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**Advocacy for the adoption of a holistic national transitional justice strategy  
in the Democratic Republic of Congo**

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## I. Introduction

For more than 25 years, the daily lives of the majority of the Congolese population have been marked by mass atrocities committed by state and non-state actors, both Congolese and foreign, in a prevailing climate of impunity that has undermined citizens' trust in institutions and the rule of law.

Impunity for alleged perpetrators of international crimes has been and continues to be one of the main obstacles to peace and stability in the Democratic Republic of Congo (DRC) and the Great Lakes sub-region. Yet successive peace agreements have often favored short-term political solutions, sacrificing justice for peace, and recourse to the security or military option has not been successful in protecting civilians in the conflict provinces, despite the presence of the United Nations Force operating under Chapter VII of the Charter for more than 20 years.

Among the various initiatives aimed at establishing the truth about past crimes and fighting impunity, the Mapping Exercise Report on the most serious violations of human rights and international humanitarian law committed between March 1993 and June 2003 on the territory of the DRC, published in 2010, is the most successful to date.

In addition to methodically mapping and documenting 617 violent incidents committed during one of the most tragic chapters in the country's modern history, during which women and children paid a very heavy price, the UN experts found that the Congolese judicial system lacks the necessary means to meet the challenges of dealing with international crimes. In addition, they made a series of recommendations to the Congolese authorities to break the cycle of violence and impunity. These recommendations support the need to use both judicial and non-judicial transitional justice mechanisms, which are complementary.

More than ten years after the publication of the Mapping Report, these recommendations have gone unheeded, which is particularly shocking given the scale and gravity of the crimes committed against the civilian population over the past decades.

It is in this context that the Panzi Foundation salutes the involvement of the President of the Republic, Félix Tshisekedi, a politician with no link to the crimes of the past, who has put transitional justice on the agenda of the government of the Sacred Union of the Nation "*in order to build the path to national reconciliation and peace.*" In addition, in a recent report on the DRC, the UN Secretary General encouraged the Congolese authorities to adopt a national transitional justice strategy that would combat impunity and bring justice to victims of the most serious crimes.

The Congolese government's expression of political will and the Secretary General's exhortation are part of a broad-based movement by Congolese civil society and citizen movements that peacefully demonstrated by the thousands across the country on the 10th anniversary of the publication of the Mapping Report on October 1,

2020. This mobilization was aimed at demanding an end to impunity and the establishment of an International Criminal Court for the DRC and/or specialized mixed chambers within the Congolese judiciary to prosecute and judge national and foreign perpetrators of the crimes listed in the report.

In addition, various religious denominations, including the Church of Christ in the Congo and the National Episcopal Conference of the Congo, have also spoken out in favor of establishing international or internationalized prosecution and trial mechanisms to ensure independence and impartiality in the administration of justice for past and present crimes.

At the international level, institutional and diplomatic partners are supporting these initiatives that aim to highlight the added value of transitional justice in order to prevent the recurrence of past and present atrocities, to contribute to the restoration of the rule of law, and to establish a lasting peace in the DRC.

The European Parliament adopted a resolution on September 16, 2020, calling for the creation of an International Criminal Court and/or mixed trial and prosecution mechanisms, thus expressing its support for a transitional justice process in the DRC. In the wake of the adoption of this resolution, the head of European diplomacy in the DRC insisted within the framework of the DRC/EU political dialogue that there can be no return to lasting peace without delivering justice for the crimes documented by the Mapping Report, as well as all those committed since then. His American, Canadian and Swiss counterparts have also expressed their support for an approach that encompasses the various aspects of transitional justice in order to ensure lasting peace.

The time has come to mobilize around this momentum to move forward on the path to peace through justice. As part of the ongoing efforts of the Congolese authorities, the Panzi Foundation urges policymakers to urgently develop a holistic national transitional justice strategy, with the participation of civil society, and the support of the international community.

This strategy should take into account the needs of survivors and affected communities, and should consider complementarity between the various transitional justice mechanisms, both judicial and extrajudicial, in order to end impunity and guarantee victims their rights to non-repetition of atrocities, justice, reparations, and truth in order to achieve reconciliation and sustainable peace and development.

Moreover, the specificity of the DRC's situation with regard to transitional justice is due to the fact that international crimes were not committed exclusively in the context of internal armed conflicts, but also and above all in the context of international or internationalized armed conflicts due to the intervention of numerous third countries. It is therefore essential to take into account the involvement of these countries in the development of the strategy and in the design of the four main transitional justice mechanisms that will have to be implemented.

Finally, the national strategy will have to integrate a strong gender dimension, given the massive, methodical, and systematic use of sexual violence by all belligerents as a weapon of war and a strategy of terror.

