Comments on the second version of the Draft Legislation to Establish Specialized Chambers within the Congolese Judicial System for the Prosecution of Grave International Crimes

February 2011

A. Specialized Chambers: Legal Foundation, Composition, and Mandate

1. Legal Foundation and Independence of Mixed Specialized Chambers

The legal foundation of the proposed specialized chambers is not made entirely clear in the draft legislation. The preamble states on page 6 that these specialized chambers are to be established pursuant to article 149 of the Constitution, which authorizes the creation of "specialized jurisdictions."

As the draft legislation describes them, the "specialized chambers" do indeed appear to resemble a "specialized jurisdiction." Indeed, the specialized chambers are tasked to deal only with one particular area of litigation (relating to grave crimes under international law); they would have a special composition (whereby the presence of international judicial officers and staff is allowed for a limited period of time) and they would employ a number of special criminal procedures (with respect to witness protection, for example).

As decided by the United Nations Human Rights Committee, the creation of special jurisdictions must satisfy certain conditions under international law. This is to avoid that these special jurisdictions and the right of all people to "equality before courts and tribunals and to a fair trial."[1] We believe that the proposed specialized chambers satisfy these conditions. They are being created out of necessity, for reasons that are serious and

[1] See the United Nations Human Rights Commission, general observation number 32, "Article 14: right to equality before courts and tribunals and to a fair trial," CCPR/C/GC/32, August 23, 2007, para. 2.

objective. It is clear that the individuals and crimes targeted by these specialized chambers cannot be prosecuted effectively in the DRC's regular courts at the present time.

It would therefore be useful for the draft legislation to specify that a "specialized jurisdiction" is being created pursuant to article 149 of the DRC's Constitution. This specialized jurisdiction would consist of four specialized chambers located in the appeals courts, as laid out in articles 1 and 2 of the current draft legislation.

A clear definition of the legal basis for the establishment of the specialized chambers is important if their independence is to be guaranteed. The special nature of the jurisdiction is justified by the gravity and sensitivity of the crimes that would come under its jurisdiction. The creation of a specialized jurisdiction would also lend a heightened visibility to the specialized chambers. The "heart" of the specialized jurisdiction would consist of one chief presiding judge, one chief prosecutor, and one registrar based, for example, in Kinshasa. This centralized structure would also help ensure the four specialized chambers have a coordinated common approach to prosecutorial strategy, witness protection, and administrative issues.

We note with appreciation that the new version of the draft legislation proposes the establishment of a reduced number of specialized chambers (four courts of first instance and four appeals courts). As we expressed in an earlier letter, [2] we are convinced that a more limited number of specialized chambers will facilitate the deeper investment necessary to their success.

2. Location of Specialized Chambers

We suggest that a paragraph be added to article 1 of the draft legislation specifying that the specialized chambers may conduct hearings in locations other than those of the courts of appeal to which they are attached, if this is considered useful to the case.

Such an article would give the mixed chambers a degree of flexibility, in that they may hold hearings near sites where the crimes they are judging were committed. This could provide victims and Congolese citizens increased access to justice. Indeed, the United Nations mapping report shows clearly that, since 1993, grave crimes have been committed in a great many DRC provinces. For this reason the geographic reach of the specialized chambers is likely to be extensive and could benefit from a "mobile" capacity of the chambers. This

[2] Letter to the Minister of Justice and Human Rights, his Excellency Luzulo Bambl Lessa, on the draft legislation to establish specialized mixed chambers, signed by 37 civil society organizations, December 22, 2010.

mobility would also present a reasonable compromise with the original proposal, which was to create specialized chambers in each of the eleven appeals courts in the DRC. Moreover, this practice has already been tested in certain Congolese provinces, where "traveling courts" (*chambers foraines*) have been the focus of a number of projects funded by development partners, with the specific aim of facilitating access to justice.

Article 3 of the Rome Statute contains relevant language which could be reproduced in the draft legislation: "The court may sit elsewhere, whenever it considers it desirable as provided in this Statute."

