



AFRICA POLICY BRIEF

Towards a renewed transitional justice in the D.R. Congo

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This paper examines the efforts by the current Congolese Government to relaunch a transitional justice process to address past and current widespread and mass crimes perpetrated in the DRC. The agenda for a renewed transitional justice coincides with the celebration of the 10th anniversary of the United Nations' 2010 report mapping human rights violations in the DRC committed between 1993 and 2003 ('Mapping Report'). The brief examines and explores the prospects for a renewed transitional justice process in the country, while identifying internal and external opportunities and the challenges ahead.

statement in which he expressed his commitment to launch a transitional justice (TJ) process to address past and current mass human rights violations committed throughout the country. This public declaration reaffirmed the decision already taken by the Council of Ministers in August 2020 to consider the adoption of official texts regulating TJ in the DRC. These new developments at official level occurred at a time when increased initiatives, both private and official, were taken in and outside the country to encourage the implementation of the 2010 OHCHR Mapping Report, which documents more than six hundred serious crimes perpetrated in the DRC between March 1993 to June 2003. These initiatives included the public campaign for the celebration of the [10th anniversary](#) of the publication of the Mapping Report (alongside the continuing advocacy by Dr Denis Mukwege, 2018 Nobel Peace Prize Laureate from the Panzi Hospital); the adoption by the [European Parliament](#) of a resolution calling for the establishment of an ad hoc international criminal tribunal for the DRC as well as the arrest of a former rebel leader

INTRODUCTION

On 6 December 2020, President Félix Antoine Tshisekedi of the Democratic Republic of the Congo (DRC) made a

Roger [Lumbala](#) by the French judicial authorities, on the basis of information included in the Mapping Report.

In this new context, three civil society organisations, namely the *Consortium des organisations de la société civile pour la justice transitionnelle* (under the leadership of two major religious umbrella organisations, the *Conférence épiscopale nationale du Congo* and the *Église du Christ au Congo*), Trial International and the *Club des Amis du Droit du Congo* (CAD-Congo) seized this momentum to convene an expert roundtable to examine and discuss the appropriate modalities for a TJ process in the DRC, taking into account the country's specificities. This expert roundtable that took place in Kinshasa on 26-27 January 2021, provided the opportunity to bring together all the Congolese actors working in the field of TJ in the DRC as well as bilateral and multilateral partners, foreign academics and experts. In light of the outcome of the expert roundtable, the aim of this paper is to examine and evaluate the recent and current dynamics towards a renewal of TJ in the DRC. It will start by briefly laying out past transitional justice efforts in the DRC. The brief will then proceed to examine current transitional justice processes. Finally, it will conclude with some reflections on the opportunities and challenges for transitional justice in the DRC.

PAST TRANSITIONAL JUSTICE EFFORTS

The decline and collapse of Mobutu's dictatorship at the end of the 1980s paved the way to hold the *Conférence nationale souveraine* (CNS), an inclusive consultation aimed at

building a new constitutional and political order. As in several other African countries, including the Republic of the Congo (Brazzaville) and Niger, the Congolese CNS established, inter alia, a *Commission des assassinats politiques et des biens mal acquis* that produced a list of individuals who were allegedly responsible for political assassinations and theft of public money or goods during Mobutu's rule. However, as in other areas discussed by the CNS, no action was taken against these individuals. This instance nonetheless constituted a precedent for the establishment of future TJ mechanisms for the DRC.

In 2001, the Inter-Congolese Dialogue process was launched, under South Africa's mediation, to put an end to the civil and regionalised wars experienced by the DRC since 1998. This resulted in the signing of the 2002 Global and Inclusive Agreement in Sun City (South Africa) by Congolese conflict actors and representatives from the political opposition and civil society groups. The peace accord recommended, inter alia, the creation of an ad hoc international criminal tribunal for the DRC and a truth and reconciliation commission. The Congolese government's request to create an ad hoc international criminal tribunal was unsuccessful at the UN Security Council, as the latter was reluctant to establish such a costly tribunal and because the International Criminal Court (ICC) was already involved in the situation in the DRC. A truth and reconciliation commission (CNVR) was established in 2003 (the law was adopted in 2004). According to its rules of procedure,

the CNVR, among others, was tasked with examining human rights violations; supporting the prevention and resolution of inter-communal conflicts; serving as a platform for peacebuilding, justice and reconciliation; and contributing to healing and trust building among the Congolese. For many reasons, including the politicised membership of the [CNVR](#), its complex mandate and mismanagement, the commission was unable to successfully complete its missions and activities. Nonetheless it was eventually involved in [settling](#) some local conflicts among rival communities in eastern DRC. Despite the failure of the CNVR, the creation of a new truth and reconciliation commission, among others, has been recommended in many instances and reports, including the Mapping Report.

