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Совет по правам человека

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**Поощрение и защита всех прав человека,
гражданских, политических, экономических,
социальных и культурных прав, включая
право на развитие**

**Доклад Рабочей группы по насильственным
или недобровольным исчезновениям**

Добавление

Миссия в Конго**Резюме*

По приглашению Республики Конго делегация Рабочей группы по насильственным или недобровольным исчезновениям посетила эту страну с 24 сентября по 3 октября 2011 года. Целью этого визита было изучение усилий Республики Конго по рассмотрению вопроса о насильственных исчезновениях, включая урегулирование случаев насильственных исчезновений, которые произошли в прошлом.

По итогам своего визита Рабочая группа приветствовала состояние мира в результате примирения между различными компонентами конголезского общества и дух национального единства, который пронизывает сегодня всю политическую жизнь страны.

Вместе с тем она отметила, что виновные в насильственных исчезновениях так и не были установлены и остаются безнаказанными по сей день, что судьбы пропавших без вести не выяснены, а компенсация некоторым семьям должна быть дополнена более широкой программой возмещения.

* Резюме настоящего доклада распространяется на всех официальных языках. Сам доклад, содержащийся в приложении к резюме, распространяется только на том языке, на котором он был представлен, и на английском языке.

Рабочая группа вынесла ряд рекомендаций в адрес властей страны, включая продолжение расследований, включение в Уголовный кодекс отдельного состава преступления насильственного исчезновения, запрещение тайного содержания под стражей или неофициальных мест лишения свободы и создание национальной комиссии по установлению истины и примирению.

Рабочая группа также сформулировала рекомендация для Управления Верховного комиссара Организации Объединенных Наций по делам беженцев (УВКБ) и международного сообщества в целом.

Annex

Report of the Working Group on Enforced or Involuntary Disappearances on its mission to the Republic of the Congo (24 September–3 October 2011)

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I. Introduction

1. At the invitation of the Republic of the Congo, the Working Group on Enforced or Involuntary Disappearances visited the country from 24 September to 3 October 2011. The Working Group was represented by two members, Mr. Olivier de Frouville (deputy chairperson) and Mr. Osman El-Hajjé. The purpose of the visit was to review the efforts made by the Congo to address the issue of enforced disappearances, including by resolving cases of enforced disappearance that had occurred in the past.
2. The Working Group wishes to thank the Congolese authorities for their invitation, the result of the good cooperation between them. The Group thanks the Government of the Congo for its warm welcome and its cooperation during the preparation for the mission and the mission itself.
3. In addition, the Group wishes to thank the members of the United Nations Secretariat for their invaluable support throughout the mission.
4. During the visit, the Working Group went to Brazzaville and Pointe-Noire. In Brazzaville, it visited the river port (commonly known as Brazzaville Beach), Makélékélé Sports Centre, the Central Directorate of Military Intelligence, the Brazzaville Central Police Station and the Ouenzé II Police Station.
5. The Working Group was received by the Minister of State, Minister of Justice and Human Rights, and coordinator of the sovereignty focus group. It also met the Minister of Communications and Parliamentary Relations, who is the Government spokesperson, and had discussions with the Minister of Social Affairs, Humanitarian Work and Solidarity, the President's Legal Adviser and senior civil servants from several ministries, including the Ministry of Foreign Affairs and Cooperation, the Ministry of the Interior and Decentralization, and the Ministry of Defence within the Office of the President.
6. The Working Group also had discussions with the President of the Senate and the Vice-President of the National Assembly, as well as with the Vice-President and a member of the Constitutional Court, the President and the Prosecutor-General of the Supreme Court, and the State prosecutor of Brazzaville regional court, as well as the First President of the Brazzaville Court of Appeal and a Supreme Court judge who had been President of the Division and Prosecutor-General, respectively, during the 2005 trial before the Criminal Chamber of the Brazzaville Court of Appeal in the case of the Brazzaville Beach disappearances.
7. In Pointe-Noire, the Working Group was received by the mayor of Pointe-Noire and the prefects of Kouilou and of Pointe-Noire, and had discussions with the Chairperson of Kouilou Departmental Council, who was also the former Chairperson of the Parliamentary Commission of Inquiry set up in 2001 to investigate the enforced disappearances that had taken place in the Congo since 1992.
8. The Working Group met the Chairperson and members of the National Human Rights Commission and members of the Monitoring Committee for the Agreement for Peace and Reconstruction in the Congo. It had discussions with non-governmental organizations (NGOs), lawyers and other civil society representatives.
9. The Working Group also had discussions with several families of victims of enforced disappearances.
10. The Group met with the United Nations Resident Coordinator in the Congo, for the international organizations, as well as with representatives of UNHCR and the delegate of the International Committee of the Red Cross in Brazzaville.

