

ACCESS TO JUSTICE FOR CHILDREN: DEMOCRATIC REPUBLIC OF CONGO

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

The Democratic Republic of Congo (“DRC”) ratified the CRC on 27 September 1990.¹ It has also ratified the Optional Protocols to the CRC on the involvement of children in armed conflict,² and on the sale of children, child prostitution and child pornography.³ As at the date of this report, it has not ratified the third optional protocol to the CRC on a communications procedure.⁴

The President of the Republic is in charge of treaty negotiation and ratification.⁵ The ratification of certain types of international treaties such as peace treaties, trading agreements, agreements relating to international organisations, the resolution of conflicts or civil status, those committing public funds, and those modifying the law or the national territory, must be authorised by a law.⁶

All international treaties and conventions regularly ratified and published by the DRC automatically take precedence over national law.⁷

B. Does the CRC take precedence over national law?

As the CRC was duly ratified and published, it takes precedence over national legislation.⁸ However it is not entirely clear whether it would also prevail over a conflicting provision of the Constitution. In theory, it is not possible to have a

¹ *Ratification Status of the Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

² *Ratification Status of the Optional Protocol on the involvement of children in armed conflict*, UNITED NATIONS TREATY COLLECTION, available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

³ *Ratification Status of the Optional Protocol on the sale of children, child prostitution and child pornography*, UNITED NATIONS TREATY COLLECTION, available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

⁴ *Ratification Status of the Optional Protocol on a communications procedure*, UNITED NATIONS TREATY COLLECTION, available at:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en.

⁵ Constitution of the Third Republic of the DRC, 2005, art. 213, available in English at:

https://www.constituteproject.org/constitution/Democratic_Republic_of_the_Congo_2011.pdf; and in French at: http://www.senat.cd/images/Constitution_de_la_RDC.pdf.

⁶ *Ibid*, art. 214.

⁷ *Ibid*, art. 215.

⁸ *Ibid*.

treaty provision which contradicts the Constitution, because before ratification of any treaty, the Constitutional Court is seized to check the constitutionality of the treaty and, if there are contradicting dispositions, the Constitution is amended.⁹

C. Has the CRC been incorporated into national law?

As the CRC automatically gained precedence over national law at its publication, it does not need to be incorporated into national law. However, the Preamble of the 2006 DRC Constitution directly refers to the State's commitment to the CRC.¹⁰

Furthermore, the DRC has implemented aspects of the CRC by adopting a number of domestic laws intended to promote and ensure the rights of children.¹¹ There have been a number of legislative reforms in the area of children's rights, particularly Act No. 001 09/10 of 10 January 2009 on Child Protection ("Child Protection Code").¹²

The following instruments also address the rights of the child: Congolese Family Code (which is the equivalent of the Civil Code),¹³ Interministerial Decree No. 12/MINTPS/AR/34/2006 of 10 June 2006 on the creation and operation of the National Committee against the worst forms of child labour,¹⁴ and Ministerial Order No. 11/CAB/VM/AFF.SO.F/98 on the creation and operation of the National Council of Children.¹⁵

D. Can the CRC be directly enforced in the courts?

According to the Constitution, the courts must apply duly ratified international treaties.¹⁶

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Research has found no such examples.

⁹ *Ibid*, art. 216.

¹⁰ *Ibid*, Preamble.

¹¹ *Second periodic report of the Democratic Republic of Congo to the UN Committee on the Rights of the Child*, CRC/C/COD/2, 24 July 2008, para. 32, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCOD%2f2&Lang=en.

¹² Child Protection Code, available in French at:

<http://www.leganet.cd/Legislation/JO/2009/L.09.001.10.01.09.htm>.

¹³ Family Code, available in French at:

<http://www.leganet.cd/Legislation/Code%20de%20la%20famille/Table.htm#Livre%20III>.

¹⁴ *Interministerial Decree No. 12/MINTPS/AR/34/2006 on the creation and the operation of the National Committee against the worst forms of child labour*, 10 June 2006, available in French at: http://www.journalofficiel.cd/jordc/adm/uploads_jo/336b049bb455a4e6bc568839e8f468f3.pdf#nameddes t=5.

¹⁵ See details in *Reply to list of issues on the second periodic report of the DRC to the UN Committee on the Rights of the Child*, CRC/C/COD/Q/2/Add.1, 30 December 2008, question 2, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCOD%2fQ%2f2%2fAdd.1&Lang=en.

¹⁶ *Constitution*, art. 153.4.

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Children's rights violations may be challenged through civil actions, legal action in the Children's Court under the Child Protection Code, administrative proceedings, or proceedings referred to the Constitutional Court (see part III.A below).

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

The Constitution,¹⁷ the Family Code,¹⁸ and the Child Protection Code¹⁹ define minors as children under 18 years of age. In the Child Protection Code, this definition only applies to the measures discussed by this law. However, the Constitution's definition has a universal reach and supersedes all contradictory national laws (including minimum age of marriage and criminal responsibility).

