

Repairing the Past and Safeguarding the Future

Legal Issues and Prospects for Reparation for Victims of Mass Crimes in Democratic Republic of Congo

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ABSTRACT

This article draws on a critical analysis of the jurisprudence of the Congolese military courts on mass crimes in North Kivu and South Kivu from 2017 to 2023, focusing on reparations for those crimes. It demonstrates how the deficient assessment of harm, the near-total non-execution of judgments and the disregard of the needs of victims undermine justice. By incorporating measures of satisfaction and guarantees of non-repetition, bolstered by the advent of national redress fund FONAREV, the study proposes an innovative perspective capable of restoring dignity of survivors, and preventing future atrocities. It posits that effective reparations must address both the harm suffered and the underlying structures that caused them. Reparations should transform victims' circumstances rather than simply restore them to poverty and discrimination.

1. INTRODUCTION

The Kivu region in the east of the Democratic Republic of the Congo (DRC) is known for atrocities that rank among the most lethal since the Second World War,¹ prompting some authors to refer to it as the location of the 'Great African War'.² For over three decades, clashes between both national and foreign armed groups and government forces — be they

¹ Although no official statistics exist, a study published by the International Rescue Committee in January 2008 estimated that violence in DRC caused 5.4 million deaths between 1998 and 2007 and continues to claim 45,000 victims each month (International Rescue Committee, Mortality in the Democratic Republic of Congo: An Ongoing Crisis, available online at http://www.rescue.org/sites/default/files/resource-file/2006-7_congoMortalitySurvey.pdf (visited 3 June 2025)).

² D. Reybrouck, *Congo une histoire* (Actes Sud, 2012), 465; J. Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (First paperback edition, PublicAffairs, 2012).

national or foreign — have raged, in flagrant violation of the laws and customs of war.³ These conflicts are accompanied by extreme brutality and inhumanity ranging from summary executions to mass rapes, sexual slavery, recruitment of child soldiers, systematic looting and the burning of entire villages. Although the conflict's origins trace back to the 1994 Rwandan genocide,⁴ it has since evolved into broader dimensions. Its stakes now extend beyond the initial violence to encompass regional, political, and economic issues.⁵ The conflicts in this part of eastern DRC are the result of a complex set of historical, political, ethnic, social, and ideological dynamics that continue to fuel violence. They cannot be reduced to a single dominant logic of greed or desire to exploit natural resources.⁶ Such an approach overlooks the country's profound institutional weaknesses, characterized by corruption, poor governance, state fragility, nepotism, lack of accountability and deficit of legitimacy of national institutions.

How the DRC should confront past and present mass atrocities remains one of the principal challenges confronting the state. Prosecuting individuals responsible for human rights violations constitutes an obligation of the Congolese state towards society, and particularly the victims. Effective justice deters future infringements of fundamental rights and lays the groundwork for peace, stability, and the rule of law. In view of the enormity of these crimes, the Congolese military courts have, for over two decades since 2004, shown a certain degree of courage in prosecuting international crimes. Between 2004 and 2024, Congolese courts issued 131 judicial decisions concerning genocide, war crimes, and crimes against humanity. Across these 131 judgments, Congolese justice convicted 613 defendants and acquitted 209.⁷ These decisions were delivered predominantly by the courts of the Eastern provinces of the DRC. The courts and tribunals of North Kivu, South Kivu, and Ituri issued nearly 80% of all rulings out of the 26 provinces. The military jurisdictions of North Kivu and South Kivu examined in this study rendered over 40% of the mass-crime judgments.⁸ This statistic underscores the proactive role of military judges in these two eastern provinces.

These quantitative progresses in prosecution of mass atrocities rest on a robust legislative framework. This framework has been progressively enhanced. International crimes first appeared in the 1972 Military Justice Code.⁹ In 2002, that Ordinance-Law was repealed and supplanted by a new Code of Military Justice.¹⁰ In the same year, a new Military Penal Code was enacted, comprising a Title IV on genocide, crimes against humanity, and war crimes.¹¹ Since then, the DRC has expanded its legal arsenal to operationalize the repression of

³ A. Mampuya, 'Responsabilité et réparations dans le conflit des grands-lacs au Congo-Zaïre', 3 *Revue Générale de droit International Public* (2004) 679–708, at 686.

⁴ In 1994, up to one million Tutsis were massacred in Rwanda by the then Rwandan Armed Forces (FAR) and Hutu ethnic militias (Interahamwe). When the exiled Tutsi army regained power in Kigali, over one million Hutus — among them former FAR soldiers and Interahamwe militiamen armed with firearms and blades — fled into eastern Congo, principally North and South Kivu, settling in border camps from which they continued the conflict. See G. Prunier, *From Genocide to Continental War: The Congolese Conflict and the Crisis of Contemporary Africa* (2nd impr, Hurst & Company, 2011); A. Bulmabo Katambu, *Mourir au Kivu: du génocide Tutsi aux massacres dans l'Est du Congo-RDC* (L'Harmattan, 2001).

⁵ See G. Ngoie Tshibambe, *Identités, ressources naturelles et conflits en RDC: défis méthodologiques et voies de sortie ? actes du colloque, du 15 au 16 avril 2013* (L'Harmattan, 2013); T. Raeymaekers, *Violent Capitalism and Hybrid Identity in the Eastern Congo: Power to the Margins* (Cambridge University Press, 2014); J-F Hugo, *La République démocratique du Congo: une guerre inconnue* (Ed Michalon, 2006); Stearns, *supra* note 2.

⁶ J. Verweijen and C. Vogel, 'Why conflict mineral narratives don't explain the M23 rebellion in DR Congo', *The New Humanitarian*, 11 February 2025, available online at <https://www.thenewhumanitarian.org/opinion/2025/02/11/why-conflict-mineral-narratives-dont-explain-m23-rebellion-dr-congo> (visited 18 February 2025).

⁷ UpRights, *La justice congolaise face aux crimes contre la paix et la sécurité de l'humanité : progrès, défis et perspective* (2025), at 28.

⁸ *Ibid.*, at 30–31.

⁹ Ordinance-Law No. 72/060 of 25 September 1972 Establishing a Military Justice Code.

¹⁰ Law No. 023/2002 of 18 November 2002 Establishing the Military Justice Code, available online at <https://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf> (visited 8 June 2025).

¹¹ Law No. 024/2002 of 18 November 2002 Establishing the Military Penal Code, available online at <https://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.024.2002.18.11.2002.pdf> (visited 8 June 2025).

genocide, crimes against humanity and war crimes. Their prosecution fell within the exclusive jurisdiction of military courts until 2013. The 2002 ratification of the Rome Statute paved the way for direct application of its definitions. This resolved ambiguities in national legislation.¹² In response to criticism of exclusive military jurisdiction to prosecute mass atrocities,¹³ the 2013 organic law¹⁴ and the 2017 amendment to the military justice code¹⁵ established concurrent jurisdiction with the Civil Courts of Appeal.¹⁶ In 2015, three implementation laws have been adopted.¹⁷ They incorporated the Statute's definitions and modes of individual criminal liability into domestic law. They also strengthened procedural safeguards, entrenched the principle of non-prescription and clarified mechanisms for cooperation with the International Criminal Court (ICC). In 2022, the law establishing the fundamental principles relating to the protection and reparation of victims of conflict-related sexual violence and victims of crimes against international peace and security has been adopted (hereinafter: 2022 Reparations Act). It created a National Reparations Fund, enhanced victim protection and provided holistic reparations measures.

Despite the increase in the number of trials and judgments, these remain relatively limited considering the scale of atrocities committed in the DRC. These 131 judgments constitute merely 'a drop in the ocean',¹⁸ and thousands of victims granted civil-party status have yet to receive the reparations awarded by the courts and tribunals. According to the joint report by Avocats Sans Frontières (ASF), Trial International and RCN Justice & Democracy, between 2005 and 2020 the Congolese justice system, in total, ordered the payment of nearly US\$28 million in damages to more than 3,300 victims against defendants jointly liable with the Congolese state.¹⁹ As of the publication of the report in October 2020, only one redress decision appears to have been executed. Yet, redress is a crucial element within the human rights system. Its aim is to repair the harm caused by rights violations and to deter individuals or states responsible for such breaches in the future. The right to redress for victims of human rights violations is fundamental in international law and plays an increasingly

¹² See e.g. Military Garrison Court of Mbandaka, 'Mutineers of Mbandaka' Case, RP 086/05, First-Instance Judgment, 20 June 2006, at 16: '... the Military Penal Code creates confusion between the crime against humanity and the war crime, which is, moreover, clearly defined by the Rome Statute of the International Criminal Court'.

