CHAPTER VI. REFORMS

1122. One of the purposes of the transitional justice policy is to establish guarantees that serious human rights and international law violations that were committed in the past will not be repeated. If this aim is to be achieved, it is often of primary importance to reform institutions that have committed such violations or failed to perform their institutional role in preventing them. The implementation of reforms develops from a principle to combat impunity[1823] based in particular on the international obligation of States to "take the necessary steps in accordance with [their] constitutional processes and with the provisions of [the International Covenant on Civil and Political Rights], to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present [Covenant]".[1824]

1123. Although all transitional justice mechanisms are important, it should nonetheless be emphasised that institutional reform is without doubt the step that will have the greatest long-term impact in achieving peace and stability in the country and which will offer citizens the best protection against repeat violations. For countries emerging from a dictatorship or devastated by long-term conflict, large-scale reform is often necessary and urgent in many sectors, such as the economy, infrastructure, healthcare, education and governance. For the purposes of transitional justice there are usually two priority sectors: security and justice. The security forces and the judiciary are the Government agencies with the most important roles in terms of the respect, safeguarding and protection of human rights. In conflict situations, they must in particular recover their capacities to curb crime and shatter the climate of impunity that prevails even after hostilities have ended, especially with respect to past serious violations of human rights and international humanitarian law. All of these reforms are included in the concept of Security System Reform (SSR).[1825]

1124. Such reforms are obviously highly relevant in the DRC. Section I of this report clearly demonstrates instances in which the Zairian (later Congolese) security forces were directly or indirectly responsible for serious violations of international human rights law and international humanitarian law that were committed between 1993 and 2003 within the territory of the DRC. Some armed group units responsible for these types of violations were integrated into the transition Government and the security services by virtue of the principle of inclusiveness embodied in the peace agreements, and many are

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[1823] Report of the independent expert to update the Set of principles to combat impunity – *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (later UN Principles to combat impunity) (E/CN.4/2005/102/Add.1), Principles 36 and 38.

[1824] International Covenant on Civil and Political Rights, Article 2.

[1825] OECD/DAC indicates that "guidelines on Security System Reform and Governance agreed by ministers in 2004 define the security system as including: core security actors (e.g. armed forces, police, gendarmerie, border guards, customs and immigration, and intelligence and security services); security management and oversight bodies (e.g. ministries of defence and internal affairs, financial management bodies and public complaints commissions); justice and law enforcement institutions (e.g. the judiciary, prisons, prosecution services, traditional justice systems); and non-statutory security forces (e.g. private security companies, guerrilla armies and private militia). This definition has become established internationally."

still in office. In 2003, the Special Rapporteur on the situation of human rights in the DRC, like the Secretary-General in 2007, denounced the fact that, despite clear representations by several international bodies, including the Security Council and the Commission on Human Rights, individuals involved in mass human rights violations had been appointed to the Government.[1826] A lengthy reform process of all institutions began during the transition period and is currently underway in the DRC. Its achievement is all the more crucial in the DRC since the post-conflict period has been marked by persistent violence, rising crime rates for sexual violence committed by the security forces and civilians, including minors, and human rights violations, often committed by state workers. Indeed, since the start of the transition period, members of the DRC security forces (FARDC and PNC) have committed the greatest number of human rights violations.[1827]

1125. In light of information gathered by the Mapping Team and revealed in the preceding sections, the most crucial and urgent of the reforms that aim to prevent repetition of crimes under international law are those that concern improvements to the judicial system which will be outlined briefly, the adoption of a law to implement the Rome Statute and the vetting of the security forces.

A. Reform of the judicial system

1126. When emerging from conflict, "with respect to the judiciary, States must undertake all (...) measures necessary to assure the independent, impartial and effective operation of courts in accordance with international standards of due process".[1828] The creation of a legitimate, strong and independent judiciary is an essential condition in a country's peace-building and democratisation process. Any rule of law rests on such a judiciary that is adequately empowered, financed, equipped and trained to uphold human rights in the administration of justice. Equally important are the other institutions of the justice sector, including lawful police services, humane prison services, fair prosecutions and capable associations of criminal defence lawyers.[1829]

1127. Section III of the report revealed the state of disrepair and dysfunction of the judicial system. On the basis of an audit conducted by several donors between 2003 and 2004 and under the joint chairmanship of the Ministry of Justice and the European Union, a Mixed Committee on Justice Reform devised the Plan of Action for Justice Reform, which was adopted in October 2007. It aims to drive wide-scale legislative reform and support the strengthening of capacities in the judicial system, particularly by reforming criminal legislation, deployment of legal administration throughout the whole country and the retraining of judges and judicial staff.

