



Transitional Justice and Peacebuilding in the Democratic Republic of the Congo

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Abstract

For seventeen years now, the Democratic Republic of Congo (DRC) has been confronted by a vicious cycle of armed conflicts in which more than ten million people are estimated to have been killed. In dealing with the past, many efforts have been made and possibilities suggested, but unfortunately, the DRC has lost opportunities to establish the truth, promote peace, and consider reparations, reconciliation, and the prevention of further violence. The resumption of conflict is the result of top-down statebuilding, instead of a bottom-up approach. After the current conflict, the combination of judicial and non-judicial mechanisms of transitional justice could respond to the past abuses and contribute to the peacebuilding process in the DRC. Hence, this paper endorses, in addition to the International Criminal Court (ICC), the establishment of a hybrid international tribunal to hold accountable those who bear the greatest responsibility since 1996. As a non-judicial mechanism, this paper endorses the promotion of an indigenous mechanism, *Barza Intercommunautaire*, to help to resolve low-level disputes and a truth and reconciliation commission tasked with promoting reconciliation, formulating recommendations on institutional reform, identifying criteria of a lustration and vetting process, and identifying victims and recommending reparations. Furthermore, to avoid the risk of further militia activities, those removed from the security service sectors will be involved in national services of agriculture and other projects in order to contribute to the development of the country they have destroyed.

Introduction

For seventeen years now, the Democratic Republic of the Congo (DRC) has been confronted by a vicious circle of armed conflicts in which horrendous human rights abuses have been (and still are) committed. As a result, more than ten million people are estimated to have been killed (Kahongya 2012: 2), and conflicts at various levels continue. In light of many efforts undertaken at many levels, there is a hope that warring parties will stop fighting, negotiate a settlement, commit not to re-engage in armed conflicts, prevent future conflicts and involve themselves in reconstruction efforts. Furthermore, in order to move on after the violent conflicts that have

created hatred among people, the nation must be rebuilt. Accordingly, various activities that fall under the umbrella of peacebuilding can help to transform the conflict in the direction of peace.

Peacebuilding is the set of initiatives by diverse actors in government and civil society to address the root causes of violence and protect civilians before, during, and after violent conflict (Dambach 2013). Peacebuilding also refers to rebuilding relationships that have broken down between conflicting parties (Adalla 2009: 49). However, there is no agreed definition for peacebuilding. This paper aims to analyse the application of peacebuilding as an approach to dealing with the past abuses through transitional justice mechanisms, on the understanding that the situation “requires a clean break from the past injustices so as to prevent their recurrence” (Buckley-Zistel and Zolkos 2012: 3).

In order to rebuild the fabric of society and keep a sustainable peace, it is important for truth to be revealed and for people to talk about what happened to them or their beloved ones. Hence, transitional justice seeks to restore the dignity of victims and to establish trust among citizens and between citizens and the state (Borello 2004: 13). Thus, the aim of transitional justice is to contribute to sustainable peace and the rebuilding of a society based on the rule of law (Kerr and Mobekk 2007: 3). The guiding question is how transitional justice mechanisms dealing with the past can contribute to a sustainable peacebuilding process in the Democratic Republic of the Congo.

This paper begins with a brief overview of the different armed conflicts in the DRC and laying out the challenges to dealing with the past. We then analyse different attempts to address the past, that is, the peacebuilding process so far. Finally, we analyse transitional justice in a peacebuilding context in the DRC, and consider the way forward.

Armed conflicts in the DRC and dealing with the past

Brief overview of different armed conflicts

The first conflict began in the eastern part of the former Republic of Zaire in 1996 with the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL). The AFDL was a coalition movement created in October 1996 that successfully overthrew the government of Mobutu in 1997 in a military coup backed by the neighbouring countries such as Angola, Burundi, Rwanda, and Uganda (Tunamsifu 2013: 245). Soon after bringing Laurent-Désiré Kabila to power, some of his allies became involved in looting the minerals of the country – gold, diamonds and coltan, among others, and partly as a result of this, in July 1998 President Laurent-Désiré Kabila decided to send back foreign armies from the Democratic Republic of the Congo to their respective countries. The countries obviously refused, infuriating the president (Clark 2010: 24). The following month, the governments of Rwanda and Uganda turned against President Kabila and decided to back a new rebellion.

Indeed, the rebellion is considered as aggression due the support of Rwandan and Ugandan armies to the rebel group as stipulated by Article 2 (5) of the Convention for the Definition of Aggression (1933). The provision provides that “[p]rovision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the

request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection”.