¹³ See E. Witte and C. Duffy, *Options for Justice. A Handbook for Designing Accountability Mechanisms for Grave Crimes* (Open Society Foundations, 2018); R. Nyabirungu, *Etude Sur La Compétence Judiciaire Partagée Entre Les Juridictions Militaires et Les Juridictions Civiles En Matière de Crimes Contre La Paix et La Sécurité de l'humanité* (PNUD, 2017).

¹⁴ Organic Law No. 13/011-B of 11 April 2013 on the Organization, Functioning and Competencies of the Courts of the Judicial Order, available online at <https://leganet.cd/Legislation/Droit%20Judiciaire/LOI.13.011.11.04.2013.htm> (visited 8 June 2025).

¹⁵ Organic Law No. 17/003 of 10 March 2017 Amending and Supplementing Law No. 023/2002 of 18 November 2002 Establishing the Military Justice Code, available online at <https://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.17.003.10.03.2017.html> (visited 8 June 2025).

¹⁶ Since 2013 the Courts of Appeal have scarcely exercised these prerogatives. One of the few known instances in which a civilian court adjudicated a mass atrocity — namely, genocide — remains the Lubumbashi Court of Appeal in the so-called 'Pygmies' Genocide' case (Court of appeal of Lubumbashi, *Public Prosecutor and civil parties v. Mwilambwe Eric et consorts*, RP 116/RMP 5005/PG 025/KKN 2015 of 30 September 2016 (hereafter: *Pygmies' Genocide case*)).

¹⁷ These comprise: The Law No. 15/022 amending and supplementing the Decree of 30 January 1940 instituting the Penal Code; the Law No. 15/023 amending Law No. 024/2002 of 18 November 2002 establishing the Military Penal Code; and the Law No. 15/024 amending and supplementing the Decree of 6 August 1959 instituting the Code of Criminal Procedure.

¹⁸ UpRights, *supra* note 7, at 36.

¹⁹ Avocats Sans Frontières, RCN Justice & Démocratie and Trial International, *L'urgence pour la RDC de solder sa dette envers les victimes de crime de masse et revoir sa politique de réparation*, October 2020, available online at <https://www.asf.be/wp-content/uploads/2020/10/Policy-Brief-Lurgence-pour-la-RDC-de-solder-sa-dette-envers-les-victimes-de-crime-de-masse-et-revoir-sa-politique-de-reparation-1.pdf> (visited 20 February 2025).

significant role in preventing future harm by demanding changes in laws, policies, institutions, or systems that rendered the violation possible.²⁰

The concept of reparation intuitively refers to the compensation received by individuals when their rights have been infringed. However, when it comes to mass crimes, determining what constitutes appropriate redress becomes considerably more complex. The term ‘mass crime’ is used in this study to refer to genocide, crimes against humanity and war crimes. This concept has been introduced into common legal parlance in order to enable both public and academic discourse to describe genocide, crimes against humanity (including ethnic cleansing), and war crimes under a single term that accurately reflects the scope and nature of the offences.²¹ In point of fact, mass crimes comprise various acts of violence with diverse objectives, motivations, dynamics, and consequences. Congolese tribunals, when tasked with adjudicating the perpetration of mass crime, also recognize redress in the form of damages to both direct and indirect victims.

This article focuses on how Congolese courts approach reparation of mass crimes. To this end, it examines the jurisprudence of the Congolese military courts issued between 2017 and 2023 in the provinces of North Kivu and South Kivu.²² The examination combines a critical analysis of these decisions with a contextual assessment of the practical challenges that ensue. The objective is not to contrast this jurisprudence with that of other international criminal tribunals, such as the ICC. Rather, it is to highlight the specific experience of these national courts and the evolution of their practices in recognizing and awarding remedial measures. Thus, through an in-depth reading of the jurisprudence of the Congolese military courts, this analysis first presents the current state of a redress jurisprudence that has hitherto been essentially compensatory. It then explores the notion of transformative redress, which goes beyond mere compensation to consider measures capable of promoting sustainable social and institutional transformation.

2. REPARATIONS OF MASS ATROCITIES IN THE LIGHT OF CONGOLESE MILITARY TRIBUNALS JURISPRUDENCE

This section critically examines the conditions of liability that permit the ordering of redress (Section 2.A). It then highlights the deficiencies in the Congolese jurisprudence regarding the handling of redress for mass crimes (Section 2.B), and finally, it analyses the limitations of the recent establishment of the National Redress Fund (FONAREV) from a judicial perspective (Section 2.C).

A. Critical Analysis of the Conditions of Civil Liability

An analysis of the jurisprudence of the Congolese military courts on mass crimes reveals a general tendency: whenever an individual is found guilty of international crimes, the judges order them to provide redress to the victims in the form of damages and interests. This reasoning is based on the tort liability rules set out in Article 258 of Book III of the Congolese

²⁰ African Commission on Human and Peoples’ Rights, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations*, September 2019, available online at <https://www.african-court.org/wpafic/wp-content/uploads/2020/11/Comparative-Study-on-the-Law-and-Practice-of-Reparations-for-Human-Rights-Violations.pdf> (visited 12 February 2025), at 2.

²¹ D. Scheffer, ‘Genocide and Atrocity Crimes’, 1 *Genocide Studies and Prevention* (2006) 229–250, at 230.

²² These two provinces, located in eastern DRC, have been the scene of multiple serious human rights violations and breaches of international humanitarian law for more than three decades. Between 2017 and 2023, the military courts in these provinces have been notably active in repressing mass crimes, issuing over 40% of judicial decisions on their own, compared to 60% for the remaining 24 provinces in the DRC (UPRights, *supra* note 7, at 28–31).

Civil Code, which states that ‘any act by a person that causes harm to another obliges the one whose fault caused it to make reparation’,²³ and on Article 260 of the same Code, which provides: ‘One is responsible not only for the harm one causes by one’s own act but also for that which is caused by the act of persons for whom one must answer or things which one has under one’s custody’.²⁴ This form of liability establishes three conditions for obtaining redress: fault, harm, and a causal link between the fault and the harm.

1. Fault

Firstly, in the case of redress for mass crimes, the fault arises from the violation of criminal law as evidenced in the conviction. It involves the breach, attributable to the perpetrator, of a legally binding norm which requires him or her either to act in a specific manner or to behave as a reasonably prudent person would.²⁵ The fault refers to the breach of the penal norm that constitutes an offence. Thus, the courts systematically adopt the formula: ‘having been found guilty of international crimes, the accused is condemned ... to pay damages to the victims or their heirs’. In their decisions, the military courts refer to the fault as the originating cause of the harm.²⁶ In the *Habarugira* case, for example, the Military Operational Court of North Kivu held that ‘the triggering fact consists of the rape committed against each of the female victims by members of the Nyatura group under the accused’s command ...’.²⁷ Likewise, in the *Miriki* case, it found that the wrongdoing in that instance materializes through the offences of participating in an insurrectional movement with the intent to commit mass crimes.²⁸

When the military courts invoke the state’s liability, they rely either on the fault committed by its agents or on its failure to protect the civilian population against the armed groups confronting the DRC.

In the first hypothesis, Congolese decisions affirm the state’s liability for the illicit acts of its military — and more broadly, of its agents — either by virtue of the subordination relationship inherent to the principal–agent theory or by the effect of the organ theory, whereby every wrongful act committed by a public agent is imputed to the state legal person itself.⁸ Notwithstanding the silence of judicial decisions as to the legal basis of this theory, it nonetheless appears to be founded upon Articles 4 and 7 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). For instance, in the *Kibibi* case, the South-Kivu Military Court held that ‘the perpetrators of the incriminated acts are agents of the state insofar as they are all members of the 43rd sector based in Fizi and, due to negligence or oversight, were neither properly rotated nor subjected to basic military training’.²⁹ The Court thereby invoked both the subordination (principal–agent) logic and the state function (organ theory). In the same case, the South-Kivu Military Court clarified that ‘in

²³ See Military Court of South Kivu, *Public Prosecutor and Civil Parties v. Batumike Frédéric and Others*, RP 0105/2017 of 13 December 2017, Feuillet 75 (hereafter: *The Kavumu case*); Military Court of South Kivu, *Public Prosecutor and Civil Parties v. Beker Dhenyo and Others*, RP 093/2016 of 29 July 2027, Feuillet 49 (hereafter: *The Beker case*); High Military Court sitting on appeal, *Public Prosecutor and Civil Parties v. Kibibi Mutware*, RPA 047/2011 of 10 July 2020, Feuillet 54 (hereafter: *The Kibibi case*).

