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The governance of complementary global regimes and the pursuit of human security : the interaction between the United Nations and the International Criminal Court

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PRELIMINARY REMARKS

The DRC has the size of Western Europe and gained formal autonomy from Belgium in 1960. Since the country's decolonization the current updated empirical data on governance show that the human development index is lower now than in 1975 and the GDP pro capita roughly one-third of what it was back in 1960. The World Bank has currently put the DRC as fourth worst-administrated State after Somalia, Iraq and Myanmar.¹ The DRC has been classified as the second most unstable country after the Sudan, and the fifth most corrupted African State. An estimated 5.4 million people have died because the war and its after-effects since 1998. In spite of the end of the civil war since 2002, millions of Congolese continue to die each year. Arguably considered as the world's most deadly crisis after WWII, its *intra*-state instability receives more attention than many of the past and recent crises such as Bosnia, Iraq and Ukraine.² Since its independence the DRC has been the subject of cross-border incursions, including the interference of neighbouring States in its domestic affairs. The illegal exploitation of natural resources has emerged as the primary means of financing the civil war including the illicit trade of corporations. Such intrusions demolished any institutional heritage in the fragile domestic apparatus of the country. The internal political transition in the DRC is characterized by extreme violence and crime to retain power on civilians, territories and resources. The last elections in 2011 marked the second vote held since the Kivu Conflict that killed more than five million people. The electoral process was characterized by voting difficulties as some voting materials arrived late, or did not arrive at all. The presidential election involved 11 candidates, although the victory of President Joseph Kabila received claims of intimidation and vote-rigging. With regard to the delicate situation affecting the civilian population including the concerns related to democratic transitions in the country, this case study puts forward important elements to be taken in consideration by the decision makers on reconfigurations, cooperation standards and interactions,

1 See The World Bank World Development Indicators respectively in 2012, 2013, 2014, accessible at: <http://data.worldbank.org/sites/default/files/wdi-2014-book.pdf>

2 For an overview of the causes and the effects of the conflict in the DRC see I. Samset, 'Conflict of Interests or Interests in Conflict? Diamonds and War in the DRC', 2002 *Review of African Political Economy* 29, at 463.

including the alternative between 'comprehensive' and 'narrowly focused' international mandates able to complement with each other on the ground.

This case study advocates for more significant political engagement coming from the African Union, the European Union, the United Nations and the peacekeeping missions in the LRA-affected region where the International Criminal Court is still involved. This chapter highlights the need for more financial and technical support of early warning networks, sensitization and demobilization efforts, including long-term rehabilitation for returnees and ex-combatants. These activities, of course, also require a well-functioning domestic accountability system. In fact, the statements released by the Congolese government that the LRA threat no longer exists in the DRC is a claim strongly disputed and requires international attention. After all, the instability in the DRC is directly linked to the causes of mass atrocity crimes committed in the region, especially by the genocide in Rwanda and the criminal activity of the LRA in the South of Sudan and Central African Republic. This case study explores the evolution of multidimensional responses in an environment of violent conflicts, volatile sites, mass atrocities, poverty and the complete absence of the State able to safeguard civilian lives.

This chapter examines the challenges of international responses fostering peace, justice and security and the opportunities, to prevent, or reduce, deadly conflicts, while protecting civilian lives.³ It offers recommendations to implement the relationship between the global regime preserving human rights and sustainable peace, through the UN presence in the country, and the criminal accountability emerging regime of the Rome Statute, including the enforcement of arrest warrants, judicial decisions, operational assistance and protection of civilians *in situ*. It reports about sensitive fact-findings by non-governmental human rights organizations on the issue of civilian protection and massive humanitarian violations, which are offering information, guidelines and recommendations for the international governance institutions of complementary character involved in the DRC. The intersection between peace enforcement, international justice and human security requires a model of governance falling under the paradigm of accountability. The DRC case confirms such necessity. This chapter demonstrates that the fight against the impunity of international crimes at domestic and international levels in the DRC is characterized by the gaps in the configurations of international mandates of complementary character requiring partnerships on the ground in order to maximize the results in accordance with the human security doctrine. The section below clarifies the case study objectives. It offers an overview of the background, analysis, issues and purpose of the case study in the DRC.

3 See H. F. Weiss, 'The DRC: A Story of Lost Opportunities to Prevent or Reduce Deadly Conflicts', in R. H. Cooper, J. Kohler (eds.), *Responsibility To Protect. The Global Moral Compact for the 21st Century*, 2009, at 115.

