The UN Security Council and Transitional Justice: The Democratic Republic of the Congo

by Professor Phil Clark
August 2020
Professor Phil Clark is Professor of International Politics and Co-Director of the Centre on Conflict, Rights and Justice at SOAS University of London

The author would like to thank Warona Jolomba for her invaluable research assistance on this project.

Contents

Introduction ........................................................................................................ 75
I. Evolution of the Security Council’s Goals, Tools and Implementation of Transitional Justice ............... 77
II. Analysing the Security Council’s Impact on Transitional Justice ............................................ 82
III. Key Takeaways .......................................................................................... 91
References ........................................................................................................ 94
This study examines the impact of the United Nations Security Council's transitional justice engagements in the Democratic Republic of the Congo (DRC) since the start of the First Congo War in October 1996. This analysis adopts a broad notion of transitional justice, encompassing the full range of judicial and non-judicial responses to serious human rights violations in the DRC, namely amnesties; domestic and international prosecutions; demobilization, disarmament and reintegration (DDR); security sector reform (SSR); a Truth and Reconciliation Commission (TRC) and other forms of truth-seeking and documentation; victim reparations; and community-based reconciliation. These mechanisms have focused on violations committed in the fluid and overlapping conflicts in the provinces of North and South Kivu and Ituri (and to a lesser extent in Equateur, Maniema, Katanga and the Kasais). During this period, fighting between an array of government and rebel forces has caused the deaths of more than five million people and internally displaced a further five million.

Drawing on an analysis of Security Council resolutions concerning the DRC since 1996, the author's interviews, and field research in the country since 2003, this study highlights a significant evolution in the Council's language and practice concerning transitional justice over the last 24 years. The Council has shifted gradually from pursuing long term peace in the DRC on the basis of political dialogue and negotiation, in which the offer of amnesty to high-level perpetrators of international crimes was a key incentive, to advocating a holistic perspective of peace through transitional justice that prohibits amnesties for international crimes. This evolution reflects changing dynamics in the DRC as well as in the UN's global approach to conflict resolution and transitional justice, first articulated in the 2004 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies and refined in the UN Office of the High Commissioner for Human Rights (OHCHR) 2009 report Rule-of-Law Tools for Post-Conflict States: Amnesties. The latter states:

“The United Nations policy of opposing amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations, represents an important evolution, grounded in long experience.”

While there are important differences among the Council's, OHCHR's and other UN agencies' positions on transitional justice matters in the DRC, the 2004 Secretary-General's report and the 2009 OHCHR report represent critical junctures in the UN's overall thinking on these themes. These also reflect broader pro-prosecution trends in the human rights advocacy and international criminal justice communities, galvanized by the inauguration of the permanent International Criminal Court (ICC) in 2002.

As this study will highlight, the Security Council and UN agencies operating in the DRC have often disagreed on these issues, with some UN actors adopting a stringent anti-amnesty stance, while others have advocated the use of amnesties in nationally-led UN-facilitated processes of DDR and SSR. While amnesties have, in some key instances, incentivized combatants in the DRC to cease hostilities, the UN's variable position on this issue has created significant confusion among armed groups, affected communities and national and international agencies involved in conflict mitigation.
Furthermore, the close entanglement of the UN peacekeeping missions, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and its successor the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), with the Congolese Government – reflecting the Security Council’s view that State-building and bolstering Congolese institutions are central to addressing the legacies of conflict – has complicated various UN efforts at transitional justice. Seeing itself as a guarantor of the newly consolidated Congolese State, the UN has often succeeded in bolstering domestic transitional justice efforts, principally through the Congolese military courts and mobile gender units. At other times, however, UN support for other forms of foreign intervention, especially through the ICC, has undermined national ownership and decision-making. Furthermore, the UN itself has, at times, complicated domestic transitional justice measures by becoming overly embroiled in community-based efforts. Changes to the Security Council – and broader UN – practice in the DRC are required to maximize the national gains from the UN’s involvement in transitional justice, while minimizing any risks to the domestic system.

This study is structured in three parts: The first section traces the evolution of the Security Council’s goals, tools and implementation of transitional justice in the DRC from 1996 until the time of writing. The second section analyses the impact of the Security Council on the practice of transitional justice in the DRC, highlighting the positive and negative consequences of the Council’s approaches. Finally, the third section draws some conclusions from that analysis and offers recommendations for the Security Council’s ongoing engagement with transitional justice issues in the DRC.
S

Since 1996, six phases are discernible in the evolution of the Security Council’s transitional justice goals, tools and implementation in the DRC. These phases highlight the Council’s shifting emphasis from achieving fundamental peace and stability across the DRC to facilitating the creation of a robust Congolese State, the transition to the DRC’s first post-conflict elections in 2006 and the entrenchment of accountability and the rule of law across the country, as the basis of democratic governance and economic growth. Changes in the Council’s approach across this period stem both from political and conflict developments in the DRC as well as changes in global UN thinking on transitional justice matters. Throughout, the Council has linked punitive forms of transitional justice to its overarching concerns in the DRC, calling for the prosecution of foreign actors perceived as undermining Congolese State sovereignty, perpetrators of crimes designed to disrupt national elections; actors responsible for the murder of UN peacekeepers; and perpetrators of economic crimes that jeopardize
national development. Arguably, the most important change has been the Council’s increasing emphasis on criminal accountability and opposition to the use of amnesties (which the Council often equates with “impunity”), for perpetrators of international crimes.

During **Phase I** (between 1996 and 1998), the period of the First and Second Congo Wars, the Council focused on securing peace through dialogue and negotiation among the newly installed Congolese Government under Laurent-Désiré Kabila (whose Alliance des Forces Démocratiques pour la Libération du Congo/Zaire [AFDL] ended the 36-year-long regime of Mobutu Sese Seko in May 1997) Rwanda, Uganda, Burundi and their various rebel proxies. During this period, Security Council resolutions eschewed any reference to transitional justice, save a passing mention in 1998 of the “individual responsibility” of senior government officials and rebel leaders for large-scale human rights violations. The Council underlined the need for UN agencies to support domestic prosecutorial efforts through the documentation of crimes and other efforts, for the wider maintenance of peace and stability. Security Council language and practice during Phase I also emphasised the need to deal with the rapidly deteriorating humanitarian situation in eastern DRC. This centred on camps for Hutu refugees fleeing the Rwandan Patriotic Front’s (RPF) advance following the 1994 genocide of Tutsi in Rwanda and for internally displaced persons after the AFDL invasion of the DRC in October 1996.

