

# THE TIME FOR JUSTICE IS NOW

NEW STRATEGY NEEDED IN THE DEMOCRATIC REPUBLIC OF THE CONGO

AMNESTY INTERNATIONAL

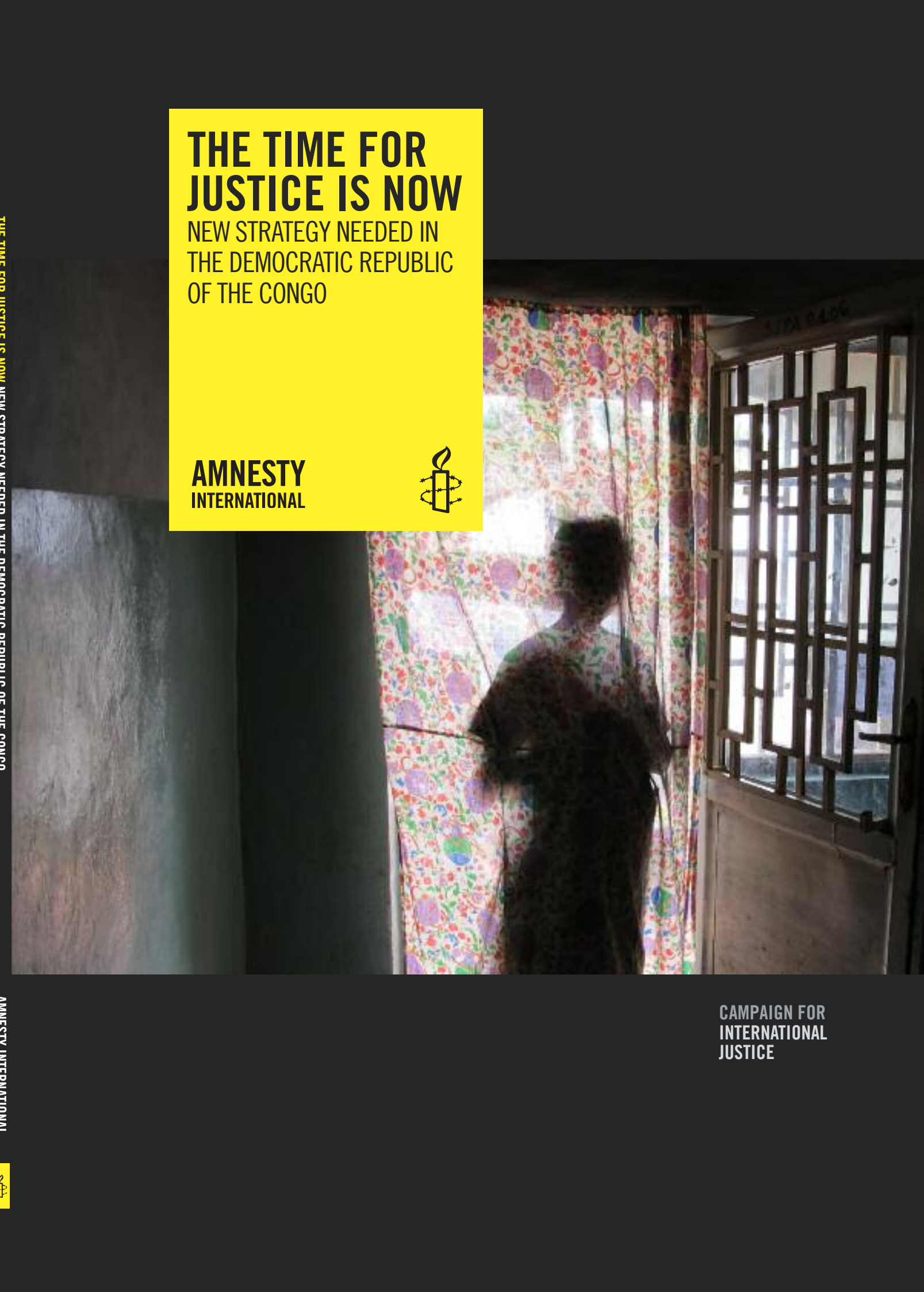


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AMNESTY INTERNATIONAL



CAMPAIGN FOR INTERNATIONAL JUSTICE



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*Cover photo:* A 15-year-old rape victim in Kivu, one of the countless victims of crimes under international law committed in the Democratic Republic of the Congo. Only a handful of perpetrators have ever been brought to justice.  
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# ABBREVIATIONS

AFDL	Alliance des Forces Démocratiques pour la Libération du Congo
ANR	Agence Nationale des Renseignements, National Security Agency
ASF	Avocats sans Frontières
BCG	Bureau de Consultation Gratuite
CMJ	Comite Mixte de Justice, Mixed Justice Committee
CNDP	Congrès National pour la Défense du Peuple, National Congress for the Defence of the People
CSM	Conseil Supérieur de la Magistrature, Supreme Council of the Judiciary
DRC	Democratic Republic of the Congo
EU	European Union
EUPOL R.D. Congo	EU Police Mission for the Democratic Republic of the Congo
FARDC	Forces Armées de la République Démocratique du Congo, Congolese national army
FDLR	Forces Démocratiques de Liberation du Rwanda, Democratic Forces for the Liberation of Rwanda
FNI	National Integration Front
FPRI	Patriotic Force of Resistance in Ituri
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice
IHL	International Humanitarian Law

JIT	Joint Investigation Team
MoJ	Ministry of Justice
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
OHCHR	Office of the High Commissioner for Human Rights
OPJ	Officier de police judiciaire, Judicial police
OSISA	Open Society Institute for Southern Africa
PAG	Programme d'Appui à la gouvernance
PARJ	Programme d'Appui à la Reforme de la Justice
REJUSCO	Programme de Restauration de la Justice à l'Est du Congo
STAREC	Stabilization and Reconstruction Plan for post-conflict areas
TRC	Truth and Reconciliation Commission
UNJHRO	United Nations Joint Human Rights Office
UN Mapping Report	Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003
UPC	Union of Congolese Patriots
USAID	United States Agency for International Development



# 1. THE TIME FOR JUSTICE IS NOW

Crimes under international law<sup>1</sup> have been committed in almost every corner of the Democratic Republic of the Congo (DRC) over the last two decades.<sup>2</sup> These include crimes against humanity, war crimes, torture, sexual violence, the recruitment and use of children associated with the armed forces and armed groups, enforced disappearances and unlawful killings. Such crimes continue to take place, most notably in the east and northeast. Impunity remains pervasive: while millions of men, women and children have suffered as a result of the violence, only a handful of perpetrators have ever been brought to justice.

The failure to hold those responsible for violations to account has a pernicious impact: it further entrenches a culture of impunity; it fosters cycles of violence and violations; it undermines any efforts to create a culture of respect for the rule of law; and it damages the credibility of the justice system in the eyes of the Congolese people. As the scheduled November 2011 presidential elections approach, justice and the fight against impunity must be a priority.<sup>3</sup>

Building the capacity of the national justice system in post-conflict countries is now widely recognized as essential to tackling impunity for crimes under international law in a sustainable fashion.<sup>4</sup> In the DRC, given the scale of the crimes committed, the number of victims and the level of impunity, a strong, effective and credible national criminal justice system is essential. However, a major obstacle to ensuring truth, justice and reparation for past and current violations is the current weakness of the Congolese criminal justice system and the lack of a comprehensive strategy to rebuild and reform it. This was highlighted by the UN Mapping Report, published in 2010, which was mandated to document atrocities committed between March 1993 and June 2003 and to assess the capacity of the national justice system to deal with these human rights violations.

Few people have access to existing justice mechanisms, and confidence in the justice system is low. Victims and witnesses are reluctant to come forward, as there is no national system to protect them. The only victim and witness protection programmes are provided by the International Criminal Court (ICC) and the United Nations Joint Human Rights Office (UNJHRO), and are limited in scope. Judicial staff also face considerable insecurity. Legal aid services, though guaranteed by law, are scarce, preventing many victims and their families from pursuing justice and limiting defendants' access to lawyers. Awareness of legal rights and the justice system remains low, and outreach efforts to address this gap are inadequate.

The judiciary is far from independent, and interference is common in both the military and civilian justice systems. In the military justice system, officers shield soldiers under their command from justice and the political and military hierarchy protects senior military figures. This is of particular concern in a country where the army is one of the main perpetrators of crimes under international law. Corruption and the widespread belief that the system is corrupt are endemic and affect every level of the judicial chain. The fact that justice is

unequal in DRC is widely acknowledged, including by the authorities themselves. Certain perpetrators – notably those with less money or influence – are more likely to be held to account than others. There are very few women in the ranks of the judiciary.

Enforcement of court judgments is rare. The term “reparation” is not defined under the existing legal framework, and in practice payment of monetary compensation is the form of reparation most frequently awarded by judges. However, Amnesty International was not able to identify a single case in which a court-ordered payment for compensation against the state was actually paid by the DRC authorities for crimes under international law.

Prison conditions are dire, and a significant proportion of inmates are detained without charge or trial. Prison escapes and extractions (assisted escapes) are common.

Furthermore, Congolese law continues to fall short of international standards despite improvements since the passing of the 2006 Constitution, and there is a significant need for harmonization of existing legislation.

The DRC authorities have taken measures at the policy level to reform the criminal justice system and tackle impunity. They have adopted the 2007 Ministry of Justice Action Plan, the 2009 Road Map and the 2008 Road Map for fighting sexual violence. They have prepared a Draft law on the Specialized Court for crimes under international law. While the draft implementing law of the Rome Statute of the International Criminal Court (ICC) was tabled on the agenda of the National Assembly in its most recent session which ended in June 2011, the one on the Specialized Court was not, and none were discussed during that session.

Practical advances have also taken place in combating impunity, notably for sexual violence, thanks to efforts by the Congolese government, judiciary and civil society, supported by the international community. A high-ranking officer was convicted of crimes against humanity in a recent trial in Fizi-Baraka. This trial – though flawed – provides promise that justice can be achieved at the national level given the necessary political will and financial support.

However, such advances have been isolated and limited. Despite proclaiming zero tolerance,<sup>5</sup> the DRC government has not shown a clear and systematic commitment to tackling impunity and supporting the necessary reform of the criminal justice system.

Those involved in the justice sector have so far largely failed to establish a comprehensive strategy to reform the criminal justice system. The UN Security Council called in June 2010 for the development of a multi-year plan<sup>6</sup> for justice reform, showing some recognition of the need for a more comprehensive strategy, but the draft plan still remains at the level of the Ministry of Justice, a long way from tackling the problems on the ground.

Immediately following the release of the UN Mapping Report in 2010, many people hoped that the issue of justice reform would be made a priority on the agenda of the DRC authorities and other key actors on the ground. While some initiatives to investigate options for criminal justice reform and transitional justice identified in the UN Mapping report were undertaken, such efforts failed to respond to the need for a major, long-term and coordinated approach to reforming the Congolese justice system. For example, discussions on the

establishment of a Specialized Court have not so far addressed how this initiative can feed into efforts to reform the justice system.

Amnesty International research in eastern DRC has identified fundamental flaws within the criminal justice system which inhibit efforts to combat impunity and to tackle the crimes that have been and are being committed against Congolese men, women and children. Many of these flaws are often overlooked by current policy and programmes. Tackling them through the development of a comprehensive strategy aimed at reforming the criminal justice system is essential to the fight against impunity in the DRC. Such a comprehensive approach will require significant political and financial commitment.

This report focuses on components of the national justice system<sup>7</sup> that are relevant to the investigation and prosecution of crimes under international law, although many of the flaws and weaknesses identified affect the justice system as a whole in the DRC. The primary components are currently military courts and tribunals that have exclusive jurisdiction over genocide, crimes against humanity and war crimes. However, the civilian criminal justice system is also considered. The exclusive jurisdiction of Congolese military courts over genocide, crimes against humanity and war crimes may be transferred to the civilian criminal courts, as foreseen in the draft bill on the implementation of the ICC Statute. Amnesty International considers that ultimately, civilian courts should have sole jurisdiction over crimes under international law. Consequently, reform efforts should also focus on the civilian justice system.

## REFORM OF THE NATIONAL JUSTICE SYSTEM

The obstacles facing the Congolese justice system are numerous and complex. Efforts to reform the national criminal justice system will succeed only if they are part of a comprehensive strategy. The DRC government should develop such a comprehensive strategy, in consultation with civil society, victims and other key actors.

Any reform strategy should prioritize flaws within the current system which have to date been largely neglected and which impede the system's ability to deal with crimes under international law. They must also dismantle barriers to justice and equality before the law, such as gender-based discrimination. Without this, impunity will persist. The comprehensive strategy should therefore include:

- Reforming the criminal law to ensure its conformity with international law
- Protecting victims and witnesses throughout the judicial process
- Establishing an effective outreach programme to raise awareness of legal rights and the criminal justice system
- Establishing independent, impartial and competent courts
- Ensuring a system that meets fair trial standards
- Ensuring full reparations

- Giving the criminal justice system the necessary human and financial resources
- Establishing and maintaining secure prisons that meet international standards

## NEW JUSTICE MECHANISMS

Following the publication of the UN Mapping Report, there has been much debate regarding the creation of specialized justice mechanisms to address the outstanding cases of crimes under international law highlighted in the report. However, in order to be successful in the long run, any such mechanisms should be considered in terms of how they will support and be integrated into efforts to reinforce the domestic justice system. Any proposed transitional justice mechanism should take into account the needs of the victims, including the survivors of gender-based violence. It should be able to adequately address their right to truth, justice and reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.

The expression “transitional justice” describes processes and mechanisms used by societies recovering from armed conflicts or a period marked by large-scale abuse to address the legacy of crimes under international law and to promote reform and reconciliation. The expression is now often used in a fluid and broader way not specifically related to transition periods. Transitional justice encompasses mechanisms and processes, both judicial and non-judicial, with differing levels of international involvement (or none at all). It involves individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination of these.<sup>8</sup> Transitional justice mechanisms should be complementary to efforts to build the capacity of the justice system in post-conflict countries.

In the DRC, transitional justice is increasingly used to frame part of the debate over tackling impunity for past violations of human rights and international humanitarian law, such as the discussion on the creation of a Specialized Court. Transitional justice options were envisaged in the UN Mapping Report and the UN High Commissioner for Human Rights called for a comprehensive approach to transitional justice encompassing justice, truth, reparations and institutional reform.<sup>9</sup> While this report makes references to transitional justice, Amnesty International considers that all such proposals and initiatives fall within the ambit of justice as a whole.

The UN Mapping Report recommended the creation of a mixed judicial mechanism made up of national and international personnel as one of various transitional justice measures to be considered to address the numerous international crimes committed in the DRC. It did not make firm proposals on the national or international character of such a mechanism, or its precise form or function.

Following the publication of the UN Mapping Report in October 2010, the DRC Minister of Justice initiated discussions on the establishment of a “hybrid” or mixed mechanism<sup>10</sup> that is one with both international and Congolese judicial personnel, able to try crimes under both international and Congolese law. This would take the form of a separate Specialized Court. These efforts were translated into a draft law in January 2011 that considered the creation of specialized chambers of mixed composition, to be grafted into some of the existing Congolese

courts of appeal.<sup>11</sup> However, revision of the draft law is underway, and the latest version of this draft, transmitted to the Ministry of Justice in May 2011 by the Commission Permanente de Réforme du Droit Congolais (Permanent Commission of Reform of Congolese Law) considers the creation of a Specialized Court, with its own prosecutor and president, and separate sections located in various Congolese appeal courts.<sup>12</sup>

Amnesty International believes that any new mechanisms must contribute to improvements in the national criminal justice system if they are to have a long-term and sustainable impact on accountability and reparation. Both the mandate of any new transitional justice mechanism and the strategies developed around it will have to reflect this reality.

Similarly, it is vital to include any new transitional mechanisms into a comprehensive justice strategy. On the one hand, the effectiveness of transitional mechanisms and proceedings depends on the capability of the national justice system to complement such efforts in tackling impunity. On the other hand, the benefits of such mechanisms and proceedings will be limited unless supported by significant reforms of the national system. Furthermore, failure to include new transitional mechanisms into a comprehensive justice strategy risks creating a two-tier justice system where victims would be treated differently according to the identity of the perpetrator or the date of the crimes. There is also a need to develop a comprehensive prosecution strategy. Such a strategy should be based on a comprehensive analysis of all crimes under international law committed in the DRC. The full number of victims of crimes under international law should be established. The prosecution strategy should define a clear set of criteria for selection of cases and their prioritization. This overall prosecution strategy should take into account the mandates and jurisdiction of any new specialized mechanism as well as those of DRC courts and the ICC to ensure that crimes under international law committed in the DRC are investigated and prosecuted.

## A COMPREHENSIVE JUSTICE STRATEGY IS NEEDED

The DRC government should prioritize the development of a comprehensive justice strategy aimed at reforming the criminal justice system, to ensure that those responsible for crimes under international law are brought to justice in fair trials and that victims and their families receive full reparations. This strategy should incorporate short-, medium- and long-term measures and mechanisms, including transitional justice mechanisms.

This strategy should be developed through an extensive consultation process led by local participants, including members of the national justice system, civil society, professional associations, community leaders and victims' representatives. Women and women's organizations must be full participants in the development and implementation of the process if this is to be effective.<sup>13</sup> In addition, it should involve other marginalized groups, including representatives of children, minorities and internally displaced persons. The strategy should address aspects of the justice system currently neglected, such as ensuring effective participation and protection of victims and witnesses, fair trial guarantees and prison reform.

An international conference can serve as a first step to developing a comprehensive justice strategy under the auspices of the DRC government to be followed by further, more focused consultations.

Given the lack of coordination between the authorities, international entities and donors involved in the justice system, an effective system of coordination should be included within the strategy. Given the current limitations of the coordinating entity – the Mixed Justice Committee (Comité Mixte de Justice, CMJ)<sup>14</sup> – this should either help to revive the CMJ or establish a new coordinating entity.

The success of this strategy requires significant material, personnel and financial resources, given the current level of under-funding of the justice system.

This report gives an overview of impunity in the DRC and explores the priorities for reform within the Congolese criminal justice system. The report also examines how the current proposed transitional justice mechanism can have a sustainable positive impact on the national criminal justice system. It spells out some key recommendations pertaining to each of these priority areas. The report concludes with a set of recommendations aimed at the DRC government, the UN and the wider international community calling for action to develop a comprehensive justice strategy. An international conference in the DRC could serve as a forum to identify the priorities of justice reform and coordinate efforts to tackle impunity and bring justice to the Congolese people.

## METHODOLOGY

This report is primarily based on research carried out in 2010 and 2011 by Amnesty International in Beni, Butembo, Goma in North Kivu, Bukavu in South Kivu and Kinshasa.

Amnesty International delegates carried out more than 100 interviews with people involved in the justice sector in the DRC. Interviews were undertaken in French, Kinyarwanda or Kiswahili with French translation. The delegates met professionals from both the military and civilian justice systems including judges and prosecutors. They also met government officials including the Directors of the Central Prisons of Goma and Bukavu and an adviser to the Minister of Justice, as well as parliamentarians. They had meetings with other legal professionals including the presidents of the Bar Associations of Goma and Bukavu. Delegates also met representatives of national and international NGOs working in the field of justice, UN representatives, including the Deputy Special Representative of the Secretary-General, and foreign diplomats and donors.

Amnesty International also interviewed more than 30 victims of human rights violations in eastern DRC. About half of these have tried to access justice – the remainder have been unable to pursue their case or have been discouraged from doing so.

For security and privacy reasons, Amnesty International has maintained the confidentiality of a significant proportion of interviewees, notably victims, NGO staff and magistrates, and has used pseudonyms or generic references. Names of locations have also been withheld.

Information obtained through the interviews was analyzed and cross-checked with information and data from other sources, including a range of reports produced on the justice system in the DRC.

Amnesty International chose to focus its research on eastern DRC, given the continuing

incidence of crimes under international law in this region. However, many of the fundamental challenges facing the justice system identified in eastern DRC are also present in other parts of the country.

This report is not a comprehensive assessment of the criminal justice system or an exhaustive evaluation of current policy and programmes in the justice sector. Rather, it seeks to highlight some of the most significant challenges identified by Amnesty International that inhibit the criminal justice system and its capacity to deal with crimes under international law. The aim is to encourage those involved in the justice sector to prioritize these areas.

Amnesty International also seeks to encourage the DRC authorities, UN bodies, international and national NGOs and donor states as well as civil society organizations to take a more comprehensive approach towards justice reform and to include any new transitional justice mechanisms within this broader framework. The somewhat piecemeal approach taken has so far resulted in the neglect of important areas.

Amnesty International would like to thank all those who took the time to meet its staff, in the hope that their contribution will help in the fight against impunity. In particular, Amnesty International would like to highlight the remarkable efforts of the many Congolese NGOs who are supporting and assisting thousands of victims.

## OVERVIEW OF THE JUSTICE SYSTEM IN THE DRC

The 2006 Constitution divides the court system into three separate jurisdictions – the judicial (civil and criminal) jurisdiction, the administrative jurisdiction and the military jurisdiction – with a new system of high courts. However, this new system has never been implemented, so the former system currently remains in place. Under the current framework, the DRC justice system is divided into the civilian jurisdiction, covering civil and criminal matters, and the military jurisdiction. Given the focus of this report on impunity for crimes under international law, this overview focuses on the courts and tribunals with actual or potential jurisdiction over such crimes.

The military justice system has broad jurisdiction, including over not only members of the armed forces and the police but also civilians accused of crimes committed with “weapons of war”. It has exclusive jurisdiction over crimes of genocide, crimes against humanity and war crimes. The civilian criminal justice system would acquire jurisdiction over such crimes committed after 2002 if the Draft Bill implementing the ICC Rome Statute was implemented.

As part of the civilian justice structure, the criminal justice system is made up of a four-tier judicial pyramid:

- At the top sits the Supreme Court with the Parquet Général de la République (National General Prosecutor’s office);
- Courts of Appeal with the Parquet Général près la Cour d’Appel (General Prosecutor’s office at the Court of Appeal level);
- Civil Courts (Tribunaux de Grande Instance) with the Parquet près le Tribunal de Grande Instance (Prosecutors office at the Civil Court level);

- The lowest tier – Tribunaux de Paix – hear crimes punishable by less than five years' imprisonment.

These courts apply various laws and regulations including the Code pénal (Criminal Code) and the Code de Procédure pénale (Criminal Procedure Code).

The military justice system is a sub-system of the Congolese judicial system. It is also divided into four levels:

- At the top sits the High Military Court (Haute Cour Militaire), with the Auditorat Général (General Military Prosecutor/Auditor).
- Military Courts, the equivalent of an appeal court (Cours Militaires) supported by the Auditorat Militaire Supérieur (Superior Military Prosecutor/Auditor's office),
- Military Garrison Tribunals (Tribunaux Militaires de Garnison) are the courts of first instance in the military justice system, supported by the Auditorat Militaire de Garnison (Military Prosecutor/Auditor's office),
- The lowest tier comprises Tribunaux Militaires de Police (Police Military Tribunals).

The military justice system applies the Code Judiciaire Militaire (Military Justice Code) and the Code pénal Militaire (Military Penal Code).

Military Operational Courts (Cours Militaires Opérationnelles, of the same status as the Military Courts), may be established in the case of war or other exceptional circumstances in the zones where military operations are conducted to prosecute crimes committed in this context. These are non-permanent jurisdictions and offer no possibility of appeal. A Military Operational Court, established in 2008, is currently operating in the province of North Kivu.

The magistrates in the DRC civilian criminal justice system and in the military justice system include prosecutors (civilian and military) and judges. Military prosecutors are known as auditeurs and civilian prosecutors are known as procureurs.

