

# The Colonial Legacy and Transitional Justice in the Democratic Republic of the Congo

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## Abstract

The Democratic Republic of the Congo (DRC) experienced a brutal colonial regime and a segregated judicial system with a weak educational system used to support colonial policies and a post-colonial legal framework designed to avoid prosecution for colonial-era crimes. Under such a regime, a broad range of violations were registered including about 10 million people who were killed. In the aftermath of the colonial era, the post-colonial regime did not sufficiently redress the situation through prosecution or meaningful reforms. Consequently, most of those atrocities remained unpunished. This study lists the main reasons for why the colonial-era crimes were not investigated which are linked to the gaps in the legal framework, the configuration of the judiciary, and an informal agreement between the DRC and the Belgian governments.

**Keywords:** Transitional justice, human atrocities, DRC, institutional reforms

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## **1. Introduction**

The Democratic Republic of the Congo (DRC), together with its historical precursors, has been an arena of conflict since the time of King Leopold II of Belgium, who created the Congo Free State in 1885 (Turner 2013:1).

Indeed, since the colonial era, the country has experienced various violations of human rights which have resulted in millions of deaths and, unfortunately, all of them have remained unpunished. The post-colonial government did not deal with violations of the colonial era, and the 1960s round-table conference held in Belgium did not provide a mechanism to address them. From independence to the last elections (30 December 2018), the transfer of power to the successor regimes has been in bloodshed and no Congolese leader has given up power peacefully.

The objectives of this paper are to analyse the reasons why the main mechanisms of transitional justice (judicial and non-judicial mechanisms) were not leveraged to deal with the colonial-era atrocities.

## **2. Brief overview of the legacies of the colonial regime**

The DRC was colonised in two phases: by King Leopold II from 1885 to 1908 and by the Belgium state from 1908 to 30 June 1960. The reign of Leopold II and the reign of the Belgian colonial administration were characterised by the looting of precious resources and human rights abuses. Repression and arbitrary killings were, at least seemingly, worse in the Belgian Congo than in other colonies. As a result of the mass killings, the population in Congo was reported to have fallen by about two thirds between the colonial conquest and 1924 (Ewald et al. 2004:159).

This section describes the brutal colonial regime, provides a critical analysis, and discusses the Congolese independence struggle.

### **2.1 Brutal colonial regime**

#### **2.1.1 Land dispossession**

Through the International Association of the Congo (IAC), Leopold II commissioned Henry Morton Stanley and his men to get signatures from

Congolese kings to renounce their lands. Thus, in 1884, on their behalf and in the name of their inheritors and all their successors, local kings signed 'treaties' to give up their territories freely in exchange for *inter alia* a piece of cloth and alcohol. The process legitimised the conquest of Leopold II and, thereafter, a flag of a gold star on a blue background was hoisted (Hochschild 2007:126).

A piece of cloth or a bottle of alcohol cannot buy a land. However, on behalf of King Leopold II, Stanley fraudulently tried to dispossess local communities of their lands.

Drawing on more than 400 'treaties' signed by Congolese kings who had no idea of what they were signing,<sup>1</sup> Leopold II wanted to ensure recognition by the other European powers. Thus, the German Chancellor Otto von Bismarck convened representatives from European nations together with the Ottoman Empire and the United States of America (USA) to attend a conference held in Berlin from 15 November 1884 to 26 February 1885. Its official purpose or agenda was to address the following three matters: First, the freedom of commerce in the basin and the mouths of the Congo River. Second, the application to the Congo and Niger of the principles adopted by the Congress of Vienna with a view to preserving freedom of navigation on certain international rivers, with principles applied at a later date to the River Danube. Third, a definition of formalities needed to be observed so that new occupations on the African coasts could be deemed effective (Craven 2015:37).

However, the hidden agenda for the conference was to create rules on how to peacefully divide Africa among participants in order to promote colonisation. At the end of the Berlin Conference, all participants signed and ratified the *General Act of 26 February 1885* (with the exception of the USA).

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1 Stanley signed more than 450 treaties with Congo chiefs. Many had no idea what they were signing in trade for the cloth, trinkets, alcohol, and other shamefully cheap goods Stanley gave to them. The idea of signing over one's land to someone on the other side of the ocean was inconceivable (Lamb 2013:185).

### 2.1.2 Unbridled exploitation of natural resources

Between 1890 and 1904, the Congo Free State was the most lucrative colony in Africa because of the increased demand for natural rubber, which was being used for cars and bicycles. The gains from Congolese ivory and rubber were multiplied by 96 and, therefore, King Leopold II found himself sitting on a source of considerable wealth (Ewans 2003:168; Hochschild 2007:270).