The purpose of this advocacy brief by the Panzi Foundation is to contribute to the debate as part of Congolese civil society's efforts to contribute to the development of a transitional justice strategy, emphasizing the need to prioritize prosecutions and the vetting of the security forces, and to engage in a constructive dialogue with Congolese authorities and international partners, most notably the United Nations Joint Human Rights Office (UNJHRO), mandated by the Security Council and the Human Rights Council to provide technical assistance to the DRC authorities in the fight against impunity and transitional justice.

## **II. Institutional reforms and guarantees of non-renewal of atrocities**

In societies seeking to emerge from authoritarian rule and armed conflict, whether internal or international, victims of human rights abuses, including survivors of crimes of sexual violence, often live with fear as their tormentors may continue to threaten them on a daily basis, often in their own environment.

This is the case in the DRC, where various attempts to end the violence have planted the seeds of instability and impunity by integrating elements of rebel armed groups, both Congolese and foreign, into the Republic's security and defense forces, in accordance with the principle of inclusiveness enshrined in the peace accords. Those who are supposed to protect civilians and the territory - the army, the police, the intelligence services - have often become a source of threat to the population and to the country, with disastrous consequences for the protection of civilians.

Underfunded and botched Disarmament, Demobilization and Reintegration (DDR) processes, as well as "mixing" and "brassage" policies, often accompanied by promotions, have embedded indiscipline within institutions. This situation has fostered a system that legitimizes violence and crime as a means of accessing power, thus undermining the establishment of lasting peace.

However, victims of mass atrocities are entitled to guarantees of non-repetition. The Congolese state must ensure that society in general, and survivors in particular, do not have to suffer violations of their most fundamental rights again. To this end, the government should undertake institutional reforms as part of the transitional justice process to ensure respect for the rule of law, foster a culture of human rights, and restore citizens' trust in institutions.

Thus, those state agents who have committed human rights and international humanitarian law violations or who have failed to play their role in preventing such violations—in this case the security forces and the judiciary—will need to be reformed and vetted as a matter of priority.

These reforms to ensure that citizens are protected against the recurrence of abuses will have the greatest impact in the short and medium term on stabilizing the country and are essential prerequisites for any effort to achieve a lasting peace. They should include not only the army (FARDC), the police (PNC), and the intelligence services (ANR, DEMIAP, etc.), but also the justice sector and the prison administration, in order to ensure the protection of people, property, and territory.

In multiple resolutions, the Security Council has urged the Congolese authorities to undertake a profound reform of the security sector (SSR) in order to break the cycle of impunity that surrounds the security forces in the DRC. He emphasized that true SSR cannot achieve sustainable results if these forces are not vetted. Many international and national experts have made the same recommendations, such as the Rapporteurs of the seven thematic special procedures on technical assistance to the Government of the DRC, mandated by the Human Rights Council, as well as experts from the Office of the High Commissioner for Human Rights through the report of the Mapping Exercise.

The most obvious link between transitional justice and institutional reform is the establishment of a vetting process. Thus, the Panzi Foundation encourages the Congolese government to vet the security sector without further delay by removing from their positions of power those state officials—particularly those in the army, police, intelligence services and the judiciary—who have been implicated in serious violations of human rights and international humanitarian law.

This non-judicial procedure, which aims at the identification and removal from public institutions of those responsible for human rights violations, will be a crucial measure to prevent human rights violations—one of the purposes of transitional justice—and will also provide a degree of satisfaction for victims and survivors, as

perpetrators who are not prosecuted will at least be removed from their positions of power, thus reducing their capacity to cause harm.

It is also a prerequisite for any other credible transitional justice initiative, as the presence of alleged perpetrators of serious human rights violations in state institutions is likely to allow them to use their power to prevent or hinder any justice efforts. Moreover, the culture of impunity goes hand in hand with the climate of fear in which many victims and witnesses of mass crimes live, frequently threatened with reprisals by their perpetrators if they demand justice, reparations, and the truth.

In addition, the government must establish a mechanism to check the human rights records of those applying for public office. Each applicant should be subject to a transparent and thorough investigation of his or her human rights record and suitability for a particular position. Those who do not pass this test will not be allowed to join the security and defense forces.

SSR should also include the adoption of a programming law for the Congolese army, the formation of an army corps, and improvements to the command and control structure. In addition, structural reforms to strengthen institutional accountability are needed. This may include the development of professional standards of conduct, complaints and discipline procedures, and monitoring and oversight mechanisms. Systematic training programs for officers and other elements of the security and defense forces in human rights and international humanitarian law are also a priority. The construction of barracks and military camps to keep soldiers away from the civilian population, weapons registration, programs to provide supplies to units, especially in operational areas, and ensuring that they receive their salaries are also important to these reform efforts, and require donor support.

