

CASE STUDY 3: DRC – COMPLEMENTARITY IN ACTION: THE MOBILE GENDER COURTS

Organisations: American Bar Association, Open Society Justice Initiative, Open Society Initiative for Southern Africa

Country: DRC (South Kivu)

Issues Addressed: Serious crimes, with an emphasis on gender-based violence and sexual crimes, including rape as a crime against humanity

Status: The mobile courts continue to operate, and the model has been replicated in the CAR, Sierra Leone, Guinea-Bissau, Somalia, and East Timor

Background

The eastern part of the DRC has one of the highest incidences of rape and sexual assault in the world. According to one report,²⁷ at this unprecedented level of gender-based violence a woman is assaulted every minute. This is due partly to the almost constant conflict in the eastern DRC over the last few decades as many sexual crimes are committed by armed forces. However, the combination of the incredibly regular occurrence of conflict-related rapes and the culture of impunity that permeates through the region has led to an increase of rapes committed by civilians as sexual violence becomes normalised and commonplace. The consequence is that victims of these crimes are not only victimised by the crime itself; the stigma that wrongly attaches to sexual crimes results in many of them being ostracised by their

family and they then have to suffer in the knowledge that the perpetrators will likely never be brought to justice.²⁸

There are two main reasons perpetrators escape accountability for these crimes: many of the rapes take place in remote, rural communities where there is seldom access to formal courtrooms and judicial structures, and (as a result) there is an overwhelming culture of impunity in which perpetrators are safe in the knowledge that their actions will not have consequences, and that they are unlikely to be prosecuted.

“The courts have brought a measure of justice – and dignity – to victims and demonstrate that, with modest support, local institutions can respond even under the most challenging circumstances.”

Open Society Foundation

It was in response to this utter lack of accountability for perpetrators and protection for victims that the mobile gender courts project was established. Mobile courts have been used in the DRC judicial system as a way to reach remote communities that have no formal courtrooms and are located far from the urban centres. Over the past few years, mobile courts have been established in a number of regions (including Bandundu, Katanga, Maniema, North Kivu, South Kivu, Ituri, Kasai

Occidental and Equateur) with the support of the government and inter-governmental organisations.²⁹ There was a hope that this model could be replicated to target sexual crimes in particular and so in October 2009 the American Bar Association / Rule of Law Initiative (ABA/ROLI) helped to establish an itinerant court to hear primarily but not exclusively cases of gender-based violence and sexual crimes in South Kivu, a project funded and designed by the Open Society Justice Initiative (OSJI) and the Open Society Initiative for Southern Africa (OSISA).

How Do they Work?

The mobile courts are created within the structure of the DRC justice system and are staffed solely by Congolese officials. Mobile courts have long been a feature of the DRC’s judiciary, but the ABA and OSJI courts are unique in that they focus specifically on gender-based violence and sexual crimes. The courts have discretion to hear other serious crimes, but their priority is to address the long ignored sexual offences.

“The gender justice mobile courts operated by ABA/ROLI have unquestionably delivered on their undertaking to bring justice to the remote reaches of the Eastern Congo”

ABA Report

What Were the Project's Goals?

There were three broad aims:

- To increase access to justice by holding judicial sessions in remote areas of South Kivu where traditional judicial structures were not present;
- To train judges, lawyers and police officers in international criminal law and the application of the Rome Statute as well as the domestic laws proscribing rape and other forms of sexual violence. In light of the history of sexual violence and the stigma attached

to the crimes and the victims there was also a need to train officials on how to approach these cases in a gender-sensitive manner. The long-term effect of this training would be to increase the capacity of officials working within the DRC judicial sector to effectively prosecute gender-based crime; and,

- To sensitise communities to the realities of sexual violence and to raise public awareness of the new sexual violence laws, the importance of reporting sexual violence and “emphasising that the shame and stigma of sexual assault should be upon those who perpetrate, and not upon those who suffer from, such crimes”.³⁰

What Jurisdiction Do they Have?

The courts have civil and criminal jurisdiction over military and civilian matters. The courts' focus is on conflict-related sexual violence, but can consider “women's issues more generally – including topics related to family law, property rights, and inheritance laws”.³¹ Importantly, however, the courts are flexible and can hear other serious crimes such as murder and theft.

Have There Been Many Prosecutions?

