



Protection and Reparation Under Congolese Law for Survivors of Sexual and Gender-Based Violence

Situational Analysis and Prospects for Reform

ACORD DRC

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Table of contents

Abbreviations and acronyms.....	2
Acknowledgements.....	2
1 Introduction.....	3
1.1 Context.....	3
1.2 Purpose of the study.....	4
2 Reparation for SGBV survivors under Congolese positive law	6
2.1 Reparation under customary law.....	6
2.1.1 Philosophical basis of liability under customary law	7
2.1.2 Conceptualisation of traditional civil liability	7
2.2 Common law reparation	8
2.2.1 Common law liability	8
2.2.2 Claims for reparation	9
2.2.3 Beneficiaries of reparation	11
2.2.4 Exception to common law civil liability	11
3 Protection of survivors of SGBV under Congolese positive law.....	13
4 Mechanisms for reparation and protection of SGBV survivors modelled on international law.....	15
4.1 Forms of Reparation under international law.....	15
4.2 Modalities for Granting Reparation	16
4.3 Mechanisms for implementation of reparation under international law	16
4.4 Support system for survivors throughout the duration of the proceedings.....	16
5 Towards holistic care of SGBV survivors in the Democratic Republic of Congo.....	17
5.1 Motivation.....	17
5.2 Lex Ferenda.....	17
5.2.1 At the legislative level	17
5.2.2 Law enforcement institutions and structures.....	18
6 Conclusion	19
7 Bibliography	20

Abbreviations and acronyms

ACORD: Agency for Cooperation and Research in Development
ANC: *Armée Nationale Congolaise* (Congolese National Army)
BAVAC: *Bureaux d'Aide aux Victimes d'Actes Criminels* (Support Offices for Victims of Criminal Acts)
CAVAC: *Centres d'Aide aux Victimes d'Actes Criminels* (Support Centres for Victims of Criminal Acts)
CIDA: Cooperation and International Development Agency
ICC: International Criminal Court
JPO: Judicial Police Officer
PPO: Public Prosecutor's Office
SGBV: Sexual and Gender-Based Violence
STAREC: ... Stabilisation and Reconstruction Programme for Conflict Areas
UNFPA: United Nations Population Fund

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1 Introduction

1.1 Context

In accordance with ACORD's objective to promote an effective and efficient culture of gender-based justice in countries of the Great Lakes Region, the organisation undertook a reflection on the issue of reparation for survivors of sexual and gender-based violence, which is considered one of the most important components in curbing the impunity of sexual aggressions in the Democratic Republic of Congo¹.

ACORD examined various statistics on sexual and gender-based violence. The latter indicate that despite significant progress made in restoring peace in the country, sexual crimes have risen exponentially, going beyond conflict areas to those which had previously been spared from the war, as evidenced by the unfortunate increase in the number of rapes in Kinshasa and the country's major towns.

The studies and statistics below speak volumes:

- According to the United Nations Population Fund (UNFPA), 1,200 to 1,600 sexual violence cases were recorded on a monthly basis from January 1 to December 31, 2009, out of which 8,000 comprised rape²;
- 32,3523 rape cases were reported by various structures in the Democratic Republic of Congo according to statistics provided in the DRC Humanitarian Action Plan for 2008;
- The report entitled "Combating Sexual Violence and Impunity in the Democratic Republic of Congo-Experience of the Joint Initiative on Prevention and Response to Sexual Violence" compiled in Lubumbashi in June 2007 on the basis of data collected through provincial synergies as well as UNFPA branches, states that on average per day, 40 women were raped in Eastern DRC in 2007;
- According to the same source above, 70% of the rape survivors were civilians aged between 6 months and 80 years, and 75% were minors;
- Statistics from the United Nations Office of Human Rights in South Kivu reveal that out of less than 1% of rape survivors, of the 14,200 cases recorded by health structures in South Kivu in 2005, only 287 were referred to court;
- Numerous other studies have dealt with this issue. One of the most decisive reports was the one produced in 2003 by the Joint Initiative, a platform to combat sexual violence impunity that was non-governmental organisations, working to promote women's rights. This true advocacy culminated in the development and adoption of two laws by the Congolese Parliament on July 20, 2006, namely: Law n° 06/18 amending and complementing the Decree of January 30, 1940 on the Congolese Penal Code and Law n° 06/019 amending and complementing the Decree of August 6, 1959 on Congolese Civil Proceedings³. The two texts today constitute the foundation stone of DRC's sexual violence legislation.

The main concern raised by various quarters was to ensure that the Republic has a legal framework to effectively repress offences related to sexual violence through key innovations, such as:

- Inclusion of unreported incriminations like sexual harassment, sexual slavery, forced marriage, genital mutilation, zoophilia, forced sterilisation, etc. in the new law. Previously, these incriminations were not punishable since they were not provided for in the old law.
- Redefining some sexual violence offences that were already included in the Penal Code in order to cover all hypotheses which did not correspond with the legal characterisation: the case of rape and indecent assault whose application of the law was broadened;
- Strengthening repression by revising the rate for penalties related to sexual violence offences upwards. To this end, special emphasis was laid on circumstances likely to increase these

¹ Colonel Toussaint Muntazini Mukimapa, *La problématique des violences sexuelles en droit congolais*, Ed. RCN-Justice et Démocratie, Kinshasa, 2009, p.34

² *Statistiques des cas incidents de violences sexuelles en 2009 en RDC*, Kinshasa, 2010

³ cf. *Official Gazette of the Democratic Republic of Congo*, Special Edition of May 25, 2009, p. 59 to 69

sentences, given the sociological context that has seen perpetrators of these crimes surprisingly being recruited in socio-professional categories as teachers, men of God, medical staff, traditional practitioners, etc.;

- Establishment of an accelerated and immediate procedure that effectively takes into account the dignity of survivors and safeguards their rights to defence.

