

Democratic Republic of Congo

Military Justice and Human Rights: An urgent need to complete reforms



A study by AfriMAP
and
The Open Society Initiative for Southern Africa

By Marcel Wetsh'okonda Koso



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For more information contact:

AfriMAP / Open Society Initiative for Southern Africa

President Place

1 Hood Ave/148 Jan Smuts Ave

Rosebank

South Africa

P.O. Box 678

Johannesburg

South Africa

www.afrimap.org

www.osisa.org

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Acronyms

ACIDH	<i>Action contre l'impunité pour les droits de l'homme</i> (Action against Impunity for Human Rights Violations)
ACHPR	African Commission on Human and Peoples' Rights
AFDL	<i>Alliance des forces démocratiques pour la libération du Congo</i> (Alliance of Democratic Forces for the Liberation of Congo)
AHRLR	African Human Rights Law Reports
ASADHO	<i>Association africaine de défense des droits de l'homme</i> (African Association for the Defence of Human Rights)
ASF	<i>Avocats sans frontières</i> (Lawyers without Borders)
AU	African Union
CEJA	<i>Centre d'études juridiques appliquées</i> (Centre for Applied Legal Studies)
CDH	<i>Centre des droits de l'homme et du droit humanitaire</i> (Centre for Human Rights and Humanitarian Law)
CJM	<i>code judiciaire militaire</i> (military justice code)
CNDP	<i>Congrès national pour la défense du peuple</i> (National Congress for the Defence of the People)
CNS	<i>Conférence nationale souveraine</i> (Sovereign National Conference)
COM	<i>Cour d'ordre militaire</i> (military court)
CPRK	<i>Centre pénitentiaire et de rééducation de Kinshasa</i> (Kinshasa Penitentiary and Re-education Centre)
CSJ	<i>Cour suprême de justice</i> (Supreme Court of Justice)
DIC	<i>Dialogue intercongolais</i> (intercongolese dialogue)
DRC	Democratic Republic of Congo
FARDC	<i>Forces armées de la République démocratique du Congo</i> (Armed forces of the Democratic Republic of Congo)
HRW	Human Rights Watch
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice
MONUC	<i>Mission de l'Organisation des Nations unies en RD Congo</i> (UN Mission in the DRC)

NEPAD	New Partnership for Africa's Development
OAU	Organisation of African Unity
OSISA	Open Society Initiative for Southern Africa
OSIWA	Open Society Initiative for West Africa
PUC	<i>Presses universitaires du Congo</i> (Congo University Press)
RAF	<i>Réseau Action Femmes</i> (Women's Action Network)
RCN	<i>Réseau citoyen Justice et démocratie</i> (Citizens' Network for Justice and Democracy)
RL	<i>Registre de consultation sur les projets ou propositions de loi et les projets d'actes réglementaires</i> (consultation register for draft laws and regulations)
RP	<i>Registre pénal</i> (criminal register)
RPA	<i>Registre pénal en appel</i> (criminal appeal register)
UNHCHR	UN High Commissioner for Human Rights
WOPPA	Women as Partners for Peace in Africa

Preface

This study of the military justice system in the Democratic Republic of Congo (DRC) forms part of a series of four studies undertaken by the Open Society Institute's Africa Governance Monitoring and Advocacy Project (AfriMAP). The three other studies analyse governance challenges in the DRC in the sectors of delivery of public services (taking the education system as a case study), justice and the rule of law, and democracy and popular participation.

The four African foundations of the Soros Foundation network, which include the Open Society Initiative for Southern Africa (OSISA), together established AfriMAP. Its objective is to monitor closely the degree to which African countries and their development partners ensure the observance of African and international standards on human rights, the rule of law, and government responsibility. This study falls within that framework. It thus does not aim to evaluate the performance of the military justice system, less still judge the quality of court rulings issued by the military courts. Instead, it is intended to highlight general trends in the functioning of military justice and the observance of constitutional and international rules regarding the jurisdiction of the military courts, the independence of magistrates, the observance of rights of defendants, and the right to a fair trial.

AfriMAP was established under a particular set of circumstances. Since the African Union (AU) replaced the former Organisation of African Unity (OAU) in 2002, African states have made specific commitments to observing better governance. The Constitutive Act of the African Union contains provisions that aim to promote human rights, democratic principles and institutions, popular participation, and good governance. Other policy documents containing more specific commitments were subsequently adopted, including the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM), the African Union Convention on Preventing and Combating Corruption, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as well as the African Charter on Democracy, Elections and Governance. AfriMAP's research activities aim to facilitate and promote the observance of these commitments by highlighting the principal challenges and by providing a working document for civil society organisations acting at national and regional level.

Far from offering a catalogue of subjective judgements or a quantitative classification, each AfriMAP report is intended to provide as complete a discussion as possible, and include strengths and weaknesses in governance, observance of human rights and political participation,

as well as underlining areas worthy of improvement. Through a process of consulting experts, AfriMAP has finalised reporting formats in the three following domains: the justice sector and the rule of law; democracy and political participation; and the effective delivery of public services. The questionnaires developed on these themes, particularly the questionnaire on military justice in the DRC, itself an abridged version of the questionnaire on the justice sector and the rule of law on which this report is based, are available on AfriMAP's website at www.afrimap.org.

The reports are drawn up by experts from the countries in question, in close collaboration with the Open Society Institute's network of foundations in Africa and with AfriMAP's own staff. The objective is for these reports to constitute a resource for stakeholders, decision-makers, practitioners, researchers and campaigners from the country in question as well as for those working in other African countries, with the aim of improving respect for human rights and democratic values.

Objective of the project

In line with AfriMAP's overall objective, which is to establish a systematic and standardised reporting format that creates a direct link between good governance practices, respect for human rights, and progress in development, this report goes beyond an analysis of compliance with basic standards linked to respect for human rights, and the functioning of the judicial system. It aims to highlight positive reform initiatives and to report on progress that remains to be achieved, while suggesting measures for remedying identified inadequacies. We hope that this report will succeed in contributing to the pursuit of the current efforts to reform the military justice system in the DRC, and that it will inspire similar reforms elsewhere on the continent.

Methodology

The research undertaken to prepare this report started with a desk study of relevant texts on Congolese military justice. The principal sources of information used were relevant AU documents and those from other international organisations concerned with this area, the Constitution of 18 February 2006 and other relevant Congolese laws, official documents of the government and other public institutions, available reports drawn up by the United Nations and by national and international human rights organisations, published works and articles, studies carried out by other organisations, and press articles. The desk study was followed by empirical research through interviews with actors within the sector and by a prescriptive analysis, which included recommendations in response to the deficiencies and lacunae identified as the information was gathered. The preliminary versions of this report were reviewed and formed the subject of discussions at different stages of the process, during meetings with the researcher and with experts who agreed to undertake a peer review. Finally, a validation workshop was organised, during which the advanced version of the report was presented and the recommendations were examined by the participants, including military magistrates, lawyers, lecturers in law, parliamentarians, funding agency representatives and members of civil society organisations.

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This report has benefited from the valuable contributions of numerous individuals and institutions, all of whom we wish to thank. Our gratitude goes first to *Maitre* Marcel Wetsh'okonda Kosso, a lawyer based in Kinshasa and programme manager at the organisation Global Rights, who coordinated the research for this report and was responsible for its preparation and editing. We would also like to thank *Maitre* Franck Mulenda Lutete for his valuable contribution to the research, and critical comments on the report.

This project was developed under the supervision of OSISA. Hubert Tshiswaka, DRC programme director at OSISA, was responsible for its general management, while Roger Mvita, AfriMAP's DRC coordinator, ensured the smooth running of each stage of the research. This report would never have seen the light of day without their professionalism and competence.

We would also like to thank the following individuals and organisations, who contributed to the enrichment of this report through their critical comments and active participation in the workshop to endorse the report: Professor Akele Adau, magistrate, chairman of the *Haute Cour militaire* (Military High Court), adviser to the Ministry of Justice, member of the *Commission permanente de réforme du droit congolais* (Law Reform Commission), and the author of several studies on military justice; Christian Bulewu, jurist of the *Réseau Action Femmes* (Women's Action Network – RAF); Colonel Ekofo Inganya, magistrate, the senior chairman (premier president) of the *cour militaire* (Military Court) of Kinshasa; Juan Fernandez Jardon, coordinator of the unit for transitional justice and the fight against impunity at MONUC (*Mission de l'Organisation des Nations unies en RD Congo*, United Nations Mission in the DRC); *Maitre* Georges Kapiamba, lawyer in Lubumbashi, the deputy chairman of ASADHO (African Association for the Defence of Human Rights); Colonel Laurent Mutata Luaba, *auditeur supérieur* (military prosecutor) of the province of South Kivu and the author of several studies on military justice; Major Innocent Mayembe, magistrate, chairman of the *tribunal militaire de garnison* (Garrison Court) of Bunia; *Maitre* Koyakosi Mbawa, lawyer in Kinshasa; Colonel Nzabi Mbombo, *avocat général* (attorney general) of the Forces armées de la République démocratique du Congo – FARDC), *auditorat général* (judge advocate general's office) in Kinshasa; *Maitre* Ester Mputu, lawyer, adviser to the Ministry of Human Rights; Captain Kilensele Muke, magistrate, chairman of the *tribunal militaire de garnison* of Ndjili; *Maitre* Guy Mushiata, programme manager at the International Center for Transitional Justice (ICTJ) in Kinshasa; *Maitre* Nyabirungu Mwene-Songa, professor of criminal law and Member of Parliament (initiator of the draft law to implement the Rome Statute); *Maitre*

Théodore Nganzi, lawyer in Kinshasa and mixed justice committee expert at the Ministry of Justice; *Maître* Nicole Odia, lawyer, member of *Action contre l'impunité pour les droits de l'homme* (Action against impunity for human rights violations – ACIDH); and Jean-Paul Tshibangu of MONUC's unit for transitional justice and the fight against impunity. We would like to express our gratitude to each of these individuals and institutions, as well as the many other individuals whose names we have not been able to mention here, for the valuable contributions they have made to the success of this project.

Pascal Kambale, deputy director of AfriMAP, was responsible for the editorial direction of this report. He benefited from valuable contributions by Roger Mvita, AfriMAP coordinator in the DRC, and Bronwen Manby, senior adviser to AfriMAP.

Part I

Military Justice and Human Rights: An urgent need to complete reforms

Discussion Paper

Introduction

Only a very small number of the serious crimes committed in the Democratic Republic of Congo (DRC) during the series of wars that have followed each other since 1996 have been brought to court, and the proceedings have taken place in military courts only. Some of the proceedings were conducted in relative compliance with the law and observance of the rights of the defence, sometimes forming a contrast with the ordinary justice system, in which trials are studded with systematic human rights violations and undermined by corruption. On the whole, however, military justice such as it is currently practised is unable to effectively lead the battle against impunity, which President Kabila established as a priority for his government in his inauguration speech on 6 November 2006.

In addition to its institutional weaknesses reflected by an objective inability to bring a large number of cases to trial, military justice is also rendered ineffective by a legislative framework that is totally anachronistic and contrary to constitutional and international standards on the right to a fair trial. Its independence is constantly undermined by the growing control that the military command exercises over its functioning as well as by political interference in its decisions. What is even more worrisome is that military courts have extended their jurisdictions to encompass civilians, a practice that is contrary both to the constitution and to the African and international standards applicable in the DRC.

The military justice reform instituted by the laws of 2002¹ only addressed these issues very partially. The minister of justice has therefore initiated another reform process, which is still ongoing, whose aim is partly to include in military justice procedures the fundamental principles laid down by the constitution of 2006, which was adopted after the reforms of 2002 were entered into force. However, the ongoing reform should also tackle the different institutional and political issues facing military justice so that it may serve as an effective tool in the fight against impunity, while upholding human rights.

This discussion paper will review some of those issues, which are analysed in greater detail in the main report: *Democratic Republic of Congo: Military justice and human rights – An urgent need to complete reforms*. By examining Congolese military justice within its historical and institutional contexts, the main report outlines its strengths and weaknesses and defines the necessary conditions for its reform. The present paper focuses on the points that warrant urgent

¹ We are referring to Acts no. 023-2002 of 18 November 2002 on the code judiciaire militaire (military justice code) and no. 024-2002 of 18 November 2002 on the *code pénal militaire* (military criminal code).

and specific attention by the authorities in charge of conducting military justice reforms. It picks out the issues analysed in the main report that seem to be most urgently in need of reform. It also proposes directions for such reforms. The objective of the proposed reforms is to ensure that military justice complies as closely as possible with the principles laid down by the constitution and international standards regarding the independence of the justice system and the right to a fair trial.

In particular, the reports highlights three areas of urgent reform. First, the jurisdiction of military courts should be restricted to members of the military, and not extend to civilians. Secondly, the independence of military judges should be guaranteed and political interference in the conduct of trials cease. Thirdly, much stronger protections should be given to ensure the right to a fair trial in the military courts, in particular by limiting the discretionary power of the military judges. These reforms will need to be paired, of course, with parallel reforms in the ordinary court system, to ensure that civilians accused of serious crimes can be brought to justice with respect for due process.

1. Institutional weaknesses

Civil wars and foreign occupation have plagued the recent history of the DRC since 1996, and have mostly taken the form of a series of attacks on civilians. In the course of those attacks, almost all of the armed groups – governmental and rebel, national and foreign – committed crimes, including war crimes and crimes against humanity. By December 2002, when the ‘Inter-Congolese Dialogue’ peace conference organised in Sun City, South Africa, officially ended armed conflict in the DRC, the conflict had already claimed more than 3 million direct and indirect victims.² The global peace agreement, concluded in December 2002 in the framework of the Inter-Congolese Dialogue, responded to the need for the required justice for these serious crimes by establishing a transitional justice system accompanying the political transition. This encompassed a Truth and Reconciliation Commission (TRC), a National Human Rights Observatory and an Ethics and Corruption Commission. It also recommended the establishment, with the support of the international community, of a special International Criminal Court for the DRC, which, however, was never actually created, chiefly due to a lack of funding. As for the International Criminal Court (ICC), although it has begun the prosecution of certain cases, its jurisdictional rules do not allow it to deal with crimes committed before 2002 and its institutional capacities are too limited for it to take on more than a handful of cases.

Consequently, only national courts are in a position to bear the brunt of the fight against impunity and thereby contribute to the rebuilding of the nation. However, to date, civilian courts have not yet prosecuted any of the serious crimes committed during the wars, partly due to the fact that there is no legislation ‘domesticating’ the Rome Statute which defines such crimes, which is to say that there is no law to integrate the crimes falling within the jurisdiction of the ICC into national law and grant national courts jurisdiction in their regard. Thus, these serious

² International Rescue Committee, *Mortality in the Democratic Republic of Congo: Results from a Nationwide Survey Conducted September – November 2002*, <http://www.reliefweb.int/library/documents/2003/irc-drc-8apr.pdf>, 13 April 2003.

crimes may only be prosecuted by military courts, since the adoption in 2002 of the military criminal code, which includes the crimes stipulated in the Rome Statute.

The performance of military justice, however, has been mediocre. Only a very limited number of the international crimes perpetrated in the DRC over the last decade have been prosecuted, and few of those have led to criminal convictions. A recent study by the organisation *Avocats sans Frontières/Lawyers Without Borders (ASF/LWOB)* was only able to list 13 cases involving serious crimes that were effectively prosecuted in military courts.³ Furthermore, these cases were heard in a handful courts, mostly the garrison courts of Mbandaka and Bunia, and, to a lesser extent, those of Bukavu and Kipushi. This state of affairs reflects the lack of a consistent prosecution policy and betrays the opportunistic approach that has characterised both prosecutions in military courts and donor support for such prosecutions. For example, at the time of writing this report, no legal decisions have been handed down on international crimes in the military garrison court of Goma, whereas its jurisdiction covers a territory that has been one of the foremost arenas for the committing of massive crimes.

In addition, an analysis of the legal decisions handed down on the most serious international crimes reveals that the proceedings leading to those decisions were a veritable obstacle race.

Due to the lack of funding for justice in general and military justice in particular, the auditorats (military prosecution departments or departments of the judge advocate) were unable to cover the high financial costs involved in investigating such crimes. Because such crimes are committed far from court locations, trials generally take place in 'itinerant hearings', that is, hearings taking place outside of court buildings and as close as possible to the locations where the crimes were committed – to facilitate access to evidence and witnesses. However, since military courts have no resources of their own to organise itinerant hearings, foreign support has been needed to hold trials for serious crimes. Such support has generally taken the form of logistic support granted either directly by the United Nations peacekeeping mission in the Democratic Republic of Congo (MONUC) or by the European Union or its members through international NGOs.

Finally, military judges generally do not hold the highest ranks in the military regions or units under their jurisdiction. Consequently, due to the hierarchical principle according to which a member of the armed forces may only be judged by judges of a rank equal to or higher than their own rank, higher ranking officers have generally escaped prosecution, which has mainly focused on enlisted members of the armed forces or militia and a few former heads of armed factions. Out of 13 cases studied by ASF/LWOB, only three involved prosecution of high-ranking officers.

³ *Avocats Sans Frontières, Étude de jurisprudence : l'application du Statut de Rome de la Cour pénale internationale par les juridictions de la République démocratique du Congo*, March 2009.

2. Recent developments: Efforts to establish rules and standards

Congolese military justice has undergone considerable changes, particularly over the last seven years. Its legal and institutional framework was extensively modified by the ratification of the Rome Statute of the International Criminal Court in March 2002 and by the enactment of the military justice code and the military criminal code in November 2002. These three legal instruments made it possible to prosecute members of the armed forces and members of armed factions for serious crimes committed during the series of armed conflicts taking place since 1996. In 2005, the adoption of the constitution of the Third Republic, which contains fundamental principles aimed at integrating military courts and judges into the ordinary justice structure, made it possible to establish rules governing military justice. The new constitution made the decisions of military courts subject to review by civilian high courts, and placed military judges under the supervision of the judicial service commission with respect to career management and the supervision of internal discipline.

Generally speaking, this change is the culmination of efforts made since the early 1970s to impose rules and standards on Congolese military justice. Aside from the experiment of the *Cour d'ordre militaire*, a military court that operated as a court of special jurisdiction from 1997 to 2002, the successive reforms of military justice have tended towards the progressive integration of ordinary criminal procedure rules into military justice procedures and the establishment of a permanent court system responsible for enforcing justice in relation to the crimes stipulated under the military criminal code, which is separate from, but largely inspired by, the ordinary criminal code.

Although it marked an obvious positive difference in relation to the previous legislative framework, the legislative reform of 2002 remained largely insufficient and allowed obstacles to the right to a fair trial to persist in military courts. First of all, the military justice reform was not accompanied by a similar reform of the civilian justice system. Consequently, the most serious offences committed during the armed conflicts that recently affected Congo are now under the sole jurisdiction of the military courts, due to the lack of a law granting jurisdiction to ordinary courts. Furthermore, despite a constitutional provision to the contrary, military courts continue to enforce provisions of the laws of 2002 which authorise them to judge civilians and people who are only very indirectly linked to the armed forces. What is even more worrisome is that this extension of the jurisdiction of military courts is taking place at a time when the political, institutional and legal pressures that have traditionally formed obstacles to the independence of military judges are growing. Thus, the control of the military command over the decisions of military prosecutors is increasingly direct. Similarly, political interference in legal decisions is increasingly common, partly due to the fact that the reform of 2002 increased the risks of prosecution of political stakeholders, many of whom have been recruited amongst the former heads of armed factions, who have committed crimes for which they are prosecuted in military court. Military judges themselves resist the exercise of various review mechanisms by the ordinary courts, particularly in the form of constitutional appeals, which are provided for under

the constitution, and they accordingly set up obstacles to prevent defendants from enjoying their constitutional rights to a fair trial.

3. Attacks against the independence of military justice

Amongst the major issues facing military justice, it is important to note the problem of independence. While major innovations have been made in this area, we are obliged to observe that efforts still need to be made before the independence of the judiciary even begins to be effective in Congolese military courts.

Positive change has been observed in recent years. For some time, military courts were presided over by officers appointed by the military command but who were not qualified judges. The career judge attached to the court sat on the bench as an ordinary member alongside the other officers but did not direct trial proceedings. As for the prosecutors (*auditeurs militaires*), due to their position, they were directly attached to the command and the executive branch in an advisory capacity. The highest-ranking prosecuting judge, the *auditeur général* (judge advocate general), automatically acted as legal advisor to the minister of defence in times of peace and as legal advisor to the president of the republic in times of war. The judge advocate general was also the head of the military judiciary and therefore took precedence over the presiding judges. This limitation on the independence of presiding judges with respect to the prosecution was confirmed by the recognised power of the judge advocate's department (*auditorat militaire*) to convene hearings in military courts.

Over time, some of these limitations on the independence of the judiciary were progressively removed. The Sovereign National Conference held in 1992 adopted resolutions advocating the abrogation of all legal provisions restricting the independence of the judiciary. In follow-up to these resolutions, the presiding role in the constitution of military courts was progressively entrusted to military judges rather than officers who were not qualified judges. At the same time, the independence of presiding judges from the prosecution and the precedence of judges over prosecutors were re-established.

The military criminal code enacted in 2002 and the constitution which entered into force in 2006 removed many additional restrictions on the independence of the military judiciary. Thenceforth, the appointment of military judges had to comply with the statutes governing the judiciary, and military judges could no longer be appointed by requisition by superior members of the judiciary. These legal instruments also considerably limited the power of the minister of defence over military justice. Henceforth, the minister could only issue requests for prosecution (*droit d'injonction positive*) but could no longer order the termination of the prosecution once the process had already begun.

However, in actual fact, open attacks on the independence of military justice officers continue to be conducted on a regular basis by the members of the executive branch, the military command and the military justice hierarchy itself.

Interference by the executive branch in the administration of military justice is not a new

phenomenon. However, it has taken on worrisome proportions since the transition began in 2003. There are several reasons underlying the rise in repeated intrusions of the political authorities in the functioning of military justice. During the war, the government entered into alliances with certain rebel movements against other ones. Thus, ties have developed between the government and certain movements which are difficult to sever and which drive the government to counteract the independence of military justice in order to protect leaders of armed factions from being prosecuted in military courts.

Political pressures are also exerted on prosecutors to urge them to abandon proceedings that have already begun against former allies amongst the leaders of rebel or resistance movements. Among numerous other examples, such pressures were exerted during the proceedings against former Mayi-Mayi chief of North-Katanga Gédéon Kyungu Mutanga, beginning on 12 May 2006, when he surrendered to MONUC and was handed over by the UN mission to the Congolese authorities. The protection he received from his former allies in the government in Kinshasa took the form of pressure to influence the investigation and the fact that he was held in pre-trial detention at the Armed Forces of the Democratic Republic of Congo (FARDC) officers' mess rather than in a holding cell.

Furthermore, successive governments have made abandoning legal proceedings against the leaders of armed factions a cornerstone of their peace policy. Accordingly, in certain cases they have exerted pressure to stop proceedings that had already begun. In one of the most recent examples of political pressure on independent justice, the government forbade military prosecutors from taking action against chiefs and combatants of armed factions based in North-Kivu and South-Kivu, particularly those belonging to the rebel movement *Congrès national pour la défense du peuple* (CNDP). A letter from the minister of justice dated 9 February 2009 instructed the state attorney general and the judge advocate general of the FARDC 'not to engage in proceedings against the members of the aforementioned armed factions and to stop all proceedings that have already been initiated'.

The military judiciary also experiences pressures from the military command. Acting either out of ignorance or with the deliberate intent of undermining the independence of military justice, certain officers take it upon themselves to forbid proceedings against any accused placed under their authority, or make such proceedings subject to their prior authorisation. Such interference may take the form of open written messages, such as the letter dated 24 July 2006 in which General Mbuyamba Nsona, commander of operations in Ituri, instructed the military prosecutor of the Bunia garrison that all summonses or warrants to appear in court issued by the latter must henceforth 'be imperatively approved by the Commander of Operations'.

The military judiciary have sometimes paid very dearly for their attempts to resist interference by the military command. On 28 July 2007, the commander of the ninth military region, General Jean-Claude Kifwa ('Tango Tango'), ordered the torture and mistreatment of four members of the judge advocate's department of the Kisangani garrison for not having sought his authorisation prior to launching proceedings.

In order to preserve the independence of the judiciary, which is an essential element of democracy and the observance of human rights, it is important for the government and top military justice authorities to scrupulously comply with the procedures established by the

statutes governing the judiciary, and particularly those on the appointment, removal and rotation of judiciary members. Specifically, they should ensure that an immediate end is put to the practice of untimely transfers of prosecutors or judges during proceedings. The judicial service commission should collaborate with unions of magistrates and human rights organisations to help members of the judiciary resist attempts to violate their independence, and to help improve their living and working conditions to protect them against corruption.

The appointment of military judges to the judiciary by the president of the republic should, according to the law, follow nomination by the judicial service commission and have nothing to do with the military command. In addition, this nomination should be complemented by another one from within the military order to place judge advocates of an equal or higher rank than the highest-ranking officer in their jurisdiction so that they are in a position to carry out their duties in a fully independent manner

4. Prosecution of civilians in military courts

One of the principal scourges of Congolese military justice is the ‘militarisation of the justice system’, that is, the extension of the jurisdiction of military courts to the detriment of ordinary courts. Over time, through a loose interpretation of the applicable laws, military courts have progressively extended their jurisdiction over civilians beyond legal provisions. The extension of military court jurisdictions was taken to its fullest extreme by the *Cour d'ordre militaire*, which judged civilians for crimes falling under the jurisdiction of ordinary courts. The abuses of the *Cour d'ordre militaire* were part of the reason for the military justice reform of 2002, which attempted to confine military justice within its traditional role as justice for members of the armed forces. However, the reform was only partial. In many cases, the codes of 2002 confirmed military court jurisdiction over civilians. The constitution of 2006 made the clearest break from the past in that regard. Although it recognised the power of the president of the republic to replace civilian courts with military courts in times of war and under certain conditions, the constitution clearly restricted the personal jurisdiction of military courts to the members of the armed forces and police forces only.

However, despite provisions to the contrary in the constitution, military courts continue to apply the provisions of the military code of justice, enshrining the jurisdiction of military courts over civilians under several different circumstances. For instance, military courts may bring proceedings against civilians for any offence that is included in the military criminal code. Military courts also have jurisdiction over civilians in the event of the criminal participation of members of the armed forces and civilians in committing military offences, in the event they have committed an armed offence and in the event of committing a continuous offence extending from a time when the person had military status to a time when they no longer had such status. Finally, military courts extend their jurisdiction over civilians by resorting to vague, catch-all offences such as ‘inciting members of the armed forces to commit acts contrary to the law or their discipline’, which makes it possible to establish extremely indirect links between civilians and offences of a military nature.

