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WATCH

JUSTICE ON TRIAL

Lessons from the Minova Rape case in the Democratic Republic of Congo



Justice on Trial

**Lessons from the Minova Rape Case in the
Democratic Republic of Congo**

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Glossary of Abbreviations

| | |
|----------------|--|
| ABA | American Bar Association |
| ASF | Lawyers without Borders (<i>Avocats sans Frontières</i>) |
| CMO | Operational Military Court (<i>Cour Militaire Opérationnelle</i>) |
| CNDP | National Congress for the Defense of the People (<i>Congrès National pour la Défense du Peuple</i>) |
| Congo | Democratic Republic of Congo |
| FARDC | Armed Forces of the Democratic Republic of Congo (<i>Forces Armées de la République Démocratique du Congo</i>) |
| FDLR | Democratic Forces for the Liberation of Rwanda (<i>Forces Démocratiques pour la Libération du Rwanda</i>) |
| ICC | International Criminal Court |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| M23 | March 23 rd Movement |
| MONUSCO | United Nations Organization Stabilization Mission in the Democratic Republic of Congo (<i>Mission de l'Organisation des Nations Unies pour la Stabilisation en RD Congo</i>) |
| NGO | Non-governmental Organization |
| OTP | Office of the Prosecutor (of the International Criminal Court) |
| UNDP | United Nations Development Program |
| UNJHRO | United Nations Joint Human Rights Office |
| UNPSCs | United Nations Prosecution Support Cells |

Summary

“When the court arrived in Minova, I felt a bit happy. I thought, ‘Finally, here is someone to listen to us and the horrible things that happened to us.’... But the judgment [it handed down], it is a lie. We were hurt. Where are they, then, those who hurt us? I am ready to continue and go anywhere for justice to be done.”

—Rape victim who participated in the Minova trial, Minova, May 2014

In November 2012, Congolese army soldiers retreated from the advancing M23 rebel group that had taken the strategic city of Goma in eastern Democratic Republic of Congo. They redeployed in Minova, a market town on the shores of Lake Kivu. En route and in Minova and surrounding communities, the soldiers engaged in a 10-day frenzy of destruction: looting homes, razing shops and shelters in camps for displaced people, and raping at least 76 women and girls.

The violence from November 20 to November 30 prompted a public outcry in Congo and beyond. Congolese authorities, who had announced a “zero tolerance” policy toward serious crimes—including sexual violence—now faced intense international pressure to bring the perpetrators to justice.

One year later, in December 2013, 14 officers and 25 rank-and-file soldiers of the Congolese army were put on trial in Goma, the capital of North Kivu province, on various charges, including the war crimes of rape and pillage, rape as an ordinary crime, and various military offenses. In more than 40 days of hearings over five months, close to 75 of the 1,016 people who joined the case as victim participants gave testimony, in addition to the defendants and other witnesses. The court held 10 days of hearings in Minova, thus bringing justice closer to those affected by the crimes.

International and national non-governmental organizations viewed the Minova trial as a test case for the Congolese justice system and its ability to hold perpetrators of grave human rights abuses to account. Many hoped it would demonstrate a real commitment by Congolese authorities, including the military, to ensure that justice would be served for grave international crimes.

The trial verdict, rendered by a local military court in Goma on May 5, 2014, quashed these hopes. Of the 39 accused, only two of the low-ranking soldiers were convicted of one individual rape each. The high-level commanders with overall responsibility for the troops in Minova were never charged; those lower-ranking officers who were charged were all acquitted. A number of soldiers were convicted of the war crime of pillage, despite an obvious lack of evidence against them.

Based on more than 65 interviews and a review of court documents, this report offers insight into the inner workings of the Congolese military justice system in the Minova case. It provides a detailed analysis of the investigation and trial—examining what went right and what did not.

Fair and impartial justice does not mean securing convictions at all cost. It is important that the military court acquitted those against whom it did not find sufficient evidence of wrongdoing. Yet, the Minova investigation and trial failed to establish what exactly happened in Minova, to identify those who were responsible for the crimes, and to bring justice to the victims.

Building on the Minova trial as an example, the report identifies reforms to the national justice system that are needed to strengthen the fight against impunity for international crimes in Congo. These include strengthening the legislative framework; increasing the specialized expertise of the justice system to handle atrocity crimes, including through the creation of a specialized investigation cell; and bolstering the independence of both the civilian and military justice systems. The government’s proposal to establish an internationalized justice mechanism within national courts remains of critical importance.

The Congolese government has legal obligations under international law to ensure that those responsible for sexual violence and other grave international crimes such as murder, pillage, torture, and the use of child soldiers are investigated and prosecuted in fair and credible trials.

There has been some progress in Congo over the past 10 years, with about 30 cases involving war crimes and crimes against humanity charges tried before local military courts. However, the vast majority of atrocities committed in Congo by members of armed groups and national armed forces during the fighting over the past two decades remain unpunished.

* * *

There were positive aspects to the Minova trial, which reflect some of the progress and experience amassed in Congo over the past decade in rendering justice for grave international crimes.

For example, the government affirmed its commitment to justice and made funds available for the trial, during which all parties had legal representation. Military judges on the bench directed the hearings effectively. Challenges, such as protecting or organizing victim and witness participation, were well addressed. Military prosecutors and judges directly applied provisions of the Rome Statute of the International Criminal Court (ICC), notably with regard to the legal theory of command responsibility and protection measures that are not available under Congolese law. Diplomatic pressure helped to ensure the case went to trial: the United Nations, for example, which had supported Congolese troops in military operations, threatened to withdraw military support unless those responsible for crimes were arrested and brought to justice.

There were also unique challenges present in the Minova case. Different army battalions and thousands of soldiers were in Minova at the time of the crimes, making it difficult to identify individual perpetrators. Commanders were replaced just before the retreat towards Minova and individual soldiers were in disarray, outside their regular units. No evidence emerged that soldiers had been ordered or encouraged to rape and pillage, but commanders failed to control their troops and to prevent, stop, or punish crimes. In addition, the timing of the investigation and trial was politically difficult: the conflict with the M23 continued as investigations were underway and many believed that the trial would harm soldier morale. In December 2013, when the case was rushed to trial, largely due to international pressure, the high-level commanders present in Minova in 2012 were already being touted as national heroes for having defeated the abusive M23.

Nonetheless, Human Rights Watch has identified three key sets of problems in the case:

- Several prosecution offices were involved in the investigation and prosecution of the case, creating confusion. There was no investigation plan or strategy to tackle such a mass crime scene. Lack of expertise and diligence contributed to the poor quality of the investigation and a weak prosecution file;
- The rights of defendants to a fair and impartial trial were compromised. In particular, some rank-and-file soldiers suffered from weak legal representation and

were convicted for the war crime of pillage and sentenced to up to 20 years in prison despite a lack of evidence. Congolese military law does not allow the right to appeal before the type of military court that heard the Minova trial; and

- The selection of accused by military prosecutors raised concerns about the political will of the armed forces to allow all those responsible for the numerous crimes in Minova to be prosecuted. Some of the officers indicted appeared to be uninvolved scapegoats for other officers with genuine command roles. There did not seem to be any willingness to seriously investigate the responsibility of certain suspects beyond field commanders, notably high-level officers who were present in Minova and may have had command responsibility.

These three failings exemplify some of the major problems that hamper accountability for serious crimes in Congo. These difficulties remain unaddressed despite years of international assistance and training of military justice officials aimed at strengthening the capacity of the national judicial system to handle grave international crimes, and promoting accountability before national courts to complement work of the ICC.

Human Rights Watch calls on the Congolese government and parliament to move forward with the proposal to establish a temporary internationalized justice mechanism involving both national and international judicial staff within the national justice system to investigate grave international crimes. Although two draft laws have faced some political resistance, such an internationalized mechanism remains critical to bolster specialized expertise and shield proceedings from interference.

Providing justice is a legal obligation of states toward individuals who have suffered grave crimes. In addition, credible, fair, and impartial trials for war crimes and crimes against humanity can be important in fostering longer term peace and stability by signaling that atrocities will not be tolerated.

National trials such as the one held to prosecute the Minova crimes do the opposite—discouraging victims and entrenching the perception that justice is arbitrary and that high-level commanders are protected no matter what happens. Congolese authorities and their international partners should urgently work to meaningfully address the challenges that continue to hinder effective justice in Congo.

Recommendations

To the Congolese Government

Seek New Investigations into Additional Minova Crimes

- Direct the office of the military prosecutor to conduct new investigations into possible crimes committed in Minova and surrounding villages that have not been prosecuted previously, in accordance with the prohibition against “double jeopardy,” and with a view to holding accountable those most responsible for the crimes.

Bolster Accountability through an Internationalized Justice Mechanism

- Work to review and pass a law establishing an internationalized justice mechanism within national courts to investigate grave international crimes.

Strengthen the Quality of National Investigations and Prosecutions

- Draft a national criminal policy on prosecutions of grave international crimes that highlights objectives and priority needs in this field, details the government’s own contribution to strengthen accountability, and serves as a basis for consultations with international donors;
- Create a specialized investigation cell of military investigators and prosecutors with specialized training in the investigation and prosecution of grave international crimes, including gender-based crimes and sexual violence, to be deployed in provinces where these crimes are most often adjudicated; and
- Work to pass legislation implementing the Rome Statute of the International Criminal Court (ICC) into Congolese law to improve the national legislative framework to prosecute grave international crimes.

Bolster Independence of Prosecutors and Judges across the Justice System

- Contribute to creating an enabling climate for the fight against impunity by making public and private statements reaffirming the government’s support for independent and impartial investigations into grave international crimes, irrespective of the identity of the suspects;

- Investigate and impose sanctions against political or army officials who try to interfere with the work of judges and prosecutors dealing with grave international crimes;
- Take measures to tackle corruption among officials in the military and civilian justice systems, including by ensuring appropriate salaries and sanctioning corrupt behavior; and
- Given concerns about trials concerning grave international crimes before the military justice system, transfer jurisdiction over war crimes, crimes against humanity, and genocide from the military justice system to civilian courts irrespective of the perpetrator, while maintaining some involvement of military justice officials.

Improve Fair Trial Rights for Defendants

- Draft and work to pass a law specifying that indigent defendants have a right to free legal assistance paid by the state. Ensure that such *pro bono* lawyers are exempted from paying judicial fees to make copies of criminal files;
- Strengthen legal assistance for defendants in cases of grave international crimes before Congolese courts, by ensuring that suspects have access to a lawyer at the early phases of the investigation, including all their interrogations by investigators. Work with international partners to ensure that lawyers receive the necessary training and assistance to competently represent persons accused of grave international crimes; and
- Ensure, in accordance with the Congolese Constitution, that the right to appeal is available for all and before all jurisdictions in Congo. To that effect, present again to parliament the draft law creating a right to appeal before operational military courts and create an appeal for those who enjoy privileges of jurisdiction.

Improve Protection, Victims' Rights

- Draft and work to pass a law on the protection of victims and witnesses that details protection measures available inside and outside the courtroom, and that is consistent with defendants' rights to a fair trial. Ensure that women's groups are consulted and able to participate in the drafting process so that their different protection needs are adequately included;

- Work with the UN peacekeeping mission in Congo (MONUSCO) and other international partners to set up an independent national protection program for victims and witnesses of grave international crimes; and
- 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 grave international crimes.

To the Personal Representative of the Congolese Head of State in Charge of the Fight against Sexual Violence and the Recruitment of Children

- Collaborate with the minister of justice to design a plan of action to improve the capacity of the national judicial system to handle complex cases involving sexual violence, including by ensuring that investigators receive adequate training in conducting investigations into international crimes and sexual violence and by creating a trained pool of female military investigators, magistrates, and prosecutors with expertise in investigating and adjudicating grave international crimes;
- Ensure that a prosecutorial strategy on the fight against impunity includes specific incidents of mass sexual violence; and
- Together with the Ministry of Justice, help initiate broad consultations on reparations for victims of grave international crimes, ensuring that victims in particular, but also reparations experts and victims associations have an opportunity to provide input.

To the Congolese Defense Minister

- Investigate and sanction attempted interference by the military command into investigations and trials of grave international crimes.

To the Congolese Parliament

- Pass legislation implementing the Rome Statute of the International Criminal Court into Congolese law;
- When it is submitted again by the government, pass legislation creating an internationalized justice mechanism in the national judicial system; and

- Pass legislation on the protection of victims and witnesses that details protection measures available inside and outside the courtroom and creates an independent protection program.

To the Military General Prosecutor’s Office and the High Military Court

- Support the government’s proposal to create an internationalized justice mechanism for the prosecution of grave international crimes;
- Support the creation of a specialized investigation cell focusing on grave international crimes;
- Refrain from intervening in cases handled by prosecutors before lower courts, unless strictly and legally necessary; and
- Request cooperation from the ICC in relevant national cases, using article 93(1) of the Rome Statute.

To the Military Prosecution Offices in North Kivu and South Kivu, and Other Provinces where Grave International Crimes are Committed

- Establish a clear investigative plan and prosecution strategy when opening a complex case involving grave crimes, and identify benchmarks to measure progress in building the case;
- Strengthen collaboration with experts from the UN Prosecution Support Cells, by involving them at the onset of investigations into specific cases, when the investigative and prosecutorial plans are designed; and
- Denounce attempted interference in cases of grave international crimes by political authorities or the military hierarchy.

To the United Nations, Intergovernmental and Governmental Donors and Partners, including MONUSCO, the United Nations Development Program, the European Union, Belgium, France, South Africa, Sweden, United Kingdom, and United States

- Call for new investigations into Minova crimes that have not been prosecuted previously, in accordance with the prohibition against “double jeopardy,” and support national efforts to that effect;

- Support the government’s proposal to establish an internationalized justice mechanism in the national judicial system as an effort to improve the capacity and independence of the national judicial system in prosecuting grave international crimes;
- Increase public and private statements about the importance of accountability for grave international crimes, use diplomatic leverage to urge that investigations in specific cases of serious international crimes are progressing, and press the Congolese government to ensure respect for the independence of prosecutors and judges.
- Call for progress on necessary legislative reforms, including adoption of the ICC implementing legislation;
- Continue the use of coordination mechanisms in Bukavu and Goma to coordinate financial and logistical support to specific international crimes cases; see that these mechanisms continue to be used to press for real progress in open investigations into war crimes and crimes against humanity;
- Improve coordination on projects aimed at strengthening national prosecutions of serious international crimes at the conceptualization phase; establish a working group on complementarity in Kinshasa and engage the government on drafting a national criminal policy on accountability for grave international crimes;
- On the basis of the independent evaluations of the performance and impact of the UN Prosecution Support Cells, identify necessary adjustments and finance such improvements, including the hiring of individuals with proven expertise and experience in investigating and prosecuting grave international crimes, gender experts, and experts with specialized training in gender-based crimes and sexual violence; and
- Support specialized capacity-building for investigators and prosecutors in the field of investigations and prosecution techniques specific to grave international crimes, including the investigation of sexual violence, gender-based crimes, and crimes perpetrated against women.

To MONUSCO

- Continue crucial support to national investigations of grave international crimes in Congo, including through UN Joint Human Rights Office independent investigations and public reports; the deployment of joint investigation teams; the UN Prosecution Support Cells; logistical, security, and protection assistance to national justice actors; arrest of suspects; pressure for progress in open investigations; and use of conditionality in application of the UN Human Rights Due Diligence Policy; and
- Improve the coordination and complementarity of the UN Joint Human Rights Office and the UN Prosecution Support Cells in assisting the national justice system with the investigation and prosecution of grave international crimes to avoid duplications and make the most of respective strengths.

To the Justice and Corrections Unit and the UN Prosecution Support Cells

- Ensure that international experts with appropriate experience in war crimes cases, gender, gender-based crimes, and crimes perpetrated against women, are hired in the UN Prosecution Support Cells, including by increasing the number of positions dedicated to independent experts, as opposed to officials seconded by governments; and by encouraging international institutions, such as the ICC, other international tribunals, and UN Office of the High Commissioner for Human Rights Commissions of Inquiry to allow their staff to participate in the Prosecution Support Cells while on limited, reimbursable leave;
- Implement a more proactive approach to the UN Prosecution Support Cell mandate, notably by seeking more direct involvement in specific cases under investigation from the outset;
- Monitor blockages or interference from the political or military hierarchy in cases of grave international crimes, press judicial staff to use national administrative and judicial mechanisms to report this interference, and report interference to the hierarchy within MONUSCO, so that it can also be brought up with authorities in Kinshasa; and
- Produce a yearly public report on activities undertaken, providing details on the specific cases worked on and the type of technical advice, training, and logistical support provided.

To the International Criminal Court

- Continue investigations in Congo, focusing on cases that cannot be investigated and prosecuted fairly and credibly before national courts;
- Upon creation of an internationalized justice mechanism, discuss a division of labor, the sharing of information and expertise, and cooperation between the two jurisdictions; and
- Adopt an institution-wide strategy on positive complementarity, as well as a Congo-specific strategy highlighting measures that the registry and the Office of the Prosecutor can take to encourage national prosecutions of grave international crimes.

Methodology

This report is based on 68 interviews conducted by Human Rights Watch between May 2014 and June 2015. Shortly after the conclusion of the Minova trial on May 5, 2014, Human Rights Watch carried out research in Goma, Bukavu, and Minova in the Democratic Republic of Congo. Human Rights Watch interviewed 28 people during that mission, including Congolese judicial officials, defense and victims' lawyers and other legal practitioners, representatives of Congolese and international non-governmental organizations, diplomats, United Nations officials, and victims of human rights abuses who had been involved in or closely followed the Minova trial.

Between July 2014 and June 2015, Human Rights Watch conducted additional interviews in person in Kinshasa, the capital of Congo, as well as by telephone and email, with UN officials, International Criminal Court officials, military justice officials, individuals with expertise in the investigation and prosecution of grave international crimes, Congolese government officials, and Congolese and international experts on the justice system in Congo. The reactions of Congolese officials to our findings have been integrated in the report. Most interviews were conducted in person and in French or English. Interviews with victims were carried out in private and in Swahili with the assistance of an interpreter. No incentives were provided to individuals in exchange for their interviews.

Human Rights Watch worked with a Congolese human rights activist who monitored all sessions of the Minova trial. Staff also obtained copies of and analyzed several public court documents related to the case, including the indictments, handwritten official records of the hearings, closing briefs presented by the lawyers of the victims and defendants, and the judgment.

Many individuals interviewed did not wish to be cited by name given the sensitivity of some of the issues covered in this report. To respect the confidentiality of these sources, we have used generic descriptions of the positions held by many of the interviewees.

I. Background

Since the early 1990s, eastern Democratic Republic of Congo has been wracked by a series of regional and local armed conflicts. Rebel movements have emerged repeatedly, often with the support of neighboring countries. Dozens of armed groups still operate in Congo today. Both these armed groups and the regular Congolese army forces battling them have preyed on civilians, committing grave violations of international human rights and humanitarian law. These include ethnic killings, pillage, mass rape and other forms of sexual violence, burning and destroying homes, and recruiting and using child soldiers.¹

For a long time, the Congolese government implemented a policy of integrating abusive rebel leaders into the regular army instead of holding them accountable for serious human rights abuses.² This approach has encouraged the emergence of new rebel groups and further abuses and violence.

The International Criminal Court (ICC) opened investigations in Congo in 2004 and has handled a small number of cases related to international crimes in Congo. In recent years, Congolese authorities, with the support of international partners, have taken significant steps at the national level to bring to justice those who commit these grave crimes. The Minova trial is one such case handled by national military courts in Congo.

Minova and Surrounding Villages, November 2012

In April 2012, an armed conflict erupted in eastern Congo's North Kivu province between the Congolese army and a new rebel movement, the M23.³ The M23 was formed in April 2012 after a mutiny by former members of a previous rebel group, the National Congress for the Defense of the People (CNDP). Most of the group's fighters had integrated into the Congolese armed forces in 2009.

¹ See Human Rights Watch reporting on Congo, Human Rights Watch, "Human Rights in the Democratic Republic of Congo," www.hrw.org/africa/democratic-republic-congo.

² Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, http://www.hrw.org/sites/default/files/reports/ij0709webwcover_3.pdf.

³ The name M23 refers to a previous peace agreement between an earlier rebel group called National Congress for the Defense of the People (*Congrès National de Défense du Peuple*, CNDP) and the government, which had been signed on March 23, 2009. The M23 mutineers said the peace agreement had not been properly observed.

With significant support from senior Rwandan military officials, the M23 gained control of much of Rutshuru and Nyiragongo territories in North Kivu by July 2012.⁴ On November 20, 2012, the M23 seized the eastern city of Goma.⁵

Goma's fall to a rebel group was significant for the Congolese population and army, reminiscent of Rwandan and Ugandan occupation of parts of eastern Congo in the 1990s. Goma's fall had a deep impact on troop morale. After the M23 occupied Goma, several Congolese army battalions were given the order to retreat to Minova, a town 50 kilometers away, in order to reorganize and prepare next steps.

On the way to Minova, once there, and in surrounding communities, soldiers committed widespread looting of homes and mass rapes of women and girls. Human Rights Watch documented at least 76 cases of rape of women and girls by soldiers from November 20 to November 30 in Minova and the nearby villages of Bwisha, Buganga, Mubimbi, Kishinji, Katolo, Ruchunda, and Kalungu.⁶ In a report documenting grave international crimes committed by the Congolese army and M23 fighters in Goma, Sake, and Minova at the end of 2012, the United Nations Joint Human Rights Office documented 135 cases of sexual violence committed by soldiers in the same 10 days, namely rapes against 97 women and 33 girls ages 6 to 17, and five attempted rapes.⁷ Most crimes were reported to have happened on November 22-23.

Many more women and girls may have been raped but did not speak up due to stigmatization and shame associated with rape in Congo. Several women described to Human Rights Watch a recurrent pattern of attack: soldiers in official army uniform forced

⁴ Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), S/2012/838 (2012), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/838&Lang=E (accessed September 2, 2015), paras. 11-25; "MONUSCO supports the Congolese Government to restore peace and security in the country," UN press release, June 14, 2012, <http://monusco.unmissions.org/Default.aspx?tabid=10846&ctl=Details&mid=13890&ItemID=19269&language=en-US> (accessed September 2, 2015); "DR Congo: M23 Rebels Kill, Rape Civilians," Human Rights Watch news release, July 22, 2013, <http://www.hrw.org/news/2013/07/22/dr-congo-m23-rebels-kill-rape-civilians>.

⁵ UN Office of the High Commissioner for Human Rights and the UN Organization Stabilization Mission in the Democratic Republic of the Congo, "Report of the United Nations Joint Human Rights Office on human rights violations perpetrated by soldiers of the Congolese armed forces and combatants of the M23 in Goma and Sake, North Kivu province, and in and around Minova, South Kivu province, from 15 November to 2 December 2012" ("UNJHRO Report May 2013"), May 2013, http://www.ohchr.org/Documents/Countries/CD/UNJHROMay2013_en.pdf (accessed September 2, 2015).

⁶ "DR Congo: War Crimes by M23, Congolese Army," Human Rights Watch news release, February 5, 2013, <http://www.hrw.org/news/2013/02/05/dr-congo-war-crimes-m23-congolese-army>.

⁷ UNJHRO Report May 2013, p. 9.

their way into their homes at night, pointed guns at them, and demanded money. The soldiers then threatened to kill the women if they refused to have sex with them or if they screamed for help. Some women were raped by multiple assailants in front of their husbands and children. Other women were raped as they fled the M23 advance.

A 30-year-old mother of four from a village outside Minova told Human Rights Watch that she was preparing dinner on the evening of November 22 when she heard gunfire. Four uniformed soldiers entered her home and started looting it. They bound her husband's hands and feet, then tied him to the door and beat him with the butt of their guns:

They said: "Give money. Give everything you have." Then they all raped me. They said that if I resisted, they would kill me. The bedroom didn't have a door, so [the children] could easily see what was happening. My husband has since abandoned me. He says he can't stay with me because he saw how they raped me.⁸

Human Rights Watch also documented at least one killing of a young boy by a soldier. The UN Joint Human Rights Office documented extensive and systematic looting by soldiers in Minova and in at least eight surrounding villages, as well as in two camps for internally displaced persons in Mubimbi the night of November 22-23, and in Minova, the night of November 23-24, 2012.⁹

Several hundred soldiers were present in Minova in late November 2012.¹⁰ The battalions that fought the M23 around Goma at the time—and which later retreated toward Minova— included the 802nd, 804th, 806th, and 810th Regiments and the 391st and 41st Commando Battalions from North Kivu's 8th Military Region.¹¹

The 1006th and 1008th Battalions from South Kivu's 10th Military Region were also in the area, although the date of their arrival in Minova is not clear. Soldiers from the Republican

⁸ Human Rights Watch interview with rape victim, Minova, October 30, 2013.

⁹ UNJHRO Report May 2013, p. 10.

¹⁰ Ibid., p. 9; Pete Jones and David Smith, "Congo's army accused of rape and looting as M23 rebels win image war," *The Guardian*, November 26, 2012, <http://www.theguardian.com/world/2012/nov/26/drc-army-accused-rape-murder-congo> (accessed September 2, 2015); "Les rebelles du M23 avancent vers Bukavu," *France 24*, November 24, 2012, <http://www.france24.com/fr/20121124-rebelles-m23-progressent-rdcongo-rwanda-kivu-bukavu/> (accessed September 2, 2015).

¹¹ UNJHRO Report May 2013, p. 7; "Democratic Republic of Congo: Ending Impunity for Sexual Violence," Human Rights Watch news release, June 10, 2014, <http://www.hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence>.

Guard, which ensures presidential security, as well as a headquarters battalion from the 8th Military Region, the military police, and several senior officers were also present. The soldiers were new to the area and the attacks happened at night, making it especially difficult for victims to identify perpetrators.

Army officers and senior government officials said that soldiers were demoralized and angry after the loss of Goma and moved in a disorganized manner towards Minova and surrounding villages.¹² Restoring order after such a serious defeat and retreat was an arduous task. However, international criminal law required the commanders in charge of troops in November 2012 to take concrete and targeted measures to prevent, stop, and punish those responsible for the crimes.¹³ As described later in this report, the Minova trial did not fully uncover what occurred in Minova, leaving many questions unanswered.

Minova Investigation and Trial

The UN peacekeeping mission in Congo (MONUSCO), publicly denounced the abuses shortly after they had happened and called for an immediate investigation.¹⁴ In the following weeks, the media reported that nine soldiers had been arrested in connection with the Minova events, two for rape and seven for pillage, although it turned out that several of them were not involved in the crimes and were later released.¹⁵

¹² Human Rights Watch group interview with Congolese military justice officials, Bukavu, May 23, 2014; Human Rights Watch interview with the Governor of North Kivu province, Goma, May 22, 2014; Human Rights Watch interview with military justice official, Goma, May 22, 2014; Peter Jones and David Smith, “Congo’s army accused of rape and looting as M23 rebels win image war,” *The Guardian*, <http://www.theguardian.com/world/2012/nov/26/drc-army-accused-rape-murder-congo>.

¹³ Under international criminal law, civilian or military superiors can be held criminally responsible for crimes committed by persons under their control because they failed to prevent or stop the crimes and did not punish those responsible. No order, active participation, or intention to commit the crimes is required for commanders to bear “command responsibility” for crimes committed by their troops. But it must be proven that the commander had effective control over the troops and knew or should have known that the crimes were being committed. See for example Rome Statute of the International Criminal Court (ICC) (“Rome Statute”), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 28.

