

# The ICC and Reconciliation in the DRC

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## 1. The Tragic Background

By mid-2015 most cases brought before the International Criminal Court ('ICC') have involved charges against nationals of the Democratic Republic of the Congo ('DRC'). The first ICC judgment concerned three Congolese nationals: Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo Chui. It is reasonable to suggest that the DRC is a laboratory for the ICC. The Court's possible contribution towards reconciliation in the DRC is therefore all the more important to consider.

The ICC's conduct in its first cases has focused on crimes committed in the Ituri region of the DRC, as part of a conflict between the Hema and the Lendu tribes. As Koen Vlassenroot and Tim Raeymaekers explain, the violence in Ituri results from the exploitation by local and regional actors of the local political conflict, which finds its roots in the struggle for access to territory, economic resources, and political power. These actors use the context of the ongoing war as a means to reshape the social and economic landscape, and to take control of the movement of goods and people. The instrumentalisation of violence for such purposes has led to an open fight among different networks trying to take control of the region. These networks rely on the connection between local warlords and remote godfathers. As a result, new strategies of political, economic and social regulation have emerged.<sup>1</sup>

This context of widespread confusion, insecurity and impunity has facilitated the creation of new networks, especially militarized ones, which aim at extracting and accumulating economic resources on the basis of ethnic ownership. The concept of ethnic property became a pillar of their strategy for control and resilience.<sup>2</sup> The conflict in

Ituri – in which the armies of the neighbouring states Rwanda and Uganda have taken part – has led to serious core international crimes.

Further to the ICC's judicial work, there have been peace efforts to end the violence and foster reconciliation. Dispute settlement mechanisms exist in every society. They offer the default option to sustain peace and social cohesion. The traditional dispute settlement mechanisms in Ituri include amicable resolution, community-based palaver, and *Barza*.<sup>3</sup> However, reconciliation has yet to be achieved in Ituri.

## 2. The ICC and the DRC

Given the DRC's limited judicial resources, it has recognized the jurisdiction of the ICC for the commission of crimes in the ICC Statute in the DRC since 1 July 2002. As of June 2015, cases have been brought before the ICC against four DRC nationals, namely (1) Thomas Lubango Dyilo (found guilty by Trial Chamber I on 14 March 2012, verdict confirmed by the Appeals Chamber); (2) Germain Katanga (found guilty by Trial Chamber II on 7 March 2015); (3) Mathieu Ngudjolo Chui (acquitted by Trial Chamber II on 18 December 2012, verdict confirmed by the Appeals Chamber); and (4) Bosco Ntaganda (trial to begin in the summer of 2015). This represents a significant dedication of resources by the ICC in the DRC situation.

This author is of the view that ICC's work on the determination of concrete cases helps to reduce impunity for core international crimes in the DRC. We need to take due note, however, of various concerns about the role of the ICC pertaining to the DRC. The conviction of Lubanga,

<sup>1</sup> Koen Vlassenroot and Tim Raeymaekers, "Le conflit en Ituri", in *L'Afrique des Grands Lacs*, Annuaire 2002–2003, p. 210 (<https://www.legal-tools.org/doc/702fe5/>).

<sup>2</sup> *Ibid.*

<sup>3</sup> RCN Justice et Démocratie, "Les conflits fonciers en Ituri: De l'imposition à la consolidation de la paix", Study, September 2009, p. 52. 'Barzas' are large community-based meetings organized by the network *Haki na Amani*. They have been useful in enabling locals to develop a better understanding of the conflict and how it is perceived by other groups in the same community.

for example, did not meet victims' expectations (although some of them committed crimes themselves). Child soldiers have been recognized as victims by the Court, but not the victims of these child soldiers' crimes. Moreover, it is problematic that the Court's investigations of alleged crimes committed in the city of Bukavu did not lead to prosecution. There are also doubts as to the actual possibility of increasing domestic judicial capabilities within the framework of so-called 'positive complementarity'.

This policy brief examines the ICC's possible role in reconciliation efforts in the DRC. It considers how to balance ending impunity for core international crimes against the objective of reconciliation in a society torn by recent armed conflict.

