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Rebuilding courts and trust:

**An assessment of the needs of the justice
system in the Democratic Republic of Congo**

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and International Bar Association Human Rights
Institute Report

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Abbreviations

ASF	<i>Avocats sans frontières</i>
CMJ	<i>Comité mixte de justice</i>
CNDP	<i>Congrès national pour la défense du peuple</i>
CSJ	<i>Cour suprême de justice</i>
CSM	<i>Conseil supérieur de la magistrature</i>
DIILS	Defense Institute of International Legal Studies
DRC	Democratic Republic of Congo
EC	European Commission
EU	European Union
FARDC	<i>Forces armées de la République Démocratique du Congo</i>
FDLR	<i>Forces démocratiques pour la libération du Rwanda</i>
IBAHRI	International Bar Association's Human Rights Institute
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ILAC	International Legal Assistance Consortium
LRA	Lord's Resistance Army
MONUC	United Nations Organisation Mission in the Democratic Republic of Congo
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights
PNC	<i>Police nationale Congolaise</i>
REJUSCO	<i>Restauration de la justice à l'est de la RDC</i>
TP	<i>Tribunaux de paix</i>
UNDP	United Nations Development Programme

Executive Summary

The International Bar Association's Human Rights Institute (IBAHRI) and the International Legal Assistance Consortium (ILAC) organised an international delegation of jurists to visit the Democratic Republic of Congo (DRC) in February 2009. The IBAHRI and ILAC are grateful to the Open Society Initiative for Southern Africa (OSISA) and the Swedish Ministry for Foreign Affairs for the financial support provided.

The IBAHRI and ILAC mission was aimed at conducting a needs assessment of the Congolese judicial system in order to assess where expertise can be most constructively applied – both geographically and thematically – to assist the reconstruction of the justice system.

The six-person delegation held meetings with government ministers, parliamentarians, civilian and military judges and prosecutors, representatives of the Congolese bar associations, police, academics, international donors, NGOs, advocates and Congolese citizens. Both ILAC and the IBAHRI wish to express their sincere gratitude for the hospitality and assistance given by all those they met and for the additional assistance generously provided by the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC), and in particular its Rule of Law Unit.

The aim of the report is not to present a full-scale analysis of the situation in the justice sector of the DRC. Instead, the report aims to assess the key areas where expertise and assistance can be most helpful to assist in reforming the Congolese justice system, based on what is planned and what is already being done regarding the DRC's judiciary.

The full conclusions and recommendations of the mission are set out in Chapter 7 of this report.

Summary of conclusions

Marked by war, corruption, fighting over the control of natural resources and serious human rights violations, including appalling sexual violence, the DRC has greatly suffered in recent years and continues to feel the repercussions of ongoing conflicts. This has taken an important toll on the country's institutions, including the justice system, which is struggling to meet the needs of the population.

Whilst the Congolese Government, with the assistance of international organisations and NGOs, has shown signs of progress in recent years in its efforts to improve the country's ailing judicial system, the DRC's judicial sector continues to suffer from under-investment, corruption, and a severe lack of resources and infrastructure.

Reform efforts of the DRC's justice sector are guided by the principles set forth in the 2007 *Comité Mixte de la Justice* (CMJ) Action Plan and the 2009 *Feuille de route du Ministère de la justice pour l'exercice 2009* (hereinafter Roadmap¹), which identified three particularly urgent actions to fight against impunity and improve the credibility of the justice system: hiring and training of magistrates; bringing justice closer to the Congolese population; and strengthening control, oversight and renovation

¹ Available on the Ministry of Justice website at http://www.justice.gov.cd/j/index.php?option=com_docman&task=cat_view&gid=30&dir=DESC&order=name&Itemid=54&limit=5&limitstart=10.

of infrastructures of the justice system. Moreover, changes to the DRC's judicial structure in the country's new constitution (adopted in 2006) created new higher courts and added a need for new administrative and specialist courts at the provincial and local level in an effort to improve access to justice.

Though the legal framework for reform is in place, in practice the changes will require the creation of numerous new institutions, with new specialised magistrates, and will be costly and complex. Given the lack of financial and human resources, it does not seem realistic to expect their implementation in the near future.

One of the main causes of the problems in the judicial system is a crippling lack of resources, which in turn is a result of the fact that the portion of the national budget set aside for the judicial sector is, by any standards, alarmingly low. The serious under-funding does not cover operating costs of courts, and also makes it difficult for courts to run efficiently and to achieve effective administration of justice.

There are a number of infrastructure needs which affect the proper administration of justice in the DRC. The lack of investigative capacity, inferior infrastructure and means of communication remain a major obstacle to a properly functioning justice system. Shortages of judges and staff and deficiencies in training are currently only supported on an ad hoc basis by programmes run by NGOs and international donors. There is no formal continuing legal education programme in place for practicing judges, which means that many judges are unable to keep their legal knowledge up to date – a problem further exacerbated by the lack of access to legislative texts due to serious deficiencies in legislative reporting and communication systems.

The delegation is concerned at the frequent disregard or delay in compliance with court orders by members of the executive and military, particularly those which are politically unpopular or which upset previously fostered alliances of military officers. It is apparent that the executive and high-ranking military officials have on such occasions considered themselves to be above the law. This poses a serious threat to the authority and independence of the judiciary and undermines confidence in the legal system, particularly in the context of the DRC where a majority of all human rights-related crimes are committed by members of the public security organs and national armed forces.

The delegation found that the high rate of corruption and impunity in the DRC's justice sector is attributable in part to the complete lack of effective control over magistrates' actions. Institutions that should play that role, such as the *Conseil supérieur de la magistrature*, currently lack the capacity to properly fulfil their function.

The existence of a mutually reinforcing relationship between the judiciary and the legal profession is an essential element in ensuring the independent and effective functioning of the judicial system. The majority of bar associations suffer from a lack of financial and technical capacity and are insufficiently engaged in legal reform, and other advocacy. The delegation supports bar representatives' appeals for support to launch a structured continuing legal education programme, and their efforts to become more involved in the national legal drafting process and to increase access to the bar associations' legal aid programmes.

There is an obvious need to rebuild the public's trust in the judiciary at all levels. While the Ministry of Justice has attempted to improve its overall image with the general public by creating a website, which provides easy access to basic laws, and an email hotline, where individuals can send complaints, the delegation fears that the almost total lack of IT-infrastructure will seriously limit the value of these innovations in the short or medium term.

Significant effort still needs to be made with regards to fighting impunity, considering the scale of the conflicts that have taken place on the DRC's territory. The International Criminal Court (ICC) is conducting investigations and has opened cases regarding crimes against humanity and war crimes allegedly committed in the DRC. However, not all suspects can be dealt with at the ICC level, and transitional justice mechanisms will need to be put in place domestically. Impunity in cases of sexual violence is of extreme concern, in light of the alarming number of rapes and other acts of sexual violence that have taken place and that continue to occur. Victims currently have limited access to justice.

Summary of recommendations

The IBAHRI and ILAC put forward recommendations at the central and regional levels.

At the central level:

- The IBAHRI and ILAC welcome the government's efforts in support of broadening access to justice and providing better access to legal institutions for the Congolese population, and encourage the government to give greater priority to the judiciary in the allocation of state resources. The judiciary should be provided with an adequate national budgetary allocation in order to ensure its effective functioning and the proper administration of justice.
- The development of stronger legislative processes, of a standardised court management system to regulate case flow administration, and of a system to recruit and train judicial support staff is essential to ensure a properly functioning judiciary.
- The IBAHRI and ILAC encourage the government to continue to engage the support of the international donor community to strengthen the operation of the judicial system and the independence of the judiciary.
- The government should continue its efforts to recruit and train more judges, but should further reinforce these efforts through securing salary payments to members of the judiciary and the magistracy in order to attract and retain suitably qualified members of the Congolese legal profession to the bench.
- The government should revive and provide sufficient resources to the already existing *Inspection Judiciaire* to serve as a national oversight mechanism to fight corruption and deal with disciplinary issues within the judiciary.
- The government should exercise better control over and improve access to legal aid by implementing, with sufficient funding, the *bureaux de consultation gratuite* provided for by the law and by providing greater support to the bars in organising legal aid offices.

- The government and military officials must not interfere in civil or military prosecutions. The President and other high-ranking government and military officials must publicly reiterate the obligation of all branches of government, the military, and the constituent parts of the executive branch, in particular the police, prisons and other security forces, of the obligation to comply with court orders promptly.
- The government and military should combat the functional immunity granted to Lieutenants-General and Majors-General in the military justice system by abolishing the rule that prevents military judges to handle cases where the accused has a higher rank than the judge or by promoting the highest military judge to the rank of Lieutenant-General.
- The IBAHRI and ILAC encourage the introduction of Military Mobile Investigation Units to strengthen the capacity to investigate war crimes and crimes against humanity.
- Efforts should be made to fight impunity, through support of the ICC's work, domestic prosecutions and the implementation of other transitional justice mechanisms. Particular attention needs to be paid to ensuring justice for victims of sexual violence.

At the regional level:

- The IBAHRI and ILAC recommend the establishment of a judicial assistance programme for the city of Kisangani for civil and military justice reform at a regional level. The IBAHRI and ILAC propose a holistic project, to be supported by ILAC, to provide assistance to the civil and military judiciary and to authorities as well as civil society and to strengthen the public's trust in the judiciary at all levels. Components of the project should include: legal training; management training; creating a module law library to increase legal documentation and access; providing light rehabilitation and basic equipment of courts and courthouses; dispatching information tools and legal literacy to civil society and the general public; enhancing mobile court capacity; strengthening the bar and legal aid; and implementing court observation and monitoring programmes.
- The IBAHRI and ILAC encourage targeted support to bar associations, starting with the Lubumbashi bar, to improve and construct continuing legal education (CLE) programmes for lawyers and to generally strengthen the capacity of the bars and their secretariats. Courses related to international criminal justice, human rights and gender justice, and training regarding constitutional issues would be of particular value. The IBAHRI could provide assistance to such activities.

This report, following on from the IBAHRI and ILAC mission, aims to serve as an assessment of where international expertise can be most constructively applied and implemented in order to contribute to the reformation of the DRC's justice system.

Chapter One – Introduction and Background

1.1 The mission

This report follows a mission undertaken by an international delegation of jurists to the Democratic Republic of Congo (DRC). The mission, organised by the International Legal Assistance Consortium (ILAC) and the International Bar Association Human Rights Institute (IBAHRI) aimed at conducting a needs assessment of the Congolese judicial system. The IBAHRI and ILAC are grateful to the Open Society Initiative for Southern Africa (OSISA) and the Swedish Ministry for Foreign Affairs for the financial support provided.

The International Bar Association (IBA) is the world's largest lawyers' representative organisation, comprising 30,000 individual lawyers and over 195 bar associations and law societies. The IBAHRI was formed in 1995 under the Honorary Presidency of former South African President Nelson Mandela. The IBAHRI is non-political and works across the IBA, helping to promote, protect and enforce human rights under a just rule of law and to preserve the independence of the judiciary and the legal profession worldwide.

ILAC is an umbrella organisation of more than 40 associations of judges, prosecutors, lawyers and academics worldwide, representing more than three million individual lawyers, with the objective of assisting legal reform in post-conflict countries. Since ILAC came into existence in 2002, it has carried out assessment missions and initiated projects of legal reform in Algeria, Afghanistan, Haiti, Iraq, Liberia, Morocco, Palestine and Rwanda. ILAC is based in Stockholm, Sweden.

The mission focused on specific aspects of the justice system, including the independence and needs of the judiciary, legal issues related to crimes targeting women, needs of lawyers and bar associations, access to legal aid, traditional justice and military justice. The delegation also looked at ongoing justice reform programs in the country. For the terms of reference for the mission, see Annex A.

From 4 to 8 February 2009, a six-person delegation visited the Congolese capital Kinshasa as well as Kisangani, the capital of the Province Orientale and Lubumbashi, capital of the Katanga province. They met with over 55 individuals, including the Minister of Defence, the Vice-Minister of Justice, parliamentarians, civilian and military judges and prosecutors, representatives of the bar associations, police, academics, international donors, NGOs, human rights advocates and Congolese citizens. For a complete list of the meetings that took place, see Annex B.

The delegation was comprised of:

- Christian Åhlund, Executive Director, ILAC, Sweden
- Renaud Galand, Director of *RCN Justice et Démocratie* (Réseau des citoyens/Citizens' Network), Belgium
- Professor Kathleen Mahoney, Faculty of Law, University of Calgary, Canada

- Colonel Dominic McAlea, Department of National Defence, Canada
- Marie-Pierre Olivier, Programme Lawyer, IBAHRI
- Mielle Nichols, Programme Manager, ILAC, Belgium (mission rapporteur)

Both ILAC and the IBAHRI wish to express their deep gratitude to the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC), and in particular its Rule of Law Unit, for all its assistance, including the logistical support provided during the mission.

This report does not purport to present a full-scale analysis of the situation in the justice sector of the DRC; that has already been done many times, as pointed out by the Ministry of Justice in the introduction to its recent *Feuille de route du Ministère de la justice pour l'exercice 2009* (hereinafter Roadmap²):

‘The background, the causes, and the diagnosis of the ills and dysfunctions, that plague our system of justice, have been the objects of numerous reports, studies, workshops, colloquia and seminars.’

Rather the ambition of this report is, on the basis of what is planned and what is already being done in the justice sector, to assess both in geographical and thematic terms where expertise can be most constructively applied in providing assistance to the reconstruction of the DRC’s justice system.

1.2 History

The territory which is today the DRC was colonised by Belgian King Leopold II in the 1880s as the king’s personal property. However, reports of brutal mass killings and ruthless exploitation of natural resources led to the transfer of the control of the ‘Congo Free State’ from the King to the Belgian Government in 1908.

By the mid 1950s, the African independence movement had reached the Congo, and in June 1960 the country was granted independence. During the first half of the 1960s the Congo was constantly plagued by violent internal power struggles, particularly a drawn out break-away attempt by the mineral-rich province of Katanga. Tensions during this time were fuelled and exacerbated by the paranoid psychology of the Cold War.

In 1965, Western-backed Colonel Joseph Désiré Mobutu ousted his rivals and began a thirty-two year rule. In 1971, Mobutu changed the country’s name to Zaire. Mobutu systematically used the country’s mineral wealth to consolidate his power, co-opt rivals and enrich himself and his cronies. The long reign of Mobutu laid the groundwork for a culture of corruption and kleptocracy, which remains to this day one of the fundamental obstacles to the development of democracy and the rule of law. In 1997, as a result of both deteriorating health and a rebellion led by Laurent Désiré Kabila with support from neighboring states Rwanda and Uganda, Mobutu was finally forced to step down.

