

Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?

Michael Maya

American Bar Association Rule of Law Initiative

Abstract

This paper will describe the impact of efforts to build the capacity of both “mobile” and traditional “bricks and mortar” courts in eastern Democratic Republic of Congo (DRC) to handle cases involving sexual and gender-based violence (SGBV), including those that rise to the level of war crimes and crimes against humanity under international and Congolese law. More broadly, this paper will advocate for greater commitment to building the capacity of local courts, including in conflict-ridden countries, to deliver locally-owned justice that as a practical matter can’t be - and in most cases, should not be - outsourced. Based on the track record of Congolese military and civilian courts since 2008, there is reason to believe that the justice sector in some of the least developed countries in the world¹ can, with relatively modest assistance, deliver justice to survivors of conflict-related violence and their communities while at the same time satisfying international standards for fair trials.

Keywords: DRC – mobile courts – positive complementarity ICC – sexual and gender-based violence – war crimes and crimes against humanity – Congo – rape

In DRC and elsewhere, the vast majority of transgressions committed during conflict are never addressed, serving ultimately to thwart reconciliation and the building of a durable peace. In fact, in remarks made in 2010, one of the architects of the International Criminal Court (ICC), Professor Cherif Bassiouni, lamented that, from 1945-2008, 866 people have been prosecuted for 92 million deaths in 313 conflicts. He also noted with considerable regret that, as of 2010, the ICC had pursued only four cases and seven defendants in its first seven years of operation. With a budget of roughly \$150 million per year, the cost of prosecuting an ICC case is obviously high. The ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) are not appreciably different, with \$1.7 billion spent prosecuting the first 177 defendants. Admittedly, these are complex, time consuming and costly cases to prosecute under the best of circumstances.

This brief paper cites the above statistics not as a critique of these or other international tribunals, as they serve a distinct purpose and were never designed to supplant national courts; instead, they are cited to strengthen the case for greater investment in national trials, including in some of the world’s least developed countries. National trials will almost always be speedier and less costly; in many cases - arguably, most - they will deliver justice that is more satisfying for victims and their communities. By making this investment, the UN and other international actors could help re-imagine the concept of “complementarity,” which, at present, is treated as a jurisdictional restraint on the ICC and not as an opportunity or even obligation to help countries deliver the best possible justice within their own borders.²

Briefly, the doctrine of “complementarity” under the Rome Statute renders the ICC a court of last resort. The ICC is designed to intervene only where no national investigation or prosecution has been or is being conducted, or where the country in question effectively cannot or is unwilling to undertake such an investigation or prosecution. Because of capacity issues (including budgetary constraints), political considerations, or the restraints imposed by the doctrine of complementarity, the ICC can realistically address only a tiny fraction of the conflict-related transgressions committed each year. As the figures cited above demonstrate (92 million conflict-related deaths, 866 convictions), the international community and individual states have a very poor track record of delivering justice to the families and communities affected by the exploits of dictators, army commanders, rebel groups, militias, etc. Thus, an international community that is genuinely committed to justice and peace-building must explore promising, complementary approaches to the costly, lengthy, geographically remote and comparatively rare prosecutions that international tribunals carry out.

Imagine that a Congolese girl - one of over 60 survivors of a mass rape committed in South Kivu province, DRC - is given two options. Under Option I, her alleged assailant, an army commander, can be brought to trial within a few months of the rape, with the trial conducted less than a half-day's walk from her village. Her family and fellow villagers can accompany her at the trial. The military judges hearing her case are Congolese. While not as well trained as a typical western judge, they have a demonstrated mastery of laws pertaining to rape and other violent acts committed by army personnel or other combatants. They are also versed in international law pertaining to war crimes and crimes against humanity. Although there have been surprisingly few reprisals against survivors and witnesses participating in rape trials, the potential exists. That said, there are few practical precautions that can be taken short of relocating survivors and witnesses, a precaution many might refuse in any event. Finally, the conviction rate for rape in military court trials in eastern DRC is roughly 60%.³

Under Option II, a tribunal roughly 7,000 kilometres from the site of the mass rape in South Kivu, DRC can issue an indictment charging the young girl's alleged assailant of orchestrating a mass rape; it is hoped that a trial can be held within a few years of the rape, at which point the survivor would travel to The Hague to testify. Judges overseeing her case are luminaries in the field of international law, have ample time to weigh the evidence, and as a practical matter are impossible to influence through intimidation or promises of money and favours. The defendant's ability to intimidate or harm the survivor or her family is reduced significantly when compared to the scenario envisaged under Option I.

