

Democratic Republic of the Congo: Confronting Impunity

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I. Introduction

Human Rights Watch strongly believes that accountability for serious past crimes is the foundation for post-conflict reconstruction based on the rule of law and respect for human rights. Impunity for atrocities committed in the past sends the message that such crimes may be tolerated in the future. Peace and justice should be seen as complementary, not contradictory, objectives.

The initiative led by the European Commission (EC) to undertake a mission of national and international experts to carry out an Organizational Audit of the Democratic Republic of the Congo (DRC) justice system is greatly welcomed. The results of this mission will be critically important in determining both national and international support for the justice sector. It will also lay the groundwork to end impunity for serious past crimes as part of the political transition of the country.

This Briefing Paper is not intended to be a comprehensive assessment of the obstacles facing the national justice system in the DRC. Rather, it looks at the challenges in addressing impunity for the horrific crimes that have been committed in the DRC since 1996. The Briefing Paper discusses several aspects of disarray in the national justice system to highlight some of the most significant problems undercutting the capacity of national courts to prosecute serious human rights crimes. It provides several concrete recommendations for initiatives and reforms that would enhance the capacity of national courts to address these crimes. The Briefing Paper makes specific suggestions on how national authorities can work cooperatively with the International Criminal Court (ICC) and other international justice mechanisms to best ensure that justice is done. It also discusses implementing the Truth and Reconciliation Commission (TRC) for the DRC as a valuable way to document serious past crimes given their scope.

II. Transitional Period

In June 2003 a government of national unity was installed in the DRC purportedly ending what has been one of the most deadly wars in the world.¹ On paper the country is on the road to peace, but in practice it

is far from peaceful. In many parts of eastern DRC, such as Ituri, South Kivu and northern Katanga, the fighting between armed groups continues with widespread human rights crimes including ethnic massacres, sexual violence, and recruitment of child soldiers. Systematic human rights offenses against civilians have been rampant throughout the duration of this five-year war and continue with almost total impunity. Appalling deeds go by without investigation, legal redress, or recompense for the victims. For most Congolese people, the rights set out under international law that ought to protect them from these abuses have no meaning.

The challenges facing the DRC to building a peaceful and democratic society are immense. A critical challenge will be confronting the culture of impunity. The international community has stated on numerous occasions that there will be no impunity for the most serious crimes under international law and that perpetrators will be held accountable. For example, on March 20, 2003, the United Nations Security Council in resolution 1468 emphasized this point and reiterated that all parties claiming a role in the future of the DRC must demonstrate their respect for human rights and international humanitarian law, and end impunity across the entire country.² So far there has been little action to back up these words.

Since August 1998 the DRC has been enmeshed in one of Africa's most internationalized wars, directly involving six other countries. The armies of Rwanda, Uganda, and Burundi, together with Congolese rebel groups, were pitted against the government of the DRC supported by Zimbabwe, Angola, and Namibia. Human Rights Watch has documented massive human rights abuses carried out by all parties during the war.

Armed groups have committed war crimes, crimes against humanity, and other violations of international humanitarian and human rights law on a massive scale in the DRC. Assaultants have massacred unarmed civilians, sometimes solely on the basis of their ethnicity, committed summary executions, forcibly abducted persons whose whereabouts remain unknown, and arbitrarily arrested and unlawfully detained others, some of whom they subjected to systematic torture. Sexual violence has been a particularly devastating feature and has been used as a weapon of war by most of the armed forces. International aid organizations recently estimated that as many as 10,000 women and girls may have been raped by combatants. All groups have recruited children, some as young as seven years old, for military service, subjecting the children to the risks and trauma of military operations.

In April 2003 the warring parties finally agreed to share power and signed the All Inclusive Agreement on the Transitional Government, meant to settle interim political arrangements while the country moves toward elections. This agreement and the subsequent swearing in of the Government of National Unity (GNU) is a significant step forward, but the transition is fragile. Parts of the east of the country remain in conflict and most of the former rebel groups appear to be preserving their military options should the transition process fail.³ As one civil society group said to Human Rights Watch researchers, "Everything is on paper, there is very little that is tangible. We see this period as the beginning of the end of our suffering."⁴

In this uncertain environment, questions of justice are critical. A number of those appointed to government positions have been accused of involvement in serious human rights abuses. Yet, respect for human rights and the rule of law are essential to establishing a durable peace and long term human development. If there is no justice, local populations may cause further violence by taking matters into their own hands. This has already been witnessed in Ituri, north-eastern Congo, where the culture of impunity has further fuelled the cycle of ethnic violence, allowing opposing groups to believe they are justified in carrying out revenge killings for crimes committed against them. Questions of justice ought to be treated delicately in such a fragile environment. Without a start to the process of justice, peace will remain fragile and risks failure.

