

# HUMAN RIGHTS CHALLENGES DURING THE TRANSITION: AN OHCHR PERSPECTIVE

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## Introduction

The UN Office of the High Commissioner for Human Rights (OHCHR) has been operating in the Democratic Republic of the Congo (DRC) since 1996. In fact, in resolution 1995/69, the Commission on Human Rights invited the High Commissioner for Human Rights to consider, within existing resources, the recommendation by the Special Rapporteur to send, in consultation with the Government of the then Zaire, two experts in the field of human rights to Kinshasa, where they would establish themselves in order to monitor the human rights situation and to give advice to both government authorities and NGOs.<sup>2</sup>

Pursuant to the above recommendation, the Office of the High Commissioner initiated a series of consultations with the Government of Zaire. In August 1996, a *Protocol d'Accord* (Protocol Agreement) establishing a Field Office in Kinshasa was signed by the High Commissioner and the Government of Zaire.<sup>3</sup> The *Protocol d'Accord* provides for the deployment of Human Rights experts tasked to observe the Human Rights situation in the DRC with a view to advising the Congolese authorities on the formulation and implementation of programmes for the promotion and protection of Human Rights.

The main objectives of the Office (which is entirely funded through voluntary contribution from Member States) include:

- Monitoring closely the general human rights situation throughout the country, both directly and through the development and support of monitoring networks of national human rights NGOs and other segments of civil society;
- Providing reports on the human rights situation to the High Commissioner;
- Providing information on individual cases of human rights violations that may require urgent action by the country Special Rapporteur and/or the Thematic Mechanisms;

- Advising, training and assisting human rights NGOs and certain segments of civil society on International Human Rights standards;
- Providing advisory services in the field of promotion and protection of human rights to the Government - in particular to the Ministry for Human Rights, which was established in June 1998; and
- Ensuring that the recommendations and the decisions of the Special Rapporteur on the situation of human rights in the DRC, the Thematic Mechanisms, and the Treaty monitoring bodies are fully implemented.

In fact, in resolution 1995/69, the Commission on Human Rights had expressed concern "... at the persistent seriousness of the situation of human rights in Zaire, in particular at arbitrary arrests and detentions, summary executions, torture and inhuman treatment in detention centres, notably those which are administered by the army and security services, serious shortcomings in the administration of justice, which is unable to function independently, the impunity of human rights violators, and forced population displacements ...".<sup>4</sup>

The serious shortcomings in the administration of justice, and the impunity of human rights violators prevail today, and the aim of this chapter is to provide a brief overview of current challenges associated with transitional justice issues.

## Mechanisms of transitional justice

There are many ways to address gross human rights violations during a period of political transition. Generally speaking, however, these fall into two basic categories: judicial mechanisms and non-judicial or extrajudicial mechanisms. Since MONUC's Human Rights Section has dealt with issues around judicial strategies, the emphasis here is on some extrajudicial solutions that are under serious consideration in DRC.

### Objectives

Transitional justice objectives include the following:

- To halt ongoing human rights crimes (new atrocities have been regularly reported by NGO's, humanitarian actors, journalists and MONUC itself);
- To investigate the crimes (over the past year alone, horrific acts of violence have been reported in Ituri, Kisangani, Kindu, the Kivus, Ankoro as well as other parts of the country, often in the context of military or political reprisals against the civilian population);
- To identify those responsible (many of them are well known by the population, by human rights NGO's, and by humanitarian actors);

- To sanction those responsible (in most cases, alleged perpetrators of war crimes and crimes against humanity remain in power and/or continue to rule in the communities in which crimes have been committed);
- To provide reparation to victims (this could be material, cash payment, combination of both, etc.);
- To prevent future human rights crimes (see Security Council resolution 1493<sup>5</sup>);
- To preserve and enhance peace and democracy (the cycle of violence in the DRC could jeopardise the political peace process); and
- To foster national reconciliation (from a human rights perspective, true reconciliation must be linked to accountability, to justice)

In the context of the DRC, the challenge is how to pursue these objectives in a situation where one is confronted with the realities of a weak justice system;<sup>6</sup> a large number of perpetrators; a very large number of victims; and the need to consolidate a fragile peace process.

