



Targeted Sanctions and Beyond

Financial and Judicial Tools for the U.S. and Europe to Help Enable Timely Elections in the Democratic Republic of the Congo

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Political tensions are building in the Democratic Republic of the Congo, where sitting President Joseph Kabila is attempting to subvert the country's constitution, hold on to power, and reduce political space ahead of the scheduled end of his second presidential term. During the past 18 months, the situation has worsened, with multiple attempts to significantly delay elections; peaceful protesters arbitrarily arrested, beaten, or killed;¹ and the expulsion of several key international researchers or officials, including those from the United Nations Joint Human Rights Office, Human Rights Watch, Global Witness, and the Congo Research Group.²

Unless clear signals come from the international community that there will be consequences for subverting the constitution and undermining democracy, human rights abuses and corruption will continue, and a full-scale humanitarian crisis could develop. To prevent this, such signals are possible. A number of policy tools are available to governments that can increase the potential for positive policy outcomes in the Democratic Republic of the Congo. Specifically, the United States, European Union, and individual European states can use financial and legal tools that are frequently employed to fight terrorism and nuclear proliferation to increase the potential for timely democratic elections, promote accountability for atrocity crimes and corruption, and discourage government repression against the civilian population.³ Other policy approaches related to the process of holding democratic elections, including support to civil society to provide meaningful monitoring and capacity building for the government to carry out an effective process, are of course also required. So too, more effective governance mechanisms are needed to bring meaningful change to Congo over the long term. These other areas remain the focus of separate research by the Enough Project.

This brief instead aims to explain a selection of the financial and legal tools and how they can help support security and respect for the constitution in Congo, and correct common misperceptions. For example, a commonly held view is that U.S. financial pressure has little utility against actors in the Congolese government because most of the Kabila regime's financial dealings are with China, not the United States. It is also often said that sanctions are the only available financial pressure tool. Another common view asserts that sanctions only have symbolic value as "name and shame" political tools but wield no concrete coercive power. As we explain below, however, these misperceptions obfuscate critical opportunities for impact. For example, Congolese elites bank and conduct business in U.S. dollars and thereby transfer money through the U.S. frequently; there are crimes committed by Congolese

actors over which the United States has jurisdiction; and there are several financial anti-money laundering tools, other types of sanctions, and ways to enforce sanctions that can have much more significant impact than simply naming and shaming.

Financial Tools: Enhancing Targeted Sanctions, Using Anti-Money Laundering Tools, Engaging Banks

The U.S. and European governments have several additional financial tools available to place pressure on the Congolese government to hold timely elections, through the U.S. Department of the Treasury and beyond.

Use anti-money laundering tools to prevent corrupt business deals. The U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) helps fight money laundering in the U.S. financial system.⁴ Since most Congolese banks accounts and transactions are in U.S. dollars, FinCEN has the ability to take several steps related to countering money laundering in the DRC, which would send powerful messages to the Kabila regime that it might not be able to transact in U.S. dollars. For example, FinCEN advisories⁵ or specific investigative requests pursuant to section 314(a) of the USA Patriot Act⁶ to banks within its jurisdiction (22,000 financial institutions) on the laundering of proceeds of corruption and/or gold trading would be an influential tool on the financial sector. Over the long term, FinCEN can also take more direct action under section 311 of the Patriot Act against a specific financial institution, or even a type of transaction or class of account, considered to be a “primary money laundering concern.”⁷ Anti-money laundering agencies, known as financial intelligence units (FIUs), in Europe could also issue advisories to their banks, particularly as many Congolese elites bank and travel in Belgium, France, and the United Kingdom.

Enhance the use of targeted sanctions. The recent U.S. designation for targeted sanctions in the form of an asset freeze of Kinshasa Police Commissioner General Célestin Kanyama⁸ has had an impact, specifically by incentivizing the Congolese government to refrain from cracking down on protestors in late July. However, that impact will dissipate quickly—and will not on its own move the DRC government’s stance on elections—unless higher impact targets are designated. Where sanctions have worked most effectively to spur an effective process toward change, such as with respect to Burma and Iran,⁹ it has generally been when significant actions are taken on a consistent basis, so that key actors understand the stakes over a period of time.