Such provisions constitute a clear violation of the constitution and international standards. According to the Draft Principles on the Administration of Justice by Military Tribunals, on the functional authority of military courts, ‘The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.’ The standards adopted by the African Union are even more explicit. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa stipulate that ‘military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts’.

The ongoing reform of military justice provides an opportunity to harmonise military criminal legislation with the constitution and international standards, which forbid the trial of civilians by military courts. It is also an opportunity to engage in a serious debate on whether police force members should be treated as members of the armed forces, justifying the jurisdiction of military courts in their regard. The fact that the military justice reform and reforms of the police and the armed forces are taking place at the same time constitutes a good opportunity to tackle the issue holistically.

Even before the military justice reform produces results, a stricter interpretation of the constitution and the military criminal laws in force could help limit, to some extent, the number of cases in which military courts have jurisdiction over civilians. One of the measures that should be envisaged is referring to the Supreme Court of Justice to interpret Article 156, Paragraph 1 of the constitution to define the jurisdiction of military courts in times of peace.

5. No judicial review of pre-trial detention

Pre-trial detentions ordered by military judges are generally too long and the procedure does not allow detainees to refer to a judge to investigate whether their detention is lawful. In any case, such an investigation, where it takes place, is only possible after a year of pre-trial detention.

Thus, defendants being prosecuted by military courts spend long periods of time in pre-trial detention without any way of knowing when the investigating judge intends to put them on trial or even whether he or she has any intention of doing so at all. In the *Kilwa* case, for instance, the accused spent more than 18 months in pre-trial detention before being referred to the military court of Katanga. At the time of the writing of this report, the accused in the *Tshindja Tshindja* and *Kabungulu* cases had totalled more than three to four years in pre-trial detention without having been sent before a court.

Judges who refuse to submit to the judicial review of pre-trial detention until at least one year has gone by justify their actions on the grounds of Article 209 of the military justice code, which authorises the office of the judge advocate to extend pre-trial detention ‘for one month and so on, from month to month, where the duly justified needs of the investigation so warrant’ as long as the investigating judge ‘feels it is necessary to hold the accused in detention’. An excessively broad interpretation of this provision by some military judges leads them to place the needs of the investigation above the need to uphold the rights of the accused. For instance, in the *Germain*

Katanga case, the superior military court not only deemed lawful a pre-trial detention of more than one year, but it further extended it by 60 days at the request of the prosecution, which only had to claim – not prove – that the investigation was ongoing.

Article 209 of the military code of justice is manifestly unconstitutional and ought to be repealed. Pre-trial detention ordered by military courts should be made subject to a new legal framework providing for the right of the accused to call for a review of their pre-trial detention by a judge as quickly as possible. Such a review should include an obligation for the investigating judge to prove the need of the investigation whose continuation he or she requests and the possibility for the accused to object.

6. Right to fair trial

The right to a fair trial stated in Articles 19 to 21 of the constitution and in Article 7 of the African Charter on Human and Peoples' Rights, is constantly violated in military courts. The principle of equality of arms between the prosecution and the defence is generally sacrificed on the altar of a speedy trial and the corps discipline that the judges associate with military justice.

The inquisitorial nature of the preliminary investigation in Congolese procedure deprives the accused of adequate access to the prosecution file before the trial and thereby puts the accused at a disadvantage in relation to the prosecution in terms of case preparation. Although this is a general problem affecting Congolese criminal procedure, which also applies to ordinary court procedure, special provisions in the military justice code increase the urgency of the need for reform to restore the equality between the prosecution and the defence in military courts. These provisions include a clause demanding that the accused make a list of defence witnesses and submit said list 'before the hearing on the merits', which is to say before the first hearing of the trial. However, the accused is not allowed access to the prosecution file before the beginning of the trial; and is therefore unable to make a list of defence witnesses to the extent that he or she cannot know exactly what allegations by the prosecution he or she will have to refute.

In addition, the military justice code contains provisions granting judges extensive discretionary power in the conduct of the trial proceedings. Military judges regularly abuse this power when they decide, instead of the accused, whether and under what conditions defence witnesses will be heard. In other cases, judges use their discretionary powers to agree to hear prosecution witnesses whose names were not on the list submitted to the defence. In this case, the defence is vulnerable to the surprise effect created by the prosecution, and the judges do not give the defence sufficient time to prepare to refute the evidence produced by the prosecution.

The right to be assisted by the defence lawyer of one's choice is considerably restricted. Most lawyers are concentrated in major cities that are generally far distant from trial locations. They often do not arrive at the trial location before the first trial hearing or can only confer with their client for the first time several days after the opening of the trial. Lawyers who plead in military courts are often appointed or instructed to defend proceedings only a few days before the beginning of trial hearings or after the trial is already underway, and the accused therefore receive no assistance during the preliminary investigation phase.

Free legal aid is not organised in military courts. As a result, in order to benefit from quality legal assistance, the accused and complainants must pay out of their own pockets for the services of the Congolese lawyers of their choice, which is something that few armed forces members or police officers are able to do, given their limited resources and mediocre pay. In addition, legal aid is not effective since it is only organised in a very limited number of bar organisations and services provided in the framework of legal aid are not reimbursed by the state.

The provisions of the military justice code that violate the rights of the defendant ought to be repealed during the ongoing reform. Meanwhile, military courts should focus special attention on upholding equal rights between the prosecution and the defence. To that purpose, they should avoid interpreting their power in the conduct of trials as an invitation to dispose of the rights of the defence at their discretion. Judges' discretionary powers should be used to uphold the rights of the defence and the principle of equality of arms.

7. Conclusion

Military courts have shown very limited effectiveness in the fight against impunity for serious crimes, committed for the most part by members of the armed forces and police or members of armed factions. This poor performance is due in part to the limited institutional capacities of Congolese military courts and the lack of sufficient available resources. Insufficient public resources for the justice sector are responsible for the lack of a consistent prosecution strategy and the fact that the prosecution of serious crimes is often only launched as a result of public pressure. It is also the reason for excessive dependence on foreign resources, resulting in the fact that prosecutions have been made possible through the support of international organisations, such as MONUC, for investigations conducted by military courts.

However, the institutional capacity and resource gaps are only part of the reason for the poor performance of military justice. As in any judiciary system, the effectiveness of the military courts also depends on the confidence that the public places in military justice. Systematic violations of the rights of the defence and the right to a fair trial do not guarantee such confidence. The prosecution of civilians for crimes falling within the jurisdiction of ordinary courts constitutes the most absolute form of this type of violation, and should be ended immediately. In addition to constituting a clear violation of the constitution and the international standards applying in the DRC, the prosecution of civilians in military courts is also a convenient shortcut for judge advocates, who are unable to effectively prosecute higher-ranking officers in the armed forces or high officials in rebel groups.

In addition to supporting specific prosecutions on a case-by-case basis, donors and international organisations should also support efforts to reform military justice to guarantee the greater independence of judge advocates and better access to justice for victims and the accused.

Through a happy coincidence, the military justice reform coincides with the ongoing reforms of all security sectors, including the army and the police. The fight against impunity should also include a preventive approach, through the establishment of a vetting mechanism

to prevent the integration into the armed forces of people under serious suspicion of having committed serious crimes falling within the jurisdiction of military courts, and to facilitate their prosecution.

Part II

Military Justice and Human Rights: An urgent need to complete reforms

Main Report

1

Historical context and the challenges of reform

Congolese military justice is an old and complex institution whose creation dates back to the founding of the Congolese colonial state. It is thus as old as the ordinary justice system. While it has undergone numerous transformations over time, the most recent taking place in 2002, the military justice system is currently based de facto on an implied state of emergency (justice d'exception), which means civilians are brought before military courts without strict observance of the right of defence and the right to a fair trial. It is important to put a stop to this tendency and undertake a thorough reform of military court structures, their rules of procedure and, most particularly, the rules governing their jurisdiction.

Since 2002, the military justice system has extended its material and personal jurisdiction to a degree unprecedented in its history. The most serious offences committed during the armed conflicts that have affected the Congo fall under the exclusive jurisdiction of the military courts; in the absence of a law that attributes jurisdiction, these cases cannot be referred to the ordinary courts. Alongside this, the military courts have developed a tendency to judge civilians and persons who are only indirectly associated with the armed forces. This extension of jurisdiction is taking place at the same time as inertia gains ground among the political, institutional and judicial forces that traditionally act as a constraint on the independence of the military judiciary. Moreover, the command of the armed forces is exerting an increasingly direct control over the decisions of military prosecutors. Political interference in judicial decisions is becoming more and more frequent, in part because the reform of 2002 has increased the risk of prosecution for political actors. Many of these are former leaders of armed groups – the perpetrators of crimes prosecuted by the military courts. Military magistrates themselves resist the exercise of oversight

by the ordinary courts, particularly by resort to the Constitution, and obstruct persons subject to their courts from enjoying the constitutional right to a fair trial.

The reform of the military courts carried out in 2002 did not remove these obstacles, and the Ministry of Justice is currently conducting another reform process. One of its objectives is to bring the military justice system into line with the Constitution of 18 February 2006, and the relevant international standards. It is important that this process achieves more than the 2002 reform and overcomes the institutional and legal obstacles that prevent observance by the military courts of constitutional and international norms on the independence of the courts and the right to a fair trial. It is also important to identify those international canons that need to be incorporated into national legislation, and prevent a selective choice of these standards. A review of past attempts to reform the military justice system, and their limitations, will suggest what the current reform programme needs to aim for.

A. Reform efforts

Congolese military justice has a long tradition of serving alternatively as an ‘emergency’ system (*justice d’exception*) and as a judicial structure more or less similar to the ordinary courts. Introduced at the same time as the *Force publique*, the private army raised by King Léopold II for his *Etat Indépendant du Congo* (Congo Free State),¹ military justice initially operated from 1888 onwards in the form of emergency courts termed *conseils de guerre*. Their jurisdiction was limited at the time to serious military misconduct committed by members of the *Force publique*.² This system was maintained with minor modifications³ until 1958, when magistrates began to sit on the *conseils de guerre*.⁴ A provisional military justice code was drawn up for the first time in 1964.⁵

The first more or less complete reform of military justice took place in 1972, with the introduction of a *code de justice militaire* (code of military justice).⁶ This code organised the military courts for the first time into a complete judicial system, distinct from that of the ordinary courts. It introduced a procedure applicable to these courts and established rules for their jurisdiction. It also defined the offences falling under the jurisdiction of these courts as well as the corresponding sentences.⁷

Towards the normalisation of the military justice system

The reform of 1972 laid the foundations of modern Congolese military justice. The military emergency system that characterised the first years of the Second Republic became a thing of

¹ The term was then taken over by the colonial army of the Belgian Congo between 1908, when the Congo formally became a Belgian colony, and 1960, the date of independence.

² *Décret* of 22 December 1888.

³ In particular, the *décrets* of 24 November 1890, 12 May 1943, and 29 April 1944.

⁴ *Décret* of 8 May 1958.

⁵ *Décret-loi* of 18 December 1964.

⁶ *Ordonnance-loi* no.72-060 of 25 September 1972 introducing a *code de justice militaire*.

⁷ On the evolution of military criminal legislation, see, in particular, Likulia Bolongo, *Droit pénal militaire zaïrois*, Paris, LGDJ, 1977, pp.8–25.

the past. Military justice was administered and dispensed by courts forming a judicial pyramid headed by the *conseil de guerre général*. The system was operated by magistrates, secretaries of the prosecutor's office and court registrars, who formed the *corps de justice militaire* (military justice corps), which was subject to the authority of the *auditeur général* (judge advocate general) of the armed forces. The nomenclature for serious breaches of discipline was expanded to include offences of a military kind, together with the sentences applicable to these offences; and the relevant procedures before the military courts were clarified.⁸

Military justice nevertheless attracted harsh criticism, especially from participants in the *Conférence nationale souveraine* (Sovereign National Conference – CNS), which took place between 1991/1992, at the start of the democratic opening of Congolese society and the reform of its institutions. The CNS was sharply critical of various aspects of the military justice system. The concerns raised were, *inter alia*, that military justice fell under both the Justice and the Defence Ministries; that it was subservient to the military high command; that the military courts were presided over by officers who lacked both the training and capacity as magistrates; and that the military courts were dependent on the prosecutor's office. Among the recommendations for reform decided by the CNS were the following: that the double supervision of military courts by both the Defence and Justice ministries should be abolished; that the independence of military magistrates from the military high command should be affirmed; that the independence from the prosecutor's office of military courts should be recognised; and that military courts should be presided over by military magistrates.⁹ These recommendations started to be put into practice, as was evident in some of the improvements introduced in practice and case law.¹⁰

Return to the emergency system

However, as with the majority of what at the time were termed the *acquis de la CNS* (achievements of the CNS),¹¹ its resolutions on the military justice system were deliberately ignored when the new regime, composed of the *Alliance des forces démocratiques pour la libération du Congo* (Alliance of Democratic Forces for the Liberation of Congo – AFDL, which rebelled against President Mobutu), led by Laurent-Désiré Kabila, reformed military justice in 1997.¹² Far from removing the obstacles to the independence of the military justice system that were criticised by the CNS, the 1997 reform instead increased them. It introduced a single court, the *Cour d'ordre militaire* (Military Court – COM), which reduced the independence of magistrates and wrecked the organisation, procedures and jurisdiction of the military justice system. On the one hand it was given jurisdiction over crimes the vague definition of which rendered criminal an almost

⁸ On the military justice system that resulted from this reform, see Likulia Bolongo, *ibid.*, p.275.

⁹ *Conférence nationale souveraine, Rapport de la Commission juridique*, pp.40–42.

¹⁰ P. Akele Adau, *La justice militaire dans le système judiciaire congolais: quelle réforme?*, *Congo-Afrique* no. 352, February 2001, pp.119–120; Nswal Nten-a-Bol, *Une conception éthique de la magistrature militaire*, in E.-P. Ngoma Binda (ed.), *Justice, démocratie et paix en République démocratique du Congo*, Kinshasa, Publications of the *Institut de formation et d'études politiques*, 2000, p.128.

¹¹ During the period that followed immediately after the holding of the CNS, the most contentious political questions concerned the nature and pace of democratic reforms. These questions divided the political class and civil society into, on the one hand, those who kept to the *acquis de la CNS*, i.e. the straight and rigorous application of the package of reforms decided at the CNS; and, on the other, those who argued in favour of their adaptation, modification and even their selective application.

¹² *Décret-loi* no. 019 of 23 August 1997 introducing a *Cour d'ordre militaire*.

limitless number of activities, and, on the other, crimes were given an elastic interpretation. As an example of the latter, the crime of *violation des consignes* (violation of orders) meant that officers were prosecuted for having entered into an 'an unauthorised relationship with a foreign diplomat or any Congolese or foreign person holding office of a political nature'.¹³

By affirming that the COM should 'as far as possible' apply the procedure of the *code de justice militaire*, which itself provides for the application, as far as possible, of the procedure of the *code de procédure pénale* (criminal procedure code), *décret-loi* 019 of 23 August 1997 effectively recognised a procedure that had not been precisely defined. This had the effect of encouraging the arbitrary power of the judge, inasmuch as he or she then had discretion to choose the procedure to apply.¹⁴ Sentences were also subject to the whim of the judge.¹⁵ During the proceedings in the *Kandolo* case in Likasi, the presiding judge declared to one of the defending counsel: '*Maître*, article 5 allows us to pronounce sentences other than those established in the 1972 code, but out of concern for the principle of legality of crimes and sentences, we shall not do so'¹⁶ The COM had thus become an emergency court system.

B. Extension of personal and material jurisdiction

The criticisms addressed against the COM by defenders of human rights,¹⁷ political actors¹⁸ and the United Nations (UN)¹⁹ served as a direct catalyst for the reform of 2002, which was given concrete form in the *code de justice militaire* and the *code pénal militaire* (military criminal code) currently in effect. By way of application of these codes, new courts were created and magistrates appointed to operate them. During the same year, the DRC ratified the Rome Statute of the International Criminal Court (ICC), which allowed for the possibility of punishment for the many severe crimes committed during the armed conflicts that had arisen after 1996. But only the *code pénal militaire* included the international crimes defined in the Rome Statute, which was not incorporated into the ordinary criminal code. The military courts thus began to exercise exclusive jurisdiction with regard to the offences defined in the Rome Statute. Whether or not the author of such crimes is military or civilian does not matter, since the 2002 reform extends the personal jurisdiction of the military courts to civilians. This represents a clear violation of

¹³ *Conseil de guerre général, Auditeur général c. Lisisia Syla*, RPA 177/97, 1997.

¹⁴ J.-P. Kilenda Kakengi Basila, 'Une nouvelle unité dans le paysage judiciaire congolais: la Cour d'ordre militaire', *Revue africaine de droit international comparé*, 10, 3, London, October 1998, p.479.

¹⁵ According to article 5 of *décret-loi* no. 019 of 23 August 1997, establishing a *Cour d'ordre militaire*: 'This court will apply the sentences of the existing *code de justice militaire* and, as far as is necessary, the sentences of the *code pénal militaire*' (italics added).

¹⁶ Interview with *Maître* Franck Mulenda, lawyer in Kinshasa, April 2009.

¹⁷ See in particular *Confessions religieuses en République démocratique du Congo, Actes de la consultation nationale*, 24 February-11 March 2000, Kinshasa, Edition Enfance et Paix, 2000, p.255.

¹⁸ A resolution on military justice adopted in the *Dialogue intercongolais* (Intercongolaise dialogue) recommended the abolition of the emergency system, including the COM, the reform of the military justice system and the introduction of appeal routes against the decisions of the *Cour d'ordre militaire*. See WOPPA, *Les Résolutions du dialogue intercongolais tenu à Sun City du 19 février au 25 avril 2002 et du 1er au 2 avril 2003*, Kinshasa, April 2005, pp.15-16.

¹⁹ R. Garreton, 'La compétence des tribunaux militaires et d'exception, rapport de synthèse', in Elisabeth Lambert Abdelgawad (ed.), *Juridictions militaires, tribunaux d'exception: perspectives comparées et internationales*, Editions des Archives contemporaines and AUF, Paris, 2007, p.451.

the principles of the African Commission on Human and Peoples' Rights (ACHPR) regarding the right to a fair trial. Therefore, while it appeared to wish to align Congolese legislation with international treaties,²⁰ the 2002 reform actually called into question whether the Congolese military justice system respects international standards on that right.

C. International standards

While the military justice system in the Congo underwent the changes described above, a parallel reform dynamic was developing, both internationally and in Africa, which profoundly affected the basic rules for the operation, procedures and jurisdiction of the military courts.

Indeed, over the last 20 years, the issue of military courts administering and dispensing justice has received increasing scrutiny from the perspective of observance of human rights and the rules governing a fair trial. As early as 1984, the Human Rights Committee of the UN noted that the existence in numerous countries of military or emergency courts that judge civilians 'run the risk of posing serious problems regarding the fair, impartial and independent administration of justice'. Very frequently, according to the Committee, 'when such courts are established, it is to permit the application of exceptional procedures which do not comply with the ordinary standards of justice. Though it is true that the [International Covenant on Civil and Political Rights] does not prohibit the establishment of courts of this type, it nevertheless clearly stipulates that judgment of civilians by these courts must be very exceptional and must take place under conditions which genuinely respect all the guarantees stipulated in article 14.'²¹

In order to prepare for the implementation of these conditions, between 2001 and 2006 the UN Sub-Commission for the Promotion and Protection of Human Rights worked hard to formulate draft principles for the administration of justice by military courts. For this purpose, it appointed two successive special rapporteurs, Louis Joinet and Emmanuel Decaux, and commissioned them to draw up draft principles for a military justice system. This report, commonly known as the 'Decaux principles', includes the following requirements: that military courts respect the Constitution and the law; that they are integrated into the ordinary judicial system; that they have no jurisdiction with regard to children and civilians or in respect of serious international crimes; and that they should respect the rules of fair trial, most notably *habeas corpus* and the right of appeal.

Even before their adoption by the *Conseil des droits de l'homme* (the Human Rights Council)²² and despite the fact that they are not yet binding, these draft principles have already been applied in a number of cases, both by states and by regional institutions, for the promotion and

²⁰ According to their account: 'The *code pénal militaire* made innovations in particular, through the introduction of offences which take account of international conventions and other legal instruments on human rights, war crimes and crimes against humanity. This introduction follows the ratification by the Democratic Republic of Congo of the Rome Statute establishing the International Criminal Court'. Law no. 023/2002 of 18 November 2002, introducing the *code judiciaire militaire* and law no. 024/2002 of 18 November 2002, introducing the *code pénal militaire*, *Journal officiel de la République démocratique du Congo*, 44th year, special edition, 20 March 2003, pp.9–10.

²¹ General Comment no. 13 on article 14 of the UN International Covenant on Civil and Political Rights. See Compilation of General Comments and General Recommendations adopted by human rights treaty bodies, HRI/GEN/1.Rev.9.

²² The Human Rights Council is the United Nations body created to replace the United Nations Commission on Human Rights.

protection of human rights. This provides eloquent proof of their significance.²³

Within the continental context, the African Charter on Human and Peoples' Rights does not speak expressly of the human rights problems posed by a system of military justice. Nevertheless, over time the ACHPR has developed a body of case law and drawn up principles applicable to these courts.²⁴ This effort by the Commission is in accordance with its mandate, by virtue of the Charter, to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation'.²⁵ Accordingly, in 1992 the Commission adopted a resolution on the Right to a Fair Trial and Legal Assistance,²⁶ through which it undertook to draw up General Principles and Guidelines on the Right to a Fair Trial and Legal Assistance within the framework of the African Charter. These Guidelines were subsequently adopted, according to their preamble, '[with a view to their incorporation] into ... domestic legislation by State parties to the Charter and [requiring to be] respected by them'.²⁷

In the most relevant section, the Guidelines state the fundamental principles governing the extent of personal and material jurisdiction of the military courts, as well as the procedures to be followed before these courts:

- G. Right of civilians not to be judged by a military court
- a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.
- b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.
- c) Military Courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals shall not try offences that fall within the jurisdiction of regular courts.

²³ E. Decaux, 'La dynamique des travaux de la Sous-commission des droits de l'homme et l'évolution de la position des Etats', in E. Lambert Abdelgawad (ed.), *op. cit.*, pp.513–523.

²⁴ See in particular, E. Lambert Abdelgawad, 'Les tribunaux militaires et juridictions pénales spéciales sous le contrôle de la Commission africaine des droits de l'homme et des peuples', in E. Lambert Abdelgawad, *op. cit.*, pp.609–627.

²⁵ Article 45(1)(b) of the African Charter on Human and Peoples' Rights.

²⁶ Resolution ACHPR/Res.4(XI)92.

²⁷ The text of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa is available at Afrimap's website: http://www.afrimap.org/english/images/treaty/ACHPR_Directives&Principes_ProcesEquitable_FR.pdf.

2

The legal and institutional framework

Congolese military justice exists within a legal framework composed of various international legal instruments relating to human rights, a constitution that, despite some weaknesses, is progressive, and certain laws that continue to require improvement. Those provisions of the Constitution that extend the jurisdiction of military courts to civilians and enshrine the immunity from prosecution of members of the government present a problem. Owing to weaknesses in monitoring compliance with the legal principles of human rights and constitutionality, magistrates in the military justice system continue to apply laws that manifestly violate the Constitution and the relevant international norms. At an institutional level, on the ruins of the monolithic, monopolistic, and now defunct *Cour d'ordre militaire* (Military Court – COM), a complete judicial pyramid has now been built and integrated with the ordinary judicial system through various mechanisms; and, in principle, is independent of the executive.

A. Legal framework

The military justice system shares almost the same legal framework as the ordinary justice system,²⁸ governed by the same international treaties,²⁹ the same

²⁸ The expressions '*justice ordinaire* (ordinary judicial system)', '*justice civile* (civil justice system)' and '*justice de droit commun* (justice under ordinary law)' or '*tribunal ordinaire* (ordinary court)', '*tribunal civil* (civil court)', and '*tribunal de droit commun* (ordinary court of law)' will be used interchangeably in this report to designate the ordinary justice system and its courts in contrast to the military justice system and its courts.

²⁹ The essential features of the international commitments of the Democratic Republic of Congo are available in *Les Codes Larcier, République démocratique du Congo, Vol. VI, Volume I, Droit public*, Brussels, Editions Larcier, 2003, pp.123–231 and 310–355.

Constitution,³⁰ and the same laws.³¹ There are nevertheless four laws specific to military justice: the *code judiciaire militaire* (military justice code);³² the *code pénal militaire* (military criminal code);³³ the *décret-loi* of 24 November 1964 which created military courts in place of ordinary law courts and tribunals;³⁴ and *ordonnance-loi* no. 71-082 of 2 September 1971, which introduced a disciplinary regime for military magistrates and court registrars.³⁵ The *code judiciaire militaire* regulates the procedure applicable to prosecutions before the military courts, as well as the rules relating to their jurisdiction and structural organisation. Its provisions are broadly inspired by the *code de procédure pénale* (criminal procedure code) and the *code de l'organisation et de la compétence judiciaires ordinaires* (code of ordinary judicial organisation and jurisdiction). In the event of contradiction between these three codes however, it is the provisions of the *code judiciaire militaire* that take precedence.³⁶

Although analysts may query whether or not this legal framework is effective, there are also questions to be raised about its consistency and completeness.

International treaties

The DRC has adhered to, or ratified, around 20 international treaties relating to human rights and international humanitarian law. As *Maître* Eddy Tshibusu, communications officer for the

³⁰ *Constitution de la République démocratique du Congo*, Kinshasa, *Journal officiel de la République démocratique du Congo*, 47th year, special issue, 18 February 2006, p.78, hereafter termed 'the Constitution'. From the time of its independence on 30 June 1960, the Democratic Republic of Congo has been successively governed by 10 constitutions. This figure does not take into account the multiple constitutional revisions that have punctuated Congolese constitutional history; in particular the 17 revisions to which the constitution of 24 June 1967 was subjected, with this remaining in effect until 1992 or 1993, according to the authors. The essential features of these constitutions and several constitutional revision laws are contained in the work by F. Toengaho Lokundo, *Les constitutions de la République démocratique du Congo de Joseph Kasa Vubu à Joseph Kabila*, Kinshasa, PUC, 2008.