Since the promulgation of these laws, a number of legal proceedings have been instituted. However, it is important to note that for various reasons, very few have resulted in the sentencing of perpetrators to penal servitude and payment of damages. Undoubtedly, the most symbolic ruling was at the Songo Mboyo trial where the Mbandaka Military Court for the first time in history qualified gang rape as a crime against humanity and accordingly, sentenced several members of the 9th infantry battalion of the former Congolese National Army (ANC) to long periods of imprisonment and regarding civilian reparation, declared the same perpetrators and the Congolese Government (civilly liable) bound *in solidum*, ordering them to pay damages to the survivors.

It is noted that both for the Songo Mboyo ruling and other sentences passed by the country's courts, survivors almost never receive the monies owed to them in this regard.

1.2 Purpose of the study

In view of the foregoing, it is important to understand why judicial proceedings on sexual violence, and particularly those concerning rape, whose survivors, who are generally hesitant, are immediately invited by the civil society and public authorities to institute in order to curb the vice, end up in rulings that are almost never applied with regard to civil damages.

Similarly, it seems appropriate to find out whether the money allocated to survivors of sexual and gender-based violence is really enough to compensate for the magnitude and varieties of damage suffered. The concern is all the more justified since without such satisfaction, disillusioned survivors wonder whether the risks taken to go to court were worth it in terms of stigma they face as a result and possible retaliation from their torturers who very often manage to escape from Congolese prisons due to the decaying institution.

In the same vein and in view of the particularly appalling circumstances surrounding some acts of commission of sexual violence (disability of the survivor, mass rape, public rape, desire to humiliate the survivor's parents and other family members or spread terror in a community in order to cause migration, etc.), it is imperative to question the very notion of a sexual violence survivor as perceived by Congolese positive law and consequently, that of legitimate beneficiaries of the right to reparation for damages arising from acts of sexual violence.

To initiate reflections on these numerous questions and propose ways to improve the current reparations system in force for SGBV survivors in the Democratic Republic of Congo, ACORD first organised a survey on the judicial practices in the area of SGBV from April to June 2009, which revealed the existence of a plethora of problems both in the enforcement of court rulings on SGBV as well as the modes of reparation for survivors. ACORD subsequently took the initiative to convene a workshop for actors on the ground including representatives of civil society organisations that have SGBV in their agenda, with guidance from a Government representative appointed by the Ministry of Gender, the Family and Child, an Embassy representative of a country partnering with the DRC to stop SGBV, a representative of a UN agency that provides legal support to SGBV survivors and an ACORD expert.

At the end of the workshop which was held from June 21 to 22, 2010 at the Nqanda Catholic Centre in Kinshasa, information was collected, analyses conducted and recommendations made which, in turn, served as the basis for a lecture forum on July 7, 2010 at Hotel Sultani, Kinshasa, facilitated by the Minister of Justice and Human Rights, the representative of the Minister of Gender, the Family and Child as well as an expert, in the person of a senior military magistrate. During the said conference, the conclusions of the Nqanda Centre workshop were presented and advocacy conducted among the invited institutional actors (Members of Parliament, Members of Cabinet or their representatives) as well as donor and civil society representatives.

This study is the systematisation of reflections formulated during the two meetings with a view to their effective use within the context of institutional and legal reforms that are vital in order to

establish and operationalise a more effective reparations system (mechanisms and structures) for survivors of sexual and gender-based violence in the Democratic Republic of Congo.

2 Reparation for SGBV survivors under Congolese positive law

According to the National Strategy to Fight Gender-Based Violence developed by the Ministry of Gender, the Family and Child in August 2009, gender-based violence is defined as “any act or omission that is detrimental to an individual and results in distinctions between men and women, adults and children, the young and old, ...”

Survivors of sexual violence that are the subject of this study fall within these categories, hence the concept of gender-based violence.

The conventional meaning of reparation is related to the notion of civil liability which consists of the obligation for an individual to repair harm caused to another arising from an event for which he is responsible. It differs from criminal responsibility which is the obligation to serve a penalty when an individual commits a crime against the social order.

Reparation, which literally means “the act or process of repairing”, can be interpreted as the indemnification or compensation for an injury by the person who is civilly liable or better still, the re-establishment of the balance disrupted by the harm, consisting of, if possible, restoring the survivor to the position he or she would have been in had the tortuous action not been committed⁴.

Reparation can take on various forms, the most common being financial or pecuniary compensation through the allocation of a sum of money, and reparation in kind through re-establishment of the original situation prior to the wrongful act being committed (*restitutio in integrum*).

In addition to these two main modes of reparation, we also cite on the one hand, equivalent reparation which is sometimes mistaken for monetary reparation, but rather comprises the provision of benefits to the survivor through compensation, and on the other hand, symbolic or ritual reparation which is meant to a some extent indemnify the survivor for moral harm caused, particularly if the moral wrong is definite, personal, direct and comprised the violation of an interest which deserves a social safety net⁵.

To better understand the difficulties encountered in establishing effective mechanisms for determination of civil liability and implementation of corresponding reparation, various systems likely to influence the behaviour of actors concerned by the obligation to repair harm in a given situation should be examined.

