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##### **A critical reflection on the preventive approach to transitional justice in the face of sexual violence in the Democratic Republic of the Congo**

Una reflexión crítica sobre el enfoque preventivo de la justicia transicional ante la violencia sexual en la República Democrática del Congo

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# A critical reflection on the preventive approach to transitional justice in the face of sexual violence in the Democratic Republic of the Congo

Una reflexión crítica sobre el enfoque preventivo de la justicia transicional ante la violencia sexual en la República Democrática del Congo

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**Abstract:** This paper makes a critical reflection on the transitional justice strategies implemented in the Democratic Republic of the Congo from the so-called First Congo War to the present. Specifically, this work calls into question the preventive approach that is predicted to establish transitional justice mechanisms in the country. Thus, it identifies successes and errors in the

functioning of the so-called transitional justice mechanisms to put an end to sexual violence, considered endemic in the country and which has intensified in the current armed conflict that is being waged in the east of the Democratic Republic of the Congo between the M23 armed group - with the support of the Rwandan armed forces - and the Congolese army.

**Keywords:** sexual violence, Democratic Republic of the Congo, transitional justice mechanisms, preventive approach.

**Resumen:** El presente trabajo realiza una reflexión crítica sobre las estrategias de justicia transicional implementadas en la República Democrática del Congo desde la conocida como Primera guerra del Congo a la actualidad. En concreto, este trabajo pone en entredicho el enfoque preventivo que se predice del establecimiento de mecanismos de justicia transicional en el país. Así, identifica aciertos y errores en el funcionamiento de los denominados mecanismos de justicia transicional para poner fin a la violencia sexual, considerada como endémica en el país y que se ha recrudecido en el actual conflicto armado que se está librando en el este de la República Democrática del Congo entre el grupo armado M23 -con el apoyo de las fuerzas armadas ruandesas- y el ejército congoleño.

**Palabras clave:** violencia sexual, República Democrática del Congo, mecanismos de justicia transicional, enfoque preventivo.

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## Introduction<sup>1</sup>

In January 2025, the armed group known as 'M23', with the support of the Rwandan armed forces, advanced rapidly towards the province of North Kivu, in the east of the Democratic Republic of the Congo (DRC). Thus, it took control of Goma, capital of the province of North Kivu and an important commercial centre of the country, which has more than two million inhabitants and is close to mining cities that supply metals and minerals of high demand. In addition, the *Mouvement du 23-Mars* (M23, March 23 Movement or Congolese Liberation Movement) pushed deep into South Kivu province, capturing its capital, Bukavu, and the border areas of Masisi, Rutshuru and Katale (International Peace Information Service 2025). This new wave of organised violence is taking place with greater brutality, severity, and frequency than usual, violence already considered endemic in the African country (Médecins Sans Frontières 2025). Since January, the M23 has raided hospitals, kidnapped patients, and subjected them to acts of torture (Amnesty International 2025). In the context of the ongoing armed conflict, sexual violence is being systematically used against women as a weapon of war by all parties to the conflict (Escola de Cultura de Pau 2024). Recent reports present deeply distressing figures. According to James Elder, spokesperson for the United Nations Children's Fund (UNICEF 2025), thousands of children were raped between January and February 2025 amid the ongoing armed conflict in the eastern region of the country, which involves the national army and allied militias, Rwandan forces, and the M23 armed group. Sexual violence continues to constitute a defining feature of the protracted cycles of armed conflict that have afflicted the country for decades. Indeed, the scale of such atrocities led the United Nations to characterize Kinshasa as "the rape capital of the world" in 2009, when more than eight thousand women and girls were reportedly subjected to sexual violence (BBC News 2010). Far from abating, sexual violence has since become an extremely severe problem due to its scale, systematic nature and number of victims. In 2022, the DRC registered the highest number of cases of "conflict-related sexual violence" in

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<sup>1</sup> This work has been carried out within the framework of the grant "CONSOLIDACIÓN E ESTRUTURACIÓN 2025 GI-1138 – GRESIN", Galician R&D&I Plan Projects, of the Department of Education, Science, Universities and Professional Training of the Xunta de Galicia.

the world (Secretary-General on Conflict-Related Sexual Violence 2022)<sup>2</sup>.

This persistent prevalence reflects how sexual violence has become an endemic aspect of the country's social and conflict structures, rooted in entrenched gender inequalities that continue to shape Congolese society. The Gender Country Profile noted that Congolese society is characterized by deep and persistent gender inequality, which manifests in highly discriminatory social norms and values across all spheres of life, including women's unequal access to education, food, healthcare, and land ownership and inheritance. Within this context, the use of sexual violence has become normalized among a significant portion of both Congolese men and women (European External Action Service 2014). In this regard, it is worth remembering that an action plan to implement the United Nations Security Council resolutions on "women, peace and security" was not adopted in the DRC until 2018. As expected, among its objectives is the fight against impunity for the commission of international crimes of sexual and gender-based violence. The degree of compliance with this objective will be evaluated based on the number of cases received, investigated and concluded. To achieve this, much more effort is needed.