³¹ In order to keep to the criminal laws that concern military justice, the object of this study, we should in particular, cite:

- *ordonnance-loi* no. 82-020 of 31 March 1982, containing the *code de l'organisation et de la compétence judiciaire* (code of judicial organisation and jurisdiction), *Les Codes Larcier, République démocratique du Congo, Vol. I, Droit privé et judiciaire*, Brussels, Editions Larcier, 2003, pp.262–273;
- *décret* of 6 August 1959, as revised and amended to date, containing the *code de procédure pénale* (criminal procedure code), *Les Codes Larcier, op. cit.*, pp.188–299;
- *ordonnance-loi* no. 82-017 of 31 March 1982, relating to the procedure before the *cour suprême de justice* (Supreme Court of Justice), *Les Codes Larcier, vol. I*, pp.319–335;
- *décret* of 6 August 1940, as revised and amended to date, containing the Congolese criminal code, *Les Codes Larcier, vol. I, Droit pénal*, pp.1–23;
- *loi organique* no. 06/20 of 10 October 2006, containing the *statut des magistrates* (Magistrates' Statute), Kinshasa, *Journal officiel de la République démocratique du Congo*, 47th year, special edition, 25 October 2006;
- *loi organique* no. 08/013 of 5 August 2008, containing the organisation and functioning of the *conseil supérieur de la magistrature* (judicial services commission), Kinshasa, *Journal officiel de la République démocratique du Congo*, 49th year, special issue, 11 August 2008, p.7;
- *décret-loi* no. 017/2002 of 3 October 2002, containing the *code de conduite de l'agent public de l'Etat* (code of conduct for public officials), *Journal officiel de la République démocratique du Congo*, 44th year, special issue, 15 January 2003, p.18.

³² Law no. 023-2002 of 18 November 2002, containing the *code de justice militaire*, *Les Codes Larcier, Vol. I, op. cit.*, pp.393–421. Hereafter designated the *code judiciaire* (judicial code).

³³ Law no. 024-2002 of 18 November 2002, containing the *code pénal militaire*, Kinshasa, *Journal officiel de la République démocratique du Congo, Les Codes Larcier, vol. I, op. cit.*, pp.42–60. Hereafter designated as the *code pénal* (criminal code).

³⁴ *Les Codes Larcier, vol. I, Droit privé et judiciaire, op. cit.*, pp.390–391.

³⁵ *Ibid.*, pp.391–393.

³⁶ Articles 2, paragraph 2 and 129 of the *code de justice militaire*.

International Committee of the Red Cross (ICRC) delegation, says, the DRC is a champion at ratifying international treaties.³⁷ It is a party to the principal international treaties on human rights and international humanitarian law, and, as far as we are aware, these ratifications are not generally accompanied by any reservations.

For the military justice system, authoritative interpretations of international treaties, particularly those relating to human rights and case law from international criminal courts, constitute an important source of law. These explanations of international human rights instruments may be found in documents such as General Observation no. 13 on article 14 of the International Covenant on Civil and Political Rights,³⁸ the Basic Principles on the Independence of the Judiciary,³⁹ the Guidelines on the Role of Prosecutors,⁴⁰ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁴¹ and the Basic Principles on the Role of Lawyers.⁴² As far as regional African instruments are concerned, we should mention the Resolution on the Right to a Fair Trial and Legal Assistance in Africa (the Dakar Declaration) and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.⁴³

With regard to international case law, in addition to the interpretations used by the ad hoc international courts for the former Yugoslavia and Rwanda,⁴⁴ we should mention the recommendations following the examination of government or individual communications submitted to the various treaty supervisory bodies, particularly the Human Rights Committee⁴⁵ and the ACHPR.⁴⁶

It is clear from analysis of these international and regional instruments relating to human rights and international humanitarian law, as well as analysis of the relevant case law, that all questions pertaining to the military justice system, whether of judicial organisation, judicial criminal procedure, associated offences or sentencing, and including the prison regime, are covered by their provisions.⁴⁷ These instruments therefore form an integral part of Congolese military criminal law.

³⁷ Interview of 5 March 2009.

³⁸ United Nations, Compilation of General Comments and General Recommendations adopted by human rights treaty bodies, *op. cit.*

³⁹ Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985.

⁴⁰ Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

⁴¹ Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985.

⁴² Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

⁴³ Adopted by the African Commission on Human and Peoples' Rights, 2001.

⁴⁴ Human Rights Watch, *Génocide, crimes de guerre et crimes contre l'humanité : recueil thématique de la jurisprudence du Tribunal pénal international pour le Rwanda*, 2004, p.90.

⁴⁵ On the evolution of the position of United Nations bodies in general and the Human Rights Committee in particular on military justice, see in particular Federico Andreu-Guzman, 'Les tribunaux militaires et juridictions d'exception dans le système onusien des droits de l'homme' in E. Lambert Abdelgawad (ed.), *op. cit.*, pp.525–551.

⁴⁶ On the evolution of the position of the African Commission on Human and Peoples' Rights, See in particular, E. Lambert Abdelgawad, 'Les juridictions militaires et les juridictions pénales spéciales sous le contrôle de la Commission africaine des droits de l'homme et des peuples', in E. Lambert Abdelgawad, *op. cit.*, pp.609–627.

⁴⁷ P. Akele Adau, 'Les normes internationales des droits de l'homme dans les juridictions militaires', in *Ministère des Droits humains, Administration de la justice et droits de l'homme*, Kinshasa, 1999, p.54.

Principal international treaties applicable to military justice to which the DRC is a party

Numbers	International treaties	Ratification dates
1.	Convention on the Prevention and Punishment of the Crime of Genocide	31 May 1962
2.	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	31 May 1972
3.	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	18 March 1996
4.	Convention on the Rights of the Child	28 September 1990
5.	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	12 November 2001
6.	Rome Statute of the International Criminal Court	11 April 2002
7.	Agreement on the Privileges and Immunities of the International Criminal Court	3 July 2007
8.	Accord de coopération judiciaire entre la République démocratique du Congo et le Bureau du Procureur de la Cour pénale internationale (Judicial cooperation agreement between the Democratic Republic of Congo and the Office of the Prosecutor of the International Criminal Court)	6 October 2004
9.	First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	24 February 1961
10.	Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War	24 February 1961
11.	Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I)	3 June 1982
12.	Additional Protocol to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)	30 March 2001
13.	African Charter on Human and Peoples' Rights	20 July 1987
14.	Protocol on the Prevention and Suppression of Sexual Violence against Women	

Source: Website of the Ministry of Justice at www.justice.gov.cd.

Both the UN⁴⁸ and the AU⁴⁹ urge member states to incorporate all of the commitments contained in these legal instruments into both their domestic legislation and their respective constitutions.

⁴⁸ United Nations, *Service consultatif et de coopération technique dans le domaine des droits de l'homme* (Consultative service and technical cooperation in the field of human rights), *Fiche d'information no. 3 (Rev.1)*, New York and Geneva, United Nations, 2002, pp.8–9.

⁴⁹ *Résolution sur l'intégration de la Charte africaine des droits de l'homme et des peuples dans le droit national*, African Commission on Human and Peoples' Rights, *Recommandations et résolutions*, Banjul, 1998, p.23.

A constitution that is globally in harmony with international commitments

In general, the DRC's Constitution is in harmony with its international commitments. It gives pride of place to justice in general and military justice in particular, as well as to human rights. Not only does it recognise the constitutional state (*état de droit*),⁵⁰ which assumes these two notions, but it chose justice as the first element in the state motto, 'Justice–Peace–Work'.⁵¹ It enshrines the independence of the judiciary and protects provisions relating to the independence of the judiciary and human rights from revision.⁵²

The Constitution allocates the sole exercise of judicial functions to the courts and tribunals it names, including military courts.⁵³ By virtue of the Constitution, military courts thus form an integral part of judicial power, and in no way constitute a category of emergency jurisdiction. The independence of military courts is thus guaranteed in the same fashion as other jurisdictions.

However, certain provisions of the Constitution are contrary to the relevant international standards. An instance is the provision that relates to the personal competence of military courts. Under the terms of article 156 of the Constitution, 'Military courts shall hear offences committed by members of the armed forces and the national police. In times of war or when a state of siege or emergency has been declared, the President of the Republic may, via a decision discussed at the *Conseil des ministres* (Council of Ministers), suspend the punitive action of the ordinary law courts and tribunals in favour of that of military jurisdiction over all or part of the Republic and for a duration and for offences which he determines. The right of appeal may not, however, be suspended.'

This provision contradicts point L of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which provides that '[m]ilitary courts may in no circumstances judge civilians. In the same way, special jurisdictions shall not hear offences which fall within the competence of the ordinary courts.'⁵⁴

Incomplete legislative reform

The result of the 2002 reform remains qualified, inasmuch as the *code judiciaire militaire* and the *code pénal militaire* contain both wheat and chaff. In other words, they contain progressive provisions that most definitely comply with the Constitution and with international human rights treaties, but their weaknesses make further reform necessary.

Positive steps

The changes introduced by the judicial reform process of 2002 relate to terminology, judicial organisation, the jurisdiction of the courts, criminal procedure and substantive criminal law. With regard to terminology, we may note that the expressions *code pénal militaire* and *code judiciaire militaire* replace the expression *code de justice militaire* (code of military justice). This may

⁵⁰ Article 1 of the Constitution.

⁵¹ Article 1 of the Constitution.

⁵² Article 220 of the Constitution.

⁵³ Article 225 of the Constitution.

⁵⁴ http://www.afrimap.org/english/images/treaty/ACHPR_Directives&Principes_ProcesEquitable_FR.pdf.

appear trivial, but the expression *code de justice militaire* is unfortunate, giving the impression that military justice is a tool in the hands of the military command. By contrast, the terms *code pénal militaire* and *code judiciaire militaire* merely emphasise that military justice is a specialised form of justice applicable to the armed forces.⁵⁵ The *code judiciaire militaire* is innovative with regard to previous legislation in recognising the terms ‘courts’ and ‘military courts’. In the Constitution,⁵⁶ these terms appear more appropriate than ‘*conseil de guerre*’ or *Cour d’ordre militaire*, which gave the impression that the mission of the military courts was to dispense order or punitive retribution rather than justice.⁵⁷

With regard to the organisation of the courts, the *code judiciaire militaire* re-establishes the military court pyramid that was replaced through *décret-loi* no. 019 of 23 August 1997 with a monolithic and monopolistic *Cour d’ordre militaire*.⁵⁸ It enshrines the separation of the court from the *auditorat militaire* (military prosecutor’s office), and establishes the formal precedence of the former over the latter. Under the regime of the *code de justice militaire*, as amended by *décret-loi* no. 017 of 23 August 1997, the court was not distinguished from the prosecutor’s office, although the latter had precedence over the former.⁵⁹ The 2002 code also extended the principle that military courts should sit with panels of judges instead of a single judge.⁶⁰ A single judge officiated at the *conseil de guerre de police* (police court martial), the lowest level in the military justice system, which was introduced by the *code de justice militaire* of 1972. Military courts are now presided over by military magistrates, in sharp contrast with the previous regime, under which military courts were presided over by officers from the military command.⁶¹

Within the COM system, the President of the Republic appointed only nine of its magistrates.⁶² All others were summoned on a case-by-case basis by the chairman of the *Cour d’ordre militaire* or the prosecutor (*procureur*) at this court, both of whom exercised disciplinary power over them.⁶³ Since the 2002 reform, all military magistrates are now subject to the *statut des magistrats* (Magistrates’ Statute).⁶⁴ Furthermore, the power of the Minister of Defence over the military prosecution service (*auditorat militaire*) is limited to issuing *injonctions positives* (positive injunctions).⁶⁵ This mechanism is clearly more progressive than that applied in the ordinary justice system, which recognises the authority of the Minister of Justice over prosecutors without defining its scope.⁶⁶

⁵⁵ P. Akele Adu, *op. cit.*, 1999, pp.111, 118 and 121.

⁵⁶ Article 149, paragraph 1.

⁵⁷ J.-P. Kilenda Kakengi Basila, ‘Une nouvelle unité dans le paysage judiciaire congolais : la Cour d’ordre militaire’, *Revue africaine de droit international comparé*, 10, 3, October 1998, p.473.

⁵⁸ P. Akele Adu, *op. cit.*, p.89.

⁵⁹ *Ibid.*

⁶⁰ Articles 10, paragraph 2, 16, paragraph 1, 20, paragraph 1, 22, paragraph 2 and 24, paragraph 1 of the *code judiciaire militaire*.

⁶¹ Articles 10, paragraph 4, 16, paragraph 3, 22, paragraph 4 and 24, paragraph 2 of the *code judiciaire militaire*.

⁶² *Décret d’organisation judiciaire* no. 020 of 23 August 1967 appointing the members of the *Cour d’ordre militaire* at the fiftieth Brigade, in P. Akele Adu, ‘La Cour d’ordre militaire: sa nature, son organisation et sa compétence’, *Congo-Afrique* 319, November 1997, p.557.

⁶³ P. Akele Adu, *art. cit.*, 2001, p.90.

⁶⁴ Article 3, paragraph 3 of the *code judiciaire militaire*.

⁶⁵ In other words, the Minister of Defence may order the launching of prosecutions but is prohibited from ordering the termination of prosecutions already in progress (‘negative injunctions’). Articles 46 and 47 of the *code judiciaire militaire*.

⁶⁶ Article 10 of the *code judiciaire militaire*.

The military justice system does not have jurisdiction over children,⁶⁷ whereas before the 2002 reform, pupils of a military school or children who served under the flag were subject to the jurisdiction of military courts.⁶⁸ There was thus a kind of emancipation through arms. The provision that allowed the military courts jurisdiction over foreign citizens in the event of their participation in criminal activities alongside military personnel was also abolished.⁶⁹ Lastly, several positive innovations with regard to criminal procedure were introduced by the *code judiciaire militaire*. Essentially, except in the case of an express waiver, the military courts apply the ordinary criminal procedure code. This procedure is particularly applicable to detention pending trial when the individuals in question are not members of the armed forces.⁷⁰ In general terms, deprivation of liberty by the judicial police is limited to 48 hours, the same duration as that established under common law.⁷¹ A mechanism for ‘controlled liberty’ has been introduced. Although it has not been defined by law and, to our knowledge, not yet applied by the courts, this mechanism is likely to limit the systematic use of pre-trial detention considerably.⁷² The right to legal aid for individuals on trial before the military courts has also been recognised.⁷³ Ordinary remedies, in this case the processes for applications for re-trial (*opposition*) and appeal that were expressly abolished by article 5 of *décret-loi* no. 019 of 23 August 1997, have been re-established as peace-time procedures.⁷⁴

It is important to underline that the 2002 reform abolished the provisions that ‘imperatively’ or ‘obligatorily’⁷⁵ prescribed the death penalty for certain military offences.⁷⁶ Moreover, some other offences that had been poorly defined in the previous legislation were either abolished or redefined. Thus, violation of oath by lawyers,⁷⁷ treason through collusion with the enemy,⁷⁸ and infringement of order⁷⁹ offences have been abolished.

Provisions contrary to the Constitution and international standards

The examination of other provisions of the same codes allows the scope of the innovations to be put into perspective. We shall list only a few examples. Firstly, it should be noted that implementation of the new military codes was expressly delayed because they contained a legislative clause⁸⁰ that some interpreted as a desire to exclude the ‘assassins’ of President

⁶⁷ Article 114 of the *code judiciaire militaire*.

⁶⁸ Article 129 of the *code de justice militaire*.

⁶⁹ Article 130 of the *code de justice militaire*.

⁷⁰ Article 157 of the *code judiciaire militaire*.

⁷¹ Article 148 of the *code judiciaire militaire*.

⁷² Article 207 of the *code judiciaire militaire*.

⁷³ Article 63 of the *code judiciaire militaire*.

⁷⁴ Article 276 of the *code judiciaire militaire*.

⁷⁵ See in particular, article 457, paragraph 3 of the *code de justice militaire*.

⁷⁶ Article 27 of the *code pénal militaire*.

⁷⁷ Article 243 of the *code de justice militaire*.

⁷⁸ Article 431 of the *code de justice militaire*.

⁷⁹ P. Akele Adau, *op. cit.*, 1999, pp.57–58.

⁸⁰ Articles 380 and 208 of the *code judiciaire militaire* and the *code pénal militaire* respectively.

Laurent-Désiré Kabila from advantages under the new laws.⁸¹ This explanation appears plausible, given that the same legislator prevented appeals citing the benefits of the new laws against the decisions of the *Cour d'ordre militaire*.⁸² We have thus witnessed the adoption of legislation tailored to fit, whereas it is more proper, in a constitutional state, for the law to be impersonal, abstract and general.

In terms of judicial organisation, at the request of the *auditeur des forces armées* (military prosecutor), the Minister of Defence has the power to appoint a prosecutor from a lower prosecutor's office to carry out higher functions on a temporary basis.⁸³ This provision clearly violates the Constitution, which allocates rotation of magistrates to the *conseil supérieur de la magistrature* (equivalent to a judicial services commission).⁸⁴ Moreover, following the example of the *code de justice militaire*, the *code judiciaire militaire* continues to appoint *juges assessesurs* (lay magistrates), *juges militaires* (military judges), or *juges policiers* (police judges) side by side with military magistrates in the military courts. These lay magistrates, who are subject to military discipline (as are members of the police), do not enjoy the independence necessary for the exercise of judicial functions. They show no evidence of any competence in legal matters, which contravenes the international obligations of the DRC, particularly the African Charter on Human and Peoples' Rights, as interpreted by the ACHPR.⁸⁵

From the perspective of jurisdiction, the *Haute Cour militaire* (Military High Court) is given the power to overturn the final decisions of lower military courts.⁸⁶ This provision runs contrary to the Constitution, which states that the final decisions of both ordinary and military courts are subject to appeal before the Appeal Court.⁸⁷ Military courts also have jurisdiction over international crimes.⁸⁸ In personal terms, their jurisdiction extends beyond military staff to members of the police, to 'nation-builders' (recruits to national service), and to civilians.

⁸¹ On 18 November 2002, date of promulgation of the new codes, the trial of the alleged assassins of President Kabila was in progress. By way of application of the rules regarding the application of criminal laws over time, these codes should have been applied within the context of this trial, which the law explicitly rejected, in an apparent effort to prevent the individuals subject to prosecution as part of this trial from benefiting from the more favourable rules of the new codes. See P. Akele Adau, 'Le nouveau droit judiciaire et pénal militaire transitoire, un soft landing pour la Cour d'ordre militaire', *Congo-Afrique* 369–370, November–December 2002, pp.547–568.

⁸² Article 378 of the *code judiciaire militaire*. The resolution of the *Dialogue intercongolais* (DIC), regarding the abolition of *juridictions d'exception* (emergency courts) and the reform of military justice, condemned the abuses perpetrated by the *juridictions d'exception* and recommended the introduction of legal routes permitting the reversal of the judgments issued by the said *juridictions d'exception* in the event of an application by the injured parties. Having concurred with the *Dialogue intercongolais* in its criticism of the COM which, according to it, had aggravated the weaknesses decried with regard to the 1972 law, the 2002 law nevertheless chose to distance itself from the DIC regarding the fate to be assigned to the decisions of this court. In other words, for the 2002 law, the tree may be bad but its fruit is good.

⁸³ Article 65 of the *code judiciaire militaire*.

⁸⁴ Article 150, paragraph 4 of the Constitution.

⁸⁵ E. Lambert Abdelgawad, 'Les tribunaux militaires et juridictions pénales d'exception sous le contrôle de la Commission africaine des droits de l'homme et des peuples', in E. Lambert Abdelgawad (ed.), *op. cit.*, pp.613–614.

⁸⁶ Article 123 of the *code judiciaire militaire*.

⁸⁷ Article 153, paragraph 2 of the Constitution.

⁸⁸ Articles 161 to 175 of the *code pénal militaire*.

By way of criminal procedure, foreign lawyers are prohibited from representing individuals in the military courts.⁸⁹ This provision manifestly violates point G,b of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, according to which '[s]tates shall ensure that an accused person or a party to a civil case is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar'. The *auditeur* (judge advocate) is able to grant warrants, even at night, to the judicial police to carry out searches and/or seizures, in military facilities or in any other location.⁹⁰

The deadline for exercising jurisdictional oversight of pre-trial detention is one year from the start of the detention.⁹¹ This clause thus disregards point M, 5, e of the Principles and Guidelines on the Right to a Fair Trial and to Legal Assistance in Africa, which states that '[j]udicial bodies shall at all times hear and act upon petitions for *habeas corpus*, *amparo* or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to *habeas corpus*, *amparo* or similar procedures.' The judge presiding over a military court has the right to issue a *mandat de comparution* (summons) or a *mandat d'amener* (warrant to bring a suspect before a judge immediately).⁹² Appeals against the decisions of the *cour militaire opérationnelle* (operational military court) are not allowed.⁹³

The 2002 reform confuses war crimes with crimes against humanity, as its definition of crimes against humanity closely resembles the classic definition of war crimes, and it considers such crimes to occur only in the context of armed conflict.⁹⁴ Nor does it establish penalties for war crimes.

Application of the constitutional and international framework by military courts

The transposition into domestic Congolese law of the provisions of international law on human rights, and of international humanitarian law, is occurring at a very slow pace. In the case of military justice, the adaptation of military criminal legislation to the Constitution remains a challenge to be met. This situation has several causes, most particularly the failure to make widely known not only the international conventions but also the Constitution and the law.

According to article 215 of the Constitution, 'as soon as they are published, agreements and treaties concluded in a regular fashion have superior authority to laws, subject to the application of each treaty and agreement by the other party'. Article 153, paragraph 4 of the Constitution states that 'courts and tribunals, both civil and military, shall apply the newly ratified international treaties'. While the condition of reciprocity for the application of international treaties is not appropriate where treaties relating to human rights are concerned, Congolese military courts have rarely drawn on these treaties to rule out the application of legal

⁸⁹ Article 61, paragraph 2.

⁹⁰ Article 139 of the *code judiciaire militaire*.

⁹¹ Articles 205ff. of the *code judiciaire militaire*.

⁹² Article 249, paragraph 2.

⁹³ Articles 87 and 276 of the *code judiciaire militaire*.

⁹⁴ *Tribunal militaire de garnison* (Garrison Court) of Mbandaka, *Auditeur militaire c. Kahenga Mumbere Papy et consorts*, RP 086/005, 20 June 2006, decision published in the *Conseil National des Droits de l'Homme en Islam, Rapport d'observation du procès sur les crimes contre l'humanité*, March 2007, pp.27–86.

provisions that run contrary to human rights. But in certain cases, the refusal to apply laws contrary to international treaties has been unambiguous. Prosecuted on a charge of *violation de consigne* (disobeying orders)⁹⁵ for having an unauthorised relationship with a foreign person, in particular for having married a foreign woman, Colonel Lisisa Sylva was acquitted in April 1997 by the *conseil de guerre général*, which ruled that it was not the role of the legislator to intervene in the domain of marriage, since the Universal Declaration of Human Rights recognises the freedom to marry.⁹⁶

In the same way, in the *Songo Mboyo* case, the *tribunal militaire de garnison* of Mbandaka, after having observed that the crime against humanity for which the accused parties were being prosecuted was regulated by two legal instruments that defined the crime differently, discarded the application of the *code pénal militaire* in favour of the statute of the ICC. The court cited article 215 of the Constitution, by virtue of which international treaties have higher authority than the law. The court also justified its decision on the grounds that the ICC statute is more favourable to the accused, since it does not impose the death penalty.⁹⁷

In other cases, however, the court's actions appear to derive from a selective reading of the Constitution and international conventions. This was true in the *Germain Katanga* case, where the *auditeur général* (judge advocate general) demanded that the *Haute Cour militaire* extend the pre-trial detention of the accused, which had already exceeded 12 months. Accepting this request, the *Haute Cour* noted that 'the judge was not responsible for assessing the legality of the previous detention; his task was to permit detention to continue if this measure appeared to him to be justified, not to rule on the legality of the original order nor address the irregularities of the detention already undergone'. The court added that 'the Constitution of the Democratic Republic of Congo, like the international instruments ratified by the Democratic Republic of Congo, provides that every detained person has the right to a hearing without delay and to appear in court within a reasonable period'.⁹⁸ The *Haute Cour militaire* thus appeared to recognise the right of the accused to be brought before a court within a reasonable period, but not to have his or her pre-trial detention made subject to supervision by the courts.

B. Institutional framework

The institutional framework of the military justice system comprises a four-tier judicial pyramid, the apex of which is occupied by the *Haute Cour militaire* and the base by the *tribunal militaire de police* (military police court). The two intermediate levels, from summit to base, consist of military courts along with *cours militaires opérationnelles* and *tribunaux militaires de garnison*.⁹⁹ Integrated into the Congolese judicial system, within which they constitute a sub-system, military courts are in principle independent of the executive and particularly of the Ministry of Justice, with which they nevertheless maintain a number of cooperative relationships.

⁹⁵ Offence established pursuant to articles 48off. of the *code de justice militaire*.

⁹⁶ RPA Ruling 177/97; See P. Akele Adau, *op. cit.*, 1999, pp. 57–58.

⁹⁷ *Tribunal militaire de garnison of Mbandaka, Auditeur militaire c. Lt Eliwo Ngoy et consorts*, RP 084/2005 of 12 April 2006 (unpublished ruling; copy available from the author).

⁹⁸ *Ordonnance* RPD no. 001/2005 of 1 December 2006.

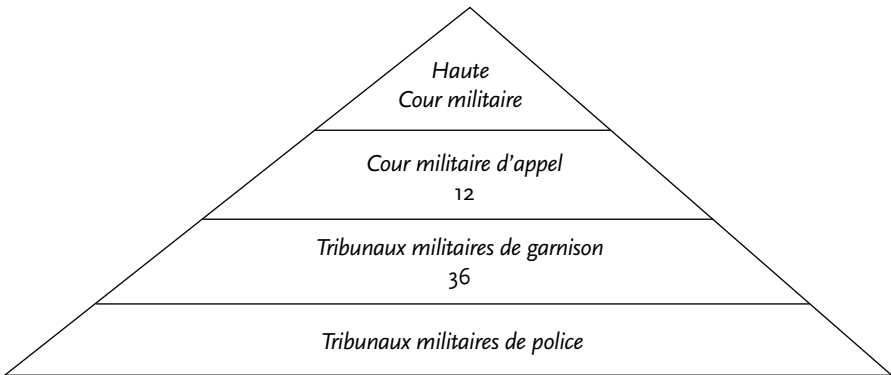
⁹⁹ Military courts are established by article 149, paragraph 1 and article 1 of the Constitution and the *code judiciaire militaire* respectively.