¹⁴ “Documented cases of human rights abuse emerge against M23 armed group in DR Congo,” MONUSCO news release, December 21, 2012, <http://www.un.org/apps/news/story.asp?NewsID=43836#.VgKYQsuqpBc> (accessed September 23, 2015); “UN alleges rape in DR Congo unrest,” *Al Jazeera*, December 8, 2012, <http://www.aljazeera.com/news/africa/2012/12/201212810233130975.html> (accessed September 2, 2015); “UN confirms rapes in DR Congo unrest,” Agence France-Presse (AFP), December 7, 2012; “La MONUSCO enquête sur les violations des droits de l’homme à Minova,” *Le Congolais*, December 16, 2012, <http://www.lecongolais.cd/la-monusco-enquete-sur-les-violations-des-droits-de-lhomme-a-minova/> (accessed September 2, 2015); Michelle Nichols, “U.N. says 126 rapes committed in Congo town after army arrived,” Reuters, December 18, 2014, <http://uk.reuters.com/article/2012/12/18/uk-congo-democratic-un-idUKBRE8BH1AP20121218> (accessed September 2, 2015).

¹⁵ “Neufs soldats arrêtés en RDC pour au moins 126 viols près de Goma,” *Le Monde*, December 18, 2012, http://www.lemonde.fr/afrique/article/2012/12/18/neufs-soldats-arretes-en-rdc-pour-au-moins-126-viols-pres-de-goma_1808091_3212.html (accessed September 2, 2015); “DR Congo: War Crimes by M23, Congolese Army,” Human Rights Watch news release, February 5, 2013, <http://www.hrw.org/news/2013/02/05/dr-congo-war-crimes-m23-congolese-army>.

The investigation was complicated by the location of Minova, which lies at the border between South Kivu and North Kivu provinces and between the 10th and 8th Military Regions. Given the location of the town and the soldiers implicated in the crimes, the jurisdiction of both the South Kivu and North Kivu military prosecutors was at play.



The investigation was initially led by the South Kivu prosecution office, which conducted three short investigation missions to Minova in late December 2012 and in February 2013, organized with the support of international partners. In part due to growing international pressure on Congolese authorities regarding the case, the General Military Prosecution Office in Kinshasa sent a general military prosecutor to take over the investigation. He went to Goma and Minova in April 2013 and questioned suspects and senior army officers. No further investigative steps appear to have been taken after that.

The prosecutor of the North Kivu Operational Military Court (*Cour militaire opérationnelle*, CMO) eventually issued indictments on November 5, 2013 against 39 accused: 14 officers and 25 regular soldiers of the Congolese army.¹⁶ All but one of the officers were charged with the war crimes of rape, pillage, and murder committed by troops under their control.¹⁷ The soldiers faced various charges, including the war crimes of rape and pillage, rape as an ordinary crime, and military offenses.¹⁸ Joining the case as victim participants were 1,016 victims.¹⁹

The North Kivu CMO, which heard the case, was established under the military judicial code by presidential decree in 2008 to prosecute violations committed by members of the armed forces during military operations in times of war. The UN and civil society organizations strongly resisted the use of the CMO for the Minova trial, notably because it does not allow appeals of judgments and there were concerns that it would be more prone to command interference than regular military courts.

During the trial, 39 defendants, 15 witnesses (such as doctors, local chiefs and civil society representatives) and 76 victims—including 50 victims of rape and 26 of pillage—testified.²⁰

¹⁶ Five of the commanders were superior officers, namely four lieutenant colonels and one major, while the others were low-level officers, namely captains and one lieutenant. Military Operational Court of North Kivu, Case No. RP 003/2013 and RMP 0372/BBM/013 (“Minova Judgment”), Judgment, May 5, 2014, on file with Human Rights Watch, pp. 33-35. For a table of ranks in the Armed Forces of the Democratic Republic of Congo (FARDC, *Forces Armées de la République Démocratique du Congo*), see Loi portant statut du militaire des Forces Armées de la République du Congo (Law on the statute of members of the Armed Forces of the Democratic Republic of Congo), No. 13/005, January 15 2013, <http://desc-wondo.org/wp-content/uploads/2013/08/Loi-portant-statut-du-militaire-des-FARDC-promulgu%C3%A9-le-15012013.pdf> (accessed September 3, 2015), annexes 1 and 2.

¹⁷ This mode of liability corresponds to the concept of “command responsibility” as defined in article 28 of the Rome Statute. See note 13.

¹⁸ Case No. RMP 0372/BBM/013, Military Operational Court of North Kivu, *Décisions de renvoi* (Indictments [issued by the military prosecutor]), November 5, 2013, on file with Human Rights Watch; Minova Judgment, pp. 39-46.

¹⁹ *Ibid.*, pp. 1-33.

²⁰ *Feuilles d’Audiences* (“Minova Hearing Transcripts”), Case No. RP 003/13 and Case No. RMP 0372/BBM/013, produced by the registry of the Military Operational Court, on file with Human Rights Watch.

On May 5, 2014, the CMO rendered its verdict:

- Of the defendants, two of the rank-and-file soldiers initially accused of rape as an ordinary crime were convicted, one for raping a girl as an ordinary crime and the other for rape as a war crime. They were sentenced to 20 years and life in prison respectively;
- All other regular soldiers were acquitted of the war crime of rape, but were convicted of other crimes including violating military instructions and the war crime of pillage, with sentences ranging between three and 10 years in prison;
- All the officers prosecuted on account of their responsibility as superiors were acquitted of all crimes; and
- The officer accused of being a direct perpetrator was acquitted of rape but found guilty of stealing a motorbike and sentenced to five years in prison.²¹

Victims and civil society activists reacted to the verdict with widespread disappointment.²²

²¹ Minova Judgment, pp. 84-97.

²² “Procès Minova: une occasion ratée?” *Radio France Internationale (RFI)*, May 6, 2014, <http://www.rfi.fr/afrique/20140506-rdc-verdict-controverse-proces-rates-minova-fardc> (accessed September 3, 2015); “Procès de Minova: 5 ONG dénoncent une justice ‘expéditive et bâclée,’” *Radio Okapi*, May 8, 2014, <http://radiookapi.net/actualite/2014/05/08/proces-de-minova-5-ong-denoncent-une-justice-expeditive-baclee/> (accessed September 3, 2015); “Minova: un verdict au goût amer et d’inachevé,” *Journal Le Phare*, May 7, 2014, <http://7sur7.cd/index.php/8-infos/4702-minova-un-verdict-au-gout-amer-et-d-inacheve#.VHWYlLdoxdg> (accessed September 3, 2015); Milli Lake, “After Minova: can war crimes trials overcome violence in the DRC?” *African Arguments*, May 8, 2014, <http://africanarguments.org/2014/05/08/after-minova-can-war-crimes-trials-overcome-violence-in-the-drc-by-millie-lake> (accessed September 3, 2015); “DR Congo rape trial: Many soldiers cleared, two guilty,” *BBC News Online*, May 5, 2014, <http://www.bbc.com/news/world-africa-27285268> (accessed September 3, 2015); Avocats Sans Frontières (ASF), “Congo: unsatisfactory verdict for crimes committed in Minova,” May 7, 2014, <http://www.asf.be/blog/2014/05/07/congo-unsatisfactory-verdict-for-crimes-committed-in-minova/> (accessed September 3, 2015); “Congo-Kinshasa: DR Congo Mass Rape Verdict Fails to Deliver Justice to Victims, says UN Envoy,” *UN News Centre*, May 8, 2014, <http://www.un.org/apps/news/story.asp?NewsID=47755#.VHWZ9Ldoxdg> (accessed September 3, 2015); “DRC: Minova rape trial verdict criticized,” post to “Africa Legal Aid,” (blog), AfricaLegalAid.com, undated, <http://www.africalegalaid.com/news/drc-minova-rape-trial-verdict-criticized> (accessed September 3, 2015); “MONUSCO Reacts to Minova Ruling,” MONUSCO press release, May 5, 2014, <http://monusco.unmissions.org/Default.aspx?tabid=10662&ctl=Details&mid=14883&Itemid=20522&language=en-US> (accessed September 3, 2015).

II. The Investigation and Prosecution

Our analysis of the Minova case found that the criminal investigation into the crimes was of poor quality, due largely to a lack of expertise and diligence on the part of the Congolese military investigators and prosecutors. This was despite the involvement of the UN Prosecution Support Cells that are mandated to assist national investigations and prosecutions of serious international crimes.

While Human Rights Watch could not review the evidence contained in the Minova file, which is confidential and restricted to the parties, we were able to interview individuals close to the case and to analyze public trial documents. The following observations are based on that material.

The investigations into the Minova crimes started late and took place under difficult circumstances. At the time of the withdrawal towards Minova, military justice officials usually based in Goma had fled the city and thus did not accompany the troops. This created a delay in the investigations.²³ The fighting with the M23 continued for several months after the Minova episode and the region remained highly militarized, which created a difficult security situation for victims and witnesses.²⁴

At least five different military police and prosecution offices were involved in investigating and prosecuting the Minova case.²⁵ This appears to have created confusion in the investigations and made it difficult to have a coherent investigative and prosecutorial strategy.²⁶ For example,

²³ Human Rights Watch interview with military justice official, Kinshasa, June 1, 2015.

²⁴ Human Rights Watch interview with Office of the Personal Representative of the Head of State on the fight against sexual violence and the recruitment of children, Kinshasa, June 3, 2015.

²⁵ During the events themselves, the military police based in Minova arrested several soldiers, some of whom were transferred to the towns of Uvira and Bukavu to be detained and investigated. Most of these suspects were later released. The military prosecution office of Bukavu was later seized of the crimes and conducted the investigation missions to Minova and surrounding villages in December 2012 and February 2013. Because the suspected Congolese army soldiers moved back to North Kivu province where they are usually based, the South Kivu prosecution office subsequently involved the North Kivu prosecution office through a letter rogatory, requesting that they interrogate suspects, including in the top command of the 8th Military Region, and battalion and company commanders. In April 2013, the General Military Prosecution Office in Kinshasa also became involved. Finally, the case was sent to trial before the North Kivu Operational Military Court (*Cour militaire opérationnelle*, CMO) in Minova, meaning that the CMO's military prosecutor, who had not been involved in the investigations, was in charge of preparing the case and presenting it at trial.

²⁶ Human Rights Watch interview with Congolese civil society activist, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with UN official, Kinshasa, November 12, 2014.

the military prosecutor who brought the case before the Operational Military Court, Col. Jean Baseleba bin Mateto, had not been involved in the investigations, which may have complicated his role at the trial.²⁷

Colonel Baseleba, the military prosecutor at the Operational Military Court, surveys his notes of the Minova trial proceedings. © 2014 Diana Zeyneb Alhindawi



Lack of Investigative Plan to Tackle Mass Crimes

While some military investigators and magistrates, notably from South Kivu province, had previously worked on cases involving grave international crimes, others from North Kivu had not.²⁸ Since Minova is located in South Kivu province, military justice officials in Bukavu started the investigations. They focused on interviewing a large number of victims.²⁹ The interviews were conducted quickly and involved a short set of recurring questions such as “What is your name? What happened to you? Who attacked you? What did you lose? What are you expecting from justice?”³⁰

The written notes of the victims’ statements were brief and failed to highlight other information that could have been important for the case. There were no details to help

²⁷ Human Rights Watch interview with Congolese military justice official, Kinshasa, November 12, 2014.

²⁸ Human Rights Watch interview with UN official, Kinshasa, November 12, 2014.

²⁹ Human Rights Watch interview with international non-governmental organization (NGO) staff member, Goma, May 20, 2014; Human Rights Watch interview with UN officials, Goma, May 21, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with international NGO staff member, Kinshasa, November 13, 2014.

³⁰ Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014.

confirm the dates of the crimes, the troops involved, the injuries suffered, and a pattern of attacks.³¹ According to one judicial official interviewed by Human Rights Watch after the trial: “The victims’ statements were like short identical forms; nobody checked the allegations.”³² A victims’ lawyer said: “It was as if the military police had been in a rush to do the interviews quick—quick and leave.”³³

Little or no effort was made to conduct in-depth analysis of the evidence collected. Very few interviews held jointly with victims and witnesses or defendants to resolve contradictory testimony were organized before the trial, which could have helped establish facts where testimonies conflicted.³⁴ The military investigators also did not include a map of Minova and surrounding villages, which would have helped judges visualize the location of the various troops and their movements.³⁵

In April 2013, Gen. Timothée Mukunto Kiyana of the General Military Prosecution Office (*Auditorat Général*) in Kinshasa took over the investigation. He did not seem to take into account or build on the testimonies collected by the Bukavu prosecution office.³⁶ General Mukunto met with the commanders of the battalions identified in the UN Joint Human Rights Office report as being responsible for the crimes committed in the Minova area, in particular the 391st and 41st Commando Battalions, and demanded they give him the names of soldiers involved in the crimes.³⁷

The commanders of these two battalions produced lists of soldiers absent from the roll calls that were conducted during the time in Minova.³⁸ The soldiers absent during the roll calls, together with their company and battalion commanders, were eventually charged

³¹ Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014.

³² Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014.

³³ Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014.

³⁴ Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014. Obviously, such joint interviews would not be held between victims of sexual violence and alleged perpetrators.

³⁵ Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014.

³⁶ Human Rights Watch interview with international NGO staff member, Kinshasa, November 13, 2014.

³⁷ Minova Hearing Transcripts, December 11, 2013; Closing Brief filed on behalf of Captain Kangwanda Swana Patrick in the case RP003/2013 and RMP0372/BBM/2013, Military Operational Court of North Kivu (Closing Brief filed on behalf of Capt. Kangwanda), on file with Human Rights Watch, p. 10.

³⁸ The military commander of the 391st Battalion had a logbook where roll calls were recorded at the time. Other commanders said they conducted roll calls but did not have written records of these.

and made up the majority of accused subsequently brought to trial.³⁹ For most of the soldiers named on these lists, Human Rights Watch is not aware of any further investigative steps taken to confirm whether they were indeed involved in the crimes of pillage and rape. It is also not clear to what extent other battalions present in Minova or surrounding villages—for example, Kalungu—were investigated.

The military prosecutor, Colonel Baseleba, tried to bring additional information or witnesses at trial, but the judges repeatedly reminded him that steps to corroborate information ought to have been taken before the trial.⁴⁰ After the trial, one judicial official involved in the proceedings commented:

In matters involving international crimes, it is imperative to better train those who conduct the investigations. If they conduct the investigations like they would for ordinary crimes, then they have not gone deep enough. Judicial police need to be trained so that they don't hit so wide off the mark.⁴¹

Prosecution Errors

Several errors in the file also point to a lack of preparation or diligence by military prosecutors.

For example, five soldiers were sent to trial despite the fact that no information about them could be found in the investigation file.⁴² The judges initially ordered that the five be released, but later it became clear that the prosecution had failed to obtain the transfer of their files from a garrison tribunal in Uvira, South Kivu, where the soldiers were first detained.⁴³ Their files were eventually added to the Minova case given that the accusations

³⁹ Seven of the 39 accused in the Minova trial did not belong to the 391st and 41st Battalions. These seven defendants were: one officer and regular soldier from the military police of the 8th Military Region, one officer from the 806th Battalion, one soldier from the 802nd Battalion, and one soldier belonging to the 810th Battalion of the 8th Military Region. In addition, one soldier from the 1007th Battalion, and one soldier from the 1008th Battalion of the 10th Military Region were also on the list of accused. See Minova Judgment, pp. 33-39.

⁴⁰ Minova Hearing Transcripts, February 12, 2014 and February 17, 2014.

⁴¹ Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014.

⁴² Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014. The situation of the five defendants against whom no evidence could be found in the file at the beginning of the Minova trial is discussed in Minova Hearing Transcripts, December 11, 2013, December 19, 2013, and December 23, 2013.

⁴³ Case No. RP 003/2013 and Case No. RMP 0372/BBM/013, Military Operational Court of North Kivu, *Arrêt avant dire droit* (Preliminary Decision), December 10, 2013, on file with Human Rights Watch.

they faced were related to the events in Minova.⁴⁴ Two of these five accused are those who were convicted of rape in the Minova trial.⁴⁵

In another example of prosecution error, one company commander, Capt. Byamungu Rusemasema, was indicted by mistake, since he did not hold the position of company commander as alleged by the prosecution at the time of the crimes in Minova. The prosecution did not try to reassess his potential role in the crimes and the CMO eventually decided it lacked jurisdiction over his case.⁴⁶

Further, the indictments against the commanders, which are based on their “command responsibility” over soldiers accused of having directly committed the crimes, wrongly applied the legal theory for some of the crimes. For example, all commanders charged under command responsibility were charged with the war crime of murder, yet only one murder was discussed in the Minova case—that of a 14-year-old boy who was shot as he tried to resist a soldier stealing the family goat. The direct perpetrator, Cpl. Alphonse Magbo, was identified and charged in the case. But since he was a soldier of the 1008th Battalion of the 10th Military Region, he was not a subordinate of any of the indicted commanders.⁴⁷

Finally, in his closing statement, the military prosecutor sought guilty verdicts against four defendants for crimes with which they had not been charged, adding to the confusion of the case.⁴⁸

Difficulties in Establishing Sexual Violence

The two defendants convicted of rape in the Minova case were direct perpetrators who could be identified by their victims. One of the convicted soldiers, Second Lt. Sabwe Tshibanda, belonged to the 1007th Regiment of the 10th Military Region and was identified by the victim who remembered that the man who raped her was missing a thumb. The

⁴⁴ The CMO’s decision to join the two files was rendered on January 29, 2014. Minova Hearing Transcripts, January 29, 2014; Minova Judgment, p. 63.

⁴⁵ The two accused are Under Lt. Sabwe Tshibanda, of the 1007th Battalion of the 10th Military Region, convicted of rape as a war crime, and Corporal Kabiona Ruhingiza, of the 8th Military Region, convicted of rape as an ordinary crime committed against a child. See below “Difficulties in Establishing Sexual Violence” section. Minova Judgment, pp. 74-76.

⁴⁶ The situation of Capt. Byamungu Rusemasema is discussed in the Minova Hearing Transcripts, December 20, 2013; Minova Judgment, p. 71.

⁴⁷ For the identification of Corporal Alphonse Magbo, see Minova Judgment, p. 37.

⁴⁸ *Ibid.*, p. 70.

victim reported this fact together with the rape to the local priest the morning after, and he in turn informed a military commander present in the area. The soldier was arrested at the time and the victim identified him again in the courtroom during the Minova trial.

The other convicted soldier, Cpl. Kabiona Ruhingiza of the 8th Military Region, raped the 8-year-old daughter of a fellow soldier with whom he shared accommodation at a school in Minova. The perpetrator was caught while committing the crime by two other soldiers of his battalion and admitted the crime to his commander. The mother of the girl identified him during the trial.⁴⁹

No other soldiers or commanders in the case were convicted for sexual violence in Minova and surrounding villages.

An accused soldier answers questions at the stand after a woman identified him as her rapist. The victim said she was raped at night and could not clearly see her attacker's face but she recalled a long scar on his forearm and that he had no thumb.
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Some observers said that forensics evidence, notably DNA testing and medical certificates, could have made a difference in the Minova case.⁵⁰ The military justice and health systems in Congo currently do not have any DNA testing capacity. But given the number of soldiers present in Minova at the time of the crimes, the fact that they belonged to several different military regions, battalions, and companies, and the dispersal of victims, it seems that DNA testing would have been excessively difficult and expensive. While this investigative

⁴⁹ Ibid., p. 57.

⁵⁰ Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014.

technique may potentially be helpful in other, more contained, cases, it is very costly and resource intensive.

Very few medical certificates of victims were presented in the Minova case.⁵¹ Several medical certificate forms that currently exist for rape victims in hospitals and health centers in eastern Congo could be of more assistance in trials if they included additional forensic and narrative information, such as a description of the attack or information about other injuries sustained by the victim. This additional information could be helpful not only to strengthen the credibility of victim testimonies at a later phase, but also to elicit broader information that may help identify to which battalions the perpetrators belong and therefore the responsible commanders.⁵²

One key difficulty in establishing responsibility for the mass rapes in the Minova case was due to the presence of multiple army units in the area at the same time. This made it difficult to identify individual perpetrators, their battalions, and in turn their commanders. Victims' evidence was clear and consistent that their attackers were Congolese army soldiers, however. More work should have been done to analyze collated victims' testimony in order to identify the dates and locations when spates of sexual violence attacks happened and to cross-check that information with troop movements. The responsibility of top military officers who bore overall responsibility for the Congolese army troops at the time of the Minova retreat (above the battalion level if specific battalions could not be identified) should also have been examined further.

Insufficient Support from UN Prosecution Support Cells

MONUSCO has a clear mandate to assist national investigations and prosecutions of grave international crimes.⁵³ Two MONUSCO components provide such support: the UN Joint Human Rights Office (UNJHRO) and the UN Prosecution Support Cells (UNPSCs).

⁵¹ The military investigators tried to access the records of health centers and hospitals where victims of rape and sexual violence had been treated after the events in Minova, but some institutions refused to cooperate. Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch Skype interview with international NGO staff member, September 26, 2014. Reportedly, this was because the military justice officials requested all medical certificates, as opposed to specific ones after having secured the agreement of specific victims. Human Rights Watch interview with international NGO staff member, Kinshasa, November 13, 2014.

⁵² Human Rights Watch Skype interview with international NGO staff member, September 26, 2014.

⁵³ See for example UN Security Council Resolution 1925 (2010), S/RES/1925 (2010), May 28, 2010, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1925\(2010\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1925(2010)) (accessed September 4, 2015), para. 12 (c), (d);

UN Joint Human Rights Office

The UN Joint Human Rights Office organizes and financially supports investigative missions by so-called Joint Investigations Teams, made up of UN Joint Human Rights Office human rights investigators, Congolese investigators and prosecutors, as well as other international partners.⁵⁴

These missions provide critical logistical support for national justice officials, especially in accessing remote locations. The presence of UN human rights investigators, who have often conducted their own investigations previously, can sometimes make victims and witnesses more comfortable speaking to justice officials.⁵⁵

The UN Joint Human Rights Office also provides logistical assistance to investigations and trials and protection for victims, witnesses, and judicial actors. The office shares specific factual information and findings from their own investigations with the Congolese investigators and prosecutors, and it closely monitors and presses for progress in open cases.⁵⁶

In the Minova case, the UN Joint Human Rights Office documented crimes allegedly committed in Minova and surrounding villages in November 2012 and published its findings in a report. It pressed the military justice system to open an investigation and facilitated investigation missions to Minova for the South Kivu military justice officials. The protection unit of the UN Joint Human Rights Office oversaw protection of victims and witnesses and security for judicial officials and the office collaborated with non-governmental organizations (NGOs) to facilitate the participation of victims in the trial.⁵⁷

UN Security Council Resolution 2147 (2014), S/RES/2147 (2014), March 28, 2014, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2147\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2147(2014)) (accessed September 4, 2015), para. 4 (d).

⁵⁴ Human Rights Watch interview with UN official, Kinshasa, November 12, 2014. The UNJHRO also has the mandate to conduct its own investigations into grave violations of international human rights and humanitarian law committed in Congo, and to publish the results of these investigations in public reports, as was done in the Minova case. In addition, the UNJHRO presses for accountability for grave crimes and provides support to efforts at the national and international level to fight impunity for the most serious crimes. See “MONUSCO: UNJHRO Mandate,” MONUSCO, accessed September 25, 2015, <http://monusco.unmissions.org/Default.aspx?tabid=10766&language=en-US>.

⁵⁵ Human Rights Watch interview with UN official, Kinshasa, November 12, 2014; “Investigating sexual violence in conflict: lessons learned and future strategies,” UN Office of the High Commissioner for Human Rights press release, June 11, 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14684&LangID=E> (accessed September 7, 2015).

⁵⁶ Human Rights Watch interview with UN officials, May 21, 2014; Human Rights Watch interview with UN official, Kinshasa, November 12, 2014; Fieldview Solutions, “Protecting human rights in the DRC: Reflections on the work of the Joint Human Rights Office and MONUSCO,” September 2010, http://www.fieldviewsolutions.org/fv-publications/Protecting_Human_Rights_in_the_DRC.pdf (accessed September 7, 2015), p.9; UNJHRO Report May 2013, pp. 5-6.

⁵⁷ For more information on support by international partners in the Minova case, see below “Advances in the Minova case” section.

UN Prosecution Support Cells

The UN Prosecution Support Cells, still relatively new, aim to improve the quality of national investigations and prosecutions of the most serious crimes by working alongside Congolese military investigators and prosecutors to provide training and technical advice when investigating these crimes.⁵⁸ They also help organize and coordinate international support for “mobile courts” (or *in situ* hearings). They aim to increase capacity and encourage better performance, by bringing some external scrutiny over the work of Congolese justice officials.⁵⁹

A Memorandum of Understanding (MoU) to regulate the functioning of the UN Prosecution Support Cells was concluded between the Congolese government and MONUSCO in December 2011. Eight UN Prosecution Support Cells have been established in total, in Beni, Bukavu, Bunia, Goma, Kalemie, Kindu, Kisangani, and Lubumbashi.⁶⁰ The UN Prosecution Support Cells have made the tacit decision to only get involved if asked by national judicial authorities in connection with a specific case.⁶¹ Over the past three years, the cells had received over 40 requests for support from the Congolese justice system covering several hundred suspects.⁶²

Because one of the key challenges in the fight against impunity in Congo is the insufficient quality of investigations and prosecutions, the UN Prosecution Support Cells represent a

⁵⁸ UN Security Council Resolution 1925 (2010); Human Rights Watch interview with UN officials, Goma, May 21, 2014; “MONUSCO: Military Justice,” MONUSCO, last modified November 17, 2014, <http://monusco.unmissions.org/Default.aspx?tabid=10806&language=en-US>; UN Police Magazine, United Nations Department of Peacekeeping Operations, 7th Edition, July 2011, http://www.un.org/en/peacekeeping/publications/unpolmag/unpolmag_07.pdf (accessed September 7, 2015), p. 14. The UN PSCs are meant to focus on cases involving war crimes, crimes against humanity, rape and sexual violence (also as an ordinary crime), pillage and other violent crimes such as murder, see “MONUSCO: Featured News,” MONUSCO, last modified November 17, 2014, <http://www.monusco.unmissions.org/Default.aspx?tabid=10927&language=en-US>.

⁵⁹ Human Rights Watch telephone interviews with UN official, October 6 and 7, 2014; Human Rights Watch telephone interview with Congolese military justice official, September 24, 2014; United Nations Department of Peacekeeping Operations (UNDPKO), Office of Rule of Law and Security Institutions (OROLSI), “Justice & Corrections Update: Sustainable Peace through Justice and Security” (“UNDP Report 2014”), 2014, <http://www.un.org/en/peacekeeping/publications/cljas/DPKO-Justice-Corrections-Update-2014.pdf> (accessed September 8, 2015), p. 32.

⁶⁰ “MONUSCO: Featured News”; “MONUSCO: Rule of Law Section,” MONUSCO, last modified November 17, 2014, <http://www.monusco.unmissions.org/Default.aspx?tabid=10804&language=en-US>; International Center for Transitional Justice (ICTJ), “The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009-2014)” (“ICTJ Report 2015”), July 2015, <https://www.ictj.org/sites/default/files/ICTJ-Report-DRC-Accountability-Landscape-2015.pdf> (accessed September 8, 2015).