It must be emphasised that every situation is different and there is no standard model on how to fight impunity. However, attention should be paid to approaches taken and lessons learned from other countries emerging from conflict. In this regard, it is worth recalling that the Security Council, in its resolution 1468, called on the Secretary-General in consultation with the High Commissioner for Human Rights, to make recommendations to the Council on ways to help the transitional Government to address the issue of impunity in the DRC.<sup>7</sup>

## Extrajudicial mechanisms<sup>8</sup>

The transitional Constitution provides for the establishment of a Truth and Reconciliation Commission and a National Human Rights Observatory to tackle the issues of impunity and promote national reconciliation and a state based on the rule of law. These provisions are generally seen as important mechanisms for addressing the issue of impunity. However, given the linkage to the Pretoria Accord, these institutions are faced with unique challenges which may not have been salient in other countries, and which are linked to some critical success factors for the functioning of extra-judicial institutions, such as:

- *Independence and autonomy from government*: these institutions need to act independently from Government, from political parties and all other entities. On the other hand, independence does not mean an entire lack of connection to the State - there will definitely be areas of connection for

example for financing and reporting on the activities of the extra-judicial mechanisms.

- *Pluralism*, or inclusive membership, is essential for legitimacy (the need to ensure representation of all sectors of civil society).
- *Adequate power of investigation*: the investigative powers of a national institution should be established by law. Provision should also be made for the imposition of legal or administrative sanctions when the free exercise of the institution's powers is obstructed.
- *Adequate resources* (both human and material): this provision must be fulfilled before extra-judicial institutions can even start operating. Sufficient human resources and adequate funding are vital to efficient functioning of such institutions.

### *The Truth and Reconciliation Commission*

The establishment of a Truth and Reconciliation Commission (TRC) is a useful instrument for promoting reconciliation. From a Human Rights perspective, true reconciliation must be linked to accountability, justice and acknowledgment of past crimes. TRCs, in addition to creating a historical record, may conduct investigations, and take testimony from witnesses, victims and perpetrators. They may also recommend the granting of compensation to victims; and recommend reforms needed to prevent the recurrence of past abuses. However, every situation is different, and there is no standard model on how to establish a TRC.

While there are useful lessons to be learned from other TRCs (for example in Sierra Leone and South Africa), there are still many contentious issues surrounding the proposed Commission for the DRC. These include the composition of the TRC, its mandate, and the timing of the establishment and work of the Commission.

Regarding the composition, some of the members of the bureau do not meet the requirement mentioned in resolution DIC/CPR/04 of the Sun City agreement. The selection of commissioners was very subjective (eligibility criteria were not respected at all). There is clearly a need to appoint high quality commissioners with expertise in human rights and reconciliation issues, and the OHCHR in close coordination with other partners will continue to push the issue forward.

As far as the mandate is concerned, it is apparent that the objectives of the TRC are too ambitious, and are simply not realistically achievable in a short transition period. For example, the commission is asked to look at issues since 1960. This very large temporal jurisdiction will have serious implications for the TRC's effectiveness. The mandate is also too wide in terms of the type of

violations to be investigated, and it overlaps in some areas with the mandate of the National Human Rights Observatory.

The timing of the TRC is also problematic. The question is, in the context of ongoing conflict and violation of Human Rights, if the DRC is ready for a TRC. Many actors are also concerned by the speed at which the Commission is being established. In this regard, grass root organisations (mainly Human Rights NGOs) have called for the TRC process to be put on hold in order to allow more time for consultation and discussion.

None of the draft proposals on the law implementing the TRC addresses, *inter alia*, the problems of the TRC's composition as well as its timing. Considering the above, and the risk of having a politicised TRC as a result of the modalities of appointment of members by the Sun City signatories, it is essential to find a way forward that is both possible and acceptable to all parties. The OHCHR position, (and that of the majority of international and national actors), is that the parties to the Sun City agreement should reconsider their approach to the TRC. The OHCHR has, therefore, (in close coordination with MONUC and others), engaged in consultation and brainstorming sessions with many of the relevant actors. OHCHR and MONUC have suggested that a law be drafted and adopted, limiting the role of the TRC bureau to that of a working group aimed at facilitating further consultation throughout the country, addressing the issue of composition and the mandate for a genuine and viable TRC for the DRC. The importance of continuing consultation at large with Congolese population throughout the country cannot be over emphasised, as well as the need to design principles to be respected whenever appointing a commissioner.

### *The National Human Rights Observatory*

It is very important that the legislation establishing the National Human Rights Observatory conforms with United Nations' principles relating to the status of national institutions for the promotion and protection of human rights, known as the "Paris Principles".

To meet this requirement, the OHCHR, in coordination with MONUC and with the financial support of Belgium, organised in Kinshasa from 7 to 9 August 2003, a national consultation on National Human Rights Institutions. Representatives of human rights organisations, selected from the 11 provinces of the DRC, participated in the consultation. The aim of the workshop was to exchange ideas and views on the functions of a National Human Rights Observatory (NHRO). After three days of deliberations in the workshop, under the facilitation of two well-experienced international experts contracted by the OHCHR, recommendations related to the functioning of NHRO were

made. Those recommendations were used in the first draft proposal of a text that could serve as a framework for the National Human Rights Observatory bill. This text was sent to OHCHR in Geneva for comments, before being finalised in Kinshasa with the participation of representatives of the elected bureau of the NHRO, MONUC's Human Rights Section and the OHCHR in the DRC.