### 2.1.3 Torture and cruel, inhumane treatment

To make the rubber trade quotas, a reign of terror was established during which time untold human atrocities were committed. In this regard, Ewans states that a potentially lethal whip of dried hippopotamus hide, the *chicotte*, was widely used, and the regime's soldiers (*Force Publique*) were ordered to kill or intimidate Congolese kings. Individuals were slaughtered and whole villages were razed to the ground (Ewans 2003:169; Hochschild 2007:279). Leopold's soldiers cut off the right hands of hostages who resisted or who failed to deliver the quotas of rubber demanded. The hands were presented to serve as evidence or as a trophy to the Commissioner representing the authority of King Leopold II. The hands were also presented to provide proof that the ammunition given was not wasted on poaching or other activities. For every bullet fired, soldiers were expected to produce a right hand. During that period, as the standard proof in Europe and the USA was to produce the right hand from a corpse, people began to associate the Congo Free State with severed hands. The situation pushed the socialist leader Emile Vanderveld to evoke in the Belgian Parliament the possibility of establishing an international special court for the Congo (Hochschild 2007:270–279). Unfortunately, this court was not created as King Leopold II deployed his strategies to neutralise this appeal (Hochschild 2007:279).

Because of the missionaries in 1890, Leopold II had to respond to scattered protests about severed hands and massacred Africans. The *London Times* newspaper was discouraged from publishing on these crimes and in public, Leopold II appeared profoundly shocked about

what was described as the “secret society of murderers” covered up by a king. The list of known and documented massacres was endless. As a result of slavery, forced labour, torture and mutilation, the population was reduced by half; an estimated 10 million Africans lost their lives (Hochschild 2007:288–293). Following these allegations of abuses and after these were confirmed by the reports of a commission of inquiry, Leopold II proposed reforming his colonial regime. However, because of atrocities committed and international pressure he was eventually forced to hand over power. Therefore, influenced by international opinion, the Belgium Parliament decided on the annexation of the Congo Free State on 15 November 1908.

When the Belgian state took over the Congo Free State, it renamed the colony, the Belgian Congo (*Congo Belge*). Just before handing over the colony, King Leopold II managed to destroy all remaining documents and archives related to his brutal regime, as well as all financial activities. In the same vein, Martin Ewans (2003:170) makes it clear that:

Belgium went into a state of denial about Leopold’s record in the Congo. When giving up the territory, he destroyed the bulk of its records, and those that were left were kept closed, even to serious researchers and state officials, for most of the following century.

### 2.1.4 Racial segregation/discrimination

After the annexation, the Belgium Parliament adopted the Law of 18 October 1908 (known as the Colonial Charter), which organised the administration of the colony to be implemented by the Government of the Belgian Congo.

To implement specific changes in the Belgian Congo, Article 2, paragraph 3 of the Colonial Charter provided that ‘Nobody can be forced to work on behalf of individuals or for the profit of companies’.<sup>2</sup> Despite efforts

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2 Translated from original French to English: ‘*Nul ne peut être contraint de travailler pour le compte ou au profit de particuliers ou de sociétés*’, Article 2, paragraph 3. See *Loi sur le gouvernement du Congo Belge* (1908) [or Law on the government of the Belgian Congo].

to improve the situation, forced labour continued, the colony had a high level of racial segregation, and no political activity was allowed for Black people – all powers were exercised by White people. In this regard, Susan Graseck (2005:35) acknowledges that:

*[T]he Belgian colonizers continued to create policies around the assumption that white European culture was preferable, even superior, to African cultures. As a result, a tiny European elite controlled the economic and political power of the Belgian Congo whilst Africans continued to provide most of the labor with minimal profit for themselves.*

The consequences of these policies were that most colonised people were economically deprived. These people were deprived of any legal rights and were not allowed to participate in the civil and political life of their society. The brutality of the colonial administration, as well as the forced labour, took work away from Congolese villagers. These situations pushed most people into poverty and created an endemic state of famine for much of the colonial era while the Belgian king became extremely wealthy. In this regard, Gondola (2002:18) argues that the King wanted Congo's wealth at all costs, even if it meant reducing the population to virtual slavery. His system of exploitation was based on forced labour and taxation: villagers were forced to work in order to pay taxes to Leopold's tax collectors. Large concessionary companies are a good illustration, because their activities involved the collection of rubber and ivory.

Separating Europeans from Africans, considering white superiority and therefore the legitimacy of European dominion led to the consideration of an apartheid type of social and political system in the Belgian Congo:

*The racial segregation turned Congo into an apartheid regime. Whites and blacks each had their own residential districts and social facilities; the death penalty was only imposed on blacks, not on whites; higher education was virtually closed to Congolese (Stichting 2001:160).*

### 2.1.5 Political subjugation

During the colonial era, White people had all the luxuries and all major decisions concerning the Belgian Congo were made in Brussels by White people – without any input from Africans. Article 24 of the Colonial Charter instituted a colonial council led by the Minister of the Colonies and 14 councillors. The King of Belgium had the power to appoint eight councillors and the Legislative Chambers (the Senate and the House of Representatives) elected six councillors after a secret ballot by an absolute majority of votes. In this regard, Africans could not involve themselves in political activities or participate in the running of their own country. The judicial sector was also segregated because two systems co-existed: European courts and native or indigenous courts (*tribunaux indigènes*). At that time, only indigenous people were tried before the native courts while colonisers and foreign people were tried before the formal or European courts. The native courts were regulated by custom and all cases were heard in the local language that all parties were familiar with. Indigenous courts were presided over by the traditional kings, but they had limited powers and remained under the firm control of the colonial administration (Dumont 1943; Tunamsifu 2011:171).

