Indigenous restorative justice mechanisms as a tool for transitional justice in the Democratic Republic of Congo

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Abstract

The United Nations Mapping Report on the Democratic Republic of Congo (DRC) is a powerful reminder of the gravity of the crimes committed in this country. This report found that the period between March 1993 and June 2003 is probably one of the most tragic chapters in the recent history of the DRC. A string of major political crises, wars and multiple ethnic and regional conflicts killed millions of people. However, since the publication of this report there has been a shocking lack of justice for the victims because the Congolese justice system has been ineffective in prosecuting the perpetrators. This article is a valuable contribution to ending impunity in that it proposes an alternative approach to justice. This is based on restorative values and principles, such as the *Baraza* indigenous restorative justice mechanism. This provides justice to victims, restores peace and reconciliation in the

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region and, most importantly, holds perpetrators accountable for the crimes and human rights violations they have committed.

Keywords: *Baraza*, restorative justice, United Nations Mapping Report, Democratic Republic of the Congo, criminal justice system, transitional justice

1. Introduction

On 1 October 2010, the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) published a report mapping the most serious violations of human rights and international humanitarian law committed in the DRC. To understand the origin of the United Nations Mapping Report (UNMR) and the situation of the DRC today, one has to go back to the two Congo wars (1996–1997 and 1998–2003). These two wars were one of the greatest tragedies worldwide since the end of World War II, and caused as many as six million deaths as a direct result of fighting or because of disease and malnutrition. Despite their short duration, the impact of these wars was enormous – with victims mostly civilians.

The UNMR was seen as a preliminary exercise. It was the first step towards criminal investigation and, subsequently, prosecution for those responsible for all the crimes and human rights violations committed in the DRC between March 1993 and June 2003. However, since its publication and despite its findings on the scale and serious nature of crimes and human rights violations, the perpetrators of those atrocities continue to enjoy impunity (Amnesty International 2011).

The UNMR analysed the capacity of the Congolese criminal justice system to try people responsible for all the crimes recorded in its report. However, it found that the Congolese criminal justice system is too inefficient to do so. According to the UNMR, paragraph 1996, the scale of human rights violations in the DRC was too high to be remedied by a justice system that operates inadequately, and where there are hundreds of thousands of perpetrators and victims (United Nations Human Rights Office of the High Commissioner 2010b). As an alternative, there have been calls for the creation of an international special court or a hybrid judicial model embedded in the Congolese and international legal systems. However, neither of these proposals has materialised, so leaving the crimes recorded in the UNMR unpunished.

In order to fill this void, this article suggests an approach based on restorative justice values and principles such as the *Baraza* indigenous restorative justice mechanism to provide justice to victims, restore peace and reconciliation in the region, and most importantly, to hold perpetrators accountable for the crimes and human rights violations they have committed.

This article includes six sections. It opens with an introduction (section one) and is followed by a brief overview of the different armed conflicts that took place in the DRC from 1996 to 2003 (section two). Section three examines the objectives, methodology and the timeline of the UNMR. This section also looks at the ineffectiveness of the Congolese criminal justice system in terms of providing justice to the victims of crimes and human rights violations documented in the UNMR. Section four introduces the *Baraza* indigenous restorative justice mechanism, and focuses on its significance and limitations in prosecuting the perpetrators of some atrocities reported in the UNMR. Lastly, section five suggests the way forward and emphasises the importance of integrating the *Baraza* indigenous restorative justice mechanism into the formal criminal justice system. This will lead to an effective and long-term solution to the crimes and human rights violations reported in the UNMR. The article closes with a conclusion.

2. A Brief History of the Congo Wars

The DRC has experienced two successive wars over the last three decades. In 1996, a coalition comprised of the Ugandan and Rwandan armies, along with Congolese opposition leader Laurent-Désiré Kabila, invaded the DRC. This led to the fall of President Mobutu in 1997 and the accession of President Laurent-Désiré Kabila. Despite the termination of the Mobutu regime, little political change took place and Kabila found himself uneasy in the position of a proxy of his former backers, Rwanda and Uganda. Therefore, in 1998, Kabila decided to expel all Rwandan and Ugandan armies from the DRC. This action was the catalyst for the Second Congo War, which ended in June 2003. These two wars have in common the articulation of forms of internal rebellion against the central government and the armed intervention of neighbouring countries (Prunier 2009).

