



Tackling Impunity in Congo

Meaningful follow-up to the UN Mapping Report: A mixed chamber and other accountability measures

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Introduction

On October 1, 2010, the United Nations' Office of the High Commissioner for Human Rights (UNHCHR) released a comprehensive mapping report ("UN mapping report") documenting grave human rights violation that occurred between 1993 and 2003 in the Democratic Republic of the Congo (DRC). It is the first time that these crimes, perpetrated by a variety of actors, have been comprehensively analyzed, compiled, and systematically organized in an official United Nations (UN) report. The report is a powerful reminder of the gravity of the crimes committed in Congo and of the shocking absence of justice. If followed up by strong action nationally and internationally, the report could make a critical contribution to ending impunity and breaking the cycle of violence in Congo and the wider Great Lakes region.

As documented in the UN mapping report, years of violence in eastern Congo have left a legacy of horrific abuses committed against civilians, including mass killing, torture, sexual violence and the forced recruitment and use of child soldiers. The pervasive culture of impunity has contributed to repeated cycles of violence, characterized by the systematic targeting of civilians by all parties to the successive conflicts, in violation of international human rights and humanitarian law. The recent mass rape of 300 civilians in Walikale, eastern Congo, at the beginning of August 2010, is only the latest horrifying illustration of the ongoing suffering endured by Congolese civilians.

Impunity for grave international crimes has been one of the major obstacles to peace and stability in the DRC and in the Great Lakes region.¹ The lack of investigation and prosecution of grave abuses against civilians has sent the message that these crimes will be tolerated. Rebel group leaders, whose troops have committed atrocities, are often rewarded with senior positions in the Congolese army, thereby encouraging more rebel groups to flourish. Once integrated into the national army, past behavior of committing atrocities often continues unchecked.

The UN mapping report underscores that tackling impunity is crucial to ending the cycle of violence. It analyzes the Congolese justice system's ability to try the crimes documented and finds that despite recent judicial reforms initiated by the government with international donors' support, the Congolese justice system lacks the capacity in the short or medium term to meet the challenges of seeking prosecutions of crimes under international law

¹ Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 7, 2009, p. 43.

committed in the past. The mapping report therefore sets out a range of possible justice options² to address the crimes it documents.

It was not in the UN mapping team's mandate to make specific accountability recommendations. As such the UN mapping report discusses both the advantages and shortfalls of a variety of options, considering the possible role of the International Criminal Court (ICC),³ the role of third states through the application of the principle of universal jurisdiction, the establishment of an international tribunal, the creation of a hybrid court independent from the Congolese justice system and finally a special mixed chamber within the Congolese judicial system. The report expresses a strong preference for the creation of a hybrid model—made up of international and national personnel—to bring justice to the victims of the serious violations set out in the report, given the lack of capacity of the domestic justice system in Congo and the numerous factors that impede judicial independence in the country.⁴

Others, including the UN Special Rapporteur on the independence of judges and lawyers,⁵ the UN seven special thematic procedures on technical assistance for the Government of the DRC,⁶ numerous Congolese civil society organizations, and Human Rights Watch⁷ have supported a similar model, proposing the establishment of a “mixed chamber”—a national institution embedded in the Congolese justice system with the temporary participation of international staff—in Congo.

In its initial written comments responding to the UN mapping report,⁸ the DRC government partially responds to this option, proposing to create a “specialized chamber” situated in

² UNHCHR, “Democratic Republic of the Congo 1993-2003 — Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 2003 and June 2003” (“UN mapping report”), August 2010, p. 454.

³ The International Criminal Court only has jurisdiction over crimes committed after July 1, 2002.

⁴ “Based on these observations, the report concludes that a mixed judicial mechanism—made up of national and international personnel—would be the most appropriate way to provide justice for the victims of serious violations. Whether national or international, the exact form and function of such a jurisdiction should be decided upon in detail jointly by stakeholders involved, particularly concerning their participation in the process, in order to provide credibility and legitimacy for the adopted mechanism.” UN mapping report, para. 61.

⁵ UN General Assembly, “Report of the UN Special Rapporteur on the Independence of Judges and Lawyers: Addendum – Mission to the Democratic Republic of the Congo,” A/HRC/8/4/Add.2, April 11, 2008, para. 88.

