

## **DRAFT TERMS of REFERENCE**

### **JUSTICE RAPID RESPONSE ASSESSMENT MISSION TO THE DEMOCRATIC REPUBLIC OF CONGO**

**Note: This document is a draft only and is not for circulation**

#### **BACKGROUND**

Notwithstanding the power sharing agreement signed in December 2002, which purported to conclude the conflict in the DRC and culminated in presidential and legislative elections in July 2006, militia leaders and army units have continued to commit widespread violations of international humanitarian law (IHL) in continuing conflict situations, as well as international human rights law (IHRL).

The eastern half of the country has been the most severely affected by this situation. Militias there have launched a range of attacks on civilians of different ethnic groups and this has resulted in numerous allegations of mass murder and widespread rape. The army has often retaliated against the local population or mounted military operations that resulted in similar violations.

Despite some recent positive developments, like the transfer earlier this year of the Ituri warlord, Thomas Lubanga, to the custody of the International Criminal Court, a culture of near total impunity continues to prevail in relation to these crimes. This state of affairs can be attributed to several factors including a lack of local capacity to investigate and prosecute complex IHL and IHR cases.

In light of this context, Security Council Resolution 1565 authorizes the United Nations mission in the DRC (MONUC) to:

[A]ssist in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, investigate human rights violations to put an end to impunity, and continue to cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations

Pursuant to this mandate, MONUC, has, *inter alia*, encouraged and facilitated the arrest of more than a dozen militia leaders and army officers who are allegedly implicated in the foregoing attacks. At this time however, MONUC is concerned that none of these individuals have been investigated despite having been detained for over 16 months in some cases.

In addition to concerns related to ensuring that those accused receive due process, MONUC recognizes that the recent elections in the DRC may affect the country's political dynamics and result in the unwarranted release of several of the detainees. Therefore, it is important to move forward in a timely manner with efforts to end impunity in the DRC.

To this end, MONUC has solicited the assistance of the “core members” of the JRR initiative.<sup>1</sup> Specifically, it has requested the deployment of a pilot JRR team to investigate crimes which took place during the transition and have gone unpunished.

It is expected that this investigation will lead to the identification, collection and preservation of information concerning war crimes, crimes against humanity and/or genocide that occurred in the time(s) and place(s) in question, including specific information about the aforementioned detainees. It is further anticipated that such information will be handed over to an appropriate accountability mechanism.

At present, the DRC’s Military Prosecutors Office (Auditor General) has the competence to try these cases and the death penalty is available in the event of successful prosecutions, although there is a moratorium in place since 2001 and nobody has been executed in 5 years. Competence will, in all probability, shift to the civilian courts after the elections.

MONUC believes that the deployment of a pilot JRR team would represent an important contribution in advancing the goals of justice and accountability for human rights violations. To this end, MONUC is prepared to provide logistical and technical assistance to a pilot JRR mission within the parameters of MONUC’s own mandate and resources.

## **PURPOSE**

In light of a request from MONUC to deploy a pilot JRR team to the DRC, the purpose of the Assessment Mission will be to determine the feasibility and usefulness of such a project in the DRC, informing decisions as to the pilot team’s size and composition; the areas where investigations will take place; the types of activities the pilot team will engage in; and the extent of cooperation with local authorities. The results of the Assessment Mission are also intended to form the basis of the decision that each JRR participant will make regarding whether or not to participate in a subsequent JRR deployment to the DRC.

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<sup>1</sup> The Justice Rapid Response initiative aims to create a mechanism that would enable the international community to respond quickly to a request to provide expertise and/or resources primarily in support of genuine efforts to identify, collect and preserve information about Rome Statute Article 5 crimes for any appropriate accountability mechanism. Given the growing importance of the fight against impunity in post-conflict settings and the often limited local expertise and state resources available for this purpose in the immediate wake of major conflict, important activities envisaged to be undertaken by a JRR team include the early location, gathering and preservation of physical, documentary and testimonial information of potential evidentiary value, especially that which is most likely to disappear. The JRR initiative is supported by a variety of states, including Germany, Belgium, Canada, the Democratic Republic of Congo, and Sweden, as well as by International Organizations (EU, EC, UNDP, DPKO, UNHCHR, and ICC) and a number of civil society groups around the world. The Stabilization and Reconstruction Task Force (START) Secretariat within the Department of Foreign Affairs and International Trade Canada has agreed to lead/coordinate on the JRR initiative until such time that it is permanently housed within an appropriate institution. To this end, START will oversee the JRR Assessment Mission to the DRC.