[1826] *Interim Report of the Special Rapporteur on the situation of human rights in the DRC* (A/58/534), para. 59. *Twenty-third report of the Secretary-General on MONUC* (S/2007/156 and Corr.1), para. 33: "Continued appointments of alleged human rights violators to high-ranking positions within FARDC are a source of concern."

[1827] All the MONUC Human Rights Office reports consulted for the past three years confirm this situation. See Section III, Chapter III.

[1828] See *UN Principles to combat impunity* (E/CN.4/2005/102/Add.1), Principle 36.

[1829] The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), par. 35.

1128. The keystone of the fabric of the new judicial system, the *Conseil supérieur de la magistrature* (CSM), or the Supreme Judicial Council, has been set up as a judiciary management body.[1830] By imposing a clear-cut division of powers, removing the Executive's old powers of injunction, excluding the President of the Republic and the Minister of Justice from the CSM, allowing judges to self-manage and control their own budget and above all requiring that all magistrates professional transfer be approved by the CSM, this reform should ensure the independence of the judiciary as stated in the Constitution. However, it appears that the reality of the situation bears no relation to the ambitions of the constituent.[1831] Doubts have also been raised over the size of the CSM, which stands at 155 members. There are fears that such a large membership could paralyse the new institution.[1832]

1129. The new Constitution, which entered into force in 2006, saw the disappearance of the Supreme Court, to be replaced by the Constitutional Court, the Court of Cassation and the State Council. Laws creating these courts are awaiting adoption or promulgation. It is still too early to assess the impact of these reforms, which are essential for establishing the rule of law.

1130. As part of efforts to curb and prevent[1833] crimes under international law, the DRC has undertaken, by ratifying the Rome Statue, to prosecute the perpetrators of crimes listed in the Statute and to provide for all forms of co-operation with the Court in its national legislation. In the application of the Statute of the International Criminal Court, legislation implementing the Rome Statute should modify and supplement certain provisions of the penal code (*code pénal*), the code on the organisation and competences of the judiciary (*code de l'organisation et de la compétence judiciaires*), the military penal code (*code pénal militaire*) and the military justice code (*code judiciaire militaire*). It is vitally important that the Bill implementing the Rome Statute be adopted for the following reasons:[1834]

[1830] See Section III, Chapter III; law no.08-13 of 5 August 2008 on the organisation and operation of the Supreme Judicial Council.

[1831] Plan of Action for Justice Reform, Ministry of Justice, Kinshasa, 2007, p.10, available in French at: www.justice.gov.cd/j/dmdocuments/pdaction.pdf (hereafter Ministry of Justice, Plan of Action 2007).

[1832] By way of comparison, France's *Conseil supérieur de la magistrature* has only nineteen members, including the President of the Republic and the Justice Minister. In South Africa this council, known as the Judicial Service Commission (JSC), has twenty-three members, including the Justice Minister and six members of the National Assembly. In Benin, the *Conseil supérieur de la magistrature* comprises thirteen members, including the President of the Republic and the Minister of Justice. In Malawi, the Judicial Service Commission has only five members. In Mozambique, the *Conselho Superior da Magistratura* has eighteen members. Lastly, in Senegal, the *Conseil supérieur de la magistrature* comprises twelve members, including the President of the Republic and the Minister of Justice.

[1833] The preventive vocation of the ICJ is recalled in the Preamble of the Rome Statute, where States party to the Statute confirm their determination to "contribute to the prevention of such crimes". During his first official visit to African States Parties to the Rome Statute in June 2009, the President of the International Criminal Court, Sang-Hyun Song, also stressed the importance of implementing the Rome Statute through appropriate national legislation, giving effect to the principle of complementarity between national jurisdictions and the ICC, to increase the dissuasive effect of the ICC system with respect to the commission of atrocities.

[1834] The items that follow are drawn for the most part from the preamble in the bill submitted to the Government for information and comments by two members of the National Assembly on 23 April 2008.

- Updated definitions of war crimes, crimes against humanity and genocide as taken from the Rome Statute will be included in the national legislation.
- The law embodies a number of basic principles, currently concerning the following tenets: individual criminal responsibility, the principle of legality of offences and penalties, the strict interpretation of criminal law, the application of the most favourable law to the defendant in the event of a conflict of laws, the non-retroactivity of criminal law, the *non bis in idem* principle and grounds for excluding responsibility.
- The law sets the age of responsibility at 18 years and prescribes identical penalties for perpetrators and their accomplices.
- It removes the privileges[1835] and immunities[1836] enjoyed by certain categories of individual as a consequence of their official capacity for crimes falling under the jurisdiction of the International Criminal Court.
- It introduces laws penalising offences against the proper administration of justice and ensuring the independence of judges in the exercise of their duties.
- It introduces life imprisonment as the maximum penalty, replacing the current death penalty.
- It establishes the choice of the Court of Appeal (*Cour d'appel*) as the only court with jurisdiction to hear these offences. The jurisdiction of the military courts, which is contrary to the principles of international law, is therefore abolished.
- It makes arrangement for cooperation in terms of inquiries and the suppression of crimes falling under the jurisdiction of the International Criminal Court, mutual assistance, arrest and surrender of accused persons and the enforcement of sentences and measures taken by the ICC.