⁶ UN General Assembly, “Combined report of seven special thematic procedures on technical assistance to the Government of the DRC and urgent examination of the situation in the east of the country,” A/HRC/10/59, March 5, 2009, para. 95.

⁷ Human Rights Watch, “A ‘mixed chamber’ for Congo?” October 5, 2009, <http://www.hrw.org/en/news/2009/11/19/mixed-chamber-congo>.

⁸ Government of the Democratic Republic of the Congo, “Observations of the Government on the Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the

the Congolese judicial system with jurisdiction over the most serious crimes committed in Congo, including those documented in the mapping report.

Human Rights Watch welcomes the DRC government's expressed commitment to justice for grave crimes committed on its territory. Creating a dedicated and specialized chamber to investigate and prosecute these complex and highly sensitive crimes is an important step forward. However, in order to give such a chamber the maximum credibility, judicial independence, and expertise, as well as the opportunity to try those most responsible for the crimes, both Congolese and non-Congolese, Human Rights Watch urges that such a specialized chamber include, on a *temporary* basis, international staff. This could include, for example, other African judges and prosecutors with relevant experience.

In this paper, drawing from our extensive experience of international and internationalized justice mechanisms, Human Rights Watch provides some initial elaboration on the establishment, mandate, and functioning of a “mixed chamber” for Congo. We also comment briefly on other accountability mechanisms suggested in the UN mapping report.

I. Establishing a mixed chamber for the Congo: why, what and how?

The proposed mixed chamber for Congo would in large part follow the model of the Bosnian war crimes chamber established in early 2005 as part of the Bosnian State Court.⁹ It would be a national institution embedded in the Congolese justice system and applying Congolese laws and procedures, but with its own bench, investigation and prosecution services, registry, and victims and defense offices. It would deal exclusively with past and present war crimes—including the current wave of rapes in the east—, crimes against humanity and genocide, and would *temporarily* include non-Congolese staff.

This model is distinct from the “hybrid court” model established in Sierra Leone, for example, which was an international court created through an agreement with the United Nations and operating according to its own statute and rules, but located in Sierra Leone and employing Sierra Leonean personnel.

territory of the Democratic Republic of the Congo between March 2003 and June 2003” (“Observations du Gouvernement sur le rapport du Projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République Démocratique du Congo”) August 2010, unpublished document on file with Human Rights Watch, p. 48.

⁹ For more information about the Bosnian war crimes chamber, see Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, February 2006, <http://www.hrw.org/en/reports/2006/02/07/looking-justice>.

A. Rationale for a mixed chamber

As highlighted in the UN mapping report, there is not likely much appetite, either on the part of the DRC government or the international community, for establishing a full-fledged international tribunal for the Congo, on the model of the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda.¹⁰

In addition to being far less costly and quicker to set up than an international tribunal, establishing a mixed chamber within the domestic judicial system in the DRC would be in accordance with the principle that states have the primary responsibility to prosecute war crimes, crimes against humanity, and genocide committed on their territory. Created by the Congolese authorities and embedded in the domestic justice system, the mixed chamber would have greater Congolese ownership. It could also benefit the Congolese justice system in the longer term through capacity-building and would thus not represent a diversion of current international efforts directed at strengthening the rule of law in the DRC.

The formal inclusion of non-Congolese experts, which would be the essence of a “mixed chamber,” is called for, as explained below, by the extreme complexity of the crimes at hand and the current structural weakness of the Congolese justice system.

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.¹¹ Draft legislation to implement the Rome Statute of the ICC into Congolese domestic law has not yet been passed by Congo’s parliament, but once approved, the jurisdiction for such crimes will move to the civilian courts.

Trying these kinds of crimes is difficult 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

¹⁰ Both these tribunals were created through the adoption by the UN Security Council of resolutions under Chapter VII of the United Nations Charter, namely UN Security resolution 827 for the International Criminal Tribunal for the Former Yugoslavia and UN Security Council resolution 955 for the International Criminal Tribunal for Rwanda.

¹¹ 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 20, 2010), art. 173.

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 as judges, lawyers, and staff 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 could provide the national justice system with the boost it needs to tackle rampant impunity for the worst crimes. As explained below, 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.