After a military stalemate, a peace process was initiated, but quickly stalled. The, on 16th January 2001, President Laurent-Désiré Kabila was assassinated. He was succeeded by his son, Joseph Kabila Kabange, who immediately restarted the peace process. Finally, on 16 December 2002, a meeting was held in Pretoria, South Africa, where various elements/groups and entities involved in the Inter-Congolese Dialogue (ICD) signed a Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo. The Parties to that Agreement having armed forces, agreed to combine their efforts and to safeguard the sovereignty and territorial integrity of the Democratic Republic of the Congo. Indeed, additional institutions supporting democracy were also set up together with transitional institutions and among them was the truth and reconciliation commission. The peace agreement established the objective of an integrated national army, meant to include all the previously hostile forces.

After the end of the conflict marked by the Agreement of 2002 and the establishment of the Transitional Government in 2003; moves were made towards achieving the objective of an integrated national army, but this did not proceed as smoothly as planned. Laurent Nkunda, one of the commanding officers of the rebel Congolese Rally for Democracy, refused the offer to become a general under the new army, because of his allegiance to his indigenous ethnic group, the ‘Banyamulenge’. With the support of many soldiers under his command, in 2004, Nkunda created his own movement, the National Congress for the Defence of the People (CNDP) and began to fight against the Transitional Government in June; which marked the beginning of the third armed conflict (Tunamsifu 2013:246).

On 23 March 2009, a peace agreement was signed between the Government of the Democratic Republic of the Congo and the CNDP called the Peace Accord of 23 March 2009 (*Accord de Paix du 23 Mars 2009*). At the end of March 2012, however, former CNDP combatants deserted from the Armed Forces of the Democratic Republic of the Congo and National Police, claiming that the Democratic Republic of the Congo’s Government had failed to fully implement the peace agreement of 23 March 2009, starting new rebellion known as the M23.

In North Kivu, the mutiny by former National Congress for the Defense of People elements, which began in April, expanded. On 6 May, a communiqué was published announcing the creation of M23 by a decision of the military wing of National Congress for the Defense of People as a result of what it claimed was the Government’s failure to implement the peace agreements of 23 March 2009 (UNSC 2012: 3).

During different stages of the armed conflicts, aside from these major rebellions, a variety of other armed factions and warlords have been involved to varying degrees in serious human rights violations, and have had a hand in committing crimes, such as crimes against humanity and war crimes (Tunamsifu 2012).

Challenges of dealing with the past

The population of the DRC continues to suffer from massive violations of human rights and gross violations of international humanitarian law due to a vicious cycle of armed conflicts. In order to move from such situation to a peaceful future, the country will be confronted by the dilemmas of whether to undertake criminal sanctions against abusers, or whether to take non-criminal sanctions in order to rebuild and reconcile the nation. Yet, an “un-reconciled” society, argues Pablo De Greiff (2010: 25), would be one in which resentment characterizes the relations between citizens and between citizens and their institutions. Therefore, it is one in which people experience anger because their norm-based expectations have been threatened or defeated.

Indeed, in a stable country, the prosecution and punishment of individuals accused to have committed any crime in the territory is considered the best way to enforce national criminal laws and therefore promote the rule of law. According to Jonathan Burchell and John Milton “some forms of conduct are so deeply disapproved of as to cause the community to believe that some form of retaliation should be taken against those who engage in such conduct” (1991: 1). In this light, article 2 of the Congolese Criminal Code (2004) provides that transgressions committed on the territory of the DRC are to be punished in accordance with the law.¹ Furthermore, Alex Boraine argues that “prosecutions are guards against impunity and the risk of future violations” (2000:281). That is why Jonathan Burchell and John Milton (1991:2) state that detection and apprehension of persons who contravene the criminal law may be brought to punishment which involves the infliction of pain or suffering.

However, retributive criminal justice in the DRC is not the only way to respond to crimes committed. There is also a need for the past to be officially recognized and publicly revealed, to reconcile with the past, rehabilitate and compensate victims. In this way, Raoul Alfonsin as cited by Laura M Olson argues that “... punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience” (2006: 294). That is why, court proceedings as pointed out by Tyler Giannini *et al* (2009:6), may not be the best vehicle to uncover the truth, since it is generally in the defendant’s interest to deny guilt in order to evade culpability.

