
Applying and ‘misapplying’ the Rome Statute in the Democratic Republic of Congo

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Introduction

The Democratic Republic of Congo’s (DRC) ratification of the Rome Statute in 2002 created expectations in a country devastated by years of war. Several national armies and multiple militia and rebel groups had committed atrocities in a territory the size of Western Europe without a properly functioning justice system.¹ Proponents of the newly established International Criminal Court (ICC) hoped that it would be able to hold perpetrators accountable for war crimes, crimes against humanity and genocide.

A decade later, the ICC’s involvement in the DRC is a tale of symbolic achievements and difficult compromises. The country has been one of the most active situations for the Court, with the cases of Germain Katanga, Mathieu Ngudjolo, Bosco Ntaganda and Thomas Lubanga all coming before the ICC’s chambers. However, the government’s promises of ‘ending impunity’ ring hollow to many Congolese. Atrocities continue to be perpetrated in some regions, and parliament has failed to meaningfully reform the domestic justice system. There is also a glaring impunity gap for past crimes: the United Nations has documented over 600 unresolved cases of serious human rights violations committed between 1993 and 2003.²

This chapter examines how international criminal justice has been interpreted, implemented and contested within the DRC. Rather than

¹ See G. Prunier, *Africa’s World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (New York: Oxford University Press, 2009), 257–283.

² Haut Commissariat des Nations Unies pour les Droits de l’Homme, *Rapport du Projet Mapping concernant les violations les plus graves des droits de l’homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo* (2010) (‘UN Mapping Report’).

focusing on the trials of Congolese nationals in The Hague, it shifts the geographical frame to the DRC to the domestic level, given that efforts at national level to secure accountability for international crimes have received less scholarly attention. The chapter explores how the Congolese authorities have invoked, applied and 'misapplied' the Rome Statute to support the government's policy of *la lutte contre l'impunité*³ amidst the broader context of the ICC's intervention in the country. Importing international norms and standards into the Congolese legal system has produced contestation between various institutional actors over: (1) who controls the process (the Ministry of Justice, the Senate, the National Assembly?), (2) where justice should be administered (civilian or military tribunals?), and (3) how to interpret international criminal law (according to the aspirations of conflict-affected communities or the expectations of international actors?). While the chapter draws attention to the achievements of the Congolese authorities in prosecuting grave crimes, it also suggests that the political and legal conflicts over implementing the Statute have led to some distortions ('misapplications') of the legal framework applicable to international crimes at the domestic level.

The chapter begins with a brief overview of the Congolese legal system, followed by an assessment of the Congolese Parliament's attempts, over the course of 2010 and 2011, to overhaul the legislative framework for international crimes, in particular through Rome Statute implementing legislation and a government-backed hybrid court.⁴ It then considers how Congolese courts have used the Statute to reinterpret and change domestic criminal law.

The Congolese legal system: institutional framework and substantive law

President Joseph Kabila and his ministers of justice have stressed on a number of occasions that strengthening the rule of law and the 'struggle

³ In English, 'struggle against impunity'.

⁴ While this chapter focuses on the 2010–2011 parliamentary period, there have been other efforts to pass such legislation. In May 2014, the National Assembly rejected another proposal that envisaged setting up special chambers within the DRC's existing court system. More recently, in June and November 2015 the Congolese Parliament provisionally endorsed an amended version of the bill domesticating the Rome Statute. Negotiations on the amended bill are underway and it is now possible the Congolese Parliament will domesticate the Rome Statute by the end of 2015. See P. Labuda, 'Whither the Fight Against Impunity in the Democratic Republic of Congo?' (24 June 2015), <http://justicehub.org/article/whither-fight-against-impunity-democratic-republic-congo>.

against impunity' are among the government's most important objectives.⁵ The Congolese Constitution of 2006 laid the groundwork for a number of sweeping reforms in the domestic justice system. The principle of the separation of powers was introduced for the first time, and several individual rights gained constitutional status, in particular the right to a fair trial, the presumption of innocence and the principle of legality.⁶ The Constitution also created a new institutional hierarchy in the justice sector: the bifurcated system of justice, in which military and civilian courts co-exist on an equal footing, was to be gradually phased out. The High Military Court (*Haute Cour Militaire*) was to remain the supreme military jurisdiction, but its decisions would be subject to judicial oversight by the (civilian) Court of Cassation (*Cour de Cassation*). Thus, military tribunals would be made accountable to civilian (democratically accountable) authorities.⁷

However, years after the enactment of the Constitution, only some of these institutional reforms have been implemented. The Court of Cassation has not been established. Its functions are still performed by the Supreme Court of Justice (*Cour Suprême de la Justice*), which is also acting as the Constitutional Court (*Cour Constitutionnelle*) and the State Council (*Conseil d'Etat*).⁸ Furthermore, depriving the military of its institutional powers and shifting them to new and inexperienced civilian bodies has proved easier on paper than in practice.

Despite efforts to give civilian courts jurisdiction over international crimes, at the time of writing Congo's military courts retain authority over the prosecution of international crimes.⁹ Genocide, war crimes and crimes against humanity are not criminalised by the regular criminal code (*code pénal ordinaire*), which is applicable to civilians. Enacted in 1886 and substantially revised in 1940, its provisions predate international crimes as a legal category. The new draft criminal code

⁵ See Plan d'Action pour la Réforme de la Justice (2007); Ministry of Justice, Feuille de Route du Ministère de la Justice pour l'année 2009; Ministry of Justice and Human Rights, Preamble of Projet de loi relative aux Chambres spécialisées pour la répression des violations graves du droit international humanitaire: création, organisation, fonctionnement, droit applicable, compétence et procédure (2011).

⁶ See Articles 149–151, 17, 19 and 20, DRC Constitution 2006.

⁷ Article 153, DRC Constitution 2006.

⁸ Articles 153, 154, 157, DRC Constitution 2006. At the time of writing, legislation establishing the three courts remained blocked in parliament.

⁹ See M. Wets'okonda Koso, 'République Démocratique du Congo. La justice militaire et le respect des droits de l'homme – l'urgence du parachèvement de la réforme', Open Society Initiative for Southern Africa (2009), 17–22.

integrates *verbatim* the Rome Statute's definitions of international crimes, but it remains to be seen whether this legislation will be enacted.¹⁰

International crimes were first criminalised in the 1972 Code of Military Justice or CMJ (*code de justice militaire*).¹¹ The Military Criminal Code or MCC (*code pénal militaire*) and the Military Judicial Code (*code judiciaire militaire*) were enacted following a series of legislative reforms undertaken towards the end of the Second Congolese War.¹² None of these military codes have statutes of limitations for international crimes, which means that, at least in theory, crimes extending as far back as the early Mobutu era can still be charged under domestic military criminal law.¹³

As a monist legal system, international treaties can be applied directly by Congolese courts without further enabling legislation at the national level.¹⁴ The 2006 Constitution allows courts and tribunals to apply 'international treaties duly ratified', and the supremacy of international law over regular laws – but not the Constitution itself – is also recognised.¹⁵ The Rome Statute, like other international treaties, can thus be invoked and applied (subject to further legal requirements) by Congolese national courts. Given that the Mobutu regime acceded to many international humanitarian law (IHL) and human rights treaties, and that customary rules of IHL were in force throughout this period, international crimes have been part of the Congolese legal framework in a broader sense for a relatively long time.¹⁶

However, in a country where a significant proportion of such crimes has been and continues to be perpetrated by the armed forces, it appears unlikely that key perpetrators will be held accountable within the existing institutional framework. The entire Congolese judicial system suffers from a lack of resources and personnel. These difficulties are further

¹⁰ The Commission Permanente de Réforme du Droit Congolais (CPRDC) is working on the draft criminal code since 2006. Chapter IV, Draft Criminal Code.