In 1998, soon after Kabila was installed as president, war broke out again. This time, Rwanda and Uganda supported the rebel movement against Kabila, while Zimbabwe, Angola and Namibia sent

² Available on the Ministry of Justice website at http://www.justice.gov.cd/j/index.php?option=com_docman&task=cat_view&gid=30&dir=DESC&order=name&Itemid=54&limit=5&limitstart=10.

troops to back the government. The ensuing conflict is sometimes referred to as ‘Africa’s World War’³ and it is estimated that some four million people were killed during the conflict.

In 2001, Laurent Désiré Kabila was assassinated by one of his own bodyguards and succeeded by his son Joseph. In December 2002 a peace agreement was signed in Sun City, South Africa, ushering in a transitional government in which Joseph Kabila shared power with four vice-presidents.

A new constitution was adopted by referendum in late 2005 and went into force in February 2006, leading to presidential and legislative elections. Kabila’s alliance gained the majority in national and provincial assemblies and Kabila defeated his opponent Jean-Pierre Bemba for the presidency in a second round run-off in October 2006.

However, despite peace agreements and the introduction of a democratic system of government, a low-intensity conflict with frequent violent outbursts has continued in the east as several rebel groups and militias have continued to fight for land and natural resources. More recently, the most notorious rebel groups have been the Rwandan-backed CNDP (*Congrès National pour la Défense du Peuple*, formed in 2006) and FDLR (*Forces Démocratiques pour la Libération du Rwanda*), made up of Hutus ousted from Rwanda in the wake of the genocide in 1994). FARDC (*Forces armées de la République Démocratique du Congo*), the militarily ineffective national army, has repeatedly demonstrated its inability to suppress these armed groups. In fact, much of the violence and sexual crimes against the civilian population in Eastern DRC is carried out by FARDC forces and members of the PNC (*Police Nationale Congolaise*). In 2004, MONUC, the UN peacekeeping mission, was boosted from 10,800 to 16,700 forces and it now numbers almost 20,000, including civilian staff.⁴

In recent years, one more rebel group, the notoriously violent LRA (Lord’s Resistance Army) has entered DRC territory in the north east, seeking sanctuary from increasing military pressure in Uganda and southern Sudan.

It is believed that more than one million people have fled the three-way clashes between the CNDP, the FDLR and the FARDC in recent years. A rough estimate of the total number of people displaced as a result of the LRA attacks stands at almost 150,000.

In an attempt to bring the situation under control, in January 2009 the government invited troops from Rwanda to help mount a combined operation against the militias in eastern Congo. The operation appears to have been successful and Rwanda went as far as arresting the leader of CNDP, Laurent Nkunda. The Rwandese forces left DRC territory in March 2009. The Congolese Government has indicted Nkunda for war crimes, and has requested his extradition from Rwanda.

An amnesty law which went into effect on 7 May 2009 is a cause of concern in this context.⁵ The law provides amnesty for acts of war and insurrection committed between June 2003 and May 2009, the date of promulgation of the law, in North and South Kivu. Although the amnesty is not applicable for genocide, war crimes and crimes against humanity, the law will reinforce the impression of a culture of impunity for members of the police (PNC), the armed forces (FARDC) and the rebel groups with regard to the countless serious crimes to which the civilian population has been subjected.

³ See eg, Gerard Prunier, *Africa’s World War*, Oxford University Press, December 2008, ISBN13: 9780195374209

⁴ Resolution 1856 of the UN Security Council extended MONUC’s mandate until 31 December 2009. See UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856.

⁵ Loi No 09/003 du 7 mai 2009 portant amnistie pour faits de guerre et insurrectionnels commis dans les provinces du Nord-Kivu et du Sud-Kivu (Law on the amnesty for acts of war and insurrection committed in the eastern provinces of North and South Kivu).

Despite the democratic elections in 2006, there are disturbing signs, even as this report is being written, that political pluralism in DRC is shrinking and that the already feeble political opposition is increasingly being marginalised through intimidation and violence.

1.3 Geography and demographics

The second largest country of Sub-Saharan Africa, DRC occupies some 2,344,885 square kilometres (almost the size of Western Europe). The DRC is bordered by nine different countries: the Republic of the Congo (Congo Brazzaville), the Central African Republic (CAR), Sudan, Uganda, Rwanda, Burundi, Tanzania, Zambia and Angola. Most of the country lies within the vast hollow of the Congo river basin that has the shape of an amphitheatre; open to the north and north west and closed in the south and east by high plateaus and mountains.

The DRC is at the heart of the equatorial region of Sub-Saharan Africa and comprises 47 per cent rainforest. The Congo river and its tributaries form the primary economic lifeline due to a lack of decent transportation infrastructure.

The population of approximately 60 million is split into various ethnic groups, divided by several hundred different languages. The five principal languages are French (the official language), Lingala, Kiswahili, Kikongo and Tshiluba.

1.4 Social and economical context

Life expectancy in the DRC is now about 45 years, with an infant mortality rate of around 130 per 1,000 births. According to the United Nations Development Programme (UNDP) statistical update for 2008-9, the Human Development Index for the DRC is 0.361, which gives the country a rank of 177 out of 179 countries, with an extremely high poverty index (the country is ranked 115 out of a total of 135 countries).

In addition, the many armed conflicts which bring rape and sexual abuse of women and children in their wake are contributing to the rise of HIV/Aids infection across the country. While this particular issue is not necessarily addressed as a priority for either the international community or the national government, there is little doubt that the consequences will soon be felt throughout the country, generating potentially destabilising economic demands that will be difficult to meet and hitting hard a population already victim of immense suffering and poverty.

On the other hand, the DRC's natural resources are such that it has the potential to become a wealthy country. These include enormous forests and large reserves of copper, coltan, diamonds and gold. Unfortunately, the country's natural resources are also sources of envy by its neighbours, and the government's inability to exercise control over the DRC territory has led to aggressive exploitation of resources and local manpower⁶ by foreign investors or, worse, foreign militias. It is widely acknowledged that a key explanation for the conflict in the DRC is the country's vast natural resources.

⁶ The US\$870 million diamond industry provides work for around one million people, but many diggers work in extremely dangerous conditions and earn less than US\$1 a day, according to the latest key facts published by BBC News service.

1.5 Transparency and corruption

The DRC is rated the tenth most corrupt country out of 180 nations on Transparency International's 2008 Corruption Perception Index.

The Mobutu regime promoted a culture of corruption during more than 30 years of rule. Over time, corruption became ingrained in the private, public, administrative and business environments, and subsequently very difficult to root out. The deterioration and, in some cases, obliteration of state institutions over the last few decades has been an important contributing factor.

In recent years, a legal framework has been created in order to fight corruption. The country is an accessory to the 2005 UN Convention against Corruption. As regards domestic legislation, the Law against Money Laundering and the Financing of Terrorism (no 04/016) was promulgated in 2004 and the Anti-Corruption Law (no 5/006) in 2005. Despite these reform efforts, however, corruption is still rampant in all sectors of private and public life, including the judicial sector. An almost complete lack of administrative transparency compounds the problem. For example, tariffs for public services are rarely made public; therefore those who request such services are not aware of the genuine rates, which opens the door to abuse by state officials. The Ministry of Justice has identified the fight against impunity for corruption crimes as one of its priorities in its recent Roadmap.

1.6 International and regional human rights obligations

The DRC has ratified the main international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. The DRC is also a party to the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, but has not signed its Optional Protocol.

At the regional level, the DRC has ratified the African Charter on Human and Peoples' Rights and the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. It has signed but not ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. It has not taken action on the African Charter on the Rights and Welfare of the Child.

The DRC is also a party to the Cotonou Agreement,⁷ which regulates relations between the European Union (EU) and developing countries in Africa, the Caribbean and the Pacific. The agreement creates obligations for signatory states to respect the rule of law and fundamental human rights.

1.7 General human rights situation

Despite the DRC's international undertakings to protect human rights, the human rights situation in the country continues to deteriorate, according to the UN Office of the High Commissioner for

⁷ 'Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other part' signed 23 June 2000.

Human Rights (OHCHR).⁸ The justice system appears to play a large role in the problem, as the OHCHR notes that the general impunity is a main contributing factor to human rights violations being committed in the DRC.

Massive human rights violations continue to be committed, particularly in the east of the country, due in part to renewed hostilities involving the FARDC, the CNDP and the FDLR. The OHCHR reports arbitrary executions, abductions, forced disappearances, rape, looting and destruction of property. FARDC troops continue to be responsible for numerous human rights violations, including sexual violence which remains widespread throughout the country. Members of the FARDC, the PNC and armed groups constitute the majority of perpetrators. The OHCHR also notes increasing political repression and politically motivated human rights violations against human rights defenders, journalists and members of opposition parties. The correctional system is also plagued by serious problems, such as prolonged pre-trial detention periods, dilapidated detention centres, lack of food and medical supplies, torture and generally appalling conditions of detention.

Impunity remains in great part because of the dire state of the Congolese justice system. Underfunded, subject to corruption and lacking human and material resources to function effectively, civil and military jurisdictions are also suffering from political interference from the authorities. These flaws in the judicial system allow impunity to flourish.

Despite these serious human rights issues, the Human Rights Council did not renew the mandate of the Independent Expert on the situation of human rights in the DRC, apparently due to the refusal by the DRC⁹ to cooperate with such an expert.

8 UNGA, 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General – Report of the United Nations High Commissioner on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo' (2 April 2009) UN Doc A/HRC/10/58.

9 UNHRC, Resolution 7/20 (27 March 2008) UN Doc A/HRC/RES/7/22.

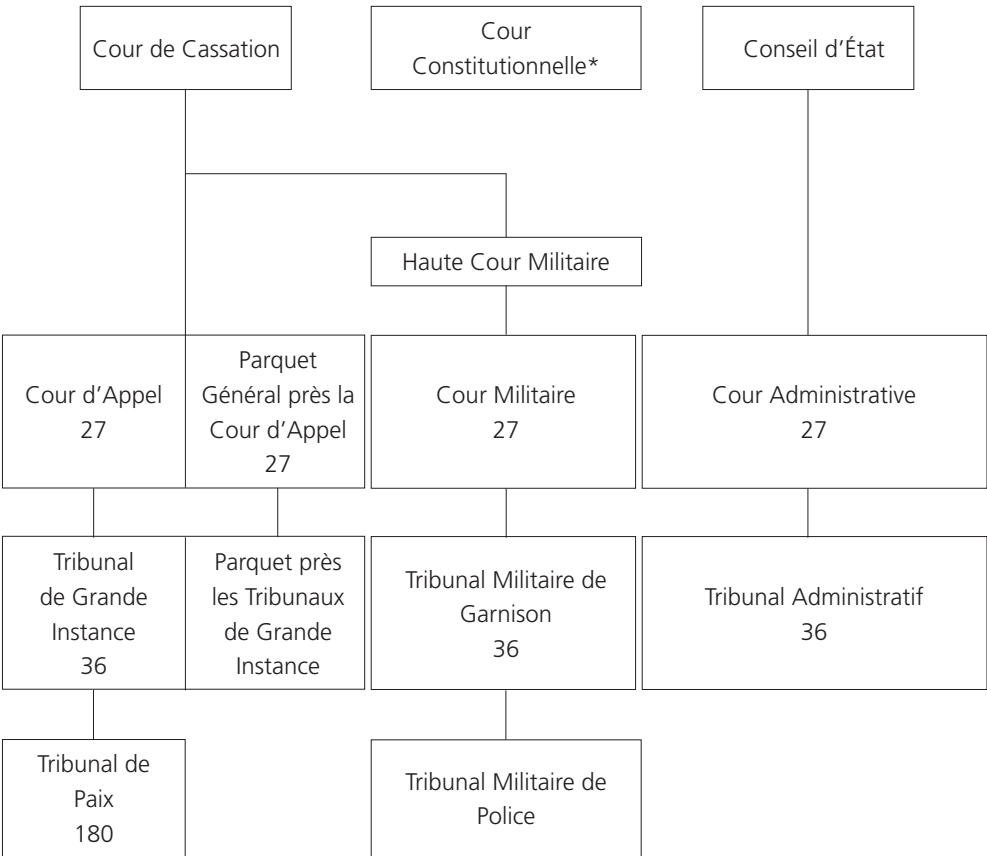
Chapter Two – The Judicial System

2.1 Constitutional structure

The DRC adopted a new constitution in 2006, which divides the court system into three separate jurisdictions: the judicial (civil and criminal) jurisdiction, the administrative jurisdiction and the military jurisdiction. As part of this reform, the Supreme Court of Justice (*Cour Suprême de la Justice*, CSJ), is divided into three separate high court instances: The *Cour Constitutionnelle* (Constitutional Court), the *Cour de Cassation* (Supreme Court) and the *Conseil d'État* (Supreme Court for administrative matters).

Article 2 of the new Constitution creates new provinces, increasing the actual number of ten (plus Kinshasa)¹⁰ to 26, which in turn has an important impact on the judicial system and the number of courts.

The organigram for the new system looks as follows:



* According to Article 161 of the Constitution, the Constitutional Court may also hear appeals from the *Conseil d'Etat* and the *Cour de Cassation* when they relate to jurisdictional issues.

In addition to the new administrative courts that will need to be implemented at the provincial and local level, a labour court has been set up¹¹ within each *Tribunal de Grande Instance*. Further, a law

10 The original 11 provinces: Bandundu, Bas-Congo, Equateur, Kasai Oriental, Kasai Occidental, Katanga, Kinshasa, Maniema, North Kivu, Province Orientale, and South Kivu.

11 *Loi No 016/2002 du 16 Octobre 2002 portant création, organisation et fonctionnement des tribunaux du travail* (Law of 16 October 2002 on the creation and organisation of labour courts).

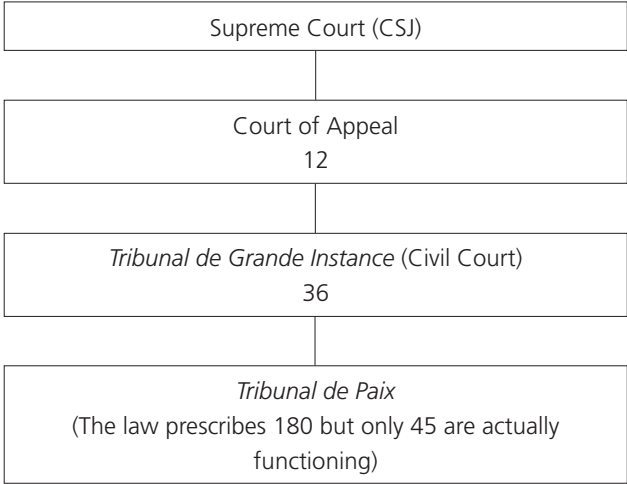
brought in in January 2009¹² stipulates the establishment of a juvenile tribunal in each town and each territory. This will require the establishment of approximately 180 such new institutions (on the same level as the *Tribunaux de Paix*). There are also discussions surrounding the establishment of a juvenile court at the *Tribunal de Grande Instance* level.