### 2.1.6 Miseducation (violation of the rights to education)

Despite the role played by the Belgian colonial system in social transformation, improving the educational system was not a priority of the colonial regime, which is described as a weak colonial administration.<sup>3</sup> Ashley Leinweber (2016:150) argues that the Belgian government had little interest in education. That is why it could not spend large amounts of money on creating a strong education sector in its colony. The Belgian colonialists were convinced that Congolese education had to essentially be moral education because their primary task in the Congo was a

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3 The French and British colonial education were different. The goal of French colonial education was to train a small administrative elite, but the British tried to reach as many children as possible. Therefore, between 1870 and 1940 the primary enrolment rates were significantly higher in the British colonies than in the French ones (see Dupraz 2015:2).

civilising mission to lead African pagans to Christianity. This conviction was expressed in the letter from Leopold II to colonial missionaries in the Congo in 1883 (Arnaut n.d.). It stated that the interpretation of the Bible must help promote Belgian economic interests and facilitate the task of administrators and industrials. The king instructed colonial missionaries to teach students to read and not to reason or reflect, to forget their heroes and to instead adore colonisers as heroes, and also to discourage an interest in the country's abundant natural resources (Vengeyi 2013:190–191).

Crawford Young (2002:14) notes that the 1950s was the main colonial decade with the provision of new opportunities for a growing and educated élite class. The educational programme was limited to primary education. Ewans (2003:172) notes that only a negligible fraction of pupils proceeded further and education abroad was banned. In the eyes of the Belgians, educating Africans was to create trouble for the colonial power. In this regard, Jeanne M. Haskin (2005:3) points out that:

[T]he Catholic Church's concept of appropriate education for the natives was exemplified by the slogan, 'no elite, no problem'. In other words, education peaked at the secondary level so as to prevent the Congolese from aspiring to leadership roles.

In the 1950s, secular secondary and tertiary institutions were created. On Independence Day, Martin Ewans argued that there were only 17 African graduates, not one qualified African doctor, no Congolese teachers, no Congolese army officers, and no lawyers or engineers (Ewans 2003:172).

As the colonial administration deprived the Congolese of the ability to make a decent living, all of the social classes decided to join the anticolonial alliance and joined the struggle for independence. However, as political organisations were proscribed in the Belgian Congo until the mid-1950s, the *évolués* integrated different ethnic associations together to advance their political interests, and therefore anticolonial nationalist movements rapidly emerged to challenge colonial domination.



Georges Nzongola-Ntalaja (2007:81) distinguishes three phases in the Congolese independence struggle. The first phase was from August 1956 to December 1958 (the phase of political agitation which corresponds to the birth of the Congolese democracy movement). The second phase was from January 1959 to January 1960 (the phase of the radicalisation of the struggle which increased the role of the popular masses in defying colonial authority). The third phase was from February to June 1960 (the phase of precipitous transition to independence which corresponds to the making of a fragile political revolution).

Following international pressure, the only exit plan for Belgium by late 1959 was to respond to the ultimate demand of the divided nationalists to grant immediate independence (Young 2002:14–17). According to Nzongola-Ntalaja (2007:87), among the reasons why the Belgians followed the Congolese demand was that several areas of the country had become ungovernable. The population of Bandundu, for example, had refused to pay taxes and did not recognise the authority of the colonial administration. The Belgian government therefore responded by convening a political round-table conference from 18 to 27 January 1960 that agreed, among other resolutions, to conduct elections on 22 May 1960 to grant independence on 30 June 1960, and to inaugurate the Fundamental Law of a sovereign Congo.<sup>4</sup> It was therefore in sorrow and in pain that the country obtained independence, as it was left unstable by the colonial government and without a senior Congolese in the judiciary, and not one army officer in the army or in the administration.

The next section confronts the brutal colonial era atrocities which provides the context within which to discuss mechanisms of transitional justice.

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4 Following the legislative elections, Patrice Lumumba, the leader of the Congolese National Movement (*Mouvement National Congolais, MNC*), became Prime Minister and Head of the Government and Joseph Kasavubu, the leader of ABAKO, became the Head of State (EISA 2006:2; Kisangani 2012:16).

### **3. Transitional justice and colonial era atrocities**

Societies that experienced various untold atrocities have the option to address the wrongdoings of the previous regime through transitional justice mechanisms that include criminal prosecutions, truth and reconciliation commissions, reparations, institutional reform, a vetting or lustration process, memorialisation, an amnesty and traditional dispute settlement (UNSC 2004:4; Tunamsifu 2015:64). These mechanisms offer possibilities of holding accountable people bearing the greatest responsibility by contributing to societal repair. In this regard, Tunamsifu (2016:5) argues that transitional justice is a *sui generis* justice which aims to look back and look forward in dealing with the magnitude of past abuses in countries transitioning from dictatorial and authoritarian regimes or armed conflicts to democracy.

