on the recruitment of child soldiers when fighting loomed again in late 2007. Numerous NGO and UN rights advocates confirm that recruitment of child soldiers continued at its normal, fairly high, rate in mid- to late 2007.

DDR agreements often result in higher recruitment rates—including of child soldiers—so that armed groups can benefit from higher troop numbers at the moment of demobilization. However, during the Goma process the UN and the EU, both deeply engaged in the DDR process, have made it clear that estimated troop numbers cannot include child soldiers. Although all the militia leaders had an interest in claiming a high number of troops—which would translate into higher ranks if they joined the national army and bring them other benefits and prestige—at least one incentive for the recruitment of children had been removed. In the months after the Goma accord there was little evidence of continuing recruitment of child soldiers.

#### 4.2.2. Peace and Justice

The DRC provides an important early example of the ICC acting in a context of ongoing conflict. Despite worries at various points along the way, as suggested above the Court's involvement in the country has not seemed to have a particularly negative impact on the peace process. Once physically removed from their support base and cut off from their networks, the targeted militia leaders have seemingly not been able to retain the intense support that might lead to a backlash of violence upon their arrest.

---

78 *Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo, S/2007/391*, 28 June 2007, p. 8.

79 *Ibid.*, p. 5.

80 The report states: "The reasons for the decrease can be attributed to a combination of factors, including the progress made in the implementation of the disarmament, demobilization and reintegration programme for children, the army integration process, a constant decrease in the number of active fighting zones, and persistent lobbying by child protection networks against the recruitment of children." *Ibid.*, p. 5.

81 In particular, this report noted that child recruitment by Congo armed groups had increased from refugee camps and communities in Rwanda. Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2008*, p. 108, based on interviews in Eastern DRC in April 2007.

The ICC was aware of these concerns and the risk of negative reaction to its actions. International partners, including the international facilitators of the peace process, would also bring these concerns to the Prosecutor's attention when the timing of expected ICC action seemed particularly ill-advised. The most striking example came with Ngudjolo's arrest. Apparently the Court had planned to have Ngudjolo arrested in Kinshasa even while peace talks were under way in Goma in January 2008. It was feared that this arrest might alarm militia leaders who were poised to sign the Goma agreement (especially since Ngudjolo had himself signed the 2006 Ituri Agreement just 14 months earlier). Key international participants at the Goma talks reportedly urged the ICC to delay unsealing the warrant for his arrest. The ICC accepted these concerns, and the arrest took place shortly after the signing of the Goma agreement.<sup>82</sup>

Some rights advocates in the DRC argue that the ICC's involvement played an important role in calming the war in Ituri.<sup>83</sup> It might have, although it is difficult to determine the difference in impact of the range of intensive programs aimed at resolving conflict in the region (as well as the central role of Artemis, the robust EU peacekeeping mission). It is clear that those involved in armed conflict in Eastern DRC fear the ICC, but many may also calculate that the ICC cannot try everyone, so it will not necessarily reach them. But the ICC remains the one major factor that cannot be negotiated away; nor can any national law provide immunity from it.

There have only been a few arrest warrants issued by the ICC for crimes committed in the DRC, and three men arrested and transferred to The Hague. But the past three years suggest that warlords do change their behavior in response to the threat of prosecution—although in this case their primary behavioral change has been to hide the evidence that they are using child soldiers. The arrests have made it clear, even for the least-sophisticated armed groups, that use of child soldiers and sexual violence are criminal acts. This understanding does not extend to general abuse and arbitrary killing of civilians. Many rebel commanders continue to believe such acts are an acceptable part of war, according to observers close to the conflict. This perception is borne out by the survey quoted above, which found that only 5.5 percent of respondents in Ituri and the Kivus believe that those who forcibly recruit adults should be held accountable for these crimes.<sup>84</sup>

The challenge now, many observers say, is to develop a more strategic and high-level approach, so that the message is clear that even the most powerful are not above the law.

---

82 Interviews with UN officials and diplomats, Kinshasa and Goma, 2008

83 Interview, UN official, Kinshasa, 2008

84 Patrick Vinck, et al., *Living with Fear*.

## 5. Beyond Prosecutions: An Assessment of Other Transitional Justice Measures

As noted above, peace agreements in the DRC have not included much language on justice issues other than amnesty and the problematic agreement for a TRC in the Sun City accord. There has also been little progress on these issues independent of the peace negotiations.

