

# The Democratic Republic of Congo

**Military justice and human rights –  
An urgent need to complete reforms**

A D I S C U S S I O N P A P E R



**A review by AfriMAP  
and  
The Open Society Initiative for Southern Africa**



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# Introduction

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

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

The military justice reform instituted by the laws of 2002<sup>1</sup> only addressed these issues very partially. The minister of justice has therefore initiated another reform process, which is still ongoing, whose aim is partly to include in military justice procedures the fundamental principles laid down by the constitution of 2006, which was adopted after the reforms of 2002 were entered into force. However, the ongoing reform should also tackle the different institutional and political issues facing military justice so that it may serve as an effective tool in the fight against impunity, while upholding human rights.

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

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

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

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

# I: Institutional weaknesses

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

Consequently, only national courts are in a position to bear the brunt of the fight against impunity and thereby contribute to the rebuilding of the nation. However, to date, civilian courts have not yet prosecuted any of the serious crimes committed during the wars, partly due to the fact that there is no legislation ‘domesticating’ the Rome Statute which defines such crimes, which is to say that there is no law to integrate the crimes falling within the jurisdiction of the ICC into national law and grant national courts jurisdiction in their regard. Thus, these serious crimes may only be prosecuted by military courts, since the adoption in 2002 of the military criminal code, which includes the crimes stipulated in the Rome Statute.

The performance of military justice, however, has been mediocre. Only a very limited number of the international crimes perpetrated in the DRC over the last decade have been prosecuted, and few of those have led to criminal convictions. A recent study by the organisation *Avocats sans Frontières/Lawyers Without Borders* (ASF/LWOB) was only able to list 13 cases involving serious

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

crimes that were effectively prosecuted in military courts.<sup>3</sup> Furthermore, these cases were heard in a handful of courts, mostly the garrison courts of Mbandaka and Bunia, and, to a lesser extent, those of Bukavu and Kipushi. This state of affairs reflects the lack of a consistent prosecution policy and betrays the opportunistic approach that has characterised both prosecutions in military courts and donor support for such prosecutions. For example, at the time of writing this report, no legal decisions have been handed down on international crimes in the military garrison court of Goma, whereas its jurisdiction covers a territory that has been one of the foremost arenas for the committing of massive crimes.

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

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

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

## II: Recent developments: Efforts to establish rules and standards

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

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

Although it marked an obvious positive difference in relation to the previous legislative framework, the legislative reform of 2002 remained largely insufficient and allowed obstacles to the right to a fair trial to persist in military courts. First of all, the military justice reform was not accompanied by a similar reform of the civilian justice system. Consequently, the most serious offences committed during the armed conflicts that recently affected Congo are now under the sole jurisdiction of the military courts, due to the lack of a law granting jurisdiction to ordinary courts. Furthermore, despite a constitutional provision to the contrary, military courts continue to enforce provisions of the laws of 2002 which authorise them to judge civilians and people who are only very indirectly linked to the armed forces. What is even more worrisome is that

this extension of the jurisdiction of military courts is taking place at a time when the political, institutional and legal pressures that have traditionally formed obstacles to the independence of military judges are growing. Thus, the control of the military command over the decisions of military prosecutors is increasingly direct. Similarly, political interference in legal decisions is increasingly common, partly due to the fact that the reform of 2002 increased the risks of prosecution of political stakeholders, many of whom have been recruited amongst the former heads of armed factions, who have committed crimes for which they are prosecuted in military court. Military judges themselves resist the exercise of various review mechanisms by the ordinary courts, particularly in the form of constitutional appeals, which are provided for under the constitution, and they accordingly set up obstacles to prevent defendants from enjoying their constitutional rights to a fair trial.

# III: Attacks against the independence of military justice

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

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

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

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

(*droit d'injonction positive*) but could no longer order the termination of the prosecution once the process had already begun.

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

Interference by the executive branch in the administration of military justice is not a new phenomenon. However, it has taken on worrisome proportions since the transition began in 2003. There are several reasons underlying the rise in repeated intrusions of the political authorities in the functioning of military justice. During the war, the government entered into alliances with certain rebel movements against other ones. Thus, ties have developed between the government and certain movements which are difficult to sever and which drive the government to counteract the independence of military justice in order to protect leaders of armed factions from being prosecuted in military courts.

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

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

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

The military judiciary have sometimes paid very dearly for their attempts to resist interference

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

In order to preserve the independence of the judiciary, which is an essential element of democracy and the observance of human rights, it is important for the government and top military justice authorities to scrupulously comply with the procedures established by the statutes governing the judiciary, and particularly those on the appointment, removal and rotation of judiciary members. Specifically, they should ensure that an immediate end is put to the practice of untimely transfers of prosecutors or judges during proceedings. The judicial service commission should collaborate with unions of magistrates and human rights organisations to help members of the judiciary resist attempts to violate their independence, and to help improve their living and working conditions to protect them against corruption.

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

## IV: Prosecution of civilians in military courts

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

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

Such provisions constitute a clear violation of the constitution and international standards. According to the Draft Principles on the Administration of Justice by Military Tribunals, on the functional authority of military courts, ‘The jurisdiction of military courts should be limited to

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

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

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

# V: No judicial review of pre-trial detention

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

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

Judges who refuse to submit to the judicial review of pre-trial detention until at least one year has gone by justify their actions on the grounds of Article 209 of the military justice code, which authorises the office of the judge advocate to extend pre-trial detention ‘for one month and so on, from month to month, where the duly justified needs of the investigation so warrant’ as long as the investigating judge ‘feels it is necessary to hold the accused in detention’. An excessively broad interpretation of this provision by some military judges leads them to place the needs of the investigation above the need to uphold the rights of the accused. For instance, in the *Germain Katanga* case, the superior military court not only deemed lawful a pre-trial detention of more than one year, but it further extended it by 60 days at the request of the prosecution, which only had to claim – not prove – that the investigation was ongoing.

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

## VI: Right to fair trial

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

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

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

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

Free legal aid is not organised in military courts. As a result, in order to benefit from quality legal assistance, the accused and complainants must pay out of their own pockets for the services

of the Congolese lawyers of their choice, which is something that few armed forces members or police officers are able to do, given their limited resources and mediocre pay. In addition, legal aid is not effective since it is only organised in a very limited number of bar organisations and services provided in the framework of legal aid are not reimbursed by the state.

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

## VII: Conclusion

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

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

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

Through a happy coincidence, the military justice reform coincides with the ongoing reforms of all security sectors, including the army and the police. The fight against impunity should also include a preventive approach, through the establishment of a vetting mechanism to prevent the integration into the armed forces of people under serious suspicion of having committed serious crimes falling within the jurisdiction of military courts, and to facilitate their prosecution.