Future reforms should also include the adoption of quotas to increase the number of women in the justice and security sectors. In addition, gender training and capacity building for elements of the security forces and law enforcement officers is essential to adequately address the scourge of sexual violence.

The expected presence of international actors in support of the transitional justice process in the DRC, primarily in the area of prosecution and adjudication of international crimes, should also be seen as an invitation to the Congolese legislator to abolish the death penalty, not only to bring criminal law into line with the best international standards, but also to facilitate the extradition of alleged perpetrators of human rights violations who are nationals of third countries or who reside abroad.

The normative framework for the protection of human rights defenders in general and for the protection of victims and witnesses is also a prerequisite for the prosecution of sensitive international crimes.

Finally, the reforms underway must also ensure that the institutions that support democracy, namely the Independent National Electoral Commission and the Constitutional Court, which are responsible for organizing and validating elections are depoliticized, in order to put an end to the chronic crises of power legitimacy that are one of the causes of the recurrent crises that have destabilized the DRC in recent decades.

### **III. Criminal prosecution**

International law obliges all states to prosecute and judge the perpetrators of serious violations of human rights and international humanitarian law. Thus, the right to justice is recognized for victims of international crimes and transitional justice can in no way be an alternative to the criminal responsibility of the alleged perpetrators of atrocities.

The United Nations Security Council has called in various resolutions on all parties—the Congolese state and other states in the region involved in armed conflict—to the obligation to bring to justice those responsible for

mass crimes committed in the DRC. In addition, it considers the fight against impunity to be an indispensable element of reconciliation and peacemaking.

In order to break the cycle of violence and impunity, prosecution should therefore be at the forefront of transitional justice measures to be considered.

In assessing domestic capacity to deliver justice for the most serious crimes committed in the DRC since the early 1990s, the UN experts who produced the Mapping Exercise Report concluded that the Congolese judicial system's capacity to end impunity is "undoubtedly inadequate." Furthermore, many other sources highlight the lack of resources and capacity of the justice sector in the DRC, which is plagued by problems of corruption, political interference, and a lack of independence affecting the proper administration of justice.

Finally, the often decisive role of foreign actors in the armed conflicts that have devastated Congolese territory and the heavy involvement of third-party states whose armed forces and affiliated rebel groups have occupied large swaths of DRC territory raises the issue of prosecuting and trying violations of human rights and international humanitarian law committed by foreign nationals.

For these various reasons, the national courts do not appear to be sufficiently effective in providing independent, impartial and effective justice.

It should be noted here that the International Criminal Court only has jurisdiction over crimes committed after July 1, 2002, the date of the entry into force of the Rome Statute, whereas the First Congo War took place from 1996 to 1997 and the Second Congo War took place from 1998 to 2003.

Given the scale and gravity of the crimes committed during the period under review by the Mapping Exercise and to date, and taking into account the regional dimension of the conflict, the Panzi Foundation advocates for the establishment of prosecution and trial mechanisms at three levels: international, internationalized/mixed, and national, bearing in mind that each formula has its advantages and weaknesses.

We will review here three options combining these different levels, the articulation of which will depend on the political will emanating from the Congolese government and the United Nations, recalling that the Head of State, Félix Tshisekedi, committed himself in his speech to the Nation at the beginning of December 2020, at the end of the national consultations, to "*obtain from the international community and the United Nations in particular, support for the initiative to establish an International Criminal Court and specialized mixed chambers in the DRC.*"

### ***Option 1: The establishment of an ad hoc international criminal tribunal for the DRC (ICT) and specialized mixed chambers within the Congolese judicial system***

The idea of setting up an ICT for the most serious crimes committed in the DRC is not new, but it is gaining momentum. Although the idea was included in the resolutions of the Inter-Congolese Dialogue in 2002 and had been mentioned on several occasions by former President Kabila, no official request has yet been made to the United Nations to create an ICT. Nevertheless, such a court has been fervently called for by a large number of human rights defenders and civil society organizations and, since September 2020, by a European Parliament resolution.

An ICT is a subsidiary body of the UN Security Council and its creation is preceded by the recognition of "*the existence of a threat to peace*" as "*measures to maintain or restore peace.*" The Panzi Foundation believes that these criteria are met. Furthermore, the Security Council renewed MONUSCO's mandate in December 2020 and remains seized of the situation, considering that the instability in the DRC still constitutes a threat to international peace and security. Numerous experts and rapporteurs, including those mandated by the UN

Human Rights Council, have repeatedly highlighted that the widespread impunity enjoyed by the perpetrators and instigators of the most serious crimes is one of the recurring causes of massacres and rapes. This impunity largely explains the continuing cycles of violence and the perpetuation of the atrocities that are committed on a daily basis to this day. Finally, the decision to create an ICT would demonstrate in concrete terms that the serious violations of human rights and international humanitarian law committed in the DRC, as listed in the Mapping Report, concern the entire international community and cannot go unpunished.