Such targets would move beyond “naming and shaming” and toward having real financial impact and linking with broader illicit networks. This includes individuals providing support to a person on the sanctions list (a designated person), or companies owned or controlled by a designated person. For example, the U.S. could designate high-level financial advisors to President Kabila or directors of key state-owned companies in Congo. Over the long term, additional types of sanctions authorities could be introduced via executive order. This can be challenging from a political perspective, but should circumstances arise necessitating consideration of sanctions authorities beyond those currently in place, at least three could be considered: anti-corruption designation criteria, designation criteria that target those who undermine peaceful assembly and civil society or media activities, and sectoral sanctions against persons active in the illicit trade of natural resources.

Proactively enforce sanctions designations. The vast majority of transactions by elites in Congo are denominated in U.S. dollars, and the vast majority of bank accounts in the DRC are in U.S. dollars as well.

This means that the United States has leverage to stop them because the transactions will likely transit through correspondent banks in New York. There are a limited number of banks in New York that clear U.S. dollar transactions for international wire transfers. In other words, if General Kanyama is trying to transfer money out of his U.S. dollar-denominated Kinshasa bank account to an account in Paris also in U.S. dollars, that transaction would go through one of these banks in New York. Thus, targeted sanctions against an individual or entity with assets outside the United States can still have significant impact because it means that the person can no longer transact in U.S. dollars, which drastically limits what kind of business they can do. It would also be helpful if European states could follow suit with sanctions actions. To enforce sanctions, Treasury's Office of Foreign Assets Control (OFAC), FinCEN, and European FIUs should work together to assess what banks individuals in the Congolese regime use and what the U.S. and European correspondent banks are for those particular financial institutions, and then freeze the assets through those banks.

Directly engage with banks and foreign governments. In addition to FinCEN action, the U.S. government, principally Treasury and U.S. Department of State officials, can counter money laundering in the DRC through direct engagement in the region, emphasizing that the health of their own financial systems could be threatened by the abuse committed by these external officials. By raising concerns about possible money laundering activities with individual governments (such as Uganda and the UAE), multilateral bodies in the region such as Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG)¹⁰ and the Task Force on Money Laundering in Central Africa (GABAC),¹¹ and with banks themselves, the United States can increase attention and action by other jurisdictions, which is likely have more direct ability to impede suspicious transactions. European FIUs can and should take similar steps with the banks in their jurisdiction.

Create responsible investment guidelines connected to natural resource sanctions. Based on the model established by the Burma Responsible Investment Reporting Requirements,¹² public reporting by U.S. companies seeking to invest in DRC's natural resources sector could provide insight into these companies' activities and ensure there is no illicit activity.

Deny visas to corrupt officials. Presidential Proclamation 7750¹³ and Section 7031(c) of the 2012 Consolidated Appropriations Act¹⁴ both provide legal authority to deny visas to enter the United States to corrupt officials and benefitting family members. The State Department should not only use these authorities but make public statements that these steps are being taken.

Judicial Tools: Investigate and punish crimes and pursue criminally-derived assets

The United States and European countries have judicial tools available that can have a powerful longer-term impact on the Democratic Republic of Congo.

Pursue criminally-derived assets. The U.S. Department of Justice's Kleptocracy Asset Recovery Initiative,¹⁵ implemented by DOJ's Asset Forfeiture and Money Laundering Section (AFMLS)¹⁶, has brought 25 cases in total to seize the proceeds of corruption from officials in Nigeria, Ukraine, Equatorial Guinea, Uzbekistan, South Korea, Taiwan, Honduras and Canada. Regarding Congo, this initiative has potential, given its scale of money laundering and stolen assets. The Kleptocracy Asset Recovery Initiative should investigate criminally-derived assets in the United States and money laundered through U.S. banks linked to Congo's kleptocrats and their facilitators, and file forfeiture claims to have the money or assets seized. This could be applied most directly through a civil forfeiture action against the

assets of gold illegally mined and sold that Congolese military commanders and others ultimately benefitted from.