²⁰

The Family Code states that minors cannot exercise their civil rights;²¹ until their majority or emancipation they stay under their parents' authority. If the parents disagree, the will of the child's father will prevail, although the mother can then appeal to the Peace Tribunal.²² Emancipation can be requested by the child's parents or legal guardian once he/she has reached 15.²³ In the civil and criminal courts, children would thus not be able to bring cases of violations of their rights in their own name. In the event the child's interests are in contradiction with the interests of his/her parents or legal guardian, the civil judge will appoint a suitable representative or fulfil this office him/herself.²⁴

The Child Protection Code states that any child may apply to the Children's Court on his/her own behalf.²⁵ Of course, the law does not prohibit the submission of an application by a parent or guardian, or even a representative.

C. In the case of infants and young children, how would cases typically be brought?

The Child Protection Code states that the child's best interests must govern all decisions and measures taken concerning a child.²⁶ However, this principle has not been translated into specific procedures concerning a legal challenge of the

¹⁷ *Ibid*, art. 41.

¹⁸ Family Code, Book II, Title II, Chapter II, art. 219.

¹⁹ Child Protection Code, Title I, Chapter I, art. 2-1.

²⁰ *Second periodic report of the Democratic Republic of Congo to the UN Committee on the Rights of the Child, CRC/C/COD/2*, 24 July 2008, para. 66; see also *Constitution*, art. 221.

²¹ *Family Code*, Book II, Title II, Chapter I, art. 215.

²² *Ibid*, Book II, Title II, Chapter IV, art. 317.

²³ *Ibid*, Book II, Title II, Chapter II, art. 289.

²⁴ *Ibid*, Book II, Title II, Chapter I, art. 216.

²⁵ Child Protection Code, Title III, Chapter III, art. 102.

²⁶ *Ibid*, Title I, Chapter I, art. 6.

violations of infants' and young children's rights,²⁷ which would be brought by the child's parents or legal guardian.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

The Constitution states that "all persons have the right to defend themselves or to be assisted by a defender of their choice" during criminal proceedings, thus affirming a right to counsel during a criminal trial.²⁸ However, there is no specific provision concerning free or subsidised legal aid as such and in general.

In civil cases, the Public Ministry may ask the presiding judge to appoint legal counsel to people unable to defend themselves, such as children.²⁹ Furthermore, civil cases involving minors are automatically sent to the Public Ministry for an opinion, meaning that the Public Ministry is aware of every such case and always has the option to ask for the appointment of legal counsel.³⁰ It is not specified whether this appointed legal counsel would be free or subsidised.

Moreover, the Child Protection Code provides that a child has the right to assistance of counsel, of his/her own choosing or appointed by the judge, in the context of the Children's Court.³¹ It is however unclear whether this assistance is free or subsidised.

It appears that a bill on free legal aid is being discussed, as a national forum on legal aid has taken place on 23 and 24 June 2015 to improve the bill project.³²

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g. would a child's parents or guardian have to agree to a case being brought)?

Parents or guardians are not required to give their consent or opinion when a case is submitted to the Children's Court by the child him/herself.³³

The lack of judicial bodies in remote parts of the country can prevent children from accessing justice. There is a need for more instances to protect children's rights, especially in the nowadays armed conflict context.

²⁷ UN Committee on the Rights of the Child, Concluding observations on the second periodic report of the DRC, CRC/C/COD/CO/2, 10 February 2009, para. 31, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCOD%2fCO%2f2&Lang=en.

²⁸ Constitution, art. 19.

²⁹ Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title I, Chapter III, art. 68, available in French at: <http://leganet.cd/Legislation/Droit%20Judiciaire/LOI.13.011.11.04.2013.htm#TICIII>.

³⁰ *Ibid*, art. 69.

³¹ Child Protection Code, Title III, Chapter III, art. 104-4.

³² "Faciliter l'accès à la Justice pour les plus vulnérables en créant un système national d'aide légale", UNDP, 23 June 2015, available in French at: <http://www.cd.undp.org/content/rdc/fr/home/presscenter/pressreleases/2015/06/23/faciliter-l-acc-s-la-justice-pour-les-plus-vuln-rables-en-cr-ant-un-syst-me-national-d-aide-l-gale/>.

³³ Child Protection Code, Title III, Chapter III, art. 102.

The ignorance of the law by the right-holders (children, their parents or legal guardians) is another barrier for children to access justice.

Finally, adding to the lack of commitment by the State to respect the international instruments that it chose to ratify, there is a lack of material, human and financial resources. These resources are needed to build up and support the long-term paralegal initiatives with the aim to help children to access justice.