### 5.1. Reparations

International law on gross human rights violations establishes the right of victims to reparations, with the accompanying implication of state duty to make such reparations. This term means a series of measures for victims, including material compensation as well as symbolic forms such as memorialization.<sup>85</sup>

To date there has been very little effort to address the question of reparations for victims of gross human rights violations in the DRC on an individual or a collective basis. The TRC included reparations as part of its mandate, but they were never considered. Indeed, establishing some level of clarity free from political manipulation about the complexity and reality of the conflicts in the DRC may be necessary first; it is difficult to imagine how a reparations program could be well-designed without it and avoid fueling further conflict.

The only form of reparations that has made progress is not directed at victims but at the state: In 2005 the International Court of Justice found Uganda liable for gross human-rights violations and other crimes committed by its forces in Ituri and Kisangani and ordered Uganda to pay reparation to the DRC.<sup>86</sup> Negotiations between the two states to settle the exact payment have yet to yield a clear result. The UN Security Council also declared in 2000 that both Rwanda and Uganda should make reparation for loss of life and property damage inflicted on the civilian population of Kisangani, but no action has been taken.<sup>87</sup>

### 5.2. Demobilization and Security System Reform

Justice-sensitive approaches to security system reform (SSR) seek to build the integrity and legitimacy of

---

<sup>85</sup> See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly resolution 60/147, and *UN OHCHR Rule of Law Tools for Post-Conflict States: Reparations Programmes*, United Nations (2008).

<sup>86</sup> International Court of Justice, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), December 19, 2005. The Court threw out a similar claim by the DRC against Rwanda.

<sup>87</sup> UN Security Council resolution 1304 (2000).

institutions in the security system and empower citizens so that they become full rights-bearing citizens in relation to public institutions, rather than victims of repression by them. Measures to address the integrity of an institution could include vetting—the removal of human rights abusers from public office—as part of broader reforms to install internal discipline and external oversight. Actions such as public apologies, changing the name of an institution, or redesigning the uniform and insignia can all contribute to building the legitimacy of an institution in the eyes of the population.

Reform of the police and army in the DRC is a pressing concern. The army is incapable of defending the territorial integrity of the state and is one of the main perpetrators of human rights violations in the DRC today. The police and judiciary cannot deliver even basic rule of law. A culture of impunity within the security system was entrenched by the formation of the army during the transition, when various disarmament, demobilization, and reintegration programs overlooked the human rights records of those entering the national army, even in the highest positions. As a result, men believed to be directly responsible for systematic human rights violations hold senior offices in the police, army and political establishment. To date there has been little international and no domestic political will to address impunity in the security system.<sup>88</sup>

Yet the issue of vetting is beginning to appear on local, national, and international agendas. Vetting was tabled at the Security Sector Reform Round Table convened by the government in February 2008. In a December 2007 resolution, the UN Security Council also officially requested the Congolese authorities to establish programs for human rights-based vetting.<sup>89</sup>

### 5.3. UN Mapping Exercise

One notable recent development is a human rights mapping exercise that the UN Office of the High Commissioner for Human Rights (OHCHR) will conduct with the agreement of the government. This project will map the violations of human rights and international humanitarian law that took place in the country between 1993 and 2003. It will also assess domestic capacity to deal with human rights violations and make recommendations for possible transitional justice mechanisms that could address the legacy of abuse. The mapping project could prove to be an important catalyst for transitional justice in the DRC, especially if it can engage domestic stakeholders.

---

<sup>88</sup> See Laura Davis, *Justice-sensitive Security System Reform in the Democratic Republic of the Congo*, Initiative for Peacebuilding (2009)

<sup>89</sup> UN Security Council resolution 1794 (2007), paragraph 15.

## 6. The Role of Civil Society

In the absence of any desire by the belligerents to push for a justice and human rights agenda during negotiations from Sun City onward, the burden fell to civil society to try to keep a justice agenda alive during and after the transitional government. Yet human rights defenders—and civil society in general—face considerable challenges.

Toward the end of the Mobutu era civil society in the DRC became internationally prominent and could mobilize significant parts of the population. It was a major political and moral force locally and nationally. But unity in opposition to a dictatorial regime did not automatically lead to unity, or even the necessary leadership, in designing what came next.

Civil society organizations and the political (unarmed) opposition participated in the Sun City negotiations. They found some challenges in dealing with the international facilitator, Ketumile Masire. Because he did not speak French, communication was difficult, and some participants felt he was not favorably inclined toward the involvement of civil society. As the talks were held outside the DRC, civil society participants could not easily consult with their constituencies. Finally—but crucially—participation in the talks exposed civil society actors, particularly human rights defenders, to targeting by the belligerents when they sought to denounce human rights violations.