The Conseil Supérieur de la Magistrature (Supreme Council of the Judiciary) is responsible for appointing, supervising and disciplining magistrates in all courts and tribunals. Prosecutors are assisted by officiers de police judiciaire (civilian or military judicial police officers) in carrying out their functions, including in their role as investigative magistrates.

Mobile courts, both civilian and military, have been organized to conduct trials in more remote areas – these are permanent courts which move temporarily to these areas. Most of the trials for crimes under international law in the DRC have taken place before mobile military courts.

While victims in the civilian criminal justice system can obtain a court order obliging prosecutors to pursue their case through the procedure of "direct citation", this is not possible before military courts where prosecution depends only on the decision of the military prosecutor. In both systems, once the case is before the court, victims can constitute themselves as a "civil party" to claim compensation.



## 2. IMPUNITY: A DENIAL OF JUSTICE

The scale and nature of the violations committed in the DRC and the almost total impunity that prevails highlight the urgent need to develop a more comprehensive approach to tackling crimes under international law. Those who have committed these crimes have enjoyed – and continue to enjoy, with a few exceptions – impunity in the courts of the DRC, in the courts of other states and in the International Criminal Court.

### TWO DECADES OF GROSS VIOLATIONS

Crimes under international law – including crimes against humanity and war crimes – have been committed throughout the DRC over the last two decades and still continue to be committed.

A significant proportion of these violations have been committed in the context of armed conflict. The country was engulfed in two wars between 1996-1997 and 1998-2003, in which the forces of at least six governments and many more armed groups fought for political, economic and military control of the country, notably in the east.

Amnesty International has on numerous occasions documented the type and scale of the violations committed. These include torture, enforced disappearances, and sexual violence committed on a systematic and widespread basis by all combatant forces,<sup>15</sup> the widespread use and recruitment of children into the armed conflicts,<sup>16</sup> countless acts of summary executions and other unlawful killings, enforced disappearances, unlawful arrest and detention, torture and other cruel, inhuman and degrading treatment as well as violations in the context of exploitation of mineral resources.<sup>17</sup>

The recent UN Mapping Report, which documented the most serious violations of human rights and international humanitarian law committed between March 1993 and June 2003, noted that the vast majority of crimes covered in the report could be defined as crimes against humanity and war crimes.<sup>18</sup> Furthermore, it indicated that the question of whether the numerous serious acts of violence committed against members of the Hutu ethnic group by the Rwandan army and the Alliance of Democratic Forces for the Liberation of Congo (Alliance des Forces Démocratiques pour la Libération du Congo, AFDL) rebel group constituted crimes of genocide remains unresolved and could only be decided by a competent court following a full judicial investigation.

The DRC, Rwanda and Uganda reached peace agreements in 2002 and the major Congolese parties signed a Global and All-Inclusive Agreement in December 2002. These have brought about a reduction in fighting, but have not resulted in an end to conflict and mass violations.

Crimes under international law continue to be committed frequently, notably in eastern DRC. The presence of Congolese and foreign armed groups struggling for power and access

to resources, along with constant shifts in alliances between these different groups, has kept the region in a state of conflict. Closely related is the lack of security sector reform, which has played a key part in the perpetuation of violations.

Efforts aimed at the integration of various fighting forces into a unified national army, the Armed Forces of the Democratic Republic of the Congo (Forces Armées de la République Démocratique du Congo, FARDC), with a single chain of command, started after the presidential and legislative elections in 2006. This process went along with the disarmament, demobilization and reintegration of former fighters. Progress on these two fronts has been disappointing. The signing of a peace accord in March 2009 between the DRC government and local armed groups in the east, notably the National Congress for the Defence of the People (Congrès National pour la Défense du Peuple, CNDP),<sup>19</sup> was accompanied by an accelerated integration process that has further undermined security sector reform efforts. It has allowed the CNDP to maintain its chain of command and allegiances and to gain control of key mining areas.

The lack of reform of the criminal justice system and lack of meaningful progress in the fight against impunity have also played a significant part in the perpetuation of crimes under international law.

Combatants of most armed groups and forces have continued to commit abuses against the civilian population that amount to war crimes and crimes against humanity. A series of mass rapes have been committed in eastern Congo since mid-2010 by the FARDC and by armed groups, including the Democratic Forces for the Liberation of Rwanda (Forces Démocratiques de Liberation du Rwanda, FDLR)<sup>20</sup> and local Mayi-Mayi militias.<sup>21</sup> Hundreds of women, children and men have been subjected to sexual violence.

Millions of Congolese have died both as a direct result of the conflict and from insecurity, displacement and lack of access to humanitarian and medical care. The full extent of all crimes, including the number of victims, has not been established. Basic health, education and justice services have been left in a state of disrepair as a result of decades of neglect, mismanagement and poor governance throughout the country.

As Amnesty International has documented on numerous occasions, very few regions have been left unscarred: while North and South Kivu, Katanga and Oriental Province have been the scene of some of the most widespread and systematic violations, the rest of the country has by no means escaped the violence and violations.

Human rights violations have also been committed that are not directly related to the armed conflict. Amnesty International has documented widespread politically motivated violations – including extrajudicial killings, arbitrary detention and torture and other ill-treatment – committed against alleged supporters of the opposition to President Joseph Kabila and his ruling party, in the aftermath of the 2006 elections.<sup>22</sup>

## FIZI-BARAKA TRIAL

### **The response of the DRC justice system to the January 2011 events in Fizi is a rare example of perpetrators being promptly brought to justice.**

On 1 January 2011 in the town of Fizi, South Kivu, a group of FARDC soldiers from the 43<sup>rd</sup> sector of Amani Leo<sup>23</sup> carried out a revenge attack on the town's population following a brawl in which a soldier had been killed. In the course of the army's attack at least 50 women were raped, houses and shops were looted, and several people were arbitrarily arrested and subjected to ill-treatment.

Congolese NGOs were the first to take up this case, and the incident was also brought to public attention by international NGOs. The military judiciary and UNJHRO, together with international NGOs, undertook efforts to bring the perpetrators to justice. UNJHRO sent a series of missions, notably in collaboration with the military magistrates from the Military Garrison Tribunal of Uvira, and then the Superior Military Prosecutor from the Military Court in Bukavu. The Governor of South Kivu also went to Fizi following the events.

Victims and eye-witnesses accused the then commanding officer of the Amani Leo 43<sup>rd</sup> sector in Fizi, Lieutenant Colonel Kibibi Mutware, of having organized the attack. He is a former CNDP member. Eleven soldiers were arrested including Lt. Col. Kibibi and transferred to Bukavu on 31 January 2011.

On 10 February 2011, the trial of 11 soldiers, including Lt. Col. Kibibi, began in a mobile military court in the town of Baraka. The soldiers were charged with crimes against humanity and terrorism. The majority of the victims were questioned during several days of closed court sessions. Their names were also concealed during the trial through a coding system. Victims and defendants received legal aid, although to varying extents. The defendants reportedly did not have adequate time and facilities to prepare their defence.

On 21 February the military court convicted Lt. Col. Kibibi and three others of crimes against humanity, notably rape, and sentenced them to 20 years' imprisonment. Five other officers were sentenced to between 10 and 15 years. One officer was acquitted for lack of evidence, and the court ruled itself incompetent to try the 11th defendant who was a minor. The court did not respond to the request for the remainder of the 43<sup>rd</sup> military sector and company to be redeployed and declared itself not competent to rule on a request from the victims for the construction of a school in Fizi as a symbolic act of reparation.

Those sentenced were initially held at the central prison in Bukavu but some of them, including Kibibi Mutware, were later transferred to the Ndolo prison in Kinshasa following rumours of a possible extraction or escape.

## MILITARY COURTS

At present in the DRC, military courts have exclusive jurisdiction over crimes of genocide, crimes against humanity and war crimes, so no one can be prosecuted for such crimes under current law in civilian courts. The UN Mapping Report, which was mandated to assess the capacity of the Congolese justice system to deal with these crimes, pointed to a series of limitations of the military justice system that made it incapable of addressing the scores of crimes under international law committed in the DRC. According to the UN Mapping Report,

at the time of writing, out of the dozen or more identified cases of such crimes dealt with by Congolese jurisdictions, only two related to crimes committed between March 1993 and June 2003, the period covered by the Mapping Exercise.<sup>24</sup>

Furthermore, according to the UN Mapping Report, even in the few cases tried by the military courts, almost all those convicted and sentenced for war crimes or other crimes under international law have escaped from prison.<sup>25</sup> In none of the cases were awards of compensation payments to victims implemented.<sup>26</sup>

The DRC authorities have failed to collect statistics about the number of investigations into crimes under international law and the number of prosecutions in such cases. The total number of incidents as well as the number of potential criminal cases resulting from those incidents is unknown.

Amnesty laws and decrees were adopted in the DRC between 2003 following the Global and All-Inclusive Agreement and 2009 as part of the Acts of Engagement of armed groups in North and South Kivu. These amnesties expressly exclude war crimes, crimes against humanity and genocide. However, in practice, such amnesties have posed obstacles to the prosecution of these crimes. For example, in February 2009, the Minister of Justice wrote to prosecuting authorities ordering them to stay any prosecutions against members of certain armed groups, including the CNDP, and not to initiate new prosecutions in anticipation of the forthcoming May 2009 amnesty law.<sup>27</sup>

The UN Mapping Report acknowledged that the reform of military law in 2002, followed by the DRC's signing up to the Rome Statute of the ICC in the same year and the adoption of the transitional Constitution in 2003, resulted in some positive outcomes, such as the dozen or more cases in which the Congolese jurisdictions dealt with crimes under international law. However, those positive outcomes, including the recent Fizi-Baraka trial, are largely insufficient to address the thousands of crimes under international law committed in the DRC.

## PROSECUTIONS IN OTHER STATES

All states may investigate and prosecute crimes, including crimes under international law, on the basis of active personality (the suspect was a national of the state where the court is located) or universal jurisdiction. Many crimes committed in the DRC were perpetrated by nationals of neighbouring states, but not a single one of these states is known to have prosecuted any of their nationals for crimes committed in the DRC.

In four cases, third-party states have exercised universal jurisdiction over crimes under international law committed in the DRC between 1993 and 2003, but only one of them has led to a conviction so far.

In 2000, a Belgian judge issued an arrest warrant for Abdulaye Yerodia Ndombas, the DRC Foreign Minister, on suspicion of war crimes and crimes against humanity.<sup>28</sup> On 7 April 2004, Sébastien Nzapali, a member of President Mobutu's Presidential Guard, was convicted of torturing a detainee in 1996 by the Rotterdam District Court in the Netherlands and sentenced to two and a half years' imprisonment.<sup>29</sup> In 2008, a Spanish court issued arrest

warrants for 40 Rwandans accused of crimes under international law allegedly committed in Rwanda and in the DRC.<sup>30</sup>

In November 2009, Ignace Murwanashyaka, president of the FDLR, and his deputy, Straton Musoni, were arrested in Germany following an arrest warrant issued by the German federal court of justice. They are accused of having controlled the FDLR remotely from Germany. The two have been indicted for crimes against humanity and war crimes allegedly committed in the DRC by the FDLR between January 2008 and November 2009. Their trial started on 4 May 2011 in Stuttgart. The arrest and trial of these two individuals is a very important step in contributing to the fight against impunity in the DRC through the exercise of universal jurisdiction.

Amnesty International knows of no other criminal investigations in these countries or elsewhere opened on the basis of universal jurisdiction against individuals suspected of crimes committed in the DRC.

## THE INTERNATIONAL CRIMINAL COURT

On 19 April 2004, the DRC referred the situation in the country since 2002 to the Prosecutor of the ICC, who opened an investigation on 23 June 2004. Since then five individuals suspected of war crimes and crimes against humanity have been named in arrest warrants issued by the Court. Three are now on trial, one is in pre-trial detention and the other is at large:

- On 17 March 2006, Thomas Lubanga Dyilo, former leader of the Union of Congolese Patriots (UPC), a Congolese militia group that was active in Ituri, was surrendered to the ICC. He was tried on war crimes charges of enlisting and conscripting children under the age of 15 to participate actively in hostilities between 2002 and 2003. Closing statements are to be presented by August 2011.
- On 17 October 2007, Germain Katanga, former leader of the Patriotic Force of Resistance in Ituri (FRPI) militia group, surrendered to the ICC and on 6 February 2008, Mathieu Ngudjolo Chui, former leader of the National Integration Front (FNI) militia group, was arrested. Their two cases were joined as their charges relate to an attack carried out in the village of Bogoro, Ituri, jointly by the FPRI and the FNI. As of May 2011, their joint trial was continuing on war crimes charges of using children under the age of 15 to take active part in hostilities, directing an attack against a civilian population, wilful killings, destruction of property, pillaging, sexual slavery and rape, as well as crimes against humanity of murder, rape and sexual slavery allegedly committed in 2003.
- Callixte Mbarushimana, executive secretary of the FDLR, who was arrested in France on 11 October 2010, is in pre-trial detention awaiting a confirmation hearing set for July 2011. He faces charges of crimes against humanity (murder, torture, rape, inhumane acts and persecution) and war crimes (attacks against the civilian population, destruction of property, murder, torture, rape and inhuman treatment) allegedly committed in the Kivus in 2009.

- The DRC authorities continue to refuse to arrest Bosco Ntaganda, former chief of military operations of the UPC and later military chief of staff of the CNDP, sought in an ICC arrest warrant dated 22 August 2006 for war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities between 2002 and 2003 in Ituri. Following the integration of the CNDP into the national Congolese army, Bosco Ntaganda is currently a General in the FARDC. This refusal is in clear breach of the DRC's obligations under Articles 59, 86 and 89 of the Rome Statute of the ICC.<sup>31</sup>

Although the ICC Prosecutor has indicated that he intends to seek arrest warrants at some future date naming other suspected perpetrators of crimes in the DRC, as of May 2011 no such arrest warrants have been made public.

## TRUTH AND RECONCILIATION COMMISSION

A Truth and Reconciliation Commission (TRC) was established for the DRC in 2003. It was active between July 2003 and February 2007, although the law establishing it was not passed until July 2004. The TRC was severely criticized on a number of grounds, notably the lack of consultation that took place before the passing of the law and the reported closeness of some members of the TRC to people suspected of war crimes and crimes against humanity, given that the main Commissioners were chosen by the parties to the Global and All-Inclusive Agreement.<sup>32</sup>

Truth commissions are generally primarily aimed at realizing the right to truth of victims of human rights abuses.<sup>33</sup> However, they have also played an important role in developing national reparation, especially compensation, programmes in a number of countries, including Peru, Sierra Leone and South Africa – although in many of these situations the governments have failed to fully implement the recommendations. Unlike truth commissions in other countries, the law in the DRC provided that instead of devising recommendations for reparations to be submitted to the government, the TRC was tasked with negotiating reparations agreements between the different factions.<sup>34</sup> The TRC controversially closed in 2007; it submitted a report to parliament. As the UN Mapping Report notes: “[t]he TRC had not opened a single enquiry; nor had it collected any witness statements from victims of or witnesses to violations.”<sup>35</sup> No reparations were awarded as a result of the process.

The UN Mapping Report noted that despite the failure of the first TRC, there was still a strong desire from victims for a new truth commission. Establishing the truth is critical to analyzing and understanding the reasons and underlying causes of the cycle of violence. The UN Mapping Report set out basic principles to ensure that any new TRC would take into account the errors of the past. However, the government reportedly made clear in its response to the UN Mapping Report that it did not support the recommendation to re-establish a TRC.<sup>36</sup> Discussions on this issue are at a standstill.

## CURRENT EFFORTS

A variety of justice reform projects are currently being carried out in the DRC. Despite their individual merits, taken together they fail to provide the long-term and comprehensive approach which is needed to ensure accountability and reparation for past and current violations.

## THE 2007 ACTION PLAN

The Ministry of Justice adopted an Action Plan for Justice Reform (Plan d'Action pour la Réforme de la Justice) in 2007 following a 2004 multi-donor audit of the justice system, carried out by the European Union (EU) in collaboration with the DRC authorities.<sup>37</sup> The Ministry subsequently adopted a Road Map in 2009, containing a set of priorities to fight against impunity and improve the credibility of the justice system. Both the Action Plan and the Road Map were adopted after consultation within the government and with donors.

The current strategy and approach have several weaknesses. On the specific topic of impunity, the Action Plan does not offer a means to achieve a comprehensive assessment of the scale of crimes under international law committed in the DRC, including the number of suspects and the requirements of the justice system to ensure investigations and prosecutions. Although the Action Plan aimed to cover a broad range of areas of judicial reform, a senior Ministry of Justice official told Amnesty International that the plan was not comprehensive and focused on a humanitarian or emergency approach to rebuilding the justice system.<sup>38</sup> It was aimed more at filling small identifiable gaps or deficiencies than offering a sustainable and comprehensive strategy for justice reform. Furthermore, although aspects of the Action Plan have been used by various international NGOs and agencies as a basis for their work, much of the Action Plan has never been implemented. The failure of the Mixed Justice Committee (Comité Mixte de Justice, CMJ) to provide effective operational coordination between the government and donors was raised by several key actors as one of the reasons for the lack of implementation of the Action Plan.

An adviser to the Minister of Justice told Amnesty International that the Ministry is currently engaged in an assessment of all the justice reform efforts in order to define a new programmatic framework.<sup>39</sup> He stated that this is one of the reasons why major new justice and rule of law initiatives are currently on hold and have not been approved by the Ministry of Justice.

The government also included some programmes for justice support within the security component of the Stabilization and Reconstruction Plan for post-conflict areas (STAREC). The plans include the construction of civilian courts dealing with lower-level crimes (Tribunaux de Paix) and the deployment of judicial and prison personnel throughout the provinces covered by the programme, including the Kivus, Maniema, as well as the Ituri, Uele and Tanganika regions. Deployment of police services is also planned.<sup>40</sup>

## JUSTICE REFORM AND RULE OF LAW PROGRAMMES

There are a number of justice reforms and rule of law programmes and projects supported by intergovernmental organizations, individual donor states and NGOs currently operating or planned in eastern DRC.<sup>41</sup>

## UN PROGRAMMES

In the period covered by Amnesty International for this report, the UN was leading a number of justice programmes and initiatives.

In February 2009, UNDP established a justice programme drawn from the 2007 Action Plan, working on the basis of a Memorandum of Understanding with the Minister of Justice. The programme's main activities include: access to justice; fight against corruption; support to

judicial police; and support to state institutions such as the Supreme Council of the Judiciary. It also encompasses thematic projects in the east to fight against impunity for sexual violence. UNDP works in Kinshasa with state authorities, as well as in the Kasais, Bundundu and Orientale Provinces.

The UN Joint Human Rights Office (UNJHRO) continues to offer investigation support to the military justice system through its Joint Investigation Teams (JIT) in the Kivus and Ituri. During its human rights monitoring activities, the UNJHRO identifies cases of human rights violations where victims and their families expressed an interest in initiating legal proceedings or cases under investigation stalled at the military prosecutor's office.<sup>42</sup> It subsequently seeks to facilitate contact between victims and the relevant authorities through a JIT visit, composed of lawyers for the victims and prosecutors. Funding for the JIT has however currently run out, further impairing the already limited scope of action of this mechanism. UNJHRO also monitors trials. In addition, it provides judicial assistance to victims and support for investigations into cases of sexual violence as an implementer of the Canadian International Development Agency's Joint project to fight violence against women in North and South Kivu.

In an effort to consolidate international efforts in the justice sector, the UN Security Council decided that MONUSCO's mandate is to include developing and implementing a multi-annual joint justice programme, with the government.<sup>43</sup>

UN Security Council resolution 1925 calls on MONUSCO to: "Develop and implement, in close consultation with the Congolese authorities and in accordance with the Congolese strategy for justice reform, a multi-year joint United Nations justice support programme in order to develop the criminal justice chain, the police, the judiciary and prisons in conflict-affected areas and a strategic programmatic support at the central level in Kinshasa".<sup>44</sup> A workshop was organized in June 2010 between relevant UN agencies and members of the DRC authorities in order to initiate discussions around a multi-annual justice support programme. A UN working group was subsequently established to develop an initial draft of the programme.<sup>45</sup> The key pillars of the draft programme are: judicial police; access to justice; integrity/transparency and judicial practices; prison administration; and fight against corruption. The focus of the programme is on conflict-affected areas with some logistical and administrative support for Kinshasa. The draft was sent to the Minister of Justice in September 2010 and has since stalled at this level.

UN Security Council resolution 1925 also calls on MONUSCO to: "Support national and international efforts to bring perpetrators to justice, including by establishing Prosecution Support Cells to assist the FARDC military justice authorities in prosecuting persons arrested by the FARDC".<sup>46</sup> One of the activities of MONUSCO's Rule of Law unit has been to work towards the establishment of these Prosecution Support Cells in the provinces covered by STAREC.<sup>47</sup> To date the cells are not yet operational.

#### DONOR PROGRAMMES

The EU has been the main donor in the justice sector in eastern DRC, notably through the REJUSCO programme (Programme de Restauration de la Justice à l'Est du Congo) which ran between 2007 and 2009 and the Justice Support Project, *Projet d'Appui à la Justice*, which ran in Kinshasa, Bandundu and Bas Congo from 2003 to 2006.



The EU currently has two significant projects planned that have not yet been approved by the Ministry of Justice.<sup>48</sup> The first is the Programme of Support for Justice Reform, Programme d'Appui à la Reforme de la Justice (PARJ), to be implemented initially in Kinshasa, and to be extended to the provinces of Bas Congo and Kasai Occidental. It aims to improve access to justice; reinforce the control and assessment capacity of the judicial system; and promote respect for women's rights within the judicial system. The second, the Uhaki Safi project, will be carried out in eastern DRC and is a continuation of the REJUSCO programme. It aims to improve the functioning of the judicial system and access to justice, including through the delivery of training to magistrates, audits, building of courts and prisons and logistical support for mobile courts in remote areas. Sweden and Belgium are the main contributors to forthcoming EU projects. In addition to these two projects, the EU has a Programme of Governance Support, Programme d'Appui à la gouvernance (PAG), which provides support to the administration of courts in Kinshasa.

The US Agency for International Development (USAID) Projustice programme which is implemented by a consulting firm, Tetra Tech DPK, has been underway since October 2008 and focuses primarily on building the capacity of the Congolese judicial system. It works closely with the different judicial mechanisms and bodies such as the Supreme Council of the Judiciary.<sup>49</sup> It targets the civil justice system and operates in four pilot provinces (Maniema, South Kivu, Bandundu, and Katanga). The programme is in theory finishing in October 2011 but may be renewed for another two years.

#### INTERNATIONAL NGO PROGRAMMES

Avocats sans Frontières (ASF) has been one of the most active international NGOs working in the sector of justice reform in eastern DRC. It focuses on the fight against impunity and access to justice, notably through training of the judiciary, mobile courts and support to Bar Associations and legal aid clinics.<sup>50</sup> RCN – Democracy and Justice has been active in the justice sector for over 10 years and focuses on training judicial staff; it has recently closed its office in eastern DRC.<sup>51</sup> The American Bar Association (ABA) supports mobile courts and legal aid particularly for victims of sexual violence. Other organizations such as the International Centre for Transitional Justice (ICTJ) and the Open Society Institute for Southern Africa (OSISA) have carried out training for judicial staff. In addition, there are numerous programmes in place to pursue justice for victims of sexual violence.<sup>52</sup>

Amnesty International did not carry out an exhaustive assessment of the achievements of current donor and NGO programmes and their impact on the fight against impunity. However, efforts so far have without doubt contributed to raising awareness and knowledge of international law within sectors of the judiciary and have increased access of the judiciary to more remote areas of the country and victims. They have also enhanced efforts to tackle crimes under international law through the national justice system and played a key role in recent successful trials for crimes under international law – notably in Fizi-Baraka.

