

***Etats Généraux* of the Justice System in the Democratic Republic of Congo**

Recommendations on the Fight Against Impunity for Grave International Crimes

April 2015

From April 27 to May 2, 2015, the Congolese Ministry of Justice and Human Rights is convening “*Etats Généraux*,” a large conference to evaluate justice sector reform in the Democratic Republic of Congo. The conference will be held in the capital, Kinshasa.

According to the terms of reference of the event, the objectives of the *Etats Généraux* are to evaluate the functioning of the judicial system in Congo and the reforms that have already begun and to formulate recommendations about priority reforms and actions that should now be implemented. Staff from the military and civilian judicial systems; civil servants and officials from the Ministry of Justice, other ministries and the presidency; and representatives of the parliament, bar association, universities, international donors and national and international nongovernmental organizations will come together to participate in the discussions. Over 200 participants are expected, about half of whom will come from outside Kinshasa.

National Prosecutions for Grave International Crimes

Since the early 1990s, eastern Congo has been wracked by a series of regional and local conflicts. Rebel movements have emerged repeatedly, often with the support of neighboring countries. Non-state armed groups as well as the regular army forces battling them have preyed on civilians, committing grave violations of international human rights and humanitarian law.

For a long time, there was complete impunity for these crimes.

In 2002, Congo ratified the Rome Statute of the International Criminal Court (ICC) and in 2004 Congolese President Joseph Kabila referred the situation in Congo to the court. Since then, in addition to cases before the ICC, there has been notable progress with regard to accountability for grave international crimes before the national justice system. Eager to promote complementarity between the ICC and national courts, Congolese authorities and international partners have implemented numerous projects to strengthen the capacity of Congo’s military justice system to handle grave international crimes (including specialized trainings, mobile courts, legal support to victims and assistance with protection).

Over the past 10 years, there have been about 30 trials for war crimes and crimes against humanity before military courts in Congo.¹ About two-thirds of the cases involved Congolese army soldiers; the others involved members of armed groups. Military and civilian courts have also handed down several hundred convictions for rape as an ordinary crime, notably through “mobile courts”—i.e., in situ hearings of local military and civilian courts—supported by international partners. This progress is encouraging and deserves to be recognized.

Yet despite this progress, the number of actual trials for international crimes is still remarkably small considering the number of serious crimes that have been committed in Congo. Many grave crimes have never been investigated, or in other cases, investigations have been stalled for years. Most of those who have been tried for serious crimes are low-level soldiers, and the trials that have taken place have often been plagued by serious problems: investigations are often of poor quality; victims and witnesses, and sometimes magistrates, are subject to threats and intimidation; and the rights of defendants are not thoroughly upheld. Sensitive cases have been fraught with interference from political and military officials, and those who are convicted sometimes escape imprisonment due to the poor state of detention facilities.

International and regional standards recommend that grave human rights violations and international law crimes be prosecuted before the civilian judicial system, but Congolese civilian courts have yet to handle such cases.

Priority Reforms to Include in the Recommendations Adopted by the *Etats Généraux*

During the *Etats Généraux*, participants will work in nine working groups dealing with different aspects of the justice sector in Congo. Below is an overview of the priority reforms that Human Rights Watch believes should be included in the recommendations adopted by the *Etats Généraux* for the following six working groups with the aim to strengthen the fight against impunity for grave international crimes: 1) fight against impunity; 2) independence of the judiciary; 3) judicial organization, competence and proceedings; 4) access to justice; 5) criminal justice; and 6) planning, coordination, and follow-up on reforms and funding of the justice system.