Despite civil society's presence, the Sun City process was dominated by the belligerents. They had greater numbers, and, as participants recall, whenever there was a problem, Masire, the facilitator, would conduct negotiations with belligerents and then present the agreement to the civil society and political opposition groups as final.<sup>90</sup>

Not all the problems civil society encountered at Sun City were caused by external factors, however. Despite intensive preparation, which included support from European governments and international NGOs to help civil society and the political opposition prepare their position and advance their negotiating skills, the civil society grouping was not as unified as expected during the talks. This may be partly attributable to unduly high expectations placed on the group by themselves and others. However, contemporary accounts and interviews five years later suggested that some members of civil society at Sun City placed personal ambition and desire for power ahead of their agreed position.<sup>91</sup> Some even suggest a level of corruption in the manner that negotiations took place and political positions were apportioned to civil society actors. All of this undermined the strength of the group as a whole.

---

90 Interview, civil society representative, Kinshasa, April 2008

91 See, for example: Pierre Anatole Matusila and Thierry Nlandu Mayamba, *Regard sur le Dialogue Intercongolais de Sun City: Trois Perspectives*, RODHECIC, August 2002. Interviews, civil society representatives Kinshasa, April-May 2008

During the post-Sun City transitional government and after the 2006 elections, many civil society activists joined the political institutions, and during the electoral campaign many joined the political process. With key actors joining government institutions, independent civil society was considerably weakened. This situation was worsened by a generalized lack of resources and capacity, and by the fact that few NGOs can claim genuine constituencies among vulnerable populations. Strong and courageous individuals and organizations are still active, but human rights defenders continue to be oppressed.

Despite the generally weakened condition of civil society, leading officials at the January 2008 Goma conference point out that the pressure to hold such a large peace conference came directly from local civil society organizations, which lobbied provincial officials. There was some initial skepticism from the public, and the opening of the conference was postponed while a team led by Abbé Malumalu, the conference facilitator, toured the Kivus explaining the reasons for the conference. However, this awareness raising effort did not address the underlying anger among some sectors of the public that the government was going to negotiate with Nkunda instead of militarily defeating him as promised. Some also feared that Congolese Tutsis would be granted an autonomous, or even independent, territory.<sup>92</sup> Indeed, a parallel, independent civil society conference that took place in Kinshasa at the same time maintained that the government should not negotiate with Nkunda at all.<sup>93</sup> Local civil society actors were also angry that the conference was organized and controlled from Kinshasa, even if led by Kinshasa-based Kivutiens.

There are, therefore, many parallels between Goma and Sun City. In both cases, negotiations between belligerent groups were the real business. Some observers even referred to the civil society participation, and particularly the large conferences that were organized, as serving as a smoke-screen to give the government the political space to negotiate directly with the rebel groups. In neither case can the formal outcomes of the talks be said to reflect civil society demands.

On the positive side, however, it was through the civil society delegations at Sun City and Goma that women's voices could be heard, at least partially, in analyzing the roots of the conflict and preparing recommendations. Women were otherwise severely underrepresented in the official delegations of belligerent groups and the government and among the national or international facilitators at both conferences.

Despite the challenges facing Congolese human rights defenders and the challenges of civil society participation in general in cease-fire talks, local civil society, particularly in the Kivus, supported by national and international actors, has mobilized a campaign around the most pressing current problem of impunity in the DRC today: the epidemic of rape and sexual violence. Local women's associations, other human rights defenders, and medical and development groups have joined to achieve a remarkable feat: Their campaign to draw attention to the plight of women and girls in the DRC has forced a change in international and national political will to address sexual violence.

Finally, national civil society and the international facilitators acknowledge the important role that international civil society organizations played in supporting a justice agenda at peace talks, including providing technical assistance. National civil society leaders noted that training, support, and expert input from international civil society actors at Sun City, such as the Center for International Negotiation Practice, the International Human Rights Law Group (now Global Rights), and the International Foundation for Election Systems, were useful in building the capacity of civil society participants at the talks. As discussed above, Human Rights Watch was the primary international human rights organization present at Goma and provided important expert input there.

---

<sup>92</sup> Interviews, civil society representatives, Kinshasa, May 2008, and Goma, June 2008.

<sup>93</sup> *Déclaration Finale*, Conférence nationale sur la paix, la sécurité et le développement dans les provinces du Nord-Kivu et du Sud-Kivu, Kinshasa, January 14–16, 2008.

