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ICJ Submission to the Universal Periodic Review of the Democratic Republic of the Congo

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The International Commission of Jurists (ICJ) welcomes this opportunity to contribute to the Human Rights Council's Universal Periodic Review of the Democratic Republic of the Congo (DRC), which is of key importance given the persistent renewal of violence and the deteriorating human rights and humanitarian situation mainly due to the repeated and large-scale armed conflicts in the country.

It is important that the Human Rights Council's Working Group on UPR (Working Group) and the Human Rights Council (Council) emphasize the gravity of the conflict situation, condemn grave breaches of international humanitarian law and gross violations of human rights, call for urgent measures to establish the rule of law, curb impunity and ensure the protection of civilians and internally displaced persons (IDPs) and full enjoyment of human rights for the population.

Urging respect for international law, including human rights law and international humanitarian law, is essential as lack thereof continues to fuel armed conflicts and remains a major source of long-standing human rights and humanitarian challenges in the Democratic Republic of the Congo. The Council must also ensure that the human rights dimension is fully incorporated into the peace-building process in the Democratic Republic of the Congo.

Violations of human rights during the armed conflicts

Renewed instability and hostility since a series of conflicts began in August 2008, with Armed Forces of the Democratic Republic of the Congo (FARDC) fighting *Congrès National pour la Défense du Peuple* (CNDP) and FARDC joined by Congolese Patriotic Resistance (PARECO) together fighting the Mayi-Mayi militia and their joint recent actions against *Forces Démocratiques de Libération du Rwanda* (FDLR) have increased the severity of the humanitarian situation, in particular in the Eastern DRC. Despite the recent ceasefire agreement, the violence and resulting situation continues to have devastating effects on the human rights and humanitarian situation in the country. At the root of this violence is a fight for control over the country's rich natural resources and a lack of resolution to conflicts of the past, including land conflicts and reprisals for actions during the Rwandan Genocide, which are tied to the abuse and manipulation of ethnic divisions.

All parties to the conflicts have committed gross human rights violations, which are crimes under international law. Members of the FARDC and police forces have committed unlawful killings, arbitrary executions, rape, and torture.¹ Non-state armed groups, including FDLR, PARECO, Mayi-Mayi, CNDP, and Lord's Resistance Army (LRA) have perpetrated mass killings, torture, recruitment and use of child soldiers, forced

¹ UN Secretary-General, *Fourth special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, UN Doc. S/2008/728, 21 November 2008, para. 31 [hereinafter: *Fourth special report of the Secretary-General*]; Group of Experts on the Democratic Republic of the Congo, *Final Report of the Group of Experts on the Democratic Republic of the Congo pursuant to paragraph 18 d) of the Security Council resolution 1807 (2008)*, UN Doc. S/2008/773, 12 December 2008, para. 18 [hereinafter: *Final Report of the Group of Experts*].

displacement, sexual slavery and rape as a method of warfare.² The recent instability and conflicts between all these parties raise particular concern about increasing occurrences of these violations.

Because of the Government's duty to prevent and refrain from committing such violations, the DRC is in violation of its international obligations as party to the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention Against Torture* (CAT), the *Convention on the Rights of the Child* (CRC), and the *Optional Protocol to the CRC on the Involvement of Children in Armed Conflict* (OP-CRC-AC), and under the customary international law.

Given the large-scale human rights challenges in the DRC, the ICJ calls on the Working Group and the Council:

- **To urge all parties to the conflict to ensure full protection of civilians, including from assaults and threats of violence and to respect international humanitarian and human rights law;**
- **To recommend to the Government to boost the necessary political will and comply with its legal obligations under the respective international human rights instruments, in particular the ICCPR, CAT, CRC and OP-CRC-AC and under the customary international law;**
- **To engage with the donor community in devising benchmarks to technically assist the Government in order to measure accountability and steer donor priorities;**
- **To re-establish a comprehensive special procedure's mandate – a separate group of independent experts on the DRC - to monitor the human rights situation and help the Government prevent vicious violence and boost full implementation of human rights standards and their integration throughout the peace-process, as recommended by the latest thematic experts' report on the situation in the DRC.³**