This second dimension played a major role in their triggering and unfolding, but they are still civil and international wars.

However, before the Congo wars, it is important to note that mass violence had started between 1993 and 1996 in the Masisi region in eastern DRC. Masisi and surrounding parts of North Kivu Province in eastern DRC have seen sporadic but intense violence since 1993. This was caused by long-standing inter-ethnic rivalries between autochthones (people of Congolese origin) and the Banyarwanda (Hutu and Tutsi) who are native to Rwanda (Stearns 2012). The critical issues of demographics, citizenship and land reform were all the prelude to this conflict. Thousands of people are believed to have been killed since late 1995, in addition to widely divergent estimates of 6 000 to 40 000 deaths during the 1993 violence (Stearns 2012).

2.1 The First Congo War: 1996–1997

After the 1994 genocide which killed close to 800 000 Tutsi and moderate Hutu in Rwanda, over a million Hutus crossed the border from Rwanda to Zaire (Zaire was renamed DRC in 1997) and took refuge in eastern DRC, mainly in and around the city of Goma, fearing post-genocidal reprisals. Among them were civilians, ex-Armed Forces of Rwanda (AFR) and Interhamwe[1] who orchestrated the genocide unleashed after the attack on the plane of the Rwandan and Burundian presidents on 6 April 1994. These refugees represented a threat at the border and worried the new Rwandan government because the ex-AFR and Interhamwe quickly took control of the refugee camps from where they planned to reconquer Rwanda (Dixon and Sarkees 2016).

Rwanda therefore decided to dismantle the refugee camps in Zaire and to track down the génocidaires by invoking a right of prosecution. On 18 October 1996, the Rwandan government legitimised its intervention in the DRC by supporting a Congolese rebel group, the *Alliance des Forces Démocratiques pour la Libération du Congo* (AFDL) or Alliance of Democratic Forces for the Liberation of Congo. A coalition of four rebel groups which included the Party of the Peoples' Revolution led by Laurent-Désiré Kabila, the National Council of Resistance for Democracy led by André Kisase Ngandu, the Revolutionary Movement for the Liberation of

1 Interahamwe is a Rwandan paramilitary and terrorist group currently based in the DRC and Uganda.

Congo led by Anselme Masasu Nindaga, and the Democratic Alliance of the People led by Déogratias Bugera, the AFDL was led by the late president Laurent-Désiré Kabila in order to oust the regime of the late president Mobutu.[2] Uganda allied itself with Rwanda by providing military specialists and logisticians and by neutralising the rebels at its border. Besides Rwanda and Uganda, the AFDL was also backed by several neighbouring countries, such as Burundi and Angola (Deibert 2013). Burundi's involvement appeared to be limited to complicity rather than active ground-level involvement. Burundi had security interests at heart and was interested in controlling the eastern DRC to prevent cross-border rebel attacks from the Burundian National Council for the Defense of Democracy – Forces for the Defense of Democracy (CNDD-FDD) rebel group, which was present in the eastern DRC (Reyntjens 2009). Angola also chose to participate in the First Congo War because members of Mobutu's government were directly involved in supporting the Angolan rebel group the National Union for the Total Independence of Angola (UNITA). Angola entered the war on the side of the rebels because its government was determined to overthrow the Mobutu government, which it saw as the only way to address the threat posed by the Zairian-UNITA relationship (Reyntjens 2009).

After eight months of war (October 1996–May 1997), the AFDL's coalition seized Kinshasa, the capital city of the DRC, on 17 May 1997, and Laurent-Désiré Kabila became the new president of the country. However, soon after bringing Laurent-Désiré Kabila to power, some of his allies, namely Rwanda and Uganda, began looting the country's extensive mineral wealth (Tunamsifu 2018a). Consequently, shortly thereafter, in July 1998, the late president Kabila ordered the expulsion of foreign armies in the DRC. The Rwandan and Ugandan armies responded belligerently, and consequently, on 2 August 1998, they turned against Kabila and decided to back new rebel groups. This was the beginning of the second armed conflict in the DRC.