### 3. Reconciliation Role for the ICC?

The fact that the ICC's work on cases may intervene while the conflict is still occurring invites debate on peace and justice. The question whether prosecuting people for core international crimes is an obstacle to peace is an old one, and has been reactivated more frequently since the prosecution of national rulers became a reality.<sup>4</sup> Peace and justice are not mutually exclusive. On the contrary, impunity nurtures the desire for revenge in those victimized by mass crimes, and thus incentivizes a restart of the conflict.

In a speech upon taking office, the first ICC Prosecutor Luis Moreno-Ocampo declared that "the International Criminal Court is independent and interdependent at the same time. She cannot act alone, and she will be effective only if she works closely with other members of the international community".<sup>5</sup> He called for a dialogue between the Court and local and international actors on the settlement of conflicts. The idea was to create other ways for criminal justice to engage in efforts to stop violence; otherwise prosecution may aggravate ongoing conflicts or disturb fragile states in transition.<sup>6</sup> In his later strategic plan for 2007, Moreno-Ocampo said that peace-building was not part of the Court's mandate, and that any peace initiative must conform with the ICC Statute. His successor Fatou Bensouda seems to have maintained this approach.

Unlike its role in prevention, the ICC's role in reconciliation is not mentioned in its Statute. Nonetheless, the Court cannot ignore the impact of its actions with regard to reconciliation. We can still ask whether a reconciliation

role exists for the ICC and, if so, what forms does or can it take?

The ICC has made some progress regarding reconciliation in its judicial work. According to Rule 145 of the Rules of Procedure and Evidence, ICC judges shall, in determining the sentence, take into account the behaviour of the accused after having committed the crimes, particularly efforts supporting reconciliation. Here we see a way for the ICC to indirectly contribute to reconciliation between communities affected by the conflict. In the Katanga sentencing decision the Chamber held that "the efforts made by the accused to promote peace and reconciliation can and must be taken into account in the determination of the sentence, and these efforts may reduce the level of the sentence". The Chamber made it clear that such efforts must have been real and sincere, which does not impose a requirement on their results.<sup>7</sup> Similarly, in the Plavšić case, the ICTY Trial Chamber stated that the accused played a major role in the conclusion and implementation of the Dayton Agreement, thus facilitating greatly the achievement of peace in the region. In these circumstances, the accused could ask for a reduction of her sentence.<sup>8</sup> In this respect the Plavšić decision is one relevant source on the normative consideration of the role international criminal tribunals can play in transitional justice.

Does the ICC also have an extra-judicial role in fostering reconciliation and ensuring peace post-conflict? Such a role could exist if the ICC's work has some positive effects on the ground. Despite the judicial nature of a judgment, it seems reasonable to expect that the Court's activities can ease ongoing tensions and even facilitate reconciliation. One main obstacle to courts playing a reconciliation role concerns the inherent context in which international criminal jurisdictions operate: Their subject-matter jurisdiction encompass core international crimes, that is, crimes against humanity, war crimes and genocide.<sup>9</sup>

Some caution against an automatic reconciliation role for the ICC. Kenneth Rodman, for example, expresses more fundamental reservations:

I don't think the ICC directly contributes to peace-building except in the sense that prosecuting those with the most responsibility is seen as necessary for (a) reconcilia-

<sup>4</sup> Human Rights Watch, "Selling Justice Short – Why Accountability Matters for Peace", Report, July 2009, p. 6.

<sup>5</sup> Kenneth A. Rodman, "Justice as a Dialogue Between Law and Politics – Embedding the International Criminal Court within Conflict Management and Peacebuilding", in JICJ, 2014, vol. 12, issue 3, pp. 437–469.

<sup>6</sup> Luis Moreno-Ocampo, Speech upon taking office, The Netherlands, The Hague, Peace Palace, 16 June 2003.

<sup>7</sup> ICC, Prosecutor v. Germain Katanga, Case ICC-01/04-01/07-3484, Decision on the sentence, 23 May 2014 (<http://www.legal-tools.org/doc/7e1e16/>). See also, ICTY, Prosecutor v. Blagojević and Jokić, Case IT-02-60-T, Judgment, 17 January 2005, paras. 858–860 (<http://www.legal-tools.org/doc/7483f2/>); and Prosecutor v. Plavšić, Case IT-00-39 and 40/1-S, Sentencing Judgment, 27 February 2003, paras. 85–94, 110 (<http://www.legal-tools.org/doc/f60082/>).

