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A FIRST FEW STEPS

The Long Road to a Just Peace
in the Democratic Republic of the Congo

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INTRODUCTION

About the ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. It provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments, and others. The ICTJ assists in the development of strategies for transitional justice comprising five key elements: prosecuting perpetrators, documenting violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and advancing reconciliation. The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so.

The ICTJ in the Democratic Republic of the Congo

The ICTJ has provided comments on draft legislation for a truth commission and traveled to Kinshasa to hold workshops and consultations with local groups, the UN, and international NGOs. The Center has been working with local civil society groups to enhance their ability to formulate transitional justice policies and lobby effectively for their implementation. In January 2004, the ICTJ held an international workshop in Cape Town, South Africa, to discuss transitional justice options for the Democratic Republic of the Congo. Congolese government officials and civil society representatives, UN officials, the prosecutor of the International Criminal Court, international NGO representatives, and experts discussed prosecutions, truth-seeking initiatives, and possible legal and institutional reform measures to advance justice during the transition. The Center also received a request to provide advice on vetting as the UN Mission in the Democratic Republic of the Congo (MONUC). The ICTJ has advised MONUC and other members of the international community on issues relating to the truth commission, vetting, and prosecutions.

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A FIRST FEW STEPS

The Long Road to a Just Peace in the Democratic Republic of the Congo

EXECUTIVE SUMMARY

On May 17, 1997, a rebellion unseated Mobutu Sese Seko from decades of dictatorship over the Democratic Republic of the Congo (DRC). Liberated from the dictator's corrupt and repressive rule, the Congolese soon found themselves at the heart of "Africa's First World War." Rwanda and Uganda, initially allies in the effort to overthrow Mobutu, became adversaries of the new government, each backing the creation of a rebel movement. Additional regional powers came to the aid of the government, sending their armies into the DRC's resource-rich land. The resulting, protracted struggle was fueled by the plunder of the country's vast natural wealth as the DRC was effectively split into three areas controlled by the government and two rebel groups. A July 1999 cease-fire began a long peace process, in which peace talks held in Sun City, South Africa, resulted in the adoption of an inclusive peace agreement in December 2002.

The conflict saw a deliberate targeting of civilian populations, with many, if not all, sides regularly committing gross violations of human rights. In addition to the struggle to disarm warring factions and maintain the fragile peace, the DRC is currently faced with the challenge of addressing this legacy of human rights violations. Realizing the importance of this in building the foundation for a democratic state, participants at the peace talks discussed transitional justice measures, and the Sun City resolutions included a commitment to create a truth and reconciliation commission and a request to the United Nations to establish an international tribunal. The International Center for Transitional Justice (ICTJ) hosted an international workshop in Cape Town, South Africa, on January 22–24, 2004, to contribute to the debate on the difficult issues facing those trying to achieve justice in the DRC. Participants were drawn from Congolese government and civil society, international human rights NGOs and academic institutions, the International Criminal Court (ICC), and the UN. This paper benefits from the discussions in this workshop, as well as several missions to the DRC, and seeks to evaluate the initiatives undertaken thus far and make recommendations on the way forward.

The development and implementation of effective transitional justice policies in the DRC has been plagued by lack of security, fear of destabilization, limited political will, scarce resources, and the overly prescriptive nature of the Sun City resolutions. The resolutions limited the opportunity for broad consultation on which transitional justice mechanisms would be most appropriate in the DRC. This paper focuses on three specific measures: prosecutions, whether in domestic or international courts; the truth and reconciliation commission; and the process of "vetting," or screening and certifying security personnel and other public employees to ensure their eligibility for specific public sector positions. The challenge in the DRC is to incorporate elements of justice in an extremely complex situation, and to set in place the right conditions to ensure that initiatives that might be premature now can be initiated as soon as the situation allows it.

This paper reviews four possible forums to prosecute those most responsible for conflict-related human rights abuses: domestic Congolese courts, the ICC, an international tribunal, and a hybrid court. There are numerous challenges facing the DRC in pursuing domestic prosecutions, including the determination of applicable law and the statute of limitations. The ordinary criminal code does not proscribe international crimes, such as genocide, war crimes, and crimes against humanity, while the current military criminal code does not define such crimes in accordance with international law. The DRC has ratified many human rights conventions and its constitution does permit the direct application of international criminal law; however, Congolese judges have been reluctant to apply the provisions of treaties absent a specific act of incorporation by the

legislature. Given these limitations, another alternative would be to prosecute suspects for underlying crimes, such as murder, rape, and assault; however, this option does not adequately address the serious nature of the abuse and might create difficulties in overcoming statutes of limitation and prosecuting those with command responsibility. In order to overcome these obstacles to prosecuting perpetrators in domestic courts, some modifications to Congolese law might be necessary, and judges and prosecutors may need to be willing to apply international criminal law directly in domestic courts.

Further impediments to domestic trials may arise from the primacy of military courts in trying international crimes and the amnesty agreed on during the peace negotiations. Once the Congolese Parliament adopts the draft law implementing the Rome Statute of the ICC, exclusive jurisdiction for international crimes will be given to the civilian courts. The current amnesty decree excludes war crimes, genocide, and crimes against humanity, but it is important that it does not serve as an impediment to the prosecution of underlying crimes. It would be desirable for the Parliament to adopt an amnesty law that narrowly defines a few specific acts for which amnesty may be granted, and clearly excludes all serious human rights violations.

Through decades of dictatorship and conflict, the independence and capacity of the Congolese judiciary has been significantly undermined. This paper does not intend to propose solutions to all these deficiencies, but it does suggest that a limited capacity to deal with international crimes could potentially be built in a relatively short time. Prosecutions should be concurrent with the rebuilding of the entire Congolese criminal justice system. The judicial reform initiative in Bunia, aimed at rapidly re-establishing criminal justice capacity, might offer insights to those considering such an effort at the national level.

Further challenges for trials in domestic courts include government officials' lack of political will (particularly among those responsible for human rights abuse) and the possible lack of cooperation from foreign governments in obtaining evidence crucial to prosecuting serious offenders.

While the principle that national courts should be the primary venue for addressing past crimes is increasingly accepted, other options must be discussed for the DRC. Despite the fragility of the transition, there seems to be a growing consensus that the ICC should remain engaged in the DRC and that it could play a positive role in the peace process. The ICC will make a more significant contribution to transitional justice if it proactively communicates with Congolese citizens and generates realistic expectations regarding its reach and capacity. The ICC should consider holding its proceedings in the DRC in order to increase their impact on Congolese society.

Because the ICC will try only a handful of perpetrators—and because its temporal jurisdiction does not cover most of the period of conflict—it should not be seen as the only avenue for achieving criminal justice. Aside from the option of domestic trials, the possibility of an additional international mechanism should be considered. This paper examines the advantages and disadvantages of an international tribunal and a hybrid court. While participants at the peace talks and representatives of the Congolese government have expressed a desire to have a fully international ad hoc tribunal established, representatives of the United Nations and its member states have thus far not expressed a willingness to establish such a court. This paper asserts that in order to move discussions on impunity forward, the Congolese government may need either to reconsider its position and request the establishment of a hybrid tribunal or to make a public and unambiguous request for the establishment of international tribunal, to which the UN should provide an official response.

This paper analyzes the benefits of a hybrid court, with a combination of international and domestic resources, vis-à-vis the alternatives of domestic trials and fully international tribunals. Hybrid courts seem to address many of the criticisms of international tribunals, such as cost and efficiency, while adding a level of independence and authority that may be missing from domestic courts. However, a hybrid court cannot restore confidence in local institutions as domestic efforts can, and it still represents a significant financial investment that some argue would be best made in repairing the domestic legal system. This paper argues that if a hybrid court is ever established in the DRC, it should be based upon an open and consultative process in which the views of civil society and victims of human rights abuse are taken into account. This paper outlines the policy issues that need to be confronted in this discussion.

Whatever mechanism or combination of mechanisms is established to prosecute perpetrators of serious human rights violations, there will inevitably be perpetrators of varying degrees of responsibility who cannot be prosecuted effectively because of the limitations on caseload capacity. Recognizing this “impunity gap,” this paper discusses the ways in which quasi-judicial or nonjudicial mechanisms may be used to address the vast majority of cases. An in-depth study could be conducted to examine the feasibility of using plea bargaining of low-level offenders to close this gap and to help prosecutors gather important evidence against high-ranking perpetrators. It also suggests that within communities in the DRC, reconciliation processes may exist that can be integrated into formal processes to address low-level perpetrators.

A law establishing the truth and reconciliation commission (TRC) in the DRC was adopted on July 30, 2004. There was a lack of sufficient consultation in the country prior to the adoption of this law, which resulted in weak legislation and frustration among important sectors of civil society. The members of the TRC were appointed through a highly politicized process, which resulted in serious doubts among the international community and local Congolese activists as to whether the TRC can become an independent, credible institution. In an effort to address these criticisms, the revised law expands the membership of the commission, although it still allows political parties to maintain overall control of the appointments.

This paper asserts that the amnesty provision of the TRC law is ineffective and undesirable and should be reconsidered. The commission is currently unable to conduct in-depth investigations into human rights abuses, and has focused its ad hoc efforts on conflict mediation and resolution. If the commission is unable to undertake in its primary work during the transition period, it may be preferable to halt its work until the elections are concluded. This could allow for a comprehensive consultation process to take place, leading to a stronger mandate and greater civil society involvement in discussions regarding the TRC.

This paper also examines the need to undertake institutional reform. Institutional reform is a complex and enormous undertaking in the DRC, yet it is essential in preventing recurrence of abuses and establishing the rule of law. Many public employees, especially in the security sector, were involved in serious human rights abuses, and corruption is rampant. This paper argues that before an appropriate and realistic vetting program can be designed, a thorough assessment must be carried out in order to identify clearly the personnel reform needs and risks.

The paper suggests that the government of the DRC and the United Nations might consider establishing a commission of experts to recommend measures to pursue transitional justice in the DRC. While a commission of experts would certainly bring greater attention to the issue of accountability for crimes committed in the DRC and mobilize international resources to this end, such a commission would have to take into account the transitional justice measures already under way.

This paper demonstrates that much is to be done before a comprehensive transitional justice framework can be implemented. In order to take into account the complex realities of the current situation, including the fragile peace process, some reforms must be prioritized to create the necessary conditions for achieving justice. Some measures, such as certain prosecutions, can and should take place immediately; others need to wait for certain reforms and a more stable and secure environment. It is important to develop a holistic vision of how the goals of justice, truth, reparations, and reform can be advanced during the transition, and what conditions are necessary to sustain this work after the elections.

BACKGROUND

The Democratic Republic of the Congo (DRC) is the third-largest country in Africa, with more than 50 million inhabitants and nearly a million square miles of territory. It is also the biggest country in the Great Lakes region, which also includes Rwanda, Burundi, Uganda, and Tanzania. This region has been engulfed by a decade of devastating conflicts, in part following the regional destabilization caused by the Rwandan genocide. In 1996, Rwanda and Uganda backed a rebellion against Mobutu Sese Seko, who had ruled the country he renamed Zaire since 1965. Mobutu's rule embodied the worst characteristics of post-colonial African dictatorships: absolute concentration of power, one-party rule, cult of the personality, widespread corruption, cronyism, violent suppression of dissent, accumulation of colossal personal fortunes and, ultimately, total institutional decay.

Vast natural resources in the DRC, a country once defined as a “geological scandal” because of its plentiful natural resources, has been a key factor in the interest of foreign powers since Belgian King Leopold II founded the Congo Free State in 1885. Gold, oil, copper, cobalt, uranium, diamond, and coltan abound on Congolese soil, although these blessings have rarely been used to the benefit of the Congolese population.

Mobutu was supported by western powers, which saw him as a bastion against communism in Central Africa; this support quickly waned after the end of the Cold War. Deprived of external financial and political support, Mobutu was forced to start a democratization process, which culminated in the holding of a National Sovereign Conference in 1991–1992. The Conference elected Etienne Tsishekedi as Prime Minister and established a framework for the progressive democratization of the country. Unfortunately, Mobutu successfully sabotaged the democratic transition, and managed to cling to power for five more years.

Laurent-Désiré Kabila, a Katangan¹ who had intermittently fought Mobutu since the 1960s, led a seven-month rebellion with the backing of Rwanda and Uganda. On May 17, 1997, forces loyal to Kabila entered Kinshasa and assumed power. Mobutu had fled the country the day before, and most of his elite troops crossed the river to Brazzaville, where many still reside. Tensions soon arose between Kabila and his Rwandan and Ugandan allies, and in August 1998 a mutiny in the Congolese army triggered “Africa’s First World War,” arguably the deadliest conflict since the end of World War II.²

Rwanda and Uganda were initially allies, but later became adversaries during the conflict. Each backed the creation of a rebel movement³ and sent its own army to occupy vast swathes of Eastern Congo. In response, Kabila requested military assistance from members of the Southern African Development Community. Angola, Zimbabwe, and Chad responded to this request and sent their own armies to the DRC; Angola and Zimbabwe played a key role in preventing the fall of Kinshasa to the rebels and their foreign allies.

¹ Katanga is one of the 10 provinces (plus the city of Kinshasa) of the DRC.

² In a report published on April 8, 2003, the International Rescue Committee found that the conflict in the DRC had caused the deaths of at least 3.3 million between August 1998 and November 2002. (This excludes the victims of the 1996–1997 conflict.) Most of the deaths were attributed to malnutrition and easily curable diseases. They were most often linked to the displacement of populations and the collapse of the country’s economy and health-care system.

³ They first created the Rassemblement Congolais pour la Démocratie (RCD) to oppose the Kinshasa government, but fighting erupted in 1999 as the two competed for a dominant relationship with the RCD in order to ensure control over the diamond-producing region in Kisangani. Uganda then backed the creation of the Mouvement pour la Libération du Congo.

As in the 1996–1997 war, security concerns were invoked by Rwanda and Uganda to justify their aggression and occupation of northern and eastern DRC. In particular, Rwanda justified its intervention by claiming the need to eliminate once and for all the rear bases of *Interhamwe* and *ex-FAR*⁴ fighters. Rwanda also claimed to be protecting Congolese Rwandophone populations from human rights abuses committed against them, even invoking the threat of genocide.

Throughout the five-year long conflict, the DRC was effectively split into three areas controlled by three main groups. The Government (today known as “former government”) controlled the capital and most of central, southern, and western Congo; the “*Mouvement pour la Libération du Congo*” (MLC, Movement for the Liberation of Congo, created by Uganda when tensions arose with Rwanda) controlled northern areas in Equateur province; the “*Rassemblement Congolais pour la Démocratie*” (RCD, Congolese Party for Democracy, which maintained a close alliance with, and even dependence on, Rwanda throughout the conflict) controlled the province of Maniema, most of the Kivus, and parts of Orientale, Kasai Oriental, and Katanga provinces. Other, smaller groups have controlled certain areas at different times. A military history of the conflict is beyond the scope of this paper.

In July 1999, the Organization of African Unity (now the African Union) brokered a cease-fire in Lusaka, Zambia, which marked the beginning of a long peace process. However, little progress was made until President Kabila was murdered by one of his bodyguards in January 2001. He was succeeded by his son, Joseph, who immediately relaunched the peace process.

The revived peace talks, known as the “Inter-Congolese Dialogue” (ICD), were held in Sun City, South Africa, in 2002. The talks led to an inclusive peace agreement, which was signed on December 17, 2002, in Pretoria, South Africa, by the eight parties to the peace talks: the former government, the MLC, the RCD, the Political Opposition, Civil Society, the Mai-Mai,⁵ the RCD-ML, and the RCD-National (the last two being splinter groups of RCD).

A transitional constitution was adopted in April 2003, and a transitional government took office in July 2003. According to Article 196 of the transitional constitution, the transitional period should not last more than 24 months from the creation of a government, with a possible extension of up to one year. National elections are due, at the latest, in June 2006.

The Congolese government and society are currently facing enormous challenges. Among the most pressing are the pacification, stabilization, and effective reunification of the country. Two coup attempts took place in 2004 in Kinshasa: in March, a few dozen rebels, allegedly members of Mobutu’s former “*Forces Armées Zaïroises*” (FAZ, Zairian Armed Forces), crossed the river from Brazzaville to Kinshasa and tried to take over the capital; in June, around 20 members of the Presidential Guard, led by Major Eric Lenge, rebelled. The army put down both rebellions within a few hours. In both cases, it was unlikely that the rebels could have overthrown the government. However, the coups have had a destabilizing effect on the fragile and divided new government.

In eastern DRC, low-intensity conflict has continued to rage in the Kivus, Ituri, and parts of Katanga. In February 2004, the RCD threatened to walk out of the transitional institutions following the arrest of a senior RCD officer in Bukavu; serious clashes between government

⁴ In Kinyarwanda, *Interhamwe* (“those who work together”) are members of the former Rwandan militia who perpetrated the genocide, fled Rwanda in 1994, and have since staged a guerrilla war against the new regime in Rwanda. *Ex-FAR* (*Forces Armées Rwandaises*) are members of the former Rwandan army who also fled Rwanda after they were defeated by the Rwandan Patriotic Front (RPF, the current Rwandan army).

