

In quest of a sustainable justice

Transitional justice and human security in the Democratic Republic of the Congo

Tyrone Savage



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Introduction: Transitional justice vis-à-vis the Democratic Republic of the Congo

In the course of a war, an interval may appear in which the fighting begins to find some sort of denouement. The rhetoric of war – the *logique de guerre* – is becoming tired, jaded, unconvincing. The will to fight, the felt need for recrimination and the energy to go on are rapidly waning. In such moments, a demand may grow for alternatives to entrenched patterns of fighting, and an openness emerges to a strategically formulated, sequenced plan for transition to a thoroughgoing peace.

In such situations, the lingering effects of abuses committed during the war pose a massive threat to the emerging peace. Can victims be expected to forgive their abusers, forget the abuses and embrace peace? What of their demands for justice, truth, a reckoning of some sort with what happened? Should those who cynically planned, orchestrated and perpetrated atrocities be allowed to walk free? If not, how does a society confront them? Many among the armed forces of the state may be partisan, perpetrators themselves or simply too afraid to take on the personal risk involved in challenging known warlords. Above all, how does a society transform itself in order to break the deeply embedded patterns of the conflict, its cycles of revenge and recrimination? How can a society create a future that breaks with the past, if it has not yet addressed the crippling impact of the atrocities it holds? Countless transitions have foundered on precisely these sorts of dilemmas.

The Democratic Republic of the Congo (DRC) is currently enjoying an interval in which a war that reportedly produced over three million deaths is, formally and for the most part, over. At the time of writing, the first democratically elections in almost half a century had been held, and results were emerging of the run-off between two presidential candidates, the incumbent Joseph Kabila and second-placed

Jean-Pierre Bemba. The elections brought an end to the official transitional period, established in late 2002 after an extraordinary negotiation process. During the transition an array of strategies were developed and plans implemented, with varying success, in the hope of producing a sustainable peace.¹ At present, discussions about retaining a number of the transitional mechanisms and disbanding others are under way. As hopes of a viable transition have grown among the Congolese public and international actors, debate about tackling patterns of past injustice and perpetrators of abuses has grown prolifically.

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In this context, a variety of dilemmas and obstacles have emerged. The judiciary itself has been party to the conflict, its independent functioning altered – usurped – to meet particular political ends; its infrastructure has been decimated; its capacity is hopelessly insufficient to answer public demand. Moreover, questions have been asked about the seeming inadequacy of pursuing justice: what will prosecuting perpetrators give to the survivors of the unspeakable abuses they have perpetrated? What reparations are possible for the millions who have died?

What of children who have been forcibly recruited and made to commit atrocious acts? How should their twofold status – victim *and* perpetrator – be managed? Justice, understood as taking the matter to court, is necessary, obviously; yet it may not be enough. Such are the dilemmas arising from the impossible demand in the DRC for justice.

Similar sorts of questions have been asked in comparable situations elsewhere – post-junta Argentina, Chile in the aftermath of Pinochet, post-apartheid South Africa, Sierra Leone, East Timor, to name but a few – giving rise to a field known as transitional justice. Multi-dimensional and outcomes based, visionary but pragmatic, transitional justice has been described, in an occasional paper by the International Center for Transitional Justice (ICTJ), as

“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”.² These policies 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”.³ Otherwise stated, among the various dimensions integral to establishing justice in transitional societies, the following are salient:

- Recovery of the truth about the past and making it a matter of public record.
- Accountability, asserted in terms of judicial proceedings.
- Institutional reform that inter alia may involve lustration (removal and barring from public office) of individuals proven to have been responsible for abuses.
- Reparations, which may be material (a lump sum, compensatory payment) or symbolic (memorials, for example).

Some disagreement exists as to whether reconciliation should be understood as a central tenet of transitional justice. Juan Méndez, Argentine lawyer and president of the ICTJ, has argued that reconciliation is not something that can be deliberately pursued. Truth recovery, accountability, institutional reform, and reparations – these are ‘controllables’ that can be engaged; and if engaged, can, but may not necessarily, produce reconciliation, in Méndez’ view. By contrast, Alex Boraine, former deputy chairperson of the South African Truth and Reconciliation Commission (TRC), argues that reconciliation, like the other four dimensions, is integral to and inextricable from the effective functioning of transitional justice; reconciliation, in turn, can only be understood if examined through the lenses of transitional justice:

Reconciliation stands a better chance and is better understood if victims believe that their grievances are being addressed and that their cry is being heard, that the silence is being broken. Reconciliation can begin when perpetrators are held to account, when truth is sought openly and fearlessly, when institutional reform commences, and when the need for reparations is acknowledged and acted upon.⁴

Reconciliation understood thus can make a significant contribution to an emerging stability and to the possibility of sustainable security by creating

conditions that promote alternatives to an entrenched pattern of violence and recrimination.

In a similar vein, Charles Villa-Vicencio of the Institute for Justice and Reconciliation (IJR) has observed that a balance is needed in post-conflict societies: too little justice opens the door to personal vendettas; too much justice can leave perpetrators without any option but to fight back in the ways they know best. The *via media* between too little justice and too much is more than a mere compromise, however. It involves a nuanced understanding of reconciliation as a political strategy: it is widely accepted that the assertion of justice is integral to the possibility of reconciliation. Villa-Vicencio highlights the converse – that unless justice is formulated within a reconciliatory framework, unless justice is about people learning to live together in at least minimally decent ways, it is prone to re-igniting deeply embedded patterns of conflict.