III. How can children's rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Criminal court proceedings can only be started by the Public Ministry;³⁴ private prosecutions are not available in the DRC. However, the victim of a crime which is being judged in a criminal court may launch a civil action, concurrently with the criminal trial and at any time during the proceedings, for damages caused by the crime.³⁵ In addition, for lesser crimes, a victim may assign the perpetrator before the court by way of a writ of summons and thus bring the facts to the attention of the Public Ministry, who will then decide whether or not to prosecute.³⁶

A representative of a child may bring a civil case in defence of the child's rights in civil courts.³⁷ Civil cases may be brought by any individual through a declaration given to the clerk of the court, mentioning the names of the claimant and of the defendant, as well as the object of the dispute. The child being represented will also be named.³⁸

The child's parents or guardians, the child him/herself or a social worker can file a legal action at the Children's Court,³⁹ in matters of the child's identity, capacity, filiation, adoption or family relationships,⁴⁰ or to challenge the child's detention.⁴¹ The judge may also decide to hear the case on his/her own accord.⁴²

Complaints requesting the cancellation of an administrative decision may be filed with the appellate courts (against decisions by local authorities) or with the administrative section of the Supreme Court (against decisions by central

³⁴ Code of Criminal Procedure, Chapter V, Section I, art. 53, available in French at:

<http://www.leganet.cd/Legislation/Droit%20Judiciaire/D.06.08.1959.ccp.htm>.

³⁵ *Ibid*, Chapter V, Section IV, art. 69.

³⁶ *The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, January/February 2015, para. 5.3, available at http://www.nyulawglobal.org/Globalex/Democratic_Republic_Congo1.htm; see also *Code of Criminal Procedure*, Chapter V, Section I, art. 54.

³⁷ Code of Civil Procedure, Title I, Chapter I, art. 1, available in French at:

<http://leganet.cd/Legislation/Droit%20Judiciaire/Decret.7.03.1960.htm#TICH1>.

³⁸ *Ibid*, Title I, Chapter I, art. 1-2.

³⁹ Child Protection Code, Title III, Chapter III, art. 102.

⁴⁰ *Ibid*, Title III, Chapter II, art. 99.

⁴¹ *Ibid*, Title I, Chapter I, art. 12.

⁴² *Ibid*, Title III, Chapter III, art. 102.

authorities).⁴³ Concurrently, the individual who suffered damages from the illegal administrative decision may ask for compensation before the same court.

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Any individual may refer to the Constitutional Court a law they deem unconstitutional if it is invoked before a court in a matter concerning that person. The Constitution includes a Bill of Rights, thus allowing for a challenge to a law violating children's rights. The court then stays its decision until the Constitutional Court has given a ruling.⁴⁵

Any individual or group of people who is a victim of a rights violation may submit a complaint to the National Human Rights Monitoring Centre ("NHRMC"). Human rights organisations may also bring about a challenge to rights violations in the place of the victims. The NHRMC can investigate a case of its own accord.⁴⁶

Individuals, including child victims, their parents or legal representatives, groups, or NGOs recognised by the African Union may submit complaints (known as "communications") to the African Committee of Experts on the Rights and Welfare of the Child ("African Committee") about violations of the African Charter on the Rights and Welfare of the Child ("African Children's Charter").⁴⁷ All available domestic remedies must have been exhausted before bringing a case to the African Committee.⁴⁸ The complaint must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, and whether or not the complainant wishes to remain anonymous and the reasons for this.⁴⁹ The African Committee will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁵⁰

⁴³ ORDONNANCE-LOI 82-020 portant Code de l'organisation et de la compétence judiciaires, 31 March 1982, Title II, Chapter III, art. 146, available in French at: <http://www.leganet.cd/Legislation/Droit%20Judiciaire/OL.31.03.82.n.82.020.htm>; see also Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title III, art. 154.

⁴⁴ ORDONNANCE-LOI 82-020 portant Code de l'organisation et de la compétence judiciaires, 31 March 1982, Title II, Chapter III, art. 149.

⁴⁵ Constitution, art. 162.

⁴⁶ Loi organique n°13/011 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme, 21 March 2013, Title V, art. 28, available in French at: http://www.journalofficiel.cd/jordc/adm/uploads_jo/bf7b1c9ea326f4cbda7e0373e1d81ee0.pdf#nameddest=3.

⁴⁷ African Charter on the Rights and Welfare of the Child ("African Children's Charter"), Article 44, available at: <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/acrwc-charter-full-text/>. For more information about communications, see: <http://acerwc.org/the-committees-work/communications/>.

⁴⁸ African Committee of Experts on the Rights and Welfare of the Child, 'Communications', available at: <http://acerwc.org/the-committees-work/communications/>.

⁴⁹ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, 'African Committee of Experts on the Rights and Welfare of the Child: communication procedure', 2012, available at: <http://co-guide.org/mechanism/african-committee-experts-rights-and-welfare-child-communication-procedure>.

⁵⁰ Ibid.

Individuals, groups or NGOs may submit complaints (known as “communications”) to the African Commission on Human and Peoples’ Rights (“African Commission”) about violations of the African Charter on Human and Peoples’ Rights (“African Charter”).⁵¹ All available domestic remedies must have been exhausted before bringing a case to the African Commission.⁵² The complaint must include, amongst other things: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether or not the complainant wishes to remain anonymous and the reasons for this; and the name of the victim, in a case where he/she is not the complainant.⁵³ The African Commission will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁵⁴ If the case relates to serious or massive human rights violations or if the Commission considers that the State is unwilling to comply with its recommendations in the case, the Commission may refer the complaint to the African Court on Human and Peoples’ Rights.⁵⁵ For an example case involving the DRC, see *Communication 259/2002 - Working Group on Strategic Legal Cases v. Democratic Republic of Congo*.⁵⁶

B. What powers would courts have to review these violations, and what remedies could they offer?

Civil actions brought concurrently with criminal proceedings can lead to restitution and compensation, the amount of which is set by the judge.⁵⁷ During criminal proceedings, even if the victim of the crime has not initiated a civil action, the judge will order restitution and/or compensation, if applicable to the case.⁵⁸ Although no specific provision has been found on this matter, it seems likely that the same remedies are available in independent civil actions.

