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Journal of Eastern African Studies

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjea20

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To cite this article: Bilge Sahin (2021) Mobile hearings in the Eastern DRC: prosecuting international crimes and implementing complementarity at national level, Journal of Eastern African Studies, 15:2, 297-316, DOI: 10.1080/17531055.2021.1913700

To link to this article: https://doi.org/10.1080/17531055.2021.1913700

Published online: 13 Apr 2021.

JOURNAL OF EASTERN AFRICAN STUDIES
2021, VOL. 15, NO. 2, 297–316
https://doi.org/10.1080/17531055.2021.1913700

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Mobile hearings in the Eastern DRC: prosecuting international crimes and implementing complementarity at national level

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ABSTRACT

Through the complementarity principle of the International Criminal Court, international criminal law enforcement is transferred from international courts to national courts. This has led to an increase of international actors' focus on national courts to achieve international criminal justice. The Democratic Republic of the Congo (DRC) presents a significant example to examine the prosecution of international crimes by national courts and international actors' support to Congolese legal system to promote complementarity and international criminal justice. International actors provide assistance to mobile hearings to prosecute international crimes and to implement complementarity at the national level in the eastern DRC. This article explores mobile hearings through their role in implementing complementarity in the DRC and international and national influences on mobile hearings regarding the prosecution of international crimes. The main argument is that although mobile hearings are significant to bring justice closer to local communities and increase the visibility of justice in remote and rural areas, their independence is in question as a result of the selective interest of international actors and political interferences coming from Congolese political and military elites.

ARTICLE HISTORY
Received 17 September 2019
Accepted 11 February 2021

KEYWORDS
International criminal justice; complementarity; international assistance; mobile hearings; Democratic Republic of the Congo

Congolese women and men gathered around to participate to the mobile hearings taking place in Kalehe, on the western shores of Lake Kivu in the Democratic Republic of the Congo (DRC), from 11 to 30 August 2014. The hearings were about international crimes that were committed by the Congolese army in Kalehe and surroundings between December 2005 and March 2006 when Lt. Col. Bedi Mobuli, alias Colonel 106, and his soldiers looted shops, tortured civilians, and used women and girls as sexual slaves.[1] The alleged perpetrators including Colonel 106 were facing the judges while people in Kalehe watched. During the hearings, an observer working for an international non-governmental organization (INGO) witnessed people enthusiastically saying: 'I have never imagined that this man will ever be in front of the judge' and 'he used to be untouchable but look how

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humbly he behaves in front of the judge'.[2] On 15 December 2014, the military court in Bukavu sentenced Colonel 106 to life imprisonment for crimes against humanity.

This experience intimated to me by the aforementioned observer illustrates the impact of prosecuting international crimes at the national level and bringing justice closer to the populations who are affected by these crimes. The DRC was the scene of two large-scale wars in the mid-1990s, the first in 1996 and the second in 1998. Despite the peace agreements signed in 2002, internal conflict has been ongoing in the eastern part of the country. Deepening fractions within local communities, economic interests of regional and international actors, and entrenched political and military elites not only contributed to wars being fought in the DRC but also structurally embedded conflict in the eastern part of the country.[3] Fighting has been continuing between the Congolese army (FARDC) and various Congolese and foreign armed groups causing recurrent killing of civilians, extensive population displacements, and international crimes.[4] While killings, sexual violence crimes, and looting have been frequently committed, torture, cruel inhuman or degrading treatment, the recruitment and use of children, forced labour, and other violations of the right to liberty and security of person are also equally widespread.[5] Such international crimes have been committed in the DRC in a systematic manner for two decades, however, starting from 2002, large-scale efforts to develop the capabilities of national legal institutions to prosecute them by international donors, the United Nations (UN), and INGOs transformed the Congolese legal system's engagement with such crimes. Particularly, the growing attention towards sexual violence crimes at the international level played a significant role to attract international assistance for the Congolese legal system. Such assistance manifests itself particularly in the support of mobile hearings (*audiences foraines*), a legal mechanism of the Congolese legal system.

The smooth administration of justice in conflict-ridden societies represents an integral step towards establishing accountability regarding international crimes, achieving reconciliation within local communities, and constructing peace in the country.[6] When the International Criminal Court (ICC) was established in 2002 following the adoption of the Rome Statute in 1998 it has seen as an accumulation of judicial power over atrocities committed around the world.[7] The Rome Statute establishes an international criminal justice system based on cooperation between the ICC and national courts to prosecute international crimes. The Rome Statute, through its complementarity principle, recognizes the primary authority of nation states to investigate and prosecute international crimes states in whose territories, atrocities took place. The Preamble and Article 17 of the Rome Statute declare that the main burden of investigating and prosecuting international crimes lies with national judicial systems, however, if a State is unwilling or unable to carry out the investigation or prosecution, the ICC will complement judicial efforts.[8]

The recognition of the primary responsibility of prosecuting international crimes for national courts has led to an increase of international actors' focus on national courts to achieve international criminal justice. As a result, the prosecution of international crimes by national courts is supported considerably by international donors, UN institutions, and INGOs to promote complementarity. Especially mobile hearings in the eastern DRC have become prominent recipients of international support for this purpose. They are frequently referred to as 'complementarity in action'.[9]

