

SECTION IV. TRANSITIONAL JUSTICE OPTIONS FOR THE DRC

976. The Sun City Agreements marked the conclusion of a long peace process initiated over three years before in Lusaka and designed to bring an end to a long series of increasingly deadly conflicts. As the foreign forces had finally undertaken to leave the national territory, it became necessary for the entire Congolese population immediately to establish dialogue among themselves in several areas, and particularly those of justice, national reconciliation and the fight against impunity. Having been invited for the first time to enter into negotiations that would lead to transition, Congolese civil society, described as *forces vives* [living forces] in the Lusaka Agreements, participated legitimately and enthusiastically in the Inter-Congolese Dialogue (ICD), freely expressing their hopes for peace, justice and democracy.

977. The global and inclusive Agreement adopted following the ICD was intended to usher in a new political order, sound the death knell for armed conflict once and for all and outline a new political future for the DRC. The fight against impunity figured prominently in the resolutions that accompanied the Agreement adopted in Sun City in April 2002, which recommended the establishment of several transitional justice mechanisms and the adoption of crucial reforms in the justice sector:

- The establishment of an international criminal court for the DRC to judge crimes of genocide, war crimes and crimes against humanity committed since 30 June 1960 (resolution DIC/CPR/05).
- The creation of a national Truth and Reconciliation Commission entrusted with re-establishing truth and promoting peace, justice and national reconciliation (resolution DIC/CPR/04).
- The creation of a national human rights observatory (resolution DIC/CHSC/08).
- The elimination of special jurisdictions, in particular the *Cour d'Ordre Militaire*, the abolition of the military courts' jurisdiction to judge civilians and the recognition of the right of appeal before those jurisdictions (resolution DIC/CPJ/06).
- The assertion of the separation of powers and the effective independence of the judiciary (resolution DIC/CPR/06).

978. These requests by Congolese society to establish transitional justice mechanisms and to implement certain institutional reforms, the majority of which have not been answered, remain equally relevant and necessary today with respect to combating impunity for the crimes committed between 1993 and 2003. Recently, at the peace, security and development conference held in January 2008 in North Kivu and South Kivu, several hundred members of Congolese civil society reiterated their demands that transitional justice mechanisms be implemented, particularly in terms of investigations and prosecutions for war crimes, crimes against humanity and crimes of genocide

perpetrated since 1996, and that the Truth and Reconciliation Commission (TRC)¹⁶⁹³ be restructured and reconvened. One participant in the transitional justice round table meeting held in Goma in May 2009, organised by the Mapping Team, identified civil society's expectations as: "first, to know the truth concerning the crimes committed before the Rome Statute came into force, then to punish the perpetrators of those crimes and finally to grant reparation to the victims for their losses".¹⁶⁹⁴ The direct and indirect victims of the crimes committed between 1993 and 2003 have often expressed similar views in their meetings with the Mapping Team. In a recent study, 82% of the population in the east of the country said that "accountability [for war crimes] is necessary to secure peace".¹⁶⁹⁵

979. The transitional justice mandate entrusted to the Mapping Team is to:

"Formulate a series of options aimed at assisting the Government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of those violations in terms of truth, justice, reparation and reform, taking into account ongoing efforts by the DRC authorities as well as the support of the international community".¹⁶⁹⁶

980. This mandate conforms perfectly with the multiple demands Congolese society has made toward its leaders and complies with the UN Security Council's recent request to MONUC to "help [the Government] create and apply a transitional justice strategy".¹⁶⁹⁷

981. To carry out that part of its mandate, the Mapping Team examined the DRC's experiences in the area of transitional justice and identified the challenges it posed, particularly in the light of the conclusions drawn from its assessment of the judicial system presented in the previous section of this report. In particular, the Mapping Team reviewed the experience of the Truth and Reconciliation Commission, which operated during the transition, as well as the reforms in progress in the justice and security sector.

¹⁶⁹³ See the final workshop reports of the conference on peace, security and development in North Kivu and South Kivu held in January 2008 where it was recommended "that a mixed (national and international) independent inquiry committee should be set up with a view to identifying the crimes committed in Kivu since 1996 and proposing sanctions for their perpetrators; that the ICC should accelerate the investigations into the war crimes, crimes of genocide and crimes against humanity committed across Congolese territory; that a Committee should be set up for identifying and compensating the victims of conflicts and war be entrusted with... defining the nature of the appropriate compensation and providing compensation to the victims; that a compensation budget should be included in the Kivu stability and reconstruction fund for the victims of the conflicts and war that have raged across the region since 1996; that a law should be adopted to establish a new Truth and Reconciliation Commission; that the independence of the judicial powers should be respected; and that the security and police forces be cleaned up".

¹⁶⁹⁴ Statements collected at the round-table meeting on the subject of transitional justice and the fight against impunity organised in Goma on 11 May 2009 by the Mapping Team for the DRC.

¹⁶⁹⁵ *Living with Fear*, a survey carried out among the population on peace, justice and social reconstruction in the east of the DRC, August 2008. Available at the following address: www.ictj.org.

¹⁶⁹⁶ Article 1.3 of the Terms of Reference approved by the United Nations Secretary-General on 8 May 2007.

¹⁶⁹⁷ Mandate reiterated by the Security Council in several of its resolutions. See Resolution 1794 (2007) of 21 December 2007, par. 16, and Resolution 1856 (2008) of 22 December 2008, par. 4.

