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## **Adopting an Anti-human Trafficking Law in the DR Congo: A Significant Step in the Process of Combating Trafficking**

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# **Adopting an Anti-human Trafficking Law in the DR Congo: A Significant Step in the Process of Combating Trafficking**

**By Roger-Claude Liwanga<sup>1</sup>**

## **Abstract**

This paper highlights the necessity of adopting a comprehensive anti-human trafficking law in the Democratic Republic of Congo (DRC). The DRC ratified a number of international instruments prohibiting human trafficking, such as the Palermo Protocol, which recommend it to take legislative measures against human trafficking domestically. But so far, the DRC has not yet adopted a comprehensive anti-human trafficking law. With the increasing prevalence of human trafficking, the existing fragmented provisions on trafficking in the DRC (catalogued within the Law 06/018 amending the Penal Code, the Labor Code and the Law 09/001 on the Protection of the Child) are not sufficient to address the scourge, given the limited scope of their regulation of human trafficking. Countless victims of trafficking, particularly adults who are subjected to bonded labor, are unprotected by the law. Following the example of comprehensive anti-human trafficking legislations in the United States, Italy, Burkina Faso, Kenya or South Africa, the DRC should also adopt its own version of comprehensive anti-human trafficking law to increase its likelihood of effectively protecting trafficking victims, investigating trafficking offences, prosecuting trafficking offenders, and deterring potential traffickers. This paper recommends a sketch of a holistic anti-human trafficking law which is adapted to the DRC's context.

## **Introduction**

Human trafficking is one of the worst forms of human rights violations. It harms the human dignity and fundamental freedoms of victims<sup>2</sup> by considering them as products to be bought and sold, and forced into labor and sex exploitation.<sup>3</sup> The most recent report of International Labour Organization (ILO) estimates that 20.9 million people are victims of forced labor globally,<sup>4</sup> including victims of trafficking in persons.

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<sup>2</sup> *Rantsev v. Cyprus and Russia*, App. No. 25965/04, Eur. Ct. H.R. (2010) at 282, available at: <<http://www.bailii.org/eu/cases/ECHR/2010/22.html>> (last accessed 19 May 2012).

<sup>3</sup> *Id.*, at 281.

<sup>4</sup> "ILO 2012 Global estimate of forced labor", available at: <[http://www.oitbrasil.org.br/sites/default/files/topic/gender/doc/relatoriate2012\\_846.pdf](http://www.oitbrasil.org.br/sites/default/files/topic/gender/doc/relatoriate2012_846.pdf)> (last accessed 8 June 2012)

The Democratic Republic of Congo (DRC) is one of the countries affected by the scourge of human trafficking, where men, women, and children are subjected to forced labor and sex trafficking.<sup>5</sup> Even though there is no official data concerning the number of trafficking victims in the country, reports from international organizations, such as UNICEF indicated that several thousand children are subjected to forced labor in the DRC's artisanal mines.<sup>6</sup> Furthermore, the U.S. State Department reported that:

“Congolese artisanal miners are exploited in situations of debt bondage by businessmen and supply dealers from whom they acquire cash advances, tools, food, and other provisions at inflated prices, and to whom they must sell the mined minerals at prices below the market value. The miners are forced to continue to work to repay constantly accumulating debts that are virtually impossible to repay.”<sup>7</sup>

Sex trafficking is also common. Girls, in particular, are forced into prostitution in markets and mining areas by organized networks, gangs, and brothel operators.<sup>8</sup> Many Congolese women and children (especially girls) are also reportedly trafficked into neighboring countries, such as Angola, Congo-Brazzaville, and South Africa, for sexual exploitation.<sup>9</sup>

The DRC ratified without reservation a number of international and regional instruments against human trafficking, including the UN Convention against Transnational Organized Crime and its Protocol on the Prevention, Suppression and Punishment of Trafficking in Persons, especially Women and Children,<sup>10</sup> the UN Convention against the Worst forms of Child Labor,<sup>11</sup> and the UN Convention on the Minimum Age for Admission to Employment. In ratifying those

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<sup>5</sup> US Department of State, “Trafficking in Persons Report 2011-Country Narratives,” available at: <http://www.state.gov/j/tip/rls/tiprpt/2011/164231.html> (last accessed 5 March 2012)

<sup>6</sup> According to UNICEF more than 43,000 children were subjected to (forced) mining labor in artisanal mines in the DRC's province of Katanga in 2010 alone. UNICEF quoted by Amnesty International, “The 2010 Annual Report for Congo (Dem. Rep. of),” available at: <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2010&c=COD>.

<sup>7</sup> Ibid.

<sup>8</sup> U.S Department of State, “Trafficking in Persons Report”, above at 5.

<sup>9</sup> *Trafficking in Persons Report 2007*, p.89, available at: < <http://www.state.gov/documents/organization/82902.pdf> > (last accessed 10 August 2012). See also: U.S Department of State, “Trafficking in Persons Report”, above at 8.

<sup>10</sup> UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, available at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (last accessed 11 June 2012). Ratified by the DRC on October 28, 2005.

<sup>11</sup> UN Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Jun. 17, 1999, available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (last accessed 11 June 2012). Ratified by the DRC on June 20, 2001.

instruments, specifically the Protocol on the Prevention, Suppression and Punishment of Trafficking in Persons [hereinafter Palermo Protocol], the DRC government, among other things, committed to adopt comprehensive criminal legislation to combat human trafficking.<sup>12</sup>

Despite these lofty aspirations, the DRC has yet to pass a comprehensive anti-trafficking law to cover all the forms of human trafficking. Instead, it currently has provisions scattered throughout its different codes, which only condemn certain aspects of trafficking. For example, the Penal Code does not have provisions criminalizing labor trafficking of both adults and children. Yet, Law 06/018 amended the Penal Code (also known as the Law on Sexual Violence)<sup>13</sup>, to punish pimping,<sup>14</sup> forced prostitution,<sup>15</sup> child prostitution,<sup>16</sup> and sex slavery<sup>17</sup> by up to twenty years of imprisonment and a maximum fine of \$200. Law 09/001 on the Protection of the Child<sup>18</sup> also prohibits pimping of children<sup>19</sup> and sex slavery.<sup>20</sup> In addition to those offenses, Law 09/001 penalizes the sale and trafficking of children,<sup>21</sup> the worst forms of child labor,<sup>22</sup> and economic<sup>23</sup> and commercial sexual exploitation of children.<sup>24</sup>

Because the Penal Code is silent on trafficking for economic exploitation, and the scope of coverage of Law 09/001 on the Protection of the Child is restricted to children, it is clear that adult victims of bonded labor are not protected by the country's laws.

The Congolese anti-human trafficking provisions are fragmented by nature, and some of the practical implications of such legal fragmentation include the difficulty of enforcement owing to the limited operational scope of the laws, the

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<sup>12</sup> Art 9 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children [hereinafter the Palermo Protocol].

<sup>13</sup> Loi N° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais [Law 06/018 of July 20, 2006 amending and completing the Decree of January 30, 1940 on the Congolese Penal Code].

<sup>14</sup> Id., art 174(b).

<sup>15</sup> Id., art 174(c).

<sup>16</sup> Id., art 174(n).

<sup>17</sup> Id., art 174(e).

<sup>18</sup> Loi No 09/001 du 10 Janvier 2009 portant Protection de l'Enfant [Law 09/001 of January 10, 2009 on the Protection of the Child].

<sup>19</sup> Id., art 182.

<sup>20</sup> Id., art 183.

<sup>21</sup> Id., art 162.

<sup>22</sup> Id., articles 53 and 187.

<sup>23</sup> Id., art 58.

<sup>24</sup> Id., art 179.

uneven enforcement of the laws due to the lack of harmony of different provisions, and the difficulty of keeping statistical data on the extent of the scourge.<sup>25</sup>

With the increasing prevalence of human trafficking in the DRC that is partially caused by the lack of an efficient anti-trafficking law, the question posed is: instead of scattering provisions on trafficking throughout different laws, why not the DRC enact a comprehensive law to cover all the forms of human trafficking and provide extensive protection to all trafficking victims? For this purpose, the paper aims to underline the necessity of adopting a comprehensive anti-human trafficking law as a significant step in the process of combating trafficking in the DRC.

This paper is structured as follows: (1) understanding the concept of “human trafficking” under the DRC context, (2) analysis of the DRC’s laws against human trafficking, (3) comparative assessment of the DRC’s laws on trafficking in relation to international standards, (4) analysis of gaps within the DRC’s legal framework on trafficking, and (5) recommendations for a comprehensive anti-human law in the DRC.