2.1 Reparation under customary law

From the sections above, it seems that individualistic ideas linked to liberal philosophy serve as the basis for conventional civil liability in the sense that Man, considered as a morally free being, must bear the consequences of his freedom so that each time he goes beyond the limits of this liberty (which ends where the freedom of a third-party begins) and as a result infringes on the interests of others, he must repair the damage thus caused.

It is this subjective conception of civil liability that underpins Article 258 of the Congolese Civil Code, Book III, which stipulates that “any act or omission by Man that causes another injury, requires that the former, due to the wrongful act committed, to repair it”.

Nevertheless, the disadvantage of this subjective conception is that it conditions reparation, not by the mere observation that harm was caused, but by the burden of proof that it is as a consequence of a wrongful act attributed to the person who committed it, failing which no reparation can be made to the aggrieved party. It is for this reason that an objective conception of civil responsibility is more palatable since it does not require any prior commission of a wrongful act in the reparation process, as harm alone is enough justification for reparation.

⁴ Gérard Cornu, *Vocabulaire juridique*, Presses universitaires de France, Paris, 1987, p. 686

⁵ Vincent Kangulumba Mbambi, *Indemnisation des victimes d'accident de la circulation et assurance de responsabilité civile automobile : étude de droit comparé belge et congolais*. Academia-Bruylant, Louvain-la-Neuve, 2002, p. 131-32

2.1.1 **Philosophical basis of liability under customary law**

Under Congolese traditional customary law, the objective conception is the main principle behind civil liability, considering that harm is perceived as an element of discord and disharmony in the society which cannot remain without repair, at the risk of breaking social equilibrium and even causing unrest in the long run⁶.

This state of affairs is justified by the fact that traditional societies are in essence societies whose equilibrium is built on beliefs and attitudes. Therefore, notions such as prescription, fate or coincidence do not exist. Everything has a reason and the sentiment of justice is defined around any obligation to redress the wrong committed⁷.

In traditional societies, a wrongful act, as is the case with reparation, is not left to an individual, be he or she guilty, the perpetrator of the harm or even its survivor. It is a matter that falls within the remit of the clan and community.

The foundations of traditional civil liability lie in the constant quest for social harmony, social equilibrium and clan solidarity.

2.1.2 **Conceptualisation of traditional civil liability**

Within the traditional social structure, civil liability tends to play two key roles, namely the compensatory and preventive functions, and is distinct through its implementation mechanisms, subjective and individualistic conception of ad hoc Western law.

i **Compensatory Function**

Under traditional law, the decision on liability is not necessarily to seek a conviction for social behaviour in the charge against the perpetrator of the wrongful act, but rather to determine the source of compensation or, more specifically, the ultimate debtor of the compensation owed to the survivor.

In these circumstances, the individual is deemed to be the link in the long chain composed of the clan, and in this regard, is only recognised and considered on the basis of his or her membership to a specific clan, which eventually bears the responsibility of repairing the harm caused by one of its members.

This is the meaning of collective responsibility which can be analysed as an assurance of civil liability since the group, defined as the family or clan, is the guarantor and responsible for actions committed by any individual belonging to it⁸.

ii **Preventive Function**

In order to avoid incurring heavy expenses in terms of damages owed by a group member, and even shun the opprobrium that is associated with the involvement of one of its members in criminal acts or behaviour committed on others, the said group, namely the clan, very often imposes a very strict code of conduct aimed at preventing this kind of situation.

iii **Objective nature of reparation**

In traditional societies, reparation compensations and benefits are handled by groups, namely families or clans to which the perpetrator and survivor belong. The individual perpetrator or survivor is sidelined and weakened in the maze of the clan structure.

iv **Scope of reparation**

Under traditional customary law, things do not work in the same way as with statutory law where redress for the harm caused to the survivor is guided by the principle of integral reparation which means that the said survivor should, as far as possible, be restored to his or her original state.

⁶ Vincent Kangulumba Mbambi, *op.cit.*, p 126

⁷ Bayona Ba Meyya, "Civilisation noire et justice", in *Rév. Jur. Polit. et Coop. (RJPIC)*, Paris, 1978, pp 831-858, cited by Vincent Kangulumba Mbambi, *op. cit.*, p.127

⁸ Kalongo Mbiyaki, *Responsabilité civile et socialisation des risques en droits zairois*, Kinshasa, PUZ, 2^{ème} édition, p.50

In fact, in traditional societies, since the wrongful act is perceived as a source of social unrest, through a link in the chain who is the individual that committed the wrong, reparation is subsequently construed to be a mechanism aimed at restoring the broken social peace or equilibrium.

Re-establishment of this equilibrium may arise from a reparation in kind, an equivalent reparation, a symbolic or ritual reparation, yet in all these cases, it seems that the scope of reparation does not have a common measurement for the harm inflicted, even though the injury can be assessed.

It is for this reason that in the event of bodily harm, or more specifically rape, a goat or cockerel given to "return the spilt blood" will be considered satisfactory⁹.

For example, in the Bagenia tribe, customs dictate that the person responsible for kidnapping, holding hostage or raping a young girl marries her as a means of reparation for the wrong caused to her physically and the damage to her reputation¹⁰.

In some aspects, clan solidarity is presented as a type of guarantee fund whose purpose is to indemnify survivors for wrongs caused by group members. From another perspective, it can be equated to a credit institution for rights to reparation in the case of harm inflicted any of its members or caused to their property¹¹.

Thus, in traditional African societies, civil liability is collective and objective.

It is collective since the obligation for reparation, by virtue of clan solidarity, weighs down on the family group in which the perpetrator of the wrongful act regularly resides. It is also objective since the obligation for reparation is not conditioned by the offence, but the occurrence of the wrong¹².

