

Perceptions of the International Criminal Court in the Eastern Democratic Republic of Congo

*A Report by the Sanela Diana Jenkins Human Rights Project at UCLA
March 2012*

*For Further Information, Go To: www.uclaforum.com/sdj
Or Email Professor Richard H. Steinberg at steinberg@law.ucla.edu*

Executive Summary

In February 2012, the Sanela Diana Jenkins Human Rights Project sponsored a field study trip to North Kivu and the Ituri District in the eastern Democratic Republic of the Congo (“DRC”). The study team consisted of six students and was led by Professor Richard Steinberg of UCLA School of Law. On that trip, an effort was made to understand perceptions of the International Criminal Court (“ICC”) held by DRC civilians, NGOs operating there, and UN personnel. We observed varying levels of knowledge about the ICC, but a few recurring themes emerged: a lack of information about the ICC and its activities; the absence of a well-known, physical presence by the ICC in the DRC; and dissatisfaction with the impunity that General Bosco Ntaganda lived with in eastern DRC. These perceptions suggest a few possible prescriptions intended to increase understanding of the ICC in the Eastern Congo.

Introduction

One of our goals in visiting the eastern DRC in February 2012 was to derive some sense of the general perceptions of the International Criminal Court’s (“ICC”) work there, given continuing tensions and armed conflict. Previous studies have discussed perceptions of the ICC in the eastern DRC and our team set out to supplement those views by asking questions in of

various stakeholders. We spoke to members of NGOs, village elders, and representatives of UN forces in the eastern DRC. We hope to lay the groundwork for a survey instrument in the future. Additionally, we offer some prescriptions that flow from our observations.

We conclude that for the International Criminal Court to be a more effective instrument of international criminal law, it must have legitimacy in the eyes of the populations that it serves. Our discussions informed us that in the eastern DRC, ICC legitimacy is hampered by a lack of effective media outreach, a physical disconnect from the Court's procedures, and a failure to arrest General Bosco Ntaganda (and others) indicted on various war crimes charges stemming from their participation in the second Congo war.

With support from the Assembly of States Parties, the ICC and its partners have the tools to remedy this situation. The ICC and supporting governments could bolster the ICC's outreach programs and increase pressure on the Congolese government to push for the arrest of General Bosco Ntaganda. We heard from a number of people that a lack of information about the trials, and the failure to arrest General Ntaganda, had reduced their confidence in the Court. Although much of this information is anecdotal, it is consistent with what others have found in more comprehensive surveys of attitudes in the region.

Observations of ICC Perceptions in Eastern DRC

In past years, researchers conducted extensive survey work regarding basic attitudes of eastern Congolese nationals toward international justice mechanisms, including the ICC. We sought to discover the extent to which our experience on the ground in February 2012 would align with those earlier findings, and whether our findings would justify future survey work related to this issue.

The most recent survey cataloging eastern DRC views of the ICC, conducted in 2008,¹ presented interesting findings that influenced the framing of our inquiries. The most obvious concerned a lack of knowledge about the ICC. In fact, only about a quarter of all respondents cited any awareness of the Lubanga proceeding.² About the same proportion had heard of the ICC itself.³ In a nearly identical response rate to questions about what mechanism should be used for accountability or justice, one quarter of respondents picked the ICC from a list, while one half picked the national court system;⁴ yet civilians expressed little faith in the national judicial system to our team.

These findings could suggest that those who had an awareness of the ICC supported it. The relatively low proportion of eastern Congolese aware of the ICC (which may have risen somewhat since 2008), despite the fact that many were affected by the war crimes and atrocities that the ICC is moving to address, prompted the inquiry we pursued.

While remaining cognizant of data already gathered throughout eastern DRC, including skepticism towards the ICC, we sought out civilians, NGOs, and military personnel associated with the UN peacekeeping effort in eastern DRC. Due to limited time, we felt this mixture of perspectives would allow us to observe, most efficaciously, the perceptions of the ICC in the eastern DRC.