III. Truth and Reconciliation Commission

A plan to establish the Truth and Reconciliation Commission for the DRC was a result of the Sun City Accord which set up five ad-hoc commissions in April 2002. In this agreement, the signatories agreed the TRC would consider political, economic, and social crimes committed from 1960 until 2003 in order to establish truth and help bring individuals and communities to reconciliation. The long historical period that the commission is to investigate was reportedly a key requirement for the signature of the RCD-Goma who were left out of the initial agreement in 2002. Reverend Kuye is the president of this Commission. The Commission is supported by eight other members, each representing one of the main parties to the peace process.⁵

The laws that will govern the TRC are currently being developed and will need to be passed by parliament and approved by the Counsel of Ministers. There are currently two draft laws being developed. One is a law deposited at the parliament by civil society members organized by a women's network called WOPPA and signed by a group of parliamentarians. This law has broad support and was developed in consultations in Kananga, funded by international donors, with members of all the main rebel groups and civil society.⁶ A second law is expected to be presented to the Council of Ministers by Reverend Kuye. His office has sought to harmonize three proposals, including the WOPPA proposal, into a new proposal.

There appear to be a number of key challenges ahead for the establishment of the TRC. There are questions about its composition, its functioning, and the timeframe which it is due to consider. One of the main concerns is the integrity and suitability of the eight members of the Commission,⁷ selected by each of the signatories of the Sun City Accord. Critics claim that a number of those selected have themselves been implicated in human rights abuses. Reverend Kuye, however, claims he has not received any formal complaints against any member of his Commission.⁸ Whatever the justification of these allegations, the integrity of the Commission has been questioned and could undermine the whole truth and reconciliation process.

Furthermore, civil society members, the U.N. High Commissioner for Human Rights (UNHCHR), and the U.N. Organization Mission in the Democratic Republic of the Congo (MONUC) have expressed concerns about the draft law being prepared by the president of the Commission. This law has been developed with only minimal consultation and does not include some key safeguards for the integrity of the process. It does not include sexual violence and other gender-based crimes as a violation and also reduces the time frame which was agreed in the Sun City Accord. The UNHCHR is considering disassociating themselves with the TRC process if the current draft law prepared by Reverend Kuye is adopted.

Having two laws before the parliament for their consideration is itself not a problem. In fact, an active and open debate on such a fundamental commission should be encouraged. It is essential, though, that any law adopted should meet the fundamental principles of independence, fairness, and transparency. It should also build upon the experience from other countries. Donors need to allow the process of debate to take place and should seek to support the Congolese vision of a TRC so long as the Commission will operate fairly, independently, and transparently.

Until a law is passed, the TRC cannot start to function. Considering that there are many laws that need to be passed, it is doubtful that this law will get the greatest priority. Having a mechanism that can establish a record of the truth and building reconciliation between communities is essential to building a solid foundation for the future in the DRC. It would be a lost opportunity if the TRC were unable to get off the ground.

IV. Breakdown of the National Justice System

The DRC's national justice system is in a state of disarray. It will likely take years to establish a functioning, independent, impartial, and fair judiciary. Yet, in the long term, it is the national justice system that provides the best hope for the protection of human rights and an end to the culture of impunity in the DRC. In the short term, the challenges for rebuilding a national justice system are enormous and will require extraordinary measures in the coming years to end the systematic and widespread abuses of human rights that characterize the DRC.