With this cautionary note, we turn to prospects for establishing a multi-dimensional transitional justice framework in the DRC. Clearly, the situation in this fragile democracy is not yet such that each of the dimensions to transitional justice can be established. Rhetoric around reparations is widespread, for example, yet what is meant by reparations, how such a programme would fit into the nation’s overall objectives, and who would pay for it – all this remains inchoate. Advancing public debate on such questions and making practical recommendations is work one might expect of the Congolese truth and reconciliation commission, the *Commission Vérité et Réconciliation* (CVR). As this study will observe, the CVR has achieved little to date that could form the basis for any reparations programme.

Similarly, the lustration of known perpetrators is a long way off: in early 2005, a number of widely suspected abusers of human rights received high-ranking military appointments, apparently in exchange for a commitment to demobilise their military groupings. Such trade-offs are both objectionable and part and parcel of everyday life in the power-sharing arrangement that has made up the Congolese transition. Again, public discussion on the issue is plentiful and what is needed is a nationally owned process that produces consensus on ways forward.

For the purposes of the present inquiry, therefore, transitional justice is somewhat minimally defined as pertaining to dilemmas and prospects for obtaining justice in the transitional conditions that currently prevail in the DRC. Some dimensions of transitional justice will receive the bulk of the emphasis:

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specifically, the paper inquires into the possibilities of achieving accountability through prosecutorial process in domestic courts as well as in the fora of international justice; it examines the work of the CVR around truth recovery and reconciliation; finally, it envisages where and when further dimensions of transitional justice might fit into a thoroughgoing framework in which a linkage is established between transitional justice efforts and prospects for conflict transformation, human security and an enduring peace.

Ahead of the critical examination, however, it is necessary to unpack the scale and salient dimensions of the challenge of justice in the DRC. For that, it is necessary to inquire into the history of inchoate efforts to break with coercive rule, the interlocking conflicts that produced a war reported to have cost over three million lives and the broader framework of transitional efforts that have unfolded since 2002.

A history of trauma: The challenge of justice in the DRC

Contemporary transitional justice efforts are set against the backdrop of a daunting, traumatised history shaped by the exploitations of international actors, the intrigue of internal elites, failed attempts at transition, and a continual ebb and flow of myriad interconnected conflicts. Systemic coercion and abuse go at least as far back as the activities of slave traders in the sixteenth and seventeenth centuries. At the Berlin Conference of 1885, King Leopold II of Belgium secured the Congo as his personal possession. The rubber plantations he established were notoriously brutal.⁵ Eventually, in 1908, the Belgian parliament annexed the territory, such an embarrassment had Leopold's rule in the Congo become.

Yet the plunder continued, chiefly through state concessions to foreign companies that, in addition to commercial rights, were granted extraordinary administrative and judicial powers in the areas in which they operated. Only in 1933 did the colonial state take control in matters of local administration. Even then, the colonial state and concession companies saw the Congolese locals as labour to be recruited, by force if necessary. The relationship was 'crude and violent'.⁶ In the decades that followed, a massive *lumpenproletariat* developed, out of which an elite group known as the *évolués* (literally, the developed ones) would begin to agitate for independence and democracy.

A few weeks into its liberation, the country's first democratically elected prime minister, Patrice

Lumumba, was assassinated – apparently with the collusion of Belgium and other Western powers. In the chaos that followed, the United States helped to install military chief Mobutu Sese Seko, and over the next 30 years provided more than US\$400 million in weapons and military training to a kleptocratic Cold War ally notorious for human rights abuses.⁷ It was not until the end of the Cold War that, under pressure from opposition and foreign donors, Mobutu declared an end to one-party rule and introduced measures designed to usher in democratic reforms.

Within days, hundreds of political parties were established. In the weeks and months that followed, public demand for comprehensive changes became increasingly vocal, forcing Mobutu, eventually, to accede to a national forum that would debate the issues. The *Conférence Nationale Souveraine* (CNS) brought together 2,850 delegates from over 200 political parties, who, after eight months of debate, reached agreement. In August 1992, an act was promulgated enabling the establishment of a provisional constitution and a transitional government. In terms of the act, President Mobutu, as head of state, would be reduced to a figurehead, and a prime minister elected by the CNS would serve as head of government with full executive powers; a provisional legislature would oversee new elections; and an independent judiciary would be established. By the end of the year, the transitional government had begun its work. As the prospect of systematic democratic transition began to come into view, Mobutu fought back, using his control of the military to obstruct the process, intimidate opposition leaders, incite violence and render the country ungovernable. The incipient government found itself unable to restrict Mobutu's powers, except on paper, and, as the situation worsened, Mobutu instituted alternative arrangements for governance. Savage comments,

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Some 35 years after the country's independence and nearly nine decades after the demise of the Congo Free State, the Leopoldian quality of the Mobutist state remained evident in its thoroughly centralized power apparatus, highly personalized style of governance, and readiness to use force whenever circumstances required.⁸

Once again, transition out of the patterns of coercive rule in the Congo had been derailed. The event was formative, however, for members of the political class, who had glimpsed an end to Mobutu's rule and began to position themselves accordingly.