¹ For example, see UN Office of the High Commissioner for Human Rights, “Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003” (“UN Mapping Report 2010”), August 2010, http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf (accessed April 25, 2015); ASF (“ASF Jurisprudence Study 2009”), “Study of Case Law: Application of the Statute of Rome of the International Criminal Court by Congolese courts,” March 2009, http://www.asf.be/blog/publications/asf_casestudy_romestatute_light_pageperpage/ (accessed April 25, 2015); ASF (“ASF Jurisprudence Study 2014”), “La mise en oeuvre judiciaire du Statut de Rome en RD Congo,” April 2014, <http://www.asf.be/blog/publications/la-mise-en-oeuvre-judiciaire-du-statut-de-rome-en-rdc-congo-april-2014/> (accessed April, 25, 2015); Antonietta Trapani, Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases (DOMAC) (“DOMAC Report November 2011”), “Complementarity in the Congo: the direct application of the Rome Statute in the military courts of the DRC,” November 2011, <http://www.domac.is/media/domac-skjol/Domac-12-Trapani.pdf> (accessed April 25, 2015); Milli Lake, “Ending Impunity for Sexual and Gender-Based Crimes: the International Criminal Court and Complementarity in the Democratic Republic of Congo,” *African Conflict & Peacebuilding Review*, vol. 4 no. 1 (2014), pp. 1-32.

1. Fight Against Impunity

- i. Develop a national criminal strategy for prosecutions of grave international crimes.** Such a national policy could detail the government's strategy concerning the fight against impunity, including cooperation with the ICC, establishing specialized chambers, and strengthening the ordinary judicial system. It could identify the current weaknesses in the national judicial system regarding the prosecution of grave international crimes, the priority actions to be implemented, and ways to better coordinate and direct support from international partners in this field.
- ii. Pass the draft law implementing the Rome Statute of the ICC.**
- iii. Pass and implement the bill creating specialized mixed chambers within the national justice system:**

The Congolese government has proposed the establishment of specialized mixed chambers within three courts of appeal (civilian courts), mandated exclusively with the investigation and prosecution of war crimes, crimes against humanity and crimes of genocide. These chambers would be made up of military and civilian, national and international, judicial personnel. The proposal to establish specialized mixed chambers is also widely supported by Congolese civil society organizations.²

As explained in the explanatory note of the government's draft bill (from May 2014), this initiative, if well implemented, could help address the main obstacles undermining the fight against impunity in Congo. It is recognized that international crimes are particularly complex and require specific expertise. Specialized chambers with the presence of international experts would enable national judicial personnel to gain and increase their experience and expertise regarding investigations and prosecutions of the most serious crimes, witness protection, and upholding the rights of the accused to a fair hearing. The chambers could also act as a buffer against possible interference from the military hierarchy or political authorities in the work of national courts.

In May 2014, the Congolese parliament cited technical errors in the bill presented to parliament on the specialized chambers, and did not put it on the agenda of the parliamentary session. We urge the Congolese government to correct these errors and present the bill again, after having consulted and explained its objectives to members of parliament and other stakeholders.

Many countries have set up national or mixed war crimes units or specialized chambers to prosecute serious international crimes. Specialized mixed chambers have been created in Bosnia and Herzegovina, Cambodia, Kosovo, East Timor, and in Senegal. On April 22, 2015, the transitional parliament of the Central African Republic (CAR) adopted with an overwhelming majority a bill establishing a special criminal court within its judicial system to try serious crimes committed in CAR since 2003, with the participation of international experts.

- iv. Guarantee the exclusive jurisdiction of civilian courts over war crimes, crimes against humanity and genocide:**

² "Democratic Republic of Congo: No more delays for justice (joint declaration)," April 1, 2014, <http://www.hrw.org/news/2014/04/01/democratic-republic-congo-no-more-delays-justice>.

To date in Congo, only military courts have exercised jurisdiction over war crimes and crimes against humanity. As explained above, there have been concerns about trials for grave international crimes before military courts in Congo.

Recognizing the difficulties military justice systems have prosecuting offenses against civilians by military personnel, international and regional standards recommend that military courts should not be involved in prosecuting serious human rights violations, and should focus purely on military offenses.³ This approach is recommended for a number of reasons, including that serious human rights violations do not fall within the scope of military duties, that access to military justice may be difficult or traumatizing for victims of serious crimes committed by soldiers, and that military justice systems may lack impartiality when prosecuting members of their own ranks.