## RELATIONSHIP TO THE INTERNATIONAL CRIMINAL COURT

The Assessment Mission is intended to support the DRC's *national* efforts to combat impunity. In this regard, the Assessment Mission is not linked to the ongoing investigations that are being conducted in the DRC by the International Criminal Court.

In order to ensure that the Assessment Mission does not compromise the important work of the ICC, the members of the JRR Team will consult with the Office of the Prosecutor (OTP) prior to deployment. This will allow the OTP an opportunity to share information with respect to the specific areas in the DRC in which it is engaged (i.e. areas where the JRR Team should avoid) and also to provide the JRR Team with advice in terms of working in the DRC.

This approach is in line with the principle of positive complementarity which is espoused by the OTP.

## STATUS AND LIABILITY

*Note: As discussed, our legal bureau has advised that the status of the Assessment Mission in the DRC needs to be clearly defined in the TORs. Ideally the members of the JRR Team can be afforded "experts on mission" status pursuant to MONUC's SOMA with the DRC. If so, then all issues related privileges, immunities and liabilities would be covered by the SOMA. Please advise whether this will be possible.*

## SCOPE<sup>2</sup>

Where a request for JRR is made by a State, an important element of an assessment mission is to evaluate the genuineness of that request. In particular, assessors need to consider whether the sole purpose of the request is the furtherance of accountability mechanisms in aid of lasting peace and security or whether there are other motivations at play. In this case, since the requesting party is a UN mission, it can be assumed that the primary motivation is a genuine commitment to combat impunity, within the context of the mission's efforts in advancing a delicate transitional peace process.

Nevertheless, the Assessment Mission is intended to rigorously evaluate MONUC's request to deploy a JRR team to the DRC. Particular focus should be placed on the following elements of the request: a) the legal basis and legitimacy; 2) the technical feasibility; and 3) the usefulness.

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<sup>2</sup> The purpose of this section is to set the parameters of the Assessment Mission and to outline specific questions/issues that will need to be addressed by the JRR Team. These issues/questions are drawn from the JRR Feasibility Study that was prepared at the request of Finland, Germany, Liechtenstein, Sweden, Switzerland and the United Kingdom, by a team of independent consultants. Though not binding, the Study represents a framework agreed to by the JRR participants.

*Legal Basis and Legitimacy:* With respect to the legal basis of the request, this will involve a legal examination of MONUC's jurisdiction under international law and under its own Security Council mandate to make a request for JRR. This segment of the Assessment Mission need not be conducted in the field but rather can be completed off site prior to deployment.

Notwithstanding any legal authority that MONUC may have with respect to requesting a JRR deployment to the DRC, the Assessment Mission will also need to evaluate the legitimacy of conducting a pilot JRR mission. Considerations include an assessment of the political will on the part of the DRC Government to host a JRR team. This portion of the assessment will entail on-site discussions with relevant DRC officials and civil society representatives.

*Technical Feasibility:* An evaluation of the technical feasibility of conducting a pilot JRR mission will entail an on-site assessment of a number of operational factors including:

- basic logistical support (esp. from MONUC)
- security;
- freedom of movement;
- privileges and immunities<sup>3</sup> for JRR members, including duty free import/export of equipment and property and inviolability of communications and telecommunications;
- access to information, witnesses and crime scenes;
- availability of local counterparts with appropriate backgrounds (i.e. police or justice officials);
- secure and appropriate storage facilities for information;
- clarity regarding security and continuity of evidence until such time as it can be handed over to the appropriate authorities; and
- the state of the justice sector.

*Usefulness:* Assuming that the request for JRR is legitimate well grounded in law and operationally feasible, further consideration must be given to the usefulness of conducting a pilot JRR mission in the DRC. In particular, the Assessment Mission must evaluate whether JRR assistance is appropriate under current circumstances. That is to say, the Assessment Mission needs to inquire as to whether or not the deployment of a JRR team would make a sufficiently significant difference to the success of justice contributing to lasting peace in the DRC, and without causing prejudice to existing and potential future ICC investigations. The extent to which the JRR pilot project can contribute to long-term capacity-building of the DRC's justice sector will also need to be assessed in this context, with particular attention paid to such factors as political will to reform the justice sector, local ownership of the process, and external assistance needs to develop the sector.

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<sup>3</sup> As noted above, the TORs must clearly set out basis upon which privileges and immunities may be granted.