Thus, the Panzi Foundation invites the President and the Congolese government to send an official request to the United Nations Security Council as soon as possible to consider this issue.

If an ICT is created by the Security Council on the basis of Chapter VII of the Charter, this tribunal would have material jurisdiction to judge war crimes, crimes against humanity, and genocide. It would take precedence over national jurisdictions and its decisions would be binding on all States. Third countries would be obliged to cooperate with this jurisdiction. This would be a significant advantage given that many of the alleged perpetrators of serious human rights and humanitarian law violations committed in the DRC and their political or military chains of command are located outside the country. It would therefore be able to compel the appearance of any individual, regardless of his or her nationality or the immunities he or she might enjoy before national courts. In addition, this type of court enjoys a high degree of independence, operates free from political interference and has adequate means to carry out complex investigations but also to protect victims and witnesses. Finally, it offers the guarantee of a fair trial in accordance with the best standards of procedural guarantees.

While the ICT would have the mandate to prosecute and judge Congolese and foreign nationals responsible for the most serious crimes committed from the early 1990s to the present day, the President of the Republic could also request the support of the United Nations to establish, in addition, specialized mixed chambers. These would be integrated into the national legal system within the Courts of Appeal (as in Cambodia, Bosnia-Herzegovina, or the Central African Republic), following the signing of a Memorandum or Agreement between the Congolese Government and MONUSCO, in accordance with Article 149, paragraph 6 of the Constitution of the DRC, which states: "*the law may create specialized jurisdictions.*" The Panzi Foundation therefore calls for the signing of such a Memorandum of Understanding between the DRC and MONUSCO and for the adoption of a law on the establishment of specialized mixed chambers.

These specialized mixed chambers would complement the ICT by focusing on the prosecution of alleged perpetrators of serious violations of human rights and international humanitarian law present on Congolese soil – in opposition of the ICT that would also focus on those in foreign countries, through an agreement between the Congolese government and the United Nations, and through their composition of national and international judges and magistrates.

The participation of international investigators, prosecutors and judges with expertise in mass crimes would help reduce political interference in the administration of justice and provide guarantees of independence and impartiality if they are in the majority compared to Congolese magistrates and judges. In addition, this option would allow the capacity of the Congolese judicial system to be strengthened through a transfer of skills and a gradual transfer of functions from international actors to their national counterparts.

The establishment of specialized mixed chambers within the Congolese judiciary has been frequently advocated and proposed as a solution to combat impunity for the most serious violations of human rights and international humanitarian law by several representatives of Congolese civil society and the international community in recent years, including in the recommendations of the joint report of seven thematic special procedures on technical assistance to the Government of the DRC and in the recommendations of the Mapping

Report. The creation of mixed chambers was also part of the recommendations of the General States of Justice conducted in 2015. More recently, the European Parliament has also come out in favor of this option, combined with an ICT.

It is worth recalling that a draft bill creating "Specialized Chambers for the Judicial Prosecution of International Crimes" was presented to the Congolese Parliament in 2011 and that the government submitted another draft bill in 2014, without either of these steps being taken.

Finally, national courts, which are the primary repositories of international criminal law, would have a general residual jurisdiction to prosecute and try cases not dealt with by the ICT and the specialized mixed chambers, and would therefore have to discontinue whenever the international or internationalized mechanisms will be seized.

### ***Option 2: The establishment of a Special Criminal Court for the Congo and specialized mixed chambers***

In the event that the Security Council does not respond favorably to the request to create an ICT for the Congo, the President of the Republic could ask the United Nations to support the creation of another type of hybrid court that has brought positive results in the past: hybrid courts operating outside the national judicial system, like the Special Court for Sierra Leone.

This type of international court of mixed composition would be created by agreement between the Congolese government and the United Nations. It would apply international criminal law relating to international crimes and, if appropriate, provisions of Congolese domestic law.

Such a court, being composed of a majority of international investigators, magistrates, and judges, would enjoy a high degree of independence and impartiality due to the prominent role given to international actors, which would create the conditions for better cooperation with third states and other institutions such as Interpol.

However, as it is not part of the national judicial system, its impact on building the capacity of the Congolese justice system would be more limited.

In this second option, the Panzi Foundation recommends that the Special Criminal Court focus primarily on the prosecution of alleged perpetrators, Congolese or foreign, who bear the greatest responsibility for the commission of the most serious international crimes, and that the specialized mixed chambers deal with the other priority cases in the fight against impunity. National courts would have residual jurisdiction over cases that are not dealt with by the above-mentioned mechanisms.

### ***Option 3: The establishment of specialized mixed chambers***

If the Congolese government and the international community do not choose the option of creating an ICT or a hybrid tribunal independent of the Congolese judicial system, the minimum option would be to set up specialized mixed chambers, ensuring that the composition of the prosecuting and judging bodies is predominantly international for the reasons mentioned above.