¹ Patrick Vinck, Phuong Pham, & Suliman Baldo Shigekane, *Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of the Congo*, Human Rights Center, U.C. Berkeley (2008) [hereinafter *Living With Fear*].

² See *Living with Fear* at tab. 28 (2008).

³ *Id.*

⁴ *Id.* at tab. 23 & 26.

The Village of Bogoro

Bogoro is a village located about 90 minutes from the town of Bunia, in the Ituri District. In 2003, it was attacked by combatants loyal to warlord Germain Katanga. This village has no electricity or running water; its only connections to the rest of the world were the dirt road to Bunia and cellphones owned by many elders and some others.

In conversations with Bogoro's chief and elders, we quickly learned that their awareness of the fact that the ICC was trying Thomas Lubanga – who became the first individual convicted by the court by way of a unanimous judgment on March 14, 2012 – overshadowed most westerners' knowledge of ICC activities. While Bogoro had been victimized by regional militias, its inhabitants used to fight for Thomas Lubanga and they still seemed to support him. Yet its elders seemed to give the ICC judges special deference (these conversations occurred prior to the conviction of Lubanga), while bestowing a tempered skepticism on the institution itself given its failure to try other perpetrators of war crimes (e.g., the failure to have General Bosco Ntaganda arrested and tried) and its plodding pace (e.g., continuing trials of Katanga and Chui, who led the forces that attacked Bogoro, and three years to try Lubanga, not to mention the time it took to get to trial). Moreover, they expressed great frustration that they had been unable to view (electronically or otherwise) any part of the Lubanga or Katanga and Chui trials.

Given the high level of respect that these elders exhibited towards the judges of the ICC, we emerged with a complicated picture of their views of the ICC. In regard to substantive legal decisions, the elders seemed quite comfortable deferring to the judges. Their questions revolved around procedure-- how the ICC operated. Significantly, they felt left out of the loop in terms of information coming from the ICC. They also posited that the time for ICC trials of DRC war

criminals had passed, as they stated they had already found a way to reconcile with their former enemies. That assertion conflicted with their desire to see General Ntaganda arrested and tried, however. It also coincides with their previous (if not current) loyalty to Lubanga. Perhaps their questions about the institution arose primarily from their desire to see Lubanga released.

Eastern DRC NGOs

We met with approximately twenty representatives of NGOs in Goma, DRC. The NGOs we visited (for security reasons we omit names), and the representatives we spoke with, all proclaimed some level of frustration with the ICC's reliance on cooperation from states parties. In particular, they all noted the deleterious effects of a rumored secret peace deal in 2009 that effectively insulated General Ntaganda from arrest. All agreed that he must face the ICC (or some legitimate national tribunal) if the people of the eastern DRC are to see the ICC as a legitimate judicial institution.

Some of these NGO representatives also pointed out that the problem with accurate perceptions about the ICC stemmed in part from a lack of information about the ICC. That dearth of information apparently arose in part due to a fear among civilians of talking publicly and frankly about the ICC itself.

UN Officials

We also paid a visit to a few UN officials in the eastern DRC. We were told that the successful execution of ICC arrest warrants affect a rebel fighter's willingness to remain in combat. This was evidenced by a jump in the number of combatants demobilizing around dates when arrests were effectuated. If true, this suggests that the ICC affects even the most remote portions of the eastern DRC.

How Can Perceptions of the International Criminal Court Be Changed?

Based on our conversations, we came to a few preliminary ideas as to how the ICC can improve its legitimacy in the eastern DRC and ensure that the population of that region is aware of the work that the Court is doing. This is by no means an exhaustive list, but rather a recounting of the issues that seemed to resurface again and again during our time in the eastern DRC.

Media Outreach

The ICC could be more proactive in terms of reaching out to the people in the regions where it works-- to combat the sense that the ICC is a political court, and/ or to dispel the notion that the ICC is too remote from the region to make an impact. For the ICC to establish its legitimacy in the region, it must ensure that people are aware of the work that it does. Most eye-opening is the fact that many citizens of Bunia – where recently-convicted Thomas Lubanga was most active – were not even aware of the most recent events in his trial, including his conviction.⁵ This lack of knowledge points to a gap that can be filled by an increased focus on outreach to people in the eastern DRC.

