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September 2014

Reflections on ICC Jurisprudence Regarding the Democratic Republic of the Congo

Drawing Lessons from the Court’s First Cases

Introduction

Ten years have passed since the government of the Democratic Republic of Congo (DRC) referred the situation in the DRC to the International Criminal Court (ICC).¹ Since then, the court has rendered two convictions—one of which is final—one acquittal, and one decision not to confirm charges.² A new trial is about to start, and one arrest warrant is still to be executed.³

These results could be interpreted as disappointing when compared with the amount of resources invested in the process. In particular, the proceedings were slow, complicated, and expensive, and the court’s operations attracted serious criticism. For Congolese civil society, the picture is more mixed or even negative.

The main criticism of the court pertains to the prosecutorial and investigative strategy of the Office of the Prosecutor. One of the primary criticisms of the ICC’s investigations in the DRC cases is that they lack representativeness, reflecting only part of the conflict, in terms of both affected victims and temporal scope. The proceedings also revealed deficiencies in respect of fair trial principles, especially those related to the rights of defendants. These principles, considered fundamental in national and international law, are guaranteed by the Rome Statute of the ICC and the ICC’s Rules of Procedure and Evidence (RPE), in particular those regulating evidence.⁴ When these principles are violated, the consequences can be catastrophic for the defense as well as the prosecution, and they can undermine the fairness of the entire trial. Any violation of fair trial principles can thus cause interruptions and delays and even impede the prosecution of alleged perpetrators for the sum of their crimes. Indeed, this occurred in the DRC cases, when the gathering of evidence, use of intermediaries, and application of the exception of confidentiality and nondisclosure were called into question.

The court’s limitations should prompt reflection on the future and development of the strategy of the ICC Prosecution Office and its application of criminal procedural rules.

On the one hand, a close examination of past proceedings and discussions calls for the broader participation of civil society actors in defining the ICC’s prosecutorial policies. The court should

TABLE OF CONTENTS

Introduction	1
Lack of Representativeness in the Prosecutorial Strategy	2
Fair Trial at Risk	4
Conclusions	5
Reflections	6

¹ On March 2004 the government of the DRC referred to the ICC for investigation the events that happened in the DRC since the entry into force of the Rome Statute of the ICC, with the objective of determining responsibilities for the crimes under its jurisdiction. In the same letter, the government expressed a commitment to cooperate with the ICC.

² See ICTJ’s analysis of the Lubanga, Katanga, Ngudjolo, and Callixte Mbarushima cases.

³ The confirmation of charges hearing in the case against Bosco Ntaganda took place on February 10th 2014. On June 9, 2014, all charges against Ntaganda were confirmed and he was committed for trial before a trial chamber. Sylvestre Mudacumura was also the subject of an arrest warrant approved on July 13, 2012, for nine charges of war crimes for events that took place in the Kivu province from January 20, 2009, to the end of September 2010; he remains at large.

⁴ See ICC Rules of Procedure and Evidence: <http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>

draw on lessons learned from the DRC cases and explore new ways to adapt the RPE to take into consideration the expectations of civil society.

On the other hand, the ICC's shortcomings in respecting fundamental principles, like the right to a fair trial, indicate that there is an urgent need to meaningfully implement the principle of complementarity. Indeed, the mixed results of the DRC trials underscores that the ICC is not mandated to investigate and prosecute *all* international crimes. The ICC is only a complementary *forum* that will intervene to fulfill the role of national courts when they are unable or unwilling to carry out genuine investigations and prosecutions themselves. Domestic courts retain primary jurisdiction.⁵

Lack of Representativeness in the Prosecutorial Strategy

Inconsistent Conceptual Framework

The former ICC Prosecutor publicly announced that he would adopt a strategy of focused investigations whereby he would prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation. The office also adopted a "sequenced" approach to selection, whereby "sample" or representative cases within the situation were selected according to their gravity, taking into account factors such as the scale, nature, manner of commission, and impact of the alleged crimes. This would allow the office to conduct expeditious trials while aiming to represent the entire range of victimization.⁶

In spite of this, decisions taken in the prosecution of cases against Thomas Lubanga, Germain Katanga, and Mathieu Ngudjolo did not align with the above-mentioned notion of representativeness. Furthermore, the selected cases did not allow for a broader vision of the relevant criminal context. In addition, it also heightened civil society's feeling of confusion about the court's goals.

