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增进和保护所有人权、公民、政治、经济、
社会和文化权利，包括发展权

法官和律师独立性问题特别报告员

莱安德罗·德斯波伊的报告

增 编

对刚果民主共和国的访问 *

* 本文件的内容提要以所有正式语文分发。报告本身载于内容提要附件，仅以原文和英文分发。

内容提要

法官和律师独立性问题特别报告员莱安德罗·德斯波伊应刚果民主共和国政府的邀请，于 2007 年 4 月 15 日至 21 日对该国进行了访问。访问期间，他发现刚果民主共和国的司法制度目前处于可悲的状况。除了战争造成了损失之外，人们也发现政府未向司法机关提供足够的资源，使其适当运作。司法工作遭到政治干扰，受腐败之害，尤其是未按《宪法》规定设立独立的最高司法委员会，以保护法官，不受这种干扰，向他们提供极缺乏的必要经费和物力，并对其行为进行监管。

特别报告员对侵犯人权事件有 86%是由警察和军人所犯下的表示忧虑，而且这些事件归军法院管辖，但军事司法却未能保证独立性和称职，因而形成了军人和警察普遍不受处罚的现象。

特别报告员坚持认为，刚果民主共和国如果不建立有力的独立司法权，就无法发挥民主国家的功能，而司法权至今仍是该国民主机构中最薄弱的机构，有鉴于这一事实，特别报告员提出了一系列建议，其中尤其包括紧急通过关于最高司法委员会组织的法律、拒绝通过由共和国总统和司法部长担任此委员会成员的拟议修正案，以及大幅度增加司法预算。

Annex

**REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF
JUDGES AND LAWYERS, LEANDRO DESPOUY, ON HIS MISSION TO
THE DEMOCRATIC REPUBLIC OF THE CONGO (15-21 APRIL 2007)**

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Introduction

1. The Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, visited the Democratic Republic of the Congo from 15 to 21 April 2007 at the invitation of the Government. He would like to thank the Government for its cooperation, and the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) for their very valuable assistance.

2. The Special Rapporteur and his team visited Kinshasa, Bukavu in Sud-Kivu, Goma in Nord-Kivu and Bunia in Ituri. The Special Rapporteur met the Prime Minister, several of his ministers, provincial authorities, judges and prosecutors of both civilian and military courts at various levels, the heads of several bar associations, lawyers, judges' and lawyers' associations, members of non-governmental organizations (NGOs), members of the different sections of MONUC and the United Nations Development Programme (UNDP), and the principal donors to the justice sector.

I. MAIN FINDINGS

A. General political and legal background

3. The Democratic Republic of the Congo, then called Congo, gained independence in 1960 after having been a Belgian colony for over one-and-a-half centuries. In 1965, General Mobutu Sese Seko took power, renamed the country Zaire and set up a dictatorship that would last over 30 years. In 1994, during the Rwanda genocide, large numbers of Tutsis and some Hutus sought refuge in the east of the country, aggravating the political and socio-economic situation in the region. In 1997 General Mobutu was overthrown and power was seized by a political-military opposition movement that emerged in the eastern region, the Alliance of Democratic Forces for the Liberation of Congo-Zaire (*Alliance de forces démocratiques pour la libération du Congo-Zaire*) (AFDL), led by Laurent-Désiré Kabila and backed by Uganda and Rwanda. Laurent-Désiré Kabila renamed the country the Democratic Republic of the Congo. Several rebel groups formed immediately and took control of different parts of the country, particularly in the eastern region. These groups included the Congolese Rally for Democracy (*Rassemblement congolais pour la démocratie*) (RCD), consisting of Tutsi refugees and demobilized Congolese soldiers with military support from Rwanda and Uganda, followed by the Movement for the Liberation of the Congo (*Mouvement pour la libération du Congo*) (MLC) led by Jean-Pierre Bemba and backed by Uganda. In 1999 the warring factions signed a ceasefire agreement in Lusaka, and the five countries with forces in the Democratic Republic of the Congo accordingly undertook to withdraw their troops. In order to maintain liaison with all parties to the Ceasefire Agreement, the Security Council constituted the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in November 1999.¹ President Laurent-Désiré Kabila was assassinated in January 2001 and succeeded by his son Joseph Kabila. The Lusaka Accord was then supplemented by the Global and All-Inclusive Agreement

¹ Security Council resolution 1279 (1999).

on the Transition, signed in Pretoria on 17 December 2002 and adopted in Sun City, South Africa, on 1 April 2003, with the aim of setting up a transition Government and holding elections within two years. The conflict, which lasted nearly 10 years, left some 4 million dead.

4. A new Constitution, adopted by referendum, entered into force on 18 February 2006, and the country's first democratic presidential and legislative elections were held in July and November 2006. On 27 November 2006, Joseph Kabila was proclaimed the new President of the Republic, marking the end of the transition Government set up in 2003.

5. Article 1 of the Constitution proclaims the Democratic Republic of the Congo "an independent, sovereign, united and indivisible, social, democratic and secular State governed by the rule of law". Several important fundamental rights and freedoms are enshrined in the Constitution. The first paragraph of article 149 establishes the independence of the judicial authority. The President of the Republic is the Head of State and ensures observance of the Constitution. He appoints the Prime Minister from among the parliamentary majority after consulting parliament. The President also appoints the other members of the Government at the proposal of the Prime Minister. The legislative power is vested in a bicameral parliament consisting of the National Assembly and the Senate. Under the second paragraph of article 100, parliament exercises control over the Government.

6. The Constitution stipulates that international treaties shall, upon their publication, take precedence over legislation (art. 215) and that civil and military courts and tribunals shall apply duly ratified international treaties (art. 153). The Democratic Republic of the Congo has ratified the main international treaties on human rights.