⁵ See, e.g., Melanie Gouby, *On Home Ground Lubanga Verdict Falls Flat*, Institute for War and Peace Reporting, available at <http://iwpr.net/report-news/home-ground-lubanga-verdict-falls-flat> (March 15, 2012). Furthermore, according to a 2008 survey conducted by UC Berkeley Human Rights Center in eastern Democratic Republic of Congo, only about a quarter of the respondents had heard of the International Criminal Court or of the proceedings against Thomas Lubanga. See *Living With Fear*.

Our discussions with the village elders of Bogoro illuminated this problem. Although the village of Bogoro had been directly impacted by the conflict⁶ and had a vested interest in the trials of Lubanga, Katanga, and Chui, many of those whom we spoke with indicated that they did not have access to information concerning the progress of the trial. The elders to whom we spoke were puzzled about why the trial had taken so long, and seemed to indicate that they had been receiving no updates regarding the progress of the trial.⁷

In such a case it might be helpful for the ICC to produce or sponsor the production of programs or updates regarding the trial, explaining the significance of various parts of the judicial process. Radio seems to serve as the most effective medium in the DRC, a medium through which roughly 54% of the population of the region receives information.⁸

Aside from providing updates about trials in progress, such a media campaign would be helpful to explain the overall mission of the Court and explain how the activities of the Court integrate with national and traditional justice systems. There is also an opening to explain certain charging issues, such as in the case of Thomas Lubanga: many were disappointed that his conviction was solely based on the conscription of child soldiers and did not include more grave charges such as murder or mass rape. Discussion of the operation of the ICC would help interested parties understand how the ICC decides what charges to level.

⁶ Bogoro was the site of the eponymous 2003 “Bogoro Attack”, in which over 200 civilians were killed. See Jacques Kahora, *Bogoro Victims Finally Laid to Rest*, Institute for War and Peace Reporting <http://www.rnw.nl/international-justice/article/bogoro-victims-finally-laid-rest> (August 18, 2009).

⁷ Interestingly, a quote from Father Willy Kpagi of Bunia in the March 17th, 2012 edition of the Economist almost precisely echoes what the elders of Bogoro told us during our short visit: “The court case has taken so long, it’s almost hard to remember what happened... The town has changed, the people have changed. We’ve made so much progress towards reconciliation.” *Bench-Mark: After ten years, the ICC gives it’s final verdict. Now what?*, ECONOMIST, Mar. 17, 2011, at 143.

⁸ *Living With Fear*, *supra* note 1, at 3

Moreover, the people of the eastern DRC appear to lack a nuanced understanding of the ICC as an institution. As we have catalogued throughout this report in responses ranging from confusion to general displeasure, people from the eastern DRC have questioned the legitimacy of the ICC precisely because many alleged perpetrators are not on trial in The Hague. DRC civilians seem to believe that the ICC should try all significant war criminals. Seeing as the ICC has issued arrest warrants for only a handful of alleged perpetrators worldwide, and it has not successfully tried half of those (the ICC has issued twenty arrest warrants, of which seven remain outstanding, not including three suspects who have passed away without arrest),⁹ many apparently concluded that the ICC worked about as effectively as the Congolese courts.

More specifically, our conversations did not elicit any understanding of the concept of gravity, and how the ICC Prosecutor cannot try every war criminal that the court has jurisdiction over. As a practical matter, the court simply does not have the institutional capacity to do so. Consequently, the activity must be an alleged crime of “sufficient gravity.”¹⁰ That is generally interpreted to involve a high-ranking official. After all, the ICC was set up to end impunity for such individuals. These subtleties of prosecutorial discretion did not resonate with DRC civilians.

