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Reflections on a decentralized approach to transitional justice in the DR Congo

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After decades of conflict, state violence and widespread impunity, recent political changes in the Democratic Republic of the Congo seem to be creating renewed prospects for the establishment of transitional justice processes. President Tshisekedi has signalled his interest in creating such processes, while local activists and the UN mission in the DRC are using this opportunity to further press their long-standing demands in this area. This policy brief is inspired by discussions that took place at a workshop organised in January 2021 in Kinshasa by civil society groups to outline what transitional justice in the DRC should look like. While many important points were discussed on this occasion, one interesting question that was raised was whether it might be feasible and appropriate to engage in decentralised approaches to transitional justice. This brief aims to contribute to this reflection by outlining the three forms that such decentralisation could take – minimal, maximal and grounded – and how it might be put into practice in the DRC.

INTRODUCTION

After a long slumber, the Democratic Republic of the Congo (DRC) seems to be reawakening to the possibility of transitional justice to address the country's heavy, decades-long legacy of mass human rights violations. At a meeting of the Council of Ministers in August 2020, President Félix Tshisekedi called for the establishment of transitional justice mechanisms, a statement which he reiterated in his address before the United Nations General Assembly a month later. Subsequently, two decree proposals for the creation of a national commission on transitional justice and a reparations fund for victims were drafted by the Congolese Minister of Human Rights (although, at the time of writing, these have not been officially adopted). As far back as 2017, the National Justice Reform Policy defined strengthening measures to combat impunity for international crimes as a central objective. At the same time, in its September 2020 report on the UN mission in the DRC (MONUSCO), the organisation urged the Congolese government to adopt a national transitional justice strategy. Progress in combatting impunity has also been defined as a key benchmark against which to assess decisions about MONUSCO's progressive withdrawal from the country.

The DRC has a chequered past when it comes to transitional justice. As part of the Comprehensive Peace Accord adopted in 2002, several transitional justice measures were slated for creation, but these either failed to materialise (vetting of the security forces, a Special Tribunal for the DRC) or were unable to carry out their work effectively (the truth and reconciliation commission). Since then, efforts have been made, with the support of international donors, to strengthen the capacity of domestic courts to investigate and prosecute perpetrators of mass human rights violations. This has included support for judicial and legislative reforms, capacity-building of military courts, the operationalisation of a mobile courts system, the establishment of a Prosecution Support Cell programme, and investigations by the International Criminal Court.

Notwithstanding some important progress that has been made, an overall climate of impunity for human rights violations persists and victims have received little recognition or redress for the harm suffered. Repeated cycles of unconditional rebel-military integration processes and the adoption of amnesty laws have embedded impunity in the security sector. Attacks and human rights abuses by rebel groups also remain rife in various parts of the country despite several rounds of peace agreements and rebel disarmament and demobilisation processes. The extremely unstable political and security situation in the country has led to considerable unwillingness to press hard on the accountability issue, over concerns that it would threaten the DRC authorities' hold on power or undermine peacebuilding and stabilisation efforts by international actors. In 2014, a draft law to create special chambers within the Congolese judiciary system was rejected by the National Assembly (and quietly opposed by some donors), and no action was taken to implement the recommendations contained in the UN's report mapping human rights violations committed between 1993 and 2003.

However, recent changes in the DRC's political environment seem to be opening up a new window of opportunity for transitional justice. As a result, we are witnessing a revival of discussions about the prospects for transitional justice in the country. At a recent expert workshop in Kinshasa convened on this topic by several Congolese civil society organisations, one interesting issue that arose was the desirability and feasibility of adopting a more decentralised approach to transitional justice.
By and large, it is not an overstatement to say that "transitional justice is usually wholly national in origin and function". From its inception, transitional justice has been conceived of as state-sponsored mechanisms which involve the creation of formal, national-level institutions (whether they be trials, truth commissions, reparations programmes, vetting processes or institutional reforms). Although the concept of transitional justice has broadened over time to encompass community-level processes as well, the idea of transitional justice as a fundamentally national process persists. However, growing criticism of the effectiveness of the 'classic pantheon' of transitional justice mechanisms in effecting the promised change on the ground warrants a questioning of this centralised approach to transitional justice. So far, though, there has been limited reflection on what exactly a decentralisation of transitional justice might entail. In this policy brief, I suggest that there are three ways in which we might view a decentralised approach to transitional justice, and I explore their relevance to the DRC context.