¹¹ See Articles 502, 505, 530, Ordonnance-loi n° 72/060 du 25 septembre 1972 portant institution d'un Code de justice militaire, with subsequent amendments.

¹² Code judiciaire militaire, Loi N°023/2002 du 18 novembre 2002; Code pénal militaire, Loi N°024/2002 du 18 novembre 2002, and subsequent amendments.

¹³ Article, 166 MJC; Article 10, MCC. Joseph Désiré Mobutu ruled the DRC (then Zaire) from 1960–1961 to 1997.

¹⁴ See W. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: T.M.C. Asser Press, 2006), 129–171.

¹⁵ Articles 153, 215, 216, DRC Constitution 2006.

¹⁶ For details on conventions to which DRC is a party, see UN Mapping Report, 383–385.

amplified within the military justice system,¹⁷ whose hierarchical command structure leads to political interference and institutional pressures, and curtails a number of due process rights.¹⁸ There are also legal obstacles to trying some members of the military. For one, under Congolese military law at least one member of the judicial panel must be of equal or superior military rank to that of the accused.¹⁹ Furthermore, amnesty bills, though formally inapplicable to international crimes, have been interpreted broadly to shield some members of the military from prosecution.²⁰ Lastly, the Congolese military's sweeping powers also extend to trials of civilians,²¹ which is considered a violation of international custom.²²

This brief overview of the Congolese legal system suggests that international crimes have been criminalised in the DRC for the past forty years through a patchwork of domestic military criminal law, international treaties and customary international law. However, the institutional framework, in particular the military's control of prosecutions of international crimes, has made enforcement of these norms very difficult. Thus, while the Rome Statute's entry into force in 2002 altered the landscape of international criminal justice, has yet to bring about a radical re-articulation of the domestic legal framework for prosecuting international crimes in the DRC.

¹⁷ 'Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo', International Bar Association and International Legal Assistance Consortium (2009), 19–24 ('Rebuilding Courts and Trust').

¹⁸ UN Mapping Report, 439–444. See also Report of the Special Rapporteur on the Independence of judges and lawyers, Leandro Despouy, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, Including the Right to Development, Mission to the Democratic Republic of Congo, UN Doc. A/HRC/8/4/Add.2 (2008), paras. 22–40.

¹⁹ Articles 25 and 34, MJC 2002. ²⁰ UN Mapping Report, 454–455.

²¹ The MJC has been interpreted broadly to give military tribunals the power to try civilians, including for international crimes. This undermines the strict separation between civilian and military authority in the DRC as required by the 2006 Constitutions. Article 111.2, MJC 2002 (and 106, 108, 112, MJC). See also Wetsh'okonda Koso, 'La justice militaire et le respect', 45–47.

²² See Principle 9, Economic and Social Council, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity, UN Doc. E/CN.4/2006/58 (2006) ('Decaux Principles'). This has raised many criticisms from international actors and domestic civil society groups. See, e.g., the former UN High Commissioner for Human Rights, Louise Arbour, in 'UN High Commissioner Concerned at Kilwa Military Trial in the Democratic Republic of Congo', *UN Press Release*, 4 July 2007.

Implementation

La loi de mise en œuvre: 2010-2011

The legislative history of efforts to implement the Rome Statute illustrates the political stakes of judicial reform in the DRC. Such legislation would better align the Congo's domestic legal framework with international standards and help empower judicial institutions to cope with the challenges of prosecuting international crimes. However, despite the Congolese government's professed support for the 'struggle against impunity' and the intense lobbying efforts of Congolese civil society groups and international organisations, Rome Statute implementing legislation (*la loi de mise en œuvre du Statut de Rome*) remained elusive for over a decade.

A number of implementing bills have been considered during this time. Two draft bills were discussed between 2001 and 2002, but they never received the approval of President Kabila.²³ (It is worth remembering that the political situation in the DRC was extremely volatile in 2001–2002, with Kabila's Kinshasa-based government controlling only parts of the country.) Different versions of a governmental *projet de loi*²⁴ were prepared together with members of civil society between 2003 and 2004, and finally brought before parliament in 2005. But the bill was never put to a formal vote in the National Assembly or in the Senate, presumably because of the government's lukewarm support.²⁵ In 2008, two members of the National Assembly, Professor Nyabirungu and Honourable Mutumbe, drafted a revised version of the law (*une proposition de loi*).²⁶ Though negotiations reached an advanced stage, parliament did not pass the bill during its five-year term, which expired in November 2011.²⁷

²³ G. Musila, 'Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's Work in the DRC', Institute for Security Studies (2009), 16–17; see also footnotes and Annex II.

²⁴ The distinction between a *proposition de loi* and a *projet de loi* is significant. The latter is a government-endorsed legislative bill, usually drafted and sponsored by the Ministry of Justice. The former is a legislative bill submitted by either an individual MP or a group of MPs, but it usually does not have the executive's approval.

²⁵ The 2005 *projet de loi* can be found in L. Stone and M. du Plessis (eds.), 'The Implementation of the Rome Statute of the International Criminal Court in African Countries', Institute for Security Studies (2008), 114–139.

²⁶ See 'Plaidoyer pour l'adoption de la loi de mise en œuvre', International Center for Transitional Justice.

²⁷ In the current legislature (2012–2016), Honourable Balamage has sought to revive the implementing bill, but as of the time of writing it had not reached a vote in Parliament.

The 2008 version of the draft legislation would have introduced a series of technical reforms to harmonise the relationship between the ICC and the Congolese domestic system. It had four main objectives:²⁸ first, it would textually incorporate the Rome Statute's classification of international crimes into domestic criminal law.²⁹ Congolese courts would no longer have to choose the applicable law each time, which would ultimately lead to a more unified and coherent case law in this area. Second, civilian courts – not military tribunals – would have sole jurisdiction over international crimes. This would include trials of members of the military or the police.³⁰ The (civilian) Courts of Appeal would be competent in the first instance, with appeals adjudicated directly by the Supreme Court (or the Court of Cassation, if and when the judicial reforms of the 2006 Constitution are implemented). Third, a number of fair trial guarantees, especially relating to defendant rights, victim participation and witness protection, would be guaranteed at the domestic level for the first time.³¹ Lastly, a coherent framework regulating collaboration between the ICC's field units and domestic Congolese judicial and governmental authorities would be established.³²

Yet these seemingly technical reforms have encountered considerable political resistance. After March 2008, when it was first presented before the National Assembly, the implementation bill did not come up for

See 'Statut de Rome: Les parlementaires congolais appeles a acceler le processus de mise en "œuvre"', *Le Potentiel*, 18 June 2013.