²⁴ Military Court of South Kivu, *Public Prosecutor and Civil Parties v. Mabiala Ngoma and Others*, RP 0101/017 of 22 November 2018, paragraphs 210–211 (hereafter: *The Mabiala case*).

²⁵ Garrison Military Tribunal of Bukavu, *Public Prosecutor and Civil Parties v. Shabani Muganza and Mukukulikwa Mubakwe and Others*, RP 1448/19 of 1 October 2019, at 67 (hereafter: *The Koko-di-Koko case*).

²⁶ See *The Kibibi case*, *supra* note 23, Feuillets 55–56; *The Mabiala case*, *supra* note 24, Feuillet 218.

²⁷ Military Operational Court of North Kivu, *Senior Operational Military Prosecutor of North Kivu, the Public Prosecutor and the civil parties v. Habarugira Rangira Marcel*, RP No. 0228/2017, 1 February 2019 (hereinafter: *The Habarugira case*), Feuillet 46.

²⁸ Military Operational Court of North Kivu, *Senior Operational Military Prosecutor of North Kivu, the Public Prosecutor and the civil parties v. Tsongo Sivitsomo Eugene et consorts*, Judgment RP No. 0159/2017, 0182/2017, 0264/2018, and 0335/2020, 30 September 2020 (hereinafter: *The Miriki case*).

²⁹ *The Kibibi case*, *supra* note 23, Feuillet 56.

accordance with the organ and agent theory, when a state organ acts, it is the State itself that acts and, consequently, when an agent commits a fault in the exercise of his functions, that fault engages the whole of the State'.³⁰ Similarly, in the Mabiala case, the South Kivu Military Court ruled that 'the State or any individual may incur civil liability or be held civilly liable for those placed under its authority — or, indeed, for the things in its custody'.³¹ The Court added that 'it is not necessary for the agents to be at fault; it is sufficient to establish a general mismanagement of public service, its poor organisation or defective functioning ... in accordance with the organ theory'.³² It concluded that 'military personnel, in the exercise of their functions, are considered as organs of the State whose mission is to ensure the security of persons and their property'.³³ This combination, firmly established in jurisprudence, reflects the intention to equip the Congolese legal order with effective tools to sanction international crimes and repair the harm suffered by the victims. It also ensures coherence between the principles of civil and public law.

In the second hypothesis, the state's liability is engaged due to its failure in the exercise of its duty to protect citizens and their property. Since safeguarding the population is intrinsic to state sovereignty, the obligation to repair the harm caused falls primarily on the state. By its action or omission, the state must bear the consequences of its failure. This theory was notably developed in the *Kibibi* case. The South-Kivu Military Court stated that 'the security of individuals is the very reason for the legal existence of peoples and the organisation of societies, and that the State must constantly attend to it'.³⁴ The South-Kivu Military Court echoed this sentiment, asserting that 'the Congolese State, among other duties, must ensure the legal security of the people and is liable for the damage caused by its agents in the exercise of their functions — not because it may have committed a fault, but because it has an obligation to guarantee the security of individuals against harmful acts perpetrated in its name and on its account'.³⁵ The Court further observed that 'in light of the general duty of care to which the Congolese State is subjected through its services, this Tribunal notes that the State has failed in its obligations, including its duty to promptly protect and secure the peace of its citizens'.³⁶

It should, however, be noted that this responsibility to protect (R2P)³⁷ remains an obligation of means rather than of result. The South-Kivu Military Court's decision in the *Kavumu* case held that 'the presumption of fault on the part of the State arising from its duty to ensure the legal security of the people is not established, given that the national army — the ultimate bulwark of security — deployed an entire regiment for defense and security in the sector, with command placed at Kavumu'.³⁸ In the *Lumenje-Kamananga* case, the Garrison Military Tribunal of Bukavu reached a similar conclusion, finding that 'although there was no principal-agent relationship between the defendants, Ndayambaje, Nizehimana and the Congolese State — which did not fail in any of its sovereign obligations regarding the facts ... the Congolese State, through its services (namely, the engaged FARDC units in pursuit), not only identified the perpetrators but also tracked and apprehended some of them,

³⁰ *Ibid.*, Feuillet 57.

³¹ *The Mabiala case*, *supra* note 24, Feuillet 211.

³² *Ibid.*, Feuillet 213.

³³ *Ibid.*, Within the context of this case, military personnel were members of the Mixed Special Intervention Battalion of the 10th Military Region.

³⁴ *The Kibibi case*, *supra* note 23, Feuillet 57.

³⁵ *The Mabiala case*, *supra* note 24, Feuillet 214.

³⁶ Garrison Military Tribunal of Bukavu, *Public Prosecutor and Civil Parties v. Cubaka Kulimushi Elie and Others*, RP 1913/2022, RMP 10340/IGL/2022 of 25 February 2923, at 31 (hereafter: *The Bralima case*).

³⁷ J.K. Sindani, 'L'obligation de protéger et la discrimination fondée sur le genre: revue critique de l'affaire Céline c. RDC devant la Commission africaine', 7 *Annuaire Africain des Droits de l'Homme* (2023) 435–452, at 439.

³⁸ *The Kavumu case*, *supra* note 23, Feuillet 76.

namely the accused FDLR Ndayambaje Gilbert and Nizehimana Evariste'.³⁹ This position of Congolese case law is nonetheless open to questions. Indeed, one can observe that the responsibility to protect entails prevention of the direct causes (preventive due diligence) prior to any reaction, which includes, *inter alia*, criminal prosecutions (substantive due diligence). How can one assess a state's failure to fulfil its obligation to respond to attacks by rebel groups, to conduct investigations, or to initiate prosecutions, if it is not known in advance that the state's policies, institutions, and agents can discharge those obligations? Considering the severity and repetition of the crimes in the *Kavumu* case, for example, a mere military presence cannot establish 'reasonable' prevention to exclude all responsibility of the state. Likewise, in the *Lumenje-Kamanaga* case, the absence of preventive measures cannot be compensated by a mere *ex post* response. Neither case is an isolated instance of the Congolese State's failure to prevent massive human rights violations.

2. Harm

The harm arises from the effects of the crime on the victim or their relatives. The concept of harm encompasses the notion of injury. An analysis of the jurisprudence shows that military courts generally attempt, albeit indistinctly, to ascertain the various types of harm. Thus, when establishing material damage, the Congolese military courts appear to refer to the violation of economic and proprietary rights, particularly in cases of looting, destruction of property, fires, etc.⁴⁰ With regard to bodily harm, the courts tend to refer to violations of personal dignity, notably in cases of rape,⁴¹ sexual slavery,⁴² illegal detention, torture, cruel, inhuman and degrading treatment or other analogous mistreatment.⁴³ Concerning the assessment of moral or psychological harm, the military courts include both the suffering and affliction caused to the direct victims⁴⁴ and to their family members, such as violations of personality rights in the event of rape,⁴⁵ of the right to life in the event of murder,⁴⁶ and of affection in cases of both murder and rape.⁴⁷

The recurrent use of the expression 'compensation for all damages combined',⁴⁸ as encountered in the decisions reviewed, gives rise to two observations. The first places the Congolese judge in a framework whereby he they seek seeks to compensate indiscriminately for material, bodily, and moral harm. By awarding a lump-sum amount as reparation, the judge does not distinguish between coverage for moral harm, bodily harm and material harm. In the second observation, the military judge intends to redress both present and future harm. Damages are awarded when the harm, although future, extends in a certain and

³⁹ Garrison Military Tribunal of Bukavu, *Public Prosecutor and Civil Parties v. Ndayabaje Gilbert and Others*, RP 1215/2017 of 21 September 2018, at 83 (hereafter: *The Lumenje-Kamananga case*); Bukavu Garrison Military Tribunal, *Public Prosecutor and Civil Parties v. Muyololo Ndarumanga and Others*, RP 1687/2022 of 15 May 2023, paragraphs 73–74 (hereafter: *The Ndarumanga case*).