The national dilemmas took on a massive, new dimension in 1994 in the aftermath of the Rwandan



genocide. Historically, the dense jungles of the Congo have provided refuge for rebel groups from neighbouring states as well as local groupings disenchanted because they receive little in the way of social services or protection from Kinshasa. As a result, the eastern provinces in particular have been a vortex for conflict, a natural theatre of war. When the Rwandese Patriotic Front (RPF) intervened to stop the genocide, more than a million Hutu refugees fled into the Congo. According to the estimates of aid agency Oxfam, about 9 per cent of the refugees had participated in the genocidal killing. Moreover, these forces used the relief stations set up by international organisations to regroup, re-arm and resume their activities. Mobutu, however, agreed to grant refuge to the fleeing genocidaires, effectively precipitating Rwandan military operations into the DRC. The Swedish International Development Agency notes:

As soon as these forces displayed their intention to mount continuous military incursions back into Rwanda from Congolese soil, the war was there ... It should have been seen as obvious from the outset that the new Rwandan government would do whatever necessary to remove this security threat.⁹

Mobutu had now rendered himself the obstacle to transition within the nation, and the nation had become a refuge of genocidal forces from neighbouring Rwanda. In 1997 Mobutu was overthrown by the *Alliance des forces démocratiques pour la libération du Congo-Zaïre* (AFDL) – a coalition of forces nominally led by veteran Congolese politician Laurent Kabila, sponsored by neighbouring states and comprising a variety of interests, not least Rwanda's determination to apprehend perpetrators of the 1994 genocide.

The prospect of a thoroughgoing transition in the Congo beckoned again – and did so in ways which suggested that a groundbreaking era of cross-border cooperation in the African Great Lakes might be possible. Instead, a war of nightmarish scale and detail unfolded. Battling to manage both the complex of stakeholder interests and an infrastructure decimated by years of corruption and decay, Kabila postponed democratic reform and centralised executive, legislative and military power in his office. Moreover, the jurisdiction of military courts was expanded to include trials of politically active civilians, who were subjected to cruel, inhumane or degrading treatment, torture and even execution. The Kabila regime systematically intimidated political opposition, the press, and the country's civil society and human rights movements.

Crucially too, Kabila failed to juggle national interests with those of his foreign sponsors. In August 1998 Kabila dismissed his foreign advisors. Within days,

the Congo was at war; within a few weeks, most of the country was occupied by foreign forces.¹⁰ In a repeat of the events that produced the overthrow of Mobutu a year earlier, alliances emerged between foreign forces and local opposition groups around the prospect of tackling a dictatorial regime in Kinshasa. The revolt reached the outlying areas of Kinshasa, but was repelled with assistance from Zimbabwe and Angola. Rwandan, Ugandan and insurgent Congolese forces were left stretched across this vast country, and their failed assault turned into a war of occupation and pillage.¹¹

The Congolese inability to resist was not only military. On assuming office, Kabila had allocated numerous positions in government to Rwandan and Ugandan officials who had been integral to his power base. This had unsettled the Congolese political class, including many who had been long-time opponents of Mobutu. They had felt forgotten, displaced and exposed to an array of foreign forces. Now they were needed as part of a national campaign against former allies who were declared to be the enemy within.

Moreover, the continual shifting on the ground of armies, militia and whole communities undid much of the control Kinshasa still exerted over the DRC's mineral and other strategic natural resources: the result was an aggressive pillage of Congolese resources.¹² Martin Meredith observes,

Like vultures picking over a carcass, all sides [are] engaged in a scramble for the spoils of war. The Congo imbroglio became not only self-financing but highly profitable for the elite groups of army officers, politicians and businessmen exploiting it ... For their part, Rwanda and Uganda, having failed to dislodge [Laurent] Kabila from Kinshasa, turned the eastern Congo into their own fiefdom, plundering it for gold, diamonds, timber, coltan, coffee, cattle, cars and other valuable goods.¹³

The chief casualties were civilian. In the five years of devastating conflict that ensued, over three million people died – either in the fighting or from the malnutrition and disease that ravaged communities fleeing from it.¹⁴

The second conflict to sweep in from the north-east made manifest the sheer military might of the Congo's neighbours, particularly Rwanda.¹⁵ It also brought out the extent to which the integrity of the DRC had been undermined by the creeping decay of state legitimacy and capacity, the impoverishment and disillusionment of the Congolese population, and the fragmentation of elite groups as a result of Mobutu's divide and rule strategy and of the contingencies of Kabila's leadership.

After numerous attempts to establish a cease-fire had failed, an agreement was reached in the Zambian capital of Lusaka in July 1999. The Lusaka Peace Accord was signed by the heads of state of Angola, the DRC, Namibia, Rwanda, Uganda and Zimbabwe as well as more than fifty rebel leaders. The agreement achieved little in the short term – apart from a cease-fire that froze the military groupings in the positions they held at the time of the signing, leaving tens of thousands of fighters in the Congo's jungles, resented, aimless and cut off from previous lines of support. It did, however, represent a point of reference shared by all stakeholders in the Great Lakes region.

Slavery, a megalomaniac sovereign, Belgian colonisation, African dictatorship, unrealised transitions and a war that transformed the Congo into a patchwork of fiefdoms – against the backdrop of this traumatised history, Laurent Kabila was assassinated in January 2001 and his son, Joseph, made president.

Widely denounced as dynastic and undemocratic, the appointment marks the turning point in the conflict. In the days that followed his appointment, Joseph Kabila re-established negotiations with neighbouring states and announced his intention to revive the national dialogue on democratic transition. In early 2002, the Inter-Congolese Dialogue was re-established at Sun City, bringing together all Congolese political groupings of any significance: government, 19 opposition parties, civil society, the Mayi-Mayi militia, the Ugandan-backed *Mouvement pour la Libération du Congo* (MLC), and the various factions of the Rwandan-backed *Rassemblement Congolais pour la Démocratie* (RCD). After intense negotiations, consensus was reached and the Sun City Accord was signed on 19 April 2002. Three months later, the DRC and Rwanda signed the Pretoria Agreement, in which the DRC acknowledged and agreed to tackle the Rwandan rebels that had taken refuge in the Congo. Rwanda, in turn, agreed to withdraw its troops from the country. In September, a similar deal was struck with Uganda.