Despite these achievements, Amnesty International identified some key weaknesses in existing justice reform and rule of law programmes.

More often than not programmes are carried out in isolation and not fully integrated into the 2007 Action Plan. Current programmes meet only a tiny part of the needs associated with rebuilding justice in the DRC. Overall, these justice programme follow a piecemeal approach

and fail to cover certain provinces such as Equateur Province. Donor and UN programmes have in the past primarily assisted the civilian justice system, although this has been changing. Current programmes have tended to overlook crucial areas of the criminal justice system that undermine efforts to ensure justice for international crimes, notably the protection and participation of victims and witnesses, the need for outreach and, to a lesser extent, the issue of military and political interference. Finally, programmes to date have largely failed to link justice reform with transitional justice.

Current efforts are undermined by a lack of systematic and institutionalized coordination between key international actors and Congolese personnel on the ground, leading to fragmentation of efforts. Coordination amongst donors has tended to be ad-hoc and sporadic. Although the establishment of the CMJ was initially seen as a positive development, interviews with donors and government representatives involved in the CMJ highlighted a series of weaknesses and challenges with the existing mechanism which undermines its ability to promote and ensure effective coordination. Lack of political will on the part of stakeholders, infrequent, poorly organized and over-attended meetings and divisions over the leadership were some of the main issues raised. Amnesty international was told that efforts to reform the CMJ have so far not brought about significant improvements. In terms specifically of reform of the Congolese criminal justice system to tackle impunity for crimes under international law, the various programmes have so far failed to engage in a comprehensive and coordinated strategy. Lack of coordination between UN agencies and entities was also highlighted as a challenge.

## 3. A COMPREHENSIVE JUSTICE STRATEGY: KEY PRIORITIES

Amnesty International research in eastern DRC has identified fundamental flaws within the criminal justice system which inhibit efforts to combat impunity for past violations and to tackle current violations. A significant number of these flaws are overlooked or inadequately dealt with by current policies and programmes.

Addressing these flaws through the development of a comprehensive strategy aimed at reforming the criminal justice system is essential to the fight against impunity in the DRC.

### REFORM OF THE CRIMINAL LAW

An essential foundation for bringing to justice those responsible for crimes under international law is effective substantive criminal law. Definitions of crimes under international law and principles of criminal responsibility must meet the strictest requirements of customary and conventional international law. In particular the definitions of crimes ought to include and be as detailed as those found in the Elements of Crimes of the Rome Statute. Defences that contravene international law and standards or that are inappropriate for crimes under international law, such as superior orders, necessity and duress should be excluded in national law.

The courts that try people for crimes under international law and provide reparations to victims should be civilian, not military, courts.<sup>53</sup> Military courts should not exercise jurisdiction over civilians and should not have jurisdiction over crimes under international law. They should, instead, be limited to offences of a purely military nature committed by military personnel such as violations of the principle of military hierarchy and the following of orders. The death penalty must be excluded as a punishment for any crime under international law, as well as for other crimes under national law.

In the DRC, once international treaties are ratified and published in the official bulletin, they are directly incorporated into the national legal order with no need to pass any further laws to implement them and give them full effect. However, in the DRC numerous existing laws and regulations are not in compliance with international law, limiting efforts to prosecute those accused of crimes under international law. While the adoption of a law implementing the Rome Statute of the ICC would contribute to reforming substantive criminal law in the DRC, comprehensive reform is needed to ensure that all laws and regulations are harmonized with one another and in line with the requirements of international law. Furthermore, the lack of information dissemination and training for magistrates and judges on prosecutions of crimes under international law results in limited application of international norms despite recent convictions before military courts.<sup>54</sup>

### MILITARY JURISDICTION

Congolese law gives military courts exclusive jurisdiction over genocide, crimes against humanity, and war crimes.<sup>55</sup> This arrangement poses several problems for the protection of human rights, especially insofar as it undermines the independent adjudication of crimes under international law and serious human rights abuses when a large proportion of such crimes are committed by the military. As stated in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity: “The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.”<sup>56</sup> This principle is also reflected in the Draft Principles Governing the Administration of Justice through Military Tribunals, which refer to a “growing tendency” not to try human rights violations in military tribunals, as reflected in the jurisprudence of several international human rights bodies.<sup>57</sup>

The current draft bill on the implementation of the Rome Statute would transfer jurisdiction over the crimes under international law covered by the Statute to civilian courts.

Several people engaged in the justice sector told Amnesty International that they were concerned about the lack of expertise regarding crimes under international law in the civilian justice system, given the current exclusive competency of the military over these crimes. However, this should not be a reason to postpone the transfer of jurisdiction from military to civilian courts, but should act as a spur to provide the necessary training to ensure proper prosecutions of crimes under international law in compliance with international standards.

### MILITARY TRIALS OF CIVILIANS

Closely linked to concerns about military jurisdiction over crimes of genocide, crimes against humanity and war crimes is the issue of the prosecution of civilians in military courts, which often encroaches on the jurisdiction of civilian courts. The 2006 Constitution limits military jurisdiction to members of the military or national police.<sup>58</sup> However, the provisions of the Constitution have yet to be harmonized with the Military Justice Code (Code Judiciaire Militaire), which contains numerous provisions for the trial of civilians, including those who commit crimes using “weapons of war.”<sup>59</sup> In practice, these exceptions to the constitutional norm lead to the trial of many civilians before military courts.<sup>60</sup> This practice has been denounced by, among others, the UN Special Rapporteur on the independence of judges and lawyers<sup>61</sup> and the Committee against Torture.<sup>62</sup> International standards clearly prohibit the trial of civilians before military courts. The Principles and Guidelines on the right to a fair trial and legal assistance in Africa state: “Military courts should not in any circumstances whatsoever have jurisdiction over civilians.”<sup>63</sup> A draft law has been proposed to update the Military Justice Code which would restrict military jurisdiction to members of the military and national police. However, Amnesty International does not know the status of the draft law.<sup>64</sup>

### DEATH PENALTY

While a moratorium on executions in the DRC has been in place since 2003, the death penalty remains on the statute books.

The Military Penal Code (Code pénal militaire) provides for the death penalty.<sup>65</sup> The manner of carrying out punishments is governed by the Military Justice Code.<sup>66</sup>

In November 2010 the National Assembly rejected a draft law proposed by a Member of Parliament, André Mbata, aimed at abolishing the death penalty in the country. Death sentences continue to be handed down, including by military courts against civilians.

Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the offender, or the method used by the state to kill the prisoner.<sup>67</sup>

#### PRACTICAL OBSTACLES TO LAW REFORM

Few Congolese magistrates have had access to training in international law and human rights. There is no judicial training college in the DRC; civilian and military magistrates generally just have a degree in law. Associate judges (*juges assessesurs*), who assist judges, are even less well equipped.<sup>68</sup> Judicial institutions are not equipped with the basic legal texts and codes.

This is of particular concern in highly complex cases, such as crimes under international law. The direct application of the Rome Statute by military courts in the DRC as well as training of prosecutors and judges, such as that conducted by ASF,<sup>69</sup> have helped to develop a certain level of legal expertise among military magistrates. However, the complexity of the prosecution of crimes under international law requires comprehensive training and information dissemination.

Furthermore, interviews carried out with military magistrates highlighted a somewhat politicized and questionable interpretation of international norms. For example, military magistrates and prosecutors refused to treat abuses committed in the context of the Amani Leo operation as war crimes on the grounds that this military operation, launched in the Kivus in 2010, is a “stabilization operation” and not an armed conflict.<sup>70</sup> Although this interpretation can be explained as arising from the specific political context, it imposes an unwarranted restriction on the legal categorization of violations committed in the context of those operations which may result in impunity for those crimes.

#### THE ROME STATUTE AND LAW REFORM

The most effective way to use the Rome Statute to address, at least in part, the necessary reform of substantive criminal law would be to enact comprehensive legislation implementing the DRC’s complementarity and cooperation obligations under the Rome Statute. Such legislation should provide that not only the internationally supported transitional justice mechanisms, but also the ordinary civilian courts, have jurisdiction over the crimes under international law covered by the Rome Statute.

The DRC signed the Rome Statute on 8 September 2000 and ratified it on 11 April 2002. Although the DRC published the first draft of implementing legislation in 2002, and revised it on two occasions, the last draft (2005) lapsed when the Parliament was dissolved in 2006 and, as of May 2011, nearly a decade after ratification, the government had still not yet reintroduced it. In addition to this draft law, a bill proposed by two members of the Parliament was drafted in March 2008.<sup>71</sup> Amnesty International was informed by one of them that the bill was tabled in the agenda of the 2011 March session of the National Assembly. DRC civil society and Amnesty International provided extensive comments on these three draft bills, some of which were taken into account by the government.<sup>72</sup>

Some provisions in the 2005 government draft were welcome, including the elimination of official immunities for the perpetrators of genocide, war crimes and crimes against humanity; rejection of the possibility of amnesties for these crimes; broader definitions in the draft legislation than in the Rome Statute (such as the crime of genocide); the implementation of international law standards with regard to the definition of child soldiers (those under 18 years of age); the increased protection for victims of crimes; and the provision of privileges and immunities for the staff of the ICC as they carry out their work in the DRC.

However, a number of provisions in the 2005 government draft raised concerns, including: the death penalty; the failure to include all war crimes; ambiguities in the text; inclusion of the prohibition of double jeopardy (the principle of *ne bis in idem*) in a manner not fully consistent with the Rome Statute; the defence of superior orders; the failure to guarantee all pre-trial rights; and the absence of effective universal jurisdiction.

The improved version submitted in March 2008 by two members of Parliament would, among other amendments, exclude the death penalty, give exclusive jurisdiction over crimes under international law to civilian courts and provide for universal jurisdiction.<sup>73</sup> Further amendments were suggested that would improve the 2008 draft by the Fondation Konrad Adenauer, ASF and the International Center for Transitional Justice in October 2008 and by Parliamentarians for Global Action in October 2010.<sup>74</sup> The March 2008 draft, with these suggested amendments, would largely fulfil the DRC's obligations under the Rome Statute and other international criminal law. However, despite some statements by government officials that the DRC will implement the Rome Statute at some point, there is no indication that the government has the political will to persuade Parliament to adopt and enact either of these drafts into law.

#### KEY RECOMMENDATIONS

- The DRC authorities must ensure that national legislation is in line with the 2006 Constitution and international standards.
- The DRC authorities must harmonize existing laws and regulations, taking into account international standards.
- The draft legislation implementing the Rome Statute should be amended to exclude the death penalty.
- The DRC should abolish the death penalty for all crimes, without exception, and commute all death sentences.
- DRC law should provide that civilian courts have exclusive jurisdiction over all individuals, military or civilian, suspected of crimes under international law. Military jurisdiction over such crimes must be abolished.

## ACCESS TO JUSTICE: PROTECTION AND SUPPORT

International standards provide that victims should be treated with humanity and respect for their dignity and human rights.<sup>75</sup> This requires that effective protection and support be provided by the national authorities. Appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. Victims should be able to participate in the justice process, including by presenting their views and concerns at appropriate stages of the proceedings, in a manner which is not prejudicial to the rights of the accused and a fair and impartial trial.<sup>76</sup>

Fear and risk of reprisals deter victims from seeking justice. Protection and support for victims and witnesses before, during or after legal proceedings in the DRC is minimal. Victims and witness protection is virtually non-existent. The only protection programmes are those run by the ICC and UNJHRO and are extremely limited in their scope.

As well as the fear of reprisals, the costs of pursuing a case and the limited access of civilians to military courts also deter victims from seeking justice. In many parts of eastern DRC, those who have had contact with the formal justice system are likely to have had a negative experience. Amnesty International was informed for example of several victims of sexual violence who were arrested by a judicial police officer and held in the same cell as their violator to prevent them from going missing.<sup>77</sup>

Access to courts in many parts of eastern DRC is severely limited, most notably outside the main urban centres. As a result, one of the main benefits identified by magistrates, lawyers and NGOs of mobile courts is that they help to improve people's perceptions of the justice system by bringing a working mechanism, and all its components, closer to the ground.

### FEAR OF REPRISALS AGAINST VICTIMS AND WITNESSES

The fear of reprisals is one of the main reasons given by victims of human rights violations and their families for not seeking justice. This fear is particularly pervasive in more remote areas of eastern DRC.

Paul is a 30-year-old man from Masisi whose village and family home were pillaged in September 2010. He told Amnesty International of the violations facing his community and why he could not lodge a complaint:

"The FARDC [the Congolese army] are systematically looting our villages, carrying out executions, committing isolated but recurrent rape. When there is nothing valuable in our houses, they come and take the women. In September 2010 my house was burnt down. At around 10pm, several soldiers came to my house and kicked down the door. They found me and started beating me, breaking one of my ribs. They then started beating my wife and children. To stop their violence, I went outside to give them my nine goats and pleaded with them to take my goats and leave my family. When the military left, I fled to the forest with my wife and children. When we came back the next morning, our house had been burnt down. What I have just told you has happened to almost everyone in my village. ... I am now in Goma to seek to mobilize people to organize assistance for us. I am not sure using the legal channel will help us much. Every legal dispute in my village is monopolized by these same military. If we lodge a complaint in Goma, I fear our community will suffer reprisals as the same soldiers are here. Where the MONUSCO is deployed, I do not think that the military can act with such violence. We would like MONUSCO to deploy a base in my village."

Human rights organizations described reprisals against victims and witnesses as common. They take place at several stages of the process – before a complaint has been lodged, when survivors testify or following sentencing or prison escapes. Amnesty International documented several cases of threats against individuals who had initiated judicial proceedings.

More often than not victims interviewed by Amnesty International mentioned the fear of reprisals as being a reason for not taking a complaint forward. For example, a man whose brother was killed in December 2009, allegedly by park rangers with the possible involvement of FARDC soldiers, said: “I fear reprisals from the families of the perpetrators if they were to be imprisoned – with the investigations currently stalled at least we are not facing any problems.”

Without effective protection and support, victims and witnesses are justifiably afraid of repercussions if they dare to testify or to lodge a complaint. After the mass rapes in Walikale, many of the large number of victims who came forward to testify were subjected to threats.<sup>78</sup>

Over the course of four days in July/August 2010, more than 300 women, men, boys and girls were systematically raped in Walikale Territory, North Kivu. Investigations by MONUSCO into the mass rapes in Walikale started in August 2010.

Some protection concerns were raised at the outset because of the continued presence of perpetrators, notably Mayi Mayi and FDLR fighters, in the region. Nevertheless, the investigations carried on without any significant protection measures being taken by the military prosecutor, UN agencies or international NGOs. More than 150 victims were interviewed by the military prosecutor, primarily in Walikale city. The victims were taken openly in cars from their villages to meet the investigation team. Several reliable sources engaged in the investigations explained that a significant number of victims received threats, both written and verbal. As a result the investigations stalled.

In March 2011, 90 police officers were deployed to the area to protect the affected community but only for a three-month period and reportedly with inadequate training. The UN has also offered protection and support to victims. The second phase of the investigations is being planned.

The recent events in Walikale, where investigations stalled as a result of threats against victims, show how the lack of protection measures for victims and witnesses can impede efforts to bring perpetrators of human rights violations to account.

Lack of protection measures also undermines victims' belief in the justice system. Victims of the Fizi mass rapes interviewed by Amnesty International identified their need for security as one of the main reasons for having lodged a complaint and testified. During the trial their lawyers asked for the military unit that had committed the rapes (the company stationed at the headquarters of the 43<sup>rd</sup> sector in Fizi) to be redeployed, but the court did not grant this request. The security of the victims that Amnesty International interviewed is not guaranteed. They told Amnesty International how they felt doubly victimized: first by the original violation and again as a result of speaking out.<sup>79</sup>

In some cases, especially cases of sexual violence, rather than using the criminal justice system, victims and their families resort to an “amicable settlement”, an informal dispute resolution system in which the victim or her family negotiates with the perpetrator or the



family of the perpetrator. Sometimes this results in compensation, or the family of the victim agreeing that the victim should marry the perpetrator. The views of the victims themselves however are often not taken into account in these proceedings and the final outcomes are often not in the victim's interest. Indeed, such "resolution" compounds the initial crime with further violations, where the victim is made to marry the rapist against her will. Human rights activists told Amnesty International that this option was regularly chosen in order to limit the risk of reprisals not only from perpetrators, but also from the victim's family and community; however, they were deeply concerned by the continuation of this practice.<sup>80</sup> The use of "amicable settlements" should be eradicated, particularly in cases of sexual violence, by providing effective protection of victims who are being threatened; investigating and prosecuting those who seek to pervert the course of justice through such settlements; and ensuring that victims are not forced to accept "compensation" instead of justice because of economic pressure.

Human rights activists who have provided key information for investigations or who have taken up cases on behalf of victims also face reprisals. The risks are greatest for those based in remote outposts. For example, a human rights activist who met survivors of mass rapes committed by FARDC soldiers in Fizi on 1 January 2011 was forced to go into hiding after receiving a series of threatening phone calls and text messages. The human rights activist was accused of giving information to the authorities and received death threats. The person was visited by soldiers at home and at their workplace. Despite appealing to the local authorities and to an international entity, no protection was provided to that person.

#### LACK OF PROTECTION PROGRAMMES

There is currently no national witness protection programme in the DRC. The failure or unwillingness of the state – the political, police, military and judicial authorities – to offer protection to victims and witnesses, as well as the reluctance of others to prioritize this issue, heightens victims' fear. It also undermines the fight against impunity. A senior magistrate told Amnesty International that the lack of witness protection was one of the obstacles to getting witnesses to participate.<sup>81</sup> There are no tangible efforts either by the authorities or among donors to set up a national witness protection mechanism.

The two programmes currently in place – under the ICC and UNJHRO – are limited in scope. The ICC programme only supports victims and witnesses "who appear before the Court, and others who are at risk on account of testimony given by such witnesses."<sup>82</sup> Furthermore, in the case of the ICC, "intermediaries", such as local NGOs, grassroots associations or individuals who have in one way or another supported the work of the ICC, currently do not benefit from the protection programme.<sup>83</sup> UNJHRO offers support to a limited number of human rights defenders as well as to victims and witnesses; their limited mandate, resources and reach significantly restrict the number of people they actually support and give rise to concerns for their security and safety.

The burden of offering protection to victims and witnesses before and during proceedings frequently therefore falls on NGOs. One women's rights activist explained that they often take the victims into their own homes;<sup>84</sup> another activist said they had to take 10 women into their compound in advance of the recent Fizi-Baraka trials, after the FARDC soldiers escorting the victims had abandoned them upon their arrival in Baraka.<sup>85</sup>

A 26-year-old man was kept in an underground cell for two days in April 2010 by a group of FARDC soldiers and subjected to ill-treatment. He told Amnesty International that a local human rights organization in Goma had recommended that he not press charges until his security situation improved, after his wife received threats from the same group of soldiers. The man himself is currently in hiding.

Justice is often sacrificed in order to protect victims. Several human rights organizations stated that at times they chose not to encourage victims to lodge complaints for fear of reprisals. At times, human rights organizations themselves fear reprisals.

Jean-Marie is a 45-year-old widower from Kitshanga who currently lives with his 12-year-old son, Frank, in Goma.

“It was in October 2008, I was at home with my family [his wife and four children] when we heard gun shots. We ran out of the house to try to escape. Other people were running. I ran into the forest. I can’t identify the perpetrators as they were as numerous as rain drops but I think it was the CNDP who were based on two hills around Kitshanga. It was not the first time they had descended into the village. After the armed men had gone back into the hills after about one day I returned to the village to find that my wife and three other children had been shot dead. Frank was lying there seriously injured. Parts of his brain were showing. I buried my family members. Then I took Frank to a nearby dispensary a day’s walk away as the nearest one had been emptied during the attack. After two months at the dispensary we moved to Goma for security reasons as other attacks took place in neighbouring areas.”

The NGO based in Goma that has dealt with Jean-Marie’s case told Amnesty International that they had chosen not to pursue justice for this case, first of all because it was not timely given that the former CNDP still control the area and secondly because if they take up such a case then their own security would be at risk.

Some NGOs have helped groups of victims to lodge complaints together in order to reduce individual exposure to threats, intimidation and attacks. Amnesty International interviewed family members of victims of enforced disappearances and possible summary executions in North Kivu who, with the help of an NGO, had lodged a complaint with the prosecutor.<sup>86</sup> In several other interviews with victims, particularly those living in more remote and conflict-affected areas, the idea of generating a collective complaint was raised.<sup>87</sup> A women’s rights NGO in Ituri told Amnesty International of its efforts to create collectives of victims.<sup>88</sup> If some victims lodge complaints, this encourages others to do so, as recent events in Fizi illustrate. Nevertheless, to date efforts to mobilize victims in eastern DRC are limited. Collective claims however do not replace the need for effective protection mechanisms – especially in the DRC where crimes are regularly committed against whole communities. Collective action also requires the consent of all victims involved and safeguards to ensure that conflicts of interests do not arise within the group.

#### INADEQUATE PROTECTION AND SUPPORT DURING PROCEEDINGS

Military magistrates told Amnesty International that they could not protect witnesses – one magistrate stated that witness protection was “not our problem”.<sup>89</sup> Some magistrates interviewed by Amnesty International appeared sensitive to protection issues and aware of measures they could take, mentioning the possibility of withholding the names of victims and witnesses or having them testify in closed court sessions or in secure areas. However, magistrates, both military and civilian, clearly lack the means, knowledge and experience to put in place measures in a systematic manner. Most courts for example do not have the

facilities to organize closed court sessions. Since individuals have a legal obligation to testify once they have been called to appear as a witness, the lack of witness protection creates serious risks for their security.

The lack of training and capacity to ensure basic protection measures is not only a problem at the level of the magistracy but also with other judicial staff. The judicial police (officier de police judiciaire, OPJ) lack training, which raises doubts over their capacity to carry out interviews with victims in a sensitive and consensual manner. Some judicial police officers have been granted their job title as a result of other functions they hold, notably inspectors of the national security agency (Agence Nationale des Renseignements, ANR). Lack of resources also prevents judicial police from conducting their work with victims in compliance with the legal requirements to ensure confidentiality, especially in cases of sexual violence. Judicial police in Bukavu told Amnesty International that they have to carry out interviews in a small office shared with four other police officers, and therefore often in the presence of others being interviewed.<sup>90</sup>

Support for victims and witnesses during the trial is almost solely provided by NGOs. Institutional mechanisms to facilitate the attendance of victims and witnesses in judicial hearings or to provide psycho-social support during the criminal process are limited. The law offers only limited guidance to the judiciary, with the notable exception of the 2006 law on sexual violence.<sup>91</sup>

The 2006 law seeks to include elements of the ICC's rules of procedure and evidence, including specific protection for survivors of sexual violence. According to that law, the new Article 14(ter) of the Criminal Procedure Code excludes inferring consent from declarations and prior and post sexual conduct of the victim. The new Article 74(bis) of the Criminal Procedure Code places the responsibility on the public prosecutor and the judge to ensure that measures are taken to ensure the security, physical and psychological well-being and dignity of the victims and other people implicated, including by calling on the prosecutor or a judge to seek medical and psychological assistance and advice for the victim, and holding closed court sessions upon the request of the victim or the public prosecutor's office. The law does not put in place any concrete mechanisms to ensure protection and support. Some protection measures were taken during the February 2011 Fizi-Baraka trial. Given the continued presence of troops of the 43<sup>rd</sup> sector and its company in Fizi and the fear of reprisals against the population or against victims testifying, the victims were interviewed in closed court sessions over several days and their names were kept confidential during the public sessions through a coding system.