The DRC's judicial system has had little investment over the past decade. Most of the courts do not function. Its personnel have not been paid for years and magistrates are badly trained and unsupported. Mismanagement or corruption often characterizes cases that are heard, sometimes fueling community grievances and furthering conflict. One of the sparks to the conflict in Ituri between the Hema and the Lendu ethnic groups was a case about land rights where one side believed the other had corrupted the judges in the local magistrates court.⁹

Lack of confidence in the judiciary's administration of justice is widespread. Not a single political crisis of a constitutional nature has been resolved by the judiciary. Politicians and businesses are reluctant to bring their disputes to the courts. The general population similarly lacks confidence in the judiciary. It is estimated that only a very small percentage of disputes end up in courts of law, not because parties to the disputes have better options, but because they are so suspicious of the judiciary that they prefer other means, including the police, security services, the military, or traditional arbitration in rural areas. Victims of human rights abuses are generally reluctant to utilize judicial mechanisms for redress.

There are recent examples of the crisis of the judicial system leading the population to the dangerous course of self-defense. In the Masisi, Nord-Kivu area, for example, the justice system had failed for many years to resolve the intense land disputes between Hunde and "Banyarwanda" population (Hutu and Tutsi).¹⁰ It was no surprise that the Mai-Mai movement in the Masisi area began in the mid-1990s with its mainly Hunde members citing local ethnic disputes over land in addition to broader political claims as the justification for resorting to organized militias.

Below we discuss certain key deficiencies in the DRC justice system that undermine its capacity to bring justice for serious past crimes. These include lack of independence of the judiciary, training, adequate investigations, protection of fair trial standards and rights of the accused.

a. Lack of independence of the judiciary

Post-independence constitutions of the DRC, including the current transitional constitution, have asserted the principle of separation of powers and recognized three branches of government. But, despite clear references to judicial independence, the constantly growing power of the executive since the mid-1970s has resulted in *de facto* subordination of the judiciary to the executive branch. The judiciary has lost the relative independence it once enjoyed in the late 1960s and the early 1970s.

The democratic reforms of the early 1990s restated the importance of separation of powers and the judiciary showed significant signs of independence. In a celebrated ruling in 1992, for example, the Supreme Court refused to apply the 1967 authoritarian constitution that the president wanted. On August 16, 1993, the president of the Supreme Court and the *procureur général* signed a joint statement declaring void the measures of dismissal and transfer of judges arbitrarily decreed by the prime minister. However, this demonstration of independence did not last long enough for the judiciary to fully recover from the damage during the Mobutu era.

In 1997 President Laurent Kabila came to power with a deep suspicion of anyone associated with the Mobutu regime, especially the judiciary. The function of overseeing disciplinary measures has been filled by the *Conseil Supérieur de la Magistrature* (CSM). By constitutional mandate, the president of the republic presides over the Council and is assisted by the minister of justice. The chairmanship of these executive officials over the CSM needs to remain only symbolic to avoid undue infringement of the independence of the judiciary. Nevertheless, the minister of justice assumed oversight functions, undermining the CSM's authority and making clear the government's will to exert tight control. In 1998 the minister of justice fired 315 judges and magistrates without even consulting the CSM.

The situation has not changed under the current Government of National Unity. The *Syndicat Autonome des Magistrats de la République Démocratique du Congo* — SYNAMAC, the principal union of magistrates and judges — recently noted, “the judges of our country have been wrongly and unjustly reduced to the rank of simple public functionaries of the state.”¹¹ In their memorandum prepared for the government, SYNAMAC asked for a significant raise in judges' salaries to help ensure their independence from economic, ethnic, and political special interests.

b. Lack of training

The lack of well-trained personnel has always been one of the most serious problems plaguing the Congolese judiciary. At independence in 1960, there was not a single trained Congolese lawyer in practice. The government recruited foreign judges from Africa and Haiti to fill the vacuum left on the bench by the Belgians. It was not until 1962-1963 that the first graduates of Congolese law schools joined the bench. The last figures released by the Ministry of Justice show that as of 1998, there were only 1448 judges and prosecutors in the entire country, with over 70 percent of these concentrated in the cities of Kinshasa, Lubumbashi, Kisangani, and Goma.

