

fidh

ASADHO



Groupe Lotus



Ligue des électeurs



DENIAL OF JUSTICE FOR VICTIMS OF CRIMES OF SEXUAL VIOLENCE

Submission by FIDH, ASADHO, Ligue des Electors, and the Lotus Group to the Committee on the Elimination of Discrimination Against Women in view of its review of the 6th and 7th Reports from the Democratic Republic of the Congo, during its 55th Session, 8-26 July, 2013.

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,

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Introduction

FIDH is an international organisation for the protection of human rights as defined in the Universal Declaration of Human Rights. It is the umbrella organisation for 178 human rights organisations around the world, to which ASADHO, the Lotus Group and the League of Electors in the Democratic Republic of the Congo (DRC) belong. Among its priorities of action, the FIDH works for the respect of women's rights, and participates in monitoring and advocacy activities to encourage the ratification and implementation without reservations of CEDAW (Convention on the Elimination of all Forms of Discrimination against Women), the elimination in law and in practice of any discrimination against women, and the adoption of laws protecting women's rights, including from domestic and sexual violence.

The FIDH and its member organisations in the Democratic Republic of the Congo work in particular in support of victims of sexual crimes committed during the conflict in that country, so they can obtain justice and reparation.

During recent missions to the DRC, in November 2012 and April 2013, FIDH and its member organisations assessed the progress and obstacles in the fight against impunity for sexual crimes amounting to against humanity and war crimes and noted the absence of a reparation policy and reparation effectively granted to victims by the courts.

It is on this particular point of access to justice and reparation for victims of sexual crimes, and with respect to the CEDAW report¹ and the responses by the DRC government², that the FIDH and its member organisations intend to make this submission.

Access to justice and reparations for victims of sexual crimes

For the victims of sexual crimes, access to justice is a personal and social struggle, which requires that they confront a serious trauma, -most often alone and without professional support- and significant stigmatisation within their communities. Thus, the decision to seek justice in court is already a major challenge.

But seeking justice means that the victim is faced with institutional, financial and significant material obstacles. The Congolese judicial system in the DRC is weak, under-financed, overloaded and largely non-existent outside the main urban centres, therefore quasi absent in

1. CEDAW/C/COD/Q/6-7, par.1-5.

2. CEDAW/C/COD/Q/6-7/Add.1, par.1-5.

places where the atrocities are committed. To file their complaint, the victims must travel to a court and pay, not only for their own expenses, but for those of a system that expects its users to pay for the actual production of a court order.

Despite certain legislative provisions that might reduce the costs for individuals demonstrating their indigence, the reality for the victims of justice in the DRC is, among other things, extremely costly, resulting in a major constraint to the access to justice.

These efforts made in seeking justice are more important for female victims of sexual violence, who are even more socially isolated and poor.

Once proceedings have been started, the victims are faced with slow processes, which can be cumbersome within a legal culture where numerous lawyers and judges approach the law mechanically, with little room for interpretation particularly with respect to reparations.

Most of the efforts by national authorities and the international community have sought to conduct investigations of international crimes and prosecutions against the alleged perpetrators. However, once a judgement has been rendered, it is not enforced, the sentence is rarely executed and the reparations set by judges are never collected.

The 2006 Act against sexual violence and the definition of sexual crimes

In 2006, the DRC adopted a law to crack down on sexual violence which a definition of rape more in line with recognised international standards, which guarantees that the burden of proof shall no longer be borne by the victim.

The new definition of rape also refers to the use of violence and intimidation, either directly or through an intermediary, to the psychological pressures and the coercive environment³. From this point of view, it is the use of violence and not the victim's consent that will become key in the definition of rape, which is compliant with recent international practice.

The act of rape is defined as a penetration "even superficially"⁴. However, international criminal case law, in particular that of the International Criminal Tribunal for Rwanda (ICTR)⁵, has adopted a wider definition according to which rape can be committed even in the absence of penetration. Nonetheless, by way of interpretation, judges of the Military Court of Garrison of Mbandaka in the Songo Mboya matter and the Military Court of Katanga, in the Gédéon matter,

3. Act No. 06/018 of 20 July 2006 amending and completing the Decree of 30 January 1940, Article 2, paragraph 2.

4. *Ibid.*

5. The Prosecutor c. Akayesu, *Affaire N. ICTR-96-4-T*

by referring to the case law of the ICTR and to the elements of the crimes of the Rome Statute of the International Criminal Court, adopted a wider definition of rape to include inhumane acts with a sex-specific connotation.