As will be seen in other sections, current theories in the area of reparation for harm caused by crimes seem to draw inspiration from the aforementioned traditional customary law.

2.2 Common law reparation

In Congolese law, like in Belgian and French law from which it greatly borrows, after contracts, offences and quasi-offences are the second classic source of liabilities. A tort is defined as an unlawful and intentional act which causes harm and involves the responsibility of the person causing damage who is obliged to make good such damage by indemnifying the survivor, whereas a quasi-tort is an unlawful and unintentional act, caused through negligence or carelessness without intent to cause damage¹³.

The tortious or quasi-tortious duty is therefore a legal bond by virtue of which the person committing a tort or quasi-tort is responsible for compensating for the damage caused to the survivor by the act.

Issues related to the determination of conditions, extent as well as the persons responsible for the compensation are examined under the institution of civil liability also referred to as tort liability or aquiline liability¹⁴.

2.2.1 Common law liability

Under Congolese law, civil liability, which should be distinguished from criminal liability, seeks to repair damage that individuals mutually cause each other in their private relationships.

The principle underlying this civil reparation is defined in the aforementioned Article 258 of the Civil Code, Book III, and as was earlier stated, civil liability under this legal fundamental legal provision, on

⁹ Vincent Kangulumba Mbambi, *op.cit.*, p 346

¹⁰ Custom cited by Toussaint Muntazini, *op.cit.*, p13

¹¹ Vincent Kangulumba Mbambi, *op.cit.*, pp 125-131

¹² Kalongo Mbikayi, *Droit civil*, Tome 1, Les obligations, éd. Centre de Recherche et de Diffusions Juridiques « CRDJ », Kinshasa 2010, p.180

¹³ Gérard Cornu, *op. cit.*, pp 246 and 639

¹⁴ Kalongo Mbiyaki, *op. cit.*, p. 179

the one hand, is individualistic since the obligation for reparation solely lies with the individual who committed the offence, and on the other hand, subjective because what is penalised is the wrongful behaviour of the person who caused the damage.

In the same vein, it is important to cite Article 259 of the Congolese Civil Code, Book III, which stipulates that "*everyone shall be liable for the wrong he has caused, not only by his act, but his negligence or carelessness as well*" and which, together with Article 258 above, constitute responsibility for personal acts that according to Congolese law form common law liability, since the other assumptions on liability are exceptions.

Regarding compensation for survivors of sexual and gender-based violence, the configuration of Congolese law is a real obstacle to the extent that most times and for various reasons related to lack of adequate resources for investigations and a dysfunctional judicial and prison system, perpetrators of violence slip through the net, so that trials take place in their absence or after trial and conviction, they escape from prisons that generally do not meet required standards, or the said perpetrators, although apprehended, tried and imprisoned have been acknowledged insolvent.

In all these cases, the judge merely awards the survivor damages that he considers correspond to the estimated losses suffered, without the latter being able to recover what is owed to him or her. Hence the feeling that at the end of the day justice has not been done, and the demobilisation and mistrust of survivors vis-à-vis the national judicial system whose sole objective, in their eyes, is to further expose them to stigma.

2.2.2 Claims for reparation

Claims for reparation by the survivor originate from common law liability through the existence of three cumulative conditions, namely the existence of damage or injury, evidence that the damage was caused through the fault of the perpetrator and lastly, establishment of a causal link between the damage suffered and the alleged wrong¹⁵.

In judicial practice, each of these conditions is accompanied by insurmountable challenges for the survivor and the fact that their establishment is concomitantly required results in making reparations based on such a principle hypothetical.

i Damage

Although the damage resulting from sexual violence is, in principle, easy to prove when the survivor (in this case referred to as "the survivor") agrees to appear before the court, which in turn seeks medical expertise, the same does not apply to the imputability of the alleged perpetrator of the denounced acts.

Indeed, "*actori incumbit probatio*" is a principle of written law that means that the burden of proof lies with those that make the allegation, in this case the Public Prosecutor's Office (PPO), assisted by Judicial Police Officers (JPOs) who are representatives of the law and experts, such as doctors, psychiatrists, etc.

The dysfunctional judicial system, however, is such that these judicial actors do not have the necessary operational capacity to handle the complexity of investigations related to sexual violence.

Thus, in addition to lack of specific skills for such cases, one can criticise the absence, until very recently, of a scientific laboratory worth its salt with means to conduct scientific investigations such as DNA tests.

In view of the above, cases presented to the judge do not often prove that the person accused by the survivor is unquestionably the one who committed the offence, leaving the court with no alternative but to acquit the accused on the basis of benefit of the doubt or unproven facts; the consequence is that without a guilty verdict and the subjective conception of civil liability under Congolese law, although formally recognised, damages are not awarded to the survivor.

¹⁵ Kalongo Mbiyaki, op. cit. p.183

ii **Wrongful act**

The wrongful act leading to full reparation may, according to Congolese Civil Code, be as a result of wilful misconduct or carelessness or negligence on the part of the perpetrator.

Concerning sexual violence, determination of the illegal act constituting the wrong does not arise since it comprises a violation of criminal law. Moreover, the principle of Congolese law is such that when a civil wrong also constitutes a criminal wrong, as is the case with sexual violence, it may result in both criminal and civil prosecution, and consequently, the survivor who has suffered harm can seek redress in court as a civil party in enforcement of Article 69 of the Congolese Code of Criminal Procedures which states in its first paragraph that "*when the trial court is seized of a public right of action, the aggrieved party can refer the action for damages in his or her capacity as a civil party*".