In less than three years of operation, 20 traveling courts heard 382 cases, with 204 rape convictions, 82 convictions for other crimes and 67 acquittals (29 decisions are pending).³²

Are the Courts Empowered to Apply International Law?

Yes! Significant efforts were made to ensure that the judges, lawyers, police investigators and court personnel were familiar with both domestic and international criminal law (including the Rome Statute), and as a result some accused persons have been charged with crimes against humanity.

What Aspects of the DRC Legal System Enable these Courts to Prosecute International Crimes?

The DRC has ratified the Rome Statute which, as the DRC is a monist country, is directly applicable in national courts. In addition there is domestic legislation criminalising genocide, war crimes and crimes against humanity. Article 28 of the 2006 Constitution is important as it excludes a defence of “following orders”. Civil courts in the DRC are not empowered to prosecute international crimes (as those prosecutions are reserved for military courts), but the mobile courts structure has gone some way to remedy this for the communities they serve.

A Case that Stands Out: Fizi³³

On New Year's Day in 2011, more than 60 women were raped by government soldiers in a horrific spree of violence and looting.

The commanding officer, Lieutenant Colonel Kibibi Mutuara, and ten of his subordinates were charged with crimes against humanity as a result of the systematic nature of their acts of rape and imprisonment. The court tried the accused, convicted nine of them, acquitted one and transferred one determined to be a minor to another court for trial.

There were a number of landmark features of this trial:

- The accused were charged with, and convicted of, crimes against humanity;
- The trial took place less than two months after the crimes were committed;
- For the first time a senior military official was put on trial – helping to remove the veil of impunity covering senior officials;
- Because the trial was held in the neighbouring village of Baraka, the community affected by the crimes was able to observe and participate in the trial – bringing justice home for this community; and
- This trial was a joint effort between ABA/ROLI, MONUSCO (the UN Stabilisation Mission in the DRC) and local NGOs.

What Other Impact – Beyond Prosecutions – Has the Project Had?

The officials involved in the trials were trained in victim and gender-sensitive approaches to criminal justice. Furthermore, the project undertook efforts to attract female personnel to the courts and to the legal profession more generally.

The sensitisation element involved a media campaign to decrease the stigma attached to victims of sexual crimes and to raise public awareness about the new domestic sexual violence law and the importance of reporting crimes.

The ABA/ROLI is also involved in the establishment of two pro bono legal aid clinics – in Bukavu and Uvira. These clinics will assist victims, referred to them by hospitals, during preparation for trial, as well as assisting them in obtaining any reparations that may have been awarded to them by the courts.

What Makes These Courts So Ground-Breaking?

The courts are domestic mechanisms, operating within the DRC's existing judicial structure. They reach communities that have little access to traditional judicial processes. They have the ability to apply international law, and so hold those responsible for atrocity crimes to account, and are an illustration of a novel approach to positive complementarity.

What Are the Tangible Consequences and Successes of the Courts?

- Victims in rural, previously inaccessible areas are given access to justice and, because they have a varied jurisdiction – being empowered to hear civil and criminal matters, against civilians and military personal, and can hear non-gender crimes – the courts are able to reach a vast number of victims.
- The courts illustrate how positive complementarity can be implemented in states and demonstrate how, with the right political will, international crimes can be tried in domestic settings without significant upheaval of the judicial system and without massive financial input. This aspect is vital because the ICC simply does not have the capacity to prosecute all perpetrators of international crimes: these courts provide the DRC with the opportunity to prosecute perpetrators the ICC cannot, such as lower-ranking soldiers.
- The willingness of the court to try the commander responsible for orchestrating the rapes at Fizi, Lieutenant Colonel Kibibi Mutuara, demonstrates a possible change in attitude in holding senior officials accountable.
- The training in international law provided to the officials is vital in ensuring continued “complementarity” projects and to ensure that the DRC is “willing and able” to prosecute international criminals.

“Quite apart from the innovative mobile gender court, it is the [DRC] government’s cooperation in the process — aimed at holding its own troops to account — that makes these trials so remarkable. Typically, government actors, when accused of grave human rights violations, use state machinery not to secure accountability but to avoid it. It is why international criminal justice often happens only outside the country where the crimes were committed. In this instance, in the arrest and prosecution of Kibibi, the [DRC’s] government is making good on its promise of a ‘zero tolerance policy will be enforced on the spot in Fizi’.”