⁵¹ African Charter on Human and Peoples’ Rights (“African Charter”), Article 55, available at: <http://www.achpr.org/instruments/achpr>.

⁵² *Ibid.*, Article 56(5).

⁵³ Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rule 93, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

⁵⁴ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, *African Commission on Human and Peoples' Rights: communication procedure*, 2012, available at:

<http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-communication-procedure>.

⁵⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Article 5, available at:

<http://www.achpr.org/instruments/court-establishment>; Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rules 84(2) and 118, available at:

<http://www.achpr.org/instruments/rules-of-procedure-2010>.

⁵⁶ 24 July 2011, available at:

http://www.achpr.org/files/sessions/14th-eo/communications/259.2002/achpr14eos_decision_259_02_eng.pdf

⁵⁷ Code Pénal, Book I, Section III, art. 15, available in French at:

<http://www.leganet.cd/Legislation/JO/2004/JO.30.11.2004.pdf>.

⁵⁸ Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title II, Chapter I, art. 108-109.

The Children's Court will offer the same remedies as the civil courts. The children's judge may reverse the child's detention if he/she deems it illegal.⁵⁹ When judging children in conflict with the law, the judge may decide to place the child under the effective authority of his/her legal guardians, put the child under house arrest, or place the child temporarily with another family, or in an institution as a last resort.⁶⁰

A complaint of an administrative nature could lead to the repeal of the administrative decision, and restitution and/or compensation if the illegal decision led to damages not fully covered by the simple repeal of the decision.⁶¹

A law deemed unconstitutional by the Constitutional Court will become automatically null.⁶²

The NHRMC can request the help of the authorities during its investigations.⁶³ Its mission is to investigate alleged human rights violations and help the victims of violations take judicial action.⁶⁴

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Research did not identify any provisions permitting a challenge to a law or action without naming a specific victim. In all the courts cited above, a victim must be identified to claim the violation of a right. However, Children's Courts are always closed to the public.⁶⁵

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

The NHRMC allows for a group of people to bring a collective action before it.⁶⁶ No other specific provisions relating to collective action could be located.

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

The NHRMC permits legally constituted human rights organisations to submit a complaint in place of the victims.⁶⁷ No other provisions could be located.

⁵⁹ *Ibid.*

⁶⁰ Child Protection Code, Title III, Chapter III, art. 106.

⁶¹ ORDONNANCE-LOI 82-020 portant Code de l'organisation et de la compétence judiciaires, 31 March 1982, Title II, Chapter III, art. 146.

⁶² Constitution, art. 168.

⁶³ Loi organique n°13/011 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme, 21 March 2013, Title V, art. 30.

⁶⁴ *Ibid.*, Title II, art. 6.

⁶⁵ Child Protection Code, Title III, Chapter III, art. 111.

⁶⁶ Loi organique n°13/011 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme, 21 March 2013, Title V, art. 28.

⁶⁷ *Ibid.*

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

The magistrate's courts (*Tribunal de paix*) and the district courts (*Tribunal de Grande Instance*) are the lower level courts with jurisdiction for civil and criminal cases. In criminal matters, the district courts hear cases where the sanction for the crime committed is the death penalty or imprisonment of over five years;⁶⁸ the magistrate's courts hear the other criminal cases.⁶⁹ In civil matters, the magistrate's courts are competent to hear family law cases, inheritance and donation issues, and property disputes. They are the ordinary courts for civil disputes on matters valued at no more than 2,500,000 Congolese francs.⁷⁰ The district courts hear the other civil cases.⁷¹ The filing process for a civil case involves a declaration given to the clerk of the court, mentioning the names of the claimant and defendant, as well as the object of the dispute. The child being represented should also be named.⁷² The decisions of the magistrate's courts may be appealed to the district courts.⁷³

District courts' decisions can be appealed to the appellate courts (*Cour d'appel*).⁷⁴ Appellate courts are also competent to judge upon international crime cases (genocide, crime against humanity and war crimes),⁷⁵ and these decisions can be appealed to the Supreme Court (*Cour Suprême*),⁷⁶ as the cassation court referred to in the 2005 Constitution has not yet been set up.⁷⁷

The Supreme Court judges crimes committed by public officials,⁷⁸ and acts as the cassation court for all criminal and civil matters.⁷⁹

⁶⁸ Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title II, Chapter I, art. 89.

⁶⁹ *Ibid*, art. 85.

⁷⁰ *Ibid*, Title II, Chapter II, art. 110.

⁷¹ *Ibid*, art. 112.

⁷² Code of Civil Procedure, Title I, Chapter I, art. 1-2.

⁷³ For criminal matters, see Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title II, Chapter I, art. 89; for civil matters, see *Ibid*, Title II, Chapter II, art. 114.