This article explores mobile hearings through their role in implementing complementarity in the DRC and examines their progress and limitations in prosecuting

international crimes. The limitations result primarily from interventions from international and national actors. On the one hand, UN institutions and INGOs promote mobile hearings particularly for sexual violence crimes and hence prevent the delivery of justice for other international crimes. On the other hand, entrenched Congolese political and military elites who have connections with armed groups often intervene in legal processes and hamper the independence of judgements. Therefore, this article argues that although mobile hearings play a significant role in bringing justice closer to local communities and increasing the visibility of justice in remote and rural areas in the DRC, their ultimate effectiveness is in question as a result of the selective interest of international actors and interferences from Congolese political and military elites.

This article highlights the misconstrual of mobile hearings in the literature and clarifies their functions. This article illustrates, through the example of mobile hearings, the discussion on how national courts deal with international crimes by exploring possible obstacles posed by national and international actors. Results pointing to successes and issues of mobile hearings in prosecuting international crimes might potentially be scalable to East Africa in general. Mobile hearings have reportedly been operationalized in Uganda, Somaliland, and Kenya in order to deliver justice to people living in remote areas.[10] Hence, exploring the issues that prevent the administration of justice in the DRC provide useful lessons for other East African jurisdictions.

The following section discusses the capacity of the Congolese legal system to prosecute international crimes prior to the operation of mobile hearings and international actors' involvement. The second section clarifies the objectives of mobile hearings. In the third section, international actors' efforts on institutional and legislative reforms are elaborated on in order to explore capacity-building initiatives. The final section analyses the application of the Rome Statute by national courts. Moreover, interference from the national level to obstruct these developments is discussed.

Data for this paper was collected from fieldwork conducted by the author in North Kivu and South Kivu between September 2015 to February 2016. Continuous contact with local interlocutors has been maintained to update the data. In total, 38 professionals – lawyers, judges, and international experts – participated as interviewees in this research. Semi-structured interviews were conducted to shed light on both procedural and institutional matters such as international assistance provided for national courts and around the effective and sustainable prosecution of international crimes as a result of financial and political influence. To respect confidentiality, interviewees are all identified with their profession or the term 'expert'.

Congolese courts prior to 2002

Although the Rome Statute recognizes the primary authority of national courts to investigate and prosecute international crimes, there is debate on these courts' legitimacy and effectiveness in prosecuting such crimes. Baylis[11] and Ludwin King[12] argue that international actors should assist national courts to implement and administer international criminal law and prosecute international crimes rather than establishing top-down and distant international mechanisms to provide international criminal justice. Imoedemhe,[13] though, points out the difficulties of 'a government that is complicit in international crimes [to] prosecute itself. Similarly, Jurdi[14] and Schabas[15] support the idea

that the prosecution of international crimes by international courts has clear advantages compared to prosecution by national courts due to possible political intervention of government authorities. Location, capacity, and impartiality thus emerge as key issues related to the prosecution of international crimes.

Discussing the legitimacy and effectiveness of national courts regarding the prosecution of international crimes necessitates comparison. As seen in these scholarly debates, comparison is usually based on the prosecution of international crimes at international level or set against a seemingly ideal standard of international criminal justice. Sikkink instead calls for empirical comparisons on a temporal scale and more commensurable political and institutional scales. She urges an exploration of 'what is actually happening and what has happened in the same country in the past or to what is happening in other countries at the same time'.[16] This way, comparison becomes more illustrative as processual gains are highlighted and baselines for comparison are streamlined. Moreover, any continuously existing obstacles can be teased out more effectively.

For this purpose, this section explores the said key areas related to the prosecution of international crimes by national courts through an examination of the Congolese legal system prior to the operations of mobile hearings. As a result, this article can provide lessons about Congolese courts' effectiveness in administering international criminal law and their ongoing issues.

First, the location of a court is debated regarding the prosecution of international crimes. It is often argued that the proximity of courts to crime scenes can compromise the objectivity of judges.[17] However, national courts' proximity to the crime scenes and to victims and witnesses is also seen as beneficial since this facilitates access to evidence including testimonies, provides victims with access to justice, and creates better-suited responses to the needs of local communities.[18] Furthermore, national prosecutions are argued to create visibility for prosecutions, they are assumed to establish responsibility for widespread and systematic crimes and raise awareness in local communities about conflict and the legal system.[19] However, the Congolese legal system was practically invisible in rural and remote areas where international crimes frequently occurred. A lawyer working for the UN stated that 'people in the rural areas have never seen a court or judge in their lives, but they always have their chief or respected elders to resolve a dispute'.[20] Courts with jurisdiction over international criminal law are located only in the capital cities of provinces. This requires for local communities living in rural and remote areas to travel to the capital cities to report their cases and participate in the trials. However, due to infrastructural issues and on-going conflict in the eastern DRC, travel to access justice poses economic and security issues for local communities.