⁶¹ Human Rights Watch Interview with UN officials, Goma, May 21, 2014.

⁶² PowerPoint presentation by UNJHRO staff at the conference organized by ICTJ in Kinshasa “Renforcer le système de poursuites nationales à l’encontre des crimes relevant du Statut de Rome en RDC” (*Strengthening national prosecutions for crimes under the Rome Statute in the DRC*), November, 12, 2014.

targeted response with the potential to make an important difference. Given that a number of other international partners are also involved in logistical support to the justice system and the organization of mobile courts, technical assistance to investigations and prosecutions is the most novel part of their mandate and should be the focus of their action.

Parties and observers in the Minova case, including military justice officials, voiced a number of concerns regarding the UN Prosecution Support Cells' assistance. The UN Prosecution Support Cell experts who were deployed in the region at the time did not actually have prior experience related to prosecuting grave international crimes or international criminal law.⁶³ This not only limited their ability to provide quality training or specialized technical advice on how to approach complex, mass crimes, but also undermined their legitimacy with Congolese justice officials.

UN Prosecution Support Cell experts were also said to be too passive regarding the implementation of their mandate. They were not involved directly in investigations, invoking respect for national sovereignty.⁶⁴ Instead, when asked, they provided very basic feedback and some technical advice regarding investigative techniques, such as writing up victims' and witnesses' statements taken in Minova and drafting a letter rogatory.⁶⁵

As illustrated above, the military investigators and prosecutors would have needed sophisticated advice to prepare an investigation plan and prosecutorial strategy to enable them to establish criminal responsibility for a mass crimes scene, involving over a thousand victims and numerous perpetrators. UN Prosecution Support Cell experts interviewed by Human Rights Watch said that it was not their role to give advice on investigative strategy or to press for specific targets to be prosecuted on the basis of the evidence collected in the Minova case. Other UN officials disagreed with this limited approach and said the Prosecution Support Cells could and should do more.⁶⁶

⁶³ Human Rights Watch interview with international NGO staff members, Goma, May 22, 2014; Human Rights Watch group interview with Congolese military justice officials, Bukavu, May 23, 2014; Human Rights Watch interview with UN official, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014; Human Rights Watch Skype interview with international NGO staff member, August 12, 2014; Human Rights Watch interview with Congolese military justice official, Kinshasa, November 12, 2014; Human Rights Watch interview with UN official, Kinshasa, November 12, 2014.

⁶⁴ Human Rights Watch interview with UN officials, Goma, May 21, 2014.

⁶⁵ Ibid.

⁶⁶ Human Rights Watch interview with UN officials, Goma, May 21, 2014; Human Rights Watch interview with UN official, Bukavu, May 23, 2014.

In conclusion, it seems that important weaknesses in the Minova investigation can be explained by a lack of expertise and diligence on the part of military investigators and prosecutors. Intense pressure from the international community and authorities in Kinshasa seems to have been a factor in the Minova case going to trial in a rushed manner in November 2013.⁶⁷ Yet it is not clear that more time would have necessarily resulted in a significantly better investigative file. No investigative steps were taken between the interviews with commanders in April 2013 and the issuing of arrest warrants in early November 2013, squandering over half a year of possible work. In addition, the military investigators and prosecutors in the Minova case with whom Human Rights Watch spoke for this report stated that, from their point of view, the investigation was complete when the file was sent to trial.⁶⁸

Capacity-building for military police and prosecutors in the field of international crimes and sexual violence is important to help increase the number of officials with specialized expertise. International crimes are often more challenging to investigate and successfully prosecute than “ordinary” crimes, due to the complexity of the law, the scale of the crimes, and the large number of players involved.⁶⁹

At the same time, a lack of genuine will or interference from the judicial hierarchy or political and military authorities can adversely impact the quality of investigations, no matter the amount of technical training provided to judicial staff. Several observers pointed out that, while certainly a gap, it is not clear that improved expertise and better investigations would have made a fundamental difference in the outcome of the Minova case.⁷⁰

⁶⁷ Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with UN officials, Goma, May 21, 2014; Human Rights Watch interview with international NGO staff members, Goma, May 22, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese official, Kinshasa, May 28, 2014.

⁶⁸ Human Rights Watch group interview with Congolese military justice officials, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese justice official, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese military justice official, Kinshasa, November 12, 2014; Human Rights Watch interview with Congolese military justice official, Kinshasa, June 2, 2015.

⁶⁹ Office for Democratic Institutions and Human Rights, Organization for Security and Cooperation in Europe, “Supporting the Transition Process: Lessons Learnt and Best Practices in Knowledge Transfer,” May 24, 2010, <http://www.osce.org/odihr/68108> (accessed September 8, 2015), p. 14; Open Society Foundation (OSF), “International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers” (“OSF Report 2012”), 2012, <https://www.opensocietyfoundations.org/sites/default/files/crimes-internationaux-justice-locale-20120908.pdf> (accessed September 8, 2015), pp. 18-21; European Commission and European External Action Service, “Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap between International and National Justice,” January 31, 2013, pp. 16, 20-21.

⁷⁰ Human Rights Watch interview with UN officials, Goma, May 21, 2014; Human Rights Watch interview with UN official, Kinshasa, November 12, 2014.

III. Fair Trial Issues

Justice is realized in the criminal justice system when the rights of the accused under international law are fully respected, including receiving a fair and public trial before a competent, independent, and impartial tribunal.⁷¹

More attention was paid to respecting the rights of the accused in the Minova case than in many other war crimes trials in Congo.⁷² For example, all defendants had legal representation throughout the trial hearings and the judges took the time to hear all parties and to allow questioning of witnesses by defense lawyers. Most defendants were also physically present during their entire trial, with the exception of four officers who were called back to the frontlines.⁷³ Motions presented by the defense were given due consideration and Operational Military Court judges granted some of their requests, including a motion to delay the start of the trial to allow more time for the defense to prepare.⁷⁴

Yet, despite these positive elements, there were serious shortcomings regarding the fairness of the proceedings.

⁷¹ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316/(1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the Democratic Republic of Congo on November 1, 1976, art. 10, 14; African [Banjul] Charter on Human and People's Rights, adopted June 27, 1981, OAU Doc, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986, art. 3, 6, 7.

⁷² Some examples of problems faced by defendants in other trials for grave international crimes or sexual violence before military courts in Congo include the fact that legal assistance for defendants is often provided at the last minute, there is not enough time to thoroughly prepare the cases, and legal assistance is not paid for, which can affect the quality of the assistance provided. In addition defendants are often denied the right to call witnesses. See for example Open Society Initiative of Southern Africa (OSISA), "Helping to Combat Impunity for Sexual Crimes in DRC, An evaluation of the mobile gender justice courts," http://www.osisa.org/sites/default/files/open_learning-drc-web.pdf (accessed September 8, 2015), pp. 33, 34; Passy Mubalama and Simon Jennings, "Roving Courts in Eastern Congo," Institute for War & Peace Reporting (IWPR), February 13, 2013, <http://iwpr.net/report-news/roving-courts-eastern-congo> (accessed September 8, 2015).

⁷³ Four officers on trial in the Minova case were sent to the front lines in the middle of the trial to take part in military operations against the ADF (Allied Democratic Forces) armed group in Beni territory, North Kivu province.

⁷⁴ Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014.

Lack of Clear Evidence against Many Convicted Soldiers

Trial monitors and parties involved in the proceedings told Human Rights Watch that the evidence that the prosecution presented in the Minova case was both vague and weak against most defendants.⁷⁵

The indictments against 18 rank-and-file soldiers were fully identical and did not specify any date, location, victim, or conduct with regards to rape and pillage accusations against them. During the hearings, judges questioned most soldiers only about their alleged absence from camp during the roll calls.⁷⁶ The commander of the 391st Battalion, Capt. Patrick Kangwanda Swana, kept a log book with written records of the roll calls, including during the time in Minova, but other commanders did not.⁷⁷ The only evidence about unauthorized absence against many soldiers was therefore their commanders' recollection and word. Most soldiers denied having missed the roll calls. Being absent when ordered to stay in the camp was a violation of military orders (also a criminal charge against the soldiers in the case), but should be insufficient to prove involvement in the other crimes, namely pillage and rape. Examples of statements made by the soldiers during the hearings include:

Judge to defendant Kaserera-Bolali Roger: “Were you present at the roll call?”

Kaserera-Bolali: “Yes.”

Judge: “Why is your name on the list [of those absent], then?”

Kaserera-Bolali: “It was what came out of their mouth, they said they were going to sacrifice the soldiers.”⁷⁸

Judge to defendant Mogisha: “You were absent for four days, why?”

Mogisha: “[My commander] said that I am undisciplined, that I need to be sacrificed.”

⁷⁵ Human Rights Watch interview with Congolese civil society activist, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with health worker, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014.

⁷⁶ See, for example, Minova Hearing Transcripts, December 9, 2013, December 10, 2013, and December 16, 2013.

⁷⁷ Closing Brief filed on behalf of Capt. Kangwanda, pp. 11, 55.

⁷⁸ Minova Hearing Transcripts, December 9, 2013.

Later, after Mogisha's commander says that he was arrested with a new jacket in his possession:

Judge to Mogisha: “Did you hear what your commander said?”

Mogisha: “It is not true. Since then, [my commanders] keep creating troubles for me. They say we are bad soldiers. They even asked me for money!”⁷⁹

The CMO judges acquitted all but two soldiers of rape, citing briefly in the judgment a lack of evidence.⁸⁰ At the same time, the judges found all rank-and-file soldiers guilty of the war crime of pillage, in addition to violating orders, and sentenced them to heavy prison sentences.⁸¹ A non-governmental organization staff member who followed the trial closely told Human Rights Watch:

It was a bit of a sacrifice, this trial. Soldiers not staying at the camp is a common phenomenon in Congo; absence at roll calls does not prove anything. And this young captain [Captain Kangwanda], he now has a lot of problems for having given the names of the soldiers, even if he was not convinced himself of their guilt in the first place.⁸²

A military judicial official involved in the trial said:

The soldiers were not happy at all. They were sacrificed. They were convicted just because of their absence that day. The court found them guilty of pillage without any evidence, maybe to please the international community.⁸³

⁷⁹ Corporal Mogisha had been in detention at the prison in Goma in November 2012. When the M23 took Goma, inmates of the prison broke out and fled together with the Congolese army troops. Mogisha was arrested in Minova while the troops were stationed there. *Ibid.*, December 16, 2013.

⁸⁰ Minova Judgment, p. 74.

⁸¹ *Ibid.*, pp. 70, 84-96.

⁸² Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014. At the reading of the verdict in the courtroom on May 5, 2014, when it became clear to the rank-and-file soldiers that all the commanders were going to be acquitted, they assaulted Captain Kangwanda in the courtroom in anger. Kangwanda was subsequently threatened by some of the convicted soldiers. According to a letter from his lawyer addressed to the military prosecutor in Goma and Human Rights Watch, Kangwanda received death threats in person and via text messages on his mobile phone, including the following message: “We may be detained now, but we have people outside who will kill you.” There is no protection available for defendants in trials before military courts in Congo.

⁸³ Human Rights Watch interview with military justice official, Goma, May 22, 2014.

No Right to Appeal

Article 87 of the Congolese Military Judicial Code states that the judgments of military operational courts cannot be appealed.⁸⁴ While all parties in the trial before the CMO are affected by this provision, including the prosecution and victim participants, it has particularly serious consequences for defendants who face stiff sentences—including the death penalty—in trials for serious international crimes. The provision is contrary to the fundamental right to have one’s judgment and sentence reviewed by a higher tribunal, which is enshrined in the Congolese Constitution and international law.⁸⁵

At the start of the trial on December 4, 2013, lawyers from the American Bar Association (ABA) who represented some of the victims filed a preliminary motion arguing that the absence of the right to appeal was unconstitutional.⁸⁶ They asked that the CMO refer the matter to the Supreme Court of Justice to resolve the issue. The following day the CMO judges rejected the motion on the grounds that it had been poorly argued in that it did not cite the correct law at issue, namely the presidential decree of January 2008 creating the CMO.⁸⁷ The victims’ lawyers still later tried to appeal the Minova judgment after the verdict before the High Military Court in Kinshasa, arguing that there were errors in the judgment. The High Military Court had not responded to the request at time of writing.

Only victims’ lawyers tried to act on this issue in the Minova trial. The defendants’ lawyers did not try to assert their clients’ right to appeal either at the beginning or at the end of the trial, even though several were sentenced to heavy prison sentences despite a lack of evidence, as discussed above. This may be an indication of the poor legal representation available for some of the defendants.

⁸⁴ Loi no 23/2002 du 18 novembre 2002 portant code judiciaire militaire (Law no 23/2002 of November 18, 2002 on the Military Judicial Code) (“Congolese Military Judicial Code”), *Journal Officiel*, March 20, 2003, <http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.024.2002.18.11.2002.pdf> (accessed September 22, 2015).

⁸⁵ Constitution de la République du Congo (“Congolese Constitution”), *Assemblée Nationale*, Kinshasa, February 18, 2006, <http://www.leganet.cd/Legislation/Constitution.htm> (accessed September 23, 2015), art. 21; ICCPR, art. 14(5).

⁸⁶ Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014.

⁸⁷ North Kivu Military Operational court, Preliminary Decision, Case No. RP 003 and RMP 0372/BBM/2013, December 5, 2014, on file with Human Rights Watch.

Weak Legal Assistance for Rank-and-File Soldiers

The Minova case was marked by a stark variation in the quality of defense available to the accused. The officers who were able to choose and pay their legal representative received a competent and strong defense on legal and factual issues.⁸⁸ The *pro deo* (*pro bono*) lawyers who were assigned to soldiers for no payment had no expertise in international crimes cases and provided a considerably less vigorous and effective defense.⁸⁹

None of the defendants in the Minova case had access to a lawyer during investigations, including when they were formally interrogated. This was contrary to article 19 of the Congolese Constitution, which states that an accused person should have access to legal assistance at all stages of the criminal proceedings.⁹⁰ The defense lawyers noted that this created difficulties and contradictions later during the trial.⁹¹



Defense lawyers listen to testimony during the Minova rape trial. © 2014 Diana Zeyneb Alhindawi

⁸⁸ The interim commander of the 391st Battalion, Capt. Patrick Kangwanda Swana, requested the assistance of a talented lawyer of the Goma Bar Association, Sabra Mpoyi. Mpoyi eventually defended all officers in the case.

⁸⁹ The CMO judges asked that *pro deo* lawyers be designated pursuant to article 63 of the Military Judicial Code and article 19 of the 2006 Constitution. This was done through a request to the Goma Bar Association, which nominated 17 lawyers to represent all defendants without lawyers. Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch email correspondence with Congolese lawyer, September 18, 2014.

⁹⁰ Congolese Constitution, art. 19.

⁹¹ Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 21, 2014.

All lawyers were nominated on the day of the opening of the trial, or later.⁹² Even if the CMO judges eventually agreed to a 15-day adjournment to enable lawyers to prepare, this was still a brief time frame to study a voluminous and complicated file and to consult with clients. The designated lawyers from the Goma Bar Association had little or no experience with grave international crimes and most had never received training on international criminal law.⁹³

In addition, *pro deo* lawyers did not receive any payment. The UN Development Program (UNDP) covered transportation in Goma, as well as transportation, accommodation, and meals for the defense lawyers who went to attend the *in situ* hearings in Minova, but no government compensation or other support was granted.⁹⁴ This limited financial support created real difficulties.

Access to the case file was a challenge. Only one paper copy of the Minova file exists and it was kept at the registry of the CMO in Goma. Consulting the file at the registry is without cost but can only be done during specific hours and is not possible during hearings.⁹⁵ It is therefore much more practical for the lawyers to have a copy of the file to study outside the registry. But, under Congolese judicial rules, heavy fees have to be paid to make copies of the case files.⁹⁶ Even if the CMO judges ordered that these fees should not be paid by *pro deo* lawyers in the Minova case, they still could not cover the cost of making the actual copies, in the absence of financial or technical support.

⁹² Ibid.

⁹³ Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 22, 2014; Human Rights Watch interview with UN official, Kinshasa, November 12, 2014; Human Rights Watch Skype interview with UNDP official, August 12, 2014. The UNDP office in Goma organized a basic training on international criminal law and jurisprudence for the Goma Bar Association in February 2014, in the middle of the Minova trial. Many of the *pro deo* lawyers involved in the case attended, but their knowledge of technical aspects of international law remained insufficient and they may not have raised important legal and factual points in the defense of their clients; Human Rights Watch Skype interview with UNDP official, August 12, 2014.

⁹⁴ Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014; Human Rights Watch interview with international NGO staff members, Goma, May 22, 2014.

⁹⁵ Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with military justice official, Goma, May 22, 2014.

⁹⁶ The fees are published in a leaflet (although different or additional fees may be requested in practice). An authorization to make a copy costs US\$20, the first page is charged \$2 and following pages \$1 each, while some documents in the file may cost more; see Government of the Democratic Republic of Congo, Ministry of Justice, “Voici les frais à payer en justice (Here are the legal fees to be paid to the justice system)” (“Official Leaflet on Justice Fees”), undated, on file with Human Rights Watch. The Minova file included thousands of pages representing an impossible expense for lawyers who received no payment.

Also, the length of the trial made the lack of compensation even more problematic. This led to inconsistent attendance at trial by *pro deo* lawyers.⁹⁷ Some tried to come to most hearings at their own expense, while others did not come at all.⁹⁸ A group of lawyers organized to attend the hearings in rotation. This was insufficient, however, because they did not necessarily inform each other of what had happened in court. Due to their inconsistent attendance, the lawyers sometimes raised issues that had already been discussed or failed to follow up on important points.

⁹⁷ Interviewed Congolese lawyers remarked that neglecting their law firms and regular clients for the duration of the Minova trial represented a significant expense. Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014.

⁹⁸ Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014.

IV. Determination of the Accused and Command Responsibility

Military prosecutors have broad discretionary power, based on evidence found during investigations, to decide which suspects should be indicted and brought to trial.

Seven soldiers caught in the act (*in flagrante delicto*) and arrested in and around Minova in November 2012 were among the accused brought to trial. But due to the circumstances at the time, including the large number of soldiers present in the area, it was extremely difficult for the prosecution to identify more direct perpetrators of the numerous rapes and acts of pillage. Under international law, however, it is not only those who commit the crimes who bear criminal responsibility, but, in certain circumstances, their military and civilian superiors.

From the onset, it was clear to most participants and observers in the Minova case that justice would hinge on the ability and willingness of the military justice system to investigate and establish the role played by commanders.⁹⁹ An NGO observer close to the investigation and trial said: “It was a situation where abuses were committed *en masse*. It was difficult for the victims to precisely identify their attackers. It was clear that one needed to look into the responsibility of the commanders.”¹⁰⁰

A military justice official involved in the investigation said: “Given that none of the victims could recognize the direct perpetrators, we had to look into the responsibility of their commanders, who should have taken precautions or other measures.”¹⁰¹

Yet, the vast majority of interviewees for this report said that they believed the “real suspects” were not in the dock in the Minova trial.¹⁰² In this section, we review how the military justice system handled the responsibility of commanders.

⁹⁹ Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 22, 2014; Human Rights Watch interview with Congolese military justice official, Kinshasa, November 12, 2014.

¹⁰⁰ Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014.

¹⁰¹ Human Rights Watch interview with Congolese military justice official, Kinshasa, November 12, 2014.

¹⁰² Human Rights Watch interview with Congolese civil society activist, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 21, 2014; Human Rights Watch interview with UN officials, Goma, May 21, 2014; Human Rights Watch interview with UN officials, Goma, May 21, 2014; Human Rights Watch interview with military

Command Responsibility Theory

“Command responsibility” as a mode of liability does not exist under Congolese law and is often misunderstood. In the Minova case, like in previous cases before military courts, the Congolese military prosecutors and judges used article 28 of the Rome Statute, which defines this theory.¹⁰³

It is a widely accepted principle of criminal law that commanders who incite, order, facilitate, take part, or are complicit in the crimes should be investigated. All these actions imply criminal intent (*mens rea*) on the part of the commanders and direct or indirect involvement in the crimes.

But international law goes beyond this and foresees that commanders can also be held criminally responsible for the actions of their subordinates if they failed to prevent, stop, or punish grave violations of international humanitarian law, provided certain requirements are met. Under the “command responsibility” theory, commanders therefore bear responsibility because of their *inaction* in the face of grave international crimes.

Command responsibility, which was first applied in post-World War II prosecutions, is codified in article 86 of the Additional Protocol I to the Geneva Conventions, as well as the statutes of several international and hybrid criminal tribunals, and many national criminal codes and military manuals.¹⁰⁴ It is an important legal theory to hold accountable military and civilian superiors of troops responsible for atrocities, given that these persons are often not directly involved in the crimes or even present when they are committed.

justice official, Goma, May 22, 2014; Human Rights Watch group interview with Congolese military justice officials, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014.

¹⁰³ Article 175 of the Congolese Military Criminal Code lists two possible modes of liability for hierarchical superiors: co-author or accomplice to the crime for having tolerated it. Article 6 of the Congolese Military Criminal Code details how an accomplice to a crime engages their criminal responsibility, namely by ordering the crime, by providing arms or other necessary means to commit the crime, by assisting the perpetrator in committing the crime, knowing that the crime was being committed, or having provided accommodation or a meeting place to the perpetrators. Loi no 24/2002 du 18 novembre 2002 portant code pénal militaire (Law no 24/2002 of November 18, 2002 on the Military Criminal Code) (“Congolese Military Criminal Code”), *Journal Officiel*, March 20, 2003, <http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.024.2002.18.11.2002.pdf> (accessed September 21, 2015), art. 6, 175. See below “Advances in the Minova Case” section for a discussion of the use of the Rome Statute in this case.

¹⁰⁴ International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, (Cambridge: Cambridge University Press, 2005), pp. 3733-3799; Rome Statute, art. 28; Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), art. 7(3); Statute of the International Criminal Tribunal for Rwanda (ICTR), art. 6(3); Statute of the Special Court for Sierra Leone (SCSL), S/Res/1315 (2000), art. 6(3); French Penal Code, 1994, art. 462-7; Australian Criminal Code Act, No. 12 of 1995, Chapter 8, para. 268.115; United Kingdom International Criminal Court Act 2001, Chapter 17, Section 65; German Code of Crimes Against International Law, 2002, Part 1, para. 4; Norwegian Criminal Code, No. 28 of 2005, para. 109.

The development of this mode of liability comes from the recognition that grave violations of the laws of war are often committed by low-level military personnel because their superiors fail to prevent or punish these crimes. A passive attitude on the part of commanders in the face of grave abuses can encourage further crimes. It would be wrong for commanders standing by as serious crimes are committed to escape criminal responsibility just because they do not carry the weapon or order the offense.

Under command responsibility, commanders have an active duty to ensure that their subordinates respect the laws of war and to appropriately punish those responsible for violating them. According to international law and jurisprudence, four elements must be met for a military or civilian superior to hold individual criminal responsibility for crimes perpetrated by his subordinates: 1) the accused was the superior, de jure or de facto, of persons who committed a crime; 2) the accused had effective control over these persons; 3) the accused knew or should have known that their subordinates were committing or about to commit a crime; and 4) the accused failed to prevent or stop the crimes, or, if the crimes had already been committed, punish those responsible.¹⁰⁵

Command Responsibility in the Minova Case

No information emerged during the trial suggesting that soldiers were ordered or encouraged to rape and pillage in Minova and surrounding villages. The question therefore is whether commanders responsible for the troops in Minova had control over them, knew or should have known about the crimes being committed, and did what was necessary to prevent, stop or, if the crimes had taken place, punish the soldiers responsible.

A total of 14 officers, holding ranks ranging from captain to lieutenant-colonel, were indicted. Thirteen of these 14 officers were charged for war crimes committed by troops

¹⁰⁵ Rome Statute, art. 28; Roberta Arnold and Otto Triffterer, "Article 28: Responsibility of commanders and other superiors," in "Commentary on the Rome Statute of the International Criminal Court," ed. Otto Triffterer, Oxford Hart Publishing, 2008, p. 840; International Committee of the Red Cross, *Customary International Humanitarian Law* (Cambridge: Cambridge Univ. Press, 2005), rule 153. For relevant jurisprudence elaborating on these elements, see also *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, ICTY, Case No. IT-96-21-T, Judgment (Trial Chamber), November 16, 1998, (*Čelebići Judgment*); *Prosecutor v. Blaškić*, ICTY, IT-95-14-T, Judgment (Trial Chamber), March 3, 2000; *Prosecutor v. Gacumbutsi*, ICTR, Case No. ICTR-2001-64-A, Judgment (Appeals Chamber), July 7, 2006; *Prosecutor v. Kajelijeli*, ICTR, Case No. ICTR-98-44A-A, Judgment (Appeals Chamber), May 23, 2005; Alex Brima, Brima Kamara, Santigie Kanu, SCSL, Case No. SCSL-04-16-T, Judgment (Trial Chamber), June 20, 2007, paras. 787-288 (*AFRC Trial Judgment*), *RUF Judgment*; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber), June 15, 2009 (*Bemba Confirmation of Charges Decision*); *Prosecutor v. Bosco Ntaganda*, ICC, Case No. ICC-01/04-02/06, Decision (Pre-Trial Chamber), June 9, 2014 (*Ntaganda Confirmation of Charges Decision*).

under their command as a matter of command responsibility. Twelve belonged to the 41st and 391st Battalions of the 8th Military Region. The two senior commanders and four low-level company commanders from each battalion were indicted. An officer from a military police battalion was also charged under the command responsibility theory.

In the judgment, the Operational Military Court judges went over the “command responsibility” requirements listed above, citing international jurisprudence, and decided to acquit all indicted commanders. The military police battalion officer was acquitted because no evidence was presented that soldiers under his command were involved in the crimes. The judgment concerning the other commanders is discussed below.

Two Dismissed Battalion Commanders

The original commanders of the 391st and 41st Commando Battalions, Colonels Nzale and Ntore, were among those indicted in the case under command responsibility. According to testimonies heard at trial and the judgment, they had been dismissed from their command positions by Gen. Gabriel Amisi, the commander of land forces at the time, on November 19, 2012, before he ordered the retreat towards Minova. (They were allegedly dismissed because of their poor performance in military operations during the fall of Goma.¹⁰⁶) Nzale was taken prisoner by M23 fighters on November 20, while Ntore went to Bukavu for medical treatment.¹⁰⁷ They never went to the Minova area and were suspended of all military duties at the time of the crimes.

These two officers were nonetheless indicted for the war crimes of pillage and rape committed in Minova. In addition, the prosecution introduced an additional indictment against them for “demoralizing the troops.”¹⁰⁸ According to trial observers and lawyers who attended the hearing, General Mukunto threatened the two officers in the courtroom.¹⁰⁹ In the official records of the hearing, as the case on war crimes charges was drawing to an end, he is quoted as saying:

¹⁰⁶ Minova Hearing Transcripts, December 17, 2013; Minova Judgment, pp. 51-52, 80; Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014. Human Rights Watch interview with Congolese lawyer, Goma, May 21, 2014; Human Rights Watch interview with Congolese civil society activist, Goma, May 20, 2014; Closing Brief filed on behalf of Capt. Kangwanda, p. 4.