⁷⁴ For criminal matters, see Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title II, Chapter I, art. 91; for civil matters, see *Ibid*, Title II, Chapter II, art. 115.

⁷⁵ Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title II, Chapter I, art. 91.

⁷⁶ ORDONNANCE-LOI 82-020 portant Code de l'organisation et de la compétence judiciaires, 31 March 1982, Title II, Chapter I, art. 98.

⁷⁷ Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title III, art. 153; see also *The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, January/February 2015, para. 8.1.

⁷⁸ ORDONNANCE-LOI 82-020 portant Code de l'organisation et de la compétence judiciaires, 31 March 1982, Title II, Chapter I, art. 98.

⁷⁹ *Ibid*, Title II, Chapter VI, art. 155.

In administrative matters, the 1982 law on the organisation of the judicial system still applies as the administrative courts and the Council of State (*Conseil d'Etat*) have not yet been created.⁸⁰ The appellate courts have jurisdiction over administrative decisions made by local authorities, and their decisions can be appealed to the administrative section of the Supreme Court. The administrative section of the Supreme Court has jurisdiction over administrative decisions taken by central authorities. In addition to the cancellation of the illegal decision, litigants may ask, before these courts, for reparation of the prejudice caused by the decision.⁸¹ Before the administrative section of the Supreme Court, the litigant must file a request mentioning the name and address of the claimant, the object of the request, the name and address of the defendant if applicable, a summary of the facts and of the argumentation of the claimant, and the inventory of the documents presented.⁸²

The Child Protection Code established Children's Courts (*Tribunal pour enfants*) in every jurisdiction.⁸³ These courts have jurisdiction only in regards to minors (children under 18),⁸⁴ and are the only courts allowed to judge children in conflict with the law, as well as matters relating to children's identity, capacity, filiation, adoption and family relationships.⁸⁵ Children can also challenge their detention in the Children's Courts.⁸⁶ To challenge a violation of a child's rights, his/her parents, legal guardian, or a social worker may submit a request. Proceedings may also be initiated by the child's spontaneous declaration, or by the judge's own accord.⁸⁷ Although the Children's Courts encountered difficulties to start with,⁸⁸ several judges were appointed in 2013 in order to relieve the backlog of cases.⁸⁹

The Constitutional Court, whose members were sworn in in April 2015,⁹⁰ reviews the constitutionality of provisions. Applicants involved in legal proceedings may refer a law they deem unconstitutional to the Constitutional Court if the law is being invoked against them.⁹¹

⁸⁰ Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title III, art. 154; see also *The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, January/February 2015, para. 8.1.

⁸¹ ORDONNANCE-LOI 82-020 portant Code de l'organisation et de la compétence judiciaires, 31 March 1982, Title II, Chapter III, art. 146 to 149.

⁸² ORDONNANCE-LOI 82-017 relative à la procédure devant la Cour suprême de justice, 31 March 1982, Title I, Chapter I, art. 2; and *Ibid*, Title III, Chapter I, art. 76.

⁸³ Child Protection Code, Title III, Chapter I, art. 84.

⁸⁴ *Ibid*, Title III, Chapter II, art. 94.

⁸⁵ *Ibid*, Title III, Chapter II, art. 99.

⁸⁶ *Ibid*, Title I, Chapter I, art. 12.

⁸⁷ *Ibid*, Title III, Chapter III, art. 102.

⁸⁸ "Tribunal pour enfants de Lubumbashi – Des juges en nombre insuffisant", 15 February 2012, available in French at:

<http://www.lecongolais.cd/tribunal-pour-enfants-de-lubumbashi-des-juges-en-nombre-insuffisant/#sthash.KLb54UNw.dpuf>.

⁸⁹ "RDC : L'UNICEF salue la nomination de nouveaux juges pour enfants", 10 June 2013, available in French at: http://www.unicef.org/wcaro/french/4501_7412.html.

⁹⁰ "RDC: les 9 membres de la Cour constitutionnelle ont prêté serment", RFI, 5 April 2015, available in French at:

<http://www.rfi.fr/afrique/20150405-rdc-9-membres-cour-constitutionnelle-prete-serment-joseph-kabila-co-ngres-parlement/>.

⁹¹ Constitution, art. 162.

This seemingly efficient judicial system is in practice reduced to only 230 jurisdictions for about 60 million inhabitants, focusing the delivery of access to justice on urban centres.⁹² The “*audiences foraines*”, mechanisms where a jurisdiction would send judges to bring justice to remote rural locations,⁹³ are very rare in practice due to a severe lack of resources and often hinder the rendering of justice at the court,⁹⁴ contrary to the law.⁹⁵

Although they are not officially part of the judicial system, customary courts are very often involved in the settlement of disputes, especially in rural places where formal justice does not reach (see part V below).⁹⁶ Magistrate’s courts can hear appeals of decisions of the customary courts.⁹⁷

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

As stated in part II.D above, there are legal provisions referring to legal assistance; however whether this assistance is free or subsidised is not clear, nor are the conditions of access to it.

