

# The role of Justice in the Peace-Process – implementing the Rome Statute of the ICC in the Democratic Republic of the Congo

Over the past 14 years, the Democratic Republic of Congo (DRC) has faced armed conflicts, causing a permanent state of emergency in the humanitarian, security and human rights situation of the country. Atrocities against the civilian population have been repeatedly committed by perpetrators from multiple groups and militias (including the national army), inspired by the most diverse motives but united by their brutal and inhumane conduct. The absence of the Rule of Law has led to a generalized status of impunity that has encouraged the repetition of crimes and the widespread use of violence as the only means of retaliation and defense. After military conflagrations that brought about the impressive figure of 4 million civilian casualties, an internationally assisted process of stabilization led to the landmark elections of 2006, the first democratic presidential elections in the history of the DRC. The newly elected Congolese Parliament, as soon as it started operating in early 2007, soon learned that Congolese MPs identified the fight against impunity as one of the major challenges to change their country.

The DRC had ratified the Rome Statute of the International Criminal Court (ICC) in April 2002. In 2004, the Congolese Government, to overcome the difficulties facing its judicial and law-enforcement system, referred its conflict-situation to the jurisdiction of the ICC, which opened several investigations and cases on crimes allegedly committed after 1 July 2002, date of entry into force of the Rome Statute of the ICC. Meanwhile, over the past few years, the Statute has been directly applied by the Congolese military courts in a number of cases. Unfortunately, it appears that this application has been partial and selective. Not only are these Courts generally controlled by the Executive branch of the Government, but they are also subject to military discipline and thus exposed to politico-military hierarchy. This has repercussions on the independence of the relevant judiciary and on the (too often insufficient) protection for victims and witnesses of crimes.

In 2008, a new text for a draft Bill for the implementation of the Rome Statute was introduced before the DRC Parliament: This

legislation is aimed at empowering civilian Courts to exercise jurisdiction over cases of genocide, crimes against humanity and war crimes. The draft legislation is on the agenda of the Parliament for the first half of 2010. The regime of the Rome Statute is based on complementary jurisdiction and "vertical" cooperation between the ICC and Member States - horizontal cooperation being the traditional inter-State cooperation among two entities with equal legal status, which assist each other in judicial matters through the lens of the principle of reciprocity. Vertical cooperation is, on the other hand, the one required by the ICC under article 119 of the Rome Statute to ensure that the Court receives the necessary assistance from State Parties to the Statute: It is not limited by the principle of reciprocity and the findings of the Court inform the cooperation regime. According to these principles, States are required to ensure the availability of national proceedings to counter impunity for international crimes. These duties of cooperation are entirely reflected in the current draft implementing legislation of the DRC and include the "arrest and surrender of suspects, protection-programmes for victims and witnesses and procedures to swiftly identify, trace and freeze or seize the proceeds, property and assets" connected to the crimes set out in the Rome Statute.

The possibility of freezing and confiscating assets of suspected perpetrators is also important from a socio-economic point of view, given that the DRC is facing major problems of corruption and the challenge of sustainable (economic) development. Furthermore, this provision would allow for a possible use of confiscated funds to put in place reparations programmes for victims. The effectiveness of this provision once again depends on the political will and capacity to implement legislative, administrative and budgetary measures in this field. In fact, the protection and participation of the victims and witnesses form an innovative and essential part of the ICC's mandate. The DRC draft Bill accordingly includes new provisions to guarantee the rights of the accused, as well as the protection of victims and witnesses.

Violence against the civilian population, in particular women, is a phenomenon which

blights not only the DRC but the entire Great Lakes and Central African region. Rape is used as a weapon of war and is the leitmotiv of hostilities for various armed groups, militias and "regular" military forces. The Rome Statute is a landmark in the struggle for gender justice, codifying a broad range of sexual and gender crimes and highlighting the importance of reparations (health care, employment, social inclusion, reconciliation) so that the victims can regain their dignity. By harmonizing its domestic law with the Rome Statute requirements, the DRC will reinforce its legal arsenal to fight impunity for gender-biased crimes. However, while the plight of sexual violence and gender crimes begins to be recognized as such in the DRC, the will and means to implement corresponding laws are still widely lacking. This will need to evolve for an efficient application of the legislation.