## **(1) Understanding the concept of “human trafficking” under the Congolese context**

### **(A) Background**

As previously mentioned, human trafficking is prevalent in the DRC where men, women, and children are subjected to forced labor, bonded labor, forced sexual exploitation, and forced recruitment to serve in military groups.<sup>26</sup> In the DRC, trafficking is largely an internal phenomenon, occurring within the country’s borders. It is most common in the artisanal mining areas,<sup>27</sup> which are located in the northeastern and eastern parts of the country.<sup>28</sup>

Like in most developing countries affected by the scourge of trafficking, the underlying causes are almost the same. In the DRC, the causes of trafficking include poverty, cultural factors, armed conflicts, lack of information and awareness, and impunity. First, because of poverty and unemployment, some parents allow their children to work in artisanal mines as a principal source of

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<sup>25</sup> “New law to tackle human trafficking,” available at: <http://www.southafrica.info/services/rights/trafficking-160310.htm> (last accessed 8 August 2012).

<sup>26</sup> US Department of State, “Trafficking in Persons Report,” above at 8.

<sup>27</sup> Artisanal mining is small-scale mining activities that use rudimentary methods to extract and process minerals. It is also called informal mining industry, and it is characterized by poor level of mechanization and lack of minimum standard of health and security.

<sup>28</sup> US Department of State, “Trafficking in Persons Report,” above at 26.

income. Numerous young boys and girls are also condemned to work in the mines because of the lack of schools in most mining areas and the inability of parents to afford education fees where schools do exist. Second, some children engage in mining-related labor because it is culturally acceptable for them to work and supplement the household income. Society considers children as a source of assistance to contribute to the family's revenue.<sup>29</sup> Third, the persistent armed conflicts in the eastern the DRC has also encouraged trafficking to flourish as armed groups forcibly recruit men, women, and children to serve as combatants, laborers, porters, domestics, and sex slaves for members of armed groups.<sup>30</sup> Fourth, most people living in the remote mining regions are not aware of health related risks posed by child mining labor and sexual exploitation. They are oblivious to the illegality and dangerousness of labor trafficking because they are usually uneducated and do not have access to this type of information. Finally, the impunity of traffickers fuels the industry. Almost no investigation has been carried on against trafficking offenders.<sup>31</sup>

The fate of human trafficking in the DRC is disastrous for the victims. Because artisanal child-miners are in constant contact with radioactive minerals (such as coltan, cobalt, copper, uranium, mercury, and zinc) without safety and protection, many get infected with lung disease and pneumonia. Others, especially women and girls, get infected with HIV and AIDS because of being forced into prostitution.

Not surprisingly, within a country like the DRC, where there is no comprehensive and harmonized legislation to prevent trafficking, most victims of trafficking have little protection under the law, while traffickers continue to benefit with impunity.

## **(B) Definition of human trafficking**

### **(B.1) Under the International law**

Article 3(a) of the Palermo Protocol defines “human trafficking” as:

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<sup>29</sup> In some territories of the eastern DRC, a child-boy who contributes to the household income is referred by his community as *mwana-umé* (a Swahili expression meaning a “brave man”) by opposition to *wabulé* (meaning derogatively a weak or coward person). In order to avoid being derogatively described as *wabulé*, some children get involved in mining labor so that they can prove their braveness. See also: Kishore K. Chhtri, “Child Labour in Bhutan: The Challenges of Implementing Child Rights in Bhutan” (2011), Thesis in Human Rights Practice, University of Gothenburg, available at: <http://hdl.handle.net/10037/3501> (last accessed 4 February 2014).

<sup>30</sup> US Department of State, “Trafficking in Persons Report,” above at 28.

<sup>31</sup> *Ibid.*

“The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The components of an act of human trafficking include: acquisition, movement, lack of consent, and exploitation. Acquisition of victims is either done through recruitment, abdication or sale.

The movement consists of moving the victim from his/her country of origin (through transit country) to destination country.<sup>32</sup> Trafficking can also be internal, occurring only within national borders. In this context, the same country will be considered as the country of origin, transit, and destination.<sup>33</sup>

The consent of the victim to acts of exploitation is irrelevant if any of the following means was employed against him/her: coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, etc. It should also be noted that the presence of the victim’s consent is not an absolute defense for the trafficker, even in the absence of any means of coercion.<sup>34</sup> This is because the actual consent of the victim can be nullified by the after-the-fact coercion by the trafficker.<sup>35</sup> This is the case where “a person who agreed to migrate and engage in sex work, but is held by force and coerced to perform sex work for long hours and not paid as promised.”<sup>36</sup> In this example, the use of force and coercion by the trafficker has invalidated the initial consent of the victim to engage in sex work. Thus, it amounts to human trafficking.<sup>37</sup>

Additionally, if the victim is a child, the Palermo Protocol presumes that the child has been trafficked even if none of the means enumerated were employed against the victim because a child is considered to be incapable of giving consent.<sup>38</sup>

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<sup>32</sup> S Kara, “Designing More Effective Laws Against Human Trafficking” (2011), Vol.9, Num. 2, *Northwestern Journal of International Human Rights*, p.10.

<sup>33</sup> Ibid.

<sup>34</sup> D Hamat and J Tribbett “A Comparative Analysis of Human Trafficking Legislation and Case Law: Suggestions for Best Practices in Creating Laws Against Human Trafficking”(2009), R76 Project UNODC, p.8.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Palermo Protocol, art3(c).

Acts of exploitation consist of sexual, economic and other forms of illicit exploitation. The list of those acts is not exhaustive and may include: forced prostitution or other sexual exploitation, forced labor or services, domestic servitude, debt bondage, slavery, removal of organs, use of children in armed conflicts, and other illicit acts.

## **(B.2) Under the Congolese law**

There is no single definition of “human trafficking” under the Congolese law.

The Congolese Constitution<sup>39</sup> does not mention the word “human trafficking,” but states that no one should be subjected to slavery or forced labor.<sup>40</sup> The Penal Code does not define trafficking. Instead, it defines “sex slavery” to have the attributes of trafficking for sexual exploitation. Article 174 (e) of the Penal Code stipulates that:

“Sex slavery is the fact of exercising the power(s) attached to the ownership of a person, including detaining or imposing a similar deprivation of liberty or buying, selling, lending, trading that person for sexual purposes, and will constraint that person to perform one or more sexual acts.”

Yet, Law 09/001 on the Protection of the Child does define “trafficking,” but the scope of its definition is strictly limited to children (persons aged less than 18 years). Article 162(1)(1) of the Law states that:

“Child trafficking shall mean the recruitment, transportation, transfer, harboring or receipt of children, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over the child for the purpose of exploitation.”

This definition of child trafficking given by the Law 09/001 is a mere replication of the description of trafficking in persons provided by the Palermo Protocol. Unlike the Palermo Protocol, Law 09/001’s definition of trafficking is not

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<sup>39</sup> Constitution de la République Démocratique du Congo du 18 février 2006 telle que modifiée par la loi du 20 janvier 2011 [Constitution of the Democratic Republic of Congo of February 18, 2006 as modified by the Law of January 20, 2011].

<sup>40</sup> Id., art 16.



holistic to the extent that it does not cover adult persons, nor does it list the constitutive elements of the acts of exploitation.

Some may argue that the absence of a comprehensive definition of human trafficking at the national level does not really constitute a problem in the DRC because the country has adopted a monist legal system,<sup>41</sup> and that the provisions of the Palermo Protocol (which the DRC ratified) are part of the domestic law and can be applied by the courts without further formalities. Even though such a statement is relevant, the practice on the ground shows that the Congolese judicial actors do not always apply international instruments duly ratified by the country in their decisions. Instead, they often apply domestic laws even if it appears contrary to international law or international instruments offer greater protection to the victims. Also, many judges are not well-informed about international instruments and ill-equipped to implement its tenets.<sup>42</sup> Thus, there is a significant gap between the aspirations of DRC in adopting the Palermo Protocol and the day-to-day activities of the courts.

## **(2) The DRC's laws against human trafficking**

As earlier mentioned, the DRC has not yet adopted a comprehensive anti-human trafficking law, but it has provisions within its laws that condemn certain aspects of trafficking. This section will analyze the existing laws addressing human trafficking issues.

### **(A) Trafficking for sexual forms of exploitation**

In July 2006, the DRC passed Law 06/018 amending the Penal Code (also known as the Law on sexual violence).<sup>43</sup> This Law criminalizes pimping,<sup>44</sup> forced prostitution,<sup>45</sup> child prostitution,<sup>46</sup> and sexual slavery.<sup>47</sup> Even though the Law does not explicitly mention the word "sex trafficking," its definition of sex slavery is

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<sup>41</sup> A monist state is a country where the international treaty duly ratified is immediately incorporated into national law without further procedural formalities.

<sup>42</sup> The author of the paper designed a training module to train the Congolese magistrates on the protection of children against trafficking for economic exploitation in mines in the DRC's province of Katanga. During the preliminary discussion with magistrates (judges and public prosecutors) in March 2011, he noted that many participants were not aware about the provisions of the Palermo Protocol. And some participants confessed to him that they did not know that the DRC ratified the Protocol.

<sup>43</sup> Law 06/018, above at 13.