Court structure

At the summit of the military justice system pyramid is the *Haute Cour militaire* (the highest military court), and below this 12 *cours militaires d'appel* (military appeal courts; one per province and two in Kinshasa), and 36 *tribunaux militaires de garnison*, which constitute the courts of first instance in the military justice system. A *cour militaire opérationnelle*, with non-permanent jurisdiction, is currently operating in the province of North Kivu.

The structure of the military courts may be represented by the following diagram.

Military justice pyramid



Source: Defence Institute of International Legal Studies, *L'État de droit et la justice militaire dans une force militaire professionnelle*, a seminar on military justice in the armed forces of the Democratic Republic of Congo, p.26.

The following table shows in schematic fashion the current military courts, their jurisdictions, their ordinary judiciary locations, and their composition.

While articles 2 and 226 of the Constitution provide for the establishment of new provinces, the DRC is still currently made up of 10 provinces, with the addition of Kinshasa, which has double status, as both a city and a province. Consequently, in addition to the *Haute Cour militaire*, the military justice system consists of 12 *cours militaires*, to which 36 *tribunaux militaires de garnison* must be added.

Jean-Paul Tshibangu, the MONUC officer responsible for observing the administration of justice, has commented that, given the size of the country, and that the jurisdiction of the *tribunaux militaires de garnison*, the basic military courts, is set at district level, access to justice is not easy. Generally, these courts are situated very far away from the places where the offences are committed. In these conditions, mobile courts are necessary to enable justice to be done. This explains why practically all the trials for international crimes recorded up to this point have been arranged as a result of hearings in the mobile courts.¹⁰⁰

¹⁰⁰ Interview of 6 March 2009.

Military courts, their jurisdictions and their locations

Courts	Jurisdiction	Ordinary judiciaries	Composition of judiciaries
<i>Haute Cour militaire</i>	The whole of the national territory (article 6, paragraph 2 of the <i>code judiciaire militaire</i>)	<ul style="list-style-type: none"> • Kinshasa, capital of the DRC (article 6, para. 1 of the <i>code judiciaire militaire</i>) • In exceptional circumstances, at any location within national territory determined by the President of the Republic (article 7, para. 1 of the <i>code judiciaire militaire</i>) • During wartime, the President of the Republic may decide to organise mobile court hearings in operational zones (article 7, para. 2 of the <i>code judiciaire militaire</i>) 	<ul style="list-style-type: none"> • Five members, including two career magistrates (article 10, paragraph 2) • In the event of appeal, five members, including three career magistrates (article 10, paragraph 5 of the <i>code judiciaire militaire</i>)
<i>Cours militaires</i>	The province or city of Kinshasa (article 12, paragraph 1 of the <i>code judiciaire militaire</i>)	<ul style="list-style-type: none"> • Provincial capital, location of the headquarters of the military region or another location set by the President of the Republic (article 12, para. 2 of the <i>code judiciaire militaire</i>) • Under exceptional circumstances, the Minister of Defence may change the location of the <i>cours opérationnelles</i> (article 13, paragraph 2 <i>code judiciaire militaire</i>) 	Five members, including two career magistrates (article 16, paragraph 1 of the <i>code judiciaire militaire</i>)
<i>Cours militaires opérationnelles</i>	Operational zones determined by the President of the Republic (article 18, paragraph 2 of the <i>code judiciaire militaire</i>)	They accompany the troops within the operational zones (article 18, paragraph 1 of the <i>code judiciaire militaire</i>)	Five members, including at least one career magistrate
<i>Tribunaux militaires de garnison</i>	District, city, garrison or military base (article 21, paragraph 1)	District capital, city where the staff of the garrison are located, or any other location determined by the President of the Republic (article 21, paragraph 2 of the <i>code judiciaire militaire</i>)	Five members, including at least one career magistrate (article 22, paragraph 2 of the <i>code judiciaire militaire</i>)
<i>Tribunal militaire de police</i>	Jurisdiction of the <i>tribunal de garnison</i> (article 23 of the <i>code judiciaire militaire</i>)		Three members, including at least one career magistrate (article 24, paragraph 1er of the <i>code judiciaire militaire</i>)

Source: *Defence Institute of International Legal Studies*.

This palliative nevertheless raises significant problems. First of all, mobile court hearings are very expensive. Without the assistance of MONUC, which in most instances has provided

logistical support, it would not have been possible to organise them. In addition, mobile court hearings are sometimes not held in conditions that allow military judges to issue rulings in a faithful and conscientious way, and with complete freedom. This is the case when these hearings draw a significant crowd, and there is public pressure for the accused to be sentenced. Judges are then very strongly tempted to make decisions that will satisfy public opinion.¹⁰¹ The final danger that hangs over hearings in mobile courts, as identified by *Maître Désiré Balume*, in charge of the military justice programme of REJUSCO (the European Commission's Programme for the Restoration of the Judicial System in Congo), is that of violating the rules of a fair trial. This is particularly likely to occur when magistrates have little time available, and must hear several cases.¹⁰²

Vast areas of the country's territory lack coverage by a military court, and crimes that have been committed in one area are prosecuted before a court located a great distance away. The court must then travel to the area, as a mobile court, for the hearing. Prosecution hearings in the *Songo Mboyo* case, for actions committed in the district of Mongala in Équateur province, were held in a mobile court by the *tribunal militaire de garnison* of Mbandaka, far away in the Équateur district.¹⁰³ In the same way, the *tribunal militaire de garnison* of Bukavu in South Kivu sat in a mobile court at Kindu in the province of Maniema.¹⁰⁴

Each of the military jurisdictions has an associated military prosecutor's office, termed an *auditorat militaire*. Following the example of the military courts, the *auditorats militaires* take the form of a judicial pyramid, with the *auditorat général* at the *Haute Cour militaire* at its summit. At its base is the *auditeur militaire* at the *tribunal militaire de garnison*, who also carries out his duties at the *tribunal militaire de police*. The intermediate functions are carried out by the *auditeur supérieur* at the military court, or the *cour militaire opérationnelle*.

Links with the ordinary justice system

Military justice is linked to the ordinary justice system through a complex system of appeals, at the centre of which is an appeal on the grounds of the unconstitutionality of the laws applicable before the military courts. The strong resistance to these appeals by military magistrates nevertheless limits or even undermines their principal objective: that of submitting military justice to the oversight of the ordinary justice system.

Plea of unconstitutionality

As is the case in most countries with a Napoleonic law system, any challenges to the constitutionality of a law in the DRC are heard exclusively by a court specifically designated for that purpose, the *Cour constitutionnelle* (Constitutional Court).¹⁰⁵ While awaiting its establishment, the DRC, by virtue of article 223 of the Constitution, has provided that the functions of the *cour constitutionnelle* are exercised by the *cour suprême de justice* (Supreme Court

¹⁰¹ Interview with Colonel Toussaint Matanzini, *directeur de cabinet de l'auditeur général*, Kinshasa, March 2009.

¹⁰² Interview of 5 March 2009.

¹⁰³ Interview with *Maître François Tshiteya* of the Mbandaka bar, 8 March 2009.

¹⁰⁴ G. Mushiata, 'Les défis de la lutte contre l'impunité dans la Région des Grands lacs', in *La justice nationale et internationale dans la lutte contre l'impunité en République démocratique du Congo*, Kinshasa, p.107.

¹⁰⁵ Articles 160 and 162 of the Constitution.

of Justice). The procedure followed is also clearly established by the Constitution: if a party to a case challenges the constitutionality of a law being applied in his case, he makes a formal demand, termed an *exception d'inconstitutionnalité* (plea of unconstitutionality), and the court is then obliged to suspend the hearing and refer it to the *Cour constitutionnelle*, which alone may pronounce on whether the plea is well founded. According to the Constitution, '[a]ny person may apply to the *Cour constitutionnelle*, through the procedure of plea of unconstitutionality, in a case which concerns him before a court. This latter court stays proceedings and refers to the *Cour constitutionnelle* forthwith.'¹⁰⁶ This mechanism, which extends to cases before the military courts,¹⁰⁷ is nevertheless regularly violated by these courts, which systematically take on the role of evaluating whether the plea of unconstitutionality raised before them is well founded. This is particularly the case when civilians challenge those provisions of the *code judiciaire militaire* that extend the jurisdiction of the military courts to civilians.

For example, the *tribunal militaire de garnison* of Kinshasa–Gombe and the *tribunal militaire de garnison* of Bukavu, who heard the cases of *Nlandu* and *Maheshe* respectively, responded directly to the pleas of unconstitutionality raised by civilians, instead of 'staying proceedings' and referring the objections to the *cour suprême de justice*, as is demanded by the Constitution. The two courts considered that since the law called into question (the *code judiciaire militaire*) was established prior to the Constitution, it could not have violated it. They added that the Constitution itself establishes an exception to the general rule of personal jurisdiction by providing that a law must fix the rules of jurisdiction, organisation and functioning of the military courts.¹⁰⁸

Other aspects of the legislative framework of the military justice system have been called into question. In the *Ngyke* case, for example, it was the constitutionality of the death penalty established by the *code pénal militaire* that was challenged before the military court of Matete in Kinshasa. Here again, the court preferred to reply directly to the merits of the plea instead of referring it to the *cour suprême de justice*.¹⁰⁹

Other forms of appeal

Moreover, the final decisions of the military courts are subject to appeal before the Court of Cassation.¹¹⁰ This court also has jurisdiction regarding the oversight of judges in the event of a conflict of jurisdiction between the ordinary law courts and the military courts.¹¹¹ Where necessary, the senior chairman of a military court may request the services of a civil magistrate to complete the bench. The autonomy that the COM enjoyed with regard to the ordinary law courts has thus ended. Henceforth, through many diverse collaboration mechanisms, military courts are instead integrated with, and complementary to, the judicial system.

¹⁰⁶ Article 162 of the Constitution (italics added).

¹⁰⁷ Article 76, paragraph 4 of the *code judiciaire militaire*.

¹⁰⁸ *Tribunal militaire de garnison* of Kinshasa–Gombe, *Auditeur militaire c. N'Landu Mpolo Néné et consorts*, RP 221/2006, 30 April 2007 (unpublished ruling available from the author) and *tribunal militaire de garnison* of Bukavu, *Auditeur militaire contre Bokungu Bokombe Arthur et consorts*, RP no. 186/2007, 28 August 2007 (Unpublished ruling available from the author).

¹⁰⁹ *Tribunal militaire de garnison* of Kinshasa–Matete, *Auditeur militaire c. Munganda Kimbao Joël et consorts*, RP 036/07, 22 December 2007 (unpublished ruling available from the author).

¹¹⁰ Article 153, paragraph 2 of the Constitution.

¹¹¹ Article 30, paragraph 2 of the *code judiciaire militaire*.

It is nevertheless appropriate to deplore the fact that today there is no formal link between the *procureur général* (attorney general) of the Republic, who is responsible for cooperation between the DRC and the ICC, and the *auditeur général* (judge advocate general) of the armed forces, who has jurisdiction over the most serious crimes that fall within the ambit of the ICC. There is a need for the rapid adoption of a law to implement the Rome Statute of the ICC to remedy this omission.

c. Recommendations

The *auditeur général* and the senior chairman (*premier président*) of the *Haute Cour militaire* should encourage knowledge of, and promote application by the military courts of, international and regional legal instruments relating to human rights, especially the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. The decisions of international criminal courts and quasi-judicial bodies on military justice should also be widely publicised, and made available to military magistrates.

Lawyers should also be trained in the application of legal and international instruments relating to human rights, and should be encouraged to draw arguments from these texts for use during their advocacy.

The Ministry of Justice, working closely with the *Commission permanente de réforme du droit congolais* (Law Reform Commission) and Parliament, with technical assistance, where necessary, from international bodies, and in cooperation with representatives of civil society, should accelerate the military justice reform process. Such reform should ensure the alignment of national legislation with both the Constitution and the relevant international legal instruments, in particular the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

Parliament needs to adopt a law implementing the Rome Statute of the ICC as soon as possible.

Human rights organisations and lawyers representing both victims and individuals prosecuted by the military courts should encourage those arraigned before the military courts to appeal to the *cour suprême de justice* sitting as a *cour constitutionnelle* on the constitutionality of the laws governing military justice.

The government should prioritise creating new military jurisdictions that give better coverage of the country, so that the accused can be tried closer to the place where the crime occurred. In the meantime, it is important for mobile court hearings to be organised with the assistance of funding agencies and the cooperation of civil society organisations, and in strict observance of the right to defence, including the rules relating to territorial jurisdiction. In particular, sufficient financial resources should be provided to ensure that, when they are called to sit in mobile court hearings, the military courts have enough time to accomplish their mission in strict observance of the law.

3

The jurisdiction of the military courts

The rules of substantive and personal jurisdiction of the military courts are detailed in the *code judiciaire militaire* (military justice code) adopted in November 2002. This code predates the Constitution of 2006, which clearly lays out fundamental principles for the personal jurisdiction of these courts. The *code judiciaire militaire* was also drawn up prior to ratification by the Congo of the Rome Statute of the ICC. Moreover, those who drafted the *code judiciaire militaire* do not appear to have taken into account international standards and principles, in particular the ACHPR, which strictly demarcates the material and personal jurisdiction of military courts. Lastly, the code was drawn up at the same time as political efforts were being made to resolve the conflicts that had turned the Congo into a theatre of serious crimes committed by armed groups. The question of offering an amnesty to the perpetrators of these crimes in exchange for peace thus arose, and was to influence the exercise of their jurisdiction by the military courts.

This context explains why the rules of jurisdiction of the military courts fail to comply with the Constitution and with international standards on human rights and international criminal law. This lack of compliance is at the root of at least three problems raised by the exercise of military justice in the Congo when examined from the point of view of human rights and the fight against impunity. The first problem concerns the jurisdiction of the military courts with regard to civilians. The second problem has to do with the prosecution of perpetrators of non-military crimes, including crimes that fall into the category of those (hereafter referred to as international crimes) prosecuted by the ICC before the military courts. The third problem concerns the obstacle raised by the application of amnesty laws to the exercise of jurisdiction by the military courts. There is, however, a fourth problem concerning the death penalty associated with offences falling under the jurisdiction of the military courts. Although not specific to the military courts, the death penalty is attached to an abnormally high number of offences under the *code pénal militaire* (military criminal code).

A. Personal jurisdiction

By virtue of article 156, paragraph 1 of the Constitution, the field of personal jurisdiction of the military courts is limited to members of the armed forces and the police.¹¹² This provision renders unconstitutional the *code judiciaire militaire*, which extends the jurisdiction of the military courts to civilians. The second paragraph of the Constitution, however, authorises the President of the Republic, during wartime or under other exceptional circumstances (in other words, a state of siege or emergency) to replace ordinary law courts with military ones for well-defined offences and for a specific duration.¹¹³ In this case, civilians may be prosecuted before the military courts, which violates the non-derogation clause of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.¹¹⁴

Members of the armed forces

Article 107 of the *code judiciaire militaire* defines military personnel who are subject to the jurisdiction of the military courts as the following:

- officers, non-commissioned officers and junior ranks;
- discharged and reserve military personnel, even those with rank, from the moment their unit is reassembled, or, if they are called up individually, from the day of their arrival until the day they are sent home;
- military personnel on indefinite leave, who are considered to be on active service;
- individuals incorporated by virtue of legal obligation or voluntary commitment, who are on active service without having necessarily been read the military laws. Such individuals are also subject to the jurisdiction of the military courts if, before their involvement in active service, they are placed for military purposes in a hospital, a prison or under the supervision of the *force publique*, or are temporarily attached to a unit.

Members of rebel groups integrated into the armed forces

On 17 May 1997, the rebel group AFDL, led by Laurent-Désiré Kabila, took power after routing the Zairean armed forces. The question then arose as to whether the combatants of the AFDL were subject to military law, and thus under the jurisdiction of the military courts. Submission to military law is contingent on compliance with a double formality, namely the reading of these laws to the accused, and a declaration by an authorised person that the person to whom the military laws have just been read is subject to these laws. A written report of this procedure is needed. If the formalities have not been observed, military criminal laws do not apply.¹¹⁵

¹¹² Article 156, paragraph 1 of the Constitution: 'The military courts hear offences committed by members of the armed forces and the national police'.

¹¹³ Article 156 paragraph 2 of the Constitution: 'In wartime, or if a state of siege is declared, the President of the Republic, by a decision discussed at the *Conseil des ministres* (Council of Ministers), may suspend the punitive action of the ordinary law courts and tribunals in favour of that of the military courts over all or part of the Republic and for a duration and offences which he determines. The right of appeal may not, however, be suspended.'

¹¹⁴ By virtue of this clause, no circumstance, whether a threat of war, state of international or internal armed conflict, internal political instability or any other situation of public danger may be cited to justify exceptions to the right to a fair trial.

¹¹⁵ Article 74 of the *code judiciaire militaire*.

But no such formalities were followed in the case of the AFDL combatants, most of whom received their military training on the job, and for most of whom there is absolutely no evidence that the formalities regarding their submission to military law had been carried out. Because of this, it should have been case law that decided their fate when they appeared before military courts. However, in most cases, the military courts declared themselves competent to judge them.¹¹⁶

An analogous situation currently prevails in the military integration process, begun in 2003. So desirous were they to reunify the country after the period of the rebellions¹¹⁷ that delegates at the *Dialogue intercongolais*, organised in 2002 to put an end to the insurrections, agreed to implement a disarmament, demobilisation and reintegration process (DDR) that was supposed to create a restructured and integrated national army.¹¹⁸ Numerous leaders of armed groups were then designated officers or non-commissioned officers in the armed forces of the DRC (FARDC), with former members of rebel movements integrated into the ranks.

Once again, no steps were taken to observe the formalities required for the submission of these groups to military justice. In formal terms, this does not present a problem with regard to persons incorporated into the armed forces in the context of DDR. Article 107, point 2, of the *code judiciaire militaire* expressly allows this waiver, as was recently established in the *Kahenga Papy* case before the *tribunal militaire de garnison* (garrison court) of Mbandaka, which decided it had jurisdiction over 57 former members of rebel movements who were newly integrated into the national armed forces. According to the court, ‘although almost all of the defendants belonged to rebel movements and never received a full reading in advance of the military laws, because of their capacity as military personnel and their membership of the FARDC, military courts have personal jurisdiction by virtue of article 107 of the *code judiciaire militaire*, without it being established that they received a reading of the military laws promulgated on 18 November 2002’.¹¹⁹

We nevertheless fail to see how former rebels who have become soldiers can be required to observe military laws of which they are unaware because nobody has made the effort necessary to bring these laws to their attention.

The Constitution obliges the state to ensure awareness of the laws, especially by translating them into the national languages,¹²⁰ as well as by including human rights in training programmes

¹¹⁶ See F. Mulenda Lutete, *Questions pratiques de la défense devant les juridictions militaires, Séminaire de formation de l'équipe des avocats du volet 'assistance judiciaire'*, Kinshasa, 13–16 July 2005, *Avocats sans frontières* (Lawyers without Borders), p.6 (duplicated course handout).

¹¹⁷ Between 1998 and 2003, during the war between the government and the rebel movements, the Democratic Republic, the government and the two principal rebel movements, the *Rassemblement congolais pour la démocratie* (Congolese Rally for Democracy) and the *Mouvement de libération du Congo* each controlled a part of the country. It would be necessary to await its unification following the *Dialogue intercongolais* to witness the twilight of the era of these republics.

¹¹⁸ See in particular, the *Résolution relative à la nouvelle armée congolaise* (Resolution on the new Congolese army), Women as Partners for Peace in Africa (WOPPA) and *Les Confessions religieuses* (Religious faiths), *Les Résolutions du Dialogue inter congolais tenu à Sun City du 19 février au 25 avril 2002 et du 1^{er} au 2 avril 2003*, Kinshasa, WOPPA, April 2005, pp.33–34.

¹¹⁹ *Tribunal militaire de garnison* of Mbandaka, *Auditeur militaire c. Kahenga Mumbere Papy et consorts*, RP 086/005, 20 June 2006, decision published in the *Conseil National des Droits de l'Homme en Islam, Rapport d'observation du procès sur les crimes contre l'humanité*, March 2007, pp.27–86.

¹²⁰ Article 142, clause 2 of the Constitution.

for the armed forces, the national police force and the security services.¹²¹ The need for human rights training is particularly acute with regard to insurgents.

The special case of the insurgents

The recurrence of the phenomenon of rebellion since the DRC gained independence in 1960 means that the question of the jurisdiction of military courts over insurgents, commonly termed rebels, requires particular attention. This is all the more necessary because the dividing line between military personnel and insurgents is porous, to say the least: insurgents may form part of the regular forces, and members of the regular forces may be found among the insurgents.

Both the *code pénal militaire*¹²² and the ordinary criminal code¹²³ criminalise membership of a rebel movement, so it is not clear whether rebels are subject to military courts rather than those governed by ordinary law.¹²⁴ This confusion has sometimes given rise to conflicts of jurisdiction between these two orders of court, as for instance in Ituri.¹²⁵ It was when the provisional military justice code was promulgated in 1964 that membership of a rebel movement was introduced into Congolese military criminal law as a crime.¹²⁶ This was in the context of the Lumumbist rebellions that characterised the first years of the Congo's independence.

The principal reason underlying the introduction of this offence into military criminal law appears to have been the need to place military personnel and insurgents on an equal footing with regard to their right of appeal to a higher court. Military personnel had already been deprived of this right,¹²⁷ the new law did the same for insurgents.¹²⁸ However, insurgents were subject to the jurisdiction of military courts only under exceptional circumstances – when a state of siege or emergency was declared. Other than this, the jurisdiction of the ordinary law courts applied to them.¹²⁹

This legal regime was extended by the *code de justice militaire* of 1972.¹³⁰ The reform introduced by the *code judiciaire militaire* of 2002 distanced itself from this regime. From then onwards, insurgents were subject to the jurisdiction of military courts regardless of whether the offences of which they were accused had been committed under exceptional circumstances or not. In Ituri, for example, the military courts prosecuted leaders of armed groups such as

¹²¹ Article 45, clause 7 of the Constitution.

¹²² Articles 136 to 139, *ibid.*

¹²³ Articles 206 to 208, *ibid.*

¹²⁴ L. Mutata Luaba, *Droit pénal militaire congolais, des peines et des incriminations des juridictions militaires en République démocratique du Congo*, Kinshasa, Editions du Service de documentation et d'études du ministère de la Justice et Garde des Sceaux, 2005, pp.451–452.

¹²⁵ Interview with Maître Delphin Bulambo, former programme coordinator of the international association RCN *Justice et démocratie* (Citizens' Network for Justice and Democracy), currently the assistant to the coordinator of Rejusco, Kinshasa, 7 March 2009.

¹²⁶ Gal Likulia Bolongo, *La compétence d'attributions des juridictions militaires en temps de paix en droit comparé zairois, belge et français*, Paris, LGDJ, 1975, p.133.

¹²⁷ Article 9 of the *décret-loi* of 18 December 1964, establishing that the judgments and rulings of the military courts were not subject to *opposition* or appeal.

¹²⁸ Gal Likulia Bolongo, *op. cit.*, p.133.

¹²⁹ *Ibid.*

¹³⁰ Gal Likulia Bolongo, *Droit pénal militaire zairois, vol. 1, L'organisation et la compétence des juridictions des forces armées*, Paris, LGDJ, 1977, p.221.

Kahwa Mandro.¹³¹

Previously, under the regime of the provisional military justice code, insurgents had already been brought before the military courts, for instance in the *Tshimpola*¹³² case. Should it be concluded from this that the provisions of the ordinary criminal code regarding insurgent movements were tacitly repealed? We shall return to this when we deal with the question of exceptions to the jurisdiction of military courts regarding civilians.

Police officers

The issue of extending the jurisdiction of military courts to cover police officers and policemen has been hotly debated in both the Senate and the National Assembly. For some, the police, as agents of public order, should be as close as possible to the population. In other words, they should be civilians, not military personnel. For others, the police should be subject to as rigorous discipline as are the military, hence the need to classify them as military personnel.¹³³ This debate is not new in the DRC: in the past it concerned members of the *Gendarmerie nationale* and the *Garde civile*.¹³⁴ In the absence of clear guidance from the legislature, a solution in principle has been sought on the basis of case law clarified by legal theory.

According to Professor Akele, who bases his view on the criteria associating members of the *Garde civile* with the army, it is the military courts that should have jurisdiction over police officers. The most notable of these criteria are the use of weapons of war and the fact that certain members of the Congolese armed forces found their way into the *Garde civile*.¹³⁵ Former members of the Congolese armed forces have also been integrated into the national police. It was these former soldiers, converted into policemen, who intervened in the context of what are conventionally termed the 'massacres of the Bas-Congo'.¹³⁶ It was General John Numbi, former Chief of Staff of the air force and currently Police Inspector General, who was entrusted with coordinating joint operations between the DRC and Rwanda regarding the disarmament of the Hutu rebels.¹³⁷

Civil society organisations have criticised the inclusion of military personnel in the police

¹³¹ *Tribunal militaire de garnison* of Bunia, *Auditeur militaire c. Kahwa Panga Mandro*, RP 13653, 19 January 2006 and the military court of Kisangani, *Auditeur militaire c. Kahwa Panga Mandro*, RPA no. 003/2007, 28 July 2007 (copies of the rulings are available from the authors). In this case, Kahwa was prosecuted for offences of associating with criminals and assassination.

¹³² P. Akele Adu, *art. cit.*, 1997, p.559.

¹³³ Interview with Jean-Louis Esambo Kangashe, constitutional expert, who took part in the process of drawing up the 2005 Constitution, Kinshasa, 11 March 2009.

¹³⁴ Institute of International Legal Studies, *L'Etat de droit et la justice militaire dans une force militaire professionnelle. Un séminaire de la justice militaire avec les Forces armées de la République démocratique du Congo*, Kinshasa, 2009, p.96.

¹³⁵ P. Akele Adu, *art. cit.*, 1997, pp.567–568. The figures on the composition of the police nevertheless appear to militate in favour of a contrary argument. Effectively, almost 95% of the members of the national police force, estimated at 90,000 to 114,000, derived from the former law enforcement bodies (*gendarmerie*, *garde civile* and traffic police). See on this theme, P. Sebahara, *La réforme du service de sécurité en RD Congo, Note d'analyse*, research and information group on peace and security, available online at www.grip.org.

¹³⁶ Read in particular, the MONUC report on these events: http://www.ohchr.org/Documents/Countries/evenerment_fevmarso8_BasCongo_Mayo8.pdf.

