
A story of missed opportunities
The role of the International Criminal Court
in the Democratic Republic of Congo

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Introduction

I left Dakar, Senegal, in March 2001 with a heavy heart. A three-judge panel of the *Cour de cassation*, the highest appeal court of Senegal, had just quashed the criminal case against Hisssein Habré, president of Chad from 1982 to 1990, and now living in exile in Senegal. I had been the main lawyer acting for a group of victims of the bloody repression perpetrated by agents of Habré's government throughout his eight years in power. All had gone well until the *Cour de cassation* ruling. A year earlier, a Senegalese investigative judge who examined the victims' complaint indicted Habré on several counts of torture and crimes against humanity under the UN Convention against Torture and the Senegalese penal code. On Habré's appeal, however, the court nullified the indictment on the grounds that the Torture Convention could not be applied in Senegal in the absence of legislation determining which particular Senegalese court had jurisdiction over acts of torture committed abroad.¹

What this legalistic interpretation meant in concrete terms was that nine years of meticulous and risky efforts by the *Association des victimes des crimes de répression politique au Tchad* (Chadian Association of Victims of Crimes of Political Repression) to document crimes committed by Habré's regime were, for a time, swept away,² ironically

¹ The ruling rendered meaningless both the provision of the Torture Convention providing for states ratifying it to prosecute the offences it describes wherever they have occurred, and the clause in the Senegalese Constitution giving international conventions ratified by the state direct application in national law.

² The International Court of Justice later found that by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed by Habré, Senegal breached its obligations under the Torture Convention and that it 'must, without

enough, by judges of the country that was the first in the world to ratify the Rome Statute. I returned to my country, the Democratic Republic of Congo (DRC), to devote myself to education in a small Catholic university in the north-eastern city of Butembo, which was occupied at the time by Ugandan troops.

It is in this small town and in the most unlikely circumstances that I re-discovered my faith in international justice. As I left a classroom for a break, I was approached by an old woman who wanted to know if I was the local boy who had gone on to prosecute a powerful president in a foreign land. She then handed me a bulky dossier related to the murder of her husband by the leader of a local rebel group supported by Uganda. Her daughter had told her that the local lawyer whom she had heard speaking on the radio regarding the Habré case was back and would be able to help in prosecuting the people who assassinated her husband and father. I was soon to devote a great part of my time to listening to victims of torture and parents of people killed or 'disappeared' by rebel and occupying forces in the DRC. I quickly realised that the faith in a vague 'international justice' to which all these people wanted to bring their cases was as contagious as their personal stories were painful to hear. A few months after I completed my teaching assignment, the DRC government ratified the Rome Statute, thus giving the International Criminal Court (ICC) jurisdiction over crimes like those described in the dossiers I was given in Butembo. I wondered, 'Would the ICC fulfil the hope of the people I met in Butembo and so many across the country?'

This chapter exposes the means by which, in my view, the Court betrayed this hope. As I argue, this betrayal is largely due to a defective prosecutorial strategy: the various wrong turns taken by the Office of the Prosecutor's (OTP) strategy in Congo could have been avoided if its first prosecutor, Luis Moreno-Ocampo, had given a more attentive ear to the numerous criticisms and to the advice that was given to him by representatives of national and international organisations who were at the outset among the Court's most enthusiastic supporters.³

further delay, submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him'. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [2005] ICJ Rep., 20 July 2012, para. 122.

³ Investigation in the cases discussed in this chapter had been completed by the time Moreno-Ocampo stepped down as prosecutor and Deputy Prosecutor Fatou Bensouda took over as chief prosecutor on 15 June 2012. Immediately after taking office, Prosecutor Bensouda embarked on a thorough review of the OTP's operating procedures and structures, including its investigations policies. This resulted in a new strategic plan, which acknowledges some of the limitations of the OTP's investigations policies

As I argue, the failure of the OTP under Prosecutor Moreno-Ocampo's tenure to extend such an ear resulted in a prosecutorial strategy that prioritised political expedience over thorough investigations, resulting in the pursuit of relatively 'small fish', frustrating a fuller accounting of the full scope of the DRC conflict, and jeopardising the OTP's independence. Moreover, rather than strengthen domestic accountability efforts, the OTP's investigations did them some measure of harm. The following critical analysis of the actions of the ICC in the DRC is grounded in the belief that criminal justice has an important expressive role to play – truth-telling, building a historical narrative – in the efforts to achieve political reconstruction in post-conflict societies.⁴ While the prosecutor's early theory of 'positive complementarity' contained the broad outline for such a role, he ultimately failed to apply his own theory in the context of the DRC.

A fertile ground for international justice

The conflict in Congo has gone through a succession of different phases since 1996. The first and shortest phase of the conflict lasted from November 1996 to May 1997 and was instigated by a rebel movement known as the AFDL (*Alliance des forces démocratiques pour la libération du Congo*) against the national army, President Mobutu's *Forces Armées Zairoises*. The support the AFDL enjoyed from Ugandan and Rwandan troops gave the conflict its international dimension. It ended with the ousting of Mobutu in May 1997 and his replacement with the AFDL leader Laurent-Désiré Kabila. The second phase of the conflict started in August 1998 when Rwanda and Uganda turned their back on Kabila to support a dissident rebel movement, RCD (*Rassemblement congolais pour la démocratie*), and many other splinter groups, all aiming to unseat President Kabila who, for his part, received the support of troops from Angola, Namibia and Zimbabwe, in addition to creating and arming self-defence groups (the so-called *Mayi-Mayi*) in the RCD-controlled territories.⁵

highlighted in this chapter. It is too early to assess how the important changes announced in the plan impact the quality of the OTP's investigations and prosecutions strategies. See 'OTP Strategic Plan June 2012–2015', Office of the Prosecutor, International Criminal Court (11 October 2013).

⁴ See M. Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007).

⁵ For further history, see John F. Clark (ed.), *The African Stakes of the Congo War* (New York: Palgrave, 2002); G. Nzongola-Ntalaja, *The Congo from Leopold to Kabila. A People's History* (London and New York: Zed Books, 2002); T. Turner, *The Congo Wars: Conflict, Myth and Reality* (London and New York: Zed Books, 2007).

At the time of my return in early 2001, the DRC was thus in the throes of a long political crisis. The signing of a comprehensive peace agreement in Pretoria, South Africa, in December 2002 formally put an end to the national and international dimensions of the conflict and paved the way for a transition period led by a national unity government. However, it also resulted in more localised conflicts in eastern territories in a third and ongoing phase of the conflict that pits the government of Kinshasa against several armed groups scattered across the vast national territory.⁶

By any measure, the violence wrought by the conflict has been devastating. All the belligerent forces, national and foreign, have indulged in brutal attacks against the civilian population. It is estimated that 5.4 million were numbered dead as the direct or indirect consequence of the war that raged from August 1998 to April 2007.⁷ A little more than 2 million were officially recorded as dead after the signing of the agreement that formally ended the war in 2002.⁸

In the DRC, the dichotomy between peace and justice has not played out at the same level of complexity as has been the case in other situation countries. Partly due to the excessive brutality of the war and the apparent absence of any political rationality in the belligerent's motives, it quickly appeared to numerous Congolese that efforts to put an end to the conflict should include the establishment of justice mechanisms. But the national justice system, undermined by corruption and weakened by lack of resources, was too limited to achieve this goal. A turn to international justice mechanisms was therefore seen as necessary.

