

TOWARDS A SILENT DEATH

CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH
DEMOCRATIC REPUBLIC OF THE CONGO

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ECPM
ensemble contre
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together against
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asbl

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LIST OF ABBREVIATIONS

ABAKO	<i>Alliance des Bakongo</i> (Alliance of Bakongo)
ACHPR	African Commission on Human and Peoples' Rights
ADF	Allied Democratic Forces
AFDL	<i>Alliance des forces démocratiques pour la libération du Congo</i> (Alliance of Democratic Forces for the Liberation of Congo)
ANC	<i>Armée nationale congolaise</i> (Congolese National Army)
ASADHO	<i>Association africaine de défense des droits de l'homme</i> (African Association for the Defence of Human Rights)
CCPM-RDC	<i>Coalition contre la peine de mort en République démocratique du Congo</i> (Coalition Against the Death Penalty in DRC)
CMO	<i>Cour militaire opérationnelle</i> (Operational Military Court)
CNDH	<i>Commission nationale des droits de l'homme</i> (National Human Rights Commission)
CNS	<i>Conférence nationale souveraine</i> (Sovereign National Conference)
COM	<i>Cour d'ordre militaire</i> (Military Order Court)
CPJ	<i>Culture pour la paix et la justice</i> (Culture for Peace and Justice)
DRC	Democratic Republic of the Congo
ECPM	<i>Ensemble contre la peine de mort</i> (Together Against the Death Penalty)
FARDC	<i>Forces armées de la République démocratique du Congo</i> (Armed Forces of Democratic Republic of the Congo)
FAZ	<i>Forces armées zaïroises</i> (Armed Forces of Zaire)
ICC	International Criminal Court
ICCN	<i>Institut congolais pour la conservation de la nature</i> (Congolese Institute for the Conservation of Nature)
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
MNC	<i>Mouvement national congolais</i> (Congolese National Movement)
MONUSCO	United Nations Organisation Stabilization Mission in the Democratic Republic of the Congo
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention Against Torture
OIF	International Organisation of <i>La Francophonie</i>
PNC	<i>Police nationale congolaise</i> (Congolese National Police)
PNRJ	<i>Politique nationale de la réforme de la justice</i> (National Policy on Reform of the Justice Sector)
RADHOMA	<i>Réseau des associations de défense des droits de l'homme et des militants abolitionnistes de la peine de mort</i> (Network of Human Rights Organisations and Activists for the Abolition of the Death Penalty)
UPR	Universal Periodic Review

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A VERY DYNAMIC CONGOLESE ABOLITIONIST MOVEMENT

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FOREWORD

Raphaël Chenuil-Hazan

Executive Director - ECPM

The expertise of ECPM (Together Against the Death Penalty) in the investigation of conditions on death row throughout the world has been recognised for many years. Following its reports produced in its “fact-finding missions” series on conditions of detention of people sentenced to death in the United States, the Great Lakes region in Africa (Rwanda, Burundi and Democratic Republic of the Congo), Morocco, Tunisia, Mauritania, Cameroon and Indonesia, ECPM is launching a second report, 15 years later, on the conditions of people sentenced to death in the Democratic Republic of the Congo (DRC).

Our previous fact-finding mission’s report, *Les « sans-voix » de République démocratique du Congo*,¹ published in 2005, received the Human Rights Prize of the French Republic, in recognition of the quality of ECPM and the association *Culture pour la paix et la justice*’s (CPJ) work. The fact-finding mission conducted in 2007 in Rwanda and Burundi was cited by Paul Kagame’s government as one of the factors leading it to abolish the death penalty in 2008.

As a continent-size country, DRC faces many challenges to maintain the rule of law throughout its territory: violence, massacres, armed militias, banditry are among the factors causing regular instability. Loss of confidence in judicial and political institutions is frequently raised by the Congolese population as an explanation for reticence towards the abolition of the death penalty. The mass escape from Makala Prison in Kinshasa in 2017 did not help to address this concern. In addition, institutions have not provided reasons for their decisions not to ratify or approve a number of international texts. Yet, abolition is within reach, firstly because there is clearly a strong abolitionist movement among legal and judicial actors in

¹ Bégot M., Ngondji L., *Les « sans-voix » de République démocratique du Congo. Août à octobre 2005. Enquête dans les couloirs de la mort de Kinshasa, Lubumbashi, Buluwo, Kindu et Goma*, ECPM, 2005, available at <http://www.ecpm.org/wp-content/uploads/rapport-gr-lacs-pdf-2008-web.pdf>

the country. Numerous parliamentarians regularly raise their voice in favour of abolition. The National Human Rights Commission, in its initial opinion in 2017, called for the moratorium to be formalised. This *de facto* moratorium on executions, which has been observed for more than 16 years (since January 2003), demonstrates, if such an illustration were necessary, that beyond the symbol, the death penalty is now obsolete, as much in practice as in the example it is supposed to set, or its deterrent effect, in which no one believes any longer. A practice which is diminishing significantly across the continent.

Unprecedented developments on the African continent have surprised and set an example. Indeed, the vision of a continent entirely liberated from the death penalty no longer seems incongruous. Only a minority of African countries retain capital punishment and continue to exercise it (mainly in East Africa). In 2018, 27 African States voted in favour of the United Nations General Assembly Resolution calling for a universal moratorium on the use of the death penalty, five opposed it, and 17, including DRC, abstained or were absent. However, it should be noted that DRC voted in favour of this resolution at the Third Committee, which took place one month earlier. Four States from the continent went from abstaining (or absence) to voting in favour (Gambia, Equatorial Guinea, Mauritius and Rwanda). 90% of the 29 African members of the International Organisation of *La Francophonie* (OIF) and 83% of the African member States of the Commonwealth apply a moratorium or are *de jure* abolitionist.

Towards a Silent Death, Conditions of Detention of People Sentenced to Death in DRC reminds us of the harsh realities of capital punishment, even when it is not carried out. This is our concern here: conditions of detention, consignment to oblivion and isolation, physical, psychological and mental torture.

According to Dostoevsky, “A death row prisoner dies twice. He dies with the certainty that he will be executed, and he dies on the scaffold.” Camus illustrated this in his play *Les Justes* (The Just Assassins), in which he wrote: “Man is neither innocent nor guilty. How can we escape this dichotomy?”

Wherever our teams and partners have investigated, the same findings have been made: extreme isolation, death row syndrome,

marginalisation, a sword of Damocles hanging over prisoners, psychological fragility and, finally, feelings of abandonment and exclusion from human society. And all this to what end?

Our ambition, as ever, is to provide detailed and accurate expertise on the use of capital punishment in order to enable the institutions and governments of these countries to move forward in an informed manner. This new publication provides Congolese decision-makers with a range of elements for reflection on this issue, in particular on conditions of detention of death row prisoners. We are willing to establish a genuine dialogue with the Congolese authorities in order to pave the way for the abolition of the death penalty.

The death penalty has always been a cruel, inhuman and degrading punishment, incompatible with human rights. It represents the persistence of barbarism in modern times, the complete denial of the values of any modern and democratic State, the absolute inviolability of human life. It is also the ultimate expression of lethal violence.

INTRODUCTION

GENERAL CONTEXT

CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH: LITTLE CHANGE IN FIFTEEN YEARS

Over the past 5 years, at least 198 people have been sentenced to death in Democratic Republic of the Congo (DRC). Although since January 2003 the country no longer executes those who have been sentenced to the capital punishment, several hundred death row prisoners are currently detained in DRC's prisons in extremely harsh conditions, without hope of release. While organisations have up until now estimated that between 250 and 300 death row prisoners were incarcerated in DRC, the fact-finding mission which is the subject of this report revealed that in reality there are more than 510 of them. The number of death row prisoners who have died in Congolese prisons as a result of the conditions of detention and lack of medical care remains unknown.

In 2005, ECPM (Together Against the Death Penalty) conducted an initial fact-finding mission in DRC to document the conditions of detention of people sentenced to death in the country. The investigation's report, *Les « sans-voix » de République démocratique du Congo*,² produced in partnership with the Congolese association *Culture pour la paix et la justice* (CPJ), won the Human Rights Prize awarded by the French Republic. Almost 15 years later, while 310 people have been sentenced to death since the publication of the 2005 report, this study looks at the situation of people sentenced to death and shows that it remains extremely problematic.

² Bégot M., Ngondji L., *op. cit.*, ECPM, 2005.

METHODOLOGY

This study is based on an in-depth documentary analysis, review of individual cases and interviews with death row prisoners and prison authorities, conducted in Congolese prisons between April and June 2019. The analysis was supplemented by interviews conducted with families of death row prisoners and experts on the Congolese justice system.

The fact-finding mission was carried out with permission from the Congolese Ministry of Justice and Ministry of National Defence. A team from CPJ, supported by members of the *Coalition contre la peine de mort en République démocratique du Congo* (Coalition Against the Death Penalty in DRC – CCPM-RDC), visited 10 prisons and detention camps, the latter referring to places of imprisonment for those given lengthy prison sentences.⁵ Since there are no available statistics in DRC on the numbers of death row prisoners, the 10 detention facilities were initially selected on the basis of information known to the abolitionist movement in the country. In the course of the fact-finding mission, the investigation team was informed that approximately 60 death row prisoners had been identified in other prison facilities, but the mission was unable to visit them.⁶

5 UN Mission in Democratic Republic of Congo (MONUC), *Rapport sur les conditions de détention dans les prisons et cachots de la RDC*, 2005.

6 There were 22 death row prisoners in the Matadi Central Prison; 12 in the Mbuji-Mayi Prison; 8 in Bunia Prison; 7 in Kalemie Prison and 5 in Bukavu Prison.

RESEARCH SAMPLE

The team interviewed 257 death row prisoners.⁷ The sample is shown in Table 1.

Table 1: Sample of death row prisoners interviewed

Prison/detention camp	Number of death row prisoners interviewed	Number of death row prisoners in the prison/detention camp
Ndolo Military Prison	9	20
Makala Central Prison	12	15
Kindu Central Prison	4	4
Kasapa Central Prison	2	3
Goma Central Prison	34	58
Kisangani Central Prison	10	10
Luzumu Detention Camp	12	19
Buluwo Detention Camp	18	38
Osio Detention Camp	19	22 ⁸
Angenga Detention Camp	137	269
TOTAL	257	458

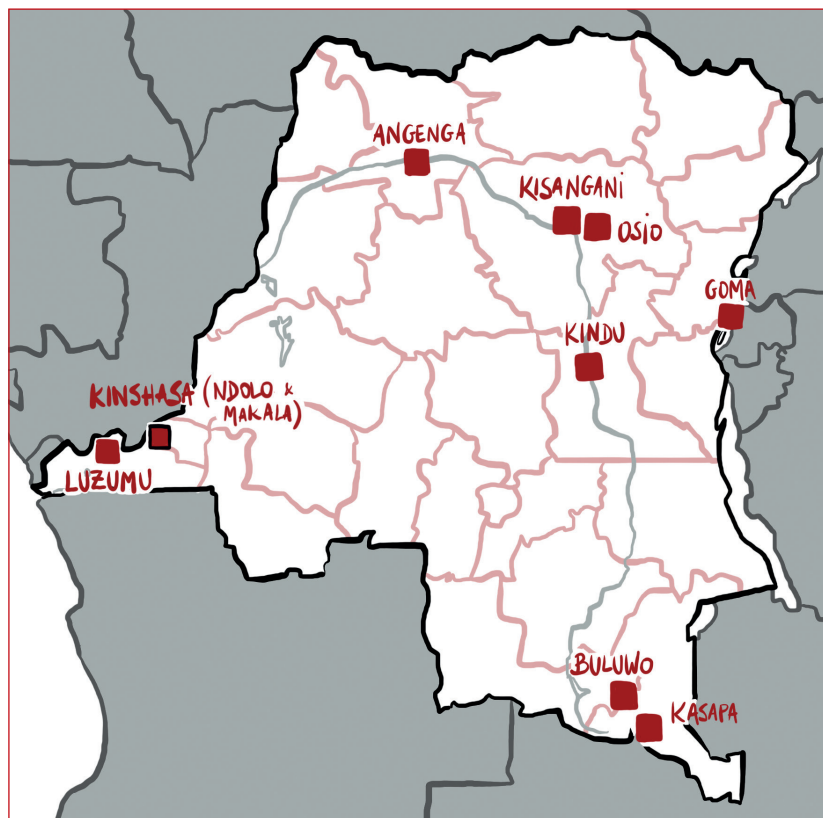
Interviewees included one woman who had been sentenced to death at first instance in 2019 and 10 foreign nationals: three Ugandans, two Rwandans, two Tanzanians, two Burundians and a Belgian.⁹

7 Some of these individuals had filed appeals – the number of death row prisoners may therefore vary depending on whether their death sentence is overturned on appeal.

8 Three of the 22 individuals stated that their sentence had been reduced on appeal but that they had not received their formal notification of imprisonment (document showing the identity of the prisoners, their sentence, the court, the crime committed and the date of conviction and sentence).

9 According to their statements.

Map of prisons visited



DATA COLLECTION METHODS

The fact-finding mission started with the cases analysis of all the death row prisoners present in the detention facilities, conducted jointly with the administration services of the prisons visited. On the basis of this initial analysis, the fact-finding mission team selected cases of death row prisoners whom they specifically wanted to interview, on the grounds of how long they had been detained or the specific features of the case (persons sentenced to death when they were minors, foreign nationals and women). The case analysis revealed that some individuals were detained without the prison

administration service holding any physical file. Two people sentenced to death by the North Kivu *Cour militaire opérationnelle* (Operational Military Court – CMO)¹⁰ are in this situation: only a road map was found to facilitate their transfer from Beni-Butembo (North Kivu) to Makala Prison in March 2019. The prison administration service, which does not know whether these individuals have filed appeals or whether their conviction and sentence are final, is therefore unable to accurately determine their situation. Furthermore, the file of Eddy Kapend, sentenced to death following trial for the assassination of President Laurent-Désiré Kabila, was also empty when the mission visited Makala Central Prison.

The data analysed were cross-checked with information obtained from interviews conducted with the death row prisoners. These interviews were held face to face, individually, in a prison administration office inside the prison or in the death row prisoner's cell. All interviews took place in the absence of prison or security officers. Further, given that the members of the fact-finding mission team spoke French and the country's four national languages,¹¹ there was no need to call on the services of an external interpreter.

For some of the prisoners, the mission's visit was the first time for years that they had had the opportunity to interact individually with persons from outside the prison setting. This was the case, for example, in the Angenga Detention Camp, in Equateur Province, 500 km from the capital as the crow flies, in an almost inaccessible area. In this camp, which holds the highest number of death row prisoners in the country, there are detainees from across DRC. Several prisoners were very emotional, and some cried during the interviews. The sense of abandonment in this prison is strong.¹² Some interviewees were overwhelmed to learn that they were considered to be death row prisoners, since they thought they had been given a lesser sentence: they found out from the fact-finding team that they were considered to be death row prisoners by the prison administration.¹³

10 See, *infra*, Sub-section, "Legislative and constitutional reform of the military justice system: from the COM to the CMO".

11 The four national languages are Kiswahili, Kikongo, Lingala and Tshiluba.

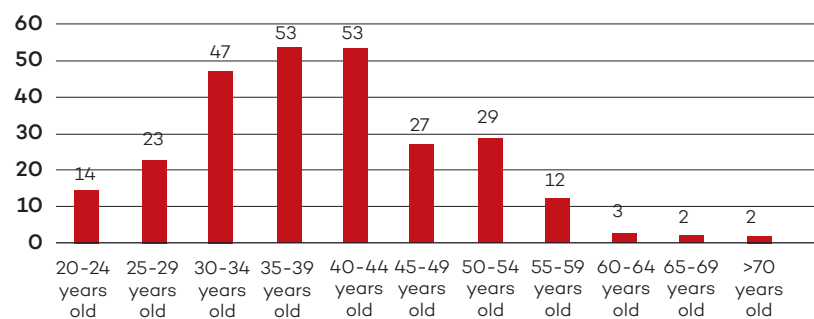
12 See, *infra*, Sub-section "Limited contact with the outside world".

13 The mission interviewed four people whose death sentences were thought to have been overturned on appeal, yet the documents from the court confirming it never reached Angenga or Osio Detention Camp. See *infra*, Sub-section "Conditions which do not allow the right to appeal to be exercised".

PROFILES OF DEATH ROW PRISONERS INTERVIEWED

Conducted in 10 prisons, the survey revealed that the profiles of death row prisoners were very diverse. Graph 1 shows the number of death row prisoners by age group. While the average age is 40 years old, some death row prisoners are very young (19 years old) and others are elderly (74 years old).

Graph 1: Number of death row prisoners by age range¹⁴

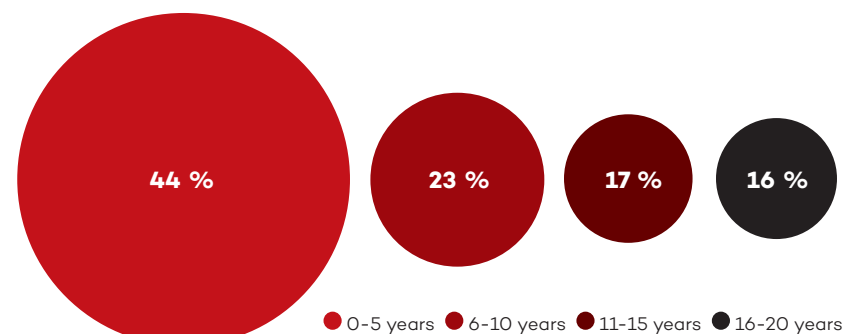


Data analysis also revealed that a significant proportion of interviewees (44%) were sentenced to death in the past five years, as shown in Graph 2. Furthermore, 42 of them (17%) had been in detention for more than 16 years, despite the amnesty laws and decrees enacted over the past 15 years. Several people sentenced by the *Cour d'ordre militaire* (Military Order Court – COM) from 2000 to 2003 remain in detention. This applies to persons sentenced to death following trial for the assassination of Laurent-Désiré Kabila,¹⁵ as well as civilians and military personnel sentenced in other criminal cases.

¹⁴ N = 230.

¹⁵ For more information on those sentenced in this case, see box, *infra*, Sub-section "Partial release of political prisoners".

Graph 2: Percentage of death row prisoners by time spent in detention¹⁶



In order to protect them from potential reprisals, the names of all prisoners interviewed have been changed.

¹⁶ N = 249.

OVERVIEW OF THE DEATH PENALTY IN DEMOCRATIC REPUBLIC OF THE CONGO TODAY

THE LEGISLATIVE FRAMEWORK OF THE DEATH PENALTY

The sanctity of the right to life, without exception, is recognised by the DRC Constitution. This led the Congolese Government to consider in 2009, that: “*The Constitution of 18 February 2006 retains earlier constitutional provisions that lay the foundations for the elimination of the death penalty (Arts. 16 and 61)*”.¹⁷ Recognition of the right to life also led the *Commission nationale des droits de l’homme de RDC* (National Human Rights Commission of DRC – CNDH) to adopt its first consultative opinion in 2017, declaring that the death penalty no longer has any constitutional basis.¹⁸

However, the range of offences carrying the death penalty in DRC is very wide. Although the death penalty has not been mandatory since 2002,¹⁹ it can still be imposed for almost 100 offences.²⁰ The majority of these crimes are provided for in the *Code pénal militaire* (Military Criminal Code): under this Code, 74 crimes carry the death penalty, including crimes without any element of intent, such as cowardice,²¹ surrender to the enemy,²² possession of drugs²³ or refusal to obey superior orders in time of war.²⁴ As for the “ordinary” *Code pénal* (Criminal Code), it provides for capital punishment in relation to 19 offences, including armed robbery,²⁵ treason and espionage.²⁶

17 Democratic Republic of the Congo, *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1* [A/HRC/WG.6/6/COD/1], 2009, para. 36.

18 National Human Rights Commission, *Avis et propositions de la Commission nationale des droits de l’homme relatifs à la réhabilitation du moratoire sur les exécutions de la peine de mort en République démocratique du Congo* [001/AP/CNDH-RDC/2017], 2017, available at <http://audf-rdc.org> (accessed on 15 November 2019).

19 Civilian and military judges have discretion enabling the death penalty to be avoided.

20 See full list of offences carrying the death penalty in Annex 2.

21 Military Criminal Code, Article 57.

22 *Ibid.*, Article 58.

23 *Ibid.*, Article 195.

24 *Ibid.*, Article 93, para. 2.

25 Criminal Code, Article 81 bis.

26 *Ibid.*, Articles 181 to 185.

DRC is under an obligation to limit application of the death penalty to “*the most serious crimes*”, in accordance with Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which it ratified in 1976.²⁷ In October 2018, in its *General Comment* No. 36, the United Nations Human Rights Committee explained what is meant by “*the most serious crimes*”:

*“The term ‘the most serious crimes’ must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of Article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty.”*²⁸

Many offences which carry the death penalty in DRC do not fulfil the requirement of “*the most serious crimes*”. Analysis of the grounds of conviction of those interviewed in the course of the fact-finding mission is revealing: most death sentences analysed concern cases which in no way “*result[ed] directly and intentionally in death*”, as required by the United Nations Human Rights Committee. 66 of the 257 cases analysed solely relate to persons convicted of criminal association, armed robbery, extortion and/or attempted murder, without resulting in death.²⁹ The offence of criminal association is the most common in connection with death row sentences. The Criminal Code provides for the death penalty for “*The initiators of such conspiracy, the leaders of the group and those who exercised*

27 Article 153, paragraph 4 of the Constitution provides that international treaties have direct application: “*The civilian and military courts and tribunals apply the duly ratified international treaties, the laws and regulatory measures, provided that they are in conformity with the laws as well as customary law unless the latter is contrary to public order or morality.*”

28 United Nations Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life* [CCPR/C/GC/36], 2018, para. 35.

29 At least 21 people interviewed were sentenced to death solely on the ground of criminal association, 5 solely for armed robbery, 28 for criminal association and armed robbery, 4 for criminal association and extortion, 5 for criminal association, armed robbery and extortion, and 3 for criminal association, armed robbery and attempted murder.

command in any way”, while the offence is constituted by the simple element of organising the group with the aim of harming people or property.³⁰ Thus, as soon as two people agree to commit theft, even simple theft, they can be prosecuted for criminal association and may be sentenced to death.

According to Congolese legislation, several categories of persons are excluded from application of the capital punishment. In theory, children cannot now be sentenced to death: they cannot be tried by the military justice system³¹ and cannot be sentenced to death by the civilian justice system.³² Yet, several minors have been sentenced to death by the justice system, as described in the subsequent sections.³³ While pregnant women can be sentenced to death, their execution is suspended until the birth.³⁴ Furthermore, as a signatory to the Protocol to the African Charter on Human and People’s Rights on Women’s Rights in Africa, DRC has an obligation to ensure that death sentences are not given to breastfeeding women.³⁵ Legislation does not contain any specific provision relating to imposition of the death penalty on foreign nationals. The death penalty applies irrespectively of whether the accused is Congolese or a foreign national.³⁶

There are two methods of execution: hanging for civilians, shooting for military personnel.³⁷ Furthermore, the law provides that executions are public and that those sentenced can be visited by a minister of religion on the day of their execution.³⁸

At the international level, DRC has consistently abstained on the periodic vote at the United Nations calling on States to support a

30 Criminal Code, Articles 155 and 156.

31 Military Justice Code, Article 114: “Military tribunals do not have jurisdiction over persons aged under 18 years.”

32 Law No. 19/001 of 10 January 2009 portant protection de l'enfant (on child protection), Article 9, paragraph 2.

33 See, *infra*, Sub-section “Minors sentenced to death”.

34 Decision of the Governor General, 9 April 1898, Article 3: “Where it has been verified that a woman sentenced to death is pregnant, she shall not be executed until after giving birth.”

35 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Article 4(2)(j).

36 On the situation of death row prisoners with foreign nationality, see, *infra*, Sub-sections “Limited and poor-quality legal representation” and “Absence of contact with consular representatives for foreign nationals”.

37 Decision of the Governor General, 9 April 1898.

38 Decision of the Governor General, 9 April 1898, Articles 2 and 4.

universal moratorium on the death penalty, with the exception of the 2016 vote when DRC was not represented. Nevertheless, highly positive signs in favour of abolition have recently been identified. Thus, in 2018, DRC voted in favour of the draft biennial resolution on a moratorium during the Third Committee, even though it subsequently abstained at the periodic vote in December 2018. In October 2019, the Deputy Minister of Justice announced that all death sentences would be commuted and that the death penalty would be abandoned in the draft of the new Criminal Code.³⁹

EVOLUTION OF DEATH SENTENCES IN DRC

DRC does not publish any official data on the use of the death penalty. However, it indicated to the Human Rights Committee that only 27 sentences were recorded between 2006 – date of the third Universal Periodic Review (UPR) – and 2017 – date of the fourth UPR.⁴⁰ These data vastly differ from those gathered by actors in the abolitionist movement. According to Amnesty International, more than 268 death sentences were passed during the same period. Between 2016 and 2019, more than 156 death sentences were documented.

Table 2: Evolution of the number of death sentences passed in DRC between 2007 and 2018 (Amnesty International)⁴¹

	2007	2008	2009 ⁴²	2010	2011	2012	2013	2014	2015	2016	2017	2018
Death sentences passed	24+	50+	+	+	+	11+	26+	14+	28	93+	22+	41

39 Progress on this issue is described, *infra*, in the Section “History of the Death Penalty in DRC”. The full text of the speech of the Deputy Minister of Justice is presented in Annex 4.

40 Democratic Republic of Congo, *Replies to the list of issues in relation to the fourth periodic report to the Human Rights Committee* [CCPR/C/COD/Q/4/Add.1], 2017, para. 42.

41 We have reproduced the symbol used by Amnesty International to indicate that the figures represent a minimum. Source: Amnesty International’s annual reports on death sentences and executions, 2008 to 2019.

42 In 2009, Philip Alston noted that at least six people had been sentenced to death in the east of the country. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to the Democratic Republic of the Congo* [A/HRC/14/24/Add.3], 2009, para. 102.

In 2017, DRC indicated to the Human Rights Committee that most death sentences had been handed down by the military tribunals, for offences of premeditated murder, rebellion, crimes against humanity and war crimes.⁴³ The survey conducted with death row prisoners and prison administration services confirmed that the majority of death sentences had been passed by a military court: 53% of respondents⁴⁴ were military personnel, persons assimilated to military personnel (members of the PNC) or were accused of being members of militia, sentenced by a military court; 29%⁴⁵ were civilians sentenced by a military court. Thus, a significant number of civilians have been sentenced to death: in addition to the civilians interviewed who had been sentenced to death by military courts, 17% of the death row prisoners interviewed⁴⁶ were civilians sentenced by civilian courts. In total, more than 47% of the death row prisoners interviewed were civilians.⁴⁷

While these data confirm that the majority of those sentenced to death were tried by military courts, the survey conducted with death row prisoners also revealed that the most common grounds for conviction were criminal association (48% of cases), murder or premeditated murder (45%), armed robbery (29%), participation in an insurgent group (12%) and extortion (9%),⁴⁸ which contradicts the 2017 government's report.

Until this fact-finding mission, associations estimated that there were between 250 and 300 death row prisoners.⁴⁹ The fact-finding mission revealed that the actual figure was much greater: it identified more than 510 persons sentenced to death in about 15 prisons. However, this number may in fact be much higher since the fact-finding mission was only able to analyse about 15 prisons, while

43 Democratic Republic of Congo, *op. cit.*, 2017, paras. 48 and 49.

44 N = 152. Approximately 100 of the fact-finding mission questionnaires did not mention the status of the person interviewed and/or the court which convicted them, which explains why the number of questionnaires cited here is below 255.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 The total exceeds 100% since most cases include several grounds for conviction.