Before criminal courts, should the trial be won by the defendant, the victim who brought the case by way of a writ of summons will be liable for the entirety of the court costs. If the victim launched a civil action after the court was seized, he/she will be liable for half of the court costs.⁹⁸ According to the Code of Criminal Procedure, litigants who are deemed to be indigent by the judge can see the court costs paid in part or in totality by the Treasury.⁹⁹ However, it is the litigant who must prove his/her indigency him/herself. Unemployed people and those who do not hold official pay documents must produce a certificate of indigency which is granted by their local administration in exchange for a high fee.¹⁰⁰

Before civil courts, the claimant must pay the court costs prior to the procedure.

¹⁰¹ At the end of the trial, the judge will decide which party - usually the one

⁹² “*République démocratique du Congo - Le secteur de la justice et l’Etat de droit*”, AfriMAP and Open Society Initiative for Southern Africa, July 2013, pp. 126-127, available in French at:

<http://afrikarabia.com/wordpress/wp-content/uploads/2014/01/RDC-Rapport-Justice-juillet-2013.pdf>.

⁹³ Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l’ordre judiciaire, 11 April 2013, Title I, Chapter II, art. 45 to 48.

⁹⁴ “*République démocratique du Congo - Le secteur de la justice et l’Etat de droit*”, AfriMAP and Open Society Initiative for Southern Africa, July 2013, p. 128.

⁹⁵ Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l’ordre judiciaire, 11 April 2013, Title I, Chapter II, art. 47.

⁹⁶ *The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, January/February 2015, para. 8.1.

⁹⁷ *Ibid.*

⁹⁸ Code of Criminal Procedure, Chapter V, Section VI, art. 82.

⁹⁹ *Ibid.*, Chapter VIII, art. 123.

¹⁰⁰ “*République démocratique du Congo - Le secteur de la justice et l’Etat de droit*”, AfriMAP and Open Society Initiative for Southern Africa, July 2013, p. 131.

¹⁰¹ Code of Civil Procedure, Title IV, art. 144.

who lost the trial - will bear the court costs. It is then possible for the claimant to get reimbursed for his/her monetary advance by the losing party.¹⁰² In civil matters as well, indigent claimants may see the court costs waived in part or in totality. The presiding judge of the court will decide on the indigency of the claimant,¹⁰³ using the criteria explained above. In civil courts, the winning party must pay a “proportional right” (*droit proportionnel*) amounting to six per cent of the amount granted by the decision, prior to the execution of the decision.¹⁰⁴

Court officials frequently do not follow the court fees indicated in the law, and ask for exorbitant, illegal additional fees, paid in US dollars.¹⁰⁵

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

It is the Congolese bar association's responsibility to establish free legal aid offices for indigents, whereby any indigent person can obtain free legal advice.¹⁰⁶ The DRC's bar association has successfully put in place several such offices, in collaboration with the European support program for the strengthening of justice.¹⁰⁷ The exact conditions for access to this assistance could not be established.

NGO initiatives also exist for any victim who cannot afford a lawyer. For example, the *Bureau National Catholique de l'Enfance - RDC* (BNCE - RDC) offers legal assistance to children in conflict with the law.¹⁰⁸

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

The Criminal Code details the limitation periods for the state's prosecution: 10 years from the date of the crime for major crimes, three years for lesser crimes, and one year for misdemeanours.¹⁰⁹

Limitation periods are suspended during minority,¹¹⁰ at least in civil cases.

¹⁰² *Ibid*, art. 147.

¹⁰³ *Ibid*, art. 146.

¹⁰⁴ *Ibid*, Title IV, art. 152 and 157.

¹⁰⁵ *République démocratique du Congo - Le secteur de la justice et l'Etat de droit*, AfriMAP and Open Society Initiative for Southern Africa, July 2013, p. 132.

¹⁰⁶ ORDONNANCE-LOI 79-028 portant organisation du barreau, du corps des défenseurs judiciaires et du corps des mandataires de l'État, 28 September 1979, Title I, Chapter III, art. 43, available in French at: <http://www.leganet.cd/Legislation/Droit%20Judiciaire/OL79..28.28.09.79.htm#TICIVSIII>.

¹⁰⁷ *Évaluation à mi-parcours du Programme d'appui à la réforme de la justice (PARJ) en République Démocratique du Congo*, August 2014, para. 4.2.3., available in French at: http://eeas.europa.eu/delegations/congo_kinshasa/projects/evaluation/rapport_final_evaluation_parj_aout_2014_fr.pdf.

¹⁰⁸ See the email address at: <http://www.bice.org/en/bureau-national-catholique-de-l-enfance-rdc-bnce>, and more information on the programme at: <http://www.bice.org/en/juvenile-justice-in-dr-congo>.

¹⁰⁹ Code Pénal, Book I, Section VII, arts 24 to 26.

¹¹⁰ Family Code, Book II, Title II, Chapter II, art. 235.

- E. Evidence. What sort of evidence is admissible / required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The burden of proof is the same for Children's Courts and the other jurisdictions. Witnesses are required to take an oath before testifying,¹¹¹ although this requirement is subject to the Public Ministry's discretion in criminal proceedings.¹¹²

There are no specific rules regarding proceedings involving children, and it is unclear whether or not children can appear as witnesses.