A second issue with national courts frequently pointed out is their capacity. Especially in post-conflict societies with dilapidated legal systems, courts are often seen as unsuitable for prosecuting international crimes. Capacity issues emerge from absent or ineffective legislative frameworks for international criminal law, and limited expertise of investigators, prosecutors and judges.[21] Until the operation of mobile hearings, the Congolese legal system was not working effectively as the result of, *inter alia,* the two Congo wars and institutional deprivation. The Penal Code was from 1940 did not incorporate any contemporary international legal frameworks of international criminal law.[22] International crimes including war crimes, crimes against humanity, and the crime of genocide were recognized under the military penal code from 1979 which was designed to be a

disciplinary mechanism and operated within the military hierarchy. As these provisions were embedded in military structures and were narrow in focus, military courts were seen as incapable of providing a fair trial for international crimes.[23] In addition to the problems in the legislative framework, judges, prosecutors and lawyers were not aware of recent developments in international law. Systematic instruction in the details of international criminal law remains embryonic at professional training.[24] Moreover, legal documents are often unavailable to members of the judiciary and practicing lawyers.

Finally, it is argued that national courts are open to political interference and governmental authorities are often unwilling to secure the arrest and surrender of suspects. Such interference clearly compromises the prosecution of international crimes.[25] As a result, national courts are seen as weak and not capable of providing fair decisions as a result of excessive political intervention.[26] Independence and impartiality are fundamental conditions for the administration of justice in order to ensure a just and fair trial. However, in the DRC, interference in the administration is reportedly widespread. This is the result of an insufficient separation of powers between the Congolese judiciary, executive, legislative, and administrative branches. The legal system is thus almost endemically exposed to interference from political and military authorities.

When peace agreements were signed in 2002 between a number of warring parties, the Congolese legal system suffered from invisibility at the local level, a lack of institutional capacity, a deficient legislative framework and a dearth of expertise, and a lack of independence and impartiality in the judiciary. Therefore, the prosecution of international crimes by Congolese courts had always remained rudimentary and inchoate, at best. The following sections explore to what extent these obstacles have been addressed as a result of international assistance.

Bringing justice closer to people

International donors, UN institutions, and INGOs have supported mobile hearings to prosecute international crimes and to implement the complementarity principle at the national level in the eastern DRC. Although mobile hearings have been part of the Congolese legal system since 1979, their operation only commenced after 2002 with resources provided by international actors.[27] This section explores the objectives of mobile hearings to analyse their role in making the Congolese legal system more visible in rural and remote areas. Mobile hearings aim to achieve increased visibility through geographical proximity to rural populations.

As mentioned in the previous section, courts with jurisdiction over serious crimes are located only in the capital cities of provinces; this creates issues for victims living outside the capital cities as considerable logistical, economic, and security problems often prevent access to justice. The Congolese legal system addresses this issue through the operation of mobile hearings, a procedural mechanism within the organization of its legal institutions. Civilian and military courts can decide to operate mobile hearings in situations where the area an atrocity occurred may be inaccessible so that victims would face severe obstacles to travel to court in the capital cities; or the number of victims may be considerable to the extent that it would be unrealistic to transport all witnesses to the capital cities to attend several trial sessions.

Academic writing as well NGO reports are often based on a number of misunderstandings regarding the function of mobile hearings. The most common misunderstanding is to refer to mobile hearings as mobile courts. The term 'mobile courts' is commonly used in the popular media and academic articles alike.[28] Even during my fieldwork, many interviewees working for UN institutions and INGOs often invoked the terminology. Two interviewees, though, pointed out that this term was based on a misunderstanding, one stating that:

> These mechanisms are not separate courts […]. Although the main court is in Goma [for the province of North Kivu], investigations and hearings can be operated in remote areas; therefore, they are just part of the normal legal process.[29]

The use of the term 'mobile court' creates an image of 'circuit courts', somehow separate from those recognized by the Congolese legal system, which travel to and operate in remote areas; however, mobile hearings are simply part of the existing legal system. They are an extension of Congolese courts as they move the courtroom to a different geographical location.

Another misunderstanding can be found in Khan and Wormington's 2011 article about mobile hearings in the DRC. While valuable for its discussion of mobile hearings and the application of international law, it frequently refers to mobile hearings as a 'mobile court programme', introduced by the American Bar Association Rule of Law Initiative (ABA ROLI) to combat impunity.[30] However, it would be false to describe mobile hearings exclusively as part of a special programme as they are part of the Congolese legal system. While international assistance is vital for mobile hearings to operate, international actors did not introduce, nor do they directly operate these mechanisms.

Finally, the Open Society Foundations' Justice Initiative refers to mobile hearings as 'mobile gender courts' or 'mobile gender justice courts'.[31] It also claims that 'working with the ABA ROLI and OSISA [the Open Society Initiative for Southern Africa] [it] developed a special mobile court with the capacity and expertise to try gender crimes'.[32] However, mobile hearings do not exclusively prosecute and deal with sexual violence crimes in conflict; they deal with all cases which would otherwise have been referred to a court in a metropolitan area. A research participant of ABA ROLI also clarified that there are no 'mobile gender courts'; it, therefore, remains unclear why a report on the subject was published by Open Society Justice in the first place although an increase in attention to sexual violence crimes in conflict has featured highly on the international agenda in recent years. Reference to such terminology and explicitly highlighting the gender dimension of the project can help organizations active in the area sharpen their profile and credentials. The representation of such projects as led exclusively by INGOs strengthens such efforts.