Last but not least, the DRC draft legislation retains the core principle of superior responsibility and rejects the doctrine of manifest unlawfulness of the superior order and defense of property as possible defense for war crimes. The issue of the implementing legislation of the Rome Statute also gives rise to an animated debate on the issue of the death penalty, which currently exists in DRC law and was last applied in 2003. However, in December 2005, the Congolese Parliament adopted a new Constitution, which no longer mentions the death penalty. The ratification of the Rome Statute as well as the vote of the tabled draft bill has profound and pragmatic implications for this debate. In fact, a double standard could result if major perpetrators of crimes against humanity were to be found guilty in The Hague and subjected to the maximum penalties under the Rome Statute (i.e., either life-imprisonment or a maximum term of 30 years of detention), while other perpetrators of the same or lower level crimes could still be subjected to capital punishment before Congolese jurisdictions. The draft Bill thus presents a legislative challenge which is likely to result, over time, in an "equalization" and humanization of the Congolese justice system vis-à-vis the prevailing standard of international criminal justice.

Sadly, the DRC continues to face major challenges such as ongoing conflicts in certain areas, weak institutions and a lack of human resources and financial means plaguing the legal and judicial system all over the country. All these hurdles will need to be overcome to allow for a real and efficient fight against impunity. However, an adequate legislation is a first and necessary step in the right direction. In this regard, the Rome Statute not only underpins the fight

against Impunity but, thanks to its potential deterrent effect, if concretely applied, also has the potential to prevent the commission of further international crimes in the DRC and worldwide. Therefore, the effective implementation of the Statute's provisions into the Congolese domestic law, together with broad legal reform efforts in the field of justice and security, is an important contribution to impede the widespread human rights violations that threaten the

well-being of individuals, democracy and long lasting peace in the DRC. It is therefore of utmost importance that the national implementing legislation of the Rome Statute of the ICC be treated as a priority item on the agenda of the next parliamentary session of the DRC, starting on 15 March 2010.

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## Actualité en bref...

### UN PÔLE CRIMES CONTRE L'HUMANITÉ À L'ÉTUDE EN FRANCE

Le 3 mars 2010, un projet de loi a été exposé au conseil des ministres en France visant à créer des pôles spécialisés sur les crimes contre l'humanité et les crimes de guerres. En contrepartie, le Tribunal aux armées de Paris (TAP), seule juridiction française compétente à l'heure actuelle pour juger des affaires impliquant des militaires français à l'étranger (et qui traite environ 1600 cas par an), sera supprimé et remplacé par une formation spécialisée au sein du tribunal de grande instance de Paris. Les treize enquêtes ouvertes par la justice française contre des présumés génocidaires rwandais tomberont ainsi sous la compétence du pôle spécialisé sur les crimes contre l'humanité. Ce projet vise à combattre la lenteur de la procédure française en la matière. Aucun jugement n'a été encore rendu à ce jour, amenant par ailleurs la Cour européenne des droits de l'homme à conclure dans l'affaire Mutimura c. France (requête n°46621/99) du 8 juin 2004 à la violation des articles 6§1 et 13 CEDH, jugeant que l'affaire n'avait pas été traitée dans un « délai raisonnable ».

### SPANISCHE JUSTIZ STELLT ERMITTLUNGEN IM ZUSAMMENHANG MIT DER GEWALTSAMEN UNTERDRÜCKUNG DER PROTESTE IN TIBET EIN

Die Ermittlungen gegen zwei chinesische Minister, zwei Generäle und drei politische Funktionäre wurden eingestellt. Im August 2008, unmittelbar vor der Eröffnung der Olympischen Spiele in Peking, hatte der Madrider Untersuchungsrichter Santiago Pedraz auf Anfrage mehrerer Menschenrechtsorganisationen hin Anklage erhoben und den Verdächtigen vorgeworfen, einen allgemeinen und systematischen Angriff gegen die Zivilbevölkerung geführt zu haben, der mindestens 203 Todesopfer, mehr als tausend Verletzte und 5972 illegal Verhaftete und Ver-