The upcoming changes will require the creation of numerous new institutions, with new specialised magistrates.

2.2 Current structure

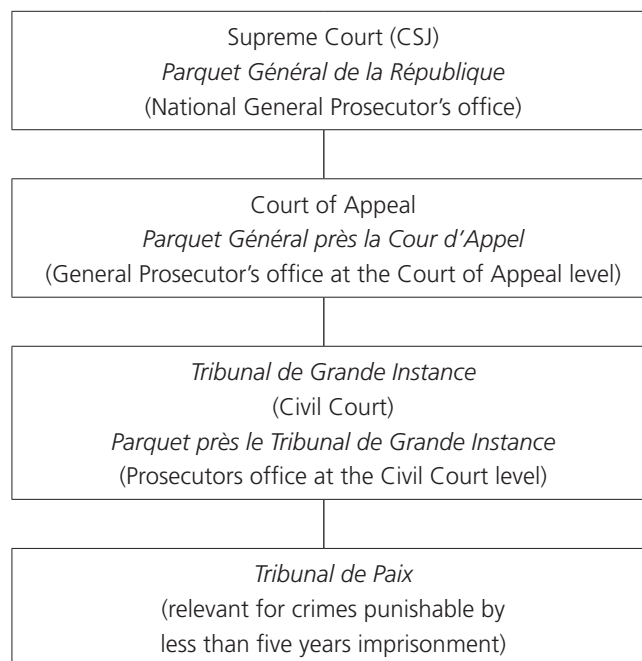
While the new structure is designed to ultimately bring justice closer to the population and provide better access to legal institutions, the country is still struggling to implement structures that were introduced decades ago. For example, a 1982 law¹³ establishing justices of the peace (*Tribunaux de Paix, TP*), calls for one tribunal for each town and rural zone.¹⁴ If this were carried out there should be a total of 180 of these tribunals. However, only 58 are currently in place and the delegation was informed that only 45 of them are actually functioning. The changes provided for by the 2006 Constitution are costly and complex and, given the lack of financial and human resources, it does not seem realistic to expect their implementation in the short or medium term. Until then, the judicial structure remains unchanged.

The existing structure for civil matters:



¹² *Loi No 001/2009 du 10 janvier 2009 portant protection de l'enfant* (Law of 10 January 2009 on the protection of the child).
¹³ *Ordonnance Loi No 82-020 portant code de l'organisation et de la compétence judiciaires (31 March 1982)* (Law on judicial organisation and jurisdiction).
¹⁴ *Ibid* at Article 22.

The existing structure for civilian criminal justice matters:



For the time being, until the structure established in the new Constitution is fully implemented, the Supreme Court plays the role that will ultimately belong to the *Cour Constitutionnelle*, the *Cour de Cassation* and the *Conseil d'État*.¹⁵

2.3 Main problems facing the judicial system

a) Judicial budget

It is obvious that the judicial system suffers from a crippling overall lack of resources. The delegation was informed that the DRC's total annual national budget is approximately US\$4 billion¹⁶, which is already alarmingly low. By way of comparison, the figure for France with a population of roughly the same size as the DRC was, in 2007, approximately US\$540 billion. Furthermore, it appears that the percentage allocated to the justice sector in the DRC is only 0.03 per cent of the country's annual budget,¹⁷ or roughly US\$1.2 million. If this figure is correct, it is not sufficient to cover the salaries of the judiciary for even one month, with approximately 2,000 judges supposedly earning US\$800 per month, let alone the salaries of other legal staff and the inevitable administrative costs.

Judges and judicial officers who met with the delegation repeatedly mentioned the fact that they do not receive the funds to cover operating costs of their courts, which the government is supposed to provide. This lack of funding makes it difficult to run courts efficiently, as it does not allow the acquiring of essential office supplies and equipment or even undertaking basic repairs needed on courthouses. Magistrates met by the delegation also complained about irregular payments of salaries, including those for the judicial personnel, which serves as a serious inducement to corruption.

¹⁵ Article 223 of the Constitution.

¹⁶ The delegation was unable to obtain confirmation from government officials on this figure.

¹⁷ Interviews with MONUC and Global Rights, Kinshasa. In comparison, the Philippines, a developing country of approximately the same size, spends approximately 0.9 per cent of the national budget on its justice sector.

It is evident that this alarming under-funding of the judicial system has a serious negative impact on all aspects of the judicial system. In his report about the DRC from 11 April 2008, the UN Special Rapporteur on the Independence of Judges and Lawyers writes: ‘The main reason for the shortage of judges and courts, low salaries and the deplorable material conditions in which they perform their duties is the negligible share of the budget allocated to the judicial authority.’¹⁸

b) Shortage of judges and deficiencies in training

According to information provided by the Ministry of Justice, there are currently 2,150 magistrates in total (both civil and military) which suggests a ratio of approximately one magistrate for 25,000 individuals. In order to put this in perspective, the minimum recommended ratio by the International Association of Judges is one magistrate per 3,000 to 5,000 individuals,¹⁹ which in the case of DRC would mean a total of approximately 12,000 judges. While this figure is unrealistic, the Ministry of Justice has announced the intention to hire at least 2,500 new magistrates, starting in April 2009 with an immediate call to hire 250 magistrates (200 civilian and 50 military). The list of candidates has been published and the competitive examination should apparently take place in the near future. It is interesting to note that in this recruitment drive the government intends to put a special emphasis on gender equality.²⁰

Along with the need for more judges, the government also recognises the strong need both for better basic training and for continued legal education of judges. In the Congolese legal education system there is no distinction between the training of judges or lawyers. The specific training of new judges begins once they have been recruited. However, there is currently no functioning school for magistrates,²¹ although such an institution used to exist in the past. The responsibility to train judges lies with the *Conseil Supérieur de la Magistrature* (CSM) (see section 2.4. c), which was recently reestablished, having been non-functioning for years. However, the Permanent Secretariat of the CSM remained in place, and according to the information provided to the delegation by the Permanent Secretary, new judges will receive an introductory training programme.

There is also no formal continuing legal education programme in place for practicing judges, which means that many judges are unable to keep their legal knowledge up to date. All judges interviewed by the delegation listed continued legal education as a priority, especially those sitting in more isolated courts, where they have less access to information otherwise available in Kinshasa. Training of practicing judges is currently offered on an ad hoc basis and run by NGOs and international donors.

Another issue arises from the fact that there are not enough sufficiently trained judges to fill the positions at the new higher courts created by the 2006 Constitution. The government sees two temporary solutions to this problem: to call retired judges back into service, or to recruit foreign judges.²² In the meantime, before the implementation of the new courts (*Cour de cassation*, *Conseil d'État* and the Constitutional Court), an even more pressing issue is the need for training of the present Supreme Court judges so they have the capacity to assume these functions.

¹⁸ UNGA, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy* (11 April 2008) UN Doc. A/HRC/8/4/Add.2, at para. 36.

¹⁹ Roadmap at para. 12.

²⁰ Roadmap at para. 17.

²¹ In a meeting with a representative of the French Embassy, the delegation was informed that France is providing assistance in building a curriculum for magistrates and training magistrates who will then be trainers.

²² Roadmap at para. 18.

Deficiencies in training and shortage of staff are not only an issue in relation to judges, but also as regards judicial officers and other support staff. There is an urgent need for hiring and training key support staff for the courts, such as registrars (*greffiers*) and bailiffs (*huissiers*). A particular problem that was highlighted to the delegation relates to the absence of a clear human resources assessment.²³ No job description or list qualifications is required for judicial personnel and support staff. As regards training, the school for judicial personnel (*École de recyclage et de formation du personnel judiciaire*) has not been effectively functioning for years. The reestablishment of the school is identified in the Ministry of Justice's *Plan d'actions pour la réforme de la justice*²⁴ (hereinafter Action Plan) as an activity to be undertaken within a five-year timeframe.

c) Corruption

Until recently, Congolese magistrates' monthly remuneration was at US\$80. Realising that low salaries have an impact on corruption and given increased pressure from the magistrates themselves, the Congolese Government has raised the salaries to approximately US\$700 to US\$800 per month. While such an increase was well overdue, it has not resolved the issue entirely, as the culture of corruption is still very much present at all levels of the judiciary. Some knowledgeable interlocutors even expressed the view that, despite the shortage of judges, about a third of the judges would ideally be removed because of a combination of ignorance of the law and corruption.

One of the reasons behind the high rate of corruption and impunity is an almost complete lack of effective control over magistrates' actions. While the CSM is responsible for overseeing and disciplining the magistrates,²⁵ it lacks a minimum operational budget to carry out its duties. It should also be recalled that the CSM was non-functioning for years until its recent reinstatement. The Permanent Secretary of the CSM informed the delegation that no oversight could be exerted on magistrates in the absence of an active CSM.

In this context, it also deserves mentioning the existence of the *Inspection Judiciaire*, a section within the Ministry of Justice, which is also tasked with the supervision of the judiciary. However, it appears that this body, due to a lack of human and financial resources and, according to some critics, an earlier lack of political will to really curb corruption, has also for a long time not been able to carry out its supervisory functions.

Corruption may occur at any level of the judicial process and has a serious impact on access to justice for Congolese citizens. For example, in order to obtain free legal aid, individuals must present a certificate of indigence. While such a certificate should in principle be issued free of charge, all levels of the judicial sector (bar associations, magistrates and governmental officials) indicated to the delegation that the local authorities will charge an applicant anywhere between US\$15 and US\$30 to issue a certificate of indigence. Similarly, some police officers will ask victims of criminal offences for 'fees' in order to look for and arrest individuals who have been convicted of criminal offences.

²³ Interview with MONUC Rule of Law Unit.

²⁴ Ministry of Justice, *Plan d'actions pour la réforme de la justice*, Kinshasa, 2007.

²⁵ *Loi organique n° 06/020 du 10 octobre 2006 portant statut des magistrats* (Law of 10 October 2006 on the status of magistrates), Article 49 and *Loi organique n° 08/013 du 5 août 2008 portant organisation et fonctionnement du Conseil supérieur de la magistrature* (Law of 5 August 2008 on the organisation and operation of the *Conseil supérieur de la magistrature*), Article 20.

d) Lack of independence

Article 151 of the 2006 Constitution provides for an independent judiciary. In reality, however, the executive power continues to issue instructions to judges and sometimes to refuse the enforcement of court decisions. There are reports about trials involving serious crimes, in which judges who had made decisions unfavourable to a member of the military command had been transferred, after which the successor had acquitted the suspect.²⁶ There are also reports about police and military commanders refusing to hand over police officers and soldiers for questioning or detention, even in cases of serious offences such as rape.²⁷

The general, very difficult working conditions of judges and magistrates also contribute to undermining their independence. Situations such as non-payment of salaries or remote working locations with separation from families will increase the risk of influence or corruption from the parties to a dispute or the leaders of a local community who will offer them support to settle in a new and unfamiliar environment. According to the UN Special Rapporteur, it is common for judges to give in to corruption or ask for money from the parties, for example, to be able to provide medical treatment to family members: 'Justice is thus for sale to those who can afford it'.²⁸

e) Pre-trial detention

According to Article 27 of the Criminal Code, pre-trial detention may be exercised for crimes punishable by a prison term of a minimum of six months. The initial detention period of 15 days may be extended by a maximum of three extensions of no more than one month each. However, according to a recent survey conducted by *Avocats Sans Frontières* (ASF),²⁹ the basic legal principles of pre-trial detention are simply not respected by the courts.

As much as 75 per cent of detainees in Congolese prisons are awaiting trial. The result is overpopulated cells and alarming conditions of detention, where men, women and children are kept for months or even years in the same detention facilities as convicted criminals. Many are reportedly held incommunicado in known and unknown places of detention.³⁰ Minors do not enjoy any protection from pre-trial detention;³¹ the delegation was given examples of a minor who had been arrested and detained for having stolen four cables worth 400 Congolese francs (approximately US\$0.70), and another who had been detained for more than eleven months before their case was brought to trial.

f) Investigative capacity

The lack of investigative capacity remains another obstacle to a functioning criminal justice system. The delegation was informed of a serious lack of cooperation between the police, handling the technical aspects of a criminal investigation, and the prosecutor and the investigative judge. There is also a lack of knowledge among the judicial police of how to conduct a criminal investigation.

²⁶ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, *supra* n 18 at para 39.

²⁷ *Ibid*

²⁸ *Ibid* at para 35.

²⁹ *Avocats Sans Frontières*, 'Etat des lieux de la détention provisoire en République Démocratique du Congo (Juillet 2006 - avril 2008)', September 2008.

³⁰ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, *supra* n 18 at para.51.

³¹ The new law on the protection of children now states, at Article 10, that detention of minors should be exceptional and for a duration as short as possible.

Furthermore, technical equipment or facilities which are needed for qualitative criminal investigations, such as forensic laboratories, were not available anywhere in the DRC until very recently.³² Faulty investigations will often lead to the acquittal of suspects who would otherwise have been convicted. This, in turn, can lead to reprisals against witnesses and victims.

g) Enforcement of judgments

Assuming a citizen is successful in getting a judgment in their favour, there is still a barrier to overcome – the enforcement of that judgment. The delegation was informed that only approximately 30 per cent of judgments made are enforced. In the province of Kivu the rate may be as low as five per cent.³³ The principal causes are the costs of enforcement, ie, the *frais de justice*, a percentage of six to 15 per cent of the damages awarded,³⁴ due to the registrar's office, and the costs of transportation, all of which are required to be paid in advance. As a result, enforcing a judgment is something many citizens simply cannot afford. This is leading to 'civil impunity' where a number of individuals act wrongfully knowing that the chances of ultimately being held liable and accountable are very small. Moreover, justice fees and fines are not consistent from one court to the other. There is currently no law on justice fees, these having been established by presidential decree. Fees and fines are sometimes still fixed in Zairian currency³⁵ and some magistrates and court officials use the vagueness surrounding calculations of current value in Congolese francs to take advantage of citizens.

The situation concerning enforcement of criminal judgments is similarly bad. Here again, corruption is a contributing factor. A person who has posted bail and is sentenced to jail forfeits his bail money if he fails to turn up to serve his prison term. A judge who sees an opportunity to keep the bail money for himself has little motivation to ensure that the sentence is enforced.³⁶

h) Prison conditions

The prisons are suffering from overpopulation, starvation and lack of security. Moreover, the total number of prisons appears to be unknown. Information provided to the delegation indicates that there could be as many as 150 ad hoc prisons, which are not properly registered. The prison in Bunia, which is built to hold 102 inmates, had in March 2008, according to the above-mentioned study by ASF,³⁷ a population of 573 of which 312 were held in pre-trial detention. With the exception of the Makala prison in Kinshasa, the government does not provide prisons with resources to feed the prisoners. As a consequence, a prisoner who does not have relatives or friends to provide food will simply starve. The delegation was told of prisons where the prisoners were allowed to leave at night to go look for food as a last resort against starvation. According to the UN Special Rapporteur on the Independence of Judges and Lawyers, it is not unusual for prisoners to die in prison owing to lack of food or care.³⁸ MONUC works on improving prison conditions through its prison advisors present in its regional offices, who provide training and mentoring to prison officials and staff.