Mobile hearings are neither independent of or separate from the Congolese judiciary nor are they specific programmes exclusively devised by international actors. As parts of the Congolese legal system, mobile hearings must be understood as extensions of the court system and thereby have jurisdiction over every crime that criminal courts or military courts are competent to hear. Their only special function is the removal of obstacles preventing victims in remote areas from accessing the formal court system. Therefore, justice can be brought closer to those who would otherwise not be able to seek it and discourses associated with formal law can be extended to local communities.

A population-based survey by Vinck and Pham[33] shows that the operation of mobile hearings increased the awareness of the formal legal system among local communities in the eastern DRC. Clark's research also confirms this by showing that Congolese people in rural areas appreciate mobile hearings as they are able to watch the proceedings and witness important political or military figures being questioned and prosecuted.[34] Mobile hearings therefore remove issues related to the location of courts. They have an important role in increasing the engagement of local communities with the Congolese legal system by boosting the awareness and visibility of formal legal institutions by allowing local communities to witness the prosecution of perpetrators and experience the attention given to crimes in the local area by judges, prosecutors, and lawyers.

Dilemmas in capacity-building

International donors, UN institutions, and INGOs provide capacity-building assistance to the Congolese legal system through institutional and legislative reform. Institutional reform comprises technical, logistical, and economic assistance to facilitate the operation of mobile hearings. As for legislative reform, international actors promote incorporation of the Rome Statute into the Congolese legal system to promote complementarity. While this section examines the processual gains regarding the implementation of international criminal law, it also highlights the dilemmas created in terms of capacity-building due to the prioritization given to sexual violence crimes by international efforts.

Institutional reforms

International assistance has been provided through technical, logistical, and financial support for the operation of mobile hearings from the investigation stage and throughout the prosecution to enable Congolese courts to prosecute international crimes. While there are various international actors that operate in the DRC, a handful of prominent INGOs, UN institutions, and donors[35] are particularly associated with support for the Congolese legal system: ABA ROLI and Avocats sans Frontier (ASF), the UN Development Program (UNDP), the UN Joint Human Rights Office (UNJHRO), and the UN Organization Stabilization Mission in the DRC (MONUSCO), the United States Agency for International Development (USAID), the United Kingdom Department for International Development (DFID), the Swedish International Development Agency (Sida), and the European Union (EU).

In bids to strengthen the operation of mobile hearings, UN institutions provide information to Congolese legal authorities on atrocities occurring in remote areas and regularly request the investigation process to be commenced. Especially UNJHRO and UNDP often gather data about atrocities.[36] Courts can then decide to initiate investigations and operate mobile hearings on an ad hoc basis depending on the request made by these actors. The ultimate decision to initiate investigations and authorize mobile hearings can only be made by the Congolese legal authorities.[37] Although information about atrocities is usually provided by UN institutions to Congolese legal authorities in the first place, courts may also request them to assist in the investigation process due to a lack of capacity to carry out investigations on part of Congolese legal institutions.[38] The Prosecution Support Cells, established by MONUSCO and with support from the EU,

specifically assist Congolese legal authorities in the investigation of international crimes committed by members of armed groups.[39] National authorities usually rely on evidence collected by international actors and rarely contribute any additional data or verify the evidence they are given. Information gathering exercises are therefore highly dependent on international actors. As a result, they have influence over the information presented to or withheld from courts.

International actors pay little attention to the DRC except in instances of sexual violence crimes in conflict, therefore, the majority of the assistance given to judicial authorities for investigations involves these crimes.[40] Out of all international crimes committed in the DRC, sexual violence crimes in particular attract great attention from international actors. In 2010 former Special Representative on Sexual Violence in Conflict Margot E. Wallström described the DRC as 'the rape capital of the world' and ensured the DRC's situation's high priority on the UN's agenda.[41] Such statements reflected a significant shift in the UN's approach from the 2000s as the fight against sexual violence crimes against women received special consideration among UN institutions. The widespread and gruesome nature of these crimes in the DRC led to the DRC becoming one of the pilot countries to focus on challenging sexual violence crimes.[42] Such a shift in attention impacted projects in the DRC significantly. A lawyer working in Goma intimated to me that local projects suddenly began to apply for grants to work on sexual violence although these usually had a lack of experience and had previously worked on unrelated issues. As these projects realized that sexual violence began to monopolize international attention, grants on other issues became, as a result, more elusive.[43] Assistance provided for mobile hearings also has been affected by this as the priorities of international actors have led to a disproportionate number of cases involving sexual violence being investigated compared to other reported international crimes in the eastern DRC.[44]