<sup>44</sup> *Id.*, art 174(b)

<sup>45</sup> *Id.*, art 174(c)

<sup>46</sup> *Id.*, art 174(n).

<sup>47</sup> *Id.*, art 174(e).

broad so that it contains the attributes of trafficking for sexual exploitation.<sup>48</sup> This was novel at the time, as the previous provisions<sup>49</sup> had failed to establish sex slavery as a crime. In contrast, Article 174(e) of the Law on Sexual Violence punishes sex slavery from five to twenty (20) years of imprisonment and a fine not exceeding \$200.

Like in Belgium<sup>50</sup> and France,<sup>51</sup> prostitution is not penalized<sup>52</sup> in the DRC. However, pursuant to the Law on Sexual Violence forced prostitution and child prostitution are criminalized. Article 174(c) of the Law on Sexual Violence stipulates that forced prostitution refers to any situation in which:

“Anyone to constraint any person(s) to perform act(s) of sexual nature by using force, threat of force or coercion or taking advantage of the inability of those person(s) to freely give their consent in order to obtain a financial advantage or other advantages...”

Article of 174(n) of the same Law also emphasizes that child prostitution occurs when a person “uses a child aged less than eighteen years for sexual activities in return for payment or other advantages”

Before the adoption of the Law on Sexual Violence, the Penal Code of 1940 was only punishing pimping and pimping- related offences. Then-Article of 174(bis) of the Penal Code stipulated:

“Shall be punished by imprisonment from three months to five years and a fine from 50 to 1000 Zaires:

1. Anyone who, in order to satisfy the passions of other persons, hires, abducts or entices a person aged or apparently aged of 21 years to engage in debauchery or prostitution, even with her consent...

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<sup>48</sup> Ibid.

<sup>49</sup> Décret du 30 janvier 1940 portant Code pénal congolais [Decree of January 30, 1940 on the Congolese Penal Code].

<sup>50</sup> Loi du 21 Aout 1948 supprimant la réglementation officielle de la prostitution [Law of August 21, 1948 removing the government’s regulation on prostitution]. See also : Van Haecht, « La prostituée : Statut et image », Ed. Université de Bruxelles, p.69, available at : [http://digistore.bib.ulb.ac.be/2008/DL2277602\\_000\\_f.pdf](http://digistore.bib.ulb.ac.be/2008/DL2277602_000_f.pdf) (last accessed 8 June 2012)

<sup>51</sup> See: “Les politiques publiques et la prostitution. Rapport d’information sur l’activité de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes pour l’année 2000” [Public policy and prostitution. Report of Information on the activity of the delegation of women’s rights and equal opportunities between men and women for 2000], available at: <http://www.senat.fr/rap/r00-209/r00-2097.html> (last accessed 8 June 2012)

<sup>52</sup> Prostitution is not a crime under the Congolese law so that a prostituted person as well as a sex buyer cannot be convicted.

2. Anyone who holds a brothel.
3. The pimp. The pimp is a person who lives in whole or in part, at the expense of another person who he exploits the prostitution.
4. Anyone who habitually exploits the debauchery or prostitution of other persons in any other ways.”

Even though the difference is not apparent, the Congolese legislator distinguishes a “*proxénète*” (pander) from a “*souteneur*” (pimp). The difference is that the *proxénète* is a person who encourages or persuades another person to engage in prostitution/debauchery (e.g.: detaining a brothel or liaising the sex-worker with the client) whereas the *souteneur* (pimp) is a person who exploits someone’s prostitution (e.g.: collecting of sex-worker’s pay).<sup>53</sup> But, both *proxénète* and *souteneur* are acting for the purpose of getting financial profit or other advantages from the prostitution of others.<sup>54</sup>

Nevertheless, the question posed is: why would the Congolese legislator name forced prostitution and child prostitution as a crime when pimping (including pimping-related acts) was already a crime? By acting so, it appears that the intention of the legislator was to discourage those who were profiting from someone’s prostitution by means of coercion or abusing victims’ vulnerability due to his/her young age. In other words, from the Congolese legislator’s perception, prostitution should be tolerated when it is performed with the “uncorrupted willingness” of the “sex worker” and “sex buyer” rather than executed with the complicity of, or under coercion from a third person. This is why, when compared to the pimping offence, which is punished by up to five years in prison, adults<sup>55</sup> who exploit child prostitution are punished by up to twenty years in prison.<sup>56</sup>

Unlike in the US where pimping is usually synonymous with violence and coercion,<sup>57</sup> under the Congolese Law 06/018, pimping seems to describe the act of

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<sup>53</sup> Akele Adau, et al, “Droit Pénal Spécial” [Special Criminal Law], Université Protestante au Congo [Protestante University in Congo], 2003-2004, p.174.

<sup>54</sup> Ibid. The scope of the definition of pimping is very broad under the Congolese law. Anyone who accepts a gift coming from the gains of prostitution is considered to have committed an act of pimping if the recipient is aware of the immoral and illegal origin of the funds that provided the gift. For instance, the brother of a female sex-worker can be charged for pimping if he receives a gift of money from his sister knowing that the gift is a product of his sister’s prostitution.

<sup>55</sup> Unlike the US’s provisions on Sex trafficking of children (18 U.S.C. § 1591) where a minor person may be prosecuted for exploiting the prostitution of another minor; in the DRC, child prostitution offence can only be committed by an adult person (aged from 18 years to above). Children are presumed to be criminally irresponsible for any criminal conducts they commit, including sexual violence offences. See articles 94-101 of the Law 09/001 on the Protection of the Child.

<sup>56</sup> Law 06/018 amending the Penal Code, art 174(n).

<sup>57</sup> J Raymond et al, “Sex Trafficking of Women in the United States,” p.48. Available at: [http://www.heart-intl.net/HEART/081004/sex\\_traff\\_us.pdf](http://www.heart-intl.net/HEART/081004/sex_traff_us.pdf) (last accessed 9 August 2012).

a person who organizes women or men to work “willingly;” whereas sex trafficking seems to describe the sexual exploitation of women or men who are working under the threat of force or coercion. It is in this context that Article 174(c) of the Law 06/018 addresses the issue of sex trafficking.

In 2009, the DRC’s president promulgated Law 09/001 on the Protection of the Child. Like the Law on Sexual Violence, Law 09/001 also has provisions that punish pimping<sup>58</sup> and sex slavery<sup>59</sup> committed against children by up to twenty years of imprisonment. It also increases the minimum punishment for those crimes by ten years.<sup>60</sup> The minimum sentence for adults who pimp children is five years, but when the person pimping the child has parental or legal authority over the child the minimum sentence is increased to ten years in prison,<sup>61</sup> meaning that the offender will be punished from ten to twenty years in prison.

### **(B) Trafficking for non-sexual forms of exploitation**

Trafficking for non-sexual forms of exploitation is also punishable under the Congolese law. The Labor Code of 2002<sup>62</sup> proscribes forced or compulsory labor (committed against adults/children) and punishes the perpetrator by six months of imprisonment and a fine equivalent to \$30.<sup>63</sup> Even though forced labor is forbidden by the Labor Code, the Penal Code of 1940 (which still applies) authorizes the sentence of forced (hard) labor for some convicted criminals.<sup>64</sup>

In addition, Law 09/001 prohibits child trafficking for the purpose of economic exploitation.<sup>65</sup> Article 162 of this Law proscribes child trafficking and sale of children and punishes the offender up to twenty years of imprisonment. This provision indistinctly imposes the same punishment for non-sexual and sexual forms of child exploitation.

Article 53 of the Law 09/001 particularly forbids the worst forms of child labor, including debt bondage, forced labor, forced recruitment of children for use in armed conflict, and work that is harmful to the health, safety and morals of children because of its nature and the circumstances in which is carried out. This

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<sup>58</sup> Law 09/001 on the Protection of the Child, art 182.

<sup>59</sup> *Id.*, art 183

<sup>60</sup> *Id.*, art 182 and 183

<sup>61</sup> *Ibid.*

<sup>62</sup> Loi n° 015-2002 du 16 octobre 2002 Portant Code du Travail [Law 015-2002 of October 16, 2002 on the Code of Labor].

<sup>63</sup> *Id.*, articles 2(2) and 326.

<sup>64</sup> Penal Code, art 5. It should be noted that, even though the court can pronounce the sentence of forced (hard) labor against a criminal; but in practice, that sentence is often replaced by a term of imprisonment.

<sup>65</sup> Law 09/001, art 162.

last category of the worst forms of child labor addresses child labor in artisanal mines that is prevalent in the DRC.

It should be noted that even though the minimum age for employment in the DRC is 16 years,<sup>66</sup> children aged 16 to 18 can only perform “light and healthy” work as opposed to “dangerous and unhealthy work”.<sup>67</sup> A Ministerial Order<sup>68</sup> issued in 2008 by the Congolese Minister of Labor lists mining labor in the category of dangerous and unhealthy work which cannot be performed by children aged less than 18 years.<sup>69</sup> According to Article 187 (1) of the Law 09/001, those who violate the provisions on the worst forms of child labor (Article 53) will be punished by one to three years of imprisonment and a fine equivalent to \$100 to \$200. Article 187(2) of the same law emphasizes that the recruitment of children aged less than 18 years for use in the armed groups and the police will be punished by ten to twenty years of imprisonment.