B. The judiciary

7. Section 4 of Title III of the Constitution provides a detailed framework for the organization and functioning of the judiciary. It states unambiguously that the fundamental principle governing the judiciary is its independence. The first paragraph of article 149 provides that: "The judiciary is independent of the legislature and of the executive". Accordingly, it is the "guarantor of the individual freedoms and fundamental rights of citizens" (article 150, first paragraph). Article 151 of the Constitution states, inter alia, that "the executive branch cannot issue instructions to judges in the exercise of their jurisdiction, obstruct justice or oppose the enforcement of a court decision".

8. The new Constitution also provides for the establishment of the Constitutional Court, the Council of State and the Court of Cassation. Pending the constitution of these three new courts, the Supreme Court of Justice is discharging their functions.

9. The Court of Cassation hears applications for judicial review of final judgements handed down by civil and military courts and tribunals. In addition, the Court has competence to act as a court of first instance in certain cases. The Constitutional Court is responsible for verifying the constitutionality of laws and instruments with force of law. In this context, an individual remedy of unconstitutionality against any law or regulation is available. Lastly, the Constitution provides for an administrative jurisdiction consisting of the Council of State and administrative courts and tribunals.

10. The remaining ordinary courts are courts of appeal, one for each province and two in Kinshasa; courts of major jurisdiction in the provincial and district capitals; commercial courts and labour courts (the latter have not yet been set up); and a community justice system consisting of magistrates' courts, which should be set up in each territory to gradually replace customary justice.

11. Every court or tribunal, except for the magistrates' courts, has a prosecutor's office attached to it. The prosecutor's office investigates offences and transmits the results of the investigations to the court. There is a State prosecution service attached to each court of appeal in each provincial capital. A prosecution service of major jurisdiction, and in some cases a secondary prosecution service of major jurisdiction, is attached to the courts of major jurisdiction in the provincial and district capitals. The Office of the Attorney-General of the Republic, attached to the Supreme Court of Justice, is in Kinshasa.

12. Like the ordinary courts, the military courts are part of the judiciary and are governed by the same principle of independence of the judicial authority. The military courts comprise the following:

- Military police courts: there are usually one or more of these under the jurisdiction of a garrison court martial
- Garrison courts martial: there are one or two in a district, a town, a garrison or a military base
- Military courts: there are usually one or two in each province, in addition to the one in Kinshasa
- The Military High Court: the final court of appeal of the military jurisdiction, this court is in Kinshasa

The military courts are under the oversight of the Court of Cassation, which hears applications for review of final judgements of military courts.

13. Each military court has a prosecutor's office called the "*auditorat*": the Military Prosecutor's Office of the armed forces attached to the Military High Court, a senior military prosecutor's office attached to each military court and a military prosecutor's office attached to each garrison court martial and each police court within the latter's jurisdiction. Like the prosecutor's offices of the ordinary jurisdiction, the military prosecutor's offices conduct investigations, establish offences and gather evidence, which they then transmit to the courts.

14. The Constitution provides that "the military courts have jurisdiction over offences committed by members of the armed forces and the national police". This provision is very important in that it makes it clear that military courts do not have jurisdiction to try civilians. However, the Military Judicial Code, which allows the possibility of military courts trying civilians, has not yet been revised. Nonetheless, these provisions are unconstitutional and should no longer be applied.

15. The vast majority of human rights violations are committed by the armed forces and the police and thus fall within the jurisdiction of the military tribunals. However, international human rights standards require that cases of human rights violations by members of the armed forces, like trials of civilians, should be heard by civilian, not military courts. This is all the more important because the lack of independence is particularly prevalent in the military judicial system, which is subject to pressure and interference by the military hierarchy, often in the form of refusals by senior officers to bring their men before military tribunals, or of obstacles during the trial process or transfers of judges in sensitive trials.

C. Other relevant institutions

1. Higher Council of the Judicature

16. A major breakthrough in the new Constitution was the introduction of a new Higher Council of the Judicature (article 152 of the Constitution). Composed entirely of judges, this independent body is responsible for administering the judicial authority. It prepares proposals for the appointment, promotion and removal of judges and exercises disciplinary authority over them. It then submits its recommendations to the President of the Republic, who adopts them by means of an ordinance. This substantially reduces the risk of interference and pressure brought to bear by the other branches of power on judges, since such pressure has most often taken the form of threats of removal or transfer of judges. The Council is also responsible for drawing up the budget of the judicial authority and transmitting it to the Government for incorporation in the general State budget.

17. Article 152 of the Constitution provides that the Higher Council of the Judicature shall be composed entirely of judges, whereas it was formerly presided and co-presided by the President of the Republic and the Minister of Justice. This is a fundamental breakthrough enabling the independence of this body, and hence of the judicature, to be safeguarded.

18. The Constitution provides that an organization act shall determine the organization and functioning of the Council. However, more than a year after the Constitution entered into force, this law has not yet been adopted. The Council is thus not operational, although there is an extremely urgent need to set it up so as to guarantee the independence of the judiciary.

2. Joint Committee to Monitor the Justice Framework Programme in the Democratic Republic of the Congo

19. Set up following a multi-donor organizational audit mission carried out in 2004, the Joint Committee to Monitor the Justice Framework Programme in the Democratic Republic of the Congo serves as a consultation platform bringing together all the development partners involved in modernizing the Congolese judicial system: the Ministry of Justice, the European Commission, UNDP, the United Kingdom Department for International Development (DFID), the US Agency for International Development (USAID), MONUC, the United Nations High Commissioner for Human Rights, and the Belgian, French and Netherlands development cooperation agencies. The Committee's objectives include the adoption of a plan of action to implement the justice framework programme adopted by the mission, to ensure that the planned reforms are effectively carried out and followed up. Priority actions and interventions for the short, medium and long term are planned in the following areas: institution building; improving access to justice; fighting

corruption; transitional justice; and the situation in the eastern part of the country. The Special Rapporteur is convinced that the Committee has a decisive role to play, since the judicial authority can only be strengthened through the joint efforts of all the national and international actors concerned.