Narrow Scope of Charges

In the Lubanga case, the limited choice of charges brought forward by the prosecutor was contested from the beginning of the trial. Indeed, Lubanga was only charged with conscripting, enlisting, and using children under the age of 15 to actively participate in hostilities. This decision was taken despite the list of abuses attributed to him and the Union des Patriotes Congolais (Union of Congolese Patriots - UPC) according to information gathered by human rights organizations and United Nations agencies, which referred to a wide range of war crimes and crimes against humanity revealing a strategy aimed at systematically attacking, destroying, and massacring whole villages.

The prosecutor explained that he chose to limit the charges due to the difficulty of conducting onsite investigations amid security concerns and the limitations imposed by the tight schedule of proceedings set by the court. Notably, by the time the confirmation of charges hearing was scheduled, state parties were already exerting considerable pressure on the court to start proceedings. Thus, the need to ensure the expeditiousness of the proceedings, and not prolong indefi-

5 It should be recalled that according to the Preamble of the Rome Statute, para. 6: "It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." Indeed, the ICC only intervenes in cases in which the state party is unwilling or unable to conduct investigations and prosecutions of international crimes falling under its jurisdiction. The primary responsibility to prosecute international crimes thus remains with the state, as part of its sovereignty. This responsibility is especially evident for states whose citizens allegedly committed such crimes and for those where crimes were allegedly committed. The ICC does not replace domestic proceedings and only intervenes as a measure of last resort, thus defining its jurisdiction as complementary to national jurisdictions. Considering that international crimes covered by the Rome Statute are by nature committed by many different actors and against large number of victims, the ICC does not have the capacity to prosecute all persons responsible for those crimes. It is, therefore, of paramount importance that national courts initiate their own investigations and prosecutions against international crimes even when the ICC is also involved, as in the DRC case, because of its duty to investigate and prosecute all those responsible for international crimes committed in its territory.

6 Report on Prosecutorial Strategy, 2006, 506 www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf; see also Prosecutorial Strategy 2009-2012, paras. 19-20, www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf

nately the investigation phase, prevailed over pursuing a more representative process reflecting the full scope of the abuses committed in the conflict.

⁷ efforts made to this end by Lubanga's victims participating in the trial who sought a legal requalification of charges did not have a positive outcome. Although Trial Chamber I initially granted the victims' request and added the crimes of sexual slavery and cruel and inhuman treatment to the charges against Lubanga, the Appeals Chamber invalidated the decision in its judgment of December 8, 2009, stating that once a trial begins the chambers cannot add factual allegations that are not included in the document containing the charges presented by the prosecutor and confirmed by the Pre-Trial Chamber in its decision confirming the charges. Accordingly, while the judges can modify the legal qualification of the facts confirming the charges pursuant to regulation 55 of the Regulations of the Court, it cannot expand its factual scope, which needs to be clearly defined at the confirmation of charges.

A later request by the prosecutor to consider sexual violence as an aggravating circumstance during the sentencing hearing was rejected by the court due to a lack of evidence supporting Lubanga's involvement in the crimes. The judges' opinion on the case was clear in stressing that in earlier proceedings the prosecutor had declined to extend the list of criminal charges against Lubanga to include sexual crimes.⁸

Thus, the prosecutor's initial choice of charges was decisive and definitive.

Insufficient Temporal Scope

The Katanga and Ngudjolo cases presented a similar problem in terms of representativeness. In this case, the temporal scope of the prosecutions was limited, as the facts under investigation were linked to one single event, namely the attack against the village of Bogoro on February 24, 2003. Yet, the groups presumed to be under the leadership of Katanga and Ngudjolo had allegedly committed other attacks, which were largely documented by international actors that had been present on the ground. On a positive note, the charges against the two accused covered a much broader range of crimes than those brought against Lubanga and provided a better representation of their criminal purpose and the scale of the attacks.⁹

Insufficient Geographical Scope

In the case against Bosco Ntaganda, the incidents selected by the prosecution were more representative, covering a broad range of alleged crimes. The timeframe under consideration was also representative, as it covered the period from September 1, 2002, to the end of September 2003.¹⁰ Nevertheless, only Ntaganda's criminal activity as leader of the Patriotic Forces for the Liberation of Congo (Forces Patriotiques pour la libération du Congo - FPLC) with Lubanga in the Ituri district was considered; though the many crimes committed afterward with the

⁷ It should be noted that during the confirmation of charges hearing (September 9–28, 2006), the prosecutor did not rule out the possibility of later extending the charges.