⁴⁰ See *The Mabila case*, *supra* note 24, Feuillet 226; *The Koko-di-Koko case*, *supra* note 25.

⁴¹ See *The Kavumu case*, *supra* note 23; *The Kibibi case*, *supra* note 23; Garrison Military Tribunal of Bukavu, *Public Prosecutor and Civil Parties v. Bitale and Others*, RMP 9347/LMB/20 of 21 August 2020 (hereafter: *The Bukanga case*); Military Court of South Kivu, *Public Prosecutor and Civil Parties v. Maro Ntumwa and Others*, RP 098/2017 of 22 April 2018 (hereafter: *The Marocain case*); Garrison Military Tribunal of Bukavu, *Public Prosecutor and Civil Parties v. Takungomo Mukambilwa and Others*, RP 1694/20 of 11 January 2021 (hereafter: *The Migamba case*); Garrison Military Tribunal of Bukavu, *Public Prosecutor and Civil Parties v. Chabwira Chirabisa Isaac and Others*, RP 1635/20 of 7 October 2020 (hereafter: *The Hamakombo case*).

⁴² *Ibid.*

⁴³ See *The Mabila case*, *supra* note 24, Feuillet 226.

⁴⁴ B. Boulloc, G. Stefani and G. Levasseur, *Procédure pénale* (Daloz, 1977), at 207.

⁴⁵ *The Kavumu case*, *supra* note 23, Feuillets 49–50.

⁴⁶ *Ibid.*, Feuillet 49.

⁴⁷ *The Beker case*, *supra* note 23, Feuillet 50.

⁴⁸ Translated from french: '*Dommages-intérêts pour tous préjudices confondus*'.

direct manner from a current situation and can be quantified without delay.⁴⁹ This is the case when an expert report establishes the rape of a minor and, with high probability, anticipates depressive or sexual disorders likely to produce lasting emotional shock.⁵⁰

3. Causal Link

Thirdly, the causal link is a principle of reparation requiring a nexus between the alleged injury and the proven violations. Reparation is thus to be granted on the basis of the harm suffered due to the commission of a crime for which the accused has been convicted. For example, in the *Kibibi* case the South-Kivu Military Court held that the claim for compensation for loss of employment following crimes against humanity committed by the accused was unfounded ‘due to the proven non-existence of a causal link between the defendants’ acts and the loss of employment suffered by the victim’.⁵¹ Similarly, in the *Beker* case, the South Kivu Military Court dismissed redress claims brought by civil parties’ counsel on the grounds of uncertainty regarding the harm suffered, owing to the absence of the victims at the trial — even though the trial was held in a neighbouring locality.⁵²

The existence of a causal link between the crimes for which a person has been convicted and the harm allegedly suffered must be demonstrated by both direct and indirect victims. In the context of armed conflicts in eastern DRC, establishing such a causal link in mass crimes presents significant methodological and evidentiary challenges. The extent of the violations, the dispersal of victims, the disorganization of institutions during wartime and the frequent destruction of evidence complicates the precise determination of the harm suffered by each individual or asset affected. Consequently, in situations of massive damage as those examined in this study may require a pragmatic approach that enables the judge to assess the overall harm and base compensation on a general estimation, without the need to identify each victim or destroyed asset individually. This approach rests on the recognition that the rules of evidence in matters of redress cannot be equated with those applicable to establishing criminal liability. Unlike the latter, which demands proof beyond a reasonable doubt, redress matters permit a more relaxed standard of proof for damage and its extent. This approach ensures that victims are not subjected to an undue evidentiary burden. Otherwise, their right to an effective remedy would be compromised. This evidentiary flexibility, drawing on available elements and a contextual appraisal of the facts, ensures a form of reparative justice more adapted to the realities of mass crimes and the imperatives of effective and equitable reparation.

B. Deficiencies in the Congolese Jurisprudence in Addressing and Assessing Reparations of Mass Crimes

The legal difficulties analysed in this section relate to judicial decisions awarding reparations to victims. They pertain to the qualification and proof of harm, the evaluation and quantification of damage, and the insufficient reasoning provided by judges regarding redress.

1. Qualification and Proof of the Harm

Regarding the qualification and proof of the harm, an analysis of the military courts’ jurisprudence reveals the difficulties encountered by judges in correctly characterizing the harm for which those found civilly liable must compensate. This mis-assessment of damage most

⁴⁹ M. Ekofo, *La Réparation Des Crimes Internationaux En Droit Congolais. Analyse Des Pratiques Indemnitaires Des Juridictions Militaires Au Regard Du Statut de Rome de La Cour Pénale Internationale* (Avocats Sans Frontières, 2014), at 76.

⁵⁰ *The Kavumu case*, *supra* note 23.

⁵¹ *The Kibibi case*, *supra* note 23, Feuillet 56.

⁵² *The Beker case*, *supra* note 23, Feuillet 51.

often results from an erroneous criminal qualification of the facts. For instance, in the *Mabiala* case the South Kivu Military Court equated the harm suffered by a torture victim — in cases of looting or arson — to that caused by inhuman acts.⁵³ A similar logic was followed in the *Koko-di-Koko* case, in which the Garrison Military Tribunal of Bukavu equated the acts of looting and destruction of victims' property to 'inhuman acts',⁵⁴ without confronting the facts with the elements of Article 7(1)(k) of the Rome Statute.⁵⁵ Yet, the characterization of harm is essential for its quantification, as it determines the appropriate method for its monetary evaluation. The manner in which harm is defined and categorized directly influences the method by which it is measured financially. In short, the better the harm is qualified, the more accurately its monetary value can be determined.

However, given the context of mass crimes committed in the DRC, the standard of proof, as noted above, should be flexible and pragmatic. In remote areas where mass crimes occur, there may be neither a doctor available to record a rape or injuries, nor a civil registrar to record a death, nor a notary to issue property titles that could serve as evidence for subsequent claims for compensation. Thus, the type of evidence usually produced in individual damage cases, such as death certificates and hospital records, is often unavailable in remote regions lacking basic public services. Without taking these specific circumstances, Congolese tribunals have, in some cases, refused to recognize the existence of harm in the absence of death certificates in many alleged murder cases, as well as for torture victims in the absence of legal evidence or physical marks.⁵⁶ In particular, they have demanded death certificates in alleged murder cases and legal evidence or physical marks for torture victims. In mass-crime contexts, the existence and extent of harm should rest on reasonable estimations rather than rigid proof. Assessments should consider whether factual findings are supported by multiple available evidence types. Convergent indications should also be considered. Under the 2022 Reparations Act, broad eligibility criteria and a victim-centred, relaxed standard of proof are mandated.⁵⁷

2. Quantification of the Harm

Secondly, regarding the quantification of harm, several questions arise: how does one evaluate and quantify the harm in the context of large-scale crimes? Once a court decides to grant redress, how is the amount determined? In the cases covered by this study, the military judges systematically resort to a lump-sum (*ex aequo et bono*) evaluation of damages. However, classically, an *ex aequo et bono* evaluation is permitted only where no certain elements exist to calculate the precise amount of damages.⁵⁸ An equitable evaluation should be excluded if it is perfectly possible to determine the actual losses and the profits foregone as a result of a mass crime. Should the judge resort to an *ex aequo et bono* assessment, they he or she must justify why the evaluation cannot be based on quantifiable elements.⁵⁹ Indeed, the principles of equity (*ex aequo et bono*) apply when the nature of the harm or the circumstances make it difficult or impossible to determine its precise value with certainty. It would be inequitable to deprive the aggrieved party of compensation arising from objective facts

⁵³ *The Mabiala case*, *supra* note 23, Feuillet 219.

⁵⁴ *The Koko-di-Koko case*, *supra* note 25, Feuillets 43–65.

⁵⁵ P. Iraguha, 'Pillage et destruction des biens comme formes d'actes inhumains au regard de la jurisprudence internationale et congolaise', in I. Mingashang and J.-P. Segihobe Bigira (eds), *Le droit pénal entre douleur et enchantement dans le contexte contemporain: liber amicorum Doyen Raphaël Nyabirungu mwene Songa* (Bruylant, 2021), at 793.

⁵⁶ *The Koko-di-koko case*, *supra* note 25, Feuillet 68.

⁵⁷ Art. 2(10) of the 2022 Reparations Act.

⁵⁸ DRC Supreme Court of Justice, RP 994, 28 July 1987, inédit.