D. Recent or current reforms affecting the judiciary

20. Act No. 06/020 on the status of judges in the Democratic Republic of the Congo was promulgated on 10 October 2006. This marked an important milestone in the normative process aimed at guaranteeing the independence of judges. Effective implementation of the Act, however, will require strong political will, and other bills will have to be adopted as well. These include the bills on the organization of the Higher Council of the Judicature, the Constitutional Court, the Court of Cassation and the Council of State.

21. Discussions are also under way on the bill on the application of the Rome Statute of the International Criminal Court, planned for adoption in first draft since 2003. One of the immediate effects of this law will be to transfer competence for international offences - i.e. those punishable under international law - from the military to the civilian courts. The Court of Appeal will thus have sole jurisdiction to try offences established in the Rome Statute, irrespective of the category of persons subject to trial. Acts obstructing the administration of justice that have not been specifically prosecuted until now will also be penalized under the law. These include any act aimed at “forcing or persuading a judge or judicial officer not to perform his or her duties”, as well as reprisals against judges on account of their office.

E. The judicature

1. Training and qualifications

22. Under the recent Act on the status of judges, in order to qualify as a judge a candidate must hold a doctorate or undergraduate degree in law. Judges are recruited through a competition, but may be appointed on the basis of their qualifications, provided that there are not more candidates than vacancies. Recruitment is always at the initiative of the Higher Council of the Judicature, and competitions are organized by its permanent secretariat. Candidates who have practised as lawyers for at least five years are exempt from the competition requirement.

23. The Democratic Republic of the Congo no longer has a judicial training college. Judges enter the profession immediately upon graduation from university, which gives rise to weaknesses in the system. Lacking adequate training and professional knowledge, judges often deliver judgements that are vague, poorly drafted and legally weak. Their lack of training also means that judges are more easily influenced.

2. Appointment, promotion, transfer and removal of judges

24. The Constitution and the Act on the status of judges provide that judges are irremovable. They can be reassigned only upon reappointment or at their own request, or as a result of a rotation on specified grounds at the decision of the Higher Council of the Judicature. The President of the Republic is the authority responsible for appointing, promoting, transferring and removing all judges, but only on a proposal by the Higher Council of the Judicature.

25. The annual report drawn up by court administrators and directors of prosecution services is intended to inform the competent authorities about each judge's performance, professionalism and ability, and determines promotion.

3. Disciplinary measures

26. The Act on the status of judges provides that judges may be subject to penalties ranging from a reprimand to removal. Disciplinary offences include "directly or indirectly attempting to contact the parties before handing down an opinion or a decision, as the case may be". Court administrators and directors of prosecution services are responsible for reporting misconduct. The Act grants judges the right to appeal to a higher authority.

4. Number of judges and material conditions in which they work

27. There are far too few judicial personnel, both in the prosecution service and in the courts. This is true of nearly all courts, both military and civilian, to the extent that civilian courts are sometimes unable to sit or have to call in a military judge. According to the most recent statistics, there are 2,030 judges in the prosecution service and in the courts, counting both the military and civilian jurisdictions. Kinshasa has a high concentration of judges, with 183 trial judges and 475 in the prosecution service in 2004. In Sud-Kivu province, for example, there are 20 trial judges and 22 prosecution members in the civil courts, and 4 trial judges and 6 prosecution members in the military courts. In Nord-Kivu province, there are 22 trial judges and 15 prosecution members in the civil courts, and 6 trial judges and 9 prosecution members in the military courts. In Bas-Congo province, there are 118 trial judges and 49 prosecution members in the civil courts, and 8 trial judges and 22 prosecution members in the military courts.

28. The number of judges is far below the level needed to handle all the cases that are or should be referred to the courts. In some cases, courts are unable to sit in the absence of the required quorum. For example, the garrison court martial in Goma only has two judges instead of the five needed to make up a full bench. Associate judges, usually with very little legal training, are therefore assigned to the court from the ranks of the police and the army. This is a clear violation of the fundamental standards of independence and professionalism of the judicial authority. The Butembo Magistrates Court, whose jurisdiction covers the town of Butembo and the entire territory of Lubero, including four towns and four districts, only has three judges; this severe shortage of judges has a very negative impact on the administration of justice.

29. Supreme Court sources have estimated that there is an urgent need to recruit at least 1,000 judges. At the time of the Special Rapporteur's visit, over 6,000 applications had been submitted to the Ministry of Justice. However, the Ministry's agreement of principle to recruit an additional 500 judges has not been implemented to date.

30. There are also not enough courts, and these are usually only to be found in the main cities. According to the latest figures from the Ministry of Justice, there are 230 courts and prosecutor's offices in the Democratic Republic of the Congo, counting both the military and the civilian jurisdictions. There is a court of appeal in the capital of each province, and two in the city of Kinshasa. Courts of major jurisdiction are located in the provincial and district capitals, with several in Kinshasa. Theoretically, there are thus three to six courts of major jurisdiction per

province. In reality, however, some districts, created during the 1990s, do not have a court. There are 39 courts of major jurisdiction nationwide. Commercial courts, which were established by a 2001 Act, have the same location and jurisdiction as the courts of major jurisdiction. Only three have been set up to date, and not all of these are operational. Labour courts, introduced by a 2002 Act, also have the same location and jurisdiction as the courts of major jurisdiction, but have not yet been set up. As regards community justice, the Act of 1978 provides that the magistrates courts shall gradually replace customary justice. Although the plan is to have a magistrates court in each territory, only 53 out of the expected 180 have been set up so far. As a result, customary justice, which provides no guarantee of independence or professionalism, is still too widespread.