3. International Participation

Human Rights Watch welcomes the Congolese government's clearly stated intention to "open the doors [of the specialized chambers] to foreign judicial officers."[3]

The possible participation of international judicial officers and staff is explicitly referenced in a number of articles in the current version of the draft legislation, including article 1 (judges), article 9 (special prosecutors), and article 14 (general provisions). We note that the explicit recognition of the possibility of involving international personnel in all aspects of the chambers' work (not only as judges) represents a significant improvement over the legislation's first version. We observe, however, that international participation remains only a possibility, and is not guaranteed. For example, the current draft article 1 provides for a maximum of two international judges, but also allows that there might be none.

In our view it is important that international participation in the specialized chambers be thoroughly reconceptualized to make it more foreseeable and consistent with an important goal for the chambers: namely to bolster domestic capacity and, after a certain period of time, allow the national judicial system to take over.

We therefore reiterate our original suggestion[4] that the participation of international judicial officials and international staff in the specialized chambers should be clearly **guaranteed** and, at the same time, **temporary and gradually phased out.** The mixed chamber in Bosnia is

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[3] "Press Release by his Excellency the Minister of Justice and Human Rights," October 2, 2010, http://www.justice.gov.cd/ (accessed February 7, 2010).

[4] Human Rights Watch, *A Mixed Chamber for Congo?* October 2009, http://www.hrw.org/news/2009/11/19/a-mixed-chamber-congo (accessed February 7, 2011).

an interesting example in this regard[5]. In Bosnia's war crimes chamber, for example, it was decided at the outset that the international component would be gradually reduced over five years, dated from the start of the chamber's activity. [6] The allocation of posts among national and international staff reflected this "transitory" international participation. Initially, for example, the majority of judges were international; but later the ratio between national and international judges was reversed. Similarly, the registrar's post was first assigned to a foreign national, and afterwards to a national. The draft legislation on the specialized chambers could, therefore, explicitly provide for robust but gradually phased out participation by international staff.

It is equally important to define in detail the skills and abilities required of international personnel: for example, it is important that international staff speak French, have a thorough knowledge of civil law, proven experience in the field of investigations and prosecutions of grave international crimes, and be highly adept at transferring knowledge and skills, a dimension that is essential for building the capacity of Congolese judicial staff. This last factor is so important for the success of the specialized chambers and bolstering the domestic judicial system that it should be part of the regular professional evaluations of international staff.

This formula for transitional and gradually phased-out participation of international staff, if adopted, could perhaps lead to re-thinking the lifespan of the specialized chambers, in their entirely domestic form. We expand on this point below in the section titled "Temporal Jurisdiction."

4. Mixed Chambers in the Appeals Phase

We note that the draft legislation in its current version does not provide for the inclusion of international judges during the appeals phase. This is probably due to oversight, but it is imperative that it be rectified. If the specialized mixed chambers are to succeed, it is absolutely vital to ensure that professional, independent investigations and well-reasoned

[5] Human Rights Watch, *Looking for Justice, the War Crimes Chamber in Bosnia and Herzegovina*, February 7, 2006, http://www.hrw.org/en/reports/2006/02/07/looking-justice-0.

[6] It should be noted that the imposition of this arbitrary time limit was justly criticized. We do not recommend that the law directly specify such a time limit. There could, however, be a separate strategy addressing specifically how to transition international staff presence.

decisions may not be overturned on appeal due to a lack of expertise or independence on the part of appeals judges[7].

As in the trial chambers, international judges' participation at the appeals level could be designed as temporary and gradually phased out.

The system set forth in the current version of the draft legislation provides for three specialized appeals chambers located in the Kinshasa/Gombe, Goma, and Kananga appeals courts. One single appeals chamber for the four specialized trial chambers would offer the advantage of unified and coherent jurisprudence at the appeals level. However, we recognize it might be beneficial to have more than one court of appeals to avoid an overload of work and significant delays in the judicial process.

If the option of having three appeals courts is retained, we wish to make the following comments. First, it should be noted that the three specialized appeals chambers need not necessarily be created at the same time. They could indeed be established gradually. It could thereby be possible to begin with a single specialized appeals chamber, and subsequently to establish the other two when the number of appeals to consider requires it. Meetings among the judges of different appeals courts to discuss their respective decisions might also be encouraged to promote the development of consistent jurisprudence.