2.2 The Second Congo War: 1998–2003

The Second Congo War involved nine African countries, and around 30 armed groups, making it the largest war between states in contemporary

2 Mobutu was the President of Zaire from 1965 to 1997.

African history. It is also nicknamed the "great African war" or even the "African World War".

Barely 14 months after the end of the first war that put the late president Laurent-Désiré Kabila in power, his relationship with his Rwandan and Ugandan allies and between his regime and Western powers had deteriorated significantly (Kisangani 2012). Consequently, on 2 August 1998, a new rebel movement known as the *Rassemblement Congolais pour la Démocratie* (RCD) – The Congolese Rally for Democracy – and backed by the Rwandan and Ugandan armies, was launched in the town of Goma to overthrow the late president Laurent-Désiré Kabila (Kisangani 2012).

Over the following months, the socio-political and military situations became more complex as the RCD rapidly occupied major cities in eastern DRC. However, as the Ugandan army controlled the northern part of the country, in late 1998 another rebel group was created in the Equateur Province: the *Mouvement de Libération du Congo* (MLC) or the Movement for the Liberation of the Congo. It was led by Jean-Pierre Bemba with the support of the Ugandan army (Tunamsifu 2018b). The Congolese government force was also supported by the armies of Angola, Namibia, and Zimbabwe. Consequently, the country found itself divided into three main zones controlled respectively by the late President Laurent-Désiré Kabila, the RCD, and the MLC, and each zone was administered like an "independent country" (International Crisis Group 2020).

On 16 January 2001, President Laurent-Désiré Kabila was assassinated (Talbot 2001) and was succeeded by his son, Joseph Kabila, who was sworn in as president on 26 January 2001. In his inaugural speech, Joseph Kabila promised internal political liberalisation and a start to dialogue with the DRC's neighbours (Rwanda, Uganda and Burundi) and rebel groups, in order to end the armed conflict (International Crisis Group 2001). In late February 2002, the Inter-Congolese Dialogue was initiated in Pretoria, where various groups and entities signed, on 16 December 2002, a "Global and Inclusive Agreement on Transition" in the DRC – commonly known as the Sun City Agreement. The peace agreement included political arrangements governing the transition, a power-sharing principle for the inclusive government, and the integration of

elements of armed groups in the unified Congolese national army (Hale 2009).

3. Revisiting the United Nations Mapping Report

The UNMR was a report on the DRC produced by the United Nations in the wake of the armed aggression and war, which took place between March 1993 and June 2003 (United Nations Human Rights Office of the High Commissioner 2010a). It aimed to map the most serious violations of human rights committed in the DRC, together with violations of international humanitarian law.

3.1 Objectives, Methodology and Timeline of the United Nations Mapping Report

In May 2007, the former United Nations Secretary-General, Ban Ki-moon, approved the terms of reference of the UNMR following consultations with relevant United Nations agencies and partners, and with members of the Congolese government, including the former president of the DRC, Joseph Kabila.

The UNMR, led by the Office of the UNOHCHR, had three objectives (United Nations Human Rights Office of the High Commissioner 2010b):

1) Conduct a mapping exercise of the most serious violations of human rights and international humanitarian law committed in the DRC between March 1993 and June 2003

2) Assess the existing capacities in the national justice system to deal appropriately with human rights violations that may be uncovered

3) Formulate a series of options aimed at assisting the government of the DRC to identify appropriate transitional justice mechanisms to deal with the legacy of these violations in terms of truth, justice and reparation and reform – considering ongoing efforts by the DRC authorities and the support of the international community.

The UNMR was based on a number of methodological premises and was concerned not only with the violations themselves but also with the context(s) in which they were committed – either in a given region or across the entire country (United Nations 2010). Such an exercise

requires various activities, including the collection, analysis and assessment of the information contained in multiple reports and documents from different sources, meetings and witness interviews, as well as consultation with field experts and consultants. However, a mapping exercise is not an end in itself. It remains a preliminary exercise that may lead to the formulation of transitional justice mechanisms – judicial or otherwise. It is a fundamental step in enabling the identification of challenges, the assessment of needs and better targeting of interventions (United Nations 2010).