7.1 THE CASE STUDY OBJECTIVE: WHAT KIND OF CONFIGURATIONS IN THE FIELD OPERATIONS?

Section Outline

This case study demonstrates that the harmonization of complementary efforts deployed in the field operations is an idea not yet realized. The Rome Statute, as a multilateral treaty, requires a balance between the *retributive*, *restitutive* and *protective* aspects of international criminal justice, while the United Nations struggles with its credibility of civilian protection duties in conflict and post-conflict situations. In devastated societies characterized by conflicts, crimes, corruption and instability the interaction between complementary global regimes represents an opportunity to maximize the results on the ground. Ending the impunity of serious crimes is an urgent priority in the DRC. Confronting the judiciary lacuna where judicial corruption is pervasive is essential in this country. Violence against civilians is largely motivated by the exploitation of resources, while gender crimes are used as a weapon of war. The current disarmament, demobilization and reintegration efforts in the DRC do not produce sufficient results. Militia groups are opposing such process of stabilization in the country. The Congolese civilians face extreme violence and insecurity caused by the presence of armed groups characterizing the current political transition. The MONUC/MONUSCO⁴ mandate to protect civilians has a negligible impact for several reasons.⁵ Furthermore, the impunity regime normalized “predation as the principal *modus operandi* by the Congolese military, by various militia groups and by self-defense forces across the east of the country. The UN peacekeepers have done little to halt this practice”.⁶ Moreover, some of the warlords targeted by the ICC were extremely dangerous for the local populations and could be even a risk for the victims and witnesses screened by the judicial institution.⁷

With regard to security the international responses should as much as possible intervene when the crisis has dramatic consequences on acceptable standards of human security. The international responses, rather than being

4 See UN docs. S/RES/1925 (2010), S/RES/2053 (2012).

5 See H. Edstrom, D. Gyllensporre (eds.), “Mission in Central Africa: MONUC/MONUSCO”, in *Political Aspirations and Perils of Security. Unpacking the Military Strategy of the United Nations*, 2013.

6 E. B. Rackley, ‘Predatory Governance in the DRC: Civilian Impact and Humanitarian Response’, March 2005 *Humanitarian Exchange Magazine* 29, at 3, accessible at: www.odihpn.org

7 On 22 March 2013, Bosco Ntaganda surrendered himself voluntarily and is now in the ICC’s custody. Two warrants of arrest have been issued by the ICC for Bosco Ntaganda for seven counts of war crimes and three counts of crimes against humanity allegedly committed in Ituri in the DRC between 1 September 2002 and the end of September 2003. See for a general overview M. Eriksson Baaz, M. Stern, ‘Making Sense of Violence: Voices of Soldiers in the Congo (DRC)’, 2008, *Journal of Modern African Studies*, 46, 1, at 57.

exclusively militarily, should be 'narrowly focused' and serve the right actors on the ground. There is consensus that the concept of security only approached by military means may work as combustible on the flame of such violent conflicts in the DRC. The military operations by the AU authorized by the UN failed to raise acceptable standards of human security. Therefore, the efforts focusing on the preservation of lives and their protection are the priority of planning whatever security mandate. The struggle of the UN on institution-building supporting the reform of the army, police and justice systems in the corrupted domestic reality of the DRC should complement and prioritize the activity of the ICC. Police and law enforcement following supranational criminal decisions are both necessary. The priority is also to safeguard the safety of victims and witnesses. The warlords still active in the army have to be immediately targeted by the domestic judicial system with judicial proceedings *in situ*. After all, the DRC has a legal obligation to cooperate in accordance with the Rome Statute. The political organs of both the UN and the Rome Statute regime should pressure the local authorities while also working on the configuration of their complementary mandates on the ground. The exchange of information and intelligence operations are still absolutely required, including investigations and the extension of prosecutions until the domestic ability to take over would be unquestionably proven by the local authorities.