³² France has financed the creation of a technical and scientific laboratory located in the school for police officers, which was inaugurated on 15 June 2009.

³³ Interview with Global Rights, Kinshasa.

³⁴ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, supra n 18 at para. 53.

³⁵ Fines are indicated in Zairian currency in the Penal Code. They have been actualised by presidential decree, but as this is not a law, there is still vagueness around the amount of fines.

³⁶ Interview with Global Rights, Kinshasa.

³⁷ Supra n 26.

³⁸ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, supra n 18 at para. 56.

i) Inferior infrastructure and means of communication

By visiting various tribunals, both civil and military, the delegation could see the dire state of the judicial infrastructure. Not only are court buildings dilapidated, but there is also a serious lack of office equipment such as typewriters, desks, filing cabinets and communication equipment. For example, the only means of communication between the Supreme Court or the Ministry of Justice in Kinshasa and the courts in Kisangani is by mobile phone. This obviously limits any communication to short voice or text messages, with no possibility to transfer decisions, judgments or other documents. Magistrates and judicial personnel do not systematically have access to computers and the delegation met many magistrates who were using their own personal equipment at work. Internet access is rarely available, particularly in remote areas.

Deficient means of communication also entail a lack of access to legislative texts for magistrates. Moreover, the delegation was informed that when a new law is published in the official Gazette, anyone who wishes to obtain a copy, including magistrates, will need to pay for it. The official Gazette is also apparently published irregularly.³⁹ Sometimes magistrates, particularly those in remote locations, are not even informed of the entry into force of a new law. Codes and legal texts are often provided not by the government but by various international donors during training programmes.⁴⁰ The delegation was informed of cases where judges relied on their old course syllabus from university in rendering their decisions.

Additionally, decisions are not systematically published and disseminated, meaning that the jurisprudence is not accessible within the judiciary. Decisions of the Supreme Court used to be published on a regular basis but publication is now done sporadically. Some decisions have now been posted on the Ministry of Justice's website.

j) Geographical restraints

Due to the country's vast territory and difficult terrain, some areas have been left to fend for themselves with simply no formal justice to speak of. For the past several decades it has been virtually impossible to hire judges in some locations. Moreover, as previously mentioned in Chapter 2, only a small number of TP are currently functioning.

It is hard to see that the increase in the number of provinces, as prescribed by the 2006 Constitution, will alleviate this problem in the short or medium term. More provinces will result in a need for more courts, judges and judicial staff. While the constitutional change may seem an appropriate means to bring formal justice to areas presently abandoned by the judicial system, the expansion of the system reform will require: judges willing to move to remote areas; funds to hire a large number of new judges and judicial staff; and substantial new infrastructure such as court houses, electricity and telephone lines.

³⁹ Regular diffusion of the Official gazette in all provinces is one of the activities identified in the Ministry of Justice's Action Plan.

⁴⁰ To name a few, the Defense Institute of International Studies (DIILS), *RCN Justice & Démocratie*, USAID and *Avocats Sans Frontières* have all distributed legal codes and texts when conducting training programmes in the country.

k) Traditional justice

As many parts of the country are still waiting for the establishment of a TP, an ordinance dating back to March 1982 specifies that the customary courts shall be maintained in the interim.⁴¹ Some regions have no other access to justice other than the traditional justice system, which has served an important role throughout the country's many conflicts and wars.

Traditional courts may apply customary law as long as it does not contradict written Congolese law, universal public order, morality or principles of humanity and equity. Criminal offences fall outside their competence, but according to MONUC reports, in the absence of any formal justice, traditional leaders have nevertheless been handling sexual violence cases in, for example, Bagata, Bandundu Province in central DRC, collecting fines, goats and cows from convicted perpetrators.⁴²

The Ministry of Justice recognises the role played by traditional leaders in the administration of justice and their position as the first judicial authorities many citizens refer to. In its Roadmap, the Ministry highlights the importance, in that context, of training traditional leaders on basic notions of modern law.

2.4 Signs of progress

a) Comité Mixte de la Justice and the Action Plan

In 2004, through an initiative by the European Commission, the Congolese justice sector underwent an in-depth audit which clearly demonstrated the need for radical reform. In order to address the many issues listed in the audit report, the *Comité Mixte de la Justice* (CMJ) was formed. The Ministry of Justice and the European Commission preside jointly over the CMJ, which includes national stakeholders as well as international implementers and donors. The ministerial order of 27 April 2009 establishes the composition of the CMJ as outlined in Annex C.⁴³ The ministerial order adds that any partner to development who wishes to attend the meetings of the CMJ may be allowed to do so. The CMJ may also invite local and international NGOs, consultants and other experts in the justice or human rights sectors to act as observers.

The work of the CMJ has resulted in the 2007 Action Plan, which identifies 43 projects, divided into 11 programmes with a budget of US\$150 million. The CMJ provides a forum where both the national and international members take part in the discussion, prioritising and decision making.

On its recently launched website, the Ministry of Justice has made public all documents and reports issued by the CMJ,⁴⁴ in order to demonstrate transparency and enable both the international community and the general public to better understand the reform process.

41 *Ordonnance Loi No 82-020 portant code de l'organisation et de la compétence judiciaires (31 March 1982)* (Law on judicial organisation and jurisdiction), art. 22, art. 163.

42 MONUC Human Rights Monthly Assessment – March 2008. This was also noted by the Special Rapporteur on Sexual Violence. See UNGA, *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk* (28 February 2008) UN Doc A/HRC/7/6/Add.4 at para. 72.

43 Arrêté ministériel no33/MIN/JUS/2009

44 See: <http://www.justice.gov.cd/>

b) Ministry of Justice's Roadmap

Based on the Action Plan, the Ministry of Justice issued its Roadmap in early 2009. This Roadmap takes a shorter perspective than the Action Plan (six to 12 months) and concentrates on visible, quick-impact activities. It indicates as its two fundamental objectives the fight against impunity and the improvement of the credibility of the justice system through the implementation of the 2006 Constitution and the improvement of the working conditions of the judiciary.

On the basis of these two objectives, the Ministry of Justice specifically identifies three particularly urgent actions:

- hiring and training of magistrates;
- bringing justice closer to the people (*justice de proximité*) – this includes improving access to legal aid; and
- strengthening capacities of control and evaluation of the justice system. This involves the urgent renovation of key infrastructures, including certain prisons and the premises of the Ministry of Justice.

c) Conseil Supérieur de la Magistrature

The CSM is provided for by the 2006 Constitution (Article 152), in order to promote the independence of the judiciary. Implemented under the Law of 5 August 2008, no 08/013, the CSM held its first General Assembly in December 2008. The CSM is responsible for appointing, supervising and disciplining magistrates at all levels, including the military magistrates.

The CSM is also responsible for preparing the budget of the judiciary, including salaries for judges and judicial staff and the courts' administrative costs, but not infrastructure. The budget is then submitted to the government, and ultimately decided by Parliament.

The creation of the CSM is a positive step towards a more independent judiciary, but it faces several serious problems. Its General Assembly is made up of more than 100 members, which makes decision-making slow, cumbersome and expensive. The first General Assembly, which took place in December 2008, reportedly cost more than US\$1 million. Moreover, no significant decisions were made during the meeting and the internal guidelines have yet to be adopted. And as a result of insufficient funding, it still lacks staff and an effective secretariat, and is not yet capable of carrying out the examination process required for the appointment of new judges.

d) Mobile courts

One particular success has been the mobile court initiative.⁴⁵ The delegation was informed by several sources that in order to facilitate access to justice in the more remote areas of the country, mobile courts have proved to be relatively effective.⁴⁶ Mobile courts not only contribute to bringing justice and the state's presence to the population of remote areas, but they also help to improve the image

⁴⁵ Mobile courts are legally recognised, and provided for by article 67 of the *Code d'Organisation et de Compétence Judiciaire* supra n 13. They are also identified as a priority in the Ministry of Justice's Roadmap (at para. 25).

⁴⁶ ASF published a rather comprehensive report in July 2006, after having assisted and monitored approximately 15 mobile court initiatives in Kasai occidental, Maniema and Equateur. The report can be obtained via their website at www.asf.be.

of the justice system. Firstly, the fact that magistrates are not in their usual location reduces the risk of corruption and bribery. Secondly, the mobile court initiatives are generally organised by international donors, which accompany the magistrates and therefore provide some on-site monitoring. Thirdly, all magistrates travel for specific periods of time and end up rendering their decisions on location. Thus claims are addressed quicker and relatively efficiently. Some mobile courts initiatives have included lawyers and paralegals to provide legal information to the population in preparation of the visit of the mobile court.

The delegation was however informed that since more international actors get involved in mobile courts initiatives, magistrates have started to demand additional pay before agreeing to participate. Having mobile courts run by the government, under specific and consistent guidelines, would contribute to solving this problem.

e) Ministry of Justice website

The Ministry of Justice has also attempted to improve its overall image with the general public. It has created a website⁴⁷ with valuable information, including some of the basic laws, such as the Criminal Code and the Criminal Procedure Code. In addition to the website and with the intention of better monitoring the justice system, the Ministry of Justice has also set up an email hotline,⁴⁸ where individuals can send their complaints. However, it is obvious that the almost total lack of IT-infrastructure will seriously limit the value of these innovations in the short or medium term.

⁴⁷ www.justice.gov.cd

⁴⁸ pourtous.justice@yahoo.fr

Chapter Three – The Military Justice System

3.1 Structure

The DRC military justice system has its roots in the country's history as a Belgian colony. It is not considered an ad hoc jurisdiction (*jurisdiction d'exception*). It is expressly organised by the 2006 Constitution⁴⁹ and applies its own military judicial code and military penal code, both of which are relatively recent texts (2002).⁵⁰

The Congolese military justice system is divided into three levels – *Tribunal Militaire de Garnison*, *Cour Militaire* and finally the *Haute Cour Militaire*. These courts and tribunals are supported by the *Auditorat Militaire de Garnison*, *Auditorat Militaire Supérieur* and *Auditorat Général*, respectively, and they are deployed in 49 locations nationwide. Some areas of the DRC are only served by military justice, due to a lack of any operational civilian justice component.

The existing structure for military justice:



Under the 2006 Constitution, the structure of the military justice system will remain unchanged, but will be subsumed under the new *Cour de Cassation*.⁵¹ The Constitution also places military judges under the supervision of the CSM. In addition, the Minister of Justice has initiated a reform process, whose aim is partly to harmonise military justice with the fundamental principles of the 2006 Constitution, which was adopted after the latest reform of military justice in 2002.⁵²

⁴⁹ Article 153 of the 2006 Congolese Constitution.

⁵⁰ Law No 023/2002 and 024/2002 of 18 November 2002

⁵¹ Article 153 of the Constitution.

⁵² AfriMAP and OSISA, *Military justice and human rights – an urgent need to complete reforms*, (22 June 2009) ISBN 978-1-920355-10-4, p. 1, accessible at www.afriMAP.org.

3.2 Jurisdiction

The Congolese military justice system exercises an unusually broad jurisdiction. Although Article 156 of the 2006 Constitution expressly limits the jurisdiction of military courts to members of the FARDC and the PNC, the Military Judicial Code and the Military Penal Code from 2002 have not yet been harmonised with the Constitution. Thus military courts continue to exercise jurisdiction – in accordance with the 2002 military justice legislation – over civilians who commit crimes with ‘weapons of war’ (*armes de guerre*)⁵³ or offences related to military personnel.⁵⁴

3.3 Independence of military judges

Although one of the aims of the 2002 reform was to strengthen the independence of the military justice system, the executive branch and the military command still continue to violate the independence of military judges.

One of the reasons for interference from the government is the fact that during the war, government forces went in and out of alliances with various rebel groups and resistance movements. These alliances fostered loyalties which now prompt government officials to try to prevent the prosecution of some of the leaders and members of these groups. In one recent example, the government instructed military prosecutors not to take action against leaders and members of armed groups based in North and South Kivu, particularly those belonging to the CNDP. In a letter from the Minister of Justice, dated 9 February 2009, the minister ordered that no action be taken against members of this group, and that on-going proceedings were to be discontinued.⁵⁵ In its latest report, the OHCHR notes the practice of the FARDC of promoting perpetrators of human rights abuse instead of sanctioning them.⁵⁶

Another threat against the independence of military judges and prosecutors comes from the military command. The delegation was informed that it is not unusual for military commanders to refuse to comply with legal actions taken against soldiers under their command, and also that military judges and prosecutors are sometimes beaten or even tortured for having acted against members of the FARDC without prior authorisation from the commander. One such incident took place in July 2007, when the commander of the ninth military region had four judges of the military court in Kisangani severely beaten for having launched legal proceedings against FARDC soldiers in the region without prior authorisation from the regional commander.⁵⁷

Furthermore, military police and military prosecutors are dependent on the military chain of command for logistical and administrative purposes. This dependence can allow a military commander to interfere with an investigation, a prosecution or even a judgment.

3.4 The issue of rank

Yet another threat to the independence and the credibility of the military justice system is the issue of rank of the military judges. DRC military law requires that an accused must be tried by a court

⁵³ Article 111 *Loi No 23/2002 du 18 novembre 2002 portant Code Judiciaire Militaire* (Law of 18 November 2002 on the Military Judicial Code).

⁵⁴ *Ibid*, Article 112.

⁵⁵ AfriMAP and OSISA, *supra* n 52.

⁵⁶ Annual Report of the United Nations High Commissioner for Human Rights, *supra* n 8 at para. 19.

⁵⁷ AfriMAP and OSISA, *supra* n 52, p. 9.

with a first president of equal or higher rank than the accused. As the highest-ranking military magistrate is a Brigadier-General, Lieutenants-General and Majors-General are functionally immune to prosecution. The functional immunity from prosecution that senior FARDC and PNC officers enjoy is obviously inconsistent with the rule of law. It also strengthens both the perception and reality of impunity.

3.5 Pre-trial detention

According to Article 209 of the Military Judicial Code, pre-trial detention can be prolonged by one month at a time, at the request of the prosecution, without any ultimate time-limit. Consequently, suspects in military justice cases are currently known to have spent up to four years in pre-trial detention, without yet having their cases brought to trial.⁵⁸

3.6 General observations

Similar to the entire Congolese civilian justice system, the military justice is functioning at a low level. All military justice operations visited by the delegation manifested the same ailments as those identified by members of the civilian justice system: lack of funds; lack of support from the central government; lack of access to the Congolese law; lack of infrastructure (evidence rooms, interrogation rooms, laboratories for forensic analysis, vehicles to enable travel to crime scenes); and lack of training.