⁸ See sentence ICC-01/04-01/06-2901, by the Trial Chamber I. The exclusion of sexual crimes was subject to strong debate that resulted in a dissenting opinion. The argument proposed by the dissenting judge, Odio Benito, can be summarized as: A) Sexual violence is inherent to the crimes of enlisting, conscripting, and using child soldiers, and it is part of those crimes. Sexual violence would not, therefore, constitute a separate and new charge; it would rather form part of a more complete and realistic interpretation of the crime and define its criminal dimension. B) The approach by the majority is discriminatory, not considering the specific dimension of the crime involving girls, nor the full extent of human rights violations presented in art. 21(3). C) The harms suffered by the victims is not an issue reserved only for reparations; but it should constitute a fundamental aspect in the evaluation of the crimes by the chamber.

⁹ The militias controlled by Katanga and Ngudjolo attacked the Bogoro village, massacred its population, and destroyed properties in a plan to ensure control over the road to Bunia, so as to facilitate the transfer of goods between Bunia and Lake Albert. This criminal action was supposedly repeated by the two commanders and their soldiers several times, in a wider strategy aimed at controlling the Ituri district and its resources. Some opposing militias, like Lubanga's UPC, shared the same strategy.

¹⁰ Ntaganda will be brought to trial for his role as the alleged Deputy Commander of the General's staff in the FPLC for thirteen counts of war crimes (murder and attempted murder of civilians, attacking civilians, attacking protected objects, rape and sexual slavery against civilians and child soldiers belonging to UPC/FLPC, pillaging, destroying the enemy's property, and enlisting and conscripting of children under the age of 15 and using them to participate actively in hostilities) and five counts of crimes against humanity (murder and attempted murder of civilians, rape, sexual slavery, persecution, and forced displacement). These crimes were allegedly committed in the Ituri district, between September 1, 2002, and the end of September 2003.

National Congress for the Defence of the People (Congrès National pour la Défense du Peuple - CNDP) in the Kivu region were excluded from the investigation.

It should be acknowledged that the cases brought to trial by the ICC prosecutor are representative of the main armed militias that fought in Ituri, as the two main groups' leaders (Lubanga and Katanga) were prosecuted and eventually convicted. Unfortunately, the events referred only to crimes committed before 2003. Moreover, cases related to crimes committed on a massive scale in the Kivu region are still unpunished. The Callixte Mbarushimana case, representing the first investigation into violations committed in Kivu, resulted in a failure, although the arrest warrant issued against him as well as his capture and transfer to the court initially raised hopes among victims and civil society for an end to impunity for armed groups in Kivu. Similarly, the arrest warrant issued for another important alleged war criminal, Sylvestre Mudacumura, could not be executed. Thus, the people of this region are still deprived of a relevant result in the fight against impunity.

Insufficient Representation of the Chain of Responsibility

Not only did the prosecutions fall short of representing the full scale of the crimes committed in the DRC, but the persons most responsible were not targeted. The documentation gathered by human rights organizations and UN agencies, as well as discussions within the court, implicated high-ranking political and military leaders in the Congolese army and government as well as those in neighboring countries. As of today, proceedings have not involved all of the persons who are alleged to be most responsible for these crimes or, notably, addressed the role of the various governments that manipulated the armed groups, contributing to their criminal behavior.

Fair Trial at Risk

Problems in the Handling of Evidence

The reasons for the court's acquittals brought into question the Office of the Prosecutor's strategy in handling the evidence. The prosecutor was blamed for producing unreliable witnesses and—more broadly—for presenting weak evidence. For example, in its judgment of December 18, 2012, acquitting Ngudjolo, the Trial Chamber stressed the weakness of the evidence produced by the prosecutor against him, highlighting the limited relevance of the three main witnesses. The court also criticized the delay in the investigation, which took place three years after the facts, and noted the unfortunate fact that the prosecution—unlike the trial chamber—had not visited as soon as possible the areas where most of the alleged violations had allegedly occurred, to assess the geographical context and verify certain details.¹¹