#### INADEQUATE SUPPORT FOR SURVIVORS OF SEXUAL VIOLENCE

As has been widely documented, including by Amnesty International, survivors of sexual violence are often subjected to stigma and discrimination.<sup>92</sup> Male and female survivors are regularly rejected by both their families and communities. Such exclusion evidently has significant personal, social and economic costs and consequences. This leaves them at increased risk of further attacks and reprisals. Survivors therefore often decide not to report crimes of sexual violence because they fear the consequences or are unable to afford the financial costs of seeking justice and reparation.

The duration of proceedings and the long distances to police stations and courts create

added challenges for women, most notably mothers, who may have no one with whom they can leave their dependants in order to travel to make a complaint or give evidence. Given the ongoing insecurity in the region, travelling in itself raises security concerns.

Furthermore, as one women's rights' NGO pointed out, women cannot cover the costs of judicial proceedings, including transport and living costs, without the support of their husbands or NGOs.<sup>93</sup> Most women who take their case forward have received support from their families to do so.

Chantal, from Masisi, was raped by a group of policemen who were guarding a plot of land that her family had recently been evicted from. Following the rape she went to a health centre one hour's walk away from their village. She was then transferred to a hospital. With the help of her brother-in-law she has lodged a complaint. Given the involvement of the police, the case comes under the jurisdiction of the military courts and the file is with the military prosecutor. An order for the alleged perpetrators to appear before the prosecutor was produced, but was blocked by the Police Colonel in control of their village. Chantal said that she would like the culprits to be arrested but she was concerned for her children who were suffering as she had had to leave them with her elderly mother when she came to Goma, where she was still receiving treatment, and she was worried for her security as the policemen were still in her village.

Most women, in addition to coping with the consequences of rape, including pregnancy, HIV/AIDS and injury, have to take on multiple roles to ensure the survival of their families. In the DRC, women are generally responsible for the upkeep of their families and due to the conflict in eastern DRC, many women are in fact the heads of households. As a result, criminal prosecutions may not be their priority.

Marie is a 37-year-old mother of eight living in the territory of Masisi.<sup>94</sup>

*"One morning in September 2010 I left my house to go and cut bananas. Two soldiers arrived in the banana field. The soldiers arrested me and told me if I say anything I will be killed. I could hear gunfire in the background which made me think that my village was being attacked. I was raped by one of the soldiers six times. He insisted on being taken to my house. When I returned to the village I saw soldiers looting houses. The soldier then took a mattress, four goats and four chickens from my house. Then he left. The whole village was looted.... Access to justice is not a priority for me. My first concern is to survive and to find medical attention – my children cannot go to school as I have lost everything."*

Some steps have been taken to enhance access to justice for victims of sexual violence in eastern DRC both by the legislature, notably with the passing of the 2006 law on sexual violence, and by Congolese and international organizations. However, the extent of the problem and the number of crimes means that efforts to ensure wider participation of survivors in the judicial process must be prioritized, including addressing some of the economic and social barriers to women seeking justice.

#### EXPENSIVE JUSTICE

Justice in the DRC is, and is perceived as, a costly endeavour. Time and again survivors and their families told Amnesty International that justice was expensive. Human rights organizations confirmed to Amnesty International that lack of money and the high cost of justice deter many victims from making formal complaints. Victims lucky enough to have

access to pro bono lawyers are still expected to pay legal fees. As several NGOs mentioned, with the notable exception of certain victims of sexual violence who may have their legal fees covered by NGOs, victims and their families in the DRC are forced to cover the costs of justice themselves.

Costs are incurred at every stage of the judicial proceedings, and include not only legal fees but also transport and living costs. Victims are obliged to pay for summonses and proceedings. Merely initiating an investigation is costly and judgments are not passed or executed unless fees are paid, often directly to judges. Lawyers expressed their concern about the impact this had on their independence or people's perceptions of their independence. One lawyer in Beni interviewed by Amnesty International said: "We represent victims and pay judges".<sup>95</sup> Procedures for waiving legal costs for those without means require the victim or their lawyers to submit a request, and many people are unaware of this option. Judicial staff, who often depend on payments made by plaintiffs to compensate for non-payment or delays in payment of their salaries, allegedly often discourage victims from asking for the costs to be waived.

#### LIMITED ACCESS TO MILITARY COURTS

Victims and their families have even more limited rights to access military courts than civil courts. Since military courts currently have exclusive jurisdiction over crimes under international law, this is a major obstacle to justice for victims. In the civil justice system, if a prosecutor fails to pursue a case, a victim can obtain a court order obliging the prosecutor to do so. This process is known as direct citation. However, the military justice system precludes victims from seeking direct citation. Action in their cases is dependent on military prosecutors who are subject to political and military interference. If they refuse to act, the case stalls. NGOs assisting victims before military tribunals told Amnesty International that in the absence of direct citation, they were limited to writing letters to the military prosecutor's office (auditorat) urging them to act on stalled cases.<sup>96</sup> A proposed draft law to update the Code of Military Justice would introduce direct citation in military jurisdictions. However, Amnesty International does not know the current status of this project.<sup>97</sup>

#### KEY RECOMMENDATIONS

- A national victim and witness protection programme with the capacity to provide protection and support to victims throughout the DRC should be established without delay.
- Specialized support programmes should be developed to assist victims or witnesses who face particular protection issues: human rights defenders, women, and children as well as people from marginalized groups, such as, for example, those with disabilities. They should be consulted on how best to secure their security, so that they can participate in the justice process.
- Such protection programmes should be given adequate technical and financial support, and should be developed in consultation with bodies that have been involved in such efforts in the DRC, including the ICC and UNJHRO.
- Properly trained female and male staff and sufficient resources should be allocated to all courts to ensure effective protection and support (including psycho-social support) measures in all cases.

- Law reform should enshrine the obligation of national courts to ensure the safety, physical and psychological well-being and privacy of victims and witnesses without discrimination.
- Training on the treatment and protection of victims and witnesses, especially in relation to survivors and witnesses of sexual violence, should be mandatory for all magistrates and court staff.
- Where appropriate, support should be given to victims to help them form groups to seek accountability and reparation, ensuring their consent and avoiding conflicts of interest.
- An effective system of legal aid should be established to ensure that victims without means can seek justice before the courts without charge and with free legal representation.

### LEGAL RIGHTS AWARENESS: NATIONAL OUTREACH NEEDED

Efforts to address impunity must be understood by all sectors of society to ensure broad support and active participation and engagement.<sup>98</sup>

To be able to access justice victims and their families must understand the justice system.<sup>99</sup> Victims and communities affected by crimes should be informed of progress and developments in their cases, including the outcomes.<sup>100</sup> The findings of cases should be widely communicated to society at large in order to establish and acknowledge the truth.<sup>101</sup> Outreach must be accompanied by significant improvements and reforms in the judicial system in order to prevent false expectations.

Given the weakness of the Congolese justice system, most victims and ordinary citizens – in particular in more remote areas of eastern DRC – have a very limited understanding of how they can seek justice and reparations. People's confidence in the justice system is low, as is its reputation. For ordinary Congolese, the justice system is often a foreign and distant mechanism.

### LIMITED KNOWLEDGE AND INFORMATION

A significant proportion of victims and their families interviewed by Amnesty International said that they would like to pursue legal action against perpetrators but did not know where to start or how to lodge a complaint. Most people are reportedly more familiar with customary settlements than formal types of justice.<sup>102</sup>

Victims and their families demonstrated common misunderstandings about the justice process which affected their decision as to whether or not to seek access to the justice system. For example, many thought that they could not file a complaint without first identifying the perpetrator or perpetrators. The law, however, calls on judicial police officers to investigate actively any complaint they receive of a crime or an offence and to take statements (*procès-verbaux*) and record information about such crimes and offences.

Sophie, a 45-year-old mother of seven from the Masisi area, has been raped on two occasions. She was raped in 2005 by FDLR fighters during an attack on Lwibo, and again in October 2009 during an FARDC attack that left her town deserted by its population. She had attended a support group (maison d'écoute) following her first rape. She highlighted how the lack of awareness and information undermines victims' ability to access the justice system and seek help even if they would like justice to be done.

*"I would like to lodge a complaint but I do not know where to start. I saw some lawyers come in UN vehicles to discuss what happened. I do not know who they are. But there is no witness to what happened to me and I cannot identify the perpetrators. I wish there could be sanctions against perpetrators, this would encourage the rest of the population to denounce what happens to them."*

Lawyers and magistrates recognize that lack of awareness of the justice system is a significant obstacle to people accessing justice. One lawyer told Amnesty International that this makes his work harder, as victims do not know the limits of state powers and what can be expected of the state in terms of accountability and reparation.

Lack of awareness and understanding of the law by members of the judiciary and law enforcement agents has also been identified as undermining victims' access to justice, resulting in significant procedural flaws and the referral of victims to the wrong channels.<sup>103</sup> One judge told Amnesty International that he had continued to apply old legislation in cases of sexual violence after the passing of the 2006 law as he had not received a copy of the new law and did not know the details of it.<sup>104</sup>

#### CURRENT AWARENESS PROGRAMMES

The DRC authorities run no national legal awareness outreach programmes at present. Any effort to rebuild the justice system must include an ambitious outreach programme to inform victims and their families about the new opportunities for gaining access to justice if it is to succeed in overcoming impunity.

Some outreach initiatives have been conducted by the Bar Association, which is legally tasked with offering free legal aid to people without means. Legal aid units – Bureaux de Consultation Gratuites (BCG) – have been set up within Bar Association offices. However, these efforts appear to be limited and primarily confined to urban areas. Very few individuals know about the free legal advice provided by the BCG, especially in remote areas. The president of the Bar Association in Goma told Amnesty International that the association explicitly chooses not to carry out outreach activities as it does not have the capacity to cope with the increase in demand that this might generate.<sup>105</sup>

Efforts at outreach apparently achieve tangible results. The president of the Bar Association in Bukavu said that since they had initiated outreach activities with support from ASF, notably on the local radio station, the number of individuals visiting their legal aid clinics had increased and included people from outside Bukavu.<sup>106</sup> Nevertheless, as a result of the weaknesses of the BCG, including the lack of experience of many of the lawyers assigned to it and inadequate financial and logistical support, NGOs often bypass the BCG in their outreach and legal aid assistance work with victims.

The only other outreach currently being carried out in eastern DRC is conducted by Congolese NGOs, and to a lesser extent, international organizations. Congolese NGOs have developed a

variety of activities aimed at raising awareness of legal rights and the judicial process and at encouraging victims to take cases forward.

Awareness-raising activities by NGOs have increased in recent years. Such activities are often organized through support groups and community networks (*réseaux communautaires*) generally made up of the local delegate of an NGO and community representatives. Women's rights activists told Amnesty International that such efforts over the course of recent years had had an impact on women and victims of sexual violence, increasing their understanding of the importance of lodging a complaint. Several NGOs with contacts in more remote areas have used these channels as a means of helping victims of human rights violations to access justice.<sup>107</sup> Victims are also referred to lawyers and organizations offering legal support via medical facilities such as those run by Heal Africa and Panzi. Victims of sexual violence in particular are likely to benefit from such mechanisms and referrals as a result of international funding to address sexual violence.

While Amnesty International did not assess the effectiveness of NGO outreach efforts, it was clear that they provide one of the only means for victims to learn about the judicial process. The majority of complaints made by victims and their families, particularly those based in more remote areas, are apparently made with the assistance of NGOs. Amnesty International did interview some victims who had lodged claims without any assistance, but they were unusual among cases of crimes under international law.

The importance of the presence of national and international NGOs as a means of encouraging victims to come forward is undeniable. The presence of very active national NGOs in Fizi – the site of mass rapes in January 2011 – and later the attention of international NGOs and entities played a key role in encouraging such a significant number of victims to come forward and later testify in the Fizi-Baraka trials. In fact, all the victims of the Fizi events interviewed by Amnesty International who had testified in the trials had initially either approached or been approached by local groups.<sup>108</sup>

Certain international NGOs and entities, notably ASF, USAID through its Projustice Programme and UNJHRO, are also carrying out dissemination and outreach activities. USAID's Projustice programme, for example, has recently developed a manual, primarily aimed at paralegals, explaining how people can access justice. ASF, which provides support for mobile courts, funds two weeks of awareness raising activities among the local population before the mobile court holds its sessions.<sup>109</sup> UNJHRO through its Joint Investigation Teams (JIT) activities carries out a certain level of outreach work. Cases are identified through UNJHRO's monitoring activities.<sup>110</sup> The JIT then helps victims to decide whether to lodge a complaint and testify, notably raising the potential risks they may face.<sup>111</sup> Such activities have recently been carried out following the events in Fizi.

Concerns were raised about the sustainability and scale of outreach activities by Congolese organizations. According to a UN staff member working in the justice sector, many of these activities are highly dependent on external funding and unlikely to be continued once the funding stops. Outreach activities are also evidently limited, given the vast size of the region. One magistrate pointed out that much awareness-raising work is currently carried out on a one-off basis rather than systematically.<sup>112</sup> The number of programmes focussing on victims of sexual violence, as opposed to other human rights violations, was also on occasion raised



as a concern. Such concerns are also largely relevant to the activities of international organizations and entities.

Although efforts by NGOs to inform victims about their rights and facilitate their access to justice are welcome, the absence of a government-led outreach programme remains a major obstacle to overcoming impunity. The government has the primary responsibility to inform the Congolese population how to seek justice, truth and reparations and to inform them about its efforts to end impunity through rebuilding the national justice system.<sup>113</sup> The current common misunderstandings and lack of confidence in the justice system demonstrate its failure to do so.

In recent years, the ICC has developed an outreach strategy in the DRC, primarily in Ituri province, to inform the population about its cases. This strategy has reportedly faced difficulties on the ground.<sup>114</sup> The ICC Strategic Plan on Outreach identifies a number of challenges that it is seeking to address, including high rates of illiteracy, communicating in local languages and communicating promptly across large areas with weak infrastructure. The ICC places specific emphasis on engaging with local communities and networks. In its strategy for communicating the Thomas Lubanga case to the population, it relies heavily on television and radio as effective media for reaching the broader community.<sup>115</sup> It has also developed specific strategies for communicating with those “most affected by the crimes” that include information and consultation meetings.<sup>116</sup>

#### LIMITED INFORMATION DURING PROCEEDINGS

The DRC authorities have a responsibility to inform victims about developments in their cases. They should inform victims when proceedings have started against the person accused of the crime against them, so that they can apply to participate in the trial and seek reparations.<sup>117</sup> Currently no effective mechanisms exist to implement this. Such follow-up by the judicial authorities is reportedly more or less non-existent. If victims do have contact with the judicial authorities, they are most likely to be dealt with by untrained clerks (greffiers).<sup>118</sup>

NGOs, national and international, also appear to offer minimal follow-up and support to victims throughout proceedings. In fact, several victims interviewed by Amnesty International expressed frustration with NGOs who had initially offered them legal assistance but then had not kept them informed on developments around their complaint and had for one reason or another failed to follow up further.<sup>119</sup> While this appears to be linked to logistical and financial constraints, notably the length of investigations and proceedings as well as the difficulty NGOs face in obtaining accurate information or contacting the victims, such frustration is revealing. As one representative of an international NGO working in the justice sector admitted, NGOs tend to focus on ensuring that the case is finalized and prosecuted, often overlooking and forgetting the victims themselves.

Local radio stations are one very effective means of providing updates on key trials.<sup>120</sup>

#### KEY RECOMMENDATIONS

- The government should develop a nationwide outreach strategy to inform the population of efforts to rebuild the national justice system and how victims and their families can

engage with it. The strategy should also provide for updating the population on key developments and outcomes of high profile cases.

- Effective mechanisms must be put in place to help victims and their families in filing complaints. Particular care should be taken to ensure that women are included and adequately supported in pursuing cases.
- Every court should have adequate staff and effective procedures to keep victims who have filed complaints informed about the status of their case.
- Mechanisms should be established to inform victims of their right to participate and claim reparations when a case involving crimes committed against them is about to proceed.

## ESTABLISHING INDEPENDENT, IMPARTIAL AND COMPETENT COURTS

Independent, impartial and competent courts are essential for the effective administration of justice and to establish trust in the justice system. Independence and impartiality of courts means, at a minimum, eliminating political interference and attacks on personnel, and setting salaries at a level that will minimize corruption of officials. All those in the justice system, including police, prosecutors, defence lawyers, representatives of victims, magistrates, administrative staff and prison officials, must have effective procedural and practical guarantees of their independence and impartiality. These guarantees include legal guarantees, sufficiently high salaries to minimize corruption of officials, effective independent civilian security arrangements and sufficient resources (financial, material and personnel). Only properly trained and qualified people should occupy positions within the justice system, they must be ethical and there should be a fair representation of women.

The lack of independence of the Congolese judiciary is one of the main obstacles to tackling impunity for crimes under international law. Direct acts of interference in the judicial process, notably by the army and the executive, attacks on procedural guarantees of independence as well as logistical and financial constraints which undermine the capacity of the judiciary to act independently are the main factors currently undermining the independence of the judiciary. Many people interviewed by Amnesty International stated that endemic corruption clearly undermines the judiciary's independence, most particularly in the civilian judiciary.<sup>121</sup>

### LEGAL GUARANTEES OF JUDICIAL INDEPENDENCE INFRINGED

The Congolese Constitution of 2006 contains several provisions aimed at guaranteeing the independence of the judiciary. Article 152 of the Constitution establishes the Supreme Council of the Judiciary (Conseil Supérieur de la Magistrature, CSM) and grants it power over the appointment, promotion, discipline and dismissal of magistrates. Article 151 reinforces the division of powers by preventing the executive from issuing injunctions, such as orders to halt an investigation.<sup>122</sup>

In practice however, these procedural guarantees are infringed, notably by the executive. A high-level UN representative suggested that efforts aimed at ensuring the independence of the judiciary in DRC should focus on ensuring that the executive fulfil its responsibilities in terms of respecting the independence of the judiciary.<sup>123</sup>

As the Special Rapporteur on the independence of judges and lawyers noted following his visit to the DRC in 2007, the prohibition on the issuing of negative injunctions by the executive continues to be violated in practice.<sup>124</sup> The Special Rapporteur noted in his report:

*"In several trials involving serious crimes... judges who had taken actions or decisions unfavourable to a member of the military command had been transferred, following which their successors had taken decisions resulting in acquittal of the accused."*<sup>125</sup>

The CSM's powers and role in relation to magistrates are often overlooked and undermined.

For example, the law establishing the CSM stipulates that the President of the Republic has the authority to nominate, promote, retire, dismiss and rehabilitate magistrates, but these decisions must be based on proposals made by the CSM. In practice, however, since the passing of the law in 2008 establishing the CSM, the President and the Minister of Justice have often disregarded the role of the CSM.<sup>126</sup> As one widely respected civil society figure explained: "justice is controlled by the executive: the government makes appointments and transfers magistrates as they see fit". One senior member of the judiciary told Amnesty International that it was the President's prerogative to place magistrates where he wanted, based on information he received about the magistrate from a range of sources – including the security services.

The recent hiring of 2,000 new magistrates was pinpointed by judicial staff, NGOs and representatives of the international community as a stark illustration of the Minister of Justice's determination to control activities under the mandate of the CSM. Donors and members of the international community explained to Amnesty International that they had tried to ensure that the hiring process would be fair and free of interference, but the Minister of Justice overlooked many of their recommendations. Concern over the quality of the new magistrates was significant, given the lack of training, their number and the questionable recruitment process.

The Minister of Justice recently sought to revoke guarantees of judicial independence, in particular the independence of the prosecuting authorities, within the 2006 Constitution. This was widely referred to as an example of the executive seeking to reassert control over the judiciary. While the precise amendments proposed by the Minister of Justice were not passed, the final amendments create ambiguity regarding the status of prosecutors and their relationship with the rest of the judicial structure and with the executive. The changes made to Article 149 of the Constitution remove the office of the prosecution (parquet) from the definition of the judiciary. Nevertheless, according to article 152, members of the office of the prosecution are part of the CSM, which, in turn, is defined as the administrative organ of the judicial power.

#### POLITICAL PRESSURE ON THE MILITARY JUDICIARY

The power of the army, the unclear chain of military command, and the political discourse and agenda in the east are significant obstacles to ensuring effective investigation and prosecution of crimes under international law.

The Congolese national army, the FARDC, was established in 2003, following a 2002 peace agreement. It brought together the former national army and the main armed groups that had fought against each other during the war. Since March 2009 the DRC government has been integrating into the FARDC combatants from local armed groups in eastern DRC, most notably the CNDP using an accelerated integration process. This has in fact enabled the CNDP to expand its presence in strategic mining areas while largely maintaining its former chain of command and allegiances, reinforcing the lack of clear command structures within the FARDC in eastern DRC. Furthermore, following the integration process, CNDP forces, now within the FARDC, were deployed in the same zones where they were previously operating as an armed group.

In eastern DRC, the accelerated integration process has had a negative impact on the fight against impunity. The process has not entailed any vetting to exclude perpetrators of serious human rights violations.<sup>127</sup> The unclear, “parallel” command structure it has created, with for example former CNDP or Congolese Patriotic Resistance (PARECO)<sup>128</sup> fighters largely continuing to respond to former commanders, further heightens the apparent untouchability of certain figures. Investigations of former CNDP fighters, especially those of a higher rank, are generally blocked either by the command itself or by interference from the military or political hierarchy. UN staff told Amnesty International that the success of investigations involving UN Joint Investigation Teams in North and South Kivu depends largely on who is under investigation. Members of the CNDP of a certain rank were unlikely to be investigated.<sup>129</sup> The difficulty of carrying out investigations, especially in the Masisi region, as a result of the “parallel” administration was regularly referred to by judicial personnel, UN staff, NGOs and victims themselves.

Intricately linked is the political discourse surrounding this integration process which appears to place “integration and stability” above justice. In February 2009, the Minister of Justice sent a letter to military justice authorities in the Kivus telling them to stall any prosecutions against members of certain armed groups, which included the CNDP, and not to initiate any new prosecutions in anticipation of the forthcoming amnesty law. The law was passed in May 2009.<sup>130</sup> High-ranking commanders have been granted virtual immunity from prosecution. As a result, well known perpetrators of crimes under international law remain in positions of command. They include General Bosco Ntaganda, wanted under an ICC arrest warrant for enlisting and using child soldiers in Ituri, and Lt. Colonel Zimurinda, commander in the FARDC in North Kivu, identified by the UN DRC Sanction’s Committee Group of Experts as responsible for child recruitment. One magistrate interviewed by Amnesty International explained that there are certain files which the national justice system cannot progress, saying “this is the price of peace”.

#### INTERFERENCE IN THE MILITARY JUDICIARY

In eastern DRC, one of the most pervasive forms of interference within the military justice system is from the military command and hierarchy. In fact, military prosecutors themselves as well as NGOs and UN staff identify military interference as a significant obstacle both to the independence of the judiciary and to tackling crimes under international law. This interference is the result of procedural and legal factors as well as the lack of political will on the part of key actors to ensure the proper working of the judicial process.

The current legal framework undermines the ability of military magistrates to act independently. Military magistrates are both army officers, who are subject to military

command, and members of the Congolese judiciary. This dual loyalty is reflected in payment arrangements. Magistrates draw two pay cheques – one as a military officers and one as a magistrate.<sup>131</sup>

Another issue is that the Military Justice Code explicitly requires that the highest ranking judge on a bench must be of equal or greater rank than the accused.<sup>132</sup> Since the highest ranking judge in the country is a Brigadier General, officers with higher rank in the army are in practice immune from prosecution.<sup>133</sup> Amnesty International did not identify any recent examples of a judicial proceeding being dropped as a result of a failure to create a bench, but magistrates told Amnesty International that certain files implicating high level military commanders had been stalled as a result of this procedural obstacle.