Impunity for Gross Violations of Human Rights

The DRC is failing in its international human rights obligations to prevent violations when they occur and provide remedies to their victims because of the culture of impunity that pervades the country. The Constitution of the DRC provides for an independent judiciary, capable of addressing and remedying human rights violations, however, this system does not operate in practice. Remedies available in theory, such as compensation for victims of crimes paid by the perpetrator, are not enforced even when ordered by a court.⁴ The DRC's international human rights obligations require the DRC to ensure "accessible and effective remedies"⁵ for victims of human rights violations, and despite the Constitutional provisions, the failure of the DRC to guarantee and implement such remedies constitutes a violation of its obligations under Article 2 of the ICCPR.

In addition to the lack of remedies, the impunity that prevails as a result of a lack of investigation constitutes a direct violation of the DRC's duty to punish perpetrators who commit violations.⁶ The rampant corruption and fear prosecutors and judges have of reprisals from Government and non-state armed groups combine to stifle any investigations

² *Fourth special report of the Secretary-General*, para. 31.

³ Report of seven thematic special procedures on technical assistance and capacity building: *Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country*, UN Doc. A/HRC/10/59, 5 March 2009, para. 119. [Hereinafter: *Combined Report of Seven Thematic Special Procedures*].

⁴ *Ibid.*, para. 40.

⁵ Human Rights Committee, *General Comment No. 31*[80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15 [hereinafter: *General Comment No. 31*].

⁶ *General Comment No. 31*, para. 15; Article 2, paragraph 3 of the ICCPR requires States to provide adequate remedies, in particular "Administrative mechanisms...to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies." ... and according to the jurisprudence of the Human Rights Committee also "judicial mechanisms to guarantee an effective redress for gross violations of human rights." And notes that "[c]essation of an ongoing violation is an essential element of the right to an effective remedy."

and allow members of both state and non-state armed groups to continually violate human rights without legal consequences. The DRC's failure in this regard is exemplified by the rarity of investigations into human rights violations.⁷ When trials do occur there is extreme and blatant interference by the government and military in favour of governmental forces and threats against prosecutors and judges by non-state armed groups to protect members of their forces from prosecution.⁸

The DRC's violations are compounded because FARDC and other state law enforcement authorities, which enjoy near total impunity, commit the majority of human rights violations.⁹ Some perpetrators have continued to commit violations in the most recent scourge of violence as they took comfort in the lack of investigation for their previous human rights violations. Although this violence has been quelled by the cease-fire agreement signed by CNDP, other armed groups and the Government, the peace process needs to include holding perpetrators of all past violations accountable, otherwise the country remains in violation of its duties under international human rights law. However, impunity is not limited to the areas of conflict, as even in the relatively stable parts of the DRC military and security personnel are rarely prosecuted. Furthering this violation, military and security personnel fall under the jurisdiction of the military courts, the proceedings of which fall short of due process guarantees (such as a lack of access to evidence by the victims) and which lacks independence, thus even if prosecutions do occur, they are not in line with international standards. Additionally, military officials heavily influence investigations and prosecutions to protect their personnel.¹⁰ Indeed, military and security personnel who commit these violations are often known and remain in their positions and are shifted about to avoid prosecutions and investigations.¹¹

Moreover, former officers of non-state armed groups, such as Bosco Ntaganda - who has been indicted by the International Criminal Court (ICC), have joined FARDC and other state forces, resulting in the promotion of war criminals among army ranks, contributing to their own impunity and ensuring the impunity of those they commanded.¹²

The ICJ calls on the Working Group and the Council to recommend to the Government:

- **To take immediate steps to remove military and security personnel who commit violations of human rights against civilians from the jurisdiction of military courts and to ensure these crimes are properly investigated and prosecuted by the ordinary courts;**
- **To investigate and prosecute the crimes against humanity and war crimes that occurred during the conflict from 1993 to 2003, the human rights violations and international crimes in Kinshasa in August 2006 and May 2007, and in Bas Congo in February 2007 and March 2008 and in North Kivu from August 2008 to January 2009 and ensure full cooperation in current investigations and prosecutions by the International Criminal Court (ICC), in particular to arrest and transfer Bosco Ntaganda to the ICC;**
- **To refrain from integrating CNDP forces into the FARDC and end the practice of appointing and promoting, among the ranks of the FARDC, persons implicated in gross human rights violations;**
- **To expand its judicial and security sector reforms, including the provision of**

⁷ *Combined Report of Seven Thematic Special Procedures*, para. 60-61; Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, *Report of the Special Rapporteur on the independence of judges and lawyers, Addendum: Mission to the Democratic Republic of the Congo*, UN Doc. A/HRC/8/4/Add.2, April 11, 2008, para. 70 [hereinafter: *Report of the Special Rapporteur on the independence of judges and lawyers*].