In the Ituri District, a reconciliation process at the grassroots level had started in September 2003, spearheaded by traditional leaders from the Hema and Lendu communities, whose members were most affected by the successive waves of the conflict. Most actors of these reconciliation efforts understood the need to complement and support the process with a justice component. There was strong popular support for the *Programme pour la restauration rapide de la justice en Ituri* ('Program

⁶ On the history of these more 'localised conflicts', see Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge: Cambridge University Press, 2010).

⁷ 'Mortality in the Democratic Republic of Congo: An Ongoing Crisis', International Rescue Committee (2007). Data in this report were later challenged in a Human Security Report Project, available at www.hsr.org/human-security-reports/20092010/overview.aspx.

⁸ Prior to his voluntary surrender to the ICC in March 2013, Bosco Ntaganda was involved in one such armed group, the Rwanda-backed CNDP (or 'National Congress for the Defence of the People'), created in 2007, which later metamorphosed into M23.

for the Urgent Restoration of the Justice System in Ituri'), a donor-supported program launched in December 2003 whose objective was to enable the criminal justice system to recover its capacity to prosecute serious crimes and thus contribute to fostering criminal accountability in Ituri.⁹

Civil society groups across the country issued communiqués, prepared reports and held workshops in support of the idea that crimes committed in the past five to six years of civil war must be prosecuted before some kind of international tribunal. Although the concept of such a mechanism varied from organisation to organisation, there was broad agreement on the need to not leave unpunished the authors, foreign and national, of the gravest crimes of the war, including those committed before the Rome Statute's entry into force.¹⁰

One of the five commissions established under the Inter-Congolese Dialogue (ICD),¹¹ the Commission on Peace and Reconciliation, was tasked with recommending measures to ensuring lasting peace within the national borders and security in the region. Members of the commission

⁹ 'Making Justice Work: Restoration of the Legal System in Ituri, DRC', Human Rights Briefing Paper, Human Rights Watch (HRW, 'Making Justice Work', 2004). The program later expanded both geographically (to the rest of the eastern territories) and thematically (to embrace other aspects of justice provision beyond criminal justice) under the name of REJUSCO (*Restauration de la Justice à l'Est du Congo*), which ran from 2007 to 2010. See K. Tekilazaya, D. Fataki Wa Luhindi and M. Wetsh'Okonda Koso, 'République démocratique du Congo: Le secteur de la justice et l'Etat de droit', AfriMAP/Open Society Initiative for Southern Africa (2013), 140.

¹⁰ NGO participants in a May 2001 seminar convened by the DRC office of the International Human Rights Law Group recommended the creation of a special international criminal tribunal that 'should be of a hybrid or mixed character (its judges and prosecutors should consist of both Congolese and non-Congolese nationals)'. They also recommended the creation of 'a national Truth Commission, the establishment of a grassroots-level reconciliation process, and reinforcing the capacity of the Congolese judicial system'. In October 2001, the Centre pour la Paix en Afrique Centrale (CIPAC) issued a report entitled '*Pourquoi une juridiction spéciale pour la RDC?*', which discussed different options for a mechanism to try the most serious crimes committed since 1996. The report recommended the creation of a special tribunal with both Congolese and international judges, and set to apply both national criminal law and international humanitarian law. The August–October 2002 issue of 'Le Scrutin', a newsletter published by LINELIT, a Kinshasa-based civic education organisation, ran an article under the headline '*Quelles juridictions pour la répression des crimes internationaux commis pendant les guerres en RDC de 1996 à 2001?*', which recommended the creation of a special tribunal following the model of the International Criminal Tribunal for Rwanda.

¹¹ Efforts to bring an end to the second cycle of war in Congo that had flowed throughout the country since 1998 led to the convening in 2002 of peace talks, known as the Inter-Congolese Dialogue (ICD), in Sun City, South Africa. In December 2002, participants in the ICD reached a Global and Inclusive Accord (or '*Accord Global et Inclusif*'), which set a timetable for a two-year transition government leading to democratic elections.

were clear about the fact that restoring lasting peace would be conditional on establishing dedicated justice mechanisms to prosecute war crimes. Their recommendations regarding the establishment of a truth and reconciliation commission and an international special tribunal for war crimes in the DRC were adopted by all 359 delegates to the ICD,¹² rather than being referred to the upcoming transitional parliament as most 'contentious' recommendations were.¹³

The transitional government formed in July 2003 engaged in an internal debate on the implementation of the recommendations of the ICD's 'Global and Inclusive Accord'. On 25 September 2003, the transitional government approved a decision to refer to the ICC war crimes and other international crimes committed throughout the territory of DRC and to request the creation by the UN Security Council of an international special tribunal for the DRC to deal with crimes that would fall outside the jurisdiction of the ICC.¹⁴ Remarkably, this decision was reached by a government composed of leaders of armed groups and factions whose own conduct would be the subject of investigations by any international criminal tribunal.

Prosecutor Moreno-Ocampo deserves a great deal of credit for having actively sought a dialogue with Congolese authorities on the scope and impact of the referral. Either through direct contacts with Congolese government and judicial authorities or through consultation with a broad network of individuals and international agencies, the prosecutor sought advice and guidance on a range of issues, from the geographic scope of his investigations to their impact on the peace process and the role of national justice mechanisms. The content of the state referral was among several issues discussed with Congolese authorities. Following the decision by the transitional government on 25 September 2003, the referral was formally made in March 2004.¹⁵

¹² P. Bouvier et F. Bomboko, *Le Dialogue intercongolais, anatomie d'une négociation à la lisière du chaos*, Cahiers africains No 63–64 (Paris: L'Harmattan, 2004), 177–178.

¹³ R. Minani Bihuzo, *1990–2007, 17 ans de transition politique et perspectives démocratiques en RDC* (Kinshasa: CEPAS/RODHECIC, 2008), 68.

¹⁴ Although the first part of this decision was followed through, as detailed later in this chapter, for reasons that remain unclear, the government failed to follow up on request for the creation of an international special tribunal for the DRC.

¹⁵ In the letter, President Kabila refers 'the situation that has been unfolding in my country since July 1, 2002, in which it appears that crimes that fall within the competence of the International Criminal Court have been committed, in order to determine if one or more persons should be charged with the commission of these crimes'. 'Letter of Referral from President Joseph Kabila to Prosecutor of the ICC', ICC-01/04-01 /06-32-US-Exp-AnxAl 12-03-2006 1/IUM, 3 March 2004.

A good start: devising the theory of 'positive complementarity'

At the outset, the then prosecutor took concrete and positive steps, demonstrating his willingness to make the best use of complementarity mechanisms provided for in the Rome Statute. Moreno-Ocampo organised the OTP so as to give complementarity issues the prominence they deserve. In addition to the Investigations and Prosecutions Divisions, he created a Jurisdiction, Complementarity and Cooperation Division (JCCD), which was given the task, among other things, to look into issues of admissibility and advise the prosecutor on the proper balance between national prosecutions and the role of the ICC. The JCCD was to foster a practical division of labour between the ICC and national courts, based on the principle of 'a positive approach to complementarity, encouraging genuine national prosecutions wherever possible'.¹⁶

In the DRC situation, the prosecutor envisaged a clear division of labour whereby the ICC would prosecute a handful of individuals among those bearing the greatest responsibility, while the Congolese justice system, with the support of the international community, would take on other cases. Elements of such a division of labour were outlined in the following paragraph from the letter the prosecutor sent to President Kabila to seek his referral of the situation in DRC:

Since the International Criminal Court will not be in a position to try all the individuals who may have committed crimes under its jurisdiction in Ituri, a consensual division of labour could be an effective approach. We could prosecute some of those individuals who bear the greatest responsibility for the crimes committed, while national authorities, with the assistance of the international community, implement appropriate mechanisms to deal with others. This would send a strong sign of the commitment of the Democratic Republic of the Congo to bring to justice those responsible for these crimes. In return, the international community may take a more resolved stance in the reconstruction of the national judiciary and in the re-establishment of the rule of law in the Democratic Republic of the Congo.¹⁷

The OTP's theory of complementarity found a positive echo in the DRC as it gave concrete meaning to the national consensus achieved at the Inter-Congolese Dialogue around the need for a special international tribunal, and to the idea that a division of labour between international

¹⁶ 'Report of the International Criminal Court to the UN General Assembly', A/60/177, 1 August 2005, para. 28.