With respect to minors, the definition of rape is not limited to penetration, but considers loosely the “carnal advances”⁶.

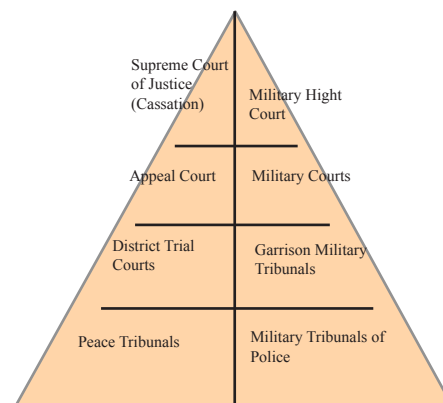
Finally, other sexual crimes exist amongst those defined in Articles 7 and 8 of the Statute of Rome which are not defined in Congolese law.

Finally, more generally, it should be noted that the application of the 2006 Act remains particularly efficient.

Access to justice, jurisdiction of military courts

The criminal justice system in the DRC is divided into two jurisdictions, civilian and military. Military courts have very wide subject matter jurisdiction, from military offences to mixed offences, for instance common law crimes aggravated by their commission.⁷ Military courts have jurisdiction over genocide, war crimes and crimes against humanity, such as those committed in the DRC conflict. Military justice remains largely seized of the most serious sexual violence crimes even if the independence of this judicial body is called into question due to senior officers not being convicted.

The organisation of the military and civilian courts:



6. Act No. 06/018 of 20 July 2006 amending and completing the Decree of 30 January 1940, Article 2, paragraph 2. The French term used in the law is « rapprochement charnel de sexes commis sur les personnes »

7. Military Penal Code. Act N° 024/2002 of 18 November 2002, Article 39 and ss.

The efforts by the international community, and in particular of the UN and MONUSCO [United Nations Organization Stabilization Mission in the DR Congo] are focused on supporting victims obtain access to justice.

Numerous mobile court hearings were actually organised in recent years. They allow for trials to be held in remote areas on a temporary basis. They have resulted in some significant convictions. However, even if these hearings have the benefit of being held close to where the crimes took place, they come at a high cost and their logistics are particularly cumbersome. They could not exist without foreign investment, which would not be sustainable. On the other hand, these hearings lack coordinated planning, organised on a case-by-case basis by jurisdiction and partners. Finally, military justice remains mostly seized of penal cases under international law, which also poses certain questions on access to justice and enforcement of convictions as noted by the High Commissioner.⁸

Despite these significant efforts, impunity for war crimes and crimes against humanity committed in the DRC, and in particular sexual crimes, remains largely prevalent. The recent mass rapes attributed to the armed forces of the DRC committed in Minova in November 2012 illustrate dramatically this real situation of impunity. If a dozen soldiers were quickly arrested, they still await trial. Only two of these soldiers were tried for rape, and no military command has raised any concerns. Thus, FIDH was able to collect witness statements during its April 2013 mission where the alleged perpetrators of rape were always present during the civilian trials in Minova and continued to threaten the victims.⁹

As such, there are very few alleged perpetrators of sexual crimes standing trial. Those most responsible, civilian or military, are not brought to justice and are not relieved of their duties.

Even when they are convicted, the perpetrators of these crimes usually manage to escape, due to the precarious prison situation and significant corruption. The Gédéon case (from his real name Kyungu Mutanga), the former head of the Mai-Mai militia, convicted in 2009 for crimes against humanity and war crimes, several of which were sexual crimes, illustrates this situation. He escaped from the Kasapa prison in Lubumbashi on 8 September 2011 and continues to this day to commit international crimes against the civilian population in the Katanga region.

As such, the project to create a hybrid court, which had been rejected by the Senate in 2011, seems again to be part of the government's and parliament's agenda. The creation of this court would, in effect, be an important move toward establishing a more equal and effective justice system.

FIDH noted that, even if this court makes limited progress in judging sexual crimes, the enforcement of judgements remains an aspiration.