⁸ *Combined Report of Seven Thematic Special Procedures*, para. 61.

⁹ *Report of the Special Rapporteur on the independence of judges and lawyers*, para. 15.

¹⁰ *Id.*; Yakin Ertürk, Special Rapporteur on violence against women, its causes and consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Mission to the Democratic Republic of the Congo*, UN Doc. A/HRC/7/6/Add.4, 28 February 2008, para. 75-76 [hereinafter: *Report of the Special Rapporteur on violence against women*].

¹¹ *Ibid.*, para. 76.

¹² *Combined Report of Seven Thematic Special Procedures*, para. 72.

vetting procedures¹³ to screen military and police officers alleged to be responsible for or suspected of gross human rights violations;

- To prevent and refrain from interference and to ensure cooperation with investigations and prosecutions of military personnel implicated in human rights violations.

Judicial Independence and Access to Justice

The Government of the DRC has an obligation, arising from both its Constitution and relevant international instruments, primarily under Articles 2 and 14 of the ICCPR, to protect and ensure judicial independence, access to justice and a due process, but the current state of the judiciary clearly shows that these obligations are not being met.¹⁴ Despite constitutional separation of the branches of government the DRC has only recently established the constitutionally required High Council of the Judicature to oversee the judicial branch.¹⁵ Furthermore, the executive branch, the military, and rebel groups interfere by instructing, threatening and coercing judges, prosecutors and lawyers, which undermines necessary judicial independence. Because of the existing control of the judiciary by political and military personnel, the political will required to give impact to laws that would improve the judicial independence seems to be nonexistent. Unless the Government takes steps to enforce and pass additional laws on the judiciary, the current laws will, in effect, remain mere aspirations.¹⁶

The Government is also failing in its duty to provide access to justice. The limited access to justice owes particularly to the low budget allocations that have led to increased corruption in the judiciary, so that the poor, who cannot afford to buy their justice, have no access to it. Additionally, because of the lack of funding there are not enough courts or judges, legal aid does not function in rural areas, and there is no money to support judges travelling to rural areas to hear cases so the people outside of the cities have virtually no legal recourse.¹⁷ This utter lack of judicial infrastructure imposes great restrictions on any access to justice for victims of human rights violations.

The recent wave of bloodshed in North Kivu has eliminated any access to justice for civilians in that area. Complacency between FARDC and rebel groups, such as PARECO, FDLR, and CNDP, allow for rebel groups to access supplies, which allows these groups, in addition to FARDC, to continue to intimidate and harass the local civilian populations.¹⁸ Civilians have no legal recourse for these violations and instead are often executed in their homes, both by rebel groups and by FARDC, if the civilians are suspected of not supporting that group.¹⁹ As violations that have occurred during the most recent as well as past conflicts have not been investigated or punished, victims have been denied access to justice and reparations in contravention of the international law. In failing to provide access to justice for its citizens, the Government is in violation of its duties under Article 2, paragraph 1 of the ICCPR.

The Working Group should recommend that the Council urge the Government:

- To allocate appropriate financial resources for the judiciary, to provide for the necessary increase in numbers of judges and courts, to make available a nationwide system of legal aid, in particular to victims of sexual violence and to the poor and rural populations, and to provide for training of judges on standards of the due process, judicial independence and human rights;

¹³ See the relevant UN standards and principles on vetting procedures: Report of the UN Secretary General: *„The rule of law and transitional justice in conflict and post-conflict societies”,* UN Doc. S/2004/616 of 23 August 2004, para. 52 and Principle 36 of the United Nations *Updated set of principles for the protection and promotion of human rights through action to combat impunity.*

¹⁴ *Report of the Special Rapporteur on the independence of judges and lawyers*, paras. 5, 16; Human Rights Committee, *General Comment No. 31*, para. 15.