This is what often happens in practice and, as such, survivors of sexual violence are part of criminal proceedings brought by the Public Prosecutor who has the burden of establishing the facts and their imputability to the alleged offender, while the civil party's role in the trial is to demand for damages which can only be granted, as mentioned earlier, if proof is provided that the alleged perpetrator committed the criminal offence.

When the criminal offence is not proven, the civil charges are consequently dropped. Imagine the human tragedy that could be caused by such a state of affairs if in a given region, due to lack of specialised investigators or qualified experts like medico-legal experts, one wrongfully concludes that the allegations of a rape survivor are unfounded for lack of proof or convincing evidence to justify the sentencing of suspect.

We must not lose sight of the fact that assuming the criminal offence is related to the civil offence, the decision to institute criminal proceedings also involves civil proceedings and that, with the exception of cases where sexual violence is considered an "international crime" (*war crimes, crimes against humanity, genocide or torture*) and as such, statutory limitations are non-applicable, in all other instances, especially in non-conflict areas when committed without any intent to destabilise, break up a family and eliminate an entire community (*which makes sexual violence qualify as a crime against humanity under Article 15 of the Constitution of the Democratic Republic of Congo of February 18, 2006*) ordinary rules on the prescription of public right of action will be determined according to the applicable sentence.

This prescription regarding rape comes after 10 years, in compliance with Article 24, point 3 of the Congolese Criminal Code. Rape is punishable by 5 to 20 years imprisonment and a fine of not less than one hundred thousand inflation-adjusted Congolese Francs according to section 170 of the Congolese Penal Code, Book II as amended and completed by Article 2 of Law No. 06/018 of July 20, 2006.

A survivor of sexual violence who decides to remain silent and not report the harm suffered, could therefore, at the expiry of the prescribed time limit public right of action, find himself or herself debarred at the moment when he or she is convinced to act and end the aggressor's impunity.

iii **Causal Link between the Wrongful Act and Damage**

This is the requirement to establish a cause-effect relationship between damage caused and wrong.

In other words, for a wrongful act to constitute the cause of the damage, it must be the direct and immediate prerequisite for the damage caused or have led to the damage¹⁶.

A priori, the problem does not arise at this level when dealing with sexual violence since causality can easily be established by simple medical expertise, which the law strongly recommends Judicial Police Officers or Public Prosecutors to urgently use.

¹⁶ Kalongo Mbiyaki, op.cit., p. 201

2.2.3 Beneficiaries of reparation

The question that arises here is the identification of the person (s) likely to claim compensation for sexual violence offences.

This concern is of particular interest since it is this (these) person (s) that is (are) able to exercise tort liability resulting in such reparation.

In this regard, it should be noted that according to Congolese law, in principle, it is the survivor who may institute legal proceedings for reparation. Nevertheless, it is generally accepted that other people can bring an action against the perpetrator on his or her behalf since such action falls under the property of the survivor. It may well be the legal representative if the survivor cannot go to court, heirs since reparation proceedings are part of the deceased's property, or his or her creditors part of the patrimony of the deceased's creditors through an oblique action.

From the above, the doctrine therefore infers that civil liability action that is part of the property of the survivor where he or she tries to bring in a sum of money, is not an action tied to the person and may be freely transferred, except under certain circumstances where it appears to be very personal¹⁷.

This action is closely related to the individual, particularly when compensation is sought for psychological or physical harm as is the case with sexual violence.

Currently, Congolese legislation on civil liability states that the indemnifiable harm, must first and foremost be direct (*in other words a direct and immediate result of the wrongful act*) and secondly, personal (*directly suffered by the survivor*), and thus, it makes it extremely difficult, if not impossible, for survivors who have indirectly suffered sexual violence (*survivor's parents, family members, community, etc.*), besides the survivor, to take advantage of a specific right to reparation for any harm they have suffered as a result of the violence meted out on the survivor or third party.

Yet, it is now established that in addition to the direct survivor, sexual violence causes serious harm to people who are indirectly affected, such as the survivor's spouse, family members or inhabitants of his village who witnessed the commission of the act or saw entire families leave the village along with their members who have suffered sexual violence, with a view to escaping the stigma and shame, or entire societies that experience the disintegration their socio-economic structures due to the family authority's status being undermined and the breakdown of social cohesion resulting from acts of sexual violence committed in public, sometimes repeatedly and in the presence of heads of household and local authorities unable to protect their own¹⁸.

2.2.4 Exception to common law civil liability

Article 260 of the Congolese Civil Code, Book III, is an exception to the principle of individual liability based on wrongful acts defined under section 258 therein, making some individuals responsible for damage caused by other people or animals and things in their custody.

This provision seeks greater protection for survivors since they do not have to prove the wrong on the part of the person who is civilly liable, like they are forced to do under common law civil liability.

Under the various hypotheses of vicarious responsibility as provided for by the above provision, the law has established presumptive liability to be borne by the person who is civilly liable.

This enables, for example, survivors of sexual violence to demand reparation for the harm suffered from the Congolese Government, if it is committed by an employee who may be a soldier or a law enforcement officer.

The advantage of this system for the survivor is obvious in the sense that in the event the perpetrators of sexual violence are absent from court or are acknowledged to be insolvent, and the act involves their personal liability on the basis of Article 258 of Civil Code, Book III, the survivor has an interesting alternative, that is obtaining payments of sums that the real culprit would have made in

¹⁷ Kalongo Mbiyaki, op.cit., p. 204

¹⁸ Toussaint Muntazini, op.cit., pp.27-28

reparation from the State, which in principle is a more solvent legal entity, on the basis of Article 260 above.