Based on the latter, this work is developed because of a starting premise. This refers to the consideration that the existence of patriarchal and androcentric societies originates and perpetuates gender discrimination that is the cause and consequence of the commission of international crimes of sexual violence during armed conflicts, situations of tension and organized violence, especially -but not only- on the African continent (Jiménez 2015). Also, an analysis of the preventive approach to transitional justice is incorporated from beginning to end as a study parameter, constituting one of the key

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<sup>2</sup> For the UN, the term "conflict-related sexual violence" refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict. That link may be evident in the profile of the perpetrator, who is often affiliated with a State or non-State armed group, which includes terrorist entities; the profile of the victim, who is frequently an actual or perceived member of a political, ethnic or religious minority group or targeted on the basis of actual or perceived sexual orientation or gender identity; the climate of impunity, which is generally associated with State collapse, cross-border consequences such as displacement or trafficking, and/or violations of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of sexual violence or exploitation, when committed in situations of conflict.

aspects of current studies in the field. Because it is now commonplace to point out that transitional justice is not a particular type of justice, but rather an accountability strategy implemented in countries that are immersed in transition processes with the aim of recognizing the victims and promoting peace, reconciliation and democracy initiatives, as well as restoring the rule of law. While trying to prevent the recurrence of violence or repression. Accordingly, beyond promoting accountability for past human rights violations and international crimes, transitional justice seeks to establish conditions that prevent the recurrence of such abuses (Boraine 2006, 19-25; Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence 2017).

Empirical studies on the implementation of transitional justice mechanisms have further demonstrated that the establishment of national criminal prosecutions for past human rights violations is significantly associated with the non-recurrence of internal armed conflicts. Contrary to the conventional 'peace versus justice' dichotomy, this evidence indicates that trials, truth commissions, and amnesties do not increase the likelihood of renewed conflict (Mahony *et al.* 2018). Some studies show that there is a tendency in several countries on the African continent that emerge from conflict to "move on" without having addressed a legacy of serious human rights violations. In such cases, Murithi (2020) argues, the re-escalation and reactivation of violent conflict become more likely if societies avoid adopting and implementing transitional justice mechanisms. However, there is also some experimental evidence on the divergent effects of international criminal procedures, apologies, reparations (David 2017; Gibson 2002). In this regard, it has been pointed out that the success of transitional justice depends on the simultaneous application of various mechanisms of truth, reparation and justice (and especially the pre- and post- conflict social context). This is an issue that is clearly seen in deeply divided societies (David 2018, 179).

Thus, the principal objective of this article is to critically examine the actual and effective capacity of transitional justice mechanisms to prevent the perpetration of grave violations of human rights and international crimes in societies that have recently emerged from, or remain entrenched in, armed conflict or dictatorial regimes. In line with the resumption of violence in the DRC, in particular sexual violence in recent months. Through this approach, the article seeks to contribute to an informed and critical understanding of whether transitional justice can genuinely operate as a structural guarantee against the recurrence of mass atrocities and systematic violations. Therefore, this

paper will attempt to critically assess how the shortcomings of these mechanisms have undermined their preventive capacity, ultimately exacerbating gender-based violence in a context of prolonged insecurity and weak accountability. Proceeding from the general to the particular, this paper turns to the practical challenges that emerged in the aftermath of the First Congo War to the present. Specifically, it seeks to identify the successes and failures in the design and implementation of transitional justice strategies that have contributed to the continued perpetration of sexual violence in the eastern DRC.

To achieve the proposed objectives, we make use of a traditional legal methodology that considers the sources of international law, international jurisprudence, that of the International Criminal Court, final reports of the Truth Commissions and the most relevant doctrinal contributions in this area. Conversely, certain resolutions undertaken by international organizations are also taken into consideration, particularly those emanating from organs within the United Nations system, such as the General Assembly and the Security Council. Additionally, reports produced by non-governmental organizations of recognized authority and credibility -such as Amnesty International and Human Rights Watch- are likewise examined.

To this end, the article is structured as follows: after this introductory section, the fifth section provides an overview of the armed conflicts in the Democratic Republic of the Congo and compiles the various transitional justice strategies and mechanisms implemented from the post-conflict period following the first Congo war to the present day. The second section discusses the preventive dimension of transitional justice and its theoretical underpinnings. Its section identifies the main errors and inefficiencies in the implementation of these mechanisms that may have contributed to a resurgence of sexual violence in the country. The third section includes recommendations to improve the preventive impact of transitional justice mechanisms in the future. Finally, the paper outlines some brief conclusions and a bibliography.

## **1. Experiences of transitional justice in the Democratic Republic of the Congo: from the first Congo war to the present**

The ongoing armed conflict in eastern DRC is rooted in a series of post-colonial power struggles that began after the country gained independence from Belgium in 1960. For decades, tensions, unrest and armed conflicts have been fueled by ethnic tensions, political rivalries,

corruption, and the struggle for control of the African country's important natural resources. In the 1990s, the situation worsened markedly until it reached its peak in 1996, when the deputy governor of the province of South Kivu issued a decree expelling the "banyamulenges", that is: the Congolese Tutsis, from Zaire (the country's official name at the time). However, they allied themselves with opponents of the dictatorial regime of Mobuto Sese Seko and participated in the rebellion led by Laurent Desiré Kabila, which culminated in the former's relinquishment of power in 1997. Subsequently, the so-called first African World War (1998-2003) was unleashed in which Burundi, Rwanda and Uganda, together with several rebel groups, tried to overthrow Kabila, who received the support of Angola, Chad, Namibia, Sudan and Zimbabwe, in a war that caused around five million deaths, around 6 million internally displaced people and thousands of children were recruited to participate in hostilities. In addition, more than one million women and girls were victims of sexual violence.