During the trial stage, INGOs such as ASF and ABA ROLI provide sensitization for local communities, explaining the legal process on what will happen and what they should expect from it.[45] Both these INGOs have received funding from DFID and USAID to organize these sensitization events.[46] Moreover, these organizations support mobile hearings by providing free legal assistance to the parties of the trial. While ABA ROLI support mobile hearings only for sexual violence crimes, ASF provides assistance for all international crimes.[47] Additionally, UN institutions provide logistical and financial support to mobile hearings. Where the majority of cases in mobile hearings are related to sexual violence crimes in conflict, UNDP provides financial and logistical support, especially in terms of transportation and accommodation for judges, prosecutors, and lawyers in remote areas.[48] Similarly, UNJHRO provides logistical and financial support to mobile hearings for sexual violence crimes.[49] As a result, prioritization of sexual violence crimes in conflict by international actors leads to prosecuting selective cases through mobile hearings. While the involvement of UN institutions in the legal system provides resources to operate mobile hearings for sexual violence crimes in conflict and implement complementarity in the DRC, this comes at the expense of the prosecution of other crimes.

International assistance continues throughout mobile hearings by ensuring security. MONUSCO supports the FARDC to provide safe transportation for judicial authorities to remote areas and safety during the hearings.[50] Moreover, MONUSCO and UNDP

jointly operate a unit to protect victims and witnesses of sexual violence crimes in conflict.[51] A number of different protection measures are used to protect victims and witnesses:

> [they] may be covered with a veil, identities replaced with numbers or codes, microphones can be used to alter a victim's or witness' voice, testimonies can be given behind a curtain, or closed sessions can be held.[52]

Support from international actors to the Congolese legal system is considered essential to operate mobile hearings since its logistical and financial resources are insufficient to operate mobile hearings by itself. Several interviewees raised this concern. One expert from an INGO stated that mobile hearings depend on such support and would cease to operate if international actors withdrew.[53] Another expert working for the UN said:

> If the INGOs leave the country and withdraw their support from mobile hearings and the legal system, it will be impossible for the DRC to operate mobile hearings. Therefore, the lack of sustainability of the impacts that international assistance has in the eastern DRC is the biggest problem.[54]

One lawyer from a UN agency argued that the 'sustainability of the international efforts is the main concern'.[55] The dependency of mobile hearings on international assistance is thus widely recognized by international actors. A report by UNDP also officially declares that mobile hearings are 'strongly dependent on international donor: an estimated 80 percent of their budgets'.[56] Therefore, although mobile hearings are an important tool to prosecute international crimes at the national level and implement complementarity in the DRC, the Congolese legal system is not capable of operating these hearings without international assistance. Hence, technical, logistical, and financial international assistance do not have an impact on capacity-building as the operations of mobile hearings are highly dependent on the continual provision of international assistance.

Due to the dependence of mobile hearings on international assistance, the focus of UN institutions and INGOs on sexual violence crimes in conflict has a considerable impact on the priorities of the Congolese legal system. Between 2009 and 2017, 10 cases of international crimes were heard before national courts in North Kivu. While 7 of the cases were for rape, the other three mainly covered killings and pillage. In South Kivu, for the same time period, 16 sexual violence cases in a total of 23 cases of international crimes were heard before national courts.[57] This demonstrates the unequal focus on other widely documented serious crimes such as killings, torture, the recruitment of child soldiers, and pillaging. Therefore, capacity-building efforts for the prosecution of international crimes and establishing responsibility for atrocities in the DRC is to an extent held back by the selective interests of international actors.

The role of international actors therefore creates a dilemma for national courts prosecuting international crimes. The operation of mobile hearings has increasingly engaged local communities in the administration of justice, facilitated trials for sexual violence crimes in conflict, and contributed to the implementation of complementarity at the national level. However, the dominant role of donors, UN institutions, and INGOs in the operation of mobile hearings has created institutional dependence. As a result, the capacity-building initiatives for the Congolese courts to prosecute

international crimes are insufficient to allow courts to carry out prosecutions without assistance from international actors. Capacity-building further remains rudimentary as focus is diverted from all international crimes in the country in line with priorities determined at the international level. Consequently, existing efforts to strengthen the capacity of Congolese courts are subdued by their dependence on international actors and the selectiveness of prosecutorial priorities.

Legislative reforms

In addition to the assistance provided at the institution level, reforms of the national legislative framework have been initiated with the support of international actors so that institutions can implement law which is aligned with international criminal law. In the DRC, international assistance has promoted the alignment of national criminal law with the Rome Statute. In 2002, the Congolese government signed the Rome Statute of the ICC which allowed international criminal law to be applied by national courts. However, international actors' objective towards legislative reform was, again, affected a rather limited outlook. Changes to the national legal system were promoted first and foremost in relation to sexual violence crimes at the expense of other violations of international criminal law.

In the Rome Statute, sexual violence crimes are defined as war crimes (Article 8) and crimes against humanity (Article 7). Several offences are included under the definition of sexual violence crimes namely 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. Additionally, Article (1) (g)-1 of the Rome Statute's Elements of Crimes defines rape as:

> (1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
>
> (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
>
> (3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population […].