In December 2002, an agreement that integrated these various settlements into a single, all-embracing document was signed. The *Accord Global et Inclusif* established a transitional constitution for the Congo, ushered in a transitional government based on power-sharing, enacted the resolutions adopted at Sun City, and established five transitional institutions: the Truth and Reconciliation Commission, the National Human Rights Observatory, the High Authority of the Media, the Ethics and Anti-Corruption Commission, and the Independent Electoral Commission.

The outcomes of the arrangements have been extremely mixed. Despite a number of horrifying outbursts in the eastern provinces, peace has held in the country as a whole. The various groupings that signed the *Accord Global et Inclusif* have kept to the arrangements through plentiful conjecture and controversy, boosting public faith in the processes of consensual politics. While vast swathes of former fighters remain outside the national disarmament, demobilisation and reintegration process, numerous military groups and militia – among them the Mayi-Mayi warriors – have joined. Threats from the region have been managed, not least the request in late 2005 from the Lord's Resistance Army for refuge in the Congo. The first democratic elections in almost fifty years have been held, the Independent Electoral Commission producing a voters' roll with 25 million registered voters – and this, in a country that has never had a census.

The list of successes could continue. Yet the comprehensive transformation envisioned at the outset has been little realised. The transitional institutions in particular have had limited, isolated results. The Ethics and Anti-Corruption Commission has exposed a few high-level cases of corruption, but a culture of nepotism remains endemic. The National Human Rights Observatory filed a complaint in the military courts of Kinshasa against Jules Mutebusi and Laurent Nkunda, two renegade RCD officers who led their troops in an assault and pillage on Bukavu in June 2004. Despite having been charged with violations of human rights as well as crimes against humanity, Mutebusi and Nkunda continue to walk free, mingling among communities in the eastern Congo, seemingly untouchable.

On the eve of the second round of elections, Nkunda publicly flouted the indictments that had been issued against him.¹⁶ The work of the CVR forms a particular focus of the discussion that follows. Suffice it here to close by noting that the conceptualisation, design and implementation of an integrated strategy for recovering truth, establishing accountability, reforming institutions, making reparations to victims and bringing the nation together around the goal of reconciliation – for achieving enough justice, in other words, to break the historically entrenched pattern of conflict – has been utterly elusive and remains a salient task in the post-transitional period.

Domestic prosecutions: The challenge of incapacity, inchoate laws and de facto amnesty

The potential that a thorough reckoning with the past holds for societies seeking to break with deeply embedded patterns of conflict is widely acknowledged.

The transitional institutions in particular have had limited, isolated results

Such a reckoning is frequently understood to mean prosecutions.

At the Inter-Congolese Dialogue, participants in the Peace and Reconciliation Commission debated the prospect of prosecutions in the DRC extensively. Among the arguments they presented were that prosecutions were integral to efforts to combat impunity, they would act as a deterrent against similar crimes in future, and proceeding with prosecutions would provide the basis for the possibility of a realistic, national reconciliation process.¹⁷

While such reasoning is both plausible and laudable, efforts to secure thoroughgoing justice in other post-conflict societies have frequently run into daunting challenges. Neighbouring Rwanda, to cite but one example, was faced with the prospect of trying over 100 000 alleged genocidaires in a legal system that itself was decimated in the destruction that overwhelmed the country between April and July 1994. In post-conflict situations, it is necessary to begin with a candid appraisal of the capacity of the legal system to meet public demands for justice and to develop a realistic prosecutorial strategy that can meet the sorts of goals articulated at Sun City and contribute to establishing sustainable peace.

Despite the many large-scale atrocities that have occurred in the DRC, particularly since 1998, very few domestic trials have been held. The reasons include the following:

- a lack of judicial independence and capacity;
- problems arising in the application of the law, in particular with regard to statutes of limitation;
- the role assumed by the military courts, particularly since the rule of Laurent Kabila;
- amnesty provisions established as part of the peace accord.

Historically, the Congo's courts have suffered from a virtually total lack of independence. From the colonial courts to Mobutu's machinations to Laurent Kabila's use of the courts to undermine critical opponents, the Congolese judiciary has effectively functioned at the pleasure of the executive since time immemorial. The dearth of capacity to deal with mass violations is evident in various ways. The infrastructure of the judicial system has virtually collapsed, with judges and prosecutors lacking copies of basic legal texts and urgently needing training or re-training. Conspicuously too, few jurisdictions have been established in any formal, effective, methodical way. In May 2004, a massive audit of the justice system in the DRC found

that only about 20 per cent of the population had access to the formal justice system.¹⁸

A great deal of work has gone into building the capacity of the Congolese judiciary since the accord was signed that ushered in the period of transition. Organisations such as the Human Rights Law Group have been much involved in addressing infrastructural needs, training lawyers and supporting efforts by civil society to tackle sexual and gender-based crimes. The independence of the judiciary has been vigorously debated and is being expanded incrementally, as democratic stability grows and security fears are allayed. Two major domestic trials have unfolded. The Ankoro trial led to the charging of 22 soldiers for mass human rights violations committed in Ankoro, 800 kilometres from Lubumbashi; and in Songo Mboyo, in April 2006, the Military Garrison Court sentenced seven military officers of the armed forces of the DRC to life imprisonment for crimes against humanity. The Songo Mboyo trial drew wide acclaim for two reasons in particular: the process asserted – in a domestic court – the international principle that

mass rape is a crime against humanity; and second, in a groundbreaking development, it went beyond focusing on the guilt or otherwise of the perpetrators and highlighted the lingering trauma and present needs of the victims. The court ruled that an array of monetary reparations should be made by the state to victims. Such trials are intended to help restore public faith in the rule of law in the DRC. They also reflect a growing dialogue between Congolese domestic courts, international humanitarian law and the salient preoccupations of transitional justice, not least of which is the impact of justice on victims.