## 7. Conclusions

Ten years of seeking and brokering peace in the DRC have resulted in very limited justice. It is true that significant efforts have been made to advance accountability (or at least preserve the possibility of justice), but these have not had significant results. Questionable political will at the national level; pressures from the international community to focus on the immediate priority of stopping the fighting; and a large gulf between independent justice-seeking advocates (and the public, which largely agrees with them) and the political leadership—all are factors that have led to this paltry record.<sup>94</sup>

The DRC is a difficult place to advance justice, given the extremely weak national judicial system and poor record of accountability for many years of massive crime. But there have also been lost opportunities where advances could have been made, such as the creation of a national truth commission, which was compromised from the start. This failure followed from the undue influence of the belligerents in the commission's creation.

The DRC faces an additional challenge: It has been trying to implement policies of peace even while war has continued or been constantly threatened in other parts of the country (or even in the same region with other armed groups). Even while concluding each cease-fire or peace agreement, the DRC was never fully at peace, and the humanitarian impact has been extraordinarily grave. These conditions have influenced each set of decisions and made it difficult for any actor to advance the priority of accounting for the crimes of yesterday when further atrocities are threatened every day. The extraordinary gains from the often illegal expropriation of natural resources have fed the conflict, with all sides profiting handsomely, often at the highest levels. The possibility of justice for these crimes is even more remote.

Broad and deep impunity is the rule. Little or none of the root causes have been seriously addressed. The urgent prioritization of peace, understandable in many respects, has sent the signal that wrongful behavior is not likely to be punished. Belligerents have little fear that there may be consequences for their acts, leading to more atrocities and conflict. So there is no deterrent that a real justice program might bring. The one exception, the ICC, has been important, but its record has been mixed.

It is now clear that further conflict in Eastern DRC will require further peacemaking efforts. As of late October 2008 armed conflict between Nkunda's troops and national army had begun again, and many observers fear that the conflict could escalate significantly.

---

94 This desire for justice as an integral part of peace is supported by the 2007 survey, which found that 85 percent of respondents considered it important to hold accountable those who committed war crimes, and 82 percent felt accountability was necessary to achieve peace. See Patrick Vinck et al., *Living with Fear*.



The lessons of peacemaking in the DRC are applicable to future peacemaking efforts in the DRC itself as well as other countries around the world. These lessons and recommendations show that some important efforts were made to advance justice, but significant opportunities have been missed. Ultimately very little progress has been made in promoting accountability for massive crimes.

## 7.1. Lessons from the DRC

### Promoting justice in peace talks:

1. **Policy options regarding justice should be proactively identified before peace talks take place.** If done earlier, the UN mapping project for the DRC could have helped to outline policy options for peace discussions. A proactive approach to identifying policy options would be welcome and could advance the limited justice initiatives in the DRC to date. This model, or something similar, could be considered before peace talks in other contexts.
2. **Focused advocacy efforts can change policy, but such efforts and the resulting policies should also be explicitly incorporated into the peace process.** The civil society-led campaign to address sexual and gender-based violence in the DRC demonstrates the power of well-coordinated civil society campaigns. It linked Congolese and international actors to bring about real change in international and national political agendas. However, holding perpetrators of sexual crimes to account has not been explicitly addressed in any of the peace agreements to date. Despite prioritization of policies to address these crimes, the rate of sexual crimes continues to be very high.
3. **A role for civil society at peace talks will strengthen the justice discussion and is likely to deepen public trust in the outcome. However, civil society actors must be credible and independent, and they must then have a real voice in the process.** Civil society participation in peace negotiations is sometimes possible only as a result of international insistence or support. But the inclusion of civil society must be addressed with care. Careful selection should ensure representation of legitimate civil society actors and ensure that human rights defenders are included.

Civil society should also have input in the substance of agreements. Both Sun City and Goma suffered weakness in this area, with the warring parties generally dictating the final terms and little room for broader discussion, even if civil society groups were physically present at the peace conferences. Technical assistance to local civil society, including training in negotiating skills, can be very helpful.

4. **Technical assistance to participants in peace talks can considerably strengthen the justice-oriented results in a peace accord.** Timely assistance on the range of policy options that are available, plus the constraints or requirements of international law and best practice, can make an invaluable contribution.

As international human rights law becomes more complex it would be advisable for human rights experts to accompany facilitators from the international community, including the UN, EU, African Union, and other regional bodies and participating states, to provide input on justice issues. These experts should have knowledge that extends beyond the legal parameters to the broader arena of transitional justice. One model for consideration would be a high-level adviser on human rights appointed to assist the talks, independent of any party or facilitator.

Furthermore, international facilitators rarely bring the depth of expertise about the history and local dynamics of a conflict that would be useful to broker a just accord. International facilitators should prioritize consultation with independent national and international observers who can provide this substantive input.