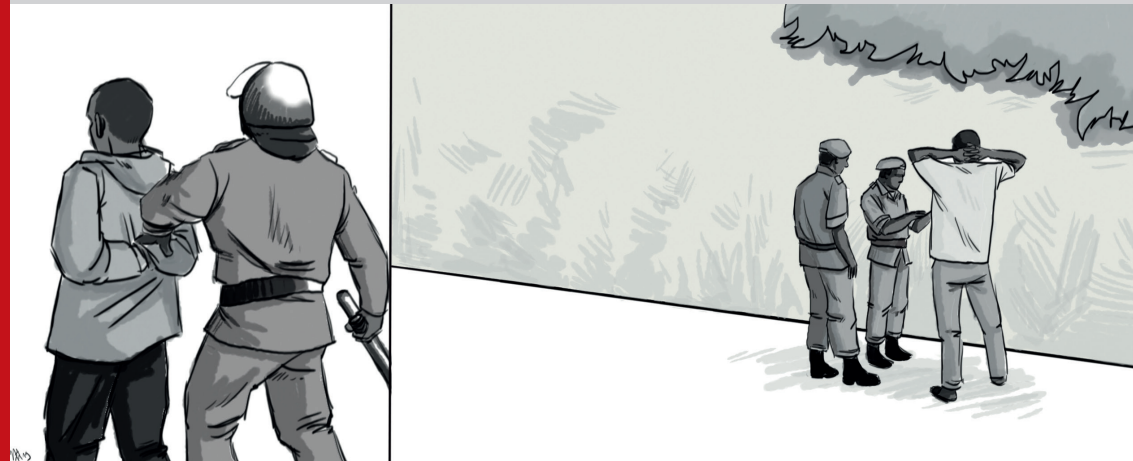
49 ECPM, CPJ, Advocates for Human Rights, World Coalition Against the Death Penalty, *La peine de mort en République démocratique du Congo. Rapport alternatif conjoint pour la 33^e session du Groupe de travail sur l'EPU*, April-May 2019, para. 12.

80 operational prison facilities have been identified in the country.⁵⁰ The country observes a *de facto* moratorium.⁵¹ The most recent executions date back to January 2003. Hundreds of death row prisoners are therefore detained in Congolese prisons.

50 The report of the *États généraux de la justice* (Justice Conference) in 2015 mentions 78 operational prisons and detention camps. Ministry of Justice and Human Rights, *Rapport général des états généraux de la justice en République démocratique du Congo*, 2015, p. 45.

51 Democratic Republic of Congo, *op. cit.*, 2017, para. 46.

HISTORY OF THE DEATH PENALTY IN DEMOCRATIC REPUBLIC OF THE CONGO



THE DEATH PENALTY BEFORE COLONISATION OF THE COUNTRY

The country's history has been shaped by several strong figures, who have left deep marks on the DRC criminal justice system. Since colonisation, the death penalty has been an instrument for domination used by the authorities over various populations: colonisers over colonised populations, Mobutu over political opponents and Laurent-Désiré Kabila over armed groups and members of the military. Joseph Kabila reformed the criminal justice system, putting an end to the regime of terror dispensed by the military justice system and establishing a *de facto* moratorium on the death penalty from 2003. However, the death penalty is still provided for in legislative texts and death sentences, while not executed, have multiplied, in particular in the military courts. The arrival in power of Félix Tshisekedi in January 2019 could open a new page of history in relation to the death penalty in the country.

The writings of numerous authors reveal that the death penalty was used before colonisation. Its use depended on the chiefdoms, each one following its own judicial procedure.⁵² The writers indicate that the death penalty was provided for by the customary law of the Ba-Mbala ethnicity for political crimes;⁵³ by the Bali, the Bira, the Kuba and the Komo for murder related to magic and/or sorcery;⁵⁴ by the Bira, the Mangbetu and the Laadi for adultery;⁵⁵ and by the Kongo, the Bira, the Ba-Mbala and the Kuba for premeditated murder.⁵⁶ The King had the power to pardon those sentenced to death. If the request for pardon was rejected but those sentenced begged the King to spare them, they were enslaved and were only executed following the death of the sovereign. In other cases, those sentenced to death were intoxicated with palm wine, then hanged.⁵⁷ The death penalty was therefore ordered and applied in relation to a range of offences in many communities which make up DRC today. The "partition" of the region at the Berlin Conference and the beginning of colonisation of the country at the end of the 19th century profoundly changed the criminal justice system, which came to be based on the Belgian model. The use of the death penalty was from then on regulated across the whole territory.

52 Sohier A., "Notes sur l'organisation et la procédure judiciaires coutumières des indigènes du Congo Belge", *Africa: Journal of the International African Institute*, 1940, Vol. 13, No. 1.

53 Karimunda Muyoboqe A., *The Death Penalty in Africa*, Doctoral thesis in philosophy, University of Galway, 2011, p. 30.

54 Van Geluwe notes: "The perpetrator of homicide by sorcery was killed and his corpse thrown into a river or forest", (Van Geluwe H., *Les Bira et les peuplades limitrophes*, ethnographical monograph, Vol. 2, Musée royal du Congo belge, 1956, p. 129). See also, Karimunda Muyoboqe A., *op. cit.*, 2011, p. 34. The accused were tried by village tribunals, which used poison to determine their guilt: if the accused was innocent, he or she would survive; if the accused was guilty, he or she would die. These trials by ordeal were used in particular by the Bira, the Komo and the Lombi (Van Geluwe H., *op. cit.*, 1956, pp. 131-133). Van Geluwe also notes that a person accused of such an offence by the Bali "Was suspended by the hands to begin with, then his head was wedged in a split tree trunk, and he was thrown to the ground with the tree until he was dead". (Van Geluwe H., *Les Bali et les peuplades apparentées*, ethnographical monograph, Vol. 5, Musée royal du Congo belge, 1960, p. 90).

55 In relation to crimes of adultery, Soret notes that the Laadi buried repeat offenders alive in the market (Soret M., *Les Kongo nord-occidentaux*, Institut international africain/L'Harmattan, 2005, p. 86). See also, Karimunda Muyoboqe A., *op. cit.*, 2011, p. 37.

56 See, Van Geluwe H., *op. cit.*, 1956, p. 129 and Karimunda Muyoboqe A., *op. cit.*, 2011, p. 35.

57 See, Karimunda Muyoboqe A., *op. cit.*, 2011, p. 35.

THE DEATH PENALTY IN THE COLONIAL PERIOD (1885-1960)

THE INDEPENDENT STATE OF CONGO AND THE FIRST CRIMINAL LAW TEXTS

In 1884-1885, the Berlin Conference divided the Kingdom of Kongo into three States: French Congo, the Independent State of the Congo and the Portuguese Congo (Angola). Prior to this, from 1879 to 1885, with the intervention of Henry Morton Stanley in Congo, the Belgian King Léopold II had obtained operation contracts over 2.5 million square kilometres in the Independent State of the Congo, enabling him to exercise full sovereignty over the territory: the territory had become the King's personal possession.

The first criminal law texts in Congo date from 1886-1889,⁵⁸ under the administration of Léopold II. These texts define offences and sanctions, on the model of applicable law in Belgium and provide for the death penalty for a series of offences including premeditated murder, murder committed to facilitate theft, arbitrary arrests or detentions resulting in death.⁵⁹ Other offences carrying the death penalty are specified in the Military Code, in particular crimes committed against the State's external security. The execution procedure was regulated during this period: according to a Decision of the Governor General of 1898, executions were to be conducted by hanging in the case of civilians and shooting in the case of members of the military.⁶⁰ This procedure still applies today.

In 1908, following information on atrocities perpetrated by the Europeans on the indigenous population in the country, in particular

58 Decrees of 7 January 1886, of 26 May 1888 and of 27 April 1889.

59 Vellut J.-L., "Une exécution publique à Élisabethville (20 septembre 1922): notes sur la pratique de la peine capitale dans l'histoire coloniale du Congo", in Jewsiewicki B. (dir.), *Art pictural zaïrois*, Le Septentrion, 1992, p. 172.

60 The first article of the Decision of the Governor General of 9 April 1898 provides that: "The death penalty will be carried out by hanging in the case of civilians, and by shooting in the case of military personnel." These methods of execution are not the same as those which applied in Belgium, where the method of execution was beheading.

in the context of exploitation of rubber and ivory,⁶¹ international pressure and public opinion led the Belgian Parliament to vote in favour of annexation of the territory as a colony: the territory became the "Belgian Congo", under the authority of Parliament.

THE LEGAL FRAMEWORK OF THE DEATH PENALTY IN BELGIAN CONGO

Following annexation of Congo, significant reforms were implemented. At the procedural level, a dual system of jurisdiction was introduced: in 1926, a decree established statutory law tribunals and "indigenous" tribunals based on custom.⁶² However, the customary tribunals had limited jurisdiction in criminal law: they only had jurisdiction if the alleged acts carried a sentence of penal servitude of under five years.⁶³ Accordingly, only the statutory law tribunals had jurisdiction to pass the death penalty.

In 1940, a colonial Criminal Code was enacted on which the tribunals thereafter based their decisions.⁶⁴ This Code provided for the death penalty for numerous crimes, including: premeditated murder,⁶⁵ superstitious practices resulting in death,⁶⁶ torture resulting in death,⁶⁷ murder committed to facilitate theft or ensure impunity for such a crime,⁶⁸ arson resulting in the death of a person where the perpetrator knew of his or her presence at the scene of the fire,⁶⁹

61 See the report by Roger Casement (1904), British Consul in Congo, who describes the forced labour, malnutrition, mutilations and torture which were perpetrated, including against women and children: <https://archive.org/details/CasementReport/page/n1> (accessed on 15 November 2019).

62 Decree of 15 April 1926 *relatif aux juridictions indigènes* (on indigenous jurisdictions). In 1955, a committee tasked with developing judicial and prison reform was established. The Decree of 8 May 1958 completely revises the judicial and prison system and provides that all individuals, whites and blacks, would thereafter be tried by the same courts.

63 Braillon C., "Nouvelles perspectives sur le droit judiciaire du Congo belge et les acteurs de la justice coloniale : la procédure d'annulation des jugements indigènes", in Piret B., Braillon C., Montel L. Plasman P.-L. (dir.), *Droit et justice en Afrique coloniale*, Presses de l'université Saint-Louis, 2014.

64 Decree of 30 January 1940. This Code is still used today but it has been amended on numerous occasions, the most recent changes dated 31 December 2015.

65 Decree of 30 January 1940, Article 45.

66 *Ibid.*, Article 57.

67 *Ibid.*, Article 67.

68 *Ibid.*, Article 85.

69 *Ibid.*, Article 108.

rape resulting in death,⁷⁰ treason⁷¹ or spying.⁷² The Military Criminal Code provided for the death penalty for cowardice, treason and desertion during time of war.⁷³

Although two criminal codes were developed, one for civilian justice and the other for military justice, the dividing line between civilian justice and military justice was in reality much more blurred. In 1917, the “mixed military regime” was defined: in the regions subject to these regimes,⁷⁴ the military tribunals (*Conseil de guerre* – War Council) were granted jurisdiction over military personnel, but also over civilians who were “*indigenous to Congo or neighbouring colonies*”, or their associates or co-perpetrators. The civilian tribunals were thus excluded. The criminal policy under the colonial regime was therefore clearly segregationist. In contrast to the decisions of civilian tribunals, those of the War Council were not subject to appeal.⁷⁵

This distinction between the indigenous population and colonisers was intended to further secure the territorial administration. According to Magistrate Dellicour, the first chief prosecutor in Elisabethville (now Lubumbashi), “*In the almost unanimous opinion of the colonisers*”, only the supreme punishment was capable of “*Powerfully striking the imagination of the indigenous populations.*”⁷⁶ In 1918, the Belgian authorities pursued their discriminatory policy and defined new offences which could only be committed by the indigenous populations, including disrespect, insubordination or spreading false rumours.⁷⁷ The discriminatory nature of colonial legislation, at all levels, led some writers to consider that the segregation measures under the Belgian administration were even more brutal than the

70 Decree of 30 January 1940, Article 171.

71 *Ibid.*, Article 181; Ordinance No. 286/APAJ of 18 September 1942, Article 2; Ordinance No. 103/APAJ of 7 March 1941, Article 1.

72 *Ibid.*

73 Decree of 22 December 1888, Article 21, amended by Decree of 24 November 1890.

74 This decision was taken by the Governor.

75 Vellut J.-L., *op. cit.*, 1992, p. 173. See, for example, *infra*, on the conviction of Simon Kimbangu, sentenced to death by the Thysville War Council.

76 Dellicour, in Vellut J.-L., *op. cit.*, 1992, p. 174. Magistrate Dellicour was a vigorous defender of the death penalty and had written a note focused on its conservation. See, Vellut J.-L., *op. cit.*, 1992, p. 209 (note 15).

77 Vellut J.-L., *op. cit.*, 1992, p. 173.

Anglo-Saxon “*colour-bar*”.⁷⁸ The populations were in effect divided into three groups: whites, “developed” blacks, who were supposed to represent the nation’s elite according to the level of assimilation of European practices,⁷⁹ and “undeveloped” blacks.

DEATH SENTENCES AND EXECUTIONS DURING THE COLONIAL PERIOD

Although no official statistics on the use of the death penalty during colonisation have been published,⁸⁰ the writings of observers and actors of the justice system in this period reported death sentences passed against and execution of dozens of persons during the colonial period – all belonging to the indigenous population. In practice, only Africans were sentenced to death.⁸¹

In the 1920s and 1930s, the executions of more than 10 “*hommes léopards*” (“leopard men”),⁸² members of a sect fighting colonisation and accused of numerous murders, were reported. In 1922, the public execution of a man, Musafiri François, sentenced to death after killing a coloniser who he wrongly accused of having had an adulterous relationship with his wife, caused a great stir in Belgium and strong criticism of colonial justice, though they had no effect.⁸³ The specific situation of Simon Kimbangu, founder and originator of the Kimbanguist religious movement, can also be noted: he was one of the only people to have had his death sentence commuted.

78 Rubbens A., “Le *colour-bar* au Congo belge”, 1949, cited by Cornet A., “Punir l’indigène : les infractions spéciales au Ruanda-Urundi (1938-1948)”, *Afrique et Histoire*, Vol. 7, 2009, p. 69. This “colour bar” refers to a social and legal system in which people of different races are separated and not given the same rights and opportunities (source: Cambridge English Dictionary). Legal discrimination existed in numerous areas, including the right to private property, employment, education, etc. See, Bitu Lihun Nzundu A., *Missions catholiques et protestantes face au colonialisme et aux aspirations du peuple autochtone à l’autonomie et à l’indépendance politique au Congo belge (1908-1960)*, Pontificia universita Gregoriana, 2013.

79 This status was “awarded” to people who demonstrated to investigators that they had adopted a European lifestyle, proven for example by the use of latrines, tables and chairs, cutlery at mealtimes, the cleanliness of accommodation, etc. See, for example, Braeckman C., *Le Dinosauraire. Le Zaïre de Mobutu*, Fayard, 1992, p. 129.

80 Vellut J.-L., *op. cit.*, 1992, p. 175.

81 *Ibid.*

82 The “*hommes-léopards*” were members of the Anyoto secret political sect fighting colonisation. They were accused of dozens of murders, mainly against local populations, with the aim of sowing terror.

83 Vellut J.-L., *op. cit.*, 1992, pp. 171-206.

In 1921, Simon Kimbangu was sentenced to death by the War Council of Thysville (now Mbanza-Ngungu), a region subject to the mixed military regime, for acts against the security of the State and public peace. As Joset explains, the existence of the prophet undermined colonial authority: “[T]he prophets allegedly spread such fear that the inhabitants, even the leaders, were afraid to execute orders from European authorities.”⁸⁴ Simon Kimbangu refused the colonial order and in particular forbade his compatriots to pay tax.⁸⁵ Simon Kimbangu’s death sentence was commuted in 1921 to life imprisonment with forced labour. He died in Elisabethville Prison in 1951, after 30 years in detention.⁸⁶ The arrests of Kimbanguists continued until 1959, when Kimbanguism was recognised by the authorities, a few months prior to the independence of Congo. In 2011, during a retrial by the Kinshasa *Haute Cour militaire* (Military High Court), Simon Kimbangu was ultimately cleared.⁸⁷

Numerous executions were reported in the period leading up to the Second World War. The official statistics for the period 1931-1953 indicate 261 death sentences and 127 executions for five offences: murder to facilitate theft, premeditated murder, offence arising from customary practices, revolts and mutinies.⁸⁸ These data include the group execution of 26 people sentenced to death for having killed colonisers in the town of Luluabourg⁸⁹ (now Kananga). As Vellut noted, “[A]s soon as the life of a European was concerned, matters entered the symbolic realm, and colonial justice struck without hesitation.”⁹⁰ The number of death sentences diminished following the end of the Second World War. Jean Sohier, judge at the Leopoldville Court of First Instance, reported in 1959: “[S]ince the end of the war, judges have plainly had an aversion to handing down the death penalty, despite the increasingly wide use of the sovereign prerogative to grant a pardon. A single death sentence

84 Joset P.-E., “Quelques mouvements religieux au Bas-Congo et dans l’ex-Afrique équatoriale française”, *Journal of Religion in Africa*, Vol. 1, No. 2, 1968, p. 105. Unofficial translation.

85 Braeckman C., *op. cit.*, 1992, p. 130.

86 Joset P.-E. *op. cit.*, 1968, p. 106.

87 Bernard G., “La Contestation et les églises nationales au Congo”, *Canadian Journal of African Studies*, Vol. 5, No. 2, 1971, p. 149. The Kimbanguist Church is today one of the largest churches in the country.

88 Vellut J.-L., *op. cit.*, 1992, p. 175.

89 The 26 people were executed following the mutiny known as the “Luluabourg mutiny”.

90 Vellut J.-L., *op. cit.*, 1992, p. 181. Unofficial translation.

was handed down over the past 10 years, and that was to punish a particularly odious crime...”⁹¹ He noted that eight death sentences were passed between 1937 and 1942, including two by war councils; two death sentences were handed down between 1943 and 1952, but none between 1953 and 1957.⁹²

While executions of death row prisoners were not uncommon during the colonial period, at the same time in Belgium no death sentences were implemented from 1863 to 1944. Several executions took place at the end of the Second World War and during the following years, until 1950, year of the last execution. A few years later a consultation was held with figures from the territorial administration of Belgian Congo and neighbouring Ruanda-Urundi aimed at amending the colonial criminal legislation. According to Vellut, “[T]here was almost unanimous agreement to recommend the conservation of the death penalty and to call for sentence remission to be limited.”⁹³ Capital punishment was maintained in the legislation of Belgian Congo.

91 Sohier J., *Essai sur la criminalité dans la province de Léopoldville. Meurtres et infractions apparentées*, Académie royale des sciences coloniales, Volume 21, Issue 1, 1959, pp. 37-38.

92 *Ibid.*, p. 38.

93 Vellut J.-L., *op. cit.*, 1992, p. 176. Unofficial translation.

INDEPENDENCE AND THE FIRST CONSTITUTION

THE ROAD TO INDEPENDENCE

In 1940, the first nationalist political party was established, the *Alliance des Bakongo* (Alliance of Bakongo – ABAKO), at the initiative of Joseph Kasavubu. ABAKO advocated autonomy of Belgian Congo as a first step, then independence of the country. The development of the party was followed by the publication of several manifestos calling for the emancipation of the populations of Belgian Congo. A few years later, in 1955, Patrice Lumumba, a journalist with “developed” status,⁹⁴ established the *Association du personnel indigène de la colonie* (Association of Indigenous Personnel of the Colony), then the pro-independence party, *Mouvement national congolais* (Congolesse National Movement – MNC) in 1958.

In 1959, a series of violent and bloody military crackdowns targeted the pro-independence movement. In January, the cancellation of a public meeting organised by ABAKO triggered major demonstrations: according to official figures, at least 42 people were killed by the Belgian military – several hundred people died according to other estimates. Joseph Kasavubu was arrested and went into forced exile in Belgium. In October of the same year, 30 people were killed by gendarmes, during the MNC National Congress. Patrice Lumumba was arrested in Stanleyville (now Kisangani) and sentenced to 6 months in prison. He was held in Buluwo Prison, where he occupied the underground cell known as “Siberia”.

In 1960, a meeting between Congolesse representatives of the pro-independence movement and the Belgian authorities was organised, but those calling for independence refused to negotiate in the absence of Patrice Lumumba. He was released and participated in the discussions: the principle of independence was approved, and the official date set for 30 June 1960. Joseph Kasavubu was

⁹⁴ See, *supra*, Sub-section “The legislative framework on the death penalty in Belgian Congo”.

elected President of the Republic of Congo (Congo-Léopoldville), and Patrice Lumumba became Prime Minister.

On the day of the proclamation of independence, Patrice Lumumba made an unscheduled and virulent speech in the presence of King Baudouin, recalling the suffering and humiliation of his people: “*We have experienced forced labour in exchange for pay that did not allow us to satisfy our hunger, to clothe ourselves, to have decent lodgings or to bring up our children as dearly loved ones. Morning, noon and night we were subjected to jeers, insults and blows because we were ‘Negroes’. Who will ever forget that the black was addressed as ‘tu’, not because he was a friend, but because the polite ‘vous’ was reserved for the White man? We have seen our lands seized in the name of ostensibly just laws, which gave recognition only to the right of might. We have not forgotten that the law was never the same for the White and the Black, that it was lenient to the ones, and cruel and inhuman to the others [...]. Eternal glory to the fighters for national liberation! Long live independence and African unity! Long live the independent and sovereign Congo!*”⁹⁵ By offending the King, the Prime Minister provoked anger in Belgium, which led the former colonising power to support the Katanga secessionist movement in the weeks following independence.

REBELLIONS AND THE ASSASSINATION OF LUMUMBA

A few days after the proclamation of independence, rebellions broke out. The unrest spread through several regions, in particular the mining province of Katanga, where secession of the leader, Moïse Tshombé, was supported by the Belgian former colonisers, and in the province of South Kasai. In the face of the United Nations’ inaction on the Katanga issue, Patrice Lumumba threatened to turn to the Soviets, which, in the middle of the Cold War, was particularly badly viewed by the Americans. In September 1960, the *Armée nationale congolaise* (Congolesse National Army, ANC – the new name of the State force) committed serious violations during operations to recapture South Kasai. In response to the abuses committed in South Kasai and the difficult relations between Patrice Lumumba and the West, Joseph Kasavubu dissolved the government and dismissed the Prime

⁹⁵ Lumumba, speech of 30 June 1960, full text in *Jeune Afrique*, “RDC: 55 ans après, le discours de Patrice Éméry Lumumba pour l’indépendance”, 2015, at www.jeuneafrique.com (accessed on 15 November 2019).

THE REIGN OF JOSEPH MOBUTU (1965-1997)

Minister. Colonel Joseph Mobutu, head of the army, formerly close to Lumumba, took over while maintaining Joseph Kasavubu as the country's leader.⁹⁶ Patrice Lumumba was arrested and transferred to Katanga, which was still governed by Moïse Tshombé. He was tortured before being assassinated in January 1961.⁹⁷

At the political level, the post-independence period was marked by popular rebellions, wars of secession, very frequent extrajudicial executions,⁹⁸ and significant governmental instability. From 1960 to 1965, the government had five Prime Ministers: Patrice Lumumba (1960), Joseph Ileo (1960-1961), Cyrille Adoula, co-founder of the MNC (1961-1964), Moïse Tshombé (1964-1965) and Évariste Kimba (1965).

THE DEATH PENALTY IN THE LULUABOURG CONSTITUTION

In 1964, the country's first Constitution was drawn up: the Luluabourg Constitution. In order to deal with secession attempts and insurrectional wars, the Constitution established a federal regime, granting a certain degree of autonomy to the 21 provinces. The Constitution guarantees respect for fundamental rights. Nevertheless, while Article 15 expressly provides for the right to respect for and protection of life and the prohibition on torture, it continues by stipulating the lawfulness of the death penalty: *"Everyone has the right to respect for and protection of life and to the inviolability of his person. No-one may be subjected to torture or inhuman or degrading treatment. No-one may be put to death except in the cases provided for by national law and in the manner prescribed by it."*⁹⁹

This Constitution was adopted by referendum. The country took the name Democratic Republic of the Congo on 1 August 1965. However, in November 1965, Joseph Mobutu finally overthrew President Kasavubu.

96 Verhaegen B., Vanderlinden J., "La politique", in Verhaegen B., Mudimbe V.-Y., Vanderlinden J., Huybrechts A., Van der Steen B., *Du Congo au Zaïre. 1960-1980*, Centre de recherche et d'information socio-politiques, 1978, pp. 116-117.

97 Several years later, while Mobutu was accused of betraying Patrice Lumumba and participating in his transfer to Katanga, he announced the redemption of the former Prime Minister, and the erection of a memorial to him in the capital.

98 See, for example, Lanotte O., "Chronologie de la République démocratique du Congo/Zaïre (1960-1997)", *Mass Violence and Resistance - Research Network*, Sciences Po, 2010, at www.sciencespo.fr (accessed on 20 November 2019).

99 Constitution of 1 August 1964, Article 15.

A POWER TAKEOVER MARKED BY EXECUTIONS OF POLITICAL OPPONENT

Having taken office as leader of the country by means of a coup d'État in November 1965, Joseph Mobutu suspended the 1964 Constitution. He very rapidly consolidated power by restricting application of the rule of law and human rights: he suspended the right to strike and banned political parties for a five-year period. He enacted an ordinance-law granting himself the power to adopt measures which, in theory, belonged to the legislative sphere, while nevertheless maintaining Parliamentary oversight.

After several months in power, President Mobutu went further. In March 1966, he granted himself legislative authority, without any parliamentary scrutiny. Parliament only had to be informed of the ordinance-laws adopted by the President of the Republic.¹⁰⁰ Several public figures spoke out, denouncing the country's transition towards dictatorship. Évariste Kimba, former Prime Minister in Kasavubu's government, Jérôme Anany, former Minister of Defence, Emmanuel Bamba, former Minister of Finance and Alexandre Mahamba, former Minister of Land Affairs, coordinated with members of the military to attempt to remove Mobutu from power in order to establish a civilian government. On the day of Pentecost, a meeting was held to organise the coup, but the four politicians were arrested – the members of the military accompanying them were actually informants for President Mobutu, who announced that a plot had been foiled. He declared:

*"Tonight, a plot against me and the new regime was conceived by several irresponsible politicians. They have been arrested and will be prosecuted for high treason."*¹⁰¹

100 According to the ordinance of 22 March 1966, "[L]egislative authority is hereby granted to the President of the Republic, who exercises it through ordinance-laws. The ordinance-laws are transmitted, for information purposes, to the Chamber of Deputies and the Senate, within two months of the date of their signature." (Unofficial translation)

101 Mobutu, cited in a newsletter issued in 1966 by the International Commission of Jurists.

That same day, Joseph Mobutu established a special military court by ordinance-law. In June 1966, following a public trial by the special military court lasting just a few minutes, the four public figures were hanged in public in the centre of Leopoldville.¹⁰² Several days later, the President clearly articulated his vision of the use of the death penalty “*To set an example*”. He declared: “*The respect owed to a leader is a sacred thing and it was necessary to strike by making an example. We have been so accustomed to secessions and rebellions in this country. We needed to put a stop to all that, so that people cannot start up again... When a leader decides, he decides, period. I decided in the name of the High Command that we shall be in power for five years, period.*”¹⁰³

This first dramatic trial was followed by others aimed at preventing any political movement which had played a role in securing independence from occupying a space in the country. In March 1967, the “*procès des traîtres katangais*” (“trial of the Katangese traitors”) took place: several members of the military, led by Colonel Tshipola, had revolted following the ousting of Moïse Tshombé in 1965. The members of the military were sentenced to death. At the same trial, Moïse Tshombé himself, former President of Katanga and former Prime Minister under Kasavubu, was sentenced to death for high treason and undermining internal and external State security, while he was in exile in Spain. He was not executed in Congo, but abducted and transferred to Algeria, where he died in detention in 1969.