On 10 July 1999, the Lusaka Ceasefire Agreement was signed, concluded between the Democratic Republic of the Congo, Angola, Namibia, Rwanda, Uganda and Zimbabwe, ratified the following month by Jean Pierre Bemba, the president of the Congolese Liberation Movement, who was subsequently prosecuted -and acquitted on appeal- by the International Criminal Court (ICC). Unfortunately, the government never implemented this agreement.

The signing of the Sun City Global and Inclusive Agreement in Pretoria (South Africa) on 16 December 2002 between the DRC and Rwanda led to the withdrawal of Rwandan troops and the formation of a transitional government in the form of Joseph Kabila, son of Laurent Desiré Kabila, who was assassinated in 2001 in the context of the Second Congo War. In 2006 he won the presidential elections. During the years that he was in office, he tried to pacify the country, appointed two rebel leaders as vice presidents and faced a *coup d'état* on March 28, 2004, which failed. It was during this period that a Truth and Reconciliation Commission was established, which closed without having achieved remarkable success. In addition, the demands to create an *ad hoc* international criminal court to investigate and prosecute international crimes committed since June 30, 1960, as advised by the 'Sun City Agreement', were not heard by the United Nations. Although this had already been proposed by Kabila to the United Nations' General Assembly on 30 September 2003.

The transition process did not end the violence in the east of the country, due to Rwanda's role and the presence of non-demobilized

rebel groups. The non-implementation of the 2009 peace agreements precipitated, in 2012, the defection of former combatants from the *Congrès National pour la Défense du Peuple* (National Congress for the Defence of the People). These defectors subsequently established a new insurgent movement known as the M23. At the end of 2013, they defeated the rebellion, and part of its fighters took refuge in Uganda and Rwanda. However, in 2022 the M23 reorganised causing an escalation of violence with the support of Rwanda, which worsened the already difficult relations between RDC and Rwanda.

On the other hand, in the elections of December 23, 2018, Félix Tshisekedi, the presidential candidate of the *Union pour la Démocratie et le Progrès Social* (Union for Democracy and Social Progress), was elected. Since December 2023, he is immersed in his second term, facing a deteriorating humanitarian and human rights situation. Government authorities harshly repressed opposition members, civil society activists, and journalists throughout 2024. Hostilities in North Kivu led to significant population displacement, disrupted humanitarian aid deliveries, and created food shortages in Goma, the provincial capital. The warring parties killed civilians, committed abuses against refugee camps, and increased the risks faced by internally displaced people. In September 2024, at least 129 prisoners were killed in Makala Central Prison and fifty-nine were injured. In addition, 268 of the 348 women held in the prison, or eighty percent, were victims of rape and other sexual violence during the escape attempt (Human Rights Watch 2025). After the events, Congolese Interior Minister Jacquemin Shabani announced the creation of a commission of inquiry to clarify the facts and identify those responsible for having committed them (Human Right Watch 2024). However, there has been no further information about the commission's establishment.

On June 27, 2025, the Democratic Republic of the Congo and the Republic of Rwanda signed a peace agreement in Washington, D.C., witnessed by representatives of the Government of the United States of America (Democratic Republic of the Congo & Republic of Rwanda 2025). The accord aimed to end hostilities and promote stability in eastern Congo but has been criticized for failing to include mechanisms to ensure accountability or justice for victims of serious crimes (Amnesty International 2025; DW 2025). More specifically, this agreement contains a significant gap, as it fails to acknowledge the widespread sexual violence that characterized the conflict and was perpetrated by combatants on all sides. All parties involved in the peace process in eastern DRC should prioritize the recognition, support, and pursuit of justice for survivors of sexual violence, while

implementing comprehensive measures to prevent its recurrence. Upcoming meetings among stakeholders regarding the implementation of the DRC and Rwanda peace agreement present a critical opportunity to address this persistent issue in a substantive and sustained manner (Markwick 2025).

## 2. **Transitional justice and prevention: an empirical study of the Democratic Republic of the Congo**

Following Gready and Robins (2014), transitional justice has been promoted as a key element in the development of international human rights norms in the era of globalization, and it constitutes a hegemonic discourse connecting development and peacebuilding with the pursuit of liberal democracy as their final goal. While transitional justice has traditionally served as the main framework for dealing with violent pasts, recent scholarship has increasingly focused on its preventive potential (Greenstein & Muchlinski 2025; Sikkink *et al.* 2024; De Grief 2020). Although there is limited empirical evidence to support this assumption, several scholars, such as Méndez (2011) and Kim and Sikkink (2010), argue that justice not only fulfils the retroactive purpose of ensuring accountability for past crimes but also contributes to the prevention of future atrocities. These authors emphasize the deterrent value of criminal prosecutions conducted before international courts, provided that such judicial bodies maintain their integrity, impartiality and independence. Otherwise, there is a risk that justice will be perceived as a form of political manipulation rather than a genuine pursuit of accountability. That said, there are some studies that show the preventive effect of establishing transitional justice mechanisms when they are implemented in a combined and complementary way (Olsen *et al.* 2010).