## OUTCOMES

1. Final Report: A report documenting the results of the Assessment Mission should include:
  - Background and history of the situation in the DRC as well as specific incidents that led to allegations of serious crimes;
  - Detailed findings concerning the legal basis and legitimacy of the request for JRR;
  - Detailed findings concerning the operational feasibility of deploying a pilot JRR team to the DRC; and
  - Detailed findings concerning the usefulness of conducting a pilot JRR mission in the DRC.
  
2. Plan of Action: If the results of the Assessment Mission are sufficiently positive to contemplate a positive reception from some JRR participants, then its report should also include a Plan of Action with specific recommendations. The Action Plan should, at a minimum, include the following elements:
  - Kind of expertise required for JRR deployment;
  - Recommended number of experts for JRR deployment;
  - Geographic areas the JRR deployment should cover;
  - Investigation/information/evidence collection plan
  - Security and logistics needs of the deployment;
  - Estimate of the time needed for the pilot JRR mission;
  - Contingency arrangements (e.g. need for early departure due to security concerns);
  - Steps required to clarify and secure the legal status of the JRR members in the territory of the DRC.

The Final Report and the Action Plan should be presented to the institution commissioning the Assessment Mission and currently coordinating the JRR initiative, i.e. the Stabilization and Reconstruction Task Force of the Department of Foreign Affairs and International Trade, Canada, as well as to MONUC and the members of the wider JRR initiative. The deadline for these deliverables will be two weeks after the completion of the Assessment Mission.

## LOGISTICS

*Schedule*: The Assessment Mission will take place as soon as possible and will last two-three weeks.

*Composition*: The Assessment Mission will consist of no more than three or four members. Together, they will have a combination of the following types of expertise:

1. *Legal expertise:* A prosecutor or investigative judge with criminal law and international justice experience, preferably with familiarity with the legal system of the subject jurisdiction (i.e. civil law);
2. *Investigative expertise:* An experienced police officer or investigator as appropriate for the situation and the legal system, who has field and operational investigation experience;
3. *Country and political expertise:* An individual with considerable knowledge about the DRC, its recent history, the transitional peace process, and the logistical challenges posed by such a vast country with little infrastructure;
4. *Security expertise:* A military or police officer with international deployment experience and, if possible experience in the region, who could assess the risks that a pilot JRR project would likely face in the DRC;
5. *Logistics expertise:* A person with experience in the logistic support required for an investigative mission, particularly in terms of the logistics of mounting investigation missions, securing and transporting evidence and methods of contacting witnesses.

One of the members of the Assessment Mission will also play the role of *Team Leader*. This individual should possess leadership/negotiating skills with specific diplomatic experience or knowledge of the area.

At least one of the members of the Assessment Missions should possess considerable knowledge of the UN system.

*Working Collaborators:*

In order for the Assessment Mission to succeed, solid partnerships will have to be developed with:

- MONUC;
- The DRC government
- Local and international civil society organizations
- UN agencies

*Security:* Security for the Assessment Mission, as well as its security during visits to the field for the examination of evidence, will be provided by MONUC. *Note: Assuming the members of the Assessment Mission can be afforded "experts on mission status", MONUC's liability relating to the security of the experts will be covered under the SOMA.*

*Transportation:* Where possible, MONUC will facilitate the transportation of the members of the Assessment Mission, allowing access to its flights and vehicles. In Kinshasa, the Canadian Embassy will provide one vehicle for the use of the Assessment

Mission, should circumstances permit. Leasing of vehicles will be the preferred option where possible, and the Canadian Embassy will facilitate this process.

*Accommodation:* Each member of the Assessment Mission will arrange his or her own accommodation, with the assistance of the Canadian Embassy in Kinshasa.

*Meals:* Each member of the Assessment Mission will arrange for his or her own meals.

*Equipment:* MONUC will provide access to one computer and one printer for the team, as well as standard office equipment and materials. Members of the Assessment Mission will be responsible for private equipment such as cell phones, laptops and B-Gan antennas, which enable data transmission via satellite link.

*Medical Support:* Each member of the Assessment Mission will be responsible for ensuring their own medical insurance, including medical evacuation coverage. Where possible, the Assessment Mission will rely on private medical care. In more remote areas of the DRC, MONUC will ensure basic medical support to the Assessment Mission.

*Communications:* MONUC will facilitate communications for the Assessment Mission.

*Workspace:* MONUC will provide a temporary workspace for members of the Assessment Mission.

*Expenses:* Each member of the Assessment Mission will provide for his or her own accommodation and subsistence expenses. Please note that US currency is the preferred medium of payment in the DRC.

*Information Security:* MONUC will provide secure and appropriate storage facilities for information collected during the Assessment Mission. No evidence will be collected during the Assessment Mission.