According to a recent study conducted by one of the members of the delegation, the Congolese military justice has a motivated and experienced core of military investigators, prosecutors, judges and prison officials but is seriously understaffed.⁵⁹ Military prosecutors are currently at approximately 49 per cent, and military judges at 32 per cent, of their established strength. Worse, the military prison staff is even lower, with less than one per cent of the established strength.⁶⁰

It is generally agreed that a wide proportion of all human rights-related crimes in DRC are committed by members of FARDC and PNC.⁶¹ It is also an obvious fact that very few perpetrators of these crimes are ever brought to justice. This constitutes the strongest argument for not merely maintaining the military justice system, but in fact reinforcing it. A stronger military justice system could hopefully break this cycle of misconduct and impunity by better means of investigating, prosecuting, convicting and punishing more of the FARDC and PNC members who mistreat the DRC population. Such accountability would allow the DRC population to gain confidence in the FARDC and PNC, which would contribute to the overall stabilisation of the country.

As regards the present scope of military jurisdiction, which today also includes certain crimes committed by civilians, the delegation is aware of the fact that this practice violates both the 2006 Constitution and international norms. The jurisdiction of the military justice system will obviously need to be brought in accordance with the Constitution. However, for the time being – since there

⁵⁸ Ibid p. 12

⁵⁹ Col D. McAlea, 'Plan stratégique pour renforcer et réformer le système de la justice militaire de la République Démocratique du Congo', (March 2008) [report prepared for MONUC Rule of Law Unit].

⁶⁰ Ibid.

⁶¹ For example, the UN Special Rapporteur on violence against women noted that "54 per cent of all sexual violence cases documented in the first six months of 2007 were committed by the FARDC and 43 per cent by the PNC". See *Report of the Special Rapporteur on violence against women*, supra n 42 at para. 13.

are still vast areas of the country, particularly in the east where it is unrealistic to assume that civilian justice in the short term will be capable of exercising any kind of jurisdiction – pragmatic arguments exist for maintaining the present scope of military jurisdiction until the civilian justice system has become sufficiently operational in those areas. Otherwise, a serious accountability gap would be created.

Realistically, until the Congolese civilian justice system gains sufficient strength the military justice system will continue to serve an important role. Meanwhile, increased capacity building, more resources and awareness of matters of rank and interference within the military justice system are essential. The delegation noted that international actors are offering and conducting professional training for military justice personnel.⁶² These programmes address a variety of subjects, including sexual violence, international war crimes and corruption.

⁶² For example the Defense Institute of International Legal Studies (DIILS; see Chapter 6).

Chapter Four – Bars and Lawyers

4.1 Organisation of the legal profession

There are currently thirteen bars in the DRC – that is one per court of appeal⁶³ and one attached to the Supreme Court. An overarching structure called the *Ordre national des avocats* (National Bar) brings all the bars together, although they remain independent. The current organisation of the legal profession was created by the Ordinance-Law No 79-028 of 1979.⁶⁴ National by-laws organise the National Bar, and also constitute the basic operating rules for the twelve other bars, which in turn may add other, local rules applicable to their local organisations. Each bar is governed by an executive council and a president (*bâtonnier*), who is elected by the bar's general assembly for a three-year mandate.

The National Bar, which describes itself as a 'federation', adopts by-laws regulating the entire legal profession.⁶⁵ It can also hear appeals from disciplinary decision issued by local bars.⁶⁶ The National Bar's Executive Council has nine members, and its president is elected by the General Assembly, composed of the presidents and executive council members of the local bars. The National Bar's president has to be selected among the members of the Supreme Court Bar and automatically becomes president of that bar.⁶⁷

Membership in a local bar is a requirement to use the title *avocat* (lawyer) in the DRC. The thirteen DRC bars represent a total of some 6,000 lawyers throughout the country, of which approximately 5,000 lawyers live and practice in Kinshasa. On the other hand, some of the bars have no active members.

4.2 Access to the profession

In order to be admitted to the bar, lawyers need to complete a period of training (*stage*) for a duration of two years. The bar rules require that all lawyers in training provide a minimum of seven days of free legal aid through the *Bureau de Consultation Gratuite* to the indigent and four pro bono cases over the course of their internship. In addition to legal aid requirements, lawyers in training must take a professional ethics class offered by the bar, after which they must pass a test organised by the bar's executive council before they can be admitted to the bar.

Given the lack of practicing lawyers, the Congolese Government has authorised certain knowledgeable individuals to represent citizens in court. These are the *Défenseurs judiciaires*,⁶⁸ generally holding a lower degree of law (*graduat* instead of a masters degree) or are deemed qualified due to professional experience (former court clerks, for example) and are considered to have sufficient knowledge of the law to effectively represent individuals. *Defenseurs judiciaires* are not

63 There are currently twelve courts of appeal (one per province and two in Kinshasa: Kinshasa-Matete and Kinshasa-Gombe). The constitutional provisions creating new provinces, for a total of 26 instead of the actual 11, are likely to cause that number to increase once the decentralisation process is completed.

64 *Ordonnance-loi No 79-028 du 26/09/1979 portant organisation du Barreau, du corps des défenseurs judiciaires et du corps des mandataires de l'Etat* (Law on the on the organisation of the Bar, judicial defenders and State representatives).

65 *Ibid*, Article 120.

66 *Ibid*, Article 96.

67 *Ibid*, Article 118.

68 'Défenseurs judiciaires' are created by the *Ordonnance-loi No 79-028*, which also regulates their practice (Art 125 to 142).

members of the bar, whose members have the monopoly of representation before higher courts (that is, the Supreme Court and the Courts of Appeal).

4.3 Activities of the bars and services provided to their members

The delegation met with representatives of three different bars, in addition to the president of the National Bar: the Kinshasa-Gombe Bar, the Lubumbashi Bar and the Kisangani Bar.

The various existing bars function on a relatively small budget, the size of which depends on the number of lawyers/members (lawyers are required to pay annual dues for membership varying between US\$150 and US\$180 depending on the lawyer's seniority). For example, the representative of the Kinshasa-Gombe bar informed the delegation that its annual budget is approximately US\$180,000 to US\$200,000. Each local bar then contributes to the National Bar.

The capacity varies greatly between the various Congolese bars. While some bars take concrete initiatives to participate in the justice process (for example, the Kinshasa-Gombe Bar publishes a law review when funds are available, and the Lubumbashi Bar has entered into cooperation agreements with the Liege Bar and the Brussels Bar in Belgium), others have so few members that they lack the capacity, especially in terms of funding, to take any kind of action or initiative. The delegation was informed that inequities could also be found in the way bar associations dealt with admission of new members. Smaller and less organised bars are reportedly less rigorous in the administration of admission exams.

The delegation was advised of the limited continuing legal education organised and/or offered by the bar associations. Bars offer training sessions, mostly on ethics, to trainee-lawyers, but there is no continuing legal education systematically offered to qualified lawyers. Some training programmes have been organised by international donors on an ad hoc basis. The Secretary of the Kinshasa-Gombe Bar told the delegation that in 2008 three training sessions had been organised, all in collaboration with international NGOs. Bar representatives expressed a desire for a more structured continuing legal education programme, which could be offered to their members on an ongoing basis. From the information gathered by the delegation, it appears that few training initiatives from international organisations are specifically directed at lawyers.⁶⁹ Bar representatives met by the delegation called for more training on international criminal justice, so as to better equip their members to deal with international crimes and the presence of the ICC in the DRC. It should be noted that the latest list of counsel authorised to appear before the ICC includes 28 Congolese attorneys out of a total of 264. Considering the extent of international crimes and serious human rights violations committed in the DRC, it is essential that the legal profession receive adequate information and training.

4.4 Legal aid

The *Ordonnance-loi 79-028* establishes that it is the bar council's responsibility to establish free legal aid offices for indigents (*bureaux de consultation gratuite*).⁷⁰ The delegation was advised by bar council members that there is limited awareness by the general public of the existence of legal aid

⁶⁹ For example, ASF has offered training to lawyers.

⁷⁰ *Ordonnance-loi* No 79-028, Article 43.

organised by the bar associations. The general public prefers to bring their issues and questions to small legal clinics organised by NGOs and civil society. Moreover, in order to access the *bureau de consultation gratuite*, individuals need to obtain a certificate of indigence issued by the municipality. However, as explained above in section 2.3 (c), indigents need to pay for the certificate, which many cannot afford. As a result, ‘there are less and less pro bono cases to speak of’, the president of the National Bar told the delegation, a paradox given the high rate of indigents (60 to 80 per cent of the population).

The delegation was informed of other challenges faced by bar associations in administering legal aid. As explained above, lawyers in training (*stagiaires*) are required to provide a fixed number of hours of pro bono work. Therefore, practically all legal aid cases are referred to inexperienced lawyers in training. Consequently, according to NGOs met by the delegation, lawyers handling legal aid cases frequently lack both capacity and motivation. Regulations on bars do not require members to carry out pro bono work.

One of the major obstacles impeding the legal aid organised by bars is the lack of involvement by the Congolese state. Bars do not receive any funding to administer legal aid or to give a minimum fee to lawyers handling cases. Consequently, according to information given by the bar representatives, some lawyers have to use their own money in order to represent legal aid clients, paying for example for court fees or transport. Members of the Lubumbashi Bar deplored this situation and explained to the delegation that if some funds were available, they would be interested in taking on more legal aid cases, including public interest litigation cases.

4.5 Protection of the public – disciplinary action

The current Law on the Bar does not have any provisions related to the protection of the public. The delegation was informed that disciplinary decisions issued by the bar were not made public. The general public therefore has no means of ensuring whether a lawyer is facing a disciplinary sanction.

4.6 Law on the Bar

The Law on the Bar dates from 1979 and has not been modified since. Lawyers met by the delegation expressed the need for an update of the law, notably to make it compliant with the new constitution and to better protect the status of lawyers. In its actual state, the law does not clearly define which acts can be performed exclusively by lawyers. In Article 1, the law defines lawyers as *auxiliaires de justice* which, according to some lawyers, does not give them sufficient independence and makes them only one of the organs of the justice system. Article 2, however, does specify that the legal profession is independent.

The delegation learned that a draft law modifying the Law on the Bar is currently considered by the *Conseil des Bâtonniers*, an organ created by the National Bar and composed of actual and former presidents of all Congolese bars.

4.7 Advocacy

Bar leaders met by the delegation expressed a will to be more involved in the legislative drafting process. They deplored the fact that the National Assembly does not consult the bars or invite them to comment when they examine bills. Bar leaders acknowledged the need for their organisations to be better equipped to comment on legislative changes. One bar leader suggested the implementation of a formal public consultation mechanism on legislative reform.

It was also noted by bar leaders that the political climate still might not be adequate for bars to make public statements on government actions or proposed legislative changes. So the Bar leaders informed the delegation that they had received threats after making public comments.

4.8 Working conditions of lawyers

Lawyers are not exempt from harassment and several incidents involving threats to lawyers have been reported in the past few years. The UN Special Rapporteur noted in his 2008 report that: ‘Other serious obstacles to the exercise of the legal profession are threats, intimidation, and assault to which lawyers are subjected, not only by some judges, but by the opposing party.’⁷¹

In April 2008, the members of a group of independent jurists observing the military trial of the defendants of Serge Maheshe’s murder were exposed to death threats. Serge Maheshe, a journalist working for Radio Okapi, was killed in July 2007 in Bukavu. The lawyers of the four defendants were also given death threats and were requested to stop criticising the trial and the army. One of the lawyers withdrew from the proceedings. The presidents of the Bukavu military court accused the group of being biased and threatened to bring charges against its members.

On 27 June 2008, four lawyers from the Lubumbashi Bar were arrested by the national intelligence service in Katanga. It seems that they were illegally arrested, confined and tortured. They were then charged before the military court. Following this event, the lawyers of the Lubumbashi Bar temporarily stopped representing servicemen or policemen before military courts. They denounced the mistreatment, such as illegal arrests, beatings and death threats that they had experienced from public officers.

The Special Rapporteur on Human Rights Defenders recently conducted a visit to the DRC, where she noted the numerous challenges faced by human rights defenders and the lack of protection mechanisms.⁷²

⁷¹ Report of the Special Rapporteur on the independence of judges and lawyers, supra n 18 at para 48.

⁷² UN Press Release, ‘United Nations expert on human rights defenders concludes visit to the Democratic Republic of the Congo’ (3 June 2009) available at www.unhcr.ch/hurricane/hurricane.nsf/view01/118FD1319956C2ADC12575CA0058F48F?opendocument. The report will be presented to the Human Rights Council in March 2010.

Chapter Five – Fighting Impunity

5.1 The Rome Statute and the International Criminal Court

a) Implementing legislation

The ICC has become an important factor in the DRC, following the referral by the Congolese Government of the situation on its territory on 3 March 2004. The DRC's ratification of the Rome Statute instituting the ICC dates back to 11 April 2002.⁷³ Despite its ratification, the DRC has yet to actually adopt the bill formally incorporating the Rome Statute into Congolese law. The delegation met with representatives of the Permanent Commission of Congolese Law Reform, who explained that they had prepared a draft law at the government's request upon ratification of the Rome Statute. The acting President of the Commission said that the draft had been handed to the government two years ago. The delegation was informed that a draft law could be presented again before the National Assembly at its next session. The draft law has been a matter of debate for several years, and some speculate that certain officials are resisting the legislation because of fears that they may themselves end up being prosecuted.

In its current format, the draft law involves changes to the Penal Code in order to include war crimes, crimes against humanity and genocide, and in order to replace the sentence of capital punishment with life imprisonment. Amendments would also be required to the Military Penal Code in order to move war crimes, crimes against humanity and genocide under the exclusive jurisdiction of the civilian Courts of Appeal. The draft legislation would also clarify the definition of these crimes as there are currently discrepancies between the definitions found in the Military Penal Code and in the Rome Statute.

This anticipated transfer of jurisdiction is the cause of debate as to the prudence of removing jurisdiction from military courts over military personnel in cases of international crimes, in light of the present state of the civilian justice system. The current draft law provides for the transfer of jurisdiction to the Courts of Appeal, but it also introduces a military judge in the composition of the five judge bench which will hear these infractions.

b) Application of Rome Statute provisions in local courts

Given the monistic⁷⁴ nature of the Congolese legal system, the Rome Statute is already part of domestic law even in the absence of an implementing law. The Constitution provides at Article 153 that courts can apply ratified international instruments as long as these are not contrary to law and custom.

⁷³ Décret-loi No 13 of 13 March 2002

⁷⁴ In a *monistic* system, ratified international treaties become directly applicable national law, while a *dualistic* system requires an additional act of the legislature to transform the ratified treaty into national law.