1131. In spite of the importance of this reform, serious doubts remain over the true desire of the Congolese Parliament to pass that Bill, which is particularly opposed by the military authorities.[1837] Although it has appeared on the agenda for a number of Parliamentary sessions in recent years, the Bill has never been debated. However, since 2003 the Congolese Parliament has received constant requests to pass the Bill from many parties, including strong pressure from Congolese and international civil society (HRW and Amnesty International have orchestrated lobbying campaigns for the Bill's adoption), the ICRC, MONUC and OHCHR, the European Union and several other donors. This Bill before Parliament is a fundamental tool in the fight against impunity in the DRC and complies with the DRC's international obligations. Parliament must pass it without delay.

[1835] "Exorbitant jurisdiction", or *privilège de juridiction*, occurs when a person accused of an offence is brought before a different court other than the competent court ratione materiae for the offence in question, on account of their capacity or their social and occupational position. The *privilège de juridiction* covers many categories of individual: the President of the Republic, national, provincial, city, town and village leaders, members of the national and provincial government, members of the constitutional court, the court of cassation, the state council, courts of audit (*cours des comptes)* and their prosecutors, and senior public administration workers, from the "director" grade upwards.

[1836] A legal prerogative temporarily or permanently shielding an alleged perpetrator of an offence from prosecution or which makes prosecution dependent on the fulfilment of certain conditions or formalities: e.g. head of State, elected representatives, diplomats, etc.

[1837] Interview with the political and judicial authorities of the DRC in April and May 2009.

B. Vetting of security services

1132. The process of reforming the security forces (SSR, see above), particularly the police and the army, was begun at the start of the transition period, along with the reform of the justice sector. A committee on police reform has produced a draft law for the reform of the Congolese National Police, which is currently in Parliament and waiting to be placed on the agenda, debated and passed. The army reform process has proven more difficult. The two processes of disarmament, demobilisation and reintegration (DDR), designed to disarm all combatants and give them the option of returning to civil society or being integrated into the army, and the mixing and integration of former combatants in a new national army (*'le brassage'*),[1838] produced very mixed results. Once this stage was complete, a comprehensive SSR process for the army was to follow. Evaluation of these processes does not fall within the mandate or the expertise of the Team. However, it is to be regretted that transitional justice issues were not taken into account during this process. The DDR process could have enabled the systematic gathering of witness accounts at the *centres de brassage*, and efforts could have been made to identify those suspected of committing serious violations in order to exclude them from the army. Links were not established with the TRC, in part due to its passiveness.

1133. The imperatives of transitional justice can and must be considered in the comprehensive army reform process under debate. The most obvious link between transitional justice and institutional reform is the vetting procedure. This is a mechanism that aims to ensure that "government workers who are personally responsible for flagrant human rights violations, particularly personnel in the army, the security services, the police, the intelligence services and the judicial system, must be prevented from working in government institutions".[1839] Vetting is particularly important in cases where many people who were responsible for serious human rights violations were employed as government workers as a result of the peace agreements. It constitutes a preventive measure for human rights violations while allowing a certain degree of satisfaction for the victims, insofar as alleged perpetrators who are not prosecuted are at least excluded from positions of authority. It is a non-judicial procedure that aims to identify and remove those responsible for human rights violations from public institutions, in particular the security forces. Legislation normally provides for the setting up of a commission to gather information on the alleged violations committed by the individual, offer the individuals the opportunity to defend themselves, and lastly make a ruling, which can generally be appealed before another body. In recent years, the United Nations has assisted many countries in conducting vetting processes.

1134. Today, many people suspected of committing serious violations of international humanitarian law can be found in a number of institutions, in particular among senior positions in the army. During the transition period and in the years that followed, several individuals exposed as being responsible for serious crimes committed in the DRC, some

[1838] These soldiers received training in *centres de brassage* ("mixing centres") for between three months and one year. They were then deployed across the country as new units, which enabled most of the old chains of command from the old armed groups to be broken.

