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Judgment Denied

The Failure to Fulfill Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of the Congo

Introduction

Decades of war, rebellion, and kleptocratic rule in the Democratic Republic of the Congo (DRC) have left millions of people victims of human rights violations, war crimes, and crimes against humanity, without any acknowledgement of their suffering nor the means to deal with the consequences. Victims have yet to receive reparations measures that address their overwhelming needs. Fulfilling the government’s duty to provide reparations requires a comprehensive approach that includes both judicial and nonjudicial measures. This briefing paper focuses on one element: the challenge of providing victims with redress through court-ordered reparations.

Given the duration and scale of the violence in the DRC and the large number of victims, the most effective way to address victims’ needs would be through a comprehensive reparations program established and administered by the government. However, the lack of political will, scarcity of government resources, and limited awareness of reparations beyond the concept of compensation through courts have made it difficult for Congolese victims to receive meaningful redress.

Congolese courts have ordered the government to pay compensation to victims in at least eight cases in which those convicted were members of the Congolese military.¹ Under Congolese law, the government bears ultimate civil responsibility for crimes committed by its agents. Yet, no payments have been made in any of these cases—a clear indication of the judicial system’s weak ability to enforce the law.

Following a workshop in Kinshasa in 2011, ICTJ produced a document under the name “Judicial Reparations for Victims of Grave Violations in the Democratic Republic of the Congo,” which summarized the workshop presentations given by victims’ representatives and respected Congolese jurists (members of both the military and civilian justice systems) on the challenges of enforcing court-ordered reparations. It also provided recommendations on how reparations could be implemented.

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¹ Cases include *Affaire des Pillages de Mbandaka*; *Affaire Bongji*; *Affaire Mulesa*; *Affaire Songo Mboyo* (infra notes 5, 6, 7 and 8); *Affaire Kahwa Panga Mandro* (note the High Military Court has overturned a decision by the Court of Appeal that overturned the original conviction by the Court of First Instance); *Affaire Mitwaba*; *Affaire Kilwa*; and *Affaire Kalonge Katesimi*.

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This briefing paper outlines and summarizes the challenges and recommendations discussed in that document, which were reinforced by later supplementary research findings from Mbandaka, Équateur Province.² It also proposes additional steps that the government, international community, victims’ groups, and civil society organizations could take to address the failure of the DRC to fulfill outstanding orders for reparations as well as broader measures that could be implemented, including nonjudicial reparations.

The Nature of the Right to Reparations in the DRC

Reparations constitute a fundamental right of all victims of human rights violations, war crimes, and crimes against humanity, according to the 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.³ A victim’s right to reparations for harm suffered is recognized under Congolese law: victims have the right to seek judicial remedy by bringing a civil action as part of criminal proceedings before Congolese courts. In cases involving crimes of genocide, war crimes, and crimes against humanity, Congolese victims must bring their claims before military courts.⁴

Since 2006, Congolese military courts and tribunals have awarded damages to victims in some cases for harm suffered as a result of war crimes and crimes against humanity committed by soldiers of the Armed Forces of the DRC. In four key cases surveyed by ICTJ—Mbandaka,⁵ Bongi,⁶ Mulesa,⁷ and Songo Mboyo⁸—no victim has yet to successfully receive compensation from individuals sentenced by military courts or from the government.

Table 1: Overview of Mbandaka, Bongi, Mulesa, and Mboyo cases

| CASE AND CRIME | NUMBER OF PERSONS CONVICTED | NUMBER OF VICTIMS AWARDED COMPENSATION | COMPENSATION AWARDED (USD) | COMPENSATION PAID (USD) |
|--|-----------------------------|--|----------------------------|-------------------------|
| Looting of Mbandaka, Crimes Against Humanity | 8 | 25 | \$126,000 | \$0 |
| Blaise Bongi, War Crimes | 1 | 3 | \$215,000 | \$0 |
| Mulesa, War Crimes | 12 | 19 | \$481,000 | \$0 |
| Songo Mboyo, Crimes Against Humanity | 6 | 43 | \$165,317 | \$0 |
| TOTAL | 27 | 90 | \$987,317 | \$0 |

² In July 2011, ICTJ conducted field research and analysis in Mbandaka, the capital of Équateur Province, where a gender reparations project had been undertaken.