In the DRC, trafficking of children for the purpose of adoption is regulated by the Family Code of 1987.<sup>70</sup> Article 658 of the Code prohibits the fact of giving or promising financial advantages or other advantages in order to get the adoption of a child. Although the prohibition exists, the Family Code did not set any punishments against those who violate the dispositions of its article 658.<sup>71</sup>

From the above, it appears that the maximum term of imprisonment for acts of trafficking for economic exploitation (except when committed against children) is less than the minimum prison term for trafficking for sexual exploitation. Most importantly, the economic penalties against “labor traffickers” are very insignificant compared to the high profit that they are gaining from exploiting the victims. For instance, the maximal fine for the worst forms of child labor offence is equivalent to \$ 200,<sup>72</sup> \$ 1,000 for trafficking and sale of children,<sup>73</sup> and \$30 for forced or compulsory labor.<sup>74</sup>

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<sup>66</sup> Labor Code of 2002, art 6(2), and Law 09/001, art 54(1).

<sup>67</sup> Law 09/001, art 54(1).

<sup>68</sup> Arrêté ministériel N° 12/CAB.MIN/TPSI/045 /08 du 08 août 2008 fixant les conditions de travail des enfants [Ministerial Order 12/CAB.MIN/TPSI/045/08 of August 8, 2008 on the conditions of work of children].

<sup>69</sup> Id., art 13.

<sup>70</sup> Loi N° 87/010 du 1<sup>er</sup> Aout 1987 portant Code de la Famille [Law 87/010 of August 1, 1987 on the Code of Family].

<sup>71</sup> In the DRC, the Family Code is a set of provisions regulating the rights of persons and family relations, particularly issues of nationality, marriage, adoption and inheritance. Notwithstanding its civil nature, the Family Code also includes some criminal sanctions for those who violate its provisions. For instance, Article 336 of the Code punishes by one to three months of imprisonment anyone who forces a person to get married against her/his will or who prevents the celebration of a marriage that meets all legal requirements.

<sup>72</sup> Law 09/001, art 87(1).

<sup>73</sup> Id., art 162.

<sup>74</sup> Labor Code, art 326.

Some may argue that the average economic penalties for these trafficking-related offences are not really too little in the context of the DRC because the country's daily wage is set at \$ 1.83 per day;<sup>75</sup> further, a disproportionate fine exceeding the offender's financial revenues could make the enforceability of the sanction less likely. This point is pertinent, but it should be noted that "labor traffickers" usually make large profits from subjecting victims to forced or bonded labor in artisanal mines. The International Labour Organization (ILO) revealed that the total profits generated by trafficked forced laborers are estimated to be about \$32 billion per year.<sup>76</sup> In light of this illicit high profit, it is likely that insignificant monetary punishments would be unable to produce any deterrent effects against potential traffickers. For that reason, in a country like France where the monthly minimum wage is fixed at € 1398.37 (almost \$ 1,894.12),<sup>77</sup> the fine for a human trafficking offence is €150,000 (\$ 187,500).<sup>78</sup> Further, when trafficking is committed against a child, a vulnerable person, or committed by a person who has parental or legal authority over the victim, the fine is increased to €1,500,000 (\$ 1,875,000).<sup>79</sup> And the amount of the fine increases to €3,000,000 (\$3,750,300) if the trafficking offender is a member of an organized criminal group.<sup>80</sup>

### **(C) Proceedings for human trafficking related offences**

In the DRC, most acts of human trafficking follow under jurisdiction of the Tribunal of Grande Instance (High Court). In July 2006, Congolese Parliament also passed the Law 06/019 amending the Code of Criminal Procedure<sup>81</sup> that introduced important innovations relating to sexual violence offences (including rape, sexual assault, sex slavery, forced prostitution, and pimping). Article 7(bis) of this Law set a maximum period of four months to adjudicate cases relating to sexual violence

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<sup>75</sup> Ordonnance N° 08/040 du 30 avril 2008 portant fixation du salaire minimum interprofessionnel garanti, des allocations familiales minima et de la contre-valeur du logement [Ordonnance No. 08/040 of 30 April 2008 fixing the minimal inter-professional wage, family allowances, and housing value], art 2.

<sup>76</sup> International Labor Organisation, "A Global Alliance against Forced Labor" (2005), p.55.

<sup>77</sup> Eurostat, "Minimum wages" Available at: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=0&language=en&pcode=tps00155> (last accessed 21 January 2014).

<sup>78</sup> Code Pénal Français tel que modifié parla Loi n°2007-1631 du 20 novembre 2007 [French Penal Code as modified by the Law 2007-1631 of November 20, 2007], available at: [http://www.legifrance.gouv.fr/affichCode.do;jsessionid=66DB84EE2B773D75A055243909BDB722.tpdjo05v\\_2?idSectionTA=LEGISCTA000006165299&cidTexte=LEGITEXT000006070719&dateTexte=20120612](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=66DB84EE2B773D75A055243909BDB722.tpdjo05v_2?idSectionTA=LEGISCTA000006165299&cidTexte=LEGITEXT000006070719&dateTexte=20120612) (last accessed 11 June 2012). See: Article 225-4-1 of the French Penal Code.

<sup>79</sup> Id., art 225-4-2.

<sup>80</sup> Id., art 225-4-3.

<sup>81</sup> Loi N° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais [Law 06/019 of July 20, 2006 amending and completing the Decree of August 6, 1959 on the Congolese Code of the Criminal Procedure].

offences, from the initial investigation to the final judgment of the court. The rationale is to ensure a prompt response to sexual violence offences and provision of legal assistance to the victims of those acts.<sup>82</sup> This is because, prior to the adoption of that disposition, sexual violence cases were not commonly adjudicated in a timely manner, unless defined as “flagrant crimes”. A flagrant crime exists when the criminal has been caught in the act of committing a crime or caught after he/she has just committed a crime.<sup>83</sup>

In addition, Article 9 (bis) of the Law 06/019 abolishes the payment of a transactional fine (*amende transactionnelle*) for sexual offences.<sup>84</sup> The Congolese Code of Criminal Procedure permits an officer of the judicial police (*officier de la police judiciaire*) or Public Prosecutor (*officier du ministère public*) who is investigating a crime to drop an offender’s charges in return for the offender’s payment of a transactional fine to the treasury.<sup>85</sup> In allowing offenders to pay the transactional fine, the Congolese legislator initially wanted to prevent courts and tribunals from having lengthy criminal trials for “petty crimes”, especially wherein the outcome would generally be economic in nature, include a fine or asset forfeiture.<sup>86</sup> Today’s practice, however, is, that officers of the judicial police or public prosecutors accept transactional fines even for serious crimes. By abolishing the payment of a transactional fine for sexual violence offences, Congolese legislator would end the spectrum of impunity for sexual violence offences. Even though the abolition of transactional fine for sexual violence offences is important to discourage sexual offenders in the country that has the highest rate of sexual abuse,<sup>87</sup> the narrow scope of the provisions of Article 9 (bis) of the Law 06/019 seems, however, not being a solution to the problem of impunity in the DRC in the way that perpetrators of non-sexual offences can still pay their way to get out of

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<sup>82</sup> Id., Preamble of the Law.

<sup>83</sup> Id., art 7. See also: Ordonnance-Loi 78-001 du 24 février 1978, relative à la répression des infractions flagrantes [Ordonnance-Law 78/001 of February 24, 1978 on the repression of flagrant crimes], art 2. The particularity of the procedure regarding flagrant crimes is that a police officer is not required to inform his/her superior before arresting the alleged offender and investigating the case. See: Code of Criminal Procedure, art 10.

<sup>84</sup> Id., art 9(bis): “L’amende transactionnelle ne s’applique pas aux infractions aux violences sexuelles.” [Transactional fine should not apply for sexual violence offences.]

<sup>85</sup> Code of the Criminal Procedure, art 9.

<sup>86</sup> M Molibenga, “Principe de l’opportunité des poursuites vecteur des abus en droit judiciaire congolais” [Principle of the opportunity of prosecution vector of abuses under the Congolese judicial law] (2007), Thesis in Law, Université de Kinshasa, available at: [http://www.memoireonline.com/04/10/3337/m\\_Principe-de-lopportunités-des-poursuites-vecteur-des-abus-en-droit-judiciaire-congolais9.html](http://www.memoireonline.com/04/10/3337/m_Principe-de-lopportunités-des-poursuites-vecteur-des-abus-en-droit-judiciaire-congolais9.html) (last accessed 3 June 2012). See also: Code of the Criminal Procedure, art 9.