In 2008, the UN Secretary-General requested that the Office of the UN High Commissioner for Human Rights (OHCHR) take the lead in mapping the alleged international crimes perpetrated in the DRC from 1993 to 2003. The objective of the mapping exercise was to document the alleged crimes perpetrated before the period excluded from the temporal jurisdiction of the ICC, whose jurisdiction in the DRC is limited to the period after the entry into force of the Rome Statute for this country (2003). The OHCHR concluded this investigation in August 2010, in close cooperation with the UN Department of Peacekeeping Operations (DPKO) and UNDP. In addition to the documentation of more than six hundred serious human rights violations and breaches

of international humanitarian law that could amount to crimes against humanity, the [Mapping Report](#) recommended setting up new TJ mechanisms to address impunity for these crimes. The proposed mechanisms encompass both retributive and restorative measures, including special chambers in the Congolese judicial system, a hybrid court including foreign magistrates, the establishment of a new TRC, reparations, judicial reforms and vetting of the security services.

However, the Congolese Senate rejected a draft proposal for the establishment of criminal judicial bodies including foreign magistrates. The main reasons for this were political, including concerns over the presence in Congolese public offices of several personalities presumably involved in the crimes documented by the Mapping Report and the opposition of some countries in the region, in particular Rwanda, whose troops were allegedly involved in the perpetration of these crimes. In the meantime, the only TJ mechanism that has been permanently involved in the DRC has been the [International Criminal Court](#) (ICC). Over the past two decades, the ICC has investigated and prosecuted several key actors involved in commissioning international crimes committed in the DRC. These proceedings have resulted in the arrest and conviction of Ituri rebel leaders Thomas Lubanga, Germain Katanga and Bosco Ntaganda, the acquittal of Ituri rebel leader Ngoudjolo Chui, and the rejection of charges against FDLR rebel leader Callixte Mbarushimana.

CURRENT TJ INITIATIVES AND PROCESSES

While progress on transitional justice in the DRC has been slow and impunity for human rights violations remains a key challenge, a variety of TJ initiatives have been initiated in the DRC in recent years. These have included both formal and informal [mechanisms](#), the best known being the military courts dealing with international crimes and the local peace committees (mostly in eastern DRC).

International Crimes before the Congolese Mobile Military Courts

In eastern DRC and several other regions, the military courts have been conducting prosecutions and trials of the presumed authors of international crimes, in accordance with the Congolese Criminal Code. They mostly operate through [mobile courts](#) in order to guarantee better access of victims and witnesses to the courts. According to the Plan of the Joint Committee of Justice (2007) and the Ministry of Justice's Roadmap (2009), the national justice reform programme is aimed at promoting [local participation](#) and ownership of transitional justice by the affected population with the objective of bringing justice closer to the population to strengthen the fight against impunity and the credibility of the justice system.

Avocats Sans Frontières (ASF), an international non-governmental organisation working on access to justice and the rule of law, has observed the proceedings of the military courts, in particular with regard to the issue of reparations. In a recent [policy brief](#) published in October 2020 it stated that by

mid-2020 thirty-eight judgments had been issued by the criminal courts, mostly convicting the members of the National Armed Forces of the DRC (FARDC). About USD 27,000,000 in reparations have also been awarded to nearly 3,300 victims. However, effective disbursement of these reparations has only occurred in one case, thanks to political interference of a minister.