This section offers an overview of the background, the issues and the purpose of international mandates in the DRC supposed to receive complementary configurations and cooperation raising the standards of human security. It emphasizes the importance of justice in securing peace and the role that international criminal justice could play in facilitating the peace process and democratic transitions with support, assistance and cooperation. The recommendations on cooperation are addressed to the high representatives and policy makers which have considered the issue of cooperation in a number of occasions. This assessment complements the recommendations set out by the report of the Bureau on Cooperation (ASP) and by the Court in the ICC-ASP8/44 and annex 1. These relate respectively, with the cooperation with the United Nations and on the consideration of the present situation, including the ways in which such cooperation can be developed in the DRC. The report of the Court on international cooperation and assistance notes, in paragraphs 6 and 7, that although cooperation with the Court has generally been forthcoming, "public and diplomatic support remains a priority in the galvanization of arrest efforts, as does the conclusion of more agreements for the enforcement of sentences, the relocation of witnesses and interim release. Attention might be drawn to the fact as well that such agreements would cover any situation of a release from custody".⁸

8 ICC-ASP/8/44, Annex I.

7.1.1 The Background

With regard to the international responses in the aftermath of the presidential elections in 2006 and the DRC constitution several concerns and critics followed respectively, on the political transition in the country, on the widespread humanitarian violations, and on the corruption in the domestic institutions. Scholars, human rights activists and practitioners claim that international actors have given little attention to the grave human rights breaches of the first two years of the Kabila government. This brought as a result the failure to hold accountable the perpetrators of these abuses. Although the UN presence took some steps to ensure political space for the opposition during the electoral transition, the institution-building assistance provided by the UN failed to check on the executive power, even though some Congolese analysts were voicing concerns about the authoritarian shift well in advance. In 2007, some Congolese media ran an opinion about the brutal behavior of the government. Questioning the electoral process and its bloody aftermath in Kinshasa and Bas Congo, the author lamented without releasing his identity “we were ardently searching to become a democracy, but we are on our way to becoming an absurd dictatorship”.⁹ According to human rights activists, the elections themselves cannot bring democracy. Both the “Congolese and international actors must work to establish an independent judiciary and a vibrant parliament with an effective opposition to improve human rights, hold the executive to account for its actions, and counterbalance the restriction of political convergence. The failure to establish such counterweights will endanger the slight chance of Congo’s young democracy. The same kind of focus and international cooperation that brought about the elections must be replicated in the cause of improving human rights and opening up democratic space, if the hopes for stability and improved governance for this war-torn nation are to be fulfilled”.¹⁰

One of the biggest negative aspects of reliance on the ICC in the DRC is that the Court’s temporal jurisdiction means that it cannot address all of the crimes committed during the civil wars in the DRC. This has been heavily criticized. The obvious expectation is that the domestic judicial capacity would arrange proceedings *in situ* undermining the regime of impunity in

9 An amnesty law was signed by President Kabila on 7 May 2009. For the debate and lack of trust to Kabila after the elections and the instable political situation for the next electoral round in 2011 see, ‘Sortir de la politique du pire: Une exigence pour le chef de l’Etat’, May 18, 2007, Kinshasa, *Le Potentiel* Congolese Newspaper. For an overview of the political transition in the country and the peace and justice constraints see, T. Carayannis, ‘The peace and justice dilemma in the DRC’, *The Challenge of Building Sustainable Peace in the DRC*, (July 2009), Centre for Humanitarian Dialogue, Background Paper, accessible at: <http://www.hdcentre.org/files/DRC%20paper.pdf>

10 See Human Rights Watch, *We Will Crush You. The Restriction of Political Space in the Democratic Republic of Congo*, November 2008, accessible at: http://www.hrw.org/en/node/76188/section/9#_ftn314

the country. The wars began in 1996 and the ICC's jurisdiction extends back only to 2002. Whatever the ICC mandate brings in the DRC, its jurisdictional and resource constraints limits a 'full service' justice solution. Another critic is that focusing primarily on Ituri, the ICC takes in hand only one part of the history of the Congo wars. This, and the combination with the case against Thomas Lubanga and the arrest of popular opposition leader, Jean-Pierre Bemba in 2008, for crimes allegedly committed in the Central African Republic, has eroded much of the goodwill enjoyed by the ICC initially in the DRC. Bemba's arrest prompted outrage in the DRC with accusations that the ICC is a political instrument of Kabila, or Western powers, or both. Increasingly, Congolese human rights lawyers favour a special chamber inside the Congolese judicial system supported by external donors, aware of the limitations of the ICC and the very expensive option of *ad hoc* tribunals. While this would help rebuild the DRC's justice system and allow for local ownership of justice, both elements being critical in building a durable peace, the ICC has neither the mandate nor the resources to accomplish such goals. In conclusion these are the enduring issues which current and future mediation efforts will have to contend.¹¹ The reality is that Kabila has the power in this country. The DRC is rich of mineral resources and this appeals different parties with negative consequences on democratic governance.