²⁸ See La Proposition de loi modifiant et complétant le Code Pénal, le Code de procedure pénale, du Code de l'organisation et de la compétence judiciaires, le code judiciaire militaire et le code penal militaire en vue de la mise en oeuvre du Statut de Rome de la Cour Pénale Internationale ('Loi de mise en œuvre'). The March 2008 version of the draft bill will be referenced in this chapter, unless otherwise stated. The 2012 version of the bill replicated the earlier *proposition* in most regards.

²⁹ Article 9, Loi de mise en oeuvre. A workshop of the PAJ Committee (Commission Politique, Administrative et Judiciaire) of the National Assembly agreed on a revised text of the bill in June 2011.

³⁰ Articles 10–12, Loi de mise en oeuvre. Trials of members of the military or police would require at least one member of the judicial panel to be coopted from the defendants' respective organisation. This solution aimed to shield the implementation bill from a potential claim of unconstitutionality, in line with Article 156, DRC Constitution 2006.

³¹ The 2008 version of the implementation bill is less explicit about defendants' and victims' rights. In response to lobbying from civil society groups, the PAJ Committee agreed upon a revised version of the bill, with more procedural safeguards for victims, witnesses and defendants.

³² On the challenge of cooperation between the national institutions and the ICC see further Chapter 7 by Kambale in this volume.

discussion for over two years.³³ During that period, the president of the National Assembly declined to place the law on the parliamentary agenda despite the efforts of international actors and local civil society groups. For reasons that are not entirely clear, in November 2010 a preliminary debate on the bill was finally scheduled in the lower chamber of parliament.

Many parliamentarians opposed the bill, and the aims of implementing Rome Statute legislation were marginalised by a debate about the status of the death penalty in the DRC. Many MPs argued (incorrectly) that incorporating the Rome Statute into domestic law would force Congo to abolish the death penalty.³⁴ Other objections concerned the involvement of outside actors in advocating for the bill's passage, which was described as a form of neo-colonialism and as a threat to national sovereignty. Only after the bill's drafters returned the discussion to substantive issues relating to the proposed reforms did the National Assembly address issues such as the bill's handling of sexual violence, the privileges and immunities of Congolese officials, amnesty provisions, universal jurisdiction and the age of criminal responsibility. After a heated and fractious debate, the National Assembly's members voted to declare the implementation bill 'admissible' (*recevable*).

The Congolese media hailed the vote as a major achievement, but in fact it had little practical significance at that stage. The bill was only transferred to the Political, Administrative and Judicial (PAJ) Committee for further discussion. Admissibility votes are usually a formality in the legislative process, and so despite the optimistic rhetoric of many NGOs surrounding the vote,³⁵ the debate made it clear that implementing the Statute could not be taken for granted.³⁶ The vote also illustrated that the

³³ Why and how certain legislative proposals find their way onto the parliamentary agenda is not clear. The Speaker of the Congolese National Assembly wields disproportionate power in this regard, but other countries have the same or similar rules.

³⁴ Article 80 of the ICC Statute provides that 'Nothing . . . affects the application by States of penalties prescribed by their national law.' This point was raised by several MPs during the parliamentary debate.

³⁵ See, e.g., Coalition Nationale pour la Cour Pénale Internationale CN-CPI RDC, *La Coalition Nationale Salue la Recevabilité de la Proposition de loi de mise en œuvre du Statut de Rome de la Cour Pénale Internationale* (2011).

³⁶ This was borne out by the debate on 18 and 19 November 2011 when a separate bill on abolishing the death penalty was voted down by the National Assembly. See 'L'Assemblée Nationale rejette la proposition de loi sur l'abolition de la peine de mort', *Le Potentiel*, 26 Novembre 2011.

challenge of incorporating the Statute into domestic criminal law is primarily political. In a country with a troubled history of colonial exploitation, some lawmakers had reservations about the international community's efforts to promote justice. Some political parties were also aware that adjusting the legal framework put their representatives at direct risk of prosecution. Another challenge lay in the Congolese military's reluctance to relinquish jurisdiction over international crimes. The DRC remains a country in which the military and the government have close ties, and there is a mutual interest in being able to exercise control over prosecutions of international crimes.³⁷

The Congolese chapter of the Coalition for the International Criminal Court sought to address these concerns by organizing a workshop for members of the PAJ Committee, in which it addressed the bill's aims and the need for swift action. This was strengthened by the government's claims that justice reform would be one of the main items on the parliamentary agenda for the spring legislative session. However, two issues hindered further progress: the looming national elections scheduled for November 2011 and the government's rival *projet de loi* establishing 'special chambers' in the Congolese courts.

Specialised chambers, the Special Court and the ICC

In October 2010 the United Nations published a 'mapping report' documenting several hundred instances of unresolved crimes and human rights violations in the DRC. One of its recommendations was the establishment of hybrid chambers in the Congolese courts.³⁸ Though the possibility of creating an international or hybrid court had already been mooted after the 2002 peace accords, this time the idea was taken up with more enthusiasm. The MoJ prepared a *projet de loi* on establishing 'specialised chambers' in the Congolese courts with jurisdiction over international crimes, whose preamble acknowledged that the Rome Statute was inoperative for crimes committed before 2002, and that the government had fallen short in its efforts to combat impunity.³⁹

³⁷ See Wetsh'okonda Koso, 'La justice militaire et le respect', 71–77.

³⁸ See UN Mapping Report, 480.

³⁹ Ministry of Justice and Human Rights, *Avant Projet de loi portant création, organisation, fonctionnement, droit applicable, compétence et procédure des Chambres spécialisées pour la répression des violations graves du droit international humanitaire* (2010).

The draft bill (as well as its subsequent amended versions)⁴⁰ raised a number of intriguing questions about the principle of complementarity.⁴¹ Hybrid tribunals and internationalised courts had been tried elsewhere, but not in countries with ongoing ICC investigations. Among other things, the draft bill sought to clarify the relationship between domestic governmental authorities and the proposed court, as well as between the proposed court and the ICC. But two issues proved more difficult to resolve.

First, the chambers' proposed jurisdictional ambit waxed and waned over the course of the bill's drafting. At one point it was mandated to investigate all crimes 'ever committed' in Congo;⁴² it then shrank to a far more limited ten-year timeframe (1993–2003, in line with the scope of the UN Mapping Report), only to expand again to cover crimes committed from 1993 to the present.⁴³ In doing so, it created a novel legal situation, in which the 'specialised chambers' would exercise primary jurisdiction over international crimes, with secondary jurisdiction devolved to Congo's civilian courts, and the ICC enjoying (presumably) tertiary jurisdiction.⁴⁴ The complementarity principle thus broke new ground under the proposed legislation, with a mixed national-international jurisdiction co-exercising judicial powers over cases within the ICC's remit.