B. Some practical aspects of the establishment of a mixed chamber

1. Legal foundation

There are various possible options as to how the chamber could be created. Specifically, the chamber could either be established through the enacting of a Congolese law, or through a formal treaty between the DRC government and the United Nations. We briefly discuss these two options below.

National law

In order to effectively integrate the mixed chamber in the Congolese judicial 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.¹² This new law would detail the mixed chamber's composition and operations, including setting out the involvement of international expertise. In order to have the most impact on the Congolese judicial system, the chamber should operate according to Congolese law and criminal procedure. In this regard, it is crucial that the draft legislation to implement ICC crimes into national law and give jurisdiction to the civilian justice system over these crimes be passed.

The law creating the mixed chamber 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 in a separate law. In advance of the ICC Review conference that took place last June in Kampala, the president of the Congolese parliament promised that the ICC implementing legislation would be examined during the fall of 2010.¹³

Memoranda of understanding could then be signed as appropriate with partners who will assist with the establishment, funding and functioning of the chamber, such as United Nations agencies, the African Union or the European Union.

Setting up the mixed chamber under domestic law reinforces Congolese ownership of the court and does not require formal UN involvement. Funding to the mixed chamber, which should come in addition to existing efforts to strengthen the rule of law in the DRC, would still directly benefit the domestic justice system, through a chamber that would remain in operation, as needed, beyond the temporary inclusion of non-Congolese personnel.

Formal 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.¹⁴ Unlike the Bosnian war crimes chamber, the Special Court for Sierra Leone sits outside of the

¹² "La loi peut créer des juridictions spécialisées," Constitution of the Democratic Republic of Congo (Constitution de la République Démocratique du Congo), 2006, <http://www.presidentrdc.cd/constitution.html> (accessed September 20, 2010), art. 149.

¹³ Lucien Dianzenza, "Justice – la CN-CPI demande au gouvernement de rassurer les victimes des crimes graves commis à l'est," *Afrique Redaction*, Septembre 16, 2010, <http://www.afriqueredaction.com/article-justice-la-cn-cpi-demande-a-la-rdc-de-rassurer-les-victimes-des-crimes-graves-commis-a-l-est-57140843.html> (accessed on September 20, 2010.)

¹⁴ Specifically, following the UN Security Council's adoption of a resolution authorizing the Secretary-General to enter 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/node/11983/section/4>.

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. Yet, heavy international involvement in the chamber's creation through the UN may not be easy to mobilize and risks undermining national ownership over the institution. If this model is followed, it is worth exploring whether it is possible to 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.

2. A chamber embedded in the national judicial system

The mixed chamber should be based within the civilian judicial system. Indeed, this is required under both the Congolese constitution and internationally accepted standards.¹⁵ 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 Congolese civilian justice system has its own weaknesses and lacks expertise in trying grave international 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. The exact location of the mixed chamber within the civilian courts (at the level of *tribunal de grande instance* or appeals chambers, for example) is yet to be determined. The mixed chamber could be permanently based in one location but could have a “mobile” capacity to hold specific proceedings closer to where the crimes were committed.

Whatever the level of jurisdiction in which the mixed chamber would be integrated, serious consideration should be paid as to how decisions of the mixed chamber would be appealed.

¹⁵ Constitution of the Democratic Republic of Congo, February 18, 2006, <http://www.presidentrdc.cd/constitution.html> (accessed September 20, 2010), 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 20, 2010); 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://daccess-ods.un.org/TMP/7110958.html> (accessed September 20, 2010), principle 9.

The Bosnian War Crimes Chamber, 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.¹⁶

3. Jurisdiction over past and current grave international crimes

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. This would not categorically deprive other local courts from jurisdiction over these crimes but would give primary authority to the mixed chamber to hear cases that meet its mandate.

The starting point for the chamber's temporal jurisdiction should be decided by policy-makers in consultation with civil society. One proposal is to start in March 1993 to coincide with the UN Office of the High Commissioner for Human Rights mapping report.