⁵ The Mai-Mai are a loose association of Congolese local defense forces aligned with former government forces.

soldiers and former RCD soldiers ensued. This episode showed the fragility of the transitional arrangements and served as a prelude to more serious events in May and August 2004.

On May 26, soldiers loyal to Colonel Jules Mutebusi, a commander formerly with the RCD who had been suspended from the integrated national army in February 2004, clashed with regular Congolese army troops in South Kivu. General Laurent Nkunda, another former RCD commander stationed in North Kivu, sent more than 1000 troops to support Mutebusi, and on June 2, he took Bukavu, the capital of South Kivu. The fall of Bukavu provoked violent popular protests throughout the country, directed against the UN Mission in the DRC (MONUC), Rwanda, and the transitional government; several people died in Kinshasa and elsewhere.

Nkunda claimed that he intervened to protect the Banyamulenge⁶ from a “genocide” that the Congolese army was perpetrating against them. Prompt investigations by MONUC and Human Rights Watch⁷ established that, while both sides had committed serious abuses, including extrajudicial executions of civilians, no evidence of anything resembling genocide could be found. On June 9, the rebels left Bukavu and the Congolese army re-entered the town to scenes of cheering crowds. Mutebusi and his men fled to Rwanda, while Nkunda retreated with his troops to Minova, a locality about 50 kilometers from Goma. Tensions mounted between Kinshasa and Kigali, when President Kabila accused Rwanda of actively supporting the rebellion, an allegation the Rwandan president categorically denied. Rwanda closed the border with the DRC, and Kinshasa redeployed 10,000 soldiers to the Kivus, a move that Rwanda saw as a threat of war. Tensions seemed to ease after a successful summit between Kabila and Kagame in late June 2004 in Abuja, Nigeria. The two recommitted themselves to the terms of the Pretoria Agreement⁸ and agreed to a “joint verification mechanism” to ensure the disarmament and demobilization of Rwandan rebels.⁹

On the night of August 13, 2004, more than 160 Congolese refugees, who had fled the violence in South Kivu in June, were massacred in the camp of Gatumba, in Burundi. The “*Forces nationales de libération*” (FNL) assumed responsibility for the attack, claiming that they were targeting a nearby Burundian army camp. While only an independent commission of inquiry will be able to shed light fully on this horrible crime, Rwanda and Burundi threatened to invade the DRC to protect their borders from such episodes of violence. RCD-Goma briefly suspended its participation in the transitional government.¹⁰

It is hard to predict whether the current sporadic violence will continue or lead to a full resumption of hostilities. For all practical purposes, the former factions still largely control (politically, economically, and militarily) the regions they administered during the war. It is difficult to envisage an enduring peace without the implementation of a more effective disarmament, demobilization, and reintegration program and a broader security sector reform initiative.

⁶ Congolese Tutsis from South Kivu who speak a version of Kinyarwanda.

⁷ Human Rights Watch, “DR Congo: War Crimes in Bukavu,” June 2004, available at www.hrw.org.

⁸ Not to be confused with the Pretoria peace accords, the Pretoria Agreement was a bilateral agreement signed by Rwanda and DRC in July 2002, which led to the withdrawal of Rwandan troops from Congolese territory.

⁹ “Les presidents Kabila et Kagame se sont entendus a Abuja,” *Le Monde*, June 28, 2004.

¹⁰ A UN investigation into this massacre has not been able to conclusively identify the perpetrators and has recommended an investigation of the events by the Government of Burundi with the full cooperation of the DRC and Rwanda and an investigation by the International Criminal Court. See <http://www.un.org/Docs/journal/asp/ws.asp?m=s/2004/821> for a full copy of the report.

Another serious challenge for the transition is to find a lasting solution to the issue of nationality, which has haunted Congolese society since independence and is widely considered one of the major causes of the war.¹¹ While it is beyond the scope of this paper to analyze this issue in depth, the transitional Parliament will have to adopt a law on nationality that reflects a broad consensus, eliminates a potential major cause of renewed conflict, and respects international standards on nationality and minority issues. A draft prepared by the government is currently under discussion. Other key challenges can be only briefly mentioned: the social infrastructure has all but collapsed, the economy is in a desperate state, access to justice is limited to a tiny fraction of the population, corruption is rampant among underpaid and unmotivated civil servants, the preparations for elections lag, and the establishment of a peaceful, democratic state based on the rule of law still seems out of reach.

This paper seeks to address a particularly important challenge: addressing the legacy of human rights violations suffered by the Congolese population. It will try to evaluate initiatives undertaken thus far and make recommendations on the way forward.

¹¹ The “issue of nationality” was mentioned among the main causes of the war in the report of the ICD.

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ABBREVIATIONS AND TERMS

A FIRST FEW STEPS

The Long Road to a Just Peace in the Democratic Republic of the Congo

“Justice, peace and democracy are not mutually exclusive objectives, but rather mutually enforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities.”

— Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies

I. INTRODUCTION: TRANSITIONAL JUSTICE IN THE DRC

While it is still impossible to ascertain the scale of the abuses that took place over the past decade in the DRC, it is clear that defenseless civilians have borne the brunt of the violations. The conflict in the DRC, as in many other contemporary wars in Africa and elsewhere, has seen the deliberate targeting of civilian populations as a way of waging war. Many, if not all, sides to the conflict have regularly employed the tactic of murdering, raping, maiming, and terrorizing civilians. Most rebels have engaged in continued recruitment of child soldiers; rape and sexual violence is commonplace; horrendous acts like cannibalism, mutilation, and the burying of live people have been reported over the years by Congolese and international organizations. The consequences for Congolese society have been devastating.¹²

In such a context, it is impossible to build the foundation for a democratic, just, and peaceful state without addressing these past atrocities, putting an end to impunity, and attempting to redress the suffering of Congolese citizens. The demand for justice is already very strong, and it is bound to become even more forceful as security improves and Congolese citizens turn their attention to the scars that the years of violence have left on their lives and communities.

The term “transitional justice” refers to the combination of policies that countries transitioning from authoritarian rule or conflict to democracy decide to implement in order to address past human rights violations. Transitional justice seeks to restore the dignity of victims and to establish trust among citizens and between citizens and the state. The reconstruction of these relationships requires an integrated approach to dealing with the past. This can include the investigation and publication of the causes and effects of widespread and systematic human rights violations; appropriate measures to establish criminal and civil responsibility on the part of the state and individuals; the provision of material and symbolic reparations for victims; and legal and institutional reforms aimed at preventing a recurrence. Transitional justice measures can

¹² It is impossible to quote here all the reports on human rights violations perpetrated throughout the war; only a few important sources can be mentioned. Human Rights Watch produced, among others, “War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny,” August 2002, and a paper on sexual violence in Eastern Congo, “The War Within the War,” June 2002, both available at www.hrw.org. Amnesty International published a comprehensive report on the violations committed in Ituri, “Our brothers who help kill us,” April 2003. The UN Special Rapporteur for the DRC, Iulia Motoc, consistently reported the violations committed in rebel-held and government-controlled territories throughout the conflict, available at www.unhchr.ch/html/menu2/7/a/mcon.htm, and MONUC human rights investigations are reflected in the periodic reports by the Secretary-General to the Security Council, available at www.un.org/documents/repsc.htm. The constant and courageous reporting of innumerable Congolese human rights organizations must be underlined; among these organizations, with no claim to completeness, are Groupe Lotus in Kisangani, the Héritiers de la Justice and the Initiative Congolaise pour la Justice et la Paix in Bukavu, the ASADHO/Katanga in Lubumbashi (and ASADHO elsewhere), and Justice Plus in Bunia.

contribute to the removal of war criminals from public life, and prevent them from consolidating their grip on power. This can contribute significantly to the creation of accountable, democratic institutions that enjoy the trust and confidence of citizens.

Transitional justice measures were amply discussed at the Inter-Congolese Dialogue (ICD). The Commission on Peace and Reconciliation, one of the five commissions of the ICD, adopted two key resolutions; the first related to the creation of a truth and reconciliation commission, while the second was a request for the creation of an International Tribunal by the United Nations for the crimes committed in the DRC. Unfortunately, 14 months after the inauguration of the transitional government, progress on the effective implementation of transitional justice mechanisms and policies has been uneven.

II. OBSTACLES TO TRANSITIONAL JUSTICE

Several factors continue to impede the development and implementation of effective transitional justice policies in the DRC.

- *The excessively prescriptive nature of the Sun City resolution*, the very detailed resolutions on the truth and reconciliation commission and international tribunal contained in the Sun City resolutions became a straitjacket that, to a large extent, prevented meaningful dialogue and consultation on the timing, form, and composition of transitional justice mechanisms. In retrospect, it would have been preferable for the resolutions to contain a general commitment to dealing with human rights abuses and then mandate a process of public consultation and policy development in order to determine the most effective mechanisms.
- *Lack of political will*. The transitional government comprises all the major former warring parties. Persons allegedly responsible for serious human rights violations are in positions of influence in many transitional institutions. Thus, it is not surprising that the government has been reluctant to seriously implement an effective transitional justice framework.
- *The general lack of security in the eastern part of the country*. Elements including conflict and human rights abuse on a significant scale in some areas; a lack of progress in the disarmament, demobilization, and reintegration process; the continuation in power of many of the same local authorities (administrative, judicial, and military) who were in power at the time abuses were committed all contribute to the precariousness of the security situation and pose serious—but not insurmountable—obstacles to the pursuit of transitional justice goals.
- *Fear of destabilization*. Although there are considerable disagreements among domestic and international actors regarding the extent of the threat to stability posed by transitional justice efforts, a general concern exists that an overly aggressive pursuit of accountability might lead to a backlash and renewed conflict.
- *The scarcity of financial, human, and technical resources*. Decades of institutional decay, combined with the specific impact of war and conflict, have weakened and virtually destroyed the DRC's criminal justice system. It will take a considerable investment of resources and training over many years to remedy this problem.
- *The reluctance of the UN and the international community to set up an international tribunal*. It is widely recognized that the UN and the international community are unwilling to establish another international tribunal following what are perceived to be the high costs and limited efficiency of the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY, respectively). As will be discussed in greater detail below, this has complicated efforts to pursue justice in the DRC.

Despite all these obstacles, more can and must be done to advance transitional justice goals during the transition. In the final analysis, the challenge is to incorporate elements of justice in an

extremely complex situation and to set in place the right conditions to ensure that initiatives that might be premature now can be initiated as soon as the situation allows. A holistic strategy is essential so that peace can develop beyond a mere armed truce and justice can contribute to the foundation of an authentically reconciled Congo that respects the rule of law and human rights.

In many circumstances, a combination of mechanisms will be necessary, as the scars left by mass atrocities are multifaceted and require integrated responses. For example, some groups might wish to examine and debate the circumstances and causes that led to a war, while victims may seek a measure of justice and/or reparations. Different mechanisms, operating concurrently or sequentially, may be necessary to respond to these diverse goals. This does not mean that all societies in transition must employ all available mechanisms; however, when multiple mechanisms are deemed appropriate, they should be structured in such a way that they complement one another's mandate and operations.

The International Center for Transitional Justice (ICTJ) hosted an international workshop in Cape Town, South Africa, on January 22–24, 2004, to contribute to the debate on these difficult issues. Participants were drawn from the Congolese government and civil society, international human rights NGOs and academic institutions, the International Criminal Court (ICC), and the UN.¹³ This paper benefits largely from the discussions in this workshop, but the views and opinions expressed here are solely those of the ICTJ. The paper also benefits from the Center's ongoing in-country work in the DRC, and from the lessons the ICTJ has learned in other contexts.

Three specific mechanisms are studied in detail: prosecutions, whether in domestic or international courts; the truth and reconciliation commission; and the process of “vetting,” or screening and certifying security personnel and other public employees to ensure their eligibility for specific public sector positions.¹⁴

III. PROSECUTIONS FOR PAST HUMAN RIGHTS ABUSES

A. Goals and Strategies

The delegates of the Peace and Reconciliation Commission of the ICD extensively debated the importance of prosecuting perpetrators of abuses. They put forward the following arguments in favor of criminal justice:

- Prosecutions would “contribute to the fight against impunity.”
- Prosecutions would further the goal of true reconciliation in a broken and divided society.
- Prosecuting individuals may mitigate the risk that collective responsibility is attributed to entire groups (ethnic, social, political, etc.) for the abuses committed by some of their members.
- Prosecutions can serve as a form of comfort and redress for victims.
- Effective prosecutions could act as a deterrent against the repetition of similar crimes.¹⁵

The prosecution and punishment of perpetrators vindicates the rule of law and emphasizes that abusive behavior is intolerable in the new, yet fragile, democracy. However, in the context of the goals of transitional justice, prosecutions should not be seen as simply a retributive mechanism;

¹³ See Annex 1 for a list of participants.

¹⁴ Definition taken from Alexander Mayer-Rieckh, “Vetting Civil Servants in Transition Situations: Legal Standards and Operational Options,” ICTJ draft.

¹⁵ All these arguments can be found in the final report of the ICD, available at www.drepeace.org.

their primary goal should be characterized as the restoration of victims' dignity and public trust vis-à-vis public institutions and the administration of justice.

Transitional justice processes in the past decade have illustrated that, following large-scale atrocities, only a fraction of those who have committed abuses can be prosecuted effectively. Rwanda is the most extreme case in point. Despite the commitment of both the government and the international community, only a relatively small percentage of perpetrators of the genocide have been prosecuted successfully in 10 years. Given this reality, a clear and coherent prosecutorial strategy is required to determine who, among the thousands of perpetrators, should be prosecuted.

International law and international jurisprudence have been evolving toward the principle that "those bearing the greatest degree of responsibility," to borrow the phrasing of the Statute of the Special Court for Sierra Leone, should be prosecuted.¹⁶

Such an approach is not intended to suggest that those who bear lesser responsibility are not guilty, but it reflects the need to make hard choices, given scarce resources, and to ground those choices in rational legal, moral, and policy arguments. By targeting those most responsible, prosecutions have a better chance of reflecting the ways in which those in positions of power planned and participated in atrocities. Such an approach lessens the risk that low-level scapegoats will bear the blame for crimes that have required high-level, systematic planning. Finally, public confidence in institutions that have been associated with violations is more likely to be restored if culpable individuals at the highest levels are identified, punished, and removed. This is not to say that those bearing lesser responsibility should not be prosecuted, but only that, if and when choices have to be made, those bearing the greatest responsibility should be prioritized. Other context-specific criteria, such as availability of evidence, recidivism, and refusal to disarm and demobilize, can also be used to decide who else should be prosecuted.

These developments should guide domestic and international policymakers in devising a prosecutorial strategy for the human rights abuses committed in the DRC. This paper discusses options and strategies for prosecuting those bearing the greatest responsibility. Such strategies might entail prosecuting mid-level perpetrators in order to gather evidence to prosecute those at the top of the chain of command.¹⁷ In some jurisdictions, plea bargaining may be offered to some

¹⁶ According to the ICC Statute, the Prosecutor, upon investigation, can decide that:

A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, *and his or her role in the alleged crime.* (Art. 53)

The provision on the perpetrator's role in the crime is widely interpreted as referring to the degree of responsibility of the suspect, allowing the prosecutor to focus on high-level perpetrators. Furthermore, a widely circulated policy paper issued by the Office of the ICC Prosecutor states that, "as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or the organization allegedly responsible for those crimes." When he announced the opening of the investigation in the DRC on June 23, 2004, the ICC Prosecutor said he would focus on those bearing the greatest responsibility. Similar provisions can be found in the agreement between the UN and Cambodia setting up extraordinary chambers, and in amended rules of procedure of the ICTY.

¹⁷ The ICTY Prosecutor indicted several low-level offenders, particularly in its first years of operation, implementing what was called a "pyramidal strategy." In the words of one Deputy Prosecutor:

perpetrators in exchange for information leading to the successful prosecution of their superiors, and consideration should be given to the possibility of introducing such a tool in the DRC.

It is worth noting that the Prosecutor of the ICC has already announced that he will prosecute only those bearing the greatest responsibility, and that the Congolese legal system grants large discretionary powers to prosecutors in deciding whether a crime should be prosecuted (*opportunité de poursuite*),¹⁸ unlike other civil law systems, where prosecutors are under an obligation to act if they have information that a crime has been committed. These powers, if not abused, will allow a degree of flexibility in devising a proper strategy; hopefully, the various domestic and international prosecuting authorities can agree on a common vision and division of tasks.