In 1968, Pierre Mulele, Minister of Education in the Lumumba Government and former leader of the Simba rebellion, returned to the country after exile in Congo-Brazzaville, on the basis of a promise of amnesty announced by the Minister of Foreign Affairs. After receiving a hero's welcome in Kinshasa, Pierre Mulele was arrested and transferred to the Kokolo Military Camp, where, according to observers, he was tortured. His limbs were amputated, and his corpse thrown into the river.¹⁰⁴ On 10 October 1968, it was announced on the radio that he had been executed following a judgement given by a

102 The Kamanyola stadium was renamed “*Stade des Martyrs de la Pentecôte*” (Martyrs of Pentecost Stadium) in their honour.

103 Beys J., Gendebien P.-H., Gérard-Libois J., Verhaegen B., Van Lierde J., *Congo, Centre de recherche et d'information socio-politiques*, 1966, p. 442.

104 Braeckman C., *op. cit.*, 1992, p. 45.

military court.¹⁰⁵ However, numerous actors believe he was killed at the time of his transfer and that he was never tried.¹⁰⁶ His execution provoked a break in diplomatic relations between the two Congos.¹⁰⁷

CONSTITUTIONAL REFORM, POLITICAL REFORM, LEGISLATIVE REFORM

In June 1967, the population was asked to vote on a proposal for a new Constitution. With over 98% of votes in favour of this new text, the Constitution of the Second Republic was enacted on 24 June 1967: it provided for a unitary system with the Head of State as its cornerstone. Only two political parties were authorised.¹⁰⁸ Article 6(3) of the Constitution again stipulates the right to life, while providing for the death penalty: “*No-one may be put to death, except in the cases provided for by law and in the manner prescribed by it.*”

In the explanatory memorandum to the new Constitution, the President indicated that the country required a “*Genuine democracy adapted to African realities*”,¹⁰⁹ laying the foundations for the new ideology of “*authenticity*” developed from 1971. Mobutu defined this policy as “*The realisation by the people of Zaire of the need to draw on their own origins, to search out the values of their ancestors in order to find those which contribute to harmonious and natural development. It is the refusal of the people of Zaire to embrace imposed ideologies.*”¹¹⁰ The country was therefore renamed Zaire; the ANC became the *Forces armées zairoises* (Armed Forces of Zaire – FAZ); and President Mobutu became Mobutu Sese Seko Kuku Ngbendu Waza Banga (“The Warrior who goes from conquest to conquest and knows no defeat”).

105 *Der Spiegel*, “Kongo/Justiz: Mayi Mulele”, 1968, available at www.spiegel.de (accessed on 15 November 2019). See also, Ngandu Mualaba C., *République démocratique du Congo, tout est à refaire. À qui la faute ?*, Publibook, 2008, p. 139.

106 See, for example, Kamitatu C., *La Grande mystification du Congo-Kinshasa*, Maspero, 1971. See also, Afriwave, “Dossiers de l'histoire : l'assassinat de Pierre Mulele”, 2016, available at www.afriwave.com (accessed on 19 November 2019).

107 *Journal de l'année 1969*, Larousse.

108 The single party system was only established 3 years later, in 1970.

109 Présidence de la République, *Mémoire explicatif du projet de Constitution établi sur la base du texte de l'avant-projet présenté au président de la République et sur la base des discussions de la Commission politique du Gouvernement*, 1967, available at www.droitcongolais.info (accessed on 15 November 2019).

110 Mobutu J., speech delivered in New York at the 28th UN General Assembly in 1973, cited in Kakama M., “Authenticité’, un système lexical dans le discours politique au Zaïre”, *Mots. Les Langages du politique*, No. 6, 1983, p. 36.

In 1972, the *Code de justice militaire* (Military Justice Code),¹¹¹ which would remain in force until 2003, was adopted. Although it had been preceded by other texts,¹¹² this Code introduced for the first time a coherent legal arsenal of military justice, distinct from that of the ordinary courts. This text maintained the jurisdiction of military courts over civilians,¹¹³ as well as the application of the death penalty.

THE PLOTS OF 1975 AND 1978

From 1968, the number of death sentences and executions diminished: most of the key figures in the fight for independence were dead or no longer played a central role in political life. The regime continued to face rebel movements in many of the country's provinces and was marked by a very high number of extrajudicial executions.¹¹⁴ Capital punishment continued to be used occasionally as a political weapon to make a lasting impression, in order to thwart actual or alleged plots. Until 1978, the majority of death sentences, including against civilians, were passed by military courts. Civilian courts issued few death sentences, preferring to recognise mitigating circumstances in the case of those risking the death penalty.¹¹⁵

111 Ordinance-law No. 72/O60 of 25 September 1972.

112 In particular, decree-law of 8 May 1958 and decree-law of 18 December 1964 *portant Code provisoire de justice militaire* (on a Provisional Military Justice Code).

113 As noted by the Special Rapporteur on the situation of human rights in Zaire in 1994, "[...] *The following are also subject to military jurisdiction: civilians accused of belonging to 'rebel bands'; those who incite servicemen to commit offences; co-perpetrators or accomplices of servicemen; persons accused of treason; and persons accused of the illegal possession of military weapons (Arts. 127 et seq., 431 and 457 of the 1972 Military Justice Code)*". Special Rapporteur on the situation of human rights in Zaire, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories* [E/CN.4/1995/67], 1994, para. 55.

114 For example, summary executions were carried out against the following groups: students of the University of Kinshasa in 1969, inhabitants of Idiofa in 1978, farmers in Kabare and Idjwi in 1985, protesters in Kinshasa in 1988 and 1990, students in Lubumbashi in 1990, farmers in Mbuji-Mayi in 1991, etc. See, in particular, Karimunda Muyoboke A., *op. cit.*, 2011; Manimba Mane M., "Événements Kasongo : traces perdues, mémoires réveillées d'une répression militaire à Idiofa", in Ozankom C., Sieme Lasoul J.-P. (dir.), *Une vie au service des jeunes*, Éditions Baobab, 2016, pp. 35-36. Other executions were more targeted, such as the assassination in 1969 of the Katangese servicemen Léonard Monga and Pierre Damase Nawej, who returned to Congo on the basis of an amnesty announced by Mobutu.

115 Bégot M., Ngondji L., *op. cit.*, 2005, p. 114.

In 1975, approximately 30 civilians and high-ranking members of the military, accused of preparing a coup against the regime with the complicity of the US intelligence services, were arrested in the case of the "failed coup". Seven of them were sentenced to death but were not executed, as a result of strong international pressure. These seven people obtained a presidential pardon, without being exonerated: their property remains confiscated by the State. One of those sentenced has been asking for a review of his case since 2009.¹¹⁶

In 1977, the Ambassador of Zaire in Washington, Nguza Karl-i-Bond, was recalled to Zaire: he was arrested, tortured and sentenced to death for high treason, accused of complicity with rebel groups. Having "confessed" to his wrongdoings, he was pardoned, appointed Minister of Foreign Affairs in 1979, and First State Commissioner – the equivalent of Prime Minister – in 1981.¹¹⁷ Some writers believe he received redemption for proving his allegiance to the President by confessing to the crimes committed.

The following year, in 1978, the President announced he had foiled a plot by officers whom he accused of creating a climate of terror in the capital to force his resignation. 77 members of the military and 24 civilians were charged, including many young officers who had been trained in European and US military schools. Thus, the "*procès des terroristes*" ("trial of the terrorists") opened. 19 people were sentenced to death for several offences including military conspiracy, criminal association, extortion using threats, and organisation of illegal meetings. 13 people were executed in March 1978 – only fugitive indictees and a woman (on the grounds of being a woman) escaped execution. During a televised speech, the President declared he no longer accepted the "excuse" of human rights: "*From this day forward, I solemnly declare that I shall be merciless in dealing with any attempts of this nature... I will no longer accept the multiplication of interventions, on the pretext of protecting human rights, calling for the State of Zaire not to impose upon this type of criminal the punishment that they deserve [...] The death sentences which have*

116 This is the case of Senator Raymond Omba Pene Djunga, sentenced in 1975, who applied for a review of his case by the *Haute Cour militaire* (Military High Court). See, *Radio Okapi*, "Affaire coup d'État manqué de 1975 : le sénateur Omba réclame un procès en révision", 2015 available at www.radiookapi.net (accessed on 15 November 2019). See also, *Politico*, "RDC : la mise à la retraite à la Haute Cour militaire handicape le déroulement de procès", 2018, available at www.politico.cd (accessed on 15 November 2019).

117 Jurt M., *La Suisse, terre d'accueil, terre de renvoi*, Éditions d'En Bas, 2012.

just been executed must be an example to all of them. This alone is the price of guaranteeing peace and the protection of people and property, this price will henceforth be paid in all circumstances.”¹¹⁸ In the same year, the preacher Martin Kasongo, leader of the Idiofa insurrectional movement, claiming to be Mulele resurrected, and 13 others were arrested and tried by a special military court. They were publicly executed on the same day as their trial.¹¹⁹

Between 1978 and 1996, no executions were reported in the country. However, the rebellions continued throughout this period and the number of people executed without trial by the FAZ, on the grounds of their actual or alleged acquaintance with rebel forces, remained very high.¹²⁰

DEMOCRATIC OPENING (1990-1996)

After the fall of the Berlin wall, a wave of democratisation spread around the world. In January 1990, President Mobutu announced a series of “public consultations” throughout the country. Thousands of dossiers of grievances were submitted to the President. Having been isolated from the realities experienced by his compatriots, he discovered the extent of public discontent with the authorities and the security forces. He was taken to task on many occasions. In Mbuji-Mayi, capital of Kasai, he was greeted by women chanting, “Papa, papa, give us food, we are hungry. Papa, when you leave the town, ask them not to cut off the electricity!”¹²¹

Following the public consultations, a *Conférence nationale souveraine* (Sovereign National Conference – CNS) was held in Kinshasa. This

118 Mobutu J., televised speech in 1978, cited in *Le Phare*, “Congo-Zaire : l’empire du crime permanent, procès dit des terroristes”, 2013, at www.lephareonline.net (accessed on 15 November 2019).

119 *Conférence nationale souveraine* (Sovereign National Conference), *Massacre d’Idiofa en janvier 1978*, dossier 07, 1992, cited in Karimunda Muyoboque A., *op. cit.*, 2011. See also, Manimba Mane M., *op. cit.*, 2016, pp. 35-36; *Le Monde*, article of 8 March 1978 cited *supra*; Ngandu Mualaba C., *op. cit.*, 2008, p. 142.

120 Among the many executions of villagers accused of sympathising with the rebels, in 1978 between 500 and 2,000 people were killed during the repression in the Idiofa region following the insurrectional movement led by Martin Kasongo, including Pierre Mulele’s mother and several other members of his family. See, Manimba Mane M., *op. cit.*, 2016, p. 36. Other examples include dozens of civilians killed in Moba in 1984 and between 500 and 1,000 civilians killed in the Beni region in 1986 (see, Lanotte O., *op. cit.*, 2010).

121 Braeckman C., *op. cit.*, 1992, p. 341.

forum, which brought together representatives of all sections of the populations, took place over several months, until December 1992. The CNS recommended reform of the military justice system. It did not adopt an unequivocal position on the abolition of the death penalty, but it noted that the country was in a position to envisage it. In a text entitled, *Acte relatif à l’abolition* (Abolition Act), it indicated that “*The progress of the abolitionist movement takes place in the context of a vast humanist trend which a State based on the rule of law cannot avoid*”, although it was considered necessary to take into account the specific sociological realities of Zaire in order to decide on the timing and modalities.¹²² The CNS also recommended that, after a six-month period, the silence of the President of the Republic should be automatically deemed to constitute a pardon and a commutation of sentence for all persons sentenced to death awaiting execution.¹²³

While this period of opening led to the end of the Second Republic and the emergence of the democratic transition, these years were also marked by political instability, civil war and mass crimes; factors which constituted obstacles to the realisation of abolition.¹²⁴ Death sentences continued to be passed, but were not carried out,¹²⁵ until the fall of Mobutu in the war of 1996-1997. The recommendations of CNS thus remained unimplemented.

THE FIRST CONGO WAR OF LIBERATION AND THE FALL OF MOBUTU (1996-1997)

The First Congo War of Liberation (1996-1997) was rooted in the 1994 genocide in Rwanda: while the Banyamulenge, Zairians of Tutsi origin, had lived for decades in eastern Congo, demographic pressure increased with the arrival of several hundred thousand Rwandan refugees along the border, in camps in the east of the country – among them many Hutus, including members of the Interahamwe militias responsible for the genocide, and their families. The Bantu populations of Zaire, originating in the region, faced growing insecurity.

122 Bégot M., Ngondji L., *op. cit.*, 2005.

123 *Ibid.*

124 Karimunda Muyoboque A., *op. cit.*, 2011, p. 197.

125 Special Rapporteur charged with investigating the situation of human rights in the Republic of Zaire, Report A/52/496, 1997, p. 103.

THE PRESIDENCY OF LAURENT-DÉSIRÉ KABILA (1997-2001)

In response, the government of Zaire adopted several resolutions in 1995 aimed at treating all Zairians of Rwandan origin, including the Banyamulenge, as refugees. The discontent grew stronger. In 1996, the Banyamulenge rebellion broke out. With the backing of Rwanda and Uganda, the Rwandan Patriotic Army supported the *Alliance des forces démocratiques pour la libération du Congo* (Alliance of Democratic Forces for the Liberation of Congo – AFDL), coordinated by Laurent-Désiré Kabila, which attacked Zaire on the ground that the perpetrators of genocide present in the Zairian camps were preparing to recapture Rwanda. Hundreds of refugees, men and women, were killed. The nature of the conflict quickly changed: it was now aimed at overthrowing the Mobutu regime. The rebels advanced rapidly and Zairian soldiers, who were poorly organised and paid, deserted.¹²⁶ At least 14 members of the military were sentenced to death by the Kisangani Military Court for cowardice and desertion in January 1997.¹²⁷ Other death sentences were reported during this period: a member of the military for theft, a civilian for spying. However, these sentences were not carried out, and several death row prisoners transferred to Kinshasa escaped when the rebels entered the city.¹²⁸

In May 1997, Laurent-Désiré Kabila seized power and proclaimed himself President of the Republic. Mobutu sought refuge in Morocco and died a short time later. Zaire was renamed Democratic Republic of the Congo.

EMERGENCE AND RISE OF THE MILITARY ORDER COURT: MORE THAN 150 EXECUTIONS IN LESS THAN TWO YEARS OF EXISTENCE

While the new President made an official commitment to restoring the rule of law, Amnesty International revealed that death sentences were handed down and carried out just several months after he came to power: the first soldier was sentenced to death for murder at the conclusion of a summary trial which only lasted a few hours, by an “*Impromptu military tribunal set up within the school*” in Kinshasa.¹²⁹ He was executed several days later, in October 1997.¹³⁰ A further eight soldiers were also sentenced to death by the same court, for attempted mutiny, having reportedly staged a protest about unpaid wages.¹³¹

In parallel to this improvised military justice, and aiming to restore discipline within the new army which emerged from the rebel groups who had been members of the AFDL¹³² and former members of the FAZ, President Laurent-Désiré Kabila established a new military court: the *Cour d'ordre militaire* (Military Order Court – COM). This special court established by decree-law No. 19 of 23 August 1997 was responsible for: “*Bringing to light all the offences committed by elements of the army's 50th brigade, soldiers formerly members of the Forces armées zaïroises (Armed Forces of Zaire) and members of the police.*”¹³³ Although in theory the jurisdiction of the COM was limited to the security forces, its Article 4 provided that “*Its jurisdiction extends to anyone charged with offences involving*

126 La Documentation française, *Le 1^{er} conflit du Zaïre 1996-1997*, 2004.

127 Report A/52/496 cited *supra*, 1997, p. 103. See also, Amnesty International, *Zaire: Rape, Killings and Other Human Rights Violations by Security Forces*, AFR 62/06/97, 1997.

128 Report A/52/496 cited *supra*, 1997, p. 103.

129 Amnesty International, *DRC: Deadly Alliances in Congolese Forests*, AFR 62/33/97, 1997, p. 31. Amnesty International, *DRC: Execution/Legal Concern/Fear of Imminent Executions*, AFR 62/032/1997, 1997.

130 *Ibid.*

131 Special Rapporteur Mr. Bacre Waly Ndiaye, *Situation in DRC*, E/CN.4/1998/68/Add.1, 1997, p. 42. Amnesty International, report AFR 62/032/1997 cited *supra*.

132 Bégot M., Ngondji L., *op. cit.*, 2005, p. 122.

133 Decree-law No. 19 of 23 August 1997, Article 3.

firearms which harm persons or their property.” Thus, from the time of its establishment, its jurisdiction extended to civilians. Its jurisdiction was further extended in 1999, when the state of emergency was proclaimed in several provinces in the country:¹³⁴ in the provinces declared under siege, all cases usually handled by civilian courts came under the jurisdiction of the military courts.¹³⁵ In these provinces, human rights organisations reported that the civilian courts were no longer handling criminal cases – all cases were processed by the military courts.¹³⁶

The COM was characterised by its severity and violations of fundamental guarantees of the rights of the defence and the right to a fair trial: no mitigating factors could be recognised, including in relation to crimes carrying the death penalty; the judges were members of the military, the majority without any legal expertise; no possibility to appeal was available to those sentenced, with the exception of requests for pardon addressed to the President by the military prosecutor. Trials could last a single day, and executions sometimes took place within hours of sentencing, without any opportunity for those sentenced to request a pardon, in violation of national legislation.¹³⁷

The law further provided that juveniles could be sentenced to death. Thus, in 1999, human rights organisations reported that a child (aged 13 or 15 years, depending on the source) had been sentenced to death and was subsequently pardoned.¹³⁸ The following year, a 14-year-old child was executed within hours of his trial by the COM, without time to appeal for pardon.¹³⁹ At least six other children, child-soldiers, were sentenced by the COM: in five cases, the sentence was allegedly commuted;¹⁴⁰ the remaining case concerned a child-soldier

134 Decree-law No. 171 of 1999.

135 Human Rights Watch, *Democratic Republic of Congo: Casualties of War: Civilians, Rule of Law, and Democratic Freedoms*, 1999, Part III.

136 *Ibid.*

137 *Ibid.* See also, Amnesty International, *Democratic Republic of Congo: From Assassination to State Murder?*, AFR 62/023/2002, 2002, pp. 5-7.

138 Amnesty International, “The death penalty in Burundi, DRC and Rwanda”, *Amnesty International News*, Vol. 28, No. 5, 1998, p. 3; Human Rights Watch, *op. cit.*, 1999.

139 Amnesty International, *Executions of juveniles since 1990*, ACT 50/9511/2018, 2018, p. 4. See also, ECPM, “Words for abolition: Liévin Ngondji”, 2019, available at www.youtube.com/watch?v=KeLIETH9Eoo (accessed on 15 November 2019).

140 Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/007/02, 2002, pp. 6-7.

sentenced to death in 2002 who was aged 17 at the time the act was committed. He was interviewed by the fact-finding mission and remains in detention.¹⁴¹

Dozens of death sentences were handed down. The prosecutor, Charles Alamba, was universally feared.¹⁴² Human rights organisations reported that judges and prosecutors themselves feared reprisals by the military if their decisions did not meet their approval.¹⁴³ In under 2 years of existence, from August 1997 to May 1999, 153 executions of civilians and members of the military were reported, including 103 public executions.¹⁴⁴ During this period, the country became the second highest ranking country worldwide for the number of executions, after China.¹⁴⁵

INITIATION AND INTERRUPTION OF THE PROCESS FOR A MORATORIUM ON THE DEATH PENALTY

In June 1999, the Congolese Minister for Human Rights made a written commitment to the United Nations to initiate a process leading to abolition.¹⁴⁶ From July 1999, when the Lusaka Ceasefire Agreement was signed – aimed at ending the Second Congo War¹⁴⁷ – the number of executions diminished in the country.¹⁴⁸ In December 1999, for the first time in DRC’s history, President Laurent-Désiré Kabila declared a moratorium on the death penalty, although it was not immediately applied. In February 2000, the President signed a general amnesty for all Congolese nationals prosecuted or convicted for undermining internal or external state security, with a view to “*Establishing a*

141 On this issue, see, *infra*, Sub-section “Minors sentenced to death”.

142 He was himself sentenced to death by the *Haute Cour militaire* (Military High Court) in 2004 for participating in an assassination. His sentence was commuted to life imprisonment. He died in prison in 2017.

143 Human Rights Watch, *op. cit.*, 1999.

144 “ASADHO”, in Swiss Federal Office for Refugees, *Feuille d’information sur les pays : République démocratique du Congo*, 1999, Chapter 14. In the first half of 1998, more than 50 people were executed: see, Amnesty International, *op. cit.*, 1998, p. 3.

145 Bégot M., Ngondji L., *op. cit.*, 2005, p. 105.

146 International Human Rights Law Group, *Droits civils et politiques*, Written Statement to the UN Commission on Human Rights, E/CN.4/2003/NGO/192, 2003, p. 3.

147 See *infra* for information on the Second Congo War, Sub-section “New steps towards abolition of the death penalty: hopes, disappointments, hesitations”.

148 Bégot M., Ngondji L., *op. cit.*, 2005.

new climate of peace.¹⁴⁹ However, this decree was only partially implemented.¹⁵⁰

While these signals indicated important steps towards abolition of the death penalty, President Kabila was shot and killed by one of his bodyguards on 16 January 2001. 135 individuals, both civilians and members of the military, were accused of participating in his assassination and charged.

¹⁴⁹ Decree-law No. 017/2000 of 19 February 2000 *portant amnistie générale* (on a general amnesty). *La Croix*, “Le président Laurent-Désiré Kabila amnistie tous les rebelles congolais”, 2000, available at www.la-croix.com (accessed on 15 November 2019). The amnesty was intended to apply to all crimes, including international crimes, in violation of international law.

¹⁵⁰ The majority of those released were military detainees. Observers reported that dozens of political prisoners remained in detention despite the amnesty. See, for example, UN Security Council, *Second Report of the Secretary-General on the UN Organisation Mission in the DRC*, 2000, para. 57; UN Commission on Human Rights, *Situation of Human Rights in the Democratic Republic of the Congo*, Resolution 2000/15, 2000.

THE JOSEPH KABILA ERA (2001-2018)

THE TRIAL OF THOSE ACCUSED OF LAURENT-DÉSIRÉ KABILA'S ASSASSINATION

After his father's death, Joseph Kabila came to power by co-optation.¹⁵¹ In his inaugural address, he pledged to continue to strengthen the rule of law and the protection of human rights, “*So that all Congolese women and men, as well as any foreign nationals received on our territory shall enjoy, in accordance with the law, freedom, equality, dignity and protection of their person and property.*”¹⁵² He also undertook to reform military justice and affirmed that the COM would henceforth deal only with offences related to military rules and regulations.¹⁵³

In June 2001, the National Conference on Human Rights convened by the President¹⁵⁴ adopted the *Charte congolaise des droits de l'homme et du peuple* (Congolese Charter of Human and Peoples' Rights). This Charter indicated clear support for the abolition of the death penalty. Article 18(4) provided that: “*The death penalty is prohibited throughout the Republic.*”¹⁵⁵ However, this document had no legal effect, since it was not enacted by the President in the form of a decree. The text remained unimplemented.

Although a moratorium on the death penalty was declared by Laurent-Désiré Kabila and reaffirmed by his son in 2001 in Geneva, who stated that he was “*Committed to a continuing moratorium on executions until such time as parliament was able*

¹⁵¹ It was not until 2006 that his presidency was legitimised by a vote; he won the presidential elections with 58% of the vote.

¹⁵² Kabila J., “Discours programme du président Joseph Kabila”, *Congo Afrique*, No. 352, 2001, available at repositories.lib.utexas.edu (accessed on 15 November 2019). Unofficial translation.

¹⁵³ *Ibid.*

¹⁵⁴ Presidential decree No. 007/01 of 23 February 2001.

¹⁵⁵ *Charte congolaise des droits de l'homme et du peuple*, Article 18(4), available at www.metafro.be (accessed on 15 November 2019).

to debate the abolition of the death penalty”,¹⁵⁶ the moratorium was lifted in September 2002, on the eve of the prosecutor’s closing submissions in the COM trial of those accused of the former president’s assassination. The Minister of Justice cited a rise in crime and insecurity in the country as justification for his decision.¹⁵⁷ On 7 January 2003, while the trial of those accused of the assassination of the President was ongoing, 15 people, several of whom had been sentenced to death for an attack against the Governor of the Central Bank, and at least five who had not yet been sentenced and were being held in the capital’s main prison, were taken to a military camp and executed.¹⁵⁸ These events were interpreted as a clear message to judges and prosecutors involved in the proceedings against those accused of the assassination of President Kabila to impose the death penalty in that case. The 15 persons executed in 2003 were the last people to be executed in the country.

Within hours of these executions, 30 people, civilians and military personnel, including the former president’s right-hand man, Eddy Kapend, were sentenced to death by the COM for attack, attempted coup, conspiracy, criminal association, disappearance of weapons of war, abandonment of post and treason. Dozens of others have been sentenced to heavy penalties. National and international observers regarded the trial as a parody of justice: the suspects were not given a fair trial and the decisions were not appealable.¹⁵⁹ Nevertheless, they were not executed.¹⁶⁰

¹⁵⁶ Kabila J., Address to the UN Commission on Human Rights in Geneva, in Amnesty International, AFR 62/023/2002, 2002, *op. cit.*, p. 6.

¹⁵⁷ International Human Rights Law Group, *op. cit.*, 2003; Amnesty International, AFR 62/023/2002, 2002, *op. cit.*, p. 6.

¹⁵⁸ Amnesty International, DRC: *Death Penalty/Fear of Imminent Execution*, AFR 62/004/2003, 2003; Bégot M., Ngondji L., *op. cit.*, 2005, p. 119.

¹⁵⁹ Among the main violations of the right to a fair trial, human rights organisations pointed to the fact that the trial was held *in camera*, the accused were not given adequate time to prepare their defence and the judges were all members of the army or security services (Amnesty international, AFR 62/023/2002, 2002). See also, *Le Soir*, “Trente condamnations à mort dans le procès Kabila”, 2003, available at www.lesoir.be.

¹⁶⁰ See box, *infra*, “The situation of those sentenced to death for the assassination of Laurent-Désiré Kabila”, Sub-section “Partial release of political prisoners”.

LEGISLATIVE AND CONSTITUTIONAL REFORM OF THE MILITARY JUSTICE SYSTEM: FROM THE COM TO THE CMO

The new President made an increasing number of public statements promoting respect for human rights. In accordance with his commitments, he reformed the military justice system: the notorious COM was abolished, a new Military Justice Code and a Military Criminal Code were enacted.¹⁶¹ Although they were enacted in 2002, they did not come into force until March 2003, after the conclusion of the trial of those accused of the assassination of the former president, which was interpreted as a clear intention to exclude those persons from their application.¹⁶²

There were several positive developments in these new texts. The Military Justice Code provided that minors shall not be tried by the military justice system.¹⁶³ However, the text remained very severe: dozens of offences were punishable by death; the military justice system continued to have significant powers and military courts could still try civilians in many cases. At the same time, DRC ratified the Rome Statute establishing the International Criminal Court (ICC)¹⁶⁴ and confirmed the leading role granted to the military justice system: international crimes – war crimes, genocide and crimes against humanity – continued to be included in the Military Criminal Code but not in the ordinary Criminal Code. The death penalty could be imposed for genocide and crimes against humanity,¹⁶⁵ although this penalty was not provided for in the Rome Statute.¹⁶⁶ This creates an

¹⁶¹ Law No. 023/2002 of 18 November 2002 enacting the *Code judiciaire militaire* (Military Justice Code) and law No. 024/2002 of 18 November 2002 enacting the *Code pénal militaire* (Military Criminal Code).