The mixed chamber's temporal jurisdiction should be open-ended (and not end in 2003 like the UN mapping report) so that it could investigate and prosecute ongoing grave international crimes under its jurisdiction. Because the DRC is a state party to the Rome Statute, the International Criminal Court has jurisdiction over war crimes, crimes against humanity, and genocide committed after July 1, 2002 in the DRC. In addition, in April 2004 the DRC government referred the situation on its territory to the Court. The ICC has conducted investigations in the district of Ituri and issued arrest warrants against four Ituri warlords.¹⁷ It is now conducting investigations in the Kivus. Existing ICC investigations in eastern DRC do not obviate the need for a mixed chamber with jurisdiction over current crimes, however. As illustrated to date, the ICC, which is operating simultaneously in five different country situations, will only be able to pursue a limited number of cases, leaving a huge impunity gap.

¹⁶ 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/backgrounders/eca/serbia0607/serbia0607web.pdf>, p. 31.

¹⁷ Thomas Lubanga, former leader of the Union des Patriotes Congolais (UPC), Germain Katanga, former commander of the Force de résistance patriotique en Ituri (FRPI), and Mathieu Ngudololo, former leader of the Front des Nationalistes et Intégrationnistes (FNI) are currently on trial at the ICC in The Hague. Bosco Ntaganda, Lubanga's co-accused, is still at large in the DRC.

In order to effectively curb impunity in the DRC, it is essential that the domestic justice system be able to complement the work of the ICC.¹⁸ The establishment of a mixed chamber would give the domestic system the necessary boost to effectively tackle these crimes and go after those who may not be targets for the ICC but still are beyond the reach of justice in the current circumstances.

The chamber could try all persons, including foreign nationals, who committed crimes within its jurisdiction.

4. Mandate and identifying 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.¹⁹ 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.

Composition of the mixed chamber

The mixed chamber will of course have its own mixed bench of judges. However, to fully protect the institution from political interference and increase its efficiency, it will be essential for the chamber to have its own investigation and prosecution teams ('parquet'), as well as its own administrative structure, or registry. The registry would essentially handle administrative functions related to the functioning of the chamber, including recruitment of staff, finances, security, management of evidence and documentation for the trial, translations or detention facilities.

The registry would also manage certain functions that are of essential importance to guarantee both the accused's rights to a fair trial, as well as the well-being and protection of

¹⁸ 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.

¹⁹ 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://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/661/77/PDF/N0066177.pdf?OpenElement> (accessed September 20, 2010), para. 30.

victims and witnesses. This includes facilitating the work of the defense, and victims' lawyers, managing witness protection and outreach to the local populations about trials.

In light of the prominence of sexual crimes in Congo, it will be especially important for the mixed chamber to promote accountability for these crimes. But building cases related to sexual violence 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 specific unit in the prosecutor's office. This "specialized sexual violence unit" could also provide advice and training to other staff in the chamber about how to interview and handle sensitively victims of sexual violence.

Inclusion of international staff in each and every component of the mixed chamber is essential. It will promote capacity building in a wide range of criminal justice related functions. As explained below, this international presence can be tailored, would be temporary and should follow a 'phasing out' strategy.

C. The crucial importance of international participation

Recruiting highly qualified and dedicated international staff to work in the chamber is essential.

The inclusion of international staff would be temporary, with the aim of enabling the chamber to function as a full-fledged national institution eventually, along the lines of the Bosnian chamber model. With the Bosnia war crimes chamber, for instance, a decision was made at the outset to phase out international staff within five years of the chamber's commencement of operations. While this arbitrary timeline has been justifiably criticized, establishing a transition process from the beginning has been important in terms of ensuring national ownership over the institution. In this regard, it is worth considering the precise benchmarks which, when satisfied, would trigger the phasing out of international staff.

International staff should have an established expertise and experience in one of the various aspects linked to the investigation and prosecution of grave international crimes. As mentioned above, building cases against high level commanders responsible for grave international crimes is a task that requires special skills. In any country in the world, it would be a stretch to ask judicial personnel usually dealing with ordinary crimes to successfully investigate these types of international crimes. International staff should also be familiar

with civil law systems and ideally speak French. International staff and judges could of course be selected from other African countries whose expertise could be invaluable in bringing their regional expertise to bear.