In April 2013, a new law concerning the organization, functioning and competency of Congo's ordinary courts gave jurisdiction to the civilian courts of appeal over war crimes, crimes against humanity and crimes of genocide "committed by persons falling under their jurisdiction and that of the *Tribunaux de Grande Instance*." ⁴

The last phrase suggests that the provision to give jurisdiction over serious international crimes to civilian courts of appeal does not apply when the alleged perpetrators are members of the military or civilians who benefit from "privileges of jurisdiction" under Congolese law, and who are not ordinarily tried by the civilian courts of appeal or *tribunaux de grande instance* (see below for more on privileges of jurisdiction). This reinforces the lack of clarity in Congolese law concerning which courts really have jurisdiction over such crimes. There are disagreements among jurists and legal scholars in Congo about whether the military justice system has exclusive jurisdiction over soldiers and police officers under article 156 of the Constitution. Congolese authorities should clarify these provisions, if necessary by adopting a new law or through requesting an interpretation of the Constitution from the Constitutional Court, so that civilian courts have exclusive jurisdiction for serious international crimes.

- v. **Create a specialized pool of investigators, prosecutors and judges trained to investigate and try the most serious international crimes.** These individuals could be nominated for extended periods to the military and civilian courts in the provinces where most serious international crimes are committed.

³ UN Human Rights Commission, Updated set of principles for the promotion and protection of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, Resolution 2005/81, April 21, 2005, principle 29; Draft Principles Governing the Administration of Justice through Military Tribunals, U.N. Doc. E/CN.4/2006/58, January 13, 2006, draft principle 9; UNGA Declaration on the Protection of All Persons from Enforced Disappearance, adopted December 18, 1992, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), Art. 16, which states that persons presumed responsible for such crimes "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts." The same principle exists in the 1995 Inter-American Convention on Forced Disappearance of Persons, article IX; African Commission on Human and People's Rights 2008 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle L(a).

⁴ Loi organique portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire (Law on the organization, functioning and competency of jurisdictions of the judiciary), entered into force on April 11, 2013, <http://www.leganet.cd/Legislation/Droit%20Judiciaire/LOI.13.011.11.04.2013.htm> (accessed April 25, 2015), art. 91.

- vi. **Improve the quality and impact of the United Nations Prosecution Support Cells (UNPSC)** by ensuring the recruitment of individuals with expertise in the field of prosecuting the most serious international crimes, and strengthen cooperation between national judicial staff and the UNPSC experts in order to improve the quality of investigations in such cases.

- vii. **Finalize reform of the 2002 military judicial code (code judiciaire militaire) to make it compliant with the 2006 constitution.** Include the following reforms in the new military judicial code:
 - **Ensure that grave international crimes cases are tried in civilian courts, even if committed by members of the army.**
 - **For so long as military courts continue to handle prosecutions of grave international crimes, adopt measures to ensure that high-ranking officers can, in practice, be prosecuted for these crimes.** To address the negative consequences of the rule that requires military court judges to be of equal or higher rank than the accused, consider the following measures: 1) nominate a sufficient number of high-ranking military judges; 2) eliminate the rule in the case of military court prosecutions of grave international crimes; or 3) eliminate ranks for military judges who could become part of a separate category of military officials.
 - **For so long as they continue to handle prosecutions of grave international crimes cases, ensure that military court benches be composed of a majority of trained military judges** for these cases, which often entail complex international law concepts, such as command responsibility. According to the current judicial code, professional judges are in the minority and are assisted by army officers without any legal training.

- viii. **Recruit female investigators, prosecutors and judges,** train them in the field of prosecuting international crimes, including sexual violence, and assign them to the military and civilian courts of the provinces where most of the serious international crimes are committed.

- ix. **Strengthen the rights of the accused to a fair trial, including by guaranteeing the right of appeal for all; by adopting a law guaranteeing that legal aid will be paid for by the state for accused who are indigent; and by suspending the fees required for *pro deo* defense lawyers to obtain copies of case files:**

The right for all to have their case heard in appeal is guaranteed under article 21 of the Congolese Constitution and in article 14 of the International Covenant on Civil and Political Rights, which Congo ratified in 1976. However, this basic and fundamental right is not available for all in Congo.

