HUMAN RIGHTS WATCH

Discussion paper:
A "mixed chamber" for Congo?
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I. Introduction

Human Rights Watch has worked closely and extensively with the Congolese justice system in a number of ways, including through providing materials and evidence to military and civilian prosecutors and monitoring trials, by taking part in national conferences to discuss reforms of the justice sector, and by working closely with Congolese partners to represent victims of crimes. Drawing from this experience, we have put forward the merits of creating a "mixed chamber" – a national judicial institution with the temporary inclusion of international staff – as a mechanism to hold to account perpetrators of war crimes, crimes against humanity and acts of genocide committed in the Democratic Republic of Congo. During a justice workshop in 2004 held at the initiative of the European Commission, other donors and the Congolese Minister of Justice, Congolese nongovernmental organizations (NGOs), legal experts and others proposed this model as a mechanism to help bring about accountability for serious crimes. This paper seeks to stimulate further discussion and set out options for how such a mechanism could be established.

Addressed in the paper are the rationale for a mixed chamber, its possible legal foundation, potential modalities of international participation, and suggestions to build capacity and expertise. Following this discussion, Human Rights Watch recommends the creation of a committee of Congolese experts and civil society representatives who can explore the technical questions surrounding the creation of a mixed chamber. This committee, which could be convened by the Congolese Law Reform Committee (La Commission Permanente de Reforme du Droit Congolais, CPRDC), for example, could also take steps towards its creation in close collaboration with the government.

II. Rationale for a mixed chamber

Congolese military courts currently have jurisdiction to try war crimes, crimes against humanity, and genocide, even though these crimes are not well defined in the current military penal code.[1] Draft legislation to implement the Rome Statute of the International Criminal Court (ICC) into Congolese domestic law has not yet been passed by Congo's

[1] For instance, compared to the Rome Statute, the Congolese Military Penal Code lacks any specificity with respect to the elements of what constitutes a war crime. Absent specific details, the definition of the war crime rests only on a judicial interpretation of whether conduct was "justified by the laws and customs of war." See Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 8 and Loi N° 24/2002 du 18 novembre 2002 portant code pénal militaire, *Journal Officiel de la République Démocratique du Congo*, March 20, 2003, http://www.justice.gov.cd/j/index.php?option=com_docman&task=cat_view&gid=16&Itemid=54 (accessed September 30, 2009), art. 173.

parliament but once approved, the jurisdiction for such crimes will move to the civilian courts.

Trying these kinds of crimes is complex for a number of reasons. Perpetrators may be individuals who once held or continue to hold senior positions in national armed forces or are powerful figures in rebel armies. Prosecuting individuals who may have ordered the crime rather than personally having committed it or are responsible as a matter of command responsibility is difficult – international experience shows that identifying these individuals and proving links between acts on the ground and orders or acquiescence from above requires extensive prosecutorial and judicial experience. Including international experts with knowledge about how to handle complex criminal investigations, prosecutions and trials can therefore be essential where exposure to and experience with such cases at the national level is more limited, such as in Congo. International expertise is also valuable to promote procedures that provide guarantees of a fair trial, to buffer proceedings from political interference, and to protect witnesses and judicial staff alike.

While Congolese military courts have in recent years shown great innovation in applying the Rome Statute and have tried important precedent-setting cases, the military justice system remains a weak institution. To date, almost all prosecutions have focused on mid- and lower-level defendants; there have been very few cases against high-level military and government officials. The civilian and military judicial systems are starved of resources and support and are plagued by political interference. Serious judicial reform and a supportive political environment are required to tackle these problems, a process that is likely to take many years.

The addition of a mixed chamber in the Congolese justice system with support from international judicial experts – based primarily on the model of the War Crimes Chamber of Bosnia and Herzegovina (WCC)[2] – could provide the national justice system with the boost it needs to tackle rampant impunity for the worst crimes. The involvement of international experts with experience in trying complex cases would be temporary and would focus on bolstering the justice sector during a transition phase while the national justice system is reformed.