11. The Working Group is currently dealing with 94 cases as part of its humanitarian mission to help families clarify the fate of their relatives. Most of these cases concern enforced disappearances that are alleged to have taken place in 1999. The Working Group thanks the Government for the information provided during its visit and hopes to continue this cooperation so as to achieve resolution in the cases pending.

12. The Working Group will first make a number of general observations to explain the background to the enforced disappearances in the Congo (chapter II), and then concentrate on the case of the Brazzaville Beach disappearances (chapter IV) in greater detail. It will then comment on a number of aspects of law and practice in the Congo in respect of the Declaration on the Protection of All Persons from Enforced Disappearance (chapter III). In conclusion, the Working Group will make recommendations (chapter V).

II. General observations

A. Background

13. Between 1993 and 1999, the Congo went through a series of political crises, which led to three lethal armed conflicts (1993–1994, 1997 and 1998–1999). The last of these officially ended with the signing of peace agreements between the various parties in December 1999. However, some of the armed groups continued fighting in the Pool region until March 2003. During the conflicts, the State security services, the army, police and special services, and the various armed groups and militia involved in the conflicts were accused of repeated attacks on the civilian population, involving serious human rights violations, such as arbitrary detention, summary executions, rape, torture and enforced disappearances.

B. Legal and constitutional framework

1. The Constitution

14. The current Constitution came into force on 20 January 2002. It establishes a presidential regime. The President of the Republic is elected for a term of seven years, renewable once. He or she exercises executive powers and appoints ministers who are answerable only to the President; he or she also has the right to initiate legislation. The Parliament has two chambers: the National Assembly and the Senate, both of which, as well as the President, have the right to initiate legislation; they also have procedures for monitoring the work of the executive bodies (notably through parliamentary inquiries). The National Assembly, elected for a five-year period, is the only body that votes on legislation. The Senate has the function of moderator and counsel to the nation.

15. The Constitution also establishes the judiciary, which consists of the Supreme Court, the Court of Audit and Budgetary Discipline, the Courts of Appeal and other national jurisdictions (art. 133).

16. The Constitutional Court is responsible for monitoring the constitutionality of acts, treaties and international agreements (art. 146), as well as electoral disputes. Any issue related to the constitutionality of a law that is raised before the ordinary courts may be referred to the Constitutional Court as a defence (art. 149). It seems that this procedure is currently underused, as the Court has issued only two decisions since its establishment.

17. The Constitution also establishes an Ombudsman (Title XIII) and a National Human Rights Commission (Title XIV).

18. Title II of the Constitution lists the constitutional rights and freedoms. Article 9, paragraph 2, states that no one shall be arbitrarily accused, detained or imprisoned. Article 10 releases all citizens from the duty of obedience when superior orders constitute a manifest violation of respect for human rights and public freedoms, and excludes superior orders as an exonerating circumstance. Article 11 provides that war crimes, crimes against humanity and the crime of genocide shall be punished in the conditions determined by the law. They may not be subject to any statutory limitations. Title XV addresses law enforcement and, in article 173, states that the establishment of militias is a punishable offence.

2. Status of international law in domestic legislation

19. The preamble to the Constitution declares as integral to the Constitution the fundamental principles proclaimed and guaranteed by:

- The Charter of the United Nations of 24 October 1945
- The Universal Declaration of Human Rights of 10 December 1948
- The African Charter of Human and Peoples' Rights of 26 June 1981
- All duly ratified relevant international texts on human rights
- The Charter of National Unity and the Charter of Rights and Freedoms adopted by the Sovereign National Conference on 29 May 1991

20. Article 184 of the Constitution also states that treaties that have been duly ratified and published take precedence over national laws, on the condition of reciprocity. Further, article 183 states that, if the Constitutional Court determines that a clause contained in a treaty is contrary to the Constitution, that treaty may be ratified or approved only once the Constitution has been revised.

21. The Congo is a party to most of the core human rights treaties, and specifically: the International Covenant on Civil and Political Rights and its Optional Protocol (including recognition of the Committee's competence to consider inter-State complaints under article 41 of the Covenant) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (but without recognition of the individual or inter-State complaint procedures). The Congo has signed but not ratified the International Convention for the Protection of All Persons from Enforced Disappearance.

22. The Congo is also party to the four 1949 Geneva Conventions on international humanitarian law and their two 1977 protocols, as well as the Rome Statute of the International Criminal Court.

23. The Working Group welcomes the Congo's signing of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. It encourages the Government to speed up the process of ratification and to recognise the Committee's competence under articles 31 and 32 of the Convention.