8. The Project Mapping report on the most violations of human rights and international law committed between March 1993 and June 2003 in the Democratic Republic of the Congo, http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf, par.968

9. Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Soldiers of the Congolese Armed Forces and Combatants of the M23 in Goma, Sake, the province of North Kivu, In and Around Minova, the province of South Kivu, from 15 November to 2 December 2012, http://www.ohchr.org/Documents/Countries/ZR/UNJHROMay2013_en.pdf

The cost of legal proceedings for the victims, a barrier to their access to justice

In the DRC, victims have the right to constitute themselves as parties in criminal proceedings, or civil parties, [a characteristic of continental Europe's criminal law tradition adopted by many francophone countries whose justice system is based on written laws] and trigger the opening of an investigation into the crimes suffered, as well as seeking reparations for the damages suffered. But the proceedings are very complex and cumbersome.

Rape victims must produce a medical certificate within forty-eight (48) hours of the crime being committed, which is impossible for most of them, given the context in which these crimes have been committed, the significant risk of stigmatisation, but also the location, often far from any jurisdiction.

Second, the proceedings have an exorbitant cost for persons in their economic situation, a real obstacle to the exercise of their right to justice.

In theory, victims can apply for a certificate of indigence, exempting them from paying certain court fees, and in particular the proportional fee (sum to be paid upon the application for enforcement of reparations, and equivalent to 6% of the total amount of reparations, see below)¹⁰ But in practical terms, victims and their representatives do not have access to this partially known and complex step. To obtain this certificate, victims must pay US\$50, which for these victims is already an impossibility. Then the judge or the president of the court verifies the indigence and sets the limits within which the costs will be advanced by the Treasury. As such, this procedure remains uncertain, since the assessment of indigence is open and can be done in whole or in part.

On the other hand, the issuance of a certificate of indigence, and therefore the declaration of indigence, results in the appointment by the Bar of a pro bono lawyer. However, in relation to sexual crimes, and particularly in the context of an armed conflict, the relationship of trust between the victim and that victim's representative is essential. Moreover, national and international legal expertise is necessary, and all lawyers do not necessarily have the required expertise for these particular cases. Finally, pro bono lawyers are students or young lawyers lacking the necessary experience. Thus, some victims might prefer not to be represented by lawyers who lack sufficient authority and expertise to represent victims of international crimes of a sexual nature, and therefore must pay the fees, a requirement that not in accordance with the obligation of the state to prosecute perpetrators and guarantee victims' right to justice and reparation.

In accordance with Congolese law court fees must be paid for any decision issued in their case, the filing to become a civil party in a criminal proceeding, and even obtaining a copy of an order and/or judgement, often equivalent to \$2 per page¹¹.

Furthermore, due to the location of the courts in Kinshasa or in other main cities, victim participation involves travel and time, additional costs with which victims can hardly cope.

10. Civil Code of Procedure, Article 146 and the Criminal Code of Procedure, Article 123.

11. Civil Code of Procedure, Article 149.

The enforcement of compensation awarded by the courts

If criminal proceedings lead to a conviction, judges can order that monetary compensation be paid to the victims by the convicted persons, the state, or both. Congolese judges do not order other forms of reparations. To date, no order for reparations has been implemented.

Given the complexities of proceedings, victims must conduct procedural fights not only to obtain a judgement convicting the perpetrators, but also recognising their right to reparations, then having them implemented.

In the Songo Mboyo case, seventeen victims of rape and sexual violence had obtained reparation in the first instance, which was refused to eighteen other victims of rape. On appeal, the Military Court recognised, on the contrary, the right to compensation for most of rape victims¹². In the Gédéon case, 121 individuals were added as plaintiffs to the criminal proceedings, only eleven (11) obtained reparation in the first instance. However for 72 victims added as plaintiffs to the criminal proceedings who had received prior fee waiver, their action was declared admissible for unfounded «for lack of quality of their counsel»¹³. These victims appealed the decision to have their right to compensation finally recognised¹⁴.

In the two cases cited, the judges ordered reparations against the state. Indeed, the crimes committed by members of the armed forces in the Songo Mboyo case implies civil liability of the state. In the Gédéon case, crimes committed by the Maï-Maï rebel groups also implied civil liability of the Congolese government, since according to the judgement, the government created and contributed to the Maï-Maï, acted imprudently and failed in its obligation to protect and secure people and their property.