This paper discusses how the current situation of insecurity affects the possibilities of successfully investigating and prosecuting conflict-related human rights abuses, regardless of whether the trial is domestic or international. It then reviews four possible forums to judge war criminals: domestic Congolese courts, the ICC, an international tribunal, and a hybrid court.

Even if high-level perpetrators are successfully prosecuted, an important “impunity gap” will remain. This refers to the vast number of perpetrators that will not be prosecuted by any tribunal because of limitations on resources. Congolese society and institutions will have to decide how to respond to this gap. This paper also discusses ways in which quasi-judicial or nonjudicial mechanisms may be used to reduce the impunity gap. Finally, and on the basis of this analysis, this paper suggests ways to advance the prospects for criminal justice in the current context of impunity and insecurity.

B. Obstacles

1. Lack of Security

The lack of security in the DRC is one of the most serious obstacles to prosecutions. Perpetrators of human rights violations are to be found in most transitional institutions, at both the local and national level. Some regions, like Ituri, are still largely under the control of lawless armed groups; in other areas, strong military forces respond to unofficial command structures, such as the troops under the control of North Kivu Governor Serufuli and the now openly rebellious soldiers under the command of Laurent Nkunda in South Kivu. The DRC does not have a national witness protection program and, as far as the ICTJ is aware, none is currently under discussion.

The prosecution of the direct perpetrators would lead to the identification of the chain of command in which they operated. Further investigations would lead later, through the analysis of the thousands of documents seized and the contribution given by military and political experts, to the identification of the planners and instigators of the crimes committed. The prosecution of low-level perpetrators was, therefore, a necessary step, to identify the members of the military and political chain of command responsible for the crimes committed. The indictments issued against high-level perpetrators can be considered to be the result of this investigative approach.

Nicola Piacente, “Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy,” *Journal of International Criminal Justice* 2, 2004, at 448.

¹⁸ These powers may only be overruled by an injunction to prosecute (*injonction de poursuite*) issued by the Minister of Justice or by a complaint filed by the victim of the crime before the court. In these cases, the Prosecutor is obliged to open an investigation or to join the action of the victim.

In August 2004, the ICTJ conducted extensive interviews with local civil society representatives, victims, MONUC officials, members of the diplomatic community, and local administrative and judicial authorities in Kinshasa, Bunia, Bukavu, and Kisangani. Most, if not all, of those interviewed said that victims and witnesses would be reluctant to testify against human rights violators because of a lack of confidence in the judicial system and general fear of reprisals. An important exception is Lubumbashi, where local human rights groups have told the ICTJ that victims and witnesses would be willing to testify. This is because Lubumbashi is, for the most part, under the political and military control of the transitional government. The prospects for achieving justice seem to be tied to ensuring a degree of local and/or regional security.¹⁹

2. The “Destabilization Argument”

A distinct, though related, security concern is whether prosecutions, particularly if directed against senior political and military leaders, would derail the peace process. Or, would they instead strengthen it by reaffirming the rule of law and eliminating from the political arena some of the worst offenders? It is impossible to draw conclusive lessons from a comparative analysis of other transitions; in some cases, however, foregoing justice for the sake of peace and reconciliation has only fed further cycles of violence.

The lively debate on this issue among participants at the ICTJ workshop in Cape Town revealed that most of those present were convinced that prosecutions *by the ICC* or *by an international court* would not derail the peace process. However, some felt strongly that an attempt from the *national judicial authorities* to prosecute senior leaders could have destabilizing effects and push some former rebels to take up arms again. Most participants also felt that prosecutions by the international community, through mechanisms agreed to by the Congolese, would enjoy a greater legitimacy than prosecutions by a local judiciary, which could be perceived as biased and corrupt.

Extensive interviews the ICTJ conducted in the country showed that there is no consensus on this point among Congolese and international actors. On the one hand, security concerns should be treated seriously and deserve to be taken into account when designing a comprehensive prosecutorial strategy; on the other hand, they should not become an excuse to justify inaction and must be assessed in concrete situations and regularly reassessed at a national, regional, and local level.

C. Domestic Trials

“On principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself.”²⁰ This principle is increasingly accepted as the preferred framework to achieve justice for past atrocities. Legitimate domestic prosecutions better serve transitional justice goals, offering a greater prospect for vindicating victims’ rights and restoring institutional trust. The Statute of the ICC espouses the principle of “complementarity,” which gives domestic courts primacy over the world court. According to Article 17 of the Rome Statute, the ICC, unlike the ICTR and ICTY, will have residual jurisdiction only in cases when the state is unable or unwilling to prosecute. Interviews the ICTJ conducted in 2004 confirmed that in the entire DRC, there is no ongoing trial in civilian courts for conflict-related mass human

¹⁹ See the Ankoro case, discussed below.

²⁰ Final report on “Question of the impunity of perpetrators of human rights violations (civil and political),” prepared by Louis Joinet for the Commission on Human Rights, E/CN.4/Sub.2/1997/20, June 26, 1997, para. 28.

rights violations.²¹ However, one trial for human rights abuse is currently under way in a military court.

On August 26, 2004, the trial of 22 suspects for serious violations that took place in Ankoro, in Katanga province, was reopened. In November 2002, fighting broke out between then-governmental troops and local Mai-Mai militia. Investigations by a local human rights organization and later by MONUC concluded that dozens of people were killed and thousands of houses were pillaged and burnt. Twenty-eight government soldiers were later arrested, and a trial commenced before the *Cour d'Ordre Militaire* on April 19, 2003. That trial was immediately suspended to ensure the participation of victims and witnesses; soon afterward, the *Cour* was abolished as part of the reform of the military justice system. The trial then resumed before a new military court in Lubumbashi, which is 800 kilometers away from Ankoro. By then, six of the original 28 defendants had escaped from prison and are now being tried *in absentia*. The case has already drawn a great deal of interest as the first trial for crimes against humanity to take place since the beginning of the transition. However, ASADHO/Katanga (African Association for the Defense of Human Rights), a local human rights group that has been lobbying for justice in this case for almost two years, has expressed serious concerns. In particular, the organization has repeatedly requested the military court to hold the trial in Ankoro, and not in Lubumbashi, in order to allow victims and witnesses to testify.²² Human rights organizations assert that witnesses are willing to testify, as the soldiers suspected of committing the violations are no longer in their area. The court initially refused, alleging that it did not have the means to move its seat to Ankoro for this case. It later agreed to travel to Ankoro to gather the necessary evidence. This falls short of the demand of human rights organizations to hold the entire trial in Ankoro, and has not dispelled ASADHO's suspicion that "the trial is being held in order to set the prisoners free."²³

Despite the magnitude of the violations in the DRC, the Ankoro trial is the only ongoing domestic trial for mass human rights violations. Because the principle that trials should generally take place in the domestic context is relatively uncontroversial, it is useful to analyze the existing obstacles to holding successful trials for human rights abuses in domestic Congolese courts. In addition to the security concerns, these obstacles can be classified in four broad categories:

- Legal obstacles and jurisdictional issues;
- Lack of capacity and independence in the Congolese judicial system;
- Lack of political will to enable the judiciary to try such cases; and
- Probable lack of cooperation by foreign governments.

After addressing the obstacles in these four areas, this paper briefly analyzes the situation in Bunia, in the context of a project that aims to rapidly re-establish the capacity of the criminal justice system there.

²¹ This was confirmed in several interviews in different parts of the country, and authoritatively by the Attorney-General in Kinshasa.

²² ASADHO/Katanga, Communiqué de presse n. 011/2004, of Sept. 9, 2004. Copy on file with the ICTJ.

²³ "L'ASADHO/Katanga considère que le mépris de ces impératives par la justice militaire constitue une volonté flagrante de soustraire les prévenus des poursuites judiciaires." Id. at 2.

1. Legal Obstacles and Jurisdictional Issues

In the DRC, three of the most pronounced legal obstacles to domestic prosecutions are: the problem of the applicable law and the statute of limitations, the issue of jurisdiction of military courts, and amnesty provisions.

a. Applicable law and the statute of limitations

Article 1 of the Congolese criminal code states the principle of nonretroactivity: no one may be punished for an act that was not legally a crime at the time the act was committed (*nullum crimen sine lege*).²⁴ There are, in principle, three different laws Congolese judges and Prosecutors pursuing cases of serious human rights violations could apply: international crimes as defined in Congolese law, international crimes as defined in international law, and ordinary crimes (such as murder, rape, assault) as defined in Congolese law. All three options, analyzed below, are somewhat problematic.

The ordinary criminal code does not proscribe international crimes, such as genocide, war crimes, and crimes against humanity. The military criminal code,²⁵ which was adopted in November 2002 and came into force in March 2003, contains provisions on genocide, crimes against humanity, and war crimes. For acts committed prior to March 2003, the provisions of the old code of military justice from 1972, which was in place until the new code was adopted, could be applied. However, the definitions of genocide, war crimes, and crimes against humanity in domestic legislation, both in the 1972 and in the 2002 codes, do not conform to international definitions and are, at best, ambiguous. Finally, in some cases penalties are not envisaged for the proscribed conduct.²⁶ These inadequacies are addressed by the law on implementation of the ICC Statute, whose definitions of international crimes are, for the most part, in conformity with international law. However, this law, even when adopted, will not apply to past violations because of the principle of nonretroactivity. For this reason, it is important to explore whether Congolese courts can directly apply international law, and therefore use international definitions of international crimes.

An argument could be made that international crimes have been incorporated into Congolese law by virtue of the DRC's international obligations. The DRC legal system is monist, which means that international treaties and agreements are automatically incorporated into the domestic legal system, with no need for an explicit act of incorporation. The DRC has ratified or acceded to many human rights conventions, which contain provisions on some of the relevant crimes.²⁷ In particular, the DRC is party to both the Genocide Convention and the Geneva Conventions and both of their Protocols, which explicitly proscribe genocide and war crimes (but not crimes against humanity). Furthermore, for all crimes committed after July 1, 2002, the argument could

²⁴ Code Penal Zaïrois, adopted by decree on Jan. 30, 1940, and modified several times since.

²⁵ Law N. 024/2002. Articles 161–175 incriminate international crimes.

²⁶ Art. 173 of the military code defines the acts constituting war crimes as “all violations of the laws of the Republic committed during the war and not legal according to the laws and customs of war.” No penalty is envisaged. The provision is clearly inadequate.

²⁷ Among others (with year of accession or ratification): the International Covenant on Civil and Political Rights (1976); the Convention against Racial Discrimination (1976); the Convention on Discrimination Against Women (1986); the Convention on the Rights of the Child (1990) and its Optional Protocol on the Involvement of Children in Armed Conflict (2001); the Convention against Torture (1996); and the Rome Statute of the International Criminal Court (2002).

be made that Congolese prosecutors and judges can directly apply the Rome Statute.²⁸ However, although prior constitutions also adopted a monist system, Congolese judges have been reluctant to apply international treaties absent a specific act of incorporation, despite such clear constitutional provisions.²⁹ In addition, it is uncontroversial that war crimes, crimes against humanity, and genocide are crimes under customary international law, although the transitional constitution does not clarify the status of international customary law in the Congolese legal system and there does not seem to be any jurisprudential precedent of Congolese courts directly applying customary international law.

A third alternative could be to prosecute the suspects for the underlying crimes and not for the international crimes *per se*. In other words, perpetrators would go to trial for murder, rape, assault, or other crimes proscribed by the criminal code, and not for war crimes or crimes against humanity. This solution is less than optimal for three main reasons.

1. First, by prosecuting underlying crimes, trials might not expose fully the gravity of the crimes committed, nor their systematic character. The contribution to shedding light on the origins, causes, dynamics, and ultimate responsibility for the violations might be somewhat limited.³⁰ Most important, such prosecutions could make it easier to put the blame on relatively low-level perpetrators, the “trigger-pullers,” and, conversely, make it more difficult to prosecute those bearing the greatest responsibility; not least because it might not be possible to prosecute on the basis of command responsibility and prosecutors may have to rely on a narrower definition of criminal participation contained in the Congolese criminal code.
2. The second problem with prosecuting underlying crimes lies in the inadequacy of the domestic definition of rape, one of the major and most widespread crimes committed during the war. According to Article 167 of the criminal code, “sexual union” needs to occur in order to qualify an act as rape; such a narrow definition is in stark contrast with that given by the International Criminal Tribunal for Rwanda in the *Akayesu*³¹ judgment, which marked the first time an individual was sentenced for rape as an instrument of genocide and crimes against humanity. The *Akayesu* judgment stated that rape could be defined as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” Using the narrow definition contained in Congolese criminal law would mean that most of the horrific sexual crimes described in many reports³² would probably be qualified simply as indecent assault.
3. The third major problem in prosecuting underlying crimes is the possible application of the statute of limitations, which sets forth the maximum period of time after certain events that legal proceedings based on those events may begin. According to Congolese

²⁸ Although some contest that the Rome Statute is directly applicable by Congolese courts for post-July 2002 crimes, several members of the judicial profession in the DRC, and the Minister of Justice, expressed this view.

²⁹ Information received from Pascal Kambale, Human Rights Watch.

³⁰ To quote Prosecutor Dubost, at the Nuremberg International Military Tribunal, set up after World War II to try Nazi war criminals: “To apply the same standards to them (the defendants) as that applied to hooligans or to murderers, would narrow the scope of the trial and misrepresent the character of their crimes,” in Lawrence Douglas, *The Memory of Judgment*, New Haven: Yale University Press, 2001, at 90. However, this was not the case in Argentina, where in the so-called “junta trials” the top leaders of the army were successfully prosecuted for underlying crimes, such as murder.

³¹ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Sept. 2, 1998.

³² See Human Rights Watch, “The War Within the War,” *supra* note 12.

law, the statute of limitations for the most serious crimes is 10 years.³³ This would mean that, for example, the law would bar prosecutions for crimes committed in the 1996–1997 war in just two years, unless legal proceedings are initiated during that time. It is increasingly recognized that the statute of limitations does not apply to international crimes,³⁴ although it does apply to underlying crimes. In some domestic jurisdictions, such as Argentina, courts are overcoming statute of limitations questions by prosecuting underlying crimes but applying the principle that such crimes, as international crimes, are not subject to statute of limitations questions.³⁵ In France, the *Cour de Cassation*, in the famous *Barbie* case, found the nonapplicability of statutory limitations to crimes against humanity to be a part of customary international law.³⁶ If and when confronted with this objection, Congolese courts could also determine that the application of the statute of limitations is suspended until the courts are able to prosecute the crimes concerned; the situation of conflict and near-collapse of the judicial system over the past 10 years in the DRC could be invoked to justify such suspension.³⁷ Finally, the Congolese Parliament could extend or even eliminate the statute of limitations for serious crimes such as murder and rape; the French *Cour de Cassation* held in *Barbie* that the law eliminating the statute of limitations could apply retroactively to permit prosecution of Barbie.

This analysis shows that all three available options may create some legal difficulties for prosecuting gross violations of human rights in Congolese courts. In order to overcome these obstacles, some modifications to Congolese law might be necessary, and judges and prosecutors may need to be willing to invoke international provisions directly in domestic courts.

b. Jurisdictional issues: military vs. ordinary courts

Congolese military courts, whose main purpose should be to discipline soldiers for military infractions, have historically seized much greater jurisdiction. In particular, the much-feared “*Cour d’Ordre Militaire*,” created by Laurent-Desire Kabila in 1997,³⁸ became a tool of repression of dissent in the hands of the government.³⁹

Facing internal and international pressure, and in the spirit of bringing DRC legislation into compliance with its international obligations, President Joseph Kabila reformed the system of military justice on November 18, 2002, when he promulgated a new military criminal code and judicial code.⁴⁰ This reform, as mentioned above, left jurisdiction over international crimes to military courts.

This contravenes the evolving international law principle that:

³³ According to Article 24 of the criminal code, the statute of limitations is 10 years for all crimes punished with a jail term of more than five years, which is the case for most important underlying crimes.

³⁴ Art. 10 of the 2002 Congolese military criminal code affirms the principle that international crimes are not subject to the statute of limitations.

³⁵ See <http://news.bbc.co.uk/2/hi/americas/3596316.stm>.

³⁶ *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 ILR 125, 135 (Fr. Cour de Cassation 1984).

³⁷ One important precedent is French legislation that suspended the application of the statute of limitations because of the absence of an effective judiciary during World War II.

³⁸ Decree No. 019 of Aug. 23, 1997.

³⁹ See, e.g., the report of the UN Special Rapporteur for the DRC, E/CN.4/2003/43, April 15, 2003.

⁴⁰ Law n. 023/2002 of Nov. 18, 2002.