3. Domestic legislation

24. Act 8-98 of 31 October 1998 on the definition of genocide, war crimes and crimes against humanity incorporates those offences, as defined in the Rome Statute, into the Congolese Criminal Code. Enforced disappearance is thus defined as a crime against humanity, in line with the Statute, when it is committed in the context of a widespread or systematic attack against any civilian population. However, the constitutive elements of the offence are not specified. Superior orders are not exonerating circumstances, but may be taken into account when the sentence is determined. Neither prosecution for these crimes nor the penalties provided for them may be subject to any statutory limitations.

Furthermore, the Act has retroactive effect, in that it is applicable even to such offences committed before it was promulgated.

C. The phenomenon of enforced disappearances in the Congo

25. The documented allegations received by the Working Group refer to enforced disappearances in the Congo linked to the last two armed conflicts, between June 1997 and December 1999.

26. In the context of the second civil conflict (June–October 1997) and its aftermath, many witness reports from various reliable sources speak of arbitrary detentions followed by summary executions and secret burials, particularly in Itatolo cemetery, near Brazzaville.

27. There are other allegations of enforced disappearances during the third armed conflict in Pool, Bouenza, Lékoumou and Niari regions. In particular, the Working Group received information on enforced disappearances alleged to have taken place in Dolisie between January and May 1999.

28. However, most of the allegations received by the Working Group (and the individual cases recorded in its database) refer to the situation from April 1999 onwards, when the Government had called on those Congolese who had fled the fighting to return home, assuring them that they would be safe. These events form the background to the so-called Brazzaville Beach disappearances which are considered in detail below.

III. Law and practice in the Congo in the context of the Declaration

29. Under its mandate to promote the 1992 United Nations Declaration on the Protection of All Persons from Enforced Disappearance, the Working Group looked at law and practice in the Congo on preventing and punishing the crime of enforced disappearance, as well as the issue of the victims' rights to truth and reparations.

A. Punishment of the crime of enforced disappearance

30. Act 8-98 of 31 October 1998 incorporates into the Criminal Code the definitions of genocide, crimes against humanity and war crimes as given in the Rome Statute of the International Criminal Court. The acts thereby classified as crimes against humanity include enforced disappearance when committed as part of a widespread or systematic attack directed against any civilian population. The Working Group welcomes the incorporation into the Criminal Code of enforced disappearance as a crime against humanity. It nevertheless regrets the fact that the punishment provided for this offence is the death penalty. The authorities assured the Working Group that the death penalty was no longer used and that there was a de facto moratorium on its use in the Congo. Given this, it would be desirable to abolish it de jure.

31. The Criminal Code does not currently contain any definition of enforced disappearance as a distinct criminal offence, other than its classification as a crime against humanity. Article 4, paragraph 1, of the Declaration on the Protection of All Persons from Enforced Disappearance states: "All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness."

32. The Working Group thus calls on the Congolese authorities to incorporate enforced disappearance as a distinct criminal offence into its Criminal Code. The Working Group welcomes the consideration currently being given to a revision of the Criminal Code, in cooperation with the European Union in particular. It is important to take this opportunity to incorporate enforced disappearance as an autonomous offence, without waiting for the Convention to be ratified.

33. The Working Group also draws the Congolese authorities' attention to the recommendations made in its study on *Best practices on enforced disappearances in domestic criminal legislation* (A/HRC/16/48/Add.3). In particular, it calls on the Congo to incorporate in its Code a clear definition of the constitutive elements of the offence of enforced disappearance.

34. The Working Group notes that the only inquiries into, and prosecutions of potential perpetrators of, disappearances took place in the context of the 2005 Brazzaville Beach disappearances trial. However, all those accused in the trial were found not guilty of the charges against them. The Working Group is also aware that the phenomenon of enforced disappearances in the Congo is not limited to the Beach disappearances. In particular, the Working Group has received allegations that enforced disappearances were perpetrated not only during the same period in other "humanitarian corridors" set up for returning refugees, but also at other times and in other places. In particular, it seems that there has never been any inquiry into the enforced disappearances alleged to have taken place between 1998 and 1999 in Pool, Niari, Lékoumou and Bouenza regions.

35. Article 13, paragraph 1, of the Declaration states that: "Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint." The Declaration obliges the authorities to take all measures to seek out and punish those responsible, and not to wait for the families to lodge a formal complaint or initiate an inquiry procedure.

36. However, with a view to allowing both victims and witnesses to do what they can to help achieve justice, an effective protection programme must be set up, to offer all guarantees of safety to any persons who wish to lodge complaints or testify.