Congolese staff will also be crucial actors in the chamber. They bring knowledge of the historical roots of the conflict, familiarity with the cultural context and expertise of Congolese criminal law and procedure. Effective collaboration between national and international staff will thus be essential for the mixed chamber to function effectively.

The allocation of positions for international and national staff is important and could evolve as part of the phasing out strategy. For example, when the Bosnia war crimes chamber first began operations in March 2005, two of the three judges on trial panels were internationals. Since then, this ratio has reversed, with Bosnian judges occupying a majority of seats on the bench. On each panel, the presiding judge, who directs proceedings and is therefore the most active member of the bench, is always a Bosnian. Both the Special Court for Sierra Leone and the Bosnian war crimes chamber initially appointed international registrars, and both now have a national occupying this position.

The inclusion of international staff and judges is also essential to promote public confidence in the justice system.²⁰ This would be particularly important in eastern DRC. After years at the mercy of rebel groups, in complete disarray and in the face of rampant corruption, the Congolese justice system has lost the population's confidence. The presence of international staff may bolster victims and witnesses' willingness to give testimony to the chamber. In addition, the presence of international staff will act as a buffer to political interference, which has been a key obstacle to date for the domestic justice system to prosecute high level defendants.

Moreover, given the tense political context surrounding the crimes documented in the UN mapping report, the presence of international staff in the mixed chamber will lend the necessary credibility and legitimacy to its investigations of crimes allegedly committed by non-Congolese perpetrators.

The DRC government, in its written response to the UN mapping report, has expressed concerns about the likely inequity of salaries for international and national staff in a proposed mixed chamber. This is a legitimate concern, and one that is widespread in

²⁰ There does not need to be a majority of international staff for this 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).

countries, like Congo, who host a large number of UN staff. At both the Special Court for Sierra Leone and the Bosnia war crimes chamber salaries of national staff and international staff were indeed calculated according to respective scales of costs. In Human Rights Watch's view, this issue should be aired and discussed with a view to finding possible solutions. But it cannot be a meaningful argument not to set up the mixed chamber.

D. The need for regional judicial cooperation agreements with regards to non-Congolese perpetrators

As discussed in the UN mapping report, the crimes committed in Congo during the two wars (1996-1997 and 1998-2003) include perpetrators who are nationals of other states, including Rwanda, Angola, Uganda and Zimbabwe. However, some of these countries, including Rwanda and Angola, prohibit the extradition of their citizens to third states.²¹ As a domestic institution, the mixed chamber could not overcome this ban on extradition. This obstacle would not in any way preclude the mixed chamber from investigating crimes, building comprehensive judicial dossiers and issuing arrest warrants, but gaining custody of the accused would be complicated. The Bosnian war crimes chamber faced a similar situation and experience in the Balkans thus provides a useful precedent.

Strong regional cooperation and international political support to the Chamber could help it overcome this legal barrier. 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). In the shorter term, improved judicial cooperation and the sharing of investigative files can help build pressure to ensure that the alleged non-Congolese accused are held to account in their country of citizenship. Eventually, the countries concerned could sign mutual agreements that would enable extradition to the mixed chamber, once necessary domestic legislative changes have been made.

Strong international support will be essential to make this happen. The International Conference on the Great Lakes Region already has a framework to end impunity for war

²¹ 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 20, 2010), art. 27; Constitution of the Republic of Rwanda, May 26, 2003, http://www.amategeko.net/display_rubrique.php?Langue_ID=Fr&Information_ID=48&Parent_ID=708&type=public (accessed September 20, 2010), art. 25.

crimes, crimes against humanity and genocide.²² The African Union could also play a positive role in helping facilitate judicial cooperation from other African states with the mixed chamber.

National bans on extradition would not trump an international tribunal created under a chapter VII UN Security Council resolution. But, in practice, and in the absence of an international police force to enforce the arrest warrants of such tribunal, gaining custody of the accused would also depend on the cooperation of the state of nationality of the accused.

Finally, it is worth noting that, even if the chamber was established by the Congolese authorities under national legislation, the UN Security Council could pass a resolution under Chapter VII of the UN Charter requiring member states to cooperate with the chamber, which could include the arrest and surrender of suspects. To do so would require showing that the absence of cooperation constituted an ongoing threat to international peace and security.