Second, the MoJ struggled to find a viable legal basis for prosecuting acts committed over such a long period of time. Drafts of the specialised chambers' bill incorporated the Rome Statute's definitions of international crimes, and applied them retroactively to crimes committed before

⁴⁰ Subsequent drafts no longer used the term 'specialised chambers'. Due to constitutional issues, the government agreed to elevate the proposed jurisdiction to the status of a 'Special Court' within the Congolese judicial system.

⁴¹ The enabling law had to resolve a number of logistical and legal issues, in particular the court's organisational and administrative structure, the participation of international and national staff, victim and witness protection mechanisms, and funding issues. See 'Commentaires sur l'avant-projet de loi portant création de chambres spécialisées' (a shortened version is available at www.hrw.org/fr/node/97326).

⁴² Article 15, Avant-projet de loi (first draft).

⁴³ The UN Mapping Report compiles data about crimes and human rights violations committed up to June 2003. Not coincidentally, this is the beginning of the transitional period and Kabila's consolidation of power.

⁴⁴ The ICC is mentioned only in the *exposé des motifs*. While the bill did not call into question the ICC's jurisdiction, it did not seek to regulate the courts' concurrent powers. The bill also assumed that the Rome Statute implementing bill would be adopted, and civilian courts would acquire jurisdiction over international crimes. See Article 14 (3), Avant-projet de loi, 25 November 2011 (first draft).

2002, which would have violated the principle of *nullum crimen sine lege*.⁴⁵ The bill's reference to the implementing bill among the chambers' sources of law – in addition to the Rome Statute's definitions of international crimes incorporated directly into the bill – only added to the confusion: it unnecessarily duplicated references to the same definitions of crimes, and incorrectly assumed that the two bills could be passed simultaneously.

The politics surrounding the two bills compounded these legal difficulties. The discussion about the DRC's legacy of impunity unfolded against the backdrop of the country's democratic elections scheduled for November 2011. In a paradoxical turn of events, parliament refused to endorse the government-backed bill, while the government obstructed parliament's efforts to enact the Rome Statute implementing bill. The Minister of Justice, Luzolo Bambi Lessa, defended the Special Court (as it was then called) in parliament in June and August of that year.⁴⁶ But parliamentarians from all sides of the political spectrum criticised the government's proposal, arguing that it would be dependent on external aid and cast Congo's own justice system in a negative light. It is also likely that many parliamentarians resented the MoJ's project, which would have marginalised parliament's implementing bill.⁴⁷

The fraught legislative histories of these two bills illustrate how efforts to incorporate international criminal law at the national level produce both legal difficulties and political resistance. In the DRC the seemingly technical task of transposing the Rome Statute's principles

⁴⁵ The Rome Statute's provisions cannot be applied retroactively to offences committed before 2002; however, in the initial draft of the specialised chambers' bill, the Statute would have served as the basis of prosecution for all crimes ever committed in the DRC.

⁴⁶ Articles 16–26, *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la répression des crimes de génocide, crimes de guerre et crimes contre l'humanité*, approved by the Conseil des Ministres, 2 August. The revised legislation, in an effort to devise a more coherent basis of the Court's jurisdiction, split the applicable law into two separate sections. The Special Court would adjudicate international crimes committed before 2002 according to one standard, and subsequent crimes pursuant to the Rome Statute, whose definitions were transposed and codified *verbatim*.

⁴⁷ Once the Senate conclusively rejected the revised Special Court (after months of wrangling), the implementing bill was not even put to a vote in parliament. Though there was no official explanation for this, parliamentarians presumably had little appetite for another protracted debate just months before the country's second democratic elections. See P. Labuda, 'The Lubanga Trial: The Democratic Republic of Congo's Failure to Address Impunity for International Crimes. A View from Inside the Legislative Process 2010–2011', Open Society Justice Initiative (2011).

into domestic law occurred in the shadow of a number of institutional conflicts between competing repositories of power. The MoJ represents the interests of the president and the executive, which is in turn closely tied to the military establishment. On the other hand, some political parties had little incentive to support initiatives that could implicate their own members, while other parliamentarians balk at legislative proposals that could strengthen the government's role in administering justice for international crimes. These and other institutional conflicts are the hidden dimension of seeking accountability for international crimes in the DRC.⁴⁸

Military justice: the Rome Statute and domestic criminal law

Aside from the political contestations surrounding the implementing bill and the Special Court, there is also the legal dimension of holding individual perpetrators to account. Prosecutions of international crimes at the national level produce a variety of challenges; to that end, the second part of this chapter explores why and how the military judicial authorities in the DRC have turned to the Rome Statute to support domestic trials. Observers have lauded these trials as a breakthrough, but they have also generated their own institutional and interpretive conflicts within the domestic justice system as to the relationship between national law and international norms.⁴⁹

A new interpretive tool

The Congolese legislature enacted the new MCC several months after President Kabila ratified the Rome Statute.⁵⁰ Given the temporal proximity of the two events – March and November 2002 – one might expect

⁴⁸ These conflicts will likely continue to play out at the domestic level in the current legislature and executive. A new version of the implementing bill was tabled in the current legislature, while the MoJ recently revived the idea of a mixed jurisdiction.

⁴⁹ G. Mattioli and A. van Woudenberg, 'Global Catalyst for Prosecutions? The ICC in the Democratic Republic of Congo', in P. Clark and N. Waddell (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008), 55–62.

⁵⁰ While beyond this chapter's scope, it is worth noting that the constitutionality of the Rome Statute's rapid ratification has been called into question. See M. Wetsh'Okonda Koso, 'Le malaise soulevé par l'application directe du Statut de Rome par le jugement n RP 084/2005 du 12 avril 2006 du Tribunal Militaire de Garnison de Mbandaka', *Revue Horizons*, 2 (2006), 154–157.

the definitions of international crimes in the military code to reflect the definitions contained within the Statute. Quite the opposite is true. The definitions not only diverge, they also conflict with principles of customary international law, and in some cases are less clear than the 1972 CMJ. These differences raise questions as to why the Congolese legislature enacted the MCC in its current form.

Among these divergences, perhaps the most striking is the definition of crimes against humanity, which the MCC conflates with war crimes.⁵¹ For instance, while IHL is the body of law applicable to armed conflict, according to the MCC, 'crimes against humanity are grave breaches of [IHL]', which can be '... committed against all civilian populations before or during war'. In fact, it is not possible to commit violations of IHL 'before . . . war', as the MCC suggests. There are also two separate lists of acts constituting crimes against humanity in the MCC but, unlike the *loi de mise en œuvre*, neither one replicates the acts criminalised in the Rome Statute. The first list invokes the Geneva Conventions, and enumerates acts that are usually considered war crimes in international law.⁵² The second list resembles the notion of crimes against humanity in the Rome Statute,⁵³ but with several intriguing differences: apartheid and forced disappearances do not appear in the MCC, but 'serious devastation of wildlife, plant life, soil and subsoil resources' and 'destruction of natural and cultural universal heritage' are criminalised. It also makes a pioneering attempt to criminalise aggression as a crime against humanity.⁵⁴ In short, while the MCC's concept of crimes against humanity departs from accepted norms of international law and the definitions established in the Rome Statute, in certain areas it is also more expansive than the Statute itself.