As illustrated by the above-mentioned evaluation, the military courts have had a limited impact in the field of TJ. This is why the participants in the Kinshasa expert roundtable of 26-27 January 2021 recommended, inter alia, the establishment of further retributive TJ mechanisms such as a hybrid court to try the presumed authors of international crimes perpetrated since 2003 and/or an ad hoc international criminal tribunal for the DRC. Participants in the roundtable also recommended to address the problem of constitutional immunities, the high cost of criminal procedures as well as the need to outline the interaction of criminal trials with other TJ measures and mechanisms, including a truth commission (transfer of its files to the hybrid court), reparation programmes, the vetting of former civil servants, etc.¹

Local Peace Committees

In several African countries, particularly in rural areas, communities facing violent conflicts or emerging from war have developed indigenous peacebuilding mechanisms, generally inspired by [African dispute settlement mechanisms](#). They provide good offices and mediation to local

communities involved in intercommunal tensions and/or conflicts, particularly regarding land properties and/or customary ruling. They are respected among the population that has greater confidence in these processes than in official or formal justice institutions. The ultimate goal of their intervention has been reconciliation between the concerned communities. They are often backed by international humanitarian NGOs. For example, in Ivory Coast the « *comités de paix* » recently played a critical role in intercommunal reconciliation processes, in particular in the western part of the country which faces a situation of state vacuum. They succeeded in addressing local conflicts, including [deadly land disputes](#). In the Central African Republic (CAR), similar « *comités de paix* » were established in Bangassou (in the *préfecture* of Mbomou) and in Bria (eastern CAR) in the aftermath of 2012-2013 with the support of Search for Common Ground and Caritas.²

In eastern DRC, communities at conflict have also established such local peace committees. A recent [study](#) looking at these practices in Burundi (Cibitoke Province) and eastern DRC (Uvira Territory) points out the challenges faced by the members of local peace committees, who generally have to operate in conflict environments. Moreover, due to the involvement of political actors in the local conflicts, they have been unable to address the structural or underlying causes of the latter, including, for example, the widespread presence of arms in the Ruzizi Plain.

Despite the above-mentioned limitations, local peace committees have the potential to strengthen the preventive dimension of TJ. Their

role in intercommunal reconciliation after conflicts has been crucial in preventing the resumption of violence. Local peace committees are thus able to complement the healing function of the truth and reconciliation commissions, which are curative rather than preventive mechanisms.

PROPOSED NATIONAL AND PROVINCIAL TJ MECHANISMS

The most notable recent initiatives on TJ in the DRC are, on the one hand, the draft governmental decrees on the establishment of a National Transitional Justice and Reconciliation Commission (NTJRC) and a Reparations Fund for Victims of mass crimes (hereafter: Reparations Fund) and, on the other hand, the proposed creation of a provincial truth, justice and reconciliation commission (PTJRC) for the Central Kasai.

Draft Governmental Decrees on TJ

In 2020, the Congolese government initiated the drafting of two decrees providing for the establishment of a new truth and reconciliation commission and a reparations fund for the victims of mass crimes. According to Article 2 of the draft decree establishing the NTJRC, the proposed national commission would be tasked, *ratione materiae*, with a wide-ranging mission including: (i) the investigation of serious human rights violations; (ii) the prevention and management of intercommunal conflicts through mechanisms such as community mediation to foster reconciliation; (iii) the provision of responses to the trauma caused by the above-mentioned violations; (iv) the

identification of the victims of these violations; (v) the elimination of tribalism, intolerance, exclusion and all other forms of hate; (vi) the contribution to healing among the perpetrators and victims of human rights violations; and (vii) proposing guarantees of non-recurrence measures.

Ratione loci, the mandate of the proposed national commission extends to the entire territory of the DRC (Article 3). At institutional level, it would consist of a pilot committee and operational commissions (Article 4). The former would be composed of representatives of the relevant ministries and civil society organisations (Article 5). The operational commissions would be tasked with the mandate to conduct field missions in order to evaluate the damages caused to the victims and to report it to the reparation fund through the pilot committee. The operational commissions, which could include national and foreign experts, would be appointed by the Minister of Human Rights (Article 7).

As far as the draft decree on the establishment of a reparations fund for victims of serious crimes is concerned, it includes a set of provisions dealing with organisational and financial factors (establishment, composition, operation, funding, in Sections II, III, IV and V). The draft does not address substantive issues. It is expected that once established, the first leaders would adopt guidelines and rules of procedure dealing with legal and procedural aspects of the reparation that goes beyond financial compensation and encompasses other important factors such as moral

support, satisfaction, restitution, collective reparation and the development of memorial sites.