**Nicole Fritz, “Congo Provides Justice Without Theatrics”
Business Day, 22 February 2011**

- The communities' exposure to the trials has unquestionably raised their awareness and understanding of the issues.
- Microphones are used to broadcast the proceedings to the hundreds of spectators, who have never seen a legitimate court process. Many are astonished to find that accused have free counsel and a right to a fair trial.
- The sensitisation element of the project is also exceptionally valuable. Through this the communities are taught about the devastating impact of sexual violence, which helps erode the stigma attaching to these crimes. This means that victims are given the confidence to come forward, and to get help. In a region where sexual violence is so prevalent this is a vital development.
- When the stigmas of sex crimes are finally reversed – with perpetrators regarded as weak and cowardly, while no shame attaches to victims – we will see a lessening of these horrific crimes.

Can This be Replicated for Other International Crimes in the Region?

Khan and Worthington are of the view that;

“Arguably the greatest strength of ABA/ROLI’s mobile court programmes is the extent to which they are genuinely oriented towards local ownership, both in terms of the structures within which they exist, and the personnel upon which they depend ... [The courts] are established under existing Congolese law, and are entirely staffed by Congolese judges, lawyers and court personnel. While the mobile courts are necessarily a temporary measure, the objective of building sustainable local capacity within the Congolese justice sector has overwhelmingly informed the justice sector-related strategies implemented by ABA/ROLI and its partners. These include the operation of legal clinics; training legal, law enforcement, and judicial personnel; supporting local bar associations; and supporting legal internships and scholarships for female students.”³⁵

Although these mobile courts have the ability to try crimes against humanity and the Fizi case was a landmark one, most cases have not involved rape as a crime against humanity but have prosecuted the suspects under domestic sexual violence law.

However, the success of the model – and the use of international law in the Fizi case – indicates that there is potential for similar models to be used as “complementarity” mechanisms.

LESSONS LEARNT

RESOURCES REQUIRED BY THE COURTS

- Salaries / stipends for the judges, lawyers and security personnel;
- Tents (easily constructed) and other equipment (such as microphones) to house the court;
- Computers, printers, and writing paper for the judges and court officials;
- Transportation for the court officials while on circuit, as well as for witnesses to attend the trial;
- Accommodation (often in monasteries) for the court officials while on circuit; and
- Security arrangements need to be made, and personnel sourced and appointed.

CHALLENGES

- The roads in rural DRC are often inadequate and hinder travelling for the court and for potential witnesses.
- Most of the remote towns have no running water or electricity, so generators must be used.
- Time constraints on the court hearings have a number of implications:
 - An emphasis on “streamlining” the proceedings risks rushing them, and risks putting the lawyers under too-tight time constraints.
 - The limited time periods also can place restrictions on which witnesses can be called – a crucial witness who is out of the area or ill may not be able to participate in the case at all, unlike in a fixed court.
 - This can all lead to injustice (for victims and accused alike).
- The ultimate responsibility for the success of these courts rests on the DRC’s legal system. Although the funders and facilitators are invested in the project it is Congolese judicial officials who are needed to make the project work – without their will and willingness the courts cannot function and cannot achieve their goals. Unfortunately, it may not be the fault of the individual officials but rather a general lack of capacity, resources and political will in the judicial system.
- For cases involving international law and international crimes there is a need to train the officials on how to correctly interpret and apply the law.

POSITIVE ELEMENTS

- The fact that the courts are wholly domestic and are staffed solely by Congolese officials – judges, prosecutors, defense counsel and civil party lawyers – has greatly helped their acceptance by communities.
- It is the travelling to the communities that is so important – the courts would not have had the same impact if the trials were held in the major urban centres far from the crime sites. It is the sense that justice is coming to them that is so important for the victims, and it is necessary for the officials to experience the same conditions as the community. It also makes the sensitisation project much easier if the cases are heard in the communities.

SUGGESTIONS

- The period that the court stays in each location should not be inflexible – it is impossible to predict the amount of business the courts have deal with, and so with experience the project should be prepared to adapt its length.
- The nature of the courts – that the lawyers and judges are taking time out of their regular jobs in provincial capitals – means that there must be structure, predictability and forward planning. These officials need to be able to coordinate their mobile court duties, which take them far from home for weeks at a time, with their other work.