Similarly, **Phase II** (between 1999 and 2001) involved little Security Council engagement with transitional justice, with the focus again on peace through dialogue, facilitated by the newly appointed Secretary-General’s Special Representative for Peace. Central to these efforts was MONUC, created through a Security Council resolution in November 1999, deployed in February 2000, and mandated to supervise the implementation of the 1999 Lusaka Peace Agreement signed by the DRC, Rwanda, Uganda, Angola, Zimbabwe and Namibia. To ensure Congolese sovereignty and to help build a more effective Congolese State, the Council demanded the withdrawal of “foreign forces,” principally Rwanda and Uganda, and called for

international investigations into serious human rights violations committed by these actors.\(^{10}\) The Council also called for investigations into the assassination of Laurent Kabila in January 2001, which brought his son Joseph into power.\(^{11}\) Starting in 2000, the Council stressed consistently the need for UN-facilitated DDR and SSR, stating that the repatriation of foreign combatants and building an effective national army and police force were essential to establishing a functional Congolese State and securing a lasting peace.\(^{12}\)

**Phase III** (between 2002 and 2005) marked a significant shift, with transitional justice featuring routinely in Council resolutions and UN practice in the DRC. This reflected a general change in Security Council approaches, in line with the recommendations of the UN Executive Committee on Peace and Security’s (ECPS) 2002 report on rule of law strategies for peace operations.\(^{13}\) By 2002, MONUC was mandated to coordinate all UN activities across Congo, with a primary focus on supporting the Congolese transitional Government’s preparations for national elections, the timeline for which was agreed at the Inter-Congolese Dialogue in Sun City in April 2002.\(^{14}\) A major threat to the elections, numerous Security Council resolutions emphasized from 2003 onwards, was “the absence of accountability throughout the DRC” and weak adherence to the rule of law, which undermined “national reconciliation.”\(^{15}\)

During Phase III, Security Council resolutions used stronger and more frequent language regarding the need for criminal accountability, precipitated by the murder of two MONUC peacekeepers in Ituri in May 2003.\(^{16}\) This trend continued in Phase IV, with Security Council resolutions amplifying calls for prosecutions following the killing in Ituri of nine MONUC peacekeepers in February 2005 and eight peacekeepers in January 2006.\(^{17}\) In response, the Council insisted, there should be “no impunity” for international crimes – genocide, war crimes and crimes against humanity – a refrain that has since continued throughout Council resolutions and UN practice.\(^{18}\)

In 2004, MONUC’s mandate was expanded to include assisting SSR through a process known as *brassage*, or the integration of rebel combatants into the newly constituted national army, the Forces Armées de la République Démocratique du Congo (FARDC).\(^{19}\) MONUC was also mandated to support the prosecution of suspected perpetrators of international crimes. The Council stated that this should take place through the Congolese domestic courts,\(^{20}\) but in 2005 it also called for the Forces Démocratiques de Libération du Rwanda (FDLR) rebels – comprising many suspected perpetrators of the Rwandan genocide – to cooperate with the UN International Criminal Tribunal for Rwanda (ICTR) based in Arusha, Tanzania.\(^{21}\) As violence engulfed the province of Ituri, accountability for three sets of crimes dominated Security Council resolutions in this period: the plunder of the DRC’s natural resources; the illegal cross-border weapons trade; and sexual violence.\(^{22}\)

The key event determining the Security Council’s stance on transitional justice in **Phase IV** (between 2006 and 2009) was the July 2006 elections, the first multiparty vote in the DRC in 41 years and, at a cost of USD 500 million, the most expensive UN-run election in history.\(^{24}\) After the elections, the Congolese Government formally assumed responsibility from MONUC for all security issues, including the oversight of DDR and civilian protection.\(^{25}\) Security Council resolutions in 2006 and 2007 stressed the importance of the elections for establishing coherent State authority throughout the DRC and for laying the grounds for “permanent dialogue” between the newly elected Government and its various opponents, including rebel groups.\(^{26}\) From 2008 onwards, Security Council resolutions referred regularly to the need to hold criminally accountable all actors who had committed grave human rights violations designed to disrupt the 2006 and subsequent elections.\(^{27}\)

With Joseph Kabila’s Government now elected and thus publicly legitimized, the Security Council’s focus on criminal accountability – begun in Phase III – for the first time included crimes committed by Congolese State actors.\(^{28}\) As a result, the 2007 national transitional
justice strategy, to be jointly coordinated by the Congolese Government and MONUC – the first time the term transitional justice was mentioned in Security Council resolutions regarding the DRC – included a range of measures to address government culpability, principally for economic crimes such as corruption and embezzlement. Alongside ongoing processes of DDR and SSR, the transitional justice strategy emphasized the need to vet State actors – both military and civilian officials – for involvement in international crimes, although (as discussed later) MONUC was initially reluctant to do so. The Security Council also successfully lobbied for the exclusion of these crimes from the national amnesty, which was adopted by the National Assembly in July 2008 and signed into law by President Kabila in May 2009.

Based on the Security Council’s view that the “peace and security situation [had] improved” across the DRC, in Phase V (between 2010 and 2012), the Council concentrated on economic development, with transitional justice concerns routinely linked to that goal. Numerous Council resolutions described delivering accountability and combating impunity for serious crimes as important for the interconnected purposes of peace, national reconciliation, development and prosperity.

In 2010, MONUC, under Security Council Resolution 1925, transitioned to MONUSCO, with a mandate geared towards consolidating Congolese State authority and bolstering its civilian protection capacity rather than its predecessor’s focus on the implementation of the Lusaka and Sun City Peace Accords. In this period, MONUSCO’s primary transitional justice activity comprised support for the national military tribunals, with UN Prosecution Support Cells throughout the country focusing on crimes committed by the Congolese army including international crimes. The Security Council also raised concerns over a range of new FARDC criminal activities such as smuggling and drug trafficking. Council resolutions in Phase V, for the first time, mentioned the Congolese Government's cooperation with the ICC. President Kabila referred the conflict situation in the DRC to the ICC in April 2004, with ICC investigations beginning two months later. In January 2009, the Congolese rebel leader Thomas Lubanga became the ICC's first ever suspect to face trial in The Hague.