[1839] See *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1), 8 February 2005, Principle 36.

for crimes dating back to the period covered by this report, were promoted on their integration into the national army created by the 2002 peace agreements. Very recent cases have confirmed the Government's unwillingness to exclude them, the most well-known being that of General Bosco Ntaganda, for more than three years under ICC warrant of arrest for war crimes and recently reintegrated into the FARDC. These actions go against the principles at the root of the vetting procedures under examination here. A vetting process is therefore not just essential in itself, but is also a prerequisite for any other transitional justice initiative. The presence of such people within institutions, and particularly in institutions that have a monopoly over the use of force, means that the alleged perpetrators of serious violations can use their power to block initiatives, and threaten or simply discourage potential witnesses and victims as needed.

1135. Since 2007, the Security Council has reiterated a number of times its call for the Congolese authorities to "establish a vetting mechanism to take into account when they select candidates for official positions, including key posts in the armed forces, national police and other security services, the candidates' past actions in terms of respect for international humanitarian law and human rights".[1840] Likewise, in March 2009 the seven thematic special procedures on technical assistance to the Government of the DRC indicate in their reports that: "The Government should remove perpetrators of serious human rights violations that have already been identified as such from its ranks and files without further delay. In addition, the Government and its major partners in security reform should set up a comprehensive and adequately resourced secondary screening mechanism, where each officer is vetted for his past human rights record and subjected to a determination of his ability to command in accordance with the principles of international humanitarian law and the values embodied in the Constitution of the DRC. Candidates who fail should be excluded and blacklisted from joining the military, police and intelligence services, with appropriate due process mechanisms and transparent processes. The international community should technically assist this process by providing specialised international staff as well as resources."[1841] Still more recently, the primary recommendation of the Group of Experts on the DRC was for the Government of the DRC to implement "a vetting mechanism to screen the human rights records of FARDC officers".[1842] Demand for such a process is also increasing within Congolese civil society.[1843]

1136. The Security Council considers that such a measure is necessary in order to break the cycle of impunity that has always surrounded the DRC security forces, and that true SSR will not achieve sustainable results if the security forces are not vetted. Unfortunately, so far official discussions have not yet been initiated by the Congolese authorities regarding a possible vetting process for the police or for the army in the

[1840] See Security Council Resolution 1794 (2007) dated 21 December 2007, para. 15; reiterated in subsequent Resolutions extending MONUC's mandate.

[1841] *Combined report of seven thematic special procedures on technical assistance to the Government of the DRC and urgent examination of the situation in the east of the country* (A/HRC/10/59), para. 97.

[1842] Interim *Report of the Group of Experts on the DRC prepared pursuant to paragraph 8 of Security Council Resolution 1857* (2008) of 22 December 2008 (S/2009/253).

[1843] See, for example, "Déclaration de COJESKI-RDC relative à la loi sur l'amnistie pour faits de guerre et faits insurrectionnels dans le Kivu", Kinshasa, 12 May 2009.

context of these reforms. The suggestion by several international partners to include vetting in police reform met with staunch opposition from Congolese stakeholders.[1844]

1137. As a priority, any vetting process implemented in the DRC should begin with the FARDC rather than the police, given that the majority of individuals facing grave allegations of serious human rights violations have been integrated into the army rather than the national police. This does not mean to say that vetting the police would be unnecessary; simply that vetting the army is a more pressing need. Secondly, at least to begin with, top-ranking officers who are now in positions of authority within the army should be vetted first. Vetting methods should include aptitude tests and an assessment of the individual's capacity, in the light of their previous experience, to hold a position of authority (e.g. regional commander, brigade commander). Vetting these positions would also have a very significant impact not only on boosting the levels of professionalism within the armed forces but also protecting civilian populations living in areas where these officers can still cause them harm.

1138. As in the case of prosecutions and truth-seeking, the mistrust of the people towards the institutions and between political actors suggests that it would be expedient to consider the possibility of including international representatives in this type of vetting mechanism. Such a mechanism would nevertheless require the firm commitment of the Congolese Government in order to ensure its success. The establishment of a vetting mechanism, which may at first be limited in scope, would do away with the widespread sentiment within Congolese civil society that 'perpetrators of crimes are favoured in the name of peace and national unity'.[1845] At the same time, such a mechanism would be politically less perilous and more acceptable than a mechanism aiming to embark on large-scale prosecutions, insomuch as the consequence for those responsible would not be a loss of freedom but "only" removal from office.

Conclusion

1139. In light of the impunity enjoyed by the perpetrators of serious violations of human rights and international humanitarian law, and the repetition of crimes within the territory of the DRC, there is a manifest urgency for justice and security service reform. The members of the Mapping Team were able to observe the constant fear on the part of affected populations that history would repeat itself, especially when yesterday's attackers are returning in positions that enable them to commit new crimes with complete impunity.

[1844] Interviews with MONUC workers, held by the Mapping Team in April 2009.

[1845] Opinion expressed by a representative from a women's legal assistance group at the Bukavu round-table meeting organised by the Mapping Team, 12 May 2009.