Finally, a media campaign of this nature would allow the ICC to highlight successes and demonstrate its positive impact in the region. For instance, one of the most telling conversations we had was with a representative of the MONUSCO DDR/RR, who suggested that execution of arrest warrants by the ICC increased the number of combatants voluntarily demobilizing. Such a result should be more broadly disseminated to the people of the eastern DRC to demonstrate the positive impact that Court has upon the region.

⁹ Economist, *supra* note 7, at 143.

¹⁰ See Rome Statute of the International Criminal Court, art. 17(1)(d), *entered into force* on July 1, 2002, 2187 U.N.T.S. 3 [hereinafter Rome Statute], *available at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

Holding a Portion of Trials In the DRC Would Increase The Court's Visibility—But Carries Costs and Risks

One of the most innovative – and problematic – means of increasing the legitimacy of the International Criminal Court would be to hold parts of a trial in the eastern DRC. There would be several challenges to doing so, primarily related to security: there is a potential for violent reprisals against the Court or against people working with the Court as the security situation in the region remains fluid. However, despite this and other challenges, there might be an opportunity for certain portions of the ICC judicial process to be held in the region, which is permitted under Article 3(3) of the Rome Statute.¹¹

Moreover, the ICC engages some degree of victim participation. Such participation in part of a trial in the regions could create a bridge between the activities of the Court in The Hague, and the realities of conflict on the ground, giving those affected a chance to become actively involved with the process of seeking justice. Of course, victims who testify in that context must be selected carefully and given adequate protection.

The Failure to Arrest Bosco Ntaganda Undermines the Legitimacy of the ICC

While the conviction of Lubanga represents a success for the Court, and the trial of other alleged Congolese perpetrators is laudable, the ICC's legitimacy is undermined by the continued freedom of Lubanga's brother-in-arms, Bosco Ntaganda. Now a general in the Congolese army, the former CNDP leader lives openly in the eastern city of Goma. Since his integration into the Congolese army as a general, he has been able to consolidate power and gain control of much of the minerals trade in the region.

¹¹ Rome Statute, *supra* note 11, art. 3(3).

A number of people with whom we spoke see this as a travesty of justice and feel that it demonstrates that the International Criminal Court is a political tool of President Joseph Kabila, who has remarked that “[i]n Congo, peace must come before justice”.¹² Because General Bosco Ntaganda apparently continues to wield substantial power that is apparently sanctioned by Kinshasa – one person to whom we spoke described as the “kingmaker of Eastern Congo” – it is unclear how crimes that continue to occur, allegedly as a result of his orders, will stop if nothing stands in his way. Moreover, arresting Ntaganda would be a signal that would show that there is no impunity for war crimes in the eastern DRC.¹³ Failure to arrest Ntaganda sends the opposite, and deeply unsettling, message.

Finally, the disparate treatment of Ntaganda and Lubanga (and others) appears to many to suggest that the ICC is a political tool of President Joseph Kabila. Those who fall out of favor with the President can expect to stand trial in The Hague, while those allied with the President can evade arrest for past war crimes and crimes against humanity.

Conclusion

This report is preliminary, capturing primarily anecdotal evidence. It should, however, provide a basis for further research into many perception issues related to the ICC. We conclude that the ICC needs to do more to communicate the work that it does to bolster its legitimacy in the regions where it is active. As a new organ of international justice, this is certainly a tall order,

¹² Bosco Ntaganda and the CNDP was integrated into the Congolese army pursuant to a 2009 peace deal, see “Peace Agreement Between the Government and Le Congres National Pour Le Defense Du Peuple”, available at http://www.iccwomen.org/publications/Peace_Agreement_between_the_Government_and_the_CNDP.pdf (last visited March 17, 2012) Ntaganda and his well-armed men were seen driving in convoy daily in Goma.

¹³ See also, Human Rights Watch, “Unfinished Business: Closing the Gaps in the Selection of ICC Cases”, September 2011.

but it would be tragic to ignore the role that perception plays in the efficacy of the Court – and the opportunities that the ICC has to affect those perceptions.