B. Prevention of enforced disappearances

37. Domestic legislation on criminal procedure provides the necessary guarantees for the prevention of enforced disappearances. According to those interviewed by the Working Group, individuals held in police custody or on remand do not generally encounter any obstacles to contacting their families, friends or counsel, if they are able to afford counsel (Declaration, art. 10, para. 2).

38. Moreover, in the places of detention that the Working Group was able to visit, the prison registers were up to date, making it possible to see that a person was being or had been held there (Declaration, art. 10, para. 3, and art. 11). There were reports of individuals being held in custody for longer than the authorized period, seemingly because of the lack of resources available to the police and the judiciary.

39. The Working Group is aware of the material problems that the police and judiciary have to cope with. In particular, it noted the absence of computers or, where they did exist, how difficult it was to use them because of power cuts.

40. In spite of these objective problems, the police officers and members of the judiciary that the Working Group met seemed determined to work together to ensure that individuals held in custody are brought before the courts within the legal time limit. The practice of

inspections of places of detention by the State prosecutor or his or her representatives should be encouraged, as should that of a telephone hotline to allow citizens to report cases of arbitrary detention.

41. The Working Group encourages the Congo, in cooperation with the international organizations, to provide the police and the judiciary with substantially better resources. In this regard, the Working Group welcomes the support programmes funded by the European Union.

42. It further recommends that the authorities should continue to closely involve the National Human Rights Commission and human rights NGOs in monitoring places of detention.

43. The Working Group also welcomes the information from the authorities that training programmes for the police and the army include some teaching on human rights and humanitarian law. It encourages the Government to make this type of training programme standard, with enforced disappearances as a specific topic.

44. The Working Group is seriously concerned by the detention, for nearly eight years, of three nationals of the Democratic Republic of the Congo in the premises of the Brazzaville Central Directorate of Military Intelligence, without any legal controls and without them having ever been brought before a judge, meaning that they run the risk of enforced disappearance. According to the authorities, the individuals concerned are being detained to ensure their safety while awaiting the outcome of their asylum applications.

45. However, the Working Group points out that article 10, paragraph 1 of the Declaration stipulates that: “Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.”

46. The Working Group therefore requests the Congolese authorities to take all the necessary measures forthwith to remedy the present situation and bring it into line with the Declaration.

47. The Working Group recommends that the Congo should ban detention in secret or in unofficial places of detention, and should prosecute and punish any behaviour by a public official, or anyone acting with the consent or acquiescence, or under the control, of the State, that contravenes the ban. More generally, the Working Group calls on the Congo to implement article 12 of the Declaration, which states that: “Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.”

C. Right to reparation

48. The Working Group notes that reintegration and rehabilitation programmes have been set up for former combatants and former militia members in particular. However, these programmes do not directly affect the people who were sometimes the victims of the now demobilized former combatants.

49. There are several generous assistance programmes that also play a positive role in society, such as the programmes that provide support for children in school. However, the aim of these programmes is not to provide reparation for harm suffered by individuals where there have been serious violations of human rights. They are intended for all Congolese citizens without distinction.

50. The Working Group also notes with satisfaction that two monuments have been erected in Brazzaville, linked to the three civil wars that divided the country. One of the two, in particular, pays homage to the victims. However, while such monuments do contribute to the memory of a painful past and speak strongly of the need to find national unity once more, they are not adequate recognition for the individual victims, whose personal stories cannot be subsumed into the collective fate.

51. More generally, the Working Group found that, despite the huge efforts that have been made to heal the wounds that have been left by the war, there is not currently any integrated and comprehensive programme of reparation for harm caused to civilians during the different conflicts.

52. Firstly, a general programme of compensation could be set up in recognition of the State's responsibility, based on the decisions of the Criminal Chamber of the Brazzaville Court of Appeal in the Beach disappearances case. In that case, the Criminal Chamber recognized the State's liability for fault, resulting from the inability of its failed institutions to ensure the safety of its citizens. The State could certainly consider encouraging similar cases to be brought to court for different categories of victims, including the families of the disappeared whose cases were not taken into account in the 2005 trial.

53. However, it would be preferable to devise a global compensation programme based on an admission of objective responsibility by the State.

54. Beyond the matter of financial compensation, article 19 of the Declaration also provides for "the means for as complete a rehabilitation as possible". The Working Group therefore recommends that the Congo establish a comprehensive reparation programme to include, in particular, health care, legal and social rehabilitation, restoration of employment, and property, return to one's place of residence and similar forms of restitution and reparation which may remove the consequences of enforced disappearance. Appropriate measures of satisfaction, particularly to restore the dignity and reputation of individual victims, should also be adopted. The victims should play a full role in the design and implementation of the reparation programme.

D. Reconciliation and the right to truth

55. All those with whom the Working Group spoke welcomed the return to peace, the essential condition for promoting and protecting the population's human rights without any discrimination.