MINIMAL DECENTRALISATION

At a minimal level, decentralisation can simply mean that a national transitional justice institution creates decentralised units to carry

out its operations on the ground. For instance, the truth commission in Peru set up multiple regional offices to carry out the work of collecting testimonies, carrying out investigations, drafting reports and conducting sensitisation and education campaigns. Brazil, in turn, set up an innovative decentralised process of hybrid truth-telling and reparations in the form of 'Amnesty Caravans': these caravans were travelling public hearings and memory sessions organised by the Amnesty Commission to hear and review applications for compensation and amnesty from victims of political persecution under Brazil's military regime.

In the DRC, such a decentralised approach to transitional justice has existed to some extent in the past. The Commission Nationale Vérité et Reconciliation (CNVR), set up in 2004, provided for the creation of local and provincial committees. These were to be tasked with collecting testimonies and amnesty applications, consulting with local stakeholders and making recommendations for reconciliation ceremonies. However, funding shortfalls, the politicisation of the commission and a lack of political will scuppered the overall work of the CNVR, which ended up closing its doors in 2006 without having been able to carry out any investigations. If a new truth commission were to be established in the future, the possibility of organising travelling hearings could be considered as an additional dimension of decentralising the activities of the commission.

The mobile courts and the Prosecution Support Cell (PSC) programme can also be seen as operating along more decentralised lines. Mobile courts seek to improve the delivery of justice in the conflict-affected regions of eastern Congo by bringing trial processes directly to the communities affected. Prosecution Support Cells, in turn, have been established in several of the country's provinces: at the request of military justice authorities, international experts detached to the PSCs are deployed to provide technical and logistical support for the investigation and prosecution of serious crimes.

Building on these experiences, minimal decentralisation could involve the creation of special investigative units at provincial/regional level to deal with past crimes rather than the creation of a national-level Special Court for the DRC. This option was already put forward with the 2004 draft bill on the Special Chambers; therefore this proposal could be revived, with a few amendments to address the legal concerns that were raised in 2004.[1] The usefulness of such an approach has been demonstrated in other countries. For instance, in Chile, the decision to create a special division of the Investigations Police and to appoint judges with an exclusive or preferential mandate to investigate mass human rights violations committed during the military dictatorship played a key role in accelerating prosecutions for past crimes. Along similar lines, in Northern Ireland, a new investigation unit was established in 2005 under the Police Service of Northern Ireland (the Historical Enquiries Team) with the mandate to reopen and re-examine cases pertaining to deaths related to the Troubles between 1968 and 1998. A decentralised special investigation and prosecution structure of this kind could coexist with the efforts that have been made to develop a national 'stratégie de priorisation des poursuites des crimes internationaux', though due consideration should also be given to the usefulness of allowing a provincial/regional-level definition of such prosecutorial prioritisation strategies.

Given the vastness of the DRC's territory (and the practical constraints on inter-provincial travel for the average Congolese) and the diverse experiences of conflict in the country, the

inclusion of such a minimal decentralised approach to transitional justice seems to be a pre-requisite. Any national-level transitional justice mechanism that may be set up will need to decentralise some of its operations to provincial or *territoire* level in order to ensure its accessibility, feasibility and legitimacy. While concerns about insecurity in certain areas of the country, and fears that decentralisation might devolve into a process of 'empty post creation', might make some hesitant to support such decentralisation, an entirely centralised transitional justice is unlikely to be effective in the Congolese context.

MAXIMAL DECENTRALISATION

A second, probably more challenging, approach to decentralisation is to engage in transitional justice activities without the creation of a unified or centralised transitional justice policy or institutions. While there has been a growing interest in community-based transitional justice activities,[2] maximal decentralisation involves a broader conception of the 'localisation' of transitional justice. This is because it would also mean that transitional justice institutions traditionally established at national level (trials, truth commissions, reparations etc.) would be established at sub-state level. These sub-state transitional justice processes would not necessarily be tied to a national transitional justice framework and they would operate in relative independence of each other. The transitional justice landscape in the country would then resemble a mosaic, in contrast to the tree-like structure of the minimal decentralisation model.