31. The shortage of courts outside urban areas is exacerbated by the fact that judges do not have the vehicles needed to reach the rest of the country where human rights violations - in some cases extremely serious - are committed. Several judges have stated that when they are informed of people being killed or raped even 30 km from the city in which their court is located, they are unable to travel to the area for lack of a vehicle. In some cases, particularly in the eastern parts of the country, MONUC provides road or air transport for judges so that investigations can be carried out and suspects arrested. In the absence of such assistance, however, it is impossible to investigate and prosecute violations committed in rural areas, leaving citizens without any legal remedy.

32. In addition to the lack of transportation, judges do not have the physical facilities they need to perform their duties in a dignified and professional manner. They do not have computer equipment or even, in some cases, typewriters or paper. They hardly ever receive the necessary financial resources to cover the running costs of the judicial system. Several courts work in premises that do not belong to them, and from which they may be evicted at any time. Judicial officers are thus compelled in nearly every case to live at the expense of those subject to their jurisdiction.

33. Court premises are extremely dilapidated. The judges sent to Bunia, in Ituri, at the end of the conflict in 2004 found themselves without any material or financial resources, and did not receive any assistance from Kinshasa. It was thanks to financing from the European Union that decent premises could be built so that the military prosecutor's office and court could function. In other regions, however, conditions are still unendurable. Some judges or officers of the court have to work outside under a straw roof, as the court premises only have three or four rooms.

34. There is no justification for these material conditions given the far superior resources and premises allocated to other State services such as certain ministries and the National Intelligence Agency. There is also a glaring gap between the substantial amount of resources allocated to military commands and the exceedingly small amount provided to the military courts. This places military judges in a situation of inferiority and dependency with regard to the military command. The material conditions in which judges work prevent them from performing their duties efficiently and confidentially, and make it impossible to ensure their safety. Lastly, they detract from the dignity their office must command if the judicial authority is to be perceived and respected by all as one of the three fundamental institutions of the State.

35. Lastly, judges are not adequately paid. The new Act on the status of judges guarantees remuneration "such as to strengthen their independence" (title 2, art. 25) and lists the social

benefits to which they are entitled (transport costs, repatriation, etc.). It has to be noted, however, that this provision is not applied. Judges earn very small salaries, which do not provide a decent livelihood. For example, one judge whom the Special Rapporteur met admitted having to accept money from a party because he could not afford to pay for treatment for his daughter. It is therefore common for judges to give in to corruption or ask for money from the parties or from lawyers. Justice is thus for sale to those who can afford it.

36. The main reason for the shortage of judges and courts, low salaries and the deplorable material conditions in which they perform their duties is the negligible share of the budget allocated to the judicial authority (around 0.6 per cent). Justice cannot function unless it is given the necessary resources. The Constitution provides that the judicial authority shall have a budget drawn up by the Higher Council of the Judicature, which is then transmitted to the Government for inclusion in the general State budget. This fundamental provision has not yet been applied, since the Act establishing the Higher Council of the Judicature has yet to be adopted.

5. Women judges

37. There are far too few women judges. There are only 2 for the province of Sud-Kivu, and the same is true of Nord-Kivu and Orientale provinces, making a total of 6 women out of 153 judges. The share of women judges nationwide is under 10 per cent.

6. Threats and harassment

38. Judges often feel threatened. Several judges reported having received threats, in particular in the eastern provinces, among other things for having accepted MONUC support. They were warned that once MONUC left they would remain behind and “be dealt with”. Other military judges stated that they had found tracts containing threats and ordering them not to investigate murders. Military judges are threatened or attacked by members of the armed forces as an intimidation tactic to ensure impunity either for themselves or for other military personnel. The intolerable level of vulnerability of judges may be seen from the serious incidents that occurred recently in Kisangani, where General Kifwa abducted four judges from their homes, stripped them and beat them in the street in front of the crowds, then took them to headquarters where two of them were reportedly subjected to cruel and degrading treatment all night.

7. Independence

39. Article 151 of the Constitution provides that the executive branch shall not issue instructions to judges in the exercise of their jurisdiction, obstruct justice or oppose the enforcement of a court decision. This provision is not implemented: the executive branch continues to issue instructions to judges and to oppose the enforcement of certain court decisions. Some judges, especially in the military jurisdiction, stated that their superiors had instructed them to take a certain decision if they wanted to be eligible for promotion. In several trials involving serious crimes, the Special Rapporteur noted that 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. The military command often does not hand over military personnel who have been accused for questioning or detention. The same is true of the police: the Inspectorate does not hand over police officers who

have been accused, sometimes on grounds that they “have support in the capital”, even in the case of serious offences such as rape. Judges find themselves in an intolerable situation in which it is often impossible to work.

40. The power the executive continues to exert over the transfer and promotion of judges, in violation of the provisions of the Constitution, which assigns these functions to the Higher Council of the Judicature, remains one of the main reasons for the lack of independence of the judiciary and hence the persistence of impunity in the country.

F. Lawyers and the right to a defence

1. Organization of the profession

41. Under Congolese law, legal representation is exclusively entrusted to lawyers and judicial defenders. This subject is governed by Ordinance-Law No. 79-028 of 28 September 1979. The legal profession is organized in bar associations, with a bar association for each court of appeal. Each bar association is administered by an executive council. The different bar associations are grouped together in a National Bar Association, administered by a National Executive Council.