One notable absence in Security Council resolutions during this period was any mention of the OHCHR mapping report in August 2010, which documented serious human rights violations committed in the DRC between March 1993 and June 2003. The report was framed explicitly as the basis of future transitional justice endeavours, including prosecutions. While the Council had called for the Congolese Government's cooperation with the mapping exercise in 2007, the 2010 report elicited no reference in any subsequent Security Council resolutions. Some OHCHR officials at the time attributed the Council's silence on this matter to the report's controversial finding that Rwanda had committed “genocide” against Hutu civilians in eastern DRC as revenge for the 1994 genocide of Tutsi in Rwanda, a claim widely criticized by commentators and denied vociferously by the Rwandan Government which, with US and UK backing, lobbied the Council to suppress the report.

Finally, Phase VI (between 2013 to the time of writing) represented a further strengthening of the Council’s language and practice around criminal accountability – and the prohibition against amnesties – for serious crimes in the DRC. Alongside continued references to the need for domestic justice for FARDC atrocities, the importance of the Congolese Government’s cooperation with the ICC and the rejection of amnesties for international crimes, the Council extended this framework to emphasize prosecutions, rather than DDR or SSR, as the appropriate measure for rebel perpetrators. This signifies a major shift, especially in removing amnesty as a possible incentive for rebel combatants to integrate into the FARDC. While consistent with the Council’s increasing global emphasis on prosecutions for serious crimes, this change also stems from growing frustration (within the Council, MONUSCO and OHCHR) over perceived failures of the brassage process,
principally the extent to which rebel groups maintained parallel chains of command and continued committing serious crimes against civilians after their integration into the FARDC.41

Driven by similar concerns, starting in 2013, Resolution 2098 created the UN Force Integration Brigade (FIB) within MONUSCO – the first UN peacekeeping mission in the world mandated to use force to “neutralize and disarm” groups considered a threat to State authority and civilian safety, with a specific focus on the March 23 Movement (M23), the Allied Democratic Forces (ADF) and the FDLR.42 Taken together, these measures – denying amnesties as an incentive for military integration and the bolstered military approach of the FIB – represented a tougher stance against rebel groups and a move away from the negotiation and inducement approach witnessed in previous DDR and SSR efforts. Crucially, though, in 2017, the Council expressed frustration at the inability of DDR processes to adjust to changing circumstances in eastern DRC, including escalating conflict in the Kasai regions, highlighting the extent to which the Council still considers DDR essential in tackling armed groups.43

Phase VI also witnessed a greater Security Council emphasis on community-based approaches to transitional justice and conflict mitigation, with several resolutions in 2019 stressing MONUSCO’s role in supporting or facilitating bottom-up conflict resolution, dialogue and security.44 Whereas the Council had previously discussed reconciliation in national terms, 2019 saw a new emphasis on community reconciliation.45 This, perhaps, resulted from MONUSCO’s growing focus on community engagement generally in this period, designed to improve the peacekeeping mission’s standing with conflict-affected communities.46 More broadly, in recent years the UN system – driven principally by the United Nations Development Programme (UNDP) – has increasingly viewed reconciliation, understood in terms of transforming intra and intercommunal relations, as essential for sustainable peace.47
Across the six phases just outlined, the Security Council – while never the most significant actor – has had a variable impact on transitional justice in the DRC. This section examines the Council’s most important positive and negative effects in this domain. In particular, the fraught issue of amnesties – their stated illegality versus their continued efficacy for a range of conflict mitigation processes – has dominated, and complicated, the UN’s transitional justice activities in the DRC.

The Security Council’s principal contributions to transitional justice in the DRC have been in terms of DDR and the reform of the domestic judicial system. DDR in the DRC has involved both the demobilization of rebel combatants, who may choose either to integrate into the FARDC through the SSR process of *brassage* or to return to civilian life, with the relative emphasis on these two tracks varying over time depending on political expediency and other factors. The latter process involves combatants’ return to Congolese communities or cross-border repatriation through MONUSCO’s Disarmament, Demobilization, Repatriation, Reintegration and Resettlement (DDRRR) programme in the case of foreign armed groups, most notably the Rwandan-dominated FDLR. Since 2002, the DDR division of MONUSCO has demobilized a total of 150,000 rebel combatants. An implicit amnesty underpins the DDR process, and combatants...
are not screened for possible participation in serious crimes before demobilization, despite the Security Council’s insistence on this measure. The removal of any threat of prosecution has been key to incentivizing combatants to lay down their arms.50

The DDR that involves domestic demobilization within the DRC has faced considerable problems, not least the failure of many combatants to integrate effectively into local communities, causing many fighters to return to combat.51 The repatriation of combatants to Rwanda, Uganda and Burundi, meanwhile, has proven much more successful. Three phases of cross-border DDR since 1998 have focused on Congo-based Rwandan rebels, the first managed by UNDP and the last two by the Rwanda Demobilization and Reintegration Commission (RDRC), building on a framework established through the Lusaka Peace Agreement. This programme has demobilized around 35,000 mainly Hutu former combatants from eastern Congo, the majority members of the FDLR and the former Rwandan army who fled across the border after the 1994 genocide.52 These combatants are disarmed by MONUSCO before being moved to the Mutobo demobilization centre near the town of Musanze in northern Rwanda.

While the Rwanda-focused aspects of DDR have been broadly successful, facilitated by the DRC’s implicit provision of amnesty, this programme has run into some difficulties in Rwanda, where three levels of accountability mechanisms – the ICTR, the Rwandan national courts and the gacaca community-based courts – have delivered comprehensive justice for suspected génocidaires. The national courts and gacaca have not prosecuted combatants returning from the DRC, highlighting the premium the Rwandan Government places on the DDR process. This has caused some grievances, though, among everyday Rwandans. Given that a significant number of FDLR fighters, including most of its leadership, participated in the genocide, some Rwandans – particularly convicted perpetrators (including members of the FDLR who were captured on the battlefield or returned to Rwanda voluntarily before the start of DDR in 1998 and were subsequently prosecuted through gacaca) – question the lack of accountability...
for demobilized FDLR fighters. Most reports indicate, nonetheless, that demobilized combatants have integrated successfully into Rwandan communities, largely because of the Rwandan Government’s extensive advocacy of the DDR programme, which stresses its benefits for reconciliation in Rwanda and for nullifying rebel threats in eastern Congo.