Investigate child soldiering, torture, and natural resource pillage. The Department of Justice’s Human Rights and Special Prosecutions Section (HRSP)¹⁷ should pursue potential claims against perpetrators and facilitators of grave crimes in Congo, especially child soldiering, torture, and the war crime of natural resource pillage.¹⁸

Warn Congo’s government officials and their enablers that the world court is watching. The Department of State’s Office of Global Criminal Justice (GCJ)¹⁹ should encourage the chief prosecutor of the International Criminal Court to announce publicly that the ICC is closely monitoring the situation in the DRC during the electoral period, noting that grave crimes committed by state or non-state actors will not go unpunished.²⁰ GCJ should also encourage the ICC to improve their prosecution of economic crimes—primarily the pillage of natural resources—and its pursuit of defendants’ criminally-derived assets.

Improve global coordination among criminal investigators. Justice Department prosecutors should improve their coordination efforts with law enforcement networks in Europe, particularly specialized units in European member states pursuing core international crimes and trafficking crimes occurring in Congo and perpetrated by individuals who bank and travel in European jurisdictions.²¹

Endnotes

¹ See, “Human Rights Watch, “DR Congo: Officials Linked to Attack on Protesters,” October 6, 2015, available at <https://www.hrw.org/news/2015/10/06/dr-congo-officials-linked-attack-protesters>; and Elsa Buchanan, “DRC: ‘Prevent bloody repression’ against protesters urge rights activists,” *International Business Times*, January 20, 2016, available at <http://www.ibtimes.co.uk/drc-prevent-bloody-repression-against-protesters-urge-rights-activists-1538953>.

² See, Aaron Ross, “Congo expels top U.N. official after report on police abuses,” *Reuters*, October 16, 2014, available at <http://uk.reuters.com/article/uk-congodemocratic-rights-idUKKCN0I52SR20141016>; Human Rights Watch, “DR Congo: Human Rights Watch Researcher Barred,” August 9, 2016, available at <https://www.hrw.org/news/2016/08/09/dr-congo-human-rights-watch-researcher-barred>; Global Witness, “Global Witness Employees Expelled from DRC Under False Allegations,” Press release, July, 14, 2016, available at <https://www.globalwitness.org/en/press-releases/global-witness-employees-expelled-drc-under-false-allegations/>; and Congo Research Group, “Press Statement Regarding the Expulsion of Jason Stearns from the DR Congo,” Press release, April 9, 2016, available at <http://congoresearchgroup.org/press-statement-regarding-the-expulsion-of-jason-stearns-from-the-dr-congo/>.

³ The United States and the United Nations each have sanctions regimes related to the DRC. For the U.S. sanctions, see, U.S. President (George W. Bush), Executive Order 13413, “Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo,” sec. 1(i,ii)(A-G) and sec. 2-9, October 31, 2006, available at <https://www.treasury.gov/resource-center/sanctions/Documents/13413.pdf>; and U.S. President (Barack Obama), Executive Order 13671, “Taking Additional Steps to Address the National Emergency With Respect to the Conflict in the Democratic Republic of the Congo,” sec. (1-6), July 10, 2014, available at <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13671.pdf>. For the U.N. sanctions, see, U.N. Security Council Subsidiary Organs, “Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo—Sanctions Measures,” available at <https://www.un.org/sc/suborg/en/sanctions/1533> (last accessed September 2016).

⁴ For more information on FinCEN and its authorities, see U.S. Department of the Treasury, Financial Crimes Enforcement Network, “What We Do,” available at https://www.fincen.gov/about_fincen/wwd/ (last accessed September 2016).

⁵ For a list of previous FinCEN Advisories, see, U.S. Department of the Treasury, Financial Crimes Enforcement Network, “Advisories/Bulletins/Fact Sheets,” available at https://www.fincen.gov/news_room/advisory/ (last accessed September 2016).

⁶ For background on Section 314(a), see, U.S. Department of the Treasury, Financial Crimes Enforcement Network, “USA PATRIOT Act—Section 314(a),” available at https://www.fincen.gov/statutes_regs/patriot/section314a.html (last accessed September 2016).

⁷ For details on Section 311 and its authorities, see, U.S. Department of the Treasury, Financial Crimes Enforcement Network, “USA PATRIOT Act,” available at https://www.fincen.gov/statutes_regs/patriot/index.html?r=1&id=311#311 (last accessed September 2016).

⁸ U.S. Department of the Treasury, “Treasury Sanctions High-Ranking Government Security Official for Role in Violence in the Democratic Republic of the Congo,” Press release, June 23, 2016, available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0496.aspx> <https://www.treasury.gov/press-center/press-releases/Pages/jl0496.aspx>.