<sup>8</sup> ICTY, Prosecutor v. Plavšić, Judgment, *supra* note 7, para. 94.

<sup>9</sup> Discussion with Bruno Cotte in March 2015, former Judge and President of ICC Trial Chamber II.

tion, (b) incapacitating spoilers, and (c) creating a precedent regarding the rule of law. In other words, contributions to peace are assumed to follow the ICC simply doing its job in trying those most responsible. My own view is somewhat more sceptical of this automatic contribution, and I think the prosecutor needs to be careful so as not to disrupt peace processes when negotiation is the best way of ending violence.<sup>10</sup>

This observation invites further reflection. In specific cases, must the ICC operate independently without taking into account the objective of the conflict's settlement? If we answer negatively, do we not automatically acknowledge the effects of the Court's conduct on reconciliation? While tensions can exist between peace and justice efforts, it does not necessarily mean that the ICC will constitute a threat to peace and reconciliation. Rather, the ICC can contribute to peace by working within the objective of an encompassing justice, and by following a holistic strategy.<sup>11</sup>

#### 4. The Contribution of the ICC's Work to Reconciliation From a DRC Perspective

Not only political parties and leaders take part in reconciliation processes, entire communities do. It is within the community that people progressively start trusting each other again, and become ready to build a common future. In that sense, reconciliation constitutes both a process and goal for those peoples who have endured gross violations of human rights.<sup>12</sup>

There was broad support in the DRC for the creation of a truth and reconciliation commission. But this institutional attempt to bring people to the table proved a failure. Instead of reassuring the different groups that took part to the conflict, it opened fresh wounds and exacerbated the antagonism between these groups.<sup>13</sup>

The fact that the ICC Statute does not give a mandate for the Court to engage in reconciliation efforts does not prevent the Court from playing a *de facto* role in such processes. Once it has rendered its judgment and set the amount of reparations for victims, the ICC's job is offi-

cially done. However, the ICC process may be seen as 1) establishing the judicial truth about relevant contextual and specific aspects of the conflict, 2) defining who are the culpable and the victims, and 3) doing justice for the victims. As such, the judgment and reparations may have a considerable psychological impact that can encourage reconciliation on the ground. These three *de facto* effects of the Court's conduct, if well received by the population, may foster reconciliation between those affected by the conflict.<sup>14</sup>

The allocation of reparations to victims can be a way for the ICC system to bring former enemy communities closer. However, it remains difficult to find a proper balance in the distribution of damages between the groups concerned. The Court does not benefit from long, relevant practice by others. Nevertheless, its Appeals Chamber made an important step forward in March 2015 by adopting its first order for reparations.<sup>15</sup> In defining the principles and procedures to be applied, the Chamber extended the scope of reparations and acknowledged the potential impact on prevention and reconciliation.

The Appeal Chamber confirmed the possibility of "collective reparations", directed to communities, within the limit of a sufficient link between the harm caused to the members of that community and the crimes committed by the convicted person.<sup>16</sup> It recognized the benefits of such a "community-based approach" for prevention and reconciliation, considering that in some specific cases these two purposes among others may justify that all members of a community benefit from collective reparations despite the eligibility criteria.<sup>17</sup> The scope of the reparations is broad. It comprises direct victims, from physical injury, interruption of school, to difficulties socializing; and indirect victims, from material loss to psychological suffering.<sup>18</sup> This innovative step shows the ICC's will to increase the rights of the victims within the Court system's power to impact on prevention and reconciliation.

The Trust Fund's resources rely on Member States' contributions.<sup>19</sup> The Appeals Chamber stated that when determining reparations, judges must consider any resolution of the Assembly of States Parties as an authoritative source of information for interpretation of the Trust Fund's

<sup>10</sup> Discussion with Kenneth Rodman in October 2014. See also his article on "Justice as a Dialogue Between Law and Politics – Embedding the International Criminal Court within Conflict Management and Peacebuilding", in JICJ, 2014, vol. 12, issue 3, pp. 437–469.