¹³⁷ M. Wetsh'okonda Koso Senga, <http://www.la-constitution-en-afrique.org/categorie-10195444.html>.

and the subsequent classification of members of the national police force as military personnel and their subordination to military justice.¹³⁸

We can only support this position. The etymology of the word ‘polis’ suggests the police should be as close as possible to the population, to ensure the protection of individuals and property. This is only possible where there is understanding and mutual respect between the police and the populace. Military personnel, who are regarded as combatants, are not subject to this requirement. On the contrary, the practice of maintaining troops in barracks is intended to keep the army as far away as possible from the population. The incorporation of police officers into the military adversely affects these principles, which are observed by most states that aspire to promote the rule of law. Conversely, the fact that members of the armed forces are joining the police without any prior training in techniques and methods of maintaining order represents an undeniable threat to the observance of human rights. The massacres mentioned above, which were attributed to the national police, particularly during the crack-down on supporters of Bundu Dia Kongo, are striking evidence of this danger.

‘Nation builders’

These reservations concerning the jurisdiction of the military courts with regard to police officers also apply in relation to the *bâtisseurs de la nation* (nation builders), the name given to young recruits in the *Service national*, which was created in 1997 to provide professional training for young people while disseminating patriotic values.¹³⁹ The legislator of the *code judiciaire militaire* took care to limit its jurisdiction to offences committed during training or at the time of exercising functions within the *Service national*.¹⁴⁰ This may attenuate the negative effects of having such a legislative option on the statute-book. But it remains a mistake.

In 2006, a raid was conducted on street children in Kinshasa. According to *Maître* Henri Wembolua, in charge of protecting children’s rights for the *Campagne pour les droits de l’homme au Congo* (Congo Human Rights Campaign), some of the children taken in for questioning were assigned to the *Service national* in Kanyama.¹⁴¹ This information appears to us all the more credible because, in 1998, a person called Mulume Oderwa, who was sentenced to death but given a presidential pardon, had also been assigned to the *Service national*. The recruitment of children into the ‘nation builders’ represents another occasion where children are forced into military service and hence subjected to military justice.

According to Richard Lukunda, the DRC is expected to report to the UN Human Rights Council (UNHRC) on the assignment of street children to the *Service national*.¹⁴²

¹³⁸ Institute for Democracy in South Africa (IDASA), *Le renforcement de la participation de la société civile à la réforme de la Police en République démocratique du Congo*, workshop report, December 2006–February 2007, p.6, available online at <http://www.idasa.org.za>.

¹³⁹ This relates to pupils of the *Service national* created by virtue of *décret-loi* no. 32, creating the *Service national*, *Journal officiel de la République démocratique du Congo*, 38th year, no. 20, 15 October 1997, pp.6–7.

¹⁴⁰ Article 106, paragraph 2 of the *code judiciaire militaire*.

¹⁴¹ Interview of 14 March 2009.

¹⁴² Interview of 13 March 2009.

Exceptions to the principle of the jurisdiction of military courts with regard to military personnel and their equivalents

The *code judiciaire* provides for at least five exceptions to the jurisdiction of military courts over military personnel and their equivalents. The civil courts have jurisdiction over members of the armed forces and the police in the following cases: the committing of offences during a hearing before an ordinary law court;¹⁴³ criminal complicity between those individuals subject to the jurisdiction of the military courts and civilians;¹⁴⁴ related cases;¹⁴⁵ indivisibility between several perpetrators or offences;¹⁴⁶ and the committing of continuous offences for which certain elements were realised while the individuals in question were acting in the capacity of military personnel or equivalents.¹⁴⁷

Jurisdiction of the military courts with regard to civilians

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa state categorically that ‘*under no circumstances may the military courts judge civilians*’.¹⁴⁸ In the DRC, however, numerous constitutional and legal provisions authorise Congolese military courts to prosecute civilians, even though the jurisdiction of the military courts with regard to civilians, one of the major grievances expressed against the *Cour d’ordre militaire* (COM),¹⁴⁹ was one of the reasons for the reform of military justice as formalised in the codes of 2002.¹⁵⁰

In wartime or under exceptional circumstances, the President of the Republic may replace civilian courts by military courts for specific offences and for defined periods.¹⁵¹ In the event of crimes committed by military personnel and/or their equivalents and civilians acting together, the military courts have jurisdiction when the offences in question have been committed in wartime, in an operational zone, under military circumstances or where these offences are of a military nature.

In peacetime as well, in several cases the *code judiciaire* and the *code pénal militaire* provide for the jurisdiction of the military courts with regard to civilians. For example, any individual attached to the army in any capacity, either as a member of the armed forces or in their service in

¹⁴³ Where an individual, whether a civilian or a military serviceman, is found guilty of an offence during a hearing before a civil court, e.g. public abuse or contempt of court, he shall be judged by this court. Article 118, *code judiciaire militaire*.

¹⁴⁴ Where several individuals, some civilian and the others military, collude in committing one or several offences, they shall all be judged by the ordinary law courts. Articles 115 of the *code judiciaire militaire* and 100 of the *code de l’organisation et de la compétence judiciaires* (code of judicial organisation and jurisdiction).

¹⁴⁵ Article 93 of the *code judiciaire militaire*. According to Professor Likulia, ‘[w]e consider that the offences are linked by a unity of time and place when they have been committed at the same time by several individuals, united either by prior collaboration and unity of design, when they have been perpetrated at different times and in different places, but by several individuals acting in perfect agreement, or by a relation of cause and effect, where certain offences had the aim of facilitating the execution of others or of ensuring their impunity, or lastly when items removed or misappropriated following an offence have been concealed in part or in whole.’ Likulia Bolongo, *op. cit.*, pp.144–145.

¹⁴⁶ According to Professor Likulia, ‘Legal theory considers that there is indivisibility when an offence has been committed by several individuals, either as joint perpetrators or as accomplices or when an individual has committed several offences which are interconnected or for which one constitutes an aggravating circumstance for the other’. Likulia Bolongo, *op. cit.*, p. 145.

¹⁴⁷ Article 119, *code judiciaire militaire*.

¹⁴⁸ Principle I (c) (*italics added*).

¹⁴⁹ P. Akele Adau, *op. cit.*, 2001, p.96. Read also the Resolution of the Human Rights Council, point 2, c, iv.

¹⁵⁰ P. Akele Adau, *ibid.*, p.96.

¹⁵¹ Article 156, paragraph 2 of the Constitution.

some other way, could be prosecuted in a military court for having stolen or impaired property belonging to the armed forces. The *code judiciaire militaire* recognises the jurisdiction of military courts with regard to the following individuals:

- persons lacking the capacity of military personnel, employed in the service of the army or the Ministry of Defence, for offences committed while carrying out their duties;¹⁵²
- an individual who, during the five years following the date on which military laws cease to be applicable to him, commits, against one of his superiors or any other immediate superior in the service relationship they shared, the offence of assaulting or insulting a superior, or one of the offences established by articles 67–70 and 74–78 of the ordinary criminal code;¹⁵³
- all those members of former armies, rebel factions, rebel gangs or armed militia who are guilty of the offences of treason, espionage or participation in a revolt established by the *code pénal militaire*, or of violence against or insult to an army superior or a sentry, participation in a mass desertion, looting, misappropriation or fraudulent removal of any objects assigned or belonging either to the state or to military personnel, as well as those who without being military personnel, commit offences using weapons of war;¹⁵⁴
- those who are listed in any capacity as crew members of a ship or craft of the navy, police, *Service national* or on the manifest of an aircraft belonging to the military, police or *Service national*;¹⁵⁵
- those who, without being legally or contractually members of the armed forces, are entered in its registers and perform services;¹⁵⁶
- members of the armed forces or the police who have been dismissed for the offences established in article 111;¹⁵⁷
- pupils of military schools;¹⁵⁸
- prisoners of war;¹⁵⁹
- members of rebel factions;¹⁶⁰
- those who, even if not members of the army, recruit or assist one or more military personnel to commit an offence against the law or military regulations, as well as those who commit offences against the army, the national police, the *Service national*, their equipment and facilities, or who do so from within the army, the national police or the *Service national*;¹⁶¹
- individuals following the army or the national police, that is persons authorised to accompany an army or national police unit.¹⁶²

¹⁵² Article 108, *ibid.*

¹⁵³ Article 110, *ibid.*

¹⁵⁴ Article 111, *ibid.*

¹⁵⁵ Article 112, point 1, *ibid.*

¹⁵⁶ Article 112, point 2, *ibid.*

¹⁵⁷ Article 112, point 3, *ibid.*

¹⁵⁸ Article 112, point 4, *ibid.*

¹⁵⁹ Article 112, point 5, *ibid.*

¹⁶⁰ Article 112, point 6, *ibid.*

¹⁶¹ Article 112, point 7, *ibid.*

¹⁶² Article 112, point 8, *ibid.*

Two other instances of the extension of the jurisdiction of military courts to civilians should be noted: offences involving weapons,¹⁶³ and political offences during wartime.¹⁶⁴

The criteria detailed above are recognised by the Constitution and the law, but there are also others that have been established through judges' interpretation of the law. In recent times military judges have considered that they have the power to assess whether or not they have jurisdiction with regard to civilians from the moment these parties appear before them. In the *Alamba* ruling, for example, the *Haute Cour militaire* (Military High Court) ruled that 'in the spirit of the recent military justice reform, as expressed in the statement of grounds for laws no. 024/2002 of 18 November 2002 containing the military judicial (*code judiciaire militaire*) and criminal codes (*code pénal militaire*), this unofficial assessment (of jurisdiction) is imposed in particular when individuals foreign to the army are referred to a military judge'.¹⁶⁵

Among the assessment criteria they use to make a determination, military judges examine the nature of the offence for which the civilian is being prosecuted, and assert their jurisdiction if this offence is established in the *code pénal militaire* to the exclusion of the ordinary criminal code. In the *Alamba* case, the *Haute Cour militaire* ruled out its jurisdiction over three civilians and a private security company, observing that the offences of failure to assist a person in danger and perjury, for which they were being prosecuted, were ordinary law offences. However, with regard to Alain Poussy, the same court declared that the offences of which he was accused included smuggling correspondence to a prisoner. Given that this offence is established only by the *code pénal militaire*, pursuant to article 115 of the *code judiciaire militaire*, the *Haute Cour* decided that it had jurisdiction over his trial.¹⁶⁶

This distinction is inadequate, since it enables the jurisdiction of the military courts over civilians to persist in certain cases. However, its application would certainly put an end to a jurisdictional tendency that has developed, particularly with regard to the COM. Citing a state of war, the COM has declared itself competent to hear several cases involving civilians. For example, in the *Makayabu* case, this court found a woman guilty of treason on grounds of 'attempting to demoralise the population'. In point of fact, she was charged with having manipulated fuel prices.¹⁶⁷ In the *Kalele* case, civilians were sentenced for treason, in this case for spreading false rumours. The COM also tried 30 individuals involved in a case relating to an attempt on the life of President Laurent-Désiré Kabila, and sentenced all of them to death.¹⁶⁸ One person, Miruho, was sentenced to death for having murdered his mother. The fact that his accomplices were military personnel was deemed sufficient grounds for the COM to claim jurisdiction over his

¹⁶³ Article 111, paragraph 2 of the *code judiciaire militaire*.

¹⁶⁴ Article 127 of the *code pénal militaire*.

¹⁶⁵ Ruling issued by the *Haute Cour militaire* in the case RP no. 01/2004, Kinshasa, 2005, *op. cit.*, pp.94–96.

¹⁶⁶ Ruling issued by the *haute cour militaire* on 18 March 2004 in the case of RP/2004, *op. cit.*

¹⁶⁷ Nswal Nten-a-Bol, *op. cit.*, pp.129–130.

¹⁶⁸ *Cour d'ordre militaire, procureur militaire c. Eddy Kapend et consorts* RP Ruling no. 1078/02, 7 January 2003. See also Maela Bégot and Liévin Ngondji Ongombe, 'Les sans voix de République démocratique du Congo. Enquête dans les couloirs de la mort de Kinshasa, Lubumbashi, Bukavu, Kindu et Goma', in *Ensemble contre la peine de mort, La peine de mort dans la région des Grands lacs, Rwanda, République démocratique du Congo, Burundi*, Paris, 2008, p.135; M. Wetsh'okonda Koso Senga, 'L'avis consultatif de la Cour suprême de justice, RL10 du 13 décembre 2005 sur l'infraction politique : interprétation ou réécriture de la loi ?', *Les Analyses juridiques* no. 8/2006, Lubumbashi, pp.4–26.

trial.¹⁶⁹ In another case, a civilian was sentenced by the COM on a charge of ‘inciting military personnel to commit actions against the law and against discipline’. In reality, the said civilian had committed adultery with the wife of a serviceman. Questioned by her husband, this woman initiated divorce proceedings. During a hearing for the divorce, the husband killed his wife and was subsequently referred to the COM, which demanded that the adulterous civilian should also be brought before it.

Long after the dissolution of the COM, the military courts continue to use excessively broad powers of assessment to extend their jurisdiction over civilians. The provision of the *code judiciaire militaire* according to which ‘regardless of the manner in which a case is referred to it, the court before which a defendant is brought shall assess its jurisdiction at its own initiative or on an objection’¹⁷⁰ evidently means that the military courts are invited to examine their jurisdiction in all cases, as every judge does. But this provision is often interpreted as giving the military courts special powers of assessment that are sovereign and unlimited with regard to their jurisdiction over civilians. An example was recently given by the *tribunal militaire de garnison* (garrison court) of Beni-Butembo in the *Kambale Kisonia* case. Eight civilians and military personnel were prosecuted for armed robbery against Dr Kambale Kisonia, who was murdered during the robbery. Although the court did not expressly justify its thinking, the fact that the crimes in question were committed with the aid of a weapon appears to have been the determining element in establishing the court’s jurisdiction over the civilians involved in this case.¹⁷¹

The *code judiciaire militaire* does indeed establish the jurisdiction of military courts with regard to offences committed with a weapon of war.¹⁷² This provision has often been interpreted as implying that the civilian or military capacity of the perpetrator of this offence does not count. This, in any event, was the interpretation by the *tribunal militaire de garnison* of Bukavu in the *Maheshe* case, in which two military servicemen and 10 civilians were prosecuted for ordinary law offences that were not of a military order as defined in articles 39 and 40 of the *code pénal militaire*. The court nevertheless considered that it had jurisdiction because ‘the civilians were brought before it because they had participated in a murder committed with a weapon of war, or because they had provoked, assisted or recruited individuals subject to the jurisdiction of the military courts with a view to committing actions against military laws or regulations’.¹⁷³

B. Material jurisdiction

The provision of the Constitution by virtue of which ‘the military courts shall hear offences committed by members of the armed forces and the national police’¹⁷⁴ speaks expressly of personal jurisdiction. It appears to indicate that the capacity of individuals is the only factor that determines the jurisdiction of the military courts, regardless of the nature of the offences for which these individuals are prosecuted.

¹⁶⁹ Maela Bégot and Liévin Ngondji Ongombe, *op. cit.*, p.172.

¹⁷⁰ Article 246, paragraph 1, *code judiciaire militaire*.

¹⁷¹ *Tribunal militaire de garnison* of Beni-Butembo, *Auditeur militaire c. James Njenga Njogu et consorts*, RP 044/07, 8 August 2007.

¹⁷² Article 111, paragraph 2, *code judiciaire militaire*, a survival of article 5 of *décret-loi* no. 019 of 23 August 1997, establishing a *cour d'ordre militaire*.

¹⁷³ *Tribunal militaire de garnison* of Bukavu, *Auditeur militaire c. Bokungu Bokombe et consorts*, RP 186/2007, 28 August 2007.

¹⁷⁴ Article 156, constitution of 18 February 2006.

For its part, although the *code pénal militaire* distinguishes offences of a military order¹⁷⁵ from offences termed ‘mixed’¹⁷⁶ and from all other ordinary offences,¹⁷⁷ the *code judiciaire militaire* extends the material jurisdiction of the military courts to all of these offence categories, provided that they are committed by military and police personnel.¹⁷⁸ It defines offences of a military order as those which, by their nature, may be committed only by military personnel or individuals classified as members of the armed forces because these offences constitute a dereliction of duty. This relates, for example, to insubordination,¹⁷⁹ desertion,¹⁸⁰ deliberate self-mutilation,¹⁸¹ cowardice,¹⁸² and refusal to obey orders.¹⁸³ These offences form the object of the code’s second heading, which covers articles 41 to 125.¹⁸⁴

Mixed offences are ordinary law offences which may be committed by anyone, but which are aggravated by the circumstances of their perpetration and are established by both the ordinary criminal code and the *code pénal militaire*. This applies particularly to the case of membership of a rebel movement. Indeed, certain mixed offences are listed under heading II of the *code pénal militaire* with regard to ordinary offences. They include looting, forgery, falsification, misappropriation, extortion by a public official and corruption,¹⁸⁵ insulting the flag,¹⁸⁶ rebellion¹⁸⁷ and misappropriation of property.¹⁸⁸ More of these mixed offences are described under other headings in the same code.

In a commentary on the ruling pronounced by the *tribunal militaire de garnison* of Beni-Butembo in the *Kambale Kisonia* case, Thierry Kambere considers that the military courts lack jurisdiction with regard to mixed offences. He argues that the ordinary courts should hear such cases; interpreting the law otherwise extends the jurisdiction of the military courts to such an extent as to make them the equivalent of ordinary law courts.¹⁸⁹

But by virtue of article 207 of the *code pénal militaire*, ‘subject to the provisions of articles 117 and 119 of the *code judiciaire militaire*, only the military courts may hear the offences established by this code’. It follows that, apart from offences of a military order, all other offences established

¹⁷⁵ Article 40, paragraph 1 of the *code pénal militaire*.

¹⁷⁶ Article 40, paragraph 2 of the *code pénal militaire*.

¹⁷⁷ This relates to the exceptions established by the ordinary criminal code, excluding those that are also established by the *code pénal militaire* and constitute mixed offences.

¹⁷⁸ Article 76 of the *code judiciaire militaire*.

¹⁷⁹ Article 41 of the *code pénal militaire*.

¹⁸⁰ Articles 44 and 51 of the *code pénal militaire*.

¹⁸¹ Articles 55 and 56 of the criminal code.

¹⁸² Article 57 of the *code pénal militaire*.

¹⁸³ Article 93 of the criminal code.

¹⁸⁴ Heading II of the *code pénal militaire* consists of four chapters and not five, as may be read in the said code. These chapters are devoted to the offences tending to exempt their perpetrator from his military obligations (articles 41 to 57), offences against honour and duty (articles 58 to 88), offences against discipline (articles 89 to 112) and offences against orders (articles 113 to 125) respectively.

¹⁸⁵ Articles 74 to 84 of the *code pénal militaire*.

¹⁸⁶ Article 87 of the *code pénal militaire*.

¹⁸⁷ Articles 91 and 92 of the *code pénal militaire*.

¹⁸⁸ Article 111 of the *code pénal militaire*.

¹⁸⁹ T. Kambere, ‘La dangereuse extension de compétence de la justice militaire, note d’observation’, *Horizons, Revue de droit et de science politique du Graben*, no. 4, Butembo, December 2007, p.95.

by the *code pénal militaire*, including mixed offences, fall within the jurisdiction of the military courts.¹⁹⁰ These provisions are a clear violation both of the Constitution and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. According to the latter, ‘military courts have the sole object of hearing offences of a purely military nature committed by military personnel’.

According to article 161 of the *code pénal militaire*, ‘in the case of indivisibility or connection with crimes of genocide, war crimes or crimes against humanity, only the military courts shall have jurisdiction’. The recognition of the most serious of these international crimes (as defined in the Rome Statute), and their formal incorporation into Congolese national law, took place only in 1972.¹⁹¹ For a country that since its independence in 1960 has experienced an almost uninterrupted succession of civil wars, involving massive violations of human rights and international humanitarian law, the inclusion of these international crimes into the country’s criminal law system occurred at a relatively late stage. We should underline the point that this tardiness was one of the principal reasons for the state of impunity enjoyed by the perpetrators, which in its turn fed into the cycle of violence in the Congo.

The *code pénal militaire* of 2002 defines these crimes under heading V, which includes articles 161 to 175. Each of these crimes falls under one of the headings below:

Genocide

Established in article 64 of the *code pénal militaire*, this is realised by ‘any of the following actions, committed with the intention of destroying a national, political, ethnic, racial or religious group in part or in whole by way of:

- the murder of members of the group;
- serious injury to the physical or mental integrity of members of the group;
- deliberate submission of the group to conditions of existence which will entail its total or partial physical destruction;
- measures aiming to prevent births within a group;
- forced transfer of children from the group to another group.’

Crimes against humanity

Articles 163 and 165 of the *code pénal militaire* define these as ‘serious violations of international humanitarian law committed against all civil populations before or during the war’. Articles 166 and 169 complete these by listing the elements that constitute these offences. The same applies to articles 170 to 172, which define a certain number of related offences.

War crimes

Pursuant to article 173 of the *code pénal militaire*, these consist of ‘all offences against the laws of the Republic committed during the war and which are not justified by the laws and customs of

¹⁹⁰ Article 76, paragraph 1 of the *code judiciaire militaire*.

¹⁹¹ L. Mutata Luaba, *Traité de crimes internationaux*, Kinshasa, Editions Universitaires Africaines, pp.7–9; S. Tsinu Phukuta, *Crimes internationaux en droit pénal militaire congolais*, training seminar for the team of lawyers under the ‘judicial assistance’ section, 13–16 July 2005, *Avocats sans frontières (Lawyers without Borders)*, 2005, pp.2–3; P. Akele Adu et A. Sita Muila Akele, *Les crimes contre l’humanité en droit congolais*, Kinshasa, Cepas, 1999, p.8; Gal Likulia Bolongo, *op. cit.*, 2007, pp.225ff.

war'. From a reading of these definitions, it emerges that if the *code pénal militaire* differs from the *code de justice militaire* in defining genocide as an autonomous offence (whereas until then it was a variant on crimes against humanity), it has nevertheless remained faithful to the earlier code with regard to the definition of war crimes and crimes against humanity.

These definitions do not correspond with those of the Rome Statute of the ICC. For example, the description of war crimes is mentioned in the category of crimes against humanity and vice versa. Moreover, as several judges have stated, these definitions do not establish sentences for war crimes.¹⁹² We should also emphasise that among other lacunae, the war crime of forced recruitment of children, for which Thomas Lubanga is being prosecuted before the ICC, is not included in the *code pénal militaire*.

The first prosecutions for international crimes that were undertaken in the DRC relate to two cases, the *Ankoro* case in Katanga and the *Songo Mboyo* case in the province of Équateur.¹⁹³ Between 10 and 22 November 2002, at Ankoro in Katanga, a series of clashes took place between members of the 95th Brigade of the FARDC and their former allies, the Mayi Mayi. With the weapons at their disposal, including artillery, the brigade committed a number of offences against the civilian population. Several deaths were recorded, along with the destruction of 4 000 to 5 000 houses and the looting of 170 houses and public buildings, including schools, churches and a hospital.¹⁹⁴ In the second case, on the night of 21 to 22 December 2003, in Songo Mboyo and Bongandanga in the province of Équateur, military personnel who had been victims of the misappropriation of their salaries by their commanding officer, Captain Ramazani, took their anger out on the civilian population, against whom they committed human rights offences including summary executions, looting, harassment and other acts of violence.¹⁹⁵

In the *Ankoro* case, the most serious international crimes of which the defendants were initially accused were ultimately reclassified, with the defendants subsequently prosecuted for violations of ordinary law.¹⁹⁶ In the *Songo Mboyo* case, however, a change could be observed. The *tribunal militaire de garnison* of Mbandaka pronounced sentences appropriate to serious international crimes, in this case, crimes against humanity. In order to do this, the court had to

¹⁹² *Tribunal militaire de garnison* of Mbandaka, *Auditeur militaire c. Lt Elizo Ngoy et consorts (Songo Mboyo case)*, RP 084/2005, 12 April 2006; *tribunal militaire de garnison* of Bunia, *Auditeur militaire c. capitaine Blaise Bongji*, RP 018/2006, 24 March 2006. See also M. Wets'okonda, 'Why Congo needs the International Criminal Court,' *Justice Initiatives*, Open Society, New York, Budapest and Abuja, 2004, pp.60–61.

¹⁹³ Federico Borello, *Les premiers pas. La longue route vers une paix juste en République démocratique du Congo*, New York, International Center for Transitional Justice, October 2004, p.55.

¹⁹⁴ Global Rights, S.O.S. Justice, *Quelle justice pour les populations vulnérables à l'Est de la République démocratique du Congo. Rapport d'évaluation du secteur de la justice au Nord et au Sud Kivu, Maniema et au Nord Katanga*, Kinshasa, Global Rights, August 2005, pp.58–59; ACIDH et CDH, *Procès de la Cour d'ordre militaire du Katanga sur les crimes commis à Ankoro, affaire RP 01/2003, RMP 004/2003/MMU, en cause MP contre Emile Twabangu et consorts, Rapport préliminaire conjoint*, Lubumbashi, September 2004, p.32; ACIDH, *Procès de la Cour militaire du Katanga sur les crimes internationaux commis à Ankoro, Rapport final*, Lubumbashi, March 2005, p.92; ASADHO - Katanga, *Rapport sur le procès de Ankoro, lutte contre l'impunité: mots vains pour le gouvernement de la RDC, Supplément au périodique des droits de l'homme no. 007*, February 2005, p.30.

¹⁹⁵ Samy Passalet, 'Le procès des militaires congolais accusés de viol des femmes à Songo Mboyo, province de l'Equateur', *MONUC Magazine, périodique de la Mission de l'Organisation des Nations unies au Congo*, Volume IV, no. 29, p.23; M. Wets'okonda Koso, 'Le malaise soulevé par l'application directe du Statut de Rome par le jugement RP no. 084/2005 of 12 April 2006 of the tribunal militaire de garnison of Mbandaka', *Horizons, Revue de droit et de science politique du Graben*, no. 2, Butembo, June 2006, pp.139–161.