Indeed, given the sheer scale and widespread nature of the mass violations of human rights and gross violations of international humanitarian law committed in the DRC, it would be practically impossible to have a fair trial for everyone. And as Priscilla B. Hayner points out, “[m]any attempts to prosecute and punish those responsible for severe abuses under a prior regime have seen little success” (2011: 8). Hence, alternative mechanisms to criminal law could be a suitable means for the DRC in order to re-establish peace and promote reconciliation between divided people, particularly in the east of the country where the conflict has been concentrated, for a shared and common future. In a deeply divided society, states Alex Boraine (2000: 282), punishment cannot be the final word if healing and reconciliation are to be achieved.

In this way, while many possibilities have been suggested to deal with past crimes,

1 Translated from the original in French : « L’infraction commise sur le territoire de la République est punie conformément à la loi ». Code Pénal Congolais Journal Officiel de la RDC n° Spécial du 30 Novembre 2004.

unfortunately the DRC has lost opportunities to establish the truth, promote peace, consider reparations, achieve reconciliation, and prevent further violence.

Attempts to address the past through the peacebuilding process

As analysed by the International Centre for Transitional Justice (ICTJ 2011:2), the scale and impact of violations requires solutions that not only provide a meaningful measure of justice for very large numbers of victims but also which help reconstruct the basic elements of trust between citizens and the government institutions that are necessary for the rule of law to function effectively. Among attempts to deal with the past (including those that preceded the conflicts mentioned above) that have been tried in the DRC, the following can be mentioned.

The first initiative of note was the National Sovereign Conference in 1991 dealing with the issue of justice, accountability and good governance, as the Cold War came to an end, and calls for democratization of the country grew louder. Unfortunately, it was boycotted because the collaborators of the then President Mobutu, in danger of losing power, did not want to face the truth and account for crimes, mismanagement, and all kinds of violations against the Congolese people.

The second initiative was the Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo that opted for the creation of a truth and reconciliation commission (TRC) and was adopted by law on 30 July 2004. Unfortunately, at the end of the transitional period it had not opened a single enquiry due to a lack of political will and continuing insecurity.

The third was the referral of the situation of crimes within the jurisdiction of the International Criminal Court (ICC) committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002, by the transitional Government on 19 April 2004. To date, the court has so far limited its activities to the Ituri District by prosecuting a handful of perpetrators.

The fourth was the Conference on Peace, Security and Development of the North Kivu and South Kivu Provinces (*Conférence sur la Paix, la Sécurité et le Développement dans les Provinces du Nord-Kivu et du Sud-Kivu*) that allowed the signature of the Engagement Act between the Government and rebels groups such as the National Congress for the Defence of People (CNDP: *Congrès National pour la Défense du Peuple*) and the Congolese Patriot Resistance (PARECO: *Patriotes Résistants Congolais*). The conference parties agreed on the possibility of a new truth and reconciliation commission, but with the CNDP having violated the ceasefire, the initiative was not implemented.

The fifth was the peace agreement signed on 23 March 2009 between the Government and the CNDP. Article 4.1 provides that “the Parties undertake to maintain a dynamic reconciliation, pacification of hearts and minds, as well as good inter cohabitation as a requirement essential for good governance”.² When the International Criminal Court found Thomas Lubanga guilty of

2 Translated from the original in French : « Les parties s'engagent à entretenir une dynamique de réconciliation, de pacification des cœurs et des esprits, ainsi que de bonne cohabitation intercommunautaire en

war crimes, Bosco Ntaganda, who had integrated into the Armed Forces of the Democratic Republic of the Congo, but was now in danger of also being prosecuted by the ICC, deserted from the army claiming that the DRC Government had failed to fully implement the peace agreement of 23 March 2009.

The sixth was the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the region of 24 February 2013. In this framework, the Government of the DRC renewed commitments to reform the security sector, to consolidate state authority, and to further the agenda of reconciliation, tolerance and democratization. Furthermore, the states of the region renewed their commitment not to interfere in the internal affairs of neighbouring states, and to facilitate the administration of justice through judicial cooperation within the region. In this way, on 24 July 2013 the General Auditor of Armed Forces of the Democratic Republic of the Congo issued three international arrest warrants that the Government of the Democratic Republic of the Congo had sent, through diplomatic means, to the authorities of Rwanda requesting the extradition of former M23 rebels for insurrectional movement, war crimes and crimes against humanity. However, on 8 August 2013 Rwanda refused to extradite those warlords on the grounds that they may face the death penalty in the DRC. According to the Rwandan Minister of Foreign Affairs and Cooperation, Louise Mushikiwabo (2013), “[o]ne of the challenges we must address is how to extradite people to a country that still has the death penalty when we abolished it”.