In accordance with its constitution the DRC held presidential elections in 2011 which were followed by local elections in 2012-2013. In 2010, the Congolese government, through a letter to the UN Secretary-General, requested international assistance for the organization of the entire electoral process. Earlier than that and to respond to the conflicts in the country, MONUC (*Mission de l'Organisation des Nations Unies au Congo*) was established by the United Nations Security Council in *Resolutions 1279 (1999)* and *1291 (2000)* to monitor the peace process of the Second Congo War, though much of its focus subsequently turned to the Ituri conflict, the Kivu conflict and the Dongo conflict. In 2010 MONUC was renamed the *United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* (MONUSCO) to reflect the new phase reached in the DRC and the inability of peace keeping to address the human security dilemma. In August 2010, the Mai Mai rebels ambushed a base of the 19th Kumaon Regiment of the Indian Army, killing three Indian peace-keepers. The attack renewed the Indian government decision to decrease the military presence in the DRC due to growing conflict in the region. It should be noted that the UN Security Council Resolution 1925 (2010) provides that MONUSCO has the mandate, *inter alia*, "to provide technical and logistical support for the organization of national and local elections, upon explicit request from the Congolese authorities and within the limits of its capabilities and resources". In 2010, a timetable of the UN missions was prepared covering until June 2012 and still subject to the

11 See for the devate P. Clark and N. Waddell, 'Courting Conflict? Justice, Peace and the ICC in Africa', in *The International Journal of Transitional Justice*, March 2008, at 40.

decision of the Security Council regarding the extension of the missions in 2013-2014 giving absolute priority to the protection of civilians.¹²

With regard to justice, since the entry to force of the Rome Statute, the DRC authorities referred to the International Criminal Court to investigate and prosecute international crimes of common concern allegedly committed anywhere in the country. On 26 January 2009, the ICC opened its first trial in the case against Congolese warlord Thomas Lubanga Dyilo. Lubanga was the first person charged in the DRC situation as well as the Court's first detainee. The trial marks a turning point for the Rome Statute. The Lubanga proceedings represent the first test of formal victim participation in an international criminal trial. The case highlights the gravity of recruitment, enlistment and conscription of child soldiers.¹³ The trial in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* started on 24 November 2009. Trial Chamber II found German Katanga guilty, as an accessory, within the meaning of article 25(3)(d) of the Rome Statute, of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC. On 23 May 2014, Trial Chamber II sentenced Germain Katanga to a total of 12 years' imprisonment. The time spent in detention at the ICC, between 18 September 2007 and 23 May 2014, will be deducted from the sentence.¹⁴

Considering the international political engagements and the governance background in the DRC, the United Nations electoral assistance was provided through an integrated team that includes the MONUSCO Electoral Division and the UNDP's Project in Support of the Electoral Cycle (PACE). The electoral assistance was provided throughout the creation of an Independent National Electoral Commission (CENI). The organization, functioning and promulgation of laws of the Independent National Electoral Commission (CENI) by Congolese President Joseph Kabila certainly marked a significant step in the electoral process and deserved international attention. It needs to be noted that millions of Congolese went to the polls in November 2011 to

12 The authorization and further extension of the UN mission in the DRC is to be found in the Security Council Resolution 1991 of 28 June 2011 and so forth, accessible at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1991\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1991(2011))

13 ICC-01/04-01/06-2901, *Case The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, accessible at: <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>

14 In the situation in the DRC, five cases have been brought before the relevant Chambers: *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Bosco Ntaganda*; *The Prosecutor v. Germain Katanga*; *The Prosecutor v. Mathieu Ngudjolo Chui*; *The Prosecutor v. Callixte Mbarushimana*; and *The Prosecutor v. Sylvestre Mudacumura*. Thomas Lubanga Dyilo, Germain Katanga and Bosco Ntaganda are currently in the custody of the ICC. Sylvestre Mudacumura remains at large. See ICC » Situations and Cases » Situations » ICC-01/04.