¹⁹⁶ See in particular, ACIDH, *Procès de la Cour militaire du Katanga sur les crimes commis à Ankoro, op. cit.*, p.92.

make a direct application of the Rome Statute of the ICC, since it considered that the *code pénal militaire* did not contain a satisfactory definition and sentencing regime for these crimes.¹⁹⁷

This decision has made case law; several other military courts have since referred to it in order to apply the Statute of the ICC directly, and thereby remedy its absence in national Congolese law. For example, after observing that ‘internal legislation, in the case in question the *code pénal militaire* of 18 November 2002 ... is guilty of ... creating a lacuna by not punishing ... a war crime which lacks a sentence’, and that ‘all the evidence suggests that the Congolese legislator had no intention of allowing this atrocious crime to go unpunished, the seriousness of which he recognised by ratifying the Treaty of Rome containing the Statute of the Court’, the *tribunal de garnison* of Bunia ruled that ‘it is appropriate under these conditions to seek to fill the lacunae in internal legislation by taking the Treaty of Rome containing the Statute of the Court ratified by the DRC as a basis, with a view to better achieving the objective the Congolese legislator has set himself of seeing war crimes punished by the military courts at national level’.¹⁹⁸

It would be no exaggeration to say that this development is partly the fruit of efforts to train judicial staff to apply international instruments, particularly those relating to human rights and international humanitarian law. These efforts have been made by several national and international institutions, both public and private, in particular the international non-governmental organisations Global Rights, *Avocats sans frontières* (Lawyers without Borders), *RCN Justice et démocratie* (Citizens’ Network for Justice and Democracy) and the Carter Center, as well as the UN Office of the High Commissioner of Human Rights. They have also benefited from the technical support and experience of senior military and civilian magistrates.

While still in its early stages, recent military court case law has revealed that the *code pénal militaire* is at odds with international law regarding the definition of serious crimes. The fact that such crimes are established solely under the *code pénal militaire*, to the exclusion of the ordinary criminal code, also poses a fundamental problem. It represents a slide towards conferring a military character on all serious crimes, and establishing the exclusive jurisdiction of military courts over such crimes.

Providing the military courts with jurisdiction over international crimes violates the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, by virtue of which ‘[t]he only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel’.¹⁹⁹ In the same way, under the terms of the ninth of the Decaux Principles, ‘[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes’.

The adoption of the *loi organique* envisaged by article 156, paragraph 3 of the Constitution, is urgent. Such a law must expressly repeal the provisions of the *code pénal militaire*, which, explicitly or implicitly, grant military courts exclusive jurisdiction over international crimes. In

¹⁹⁷ *Tribunal militaire de garnison* of Mbandaka, *Auditeur militaire c. Lt Elizo Ngoy et consorts* (Songo Mboyo case), RP 084/2005, 12 April 2006.

¹⁹⁸ *Tribunal militaire de garnison* of Bunia, *Auditeur militaire c. capitaine Blaise Bong*, RP 018/2006, 24 March 2006.

¹⁹⁹ Principle (L(a)) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

parallel, it is important to include serious international crimes in the ordinary criminal code, and grant jurisdiction over them to ordinary courts.²⁰⁰ The draft law to implement the Rome Statute prepared by the *Commission permanente de réforme du droit congolais* (Law Reform Commission) and submitted for adoption by Parliament, ensures these two objectives.²⁰¹ It is important and urgent that Parliament should adopt this draft law. This will re-establish the observance of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which specify that '[m]ilitary or other special tribunals ... shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies'.²⁰²

By extending the material jurisdiction of the military courts to crimes other than those of a military character, the reform of 2002 permitted the military courts to continue to judge civilians. Thus in the *Kilwa* case, three agents (Pierre Mercier, Peter Van Niekerk and a person identified as Cédric) of Anvil Mining, a company operating in Kilwa in the province of Katanga, were prosecuted by the military court of Lubumbashi for complicity in war crimes. These prosecutions followed the massacre by the army of around 100 villagers from Kilwa in October 2004 during military operations against a group of rebels who had occupied the village. MONUC and local human rights organisations established that the subsequent massacres of the civilian population were carried out by virtue of the logistical support that Anvil Mining had granted to the FARDC.²⁰³

Professor Antoine Rubbens noted as early as 1966 that 'individuals subject to the jurisdiction of the military courts, and practitioners, are in disarray due to (their) extensions of jurisdiction'.²⁰⁴ To date this situation has not improved; it may even have become more complicated. In order to limit the jurisdiction of the military courts, one must engage in rigorous intellectual gymnastics, in which not only the *code judiciaire militaire*, which is supposed to regulate matters, but also the *code pénal militaire* must be taken into account. Furthermore, it is necessary to highlight the principles by distinguishing them from the exceptions, taking into account that in practice, exceptions may become rules and rules exceptions.

c. Application of amnesty laws

The prosecution of P. Kahwa, head of one of the militias responsible for the most serious crimes committed in Ituri between 2003 and 2006, resulted in a decision of acquittal on appeal, pronounced in July 2007 by the military court of Kisangani.²⁰⁵ The judges of this

²⁰⁰ A number of participants in the validation workshop for this report objected to the transfer of jurisdiction for international crimes in favour of the civil courts, pointing out that the military courts had accumulated experience in this area from which the civil courts would not benefit, and that in any case, it is military personnel who commit international crimes during wartime. The majority of participants nevertheless considered that the observance of the fundamental principle according to which the military courts should not hear international crimes was more important than the benefit of the relative experience of the military courts.

²⁰¹ Re-endorsed with several modifications by Professor Nyabirungu and *Maître* Mutumbe, both lawyers, this project benefited from contributions from civil society during a workshop organised jointly for this purpose by the international associations *Avocats sans frontières* (Lawyers without Borders) and the Konrad Adenauer Foundation.

²⁰² Principle 4(e) of the Principles and Guidelines on the Right to a Fair Trial and to Legal Assistance in Africa.

²⁰³ ACIDH, ASADHO, GLOBAL WITNESS and RAID, *Le procès de Kilwa: un déni de justice, chronologie*, October 2004–July 2007, 17 July 2007, p.31.

²⁰⁴ A. Rubbens, 'La justice militaire', *Congo-Afrique* no. 1, 1966, p.3.

²⁰⁵ Military court of Kisangani, *Auditeur militaire c. Kahwa Panga Mandro*, Ruling RPA no. 023/2007 of 28 July 2007, unpublished (author's copy).

court considered that the crimes of ‘participation in a rebel movement’ and ‘holding weapons and munitions of war without title or right’, for which Kahwa had been sentenced in the first instance, were covered by the amnesty decreed by the laws of 2003 and 2005. This decision opened a debate on the principle and scope of the successive amnesty laws enacted within the context of efforts to end the activities of armed groups in the east of the country.

Amnesty in exchange for peace

Amnesty has always been used in the DRC to seal national reconciliation after a period of turbulence. In the environment of the conflicts that have shaken the country since 1996, the adoption of an amnesty law has appeared among the resolutions agreed at each of the various peace negotiations.

The Lusaka Accord,²⁰⁶ the Global and All-Inclusive Accord,²⁰⁷ the Goma Declaration²⁰⁸ and the most recent negotiations held by the government with members of the National Congress for the Defence of the People (CNDP), all include a clause adopting an amnesty law in favour of the insurgents.

In accordance with the Global and All-Inclusive Accord, the transitional Constitution of 4 April 2003 provides, in article 199, that ‘in its first session, the National Assembly shall adopt a law providing an amnesty for actions of war, political and public opinion offences, in accordance with universal principles and international law, with the exception of war crimes, crimes of genocide and crimes against humanity. In a provisional capacity and while awaiting the adoption and promulgation of the amnesty law, the amnesty shall be promulgated by Presidential *décret-loi*’. On 15 April 2003, by way of application of paragraph 2 of this article, the President of the Republic promulgated *décret-loi* no. 003/001.

Practical scope of amnesty laws

In practice, the application of various amnesty laws is characterised by discrimination. Kahwa may have benefited from successive amnesty laws, but individuals at the *Centre pénitentiaire et de rééducation de Kinshasa* (Kinshasa Penitentiary and Re-education Centre – CPRK), sentenced in connection with an attempt on the life of President Laurent-Désiré Kabila, did not.²⁰⁹

A similar situation may be observed today with regard to the combatants of the armed

²⁰⁶ See Point 9.2 of Annex A of this agreement available online at <http://www.afrique-express.com/archive/CENTRALE/rdcongo/rdcongopol/223annexesaccordslusaka.htm>

²⁰⁷ See Point III, 8 of this Agreement, available online at <http://www.grandslacs.net/doc/2826.pdf>

²⁰⁸ Available online at http://www.amanileo.org/index.php?option=com_docman&task=cat_view&gid=14&Itemid=47

²⁰⁹ Individuals sentenced within the context of this case were excluded from the benefits of this amnesty on the grounds that the attempt against the life of the President of the Republic, for which they were sentenced, is not a political offence. Basing himself on the opinion of the *cour suprême de justice* (Supreme Court of Justice) RL 10 of 13 December 2005, which recognised this interpretation of the amnesty law of 29 November 2005, the Minister of Justice issued a regulation applying this law, through which it excluded the above individuals from the benefit of the amnesty measures. According to the working group on arbitrary detention, among the cases qualifying as arbitrary detention is, ‘the holding in detention of an individual who has served his sentence or to whom an amnesty law is applicable’. See on this subject *Maître Wets’hokonda Koso, ‘L’avis consultatif de la Cour suprême de justice RL 10 du 13 décembre 2005 sur l’infraction politique : interprétation ou réécriture de la loi ?’, Les analyses juridiques* no. 8/2006, pp.4–26.

group CNDP. While the government has prohibited prosecutions against the fighters of this rebel movement, which has been transformed into a political party,²¹⁰ it is seeking to obtain the extradition from Rwanda of Laurent Nkunda, the head of the movement. The arrest warrant issued against Nkunda Batware has never been executed. Moreover, the *cour militaire opérationnelle* of Goma, established in 2007, remained ineffective until recently. According to Colonel Mutombo, this may be explained by the fact that the government considers it appropriate to prioritise the political regulation of the crisis, even if this entails not pursuing judicial prosecutions.²¹¹

The same consideration can be observed in the tendency to conclude contracts with warlords, under which they renounce war and in return receive promotion within the armed forces of the DRC and the police. Once promoted, these warlords are protected from judicial prosecution. This creates a context in which the independence of the judiciary is not always as effective as one would wish, as we have already pointed out.

In general, Congolese legislation on amnesty has observed the ‘Joinet Principles’, according to which amnesty should not be granted for the most serious international crimes. This principle was incorporated into the provisions of article 199 of the transitional Constitution of 4 April 2003, and into most of the specific laws on amnesty cited above.

D. Application of the death penalty

In violation of the International Covenant on Civil and Political Rights, the 2002 legislation established the death penalty for a considerable number of offences, 62 in total, including offences that could not be considered serious crimes.²¹²

Offences subject to the death penalty pursuant to the code pénal militaire

No.	Infractions	Article
1	Desertion during wartime or under exceptional circumstances (in wartime or under circumstances linked to a state of siege or emergency or on the occasion of a police operation aiming to maintain or re-establish public order)	45
2	Pre-planned desertion during wartime	46
3	Desertion abroad during wartime or under exceptional circumstances	48
4	Desertion to an armed group during wartime or under exceptional circumstances	49
5	Desertion to the enemy	50
6	Desertion in the presence of the enemy	51
7	Self-inflicted mutilation during wartime or under exceptional circumstances, or in the presence of the enemy or of an armed group	55
8	Accomplices to self-inflicted mutilation, if they are healthcare professionals, during wartime or under exceptional circumstances	56

²¹⁰ The military and civil judicial authorities were notified of this prohibition by a letter from the Minister of Justice. The letter was posted on the CNDP website at <http://www.cndp-congo.org/index-fr.php>.

²¹¹ Interview cited above.

²¹² By virtue of article 6, paragraph 2 of the Covenant, '[i]n countries where the death penalty has not been abolished, a death sentence may only be pronounced for the most serious crimes.'

9	Cowardice (i.e. 'flight before enemy forces or rebel groups, or the use of irregular means to remove oneself from danger', <i>code pénal militaire, Journal Officiel de la RDC</i> of 20 March 2003, special issue, p.80.)	57
10	Capitulation before the enemy	58
11	Demoralisation of troops during wartime or under exceptional circumstances, if entailing serious consequences	59
12	Refusal to fight during wartime	60
13	Deliberately carrying out a mission without the means to accomplish it, where there have been serious consequences	61
14	Military conspiracy during wartime or under exceptional circumstances	62
15	Organised looting	64
16	Looting during wartime or under exceptional circumstances	65
17	Destruction of arms or munitions during wartime	67
18	Definitive disablement of weapons, aircraft, a building or materials, if deaths of troops have occurred, or during wartime, or under exceptional circumstances	68
19	Illegal use of an aircraft, building, material or a vehicle during wartime or under exceptional circumstances, if the events entail serious losses	69
20	Use of forgeries affecting the national defence or vital interests of the nation	72
21	Incitement to commit actions contrary to duty or discipline during wartime or under exceptional circumstances	88
22	Revolt during wartime or under exceptional circumstances, or in the presence of the enemy or armed groups	90
23	Acts of armed rebellion during wartime or under exceptional circumstances	91
24	Armed rebellion during wartime or under exceptional circumstances	92
25	Refusal to obey orders during wartime or under exceptional circumstances	93
26	Refusal to obey an order to march against the enemy	94
27	Assaults and insults against superiors during wartime or under exceptional circumstances	100
28	Violence against a sentry during wartime or under exceptional circumstances	101
29	Violence or physical abuse against civilian populations during wartime	103
30	Violation of instructions in the face of the enemy or during wartime or under exceptional circumstances	113
31	Any commander who, during wartime, deliberately fails to carry out his mission with regard to war operations	114
32	Abandoning a position during wartime or under exceptional circumstances	116
33	Abandoning a position or falling asleep at one's post during wartime or under exceptional circumstances	117
34	Abandoning a ship or aircraft in the presence of the enemy or in the case of imminent danger	119
35	Any commander who, in the event of loss of a ship or aircraft, is not the last to abandon ship	120

36	Abandoning a position in the face of the enemy or an armed group	121
37	Treason during wartime	128
38	Espionage	129
39	Misappropriation of objects seized during wartime or under exceptional circumstances	132
40	Sabotage with the aim of serving a foreign power or enterprise	133
41	Providing false information to the Congolese authorities with a view to serving a foreign power during wartime	134
42	An assassination attempt by an armed group	135
43	Participation in an armed insurrection during wartime	137
44	Providing arms to rebels	138
45	Directing or commanding armed forces or inciting them to arm illegally during wartime	139
46	Usurping command of the armed forces or inciting them to arm illegally during wartime	140
47	Inciting soldiers to shift to the service of a foreign power with a view to harming the national defence	143
48	Taking part in an attempt to demoralise the army during wartime	146
49	Actions intended to harm or slow the functioning of the administration of the national defence during wartime	148
50	Dissemination of information on the national defence during wartime or under exceptional circumstances	150
51	Terrorism entailing deaths	158
52	Genocide	164
53	Crimes against humanity	167, 169
54	Poisoning water or the dispersion of products intended to kill during wartime or under exceptional circumstances	170
55	Retaliatory killings	171
56	Use of prisoners for the purpose of protection against the enemy during wartime or under exceptional circumstances	172
57	Enabling an escape by transfer of weapons	179
58	Impeding the law on military recruitment or mobilisation by using the <i>force publique</i> , during wartime or under exceptional circumstances	189
59	Enrolment by the enemy or its agents	190
60	Imposing abusive fines or confiscations accompanied by torture during wartime or under exceptional circumstances	192
61	Making arrests while wearing a false uniform or with a false order, accompanied by torture	194
62	Theft, misappropriation or destruction during wartime of weapons, vehicles, or military objects	202

Source: Ensemble contre la peine de mort, *La peine de mort dans la région des Grands lacs, Rwanda, République démocratique du Congo, Burundi*, Paris, 2008.

E. Recommendations

Clear legislative measures must be adopted urgently in order to repeal all the provisions recognising the jurisdiction of the military courts with regard to civilians, the police, insurgents, and *bâtisseurs de la nation*. Only military personnel in the strict sense should be subject to the military courts.

The same legislative reform should lead to the repeal of all the provisions recognising the jurisdiction of the military courts with regard to offences other than those of a strictly military nature. For this purpose, it is important to exclude mixed offences, especially the most serious international crimes, from the field of military court jurisdiction. The death penalty should also be abolished for all offences established by the military code, starting with offences that do not have the character of serious crimes. In any case, the military courts should refrain from applying the death penalty in all cases in which civilians are prosecuted.

The first priority should be given to adopting the proposed law to implement the Rome Statute. It is furthermore important to raise public awareness of military criminal laws, with a view to promoting appropriate interpretation. Military court case law should also be made accessible to the public in order to encourage a unified understanding and practice of case law across the entire country.

Military magistrates should be trained as lawyers and interpret laws to give full effect to the international commitments of the state, including international legal instruments relating to human rights, such as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

The government should apply itself to ensuring the release of all individuals benefiting from amnesty laws, and more specifically, the individuals sentenced by the *Cour d'ordre militaire* within the context of a case relating to the attempt on the life of President Laurent-Désiré Kabila.

The police reform process should include a prohibition on admitting military personnel into the police force without prior and rigorous training in techniques for maintaining order. The government should equally ensure that the police are equipped with resources appropriate to their mission of maintaining order.

4

Functioning and effectiveness of the military courts

The inadequacy of staffing levels significantly reduces the effectiveness of the military justice system. This deficiency is moreover reinforced by the hierarchical principle that insists that only peers holding at least equal rank can judge a member of the military. Also, the geographical distribution of the military courts is unbalanced, and on many occasions means that crimes subject to their jurisdiction are perpetrated in places distant from the location of the relevant court. Military magistrates have a basic training equivalent to that of civil magistrates, which qualifies them to operate with authority. Specialised training is nevertheless necessary to compensate for the shortcomings demonstrated by numerous military magistrates in specific issues directly related to military justice. Among the areas in which supplementary training is required are investigations into mass crimes, which are generally complex.

A. Staffing levels

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa invite African states to ‘endow judicial bodies with adequate resources for the performance of their function’.²¹³ The Congolese military justice system has nevertheless continued to suffer from a very noticeable staffing shortage. The COM had only a total of nine magistrates appointed by the President of the Republic, while it had jurisdiction over the whole of the country. The decree of appointment also made the magistrates of the prosecutor’s office members of the *Cour d’ordre militaire*. In order to function normally, the presiding judge and the prosecutor at this court were obliged to requisition magistrates in order to flesh out the military judicial staff. This created

²¹³ Principle (A(3)(v)) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

a confused relationship between the military court and the prosecutor's office, which now constitute two distinct institutions. The magistrates of both are appointed by the President of the Republic on recommendations from the *conseil supérieur de la magistrature* (the equivalent of a judicial services commission).²¹⁴

The number of magistrates has been significantly increased – it currently exceeds 340, but is still insufficient to meet current requirements. The following table shows the numbers of military magistrates.

Numbers of military magistrates by military court

Military court	Number of sitting magistrates	Number of magistrates to be provided
Kinshasa/Gombe	1 senior chairman 2 chairmen 1 magistrate	1 chairman
Kinshasa/Matete	1 senior chairman 1 chairman 0 magistrate	1 chairman 1 magistrate
Bas Congo (Matadi)	1 senior chairman 1 chairman 1 magistrate	1 chairman
Bandundu	1 senior chairman 0 chairman 0 magistrate	1 chairman 1 magistrate
Équateur (Mbandaka)	0 senior chairman 1 chairman 0 magistrate	1 senior chairman 1 magistrate
Kasaï Occidental (Kananga)	1 senior chairman 0 chairman 0 magistrater	1 magistrate 1 magistrate
Kasaï Oriental (Mbuji-Mayi)	1 senior chairman 1 chairman 0 magistrate	1 magistrate
North Kivu (Goma)	1 senior chairman 0 chairman 0 magistrate	1 chairman 1 magistrate
Katanga (Lubumbashi)	1 senior chairman 1 chairman 0 magistrate	1 magistrate
South Kivu (Bukavu)	0 senior chairman 0 chairman 1 magistrate	1 senior chairman 1 chairman
Maniema (Kindu)	0 senior chairman 0 chairman 0 magistrate	
Province Orientale (Kisangani)	1 senior chairman 1 chairman 0 magistrate	1 magistrate
<i>Effective total of sitting magistrates in the military courts</i>	10 senior chairmen 14 chairmen 12 magistrates	6 senior chairmen 8 chairmen 10 magistrates

²¹⁴ Article 82 of the Constitution.

Summary of requirements for magistrates in the military courts

Tribunaux de garnison (Garrison Courts)	Number of sitting magistrates	Number of magistrates to be provided
Kinshasa Gombe	1 chairman 3 judges	none
Kinshasa Ngaliema	1 chairman 4 judges	none
Ndjili	1 chairman 3 judges	none
Matete	1 chairman 2 judges	none
Bandundu	0 chairman 2 judges	1 chairman
Kikwit	1 chairman 1 judge	none
Matadi	1 chairman 1 judge	none
Boma	0 chairman 2 judges	1 chairman
Kiton	1 chairman 0 judge	2 judges
Mbandaka	1 chairman 2 judges	none
Kananga	1 chairman 1 judge	none
Tshikapa	1 chairman 1 judge	none
Mbuji Mayi	1 chairman 1 judge	none
Mwene-Ditu	1 chairman 0 judge	1 judge
Lodja	0 chairman 1 judge	1 chairman
Lusambo	no judges provided	chairmen and judges
Lubumbashi	1 chairman 2 judges	none
Likasi	1 chairman 2 judges	none
Kolwezi	1 chairman 2 judges	none
Kalemie	1 chairman 0 judge	2 judges
Kamina	1 chairman 1 judge	1 judge
Kindu	0 chairman 2 judges	1 chairman

Goma	1 chairman 1 judge	1 judge
Beni	0 chairman 3 judges	1 chairman
Bukavu	1 chairman 2 judges	none
Uvira	no judges provided	chairmen and judges
Bandundu	0 chairman 2 judges	1 chairman
Lisala	1 chairman 2 judges	none
Buende	0 chairman 2 judges	1 chairman
Gemena	no judges provided	chairman and judges
Gbadolite	no judges provided	chairman and judges
Kisangani	1 chairman 0 judge	2 judges
Bunia	1 chairman 2 judges	none
Isiro	no judges provided	chairman and judges
Buta	no judges provided	chairman and judges

Source: Defence Institute of International Legal Studies, *op. cit.*, pp.24–25.

The total number of *tribunaux de garnison* is 36, while the current total of sitting judges in the *tribunaux de garnison* is 69, of which 21 are chairmen and 48 judges. It thus appears that there is a need for 15 *tribunaux de garnison* chairmen and for 45 judges.

Military justice system staff numbers

Category	Number
Judges	112
Prosecutors	232
Judicial police inspectors	265
Registrars	92
Secretaries	66
Bailiffs	44
Total	881

Source: Defence Institute of International Legal Studies, *op. cit.*, p.15.

Although at present the military justice system employs 344 magistrates, its optimal functioning would require the appointment of at least 96 more, of which 60 would serve the *tribunaux militaires de garnison* and 36 the military courts.

After the armed conflicts that ravaged the country, we are witnessing a battle over the statistics regarding men in uniform. These are overestimated by some and underestimated by others. In any case, the numbers swing between 120 000 and 300 000 military personnel.²¹⁵ Therefore, if we take an average of 200 000 military personnel, we may say that there is one military magistrate for every 700 soldiers and officers, a workload that is crushing for the magistrate. Even so, this figure does not take into account the other military personnel subject to the jurisdiction of the military courts—police officers, *bâtisseurs de la nation* and civilians.

Another issue to which the ACHPR has drawn the attention of African states is that of the representation of women in judicial institutions. It has called on states to ‘take measures immediately aiming to guarantee more satisfactory representation of women ...’.²¹⁶ For its part, article 13, paragraph 5 of the Constitution imposes the same obligation on government authorities. Its wording deserves to be cited in full. ‘The State guarantees the implementation of parity between the sexes in the said institutions (national, provincial and local institutions)...’. But of the 344 military magistrates in the DRC, there are only some 20 women.²¹⁷ The state thus needs to make efforts to recruit more women into the military justice system, particularly to take charge of prosecutions for crimes of sexual violence.

On an exceptional basis, where necessary, military magistrates may request the services of their civilian counterparts in order to make up the numbers of their courts.²¹⁸ The administration of this justice system is carried out by a military judicial staff consisting of magistrates, lawyers and other judicial defenders,²¹⁹ judicial police, court registrars, bailiffs and secretaries from the prosecutor’s office.²²⁰ At court level, the judicial staff benefits from the contribution of military and police personnel appointed for a defined period by rotation and the drawing of lots. These are *juges assessesurs* (lay magistrates), who find themselves within the military court system beside permanent judges and career magistrates, and who, without exception, act on behalf of the accused.²²¹

In addition to the shortage of magistrates, the military justice system faces many difficulties in applying the principles governing its administration. According to one of these, a military serviceman must be judged by his peers. This requirement is supplemented by the hierarchical principle that the peer who judges the military serviceman is of at least equal rank, if not higher.²²² The first of these principles (relating to judgement by peers) is often called into question, notably by the appointment of members of the police as *juges assessesurs*. This occurs even if members of the military capable of taking on this task are available. The same is true for

²¹⁵ P. Sebahara, *op. cit.*

²¹⁶ Dakar Declaration on the Right to a Fair Trial and Legal Assistance in Africa.

²¹⁷ Interview with Colonel Ekofo, chairman of the military court of Kinshasa–Gornbe, in March 2009.

²¹⁸ Article 17 of the *code judiciaire militaire*.

²¹⁹ Articles 61 to 63, *ibid.*

²²⁰ Articles 3 to 5, *ibid.*

²²¹ Article 30, *ibid.*

²²² Articles 35 and 67, *ibid.*

the hierarchical principle, the application of which has frequently paralysed the military courts, which cannot hear cases owing to a shortage of judges holding rank equal to, or greater than, that of the defendants. The most eloquent example of this is that of the *Haute Cour militaire* (Military High Court) in the *Germain Katanga* case. Since two of the defendants, Germain Katanga and Goda Supka, had the rank of brigadier general, only judges of at least the same rank could try them. With the exception of General Nyembo, senior chairman of the *Haute Cour militaire*, there were no other brigadier generals among the military. Thus the *Haute Cour* found itself unable to sit from 20 April to 5 May 2006, and could hear the case only after the military magistrate Bigevete had been appointed brigadier general.²²³ In the same way, in the *Bolongoloka* case, where an appeal was made to Lieutenant Kadima of Gbadolite to act as judge, the case against Captain Toussaint Etepe, summoned at the same time as the other defendants, could not be heard, since the *auditeur* (military prosecutor) Mbuta Muntu and the chairman of the court, Kadima, were of lower rank than Etepe.