Efforts to secure thoroughgoing justice in other post-conflict societies have frequently run into daunting challenges

In addition to establishing judicial independence and capacity, law reformers in the DRC have had to tackle the law itself and how it may be applied. The ordinary criminal code says little about mass violations and other crimes of international concern, effectively leaving these with the military courts. A new military criminal code was adopted in November 2002, entering into force in March 2003, which contains provisions on genocide, crimes against humanity and war crimes.¹⁹ In keeping with the principle of non-retroactivity, *nullum crimen sine lege* (that is, one may not be convicted of an act that had not been established as a crime at the time the act was committed), acts committed prior to March 2003 are covered by the provisions of a code of military justice established in 1972. However, the definitions of genocide, war crimes, and crimes against humanity in both the 1972 and 2002 legislation are vague and fail to conform to contemporary international

formulations. For example, Article 173 of the current military code defines 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”. Harmonising local definitions with internationally accepted formulations remains a pressing task, as does a revision of the ordinary civilian criminal code to include mass violations.

As a signatory to an array of international treaties and agreements, Congolese courts are in a position to directly apply the provisions of international law as well as to draw on international formulations of certain crimes.²⁰ Moreover, the DRC’s legal system is such that international treaties and agreements are automatically incorporated into domestic law, and no explicit act of incorporation is needed. However, it would appear that Congolese judges remain loathe to apply the international treaties without specific, explicit acts of incorporation.

One further option in the application of the law would be to prosecute suspects for underlying crimes rather than the larger systemic crimes with which international law is concerned. The accused would therefore be tried for assault, rape, murder and other crimes covered by the criminal code rather than war crimes or crimes against humanity. The chief advantage of this option is that it would assert the criminality of such acts and so, to some extent, provide victims a measure of vindication.

Reducing the focus of the trials to underlying crimes would hold numerous risks, however, not least that of obscuring the systemic character of the crimes, concealing those who held command responsibility by focusing on isolated individuals, and failing to account for the pervasiveness of the abuses. The truth-seeking potential of a prosecutorial process would thus be little exploited.

A further problem in prosecuting underlying crimes pertains to the statute of limitations. Specifically, according to Article 24 of the criminal code, legal proceedings on crimes with a jail term of more than five years must begin within a period of ten years. Such limitations are extremely problematical in situations of war or repression, in the midst of which it is often impossible or hazardous to attempt prosecutions. While violations of international humanitarian law are increasingly being exempt from statutes of limitations established in domestic jurisdictions, contemporary efforts are under way in several post-conflict societies, most notably Argentina, to overcome statute of limitations restrictions pertaining to periods when it was unrealistic to expect victims to pursue legal

proceedings. In the DRC, it may be useful for courts to extend the statute of limitations or even suspend its application until such time as the threat of renewed fighting is a thing of the past and the Congolese legal system, as well as public confidence in it, is established.

Another problem for domestic prosecutions in the DRC is the extraordinary role occupied by the military courts. Although the jurisdiction of military courts is usually understood to be restricted to the disciplining of soldiers for military offences, military courts in the Congo, throughout history, have been invested with vast powers. Laurent Kabila’s *Cour d’Ordre Militaire*²¹ achieved particular notoriety for its brutal suppression of political opposition.²²

Under pressure to normalise DRC legislation, the transitional government has engaged in a sweeping reform of the system generally and of the role of the military courts in particular. Integral to this effort has been an acknowledgement that military courts enjoy little statutory independence and that, as the DRC moves towards democracy, their jurisdiction should therefore be made to harmonise with international norms. The reforms were promulgated on 18 November 2002 (Law no 023/2002 of 18 November 2002). The *Cour d’Ordre Militaire* established under Kabila the Elder was disbanded in 2004. Yet the military courts still enjoy significant jurisdiction over international crimes – as is evident in the trials held at Ankoro and at Songo Mboyo. It is envisaged that, in time, as the provisions of the Rome Statute are fully implemented in the post-transitional period, all crimes will be tried in civilian courts.

One particular problem still to be fully confronted was an amnesty agreed upon during the Sun City negotiations for acts of war, political crimes and crimes of opinion. A presidential decree was adopted on 15 April 2003, in conformity with the Pretoria Agreement and the constitution,²³ stating 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 to 4 April 2003 are provisionally amnestied, excluding war crimes, genocide and crimes against humanity.²⁴

A clear policy is yet to be formulated in the Congolese parliament on the question of amnesty. This remains a salient priority in the post-transitional dispensation. Nonetheless, it will be impossible to prosecute all or even most perpetrators, and a ‘de facto amnesty’

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is inevitable.²⁵ A nuanced strategy is going to be needed that combines several interests, not least the public's demands for accountability, the courts' need to re-establish the rule of law, the victims' needs to have lingering trauma and loss redressed, the armed services' ability to apprehend mass criminals, and the nation's need to begin to move on.