In addition, the United Nations -one of the fundamental pillars of the 'liberal rules-based international order'- has in recent years assumed a leading role in promoting the rule of law at the international level. It has emphasized that the international community must address the root causes of conflicts, underscoring that "prevention is the first imperative of justice" (Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence 2017: 5). Within the United Nations system, interest in the prevention of crises and armed conflicts and their link to human rights has gained renewed interest in recent years, not only at the conceptual level but also at the operational level. Prevention is currently high on

the global political agenda for peace, sustainable development, and global governance. Take the example of the Sustainable Development Goals, which have repeatedly reiterated the preventive value of transitional justice in addressing common drivers of rape and violence, such as exclusion, fragility, and inequality. Earlier, in his 2004 report on the rule of law and transitional justice, the Secretary-General emphasized this same idea, underlining the preventive and deterrent effect of justice. A decade later, both the General Assembly and the Security Council reaffirmed it in parallel resolutions, emphasizing the importance of a comprehensive approach to sustaining peace particularly through conflict prevention, addressing root causes, and promoting access to transitional justice (United Nations General Assembly 2016; United Nations Security Council 2016).

One of the main limitations of transitional justice lies in the scarcity of empirical studies that provide reliable and accurate data that determine the impact of implementing transitional justice mechanisms on the prevention or reduction of the commission of future mass crimes (Greenstein & Muchlinski 2025). As a result, it remains difficult to theorize whether transitional justice effectively contributes to preventing new crimes. Therefore, each situation should be examined on a case-by-case basis.

Over the last three decades, the African continent has been recognized as a testing ground for transitional justice. Notably, efforts to incorporate a gender perspective into transitional justice mechanisms have gained increasing attention (Moyo-Kupeta 2024). Since the 1990s, international courts such as the ICC and the International Criminal Tribunal for Rwanda, hybrid courts including the Special Court of Sierra Leone and the Special Criminal Chamber of the Central African Republic, as well as national courts, have investigated and prosecuted international crimes of sexual violence. The resulting judicial decisions have played a crucial role in interpreting and clarifying the constituent elements of these crimes, thereby contributing to the development of gender-sensitive jurisprudence in transitional justice processes (Das & Sukhdev 2021).

Likewise, truth commissions in Sierra Leone, Kenya, Liberia, Morocco, Tunisia and the Gambia have included the investigation of sexual crimes in their mandate. Achieving mixed results in terms of completeness of the investigations and effectiveness in the implementation of its recommendations. The most recent, Tunisia and the Gambia, whose final reports were published in 2019 and 2021, respectively, embrace an idea of transformative justice, addressing the causes of conflict, to take action to prevent sexual crimes from

happening again (Centre for the Study of Violence and Reconciliation 2024; Tunisia Truth & Dignity Commission 2019; Truth, Reconciliation and Reparations Commission of the Gambia 2021).

Besides, reparations programmes are increasingly being used in African countries. This is an advantage over judicial reparations, since in the former the recognition of the victims is not made dependent on the conviction of the accused person. Legislative reform of gender-based discriminatory laws and practices has often been seen as a redress measure. Specifically, it would be the “guarantees of non-repetition” modality. However, its implementation remains problematic. Thus, it is necessary to have monitoring mechanisms. In this sense, the mechanism for receiving reports from the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) is a good instrument to carry out this task (Montero 2023, 178).

In the case of the DRC, the question to be analyzed is the extent to which the functioning of truth-seeking bodies, the exercise of criminal prosecution, and the implementation of reparations, including guarantees of non-repetition through institutional and legislative reforms, have influenced the resurgence of sexual violence in the country.

## 2.1. *Criminal prosecutions*

### 2.1.1. INTERNATIONAL CRIMINAL PROCEDURES: THE CONTROVERSIAL ‘STAR’ ROLE OF THE INTERNATIONAL CRIMINAL COURT

So far, the International Criminal Court’s investigations into the situation in the Democratic Republic of the Congo have focused on war crimes and crimes against humanity committed in the Ituri region and the provinces of North and South Kivu since 1 July 2002. When the investigation into the situation opened in June 2004, the Office of the Prosecutor acknowledged that alleged crimes had been reported since the 1990s, but the Court’s temporal jurisdiction did not begin until that date. Since then, six cases have been opened, resulting in three convictions, including the Prosecutor’s first investigation in its history: Prosecutor v. Thomas Lubanga, Prosecutor v. Germain Katanga and Prosecutor v. Bosco Ntaganda, and the acquittal of the defendant in the case of Prosecutor v. Ngudjolo Chui. In addition, he brought two other cases, the Prosecutor’s Office v. Callixte Mbarushimana (unconfirmed) and the Prosecutor’s v. Sylvestre Mudacumura (released). The three convictions were only for crimes committed in

specific places and in the same period, which reflects an extremely limited scope of justice (De Vos 2020).