Local courts have started invoking the provisions of the Rome Statute in their judgments since 2006.⁷⁵ The *Tribunal militaire de garnison* of Mbandaka was the first one to do so in the cases of Mutins de Mbandaka⁷⁶ and Songo Mboyo.⁷⁷ In these two cases, the tribunal used the definition of crimes against humanity found in the Rome Statute. In Songo Mboyo, the tribunal used the definition of rape as a crime against humanity as outlined in the Rome Statute, which is wider than the one found in the Military Penal Code. Recently, the trial of Mai Mai militia chief Gédéon Kyungu Mutanga showed another example of the application of the Rome Statute by domestic court. In March 2009, the *Tribunal militaire de garnison* of Haut-Katanga found Gédéon guilty of crimes against humanity. The court applied the definition of crimes against humanity as found in the Rome Statute.

The jurisprudence of domestic courts as regards the application of the Rome Statute provisions is still limited not only in the number of decisions, but also in the strength of the legal reasoning found in the judgments. In its study, ASF notes the weakness of the decisions and explains that judges often omit to point out the constitutive elements of the crime or the evidence on which they are founding their decision.⁷⁸

Challenges to the proper functioning of the judiciary noted in Chapter Two also influence the application of the Rome Statute by domestic courts. Magistrates have rarely been adequately trained and investigative capacities are very limited. The lack of qualified magistrates and judicial personnel also poses a challenge to proper application of the Rome Statute domestically.

c) Cases before the ICC

Following the referral by the Congolese Government, the Prosecutor opened an investigation in 2004 which led to warrants of arrest being issued against four Congolese nationals. There are currently three pending cases before the ICC for the crimes committed in the DRC. Thomas Lubanga Dyilo,⁷⁹ accused of war crimes and crimes against humanity in relation to the use of child soldiers, was arrested in 2006 and his trial began in January 2009. In the joint case of Germain Katanga and Mathieu Ngudjolo Chui,⁸⁰ charges were confirmed on 26 September 2008 and the trial is scheduled to start in September 2009. In addition, a warrant of arrest was issued against Bosco Ntaganda, the alleged Deputy Chief of the General Staff of the *Forces Patriotiques pour la Libération du Congo* (FPLC) and alleged Chief of Staff of the *Congrès national pour la défense du peuple* (CNDP), an armed group active in North Kivu. The warrant of arrest still has not been executed to this date, and critics say that Ntaganda is being protected by the Congolese Government.

In addition to the three above mentioned cases, the ICC has charged another Congolese national, former opposition leader Jean-Pierre Bemba, with crimes against humanity and war crimes committed in the Central African Republic.⁸¹

⁷⁵ A recent publication by Avocats Sans frontières analyses the jurisprudence of Congolese military courts applying the Rome Statute. See Avocats Sans frontières, *Etude de jurisprudence – L'application du Statut de Rome de la Cour pénale internationale par les juridictions de la République démocratique du Congo*, March 2009, at www.asf.be/index.php?module=publicaties&lang=fr&id=51.

⁷⁶ Military Court of the Garrison of Mbandaka, *Affaire Mutins de Mbandaka*, 12 January 2006, RP 086/05.

⁷⁷ Military Court of the Garrison of Mbandaka, *Affaire Songo Mboyo*, 12 April 2006, RP 084/05.

⁷⁸ ASF, supra n 75 at 106.

⁷⁹ ICC-01/04-01/06

⁸⁰ ICC-01/04-01/07

⁸¹ ICC-01/05-01/08

5.2 Alternatives to the ICC to deal with impunity

The ICC's jurisdiction is limited not only in terms of time, as it only covers crimes committed after the entry into force of the Rome Statute on 1 July 2002, but also in terms of the number of individuals it may prosecute. The prosecution strategy of the ICC is to carry out targeted investigations and trials, and to prosecute those bearing the greatest responsibility. The ICC operates according to the principle of complementarity with the national justice system, taking over when the latter lacks the will or the capacity to judge perpetrators of the most serious crimes.⁸² On this basis, it remains the responsibility of the Congolese courts to try perpetrators of serious violations of human rights and international humanitarian law. However, the present weakness of the Congolese justice system makes this difficult. As described in the sections above, judicial institutions, civil as well as military, face numerous challenges in their day-to-day operations. Moreover, the prosecution of international crimes requires extensive investigative capacities. The delegation was informed of the need to strengthen current investigation capacities of the judicial police. The lack of witness protection programmes in the DRC is another obstacle to the prosecution of international crimes.

a) The 'Mapping Project'

Years of conflict, notably during the wars that took place in the country between 1995-1997 and 1998-2002, caused massive human rights violations and violations of international humanitarian law, many having been committed prior to the DRC's ratification of the Rome Statute. Potential solutions to put an end to impunity for these crimes will need to be examined.

An important step in that process is the Justice Mapping Project. Originally a MONUC initiative, the project was established by the Office of the High Commissioner for Human Rights (OHCHR), in close collaboration with MONUC. The Justice Mapping Project covers the most serious violations of human rights and international humanitarian law committed in the DRC between March 1993 and June 2003 (until the implementation of the transitional government).

The project is divided into three steps. It aims first at establishing an inventory of human rights violations committed between 1993 and 2003. This portion of the project does not involve forensics or any formal investigation, inasmuch as the project's team members use a 'reliable body of evidence' established by cross-referencing sources, reports and witness statements. Secondly, the Congolese justice system will be examined to determine its capacity to deal with the human rights violations inventoried. On this point, the project director noted the strong need to reinforce the country's legal aid system.

Finally, the project's report, due in summer 2009, will propose options for transitional justice to deal with impunity and will make suggestions to deal with related issues such as memorial, vetting and compensation. The report will first be submitted to the High Commissioner for Human Rights and will eventually be made public. As regards the information collected during the mapping exercise, some of it will be made public, while the rest will remain confidential. It will, however, be made available to a serious justice mechanism willing to undertake prosecution. The project's director told the delegation that the project has received the approval of President Kabila, as it is aimed at helping local authorities deal with impunity.

⁸² Article 17, Rome Statute.

b) Truth and Reconciliation Commission

It should be recalled that the DRC made an attempt at a truth and reconciliation commission. Created by the Sun City Accord of 16 December 2002, the commission was then established by law in 2004.⁸³ Faced from the beginning with issues related to its credibility and independence, the DRC's Truth and Reconciliation Commission was never successful and was dissolved in December 2006, without having heard a single case. However, the idea is still alive and the former head of the Truth and Reconciliation Commission presented a proposal to the Senate in 2008 for the establishment of a new commission.

The issue of amnesty will need to be examined by a future transitional justice mechanism in the DRC. Amnesty appears to still be used in peace negotiations, as illustrated by the recent amnesty law covering crimes committed from June 2003 to May 2009 in the regions of North and South Kivu.⁸⁴ This law does not, however apply to acts of 'genocide, war crimes and crimes against humanity'.

5.3 Sexual violence

Rape and sexual violence are now internationally recognised as crimes against humanity, war crimes and genocide. The DRC, throughout its long running conflict, has witnessed some of the highest levels of sexual violence in the world. Rape has been used as a weapon of war by all sides involved in the conflict, and an estimated 200,000 women and girls of all ages have been assaulted over the past 12 years.⁸⁵ While sexual violence is rampant and prevalent throughout the DRC, the most affected areas have been in north-eastern provinces (for example Ituri, North Kivu, South Kivu and Maniema). Victims are becoming younger and younger, in part due to the erroneous belief that raping a virgin girl is a remedy against HIV and AIDS.⁸⁶

Unfortunately, despite the adoption of laws against sexual violence,⁸⁷ it continues to occur at an alarmingly high rate, with many acts committed by those charged with protecting the general public (the FARDC and the PNC). Courts struggle to apply the law properly, with most of the sexual violence cases remaining under investigation for years. Even if a perpetrator is tried and convicted, the sentence is rarely enforced. The law on sexual violence requires the courts to conclude a case within three months after the case is brought to the justice system,⁸⁸ but this is hardly ever possible due to the fact that the justice sector is severely under-resourced and under-staffed.

The absence of an effective criminal justice delivery system has led to an increase in the number of out-of-court settlements based on traditional justice and often leading to forced marriages, to the detriment of the victim's rights and in violation of the various laws on sexual violence.

The problem is two-fold. On the one hand, the major difficulty encountered by the victims and often leading to the perpetrators' impunity is the difficulty to prove the crime in court, or even bring the

⁸³ *Loi No /04/018 du 30 Juillet 2004 portant sur l'organisation, attributions et fonctionnement de la Commission Vérité et Réconciliation* (Law on the organisation of the Truth and Reconciliation Commission).

⁸⁴ *Loi No 09/003 du 7 mai 2009 portant amnistie pour faits de guerre et insurrectionnels commis dans les provinces du Nord-Kivu et du Sud-Kivu* (Law on amnesty for acts of war and insurrection committed in the eastern provinces of North and South Kivu).

⁸⁵ According to the statistics compiled by the United Nations Children Fund (UNICEF) see UN News Service, 28 February, 2009, available at: www.unhcr.org/refworld/docid/49aff7bc1e.html

⁸⁶ See *Report of the Special Rapporteur on violence against women*, supra n 42 at pp 14, 16.

⁸⁷ *Loi No 06/018 modifiant et complétant le Décret du 30 janvier 1940 portant Code Pénal Congolais* (Law amending the Congolese Penal Code).

⁸⁸ *Loi No 06/019 de 2006 sur les violences sexuelles* (Law on sexual violence), Art 1, adding art 7 bis to the *Code de procédure pénale* (Penal Procedure Code).

matter to court – this is all the more difficult in the absence of any witness protection programme. On the other hand, even if the victim can bring the matter to court and have the perpetrator(s) arrested and convicted, there is no certainty that reparations will be paid. This is because victims may not be able to afford to pay the legal fees required for judgment enforcement or because the perpetrator will not have sufficient resources to pay. Also, due to very deficient security in most of the prisons, it is not uncommon that the perpetrators are able to escape and become a threat to victims and witnesses.

The inability of the justice system to handle such crimes has had the adverse effect of creating a sentiment of impunity. Unfortunately, and as a direct result of the many crimes remaining unpunished and the general sense of impunity, rape and sexual violence in the DRC is increasing at an alarming rate and is now being committed by ordinary citizens, in addition to the armed and military groups.

The international community has reacted to the extent and the brutality of sexual violence committed in DRC, particularly in the east of the country, and efforts to fight impunity have been directed in that region.

Chapter Six – International Assistance: Who Does What?

Several international organisations, state donors and NGOs are involved in supporting the justice system in the DRC. Our objective is not to put together an exhaustive list but to highlight the work of some of the main actors.

6.1 MONUC

The MONUC (*Mission de l'Organisation des Nations Unies en République démocratique de Congo*; Mission of the United Nations Organisation in the Democratic Republic of the Congo) Rule of Law Section was first set up in 2004 as a small unit to advise on a range of rule of law issues and has since expanded to support wider security sector reform, including civilian and military justice and reform of the penitentiary system. The Rule of Law Section has adopted a three-tiered approach to the support of the justice system, providing, first, immediate assistance to enable existing DRC capacity to be fully maximised. Second, the section supports DRC authorities in designing mid-term coordinated strategic plans to reform justice sub-sectors, such as legislation, military justice, prisons and courts. Third, the section supports short-term implementation of urgent elements of longer-term reform strategy, including building capacity to investigate and try cases involving international crimes.⁸⁹

Closely attached to MONUC is the Office of the Senior Adviser and Coordinator on Sexual Violence for DRC. The Office was created in March 2008 as an answer to increasing international reaction against the extent and brutality of sexual violence in the DRC, particularly in the war-torn eastern part of the country. The Office has been set up with the support of UN Action Against Sexual Violence in Conflict, a conglomerate of 12 UN agencies and sections (including UN DPKO), and the UNDP Bureau for Crisis Prevention and Recovery (UNDP BCPR). On 18 March 2009, in consultation with UN agencies and MONUC sections, international NGOs, the Sexual Violence Task Force and the DRC's ministries of justice, defence, interior and gender, the Office launched a 'Comprehensive strategy on combating sexual violence in the DRC'. This strategy consists of four pillars: i) fighting impunity; ii) prevention and protection; iii) security sector reform (reforming the Congolese army and police); and iv) coordinated medical, mental-health, legal and reintegration assistance to victims. The aim of this strategy is, according to the office, to provide a practical framework for action.

6.2 UNDP

UNDP is an active member and important funder of the CMJ and contributor to the Action Plan. In 2008, UNDP launched a US\$390 million governance programme with the DRC. The programme, which will run throughout 2012, consists of five components, one of which, the legal and security governance component, will work towards judicial reform, capacity-building in the security forces, efforts to combat corruption in public administration, and action to strengthen internal and external audit institutions. Within the framework of the Action Plan of the CMJ, UNDP supports the drafting of organic laws for the justice system, the upgrading of equipment and the training of judges. UNDP

⁸⁹ See <http://monuc.unmissions.org> for further information.

also supports the CSM and has contributed US\$36,000 to its secretariat during the first three months of 2009.

In early 2009, UNDP BCPR decided to contribute an additional US\$2 million to reform activities in the judicial system.

6.3 European Union (EU) and European Commission (EC)

The EC has been supporting the justice sector in the DRC since 2003. It has played an important role in the creation and the work of the *Comité Mixte de Justice*.⁹⁰ Through a commitment of €8 million, the EC also plays an important part in the financing of REJUSCO (*Restauration de la Justice à l'est de la RDC*, see below). The EC is considering the addition of a fourth pillar to REJUSCO: gender issues and sexual violence. REJUSCO would offer assistance to victims and help them access the justice system.

The EC also has a new governance programme, which includes natural resources, justice and public finances. €9 million will go to the justice sector. Activities will include, inter alia, support to the Congolese Government in implementing the CSM. The programme began in January 2009 and will run for three years.

6.4 REJUSCO

The REJUSCO programme aims at restoring the justice system in the east of the DRC. The programme was launched in January 2007 and will run through 2009, with a budget of more than €15 million, with funding from the EU, United Kingdom, Belgium, the Netherlands and Sweden. The central managing unit is based in Goma, but there are branches in Bukavu and Bunia. REJUSCO has three pillars:

- Rehabilitating the judicial infrastructure: tribunals, prisons, 'parquets' and TP.
- Strengthening the functioning of the justice sector. REJUSCO provides transport and basic material. It also helps with police investigation and strengthens judges' technical capacities. A study is currently taking place as to the feasibility of payment of judges' salaries based on performance (bonus system).
- Legal sensitisation and monitoring of the justice chain. REJUSCO provides legal sensitisation to civil society and governmental actors. It also finances local NGOs and local bar associations, allowing defence counsel to undertake specific cases of human rights violations. In order to access this funding, lawyers need to make a request to REJUSCO.

The Belgian Technical Cooperation is the implementer of REJUSCO, in addition to contributing €3.7 million towards its financing.