In other words, prosecutions are, inevitably, going to be somewhat selective. What will be crucial in holding the nation together is not whether all crimes are uncovered and punished, but whether the process of establishing criteria for the selection manages to draw the nation together. The detail of such criteria could easily form the subject of a further study; suffice it to note here a few principles that may help inform such discussion:

- Target those most responsible for mass violations, such as public officials, military officers and others involved in orchestrating crimes; while this would risk appearing to condone or at least declare negligible the crimes of less notorious criminals, it would reflect the nation's commitment to breaking patterns of abuse at the root.
- Pursue cases where evidence is readily available and ample and conviction is likely.
- Prioritise recidivism, again, in an attempt to tackle patterns of abuses.

It is widely accepted that the chief avenue for the pursuit of prosecutions in any post-conflict society should be the domestic courts: 'On principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself.'²⁶ Domestic prosecutions and the reforms usually needed to make them feasible are an integral part of the reconstruction process, giving public vindication to victims and restoring trust in public institutions. Given the magnitude of the challenges and the lingering volatility of the situation in the DRC, however, intervention by international justice mechanisms is obviously crucial. At Sun City and elsewhere, demands have been articulated for an ad hoc international criminal tribunal of the sort established for Rwanda and the former Yugoslavia (ICTR and ICTY respectively). Given the costs involved in these tribunals, as well as their seemingly limited efficiency in dealing with mass crimes, the United Nations (UN) has become somewhat unwilling to establish any further ad hoc tribunals. Moreover, it was hoped that the establishment in 2002 of the International Criminal Court (ICC) as a permanent institution would supplant the work of the ad hoc tribunals. Unsurprisingly, perhaps, the ICC's first arrest was in the Congo.

International prosecutions: The International Criminal Court

After years of preliminary meetings, the Rome Statute was adopted by 120 nations in 1998, establishing the possibility of a permanent, international criminal court. As momentum built, the minimum of 60 states ratified the statute, and in July 2002 the ICC was formally founded. It currently has jurisdiction over three crimes: genocide, war crimes and crimes against humanity. A fourth, aggression, is to be added in due course. The principle of complementarity guides the work of the ICC, meaning that the court undertakes investigations and prosecutions only when states are unable or unwilling to do so themselves. Moreover, the ICC may intervene only if the crime occurred in a state that is a party to the Rome Statute (the principle of territoriality) or in which the suspect is a national of a state that is party to the statute (the principle of nationality). These conditions may be waived if a situation is referred to the ICC Prosecutor by the Security Council, according to Article 13 of the Rome Statute referrals.

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On 19 March 2006 the ICC made its first arrest, apprehending and charging a Congolese militia leader in Ituri province, Thomas Lubanga, with three counts of war crimes involving forcibly recruiting children and forcing them to take part in armed hostilities. The intervention was made possible by President Kabila's March 2004 referral of the situation to the ICC, and the arrest was the culmination of efforts by a multinational team led by Chief Prosecutor Luis Moreno-Ocampo to identify and apprehend those most responsible for atrocities in Ituri province.

Against fears that such intervention could escalate the conflict, the arrest of Lubanga had a settling effect, inhibiting similar activities by other warlords and bringing some respite to the traumatised communities of north-eastern DRC. Public response, both in the Congo and abroad, has been enthusiastic and demand for similar arrests is prolific. Following the arrest, the ICTJ issued a press statement to the effect that:

... much more must be done to ensure justice for victims in that country ... where countless others accused of war crimes continue to operate with impunity. The ICTJ express[es] the hope that this development is but the first step in a broader and more comprehensive prosecutorial strategy targeting the long list of those responsible for horrific abuses in one of the world's most deadly conflicts.²⁷



While the ICC's intervention has been widely welcomed, it is crucial that this first success should be consolidated into strategic thinking about how best to proceed in a situation that remains extremely volatile. Among the challenges that remain are the following:

- the unrealistically high expectations among the Congolese population
- the need for a comprehensive prosecutorial strategy to replace sporadic interventions
- the relationship between the ICC and other transitional justice mechanisms.

While the principle of complementarity between domestic prosecutions and the work of the ICC is well established, myriad questions remain unresolved as to how domestic prosecutions, international prosecutions, and a national truth commission will relate to each other. Will there be sharing of information between domestic courts, the ICC and the truth commission? Will perpetrators be willing to participate in truth commission hearings if their testimony can incriminate them in the domestic courts or at the ICC? What of the many who are both perpetrator and victim? How can they present their stories, replete with intimate complexity and inevitable contradictions, under threat of prosecution? What role is possible for reconciliation if truth recovery is inextricably linked to the threat of prosecutions? Even greater than the challenge of prosecutions in the Congo has been that of creating conditions in which processes of truth-seeking and truth-telling can unfold. Whereas the domestic courts have managed to prosecute only a few cases of mass violations in which the evidence has been overwhelming, the nation's truth and reconciliation commission has, thus far, abandoned truth recovery as the basis for reconciliation. As such, it has failed to produce a framework for national reconciliation within which prosecutions and an array of other justice initiatives, including memorialisation and reparations, can contribute to the overarching goal of thoroughgoing peace.

The Truth and Reconciliation Commission: truth delayed as justice denied

The Congolese Truth and Reconciliation Commission, the CVR, was established in the course of negotiations, as noted above, as one of five transitional institutions. Much was asked of it and the mandate it was given included the following:

- to investigate all political crimes and human rights abuses that occurred in the country from independence on 30 June 1960 to the end of the transition
- to investigate and hear testimonies from citizens
- to investigate crimes and human rights abuses committed by individuals who have enjoyed official immunity

- to investigate violations committed by foreigners or in foreign countries that linked to Congolese conflicts
- to take necessary measures to provide reparations to victims.