⁵⁹ DRC Supreme Court of Justice, *Kanyanga contre MP et Makosso*, 5 July 1997, at 119.

which cannot be attributed to any fault on their part. This is not always the case in mass crime proceedings before Congolese courts.

Accordingly, the ‘shortcut’ recourse to an *ex aequo et bono* evaluation by military courts gives rise to an inconsistency and disparity in the awarding of compensation for bodily harm, as will be discussed further. The concept of equity is inherently fraught with a risk of unpredictability and legal uncertainty, not to mention the potential for judicial arbitrariness. The primary characteristic of equity is its appeal to subjective considerations. Decisions adopting this approach invariably vary in accordance with the individual judge’s conscience and moral outlook.⁶⁰ In invoking an *ex aequo et bono* assessment, military courts have applied superfluous multipliers which reveal certain biases, and the arbitrary nature of the damages awarded. Yet, a better equitable evaluation should allow the military courts to roughly determine the value of the harm where its existence is indisputable. The principles underpinning an equitable assessment include reasonableness, flexibility, sound judgment, approximation and fairness.⁶¹ It is true that even ‘approximately’ exact calculations can pose significant challenges when compensating a large number of victims, as is the case in most mass crime proceedings where financial calculations cannot be applied to many widespread atrocities.

3. Insufficiency of the Grounds of the Judicial Decision

With regard to the judicial reasoning for redress decisions, an analysis of military decisions on mass crimes reveals that damages are sometimes allocated without sufficient motivation. The amounts awarded are rarely justified based on the harm established, with few exceptions.⁶² Judicial reasoning mandates that the judge address every claim concerning the allocation of damages. An *ex aequo et bono* evaluation does not fully discharge the judge’s obligation to provide a reasoned judgment; they he or she remains required to indicate in the judgment the rationale for fixing the damages on an *ex aequo et bono*⁶³ basis, in lieu of actual evaluative elements of the harm suffered.

The recourse to equity should not open the door to arbitrariness. Principles of equity are not intended to fill the gaps in the claimant’s file by substituting for evidence that could have been produced had it truly existed.⁶⁴ Equity’s considerations cannot justify a judge departing from their judicial role. According to Article 21 of the Congolese Constitution, every judgment must be written and reasoned. This obligation flows from the inherently judicial nature of courts. It ensures transparency in the decision-making process and reinforces the authority and persuasive force of the decisions. The reasoning is the condition for the legality of a decision. The reasoning of the judgment is a guarantee of proper judicial administration for the parties involved. It enables them to understand the rationale that led the judge to reach one conclusion rather than another.⁶⁵ This reasoning is not limited solely to the establishment or otherwise of the defendant’s guilt. It also extends to the civil action and should meet each claim introduced by the civil party particularly with respect to the damages awarded. Hence, the trial judges cannot proceed to an abstract or lump-sum evaluation, nor can they rely on pre-established rules.⁶⁶ The harm must be analysed in a concrete manner,

⁶⁰ Ekofo, *supra* note 49, at 85.

⁶¹ F. Francioni, ‘Equity in International Law’, *Max Planck Encyclopedia of International Law*, November 2020, available online at <https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1399?prd=MPIL> (visited 20 February 2025).

⁶² Military Operational Court of North Kivu, *Public Prosecutor and the Civil Parties v. Ntabo Sheka and Others*, RP No. 0191/017, RP No. 0255/018, RP No. 0270/018, RP No. 0271/018, RP No. 0272/019 of 23 November 2020, at 422–424 (hereinafter: *The Sheka case*).

⁶³ See DRC Supreme Court of Justice, *supra* note 58, at 119–123.

⁶⁴ See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Reparations Judgment, ICJ Reports 2012 (I), statement by Judge Greenwood, at 393.

⁶⁵ Ekofo, *supra* note 49, at 75.

taking into account the factual elements as closely as possible in relation to the case under review, failing which the judgment may be overturned on appeal.

C. FONAREV: A New Dawn for Mass Crime Reparations or New Wine in Old Wineskins?

In the past, an individual case was often presented as a ‘teaching case’ in which the Congolese government had discharged the amounts due in redress to the victims.⁶⁷ In this case, seven members of the Armed Forces of the Democratic Republic of the Congo (FARDC) were criminally sentenced to life imprisonment for crimes against humanity and war crimes committed in the village of Songo Mboyo (Équateur) in 2003, and, in civil proceedings, were ordered jointly and severally with the Congolese State to pay USD 165,317 in damages to 33 civil parties in the case. The reparations were disbursed in two instalments, in 2015 and 2018, more than 10 years after the decision. The execution of that decision exposed significant dysfunctions, notably the lack of transparency in the distribution of funds to the victims due to discriminatory practices and the misappropriation of part of the funds by state agents and intermediaries.⁶⁸

Since December 2022, the Congolese government has established a Fund charged with supporting access to justice, redress, empowerment, and community recovery for victims and their heirs.⁶⁹ This public institution was created under the 2022 Reparations Act and Decree No. 22/38 of 6 December 2022, which sets out the statutes of a public institution called the National Fund for Redress of Victims of Conflict-Related Sexual Violence and Crimes against the Peace and Security of Humanity (FONAREV).⁷⁰ To date, in the cases covered by this study — the vast majority of which were rendered before the creation of FONAREV — there are no judicial decisions in which victims have obtained redress through this institution. In fact, the humanitarian assistance actions in which FONAREV has been involved to date cannot be conflated with redress. The 2022 Reparations Act expressly establishes, within its fundamental principles, a distinction between humanitarian assistance and redress.⁷¹

The existence of such an instrument represents a significant advance. It facilitates effective compensation, the recovery of awarded damages, and judicial support, especially in contexts where the judicial apparatus is inaccessible or prohibitively costly. Under Article 13(5) of the 2022 Reparations Act, FONAREV assists the victim or their successors in the enforcement of the judgment, granting them reparation. However, the absence of any provision empowering a judge to formally request the intervention of this Fund to grant redress considerably restricts its scope. This role is likely to encounter persistent obstacles, notably the debtors’ insolvency and the difficulties of enforcing awards against state assets. It would have been preferable for FONAREV to adopt the solidarity-based penal model by intervening in cases of the accused’s insolvency or indigence, as does the ICC’s Trust Fund for Victims. Accordingly, FONAREV should serve as the channel for executing reparations ordered against a convicted person. This normative gap confines the Fund’s redress initiatives to the extrajudicial sphere, which may prove problematic for the enforceability of judicial decisions. Judge’s lack of power to directly order their intervention places victims in an ambiguous situation, having to pursue two parallel routes to compensation. One stemming from the judicial

⁶⁶ *Ibid.*

⁶⁷ Avocats Sans Frontières, RCN Justice & Démocratie and Trial International, *supra* note 19.

⁶⁸ *Ibid.*

⁶⁹ Art. 21 of the 2022 Reparations Act.

⁷⁰ Art. 22 of the 2022 Reparations Act.

⁷¹ Art. 3(6) of the 2022 Reparations Act.

decision itself and the other falling under the competence of an administrative or quasi-administrative body, without the judge having the power to directly order its intervention. Consequently, the very purpose of the mechanism to guarantee comprehensive and effective redress risks being compromised by the lack of coordination between the judicial and extra-judicial spheres. The necessity for a regulatory clarification that would overcome this shortfall and fully integrate the Fund into the judicial redress framework.

3. REPAIRING BEYOND COMPENSATION: PROSPECTS FOR TRANSFORMATIVE REPARATIONS

At the national level, victims who seek to enforce court judgments awarding them damages face obstacles of various kinds. Some of these have been analysed above. Beyond the fact that victims do not actually obtain the amounts awarded, pure financial reparations for mass crimes give rise to three principal criticisms. First, no sum, however substantial, can restore the dignity and humanity taken from victims of mass crimes. Secondly, financial reparations address the consequences of the crimes rather than their ideological and social causes. The amounts disbursed to victims cannot guarantee the non-recurrence of such crimes. Finally, as noted above, the criteria for awarding financial reparations are restrictive in most cases. In general, they concern only victims who have joined as civil parties. Unidentified victims and those who have not joined as civil parties, as well as those unable or unwilling to participate in the judicial process, are excluded from such reparations. Therefore, it is necessary to seek alternative means either outside the judicial route (extrajudicial redress) or within the judicial process itself to grant victim's redress. This section analyses, among other perspectives, the issue of transformative redress due to the impossibility for victims to return to the status quo ante (Section 3.A). It also examines the transformative potential of measures of satisfaction and guarantees of non-repetition (Section 3.B), as well as the encouraging transformative initiatives undertaken by Congolese courts (Section 3.C).