Unfortunately in practice, although court rulings have been made ordering the State to repair the harmful consequences of sexual violence acts committed by members of the armed forces, there are no records of effective indemnification of beneficiaries of these rulings to date, even with regard to the most famous Songo Mboyo case.

Speaking on this issue during the lecture forum hosted by ACORD on July 7, 2010 in Hotel Sultani, Kinshasa, the Minister of Justice and Human Rights of the Congolese Central Government has revealed that the budgetary allocations given to his Ministry do not allow him at all to pay various claims made against the State by numerous beneficiaries of res judicata and ordering the Republic to pay damages for the wrongs committed by its agents.

Given these modest allocations and rather than paying nothing at all, as is the case now, a recommendation made by civil society at seminar-workshop organised by ACORD earlier, from June 21 to 22, 2010, at Nganda Catholic Centre, Kinshasa, proposed that the Government includes as priority expenditure, reparation claims owed to survivors of sexual and gender-based violence.

Meanwhile, it is clear that even the statutory exception to civil vicarious liability does not suffice to adequately meet the need for reparation for sexual and gender-based violence survivors, who, faced with this situation, are logically reluctant to bring their cases before the courts and tribunals from which they expect nothing much, other than "papers" allocating them damages at a fixed rate that they will never receive.

These are the limits of Congolese positive law regarding reparation for survivors of sexual and gender-based violence.

3 Protection of survivors of SGBV under Congolese positive law

Allocating damages to survivors of SGBV without guaranteeing them protection to enable them to safely participate in all proceedings before the relevant authorities is not enough.

In the Democratic Republic of Congo, there is no specific legislation on the protection of survivors of criminal acts, in general, or sexual violence offences, in particular.

Regulations on the protection of survivors of such offences are scattered in various legal texts, mainly in the Code of Criminal Procedure as amended and completed by Law No. 06/019 of July 20, 2006.

The above text states that:

“during all phases of the proceedings, the victim shall be assisted by a legal counsel” (Article 7a), that

“the public prosecutor or the judge before whom a sexual violence case is referred shall as a matter of course appoint a doctor and psychologist to assess the condition of the victim of violence and determine appropriate care and to assess the extent of injury suffered by the latter and its consequences” (Article 14a)

and that

“the public prosecutor or judge before whom a sexual violence case is referred shall take the necessary measures to safeguard the security, physical and psychological well-being, dignity and respect the privacy of victims, or any other concerned person” (Article 74a).

Although assistance by counsel, lawyers or defence attorneys is generally given to survivors in an efficient manner through support from international non-governmental organisations, the same cannot be said of medical and particularly, psychological care. This care is often lacking outside urban centres and / or may prove too costly for survivors and their families due to their low purchasing power.

Similarly, the precarious and crowded conditions in which the judicial staff works, particularly the Judicial Police Officers (JPOs) and Public Prosecutors (PPs), do not often allow them to deal with sexual violence offences under conditions that preserve the privacy and dignity of survivors, as provided by the law.

The same lack of logistics is the basis of the fact that personal security against possible reprisals by the accused or his family is not guaranteed for survivors who agree to confide in the court.

Lastly, it is noted that while in urban survivors can easily be referred to some hospitals for the initial check-up and emergency health care, the intervention of psychologists is often not required by the legal actors or organised for by the hospitals receiving survivors.

In sum and in view of the foregoing, it is no exaggeration to say that the protection of survivors of sexual violence is still in an embryonic state in the Democratic Republic of Congo, if not totally deficient, which on the one hand, encourages survivors to remain silent and, on the other hand, fuels the impunity of crimes related to sexual violence.

However, the Government of the Democratic Republic of Congo, through its Ministry of Gender, the Family and Child should be lauded for trying to redress the situation by taking the initiative to create a structure and a mechanism that can somewhat contribute to improve the level of the protection of SGBV survivors, especially women. They include the National Agency to Stop Violence against Women (AVIFEM) and the Fund for the Empowerment and Protection of Women and Children (FONAFEN).

AVIFEM, which according to the Minister of Gender was created by the Head of State in 2009, seeks to compile complaints from women on the violence they face, including violence related to culture, whereas FONAFEN’s mission consists of mobilising resources to fund projects initiated by women.

Both institutions are also responsible for the establishment of women’s local councils in communes, estates and streets for more effective actions targeting women in vulnerable situations.

If this agency and fund are fully operational and receive funding for their activities, this will be an important step towards the efficient protection of SGBV survivors, especially women and children.

Nevertheless, the fact is that these two institutions alone cannot overcome the challenge of providing protection and reparation for SGBV survivors in DRC.

Efforts by the Congolese Government in collaboration with the United Nations system as well as some humanitarian partners within the framework of the Stabilisation and Reconstruction Programme for regions emerging from conflict (STAREC) need to be coordinated. The latter is an emergency plan whose overall objective is to stabilise Eastern DRC by improving the security environment and restoring the rule of law in areas previously controlled by armed groups, facilitating the return and reintegration of displaced persons and refugees and fast-tracking economic recovery. Launched in 2009, the STAREC plan includes an important component on combating sexual violence using a multisectoral approach (the fight against impunity, security sector reforms, prevention / protection, multisectoral response). Unfortunately, despite the existence and implementation of this programme, the situation on the ground does not appear to have significantly changed with regard to the fight against sexual and gender-based violence, in general and redress for SGBV survivors, in particular.