The Kinshasa expert roundtable discussed, among other issues, these two draft governmental decrees on TJ. The main two criticisms that were formulated relate to the legal framework and composition of the proposed mechanisms. Participants were of the view that the proposed mechanism, in particular the National Commission on Transitional Justice and Reconciliation, should be established by law rather than through a decree (administrative act). In addition, they rightly pointed out the over-representation of political bodies in its membership. In order to improve the existing draft decrees, several recommendations were made: (i) the adoption of a national TJ strategy before the establishment of the proposed national commission; (ii) the establishment of the latter through a legislative act and not a decree; (iii) the handing over of the files reviewed by the TRC to justice institutions after the truth processes; (iii) the limitation of the duration of the proposed commission to ten years; and (iv) the establishment of the reparation fund after the truth process. In the author's view, recommendations (iii) and (iv) should be open to discussion in the light of the practice and lessons learned from comparative experiences and in view of the average life expectancy in the DRC. There is a risk that most of the victims could die before the end of the commission's work if they have to wait until it is concluded for reparation.

The Provincial Truth, Justice and Reconciliation for the Central Kasai

In 2016, a violent conflict occurred in the province of Central Kasai between several opposing communities about the inheritance of customary power. This *Kamuina Nsapu* conflict spread through the Central Kasai province and its neighbouring provinces from 2016 to 2018 and involved several militias from local communities. The conflict resulted in [mass atrocities](#) causing thousands of killings and looting of property in all communities. The UN Human Rights Council set up and deployed a team of experts mandated to investigate the human rights situation and to assist the national and provincial authorities as well as stakeholders to address the lingering consequences of this conflict. According to the team of experts, the conflict resulted in the death and/or injury of several thousands of people, the disappearance of many others, sexual violence, and about 1,4 million displaced persons as well as 35,000 refugees in neighbouring Angola. The conflict also led to the forced enrolment of 1,220 young boys and 658 girls in the *Kamuina Nsapu* militias. While 416 schools and 224 health care centres were looted and/or burnt. Based on these findings, the UN team of experts concluded that the human rights violations and breaches of international humanitarian law perpetrated in this context could amount to crimes against humanity and recommended, inter alia, the establishment of mechanisms to address impunity for these crimes while also setting up processes to promote reconciliation among the affected

communities. This recommendation echoed those made by the [Conference on Peace, Reconciliation and Development in the Kasai](#) region convened by the national government in Kananga from 19 to 22 September 2017.

For its part, the UN team of experts organised a workshop on reconciliation in the Kasai regions, held in Kananga, on 17 and 18 April 2019. Participants in this workshop recommended the adoption of several measures by the national and provincial authorities, including the prosecution and trial of the presumed authors of the crimes perpetrated during the *Kamuina Nsapu* conflict, the creation of a ministry of national reconciliation and the establishment of TJ mechanisms comprising a truth and reconciliation commission in each of the five provinces in the Grand Kasai area (Kasai, Central Kasai, Eastern Kasai, Lomami and Sankuru). A peacebuilding project named «Paix, Justice, Réconciliation au Kasai Central» (PAJURR) was also developed, with funding from the UN Peacebuilding Fund and the National Special Fund which was initiated by the Congolese Government and implemented with the support of UNDP and the UN Joint Human Rights Office.

With the support of this project and in accordance with the Central Kasai provincial government's action plan for the period 2019-2024, in August 2019 the latter was able to hold [provincial consultations](#) on the «Need for Justice, Reparations and Prevention of New Conflicts in the Kasai Province». The report of these consultations recommended, inter alia, (i) to the Head of State, to ensure the implementation of the report's

recommendations; (ii) to the Central Government, to provide support to the TJ process in the Kasai; and (iii) to the Provincial Assembly of the Central Kasai, to formally adopt an act establishing the proposed provincial truth and reconciliation commission. The Kinshasa expert roundtable of January 2021 also discussed the issues pertaining to the proposed provincial TRC for the Central Kasai. The experts questioned whether the Provincial Assembly has the legal authority under the Congolese constitution to create such a commission. Eventually, they recommended that the proposed commission act as a building block in the development of a decentralised TJ system in the DRC.