¹⁰⁷ Minova Judgment, pp. 51-52; Human Rights Watch interview with Congolese lawyer, Goma, May 21, 2014.

¹⁰⁸ Congolese Military Criminal Code, art. 59, 146.

¹⁰⁹ Human Rights Watch interview with Congolese civil society activist, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 21, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014.

Regarding the court’s decision to acquit Lieutenant Colonel Nzale under the case RP 009/2013 [for demoralizing the troops], the prosecution promises him that he is a traitor and a traitor can betray again, his place is not in the FARDC [Armed Forces of the Democratic Republic of Congo]! This applies to Lieutenant Colonel Wasinga Ntore too.¹¹⁰

The CMO judges demanded that General Mukunto stop the threats. In the judgment, the judges found that Colonels Nzale and Ntore did not have effective control over the troops that committed the crimes in Minova because “they were not in function anymore, did not have the capacity to give orders, and exert control over their implementation anymore or to punish the crimes. Control had been handed over to those replacing them since their dismissal in Mubambiro on November 19, 2012.”¹¹¹ The court eventually acquitted the two commanders of all charges.

The prosecution of these commanders was interpreted by many as an attempt to make them scapegoats for the Minova crimes because of their poor performance during military operations. A defense lawyer told Human Rights Watch:

The government really wanted these officers to be convicted. That is why Mukunto came from Kinshasa, so that they could say that these two were responsible for the crimes in Minova. He threatened them during the hearing—it was clear that he came to show what needed to be decided.¹¹²

A military justice official involved in the Minova investigation said: “Officers who had never arrived in Minova were prosecuted. That did not make any sense. These two were innocent and others should have been indicted.”¹¹³

Acquittal of Other Commanders

For the remaining officers, the judges found that they were indeed in charge, had effective control over the troops in Minova, and knew that crimes were being perpetrated.

¹¹⁰ Minova Hearing Transcripts, April 18, 2014.

¹¹¹ Minova Judgment, pp. 80-81.

¹¹² Human Rights Watch interview with Congolese lawyer, Goma, May 21, 2014.

¹¹³ Human Rights Watch interview with Congolese military justice official, Kinshasa, November 12, 2014.

The judges however decided that the criminal responsibility of these commanders for the crimes in Minova could not be established because they “did not fail to punish the crimes or to refer the suspects to the judicial authorities.” They added: “As a matter of fact, it is thanks to these commanders that the suspects have been identified and brought to this court.”¹¹⁴

But there are problems with this reasoning. First, while it is true that the battalion commanders gave the judicial authorities the names of soldiers who were later prosecuted, they only did so in April 2013, upon General Mukunto’s request. A handful of soldiers caught drunk or in possession of looted goods were referred to the judicial authorities at the time of the Minova events but most soldiers arrested in Minova were later released and reintegrated. In addition, as established during the questioning of commanders at trial, no official military reports were filed on the crimes, suggesting that these commanders did not really intend to act on the crimes in Minova.¹¹⁵

Second, the decision does not discuss other elements of command responsibility, notably whether the commanders took any steps to prevent or stop the crimes. There is no discussion in the judgment of measures that the commanders could have taken as they led their troops towards Minova, such as instructing their subordinates about the need to protect civilians in accordance with the laws of war. According to testimony at trial, several commanders were at times located just a couple hundred meters from where the crimes were being committed.¹¹⁶ At trial, the judges repeatedly asked the commanders why they did nothing other than wait around and do roll calls when they heard the gunshots.¹¹⁷ In the judgment, however, the court finds that the commanders could not leave camp while the crimes were ongoing, as this could have worsened the situation by leaving the soldiers without supervision.

International jurisprudence recognizes that the determination of whether commanders took “all necessary and reasonable measures” requires a case-by-case analysis of the facts of the case and of what the superiors were in a position to do in the given

¹¹⁴ Minova Judgment, p. 81.

¹¹⁵ Human Rights Watch interview with UN official, Kinshasa, November 12, 2014; Human Rights Watch interview with Congolese civil society activist, Kinshasa, November 11, 2014.

¹¹⁶ The 391st Battalion, for example, was stationed on the football field in Minova. Some of the crimes allegedly took place in the market, which is just across the street from the football field. Minova Hearing Transcripts, December 9, 2013 and December 18, 2013.

¹¹⁷ Minova Hearing Transcripts, December 9, 2013, December 17, 2013, and December 18, 2013.

circumstances.¹¹⁸ International tribunals have determined that commanders must take measures that are “specific and closely linked to the acts they are intended to prevent.”¹¹⁹ As such, it is not clear that routine measures such as roll calls would be sufficient, at least concerning the superior officers, such as battalion commanders.¹²⁰

The CMO bench, in accordance with the Congolese Military Judicial Code, was composed of two professional military judges and three military officers from the 8th Military Region, with no legal training, acting as associate judges. These associate judges are chosen randomly from a list prepared by the military command.¹²¹ Judgments are decided by majority, following a secret vote. One military judge indicated that in cases involving grave international crimes and complicated legal theories such as command responsibility, benches should always be composed of at least a majority of professional military magistrates.¹²²

Other Officers Not Indicted

Evidence presented at trial, including testimonies and citations from investigative interview notes, established that a number of officers above those indicted in the case were also present in Minova during the crimes. These high-ranking officers were questioned by the General Military Prosecution Office in the course of the investigations, but they were neither called as witnesses during the trial nor indicted.

A military justice official involved in the case told Human Rights Watch:

Several commanders were interviewed but not indicted. Why this commander and not that one? It is important to realize that there were de jure and de facto commanders in Minova. Nobody tried to establish who was really in charge there.¹²³

¹¹⁸ *Prosecutor v. Strugar*, ICTY, Case No. IT-01-42-T, Judgment (Trial Chamber), January 31, 2005, para. 372; *Prosecutor v. Hadzihasanovic*, ICTY, Case No. IT-01-47-PT, “Decision on Joint Challenge to Jurisdiction” (Trial Chamber), November 12, 2002, paras. 1236-1240.

¹¹⁹ *Prosecutor v. Hadzihasanovic*, para. 155.

¹²⁰ *Prosecutor v. Strugar*, para. 375; *Prosecutor v. Hadzihasanovic*, para. 153.

¹²¹ The African Commission on Human and Peoples’ Rights (ACHPR) found that this practice undermines the independence of military courts: “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.” *Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples’ Rights, Communication No. 224/98 (2000), <http://www1.umn.edu/humanrts/africa/comcases/224-98.html> (accessed September 10, 2015), para. 60.

¹²² Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014.

¹²³ *Ibid.*

For example, senior officers were nominated “coordinators” and asked to take responsibility for some of the battalions in Minova for the period of the reorganization.¹²⁴ The indicted commanders said at trial that they regularly reported to and took their orders from these officers while in Minova. Although they were not the regular hierarchical superiors of the battalion commanders, these officers were de facto in charge of some of the troops at the time.¹²⁵ Under the command responsibility theory, the role of a de facto commander can also be examined.

In addition, several testimonies and interview statements in the case asserted that the entire high command of North Kivu’s 8th Military Region was in Minova at the time of the crimes, including Gen. Jean-Lucien Bahuma, the commander of the 8th Military Region, and several colonels belonging to the region’s headquarters battalion.¹²⁶ Some high-ranking officers from South Kivu’s 10th Military Region were also present.¹²⁷

According to testimonies and witness statements, many of these senior officers took part in a military strategy meeting on November 22 at the Lwanga Institute, near the Catholic parish in Minova. November 22 is one of the dates most cited by victims at the Minova trial for when the crimes took place.

The Minova judgment states that commanders of the 8th Military Region admitted during the interviews with the military prosecutors that pillage and rape happened on a mass scale in Minova. General Bahuma is reported to have said that “there was a problem of control over the troops, which allowed soldiers to leave their units and go into Minova town where they committed the crimes that were later denounced by the civilian population.”¹²⁸

There was no testimony at trial about what the high-level command did to prevent or stop the crimes happening at the time. A lawyer with access to the investigation file and notes of the interrogations of these commanders told Human Rights Watch: “The questioning [of

¹²⁴ Minova Judgment, p. 52.

¹²⁵ Minova Hearing Transcripts, December 18, 2013; Closing Brief filed on behalf of Capt. Kangwanda, pp. 6, 28.

¹²⁶ Gen. Lucien Bahuma died on August 30, 2014. See “RDC: émotion après la mort du général Bahuma, héros discret des FARDC,” *RFI*, September 1, 2014, <http://www.rfi.fr/contenu/ticker/rdc-mort-general-lucien-bahuma-commandant-8e-region-militaire-nord-kivu-suites-violen/> (accessed September 23, 2015); “RDC: qui était le général Lucien Bahuma, chef de l’armée au Nord-Kivu?” *Jeune Afrique*, August 31, 2014, <http://www.jeuneafrique.com/Article/DEPAFP20140831162846/> (accessed September 10, 2015).

¹²⁷ Minova Hearing Transcripts, February 15, 2014; Closing Brief filed on behalf of Capt. Kangwanda, p. 33.

¹²⁸ Minova Judgment, p. 50.

these top commanders] was weak. They were not asked where they were, what they did as the crimes were being committed and after.”¹²⁹ There was also no information put forward about steps these high-level commanders may have taken to ensure justice was served for the crimes in Minova.

At trial, several indicted commanders said that the high command of the military region was present and in charge in Minova and that it would therefore have been difficult for them, as low-level commanders, to take the initiative to stop the crimes. A defense lawyer said in court:

You cannot limit yourself to the commanders lower down in the chain of command. All these people received orders; you need to check what was done by the top commanders in Minova.¹³⁰

The presiding judge of the CMO replied:

This court is seized of the indictments it has received; you can't ask us to make anybody else come. It is for the prosecution to decide whom to prosecute.¹³¹

Human Rights Watch asked several military justice officials involved in the Minova case why these other commanders were not indicted. One military justice official involved in the investigation said:

We could have gone all the way up to General Bahuma but the decision was made to stop at low-level field commanders. I don't have an explanation for that. I was not the one who decided who should be indicted.¹³²

A military investigator involved in the investigation said:

General Bahuma was interrogated by the general military prosecutor [General Mukunto]. But here, there are people who simply cannot be

¹²⁹ Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014.

¹³⁰ Minova Hearing Transcripts, December 18, 2013.

¹³¹ Ibid.

¹³² Human Rights Watch interview with Congolese military justice official, Kinshasa, November 12, 2014.

brought to trial. We can't do anything we like; there are always people who are protected in the army. Sometimes we are told to stop investigations because of defense or national security interests.¹³³

General Mukunto of the General Military Prosecution Office, who decided on the list of accused in the case, told Human Rights Watch that the military region commander could not be indicted under command responsibility because “while it is true that he had the title [of Military Region Commander], in reality, it is not him who was in charge [of the troops].”¹³⁴

Mukunto cited a law on the organization of the armed forces from 2004, according to which, he said, the role of the military region commander is only to coordinate troops.¹³⁵ As such, according to Mukunto, it is the battalion and company commanders alone who have effective control over the troops. However, this cited law on the organization of armed forces has since been clarified and the new law, which was adopted in 2011 although it was only promulgated in 2013, makes clear that the regional commander is in charge of the troops.¹³⁶ The legal interpretation suggested by General Mukunto would effectively give a free pass to high-level officers when troops under their command commit war crimes.

A Congolese expert on the justice system who closely followed the Minova trial summed up the prosecutions of officers as follows:

The Congolese government wanted to please the international community, but those really bearing responsibility for the Minova crimes were not arrested. They are still running free. The court disappointed us with the verdict, but the judges could not do magic if the indicted persons were not the right ones. And the judges also tried to please by condemning soldiers for pillage, even though

¹³³ Human Rights Watch group interview with Congolese military justice officials, Bukavu, May 23, 2014.

¹³⁴ Human Rights Watch interview with General Mukunto, Kinshasa, June 1, 2015.

¹³⁵ Loi no 04/023 du 12 novembre 2004 portant Organisation Générale de la Défense et des Forces Armées (Law no 04/023 of November 12, 2004 on the General Organization of the Defense and of Armed Forces), November 2004, <http://www.leganet.cd/Legislation/Droit%20Public/Ministeres/defense/loi.04.023.12.11.2004.pdf> (accessed September 22, 2015), art. 80.

¹³⁶ Loi no 011/012 du 11 août 2011 portant Organisation et Fonctionnement des Forces Armées (Law no 011/012 of August 11, 2011 on the Organization and Functioning of the Armed Forces), August 2011, <http://desc-wondo.org/wp-content/uploads/2013/08/Loi-Organique-sur-les-FARDC.pdf> (accessed September 22, 2015). President Joseph Kabila signed the decrees implementing this law in June 2013: “RDC: Joseph Kabila signe des ordonnances sur la nouvelle organisation des FARDC,” *Radio Okapi*, June 19, 2013, <http://www.radiookapi.net/en-bref/2013/06/19/rdc-joseph-kabila-signe-des-ordonnances-sur-la-nouvelle-organisation-des-fardc/> (accessed September 22, 2015).

there was not more evidence for pillage than for rape. The message for soldiers from the Minova trial is clear: high-level people are protected.¹³⁷

Another military judicial official involved in the trial concluded: “The real suspects were not there, they are protected. Some are untouchable.”¹³⁸

Grave crimes continue in Congo in large part because commanders order or tolerate atrocities committed by troops under their control.¹³⁹ While there has been some progress with prosecutions in recent years, these are only likely to be effective as a deterrent when high-ranking commanders are also held to account. This is important so that the army hierarchy recognizes a true sense of responsibility to ensure that these crimes do not continue. Trials such as the one on the Minova crimes reinforce the perception that justice only applies to low-level soldiers and that officers are protected.

Command Responsibility in Other Cases Involving Grave Abuses in Congo

High-ranking military and police commanders are powerful figures in Congo, who are rarely investigated and held accountable for criminal offenses, as direct perpetrators or for command responsibility.¹⁴⁰ Congolese law hinders the prosecution of the most senior officers, in part because the judges on the bench must be of equal or higher rank than the defendants and there are few high-ranking military judges in Congo.¹⁴¹ Under the Military Judicial Code, generals benefit from privileges of jurisdiction, which means that they can only be prosecuted before the High Military Court in Kinshasa.¹⁴² Only one general, Jérôme Kakwavu, has ever been prosecuted before military courts for war crimes.¹⁴³

¹³⁷ Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014.

¹³⁸ Human Rights Watch interview with military justice official, Goma, May 22, 2014.

¹³⁹ Human Rights Watch, “*You Will Be Punished*”: *Attacks on Civilians in Eastern Congo*, December 2009, <http://www.hrw.org/sites/default/files/reports/drc1209webwcover2.pdf>.

¹⁴⁰ ICTJ Report 2015, p. 28.

¹⁴¹ Congolese Military Judicial Code, art. 67; “Democratic Republic of Congo: Ending Impunity for Sexual Violence,” Human Rights Watch news release; Human Rights Watch, *Operation Likofi: Police Killings and Enforced Disappearances in Kinshasa, Democratic Republic of Congo*, November 2014, http://www.hrw.org/sites/default/files/reports/drc1114_forUpload_o.pdf, pp. 49-50.

¹⁴² See below “The Way Forward” section for a discussion of privileges of jurisdiction under Congolese law.

¹⁴³ Jérôme Kakwavu was the leader of a rebel group active in Ituri in the early 2000s, the Peoples’ Armed Forces of Congo. He was integrated into the FARDC in 2004 as a result of peace negotiations between the government and his armed group and named a general. He was subsequently arrested in 2005. Kakwavu was eventually indicted in 2010 for war crimes and crimes

Human Rights Watch has documented several cases where military prosecutors have failed to address the criminal responsibility of high-ranking officers, including command responsibility, and where senior officers may have been effectively protected. We describe a few examples below. In some of these cases, the implicated senior officers manipulated and intimidated justice officials to avoid prosecution.

One recent case concerns Operation Likofi (which means “iron fist” or “punch” in Lingala, one of Congo’s four national languages), a police operation launched by the Congolese police in Kinshasa in November 2013 to remove gang members known as “*kuluna*” from the streets. During the operation, the police conducted extrajudicial executions of at least 51 young men and boys and forcibly disappeared 33 others. Human Rights Watch found evidence implicating senior police officials in the killings and enforced disappearances, as well as subsequent cover ups, notably Gen. Célestin Kanyama, who was the primary commander of Operation Likofi.¹⁴⁴ The Congolese government promised there would be an investigation, and that those responsible would be arrested and face justice.¹⁴⁵ Yet to date, no high-ranking officers have been investigated, arrested, or prosecuted for these crimes. A military magistrate who wanted to open a judicial investigation into a police colonel who allegedly shot and killed a suspected *kuluna* detained during Operation Likofi received oral instructions from a government official to “close [his] eyes” and not follow up on the case.¹⁴⁶

Another case concerns the death of prominent Congolese human rights defender, Floribert Chebeya Bahizire, executive director of the NGO Voice of the Voiceless. He was found dead on June 1, 2010, after a visit to police headquarters in Kinshasa. In June 2011, the deputy head of special police services, Col. Daniel Mukalay, and three fugitive police officers were convicted and sentenced to death. Another defendant was sentenced to life imprisonment. Congolese human rights groups criticized the trial for failing to take into account the role of the national police chief, Gen. John Numbi, in Chebeya’s death. In appeal, Mukalay’s conviction was upheld, while all other accused

against humanity in Ituri, including murder, torture and rape. He was convicted in 2014 and sentenced to 10 years in prison by the High Military Court in Kinshasa. Kakwavu’s case raised fair trial concerns, notably with regard to the length of his pre-trial detention, the duration of proceedings, and the absence of the right of appeal before the High Military Court.

¹⁴⁴ “DR Congo: Police Operation Kills 51 Young Men and Boys,” Human Rights Watch news release, November 18, 2014, <http://www.hrw.org/news/2014/11/18/dr-congo-police-operation-kills-51-young-men-and-boys>.

¹⁴⁵ See Human Rights Watch, *Operation Likofi*, pp. 43-50.

¹⁴⁶ See Human Rights Watch, *Operation Likofi*, p. 15.

were acquitted, but Gen. John Numbi has not been indicted and was apparently never seriously investigated.¹⁴⁷

Bosco Ntaganda, a former rebel leader promoted to the rank of general in the Congolese army in 2009 after a peace deal, also enjoyed complete impunity until he surrendered himself to the International Criminal Court in March 2013. While Ntaganda was a general, Human Rights Watch documented grave abuses committed by army troops under his command, including in the context of military operations against an armed group called the Democratic Forces for the Liberation of Rwanda (FDLR) in 2009-2010.¹⁴⁸ Ntaganda also conducted a brutal campaign against perceived opponents, both military and civilian, by ordering assassinations, arbitrary arrests, and other forms of intimidation. Human Rights Watch documented extensive interference by Ntaganda with the military justice system in Goma as he blocked judicial investigations into abuses committed by his loyalists. Despite these abuses, political authorities in Kinshasa publicly stated that they would not bring Ntaganda to justice for fear that his arrest would disrupt the peace process.

There are many other examples of senior army officers implicated in grave abuses who have never been investigated and brought to justice. These commanders were sometimes leaders of armed groups who were later integrated into the army. For example, 50 Congolese and international human rights and civil society organizations, including Human Rights Watch, lodged a complaint in 2010 against Col. Innocent Zimurinda, citing a litany of serious abuses—including massacres of civilians, summary executions, rape, and the recruitment of children—committed by troops under Zimurinda's command since 2007. Congolese justice officials only issued an arrest warrant against him after he left the army to join the M23 rebellion.¹⁴⁹

¹⁴⁷ Human Rights Watch, *World Report 2013* (New York, 2013), Democratic Republic of Congo chapter, <http://www.hrw.org/world-report/2013/country-chapters/democratic-republic-congo?page=2>; Eric Wemba, "Congo-Kinshasa: Affaire Chebeya, Tous les prévenus acquittés sauf Mukalay," September 18, 2015, <http://fr.allafrica.com/stories/201509181529.html> (accessed September 22, 2015).

¹⁴⁸ Human Rights Watch, "*You Will Be Punished.*"

¹⁴⁹ "DR Congo: Letter to President Joseph Kabila on prosecuting M23 leaders and others for Serious Abuses," Human Rights Watch Letter, January 29, 2014, <https://www.hrw.org/news/2014/01/29/dr-congo-letter-president-joseph-kabila-prosecuting-m23-leaders-and-others-serious>.

V. Advances in the Minova Case

The following section explores a number of positive aspects of the Minova investigation and trial, including:

- 1) Political and practical support from Congolese authorities;
- 2) Extensive financial and logistical support from international partners;
- 3) Effective protection for those involved in the case;
- 4) Significant victims' participation in the trial; and
- 5) Firm and ongoing international diplomatic pressure to see the case pursued.

In recent years, international donors involved in justice sector reform in Congo have increasingly recognized the need to lend targeted support to national efforts to fight impunity for the most serious crimes. Relevant projects have included legal education for national justice officials on international criminal law and the Rome Statute of the International Criminal Court; trainings focused on sexual violence crimes; logistical and technical assistance to investigations; legal representation for victims of grave crimes; the funding of *in situ* hearings ("mobile courts"), notably for sexual violence crimes, and assistance to the protection of victims and witnesses.¹⁵⁰

The Minova case benefitted from these existing projects and reflects the complexities of conducting an investigation and trial for war crimes before a national court in a conflict zone.

Congolese Authorities' Support for Justice in Minova

In the Minova case, Congolese officials, including the vice prime minister and minister of defense, and the government spokesperson, made public statements and took some concrete steps to affirm the government's support for seeing justice served.¹⁵¹

¹⁵⁰ OSF, "Putting Complementarity into Practice: Domestic Justice for International Crimes in the Democratic Republic of Congo, Uganda and Kenya" ("OSF Report 2011"), January 11, 2011, <http://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf> (accessed September 8, 2015); The International Bar Association (IBA) and the International Legal Assistance Consortium (ILAC) ("IBA and ILAC Report 2009"), "Rebuilding courts and trust: Assessment of the needs of the justice system in the Democratic Republic of Congo," August 2009, <http://issat.dcaf.ch/content/download/12040/121847/file/DRC-IBA-ILAC-Justice-Aug09.pdf> (accessed September 11, 2015).

¹⁵¹ In February 2013, the Minister of Defense at the time Alexandre Luba Ntambo declared: "There will be no impunity for the soldiers who committed rapes and pillage in the cities of Bweremana and Minova." See *La Prospérité*, "Viols et Pillages au

The minister of justice at the time, Wivine Mumba Matipa, sent one of her advisers to Minova shortly after the events, and she visited Minova herself and sent two letters to the General Military Prosecution's Office to press for investigations into the Minova crimes.¹⁵² She later publicly announced the suspension of several suspected officers.¹⁵³ The Ministry of Justice also ensured that some funding be made available for the trial before the Operational Military Court, covering costs for two military judges on the bench, the general military prosecutor involved in the case, and other CMO costs, including the rental of the room used to hold the trial in Goma.¹⁵⁴ Several UN and NGO representatives expressed the view to Human Rights Watch that this was an unusual and important sign of ownership on the part of the government.¹⁵⁵

International Financial, Logistical Support

Due to the lack of material and personnel resources in local courts in Congo, trials for grave international crimes would not be possible without the assistance of international partners.¹⁵⁶ In the Minova case, international support was extensive and well coordinated.

Nord Kivu, Luba Ntambo : "Les auteurs seront sévèrement châtiés," March 11, 2013, <http://www.digitalcongo.net/article/90327> (accessed September 22, 2015). In April 2013, the spokesperson of the government, Lambert Mende, also publicly affirmed that judicial investigations were ongoing in the Minova case and stressed that "the Congolese government and institutions are the primary concerned by the grave violations of the human rights of our fellow citizens." See "Viols à Minova: le gouvernement congolais et les institutions congolaises sont les premiers concernés, affirme Lambert Mende," *Radio Okapi*, April 3, 2013, <http://radiookapi.net/emissions-2/linvite-du-jour/2013/04/03/viols-minova-le-gouvernement-congolais-les-institutions-congolaises-sont-les-premiers-concernes-affirme-lambert-mende/> (accessed September 11, 2015). Human Rights Watch interview with international NGO staff member, May 21, 2014; Human Rights Watch interview with UN officials, Goma, May 22, 2014; Human Rights Watch Skype interview with UNDP official, August 12, 2014; Human Rights Watch interview with Congolese Ministry of Justice officials, November 10, 2014.

¹⁵² Human Rights Watch interview with Congolese Ministry of Justice officials, Kinshasa, November 10, 2014.

¹⁵³ Melanie Gouby, "Congo: 12 army officers to be charged with rapes," Associated Press, April 13, 2013, <http://news.yahoo.com/congo-12-army-officers-charged-rapes-175809730.html> (accessed September 11, 2015); "DR Congo officers 'suspended' in mass rape inquiry," *BBC News Online*, April 12, 2013, <http://www.bbc.com/news/world-africa-22121722> (accessed September 11, 2015).

¹⁵⁴ Human Rights interview with Congolese Ministry of Justice officials, Kinshasa, November 10, 2014.

¹⁵⁵ Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014; Human Rights Watch interview with international NGO staff members, May 22, 2014; Human Rights Watch interview with military justice official, Goma, May 22, 2014; Human Rights Watch interview with Congolese civil society activist, Kinshasa, November 11, 2014.

¹⁵⁶ 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 September 11, 2015), paras. 905-911, 975, 979; AfriMAP and OSISA ("AfriMAP and OSISA Report 2013"), "Democratic Republic of Congo - Evaluating efforts to establish the rule of law" (République Démocratique du Congo - Secteur de la Justice et Etat de Droit: Un Etat de Droit en pointillé, Essai d'évaluation des efforts en vue de l'instauration d'un Etat de droit et perspectives d'avenir), July 2013, http://www.osisa.org/sites/default/files/rdc_justice_et_etat_de_droit_19jun0930.pdf (accessed September 11, 2015), p. 139; Thirty First Report of the UN Secretary-General on the United Nations Organization Stabilization

Congolese military justice officials often lack the most basic office supplies. Facilities are poor; in both Bukavu and Goma, the military justice offices lack the most basic supplies such as paper, as well as computers, copy machines, and other electronic equipment.¹⁵⁷ There is no electricity in their offices, which also lack windows. Military justice magistrates said they are paid regularly but poorly and there is no budget allocated to military prosecution offices and courts for their regular functioning.¹⁵⁸

Costs incurred during investigative missions in remote places, such as accommodation and meals, are not reimbursed by the national justice system. Military police and magistrates reported that they often lack means of transportation or fuel.¹⁵⁹ A military police officer in Minova reported having to walk several hours to reach surrounding villages when pillage and rapes were reported during the November 2012 events.¹⁶⁰ Despite a round of recruitment in 2010 and 2011, the number of military judges remains insufficient.¹⁶¹ There is no state legal aid for indigent victims and defendants.

Several observers have noted that international assistance available to remedy gaps in the justice sector in Congo is not always well coordinated. There have also been coordination gaps in projects aimed at strengthening prosecutions of war crimes and crimes against

Mission in the Democratic Republic of Congo, S/2010/164, March, 30, 2010, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2010/164 (accessed September 25, 2015), pp. 12, 13, 20-21; Aaron Hall and Annette LaRocco, Enough Project, “Time Works Against Justice, Ending Impunity in Eastern Congo,” February 16, 2012, <http://www.enoughproject.org/files/Ending%20Impunity%20in%20Eastern%20Congo.pdf> (accessed September 11, 2015).