Which of the two options above best advances the rape survivor's interests? What is best for her village? Nearby villages? Which might have a greater deterrent effect on would-be rapists, especially if they were to learn of the commander's conviction before the conflict ends? Setting aside the costs of the two options, is the international criminal justice regime advanced more by a trial in DRC that receives comparatively little media attention, or at an international tribunal that receives significant worldwide media coverage? Finally, assuming that outside assistance is provided that helps the Congolese justice sector handle cases such as the one posited above in a professional, fair-handed manner, what is in DRC's best long term interests?

Since 2008, the American Bar Association Rule of Law Initiative (ABA ROLI) has been collaborating with MONUSCO, HEAL Africa and Panzi hospitals, Congolese NGOs, and international NGOs such as DanChurchAid, to conduct military and civilian rape trials in some of the most remote areas of South Kivu, North Kivu and Maniema provinces in eastern DRC. Many of these trials are conducted by mobile courts - temporary courts that are explicitly contemplated under Congolese law and which operate for a limited period of time in remote areas. A full team of justice sector professionals participate in these trials, including judges, prosecutors, defence lawyers, and bailiffs. Many of them receive training from ABA ROLI on relevant Congolese and international law governing rape, crimes against humanity, etc. Mobile court trials are often held under a tent, with scores of rapt villagers attending the trial for hours at a time without the comfort of shade, food or water. For most villagers, this is the first time they have seen a judge or lawyer. Few if any have ever observed a trial, with many unaware that a soldier, commander or other combatant can be held accountable for their misdeeds; in fact, the news that the accused do not enjoy impunity comes as a great surprise to many villagers, although public education campaigns and word of mouth are slowly dispelling this noxious myth.

During the period 2008-2012, ABA ROLI has helped facilitate nearly 900 rape trials in both mobile and "bricks and mortar" courts.⁴ The conviction rate for alleged rapists has remained steady at roughly 60%, regardless of whether the case is heard by a military or civilian court. The cost of a typical, two-week mobile court is \$45,000-\$60,000, during which time the court can hear about 15 cases. This translates into \$3,000-4,000 per case, with cases heard in bricks and mortar courthouses costing significantly less to adjudicate. By design, roughly 75% of the cases heard by mobile courts are rape cases, with cases involving robbery and pillaging among the cases also commonly heard.

On January 1, 2011, a Lieutenant Colonel in the Congolese Army, Mutuare Daniel Kibibi, led his soldiers and officers into the village of Fizi in South Kivu province. Over the course of two days, he and over 100 soldiers and officers engaged in a rampage that included the rape of at least 62 girls and women. Kibibi himself was among the alleged rapists. Kibibi was apprehended and brought to trial at a mobile court in the village of Baraka, a few dozen kilometres from Fizi. The court was primarily facilitated by ABA ROLI, with significant assistance from MONUSCO, DanChurchAid and Avocat Sans Frontieres, among others.

Over the course of 12 days, the mobile court tried Kibibi, 10 high ranking officers, and one juvenile.⁵ Scores of villagers from the surrounding area observed the trial, as did a number of international observers. Among them were noted war crimes scholar and commentator, Dr. Kelly Askin, of the Soros-funded Open Society Justice Initiative, an early backer of mobile courts as a complement to ICC prosecutions. Kibibi and nine officers were convicted of committing crimes against humanity under both international and Congolese law for raping and pillaging during the two-day rampage. The mobile court sentenced Kibibi to 20 years in prison, while his fellow officers received sentences ranging from 10-20 years. One defendant was acquitted. During the trial, it came to light that Kibibi boasted about his invincibility, joking that the ICC was ineffectual and would never touch him or anyone else involved in the rampage. He never imagined a Congolese mobile court would be his undoing. After the trial, Dr. Askin opined that the trial met international fair trial standards.⁶

Kibibi was the most notorious, high ranking defendant to be tried for rape by a court in eastern DRC since 2008. In fact, of the cases with which ABA ROLI has been directly involved, his was arguably the only one that might have attracted the attention of the ICC and resulted in a possible indictment. That an all-Congolese court could carry out a trial of this complexity and political sensitivity in a remote village in eastern DRC is above all a tribute to the professionalism and commitment of Congolese justice sector actors involved in this trial, including defence counsel who were appointed to protect the defendants' interests.