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

The Constitution states that “[a]ll persons have the right that their case will be heard within a reasonable time by the competent judge”.¹¹³ The Criminal Procedure Code¹¹⁴ and Child Protection Code¹¹⁵ provide that judgments in criminal courts and in Children's Courts shall be rendered within eight days following the hearing. The law n° 06/019 of 20 July 2006 on the repression of sexual crimes and modifying the Criminal Procedure Code (article 7 bis) further states that the investigation in sexual violence matters shall take place within a month from the date the competent judge was seized. The court decision shall be rendered within three months from that date.¹¹⁶

However, in practice, actions filed before the Congolese courts last several months or even years until the final hearing is scheduled.¹¹⁷ This is especially true in cases involving children as the judicial system is lacking in professionals trained to handle such cases,¹¹⁸ even after the new appointments in 2013.

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

The Constitution grants to all persons a right of recourse against a judgment.¹¹⁹

¹¹¹ Code of Civil Procedure, Title I, Chapter V, art. 33.

¹¹² Code of Criminal Procedure, Chapter II, Section III, art. 17.

¹¹³ Constitution, art. 19.

¹¹⁴ Code of Criminal Procedure, Chapter V, Section VI, art. 80.

¹¹⁵ Child Protection Code, Title III, Chapter III, art. 113.

¹¹⁶ Loi n° 06/019 modifiant et complétant le décret du 6 août 1959 portant Code de Procédure Pénale Congolais, 20 July 2006, art. 1, available in French at:

[https://www.icrc.org/ihl-nat/6fa4d35e5e3025394125673e00508143/6e01b0dfe9fe4819c125765600520370/\\$FILE/98612881.pdf/Loi%20modifiant%20le%20Code%20p%C3%A9nal.pdf](https://www.icrc.org/ihl-nat/6fa4d35e5e3025394125673e00508143/6e01b0dfe9fe4819c125765600520370/$FILE/98612881.pdf/Loi%20modifiant%20le%20Code%20p%C3%A9nal.pdf).

¹¹⁷ *République démocratique du Congo - Le secteur de la justice et l'Etat de droit*, AfriMAP and Open Society Initiative for Southern Africa, July 2013, p. 133.

¹¹⁸ *Second periodic report of the Democratic Republic of Congo to the UN Committee on the Rights of the Child*, CRC/C/COD/2, 24 July 2008, para. 221.

¹¹⁹ Constitution, art. 21.

As explained in part IV.A above, appeal is almost always possible in civil and criminal cases, for any party.¹²⁰ Customary courts' decisions can be appealed to a magistrate's court,¹²¹ which can in turn be appealed to the district courts.¹²² The appellate courts have jurisdiction over the appeal of district courts' decisions,¹²³ and the Supreme Court is the cassation court.¹²⁴ The Supreme Court also hears appeals on the judgments of international crimes rendered by the appellate courts.¹²⁵

In administrative cases, only the appellate courts' judgments on the legality of administrative decisions taken by local authorities can be appealed to the administrative section of the Supreme Court.¹²⁶

The Child Protection Code states that the appeal is ultimately formed by an authenticated declaration of any party or of the Public Ministry to the clerk of the Children's Court that rendered the decision, or the clerk of the Appeals Chamber of the Children's Court, within 10 days from the date of the decision. The Appeals Chamber must make a decision within 30 days from the date of referral.¹²⁷

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

The DRC is a civil law country. As such, case decisions do not have the precedential weight as those of common law jurisdictions.¹²⁸

There are several reports of severe backlash against human rights and children's rights activists, including threats, torture and murder,¹²⁹ and a lack of judicial

¹²⁰ For criminal matters, see Code of Criminal Procedure, Chapter VI, Section II, art. 96; for civil matters, see Code of Civil Procedure, Title II, Chapter II, art. 68.

¹²¹ *The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, January/February 2015, para. 8.1.

¹²² For criminal matters, see Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title II, Chapter I, art. 89; for civil matters, see *Ibid*, Title II, Chapter II, art. 114.

¹²³ For criminal matters, see Loi organique n° 13/011-B portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Title II, Chapter I, art. 91; for civil matters, see *Ibid*, Title II, Chapter II, art. 115.

¹²⁴ ORDONNANCE-LOI 82-020 portant Code de l'organisation et de la compétence judiciaires, 31 March 1982, Title II, Chapter VI, art. 155.

¹²⁵ *Ibid*, Title II, Chapter I, art. 98.

¹²⁶ *Ibid*, Title II, Chapter III, art. 148.

¹²⁷ Child Protection Code, Title III, Chapter III, art. 123.

¹²⁸ *The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, January/February 2015, para. 2.