¹⁵⁷ Human Rights Watch interview with military justice official, May 22, 2014; Human Rights Watch interview with military justice official, November 12, 2014.

¹⁵⁸ Human Rights Watch group interview with military justice officials, May 23, 2014; IBA and ILAC Report 2009, p. 19; AfriMAP and OSISA Report 2013, p. 59.

¹⁵⁹ It would have been difficult for the military investigators and prosecutors who investigated the Minova case to travel from Bukavu or Goma to Minova without international support. Minova is located about 130 kilometers north of Bukavu—a five-hour drive—and 50 kilometers south of Goma—a 90-minute drive. Human Rights Watch interview with military justice official, Goma, May 22, 2014; Human Rights Watch group interview with military justice officials, May 23, 2014; Human Rights Watch interview with Congolese military justice official, Minova, May 24, 2014.

¹⁶⁰ Human Rights Watch interview with military justice official, May 24, 2014.

¹⁶¹ Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014. Lack of personnel in the judicial system is described in a report by the UN Office of the High Commissioner on Human Rights and MONUSCO, “Progress and Obstacles in the Fight Against Impunity for Sexual Violence in The Democratic Republic of The Congo” (“MONUSCO Report April 2014”), April 2014, www.ohchr.org/Documents/Countries/CD/UNJHROApril2014_en.doc (accessed September 11, 2015), para. 7.1; IBA and ILAC Report 2009, p. 37; UN Secretary-General Report on MONUSCO, S/2010/164, para. 50; UN Mapping Report 2010, paras. 905-909; “Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes region,” S/2013/119, February 27, 2013, http://www.securitycouncilreport.org/atf/cf/%7B65BFC9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2013_119.pdf (accessed September 11, 2015), para. 22.

humanity.¹⁶² In North and South Kivu provinces, however, international actors have recently begun to coordinate their efforts regarding specific cases involving grave international crimes.

Coordination mechanisms were set up in Bukavu and Goma in 2012 and 2013, respectively.¹⁶³ The meetings of both mechanisms, which are supposed to be held once a month, but in reality have happened less regularly, are chaired by representatives of the UN Prosecution Support Cells.¹⁶⁴ The meetings are used to discuss the needs in specific cases with Congolese military justice officials and to agree on a division of labor among international actors to support investigations and trials.¹⁶⁵

Relevant actors noted that the meetings have greatly contributed to reducing duplication and waste of resources, given that several donors implement projects aimed at supporting the military justice system (notably with regards to sexual violence crimes) and *in situ* hearings (“mobile courts”). Before the coordination mechanisms existed, military prosecutors sometimes obtained funding from different donors for the same investigative missions or conducted unnecessary additional missions.¹⁶⁶ The meetings have also proved

¹⁶² Some coordination exists in Kinshasa since the audit of the justice sector conducted by the European Commission and partners in 2004. The coordination mechanism was first called the Mixed Committee for Justice (*Comité Mixte de Justice, CMJ*), but was recently renamed the Thematic Group for Justice and Human Rights (*Groupe Thématique sur la Justice et les Droits Humains*) and gathers Congolese justice ministry officials and international partners to discuss priorities and developments in the field of justice reform and human rights. See below “The Way Forward” section for discussion of the need to create a coordination mechanism specifically dedicated to complementarity projects.

¹⁶³ In Goma, the mechanism is called the “Consultation Framework for support to the military justice system” (*Cadre de Concertation pour l’appui à la Justice Militaire*) and brings together the UN Joint Human Rights Office, UNPSCs, UNDP, ASF, ICTJ, American Bar Association (ABA) and local Congolese military prosecutors. In Bukavu, the mechanism is called the “International Justice Task Force” (*Task Force Justice Internationale*) and includes the Bukavu-based representatives of the same actors as in Goma, plus representatives of the international NGOs Physicians for Human Rights, RCN Justice & Démocratie, and Track Impunity Always (TRIAL). Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, May 21, 2014; Human Rights Watch interview with international NGO staff members, May 22, 2014; Human Rights Watch interview with UN official, May 23, 2014; Human Rights Watch interview with Congolese lawyer, May 23, 2014; Human Rights Watch Skype interview with UNDP official, August 12, 2014; Human Rights Watch interview with UN official, November 12, 2014; Human Rights Watch interview with international NGO staff member, November 13, 2014.

¹⁶⁴ Human Rights Watch interview with international NGO staff members, May 22, 2014; Human Rights Watch interview with UN official, May 22, 2014; Human Rights Watch interview with UN official, May 23, 2014; Human Rights Watch interview with military justice official, November 12, 2014; Human Rights Watch interview with UN official, November 12, 2014.

¹⁶⁵ Human Rights Watch interview with international NGO staff member, May 21, 2014; Human Rights Watch interview with international NGO staff members, May 22, 2014; Human Rights Watch interview with UN officials, May 22, 2014; Human Rights Watch Skype interview with UNDP official, August 12, 2014; Human Rights Watch interview with UN official, November 12, 2014.

¹⁶⁶ Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014.

useful to press the military justice system for progress in specific cases and should continue to be used for that purpose.¹⁶⁷

In the Minova case, international partners coordinated support and split among themselves the vast majority of costs incurred during the investigation and for holding the *in situ* hearings in Minova.¹⁶⁸ International support in the Minova case did not, however, cover any of the expenses incurred by the Operational Military Court. Due to fair trial rights concerns mentioned above, MONUSCO refused to provide any direct support to the functioning of the court and its staff (for example to cover the costs of renting a room for hearings or to support the CMO judges to participate in hearings in Minova). The authorities in Kinshasa stepped in to cover these costs, although government and military justice officials interviewed for this report expressed concerns that the entire amount allocated for the trial was not disbursed by the General Military Prosecution Office, which had been entrusted with it.¹⁶⁹ As one government official told Human Rights Watch:

The Ministry of Justice obtained funds for the Minova case but not all of the money was used for the trial. We had done a costing exercise [to estimate the needs]. The military justice system should account for how the money was actually spent.¹⁷⁰

Security and Protection for Involved Parties

Conducting investigations and organizing a trial for grave international crimes in the context of an ongoing armed conflict raises significant security and protection issues for both judicial staff as well as victims and witnesses involved.

The presence of MONUSCO and the expertise of its protection unit were crucial in the Minova case. Significant numbers of soldiers remained around Minova for weeks after the events in November 2012. Their presence raised concerns for the security of both victims

¹⁶⁷ Human Rights Watch interview with international NGO staff members, May 22, 2014; Human Rights Watch interview with UN official, November 12, 2014.

¹⁶⁸ Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014; Human Rights Watch interview with military judicial official, May 22, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch Skype interview with UNDP official, August 12, 2014.

¹⁶⁹ Human Rights Watch interview with Congolese Ministry of Justice officials, November 10, 2014; Human Rights Watch interview with Congolese civil society activist, Kinshasa, November 11, 2014.

¹⁷⁰ Human Rights Watch interview with Congolese Ministry of Justice officials, Kinshasa, November 10, 2014.

and actors involved in the investigations. MONUSCO transported and accompanied military justice staff during each of their investigative missions to Minova, thus providing essential logistical support and some measure of security.

According to the military justice staff that Human Rights Watch interviewed for this report, they did not experience threats or intimidation from soldiers and officers in this case¹⁷¹—often a challenge in cases involving the army.¹⁷² Preventative protection measures to ensure the security of victims and witnesses were taken at the investigative phase. For example, in late January 2013, ahead of an upcoming investigative trip by military justice officials, two international organizations, the American Bar Association and Avocats sans Frontières (ASF), and the protection unit of MONUSCO conducted a protection evaluation mission in Minova.¹⁷³ MONUSCO’s protection unit also conducted protection trainings for all participants in the trial.¹⁷⁴



A woman —veiled to protect her identity from the public— testifies about having been raped at the Minova trial. A lawyer holds the microphone for her. Accused soldiers are seated in the rear. © 2014 Diana Zeyneb Alhindawi

¹⁷¹ Human Rights Watch interview with military justice official, Goma, May 22, 2014; Human Rights Watch interview with military justice official, Goma, May 22, 2014; Human Rights Watch group interview with Congolese military justice officials, Bukavu, May 23, 2014; Human Rights Watch interview with military justice official, May 24, 2014; Human Rights Watch interview with military justice official, May 24, 2014.

¹⁷² Human Rights Watch interview with military justice official, May 22, 2014; Human Rights Watch interview with UN official, May 23, 2014; Human Rights Watch interview with military justice official, May 24, 2014; UN Mapping Report 2010, pp. 60, 72, 421, 435, 436, 451, 481; OSF Report 2011, pp. 3, 39; ICTJ Report 2015 p. 26.

¹⁷³ Human Rights Watch interview with international NGO staff member, May 20, 2014; Human Rights Watch interview with UN official, May 22, 2014; Human Rights Watch interview with Congolese lawyer, May 25, 2014; Human Rights Watch interview with UN official, Kinshasa, November 12, 2014.

¹⁷⁴ Human Rights Watch interview with international NGO staff member, May 21, 2014; Human Rights Watch interview with UN official, May 22, 2014.

In addition to physical protection, some measures were taken to minimize re-traumatization of rape victims. For instance, the UN Joint Human Rights Office, which has extensive experience interviewing victims of grave international crimes, asked the military investigators and prosecutors to wear civilian clothes for the interviews instead of their military uniforms, to avoid reminding victims of the violence they suffered.¹⁷⁵ Psychologists were present and, when possible, spoke with the victims before they met the military justice officials.¹⁷⁶ In some instances, female counselors or local activists whom the victims knew well were allowed to accompany the victims.¹⁷⁷

Congolese law does not include any specific provisions regarding the protection of victims and witnesses.¹⁷⁸ However, in the Minova case, the CMO judges ordered extensive and progressive protection measures, using article 68 of the Rome Statute of the ICC and ordering a number of measures similar to those used at international tribunals. This remarkable step was attributed to the considerable experience of one of the military judges, Col. Freddy Mukendi, who had been involved in a number of trials for grave international crimes while sitting on the military court in Bukavu.¹⁷⁹

For example, the names of rape victims were not released publicly and they were referred to by codes instead. Rape victims were also clothed in form-disguising black

¹⁷⁵ Human Rights Watch interview with psychologist, Goma, May 21, 2014; Human Rights Watch group interview with military justice officials, May 23, 2014; Human Rights Watch interview with two Congolese civil society activists, Minova, May 24, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014;

¹⁷⁶ Human Rights Watch interview with psychologist, May 21, 2014; Human Rights Watch interview with Congolese lawyer, May 23, 2014; Human Rights Watch interview with Congolese lawyer, May 25, 2014; Human Rights Watch interview with UN official, Kinshasa, November 12, 2014.

¹⁷⁷ Human Rights Watch interview with two Congolese civil society activists, May 24, 2014.

¹⁷⁸ The only article in the military judicial code dealing with victims and witnesses' support is article 253, which mentions the need to take breaks during proceedings to allow witnesses to rest. A new article, article 74 bis, was inserted in 2006 in the civilian criminal code with regards to the protection and support of victims of sexual violence. It provides that a judge seized of a matter involving sexual violence should take measures to protect the safety and dignity of victims and other involved persons, without specifying what these measures are. Loi no 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénale congolais ("Congolese Civilian Criminal Code"), http://www.leganet.cd/Legislation/Tables/droit_penal.htm (accessed September 23, 2015).

¹⁷⁹ Human Rights Watch interview with international NGO staff member, May 21, 2014; Human Rights Watch interview with UN official, May 22, 2014. Human Rights Watch interview with Congolese lawyer, May 23, 2014; Human Rights Watch interview with UN official, November 12, 2014. Human Rights Watch interview with Congolese military justice official, November 12, 2014. Similar protection and support measures were taken in other recent cases involving sexual violence, including the Mukope and Kibibi cases before the South Kivu military court. Judge Mukendi was also a judge in these cases. Human Rights Watch interview with international NGO staff member, May 20, 2014; Human Rights Watch interview with UN official, May 22, 2014; Human Rights Watch interview with military justice official, May 24, 2014; Human Rights Watch interview with UN official, November 12, 2014.

dresses and facial coverings similar to burkas.¹⁸⁰ One local NGO staff member, who was not a victim, testified from behind a curtain and others spoke using a microphone from an adjacent room.

The court also ordered that all victims of sexual violence be heard in hearings closed to the public. MONUSCO troops organized patrols in Minova during the *in situ* hearings to help ensure the security of all participants in the trial.¹⁸¹ There was also an effort to balance necessary protection with the defendants' right to a fair trial, for example by ensuring that defense legal representatives knew the identity of protected victims and witnesses.¹⁸²

A few instances of intimidation around the Minova proceedings did nonetheless occur, illustrating the difficulties that can arise in this type of case. For example, one victims' lawyer told Human Rights Watch:

Yes, there were a few threats. A woman who helps rape victims in Minova was threatened by armed men. They came to her house and said: "You are the one denouncing members of the army, we are watching you!" She had to spend a week away from her house. I was also threatened myself by members of the army, here in Goma. They were bodyguards of one of the accused in the case. They saw me drive my car and shouted: "It's her! It's her! Don't let her go through." It was scary.¹⁸³

There were also unverified reports that some of the commanders implicated in the case tried to bribe witnesses.¹⁸⁴ A victims' lawyer explained:

In Bulenga, certain indicted officers paid the local chiefs to change their stories. Some came to the trial and denied that anything at all had happened there. Three local chiefs sent a letter to the military prosecution office to say that the commander of the

¹⁸⁰ See photos in "They will be heard, the Rape survivors of Minova," *Al Jazeera*, March 14, 2014, <http://america.aljazeera.com/multimedia/2014/3/they-will-be-heard-therapesurvivorsofminova.html> (accessed September 14, 2015).

¹⁸¹ Human Rights Watch interview with UN official, Kinshasa, November 12, 2014.

¹⁸² Human Rights Watch interview with Congolese lawyer, Goma, May 22, 2014.

¹⁸³ *Ibid.*

¹⁸⁴ Human Rights Watch interview with international NGO staff member, May 20, 2014; Human Rights Watch interview with Congolese lawyer, May 22, 2014; Human Rights Watch interview with Congolese lawyer, May 23, 2014; Human Rights Watch interview with two Congolese civil society activists, May 24, 2014; Human Rights Watch interview with UN official, November 12, 2014.

41st Battalion had behaved well during the events but the timing of this letter is very suspect. Only three of the five local chiefs signed the letter. We asked the two other ones to come explain what happened but they refused; they were scared.¹⁸⁵

All 14 officers indicted in the case were at liberty throughout the proceedings. The list of protected victims, which included their real identities, was leaked and found in the possession of one of the Bulenga chiefs. The victims' lawyers brought these matters and their concerns for the security of victims to the attention of the judges.¹⁸⁶ The CMO judges stated in court that tampering with and intimidating victims was an offense¹⁸⁷ but did not consider that there was sufficient evidence to take action.¹⁸⁸

Some participants remain concerned with security and protection risks that may arise after the trial. Given that the list of protected victims was leaked, there remains a risk that they may be targeted. NGO staff and lawyers based in Goma also stressed the weakness of the prison system in Congo and the possibility that those convicted in the Minova case might escape from the Goma prison.¹⁸⁹ This creates security risks both for the victims and their lawyers. The latter gained considerable public profiles during this case.

MONUSCO's protection unit has the responsibility to regularly check in with witnesses and victims in Minova and evaluate their personal security and the general environment post trial. Some participants suggested that those convicted should serve their sentences in a prison located further away from Minova and the location of the crimes, although the rights

¹⁸⁵ Human Rights Watch interview with Congolese lawyer, Goma, May 22, 2014; "Note de plaidoirie RP 008/007/006/005/004/003/013 RMP 0372/BBM/013 pour Mesdames F23, F66, F179, F108, F26, F1, F143, F176, F2, F65, F142, F38, F167, F88, F60, F172, F28, F78, F139, F187, F181, F9, F150, F18, F149, F162, F163, F36, F177, F130, F152, F89, F33, F173, F119, F68, F90, F193, F196, F63, F153, F135, F183, F145, F160, F114, Shamavu Ahamiaga, Gilbert Muhindi Mitima, Batasema Lukanga et consorts, parties civiles" ("Closing Brief filed on behalf of victims"), on file with Human Rights Watch, p. 27.

¹⁸⁶ Closing Brief filed on behalf of victims, p. 28.

¹⁸⁷ Human Rights Watch interview with Congolese lawyer, May 22, 2014; Human Rights Watch interview with UN official, May 22, 2014; Human Rights Watch interview with Congolese lawyer, May 23, 2014.

¹⁸⁸ Human Rights Watch interview with Congolese justice official, May 24, 2014.

¹⁸⁹ On the weaknesses of prisons and detention centers in Congo, see UN Mapping Report 2010, p. 422; Audit organisationnel du secteur de la justice en République Démocratique de Congo, réalisé en 2003-2004 par la Commission Européenne, conjointement avec la Grande-Bretagne, la Belgique, la France, le Haut Commissariat des Droits de l'Homme, le PNUD et la MONUC ("EU audit of 2004"), "*Rapport de synthèse des ateliers pour l'élaboration d'un programme cadre de la justice*," on file with Human Rights Watch. There are precedents of rape victims having testified in criminal proceedings and who were later re-victimized by their aggressors, see Rebecca Feeley and Colin Thomas-Jensen, Enough Project, "Getting Serious about Ending Conflict and Sexual Violence in Congo," March 2008, <http://www.enoughproject.org/files/publications/CongoSerious.pdf> (accessed September 14, 2015); Human Rights Watch interview with Congolese civil society activist, Goma, May 22, 2014.

of those convicted to have contact with their families should be taken into consideration when implementing such a measure.¹⁹⁰

While the long-term solution is to strengthen Congo's prison system, it is important in the short term to set up an alert mechanism at the prison in Goma so that any relevant escape could be immediately reported and measures taken to protect anyone at risk. A national specialized protection program, which could be created with the assistance of MONUSCO, could assume protection responsibilities in international crimes cases.



A psychologist comforts a woman before she testifies about having been raped at the Minova trial. © 2014 Diana Zeyneb Alhindawi

Victim Participation

Participation by victims in criminal proceedings is essential for bringing forth evidence that can result in convictions.¹⁹¹ Participating as civil parties also enables victims to claim reparations and helps make justice a tangible reality for those directly affected by atrocities.

¹⁹⁰ Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014; Human Rights Watch telephone interview with Congolese lawyer, August 8, 2014.

¹⁹¹ Congo has a civil law justice system that allows the participation of victims in criminal proceedings not only as witnesses for the prosecution but also as victim participants (*parties civiles*) in both the civilian and military justice systems. Loi no 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de procédure pénale congolais ("Congolese Civilian Criminal Procedural Code"), <http://www.leganet.cd/Legislation/JO/2006/JO.01.08.2006.C.P.P.06.019.pdf> (accessed September 14, 2015), art. 69; Congolese Military Criminal Code, art. 226.

In practice, however, victims of grave international crimes in Congo face numerous challenges accessing justice. They may have to travel a long way to reach justice officials. They may not have the financial means to register as a victim participant or to hire a lawyer.¹⁹² They may also fear retaliation by the perpetrator or stigmatization in their community if the crime they suffered becomes known, especially in rape and sexual violence cases.

In the Minova trial, victim participation was in large part a success due to the work of local groups, such as the Association des Personnes Déshéritées Unies pour le Développement (APDUD) in Minova and Centre d'Assistance Medico-Psychosociale (CAMPS) in Bukavu, accompanied by the international groups ASF and the ABA.¹⁹³ ABA and ASF coordinated and shared work from the beginning of the investigations in this case. The two organizations funded 12 Congolese lawyers to represent victims. They worked in coalition and regularly met to discuss their strategy, even if they did not agree at all times. ABA staff and lawyers assisted rape victims while ASF worked with victims of other crimes.¹⁹⁴

As noted above, a total of 1,016 victims were registered as civil parties in the Minova case. An ASF staff member said their organization's aim was to "find all the victims" of crimes during the retreat to Minova and surrounding villages. During the investigative phase, ASF and ABA brought the victims to the military magistrates for interviews and ensured that the victims had access to a lawyer early on who could explain to them their rights and how the process would work.¹⁹⁵

¹⁹² The judicial fee to register as a civil party is US\$7, a large sum for many in eastern Congo. Human Rights Watch interview with international NGO staff member, May 20, 2014; Human Rights Watch interview with international NGO staff member, May 21, 2014; Human Rights Watch interview with Congolese lawyer, May 22, 2014; Human Rights Watch interview with Congolese lawyer, May 23, 2014; Government of the Democratic Republic of Congo, Official Leaflet on Justice Fees.

¹⁹³ Human Rights Watch interview with international NGO staff member, May 20, 2014; Human Rights Watch interview with international NGO staff member, May 21, 2014; Human Rights Watch interview with Congolese lawyer, May 22, 2014; Human Rights Watch interview with international NGO staff members, May 22, 2014; Human Rights Watch interview with Congolese lawyer, May 25, 2014.

¹⁹⁴ ASF funded four lawyers and the ABA eight lawyers to represent victims in the Minova case. ASF finances the work of independent lawyers, who are organized in a pool of lawyers specialized in international crimes and who receive regular training. ABA lawyers are staff members of the organization. In the Minova case, some of the lawyers belonged to the Bukavu Bar Association, while others belonged to the Goma Bar Association. Human Rights Watch interview with international NGO staff member, May 20, 2014; Human Rights Watch interview with international NGO staff member, May 21, 2014; Human Rights Watch interview with Congolese lawyer, May 22, 2014; Human Rights Watch interview with international NGO staff members, May 22, 2014; Human Rights Watch interview with Congolese lawyer, May 23, 2014.

¹⁹⁵ Human Rights Watch interview with international NGO staff member, May 20, 2014; Human Rights Watch interview with Congolese lawyer, May 23, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 25, 2014.

ABA and CAMPS ensured the presence of two psychologists who provided counseling to victims before they met the military investigators and prosecutors.¹⁹⁶ Legal and psychological assistance to victims at this early stage of the proceedings is rare in domestic proceedings for grave international crimes in Congo. ABA and ASF paid the registration fees for the 130 victims who had to pay them to become civil parties, while 886 others were declared indigent and exempted from payment.¹⁹⁷

At trial, the victims' lawyers were allowed to question witnesses, they collaborated with the judges to identify which victims were best placed to give testimony in court, and they facilitated their appearance in court.¹⁹⁸ Non-governmental organizations organized and paid for the transportation of all victims who came to testify in the trial, both in Minova and Goma, while the UN Joint Human Rights Office covered costs for accommodation and meals. One of the victims' lawyers said: "Victims' participation in trials for serious international crimes would not be possible without ASF and ABA."



Judges and other judicial officials of the Operational Military Court meet with victims in a waiting room before the day's testimonies begin. © 2014 Diana Zeyneb Alhindawi

¹⁹⁶ Human Rights Watch interview with psychologist, May 21, 2014; Human Rights Watch interview with Congolese lawyer, May 22, 2014.

¹⁹⁷ Human Rights Watch interview with international NGO staff member, May 20, 2014; Human Rights Watch email correspondence with Congolese lawyer, August 18, 2014; Minova Judgment, p. 82.

¹⁹⁸ Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 22, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014.

There were two important shortcomings with regard to victims' participation in the Minova trial:

First, observers and parties in the trial described stark contradictions at trial within the testimonies of some of the victims, raising concerns about possible "false victims." It is undoubtedly intimidating for vulnerable and often traumatized victims to give testimony in criminal proceedings, and this may explain some contradictions.¹⁹⁹ But many participants and observers to the proceedings concluded that there may have been a problem of "false victims" at various stages of the investigation and trial.²⁰⁰ Some suggested that the widespread interest and publicity around the Minova events led some people to believe they could obtain compensation or other benefits in exchange for their testimony.

This indicates the need for military prosecutors and victims' lawyers to carefully cross-check the credibility of victim testimony. Further work may also be needed to train local NGOs in the legal ethics of finding victims and facilitating their participation in justice proceedings. Managing victims' expectations about what is to be gained from judicial proceedings is also critical.

A second shortcoming regarding victims' participation was the lack of payment of court-ordered reparations. NGOs, victims' representatives and victims interviewed by Human Rights Watch all stressed that a major problem with regards to victims' participation in national trials for grave international crimes in Congo is that court-ordered reparations are never paid.²⁰¹ In the Minova judgment, the judges ordered US\$15,000 to each of the two victims whose assailants were convicted of rape. They further ordered that \$100,000 be paid to the father of a murdered boy, \$5,000 each for four owners of pillaged shops in Minova, and \$700 each to 65 other victims of pillage. In the Minova judgment, like in previous judgments involving

¹⁹⁹ Human Rights Watch interview with psychologist, Goma, May 21, 2014.

²⁰⁰ Human Rights Watch interview with Congolese civil society activist, Goma, May 20, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff members, Goma, May 22, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 22, 2014; Human Rights Watch interview with Congolese lawyer, Bukavu, May 23, 2014; Human Rights Watch interview with two Congolese civil society activists, Minova, May 24, 2014; Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014.

²⁰¹ Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 22, 2014; Human Rights Watch interview with international NGO staff members, Goma, May 22, 2014; Human Rights Watch separate interviews with two victims having participated in the Minova trial, Minova, May 24, 2014; Human Rights Watch interview with two Congolese civil society activists, Minova, May 24, 2014.

soldiers as accused, the Congolese state, as the institution bearing civil responsibility for the actions of its civil servants, is ordered to pay the reparations when soldiers are indigent. One Congolese state official, while recognizing the duty of the state to pay, suggested that the lack of payment of reparations may be due to technical or legal difficulties at the Finance Ministry.²⁰² Others believed there was simply no willingness to pay.²⁰³

It is important that Congolese authorities consult with judicial officials, lawyers, local and international NGOs representing victims, and reparations experts to design an effective and sustainable reparations strategy for grave international crimes.

Direct Application of the ICC’s Rome Statute

The definitions in the Congolese Military Criminal Code (revised in 2002) of international crimes—war crimes, crimes against humanity, and genocide—are confusing and inconsistent with those in the Rome Statute, the ICC’s founding treaty.²⁰⁴

Congolese law also does not include the various modes of liability that may be needed to effectively prosecute international crimes. Notably, as mentioned above, command or superior responsibility, as defined at the international tribunals and in the Rome Statute, does not exist under Congolese law.

Given this confusing and incomplete national legal framework, military prosecutors and judges in the Minova case—as in several previous trials involving grave international crimes before Congolese military courts—chose to apply the provisions of the Rome Statute directly together with other relevant national laws.²⁰⁵ This application is possible

²⁰² Human Rights Watch interview with Congolese official, Goma, May 22, 2014.

²⁰³ Human Rights Watch interview with international NGO staff member, Goma, May 20, 2014; Human Rights Watch interview with international NGO staff member, Goma, May 21, 2014; Human Rights Watch interview with Congolese lawyer, Goma, May 22, 2014.

²⁰⁴ The definitions of crimes against humanity, which can be found at articles 165, 167, 169 and 170 of the Congolese Military Criminal Code, are mixed up with those of war crimes. For example, article 165 states: “Crimes against humanity are grave violations of international humanitarian law committed against civilians before and during the war.” The definitions of war crimes, at articles 173 and 174 of the Congolese Military Criminal Code, are similarly unsatisfactory. War crimes are laconically defined as “violations of the laws of the Republic during war” with no underlying offenses mentioned. Article 174 is ambiguous but seems to suggest that those who can be prosecuted for war crimes, as defined in article 173, are exclusively persons who were at “the service of the enemy.” In addition, Congolese law does not differentiate between conflicts of an international and non-international character, and only refers to the term “war,” the definition of which is unclear.