The Congolese judicial system is based on a career magistracy where judges and prosecutors are appointed directly from law school without prior experience as lawyers. They enter a hierarchical structure where they depend on their superiors for job assignments and promotion. For this system to work there must be specialized training for judges and a self-regulatory mechanism to oversee discipline and promotion. Such specialized training was provided in the early 1960s through the *Ecole Nationale de Droit et d'Administration*, a judicial college which lasted only a few years. Since that time, there have been no effective training programs for judges and prosecutors.

c. Lack of adequate investigative capacity

In the DRC, criminal cases are in general poorly handled. Pre-trial investigation is usually one-sided or in some cases, does not take place at all. Unlike many countries in Francophone Africa and most civil law countries, the investigative functions are not separate from the functions of prosecution. The state prosecutor in the DRC both investigates and prosecutes. For such a system to work, the prosecutor and the defense must be put on an equal footing, at least formally. They both must be able to investigate and have the opportunity to present the results of their investigations. Evidence must be disclosed to each other; no side must be allowed to conduct a trial by ambush.

However, this is not the case in the DRC. There is no mechanism to ensure fairness and independence of the investigation. The prosecutor enjoys large discretionary powers — called the “opportunity of prosecution” (*opportunité de poursuite*) — to decide whether a particular crime warrants investigation. However, neither a *juge d'instruction*, an investigating magistrate in a civil law system, nor rules of disclosure exist to counter-balance the one-sided investigation by the prosecutor. This discretionary power may only be overruled by a complaint filed directly before the court by the victim of the crime.

d. Lack of fair trial standards and rights of the accused

Even though the Congolese justice system has a long way to go to become fully functioning, ordinary tribunals still have a semblance of respect for fair trial and the most basic rights of the accused. However, as exemplified by the *Cour de Sûreté de l'Etat*, the *Cour d'Ordre Militaire*, and the *Office des Biens Mal Acquis*, successive governments have established and used special judicial or quasi-judicial bodies against politically targeted groups to avoid the application of even these minimum standards of fair trial.

After the fall of Mobutu in 1997, the Kabila government established a Commission of Illegally Gotten Wealth (*Office des Biens Mal Acquis* - OBMA) to investigate economic crimes committed by members of the Mobutu regime. The stated mandate of the Commission was to investigate the origin of the wealth accumulated by the most senior officials of the Mobutu regime, and to bring to trial those suspected of illegal enrichment. But the Commission has acted as a tribunal, administering justice without respect to fair trial standards and ordering the seizure of properties allegedly gotten illegally.

The Kabila government also abolished all previously existing military tribunals and replaced them by a single military court (the *Cour d'Ordre Militaire* - COM). The COM was the result of the deep suspicion with which the Kabila government held anyone who previously worked in the justice system under Mobutu and the preference of members of the new army to directly handle their arrest and adjudication outside of the courts. During the five years of its existence, the COM was characterized by a total violation of due process and basic guarantees of fair trial, including an accused's right to appeal and to counsel of his choice.

Amid outcry and denunciations from all sectors of the society, the government abolished the COM in early 2003 and replaced it with new military tribunals. Nevertheless, the *Cour de Sûreté de l'Etat*, a special tribunal established in the 1970s to prosecute political offenses, continues to try members of the opposition, journalists, and union leaders without due process.

V. Rebuilding the National Justice System — Possible Ways Forward

The major challenge ahead is how to rebuild the national justice system for the long term while at the same time putting short term measures in place to end the culture of impunity. Both the civilian and the military justice system must be reformed and strengthened in order to be able to deal with the vast number of serious crimes committed. Investigators lack the training and means to properly gather, catalogue, and preserve evidence for use in further investigations and potentially a trial. They often lack the special skills to work with victims and witnesses of crimes such as sexual violence. To build a cadre of judicial personnel — judges, prosecutors, investigating judges, investigating officers, and others — will require training on judicial procedures and human rights. These officials also must receive specific training on the problems of sexual violence and the specific challenges prosecutions of such crimes pose. Below we discuss specific recommendations to address immediate and longer term needs of the DRC justice system.

a. Create a mobile investigative unit to help bring justice for widespread human rights abuses in the short term

In the short term, quick and innovative solutions need to be found to hold to account those responsible for human rights abuses. One way to make progress toward this goal would be to establish a mobile investigative team to enable a quick start of investigations into grave human rights crimes, in particular war crimes and crimes against humanity. Such a team could be composed of national and international