¹⁵ *Fourth special report of the Secretary-General*, para. 69.

¹⁶ *Combined Report of Seven Thematic Special Procedures*, para. 64.

¹⁷ *Report of the Special Rapporteur on the independence of judges and lawyers*, paras. 27-36.

¹⁸ *Final Report of the Group of Experts*, paras. 26, 81, 102, 116, 118; *Fourth special report of the Secretary-General*, para. 23.

¹⁹ *Fourth special report of the Secretary-General*, para. 31.

- To increase access to the legal system by opening courts and guaranteeing legal aid in rural areas;
- To instigate proper separation of the judicial branch from the executive and military. Ensuring that the judicial branch conducts its investigations and prosecutions without orders or direction from either the executive or the military;
- To guarantee protection for judges and lawyers from threats and acts of violence and ensure their safety in carrying out their duties with independence.

Arbitrary Detention and Torture

The ICJ is extremely concerned at the rate of arbitrary detention of political opponents and human rights defenders and long periods of pre-trial detention or detention without charges in the DRC, both of which undermine the rule of law and violate the DRC's obligations under international human rights law, in particular Articles 2, 9, and 10 of the ICCPR.

Arbitrary arrests are most often politically motivated, human rights defenders are frequently targeted, and particularly concerning is the complacency and support of the Government in these violations.²⁰ Individuals subjected to arbitrary arrests and detention are often tortured, which also violates the DRC's obligations under Articles 2 and 3 of the CAT.²¹

Those deprived of liberty are held for extended periods of time in prisons, detention facilities, and secret detention centres. Victims of long pre-trial detention and detention without charges, both amounting to arbitrary detention, are often prevented from seeking access to a lawyer of one's choice or seeing a family.²² Stringent application of the Constitutional provision that sets a limit on pre-trial detention would help prevent arbitrary detention and fulfil the DRC's international human rights obligations in this regard. As this provision is rarely enforced, the DRC remains in violation of its duties.²³

The ICJ encourages the Working Group and the Council to urge the Government:

- To immediately cease the practice of arbitrary detention, and end the use of arbitrary arrests and detention for suppression of political opposition and dissenting opinions;
- To immediately investigate cases and prosecute alleged perpetrators of all acts of arbitrary detention, torture, or cruel, inhuman or degrading treatment, including that towards prisoners or detainees;
- To investigate previous instances of arbitrary detention, free those who remain detained and provide an effective remedy and reparation to victims as required by Article 9 of the ICCPR;
- To address the overcrowding of prisons, by releasing any persons who were arbitrary detained or who are waiting for unduly delayed trial; also by reducing the practice of pre-trial detention to be used only in necessary, legitimate and legally justifiable cases, for a limited period of time, as any deprivation of liberty must conform to the general principles of legality, legitimacy, necessity and reasonableness and proportionality;
- To ensure that pre-trial detention is used exceptionally and guarantee bails, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State;
- To guarantee that anyone arrested or detained on a criminal charge shall be brought to trial within a reasonable time, and without undue delay, or be released pending trial;²⁴

²⁰ *Id.*; *Combined Report of Seven Thematic Special Procedures*, para. 19;

²¹ *Combined Report of Seven Thematic Special Procedures*, para. 18; *Fourth special report of the Secretary-General*, para. 31; Articles 2 and 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

²² *Fourth special report of the Secretary-General*, para. 31; *Report of the Special Rapporteur on the independence of judges and lawyers*, para. 51; *Combined Report of Seven Thematic Special Procedures*, para. 18-19.

²³ *Report of the Special Rapporteur on the independence of judges and lawyers*, para. 50.

²⁴ See, Article 38 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and Human Rights Committee Views of 4 April 1995, Communication No. 447/1991, *Case Leroy Shalto (Trinidad and Tobago)*, para. 7.2.

- To refrain from prolonged detention without trial and unduly delayed detention waiting for a trial, which are prohibited under international law and both of which constitute arbitrary detention.