The rhetorical question that can be asked about it is: But what about the rest of the crimes? Will victims be able to overcome their experiences or will the absence of acknowledgment and reparations perpetuate cycles of violence? We cannot know for sure, but the path of impunity seems incompatible with trying to prevent the reactivation of conflicts.

The existence of obstacles to prosecution has been acknowledged by the ICC's own chief prosecutor, Mr. Karim Khan, who in an interview with *Agence France-Presse* (Agency France-Press) in February 2025, said he was extremely concerned about the escalation of violence in the DRC and admitted the failure of the international justice system to curb the atrocities that have accompanied decades of conflict in the region (Vincenot 2025). In addition, he welcomed the proposal of the Kinshasa government to create a hybrid court, considering that such a body is "absolutely necessary". In my opinion, it would also be desirable<sup>3</sup>. Not surprisingly, previous experiences of hybrid justice on the continent have been extremely fruitful in many respects, covering both substantive and procedural issues. The prosecution of international crimes in hybrid tribunals makes it possible to overcome the difficulties and address the deficiencies of national legal systems, and in turn strengthens internationalized regional justice in the continent.

That said, on 14 October 2024, the Office of the Prosecutor of the International Criminal Court announced its decision to resume investigations into the situation in the DRC focusing on crimes perpetrated in North Kivu since January 2022 (International Criminal Court 2024). It took this decision after learning of a new referral made by the DRC government and stating that these violent episodes were connected to the patterns of violence and hostilities that have plagued the region since at least the date of the entry into force of the Rome Statute. In this regard, the role played by the ICC in promoting national prosecutions in application of the principle of "positive

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<sup>3</sup> Following the conclusion of the work of the Special Court for Sierra Leone -whose decision in *Prosecutor v. Alex Tamba Brima, Ibrahim Bassy Kamara and Santigie Borbor Kanu* ("AFRC") laid the groundwork for the recognition and normative development of the crime of forced marriage -the establishment of the Central African Special Chamber between the Government of Sierra Leone and the African Union in 2018 represents a noteworthy development. During its first term of office, this court issued a conviction against Isa Sallet Adoum, former leader of the rebel group 3R, marking an important step forward in the fight against impunity.

complementarity” must be recognized (Burke-White 2008, 105-106). As the situation in the DRC is one of the oldest remaining opens before the ICC, the Office of the Prosecutor has had the opportunity to carry out several activities that have helped to strengthen the capacity of national institutions to prosecute crimes committed in eastern DRC. Among these measures, it is particularly important to highlight the deployment of ICC forensic experts in the field and the support provided to national authorities in collecting evidence to ensure the preservation of the chain of custody (Office of the Prosecutor 2024, 59).

### 2.1.2. NATIONAL PROCEEDINGS: THE CONVICTION OF NTABO NTABERI SHEKA

On 30 July 2010, armed members of the Nduma Defense of the Congo militia (*‘Nduma Défense du Congo’* in French, hereinafter *‘NDC’*) deployed to thirteen remote villages in Walikale, the largest territory in North Kivu 150 kilometers’ west of Goma, the provincial capital. For two decades, this area has been plagued by countless conflicts where armed groups fight for control of lucrative tin mines. The former miner Ntabo Ntaberi Sheka, who was 34 years old at the time, had founded this militia a year earlier. For four days and nights they occupied and looted the villages, murdering and carrying out mass rapes against their population. The *Mission de l’Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo* (MONUSCO, United Nations Organization Stabilization Mission in the DR Congo) supported the deployment of a police contingent in response to the activities of Sheka’s rebel group. In November 2010, a formal complaint was filed against the rebels, prompting Congolese authorities to issue a nationwide arrest warrant for Ntabo Ntaberi Sheka. Subsequently, the United Nations Security Council placed him on its sanctions list. Cornered, Sheka surrendered to MONUSCO on 26 July 2017 and was later handed over to the Congolese authorities, who charged him with war crimes, including murder, sexual slavery, the recruitment of minors, looting, and rape. The public hearings began in November 2018, more than three thousand evidentiary items were examined, and 108 testimonies were heard, which served to incriminate the accused. These statements were made possible by the adoption of measures to ensure the well-being and safety of victims, particularly those who suffered acts of sexual and gender-based violence, most of whom confessed to being afraid of social stigma after testifying.

Thanks to MONUSCO’s support, preliminary investigations could be concluded without putting at risk the victims who, incidentally, were

threatened by Mr. Sheka during the proceedings. Finally, the defendant was sentenced to life imprisonment as responsible for committing war crimes, including murder, sexual slavery, and recruitment of child soldiers into DRC (Mahamba 2020).

## 2.2. *The failure of the Truth and Reconciliation Commission: a missed opportunity*

The signing of the Sun City Agreement also led to the establishment of the Truth and Reconciliation Commission (TRC), which was active from 2003 to 2007. Law No. 04/018 defined the mandate of the TRC, which states that the objective of the commission is to restore the truth and promote peace, justice, reparation, forgiveness, and social reconciliation. Except for the participation of women as commissioners (8 out of 21) and staff members, as well as the involvement of women's rights organizations, the TRC did not adopt any gender-sensitive approaches or procedures specifically aimed at addressing sexual and gender-based violence. While rape and sexual violence were mentioned in its mandate (article 73.3), and there is clear evidence of their widespread prevalence across the country, the TRC's lack of a tangible investigation meant that such violence was not addressed in its final report. Due to significant operational challenges, the TRC was unable to fulfil its mandate or conduct a comprehensive inquiry into the conflict. Its work was further hindered by a high degree of politicization stemming from the ongoing armed conflict. Although the TRC had an ambitious mandate, violence continued unabated throughout the country (González & Varney 2014, 57). Consequently, the TRC was unable to produce substantial findings or analyses regarding sexual and gender-based crimes (Ellemers 2023).