The Congolese courts would retain jurisdiction over the prosecution and punishment of international crimes that are not dealt with by the specialized mixed chambers, according to a national prosecutorial strategy based on a case selection criteria to be defined and a procedure of discontinuance at the national level when internationalized mechanisms have jurisdiction.

Given the high probability that specialized mixed chambers will be created, the Panzi Foundation commends the efforts of the Military Tribunals to fight impunity for certain international crimes committed in the DRC, particularly crimes of sexual violence committed in recent years. Nevertheless, it is believed that the expected

presence of international actors in the prosecution and trial bodies as part of the transitional justice process in genesis offers an opportunity to transfer to the ordinary courts, in accordance with international standards and with the law implementing the Rome Statute adopted in June 2015. This law amending the Penal Code, the Code of Criminal Procedure, the Military Penal Code, and the Military Judicial Code, respectively, removed the exclusive jurisdiction of military courts to try war crimes, crimes against humanity, and genocide.

Indeed, many recommendations made repeatedly over the years by UN and civil society experts have expressed various concerns and shortcomings regarding the long-standing exclusive jurisdiction of military courts to try international crimes. In terms of the rights of the defense, defendants before the operational military court do not have the right to a dual level of jurisdiction, which is contrary not only to the Constitution but also to international human rights standards.

It should be recalled that under the 2015 law, civilian courts now have jurisdiction to try war crimes, crimes against humanity, and genocide committed on Congolese territory, regardless of the official position of the alleged perpetrator of the crime or any immunity he or she may have under national or international law, but it must be noted that to date the civilian courts have made little use of this opportunity to bring justice to the victims of the most serious crimes.

The Panzi Foundation would like to draw attention to a major challenge that would arise if an ICT is not established: ending impunity for the many perpetrators of international crimes committed in the DRC by foreign nationals and/or person living outside the country through mechanisms integrated into the national justice system.

The Security Council has repeatedly stressed that forces that have occupied areas of the DRC must be held accountable for human rights violations committed in the territories they have controlled. It has also reiterated the obligation of the Congolese state, as well as other states in the region, including states involved in armed conflict, to bring those responsible for violations to justice and to allow for accountability for violations of international humanitarian law.

As noted above, only an ICT could make decisions that are binding on all states, including those bordering the DRC, whose armed forces and groups are involved in the commission of international crimes during conflicts.

Domestic justice in the DRC would therefore require extradition agreements and very effective judicial cooperation with all the states party to the conflict, particularly Uganda and Rwanda, because establishing the facts and responsibilities, including who ordered or instigated the killings, will be difficult without the assistance and cooperation of the authorities of the third states concerned.

Despite various commitments made by the signatory countries of the Addis Ababa Framework Agreement for Peace, Security and Cooperation and the Nairobi Declaration on Justice and Good Governance, it is clear that there is a lack of real political will on the part of all the States concerned to bring to justice their nationals who are allegedly responsible for international crimes committed in the DRC, despite the creation of a Judicial Cooperation Network for the Great Lakes Region. Indeed, to date, the Panzi Foundation is not aware of any prosecutions initiated by third countries against their nationals involved in the commission of the most serious crimes committed in the DRC.

However, international law obliges States to prosecute or extradite their nationals, as well as persons present on their territory, following the example of the recent and first indictment of Roger Lumbala in the context of legal proceedings opened in France on the basis of the Mapping Report, in application of the principle of universal jurisdiction for the most serious international crimes.



Thus, in the event that an ICT is not created, the Panzi Foundation invites the Security Council to adopt a resolution obliging third-party states to bring to justice their nationals involved in the commission of crimes committed in the DRC and requiring the cooperation of all states in the prosecution of alleged perpetrators of serious violations, both Congolese and foreign, so that they can be brought to justice before international or internationalized mechanisms to be created in the DRC.

Finally, since the decision to create such mechanisms and the effective start of their activities may take time, the Panzi Foundation believes that it is urgent to proceed as quickly as possible with the collection and preservation of evidence that can be used before these courts. This evidence, and more specifically the evidence that can be collected during the exhumation of the numerous mass graves inventoried by the Mapping Report, is essential and indispensable in order to establish the criminal responsibility of the perpetrators of the mass crimes committed in the DRC before the courts. The President of the Republic should, without further delay, send a letter to the Security Council requesting the assistance of the international community and the adoption of a Security Council resolution creating a team of investigators, integrated into MONUSCO, including experts in forensic anthropology, to collect, preserve and store evidence of acts that may constitute war crimes, crimes against humanity and crimes of genocide committed in the DRC, according to the most rigorous criteria, which should be defined in the mandate of this team of investigators.