The mapping exercise began on 17 July 2008. Between October 2008 and May 2009, a total of 33 staff worked on this project, including Congolese and international human rights experts. The report was submitted to the former High Commissioner for Human Rights, Navi Pillay, on 15 June 2009. This was for review, comment and finalisation. The report mentioned 617 alleged violent incidents in the DRC. Each of these incidents point to the possible commission of gross violations of human rights and/or international humanitarian law (United Nations Human Rights Office of the High Commissioner 2010c).

The methodology used by the mapping team were derived from United Nations developed tools, in particular those of UNOHCHR. These covered several areas: a gravity threshold for the selection of serious violations, a standard of evidence required, the identity of perpetrators and groups, confidentiality, witness protection, witness interviewing guidelines with a standardised interview form, and physical evidence guidelines including mass graves (United Nations 2010).

The Mapping Team's six-month time frame for compiling an inventory of the most serious violations committed in the DRC over a ten-year period imposed certain constraints in terms of the methodology to be used. It did not provide for in-depth investigations or gathering of evidence admissible in court, but rather the basis for the formulation of initial hypotheses of an investigation by giving a sense of the scale of violations, detecting patterns and identifying potential leads or sources of evidence. Consequently, with regard to violations of human rights and international humanitarian law, the exercise described the violations and their location in time and space, the nature of the violations, the victims and their approximate number, and the often-armed groups to which the alleged perpetrators belonged. It was carried out chronologically

by province (United Nations Human Rights Office of the High Commissioner 2010c).

Unlike some commissions of inquiry with a specific mandate to identify the perpetrators of violations and to make them accountable for their actions, the objective of the UNMR was not to establish or to try to establish individual criminal responsibility. Instead, it aimed to expose in a transparent way the seriousness of the violations committed, in order to encourage an approach aimed at breaking the cycle of impunity (United Nations 2010). The report does, however, identify the armed groups to which the alleged perpetrators belonged, since it was essential to identify the groups allegedly involved in order to suggest proper legal characterisations for the conduct in question. Consequently, information on the identity of the alleged perpetrators of some of the crimes listed does appear in the report – but is held in a confidential project database submitted to the United Nations High Commissioner for Human Rights (United Nations 2010). However, the identities of alleged perpetrators under warrant of arrest and those already sentenced for crimes listed in the report have been disclosed. Names have also been cited where political officials have assumed public positions instigating and triggering off the crimes reported in the UNMR (United Nations 2010).

The report is presented chronologically, reflecting four key periods in the DRC's history (United Nations Human Rights Office of the High Commissioner 2010b:16–21):

i) March 1993–June 1996: The first period covers violations committed in the final years of the regime of the late President Mobutu and is marked by the failure of the democratisation process and the devastating consequences of the Rwandan genocide on the declining Zairian state – in particular in the provinces of North and South Kivu. During this period, 40 incidents were listed.

ii) July 1996–July 1998: The second period concerns violations committed during the First Congo War and the first year of the regime established by the late President Laurent-Désiré Kabila. This period has the greatest number of listed incidents (238) in the whole of the decade under examination.

iii) August 1998–January 2001: The third period concerns the inventory of violations committed between the start of the Second Congo War

in August 1998 and the death of President Laurent-Désiré Kabila. This period includes 200 incidents and is characterised by the intervention in the DRC by the national armed forces of several countries.

iv) January 2001–June 2003: The final period lists 139 incidents of violations committed in spite of the gradual establishment of a ceasefire along the front line and the speeding up of peace negotiations in preparation for the start of the transition period on 30 June 2003.

The report notes "with utmost regret" that the extraordinary number of violations committed between 1993 and 2003, the sheer size of the country, and the difficulties in accessing a number of sites, mean that the exercise remains incomplete and cannot reconstruct the complexity of each situation or gain justice for all (United Nations Human Rights Office of the High Commissioner 2010a).