2. Number of lawyers

42. Despite the fact that lawyers have a well-structured organization, there are not enough lawyers to meet the needs for defence counsels throughout the country. Although Kinshasa has some 2,500 lawyers and other towns such as Lubumbashi and Matadi have a reasonable number, the rest of the country suffers from a real shortage, as lawyers tend to set up practice in more developed urban centres, where they are likely to find civil and commercial cases. They are less inclined to handle criminal cases, as they usually do not generate enough income. As a result, the right to a defence is not guaranteed in vast areas of the country where there is very little economic activity.

3. The right to a defence and to assigned counsel

43. Under paragraphs 3, 4 and 5 of article 19 of the Constitution, the right to a defence is organized and guaranteed. Everyone has the right to defend himself or herself, either in person or through counsel of his or her own choosing, at every stage in criminal proceedings, including police and pretrial investigations. Persons may also be assisted when they appear before the security services.

44. In order to guarantee this right, the State must provide free legal aid to those who cannot afford to pay for it. Under the law, each bar association shall have a free legal aid service, normally called “Pro Bono Assistance Office”. Lawyers assigned by this service are required to provide free assistance to accused persons who cannot afford to pay a lawyer. These lawyers are usually inexperienced and poorly motivated to handle these cases, for which they are not paid. The State budget does not contain any provision for paying lawyers providing free legal aid to indigents, who make up the majority of the population in the Democratic Republic of the Congo. In many cases, especially in the eastern regions visited by the Special Rapporteur, the free legal aid services are not operational, and this assistance is sometimes provided by NGOs.

4. Judicial defenders

45. The Corps of Judicial Defenders is made up of judicial defenders, who play the same role as lawyers but only in magistrates' courts and courts of major jurisdiction. The existence of this association raises problems in regard to the quality of defence provided, since judicial defenders do not hold law degrees and are often very poorly qualified.

5. Disciplinary measures

46. Lawyers' rights and duties are laid down in articles 71 to 80 of Ordinance-Law No. 79-028 on the organization of the bar association. Professional misconduct by lawyers is punished by the Executive Board of the Bar Association, sitting as a disciplinary board, either of its own motion or on receiving a complaint or report from a judge, another lawyer or any concerned person. It is prohibited, inter alia, for lawyers to "enter into hazardous contracts contingent on the outcome of the trial with the parties, with a view to remuneration" or to "agree to defend consecutively opposed interests in the same case" (art. 74).

6. Obstacles to the exercise of the profession

47. Lawyers do not appear to be suffering from a lack of organization of their profession or an absence of independence in a formal sense; the difficulties they face have more to do with the lack of independence of judges, and their corruption in particular. All too often, judges demand money from lawyers, on pain of finding against their clients if they do not pay. Some lawyers therefore give in to corruption, and those who resist it face many difficulties.

48. Other serious obstacles to the exercise of the legal profession are the threats, intimidation and assault to which lawyers are subjected, not only by some judges, but by the opposing parties. Judges often summon lawyers on some pretext just before their client's hearings, in order to intimidate them and interfere with their work. This prevents lawyers from attending hearings and defending their clients. In this context, as a measure to ensure that judges do not summon lawyers on the eve of important trials, a proposed amendment to the law on the bar association provides that lawyers may be summoned only by appeal courts. There is apparently a circular providing that lawyers shall be summoned by the appeal courts where they were sworn in; however, it does not seem to be applied.

G. The right to be tried within a reasonable time and preventive detention

1. Trial within a reasonable time

49. Under the second paragraph of article 19 of the Constitution, every person has the right to have his or her case tried within a reasonable time by a competent judge. In practice, however, trials often do not take place and when they do, they are extremely slow. Trials in which military officers or other State officials are charged with serious violations of human rights are in most cases obstructed by interference - often quite blatant - from political quarters or the military command, and never seem to reach a conclusion. In trials implicating opponents of the Government, however, the administration of justice is swift, as was the case of the trials of Pasteur Kutino and Marie-Thérèse Nlandu.

2. Preventive detention

50. Preventive detention is the rule rather than the exception in the Democratic Republic of the Congo. It is used in connection with far too many offences, and often the sole aim is to extract money in return for the detainee's release. The law sets an upper limit on preventive detention, but this is usually not applied. During his visits to places of detention in Kinshasa and Bunia, the Special Rapporteur was extremely concerned to note that, given the slowness of the judicial system, and in some cases the absence of any trial, men, women and children are often held in preventive detention for months or even years without being found guilty by a court of law. What is more, these persons are usually held with convicted prisoners.

51. The Special Rapporteur was also informed that uniformed men, such as soldiers and officers of the National Intelligence Agency (ANR), often carry out arbitrary arrests and detentions - which is beyond their authority - and often for activities that do not constitute an offence. Many persons are reportedly held without access to their families, to a judge or to a lawyer, in known and unknown places of detention. The Director of the ANR denied the existence of these places in an interview with the Special Rapporteur.

H. Enforcement of court judgements and conditions of detention

1. Very low rate of enforcement of judgements

52. The fourth paragraph of article 149 of the Constitution provides that decisions, judgements and orders handed down by courts and tribunals shall be enforced in the name of the President of the Republic. Despite this provision, and the relevant rules in the Codes of Civil and Criminal Procedure laying down mechanisms for the effective implementation of the law, court decisions are not enforced in the vast majority of cases. For example, according to the multi-donor audit of the judiciary published in 2004 by the European Union and other partners, the rate of enforcement of court decisions was between 4 and 6 per cent.