#### **IV. Reparations**

Under international law, victims of human rights and international humanitarian law violations are entitled to adequate, effective and prompt reparation. Indeed, the victim or his or her dependents are entitled to receive damages from the perpetrator of the crime. In addition, the obligation to provide reparation is also incumbent on the State for acts and omissions that can be attributed to it, in particular when it has failed in its obligation to protect the civilian population in a timely manner.

The right to reparation can take many possible forms and include various measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as provided for under international law in many human rights and humanitarian law treaties.

According to the United Nations, a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted. Furthermore, in exercising his or her right to reparation, the victim must be protected from intimidation and retaliation.

Among the various transitional justice mechanisms, the right to reparation is the most victim rights-oriented tool and many studies have highlighted that one of the main demands of victims and survivors is restorative justice. Indeed, reparations not only represent a measure of justice, but also acknowledge the harm inflicted and provide financial or material support to the victim to enable him or her to rebuild his or her life with dignity.

Reparations are generally made in one of two ways: they can be ordered by a court (judicial reparations) or established by government decree or law (administrative reparations).

Despite the courage of many victims of mass crimes to bring their cases to court, and to overcome the many obstacles associated with the administration of justice in the DRC, their aspiration to see their perpetrators convicted goes hand in hand with their hope of obtaining damages. However, while Congolese courts have frequently awarded reparations to victims in recent years, particularly survivors of sexual violence, these awards are never paid out, even when the Congolese state is ordered to pay damages jointly and severally with the defendants—often FARDC elements—when they are insolvent.

It should be noted that the Congolese procedure for enforcing court decisions on compensation in the post-trial phase is complex and expensive, which discourages many victims and leaves them with a bitter feeling of justice

half-done. The non-payment of compensation not only undermines the credibility of the judiciary and the confidence of those subject to trial in the justice system, but also discourages victims from filing complaints, thus undermining efforts to fight impunity.

To remedy this situation, the Panzi Foundation calls on the government to put in place without delay a system to ensure that damages are paid to victims of serious international crimes tried by Congolese courts.

Given the difficulties and obstacles faced by victims in obtaining reparation from a judicial decision, which requires establishing the responsibilities of the perpetrators, and taking into account the fact that many perpetrators, for various reasons, will not be prosecuted, there is a need to seek alternatives to the judicial process to provide reparations to victims and survivors who do not have access to formal justice mechanisms.

For example, administrative reparations are increasingly being advocated in the context of massive human rights violations. These reparations programs are generally much broader in scope than judicial reparations and are less demanding of victims, particularly in terms of the evidence they must provide. In addition, they focus primarily on the harm suffered, without necessarily seeking to attribute fault to a specific individual.

In order to ensure the timely delivery of reparations to victims and survivors who are in dire need and have been waiting for justice and other forms of reparation for many years, these administrative reparations programs should be pursued, developed, and implemented in parallel and in complementarity with the development and implementation of the other transitional justice mechanisms mentioned in this paper.

Given the large number of victims and the complexity of the reparations to be implemented, it would be wise to entrust the development of reparations programs to a specific body that should enjoy a high level of independence, probity, and broad prerogatives to define the type of violation that will be subject to reparations and to identify categories of victims entitled to different forms of reparations. Indeed, the determination of the beneficiaries of a reparations program is of crucial importance and several valid criteria can be used, such as the severity of the violation, its impact on the physical or mental health of the victims, stigmatization, the possible repetition of violations, or the current socio-economic situation of the victims. The types of reparations should also be determined: individual, collective, material, and symbolic.

It should be noted that while individual and monetary reparations are the only measures of reparations provided for in Congolese law, other measures are envisaged by international standards in the context of transitional justice processes. Collective reparations, such as the construction of a school or a health center or the implementation of development projects for the benefit of affected communities, should also be encouraged. So should more symbolic measures, some of them low-cost, such as a public apology by the government or the Head of State on behalf of the nation, or other initiatives that address the need to preserve memory, such as the building of museums and memorials, or the institution of a day of remembrance dedicated to the memory of the victims.

These symbolic measures not only involve a process of public and official recognition of the violations and their consequences for the victims, but also address society as a whole as a call for non-repetition, with the message: *"Never again."*

Taking these different options into account, it is particularly important that victims be involved in the design and implementation of reparations programs. It is with this vision that the National Movement of Survivors of Sexual Violence in the DRC has adopted the slogan: *"Nothing for us, without us!"* Victim consultation processes are essential because victims know their needs and priorities best and are in the best position to address concerns about the modalities and distribution of reparations that affect them directly. To this end, appropriate funding must be made available to strengthen the networking and advocacy capacities of human rights

organizations in general and victims' and survivors' associations in particular, in order to ensure their effective participation in the transitional justice process.