²⁰⁵ ASF, “Study of Case Law: Application of the Statute of Rome of the International Criminal Court by Congolese courts” (“ASF Jurisprudence Study 2009”), March 2009, http://www.asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf (accessed September 15, 2015); ASF, “La mise en oeuvre judiciaire du Statut de Rome en RD Congo” (“ASF Jurisprudence Study 2014”), April 2014, <http://www.asf.be/blog/publications/la-mise-en-oeuvre-judiciaire-du-statut-de->

because Congo is a monist country, meaning that once an international treaty is ratified and officially published, it has higher normative status than national legislation and can be applied directly by national courts. Direct application of Rome Statute without incorporating it into national law is rare—an insightful and noteworthy practice by Congolese justice officials.

It is also notable that the judges in this case did not pronounce the death penalty—available in Congo—for those convicted of war crimes.²⁰⁶ The rapporteur of the bench, Judge Mukendi, told Human Rights Watch, “You cannot use the definitions of the Rome Statute [which does not permit capital punishment] and then order the death penalty. One must be consistent in one’s approach.”²⁰⁷

But while direct use of the ICC’s Rome Statute proved significant in the Minova trial, it would be better and easier for national judicial officials to be able to refer to national laws and procedure when prosecuting grave international crimes. Working from international treaties and jurisprudence is a difficult exercise for prosecutors and judges as well as for lawyers who have neither an extensive experience in international criminal law nor easy access to relevant materials.²⁰⁸ This can be especially confusing when national and international law contradict each other. Congolese national jurisprudence using ICC provisions has also been of varying quality.²⁰⁹ A draft law implementing the Rome Statute into national law would help address these challenges and has been under consideration for over 10 years.

rome-en-rdc-congo-april-2014/ (accessed September 15, 2015); Antonietta Trapani, Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases (DOMAC), “Complementarity in the Congo: the direct application of the Rome Statute in the military courts of the DRC” (“DOMAC Report 2011”), November 2011, <http://www.domac.is/media/domac-skjol/Domac-12-Trapani.pdf> (accessed September 15, 2015). In the Minova case, the military prosecutors used the Congolese Military Criminal Code to define purely military offenses, such as disobeying orders or wasting ammunitions; the civilian criminal code to define one rape as an ordinary crime and extortion; a 2009 national law on the protection of the child to define a second rape as an ordinary crime, and the Rome Statute to define the war crimes of pillage and rape and the modes of liability of co-perpetration and command responsibility.

²⁰⁶ Although the death penalty is still permitted in Congo, there has been a moratorium on executions since 2003. See Ensemble Contre la Peine de Mort, “La peine de mort dans le monde: République Démocratique du Congo,” undated, <http://www.abolition.fr/node/76> (accessed September 15, 2015). Human Rights Watch opposes the death penalty in all circumstances as an inhumane and irrevocable punishment.

²⁰⁷ Human Rights Watch interview with Congolese justice official, Goma, May 24, 2014.

²⁰⁸ For example, in the Minova trial, there were extensive discussions about the elements of war crimes and whether the events in Minova could be considered as having happened in the context of an armed conflict. See Closing Brief filed on behalf of Capt. Kangwanda, pp. 17-20; Minova Judgment, pp. 61, 68, 71.

²⁰⁹ ASF Jurisprudence Study 2009; ASF Jurisprudence Study 2014.

Diplomatic Pressure

Concerted diplomatic efforts played an important role in bringing about the necessary political will to investigate and prosecute the Minova crimes. These efforts included both private and public diplomacy, the involvement of a variety of actors, consistent messaging over a long period, and the use of conditionality for military assistance.

The United States and the UN were particularly invested in seeing an appropriate response to the crimes in Minova. Both provided military assistance to some of the army battalions who were later present in Minova and surrounding villages at the end of November 2012.²¹⁰ MONUSCO made clear that military support to battalions implicated in Minova crimes would only continue if the military justice system conducted an independent and effective investigation into the crimes there and suspects were prosecuted in a fair trial.²¹¹ In application of national law prohibiting support to foreign units implicated in gross human rights violations, the United States suspended military assistance to the 391st Battalion.²¹²

²¹⁰ The United States provided military training to the 391st Battalion for over three years while MONUSCO supported and fought alongside Congolese army troops in the conflict against the M23 in 2012 and 2013. See John Vandiver, “US-trained Congolese Battalion among units accused of Rape,” *Stars and Stripes*, May 10, 2013, <http://www.stripes.com/news/africa/us-trained-congolese-battalion-among-units-accused-of-rape-1.220357> (accessed September 22, 2015); Eric Elliott, “750 Congolese Soldiers Graduate from U.S.-led Military Training, Form Light Infantry Battalion,” *U.S. AFRICOM*, September 20, 2010, <http://www.africom.mil/Newsroom/Article/7727/750-congolese-soldiers-graduate-from-us-led-milita> (accessed September 15, 2015); “US Trained Congolese troops committed rapes and other atrocities, UN says,” *Washington Post*, May 13, 2013, http://www.washingtonpost.com/world/national-security/us-trained-congolese-troops-committed-rapes-and-other-atrocities-un-says/2013/05/13/9781dd88-bbfe-11e2-a31d-a41b2414d001_story.html (accessed September 15, 2015); UN Secretary-General Report on MONUSCO, S/2010/164, paras. 2, 4, 8, 11; “Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo,” May 23, 2012, S/2012/355, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/355&Lang=E (accessed September 15, 2015), paras. 22, 25, 46, 58-59; “Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo,” S/2012/838, November 12, 2014, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/838&Lang=E (accessed September 15, 2015), para. 67.

²¹¹ According to UN Security Council Resolution 1906 (2009), MONUSCO’s support to FARDC troops is conditioned to their respect of international human rights, humanitarian and refugee law. UN Security Council, Resolution 1906 (2009), S/RES/1906 (2009), [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1906\(2009\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1906(2009)) (accessed September 15, 2015), preambular para. 8, 10, 14, para. 22, 23. The UN also adopted a “Human Rights Due Diligence Policy” in February 2013. The policy deals with UN support to non-UN security troops. It aims at ensuring that this support is consistent with the UN Charter and UN international obligations to respect human rights, humanitarian and refugee law. According to the policy, if UN entities become aware of human rights violations committed by non-UN troops to which they are giving support, they should intercede with local authorities to ensure that the human rights violations stop immediately. If the violations do not stop, UN entities should suspend or withdraw support. See UN Human Rights due Diligence Policy on United Nations support to non-United Nations security forces, A/67/775-S/2013/110, http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/110&referer=http://www.un.org/en/sc/documents/letters/2013.shtml&Lang=E (accessed September 15, 2015).

²¹² See U.S. Department of State, “An Overview of the Leahy Vetting Process”, September 7, 2013, <http://www.humanrights.gov/dyn/an-overview-of-the-leahy-vetting-process.html> (accessed September 22, 2015); IRIN, “Can the DRC Army stop abusing human rights?” August 12, 2013, <http://www.irinnews.org/report/98554/can-the-drc-army-stop-abusing-human-rights> (accessed September 22, 2015); Human Rights Watch phone interview with US official, September 17, 2015.

In the months that followed the Minova events, a steady diplomatic campaign unfolded. A variety of actors held private meetings and issued public statements calling for justice. MONUSCO started a formal process to suspend support to implicated battalions in February 2013 and sent at least three separate letters to the Congolese government urging that immediate steps be taken to bring perpetrators of the Minova crimes to justice.²¹³ UN military support to the units involved in the Minova events was temporarily suspended.²¹⁴

The UN Joint Human Rights Office publicly released the results of its own Minova investigations in May 2013. The report helped establish the gravity of the crimes that had been committed and increase pressure for accountability.²¹⁵ Other actors made public calls for justice, including France, the United Kingdom, the US, and the UN Security Council.²¹⁶ US diplomats met with Congolese government officials in Kinshasa, as well as with military judicial officers in Kinshasa and Bukavu.²¹⁷ In the beginning of October 2013, the US, UK, and MONUSCO issued statements expressing disappointment at the lack of progress in the Minova investigation.²¹⁸

A Congolese government official said:

It is true that the government waited a little bit with this case. There was still a war against the M23; it would have made the soldiers angry. MONUSCO, the US, and NGOs put a lot of pressure; their role was important.²¹⁹

²¹³ UNJHRO Report May 2013, p. 15.

²¹⁴ Human Rights Watch telephone interviews with UN official, October 6 and 7, 2014.

²¹⁵ Human Rights Watch telephone interviews with UN official, October 6 and 7, 2014.

²¹⁶ "Paris juge insuffisantes les sanctions de Kinshasa après les viols à Minova," *Radio Okapi*, June 25, 2013, <http://radiookapi.net/actualite/2013/06/25/paris-juge-insuffisantes-les-sanctions-de-kinshasa-apres-les-viols-minova/#.U9eZebccRdg> (accessed September 15, 2015); "Foreign Secretary comments on verdict in Minova mass rape case," Foreign & Commonwealth Office, May 7, 2014, <https://www.gov.uk/government/news/foreign-secretary-comments-on-verdict-in-minova-mass-rape-case> (accessed September 15, 2015); "US Trained Congolese troops committed rapes and other atrocities, UN says," *The Washington Post*, May 13, 2013; UN Security Council Presidential Statement on the Democratic Republic of the Congo, July 25, 2013, <http://usun.state.gov/remarks/5769> (accessed September 23, 2015).

²¹⁷ Human Rights Watch interview with diplomat, Goma, May 21, 2014.

²¹⁸ "MONUSCO deplores lack of progress on the Minova case," MONUSCO press release, October 19, 2013, <http://monusco.unmissions.org/Default.aspx?tabid=10662&ctl=Details&mid=14701&Itemid=20206&language=en-US> (accessed September 15, 2015); "U.S., Britain push Congo to prosecute soldiers over Minova rapes," Reuters, October 6, 2013, <http://www.reuters.com/article/2013/10/06/us-congo-democratic-rapes-idUSBRE9950J820131006> (accessed September 25, 2015).

²¹⁹ Human Rights Watch interview with Governor of North Kivu province, Julien Paluku, May 22, 2014.

Several critical steps in the Minova case seem to have coincided with heightened international pressure. For example, interviews of commanders by the General Military Prosecution’s Office took place as MONUSCO was preparing to suspend military support to Congolese battalions involved in the Minova crimes in April 2013. The scheduling of a trial date in November 2013 occurred after a visit of the UN Security Council and another round of international statements expressing concerns about the lack of progress in the case. After an NGO representative expressed concern that the delay between the indictments and the trial opening date was too short, a prosecutor from the Military General Prosecution’s Office reportedly said: “We are under international pressure. We must send this case to trial or we risk an embargo.”²²⁰

While clearly indispensable in moving the case forward, the intense international pressure may have been a double-edged sword. The widespread public and media interest may have put the military justice officials under intense pressure to quickly provide results whatever the costs. This may have contributed, in combination with the serious shortcomings documented in this report, to the ultimately botched prosecutions. As discussed below in the section The Way Forward, international partners should ensure that diplomatic pressure is carried out strategically in order to encourage prosecutions for grave international crimes that are free and fair and bring credible justice.

²²⁰ Human Rights Watch interview with international NGO staff member, May 20, 2014.

VI. The Way Forward

Improving the prosecution of war crimes and crimes against humanity cases at the national level is intricately related to broader reform of the criminal justice system in Congo.

Ensuring fair, impartial, and effective trials for atrocity crimes is only one aspect of broader justice sector reform. Yet justice for these crimes will be essential to re-establishing victims' and the broader population's trust in justice institutions, and anchoring respect for the rule of law and human rights, which are at the heart of any democratic society.²²¹

Congolese authorities have begun work on justice sector reforms in the past several years with the support of international partners, adopting an action plan on justice reform in 2007 and a Roadmap in 2009, and taking some concrete measures such as the recruitment of additional judicial staff and the (continued) work on several laws.

From April 27 to May 2, 2015, the Congolese Ministry of Justice convened the “*Etats Généraux de la Justice*,” a large conference to evaluate justice sector reform to date and to identify priority actions going forward. Over 200 participants, including the president, staff from the military and civilian justice systems, civil servants and officials from the Ministry of Justice and other ministries, representatives of the parliament, bar associations, universities, international donors, and national and international civil society representatives participated.²²²

An official report of the *Etats Généraux* that lists key recommendations in order of priority is being prepared. Based on the meeting and subsequent recommendations, the government plans to produce a judicial programmatic law by the end of 2015, which would set out and formalize in law the government's priorities for justice sector reform over the next few years.²²³

²²¹ Phuong N. Pham and Patrick Vinck, Harvard Humanitarian Initiative and UNDP, “Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of the Congo,” 2014, http://www.peacebuildingdata.org/sites/m/pdf/DRC2014_Searching_for_Lastning_Peace.pdf (accessed September 25, 2015).

²²² Human Rights Watch, “Etats Généraux of the Justice System in the Democratic Republic of Congo: Recommendations on the Fight Against Impunity for Grave International Crimes,” April 27, 2015, <https://www.hrw.org/news/2015/04/27/etats-generaux-justice-system-democratic-republic-congo>.

²²³ Human Rights Watch interview with Congolese Justice Minister Alexis Thambwe Mwamba, Kinshasa, June 2, 2015.

An appraisal of general justice sector reform in Congo is beyond the scope of this report, but further progress in a number of areas is urgently needed.

Some of the measures with most bearing on the effective prosecution of grave international crimes include: improvements to the legal framework and alignment of the military criminal and judicial code of 2002 with the 2006 constitution; the establishment of Congo's highest courts (the *Cour de Cassation* and *Conseil d'Etat*); restoration of state-provided education and training for judicial staff; strengthening the independence of the judiciary; and an overhaul of the prison system.

Since the Minova crimes and trial, significant efforts have been undertaken to fight sexual violence and increase accountability for such crimes in Congo. In July 2014 President Joseph Kabila nominated a personal representative on the fight against sexual violence and the recruitment of child soldiers. The representative's office works to facilitate reporting of sexual violence crimes, to prevent sexual violence through education, and to press for accountability for sexual violence crimes, among other objectives.²²⁴

In September 2014, the Congolese armed forces adopted a national action plan against sexual violence in conflict.²²⁵ Several prosecutions for grave international crimes, including rape, have taken place or finished since the Minova trial, including for example that of Col. Bedi Mobuli Engangela (known as "Colonel 106"), Gen. Jérôme Kakwavu, and lower-level police and army members.²²⁶ Finally, initial steps are underway to implement reparations ordered for victims, including by drafting a law creating a trust fund for reparations.²²⁷

²²⁴ Presidency of the Republic, Office of the Personal Representative of the Head of State in charge of the fight against sexual violence and recruitment of children, <http://en.stopdrcsexualviolence.org/> (accessed September 1, 2015).

²²⁵ Plan d'Action des Forces Armées de la République Démocratique du Congo pour la Lutte contre les Violences Sexuelles (Action Plan of the Armed Forces of the Democratic Republic of Congo on the fight against sexual violence), undated, on file with Human Rights Watch; "DRC: Military Pledge Marks Milestone On Road to Ending Conflict-Related Sexual Violence," UN press release, March 31, 2015, <http://www.un.org/sexualviolenceinconflict/press-release/drc-military-pledge-marks-milestone-on-road-to-ending-conflict-related-sexual-violence/> (accessed September 1, 2015).

²²⁶ Anneke van Woudenberg, "First Congolese General Convicted of Rape," Human Rights Watch Dispatch, November 10, 2014, <http://www.hrw.org/news/2014/11/10/dispatches-first-congolese-general-convicted-rape>; "DR Congo colonel Kibibi Mutware jailed for mass rape," *BBC News Online*, February 21, 2011, <http://www.bbc.co.uk/news/world-africa-12523847> (accessed September 1, 2015).

²²⁷ A draft law creating a trust fund to pay reparations to victims has been presented by the Congolese government to the Senate at the initiative of the Office of the Personal Representative of the Head of State in charge of the fight against sexual violence and the recruitment of children. Human Rights Watch interview with Office of the Personal Representative of the Head of State in charge of the fight against sexual violence and the recruitment of children, Kinshasa, June 3, 2015.

Drawing from the experience of the Minova case, this section of the report discusses a number of reforms that could considerably improve the fight against impunity in Congo. Reforms to the system as it currently operates are first discussed, including legislative improvements, the creation of a specialized investigation cell, and transferring jurisdiction over grave international crimes to the civilian justice system.

Given the vast number of serious international crimes committed in Congo over the past two decades and challenges faced by national courts, the establishment of a temporary internationalized mechanism within the Congolese judicial system to prosecute these crimes continues to be a critically important proposal. The participation of international personnel for the initial years, as proposed in two government draft laws over the past five years, could help build specialized capacity and expertise among Congolese judicial staff. It could also help protect against political and military interference in sensitive cases.

Criminal Justice System Reforms

With the recent exception of a case about crimes against humanity and genocide that just started before the Appeals Court of Lubumbashi, all cases to date involving grave international crimes, namely war crimes and crimes against humanity, have been tried before military courts in Congo. Congo has ratified several international treaties prohibiting grave international crimes, such as the Genocide Convention, the Geneva Conventions, and the Convention against Torture.²²⁸ Congo is also a state party to the International Criminal Court.²²⁹ The Congolese Military Criminal Code has included definitions of war crimes, crimes against humanity, and genocide since 1972, with

²²⁸ Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, G.A. res. 260 (III), *Official Records of the General Assembly, Third Session*, Part I (A/810), p. 174, entered into force January 12, 1951, ratified by the Democratic Republic of Congo on May 31, 1962; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field, adopted August 12, 1949, 75 U.N.T.S. 31, entered into force October 21, 1950, ratified by the Democratic Republic of Congo on February 24, 1961; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted August 12, 1949, 75 U.N.T.S. 85, entered into force October 21, 1950, ratified by the Democratic Republic of Congo on February 24, 1961; Geneva Convention relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 U.N.T.S. 135, entered into force October 21, 1950, ratified by the Democratic Republic of Congo on February 24, 1961; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950, ratified by the Democratic Republic of Congo on February 24, 1961; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the Democratic Republic of Congo on March 18, 1996.

²²⁹ Rome Statute, art. 126. Signed by the Democratic Republic of Congo on September 8, 2000, and ratified on April 11, 2002, see “States Parties to the Rome Statute,” ICC, http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/democratic%20republic%20of%20the%20congo.aspx (accessed September 22, 2015).

revisions in 2002. Despite this existing legal framework, no investigation or prosecution of grave international crimes had taken place before 2003, even though there have been widespread international crimes in Congo since the 1990s.²³⁰

Since the beginning of the ICC’s investigation in Congo in 2004, Congolese authorities and international partners have sought to encourage “complementarity” between the ICC and the national justice system. The “complementarity” principle, defined in the preamble and article 17 of the Rome Statute of the ICC, means that national judicial systems retain primary responsibility to investigate and prosecute war crimes, crimes against humanity, and genocide, and that the ICC will only step in as a court of last resort—in essence, to “complement” judicial efforts when national courts are unable or unwilling to act.

Foreign donors have funded a variety of programs aimed at increasing local capacity to deal with these crimes. Since 2004, due to a stronger commitment to justice on the part of Congolese authorities matched with international assistance, there have been an increasing number of trials for war crimes and crimes against humanity before military courts in Congo.

There is no comprehensive public record of judgments rendered by national courts in Congo. This makes it difficult to evaluate exactly how many trials for war crimes and crimes against humanity have taken place, but the total can be estimated at about 30 over the past decade.²³¹ About two-thirds of these trials involved Congolese army soldiers; the others involved members of non-state armed groups. In addition, military and civilian courts have handed down several hundred convictions for rape committed by members of the army and civilians as an ordinary crime, notably through “mobile courts”—that is, *in situ* hearings of local military and civilian courts—sponsored by international partners.²³²

²³⁰ UN Mapping Report 2010, pp. 376-393.

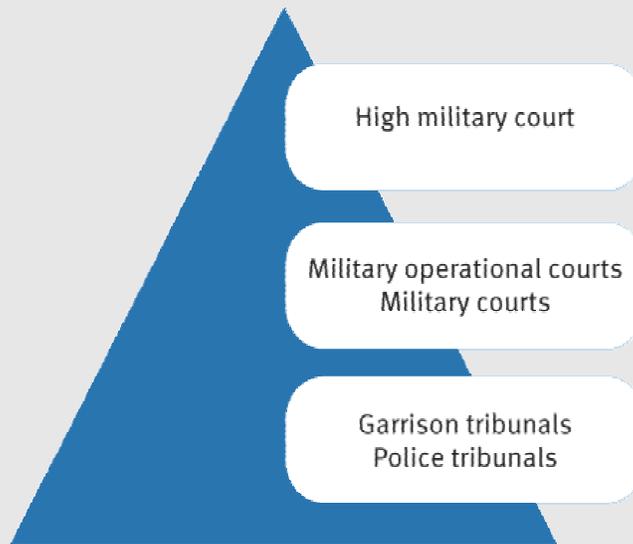
²³¹ An analysis of several publications suggests that about 30 trials involving charges of war crimes and crimes against humanity have taken place before Congolese military courts over the past decade. For example, see UN Mapping Report 2010; ASF Jurisprudence Study 2009; ASF Jurisprudence Study 2014; DOMAC Report 2011; 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; ICTJ Report 2015.

²³² Supported by MONUSCO, multiple donors and other international and national organizations, “mobile courts” consist of facilitating trials by military and ordinary courts in the locations where the crimes occurred and where no justice institutions exist. MONUSCO and other partners provide financial and logistical support to enable travel by local judges, prosecutors, victims and defense lawyers from the provincial capitals to remote rural locations. The holding of these “mobile courts” has been supported for cases involving grave international crimes, such as war crimes, crimes against humanity and sexual violence. See MONUSCO Report April 2014; Passy Mubalama and Simon Jennings, “Roving Courts in Eastern Congo”; OSF,

Congo's Military Justice System

The military justice system in Congo has three levels of courts:

1. At the lowest level are garrison tribunals that can be established in a district, town, or at a military base and that have jurisdiction over rank-and-file soldiers. There are several garrison tribunals in each of Congo's former 11 provinces;²³³
2. Above the garrison tribunals are military courts, which are established at the provincial level and have jurisdiction over cases involving officers (with the exception of those who benefit from privileges of jurisdiction, as explained below). There can be one or two military courts per province, which are usually located in the provincial capital; and
3. The High Military Court, based in Kinshasa, hears appeals from lower courts and cases in first instance against officers with privileges of jurisdiction, namely generals and certain military justice officials.²³⁴



"Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo," January 14, 2013, <http://www.opensocietyfoundations.org/sites/default/files/justice-drc-20130114.pdf> (accessed September 22, 2015).

²³³ In July 2015, the number of provinces in Congo was increased to 26 in implementation of the 2006 constitution.

²³⁴ Congolese Military Judicial Code, art. 128.

The Military Judicial System in the Democratic Republic of Congo

In addition, the military judicial code foresees the creation of operational military courts in times of war, such as the one that heard the Minova case.

All these courts have jurisdiction over grave international crimes, and cases have been investigated and tried at all levels. The location of the crime and the rank of the army members involved determine which military court hears the case. Each level has a military prosecution office and military investigators.

The General Military Prosecution Office in Kinshasa is attached to the High Military Court. In addition to the cases heard before that court, the General Military Prosecution Office supervises all other military prosecution offices. It has the power to give orders to investigate to lower prosecutors, and to get involved in or take over any case before a military court in Congo.²³⁵ Military court benches are composed of a minority of professional judges, assisted by “associate judges,” who are army officers, chosen at random for each trial from a list prepared by the local military command.²³⁶

The efforts of the military justice system in combatting impunity for atrocities in Congo have been innovative and courageous in the face of great difficulties, including security issues. To date, military trials have been the only available remedy for victims at the national level.

Although civilian courts could also theoretically apply the Rome Statute directly, they have not done so. In a law promulgated in April 2013, appeals courts in the civilian justice system were explicitly given jurisdiction over war crimes, crimes against humanity, and genocide, but there are problems with that law, as discussed below.²³⁷

While the developments before the military courts are encouraging, the number of actual trials for international crimes is still remarkably low considering the large scale of serious

²³⁵ *Ibid.*, art. 42.

²³⁶ See note 121.

²³⁷ *Loi organique portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire* (Organic Law on the Organization, Functioning and Competences of Jurisdictions of the justice system), entered into force on April 11, 2013, <http://www.leganet.cd/Legislation/Droit%20Judiciaire/LOI.13.011.11.04.2013.htm> (accessed September 1, 2015) (“April 2013 Law”).

crimes committed in Congo. Many grave crimes have never been investigated, and in other cases, investigations have been stalled for years.²³⁸

Beyond the number of trials and convictions, the quality of the justice rendered needs to also be considered. Most of those who have been tried for serious crimes to date are low-level soldiers, and these trials have often been plagued by serious problems: investigations are of poor quality; victims and witnesses are subject to threats and intimidation; and the rights of defendants are not rigorously upheld.²³⁹

The handful of higher-ranking officers who have been prosecuted (a few colonels and one general) were mostly former rebel leaders or individuals who had fallen out of grace with their command. Sensitive cases have been fraught with interference from political and military officials, and those who were convicted sometimes escaped due to the poor state of prison facilities.²⁴⁰

The Minova case brings to light a number of challenges and the improvements needed to strengthen the expertise, capacity, and impartiality of the Congolese military justice system in handling international crimes.

As long as the military justice system continues to handle the bulk of grave international crimes, several reforms should be made to strengthen the legislative framework, expertise, and impartiality surrounding these cases.

²³⁸ Human Rights Watch, “DR Congo: Ending Impunity for Sexual Violence,” June 10, 2014, <https://www.hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence>; Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo*, July 2009, <http://www.hrw.org/sites/default/files/reports/drco709web.pdf>, pp. 47-50. UN Mapping Report 2010, paras. 861, 958, 974; DOMAC Report 2011, p. 62; MONUSCO Report April 2014, paras. 4, 43; ICTJ Report 2015, p. 29.

²³⁹ With the notable exceptions of Gen. Jérôme Kakwavu, who was prosecuted for war crimes before the High Military Court in Kinshasa, and Lieutenant Colonel Kibibi and Colonel Bedi Mobuli Engangela (also known as “Colonel 106”), who were recently prosecuted before the military court in Bukavu, all other accused have been rank-and-file soldiers or low-level officers. Milli Lake, “Congo-Kinshasa: After Minova – Can War Crimes Trials Overcome Violence in the DRC?” *All Africa*, May 8, 2014, <http://allafrica.com/stories/201405090554.html?page=2> (accessed September 22, 2015).