53. The very high rate of non-enforcement is mainly due to failings and corruption among the officers responsible (registrars, marshals, officers of the prosecution and the General Inspectorate of the Ministry of Justice), lack of resources to cover the transportation costs of these officers, and poverty among the beneficiaries of judicial decisions, who are expected to contribute to enforcement costs. On the latter point, the law provides that convictions handed down in criminal indemnification actions shall be enforced only if the claimant has sufficient resources to pay the registrar proportional fees in cash or in securities (ranging between 6 and 15 per cent). Courts often fail to take the poverty of the parties into account, thus denying many victims the compensation to which they are entitled.

54. Concerning the possibility of bringing an action against the State for damages caused by public officials, although domestic law recognizes civil liability of public authorities, it does not contain any specific provisions on "public liability" laying down the rules for compensation for damages caused by actions committed by public officials.

2. Prison escapes

55. The very low rate of enforcement of court decisions is compounded by the high rate of prison escapes, mainly due to the dilapidated state of the prisons. Efforts to bring the perpetrators of human rights violations to justice are invalidated by these all too frequent escapes, which contribute to immunity. According to MONUC figures, at least 429 detainees, including some convicted of serious human rights violations, escaped from places of detention throughout the country in the second half of 2006.

56. Attention should also be drawn to the appalling conditions of detention to which detainees are subjected. Many prisons do not have electricity, food, drinking water or basic medical care, endangering the lives of prisoners. It is not unusual for prisoners to die in prison owing to lack of food or care.

I. Access to justice

57. There are many factors blocking access to justice in the Democratic Republic of the Congo. The main obstacles noted by the Special Rapporteur are described below.

1. Insufficient number and geographical remoteness of courts

58. There are far too few judges - both prosecutors and trial judges - and courts. There are vast areas of the country where victims do not have access to a court, as it is too far away and means of transport are rare.

2. Poverty

59. Poverty prevents people from travelling to the competent courts and prosecution offices, and from covering other court fees payable by the parties, including enforcement fees. The pro bono legal aid system under which a lawyer is assigned by the court is in many cases inoperative, thus effectively denying victims the right to a defence in court.

3. Ignorance of the law

60. In most cases people are unaware even of the possibility of bringing an action in court, and are only familiar with customary justice as a means of settling disputes. Some NGOs, such as *Avocats sans frontières*, carry out very useful dissemination activities, but their efforts unfortunately have a limited impact in such a vast territory. Another obstacle to access to justice is ignorance of the law by some court officers or even certain judges, as they sometimes refer the parties to courts that are not competent to try the offences concerned.

4. Informal settlement based on customary justice

61. Informal settlement based on customary justice is still very common, particularly outside cities, although it is prohibited in criminal cases. Although one of the reasons for resorting to this system is ignorance of written law and the competent jurisdiction, as mentioned above, people choose customary justice even when they are aware of the formal justice system. They often have misgivings about the formal system, having observed the corruption among judges and court officers, political interference and inefficiency affecting the entire system, and the resulting

impunity that prevails in the vast majority of cases. People thus have more confidence in the customary justice system, which is more familiar, easier to understand and easily accessible. However, it can give rise to unfair and even inadmissible settlements, for example in rape cases where victims are often forced by their families to marry the perpetrator.

5. Corruption and political interference in the judiciary

62. With few exceptions, corruption of judicial personnel is widespread. It is common practice for money to be demanded from plaintiffs. Judicial personnel are poorly paid and lack the necessary resources and infrastructure to carry out their duties. This is compounded by the lack of training and awareness of professional ethical standards. 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.

6. Insecurity

63. The victims of serious human rights violations are often in areas under the military control of the perpetrators of those very violations, who continue to enjoy impunity. As pointed out in the reports published twice a year by the MONUC Human Rights Division, nearly all of those who commit serious human rights violations are armed men: members of the armed forces of the Democratic Republic of the Congo (FARDC), policemen, armed bands of Rwandan Hutus or Congolese armed groups such as the Mai-Mai which hold violent sway in many rural areas. After looting houses and raping women and girls, they often threaten to return. These threats and fear prevent victims from seeking redress before the competent courts, which are often far away. Even if a victim manages to bring a case before the court, the judiciary cannot guarantee their protection. Judges themselves have admitted to the Special Rapporteur that they are afraid to go to the eastern parts of the country, much less remote areas of the provinces. Judges report having been threatened and even violently assaulted on account of their investigations. Lastly, there is no witness protection programme. Witnesses often refuse to appear before the judicial authorities as they are subjected to the same threats, which makes investigation difficult. The situation of insecurity is a major obstacle to victims' access to justice and, in general, to combating impunity, as it affects the main participants in the judicial procedure: victims, witnesses and judges.

7. Power of criminal investigation officers over the prosecution

64. It was also pointed out to the Special Rapporteur that it is not unusual for criminal investigation officers to refrain from forwarding victims' complaints to the prosecution services. Since they have wide discretion in evaluating the facts submitted to them, in most cases it seems that they do not refer complaints to the prosecution services, which makes legal prosecution impossible.

8. Lack of access to justice for vulnerable sectors of the population

65. In view of all the above, the Special Rapporteur notes that the judicial system is not accessible to the vast majority of the population. This is especially true of those who are most vulnerable: the poor, who make up the majority of the population, and women, who are victims of sexual violence. A study carried out in Sud-Kivu province confirms not only the extent of the problem, but also the very high level of impunity enjoyed by the perpetrators of sexual violence. During the period 2000-2007, only 287 cases of sexual violence were reported to the judicial authorities (186 to the civilian authorities and 101 to the military authorities). However, statistics from hospitals and other health facilities indicate that some 14,200 cases of rape were registered for 2005 alone, which means that less than 1 per cent of rape victims report the crime to the courts and tribunals in order to seek justice and compensation, and ensure that the perpetrators are tried and sentenced.