In addition to causing judicial paralysis and thus contributing to impunity, the requirement of the hierarchical principle is likely to lead to the violation of the rights of defence, as was illustrated in the *Blaise Bongi* case before the *tribunal de garnison* of Bunia. Prosecuted for war crimes, Captain Bongi wished to summon his battalion commander, Major Faustin Kakule Kimbwa, to the hearing, arguing that the murders constituting war crimes that had been attributed to him had been committed with the full knowledge and participation of Major Kakule. The court rejected this request on the grounds that Major Kakule was ‘not subject to the jurisdiction of the *tribunal militaire de garnison*’ on account of his rank.²²⁴

B. Qualifications of military magistrates

Military magistrates follow the same academic training as civil magistrates, and therefore have the same qualifications, at minimum a degree in law. Despite this, with few exceptions, military magistrates continue to demonstrate ignorance of certain issues, such as international human rights law, constitutional law, or even the military criminal law contained in the new military justice and criminal codes. The situation is clearly of even greater concern in the case of *juges assessesurs*, who in general are entirely lacking in legal training.

Gaps in basic training

Normally, military courts sit with five judges, among whom are two military magistrates. Exceptionally, the *tribunal militaire de police* (military police court) sits with three members, including a military magistrate. It is the military magistrates who chair a bench that also comprises military officers and/or civilians. The appointment criteria for these officers and civilians do not include academic qualifications. This is a violation of African standards, according to which ‘no individual may be appointed to judicial functions without providing evidence of legal training and adequate legal qualifications which allow him to carry out his duties appropriately’.²²⁵ It is easy to imagine the difficulties such judges have in retracing the

²²³ Interview with Roger Mvita, former magistrate, AfriMAP programme coordinator in the Congo, June 2008.

²²⁴ *Tribunal militaire de garnison of Bunia, Auditeur militaire c. capitaine Blaise Bongi*, RP 018/2006, 24 March 2006.

²²⁵ Principle 4(k) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

evidence and disentangling the complex connections between the constituent elements of the most serious international crimes.

Like their civilian colleagues, military magistrates are recruited from persons who hold at least a basic law degree. Traditionally, they were recruited in the same way as their civilian counterparts, with whom they share the same status,²²⁶ and their qualification for the role of magistrate was based on documentary evidence of their law degrees or doctorates. Since military criminal law is included only as an optional (that is, non-obligatory) subject in the course programme for students reading law, numerous jurists without any basic knowledge of military criminal law currently form part of the military judiciary.²²⁷ Once appointed, these magistrates exercise their duties immediately, without professional training.

Military magistrates were not included in the most recent recruitment of magistrates, which took place in 1998. Henceforth, with the new *statut des magistrats* (Magistrates' Statute), things will have to change. Recruitment will essentially be carried out by the *conseil supérieur de la magistrature*, which will be responsible for organising competitive recruitment rounds, and will submit appointment proposals for approval by the President of the Republic. Furthermore, new recruits will be given an internship and professional training at the *École supérieure de la magistrature* (Higher School for the Judiciary). While this institution is being established, the study and documentation department of the Ministry of Justice will undertake these functions.

It should also be noted that not only the seniority but the quality of the individual magistrate's contribution will be taken into account when considering that person for promotion. Moreover, his or her performance, which will be evaluated annually in the context of the description introduced by the *statut des magistrats*, will determine whether or not that magistrate is given an increase in salary.

Military law has specific characteristics and requirements. The lack of basic training for military magistrates in this area is thus a source of concern. To date, there is no continuous training mechanism for magistrates that compensates for the deficiency. The school that could have provided such training for judicial staff closed its doors during the 1980s owing to a lack of funding.

In the absence of a public system for continuous training, the task of strengthening the capacities of judicial operators tends to be carried out by non-governmental organisation programmes. Their efforts provide part of the reason for a progressive improvement in the quality of judicial decisions on the application of international standards in military justice.

This observation was confirmed by lawyers who intervened in the cases judged by the *Tribunal militaire de garnison* of Mbandaka, including the *Songo Mboyo* case. In another case heard by the military court of Haut Katanga, that of Gédéon Mutanga, the instructing magistrates made use of notes from modules developed for them during a 2007 seminar organised by RCN (*Réseau citoyen justice et démocratie* – Citizens' Network for Justice and Democracy), to draw up the referral decision and, later, the charge. This experience proves, as if any further evidence were needed, that, when they are well trained, Congolese military magistrates can be effective,

²²⁶ Article 3, paragraph 3 of the *code judiciaire militaire*.

²²⁷ Interview with military magistrates, January and February 2009.

particularly in prosecuting the most serious crimes.²²⁸

Specialised training

With regard to the specialised branches of human rights and international humanitarian law, these have not been incorporated into the programme of courses offered in law faculties. It is within the context of other courses, such as civics and development, constitutional law, criminal law, and international public law, that certain lecturers introduce ideas on these subjects. The course in international humanitarian law contains optional subjects. Such a superficial training in human rights and international humanitarian law may explain decisions such as that of the sentencing on 28 March 1998 by the *Cour d'ordre militaire* of Mulume Oderwa, a child soldier aged 14, who had murdered a worker employed by a humanitarian organisation.

A military magistrate with over 20 years of experience recently stated, 'many prosecutors are ignorant or ... unaware of universal standards on the protection of human rights'. As a result, the accused who appear before such magistrates 'are exposed to the genuine risk of dehumanising treatment', which subjects them, for example, 'to interrogations which take no account of [their] state of mental health'.²²⁹

The integration of human rights into course programmes in primary and secondary schools is thus to be hailed and encouraged, even if there is a failure to introduce supplementary measures like providing human rights training teachers, drawing up school textbooks and supplying other teaching materials. Universities should follow the example of the primary and secondary schools by including human rights in teaching programmes, particularly within the law faculty.

C. Recommendations

The Ministry of Justice and national and international civil society organisations should make a particular effort to equip military magistrates with a minimum of teaching documentation, which should be constantly updated. In the past, there was a *Revue juridique des Forces armées zairoises* which unfortunately published only two issues. It would be desirable for such a review to be re-established, so as to permit theory on military criminal law to develop, and at the same time to make military court case law more widely known. Publishing the appeal and/or Court of Cassation rulings by the military courts, along with commentaries, would undoubtedly contribute to strengthening the capacities not only of military magistrates but also of all judicial staff. At the same time it would permit the general public to monitor the functioning of the military justice system. It is the people in whose name judicial decisions are pronounced.

The government should also give priority to measures aiming to:

- increase the numbers of military magistrates;
- increase the numbers of women within the military justice system;
- take account, when appointing military magistrates, of the requirements of the fight against impunity;

²²⁸ J. B. Habibu, *L'effectivité du Statut de la Cour pénale internationale : référence spéciale à la situation concernant la République démocratique du Congo*, Bukavu, Editions de l'ACAT, December 2007, p.176.

²²⁹ Laurent Mutata Luaba, *Traité de crimes internationaux*, Kinshasa, Editions Universitaires d'Afrique, 2008, p.50.

- ensure that the appointment of magistrates is accompanied by the granting of the rank necessary for the exercise of their duties;
- ensure the continuous training of military magistrates, particularly in subjects such as human rights, international humanitarian law and the conduct of investigations of international crimes;
- provide military magistrates with a police team with sufficient skills and resources to carry out investigations;
- improve the living and working conditions of military magistrates;
- equip military magistrates with the material and logistical resources necessary for carrying out their duties;
- provide a supplementary salary for *juges assessesurs* and clarify their legal status, in particular by setting down their role in the administration of justice, and the guarantees of independence from which they should benefit once their service has ended.

5

Independence of the military justice system

In part because it currently exercises exclusive jurisdiction over the serious crimes committed by armed groups during the conflicts of the last 15 years, military justice attracts particular attention from the principal political actors, who are the former leaders of these groups. More directly than their civilian colleagues, military magistrates are subject to the wish of the executive to exert control over the functioning of the military courts. Interference in their operation can take a more overt form than in the ordinary justice system, and gives it the appearance of having a political character. Military justice is equally affected by the influence of the command structure of the armed forces. Moreover, certain members of the private sector very often find themselves obliged to seek support from the armed forces which the public order services (the police) and judicial system cannot provide, for the protection of their economic interests. Owing to this connection with the armed forces, members of the business community have often sought to undermine the independence of military justice in cases where economic crimes committed by military personnel are being prosecuted, citing the need to protect private investors.

In practice, the independence of the military justice system is vulnerable to attack on many fronts. Government authorities, the military command, economic forces, and also the hierarchy of the military judiciary itself, can seek to influence the military courts. Harassment and interference from the military judiciary can take a variety of forms, including the summary dismissal of magistrates, corruption, disregard for the law, illegal appointments, the introduction of chosen magistrates to hear particular cases, sudden changes in the composition of courts, prohibition of prosecutions (or at least their submission to prior authorisation by the military command), and injunctions preceding the taking of judicial decisions.

A. Dismissals and untimely changes of magistrates

The dismissal in 2006, under conditions which hardly observed the law, of the senior chairman of the *Haute Cour militaire* (Military High Court), Nawele Mukhongo, revealed the extent of this practice within the military courts. This dismissal was linked to the acquittal by the *tribunal militaire de Garnison* of Kinshasa–Gombe of *Maître* Marie Thérèse Nlandu, prosecuted on a charge of participating in a rebel movement. According to a UN report, General Nawele was accused of not having properly ‘supervised’ the chairman of this military court, Mbokolo, his chief of staff at the time. This claim appears to be supported by the fact that this same Mbokolo, and Kawende, another military magistrate close to General Nawele, were transferred to the interior of the country when they were on the point of completing specialist studies, for which they had taken care to obtain all necessary authorisation. Because they did not return to their respective assignment locations, they were subject to judicial prosecution for insubordination.²³⁰

While difficult to descry, the negative consequences for the independence of magistrates caused by the dismissal of General Nawele, and the climate of harassment that surrounded the event, are nevertheless evident. Earlier it had been observed that one of the effects of relieving magistrates from duty, particularly the case where 315 magistrates were discharged in 1998, is self-censorship. In concrete terms, before taking decisions in the cases referred to them, magistrates take care to ensure that these decisions correspond with the expectations of the authorities, for fear of incurring their wrath. Prosecutors wait until they are sure of the position of the authorities on a case before they undertake the required investigations.

The law that establishes the *statut des magistrats* (Magistrates’ Statute) recognises the power of the chairman of a court and the prosecutor’s office to replace the magistrate under their authority in the event of an emergency. This power has nevertheless been abused to justify sudden decisions to make changes. The replacement of magistrates while they are investigating cases constitutes one of the reasons for acquittals, the issuing of derisory sentences, or simply the obstruction that has characterised certain cases investigated by the military courts. According to a UN report, the magistrate Majaliwa Mulindwa was suddenly replaced in 2005 in order to prevent him from revealing the involvement of certain political figures in the assassination, on 31 July 2005, of Pascal Kabungulu, a human rights activist from Bukavu.²³¹

The *code judiciaire militaire* (military justice code) recognises the power of the Ministry of Defence to appoint a magistrate from a lower military prosecutor’s office to fulfil higher functions on a temporary basis by citing ‘reasons linked to the imperatives of defence’.²³² This provision allows the Minister of Defence, under the pretext of ‘defence imperatives’ which he is not obliged to specify, to dismiss a military magistrate from the investigation of a case that the executive wishes to steer for political or private reasons. This is contrary to the interests of justice.

²³⁰ United Nations, *Rapport de l’expert indépendant sur la situation des droits de l’homme en République démocratique du Congo*, A/HRC/7/25, 29 February 2008, paragraph 28, (available online at <http://daccessdds.un.org/doc/UNDOC/GEN/Go8/115/59/PDF/Go811559.pdf?OpenElement>).

²³¹ United Nations, *Rapport du Rapporteur spécial sur l’indépendance des juges et des magistrats, mission en République démocratique du Congo*, A/HRC/8/4/Add.2, 11 April 2008, p.75 (available online at: <http://daccessdds.un.org/doc/UNDOC/GEN/Go8/128/48/PDF/Go812848.pdf?OpenElement>).

²³² Article 65 of the *code de justice militaire*.

B. Political pressure

It is routine for political pressure to be brought to bear on magistrates to cause them to abandon investigations or to influence their decisions. At times, the authors of such pressure aim to protect former allies among the heads of rebel or resistance movements. Gédéon Kyungu Mutanga, the former Mayi Mayi leader of North Katanga, clearly benefited from the protection of his former allies in the government of Kinshasa, who exerted themselves to influence the course of the investigation against him. According to *Maître* Kuboya of the bar of Lubumbashi, after his surrender to MONUC on 12 May 2006 and his transfer to the Congolese authorities, Gédéon Kyungu Mutanga was accommodated in the officers' mess rather than in a provisional detention cell, and regularly received pocket money.²³³ This was confirmed by MONUC when it stated that the fate of Gédéon Kyungu depended exclusively on the will of the President of the Republic.²³⁴

In most cases, political pressure is exerted subtly, and often in a way that is not apparent to the public, although it is obvious to the magistrate directly involved. In the *Tshiinja Tshinja* case, another head of the Mayi Mayi militia of Katanga, when the investigating magistrate was accused by civil society of delays in launching the investigation, he finally admitted that the suspect's fate did not depend on him, but on the authorities.²³⁵ It should be noted that although he had been under arrest since 2005, *Tshiinja Tshinja* had not yet been brought to trial at the time when this report was being edited. According to *Maître* Mukendi of the Kinshasa bar, the investigation will be continued in Kinshasa,²³⁶ more than 2 000 km from the scene of the crimes of which he is accused.

In other cases, pressure has been more overt, and even flagrant, as was the experience of the magistrates in the *Kilwa* case. An indignant notice published by four human rights organisations set out the situation:

19 October 2006: the *auditeur militaire* (military prosecutor), Colonel Nzabi, is summoned to Kinshasa, allegedly by the military judicial authorities, but in reality on the orders of the Chief of Staff of President Kabila. He is obliged to stay there for almost a month and pressured to abandon prosecutions against the employees of Anvil Mining. Following international protests against this excessive political interference, he is authorised to return to Lubumbashi.²³⁷

More recently, the government prohibited military magistrates from prosecuting leaders and fighters of the armed groups based in North and South Kivu, in particular those of the rebel movement *Conseil national pour la défense du peuple* (CNDP). In a brief letter dated 9 February 2009, the Minister of Justice effectively ordered the *procureur général* of the Republic and the

²³³ Interviews with *Maître* Kuboya, lawyer in Lubumbashi, 2 November 2008. See also a press release by Human Rights Watch, Gédéon, *le seigneur de guerre katangais doit être inculpé et jugé pour crimes de guerre*, press release, available online at <http://www.hrw.org>.

²³⁴ MONUC, *La situation des droits de l'homme en République démocratique du Congo au cours de la période de juillet à décembre 2006*, 8 February 2007, p.22.

²³⁵ Interview with *Maître* Kuboya.

²³⁶ Interview of 6 November 2008.

²³⁷ ACIDH, ASADHO, Global Witness and RAID, *op. cit.*, p.8.

auditeur general (judge advocate general) of the armed forces of the DRC ‘not to undertake prosecutions against members of the said groups and to halt those which had already been initiated’. According to the government, this prohibition, which was issued even before the formal adoption of the amnesty law that was being debated in Parliament at the time, was justified by the need to ‘consolidate peace and ensure national harmony’.²³⁸

Several reasons may be given for these repeated intrusions of political power into the administration of justice. The first is that during the war, the government allied itself with certain rebel movements to the detriment of others.²³⁹ Links were thus forged between the government and particular rebel movements that the government has found difficult to break. These connections lead it to act against the independence of military justice to protect the leaders of armed groups who should be subject to prosecution by the law.

Moreover, political leaders sometimes consider the abandonment of prosecutions a prerequisite for a return to peace, and thus apply pressure to end prosecutions that, in some cases, have already been initiated. The UN²⁴⁰ and certain international organisations have recently launched appeals in favour of excluding from the ranks of the army individuals suspected of involvement in committing international crimes. But despite its renunciation of war, the government continues to appoint militia leaders as military officers, without taking into account their history of criminal activities or their involvement in human rights violations.²⁴¹ Among the individuals who have thus far benefited from the ‘delinquency bonus’, we may cite Laurent Nkunda, Tangofor Gabriel Amisi, Germain Katanga, Jérôme Kakwavu, Floribert Kisembo Bahemuka, Bosco Tanganda, Rafiki Saba Aimable and Salumu Mulenda.²⁴²

c. Appointment of magistrates to hear particular cases

The appointment of certain magistrates to particular cases, with the obvious aim of obtaining a predetermined outcome, is an increasingly common practice in military justice. According to *Maitre Alexis Mikandji*, in the *Songo Mboyo* case, the senior chairman of the *Haute Cour militaire* appointed magistrate Kilimpimpi of Kinshasa to chair the military court of Mbandaka that was hearing the case on appeal. This appointment was motivated by the fact that the senior chairman of the military court of Mbandaka had publicly pronounced against the original judgement, saying that it was not justified to classify the collective rapes of which the defendants were accused as crimes against humanity. Magistrate Kilimpimpi supposedly led the lawyers to

²³⁸ Letter from the Minister of Justice No. 0226/JPM284/D/CAB/IN/J//2009 of 9 February 2009 containing ‘*Amnistie à accorder aux membres des groupes armés (CNDP...)*’.

²³⁹ Human Rights Watch, *Gédéon, le seigneur de guerre doit être inculpé et jugé...*, *op. cit.*

²⁴⁰ See in particular, Chapter VI, of Document E/CN.4/2005/120, Independent expert’s report on the human rights situation in the Democratic Republic of Congo, 2005, available online at www.ohcdh.org; Brief consolidated overview of the human rights situation in the Democratic Republic of Congo, August 2007, p.11.

²⁴¹ MONUC, *La situation des droits de l’homme en République démocratique du Congo...*, *op. cit.*, p.21.

²⁴² Human Rights Watch, *Les bailleurs doivent insister pour que le gouvernement poursuive en justice les seigneurs de guerre accusés d’avoir tué et violé des civils*, press release, available online at www.hrw.org; A/58/534, 24 October 2003, interim report of the special rapporteur on the situation of human rights in the Democratic Republic of Congo, p.13.

understand that he was awaiting instructions from the hierarchy before giving his ruling.²⁴³

The practice must have spread, since the appointment of magistrates from one territorial jurisdiction to hear cases under investigation in another has occurred elsewhere, as in the *Bavi* case in Ituri. It should be noted that the ACHPR has already expressed its disapproval of courts being made up of magistrates appointed at the discretion of the executive, a practice it considers detrimental to the independence of the judiciary.²⁴⁴

D. Submission of prosecutions to the prior authorisation of the command

One of the major factors causing underperformance in the military justice system that has been identified by almost all the individuals consulted during research for this report is the weight exercised by the military command. Everywhere, the command assumes the right either to prohibit prosecutions against elements placed under its authority, or to force such prosecutions to be submitted for its prior authorisation.

In a letter addressed to the *auditeur militaire* of the garrison of Bunia on 24 July 2006, General Mbuyamba Nsona, commander of operations in Ituri, issued the following warning:

1. I have observed that for some time, the military personnel of the garrison are summoned to, and appear in, your office without the Commander of Operations being aware of this.
2. From now on, every summons or warrant to bring a suspect before the court must be approved by the Commander of Operations. The forces are on active service.
3. Action to the contrary will constitute a procedural irregularity, which will be punishable.

In the province of Maniema, the provincial inspector of the national police prohibited the *auditorat militaire* (military prosecutor's office) from prosecuting its members without prior authorisation from Office II, the police service in charge of security. Similarly, in the Kasilembo murder case for which police officers were summonsed, the investigation was paralysed, with the *auditorat* unable to proceed without authorisation from Office II.²⁴⁵

At times, military magistrates have paid dearly in personal terms for bypassing the military command in carrying out their work. On 28 July 2007, for example, four deputy prosecutors of the *auditeur militaire* in the garrison of Kisangani, Julien Lwemba, Guillaume Ngembo, David Kazadi and Joseph Nganama, were stripped in public, beaten, exposed to inhuman and

²⁴³ Interview with *Maître* Alexis Mikandji, lawyer in Kinshasa, March 2009. During the validation workshop of this report held on 3 April 2009, Professor Akele Adau, Judge of the *Haute Cour militaire*, criticised the behaviour of the magistrates in referring to the hierarchy before pronouncing their decisions. For this high magistrate, this practice has had the result that instead of three or five members, the composition of military courts de facto consists of six or seven. We think that the same practice has the effect of emptying the right of appeal of all of its content. If, informally, the appeal judge is the one who has dictated the judgement in the first instance, the appeal becomes pointless.

²⁴⁴ Institut pour les Droits Humains et le Développement, *Compilation des décisions sur les communications de la Commission africaine des droits de l'homme et des peuples, extraits des rapports d'activités, 1994–2001, 2002*, pp.246–247.

²⁴⁵ Interview with *Maître* Assani Rock, lawyer in Kinshasa - Matete, 6 December 2008.

degrading treatment and arrested on the personal orders of General Jean-Claude Kifwa ‘Tango Tango’, commander of the ninth military region, for having infringed an instruction similar to the one detailed above.²⁴⁶ In an interview conducted during research for this report, General Kifwa maintained that he had intervened at the request of the civilian population to prevent the military magistrates in question from carrying out arrests of civilians for cases of debt on a Sunday. According to the General, his guard set about them after they refused to obey an order to withdraw from a case that was not subject to the jurisdiction of the military prosecutors.

E. Political interference before judicial decisions are taken

Political interference, or interference by the military command, which may already be present by the time a prosecution begins, continues during the investigation, and becomes even stronger when judicial decisions are about to be taken. According to *Maître* Désiré Balume, after having been interrupted several times when he was chairing a hearing, chairman Gabriel Kyungu of the *tribunal militaire de garnison* of Goma expressed his exasperation, declaring that all of the appeals he had received had asked him not to pass sentence. This indiscretion cost him a transfer to Katanga.

F. Corruption among magistrates

Like their civilian colleagues, military magistrates are not free from corruption, whether it is overt or concealed. In the *Kilwa* case, after having requested in vain that the government provide resources to allow the case to be properly organised, the military court of Lubumbashi accepted offers from the company Anvil Mining, three of whose agents, Pierre Mercier, Van Niekerk and Cédric, were due to be tried. According to witnesses, this rapprochement between the court and the company was one of the reasons for the acquittal, not only of the company’s agents, but also of the other defendants.²⁴⁷

G. Recommendations

In order to preserve the independence of the judiciary, which is an essential element of democracy and the observance of human rights, it is important that the government and the senior figures in military justice scrupulously observe the procedures established by the *statut des magistrats*, particularly with regard to the appointment, dismissal and rotation of magistrates. They should also take particular care to ensure an immediate end to the practice of disruptive changes of magistrates during investigations.

The *conseil supérieur de la magistrature* (equivalent to a judicial services commission) should collaborate with magistrate unions and human rights organisations to support magistrates in their resistance to attempts to violate their independence. It should also improve magistrates’ living and working conditions, so that they are less vulnerable to corruption.

²⁴⁶ A/HRC/7/25, 29 février 2008, *Rapport de l’Expert indépendant sur la situation des droits de l’homme en République démocratique du Congo*, Frédéric Titinga, p.10.

²⁴⁷ Previously cited interview with *Maître* Kuboya of the Lubumbashi bar.

6

The right to a fair trial

The accelerated procedure applied before the COM has led to numerous violations of the right to a fair trial. With the reform of 19 November 2002 and the promulgation of the Constitution of 18 February 2006, the legal framework, despite retaining several undeniable weaknesses, changed procedure to guarantee greater respect for this right. This is all the more likely to take effect because, apart from an express *code judiciaire militaire* (military justice code) waiver, the procedure applied is that instituted by the ordinary criminal code. In judicial practice as well, an effort has been made to ensure observance of the right to a fair trial. In the *Alamba* case, for example, the court discarded reports drawn up by the prosecution in violation of the law's requirement to guarantee the rights of the defence.

Procedures in the military courts nevertheless remain marred by numerous infringements of the rights of the defence and the right to a fair trial. Until one year of detention has passed, pre-trial detention largely escapes judicial monitoring. In the same way, the military courts continue to oppose fiercely any control of their decisions by the *hautes cours civiles* (civil high courts), through appeals on grounds of constitutionality or to the Court of Cassation. Among other infringements of the rights of the defence, it is appropriate to mention the systematic violation of the principle of 'equality of arms' (disclosure) between prosecution and defence; irregularities in referrals to the military courts; the failure of victims and witnesses to appear; the lack of appropriately-qualified legal assistance; the slowness of procedures; violations of the right of appeal; and failure to enforce judicial decisions.

A. Judicial control of provisional detention

One particular aspect of Congolese prisons is their overcrowding, and the abnormally high number of individuals in preventive custody, the largest category of prisoners. According to a

member of the *Commission permanente de réforme du droit congolais* (Law Reform Commission – CPRDC), almost 80% of the 3 500 individuals held at the Kinshasa Penitentiary and Re-education Centre (CPRK) were being held in a preventive capacity and awaiting prosecution before the military courts.²⁴⁸

One of the major reasons for this situation is the absence of control over the legality of provisional detention before the military courts until the detainee has been held for one year. This twisting of the rights of the defence appears to be sanctioned by law. Indeed, according to the *code judiciaire militaire*, '[i]f the investigation of the case lasts for more than 15 days and the military magistrate considers it necessary to maintain the accused in detention, it shall refer the same to the *auditeur militaire* (military prosecutor). This party shall rule on the provisional detention and decide on its extension for one month, and so on from month to month, for as long as the duly justified duties of investigation so require... If the established sentence is equal to or greater than six months, the extension of the preventive detention cannot exceed 12 consecutive months. Once this deadline has passed, the extension shall be authorised by the competent court. The prisoner may demand that the *auditeur militaire* release him or grant parole at any time.'²⁴⁹

As a result, provisional or preventive detention may be extended for a year before the judge called on to assess its legality intervenes. The least one can say on this point is that the delay is very long, and flagrantly contravenes article 9, point 3 of the International Covenant on Civil and Political Rights (ICCPR), by virtue of which '[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release', as well as article 9, point 4, according to which '[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

The *Germain Katanga* case and others gave the *Haute Cour militaire* the opportunity to pronounce on preventive detention. On 9 March 2005, Germain Katanga was arrested along with other heads of the Ituri militia, including Thomas Lubanga. On 17 March 2006, Lubanga was handed over to the ICC, leaving his companions in detention. It was in relation to this situation that the *Haute Cour militaire*, sitting at the request of the *auditeur general* (judge advocate general), was asked to issue a ruling. Basing its argument exclusively on article 209 of the *code judiciaire militaire*, not only did this court declare the preventive detention of Germain Katanga legal (even though it had lasted for over a year), but it extended the detention by ordering the *auditeur militaire* to take the necessary investigative steps to submit the case for trial.²⁵⁰

In the *Kilwa* case before the military court of Katanga, the defendants spent more than 18 months in preventive detention, with the court justifying the situation by the implication that there were serious indications of guilt, even though the final ruling acquitted most of the defendants.²⁵¹ In the *Ankoro* case, the defendants spent a total of 17 months in provisional

²⁴⁸ Declaration of *Maître* Shebele Makoma, Member of the CPRDC on the occasion of World Anti-Death Penalty Day, 10 October 2008.