¹⁶² See, Akele Adau P., “Le nouveau droit judiciaire et pénal militaire transitoire, un *soft landing* pour la Cour d’ordre militaire”, *Congo-Afrique*, No. 369–370, 2002, cited in AfriMAP, Open Society Initiative for Southern Africa, *RDC : La justice militaire et le respect des droits de l’homme – L’urgence du parachèvement de la réforme*, Open Society Institute, 2009, p. 31.

¹⁶³ Military Justice Code, Article 114.

¹⁶⁴ Decree-law No. 0013/2002 of 30 March 2002 authorising ratification of the ICC Rome Statute.

¹⁶⁵ The new Military Criminal Code did not provide for penalties for perpetrators of war crimes. This oversight led the judges to directly apply the provisions of the Rome Statute. See, for example, the Bongji case (Ituri garrison military court, 26 March 2006) in *Avocats sans frontières, Study of Case Law: Application of the Statute of Rome of the International Criminal Court by Congolese Courts*, 2009, p. 20.

¹⁶⁶ Although the Rome Statute does not provide for the death penalty, neither does it prohibit it. On the contrary, as the outcome of long negotiations, Article 80 of the Rome Statute allows States to apply their national penalties: “Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.”

unfair disparity between commanders tried by the ICC, who cannot be sentenced to death, and executing agents who can be sentenced to death by national courts.

In 2006, a new Constitution was enacted. The new constitutional text considerably limits the jurisdiction of military courts. They can still replace ordinary courts “*In time of war or when a state of siege (état de siege) or of emergency is declared*”, but Article 156 restricts the jurisdiction of military courts to the members of the armed forces and the police in all other cases.¹⁶⁷ Furthermore, the Constitution stipulates that, even in the event that the military courts have jurisdiction, the right of appeal cannot be suspended.¹⁶⁸

However, this text had little effect in practice. The courts continued to apply the Military Justice Code and to exercise jurisdiction over civilians in numerous cases, substantially overstepping the constitutional limits. According to Professor Akele Adau, “[T]he systematic refusal to give full effect to the Constitution can be seen in relation to the most significant constitutional rules defining the new legal system.”¹⁶⁹ As a result of the application of the Military Justice Code, civilians can still be tried by military courts in the event that they participated alongside members of the military in a military offence or they committed vaguely defined offences, such as inciting members of the military to commit acts contrary to the law or disciplinary rules.¹⁷⁰

Furthermore, a *Cour militaire opérationnelle* (Operational Military Court – CMO) was established in 2008 in North Kivu by Presidential ordinance¹⁷¹ to try members of the armed forces who committed offences during military operations in wartime. Contrary to the Congolese Constitution and international standards on the right to

¹⁶⁷ Constitution of Democratic Republic of Congo, Article 156, para. 1.

¹⁶⁸ *Ibid.*, para. 3.

¹⁶⁹ Akele Adau P., “Réponses pénales au discours du désordre ou au désordre du discours constitutionnel en République démocratique du Congo : la Cour constitutionnelle à l’épreuve”, *African Journal of Democracy and Governance*, Vol. 1, No. 2, 2014, p. 49. Unofficial translation.

¹⁷⁰ AfriMAP, Open Society Initiative for Southern Africa, *op. cit.*, 2009, p. 9.

¹⁷¹ Ordinance No. 08/003 of 9 January 2008 *portant implantation d’une Cour militaire opérationnelle* (on the establishment of an Operational Military Court), available at www.droitcongolais.info (accessed on 15 November 2019).

have one’s conviction and sentence reviewed by a higher court,¹⁷² the decisions of this court are not subject to appeal.¹⁷³ An analysis of some of the judicial decisions rendered by the CMO revealed that the rights of the accused to a fair and impartial trial were not always respected.¹⁷⁴ Many death sentences were handed down by the CMO: for example, from 2016 to 2018, 66 persons were sentenced to death in the course of proceedings against Ugandan rebels from the Allied Democratic Forces (ADF).¹⁷⁵

Although a new reform is under consideration, aimed in particular at incorporating constitutional standards into military judicial procedure,¹⁷⁶ at the time of writing, in November 2019, it remained the case that the decisions of the CMO were not subject to appeal. However, a process for the reform of the court system’s structure has been initiated and three new levels of court have been introduced to replace the former Supreme Court. A Constitutional Court was established in 2013,¹⁷⁷ followed in 2018 by the creation of a *Cour de cassation* (Court of Cassation) and a *Conseil d’État* (Council of State).¹⁷⁸

¹⁷² ICCPR, Article 14(5).

¹⁷³ Military Justice Code, Article 87.

¹⁷⁴ See, *infra*, Section “Death penalty: the serious inadequacies of the Congolese criminal justice system”. See also the analysis of the 2014 Minova trial in Human Rights Watch, *Justice on Trial: Lessons From the Minova Rape Case in the Democratic Republic of Congo*, 2015.

¹⁷⁵ The United Nations Joint Human Rights Office expressed its concern about the high number of death sentences handed down in these trials: from August 2016 to May 2017, 36 death sentences were passed. In 2018, the media reported that 66 death sentences had been handed down against Ugandan rebels and their sympathisers since the start of proceedings. AFP, “RDC : 66 condamnations à mort dans le procès des ADF depuis 2016”, 2018, at www.justiceinfo.net (accessed on 15 November 2019).

¹⁷⁶ The Working Group on the fight against impunity of the 2015 *États généraux de la justice* recommended granting the right to a second hearing to all defendants charged with serious crimes and to bring the new draft Military Codes in line with the 2006 Constitution (Recommendations Nos. 326 and 363). This reform has been under consideration for over 10 years (see, for example, AfriMAP, Open Society Initiative for Southern Africa, *op. cit.*, 2009, p. 3). The Constitution was amended in 2011, but Articles 16 and 61 were not amended (Law No. 11/002 of 20 January 2011 *portant révision de certains articles de la Constitution de la RDC du 18 février 2006* (amending certain articles of the DRC Constitution of the Democratic Republic of Congo of 18 February 2006)).

¹⁷⁷ Its role is to ensure that legislation is in conformity with the Constitution. RFI, “Une Cour constitutionnelle pour la RDC”, 2013, available at www.rfi.fr (accessed on 15 November 2019).

¹⁷⁸ The Court of Cassation is the highest court of the ordinary courts, while the Council of State is the highest court in the administrative system. RFI, “Réforme judiciaire en RDC : création de la Cour de cassation et du Conseil d’État”, 2018, available at www.rfi.fr (accessed on 15 November 2019).

NEW STEPS TOWARDS THE ABOLITION OF THE DEATH PENALTY: HOPES, DISAPPOINTMENTS, HESITATIONS

From 1998 to 2003, the Second Congo War ravaged the country, especially in the east, an area particularly rich in raw materials and minerals. Many armed groups were present, and a significant number of countries were involved. In schematic terms – acknowledging the complexity of the situation –, two major groups clashed:¹⁷⁹ DRC, supported by Angola, Namibia, Zimbabwe and South Africa on one side; rebel movements supported by Rwanda, Uganda and Eritrea on the other. According to the International Rescue Committee, the Second Congo War resulted in the deaths of nearly 4 million people between 1998 and 2004, due to the conflict or its consequences (famine, diseases, etc.¹⁸⁰). Following the Sun City Dialogue, a global and inclusive agreement was signed in December 2002 to end the hostilities, providing for amnesty for certain offences.¹⁸¹ “*Considering the urgency and necessity to achieve national reconciliation*”, an initial decree-law signed in April 2003 granted amnesty on a provisional basis for acts of war, political offences and offences of dissent for acts committed between 2 August 1998 and 4 April 2003, with the exception of international crimes.¹⁸² This decree-law was enacted pending the adoption of an Amnesty Law by the Parliament. On 19 December 2005, the Amnesty Law, repealing the decree-law of 2003, was enacted in respect of “*Acts of war, political offences and offences of dissent, for all Congolese nationals residing in the country or abroad, indicted, prosecuted or convicted by a judicial decision*”, committed between 20 August 1996 and 30 June 2005, with the exception of war crimes, crimes of genocide and crimes

179 United Nations, “DRC President Assures Council of his Commitment to Lusaka Agreement”, Press release, 2001, available at <https://www.un.org/press/en/2001/sc7006.doc.htm> (accessed on 15 November 2019).

180 International Rescue Committee, *Mortality in the Democratic Republic of Congo: an Ongoing Crisis*, 2008, p. 1. These data are contested, some estimating that 200,000 persons have died in the course of the conflict. See, for example, Michel Naepels’ column: “Au Congo, une violence sans nombres”, *Le Monde*, 2018, available at www.lemonde.fr (, accessed on 15 November 2019).

181 The Global and Inclusive Agreement on Transition in Democratic Republic of Congo, signed in Pretoria in December 2002, provided for amnesty “*For acts of war, political offences and offences of dissent, with the exception of war crimes, crimes of genocide and crimes against humanity.*”

182 Decree-law No. 03-001 of 2003 *portant amnistie pour faits de guerre, infractions politiques et d’opinion* (establishing amnesty for acts of war, political offences and offences of dissent).

against humanity.¹⁸³ This law was perceived as a significant step forward by the abolitionist movement, since most of those detained on death row in DRC were convicted of offences to which the amnesty applied. However, this Amnesty Law was only partially implemented: it was not applied to those sentenced to death in proceedings related to the assassination of the former President Kabila.¹⁸⁴

In 2005, while the new Constitution was being drafted, the abolition of the death penalty was discussed at length. Some reports suggested that abolition remained a controversial issue among the population: at the conclusion of heated debates in Parliament, it was eventually decided not to include abolition in the constitutional text.¹⁸⁵ However, when the new Constitution was enacted on 18 February 2006, and for the first time in the country’s history, the constitutional text did not contain any provision in favour of the death penalty. On the contrary, in Articles 16 and 61, the Constitution guaranteed the sanctity of human life and the non-derogable nature of the right to life, even when a state of siege or of emergency has been declared. These articles state:

“*Article 16*

The individual is sacred. The State has the obligation to respect and protect him/her.

All persons have the right to life, physical integrity and to the free development of their personality, while respecting the law, public order, the rights of others and public morality [...].

Article 61

In no case, not even when the state of siege or the state of emergency has been proclaimed in accordance with Articles 85 and 86 of this Constitution, is a derogation admissible from the following rights and fundamental principles: 1. The right to life [...].”

Some writers consider that the absence of a prohibition means that the death penalty continues to apply; many others consider it clear that the death penalty has become unconstitutional in DRC.¹⁸⁶ The

183 Law No. 05/023 of 19 December 2005 *portant amnistie pour faits de guerre, infractions politiques et d’opinion* (establishing amnesty for acts of war, political offences and offences of dissent), Articles 1, 3 and 5.

184 See, *infra*, “The situation of those sentenced to death for the assassination of Laurent-Désiré Kabila”.

185 Bégot M., Ngondji L., *op. cit.*, 2005, p. 121.

186 Akele Adau P., *op. cit.*, 2014, p. 49.

recognition of the sacred nature of the right to life led the CNDH to publish in 2017, for the first time, an opinion on the abolition of the death penalty: “*The National Human Rights Commission is of the opinion that the death penalty has no constitutional basis in Democratic Republic of the Congo.*”¹⁸⁷

Although death sentences continued to be passed, the route towards abolition became clearer. Several legislative texts tending towards a restriction of the use of the death penalty were enacted.¹⁸⁸ In 2009, during the Universal Periodic Review (UPR), DRC declared that the Constitution of 18 February 2006 enshrined the abolition of the death penalty.¹⁸⁹ Draft legislation on abolition of the death penalty was submitted to Parliament by members Mbata and Nyabirungu. However, it was rejected by the Congolese Parliament in November 2010, “*At the conclusion of a general debate marked by exceptional verbal abuse*”, according to observers.¹⁹⁰

However, in March 2012, the Minister of Foreign Affairs expressed the intention of the government to establish a formal moratorium in the country,¹⁹¹ yet no action was taken following this announcement. Two years later, DRC rejected the recommendations made during the UPR to abolish the death penalty and to ratify the Optional Protocol to the ICCPR aiming at the abolition of the death penalty.¹⁹²

In 2015, the country adopted legislation to implement the Rome Statute, providing for the death penalty for international crimes in the ordinary Criminal Code and the Military Criminal Code.¹⁹³ The

ordinary courts can apply the death penalty for international crimes committed by civilians; the military courts can apply the death penalty for international crimes committed by the security forces or militias.¹⁹⁴ These new provisions were interpreted as a significant setback on the path to abolition. Several commentators noted that many judges have in practice rejected the application of domestic law, directly applying the Rome Statute with its lighter provisions, to avoid passing the death penalty for international crimes,¹⁹⁵ but this is not the general practice.¹⁹⁶ It is also essential to underline that the persistence of the death penalty has significant consequences for judicial cooperation, as some countries, including Rwanda and Tanzania, oppose extradition to DRC of persons accused of serious crimes due to the retention of capital punishment in the country.¹⁹⁷ This led the 2015 *États généraux de la justice* to recommend “*Abolition of capital punishment in order to facilitate extradition proceedings.*”¹⁹⁸

187 CNDH, *op. cit.*, 2017.

188 Between 2006 and 2009, two legislative texts limited the application of the death penalty. In 2006, law No. 06/018 abolished the death penalty for rape leading to death and replaced this penalty with penal servitude for life. In 2009, law No. 09/001 provided that no-one shall be sentenced to death for crimes committed before the age of 18 years.

189 Democratic Republic of Congo, *op. cit.*, 2009, para. 36.

190 *Radio Okapi*, “L’Assemblée nationale maintient la peine de mort”, 2010, available at www.radiookapi.net (accessed on 15 November 2019).

191 Amnesty International, *Death sentences and executions in 2012*, 2013.

192 UPR, DRC: *Second Review, Session 19, Democratic Republic of the Congo’s Responses to Recommendations (as of 14.11.2014)*, 2014, available at www.upr-info.org (accessed on 15 November 2019).

193 Law No. 15/022 of 31 December 2015 amending and supplementing the decree of 30 January 1940 establishing the ordinary Criminal Code and law No. 15/023 of 31 December 2015 amending law No. 024-2002 of 18 November 2002 establishing the Military Criminal Code. See also, ECPM, CPJ, The Advocates for Human Rights, World Coalition Against the Death Penalty, *op. cit.*, 2019.

194 The ordinary courts had jurisdiction to try international crimes since 2013, on the basis of organic law No. 13-011-B on organisation, functioning and jurisdiction of the ordinary courts of 11 April 2013. In 2015, the new law abolished Article 207 of the Military Criminal Code which provided for the exclusive jurisdiction of military courts for international crimes.

195 Mbokani J. B., *La Jurisprudence congolaise en matière de crimes de droit international : une analyse des décisions des juridictions militaires congolaises en application du Statut de Rome*, Open Society Initiative for Southern Africa, 2016, pp. 25 and 282. For examples of decisions explaining the positions of the courts on the application of the Rome Statute before the 2015 laws, see, Kazadi Mpiana J., “La Cour pénale internationale et la République démocratique du Congo : 10 ans après”, *Revue internationale de droit comparé*, Vol. 65, No. 2, 2013, pp. 446-451. Joseph Kazadi Mpiana also noted that “*It is significant that Congolese judges are joining the dynamic for abolition of the death penalty, despite its conservation in Congolese law [...]*”.

196 Several judicial decisions referring to international crimes and the Rome Statute have led to the imposition of death sentences on the accused. Examples include the *Kalanga Katamisi* case in 2005, the *Gédéon* case and the *Jean-Pierre Biyoyo* case in 2006. See, Mnokani J. B., *op. cit.*, 2016, pp. 40 and 69. See also, Office of the United Nations High Commissioner for Human Rights, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003*, 2010, pp. 416-423.

197 For example, Rwanda opposed the extradition of Laurent Nkunda, former leader of the *Congrès national pour la défense du peuple* (National Congress for the Defence of the People), a militia group active in the East of the country. See, 7sur7, “Discussions difficiles sur une extradition de Laurent Nkunda”, 2011, available at www.7sur7.be (accessed on 15 November 2019). See also, MONUSCO, *Accountability for Human Rights Violations and Abuses in the DRC: Achievements, Challenges and Way forward (1 January 2014–31 March 2016)*, 2016, para. 70.

198 *États généraux de la justice*, Recommendation 332.

There were increasing calls for abolition. In 2016, during the World Congress Against the Death Penalty, the deputy Minister of Justice called on DRC to vote in favour of the resolution on abolition. However, this appeal did not lead to action, with DRC unrepresented at the vote. In December 2018, despite the fact that the country had supported the text during the preparation of the draft biennial resolution on a moratorium, the DRC abstained again.¹⁹⁹

As a result, given DRC's hesitation regarding abolition,²⁰⁰ and although the most recent execution took place in 2003, death sentences continue to be passed. They are handed down, in particular, by the CMO, whose decisions are not appealable, in violation of the country's Constitution and fundamental guarantees of the right to a fair trial. Between 2015 and 2018, dozens of death sentences were passed: at least 28 were reported in 2015, 93 in 2016, 22 in 2017 and 41 in 2018.²⁰¹ It should however be noted that, in contrast to the sentences passed by the CMO, sentences handed down by the other military courts or the civilian courts are subject to appeal, albeit in very limited circumstances.²⁰² This was illustrated in the case of those sentenced to death at first instance for the assassination of human rights defenders Floribert Chebeya and Fidèle Bazana, who were acquitted on appeal (see box below).

The Congolese military courts trial of the alleged murderers of Floribert Chebeya and Fidèle Bazana

Floribert Chebeya was founder-director of the NGO *La Voix des sans voix*, a well-respected organisation involved in fighting human rights violations in DRC. On 1 June 2010, he was reported missing along with his friend and assistant,

Fidèle Bazana, while he was meeting with the Inspector General of the Police nationale congolaise (Congolese National Police – PNC). The next day, Floribert Chebeya was found suffocated. Fidèle Bazana's body has never been found. In June 2011, the Kinshasa Military Court recognised the civil liability of the Congolese State and sentenced four police officers to death, one soldier to life imprisonment and acquitted three other people. Three of the officers sentenced to death were at large. In 2015, the Public Prosecutor asked the Military High Court, acting as an appeal court, to sentence the five accused to life imprisonment, supporting the applications of the civil parties to the proceedings, who were against the death penalty. The Court did not accept these submissions: in September 2015, the four police officers were acquitted and the fifth had his sentence reduced to 15 years' imprisonment. The PNC Inspector General was never investigated: he was suspended from the security forces, then awarded the *Kabila-Lumumba Ordre des héros nationaux* (Order of National Hero) in June 2017 and finally moved to the Armed Forces of the Democratic Republic of the Congo in 2018.²⁰³

Furthermore, a high number of extrajudicial executions continued to take place in the country. The "*Likofi*" ("lightening raid") anti-crime operation of November 2013, aimed at tracking down youth gangs in Kinshasa, referred to as "*Kulunas*", provides an example: this operation culminated in 51 extrajudicial executions and 33 enforced

199 DRC had voted in favour of the text at the Third Committee stage. See, for example, United Nations, *Third Committee Approves 11 Drafts amid Heated Debate over Death Penalty Moratorium, Use of Mercenaries, Efforts to End Cybercrime*, Press Release, 2018, available at <https://www.un.org/press/en/2018/gashc4252.doc.htm> (accessed on 15 November 2019).

200 In 2017, during the country's review by the UN Human Rights Committee, DRC reiterated its doubts, indicating that ratification of the Second Optional Protocol to the ICCPR aimed at the abolition of the death penalty was subject to prior national consultation. Democratic Republic of Congo, *op. cit.*, 2017, para. 45. This national consultation has not yet been launched.

201 Amnesty International, *Annual reports on death sentences and executions, 2017, 2018 and 2019*. See the evolution of the number of persons sentenced to death in the Section "Evolution of death sentences in DRC".

202 See, *infra*, Sub-section "Limited access to appeals".

203 See, for example, *Jeune Afrique*, "RDC : quatre condamnations à mort dans l'affaire Chebeya", 2011, available at www.jeuneafrique.com (accessed on 15 November 2019); *Jeune Afrique*, "RDC : le général John Numbi remplacé au sein des FARDC", 2018, available at www.jeuneafrique.com (accessed on 15 November 2019). While the families of the victims and human rights organisations consider it a "*trivialisation of a crime of State*" and a parody of justice, attention now focuses on Paul Mwilambwe, suspect and key witness, who was charged in 2015 in Senegal in connection with the case. In June 2019, Paul Mwilambwe asked to be extradited to DRC, on the basis that the election of Félix Tshisekedi had made it possible for a trial to take place. See, *RFI*, "RDC : nombreuses zones d'ombre sept ans après la mort de Chebeya et Bazana", 2017, available at www.rfi.fr (accessed on 15 November 2019); FIDH, "Verdict en appel dans l'affaire Chebeya : 'une banalisation du crime d'État'", Press Release, 24/09/2015, available at www.fidh.org (accessed on 21 November 2019); FIDH, "DRC/Senegal: 5 Years Later, Recourse to the Senegalese Judiciary to Establish the Truth in the Chebeya-Bazana Case Essential More Than Ever", Press Release, 02/06/2015, available at www.fidh.org (accessed on 21 November 2019); *RFI*, "Affaire Chebeya : pour l'avocat de Mwilambwe, le Sénégal bloque le dossier", 2019, available at www.rfi.fr (accessed on 15 November 2019).

disappearances, without any investigation being opened against the perpetrators.²⁰⁴ Several members of the *Kulunas* were also sentenced to death following summary trials for their participation in these gangs.²⁰⁵ The country deemed this operation a resounding success, “*Despite a few hitches in its implementation.*”²⁰⁶ In the first half of 2018, the United Nations recorded 389 victims of extrajudicial or arbitrary executions attributable to the Congolese security forces, – the *Forces Armées de RDC* (Armed Forces of DRC – FARDC) and the *Police Nationale Congolaise* (Congolese National Police – PNC).²⁰⁷

Although Joseph Kabila’s mandate was due to expire in December 2016, the Constitutional Court allowed him to remain in office until the organisation of a presidential election. Dozens of people died during demonstrations against his retention of power. In 2018, President Kabila announced that he would not seek a new mandate. Presidential elections were held in December 2018.

204 Human Rights Watch, “Submission to the Universal Periodic Review of the Democratic Republic of Congo”, 2018, available at www.hrw.org.

205 Some of them were detained in Osio and were met by the delegation of the fact-finding mission. See, *infra*, Sub-section “Deficient judicial practices”.

206 Democratic Republic of Congo, *op. cit.*, 2017, para. 45.

207 MONUSCO, “BCNUDH – Note annuelle 2018”, Press release, 30/01/2019, available at monusco.unmissions.org (accessed on 15 November 2019).

THE ASCENSION TO POWER OF FÉLIX TSHISEKEDI (2019-)

On 30 December 2018, a new chapter of the country’s history opened. For the first time since independence, DRC experienced a peaceful political changeover through the ballot box. Félix Tshisekedi, son of the veteran opposition leader Étienne Tshisekedi, was elected President of the Republic.²⁰⁸ The Constitutional Court proclaimed Félix Tshisekedi President of the Republic and he was inaugurated in January 2019.

PARTIAL RELEASE OF POLITICAL PRISONERS

The President’s first announcements were encouraging for the protection of human rights. In his inaugural address on 24 January 2019, he declared: “*During our term in office, we shall ensure that each citizen enjoys respect for fundamental rights. We undertake to banish all forms of discrimination.*”²⁰⁹ On 2 March 2019, President Tshisekedi unveiled his programme for his first 100 days in office and announced measures to be taken in all areas: security, consolidation of the rule of law, education, justice, infrastructures, etc. He also announced significant measures aimed at defusing the political situation, including pardoning political prisoners: “*Within the next 10 days, I will take steps to grant presidential pardons for all political prisoners who have been convicted and sentenced in final decisions.*”²¹⁰ Several days later, 700 people were pardoned, however none of those sentenced to death in proceedings for the assassination of President Kabila benefited from this presidential measure.

208 *Jeune Afrique*, “RDC : Félix Tshisekedi élu président, selon les résultats provisoires”, 2019, available at www.jeuneafrique.com (accessed on 15 November 2019).

209 Tshisekedi F., Inaugural address, see, *La Libre Afrique*, “Document : le discours d’investiture de Félix Tshisekedi”, 2019, available at afrique.lalibre.be (accessed on 15 November 2019).

210 *La Tribune Afrique*, “RDC : Tshisekedi se donne 100 jours pour convaincre à travers un programme d’urgence”, 2019, available at afrique.latribune.fr (accessed on 15 November 2019).

The situation of those sentenced to death for the assassination of Laurent-Désiré Kabila

In 2003, 30 of the 135 persons accused were sentenced to death by the *Cour d'ordre militaire* (Military Order Court – COM) for their involvement in the assassination of President Laurent-Désiré Kabila in 2001.

Today, despite the COM's excesses, of which the authorities are well aware, those sentenced to death are still detained in Congolese prisons – those of them that are still alive. The last death in detention of a death row prisoner, Jean, *alias* "John" Bompengo, was in July 2019; the previous death, that of Oscar Mayembe, dates back to June 2018.²¹¹ Two other death row prisoners met by the fact-finding mission delegation are no longer able to move around due to their poor state of health.

These death row prisoners have not been released despite the amnesties announced in 2003 and 2005. The 2005 amnesty should have applied, in theory, to anyone convicted of acts of war, political offences and offences of dissent between 20 August 1996 and 30 June 2005.²¹²

Several appeals have been filed asking for the convictions to be reviewed. In 2006, the *Coalition contre la peine de mort en République démocratique du Congo* (Coalition Against the Death Penalty in Democratic Republic of the Congo – CCPM-RDC) lodged an initial appeal with the Attorney General at the Supreme Court of Justice²¹³ requesting that the decisions imposing death sentences issued by the COM be subject to cassation proceedings.

211 Jean Bompengo died in Angenga Prison. See, *RFI*, "RDC : mort en prison de Jean Bompengo, accusé dans l'assassinat de Kabila père", 2019, available at www.rfi.fr (accessed on 15 novembre 2019). See also, *Radio Okapi*, "Kinshasa : Eddy Kapend rend hommage à John Bompengo et dénonce ceux qui couvrent les coupables", 2019, available at www.radiookapi.net (accessed on 15 November 2019). According to the association *Voix des sans voix*, 11 of the 90 people convicted in this case (sentenced to death or to terms of imprisonment) have died in prison: Jean Bompengo, Patrick Kilay, Nico Bavurhe, Panda Fariala, Yav Naweji Ditend, Jean-Jacques Kakwat Mbugi, Rocky Byamungu Kachuraki, Salumu Tchapi-Tchap, Gordon Kunda Ntalabo and Oscar Mayembe. For more information on their conditions of detention, see, *infra*, Sub-section "Highly problematic conditions of detention of death row prisoners".

212 On the question of amnesty, see, *supra*, Sub-section "New steps towards abolition of the death penalty: hopes, disappointments, hesitations".

213 At that time, the Supreme Court of Justice had the role of a Court of Cassation.

The Attorney General at the Supreme Court of Justice requested that the files be transmitted to him so that he could assess the merits of such proceedings. In the absence of a response, this request was reiterated by the association *Culture pour la paix et la justice* (CPJ) in 2009 to the Ministry of Justice. CCPM-RDC and CPJ were forced to halt these initiatives after several people received death threats. In 2013, the African Commission on Human and Peoples' Rights (ACHPR) asked DRC, during its 54th Ordinary Session, "To take the necessary measures to release those people who remain in detention" in this case.²¹⁴ No action was taken in response to this request. In February 2019, 29 death row prisoners applied to the new President Tshisekedi to benefit from the application of the 2005 amnesty. This application received no response. In June 2019, a march organised jointly by the *Association africaine des droits de l'homme* (ASADHO) and the Bill Clinton Foundation for Peace, calling for the release of those convicted in the case of the assassination of Laurent-Désiré Kabila, was broken up by the police. The President of ASADHO received death threats.²¹⁵

In July 2019, John Bompengo, sentenced to death in this case, died in prison, in the Angenga Detention Camp. ASADHO, which continues to campaign for the release of those convicted, stated that it was "Inacceptable that these people continue to die in prison as if there was a plan to gradually exterminate them all, to hide the truth surrounding the assassination."²¹⁶

During a press conference in July 2019, President Tshisekedi asked for time to enable him to follow-up on the case. In relation to Eddy Kapend, he said: "I do not know if he can be released. Let me follow-up on this case, given the

214 ASADHO, *Voix des sans voix*, "La Commission africaine des droits de l'homme de l'UA demande la relaxation immédiate des condamnés du procès pour l'assassinat de L.D. Kabila", Joint Press Release, 2015.