¹⁷ 'Letter from Prosecutor Luis Moreno-Ocampo to H.E. Joseph Kabila, President of the Democratic Republic of Congo', 25 September 2003 (on file with author).

justice bodies and the Congolese judicial system was desirable. The highest-ranking leaders linked to the most serious crimes, including foreign nationals, would appear before international justice mechanisms, given the incapacity of the Congolese justice system to prosecute them. The Congolese justice system would use the respite gained in order to reform its internal structures as well as to prosecute people in lower-ranking positions.

Former minister of justice Ngele Masudi articulated this vision in his opening remarks at a meeting on the ICC in October 2002. Before a gathering of lawyers, law professors, senior members of the judiciary, human rights activists and representatives of civil society organisations, he indicated that the government's strategy to address war crimes was based on the principle of complementarity, by which he meant that the DRC would leave to the ICC the task of prosecuting those in the top leadership of armed groups who bore the greatest responsibility for crimes under the ICC jurisdiction, whereas the Congolese justice system would deal with the lower-ranking perpetrators and the less-complex crimes. This was the background, Minister Ngele explained, against which the government had ordered the overhaul of the legal framework for military justice so as to give military courts jurisdiction over crimes under the Rome Statute. He added that the same rationale was the basis for the government's request to the United Nations for the creation of a specific international criminal tribunal for the DRC.

The announcement by then prosecutor Moreno-Ocampo in June 2004 of the formal opening of investigations in the DRC seemed to reinforce the idea of an ideal division of work between the Congolese justice system and an international court. In the communiqué announcing the opening of the investigation, the prosecutor highlighted the fact that his office would focus its investigation so as to target 'serious crimes' committed in the DRC territory from 1 July 2002 and only those 'people that bore the highest responsibility' for the crimes.¹⁸

In the following months, however, the opposite happened. At the end of what appeared to be only a cursory investigation, the Court issued arrest warrants for people hardly thought of as bearing the highest responsibility for crimes committed. Indeed, the crimes for which the prosecutor sought early convictions were not among the most serious committed in Ituri. The strategy the OTP was implementing in the DRC

¹⁸ 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', ICC-OTP-20040623-59, Press Release, 23 June 2004.

seemed to be moving away from the basic principles that it had previously outlined.

Targeting small fish: Thomas Lubanga

Very few among the Congolese legal community and civil society expected the ICC prosecutor to go as high up as he later did in the Sudan case. Though he was the person bearing the greatest responsibility for crimes committed in Darfur, the issuance of an arrest warrant against President Bashir was rightly criticised for its potentially adverse implications to the peace process that was taking place at the time the warrant was issued. The DRC situation was different: there was no shortage of individuals other than heads of state who bore a much greater responsibility for crimes in Ituri than those for whom the prosecutor later sought arrest warrants.

The first disillusionment came with news of Thomas Lubanga as the first person to be charged by the ICC. Lubanga was prosecuted for crimes consisting of ‘conscripting and enlisting children under the age of 15’ and forcing them ‘to participate actively in hostilities in Ituri, from September 2002 to 13 August 2003’.¹⁹ Both the choice of individual and the crime he was charged with would irreparably damage the effectiveness of the division of labour between the Court and the Congolese justice system.

For most Congolese, Thomas Lubanga did not fit into the category of persons bearing ‘the greatest responsibility’ for the crimes committed during the second phase of the Congolese war. A mid-level actor in the conflict in Ituri, Lubanga started his criminal career as an aide to Mbusa Nyamwisi, leader of the armed group RCD-ML (*Rassemblement Congolais pour la Démocratie – Mouvement de Libération*), which controlled Ituri between 1999 and 2002 with the support of Uganda. A large percentage of the crimes committed in Ituri were committed by the RCD-ML, but Lubanga was only one among several ‘ministers’ in the group. Only in the beginning of 2003 did he create his own militia, the *Union des Patriotes Congolais* (UPC) – with the support and at the initiative of officers of the Ugandan army, the Uganda People’s Defence Force (UPDF) – although he quickly switched sides and pledged allegiance to the Rwanda Defence Force, which provided him with arms, training and operational capability

¹⁹ Decision on the Prosecutor’s Application for Warrants of Arrest, *Situation in the Democratic Republic of the Congo*, ICC-01/04, Pre-Trial Chamber I, ICC, 10 February 2006, para. 37 (Arrest Warrant, *Lubanga*, 10 February 2006).

for the greater part of 2003. As was the case with most of the militia in Ituri, however, the UPC's operations were under the effective strategic control of the Ugandan army and later the Rwandan army, whose officers retained command and control of military operations, including those during which crimes were committed against the civilian population.

Moreover, many in the DRC found it deeply disturbing that, after two years of investigations, conscription of child soldiers was all that the OTP was able to point to as being among 'the worst crimes' committed in Ituri. Loud expressions of indignation would quickly be heard in the media and among the human rights community. Most of the journalists invited by the ICC in November 2006 to cover the Court's hearing on the confirmation of charges against Lubanga expressed their bewilderment at the fact that Lubanga was not prosecuted for more serious crimes. It did not make sense to the Congolese media that the ICC prosecutor would identify and describe 'the instigators of the conflict in Ituri' and yet refrain from pursuing them. According to John Lwamba, director of the Kinshasa daily *L'Echo des Grands Lacs*, 'We criticise the work of the Court for only targeting the small fish.'²⁰

By the OTP's own admission, it appears that the decision to prosecute Lubanga on the charges of enlisting and conscripting children under fifteen was based not on the gravity of the crime but rather on which crime investigators could quickly gather evidence on in order to secure an arrest warrant. According to a report issued weeks before Lubanga's confirmation hearing, the OTP's investigation of Lubanga initially included a wider range of crimes with the aim of representing a broad range of criminality.²¹ At the same time Lubanga was the subject of another investigation in the national courts: on 19 March 2005 a Congolese military prosecutor had ordered him into preventive detention on different counts of war crimes and crimes against humanity. However, the prosecutor suddenly dropped the investigation of a wider range of crimes upon learning from the Congolese investigative magistrates that they might have to grant Lubanga's release if by 19 March 2006 they could not gather enough evidence to charge him. The prosecutor thought it urgent to prevent such release so he decided to focus his investigation on the more manageable crime of enlisting and conscripting children under 15.²²

²⁰ D.I. Kazadi, 'Procès Lubanga – la CPI critiquée par les médias congolais', *Le Phare*, Kinshasa, 15 April 2008.

²¹ 'Report on the activities performed during the first three years (June 2003-June 2006)', Office of the Prosecutor, ICC, 12 September 2006, 8, 12.