²⁴⁰ UN Mapping Report 2010, pp. 436-437; OSF Report 2011, pp. 32, 36-37; MONUSCO Report April 2014, pp. 13, 17, 19-21; Amnesty International, “The Time for Justice is Now: New Strategy Needed in the Democratic Republic of the Congo” (“Amnesty Report 2011”), August 10, 2011, <http://www.amnesty.org/en/library/asset/AFR62/006/2011/en/6cd862df-be60-418e-b70d-7d2d53a0a2d4/afr620062011en.pdf> (accessed September 2, 2015), pp. 4, 14, 39-41, 51-53; AfriMAP and OSISA, “République démocratique du Congo La justice militaire et le respect des droits de l’homme – L’urgence du parachèvement de la réforme” (“AfriMAP and OSISA Report 2009”), 2009, <http://www.afriMAP.org/english/images/report/AfriMAP-RDC-JusticeMilitaire-FR.pdf> (accessed September 14, 2015), p. 86; AfriMAP and OSISA Report 2013, p. 124; ICTJ Report 2015, pp. 15, 26.

More broadly, the dominating role of the military justice system in Congo in prosecutions of serious human rights violations runs counter to a growing body of international and regional standards which recognize that such crimes should be handled by civilian courts.²⁴¹ Steps should be taken in Congo to enhance the role of the civilian justice system in the fight against impunity.

National Criminal Policy on Accountability

Following the *Etats Généraux*, Congo's government should articulate a clear national policy for the prosecution of grave international crimes. Such a policy should lay out the government's current approach, which has included continued cooperation with the ICC, establishing an internationalized justice mechanism, and strengthening the ordinary justice system.

The key elements of such a policy could be identified in the judicial programmatic law that will be prepared by the government, as mentioned above. In addition, officials in a newly established unit on the fight against impunity in the Ministry of Justice told Human Rights Watch that one of their tasks was to draft a detailed national action plan against impunity.²⁴² The government should validate such an action plan in order to guide priority actions in the coming years.

These measures could greatly contribute to efforts aimed at better coordinating and directing support from international partners in this field. Heightened national financial investment in this critical area, to the extent possible, would not only demonstrate strong political will to ensure accountability for grave crimes, but would also help to sustain activities.

Strengthening Legal Framework

The government should review or adopt several laws in order to strengthen the legal framework regarding accountability for serious crimes. Some relevant drafts exist but seem blocked, such as the law implementing the Rome Statute into national law and a revised, modernized civilian criminal code.

²⁴¹ See below "Transferring Jurisdiction to Civilian Justice System" section for a detailed discussion of this point.

²⁴² Human Rights Watch interview with Ministry of Justice officials, Kinshasa, June 2, 2015.

Definition of Crimes and Modes of Liability

Implementing the Rome Statute into national law remains an important priority. Various proposals, by the government and later by members of parliament, have been under consideration in Congo since 2006.

In May 2015, the National Assembly adopted in plenary session a revised version of an ICC implementing legislation proposed by a member of parliament in 2012, which would amend the civilian criminal code, criminal procedural code, military criminal code, and military judicial code.²⁴³

The draft law would strongly improve the Congolese legal framework by adding definitions of war crimes, crimes against humanity, and genocide that are consistent with the Rome Statute, inserting the concept of command responsibility, and providing for improved fair trial rights and protection provisions. As required by the Rome Statute, the draft law also includes extensive provisions on cooperation between Congolese authorities and the ICC.

The latest version of the draft law, as modified by the Law Committee of the National Assembly, regrettably does not provide for a full transfer of jurisdiction over ICC crimes from military courts to the appeals courts in the civilian justice system, as foreseen in the original draft.²⁴⁴ The draft still needs to be put on the agenda of the Senate and, if an amended version is approved there, a final version will need to be worked out by a committee from both chambers.

²⁴³ Proposition de Loi modifiant et complétant le décret du 6 août 1959 portant code de Procédure pénale (Draft Law amending and complementing the August 6 1959 decree on the Criminal procedural Code); Proposition de Loi modifiant la Loi no 024-2002 du 18 novembre 2002 portant Code pénal militaire (Draft Law amending Law no 024-2002 on the [Congolese] Military Criminal Code); Proposition de Loi modifiant et complétant la Loi no 023-2002 portant Code judiciaire militaire (Draft Law amending and complementing Law no 023-2002 on the military judicial code); Proposition de Loi modifiant et complétant le décret du 30 janvier 1940 portant code pénal (Draft Law amending and complementing the January 30 1940 Decree on the Criminal Code), *Political, Administrative and Legal Committee of the National Assembly*, May 2015, on file with Human Rights Watch (Draft ICC Implementing Legislation).

²⁴⁴ Rapport relatif à l'examen et l'adoption de la proposition de loi modifiant et complétant le code pénal, le code de procédure pénale, le code judiciaire militaire et le code pénal militaire en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale (Report regarding the consideration and adoption of the draft law amending and complementing the criminal code, the criminal procedural code, the military judicial code and the military criminal code in order to implement the Rome Statute of the ICC), *Political, Administrative and Legal Committee of the National Assembly*, December 2013, on file with Human Rights Watch.

Bolstering Fair Trial Rights of Defendants

The 2006 constitution includes detailed provisions enshrining the rights of all to a fair, credible and timely trial.²⁴⁵ Unfortunately, these provisions have not yet been fully implemented into Congolese procedural law and are poorly implemented in practice.

First, the right of accused persons to have access to a lawyer during the investigation phase is of critical importance but rarely implemented in practice. This is all the more important in Congo given that there is no investigative judge controlling the investigative phase, as is usually the case in civil law systems. The investigative judge (*juge d’instruction*) is traditionally in charge of “finding out the truth” about a crime, by neutrally looking for evidence against and in favor of the accused.²⁴⁶ In Congo, the prosecutor leads the investigation, prepares the prosecution file, and presents the accusation at trial. It is therefore critical for a defendant to have the assistance of a lawyer as soon as possible during the investigation in order to collect exculpatory information and prepare a defense strategy.

Second, the state should provide legal aid for indigent defendants. Under Congolese law, local bar associations are mandated to provide legal representation free of charge for indigent defendants. Several local bar associations have created free legal advice offices (*bureaux de consultations gratuites*), which give advice to both victims and the accused. But a lack of resources and (rampant) corruption hamper their effective functioning in practice.²⁴⁷ International partners should consider increasing assistance for legal defense for the indigent accused in serious international crimes cases, including specialized trainings on the elements of international crimes and strategies to mount an effective defense.

Finally, the right of appeal should be guaranteed for all in accordance with the constitution and international human rights law.²⁴⁸ This notably requires amending the military judicial code to ensure that appeals are allowed before operational military courts.²⁴⁹ As explained

²⁴⁵ Congolese Constitution, art. 18-21. As mentioned above in note 71, Congo has been a party to the ICCPR since 1976.

²⁴⁶ Jacqueline Hodgson “The Police, The Prosecutor and the Juge d’Instruction: Judicial Supervision in France, Theory and Practice, *British Journal of Criminology*, vol. 41 (2001), p. 347.

²⁴⁷ AfriMAP and OSISA report 2013, p. 96.

²⁴⁸ Congolese constitution, art. 21; ICCPR, art. 14(5).

²⁴⁹ In May 2014, the Congolese minister of justice presented a draft law amending the military judicial code to allow appeal of CMO judgments. Members of parliament, however, declined to put the draft legislation on the agenda of the parliamentary session.

below, it also requires reviewing the system of privileges of jurisdiction, under which accused persons only have access to one level of jurisdiction.

The military criminal and judicial codes of 2002 have not been amended to comply with the enhanced fair trial rights included in the 2006 constitution. A review of these codes is currently underway and presents an opportunity to further clarify or integrate these rights.²⁵⁰

Privileges of jurisdiction

Under Congolese law, several categories of people enjoy privileges of jurisdiction, meaning that, if prosecuted, they are tried in first instance before the highest courts of the country, instead of before the regular first instance courts.

Under article 153 of the constitution, a large number of categories of public officials (including members of the National Assembly and Senate, members of the government other than the prime minister, various justice officials, provincial governors and ministers, and presidents of provincial parliaments) can only be tried before the *Cour de Cassation*. The number of people benefitting from this measure will soon multiply with the recent increase from 11 to 26 provinces in Congo. Further, article 163 of the constitution provides that the president and the prime minister can only be tried before the Constitutional Court. Finally, under article 128 of the military judicial code, generals in the army and certain military justice officials can only be tried before the High Military Court.

These privileges of jurisdiction give rise to a number of difficulties. For example, the Constitutional Court and the *Cour de Cassation* (in addition to the fact that the latter does not yet exist) do not have jurisdiction over war crimes, crimes against humanity, and genocide (which currently fall under the jurisdiction of military courts and appeal courts in the civilian justice system). It is therefore unclear whether individuals benefiting from privileges of jurisdiction before these two courts can be prosecuted for these crimes at all. As such, privileges of jurisdiction can lead to de facto impunity.

²⁵⁰ Human Rights Watch interview with Congolese military justice official, Kinshasa, November 11, 2014.

In addition, individuals tried in first instance at the Constitutional Court, the *Cour de Cassation*, or the High Military Court do not have access to an appellate court, given that these are the highest courts in the country, effectively denying them the right to appeal their sentence. This affects, for example, the recent case of Gen. Jérôme Kakwavu, who was found guilty of war crimes including rape, and that of three former ICC witnesses who are currently awaiting trial for war crimes and crimes against humanity before the High Military Court.²⁵¹

Privileges of jurisdiction should be reformed, at least with regards to the most serious crimes under international law. At a minimum, the government should vest the Constitutional Court and the *Cour de Cassation* with clear jurisdiction over war crimes, crimes against humanity, and genocide, and create an avenue to appeal decisions of these courts.

Protection of Victims and Witnesses

As discussed earlier, some military judges have taken measures inspired by the Rome Statute to ensure the physical protection and psychological well-being of victims and witnesses, despite the lack of details in Congolese law on this matter. In doing so, they benefitted from the expertise and logistical support of MONUSCO.

This practice, however important, does not displace the need for Congolese authorities to strengthen Congolese law on the protection of witnesses. Given the large number of courts and judicial officials who may deal with grave international crimes in Congo, there is no guarantee that such good practices would be known or replicated in the absence of specific legal provisions. Areas that should be covered include processes to assess the risk to witnesses, a specific but non-exhaustive list of measures that judges can take to facilitate court appearance (including measures to keep identities from the public, as occurred in the Minova case) while still ensuring the right of defendants to a fair trial, notably their right to fully challenge the evidence and witnesses against them.

In addition, Congolese authorities should consider the creation of a national protection program, mandated to operate for all victims and witnesses at risk testifying for the defense or the prosecution. The program could assist with protection measures for victims

²⁵¹ These individuals did not have the rank of general but are being prosecuted together with a general, meaning that their case will be heard before the High Military Court. Letter from Human Rights Watch to Fred Teeven, State Secretary of Justice and Security, the Netherlands, “Netherlands: Reconsider ICC Witness Deportation,” July 4, 2014, <https://www.hrw.org/news/2014/07/04/netherlands-reconsider-icc-witness-deportation>.

and witnesses before, during, and after trial. In order to minimize the risk of disclosure of confidential information, the protection program should be independent from the police, army, and justice authorities.²⁵²

Such a national protection program could learn and progressively take over from work currently done by international NGOs and MONUSCO in this field and thus ensure the sustainability of international assistance related to protection. The benefits of creating such a protection program could extend to other sensitive or high-profile cases, beyond war crimes cases.

Bolstering Capacities to Investigate Grave International Crimes

The investigation and prosecution of war crimes, crimes against humanity, and genocide often present complex challenges and demand specific skills. A lack of specialized knowledge and experience can compromise the quality of investigations and prosecutions.

State-Run Training on International Crimes

A variety of international and national organizations have organized trainings in Congo on international criminal law, the Rome Statute, and various aspects of the investigation and prosecution of serious international crimes. However, these activities are not always well coordinated.²⁵³

Justice officials have complained that the trainings can be too basic, not well adapted to their needs, or repetitive.²⁵⁴ Given the importance of this area of justice in Congo, academic basic training on international crimes cases should be integrated into a state-run educational curriculum for both civilian and military investigators and magistrates. The establishment of a “Superior School for magistrates” (*Ecole Supérieure de la*

²⁵² See United Nations Office on Drugs and Crime (UNODC), “Good practices for the protection of witnesses in criminal proceedings involving organized crime,” February 2008, <https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Febo8.pdf> (accessed September 1, 2015).

²⁵³ See United Nations Development Program, “Rule of Law and Access to Justice in eastern and Southern Africa: Showcasing Innovations and Good Practises,” April 2013, http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Rule%20of%20Law%20and%20Access%20to%20Justice%20in%20Eastern%20and%20Southern%20Africa%202013_EN.PDF (accessed September 22, 2015), pp. 11, 26-29.

²⁵⁴ Human Rights Watch group interview with Congolese military justice officials, Bukavu, May 23, 2014; Human Rights Watch interview with Congolese military justice official, Kinshasa, November 12, 2014.

magistrature), through the Law on the Statute of Magistrates adopted in 2006, has been slow but is underway.²⁵⁵ Ensuring adequate official training of justice officials is an important aspect of justice sector reform.

Creating a Specialized Investigation Cell

The presence of motivated and well-trained judicial staff with specialization in the field of grave international crimes can enhance both the ability and the willingness of a justice system to handle these difficult cases.

A key obstacle with the current justice system in Congo is that a vast number of courts and judicial staff have potential jurisdiction over war crimes, crimes against humanity, and genocide.²⁵⁶ Such dispersion hinders a broader perspective over cases and possible coordination between investigations that may relate to crimes committed by the same groups. In addition, justice officials regularly rotate among courts in different provinces. As such, investigators and magistrates who participated in specialized international crimes trainings or who have gained experience in handling such cases may leave or be replaced by others with no such experience or no interest.

In these circumstances, even with important international support, the quality of investigations and prosecutions, and their pace, may not significantly improve over time. Even with a more systematic state-run training, it is unrealistic to expect that all justice officials in Congo become experts in this specialized field.

Recognizing the intrinsic specificities of investigating and prosecuting serious international crimes, several countries have created specialized war crimes prosecution cells, including, in Africa, the Central African Republic, Côte d'Ivoire, South Africa, and Uganda.²⁵⁷

²⁵⁵ Loi organique no 06/020 du 10 octobre 2006 portant statut des magistrats (Organic Law no 06/020 of October 10, 2006 on the Statute of Magistrates), October 10, 2006, <http://www.leganet.cd/Legislation/JO/2006/JO.25.10.2006.pdf> (accessed September 22, 2015), art. 4; RCN Justice & Démocratie, "L'appui technique à l'EFRPJ dans un nouveau contexte institutionnel de gestion du système judiciaire congolais," January 2011, http://www.rcn-ong.be/IMG/pdf/RDC-EFRPJ_avril2011.pdf (accessed September 22, 2015).

²⁵⁶ This will multiply with the number of provinces in Congo having gone from 11 to 26. There will be a need to create new military and civilian courts in new provinces.

²⁵⁷ These countries include Belgium, Canada, the Central African Republic, Côte d'Ivoire, Denmark, France, Germany, the Netherlands, Norway, South Africa, Sweden, Switzerland, the United Kingdom, the United States, and Uganda. See Human Rights Watch, "The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany and the

Building on these examples, Congolese authorities should consider setting up a specialized cell of military investigators and prosecutors to exclusively handle war crimes, crimes against humanity, and genocide. The team could be based in Goma, or another town in eastern Congo close to where the bulk of international crimes have been committed, and travel whenever investigations are needed.

Such a cell could strengthen the current administration of justice for grave crimes in Congo for the following reasons:

First, the cell would centralize expertise and specialized knowledge, making it more likely that investigations are successful and prosecutions move forward. Justice officials working in the cell would have the opportunity to build up their expertise through involvement in numerous relevant cases. They would have the opportunity to strengthen their skills in relevant areas such as:

- Investigating certain crimes that pose specific challenges or are not often dealt with by Congolese courts such as mass crimes involving numerous victims and perpetrators, international crimes committed by legal entities and corporations, sexual violence, and the use and recruitment of child soldiers;
- Identifying evidence linking low-level perpetrators and senior officers to show command responsibility;
- Identifying and managing insider witnesses; and
- Handling vulnerable or traumatized victims and witnesses to minimize re-traumatization in the process of gathering evidence.

Second, the creation of such a centralized cell could facilitate the drafting of a prosecutorial strategy for grave international crimes in Congo. A prosecutorial strategy prioritizing cases is essential to direct finite resources to maximum effect.²⁵⁸

Netherlands,” September 2014, <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and>.

²⁵⁸ UN Human Rights Council, Report of the special rapporteur on the Promotion of Truth, Justice, Reparations, and Guarantees of Non-Recurrence, Pablo de Greiff, A/HRC/27/56, August 27, 2014, <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/AnnualReports.aspx> (accessed September 26, 2015).

Given the large number of grave international crimes in Congo over the past two decades, such a prosecutorial strategy could enable the military justice system to more strategically and proactively identify priorities, such as pursuing the most serious crimes, those bearing most responsibility for these crimes, or systematically including crimes that have special significance for victims.

Adopting a more proactive approach can enhance the system's response to the need for justice. To date, the response of the military justice system has been more reactive: decisions to investigate are based on the availability of information collected by international organizations about the crimes, availability of international assistance, and diplomatic pressure.²⁵⁹ Creating a centralized body could help to maintain an overview of the cases under investigation and prosecution and enable the Congolese justice system to exert the required leadership in opening investigations and moving cases to prosecution.

Third, by only focusing on international crimes, the resources of the specialized cell would not be diverted to address other cases and there would be natural expectations that the cell keep investigating and prosecuting cases.

Finally, the creation of the centralized cell could help focus donor assistance in this field and ensure the sustainability of expertise and knowledge in the long term. It would also be less expensive and more efficient to protect a limited number of judicial staff working on these sensitive cases where their personal security may be at risk.

The mobile investigation cell should consist of a sufficient number of military investigators and prosecutors, ideally with prior involvement and experience in handling war crimes and crimes against humanity cases.

Gender diversity of the staff is crucial so that female investigators are available to interview victims of sexual and gender-based violence, if victims wish to speak to a woman. In addition to investigators and prosecutors, the investigation cell could employ experts whose skills are regularly needed during such investigations, such as psychologists, financial investigators, and forensic experts. Judicial personnel nominated to the specialized investigation team should be willing to accept long-term assignments.

²⁵⁹ ICTJ Report 2015, p. 32.

Creating the cell—a matter of judicial organization—could be done by government decree, later formalized by a law. To have jurisdiction across Congo, the specialized investigation cell should be attached to the General Military Prosecution Office in Kinshasa.²⁶⁰ It should be headed by a military prosecutor with the rank of general to be able to investigate and prosecute crimes committed by all military personnel, including general officers. The military prosecutor should be of high moral standing, with a reputation for independence and impartiality and experience investigating and prosecuting grave international crimes.

Given that the office would still fall under the direct authority of the minister of defense and minister of justice—like any other military prosecution office—and be part of the General Military Prosecution Office, the specialized investigation cell would not be fully protected against possible interference by the military justice hierarchy, the army hierarchy, and other officials in the work of justice officials.

Nonetheless, creating a specialized cell staffed with competent staff with relevant expertise to handle these sensitive cases is an essential baseline to tackle problems of interference or pressure that could emerge down the line. This group of specialized personnel could eventually be integrated into an internationalized justice mechanism, when it is created.

Bolstering UN Support for Investigations

The functioning of the UN Prosecution Support Cells should be strengthened so that they can realize their potential in helping to build the Congolese justice system's investigation capacity. An evaluation into the functioning of the Prosecution Support Cells was conducted in 2014 by the UN Development Program, which is involved in managing the Prosecution Support Cell project.²⁶¹ The UN Department of Peacekeeping Operations also conducted an evaluation of the cells in 2015.

²⁶⁰ Congolese Military Judicial Code, art. 42.

²⁶¹ Elysée Sindayigaya and Achille Mutombo Ntalaja, "Rapport d'Evaluation Finale: Projet d'Appui à la Justice Militaire à travers le renforcement du Programme des Cellules d'Appui aux Poursuites Judiciaires (CAP)" (Final Evaluation Report: Project supporting military justice through the strengthening of the Prosecution Support Cell (PSC) Program), *independent evaluation report requested by the United Nations Development Program*, January 2015, <https://erc.undp.org/evaluationadmin/downloadaddocument.html?docid=8563> (accessed September 23, 2015).

Strategies should be developed to hire experts with the right profile and expertise to effectively assist Congolese justice staff in investigating and prosecuting war crimes and crimes against humanity. One challenge is that the Prosecution Support Cell staff are currently seconded by UN member states from among military and civilian police and prosecutors without relevant experience in investigating and prosecuting grave international crimes. Experts in this field are instead more often likely to be employed by international or hybrid tribunals.

The UN Prosecution Support Cells have only employed a small number of such experts. Further positions should be opened up to independent consultants with relevant expertise. Given that it may be difficult to find experts in international crimes investigations willing or able to be based in Congo for long periods of time, a mix of long-term and short-term Prosecution Support Cells positions could be created. Long-term seconded personnel, who do not necessarily have specific expertise in investigating war crimes and crimes against humanity, could supervise and administer the program, keeping an overview of cases requiring assistance, scheduling trainings, building ties with the Congolese justice system, and monitoring progress in international crimes investigations over time.

Experts with demonstrated experience in war crimes investigations and prosecutions could be hired on several short-term contracts to assist justice officials at key moments throughout a specific investigation and trial: for example, at the very start when an investigation plan is designed, around key witness interviews, when designing the prosecution strategy or preparing the file for prosecution.

A more direct and proactive approach by the Prosecution Support Cells could also produce better results. The cells should provide advice on the specifics of cases under investigation. Such an approach is allowed by both the language of UN Security Council Resolution 1925, which created the Prosecution Support Cells, and the Memorandum of Understanding signed with the government.

To make this possible, it is important that Congolese military justice staff collaborate more systematically with Prosecution Support Cell staff. These experts could also organize specialized trainings and workshops on relevant issues identified on the basis of their observation of the work of national judicial staff and focusing on matters related to grave international crimes investigations.

Finally, the Prosecution Support Cells are uniquely placed to identify blockages or interference in certain cases. They should be willing to intervene with their Congolese counterparts to resolve these issues or report such problems to the MONUSCO hierarchy, who in turn could bring up the issue with Congolese authorities in Kinshasa. The Prosecution Support Cells should produce yearly reports about their activities, with sufficient details about the type of assistance provided, but not revealing details of confidential investigations.

Strengthening Independence of the Justice System

The independence and impartiality of the judiciary and the prosecution are critical elements of the rule of law and the guarantee of fair trials. While the 2006 constitution recognizes the separation of powers and guarantees the independence of the judicial system, Congo's civilian and military justice systems are weak and lack independence in practice. Instances of interference by political authorities, the military command, and the judicial hierarchy are common, well documented, and acknowledged.²⁶²

Independence and impartiality are especially critical when it comes to trying serious international crime cases. War crimes and crimes against humanity in Congo have often been committed along ethnic or political lines and are therefore more sensitive. In some cases, key perpetrators have continued to occupy or remain close to those in positions of power.

In both the civilian and military justice systems in Congo, certain top justice officials have strong ties with the executive or other political officials. This can be an impediment to independence. For example, Gen. Timothée Mukunto, in the General Military Prosecution Office in Kinshasa, is seen by many as a controversial and politicized figure. He was formerly the president of the *Cour d'Ordre Militaire*, a feared exceptional court created in 1997 by then-President Laurent-Désiré Kabila, which was widely criticized for unfair and politically biased trials.²⁶³ Mukunto reportedly had other

²⁶² See UN Mapping Report, p. 423; UN Human Rights Council, Report of the Special Rapporteur on the independence of the judges and lawyers, Leandro Despouy, Mission to the Democratic Republic of Congo, A/HRC/8/4/Add.2, April 11, 2008, pp. 2, 7, 13, 15-16, 18; AfriMAP and OSISA Report 2009, pp. 3, 7, 76; AfriMAP and OSISA Report 2013, pp. 33, 83-84, 111; Amnesty Report 2011, pp. 3, 20, 31; MONUSCO Report April 2014, p. 17; ICTJ Report 2015, pp. 15, 29.

²⁶³ UN Commission on Human Rights, Report of the UN special rapporteur for the Democratic Republic of Congo, "Rapport sur la situation des droits de l'homme dans la République démocratique du Congo, présenté par le Rapporteur spécial, M. Roberto Garretón conformément à la résolution 1999/56 de la Commission des droits de l'homme," E/CN.4/2000/42, January 18, 2000, <https://repositories.lib.utexas.edu/bitstream/handle/2152/5585/2267.pdf?sequence=1> (accessed September 23, 2015), pp. 23, 64; UN Commission on Human Rights, Report of the Human Rights Committee, A/61/40 (Vol. II),

non-judicial functions that made him close to senior political and security officials in Kinshasa for a long time.²⁶⁴

Strict implementation of existing legal guarantees, as well as institutional and informal measures, are all needed to strengthen the independence of the justice system in Congo. This would represent a long-term culture shift, which should be a priority for both Congolese authorities and international actors involved in justice sector reform.

Lack of implementation of existing rules regarding the transparent nomination of magistrates to specific jurisdictions and of respect for safeguards regarding their tenure and non-removability remains a pervasive problem in Congo. A budget that is sufficient to allow the proper functioning of the justice system could also help reduce corruption and other attempts to influence the judiciary.

Judicial officials can play a part in strengthening independence from the inside. However, while activities to sensitize them about the need for a truly independent and impartial judiciary can be useful, real change can only come about through a reformed political culture in which those in authority send the right messages through their actions and words. Independent and strong magistrate associations should be supported. Prosecution of individuals seeking to interfere with the justice system or of senior judicial officials accepting bribes is also necessary to show that such behavior will not be tolerated.²⁶⁵

2006, <http://www.un.org/ga/61/documentation/list.shtml> (accessed September 23, 2015); UN Commission on Human Rights, UN special rapporteur for the Democratic Republic of Congo, “Cour d’ordre militaire: un instrument de répression et de mort en République démocratique du Congo,” Congo Online, undated, <http://www.congonline.com/Forum1/Forum04/Garretono1.htm> (accessed September 23, 2015); José Ndjemoti, “Cour d’ordre militaire: un instrument de répression et de mort en République démocratique du Congo,” Congo Online, undated, <http://www.congonline.com/Forum/Ndjemotio1.htm> (accessed September 23, 2015). The *Cour d’Ordre Militaire* was dismantled in 2002.

²⁶⁴ Timothée Mukunto was the adviser to Pierre Lumbi, President Kabila’s security advisor, and a member of the “National Security Council,” an informal body that advises the president on national security issues. Human Rights Watch telephone interview with Congolese justice expert, September 20, 2014; Human Rights Watch interview with Congolese justice expert, Kinshasa, November 10, 2014; Human Rights Watch interview with Congolese civil society activist, Kinshasa, November 11, 2014; Human Rights Watch interview with Congolese judicial official, Kinshasa, June 2, 2015. As general prosecutor, General Mukunto was involved in a number of judicial cases with high political stakes, including the Kilwa case (which involved the Anvil mining company), the case involving the murder of human rights activist Floribert Chebeya, and the case of the murder of Col. Mamadou Ndala. Serious concerns about political interference and lack of impartiality were raised in each of these cases.

²⁶⁵ Décret du 30 janvier 1940 portant le Code Pénal Congolais (Decree of January 30, 1940 on the Congolese Criminal Code) (“Congolese Criminal Code”), <http://www.leganet.cd/Legislation/JO/2004/JO.30.11.2004.pdf> (accessed September 23, 2015), art. 147-150.