OPPORTUNITIES, CHALLENGES AND PROSPECTS OF A NEW TJ PROCESS IN THE DRC

There is a momentum for the renewal of TJ in the DRC. This momentum proceeds from several factors, most notably the change in national political dynamics since the election of President Félix Tshisekedi and the readiness of the international community to support the fight against impunity and corruption. The latter is also at the top of the agenda of the new Congolese political leadership. The latter has clearly taken a position for TJ in response to the prevailing insecurity in eastern DRC. Despite these positive developments, there are still several challenges and constraints to move the new agenda forward for TJ, several of which were identified by the government itself in its 2017 *Politique nationale de réforme de la justice*. These include: (i) the weak judicial response to the widespread commission of international crimes; (ii) the inadequate criminal legislation in place in the DRC in light of international standards and norms; (iii) the lack of judicial cooperation with the countries from the

region; (iv) the absence of a national strategy to fight impunity; as well as (v) the insufficient protection of victims and witnesses.

In addition to the above-mentioned challenges, the Kinshasa expert roundtable identified as other constraints the multiplicity of TJ initiatives and the lack of a clear vision on the part of the national authorities (as illustrated by the controversial draft decrees on TJ as well as the absence of a national comprehensive strategy in this field). The latter is a prerequisite for a reliable and consistent TJ process. To address these gaps, the experts recommended holding a symposium and commissioning a mapping study on the various existing TJ initiatives in the DRC. Both the symposium and the study would pave the way for holding the *Etats généraux de la justice transitionnelle* under the Congolese government's leadership as it did for the justice reform in 2015. The outcome of these *Etats généraux* would inform the national authorities and stakeholders about the adoption of a national strategy or policy on TJ. Possible strategic axes of this policy include: (i) the mapping of past and current TJ initiatives with a view to developing a consistent and comprehensive approach in this field; (ii) the [decentralisation](#) of TJ; (iii) defining the interactions of TJ with the national justice reform policy; (iv) the promotion of interaction between the proposed TJ in the DRC and the Belgian commission on the colonial past, as far as [colonial abuses](#) are identified as one of the root causes of the deadly conflicts, in particular in eastern DRC; and (v) the national leadership and ownership of the TJ process.

CONCLUSION

The above analysis provides a basis for three conclusions. First, the current formal (ICC and military courts) and informal (local peace committees) TJ initiatives and processes constitute building blocks for the adoption of a holistic approach to TJ in the DRC. To address the existing gaps and weaknesses in this field, there is an urgent need to adopt a national comprehensive strategy on TJ and to hold the États généraux de la justice transitionnelle for this purpose.

Secondly, because of the multiplicity of TJ initiatives and the diversity of conflict dynamics in the country, more consideration should be given to a decentralised approach to TJ, rather than the establishment of national mechanisms. The Congolese government seems to have reflected this factor in its draft decree on the proposed NTJRC. The approach adopted in this draft decree as well as the proposed TRC for the Kasai could be a good basis for the decentralisation of TJ. This trend does not exclude the possibility of establishing umbrella structures to support coordination and the sharing of good practices and lessons learned at the national level.

Thirdly, the national leadership and ownership of the new TJ in the DRC should be at the heart of the process. In this regard, there is a need to develop a shared and common vision on TJ among the national authorities and stakeholders, including civil society organisations and victim associations. To this end, the international community, including the African Union, the European Union and the United Nations should continue to provide support for strengthening the national capacities for a stronger ownership and the sustainability of the process.

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Endnotes

¹ «Rapport général de la Table ronde d'experts sur la justice transitionnelle en République démocratique du Congo, Kinshasa, 26-27 janvier 2021», Kinshasa, 2021, p. 6 (Unpublished document; copy on file with the author).

² Testimony by Abbé Alain Bissialo at the Justice and Reconciliation Commission of the Bangui National Forum for Peace and Reconciliation in the CAR, 25 May 2015. The present author acted as a member of this Commission, on behalf of the United Nations.



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