²² *Ibid.*

In August 2006, the ICC also issued an arrest warrant against Bosco Ntaganda, former *chef d'état-major général adjoint* ('Deputy Chief of the General Staff'), responsible for overseeing military operations of Thomas Lubanga's militia, the UPC.²³ Again, Ntaganda was charged with the same crimes as his former boss: conscription of children of less than fifteen years old, although the OTP would later add more serious charges in an additional application for warrant of arrest in 2012.²⁴

Human rights NGOs and victims' associations across the country began questioning the ICC's motives. Some warned that not taking into account the most serious crimes risked the Court's credibility in the DRC. In the months following the arrest of Thomas Lubanga and his surrender to the Court, a group of twenty-five Congolese women's and human rights organisations met in Beni, North Kivu, to discuss the status of the ICC prosecutions in the DRC. In a strongly worded statement, these organisations expressed their 'deep regret' that the only charge brought against Lubanga pertained to the enlistment and conscription of child soldiers. They stressed that Lubanga's UPC had committed 'several other crimes falling under the jurisdiction of the ICC, of which the details have been submitted to the OTP by national and international NGOs'. More specifically, the groups thought it was the ICC's responsibility to address 'the widespread commission of rape and other forms of sexual violence by the UPC'. They concluded their statement with a warning that a failure to add more serious charges would result in 'offending the victims and strengthen the growing feeling of mistrust of the work of the ICC in the DRC and of the work of the prosecutor especially'.²⁵

The Congolese National NGO Coalition for the ICC, which claimed membership of more than a hundred leading human rights organisations, joined a group of international human rights NGOs in sending a letter to the ICC prosecutor in which they expressed their disappointment 'that two

²³ Warrant of Arrest, *The Prosecutor v. Bosco Ntaganda* ('Ntaganda'), ICC-01/04-02/06, Pre-Trial Chamber I, ICC, 22 August 2006.

²⁴ The prosecutor's application for a second arrest warrant against Ntaganda on 14 May 2012 included charges of (1) crimes against humanity of murder, rape/sexual slavery and persecution based on ethnic grounds; and (2) war crimes of murder, intentional attacks against civilians, pillaging and rape/sexual slavery. See Decision on the Prosecutor's Application under Article 58, *Ntaganda*, ICC-01/04-02/06, Pre-Trial Chamber II, ICC, 13 July 2012, para. 5 ('Article 58 Decision, *Ntaganda*, 13 July 2012').

²⁵ 'Obtaining further charges in the opening case against Thomas Lubanga', Statement by women's rights and human rights NGOs of the DRC on the prosecutions by the ICC, Beni, 16 September 2006 (on file with the author).

years of investigation by your office in the DRC have not yielded a broader range of charges against Mr. Lubanga'. While acknowledging the seriousness of the charges related to enlisting of child soldiers, they cited concrete examples of the UPC's involvement in the commission of far more serious crimes, such as the killing of 350 persons in the course of a military operation, which also resulted in the 'complete destruction' of more than twenty villages in February and March 2003. They also concluded that the failure to include additional charges for the most serious crimes in the case against Lubanga 'could undermine the credibility of the ICC in the DRC'.²⁶

A partial story: Katanga and Ngudjolo

The credibility of the ICC was indeed seriously undermined. The much more serious charges of war crimes and crimes against humanity brought against two other militia leaders of Ituri, Germain "Simba" Katanga and Mathieu "Chui" Ngudjolo, in July 2007 were too late to do much to restore the Court's standing. Katanga and Ngudjolo were arrested and surrendered to the ICC in connection with crimes committed in the course of a brutal attack jointly launched by their respective militia on the Ituri village of Bogoro on 24 February 2003. They were eventually charged with war crimes (consisting, amongst other things, of attacks against the civilian population, intentional murders, and sexual slavery and rape) and crimes against humanity (consisting of murders, rapes and sexual enslavement).²⁷

However, according to Godefroy Mpiana of the human rights organisation Justice Plus of Bunia, 'the procedure [against Germain Katanga] was very delayed. The court had really spent its credit here on the ground.'²⁸ Moreover, as with the prosecution of Lubanga, the ICC's arrest of Ngudjolo and Katanga appeared in the eyes of many Congolese to be the result of a mix of opportunism and a public relations operation having little to do with a genuine effort to punish the leaders of crimes committed in Ituri. In particular, the fact that the case against

²⁶ The other signatories of the letter of 31 July 2006 are: Avocats Sans Frontières, the Center for Justice and Reconciliation, International Federation for Human Rights (FIDH), Human Rights Watch, International Center for Transitional Justice (ICTJ), Redress, and Women's Initiative for Gender Justice.

²⁷ Warrant of Arrest, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Pre-Trial Chamber I, ICC, 2 July 2007, and Warrant of Arrest, *The Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/07, Pre-Trial Chamber I, ICC, 6 July 2007, respectively.

²⁸ 'Germain Katanga, deuxième Congolais transféré à la CPI', http://sites.rnw.nl/pdf/ijt/IJT76_VF.PDF.

Katanga was already before the Congolese courts, as explained below, on charges of genocide, war crimes and crimes against humanity under Congolese law, meant that its removal to the ICC had the effect of weakening national efforts at justice, while doing nothing to take on those who were their superiors.²⁹

The commander of a small armed group, the FRPI (*Forces de résistance patriotique de l'Ituri*), Germain Katanga had been appointed a general of the national army of Congo in December 2004 with six other warlords from Ituri, over the protests of the victims' organisations and the human rights activists who gave evidence of their implication in criminal acts in Ituri. Ngudjolo, meanwhile, occupied a lower post in the leadership chain of an allied group, the FNI (*Front des nationalistes intégrationnistes*). He had joined the Congolese army at the same time as Katanga, and was arrested by the ICC in January 2008, while attending an army officer-training course in Kinshasa.

Floribert Njabu, the president and co-founder of the FNI-FRPI, was held in a prison in Kinshasa at the time of the transfers of Katanga and Ngudjolo to the ICC, but was not himself transferred to The Hague. Even if the FNI-FRPI was a movement of lesser scale than the RCD-ML, for example, Floribert Njabu better matched the profile of 'persons bearing the largest responsibility' for crimes committed by this armed group than either Katanga or Ngudjolo. It was not until November 2010, after the prosecution's case was closed, that Njabu was called to testify by the defence for Germain Katanga, along with two other militia leaders, Pierre Mbodina Iribi and Sharif Manda Ndadza, who were also in detention in Kinshasa.³⁰

Moreover, evidence produced in the *Ngudjolo* and *Katanga* cases indicated that the governments of Uganda and the DRC, in conjunction with a larger armed group, the RCD-ML, supplied the FNI-FRPI with military support for, and jointly planned, several attacks, including the

²⁹ By the time of his transfer to the Court, Katanga was in the custody of the Congolese military justice and was awaiting the commencement of his trial in the case *Auditeur militaire c. Germain Katanga et Crts*, No RDP 001/05, before the *Haute cour militaire* of Kinshasa, in connection with different attacks on civilians and the murder of nine UN peacekeeping troops in Ituri on 25 February 2005.

³⁰ After they had completed their testimony in which they implicated the Kinshasa government, including President Joseph Kabila personally, in the attack on Bogoro, the three witnesses applied for asylum in the Netherlands, citing fear for their security if they were to return to prison in the DRC. Their asylum applications have since been denied and they were returned to the DRC. See J. Easterday, 'Three Defense Witnesses Blame the DRC for Bogoro Attack, then Seek Asylum in the Netherlands', 6 June 2011 at <http://www.ijmonitor.org/2011/06/three-defense-witnesses-blame-the-drc-for-bogoro-attack-then-seek-asylum-in-the-netherlands/>.