cast their votes in presidential and parliamentary elections. Since its independence in 1960 this is only the second time that the country held democratic elections. Earlier in 2011, the UN issued a report that detailed numerous human rights violations during the pre-electoral period in the DRC, and warned that such incidents could threaten the democratic process and could escalate in further post-electoral violence. The report documented 188 violations apparently linked to the electoral process that occurred between 1 November 2010 and 30 September 2011, including acts of intimidation, threats, incitement, arbitrary arrests and violence. The violations most frequently infringed individuals' freedom of expression, the right to physical integrity and the right to liberty and security of the person, as well as the right to freedom of peaceful assembly.¹⁵

7.1.2 The Analysis

This case study deals with the multidimensional operations fostering peace, justice and security and the issue of cooperation in the DRC. It discusses the links between comprehensive and narrowly focused mandates encompassing a range of civilian protection tasks. In particular, it argues about the implementation of peace agreements and the actions undertaken to consolidate peace, including the reforms strengthening the institutions of the State and the rule of law, while fighting against the impunity of serious crimes. In other words, the multidimensional peace-keeping and peace-building operations supposed to contribute to the formation, recovery and democratization of the domestic jurisdiction in the DRC.¹⁶ In this situation the intents have fallen on the political transitions following the authorization of the Congolese authorities involving international governance institutions, such as the UN missions and the Rome Statute institutions. In accordance with the three essential tasks set out in the Security Council *Resolution 1279* (1999) and *Resolution 1906* (2009), the activities of MONUC (*Mission de l'Organisation des Nations Unies au Congo*) and later re-named MONUSCO (*Mission de l'Organisation des Nations Unies pour la stabilisation en République Démocratique du Congo*)¹⁷ should centralize a) the post-election peacekeeping

15 See the report of the Joint Human Rights Office in the DRC accessible at: http://www.ohchr.org/Documents/Countries/ZR/ReportDRC_26Nov_25Dec2011_en.pdf For an overview of the situation during the national elections, see the UN News Centre, *Deploring election-related violence in the DRC, top UN official appeal for calm*, 1 December 2011, accessible at: <http://www.un.org/apps/news/story.asp?NewsID=40580&Cr=democratic&Cr1=congo>

16 See C. T. Call, E. M. Cousens, "Ending Wars and Building Peace", in *Coping with Crisis Working Paper Series*, International Peace Academy, March 2007, at 4. For some views of experts in African politics and the politics of 'collapsing State' such as DRC see, W. Reno, 'Sovereignty and the Fragmentation of the DRC', *Warlord Politics and African States*, (1998), at 147.

17 See UN doc. S/RES/1925 (2010) Adopted by the Security Council at its 6324th meeting, on 28 May 2010, accessible at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1925\(2010\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1925(2010))

and peacebuilding in the protection of civilian populations; *b*) the disarmament, demobilization and repatriation and reintegration of armed Congolese and foreign armed groups; *c*) the support provided to the government in security sector reform (SSR), respectively the reform of the army, police and judiciary. As part of its mandate and compared with the new peace-keeping and peace-building operations, MONUC had the following tasks: *a*) establish contact with the signatories to the Ceasefire Agreement; *b*) liaise with the Joint Military Commission, provide technical assistance and investigate ceasefire violations; *c*) provide information on security conditions; *d*) prepare for the observation of the ceasefire and disengagement of military forces; *e*) maintain contacts with signatories of the Ceasefire Agreement, facilitate the delivery of humanitarian aid and protect human rights.

While other approaches are conceivable, considering that the European Union might be operationally involved again on the ground, the UN primacy among external actors in the DRC especially in the (human) security arena, including its long-lasting presence on the ground, makes MONUC/MONUSCO the principal point of analysis. MONUSCO expresses deep concern about the renewed fighting between rival groups in Rutshuru and Masisi territories, in North Kivu, and the subsequent consequences on the civilian population.¹⁸ Moreover, the impact of the Rome Statute in the justice system of the DRC as the complementary capacity on the ground is also debated. This case study offers an overview of the actors involved in the DRC where the public authority of state-building are partly in the hands of the subsidiary body of the UN Security Council. In this case study the following relationships are argued, namely the issues of evolution, coordination and coherence within the MONUC's mandate; MONUC's cooperation with the Congolese authorities; MONUC's coordination with the UN agencies and humanitarian NGOs; including the implementation, harmonization and coordination between MONUC and the ICC. The arrest warrants against warlords should be enforced by MONUSCO due to the State not cooperating with the Court. This case study argues that the reconfiguration of the security forces should provide support to the ICC. In order to deliver