Because military courts do not have enough statutory independence, their jurisdiction must be limited to specifically military infractions committed by members of the military, excluding serious crimes under international law which must come within the jurisdiction of the ordinary courts.⁴¹

However, the July 2003 draft law implementing the Rome Statute of the ICC⁴² grants exclusive jurisdiction for international crimes to civilian courts,⁴³ even in cases where the suspect is a member of the military.⁴⁴ Once the Congolese Parliament adopts the ICC implementing legislation, this problem will be resolved.

c. The amnesty process

Black's Law Dictionary defines “amnesty” as:

A sovereign act of oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict, generally political offences—treason, sedition, rebellion—and often conditioned upon their return to obedience and duty within a prescribed time.⁴⁵

In recent times, amnesties have often been used for a controversial purpose: to bar prosecution of perpetrators of human rights abuses. There is now an increasing recognition that amnesties for war crimes, crimes against humanity, and genocide are illegal under international law.⁴⁶ In the DRC, an amnesty for “acts of war, political crimes and crimes of opinion,”⁴⁷ was agreed upon during the peace negotiations. A presidential decree was adopted on April 15, 2003, in conformity with the Pretoria Agreement and the Constitution.⁴⁸ It states that:

Pending adoption of an amnesty law by the National Assembly and its promulgation, all acts of war, political crimes and crimes of opinion committed during the period from 2 August 1998 and 4 April 2003, are provisionally amnestied, excluding war crimes, genocide and crimes against humanity.⁴⁹

⁴¹ See Joinet, *supra* note 20, at para. 38.

⁴² Copy on file with the ICTJ.

⁴³ Specifically, to the Appeal Courts in the first instance and thereafter to the Supreme Court.

⁴⁴ The draft includes an unusual provision. If the suspect is a military person, the judging civilian court will be integrated by an additional military judge.

⁴⁵ *Black's Law Dictionary*, 5th ed., 1983, at 76.

⁴⁶ See the report of the Secretary-General on the Establishment of the Special Court in Sierra Leone, S/2000/915, of Oct. 4, 2000; the *Barrios Altos* judgment of the Inter-American Court of Human Rights of March 14, 2001; and the March 13, 2004, decision of the Special Court for Sierra Leone, in *Prosecutor v. Kallon and Kamara*, that “the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction.” Finally, the recent Secretary-General report on the rule of law and transitional justice in conflict and post-conflict societies states that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.” S/2004/616, Aug. 3, 2004.

⁴⁷ “Faits de guerre, infractions politiques et d’opinion” in the original French.

⁴⁸ Section III, point 8 of the Agreement and Article 199 of the Constitution.

⁴⁹ Presidential Decree n. 03-001 of April 15, 2003, on amnesty for acts of war, political crimes, and crimes of opinion, Article 1. The original text reads: “En attendant l’adoption de la loi d’amnistie par l’Assemblée Nationale et sa promulgation, sont amnistiés, a titre provisoire, les faits de guerre, les infractions politiques et d’opinion commis pendant la période allant du 2 août 1998 au 4 avril 2003, a l’exception des crimes de guerre, des crimes de génocide et des crimes contre l’humanité.”

Article 199 of the Constitution stipulates that the decree is adopted “pending adoption of the amnesty law.” The National Assembly, however, has not yet adopted the amnesty law, despite a constitutional provision that mandated its adoption at the Assembly’s first session. The government has sent to Parliament a draft of the law, which is currently under discussion. While the exclusion of war crimes, genocide, and crimes against humanity from this amnesty is to be welcomed, it is also important that this amnesty does not serve as an impediment to the prosecution of underlying crimes, such as murder, rape, and serious assault.⁵⁰ For this reason, it would be desirable for the Congolese Parliament to adopt a law that narrowly defines a few specific acts for which amnesty may be granted, and clearly excludes all serious human rights violations from the scope of application of the amnesty law.⁵¹

2. Lack of Independence and Capacity of the Judiciary

The recently completed “Joint Assessment Mission on the Justice System in the DRC” (“Justice Audit”) paints a grim picture of the status of the Congolese judicial system.⁵² Extensive interviews conducted by the ICTJ in August 2004 largely confirm this picture. First, the system suffers from an almost absolute lack of independence from the executive. The President of the Republic enjoys ample discretion in the appointment of judges, while the Minister of Justice largely controls the Public Prosecutor’s initiative and the disciplinary process of judges and prosecutors alike.⁵³

Second, corruption seems to dictate the outcome of most judicial proceedings. This is encouraged by the fact that judges’ salaries are below the poverty line for the DRC, as calculated by the World Bank.⁵⁴ Many jurisdictions have not been formally established⁵⁵ and, as a result, only 20 percent of Congolese citizens have access to the formal justice system, while in the remaining cases disputes are settled in traditional justice forums.⁵⁶ The infrastructure of the judicial system has all but collapsed; judges and prosecutors lack copies of basic laws and are in dire need of training or re-training.⁵⁷

This paper does not intend to propose solutions to all these deficiencies; the justice audit is a starting point for that. Rather, it examines the feasibility of prosecutions for past human rights abuses in Congolese courts. Many Congolese and international observers conclude that, given the magnitude of the problems described above, prosecutions of serious human rights violations, at least in the short term, can only take place before an international court. However, the prosecution of a limited number of high-level perpetrators should not depend on rebuilding the capacity and independence of the *entire* Congolese criminal justice system. While comprehensive capacity building and reform will necessarily take years, a limited capacity to deal with international crimes could be built in a relatively short time.

Prosecutions for international crimes, particularly if directed against the political and military leaders who planned them, present some specific challenges. These investigations must go

⁵⁰ This could occur if such acts are interpreted as “faits de guerre” or “infractions politiques.”

⁵¹ A detailed legal analysis on this issue is available from the ICTJ upon request.

⁵² Audit organisationnel du secteur de la justice en RDC, Rapport d’Etat des Lieux, Synthèse, May 2004, at 47.

⁵³ Id. at 28.

⁵⁴ Id. at 21.

⁵⁵ Only 53 “Tribunaux de Paix” out of 180 (one per territory) had been established by May 2004.

⁵⁶ Audit organisationnel, supra note 52 at 73.

⁵⁷ Audit organisationnel, supra note 52 at 26–29.

beyond simply reconstructing a crime and the different stages in which it was planned and executed, particularly if the ultimate goal is to prosecute those bearing the greatest responsibility. They must document organizational structures that carried out the crimes; analyze the command, communication, and control framework; and conduct socio-historical investigations that help explain the general dynamics of the violence. Such an analysis is very complicated in the context of a war between regular armies with coherent command structures; it will present enormous challenges in the context of the Congolese wars, where many irregular militia groups with loose or nonexistent command structures and shifting allegiances fought much of the conflict. Prosecutors and judges will need specific training, and investigative teams will have to contain nonlawyers, such as forensic specialists, sociologists, anthropologists, historians, or military historians. Guarantees would have to be established to insulate investigators, prosecutors, and judges from political influences. Finally, the costs associated with these investigations are going to be considerable even if undertaken at the domestic level, although substantially lower than the costs of international tribunals.

3. Lack of Political Will

The most serious obstacle to ensuring effective prosecutions for serious human rights violations may be the lack of political will to make this happen. Despite the grave deficiencies analyzed above, the transitional government devoted a mere 0.6 percent of the 2004 total budget to the needs of the judicial system, an allocation that hardly shows a commitment to rebuilding a strong and independent system.

An absence of political will is a serious obstacle for any transitional justice measure. In the field of prosecutions for serious human rights abuses, the government has requested (albeit ambiguously, as seen below) the creation of an international tribunal, and the President has referred the situation of the DRC to the Prosecutor of the ICC.⁵⁸ However, no serious debate on domestic prosecutions has been initiated.

A test case to judge the willingness and ability of the government to punish atrocities is its response to the Bongandanga case. In December 2003, a group of soldiers of the integrated national army (all former MLC soldiers) rebelled against their commander, suspected of pocketing part of their pay. For a whole night, the soldiers went on a looting and raping spree against defenseless civilians in the villages of Bongandanga and Songo Mboyo.⁵⁹ Soon after the incident, the battalion was redeployed elsewhere. The MONUC Human Rights Section conducted a thorough investigation of the incident, and facilitated the visit of a Human Rights Ministry delegation and the Mbandaka-based *Auditorat Militaire* in May 2004. Months have passed, and despite the fact that the *Auditorat* team received more than 100 complaints of rape and some of the assailants were clearly identified by several victims and witnesses, no action has been taken. The official reason given by the government is a lack of resources for the *Auditorat* to complete its investigation. The transitional government has been alerted at its highest levels (through the Minister of Human Rights), and swift and exemplary action in this case would have sent the powerful signal that continuing abuses will not be tolerated. In this particular case, victims are willing to speak out and demand justice because the alleged perpetrators have been transferred elsewhere and no longer represent a threat. The Bongandanga and the Ankoro cases, analyzed

⁵⁸ Many observers believe that the referral was sent to the ICC by President Joseph Kabila without any prior consultation with any of the four Vice Presidents, some of whom are allegedly less committed to international justice.

⁵⁹ These villages are in the Bongandanga territory, located in the Mongala district in Equateur province.

above, are good tests to judge the real political will of the transitional government to break the cycle of impunity.

4. Cooperation of Foreign Governments

The final serious obstacle that domestic Congolese courts would encounter in prosecuting serious offenders would be the probable lack of cooperation from foreign governments. Because the conflict was regional and saw the involvement of several foreign armies, some of the high-level suspects are likely to be nationals of foreign states, and crucial evidence might be found only outside of the DRC. A lack of judicial cooperation with Congolese domestic courts is to be expected, particularly from countries that invaded the DRC during the 1998–2003 war.

The existence of all these obstacles should not lead to the conclusion that prosecutions in Congolese courts are not feasible. A capacity to prosecute some selected cases targeting high-level perpetrators could be built relatively rapidly, although this would not necessarily overcome all the legal, political, and security obstacles analyzed above. The case of Bunia, where a project to rapidly re-establish a criminal justice capacity is currently under way, may offer some useful insights.

5. The Re-establishment of Criminal Justice Capacity in Bunia

a. Background⁶⁰

The northeastern district of Ituri, situated in Oriental province, has become known to the world for the violence that left up to 50,000 people dead between 1999 and 2003.⁶¹ The conflict, mainly between Hema and Lendu but involving other groups, erupted in June 1999; the area had been under Ugandan occupation since November 1998. Uganda occupied Ituri directly or through proxies until May 19, 2003, when the last of its troops returned to Uganda, in accordance with the Luanda agreement of September 6, 2002.⁶² Uganda's withdrawal was immediately followed by a violent re-escalation of the conflict as various militias, with external support from Kampala, Kinshasa, and Kigali, rushed to fill the power vacuum and gain control of the resource-rich region. The violence reached such a scale that the UN Special Rapporteur for the DRC stated that genocide "may have occurred."⁶³ Pursuant to UN Resolution 1484 of May 30, 2003, the European Union deployed an Interim Emergency Multinational Force, which secured the town of Bunia, Ituri's provincial capital, although it did not have the capacity (or the mandate) to deploy in the whole district. Operation Artemis, as the EU mission was named, was relatively successful and ended on September 1, 2003, as envisaged in the UN resolution. Military control over Bunia, or at least over parts of the town, was then handed over to MONUC's Ituri brigade. Parts of Bunia and most of the district is still under the control of various armed groups; a disarmament process should start soon, and the first fully integrated brigade of the national army, trained in Kisangani, is expected to deploy in the district (advance elements arrived in August 2004) to oversee the disarmament of the armed groups and ultimately take over control from MONUC.

⁶⁰ For a much more detailed background on the conflict in Ituri, see the recent UN Special Report on Events in Ituri, S/2004/573, July 16, 2004.

⁶¹ See IRIN Web Special on Ituri, available at www.irinnews.org/webspecials/Ituri/default.asp.

⁶² Agreement Between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Cooperation and Normalisation of Relations Between the Two Countries (Luanda Agreement), available at www.state.gov/t/ac/csbm/rd/22627.htm.

⁶³ See www.irinnews.org/report.asp?ReportID=36308&SelectRegion=Great_Lakes&SelectCountry=DRC.

In April 2003, pursuant to the Luanda agreement, the Ituri Interim Administration (IIA) was created and assigned two specific tasks: reconciling communities (pacification) and effectively managing public services in Ituri (administration). Only in late June 2004 was the district of Ituri reintegrated into national administrative structures, with the appointment of Petronille Vaweke, formerly the head of the IIA, to the position of “*commissaire de district*.”

b. The project

In July 2003, a UN assessment mission found that the judicial system in Bunia had entirely collapsed. As part of the effort to pacify this troubled region, the DRC government, the European Commission, and the French agency for cooperation (Cooperation Française) decided to undertake a project to rapidly rebuild a minimal judicial capacity. The project had two main objectives:

- Quickly establish a system of arrest and pretrial detention for those who committed serious criminal offenses; and
- Re-establish minimally functioning local police, judicial, and correction structures with capacity to provide basic policing, conduct pretrial detention hearings, detain prisoners, complete criminal investigations, and hold some criminal trials.

The project was implemented by a Belgian nongovernmental organization,⁶⁴ and within a few months the Bunia judicial system started functioning. By the end of July 2004, 440 cases were under investigation and 42 judgments had been rendered.⁶⁵

A detailed evaluation of the successes and failures of the project is beyond the scope of this paper, which does discuss whether and how the judicial authorities dealt with the obstacles to domestic prosecutions.⁶⁶ This analysis should provide some lessons and insights into the reforms that are necessary to enable the local judicial system to prosecute grave human rights violations on a wider scale.⁶⁷

There are currently only two ongoing investigations for conflict-related human rights violations. Three individuals, all relatively high-level members of an armed group, are currently detained in MONUC barracks⁶⁸ and are being investigated for the Tchomia massacre.⁶⁹ This investigation, although it is at a very early stage, is briefly analyzed below. Other relatively high-level members

⁶⁴ Réseau des Citoyens Network (RCN), Justice & Démocratie.

⁶⁵ Information from RCN staff in Kinshasa, August 2004.

⁶⁶ Based on an interview with the State Prosecutor in Bunia, Chris Aberi, and two interviews with the President of the Bunia *Tribunal de Grande Instance*. Local NGO representatives, RCN staff, MONUC personnel, Human Rights Watch, and other sources also provided information.

⁶⁷ A recent Human Rights Watch briefing paper, “Making Justice Work: Restoration of the Legal System in Ituri, DRC,” analyzes the process mostly with a view to strengthening it, while this paper seeks to draw lessons to apply to the national context. This analysis greatly benefits from HRW’s document, which is available at <http://hrw.org/backgrounders/africa/drc0904/index.htm>.

⁶⁸ Although the Bunia prison has been rehabilitated, it has a capacity of just over 100 detainees and is currently full. Some of the detainees, and all those judged more dangerous because of their affiliation with armed groups, are still detained by MONUC, although efforts are under way to find a solution to this problem.

⁶⁹ On May 31, 2004, the lakeside village of Tchomia was attacked by unknown assailants. At least 96 people were killed, including 30 hospital patients executed in their beds. See UN Special Report on Events in Ituri, *supra* note 60 at 27.

of militia groups have been on trial and, some cases, sentenced, but for ordinary crimes, not massive human rights violations. Ten individuals have been arrested soon after the massacre of Lengabo.⁷⁰ Some observations on the judicial process, and on the Tchomia and Lengabo investigations specifically, are discussed below.

c. Security

The lack of security is the most serious obstacle to conducting meaningful investigations and prosecutions in Bunia. As mentioned above, armed groups still control most of the district, and the disarmament process has not yet begun. Victims and witnesses are reluctant to testify even in ordinary crime cases, let alone in serious human rights violations involving powerful militia members. Retaliation is a concrete possibility (some even say probability), and none of those interviewed felt that victims should be encouraged to testify before the disarmament process has (hopefully) restored some measure of security to the district.

In such a difficult context, the Prosecutor has indicted militia leaders on ordinary crimes charges in many cases when it has proven impossible to find sufficient evidence to accuse them of serious human rights violations. Mathieu Ngujolo, former Chief of Staff of the “*Front des Nationalistes Intégrationnistes*” (FNI) and widely suspected of war crimes and crimes against humanity, was charged and later acquitted for lack of evidence in a murder case. All witnesses for the prosecution, except one, withdrew their statements, and the witness who testified refused to appear again, citing death threats. Prince Mugabo, a leading member of the Party for the Unity and Safeguard of the Integrity of Congo, was sentenced to 48 months’ imprisonment for armed robbery of a hi-fi stereo, even though he is also suspected of serious atrocities. Aimable Rafiki, a Union Patriotes Congolais senior officer, was convicted of a single charge of murder and sentenced to 20 years’ imprisonment. Human rights groups have criticized this case, particularly because Rafiki was also convicted on the rather imprecise grounds of “arbitrary detention.” This strategy seems to be driven more by the need to find solid accusations against militia leaders *after* MONUC has arrested them than by a conscious investigative and prosecutorial strategy. But prosecuting criminals for ordinary crimes is no substitute for justice for serious human rights violations.