Second, the draft legislation provides that, in the event of conflicting jurisprudence among these three appeals courts, their decisions may be referred to the *cour de cassation* (highest court) (article 58). This procedure is an important one. For the same reasons stated above, however, it would be advisable to provide that the *cour de cassation* may establish its own specialized mixed chamber to consider cases emanating from the specialized chambers. The participation of international judges in such cases over a transitional period—as in all other jurisdictional levels—should be guaranteed by the law.

5. Independence, Mandate, and Appointment of Judges

We suggest that the draft legislation include an article clearly specifying that the judges in the mixed specialized chambers must carry out their duties independently and abstain from any activities that might compromise this independence or call it into question. Such an article might be modeled on article 40 of the Rome Statute.

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[7] This is not a purely hypothetical concern; in Serbia, for example, the Supreme Court reversed a number of its war crimes chamber's decisions for questionable reasons. See Human Rights Watch, Unfinished Business: Serbia's War Crimes Chamber, no. 3, June, 2007.

We also believe that the appointment process for judges to the mixed specialized chambers should follow the ordinary procedure outlined in the Constitution for appointing judges (namely appointment by the President of the Republic at the recommendation of the *Conseil Supérieur de la Magistrature* (Judicial Services Council)).

Finally, we believe the term of office for *ad litem* judges specified in article 5 of the draft legislation (three years) is too short. One of the most advantageous aspects of creating specialized chambers is their potential to build judges' capacity and expertise with respect to international criminal law, providing familiarity with applicable jurisprudence, theories of criminal liability, and even management of traumatized or endangered witnesses. A term of three years seems far too short to gain proficiency in all these areas. In fact, no clear reason is given, either in the draft legislation or the explanatory memorandum, for the distinction made in the draft legislation between judges and "*ad litem* judges" with respect to the length of their respective mandate. Possibly, the distinction reflected a desire to limit the duration of international participation in the mixed specialized chambers, since there is also a provision that only *ad litem* judges may be non-Congolese. We remain convinced that this goal would be better achieved if the legislation specifies clearly that international participation in the specialized chambers is to be transitory, phased out, and detailed in a clear "exit strategy " for international staff. If this proposal is adopted, there would no longer be a reason to specify a length of mandate for *ad litem* judges, and it could be removed from the text.

6. Role of the Registry in the Specialized Chambers

Article 8 of the draft legislation provides that the Registry will assist the specialized chambers. The current version of the draft legislation, however, offers few details as to the Registry's duties and the selection of the registrar.

We note with concern that article 12 of the draft legislation, which details the activities of the special investigative units, seems to confuse duties that clearly fall within the remit of the *Ministère Public* (Prosecutor's Office) with those that ought to be overseen by the Registry. For example, the current version of article 12 of the draft legislation provides that the special investigative units, in addition to duties directly relating to investigations and preparing cases for trial, will be responsible for managing evidence and documents collected at the time of proceedings, in addition to protecting victims, witnesses, and judicial staff. It is particularly important to stress that witnesses for the prosecution and witnesses for the defense may benefit equally from protection. Clearly, investigators for the Prosecutor's

Office may be less committed to protecting witnesses for the defense. Further, the physical and psychological work of protection demands time, availability, and specific expertise. This is equally true for managing evidentiary materials and court transcripts. For all the above reasons, these duties should be overseen by a neutral judicial body with the necessary resources: the registry.

Notably and without exception, in every international or hybrid tribunal to date, the above mentioned functions (archiving and protection), as well as those associated with the participation of victims (at the ICC and the Extraordinary Chambers for Cambodia), or the organization of an effective defense for the accused, have been managed by the registry.

We therefore recommend that an article be added to the draft legislation specifically concerning the Registrar's role vis-à-vis the specialized chambers. Such an article would also furnish an opportunity to outline the characteristics desirable for the registrar's position (high moral standards and professionalism), as well as the fact that this position could be held by a foreign national for a temporary period. The article need not be extremely detailed, but it might note the registrar's principal duties: to provide administrative support for judicial activities, manage the budget, protect victims and witnesses, facilitate victims' participation in proceedings, organize the legal representation of defendants and facilitate their defense, and manage case records.