Bogoro attack in connection to which Katanga and Ngudjolo were also charged. For example, the chamber in *Ngudjolo* was provided extensive evidence of numerous meetings that Ngudjolo, Katanga and other FNI-FRPI leaders held with senior Congolese and Ugandan government and military leaders, including President Kabila and President Museveni and their emissaries, prior or subsequent to these attacks. Meetings with General Kale Kayihura, overall commander of the UPDF occupying forces in Ituri, were particularly detailed.³¹ The evidence in *Katanga* was that the attack on Bogoro was planned in Beni by the EMOI ('Integrated Operational Head Command') commanding structure operated by the government of Kinshasa and the RCD-ML armed group, which provided arms and training of FNI-FRPI combatants in preparation for the attack on Bogoro.³²

This prosecution strategy was never likely to allow the ICC to tell the full story of the conflicts in Ituri, and less still in the DRC as a whole. The relatively minor role that the individuals who have been brought to court in The Hague played in the Ituri conflict means that the OTP deliberately left the most important actors – all of the national political and military leaders in DRC, Uganda and Rwanda – in the shadows.³³ The Court has thus been unable to place the crimes that it prosecutes in their full historical context and so fails to contribute to the uncovering of the truth. As one analyst noted, the Court deliberately chose not to respond to the following important questions: 'Who provided the weapons? Who supported the militia leaders? Where are the political leaders that are behind these crimes?'³⁴ By choosing not to deal with these and other similar questions, the OTP presented evidence that was so weak and incomplete that, in the words of the dissenting judge in *Katanga*, 'we will never fully understand

³¹ Judgment pursuant to article 74 of the Statute, *The Prosecutor v. Mathieu Ngudjolo*, ICC-01/04-02/12, Trial Chamber II, ICC, 18 December 2012, paras. 474–475, 493–494, 500 ('Judgment, *Ngudjolo*, 18 December 2012').

³² Jugement rendu en application de l'article 74 du Statut, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, ICC, 7 March 2014, paras. 635; 643–644; 651 ('Judgment, *Katanga*, 7 March 2014').

³³ According to Human Rights Watch, during the period in which the crimes of which Katanga, Lubanga and Ngudjolo are accused were committed, Ituri was 'the battleground for the war between the governments of Uganda, Rwanda and the DRC, which have provided political and military support to local armed groups despite abundant evidence of their widespread violations of international humanitarian law' and who, therefore 'share responsibility for these crimes'. Human Rights Watch, 'Ituri: "Covered in Blood." Ethnically Targeted Violence in Northeastern DR Congo', Human Rights Watch Report, 15:11(A) (2003), 2.

³⁴ 'Germain Katanga, deuxième Congolais transféré à la CPI', *Radio Nederland Wereldomroep*, 21 October 2007.

what happened on 24 February 2003 and especially who did what to whom and why'.³⁵

The narrative that better fit this prosecutorial strategy was one that presented the conflict in Ituri as being predominantly of an ethnic nature. The OTP first worked on describing crimes committed in Ituri as the direct consequence of a deliberate policy 'of attacking the Lendu and other non-Hema population throughout the territory of Ituri', in order 'to seek Hema political and military domination over Ituri'.³⁶ Prosecutor Moreno-Ocampo then presented a situation of all-out ethnic conflict between the Hema, the Lendu and the Ngiti.³⁷ This narrative was a distortion of history: it deliberately ignored important elements of the historical context, including the fact that the implication of the governments of the DRC, Rwanda and Uganda was motivated by the desire to control political space and natural resources.³⁸ It left the impression that the alleged crimes were motivated only by ethnic identity and thus reinforced the Western media's lazy and inadequate image of 'tribal warfare', without spending the time to learn about the political and economic causes of those wars. As Judge Christine Van den Wyngaert rightly observed in her dissenting opinion:

It is factually wrong to reduce this case . . . to ethnic fear and/or hatred. Such oversimplification may fit nicely within a particular conception of how certain groups of people behave in certain parts of the world, but I fear it grossly misrepresents reality, which is far more complex. It also implicitly absolves others from responsibility.³⁹

A one-way street: failure to support national prosecutions

The prospect of a division of labour between international and national justice and the promise of international support to the reconstruction of

³⁵ Minority Opinion of Judge Christine Van den Wyngaert, Judgment, *Katanga*, 7 March 2014, para. 261.

³⁶ Article 58 Decision, *Ntaganda*, 13 July 2012, para. 23.

³⁷ Decision on the confirmation of charges, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber I, ICC, 29 January 2007, para. 4; Decision on the confirmation of charges, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber I, ICC, 30 September 2008, para. 4.

³⁸ See United Nations, 'Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo', S/2002/1146, 16 October 2002.

³⁹ Minority Opinion of Judge Christine Van den Wyngaert, Judgment, *Katanga*, 7 March 2014, para. 318.

the national justice system were among the factors that made the ICC so attractive to most in the Congolese legal community. The October 2004 cooperation agreement between the ICC and the government of the DRC included a specific commitment for the OTP to 'cooperate with the [Congolese] courts and provide assistance to them for . . . investigations, prosecutions, and any eventual trials for crimes that fall within the competent jurisdiction of the International Criminal Court'; the ICC prosecutor also committed to, 'as far as possible, facilitate such assistance by third parties'.⁴⁰ Immediately after the signing of the cooperation agreement, the Congolese *Procureur général de la République* (the chief public prosecutor) established a section in his office with a team of senior prosecutors in charge of the implementation of the cooperation mechanisms provided under the agreement.

This cooperation mechanism, however, has worked as a one-way street in favour of the ICC. While the ICC prosecutor has enjoyed unlimited access to the judicial proceedings before national courts in accordance with Article 36 of the ICC-DRC agreement, no Congolese court has been given information in the ICC's possession relevant to crimes being prosecuted in national courts.⁴¹ Moreover, the ICC has not provided national courts with the much-needed training in prosecution of complex mass crimes, even though national prosecutors and judicial police officers have consistently identified such training as a prerequisite for a more efficient fight against impunity.⁴² Nor has the prosecutor's commitment to helping with international assistance for the rebuilding of the Congolese justice system materialised.

In fact, the ICC has hindered progress towards the rebuilding of a functioning Congolese justice system by taking cases away from national courts. As an initial matter, it should be noted that the OTP began its investigations in Ituri, a region where the domestic criminal justice system was in comparably better condition than other conflict-affected regions. Indeed, the announcement by the OTP of the beginning of investigations in Ituri coincided with the piloting of donor-funded *Programme pour la restauration rapide de la justice en Ituri* ('Program for the urgent restoration of the criminal justice system in Ituri'), with the aim of putting an

⁴⁰ 'Judicial Cooperation between the Democratic Republic of the Congo and the Office of the Prosecutor of the International Criminal Court', Article 37, Kinshasa, 6 October 2004.

⁴¹ Interviews with senior military judges (Kinshasa, August 2009).