Thus, the goal of transitional justice is to make perpetrators accountable for the violations of the past, to restore the dignity of victims and to appreciate how to compensate the survivors. Nevertheless, the post-colonial regime did not bring to account people bearing the greatest responsibility or whomever committed crimes during the colonial era. There are different reasons for why the colonial-era crimes were not investigated.

This section analyses reasons for why the country failed to deal with past atrocities and develop institutional reforms.

#### **3.1 Reasons for failing to deal with past atrocities**

##### **3.1.1 Nature of the post-colonial legal framework**

Chambers of the Belgian Parliament wrote the Fundamental Law and it was given to the post-colonial government on 19 May 1960. It had several limitations that prevented the judiciary from acting because of a lack of jurisdiction.

In principle, when the country gained independence, the Belgian courts no longer had jurisdiction. However, because of the lack of judges, prosecutors or lawyers, the Fundamental Law provided transitional

exceptions. According to Articles 189 and 253 of the Fundamental Law, until the Final Court of Appeal or the Court of Cassation and the Constitutional Court were legally organised, the Belgium Court of Cassation and the Belgium *Conseil d'Etat* had jurisdiction to deal with Congolese cases. Thus, in the meantime, the Belgium Court of Cassation played the role of the Court of Cassation of the Congo, while the Belgium *Conseil d'Etat* played the role of the Congo Constitutional Court. In addition, there was no provision in the Fundamental Law providing for which court could hold senior politicians accountable. For example, Article 19 provides that 'the person of the Head of the State is inviolable (...)'. From this provision, it can be noted that the Head of State could not be held criminally or civilly liable. This principle of inviolability was borrowed from Article 88 of the Belgian Constitution. In this regard, and referring to colonial-era crimes, it can be assumed that not only did no court of law have jurisdiction to bring to account the king, but in addition his person was inviolable. With regard to wrongful acts committed by senior Belgian officers representing the Kingdom of Belgium, Jean-Victor Louis states that the Belgian state was liable for the acts of the public authorities under its sovereignty.<sup>5</sup> In this regard, the *Conseil d'Etat* admitted to having jurisdiction for dealing with the appeal against the lawfulness acts 'of Belgian authority committed before the independence', but it rejected appeals against acts committed after independence – arguing that 'a Belgian court cannot rule on the legality of an act which is under the authority of a foreign State' (Louis 1966:737–738). This statement was a violation of the Fundamental Law which provided that Belgian courts have jurisdiction. It is also evidence that the post-colonial legal framework was judiciously designed to avoid prosecutions of colonial-era crimes. Thus, in July 1963, Articles 189 and 253 of the Fundamental Law were abrogated by the Constitutional Law. Therefore, the Belgium Court of Cassation and the *Conseil d'Etat* could not function or have jurisdiction in the Congo. Following chaotic

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5 Translated from the original version in French '*L'Etat belge devait répondre des actes des autorités publiques relevant de sa souveraineté*' (see Louis 1966:734).

developments, General Joseph Mobutu, then Chief Commander of the army, took political control of the country and declared himself Head of State in a *coup d'état* on 24 November 1965 (Tunamsifu 2016:146–147).

Thus, because of the destabilisation of all state institutions, including the judiciary, and the breaching of diplomatic relations between the Congo and Belgium, and given that the Belgian Court of Cassation and the *Conseil d'Etat* were limited to trying acts committed before independence while they rejected post-colonial cases, the judicial supremacy of the Belgian courts did not play an important role. In addition, if the King of the Belgians were to be prosecuted for crimes committed during the Congo Free State, both courts would not have jurisdiction according to Article 88 of the Belgian Constitution because his person was inviolable as the Head of the Kingdom of Belgium. Conscious of the lack of senior staff in the post-colonial regime, a cooperation agreement was signed after the re-establishment of diplomatic relations between the Congo and Belgium in 1964. It was focused on allowing officers to supervise the young Congolese administration and to provide medical assistance and technical assistance in the field of education. From the latter, professors were made available to the Congo through UNESCO (De La Buisserie 2009:9; Gendebien 1967:185–186).

### **3.1.2 Political unwillingness to achieve justice**

To avoid a potentially bloody colonial war, in early 1960 Congolese leaders were invited to Brussels for a round-table conference in order to discuss independence. The Congolese leaders and Belgian authorities agreed that independence would begin on 30 June 1960. While discussing the form and the nature of the round-table, the Belgian government sought to maintain control of telecommunications, the highest positions in the army, the various economic sectors and transport, the reserve bank, and foreign affairs. Thus, they wanted to organise a consultation meeting in which Congolese leaders would give only their opinion. However, on 22 January 1960, Moses Tshombe made a declaration requiring a formal commitment from the Belgian government, which would link its fate to

a vote on the projects resulting from the round-table. In addition, on 25 January, Kasavubu requested that the round-table be a true constituent assembly. Following both declarations, the Belgian communities requested from the Congolese a moral commitment regarding the security of their properties and investments (Cornevin 1989:378–379).