The creation in the 2006 constitution of a *Conseil Supérieur de la Magistrature* (High Judicial Council) responsible for drawing up the justice budget and managing the nominations and career tracks of magistrates raised high hopes, but unfortunately the council has not performed successfully and greater efforts are needed to increase its effectiveness and independence.²⁶⁶

The High Judicial Council's functioning has been hampered by a concentration of its power in the hands of the top hierarchy of the military and civilian justice systems, a lack of resources for its full membership to meet, and little transparency in its decision-making.²⁶⁷

The mandate of the UN special rapporteur on the independence of judges and lawyers is relevant to formulate further recommendations. To execute the mandate, the UN special rapporteur conducts country visits to assess in greater detail the situation of the judiciary and the wider legal system and, where appropriate, make recommendations for its improvement.²⁶⁸ The UN special rapporteur last visited Congo in 2008 and should request permission from the Congolese authorities for a new visit to follow up on developments.

Transferring Jurisdiction to Civilian Justice System

Congolese military courts have exercised exclusive jurisdiction over cases of alleged war crimes and crimes against humanity. There have been serious concerns about the quality and impartiality of these trials before military courts. The Congolese military justice system

²⁶⁶ Congolese Constitution, art. 121.

²⁶⁷ Human Rights Watch telephone interview with Congolese justice expert, September 20, 2014.

²⁶⁸ The UN special rapporteur on the independence of judges and lawyers is mandated by the UN Human Rights Council to do the following:

- (a) To inquire into any substantial allegations transmitted to him or her and to report his or her conclusions and recommendations thereon;
- (b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including the provision of advisory services or technical assistance when they are requested by the State concerned;
- (c) To identify ways and means to improve the judicial system, and make concrete recommendations thereon;
- (d) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers and court officials;
- (e) To apply a gender perspective in his or her work;
- (f) To continue to cooperate closely, while avoiding duplication, with relevant United Nations bodies, mandates and mechanisms and with regional organizations;
- (g) To report regularly to the Council in accordance with its programme of work, and annually to the General Assembly.

See UN Office of the High Commissioner for Human Rights, "Special rapporteur on the Independence of Judges and Lawyers – Introduction," 2012, <http://www.ohchr.org/EN/issues/Judiciary/Pages/IDPIIndex.aspx> (accessed January 29, 2013).

has long demonstrated reluctance to prosecute military personnel, especially high-level officers, for grave offenses committed against civilians.

There has been increasing recognition at the regional and international level that military tribunals should not be involved in prosecuting grave human rights violations against civilians and that military tribunals should only prosecute purely military offenses. This approach has been urged for a number of reasons, including because the military chain of command is often empowered to intervene in proceedings, access to the military justice system can be more difficult and traumatizing for civilian victims, and the risk that military justice systems may lack the independence and impartiality to prosecute perpetrators of the crimes when they are members of the armed forces.

Principle 29 of the UN Commission on Human Rights Updated Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity states: “The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.”²⁶⁹

Similar language recommending the exclusion of military courts from adjudicating human rights violations can be found in several regional and international instruments.²⁷⁰ In her 2013 statement to the UN General Assembly, the UN special rapporteur on the independence of judges and lawyers supported the view that civilian courts should have jurisdiction over grave human rights violations.²⁷¹

²⁶⁹ UN Commission on Human Rights, 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.

²⁷⁰ Draft Principles Governing the Administration of Justice through Military Tribunals, U.N. Doc. E/CN.4/2006/58, January 13, 2006, draft principle 9; UN General Assembly 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 1994 Inter-American Convention on Forced Disappearance of Persons, art. IX; African Commission on Human and Peoples’ Rights, 2008 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle L(a).

²⁷¹ UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and prosecutors, Gabriela Knaul, A/68/285, August 7, 2013, <http://www.un.org/Docs/journal/asp/ws.asp?m=A/68/285> (accessed September 26, 2015), para. 106.

In Congo, donors and national and international NGOs involved in justice sector reform point out that the military justice system currently functions considerably better than the civilian justice system. As acknowledged during the recent *Etats Généraux*, the civilian justice system is plagued with multiple problems, including the lack of qualified personnel, corruption, and a lack of independence. It is widely thought that civilian justice officials would not enjoy respect and compliance from the armed forces when seeking to prosecute military suspects. There has also been strong political resistance to a shift of jurisdiction towards the civilian justice system, as this could diminish control of the military justice system hierarchy and army command over prosecutions of grave international crimes.²⁷²

It should be recognized that most international support and assistance with regard to grave international crimes prosecution in Congo to date has been directed toward strengthening the military justice system, which has in effect helped to improve the military justice system while the civilian justice system has continued to struggle. This suggests that greater efforts should be undertaken to strengthen the civilian justice system's capacity to handle grave international crimes and to address some of these concerns.²⁷³

An April 2013 law on the organization, functioning, and competency of the judiciary (2013 Judiciary Law) explicitly gives civilian courts jurisdiction over war crimes, crimes against humanity, and genocide. But the text of the law appears to have been modified *after* its adoption by parliament to specify that this only applied to “persons who usually fall under the jurisdictions of appeals courts or first instance tribunals.”²⁷⁴ This would exclude as defendants those civilians who benefit from privileges of jurisdiction under Congolese law and fall under the jurisdiction of the Constitutional Court or the *Cour de Cassation*, as discussed above.

Whether appeals courts would still have jurisdiction over members of the army, and in which circumstances, given the current phrasing of the 2013 Judiciary Law, is disputed.

²⁷² ICTJ Report 2015, pp. 10-14.

²⁷³ The UN special rapporteur on the independence of judges and prosecutors noted that deficiencies in the civilian justice system are not an excuse to prefer military courts. Report of the special rapporteur on the independence of judges and prosecutors, A/68/285, para. 90.

²⁷⁴ 2013 Judiciary Law, art. 91. According to the various versions of the bill seen by Human Rights Watch, it seems that the cited portion of the sentence was added to the text of the law after its final adoption by parliament and before its promulgation, which brings its legality into question. For a discussion of this last-minute amendment of the law, see AfriMAP and OSISA Report 2013, p. 38.

There are disagreements in Congo as to whether military courts do or do not have exclusive jurisdiction over military personnel under article 156 of the constitution, which states that, “the military justice system has jurisdiction over members of the army and police.” Some have expressed the view that this article should be read literally, as meaning that only military courts can prosecute members of the army and police.²⁷⁵

Others have argued that article 156 should be read as referring to military offenses only.²⁷⁶ A teleological study of the drafting of the constitution prepared by MONUSCO suggests the article was meant to explicitly exclude civilians from the jurisdiction of the military justice system, given a pervasive practice by military courts to take cases involving civilians.²⁷⁷

Congolese law foresees instances in which members of the army can be prosecuted before the civilian justice system, notably when crimes are committed together by civilians and members of the army, suggesting that there is no exclusive jurisdiction of the military justice system over military personnel. Congolese law allows the composition of mixed civilian-military benches.²⁷⁸

The exact delineation of the jurisdiction of civilian appeal courts over war crimes and crimes against humanity thus remains unclear. Congolese authorities should clarify these provisions, if necessary by revising the 2013 Judiciary Law or requesting an interpretation of the constitution by the Constitutional Court.

Shifting jurisdiction over grave international crimes to the civilian justice system would be consistent with regional and international human rights standards. Taking into

²⁷⁵ Leaflet prepared by a member of the Congolese parliament citing arguments against the draft law on the Specialized mixed chambers, “*Les raisons fondamentales du rejet du projet de loi modifiant et complétant la loi organique no 13/011-B du 11 avril 2013 portant organisation du fonctionnement et compétences des juridictions de l’ordre judiciaire en matière de répression des crimes de génocide, des crimes contre l’humanité et des crimes de guerre*” (Fundamental reasons to reject the draft law modifying and completing organic law no. 13/011-B of April 11, 2013 on the functioning and organization of jurisdictions in the judicial order with regard to the prosecution of crimes of genocide, crimes against humanity, and war crimes), undated, on file with Human Rights Watch.

²⁷⁶ The former Congolese minister of justice, Wiwine Mumba Matipa, put the question of the interpretation of article 156 of the Congolese Constitution to the Supreme Court, in light of debates on this point in relation to the draft law on the specialized mixed chambers. At the time of writing, the Supreme Court has not provided an answer.

²⁷⁷ UNJHRO, “Chambres spécialisées et réformes de l’organisation judiciaire: Argumentaire sur la compatibilité des textes proposés avec les dispositions constitutionnelles relatives aux juridictions militaires” (Specialized chambers and reform of the judicial order: argumentation on the consistency of the proposed draft law and the constitutional provisions regarding military jurisdictions), May 26, 2014, on file with Human Rights Watch.

²⁷⁸ Congolese Military Criminal Code, art. 93, 115; 2013 Judiciary Law, art. 100; ICTJ Report 2015, p. 11.

consideration the specificities of Congo and the considerable experience amassed by the military justice system over the past 10 years in the investigation and prosecution of war crimes and crimes against humanity, this could be done while preserving involvement of military justice officials in mixed benches, as allowed under Congolese law.

Internationalized Justice Mechanism

Discussions about the possible creation of an internationalized justice mechanism to deal with grave international crimes have been underway for several years in Congo. This mechanism could have jurisdiction over crimes committed before the entry into force of the Rome Statute of the ICC in Congo and complement the work of the ICC, which is still active in Congo but is only able to handle a limited number of cases.

A fully-fledged international criminal tribunal for Congo—which could have jurisdiction over crimes committed before 2002—created by the UN on the model of the tribunals for the former Yugoslavia or Rwanda, does not seem a realistic option at this moment, because of cost and sovereignty concerns.

Recognizing this, the essence of an “internationalized justice mechanism” is to integrate international justice officials and experts within a national Congolese jurisdiction. This idea would be in line with the principle that states have the primary responsibility to prosecute grave international crimes. The integration of international experts seeks to address both issues of capacity to investigate serious international crimes and judicial independence.

Congolese civil society organizations first proposed the establishment of a specialized “mixed” chamber—that is, composed of national and international staff—in 2004, during a conference organized by the European Union and Congolese authorities to discuss the results of an audit of the justice system. Establishing an internationalized justice mechanism was later recommended by the UN special rapporteur on the independence of judges and lawyers in 2008, the UN seven special thematic procedures on technical assistance for the government of Congo in 2009, and the UN Mapping Report in 2010.

Then-Minister of Justice Bambi Luzolo Lessa responded positively to the UN Mapping Report and started drafting a law to create such a mechanism. The first draft law proposed creating specialized mixed chambers in all 11 civilian appeal courts in Congo. After

extensive consultations with legal experts, international partners, Congolese and international civil society, and the Congolese Permanent Commission for Law Reform, the draft law was modified to create one specialized mixed court instead.

The proposed court would have been a specialized jurisdiction, as allowed by article 149 of the Congolese Constitution, handling exclusively war crimes, crimes against humanity and genocide, which would have been separate from other existing courts but still part and parcel of the national justice system. The proposed court—neither in the civilian nor in the military justice systems, but employing both civilian and military justice officials—addressed jurisdiction issues highlighted above.

The Congolese government adopted the law, which was examined by the Senate in August 2011. The senators rejected it, citing contradictions between this law and others such as the draft ICC implementing legislation law, and possible unconstitutional provisions (notably on immunities and jurisdiction over military personnel). Some senators also raised sovereignty concerns.

In October 2013, in his national address to parliament, President Joseph Kabila publicly supported the idea of creating specialized chambers as a key measure to strengthen the fight against impunity for grave international crimes.²⁷⁹

The presidency reportedly asked the new justice minister, Wivine Mumba Matipa, to start working on the law again, while addressing previous concerns. After several inter-ministerial consultations, the government adopted a new draft, which was presented to the lower chamber of parliament in May 2014. This draft law created three specialized mixed chambers within the civilian Appeal Courts of Goma, Lubumbashi, and Mbandaka and a specialized appeals chamber within the *Cour de Cassation* in Kinshasa, which is foreseen by the constitution but has not yet been established. This chamber in Kinshasa would have heard appeals from the other chambers and tried in the first instance persons benefitting from privileges of jurisdiction. The chambers would also have employed both civilian and military justice officials. Citing a technical mistake in the title of the law, the plenary of the National Assembly refused to put the draft law on its agenda.

²⁷⁹ President Joseph Kabila speech in front of the Congolese Parliament, October 23, 2013, <http://afrique.kongotimes.info/rdc/politique/6768-cohesion-nationale-discours-joseph-kabila-devant-congres.html> (accessed September 23, 2015).

Both times, discussions with members of parliament showed a lack of information and understanding about the motives behind the proposal to establish an internationalized justice mechanism and the finer legal aspects of the draft laws. There was confusion about the interaction between these draft laws and the ICC implementing legislation. One recurring concern of some members of parliament touched on the application of parliamentary immunities before the proposed mixed court or chambers. It seems the Congolese government, despite important drafting efforts, did not succeed in overcoming political resistance in parliament.

The government should not abandon this important proposal but rather work to present another draft law and provide information to members of parliament well in advance of a vote.

The establishment of an internationalized justice mechanism (be it a court or chambers), for a temporary period of time, will be crucial for effectively overcoming impunity for grave international crimes in Congo.

VII. Role of International Partners

International Criminal Court Involvement

Congo ratified the Rome Statute of the International Criminal Court in June 2002. The ICC is the first international and permanent criminal court with jurisdiction over war crimes, crimes against humanity, and genocide. In April 2004, President Joseph Kabila referred the situation in Congo to the ICC.²⁸⁰ The ICC Office of the Prosecutor (OTP) formally opened an investigation in Congo in June 2004.²⁸¹

The ICC has brought cases before the court in The Hague and has encouraged justice before national courts in Congo under the principle of complementarity. In the past 10 years, the OTP has publicly brought cases against six individuals implicated in grave crimes in Congo, all leaders of rebel groups active there.²⁸²

While these cases represent an important contribution to the fight against impunity in Congo, they do not address the scale of crimes committed in the country since 2002.²⁸³

The ICC plays a key role as a court of last resort for cases that cannot be tried before national courts in Congo. ICC Prosecutor Fatou Bensouda publicly stated during a visit to Kinshasa in March 2014, and in December 2014 after the appeal judgment in the Lubanga

²⁸⁰ “ICC - Prosecutor receives referral of the situation in the Democratic Republic of Congo,” ICC press release, April 19, 2004, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx (accessed September 11, 2015).

²⁸¹ “ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation,” ICC press release, June 23, 2004, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx (accessed September 11, 2015).

²⁸² The suspects are Thomas Lubanga and Bosco Ntaganda of the Union of Congolese Patriots (*Union des Patriotes Congolais*, UPC), Mathieu Ngudjolo and Germain Katanga of the National Integration Front (*Front des Nationalistes Intégrationnistes*, FNI) and the Front for the Patriotic Resistance in Ituri (*Front de Résistance Patriotique en Ituri*, FRPI) respectively, and Callixte Mbarushimana and Sylvestre Mudacumura of the Democratic Forces for the Liberation of Rwanda (*Forces Démocratiques pour la Libération du Rwanda*, FDLR). Thomas Lubanga was found guilty in March 2012 (confirmed in Appeal in December 2014) and sentenced to 14 years in prison. Mathieu Ngudjolo was acquitted in December 2012 (confirmed in Appeal in February 2015). Germain Katanga was found guilty in March 2014 and sentenced to 12 years in prison. The ICC pre-trial chamber declined to confirm the charges against Callixte Mbarushimana for lack of evidence in December 2011. The trial of Bosco Ntaganda started in September 2015. Sylvestre Mudacumura is still evading justice. See ICC, “Situations and cases,” undated, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (accessed September 11, 2015).

²⁸³ The ICC can only take cases after entry into force of its statute in 2002. See Rome Statute, art. 11.

case, that her office is continuing investigations in Congo.²⁸⁴ The Office of the Prosecutor should draw up a prosecutorial strategy for Congo identifying key cases that would have the most impact in ending impunity there.²⁸⁵

Human Rights Watch believes that the OTP should focus on two types of cases. First, the OTP should select cases that would expose the regional dimension of the conflict in eastern Congo. It should investigate and, evidence permitting, prosecute high-level military officers and officials from Rwanda, Uganda, and Congo who were responsible for supporting, arming, and training any of the numerous armed groups present in eastern Congo, aware that these groups were committing grave abuses against civilians. Second, the OTP should consider cases involving high-level commanders of the Congolese army who continue to evade justice because of the apparent protection they enjoy.

The ICC should also take more concrete measures to enhance the capacity of the national judicial system in Congo to try international crimes. This approach, known as “positive complementarity,” has been listed as a priority and guiding principle in the OTP’s prosecutorial strategies since 2006.²⁸⁶ The court’s ability to galvanize efforts around national war crimes trials is key to ensuring that its own operations have a lasting impact in the countries where the court conducts investigations.

In a 2012 report to the Assembly of States Parties of the ICC, the court stressed that it has expertise that could be useful to share with national judicial personnel and that it has

²⁸⁴ “Fatou Bensouda: ‘Ensemble, nous pouvons mettre fin à l’impunité,’” *Radio Okapi*, March 14, 2014, <http://radiookapi.net/emissions-2/invite-du-jour/2014/03/14/fatou-bensouda-ensemble-nous-pouvons-mettre-fin-limpunite/> (accessed September 11, 2015); “Statement of the Prosecutor of the ICC, Fatou Bensouda, following the Appeals Chamber decision on the verdict and sentence in the Lubanga case: Protecting children means preserving the future,” Office of the Prosecutor (OTP) press release, December 2, 2014, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-Statement-02-12-2014.aspx (accessed September 11, 2015).

²⁸⁵ Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 15, 2011, <http://www.hrw.org/reports/2011/09/15/unfinished-business-o>. The Office of the Prosecutor is currently conducting a mapping of all its investigations. Drawing up a Congo strategy could be part of this process.

²⁸⁶ ICC, OTP, “Report on the activities performed during the first three years (June 2003 – June 2006),” September 12, 2006, http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf (accessed September 23, 2015), para. 95; ICC, OTP, “Prosecutorial Strategy 2009 - 2012,” February 1, 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (accessed September 23, 2015), paras. 3, 15-17, 19, 28, 59; ICC, OTP, “Policy Paper on Preliminary Examinations,” November 2013, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf (accessed September 23, 2015), paras. 100-103.

already participated in ad hoc trainings.²⁸⁷ But that contribution has remained haphazard. The ICC has yet to develop either an institutional approach to positive complementarity or country specific plans that would detail the most useful contributions the court could make in each of the situations where it is active.

The ICC could play an important role promoting justice for grave crimes in Congo, including by providing technical assistance on topics such as investigation and prosecution techniques, as well as legal representation in grave international crimes cases, in supporting national investigations under article 93 of the Rome Statute, and in assisting partners such as the UN Prosecution Support Cells with respect to capacity-building.²⁸⁸

The current review of the operation of ICC field offices could provide additional opportunities.²⁸⁹ With regard to some ICC situation countries, including Congo, the court is set to hire “chiefs of field offices” with a more public and representational mandate. The head of the ICC office in Kinshasa could be well placed to start and chair a “complementarity working group” to hold strategic discussions among international partners and the Congolese Justice Ministry on ongoing projects, division of labor, challenges, and future plans in the field of accountability for grave international crimes before national courts. This working group could be established as a subset of the Justice and Human Rights Thematic Group, which functions as a coordination platform between the Ministry of Justice and international partners in Kinshasa.

If and when an internationalized justice mechanism is created in Congo, the ICC should closely cooperate with it. Such internationalized jurisdiction would complement and not replace the work of the ICC. This could result in a three-pronged anti-impunity effort:

1. The ICC could focus on the hardest cases that cannot be tried at the national level;

²⁸⁷ Assembly of States Parties (ASP), “Complementarity - information on any capacity-building needs in the area of the investigation and prosecution of serious international crimes,” ASP/12/S/012, April 12, 2013, http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ASP12-NV-Comp-Missions-Cap-Bldg-ENG.pdf (accessed September 23, 2015).

²⁸⁸ See Géraldine Mattioli and Anneke van Woudenberg (Human Rights Watch), “Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo,” March 15, 2008, <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=58828> (accessed September 23, 2015).

²⁸⁹ See interview with Herman Von Hebel and Rosemary Tollo, “ReVision project aims at a ‘coherent’ ICC Registry,” *The East African*, December 6, 2014, <http://www.theeastafrican.co.ke/news/ReVision-project-aims-at-a-coherent-ICC-Registry/-/2558/2547086/-/54wapn/-/index.html> (accessed September 23, 2015); ASP, “Report on the review of the organizational structure of the Registry: Outcomes of Phase 4 of the ReVision Project - Decisions on the structure of the Registry,” ICC-ASP/14/18, May 4, 2015, http://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-18-ENG.pdf (accessed September 23, 2015).

2. The internationalized mechanism could concentrate a level down dealing with sensitive cases and higher-level accused that ordinary courts cannot currently address; and
3. Ordinary courts could continue to deal with cases involving low-level perpetrators.

This would be similar to the model currently being set up in the Central African Republic.²⁹⁰

The ICC (which has ongoing investigations in seven other countries) has limited resources and will likely only have the capacity to take on a few additional cases in Congo. As a result, the onus of handling most other cases of grave international crimes in Congo is retained by the national justice system. This, in turn, underscores the importance of national courts gaining the necessary capacity, independence, and impartiality to handle these cases, benefitting from international support to bolster their work.

Financial, Political Support by Donor Agencies and Governments

A comprehensive review of international donors' assistance in the area of complementarity in Congo is beyond the scope of this report. A few brief lessons learned that build on the Minova investigation and trial are highlighted below.

Diversifying, Coordinating, and Deepening Donor Support

Donors should continue to dedicate specific support for justice for the worst crimes in Congo. As discussed above, international support was critical for the advances made in the Minova case. For the future, this support could be strengthened in a number of ways.

First, donors should **diversify the types of criminal justice projects** they support with regard to grave international crimes cases to increase the likelihood that all important aspects of a criminal trial function effectively. Some activities—such as support to “mobile courts” or trainings—have been funded by multiple donors, while other aspects seem to be either neglected or could benefit from more attention.

²⁹⁰ Géraldine Mattioli-Zeltner, “Taking Justice to a New Level: the Special Criminal Court in the Central African Republic,” JURIST, July 9, 2015, <http://jurist.org/hotline/2015/07/G%C3%A9raldine-Mattioli-Zeltner-CAR-Special-Court.php> (accessed September 23, 2015).

For example, support to fair trial rights through increasing expertise and resources available to defense lawyers seems insufficient. The same seems to be true of administrative and registry support to the functioning of local courts.²⁹¹ There also appears to be disproportionate funding available to prosecute sexual violence crimes compared to other grave international crimes.

Supporting monitoring activities by non-governmental organizations and the media could also help strengthen the quality and independence of national proceedings. For example, in the Minova case, a local NGO trial monitor said: “The judges knew they were under scrutiny, from us and from the international community; this put pressure on them to conduct good proceedings.”²⁹²



Only one paper copy of the Minova case file exists, pictured here on the floor at the Operational Military Court. © 2014 Human Rights Watch

Second, **strengthening coordination and effective division of labor** between donors and international actors on accountability for grave international crimes remains critical. A complementarity working group within the “Justice and Human Rights Thematic Group” in Kinshasa, as suggested above, could help address coordination needs.

²⁹¹ OSF Report 2011, pp. 30-32. For example, in the Minova case, only one paper copy of the Minova file—over 1000 pages—exists, with handwritten interview notes and handwritten summaries of hearings. During the *in situ* hearings in Minova, the CMO registrar had to spend long hours in the evenings flipping through numerous victims’ interview notes to identify the ones that would be needed in advance of the appearance of specific victims. Given that files such as the Minova file sometimes have to physically travel between courts and cities, it is a concern that they could be lost or destroyed. Human Rights Watch interview with military justice official, Goma, May 22, 2014.

²⁹² Human Rights Watch interview with Congolese civil society activist, Goma, May 20, 2014.

Further, international partners should work to ensure greater **sustainability for their assistance to complementarity efforts**. It is striking that national war crimes trials in Congo, like the Minova case, appear to be extremely reliant on international financial and material support. Increasing the sustainability of aid in this sector will require increased buy-in by the Congolese authorities, which could be demonstrated through a national strategy and increased national financial commitment as mentioned above. International partners should also consider creating capacity within the national justice system to allow national actors to take ownership of certain aspects of international crimes trials. For example, in the area of protection, national authorities, assisted by international partners, should consider creating a legislative framework and national program to protect victims and witnesses.

More Strategic Diplomacy to Support Justice

The Minova case demonstrated that international partners in Congo have a key role to play in pressing for justice for grave international crimes. Such targeted political engagement by international partners is often missing in other cases in Congo.

Diplomatic pressure was present and strong in the Minova case. It was critical in ensuring that the case went to trial but did not result in independent and effective justice. An important lesson to draw is the need to apply diplomatic pressure more strategically in sensitive international crimes cases. A possible course of action could be to focus on making sure that the investigation is progressing steadily without interference instead of focusing principally on the end result, that is, the trial. In a complex case like Minova, it is to be expected that proper investigations may take time. International partners can have a significant role in ensuring that investigations are not improperly halted or blocked, and that the independence of judges and prosecutors is respected. This could be done, for example, by regularly seeking updates on progress in a specific case and by calibrating pressure depending on this progress, or lack thereof.

International partners should use bilateral diplomacy and public statements to stress the importance of accountability for grave international crimes and to encourage a political climate in Congo that favors the pursuit of independent and credible justice.

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JUSTICE ON TRIAL

Lessons from the Minova Rape case in the Democratic Republic of Congo

In November 2012, thousands of defeated army troops rampaged through the small eastern town of Minova and neighboring villages in the Democratic Republic of Congo, pillaging and raping as they went. It was one of the worst incidents of sexual violence in Congo in recent years. A year later, under intense international pressure, Congolese judicial authorities brought to trial 25 soldiers and 14 officers for war crimes before a domestic military court.

The Minova rape trial raised high hopes and drew intense international scrutiny. It was seen as a key test for providing accountability for the pervasive sexual violence and other abuses that have plagued eastern Congo. Yet, despite massive international support, the proceedings failed to deliver justice: none of the high level commanders with overall responsibility for the troops in Minova were indicted and some of those who went to prison were convicted on questionable evidence without right to appeal.

Justice on Trial is based on extensive interviews with military justice officials, lawyers, victims who testified, United Nations staff, and local activists, and analysis of public court documents. It examines the inner workings of the Congolese military justice system and highlights—through the shortcomings in this case—the barriers that often thwart effective justice for atrocities in Congolese courts, including insufficient expertise in handling grave international crimes, violations of fair trial rights, and an apparent unwillingness to pursue high-level commanders.

The scale of serious crimes committed in Congo, and the limitations of the International Criminal Court, increase the burden on the Congolese justice system to develop the capacity and will to prosecute crimes competently, independently, and impartially.

(above) The accused sit in rows during the opening of the Minova trial held in the Cathedral of Goma in late 2013. The Congolese military justice system charged 39 soldiers and officers with the war crimes of rape and pillage and other violations of military orders committed in Minova and surrounding villages. Two soldiers were found guilty of rape and 24 others were convicted of other crimes. The officers were acquitted.

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(front cover) A woman—veiled to protect her identity from the public—testifies about having been raped before the Operational Military Court during the Minova trial. The accused soldiers are seated in the rear. Victims are often reluctant to participate in criminal proceedings given the stigma associated with rape in the Democratic Republic of Congo and the risks of retaliation.

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