Generally speaking, the functions of the NHRO deal with the promotion and protection of human rights. The Observatory will have the following specific responsibilities:

- To advise Cabinet, Parliament, and any competent body on matters concerning the promotion and protection of Human Rights;
- To receive complaints and undertake investigations;
- To examine and report on the legislation and administrative provisions in force, as well as draft laws and proposals, and to make such recommendations as it deems appropriate to ensure that these conform to the fundamental principles of HR;
- To recommend the adoption of new legislation, the amendment of legislation in force, and the adoption or amendment of administrative measures;
- To prepare reports on the situation in the DRC with regard to HR in general and on more specific matters; and
- To assist in the formulation of programmes for the teaching of and research into human rights, and to take part in their implementation.

At this stage, OHCHR is quite satisfied with the law being submitted to Parliament by the bureau of the NHRO, and is looking forward to its adoption by the legislature.

## **Future Course of Action**

It is crucial that some form of transitional justice mechanism be devised promptly, so that those responsible for gross human rights violations and crimes are prosecuted. Considering future courses of action, it is clear that effective judicial and national human rights protection systems will need to be put in place during the transition. In this regard, OHCHR, together with MONUC, will:

- Continue to monitor the HR situation on the ground;
- Investigate and document gross violations of human rights, war crimes, crimes of genocide, and crimes against humanity;
- Bring the human rights situation to the attention of the UN human rights protection mechanisms (e.g. the Commission on Human Rights), as well as to the attention of the High Commissioner for Human Rights and to the Security Council; and

- Provide technical assistance to national institutions (e.g. training for government officials, provision of expertise to the institutions for support to democracy, etc).

Moreover, the rebuilding of the justice system should be a priority for the international community during the transitional period.

On the judicial level, the International Criminal Court (ICC) now serves as an important mechanism for the prosecution of war crimes and crimes against humanity. The DRC has ratified the ICC Statute, which mandates the ICC to prosecute international crimes committed after 1 July 2002.

In addition, a special jurisdiction could be established during the transitional period in order to assist the Congolese judicial system (whose lack of independence and limited technical capacity are well documented) in ensuring that war crimes and crimes against humanity do not go unpunished. In this regard, in her report to the fifty-ninth session of the Commission on Human Rights, the Special Rapporteur on the human rights situation in the DRC has recommended the establishment of a special jurisdiction to investigate and prosecute those responsible for war crimes and crimes against humanity perpetrated by all parties in the DRC conflict (this will address the delay in delivery of justice).

Another course of action is for the DRC Government to exclude all suspected perpetrators from positions of power and authority during the transition, until they have been exonerated by an international inquiry. Individuals with a record of violations of human rights and International Humanitarian Law do not have the right to be part of any state structures.

## Conclusion

For the transitional period, a particular challenge will be the preparation, development and implementation of the rule of law program in the DRC. In this regard, there is a need for a co-ordinated approach in tackling rule of law issues in the DRC. No single UN agency has the necessary expertise, experience, resources or mandate to identify priorities, and to subsequently formulate a conceptual and operational approach and work plan for handling these priorities. Rather, such a process will require a real team effort by various partners within the UN system. Co-ordination should be extended to other, non-UN actors as well, in order to avoid duplication and to make optimum use of available resources.

Ultimately, the paramount concern must be to avoid a return to the past. In this regard, the only valid prescription is to pursue, as much as possible, the

requirement for both justice and peace. In this context, efforts to assist transitional institutions in the DRC must take into consideration mechanisms for dealing with past abuses in a manner that does not undermine the fragile peace process.

## NOTES

1. Mahamane Cisse-Gouro is the Deputy Director of the DRC Office of the UN High Commissioner for Human Rights.
2. United Nations Commission on Human Rights, resolution 1995/69 on the Situation of human rights in Zaire, E/CN.4/RES/1995/69, 8 March 1995.
3. Human Rights Field Operation in Zaire, later renamed Human Rights Field Operation in the DRC.
4. E/CN.4/RES/1995/69, op cit.
5. In resolution 1493, the Council : "*Strongly condemns* the acts of violence systematically perpetrated against civilians ... and urges all parties, including the Government of the Democratic republic of the Congo, to take all necessary steps to prevent further violations of human rights and international humanitarian law ...". S/RES/1493 (2003), 28 July 2003, par. 8.
6. The DRC justice system has been a casualty of the conflict, thus narrowing the chances that perpetrators of atrocities will be brought to justice before the national courts.
7. S/RES/1468 (2003), 20 march 2003, par. 7.  
This refers to non-judicial bodies, created for a short period of time, usually during a period of political transition.