The level of detail with which the MCC defines crimes against humanity (albeit incorrectly in many instances) stands in marked contrast with its laconic regulation of war crimes. In one short provision, the MCC says: 'War crimes should be understood as any transgression of the law of the Republic committed in time of war and contrary to the laws and customs of war.'⁵⁵ It is significant that there is no penalty for

⁵¹ Article 165, MCC 2002. ⁵² Article 166, MCC 2002.

⁵³ Article 169, MCC 2002 and Article 7, Rome Statute.

⁵⁴ Article 169, MCC 2002: '... against the Republic'. The crime of aggression was not part of the Rome Statute's original jurisdiction.

⁵⁵ Article 173, MCC 2002. This provision is almost a carbon copy of its counterpart in the 1972 CMJ.

war crimes in this provision. Under Congolese criminal law and in line with the continental tradition of criminal law, there is no crime without a specific penalty (*nulla poena sine lege*, the principle of legality of penalties).⁵⁶ This means that, in theory at least, any prosecution of war crimes in the DRC would violate this fundamental principle of criminal law.

It is unlikely that the MCC's textual ambiguities are accidental given the intense discussions surrounding international criminal law at the time of its drafting.⁵⁷ The Congolese legislature enacted the MCC just six months after President Kabila ratified the Rome Statute and three weeks before the Rome Statute was promulgated in the *Journal Officiel*.⁵⁸ Two separate parliamentary bills incorporating the Rome Statute into domestic law had already been proposed in 2001 and 2002. In these bills the Rome Statute's definitions of international crimes were replicated at length, with only minor variations. Moreover, two high-level conferences organised by the MoJ in Kinshasa and Lubumbashi discussed these matters in late 2002, and the preamble to the MCC also expressly invokes the Statute.⁵⁹

Thus, the MCC's distortions may well have been deliberately introduced by the Congolese legislature. For instance, the decision not to provide penalties for war crimes suggests that the military authorities remained wary of drastic reform and the threat of accountability.⁶⁰ A resumption of hostilities was not out of the question as much of the DRC remained under de facto military rule in 2002; indeed, the ink was still drying on the Sun City accords.⁶¹ In sum, despite some of the MCC's

⁵⁶ Article 2, MCC: 'Nulle infraction ne peut être punie de peine qui n'était pas prévue par la loi avant que l'infraction fut commise.'

⁵⁷ The definition of genocide enacted by the Congolese legislator is almost identical to that of the Genocide Convention and the Rome Statute, but the DRC code is notable for its inclusion of political groups as a protected class.

⁵⁸ The Rome Statute was published in the *Journal Officiel* on 5 December 2002. See P. Kambale, 'L'application du Statut de Rome était-elle correctement faite? Une brève réplique à Marcel Wetsh'okonda', *Revue Horizons*, 2 (2006), 202–203.

⁵⁹ Exposé des motifs, MCC 2002.

⁶⁰ See 'Etude de Jurisprudence: L'Application du Statut de Rome de la Cour Pénale Internationale par les Juridictions de la République Démocratique du Congo', *Avocats Sans Frontières* (2009), 22–24, 27. Article 174 of the MCC seems to give military courts jurisdiction over enemy combatants only, which would strengthen this argument.

⁶¹ However, some believe institutional inertia may have contributed to the poor drafting of the MCC and MJC. Drafts of both codes could have been prepared in advance (perhaps years before 2002), and nobody noticed the contradictions during parliamentary debate. Author's interview with M. Wetsh'okonda Koso (Kinshasa, DRC, 24 April 2011).

progressive provisions, it appears that the Code's regulation of international crimes primarily reflected the entrenched interests of the Congolese military, which had little interest in aligning it with the ICC.

Case law: using the Rome Statute to interpret domestic law

The military justice system began investigating international crimes around the time that the ICC's first arrest warrants were issued. Though there was no direct causal relationship between these investigations, since then the Rome Statute and international criminal law have been a source of inspiration for Congolese military tribunals. Confronted with the MCC's inconsistencies and a lack of prosecutorial and judicial experience, the military authorities have turned to international practices to fill these gaps. Applying the Statute to domestic trials in the DRC has produced a number of progressive developments, such as increased protection of victims and witnesses, as well as innovative interpretations of the definition of rape. However, it has also led to some misapplications of other legal norms and principles, notably with respect to the relationship between domestic and international law or the fair trial rights of defendants. This section explores how the Rome Statute has featured in the case law of domestic military tribunals.

Despite the DRC's conflict-ridden past, no judicial decision on international crimes was made under the 1972 JMC.⁶² In fact, only two international crimes trials have ever addressed events preceding the entry into force of the revised MCC and the transitional constitution of 2003, and neither has dealt with the atrocities of the First and Second Congo Wars.⁶³ The pro-Kabila Court of Military Order (*Cour d'Ordre Militaire*), which operated during this time (1997–2003), made little effort to ground its judgments in sound domestic criminal law, let alone in international law.⁶⁴ Likewise, other de facto jurisdictions

⁶² UN Mapping Report, 425.

⁶³ In the *Ankoro* case the Military Court of Katanga province declined to uphold charges of crimes against humanity under the 1972 CMJ (Article 505) relating to events in November 2002. See Association Africaine de Defense des Droits de l'Homme, Représentation du Katanga, 'Rapport sur le procès de Ankoro'; A. Katanga, 'Lutte contre l'impunité, mots vains pour le gouvernement de la RDC' (2005). The other trial relating to events before May 2003 – when a new constitutional and military legal order entered into force – is the *MILOB*s prosecution for the murder and torture of two United Nations peacekeepers in 2003. In this case, which began only in 2007, the judges applied the Rome Statute.

⁶⁴ 'Cour d'ordre militaire: un instrument de répression et de mort en RDC: Procès Olenga Nkoy', Association Africaine de Défense des Droits de l'Homme (1998).

administered by rebel groups, such as the military courts of RDC-Goma and MLC, were more concerned with political contingency and short-term gain than substantive criminal law and due process.⁶⁵ The situation began to change towards the end of the transitional period and shortly before the entry into force of the 2006 Constitution. In March 2006, Lubanga, a militia leader from Ituri province, was arrested and transferred to The Hague. Shortly before that, charges of international crimes were also brought against him within the DRC's military justice system.