³ UN General Assembly, 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, resolution adopted Dec. 16, 2005 A/RES/60/147, available at www.unhcr.org/refworld/docid/4721cb942.html.

⁴ The Congolese military courts have exclusive jurisdiction for these offenses, according to the provisions of Law 023/2002, dated November 18, 2002, constituting the Military Judicial Code and of Law 024/2002, dated November 18, 2002.

⁵ Tribunal Militaire de Garnison de Mbandaka (/TMG de Mbandaka), 12 January 2006, RP 086/2005 (first tribunal); Tribunal Militaire de Garnison de Mbandaka (/TMG de Mbandaka), 20 June 2006, RP 086/2005-RP 101/2006 (first tribunal); and Cour Militaire de l’Équateur (/CM de l’Équateur), 15 June 2007, RPA 015/2006 (appeal).

⁶ Tribunal Militaire de Bunia (/TMG de Bunia), 24 March 2006, RP 018/2006 (first tribunal); Cour Militaire de Kisangani (/CM de Kisangani), 4 November 2006, RPA 030/2006 (appeal).

⁷ Tribunal Militaire de Bunia (/TMG de Bunia), 19 February 2007, RP 101/2006 (first tribunal); Cour Militaire de Kisangani (/CM de Kisangani), 28 July 2007, RPA 003/2007 (appeal).

⁸ Tribunal Militaire de Garnison de Mbandaka (/TMG de Mbandaka), 12 April 2006, RP 084/2005 (first tribunal); Cour Militaire de l’Équateur (/CM de l’Équateur), 7 June 2006, RPA 014/2006 (appeal).

By failing to implement court-ordered reparations, Congolese authorities have weakened trust in the rule of law. Any trust that the courts may have earned from victims through legal proceedings has now given way to disappointment and frustration. More broadly, the situation appears to have eroded the faith of the general public in the ability of the legal system to redress harms resulting from serious crimes. Further, research conducted for this report confirms existing perceptions that the government persistently evades its international and domestic obligations to provide reparations to victims. Yet, despite these failures, victims are aware of their right to compensation for the harms they have suffered and the government's responsibility to fulfill this right.

Challenges to Awarding Judicial Reparations

There are fundamental obstacles to providing reparative justice through Congolese courts due to general laws and practices governing claims for compensation.⁹

First, given the individualized nature in which civil action claims are initiated, the Congolese legal framework for reparations requires significant reform. A victim can only participate in a proceeding by filing an individual claim as a *partie civile* (civil party), a requirement that precludes groups of victims from pooling their resources and experiences, and seeking redress collectively. Further, cumbersome rules govern how evidence is presented and accepted in court, further complicating the difficulty inherent in gathering evidence for mass crimes. For example, in the case of rape, judges require a medical certificate prepared by a medical officer within 48 hours of the incident, which is nearly impossible for survivors to obtain because of the general lack of access to basic medical care in the DRC.

Second, enforcing court orders for successful claimants involves a judicial process that entails complex and time-consuming procedural rules. In addition to the operational inefficiency of domestic judicial enforcement offices, these rules require specialized knowledge that is challenging even for experienced Congolese judicial actors to navigate. Thus, the rules are especially difficult for victims and their representatives to follow.

Another obstacle to enforcement is the exorbitant expense of enforcement procedures. Victims who cannot afford to pay are required to obtain a legal certificate attesting that they are indigent (*attestation d'indigence*), which invariably requires securing legal counsel. With this certificate, victims are legally exempt from paying a tax proportional to the damages sought (*droit proportionnel préalable*). In practice, however, victims are often still required to pay the tax, even after being declared indigent. Moreover, the financial insolvency of some convicted perpetrators presents an additional barrier to payment of reparations.