The situation in the DRC demonstrates that civilians continue to pay the price of different armed conflicts as they cannot defend themselves. From the above, it can be deduced that the need for the past to be officially recognized and publicly revealed is crucial. The reactivation of the truth and reconciliation commission would be a good start, but at the time of writing the political will to do so remains unseen, and the current conflict also remains unresolved.

Transitional justice and the peacebuilding process in the DRC

The term ‘transitional justice’ refers to the combination of policies that countries transitioning from authoritarian rule or conflict to democracy decide to implement in order to address past human rights violations. Indeed, defining the notion of transitional justice, most scholars and practitioners have endorsed the definition provided by the former United Nations Secretary-General, Kofi Annan, in the report on ‘the rule of law and transitional justice in conflict and post-conflict societies’. The former Secretary-General defines transitional justice as:

the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof (UNSC 2004:4).

tant qu'exigence primordiale de bonne gouvernance ».

As mentioned above, holistic approach of judicial and non-judicial mechanisms are measures that societies in transition may adopt or combine to respond to the past abuses. The former UN Secretary-General, Kofi Annan, has suggested the following framework of transitional justice: criminal prosecutions, truth commissions, reparations, institutional reform, and vetting or lustration process. But the list is not exhaustive, with others including memorialization, amnesty and traditional dispute settlement systems. In the DRC, the combination of judicial and non-judicial mechanisms of transitional justice can respond to the past abuses and contribute to the peacebuilding process.

Judicial mechanisms

Judicial mechanisms of transitional justice include national judicial prosecution if national courts and tribunals have the capacity and if they are independent. Before the creation of the ICC, the UN Security Council showed the willingness on occasion to establish international ad hoc tribunals, as was seen in the former Yugoslavia and Rwanda. In some cases where circumstances allow, hybrid tribunals composed of international and local judges have also been created by a treaty or an agreement between the United Nations and the concerned government. Finally, with a view to overcoming the ad hoc nature of such judicial prosecution, the International Criminal Court was established, exercising its jurisdiction when states are unwilling or unable genuinely to carry out the investigation or prosecution.

Among judicial mechanisms, this paper endorses, in addition to the current activities of the ICC, the establishment of a hybrid international tribunal, which it sees as being crucial in order to hold accountable those who bear the greatest responsibility in planning or ordering atrocities, and those who continue to commit such atrocities in the DRC.

The Rome Statute that established the ICC entered into force on 1 July 2002 with the determination to put an end to impunity. Its preamble recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”, by emphasizing that it is “complementary to national criminal jurisdictions”. The ICC exercises its jurisdiction over persons for war crimes, crimes against humanity, genocide (article 5), and aggression (as of 2017) committed only after July 1, 2002, in accordance with the principle of non-retroactivity *ratione personae* (article 24). As such, the court cannot deal with crimes committed in the period between 1996 and June 2002. That is why, in the context of the DRC the establishment of a hybrid international tribunal composed of international judges and Congolese judges remains crucial to deal with crimes not covered by the ICC’s jurisdiction.

Having said that, the question of how realistic such an endeavour would be of course remains. The national judicial system alone will not be able to deal effectively with the past for different reasons. The national courts and tribunals that have jurisdiction over international crimes are unable to investigate large-scale serious crimes and prosecute a large number of perpetrators due to the lack of capacity. Besides this, the current regime is clearly unwilling to prosecute some perpetrators. It has shown a tendency to interfere with the judicial affairs, and many of those

suspected of being involved in past crimes have been promoted and granted important positions within the government as well as the army and police. As such, the Congolese national judicial system is in serious need of reform. As Tyrone Savage argues, from the colonial courts to Mobutu's machinations to Kabila's use of the courts to undermine critical opponents, the Congolese judiciary has effectively functioned at the pleasure of the executive (2006: 6).

Non-judicial mechanisms

Non-judicial mechanisms of transitional justice include the following components: truth and reconciliation commissions, lustration or substitute criminal proceedings and vetting processes, institutional reform, amnesty process, reparations, and building memorials.

For the non-judicial mechanism, this paper endorses the indigenous local mechanism called *Barza Intercommunautaire* to help to resolve low-level disputes and the truth and reconciliation commission with different task to promote reconciliation, formulate recommendations on institutional reform, identify criteria for lustration and vetting processes, and identify victims and recommend reparations. The Barza, deriving from a Swahili word signifying a meeting place for local leaders, is a process assembling leaders from various (often conflicting) groups to discuss issues of importance and resolve their problems.