215 FIDH-OMCT Observatory for the protection of human rights defenders, "RDC : Menaces de mort contre Jean-Claude Katende", 2019.

216 *La Libre Afrique*, "RDC : mort en prison d'un des condamnés pour l'assassinat de Laurent Kabila", 2019, available at afrique.lalibre.be (accessed on 15 November 2019).

sentence of life imprisonment.” (sic)²¹⁷ It should be noted that the new President appears to consider the effective sentence to be life imprisonment rather than the death penalty. Since the files examined by the fact-finding teams in the prison administration service were empty at the time of the mission, it is not possible to affirm whether his sentence has been reduced. At the time of writing, in November 2019, no additional information had been shared.

TAKING A STANCE IN FAVOUR OF ABOLITION?

The country faces vast security challenges. Massacres, rapes, abductions of civilians, violence and tensions continue today in eastern DRC and in other regions of the country. The military justice system and the civilian justice system are underfunded and accused of corruption. In this context, several human rights organisations, including Human Rights Watch,²¹⁸ Amnesty International,²¹⁹ FIDH, Groupe Lotus, Association africaine des droits de l’homme (ASADHO) and the Ligue des électeurs²²⁰ submitted their recommendations to the new President, including abolition of the death penalty.

In August 2019, Member of Parliament Mbata submitted a new draft law aimed at the abolition of the death penalty.²²¹ While President Tshisekedi has not yet made a formal statement on the abolition of capital punishment, the Minister responsible for Congolese nationals abroad reported in August 2019 that the President had personally intervened in support of a Congolese national sentenced to death in Malaysia for drug trafficking to obtain commutation of the

sentence.²²² Yet such a position in support of a citizen sentenced to death abroad only makes sense if those sentenced to death within the country also benefit from the same measure. The government’s willingness to commit to abolition was even more clearly expressed during the conference organised on 10 October 2019 by CPJ to mark the World Day Against the Death Penalty. On that occasion, the Deputy Minister of Justice announced the abolition of the death penalty to be in the draft of the new Congolese Criminal Code, and the commutation of all death sentences. His speech implied that all those sentenced to death, including those sentenced by the military justice system would benefit from the new measure:

“Article 16 of the Constitution proclaims the sanctity of human life, without reference to the possibility of causing death. Thus adopting an abolitionist stance, the Constitution leaves no room for the death penalty to exist. This means that de lege ferenda, any law providing for such penalty will be without constitutional basis.

Yet considering, on the one hand, that criminal laws providing for the death penalty have not been expressly repealed by members of the constituent assembly and that, on the other hand, the Congolese criminal judge is not judge of the constitutionality of laws but of legality, the legislator should draw all necessary legal consequences from the provisions of Articles 16 and 61 of the Constitution, which enshrine the primacy of the right to life of the human individual, in order to enact implementing criminal legislation.

[...] To this end, the new draft Congolese criminal code provides for life imprisonment to replace capital punishment, with a sentence of non-reducible duration.

Pending the completion of this reform, in order to comply with the Constitution and in view of the moratorium, all death sentences shall be commuted to either imprisonment with hard labour or life imprisonment, or a maximum of 20 years.”²²³

217 Agence d’information d’Afrique centrale, “Décès d’un condamné dans le dossier assassinat de Mzée LD Kabila : Félix Tshisekedi appelé à respecter sa promesse”, 2019, available at www.adiac-congo.com (accessed on 15 November 2019).

218 Human Rights Watch, “Letter to President Tshisekedi: Protecting Human Rights in DR Congo”, 2019.

219 Amnesty International, “DRC: 10 Human Rights Priorities for President Tshisekedi”, 2019.

220 FIDH, Groupe Lotus, ASADHO, Ligue des électeurs, *Democratic Republic of the Congo: Five Priorities for a State that Respects Human Rights*, 2019, p. 21.

221 Agence d’information d’Afrique centrale, “Justice : le Pr André Mbata initie un projet de loi pour abolir la peine de mort”, 2019, available at www.adiac-congo.com (accessed on 15 November 2019).

222 This was indicated on the Facebook page of Emmanuel Ilunga on 7 August 2019: “Eddy Kabunda Kasanji, the Congolese national sentenced to death by hanging in Malaysia was released from detention after his sentence was quashed by the Malaysian judicial authorities. This diplomatic victory is the work of the Head of State, Félix Tshisekedi, who was personally involved in obtaining the release of our compatriot”, www.facebook.com/emmanuelilungaarp (accessed on 15 November 2019). See also, *Digital Congo*, “Un Congolais échappe à la pendaison en Malaisie”, 2019, available at www.digitalcongo.net (accessed on 15 November 2019); *Media Congo*, “Malaisie : la peine du ressortissant congolais annulée (gouvernement)”, 2019, available at www.mediacongo.net (accessed on 15 November 2019).

223 Ministry of Justice, “Mot du vice-ministre de la Justice à l’occasion de la 17^e Journée mondiale contre la peine de mort” (Speech of the Deputy Minister of Justice on the 17th World Day Against the Death Penalty), 2019, see Annex 4.

CONCLUSION ON THE HISTORY OF THE DEATH PENALTY IN DRC



While imposition of the death penalty existed prior to colonisation, the central role of the military justice system in the country as a catalyst for the application of capital punishment, is rooted in the colonial era. Under colonial rule, the death penalty was an instrument serving the interests of the oppressor, who used it to consolidate authority at the expense of the indigenous population. Since the appropriation of Congolese territories by the Belgian King and throughout the entire colonial period, the death penalty was applied in a discriminatory manner and largely relied on the military justice system, in a logic of domination by the colonisers. After independence, death sentences were relatively rare during Mobutu's reign. They were pronounced by special military courts against political figures, with the objective of strengthening the regime by combating real or imaginary plots.

The presidency of Laurent-Désiré Kabila changed this position: with the creation of the COM, the death penalty was frequently imposed and implemented in conditions of serious violations of the fundamental guarantees of the rights of the defence. It was no longer a question of sentencing a few people regarded as opponents, but of disciplining the civilian population and the security forces who, overnight, changed commander and were required to respect the new order of the former rebel and enemy.

The military justice reforms undertaken in 2002 by Joseph Kabila and the new Constitution of 2006 laid the foundations for a departure from the precedent set by the COM: many writers and academics consider that the death penalty was abolished by the Constitution. However, the provisions of the new Constitution were not reflected in domestic law; in particular, the CMO continued to hand down death sentences, without right of appeal. In the context of a lasting armed conflict, military courts maintained their dominant position in the country's judicial system which applied to civilians.

Although he has not taken a personal stance on the death penalty, the new President Félix Tshisekedi has pledged, upon his inauguration in 2019, to guarantee human rights. This commitment was confirmed in the speech delivered by the Deputy Minister of Justice on 10 October 2019, announcing the commutation of all death sentences and the abolition of the death penalty in the draft Congolese Criminal Code, suggesting major developments in this direction.

DEATH PENALTY: THE SERIOUS INADEQUACIES OF THE CONGOLESE CRIMINAL JUSTICE SYSTEM



TORTURE, ILL-TREATMENT AND ARBITRARY ARRESTS DURING THE PRE-TRIAL PHASE

For many years, national and international observers have been reporting and denouncing shortcomings and dysfunctions in the Congolese criminal justice system: lack of resources, corruption, inadequate training of judges and prosecutors, torture and ill-treatment by security forces and impunity for criminals.²²⁴ While some progress has been reported, such as the adoption of a legislative framework to combat torture, concrete changes remain limited. Death row prisoners interviewed during the fact-finding mission, including those sentenced in the past 5 years, described a highly flawed justice system throughout the criminal process, from the moment of arrest to the exercise of the right of appeal.

In 2011, the legal framework for combating torture was strengthened by the enactment of law No. 11/008 on the criminalisation of torture: its definition is now in conformity with the Convention Against Torture ratified by DRC.²²⁵ However, there are no legislative provisions expressly prohibiting the extraction of confessions under duress.²²⁶ Thus, despite the adoption of several measures aimed at fighting torture and ill-treatment,²²⁷ such acts remain very common: in 2019, the United Nations Committee Against Torture stated that there continued to be reports of “*Very widespread use of torture in many places of detention in the country by members of the Armed Forces of the Democratic Republic of the Congo, the National Police and the National Intelligence Agency.*”²²⁸

The widespread persistence of torture and ill-treatment following arrest was confirmed by those interviewed during the fact-finding mission. 71% of death row prisoners interviewed²²⁹ reported that security forces used coercion to extract confessions or information. Some described acts of ill-treatment: food deprivation for several days, wearing handcuffs and ankle cuffs day and night for several weeks, forced nudity in solitary confinement for over a month, beatings and humiliation. Sylvie, a woman sentenced to death

²²⁴ For example, the 2015 *États généraux de la justice* produced a diagnosis of deficiencies in the justice system. This diagnosis described the many weaknesses in the justice system, in particular in the criminal system, and set out a series of recommendations. Ministry of Justice and Human Rights, *Rapport général des États généraux de la justice en République démocratique du Congo*, 2015.

²²⁵ Law No. 11/008 of 9 July 2011 *portant criminalisation de la torture* (on the criminalisation of torture). On the issue of conformity, see, in particular, United Nations Committee Against Torture, *Concluding Observations on the Second Periodic Report of the Democratic Republic of the Congo* [CAT/C/COD/CO/2], 2019, para. 8.

²²⁶ United Nations Committee Against Torture, *op. cit.*, 2019, para. 10.

²²⁷ Such measures include the following: directive No. AG/0793/10 of 23 June 2010 issued by the Chief Military Prosecutor of the Military High Court instructing heads of military prosecutors’ offices to investigate all cases of torture or ill-treatment; and circular No. 1981/PNC/CG/COMDT/2014 of 16 July 2014 issued by the Commissioner-General of the National Police instructing all unit commanders and division chiefs to ensure that their actions in the context of judicial proceedings, in particular those relating to torture, are strictly in accordance with the law. See, Democratic Republic of Congo, *op. cit.*, 2017.

²²⁸ United Nations Committee Against Torture, *op. cit.*, 2019, para. 22. See also, United States Department of State, *Country Reports on Human Rights Practices for 2017, 2018*, p. 8.

²²⁹ N = 251.

in 2019, said that she had been beaten and stripped of her clothes in public in the presence of her 7-month-old baby.

Other prisoners described the use of torture techniques. Aimé, sentenced to death in 2017, told the mission: *"I was handcuffed and thrown to the floor. They threw water over me. A police officer stepped on me and hassled me to extract a confession."* Henri, sentenced in 2018, said: *"The soldiers tied me to a tree, bound my feet and hands and applied hot chilli pepper to my skin. They whipped me until I lost consciousness."* Pascal, sentenced to death in 2017, said: *"The police destroyed my house, accusing me of keeping weapons. They burned my backside with petrol. I spent 2 days naked and tied to a tree."* Marcel, sentenced in 2018 and accused of being a member of a militia group, said: *"The commandos tied me between two vehicles and then started pulling in different directions to force me to confess to being a member of the Nyatura."*²³⁰ Testimonies of torture and ill-treatment are widespread throughout all provinces, regardless of which security forces carried out the arrests. Many respondents, including Christophe, sentenced in 2018, said they had confessed to crimes they had not committed, *"Simply to save my life."* Several interviewees indicated that they had seen suspects die as a result of torture. They also reported continuing to suffer consequences of varying severity: broken teeth, loss of sensitivity or mobility in the lower or upper limbs, fractured ribs, hearing loss or scars on the face or body.

Although the Constitution provides for the right to be assisted by a lawyer *"At all stages of the criminal process, including during the police and pre-trial judicial investigations"*,²³¹ legal representatives are rarely present before the trial. Only 17% of interviewees²³² indicated that they had been assisted by counsel during the investigation stage. Those detained in police custody can request assistance, but death row prisoners interviewed explained that they had not done so due to lack of financial resources, lack of knowledge of their rights or physical remoteness – many are apprehended in

230 The Nyatura are a Congolese Hutu faction linked to the FARDC operating in eastern DRC.

231 Constitution of Democratic Republic of Congo, Article 19, para. 4: *"Everyone shall have the right to defend him or herself, either in person or through counsel of his or her own choosing, at any stage of the criminal process, including during the police and pre-trial judicial investigation."*

232 N = 248.

operational areas, on the front line. Furthermore, several said that they had requested the presence of a lawyer or a family member, but that this had been refused by the security forces, in violation of Article 18 of the Constitution which provides: *"Everyone held in police custody shall have the right to immediately contact their family or legal counsel."*²³³ In addition, the law does not guarantee the presence of a doctor during the preliminary investigation or trial. The absence of any contact with the outside world and obstacles to the right to assistance during the pre-trial stage clearly facilitate abuses by security forces.

Many death row prisoners reported that the investigation stage was limited to obtaining confessions under duress, without any other techniques of investigation, recording of statements or collection of documentation. Many of them also revealed that they had been arrested because they had close relations with other criminal suspects. This was the case of Désiré and Papy, sentenced in 2018: they were both prosecuted for a murder committed by their father. Sylvie explained that she had been arrested because she was married to the co-accused. Conversely, Robert, sentenced in 2012, stated that he had been convicted in place of his wife. Jacques, sentenced in 2010, also stated: *"I was arrested simply because I was found at the same location as the person they were looking for."*

Others were arrested for minor offences and later convicted for much more serious offences. There are plenty of examples. Fidèle was sentenced to death in 2016 for participating in an insurrectional movement: he stated that he was initially arrested for not wearing a motorcycle helmet. Bernard was sentenced to death in 2009, at the age of 19, for criminal association and robbery, after confessing to having stolen a chain worth \$25. Nicolas said he had been sentenced to death for rape resulting in death, after being arrested for theft.

In eastern DRC, several interviewees explained that they had been arrested and later sentenced to death for participating in an insurrectional movement after escaping the militia who had forcibly recruited them. Matthieu, sentenced to death in 2018, said: *"I was abducted by three armed men and used to carry their supplies in the forest. I managed to escape, and I surrendered to the armed*

233 Constitution of Democratic Republic of Congo, Article 18, para. 3.

forces. Unfortunately, I was not well received. Even though we brought them to the barracks used by the rebels where they found supplies, weapons and ammunition, they beat us.” Marcel faced a similar situation: “The commando arrested me, which took me by surprise given that I was the one who had come to tell them where to find the Nyatura who had kidnapped me.”

DEFICIENT JUDICIAL PRACTICES

“I cry to God for my innocence”
– Emmanuel, sentenced to death,
held at Luzumu Detention Camp

A MILITARISED JUSTICE SYSTEM

The militarisation of justice has been a constant feature of the Congolese justice system since colonial times: from 1917 to this day, military justice has been prosecuting and trying civilians. Extending the jurisdiction of military courts at the expense of ordinary courts is contrary to international and regional minimum standards on the right to a fair trial. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted in 2003, are particularly clear on the prohibition of the exercise of jurisdiction over civilians: “Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.”²³⁴

Although in 2003 and 2017 two organic laws changed the allocation of jurisdiction between civilian and military courts,²³⁵ military courts continue to have jurisdiction over crimes committed by military personnel against civilians, even if they are offences under ordinary law,²³⁶ and, in some instances, crimes perpetrated by civilians. Thus, the military justice system has jurisdiction to prosecute civilians in operational areas and where a state of emergency has been declared,

²³⁴ African Commission on Human & Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003.

²³⁵ Organic law No. 17/003 of 10 March 2017 amending and supplementing law No. 023-2002 of 18 November 2002 establishing the Military Justice Code, and organic law No. 13/011-B on the organisation, functioning and competence of ordinary courts. On this law, see, for example: Avocats sans frontières, *Analyse du projet de loi modifiant et complétant la loi n° 13/011-B du 11 avril 2013 organique portant sur l'organisation, le fonctionnement et les compétences des juridictions de l'ordre judiciaire en matière de répression des crimes de génocide, des crimes contre l'humanité et des crimes de guerre*, 2014.

²³⁶ See, for example, United Nations Committee Against Torture, *op. cit.*, 2019, para. 26.

which, in practice, applies to many regions: Bas-Uele, Ituri Province, North Kivu, South Kivu, Maniema, Tanganyika, Kasai Province and Kasai-Central.²³⁷ It also has jurisdiction when civilians commit crimes using weapons of war,²³⁸ when members of insurrectional gangs are involved²³⁹ and when former members of armed groups perpetrate certain offences.²⁴⁰ Such extension of jurisdiction to the civilian population is of particular concern, given that the military justice system is not immune from political or military interference.²⁴¹

In practice, 35% of interviewees sentenced to death by military courts were civilians and 13% were accused of being members of armed groups.²⁴² In eastern DRC, several interviewees said that they were civilians, farmers or motorbike taxi drivers, who had been deemed by security forces to be members of militia groups and tried by military courts. Henri, convicted in 2017, said: *“Since my birth, I have just been farming. I don’t know anything.”* Several people interviewed also stated that they had been prosecuted by military courts because they were relatives of soldiers. Stéphane, a civilian, was sentenced to death in 2009 by a military court after being accused with his son-in-law, a member of the military, of killing his grandson in a fire. Luc, a civilian convicted of armed robbery in 2017, said: *“I was accused of being in league with a soldier in a murder case. [The soldier] was a cousin who had just stopped by my house.”* These practices have been regularly denounced by human rights organisations.²⁴³

237 Military Justice Code, Article 115 amended by law No. 17/003 of 10 March 2017: *“Ordinary courts have jurisdiction when one of the co-perpetrators or accomplices may not be tried before military courts, except in times of war or in operational areas, in a state of siege or of emergency.”*

238 *Ibid.*, Article 111, para. 2: *“They also have jurisdiction to try individuals who, even though they are not members of the military, commit offences using weapons of war.”* On this issue, see also, United Nations Committee Against Torture, *op. cit.*, 2019, para. 26.

239 *Ibid.*, Article 112, para. 6.

240 *Ibid.*, Article 111, para. 1.

241 Many reports have pointed to external pressure and influence. See, for example, ICTJ, *The Accountability Landscape in Eastern DRC. Analysis of the National Legislative and Judicial Response to International Crimes (2009-2014)*, 2015; Office of the United Nations High Commissioner for Human Rights, *op. cit.*, 2010, pp. 437-438; Open Society Foundations, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya*, 2011, p. 40.

242 N = 125, corresponding to the number of persons interviewed who were sentenced to death by the military justice system, whose status was specified.

243 See, for example, ECPM, CPJ, The Advocates for Human Rights, World Coalition Against the Death Penalty, *op. cit.*, 2019, p. 5.

DUBIOUS EVIDENCE

Testimonies described summary trials, based on sloppy investigations resulting in questionable decisions. According to many of those interviewed, their death sentences were based on “evidence” obtained through ill-treatment or torture, admitted by judges in criminal proceedings. It should be noted that, in numerous cases, the accused failed to report the ill-treatment they had experienced, simply because they were not asked, demonstrating, on the one hand, an extreme lack of awareness of their rights and, on the other hand, where applicable, the inadequate representation of the accused by their legal counsel.²⁴⁴

Other interviewees said that they had raised the issue of ill-treatment during their trials, but that the court had failed to take these allegations into account. David was sentenced to death by the Kinshasa High Court in 2011 for criminal association, after only one hearing, under an accelerated procedure, in the *Kulunas* case²⁴⁵ concerning the fight against urban insecurity. He said that the court had not examined the torture allegations even though his wounds were visible at the hearing.

Many death row prisoners said that they had been convicted in proceedings that often failed to present any evidence, witnesses or victims. For example, Pascal stated: *“The Police said that I had kidnapped a child. They know I am innocent. If that was not the case, why would they refuse to bring the child to identify me?”* In eastern DRC, several people sentenced to death for illegal possession of weapons or participation in an insurgent movement have reported being tortured to force them to confess to hiding weapons. In most cases, no weapons were found, yet weapons were presented during court hearings. Some cases are striking examples of a lack of rigour. In the case of Paul, a civilian sentenced to death by a military court in 2016, a weapon was presented to the court: *“They showed a weapon. I objected because the number of the weapon in the file wasn’t the same as the one on the weapon shown to the court.”*

244 On this issue, see, *infra*, Sub-section “Limited and poor-quality legal representation”.

245 The *Kulunas* are youth gangs in Kinshasa. On this issue, see, *supra*, Sub-section “New steps towards the abolition of the death penalty: hopes, disappointments, hesitations”.

SUMMARY PROCEEDINGS AND ABSENCE OF TRIAL

Numerous summary military courts trials, under accelerated procedures, held in various courts across the country, were reported. For example, Sylvie was sentenced to death in April 2019, just 48 hours after questioning. Other recent cases provide further examples: Fernand, a civilian sentenced by a Kisangani garrison military court in 2018 and Moïse, a soldier sentenced by the CMO in 2016, whose trials lasted a single day. In an earlier case, Francis was sentenced to death in 2000 after a 45-minute hearing by the COM. There are many examples of similar cases.

Furthermore, some of the death row prisoners interviewed stated that they had never been summoned to appear before a court and had therefore never been heard by a judge. For example, this was the case of Alphonse, sentenced in 2005 by a military court. Richard, sentenced in 2018, described a similar situation: *“I have never seen a judge. I was arrested by the military and transferred directly to prison. One day, they brought me papers to sign. Later, they told me that I had been sentenced to death.”*

TRIALS SUBJECT TO EXTERNAL PRESSURE

Cases of political interference were reported by interviewees. According to David, sentenced in the *Kulunas* case, media coverage of the trial rendered any defence ineffective: *“The Minister of Justice attended the hearing in person. He had all the Kulunas convicted. The Minister wanted exemplary convictions.”* Jean, sentenced in the same case, confirmed: *“The trial was attended by the Minister of Justice, with vast media coverage. There was a single hearing for the investigation of the case and the trial. The Minister, who wanted to eradicate banditry, influenced the trial.”*

In addition, since the Congolese criminal justice is seriously underfunded, various partners are involved in the organisation of hearings and funding of trials. Some of those interviewed reported pressure exerted by actors who had contributed to the funding of hearings. The *Institut congolais pour la conservation de la nature* (Congolese Institute for the Conservation of Nature – ICCN), the entity responsible for the management of national parks and the fight against poaching, was mentioned in particular. In 2011, the ICCN

participated in the organisation of a trial by the Equateur Military Court,²⁴⁶ in which the Institute also acted as a civil party. The Equateur Military Court sentenced Thomas to death, on the ground that he possessed a hunting weapon. He was sentenced to death for crime against humanity, criminal association and illegal possession of war weapons and ammunition. According to Thomas, the ICCN wanted to show an example of the fight against poaching. Dieudonné was also sentenced to death in 2011 by the Equateur Military Court, in a separate case, after guiding a group of poachers, under duress. He said that the deputy head of the ICCN had travelled from Kinshasa in order to attend his trial. In such conditions, the sentences are required to set an example.

MINORS SENTENCED TO DEATH

Under the new Military Justice Code of 2002, children cannot be tried by military courts.²⁴⁷ In addition, civilian courts cannot sentence them to the death penalty.²⁴⁸ However, while DRC is generally not cited as a country which sentences minors to death,²⁴⁹ the analysis of files and interviews with several prisoners revealed that some had recently been sentenced to death despite the fact that they were minors at the time of commission of the offence.²⁵⁰ Furthermore, as dates of birth were not systematically indicated in the files obtained from the prison administration services, the number of minors sentenced to death may be higher than the situation described below.

Fidèle, a foreign national, was sentenced to death by the CMO in September 2016 for participating in an insurrectional movement at the age of 17. He had no access to a lawyer or an interpreter. The fact-finding mission also interviewed Adrien, who was sentenced in 2011 at the age of 17, without the assistance of a lawyer at the court hearing; Marc, sentenced in 2018 for murder when he was aged 17, without legal representation at the court hearing; and Édouard,

²⁴⁶ The ICCN covered, in particular, the cost of transporting the accused from the military court to the prison facilities.

²⁴⁷ Military Justice Code, Article 114.

²⁴⁸ Law No. 19/001 of 10 January 2009 on the protection of the child, Article 9, para. 2.

²⁴⁹ Over the past 5 years, DRC has not been cited as a country applying the death penalty to minors. See, Amnesty International, Annual reports on death sentences and executions, 2013 to 2018.

²⁵⁰ The list of people concerned is held by CPJ.

sentenced to death by a civil court in 2013 for murder at the age of 17, following a one-day hearing.

Joseph's case calls for further analysis: he is probably the last child-soldier sentenced to death by the COM who remains in detention. Joseph was arrested at the age of 17. He was a platoon leader when one of the soldiers under his command killed a woman. The soldier fled. Joseph was arrested, promptly brought before the COM and sentenced in March 2002. He has been detained for 17 years.

A SELECTIVE JUDICIAL SYSTEM

In order to fight corruption within judicial bodies, the country established disciplinary boards under the authority of the *Conseil supérieur de la magistrature* (High Council of the Judiciary), in charge of dismissing, suspending or imposing fines on judges or prosecutors for corruption. Allegations of corruption against security forces and judicial personnel in DRC are widespread and were also reported by the majority of the death row prisoners interviewed. Most said that they had been asked to pay sums of money, ranging from \$30 to \$1,000 by security forces, and up to \$10,000 by the courts, for release or a favourable ruling. For example, François, arrested in 2013, said that soldiers had demanded \$50 for his release. As he did not have the sum requested, he was kept in detention and then sentenced to death. Laurent, sentenced in 2012, stated: *"The lawyer kept telling me that if I had a little bit of money to give to the court, things would work out better."* Arthur, sentenced to death by the CMO in 2017, said: *"The lawyer told the interpreter that I had to find \$10,000 for my release."* Albert, also sentenced to death by the CMO, said: *"The court asked for \$3,000 to sentence me to a lighter penalty."*

Those interviewed indicated that they had not been able to provide the amounts requested. Many of them said that they had been convicted and sentenced while others arrested in the same case had been released after paying sums of money. Désiré, sentenced by a civil court in 2018, said: *"They asked for money to let us off the hook. The three who paid money were acquitted."* Matthieu deplored the arbitrariness of this situation: *"When I was apprehended, there were 40 of us in total. Nothing justifies that there ended up being*

nine of us." Samson summarised the situation simply: *"If I'd had money, I wouldn't be here."*

Most of those interviewed had very low incomes. The lack of resources creates additional problems: they could not pay the transportation expenses for witnesses or their lawyers, or even contact witnesses to give evidence in their favour or to obtain documents proving their innocence. They therefore could not receive an effective defence.

Furthermore, Charles, sentenced to death for murder in 2013, indicated that his ethnic origin was emphasised by the military judges to justify his conviction: *"The judges started to introduce a tribal element into the trial, saying that we, the Hutus, were murderers. I kept silent. The fact that I am Hutu had an impact on my case. People who were accused of the crimes with us were released."*

LIMITED AND POOR-QUALITY LEGAL REPRESENTATION

Congolese law provides that *“In military courts, the accused shall be represented by lawyers who are members of the Bar, legal defenders and military personnel approved by the president of the court.”*²⁵¹ If the accused has not chosen defence counsel, the military judge must appoint one.²⁵² 66% of the persons sentenced to death interviewed²⁵³ indicated they had been assisted during court hearings. However, the majority of them said that the legal assistance provided was of poor quality. Most death row prisoners regretted not having met their legal counsel before the hearings: the state-appointed military counsel and court-appointed lawyers therefore represented their clients in court without knowledge of their case, raising questions as to the quality of the service provided. Many death row prisoners also deplored their lawyer’s lack of experience. Faustin, for example, reported that court-appointed lawyers stumbled over their words during hearings. Others denounced the fact that their counsel were from the military, believing that they lacked independence from the court. According to Bruno, the lawyer appointed by the court was initially one of the lawyers representing the civil party. He said he was very poorly represented.

