

CHAPTER II. TRANSITIONAL JUSTICE

A. Challenges facing transitional justice

1. Number and types of crimes committed and number of perpetrators and victims

992. Section I illustrated the scale and severity of the crimes committed against civilian populations during the period under consideration. These violations were committed on a massive scale during more than a decade of conflicts, and by various armed forces and armed groups. The number of violations reaching the threshold of crimes under international law is so high that even a properly functioning justice system working at full capacity would not be able to handle such a large number of cases. The perpetrators of those crimes number in their thousands, even tens of thousands, and their victims in their hundreds of thousands.

993. The crimes committed were often widespread and systematic. In the majority of cases, the armed forces and groups deliberately attacked civilian populations, repeatedly applying a disproportionate use of force. The systematic or widespread nature of the crimes committed against vulnerable groups, women, children and defenceless refugees, raises questions on the reasons behind the violence unleashed, on the existence of a deliberate policy of attacking certain categories of people on ethnic or political grounds, or by reason of their nationality. Such questions will not be answered satisfactorily before a court of law, which would primarily seek to assess the individual responsibility of perpetrators without attempting to understand the conflict as a whole, how it came into being and the underlying reasons for it. A judicial mechanism, in and of itself, can only look in a limited and fragmentary way at such violence, and can only deal with a limited number of cases, without taking into account the petitions of the majority of victims.

2. Characteristics of the conflict

994. A further difficulty in the implementation of some of the transitional justice measures advocated concerns the participation of foreign armed forces and groups in the waves of violence that swept across the country in the period 1993-2003. The Team has gathered information confirming that, in many incidents recorded, armed forces and groups from countries other than the DRC were involved.

995. The frequently decisive role played by foreigners in the armed conflicts on Congolese territory poses a serious challenge to the implementation of certain global transitional justice measures in the DRC. The process of seeking truth and finding facts, even more so the establishment of accountability, will be difficult in certain cases without the help and cooperation of third-party States or their citizens. It will be more difficult to establish the extent to which foreign commanders, sponsors and those who gave orders are responsible without the assistance of the authorities in the relevant countries. Even in the case of non-judicial transitional justice mechanisms, examining the role and involvement of foreign armed groups risks engendering diplomatic reticence and halting

the process of national reconciliation by hiding important aspects of the history of the conflict.

996. In this respect, the Security Council reminded “occupying” foreign forces in 2001 that they “should be held responsible for human rights violations in the territory under their control”.¹⁷⁰⁶ Furthermore, the Council also reminded States in the region that were involved in the armed conflict of their obligations under international law “to bring to justice those responsible and [...] facilitate measures ...to ensure accountability for violations of international humanitarian law.”¹⁷⁰⁷

3. Context

997. The DRC’s size and the extent of the devastation to its infrastructures present a challenge to any large-scale operation such as a national consultation process, truth and reconciliation initiatives, reparation programmes or judicial investigations. The distances which people must travel to collect information on the incidents that occurred across the territory are vast, as are the distances that would separate the victims of affected communities from the location of the mechanism that would hear them. However, the experience gained during the last elections served to demonstrate that this challenge is not insurmountable. Funding measures intended to help victims and witnesses gain access to transitional justice mechanisms need to be a priority of the DRC’s partners working in this area.

998. Although peace currently prevails across most of Congolese territory, the situation remains unstable. The State does not monopolise the use of force, since Congolese and foreign armed groups still control certain areas of the country, particularly in the Kivus and in Ituri. The peace process in the east of the country remains very fragile. In such cases, certain investigations may prove difficult and perhaps impossible to carry out, even with the assistance of MONUC.

999. The Congolese security forces are not in a position to guarantee the safety of the civilian population, including the main actors of the judicial system. On the contrary, the forces themselves are a source of insecurity and represent some of the main perpetrators of violations of human rights in the country, according to the most recent reports from MONUC’s Office of Human Rights. The work of human rights defence NGOs is constantly compromised by the high incidence of intimidation by the authorities, which risks holding back the few transitional justice initiatives undertaken by civil society.

1000. These security problems must be overcome, particularly with regard to the victims, witnesses, judicial actors and staff of any transitional justice mechanism. Measures intended to protect witnesses and members of the judicial system are crucial to assure the security of those who would collaborate or worked with transitional justice institutions.

¹⁷⁰⁶ See Resolution 1341 (2001) of 22 February 2001, par. 14.

¹⁷⁰⁷ See for example resolution 1291 (2000) of 24 February 2000, par. 15.

B. Implications for transitional justice

1001. Because of the many challenges that arise when seeking justice for the crimes committed in the DRC, it is crucial that a holistic policy of transitional justice be adopted, which involves relying on diverse and complementary mechanisms, both judicial and non-judicial. The process requires a strategy based on a global view of known violations, the timescales involved (crimes committed over a 10-year period) and the principal categories into which the victims fall. In that respect, this report may help to form the basis of a process of reflection for civil society and the Congolese Government as well as their international partners. This strategy must involve complementarity between various mechanisms, whether already available or yet to be created, each of which will have a particular role in seeking truth, justice and the reconstruction of the historical truth and the reparation and rehabilitation of victims, as well as vetting and institutional reform.

1002. For each challenge identified above, transitional justice proposes one or more mechanisms that can provide a solution or, at least, the beginnings of one. For example:

- The total impunity of the perpetrators of serious human rights violations and the difficulty posed by the complexity of these crimes to be investigated and prosecuted call for the establishment of a specific judicial mechanism and the reform of the justice sector.
- The high number of crimes committed and of individuals involved requires the implementation of a truth-seeking mechanism that will complete and transcend the intrinsic limitations of the judicial system, with a view to shedding light on the multiple conflicts that engendered such violence, thus fulfilling the individual's and society's right to truth.
- The extremely high number of victims calls for the introduction of more accessible and more flexible mechanisms to satisfy their requests for truth and reparation. A judicial institution in and of itself does not meet these conditions.
- The impunity enjoyed by numerous perpetrators of violations who are foreigners or living outside the country poses a challenge to the national judicial system and calls for the full cooperation of third-party States, either by prosecuting the perpetrators themselves or extraditing people suspected of committing crimes on DRC territory. The role of the ICC and the Security Council may be a determining factor in this area.
- The prosecution of those who bear the greatest responsibility, those who orchestrated or ordered many crimes, poses a huge challenge in terms of protecting witnesses and judicial actors. Here too, a specific and independent judicial mechanism could meet this challenge and institutional reform could produce long-term solutions to these difficulties.
- The persistent insecurity in the country undermines all the efforts deployed in the area of justice. Any solution to the problem inevitably implies a true reform of the security sector, with a 'vetting procedure' that would demote the perpetrators of serious violations of human rights from their rank, instead of keeping them there and supporting their power.