There are also significant inconsistencies in how compensation is calculated. There has no transparency or consultation with experts or victims, and the amounts awarded have been inconsistent across cases. Compensation is often awarded arbitrarily as fixed lump-sum amounts. Even if these court orders were fulfilled, they would reflect amounts that do not fully redress the harms suffered by victims. Feedback from victims shows a desire for additional publicly supported measures to address their full needs, including forms of material reparations.

⁹ Following the cases surveyed for this report, each trial resulted in decisions that found the guilty parties responsible for paying reparations to victims, including and most notably the Congolese government by virtue of joint and solidary liability for damages arising from crimes committed by its agents. For a full description and analysis of these cases and court practice generally see *Avocats Sans Frontières, Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo (2009)*, www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf.

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In addition to existing legal and procedural obstacles, the pervasive ignorance at the provincial government level of the constitutionally mandated obligation to provide reparations and the lack of political will to pursue them further impede the enforcement of court-ordered reparations. Provincial government officials appear to either lack familiarity with their obligations or defer responsibility to the central government. They seem to know only the most-high-profile cases, neglecting other documented cases that deserve attention and redress. Ongoing advocacy is required for both commitment and action from provincial governments.

Finally, research and discussion with both victims' and justice groups in 2009 and 2011 confirmed that victims gained a sense of justice and public recognition by participating in proceedings for criminal and civil remedies. Unfortunately, in a number of cases, convicted individuals have since escaped from prison and evaded authorities. For example, in the Mbandaka case, all of those convicted have escaped from prison and remain at large. Victims now believe that the government has been complicit in allowing convicted former state agents to remain at large. The situation also worries judges, lawyers, and observers involved in the case, according to a victim from Mbandaka interviewed in 2011.¹⁰

This problem is compounded by the government's systemic failure to respect court-ordered payment obligations. As stated before, no payments have been made in any of the four most prominent cases. This erodes confidence in the national legal system, compromises the effective implementation of the principle of complementarity, and contributes to a pervasive culture of impunity in the DRC.

Recommendations for Realizing Reparations in the DRC

Congolese jurists, human rights lawyers, activists, and victims' groups have made the following recommendations that they believe can help to expand awareness of the right to reparations in the DRC, including the enforcement of court orders for compensation and reparations.

A. Working toward the broader realization of the right to reparations

1. Establish a public fund for victims based primarily on state contributions

Congolese jurists consulted by ICTJ for its reparations study cited the need for the central government to establish a special indemnity fund for Congolese victims of international crimes. One possible source of funds is the indemnification that the government of Uganda owes to the DRC based on the 2005 International Court of Justice decision.¹¹ For the fund to be sustainable and fully capable of responding to the needs of victims, the central government should make additional contributions. Pooling together multiple sources for the fund would also ensure that a broader constituency of victims could be served, rather than just those linked to specific cases.¹²

Victims' rights groups say creating a reparations fund should be a high priority because it would represent the central government's firm commitment to reparations.¹³

2. Build the capacity of the civilian and military justice systems

Judicial actors in the DRC require training in how to frame and implement judicial reparations. For example, court clerks and bailiffs should know the documentation and procedures required

¹⁰ Tribunal Militaire de Garnison de Mbandaka (TMG de Mbandaka), 12 April 2006, RP 084/2005 (first tribunal); Cour Militaire de l'Equateur (CM de l'Equateur), 7 June 2006, RPA 014/2006 (appeal).

¹¹ Armed Activities on the Territory of the Congo (*Dem. Rep. Congo v. Uganda*), 2005 ICJ 168 (December 19, 2005).

¹² Interview with Lambert Lisika, Mbandaka-based human rights lawyer, La Clinique Juridique, July 2011.

¹³ Interview with François Tshiteya, Mbandaka-based human rights lawyer, Observatoire Congolais de Droits Humains, July 2011.