<sup>87</sup> According to the UN Report, the eastern part of the DR Congo is considered the “rape capital of the world,” with an estimated 48 women raped every hour. See: F Lloyd-Davies, “Why eastern DR Congo is ‘rape capital of the world’” (25 November 2011) CNN, available at: <http://www.cnn.com/2011/11/24/world/africa/democratic-congo-rape/index.html> (last accessed 9 August 2012).

prosecution. In order to avoid double standard in treating perpetrators of different serious crimes, the Congolese legislation should consider abolishing explicitly the payment of transactional fine for any serious crimes, including those punishable at least one day of imprisonment.

On the prosecutorial scheme, sexual exploitation cases have received substantial more legislative interest in the DRC than labor-related trafficking. For instance, unlike cases of sex slavery or forced prostitution, there is no a compulsion to expedite proceeding. In this context, cases may take years before the delivery of the final judgment. Also, a perpetrator of acts of bonded labor can pay a transactional fine, resulting in all charges being dropped against him/her.

## **(D) Protection of trafficking victims**

The protection of human trafficking victims is regulating by the Code of Criminal Procedure and the Law 09/001 on the Protection of the Child. The protection of trafficking victims includes a panoply of safeguards, namely:

### **D.1. Judicial and administrative protection**

Article 74(bis) of the Code of Criminal Procedure guarantees judicial support to trafficking victims by requiring public prosecutors and judges to take appropriate measures to safeguard the security, physical and psychological well-being, dignity, and respect of privacy of the victims of sexual violence offences (including the removal of particular spectators and/or media during the court hearings). Victims of sexual violence/exploitation are also entitled to be assisted by counsel during all the stages of the proceedings.<sup>88</sup> Beyond the judicial protection, Articles 62-65 of the Law 09/001 grants child- victims of economic exploitation or enlistment in armed groups with special /exceptional protection, including foster care, reeducation, and social reinsertion.<sup>89</sup>

Unlike the Law 09/001, the Code of Criminal Procedure is not clear on whether or not adult victims of sex/economic trafficking should also be granted material assistance, appropriate housing, educational and training opportunities. This ambiguity may create a hierarchy of protection among trafficking victims based on the crimes committed against them or based on their age.<sup>90</sup>

### **D.2. Right to claim compensation**

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<sup>88</sup> Code of Criminal Procedure, art 7(bis)(4).

<sup>89</sup> Law 09/001, articles 62-65.

<sup>90</sup> UNODC, “Model Law against Trafficking in Persons”, p.43, available at: [http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf) (last accessed 12 June 2012).



In terms of the Code of Civil Procedure, (adult) victims of trafficking also have legal standing to initiate civil action against their traffickers<sup>91</sup> to request for appropriate compensation for physical, psychological and other harm.<sup>92</sup>

However, it is problematic for child-victims of trafficking to initiate civil action against their traffickers, particularly for children who are economically/sexually exploited by their parents or legal guardians. This is because children are legally considered incapable under the Congolese law,<sup>93</sup> and thereby lack legal standing to approach the court. Only their parents or legal guardians can act on their behalf. In the case of a child exploited by his/her own parents, clearly his or her parents would not approach the court against themselves. Therefore, the trafficked child has to wait until his/her adulthood to approach the court to get a legal remedy. This state of affairs is disadvantageous to some categories of trafficking victims, and prevents them from getting their legal remedies timely.

Nevertheless, there is a possibility for child-victims of trafficking to overcome the legal capacity barrier by using the “adhesive procedure”,<sup>94</sup> through which victims of criminal offences can file civil claims during criminal proceedings rather than pursuing damages in separate civil actions.<sup>95</sup> But this option would require that the public prosecutor first initiate criminal proceedings for a child trafficking offense. According to the Code of Organization and Judicial Competence,<sup>96</sup> a public prosecutor can start a criminal investigation either by receiving a complaint/denunciation or by his/her own initiative for child trafficking offense without having received a complaint/denunciation from the victim or an individual who is aware about the crime.<sup>97</sup>

### **D.3. Legal status and repatriation of foreign victims of trafficking**

The DRC’s Law on Immigration (*Ordonnance-loi n° 1983-033 du 12 septembre 1983 relative à la police des étrangers*) is silent on whether foreign victims of trafficking can be given residence permits to remain in the country temporarily or permanently. With is this silence of the law, it would not be surprising that a non-national trafficking victim, who was illegally brought into the

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<sup>91</sup> Code of Civil Procedure, art 1.

<sup>92</sup> Civil Code Book III (Code Civil Livre III of 1888), art 258.

<sup>93</sup> Code of Family, art 215(1).

<sup>94</sup> Code of Criminal Procedure, art 69.

<sup>95</sup> Ibid.

<sup>96</sup> Ordonnance-Loi 82-020 du 31 mars 1982 portant Code de l'organisation et de la compétence judiciaires [Ordonnance-Law 82-020 of March 31, 1982 on the Code of Organization and Judicial Competence].

<sup>97</sup> Id., art 7.

DRC, to be expelled from the country regardless of his/her judicial actions against his/her traffickers.

The inconsistency of the DRC's immigration law creates a danger for the safety of the trafficking victims as long as immigrations authorities may expel undocumented trafficking victims without examining if or not they would be safe upon their return to their home countries. As a result, trafficking victims may be re-trafficked upon their return to places from where they were trafficked.

### **(3) Brief comparative assessment of the DRC's laws on trafficking in relation to international standards**

The DRC ratified a number of international instruments prohibiting human trafficking, including the UN Convention against Transnational Organized Crime and its Protocol on the Prevention, Suppression and Punishment of Trafficking in Persons, especially Women and Children,<sup>98</sup> the UN Convention against the Worst forms of Child Labor,<sup>99</sup> and the UN Convention No 138. At the regional level, the DRC also signed several anti-human trafficking Action Plans, such as the Ouagadougou Action Plan,<sup>100</sup> the SADC Action Plan,<sup>101</sup> and the bi-regional ECOWAS and ECCAS Action Plan.<sup>102</sup> In ratifying those instruments, specifically the Palermo Protocol, the DRC has shown a commitment to establishing comprehensive policies, programs and other measures to prevent and combat trafficking, punish the traffickers, and protect the victims of trafficking.<sup>103</sup> This section aims to determine the compliance of the DRC's anti-trafficking laws with international instruments, to identify the gaps into domestic laws, and to recommend comprehensive policies eventually.

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<sup>98</sup>UN Convention against Transnational Organized Crime, above at 10.

<sup>99</sup> UN Convention against the Worst Forms of Child Labor, above at 11.

<sup>100</sup> Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, adopted by African Union governments in November 2006, available at: [http://ec.europa.eu/anti-trafficking/download.action?nodeId=2e8b2503-6b83-498d-95f0-3acc85f9449f&fileName=Ouagadougou+Action+Plan+to+combat+trafficking\\_en.pdf&fileType=pdf](http://ec.europa.eu/anti-trafficking/download.action?nodeId=2e8b2503-6b83-498d-95f0-3acc85f9449f&fileName=Ouagadougou+Action+Plan+to+combat+trafficking_en.pdf&fileType=pdf) (last accessed 11 June 2012).

<sup>101</sup> SADC Plan of Action on Combating Trafficking in Persons, especially Women and Children, adopted SADC Ministers on May 28, 2009, available at: <http://www.sadc.int/index/browse/page/531> (last accessed 11 June 2012).

Joint ECCAS/ECOWAS Plan of Action against Trafficking in Persons, especially women and children in West and Central Africa. (2006-2008), adopted on July 6, 2006

<sup>102</sup> Art 9 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children [hereinafter the Palermo Protocol].

<sup>103</sup> Palermo Protocol, art 9.