Use of Intermediaries

Intermediaries are persons who support the participation of victims in the documentation of alleged crimes (and in the prosecution's gathering of evidence), facilitate the court's contact with them, and assist them in their requests for participation or reparation. In the Lubanga case, the court repeatedly stressed their essential role. At the same time, it brought into question the way in which they were used by the prosecutor.¹² Notably, the court criticized the lack of transparency in how intermediaries were selected and the weak control exercised over them, which had serious repercussions for the reliability of the testimony they helped to render. In fact, some intermediaries appeared to have acted in a less-than-transparent way, eventually manipulating some witnesses. The court also reproached the prosecutor for over-delegating his investigative duties and considered that intermediaries should not have replaced him in carrying out his duties.

¹¹ See Trial Chamber II, December 18, 2012, ICC-01/04-02/12, paras. 1170-118.

¹² See Trial Chamber I, May 31, 2010, ICC-01/04-01/06, para. 1. The use of intermediaries has been considerable: The Prosecutor relied on seven intermediaries to contact 23 persons or organizations, which constitute approximately half of the witnesses in the trial.

Abuse of the Exception of Confidentiality Pursuant to Article 54.3(e) of the Rome Statute

In the Lubanga case, Trial Chamber I ordered a stay of proceedings because the right to a fair trial could not be guaranteed.¹³ This was due to the Office of the Prosecutor's abusive use of article 54.3(e) of the Rome Statute,¹⁴ which permits the prosecutor to keep some documents and information confidential—and not disclose them to the defense—in order to protect sources, for the purpose of gathering more evidence. Thus, the prosecution can use some material as leads to obtain additional evidence, but it cannot use it as evidence at trial. The Office of the Prosecutor received more than 200 documents from the United Nations and some nongovernmental organizations on the condition of confidentiality. Some of this material contained potentially exculpatory information and information relevant to the preparation of the defense case, which, pursuant to article 67.2 and rule 77, needs to be disclosed to the accused. The prosecution did not disclose this material under article 54.3(e) and, notably, it refused to put it before the Trial Chamber so the judges could assess whether the material had to be disclosed. The judges stated that accepting an important amount of potentially exculpatory evidence under such terms did not fall under the provision of art. 54.3(e) and that the prosecutor misused his powers under Article 54.3(e) to keep potentially exculpatory evidence from the accused. In the opinion of the judges, such behavior constituted a violation of the rights of the defendant and compromised the fairness of the trial.¹⁵

The disagreement between the prosecutor and the Trial Chamber over this issue resulted in a stay of the proceedings for some months. The court thus demonstrated its concern for guaranteeing the right balance between prosecution and defense in the search for truth, and the need to protect the rights of witnesses, intermediaries, and the defendants. The proceedings eventually resumed when the providers of the documentation lifted the condition of confidentiality.

Conclusions

In conclusion, the strategy adopted by the ICC prosecutor in the DRC cases involved a series of debatable choices that proved to be dysfunctional, led to the violation of fair trial rules, and were poorly perceived by civil society groups involved in the process.

The lack of representativeness of the cases jeopardizes the court's role in suppressing international crimes. The strategy adopted by the prosecutor had a significant impact on the scope of the decisions issued by the court. If the prosecution only targets certain regions, crimes, or alleged perpetrators, then the court is unable to issue decisions that provide a comprehensive description of a complex conflict like the one in the DRC. Furthermore, the lack of representativeness risks alienating some civil society groups and victims, thus potentially undermining the credibility of the ICC.

Sanctioning any violation of fair trial principles in its proceedings, the ICC judges have stressed the importance of issuing decisions that are exemplary and in full compliance with international law and fundamental judicial principles common to all state parties to the Rome Statute. The Office of the Prosecutor, as the organ that starts the process and whose choices define the scope of the proceedings, is all the more bound by these fair trial rules. The prosecutor will thus have to ponder all relevant decisions adopted by the various chambers to rethink the prosecutorial strategy.

An analysis of the prosecutor's approach to managing prosecutions in the DRC cases leads to reflection on the capacity and the pertinence of the role of the court in prosecuting international crimes committed in certain situations. Every situation has its own degree of complexity and novelty that imposes certain expectations on an international court of last resort,"

¹³ See Trial Chamber I ordering stay of proceedings, June 13, 2008, ICC-01/04-01-/06-1401.