4 Mechanisms for reparation and protection of SGBV survivors modelled on international law

Participants at the civil society workshop on sexual and gender-based violence organised by ACORD and held on June 21 and 22, 2010 were unanimous in acknowledging that the Congolese positive law in this area, as described above, would benefit greatly by drawing from various modes and mechanisms of reparation that are currently in force internationally.

It is indeed interesting to note that under international law reparation must, as far as possible, eliminate the consequences of the illegal act and re-establish the situation that existed prior to the commission of the act. In other words, reparation must be adequate and appropriate or even proportionate to the harm suffered.

To accomplish this, international law bases its reparation system on a simple principle which dictates that when serious crimes are committed on the territory of a State, obtaining justice requires that the concerned State acknowledges its liability and gives redress.

Although obtaining a ruling that sentences the perpetrator is already a big gain for the survivor, it is equally important that these decisions are effectively implemented not only in terms of the sentence, but also civil reparation, which can take many forms: material, moral, pecuniary, etc. To this end, it is advisable that the possible insolvency of the perpetrator is compensated by the involvement of the State.

4.1 Forms of Reparation under international law

In international law, reparation for survivors complies with the standards in a document adopted by the United Nations General Assembly entitled "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 No. 60/147 of December 16, 2005).

Article 75 of the Rome Statute formalises these principles by stipulating that

"the International Criminal Court may make an order specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, either upon request or on its own motion in exceptional circumstances."

i **Restitution**

It refers to restoration of "status quo ante", meaning the situation prior to the commission of the illegal act. Evidently, in the case of sexual violence, it is almost impossible for the situation to be re-established to exactly what it was, but other aspects of restitution that are feasible involve restoration of family life, return to one's place of residence and restoration of employment.

ii **Compensation**

It refers to monetary compensation for any economically assessable damage and covers material damages such as medical expenses and non-material or psychological damages such as pain, suffering, humiliation, loss of zeal for life, loss of social relationships, etc.

In the absence of quantifiable elements, non-material damages are calculated on the basis of a fair assessment.

iii **Rehabilitation**

This includes medical and psychological care as well as legal and social services for the survivor.

iv **Satisfaction and Guarantees of Non-Repetition**

They comprise a series of effective measures aimed at attaining the broader objectives of reparation in the long-term. These include, inter alia, public acknowledgement of the facts related to the violation, full and public disclosure of the truth, judicial and administrative

sanctions against persons liable for the violations, cessation of continuing violations; a public apology, including acknowledgement of the facts and acceptance of responsibility, commemorations and tributes to the survivors, preventive measures like ensuring effective civilian control of military and security forces, protecting human rights defenders as well as persons in the legal profession, the media and other related professions, etc.

4.2 Modalities for Granting Reparation

These are governed by rule 97 (I) of the Rules of Procedure and Evidence of the ICC which states that depending on the extent of any damage, loss or injury, the Court may award an individual or collective reparation or both. Collective reparation may consist of the construction of centres to care for trauma survivors, for example: hospitals, maternity wards, remedial education centre, shelters, etc.

In the case of an individual reparation as in that of a collective one, the reparation may be material or symbolic.

4.3 Mechanisms for implementation of reparation under international law

After exercising his or her right to judicial redress and obtaining the conviction of the perpetrator(s) of sexual violence as well as the allocation of compensation for reparation, the survivor must be assured of recovering his or her rights.

i **Trust Fund for survivors**

The fund can be accessed by the ICC and receives contributions from States Parties, voluntary contributions from donors and proceeds from property disposed belonging to persons convicted by the ICC.

It is actually a complementary mechanism to ensure the effectiveness of reparation for survivors in the case of insolvency of the convicted person. The special nature of this fund is that it can be put into operation even before a ruling is made; it could also benefit survivors other than those who actually went to court (Article 79 of the Rome Statute and Standard No. 98 of the Rules of Procedure and Evidence).

ii **Conservatory measures**

The Rome Statute allows the pre-trial Chamber or the trial chamber to take provisional measures when a warrant of arrest or a summons has been issued or after a person has been convicted (*Articles 57 (3) (e) and 75 (4) of the Rome Statute and Rule 99 (I) of the Rules of Procedure and Evidence*). These measures are taken in the best interests of survivors and consist of the identification, tracing, freezing and seizure of proceeds, property and assets and instruments that are related to the crime, for the purpose of eventual forfeiture.

The purpose of these measures is always to guarantee survivors an effective remedy for damages resulting from crime.

4.4 Support system for survivors throughout the duration of the proceedings

At the ICC, this support is made effective through the Registry's Unit for Survivors' Participation and Reparation.

In countries like Canada, support is provided to survivors through structures for application of the law on assistance to survivors namely, Support Offices for Victims of Criminal Acts (BAVAC), established within the Ministry of Justice and Support Centres for Victims of Criminal Acts (CAVAC), which are managed by community organisations and financed by the Fund to Assist Victims.

In all cases, the systems seek to advance the rights of survivors and support their efforts by providing technical assistance and professional advice as well as financial support.

5 Towards holistic care of SGBV survivors in the Democratic Republic of Congo

5.1 Motivation

As is manifest, the system of reparation for survivors of crimes, in general and more specifically, survivors of sexual and gender-based violence under Congolese positive law is flawed since it does not have any effective mechanisms capable of providing civil reparation, by the perpetrator, or in case of insolvency of the latter, the civilly liable State.

It seems that the subjective conception that characterises Congolese common law civil liability does not support reparation for sexual violence offences in the sense that conviction of the accused is a prerequisite as he or she must personally bear the consequences of the act on the basis of civil interests. In cases where the accused is not sentenced, or if convicted, is personally insolvent, the survivor, who has suffered obvious harm has no chance for redress.