The UN Mapping Report documented that this has been the case in the past:

*“The extent of blocking is such that the Military High Court has found it impossible to deal with the case of Germain Katanga, who was promoted to brigadier-general before being transferred to the ICC to be tried for war crimes and crimes against humanity.”<sup>134</sup>*

Interference by the military takes place in a variety of ways as has been documented on many occasions.<sup>135</sup> Amnesty International received credible reports and testimonies suggesting that the most pervasive forms of interference were: failure by commanders to comply with arrest warrants; injunctions and interference during investigations and trials; and prisons extractions (assisted prison escapes).

Magistrates and human rights organizations identified the unwillingness of army commanders to hand over military personnel under their command to military prosecutors for questioning or detention as one of the most frequent forms of interference by the military.<sup>136</sup> Commanders, rather than handing over the requested individuals or units, often redeployed them. One prosecutor stated: “Commanders do not collaborate with us, we are at the service of the commanders”.

Under the Military Justice Code, arrest warrants are to be sent via the chain of command, but the commander receiving the warrant is bound by law to execute it.<sup>137</sup> The failure to execute an arrest warrant in the military justice system (mandat d’amener) can result in a prison sentence of up to six months and/or a fine. Magistrates told Amnesty International that at times the failure to comply with an arrest warrant is a result of ignorance of the process, given the current make-up of the army which has brought into levels of command untrained former rebels. However, more often than not it is deliberately intended to undermine proceedings.

The lack of cooperation by commanders clearly hampers what efforts are underway in the military justice system to hold soldiers to account. The lack of funding in the system and the lack of logistical resources also heighten the military justice system’s dependence on the army – notably when it comes to carrying out arrests. Amnesty International was informed that even when critical logistical constraints are overcome, the lack of cooperation by commanders undermines further investigations: “we got transport from UNDP to arrest him on rape charges, but his commander refused to cooperate”.<sup>138</sup>

A recent case of mass rape and pillage in Bushani, North Kivu province, is a telling example. On 31 December 2010, FARDC soldiers allegedly raped more than 30 women. The senior military prosecutor at the level of the Military Operational Court of North Kivu ordered the Zone Commander of the military zone to produce the Commander of the Brigade and the Commander of the Battalion.<sup>139</sup> By May 2011, the Zone Commander had not fulfilled this request.

Amnesty International received credible reports of sensitive cases where magistrates had received direct injunctions from the military hierarchy or the political authorities. As one member of the judiciary explained: “it is only when you execute judgments for weak individuals who have no umbrellas [i.e. protection], that you receive no injunctions”. Military magistrates interviewed by Amnesty International explained that they rarely receive files dealing with crimes under international law. One noted that such files are stopped at the level of the public prosecutor’s office as a result of interventions by the military hierarchy.<sup>140</sup>

Another way in which military commanders interfere with the justice process is by helping prisoners to escape. Amnesty International has identified several cases of FARDC soldiers being assisted by their commanders to escape in 2010. Six FARDC soldiers, all former CNDP, convicted and sentenced on charges of failing to follow orders and armed robbery,<sup>141</sup> escaped from prison in Butembo, allegedly with the help of their commander in February 2010.

On 12 August 2010, several dozen FARDC soldiers, former CNDP, surrounded the Military Prosecutor’s Office in Goma and succeeded in obtaining the release of Lt Colonel Yusef Mboneza, former CNDP leader and then the FARDC 212<sup>th</sup> Brigade Commander, who had been arrested a few hours earlier. He faced various charges resulting from his failure to follow orders to redeploy his troops to areas under his command – areas where the August 2010 Walikale mass rapes would subsequently take place. An eyewitness told Amnesty International how the heavily armed soldiers cut off access and power in the neighbourhood and encircled the Military Prosecutor’s Office for several hours. As of December 2010, Lt Colonel Mboneza was allegedly redeployed to Masisi territory.

During Amnesty International’s visit to the Central Prison in Bukavu, the Prison Director expressed fears of a possible extraction of Lt. Col. Kibibi and his men, the commander and soldiers held responsible for the mass rapes in January 2011 in Fizi. After persistent rumours of a planned extraction, some of these men were transferred on 24 March 2011 to the new military prison in Kinshasa, Ndolo.

#### MAGISTRATES’ FEAR FOR THEIR POSITIONS

Magistrates’ fear for their positions due to a lack of respect for tenure is an important reason behind their reluctance to act independently and to take up sensitive cases.

Disciplinary sanctions and transfers influence military judges’ willingness and ability to act independently. Such interference occurs at different levels of the judicial process. The Senior Military Prosecutor (Auditeur Supérieur) for North Kivu, for example, is regularly replaced. Military judges interviewed by Amnesty International described the transfer of magistrates who had refused to follow orders from their hierarchy during trials.

Political interference, disciplinary measures and injunctions all affect the independence of civilian magistrates.

No magistrates were discharged from their posts in 2010, but 2008 and 2009 saw the forced retirement of high-level magistrates, including the former First President of the Supreme Court, who was also the President of the CSM. These have reportedly had a lasting impact on the magistracy and showed the executive's control of the CSM.<sup>142</sup> Magistrates and NGOs explained that the quality of the magistracy has deteriorated since these dismissals, both as a result of self-censorship and a lasting sense of insecurity among magistrates but also because of the irreplaceable experience that was lost.

Self-censorship among both civilian and military magistrates appears to be a significant problem and magistrates often choose only to deal with cases involving lower level defendants. Amnesty International received credible reports suggesting that both military and civilian magistrates consult with their superiors before taking on sensitive cases or making decisions. Military magistrates told Amnesty International that they had had sensitive files left untouched lying on their desks.

#### LACK OF SECURITY

The inadequate protection given to magistrates was raised not only by magistrates themselves but also by NGOs and representatives of the international community. Directly and indirectly, the resulting insecurity affects magistrates' willingness and ability to carry out certain investigations and take on certain files. One judge, when asked what forms of protection they received during trials exclaimed: "it is not the military [who protect us] but God".

Magistrates in the civilian system highlighted the need for security if they were to gain jurisdiction over crimes under international law. They also expressed a belief that the military would not be willing to make arrests or to hand over military personnel to civilians.

#### CORRUPTION

Another factor which undermines judicial independence, particularly in the civilian system, is corruption. Corruption takes place at every level of the judicial system. While linked to the lack of adequate resources within the system, it is also the result of an embedded culture of corruption in society as a whole.

It is difficult to document the extent of different forms of corruption, but the testimonies gathered by Amnesty International identify clear trends. Payments are taken by judicial staff in order to implement a warrant, to overrule a sentence, to change a decision or to allow an escape from prison. UN staff and Congolese NGOs suggested that monitoring of trials helped to reduce levels of corruption, as well as political and military interference.<sup>143</sup> Although senior civilian magistrates denied that corruption was a particular concern in the civilian sector, there was consensus amongst NGOs, staff within international organizations, lawyers and members of the military judiciary that this was the case. One lawyer also raised the fact that at present people, including lawyers, are not filing complaints of corruption.<sup>144</sup>

#### KEY RECOMMENDATIONS

- The current legal guarantees in the Constitution and legislation regarding the impartiality and independence of the courts should be respected in practice.

- The Minister of Justice should respect Article 151 of the Constitution which prohibits the executive from issuing injunctions to the judiciary; rescind any instructions or other statements seeking to influence, limit or stop investigations or prosecutions of crimes under international law; and issue binding regulations prohibiting such instructions or statements.
- The DRC authorities and the CSM should commit to ensuring that the criminal justice system receives sufficient and appropriate resources (financial, material and personnel).
- The mandate of the CSM should be respected and necessary political, logistical and financial means placed at its disposal.
- The DRC authorities should ensure respect for the security of tenure of magistrates.
- Salaries should be paid regularly at a level sufficient to minimize the risks of corruption.
- All judicial personnel should be qualified and properly trained, including in gender awareness; they should have the highest ethical standards; and there should be fair representation of women.
- The DRC authorities should take measures to ensure the safety of judicial officials;
- Pending transfer of jurisdiction over crimes under international law to civilian courts, steps to prevent interference by members of the armed forces in the work of the judiciary should be taken, including:
  - changing the chain of command for military prosecutors and judges so that they report solely to the Supreme Council of the Judiciary;
  - paying military judges only for their work as judges, not also as members of the armed forces;
  - improving the security of prisons to prevent escapes.

## FAIR TRIAL GUARANTEES

In both military and civilian courts, there should be effective legal guarantees, implemented in practice, incorporating the right to fair trial in accordance with international law and standards.<sup>145</sup> Effective legal assistance programmes for the defence are required.<sup>146</sup>

Violations of fair trial standards in the DRC are endemic and are clearly a major obstacle to the creation of an effective judicial system able to deal with crimes under international law. Very little attention is currently given to this issue by those engaged with the judicial system and justice reform.

Given the lack of resources and training within the judicial system, most investigations are rushed and incomplete and decisions are often poorly drafted and not based on legal grounds or evidence.<sup>147</sup>



## VIOLATIONS OF DEFENCE RIGHTS

Fair trial standards – most particularly the rights to defence – are systematically violated in eastern DRC. One magistrate explained that there is such a backlog of cases that when cases do come to trial, key basic standards of fair trial are frequently overlooked.

In the recent Fizi-Baraka case, according to one of Lt. Col. Kibibi's defence lawyers, both the defence and the victims' lawyers received the 600-page case file only two days before the first hearing, while the Military Prosecutor had one and a half months to review the documents. There was no funding for the defence lawyers to obtain photocopies of the file, making their preparations for the trial very difficult.<sup>148</sup>

DRC law does not guarantee all rights to fair trial set out in international law and standards. In particular, DRC law fails to protect the rights of individuals during the course of investigations. For example, such rights should be guaranteed by a provision incorporating all the rights recognized in Article 55 of the Rome Statute of the ICC.<sup>149</sup>

## ARBITRARY ARRESTS AND DETENTION

Amnesty International's evidence suggests that arbitrary arrests are a widespread practice, including arbitrary arrests and detention of civilians by military authorities – notably the FARDC. At times these arrests are carried out in collaboration with civilian and military judicial staff, often with the purpose of extorting payment from the victims.<sup>150</sup> Amnesty International also came across cases of arbitrary arrests by other members of the security services, including the ANR.

Article 209 of the Military Justice Code allows for pre-trial detention without the right to challenge the legality of the detention before a court for longer periods than permitted by international law and standards. If an investigation lasts longer than 15 days, the detention of the suspect is referred to the military prosecutor (Auditeur Militaire) who may renew detention on a month-to-month basis for up to a year before it may be challenged before a court.<sup>151</sup>

In the civilian system, officers of the judicial police have powers to open police investigations, arrest suspects, and detain them for questioning for a fixed period of time, limited to 48 hours, known as *garde à vue*, (pre-arraignment detention) until they are either charged or released. These limits are rarely applied in practice.

In addition, convicted prisoners who come to the end of their sentence are often not freed. The lack of prison records accentuates this problem. A representative from an international organization working in prisons told Amnesty International that prosecutors responsible for sending a notification to the Prison Director rarely do so. As a member of the prison services exclaimed: "they arrest a lot but don't free many".

Corruption within the judicial sector, limited defence rights, slowness of judicial proceedings, mismanagement and logistical constraints all contribute to prolonged and illegal detentions. In Butembo, Amnesty International was told that the problem of prolonged detention is aggravated by the fact that there is no military court in the city. Inmates are forced to wait indefinitely for the Military Garrison Tribunal based in Beni to visit. The significant number of pending cases not only undermines defendants' right to be tried within a reasonable time but

also opens the door to corruption and unequal justice – those who are able to pay are more likely to see their cases brought forward if they are in detention, or ignored if they are not. As one women's rights activist said, referring to a man locked up since 2008 without trial: "I don't think this is justice".<sup>152</sup>

Several NGOs, notably ASF and RCN-Démocratie et Justice, as well as the ICRC (International Committee of the Red Cross), are undertaking activities to tackle the high levels of pre-trial detention, such as organizing legal clinics inside prisons. Amnesty International was told that several of these initiatives had produced tangible results.<sup>153</sup> However, much remains to be done to tackle the fundamental causes of this violation.<sup>154</sup>

#### LEGAL AID

Article 19 of the 2006 Constitution guarantees criminal suspects the right to defend themselves or to be assisted by a defender of their choice. However, for criminal suspects without the means to hire a lawyer, there is little chance of obtaining representation. Bureaux de Consultation Gratuites (BCG) are limited in scope, receive no government funding,<sup>155</sup> and are not well known in eastern DRC.<sup>156</sup>

Members of the judiciary, of the Bar Association in Goma and NGOs told Amnesty International that the Bar Association is generally only called on to offer free legal aid to a suspect when the individual is likely to be sentenced to death. NGOs, lawyers, and a prosecutor explained to Amnesty International that defendants who are lucky enough to have access to a pro bono lawyer rarely choose their lawyer, meet their lawyer before the trial or present witnesses in their defence. Pro bono lawyers are often young and inexperienced. More experienced lawyers are sometimes hired directly by NGOs. Even when victims are given access to free legal counsel, they still have to bear the cost of judicial fees.

And yet, time and again Amnesty International was told by international organizations that they had difficulty justifying to their donors activities aimed at offering support to the defence. When support is given, it generally passes through the BCG and only covers the defence lawyers' activities at the trial itself.

#### IMPACT OF CORRUPTION

Wealth significantly reduces the likelihood of being held to account for a crime. As a high-level representative of the local authorities in Butembo told Amnesty International: "Justice is unequal – those who can pay can do what they want". This was confirmed by the President of the Bar in Goma: "Rich people don't go to prison".<sup>157</sup>

Corruption is endemic throughout the judicial system and has negative repercussions on all key areas described in this report. It undermines fair trial standards, creating a two-tier judicial system in which only individuals without money, connections or protection are brought to justice. The Special Rapporteur on the independence of the judiciary wrote in 2008:

*"The absence of political will to fight corruption only serves to maintain the status quo in which judges' services are bought by those who can afford to pay for them. There thus appear to be two kinds of justice in the Democratic Republic of the Congo: swift justice for the rich and powerful who can buy or influence judges' decisions, and dilatory justice for the poor, who are the victims of decisions bought by the rich or of political interference."<sup>158</sup>*

Amnesty International was repeatedly told that people can buy impunity for a variety of offences, including crimes under international law such as rape.

Amnesty International received reports of a range of practices which, though difficult to corroborate, indicate the level and impact of corruption on fair trial standards and justice. These included accounts of magistrates taking on cases depending on their profitability and judgments not being made without NGOs first “paying a visit” to the magistrate. Bail was described by one lawyer as “a commercial enterprise for judges” even for sexual violence cases in which, according to the 2006 law, bail is in fact banned. One NGO told Amnesty International of a case it was dealing with where a man detained for rape was released on bail and subsequently committed another series of rapes and threatened the NGO’s local monitor.<sup>159</sup>

Amnesty International identified some efforts by donors to overcome corruption – notably efforts by USAID in its Projustice programme to enhance ethical practices within the judiciary. The government has also increased the pay of magistrates in recent times and deployed another 2,000 magistrates into the field. But Amnesty International was told on numerous occasions that the recent deployment of new magistrates had not brought about an improvement in the situation, particularly since they are not being regularly paid and are living and working in poor conditions.

#### SOME VICTIMS OVERLOOKED

Amnesty International was told that the current focus in terms of NGO, donor and UN programming on access to justice for victims of sexual violence had at times had a negative impact on ensuring accountability for victims of other types of human rights violations. In fact, UN staff, NGOs and even a magistrate said that they were trying to redress what they saw as an imbalance by including non-sexual violence cases in the hearings of the mobile courts set up to try sexual violence crimes.

Several people also raised what they described as disproportionate support in terms of legal aid for victims of sexual violence, as opposed to victims of other human rights violations. Amnesty International is concerned that badly needed attention to victims of sexual violence has been seen as divisive and has been raised as a problem in this manner. Investigation and prosecution of crimes of sexual violence may in many cases require additional resources. The reasons include the need to provide higher levels of support and protection to survivors due to stigmatization; difficulties in obtaining intimate and sensitive information as evidence; and the need for specialized psychological and health support for survivors. Also, in reality sexual violence is not the only crime that women and girls experience, and sexual violence is also perpetrated against men and boys.

What is needed is sufficient political will and resources from both the DRC authorities and the international community to address all crimes.

#### KEY RECOMMENDATIONS

- All suspects should be tried in proceedings that fully respect international fair trial standards at all stages of the proceedings, especially the right to be brought promptly before a court to assess the legality of detention, and the right to apply for bail.

- All detainees within the civilian justice system be brought promptly, and as required by DRC law in no case later than 48 hours, before a competent judicial authority to determine the lawfulness of their arrest and detention; and the law be amended to clarify that this maximum time limit applies to all detainees, including those held within the military justice system.
- Article 209 of the Military Justice Code should be amended to provide for prompt access to a magistrate to challenge the legality of pre-trial detention and to limit its length, requiring release, subject to effective security guarantees, if the trial is delayed.
- Steps should be taken immediately to bring the conditions of pre-trial detainees, whether in the military or civilian courts, into conformity with international law and standards.
- The right of all suspects and accused to be represented by counsel of their choice and to have legal representation if needed, provided without cost when necessary, should be guaranteed in all courts, military and civilian, including through an office of defence counsel and a properly funded legal aid programme.
- Legislation guaranteeing legal aid must be widely distributed; Bar Associations should raise awareness of legal aid; and the DRC authorities must ensure that the BCG legal aid programme receives adequate funding.
- Progress made on addressing impunity for sexual violence should be matched with the same attention to other crimes, without taking resources from efforts to address sexual violence.
- All judicial staff should receive training in international fair trial standards.
- Effective mechanisms to tackle corruption must be established.

## ENSURING FULL REPARATIONS

### RIGHT TO FULL REPARATION

Under international law, all victims of crimes of genocide, crimes against humanity, war crimes and other serious violations of international human rights law and, in some circumstances, their family members have the right to a remedy, including full and effective reparation to address the harm they have suffered.<sup>160</sup> The right to reparation, including the rights to restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition, must be guaranteed by law.<sup>161</sup> Amnesty International is concerned that at present reparation is not defined by law in the DRC and that in practice tribunals mostly focus on payment of monetary compensation. Even so, the majority of victims of crimes under international law who have applied for compensation have not been granted it. Other forms of reparation such as restitution, rehabilitation, satisfaction and guarantees of non-repetition are not even defined by law in the DRC.<sup>162</sup>

The obligation to provide effective remedy, including adequate, effective and prompt reparation to victims, rests with the state.<sup>163</sup> Victims must be able to seek reparation before

national courts against the person(s) who committed the crime or, where the state bears responsibility, against the state. Victims should also be able to seek reparation against other states, corporations, or other entities.<sup>164</sup> Civil society organizations, international agencies and donors can also be involved in the implementation of effective reparation mechanisms and programmes. These must be established in close consultation with victims themselves.

Reparation programmes established by the state can be effective in ensuring that large numbers of victims and their families can receive reparation. Victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes.<sup>165</sup> Any reparation programme must respect the rights of victims to seek reparation and to challenge decisions of the reparation programme before the courts. Reparations must be comprehensive and not exclude groups of victims. Reparation programmes must not preclude victims' access to the courts. Programmes must be adequately funded – this is the primary responsibility of the state, although a fund could be established to obtain additional contributions from international donors.<sup>166</sup>

Where crimes have been committed by other governments, the state can seek through bilateral negotiations or legal action to obtain full and effective reparation for the victims and ensure that they benefit from any reparation paid.<sup>167</sup> Victims who do not receive full and effective reparation in this way should not be obstructed from seeking reparation before national courts.

In practice, victims of crimes under international law in the DRC and their families are being denied reparation by limits in the legislative framework, lack of access to judicial mechanisms and the state's lack of will to fulfil this responsibility. Amnesty International was unable to identify a single case in which reparation for crimes under international law, in the form of compensation, has been paid by the state when held accountable.

#### LIMITED ACCESS TO REPARATION BEFORE NATIONAL COURTS

Access to reparation for victims and their families before national courts in the DRC is limited as a result of legal, financial and logistical obstacles.

Amnesty International's review of DRC law shows legislative gaps that undermine victims' ability to access reparation before national courts.

Victims have limited access to seek reparation before military courts – which currently have sole jurisdiction for prosecuting genocide, crimes against humanity and war crimes. Victims do not benefit from “direct citation” in the military system and can therefore only constitute themselves as civil party once the prosecutor has submitted the case to the military court.<sup>168</sup>

National legislation recognizes civil liability, but in practice it appears to be limited to instances where victims can identify the perpetrators. Article 258 of the Civil Code permits victims of human rights violations to seek reparation against the person who committed the violation: “any act whatsoever that causes harm to another obliges the person by whose offence the harm was caused to make amends for this harm.” Article 259 of the Civil Code states that a person is responsible not only for the harm caused by his/her own action, but also the harm caused by acts committed by persons answerable to him/her, or matters that are within his/her responsibility.<sup>169</sup>

For reparation orders to be enforced, victims must contribute a certain percentage of the total reparation awarded in fees to the registrar.<sup>170</sup> Courts could in practice decide to waive this fee, but Amnesty International was informed by a judge that they rarely do so.<sup>171</sup>

Several judgments by national courts have ordered the state to provide reparation to victims. For example, in the recent judgment made in the Fizi-Baraka trial as well as in the Songo Mboyo case.

National law does not currently provide clear guidance for judges to decide on the scope and nature of reparation to be provided to victims in relation to the scale and nature of the crimes committed thereby leaving it up to the judge to make the decision. This can have negative consequences. In the recent Fizi-Baraka judgment, for example, the court found that it was incompetent to pronounce on the issue of symbolic/communal reparation (the building of a school) and the court did not grant the request for the remainder of the 43<sup>rd</sup> sector and its company that was still stationed in Fizi to be redeployed. When questioned, the First President of the Military Court told Amnesty International that he did not feel that it was his role to make judgments on what is inherently a military issue, i.e. troop deployment, and did not believe that the victims had the legal standing to ask for communal reparation – this would have had to be requested by, for example, an association representing the community.<sup>172</sup>

#### LACK OF ENFORCEMENT OF DECISIONS AND ORDERS

In cases where military courts have awarded reparation to victims against perpetrators or the state, the decisions have not been enforced.<sup>173</sup> Despite a number of judgments ordering the state to provide reparation, Amnesty International failed to identify a single case to date where the reparation has in fact been paid. This failure has undermined confidence of individuals in the justice system. It has influenced victims' decisions as to whether to seek justice.<sup>174</sup> Many, as a result, prefer to turn to "amicable settlements" which are perceived as providing a higher chance of resulting in some form of reparation.<sup>175</sup>

This highlights the importance in many victims' minds of effective measures for individual reparation and material reparation such as compensation. A recent report by the OHCHR on remedies and reparation highlighted the fact that victims have differing views on the issue of collective vs. individual reparation.<sup>176</sup> Amnesty International has identified the demand for collective reparation, particularly in more remote areas of the Kivus, as being particularly salient. However, victims interviewed by Amnesty International also often referred either directly or indirectly to material concerns as one of the main reasons behind their decision to seek justice. Efforts to date by Congolese organizations and the international community appear to have focused largely on symbolic measures.

Unsurprisingly, victims who have been awarded reparation but have not received it are extremely frustrated, as documented by recent OHCHR panels on remedies and reparation. In some cases, the failure of victims to receive their reparation further heightened their sense of stigmatization.<sup>177</sup> Two magistrates interviewed by Amnesty International explained how in their judgments they call on the accused to pay a symbolic sum in terms of reparation so as to reduce the frustration of victims, but in a country where those who are tried are likely to be living in poverty, even these nominal sums are rarely paid. As a UN employee pointed out, when soldiers are convicted, they are often dismissed from the army, and lose what little

salary they had. This further underlines the importance of the state paying the part of the reparation for which it is found liable.