The Military Tribunal in Equatorial Province was the first to make use of the Rome Statute in an international crimes trial.⁶⁶ Since then, military tribunals in four other provinces – Katanga, Oriental Province, South Kivu and North Kivu – have also applied the Statute to clarify points of law and procedure in around fifteen separate trials for war crimes and crimes against humanity.⁶⁷ In the absence of institutionalised case reporting in the DRC it is not possible to establish a comprehensive list of such cases. Tribunals are reluctant to share information about prosecutions of members of the military, and while the media tries to keep the public aware of such developments, many court documents and trial transcripts remain inaccessible or lost; in some instances, the documents may not have existed in the first place.⁶⁸

The MCC's definitional flaws seem to lie at the heart of the military justice system's embrace of the Rome Statute. In *Mutins de Mbandaka*, the judges candidly explained that the MCC 'conflates crimes against humanity with war crimes, which, incidentally, is clearly defined by the Rome Statute of the International Criminal Court'.⁶⁹ In *Bongi*, the tribunal was equally clear that 'this internal legislation, namely the military criminal code . . . has, however, a glaring loophole and does not criminalise war crimes, which are left with no sanction . . . in this situation, a remedy to these loopholes must be found by invoking the Rome Statute'.⁷⁰

⁶⁵ UN Mapping Report, 408–409.

⁶⁶ Tribunal Militaire de Garnison, *Mutins de Mbandaka* ('TMG de Mbandaka'), jugement avant dire droit, 12 January 2006, RP 086/05.

⁶⁷ To date, no genocide cases have been brought, although Thomas Lubanga was initially indicted for genocide (alongside other crimes). The main trials in the DRC are described chronologically in UN Mapping Report (n 2), 410–421.

⁶⁸ Some transcripts were compiled by the International Center for Transitional Justice in *Recommandations de l'atelier sur l'évaluation de la justice militaire comme mécanisme de répression des crimes internationaux* (2009).

⁶⁹ TMG de Mbandaka, *Mutins de Mbandaka*, 20 June 2006, RP 101/06, 16.

⁷⁰ TMG de l'Ituri, *Bongi*, paras. 66 and 71. Other judgments also mention the MCC's conflicting definitions; See TMG de l'Ituri, *Bavi*, 19 February 2006, 37; TMG de l'Ituri,

The courts have also articulated other rationales for applying the Rome Statute. In *Songo Mboyo*, the tribunal noted that ‘the Rome Statute of the ICC is very favourable to the suspects eliminating capital punishment and providing efficient protection mechanisms for victims [meriting] its application in the ongoing proceedings’.⁷¹ The tribunal in Oriental Province argued in similar terms that, ‘the provisions of the Rome Statute are more humanitarian, in effect, less severe with respect to its penalties, there being no capital punishment’.⁷² In the *Kibibi* decision, these various strands of argumentation were brought together: ‘This legal instrument [i.e., the Rome Statute] is more explicit with respect to the definition of concepts, more favourable to suspects in that there is no death penalty and better adapted in that it foresees clear mechanisms for victim protection.’⁷³

While the military tribunals are fairly clear about *why* it makes sense to apply the Rome Statute – an international treaty – to domestic prosecutions, they have more difficulty explaining *how* this is possible in legal terms.⁷⁴ Some tribunals have quoted Articles 153 (‘courts may also apply international treaties’) and 215 (‘international treaties have superior authority [*autorité supérieure*] over regular laws’) of the 2006 Constitution, but the judges seem to view these provisions as self-explanatory. There is little legal analysis of how an international treaty can or should displace domestic law. The theory of monism, arguably the strongest argument in favour of the Rome Statute’s direct application, is mentioned only in the *Bongi* decision.⁷⁵ Notably, the majority of tribunals make only passing and incomplete references to the DRC’s ratification of the Rome Statute, or to its self-executing character in Congolese domestic law.⁷⁶

Kahwa, 2 August 2006, RP 039/2006, 24. TMG de Mbandaka, *Songo Mboyo*, 12 April 2006, RP 084/2005, 12.

⁷¹ TMG de Mbandaka, *Songo Mboyo*, 2.

⁷² Cour Militaire (‘CM’) de la Province Orientale, *Bongi*, 4 November 2006, RPA 030/2006, 15–16.

⁷³ CM du Sud Kivu, *Daniel Kibibi et autres*, 21 February 2011, RP 043/2011, 16.

⁷⁴ Usually, these arguments appear alongside those concerning definitional gaps and constitutional arguments. But see CM de la Province Orientale, *Bongi*, 15–16.

⁷⁵ *Ibid.*, para. 74.

⁷⁶ The Rome Statute’s self-executing character and its reciprocal application (or lack thereof) by other states parties are never raised. There is no proper legal analysis of the legality of the ratification of the Rome Statute, or its entry into force (significant for the principle of non-retroactivity). See *Etude de Jurisprudence*, 14–16.

The legality of the direct application of the Rome Statute's Elements of Crimes (EoC) and Rules of Procedure and Evidence (RPE) to displace binding domestic law is equally problematic. None of the judgments examine the legal status of the EoC under international law or its relationship to Congolese criminal law and procedure. For instance, the *Bavi* and *Kahwa* decisions determine culpability on the basis of the EoC, but fail to mention it as a source of law.⁷⁷ Likewise, the *Bongi* decision, which rigorously analyses the constitutive elements of pillage and homicide as war crimes by applying the five-pronged test from the EoC, fails to acknowledge it as the source of this new legal standard.⁷⁸ Some judgments go even further and make direct use of the Rome Statute's RPE.⁷⁹ For instance, in *Kibibi* the Military Court of South Kivu, after endorsing the *Songo Mboyo* and *Mutins de Mbandaka* decisions, applied the rules relating to victim protection and testimony.⁸⁰

While it is clear that, in instances like these, the tribunals are filling significant gaps in the Congolese criminal procedure, the questionable legality of transposing an international criminal tribunal's internal set of rules to displace binding domestic law seems somewhat lost in the excitement surrounding international criminal justice. For instance, the *Kibibi* trial lasted just two weeks, which raises questions about the tribunal's respect of fair trial standards and defendants' rights. The military judges administering international crimes trials in the DRC have also struggled to articulate a coherent legal basis for the Rome Statute's application to Congolese law. Although this, on its own, does not undermine the legitimacy of the tribunals' judgments, it does point to a flexible understanding of how international law can be used – and potentially abused – to enhance domestic justice.⁸¹

Thus far, the Rome Statute has been applied to a variety of charges in both war crimes and crimes against humanity trials; there have been no

⁷⁷ *Ibid.*, 25–34. TMG de l'Ituri, *Bavi*, 37–43, CM de la Province Orientale, *Bavi*, 28 July 2007, RPA 003/07, 30.

⁷⁸ Art. 8(2)(c)(i) ICC EoC.

⁷⁹ Rules 70 (in particular) and 66(4) ICC RPE. See also *Etude de Jurisprudence*, 42–48.

⁸⁰ Rules 68(2) and 87(3) ICC RPE. See *Avocats Sans Frontières, Le Lieutenant-Colonel Daniel Kibibi Mutware condamné à 20 ans de prison pour crimes contre l'humanité* (2011).