III. Legal foundation

[2] We have also examined the "lessons learned" of other hybrid institutions, including the Extraordinary Chambers in Cambodia and the Special Court for Sierra Leone, as well as UN involvement in justice sector reform in both East Timor and Kosovo.

This section outlines the legal foundation necessary to establish the chamber. Please find below a brief discussion of the options as to how the chamber could be created, its position within the Congolese justice system, its temporal and subject matter jurisdiction, and who should be its key targets.

A. Instrument of creation

In order to be fully integrated into the Congolese justice system, the mixed chamber should be established under national legislation. There is also the possibility of setting the mechanism up through the formal involvement of the United Nations (UN). These options are discussed below.

A relevant consideration in determining the mixed chamber's legal foundation is the issue of trying foreign nationals. The crimes committed in Congo during the two wars (1996-1997 and 1998-2003) include perpetrators who are nationals of other countries, including Rwanda, Angola, Uganda and Zimbabwe. However, many countries, including Rwanda and Angola, prohibit the extradition of their citizens.[3] How the chamber is established – and extent to which its operations are supported regionally and internationally – will have an impact on its ability to overcome this legal barrier.

1. National legislation and the need for regional cooperation

To effectively integrate the mixed chamber in the Congolese justice system, it should be established by enacting a domestic law, as was done with the Bosnian War Crimes Chamber. Article 149 of the Congolese Constitution allows for the creation of specialized jurisdictions: *"La loi peut créer des juridictions spécialisées."* This new law would detail the mixed chamber's composition and operations, including setting out the involvement of international expertise. This law could be integrated into the current ICC implementing legislation not yet passed by parliament (thereby only requiring the enactment of one law) or it could be included a separate law.

Setting up the mixed chamber under domestic law reinforces Congolese ownership of its establishment and does not require formal UN involvement. However, as a purely domestic institution, such a chamber could not overcome the domestic ban on extradition, as in Rwanda and Angola.

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[3] See, for example, Constitutional Law of the Republic of Angola, August 25, 1992, http://unpan1.un.org/intradoc/groups/public/ documents/CAFRAD/UNPAN002502.pdf (accessed September 30, 2009), art. 27; Constitution of the Republic of Rwanda, May 26, 2003, www.cjcr.gov.rw/eng/constitution_eng.doc (accessed September 30, 2009), art. 25.

At the same time, strong regional cooperation would help to tackle the challenges associated with trying foreign nationals. This would require the conclusion of agreements with other countries outlining cooperation in judicial and prosecutorial matters (for instance, establishing procedures to gather evidence, share case files and enforce judicial decisions). The International Conference on the Great Lakes Region already has a framework to end impunity for war crimes, crimes against humanity and genocide.[4] Further, the African Union could mandate that other African states cooperate with the mixed chamber.[5]

Strong regional support would be important to ensure that, where possible, foreign nationals suspected of committing crimes in the chamber's jurisdiction are extradited to face justice. For those suspects whose extradition is legally prohibited, improved regional cooperation in judicial matters – through, for example, the sharing of case files - can help ensure that these alleged perpetrators are held to account in their countries of citizenship.

2. Agreement with the United Nations

The mixed chamber could also be created through an agreement between the United Nations and the Congolese government, as was done with the Special Court for Sierra Leone. [6] Unlike the Bosnian WCC, the Special Court for Sierra Leone sits outside of the domestic justice system, and will therefore cease operations once its current cases reach a final verdict.

Under this model, the chamber could be provided with the authority to issue binding orders on the Congolese government, as was done with the Special Court for Sierra Leone. Formalizing UN support for the chamber through a consensual agreement has the added advantage of raising the chamber's profile on the international stage, which can foster ongoing financial and political support for its operations. As a treaty-based court, however, it would not have the authority to overcome the legal ban on extradition. Moreover, heavy international involvement in the chamber's creation risks undermining national ownership over the institution. If this model is followed, it is worth exploring whether it is possible to

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[4] Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, International Conference on the Great Lakes Region, November 29, 2006, http://www.icglr.org/key-documents/democracy-good-gov (accessed September 30, 2009). The ICGLR was created following a pact made between the presidents of Angola, Burundi, the Central African Republic, Congo, the Democratic Republic of Congo, Kenya, Rwanda, Sudan, Uganda, Tanzania and Zambia. One of its goals is to provide a legal framework to govern relations between the Member States.