Those responsible for ensuring the execution of judgments, including prosecution staff and registrars, rarely do so. The UN Special Rapporteur on the independence of the judiciary, in his April 2008 report, identified several causes for their failure to follow up on judgments, including the lack of resources to cover logistical costs and corruption.<sup>178</sup>

#### CURRENT INITIATIVES

Amnesty International commends the OHCHR's effort to place the issue of reparation and consultation with victims on the agenda by organizing two weeks of consultations in the DRC in 2010.<sup>179</sup> The report released by the OHCHR following this visit recommended the establishment of a fund to support reparation for victims of sexual violence as foreseen in the national strategy on sexual violence. Amnesty International welcomes this but believes that such an initiative should form part of a broader national strategy to ensure full reparation for all victims of human rights violations. Indeed, the singling out of specific groups of victims to receive reparation could generate resentment and tensions within the community. Given the level of stigmatization of survivors of sexual violence in the DRC, a restricted programme would risk isolating survivors further.

A Draft Ordinance on the creation, organization and functioning of a fund for the compensation of survivors of sexual violence has been prepared, but its status is unclear. Furthermore, the current draft fails to provide adequate funding mechanisms.

#### REPARATION FROM OTHER GOVERNMENTS

In addition to ensuring that victims can seek reparation before its national courts against other states that are responsible for violations, the DRC government can itself seek reparation from those states on the victims' behalf. Angola, Burundi, Rwanda, Uganda and possibly other states committed serious human rights violations in the DRC between 1993 and 2003. Those states are obliged under international law to pay full reparation for the crimes committed by their forces.

In 1999, the DRC government filed cases at the International Court of Justice (ICJ) against Burundi, Rwanda and Uganda for serious violations of human rights and international humanitarian law and for "acts of armed aggression" perpetrated on the territory of the DRC. The government withdrew the case against Burundi in 2001 and, in the same year, the ICJ found that it did not have jurisdiction in relation to the case against Rwanda.

The cases against Uganda did, however, proceed. On 19 December 2005, the ICJ issued a judgment finding that Uganda had violated international law during the conflict, including by its forces violating international human rights law and international humanitarian law. It found that Uganda has an obligation to provide reparation.<sup>180</sup> The ICJ did not make a decision on the amount of reparation to be paid as the DRC indicated that it would seek to resolve the issue of reparation by way of direct negotiations with Uganda and would submit the question back to the Court only if an agreement could not be reached.<sup>181</sup> This process of negotiating reparation between states has often ignored the needs of the victims for reparation. Many bilateral reparation agreements between governments include provisions precluding victims from seeking individual reparation against the offending state.<sup>182</sup> Even

when reparation has been paid, it is allocated to the government's budget and rarely reaches the victims. The risks are recognized in the UN Mapping Report:

*"[T]hese [negotiations] are linked to a wide-ranging process of normalisation of relations between the two countries, which could have a negative effect on the rights of victims in the name of good neighbourly relations and other diplomatic considerations."*

At the time of writing, these negotiations are continuing.

Amnesty International is not aware of any other efforts by the DRC government to seek reparation for victims through litigation or bilateral negotiations with states that committed violations of human rights and humanitarian law violation on its territory.

#### KEY RECOMMENDATIONS

- National laws should be enacted or amended to ensure that all victims of crimes under international law and other serious human rights violations can seek reparation before DRC civilian courts in accordance with international standards. Victims should not be charged and should be provided with legal aid.
- The government must enforce all existing reparation orders against the state and others. Effective procedures and mechanisms must be put in place for enforcing all reparation orders.
- A comprehensive reparation programme should be developed to provide full and effective reparation to all victims of crimes under international law in the DRC. The programme should be developed in full consultation with civil society and victims. The reparation programme must be adequately resourced by the government, which bears the primary responsibility for ensuring reparation for the victims. Nothing must preclude victims from having access to the courts. Other donors should also be encouraged to contribute to funding the programme.
- Outreach must be conducted to ensure that victims know how to seek reparation either before the courts or through a reparation programme.
- The government should pursue reparation on behalf of victims against other states that have committed violations in the DRC.

#### ENSURE ADEQUATE AND SECURE PRISONS

There should be a sufficient number of prisons to hold all those convicted of crimes under international law, without overcrowding. Prisons should be secure. This means that those in the prisons should have their safety ensured and that convicted prisoners should not be able to escape. Convicted prisoners should be held separately from detainees, women and men should be held separately and juveniles should not be held with adults. All prisons should meet international standards, including the 1955 UN Standard Minimum Rules for the Treatment of Prisoners, the 1990 UN Basic Principles for the Treatment of Prisoners, the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty, and the 1988 UN



### Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>183</sup>

As Amnesty International has documented on numerous occasions, prison conditions in the DRC often amount to cruel, inhuman and degrading treatment, with endemic overcrowding, death from preventable causes and regular prison escapes.<sup>184</sup> Illegal detention facilities are also numerous. Despite this, the prison system in the DRC is one of the most neglected areas of the justice system. This undermines the fight against impunity on several fronts. It results in significant violations of fair trial standards through prolonged pre-trial detention. It also means that convicted prisoners rarely serve their sentences, which in turn undermines the credibility of the justice system.

#### OVERCROWDING

Prisons in the DRC are overcrowded largely as a result of under-investment, the large number of pre-trial detainees and a lack of monitoring. In March 2011, Amnesty International visited the Central Prisons in Bukavu and Goma.<sup>185</sup> Bukavu prison was built to house up to 350 prisoners. On the day of Amnesty International visit it held 1,207 inmates, including 21 women and 37 children under 18. Seven infants were also in the prison with their mothers.<sup>186</sup> Similarly, Goma Central Prison, which was built for 150, had a population of 943.

The overcrowding and disrepair of prison facilities mean that different categories of prisoners are not held separately: pre-trial detainees are mixed in with convicted prisoners, including prisoners on death row, civilians are held with military. Women and children are sometimes, but not always, detained separately, leading to increased risk of targeting for violence by other prisoners.

A significant percentage of the prison population is in prolonged detention without trial. In Goma Central Prison, 604 of the 943 detainees (64 per cent) were in pre-trial detention. In Bukavu, 681 detainees of 1,207 (56 per cent) were in pre-trial detention. Many detainees have not appeared before a court or been allowed to challenge the lawfulness of their detention, in clear violation of the Constitution which states, under article 18, that no one should be held for more than 48 hours without being charged.

#### LACK OF GOVERNMENT AND DONOR SUPPORT

The government has largely overlooked its responsibility to ensure basic standards of detention conditions.

Prison and local authorities in eastern DRC told Amnesty International that they receive no support from the central government. In fact, Amnesty International was informed that the government at present only gives financial support to the Kinshasa Penitentiary and Re-education Centre (CPRK).<sup>187</sup> In Bukavu, Goma and Beni, the provincial authorities provide food to the inmates but the prison directors said that the rations were insufficient and gave inmates at most one meagre meal a day. Inmates fortunate enough to have friends and family nearby rely largely on food brought in by them in order to survive.<sup>188</sup>

Many prisoners die from preventable causes. Prisons are insanitary and deaths from treatable conditions, such as diarrhoea, malaria and malnutrition, are regularly reported.

Prison statistics are not centralized nor systematically kept. While Amnesty International was impressed by the statistics kept by the Prison Director in Bukavu, figures for the national prison population are non-existent.<sup>189</sup>

The prison system is also largely overlooked by donors. The EU REJUSCO project which ended in 2009 focused primarily on infrastructural development – renovation of prison buildings – and appears to have been one of the few projects in eastern DRC to have addressed this aspect of the judicial chain.<sup>190</sup> While Amnesty International was informed of several forthcoming projects to tackle the lack of prison facilities and dire prison conditions, including a UNDP plan to carry out a prison census, such programmes are limited and are at present stalled at the level of the Ministry of Justice.<sup>191</sup>

#### ILLEGAL DETENTION CENTRES

Military and state security services run a series of illegal detention facilities which are not supervised by judicial authorities. Illegal detention centres are particularly frequent in more remote areas. Despite President Kabila's decision to close all illegal detention facilities, this decision has reportedly not been implemented.<sup>192</sup> Previously Amnesty International has shown that torture and other ill-treatment, while not limited to illegal detention facilities, are particularly common in such facilities.<sup>193</sup> Amnesty International also met several victims who claimed to have been detained in underground detention cells.

In eastern DRC, monitoring of prisons and detention facilities is carried out by the UN, the ICRC, Congolese human rights organizations, religious groups and the judiciary. However, these activities are limited in their scope. Amnesty International was told that monitors, including from the UN, are routinely denied access to illegal detention facilities by the military and state security services.<sup>194</sup> The UNJHRO for example regularly reports having been denied access to a range of detention facilities, most notably those of the ANR.

#### INSECURITY IN PRISONS

Prison inmates in the DRC are widely referred to as “voluntary prisoners” given the ease with which they can escape. In Beni, Amnesty International was informed by the Mayor of the town that he was preparing to intervene to ensure that the prison door would be put back on.<sup>195</sup>

The state authorities, notably the police and the army, provide minimal support in terms of staff to prisons – the prison in Bukavu, with its inmate population of 1,207, had only nine military personnel and five police personnel assigned to it on the day of Amnesty International's visit.<sup>196</sup> As a result prisoners themselves control the prisons through a hierarchical system which is headed by one prisoner who is chosen as the leader for a determined period, usually on the basis of how long the prisoner has been held there. One inmate held without trial in the Central Prison in Bukavu for more than six years told Amnesty International: “we make the law here”.

The fact that civilian and military detainees are held together increases the risks of violence. Prison escapes are common as is internal violence. In June 2009 a riot broke out in the Goma Central Prison with male inmates breaking into the female sector and raping at least 20 female detainees; one prisoner was killed.<sup>197</sup>

As a result of prison escapes, few convicted prisoners serve their full sentences. It appears that most of those sentenced to prison by military courts for crimes under international law have since escaped, although the lack of statistics makes this difficult to confirm.

Many NGOs interviewed by Amnesty International described the damage this does to the credibility of the judicial system and the extent to which it deters people from seeking justice. Victims, magistrates and lawyers have legitimate fears of reprisals from freed or escaped perpetrators, further undermining people's willingness to lodge complaints.

#### KEY RECOMMENDATIONS

- The government should ensure that sufficient prisons are built to end overcrowding and that conditions are brought into line with international standards.
- Inmates must be provided with adequate food, medical care, sanitary facilities and exercise;
- Detainees should be held separately from convicted prisoners, by ensuring sufficient facilities, developing clear prison records and by requiring this in law.
- Separate and secure prison accommodation for women and offenders under the age of 18 should be provided, as a matter of priority and the situation of pregnant women as well as women imprisoned with their infants should be improved, in conformity with the UN Rules for the Treatment of Women Prisoners.
- Criminal justice processes for children under 18 should be specially designed to conform with international standards, emphasizing the well-being of children and a proportionate response to the offenders and their offence.
- Children under 18 who are awaiting trial or serving sentence should be held separately from adults.
- Existing military and civilian prisons should be upgraded to ensure that no one can escape, including by providing adequate, regularly and sufficiently paid and trained security personnel;
- All unofficial military, police and intelligence service detention centres that are outside the supervision of a competent and legally-established judicial authority should be closed.
- Court rulings ordering the release of detainees should be implemented without delay.
- A centralized register of all detainees should be developed and maintained available for public access, detailing the date of orders of arrest and detention, the authority issuing such orders and all transfer, release and revocation orders.
- The current civilian and military prison inspection system should be improved so that it can ensure that these recommendations are promptly and effectively implemented, including through unannounced visits with complete, confidential access to prisoners in all places of detention in accordance with international standards.

- One or several independent national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment for all places of detention where someone may be deprived of liberty should be established in accordance with the obligations under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment acceded to by DRC on 23 September 2010.
- Unrestricted and unhindered access to all detention facilities should be guaranteed to national and international human rights monitors and judicial monitors.

## 4. THE SPECIALIZED COURT AND ITS IMPACT ON THE CONGOLESE JUSTICE SYSTEM

Amnesty International believes that reform of the DRC justice system is the long-term and sustainable way to tackle impunity for crimes under international law. New transitional justice mechanisms, both judicial and non-judicial, may complement justice system reform. For example, they can pursue truth-seeking and reconciliation in ways that criminal prosecutions cannot. Such mechanisms should also be complemented by a comprehensive reparation programme for victims. However, any new judicial mechanism must be part of a comprehensive strategy to rebuild the national criminal justice system. If hybrid or internationalized courts<sup>198</sup> are established, they must therefore include an explicit mandate to contribute to national justice reform.

Both processes – establishing internationalized courts and reforming the national criminal justice system – must be mutually reinforcing. The internationalized courts are meant to be integrated in the national justice system. The degree of integration depends on the model applied, ranging from a special court created by an international agreement such as in the case of Sierra Leone to special “chambers” grafted onto the existing national courts. The benefits flowing from new mechanisms outside the established national system are unlikely to be sustained if they do not feed into and are not supported by significant direct reforms of the national system.

The DRC Minister of Justice’s response to the UN Mapping Report and his apparent willingness to engage in the establishment of a Specialized Court with both national and international components are positive: they signal a recognition for the need to include new measures in the fight against impunity.

The creation of a Specialized Court in the DRC is one of the transitional justice options recommended in the UN Mapping Report. While the draft law of January 2011 envisaged the establishment of Specialized Chambers, the revised version of May 2011 refers to the creation of a Specialized Court.<sup>199</sup>

Such a court will have to respect a series of essential principles in order for it to be an efficient mechanism to end impunity and secure justice, access to the truth, and full reparations for victims of crimes under international law.<sup>200</sup> It must be able to try all crimes under international law, and those crimes must be defined in accordance with international standards. It must be able to try any accused person, including members of the armed forces. Existing constitutional and legal provisions that give military courts exclusive jurisdiction over crimes committed by members of the armed forces must be repealed. The court must be able to investigate and prosecute crimes under the principle of command and

superior responsibility, which should be defined as equally applicable to military commanders and civilian superiors. Crucially, the court must be part of a long-term initiative to rebuild the national justice system.<sup>201</sup>

In order for the Specialized Court in the DRC to contribute effectively to efforts to enhance the national criminal justice system, particular attention must be paid to several potential risks and pitfalls. These include draining the domestic system of capacity as local professionals are drawn into it and diverting the focus away from investment in the necessary national criminal justice reforms.<sup>202</sup> The failure to include the Specialized Court into a comprehensive strategy for justice risks creating a two-tier system for prosecuting crimes under international law, where victims would be treated differently according to the identity of the perpetrator or the date of the crimes. This risk was raised by several people involved in the reform of the justice system in the DRC interviewed by Amnesty International. It is particularly serious in a context where such a court can only address a proportion of the international crimes committed, given the scale of the crimes and the number of perpetrators in the DRC. A two-tier system would have detrimental effects on the overall efforts to combat impunity in the DRC.

### LACK OF LINKS WITH THE NATIONAL JUSTICE SYSTEM

Consideration of the Specialized Court as part of a broader effort to reform the criminal justice system is currently limited in the DRC. A key individual involved in discussions indicated that there is no real or concrete linkage at this point between this and other reform projects, stressing more generally that transitional justice initiatives and reforms of the justice system are kept in separate categories.<sup>203</sup> While this lack of attention may be partly explained by the fact that the current justice reform projects were developed before debate started over a specialized mechanism, donors interviewed by Amnesty International are clearly currently primarily concerned about whether or not this transitional justice mechanism will be independent and not whether it will have an impact on the national criminal justice system. There have been, however, some discussions among donors on the issue of remuneration of international and local staff.

Similarly, recent debates on the specialized mechanism have in many ways overlooked the question of how it will reinforce the national criminal judicial system. The draft bill contains articles on the presence of international staff within the Specialized Court and on the auxiliary judicial staff assigned to this Court.<sup>204</sup> However, it contains no provisions specifically addressing how the Specialized Court might enhance the national justice system, such as the possible creation of a training unit.

This lack of consideration of measures to ensure that the Specialized Court will have a positive impact on the domestic justice system may stem from the assumption that the presence of international staff would automatically bring benefits to the national justice system. However, cooperation between international experts and local judges within such a mechanism may have only limited effects, for example if those local judges do not join the ordinary courts afterwards.

Discussions so far have favoured the Specialized Court being removed from the normal hierarchy of the ordinary courts in order to guarantee its independence.<sup>205</sup> While this

approach is justified by the risk of political and military interference and the current state of the DRC justice system, it will call for creative and innovative ways of linking the Specialized Court to the national justice system.

## KEY ELEMENTS FOR LONG-TERM IMPACT

Both the statute of the Specialized Court and the strategies developed around it should be considered in the light of the need to reform and reinforce the national criminal justice system. Lessons can be learned from the experiences of past and current hybrid jurisdictions such as in Bosnia and Herzegovina, Timor-Leste, Cambodia, Sierra Leone and Kosovo in terms of effects on the domestic justice system. All components of the proposed new mechanism should be examined to determine their potential long-term and sustainable impact on the DRC justice system, not only at the level of international judges and prosecutors.

The following elements are key.

### LINKS TO THE NATIONAL JUSTICE SYSTEM

The articulation between the Specialized Court and the national criminal justice system depends to a large extent on the degree to which court is part of the domestic judicial apparatus. At this point the new version of the draft law envisages a Specialized Court with separate sections located in various appeal courts and its own prosecutor and president. This would contribute to ensuring the independence of the internationalized mechanism and consistency of policies.

It is important that the judges and other personnel of the Specialized Court are not isolated from the rest of the criminal and civil justice system – the investment in and experience gained in this body must have a positive impact on the national justice system as a whole.

Formally, staff working in a Specialized Court would be separate from the rest of the justice system in that they would part of a distinct structure. However, proper mechanisms should be put in place to ensure transfer of knowledge and experience. Creating sections of the Specialized Court within appeal courts could help to bridge the two institutions. Furthermore, additional machinery must be put in place to ensure a proper interaction between the Specialized Court and the national courts to avoid creating a complete separate institution.

### CAPACITY-BUILDING

The international component of a “hybrid” mechanism can build the capacity of local personnel to undertake prosecutions of crimes under international law. The extent of the international presence and the role of international staff in the Specialized Court are still under discussion. Whether they play a role as judges, prosecutors and investigators or only as advisers, trainers or monitors, international personnel should be involved at all stages of the criminal chain, from investigations to witness protection. Likewise, local personnel should be involved at every level of the proceedings.

For example, if special witness protection units are established for the Specialized Court, as recommended by Amnesty International, these units should initially be managed by experts in witness protection, drawing on the best possible experience from around the world. They

should work with national staff who can be trained to build up efforts to develop a long-term witness protection system throughout the DRC.

The short-term gain in expertise that foreign judges, prosecutors and other experts may bring must benefit the whole criminal justice system by building the capacity of local judges and lawyers in this specialized area of law.

If international personnel are to serve as judges, prosecutors and forensic experts and not merely as advisers in the Specialized Court, several steps should be taken to ensure that the best possible individuals are selected for such posts. They should include people qualified to participate in training sessions and exchange of information with local personnel. Similarly, the recruitment of local staff should include experienced magistrates and other local personnel such as police who have been involved in investigations and prosecutions of crimes under international law in the DRC.

There should be intensive capacity-building programmes and a training unit in charge of training local staff and ensuring transfer of skills and knowledge on a regular basis. Among the areas covered should be the development of the jurisprudence of the Specialized Court and investigation techniques. This unit should cover both training and exchange of knowledge within the Specialized Court and between its staff and local personnel from the national justice system. Furthermore, it should target lawyers and police as well as judges and prosecutors.

The training should include exchange of knowledge to allow the international personnel to benefit from the experiences of national judicial personnel.

Differences of remuneration between international staff and local staff working within the Specialized Court may affect the success of a capacity-building programme. The risk that DRC staff would be frustrated in the event of a significant gap in remuneration was mentioned repeatedly by Congolese judges and prosecutors interviewed by Amnesty International. The past experiences of other hybrid courts show that such a gap could hamper good working relations and damage capacity-building activities.

#### SUSTAINABILITY

The risk of draining domestic capacity through local professionals moving to the Specialized Court and then leaving the DRC to work abroad was highlighted in several interviews Amnesty International conducted. It is not just a question of remuneration, but also related to the overall conditions of service, which will doubtless be significantly better in the internationalized mechanism than in the national justice system. The risk is that once local staff have gained experience within the Specialized Court, they will be reluctant to rejoin the national justice system.

This underlines the need to introduce measures to ensure that the Specialized Court does not damage the domestic justice system. To guarantee that newly trained local staff remain in the DRC so that the local judiciary benefit from their experience, the national criminal justice system must be improved and reformed. This would include raising salaries of judges and prosecutors and offering them continuing education and training in partnership with international staff working in the Specialized Court.



## JURISDICTION AND PROSECUTION POLICY

Due to the scale of crimes under international law committed in the DRC and the number of perpetrators, the jurisdiction of any specialized mechanism must be seen as complementary to that of national courts and to that of the ICC. The ICC can only investigate and prosecute a handful of people suspected of committing crimes under international law in the DRC since 2002. Although investigations and prosecutions in other states exercising universal jurisdiction are not limited by that date, it is likely that police and prosecutors in other countries will only pursue a similar number of cases. Furthermore, as documented in this report, the national criminal justice system faces a huge backlog of crimes under international law committed in the DRC.

In order to tackle impunity for past and current crimes in the DRC, the specialized mechanism should therefore not have exclusive jurisdiction over crimes under international law. The comprehensive justice strategy should ensure that national courts take on an increasing number of cases involving crimes under international law during the time that the specialized mechanism carries out its functions. This would also contribute to the development of a more consistent jurisprudence on prosecution of international crimes between the specialized mechanism and the national courts.

In addition, a comprehensive prosecution policy is needed to prioritize prosecutions of the huge number of people identified in DRC investigations as suspected perpetrators of crimes under international law. Such an overall prosecution strategy should not be limited to the work of the Specialized Court but should also take into account the mandates and jurisdiction of the Congolese courts and the ICC to ensure that crimes under international law committed in the DRC are investigated and prosecuted. Such a prosecution strategy should be included in the comprehensive justice strategy. This prosecution strategy should be based on clear and objective criteria on the selection and prioritization of cases to address practical challenges such as the potential interference of the military as well as to avoid politically motivated prosecutions or the suspicion of political interference in the prosecution process.

In determining which cases should be prosecuted first, the most important criteria include: the extent to which prosecutions can take place without endangering victims and witnesses; the age of the victims and witnesses (justice should be achieved while they are still alive); and the scale and gravity of the crimes committed. For example, some crimes under international law should not be prosecuted in the communities where they were committed if the protection of victims and witnesses cannot be guaranteed; the cases should be transferred to the internationalized mechanism. Of course, giving priority to investigating certain suspects before others does not mean that the others should not be prosecuted; it only means that in allocating time and resources, certain suspects should be investigated and prosecuted at the beginning of the anticipated 10- to 15-year period that such prosecutions will continue and others at later dates.

There should be no limitation on investigations and prosecutions based on the level of responsibility, such as limiting jurisdiction to only those bearing the greatest responsibility. The current draft law contains a provision (Article 16 para. 2) that provides the Specialized Court with the power, in cases where the facts are not grave enough and that the perpetrators are not among those bearing the greatest responsibility, to transfer those cases to relevant ordinary jurisdictions.<sup>206</sup> This article should not lead to some cases being avoided or ignored.

As far as possible, all those responsible for crimes under international law should be brought to justice and all cases should be investigated and prosecuted.