⁴² Mission multi-bailleurs de l'audit du système judiciaire en RDC, 'Rapport final des ateliers et du séminaire pour un programme cadre de la justice en RDC', Kinshasa, 15 November 2004 ('Mission multi-bailleurs, Rapport final').

end to impunity for serious crimes in the region. As the first ICC investigative teams were being deployed, local prosecutors supported through the program were making progress on their first prosecutions, which included cases against prominent leaders of local armed groups, among them Mathieu Ngudjolo.⁴³

Most militia leaders currently in the ICC's custody were being prosecuted or had been indicted by Congolese courts at the time of their transfer to the ICC. Two of them, Lubanga and Katanga, had been arrested following the murder of nine UN peacekeepers in February 2005 and charged by Congolese military prosecutors on different counts of looting, crimes against humanity and war crimes. Until his surrender to the ICC on 17 March 2006, Lubanga had been in the custody of the prosecutor of the Kinshasa *Haute Cour Militaire* ('Military High Court'), the country's highest military court, though he had not yet appeared before it. Katanga had been arrested in March 2005 and an investigative judge had opened a formal investigation file against him and seven other militiamen.⁴⁴

During their appearance before Congolese investigative judges on 17 June 2004 and 20 January 2006, respectively, Ngudjolo and Katanga were asked specific questions in relation to crimes committed during the attack on Bogoro in 2003 – with which they were eventually charged at the ICC.⁴⁵ Six months prior to his surrender to the ICC in October 2007, Germain Katanga had appeared before the *Haute cour militaire* in Kinshasa, which ruled on his application for conditional release by directing the military prosecutor to complete his investigations and bring the case to trial without further delay.⁴⁶ Katanga was eventually transferred to the ICC before the investigative magistrate could complete his investigation. The long delay in bringing his and Lubanga's cases to trial since they were arrested in 2005 was in part due to lack of training on the part of military investigative magistrates in investigation of complex crimes of an international nature.⁴⁷ Nonetheless, the initial work in their

⁴³ HRW, 'Making Justice Work', 4.

⁴⁴ *Haute cour militaire*, File RMP No. 0121/0122/NBT/05 in the case against Germain Katanga, Goda Sukpa, Ndjabu Ngabo, Pitchou Mbodina Iribi, Masudi bin Kapinda, Lema Bahat Pelo, Philémon Manono and Bede Djokaba Lambi.

⁴⁵ Judgment, *Ngudjolo*, 18 December 2012, para. 455; Transcripts of the pre-trial hearing in the case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 22 October 2007, ICC-01/04-01/07-T-5-ENG [22Oct2007 WT] 1/31 NB PT, 18.

⁴⁶ *Haute cour militaire, Auditeur militaire c/ Germain Katanga et Crts*, Aff. RDP 001/05, jugement du 10 avril 2007.

⁴⁷ Interview with a senior investigative magistrate (Kinshasa, August 2009).

cases had already been completed, enabling the ICC to take credit for bringing new cases without doing the hard graft of investigation that should have established the basis for charges.

Ngudjolo, meanwhile, had been charged with the kidnapping and murder of a UPC sympathiser in September 2003 and prosecuted before a civilian court of first instance in Ituri. His acquittal on 3 June 2004 was mainly due to the Congolese and UN security agencies' failure to protect the prosecution's witnesses from threats by FNI supporters, which led to the witnesses' refusal to appear in court to give evidence.⁴⁸

The failure of these cases to be successfully prosecuted before national courts is but one example of opportunities the OTP missed to make good use of the prosecutor's stated vision of complementarity. Prosecutor Moreno-Ocampo could have used the cooperation and complementarity mechanisms set out in the Rome Statute and the DRC-ICC agreement to help the Congolese justice system address key obstacles to effective prosecution of war crimes in DRC: the lack of trained investigators and the lack of adequate national legislation defining the relevant crimes.⁴⁹ Participants to the November 2004 national seminar on the reconstruction of the justice system in the DRC had hoped for such help, but it was not forthcoming.⁵⁰

The Pre-Trial Chamber deciding on the first application for warrants of arrest against Lubanga and Ntaganda was therefore right to point out that,

[S]ince March 2004 the DRC national judicial system has undergone certain changes, particularly in the region of Ituri where a Tribunal de Grande Instance has been re-opened in Bunia. This has resulted inter alia in the issuance of two warrants of arrest by the competent DRC authorities for Mr Thomas Lubanga Dyilo in March 2005 for several crimes, some possibly within the jurisdiction of the Court ... Moreover, as a result of the DRC proceedings against Mr Thomas Lubanga Dyilo, he has been held in the *Centre Pénitentiaire et de Rééducation de Kinshasa* since 19 March 2005. Therefore, in the Chamber's view, the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of article 17 (1) (a) to (c) and 3, of the Statute does not wholly correspond to the reality any longer.⁵¹

⁴⁸ HRW, 'Making Justice Work', 8.

⁴⁹ For example, under the October 2004 Judicial Cooperation Agreement with the DRC, the ICC prosecutor committed to 'cooperate with national jurisdictions and provide assistance to them for those investigations, prosecutions, and any eventual trials for crimes that fall within the competent jurisdiction of the International Criminal Court'.

⁵⁰ Mission multi-bailleurs, Rapport final.

⁵¹ Arrest Warrant, *Lubanga*, 10 February 2006.

Thus, the ICC simply took over the prosecution of crimes allegedly committed by these middle-level perpetrators instead of helping the Congolese judiciary address these prosecutions directly. It sent the message that individuals and institutions involved in efforts to rebuild the Congolese justice system had no reason to speed up the pace of the reforms as long as the ICC could substitute its jurisdiction for that of national courts. It was not surprising, therefore, that to justify the Court's jurisdiction, the Congolese minister of justice (the very person in charge of implementing reforms in the justice sector) made vague reference to the 'difficulties' of completing investigations, without having to face questions as to the reasons for such difficulties.⁵²

Hit-and-run investigations

The ICC's failure to bring charges against high-ranking commanders and for the most serious crimes was also a direct result of the OTP's strategy of conducting quick investigations with the lowest cost possible. From the outset, the OTP invested only in low-intensity and short investigations in Ituri, relying on the cooperation of the Congolese government and the UN mission in Congo, rather than on collecting direct victim testimony or using the material already collected by local NGOs for information on crimes and analysis of the cases. This system would eventually form the default operating protocol in the OTP and lead to investigative disasters elsewhere in the DRC and other countries.⁵³

It would appear that investigations were never at the top of the ICC prosecutor's agenda from the time of the establishment of the office. While Moreno-Ocampo devoted considerable efforts and resources in establishing the impressively bureaucratic JCCD, he also put in place administrative operations and policies that had the consequence of undermining the importance and professionalism of the Investigations Division. In December 2003, for example, the prosecutor told a group of international NGOs that the investigative teams deployed to the field would be composed almost entirely of temporary staff. It is only after strong objections from some of those NGOs and senior staff in his office

⁵² 'Statement by the DRC Government in opposition to Germain Katanga's challenge to the admissibility of his case before the ICC on the ground that he has already been the subject of proceedings by Congolese courts for the same facts', 1 June 2009, available at www.icc-cpi.int/iccdocs/doc/doc711960.pdf.

⁵³ See C. De Vos, 'Investigating from Afar: The ICC's Evidence Problem', *Leiden Journal of International Law*, 26 (2013), 1009–1024.

that he agreed to reconsider this initial plan.⁵⁴ Among arguments put forward to counter these initial plans was the experience of other international tribunals: expertise in field investigation and proper analysis of information and evidence, which is the foundation of a sound prosecution strategy, would not be easily obtained through lightweight, under-sized investigative teams.