It is too early to draw conclusions on the Tchomia and Lengabo investigations. The Prosecutor understandably does not want to make public sensitive information on an ongoing investigation; he told the ICTJ that he is making every effort to gather evidence from other sources, in case he is unable to gather sufficient evidence from victims and witnesses. The introduction of plea bargaining could create an incentive for lower-level perpetrators to testify against high-level suspects.⁷¹ However, while the Prosecutor’s initiative should be commended, the dearth of witnesses might translate into lack of sufficient evidence. If the Prosecutor brings the case to court and the suspects are acquitted for lack of evidence (as in the Ngujolo murder case), the *ne bis in idem* rule may prevent future prosecutions against them by domestic courts and the ICC.⁷²

⁷⁰ In the night between September 19 and 20, 2004, 16 civilians were murdered by armed assailants in the village of Lengabo.

⁷¹ See section on impunity, below.

⁷² Article 20(3) of the Rome Statute states that:

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

For this reason, prosecutors throughout the country should be given all appropriate means to investigate cases and bring them to court once they believe they have gathered sufficient evidence to prove their case.

At the same time, the Prosecutor told the ICTJ that he is confident that witnesses are willing to testify in cases where the violations occurred in places that are not controlled by the armed groups suspected of committing the violations. The same point was made by human rights organizations in Katanga when discussing the Ankoro case.⁷³ In an atmosphere of continuing insecurity, this factor might play an important role in devising prosecutorial priorities, both for national and international authorities.

d. The “destabilization argument”

Interestingly, the argument that arresting powerful warlords would destabilize the situation and lead to further bloodshed has been disproved so far in Ituri. The arrest of several leaders from the most powerful armed groups and the sentencing of some have not had any major repercussions (except for noisy protests and minor violence). While different consequences might have resulted from the arrest and trial of political and military leaders elsewhere in the DRC, this is an important precedent that can help policymakers draw more reasonable conclusions when making difficult choices on accountability.

e. Legal obstacles and jurisdictional issues

The Tchomia massacre took place in May 2003, and the Lengabo massacre in September 2004; therefore, there are no retroactivity or statute of limitations issues. In both cases, suspects are accused of crimes against humanity, according to Article 166 of the military criminal code. For crimes committed after July 2002, such as this one, it would be preferable to apply the Rome Statute, whose definitions of international crimes are in conformity with international law; also, the Rome Statute, unlike the military code, does not envisage the death penalty. The crimes in question are also outside of the temporal scope of the amnesty decree, which covers acts committed until April 4, 2003. It is worth noting that the governmental draft amnesty law, if adopted, would cover acts committed until June 30, 2004. In any case, both the Prosecutor and the President of the Tribunal dismissed the possibility that the amnesty could cover crimes such as the two massacres in question.

On the issue of jurisdiction, both the Prosecutor and the President were confident that the ordinary courts have jurisdiction over serious human rights violations, even if committed by members of the army or of armed groups. Article 161 of the military criminal code seems to give exclusive jurisdiction on international crimes to military courts, but Article 117 of the military judicial code⁷⁴ states that when ordinary courts are called to judge persons normally under the jurisdiction of military courts, they must apply the military criminal code. While waiting for the ICC implementing law, the latest draft of which grants exclusive jurisdiction on international crimes to ordinary courts, it will be interesting to see whether this argument, firmly endorsed by the judicial authorities in Bunia, is accepted by higher Congolese courts.

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

⁷³ See section on domestic trials, above.

⁷⁴ Law n. 023/2002 of Nov. 18, 2002.

f. Lack of capacity

The judicial authorities in Bunia are struggling to keep up with current, ordinary crimes. It would be unrealistic to expect that, with the means currently at their disposal, these authorities could implement an aggressive prosecutorial strategy to tackle past human rights abuses.

Furthermore, all those the ICTJ interviewed in Bunia in August 2004 noted that investigators, prosecutors, and judges have a fairly limited understanding of international crimes. The Prosecutor and the President of the Tribunal have stated that all three groups would greatly benefit from additional training on prosecuting international crimes. These two observations point to the need to build a specialized capacity to prosecute serious human rights violations, which is addressed in the conclusions and recommendations.

g. Lack of independence

The influence of the transitional government in Ituri is still quite limited, and it is difficult to assess if and how the executive is trying to exercise influence on the judicial authorities in Bunia. One interesting aspect has been the choice to appoint prosecutors and judges from other regions of the DRC, rather than Ituri. This has allowed the judicial authorities to maintain a degree of independence from local armed groups, and has, for the most part, prevented accusations of bias. In a country where the confidence in institutions, and particularly in judicial ones, is extremely low, this is a very important sign. Although it is too early to draw definitive conclusions, appointing prosecutors and judges from other regions to investigate and prosecute serious wartime human rights violations is an interesting idea to explore further; the independence and impartiality that they are likely to bring, both objectively and in the eyes of the population, might compensate for their lack of local knowledge.

h. Preliminary conclusions

The evolution of the prosecutorial efforts in Bunia should be closely followed. Although they cannot be simply transposed to the national level, lessons can be learned from the practice of rapidly building the capacity of a local court. The authorities in Bunia are the first to face legal problems that other courts will face. Finally, lessons can be learned on the relationship between the ICC and domestic courts, as the ICC has officially launched an investigation into crimes committed in Ituri.

Addressing all the obstacles analyzed above, and building the capacity of Congolese courts to deal with serious human rights violations, will undoubtedly be some of the key challenges for Congolese and international policymakers in the near future. However, such efforts alone will not be sufficient to address the legacy of abuse in the DRC.

D. The International Criminal Court

After several years of preparatory meetings, the Rome Statute for the ICC was adopted by 120 nations in 1998. The ICC was formally brought into existence in July 2002, when the treaty was ratified by the minimum 60 states required for its creation. Accordingly, the ICC has jurisdiction only over crimes committed after July 2002. The ICC is a permanent, treaty-based court, and currently has jurisdiction over crimes against humanity, war crimes, and genocide.

The Court is based on the principle of complementarity, which means that in most cases it will undertake investigations and prosecutions only when states are unable or unwilling to investigate

or prosecute. The Court may undertake an investigation or prosecution only if the crime took place in a state that is a party to the Rome Statute (principle of territoriality), or in which the suspect is a national of a state that is a party to the Statute (principle of nationality). These preconditions are waived only when a situation is referred to the ICC Prosecutor by the Security Council, according to Article 13 of the Rome Statute referrals, and when a state that is not a party to the Statute accepts jurisdiction of the Court by lodging a declaration to this effect.

On June 17, 2004, the Prosecutor of the ICC informed the President of the Court that, after completing his preliminary examination, he believes there is a reasonable basis to initiate an investigation for crimes committed in the DRC. He also stated that he intends to prosecute those “most responsible for grave crimes.”⁷⁵ This decision was the most recent in a string of events necessary for ICC involvement in the country. First, the DRC ratified the ICC Statute on April 11, 2002, at a special UN ceremony. On July 16, 2003, the Prosecutor made a statement that he was closely following the situation in Ituri. Finally, in March 2004, the President of the DRC sent an explicit referral to the Prosecutor. While the DRC government had initially requested that the Prosecutor investigate crimes only in the Ituri district, the referral ultimately took a more comprehensive form, including crimes committed in the whole territory.⁷⁶

Although there is no formal obstacle to opening investigations on the ground, the Congolese Parliament must adopt, as a matter of priority, the law implementing the ICC Statute; the current draft law needs to be amended before adoption, eliminating the death penalty from the list of applicable sanctions. The DRC should also sign and ratify the Agreement on Privileges and Immunities for the ICC, which will enable court personnel, investigators, and witnesses to travel and transport evidence across and within national borders.

Despite the fragility of the transitional process, there seems to be a growing consensus that the ICC should remain engaged in the DRC and that it could play a positive role in the peace process by breaking the cycle of impunity and acting as a deterrent. At the Cape Town meeting, Marie-Madeleine Kalala, Minister of Human Rights, said, “The announcement by the Prosecutor that he is considering bringing his first case in the Congo had a pronounced deterrent effect on the action of armed groups in Ituri,”⁷⁷ and she invited the ICC Prosecutor to visit the DRC. The International Crisis Group (ICG) recently analyzed the May 2004 events in Bukavu, noting, “In general, the Bukavu incident demonstrates the need for accountability for past abuses and an end to impunity for war crimes in Congo as an imperative for a stable national transition.”⁷⁸ The ICG went on to stress the importance of the ICC in the resolution of the conflict.

However, the Prosecutor must tread carefully, as the situation is unstable. The ICC Statute provides the Prosecutor with a degree of discretion in deciding whether to investigate matters that are within the ICC jurisdiction,⁷⁹ subject to the approval of the Pre-Trial Chamber.⁸⁰ In particular, according to Article 53, the Prosecutor must evaluate whether an investigation would serve “the interests of justice.” It is uncontroversial that this concept grants the Prosecutor the discretion not to initiate an investigation, at least in the short term, if he has reason to believe that it would seriously destabilize a peace process or contribute to a recurrence of those violations that the ICC is mandated to punish.

⁷⁵ See www.irinnews.org/report.asp?ReportID=41842.

⁷⁶ See www.irinnews.org/print.asp?ReportID=40655.

⁷⁷ See www.npwj.org/modules.php?name=News&file=print&sid=1524.

⁷⁸ See ICG, “Pulling back from the brink in the Congo,” July 7, 2004.

⁷⁹ Arts. 15.1, 53.1.C, 53.2.C of the Statute and Rule 48 of the Rules of Evidence and Procedure.

⁸⁰ Art. 53.3 of the Statute.

It would be wrong, however, to conclude that the Prosecutor should suspend investigations until the situation improves. Rather, he should monitor regularly the (almost daily) security developments and decide which investigations should proceed and which will be deferred. Some have suggested that the Prosecutor commence his investigations of crimes committed in Ituri, where the leaders of armed groups do not seem to have the capacity to destabilize the national peace process, and defer (not renounce) investigations on crimes committed for example in the Kivus, where negotiations are under way to prevent another war. A central concern of this paper is to analyze how the ICC could contribute to transitional justice goals, including re-establishing citizens' confidence in state institutions and restoring the dignity of victims. Four points deserve attention: (1) the danger of creating excessive expectations among the population; (2) the need to establish a comprehensive prosecutorial strategy to give a sense of justice to all Congolese; (3) the seat of the Court once it starts judging suspects; and (4) the ICC's relationship with other transitional justice institutions.

In the first place, it is clear that informed Congolese citizens have very high expectations for the ICC's role in delivering justice for past crimes. It will be extremely important for the ICC to communicate clearly the limitations of its actions, and the government and civil society need to take part in this effort.

Decisions on prosecutorial strategy will be very difficult. It appears clear that the ICC will initially focus on Ituri, as the general perception is that the leaders of local armed groups have committed atrocities but do not threaten the stability of the transition. While such strategy might be justified in the short term, the Prosecutor should indicate clearly that all those bearing "the greatest responsibility," whatever their official position, will be held accountable. In Ituri, the Prosecutor should investigate all major crimes within its jurisdiction; some observers have expressed concern that the Prosecutor might not, at least initially, investigate the infamous "*Effacer le Tableau*"⁸¹ operation, fearing that such an investigation might have destabilizing effect on the transitional government. Excluding one of the most ferocious episodes of the conflict in Ituri would be problematic; the Prosecutor has ample discretion in conducting his investigations and, if necessary, issuing sealed indictments.

On the third point, proceedings happening thousands of kilometers away, despite all the outreach work that the ICC can and should do, can have only a limited impact on Congolese society. The Statute provides that "the Court may sit elsewhere, whenever it considers it desirable."⁸² The Court should consider holding proceedings, or part of the proceedings, *in situ*. The President of the Bunia Tribunal has noted that the ICC could be situated in a building that is being constructed in the court compound. Other considerations may work against this option, such as security, costs, lack of infrastructure and communication, fear of undue interventions by the host state, etc. But there is no doubt that proceedings that take place within the DRC would make victims feel closer to the justice process.

The fourth point deserves a study of its own. The ICC's relationship with local mechanisms, particularly domestic courts and the truth and reconciliation commission, raises a host of issues.

⁸¹ An excellent (and ghastly) account of the crimes committed during this military operation mounted by the MLC and the RCD-N between October 2002 and January 2003 to capture the town of Mambasa can be found in Minority Right International, "Erasing the Board: Report of the international research mission into crimes under international law committed against the Bambuti pygmies in the eastern Democratic Republic of Congo," July 2004.

⁸² Art. 3.3.

How will the complementarity principle be addressed? Will the ICC share information and evidence with local courts? Will the commission share evidence with the ICC?

Because the ICC will be able to try only a handful of people—and because its temporal jurisdiction does not cover the entire conflict—it should not be seen as the only avenue for achieving criminal justice. In addition to the option of domestic trials, the possibility of an additional international mechanism should be evaluated.

E. An International Tribunal

In Resolution DIC/CPR/05, participants to the ICD resolved:

That a request be made to the UN Security Council by the Transitional Government with a view to establishing an International Criminal Court [sic] for the Democratic Republic of Congo, endowed with the necessary cognizance of crimes of genocide, crimes against humanity, war crimes and mass violations of human rights committed or presumed committed since 30 June 1960 as well as those committed or presumed committed during the two wars of 1996 and 1998.

The final report of the ICD reveals that the former government put forward the proposal, and that the RCD-Goma requested that jurisdiction be extended to 1960. In the words of the delegates, the creation of such a court would be “a further step towards involving the United Nations in the defense of the most basic human values in Congo,” and “a tangible manifestation of the international disapproval of the Congolese tragedy.”⁸³ Participants also made it clear that they wanted a fully international ad hoc tribunal, modeled on the ICTR and ICTY.

On January 17, 2003, the Congolese Ambassador to the UN, Ileka Atoki, expressly requested the creation of an international tribunal for crimes committed in Ituri in a letter addressed to the President of the Security Council.⁸⁴ However, the letter requests the creation of an international tribunal for crimes committed in Ituri, not in the whole territory of the DRC. Furthermore, the crimes for which the tribunal is requested fall under the jurisdiction of the ICC.

President Kabila, in his address to the General Assembly on September 24, 2003, said:

The major objective is the establishment, with the assistance of the United Nations, of an international criminal tribunal for the DRC to deal with crimes of genocide, crimes against humanity, including rape used as a weapon of war, and mass violations of human rights.⁸⁵

The Minister of Human Rights mentioned the goal of the creation of an international tribunal in her address at the 60th session of the Commission on Human Rights on March 18, 2004.

When evaluated in terms of its capacity to make a meaningful contribution to the struggle against impunity, such a tribunal would present some key advantages, but also some significant disadvantages.

⁸³ From the final report of the ICD, available at www.drcpeace.org.

⁸⁴ Copy on file with the ICTJ.

⁸⁵ UN General Assembly document, A/58/PV.10, at 15.

Advantages:

- An ad hoc tribunal would not encounter the legal and jurisdictional obstacles met by local courts. The ICTR and ICTY prosecuted and sentenced people even if international crimes were not expressly defined in national legislations at the time the crimes were committed.
- The tribunal would be independent of domestic political influences.
- To date, ad hoc tribunals have been seated outside the country concerned. This could decrease security risks for staff, victims, and witnesses (although, as the ICTR's experience shows, it will be very difficult for the tribunal to guarantee confidentiality and security to its witnesses before they testify and once they have returned home).
- If created under Chapter VII of the UN Charter (like the ICTR and ICTY), all states would be under the obligation to fully cooperate with the tribunal. This would include the obligation of sharing evidence, as well as arresting and extraditing (or trying locally) suspects.

Disadvantages:

- Ad hoc tribunals are very costly, and they proceed at a slow pace.
- Because of their removed locations, the tribunals arguably have not had a significant impact in the places where the crimes were committed.
- Geographical distance also hinders the best treatment of victims, including their ability to participate meaningfully in proceedings.
- Ad hoc tribunals make negligible contributions to the development of local capacity in the judicial system.

In any case, the discussion on the desirability of an ad hoc tribunal is largely academic because this option is not realistic for the DRC. Tribunals have made many important contributions, particularly a vital impact on jurisprudence and the international justice movement. However, representatives of UN member states have consistently sent a single message, summarized in the words of Ralph Zacklin, the Assistant Secretary-General for Legal Affairs:

The bare truth is that it is impossible today to envisage the establishment of an ICTY-type tribunal in new situations, however egregious the violations of international criminal law may be, e.g., in Liberia, the Democratic Republic of Congo or the Ivory Coast. This has not dissuaded governments or civil society from trying to deliver justice in post-conflict societies, but has made it imperative to find alternative ways for doing so.⁸⁶

Although this argument is not uncontroversial, it reflects the dominant mood at the UN. In this context, the Congolese government may need either to reconsider its policy or to request again, in an unambiguous and public manner, that the UN create an international tribunal. If such a request is made, the UN should promptly provide an official response. This would be the only way to move the matter forward, as only an official response would allow the discussion on other alternatives, such as domestic prosecutions or the creation of a hybrid Congolese-international court, to take place.