J. Transitional justice

66. The serious crimes committed in the Democratic Republic of the Congo during a decade of war, believed to have left nearly 4 million dead between 1993 and 2003, have not been tried. Justice has not been done for the victims, who have not been able to know the truth, to see their torturers punished or to receive compensation. In the case of serious mass crimes, society cannot build and sustain peace in the aftermath of a conflict by building a firmly grounded democracy unless the perpetrators are prosecuted and punished. Although it can be difficult to try all the perpetrators in the case of mass crimes, it is crucial that at least those with the greatest degree of responsibility for planning, directing and ordering those crimes should be punished. Social tensions cannot be dispelled and lasting peace restored unless the population can be sure of obtaining compensation for crimes committed during the conflict, as a first step, followed by the establishment of a fair system of administration of justice to prevent and punish further abuse, as a second step.

67. Concurrently with the establishment of an independent and efficient judicial system in the Democratic Republic of the Congo, it is thus essential to put in place a transitional justice mechanism specifically to try the crimes committed during the conflict. The establishment of the International Criminal Court and the opening of the preliminary hearings in the trial of former militia leader Thomas Lubanga Dyilo, charged with conscripting and enlisting child soldiers in his militias, are important steps that will make it possible to try some of the crimes committed in the Democratic Republic of the Congo. However, the International Criminal Court alone cannot try all the serious violations of human rights and international humanitarian law committed in the country over almost a decade, not only because its jurisdiction is limited to acts committed since the entry into force of the Rome Statute (1 July 2002), but also because it lacks sufficient resources. The Democratic Republic of the Congo must therefore set up a transitional justice mechanism to supplement the investigations and trials being conducted by the International Criminal Court.

68. While the establishment of a special international tribunal, though useful, may prove very costly, a less expensive solution might be to set up mixed chambers in the national court system; the Congolese courts would also stand to gain more from this arrangement, as their judges would

benefit directly from the experience acquired. Lastly, the results of the mapping exercise to be carried out by the United Nations in order to compile information on the serious violations committed between 1993 and 2003 can make an important contribution to the transitional justice mechanism that will be selected and put in place.

II. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

69. In view of the above findings, the Special Rapporteur can only conclude that the judicial system in the Democratic Republic of the Congo is in a deplorable state today. Over and above the damage caused by the war, it has to be recognized that the main reason for this situation is the State's failure to give the judicial authority the necessary resources for it to function. In the present circumstances, the judiciary cannot function independently, as it is subject to political interference and corruption, partly because of the lack of adequate salaries and an independent Higher Council of the Judicature to protect judges from such interference, provide them with the necessary resources and supervise their conduct. It is also prevented from functioning efficiently by the lack of the most basic financial and material resources, owing to the exceedingly small budget assigned to it.

70. As a result of this inadequate financing of the judiciary, investigations cannot be carried out; very few trials are held, and meanwhile large numbers of persons spend months or even years in preventive detention without seeing a judge; the few court decisions finally handed down are hardly ever enforced; and in the rare cases when they are, a large percentage of convicts escape owing to the dilapidated state of the prisons and the lack of prison staff. Thus, impunity prevails, and it is only in exceptional cases that justice is done in an independent manner, including in cases involving the most serious human rights violations, such as rape, summary execution, torture and arbitrary detention.

71. The Special Rapporteur also points out that, according to statistics from the MONUC Human Rights Division, 86 per cent of these serious violations are committed by State officials - namely police officers and members of the armed forces - and fall within the jurisdiction of the military tribunals. This constitutes a violation of the relevant international standards, which require that cases of serious human rights violations by military personnel be tried by the ordinary courts, and not the military jurisdiction, which does not provide the necessary guarantees, particularly with regard to independence and competence.

72. Lastly, the Special Rapporteur notes that gaining access to justice is very difficult for the majority of the population because of corruption, a lack of financial resources, the geographical remoteness of the courts and transport problems, as well as ignorance of legal remedies.

73. Although the Democratic Republic of the Congo cannot function as a democratic State without a strong and independent judiciary, the judicial system remains the poor relation of the country's democratic institutions. To remedy this situation, the Special Rapporteur makes the following recommendations.

B. Recommendations

74. Given that the constitutional provisions adopted by referendum in 2006 on the independence of the judiciary have yet to be implemented nearly two years later, the following laws must be adopted as a matter of urgency:

(a) A law on the organization of the Higher Council of the Judicature. The adoption of this law is extremely urgent, since this body, which will be responsible for appointing, promoting and disciplining judges, is necessary to guarantee their independence while at the same time providing adequate supervision of their conduct. It will also draw up the judicial system's budget, which is crucial to its independence and effectiveness;

(b) A law providing for the application of the Rome Statute, which will, inter alia, transfer jurisdiction over international crimes from military tribunals to the civilian judicial system;

(c) Laws establishing the Court of Cassation, the Constitutional Court and the Council of State.

75. As regards the composition of the Higher Council of the Judicature, it is essential that this body be independent of the other branches of the State, as its mandate is to guarantee the independence of the judicature from the other branches of power. It is therefore crucial to maintain the composition of the Council as set forth in article 152 of the Constitution, i.e. comprising only judges. The proposal for a constitutional amendment put forward by a group of members of parliament, according to which the members of the Council would include the President of the Republic and the Minister of Justice, is contrary to the other provisions and to the very spirit of the Constitution, which is founded on the separation of powers. The proposed amendment should therefore be rejected.