<b>International and regional instruments</b>	<b>Congolese laws/Government policies and other measures</b>
<p><b><i>Definition of human trafficking</i></b>                      Art 3 of the Palermo Protocol                      Art 1 of Art 10(c) of ECOWAS and ECCAS bi-regional Action Plan</p>	<p>There is no a comprehensive definition of human trafficking at the national level.                      Only child trafficking is defined [Art162(1)(1) Law 09/001]</p>
<p><b><i>Penalization of trafficking offences</i></b>                      Art 5 of the Palermo Protocol                      Section III of the Ouagadougou Action Plan                      Art 10(c) of ECOWAS and ECCAS bi-regional Action Plan</p>	<p>Several acts of trafficking related offences are criminalized in the DRC, namely by Law on Sexual Violence (Law No 06/018) or Law on the Protection of Rights of Child (Law 09/001):</p> <ul style="list-style-type: none"> <li>•</li> <li>• Sex slavery[Art 174(e) of Law 06/018 and art 183 of Law 09/001]</li> <li>• Forced prostitution [Art 174(c) of Law 06/ 018]</li> <li>• Child prostitution [Art 174(n) of Law 06/ 018]</li> <li>• Child pornography [Art 179 of Law 09/001 and Art 174(m) of Law 06/018]</li> <li>• Pimping [Art 174(b) of Law 06/ 018 and Art 182 of Law 09/001]</li> <li>• Giving or promising money for getting adoption [Art 658 of Code of Family]</li> <li>• Forced or compulsory labor (Articles 2(2) and 326 of Code of Labor)</li> <li>• Child trafficking for any forms of exploitation [Art 162(1) of Law 09/001]</li> <li>• Sale of child [Art 162(2) of Law 09/001]</li> <li>• Economic exploitation of children (Art58 of Law 09/001]</li> <li>• Worst forms of child labor [Art 53 of Law 09/001, and Art 3 of Code of Labor]</li> <li>• Forcing children to beg[Art 194 of Law 09/001]</li> <li>• Recruitment of children for use in armed conflicts [Art 53 of Law 09/001, and Art 3 of Code of Labor]</li> </ul>

<p><b><i>Judicial and administrative support to trafficking victims</i></b></p> <p>Art 6 of the Palermo Protocol                  Section II of the Ouagadougou Action Plan                  Articles 4-7 of the ECOWAS and ECCAS bi-regional Action Plan</p>	<p>The Code of Criminal Procedure [art 74(bis)] compels the public prosecutors and judges to take appropriate measures to safeguard the security, physical and psychological well-being, dignity, and respect of privacy of the victims of sexual violence offences. Victims of sexual violence should also be assisted by a counsel. [Art 7(bis)(4) of Code of Criminal Procedure]</p> <p>Child- victims of sexual or economic exploitation or enlistment in armed groups should receive a special/exceptional protection, including foster care, reeducation, and social reinsertion [Articles 62-65 of Law 09/001].</p>
<p><b><i>Status of trafficking victims in the receiving country</i></b></p> <p>Art 7 of the Palermo Protocol</p>	<p>The DRC is a source and destination country. The status of victims is not a problem since most trafficking victims are Congolese citizens and do not need a permit allowing them to remain in the country. The DRC’s law on immigration is, however, “silent” concerning the issuing of permit to non-nationals, who are victims of trafficking, to remain in the country temporarily or permanently.</p>

<p><b><i>Repatriation of trafficking victims</i></b>                  Art 8 of the Palermo Protocol                  Articles 11 and 12 of the ECOWAS and                  ECCAS bi-regional Action Plan</p>	<p>The DRC acts as origin, transit and destination because trafficking is mostly internal. The Congolese government established a Program of Disarming, Demobilization and Reinsertion of children victims of forced recruitment in armed groups in order to facilitate their return in their family and community. For the last decade, several thousand children have demobilized and returned to their family and community. However, because of the persistence of insecurity in the eastern part of the DRC, some ex-children soldiers (who were demobilized) are sometime re-recruited by armed groups.</p>
<p><b><i>Prevention of human trafficking and awareness raising</i></b>                  Art 9 of the Palermo Protocol                  Section I of the Ouagadougou Action Plan                  Art 9 of the ECOWAS and ECCAS bi-regional Action Plan</p>	<p>The DRC is making no significant efforts to prevent human trafficking. Even though the Law 09/001 established a National Committee against the Worst Forms of Child Labor, however actions that the Committee has taken for eradicating child forced labor are unknown on the ground.</p> <p>A presidential decree created the SAESSCAM to serve as a technical service to enforce the provisions of the Mining Code in the artisanal mines, including those prohibiting of child labor. So far, SAESSCAM is not yet effective in the field because of lack of resources.</p>
<p><b><i>State co-operation against trafficking, border measures, and security and control of travel documents</i></b>                  Art 10 of the Palermo Protocol                  Section IV of the Ouagadougou Action Plan                  Articles 10(g), 14 and 15 of the ECOWAS and                  ECCAS bi-regional Action Plan</p>	<p>The DRC's Directorate General of Migration (DGM) is now subjecting all minor travelers (accompanied or not by an adult traveler) to obtain from its office an exit permit before crossing the borders of the State. Due to the fact that the DRC shares with nine countries the very long borders where there are not always the DMG agents, it is very difficult to prevent cross borders movement of children.</p>

#### **(4) Gaps in the legal framework on trafficking in the DRC**

The gaps within the Congolese legal framework will be analyzed in regards to the prevention of trafficking, prosecution of traffickers, and protection of victims.

##### **(A) Gaps in the context of preventing trafficking**

The DRC does not have holistic legislation addressing all forms of human trafficking, nor does it have a comprehensive definition of human trafficking. Law 09/001 on the Protection of the Child does not give an inclusive definition of trafficking, and limits the scope of its definition to children (persons aged less than 18 years).

Even though a National Committee against the Worst Forms of Child Labor was established, there are insufficient awareness campaigns to inform the parents and communities about the danger of child sexual exploitation and forced labor for the future of their children and their community at large. The Ministry of Labor, which is responsible for inspecting worksites for child labor, has neither conducted any forced child labor investigations nor identified any cases of forced child labor in mining areas.<sup>104</sup>

In addition, law enforcement officers are not regularly trained, and they lack the resources to carry out their work.

##### **(B) Gaps in the context of prosecuting traffickers**

The lack of anti-human trafficking legislation and a comprehensive definition of human trafficking make the prosecution of trafficking very difficult. The Law 06/018 amending the Penal Code only deals with sexual aspects of trafficking, while the Law 09/001 on the Protection of the Child simply covers acts of trafficking committed against children. Therefore, it appears that there are no provisions that protect adult persons against their economic exploitation. As a result, those who exploit adult forced labor will escape criminal responsibility for their actions.

Overall, there are insignificant prosecutions against perpetrators of acts of trafficking for economic or sexual exploitation.<sup>105</sup> Of the 43,000 cases of child (forced) labor in artisanal mines in 2010 in the DRC's province of Katanga<sup>106</sup> no

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<sup>104</sup> US Department of State, "Trafficking in Persons Report," above at note 28.

<sup>105</sup> US Department of State, "Trafficking in Persons Report," above at note 101.

<sup>106</sup> See above, at 6.

case was brought before the court. It should also be noted that, the defective anti-trafficking provisions are not the only principal reason explaining the lack of prosecution of traffickers in the DRC. Some other major reasons for the lack of prosecution include:

1. Shortage of law enforcement officers in the areas where trafficking is prevalent.<sup>107</sup> In numerous remote mining areas around DRC (including in the mining rich provinces of Katanga, North and South Kivu, and Oriental and Occidental Kasai) there is either an inexistence of judicial structures (e.g.: tribunals/offices of public prosecutor) or insufficiency of law enforcement officers where tribunals exist. For example, the United Nations–sponsored radio revealed that there were only ten (10) judges and prosecutors per two million populations in some territories of the DRC,<sup>108</sup> resulting in the situation of heavy per-judgeship caseload, unresolved cases, or influence of customary/tribal courts in the remote areas. One may also suggest that the shortage of law enforcement officers to prosecute trafficking cases is not really a problem in the DRC given the role of customary courts traditionally. The Congolese Code of Judicial Organization and Competence<sup>109</sup> recognizes the cohabitation of two legal systems: the written law (set down by a legislature) and the unwritten law (based on local customs),<sup>110</sup> and that the local customary courts could adjudicate cases in the areas where the ordinary courts of law are not established yet. While this is the law, it is also important to note that the competence of local customary courts is limited to the issues of personal status rights (marriage and divorce) and property rights (inheritance and land tenure).<sup>111</sup> In other words, local customary courts are not competent to prosecute and try criminal acts (including trafficking offences), which fall under the sole jurisdiction of ordinary courts of law.

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<sup>107</sup> Ibid.

<sup>108</sup>Radio Okapi, «Carence des magistrats en RDC: que faire?» Available at: <http://radiookapi.net/actualite/2010/03/21/carence-des-magistrats-en-rdc-que-faire/> (last accessed 5 February 2014)

<sup>109</sup> Ordonnance-Loi 82-020 du 31 mars 1982 portant Code de l'Organisation et de la Compétence Judiciaires [Ordinance-Law 82-020 of March 31, 1982 on the Organization and Judicial Competence.

<sup>110</sup> The cohabitation of the two legal systems in the DRC (written and unwritten law) is mostly justified in the way that over 60% of the DRC's population lives in the remote rural areas. So, in the territories where the ordinary courts of law are not established yet, the local customary courts should be competent to adjudicate conflicts between litigants. However, the written law has authority over the customary law that is unwritten. See also Article 163 of Ordinance-Law on the Organization and Judicial Competence: "...Customary courts are maintained until the installation of the Courts of Peace."