This definition provides a broader interpretation of sexual violence crimes and includes acts even without penile penetration or attacks with objects. The gender-neutral language used in the definition also allows for criminalizing not only sexual violence crimes against women but also for men. Finally, the Rome Statute lays down a strict circumscription of the notion of consent. According to this definition, the threshold for obtaining consent has been increased as 'genuine' consent must be sought, a threshold rather unlikely to be cleared in a conflict situation.[58]

This definition of sexual violence crimes has been rather impactful for Congolese legislative reforms. The Congolese Penal Code of 1940 and the Code of Penal Procedure of 1959 were amended in 2006 in accordance with the Rome Statute.[59] The reform process

was supported by USAID and the UK government together with ABA ROLI.[60] In this reformed law, acts defined as sexual violence crimes are include rape, indecent assault, child abuse, forced prostitution, sexual harassment, sexual slavery, forced marriage, sexual mutilation, sexually transmitting disease, child trafficking, forced pregnancy, forced sterilization, child pornography, and child prostitution (Articles 170, 172, 173, 174). Rape is specifically defined in the Penal Code as a broadened category that also comprises assaults without penile penetration and male victims. These definitions show clear similarities with the Rome Statute. According to Article 170, rape is defined as:

> (a) any person, regardless of age, who has introduced his sexual organ, even superficially in that of a woman or any woman, regardless of age, to force any man to introduce his sexual organ even superficially in hers;
>
> (b) a man who has penetrated even superficially anus, mouth or another body orifice of a woman or a man with a sexual organ, by any other body part or any object;
>
> (c) any person who introduces, even superficially, any other body part or any object into the vagina;
>
> (d) any person who forced a man or woman to enter, even superficially his anus, mouth or orifice of his body with a sexual organ, by any other body part or any object.

In addition, the definition of the notion of consent has been aligned with the definition of the Rome Statute. A conflict environment is delineated as a coercive environment, increasing the threshold for obtaining consent significantly. Article 14 of the Code of Penal Procedure recognizes additional aspects for consent and does not accept misinterpretations of spoken words, silence, and non-resistance as consent.[61]

Such reforms have brought sexual violence crimes under the primary jurisdiction of criminal courts. Prior to these legal changes, until 2015, the Military Penal Code was the main instrument to prosecute international crimes. They were thus placed within the jurisdiction of military courts[62] whose laws now reflect the 2015 reforms. The transfer of jurisdiction over sexual violence crimes from the military judiciary towards the civilian judiciary was a key driver of international actors' support of the Rome Statute Implementation Law.[63] This transfer of jurisdiction was initially met by considerable resistance by Congolese authorities as such a transition would facilitate prosecution of political and military elites involved in international crimes.[64] Nevertheless, the Law of Implementation of the Rome Statute was adopted in in 2015 and the Military Penal Code was amended ceding jurisdiction over international crimes.[65]

Additionally, ASF, ABA ROLI and UN organizations, especially UNDP and UNJHRO, provide assistance to judges, prosecutors, and lawyers in a bid to strengthen expertise on these reforms.[66] Training is widely provided on national and international criminal law in general and sexual violence crimes in particular.[67] Furthermore, ASF and UNDP facilitate access to legal documents for judges, prosecutors, and lawyers. They publish newsletters and reports on international criminal law and provide books and other materials.[68] Such efforts are key to address a scarcity of resources and establishing a uniform jurisprudence in line with legislative developments.

In accordance with the complementarity principle, the transplantation of the Rome Statute has had a significant impact on Congolese law. The Penal Code has been

brought in line international criminal law has assumed jurisdiction over the prosecution of sexual violence crimes in conflict, a development also reflected in the amended Military Penal Code. Therefore, civilian criminal courts are now tasked with establishing responsibility for atrocities. Such developments necessitated capacity-building among key legal actors. For this purpose, training is provided for judges, prosecutors, and lawyers and legal materials are systematically distributed to them. This way, legal expertise on international criminal law is to be strengthened. However, due to priorities set by international actors, the implementation of the complementarity principle is limited to the prosecution of sexual violence crimes neglecting legislative reforms on other crimes under international law. These constraints have resulted in highly circumscribed capacity building efforts that have implemented the complementarity principle for certain crimes at the expense of others.

Complementarity or impunity in action?

This final section examines the trials based on international crimes in the eastern DRC. It asks to what extent the Rome Statute has been applied by courts and whether institutional and legislative developments have sufficed for national courts to implement the principle of complementarity.

The Rome Statute's recognition of the primacy of national courts to prosecute international crimes directly affects the prosecution of international crimes by DRC courts. In the Songo Mboyo Case, a military court in the province of Equateur prosecuted 12 Congolese military personnel including the commander Bokila Lelomi for crimes they committed during the night of 21 December 2003 where they committed rape and systematic looting of all houses in the villages of Songo Mboyo and Bongandanga. 119 reports of crimes of rape and 86 on looting were recorded by the military prosecutor. On 12 April 2006, the Military Court sentenced seven soldiers to life imprisonment for rape as crimes against humanity by reference to the Rome Statute and its provisions on consent.[69] Although the sentenced FARDC soldiers escaped from prison one year later[70], thus representing a major setback for the fight against impunity, this case demonstrates for the first time how a national court directly applied the Rome Statute to try international crimes not only in the DRC but in the world.[71] Since then, Congolese legal practitioners have invoked the Rome Statute especially for its provisions on consent and the definition of rape regarding sexual violence cases.