76. The development of a strong, effective and independent judicial system should be a priority of the Government and of international bodies active in the field of justice and human rights. Without urgent and substantial reinforcement of the judicial system in the Democratic Republic of the Congo, the rule of law and the consolidation of the democratic reforms in which the Congolese people and the international community have invested so much over recent years will not materialize. Meeting this objective will require, in particular:

(a) The allocation of a considerably higher percentage of the national budget to the judicial system, bearing in mind that the budget of the judicial system usually accounts for between 2 and 6 per cent of national budgets. These resources should make it possible to:

- (i) Recruit new judges. Over 6,000 applications have been submitted to the Ministry of Justice. A substantial number of additional judges should be recruited as soon as possible;**
- (ii) Give judges decent premises that are more secure, more spacious and not merely provisional, as well as the resources to maintain them;**

- (iii) Give judges the operational capacity (transport, information technology, etc.) they need to perform their duties efficiently and independently, without having to rely on other State bodies or international organizations;**
- (iv) Provide judges with the necessary resources to cover the operational costs of the judiciary, so that they do not need to ask for a financial contribution from victims to carry out their investigations;**
- (v) Improve judges' pay: the experience in Ituri, where judges received allowances from the European Union for several months, shows that they can function more efficiently under these conditions, are less likely to give in to corruption or interference, and have a greater sense of recognition and motivation;**
- (vi) Establish new courts, especially magistrates' courts;**
- (vii) Set up a fund for each bar association to provide financial compensation to lawyers assigned by the courts to defend indigents.**

(b) The development and implementation by the Justice Ministry, in close cooperation with donors, of a plan for rebuilding the judicial system. In this regard, the Special Rapporteur considers that the Joint Committee to Monitor the Justice Framework Programme in the Democratic Republic of the Congo is the key mechanism for reforming the judicial system. Accordingly, he encourages the Committee members to press on with their work so that the plan can be adopted and implemented in the very near future. Specific measures to rebuild and support the judicial system should begin as soon as possible, given the extremely weak state of the judiciary and the destabilizing effect this weakness has on the democratic balance in the country;

(c) Recovery by the country's authorities of control over its natural resources. The Democratic Republic of the Congo is an extremely rich country, but thus far, exploitation of its natural resources has not benefited its population. On the contrary, unplanned or illegal exploitation continues to be a significant source of conflict and human rights violations, leading to looting and other abuses. Despite this, no one has been held to account for this illicit exploitation. It would be helpful to train specialist judges in this field. Regaining control of natural resources would allow the country to obtain the resources it needs to strengthen its institutions, in particular the judicial system, and to ensure that the population benefits from the country's wealth.

77. Civilians should no longer be tried by military courts. The Military Judicial Code should be amended to limit the jurisdiction of military courts to purely military offences, such as infringements of military regulations such as breach of rules, etc., committed only by military personnel. Accordingly, the civilian courts should be substantially strengthened, as having sole jurisdiction to try civilians and cases of human rights violations committed by the armed forces or the police.

78. Given that the vast majority of human rights violations are committed by the armed forces and the police, reforms of these bodies should be stepped up and military personnel and police officers should be trained to be disciplined and respect the law. This will also help relieve congestion of the courts, which are burdened by an excessive caseload.
79. The training of judges, especially in ethics, professional conduct and international human rights standards, and the training of court officers should be considerably strengthened. There is no body offering initial training to judges after university and to court officers before they assume office. A college for judges and a college for the professional training of court officers should be established as soon as possible.
80. Acts of sexual violence, the vast majority of which are committed against women, have reached inconceivable proportions in the Democratic Republic of the Congo. This is a scourge devastating Congolese society. In order to combat impunity of the perpetrators, which is not only a danger and an injustice but also an incitement to further crimes, judges should receive regular training on the law on sexual violence. They should be made aware of the need to apply the law to render justice to the victims and prevent further acts of violence. The Special Rapporteur welcomes the visit to the Democratic Republic of the Congo in July 2007 of the Special Rapporteur on violence against women, its causes and consequences, and invites the Government and the judicial and legislative authorities of the country to follow her recommendations in this regard (see A/HRC/7/6/Add.4, paras. 102 to 111) in order to remedy this extremely grave situation as soon as possible.
81. Less than 10 per cent of judges are women. More women judges should be recruited to correct this glaring imbalance. Recruitment of women judges is also important to facilitate the prosecution and conviction of perpetrators of sexual violence and other violations committed against women.
82. Urgent measures should be taken to guarantee the safety of judges, especially that of military judges from military officers and the military command. Military personnel who assault judges should be subjected to urgent criminal proceedings and immediate exemplary suspension.
83. A system for monitoring the enforcement of judgements should be established, as should a mechanism for State coverage of enforcement fees for indigents and victims of sexual violence.
84. A special “public liability” system should be put in place to establish rules governing compensation for damages caused by acts committed by public officials.
85. Given that the use of mobile courts has been very effective in increasing access to justice for residents of rural areas, in particular in Ituri in 2006, but that they were mainly organized by NGOs, the State should immediately include these initiatives when planning the activities and preparing the budget for the judiciary.
86. The use of preventive detention should be strictly limited. This will also prevent prison overcrowding. A maximum period of preventive detention should be established by law, especially for offences for which the prison sentence is under five years.

87. The Act on the bar association should be amended to provide that lawyers may only be summoned by courts of appeal. The gradual elimination of the profession of judicial defender should be envisaged.

88. In order to provide a solid foundation for democracy, the Congolese judiciary and the international community should cooperate in prosecuting grave violations of human rights and humanitarian law committed during the war, drawing on the experience of judicial cooperation in the area of transitional justice that has produced good results in other countries. The establishment of joint benches comprising national and international judges sitting in national courts might be an appropriate solution.

89. As the National Human Rights Monitoring Centre, a transitional body, has ceased to exist, a new national human rights commission should be established, in accordance with the Paris Principles relating to the status and functioning of national institutions for protection and promotion of human rights (General Assembly resolution 48/134, annex).

90. The international community should continue to provide support through MONUC and to strengthen cooperation programmes so that the country can embark on the necessary institutional reforms.