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to fulfill judicial reparations decisions. Additionally, civil and military judges should develop a deeper understanding of the nature and scope of reparations for gross human rights violations, war crimes, and crimes against humanity.

Below are a set of specific measures that are recommended:

- The Ministry of Justice should implement training that strengthens the capacity of judicial personnel (magistrates, clerks, bailiffs) in the enforcement of court orders for compensation.
- The High Judicial Council should support training for civil and military judges on the subject of reparations in cases involving the commission of gross human rights violations, war crimes, and crimes against humanity.
- The High Judicial Council should adopt and circulate a formal note of instruction directing civil and military judges to justify damage awards by specifying the nature of the harm for which they are awarded (for example, moral, material, and/or cosmetic damage in cases of disfigurement). In cases where detailed facts specifying the precise harm incurred are not available, the council should direct judges to use the principle of equity and provide detailed explanations.
- International donors should support training for judicial magistrates on the provision of reparations in cases involving human rights violations, war crimes, and crimes against humanity.
- National and international nongovernmental organizations (NGOs) working on justice sector reform should support the High Judicial Council in training judicial magistrates on reparations, in general, and cases involving human rights violations, war crimes, and crimes against humanity, in particular.

3. Provide victims' rights groups with advocacy and legal support

Education and training will not be successful without a demonstrated commitment to paying existing reparations from government at the national and provincial level. Even with well-trained clerks, the procedural obstacles described above should be addressed and the process of obtaining judicial reparations made more accessible to victims. As noted earlier, victims are often forced to pay fees that they should not legally be required to pay.¹⁴ Victims and their representatives, like local human rights organizations, require ongoing advocacy, support, and mentoring from both Congolese and international civil society groups. Victims' groups also require support in seeking compensation against foreign corporations that are found complicit in the commission of crimes and human rights violations in the DRC.

4. Conduct a comprehensive study on collective and symbolic reparations

The Congolese government, through the Ministry of Justice, should support a mapping and documentation of potential cases for which collective and symbolic reparations may be appropriate. This could inform a draft law that would provide domestic legal framework for administrative reparations programs. Such a law could serve victims who are unable to identify the perpetrators of crimes they suffered or who cannot pursue a case in court for other reasons. In such cases, a combination of material collective reparations measures (the construction of schools or medical centers) as well as symbolic reparations (official commemorations and memorials) could be awarded under Congolese law.

Such endeavors should complement, rather than replace, the enforcement of existing awards for unpaid compensation owed by the state. The obligation to pay these outstanding compensation orders remains, and enforcement is of both material and symbolic importance.

¹⁴ Victims who cannot afford to pay a tax proportional to damages sought are often still required to pay, even after being declared indigent.

B. Specific recommendations to enable enforcement of court-ordered reparations

1. Adopt and implement key policy and practice reforms at the Ministry of Justice

- Draft a bill to establish a schedule of payments that would govern outstanding and future state-owed compensation awards and assign a corps of judges to oversee and enforce the schedule of payments.
- Include the amount of outstanding compensation payments that are currently registered with the Service du Contentieux (Public Litigation Unit) as part of the public debt.

2. Create an independent mechanism led by the judiciary to oversee payments of court-ordered reparations

An independent commission of experts, established through the Ministry of Justice, should identify and determine the legal and policy reforms on compensation payments described above. Most importantly, such a commission could be charged with simplifying the current process of litigating and enforcing judicial reparations.

3. Enable courts to reasonably assess and enforce damages

The Ministry of Justice should establish an internal monitoring mechanism to oversee payments of future court-ordered damages owed by the state. Such a body should be composed of judges with knowledge and experience in the enforcement of court-ordered reparations as well as experts in actuarial science. Such a mechanism could offer expert technical advice and recommendations to tribunals on reparations. Such a body could also support victims who may want to appeal awards that are clearly insufficient.