6.5 Avocats Sans Frontières

Avocats Sans Frontières (ASF) is an NGO based in Belgium with activities in several African francophone countries. ASF has a presence in the DRC since 2002. In 2007 it received the first Human Rights Award from the Council of Bar Associations and Law Societies in the European Union

⁹⁰ See above section 2.4a)

for its work in Africa. The aim of ASF is the establishment of the rule of law and the implementation of a just legal system. There are three pillars to ASF's current programme: improve access to justice (through various initiatives such as mobile courts, legal clinics and legal training programmes); fight impunity in matters of war crimes and crimes against humanity; and fight impunity in matters of sexual violence. ASF has its Congolese headquarters in Kinshasa with field offices in Bukavu, Kindu and Mbandaka. ASF receives funding from Belgium, The United Kingdom Department for International Development (DFID) and USAID.

6.6 RCN Justice et Démocratie (*Réseau des Citoyens/Citizens' Network*)

RCN Justice et Démocratie is a Belgium-based NGO which has been present in the DRC since 2000 and currently has offices in Kinshasa and in Bunia (Ituri province, north-east of the country). RCN also runs a project in the Bas-Congo Province and ran another one in the Katanga Province (office in Lubumbashi 2005-2007). Its focus is two fold: assisting the judiciary at all levels (training, equipment etc); and providing support to the civil society including through legal literacy programmes. The activities implemented by RCN aim to recreate the link and trust between the Congolese citizens and their judicial institutions. From 2004 to 2006, RCN developed a comprehensive programme to restore the judiciary just after the conflict in Ituri, prior to the implementation of the EU-REJUSCO programme. Since 2006, the Ituri programme is mainly focused on the land access and land law and targets the land administration civil servants as well as the population (including internally displaced persons (IDPs)) and civil society. RCN is also an ILAC member. RCN receives funding from Belgium, the EU, UNDP, DFID and Japan.

6.7 American Bar Association (ABA)

The Dutch government recently awarded the ABA Rule of Law Initiative (ABA ROLI) a US\$5.2 million grant that will expand its work on combating gender-based violence in the DRC. ABA ROLI currently has a programme on gender-based violence in North Kivu province, which is supported by a US Department of State Bureau of Democracy, Human Rights and Labor (DRL) grant, while the three-year Dutch grant will expand the programme to Maniema Province. Both programmes focus on improving access to justice for victims of sexual violence and increasing the capacity of police, prosecutors and judges to combat impunity in rape cases.

6.8 DPK Consulting

DPK Consulting is a private consultancy firm, with headquarters in San Francisco, United States. With a budget from USAID of US\$13 million for the period October 2008 through to September 2011, DPK works to improve access to justice and the overall management and effectiveness of judicial institutions and courts in the DRC. The aim of the project is to work with judicial institutions and civil society in the country to support the establishment of new judicial procedures and a more accessible and responsive system; improve transparency and management of the judiciary and of the Ministry of Justice; strengthen court effectiveness, transparency, and accessibility; and to increase access to justice for vulnerable populations through legal assistance and support to victims.

6.9 Defense Institute of International Legal Studies (DIILS)

DIILS serves as the US Department of Defense's lead agency for providing legal education and training to international military members and civilian government officials. The first such training in the DRC was practical, focusing on how to investigate and prosecute sexual crimes programme for Congolese military magistrates and judicial police, launched in 2007. DIILS is currently providing training to the officers of higher ranks in matters of rule of law, human rights and military justice. The delegation met with members of the DIILS programme and attended one of the training sessions which took place in Kinshasa during the mission.

6.10 State donors

A number of states support the justice system in the DRC through the CMJ. REJUSCO, for example, receives funding from state donors, including Belgium, the Netherlands, Sweden and the United Kingdom. State donors fund international and national NGOs conducting work in the justice sector and also work on various initiatives. France, for example, is working on the creation of a school for judges and is training judicial police officers in investigative techniques. France is also providing a forensic laboratory located in Kinshasa and inaugurated in June 2009. The Netherlands have financed training of military judges and judicial personnel.

The information in this section is not exhaustive, but it illustrates that practically all legal reform assistance is taking place in Kinshasa and in the war-torn eastern part of DRC. It is also noteworthy in this context that some countries, for example Japan and Sweden, are about to launch new wide-ranging programmes of assistance in the justice sector.

Chapter Seven – Conclusions and Recommendations

Based on the guiding principles in the Action Plan and the Roadmap, many important projects have already been launched – or are in the process of being launched – in order to improve the ailing judicial system of the DRC. A number of countries, international organisations and NGOs are already at work assisting the DRC in its task to build a judicial system in a country where history, geography and recent political developments present huge challenges to establishing the rule of law.

It appears that most of the ongoing reform work is either targeting the central institutions in Kinshasa, or has been developed in response to the atrocities and human suffering in the eastern part of the DRC. As a consequence, and despite the combined efforts by the DRC Government and the international community, it seems that vast areas of the country are still largely untouched by any reform activities. Against this background this report recommends projects of assistance with two different approaches: one which focuses on central institutions in Kinshasa, which may or may not yet have been targeted by the current reform activities; and one which targets two important regional centres, Kisangani and Lubumbashi. For Kisangani the report proposes a holistic approach with practical projects designed to support the current objectives of the Congolese Ministry of Justice and to fit in with the priorities identified in the Ministry of Justice’s Roadmap matrix. In Lubumbashi, we are proposing a more target-driven project to support the already well established Lubumbashi Bar. The IBAHRI, with its particular expertise, is well positioned to implement activities in that regard, which could be extended to other bar associations. It is hoped that in the near future the benefits derived from these projects could provide a foundation for similar projects within other parts of the country.

Also, and particularly because of the way violence and injustice are being directed towards women, a theme that infiltrates most of the following recommendations is gender. This includes the protection of women’s rights, in law and practice, and the promotion of women’s participation at all levels of the judiciary, bar, government and civil society. All training programmes should include women and all access-to-justice programmes should target women.

7.1 Central level recommendations

On the central level, the IBAHRI and ILAC have the following recommendations:

a) Increase the national judicial budget

It is obvious that one of the root causes of the problems in the judicial system is an almost paralysing lack of resources, which in turn is a result of the fact that the portion of the national budget which is set aside for the judicial sector is by any standards alarmingly low.

b) Recruit and train more judges

Many of the shortcomings of the judicial system are the result of a shortage of judges, as well as insufficient training. The IBAHRI and ILAC have taken note of the recently launched efforts to recruit and train more judges. However, these efforts need to be further reinforced in order to meet the increased demand for judges as a result of the 2006 Constitution. Better trained judges would almost certainly have positive effects on other identified problems in the judicial system, such as excessive pre-trial detention periods. More women judges should be recruited, particularly in the military justice system.⁹¹

c) Introduce a standardised court management system, and recruit and train judicial support staff

In addition, the delegation's visits to courts at various levels and in various locations have demonstrated an obvious need for the introduction of effective and standardised administrative procedures to regulate the case flow administration from when a case is brought to court until judgment is passed. Court staff need to be trained in the management of such a standardised system. To this end we propose that the dormant *École de recyclage et de formation du personnel judiciaire* (school for registrars and other support staff) should be revived. Existing international expertise in this area, such as the International Association of Court Administrators, could play an important role in this often neglected area of the law.

d) Strengthen the independence of the judiciary and fight corruption by reinforcing the Inspection Judiciaire

As described above, the judiciary is deeply affected by corruption and a lack of capacity. At present there appears to be no efficient national oversight mechanism to deal with disciplinary issues within the judiciary. The IBAHRI and ILAC are of the opinion that the already existing *Inspection Judiciaire* could fulfil this function if given sufficient resources and, for reasons of independence, it is moved from the Ministry of Justice to the CSM. This would also send an important signal as to the government's political will to strengthen the independence of the judiciary.

e) Strengthen the legislative process

The DRC, like many emerging democracies, lacks a comprehensive system which regulates the formal and practical steps in the legislative procedure; that is the creation of a law from the original concept through the process of drafting to how it is handled in the legislature and, finally, the promulgation procedure. The delegation was informed by several stakeholders of the need to reform some existing laws. The IBAHRI and ILAC believe that the carrying out of a diagnosis of the legislative procedure, with the aim to formulate a proposal for strengthening the legislative procedure could prove useful in the DRC.⁹²

⁹¹ Out of 344 military judges, only 20 are women. See AfriMAP, *supra* n 52 at p 66. Overall, female judges represent less than ten per cent of the DRC's judiciary. See Report of the UN Special Rapporteur on the independence of judges and lawyers, *supra* n 18 at para 37.

⁹² ILAC successfully sponsored such a project in Haiti in 2008. See Pierre-Louis/Jean-Vernet, *Diagnostic de la Politique Législative en Haiti*, edition Zémès 2008, ISBN 978-999935-41-29-5

f) Improve access to legal aid

Access to legal aid is seriously impeded by the costs of the *certificat d'indigence* and the lack of support to the bars in organising legal aid offices. Although NGOs organise legal aid clinics, the *bureaux de consultation gratuite* provided for by the law should be implemented, with sufficient funding from the government to allow lawyers to offer free services to the indigents. Better control should be exercised in order to eliminate illegal fees charged for the issuance of a *certificat d'indigence*.

g) Address the issue of rank in the military justice system

As pointed out above in Chapter 3.4, the military justice system in practice grants judicial immunity to Lieutenants-General and Majors-General. This unacceptable practice must be changed by abolishing the rule which prevents military judges to handle cases where the accused has a higher rank than the judge, or by promoting the highest military judge to the rank of Lieutenant-General.

h) Eliminate interference in military prosecutions

Interference, whether by government officials or military commanders, contributes to the impunity enjoyed by members of the FARDC and the police, together with the lack of trust from the population. Independence of military judges and prosecutors needs to be strengthened in order to ensure that they can conduct prosecutions in accordance with the evidence that is available to them.

i) Strengthen the capacity to investigate war crimes and crimes against humanity by introducing Military Mobile Investigation Units

Most of the serious crimes against the civilian population are committed by men in arms – members of the FARDC, the PNC, and the various militias and rebel groups. The jurisdiction over these groups belongs with the military justice system. The military justice system appears to be somewhat more cohesive and better disciplined than the civilian justice system, but it is obvious that it suffers from many of the same ailments as the civilian justice system. Much of its weakness in dealing with the serious crimes that fall within its jurisdiction is due to a serious lack of investigative capacity combined with a lack of mobility. As these crimes are often committed against the civilian population in remote areas of the country, in the Kivu, Ituri and Uele, for example, they are rarely investigated and brought to trial.

The IBAHRI and ILAC believe that setting up and training two mobile investigation teams – which should be put under the control of the *Auditorat général militaire* in Kinshasa – could significantly improve the situation. Each team could consist of a group of judicial police inspectors (five to ten) and one or two investigating judges. The members of these teams would be provided with special training in areas such as:

- investigation techniques (how to secure evidence and how to interview witnesses, as well as basic forensic techniques);
- how to avoid exposing witnesses and victims; and
- how to exercise respect for human rights during the investigation procedure.

The teams would require access to medical expertise, in order to produce valid medical certificates, as well as to the forensic laboratory, which was recently inaugurated in Kinshasa. The assistance of MONUC in providing security and transportation would be essential.

7.2 Regional level recommendations

a) Kisangani – a holistic project

Kisangani is the capital of the Province Orientale, the largest province of the DRC (over 500,000m²), and the third largest city in the country (after Kinshasa and Lubumbashi). Kisangani is also the farthest navigable point upstream on the Congo river from Kinshasa making it an important economic centre. Kisangani is also an important judicial centre, with a Court of Appeal covering a vast area, including Haut Uele, where the LRA is still committing atrocities against the civilian population, and Ituri, where many crimes against humanity and war crimes have taken place in recent years. It is also relevant to note that the majority of crimes actually prosecuted or submitted to the ICC in relation to the DRC context have been committed in Ituri (the cases against Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo Chui) including north Ituri, where many of the atrocities have taken place. It is also the home of a *Tribunal de Grande Instance* as well as an important centre for the military judicial system. There are presently no international actors in the region, except for MONUC, whose presence has been reduced over the past several months. Kisangani's recent history has been very violent. In the delegation's meeting with the Vice-Minister of Justice, Mr Jean-Collins Musonda, he called Kisangani the 'province of martyrs'.

The focus of a judicial assistance programme for Kisangani should be holistic and include both civil and military justice, and the authorities as well as civil society. There is an obvious need to rebuild the population's trust in the judiciary at all levels. The first steps should be taken in the city before expanding into other areas.

The centre-piece and driving force of a holistic programme in Kisangani could be the establishment of a local office of RCN Justice et Démocratie, which is an ILAC member organisation, with almost ten years of experience of legal reform assistance in the DRC (see Chapter 6.6).

7.3 Proposed components of a holistic project

a) Legal training

Both new and refresher legal training courses are required at all levels for judges, prosecutors, clerks and lawyers. Recommended courses include:

- basic legal skills: how to conduct legal research, and how to write a brief and a judgment;
- basic national codes;
- human rights in the administration of justice;
- gender justice; and
- international criminal law (ICC and the Rome Statute).

b) Management training

Training for judges and court staff should also include:

- Case flow management;
- Court administration; and
- Human resources management.

c) Module law library

The country's judiciary lacks sufficient legal documentation. One way to overcome this need would be to implement a module law library that would serve not only all actors of the judicial system, but also be available to civil society. The Raoul Wallenberg Institute at the Faculty of Law at the University of Lund, an ILAC member organisation, has many years of experience of providing module law libraries to various African countries.

d) Light rehabilitation and basic equipment

The current work environment in most court houses visited by the delegation were deplorable and lacked minimal basic tools, such as proper evidence rooms, archives, filing cabinets and book keeping equipment. Offering such light rehabilitation is a vital component to enable proper case flow management. However, in order to prevent any such equipment disappearing as it has in the past, there is also a need to ensure accurate and regular monitoring.

Certain basic IT tools, as well as training, should also be considered in this context. Given the vastness of the country and the almost total lack of conventional means of communication, the internet could eventually be used as a tool to lift the isolation of the regional courts.

e) Information tools and legal literacy

Information should be dispatched not only via civil society and international donors. In order to restore the general public's trust in the judicial system, it is important that the members of the judiciary actively participate in the dissemination of information. The IBAHRI and ILAC recommend that basic information tools be provided for the judiciary, such as posters advising the general public on a variety of subjects, including access to legal aid for the indigent and applicable fees. Another initiative that has proven to be rather successful is the open day programme that RCN launched in the past: a court house is open to the general public who is free to come visit, take a tour and understand the judicial process through general presentations offered by the magistrates. This helps the judiciary promote a more accessible image, which also facilitates the restoration of trust.