According to Jeanne M. Haskin (2005:20), “the Belgians made concessions, there were also many points on which the Congolese conceded.” In the researcher’s opinion there was a win–win deal for the Belgians to grant independence peacefully. From this assumption, one can believe that the post-colonial regime did not prosecute colonialists for colonial-era crimes – in exchange for independence. This attitude was followed by successive regimes in the DRC. That is why the transitional mechanisms adopted in 1991 and 2003 did not deal with crimes committed under the brutal colonial regime. Besides, prosecuting colonial-era atrocities would have been challenging given the lack of evidence and witnesses.

After the May 1960 general elections, Lumumba became the first prime minister and Kasavubu became the head of state. During the official independence commemorations, two speeches by King Baudouin and Kasavubu were scheduled. However, Lumumba improvised his own speech and it is considered to be the cause of the Congo crisis and his assassination. In his speech, King Baudouin praised Belgium’s colonial record – to which the Congo’s Head of State replied by also paying personal tribute to the king.

In response to the king’s speech, Lumumba, who was excluded from the official programme, presented an unscheduled and non-diplomatic speech which denounced colonialism’s brutalities:

We have known sarcasm and insults, endured blows morning, noon and night, because we were ‘negroes’ ... We have seen our lands despoiled under the terms of what was supposedly the law of the land but which only recognised the right of the strongest. We have seen that the law was quite different for a white than for a black: accommodating for the former, cruel and inhuman for the latter.

We have seen terrible suffering of those banished to remote regions because of their political opinions or religious beliefs; exiled within their country, their fate was truly worse than death itself ... And finally, who can forget the volleys of gunfire in which so many of our brothers perished, the cells where the authorities threw those who would not submit to a rule where justice meant oppression and exploitation ... We are no longer your monkeys. (Haskin 2005:21).

While Lumumba's speech was well appreciated, it had various consequences as many positions in the administration and the army were still under the control of Belgians.

The researcher believes that denouncing past atrocities was treason in the eyes of King Baudouin and his kingdom. Characterised as a diplomatic incident, Lumumba's speech was the point of departure of what was considered to be the first political Congolese crisis: he was assassinated on 17 January 1961. Belgium was continually accused of assassinating Lumumba, and 40 years after the assassination the Belgian parliament admitted that 'Belgium bears a moral responsibility for the killing of Lumumba.'<sup>6</sup>

It would be correct if both parliaments (DRC and Belgium) agreed to the establishment of an official mixed commission of inquiry tasked with investigating colonial-era crimes and how to restore the dignity of victims or their family members affected by the brutal colonial regime.

#### 4. Institutional reforms

During the colonial era, the colonial educational system, the *Force Publique* and the judicial sector were used to support the oppression and exploitation maintaining Belgian rule. Even if no Congolese had acquired

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6 In December 2001, a Belgian parliamentary commission of inquiry that was tasked to investigate the matter concluded that "Belgium bears a moral responsibility for the killing of Lumumba. (...) There was no documentary evidence that any member of the Belgian government gave the orders to physically eliminate Lumumba. However, it did find that King Baudouin knew of plans by Lumumba's opponents to assassinate him and that some Belgian officers had witnessed the killing" (see Villfana 2012:28–29).

any experience, there was a need for these institutions to be reformed. In this regard, Tunamsifu (2016:60) observes that societies transitioning from repressive rule to democracy may include a vetting process – one of the measures of transitional justice to exclude dangerous people or persons who lack integrity that had planned, ordered or executed atrocities – from participating in reformed institutions.

### **4.1 Educational system reform**

During the colonial era, colonial missionaries were ordered by King Leopold II to teach the history of Europe rather than local history, and inter alia to abandon the mystic system (see Leopold II's letter 1883). This colonial educational system was used to support colonial policies and had influenced the post-independence educational system. Transitional justice mechanisms refer to the processes by which nations attempted to move from conflict, brutal colonial regimes, authoritarianism or oppression characterised by systematic violations of norms to more well established democratic legal regimes which can protect against such occurrences in future (Davies 2017:2). As education had been used to support colonial policies that implemented a segregation policy and which were used to exacerbate divisions between Black elites and the rest of the Congolese population, more attention could be paid to the specific educational legacies of the brutal colonial regime. Nevertheless, after independence, the specific educational legacies of repression and human rights violations during the colonial era were put aside. The teaching of history is still mostly dominated by European rather than Congolese or African history. According to Duthie and Ramirez-Barat, “the contribution that education can make to move on depends on measures such as the (...) sensitivity of reforms and programs to the legacies of past injustices in the education sector itself” (2018:18).