A judgement in favour of reparations for victims marks the beginning of a new fight, to date unsuccessful, to receive compensation. Victims can only request enforcement of the compensation when the judgement is final. Congolese law only recognises compensation measures for victims who are plaintiffs within criminal proceedings.

As most of the convicted are indigent, compensation by the state remains the only hope for victims to obtain reparation. And even if the convicted are solvent, the state has the primacy in collecting -over the personal property of the convicted- the amount corresponding to fines and court costs.

Compensation imposed in penal matters are enforced by the plaintiff who pays the fees to the Registrar. These fees shall include the prorated fees at a rate of 6%¹⁵, and the court fees. Pursuant to the Criminal Code of Procedure, these fees must be paid to the Registrar within eight (8) days after the date on which the conviction is deemed irrevocable¹⁶. The Registrar

12. Military Court of Ecuador, RPA No. 14/2006, 7 June 2006.

13. Military Court of Garrison of Haut Katanga, RP N° 0134/07, 4 March 2009.

14. Military Court of Katanga, RPA N° 025/09, 16 December 2010.

15. Criminal Code of Procedure, Article 129.

16. Criminal Code of Procedure, Article 117. See also, Ministry of Justice and Human Rights, MONUSCO, *The enforcement of judgements*, Kinshasa.

cannot even provide a copy of a decision ordering payment of damages before the prorated fee has been paid¹⁷. As an example, in the Songo Mboyo case, these fees, calculated in 2006, comprised \$28,000 in prorated fees, an impossible amount to be paid by victims of sexual crimes, the poorest, on top of the payment of US\$678 as other fees (US\$542 as court fees, US\$82 for the execution copy and any other copy, US\$756 as the judgement fee, US\$54 as “other” fees).

Finally, the Registrar must issue an execution order which is communicated to the Ministry of Justice. There, the office enforcing the judgement must include these requests in the preparation of the next budget. It can also stay the enforcement without further explanation.

According to a document from the Ministry of Justice of the DRC, the MONUSCO and the UN High Commissioner for Human Rights, in 2010 the Ministry of Justice had requested the sum of 44,633 million Congolese Francs (US\$48.5 million) to discharge approximately 150 files. However, the state only made 0.7% of this sum available (612 million Congolese Francs, or US\$670,000)¹⁸.

In principle on the basis of the available budget, the enforcement office makes an assignment to beneficiaries whose selection is based on subjective criteria¹⁹. These proposals are approved by the Litigation Director or by the Secretary General of Justice for final signature by the Minister.

During the last FIDH mission in April 2013, the Minister of Justice had stated that she had not received any request to enforce civil reparations for victims of sexual crimes. The maintenance of this procedure is a clear obstacle to the right to reparation of victims since it imposes a cost on them but also a very heavy weight in the implementation of reparations owed. The Minister also referred to the possibility of compensation orders prior to 2011 to be included in the public debt account, a move that would further complicate payment of these reparations, to the point of making it impossible.

It appears that the definition and implementation of the right to reparation for victims of sexual crimes have actually caused further trauma to victims. Rape victims who had to bear the weight of stigmatisation, the lack of support from their family and community, and witness protection, who courageously engaged in this course fraught with pitfalls of justice actually never obtained reparation. This lack of enforcement contributes also to question the validity and the strategy to fight against impunity for international crimes in the DRC, including sexual crimes, such as that supported also by the international community. It is legitimate to question why efforts are made to prosecute when the legal system does not allow for criminal and civil enforcement of judgments.

Finally, this definition and implementation of the right to reparation for victims of sexual crimes are also contrary to the international obligations of the DRC and refers to the need for an extensive reparation programme.

17. Criminal Code of Procedure, Article 134.

18. Ministry of Justice and Human Rights, MONUSCO, *The enforcement of judgements*, Kinshasa.

19. *Ibid.*

Uncertain and limited definition of reparation

Reparation for victims of sexual crimes is not defined by Congolese legal texts.

Thus, only the victims who are recognised by the courts have a right to compensation in theory. Courts grasp it unevenly and without objective criteria. With respect to victims who are minors, it is their parents or guardians who hold this right. Reparation is thus financial and individual.