The situation is of particular concern to the extent that even when the legal mechanism for vicarious civil liability involves a guarantor like the State, the latter does not have sufficient budgetary allocations to pay claims for reparation.

Ultimately, while legal remedies are open to the survivor of sexual violence offences, he or she is led to wonder of what significance going to court is, especially with exposure to stigma given the visibility that accompanies such proceedings, when at the end of the day, he or she will not get the expected reparation, which under Congolese law in force, can only be a pecuniary penalty, since other forms of international reparation have not been domesticated in the Democratic Republic of Congo.

The situation discourages litigants, roots survivors in their silence, at best facilitates a negotiated settlement between the families for serious crimes of sexual violence and reinforces the impunity of perpetrators.

In a country where sexual violence has indisputably acquired the status of a plague, such a situation calls for the establishment of other mechanisms, mainly inspired by international law and the experiences of other countries in order to ensure reparation for SGBV survivors.

5.2 Lex Ferenda

5.2.1 At the legislative level

One of the most urgent reforms to undertake must involve complementing the existing legal arsenal by the introduction of two important legal texts respectively on assistance to survivors of sexual violence and compensation for survivors of such acts.

The advantage of the texts would be that they would provide a clear definition of the concept of survivor of sexual violence, who is the creditor of the reparation, that is currently not explicit in Congolese positive law and could include both direct survivors as indirect survivors who are relatives of the survivor or direct dependents, as well as all persons who have suffered harm while intervening to assist survivors in distress or prevent their victimisation.

Furthermore, these texts could establish the principle of compulsory reparation upon the commission of the act of sexual violence affecting the survivor's physical or psychological integrity, even if the perpetrator is not identified, apprehended, prosecuted or convicted.

The new law could determine the following in its section on assistance to survivors:

- types of assistance to which the survivor is entitled,
- resources that must be made available to the survivor,
- redress that is open to the survivor,
- his or her role in the criminal process and participation in legal proceedings,
- modalities for his or her protection against intimidation and retaliation,

- the principle of his or her information on the status and outcome of the preliminary investigation,
- the principle of technical assistance in the preparation of files and support at various stages,
- the principle of allocating a reasonable allowance to cover expenses incurred in order to give testimony,
- the principle of prompt and fair reparation and compensation for the harm suffered,
- criteria for assessment of harm,
- the principle and modalities of interim measures such as freezing or seizure of property or assets of the alleged perpetrator to guarantee funding for reparation,
- the principle and modalities of immediate and free medical and psychological, etc.

5.2.2 Law enforcement institutions and structures

Of utmost importance is the creation of specialised structures and appropriate institutions modelled upon those that exist in other parts of the world, whose role is to implement all the mechanisms provided for by the laws within the framework of rights of survivors of sexual violence. The following institutions and structures could be envisaged:

i **Assistance and compensation fund for SGBV survivors**

It is a fund that could be run through State budgetary allocations, donations, bequests and other grants from other individuals, juridical persons or external partners.

This fund may be used to finance reparations for survivors in cases where compensation is not possible due to insolvency of perpetrators, or even when no conviction is made, yet harm caused. It may also serve to provide assistance to survivors outside or before the trial.

In addition to individual and material reparations, the fund may be used to implement collective and / or symbolic reparations, such as the construction of monuments or memorials, construction of health centres or hostels or remedial education and learning, etc.

For more efficient and transparent management, the fund should be managed by an autonomous and decentralised structure.

ii **National agency for assistance to SGBV survivors**

An autonomous and decentralised structure is needed to manage the abovementioned Assistance and Compensation Fund for SGBV Survivors, and in general, to design and implement programs to promote rights of SGBV survivors as provided for by the law.

It could be established by a law and run by civil servants as well as civil society experts, all appointed by the President of the Republic in order to ensure the necessary stability and prestige required for them to fulfil their mandate.

The agency could concretely:

- provide technical assistance to the survivors and financial support they need to effectively seek recourse as provided by the law,
- advise the Government on aid to give to survivors,
- monitor the activities of individuals and institutions involved in providing assistance to survivors,
- encourage and monitor the establishment of provincial structures giving assistance to survivors,
- organise and support post-traumatic, psychological and social care in order to mitigate the consequences arising from victimisation,
- refer survivors to specialised services, etc.

6 Conclusion

As you may have noted, this study, which is based on the results of the civil society workshop organised by ACORD in Kinshasa from 21-22 June 2010, firstly provides a succinct situational analysis on legal reparation modes and mechanisms for survivors of sexual and gender-based violence in the Democratic Republic of Congo. Their incomplete nature has been strongly highlighted in the study. It seems that on the one hand, given the current configuration and various reasons discussed above, the Congolese law as well as institutions responsible for its implementation do not provide SGBV survivors with adequate guarantees of a full and fair reparation for damages suffered, while on the other hand, international experience in this area includes significant innovations that could lay the foundations and provide inspiration for efficient reforms of the national legislation to ensure better care for SGBV survivors, whose overview has been presented in the second section.

Having thus opened discussions on this important topic and scrutinised ways and means to improve existing laws, structures and institutions, ACORD acknowledges that this is merely the beginning and remains willing to support any efforts towards concretising and operationalising any major reform ideas herein as well as others, with the proviso that they improve the fate of numerous SGBV survivors in the Democratic Republic of Congo.

It is hoped that the recommendations of the aforementioned workshop as well as this research presented in a more conceptualised format, will be quickly adopted and implemented by state actors concerned in order to optimise the fight against SGBV.

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