982. During that exercise, the Team consulted Congolese experts in criminal law and international criminal law. It met the Congolese civilian and military judicial authorities in Kinshasa and in the provinces, representatives of the Ministry of Justice and Human Rights, members of the government agencies responsible for the reform of the judicial system, including the justice reform monitoring committee within the Ministry of Justice (CMJ) and the Permanent Commission for Congolese Law Reform (CPRDC), NGOs for the defence of human rights, in particular those dealing with justice, victims' associations, Bar Association representatives and magistracy unions.

983. Convinced of the need for national appropriation of the transitional justice measures in order to guarantee their effectiveness and in order to gather views and opinions from civil society on this subject, the Team organised several round table meetings concerning transitional justice and the fight against impunity. These were held on 25 April 2009 in Bunia, 11 May 2009 in Goma, 12 May 2009 in Bukavu and 22 May 2009 in Kinshasa. In total, over a hundred people took part, primarily figures in the Congolese justice system, civil society organisations, including several victims' associations and professionals actively involved in the field of transitional justice. The Team observed that Congolese civil society was already keenly aware of the pitfalls to be avoided when drafting and implementing transitional justice measures and those pitfalls will be detailed in this section of the report.

984. The options for transitional justice put forward in this report broadly take into account the various points of view expressed by key Congolese figures at round table meetings and working sessions, and are also based on other studies of victims' expectations in terms of transitional justice and data gathered from the Mapping Team's own fieldwork. These round-table meetings do not claim to replace a dedicated national consultation process which must precede any important decision in terms of transitional justice in order to ensure its legitimacy and acceptance. Finally, the various options presented are compatible with the current efforts deployed and comply with the DRC's international obligations.

CHAPTER I. DEFINITION OF TRANSITIONAL JUSTICE

985. The United Nations defines justice as “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large”.¹⁶⁹⁸ The concept of “administering justice during the transition period” or “transitional justice” “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.¹⁶⁹⁹

986. The main objectives and challenges of transitional justice are summed up by the Secretary-General of the United Nations as:

*“(...)helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security.”*¹⁷⁰⁰

987. Transitional justice mechanisms aim to combat impunity with regard to serious and gross violations of human rights and international humanitarian law and to promote the dynamics for reform and reconciliation within societies recovering from armed conflicts or a period marked by large-scale abuses. They must also contribute to the prevention of further conflicts, the strengthening of democracy and the re-establishment of the rule of law, all of which must be supported by new consensual foundations. Transitional justice also seeks to restore dignity to the victims of human rights violations through the establishment of provisions for justice, truth and reparation for the wrongs they have suffered. Moreover, mobilising the national awareness around transitional justice measures will lay the foundation for the consolidation of peace and the reconstruction of a shared history.

988. Transitional justice is based on all the rights granted to the victims of large-scale abuses resulting from the international obligations of States to comply with, enforce and apply international law concerning human rights and international humanitarian law, which are derived from international customary and treaty law and from domestic law. The rights of victims are codified in the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (herein “Principles on

¹⁶⁹⁸ See the *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies* (S/2004/616), par.7.

¹⁶⁹⁹ Ibid, par. 8.

¹⁷⁰⁰ Ibid, par. 3.

rights to a remedy and reparation”¹⁷⁰¹ recalling numerous elements from the United Nations’ Set of Principles to Combat Impunity¹⁷⁰² and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.¹⁷⁰³ These texts essentially identify three rights for victims: the right to truth, which implies establishing the facts,¹⁷⁰⁴ the right to justice and the right to reparations. The Human Rights Council has asserted these rights in several of its decisions, communications and general observations. Regional human rights courts have also contributed to delineating these rights. As regards the DRC, it is worthwhile pointing out the importance of the right to non-discrimination among victims, as reiterated in the Principles on rights to a remedy and reparation, which demands that victims should be recognised, irrespective of the communities from which they come.

989. In post-conflict situations or when a dictatorship ends, States are seldom in a position to meet their human rights obligations, particularly when it implies answering for serious crimes committed in the past. The scale and severity of the crimes dictate that *ad hoc* and exceptional measures be adopted to compensate for these failings and to provide adequate responses both to the victims and to society at large.

990. Various types of measure can contribute to these objectives, particularly “both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”¹⁷⁰⁵

991. These mechanisms are complementary and non-exclusive. Most of the numerous countries that have looked back at their recent history marked by dictatorship, armed conflict and large-scale serious crime have used transitional justice measures of several kinds, implemented simultaneously or gradually, in order to restore rights and dignity to victims, to ensure that human rights violations are not repeated, to consolidate democracy and lasting peace and to lay the foundations for national reconciliation. The exact form and function of the mechanisms adopted by governments vary according to the specific context and realities of each country, including the nature of the crimes committed.

¹⁷⁰¹ Resolution 60/147 of the General Assembly dated 16 December 2005.

¹⁷⁰² Louis Joinet, *Question of the impunity of perpetrators of violations of human rights (civil and political). Final report produced following decision 1996/119 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (E/CN.4/Sub.2/1997/20,); Diane Orentlicher, *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102 and E/CN.4/2005/102/Add.1, 8 February 2005.

¹⁷⁰³ Resolution 40/34 of the General Assembly dated 29 November 1985.

¹⁷⁰⁴ It also defines the right to truth as a “collective right, drawing upon history to prevent violations from recurring in the future”. See Louis Joinet, *Report on the question of the impunity of perpetrators of violations of human rights (civil and political)*, par. 16 to 18, E/CN.4/Sub.2/1997/20. See also the updated Principle 2 that stipulates: “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”

¹⁷⁰⁵ See the *Report of the Secretary-General on the re-establishment of the rule of law and the administration of justice during the transition period in societies that are in conflict or are emerging from a period of conflict* (S/2004/616), par. 8.