[5] See, for example, the Constitutive Act of the African Union, July 11, 2000, entered into force May 26, 2001, http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm (accessed on September 30, 2009), art. 4.

[6] Specifically, following the UN Security Council's adoption of a resolution authorizing the Secretary-General to enter into negotiations with the Sierra Leonean government to establish such a court, an agreement was reached in January 2002 to create the court's legal framework. See Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone*, September 7, 2004, http://www.hrw.org/en/node/11983/section/4.

subsequently integrate the chamber into the domestic justice system through legislation in order to maintain national ownership and sustainability of the institution after the departure of international staff.

3. UN Security Council

Even if the chamber were established by the Congolese authorities under national legislation, the UN Security Council could pass a resolution under Chapter VII of the UN Charter to require member states to cooperate with the chamber, which could include the arrest and surrender of suspects.[7] To do so requires showing that the absence of cooperation constitutes an ongoing threat to international peace and security. This is a high threshold.

Vesting the chamber with the Security Council's Chapter VII authority would provide it with the legal basis it needs to overcome any domestic ban on extradition. The Security Council's backing could also provide the chamber with important political leverage to secure cooperation from neighboring states. For example, situations of non-cooperation could be referred to the council for further action, which might theoretically include sanctions.

B. Position within the justice system

The mixed chamber should be based within the civilian judiciary. Indeed, this is required under both the Congolese constitution and internationally accepted standards.[8] Further, the draft legislation implementing the Rome Statute of the ICC currently before parliament vests the civilian courts with the jurisdiction to try ICC crimes. However, the civilian justice system has its own weaknesses and lacks expertise in trying these crimes compared to the military justice system. The location of a mixed chamber within the civilian judiciary should not preclude participation of or consultation with military justice officials, such as military prosecutors with significant experience in investigating war crimes and crimes against humanity.

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[7] United Nations Security Council, Resolution 1207 (1998), S/RES/1203 (1998), http://daccessdds.un.org/doc/UNDOC/GEN/N98/321/21/PDF/N9832121.pdf?OpenElement (access September 30, 2009).

[8] Constitution de la République Démocratique du Congo, February 18, 2006, http://www.justice.gov.cd/j/index.php?option=com_docman&task=doc_download&gid=35&Itemid=54 (accessed September 30, 2009), art. 156; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human & Peoples' Rights, 2001, http://www.achpr.org/english/declarations/Guidelines_Trial_en.html (accessed September 30, 2009); Draft Principles Governing the Administration of Justice Through Military Tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, 13 January 2006, U.N. Doc. E/CN.4/2006/58, http://daccessdds.un.org/doc/UNDOC/GEN/G06/106/77/PDF/G0610677.pdf?OpenElement (accessed September 30, 2009), principle 9.

The exact location of the mixed chamber within the civilian courts is yet to be determined. One possibility could be to create the chamber within a *tribunal de grande instance* (a High or Superior Court), which would have primary authority to try cases that fall under its jurisdiction. Under this model, the *tribunal de grande instance* could be permanently based in one location but could have a "mobile" capacity to hold specific proceedings closer to where the crimes were committed.

If this model were pursued, serious consideration should be paid as to how decisions of the mixed chamber would be appealed. The Bosnian WCC, for instance, has its own appellate division with international judges on its bench (discussed below). This was important to ensure that solid investigations, prosecutions and trials were not overturned on appeal because of political interference or a lack of expertise. [9]

Another possibility would be to place the mixed chamber at the level of some or all appeals courts (at the provincial level), as currently proposed in the draft legislation implementing the Rome Statute of the ICC. Since there are presently 11 appeals courts (and there are supposed to be 23 as of 2010), it may be necessary to strategically situate the mixed chamber in only a few provinces in order to keep costs down. Further, this option would require identifying an additional judicial body competent to hear appeals from the mixed chamber.