In order to meet the expectations of restorative justice, the state should therefore send a clear political signal that it is committed to assisting victims of international crimes. It should establish a national reparations program to intervene in all cases where those responsible for the harm suffered are not identified or are unable or unwilling to fulfill their obligations.

The Panzi Foundation is aware of various initiatives under discussion: a draft law on reparations that was tabled in Parliament several years ago; a draft fund at the level of the Ministry of Justice to receive the funds to be derived from the reparations from the "DRC vs. Uganda" case before the International Court of Justice; a project for a reparations fund for victims of sexual violence, supported by the Office of the Special Advisor to the Head of State on Sexual Violence and Youth, with the collaboration of the Ministry of Justice; and finally, a project for a fund to compensate victims of serious human rights violations is being prepared by the Ministry of Human Rights.

This plethora of ongoing initiatives, none of which have yet been completed, highlights the need to first adopt a victim-centered and gender-sensitive national reparation strategy and program before adopting a normative framework and setting up a Trust Fund or a Compensation Fund to implement the reparation program for victims of conflict in the DRC.

The implementation of such a program will require an indispensable investment by the Congolese state and the support of the international community. The Congolese state should consider various models for financing reparations. These reparations measures should also be undertaken by third-party states that are responsible, including states that are responsible for violations of human rights and international humanitarian law committed in the conflicts that took place in the DRC, as an obligation under customary international law, and as a privileged vehicle for creating the conditions for regional reconciliation and peaceful coexistence.

## **V. Mechanisms for truth-seeking**

The Congolese people as a whole, and the victims of human rights violations in particular, have a right to know the truth about past events related to the commission of mass crimes. This means shedding light not only on the circumstances and reasons that led to the perpetration of these atrocities, but also on the root causes, structures, and institutions that enabled or facilitated them.

The effective exercise of the right to the truth is an essential safeguard against the recurrence of violations and is particularly important for societies seeking to emerge from authoritarian and repressive regimes that often tend to deliberately rewrite history and deny or minimize atrocities in order to legitimize themselves, fuel mistrust, and even provoke new cycles of violence. Establishing the truth therefore helps to prevent this kind of revisionist or denialist manipulation.

The right to the truth, in its individual or collective dimension, has been explicitly cited as a legal basis in several instruments establishing truth commissions or other similar mechanisms. The legal acts establishing these commissions are often based on the need of victims, their relatives and society in general to know the truth about what happened and to facilitate the process of reconciliation, to contribute to the fight against impunity and to reinstate or strengthen the rule of law and democracy.

These commissions—non-judicial investigative bodies—are usually given a relatively short period of time to take statements, investigate, research and conduct public hearings, before concluding their work with a final public report.

While truth commissions do not replace the need for prosecution—and justice shall not be the first casualty of truth—they do provide a form of accountability for the past and are therefore particularly relevant in situations where prosecution of all mass crimes is impossible or unlikely, such as in the DRC, due to the very large number of crimes committed and people involved. The use of a truth-seeking mechanism is therefore intended to complement and address the inherent limitations of the judicial approach.

Despite the failure of the Truth and Reconciliation Commission (TRC) established between 2003 and 2006 at the end of the Inter-Congolese Dialogue in Sun City and Pretoria, which led to a great deal of disappointment among the victims, the thirst for truth about the conflicts, their genesis, and the deep-seated reasons that led to so much violence remains great within Congolese society, particularly in the east of the country.

After decades of denial, manipulation, and lies, the search for the truth is essential to avoid repeating the mistakes of the past, to establish the different levels of responsibility—national, regional and international—to build the foundations of a society at peace with the traumas of the past, and to promote reconciliation within Congolese society and among the countries of the Great Lakes region.

A new truth commission for the DRC should therefore first and foremost learn from the mistakes of the past and adopt a victim-centered and gender-sensitive approach. The reasons for the failure of the TRC were related to the lack of a consultation process, the nature of its composition—linked to the principle of inclusiveness that underlies the Global and All-Inclusive Agreement—the existence of an unrealistic dual mandate of truth-seeking and conflict resolution through mediation, and finally, the lack of human and material capacity.

The Panzi Foundation has learned of the draft decree under consideration by the Ministry of Human Rights to establish a "Transitional Justice and Reconciliation Commission." This Commission, which would be responsible for implementing the transitional justice policy in order to ensure mediation and reconciliation between the perpetrators and victims of serious crimes and to make the necessary reparations to the victims, does not seem to have sufficiently taken into account the mistakes of the first TRC: lack of consultation, lack of independence, bureaucratic structures, dual mandate of truth-seeking and mediation, etc. Moreover, it appears difficult for a Commission to implement a transitional justice policy before a national strategy has been defined. For this reason, the Panzi Foundation calls on the government to first define a national policy and a holistic strategy for transitional justice before adopting a normative framework.