Greater complications have arisen regarding high-ranking demobilized suspects pursued by the ICTR. While the Lusaka Peace Agreement in 1999 stipulated that MONUC should screen disarmed combatants for possible involvement in Rwandan genocide crimes and hand suspects over to the ICTR, MONUC and MONUSCO have generally refused to do so – highlighting internal UN tensions over the implicit amnesty necessary to enable DDR and the prosecutorial mandate of the ICTR. Only three ICTR indictees have been extradited from the DRC: Grégoire Ndahimana in 2009, Bernard Munyagashiri in 2011 and Ladislas Ntaganzwa in 2016, all of whom were captured by the Congolese Government and extradited with minimal involvement by MONUC or MONUSCO.

The second major positive contribution by the Security Council to transitional justice in the DRC has been effective support for the reform and practice of the Congolese domestic judiciary. These efforts have centred on the military tribunals and mobile gender units, which have now prosecuted hundreds of cases of genocide, war crimes and crimes against humanity. While the Security Council has never been the primary actor in this regard, it has played an important role in creating a diplomatic atmosphere conducive to bolstering domestic justice (at a time when some foreign donors have expressed reservations about supporting such activities) and offering technical and logistical support to domestic judicial actors. As argued below, however, tensions have arisen between the Council and UN agencies based in the DRC over the extent to which the Council’s support for ICC investigations in the DRC has, at times, undercut the work of the national courts.

Since 2003, a European Commission (EC) funded reform process has bolstered the domestic courts and enabled them to investigate and prosecute a wide range of war crimes and crimes against humanity. Centring on Ituri, the EC’s investment of more than USD 40 million towards reforming the Congolese judiciary has seen considerable progress in local capacity. This programme became the basis of the much broader Restoration of Justice in the East of the DRC (REJUSCO) initiative funded by the EC, Belgium, the Netherlands and Sweden, which extended to the Kivus and other provinces. Implemented by the Belgian NGO Réseau des Citoyens-Citizens’ Network (RCN), the project in Bunia aimed to establish the minimal operation of the local police and judiciary and to improve arrest and detention processes and facilities. The EC funded the purchase of new judicial offices and equipment and provided training and salaries for investigators and magistrates. Since 2003, MONUC (followed by MONUSCO) has provided around-the-clock protection to all judges in Bunia. The Security Council’s creation of the UN Joint Human Rights Office (UNJHRO) within MONUSCO in 2008 – merging MONUSCO’s previous Human Rights Division and the DRC office of OHCHR – increased the UN’s assistance to the Congolese courts through criminal investigations, support for victims and witnesses and sharing of evidence, which has been used in numerous atrocity trials. These developments have helped boost the efficiency of the national courts throughout eastern DRC, including in their handling of high-profile cases concerning international crimes.

One of the most important reforms in the Congolese judicial system has been the use of mobile courts in eight provinces to address a wide range of cases, including atrocity trials. The mobile courts represent an attempt to make justice more accessible to local populations by holding hearings close to the sites of alleged crimes – a model replicated in the mobile courts system in South Sudan since 2018, supported by the UN Mission in South Sudan (UNMISS).
In the DRC, the most extensive mobile courts programme has focused on sexual and gender-based crimes in South Kivu and Maniema. A key innovation here is an international-domestic collaboration, with the mobile courts overseen exclusively by Congolese judges and lawyers but with funding and technical support from the American Bar Association/Rule of Law Initiative (ABA/ROLI), the Open Society Justice Initiative (OSJI) and the Open Society Initiative for Southern Africa (OSISA).

As with the military tribunals, MONUSCO has provided security for the mobile court judges and shared evidence with prosecution and defence investigators. In their three years of operation between 2009 and 2012, twenty mobile courts heard 382 cases (the majority involving senior and middle-ranking members of the Congolese army), leading to 204 rape convictions, 82 convictions for other crimes and 67 acquittals.61 The majority of cases resulted in the award of victim reparations, although it has proven difficult to secure reparation payments from convicted perpetrators.62 Fundamental to these reforms in the DRC has been activism from within the Congolese judicial community, with the support of external actors such as the EC, MONUC, ABA/ROLI, OSJI and OSISA. Crucially, these international actors have played a supportive and subordinate role to the Congolese courts, providing finance, evidence and logistical assistance but without undermining national ownership.

While the Security Council overall has boosted DDR and domestic prosecutorial efforts in the DRC, it has generated considerable problems for several important transitional justice approaches (including those same processes it has helped promote). These challenges stem from three main sources: the Council’s increasing opposition to amnesties for international crimes; its support for the ICC; and, MONUSCO’s recent involvement in community-based responses to atrocities.

First, the Council’s growing opposition to amnesties for suspected perpetrators of international crimes has significantly undermined DDR, SSR and the TRC. Since 2002, the DRC has passed four amnesty laws, all resulting from peace negotiations and designed to facilitate these other mechanisms.63 As discussed earlier, an implicit amnesty also underpins the DDR process that facilitates the return of Congo-based rebels to Rwanda, Uganda and Burundi.

Various UN actors – especially MONUC and MONUSCO – have adhered to these nationally-led amnesty processes because they enable DDR and SSR. MONUC and UNDP also supported a controversial pardon of several Ituri rebel groups in 2006. Acting outside of the 2005 amnesty law, Kabila pardoned Mathieu Ngudjolo and all 10,000 members of his Ituri rebel coalition, the Mouvement Révolutionnaire Congolais (MRC), as well as the rebel groups led by Peter Karim and Cobra Matata, in exchange for their surrender, the decommissioning of their weapons and their integration into the FARDC.64 As a result, all three leaders were promoted to the rank of colonel in the Congolese army. Such a practice was common in the lead-up to the 2006 national elections, as the Government sought to minimize the impact of militia groups capable of intimidating voters and disrupting preparations for the poll. MONUC supported the scheme as part of the UN’s broader DDR programme in eastern DRC, designed to support preparations for the elections. Kemal Saiki, a MONUC spokesperson, defended the amnesty-for-peace deals with Ngudjolo, Karim and Matata: “The most important thing is to bring an end to the bloodshed. Since these deals have been signed, there has not been any large-scale fighting in Ituri.”65