56. The Working Group welcomes the state of peace that has resulted from reconciliation between the various military and civilian groups, as well as the sense of national unity that inspires the country's political figures today. This has been seen at the highest level of State and has led to a number of measures aimed at bringing peace and restoring harmony. The National Forum for Reconciliation, Unity, Democracy and the Reconstruction of the Congo was held in January 1998, just after the second civil war in 1997.

57. Then in April 2001, after the end of the third war, an Inclusive National Dialogue was held, bringing together various sectors of Congolese society; it concluded with the adoption of an agreement for peace and the reconstruction of the Congo. During its visit, the Working Group was able to meet with the commissioners who sat on the monitoring committee established to promote the agreement. A Day of National Reconciliation is celebrated every year on 10 June, the anniversary of the country's independence.

58. More generally, the Working Group gained the impression that the various representatives of Congolese society clearly condemned the excesses of the past, which

they attributed to “human stupidity”; they wanted to remember the mistakes that had been made to avoid repeating them in the future.

59. The Working Group is thus aware of the efforts that have been made to restore trust between the various segments of the country’s population.

60. However, it did note that the people were still somewhat reticent about testifying and demanding their legitimate rights. The Working Group therefore encourages the Government to continue working to restore trust, taking the necessary measures to ensure that every citizen feels protected by the law, in full equality and without discrimination, particularly on the basis of geographic or ethnic origin.

61. The Working Group also points out that the injuries that the conflicts caused to the civilian population are far from all being healed. In particular, there are families still hoping to learn the truth about the fate of their loved ones, victims of enforced disappearance. While the country’s political history seems to be a subject of consensus, upheld by a desire for harmony, the individual stories of the victims are threatened by oblivion.

62. The right to the truth is both a collective right and an individual right. The truth must be told throughout society, to guarantee that such violations do not happen again. At the same time, each victim also has the right to know the truth about the violations that have caused him or her harm.

63. The individual right to know the truth about the fate of a person who fell victim to enforced disappearance is absolute. It entails procedural obligations on the part of the State and, specifically, the obligation to ensure access to a competent, independent body, as well as to conduct inquiries until the fate of the person who disappeared has been clarified.

64. The right to truth must be recognized as an autonomous right, distinct from the right to justice. In particular, the Working Group points out that the right to the truth can be achieved by means other than court proceedings. In some situations, realization of the right to truth can affect the right to justice, if, for instance, criminal action is seen as going against the aim of reconciliation which the State and the various parts of Congolese society are pursuing. The Working Group does, however, highlight that pardon should only be granted after a real peace process and negotiations in good faith with the victims, which result in apologies and an expression of regret on the part of the State or the perpetrators, and guarantees that such disappearances will be prevented in the future.

65. The 2005 trial was certainly a first step towards realization of the right to truth. However, the approach needs to be broadened, through a much bigger programme aimed at restoring truth and achieving reconciliation to give satisfaction to every victim and to address all the serious human rights violations that occurred throughout the country. Here again, the victims, and particularly the families of the disappeared, must be fully and truly involved in designing and implementing the programme.

IV. The Brazzaville Beach disappearances

A. Background

66. During the third armed conflict in the Congo from December 1998, the civilian population was deliberately targeted in the heavy fighting that affected the districts in the south of Brazzaville and Pool region. Hundreds of thousands of Congolese civilians were thus forced to flee the fighting and the atrocities committed by the various parties to the conflict. While most of the refugees fled to the forests of Pool region, others — several tens

of thousands — opted to cross the border to find refuge in Bas-Congo province in the Democratic Republic of the Congo.

67. In April 1999, the Government made several calls for these refugees to return, guaranteeing them safety in the Congo. Against that background, a tripartite agreement was signed on 10 April 1999 between the Republic of the Congo, the Democratic Republic of the Congo and UNHCR, to organize the repatriation of those Congolese refugees who wished to return home.

68. The agreement committed UNHCR to assisting with the transportation of refugees from Bas-Congo province in the Democratic Republic of the Congo to Kinshasa by road, and then from Kinshasa to Brazzaville by boat. The returns were to be based on the voluntary decision of the refugees, after an information campaign describing the current security situation in the Congo, to allow them to take an informed decision.

B. Allegations of enforced disappearances

69. There are many consistent allegations by families and witnesses of enforced disappearances of these refugees in the three humanitarian corridors opened for their return.

70. The most numerous and best documented concern enforced disappearances perpetrated on the arrival of the refugees in Brazzaville's river port in May 1999.