A. Impossibility for Victims to Return to the status quo ante

Victims of mass crimes occupy a particular status that lies not only in the extreme violence, horror and collective nature of what they have endured.⁷² In effect, to repair is to attempt to restore victims to a state that, in reality, is impossible to achieve.⁷³ As Roht-Arriaza notes, the fundamental principle of redress is paradoxical:

Redress is intended to restore or reinstate the victims to the state in which they would have been had the violation not occurred. It is an impossible task. One cannot bring back those who have been killed, restore the health of those who have been tortured or recover the lost years of those who have been interned. Yet, to do nothing in response to atrocities is morally reprehensible.⁷⁴

Reparation covers any form of compensation granted to a person who has suffered a wrong. Both international and national law advocate the principle of full reparation (*restitutio in integrum*). It encompasses a range of measures aimed at restoring, as far as possible, the balance destroyed by the harm and thereby placing the victim back in the position they would

⁷² J-B. Jeangène, *Réparer l'irréparable: Les Réparations Aux Victimes Devant La Cour Pénale Internationale* (, Presses universitaires de France, 2009) at 2.

⁷³ *Ibid.*, at 7.

⁷⁴ N. Roht-Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence', in E. Stover and H. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004) 121–139, at 122.

have occupied prior to the commission of the crime or violation (i.e. the *statu quo ante*). The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafter: The 2005 Principles and Guidelines) suggest that redress must be adequate, effective and prompt in order ‘to promote justice by remedying flagrant violations of international human rights law and serious breaches of international humanitarian law’.⁷⁵ Redress should be proportionate to the gravity of the violation and the harm suffered. It may take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷⁶ These same forms of redress are also provided for in Article 42 of the 2022 Congolese Reparations Act.

In the context of mass crimes, full reparation is difficult, if not impossible, when it comes to hundreds or thousands of cases of very serious violations.⁷⁷ Full reparation presupposes, as nearly as possible, erasing all consequences of the criminal act and restoring the situation that would presumably exist if the act had not been committed.⁷⁸ Yet, conceiving redress as the restoration of the status quo ante presupposes imagining what the present reality would be without the harm of the past is manifestly impossible in cases of mass crimes. Pierre d’Argent observes that:

Even if one may attribute to it certain transformative virtues — by virtue of its normative character — the law is not a time machine, so that the objective of redress appears, per se, almost utopian — even more so when it concerns the repair of the consequences of war, a major historical event.⁷⁹

From the foregoing, the idea of full (integral) reparation is theoretically sound, yet it becomes exceedingly difficult to apply in concrete contexts where violations have been committed on a massive and systematic scale, as is the case in eastern DRC. Margarrell is right when he states that:

In large-scale redress programmes, where it would be impossible to fully assess the individual harm suffered by each victim, or where complete reparation for the harm caused proves unattainable, even the most generous programme will fail if its objective is the repair of all damage.⁸⁰

Nevertheless, despite the impossibility of fully repairing the past, redress can serve as a transformative gesture for society. It provides an opportunity to deliver justice to the victims and to profoundly transform traumatized societies.⁸¹ In this sense, redress becomes not only a means of rectifying a past wrong but also an instrument for promoting democratic

⁷⁵ 2005 Principles and Guidelines, § 15.

⁷⁶ *Ibid.*

⁷⁷ See generally G.J. Bass, ‘Reparations as a Noble Lie’, in M.S Williams et al. (eds), *Transitional Justice* (New York University Press, 2012).

⁷⁸ *Zongo v. Burkina Faso*, ACTHPR No. 013/2011, judgment on reparations, paragraph 60 (5 June 2015).

⁷⁹ P. d’Argent, *Les réparations de guerre en droit international public: la responsabilité internationale des États à l’épreuve de la guerre* (Bruylant, 2002), at 664.

⁸⁰ L. Margarrell, *Les réparations en théorie et en pratique*, International Center for Transitional Justice (ICTJ), Reporative Justice Series, 2007, at 32.

⁸¹ P. d’Argent, ‘Le droit de la responsabilité internationale complété? Examen des Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l’homme et de violations graves du droit international humanitaire’, *51 Annuaire Français de droit International* (2005) 27–55, at 52.

transformation and achieving better standards of distributive justice for all.⁸² Such redress is described as ‘transformative reparations’.⁸³ According to the African Commission:

Transformation is the ultimate goal of redress. Redress should bring about changes in the social, economic and political structures and relationships in a manner that effectively addresses the factors enabling torture and other ill treatments. This transformation requires long-term and durable processes that respond to the multifaceted needs of victims in terms of justice and, in doing so, restore human dignity.⁸⁴

The concept of transformative reparation is particularly pertinent for victims of mass crimes, for whom restitution,⁸⁵ compensation,⁸⁶ and even, to some extent, rehabilitation⁸⁷ tend merely to return them to their prior state, often one of vulnerability vis-à-vis their unpunished perpetrators. The objective of restitution is adequate in cases of isolated violations within reasonably just societies in terms of distributive justice. However, it would be unacceptable in extremely unequal societies, particularly when it involves adopting redress measures for victims from profoundly disadvantaged social backgrounds.⁸⁸

There is no merit in attempting to revert to a situation characterized by the status quo ante — an arrangement that was itself the source of the widespread violence. Transformative redress is thus particularly relevant because it is broadly aimed at transforming the underlying causes that gave rise to the violent situation.⁸⁹ In line with this logic, the 2022 Reparations Act provides for measures such as uplift (relèvement), which entails a complete revaluation of the victim to meet their needs and remedy their vulnerable condition;⁹⁰ community uplift (relèvement communautaire), an approach to local development based on collective projects in which all benefits or profits are reinvested into the

⁸² R. Uprimny, ‘Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice’, *Inaugural address as visiting professor to the UNESCO Chair*, (Utrecht University, 2009), at 57.

⁸³ See generally L-M. Gutierrez Ramirez, ‘Les réparations « transformatrices » - Une nouvelle approche des réparations dans la justice transitionnelle’, 98 *Revue trimestrielle des droits de l’homme* (2014), at 432. F. Ní Aoláin and Rashida Manjoo, ‘Introduction: Reflections on the Concept and Implementation of Transformative Reparations’, 21 *The International Journal of Human Rights* (2017) 1193; C. O’Rourke and A. Swaine, ‘Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice’, 28 *Harvard Human Rights Journal* (2015) 97–146; U. Walker, ‘Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations’, 10 *International Journal of Transitional Justice* (2016) 108–125.

⁸⁴ African Commission on Human and Peoples’ Rights, General Comment No. 4 on the African Charter on Human and Peoples’ Rights on the Right to Reparation for Victims of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 5), paragraph 8, available online at <https://caselaw.ihra.org/api/files/1509793527436g66f3sslmt861sg1svsfw29.pdf> (visited 15 July 2024).

⁸⁵ Restitution should, as far as possible, restore the victim to the original situation that existed before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to the place of residence and restitution of employment and property (2005 Principles and Guidelines, § 19). Compensation should be awarded for any damages resulting from gross violations of international human rights law and serious violations of international humanitarian law, which lend themselves to economic evaluation, as appropriate and proportionate to the gravity of the violation and the circumstances of each case, such as the following: (a) Physical or psychological harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damage and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs incurred for legal assistance or expert opinions, for medicines and medical services, and for psychological and social services. (2005 Principles and Guidelines, § 20).

⁸⁶ Compensation should be awarded for any damage resulting from gross violations of international human rights law and serious violations of international humanitarian law, which lends itself to economic assessment, as appropriate and proportionate to the gravity of the violation and the circumstances of each case, such as (a) Physical or psychological harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damage and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs incurred for legal assistance or expert opinions, for medicines and medical services, and for psychological and social services. (2005 Principles and Guidelines, Principle 20).

⁸⁷ Rehabilitation should include medical and psychological care as well as access to legal and social services. (2005 Principles and Guidelines, Principle 21).

⁸⁸ Uprimny, *supra* note 82, at 53.

⁸⁹ Gutierrez-Ramirez, *supra* note 83, at 432.