By Congolese standards, a mobile court such as the one assembled to prosecute the Fizi rampage is prohibitively expensive. For the international donor community, particularly when compared to the cost of conducting a similar trial at an international tribunal, this represents a very modest sum, even when factoring in the cost of training justice sector actors over the course of a year.

Finally, it is important to note that the Kibibi trial and several hundred other rape trials in eastern DRC would never have been conducted without outside assistance by ABA ROLI and its donors. In fact, without these resources, it might never have come to light that the Congolese justice sector had the potential and the will to address DRC's rape crisis, arguably one of the gravest and longest running human rights disasters of our time.⁷ Finally, while it is easy to fall into the trap of writing off a conflict-ridden country's justice sector as unworthy of investment, the improbable example of DRC provides a needed check on our cynicism and lack of imagination.⁸

Conclusion

The aim of this paper is to provoke a dialogue about the viability, advisability and even obligation to support locally delivered justice, even in countries in the midst of conflict. Ultimately, this paper supports the proposition that the donor community has the ability and obligation to collaborate with local justice sector actors to help deliver justice, even in regions enmeshed in conflict such as eastern DRC. By doing so, the donor community is helping host country actors to deliver justice that will in many cases be more immediate and satisfying to victims of conflict-related transgressions than a trial conducted by an international tribunal. Moreover, locally delivered justice will almost certainly have a greater deterrent effect on would-be transgressors than a geographically remote prosecution that is usually concluded long after the conflict is over. Finally, a modest investment in building the capacity of local justice sector actors to address conflict-related transgressions will not only increase their ability to deliver justice during the conflict, but also during the ensuing, shaky peace. For these reasons, it is submitted that it is incumbent upon the international community to explore whether the success achieved by DRC's justice sector since 2008 can be replicated in other regions affected by conflict. Looking ahead, the concept of complementarity could eventually be viewed as an affirmative mandate to assist countries deliver justice within their own borders rather than simply as a technical constraint upon the ICC.

Endnotes

¹ DRC is the *least* developed country in the world according to UNDP's Human Development Index (2011).

² This approach is in keeping with the evolving concept of "positive complementarity."

³ This is based on statistics maintained by the American Bar Association Rule of Law Initiative for rape trials that it has facilitated since 2008.

⁴ Funding to facilitate these trials and to conduct training of justice sector actors has been supplied by the Open Society Institute for Southern Africa, the Dutch and Norwegian governments, the State Department (DRL and INL), USAID and the MacArthur Foundation. Additionally, donor funds have been used to provide extensive psycho-social support to survivors and their families, to conduct public education campaigns on SGBV, and to fortify prisons to minimize or eliminate prison breaks by convicted rapists and other prisoners.

⁵ The juvenile's case was remanded to a juvenile court in Kinshasa, DRC.

⁶ Dr. Kelly Askin's writings on DRC mobile courts can be found at blog.soros.org.

⁷ DRC is the site of the deadliest conflict since World War II, with an estimated 5.4 million persons perishing since civil war erupted in the aftermath of the 1994 Rwandan genocide. Further, it is believed that no fewer than 500,000 girls and women have been raped during this period in eastern DRC alone. Recent estimates by the Harvard Humanitarian Initiative suggest the actual figure might be much higher.

⁸ For an analysis of the potential of international development efforts, such as support for DRC's mobile courts, to achieve the objectives of international criminal justice, see Khan, Wormington, 'Mobile Courts in the DRC: Lessons from Development for International Criminal Justice' *Oxford Transitional Justice Research Working Paper Series* (2011).

<http://www.csls.ox.ac.uk/documents/OTJR-KhanandWormington-MOBILECOURTSINTHEDRC-LESSONSFROMDEVELOPMENTFORINTERNATIONALCRIMINALJU.pdf>