C. Jurisdiction and timeframe

The mixed chamber should have primary jurisdiction to try cases involving war crimes, crimes against humanity, and genocide – using the definitions of these crimes as found under the Rome Statute – over which Congolese courts have jurisdiction. [10] The starting point for the chamber's temporal jurisdiction should be decided by policy-makers in consultation with civil society. One proposal could be to start it in March 1993 to coincide with the UN Office of the High Commissioner for Human Rights mapping exercise supported by the Congolese government, which has sought to document the most serious abuses committed in Congo between March 1993 and June 2003. The mixed chamber's temporal jurisdiction could go beyond this date in order to try ongoing crimes. The chamber could try all persons, including foreign nationals, who committed crimes within its jurisdiction.

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[9] This concern is not merely theoretical: in Serbia, for instance, the Supreme Court has overturned a number of decisions of its War Crimes Chamber for questionable reasons. See Human Rights Watch, Unfinished Business: Serbia's War Crimes Chamber, no. 3, June 2007, http://www.hrw.org/legacy/backgrounder/eca/serbia0607/serbia0607web.pdf, p. 31.

[10] Under the ICC's complementarity regime, the mixed chamber, as a competent national court with the capacity and willingness to try these crimes, would have primacy over these crimes. As a practical matter, staff in the mixed chamber should work closely with ICC staff members to share information so as to make the most impact on ending impunity.

D. Mandate: Identifying the chamber's targets

The mixed chamber should pursue "persons most responsible" for committing war crimes, crimes against humanity, and acts of genocide. The primary focus should be those in the political or military leadership, but it could also include others down the chain of command who may be regarded as "most responsible" judging by the severity of the crime or its scale.[11] This would therefore permit a certain degree of flexibility to pursue lower-ranking officials who are, for example, suspected of committing particularly gruesome crimes, including sexual violence crimes, against a large number of victims. It would also allow the pursuit of lower-level officials if considered necessary for the overall prosecutorial strategy.

IV. International participation

Recruiting highly qualified and dedicated international staff to work in the chamber is essential. We have outlined below a brief analysis of how international participation has been realized in the Bosnian and Sierra Leonean contexts. In addition to identifying the expertise needed for the relevant position, staff members should ideally have experience in capacity-building and transferring skills. Consideration should be given to existing programs (and staff) that provide assistance to the justice sector, such as the European Union's current Program for the Restoration of Justice in Eastern Congo (REJUSCO).

It is also worthwhile to consider early on the precise benchmarks which, when satisfied, would trigger the phasing out of international staff. In Bosnia, for instance, a decision was made at the outset to phase out international staff within five years of the WCC's commencement of operations. While this arbitrary timeline has been justifiably criticized, establishing a transition mechanism from the beginning has been important in terms of ensuring national ownership over the institution.

A. Building cases: Prosecutors, investigating judges, investigators

Drawing from the experience of the Bosnian WCC, the temporary inclusion of international staff (such as prosecutors) with experience in handling complex criminal investigations can help narrow the impunity gap and buffer the proceedings from political interference. In Bosnia, where many national prosecutors were perceived, often justifiably, to be biased

[11] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, October 4, 2000, U.N. Doc. S/2000/915, http://daccessdds.un.org/doc/UNDOC/GEN/N00/661/77/PDF/N0066177.pdf?OpenElement (accessed September 30, 2009), para. 30.

along ethnic lines, the inclusion of international prosecutors proved to be essential to promoting public confidence in the justice system.[12]

The knowledge that national investigators and prosecutors provide of the underlying historical roots of the conflict and the crimes committed, coupled with their expertise of Congolese criminal law and procedure, make them invaluable actors in the mixed chamber. It is therefore essential to promote effective collaboration between national and international staff for the chamber to work effectively (discussed in section V).