Educating civil society in basic legal rights should be a priority. It is an essential step for harmonisation and the restoration of general public's trust in the judiciary. Several Congolese NGOs and organisations already have outreach programmes but need support to introduce these programmes to a larger audience. This support includes funding and practical assistance for:

- production of manuals, leaflets and posters as well as street theatre programmes;

- translation of laws, conventions and international standards into local dialects; and
- production and transmission of legal literacy programmes through radio and TV.

f) Enhance mobile court capacity

The success of the mobile court initiatives as witnessed by ASF should not go unnoticed. As the country prepares itself for an increase in number of magistrates and a better management of judicial proximity, promoting access to justice will require regular mobile court projects. The main difficulty encountered so far by other international donors has been the demands for fees (in addition to cost of transportation and accommodation) made by the participants. Also, when participating in these mobile court initiatives, the home courts are left deprived of the legal minimum number of magistrates required to hear a dispute/case. Therefore, the IBAHRI and ILAC recommend lobbying initiatives at the national level to amend the current legal text, in order to enable proceedings to move forward notwithstanding the number of judges present. Mobile court initiatives should also be organised efficiently to ensure rapid turnaround and therefore limit the number of days a participating magistrate is absent from court.

g) Strengthening the bar and legal aid

The Kisangani Bar appears to be barely functioning. It needs core funding to support an office and small staff. It also appears to receive very little support from the National Bar, mainly due to poor funds. One initiative that may help promote the image of the Kisangani Bar would be strengthening its legal aid capacity. The IBAHRI and ILAC recommend implementing a legal aid office in the city of Kisangani to be run in cooperation with the Kisangani Bar. Members of the bar and law students would be required, under the applicable bar rules and graduate programme, to offer legal aid and services to the indigent. Mobile initiatives could also be run in conjunction with mobile court programmes.

h) Court observation and monitoring

Given the country's history of problematic court procedures and trial outcomes, the IBAHRI and ILAC recommend an international court observer/case review programme with the aim to publish a report on court procedures and proper application of laws and international human rights standards. The report would be easily available to the general public. The programme would include a mentor component to train and possibly finance local NGOs to eventually take over the role of court observation/case reviewer. The programme could be initiated in conjunction with the legal aid programme so as to ensure continued monitoring throughout the entire system (that is, a particular matter brought before a pro bono attorney would be monitored as of initial consultation all the way to the enforcement of a decision). The programme could also include a training manual so that future observers/reviewers could be easily trained. The programme would be initiated in Kisangani and if successful would expand to include all regions within the province.

7.4 Focusing on bar associations: the Lubumbashi Bar

The delegation found that bars and lawyers received more limited attention from donors than other actors within the justice system. Lawyers play an essential role in a fair justice system and can contribute to improving access to justice by the population, notably through the provision of legal aid.

As previously mentioned, capacities and resources vary greatly among provincial bar associations in the DRC. The IBAHRI and ILAC recommend starting with targeted support to the Lubumbashi Bar, but such activities could also be extended to other bar associations in the country, taking into account their needs and existing resources.

Lubumbashi is the DRC's main economic centre and is also the country's second largest city. The oldest in the DRC, the Lubumbashi Bar existed at the time the country was a Belgian colony. Lubumbashi used to be the city of administration, which explains its longstanding legal tradition. Furthermore, legal publications used to be published in Lubumbashi.

a) Strengths and existing partnerships

The Lubumbashi Bar and its members appear to be fairly active. They have succeeded in entering agreements/partnerships with the Brussels and Liege Bar (Belgium) and the members have decided to directly fund their own office building, the *Maison du Barreau*, which includes offices, an assembly room and computer facilities accessible to members.

b) Promoting further development

The IBAHRI and ILAC are of the belief that the Lubumbashi Bar should be encouraged in its efforts. A strong bar can easily promote a good standard of education, ethics and ultimately improve the overall image of the legal profession. The IBAHRI and ILAC recommend providing support by means of expert training, with the objective of ensuring effective development and management, notably through a strong secretariat. The development of advocacy skills and of a strategy in that regard would also help strengthen the Bar's position in civil society.

c) Legal aid

One initiative that would benefit the population as a whole, would be strengthening the Bar's legal aid capacity. Such an initiative would also improve lawyers' public recognition and skills. The IBAHRI and ILAC recommend better funding of legal aid, so as to make it more accessible. The law requires bars to implement legal aid offices (*Bureaux de consultation gratuite*), but since the government does not currently meet its obligations in terms of funding, it is difficult for bars to offer these services. The IBAHRI and ILAC also noted that pro bono work is mandatory only for trainee-lawyers. By requiring qualified lawyers to undertake a certain number of hours of pro bono work a year in order to maintain their membership in the bar, access to legal aid would be improved. The IBAHRI and ILAC recommend a reflection on legal aid and pro bono work at the Lubumbashi Bar level, for example through a workshop involving international experts who would share their experience. Such an activity would be aimed at developing strategies to increase legal aid offer.

d) Continued legal education

The members of the Lubumbashi Bar have expressed a desire to improve their continuing legal education (CLE) programme. At the moment, no formal programme exists. The IBAHRI and ILAC recommend support towards building a strong CLE programme, by identifying providers and trainers, notably among the members of the Lubumbashi Bar itself. While general legal education is undoubtedly of utmost importance, such CLE training could be used as a forum to promote subjects such as human rights and gender justice. As indicated by the representatives of the Lubumbashi Bar, courses related to international criminal justice, including the ICC and the Rome Statute, should be available to its members considering that this is an area of great relevance to the DRC.

Training regarding constitutional issues would also be of great value. The Constitution of the DRC was adopted in 2006, and lawyers play an important role in ensuring that laws are constitutional. They should, therefore, hold the required skills to bring constitutional challenges before the Supreme Court. Moreover, in order for the Lubumbashi Bar to be better able to comment on bills, training on legislative drafting for lawyers would be warranted.

ANNEX A – Terms of Reference

The IBAHRI and ILAC will undertake a needs assessment of the justice system of the DRC, including its legal framework and relevant institutions (inter alia prosecution, judiciary, investigation units, victims' assistance units, and bar associations), to assess priorities in rebuilding a fair and properly functioning system.

Specific areas to be addressed are:

- 1) Independence and needs of the judiciary;
- 2) Case and court management;
- 3) Trial practice;
- 4) Needs of bar associations and of members of the legal profession;
- 5) Access to legal aid;
- 6) Right to adequate defence;
- 7) Progress report on the adoption of laws related to the justice sector;
- 8) International crimes (war crimes and crimes against humanity):
 - a) Options available to deal with international crimes
 - b) Capacity: judicial and investigative
 - c) Preparedness to accept outside assistance
- 9) Legal issues related to crimes targeting women, particularly in the context of armed conflict;
- 10) Impact of traditional justice;
- 11) Role and impact of the military system of justice;
- 12) Analysis of ongoing justice reform programmes with regards to the action plan adopted by government and international donors in 2007.

The IBAHRI/ILAC team of legal experts will be meeting with:

- Judges, both senior and junior;
- Government officials;
- Lawyers and lawyers' organisations;
- NGOs;
- Human rights organisations;
- Representatives of civil society;
- Women's groups;

- International and regional organisations, eg UNDP, MONUC, OHCHR, EC, ICC;
- Embassies;
- Representatives of the media.

The mission's report will contain recommendations for support to the justice system.

These recommendations will be designed to help the government, NGOs, donors and IGOs identify priority areas for future activities and funding. It will also help in formulating project proposals and capacity building programmes.

ANNEX B – List of meetings

KINSHASA

5 February 2009

MONUC:

- **Harriet Solloway**, Director, Rule of Law Unit, MONUC
- Lieutenant Colonel **Michael Gibson**, Military Criminal Law Advisor, Rule of Law Unit, MONUC
- Lieutenant Colonel **Peter Aerts**, Attaché de défense, Embassy of the Netherlands
- **Yaron Oppenheimer**, Second Secretary, Embassy of the Netherlands
- Lieutenant **Derek Mills**, JAGC, USN, International Operations Officer, Defense Institute of International Legal Studies

Conseil Supérieur de la Magistrature :

- **Victor Safari Kasongo**, 1er Avocat Général de la République, Secrétaire Permanent du Conseil Supérieur de la Magistrature
- **Sesanga Hipungu Dja Kaseng**, Deputy, National Assembly, and Attorney-at-Law

6 February 2009

Avocats Sans Frontières:

- **Aurore Decarnieres**, Head of mission DRC

Ligue pour le Droit de la Femme Congolaise:

- **Angélique Kipulu Katani**, Secretary General

7 February 2009

Toges Noires (ONGDH/Human Rights NGO):

- **Marie André Muila Kayembe**, Secretary General

KISANGANI

9 February 2009

RCN Justice et Démocratie :

- **Joseph Mango**, Project Officer

MONUC:

- **Ivan Timnev**, Head of Kisangani bureau

Court of Appeals of Kisangani:

- **Kabuya Mulamba**, First President

Meeting with group of representatives of local NGOs:

- **François Lemba** (Centre d'Etudes de Documentation pour la Femme – CEDAF)

- **Jacques Muzinga** and **Gilbert Loya** (Les Amis de Nelson Mandela pour la Defense des Droits Humains – ANMDH)
- **Maurice Bonyambala** (LIPADHO)
- **Angélique Mauwa** (REFED)
- **Régine Lukusa** (RAF)
- **Jean-Baptiste Bosomgo & Jolix Atia** (Groupe Lufalanga pour la Justice et la Paix)
- **Fansisco Deko** (LIFE)
- **André Muamba** (Solidarité pour l’Ecllosion de la Démocratie au Congo)
- **Lucien Bendenda** (Gradi-Jeunes)
- **Madeleine Balebamiso** (Centre d’Education et de Recherche aux Droits des Femmes)
- **Pierre Esanganya** (ELAT)
- **Roger Ekongo** (Groupe Justice et Libération),
- **Ferdinand Ntabyo** (Congo en Images)
- **Patrice Asiho** (Fondation Congolaise pour la Promotion des Droits Humains et la Paix)
- **Clément B Mukaya** (Member and former head of the Kisangani Bar)

10 February 2009

- **Robert Bassy** and **Benjamin Bebwa Miega** Kisangani Court of Appeals court clerks and administrators
- President **Pierre Malagano**, Tribunal de Grande Instance Kisangani
- **Nestor Botela**, General Prosecutor of Kisangani
- **Capitaine Mutomba Basaya**, Auditorat Militaire de Garnison de Kisangani, President of the Military Court of Appeal

LUBUMBASHI

9 February 2009

Centre des droits de l’homme et du droit humanitaire (CDH):

- **Grégoire Mulamba**, General Secretary

MONUC:

- **Margaret Chuma**, Detention Advisor, and **Christian Lumbale**, National Professional Officer

10 February 2009

MONUC:

- **Boubacar Touré**, Human Rights Officer, Acting Head of Office, Lubumbashi

Military Court of Katanga:

- Colonel Magistrat **Joseph Mokako Maya-Madjo**, First President
- Major **Hippolyte Ndaka**, Auditeur militaire

Lubumbashi Bar:

- **Cyrille Ngoy Kyobe**, President, **Patrick Mulowayi** and **Dieu-Donné Wedi**, members of the Bar Council

6th Military region:

- General **Tshimbumbu**, Commandant

Association africaine de défense des droits de l'homme (ASADHO):

- **Georges Kapiamba**, Vice-President, Lawyer, Member of the Lubumbashi Bar
- **Jacques Bakambe Shesha**, Lawyer, Member of the Lubumbashi Bar, Deputy, National Assembly

KINSHASA

12 February 2009

MONUC:

- **Leila Zerrougui**, Deputy Special Representative of the Secretary-General
- **Harriet Solloway**, Director, Rule of Law Unit

Les Amis de Nelson Mandela pour la Défense des Droits Humains :

- **Robert Ilunga Numbi** and **Marie-Thérèse Kalunga**

13 February 2009

UNDP:

- **Cheikh Ndiaye**, Coordinator, Governance, Justice and Security

UN Justice Mapping Project:

- **Luc Côté**, Project Director, and **Nazzarena Ferraro**, Legal Specialist
- **Alain Makhana Manzenza**, Deputy, National Assembly
- **Delphin Banza Hangankolwa**, President of the National Bar Association
- **Willy Wenga Ilombe**, Secretary, Kinshasa-Gombe Bar

14 February 2009

Global Rights:

- **Justin Mushagalusa** and **Thierry Kambere**

OHCHR-MONUC Joint Office:

- **Todd Howland**, Representative of the High Commissioner for Human Rights and Head of Office
- **Marie Gonin**, Human Rights Officer

16 February 2009

Commission Permanente de Réforme du Droit Congolais:

- **Balanda Gerard Mikuin Leliel**, ad interim President
- **Corneille Kirongozi Bonga-Bombolembole**, Director

Embassy of France in the DRC:

- **Philippe Lafosse**, Cooperation Attaché – Governance

European Union – European Commission Delegation to the DRC:

- **Stefano Varriale**, Human Rights and Justice Attaché

Swedish Embassy in the DRC:

- **Johan Borgstam**, Ambassador
- **Christina Etzell**, First Secretary
- **Asa Palmgren**, Head of Cooperation

17 February 2009

Association des Femmes Avocats au Congo:

- **Annie Bipendu Mulamba Kabwe**
- **Liliane Kamashy**

UN Office of the Senior Adviser and Coordinator for Sexual Violence:

- **Nicola Dahrendorf**, Director (via conference call)

University of Kinshasa

- **Mulumba Katchy**, Dean of the Law Faculty

Ministry of Justice:

- **Jean Collins Musonda Kalusambo**, Vice-Minister
- **Pierre Kanika**, Project Manager, Comité Mixte de Justice

International Centre for Transitional Justice:

- **Mirna Adjami**, Head of Mission

18 February 2009

Ministry of Defence

- **Charles Mwando Simba**, Minister

Military General Prosecutor's Office:

- Colonel **Mutanzini**, Auditeur Général Adjoint

RCN Justice et Démocratie:

- **Manuel Eggen**, National Coordinator

Annex C – Members of the *Comité mixte de justice*

1. Minister of Justice
2. Vice-Minister of Justice
3. Representative of the Embassy of the United States of America
4. European Commission
5. Belgian Cooperation
6. British Cooperation
7. French Cooperation
8. Dutch Cooperation
9. Japanese Cooperation
10. South African Cooperation
11. Swedish Cooperation
12. UNDP
13. *Comité de pilotage de la Réforme des Entreprises Publiques* (Steering Committee on the Reform of Public Organisations)
14. *Ordre national des avocats* (National Bar Association)
15. UN Human Rights Office
16. MONUC Rule of Law Unit
17. First President of the Supreme Court of Justice
18. First President of the *Haute Cour Militaire*
19. *Procureur général de la République* (National Prosecutor)
20. *Auditeur-Général près la Haute Cour Militaire* (National Prosecutor – Military Court)
21. Secretary-General of Justice
22. *Commission permanente de Réforme du droit congolais* (Permanent Commission on the Reform Of Congolese Law)