In addition, many interviewees said that their court-appointed lawyers did not attend all hearings, arrived late or stopped providing assistance during the course of the trial altogether. Some indicated that the lawyers, although court-appointed, had asked them for money to pay for their assistance. Vincent said: *“The lawyer showed up at the first hearing. When he realised that I couldn’t pay him, he left.”* Brice also said: *“Since I wasn’t paying him, he didn’t attend very often, and I appeared before the court on my own.”* Despite the written texts, legal aid resources are generally unavailable at the free legal consultation offices run by the Bar Associations.²⁵⁴

251 Military Justice Code, Article 61.

252 *Ibid.*, Article 63.

253 N = 255.

254 Ministry of Justice and Human Rights, *op. cit.*, 2015, p. 40.

Lawyers and legal defenders do not have the necessary resources to prepare case files and organise their clients’ defence.

Moreover, those interviewed indicated that, in many cases, court-appointed defence counsel were assigned to several accused simultaneously in court hearings. One of them, Jean-Luc, sentenced in 2018, said: *“There were 30 of us with two lawyers. It was bad, we were not properly represented.”*

While the majority of those interviewed were assisted by counsel at hearings, 34% of death row prisoners interviewed by the fact-finding mission²⁵⁵ said that they appeared without a lawyer. Some of them were not surprised by this situation, since they were unaware of their rights. Yves told the fact-finding mission: *“I’m just an illiterate farmer. I didn’t know what a lawyer was.”* According to Benoit, sentenced to death in 2018, the lack of financial means was the issue: *“The lawyers asked us to pay money. The others had lawyers, not me.”*

The lack of legal assistance at hearings also affected the foreign nationals interviewed, despite the DRC having ratified the Vienna Convention on Consular Relations, which provides in particular that the consular authorities have the right to arrange for the legal representation of their nationals.²⁵⁶ While the fact-finding mission met three Ugandans, two Rwandans, two Tanzanians, two Burundians and one Belgian,²⁵⁷ none of them reported that they had met with their countries’ authorities during the police or judicial investigation, or the court hearings. Some, like Vincent, invoked discrimination: *“I think I was convicted simply because I am a foreigner.”*

However, it should be noted that two Europeans sentenced to death in 2009 received legal representation through their consular authorities. The Norwegian authorities made lawyers available to Joshua French and Tjostolv Moland throughout proceedings. The authorities also ensured access to their families.

255 N = 255.

256 Article 36(1)(c) provides: *“Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.”*

257 According to their claims.

Two Europeans sentenced to death in 2009

In 2009, two former soldiers, Joshua French, a British-Norwegian national, and Tjostolv Moland, a Norwegian national, were sentenced to death by the Kisangani Military Court for the murder of their Congolese driver, while they were on a mission for a private security company. In 2013, Tjostolv Moland was found dead in the cell he shared with Joshua French at the Ndolo Military Prison. The Norwegian forensic experts sent to investigate concluded that he had committed suicide by hanging. However, in 2014, Joshua French was convicted of his murder. After his lawyer invoked mitigating circumstances, he was sentenced to life imprisonment, instead of death.²⁵⁸

Thereafter Joshua French's health rapidly deteriorated. Following lengthy negotiations between Norway and DRC, the Congolese authorities accepted his repatriation to Norway in 2017 on humanitarian grounds. He was transferred from the Makala Prison on 17 May 2017, on the eve of one of the world's largest prison breaks: over 4,000 prisoners escaped.²⁵⁹

SERIOUS BREACHES OF THE RIGHT TO THE ASSISTANCE OF AN INTERPRETER

The official language in DRC is French and there are four other national languages: Kiswahili, Kikongo, Lingala and Tshiluba.²⁶⁰ Under Congolese law, any accused has the right to testify in the language of his or her choice.²⁶¹ However, according to the death row prisoners interviewed, this is far from standard practice and many of them were unable to follow the hearings as no interpreter was made available. Pascal, sentenced to death in 2017, said: *"Judges and prosecutors spoke in French and Lingala, but we did not know either of these languages. There was no interpreter."* Léon, sentenced to death for robbery in 2009, reported that he had no interpreter and was unable to understand the judges or his lawyer: it was the complainant who provided some interpretation. He believes that if the judges had spoken his language he would not have been convicted. Several people interviewed explained that their lawyer or the registrar provided interpretation in their language: they were forced to interrupt regularly in order to follow the hearing. Alain, a Rwandan national sentenced to death, said that he had requested the assistance of an interpreter, but the military judge had refused. These practices are in breach of fundamental guarantees on the right to a fair trial for the accused.²⁶²

Furthermore, several death row prisoners, in particular foreign nationals, said that while they had access to an interpreter, the poor quality of interpretation meant they were unable to understand the hearings. For example, John, a Ugandan prisoner, told the fact-finding mission: *"The so-called interpreter barely spoke the Ugandan language. I am suffering, it's unjust. It was a trial without*

258 Source: one of the lawyers in the case. See, for example, "La RDC libère un Norvégien condamné pour espionnage et meurtre", *VOA Afrique*, 2014, available at www.voaafrique.com (accessed on 21 November 2019); "Norwegian-British prisoner in DR Congo jail freed", *AfricaNews*, 2017, available at fr.africanews.com (accessed on 15 November 2019).

259 "RDC : colère à Kisangani", *La Libre Afrique*, 2017, available at afrique.lalibre.be (accessed on 15 November 2019).

260 Constitution of Democratic Republic of the Congo, Article 1. However, the number of languages spoken is significantly higher. In 1983, the linguistic atlas of Zaire reported 221 languages in the country. See, Ngalasso N.M., "État des langues et langues de l'État au Zaïre", *Politique africaine*, 1983.

261 Decree of 20 August 1979 on court organisation, Article 128.

262 Article 14(3)(d) of the ICCPR provides: *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] To have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

real communication.” Edward, a Tanzanian death row prisoner, said: “We had an interpreter who spoke Congolese Swahili, but that’s not the same as Tanzanian Swahili.”

RESTRICTED ACCESS TO REMEDIES

CONDITIONS PREVENTING THE RIGHT TO APPEAL TO BE EXERCISED

The right of the accused to have his or her conviction and sentence reviewed by a higher court is one of the fundamental aspects of the right to a fair trial.²⁶³ In DRC, although the Constitution expressly provides that everyone has the right to appeal a judgment and that the right to appeal may not be suspended in any circumstances, including by the military courts,²⁶⁴ the decisions of the CMO are not subject to appeal, as was the case of those issued by its predecessor, the COM.²⁶⁵ Thus, there are still dozens of people on death row today whose sentences have never been reviewed. Among the death row prisoners interviewed, 55 of them had not had their case reviewed because they were convicted and sentenced by the COM (33 people) or the CMO (22 people). The lack of consistency between the Constitution and the Congolese body of legislation, rules and regulations represents a major obstacle to the consolidation of the rule of law in the country. This led the *États généraux de la justice* in 2015 to recommend “Granting the right to a second hearing to all defendants charged with serious crimes.”²⁶⁶ However, this recommendation is yet to be implemented. Furthermore, the establishment of the CMO raises questions among many legal experts, since there are garrison military courts in the North Kivu province that rule at first instance, with the same jurisdiction as the CMO, but which guarantee the right of appeal.

The proportion of prisoners among those interviewed who had been sentenced to death by other courts (excluding the CMO and the COM) and who had filed an appeal was not very high either:

²⁶³ At the international level, see, in particular, Article 14(5) of the ICCPR on the right to appeal, and the Basic Principles on the Independence of the Judiciary.

²⁶⁴ Constitution of Democratic Republic of the Congo, Article 21, para. 2 and Article 156, para. 2.

²⁶⁵ Military Justice Code, Article 87: “Decisions issued by operational military courts shall not be subject to appeal.”

²⁶⁶ *États généraux de la justice*, Recommendation No. 327.

according to the fact-finding mission's analysis of case files obtained from the prison administration services, only 44% of prisoners sentenced by other military courts had filed an appeal.²⁶⁷ The proportion is also low in relation to those sentenced by civilian jurisdictions: only 48% of those sentenced by civilian jurisdictions appealed against their conviction or sentence. These percentages seem low given the severity of the sentence, particularly since, according to Congolese regulations, in the event that a death sentence is handed down the prosecutor must, in all circumstances, lodge an appeal.²⁶⁸ In practice, it appears that the automatic obligation to appeal in the event of a death sentence has not been enforced by the Public Prosecution Service systematically, and/or within time-limits.

Prisoners sentenced to death at first instance pointed to a series of obstacles which had prevented them from exercising their right of appeal or having decisions on appeal enforced. The first is a lack of awareness of procedures: as mentioned above,²⁶⁹ many of those interviewed did not have access to a lawyer and were not informed of the right to appeal and the conditions in which it could be filed. Samson, sentenced in 2017 by a military court, said: *"I didn't know that I could file an appeal. Nobody told me."* Damien, sentenced in 2015 by a civil court, was not aware of conditions for filing an appeal: *"I wasn't aware of the ten-day time-limit for filing an appeal. I filed my application too late."*

The second obstacle raised was the issue of financial resources. Although the Criminal Procedure Code lists a number of legal costs to ensure the admissibility of legal actions, such as an appeal lodged by civil parties, no costs are specified in relation to appeals filed by an accused.²⁷⁰ However, those interviewed reported that their lack of resources prevented them from filing an appeal. In most cases, they had been requested to pay between \$10 and \$50 to initiate proceedings. For example, Paul said: *"The Registrar asked me to pay money for the appeal, but I had nothing."*

267 N = 156.

268 Decree on court organisation No. 299/75 of 20 August 1979, Article 175.

269 See, *supra*, Sub-section "Limited and poor-quality legal representation".

270 Criminal Procedure Code, Article 122.

The third obstacle concerns the transfer of prisoners. Many death row prisoners complained that they had been transferred shortly after their sentence. Some had filed an appeal and paid the costs requested but had never been summoned to appear before an appeal court. Alexandre, sentenced to death in 2016, said: *"My family gave \$20 to the lawyer for the appeal, but there was no follow-up because I was transferred shortly after."* David, sentenced to death in 2011, was in the same situation: *"While I was waiting for the appeal hearing, I was transferred here, where I've been until now."* Others said that they had filed an appeal and even had a date for the appeal hearing, but they could not get to the hearing as a result of their transfer. Some of those sentenced to death simply did not have the time to lodge an appeal. For example, Cédric, sentenced to death in 2017, said: *"We were not given the time to file an appeal because we were transferred immediately after the conviction."*

The fourth obstacle relates to the enforcement of the courts of appeal's decisions. Several people sentenced to death at first instance said that they had been informed that their sentence had been reduced on appeal, but these decisions did not appear in their case files. Antoine, held at the Angenga Detention Camp, told the fact-finding mission: *"I am astonished that I am still on death row given that on appeal I was sentenced to 20 years in prison."* In the Osio Detention Camp, three people told the mission that their sentence had been reduced to 10 or 20 years in prison. Since they have never received any court documents confirming such decisions, they are still officially considered by the prison authorities as death row prisoners.²⁷¹

PARDONS INEFFECTIVE IN PRACTICE FOR DEATH ROW PRISONERS

The right to pardon is exercised by the President of the Republic. According to the Constitution, *"He or she may postpone, commute or reduce sentences."*²⁷² This right has been exercised on several occasions over the past 10 years, including for death row prisoners. Ordinance

271 These people have not yet been cleared for release. The list of people concerned is held by CPJ.

272 Constitution of Democratic Republic of the Congo, Article 87.

No. 16/O66 of 2016 should be highlighted in particular. It provides for the general commutation of death sentences: *“The commutation of death sentences to life imprisonment shall be granted to all persons sentenced in a final decision as of 30 June 2016.”*²⁷³ While this ordinance was commended by abolitionists,²⁷⁴ its impact was very limited, as it did not apply to prisoners convicted of premeditated murder, murder, armed robbery, criminal association, undermining State security, etc.²⁷⁵ In practice therefore, it excluded the crimes for which the majority of those interviewed were sentenced to death. This fails to comply with the guarantees set out in General Comment No. 36 of the United Nations Human Rights Committee on pardon or commutation of sentence: *“No category of sentenced persons can be a priori excluded from such measures of relief, nor should the conditions for attainment of relief be ineffective, unnecessarily burdensome, discriminatory in nature or applied in an arbitrary manner.”*²⁷⁶

Furthermore, two interviewees held at Angenga reported that while they should have benefited from a presidential pardon, other prisoners were released instead. Pacôme, a former member of a militia group, said he had received a pardon: *“Unfortunately someone else was released instead of me. The authorities used this opportunity to benefit someone else from the M23.”*²⁷⁷ Often they release the wrong people.” Some prisoners said that the prison administration asked for money from those concerned for pardons to be enforced.

In October 2019, the Deputy Minister of Justice announced the commutation of all death sentences *“To either hard labour or imprisonment for life or for a term not exceeding 20 years.”*²⁷⁸ At the time of writing, in November 2019, a few weeks after the Deputy Minister’s announcement, implementation of these commutations had not yet been initiated.

²⁷³ Ordinance No. 16/O66 of 22 July 2016 on the collective pardon, Article 3.

²⁷⁴ ECPM, “ECPM salue la décision du gouvernement de RDC de commuer les peines de mort en servitude pénale à perpétuité, tenant ainsi ses engagements pris lors du 6^e Congrès mondial contre la peine de mort d’Oslo”, Press Release, 2016, available at www.ecpm.org (accessed on 19 October 2019).

²⁷⁵ Ordinance No. 16/O66 of 22 July 2016 on collective pardon, Article 5.

²⁷⁶ United Nations Human Rights Committee, *op. cit.*, 2019, para. 47.

²⁷⁷ Rebel movement active in eastern DRC.

²⁷⁸ Ministry of Justice, “Speech by the Deputy Minister of Justice on the 17th World Day Against the Death Penalty”, 2019, see Annex 4.

INCONSISTENT APPLICATION OF AMNESTIES

Several general amnesties²⁷⁹ have been promulgated by the President over the past 15 years, in 2005, 2009 and 2014.²⁸⁰ However, concrete application is not always transparent. The fact-finding mission met several people who, in theory, should have fallen under the scope of these measures, but were kept in detention. Among them are those sentenced for the assassination of former President Laurent-Désiré Kabila:²⁸¹ they denounce a political decision.

²⁷⁹ In contrast to a pardon which suspends all or part of the sentence, an amnesty retroactively eliminates the offence: the conviction disappears.

²⁸⁰ See, *supra*, Sub-section “New steps towards abolition of the death penalty: hopes, disappointments, hesitations”. Several general amnesties have been promulgated: in 2005, in relation to acts of war, political offences and offences of dissent, with the exception of international crimes, committed during a period of nearly 10 years (from August 1996 to June 2005) for all Congolese nationals accused, prosecuted, convicted or sentenced by a court decision; in 2009, in relation to acts of war and insurrection, with the exception of international crimes, committed in North and South Kivu between June 2003 and 2009 by Congolese nationals; in 2014, in relation to acts of insurrection, acts of war and political offences committed between February 2006 – date of the new Constitution – and December 2013 – end date of the ultimatum given to M23 to lay down arms. International crimes, as well as a number of other crimes, including terrorism, rape, the recruitment of children and looting, were excluded from the scope of this law. See law No. 09/O03 of 7 May 2009 on amnesty in relation to acts of war and insurrection committed in the provinces of North Kivu and South Kivu and law No. 14/O06 of 11 February 2014 on amnesty in relation to acts of insurrection, acts of war and political offences.

²⁸¹ On this issue, see, *supra*, Sub-section “Partial release of political prisoners”.

CONCLUSION ON THE INADEQUACIES OF THE CRIMINAL JUSTICE SYSTEM



The various aspects of the right to a fair trial are far from being respected in DRC. Deficiencies in the Congolese criminal justice system are frequently denounced by national actors, stakeholders in international cooperation and human rights organisations, who report dubious investigations, violations of the rights of the defence, various forms of interference in the judicial process and an under-resourced justice system.²⁸² This study demonstrated that these serious failings also affect those given very heavy sentences. Many prisoners held in Congolese penal institutions, both civilian and military, said that they had been convicted on the basis of evidence obtained under duress, in summary trials, without access to quality legal assistance, sometimes even without having been able to understand the trial or defend themselves.

The majority of death row prisoners were not given the opportunity to appeal, either because decisions of that court were not subject to appeal, or they were unaware of the procedures, lacked resources or were transferred shortly after the hearings, before an appeal was filed. The implementation of the right to pardon and amnesty appears to be the subject of political discussions and negotiations within prisons, between the prison administration and certain prisoners.

The support provided by donors and non-governmental organisations involved in the criminal justice system still appears to be essential to guarantee that hearings are held, victims obtain reparation and prisoners on remand are tried within a relatively reasonable time. The interviews conducted revealed, however, that dozens of people have been sentenced to death in such proceedings, without respect for the rights of the defence. Today, real political will is required in order

to achieve concrete improvements to the criminal justice system in the country, in partnership with the full range of national and international actors. Indeed, despite an existing *de facto* moratorium on the death penalty, which has not been applied since January 2003, death row prisoners are kept in detention for very long periods, in extremely vulnerable conditions, sometimes resulting in death.

282 See, in particular: ECPM, CPJ, The Advocates for Human Rights, World Coalition Against the Death Penalty, *op. cit.*, 2019; United Nations Committee Against Torture, *op. cit.*, 2019; United States Department of State, *Country Reports on Human Rights Practices for 2018*, 2019; Ministry of Justice and Human Rights, *op. cit.*, 2015; Open Society Foundations, *op. cit.*, 2011; Office of the United Nations High Commissioner for Human Rights, *op. cit.*, 2010.

CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH



OVERVIEW OF THE LEGAL FRAMEWORK GOVERNING DETENTION AND CONDITIONS OF DETENTION AT THE NATIONAL LEVEL

The tasks and functioning of prisons are regulated by ordinance No. 344 on the prison system, which was adopted in 1965,²⁸³ shortly after independence.²⁸⁴ It makes a distinction between prisons, exclusively intended for convicted prisoners – including those on death row – and remand centres, exclusively intended for those held in pre-trial detention.²⁸⁵ This distinction is not applied in practice and convicted and remand prisoners are held together. However, in practice, distinctions are made between other types of prisons: on the one hand, prisons under the responsibility of the central government, which manages “central prisons” and “detention camps” – detention camps referring to facilities intended for people who have received lengthy sentences; and on the other hand prisons under the responsibility of decentralised administrations, which manage “urban”, “district” or “local” prisons.²⁸⁶ Prisons under the responsibility of the central administration benefit, in theory, from a budget line included in the State’s general budget.²⁸⁷

Article 18 of the 2006 Constitution guarantees that “*Detainees must be treated in such way as to preserve their life, physical and mental health, as well as their dignity.*” The 1965 ordinance lists a number of detainees’ rights, including the right to be dressed in a manner which is “*Suitable for the climate and adequate to maintain the prisoner in good health*”,²⁸⁸ the right to nutrition of sufficient

283 Ordinance No. 344 of 17 September 1965 on the prison system.

284 Decree on court organisation No. 87/O25 of 31 March 1987 provides for committees for the management of prison establishments but contains limited details on the functioning of these establishments, apart from the creation of a management committee in each prison, composed of a warden, a deputy warden and two administrators. In practice, such management committees were not established.

285 Ordinance No. 344 of 17 September 1965 on the prison system, Articles 9 and 10.

286 *Avocats sans frontières, Why imprison? The Realities of Imprisonment in the Democratic Republic of the Congo*, 2015, p. 17.

287 *Ibid.*

288 Ordinance No. 344 of 17 September 1965 on the prison system, Article 52.

quality to “*Maintain the prisoner in full physical fitness*”, with food served three times a day,²⁸⁹ or the right to education, which must be provided by specialised staff.²⁹⁰ In practice, these standards are not applied. All stakeholders in the prison sector agree that the 1965 ordinance is obsolete²⁹¹ and no longer corresponds to realities in the country.

The poor conditions of detention in DRC are often highlighted by national and international institutions and organisations:²⁹² many of them consider that prison conditions are such that they are likely to result in death.²⁹³ Most prisons are characterised by their state of disrepair, very poor sanitary conditions, health care and nutrition, endemic overcrowding and lack of qualified personnel. In 2019, the Committee Against Torture described the situation, stating that it was “*Very concerned about conditions of detention in the majority of institutions in the country, which have led to numerous deaths in custody.*”²⁹⁴ The Committee expressed concern, in particular, about “(a) *prison overcrowding [...]; b) the insalubrity of the majority of prisons, the inadequate hygiene, lack of ventilation, poor quality and insufficient quantity of food, and the limited recreational and training activities to foster rehabilitation; c) the limited access to quality health care in most places of detention; and d) the lack of qualified prison staff, which means that inmates themselves are responsible for supervision, resulting in violence and corruption.*” The *États généraux de la Justice* in 2015 described prisoners “*Who are deprived of food and health care, due to a lack of funds*” and “*Ageing*

289 *Ibid.*, Article 61 and 62.

290 *Ibid.*, Article 23.

291 *Programme pluriannuel du Gouvernement et des Nations unies pour l'appui à la justice (PPAJ) en RDC axé sur le renforcement de la chaîne pénale* (Multi-year joint United Nations Justice Support Programme in the DRC focusing on strengthening the penal chain), 2015, p. 24. Ministry of Justice and Human Rights, *op. cit.*, 2015, p. 45. See also, *Avocats sans frontières, op. cit.*, 2015, pp. 17-18.

292 See, for example, Commission nationale des droits de l'homme (National Human Rights Commission), *Troisième rapport annuel d'activités (janvier à décembre 2018)*, 2019, p. 53; Commission nationale des droits de l'homme, *Rapport synthèse des visites des centres pénitentiaires et de détention effectuées en République démocratique du Congo - année 2018*, 2018; United Nations Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the DRC [CCPR/C/COD/CO/4]*, 2017, para. 33; United Nations Committee Against Torture, *op. cit.*, 2019, para. 20; Immigration and Refugee Board of Canada, *Democratic Republic of the Congo: Prison Conditions in Kinshasa, Including the Treatment of Prisoners (2015-June 2017)*, 2017.

293 Freedom House, “*Congo, Democratic Republic of (Kinshasa)*”, 2017, quoted in Immigration and Refugee Board of Canada, *op. cit.*, 2017.

294 United Nations Committee Against Torture, *op. cit.*, 2019, para. 20.

and low-paid staff, leading to lack of motivation and encouraging them to ask for payment for visits or to engage in other improper practices to obtain income.”²⁹⁵

While the Government estimated that it had, in 2019, a prison capacity of 32,250 places,²⁹⁶ according to official data, Congolese prisons held 25,000 prisoners in 2016.²⁹⁷ However, overcrowding in some of the Congolese prisons is at breaking point.²⁹⁸ The Makala Central Prison, in the capital, was built in 1958 for 1,500 prisoners. In 2018, it housed as many as 8,500 prisoners, representing an occupancy rate of 560%;²⁹⁹ in the east, the Goma Central Prison, built in 1953 for 300 prisoners, held nearly 1,487 in 2018, an occupancy rate of 495%.³⁰⁰

The impact of overcrowding on hygiene, security, access to health care and adequate food is very serious. According to the United Nations, 201 people died in custody in 2017 and 223 in 2018.³⁰¹ Those deaths are considered to be the result of malnutrition, poor hygiene conditions and lack of access to health care.³⁰² For example, in 2018, the United Nations reported that detainees at the Manono Prison, in the Tanganyika Province, had spent more than 10 days without food.³⁰³ According to official government data, 135 prisoners died in custody between June 2015 and August 2016.³⁰⁴ Furthermore, mass prison escapes are common. The United Nations documented at

295 Ministry of Justice and Human Rights, *op. cit.*, 2015, p. 80.

296 Democratic Republic of Congo, *National Report Submitted for the Universal Periodic Review* [A/HRC/WG.6/33/COD/1], 2019, pp. 9-10. See also, Democratic Republic of Congo, *op. cit.*, 2017, para. 86.

297 Remarks made by the Deputy Minister for Human Rights during the World Congress Against the Death Penalty, in Fiacat, ACAT-RDC, *Rapport alternatif de la Fiacat et de l'ACAT RDC pour l'adoption d'une liste de points à traiter à l'occasion de l'examen du quatrième rapport périodique de la République démocratique du Congo sur la mise en œuvre du Pacte international relatif aux droits civils et politiques devant le Comité des droits de l'homme des Nations unies*, 2016, p. 12.

298 One explanation for this contradiction relates to the fact that the exact number of prisoners is unknown. Since funds allocated to prison administration are very limited, many prison governors do not know the exact number of prisoners in their facilities. This explains why it is not uncommon for prisoners to be kept in detention even though they should be released. United States Department of State, *op. cit.*, 2019, pp. 6 and 9.

299 *Ibid.*, p. 5.

300 Commission nationale des droits de l'homme, *op. cit.*, 2018, p. 9.

301 United States Department of State, *op. cit.*, p. 5.

302 *Ibid.*

303 *Ibid.*, p. 6.

304 Democratic Republic of Congo, *op. cit.*, 2017, para. 85.

least 5,528 escapees during the first half of 2017 – a mass escape of more than 4,000 prisoners took place in May 2017 at the Makala Prison in Kinshasa.³⁰⁵ Among them were several death row prisoners who have not been found.

The Congolese government, aware of these issues, is implementing a prison renovation policy to increase prison capacity and reduce overcrowding. In addition, a national policy paper on reform of the justice sector (*politique nationale de réforme de la justice* – PNRJ) for 2017-2026 was adopted, together with a priority action plan for 2018-2022. A plan to reform the prison sector, emphasising revision of the 1965 ordinance on the prison system and training of prison staff, is pending.³⁰⁶ However, it should be noted that debate on the revision of the 1965 ordinance has been ongoing since 2007.³⁰⁷

305 United States Department of State, *op. cit.*, 2018, p. 6.

306 Ordinance No. 344 on the prison system of 17 September 1965. Democratic Republic of Congo, *op. cit.*, 2017, para. 87.

307 A draft ordinance was prepared during the Kinshasa Prison Conference which took place in 2007. Ministry of Justice and Human Rights, *op. cit.*, 2015, p. 80.

HIGHLY PROBLEMATIC CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH

According to prison governors, the prison establishments where the death row prisoners met by the mission were held date back to the colonial era; the oldest prison visited by the fact-finding mission was that in Kisangani, built in 1925; the most recent ones were in Makala and Kasapa, built in 1958. Although the country has now adopted a prison renovation policy, only the Luzumu Detention Camp, renovation of which lasted several years, offers adequate conditions of detention.³⁰⁸ The conditions in other prison establishments raise serious issues and are far from conforming with international standards on detention, in particular the United Nations Standard Minimum Rules for the Treatment of Prisoners, also referred to as the “Nelson Mandela Rules”, in honour of the former South African President.³⁰⁹

In most of the prisons visited, there was no specific regime for death row prisoners, who were not separated from other prisoners. At the Ndolo Military Prison, Kasapa, Kindu, Goma and Kisangani Central Prisons and Buluwo Detention Camp, death row prisoners sleep in the same overcrowded rooms, live in the same sanitary conditions and with the same poor nutrition and are treated in the same way as other detainees, who have been sentenced to less severe penalties or are awaiting trial. Sleeping conditions are very hard and the allocation of sleeping quarters is based on the financial resources of detainees or their role in the prison – in particular their participation in the team of “capitas”.³¹⁰

308 The prison authorities provided the following dates of construction: Ndolo Military Prison, 1933 (renovated in 2010); Makala Central Prison, 1958; Kindu Central Prison, 1938; Kasapa Central Prison, 1958; Goma Central Prison, 1953; Kisangani Central Prison, 1925; Luzumu Detention Camp, 1955 (under renovation until 2019); Buluwo Detention Camp, 1954; Osio Detention Camp, 1954; Angenga Detention Camp, 1952.