18 "The situation on the ground is extremely precarious and civilians are being exposed to an unacceptable threat," said Moustapha Soumare, Deputy Special Representative of the Secretary-General, Humanitarian Coordinator and acting Head of MONUSCO. "MONUSCO troops are risking their own lives to fulfill their mandate. See latest press release, 2 March 2013, *MONUSCO expresses deep concern about the escalation of violence in North Kivu*. The UN documents on MONUSCO are accessible at: <http://www.un.org/en/peacekeeping/missions/monusco/documents.shtml> For an overview of the crisis in North Kivu, the Human Rights Watch 86-page report details crimes against civilians by Congolese army soldiers, troops of renegade general Laurent Nkunda, and combatants of a Rwandan opposition force called the Forces for the Liberation of Rwanda (FDLR). The report documents an 18-month pattern of conflict where civilians bear the brunt of the abuses. See HRW, 'The Role of the International Community', *Renewed Crisis in North Kivu*, October 2007, the report is accessible at: <http://www.hrw.org/en/reports/2007/10/22/renewed-crisis-north-kivu>

results in the context of sustainable peace-building, global mandates have to find clear interaction strategies of law enforcement and humanitarian protection in the fight against the impunity of serious breaches of human rights. The multidimensional presence of international actors in the DRC and the necessity of implementing their interactions is the purpose of this case study. The concerns arise about the lack of preparedness and accountability in the reconfiguration of the civilian protection and peace building mandate of MONUSCO. Serious concerns are particularly raised about *a)* the victims and witnesses protection and relocation programs; *b)* about the delimitation of competences between such mandates; *c)* including the option of law enforcement at disposition of the judicial outcomes of the Court, which are still in motion. In other words, both options fighting the impunity at international and domestic levels in the DRC are analysed.

7.1.3 *The Issues*

With regard to the international mandates active on the ground and the enduring struggle of sustainable peace and stability several issues arise due to the lack of coherence and coordination. Mainly on the nature of the 'comprehensive' mandate of peacekeeping characterized by the militarized approach, while dealing with the responsibility to protect civilians, humanitarian assistance and preservation of human rights. The Security Council members should have a better understanding of the mission's status in the DRC and not rely exclusively on the unilateral position of the DRC government. First, considering the range of actors involved in the country, second, assessing the progress made by the military operations against armed groups, and third, deploying security forces to assume UN's protection tasks, including the establishment of State authority in the areas freed by the armed groups. These issues should have received an appropriate assessment before extending or revising the MONUC's mandate, initiating a substantive model of reconfiguration and preparedness to support complementary actors on the ground with MONUSCO serving to such purpose. The support of the electoral activities in the country should have been combined with investigations and prosecutions and with law enforcement against the most dangerous criminal perpetrators. The State apparatus in the DRC is still not able to safeguard its citizens by war and crimes, while international responses lack of interaction strategies to maximize the results in such devastated society.

The idea behind this work is to stimulate the debate on governance strategies and unresolved gaps, recommending an appropriate interrelation between civilian protection, peace and security enforcement, crime prevention and international criminal justice mandates on the ground. Such mandates need to be planned jointly and in full compliance with human rights, international humanitarian law and refugee law. This case study debates on the overall impact of such mandates in the domestic institutional reality of the

DRC, enabling its governance institutions to safeguard human security. This obviously depends on the sovereign responsibilities of the DRC authorities, but not exclusively, since the international community has specific responsibilities as well. The implementation, harmonization and coordination of complementary mandates are indispensable. These aspects require urgent consensus including the know-how of global organizations operating on the ground and supporting with each other. The results about peace, justice and security in the country depend on the way the States Parties, including the non-States Parties to the Rome Statute and formal UN members would take delivery of precise guidelines of cooperation with regard to the DRC, extending the challenge of cooperation in the whole African region. In other words, what kind of practical measures would finally be applied pressuring the DRC authorities to take care about civilians?