If, as we have recommended above, the legal nature of the specialized chambers is explicitly defined as a "specialized jurisdiction" established under Article 149 of the Constitution, then a single registrar will be appointed; it would be possible to assign assistant registrars to each "section" (or specialized chamber). A model of this kind would foster a single comprehensive approach to registry functions, which will be crucial to preserving standards of quality for procedures shared by the four specialized chambers.

7. The Office of the Prosecutor (Ministère Public)

Article 9 of the draft legislation specifies that the duties of the Office of the Prosecutor in the specialized chambers are to be carried out by special prosecutors of Congolese or foreign nationality.

Consistent with our suggestions above concerning the participation of international staff, we suggest that this article be revised to make the inclusion of international prosecutors guaranteed at the beginning, but phased out over a transitional period. If, as we have recommended above, the legal foundation for the specialized chambers is clarified to be a

"specialized jurisdiction" created in accordance with article 149 of the Constitution, then a single chief prosecutor would be appointed; it would possible to designate deputies for each "section " (or specialized chamber. We suggest that, initially and for a transitional period only, the first chief prosecutor for this specialized jurisdiction be a foreigner.

Such a choice would send the strong message that the Congolese government is determined to ensure the specialized chambers' independence as regards prosecutorial policy. For the Office of the Prosecutor to function properly, it is also essential for there to be some degree of clarity as to the individual ultimately responsible for decision-making in the event of disagreement among the special prosecutors, particularly with respect to investigative strategy. The experiences of the mixed chamber in Bosnia-Herzegovina and of the Extraordinary Chambers in Cambodia offer excellent illustrations of this issue. Disagreements within the Office of the Prosecutor can create significant tensions and impediments in investigations. In Cambodia's Extraordinary Chambers, a system of conflict resolution was set up whereby possible disagreements between prosecutors would be brought before judges for resolution. Unfortunately, the system has not worked satisfactorily[8]. At the time of our research on the Bosnian mixed chambers, personnel recommended, instead, a clear, hierarchical system in which the final responsibility for decisions is clearly assigned. This responsibility should initially be granted to a foreigner with extensive experience prosecuting grave international crimes, for whom it might be easier to make difficult decisions, and whose impartiality could not be questioned. After a transitional period, the position (which would thus be the position of chief prosecutor of a specialized jurisdiction composed of four specialized chambers) would be assigned to a Congolese national. Once again, it is essential that the person chosen for this position demonstrate a genuine commitment to sharing knowledge and skills with national colleagues.

B. Jurisdiction of the Specialized Chambers

1. Primary vs. Exclusive Jurisdiction:

Article 18 of the draft legislation provides that the specialized chambers are to exercise exclusive jurisdiction over crimes falling within their subject matter jurisdiction. The last paragraph of this article further prescribes that "the presiding judge or the special

[8] See Open Society Institute, "Recent Developments at the ECCC: December 2010", December 2010, http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-report-20101207 (accessed February 7, 2011).

prosecutor, because, for example, the offense is of lesser gravity, may disqualify the facts before them and refer it to an ordinary *Tribunal de Grand Instance* (lower court).*"*

A dynamic partnership between the specialized chambers and the ordinary courts is, in our view, essential. It would prevent the specialized chambers from being flooded by cases of lesser gravity, while maintaining the relevance of the ordinary judicial system in cases of this kind. This is essential for following through on prosecutions of soldiers for acts of sexual violence, which have started taking place in Congolese courts, for example. Shared jurisdiction between the ordinary courts and the specialized chambers would also make it easier to establish "bridges" between the two (training, sharing knowledge and experiences)..