4. Ensure that national and provincial governments respect outstanding payment obligations

Because no court-ordered reparations have been paid yet, it is important for both national and local state institutions to implement practical measures that preserve awards and facilitate their enforcement. Such measures include:

a. Ministry of Justice

- Register outstanding awards for damages to victims with the Public Litigation Unit, especially in the Mbandaka, Bongi, Mulesa, and Songo Mboyo cases.
- If a schedule of payments bill is not forthcoming from the national government, undertake the required procedures to ensure payment is made. Specifically, forward a *bon d'engagement* (a kind of formal fiscal commitment) that represents the total amount of outstanding court-ordered reparations awards, including and especially in the Mbandaka, Bongi, Mulesa, and Songo Mboyo cases. This amount should then form part of the next official budget, and the Ministry should diligently follow up with the national government until payment has been provided to victims.

b. National and provincial ministries of budget and finance

- Ensure that the public has access to the *bon d'engagement* submitted by the Ministry of Justice regarding the payment of court-ordered reparations by the state and its officials.
- Distribute provisions for victim compensation for court-ordered reparations proportionately among national and provincial budgets.

c. National and provincial parliaments

- A national legislative committee should monitor expenses undertaken as part of budget implementation by federal justice ministers and other relevant central government actors

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for the purpose of payment of judicial compensation. This committee should also call for an official public policy on paying court-ordered reparations awards as well as the broader realization of victims' right to reparations.

- When provincial governments have been found responsible for paying judicial compensation (see below), provincial legislative committees should be established to undertake the same responsibilities as those mentioned above.
- d. The provincial governments of Équateur and Orientale**
- These provincial governments must act to ensure that payments owed to the victims of the Mbandaka and Songo Mboyo cases (implicating Équateur) as well as the Bongi and Mulesa cases (implicating Orientale) are included in the next official budget.
- e. International donors funding justice sector reform**
- Undertake bilateral and multilateral advocacy with the Ministries of Justice, Budget, and Finance to ensure the payment of compensation owed to victims.
 - Link development aid for the justice and security sectors to demonstrable action by the government to enforce court-ordered reparations and the apprehension and imprisonment of convicted perpetrators.
 - Support training to strengthen the capacity of victims' groups and civil society organizations.
- f. National and international NGOs**
- Undertake advocacy targeting the Ministries of Justice, Budget, and Finance to draw attention to unpaid court-ordered compensation to victims, including media campaigns calling for a comprehensive reparations program.
 - Establish and support civil society monitoring of state budget allocations for court-ordered reparations.
 - Encourage and advocate for provincial governments to take responsibility for the payment of judicial compensation when the Congolese government has been found liable. Based on the shared jurisdiction for payments of judicial compensation, provincial governments could be encouraged to provide symbolic payment to formally recognize the rights of victims and acknowledge their suffering.

5. Improve prison security and the protection of judicial personnel

The Ministry of Justice should enforce the re-arrest and imprisonment of perpetrators convicted of war crimes and crimes against humanity. With the support of international and national stakeholders, urgent penal reforms should be implemented immediately to prevent future escapes. Particular attention is needed to ensure that Mbandaka and Bunia prisons are secure and that judicial personnel involved in trying the cases discussed in this report are provided with adequate security and protection.

Conclusion

Victims in the DRC are losing hope that they will see any form of redress for their suffering. Though encouraged by their lawyers, civil society, and other advocates to continue campaigning for court-ordered awards, the lack of results from their sustained efforts has left many victims open to ridicule by their own families and within their communities. The situation has also discouraged supporters in civil society who have invested significant time and resources in assisting victims without seeing any results.

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SWEDEN

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Despite their diminishing motivation, victims and their representatives remain committed to pursuing compensation and other forms of reparations in Congolese courts. They acknowledge having achieved some recognition of their suffering through the trial process; therefore, it is important that they receive ongoing support and advocacy assistance to see the process through to conclusion.

Broader efforts to guarantee the right to reparations in the DRC must ensure that court orders directing payment of compensation are implemented in a just and equitable manner, alongside other measures of reparations that cover victims of a wide range of violations. Victims need to be active participants in discussions and programming, rather than merely an object of them.