As previously discussed, once the 2006 elections were over, the Security Council’s opposition to amnesties for perpetrators of international crimes became more entrenched, amplifying calls for prosecutions. In this general atmosphere – and with the ICC nearly four years into its investigations into crimes in Ituri – the Congolese Government saw strategic advantage in cooperating with the ICC, a move praised by the Security Council and international donors.66 In February 2008, the Government arrested Ngudjolo at a military training camp in Kinshasa following an ICC warrant issued in July 2007. This amounted to a bait and switch, with Ngudjolo
lured into surrender from his rebel ranks and integrated into the Congolese army, only to be arrested and transferred to The Hague for prosecution 18 months later. While the Congolese Government was widely hailed for its cooperation in arresting and transferring Ngudjolo to the ICC, its duplicity toward a recipient of a government pardon undermined the broader use of amnesty as an incentive for members of rebel groups to lay down their arms. Some UN officials privately expressed disquiet over the handling of the Ngudjolo case. Interviews with former rebels from Ngudjolo’s Front des Nationalistes et Intégrationnistes (FNI) and Forces de Résistance Patriotiques en Ituri (FRPI) in Bunia who had been integrated into the Congolese army underscored this point. One former FNI combatant said:

“This is the big problem with brassage. The Government gives us an amnesty, so we join the army and get a new uniform. But look what happened to Ngudjolo. He also got an amnesty but now he’s in The Hague. We all wonder whether this will happen to us next.”

A former mid-ranking FRPI commander echoed these views: “You can’t trust the Government or the ICC. These amnesties mean nothing. They can change their mind at any time, which makes us all vulnerable.” Similar sentiments were expressed by former Congolese rebels in the Mutobo demobilization centre in Rwanda, following the transfer of former CNDP and M23 leader Bosco Ntaganda to the ICC in March 2013:

“We heard what happened to Bosco. He was bigger than us and did the same as we did, coming across the border. Now he’s at the ICC. Is that going to happen to us too?”

“We [Rwandan] Government here said that if we come back, we won’t be punished. Even when there was gacaca, we wouldn’t be punished because they wanted us to come home. We trusted them but, after Bosco, none of us are sure we made the right choice.”

“The Bosco case sends a bad message to others in Congo. Many of them won’t come back now. Some people say Bosco wanted to go to the ICC but why would he do that? He could’ve been reintegrated and gone back to his family in Virunga.”

Such views highlight the extent to which the threat of prosecution can severely undermine SSR and DDR processes. Even the threat of prosecuting only high-ranking suspects can sow doubt among lower-ranking combatants who may not readily appreciate such fine distinctions. In the cases of Ngudjolo and Ntaganda, the UN did not play a direct role in their transfer to The Hague. However, the Security Council’s growing anti-amnesty stance – coupled with explicit support for the ICC’s investigations in the DRC from 2010 onwards – helped create an atmosphere in which such moves were possible, to the detriment of the UN’s own role in DDR and SSR.

Uncertainty over whether amnesties still applied in an era of increased emphasis on prosecutions – a discourse bolstered by regular Security Council resolutions and statements by various UN agencies operating in the DRC – also hampered the efforts of the TRC, which operated between 2003 and 2007. Article V of the TRC Statute broadened the commission’s mandate to include active conflict resolution, described as “the prevention or management of conflicts as they occur through mediation between divided communities.” The President of the TRC, Jean-Luc Kuye, and several TRC Commissioners attempted to resolve conflict by travelling to Kisangani, Bukavu, Goma, Rutshuru and elsewhere to talk to protagonists. Following Rassemblement Congolais pour la Démocratie (RCD) violence in North Kivu in January 2006, for example, Kuye and a delegation from the TRC travelled to meet with Laurent Nkunda, other RCD commanders and community leaders in Rutshuru and Goma.

Kuye argued that many belligerents refused to confess to crimes or to cooperate with mediators for fear of evidence being used against them in criminal trials, either through the ICC or the
domestic courts. “The ICC came up forcefully in our discussions with several rebel leaders, including Nkunda,” Kuye said. “We would start talking to them, make good progress, then the conversation would stop. They didn’t want to incriminate themselves, even when we stressed that the amnesty was in place.”

This situation echoes challenges in other countries such as Sierra Leone and Timor-Leste that have simultaneously deployed trials and truth commissions. Within such a structure, the former process typically addresses serious violations by high-ranking perpetrators, while the latter addresses crimes by less senior actors. As various commentators have argued, however, the threat of prosecutions in such cases often deters even lower-ranking actors from appearing before truth commissions.

The second set of problems stemming from the Security Council’s evolved position on transitional justice in the DRC concerns the ICC. Especially in the early years of ICC investigations in the DRC, tensions emerged between the Council and other UN agencies over the extent to which the UN should support the Court, which many Congolese judicial actors perceived as competing with domestic courts for jurisdiction over prominent cases. In the DRC, the ICC has charged six suspects – Thomas Lubanga, Bosco Ntaganda, Germain Katanga, Mathieu Ngudjolo, Calixte Mbarushimana and Sylvestre Mudacumura – the first four concerning crimes in Ituri and the last two in North and South Kivu. Lubanga, Ntaganda and Katanga were all convicted, Ngudjolo was acquitted, the case against Mbarushimana was dismissed at the confirmation of charges stage, and Mudacumura reportedly died on the battlefield in 2019.

Broadly, the UN – and within the Security Council, the two permanent members that are also signatories to the Rome Statute, France and the UK – have supported the ICC’s efforts in the DRC, rhetorically and in practice. MONUSCO has provided security, evidence and logistical backing to ICC investigators in the field. The ICC’s investigations in Ituri were greatly boosted by the Government’s arrest and imprisonment, with MONUC’s assistance, between February and April 2005 of four Ituri rebel leaders: Lubanga, leader of the Union des Patriotes Congolais (UPC); Floribert Ndjabu, leader of the FNI; Kahwa, leader of the Parti pour l’Unité et la Sauvegarde de l’Intégrité du Congo (PUSIC); and Katanga, military leader of the FRPI. All four suspects were charged with involvement in the murder in February 2005 of nine Bangladeshi peacekeepers, ambushed during a MONUC patrol near the town of Kafe on Lake Albert.