3.2 United Nations Mapping Report – A Sacrificed Project

As stated in the UNMR, the DRC has been the scene of appalling abuses against civilians, including massacres, acts of torture and sexual violence, as well as the forced recruitment and use of child soldiers (United Nations Human Rights Office of the High Commissioner 2010b). Given the scale of the crimes committed, the number of victims and the level of impunity, a strong, effective and credible national criminal justice system is essential. However, a major obstacle to ensuring justice for victims is the weakness of the Congolese criminal justice system (Amnesty International 2011).

The UNMR raises strong suspicions that crimes under international law, at least war crimes and crimes against humanity, have been committed in the DRC on a large scale. These cannot simply be disregarded or ignored, especially as they concern the very crimes envisaged under the principle of the "responsibility to protect" (Aptel 2010). The UNMR emphasises that the fight against impunity is essential in order to end the cycle of violence in the DRC (United Nations Human Rights Office of the High Commissioner 2010b). However, since its publication, there has been no political will from the Congolese government and the international community to seek justice, or the capacity and modalities to implement justice. This lack of justice is unsatisfactory for all, especially for the

victims, most of whom took risks to provide information and therefore expect redress. Justice has been slow in coming.

Hoping that there will be sufficient political will in the future, what would be the best mechanism(s) for achieving justice in the DRC? The mass atrocities listed in the UNMR raise a sobering question: Which judicial system could offer justice to every victim? One option is to concentrate on those bearing the greatest responsibility, but this is always the most difficult course of action and inflates the political costs and risks of interference. In addition, what form and extent of regional justice mechanisms can be implemented to prosecute crimes committed by both Congolese and non-Congolese actors? While the International Criminal Court is involved in the DRC, it only has jurisdiction over crimes committed since July 2002, not over the many prior violations (Aptel 2010). Therefore, there is an urgent need to consider different options to address the documented violations. The Congolese justice system is ill-equipped, and consequently is incapable of addressing the alleged crimes, citing frequent political interference and lack of independence. The creation of an international hybrid judicial system grounded on the model of the Extraordinary African Chambers in the Courts of Senegal (EACCS) is believed to be necessary to address all the crimes and human rights violations reported in the UNMR, and which were committed by non-Congolese actors.

The EACCS was created in February 2013 to trial the crimes committed by Hissène Habré, former Chadian President, for crimes committed in Chad between 1982 and 1990. The Chambers' jurisdiction is suitable for the DRC because it can prosecute all the crimes reported in UNMR – such as crimes against humanity, war crimes, torture and genocide (Garrido 2020). Furthermore, the EACCS has an important advantage over previous hybrid tribunals that were established under the auspices of the United Nations. It has the potential to respond effectively to the current challenges plaguing the legitimacy of international criminal justice in Africa by presenting itself as an African solution. This jurisdiction encompasses all the international justice initiatives of the

African Union, its policies, institutional reforms, and international agreements (Garrido 2020). .

4. The *Baraza* Indigenous Restorative Justice Mechanism as a tool for Transitional Justice in the DRC

The *Baraza* is a community-level conflict mediation institution dealing with conflicts at the grassroots level in eastern DRC, particularly in the province of North Kivu. It is a traditional structure of elders sitting together to discuss the various aspects of community life and to resolve intra- or inter-community problems so that the community can live together in harmony (Villa-Vicencio et al. 2005). In this regard, the *Baraza* concept is rooted in the principle of the African palaver. Palaver is here to be understood as a dialoguing institution and a principal instrument of negotiation, conflict resolution, and peacebuilding (Kiyala 2019). From this assertion, it is contended that the *Baraza* is based on restorative justice principles and values.

The *Baraza* functions on three main principles: resolving disputes, preventing violent conflict, and healing suffering after conflict (Clark 2008). Regarding dispute resolution, victims are granted an opportunity to share their experience of suffering in front of mediators and perpetrators. Then, perpetrators are requested to explain the rationale behind their actions. Throughout the process, victims can ask for reparation if they wish, while perpetrators have the opportunity to be accepted back into the community. Accordingly, the ceremony entails elements of the acknowledgement of guilt (truth-telling) and the virtue of forgiveness – both of which are expected to improve the relationship between the antagonistic parties and to reactivate communal solidarity (Tuenpakdee 2020).