309 United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 2015.

310 See, *infra*, Sub-section “Capitas and prison staff”.

At the Buluwo Detention Camp, between 4 and 11 prisoners share cells built to accommodate a single prisoner. According to detainees held in this facility, the number of prisoners sharing the same cell depends on the “ranking” of occupants: those carrying out an activity in the prison have better sleeping conditions than others. Robert, sentenced to death in 2012, said: *“I am the head of section of the general capita. There are four prisoners in my cell, which was built for one.”* Oscar, sentenced to death in 2014, shares his cell with seven other people. He said that he did not have the means to buy a mattress: *“We use empty bags filled with dried grass and leaves as mattresses. We have no sheets.”*

These problems of serious overcrowding and lack of adequate bedding supplies were the same in other prisons visited, including for women. Sylvie is detained in the women’s unit at the Ndolo Prison. She said: *“In my cell, there are three adults and my baby, a cell normally designed for one prisoner. We have mattresses on the floor, without sheets.”* Charles is held at the Goma Central Prison, in eastern DRC. He said that some of the cells held up to 200 prisoners. As rooms are overcrowded, he has been sleeping outside in a corridor for the past 6 years: *“Every night, I prepare a spot where I will spend the night.”* Tristan also sleeps outside, due to his lack of means. He said that it was necessary to pay a sum of money to have access to a cell: *“I wake up in the morning, I fold up my boxes and I sit on them to make sure nobody takes them from me.”* Without access to a room, those sleeping outside are forced to defecate in a water pipe. Désiré, a death row prisoner held at Kindu Central Prison, said that he shared his cell with about a hundred people, with no access to toilets: *“We sleep on the ground, on cloth, fabric or traditional floor mats. The richest ones have mattresses they got from outside. From 4pm, we relieve ourselves in vases as we are locked up in the cells.”* Given the problem of overcrowding, the infrastructures are highly inadequate. In Buluwo, prisoners highlighted that only six operational toilets were available for 600 prisoners; in Goma, there were three for 500 prisoners; in Kindu, there were three for 200 prisoners. This situation is far from complying with international standards, in particular Rule 15 of the Nelson Mandela Rules, which provides: *“The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.”*

These conditions are particularly unfit for people living with disabilities. At the Goma Prison, special arrangements have been made for Ferdinand, who has had one leg amputated. He sleeps in a separate area because of his physical condition. He said: *“They gave me an unused room, which used to be for toilets. But I have no sheets, no mattress. I use the clothes I wear as bedding.”*

The majority of prisoners in Angenga Detention Camp, which held 269 death row prisoners at the time of the fact-finding mission’s visit, come from outside the region and were transferred following their conviction. Although it appears that, in many cases, prisoners were transferred to relieve congestion in other prisons, there are also some who have been transferred from less overcrowded prisons. The reasons for transfers are not always understandable. In addition, many transfers are not documented: families of death row prisoners are not always told in which prison establishment their relatives are being held. As a result of geographical distance and lack of information given to families, most prisoners never receive any visits³¹¹ and have no financial resources: they sleep without mattresses or sheets, with a blanket supplied by the International Committee of the Red Cross (ICRC³¹²), locked in small rooms with approximately 40 other people. Several prisoners are held under the restricted-release regime and have accommodation outside the prison.³¹³ Those incarcerated said that two people had to share a one-metre-wide mat. Hugo, sentenced to death in 2014, said: *“I sleep in the same conditions as an animal in a forest. They keep us in confined spaces, causing suffocation and disease.”* According to Guillaume, *“Inside our cell, we urinate in the shower and defecate in a bucket.”* As cells are poorly ventilated, they are very hot. Eustache also said: *“Prisoners cook for themselves in the cells. Imagine the temperature!”*

This detention facility also has serious problems connected to water supply: prisoners are only given 2 litres of water per day for washing themselves and their clothes and for cooking. Some said they had to wait for the rain to wash themselves or their clothes. For example, Antoine, sentenced to death in 2016, said: *“Water supply*

311 On visits, see, *infra*, Sub-section “Limited contact with the outside world”.

312 On ICRC, see, *infra*, Sub-section “Essential presence of humanitarian and faith-based organisations”.

313 See box, *infra*, Sub-section “Absence of activities”.

conditions are difficult. I spent 3 weeks without washing.” Given the serious shortage of water, prisoners who have the means are forced to purchase water from villagers: a 25-litre water container costs 300 Congolese francs (the equivalent of 0.16€).

At the Makala Prison in Kinshasa, where the occupancy rate exceeds 560%, the situation is unique. Those sentenced to death by the COM for the assassination of former President Laurent-Désiré Kabila have individual cells. However, people sentenced to death in other cases are not separated from other prisoners and live in very harsh conditions. Anatole, sentenced to death by a military court in 2005, said: *“As we are all held together, nobody knows each other’s sentence.”* Martin, sentenced to death by a military court in 2003, stated: *“There are 50 of us in a cell. For bedding, we all have to manage. If you have the means, you can get a private bed. Others sleep on the floor.”* Neither the status of death row prisoner nor the length of detention give access to more “favourable” conditions, only the reputation of detainees and their contact with the outside world. Those with no contacts are left to their own devices.

Unlike other prison establishments visited, Luzumu and Osio detention camps are less overcrowded. Detainees, whatever their status or sentence, sleep on their own or share an individual room with one other person, in better conditions than those of death row prisoners in other prisons. While the Osio Detention Camp is less overcrowded, the water supply is highly insufficient, so prisoners have to draw water from the river, and it has no bedding supplies. Prisoners sleep without mattresses or, if they have the means to pay for them, on mattresses purchased from others.

Of all the prison establishments visited, the Luzumu Detention Camp is the only one where death row prisoners said they enjoyed good sleeping conditions – a metal bed with mattresses in good condition – and adequate access to water, showers and toilets. In contrast to other prison establishments, the Luzumu Detention Camp has been renovated and only re-opened in March 2019. All death row prisoners interviewed in this prison had been transferred from the Makala Prison.

Evolution of prison conditions for death row prisoners in the Makala Prison from 2005 to 2019

In 2005, ECPM and CPJ published the fact-finding mission report *Les « sans-voix » de République démocratique du Congo*, the first study published on conditions of detention of people sentenced to death in DRC. Based on interviews with 61 death row prisoners held in five prisons, the report described the inhuman conditions of detention of people sentenced to capital punishment. At the Makala Prison, the report described the systematic solitary confinement of death row prisoners, hooded and handcuffed on arrival at the prison, for up to one year, on the pretext of their alleged dangerousness.³¹⁴ It also revealed testimonies of insults and verbal aggression specifically targeting death row prisoners and restrictions on their right to move around inside the prison compared to other detainees.³¹⁵ The fact-finding mission conducted in 2019 revealed a slight improvement in conditions of detention of death row prisoners at the Makala Prison. Today, they are held in conditions identical to those of other prisoners. Those sentenced to death in the Laurent-Désiré Kabila case, in particular, enjoy better conditions compared to 2005 and live in cells which are better maintained. According to some civil society actors, these improvements are the result of the public denunciation of conditions of detention, based on the publication of the fact-finding report in 2005 and reports from national and international stakeholders, including the United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo (MONUSCO) and the *Commission nationale des droits de l'homme* (National Human Rights Commission – CNDH). However, while those sentenced in the Laurent-Désiré Kabila case are held in better equipped cells, this is not the case for other death row prisoners, who live in the same conditions as other detainees. Overall, prison conditions have significantly deteriorated over the years, given the very high increase in the general prison population.

CAPITAS AND PRISON STAFF

Faced with prison overcrowding and the scarcity of human and material resources, an informal hierarchical social organisation emerged in Congolese prisons. This self-regulatory system gives a small number of prisoners significant supervisory power over the others. At the head of this system, a fellow prisoner, known as “general capita”, has the role of leader. In most prisons, the capita’s team is responsible for maintaining order, access certain resources and distributing rooms and bedding supplies. Although international standards prohibit the employment of detainees to maintain discipline in prisons,³¹⁶ this system was set up under a delegation of authority from prison staff.³¹⁷ This system is reported to exist throughout Congolese territory.³¹⁸

At the Angenga, Buluwo and Osio Detention Camps and the Goma Central Prison, the fact-finding mission interviewed death row prisoners who were or had been part of the capita’s team; one of them was a former general capita. These prisoners said they enjoyed advantages over other detainees, particularly with regard to sleeping conditions.³¹⁹ Innocent, detained in Goma since 2013, said: “As a former capita, I have my own cell, but others are crammed in like sardines.” Not all members of the capita’s team enjoy the same favourable conditions, but they live in rooms less overcrowded than those of other prisoners. In Angenga, members of the capita’s team enjoy greater freedom of movement within the prison than other detainees and wear uniforms, making them recognisable.

314 Bégot M., Ngondji L., *op. cit.*, 2005, p. 144.

315 *Ibid.*, p. 147.

316 Rule 40 of the Nelson Mandela Rules provides: “No prisoner shall be employed, in the service of the prison, in any disciplinary capacity.” However, these rules are soft-law rules, with no binding force.

317 Bégot M., Ngondji L., *op. cit.*, 2005, p. 136 et seq. See also, *Avocats sans frontières, Commodification of Detainees in Democratic Republic of Congo*, 2015.

318 See, for example, Ministry of Justice and Human Rights, *op. cit.*, 2015, p. 48; *Avocats sans frontières, op. cit.*, 2015, pp. 18 and 25; Lankoandé D. D., *Du respect des droits de l'homme dans les prisons des pays en reconstruction. Étude du cas de la RDC*, Research paper, 2015.

319 See, *supra*, Sub-section “Highly problematic conditions of detention of death row prisoners”.

The vast majority of death row prisoners interviewed were not members of the capita's team: team selection does not depend on sentences, but on existing relationships among prisoners and with the prison staff. According to Boris, detained in Angenga, *"Everything is based on relations or contacts."* Many death row prisoners interviewed said they had been ill-treated by the capita's teams. Tristan, imprisoned in Goma, said: *"We are not abused by the guards, but other prisoners with responsibilities inside the prison often abuse us."* Sylvestre, detained in Angenga, confirmed this: *"Abuse comes from the other prisoners with responsibilities."*

This system of domination, which relies on the consent of authorities, gets going very rapidly: arbitrariness and deprivation start from the moment of incarceration, so that prisoners understand from the outset that they are subject to a new system of constraints. At the Angenga and Buluwo Detention Camps, prisoners interviewed said that newcomers were held for several days in a cell, the same one used for punishment. Bertin, sentenced to death in 2014 and currently detained in Buluwo, reported: *"On arrival, we spent 56 days in the private cell, because we were newcomers."* In other prison establishments, some of the chores are assigned to the newcomers, as attested by Théodore, who was sentenced to death less than six months previously and held at Osio, who said that he was forced to sweep the courtyard every day, because he was a newcomer.

Interviews with death row prisoners revealed that the capita and his team played a significant role in disciplinary matters. Claude, a death row prisoner detained in Goma, said: *"Inside, there is no surveillance. There are only other prisoners who transform themselves into supervisors."* In practice, members of the capita's team apprehend anyone who misbehaves and bring him or her to the capita, who decides on the "sentence". For example, David, held at the Osio Detention Camp, said: *"I am in charge of security. I apprehend those who misbehave and bring them to the big boss, who decides on a sentence."* The "breaches" mentioned by those interviewed include the consumption of cannabis, fighting, unpaid charges or presence in unauthorised areas. Penalties vary depending on the prison, but they almost always include acts of ill-treatment. Georges, sentenced to death in 2006, detained in Angenga, said: *"In cases of fighting or smoking cannabis, you can be locked up in a cell for 15 to 45 days. They keep you there half naked and throw water over you."* Sylvestre

spent 27 days in a cell for smoking cannabis. In Kindu, Désiré said that he was kept in a cell called the "cellar" for 6 months for failing to pay the required charges. Some death row prisoners mention other "penalties", such as restraint, standing for hours in an isolated location (Buluwo), or being whipped and held naked in a cell for 30 days (Kisangani). Willy, a death row prisoner detained in Angenga, denounced cases of rape targeting members of specific tribes from eastern DRC: *"The greatest scourge is tribalism. If anyone from eastern DRC breaks the rules, the whole community pays the cost. We are subjected to sodomy."* Although Willy was the only one who unequivocally denounced cases of rape, several other prisoners in the Angenga Detention Camp said that members of certain tribes from eastern DRC suffered discrimination.

Even though security inside detention facilities is in practice organised and managed by the general capita and his team, the prison staff plays a role outside the walls. In the absence of dedicated prison staff at the national level, security is provided by the PNC and/or FARDC. Any attempt to escape, in particular, is severely repressed. Some prisoners in Angenga reported that those who had tried to escape had been subjected to simulated executions. This situation is not specific to death row prisoners but applies to anyone seeking to escape.

POOR QUALITY AND INSUFFICIENT QUANTITY OF FOOD

“Prisoners are now herbivorous”
– Didier, sentenced to death in 2003,
detained at the Angenga Detention Centre

Although a 2013 Decree required all prisons to set up a joint committee to manage funds allocated to the supply of food to prisoners,³²⁰ no such committee was reported to have been set up in the prison establishments visited and the food supplied to prisoners was clearly inadequate, both in terms of quantity and quality.

In the vast majority of prison establishments visited by the fact-finding mission, interviewees said that they did not get enough to eat. They stated that prison authorities only gave them one meal a day, with fufu and manioc leaves (*pondu*) or beans (*kunde*), or corn with beans, without meat or fish. According to Augustin, sentenced to death in 2005, held in Angenga, *“The quantity of food is not even sufficient for a 2-year-old child.”* According to prisoners at the Osio Detention Camp, the quantity of food had recently improved: they considered that this improvement was related to the fact-finding mission’s visit. Only prisoners detained at the Luzumu Detention Camp, as well as some others held at the Ndolo Military Prison, said that they received sufficient food through the food rations supplied by the prison.

Several prisoners said that they got food from people visiting from the outside. For these prisoners, the proximity of relatives improved their quality of life in detention significantly. By contrast, those living far away from their families were completely destitute and depended on rations supplied by the authorities. The vast majority of prisoners interviewed were detained far away from their families and did not receive any visits.³²¹

³²⁰ Officially, this committee is composed of the Governor of the province or his/her representative, the Prosecutor General, the head of the provincial division of the justice system, the prison warden and two civil society representatives. Decree on court organisation No. 029/CAB/MIN/J&DH/2013 of 28 January 2013 on the creation, organisation and functioning of local committees for the supervision of budget management in provincial central prisons and detention camps, cited in Democratic Republic of the Congo, *op. cit.*, 2017, para. 85.

³²¹ On this issue, see, *infra*, Sub-section “Limited contact with the outside world”.

VIRTUALLY NON-EXISTENT ACCESS TO HEALTH CARE

SERIOUS SHORTCOMINGS IN THE HEALTH CARE SYSTEM

“If you don’t have the funds, you can die”
– Cédric, sentenced to death in 2017,
detained at the Kisangani Central Prison

Death row prisoners live in conditions similar to those of other prisoners, who are to be released in the short or medium-term. Harsh conditions of detention – in particular lack of food, poor standards of hygiene, water shortages, poor sanitation infrastructure and promiscuity – increase the exposure of death row prisoners to prison-related illnesses, such as malnutrition, tuberculosis, HIV/AIDS, scabies, etc.

In all the prisons visited, access to clinics was organised by prisoners and no restriction was reported by death row prisoners. Room leaders identify sick persons in each room and refer them to prison clinics. However, while clinics have been set up, detainees and prison governors interviewed reported that all prisons lacked sufficient medical equipment and medicines, except the Luzumu Detention Centre. This is the only prison clinic with sufficient drug supplies available and which organises medical check-ups for prisoners on their arrival.

The Buluwo Prison governor reported that the clinic did not even have a thermometer or tensiometer, for example. In the majority of the prison visited, prisoners said that apart from paracetamol and treatment for malaria and tuberculosis, there were no available medicines. For those who cannot afford medical costs or whose families are far away or unaware of their place of detention, paracetamol is supplied for any type of pathology. For example, John, sentenced to death in 2016 and held at the Angenga Detention Centre, said: *“I am asthmatic, and I suffer from stomach pains, but they give me paracetamol.”* André, one of the death row prisoners interviewed, said that he had become blind due to the lack of appropriate medication.

Virtually no specialist medical consultations are provided. A number of death row prisoners stated that although they needed a surgical operation, no medical care was available in the absence of financial resources. This was the case for Jean, detained at Osio, who needed a hernia operation; Jonathan, detained in Angenga, needed bowel surgery and Guy, also detained in Angenga, required surgery for haemorrhoids. As explained by Brice, detained at the Goma Central Prison: *“Whatever you have, they give you paracetamol. For anything else, we are under God’s protection.”*

Death row prisoners in several prison establishments reported that prisoners had recently died as a result of lack of medical care. Those held at Angenga Detention Centre said that a prisoner had died 3 days before the mission’s visit. Another prisoner, a Rwandan national, died on the day of the mission’s visit. While neither were death row prisoners, their cases are a good illustration of the fact that these prison establishments are places of death. Death row prisoners expressed their profound fatigue. José, one of the longest serving death row prisoners in DRC still in detention, said: *“They asked for money, but where can I find it? I’ve been detained since 2001 and my family is poor.”*

COMPLETE LACK OF CONSIDERATION FOR MENTAL HEALTH

“I am always sad”

– Francis, sentenced to death in 2000, held at the Angenga Detention Camp

During the mission, the researchers met three death row prisoners with mental health conditions. Due to their state of health, the mission could not collect their testimonies or analyse whether they had suffered from disorders before incarceration or whether they had been caused by detention. However, all death row prisoners interviewed confirmed the absence of specific monitoring for this type of condition: they live in the same conditions as other prisoners, without access to specialist health care professionals or medical treatment. The absence of monitoring is incompatible with the Nelson Mandela Rules, which provide: *“Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in*

*prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.”*³²²

In addition to such mental problems, the vast majority of death row prisoners reported suffering from severe psychological distress: anorexia, stress, insomnia, memory loss, hypertension, weight loss and suicidal thoughts. Some of those interviewed felt that life no longer had any meaning. They were awaiting death: in spite of the moratorium, the fear of execution remains real and they said that they live in fear. Jean-Marie, detained at Kasapa Central Prison, explained: *“They showed us where death row prisoners are killed. I am always scared, every day.”* This ever-present and growing anguish caused by awaiting execution, which is referred to as “death row syndrome”, is widespread among death row prisoners awaiting execution throughout the world. Sylvain, detained at the Angenga Detention Centre, said: *“Knowing that we are going to spend all our life in prison until death causes terrible damage, but prison does not take it into account. Life has no taste and the human being just becomes a worthless animal.”* Pascal, detained at the Goma Central Prison, said: *“I’m psychologically weak. I do nothing except sleep and wake up every day, knowing that I am going to die. I have no interest in what is going on around me. I think that I am quietly awaiting death.”* Justin, also detained in Goma, stated: *“I already know what awaits me, it’s death, and that’s why I am not taking care of my body.”*

Several prisoners said that they had been informed of the death of family members while in detention. André, sentenced in 2001, told the fact-finding mission through tears: *“Both my parents died while I was in detention.”* Clément, sentenced in 2006, also said: *“My life has been destroyed, my mother and my two children died while I have been away.”* The feeling of having abandoned their families combines with the feeling of having been abandoned themselves by their relatives.

³²² Nelson Mandela Rules, Rule 109(1).

LIMITED CONTACT WITH THE OUTSIDE WORLD

*"I've been here for 4 years, this is the first time
I have met people from the outside"*
– Gilbert, sentenced to death in 2005,
held at the Angenga Detention Camp

MOST FAMILIES LOCATED FAR AWAY FROM DETENTION FACILITIES

The absence of family visits to death row prisoners was highlighted in the majority of prison establishments visited. Family visits to prison establishments are a pre-condition for access to external resources, enabling prisoner's vital needs to be better met, needs which are not systematically or sufficiently met by prison authorities, such as food, water, medicines or other medical costs. These external resources also contribute to the improvement of their daily lives, through financial transactions (purchasing space in a cell, mattresses, blankets, soap, etc.). Moreover, access to visits enables detainees to maintain contact with the outside world, follow legal developments in their case and receive family news, which considerably improves their morale.

Some prisoners, who have families living near the prisons, said that they had no difficulties receiving visits, including from their children who were minors. However, those visiting relatives must pay a sum of money. In Goma, the amount is 1,000 Congolese francs (or €0.55) for each visit. In Kisangani, prisoners said that visitors are asked to pay money at the police post, to the on-duty surveillance personnel and to the prison's capita before being allowed to talk to their relatives.

For most of those interviewed, visits are rare. Many of them were transferred after their conviction and are detained in remote prisons far away from their families. The majority of those held at the Angenga, Osio and Luzumu Detention Camps as well as the Kasapa and Kisangani Central Prisons said that they had not received any

family visits since their arrival. According to Cédric, held at Kisangani: *"Visits are authorised without restriction. Personally, I don't have any visits, my family is far away. Maybe my family thinks that I'm already dead."*

The isolation of some prisons also significantly contributes to the absence of visits. The Osio Detention Camp, located in the middle of the tropical forest, is only 17 km from Kisangani, but access by road is difficult. The Angenga Detention Camp is situated 25 km from Lisala, more than 500 km from the capital, as the crow flies. Yet most prisoners at Angenga come from other provinces. They reported that their families had no means of reaching the detention camp. Gilbert said: *"I've been here for 4 years, this is the first time I have met people from the outside. Your visit gives me hope. I don't get any visits because my family is in Kinshasa."* Due to the isolation of this prison establishment, prisoners reported that no lawyers ever came to the prison. These persons wait for years for someone to pay attention to their situation, in vain. In addition, several prisoners stated that women who visited them were subjected to "solicitations" on the part of prison staff. Sexual violence suffered by prisoners' spouses is a pre-condition for access to their husbands.

Other death row prisoners with families living in less remote places, such as those detained at Goma prison, reported that, in the absence of future prospects, many of the families simply gave up.

ABSENCE OF CONTACT WITH CONSULAR REPRESENTATION FOR FOREIGN NATIONALS

The situation of foreign prisoners is very alarming. With the exception of the Tanzanian authorities, who came to visit their nationals at the Angenga Detention Camp, no contact with representations has been reported: in addition to Tanzanian prisoners, this detention camp holds Ugandan, Rwandan and Belgian death row prisoners. At the Buluwo Detention Camp, where Rwandan and Burundian death row prisoners are held, the prison governor stated that no action had been taken in this regard, since the ICRC was in charge of communication, even though the it had been 2 years since ICRC had left the prison

ESSENTIAL PRESENCE OF HUMANITARIAN AND FAITH-BASED ORGANISATIONS

Due to the limited resources supplied by the prison authorities and the scarcity of family visits, the majority of prisoners interviewed were fully dependent on resources from the outside. The presence of the ICRC and faith-based organisations is vital for prisoners: in most of the prison establishments visited, these organisations supply basic hygiene products (soap), sometimes bedding supplies (blankets) and cooking utensils (pots). Governors of some prison establishments have stated, however, that, in the last few years they had not been visited by humanitarian organisations: this was the case of prison establishments in Buluwo, Osio and Kindu.

LACK OF ACTIVITIES

Except at the Ndolo Prison – where several prisoners said they were only allowed to leave their cell for one hour a day –, death row prisoners reported that they went out of their cells during daytime and had access to activities under the same conditions as other prisoners. Although at the Kasapa Central Prison detainees said they had access to occupational training, such as baking or carpentry, there are no activities available in most prison establishments. As a result, those interviewed stayed busy as best they could, playing cards and chatting. None of the prisons visited had a functional library and the football fields which exist in several prisons are, in most cases, no longer used due to fear of escapes. Luc, held at the Kisangani Central Prison, said: *“We get out from 7am to 4.30pm. During that time, we do nothing.”* At the Osio Detention Camp, most of those interviewed stated that they didn’t do any activity, although a few said they did crafts, gardening or participated in choirs.

At the Angenga Detention Camp, access to activities varies from one person to another. Some death row prisoners live outside the prison and work as farmers under a restricted-release regime (see box). For those living inside the prison, a life “behind the walls” has been put in place and some practice small trades – masonry, phone charging, gardening, small shops, crafts, or sport or leisure activities – singing or playing music. But many have no activities. According to Eustache, *“Everything depends on relationships and connections with those giving or assigning activities. Personally, I have no activities.”* Some explained that their movements within the detention centre were restricted by other prisoners. Discrimination was not based on sentence, but on ethnic origin.³²³ A number of interviewees referred to tribalism and discrimination against some tribes from eastern DRC. This absence of activity adds to other elements contributing to their unhappiness: the detainees interviewed said that they spent their time thinking about their situation.

³²³ See, *supra*, on allegations of sodomy against members of certain tribes from eastern DRC, Sub-section “Capitas and prison staff”.

Restricted-release regime at the Angenga Detention Centre

Four death row prisoners interviewed by the fact-finding mission were held under the restricted-release regime at the Angenga Detention Centre: they had their own house outside of the prison and could farm in a field nearby. Some even got married.

Conditions for accessing this semi-restricted regime are vague. Some prisoners referred to discrimination in the attribution of this privilege, those in charge of selection prioritising those from Kinshasa over those from other regions of DRC.

While this regime is considered as a privilege granted by the prison authorities, it has corresponding obligations. Several of those interviewed explained that the beneficiaries of the restricted-release regime were forced to work for free in fields belonging to the prison staff, before working in their own fields. These practices are incompatible with international standards on detention facilities, in particular Rule 97 of the Nelson Mandela Rules, which provides: *“No prisoner shall be required to work for the personal or private benefit of any prison staff.”*

ABSENCE OF MECHANISM TO PREVENT TORTURE AND ILL-TREATMENT

Monitoring and inspection mechanisms are provided for by regulations, in particular the 1965 ordinance, which stipulates that prisons shall be inspected by the prison inspectorate at least every quarter and shall be visited by the provincial governor or his/her representative at least once a month. Discussions with governors of prison establishments revealed that such monitoring was not carried out in practice.

In 2010, DRC ratified the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). This protocol requires States to set up an independent National Preventive Mechanism (NPM), to monitor places of deprivation of liberty and issue recommendations. The implementation of a system of regular and structured monitoring of detention and conditions of incarceration is a key tool to prevent torture and ill-treatment. However, despite the ratification of OPCAT and statements of intent from the government,³²⁴ no NPM has been set up to date. During the UPR in 2019, the government stated that it was exploring the best mechanism to establish.³²⁵ The possibility of appointing the current CNDH is under consideration. Every year, the CNDH visits prison establishments and publishes fact-finding reports. Since 2018, it has had A-status under the United Nations “Principles related to the status of national institutions for the promotion and protection of human rights”, recognising its independence and impartiality.

³²⁴ See, for example, the statement of Mbose Nkodia Mpuanga, Deputy Minister, 26 June 2016.

³²⁵ Democratic Republic of the Congo, *op. cit.*, 2019, p. 12.

CONCLUSION

ON CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH

Most of the death row prisoners interviewed sleep in overcrowded prisons. The conditions of detention do not allow them to take care of their health: hygiene conditions are extremely poor; food rations are highly inadequate and access to medication is very limited. Several deaths were reported. Although detainees are generally subject to the same conditions, death row prisoners are also subject to specific physical and mental pathologies, which are not dealt with by the prison health care system.