From the outset, the CVR has battled. Its work has chiefly involved pacifying traumatised communities. It has yet to begin any truth-seeking process and appears to have barely glimpsed the role that truth recovery could play in transforming relations in the DRC – helping survivors of past abuses gain closure, creating opportunities for perpetrators to acknowledge their actions, entrenching the rule of law and initiating a shared national process. Among the problems have been the following:

- *Composition:* The plenary comprises political appointees nominated by the parties to the accord. The result has been a commission that includes members alleged to have themselves been involved in human rights abuses. Suspicion is rife that they are in the commission to protect themselves and the interests of their political group rather than to advance impartial truth seeking processes.
- *Budget deficiencies:* In part these are the result of funders' refusal to support a commission that holds alleged perpetrators.
- *Lack of credibility among the Congolese public:* Many members of the public have asked how victims could be expected to appear before a commission that contains figures who are part of networks implicated in atrocities.
- *Leadership:* in addressing these issues head-on and enabling the commission to do its work.

In short, the CVR has failed to present itself as an independent, credible institution. Its predilection for reconciliation without a thoroughgoing, managed truth-seeking process has left the CVR being viewed, in the words of Congolese activist Joseph Yav Katshung, as essentially about "truth omission and pacification."

Currently, the commission as it existed during the transitional period is fighting to have its tenure extended beyond the second round of presidential elections. Given that the CVR has failed over several years to establish its credentials, capacity or commitment to truth recovery, it may be preferable for the post-transitional government to disband the current commission and institute an entirely new initiative that begins with a comprehensive consultation process designed to draw the Congolese public into the process.

Conclusion: Prospects for transitional justice and its links with human security

While the Congolese transition has ushered in a variety of extraordinary initiatives that together have

led to a first round, at least, of successful elections, the systematic transformation of conflictual relations central to any vision of transitional justice is a long way off. Known perpetrators circulate freely among the population. Some occupy public office.²⁸ Victims nurse their pains privately, with many still longing for a reckoning of some kind. Groundbreaking prosecutions have been made, as we have noted, but the cases that have been tackled are few. Similarly, the formal transition is virtually over, but the truth-seeking process expected of the CVR is yet to begin. Mixed in with the relief, the hope and the sheer novelty of the transition, one may sense above all a waiting among everyday Congolese people: a watchfulness, a restraint, an ambivalence toward internationally driven initiatives, a circumspection towards neighbours with whom they will have to live when the present, internationally bolstered security is over.

Much is being done. Much more can be and needs to be if the people of the DRC, with history against them, are to live in freedom from fear and want. In this effort, developing a thoroughgoing, strategically sequenced transitional justice framework is crucial. Numerous circumstantial obstacles and dilemmas remain. Among them, the following are perhaps most salient:

- Sporadic violence and continuing insecurity, particularly in the provinces along the eastern borders.
- Many thousands of fighters who have not joined the formal demobilisation and reintegration process and pose an ongoing threat to those they victimised as well as to comrades who may wish to participate in a truth-telling process.
- Lack of capacity in the armed forces to enforce court orders, whether to apprehend alleged criminals or to provide security for the truth commission hearings.
- Lack of political will among the Congolese political elite to engage in any process of truth recovery, accountability, reparations, or vetting procedures.
- Regional factors, including the risk of re-escalating conflict if atrocities committed by foreign troops on Congolese soil are confronted.
- Devastated infrastructure, logistical incapacity, and a general state of underdevelopment.
- Fear of re-escalation and specifically of a backlash if prosecutions or other accountability mechanisms are pursued too aggressively.

The list of obstacles could easily continue. By most accounts, transitional justice efforts during the transitional period were, at best, precipitous and ambiguous but promising still; at worst, they were an outright failure chequered by a few isolated successes. As the DRC embraces life beyond the formal transition

and debates the mechanisms it will need to establish as it seeks to make its transition sustainable, it can be expected that the demand for justice will grow. At the same time, the difficulties involved in obtaining that justice, given the present circumstances of human insecurity, will, inevitably, become painfully evident. A strategically constructed combination will be needed that both fights against any watered down version of justice and is also sensitive to the risks of excessive zeal in pursuing retributive justice.

In this context, an interval of opportunity may again open for a thoroughgoing dialogue about transitional justice in the Congo. If so, it will be a moment in which to build national consensus around imagining transformative options. It will be a moment in which, this time, to draw the nation into the process and have the nation define that process. It will be a moment, to draw on the words of Hannah Arendt, “determined by things which are no longer and which are not yet”.²⁹ Such a moment, notes Arendt, holds the possibility of truth.

Acknowledgements

Principle sources for this study include *A first few steps: the long road to a just peace in the Democratic Republic of the Congo* (an occasional paper by the ICTJ, which inter alia provides an extremely useful examination of the state of the legal system in the DRC at the time of publication in late 2004; *Transitional justice and human security* (edited by Alex Boraine and Sue Valentine) (proceedings of an ICTJ/JICA conference in Cape Town in early 2005); *A strategic conflict analysis for the Great Lakes Region: an analysis of the conflict in the DRC* (Swedish International

Development Agency (SIDA)); ‘The relationship between the International Criminal Court and truth commissions: some thoughts on how to build a bridge across retributive and restorative justice’ by Joseph Yav Katshung;³⁰ ‘The DRC elections, reconciliation, and justice’ by Theodore Kasongo Kamwimbi (*Pambazuka News*); an article I co-published with Kamwimbi in the German magazine *Der Überblick* in June 2006; and ample research and fieldwork I was privileged to conduct as part of my work with the IJR between 2001 and 2005. Some of that has found form in publications, the most useful of which for present purposes has been *Building nations: transitional justice in the African Great Lakes Region*.³¹

Notes

- 1 These initiatives are discussed in, among others, the situation reports by the Institute for Security Studies. Among the more recent are Democratic Republic

A combination that both fights a watered down version of justice, and is sensitive to excessive zeal, is needed

of Congo update: a second round of elections? (16 August 2006), The impact of slow military reform on the transition process in the DRC, Stephanie Wolters and Henri Boshoff (10 July 2006), and Update on the status of army integration in the DRC, Henri Boshoff (2 September 2005)(accessed 7 November 2006).