⁸¹ The direct application of international law in a domestic court is a threshold legal question, which gives rise to divergent solutions depending on the type of legal system. To date, no Congolese military tribunal has performed a comprehensive analysis of the applicability and enforceability of the Rome Statute at the domestic level. See CM du Katanga, *Kilwa*, 28 June 2007, RP 010/2006.

trials of genocide. Application of the Rome Statute has proved more successful in trials involving crimes against humanity. On several occasions, tribunals have referred to the Statute and the case law of the International Criminal Tribunal for Rwanda (ICTR) to interpret the notion of 'systematic' and 'widespread' attacks against civilians.⁸² By contrast, the military justice system has had more difficulty prosecuting war crimes cases. In fact, indictments for war crimes have been thrown out in the majority of cases (with only the charges concerning ordinary crimes or crimes against humanity upheld).⁸³ The *Mitwaba* trial illustrates these challenges: the civil parties brought war crimes charges,⁸⁴ while the prosecutors, who doubted it would be possible to convince the judges that an armed conflict was still ongoing in 2005, opted for crimes against humanity.⁸⁵

The notion of armed conflict has also been a recurring and contentious issue. The tribunals have struggled with the threshold questions of whether the DRC continues to be in a state of war after the 2002 peace accords (and the Rome Statute's ratification), and if so, whether the armed conflict should be classified as international or non-international. In the *Bongi* trial, the judges performed a thorough analysis of the legal framework applicable to international and domestic conflicts, and conceded that 'foreign armies, including those of Uganda and others have aggravated this situation by providing war materials, funds and personnel to one or other armed group'; yet the tribunal concluded that 'all hypotheses of war crimes committed in the context of an international armed conflict are to be excluded because the FRPI [Patriotic Resistance Forces of Ituri], the UPC army [Union of Congolese Patriots], the FNI army [National and Integrationist Front], the PUSIC army [Party for Unity and Safeguarding of the Integrity of Congo] are, in fact, only

⁸² See Article 7(1), ICC Statute and Article 169, MCC 2002. Both the *Songo Mboyo* and *Mutins de Mbandaka* decisions require – for reasons that remain unclear – that weapons of war (*armes de guerre*) be used to commit crimes against humanity. See TMG de Mbandaka, *Songo Mboyo*, 26.

⁸³ CM du Katanga, *Ankoro*, 20 December 2004, RP 02/2004. See also, TMG de l'Ituri, *Kahwa*; TMG de l'Ituri, *Mutins de Bunia*, 18 June 2007, RP 008/2007; TMG du Haut Katanga, *Gédéon Kyungu*, 5 March 2009, RP 0134/2007; CM du Katanga, *Kilwa*, 28 June 2007, RP 00/2006.

⁸⁴ CM du Katanga, *Mitwaba*, 25 April 2007, RP 011/2006, 7.

⁸⁵ In the end, the court threw out all charges relating to international crimes, and punished the suspect only for failing to assist a person in danger: an ordinary military crime under the MCC. In this trial – as in many others – prosecutors had presented ample proof of ongoing hostilities amounting to a domestic, or even an international, conflict. *Etude de Jurisprudence*, 54–58.

domestic militias or armed groups fighting against the Congolese armed forces'.⁸⁶ In the *Bavi* case, the judges cited both the ICTY's *Tadic* and the ICTR's *Akayesu* and *Bagilishema* jurisprudence, and also concluded that there was an internal conflict in Ituri.⁸⁷ Notably, none of the tribunals have looked to the ICC's confirmation of charges against Lubanga to help circumscribe the parameters of armed conflict in Congo, which is surprising given the tribunals' general willingness to refer to Court practice.⁸⁸

The tribunals' reluctance to detail the causal link between military activities and armed conflict, or to re-consider the duration of 'international armed conflict' in the country (June 2003 being the cut-off point suggested in the ICC's Lubanga decision),⁸⁹ has several consequences. For victims there is little guidance as to which charges and claims to pursue before the Congolese tribunals.⁹⁰ It would also suggest that the military justice system is invested in downplaying the continued existence of hostilities in the country, as this would be a tacit acknowledgment of the government and military's failures. It could also be interpreted as an effort to shield members of the military from war crimes prosecutions. The reluctance to extend the duration of international armed conflict makes prosecution of foreign perpetrators or linking atrocities to foreign armies more difficult.

The relationship between the ICC and national jurisdictions is governed by the principle of complementarity. Although it forms part of the admissibility criteria for adjudicating crimes before the ICC, complementarity has also been understood more broadly as a burden-sharing relationship in which the ICC can and should encourage domestic

⁸⁶ TMG de l'Ituri, *Bongi* (n 56) 13–14 and para. 93, and 5 and para. 7. Confirmed by CM du Province Orientale, 4 November 2006, RPA 030/06, 19. The judges amended the prosecutor's act of indictment, which was based on Article 8 (2) (b), Rome Statute, to reflect the non-international character of the war crimes (Article 8 (2) (e)). *Ibid.*, paras. 75–80.

⁸⁷ Article 29, MCJ 2002. TMG de l'Ituri, *Bavi* (n 70), 37–41. The same tribunal reached an analogous decision in the *Kahwa* trial, though its legal rationale is incomplete; TMG de l'Ituri, *Kahwa*, 28–29.

⁸⁸ The International Court of Justice's judgment condemning Uganda for its intervention in eastern Congo has not been cited either: *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168.

⁸⁹ Décision sur la confirmation des charges, Lubanga, *Situation in the DRC*, ICC-01/04-01/06, Pre-Trial Chamber I, ICC, 29 January 2007, para. 240.

⁹⁰ The military tribunal in the *Bongi* case began addressing some of these questions. See TMG de l'Ituri, *Bongi*, paras. 79–97. See also *Etude de Jurisprudence*, 58–59.

prosecutions.⁹¹ The trial of Lubanga is interesting because of its purported ‘catalysing’ effect on domestic prosecutions of analogous cases. The suspect was transferred to The Hague to stand trial for conscripting and enlisting child soldiers, which was an offence that the MCC does not criminalise. According to the Office of the Prosecutor (OTP), it stepped in because the Congolese military tribunals were unable to prosecute.⁹² Since then, two domestic trials have included charges of child conscription. In *Biyoyo* the tribunal refused to apply the Rome Statute’s definition of this crime, and instead convicted the defendant for ordinary crimes, including ‘illegal detention of a person’ and ‘kidnapping’.⁹³ In *Gédéon Kungu*, prosecutors requested an indictment for the war crime of ‘enlisting . . . about 300 children below the age of 15, among whom 150 have been identified and demobilized’;⁹⁴ but the military tribunal threw out these charges, and issued a conviction only for ordinary military crimes, terrorism and crimes against humanity.⁹⁵

In light of eastern Congo’s reputation as the ‘rape capital of the world’, it would seem reasonable to expect many cases involving charges of rape. Surprisingly, rape as a war crime has been sanctioned in only a handful of cases: in *Bavi*, for instance, the tribunal applied the Rome Statute’s EoC and used international case law to establish the defendant’s command responsibility for ordering his soldiers to commit rape.⁹⁶ In *Kilwa* the judges rejected all charges of war crimes, including rape.⁹⁷ But this low figure is misleading. So far, Congolese military tribunals have been more willing to classify rape, and especially mass rape, as a crime against humanity. This trend began in 2006 with *Songo Mboyo*, one of the earliest judgments, and continued through 2011, with the *Kibibi* verdict (which found eleven members of the Congolese armed forces guilty of raping eighty-nine women) and the

⁹¹ On complementarity and its different meanings, and especially the ICC’s ‘catalytic effect’ on domestic prosecutions, See S. Nouwen, *Complementarity in the Line of Fire. The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (New York: Cambridge University Press, 2014), 34–110, 337–410.