5. **The DRC shows the positive effect of a consistent position on justice by all key facilitators involved in talks.** At the Goma talks the international facilitators in the DRC put forward a consistent message on the question of amnesty. This made it difficult for the belligerent groups to demand certain immunities.

#### **Strengthening the text of the agreement:**

6. **Limiting an amnesty so that it does not cover international crimes may be more possible and less strongly resisted than might be expected.**

Amnesties that conform to the standards required by international law and practice have been agreed to relatively easily in demobilization, cease-fire, and peace agreements in the DRC. The increasing international clarity of these standards is having a direct impact on the text of these agreements.

7. **However, mediators and facilitators should move beyond the minimal approach of ensuring the correct language of any amnesty** and take a proactive stance on incorporating other measures for victims, reforms, and prevention of future abuses.
8. **Even in preliminary agreements or cease-fire accords, where details may be lacking, there are great advantages in signaling the intention to implement broader accountability or reform measures,** such as vetting, truth-seeking, reparations, and judicial reforms.
9. **Flawed justice components should be strongly resisted.** A justice initiative that is fundamentally compromised may be worse than none at all. The TRC agreed to in the Sun City Accord was flawed in giving the belligerent groups membership in the commission. This model should have been rejected from the outset.

#### **Implementation and broader justice initiatives:**

10. **A credible, independent mechanism to monitor and report human rights violations, to be immediately implemented in the wake of a peace agreement, should be given strong consideration.**

It could be included in the text of the accord, with immediate consequences in the peace process for those who commit abuses later. Where armed conflict continues or is threatened, such a mechanism is particularly important.

International facilitators and other donor states welcomed the call for a high-level, special envoy on human rights in Eastern DRC, advanced by a group of international and national NGOs after the Goma accord.<sup>95</sup> The implementation of this idea has been slow, however.

11. **While excluding international crimes from any amnesty is important, this does not equal justice. Greater effort should be made to further credible and independent national prosecution efforts.**

In the DRC, the government has failed to meet – or even attempt to meet – its obligations to prosecute those suspected of the most egregious human rights violations. The only real challenge to impunity for serious human rights violations is the International Criminal Court, whose reach is necessarily limited. Given the scale of the international community's commitment to support peace in the DRC, more pressure should be brought to bear on the national authorities to prosecute serious human rights abusers, including those aligned with the government.

---

95 See Human Rights Watch, "DR Congo: End the Horrific Suffering in Eastern Congo: 63 Leading NGOs Press for Urgent Implementation of Goma Peace Agreement," April 23, 2008; and Human Rights Watch, "Letter to Abbe Malu Malu and the international facilitators to the Goma peace agreement" May 2, 2008; [www.hrw.org](http://www.hrw.org).

12. **Criminal accountability that does not address the complicity in crimes on all sides of a conflict and at all levels—including the government as well as regional leaders deeply involved in a conflict—will have a limited effect.**

The role of Uganda in the previous DRC war has been well established by the International Court of Justice. Rwanda is known to back Nkunda and the CNDP. The government is widely reported to be involved in abuses linked to resource extraction by the FDLR, and the national army is known as the worst abuser of human rights. The ICC has not ventured into these arenas of responsibility, focusing instead, on the whole, on lower-level militia leaders.

13. **The threat of action by an international court such as the ICC may indeed affect the behavior of combatants, but in unexpected ways. Misunderstandings regarding the ICC should be recognized and addressed early and directly. Public outreach and clarity of policy are critical.** The unexpected side-effects of the ICC on the DRC's continuing war in the East require further inquiry. Evidently, in the short term, because of the "Lubanga effect," child combatants are less likely to receive the services they need and deserve, and so children's protection programs need to be redesigned. Meanwhile, there is little evidence that armed groups have been deterred from recruiting more children in Eastern DRC.

---

Building peace and promoting justice are difficult in a complex and demanding environment such as the DRC. Peace and justice may be presented as in conflict, not least by the warring parties. The relationship between peace and justice, particularly during a period of negotiations, remains under-studied and little understood. But analysis of the past ten years of peacemaking in Congo suggests that, although many challenges lie ahead, small steps forward have been made in promoting both peace and justice. Learning from this experience may be useful in future negotiations in Congo as well as in other protracted conflicts where civilians continue to suffer at the hands of armed groups.

ICTJ New York  
5 Hanover Square, 24th Fl.  
New York, NY 10004  
Tel +1 917 637 3800  
Fax +1 917 637 3900  
[www.ictj.org](http://www.ictj.org)