⁸⁶ Ralph Zacklin, "The Failings of Ad Hoc International Tribunals," *Journal of International Criminal Justice* 2, 2004, at 545.

F. A Hybrid Court

Hybrid courts are set up in the country where the crimes occurred; they draw on both international and domestic resources (financial and personnel) and apply a combination of domestic and international law. Such courts are currently functioning in Kosovo, Sierra Leone, and Timor-Leste, and one has been proposed for Cambodia.

Hybrid courts seem to address most of the criticisms leveled against ad hoc tribunals, particularly regarding efficiency. While efficiency is a legitimate concern, this paper analyzes the benefits of a hybrid solution vis-à-vis the alternatives of domestic and fully international trials, focusing more on a domestic courts.

After initially insisting on a fully international tribunal, the position of the Congolese government has been evolving. In its statement to the UN General Assembly Sixth Committee on October 20, 2003, the DRC government indicated that an international tribunal in the DRC could model itself after those set up in Sierra Leone or Cambodia.⁸⁷ In an interview with the ICTJ in August 2004, the Minister of Human Rights also indicated that the government is open to discussing with the UN the nature and shape of the tribunal. Some local human rights groups have also indicated that, if a fully international tribunal was not possible, they would favor a hybrid court.⁸⁸

There are advantages, disadvantages, and policy issues related to the design of a hybrid court. Some elements are listed as both advantages and disadvantages, reflecting different points of view on the same issues. Existing hybrid courts vary widely, and every country must find the most appropriate model for its situation. If a hybrid court is to be set up in the DRC, however, policymakers should draw on some lessons from previous courts' experience.

Advantages:

- As already noted, hybrid courts are less costly than international tribunals, and their structure allows them to dispense speedier justice.⁸⁹
- Hybrid courts may give greater guarantees of impartiality and independence than domestic courts, which is essential in the Congolese context.
- Hybrid courts are more likely than domestic courts to have the technical skills necessary to prosecute system crimes, as specialized international staff will be assigned to serve.
- Being seated *in situ*, hybrid courts are closer to the victims than international tribunals and might offer a better sense that justice is being dispensed, favoring the process of national reconciliation.
- Hybrid courts may make significant contributions to building the capacity of the local judicial system.
- Although they might not have Chapter VII powers, hybrid courts are much more likely than national courts to have the political weight to indict foreign officials suspected of abuses and residing abroad, and to demand their arrest and extradition.⁹⁰

⁸⁷ Amnesty International, "The Democratic Republic of Congo: Addressing the present and building a future," AFR 62/050/2003, at 22.

⁸⁸ Based on interviews with several human rights activists in Kinshasa, Bukavu, and Kisangani.

⁸⁹ ⁸ The Special Court for Sierra Leone is due to complete its trials and appeals by 2005, after only five years, while the ICTY and the ICTR, due to close their doors in 2010, will have taken more than 15. However, many doubt that the Special Court will be able to meet its own deadline.

⁹⁰ The Special Court indicted Charles Taylor when he was still the President of Liberia, and unsealed the indictment while Taylor was in Ghana for peace talks on the Liberia conflict. Ghana refused to extradite

Disadvantages:

- The cost of hybrid courts, while lower than that of international tribunals, is substantial,⁹¹ and some believe that these funds would be better invested in fully domestic systems.
- Being seated *in situ*, and partly depending on local institutions, makes a hybrid court more vulnerable to political pressures.
- The temporary and partly alien nature of a hybrid court reduces its impact on a given society, particularly its ability to help restore confidence in local institutions; on the contrary, it can strengthen the belief that one must always resort to the international community to solve local problems.
- The hybrid court's ability to indict foreign officials, while positive for the overall goal of the struggle against impunity, might have destabilizing effects on fragile regional balances.⁹²

If a hybrid court is ever established in the DRC, it should be based upon an open and consultative process in which the views of civil society and victims are taken into account. At this early stage, we can briefly highlight the policy issues that would have to be confronted in such a process.

- *The mode of establishment.* The most relevant model appears to be the Special Court for Sierra Leone, which was established by a treaty between the UN and the local government following the government's request; in Kosovo and Timor-Leste, the courts were established by UN transitional administrations.
- *The alleged perpetrators.* A court should have jurisdiction over those bearing the greatest responsibility; a decision would have to be made on the temporal jurisdiction of the court, particularly whether the court maintains jurisdiction for crimes committed after July 2002.
- *The seat.* While the court would probably be based in Kinshasa, the DRC is much larger than any other country in which a hybrid court has been created. Obviously, investigations are required in the provinces, but consideration should be given to the possibility of holding trials in the interior, if security conditions permit.
- *The relationship with the local judicial system.* Two models are available: the Special Court for Sierra Leone is entirely independent of the local judiciary, while the Special Panels in Timor-Leste are integrated into the structure of the district court in Dili, the capital. The Sierra Leone model shelters the court from the inadequacies of the domestic legal system, but also limits its ability to leave a legacy and build local capacity.
- *The right balance between international and national influence* will have to be struck. For example, in Kosovo, the international element is excessively dominant, and the local population generally perceives the court as a foreign body pursuing the political goals of the international community.
- *The relationship with the truth and reconciliation commission.* In Sierra Leone, where the two bodies co-exist, this issue did not receive enough attention.⁹³

him, and Taylor was able to return to Liberia. When he lost power, he obtained refuge in Nigeria, where he remains. The Nigerian government has stated that it will release Taylor to a democratically elected government that requests Nigeria to do so.

⁹¹ The Sierra Leone projected budget for its first three years of operation is a total of US\$75 million, while the budget of the ICTY and ICTR is around US\$100 million per year.

⁹² The Special Court was heavily criticized for unsealing the indictment against Taylor while he was in Ghana for peace talks. This argument holds that the indictment damaged the peace process by pushing Taylor into a corner. However, the opposite argument holds that the indictment actually weakened a president widely suspected of all sorts of atrocities, and ultimately facilitated his demise.

- *Funding considerations.* The growing trend of relying on voluntary contributions to support international justice mechanisms has left many international institutions struggling to survive. Assessed contributions are generally preferable.
- *Chapter VII powers.* We have already analyzed how these powers (which no hybrid court yet enjoys, but the Security Council could possibly grant) can be a double-edged sword. While they would strengthen the obligations of all states to cooperate with the court, they could potentially destabilize regional balances if not used wisely.

Ultimately, if the Congolese government and the international community are determined to break the cycle of impunity in the DRC, they may have to choose between domestic prosecutions or some form of hybrid court. The choice should be guided by careful consideration of the pros and cons of each mechanism, the obstacles and the prospects for overcoming them, and political issues. The final choice should be made after consulting widely with Congolese society, especially victims, whose perspectives must be a key consideration.

Although the primary responsibility for breaking the cycle of impunity rests with the transitional government, the international community should not remain indifferent to requests for help. The June 2003 Report of the Security Council Mission to Central Africa, among many others, reads, “The mission stressed to all its interlocutors that impunity would no longer be tolerated, and that those responsible for crimes should expect to be held accountable for them.” If this is not an empty threat, the UN has to be prepared to seriously assist this effort. The end of this report includes some recommendations on the form such assistance could take in the short term.

G. The Impunity Gap

Whatever mechanism or combination of mechanisms is finally set up to prosecute perpetrators of serious human rights abuses, an “impunity gap” will inevitably persist. This refers to the cases of all those who participated with varying degrees of responsibility in serious human rights abuses and cannot be effectively prosecuted in national or international courts because of the excessive caseload that would result. The vast majority of cases will have to be dealt with either outside of the criminal justice framework or within the justice system but with abbreviated and simplified procedures.

The following five options could contribute to reducing the impunity gap in the DRC: plea bargaining, community reconciliation procedures, amnesty, a truth and reconciliation commission, and vetting. The first three are examined here, while the latter two are covered in the next sections.

1. Plea Bargaining

Consideration could be given to the introduction of plea bargaining into the Congolese legal system. A plea bargain is an agreement between the defense and the prosecutor in which a defendant pleads guilty to criminal charges. In exchange, the prosecutor drops some charges, reduces a charge, or recommends that the judge enter a specific sentence that is acceptable to the defense. A community-service requirement can also be tied into this process. Through plea bargains of low-level offenders, prosecutors could gather important evidence against high-ranking perpetrators that may secure their convictions. This will require a functioning judicial

⁹³ One major source of tension between the Court and the Commission has been the Commission’s request to hold a public hearing with Sam Hinga Norman, an indicted leader who is currently in the Court’s custody. The Court ultimately denied the request.

system, which may not be possible in the DRC before minimal capacities are rebuilt and public confidence is restored. The high number of perpetrators that could seek this alternative might clog the judicial system. Highly credible institutions must make decisions to exercise prosecutorial discretion, as the distinction between those who will be offered plea bargains and those who will be prosecuted could cause tensions to increase. On the other hand, plea bargains can help victims to feel that some measure of justice is being dispensed. A deterrent effect might be achieved if the benefits of the plea-bargain agreement would be revoked in case of recidivism.

An in-depth study could be conducted to examine the feasibility of plea bargaining and to identify the necessary legal reforms for its introduction in the Congolese system.

2. Community Reconciliation Procedures

An interesting experiment is currently under way in Timor-Leste, where low-level perpetrators have the option of going through a community reconciliation procedure. This process, based on traditional Timorese reconciliation ceremonies, brings together perpetrators, victims, community elders, and the entire community. In a process organized by the local truth commission, perpetrators confess their crimes, ask for the victims' forgiveness, and are reintegrated into the community by their elders, on the condition that they agree to undertake a form of community service decided by the truth commission in consultation with the elders and the victims. If the perpetrator performs the community service, the liability for his crimes is extinguished. It should be clarified that perpetrators of serious abuses (such as murder or rape) cannot go through this procedure. In Timor, this process is channeled through the local truth commission, but such procedures could operate independently or through other institutions. This is just one example of the many communities throughout the world (and certainly in the DRC) that have their own reconciliation procedures, often applied to conflicts between individuals or clans. These procedures can be integrated into formal processes to address the impunity gap, at least for low-level offenders.

The organic law establishing the truth and reconciliation commission (TRC) in the DRC (see below) contains a provision to this end. Article 42 states that, "The TRC can envisage the organization of a ritual for certain cases of reconciliation among the parties appearing in front of it."⁹⁴ This provision does not create an obligation, but simply empowers the TRC to facilitate such procedures. However, there have been many shortcomings in the process leading to the creation of the TRC, and it is not clear how much the commission could accomplish before the end of the transition. Nevertheless, the inclusion of this clause is a positive development, although much more reflection and discussion is needed before this provision can be implemented.

3. Amnesty

In order to address the impunity gap, Congolese institutions could adopt an additional amnesty law for minor crimes, possibly conditioned on the promise of nonrecidivism and on the release of information. However, this discussion is probably premature, as an amnesty for minor crimes needs to be linked to a coherent prosecutorial strategy for major crimes, which has yet to be developed.

⁹⁴ "La Commission Vérité et Réconciliation peut envisager l'organisation d'un rituel pour certain cas de réconciliation entre les parties ayant comparé devant elle."

The next two sections focus on two transitional justice mechanisms that could contribute to reducing the impunity gap: the TRC and the removal of officials from public institutions, also known as “vetting.”

IV. THE TRUTH AND RECONCILIATION COMMISSION

A. Introduction

Truth commissions are institutions sharing the following characteristics:⁹⁵

- Temporary bodies, usually in operation for one to two years;
- Officially sanctioned, authorized, or empowered by the state and, in some cases, by the armed opposition, as in a peace accord;
- Nonjudicial bodies that enjoy a measure of *de jure* independence;
- Usually created at a point of political transition, either from war to peace or authoritarian rule to democracy;
- Focus on the past;
- Investigate patterns of abuses and specific violations committed over a period of time, and not just a single specific event;
- Generally complete their work with the submission of a final report that contains conclusions and recommendations; and
- Focus on violations of human rights and, sometimes, humanitarian norms.⁹⁶

A common trend among recent truth commissions is to transpose the South African model to other countries. While important lessons can and should be drawn from all experiences, one of the greatest benefits of truth commissions is the flexibility of their design, which can be adapted to each specific context. Every country needs to design the mandate, objective, composition, and powers of its commission; policymakers should not assume that a model that has produced positive results in one country would be effective in another.

Currently, truth commissions are functioning in Morocco, Paraguay, and Timor-Leste. Two commissions recently finished their work and released their reports in Ghana and Sierra Leone, and several other countries are considering the creation of such institutions, including Burundi, the Central African Republic, and Liberia.

B. The Creation Process

Participants to the ICD, as mentioned, adopted a resolution “on the Institution of a Truth and Reconciliation Commission” (Res. No 20/DIC/2002, “Resolution”). This Resolution, which contains very detailed provisions on the structure and functioning of the TRC, has been, together with the provisions in the transitional constitution (Articles 154–160), the legal basis for the creation of the TRC.

When the discussion was introduced in the DRC, some tensions immediately surfaced. On the one hand, the TRC is one part of a fragile peace accord whose provisions are meant to regulate the way the commission is set up and functions. Some Congolese, particularly many of those who

⁹⁵ For a detailed analysis of truth commissions, see Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York: Routledge, 2001.

⁹⁶ International Idea, “Reconciliation after Violent Conflict: a Handbook,” 2003, at 125, available at www.idea.int/conflict/reconciliation/reconciliation_full.pdf.

were in Pretoria during the negotiations, were concerned that tampering with one part of the accord could encourage changing other parts and lead to its collapse.

On the other hand, the legislative process has led to the creation of a body that would not meet the tests of credibility, independence, competence, and impartiality that are necessary to achieve the complex mandate of a truth commission. The recognition of such deficiencies has led some Congolese civil society organizations and the international community, through the UN, to demand further reflection and consultation before establishing the institution.⁹⁷

The law establishing the TRC was promulgated by the President of the Republic on July 30, 2004. While a comprehensive analysis is beyond the scope of this paper, four aspects of the TRC are discussed: the consultation process leading to its establishment, its composition, its amnesty-granting powers, and its provisions on reparations.

1. Consultation

The importance of undertaking an open and inclusive consultative process prior to establishing a truth commission cannot be overemphasized. Citizens, and particularly victims, need to see themselves as participants, not just beneficiaries, of transitional justice policy. In particular, a truth commission, the success of which depends on society's level of participation, should not be simply imposed on citizens. If there is no proper consultation on some fundamental issues, citizens are likely to feel disenfranchised and indifferent, particularly if some of their key concerns are not taken into consideration.⁹⁸ The lack of sufficient consultation is already hindering the process in the DRC. The Sun City resolution establishing the TRC was the product of an agreement between Congolese delegates; in this sense, it was the result of an initial consultation process, although an agreement among elites is no substitute for genuine popular consultation.

While different organizations and individuals have made several efforts since January 2003 to discuss the establishment of a TRC, they have not always been coordinated, nor have they been sufficient to produce a wide consensus on the proper shape and mandate for a TRC. Important sectors of civil society, particularly in the provinces where most of the recent violence has taken place, have expressed frustration at not being consulted.⁹⁹ Finally, in a context where human rights violations mostly occurred in rural, hard-to-reach areas, and where victims have not been able to organize themselves effectively, very little direct consultation with victims has taken place. The international community also expressed this view, and invited Congolese political actors to extend the consultation process.¹⁰⁰

⁹⁷ See, e.g., an open letter sent by 31 civil society organizations from Bukavu on Aug. 13, 2003, upon initiative of the organization "Initiative Congolaise pur la Justice et la Paix," and a similar memorandum signed by 16 individuals representing various organizations in Kisangani on Aug. 13, 2003. On the international community front, MONUC, to which the Security Council gave the mandate to support this process, repeatedly invited the Congolese institutions to consult more widely and consider substantial amendments to the organic law before adopting it.

⁹⁸ An example of this is the TRC set up by President Kostunica in Serbia in 2000. Kostunica announced the creation of the commission by decree to the population, without consulting virtually anyone. The commission never gained a foothold in Serbian society, and was ultimately disbanded before producing its final report.

⁹⁹ See the memoranda, *supra* note 97.

¹⁰⁰ The President of the Security Council issued a statement on December 11, 2003, inviting the Congolese Parliament to extend the consultation process. The ICTJ also encouraged the continuation of the

In February 2004, MONUC, the Office of the High Commissioner for Human Rights, Global Rights, and the ICTJ organized a national seminar on the TRC, which representatives from all provinces and several Congolese officials attended. The conclusion of the seminar was, “it seems that the establishment of a TRC in the DRC should take more time before it can start functioning effectively and in conformity with the objectives conferred to it.”¹⁰¹ In general terms, even the modest consultation process that has taken place has not significantly influenced the legislation establishing the TRC. As a result, the legislation seems weak in many respects.