71. On arrival, the refugees were generally welcomed by reassuring announcements made by a representative of the authorities. The families were then separated, the men taken to the premises of the river port police station. The women and children were allowed to leave the port zone. When the families then enquired about their relatives who had been detained, they were generally told that they were undergoing routine inquiries, as the authorities wanted to avoid any "Ninja" militia members entering along with the refugees. Some witness statements also mention the systematic body-searching of the men for any signs that they had carried weapons.

72. Once they were out of the port area, the families waited for their relatives to join them, until they were, sometimes violently, chased away by the security forces. The next day, the families tried to look for their relatives, but in vain, as none of the authorities would admit to holding them.

73. One such statement concerning a disappearance was given by an eyewitness: "I am the father of child XX. He was 25 years old when it happened. On 14 May [1999], after we left our village YY, we made our way to Gobila Beach with the help of UNHCR. We went there because we had heard that it was possible to return to the capital. When we arrived at ATC Beach, police officers separated us, the women to one side and the men to the other. Then they took us to a small room. They removed our shirts and looked to see whether we had any marks from carrying weapons. The young men were put in one corner, and that is when my son was taken. We tried to find out what was happening, but the police told us that it was just routine, they were questioning the children and would release them the next day, but since that day I have never found my boy. (...) We stayed there until 6 p.m. waiting for our son to be released, but in vain. Some of the officers shouted insults at us: 'Go away, you Ba-Congo', and that's when we had to leave. I haven't seen my son since then."

74. Some people claiming to be "survivors" or eyewitnesses say that the men who were detained were later taken to various detention centres, where most of them were executed. Some are alleged to have been taken to the headquarters of the Directorate of Military Intelligence, the premises of the Directorate-General for Presidential Security, the Directorate of Military Security or the Directorate-General for National Surveillance, or to various district police stations or security centres, such as the Ouenzé II police station. The

executions are alleged to have taken place later in various places, notably the headquarters of the Presidential Guard, and the bodies are said to have been buried secretly in various places, thrown into the River Congo or burned.

75. In August 1999, a number of families of the disappeared set up a committee of parents of individuals who were detained by the police and then disappeared. The committee was not able to register as an association because it could not get official authorization. The committee drew up a list of 353 names of disappeared persons and made a number of approaches to the authorities.

C. Role of the Office of the United Nations High Commissioner for Refugees

76. Between April and mid-May 1999, UNHCR, acting in accordance with the tripartite agreement mentioned above, registered the returnees and accompanied them to the boats that were to take them from the port of Kinshasa to the other side of the River Congo. UNHCR made sure that the refugees consented to their return, asking heads of families or heads of groups to sign a “declaration of good faith”. Then, on embarkation, each person on the list of returnees had to sign a manifest. UNHCR found that some of the people who had signed on embarkation never reached their destination, which corroborates the allegations of some families of the disappeared who say that their relatives were detained by the authorities on their arrival at the Beach.

77. On 21 May 1999, UNHCR wrote to the Congolese Ministry of Foreign Affairs, with copy to the Minister of the Interior, the Minister of Health and the interim resident representative of the United Nations Development Programme in Brazzaville. In the letter, UNHCR protested at the treatment of the returnees and quoted several allegations of violations against them in the humanitarian corridors set up under the tripartite agreement. The UNHCR facilitation operations were suspended until the Government of the Congo gave assurances that the agency would be guaranteed access to the returnees in order to monitor the conditions of their return.

78. On the basis of those assurances, from the end of May 1999 onwards, UNHCR took measures to ensure the security of the returnees on their arrival in Brazzaville. The returnees were taken to reception centres, notably Makélékélé Sports Centre, where they were again registered before being sent to their homes.

79. Despite these measures, there are many consistent allegations of the continued enforced disappearance of returnees. Several allegations concern arrests in Makélékélé Sports Centre which, as the Working Group was able to note, is a huge area surrounded by walls that are easy to break through. Other allegations speak of returnees being arrested during their return home after leaving the Centre, or even on arrival at their home.

80. The Working Group questioned UNHCR about the measures that had been taken to make inquiries into the allegations and draw the lessons learned. According to UNHCR, the national authorities are responsible for making inquiries in respect of the disappearances. In repatriation operations, the agency uses the procedures laid down in a number of relevant official documents, such as the *Handbook for Repatriation and Reintegration Activities*.

D. Measures taken by the Congo

1. Parliamentary inquiry

81. In August 2001, the National Transitional Council, the provisional parliament responsible for overseeing the transition until the establishment of new institutions, decided to set up a parliamentary commission of inquiry to shed light on the enforced disappearances that had taken place in the Congo since 1992. The commission had 11 members. It held a press conference in September 2001 and announced that it would hold hearings of family members and make site visits. However, it decided to suspend its work when it found that the Beach disappearances case had been brought before the courts. Subsequently, the commission was dissolved on 7 August 2002, at the same time as the National Transitional Council. The commission never reported on its work. No other commission of inquiry has been set up since the new National Assembly was inaugurated.