⁹² The DRC’s authorities had issued an arrest warrant charging Lubanga with crimes against humanity and genocide. The ICC stepped in because the Congolese prosecutors did not bring charges of child conscription and enlistment as a war crime, which was impossible because the MCC does not criminalise these acts. See W. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’, *Journal of International Criminal Justice*, 6 (2008), 731–761.

⁹³ TMG de Bukavu, *Biyoyo*, 17 March 2006, RP 101/2006, 7–10.

⁹⁴ Auditorat militaire près le TMG du Haut Katanga, *Gédéon*, 20 July 2007, RMP 0468/MAK/2007, 5.

⁹⁵ TMG du Haut Katanga, *Gédéon Kyungu*, 5 March 2009.

⁹⁶ TMG de l’Ituri, *Bavi*, 42–43. ⁹⁷ CM du Katanga, *Kilwa*, 28 June 2007.

conviction of two members of the Democratic Forces for the Liberation of Rwanda (FDLR) of, among others, rape as a crime against humanity.⁹⁸

Cases involving charges of rape have featured progressive and unconventional uses of international law and the Rome Statute.⁹⁹ In *Songo Mboyo*, the Rome Statute served to advance a novel legal interpretation of '[r]ape as an inhuman act [which] is defined differently under domestic and international law. In fact, the interpretation provided by the Elements of Crimes . . . considerably extends the notion of rape to also include any other inhuman act with gender-specific connotations.'¹⁰⁰ The EoC allowed the judge to criminalise all forms of rape, including against men,¹⁰¹ and to give greater weight to the testimony of rape victims than is usually permitted in the Congolese justice system.¹⁰² Both *Songo Mboyo* and the *Mutins de Mbandaka* decision, another case involving charges of rape,¹⁰³ assess the credibility of rape victims' first-hand testimony and conclude that it should usually be privileged over that of other trial participants.¹⁰⁴ These are creative and progressive instances of judicial decision-making, though – as explained above – the legality of the tribunals' direct application of the EoC to displace binding domestic law raises questions.

A growing body of case law has matured in the last few years. The attention surrounding the ICC's work in the DRC, and the transfer of a few militia leaders to stand trial in The Hague, have made the Rome Statute a source of inspiration for Congolese judges and prosecutors. The military judicial system has drawn original insights from the Statute and ICL jurisprudence to supplement the domestic legal framework, and to address its lack of experience in dealing with complex international crimes trials. It is also encouraging that the military has begun holding members of its own armed forces (not just militias) accountable.

⁹⁸ CM du Sud Kivu, *Daniel Kibibi et autres*; 'Deux elements FDLR comdanés pour crimes contre l'humanité en RDC', *Avocats Sans Frontières* (2011).

⁹⁹ In August 2006, a new law on sexual violence was enacted, aligning Congolese criminal law with international standards in this area: Loi no. 06/18 du 20 juillet 2006. Many of the Rome Statute's progressive institutions relating to rape and victim protection were incorporated into this law.

¹⁰⁰ TMG de Mbandaka, *Songo Mboyo*, 27. ¹⁰¹ *Ibid.*, 32.

¹⁰² *Ibid.*, 27. This decision is examined by J.-P. Fofe Djofia Malewa, 'Commentaire du Jugement Songo Mboyo: Une illustration de l'éclairage de la justice nationale par les textes et la jurisprudence pénaux internationaux', *Revue Horizons*, 2 (2006), 119–140.

¹⁰³ TMG de Mbandaka, *Mutins de Mbandaka* and, on appeal, CM de l'Equateur, *Mutins de Mbandaka*, 15 June 2007, 12–14.

¹⁰⁴ TMG de Mbandaka, *Songo Mboyo*, 27–34. CM de l'Equateur, *Mutins de Mbandaka*, 15.

But serious challenges remain: in some trials there have been evidentiary deficiencies, and facts are not always construed in the light of the applicable law. Judges have also evinced a rather liberal understanding of how and why international law should displace domestic legislation, leading to both progressive interpretations of some legal norms (for instance, the definition of rape) and regressive infringements of others (fair trial rights of defendants). Victim and witness protection is still in its infancy, and the penitentiary system allows too many perpetrators to escape. Lastly, international crimes are prosecuted in an uneven and selective manner, and some perpetrators, especially high-ranking members of the Congolese military, remain beyond the reach of the judicial system.¹⁰⁵

Conclusion

In 2003, President Joseph Kabila argued that, 'because of the specific situation in my country, the competent authorities are unfortunately not capable of investigating [international] crimes or undertaking the required inquiries without the participation of the International Criminal Court'.¹⁰⁶ While some authors have criticised the self-serving nature of Kabila's self-referral and the selectiveness of the OTP's investigations in the DRC,¹⁰⁷ there is little doubt that the Congolese justice system still faces daunting challenges. The inconsistent codification of international crimes in the MCC and the military tribunals' historical jurisdiction over such offences reflect the military's disproportionate influence on criminal justice, and remain a compelling reason for aligning the domestic legal and institutional framework with internationally recognised standards.

The Rome Statute has played an important role during the last ten years as a catalyst for judicial and legal reform at the domestic level. In over a dozen trials, the military tribunals have drawn on the Statute and applied the case law of international tribunals, leading to many important

¹⁰⁵ See Etude de Jurisprudence, 42, 68, 106–109; 'Putting Complementarity Into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya', Open Society Foundations (2011), 35–36.

¹⁰⁶ Kabila's letter is available in Musila, 'Between Rhetoric and Action'.

¹⁰⁷ See P. Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda', in P. Clark and N. Waddell (eds.), *Courting Conflict?*, 37–42; N. Jurdi, *The International Criminal Court and National Courts. A Contentious Relationship* (Surrey, UK: Ashgate, 2011), 173–180; P. Gaeta, 'Is the Practice of Self-Referrals a Sound Start for the ICC?', *Journal of International Criminal Justice*, 2 (2004), 949–952.

convictions. The legal framework of the Statute was also the driving force behind two important initiatives: the specialised chambers, which initially sought to establish a domestic mechanism with international elements for adjudicating international crimes, and implementing legislation, which could put in place a robust accountability framework for the future. Thanks to the efforts of Congolese civil society and the work of international organisations, knowledge about the ICC and international criminal justice increased considerably during this time.

However, the history of these two initiatives also speaks to the political dimensions of the international justice project. The political context of the ICC's intervention in the DRC (and increasingly in other African countries) has made international actors – NGOs and donor states alike – uneasy bedfellows for some Congolese parliamentarians, and undermined the viability of more sweeping judicial reform in the country. For some military judges, the role of international law in addressing mass atrocities remains vague. These difficulties should be borne in mind as the DRC continues to search for viable ways to ensure accountability for past and continuing human rights violations.