Article 87 of the military judicial code states that no recourse is available before operational military courts set up in times of war. The Goma operational military court, set up in 2008, has judged cases concerning war crimes, including the case of mass rape and pillage committed by Congolese army soldiers in and around the town of Minova in November 2012, without the possibility of appeal.

In May 2014, then-Minister of Justice Wivine Mumba Matipa tabled a bill to create an appeal before operational military courts. However, the parliament did not put this bill on the agenda of the parliamentary session.

The second category of individuals who do not have access to the right of appeal in Congo are those benefitting from privileges of jurisdiction under Congolese law, either in accordance with article 153 of the Constitution (a long list of elected officials and magistrates who instead come under the jurisdiction of the Court of Cassation), or in accordance with article 120 of the military judicial code (generals in the Congolese army or individuals accused in a case involving a general, who come under the jurisdiction of the Military High Court). As these people are prosecuted in the first instance in the highest courts of the country (Court of Cassation and Military High Court), they do not have access to an appellate court. This means that the integrity of any trial involving a general in the Congolese army, for example the recent trial of General Jérôme Kakwavu, who was found guilty of rape, is seriously compromised.

2. Independence of the Justice System

- i. Ensure the impartial investigation and appropriate prosecution of those suspected of attempting to obstruct or interfere with judicial officials in cases of grave international crimes.**
- ii. Provide exclusive jurisdiction for civilian courts over war crimes, crimes against humanity, and genocide (see above).**
- iii. Finalize the reform of the 2002 military judicial code in order to ensure its compliance with the 2006 Constitution.** Include the abovementioned reforms in the new code.
- iv. Improve the performance of the High Council of Judicial Magistrates (*Conseil supérieur de la magistrature*, CSM) by requiring that general assembly meetings be held regularly, and that there be more transparency regarding deliberations leading to CSM decisions.**

3. Judicial Organization, Competence, and Proceedings

- i. Provide exclusive jurisdiction for civilian courts over war crimes, crimes against humanity and genocide (see above).**
- ii. Pass the draft law establishing specialized Chambers within the national judicial system (see above).**

4. Access to Justice

- i. Pass a law on legal aid that guarantees that the state will fund legal aid for accused who are indigent.** Consider legislation that would allow indigent civil parties to have access to counsel free of charge.
- ii. Pass a law on protection of victims and witnesses, in particular in cases involving grave international crimes.** This law should complement article 74 of the code of criminal procedure and list protection measures and psychological support available prior to, during and after trial (building on the progressive practices of the military court in Bukavu and the operational military court in Goma in cases of war crimes and crimes against humanity through application of the Rome Statute). The law should also foresee the establishment of a national protection agency, with the assistance of the UN peacekeeping mission in Congo, MONUSCO, in order to transfer the valuable experience of the peacekeeping mission to the national judicial system.
- iii. Immediately pay reparations ordered against the state by criminal courts in cases of grave international crimes and sexual violence.** Start consultations to design an effective and sustainable reparations scheme for victims of grave international crimes.

5. Criminal Justice

- i. Develop a national criminal strategy for prosecution of international crimes** (see above).
- ii. Pass and implement the draft law establishing specialized Chambers within the national judicial system** (see above).

6. Planning, Coordination and Follow-Up on Reforms and Funding of the Justice System

- i. Create a sub-group on complementarity and the fight against impunity within the thematic Group on Justice and Human Rights,** which brings together members of the Ministry of Justice and international partners. This sub-group should focus on the coordination of activities aimed at supporting the prosecution of serious international crimes and sexual violence crimes, to fill gaps and avoid duplication of efforts. The ICC office in Kinshasa could help to coordinate this sub-group.
- ii. International partners should prioritize the sustainability and diversification of the projects they support regarding the fight against impunity for serious international crimes.**