Such a practice of maximal decentralisation of transitional justice has been uncommon so far, and the idea that developing a national transitional justice strategy constitutes 'good practice' is prevalent in the transitional justice field. At the Kinshasa workshop, much emphasis was similarly placed on the need for the government to formulate a National Transitional Justice Policy as a first step. There is undoubtedly a value to this, such as the needs to clarify the goals a country is pursuing through transitional justice, to ensure coherence and complementarity between transitional justice processes (in particular where a country opts to pursue a comprehensive approach to transitional justice), and to guarantee that the component of state acknowledgment of the violent past is realised through transitional justice. However, there are also various factors that suggest a maximal decentralisation of transitional justice in the DRC may be pertinent.

A first factor is that there is no uniformity in conflict dynamics and experiences in the different regions of the country. While there are some important overlaps and dynamics of national and regional security and insecurity, the DRC's conflict landscape also resembles an elaborate patchwork quilt. Recent research suggests that differences in conflict experiences and community dynamics (such as the degree of social trust and the presence of demobilised combatants in the community) influences people's perceptions of justice. The configuration of conflicts can also strongly influence perceptions of victimisation, which in turn influence people's transitional justice preferences as well as how inter-community trust and social cohesion can be rebuilt. Because the nature and experiences of conflict are very diverse in the DRC, it is questionable whether a single, unique approach to transitional justice, which is defined at the national level, can adequately address the variety of conflict experiences and the needs for justice that flow from it. An added element here is that the long time frame of the conflicts in the DRC,[3] and the fact that human rights violations are ongoing, creates a situation in which it seems unlikely that

a single transitional justice approach will be able to address all the past and current human rights violations.

The importance of engaging in context-sensitive transitional justice has been recognised in the UN, EU and AU policy frameworks on transitional justice. Generally, this is understood to mean that we should refrain from simply exporting a 'transitional justice model' from one country to the next. In a broader sense, it has also been understood to require that transitional justice policies are designed with consideration of the institutional, political and socioeconomic context in which these institutions will operate. I would suggest, though, that a context-sensitive approach to transitional justice may also mean that we should not follow a one-size-fits-all-approach *within* a same country. Engaging in a maximal decentralisation of transitional justice may contribute to making these processes more sensitive, and therefore better able to respond to people's localised experiences of conflict and victimisation.

A second factor to consider is that in certain contexts decentralised transitional justice processes may be more achievable than the creation of national institutions. Where there is resistance on the part of national elites to transitional justice, parts of a country are not yet fully pacified, there is a low level of trust of citizens in state institutions, or the level of polarisation between communities remains very high, national transitional justice processes often find themselves blocked, ineffective or highly politicised. This consideration is particularly relevant in the case of the DRC, where transitional justice advocates have been waiting for close to two decades now for 'the right political and security context' to emerge before engaging on the path of transitional justice. Yet, that 'right time' is ever elusive. And in the meantime, victims' justice needs remain unaddressed and impunity rampant. Shifting the focus from a national approach to transitional justice to a maximal decentralisation approach might make it more feasible to finally set in motion some transitional justice processes. Moreover, a maximal decentralisation will make it easier to devise specific transitional justice processes that are adapted to both the specific needs of victims and what is feasible in particular context (for instance, because of differences in the security environment, what is feasible on the transitional justice front in the Kasais may not be the same as in Ituri or South Kivu). By delinking transitional justice from national state institutions, the former processes might also benefit from greater legitimacy amongst the population.

A third consideration is that the process of drafting a national transitional justice policy in the DRC could be protracted and allow for many partisan interests to weigh in on outlining what transitional justice will (be allowed to) be. It also risks building an overly rigid framework for transitional justice that stymies innovation - yet it is widely recognised that transitional justice works at its best when sufficient room is left to either tweak existing models to local context or when societies/communities come up with innovative processes to address context-specific needs. Finally, if the purpose pursued through transitional justice is not only accountability but also conflict resolution, prevention, and rebuilding social relations (which were oft-cited objectives at the Kinshasa workshop), then national-level institutions might not be the most effective at achieving these. Research on interpersonal trust, for instance, strongly suggests that activities which facilitate direct personal contact and involve close physical proximity that have the greatest impact on trust recovery.