Examples can be given from some well-known cases in the eastern DRC. The Fizi I/Baraka Case took place in South Kivu in 2011. Lieutenant Colonel Daniel Kibibi Mutuare and soldiers under his command attacked civilians in Fizi and raped dozens of women aged between 19 and 60 between 1 and 2 January 2011. A military court sentenced Kibibi Mutuare and 4 soldiers under his command to 20 years imprisonment for crimes against humanity constituted of rape and other international crimes.[72] The court applied the definition of rape and the element of consent of the Rome Statute. This case presents the conviction of the highest-rank soldier for sexual violence crimes in the DRC.[73]

A military court in North Kivu also referred to the Rome Statute for the Minova Case in 2013. In November 2012, the FARDC had to retreat from the advancing *Mouvement du 23 Mars* – the M23 rebel group that had taken Goma – and was redeployed in Minova.

While they were retreating from 20 to 30 November 2012, they attacked civilians and at least 135 people were raped, including 33 girls in Minova and the nearby villages. To establish the legal case, the court used Article 8 of the Rome Statute on war crimes, Article 25 on individual criminal responsibility, and Article 28 on the responsibility of commanders. The court found only 2 low-ranking soldiers guilty of sexual violence crimes, the remaining 20 low-ranking soldiers and their superiors were all acquitted due to a lack of evidence.[74]

Furthermore, in 2013, 40 girls aged 18 months to 10 years were abducted and raped in Kavamu, South Kivu by a Congolese armed group, *Djeshi ya Yesu*, which is controlled by parliamentarian Frederic Batumike. The local prosecutor did not initiate investigations due to political dynamics until 2016 when he was replaced with a provincial military prosecutor.[75] The investigation officially commenced, and the trial started in November 2017. Although the Congolese Constitution offers immunity for parliamentarians, the Court referenced Article 27 of the Rome Statute which lays down rules to render immunity as a result of official capacity irrelevant in cases of investigations of and prosecution for international.[76] Consequently, the military court in South Kivu convicted 11 members of *Djeshi ya Yesu* and Batumike of killings and rape as crimes against humanity. The accused were sentenced to life imprisonment.[77]

The Rome Statute therefore has a significant impact on the Congolese legal system. Legislative reforms have led to international criminal law being invoked and applied in Congolese courts to prosecute sexual violence crimes as war crimes and crimes against humanity. This represents an essential step to implementing the principle of complementarity in the DRC. Such developments further show that Congolese legal practitioners have become highly aware of the incorporation of international criminal law and the Rome Statute into national criminal law. International assistance and its support for legislative and institutional reform have played a key role in instigating and maintaining these gains. Nevertheless, institutional reforms have remained inchoate. Consequently, dependence of Congolese judicial institutions on international assistance for the maintenance of these gains has been created.

Moreover, reforms and subsequent institutional achievements have often remained fragmentary. For example, national courts have only managed to finalize a fraction of sexual violence cases brought before them. Some cases were finalized but their outcomes were far from satisfactory. Between 2009 and 2017, there were 7 sexual violence cases before national courts in North Kivu, and only one case, the Minova Case, was finalized. In South Kivu, over the same time-period, 9 out of 16 cases involving charges for sexual violence crimes were finalized.[78] For more than half of the cases on sexual violence in North Kivu and South Kivu in total, no progress has been made due to a lack of evidence, a lack of funding, or simply a lack of political interest. The prosecution rate of other international crimes is even lower; only 2 cases were finalized out of a total of 10 cases in North Kivu and South Kivu.

The main reason for this inconsistency despite reforms of the Congolese judicial apparatus in line with the Rome Statute can be explained with continuing problems related to impartiality and independence of national courts. The political and military power dynamics at the national level are highly entrenched in the legal process. A judge from a military court expressed that 'the legal system is strong, and no perpetrator can run away from justice and no one is powerful enough to protect these perpetrators

from justice'.[79] However, a look into the case files paints a contradictory picture. The Congolese army either failed to cooperate with the courts to investigate and arrest criminals or simply handed over low-ranking soldiers as scapegoats to military prosecutors. In the Fizi I/Baraka Case, Kibibi Mutuare was known as out of favour within the army and therefore the trial was not blocked by the Congolese army.[80] Regarding the Minova Case, Human Rights Watch has argued that the reason behind the low conviction rate is that the soldiers of the FARDC were regarded as heroes at the time of the trial. Such sentiments affected the political atmosphere, creating a lack of political will to prosecute soldiers as perpetrators.[81]