It seems dangerous, inexact, and purposeless to "disqualify" a case (i.e. change the legal qualification of the facts from international crimes to crimes under ordinary law) as a means of guaranteeing this shared jurisdiction. A war crime is a war crime, however isolated an act it may be. For victims, the terminology is important. Further, prosecuting war crimes committed by subordinates as "ordinary crimes" could lead to overlooking important links between these individuals and others at higher levels who would have ordered the crimes. This could have significant ramifications for the possibility of clearly exposing the criminal structure that allowed these crimes to be committed. In Croatia after the conflict of the 1990s, for example, prosecutors regularly prosecuted war crimes as ordinary "murders," without taking into consideration the context of the conflict in which they were committed. This led them to miss, or not do the necessary follow-up of emerging evidence and leads in these cases, which could have been useful for prosecution of those at higher levels.[9] There is also the possible risk that a case will be disqualified for political reasons, to ensure that an individual will be tried in the regular courts rather than the specialized chambers.

We therefore suggest, instead, that the specialized chambers (or the specialized jurisdiction) have primary jurisdiction, with the ability to choose the cases they will consider and those to be referred back to the ordinary courts. We think the special chambers should focus on the most serious cases and on individuals bearing the greatest responsibility for these crimes (this mandate could be added to Article 18 of the draft legislation, or specified as part of a prosecutorial strategy to be developed at a later time). It will be important to establish a procedure specifying exactly how this distribution of litigation will work in practice. The idea

[9] Organization for Security and Co-operation in Europe, Office of Democratic Institutions and Human Rights (ODIHR), "Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer, " 2009, http://www.osce.org/odihr/38689 (accessed February 7, 2011).

of a "shared jurisdiction" could also be a way to determine what the appropriate articulation between this draft legislation and the draft ICC implementing legislation should be. The parallel existence and jurisdiction of the specialized chambers with appeals courts (as foreseen in the current ICC implementing legislation) or of the specialized chambers with ordinary civilian courts would be feasible in the long term in this scenario.[10] A strategy of cooperation and capacity-building between the specialized chambers and ordinary courts should also be developed, to minimize the emergence of a "two-speed" justice system.

2. Temporal Jurisdiction

Human Rights Watch applauds the intent clearly displayed in the draft legislation to make the specialized chambers a tool in the fight against impunity, not only with regard to past crimes but also for grave crimes which continue to be committed in the DRC, especially in the eastern part of the country.

The issue of the specialized chambers' temporal jurisdiction is addressed in article 19 of the draft legislation. We have two observations with regard to this article. First, we find a degree of vagueness in the language of the article's second paragraph that could lead to confusion: "It covers crimes falling within its subject matter jurisdiction committed from 1990 to the present, until a law is passed transferring this jurisdiction to ordinary criminal courts." The phrase "to the present" is unclear, in that it could refer to the date the specialized chambers law is adopted, rather than to the present time in a more general sense—including the period after the text of the law is adopted. It would therefore be useful to alter the language of this paragraph slightly to indicate that the specialized chambers have competence to hear cases of acts within their subject matter jurisdiction committed from 1990 on.

Our second observation concerns the lifespan of the specialized chambers, which this article fixes at 10 years. It is understandable that the government would wish to limit the duration of the chambers' "mixed" nature (meaning the presence of international staff). The goal, for the middle term, is clearly to bolster the independence and capacity of the domestic judicial system so that it may effectively manage, on its own, the litigation of war crimes, crimes against humanity, and acts of genocide, and deter the commission of such acts. If the above proposal for temporary and phased out international involvement is adopted, then after a certain number of years to be determined, the specialized chambers will be entirely staffed with national personnel. This then raises the question of why it would be necessary to discontinue them. Indeed, it could be useful to maintain the specialized

[10] See below, in the section on temporal jurisdiction, our suggestion that the specialized chambers be maintained within the Congolese judicial system after the period of international participation ends.

chambers, which could act in combination with the regular judicial system to review particularly grave, complex cases. We reiterate that such an arrangement would be justified by the gravity of the crimes and the complexity of the proceedings, which demand specific expertise. Moreover, the Rome Statute implementing legislation currently being considered by Parliament also provides for such "specialization," by delegating jurisdiction for Rome Statute crimes to the appeals courts. Other examples of specialization of specific courts in a subject matter exist elsewhere: in France, for example, cases associated with the conflicts in former Yugoslavia and Rwanda are brought before the first instance court in Paris (and draft legislation prepared by the government would extend this specialization to all cases involving war crimes and crimes against humanity).[11] The utility of maintaining the specialized chambers in their "national" form in the DRC, once the period of international participation has concluded, should therefore be considered.