A maximal decentralisation of transitional justice might take on different forms in the DRC. It could involve the establishment of transitional justice institutions at the sub-state level rather than at the national level. To deal with the human rights violations committed in the context of the Kamuina Nsapu crisis in Central Kasaï (2016-2018), consultations were held between the UN joint human rights office (UNJHRO), the Kasai provincial authorities and victims. These have resulted in suggestions for the creation of a provincial truth and reconciliation commission and reparations programme. An approach like this, at provincial level, would offer the opportunity to develop transitional justice institutions that respond to the particularities of the Kasai conflict context and, according to some, can facilitate the integration of local conflict reconciliation and community dialogue traditions to ensure that the transitional justice processes have a cultural resonance and legitimacy. The applicability of such province or region-specific approaches to transitional justice could be explored for other areas of the country affected by conflict.

However, it is important to ensure that the creation of such provincial-level institutions occurs within the legal bounds of the DRC Constitution. Furthermore, because conflict dynamics in Central Kasai or other Congolese provinces are never purely local, it would be important to ensure that provincial-level transitional justice institutions also examine the broader drivers and impacts of these conflicts. Thus the Kasai truth commission would need to be given an explicit mandate to investigate the local, cross-provincial and national drivers and impacts of the conflict and have the authority to collect evidence or testimonies beyond the Central Kasai provincial boundaries (which links back to the question of what legal authority such a commission can have under the Congolese Constitution).

Maximal decentralisation can also mean that instead of seeking to establish central institutions or a national transitional justice strategy, much room is left for ad hoc government initiatives, grassroots processes and civil society organisations to pursue particular objectives, such as improving community relations,[4] addressing the socio-psychological harm suffered by victims and combatants or addressing structural inequalities that are drivers of conflict.[5] It could also involve encouraging and supporting community-led documentation activities instead of seeking to establish a formal, national-level truth commission.[6] Such an approach can be particularly useful in the light of recently outlined plans for a renewed decentralised disarmament, demobilisation, and community-reintegration process (the DDRCS). While the draft legislation has not yet been adopted, the current version of the bill expressly states an intent to integrate transitional justice in the DDRCS.[7] For successful community re-integration of former combatants, the provision of psycho-social and economic support measures are necessary but insufficient interventions. It is equally important to invest in projects that work on personal reconciliation and on rebuilding social ties and trust, which in turn means that victims' needs have to be addressed alongside those of combatants. Setting up transitional justice activities alongside DDR processes – such as reparation measures, baraza intercommunautaires and other community justice, memory or reconciliation activities, perpetrator apologies, etc. – thus has the potential to facilitate community reintegration. While such a coordination between transitional justice and DDR can happen at the national level, local-level coordination might be more feasible and impactful.

While these multiple initiatives would operate with cognisance of the others to avoid undue duplication, there would be no overarching coordination structure or authority. This is based on the recognition that different types of stakeholders have something unique to bring to the table and that since victims' needs are diverse and not fixed in time, a diversity of approaches needs to be deployed in order to effectively address these needs. A bureaucratic drive for coordination and centralisation is often a go-to strategy amongst donors and transitional justice advocates, but it might not always be the best approach for effecting change on the ground.

GROUNDED DECENTRALISATION

A third way in which to conceive of a decentralised approach to transitional justice draws on calls for more bottom-up and participative transitional justice processes. It has been observed that while transitional justice *discourse* places much emphasis on victims, transitional justice *practice* has in fact been focused more on the state than the victims. State players, not victims, have been the central agents in the design and creation of transitional justice mechanisms. Furthermore, state interests such as rebuilding the rule of law, promoting political reconciliation and stability or strengthening state authority, legitimacy and institutions – have often been prioritised as the objectives that transitional justice should achieve. The growing bureaucratisation, legalisation and institutionalisation of transitional justice has further contributed to the development of an increasingly rigid framework of how transitional justice should operate and what gets accepted as constituting transitional justice. The United Nation's promotion of a conceptualisation of transitional justice based on the four pillar structure (right to justice, right to truth, right to reparations and guarantees of non-recurrence) has further reinforced this. The result of these developments is that, all too often, an overly legalistic and normatively prescriptive approach to transitional justice dominates, which hampers efforts to devise either victim-centred or context-sensitive approaches to transitional justice. It has also progressively led to an approach to transitional justice that focuses on rights rather than on needs.