The entire prison system is based on a mode of organisation that relies on financial transactions and relations with decision-makers, both prisoners and penitentiary staff. Those detained outside of their region of origin are exposed to particularly severe distress: without family visits to improve their conditions of detention or ensure the follow-up of their court file, they lose hope. The transfer of prisoners has a particularly negative impact on people sentenced to death, who said they were dying a slow death. At the Angenga Detention Camp, where more than 260 death row prisoners are held, members of certain tribes from eastern DRC said that they encountered discrimination which restricted their right to move around within the prison and were subjected to violence, including sexual violence. They reported being in a state of despair.

The CNDH conducts regular visits to prison establishments to monitor conditions and publishes reports detailing conditions of detention, described as “appalling”.³²⁶ However, no regular and structured monitoring system has been set up, despite the State’s commitments in this regard. Although, over the past few years, the country has officially committed to a policy of improving conditions of detention, the results are far from being visible.

³²⁶ Commission nationale des droits de l’homme, *op. cit.*, 2018, p. 51.

Focus on the inhuman conditions at the Angenga Detention Camp

The Angenga Detention Camp, built in the 1950s, was used by the settlers to detain people sentenced to lengthy periods of imprisonment, then during the Mobutu regime to imprison military staff and political prisoners. It closed down in 1997 and re-opened in March 2015.³²⁷

This correctional facility is situated in Equateur Province, 500 km from Kinshasa as the crow flies, in a very remote area. It holds 1,245 men, including the highest number of death row prisoners in DRC. At the time of the fact-finding mission’s visit in June 2019, it held 269 prisoners sentenced to capital punishment, most of whom had been transferred from various provinces in the country, in particular from the east (Goma, Beni, Butembo and Bukavu) and Kinshasa.

The remoteness and isolation of the detention camp has a serious impact on prisoners, given that significant financial resources are needed for prison visits. A number of the death row prisoners interviewed said that they had not received any visits since their arrival at the prison, in some cases several years previously, whether from their families or legal counsel: they reported that they felt forgotten, waiting for years for support to be provided, in vain. Many of them said that the mission’s visit was a sign of hope, as the interview was their first real contact with the outside world since their incarceration at Angenga. As a consequence, in the absence of family visits, most death row prisoners are completely dependent on resources supplied by prison authorities. But the authorities do not provide mattresses or sheets and only supply 2 litres of water per prisoner per day for their washing and cooking needs, as the prison faces major water shortages. Some wait for the rain for weeks in order to wash, using tanks installed by the ICRC. In addition to these extremely poor hygiene conditions, there is a high level of promiscuity,

³²⁷ Human Rights Watch, “DR Congo: Children held in remote military prison”, 2016, available at www.hrw.org (accessed on 14 November 2019).

with more than 40 detainees locked up in very small spaces, which leads to the spread of illnesses, in particular tuberculosis and diarrhoeas. Two deaths were reported by prisoners in June 2019. Jean Bompengo, sentenced to death during proceedings against the murderers of Laurent-Désiré Kabila, died there in July 2019. Furthermore, it should be noted that while some prisoners acknowledged having received visits from their wives, several reported that their wives had been forced to have sexual relations in order to earn the right to meet with their husband.

According to those interviewed, the prison is managed by the capita's team: its members, wearing uniforms, have more rights than other prisoners and exert arbitrary discipline. Members of the capita's team grant the right to move within the prison or to engage in sports or leisure activities. Some death row prisoners were, therefore, authorised to practice small trades and activities inside the prison, but several death row prisoners explained that they had no activities, as they had no connection with members of the capita's team. Some mentioned abuses and violence by the capita's team, targeting in particular those belonging to certain tribes from eastern DRC; one of them even denounced cases of rape. Some also referred to placement in a punishment cell for lengthy periods: prisoners are naked, water is thrown over their body and they are not allowed any contact with the outside world during the punishment. The malaise of death row prisoners and the feeling of abandonment in this prison are harrowing.

A VERY DYNAMIC CONGOLESE ABOLITIONIST MOVEMENT



The Congolese abolitionist movement was launched by the CPJ, a human rights organisation founded in 1999, at a time when the COM was sentencing dozens of civilians and soldiers to death after summary trials. The CPJ, which is part of several networks, including the World Coalition Against the Death Penalty,³²⁸ conducts fact-finding missions and monitors the situation of people sentenced to death in several prisons in the country. The organisation's President, lawyer Liévin Ngondji, co-authored the study carried out in 2005 with death row prisoners in the country, which received the Human Rights Prize of the French Republic.³²⁹ The CPJ also advocates to national, regional and international decision-makers in favour of a universal moratorium, including through the publication of reports, such as the alternative report submitted to the UPR in 2019, in partnership with ECPM.³³⁰ Since its establishment, it has participated in all the World Congresses Against the Death Penalty organised by ECPM.

The CPJ coordinates the *Coalition contre la peine de mort en République démocratique du Congo* (Coalition Against the Death Penalty in Democratic Republic of the Congo – CCPM-RDC). This coalition, which has been active since 2003, was established following the decision of Congolese President Joseph Kabila to suspend the moratorium on executions.³³¹ The aim of the CCPM-RDC is to strengthen links among abolitionist actors, in order to

328 The CPJ participated in the creation of the World Coalition Against the Death Penalty.

329 Bégot M., Ngondji L., *op. cit.*, 2005.

330 ECPM, CPJ, The Advocates for Human Rights, World Coalition Against the Death Penalty, *op. cit.*, 2019.

331 Gorchs-Chacou F., Sculier C., *The Death Penalty in the Great Lakes Region of Africa*, World Coalition Against the Death Penalty, 2008, p. 22.

improve their actions' impact, with a view to reducing and eventually abolishing death sentences and executions.

The CCPM-RDC and the CPJ are very active in DRC. With the support of international partners, they organised numerous awareness-raising and advocacy events on abolition of the death penalty, including the African Day Against the Death Penalty in 2007, which established the Great Lakes Coalition Against the Death Penalty; the International Conference of Central and Eastern Africa on the Abolition of the Death Penalty in 2012; the National Conference of Abolitionist Actors in 2017; and a Regional Parliamentary Seminar on the role of parliamentarians in the promotion of the abolition of the death penalty in Africa. This seminar was organised under the sponsorship of DRC's President of the National Assembly in 2018.³³² On the initiative of the CPJ, the *Coalition d'Afrique francophone contre la peine de mort* (Coalition of French-Speaking Africa Against the Death Penalty) was formally established during the World Congress Against the Death Penalty in February 2019.

As a result of the CCPM-RDC and the CPJ's actions, the movement towards abolition has been a significant success. The mobilisation of parliamentarians, lawyers, judges and prosecutors continues to grow. Since 2013, several abolitionist networks have been launched, demonstrating the dynamism of the Congolese abolitionist movement: the *Réseau des associations de défense des droits de l'homme et des militants abolitionnistes de la peine de mort* (Network of Human Rights Organisations and Activists for the Abolition of the Death Penalty – RADHOMA); the *Réseau des parlementaires abolitionnistes* (Network of Parliamentarians for the Abolition of the Death Penalty); the *Réseau des magistrats contre la peine de mort* (Network of Judges and Prosecutors Against the Death Penalty); the *Réseau des avocats contre la peine de mort* (Network of Lawyers Against the Death Penalty). In addition, the CCPM-RDC and the CPJ initiated the referral of the issue of death penalty to the CNDH. It was in response to this request that the CNDH issued an advisory opinion recommending a formal moratorium and a vote in favour of the United Nations Resolution

³³² ECPM, CPJ, The Advocates for Human Rights, World Coalition Against the Death Penalty, *op. cit.*, 2019, p. 6.

on a universal moratorium on the use of the death penalty. The CNDH also recommended the ratification by DRC of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.³³³ The Congolese abolitionist movement, a pillar in the fight against the death penalty in DRC, continues to strengthen.

³³³ Office of the United Nations High Commissioner for Human Rights, *Summary of Stakeholders' submissions on the Democratic Republic of the Congo* [A/HRC/WG.6/33/COD/3], 2019, para. 2.

CONCLUSION

The history of the death penalty in DRC is intrinsically linked to the colonial justice system, and the military justice system in particular. Shortly after its first regulation at the end of the 19th century, the death penalty was used as a tool to oppress indigenous populations, who were subject to the military justice system despite their civilian status: on the grounds of their “indigenous” status alone, populations lost the right to be tried by an independent and impartial judiciary respecting their fundamental rights. Although the situation evolved with independence and the regular adoption of justice sector reforms, traces of this arbitrariness persist today. Despite the fact that international and regional standards prohibit the application of the military justice to civilian populations, Congolese military courts continue to try civilians. Furthermore, although the Constitution provides that the right of appeal may not be restricted under any circumstances, the CMO established in 2008 does not allow those convicted in first instance to exercise this right.

In DRC, the harmonisation of constitutional standards with laws and regulations presents challenges. In 2006, the Constitution provided for the sanctity of human life and the non-derogable nature of the right to life, leading the authorities and the CNDH to consider that the abolition of the death penalty was enshrined in the Constitution. However, civilian and military courts continue to apply the death penalty against civilians and military personnel on the basis of the ordinary Criminal Code of 1940 and the Military Criminal Code of 2002. The number of people sentenced to death in proceedings that violate fundamental principles of the right to a fair trial continues to rise. More than 510 people, women and men, civilians and soldiers, Congolese and foreign nationals, are incarcerated in appalling conditions, with extremely limited access to hygiene, food and health care, without any psychological support, subjected to the arbitrary treatment of other prisoners or unscrupulous personnel. About 20 people, sentenced by the COM more than 15 years ago following political trials, are still alive: they are still being detained, despite calls for their release launched by the ACHPR and national and international organisations.

The Congolese abolitionist movement has launched several initiatives over the past few years, which have contributed to put the abolition of the death penalty back on the agenda. The involvement of President Félix Tshisekedi in the release of a Congolese national sentenced to death abroad in July 2019, the announcement of the commutation of all death sentences in October 2019 and the abolition of capital punishment in the draft Congolese Criminal Code are strong signals. They give good reasons to hope for a clear change in the regime’s position towards the abolition of the death penalty in fact and in law.

RECOMMENDATIONS

The recommendations of this study are based on the interviews and research conducted.

RECOMMENDATIONS TO THE CONGOLESE STATE

Commit to the abolition of the death penalty

- Ratify the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty
- Support the United Nations Resolution on a universal moratorium on the use of the death penalty
- Instruct judges and prosecutors to observe a moratorium on the imposition of the death penalty
- As announced by the Deputy Minister of Justice in October 2019, commute the sentences of all people sentenced to death to sentences of imprisonment, in fact and in law

Harmonise laws and regulations with constitutional provisions

- Amend the provisions of the Criminal Code and the Military Criminal Code to bring them into conformity with the Constitution, excluding the death penalty from the range of penalties
- Remove the restriction on the right of appeal to a higher jurisdiction in operational courts
- In the event that abolition is not immediately approved, limit the application of the death penalty, as soon as possible, to the most serious crimes. In particular, exclude the death penalty for the crimes of criminal association, armed robbery and extortion
- Amend legislation to ensure that military courts no longer have jurisdiction over civilians

Put an end to torture and ill-treatment from the pre-trial phase

- Condemn publicly and at the highest level torture and ill-treatment perpetrated by security forces
- Guarantee the opening of in-depth investigations by prosecutors and judges into any allegation of torture, ill-treatment or procedural irregularity

- Bring perpetrators of acts of torture and ill-treatment to justice
- Amend legislation to expressly prohibit the use of confessions under duress, in accordance with the Convention Against Torture ratified by DRC
- Amend legislation to ensure that the presence of a lawyer is compulsory from the pre-trial phase and throughout the proceedings
- Ensure that the alleged victims of torture or ill-treatment have access to forensic examination as soon as possible
- Ensure that all detainees have the opportunity to inform their relatives of the reasons for their arrest, as soon as possible

Ensure high-quality judicial representation for people facing the death penalty

- Inform those arrested of their right to access an interpreter, legal assistance and a medical doctor immediately upon their arrest
- Adopt measures to ensure that all people facing the death penalty are represented by experienced and properly remunerated lawyers or advocates and allocate the necessary resources to ensure that all defendants have access to a lawyer or advocate with the means to analyse cases before court hearings
- Amend legislation to ensure that compulsory free legal assistance is provided to persons suspected of crimes facing the death penalty, from the pre-trial phase
- Guarantee the presence of an interpreter for all accused persons who do not understand the language of the court, from the pre-trial phase and throughout the proceedings

Review the case of death row prisoners

- Review the cases of those sentenced to death for crimes committed when they were minors, as soon as possible³³⁴
- Review the cases of all those convicted in proceedings which failed to respect national standards and fundamental guarantees of the right to a fair trial: torture and ill-treatment, absence of counsel, absence of interpreter, discriminatory decisions, etc

Strengthen the availability and effectiveness of remedies

- Ensure that the transfer of those sentenced to death at first instance to other prison establishments does not hinder the exercise of their right to appeal or to attend hearings before appeal courts

³³⁴ The list of those concerned is held by the CPJ.

- Ensure that the rights to pardon and amnesty apply effectively and without discrimination
- Release all those who have received a pardon and are still in detention
- Ensure that the case files of those whose sentence was reduced on appeal are transmitted to the administration services of the relevant prison establishments³³⁵
- In accordance with the decision of the ACHPR, discharge prisoners sentenced to death by the COM

Strengthen the rights of foreign nationals

- Alert diplomatic representations as soon as their nationals have been arrested
- Inform foreign nationals of their right to consular assistance from the pre-trial phase
- Contact the diplomatic representations of detained foreign nationals to inform them of the status of case files and the location of incarceration of their nationals

Improve conditions of detention for death row prisoners, in accordance with the Nelson Mandela Rules

- Significantly increase budgets allocated to the nutrition and health of detainees, taking into consideration the prison population and take measures to combat prison overcrowding
- Pursue the renovation of prison establishments, ensuring observance of international standards
- Undertake psychiatric examination of mentally ill death row prisoners and, if necessary, commit them to institutions appropriate to their state of health³³⁶
- Ensure that death row prisoners can receive visits from their family and legal counsel without hinderance
- Document all transfers to enable families to be informed of where their relatives are being detained
- Detain death row prisoners in prison establishments close to their families
- Ensure that all prisoners can move around within prison establishments, in accordance with the applicable internal regulations, in particular at the Angenga Detention Camp

³³⁵ *Ibid.*

³³⁶ The list of people met suffering from these disorders is held by the CPJ.

- In all prison establishments, ensure that prisoners are allowed out of their cells and have access to sports and socio-cultural activities, including at the Ndolo Prison
- Carry out in-depth investigations into allegations of sexual violence perpetrated by security forces on women visiting prisoners at the Angenga Detention Camp and bring those responsible to justice
- Carry out in-depth investigations at the Angenga Detention Camp into discriminatory practices and acts of violence inflicted on people from certain provinces of DRC, in particular into allegations of rape perpetrated by other prisoners and bring those responsible to justice
- Prohibit work for the benefit of prison staff undertaken by those detained under the restricted-release regime
- Establish a body of skilled and adequately paid prison staff to monitor and supervise detainees and put an end to the imposition of discipline by other prisoners (“capitas”)

Establish an independent mechanism to prevent torture

- Involve civil society in the mechanism to prevent torture which is currently being established

Publish data on the death penalty

- Publish annual data on the number of people sentenced to death, the nature of the offences for which they have been sentenced, the number of people sentenced to death in detention, the location of their detention, the number of people sentenced to death who have died in detention, the reasons for their deaths, the number of death sentences commuted or confirmed on appeal and the number of death row prisoners who received a presidential pardon

RECOMMENDATIONS TO HUMANITARIAN ORGANISATIONS AND CIVIL SOCIETY ORGANISATIONS

Support death row prisoners

- Develop activities to provide legal support and to raise detainees’ awareness of their rights, in particular the right to appeal court decisions
- Provide assistance to death row prisoners to ensure they benefit from the regulation on exemption from fees for indigent persons, in particular in relation to the payment of costs of appeal

APPENDIX

- Ensure the maintenance of family ties for the most isolated death row prisoners by contacting their families
- Continue regular visits to detainees, in particular death row prisoners, and provide basic supplies to prison establishments

Pursue the mobilisation of actors

- Strengthen networks and exchanges between actors in the law and justice sector on the issue of the death penalty
- Pursue advocacy and awareness-raising activities for decision-makers and the general public on the abolition of the death penalty
- Strengthen advocacy aimed at improving prison conditions

RECOMMENDATIONS TO REGIONAL AND INTERNATIONAL COOPERATION STAKEHOLDERS

Conduct high-level advocacy

- Advocacy on the abolition of the death penalty and the fight against torture and ill-treatment, in fact and in law
- Advocacy for the creation of a high-quality body of prison staff

Continue funding the justice sector

- Continue to support the justice sector, in particular in relation to organisation and holding of court hearings, legal representation of prisoners and training of actors in the criminal process (the police, the military, judges and prosecutors, etc.)
- Fund a greater number of projects seeking to improve prison conditions, including legal assistance, access to health care, combating malnutrition, sanitary conditions, maintaining detainees' social and family ties, etc

APPENDIX 1: RATIFICATION STATUS OF INTERNATIONAL AND REGIONAL INSTRUMENTS (DRC)

Treaty	Signature date	Ratification/ Accession date (a)
<i>International instruments</i>		
CAT – Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment		18 March 1996 (a)
CAT-OP – Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment		23 Sept. 2010 (a)
CCPR-OP2-DP – Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty		
CED – International Convention for the Protection of All Persons from Enforced Disappearance		
CEDAW – Convention on the Elimination of All Forms of Discrimination against Women	17 July 1980	17 Oct. 1986
CERD – International Convention on the Elimination of All Forms of Racial Discrimination		21 April 1976 (a)
CMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		

CRC – Convention on the Rights of the Child	20 March 1990	27 Sept. 1990
CRC-OP-AC – Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict	8 Sept. 2000	11 Nov. 2001
CRC-OP-SC – Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography		11 Nov. 2001 (a)
CRPD – Convention on the Rights of Persons with Disabilities		30 Sept. 2015 (a)
ICCPR – International Covenant on Civil and Political Rights		1 Nov. 1976 (a)
ICESCR – International Covenant on Economic, Social and Cultural Rights		1 Nov. 1976 (a)
Regional instruments		
African Charter on the Rights and Welfare of the Child	2 Feb. 2010	
African Charter on Human and Peoples' Rights	23 July 1987	20 July 1987
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	5 Dec. 2003	9 June 2008

APPENDIX 2: LIST OF OFFENCES CARRYING THE DEATH PENALTY IN DRC

Ordinary Criminal Code

Murder and premeditated murder (art. 44 and 45), murder by poisoning (art. 49), conducting superstitious practices resulting in death (art. 57), torture of a person who has been abducted, arrested or detained resulting in death (art. 67), torture of an enslaved person resulting in death (art. 68), armed robbery (art. 81bis), murder to facilitate theft or extortion or to guarantee impunity for such crimes (art. 85), arson resulting in death (art. 108), criminal association (art. 156 to 158), treason (art. 181 to 184), espionage (art. 185), attack against the Head of State (art. 193), attack and participation in armed gangs (art. 200, 202, 204, 207 and 208), genocide (art. 221), crime against humanity (art. 222), war crime (art. 223).

Military Criminal Code

Desertion (art. 45, 46, 48 to 51), provocation of an officer to commit desertion (art. 53), abandonment of post and incitement to abandonment of post (art. 55, 56, 60, 61, 88, 114, 116, 117 and 121), cowardice (art. 57, 119, 120), capitulation (art. 58), demoralising troops (art. 59), plotting against a higher authority (art. 62), genocide, crimes against civilians and serious violations of humanitarian law in times of war (art. 64, 65, 103, 164, 166 to 170, 172, 191, 192 and 194), wilful destruction, loss or decommissioning of equipment or buildings (art. 67, 68, 69 and 202), destruction of military buildings or equipment resulting in death (art. 68), forgery of a command or staff report undermining national defence in time of war or causing the destruction of troops (art. 72), insubordination, mutiny or insurrection (art. 90 to 94 and 113), act of rebellion resulting in death (art. 91), insulting a higher authority or sentry (art. 95 to 97, 100 and 101), breach of instructions and culture, holding, trafficking or commercialising drugs, hemp for smoking or other narcotic substances in a military facility, in times of war, or when the safety of a military establishment is threatened (art. 113 and 195), treason in times of war (art. 128, 133, 148 to 150 and 154), espionage (art. 129), misappropriation of goods seized, sequestered or confiscated by an officer of the public prosecutor's office in times of war (art. 132), attempt to assist the enemy or prisoners of war (art. 134, 143, 179 and 190), terrorist act committed by an armed gang (art. 135), participation in an insurrectional movement (art. 138 and 139), usurpation of command (art. 140), demoralisation of troops (art. 146), attack (art. 158), killing through reprisals (art. 171), preventing military recruitment or mobilisation (art. 189).

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APPENDIX 4:

ADDRESS BY THE DEPUTY MINISTER OF JUSTICE ON 10 OCTOBER 2019

[Democratic Republic of the Congo]
[MINISTRY OF JUSTICE]

SPEECH BY THE DEPUTY MINISTER OF JUSTICE
ON THE 17TH WORLD DAY AGAINST THE DEATH PENALTY

KINSHASA, 10 October 2019

**Honourable Members of Parliament, Senators;
Your Excellency the Minister of Human Rights;
Your Excellencies Ambassadors and Heads of Diplomatic Missions;
Mr. President of the *Commission Nationale des Droits de l’Homme*;
Mr. President of the Culture for Peace and Justice;
Ladies, gentlemen, in your respective roles and capacities;**

It is a real pleasure for me to deliver this address on behalf of the Deputy Prime Minister, the Minister of Justice and Keeper of the Seals, at this ceremony to mark the World Day Against the Death Penalty on the theme “Children, unseen victims of the death penalty” and the sub-theme “The death penalty in Democratic Republic of Congo: taking stock”.

Concerning the situation on the death penalty in Democratic Republic of Congo, I would first like to recall that the Constitution promulgated on 18 February 2006 introduces a new vision of criminal policy in the country which, henceforth, guarantees the protection of the individual’s fundamental rights in keeping with the profound aspirations, beliefs and immense hopes for a new, more humane and humanist society.

Indeed, in Title II, the Constitution of the Republic enshrines fundamental rights, such as:

- The right to life of all persons;
- The respect of physical integrity;
- The right not to be subjected to torture, cruel, inhuman or degrading treatment, etc.

In the face of many sacred, unalienable and imprescriptible rights to which no derogation is permitted, even when a state of siege or of emergency has been declared; Congolese criminal law continues

to provide for the death penalty for numerous offences. However, it should be noted that, in spite of this, recent developments on the issue of the death penalty in Democratic Republic of Congo express the ideals of a society which cherishes the core values of humanity, republican virtues, the emergence of the Rule of Law and the consolidation of democracy.

It is for this reason that in 1990 the Sovereign National Conference adopted a resolution providing for the abolition of the death penalty. In 2000, the Government endorsed a moratorium on the use of the death penalty; this moratorium was extended in 2001 at the Commission on Human Rights in Geneva and continued until the conclusion of parliamentary debates on the abolition of the death penalty.

Later, on 1 July 2002, Democratic Republic of Congo deposited its instruments of ratification of the Rome Treaty establishing the International Criminal Court. This Treaty, in its list of penalties, under Article 77, does not provide for the death penalty, even though it addresses the most serious crimes against internal and international public order, namely genocide, crimes against humanity, war crimes and the crime of aggression.

Since 2004, Democratic Republic of Congo has ratified the United Nations Resolution on a moratorium on the death penalty which prohibits its implementation when it has been passed in a court ruling. In 2006, the laws on the repression of sexual violence and the law on the protection of the child removed the death penalty, replacing it with life imprisonment, even in cases in which the incriminated act resulted in the victim's death.

As we have seen, the contemporary legal context in Democratic Republic of Congo is not conducive to the death penalty, since the Constitution enshrines the right to life.

Article 16 of the Constitution proclaims the sanctity of human life, without reference to the possibility of causing death. Thus adopting an abolitionist stance, the Constitution leaves no room for the death penalty to exist. This means that *de lege ferenda*, any law providing for such penalty will be without constitutional basis.

Yet considering, on the one hand, that criminal laws providing for the death penalty have not been expressly repealed by members of the constituent assembly and that, on the other hand, the Congolese criminal judge is not judge of the constitutionality of laws but of legality, the legislator should draw all necessary legal consequences from the provisions of Articles 16 and 61 of the Constitution, which enshrine the primacy of the right to life of the human individual, in

order to enact implementing criminal legislation.

Ladies and gentlemen

You will agree that, in Democratic Republic of Congo, as elsewhere, the abolition of the death penalty is a major political undertaking for the humanisation and modernisation of criminal policy.

Our Government, in view of the country's security environment, implements this policy with great caution and sensitivity in order not to give the population the impression or the sentiment that justice is not being done or is being administered in a lax and complacent manner.

It is for this reason that, at the request of the Government, the *Commission permanente de réforme du droit congolais* (Permanent Commission for the Reform of the Congolese Legislation) has been carrying out deep reflection on offering the country a criminal law, and in particular a criminal code, which provides the public justice system with an institutional and legal framework, enabling it to play both its normative and moral role, in particular by defining the most appropriate penalties and measures for the defence of society and the protection of the rights of the individual.

To this end, the new draft Congolese criminal code provides for life imprisonment to replace capital punishment, with a sentence of non-reducible duration.

Since no penalty should lead those sentenced to despair, and considering the necessity to take into consideration the detainee's behaviour on his or her path to re-socialisation and modification by way of pardon or conditional release, a longer period of detention, could be provided for, for example, between 25 and 30 years.

Pending the completion of this reform, in order to comply with the Constitution and in view of the moratorium, all death sentences shall be commuted to either imprisonment with hard labour or life imprisonment, or a maximum of 20 years.

It goes without saying that, in order to produce the desired results with the greatest possible effectiveness, these innovative criminal law developments must be accompanied and supplemented by the readjustment of the relevant judicial and prison policies.

Ladies and Gentlemen, this reflects the current state of play, as well as some perspectives for the future on the issue of the death penalty in Democratic Republic of Congo.

I have no doubt that the framework provided by this event, through

the exchange of ideas, knowledge and experiences, will lead the way for the development of new synergies to enable us to carry out the adjustments and arrangements necessary in Democratic Republic of Congo, to fulfil the ideal of abolishing the death penalty.

I thank you for your attention.

Bernard TAKAISHE NGUMBI, Lawyer
Deputy Minister

TOWARDS A SILENT DEATH

CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH DEMOCRATIC REPUBLIC OF THE CONGO

“I am astonished that I am still on death row given that on appeal I was sentenced to 20 years in prison” – Antoine, detained in Angenga

“I’ve been here for 4 years. This is the first time I have met people from the outside. Your visit gives me hope. I don’t get any visits because my family is in Kinshasa” – Gilbert, detained in Angenga

This publication is the result of a fact-finding mission conducted in Democratic Republic of the Congo between April and June 2019 by the Congolese organisation *Culture pour la paix et la justice* (CPJ), the *Réseau des magistrats congolais contre la peine de mort* (Network of Congolese Judges and Prosecutors Against the Death Penalty), the *Réseau des avocats congolais contre la peine de mort* (Network of Congolese Lawyers Against the Death Penalty) and ECPM (Together Against the Death Penalty). It was locally directed by Liévin Ngondji, lawyer and President of CPJ, coordinated by George Kishabongo, member of the Network of Judges and Prosecutors, and conducted by members of the Network of Lawyers.

The fact-finding team visited 10 prisons and met with 257 death row prisoners, families of death row prisoners, prison governors and guards and lawyers. Carole Berrih, Director of *Synergies* Coopération and author of this report, provides a careful analysis of the testimonies gathered by the fact-finding team in the context of the criminal justice system and the prison system in the country.

This report is part of the “Fact-finding missions on death row” series, which aims to provide situational analysis of the living conditions of death row prisoners awaiting implementation of their sentence in various countries around the world. The dual objective is to describe the reality of death row in these countries and to engage public opinion.



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