3. Relationship with the Draft Rome Statute Implementing Legislation

The last two points made above concerning jurisdiction oblige us to highlight, once again,[12] the importance of harmonizing the draft legislation creating specialized chambers and the draft ICC implementing legislation, which is currently before Parliament. As it stands now, the two texts assign partially similar jurisdiction to different courts. It is essential to ensure the two documents are well coordinated. Further, the draft legislation creating the specialized chambers refers to the implementing legislation a number of times, as if it had already been passed, which is obviously not the case. These passages must be amended to avoid any possibility of legal gaps or inconsistency.

We rely on the Congolese government to urge Parliament to also pass the ICC implementing legislation, which contains important features such as incorporating definitions of Rome Statute crimes into Congolese law, and arrangements for effective cooperation with the court.

4. Individual Criminal Responsibility

Article 23 of the draft legislation provides that criminal liability for acts falling within its jurisdiction apply to natural persons, individually. We would like to suggest that article 25 of the Rome Statute on individual criminal responsibility be adopted here, in its entirety. Article 25 very usefully clarifies the various modes of individual involvement in crimes (for example:

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[11] See "Draft bill for the allocation of litigation and relief of certain jurisdictional proceedings," number 344, registered at the Senate president's office March 3, 2010, on file at Human Rights Watch.

[12] Letter to the Minister of Justice and Human Rights, His Excellency Luzulo Bambl Lessa, on the draft legislation to establish specialized mixed chambers, signed by 37 civil society organizations, December 22, 2010.

directly committing a crime, as an individual or jointly; ordering or inducing the commitment of a crime; financial or other assistance in commission; etc). The Rome Statute lists these different types of commission in order of gravity. This precision is very useful to the defense in preparing its case. It would also allow judges to simply monitor the decisions of the ICC to keep up to date on evolving law in this area.

Article 24 of the draft legislation, however, appears to backtrack on the principle of individual criminal liability for natural persons, by providing that legal persons under private or public law, excepting the government, will continue to be subject to legal action under Congolese criminal law. Given the context in the DRC, it seems clear that this provision is aimed at private companies that have benefited from the exploitation of natural resources, or arms sales, as well as at peacekeeping forces some members of which may have committed serious crimes, such as rapes. It is crucial that justice be done for the grave crimes committed by these categories of actors in the DRC. However, this must not lead to undermining the principle of individual criminal responsibility. Indeed, it will be crucial to identify, within these legal persons, which individuals may have engaged in grave crimes that fall within the jurisdiction of the specialized chambers, as well as to specify the mode of perpetration and the degree of responsibility these individuals bear. These individuals can then be prosecuted before a criminal court. One example is the case of Frans van Anraat, who was prosecuted in the Netherlands for having sold gas to Sadaam Hussein through his firm in the knowledge that this gas would be used to gas Kurdish civilians in Iraq. [13]

Prosecuting a legal person as such would amount to arguing that this legal person **in its entirety** is a criminal enterprise and that any persons employed by this legal person are jointly responsible for its crimes. This does not seem likely to be the case here. The legal person could, of course, still be sued through civil action for payment of damages—if it were negligent in supervising employees implicated in grave crimes, for example. We therefore suggest that criminal responsibility be preserved as strictly individual, applying solely to natural persons.

5. Universal Jurisdiction

Human Rights Watch applauds the specific inclusion of provisions in the bill giving the specialized chambers universal jurisdiction. Universal jurisdiction is an important safety net in the fight against impunity which makes it possible to prosecute the perpetrators of grave crimes when they have fled the country where the crimes occurred, when authorities in their

[13] For more information on this affair, see the website TRIAL, "Profile: Frans van Anraat," http://www.trial-ch.org/index.php?id=802&L=0&jf=23 (accessed February 7, 2011).

countries do not wish to prosecute them, and when no international court exists for the crimes involved, or none will hear the case. Universal jurisdiction is an important tool in the international justice toolbox. By including these articles in the draft legislation, the Congolese government declares its solidarity with the victims of grave international crimes, no matter their nationality, the place where the crimes were committed, or the nationality of the perpetrators of the crimes.