#### OUTREACH

In order for the Specialized Court to have an impact on the wider population, including on its perceptions of justice and impunity, an outreach strategy is vital. This would also be a way of involving victims and other stakeholders in order to ensure a sense of legitimacy and ownership. Outreach would require sharing information about the Specialized Court and its work. It could include training local media personnel, producing audio and video materials, nationwide activities and community meetings. Ultimately, such outreach could contribute to promoting a culture of rule of law in the DRC. This should form part of the wider national outreach strategy that Amnesty International believes is essential for overcoming impunity for crimes under international law in the DRC.

#### KEY RECOMMENDATIONS

- The DRC Parliament and relevant authorities should revise the draft law and broaden the mandate of the Specialized Court to include local justice reform.
- International and local staff should be involved at all levels and stages of the internationalized mechanism.
- The draft law and operational plan currently being developed for the internationalized mechanism should include measures to ensure that it brings long-term and sustainable improvements to the national justice system, notably:
  - the establishment of intensive capacity-building programmes, including the creation of a training unit within the internationalized mechanism ensuring mutual exchange of knowledge and professional development between international and local staff;
  - technical mechanisms such as a rotating system to ensure that experienced local staff who have worked within the internationalized mechanism are replaced by newly trained staff from the national justice system;
  - appropriate remuneration for local staff working within the internationalized mechanism.
- The draft law and operational plan currently being developed should include a robust outreach strategy targeting all categories of stakeholders as well as victims and communities, using media and other nationwide means of sharing information.
- A long-term prosecution strategy should be developed on the basis of clear and objective criteria to ensure that all efforts to tackle impunity are complementary and as comprehensive as possible.

## 5. CONCLUSION AND RECOMMENDATIONS

The Congolese population continues to suffer as a result of decades of grave abuses and their consequences. Mass rapes, killings, torture and other crimes are still being perpetrated, especially in the east, with virtually total impunity. The people's need for justice is undeniable: impunity fosters cycles of violence and violation, undermines confidence in the justice system and the state and prevents victims and their families from gaining accountability and reparation.

Despite efforts by both the DRC authorities and the international community to reinforce the criminal justice system and fight impunity, the Congolese population is still denied justice, truth and reparation. So far, these efforts have failed to ensure sustainable improvements within the criminal justice system. To date the DRC authorities have not shown the clear political and financial commitment necessary to respond to the Congolese population's need for justice. Significant gaps within current reform efforts have left national and international NGOs the only providers of services which are the responsibility of the state.

Justice reform and eradicating entrenched impunity must become a priority for the government and the international community before and after the November 2011 elections.

Amnesty International believes that the development of a long-term comprehensive justice strategy to establish a strong, effective and credible national criminal justice system is crucial to ending impunity for crimes under international law and securing reparation for victims and their families in the DRC.

This comprehensive, long-term justice strategy should prioritize flaws within the current system that are neglected in existing policy, programmes and discourse – flaws which impede the system's ability to deal with crimes under international law.

It should therefore include efforts to bring national legislation into conformity with international standards, notably by excluding the death penalty and by ensuring that civilians, and all those suspected of crimes under international law, are tried in civilian, not military courts. It should encompass measures to ensure that victims and their families are able and willing to take part in the judicial process and seek justice, truth and reparation; that the judiciary is able to act independently; that fair trial standards are met; and that judgments are enforced, which requires, among other things, reform of the prison system.

In light of recent developments towards establishing a Specialized Court, Amnesty International acknowledges the part such a mechanism may play in overcoming impunity. However, any such mechanism must be part of a long-term comprehensive justice strategy if it is to bring sustainable improvement. It must include an explicit mandate to contribute to the reform of the local justice system.

In order to ensure that the comprehensive justice strategy is developed in an inclusive and consultative manner, Amnesty International calls on the DRC authorities to organize an international conference, with the assistance of the UN. This initial conference should be followed by much wider consultations with local participants, notably civil society, the judiciary and victims' groups, over the different areas of reform.

Amnesty International also calls on key participants in the justice sector to ensure that an effective system of coordination between the authorities, international entities and donors is included within the long-term comprehensive strategy.

## RECOMMENDATIONS

### To the DRC government

- Convene without undue delay, with the assistance of the UN, an international conference to initiate the development of a long-term comprehensive justice strategy aimed at reforming the criminal justice system. Invite to this conference the national authorities, civil society and victims' representatives, including women, interested states, and intergovernmental organizations.
- This conference should be the first in a series of much more extensive and inclusive consultation processes that should take place throughout the country. These consultations should include local participants, notably members of civil society including women, the judiciary, and victims' groups.
- Develop a long-term comprehensive justice strategy:
  - in close consultation with national and international experts and civil society and victims' representatives;
  - with the aim of establishing a strong, effective and credible national justice system that can ensure that crimes under international law committed in the DRC are fully investigated and those responsible prosecuted in proceedings that meet international standards of fair trials and respect the dignity of survivors.
  - which will lead to training and recruitment of staff, which ensures a fair representation of men and women at all levels, including the judiciary.
  - The long-term comprehensive strategy should seek to:
    - finalize legal reform, notably by ensuring national legislation is in line with the 2006 Constitution and international standards;
    - establish an independent or autonomous victim and witness protection program with the technical and financial capacity to provide effective protection and support to victims throughout the DRC; providing protection to victims and witnesses from the very start of investigations, not just at trial; victims and witnesses with particular

needs, such as human rights defenders, women, and those who have dependent children should receive effective protection according to their circumstances;

- develop a nationwide outreach strategy to inform the population on how victims and their families can engage with the justice system;
  - ensure the independence of the judiciary and reinforce independent oversight mechanisms, notably the Supreme Council of the Judiciary (CSM);
  - ensure that suspects are tried in proceedings that fully respect international fair trial standards;
  - develop a comprehensive reparation programme to provide full and effective reparation including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition to victims of crimes under international law,
  - ensure that sufficient, secure prisons are built and improve conditions to meet international standards.
- Commit to significantly increasing the allocated budget for the justice system, and ensuring that this budget is disbursed in a timely and regular fashion throughout the system. Among other things, an effective legal aid programme for people without means should be established and maintained and all existing reparation orders against the state and others should be enforced.
- Ensure that the draft law and operational plan currently being developed for the Specialized Court includes concrete measures to ensure that it has a long-term and sustainable impact on the national justice system.
- Develop a prosecution strategy on the basis of clear and objective criteria to ensure that all efforts to tackle impunity are complementary and as comprehensive as possible.

#### **To the DRC government and parliament**

- Ensure that law reform takes place in a timely manner and ensure harmonization of existing and new laws, taking into account international standards.
- Ensure that DRC law provides for civilian courts to have exclusive jurisdiction over all those, military or civilian, suspected of crimes under international law.
- Abolish the death penalty without exception.
- Ensure prompt adoption and enactment of a law establishing an effective national victim and witness protection programme with the capacity and resources to provide protection and support to victims throughout the DRC.
- Adopt and enact legislation to implement the Rome Statute of the International Criminal Court, in accordance with Amnesty International's recommendations.<sup>207</sup>

- Revise the draft law on the Specialized Court to include concrete measures to ensure that it has a long-term and sustainable impact on the national justice system.
- Support the establishment by the UN Human Rights Council of a country mandate on the DRC with a technical focus on assisting the DRC government in the implementation of UN recommendations aimed at reforming the justice system and tackling impunity.

#### **To the United Nations**

- Support, via the OHCHR and other UN agencies with technical knowledge in the area, the organization of an international conference by the DRC government to initiate the development of a long-term comprehensive justice strategy aimed at reforming the criminal justice system to which civil society and victims' representatives, members of the national authorities, interested states, and intergovernmental organizations should be invited.
- Offer financial and technical support to ensure that a comprehensive, long-term justice strategy is developed.
- Take proactive measures to resolve the flaws undermining the functioning of the Mixed Justice Committee (CMJ) give it the tools to implement the comprehensive justice strategy and enable it to effectively undertake a coordination role in donor's programmes.
- Support efforts to ensure that the draft law on the Specialized Court and its operational plan include concrete measures to ensure a long-term and sustainable impact on the national justice system.
- Assist in developing a prosecution strategy on the basis of clear and objective criteria to ensure that all efforts to tackle impunity are complementary and as comprehensive as possible.

#### **To the international community**

- Call on the DRC government to organize an international conference, with the support of the OHCHR, to initiate the development of a comprehensive, long-term justice strategy aimed at reforming the criminal justice system to which civil society and victims' representatives, members of the national authorities, interested states, and intergovernmental organizations should be invited.
- Encourage and assist the government with the organization of inclusive country-wide consultation processes on the development a comprehensive justice strategy.
- Ensure a more concerted, comprehensive and long-term approach between donors to the reform of the justice system, in line with developments at the policy level.
- Provide the necessary financial support for the reform of the criminal justice system in the DRC and ensure this support feeds into a long-term comprehensive strategy for judicial reform without overlooking key areas of the system, in particular, witness protection, nationwide outreach, the independence of the judiciary and reparation.

- Take proactive measures to resolve the flaws undermining the functioning of the Mixed Justice Committee, give it the tools to effectively implement the long-term comprehensive justice strategy and enable it to effectively undertake a coordination role in donor's programmes or replace the Mixed Justice Committee and establish a new coordinating entity.
- Ensure that the draft law on the Specialized Court and its operational plan include concrete measures to ensure a long-term and sustainable impact on the national justice system.
- Assist in developing a prosecution strategy on the basis of clear and objective criteria to ensure all efforts to tackle impunity are complementary and as comprehensive as possible.
- Provide long-term and sustained resources to local organizations supporting victims and defending human rights, to enable them to plan their work over the longer term and to spread information about good practices across the DRC.

## ENDNOTES

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<sup>1</sup> Crimes under international law are crimes by individuals that are defined by international law itself and that international law permits or requires states to punish.

<sup>2</sup> See for example, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, [http://www.ohchr.org/Documents/Countries/ZR/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf), last accessed 2011. Hereafter UN Mapping Report.

<sup>3</sup> The 2006 presidential and legislative elections were the first multi-party elections in over 40 years. They marked the end of a three-year transitional period in which power had been shared between the former government, former armed groups, the political opposition and civil society. The November 2011 elections will be the second. The presidential elections are planned to take place on 28 November 2011 according to the electoral calendar that was published on 30 April 2011 by the new electoral commission (Commission Électorale Nationale Indépendante).

<sup>4</sup> See for example, Report by the Secretary-General, The Rule of Law and transitional justice in conflict and post-conflict societies, (S/2004/616), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>, last accessed 1 May 2011. Hereafter Secretary-General's 2004 Report S/2004/616.

<sup>5</sup> The DRC government announced a zero-tolerance policy for crimes committed by the Congolese army in July 2009.

<sup>6</sup> UN Security Council resolution 1925, May 2010, article 12 (o).

<sup>7</sup> For the purpose of this report, the expressions "national justice system" and "national criminal justice system" will be used to describe the components of the justice system relevant to dealing with crimes under international law.

<sup>8</sup> See for example Secretary-General's 2004 Report S/2004/616, para 8.

<sup>9</sup> Opening Statement by Navanethem Pillay, United Nations High Commissioner for Human Rights, 17th Session of the Human Rights Council, Geneva, 30 May 2011.

<sup>10</sup> "Hybrid" courts combine local and international components. Currently, the term "hybrid" is used to describe seven jurisdictions created between 1999 and 2006 in Timor Leste, Kosovo, Sierra Leone, Cambodia, Iraq, Bosnia-Herzegovina and Lebanon.

<sup>11</sup> See Amnesty International's comments on the second version of the government proposal for a set of Specialized Chambers with jurisdiction over crimes under international law (*Avant-Projet de Loi relative aux Chambres spécialisées pour la répression des violations graves du droit international humanitaire*). Amnesty International, Memorandum on Special Chambers in the DRC, February 2011 (Index: AFR 62/003/2011).

<sup>12</sup> See, *Loi organique portant création, organisation et fonctionnement d'une Cour spécialisée*, May 2011. In June 2011 the Minister of Justice submitted the version of the draft law of January 2011 to the Parliament, together with a revised version of the draft law sent by the Permanent Commission of



Reform of Congolese Law. At the time of writing Amnesty International was informed that the Ministry of Justice will be submitting a version of the draft law on the Specialized Court revised in July 2011 to the Council of Ministers for adoption to replace the version submitted to the Parliament.

<sup>13</sup> The DRC has committed itself to implement Security Council resolution 1325, and a series of related resolutions (SCR 1820 (2008); SCR 1888 (2009); SCR 1889 (2009); and SCR 1960 (2010)), in a National Action Plan (Plan d'Action du Gouvernement de la République Démocratique du Congo pour l'application de la Résolution 1325 du Conseil de Sécurité des Nations Unies, Janvier 2010, <http://peacewomen.org/pages/about-1325/national-action-plans-naps> ). Security Council Resolution 1889, among other things, "[e]ncourages Member States in post-conflict situations, in consultation with civil society, including women's organizations, to specify in detail women and girls' needs and priorities and design concrete strategies, in accordance with their legal systems, to address those needs and priorities, which cover inter alia support for [...] gender-responsive law enforcement and access to justice, as well as enhancing capacity to engage in public decision-making at all levels".

<sup>14</sup> The CMJ was created to support the Ministry of Justice in the justice reform sector as a coordinating body composed of the various relevant Ministries and representatives of the international community, including the European Union and the UN. It was established following a 2004 European Union audit of the justice system in the DRC.

<sup>15</sup> See for example: Amnesty International, *Democratic Republic of Congo: Mass Rape: Time for remedies*, October 2004, (Index: AFR 62/018/2004), <http://www.amnesty.org/en/library/info/AFR62/018/2004/en>

<sup>16</sup> See for example: Amnesty International *Democratic Republic of Congo: Children at War*, September 2003, (Index: AFR 62/034/2003), <http://www.amnesty.org/en/library/info/AFR62/034/2003/en>; Amnesty International, *Democratic Republic of Congo: Children at war - Creating hope for their future*, October 2006, (Index: AFR 62/017/2006).

<sup>17</sup> See for example: Amnesty International, *Making a Killing. The diamond trade in government-controlled DRC*, October 2002, (Index: AFR 62/017/2002), <http://www.amnesty.org/en/library/info/AFR62/017/2002/en>

<sup>18</sup> UN Mapping Report, p. 11-12.

<sup>19</sup> The CNDP, a Congolese armed group, was created in 2006 by General Laurent Nkunda. In 2009, the group was integrated in the army, registered as a political party and changed leadership: General Nkunda was arrested on 22 January 2009 and replaced by Bosco Ntaganda, who was indicted by the ICC in 2006 on charges of war crimes. In spite of its integration in the national army, the CNDP remains very powerful in the north Kivu province, as a result of support from neighbouring Rwanda, and it has retained a distinct chain of command. The CNDP is perceived by many in the local population as the continuation of the Congolese Democratic Rally (Rassemblement Congolais pour la Démocratie), the rebel group which controlled part of eastern DRC during the second Congolese War (1998-2003).

<sup>20</sup> The FDLR is an armed opposition group operating in eastern DRC mainly composed of Rwandan Hutu. It contains remnants of the Interahamwe and former Rwandan soldiers responsible for the 1994 Rwandan genocide, as well as fighters not involved in the genocide, including many too young to have participated in the genocide.

<sup>21</sup> Mayi Mayi are local Congolese militia groups.

<sup>22</sup> See for example: Amnesty International, *Democratic Republic of Congo : Torture and Killings by state security agents endemic*, October 2007, (Index: AFR 62/012/2007), <http://www.amnesty.org/en/library/info/AFR62/012/2007/en>

<sup>23</sup> “Amani Leo” is the code name for the military operation, officially launched on 1 January 2010, led by the FARDC, with MONUSCO support, against armed groups including the FDLR in North and South Kivu provinces. It follows two earlier military operations carried out in 2009: “Umoja Wetu”, a Congolese operation jointly led with the Rwandan army and “Kimia 2”, an operation conducted by the Congolese army, with the support of MONUC (the previous name of the UN peacekeeping operation in DRC).

<sup>24</sup> UN Mapping Report, para. 893, note 1555.

<sup>25</sup> UN Mapping report p. 422.

<sup>26</sup> UN Mapping Report, para. 551.

<sup>27</sup> UN Mapping Report, paras. 969 – 972.

<sup>28</sup> Arrest warrant under international law, issued by examining magistrate Vandermeersch (Belgium) against Mr. Abdulaye Yerodia Ndombasi, dated 11 April 2000. This warrant was subsequently quashed after the International Court of Justice ruled that the foreign minister was immune from prosecution in a foreign court. *Democratic Republic of the Congo v. Belgium*, ICJ Rep., 14 February 2002.

<sup>29</sup> Judgment of Rotterdam District Court (Netherlands), 7 April 2004 against Colonel Sébastien Nzapali. See also Trial, ‘Sébastien Nzapali – Legal procedure’ ([http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx\\_ibtrial\\_pi2%5Btab%5D=legal-procedures&tx\\_ibtrial\\_pi2%5Bprofile%5D=sebastien\\_nzapali\\_47&cHash=1aa9c9dce9](http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_ibtrial_pi2%5Btab%5D=legal-procedures&tx_ibtrial_pi2%5Bprofile%5D=sebastien_nzapali_47&cHash=1aa9c9dce9)) .

<sup>30</sup> Spanish arrest warrants against 40 officers in the Rwandan army, “Juzgado Nacional de Instrucción n. 4, Audiencia Nacional, Madrid”, 6 February 2008.

<sup>31</sup> ICC Rome Statute, arts. 59, 86 and 89. See also Secretary-General’s 2004 Report, S/2004/616, para. 64 (j): “Insist upon full governmental cooperation with international and mixed tribunals, including in the surrender of accused persons upon request”.

<sup>32</sup> For more information see Amnesty International, *Democratic Republic of Congo: Addressing the present and building a future*, November 2003, (Index: AFR 62/050/2003); Borello, Federico and International Centre for Transitional Justice, *A few steps: The long road to a just Peace in the Democratic Republic of Congo*, 2004, [www.ictj.org/images/content/1/1/115.pdf](http://www.ictj.org/images/content/1/1/115.pdf) , last accessed 27 April 2011.

<sup>33</sup> For a more comprehensive analysis of truth and reconciliation commissions worldwide see, Amnesty international, *Commissioning Justice: Truth commissions and criminal justice*, April 2010, (Index: POL 30/004/2010, Available at: <http://www.amnesty.org/en/library/info/POL30/004/2010>

<sup>34</sup> Article 41 of the TRC law states: “At every time and in every circumstance, reparations are decided by an agreement between the parties. The agreements concluded under the aegis of the TRC on reparations or restitution have the value of a contract and, as such, the value of res judicata.” For more information see: Jeremy Sarkin, “Reparations for Gross Human Rights Violations in Africa – The Great Lakes”, in Ed. Max du Plessis and Stephan Pete, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Intersentia (2007), p. 209-210.

<sup>35</sup> UN Mapping Report, p. 478.

- <sup>36</sup> US State Department, *2010 Country Reports on Human Rights Practices: Democratic Republic of Congo (DRC)*, p. 27, <http://www.state.gov/g/drl/rls/hrrpt/2010/index.htm>, last accessed 2 May 2011.
- <sup>37</sup> Please see the Ministry of Justice website for more information on the Action Plan [http://justice.gov.cd/i/index.php?option=com\\_content&task=view&id=46&Itemid=9](http://justice.gov.cd/i/index.php?option=com_content&task=view&id=46&Itemid=9)
- <sup>38</sup> Amnesty International interview with the Deputy Head of Cabinet in charge of judicial reform and governance, Ministry of Justice, March 2011.
- <sup>39</sup> Amnesty International interview with the Deputy Head of Cabinet in charge of judicial reform and governance, Ministry of Justice, March 2011.
- <sup>40</sup> Programme de Stabilisation et de Reconstruction des Zones sortant des conflits armés, June 2009.
- <sup>41</sup> For a more detailed description of current justice and rule of law programmes please see OSI, *Putting complementarity into practice: domestic justice for international crimes in DRC, Uganda and Kenya*, 2011. [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf), last accessed 18 May 2011.
- <sup>42</sup> Amnesty International interview with UNJHRO, Goma, December 2010.
- <sup>43</sup> Resolution 1925 (2010) extended the mandate of MONUC, henceforth MONUSCO, until June 2011. At the time of writing, discussions were ongoing at the UN Security Council for the renewal of MONUSCO's mandate beyond June 2011.
- <sup>44</sup> UNSC resolution 1925, article 12 (o).
- <sup>45</sup> Phone interview by Amnesty International with MONUSCO, February 2011.
- <sup>46</sup> UNSC resolution 1925, article 12 (d).
- <sup>47</sup> Amnesty International interview with MONUSCO Rule of Law Unit, Kinshasa, March 2011.
- <sup>48</sup> Amnesty International interview with EU representative, Kinshasa, March 2011.
- <sup>49</sup> Amnesty International interview with USAID, Bukavu and Kinshasa, March 2011.
- <sup>50</sup> Amnesty International interview with ASF, Kinshasa, March 2011.
- <sup>51</sup> Amnesty International interview with RCN - Démocratie et Justice, Kinshasa, March 2011.
- <sup>52</sup> Amnesty International interview with ABA, Bukavu and Goma, March 2011.
- <sup>53</sup> Principle 5 (Jurisdiction of military courts to try civilians) of the Draft principles governing the administration of justice through military tribunals, Issue of the administration of justice through military tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, UN Doc. E/CN.4/2006/58, 13 January 2006, provides: "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts." See also African Commission on Human and Peoples' Rights, *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*, Principle G(c), [http://www.achpr.org/english/declarations/Guidelines\\_Trial\\_en.html](http://www.achpr.org/english/declarations/Guidelines_Trial_en.html).

<sup>54</sup> See for example, Ruling of the South Kivu Military Court, sitting as mobile court in Baraka, 21 February 2011 and the ruling of the Military Garrison Tribunal of Kisangani, sitting as mobile court in Opala, 14 May 2011 where six policemen were convicted of crimes against humanity, pillage and arbitrary arrest.

<sup>55</sup> Military Penal Code, Art. 161: "En cas d'indivisibilité ou de connexité d'infractions avec des crimes de génocide, des crimes de guerre ou des crimes contre l'humanité, les juridictions militaires sont seules compétentes."

<sup>56</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, para. 29.

<sup>57</sup> Draft Principles Governing the Administration of Justice through Military Tribunals, E/CN.4/2006/58, Principle 9. See also African Commission on Human and People's Rights, Principles and Guidelines on the right to a fair trial and legal assistance in Africa, Principle G(A) [http://www.achpr.org/english/declarations/Guidelines\\_Trial\\_en.html](http://www.achpr.org/english/declarations/Guidelines_Trial_en.html) .

<sup>58</sup> Constitution, Art. 156.

<sup>59</sup> Military Justice Code, Arts. 108 – 112.

<sup>60</sup> Amnesty International interview with Congolese civil society organizations, Goma, December 2010. See also, Afrimap/OSISA, *Democratic Republic of Congo: Military Justice and Human Rights: An urgent need for complete reforms*, 2010, pp. 44-47; and UN Mapping Report, pp. 432-434.

<sup>61</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 77.

<sup>62</sup> Conclusions and Recommendations of the Committee against Torture, Democratic Republic of Congo, CAT/C/DRC/CO/1, 2006, para. 9.

<sup>63</sup> African Commission on Human and People's Rights, Principles and Guidelines on the right to a fair trial and legal assistance in Africa, Principle L(c), [www.afrimap.org/.../ACHPR\\_Principles&Guidelines\\_FairTrial.pdf](http://www.afrimap.org/.../ACHPR_Principles&Guidelines_FairTrial.pdf) .

<sup>64</sup> Projet de Loi Organique Portant Code Judiciaire Militaire, Arts. 117 – 125; Amnesty International interview with judicial staff, December 2010.