¹⁴ Article 54.3(e) of the Rome Statute: The prosecutor "may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purposes of generating new evidence, unless the provider of the information consents."

¹⁵ See Trial Chamber I, June 13, 2008, ICC-01/04-01-/06-1401. Para. 73: The prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence.

recalling that the ICC has neither the mandate nor the capacity to prosecute all international crimes committed in the DRC.

It should be noted that a reflection on the shortfalls and weaknesses of the past prosecutorial strategy is already underway by the new prosecutor, Fatou Benasouda, as presented in the ICC's Strategic Plan for 2012–2015.¹⁶ Among the changes, the prosecutor aims to present cases at a confirmation hearing that are as trial ready as possible,¹⁷ and rather than exclusively focusing on the most responsible, she will also investigate or prosecute a limited number of mid- and high-level perpetrators (in order to ultimately have a reasonable prospect of convicting the most responsible) and lower level perpetrators where their conduct has been particularly grave and notorious.¹⁸ The prosecutor also noted that she aims to further improve the quality and efficiency of preliminary examinations, investigations, and prosecutions.¹⁹

Reflections

With the benefit of a decade of operations at the ICC, there is an opportunity to analyze, question, and think about the need for reform. The principles contained in the Rome Statute open the door to a broad range of possibilities for evolution and adaptation to societies' needs. The ICC is a young court, with traits and features that are not yet completely defined. The failures and weaknesses that emerged from the previous prosecutor's strategy in the DRC cases clearly show that some changes need to be implemented to improve future prosecutions as well as the gathering and managing of evidence.

At the same time, as was shown in the evolution of the DRC cases, the ICC is also built on a dynamic of confrontation and debate among its various bodies and protagonists. As such, civil society should be considered a key player in a trial. It is already supposed to be the case through the use of intermediaries. The role of civil society in the process should, therefore, receive special consideration in developing the rules of criminal procedure.

Need to Implement the Principle of Complementarity

These conclusions bring into focus the limitations of international tribunals like the ICC and the importance of the principle of complementarity. This is, in fact, one of the founding principles of the Rome Statute system, which is aimed at strengthening the responsibility of state parties to investigate and prosecute international crimes in their domestic courts. It is, therefore, necessary that national courts become more active in the fight against impunity for international crimes.

In the DRC the principle of complementarity is sought to be implemented, among others measures, through a government initiative aimed at introducing laws that give national courts the appropriate procedural means to pursue prosecutions of serious crimes. In particular, a draft law presented in 2008 aims to harmonize the national criminal code with the Rome Statute, while another draft law introduced first in 2010 and again in 2014 sets the basis for creating specialized chambers. Legislative activity in the DRC is thus very important, showing the Congolese government and justice system's engagement in obtaining significant results in the fight against impunity.

Need for Increased Role of Civil Society before the ICC

Any legitimate prosecutorial strategy needs to satisfy the need for justice of the society that it serves. Indeed, the fact that the interests of the international community are also affected by grave crimes does not reduce the impact that is first and foremost caused on society at the national level. Crimes under investigation by the ICC affect the future of entire communities and societies in profound and lasting ways, in particular, the capacity to build a stable future.

¹⁶ ICC Office of the Prosecutor, Strategic Plan June 2012–2015, www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf

¹⁷ *Ibid.*, 6, 14.

¹⁸ *Ibid.*, 6.

¹⁹ *Ibid.*, 7.

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Acknowledgments

ICTJ is grateful to the Swedish International Development Cooperation Agency for the support it provided for this research.



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International justice, like every justice system, has a significant role in satisfying victims' right to justice, in addition to its role in suppressing crime. The ICC prosecutor in defining the prosecutorial strategy should consult with civil society and discuss with them how to respond to serious violations committed in their national territory. This is especially important given the impact that the strategy will have in building the communities' collective memory, fight against impunity, and social reconstruction.

In this way, civil society should advocate for the participation of civil society in drafting the prosecutorial strategy. Involving civil society in this way would ensure the ICC's legitimacy ICC, particularly when it is suspected of partiality. Civil society can contribute to improving the knowledge and understanding of the role of the court and the rights that can be invoked before it and, therefore, inform affected communities.

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