As discussed above, the DRC justice system faces institutional problems relating to lack of independence, poor infrastructure, nonexistent training, inadequate investigations, and failure to protect fair trial standards and rights of the accused. We suggest that the EC mission consult with Congolese lawyers to consider recommending financial support for measures to implement institutional reforms to improve the administration of justice. Specifically, such measures could include adding a *juge d'instruction* to the justice system and amending the code of criminal procedure to grant more rights to the accused during the pre-trial phase to ensure fairness and independence in pre-trial criminal investigations. We also recommend abolishing all the special judicial or quasi-judicial bodies, including the OBMA and the *Cour de S'reté de l'Etat*, and supporting the creation of a specialized training school for law graduates who want to pursue a career as magistrates or judges. The school would train them in special legal areas, such as criminal investigations for mass slaughter, sexual crimes, etc. The school would also prepare judges for professional specialization. In addition, we suggest initiatives to enable the CSM to regain full control over the management of the career promotion and resources of the judiciary. The budget voted by the parliament for the judiciary should be managed by magistrates themselves through the CSM to avoid the unduly great influence the executive exerts on the judiciary through resource management and career promotion.

VI. International Justice

a. Addressing impunity for crimes committed before July 1, 2002

Since 1996 the DRC has experienced a horrific armed conflict in which impunity for war crimes and crimes against humanity has been, and continues to be, the norm. Attacks against the civilian population, killings, and use of sexual violence continue to be committed in the East. These crimes will not stop as long as those who commit them are not held responsible for their acts. Accountability for those responsible for serious crimes is essential if the DRC and the region are to make a transition to a durable peace.

The Security Council has, on numerous occasions, expressed great concern about violence in the DRC, and stressed the need for a transitional period built on a system of accountability. After the promulgation of the Transitional Constitution at the announcement of the formation of the GNU, the Security Council: "Strongly [condemned] the acts of violence systematically perpetrated against civilians, including the massacres, as well as other atrocities and violations of international humanitarian law and human rights, in particular, sexual violence against women and girls," and stressed "the need to bring to justice those responsible, including those at the command level."¹²

The Council in the same resolution encouraged the secretary-general to assist the transitional authorities of the DRC "in order to put an end to impunity." But due to its current state of disarray, the national justice system is unable, even with massive help, to thoroughly investigate and prosecute the gravest crimes committed during the seven-year war and put an end to impunity. While the DRC's ratification of the Rome Statute, the founding treaty of the ICC, allows the ICC to try crimes committed after July 1, 2002, there is no mechanism competent to address past crimes perpetrated in the DRC since 1996.

The Congolese GNU has called several times on the United Nations to help set up an international tribunal. President Kabila recently repeated this request in his speech at the General Assembly on September 25, 2003. There are also different forms of justice mechanisms short of an international tribunal that can be pursued. A Group of Experts, including international and Congolese experts, should be established through the United Nations to conduct an in-depth study of possible justice mechanisms to investigate and prosecute crimes against humanity and war crimes committed prior to the entry into force of the ICC Statute. The appointment of such a Commission would demonstrate that the

staff including magistrates, investigators, prosecutors, forensic experts, and counselors serving as a central investigative body. It could be established by the *procureur général* of the DRC, with a base in Kinshasa, to be deployed, as needed, to sites of reported massacres and trials throughout the DRC. As an investigative entity, the mobile investigative team would be able to gather and preserve evidence crucial for any criminal trial, whether of a national or international character.

Forming a mobile investigative unit would be a discrete measure that could be undertaken relatively quickly. It would represent a significant step forward in delivering justice for the most serious crimes under international law. The evidence gathered by the mobile investigative unit would be handed over to the national courts, or where the national justice system seems unwilling or unable to prosecute, it could hand over evidence to the ICC. Human Rights Watch recommends that the DRC government immediately establish, and the EC mission fund and train, a mobile investigative team with national and international staff to act as a central investigative body to gather and preserve evidence for future criminal trials.

b. Enhance capacity to investigate and prosecute crimes involving sexual violence and other gender-based crimes and create witness and victim protection programs

Women and girls have been victims of sexual violence and other gender-based crimes, such as rape, sexual assault, mutilation, and forced labor, in the DRC war. An important way to address justice for serious human rights crimes is through the creation and financial support of measures to enable adequate investigation and prosecution of a large number of these crimes. Even with the dire lack of resources in the DRC, maximum efforts also must be made to address the particular needs of victims and witnesses relating to crimes of sexual violence.

