



General Assembly

Distr.
GENERAL

A/HRC/4/25/Add.3
24 May 2007

FRENCH AND ENGLISH
ONLY

HUMAN RIGHTS COUNCIL
Fourth session*
Agenda item 2

**IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF
15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”**

**Report of the Special Rapporteur on the independence of judges and lawyers,
Leandro Despouy**

Addendum*

Preliminary note on the mission to the Democratic Republic of the Congo

* The present document, which carries the symbol number of the fourth session of the Human Rights Council, is scheduled for examination by the fifth session of the Council.

Introduction

1. The Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, visited the Democratic Republic of the Congo from 15 to 21 April 2007 at the invitation of the Government. He would like to thank the Government for its cooperation, and the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) for the very valuable assistance that he received.

2. The Special Rapporteur and his team visited Kinshasa, Bukavu in Sud-Kivu, Goma in Nord-Kivu, and Bunia in Ituri. The Special Rapporteur met the Prime Minister, several of his ministers, provincial authorities, judges and prosecutors from various levels of courts, both civilian and military, the heads of several bar associations, lawyers, judges' and lawyers' associations, members of non-governmental organizations (NGOs), members of the various sections of MONUC and the United Nations Development Programme (UNDP), and the principal donors to the justice sector.

I. PRELIMINARY OBSERVATIONS

3. Having emerged from a decade of deadly conflict and a three-year transition period, the Democratic Republic of the Congo has managed, with the support of the international community, to adopt a new constitution and hold its first democratic elections in 2006. Now that it has a democratically elected Government and an appropriate institutional framework, the Republic faces two major challenges: to establish the rule of law and a democracy based on an effective separation of powers, and to face up to the aftermath of past crimes. The judiciary, which has a key role in meeting these challenges, must be truly independent and effective, as required under the Constitution, so that it can play its role as a pillar of democracy and guarantor of the rule of law.

4. The Special Rapporteur's final report, containing his conclusions and recommendations on his visit, will be presented to the Human Rights Council of the United Nations in a few months; this preliminary note offers some conclusions and recommendations. During his visit, the Special Rapporteur noted that the judicial system is in an alarming state, especially in view of the following:

- There are far too few judicial personnel, both in the prosecution service and in the judiciary, and courts in the country. Judges do not have the logistic and physical facilities they need to perform their duties in a dignified and professional manner. They lack appropriate premises such as courtrooms, vehicles in which to reach places of investigation, basic computer equipment, and the financial resources to cover the running costs of the judicial system. Furthermore, they are not adequately paid. Their lack of financial independence has a direct impact on the lack of independence of both civilian and military justice and encourages almost systematic corruption among judges and court officials;

- Interference by the executive authorities and the army remains very common despite the express prohibition in article 151 of the Constitution. The structural and financial weakness of the judicial authorities is exacerbated by institutional shortcomings, such as the lack of any oversight by an independent, functioning higher council of the judiciary, which makes judges more vulnerable to interference;
- Gaining access to justice is very difficult for the majority of the population because of corruption, a lack of financial resources, the geographical remoteness of the courts and transport problems, and a lack of awareness of appeal mechanisms. Judges and lawyers also have difficulty in gaining access to legislative texts and case law;
- In most cases where it is possible to conclude a trial, the courts' decisions are not enforced. The very high rate of non-enforcement is mainly due to an inability to deploy the officers responsible, corruption among these officers, poverty among the beneficiaries of judicial decisions, who are expected to contribute to enforcement costs, and a preference in some communities for friendly settlements in accordance with custom. The number of prison escapes is also high, owing in part to the badly dilapidated state of the prisons, which is extremely worrying. This undermines the work of the judicial system and allows crime to go unpunished;
- Very alarmingly, most human rights violations are committed by the armed forces and the police and fall, under domestic legislation, within the jurisdiction of the military tribunals. International human rights standards require that cases of human rights violations by members of the armed forces, like trials of civilians, should be heard by civilian, not military courts. This is all the more important because the lack of independence particularly affects the military judicial system, which remains dependent on the military hierarchy. Military justice continues to be tarnished by a very high incidence of military and political interference in the form of refusals by senior officers to bring their men before military tribunals, and pressure and obstacles during the trial process;
- Preventive detention is the rule rather than the exception. It is used in connection with far too many offences, and often the sole aim is to extract money in return for the release of the detainee. It is especially worrying that uniformed men, such as soldiers and officers of the National Intelligence Agency (ANR), often carry out arbitrary arrests and detentions - which is beyond their authority - and often for activities that do not constitute a crime. Given the slowness of the judicial system, and in some cases the absence of any trial, suspects can often be held in preventive detention for months or even years without being found guilty by a court of law.

5. In view of these shortcomings, it has to be said that the judicial system is rarely effective and that human rights violations, the most frequent and serious of which are rapes, summary executions, arbitrary detention, and looting and destruction of property, generally go unpunished. Since a democratic State cannot function without a strong and independent judiciary, it is regrettable that the judicial system is still the poor relation of the country's democratic institutions.