It is impossible to comment in detail here on the content of these provisions, but we would like nevertheless to bring up three points which would be worthwhile to amend. First, article 31 clearly specifies that the Prosecutor would have a monopoly on prosecutions in the event universal jurisdiction is exercised. This is contrary to the long tradition in Congolese law of *constitution de parties civiles*, or allowing plaintiffs to seek civil damages in criminal cases. [14] Furthermore, our research has shown that it is frequently thanks to the victims that the mechanism of universal jurisdiction is employed. [15] Second, article 33 provides for the principle of "double incrimination," meaning that acts may only be prosecuted in the DRC when they are also defined as crimes in the country where they were committed. This measure is fundamentally inconsistent with the spirit and purpose of universal jurisdiction, and contrary to fundamental principles of international law. [16] War crimes, crimes against humanity, and acts of genocide are prohibited by customary international law, and thus should not necessarily require codification at the level of national law.[17] Finally, article 37 appears to suggest that the specialized chambers can only exercise their universal jurisdiction in cases where an extradition request has been refused. A scenario in which no extradition request is made seems not to have been foreseen; this may create a legal gap for certain perpetrators of grave crimes.

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[14] We realize that some countries, such as Belgium and France, have recently amended their laws on universal jurisdiction in this direction, but this is a negative trend. In fact, these recent changes seem to be principally motivated by a desire to manage the possible diplomatic repercussions associated with politically motivated cases of *constitution de parties civiles* (even though any such complaint, if it is not based on facts, would not, in fact, lead to investigations and prosecutions).

[15] Human Rights Watch, *State of the Art: Universal Jurisdiction in Europe*, June 27, 2006, http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe-0, See the chapters on Spain and France, in particular.

[16] See *Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgment of the Tribunal, Principal II*, "The fact that domestic law does not punish an act that is a crime under international law does not absolve the individual who committed it of responsibility under international law," Text adopted by the International Law Commission and approved by the UN General Assembly, 1950, Yearbook of the International Law Commission, 1950, vol. II.

[17] From a practical point of view this measure does not exempt criminals who are natives of countries that are the most abusive and least likely to prosecute (those who have not ratified the relevant treaties or have not implemented them in their national law)—while it is precisely vis-à-vis these very individuals that universal jurisdiction is especially useful.

6. Criminal Responsibility for Children Under the age of 18

Human Rights Watch recommends that an article be added to the draft legislation specifically excluding from the jurisdiction of the specialized mixed chambers children who were under the age of 18 at the time when they committed the crime. Such a measure would be consistent not only with the ICC's Rome Statute but also with the draft ICC implementing legislation, which also provides that prosecutions against children at the national level be prohibited. The phenomenon of enlistment and forced recruitment of children in armed forces is, unfortunately, widespread in the DRC. Nevertheless, it is internationally acknowledged that child soldiers are primarily victims of conflicts, in the course of which they are sometimes forced to commit grave crimes. Furthermore, as we state below, we believe the specialized chambers are principally intended to judge individuals with the highest responsibility for crimes committed. In no instance could children bear this highest level of responsibility.

C. Procedure

The focus of the final part of the bill is defining a number of procedures involving the rights of the defense, victims' participation, and witness protection. At the same time, article 38 of the draft legislation provides that the specialized chambers will apply the Congolese code of criminal procedure.

The specialized chambers' application of Congolese law and procedure is very important to anchor them in the national judicial system and its practices. Capacity-building for judicial staff is especially valuable when experiences and "lessons learned" can be directly imported and applied to the ordinary justice system.

At the same time, it is imperative that the rules of criminal procedure in this type of litigation scrupulously observe international standards with regard to prosecuting grave international crimes and guaranteeing a fair trial. The gravity of the crimes to be prosecuted here (war crimes, crimes against humanity, and genocide) and the specific demands associated with these types of prosecutions (with regard to protection, for example) may justify including certain special procedures in this document. The ICC's Rome Statute could provide a valuable point of reference in this respect, although care should be taken not to distort Congolese procedure. A revision of the Congolese code of criminal procedure is currently in process. It will be important to ensure that all "general " procedures—those that apply in any kind of criminal proceeding—be directly integrated into the code of criminal procedure and

that the articles in the draft legislation creating the specialized chambers be consistent with the proposed changes to the code.