The question of whose voice is heard in the process of designing transitional justice policies and institutions and on the basis of what knowledge this happens is not anodyne. At present, the politics of knowledge production on transitional justice is such that local voices, victims' voices and the voices of those with lived experience of the conflict or repression are all too often overwritten by the voices of state and international actors. A grounded decentralisation of transitional justice would therefore entail a re-centring of the victim and creating spaces for the reassertion of victim's agency in transitional justice processes.[8] Not only would this realign the practice of transitional justice with its stated aim, but it would also contribute to strengthening the social and cultural legitimacy of transitional justice practices and our ability to align transitional justice to context-specific needs.

A grounded decentralisation thus requires an identification of how transitional justice should be implemented that is based on victims' own definitions of needs and conceptions of what justice entails and how it can be realised – and not from a normative positioning on what transitional justice should be. The point of departure has to be the impact that the violence and human rights violations have had on victims and communities and the needs that ensue from this.

In practice, engaging victims in transitional justice processes has taken the form of organising consultations with victims or carrying out opinion surveys prior to the establishment of a transitional justice process or institution. While these are certainly important endeavours and more transitional-justice focused consultations with victims in the DRC would be welcome, consultations are not a sufficient form of participation. This is because they tend to limit victims' inputs to the pre-establishment phase (consultations to identify victims' needs) or after the completion of transitional justice processes (consultations to assess the impact of transitional justice). In other words, they do not allow victims to participate actively in decisions and negotiations about the creation and operationalisation of transitional justice mechanisms. The fact that victims' needs change over time make the lack of participation of victims throughout the entire life cycle of transitional justice processes particularly problematic.

When poorly designed, consultation can also be limited in the amount of space it leaves for culturally specific understandings of notions such as 'justice' or 'truth' to emerge or for linking justice with socioeconomic needs. This is further reinforced by the common practice of merging sensitisation campaigns and consultations, as the former can strongly orient the viewpoints that will be expressed in the latter. Finally, consultations can also result in a homogenised representation of victims' voices by paying insufficient attention to how context, the nature of civilians' relations with combatants, and the nature of their experience of violence and victimisation can lead to a differentiation in victims' needs.

In a grounded decentralisation approach, placing victims at the centre of transitional justice processes thus means giving them a direct stake in outlining the aims, scope and implementation of these processes. It also entails being sensitive to not imposing a particular transitional justice language. For instance, consultations might reveal that victims place a strong emphasis on a demand for 'truth'. But their understanding of how truth provision can best happen will be culturally determined. It should therefore not be automatically presumed that the creation of a formal truth commission on the adversarial examination model or the public testimony model corresponds to their understanding of how 'truth' takes shape. Consultations should therefore take care to not impose preconceived transitional justice constructs and instead allow for cultural and contextual understandings of common transitional justice concepts to emerge.

The Global Survivors Fund, which is setting up a pilot project in the DRC, offers an interesting example of an approach that seeks to set up a survivor-centric approach by leveraging support for reparations programmes that have been designed and initiated by survivors. If one is willing to think outside the box, a grounded decentralised approach could also mean, for example, that the definition of a national or provincial prosecutorial strategy as mentioned above engages with victims to generate a list of priorities, as well as bringing judicial players together to identify selection criteria.[9] The core element for a more grounded decentralised approach is to enable victims to participate on their own terms at all stages of transitional justice processes and to have true agency in influencing decisions on transitional justice design and implementation, and even sometimes to have meaningful ownership of transitional justice processes. In addition, it also involves incorporating existing localised practices to

respond to the consequences of human rights violations into our conceptions of transitional justice.