<sup>11</sup> Janine N. Clark, "Peace, Justice and the ICC – Limitations and Possibilities", in JICJ, 2011, vol. 9, issue 3, pp. 521–545.

<sup>12</sup> Commission Justice et Paix, "Réconcilier l'inconciliable? Comment rendre justice et mémoire? Un travail sur le passé pour un avenir de paix et de démocratie", Study, 2005, p. 27.

<sup>13</sup> Serge Makaya Kiela, "Le droit à réparation des victimes des crimes internationaux, condition de justice efficiente: l'exemple de la RDC", Ph.D. thesis, University of Aix-Marseille, July 2014, p. 185.

<sup>14</sup> Discussion with Emmanuelle Siou in May 2015.

<sup>15</sup> ICC, Prosecutor v. Thomas Lubanga Dyilo, Case ICC-01/04-01/06-3129, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015 (<http://www.legal-tools.org/doc/c3fc9d/>).

<sup>16</sup> *Ibid.*, paras. 210–214.

<sup>17</sup> *Ibid.*, para. 215.

<sup>18</sup> *Ibid.*, para. 191.

<sup>19</sup> See <http://www.trustfundforvictims.org/financial-information>, accessed on 15 June 2015.

regulation.<sup>20</sup> This means that the actual impact the ICC system will have on prevention and reconciliation via reparations depend heavily on the political will of Member States.

In parallel, the ICC's work can be used by other actors on the ground to promote reconciliation between communities, by that realizing the Court's potential impact on reconciliation at least in the shorter term. This can be local actors such as NGOs that launch local initiatives for reconciliation, or actors working within a broader framework for peace-building established by international NGOs or ICC States Parties unilaterally or via multilateral organizations.<sup>21</sup>

Peace-building, including reconciliation and reintegration, constitute important components of assistance activities of the Trust Fund for Victims.<sup>22</sup> Activities related to specific efforts to promote a culture of peaceful coexistence, forgiveness and reconciliation are woven into the achievements presented above in each of the core areas of the Fund's assistance mandate.<sup>23</sup> The community dialogue provides an opportunity for victims and their families to discuss the underlying causes of the conflict, and to address community understandings and perception that can prevent or fuel conflict. This process will help to rebuild trust within and between communities, and foster reconciliation.<sup>24</sup>

## 5. Concluding Remarks

The creation of the International Criminal Court suggests a desire of the international community to put an end to impunity for core international crimes. The DRC, amongst other countries, has endured terrible atrocities and seen millions of human lives perish. In Ituri communities the conflict was fought with an extreme level of violence. The ICC's first investigations were conducted in that part of the DRC's territory. Some individuals responsible for these

community-based conflicts have been prosecuted before the Court: Lubanga, Katanga and Ngudjolo. Lack of assistance from the public authorities prevented an effective reconciliation process from being launched. As a result, communities affected by the conflict did not confront their past. Hence there is a need for the international community to step in to aid reconciliation.

The ICC Statute does not include a reconciliation role for the Court. Prevailing thinking does not seem to promote such explicit mandates for international criminal jurisdictions. We have nonetheless seen, firstly, that the ICC's work can be used by other actors to promote reconciliation, and, secondly, that the allocation of reparations can bring communities who fought against each other closer. Thirdly, the requirement that judges consider the behaviour of the accused in the peace and reconciliation process shows progress in this direction. This policy brief is in line with Juan Mendez's reflection that the ICC's investigations and determination of cases naturally bring the question of its role in reconciliation efforts.<sup>25</sup>

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<sup>20</sup> ICC, Prosecutor v. Thomas Lubanga Dyilo, Case ICC-01/04-01/06-3129, *supra* note 15, para. 2.

<sup>21</sup> Discussion with Emmanuelle Siou in May 2015.

<sup>22</sup> External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the DRC: Towards a Perspective of Upcoming Interventions, November 2013, p. 37.

<sup>23</sup> That is, physical rehabilitation, psychological rehabilitation, and material support.

<sup>24</sup> The Trust Fund for Victims, Strategic Plan 2014–2017, p. 21.

<sup>25</sup> Juan E. Mendez, "National Reconciliation, Transnational Justice and the International Criminal Court", in *Ethics and International Affairs*, 2001, vol. 15.1.