2. Composition

One of the main lessons gleaned from the operation of more than 20 truth commissions around the world is that their membership, and the process of appointing their members, is fundamentally important to ensure their ultimate success.

The text of the Sun City resolution states that:

The members will be appointed by consensus from the ranks of the components according to the criteria established by the ICD: moral probity, credibility, knowledge of the social realities on the ground, proven competence in relation to processes for promoting truth and reconciliation, patriotism and evidence of a conciliatory and unifying spirit.¹⁰²

The Constitution states at Article 157 that the President of the TRC will be a representative of civil society, while the other parties will be part of its “bureau.”

In July 2003, seven of the eight members¹⁰³ of the TRC bureau were appointed by their respective parties, although the process was not transparent and the criteria for appointing the members were related more to political affiliation than to the objective criteria set up in the ICD. Furthermore, the members were not appointed by consensus, as demanded by the resolution; their appointment was simply announced by their respective parties. The Congolese TRC has been the first case of a truth commission whose members are appointed before the law creating the institution is adopted. A similar process later occurred in Liberia, with largely similar, damaging consequences for the independence, impartiality, and credibility of the commission.

The international community and local Congolese activists have expressed serious doubts that the TRC can become an independent, credible institution with the current membership. First, political appointees are not likely to act independently; second, the populace is unlikely to have confidence in a commission formed by members of those same factions that perpetrated the abuses; third, serious doubts have been cast on the competence, and in some cases even on the human rights records, of some bureau members.

consultation process in several occasions. See, e.g., the speech delivered by ICTJ Vice President, Ian Martin, at the seminar organized by the bureau of the TRC, on Aug. 22, 2003.

¹⁰¹ Report of the National Seminar on the TRC, held at the Stade des Martyrs in Kinshasa, Feb. 25–28, 2004, at 26.

¹⁰² “Les membres seront désignés par consensus des composantes conformément aux critères retenus par le DIC: moralité, crédibilité, connaissance des réalités sociales du terrain, compétence (par rapport aux principes de vérité et réconciliation) patriotisme, esprit rassembleur et réconciliateur.”

¹⁰³ The Political Opposition did not appoint its member until mid-2004.

To address these growing criticisms, the organic law expanded the membership of the commission. Article 9 envisages the appointment of 13 additional members, to be chosen from “religious institutions, academic institutions, associations of women and other associations whose activities are related to the objective of the TRC.”¹⁰⁴ However, even though the additional members must be chosen in a public and transparent process, this will take place “under the direction of the bureau.”¹⁰⁵ This ambiguous provision effectively ensures that the political parties maintain overall control on the appointment of the “independent” commissioners. The President of the TRC bureau, Monsignor Jean-Luc Kuye, announced in September 2004 that the bureau intended to invite civil society organizations in every province to participate in the selection process of the additional commissioners. The appointment of 13 independent, competent, representative, and credible commissioners would be an important step forward; however, the modalities of implementation of this selection process had not been made public at the time of this writing.

3. Amnesty-granting Powers

Of the more than 20 truth commissions that have operated worldwide, the South Africa TRC has been the only one with the power to grant amnesties to perpetrators, if the “act, omission or offence was associated with a political objective,” and if the applicant “made a full disclosure of all the relevant facts.”¹⁰⁶ This controversial provision was the product of very delicate political negotiations in which those responsible for gross human rights violations in the former regime maintained that an amnesty would be a necessary precondition for the peaceful transfer of power; an amnesty provision was entrenched in the transitional constitution and implemented by the TRC.

Perpetrators who did not apply for and those who were denied amnesty could be—and still can be—prosecuted by ordinary South African courts. It is worth noting that any crime, including international crimes, could be amnestied, if the applicant acted “with a political objective.” Although the law made an effort to define these acts,¹⁰⁷ despite its best efforts, the TRC was

¹⁰⁴ “Des personnalités issues des confessions religieuses, des associations savantes, des associations féminines et d’autres associations dont les activités ont un rapport avec l’objet de la Commission Vérité et Réconciliation.”

¹⁰⁵ “Sous la direction du bureau.”

¹⁰⁶ Promotion of National Unity and Reconciliation Act, N. 34 of 1995, July 26, 1995, Arts. 20.1(b, c).

¹⁰⁷ Art. 20 (3): Whether a particular act, omission or offence contemplated in subsection

(2) is an act associated with a political objective, shall be decided with reference to the following criteria:

(a) The motive of the person who committed the act, omission or offence;

(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted-

heavily criticized for the uneven application of this criterion. Furthermore, while the amnesty clause certainly allowed the commission to gain access to information it would not have been able to gather otherwise, a vast number of perpetrators decided not to come forward when they realized that they were unlikely to face prosecutions. A key lesson from South Africa is that, absent a credible threat of prosecution, perpetrators are unlikely to appear in front of a commission, even with the incentive of an amnesty.

The South African experience shows that linking an amnesty to a truth commission process is very complex; requires many financial, human, and technical resources; and is likely to provoke heated controversies.

In the DRC context, the original ICD resolution states that:

The Commission is empowered to grant amnesty to any person who accepts to confess and completely denounce, on pain of perjury, all the facts that he/she knows and which have a bearing on the crimes and large-scale violations in which he/she was involved, and whose primary motivation is of a political nature. Such amnesty will have to conform to the relevant international norms, and the Commission will not be empowered to grant amnesty for crimes of genocide or crimes against humanity.¹⁰⁸

According to Article 8(g) of the promulgated law, the Commission has the power to:

Under reserve of the amnesty law which will be voted by the National Assembly, propose to the competent authority to accept or refuse any individual or collective amnesty application for acts of war, political crimes and crimes of opinion.¹⁰⁹

This provision has changed several times; in the law initially adopted by the National Assembly, the TRC was given the power to propose amnesty for violations *other than* acts of war, political crimes, and crimes of opinion.

The provision does not state that all those who want to benefit from the amnesty law have to submit their application to the TRC, but this is the understanding of the President of the TRC.¹¹⁰ As discussed above, an amnesty should not cover serious human rights violations. It is therefore not clear why the TRC, whose mandate should cover primarily the investigation of human rights violations, should also be burdened with this amnesty process.

(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.

¹⁰⁸ “La Commission est habilitée à amnistier toute personne qui aura accepté de confesser et de dénoncer complètement, sous peine de parjure, tous les faits qu'elle connaît et qui se rapportent à des crimes et des violations massives des droits de la personne dans lesquelles elle a été impliquée dont la motivation première est de nature politique. Une telle amnistie devra être conforme aux standards internationaux en la matière, et la Commission ne pourra être habilitée à amnistier des crimes de génocides ni des crimes contre l'humanité.”

¹⁰⁹ “Sous réserve de la loi d'amnistie qui sera votée par l'Assemblée Nationale, proposer à l'autorité compétente l'acceptation ou le rejet de toute requête individuelle ou collective d'amnistie pour les faits de guerre et les infractions politiques et d'opinion.”

¹¹⁰ Interview with the ICTJ, August 2004.

The ICTJ agrees with the conclusion of the final report of the February 2004 seminar on the TRC: “The discussions around the amnesty provision [and the relationship between the TRC and the judicial system] have shown that this issue needs to be further discussed.”¹¹¹ More discussion and reflection is necessary to determine whether to include an amnesty provision, the crimes an amnesty would cover, and the procedure and modalities for its implementation. The clause in the TRC law (“under reserve of the amnesty law which will be voted by the National Assembly”) allows for such reflection.

4. Reparations

The ICD recognized the importance of the “rehabilitation of victims and compensation for harm done,” and decided to include this in the mandate of the TRC. The mandate of most truth commissions includes developing and/or recommending a comprehensive reparations program for victims; this is usually presented to the government in the commission’s final report. Reparations have proven a particularly challenging aspect of the work of truth commissions, as governments are often reluctant to implement the reparations plans that the commission proposes. In the case of South Africa, the government ignored the TRC’s recommendations until 2003, when it granted victims a fraction of what the commission had proposed.

In the field of reparations, the ICD resolution gives the TRC a much more arduous task than any other commission to date. In the first place, the commission would be responsible for “taking all the necessary measures to compensate them [the victims] and completely restore their dignity.” No other commission has directly awarded reparations to victims, except for very limited urgent measures awarded to indigent victims or victims with special needs (such as medical assistance) while a comprehensive reparations program was being developed. This responsibility could paralyze the commission’s activities and divert attention and resources from other important issues.

Article 41 of the law states:

At every time and in every circumstance, reparations are decided by agreement between the parties. The agreements concluded under the aegis of the TRC on reparation or restitution have the value of a contract and, as such, the value of *res judicata*.¹¹²

Thus, the commission is assigned a role of mediator between perpetrators and victims; decisions on reparations are taken by agreement among the parties and immediately implemented.

Such a program, in its current formulation, would be extremely difficult, if not impossible, to implement. In order to make the procedure envisaged by the law feasible, it would be necessary to identify the perpetrator in every single case. In the eastern DRC, many victims tell stories of armed groups assaulting a village by killing, raping, looting, and leaving; often, victims could not tell which group the aggressors belonged to, let alone identify individual perpetrators. Too many “rebel groups,” local and from neighboring countries, and too much chaos and anarchy have plagued the DRC. In how many cases will the commission be able to identify the individual murderer or rapist? Who will pay reparations to the victims in the cases in which the perpetrator cannot be identified? Even if the perpetrator is identified, how will the commission convince him

¹¹¹ Report of the National Seminar on the TRC, *supra* note 101.

¹¹² “En tout temps et toute circonstance, la réparation s’effectue selon une procédure à l’amiable. Les arrangements à l’amiable intervenus sous l’égide de la CVR ont valeur de transaction et, a ce titre, sont revêtues de l’autorité de la chose jugée, conformément au Titre X du Code Civil Congolais.”

to appear, especially when it will not be able to offer amnesty for most crimes? Will the commission use its subpoena powers? How can an “agreement between the parties” be reached when one has to be compelled to appear? What happens if that agreement is not reached? Or if the perpetrator is indigent and has nothing to offer? Also, will the commission establish some criteria or leave it entirely to the parties to negotiate, with the result that compensation for human rights violations might become the object of a tough bargaining process, which would humiliate the victim even further? What are the legal consequences of a reparations agreement for the responsibility of the alleged perpetrator? Does it amount to a confession of guilt? If the perpetrator denies responsibility, can the TRC find him responsible for the purposes of reparations? These are only some of the numerous questions that need to be addressed before the final text is adopted.

To complicate matters further, Article 55 of the law states, “The final report will include recommendations on reparations due to victims and on their rehabilitation.”¹¹³ This article seems to contradict the principle stated in Article 41: “At every time and in every circumstance, reparations are decided by agreement between the parties.” Would victims who do not receive reparations through an agreement with the perpetrator be eligible for reparations from the state? Or are these reparations of a different nature? The law should specify how the two different processes, if they are indeed distinct, relate to each other.

In conclusion, as with the amnesty provision, it seems that more reflection, discussion, and analysis of other experiences of reparations programs are necessary. It might be advisable to consider a “classical” model, where the TRC simply recommends—but does not implement—a comprehensive reparations program to the government, except for urgent measures. Responsibility for actually implementing the program would then lie with the government.

C. Preliminary Conclusions

The TRC is supposed to operate during the transition and complete its final report before the elections.¹¹⁴ Aside from a mandate to investigate human rights violations, the Congolese TRC also has a conflict-prevention and resolution mandate, which it is supposed to execute “through mediation between torn communities.”¹¹⁵ Thus far, the commission has focused its efforts exclusively on conflict mediation and resolution efforts. Delegations of commission members, accompanied by other resource persons, have visited South Kivu twice and Kisangani once. They held seminars and meetings with various communities and political, military, religious, and civil society representatives. The ICTJ is unable to evaluate the impact of these activities on local realities. However, conflict mediation or resolution is not part of the core mandate of a truth commission; while this might be one of the top priorities in the DRC, where tensions between communities remain high in many regions, such work conceptually and operationally differs from the truth commission’s investigative work.

¹¹³ “Ce rapport reprend: les recommandations relatives notamment: aux réparations dues aux victimes et à la réhabilitation de celles-ci.”

¹¹⁴ Article 55 of the law states that the TRC must deposit its final report with Parliament at the end of the transition. However, the same article also says that the TRC report should also include recommendations concerning “practical ways to possibly continue the search for truth and reconciliation after the transition,” which opens the possibility to extend the operations of the current TRC or to the establishment of another body after the transition.

¹¹⁵ Art. 5: “Elle assure: la prévention ou la gestion des conflits en cas de leur survenance, par la médiation entre les communautés déchirées.”

In a discussion with the ICTJ in August 2004, Monsignor Jean-Luc Kuye, President of the TRC, said that the commission is currently unable to undertake investigations into human rights abuses. He plans to focus on conflict-mediation activities.

It is unlikely that the current commission will be able to function effectively as an investigative body for the following reasons:

- Lack of legitimacy because of its composition and insufficient consultation prior to its creation. This shortcoming might be partly addressed by organizing a truly open and participatory selection process for the 13 additional commissioners.
- Security concerns for staff, victims, and witnesses.¹¹⁶
- Lack of sufficient time for the commission to complete its investigations and submit a final report before the end of the transition.
- Apparent lack of sufficient reflection on key provisions of the law, such as amnesty, reparations, and other matters.
- Lack of necessary political will to support the commission's work.

The debate on transitional justice inevitably will resurface after the elections, particularly if little progress is made during the transition. If, as it now seems clear, the current commission is not able to undertake in-depth investigations into conflict-related human rights violations, it is probably best to resume this debate after the elections. A new consultation process can then take place if the Congolese people think that the country still needs a truth commission, at which time a new body—with a new composition and a new mandate—can be created.

V. INSTITUTIONAL REFORM¹¹⁷

Institutional reform, particularly in the security and justice sectors, is an essential condition to prevent abuses from recurring and build peace and the rule of law in countries emerging from conflict or authoritarian rule. A key aspect of post-conflict and post-authoritarian governance reform is the screening and vetting of public employees in order to remove those unfit for service and build more effective, impartial, and trustworthy public institutions.

In the DRC, institutional reform presents an enormous undertaking. The country has known decades of authoritarian rule followed by a devastating conflict, and the public administration and infrastructure has all but collapsed. The transitional government, with the support of the international community, is engaged in efforts to reform virtually all public institutions.

Vetting in the DRC faces a variety of complex challenges. As a result of the conflict, public institutions were divided and each of the factions maintained its own public administration. The precise number and status of security personnel and other public employees is unknown, personnel management systems are not maintained or do not exist, and basic information on public employees is not available. The professional competence and experience of public employees varies greatly, with many lacking any significant training at all. Many public employees, especially in the security sector, were involved in serious human rights abuses, and corruption is rampant. However, before an appropriate and realistic vetting program can be

¹¹⁶ At the MONUC workshop in February 2004, several participants from the eastern part of the country questioned how one could start speaking about truth and reconciliation when the conflict is not over, at least in their regions, and the violations continue unabated.

¹¹⁷ This section, and the conclusions and recommendations on institutional reform, have been written by Alexander Mayer-Rieckh.

designed, a thorough assessment must be carried out in order to identify clearly the personnel reform needs and risks.

The registration of public employees provides a useful tool for assessing the current status of public personnel, including the competence and integrity of individual employees and the existing organizational structure and composition. Registering is an important, yet relatively uncontroversial, start for a vetting and personnel reform process. Initial reactions in the DRC indicate that a comprehensive process would be politically unrealistic at the current stage of the transition. Public officials are, however, generally receptive to conducting a registration process, and international donors appear interested in supporting such activities.

Registration processes require significant resources, especially in a post-conflict country the size of the DRC. For example, according to current estimates, there are more than 90,000 police officers. However, in order to identify key personnel reform requirements and design a vetting process, it is generally sufficient to carry out a pilot registration of a significant sample of employees. A full registration process can be undertaken at a later stage.

On the basis of this assessment and following an identification of public needs, the objectives of a personnel reform program and the parameters and standards for a vetting process can be defined. These fall into four broad categories. First, the organizational structure of the institution needs to be defined, as changes affect the number of public employees and individual employment. The appropriate structure depends on the personnel required to effectively and efficiently implement the institution's mandate. In the DRC, organizational changes relate in particular to the planned integration of public institutions of the same type that were divided along factional lines.

Second, the composition of the institution's personnel needs to be defined, including the gender, ethnic, geographic, and even religious composition. The personnel composition should broadly reflect the composition of the population it is called to serve. Vetting processes are affected by decisions on personnel composition, as they define and limit the number of posts available for employees from one or the other gender, from a specific ethnic or religious group, and from a specific geographic region. Decisions on composition are particularly relevant in countries that emerge from a conflict with an ethnic or geographic dimension, such as the DRC.