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- 5 See A Hochschild, *King Leopold's ghost: A story of greed, terror, and heroism in colonial Africa* (Boston: Houghton Mifflin, 1998) for a detailed history of Leopold II's rule in the Congo.
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- 9 SIDA, A strategic conflict analysis, p 163.
- 10 International Crisis Group, Africa's seven nation war, in ICG Democratic Republic of the Congo report No 4, 21 May 1999: ii. Online at <www.sul.stanford.edu/depts/ssrg/africa/zaire.html> (accessed 14 November 2006).
- 11 Reports on human rights violations during the war are plentiful and I cite only a few here. The UN Special Rapporteur for the DRC, Iulia Motoc, consistently reported abuses in territories held both by government and by rebels throughout the conflict (available at <www.unhchr.ch/html/menu2/7/a/mcon.htm> (accessed 7 November 2006). The investigations of MONUC into human rights abuses are reflected in the periodic reports of the Secretary-General to the Security Council, <www.un.org/documents/repsec.htm> (accessed 7 November 2006)). Among the most notable publications by international organisations are Human Rights Watch's, War crimes in Kisangani: The response of Rwandan-backed rebels to the May 2002 mutiny, <reliefweb.int/rw/rwb.nsf/AllDocsByUNID/ed57e73b3472cbd9c1256c1a0050...>(August 2002). The same organisation's report on sexual violence in the eastern provinces, The war within the war (June 2002), <www.hrw.org/reports/2002/drc/Congo0602-04.htm>, and Amnesty International's inquiry into violations committed in Ituri, Our brothers who help kill us (April 2003), <web.amnesty.org/library/Index/ENGAFR620102003?open&of=ENG-UGA> (all accessed 14 November 2006). At great personal risk, numerous Congolese grassroots organisations reported violations of human rights, among them, 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.
- 12 In April 2001, a UN inquiry found that Rwanda, Uganda and Burundi were systematically plundering the DRC's mineral resources. See United Nations Security Council, Report of the Security Council mission to the Great Lakes region, 15–26 May 2001, S/2001/521, <<http://www.un.org/Docs/sc/missionreports.html>>.
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- 17 Available at <www.drcpeace.org> (accessed 7 November 2006).
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- 19 Law no 024/2002. Articles 161–175 incriminate international crimes.
- 20 The DRC has either ratified or acceded to, among others, the International Covenant on Civil and Political Rights, the Convention against Racial Discrimination, the Convention on Discrimination Against Women, the Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict, the Convention against Torture, the Genocide Convention and the Geneva Conventions and both of their Protocols, and the Rome Statute of the International Criminal Court.
- 21 Decree No 019 of 23 August 1997.
- 22 Report of the UN Special Rapporteur for the DRC, E/CN.4/2003/43, 15 April 2003, <www.unog.ch/news2/documents/newsen/cn0358e.htm> (accessed 14 November 2006).
- 23 Section III, point 8 of the Agreement and Article 199 of the Constitution.
- 24 Presidential Decree no 03-001 of 15 April 2003, on amnesty for acts of war, political crimes, and crimes of opinion, Article 1, as cited in Borello, p 23.
- 25 In J Sarkin, *Carrots and sticks: The TRC and the South African amnesty process*, Antwerp-Oxford: Intersentia, 2004.



- 26 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, 26 June 1997, paragraph 28 < hri.ca/.../documentation/subcommission/e-cn4-sub2-1997-28.htm> (accessed 14 November 2006).
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- 28 In early 2005, to cite but one example, four suspected human rights abusers were appointed to serve as generals in the army.
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- 30 <www.lawandsocietysummerinstitutes.org/workshop06/participants/joseph.htm> (accessed 20 November 2006).
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About this paper

Emerging from a history marked by coercive rule, failed transition and systemic violations of human rights, the Democratic Republic of the Congo (DRC) is currently enjoying an interval of peace. It is an interval in which public demand for justice – for some sort of reckoning with past abuses – threatens to overwhelm fragile prospects for sustainable transition. Yet a variety of dilemmas and obstacles have become evident. The judiciary itself has been party to the conflict, its independence usurped, its infrastructure decimated, and its capacity rendered hopelessly inadequate. Questions abound outside the courts. 'In quest of a sustainable justice' inquires into the dilemmas, challenges and strategic options that define contemporary efforts to establish justice amidst the opportunities opening up in the transition of the DRC.

About the author

TYRONE SAVAGE is an independent consultant who is currently attached to Stellenbosch University, Cape Town, and the *Institut des Sciences sociales du Politique* in Paris. He was formerly Head of Research and Analysis in the Transitional Justice in Africa Programme at the Institute for Justice and Reconciliation in Cape Town, South Africa. A Fulbright Fellow, he holds degrees from Rhodes University, the University of Cape Town and the Maxwell School of Public Affairs, Syracuse University. Savage's publications, teaching, and presentations generally involve comparative analyses of transitional societies, with a particular interest in negotiations and strategies for transforming conflict.

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