schwundene zur Folge hatte." Jetzt sah er sich gezwungen, die Ermittlungen einzustellen. Die gewaltsame Unterdrückung der Proteste, so Pedraz, falle nicht in die Zuständigkeit spanischer Gerichte. Damit zeichnet sich eine neue Tendenz in der spanischen Strafverfolgung ab: Bis im Oktober 2009 galt in Spanien das uneingeschränkte Weltrechtsprinzip, demzufolge besonders gravierende Verbrechen, obwohl sie von Ausländern und im Ausland begangen worden waren, in Spanien verfolgt werden konnten (vgl. TRIAL Journal Nr. 20). Auf der Grundlage dieses Prinzips liefen 2009 in Spanien 14 Ermittlungen, darunter Untersuchungen bezüglich der Foltervorwürfe von Guantanamo-Gefangenen und der Gaza-Offensive Israels. Die Ermittlungen blieben nicht ohne politische Auswirkungen: die USA, Israel und China machten Druck auf die spanische Regierung, China drohte unter anderem mit der Verhaftung des Untersuchungsrichters Pedraz, sollte dieser nach China reisen, und warnte die Regierung davor, sich in Chinas inneren Angelegenheiten einzumischen oder tibetische Separatisten zu unterstützen. Im Oktober 2009 kam es daraufhin zu einer Justizreform: Künftig dürfen spanische Gerichte Menschenrechtsverletzungen im Ausland nur dann verfolgen, wenn spanische Staatsbürger als Opfer betroffen oder als Täter daran beteiligt waren, oder die Täter sich in Spanien befinden. Obwohl das Gesetz nicht rückwirkend gilt, hat es anscheinend dazu geführt, dass die Ermittlungen bezüglich Tibet nicht weitergeführt werden.

### ARRESTATION DE LA VEUVE DU PRÉSIDENT RWANDAIS ASSASSINÉ EN 1994

Agathe Kanziga, la veuve du défunt président rwandais Juvénal Habyarimana, figure parmi les personnes visées par une plainte pour complicité de génocide et de crime contre l'humanité devant la justice française. Vivant en France depuis 1998, où elle a déposé une demande d'asile rejetée par

l'OFPR au motif des « lourdes présomptions de complicité de crimes contre l'humanité » pesant sur elle, elle a été interpellée le 2 mars dans son domicile de l'Essonne en région parisienne en vertu d'un mandat d'arrêt international émis par l'Igall. Les autorités rwandaises l'accusent d'avoir participé à la planification et à l'organisation du génocide de 1994. D'aucuns la voient comme membre du clan « Akazu », premier cercle du pouvoir hutu qui a fomenté le génocide, et impliquée dans les organes de propagande. Cette arrestation ressemble à un coup médiatico-diplomatique du président français, qui rentre d'une visite historique au Rwanda. Les relations entre les deux pays viennent en effet d'être rétablies et Nicolas Sarkozy avait alors assuré que les responsables du génocide devaient être punis, où qu'ils se trouvent. Agathe Kanziga a depuis lors été remise en liberté sous contrôle judiciaire. La question de savoir si elle sera jugée en France ou extradée au Rwanda reste ouverte, ce pays ne donnant à l'évidence pas toutes les garanties du respect d'un procès équitable.

### GAZA: UN-GENERALVERSAMMLUNG FORDERT ERNEUT UNABHÄNGIGE UNTERSUCHUNG VON MENSCHENRECHTSVERLETZUNGEN UND KRIEGSVERBRECHEN

In der Generalversammlung der Vereinten Nationen stimmte eine Mehrheit der Länder am 26. Februar 2010 für eine nicht bindende Resolution, in der Israel und die Hamas aufgefordert werden, Menschenrechtsverletzungen und Kriegsverbrechen während der Gaza-Offensive Israels zu untersuchen. Die Resolution sieht einen Report von Generalsekretär Ban Ki-Moon über die erzielten Fortschritte nach 5 Monaten vor. Von den 192 Mitgliedern stimmten 98 für eine „unabhängige, glaubwürdige“ Untersuchung. Sieben stimmten dagegen (darunter Israel und die USA) und 31 enthielten sich.