<sup>65</sup> Military Penal code, Art. 26.

<sup>66</sup> Military Justice Code, Arts.345 to 355.

<sup>67</sup> See Amnesty International, *International Standards on the Death Penalty*, January 2006 (Index: ACT 50/001/2006). [www.amnesty.org/en/library/asset/ACT50/001/2006/en/61251e61-d469-11dd-8743-d305bea2b2c7/act500012006en.pdf](http://www.amnesty.org/en/library/asset/ACT50/001/2006/en/61251e61-d469-11dd-8743-d305bea2b2c7/act500012006en.pdf)

<sup>68</sup> Afrimap/OSISA, *Democratic Republic of Congo: Military Justice and Human Rights: An urgent need for complete reforms*, 2010, p.63.

<sup>69</sup> See OSI, *Putting complementarity into practice : domestic justice for international crimes in DRC, Uganda and Kenya, 2011*, [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-)

[20110120.pdf](#) , last accessed 18 May 2011, pp. 27 and 29.

<sup>70</sup> Amnesty International interview with military judges and magistrates, March 2011.

<sup>71</sup> See, Avant projet de loi portant mise en œuvre du statut de la Cour pénale internationale (October 2002); Avant projet de loi portant mise en œuvre du statut de la Cour pénale internationale (July 2003); Loi modifiant et complétant certaines dispositions du code pénale, du code d'organisation et de la compétence judiciaires, du code pénal militaire et du code judiciaire militaire, en application du statut de la Cour pénale internationale (September 2005); Proposition de loi modifiant et complétant le Code pénal, le Code de procédure pénale, le Code de l'organisation et de la compétence judiciaires, le Code judiciaire militaire et le Code pénal militaire en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale (2008).

<sup>72</sup> See, for example, the following Amnesty International commentaries: *République Démocratique du Congo: Commentaires et analyse du projet de loi de la RDC portant mise en œuvre du Statut de Rome de la Cour pénale internationale*, September 2003, (Index: AFR 62/031/2003); *République Démocratique du Congo: Commentaires et recommandations du projet de loi de juillet 2003 portant mise en œuvre du Statut de Rome de la Cour pénale internationale*, May 2004, (Index: AFR 62/008/2004); *Democratic Republic of the Congo: Parliament must reform and enact International Criminal Court bill*, February 2006, (Index: AFR 62/002/2006).

<sup>73</sup> Loi de Mise en Oeuvre du Statut de Rome en RDC, submitted to Parliament by Prof. Raphaël Nyabirungu Mwene Songa and Adv. Crispin Mutumbe.

<sup>74</sup> Parliamentarians for Global Action, *Projet de loi de mise en œuvre du Statut de Rome en RDC – Commentaires de PGA*, October 2010.

<sup>75</sup> Principle 6 (d) of the United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power states: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation"; Principle 10, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law states: "Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation." See also: Article 68 (1) of the Rome Statute of the International Criminal Court and ECOSOC Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

<sup>76</sup> Principle 6 (b), Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system." See also: Article 68 (3) of the Rome Statute.

<sup>77</sup> Amnesty International interview with a women's rights NGO, Goma, March 2011.

<sup>78</sup> For background on the Walikale mass rapes see: Amnesty International, *Mass rapes in Walikale: Still a need for protection and justice in Eastern DRC*, December 2010 (Index: AFR 62/011/2010).

<sup>79</sup> Amnesty International interview with Fizi victims, April 2011, by telephone from London.

<sup>80</sup> Amnesty International interview with NGOs in Butembo, December 2010.

<sup>81</sup> Amnesty International interview with military judicial staff, December 2010.

<sup>82</sup> Article 43.6 of the Rome Statute.

<sup>83</sup> Draft Guidelines governing the relations between the Court and Intermediaries currently being considered by the ICC do, however, recognize "the Court has a duty to prevent or manage security risks to intermediaries, resulting from the intermediaries' interaction with the Court and the fulfilments of the intermediaries' functions on behalf of the Court." It is currently unclear whether that will include protection by its Victims and Witnesses Unit.

<sup>84</sup> Amnesty International interview with a human rights NGO in North Kivu, March 2011.

<sup>85</sup> Amnesty International interview with a human rights NGO in South Kivu, March 2011.

<sup>86</sup> Amnesty International with victims in North Kivu, December 2010.

<sup>87</sup> Amnesty International interview with victims in North Kivu, December 2010.

<sup>88</sup> Amnesty International interview with a human rights NGO from Ituri, Kinshasa, March 2011.

<sup>89</sup> Amnesty International interview with a military prosecutor, December 2010.

<sup>90</sup> Amnesty International interview with a judicial police officer, March 2011.

<sup>91</sup> Loi n° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais.

<sup>92</sup> See for example Amnesty International, *Democratic Republic of the Congo: Mass rape- Time for remedies*, October 2004, (Index: AFR 62/018/2004).

<sup>93</sup> Amnesty International interview with a women's rights NGO, Goma, March 2011.

<sup>94</sup> Amnesty International interview with victims from Masisi, Goma, December 2010.

<sup>95</sup> Amnesty International interview with a lawyer, Beni, December 2010.

<sup>96</sup> Amnesty International interview with a civil society organization, Butembo, December 2010.

<sup>97</sup> Projet de Loi Organique Portant Code Judiciaire Militaire, Arts. 204; Amnesty International interview with military judicial staff, December 2010.

<sup>98</sup> The UN Secretary-General has stated: "Support for reform must be cultivated among all groups in society, including elites, ex-combatants and (non-criminal) elements of former regimes, all of whom must be reassured that they will be protected from unlawful or unfair retribution and offered a real chance at reintegration into their society. Finally, in post-conflict situations and where transitional justice processes are under consideration, a particularly important constituency is the country's victims. The United Nations must assess and respect the interests of victims in the design and operation of transitional

justice measures. Victims and the organizations that advocate on their behalf deserve the greatest attention from the international community.” Secretary-General’s 2004 Report, para. 18.

<sup>99</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Principle 5 states: “Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.”

<sup>100</sup> Principle 6 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states: “The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information...”

<sup>101</sup> For society, the right to truth is recognized as a collective right which focuses on the right to know the circumstances surrounding and reasons that led to violations being committed as a safeguard against the recurrence of violations in the future, and to have their shared experiences acknowledged and preserved. See for example: Updated Set of principles for the protection and promotion of human rights through action to combat impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, U.N. Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 2; Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report prepared by Mr Joinet; E/CN.4/Sub.2/1997/20/Rev.1, 2, October 1997, at para. 17; Sierra Leone Truth and Reconciliation Commission Report, Overview, para. 27.

<sup>102</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 60.

<sup>103</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 60.

<sup>104</sup> Amnesty International interview with a judge, March 2011.

<sup>105</sup> Amnesty International interview with President of the North Kivu Bar Association, Goma, March 2011.

<sup>106</sup> Amnesty International interview with President of the South Kivu Bar Association, Bukavu, March 2011; interview with ASF, Kinshasa, March 2011.

<sup>107</sup> Amnesty International interview with human rights NGOs, Goma and Bukavu, March 2011.

<sup>108</sup> Amnesty International telephone interview with victims from Fizi, London, April 2011.

<sup>109</sup> Amnesty International interview with UNDP, Goma, December 2010; interview with ASF, Kinshasa, March 2011.

<sup>110</sup> Amnesty International interview with UNJHRO, Goma, December 2010.

<sup>111</sup> Amnesty International interview with UNJHRO, Goma, December 2011.

<sup>112</sup> Amnesty International interview with a civil judge, March 2011.

<sup>113</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Principle 5 states: “Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.”

<sup>114</sup> ICTJ, *Sensibilisation à la CPI en RDC: Sortir du « Profil Bas »*, March 2007, available at: <http://es.ictj.org/images/content/6/3/638.pdf>, last accessed 18 May 2011.

<sup>115</sup> Communications strategy for the trial of Thomas Lubanga, p.6, available at <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Outreach/Democratic+Republic+of+the+Congo/>

<sup>116</sup> *Ibid.*, p.8.

<sup>117</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Principle 6(a) states: “The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information”.

<sup>118</sup> Amnesty International follow-up interview with ASF, April 2011.

<sup>119</sup> Amnesty International interview with victims, Goma, March 2011.

<sup>120</sup> Amnesty International follow-up interview with ASF, April 2011.

<sup>121</sup> See for example Transparency International, National integrity system assessments: DRC, 2007, p. 26. [http://www.transparency.org/policy\\_research/nis/nis\\_reports\\_by\\_country](http://www.transparency.org/policy_research/nis/nis_reports_by_country), last accessed 3 May 2011.

<sup>122</sup> Article 151 states that: “Le pouvoir exécutif ne peut donner d’injonction au juge dans l’exercice de sa juridiction, ni statuer sur les différends, ni entraver le cours de la justice, ni s’opposer à l’exécution d’une décision de justice”.

<sup>123</sup> Amnesty International interview with UN Deputy Special Representative of the UN Secretary-General, March 2011.

<sup>124</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 39.

<sup>125</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 39.

<sup>126</sup> Loi organique n° 08/013 du 05 août 2008 portant organisation et fonctionnement du Conseil supérieur de la magistrature.

<sup>127</sup> See for example, UN Mapping Report, pp. 504-506.

<sup>128</sup> PARECO is a coalition of Mayi-Mayi militias which was partly integrated in the national army in March 2009.

<sup>129</sup> Amnesty International interview with UNJHRO, Goma, December 2010 and March 2011.

<sup>130</sup> UN Mapping Report, paras. 969 – 972; OHCHR, *Report by the Special Rapporteur on extrajudicial, summary, or arbitrary executions*, 14 June 2010, A/HRC/14/24/Add.3.

<sup>131</sup> Amnesty International interview with military judicial staff, December 2010 and March 2011.



<sup>132</sup> Military Justice Code, Art. 34.

<sup>133</sup> International Bar Association, *Rebuilding Courts and Trust: An Assessment of the needs of the Justice System in the Democratic Republic of Congo*, August 2009, pp. 29-30.

<sup>134</sup> UN Mapping Report, para. 963.

<sup>135</sup> See for example Afrimap/OSISA, *Democratic Republic of Congo: Military Justice and Human Rights: An urgent need for complete reforms*, 2010; UN Mapping Report, paras 942, and 956-961.

<sup>136</sup> Amnesty International interview with military judicial staff, December 2010.

<sup>137</sup> Military Justice Code, Articles 142, 182, 184, 189.

<sup>138</sup> Amnesty International interview with a military prosecutor, December 2010.

<sup>139</sup> Amnesty International interview with UNJHRO, March 2011.

<sup>140</sup> Amnesty International interview with magistrates, March 2011; interview with UNJHRO, March 2011.

<sup>141</sup> Violations de consignes et vol à main armée.

<sup>142</sup> Amnesty International meeting with magistrates, Kinshasa, March 2011.

<sup>143</sup> Amnesty International interview with representatives of an association of women lawyers, December 2010.

<sup>144</sup> Amnesty International interview with a senior lawyer, Bukavu, March 2011.

<sup>145</sup> UN Secretary-General's 2004 Report, para. 64 (b): "Respect, incorporate by reference and apply international standards for fairness, due process and human rights in the administration of justice"; para. 64 (e): "Require that all judicial processes, courts and prosecutions be credible, fair, consistent with established international standards for the independence and impartiality of the judiciary, the effectiveness, impartiality and fairness of prosecutors and the integrity of the judicial process".

<sup>146</sup> International standards regarding fair trial include those in Articles 55, 63, 65, 66, 67 and 68 of the Rome Statute, Articles 9, 10 and 11 of the Universal Declaration of Human Rights, Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), the UN Standard Minimum Rules for the Treatment of Prisoners (UN Standard Minimum Rules), the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles), Articles 7 and 15 of the UN Convention against Torture, the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, the UN Guidelines on the Role of Prosecutors, the Geneva Conventions of August 12, 1949, and their Additional Protocols I and II. Regional standards include the African Commission on Human and Peoples' Rights Principles and Guidelines on the right to a fair trial and legal assistance in Africa.

<sup>147</sup> UN Mapping Report, p 438.

<sup>148</sup> Amnesty International interviews with defence lawyer, Bukavu, March 2011.

<sup>149</sup> Article 55 on the "Rights of persons during an investigation" provides the following:

"1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 [of the Statute on International cooperation and judicial assistance], that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”

<sup>150</sup> Amnesty International interviews with representatives of Congolese civil society organizations, Butembo, December 2010 and Goma, December 2010.

<sup>151</sup> Military Justice Code, Art. 209. Article 192 of the draft law reforming the Military Justice Code (Projet de Loi Organique Portant Code Judiciaire Militaire) provides that the pre-trial detention can only be prolonged three times (for a total of 90 days).

<sup>152</sup> Amnesty International interview with a women's rights organization, Goma, March 2011.

<sup>153</sup> Amnesty International meeting with ASF, Kinshasa, 25 March 2011; meeting with RCN, Kinshasa, 22 March 2011.

<sup>154</sup> Amnesty International interview with military judicial staff, December 2010.

<sup>155</sup> The government has included a budgetary line for the BCG, but the funding is allegedly not being provided.

<sup>156</sup> UN Mapping Report, paras. 926-928; Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 44.

<sup>157</sup> Amnesty International interview with ACAT-NK, Goma, December 2010.

<sup>158</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 62.

<sup>159</sup> Amnesty International interview with a women's rights organization, Goma, March 2010.

<sup>160</sup> See, for example: Article 8 of the Universal Declaration of Human Rights; Article 2 (3) of the International Covenant on Civil and Political Rights; Article 14 of the Convention against Torture; Article 21 (2) of the African Charter on Human and Peoples' Rights. In General Comment 31, para.16, the Human Rights Committee states: "[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged." See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

<sup>161</sup> In relation to the International Covenant on Civil and Political Rights, the Human Rights Committee notes in General Comment 31, para. 17: "Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant."

<sup>162</sup> For the definitions of each form of reparation, see Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of the International Humanitarian Law, A/RES/60/147/, adopted on 16 December 2005.

<sup>163</sup> The obligation of the DRC authorities to ensure the rights of the victims of human rights violations to an effective remedy, including reparation, is set out in numerous human rights treaties and instruments, including in the International Covenant on Civil and Political Rights, to which the DRC acceded on 1 November 1976.

<sup>164</sup> Article 2 (3) (b) of the International Covenant on Civil and Political Rights states: "[a]ny person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." For definitions of acts attributable to the state see Chapter 2 of the International Law Commission's draft Articles on State Responsibility.

<sup>165</sup> See Principle 32 of the United Nations Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc: E/CN.4/2005/102/Add., 8 February 2005.

<sup>166</sup> Research carried out by the International Centre for Transitional Justice (ICTJ) has shown that the majority of civilians believe that the Congolese State should be responsible for offering reparation for crimes committed, not the international community, quoted in UN Mapping Report, p. 491.

<sup>167</sup> Article 31 of the Draft *Articles of State Responsibility for Internationally Wrongful Acts* states: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

<sup>168</sup> Military Justice Code, Art. 77.

<sup>169</sup> These two provisions come from the French Napoleonic Code of 1804.

<sup>170</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para.53.

<sup>171</sup> Amnesty International interview with a judge, Bukavu, March 2011.

<sup>172</sup> Amnesty International interview with the First President of the Military Court, Bukavu, March 2011.

<sup>173</sup> UN Mapping Report, para.1092.

<sup>174</sup> Amnesty International interview with a women's rights organization, Goma, March 2011; interview with a UN official, Bukavu, March 2011.

<sup>175</sup> Amnesty International interview with lawyers and human rights organizations, March 2011; OHCHR, Report of the Panel on remedies and reparation for victims of sexual violence in the Democratic Republic of Congo to the High Commissioner for Human Rights, March 2011, p.4, <http://www.ohchr.org/EN/NewsEvents/Pages/ReparationforsexualviolenceinDRC.aspx>, last accessed 8 April 2011.

<sup>176</sup> OHCHR, Report of the Panel on remedies and reparation for victims of sexual violence, para. 147.

<sup>177</sup> OHCHR, Report of the Panel on remedies and reparation for victims of sexual violence, p. 31; Amnesty International interview with a UN official, Bukavu, March 2011.

<sup>178</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 53.

<sup>179</sup> See OHCHR, Report of the Panel on remedies and reparation for victims of sexual violence in the Democratic Republic of Congo to the High Commissioner for Human Rights, March 2011, <http://www.ohchr.org/EN/NewsEvents/Pages/ReparationforsexualviolenceinDRC.aspx>, last accessed on 8 April 2011.

<sup>180</sup> ICJ, "Armed activities on the territory of the Congo" (*DRC v. Uganda*), 19 December 2005, para. 259.

<sup>181</sup> ICJ, "Armed activities on the territory of the Congo" (*DRC v. Uganda*), 19 December 2005, para. 261

<sup>182</sup> See for example, Amnesty International, *Japan: Still waiting after 60 years, Justice for survivors of Japan's military sexual slavery system*, (Index: ASA 22/012/2005), Chapters 6 and 7.

<sup>183</sup> The UN Department of Peacekeeping Operations has developed lessons learned studies and guidance materials with regard to prisons. A *Prison Support Policy Directive* and *Prison Support Guidance Manual* provide best practice guidance concerning the principles, planning, management operations and technical requirements for the support of national prison systems within UN peacekeeping operations. See also the 2010 UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (UN Doc A/C.3/65/L.5, 6 October 2010).

<sup>184</sup> See for example Amnesty International, *Democratic Republic of Congo: Amnesty International submission to the Universal Periodic Review*, April 2009 (Index: AFR 62/009/2009).

<sup>185</sup> Amnesty International visit to Goma Central Prison, 10 March 2011 and to Bukavu Central Prison, 16 March 2011.

<sup>186</sup> The UN Rules for the Treatment of Women Prisoners, Rules 48-52 address the particular needs of new mothers and their babies in prison, particularly healthcare, breastfeeding, access of mothers to their children, and the principle of the best interests of the child (especially in decisions to separate mother and baby).

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<sup>187</sup> Amnesty International interview with EU representative, March 2011, Kinshasa; see also US State Department Report, *2010 Country Reports on Human Rights Practices: Democratic Republic of Congo*, April 2011, <http://www.state.gov/g/drl/rls/hrrpt/2010/index.htm>, last accessed on 1 May 2011.

<sup>188</sup> Conclusions and Recommendations of the Committee against Torture, Democratic Republic of the Congo, CAT/C/DRC/CO/1, 2006, para. 11; Combined Report of the seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country, A/HRC/10/59, 2009, para. 63; Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4/Add.2, para. 56; Amnesty International interview with local government officials in Butembo and Beni, December 2010; Amnesty International interview with prison authorities in Goma and Bukavu, March 2011.

<sup>189</sup> Report by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.3, 14 June 2010, para. 86.

<sup>190</sup> Amnesty International interview with former REJUSCO staff, Goma, December 2010.

<sup>191</sup> Amnesty International interview with UNDP, Kinshasa, March 2011; Amnesty International interview with Adviser to the Ministry of Justice, Kinshasa, March 2011.

<sup>192</sup> See for example, US State Department, 2010 Country Reports on Human Rights Practices: Democratic Republic of Congo (DRC), p.13, <http://www.state.gov/g/drl/rls/hrrpt/2010/index.htm>, last accessed 2 May 2011.

<sup>193</sup> See for example Amnesty International, *Democratic Republic of the Congo: Amnesty International submission to the Universal Periodic Review*, April 2009, (Index: AFR 62/009/2009).

<sup>194</sup> Amnesty International interview with civil society organizations, Goma, March 2011.

<sup>195</sup> Amnesty International interview with the Mayor of Beni, Beni, December 2010.

<sup>196</sup> Amnesty International interview with Director of the Central Prison of Bukavu, Bukavu, March 2011.

<sup>197</sup> Report by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.3, June 2010, para. 84.

<sup>198</sup> “Hybrid” courts combine local and international components. Currently, the term “hybrid” is used to describe seven jurisdictions created between 1999 and 2006 in Timor Leste, Kosovo, Sierra Leone, Cambodia, Iraq, Bosnia-Herzegovina and Lebanon.

<sup>199</sup> See, *Loi organique portant création, organisation et fonctionnement d'une Cour spécialisée*, May 2011.

<sup>200</sup> See Amnesty International, *Memorandum on Special Chambers in the DRC*, February 2011, (Index: AFR 62/003/2011).

<sup>201</sup> These principles and elements were outlined in Amnesty International's comments on the second version of the government proposal for a set of Specialized Chambers with jurisdiction over crimes under international law (*Avant-Projet de Loi relative aux Chambres spécialisées pour la répression des violations graves du droit international humanitaire*). Amnesty International, *Memorandum on Special Chambers in the DRC*, February 2011, (Index: AFR 62/003/2011). These principles have equal applicability with respect to the proposal for a Specialized Court.

<sup>202</sup> OHCHR, *Rule of Law Tools for Post-Conflict States – Maximizing the legacy of hybrid courts*, 2008,

p. 15.

<sup>203</sup> Amnesty International interview with EUPOL R.D. Congo, March 2011.

<sup>204</sup> See for example, articles 3 and 14, *Loi organique portant création, organisation et fonctionnement d'une Cour spécialisée*, May 2011.

<sup>205</sup> Human Rights Watch, *DR Congo: Amend Draft Specialized Chamber Legislation to Ensure Meaningful Accountability*, Letter to the Minister of Justice, 14 March 2011, p. 2.

<sup>206</sup> See *Loi organique portant création, organisation et fonctionnement d'une Cour spécialisée*, May 2011.

<sup>207</sup> See, Amnesty International, *République Démocratique du Congo: Commentaires et analyse du projet de loi de la RDC portant mise en œuvre du Statut de Rome de la Cour pénale internationale*, September 2003, (Index: AFR 62/031/2003); *République Démocratique du Congo: Commentaires et recommandations du projet de loi de juillet 2003 portant mise en œuvre du Statut de Rome de la Cour pénale internationale*, May 2004, (Index: AFR 62/008/2004); *Democratic Republic of the Congo: Parliament must reform and enact International Criminal Court bill*, February 2006, (Index: AFR 62/002/2006).



WHETHER IN A HIGH-PROFILE CONFLICT OR A FORGOTTEN CORNER OF THE GLOBE, **AMNESTY INTERNATIONAL** CAMPAIGNS FOR JUSTICE, FREEDOM AND DIGNITY FOR ALL AND SEEKS TO GALVANIZE PUBLIC SUPPORT TO BUILD A BETTER WORLD

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## THE TIME FOR JUSTICE IS NOW NEW STRATEGY NEEDED IN THE DEMOCRATIC REPUBLIC OF THE CONGO

The people of the Democratic Republic of the Congo have been beset by violence and human rights abuses for two decades. Crimes under international law – including mass rape, torture and murder – have been committed in almost every corner of the country and are still being committed with alarming frequency.

Impunity remains pervasive: while millions of men, women and children have suffered as a result of the violence, only a handful of perpetrators have ever been brought to justice.

After decades of neglect, mismanagement and poor governance, the Congolese justice system is largely unable to deliver accountability, address impunity and secure reparation. Its credibility is low because of political and military interference, endemic corruption, lack of personnel, training and resources and its failure to protect victims and witnesses, provide legal aid, enforce its own rulings or even keep convicted prisoners behind bars.

Despite some efforts at reform, the government has not shown the clear political and financial commitment necessary to respond to the Congolese population's need for justice.

This report identifies fundamental flaws within the criminal justice system that are more often than not overlooked by current policy and programmes. It examines the complementary role that some proposed transitional justice mechanisms could play. Amnesty International calls for the development of a comprehensive justice strategy that can deliver long-term and sustainable reform of the Congolese justice system in order to overcome impunity.

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