The international or internationalized nature of some of the conflicts that took place in the territory of the DRC raises the question of the appropriateness of giving a regional mandate to a national structure, or of exploring the idea of setting up a regional body—a TRC of the Great Lakes region—to establish the facts and responsibilities of the various state and non-state actors who occupied portions of the territory of the DRC during the conflicts and to lay the foundations for peaceful coexistence among the countries of the subregion. Finally, while it may be necessary to analyze and officially recognize the international and regional nature of the conflict, the question of establishing Provincial Commissions, following the example of the initiative underway in Kasai Central, should also be examined in other sensitive local contexts, in various Provinces of the country, such as in Ituri or in North and South Kivu.

It is in this context that the Panzi Foundation makes some recommendations should a new national TRC and/or provincial TRCs be established.

Recruitment and appointment procedures are of critical importance because the credibility, independence, and competence of the members of new DRC truth mechanisms will largely determine their legitimacy and support. In addition, these mechanisms should seek parity or a minimum quota of women in all staff positions, and women's groups, including survivors of conflict-related sexual violence, should be included in the selection panel for commissioners.

The mandate of the national commission and/or a provincial commission should shed light on the context in which the conflicts took place, the root causes of the violence that devastated so many lives and communities, the scale and systematic or widespread nature of the crimes, and the different levels of responsibility — political, institutional, social, economic. It will not replace a mediation body or reparation mechanism, but will provide recommendations, including on reparations and institutional reforms. When specific populations have been particularly affected by violence, and especially when such violence is underreported or poorly understood, as is the case with sexual crimes, it will be useful to ask the commission to give special attention to these victims or types of abuse. For example, some truth commissions have created a “women’s unit” and have been tasked with paying special attention to abuses against women and girls, or to victims of sexual abuse. In addition, in the case of the DRC, the economic motives behind armed conflict, related to land occupation and the illegal exploitation of and trade in natural and mineral resources, will need to be specifically addressed.

With respect to hearings, the commission should develop procedures to facilitate and encourage victims to provide information about their experiences, including gender-sensitive witness protection and psychosocial support mechanisms. The presence of women on the Commission and its bodies will help survivors of sexual violence feel more comfortable reporting sexual abuse. A commission could also hold women-only hearings, with only female commissioners and observers present, or allow women to testify in a public hearing while veiling their identity.

The final report of the truth commission should analyze the causes, context, and consequences of the violence on Congolese society in general and the victims in particular. In addition, it will make recommendations to remedy the harm suffered by the victims and ensure non-repetition. It will be an important way to ensure that women's experiences during conflict are documented and recommendations are made for appropriate redress. The report should include chapters on the experiences of women and children during conflict, as well as a gender analysis integrated throughout the document.

Finally, if the option of recreating a new TRC or creating provincial TRCs returns to the agenda, it should not be at the expense of unofficial truth-seeking mechanisms, including all the initiatives for the preservation of historical memory, which today most often emanate from civil society actors, and which must also be encouraged. These are activities that are multiplying today, such as marches to fight impunity, commemorative days and ceremonies for the victims of the massacres, the construction of monuments or an online memorial, the demands, expressed by the victimized communities, for the opening and exhumation of mass graves, etc.

## **VI. Conclusion**

The scope and gravity of the most serious crimes committed in the DRC for almost three decades has deeply traumatized our entire society, which has lost its bearings and values.

The culture of impunity enjoyed by the alleged perpetrators of the most serious crimes that are supposed to shock the conscience of our common humanity is one of the root causes of the instability and the perpetuation of serious violations of human rights and humanitarian law to this day.

While political and security options have failed to stabilize the country and protect civilians, and MONUSCO is considering a gradual and progressive withdrawal, it is high time to harness the added value of the various transitional justice mechanisms to prevent the recurrence of past and present atrocities, to heal our ailing society, and to move forward on the path of sustainable peace through both retributive and restorative justice.

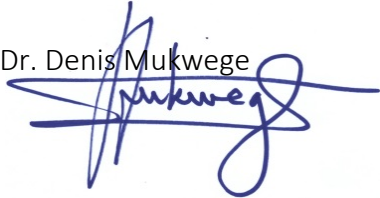
The Panzi Foundation will continue its advocacy efforts to ensure that the rights of victims to justice, truth, reparation, and guarantees of non-recurrence are finally respected.

We urge the United Nations to place the fight against impunity and transitional justice at the heart of its exit strategy for the DRC and urges the Congolese government to adopt without further delay a holistic national transitional justice strategy that meets the best international standards.

Bukavu—June 5, 2021

Panzi Foundation

Dr. Denis Mukwege

A handwritten signature in blue ink, appearing to read 'Mukwege', is written over the printed name 'Dr. Denis Mukwege'. The signature is stylized and cursive.