However, the prosecutor did not completely back down from his vision of light-touch investigations. Although he eventually integrated permanent staff into the investigative teams in the DRC, his cost-efficient approach to investigations meant that investigators were sent to the field for short periods of time. Other elements of the strategy included the OTP's over-reliance on indirect evidence and the absence of nationals in the investigative teams.⁵⁵ In a 15 July 2004 meeting with NGOs, the prosecutor highlighted his vision of 'a short and focused investigation' aiming at eliciting 'a limited number of witnesses'. As he explained, this investigation strategy would 'simplify witness protection' while furthering the OTP's policy of seeking 'more evidence from States, less from witnesses' and advancing his vision of 'short trials with few charges'. At the same meeting, he stressed other benefits of the strategy, including the fact that it would minimise the need for having local people in the investigative teams, thus helping avoid situations where impartiality is questionable.⁵⁶

To be fair, cost efficiency was part of the agenda that major state contributors were pushing both bilaterally and through the Assembly of States Parties to the ICC, with some threatening to withhold or cut contributions unless clear cost-efficient policies were articulated by the OTP and other organs of the Court. The principle of an independent prosecutor, however, means that such efforts by states parties to the Rome Statute could only concern decisions of a non-judicial nature.⁵⁷ Indeed, in making the case for his hit-and-run investigations policy, the prosecutor was careful not to over-emphasise the cost-efficiency argument, insisting instead on a range of other factors, such as security on the

⁵⁴ Interviews with senior investigators in the OTP (January–March 2005).

⁵⁵ 'Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor', American University Washington College of Law War Crimes Research Office (October 2012), 1016.

⁵⁶ Personal notes of a meeting with the prosecutor and the OTP officials (The Hague, 15 July 2004).

⁵⁷ According to Article 112 (2) (b) of the Rome Statute, the Assembly of States Parties 'shall . . . provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court'.

ground, quality of analysis of the situation and the value of state cooperation.

In a meeting in March 2005, for example, Moreno-Ocampo brushed aside objections from NGOs by insisting that, 'even with a small team, we can do a good investigation'. A participant in the meeting conveyed the view that the humanitarian NGO community in Ituri blamed the slow pace of investigations on the undersized investigative teams and the short periods of time they spent on the ground. The prosecutor immediately countered that 'the problem in DRC is not the size of the [investigative team], but that factions are killing each other and killing peacekeepers and witnesses'. He offered the situation in northern Uganda as proof that his strategy was working, since 'in a few months, we have had a fast and efficient investigation in Uganda with a small team of twelve'.⁵⁸

In addition to security conditions, the prosecutor also thought state cooperation was more important than the size of the investigative teams or the time they spent on the ground. 'What we learned in comparing Uganda and Congo', Moreno-Ocampo explained, 'is that our life was different in Uganda because the government was more involved. We have worked longer in Congo and have less information, we need to improve cooperation [with the DRC State]'.⁵⁹ Since the DRC government and other state institutions, such as the newly integrated army, were populated with some of the individuals who potentially bore the greatest responsibility for the crimes committed in Ituri, such a strategy was a recipe for failure.

Two years into the investigation – as donor states, human rights groups and victims' associations impatiently waited for the first cases to be brought – the cooperation with the DRC on which the OTP had relied was so poor that it could not, by the prosecutor's own admission, elicit enough quality information on the most serious crimes committed in Ituri to bring solid charges against those most responsible. The investigative teams assigned to the Ituri situation were too undersized and too short term to generate good analysis of the intricately entangled criminal activities in this bloody part of Congo. Local NGOs and activists, who had more raw intelligence on the crimes than any other entity, were deliberately sidelined and their invaluable expertise not fully integrated into the investigative process. In such a situation the OTP was left with no

⁵⁸ Personal notes of a meeting between the ICC prosecutor and NGOs (New York, 4 March 2005).

⁵⁹ Personal notes of a meeting with the prosecutor and OTP officials (The Hague, 15 July 2004).

other choice than to bring the most ‘manageable’ charges for the short prosecution he envisioned. Thus, to some extent, the situation was also a reaction to the growing impatience among the major states supporting the ICC, the human rights community and victims to see some movement at the Court in the form of arrests and trials.

This difficult position led to the investigators having to rely on ‘intermediaries’ for the identification of potential witnesses and the generation of contextual analysis. Much of the delay of Lubanga’s trial was due to the heated debates between the prosecution and the defence over the credibility of evidence generated through intermediaries.⁶⁰ The Court dismissed some of the evidence produced through the intermediary system as weak and full of contradictions. In the end, therefore, what was meant to be a short and cost-effective investigations strategy ended up causing unnecessary delays and almost caused the prosecution’s case to be thrown out.

Indeed, the OTP’s case against Ngudjolo was thrown out, in part after the chamber determined that the prosecutor had failed to conduct a more thorough investigation, ‘which would have resulted in a more nuanced interpretation of certain facts, a more accurate interpretation of some of the testimonies and . . . an amelioration of the criteria used by the Chamber to assess the credibility of various witnesses’.⁶¹ For example, as the chamber noted, the OTP failed to perform such basic investigative tasks as visiting the location where Ngudjolo lived and where the preparations of the attack on Bogoro allegedly took place. The prosecution was thus unable to provide the Court with such basic information as the distances between the relevant sites and the conditions of the roads, all elements that ‘would have been useful in clarifying several witness testimonies, thereby promoting a better understanding *ab ovo* and a more accurate assessment of the various statements’.⁶²

Questioning the prosecution’s independence

All but one individual currently in ICC custody in relation to the conflict in the DRC are Congolese, although the crimes with which they have been charged were committed on territory that was at least partially under the military occupation of Uganda and by armed groups

⁶⁰ A detailed account of the debates is provided in C. De Vos, ‘“Someone Who Comes Between One Person and Another”: Lubanga, Local Cooperation and the Right to Fair Trial’, *Melbourne Journal of International Law*, 12 (2011), 1.

⁶¹ Judgment, *Ngudjolo*, 18 December 2012, para. 123. ⁶² *Ibid.*, para. 118.

manipulated by the Congolese, Ugandan and Rwandan governments. President Museveni had referred the situation in the north of Uganda to the ICC only some months after Moreno-Ocampo announced his interest in investigating the crimes perpetrated in Ituri.⁶³ The investigation of crimes committed in the Uganda-occupied district of Ituri thus unfolded during the same period as the investigation of the situation in northern Uganda, for which the OTP received the support of the Ugandan government. This support consisted, in particular, of the provision of intelligence on the Lord's Resistance Army (LRA) by the Ugandan army, which was itself implicated in the crimes in Ituri.

It has been suggested, quite convincingly, that President Museveni used the referral to, among other objectives, confer a moral ground status to the Ugandan government, to attract international support 'for a legitimate government, committed to international justice, fighting a *hostis humani*', and to 'make the ICC's Prosecutor dependent on the cooperation of the Ugandan government' so that 'he might hesitate to jeopardize such cooperation by charging his cooperative friends with crimes committed in neighbouring DRC'.⁶⁴ Indeed, the Ugandan government wasted little time in signalling its intention to use the credibility it had gained on matters related to international justice to influence ICC investigations in Ituri, as well as in northern Uganda. One month after the beginning of investigations in Ituri was announced, President Museveni asked for the intervention of the UN Secretary-General for the suspension of these investigations until progress in the peace process in Ituri was irreversible.⁶⁵

The investigations in Ituri and in Uganda thus became entangled with each other by a series of linked events, which, added together, made the ICC vulnerable to the charge of political manipulation by the Ugandan authorities. For several months, the Congolese press dwelt on the idea of an ICC prosecutor who 'across the board, has a selective vision of the facts and of who is guilty', justifying proceedings 'against President Bashir of Sudan, when nothing disturbs the peace enjoyed by Presidents Yoweri Museveni

⁶³ On 16 July 2003, ICC prosecutor Luis Moreno-Ocampo announced his office had selected the conflict in Ituri, DRC, as 'the most urgent situation to be followed'. In December 2003, Ugandan president Yoweri Museveni referred the situation concerning the LRA to the ICC prosecutor.