In order to render investigations and prosecutions into sexual violence and other gender-based crimes more effective, prosecutors and judges should be trained on how to investigate sexual and other gender-based violence, and trained forensic medical professionals should be hired to assist in investigations. Prosecution of sexual and other gender-based crimes also should be enhanced by employing people with expertise in these types of crimes as judges, magistrates, investigating officers, and other judicial personnel.

Courts must also apply measures to ensure that victims and witnesses are treated with appropriate competence. All judicial staff should be educated on the long-lasting physical and emotional trauma of sexual violence and other gender-based crimes, and be given clear procedures to avoid re-traumatization of the victims, i.e. through minimizing the number of times the survivor has to recount the details of the crime. Courts should take measures to protect the confidentiality of the victims and witnesses, such as holding in camera trials and assisting with relocation where necessary. Counseling should be made available for victims and witnesses. There should be programs to educate victims and witnesses about the nature of the judicial process and its various stages from the commencement of proceedings and the filing of an indictment through trial.

The situation in the DRC is particularly complicated as the rape law excludes a number of sexual and other gender-based crimes that have frequently occurred in the DRC, for example bodily penetration with an object. Any future law should address sexual violence more comprehensively as an assault against the bodily integrity and sexual autonomy of an individual. With the widespread use of rape by most armed groups in the DRC, it is essential that this law be revised to ensure better protection for civilians. There also needs to be further urgent revision to clarify which acts of sexual violence and other gender-based crimes constitute war crimes and crimes against humanity.

c. Institutional reforms to the justice system

international community is willing to match its words about putting an end to impunity with concrete action. The Commission's conclusions would help the secretary-general make recommendations to the Security Council on "Öways to help the transitional government in the Democratic Republic of the Congo address the issue of impunity."¹³

b. ICC implementing legislation

The Congolese government and parliament should create a legal and institutional framework for the prosecution of war crimes and crimes against humanity, including sexual violence, committed during the two wars in the DRC. Current laws are insufficient and in part unsuitable to guide the process of transition and the delivery of justice. Under the current penal code, crimes against humanity, war crimes, and genocide are not punishable offenses. The definition of war crimes and crimes against humanity in the Military Penal Code falls short of the elements of these crimes under both the Rome Statute and the Geneva Conventions, to which the DRC is a party.

A key piece of this legal framework will be the implementing legislation for the ICC. The DRC has signed (on September 8, 2000) and ratified (on April 11, 2002) the Rome Statute. The *Project de Loi de Mise en Oeuvre du Statut de la Cour Pénale Internationale* was drafted in July 2003 by the *Commission Permanente de Réforme du Droit Congolais* at the request of the minister of justice and following a year-long drafting process that involved the participation of magistrates, law professors, members of national and provincial bar associations, and the NGO community.

The minister of justice is now reviewing this important piece of legislation before it is sent to the transitional parliament. It is important that it be sent to transitional parliament without further delay as its adoption will be a major step towards establishing justice in the DRC. The draft law provides a comprehensive definition of war crimes, crimes against humanity, and genocide consistent with the Rome Statute. It spells out the way in which the DRC government and judicial authorities will work with the ICC to prosecute such crimes. It provides for important safeguards of fair trial and respect for the rights of the accused for all crimes under Congolese law, as guaranteed by the transitional constitution, that are lacking in the current code of criminal procedure. It also expands the jurisdiction of civilian tribunals to members of the armed forces when accused of crimes against humanity or war crimes. This is of a particular importance to assert the primacy of the civilian justice system and create a coherent and unified jurisprudence.

VII. Recommendations

To the Government of National Unity:

- Encourage an open and active debate on the TRC in parliament and allow broad consultation on the staffing and the composition of the TRC to ensure meaningful involvement of civil society. Ensure that the law includes guarantees for fair, independent, and transparent operations by the TRC.
- Urgently adopt the ICC implementing law codifying crimes against humanity and war crimes into Congolese domestic legislation and permitting cooperation with the ICC.
- Refer the most serious crimes against humanity and war crimes to the Office of the Prosecutor of the ICC to ensure that justice is done while the national justice system is being rebuilt.
- Revise the law on rape to address sexual violence more comprehensively, define where sexual violence and other gender-based crimes are a war crime or crime against humanity, and ensure