## 2.3. *Reparations: challenges in providing redress to victims of sexual and gender-based violence*

Reparations are the transitional justice mechanism that most directly focuses on victims. The obligation to provide reparations to victims of serious violations of human rights and international humanitarian law arises from the obligation of the State to provide and guarantee the right to an effective remedy. This obligation, enshrined in the main human rights instruments and in the law of armed conflict,

constitutes not only an inter-State duty but also a responsibility of States toward individuals or groups under their jurisdiction (Office of the High Commissioner for Human Rights 2008, 5). In this way, these victims have the right to file claims for compensation and reparation before national courts and, where appropriate, before international courts, which will give rise to the so-called “judicial reparations” (Gómez Isa 2006). Having said that, the effective realization of that right and the corresponding obligation is a matter of national law. Consequently, States enjoy a certain margin of discretion in satisfying the right and obligation to make reparation.

However, this obligation is usually made effective in the field of transitional justice through a double track. Thus, together with the so-called judicial reparations, which include a set of measures that can be adopted to compensate for the different types of damage that victims may have suffered because of certain crimes, reference should be made to the so-called “reparations programs”, consisting of reparation plans approved by governments through administrative procedures.

### 2.3.1. JUDICIAL REPARATIONS: THE INTERNATIONAL CRIMINAL COURT SYSTEM

Although the preamble to the Rome Statute does not expressly refer to the restorative function and does not even mention the question of reparation for damage, its repeated reference to victims shows that the ICC does not intend to limit its activity to the exercise of punitive action. As part of a movement that defends a model of justice based on retribution, but also on the restoration and reparation of the victim of international crimes, article 75 Rome Statute establishes the right of victims of crimes under its jurisdiction to obtain reparations for the damage caused because of their commission.

The inclusion of this provision is a milestone in the international criminal justice system, as it establishes for the first time the obligation of a court to provide reparations to the victims of those who have been convicted (Gil 2020). Thus, the Trial Chamber in question may issue an order against them recognizing the right of the victims in that case to obtain reparations. The Trust Fund will use this order to prepare a plan that specifies the beneficiaries and the modalities of reparation that meet the needs of each type of victim in a “fair and adequate” manner (Office of the United Nations High Commissioner for Human Rights 2008, 30). To date, the Court has issued five reparations orders, three of them relating to the situation in the DRC, in the so-called ‘Lubanga’, ‘Katanga’ and ‘Ntaganda’ cases.

After several extensions and delays, the reparations plan for the victims in the Lubanga case was finally approved by Trial Chamber II. This only contemplates a series of collective reparations of a symbolic nature, and only for the victims of forced recruitment and enlistment, a crime for which he was finally convicted. The ICC misinterpreted the gender mandate contained in Article 54.1 b ER. At first, the Trial Chamber II justified its decision to include victims of sexual violence on the grounds that this type of violence “is a complex phenomenon that requires a specialized, integrated, and multidisciplinary approach” (International Criminal Court 2012). Subsequently, however, this decision was reversed by the Appeals Chamber which rejected the inclusion of victims of sexual violence for the purposes of reparations. The judges based their decision on the definition of victim set out in Rule 85 RPP, arguing that the harm caused to those who suffered acts of sexual violence is not the result of the crimes for which Lubanga was convicted (International Criminal Court 2014). It also concluded that, if these people were included as beneficiaries for the purposes of reparations, the principle of causality that governs as a parameter to configure the reparations plan would be violated.

The ICC’s malpractice in this matter, which did nothing but revictimize victims of crimes of sexual and gender-based violence, is the latest in a series of mistakes made by the Court, especially during the first years of operation, in relation to the scope and meaning of the gender approach. This phenomenon has been described as “gender injustice cascade” (Chappell 2017) and represents a missed opportunity in terms of the design of reparations capable of transforming the unequal gender relations that exist in those societies that, like the Congolese, are immersed in long-term armed conflicts.

This incoherent position on reparations with a gender perspective has been partially corrected by the Court in the following cases investigated on the situation in the Democratic Republic of the Congo. In the case of ‘Prosecutor v. Bosco Ntaganda’, Trial Chamber VI of the ICC sentenced Bosco Ntaganda on 8 July 2019 to 30 years of imprisonment. He was found guilty of crimes against humanity and war crimes, including rape and sexual slavery, committed in the Ituri region of the DRC between 2002 and 2003. In 2021, this Chamber issued the “reparations order” in this case. There are several aspects that are worth highlighting, including: the lower requirement of the evidence required to include victims of sexual violence in the plan only if their testimony is “credible, consistent and reliable”, and especially: the inclusion within the category of “indirect victims” of children born of rape and sexual slavery. That is, it is the recognition of the so-called

“transgenerational damage”, understood as the transmission of the pernicious effects of trauma from one generation to the next (International Criminal Court 2023). By doing this, the ICC lays the groundwork to prevent the psychosocial consequences of harm caused to parents being passed from to their descendants, thus contributing to breaking the cycle of violence between generations and the repetition of acts of sexual violence in the future (Brusco & Martínez 2023).