<sup>111</sup> Dunia Zongwe, et al, "The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview." Available at: [http://www.nyulawglobal.org/globalx/democratic\\_republic\\_congo1.htm](http://www.nyulawglobal.org/globalx/democratic_republic_congo1.htm) (last accessed 13 January 2014)

2. Lack of adequate training and resources for conducting investigations.<sup>112</sup> Some judicial operators in the DRC are not well equipped to detect, investigate and prosecute cases of human trafficking, including child labor exploitation in the mines. Judges and prosecutors lack access to the international and domestic legal documents prohibiting, for example, sex or labor exploitation.<sup>113</sup> In the case of (child) labor exploitation in the mines, law enforcement officers do not often have the means of transport to go to the remote mining areas where children's rights are being violated in order to investigate these cases.
3. Corruption and interference of the government in the administration of justice. The poor working conditions combined with unpaid modest salaries expose law enforcement officers to the potential risk of corruption and related offences.<sup>114</sup> Some judges and prosecutors usually receive bribes in order not to bring charges against those who exploit children in the mines. In addition to the corruption within the justice system, there are also situations where judicial actors, particularly the prosecutors<sup>115</sup> are pressured by government members (e.g., the justice minister) to stop or refrain from bringing charges against their protégés.

The rare trials relating to trafficking of Congolese children for their use in armed conflict were those organized by international institutions, particularly the International Criminal Court with cases such as *Prosecutor v. Thomas Lubanga* case,<sup>116</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo* case,<sup>117</sup> and *Prosecutor v. Bosco Ntaganda* case.<sup>118</sup> Thomas Lubanga was convicted and sentenced to 14 years of imprisonment for war crimes which consist of enlisting and conscripting children under the age of 15 years in armed groups and using

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<sup>112</sup> US Department of State, "Trafficking in Persons Report 2013, pp. 134-136.

<sup>113</sup> Ibid.

<sup>114</sup> R-C Liwanga, "Judicial Independence in the Democratic Republic of Congo: Myth or Reality?" (2012), Vol.56, Num.2, *Journal of African Law*, p. 213.

<sup>115</sup> Id., p. 198. Unlike the judge, the public prosecutor has a hybrid nature under the Congolese Law. He or she is considered to be a 'judicial officer' and a 'functionary' of the State. So he or she is under the direction and supervision of his hierarchical superiors and the minister of justice who may compel him/her to initiate or dismiss any investigation. See also: Article 12(2) of the Code of Organization and Judicial Competence.

<sup>116</sup> *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-2901 10-07-2012 1/52 RH T, available at : <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf> (last accessed 14 August 2012)

<sup>117</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1417444.pdf> (last accessed 12 June 2012).

<sup>118</sup> *Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06, available at: [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/court%20records/chambers/ptc-II/Pages/36.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/court%20records/chambers/ptc-II/Pages/36.aspx) (last accessed 21 January 2014).



them to participate actively in armed conflicts in the DRC.<sup>119</sup> Germain Katanga, Mathieu Ngudjolo and Bosco Ntaganda are also facing trials for similar charges.

### **(C) Gaps in the terms of protecting victims**

The lack of a common definition of and the narrow scope of the description of trafficking imply that some trafficking victims are not legally protected, especially adult victims of trafficking for economic exploitation.

The DRC's laws seem primarily focusing on acts of sex trafficking related offences. This situation implies that punishment for acts of trafficking for labor do not have the same weight as those for sex trafficking. Victims of trafficking for labor are involved in long proceedings before getting legal remedies.

There is no program for protecting witnesses and those who report cases of trafficking. Provisions of the Code of Criminal Procedure only list obligations that witnesses are subjecting to, and sanctions that they may face in the case of failure to testify.<sup>120</sup>

Additionally, the national government does not provide any shelters or psychological, medical and other services to child victims of forced enlistment in armed groups, even though it contributes to identification and demobilization of child soldiers.<sup>121</sup> Most of these types of services are provided by nonprofit organizations.<sup>122</sup>

## **5. Recommendation for a comprehensive anti-human trafficking legislation in the DRC**

Considering the lack of a comprehensive anti-human trafficking law in the DRC, and the gaps in the existing laws in terms of combating trafficking, there is a necessity of adopting a holistic anti-trafficking law that would advance the prosecution, protection and prevention of trafficking in the DRC. In this regard, the Congolese anti-human trafficking law should:

- *Broaden the definition of acts of human trafficking.* In addition to the recruitment, transportation, transfer, harboring or receipt as defined in the Palermo Protocol, “acts of trafficking” should also include “legal” child

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<sup>119</sup> Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06-2901 10-07-2012 1/52 RH T at 97-99, available at : <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf> (last accessed 14 August 2012).

<sup>120</sup> Code of Criminal Procedure, articles 17- 21 and 78.

<sup>121</sup> US Department of State, “Trafficking in Persons Report” above at note 105.

<sup>122</sup> Ibid.

adoption (for purposes of exploitation), sale, purchase, lending, and hiring of persons within or outside of national borders.

- *Expand the scope of acts of exploitation to also cover cases of adult bonded/forced labor.* Acts of exploitation should include, but not be limited to sex slavery or all forms of slavery or practices similar to slavery, forced marriage, sexual exploitation, forced prostitution, child prostitution, exploitative domestic labor, adult bonded/forced labor, child hazardous or dangerous labor, false adoption, child begging, child used in armed conflicts, and removal of body parts. The rationale of broadening the scope of exploitation without making the list exhaustive is to provide to judges with more liberty when interpreting the Statute so that a wide range of unlisted exploitive activities can also fall under the definition of trafficking.
- *Consecrate the irrelevancy of the consent of trafficking victims in the case of extorted consent.* The consent of the victims to acts of exploitation should be irrelevant if any of the following means was employed against them: coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, etc. In the case of child-victims, the exploited children must be considered as victims of trafficking even if a means of coercion is not used.
- *Elevate all human trafficking offences to the level of flagrant crimes.* The rationale behind listing all acts of human trafficking in the category of flagrant crime is motivated by the need to harmonize the Congolese criminal laws, and to avoid a double standard in treating acts of trafficking. As mentioned earlier, the Law 06/019 amending the Code of Criminal Procedure only lists sexual violence offences (including sex slavery, forced prostitution or pimping) as flagrant crimes<sup>123</sup> for which the legal obligation imposed to police officers to inform their hierarchical superior before arresting the alleged offender and investigating the case is not required.<sup>124</sup> The elevation of human trafficking to a flagrant crime would also imply that victims of all forms of trafficking will receive legal remedies in a timely manner since an expedited proceeding will be required.
- *Consecrate the extraterritorial competence of the Congolese courts over trafficking offences.* The country's courts should have jurisdiction over human trafficking offence regardless of whether or not that wrongdoing

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<sup>123</sup> Code of Criminal Procedure, art 7(bis).

<sup>124</sup> Id., art 10.

constitutes an offence at the place of its commission, if the perpetrator is: (1) a Congolese citizen, (2) a juristic person (or a partnership) registered in the DRC, (3) a foreign national who acted against a Congolese citizen, (4) a foreign national whose home country has no extradition treaty with the DRC or (5) a foreign national who cannot be extradited by the DRC for any reason. As matters stand, the Congolese Courts only have jurisdiction over infringements committed within the national borders,<sup>125</sup> unless the reprehensible act committed abroad constitutes an infringement both at the place of its commission and in the DRC.<sup>126</sup> This means that the Congolese courts would not have jurisdiction over trafficking offences committed abroad if those acts were not punishable at their place of commission. The rationale of the extension of jurisdictional competence of the DRC's courts is to discourage transnational criminals, and increase the scope of protection of trafficking victims so that any Congolese nationals who are victims of trafficking or any person who is victim of trafficking committed by a Congolese citizen should be entitled to legal remedies no matter the place of the commission of the wrongdoing and the wrongdoer's nationality. Kenya's Counter Trafficking in Persons Bill, for example, has similar provisions that extend the jurisdictional competence of its courts over human trafficking offences.<sup>127</sup>

- *Establish a uniform punishment for all acts of trafficking, including sex and non-sex trafficking.* This will correct the existing legal gap where non-sex traffickers are less severely punished. The law should also determine a minimum custodial term, i.e. a minimum sentence. Concerning the economic penalties, the law must increase fines for human trafficking offences, especially for trafficking for sexual and economic exploitation. As Siddharth Kara noted: “economic penalties for human trafficking offences must be elevated to a level that effectively inverts the high profit, low risk business profile that fuels demand among offenders to acquire and exploit trafficked slaves.”<sup>128</sup>
- *Set a maximum duration for all criminal proceedings involving human trafficking offences.* For the purpose of “legal harmonization”, the anti-human trafficking law could replicate Article 7 (*bis*) of the Law 06/019

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<sup>125</sup> Penal Code, art 2.

<sup>126</sup> *Id.*, art 3(1).

<sup>127</sup> Counter Trafficking in Persons Bill of 2010, sec. 25.

<sup>128</sup> S Kara, “Designing More Effective Laws Against Human Trafficking”, above at note 117, p.123.

which fixes a maximum period of four months for the adjudication of sexual violence cases.