1. Rights of the Defense

There is a useful distinction to be made here between two categories of individuals: suspects and defendants. The provisions in the Rome Statute of the ICC could serve as a model in this respect. At a minimum, it is imperative that the rights recognized in articles 9 and 14 of the International Covenant on Civil and Political Rights be applied in proceedings before the specialized chambers. The DRC ratified the Covenant in 1976 and is therefore committed to observe these rights in all criminal proceedings. We will not comment in detail on all the provisions in the draft legislation relating to the rights of the defense. One point, however, causes us deep concern. Articles 44 and 49 of the draft legislation appear to indicate that a defendant could be represented by an individual who is not a lawyer (a "defender" or "any person who [the presiding judge] deems fit to provide an effective defense"). In view of the gravity of the crimes concerned, the complexity of the procedures, and the severity of punishment incurred, defendants before the specialized chambers must have the absolute right to be represented by a lawyer—if possible, one who has experience with and detailed knowledge of this type of litigation.

It will also be essential to ensure that the specialized chambers have the necessary resources to guarantee an effective defense to defendants. For this purpose we recommend that an office for the defense be created within the Registry of the specialized chambers, modeled on the office that exists at the ICC, which can organize training opportunities for defense lawyers, help them to keep informed on evolving jurisprudence, and provide them with any other useful assistance. [18]

2. Victims' Participation

We note that this aspect is not addressed in details in the draft legislation and that victims' participation is mentioned only in passing. The participation of victims in cases of war crimes, crimes against humanity, and genocide is very important. This participation can contribute to the effectiveness of proceedings; it can also help strengthen access to justice and, finally, make it possible for victims to claim reparations. In a country like the DRC, where allowing plaintiffs to seek civil damages in criminal cases is a customary part of

[18] See the International Criminal Court's website for information on the Office for Public Counsel of the Defense, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Office+of+Public+Counsel+for+the+Defence/ (accessed February 7, 2011).

criminal trials, it is foreseeable that victims will have a strong interest in participating in specialized chambers' trials. It would therefore be useful to consider whether any specific procedures may be necessary for these cases before the chambers, as the number of victims tends to be very high, given the nature of the crimes concerned.

3. Protecting Victims, Witnesses, and Judicial Staff

Protecting victims, witnesses and judicial staff is essential for proceedings involving war crimes, crimes against humanity, and genocide to run smoothly. Previous experience in international and mixed courts, as well as Congolese national courts, shows that victims and witnesses in these cases are very often in a vulnerable position, both physically and psychologically. We suggest that the draft legislation provide for the creation of a special unit within the Registry for protecting victims, witnesses, and judicial staff, composed of protection specialists and psychologists. We note that the Congolese judicial system does not currently possess such means of protection, and that creating a unit of this kind could have a significant impact on building Congolese capacity in this area. The DRC does not currently have a law on the protection of victims and witnesses. Such a law might be useful when it comes to specifying in detail what protection procedures are available and criminalizing attacks on witnesses.

D. Additional Comments

1. Parliamentary Evaluation of the Performance of Specialized Chambers

Article 19 of the draft legislation provides that Parliament evaluate the performance of the specialized chambers on a regular basis. Evaluations of this kind are crucial to ensure the transparency and sound management of the specialized chambers. It could also be desirable for the specialized chambers (or the specialized central "court" created pursuant to article 149 of the constitution) to present regular reports on their activities.

However, it is not entirely clear whether Parliament is the best placed and has the necessary expertise to perform these evaluations. We therefore suggest that article 19 be amended to provide that these evaluations be carried out by an independent committee of experts, created under Parliament's auspices. On the basis of these evaluations, Parliament should have the authority to issue a recommendation—not a decision—on the necessity of continuing the specialized chambers' mandate. This would help avoiding any politicization of the process.