### **4.2 Justice sector reform**

Under the colonial administration, the justice sector was a tool for maintaining authoritarian rules. This colonial regime also implemented a segregation policy because some laws were applied for White people and

others for Black people. Referring to Grévisse (1949:47–55), Crawford Young (1965:102) argues that elders who were not formally educated were appointed to serve as judges in the native courts. They applied de facto pseudo-traditional legal principles. Even by Independence Day, no Congolese were qualified to work in the courts that applied civil law. Those who formed part of elite communities were appointed and trained to serve as judges in low-level courts of law but at the highest level the Belgian courts would have jurisdiction.

In the aftermath of colonisation, the DRC maintains a dual system of justice, learning from the colonial system. It is composed of the classic courts and the customary tribunals. The first applies the civil law (written law and unwritten law or customary law) organised by the judicial reform of Ordinance No. 82-020 of 31 March 1982 on the Organisation and Jurisdiction of the Courts (*Code de l'Organisation et de la Compétence Judiciaire, COCJ*). The second, the customary tribunals,<sup>7</sup> applies custom formally established and organised by the Decree of 15 April 1926, as it has been amended and supplemented from time to time (Tunamsifu 2011:171). The local customs regulate matters relative to custom when they are not contrary to the Constitution, the law, public order and good morals (Article 207 of the Constitution of 18 February 2006 as amended in 2011). About the written laws, there are no longer segregated laws because all laws are applied equally to all – even if the dignitaries have the privileges of the courts.<sup>8</sup> The Congolese judicial system is a written legal system that was modelled on the Belgian system. The latter derives from the 1804 Napoleonic Civil Code of France. Like so many other institutions, the Congolese judicial system was affected

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7 The customary tribunals are gradually being replaced by the *Tribunal de Paix*, depending on the willingness of the executive. See *l'Ordonnance no 89-13 du 3 juin 1989 et Loi organique no 13/011-B du 11 avril 2013*.

8 Article 163 provides that the Head of the State together with the Prime Minister are criminally accountable before the Constitutional Court. Ministers, members of parliament, the highest magistrates and dignitaries are tried before the Court of Cassation. (Article 153).



by the dictatorship regime, by different political crises, and by various armed conflicts. In this regard, Tunamsifu (2016:286) acknowledges that little reform was made in the judicial sector. However, there is still a long way to go in respect of judicial independence and the political will to deal with the legacies of past gross violations of human rights and international humanitarian law. In a shocking statement delivered on 21 September 2019 in the media, President Tshisekedi declared that he had “no time to rummage into the past” and hold accountable those who are most culpable for serious international crimes (Amnesty International 2020). Whereas Article 149, 2 of the Constitution provides that “[j]ustice is rendered on the whole of the national territory in the name of the people”, ensuring prosecution of past and present crimes committed against the people must be the priority of the president who is promoting the rule of law.

Fortunately, Belgium’s King Philippe has twice expressed his deep regrets for the colonial past which was marked by abuse and humiliation inflicted during 75 years under Belgium’s brutal colonial rule. Because of these wounds and past injuries, the pain is regularly revived by the discrimination that is still present.<sup>9</sup> In addition, Article 69, 2–3 stipulates that the president sees respect for the Constitution and assures the regular functioning of public powers. Thus, the responsibility to deliver accountability for all crimes must not be left behind. Unhappily, when the Belgian king reaffirmed his deepest regrets for the abuses and humiliation inflicted during the colonial era, it was crucial for the Congolese government to put forward recommendations for a reparations programme. However, President Tshisekedi said during a press briefing that “We did not dwell on the past, which is the past and which should

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9 The first expression of regret for Belgium’s colonial past was the king’s message released in a letter to the Congo President to mark the 60<sup>th</sup> anniversary of Congo’s independence on 30 June 2020 (see Abnett and Strauss ‘Belgian king express deep regret for colonial past in Congo’, available from: <https://www.reuters.com/article/us-belgium-congo-king-idUSKBN24113E> [Accessed 4 September 2022]). The second expression of deepest regret was reaffirmed in June during the King’s historic visit to the DRC.

not be reconsidered, but we must look to the future.” Furthermore, he said that he was focused on boosting cooperation with Belgium.<sup>10</sup> The researcher believes that the rights to remedy and reparation for victims of colonial atrocities are essential elements for sustainable cooperation between the DRC and Belgium. In other words, there cannot be sustainable cooperation when the colonial past is forgotten or when the right to remedy and reparation for victims of past colonial atrocities is forgotten or left behind.

### **4.3 Security sector reform**

Since the colonial era, the army has been the tool for enforcing the harsh policies of the rulers. Through several stages and periods, the army committed various atrocities, but less attention was given to reform in the aftermath of colonial rule. For example, King Leopold II created the *Force Publique* in 1888 (Hochschild 2007:211) as a type of paramilitary army, and it remained in place when the Belgian government took over the colony. The members of the *Force Publique*<sup>11</sup> were recruited locally and included mercenaries from other countries under the command of Belgian officers. It was tasked to maintain public order in the colony and to enforce the forced labour policies. Those who resisted were violently suppressed or killed – with almost no judicial action against alleged offenders.