¹²⁹ *République démocratique du Congo - Le secteur de la justice et l'Etat de droit*, AfriMAP and Open Society Initiative for Southern Africa, July 2013, pp. 108-109.

interest in these cases.¹³⁰ Intimidation of victims and witnesses has also been reported.¹³¹

The Constitution states that the judiciary is independent from the executive and legislative powers, neither of which can influence the process of justice at any point.¹³² However, serious systemic issues of corruption, lack of enforcement infrastructure, and weak institutional capacity hinder the effects of a positive decision and serve as setbacks for the further implementation of policies and procedures aiding the rights of children.¹³³ Magistrates' pay is not enough for them to survive,¹³⁴ and contrary to the Constitution and the legislation, the executive power does not hesitate to remove them from their offices.¹³⁵ Between 2006 and 2010, three Presidents of the Supreme Court were removed from office,¹³⁶ in direct contradiction with the Constitution.¹³⁷ As a result, many judges resort to corruption, and follow the executive's directives.¹³⁸ The Superior Council of the Magistrature (*Conseil Supérieur de la Magistrature*), institution created by the 2005 Constitution to supervise magistrates and their independence and effectively set up in 2008, has been time and again countered in its action by the government by withholding resources and appointing members loyal to the government.¹³⁹

I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Very often, the executive power interferes directly with judicial proceedings, especially against the enforcement of a decision against the DRC state or public companies. The Supreme Court has declared not to have jurisdiction to review such "acts of government".¹⁴⁰

The required payment of a proportional right before the enforcement of a civil award - which is very often too high for the litigant to pay - combined with the executive interference in the enforcement of judicial decisions make for a very low enforcement rate.¹⁴¹

¹³⁰ "Assassinats des défenseurs des droits de l'homme : le Radhoski dénonce la lenteur de la justice", Radio Okapi, 17 february 2012, available in French at: <http://radiookapi.net/actualite/2012/02/17/assassinats-des-defenseurs-des-droits-de-lhomme-le-radhoski-d-enonce-la-lenteur-de-la-justice/>.

¹³¹ "Faciliter l'accès à la Justice pour les plus vulnérables en créant un système national d'aide légale", UNDP, 23 June 2015.

¹³² Constitution, arts 149 and 151.

¹³³ *République démocratique du Congo - Le secteur de la justice et l'Etat de droit*, AfriMAP and Open Society Initiative for Southern Africa, July 2013.

¹³⁴ *Ibid*, pp. 76-78.

¹³⁵ *Ibid*, pp. 73-74.

¹³⁶ *Ibid*.

¹³⁷ Constitution, art. 150.

¹³⁸ *République démocratique du Congo - Le secteur de la justice et l'Etat de droit*, AfriMAP and Open Society Initiative for Southern Africa, July 2013, pp. 78 and 83.

¹³⁹ *Ibid*, p. 82.

¹⁴⁰ *Ibid*, pp. 83-84.

¹⁴¹ *Ibid*, p. 135.

Finally, in customary law judgements (more information below in part V.), the quality of the judgement will reportedly depend on the relationships between the judges and the parties and on their personal perception of the gravity of the offence committed against a child.

- V. Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

Customary law

Customary law has been recognised by the Constitution and can be applied by courts so long as it is not contrary to the laws, to the public order or to morality.¹⁴² Its application is delegated to the provinces¹⁴³ and in particular the customary authorities,¹⁴⁴ although the law regulating the customary chiefs' status has not yet been adopted.¹⁴⁵ Customary law varies all over the country as it only applies to the members of the community they originate from.¹⁴⁶

Customary law is widely used in rural areas, and regulates personal status and property rights.¹⁴⁷ Although civil law is supposed to be the primary source of law, in practice customary courts settle most disputes in the DRC.¹⁴⁸ Indeed, customary courts are the fastest and most practical way to seek justice. However, the plurality of customary laws, the disparity in the decisions, the lack of formal control and the inferior status granted to women and children make for an unreliable and often unjust process.¹⁴⁹

Sexual violence crimes

When approaching a court to claim compensation for violations of children's rights, it is imperative to take into consideration Act n° 06/018 of 20 July 2006 amending and supplementing Decree of 30 January 1940 on the Congolese Criminal Code, which modifies some provisions relating to sexual violence crimes.¹⁵⁰

¹⁴² Constitution, art. 153.

¹⁴³ *Ibid*, art. 204.

¹⁴⁴ *Ibid*, art. 207.

¹⁴⁵ "RDC : le Sénat adopte la loi sur le statut des chefs coutumiers", Radio Okapi, 21 April 2015, available in French at :

<http://radiookapi.net/actualite/2015/04/21/rdc-le-senat-adopte-la-loi-sur-le-statut-des-chefs-coutumiers/>.

¹⁴⁶ *The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research*, January/February 2015, para. 2.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*.

¹⁴⁹ "Customary courts in the Congolese judiciary system: a reform for better administration of justice", Open Society Institute and AfriMAP, September 2006, available at:

http://www.afriMAP.org/english/images/paper/Customary_Jurisdictions_DR Congo_EN.pdf

¹⁵⁰ Act n° 06/018 amending and supplementing Decree of 30 January 1940 on the Congolese Criminal Code, 20 July 2006, available in French at:

<http://www.ilo.org/dyn/natlex/docs/SERIAL/79516/85601/F683101199/code%20penal%20%28modif%29.pdf>. See also Act n° 06/019 amending and supplementing Decree of 6 August 1959 on the Congolese

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