At a broader level, the issue of truth and reconciliation commission is also in need of consideration. In her book on *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Priscilla B Hayner (2002: 14) uses the term "truth commissions" to refer to those bodies that share the following characteristics:

- (1) truth commissions focus on the *past*; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) these commissions are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord).

At the time when the book was published, there had been twenty-one truth commissions, and the author identified other essential elements in common:

all were created to look into recent events, usually at the point of a political transition; all investigated politically motivated or politically targeted repression that was used as a means to maintain or obtain power and weaken political opponents; and in each of these cases, the abuses were widespread, usually affecting many thousands of persons. Most of these commissions were created to be a central component of a transition from one government to another or from civil war to peace (Hayner 2002: 17).

Later, Mark Freeman, finding that Hayner's definition omitted other essential attributes of truth commissions, went on to define a truth commission as follows:

A truth commission is an ad hoc, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention (Freeman 2006:18).

In her latest updated publication, Priscilla B. Hayner found that Freeman's definition was more descriptive rather than definitional, and updated her own definition in the following terms:

A truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with final report; and (5) is a officially authorized or empowered by the state under review (Hayner 2011: 11-12).

The eastern part of the DRC, where the country's armed conflicts have been concentrated, remains the part affected most by various rebel groups. As a mechanism of conflict transformation in the North Kivu Province, it is crucial that the *Barza Intercommunautaire* be prioritized, promoted and re-structured to sensitize the affected ethnic groups for pacification and reconciliation in order for the population to take ownership of the process with a view to the rebirth of a truth and reconciliation commission. The initial truth and reconciliation commission failed to investigate a single case, and there remain many challenges to be overcome in this regard, but this there is still the need to establish a new truth and reconciliation commission. In order to increase its chances for being effective, before the establishment of a new commission, it is important that to some degree, conflict must be resolved, security restored, and the capacity and resources available to rulers engaged with political will. This is indeed a tall order, and the likelihood slim, but at the very least, it is advisable that a new truth and reconciliation commission be established after the 2016 elections, assuming that Joseph Kabila does not amend the constitution in order to attain a third term.

Concluding remarks

Many peace agreements have been signed by many warring parties since conflict broke out in the DRC in 1996. Unfortunately, the population affected by those conflicts has yet to experience any semblance of justice, and waits to know the reason behind those atrocities, and to know the truth about what happened to them or their beloved ones, in order for the process of reconciliation to occur. What is needed is the establishment of institutions that hold accountable perpetrators for past abuses and promote the rule of law; the creation of activities focusing on the removal of perpetrators from within public institutions and the creation of trust within governmental institutions; and the establishment of institutions that help to reveal the truth about what

happened and promote national reconciliation. But instead, the perpetrators of past crimes have been promoted and granted important positions within the government as well as the army and police. The root causes of armed conflicts have not yet been addressed, and consequently, the DRC remains in a vicious cycle of armed conflicts. As Edward Newman observes, “[i]f impunity remains, the social divisions remain open and volatile; if the state has not granted a public acknowledgement of the wrongs of the past, these wrongs constitute a continuing affront to society” (2002: 35). Furthermore, as the former UN Secretary-General notes:

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective (UNSC 2004: 4).

The implementation of national development plans requires a minimum of trust within public institutions. To respond to the past abuses, address the needs and the demands of victims, and to address the root causes of the country’s various armed conflicts that continue to bereave the Congolese population, some form of transitional justice should be considered.

Judicial mechanisms may hold accountable those who bear the greatest responsibility and provide reparation for victims. A truth commission may provide an opportunity for the promotion of national reconciliation. In addition, it may help the perpetrators who have executed plans of atrocities to apologize, seek forgiveness and be symbolically sanctioned. The indigenous organ of *Barza Intercommunautaire* may be helpful in the process of reintegration and the promotion of pacification. To avoid the risk from those removed from the security service sectors from establishing or joining armed groups, the possibility of establishing national service, for example, of agriculture and other projects in which people removed from public institutions can become involved and contribute to the development of the country they have destroyed should also be considered.

The proposals made in this paper represent lofty ideals, and the possibility that the necessary resources and political will can be made available for such endeavours is not necessarily high. But in the absence of such measure, it is difficult to see how root causes of the country’s various armed conflicts can be addressed, and how the persistent human rights and international humanitarian law violations can be put to an end. International, regional and national actors must understand by now that the limits of political solutions between warring parties or top-down state building attempts have been made abundantly clear. It is time for the root causes of armed conflicts to be addressed from the local level by involving affected population through a bottom-up approach.

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