⁶⁴ S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *The European Journal of International Law*, 21 (2010), 950.

⁶⁵ 'Letter from President Yoweri Katuga Museveni to H.E. Kofi Annan, Secretary General of the U.N., Re: Integration of Ituri Armed Groups', 3 July 2004 (copy on file with author).

of Uganda and Paul Kagame of Rwanda, although both were instigators of rebellions responsible for the deaths of 6 million Congolese'.⁶⁶

The OTP's own strategy documents had clearly identified the risk that its efforts to secure cooperation could pose to its independence. For example, in a restatement of its policy on preliminary examinations, the OTP vowed to guard itself against the possibility that its decisions are 'influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation'.⁶⁷ At the same time, however, the OTP had repeatedly indicated its preference for state referral over the use of the prosecutor's *proprio motu* power to initiate an investigation. This preference has been based on the assumption that a state referral is a strong indication of the state's 'political will to provide [the Prosecutor] with all the cooperation within the country that it is required to give under the Statute'.⁶⁸ Having candidly anticipated the likelihood of a risk to its independence from state cooperation, it is beyond understanding that the OTP did not contemplate the possibility of a state referring a situation to the Court in order to better control the investigations by a cooperation-obsessed prosecutor.⁶⁹ Yet, that is exactly what seems to have happened with its very first investigation.

As the prosecutor launched parallel investigations in northern Uganda and the Uganda-occupied Congolese district of Ituri, the relations between the two countries were already bad, the DRC having sued Uganda before the International Court of Justice (ICJ) for acts of armed aggression perpetrated on the DRC's territory. The decision rendered by the ICJ made some factual findings, which should have been directly relevant to the OTP's investigation of crimes committed in Ituri. For example, the ICJ found,

[C]redible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of

⁶⁶ A. Kasele, 'Quand la Cour Pénale Internationale se disqualifie', *direct.cd*, 27 January 2009. See 'Lubanga plaide non coupable, accuse Josph Kabila', *Le Nouvel Observateur* (daily), Kinshasa, 28 January 2009; S. Tisseyre, 'Le procès Lubanga, ou la fabrique de la justice internationale', *Afribone*, 28 January 2009.

⁶⁷ 'Policy Paper on Preliminary Examinations', OTP, ICC (November 2013), 7.

⁶⁸ 'Paper on Some Policy Issues before the Office of the Prosecutor – Annex', OTP, ICC (September 2003).

⁶⁹ Other scholars have argued that the OTP deliberately 'chased' these cases, in search of state referrals. See P. Clark, 'Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2010).

the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.⁷⁰

In other words, it was highly likely that the Ugandan occupying troops were involved in the planning, preparation, incitement and execution of the very crimes the OTP was investigating in Ituri. Yet not a single one of the charges brought by the OTP in relation to the situation in Ituri made reference to the ICJ decision.

There was no shortage of heinous and extremely violent incidents in Ituri from which the prosecutor could build strong cases. It appears, however, that only those incidents in which Ugandan army officers played the least decisive role were picked. This looked like a trade-off: Ugandans would be shielded from prosecution over their role in crimes committed in Ituri in exchange for their cooperation in the investigation against the LRA.

A similar dynamic drove the prosecutor's approach in the DRC. In *Ngudjolo*, for example, the chamber was provided with sufficiently detailed evidence that the defendant was more clearly involved in the planning and organising of attacks on Mandro and Bunia on 4 and 6 March 2003,⁷¹ respectively, than he was for the attack on Bogoro on 24 February 2003.⁷² In addition, evidence of Ngudjolo's seniority in the command structure of the FNI Lendu militia was more detailed at the time of the Mandro and Bunia attacks than it was at the time of the Bogoro attack. At first sight, therefore, the attacks on Mandro and Bunia – both of which resulted in massacres of civilians and other Rome Statute crimes – presented the OTP with much greater chances of securing Ngudjolo's conviction than the attack on Bogoro. Yet, the OTP chose to build its case on the Bogoro attack. It was not surprising, therefore, that the chamber was later unable to establish beyond reasonable doubt that Ngudjolo 'was one of the military commanders who held

⁷⁰ *Case concerning armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda)*, [2005] ICJ Rep., 19 December 2005, para. 211.

⁷¹ Launched two days apart, the two attacks were aimed at driving Thomas Lubanga's UPC out of its positions in these two cities. They were launched by a coalition of FNI combatants, RCD-ML's APC ('*Armée Patriotique Congolaise*') rebels and UPDF troops, and resulted in dozens of deaths among the local civilian populations.

⁷² Judgment, *Ngudjolo*, 18 December 2012, paras. 496–499.

a senior position among the Lendu combatants' at the time of the attack on Bogoro.⁷³ It is further worth noting that while there was no strong evidence of the UPDF's direct involvement in the attack on Bogoro, the chamber established that its participation in the 6 March 2003 attack on Bunia was uncontested.⁷⁴

Conclusion

All good faith advocates of international justice in the DRC understood that the ICC's intervention in Congo would have limitations and face challenges of politics, infrastructure and other obstacles. One of the greatest issues in such situations has always been the management of too high expectations among different constituencies. As this chapter has sought to illustrate, however, the DRC investigation offered the ICC a unique set of potential assets for the assertion of the young institution's legitimacy. The Congolese legal community's predisposition and desire to cooperate meant that the ICC had an opportunity to develop and creatively implement a doctrine of complementarity based on a positive division of labour with national courts. Faith in international justice from ordinary people like the woman who approached me as I was walking between two classrooms in Butembo meant that ICC investigators could rely on cooperation from victims and integrate their stories into the broader narrative of the crimes committed in the DRC.

Yet, the prosecutorial strategy implemented led Prosecutor Moreno-Ocampo to give priority to the views of states and the demands of international organisations over the needs of the victims. The concept of 'positive complementarity' has resonance in the West among the representatives of international human rights organisations. However, its implementation was frustrated by an obsession with the need to obtain the cooperation of the states where the ICC's investigations were taking place. The idea to set up small investigation teams and to deploy them for short periods was applauded by contributing states and international agencies impatient to see the beginning of the trials. Yet the emphasis on cost saving prevented the ICC's investigators from spending essential time with the victims and reigniting their faith in the international justice system.

Prosecutor Bensouda has signalled her intention to operate a radical reversal of this approach to investigations. Among important changes

⁷³ *Ibid.*, para. 501 ⁷⁴ *Ibid.*, para. 452.

announced in the OTP's new strategic plan are the replacement of focused investigations with in-depth, open-ended investigations; the enhancement of the OTP's analytical capabilities, including through a set of guidelines currently being developed for NGOs wanting to assist the office in the area of investigations; the increase of its field presence wherever possible and the enhancement of complementarity and cooperation in support of national efforts under preliminary examination or investigation.⁷⁵ These new changes were announced in October 2013, as the OTP was preparing for the confirmation of charges hearing in the case against Bosco Ntaganda, who surrendered himself to the Court in March 2013. Ntaganda's trial will thus provide the OTP the opportunity to test its commitment to more in-depth and open-ended investigations aimed at collecting trial-ready evidence, which presents crimes committed in the DRC in a broader, more complex context than has been the case.

⁷⁵ See OTP Strategic Plan, June 2012–2015 (strategic goals 1, 2, 4).