B. Specialized sexual violence unit

Promoting accountability for the rampant sexual violence, primarily against women and girls, during the armed conflict should be a priority for the mixed chamber, but building these cases is particularly complicated. The successful prosecution of sexual violence crimes will therefore likely require the inclusion of additional expertise in the chamber, potentially channeled through a specialized unit in the prosecutor's office, tasked with investigating these crimes, for several reasons. Physical evidence, such as that found in a rape kit, can be instrumental in proving the crime, but it is rarely available in the Congo. Investigators and prosecutors – instead of relying on unlawful fact-gathering methods – must be familiar with how to collect additional direct or circumstantial evidence to build a prosecutable case where such physical evidence is lacking. Moreover, investigators and prosecutors must be trained to approach a witness with cultural and gender awareness to avoid additional trauma and to accurately assess his or her credibility given the sensitive nature of the crime.

C. Trials: judicial panels

International judges have played a very valuable role in both the Special Court for Sierra Leone and the Bosnian War Crimes Chamber. In Bosnia, the use of international judges was particularly effective in helping to build national capacity. When the Bosnia WCC first began operations in March 2005, two of the three judges on first instance panels were internationals. Since then, this ratio has reversed, with national judges occupying a majority of seats on the bench. This reflects the implementation of the transition strategy aimed at eliminating international staff over time. On each panel, the presiding judge, who directs proceedings and is therefore the most active member of the bench, is always a Bosnian.

[12] There does not need to be a majority of international staff to be effective; international prosecutors have always constituted the minority in the Bosnian WCC (as of June 2008, there were five international and 13 national prosecutors).

This might be a formula for Congo to consider. The international judges could of course be selected from other African countries whose expertise could be invaluable and who bring their regional expertise to bear.

D. Registry

Installing an administrative structure – a Registry – to run the mixed chamber would be essential to further protect the institution from political interference. The Registry essentially handles the administrative functions related to the chamber, which includes logistics relating to the recruitment of national and international staff, security, and finances. It also manages the detention facility during the pre-trial and trial proceedings. As head of the Registry, the registrar has the authority to make crucial personnel, budget, and policy decisions, and can speak for the court and represent its interests.[13] This underscores why the selection of a qualified and independent registrar is important. Both the Special Court for Sierra Leone and the Bosnian WCC appointed an international registrar, although in Bosnia, this position is now occupied by a Bosnian national.

In addition, the Registry is responsible for managing certain functions that are essential to effective investigations and trial proceedings. These include victim and witness protection and support, victims' participation and reparations and outreach and communications. Most of the staff positions associated with these functions can and should be staffed by qualified Congolese nationals (with relevant trainings provided as necessary).

E. Defense

In addition to applying international fair trial standards, ensuring the defense has adequate resources and facilities to vigorously prepare its case is essential to a fair trial. This includes employing defense lawyers with sufficient expertise in international criminal law. The ICC, the SCSL, and the Bosnian WCC have created independent offices to provide essential support to defense teams appearing before the respective courts. The staff members in these offices do not represent defendants in proceedings, but instead provide research and other support to national defense attorneys.

V. Capacity-building/sharing expertise

[13] David Cohen, "Hybrid Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future," *Stanford Journal of International Law*, vol. 43 (2007), p. 8.

Given the chamber's capacity-building function, promoting strong working relationships between international and national staff is central to its success. However, the mere presence of international and national prosecutors in the mixed chamber does not guarantee that this will occur. The challenges associated with effective capacity-building could be addressed through recruiting international staff with the necessary training and experience, regularly evaluating international staff on their effectiveness in sharing the expertise with Congolese colleagues, and requiring an adequate length of contract to provide for greater cooperation. In addition, military judges, prosecutors and other personnel who have participated in the trials should be strongly encouraged to share their experiences with their national and international civilian counterparts. Further, fostering capacity-building between staff in the mixed chamber and staff in other courts trying serious crimes should be pursued over the longer term.