2. Legal proceedings

82. On the request of the parents' committee, the Ministry of Justice received about a hundred families between November and December 1999. In June 2002, the senior investigating judge of Brazzaville regional court was appointed to open the case and conduct the investigation. In June 2005, the case was sent to the Prosecutor-General of the Brazzaville Court of Appeal. Sixteen high-ranking officers were accused of genocide, crimes against humanity, war crimes, killings and arbitrary arrests, detentions and kidnappings. On 11 July 2005, the Indictments Chamber sent the case to the Criminal Chamber of the Court of Appeal, noting that the investigating judge was not able, on the basis of the information available since 2000, to bring together conclusive proof that the alleged offences had taken place.

83. The Brazzaville Beach disappearances trial was thus held from 21 July to 17 August 2005 before the Criminal Chamber of the Brazzaville Court of Appeal. The Court's decision was adopted on 17 August 2005. The parties brought an appeal on a point of law to the Supreme Court which, in turn, issued its decision on 5 May 2007.

84. The trial before the Criminal Chamber was broadcast direct on Congolese television and radio. Eighty-four families were allowed to join the proceedings as private parties; the requests of other families were refused. In particular, eight cases of persons arrested in situations related to the Beach case were separated: these were individuals arrested during the same period in other humanitarian corridors set up under the tripartite agreement, or once the returnees were back in their homes. No other trial has since been brought in connection with these cases. The Supreme Court, seized of this point in the appeal on a point of law brought by the civil parties, found that the Criminal Chamber had been correct in limiting the subject matter of the proceedings, in that, in areas other than Brazzaville Beach, it would have been impossible to distinguish between the civilian victims of atrocities and combatants who had died in fighting between the factions.

85. The accused appeared in liberty at the hearings, as they had not been served with arrest warrants by the Indictments Chamber. According to various sources, the atmosphere at the trial was extremely tense. Some of the civil parties, led by their counsel, disputed the independence of the judgement pronounced. The civil parties said that they had been intimidated many times by the presence of people with weapons in the courtroom. Some people said they had decided before the trial not to become civil parties to the case or to testify in the hearing for fear of reprisals. No measures were adopted to provide protection for the victims or witnesses, although the accused held senior positions in the various State security services.

86. After the hearings, the accused were acquitted. However, ruling on the civil case, the Criminal Chamber awarded compensation to the civil parties.

87. In doing so, it found that the State did have a responsibility on the basis of a presumption of fault: “The repatriations took place at a time of increasing attacks by the Ninja militias and so the State ought to have ensured the scrupulous organization of the general security measures justified by the state of war.”

88. Ruling on an appeal on points of law, the Supreme Court partially quashed the decision of the Criminal Chamber and increased most of the compensation awards to the civil parties.

89. According to various persons the Working Group met with, the Brazzaville trial had an educational effect on the population, shedding light on a particularly tragic episode in the civil war. Some said that merely seeing high-ranking officers in the dock brought a general recognition of the need to take effective measures to prevent such violations happening in the future. Others believed that the only purpose of the trial was to definitively exonerate the accused so as to prevent similar cases being brought in the future, thus creating a *de facto* amnesty.

90. The Working Group is of the opinion that the 2005 trial in Brazzaville did prove beyond doubt, firstly, that individuals had indeed been victims of enforced disappearances and, secondly, the State’s responsibility in the matter.

91. The Working Group regrets however that the legal proceedings have not yet led to the identification and punishment of those responsible for the enforced disappearances. It points out that article 13, paragraph 6, of the Declaration states that: “An investigation ... should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.”

92. Furthermore, article 7 of the Declaration provides as follows: “No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.”

93. In that regard, the Working Group welcomes the fact that the State prosecutor of the Brazzaville regional court has been instructed to open an inquiry into 23 cases of enforced disappearance that were not included in the 2005 trial.

94. The Working Group also regrets that the families’ right to know the truth about the fate of their relatives has not been upheld. Indeed, the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation.

95. In respect of the right to reparation, the Working Group notes with pleasure that the families who were civil parties to the 2005 case have received compensation on the basis of the State’s liability for fault. However, the Working Group considers that the compensation should be supplemented by other forms of reparation, including psychological and social support for the relatives, who often face huge difficulties because of the disappearances.

96. The families of the disappeared have furthermore expressed the wish to be received by the President as a sign of recognition of their grief. They have also requested permission to hold a ceremony in homage to the disappeared on Brazzaville Beach on 5 May each year. The Working Group encourages the Government to grant these legitimate requests, which emanate from the right to reparation recognized in the Declaration in 1992.