Various other cases can be named in which political and military interventions impeded the prosecution of international crimes. Bushani Case in North Kivu dealt with FARDC attacks on civilians in the villages of Bushani and Kalambahiro between 31 December 2010 and 7 January 2011. It was alleged that several international crimes had been committed. A military prosecutor charged 12 soldiers with crimes against humanity constituted of rape and pillage. However, the FARDC failed to cooperate with prosecutors and refused for its soldiers to be interviewed by investigators. Consequently, the court was unable to finalize its investigations and prosecution.[82] In the Lubero Case in North Kivu, it was alleged that FARDC soldiers used a military operation against a rebel group named *Les Forces Démocratiques de Libération du Rwanda* (FDLR) in 2009 to commit several international crimes against civilians. Again, the court's investigations were never completed. Although a number of FARDC commanders already faced charges of international crimes in national and international courts before these operations, they continued to carry out their military duties. Such refusal to suspend commanders was the result of the DRC government's lack of political will to compromise military operations in the face of allegations of violations of international criminal law. This lack of political will continued throughout the trial stage of the Lubero case and manifested itself in a failure to complete the trial.[83]

In sum, no or little progress has been made in a majority of cases under international criminal law in the DRC. Examples include cases where low-ranking soldiers were prosecuted while their superiors remained free, or cases where showcase trials were arranged but eventually only out-of-favour soldiers were punished. Political and military power dynamics have played a significant role in impeding the prosecution of perpetrators. Hence, legislative reforms in line with international criminal law or the direct application of the Rome Statute is not a guarantee of successful completion of a trial. While the prosecution of international crimes in the DRC represents a fundamentally important step in implementing the complementarity principle and improving legislative and institutional capacity to a certain extent, political and military power dynamics at national level have also impeded such developments. The latter remain important determinants of which cases can be finalized and who will be prosecuted.

Conclusion

The international criminal justice system established by the Rome Statute of the ICC recognizes the primary responsibility of national courts to prosecute international crimes. This article explored the prosecution of international crimes by mobile hearings

in the eastern DRC and international actors' support to the Congolese legal system in a bid to promote complementarity.

This article firstly demonstrated that the Congolese legal system prior to 2002, the period prior to intense international interventions, did not have a systemic approach to prosecute international crimes. The Congolese legal system was not accessible in rural and remote areas where atrocities are prevalent, and it suffered from a lack of legislative capacity to prosecute international crimes and entrenched impunity.

Support from donors, UN institutions and INGOs has sought to fundamentally alter the approach of the Congolese legal system and bolstered the capacities of mobile hearings. This legal mechanism, which already existed prior to international support, became operationalized only with the influx of international assistance. By holding hearings at the local level they facilitate local communities witnessing and participating the prosecutions of international crimes. Support to the operation of mobile hearings has thus not only removed obstacles around the inaccessibility of the Congolese legal system but has also strengthened an understanding of the formal legal system within local communities.

International actors' support to mobile hearings has also had a significant impact on institutional capacity-building for the prosecution of international crimes. Legislative reforms have been carried out to align national criminal and military law with international criminal law. The impact of the Rome Statute on the Congolese Penal Code has as a result become clear. However, the results of capacity building efforts are compromised by a number of factors. Technical, logistical, and economic assistance provided for the operations of mobile hearings has created dependency of the Congolese legal system on international assistance and, hence, the development of capacity building has remained rudimentary. Efforts are further impeded by the limited focus of international actors on international crimes to be prosecuted in the DRC. Sexual violence crimes in conflict are prioritized by international actors whereas the prosecution of other international crimes has received considerably less support. Hence, both institutional and legislative efforts are primarily aimed at sexual violence crimes. This jeopardizes capacity-building efforts as prosecutions of international crimes are diverted in line with priorities determined at an international level.

Finally, this article examined several legal cases in the eastern DRC to explore the implementation of the Rome Statute by Congolese courts and the difficulties of finalizing trials. A clear application of the Rome Statute for the prosecution of sexual violence crimes has been demonstrated in this article, an important determinant of the implementation of the complementarity principle. The Congolese legal system thus provides an illustrative example of the prosecution of sexual violence crimes at a national level. However, despite these developments, the legal process continues to be interfered with by Congolese political and military elites. While impunity has become less endemic compared to the time prior to intense international assistance, it is still particularly prevalent where political and military interests are at stake.

Mobile hearings represent an important tool to bring justice closer to local communities in the DRC. Moreover, Congolese legislative capacity to prosecute sexual violence crimes in conflict has developed significantly in line with international criminal law. However, mobile hearings and the prosecution of international crimes continue to be interfered with, jeopardizing due legal process. The selective interest of UN institutions and INGOs and interference from Congolese political and military elites have impeded the capacity of the legal system to adequately prosecute crimes and determine its own

priorities. In other words, issues regarding capacity and impartiality continue to affect the prosecution of international crimes in the DRC. If these issues were to be continuously addressed, at an international and national level, mobile hearings could provide a meaningful opportunity to seek justice and create a sense of local ownership for local communities through their participation in legal processes.

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Disclosure statement

No potential conflict of interest was reported by the authors.

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