²⁴⁹ Article 209 of the *code judiciaire militaire*.

²⁵⁰ *Haute Cour militaire, Auditeur militaire c. Germain Katanga et consorts*, RDP no. 001/05, 1 December 2006.

²⁵¹ Military court of Katanga, *Auditeur militaire c. Ilunga Ademar et consorts*, RP no. 010/06, 28 June 2005.

detention.²⁵² Tshiinja Tshinja, a leader of the Mayi Mayi militia of Katanga who was arrested in 2005, was still in provisional detention when this report went to press, without the examination by a judge of the legality of his detention.²⁵³

In this way, case law contrary to that of the relevant institutions for the protection of human rights has developed. This includes cases that implicate the DRC, for example the Willy Wenga case, on which the Human Rights Council of the UN was obliged to pronounce. Accused of complicity with the assassins of President Laurent-Désiré Kabila, Willy Wenga was kept in provisional detention for nine months without being brought before the *Cour d'ordre militaire*. His co-defendant, N'Sii Luanda, suffered 11 months of provisional detention. This situation was referred to the Human Rights Council by *Maître* Marcel Wetsh'okonda, in the name of the strategic workgroup attached to Global Rights, an international association for the promotion of human rights. The Council commented on the violation of the International Covenant on Civil and Political Rights, and invited the DRC (among other countries) to 'take measures to avoid the repetition of analogous violations in the future'.²⁵⁴

Deprivation of the right to judicial inspection of the legality of detention as rapidly as possible is all the more deplorable because it allows officers of the judicial police to impose a detention for a military irregularity without having to specify the offence. This occurs even if the irregularity is nowhere to be found in the *code pénal militaire* or the ordinary criminal code.²⁵⁵

B. Cases referred to the military courts

The military courts should hear only cases submitted to their jurisdiction insofar as the referral is regulated with regard to the interests of all the parties concerned. The rights of the defence are seriously threatened when the individuals in question have not been informed in advance of the proceedings about to take place. The military courts often violate the basic rules of a fair trial. For example, in the *Kalonga Katamisi* case, judged before the *tribunal militaire de garnison* of Bukavu, sitting at a mobile court hearing in Kindu, Kalonga's co-defendants were not identified. Consequently, they were never notified of their being on trial. The court nevertheless declared that it had jurisdiction over their case, and even went on to sentence them to death. The DRC itself was joined as a third party during the hearing as bearing civil (rather than criminal) responsibility, but its rights of defence were disregarded, since it too received no prior notice.²⁵⁶

²⁵² CDH, ACIDH, *Procès de la Cour militaire du Katanga sur les crimes commis à Ankoro*, op. cit., p.9.

²⁵³ MONUC, *La situation des droits de l'homme en République démocratique du Congo au cours de la période de juillet à décembre* 2006, 8 February 2007, pp.22–23.

²⁵⁴ M. Wetsh'Okonda, *Les perspectives des droits de l'homme dans la Constitution du 18 février 2006*, 2nd edition, Kinshasa, Editions de la Campagne pour les droits de l'homme au Congo, 2006, pp.34–35.

²⁵⁵ Articles 159 and 160, *code judiciaire militaire*.

²⁵⁶ *Tribunal militaire de garnison* of Kindu, *Auditeur militaire contre Kalonga Katamisi et consorts*, RP 011/05 26 October 2005.

C. Appearance of victims and witnesses

Owing to the distance between the fixed location of the courts and many of the places where crimes have been perpetrated, it may happen that victims and witnesses, or even the victims' lawyers, take no part in the proceedings. In the Ekembe and others case, this flagrant violation of due process allowed the court to reduce international crimes to the status of ordinary law offences, in this case, failure to assist persons in danger. Indeed, the absence of the victims and witnesses, as well as the rejection of the request to visit the site of the crime submitted to the court by the victims' lawyers, deprived the court of any evidence likely to back up the accusation that international crimes had been committed.²⁵⁷

D. Equality of arms before the military courts

The legal phrase 'equality of arms', better known as disclosure, 'requires each party [in a hearing] to be given a reasonable opportunity to present his or her case under conditions that do not place him or her under a substantial disadvantage vis-à-vis his [or her] opponent'.²⁵⁸

Like his civilian counterpart, the *auditeur militaire* exercises the dual functions of prosecutor and investigator simultaneously. This idiosyncrasy of the Congolese judicial system represents an infringement of human rights and more specifically, of the right to presumption of innocence. As Bayona Ba Meyya notes: '[t]he consequences of this double mission entrusted to the public prosecutor are as follows: split between the mission of investigating in favour of, or against the accused, a task which is irreconcilable with the prosecution mission which requires him to prepare the case of the prosecution, the public prosecutor will give a one-sided form to his investigative mission, i.e. he will give priority to the mission of public accuser, of prosecutor; in order to do this, he will essentially proceed on the basis of evidence against the accused, since for him it is a question of preparing the case for the prosecution, thus seriously violating the constitutional principle of presumption of innocence. But this is not all. The judges will in turn violate this principle because they will submit their questions to the accused on the basis of a case which only contains the elements for the prosecution, so much so that a careful analysis of these questions will reveal that in the eyes of the judge, the defendant is presumed guilty and must, through his replies, demonstrate that he is innocent.'²⁵⁹

Since in Congolese procedure the preparatory investigation is inquisitorial rather than adversarial, the prosecuted person does not have access, or only very limited and partial access, to the case for the prosecution before the trial starts. He or she is thus at a disadvantage with regard to the preparation of a defence. This is particularly the case in relation to entering appearances for witnesses for the defence. Effectively, the law requires the notification of the list of witnesses 'before the hearing on the merits' (*avant le débat sur le fond*),²⁶⁰ that is, starting from the first

²⁵⁷ Military court of Katanga, *Auditeur militaire c. Ekembe Monga Yamba André et consorts*, RP no. 011/2005, 26 April 2007 (copy of the ruling available from the authors).

²⁵⁸ http://regulatorylaw.co.uk/Disclosure:_Equality_of-arms.html.

²⁵⁹ Bayona ba Meyya, 'Regard estimatif sur les problèmes saillants du fonctionnement de la justice congolaise', in Lukuni Lwa Yuma, *op. cit.*, vol. II, no. 3, 1999, p.36; See also Pascal Kambale, 'Pour une rationalisation des enquêtes et de l'instruction préjuridictionnelle au Congo: essai d'analyse et propositions', *Horizons, Revue de droit et de science politique du Gabon*, no. 2, June 2006, pp.11–12.

²⁶⁰ Articles 242 and 243, *code judiciaire militaire*.

judgment hearing, which presupposes that the accused has familiarised himself (or herself) with the case for the prosecution before the first hearing. This is evidently not so, and the defendant's lawyers are generally appointed or start work only the day before the first hearing, or even after the proceedings have begun.

This blatant violation of the equality of arms was brought before the *tribunal de garnison* of Bunia during the prosecution of Captain Bongi. According to his lawyer, for Blaise Bongi to respect the requirement that he should notify the court of the list of witnesses he wished to call at the first hearing, it was necessary 'for him to have had previous time to familiarise himself with the elements of evidence presented by the *procureur*'. The court rejected this argument on the grounds that 'counsel for the defendant had not taken care to define the concept of 'timeliness' in a criminal procedure', and added that, in any case, the provisions of the *code judiciaire militaire* requiring the notification of the list of witnesses before the hearing on the merits 'only apply to the principle of due dispatch which is supposed to characterise criminal military courts'.²⁶¹

The weakness of the Congolese system on this point is further underlined by the use made by military courts of the powers given them by law during the conduct of hearings. This is particularly the case in the latitude given to judges to decide whether new witnesses, for whom a hearing has been requested by the prosecution or the defence, may indeed be heard. This discretionary power arises from article 249 of the *code judiciaire militaire*.²⁶² As has already been illustrated in the *Blaise Bongi* and *Songo Mboyo* cases, the exercise by military judges of this discretionary power is not always compatible with the observance of the rights of the defence.

In the first case, Captain Bongi requested during the proceedings a hearing for 18 witnesses for the defence. Only eight of these were allowed to be called, and only two actually appeared and gave evidence. Concerning the 16 other witnesses, the court decided to 'make use of its discretionary power by virtue of paragraph 3 of article 249 of the *code judiciaire militaire*' not to hear them, justifying its decision by the 'principle of due dispatch which is supposed to characterise military criminal courts'.²⁶³ In the *Songo Mboyo* case, the counsel for the defence objected to the appearance of three witnesses for the prosecution for whom the *auditeur militaire* had submitted a list during the proceedings. While he recognised, in agreement with the defence, that the defendants had not been notified of the list of witnesses [for the prosecution] at the time of signing their writ of summons, the court nevertheless used its discretionary power 'to direct the hearing and discover the truth' to decide that these witnesses 'would be heard in the capacity of simple informants during the proceedings'.²⁶⁴

In the first case, the court's ruling had the effect of depriving the defendant of his means of defence by deciding, in the name of due dispatch, that only two of 18 witnesses for the defence would be heard. In the second case, the court was unable to protect the defendants from the

²⁶¹ *Tribunal de garnison of Ituri, Auditeur militaire c. cap Blaise Bongi*, RP 018/2006, 24 March 2006. This decision was published in *Ligue pour la Paix et les Droits de l'Homme, Rapport d'observation du procès sur les crimes de guerre*, September 2006, pp.30–60.

²⁶² Article 249, paragraph 1: 'The Chairman holds a discretionary power for discovering the truth'; article 249, paragraph 3: 'If the public prosecutor or the counsel for the defence requests the hearing of new witnesses during the proceedings, the chairman shall decide whether these witnesses should be heard'.

²⁶³ *Tribunal de garnison of Ituri, Auditeur militaire c. cap Blaise Bongi*, RP 018/2006, 24 March 2006.

²⁶⁴ *Tribunal de garnison of Mbandaka, judgment 'avant dire droit' (interlocutory ruling) of 26 October 2005, Auditeur militaire c. Lt Elizo Ngoy et consorts*, RP084/2005.

effect of surprise created by the *auditeur militaire* when this latter party summoned witnesses for the prosecution about whom the defence had not been previously notified. The requirement for notification contained in article 242 of the *code judiciaire militaire* has the precise aim of avoiding ‘prosecutions by ambush’ and of giving the defence sufficient time to prepare itself to counter the evidence of the accusation. The discretionary power of the judge must be used precisely to ensure the observance of this fundamental right of the defence and the principle of equality of arms, and not to destroy it.

E. The right to be represented by a lawyer of one’s choice

This right is limited in the military courts. On the one hand, foreign lawyers are not permitted to assist defendants before a military court.²⁶⁵ On the other, there is no free judicial assistance for the military courts. The result is that in order to benefit from high-quality legal assistance, defendants and civil parties are themselves obliged to pay for the services of Congolese lawyers of their choice. Considering their limited resources, few military and police personnel are able to do this. They are thus obliged to accept the defence offered to them by the bar through their free consultation offices (where these exist). Since the services are not paid for by the state, the lawyers, who are usually trainees, consider such work a chore from which they attempt to free themselves as soon as possible, regardless of the results.

Whether they are contracted by the parties or appointed by the bar, most lawyers who appear before the military courts have weaknesses that hinder the effective exercise of the right to legal assistance. Firstly, these lawyers are not always familiar with either criminal law and military criminal procedure, or with human rights and international criminal law. However, this observation should be qualified since, by virtue of the contribution of international associations which defend human rights, such as *Avocats sans frontières* (Lawyers without Borders), the Konrad Adenauer Foundation, *RCN Justice et démocratie* (Citizens’ Network for Justice and Democracy), Global Rights and others, some lawyers have benefited from capacity building in this area. The ICC has also organised a number of training seminars aimed at lawyers, and some bar associations, especially the Kinshasa–Gombe bar, have undertaken initiatives to train lawyers, particularly in the field of international human rights law and international humanitarian law.

Around 100 lawyers have benefited from the training organised by the association *Avocats sans frontières* in assisting the victims of, and individuals accused of, international crimes. It is this team of lawyers that intervenes most frequently in proceedings for international crimes, some in favour of the defendants and others in favour of the injured parties, and provides expertise that is of fundamental importance to the evolution of case law that fights against impunity. But several of these lawyers pointed out in interviews that even though the provisions of the Rome Statute of the ICC have been cited in domestic proceedings, the same cannot be said of other international instruments relating to human rights, or of the Constitution.²⁶⁶

Secondly, the lawyers intervening before the military courts often file appearances, or are appointed, only a few days before the start of the judgement hearings; some even do so after

²⁶⁵ Article 61, paragraph 2 of the *code judiciaire militaire*.

²⁶⁶ Interview with *Maître* Gaby Okoko, member of the team of lawyers trained by *Avocats sans frontières*, interview of the month, of 9 June 2008.

the proceedings have begun. In all cases, they will not have advised the prosecuted individuals during the pre-trial investigation phase. Where lawyers live a long way from the location of the trial, they often do not arrive before the first hearing. In the *Blaise Bong* case, for example, Captain Bong's lawyer, *Maître* Bisimwa Ntakobagira, based in Bukavu, was able to reach Bunia, where the trial was taking place, only after the first hearing had taken place.²⁶⁷ In other examples, such as the *Kahwa* case, the first occasion on which the counsel for the defence was able to confer with his client took place several days after the start of the proceedings.²⁶⁸

Lastly, lawyers who appear before the military courts do not always demonstrate sufficient courage to exercise their office, because they are intimidated by the military. On World Day Against the Death Penalty, Professor Akele stated that military justice in no way intimidates those lawyers who have mastered their field and exercise their profession in full independence. However, when they find themselves lost in the maze of military criminal procedures, many lawyers hide behind the argument of the intimidation to which they are subjected by military magistrates. *Maître* Kuboya, a barrister at the Lubumbashi bar and member of the *Conseil de l'ordre* (bar council), considers that the profile of the lawyer, his level of legal knowledge, and his behaviour, play a major part in the way he is treated by the military magistrates. If he is weak, if he lacks firmness, the military magistrates will exploit these weaknesses to their advantage, and ride roughshod over him.²⁶⁹

According to *Maître* Gaby Okoko, in contrast with the era of the *Cour d'ordre militaire*, when threats against lawyers were commonplace, today lawyers exercise their profession in full independence.²⁷⁰ This does not mean, however, that means of coercing lawyers have entirely disappeared. On the contrary, in a number of particularly sensitive cases, lawyers have been warned off. This was particularly true in the *Maheshe* case.²⁷¹ In Lubumbashi, the lawyers Serge Shungu, Richard Matuli, Adolphe Luyamba and Mumba Mutali not only suffered threats in June 2008, but were arrested by the *auditorat militaire* (military prosecutor's office) of Lubumbashi,²⁷² which led the General Assembly of the Lubumbashi bar to order a boycott of the military courts.²⁷³

One last point with regard to legal assistance is that most lawyers are to be found in the major cities. Consequently, if proceedings are held far from these cities, the parties often fail to benefit from the assistance of lawyers. This is the case in Bunia, which has only four to five lawyers and numerous paralegals (*défenseurs judiciaires*). In trials for international crimes in this district, the parties were able to benefit from legal assistance only by virtue of the contribution of the international organisation *Avocats sans frontières*.

²⁶⁷ Ligue pour la Paix et les Droits de l'Homme, *Rapport d'observation du procès sur les crimes de guerre*, September 2006, p. 14.

²⁶⁸ Justice Plus, *Rapport d'observation du procès sur les crimes de guerre et crimes contre l'humanité, affaire ministère public contre Kahwa Panga Mandro*, May 2007, p.17.

²⁶⁹ Interview with *Maître* Kuboya of 2 November 2008.

²⁷⁰ Interview of 9 June 2008 in Kinshasa with *Maître* Gaby Okoko.

²⁷¹ HRW, 'RD-Congo : éviter une injustice flagrante, des ONGs de droits humains affirment que la Cour a bafoué les droits fondamentaux des accusés dans le procès pour le meurtre de Maheshe', press release of 18 May 2008, available online at <http://www.hrw.org>.

²⁷² ASADHO, 'Four lawyers at the Lubumbashi bar arrested and arbitrarily detained by the ANR', Press release no. 007/2008 of 1 July 2008.

²⁷³ CDH, 'Vérité sur la justice militaire au Katanga : l'Assemblée générale du Barreau du Katanga a été induite en erreur par un de ses membres', Press release no. 3 M/CDH/15/2008.

F. The right to be judged within a reasonable time

The right of every individual 'to a hearing of his case within a reasonable time period' is guaranteed by both the Constitution²⁷⁴ and by the African Charter on Human and Peoples' rights.²⁷⁵ While there is no precise definition of what constitutes a 'reasonable time period',²⁷⁶ it is undeniable that the military courts regularly ignore this right. Indeed, procedures tend to oscillate between two extremes: either they are summary and rapid, or they drag on indefinitely. The *Kalonga Katamisi* case illustrates the former tendency. In a single day, 26 October 2000, this case was investigated, pleaded and judged by the *tribunal militaire de garnison* of Bukavu, sitting in a mobile court at Kindu. This is astonishing, considering the seriousness of the offences for which the defendants were being prosecuted. They were sentenced to death for war crimes.

This due dispatch, which is observed as a general rule in cases relating to state security, stands out in striking contrast to the slowness characterising proceedings for other cases. Since his arrest and detention in 2005, Tshinja Tshinja was still awaiting trial when this report was completed. Other cases cited in this report have been distinguished by the slow pace of the proceedings. This is manifestly true of the *Ankoro*, *Kilwa* and *Gédéon* cases. Arrested in March 2003, the defendants in the *Ankoro* case waited until 20 December 2004, a year and nine months, for their fate to be decided. In the second case, the principal defendant, Colonel Ilunga Ademar, spent a total of two years in detention, from 29 June 2005 until 28 June 2007, before judgement was pronounced. In the third and last case, almost three years elapsed between the surrender of Gédéon Kyungu Mutanga in May 2006 and the verdict of the military court of Haut Katanga.

G. Right of appeal

The right of appeal against a verdict is guaranteed by articles 21, paragraph 2 and 156, paragraph 2 of the Constitution, which do not permit any exception. Under the terms of article 276 of the *code judiciaire militaire*, '[w]ith the exception of the rulings issued by the *cours militaires opérationnelles* (operational military courts), the rulings and judgements of the military courts and tribunals are subject to opposition (application for re-trial) and appeal'. In other words, in principle the right of appeal is recognised before the military courts. This rule nevertheless suffers from an exception: in wartime, the decisions of the *cour militaire opérationnelle* are not subject to appeal, raising the fear that during wartime, the military courts will start functioning like the *Cour d'ordre militaire*, the decisions of which were subject neither to opposition nor to appeal.

Even in peacetime, various physical and bureaucratic obstacles have made it difficult in practice to exercise the right of appeal before the military courts. By way of example, there are people who have been in detention since 2005 at Kasapa prison in Lubumbashi, awaiting their appeal hearings before the *Haute Cour militaire*. This applies to the case of Colonels Nsimba

²⁷⁴ Article 19 of the Constitution.

²⁷⁵ Article 7(1)(d) of the Constitution.

²⁷⁶ Case law of the UN Human Rights Committee (UN HRC) and the African Commission on Human and Peoples' Rights (ACHPR) nevertheless contains more or less precise indications. See e.g. *Lubuto v. Zambia* AHRLR 2001 38 (UN HRC 1995); *Mazou v. Cameroon* AHRLR 2001 8 (UN HRC 2001); *M'Boissona (on behalf of Bozize) v. Central African Republic* AHRLR 2001 25 (UN HRC 1994); *Mouvement Burkinabé des Droits de l'Homme et des Peuples c. Burkina Faso* AHRLR 2001 53 (ACHPR 2001).

Useni, Mwamba Takari, Cibunga Fraterne, Emmanuel Ngabo and Major Jean Paul Sinday. Owing to the distance of the *Haute Cour militaire* from Lubumbashi, and the stark absence of resources from which the military courts suffer, this infringement by the courts of the right of appeal runs the risk of being prolonged indefinitely. The military court of Goma has sometimes failed to sit for periods of up to a year. Individuals who have lodged an appeal before this court are then condemned to remain in detention for many months while awaiting a ruling on the merits of their appeals.²⁷⁷

H. Execution of judicial decisions

If it is already difficult to ensure that prosecutions of crimes falling within the jurisdiction of the military courts actually happen, it is even more difficult to enforce the sentences pronounced by them.

Apart from the CPRK (Kinshasa Penitentiary and Re-education Centre), the infrastructure of the country's other detention centres is in an advanced state of dilapidation. Forced to live in these prisons without food or health care, prisoners never miss an opportunity to escape. The verdict in the *Songo Mboyo* case is often cited as striking evidence of the commitment of the DRC to the fight against impunity. But of the six people sentenced, two escaped and have never been traced.²⁷⁸ *Maître* Koya Kosi, lawyer at the Kinshasa–Gombe bar, discovered during a recent visit to Mbandaka that the four others had also escaped.²⁷⁹

With regard to civil sentences, particularly those for which the DRC is liable (insofar as it is responsible for crimes committed by members of the armed forces and police, who perpetrate the largest percentage of crimes), to our knowledge not one of them has been subject to the least degree of enforcement. It can hardly be otherwise when we know that the share of the state budget allocated to the justice sector, estimated at 0.6%, does not permit the compensation of victims.

I. Recommendations

Observance of all of the guarantees of the right to a fair trial is essential. The military courts must ensure in particular the observance of equality of arms between the prosecution and the defence. For this purpose, they must avoid interpreting their power in conducting proceedings as an invitation to dispose of the rights of the defence in a discretionary manner. They should also pay particular attention to the requirements of prior and timely notification to the defence of all the evidence against the accused in order to avoid prosecution by ambush.

Organisations that defend human rights should continue, and intensify, their observation of proceedings before the military courts in order to ensure observance of the rights of the defence. For this purpose, they should seek to collaborate with the *conseil supérieur de la magistrature* and refer specific cases of violation of the right to a fair trial to it.

The Minister of Justice and the *conseil supérieur de la magistrature*, with the assistance of

²⁷⁷ Interview with *Maître* Désiré Balume, lawyer at the Goma bar, 5 March 2009.

²⁷⁸ MONUC, *La situation des droits de l'homme en République démocratique du cours de la période de juillet à décembre 2006*, 8 February 2007, p.25.

²⁷⁹ Intervention during the validation workshop for this report, held on 3 April 2009.

international partners and civil society, should collaborate on the urgent implementation of a practical mechanism to strengthen the capacity of military magistrates to observe the rules of a fair trial.

The Minister of Justice should work with Parliament, bar councils and the judicial authorities on preparing and adopting a law on legal aid, which should include the assumption by the state of free legal assistance. While awaiting the adoption of such a law, the free consultation offices of bar associations should be strengthened and supported, particularly financially, in return for granting free legal assistance.

Legislative reform of the military justice system should include the creation of a fund for the compensation of victims of international crimes. In the interim, Parliament should ensure that a sufficient allocation is regularly made in the state budget for the costs of compensating the victims of crimes perpetrated by members of the armed forces and the police.

List of interviewees

- Rock Asani, barrister at the Kinshasa-Matete bar, chairman of the Centre for Assistance and Legal Aid (*Centre d'Aide et d'Assistance Juridique – CAAJ*)
- Kasimu Asani, barrister at the Kindu bar, member of the CAAJ
- Delphin Bulambo, assistant to the national coordinator of Rejusco, former programme leader of the international association RCN *Justice et démocratie* (Citizens' Network for Justice and Democracy)
- Désiré Balume, leader of Rejusco's 'military justice' programme
- Ekofo, military magistrate
- Jean-Louis Esambo Kangashe, constitutional expert, junior lecturer in the Faculty of Law of the University of Kinshasa and deputy for the *Procureur général* at the Court of Appeal of Kinshasa-Gombe
- Georges Kapiamba, barrister at the Lubumbashi bar, deputy chairman of the African Association for the Defence of Human Rights (ASADHO)
- Richard Vakala Lukunda, advisor at the Ministry of Human Rights
- Serge Lukunga, barrister at the Lubumbashi bar, member of the association Action Against Impunity for Human Rights Violations (ACIDH), formal project manager of *RCN Justice et démocratie*
- Innocent Mayembe, chairman of the *tribunal militaire de garnison* of Bunia
- Alexis Mikandji, director of the Office of the Minister of Mining, barrister at the Kinshasa-Gombe bar
- Eleuthère Molisho, barrister at the Kinshasa-Gombe bar, adviser at the Ministry of Defence
- Katatalay Mutombo, adviser at the Ministry of Defence, military magistrate
- Toussaint Muntanzini, director of the office of the *Auditeur général des Forces armées* (Judge Advocate General of the Armed Forces) of the Democratic Republic of Congo, military magistrate
- Godé Mpiiana, member of the Association Justice plus, currently programme manager for the international association International Centre for Justice and Reconciliation
- Théodore Ngazi Ndoni, barrister at the Kinshasa-Gombe bar, assistant to the *Comité mixte pour la justice* (Mixed Justice Committee)/Ministry of Justice

- Juvénal Ndjende, programme manager for the association *Avocats sans frontières*, barrister at the Kindu bar
- Gaby Okoko Takedi, barrister at the Kinshasa-Gombe bar
- Régine Sesepe, barrister at the Kinshasa-Gombe bar, former coordinator of the *Association des femmes avocats* (Association of Women Lawyers)
- Jean-Paul Tshibangu, human rights officer at MONUC
- Eddy Tshibasua, communications manager for the ICRC
- François Tshiteya, barrister at the Mbandaka bar
- Christian Tshombe, communications manager at the Ministry of Defence, journalist for *Radio Télévision Nationale Congolaise*.
- Henri Wembolua, barrister at the Kananga bar, member of the *Campagne pour les droits de l'homme au Congo*.

NB: Certain interviewees asked to remain anonymous.