However, under international law the right to reparations comprises measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²⁰

Certainly there are some centres in the east of the country, which provide medical and psychological, even socio-economic and legal, support for victims of sexual crimes, such as the Karinunio wa mama centre, managed by the organisation, Women's Solidarity for Integral Peace and Development (SOFEPADI) in Bunia, or the Dr. Mukwege Panzi hospital close to Bukavu. But these clinics remain isolated initiatives, dependant on private funding and support. Their existence remains fragile and cannot in any way address the needs of victims.

There is a National Agency fighting against violence to women, the youth, and young girls under the Ministry of Gender. This ministry benefits from 0.3% of the general budget and this agency does not support access to justice for women and girls who are victims of sexual crimes.

It is important that the right to compensation is incorporated as such in DRC law. Legislative reform must include a more integral definition and comply with the international commitments of the Congolese state. Overall reparation mechanisms should be implemented, after compiling observations from victims, civil society representatives working with victims and the lawyers who represent them. To date, there has been some discussion about creating a compensation fund project but draft wording still needs to be submitted. Be that as it may, this fund should not replace the enforcement of legal decisions due to victims. It would not be a bargaining chip against ongoing impunity. Its management and operation should also be strictly regulated.

The required cooperation of the Congolese government in the implementation of reparations decided in the Lubanga case at the International Criminal Court should sow the seeds for a more comprehensive reparation for the victims of sexual crimes qualified as crimes against humanity or war crimes in the Democratic Republic of the Congo.

20. See particularly the Fundamental Principles and Directives respecting the right to appeal and to reparation for victims of flagrant violations of international law of serious human rights and violations of international humanitarian law, Rés A.G. on 16 December 2005.

Recommendations to the DRC government

On the 2006 Act against sexual violence

- Take real and efficient measures to guarantee the effective implementation of the 2006 Act.
- Include a new definition of sexual crimes under criminal law, in compliance with the Rome Statute of the ICC.

On access to justice and jurisdiction of military courts

- Undertake a vast reform of the administration of justice system to guarantee that the alleged perpetrators of sexual crimes, regardless of their hierarchical rank and their official position, be effectively tried, convicted and remain in detention.
- Guarantee a better access to justice for victims of sexual crimes.
- To eliminate the mandatory requirement of medical reports for victims of sexual violence.
- Increase the resources allocated to the National Agency fighting violence against women under the Ministry of Gender.
- Guarantee training for prosecutors and magistrates respecting the definition and the prosecution of sexual crimes in international criminal law, international law of human rights and international humanitarian law.

On the cost of legal proceedings for victims

- Reform current legislation to eliminate exorbitant legal costs.
- Improve the legal aid system for victims, including assuring that it remains free and allowing victims who have a certificate of indigence and to be represented by a lawyer of their choosing.
- Assume the poverty of the victims of crimes against humanity and war crimes.

On the enforcement of compensation allowed by the courts

- Remove prorated fees contrary to the right to redress by victims.
- Pay compensation due to victims and to which the State was convicted, after a fair allocation of costs in the budgets of the Ministry of Justice and the Budget.

- Establish an inventory of compensations granted to victims and an evaluation of the stage of their enforcement.
- Establish an independent and national mechanism for internal monitoring of compensation to be paid to victims.

On the definition of national compensation

- Identify in Congolese law forms of reparation other than financial ones, in accordance with the international obligations of the state.
- Legislate to establish objective criteria for compensation.
- Support the training and the setting up of clinics in all regions guaranteeing medical, psychological and social support for victims of sexual crimes.
- Adopt a national reparation plan for victims of sexual violence, and in consultation with them, pursuant to the international obligations of the state.
- Guarantee that the bill to establish a compensation fund for victims of rape to be drawn up in consultation with the victims and civil society organisations, guarantees independent financial management and the use of funds pursuant to internationally recognised standards for compensation.



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Establishing the facts

investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

Supporting civil society

training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level

Mobilising the international community

permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting

mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

FIDH
represents **178**
human rights organisations
on **5** continents

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ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 178 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

inhuman or degrading treatment or punishment. Article 6:

Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be

presumed innocent until proved guilty

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Find information concerning FIDH's 178 member organisations on www.fidh.org