II. The role of the African Union

One of the founding principles of the African Union is the rejection of impunity for war crimes, crimes against humanity and genocide as a crucial way to strengthen the rule of law and long-term stability.²³

The second war in Congo involved up to nine different African states, and is often called Africa's "first world war." Victims in the DRC continue to endure unspeakable atrocities. It is the African Union's duty to promote a long term solution to anchor peace and stability in DRC and the Great Lakes region. This includes promoting accountability for the grave international crimes documented in the UN mapping report and more recent crimes in the DRC. Because of its commitment to end impunity, its unique character as an African platform for peace and security, and its ongoing involvement in the Great Lakes region, the African Union is well placed to support the establishment of a mixed chamber. Despite some of

²² 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 20, 2010). 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.

²³ 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 20, 2010), art. 4.

worrisome recent positions of the AU leadership and summits on justice issues, it would be worth making an effort to engage the African Union in supporting the chamber.

The African Union could sign a Memorandum of Understanding with the Democratic Republic of the Congo to assist with various practical aspects related to the establishment of the mixed chamber. For example, the African Union could assist with convening an international conference of donors for the chamber. It could also help facilitate the identification of African professionals with expertise in the investigation and prosecution of war crimes, crimes against humanity and genocide who could serve as international staff in the mixed chamber. Finally, the African Union could play an important convening role, to facilitate dialogue among African countries concerned in order to facilitate judicial cooperation. It could also mandate other states to cooperate with the mixed chamber.

Supporting the establishment of a mixed chamber, which would contribute to strengthening domestic capacity to deal with grave crimes and thus strengthen the rule of law and respect for human rights in the Congo is fully in line with the stated objectives of the African Union. This would test the organization's often stated commitment to ending impunity for war crimes and crimes against humanity and work for durable peace on the continent.

III. Other measures to address grave crimes committed in the DRC

The UN mapping report discusses the application of the principle of extraterritorial or universal jurisdiction by third states as one means to ensure accountability for grave crimes committed in Congo.²⁴ Universal jurisdiction is the ability of the domestic judicial system of a state to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals or against one of its nationals. The use of this form of extraterritorial jurisdiction is justified by the gravity of the crimes it can be used to prosecute, which shock the conscience of humanity, such as war crimes, crimes against humanity, torture and genocide. Prosecution in third states using universal jurisdiction is an important 'safety net' when the states with primary jurisdiction are unable or unwilling to act or when the accused persons have fled to these third states.

²⁴ UN mapping report, p. 461.

There are currently at least two such cases that are directly related to crimes committed in eastern DRC.²⁵ The continued and intensified use of universal jurisdiction in relation to crimes in the Congo will be particularly important in case the states of nationality of some of the non-Congolese accused are not willing to either bring them to justice or cooperate with the mixed chamber.

In addition to prosecutions of the most serious crimes, broader accountability efforts for lesser offenses are important to address a difficult past of mass atrocities. In this regard, Human Rights Watch fully supports the suggestions included in the UN mapping report. These include the vetting of Congolese armed forces to remove soldiers and officers suspected of having committed atrocities against civilians, the establishment of a Truth Commission,²⁶ and designing meaningful reparations for victims.

²⁵ In Spain, in February 2008, a judge issued arrest warrants against 40 officers of the Rwandan Army for their role in the mass killing of Rwandan refugees and the Congolese population in the DRC during the 1990s (Al Goodman, 'Spanish judge indicts 40 Rwandan military officers for genocide,' CNN, February 6, 2008, <http://edition.cnn.com/2008/WORLD/europe/02/06/spain.indictments.rwanda/index.html> [accessed September 20, 2010].) In Germany, in November 2009, leaders of the rebel group Democratic Forces for the Liberation of Rwanda (FDLR) Ignace Murwanashyaka and Straton Musoni were arrested on the suspicion of ordering war crimes and crimes against humanity committed in the Kivus ('Germany arrests top Rwanda rebels,' BBC, November 17, 2009, <http://news.bbc.co.uk/2/hi/8364507.stm> [accessed September 20, 2010]).

²⁶ In light of the unsuccessful experience with a first Truth and Reconciliation Commission in the DRC, it would be essential that a renewed attempt be designed in close consultation with local populations and civil society.