The ICC’s relationship with MONUC and MONUSCO, however, was often fraught, especially in the early years of the ICC’s operations in the DRC. The ICC’s early investigations in Ituri were hampered by MONUC’s initial reluctance to hand over evidence gathered by its own forces in cooperation with the Congolese army and police. Some MONUC officials argued that the ICC’s requests distracted from their primary responsibilities, could jeopardize the security of their forces in the field, and undermine attempts by the national Congolese judiciary – with which MONUC human rights and rule of law personnel worked closely – to prosecute cases of war crimes and crimes against humanity.

Several senior MONUC officials described the unilateralism of the ICC, often assuming the role of ‘top dog’ in this partnership. One high-level MONUC official in Bunia said:

“[The ICC’s] investigators arrived out of the blue and expected us to help them. They wanted access to sites where massacres happened. They wanted help with identifying communities that would speak to them. These are places with many vulnerable people, where we’ve been working for many years and where we have close working relationships...We have to keep working there long after the Court leaves, so we have to be very careful about involving ourselves too much with [ICC personnel].”

Difficult relations between the ICC and the UN were a key reason the Lubanga trial – the ICC’s first-ever trial – almost collapsed before it started. In 2008, MONUC refused to allow the ICC Office of the Prosecutor to make public UN-gathered evidence concerning Lubanga. The Defence argued that this compromised Lubanga’s fair trial
Analysing the Security Council’s Impact on Transitional Justice

rights because potentially exculpatory evidence was not being disclosed on the basis that the UN wished to maintain the anonymity of local sources. The ICC Trial Chamber stayed the proceedings in Lubanga for almost one year until the Prosecutor could convince the UN to permit the public release of the relevant evidence.

Since the ICC opened investigations in the DRC in 2004, senior MONUC and MONUSCO officials (especially in the Human Rights, DDR, Justice Support and Political Affairs Divisions) have, at times, expressed concerns over the ICC’s competitiveness with the Congolese judiciary. The peacekeeping mission’s disquiet stems from its role in helping rebuild the military tribunals, which on several occasions have seen cases within their jurisdiction usurped by the ICC.

This view was strongest during the ICC’s first three cases in Ituri concerning Lubanga, Katanga and Ngudjolo, which the military tribunal in Bunia was also investigating at the time. “When the ICC first came here,” Chris Aberi, the State Prosecutor in Bunia, said: “We showed them the dossiers we had already assembled on Lubanga and others. We were ready to try those cases here. We had the capacity to do this and it would have had a major impact for the people here, to see these [rebel] leaders standing trial in the local courthouse.” John Penza, the Military Prosecutor in Bunia, concurred: “You only have to look at our record here to know what we are capable of. With MONUC’s help, we prosecuted Kahwa here – MONUC detained him and we prosecuted him...We found the mass grave at Bavi and we prosecuted [Congolese army captain François Mulesa] Mulombo and his men in connection with that...The ICC is certainly a necessary thing but it should be handling bigger cases than those [it is currently prosecuting].”

That domestic investigations were already underway into the early cases pursued by the ICC should have kept those cases within the domestic jurisdiction, on the basis of the ICC’s principle of complementarity. The technical legal reasons that the ICC succeeded in maintaining jurisdiction over the Ituri cases are an issue the author has explored in depth elsewhere. The impact of these early ICC decisions was widespread disappointment among judicial actors in Ituri (and
their supporters within MONUC and MONUSCO) that, despite the extensive legal reforms of the last 16 years, they would not be able to prosecute some of the most important atrocity suspects in local courtrooms.87

This has important ramifications for the long-term legitimacy and efficacy of the domestic judiciary, which Security Council resolutions and various UN agencies stress must be supported as part of a longer-term rule of law strategy. It also led some domestic judicial actors to claim they are receiving mixed messages from the international community, which has invested heavily in legal reform but maintains that such reforms are insufficient to warrant domestic trials of high-profile suspects who are also pursued by the ICC.88 Such concerns appear to have diminished over time, as the ICC has not issued new arrest warrants in the DRC and the national courts have focused on a separate and substantial caseload (including cases involving Congolese military and other State actors – a category of suspects eschewed by the ICC). Nevertheless, the ICC's competitiveness with the Congolese courts in its early operations – coinciding with the beginning of major national judicial reforms – jeopardized the latter and highlighted critical tensions between the Security Council's generally pro-ICC stance and the priorities of MONUC and other UN agencies on the ground.

Finally, while the Security Council has recently emphasized the importance of community-based approaches to transitional justice and conflict resolution in the DRC (and advocated direct UN involvement in these processes), it is worth recalling the UN's earlier difficult entanglements at this level, which should inform the present situation. A salient example is the UN's role in a community-level conflict mediation institution in North Kivu known as the Barza Inter-Communautaire. The Barza assembled leaders from North Kivu's nine major ethnic groups to help resolve low-level conflicts before they escalated to violence. Between 1998 and early 2004, a period of major instability and armed conflict in many parts of eastern DRC, the Barza generally succeeded in resolving ethnic disputes in North Kivu, particularly those concerning land ownership.89 By the end of 2004, however, the Barza's ability to mitigate ethnic tensions had weakened considerably, and by the end of 2005 the Barza had collapsed altogether.