In 1960, when the country gained independence from Belgium, the army was not reformed. Since then, the Congolese army has been going through various transformations in terms of changing the name and introducing various structures – but without any meaningful reform.

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10 For more read Gbadamosi, N. ‘Belgium offers regret – but no reparations – to Congo’, available from: <https://foreignpolicy.com/2022/06/15/belgium-congo-king-philippe-colonialism-tshisekedi/> [Accessed 4 September 2022].

11 The *Force Publique* performed well during the First World War and helped fight off invading German colonial forces in East Africa, while during the Second World War it did the same with Italian forces in East and West Africa and in the Middle East. However, in Belgium and in various countries where Congolese soldiers fought, there is no recognition to honour the memories of those who died in the battlefield.

For example, many mutinies, secession, branch dissidents and rebellions, human rights violations including gender-based violations, looting, and pillage have been observed. However, instead of applying the vetting or lustration process, perpetrators and warlords are promoted in the security sector institutions as the result of peace deals, and prosecution of high-profile individuals or their removal has been extremely rare (Human Rights Watch 2011:11; Tunamsifu 2016:36, 153).

Thus, it can be noted that the members of the *Force Publique* were recruited and trained to enforce policies of the colonialists and they suppressed whoever resisted them. In the post-colonial period, the *Force Publique* was reversed within the Congolese National Army without special training for a republican army. Following various armed conflicts, this practice has not been changed because as part of political negotiations, all armed wings of different rebel groups have been integrated into the National Army and National Police (see Section VI of Global and Inclusive Agreement on Transition in the DRC: Inter-Congolese Dialogue – Political Negotiations on the Peace Process and on Transition in the dialogue of 2002 [in the DRC], Article 1, 1.1a of *Accord de Paix entre le Gouvernement et le CNDP* [2009]).

#### **4.4 Zairianisation [nationalisation], radicalisation and retrocession**

During the colonial era, local communities were dispossessed and did not have access to economic opportunities. In 1965, Mobutu took full power after a *coup d'état*, and later the country went through an acute economic crisis because of rising oil costs and a dramatic fall in the price of copper. Then, Mobutu embarked on a policy of *Zairianisation* and

radicalisation<sup>12</sup> of the economy in 1973,<sup>13</sup> which involved nationalising all foreign business. In this regard, it was decided that inter alia firms, farms, plantations and companies owned by foreigners should be returned to Zairian people. Unfortunately, most of the new owners were not sufficiently prepared to run businesses or to adequately manage the properties acquired. Consequently, *Zairianisation* was a big failure and had the effect of restricting foreign investments in Zaire. Therefore, in 1976, Mobutu issued a decree on *retrocession* handing back companies to their former foreign owners. The government promised to compensate foreigners (mostly Belgians) who had lost assets during *Zairianisation*. It allowed foreigners whose property had been expropriated to recover 60% of their assets. This led to a Belgian renewal of interest in investment (Kisangani & Bobb 2010:48). However, it was agreed that former owners had an obligation to find a Zairian buyer for the remaining 40% over

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12 According to Lukombe Nghenda, *Zairianisation* is the set of measures by which the state, by virtue of its sovereignty, decided to withdraw from the hands of foreigners, their property, economic activities and units of production, and which the state subsequently yielded only to the Congolese, both physically and morally. However, the measures by which the state has taken over the large units of production and economic activities that formerly belonged to foreigners and to the Congolese are called radicalisation (see Nghenda 2003:864).

13 In the meantime, the land law was adopted on 20 July 1973. The law recognises that individuals only have the rights of enjoyment. Thus, Article 53 of the land law provides that “the soil is the exclusive, inalienable and imprescriptible property of the State”. Reinforcing this provision, Article 9 of Constitution provides that “the State exercises permanent sovereignty, in particular on the soil, subsoil, (...)”. This is why the first Chapter of the new Mining Code of July 2002 has the merit of reaffirming the principle of speciality that the rights arising from the mining concession are distinct from those of the land concessions, so that a land concessionaire cannot rely on its contract or certificate to claim any property rights over mineral substances contained in the basement. However, since its adoption and amendment in 1980, the land law has been a major source of conflict between communities because of the poor governance of land allocation. Thus, since July 2012, the initiative to revise the land law has been supported in order to resolve and prevent conflicts and land issues.

several years, but the number of those who returned to Zaïre to pursue businesses is unclear (Waites 2012:288).