⁹ “Observers also have given economic sanctions some credit for the ongoing democratic transition in Myanmar, as well as Russia’s economic woes. ... As described above, the United States has innovated substantially in using financial sanctions in the post-9/11 era, with important successes in changing behavior, as in the Iran and Burma cases, and in choking off the ability of terrorist groups to raise, store, move, and use funds.” Found in Elizabeth Rosenberg, Zachary K. Goldman, Dr. Daniel Drezner & Julia Solomon-Strauss, “The New Tools of Economic Warfare: Effects and Effectiveness of Contemporary U.S. Financial Sanctions,” (Washington: Center for a New American Security, 2016), p. 5 and p. 34, available at <http://www.cnas.org/sites/default/files/publications-pdf/CNASReport-EconomicWarfare-160408v02.pdf>

¹⁰ Eastern and Southern Africa Anti-Money Laundering Group, “Home,” available at <http://www.esaamlg.org> (last accessed September 2016).

¹¹ Task Force on Money Laundering in Central Africa, available at <http://spgabc.org> (last accessed September 2016).

¹² U.S. Department of State, “Fact Sheet: Burma Responsible Investment Reporting Requirements,” July 20, 2016, available at <http://www.humanrights.gov/dyn/fact-sheet-burma-responsible-investment-reporting-requirements.html>.

¹³ U.S. President (George W. Bush), Proclamation 7750, “To Suspend Entry as Immigrants or nonimmigrants of Persons Engaged in or Benefitting from Corruption,” sec. 1, January 12, 2004, available at <https://www.gpo.gov/fdsys/pkg/FR-2004-01-14/pdf/04-957.pdf>.

¹⁴ U.S. Government Printing Office, 112th Congress, “2012 Consolidated Appropriations Act,” Pub. L. 112-74, sec. 7031(c), available at <https://www.gpo.gov/fdsys/pkg/PLAW-112publ74/html/PLAW-112publ74.htm>.

¹⁵ For more information, see, U.S. Department of Justice, “Second Vice President of Equatorial Guinea Agrees to Relinquish More than \$30 Million of Assets Purchased with Corruption Proceeds,” Press release, October 10, 2014, available at <https://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased>; and Leslie Wayne, “Wanted by U.S.: The Stolen Millions of Despots and Crooked Elites,” February 16, 2016, *New York Times*, available at http://www.nytimes.com/2016/02/17/business/wanted-by-the-us-the-stolen-millions-of-despots-and-crooked-elites.html?_r=0.

¹⁶ U.S. Department of Justice, “Asset Forfeiture and Money Laundering Section (AFMLS),” available at <https://www.justice.gov/criminal-afmls>.

¹⁷ For information about HRSP including past cases and relevant sources of law, see, U.S. Department of Justice, Human Rights and Special Prosecutions (HRSP),” available at <https://www.justice.gov/criminal-hrsp>.

¹⁸ For more on applying the war crime of pillage framework to natural resources in Congo, see James G. Stewart, “Corporate War Crimes: Prosecuting the Pillage of Natural Resources,” (New York: Open Society Foundations, 2011), available at: <https://www.opensocietyfoundations.org/reports/corporate-war-crimes-prosecuting-pillage-natural-resources>; and Holly Dranginis, “Grand Theft Global: Prosecuting the War Crime of Pillage in the Democratic Republic of Congo,” (Washington, DC: Enough Project, January 2015), available at: <http://www.enoughproject.org/files/GrandTheftGlobal-PillageReport-Dranginis-Enough-Jan2015.pdf>.

¹⁹ U.S. Department of State, “Office of Global Criminal Justice,” available at <http://www.state.gov/j/gcj/> (last accessed September 2016).

²⁰ Chief Prosecutor Bensouda issued such a statement as political and humanitarian crises escalated in Burundi in November 2015 before opening a preliminary investigation in April 2016. For that statement, see, International Criminal Court, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening security situation in Burundi,” November 6, 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-06-11-2015>.

²¹ For information about efforts to coordinate specialized prosecution units in EU member states including related to atrocity crimes, see, “Eurojust: The European Union’s Judicial Cooperation Unit,” available at <http://www.eurojust.europa.eu/Pages/home.aspx> (last accessed September 2016).