- *Allow foreign victims of trafficking to temporarily remain in the country for their recovery regardless of their legal status in the country.* Like in Italy, the Congolese anti-trafficking law should consider granting temporary permit to trafficking victims regardless their willingness or reluctance to cooperate with judicial authorities by filing complaints against trafficking offenders.<sup>129</sup> Similarly in Kenya,<sup>130</sup> the temporary permit must enable trafficking victims to work for gain for the duration of their presence in the DRC or permit them to bring their children in DRC. It should be noted that the issuance of temporary permits to foreign trafficking victims presents several advantages such as: (1) permitting victims to testify against their traffickers and (2) allowing law enforcement officers to have accurate information about the high number of trafficking cases.<sup>131</sup>
- *Prevent explicitly the Ministry of Interior or the Directorate General of Migration (DGM) from repatriating trafficking victims to places from where they were trafficked without considering the safety of the victims during the process of repatriation, and their wellbeing in places to which they will be returned in order to prevent further harm or re-trafficking.*<sup>132</sup> In the case of internal trafficking or external trafficking of Congolese citizens, the Congolese Ministry of Interior or DGM should assess the safety risks for trafficking victims when they return to the country or their provinces of origin.

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<sup>129</sup>D Hamat and J Tribbett “A Comparative Analysis of Human Trafficking Legislation and Case Law,” above at note 37, p.13.

<sup>130</sup> Counter Trafficking in Persons Bill of 2010, sec. 15(3).

<sup>131</sup> D Hamat and J Tribbett “A Comparative Analysis of Human Trafficking Legislation and Case Law,” above at note 129, p.13.

<sup>132</sup> In *Nigeria v. Secretary of State for the Home Department* case, the UK Appeal Court emphasized the necessity of examining all parameters before repatriating trafficking victims to places from where they were trafficked because they were at risk of being re-trafficked upon their return. The Court held that: “A very careful examination of the circumstances in which the victim was first trafficked must be undertaken and careful findings made. If a victim has been told that she is required to earn a particular sum of money (“target earnings”) for the trafficker or gang, before being free of any obligation to the trafficker or gang, then, if the victim should escape before earning the target sums, there may well be a risk to the victim that on return to Nigeria she may be re-trafficked if found. The extent of the risk of the trafficking will very much depend on the circumstances in which the victim was originally trafficked.” See: *Nigeria v. Secretary of State for the Home Department* [2011] EWCA Civ. 132 Case No: C5/2010/0768, available at: [http://ec.europa.eu/anti-trafficking/download.action?nodeId=999bcfe9-9607-4dc8-9f7a-cea1248c2b47&fileName=PO+%28Nigeria%29+v+Secretary+of+State+for+the+Home+Department+\[2011\]+EWCA+Civ+132+%2822+February+2011%29.pdf](http://ec.europa.eu/anti-trafficking/download.action?nodeId=999bcfe9-9607-4dc8-9f7a-cea1248c2b47&fileName=PO+%28Nigeria%29+v+Secretary+of+State+for+the+Home+Department+[2011]+EWCA+Civ+132+%2822+February+2011%29.pdf) (last accessed 31 May 2012)

- *Have a stipulation granting all trafficking victims not only legal counseling and information, but also appropriate housing, psycho-medical and material assistance, employment, and educational and training opportunities.* The extension of these services to all trafficking victims would avoid creating a hierarchy of victims based on the crime committed against them or based on their age.<sup>133</sup>
- *Have a stipulation compelling the judges to adopt measures that allow victims or witnesses of trafficking to testify without fear and in a manner that ensures their safety.* As for criminal proceedings involving children or sexual violence offences,<sup>134</sup> those measures may include: removal of defendants, removal of particular spectators and/or media, limiting disclosure of witnesses' personal and identifying information, shielding the witness from the defendant and/or from spectators, disguising the face and/or distorting the voice of the witness, and allowing testimony via video-conferencing or other communication technology.<sup>135</sup>
- *Extend the list of persons who may have legal standing to initiate civil actions for human trafficking offences committed against children.* As earlier mentioned, children are legally incapable and lack legal standing to approach the court under the Congolese law,<sup>136</sup> and only their parent or legal guardian can act on their behalf. This state of affairs is problematic, particularly for a child who is trafficked by his/her parents or legal guardian. So, in addition to the parents or legal guardian, the anti-human trafficking law should allow the child her/himself (whether or not with the assistance of an advocate) or the public prosecutor to initiate civil action against a child trafficker. This would be a major innovation in terms of protecting trafficking victims in the DRC, but it would not be the first time where a legal provision exceptionally recognizes legal standing to children (for a specific matter). Indeed, the UN Convention on the Rights of the Child, which the DRC has ratified<sup>137</sup>, guarantees children legal standing for any judicial and administrative proceedings concerning them either directly or indirectly.<sup>138</sup> Even though the

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<sup>133</sup> UNODC, "Model Law against Trafficking in Persons", p.43, available at: [http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf) (last accessed 12 June 2012).

<sup>134</sup> Code of Criminal Procedure, art 74(bis)(1).

<sup>135</sup> UNODC, "Model Law against Trafficking in Persons", above at note 159, art 23, p.49.

<sup>136</sup> Code of Family, above at note 100, art 215(1).

<sup>137</sup> UN Convention on the Rights of the Child, Nov. 20, 1989, available at: <http://www2.ohchr.org/english/law/crc.htm> (last accessed 12 June 2012). Ratified by the DRC on September 27, 1990.

<sup>138</sup> Id., art 12(2).

child is also legally incapable in France, however Article 375 of the French Civil Code exceptionally recognizes a legal standing to the child for issues affecting his/her educational assistance.<sup>139</sup>

- *Oblige the courts to order the convicted traffickers to pay appropriate compensation<sup>140</sup> to trafficking victims, and to determine the method of and the time within which the payment should be made.*
- *Create an Inter-sectoral Committee to prevent and confront human trafficking, which may include representatives of ministries of justice, interior, labor and social affairs, police, national intelligence agencies, and non-governmental agencies.* Like the U.S. Trafficking Victims Protection Act of 2000<sup>141</sup>, the role of that Inter-sectoral Committee would be to develop and implement various public awareness programs or other measures in order to prevent and combat human trafficking, which may consist of informing parents and communities about the danger of child sexual exploitation and forced labor for the future of their children and their community. It should also sensitize employers not to include victims of trafficking or forced labor in their supply chains, whether through subcontracting or directly in their production.<sup>142</sup>
- *Have a stipulation that compels the leaders of the ministry of justice or other government departments to regularly organize training programs to reinforce the capacities of judicial actors (judges and public prosecutors) and other law enforcement officers in prosecuting human traffickers.* The training of law enforcement officers is also necessary, especially if they will be called to investigate and prosecute domestic and international human trafficking offences.

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<sup>139</sup> Code Civil Français tel que modifié par Loi n°2007-293 du 5 mars 2007[French Civil Code as modified by the Law 2007-293 of March 5, 2007], art 375. Available at: <http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070721&idArticle=LEGIARTI000006426776&dateTexte=20110513> (last accessed 12 June 2012).

<sup>140</sup> Like the South African Prevention and Combating of Trafficking in Persons Act (sec. 29), the compensation to trafficking victims relates to damage, loss, destruction of property, physical, psychological or other injury, being infected with a life-threatening disease, and loss of income as a result of the commission of trafficking offences.

<sup>141</sup> Trafficking Victims Protection Act of 2000, sec.105.

<sup>142</sup> UNODC, “Model Law against Trafficking in Persons”, above at note 161, art 35, p.67.

## Conclusion

The purpose of this paper was to analyze the necessity of adopting a comprehensive anti-human trafficking law in the DRC. Several thousands of women, men and children are subjected to various forms of human trafficking in the DRC. The absence of a comprehensive law against trafficking implies that victims of trafficking are not sufficiently protected and perpetrators of trafficking are not efficiently punished. By enacting a domestic anti-human trafficking law that covers all aspects of trafficking and establishes appropriate penalties against these acts, the DRC would increase its likelihood of effectively protecting trafficking victims, investigating trafficking offences, prosecuting trafficking offenders, and deterring potential traffickers.

Passing the law is also an international obligation that the DRC should comply with because of its ratification of the Palermo Protocol.<sup>143</sup> The failure of the DRC to adopt holistic legislation that addresses all aspects of human trafficking may be considered as a violation of its international obligations. In *Siliadin v. France*,<sup>144</sup> the European Court of Human Rights held that France violated its obligations under the European Convention on Human Rights by failing to take adequate legal, judicial, and administrative measures against human trafficking.<sup>145</sup> From this ruling, it should be understood that the adoption of an anti-trafficking law is not the finality in the fight against trafficking, but should be accompanied by other measures and programs to ensure effectiveness.

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<sup>143</sup> Palermo Protocol, art 9.

<sup>144</sup> *Siliadin v. France*, App. No. 73316/01, Eur. Ct. H.R. (2010), available at: [http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN\\_v\\_FR.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN_v_FR.pdf) (last accessed 12 June 2012).

<sup>145</sup> *Id.*, at 67-68.