As a sign of continued faith in the Barza's ability to mitigate ethnic tensions in North Kivu, various external actors, but most prominently MONUC, tried to revive it.90 MONUC forged a working relationship with the Barza before the ethnic conflagrations of 2004, sometimes consulting it on conflict resolution issues in certain communities or discussing evidence of atrocities that the Barza gathered during its own investigations.91 Several months after the collapse of the Barza in 2005, officials from the MONUC's Political Affairs and Human Rights Divisions commenced shuttle diplomacy between Barza leaders, encouraging them to restart an inter-ethnic dialogue and holding general meetings between community leaders that MONUC hoped would encourage Barza leaders to cooperate again.92

These meetings, though, highlighted the problems for community-based initiatives such as the Barza stemming from a perceived overly close relationship with the UN. Some Barza leaders resented the UN's meddling in their affairs. “MONUC's mediation hasn't been particularly effective,” said Aloys Majune, the Secretary of the Barza. “We can resolve our own problems. We don't need a big international agency telling us what to do.”93 Other leaders noted the danger of the Barza forfeiting its neutrality and, thus, popular legitimacy through its relationship with MONUC, which at the time was widely viewed as having failed to quell the violence in the Kivus and roundly criticized for its close cooperation with the Congolese army during a period of widespread FARDC atrocities against civilians.94 Similar issues have bedevilled other community-based responses to mass atrocity in eastern Congo, highlighting the importance of their insulation from international influence for their local legitimacy and efficacy.95

A critical realization from the DRC and other contexts, including Rwanda, Uganda and Timor-Leste,96 is that community-based mediation and reconciliation, when it is effective, succeeds because it is overseen by leaders whom local actors know intimately and can hold directly
accountable for their responsiveness to local needs. There may be a role for international actors in supporting such measures – through the provision of security or sharing information – but this must not impinge on the independence and authority of local leaders overseeing community-based practices. International actors must be cognizant of the immense power differentials involved when they seek to engage in community-driven practices, the danger of imposing external frameworks that may not necessarily resonate with local communities and the need to participate only on the explicit invitation and terms of local actors.

These issues are likely to impinge on the proposed Truth, Reconciliation and Justice Commission (TJRC) in Kasai-Central province, which may include community-level reconciliation and commemoration ceremonies. The proposal for the TJRC emerged from an expert consultation in 2019, supported by UNJHRO, with citizens in 37 sites in the five territories of Kasai-Central. While MONUSCO played an important role in the public consultations that led to the TJRC proposal, the Commission's success will hinge on the extent to which it is perceived as locally driven and responsive to the community concerns expressed in the 2019 consultation.
The analysis in this study leads to the following three key recommendations for future Security Council engagements with transitional justice in the DRC.

1. CLEARER, PRINCIPLED POSITION ON AMNESTIES

There is an urgent need for the Security Council and UN agencies on the ground in the DRC to clarify their position on the use of amnesties for international crimes, especially given the centrality of amnesties (implicit and explicit) in ongoing UN facilitation of DDR and SSR. This matter is also likely to arise in any future peace negotiations in the country. International criminal law is now a central feature of most peace negotiations around the world, especially those involving UN mediation. As discussed above, the UN increasingly holds that international law prohibits the use of amnesties for suspects of genocide, war crimes and crimes against humanity and therefore insists on prosecutions within the framework of peace negotiations. The ICC, meanwhile, has increasingly briefed international mediators about the illegality of amnesties for this category of suspects during peace talks.

While some practitioners and scholars readily accept this anti-amnesty stance, various commentators argue that international criminal law does not so clearly prohibit the use of amnesties for serious crimes. The Rome Statute governing the ICC does not mention amnesties, and other international criminal law statutes and conventions are less prescriptive or say very little about this issue. At the Rome conference in 1998 that led to the ICC Statute, many delegates expressed sympathy for the model of amnesty central to the South African TRC which was underway at the time. Philippe Kirsch, the
Chair of the Preparatory Commission in Rome and later the first President of the ICC, stated that the Rome Statute purposely contains a “creative ambiguity”\textsuperscript{102} that gives substantial discretion when considering amnesties. This suggests that the international legal basis for the trend against amnesties may be significantly weaker than many advocates, including the Security Council, have proposed. In a highly contested academic arena, various scholars also challenge the widespread assumptions that international trials inherently deter crimes and produce long-term stability and that amnesties (even if highly conditional) foster impunity and ultimately undermine peace and social order.\textsuperscript{103}

Furthermore, as MONUC’s and MONUSCO’s role in DDR and SSR has shown, key UN actors see substantial efficacy in the continued use of amnesties as incentives within other important conflict mitigation efforts in the DRC. The Security Council can provide much needed clarity and greater coordination of all UN agencies by articulating more comprehensively the conditions under which amnesties can still be used in UN-facilitated processes in the DRC – acknowledging the successes (and shortcomings) of their use in the past.

\section{More Coherent Position on the ICC, Domestic Justice and Complementarity}

While the Security Council (and broader UN) position on the links among amnesties, DDR and SSR has not always cohered, similar tensions have emerged in the Council’s simultaneous advocacy of the ICC and prosecutions through the Congolese domestic courts. Again, tensions between the Security Council and MONUC/MONUSCO have manifested in this regard. The Council has been highly supportive of the ICC in the DRC context, and the three permanent members that are not signatories to the Rome Statute – China, Russia and the US – have not opposed ICC involvement in the country. At times, however, MONUC/MONUSCO has perceived the ICC as undermining domestic practices in which they have invested heavily. Supporting domestic efforts often requires using diplomatic and other forms of pressure to convince the ICC to leave particular cases to competent national institutions (even those in the relatively early stages of reform, such as in many parts of eastern DRC) and where possible to support domestic investigations, for example through evidence sharing. The Security Council should recognize that – despite the ICC’s language of “complementarity” – there is often a high degree of competitiveness between international and national prosecutorial bodies, which require cases to legitimize their work.\textsuperscript{104}

This issue is not unique to the DRC, and tensions have arisen in various contexts where international justice institutions are perceived to have unjustifiably trumped domestic courts.\textsuperscript{105} This reality necessitates a stronger stance to safeguard the vital work of domestic courts, whose investigations and prosecutions will continue long after the ICC has departed the DRC. The Security Council and UN agencies operating in Congo can play a vital role in this respect by speaking out when the ICC oversteps and contravenes its own principle of complementarity. The ICC is also widely perceived in some sections of Congolese society as a partisan institution, heavily geared towards the interests of the Government and, therefore, reticent to investigate State crimes.\textsuperscript{106} The Security Council and MONUSCO, with their own unavoidable challenges stemming from close relationships with the Congolese Government, must mitigate any risks to UN legitimacy by being seen as too closely linked to the ICC.