⁹⁰ Art. 2(r) of the 2022 Reparations Act.

community;⁹¹ and social reintegration, a set of mechanisms designed to help the victim fully resume life within the community and promote their empowerment.⁹²

Transformative redress is forward-looking in that it does not merely address past wrongs but also sets the conditions and structures necessary to ensure justice in the present and future. It creates a longer term vision and commitment than the term transitional justice might suggest.⁹³ It also underlines the need to consider not only restorative justice for past injustices but also distributive or socioeconomic justice for the future.⁹⁴

B. Transformative Potential of Measures of Satisfaction and Guarantees of Non-Repetition

A critical review of the national judicial reparation initiatives in favour of victims of mass crimes analysed below prompts consideration of alternatives to the judicial route (extrajudicial reparations). Balancing the logic of judicial reparation with that of extrajudicial reparation is a lever for ensuring adequate redress of the harms suffered by victims of mass crimes. In what follows, the analysis focuses on two alternative mechanisms, namely the so-called 'transformative' reparations, such as satisfactions, and guarantees of non-repetition. Under the current Congolese *droit positif*, such mechanisms exceed the competence of a tribunal and call upon the state to consider a comprehensive indemnification plan outside the judicial system, without, however, entirely excluding it, as will be seen below.

1. Satisfaction

Satisfaction encompasses a wide array of non-monetary measures that can contribute to the broader, long-term objectives of redress, particularly when harm cannot be remedied by restitution or compensation.⁹⁵ The 2022 Reparations Act merely states that satisfaction is 'a redress mechanism that may take various forms,'⁹⁶ without specifying which. According to the 2005 Principles and Guidelines:

Satisfaction should, where appropriate, include all or part of the following measures:

- a) Effective measures to cease ongoing violations;
- b) A fact-finding process and a full, public disclosure of the truth, provided that such disclosure does not result in further harm or threaten the safety and interests of the victim, their relatives, witnesses, or those who intervened to help the victim or prevent further violations;
- c) The search for missing persons, the identification of abducted children and the recovery of the bodies of those killed, and assistance with the retrieval, identification, and reburial of bodies in accordance with the expressed or presumed wishes of the victim or the cultural practices of the families and communities;
- d) An official declaration or judicial decision restoring the victim and those closely associated with them in their dignity, reputation, and rights;
- e) Public apologies, including an acknowledgement of the facts and an acceptance of responsibility;
- f) Judicial and administrative sanctions against those responsible for the violations;

⁹¹ Art. 2(s) of the 2022 Reparations Act.

⁹² Art. 2(q) of the 2022 Reparations Act.

⁹³ W. Lambourne, 'Transformative justice, reconciliation and peacebuilding', in S. Buckley-Zistel and others (eds), *Transitional Justice Theories* (Routledge, 2014), at 33.

⁹⁴ *Ibid.*

⁹⁵ ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 37.

⁹⁶ Art. 2 of the 2022 Reparations Act.

- g) Commemorations and tributes to the victims;
- h) The inclusion, in the training on international human rights law and international humanitarian law, and in educational materials at all levels, of accurate information on the violations that occurred.⁹⁷

It is evident that policies of satisfaction are so extensive that they go far beyond the interests of individual victims and are aimed at transforming the very causes of the violent situation.⁹⁸ Thus, satisfaction measures afford victims a new and distinctive recognition. Through this treatment, those who have suffered flagrant or serious violations are called upon to transform the society in which they live.⁹⁹ As Pierre d'Argent observes regarding the transformative potential of redress via satisfaction mechanisms:

The key point is that, with measures of satisfaction ... , the right to redress leaves the familiar realm of the legal relationship between creditor(s) and debtor(s) and ventures into the far more political and societal waters of what may be called collective rights ... The 'genius' of the 2005 Principles and Guidelines — and also their potential disillusionment should the hope engendered be disappointed — is to seize the opportunity to render justice to victims in order to profoundly transform traumatised societies.¹⁰⁰

In light of the foregoing, the satisfaction measures as formulated in the 2005 Principles and Guidelines offer transformative potential by contributing to the reconstruction of societies torn apart by violations of human rights and humanitarian law. Each component of these measures plays a crucial role in promoting truth, justice and reconciliation, and in preventing future mass atrocities. It is incumbent upon the state to adopt effective measures to halt ongoing violations¹⁰¹ and to alleviate the trauma of victims, thereby transforming both them and their societies. Furthermore, these measures of satisfaction resonate with the logic of redress envisaged within transitional justice mechanisms. Transitional justice aims to grant victims the recognition they are due as citizens. This involves recognizing the unjust violation of the victims' rights, the state's responsibility for such violations, the harm resulting from these breaches, and the attempt to help victims cope with the consequences.¹⁰² In this way, redress is intended, on the one hand, to embody society's repudiation of atrocity crimes, and on the other, to lay the foundations for both physical and psychological societal transformation in the pursuit of durable peace.¹⁰³

Furthermore, the recommended measures of satisfaction — such as public apologies, acts of remembrance, and truth-seeking — are essential to the reparation process for mass crimes. This is all the truer when such crimes have destroyed entire social strata, as is the case in eastern DRC. Apologies, memorialization, and the pursuit of truth help to complete the reparative process.¹⁰⁴ These measures can also play a remarkable preventative and educational role. Similarly, in the context of mass crimes, measures of satisfaction through truth-seeking benefit not only the direct victims and their families but also victims of similar acts

⁹⁷ 2005 Principles and Guidelines, Principle 22.

⁹⁸ Gutierrez-Ramirez, *supra* note 83, at 432.

⁹⁹ D'Argent, *supra* note 79, at 35.

¹⁰⁰ *Ibid.*, at 52.

¹⁰¹ 2005 Principles and Guidelines, Principle 22(a).

¹⁰² R. Rubio-Marín, *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press, 2009), at 7.

¹⁰³ See J-P. Lederach, 'Journey from Resolution to Transformative Peacebuilding', in C. Sampson and J-P Lederach (eds), *From the Ground Up: Mennonite Contributions to International Peacebuilding* (Oxford University Press, 2000) 45–56.

¹⁰⁴ S. Wolfe, 'Reparations and the role of apologies', in B. Hols, H. Brehm and M. Weerdesteijn (eds), *The Oxford Handbook of Atrocity Crimes* (Oxford University Press, 2022) 725.

and society at large by revealing what had occurred.¹⁰⁵ In this regard, the right to truth derives from the state's obligation to carry out thorough and effective investigations capable of identifying and punishing those responsible. This obligation also entails granting the complainant effective access to the investigative process.¹⁰⁶ It is no longer merely a prerogative of the public prosecutor to investigate legal and regulatory violations but rather a genuine procedural duty to initiate inquiries whenever such violations occur.¹⁰⁷

2. Guarantees of Non-Repetition

Under international human rights law, guarantees of non-repetition form part of the state's obligation to protect human rights. This obligation requires the state to take measures to prevent future violations. Guarantees of non-repetition are regarded as an exceptional and essential form of reparation for victims who have endured prolonged periods of conflict.¹⁰⁸ Sometimes conflated with the right to redress, the right to non-repetition requires a series of institutional reforms and measures designed to ensure respect for the rule of law, foster a culture of human rights and restore or rebuild public confidence in state institutions. This primarily includes the disqualification of human rights violators from public office (commonly referred to as vetting, lustration, or administrative filtering). Under the 2022 Reparations Act, guarantees of non-repetition refer to mechanisms aimed at influencing or altering the structural, institutional, and political factors that contributed to the commission of serious human rights violations.¹⁰⁹ Vetting consists of barring those responsible for conflict-related sexual violence and crimes against the peace and security of humanity from holding public office.¹¹⁰

According to the 2005 Principles and Guidelines, guarantees of non-repetition should, where appropriate, include all or part of the following measures, which will also contribute to prevention:

- a) Ensuring effective civilian control over the armed forces and security services;
- b) Ensuring that all civil and military procedures comply with international standards of procedural regularity, fairness, and impartiality;
- c) Strengthening the independence of the judiciary;
- d) Protecting members of the legal, medical, and health professions, as well as media personnel and other similar professionals, and human rights defenders;
- e) Providing, on a priority and sustained basis, education on human rights and international humanitarian law throughout society, as well as training for law enforcement officials and members of the armed and security forces;
- f) Encouraging the observance of codes of conduct and ethical standards, particularly international standards, by public officials including law enforcement, prison staff, media, and personnel in the medical, psychological, and social sectors, as well as by military personnel and companies;
- g) Promoting mechanisms to prevent, monitor, and resolve social conflicts;
- h) Reviewing and reforming laws that favour or allow flagrant violations of international human rights law and serious breaches of international humanitarian law.¹¹¹

¹⁰⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Doc. ONU A/HRC/22/52, 1 March 2013, paragraph 23.

