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MEMORANDUM



TO: Mr. Vijay Nambiar, Chef de Cabinet
Executive Office of the Secretary-General

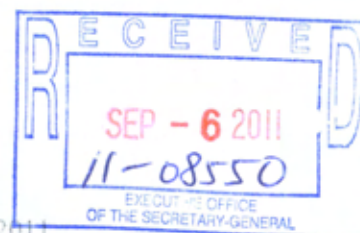
REF: GW/mai

DE/FROM: Navi Pillay
High Commissioner for Human Rights

DATE: 2 Sept 2011

OBJET:
SUBJECT:

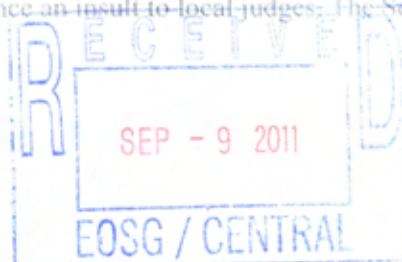
Update on follow-up to the DRC Mapping Report ✓



1. I would like to refer to my code cables dated 21 March and 13 May 2011 regarding OHCHR's follow-up to the 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.
2. On 22 August 2011, the Senate of the DRC rejected a revised draft law establishing a hybrid international/national specialized court to try the most serious crimes committed since 1990, which had been presented to parliament by the Minister of Justice on 12 August 2011. The establishment of such a specialized judicial mechanism, involving both Congolese and international judges and prosecutors, had been one of the key recommendations emanating from the Mapping Report. The rejection of the draft law marks a set-back to efforts to end impunity for serious human rights violations in the DRC, but also gives an opportunity to rectify on current shortcomings in the draft law.
3. In the circumstances, it is important to hold an international conference on transitional justice in the DRC, and use that opportunity not only to reinvigorate momentum, but also to review the reasons for the rejection and discuss possible corrections. Such a conference should be held very soon after the DRC elections, with the view to engaging parliamentarians very early in their new legislative mandate.

Rejection of the Draft law on the specialized mixed court

4. The draft law was reviewed on 22 August 2011 during a special session of Parliament and rejected by the Senate on the following three grounds: (1) potential overlapping jurisdiction with the Court of Appeals which, after the envisaged procedural reforms, would enjoy concurrent and default competence to prosecute the same crimes; (2) the complaints of unconstitutionality of some of the provisions relating to the special status of Congolese judges on the Court; and (3) the integration of international judges in the national jurisdiction, which the Senate felt could be seen as an acknowledgment of the impossibility of reforming national courts and hence an insult to local judges. The Senate



stated that it would favor the outright establishment of an ad hoc international criminal tribunal for the DRC.

5. The Minister of Justice will have to examine the issues raised by the senators and decide whether to re-table a revised draft law to the current parliament. This is unlikely to succeed given the profound reservations of the current Senate and the fact that presidential and parliamentary elections are imminent (28 November). A new Senate might be more amenable to adopting the draft law, in particular if it is presented after adequate consultation and receives strong support from civil society and the international community.
6. Regarding the Senate's alternative proposal of an ad hoc international criminal tribunal for the DRC, it is to be noted that the Mapping Report had expressed a preference for the establishment of a hybrid judicial mechanism involving both the international and Congolese judges. The main reasons for that preference are these: the costs of an ad hoc international criminal tribunal will exceed what donors may be willing to fund; if set up outside the DRC, the international tribunal's work would be less visible to the Congolese population than that of a mixed tribunal based in the DRC; and, arguably, an international tribunal that is completely delinked from Congolese institutions may not be as likely to generate momentum for the overall reform of the Congolese criminal justice system (although some would say that Rwanda is an example that debunks that argument). On the other hand, an ad hoc international tribunal offers the strongest guarantees of justice, emanating from an impartial process that is insulated from undue political pressure. Ultimately, I would not recommend against an international criminal tribunal if that were at all possible to establish.

Shortcomings of the current process

7. In March 2011, OHCHR, in cooperation with MONUSCO, shared comments on what was then the Draft Law establishing Specialized Chambers (which has recently been changed by the Minister of Justice into a draft bill on a specialized court) with the Government, members of the Parliament and civil society. At the time, OHCHR expressed concerns about some of the provisions of the law, including those related to the lack of independence of the judges, the lack of clarity on the role of the prosecutor, the applicable legal framework, the unconstitutional nature of some of the provisions, as well as the possibility of applying the capital punishment. OHCHR stressed that the failure of the law to comply with international standards would undermine the credibility of the Special Chambers and, consequently, the willingness of key donors and international judges to support and participate in this process. Many of these concerns still persisted with regard to the draft law eventually presented to Parliament.
8. OHCHR had also advised the Minister of Justice to avoid short-circuiting the process and insisted on ensuring a consultative process. During the OHCHR mission in March 2011, the Minister of Justice explained that his intention was to rush the draft law on a special court through the Parliament by using a fast track procedure, which resulted in the lack of adequate consultation with civil society.

Organization of a conference on transitional justice

9. In anticipation of the draft law being adopted, the UN Joint Human Rights Office of MONUSCO had put forward the proposal of a conference on transitional justice and shared a draft concept note with the Minister of Justice for comments and advice. In view

of the rejection of the draft law, this proposal has now taken on an added relevance and urgency. It will provide a platform for consultations in order to seek the views of various stakeholders on how to address the concerns raised by the Senate, civil society and the United Nations ; while at the same time maintaining the momentum behind the need for transitional justice in the DRC. It stands to be hoped that the political impetus of such a conference will encourage the Government to present a revised draft law to the newly elected parliament in 2012.

10. The conference of transitional justice could ideally be organized early next year, and very soon after a new Government and/or Parliament is or are in place. In the near future, I intend to write to the Minister of Justice to convey my appreciation for his initiative to present a draft law to the current parliament, express hope that a revised law will be presented to the next parliament and reaffirm the proposal of a conference on transitional justice in the DRC.

Other relevant developments

11. OHCHR is engaged with various parts of the UN system including DPKO, DPA, PBSO, OLA, and UNDP to secure their involvement in follow-up initiatives. OHCHR also held a series of meeting with the representatives of the countries mentioned in the Mapping Report, including Rwanda, Uganda and Angola, to defuse the tension generated by the publication of the report and prevent negative impact on the operations of the office. OHCHR is in the process of sending a new human rights adviser to Rwanda. Renewal of the Host Country Agreement with the Government of Uganda which expires at the end of October 2011, is under discussion with the Government.

Cc: Mr. Edmond Mulet
Mr. Lynn Pascoe
Ms. Patricia O'Brian
Mr. Roger Meece
Mr. Ivan Simonovic