\section{Seek Ways to Enable – But Not Direct – Community-Level Transitional Justice}

Finally, the Security Council should adopt a cautious stance when advocating that MONUSCO and other UN agencies engage closely with community-based responses to mass atrocity in eastern DRC. Community-based transitional justice and conflict resolution processes such as the Barza hinge on their deep understanding of contextual factors, responsiveness to localized
needs and local legitimacy (which, in the context of eastern DRC, includes neutrality from the meddling of national and international elites, who are treated with a certain degree of suspicion). Certainly, community-based practices are critical to any lasting peace. Overt UN involvement at this level, however, can jeopardize these processes, necessitating a more careful approach than the UN has sometimes adopted in the past. The initial indications from the Kasai-Central TJRC discussed above are that the UN has begun to play a constructive, background catalytic role in this provincial transitional justice mechanism, which includes critical community-based dimensions. It is imperative that the independence of the TJRC is maintained and that the UN positions itself as a distanced enabler, rather than as a direct participant, in the provincial and community-level aspects of the process.
In the academic literature, DDR and SSR are sometimes treated as separate from, and at other times components of, transitional justice. This report subsumes DDR and SSR within transitional justice, given the centrality of amnesty/prosecutions issues and broader questions of redress for past crimes within both of these processes in the DRC, as discussed in detail below.


References


20 Ibid.


29 Echoing the language of ‘ending impunity’, a common phrase from 2007 onwards is ‘zero tolerance’.


39 Interviews with OHCHR officials and Rwandan officials, Geneva and Kigali, August-September 2010.


41 Interviews, MONUSCO and OHCHR officials, Kinshasa, Goma, Bukavu, Bunia, 2006-2019.


45 Ibid.

46 Ibid.


49 The DRC’s use of explicit amnesties to facilitate SSR is discussed below.


53 See Phil Clark, “Bringing Them All Back Home”.


Interview, Esther Elkrief, Consultant on Justice Sector in the DRC, European Commission, Kinshasa, 27 January 2006.


Interviews, MONUC Officials, Bunia, 15 February 2006.

Interviews, Chris Aberi, State Prosecutor, Bunia, 14 February 2006 and 11 September 2008. Author’s telephone interviews, Senior Bunia Judicial Official, 4 March 2016 and 13 January 2017. For further discussion of this issue, see Phil Clark, Distant Justice: chp. 4.


See, for example, Avocats sans Frontières, “Bringing Justice to the People: How the UN is Helping Communities Deal with Disputes in Remote and Dangerous Areas”, UN Regional Information Centre for Western Europe, 29 April 2019, https://unirc.org/en/bringing-justice-to-the-people-how-the-un-is-helping-communities-deal-with-disputes-in-remote-and-dangerous-areas/.

Interview, Former FDLR Combatant, Mutobo, 19 April 2013.

Interview, Former FDLR Combatant, Mutobo, 19 April 2013.


Interview, Integrated Former FDLR Combatant, Bunia, 24 August 2006, in exchange for a full confession of their crimes.

(Government of the Democratic Republic of Congo, “Loi n°04 Portant Amnistie Pour Faits de Guerre, Infractions Politiqes et d’Opinion,” 30 November 2005, Articles 1 and 5.) The third and fourth amnesty laws, passed in May 2009 and February 2014, respectively, resulted from peace negotiations with two main rebel groups, the Congrès national pour la défense du peuple (CNDP) in 2005 and the beginning of the transitional period in June 2003. A crucial feature of the TRC was its ability to grant amnesty to perpetrators of ‘acts of war, political crimes and crimes of opinion’ committed between the start of the rebellion against Mobutu on 20 August 1996 and the establishment of the transitional government on 30 June 2003, in exchange for a full confession of their crimes.


See, Phil Clark, Distant Justice: chp. 3.

Interviews, MONUSCO and UNDP officials, Kisangani and Bunia, 12-15 September 2008.

Interview, Integrated Former FNI Combatant, Bunia, 24 August 2011.

Interview, Integrated Former FRPI Combatant, Bunia, 25 August 2011. The case of Cobra Matata elicits similar concerns. He was arrested in Ituri in January 2015 and transferred to Kinshasa to face trial on charges of war crimes and crimes against humanity. The Matata case differs somewhat from Nagudjo’s, though, in that following Matata’s integration into the Congolese army in 2006 he defected in 2010 to form a new rebel group in Ituri, the Front Populaire pour la Justice au Congo (FPJC), and surrendered to the Congolese authorities in November 2014.

Interview, Former FDLR Combatant, Mutobo, 19 April 2013.

Interview, Former FDLR Combatant, Mutobo, 19 April 2013.

Interview, Former FDLR Combatant, Mutobo, 19 April 2013.

See, for example, Abdul Tejan-Cole, "The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission," Yale Human Rights and Development Journal, 6, 1 (2014): 139–159; and Kimberly Lane, "Truth Commissions, Human Rights Trials and the Politics of Memory," Comparative Studies of South Asia, Africa and the Middle East, 25, 1 (2005): 111-121. The threat of prosecution hampered the Congolese TRC’s work but was not the principal reason for the TRC’s collapse in 2007 before it could hand down its final report. More fundamental catalysts of the breakdown included the fact that most of Kuye’s fellow commissioners were themselves senior figures in rebel groups such as the MLC, RCD and various Mai Mai groups and therefore deterred most everyday Congolese from giving evidence to the commission; the TRC lacked substantial financial and logistical support from the Congolese Government; and the commission ultimately buckled under the weight of its vast mandate (alongside its role in uncovering the truth about past atrocities, handing down amnesties and facilitating peace mediation, it was also expected to deliver victim reparations and hold reconciliation ceremonies between perpetrators and victims). For a fuller discussion of these issues, see Phil Clark, Distant Justice: chp. 6.

The Prosecutors v. Thomas Lubanga Dyilo (Trial Proceedings), International Criminal Court, 26 January 2009 (opening). ICC-PIDS-CIS-DRC-01-016/17_ENg. Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 and 13 June 2008: para. 11. Tor Krever argues, ‘MONUC officials had assumed that [their evidence] would merely provide the “signposts” for the Prosecutor’s further investigation, and they were handed over on the expectation of confidentiality. Detailed investigation was not Ocampo’s speciality, however, and his case leaned heavily on the MONUC reports.’ (Tor Krever, “Dispensing Global Justice,” New Left Review, 85 (2014): 87.)

The Prosecutors v. Thomas Lubanga Dyilo, International Criminal Court.

See Clark, Distant Justice, chapter 5.


See, for example, Nicola Palmer, *Courts in Conflict*.


Ibid.: 97–98.