¹⁰⁶ *Menteş et al. c. Turquie*, ECtHR (1997), paragraph 89.

¹⁰⁷ J. Mbokani, *La jurisprudence congolaise en matière de crimes de droit international: Une analyse des décisions des juridictions militaires congolaises en application du Statut de Rome* (African Minds, 2017), at 361.

¹⁰⁸ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. II, November 2004, chap 4, at 232.

¹⁰⁹ Art. 2(h) of the 2022 Reparations Act.

¹¹⁰ Art. 2(x) of the 2022 Reparations Act.

The transformative potential of guarantees of non-repetition is succinctly captured by Uprimny, who writes:

The incorporation of guarantees of non-repetition as a component of redress goes beyond the notion of restitution; they do not aim to restore victims to their pre-crime state, but rather these measures pursue a certain form of institutional reform — that is, a form of democratic transformation.¹¹²

Redress in the form of guarantees of non-repetition demands that States adopt measures which contribute to preventing serious international crimes, ensuring that the human rights and humanitarian law violations suffered by victims are not repeated.¹¹³ To achieve this, the state must implement measures that have a social and political impact, evolving the societal context so that its population is no longer subjected to conflict, which engenders human rights violations.¹¹⁴

The mass crimes committed in the DRC over the past three decades arise from conflicts with various deep-rooted causes that legislative and institutional reforms — particularly in the areas of security, justice and disarmament — have so far failed to be addressed effectively. To date, transformation initiatives have focused on institutions. Focusing solely on institutions without addressing the constituents — namely, the people — is the pitfall in which the Congolese State and its national and international partners fall. It may be more feasible to concentrate on the individual rather than on institutions, given that the individual precedes the institution. Indeed, when societal solidarity fails, justice is expected to restore harmony. When justice is no longer capable of doing so, it is only individuals or small communities that bear the burden of the general interest. It is upon these individuals that the rebuilding of institutions must ultimately rely on.

Furthermore, in the post-conflict context, as in the DRC, human rights education — serving as a guarantee of non-repetition — for all social actors to prevent future violations may be an excellent lever for shaping mindsets around principles of legality, equity, and justice. Such education must be conceived as an ongoing process integrated at every level of society in order to produce one of the systemic effects of transformation. Comparative research supports the importance of human rights education as a mechanism for preventing or mitigating conflicts and consolidating peace in post-conflict or extreme-violence contexts.¹¹⁵ To this end, guarantees of non-repetition aim to prevent further violations and to facilitate the restoration of the rule of law.

C. Progressive Judicial Recognition of Transformative Reparations. Analysis of the So-called ‘Koko-di-Koko’ and ‘Bralima’ Cases

In the *Koko-di-Koko* case, the attacks launched in February 2018 by the armed group Raiya Mutomboki, led by Koko-di-Koko, in the village of Kabikokole in the Mwenga territory are examined. Facing an undefended population, the militiamen committed atrocious acts, including the destruction of the only bridge linking Kabikokole with neighbouring villages,

¹¹¹ 2005 Principles and Guidelines, Principle 23.

¹¹² Uprimny, *supra* note 82, at 57.

¹¹³ 2005 Principles and Guidelines, Principle 23.

¹¹⁴ Ní Aoláin et al., *supra* note 83, at 122.

¹¹⁵ D. Celermajer and K. Grewal, ‘Preventing Human Rights Violations ‘From the Inside’: Enhancing the Role of Human Rights Education in Security Sector Reform’, 5 *Journal of Human Rights Practice* (2013) 243; C. Sganga, ‘Human Rights Education — As a Tool for the Reform of the Police’, *Journal of Social Science Education* (2013) 139 kB; R. Wahl, ‘Learning World Culture or Changing It? Human Rights Education and the Police in India’, 60 *Comparative Education Review* (2016) 293.

taking approximately a hundred women hostage. They confined them in a house and subjected them to collective rapes, looting, and kidnappings. After two months of trial, militia chief Frédéric Masudi Alimasi, known as Koko-di-Koko, was sentenced to life imprisonment in November 2019 by the Bukavu Military Tribunal. Two other militiamen received sentences of 15- and 20-years' imprisonment, respectively, while two were acquitted. Furthermore, the Tribunal held the accused jointly liable with the Congolese State for the payment, in Congolese Francs, of damages amounting to approximately US\$2,150,200 to the civil parties. In ruling on the civil action, the Tribunal also paved the way for rehabilitative measures by ordering, in addition to damages, psychological and medical support for victims of sexual violence, stating: 'Moreover, the Congolese State is obliged to ensure the ongoing psychological and healthcare follow-up for all victims of rape and sexual violence'.¹¹⁶

The *Bralima* case concerns members of Raiya Mutomboki who, between 2017 and 2021, carried out repeated attacks against civilian populations in several villages in the Kabare territory. During these attacks, the militiamen stripped any captured victim of all possessions, set fire to villagers' houses, looted their livestock, and abducted women and young girls. They subjected them to rape and reducing them to sexual slavery. In March 2023, three militiamen from the Raiya Mutomboki Bralima group were convicted by the Bukavu TMG for crimes against humanity. They were sentenced from 10 to 20 years of prison for murder, rape, sexual slavery, torture, and other inhuman acts. The Tribunal also held them jointly liable with the Congolese State for the payment of damages amounting to approximately US\$50,910 to the civil parties. In addition to damages, the Bukavu TMG ordered rehabilitative measures as follows:

Moreover, the Congolese State is obliged to:

Take all necessary measures to provide for all the victims, particularly those who continue to suffer psychological or health consequences from the acts they endured;

Implement all accompanying measures for these victims who, as testified by the psychologist, continue to suffer the effects of these acts to this day.¹¹⁷

The execution of this obligation implies not only immediate care, such as medical examinations and emergency treatment. It also requires a long-term follow-up to manage any eventual complications and ensure the ongoing well-being of the victims. These two decisions represent an important step towards a more inclusive and holistic justice for victims of sexual violence in the context of mass crimes. They underscore the importance of recognizing and responding to the complex needs of the victims, both physically and psychologically. However, neither this rehabilitative obligation nor the damages have yet been executed. Victims of sexual violence in these cases have continued to receive psychological and healthcare follow-up from the civil society organizations that accompanied them during the judicial process. The state has never discharged its obligation. Yet, the execution of such a rehabilitative obligation would have been an opportunity for the state to affirm its commitment to adequately address the needs of the victims and to help them rebuild their lives after enduring such atrocities.

¹¹⁶ *The Koko-di-Koko case*, *supra* note 25, Feuillet 76.

¹¹⁷ *The Bralima case*, *supra* note 36, Feuillet 35.

4. CONCLUSION

This study highlights both the complexity and urgency of the issue of redress for mass crimes in DRC. The essentially compensatory approach, though an indispensable milestone for recognizing harm and awarding compensation, proves insufficient when it comes to addressing the magnitude and multidimensional nature of mass crimes. The Congolese military courts have made notable efforts to adapt traditional civil liability rules to a context of widespread atrocities, particularly by holding the state jointly liable.

Beyond the strictly compensatory logic, the prospect of ‘transformative redress’ offers a more ambitious horizon that is better suited to the profound nature of mass crimes. The inclusion of measures of satisfaction and guarantees of non-repetition attests to the desire to move beyond pure financial compensation towards a transformation of political, judicial, and social structures. The examples of the *Koko-di-Koko* case and the *Bralima* case testify to an encouraging progression towards recognizing the dignity of victims and the necessity of comprehensive support. Moreover, the creation of FONAREV, although still in its infancy, paves the way for a more institutionalized mechanism for funding and implementing redress, provided that its role is clarified and its capacity for judicial intervention is strengthened.

Considering these elements, the imperative for justice and peace calls for a renewed investment in the redress component of the fight against impunity. For redress to be genuine and effective, every remedial initiative must be embedded in a coherent programme combining effective criminal prosecutions, deep institutional reforms, and active participation of victims. Such an approach will fully honour the state’s obligation to repair while ensuring the construction of a resilient future based on the recognition of rights, the restoration of civic trust, and the prevention of large-scale violence. Effective reparations must address both the harms suffered and the underlying structures that caused them. Reparations should transform victims’ circumstances rather than simply restore them to poverty and discrimination.

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