6. In this context, the Special Rapporteur welcomes the efforts made by the integrated United Nations Human Rights Office in the Democratic Republic of the Congo and various civil society organizations to combat impunity - supporting judges in their work, for example, and providing them with the means to conduct investigations and conclude trials. These isolated efforts, however, cannot offset the systematic shortcomings of the judicial system.

II. PRELIMINARY RECOMMENDATIONS

7. In view of these observations, the Special Rapporteur makes the following preliminary recommendations:

(a) The development of a strong, effective and independent judicial system should be a priority of the Government and of international bodies active in the field of justice and human rights. Without urgent and substantial reinforcement of the judicial system, the rule of law and the consolidation of the democratic reforms in which the Congolese people and the international community have invested so much over recent years will not materialize. Meeting this objective will require, in particular:

- (i) The allocation of a considerably higher percentage of the national budget to the judicial system, bearing in mind that the budget of the judicial system usually accounts for between 2 and 6 per cent of national budgets. These resources should make it possible to improve judges' pay, recruit new judges, give them the premises and operational capacity (transport, information technology, etc.) they need to perform their duties, and establish new courts, especially magistrates' courts;
- (ii) The development and implementation by the Justice Ministry, in close cooperation with donors, of a plan for rebuilding the judicial system. In this regard, the Special Rapporteur supports the work of the Joint Committee to Monitor the Justice Framework Programme in the Democratic Republic of the Congo, which brings the Justice Ministry together with donors. On the basis of the results of the organizational audit of the Congolese judicial system conducted, by agreement with the Government of the Democratic Republic of the Congo, in 2004 by the European Commission in partnership with Belgian and French development cooperation institutions, the United Kingdom Department for International Development (DFID), UNDP, MONUC and the Office of the United Nations High Commissioner for Human Rights, the Committee intends to draft a plan of action to give effect to the justice framework programme. The Special Rapporteur is convinced that this Committee's work is critical to strengthening the country's judicial system. Having noted delays in the drafting of the plan, however, he encourages Committee members to press on with their work so that the plan can be adopted as soon as possible. The implementation of specific measures to rebuild and support the judicial system should begin in 2007;

- (iii) **Recovery by the country's authorities of control over its natural resources. The Democratic Republic of the Congo is an extremely rich country, but thus far, exploitation of its natural resources has not benefited its population. On the contrary, unplanned or illegal exploitation continues to be a significant source of conflict and human rights violations, leading to looting and other abuses. Despite this, no one has been held to account for this illicit exploitation. It would be helpful to train specialist judges in this field. Regaining control of natural resources would allow the country to obtain the resources it needs to strengthen its institutions, in particular the judicial system, and to ensure that the population benefits from the country's wealth.**

(b) To give effect to the constitutional framework and ensure that judicial independence does not remain a dead letter, a number of laws must be adopted as a matter of urgency:

- (i) A law on the organization of the Higher Council of the Judiciary, a key body that will be responsible for appointing, promoting and disciplining judges, thereby safeguarding their independence while at the same time providing adequate supervision of their conduct, and for drawing up the judicial system's budget, which is the key to its independence and effectiveness;**
- (ii) A law providing for the application of the Rome Statute, which will transfer jurisdiction over international crimes from military tribunals to the civilian judicial system;**
- (iii) Laws establishing the Court of Cassation, the Constitutional Court and the Conseil d'État.**

(c) The training of judges, especially in ethics, professional conduct and international human rights standards, and the training of auxiliary staff should be considerably strengthened. There is no body offering training to judges and judicial auxiliary staff before they assume office. A college for the judiciary and a college for the professional training of judicial auxiliary staff should be established as soon as possible.

(d) In order to guarantee the right to a defence, a right recognized in the Constitution, the State should establish a system for paying duty lawyers, for example, through bar associations, to ensure that poor people can have a high quality defence.

(e) The reconstruction of the judicial system should be based on a strengthened civilian judicial system, which should have sole jurisdiction to judge civilians and cases of human rights violations committed by the armed forces or the police. The jurisdiction of the military tribunals should be gradually limited to offences of a purely military nature.

(f) The use of preventive detention must be strictly limited. This will also prevent prison overcrowding. A maximum period of preventive detention should be established by law, especially for offences for which the prison sentence is under five years.

(g) A system for monitoring the enforcement of judgements should be established, as should a mechanism to ensure that the legal costs of poor people are met by the State.

(h) In order to provide a solid foundation for democracy, the Congolese judiciary and the international community should cooperate in prosecuting grave violations of human rights and humanitarian law committed during the war, drawing on the experience of judicial cooperation in the area of transitional justice that has produced good results in other countries. The establishment of joint benches comprising national and international judges sitting in national courts might be an appropriate solution.

8. In talks with the Special Rapporteur, the Government recognized that an independent and effective judiciary is the backbone of the rule of law and the country's development. It also recognized that the judicial system is in a critical state, and urgently needs to be strengthened. The Special Rapporteur reiterates that it is vital for the new Government to make the reconstruction and strengthening of the judicial system a priority in its programme for the democratic consolidation of the country, and he encourages the Government in its intended endeavours.