E. Proceedings brought in other countries

97. On 1 February 2002, criminal proceedings were brought in Meaux, France, on the basis of a complaint lodged by the International Federation for Human Rights, the Ligue des droits de l'homme (Human Rights League) and the Observatoire Congolais des Droits de l'Homme (Congolese Human Rights Observatory). The case is still being investigated. It has, in particular, given rise to an international arrest warrant, issued in January 2004, for Norbert Dabira, Inspector-General of the Armies of the Republic of the Congo. The case is based on the French Code of Criminal Procedure, which gives domestic courts universal competence to try perpetrators of the crime of torture, in application of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

F. Application by the Congo to the International Court of Justice

98. An application was filed with the International Court of Justice on 9 December 2002 by the Republic of the Congo for the annulment of the measures of investigation and prosecution taken by the French justice system following a complaint to the French courts by several NGOs. France accepted the Court's jurisdiction, and the Court was able to pronounce on the Congo's request for a provisional measure, rejecting it in an order of 17 June 2003. However, by an order of 16 November 2010, the International Court of Justice removed the case from its list, on the request of the Republic of the Congo.

V. Recommendations

99. **In light of the conclusions drawn during its visit, the Working Group would like to make the recommendations below. The Working Group is fully at the disposal of the Government of the Congo for any assistance it may wish to have in implementing these recommendations. To that end, it welcomes the continued constructive dialogue with the Government.**

A. To the Government of the Congo

100. **On law and practice in the Congo in respect of the Declaration:**

(a) **Continue to seek the truth concerning the fate of all those alleged to have been victims of enforced disappearance in the Congo;**

(b) **Ratify the International Convention for the Protection of All Persons from Enforced Disappearance as soon as possible;**

(c) **Incorporate enforced disappearance into the Criminal Code as an autonomous offence;**

(d) **When incorporating the offence of enforced disappearance into domestic legislation, use as a basis the recommendation made by the Working Group in its study on best practices on enforced disappearances in domestic criminal legislation (A/HRC/16/48/Add.3);**

(e) **Take all necessary measures to combat impunity for the perpetrators of this crime, without waiting for the relatives of the disappeared to lodge a formal complaint or initiate an inquiry procedure;**

- (f) Establish an effective victim and witness protection programme, offering all guarantees of safety for those who wish to lodge a complaint or testify;
- (g) Ban detention in secret or in unofficial places of detention, and prosecute and punish any behaviour by a public official, or anyone acting with the consent or acquiescence or under the control of the State, that contravenes the ban;
- (h) Make more means available to the police and the judiciary to ensure better prevention of enforced disappearances;
- (i) Take measures to encourage the involvement of the National Human Rights Commission and human rights NGOs in monitoring places of detention, while respecting their independence;
- (j) Provide training programmes in human rights and humanitarian law, with particular mention of enforced disappearances, for all members of the police, the judiciary and the army;
- (k) With full participation of the victims, draw up an integrated comprehensive programme of reparations based on the harm caused to civilians during the different conflicts that have blighted the Congo;
- (l) With the full participation of the victims, implement a programme aimed at restoration of the truth and reconciliation;
- (m) Consider setting up a peace and reconciliation commission, which could have its institutional base in the Monitoring Committee of the Agreement for Peace and Reconstruction of the Congo;
- (n) Finally, the Working Group requests the Congolese authorities immediately to take all the necessary measures to remedy the situation of the three nationals of the Democratic Republic of the Congo who have been detained for nearly eight years, without any legal controls, in the premises of the Central Directorate of Military Intelligence, which are not an official place of detention.

101. On the Brazzaville Beach disappearances:

- (a) Continue inquiries aimed at identifying and punishing those responsible for enforced disappearances, and clarifying the fate of the victims of the enforced disappearances during the repatriation operations from April 1999 onwards;
- (b) Award to the families of the disappeared reparations that go beyond compensation and include rehabilitation, satisfaction and, particularly, psychological and social support for the relatives;
- (c) In particular, grant the wishes of the families of the disappeared to be received by the President and to be allowed to commemorate the Brazzaville Beach disappeared every year on 5 May.

B. To the Office of the United Nations High Commissioner for Refugees

102. On the Brazzaville Beach disappearances:

- (a) Draw up a public report detailing the conditions under which UNHCR took part in the repatriation of Congolese refugees to Brazzaville between April and December 1999;
- (b) Make public the lessons that can be learned from such events in terms of procedures for the repatriation of refugees in conflict zones.

C. To the international community as a whole

103. The Working Group recommends that the international community provide appropriate technical capacity-building assistance to the Congo to help it promote and protect human rights.