The *Baraza* processes allow parties to discuss the aftermath of the crime, find a solution, and set up measures to prevent future re-offending. The process is "informal", non-adversarial, friendly and non-coercive. Parties are not regarded as adversaries; rather, they are stakeholders in finding a solution to their problems with a healing effect on the victims and the community.

The contribution of the *Baraza* to finding justice for serious crimes reported in the UNMR can be beneficial for all stakeholders and all

concerned, including the international community. The attractiveness of this model is justified by its proximity, the speed of the procedures, the concern to protect the interests of the community, the active participation of the victims, and the instauration of peace and stability in the African Great Lakes region.

Traditional courts such as the *Baraza* have the advantage of being located close to the victims and to the place where the crimes were perpetrated. Furthermore, those responsible for crimes appear in their community before people of integrity, experienced in the techniques of peaceful conflict resolution. In the context of traditional courts, defendants appear in their community and, where appropriate, are tried by judges they are accustomed to and who speak a language they understand. The victims do not have to be displaced to go and relive their ordeal in an environment that is sometimes not very compassionate, with sometimes very intrusive procedures such as cross-examination – which they do not expect (Penal Reform International 2000). Justice thus rendered is close to litigants and is very accessible to them at all levels. This increases the impact or the dissuasive effect of the decisions of traditional courts in the environment where the crimes were committed. Proximity is therefore a great advantage that helps to reduce the legal distance between the place where crimes were committed and where they are tried, if one looks at international tribunals which sit abroad far from the place of the commission of the crimes (Sriram 2001). Besides, plaintiffs are familiar with this system piloted by esteemed citizens. In the case of traditional jurisdictions, these are traditionally tribal, ethnic, religious or older adults who are familiar with the customs and traditions of the community and who have been trained in dispute resolution techniques (Megret 2005).

In addition to the proximity of traditional justice mechanisms, the procedures before these bodies are fast. In general, depending on the severity of a case, it takes one or two days to deliver a verdict (Daly 1999). In reality, the procedures are quick because they are very simplified. They are characterised by the absence of confrontation and non-involvement of lawyers, who often get bogged down in furtive procedures, thus slowing down the normal course of proceedings. Likewise, most of the participants are aware of the criminal cases because they witnessed them (Daly 1999).

Thus, traditional courts spend very little time on establishing the facts and guilt; and have much time to focus on sentencing.

Procedural speed thus has positive repercussions for the future of society: disputes are settled in a few days and to the advantage of all stakeholders, defendants, victims and the rest of the community. The horrific pages of history are thus quickly turned, allowing society to heal and to move on from the crime committed (Daly 1999). The importance of this procedural speed can only be appreciated by analysing the extraordinary slowness of the Congolese and international criminal justice systems. It is not uncommon for an international trial to last more than five years. This is seriously detrimental to social reconciliation and reconstruction, as the judgment of the case remains hanging eternally over individuals – thus preventing them from thinking about the future and adopting a positive outlook and attitude.

Unlike the conception of contemporary criminal justice, traditional courts promote reconciliation and favour group interests and conflict conciliation (Choudree 1999). In the traditional context, justice and reconciliation are not contradictory or incompatible, just as there is no opposition between accountability and reconciliation (Alie 2008). The aim is therefore social harmony while settling disputes between members of a given community, and at the same time strengthening solidarity between members of the same community (Murithi 2006).

The advantage of this mechanism is that it recognises an inalienable right of victims to compensation for the harm suffered. In this mechanism, justice means more than simply the shaming of offenders (Drumbl 2005). Traditional courts are designed so that victims have an almost automatic status as parties to the proceedings. Also, the victims are known in their community and the mechanisms can proceed without delay. The situation of the victims can therefore be definitively clarified in less than a few days, which will allow them to focus on their survival and future.

Besides its advantages, *Baraza* involvement in resolving war crimes and human rights violations reported in the UNMR may have drawbacks and may present some dangers that can compromise its impact and the chances of success. These drawbacks relate to the absence of certain legal guarantees for a fair and equitable trial – as they are known in international criminal law. In terms of the risk of unfairness, the

procedures are characterised by the absence of a system of legal representation of the accused, the dual status of community judges and commissioners acting both as judges and prosecutors, and a lack of legitimacy of the *Baraza* in the eyes of parts of Congolese society and the international criminal justice system.