CONCLUSION

A window of opportunity seems to be opening up in the DRC to re-engage with transitional justice efforts to address the legacy of human rights violations resulting from decades of armed conflict and state repression. However, the country remains a difficult environment for transitional justice: violence continues unabated in eastern Congo, political stability is fragile, state capacities are weak, and the overall number of perpetrators and victims to deal with is high. It is therefore of primordial importance that efforts towards transitional justice are well-thought out and adapted to the Congolese contexts and the specific needs of Congolese victims. A context-specific element that has been emerging from recent discussions amongst Congolese transitional justice advocates is the appropriateness and feasibility of decentralising transitional justice processes. This policy brief seeks to contribute to this reflection by proposing three forms of decentralisation (minimal, maximal and grounded) and how these could be implemented in the DRC.

This brief has also presented the advantages that a decentralised approach to transitional justice might offer. However, there are also some obvious risks and challenges associated with such an approach. One important element is that decentralised processes are generally less effective at achieving structural change and ensuring that the state takes ownership of and responsibility for transitional justice. Specifically in the DRC context, there is also a risk that a decentralisation of transitional justice processes will lead to a neglect of the national and regional drivers of the conflict and enable certain parties in the conflict to evade responsibility. It may also contribute to increasing already existing tensions and political struggles between the central authorities in Kinshasa and provincial authorities. Lastly, weak state capacity is as prevalent at provincial and local level than at national level, and sometimes even more so. This may hamper the implementation of certain decentralised transitional justice approaches.

However, it is important to remember that the choice is not necessarily between adopting exclusively one or the other approach for all transitional justice efforts. Some processes might lend themselves more to being implemented at the national level while others might operate better as decentralised processes. Engagement with transitional justice is also a long-term effort that lends itself to a step-by-step or sequenced approach: turning towards maximal decentralised transitional justice approaches might help to kickstart certain transitional justice efforts that are too politically sensitive to be implemented at national level. For instance, starting up decentralised documentation efforts today does not close off the option to create a national truth commission at a later stage when levels of polarisation between communities have decreased and the security and political situation has improved. The two approaches can even co-exist. The most important thing will be for decisions about how to move forward on transitional justice in the DRC to be guided by a combined consideration of victims' needs, ownership and appropriateness to the context, rather than by a rigid attachment to transitional justice principles or models.

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Endnotes

[1] One important point of contention was the hybrid nature of these chambers. However, such special chambers do not have to be mixed. Experience with hybrid courts in other countries has highlighted that their mixed composition is not a guarantee of the greater independence or effectiveness of these courts. The Special Chambers could thus be entirely Congolese with the provision of international technical support through an expanded PSC system.

[2] Grassroot initiatives continue to occupy a liminal place in transitional justice. Community-based initiatives are recognised as having a place in transitional justice, but they are often presented as having a 'lesser' position than formal TJ mechanisms and are required to conform to institutionalist rule-of-law principles. Initiatives led by non-state players are still not treated, by and large, as transitional justice mechanisms.

[3] It is politically sensitive to set an exact date for the start of the conflicts in the DRC, but it is safe to say that eastern Congo has been experiencing armed conflict for close to three decades.

[4] Experiences with local peace committees in eastern Congo would be a useful starting point. While these are peacebuilding mechanisms, it would be worth examining the integration of transitional justice considerations in their work (i.e. engaging in activities that are focused also on personal reconciliation, victim redress and perpetrator acknowledgement or apologies).

[5] A national transitional justice policy could be envisaged which does set out the objectives the country wants to realise through transitional justice, but which is not overly prescriptive in terms of the kind of institutions, processes or activities that will be set up to achieve these objectives and which expressly states that processes can be national, provincial, or local/community-based.

[6] Such documentation would be about more than collecting evidence on human rights violations by civil society organisations. It would also be about engaging in historical memory work at the (cross-)community level. Examples of such local-led documentation activities are the National Peace and Documentation Centre in Kitgum in northern Uganda or the Healing Through Remembering project in Northern Ireland.

[7] Article 19 of the November 2020 draft of the 'Ordonnance Portant création, organisation et fonctionnement d'un service spécialisé dénommé « Coordination Nationales des Programmes décentralisés de désarmement, démobilisation et réinsertion socio-économique communautaire et stabilisation »' (on file with the author).

[8] Fostering victim agency in and through transitional justice can in itself constitute an element of redress or remedy to victims

[9] For a broader perspective on using locally-produced indicators in peacebuilding policies, see https://www.everydaypeaceindicators.org/