Third, employment standards must be defined. These refer to the necessary physical and mental fitness, as well as the professional competence and experience, required to fulfill the technical aspects of a certain position. The definition of these standards will imply difficult and politically controversial choices in the DRC context, as a significant number of current public employees lack any significant professional education. Transitional arrangements may have to be put in place to allow for training such employees.

Fourth, public employees must be competent and must have integrity. Individual integrity manifests itself in an employee's adherence to international standards of human rights and professional conduct, including financial propriety. In particular, individuals who have committed serious international crimes—especially genocide, war crimes, crimes against humanity, and torture—should not hold or be recruited for public office. Employees who commit serious crimes forfeit the public's trust and should be removed from office. This standard is, however, extremely controversial in the current DRC context, as the civil conflict was particularly cruel and continues to flare up, large numbers of public employees from all factions committed serious abuses, and individuals who committed abuses remain in positions of power during the transition. The dearth of reliable information on the abuses committed by individual employees is another complicating factor for the application of integrity standards.

The design of a vetting process raises a number of complex practical and legal questions that cannot be discussed in detail in this paper. It is important to emphasize, however, that the fundamental principles of legality and due process must be respected, and that a vetting process must not constitute a pretext for political manipulation and interference. In terms of management and implementation, it should be stressed that vetting processes are complex, time-consuming, and resource-intensive. Moreover, the consequences of a vetting process for those eventually removed from their public positions, for the function of the public administration (as well as for the transition itself), must be considered during the design phase.

VI. A COMMISSION OF EXPERTS

The UN has, on several occasions, established commissions of experts in the wake of mass atrocities in a particular country or region. Such bodies have been mandated to investigate the violations of human rights and international humanitarian law that occurred, explore the possible responses of the international community, and recommend necessary mechanisms to respond to the atrocities.

Commissions of experts were set up in Cambodia, Rwanda, Timor-Leste, and the former Yugoslavia. The UN Secretary-General usually appoints such commissions after resolutions are adopted by the Security Council or the General Assembly. More recently, an assessment mission to analyze the feasibility and desirability of a commission of experts has been dispatched to Burundi. Commissions of experts usually comprise three to five members selected according to their reputation, knowledge of the region, and expertise in human rights law and international humanitarian law.

The late UN High Commissioner for Human Rights made a recommendation on the establishment of such a commission for the DRC.¹¹⁸ This was also recommended in the report presented by the Special Rapporteur on the DRC to the UN General Assembly.¹¹⁹

In the case of the DRC, the following points should be considered:

- The Secretary-General could establish the commission, pursuant to Resolution 1468, where the Council requested “the Secretary-General, in consultation with the High Commissioner for Human Rights, to make recommendations to the Council on other ways to help the transitional government in the DRC address the issue of impunity.”¹²⁰
- The commission could be a mix of both international and Congolese experts, chosen by the Secretary-General, or a purely international commission.
- The commission could analyze the scope of violations, making use of evidence already available in UN and NGO reports.
- The commission could consult widely with Congolese and international actors on the ground.
- The commission could be mandated to make recommendations on how the international community can assist the Congolese government to address the issue of impunity.

¹¹⁸ Discours de Mr. Sergio Viera de Mello, Haut Commissaire aux Droits de l’Homme au Conseil de Sécurité, Feb. 13, 2003, available at www.unhcr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet.

¹¹⁹ Iulia Motoc, Interim report of the Special Rapporteur on the Situation of human rights in the Democratic Republic of the Congo, A/58/534, Oct. 24, 2003.

¹²⁰ Security Council Resolution 1468, S/RES/1468 (2003), March 20, 2003.

- The commission could assess the capacity and independence of the Congolese judiciary in order to evaluate its potential contributions and whether international involvement would be necessary, based on prior assessments.
- The commission could make recommendations on how the citizens' institutions (in particular, the TRC and the Human Rights Commission) could contribute to the struggle against impunity, and preliminarily evaluate their work.
- In close consultation with the Prosecutor of the ICC, the commission could take into account the role of the ICC and, if additional internationalized mechanisms are recommended, consider how the principle of complementarity and other interrelationship issues might apply.

At the end of its work, the commission would submit a report with recommendations on how to address the issue of impunity, including an analysis of existing mechanisms and the possible establishment of others. The establishment of a commission of experts would be more likely to succeed if the DRC government were to make the request directly to the Secretary-General. Civil society groups could ask the government to take such a step, if they deemed it necessary.

A commission of experts would certainly bring greater attention to the issue of accountability for crimes committed in the DRC, and it could help mobilize resources and skills from the international community. However, such a commission, if created, would have to take into account the steps already taken, such as the creation of the TRC, the ICC investigations, and other developments.

VII. CONCLUSIONS AND RECOMMENDATIONS

The preceding analysis shows that much is to be done before a comprehensive transitional justice framework can be implemented. The DRC peace process remains very fragile, and it is therefore necessary to adopt a strategy that takes into account the complex realities, strengthens the peace process, and fosters a state based on the rule of law, not impunity. In order to do this, some reforms must be prioritized to create the necessary conditions for achieving justice. Some measures, including certain prosecutions, can and should take place immediately; others need to wait for certain reforms and a more peaceful and secure situation.

It is important to develop a holistic vision of how the goals of justice, truth, reparations, and reform can be advanced during the transition, and what conditions are necessary to continue this work after the transition. Visible and concrete signals are necessary to show the commitment and determination of the Congolese government and the international community to break the cycle of impunity. There is simply no alternative, other than the continuation of a system where terror and violence remain effective ways to gain power and wealth.

The following suggestions are made based on the analysis of transitional justice measures in the DRC outlined in this paper. It is hoped that they will contribute toward efforts to pursue greater accountability in the DRC.

A. Prosecutions

It is unlikely that the Congolese people will feel that justice has been served unless at least the main perpetrators are brought to justice. The Congolese government is responsible for developing a comprehensive strategy; in doing so, it should consult local civil society and will need to rely on the technical, political, and financial support of the international community. Some key reforms should be implemented to remove legal obstacles to prosecution, ensure the independence of the judicial system, and increase the level of security for victims, witnesses, and judicial staff. An

intensive training program should be organized to build the capacity of the Congolese judicial system in the field of international crimes.

In order to address the security concerns analyzed in this paper, the Congolese government should consider the following:

- Formulate and implement a witness protection program, to be developed with the support of Congolese civil society. The international community must be prepared to support this program. It should be clear that only a handful of key witnesses in important trials will benefit from the most sophisticated tools in the program (such as relocation, change of identity, etc.). For the vast majority of witnesses, security will have to be ensured in simpler and cheaper ways. Congolese human rights organizations, supported by international groups specializing in legal assistance, could initiate this discussion and engage the government, possibly by introducing a draft law in Parliament through its delegates.
- Similarly, adopt a protection program for investigators, prosecutors, and judges.
- Accelerate the disarmament process and the army reform; in particular, units of the army or of former rebel groups should be relocated to places outside of where they operated during the conflict in order to diminish the risks of retaliation against potential witnesses.
- Similarly, implement a targeted program of relocating some key officials (police officers, judges, administrators, etc.). In the areas most affected by the conflict, most local authorities have remained in charge after the peace accords and are inevitably associated with the local dynamics of the conflict. Replacing them could increase confidence in state institutions.

In order to remove the legal obstacles to prosecutions, the Congolese government should:

- Adopt, as a matter of priority, the law implementing the ICC Statute, which would give jurisdiction on international crimes to civilian courts.
- Adopt an amnesty law that specifies a limited number of specific acts (not including international crimes or serious domestic crimes, such as murder or rape) for which amnesty is to be granted. The law should also specify the mechanism for implementation of the amnesty.
- Consider extending the statute of limitations for serious crimes, such as murder and rape, to 20 or 30 years.
- If judges prove unwilling to apply international law without a specific act of incorporation by the legislature, clarification on the applicability of international law by Congolese courts should come either from the Supreme Court or through an appropriate legislative act.

In order to strengthen the capacity and independence of the Congolese judicial system, an intensive training program for hundreds of investigators, prosecutors, and judges on matters related to investigating and prosecuting serious human rights abuses should be organized. This program could be integrated into the national judicial reform program, which will be largely based on the findings of the Justice Audit mission. The international community should contribute to financing this effort. This would send a real signal that the international community is serious about “assist(ing) the transitional authorities of the DRC in order to put an end to impunity,”¹²¹ and enhance its credibility in the eyes of ordinary Congolese. If such a program were to gain the full support of the government, it would significantly increase the prospects of achieving justice in Congolese courts. At the same time, a training program can hardly be perceived as an immediate threat to the stability of the country, and it would overcome the

¹²¹ These are words of the Security Council, directed to the Secretary-General in resolution S/RES/1493 (2003), July 28, 2003.

expectation that the elections would diminish a commitment to accountability. The program would create a class of public employees with a vested interest in justice. Extensive discussion needs to take place before the implementation of such a program. Congolese civil society should be involved in the debate on its establishment, design, and implementation. Obviously, legal capacity is not sufficient to ensure proper accountability, but it is one necessary precondition. Many of the reforms necessary to diminish the undue influence of the executive on the judicial process have been identified in the justice audit.

In order to increase the political will of the government to pursue accountability, the international community should:

- Continue to insist on accountability for gross violations of human rights.
- Maintain the option of creating additional international justice mechanisms if it seems unlikely that justice will be obtained through domestic courts.
- Support civil society's efforts to participate in the debate on transitional justice issues in the DRC. The process leading to the creation of the TRC is an example of the exclusion of many important sectors of society—including victims—from the policy debate; such a mistake should not be repeated in the future.

While implementing the medium- to long-term strategies described above, it is important to give immediate signs that the cycle of impunity is being broken. To this effect:

- The existing Bongandanga and Ankoro cases should be transferred to ordinary courts (if necessary, by fast-tracking the implementation of the ICC Statute law). Full political and financial support should be provided to the prosecutors and judges in these cases, and the presence of witnesses to the trials should be ensured (if necessary, by holding the trials in the territories where the crimes occurred).
- In order to convey a message that no one is beyond the reach of the law, the Attorney-General should identify violations allegedly committed by the RCD-Goma movement and instruct the relevant jurisdiction to investigate and prosecute such a case. The simultaneous holding of trials against MLC soldiers (Bongandanga), the ex-government (Ankoro), and the RCD-Goma would send a strong signal that all three major Congolese groups who fought the conflict are under scrutiny.
- The government should fully support the Prosecutor in Bunia in his intention to investigate and prosecute serious human rights violations, particularly by working to improve the security of witnesses, victims, and court personnel.
- Other prosecutions for human rights abuses should be launched in the areas where the security situation so permits, such as Katanga.
- While the capacity of Congolese investigators, prosecutors, and judges is being developed through the training program proposed above, a small investigative mobile unit, “consisting of magistrates, investigators, prosecutors, forensic specialists and counselors” could be created. Such unit “would be able to gather and preserve evidence crucial for any criminal trial, either national or international.”¹²²

At the same time, it is necessary to develop a comprehensive prosecutorial strategy. Who should be prosecuted? Should national courts prosecute crimes prior to July 2002 and post-July 2002

¹²² This proposal comes from Human Rights Watch, and the quotes are from letters sent to Javier Solana, at the High Representative for Common Foreign and Security Policy for the European Union, and to the Congolese Minister of Justice. Both are on file with the ICTJ.

crimes that the ICC will not prosecute? And, in this case, should existing ordinary courts prosecute, or should specialized chambers be created in Congolese courts? Should a hybrid international-Congolese court be created instead?

To answer these and other questions, an inclusive national dialogue should be conducted to consult Congolese citizens on prosecutorial priorities and strategies. If the government does not take the lead, Congolese civil society (particularly human rights organizations and churches) could spearhead this effort with the full support of the international community.

The discussion on the impunity gap (i.e., what measures to take for all those who will not be prosecuted) has to take place within the national dialogue described above, as one needs to logically decide who to prosecute first, and then decide what to do with those who will not be tried. However, early steps could be taken to:

- Consider the introduction into Congolese law of plea bargaining as a tool to reduce the impunity gap and gather evidence against high-level perpetrators. Local civil society groups, supported by international groups specializing in legal assistance, could lead this effort.
- Study the possible role of existing community reconciliation procedures in pursuing the goals of transitional justice.

On the international justice front, the ICC should:

- Continue its investigations into crimes committed in Ituri, if the security situation so permits. All major waves of violence, including the “Erasing the Board” operation, should be investigated with the goal of bringing those bearing the greatest responsibility to trial.
- Monitor the ongoing trials for war crimes and crimes against humanity with a view toward determining whether they are good-faith efforts.
- Consider opening investigations in areas other than Ituri, such as Katanga, where conditions seem to be favorable.

B. Truth-seeking and Reparations

Although the consultation process has been flawed, the vast majority of Congolese civil society groups consider the establishment of a truth-seeking mechanism necessary to help the DRC deal with its past and move forward. The current TRC will not be able to undertake any truth-seeking activity, nor tackle the difficult issue of reparations during the transition. It is recommended that:

- Civil society continues to build its understanding and knowledge of truth commissions, with a view to recommending the creation of a truth-seeking mechanism after the transition, if this is the desire of Congolese society.
- No firm decision is taken on the final composition of the TRC, or on its mandate, before an open and inclusive consultation process takes place.

C. Institutional Reform

Both international and domestic observers agree that there are significant obstacles to implementing a comprehensive personnel reform and vetting program in the DRC. This could change after the elections. Nevertheless, a personnel reform program can be introduced gradually, and efforts should focus on those phases that can be implemented in the interim, including:

- Initiate a registration process to assess the current status of security personnel and other public employees.
- Define the organizational parameters of a personnel reform process, particularly the future organizational structure, number of employees, and composition of personnel.
- Implement organizational parameters, especially the integration of divided institutions.
- Determine minimum educational standards and initiate a training program to provide an opportunity to all employees to achieve those standards.
- Establish systems to collect reliable information on past abuses committed by security personnel and other public employees that may be used in a future background vetting process.
- Put into place effective disciplinary mechanisms, coupled with a zero-tolerance policy for future abuses.
- Establish accountability and transparency mechanisms, including declarations of income and assets, to end corruption; this should be linked with the provision of decent and competitive salaries.

ANNEX 1 List of Participants at the Workshop on Accountability for Past Human Rights Violations in the Democratic Republic of the Congo

Cape Town, January 22–24, 2004

Congolese Experts

Nicole Odia (ASADHO Kinshasa)
Paul Nsapu (Ligue des Electeurs)
Olivier Kambala (CIPAC)
Freddy Kitoko (ASADHO Katanga)
Dismas Kitenge (Groupe Lotus–Kisangani)
Raphael Wakenge (ICJP–Bukavu)
Immaculee Birhaheka (PAIF–Goma)

Congolese officials

Monsignor Jean-Luc Kuye (President of the Truth and Reconciliation Commission)
Mme Petronille Vaweka (Parliamentarian–former Head of Interim Administration in Bunia)
Mme Madeleine Kalala (Minister of Human Rights)
M. Mpinga Tshibusu (President National Commission on Human Rights)

ICTJ

Alex Boraine (President)
Paul van Zyl (Director, Country Programs Unit)
Federico Borello (Senior Associate)

Rapporteur

Olivier Bercault

International Organizations

Amnesty International (Veronique Aubert)
Human Rights Watch (Pascal Kambale)
Global Rights (Boubacar Diabira)
Human Rights First (Fiona McKay)
International Crisis Group (Francois Grignon)
Institute for Justice and Reconciliation (Tyrone Savage, Charles Villa-Vicencio)
Columbia University (Peter Rosenblum)

UN and ICC Officials

MONUC (Alpha Sow, Head of Kisangani office, representing the SRSG)
MONUC (Roberto Ricci, Head of Human Rights)
International Criminal Court (Luis Moreno-Ocampo, Prosecutor; Pascal Turlan, Associate Analyst)
Office of the High Commissioner for Human Rights (David Marshall, Human Rights Officer)

ABBREVIATIONS AND TERMS

ASADHO	African Association for the Defense of Human Rights
CONADEP	National Commission on the Disappeared
CVR	Commission de Vérité et Réconciliation
DDR	Disarmament, demobilization, and reintegration
DRC	Democratic Republic of the Congo
FAR	Forces Armées Rwandaises
FAZ	Forces Armées Zaïroises
FNI	Front des Nationalistes Intégrationnistes
FNL	Forces nationales de libération
HRW	Human Rights Watch
ICC	International Criminal Court
ICD	Inter-Congolese Dialogue
ICG	International Crisis Group
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IIA	Ituri Interim Administration
IRIN	Integrated Regional Information Networks
MLC	Mouvement pour la Libération du Congo
MONUC	UN Mission in the DRC
RCD	Rassemblement Congolais pour la Démocratie
RCD-ML	Rassemblement Congolais pour la Démocratie–Mouvement de Libération
RCD-N	Rassemblement Congolais pour la Démocratie–National
RCN	Réseau des Citoyens Network
RPF	Rwandan Patriotic Front



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