In addition to these, the Trust Fund has been exercising an assistance function since 2008 under Rule 47 of the Trust Fund Rules, consisting of: “providing physical, psychological and material support to victims and their families”. Currently, it is carrying out the aforementioned support in eight countries whose situations are being investigated by the ICC, including that relating to the DRC, where the five projects launched, three are particularly aimed at the very high number of victims of sexual violence triggered by the armed conflict that took place in Congolese territory between 2002 and 2003. They consist of psychosocial rehabilitation measures and economic compensation in various areas of the country. Victims of sexual and gender-based violence in Lubanga who were not part of the sentence, as seen above, are included in these programmes (Trust Fund for Victims 2022)

In this sense, this step toward the full inclusion of a gender perspective in the ICC system should be celebrated. However, we should not ignore that the recognition of the beneficiaries as victims is a key positive effect of judicial reparations which unfortunately will not occur in this case. On the other hand, the mechanism of financing the Trust Fund through voluntary state contributions limits its operation, which implies that it is generating false expectations in the victims that it can hardly satisfy.

### 2.3.2. NATIONAL REPARATION PROGRAMS

As mentioned above, the obligation to make reparation primarily concerns States. In view of the high number of victims that Governments are forced to compensate in the aftermath of armed conflict or dictatorship, so-called “reparations programmes” have been used at the international level. These are designed to cover a broad category of victims and to lay the legal foundations for the new society (United Nations General Assembly 2006). Principle 16 of that resolution states that these programs have a great advantage when compared to

judicial reparations. Unlike judicial reparations, the programs are created based on a three-element relationship, victim-beneficiary-benefit, which does not require ambitious standards of proof to be executed (Office of the United Nations High Commissioner for Human Rights 2008, 60). This type of reparation therefore enjoys a general scope, making it possible for those who do not have the financial resources to participate in a costly judicial process to have access to the reparations provided for in the program (Magarell 2006).

Following this idea, the government of the DRC, through the *Fonds national de réparation des victimes de violences sexuelles liées aux conflits* (National Fond for the Reparation of Victims of Sexual Violence related to Conflicts and Crimes Against Peace and Security of Humanity), has just signed an agreement with the United Nations system to work together for the victims of the conflict in eastern DRC<sup>4</sup>. Its main objective is to repair, protect, build, and rebuild hope and the future for the victims and torn communities of this part of the country. Both parties commit to sharing their experiences, working together, and providing support in different sectors to victims of sexual violence in conflict zones. A budget of more than \$12 million was agreed for its implementation for a period of one year, from April 4, 2025, to April 3, 2026 (United Nations Population Fund 2025). In addition, in 2022 the Congolese legislature adopted *Loi No. 22/065, fixant les principes fondamentaux relatifs à la protection et à la réparation des victimes des violences sexuelles liées aux conflits et des victimes des crimes contre la paix et la sécurité de l'humanité*. This law sets out the principles applicable to the reparations to be received by victims of sexual violence during armed conflict (Democratic Republic of the Congo 2022).

### 2.3.3. HIGH EXPECTATIONS GENERATED ABOUT GUARANTEES OF NON-REPETITION

The role of transitional justice in preventing crises and the commission of international crimes is intricately linked to the concept of “guarantees of non-repetition” (GNR). The term was used for the first time in the Study on the Right to Restitution, Compensation and Rehabilitation to Victims of Gross Violations of Human Rights and

<sup>4</sup> National Fond for the Reparation of Victims of Sexual Violence related to Conflicts and Crimes Against Peace and Security of Humanity is a public technical, financial and social institution responsible for implementing the protection and reparation of victims of conflict-related sexual violence and victims of crimes against the peace and security of humanity

Fundamental Freedoms, prepared by the Special Rapporteur, Mr. Theo van Boven, in 1993. Since then, GNR has been categorized as one of the modalities of reparation provided by International Law to respond to serious violations of human rights and international humanitarian law. In this regard, see its inclusion as principle 23 in 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 (United Nations General Assembly 2006). It is defined as a measure that would contribute to prevention to gross violations of international human rights law. Specifically, point (h) of this principle 23 refers to the revision or reform of legislation that serves as a basis for the commission of such violations.

In this regard, it should be noted that currently the DRC is a party to the main international treaties and regional instruments that ensure the protection and defense of the rights of Africans. These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, better known as the Maputo Protocol (African Union 2003). This instrument includes a wide range of rights of different kinds: sexual and reproductive, hereditary, economic and related to social welfare, education, access to justice and equality before the law, as well as the right to live a life free from violence. Article 11 refers to the obligation of states parties to protect women from the commission of acts of sexual violence against them. To complete this protection, in its third paragraph, the precept establishes the obligation of States to classify acts of sexual violence perpetrated in armed conflicts as war crimes, genocide and crimes against humanity in their domestic legal systems. On the other hand, Article 26 of the instrument establishes the obligation of the member states to implement it at the state level. This provision must be interpreted in conjunction with Article 62 of the African Charter on Human and Peoples' Rights, which imposes an obligation on states parties to the Maputo Protocol to report on the implementation of its provisions.