The *Baraza*, as with most traditional justice systems, does not recognise legal representation. As Sachs (1973:96–97) stated, "in traditional African society, every man is his own lawyer … and all the local men do take part in the forensic debate." This can raise important constitutional questions as the Constitution of the DRC recognises the right to a lawyer in all legal proceedings.

Furthermore, in the *Baraza*, judges act as both judges and prosecutors. They accuse and judge the parties. From this perspective, their intervention carries within itself the seeds of injustice, especially in a situation where political or ethnic tensions (or both) still prevail, and where the people who hold the office of judge represent, even in appearance, a specific ethnic group or a rival political tendency – or both at the same time. Thus, this legal situation is likely to be open to challenge at the local and international levels because it infringes the sacrosanct principle of the separation of powers and that of the right of an accused to a fair and equitable trial. However, one must point out that this risk is not as great as it seems, unless there is manipulation or interference by political authorities in the functioning of the *Baraza*.

Lastly, there is a lack of legitimacy of the *Baraza* vis-à-vis the Congolese criminal justice system. For instance, despite its remarkable success in reducing rates of ethnic violence and armed conflicts between 1998 and 2004 in eastern DRC, it was not recognised by the Congolese criminal justice system in adjudicating serious crimes against humanity. Thus its members would usually transfer such crimes to a customary court, the lowest level of civilian courts in the Congolese judicial system. In other words, the *Baraza* has a mediation function, while the task of punishment falls under the jurisdiction of a customary court.

5. The Way Forward

It is important to note that in order to offer a more efficient, effective and long-term solution to the crimes and human rights violations reported in the UNMR, the *Baraza* has to be recognised by the Congolese

criminal justice system as an alternative to the current models of the retributive justice system used in the DRC. To scale up the *Baraza* and to increase its impact significantly, it is important to find a way to incorporate its participation in the Congolese criminal justice system. The *Baraza* and the Congolese criminal justice system should be part of the same whole and they should synergistically complement each other, using the positives of both and minimising or eliminating their negatives. If the goal is reconciliation, compensation to the victims and some kind of penalty – retributive or restorative – all the various instruments could be adopted including the traditional justice systems such as the *Baraza*. This position aims to integrate the *Baraza* into the current criminal justice system by defining, through legislation, the concrete ways in which its measures will be associated with the current criminal justice system. The *Baraza* as a restorative justice intervention is truly an integral part of criminal procedure and it cannot be seen as a model of justice that can operate in a mode completely independent of the Congolese criminal justice system

6. Conclusion

The UNMR is a solid, detailed document based on extensive and credible research that focuses on the most serious incidents across the DRC during a ten-year period (March 1993 to June 2003). It provides details of grave cases of mass killings, sexual violence, attacks on children, and other abuses by a range of armed actors, including foreign armies, rebel groups and Congolese government forces. A significant part of the report was devoted to an assessment of the current Congolese criminal justice system, the legal framework for trying these crimes, and options for transitional justice. The UNMR found that the Congolese justice system lacks the capacity to prosecute the crimes it documented. Therefore, it is imperative to create hybrid courts similar to the Extraordinary African Chambers which were created in 2013 in the courts of Senegal to try the crimes committed by the former Chadian president, in Chad, between June 1982 and December 1990. If implemented in the DRC, Extraordinary African Chambers will have the power to prosecute all non-Congolese individuals involved in the violations of human rights and of international humanitarian law reported in the UNMR. Furthermore, the incorporation of the *Baraza* into the current Congolese criminal justice system will also provide justice to victims, restore peace and reconciliation, and most

notably hold Congolese perpetrators responsible for their atrocities. The lack of justice for these crimes has been a major failing of the Congolese government and the international community and has undoubtedly contributed to the continuation of serious crimes against the civilian population in the DRC. The creation of a justice mechanism to begin to hold perpetrators to account for these crimes will be crucial to ending this cycle of violence.

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