In fact, *Zaïrianisation* ensured that Mobutu had a large number of resources to distribute among his patrimonial network of clients, and he gave everyone a free hand to ‘*debrouillez-vous*’ – fend for yourselves – reinforcing the corruption that would become characteristic of the Congo (Willems 2015:69). More than four decades later, the consequences of *Zaïrianisation* are still felt – such as corruption, tribalism, ethnicity, favouritism, pillage, bad governance and mismanagement, and lack of transparency in public affairs. That is why, while experiencing mechanisms of transitional justice for the first time in 1991, and among Committees that were adopted to deal with Mobutu’s rule, there was the *Commission Nationale des biens mal acquis* (or National Commission of properties acquired fraudulently or Commission of ill-gotten property). This Commission was tasked to investigate cases related to ill-gotten property and to formulate practical recommendations allowing all victims, including the state, to recover the property that was deprived following diversion, spoliation or unjust enrichment by official or private persons (Tunamsifu 2018:33). Unfortunately, although the Commission provided a complete list of all alleged offenders who were liable with regard to ill-gotten properties, it was terminated as Mobutu’s collaborators would have been held accountable for mismanagement (Tunamsifu 2016:152).

### 4.5 Governance reform

Because of the colonial educational system, very few Congolese had acquired any skills or experience with ruling the country after the colonisation period. This explains the political crisis that arose on the misinterpretation of the constitutional provisions of the *Loi Fondamentale* (Fundamental Law) by President Joseph Kasavubu and Prime Minister Patrice Lumumba (Tunamsifu 2016:146).

In 1883, the letter from King Leopold II (Arnaut n.d.) instructed colonial missionaries “to keep on disinteresting Congolese from the richness, but

also to use the money supposed for the poor to build the flourishing business centre. Through the confessional system, they were invited to denounce any black that has different consciousness contrary to that of the decision-maker.”

It is unfortunate that Congolese leaders mismanaged the country in order for them to become very rich – like King Leopold II. In this regard, Nzongola-Ntalaja (2007:2) argues that Mobutu and Kabila have replicated the Leopoldian regime in post-colonial Congo. For example, Mobutu led the country for 32 years (1965–1997) and his regime was characterised by corruption and mismanagement.

Although the country has a foreign debt of more than USD 5 billion, President Mobutu was estimated to be the second richest man in the world, with more than USD 8 billion in a numbered personal account at a Swiss bank (Acquaah-Gaisie 2006:221). By contrast, the former President, Joseph Kabila, who led the country from 2001 to January 2019, has a personal fortune of about USD15 billion in banks in the British Isles and elsewhere (Ivoire Business 2014).

While Article 58 of the Constitution of 18 February 2006, as amended in 2011, provides that Congolese people have the right to enjoy the national wealth, unfortunately such resources have been poorly managed and unequally distributed; the population do not benefit from them and it is very difficult to hold state actors accountable (Tunamsifu 2014:247–249).

Most of these problems have a long history dating as far back as the colonial era. In particular, the colonial administration established a system of state-condoned exploitation of national resources for the personal enrichment of the rulers. This practice that was passed on from King Leopold II to the Belgian colonial administration and to the post-independence regimes (UNESCOA 2015:2).

## 5. Conclusion

Since the period of colonisation, the DRC has witnessed difficult periods characterised by various human rights violations. These were preceded or were followed by negotiations in their different forms. Those events and periods have resulted in many changes in terms of actors and the country's names. Nevertheless, the colonial legacy has been replicated in the post-colonial DRC.

In the post-colonial periods, the country went through many events, such as the political instability after independence because of poor preparation for self-rule, Mobutu's *coup d'état* in 1965 and his 32 years of dictatorship during which time he renamed the country the Republic of Zaire in 1971, with it renamed again in 1997 as the DRC when Mobutu was overthrown. From 1996, the country entered into various armed conflicts in which unspeakable human rights offences have been (and still are) committed. Since 1991, conferences, dialogues and peace deals have established mechanisms of transitional justice dealing with atrocities committed since 1960. However, the country has lost opportunities to hold perpetrators accountable. In 1991, the *Conférence Nationale Souveraine* (CNS) established two commissions. The first for dealing with cases of assassinations and human rights violations and the second for dealing with ill-gotten property. In 2002, the Sun City Peace Accord put in place the Truth and Reconciliation Commission and the Amnesty process.

To conclude, the researcher believes that transitional justice mechanisms adopted in the DRC left the colonial legacy uninvestigated for the following reasons:

- The nature of the post-colonial legal framework and the effects of the political crisis that destabilised all state institutions immediately after the independence.
- Informal arrangements between the Congolese elite and the Belgian Congo prohibited the post-colonial regime from prosecuting colonial-era crimes in exchange for granting independence peacefully.
- The 1991 and 2003 transitional justice mechanisms left victims of colonial-era atrocities with their grievances unattended to because of time issues, problems with accessing sufficient evidence, and because the colonial administration destroyed all documents and archives to hide the crimes committed. Obtaining testimonies from victims and witnesses for colonial-era atrocities during an enquiry and obtaining access to potential evidence against alleged perpetrators remained a challenge.

In order to restore the dignity of the affected persons who individually or collectively suffered harm as a result of colonial-era crimes, both countries – the DRC and Belgium – should establish an institution that helps to ensure that past injustices are uncovered and acknowledged.

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