Despite this, to date, the DRC has only announced its intention to amend the penal code to include the prohibition of sexual violence during armed conflict (Democratic Republic of the Congo & United Nations 2019).

### **3. Recommendations: towards a more comprehensive inclusion of the gender perspective to prevent future sexual crimes in DRC**

In this final section, I offer recommendations to address the challenges of transitional justice in the DRC, with a focus on prevention.

First, the Women, Peace, and Security Agenda must be fully implemented. In this context, Congolese women should be actively involved not only in peace negotiations but also in post-conflict reconstruction. To date, women remain underrepresented in Congolese political life, and those who participate in public debates often face stigmatization and marginalization by society. Furthermore, it is crucial to address the exclusion of sexual violence crimes from the most recent peace agreement between the DRC and Rwanda, which was witnessed by representatives from the United States.

Secondly, it is necessary for the DRC to amend its criminal legislation to ensure the criminalisation of sexual violence as war crimes, genocide, and crimes against humanity, in line with the Rome Statute and the Maputo Protocol. Furthermore, all Congolese legislation that perpetuates gender inequalities should be reviewed and amended to ensure compliance with international human rights standards. In this regard, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) could serve as a monitoring mechanism, since, through the periodic reports submitted by States, it allows for the evaluation of legislative reforms undertaken to promote gender equality.

Thirdly, in the DRC, a transitional justice strategy must be implemented that prioritizes victims, including those who have experienced sexual violence. Their voices must be heard, and it is essential to formally recognize them as victims and provide reparations for the harm they have suffered. To achieve this, gender-sensitive protection and welfare measures should be integrated into all stages of criminal proceedings, statements before truth commission hearings, and the design of reparations programs. Only through such comprehensive measures can revictimization be prevented and cycles of violence that contribute to the outbreak or resurgence of armed conflict be effectively broken.

## **Conclusions**

From a theoretical level, the preventive purpose of transitional justice is indisputable. However, affirming this idea for all times and

places depends on the empirical data extracted from cases, an area -that of practice- to which academia has not yet devoted much attention. Thus, this work has tried to carry out an analysis of the experiences of transitional justice implemented in the DRC, to draw a conclusion that serves this case.

In this regard, the present paper examines both the achievements and shortcomings of transitional justice initiatives implemented in the DRC. Far from fostering pacification and stabilization, advancing national reconciliation, or preventing a resurgence of grave human rights violations -including acts of sexual violence- these initiatives have encountered significant limitations. In general terms, the implementation of these mechanisms has largely fallen short of fulfilling their intended objectives. Specifically, the measures designed to guarantee victims' rights to justice, truth, and reparation have proven inadequate in delivering meaningful outcomes. The existence of a deeply divided society and structural gender inequality has contributed to this. The failures in the establishment of the TRC have had particularly devastating consequences, especially for victims of sexual violence, who have been unable to benefit from the implementation of the TRC's recommendations aimed at addressing the underlying gender inequalities that contribute to the commission of sexual crimes.

Nonetheless, there remain grounds for cautious optimism. Despite the continued escalation of armed conflict in eastern DRC, recent years have seen notable efforts toward the enhanced integration of gender perspectives into transitional justice strategies and public policies. It is possible that additional time will be required before the implementation of these measures translates into tangible reductions in the incidence of sexual violence across the country.

The creation of a hybrid justice mechanism with jurisdiction over high-ranking officials, as well as mid- and low-level perpetrators, would constitute a significant advancement toward accountability. Considering the numerous challenges inherent to the post-conflict context and the severe resource constraints facing the weakened Congolese judiciary, it would be appropriate for ICC either to assume responsibility for prosecuting senior commanders or to oversee and support national judicial efforts in accordance with the principle of "positive complementarity". In this regard, both the resumption of investigations in the DRC and the training activities for Congolese authorities that ICC officials are carrying out are moving in the right direction.

In addition, in the field of judicial reparations designed by the ICC, important steps are being taken in the incorporation of a gender

perspective in application of the mandate contained in article 54.1 b ER. Proof of this is the inclusion of indirect victims of “transgenerational harm”. This makes it possible to break the cycle of violence passed down from generation to generation, helping to prevent new mass crimes from being committed in the future. In addition, the adoption of *Loi No. 22/065*, on reparations and protection for victims of sexual violence is a good practice, the results of which depend on implementation by the country’s public authorities.

On the other hand, some recommendations have been identified on the desirable participation of women in the negotiations of the peace agreements in DRC and the inclusion of sexual crimes in them. Also, on the modification of Congolese legislation that promotes gender inequalities. As well as the design of a transitional justice strategy focused on victims who have suffered sexual violence. In short, a greater understanding of what implementing a gender perspective in transitional justice mechanisms entails is needed. Not only to respond to the commission of crimes but also to prevent their recurrence in the future. Only then can Kinshasa stop being called “the rape capital of the world”.

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