The challenges incurred by the multidimensional operations on the ground in the DRC are extensively debated. The first option refers to the implementation of cooperation agreements, memoranda, and other legal tools either at bilateral (e.g. ICC-State) or at multilateral levels (e.g. MONUSCO-ICC). The extreme situation in the country, characterized by serious threats and crimes, shows the inevitability to implement, harmonize and coordinate the international responses. According to the rule of law as one of the most important requirements of governance, all feasible ways deserve to be analysed. The harmonization of governance of resources and competences of global mandates 'narrowly focused' means to influence the State formation and self-sufficiency of the institutional apparatus in such complex situation. The challenges incurred by multidimensional operations need to dwell on the fragility of the State, keeping away from the risk of political manipulation by the DRC government from such international presence in the country. Global actors need to harmonize their work on the ground to maximize the results. The ideal would be a deep determination to act on the causes such as corruption, militarization, resource exploitation and criminal behaviour reducing the devastating effects on the civilian population. In the quest of the State fulfilling its own responsibilities, the change of regime undermining human security in the country is the only way for this community to profit from development programs. Challenging such aggressive regime requires the harmonization of international mandates with law enforcement actions, enhancing the role that international criminal justice can play in facilitating peace processes, domestic institution reforms and democratic transitions in the country. Despite the several approaches in such debate there seems to be only one way out from war and crime in the DRC. This can obey result from a stronger unity of intents between the relevant stakeholders to make sure that the domestic institutions start working in favor of civilians affected by war and crime.

7.1.4 The Purpose

The modest purpose of this case study is to examine the challenges of the interaction between complementary mandates on the cluster of cooperation between peace and justice in a 'failed' State, with appropriate implementation of 'arrangements and agreements' between complementary global tools. It addresses the enduring challenge for the Court made only more difficult in the absence of adequate diplomatic and political support such as the need for increased international cooperation towards arrests, including the protection of affected communities and individuals during violent hostilities. The need of political support for international criminal justice risks constant tension with other important diplomatic objectives, including peacekeeping and peace negotiations which may undermine the credibility of the international judiciary. The UN 'comprehensive' mandate active on the ground fostering peace, justice and security and the pressure for democratic political transitions in the country, requires specific arrangements between all actors involved in the field, including the Court. There is an opportunity on the ground to establish 'narrowly focused' mandates based on the rule of law. Such mandates need high cooperation standards undermining the risks for the country to fall back in the regime of war and mass atrocities.

The concern addressed in this case study questions the extent in which the governance of 'comprehensive' international responses may challenge the complex reality in a 'failed' State such as in the DRC, without raising appropriately the international standards of cooperation between complementary mandates and the Congolese authorities. This study also measures the level of cooperation provided by the DRC to the Court where the most dangerous criminal perpetrators are still at large and around. The problem in the DRC is a lack of responsibility by the government to design acceptable security sector reforms protecting the affected communities and civilians by war and crime. The justice system, including army and police are still unable to function in acceptable ways. The membership of the DRC of the Rome Statute system does not show any consistent check against the impunity, with genuine investigations by the State itself, including the delivery of meaningful justice to the victims. Furthermore, being a party to the Rome Statute is not serving as a deterrent of serious crimes.¹⁹ Another problem derives

19 Lately, 50 Congolese NGOs and Human Rights Watch lodge a formal complaint against Colonel Innocent Zimurinda. The complaint was addressed to General Amuli Bahigwa, the officer in command of Congolese army operations in eastern Congo. The Congolese groups said that abuses were continuing under Zimurinda's command, including with his direct involvement: "We have taken this unusual step of jointly lodging a formal complaint against Colonel Zimurinda because we can no longer tolerate the abuses he continues to commit against civilians", said Joseph Dunia of *Promotion de la Démocratie et Protection des Droits Humains* (PDH). "We fear these attacks on civilians will continue unless there is urgent action by the authorities to suspend and investigate him". See HRW, 'Complaint Against Colonel Innocent Zimurinda' 1 March 2010, accessible at: <http://www.hrw.org/en/news/2010/03/01/complaint-against-lt-col-innocent-zimurinda>

from the temporal jurisdiction of the Court which leaves uncovered serious crimes committed in the country. The DRC leadership launched amnesties for crimes previously committed not applicable to serious human rights breaches and humanitarian violations falling under the Rome Statute. There seems to be a hole to be covered in the country for sustainable order and stability. In any case the violence can be put to an end only finding an appropriate balance between the 'interests of peace' and the 'interests of justice' and only by vigorous interactions improving responsibility and cooperation while providing such balance. The practice applied shows several problems of legal and political nature. The DRC situation has been characterized by the failure of democratic elections, retention of internal power by the political élite, and the limited impact of international responses.²⁰

7.2 THE PROBLEM OF OPERATIONAL COHERENCE AND COOPERATION

Section Outline

In the DRC the Court delivered arrest warrants against warlords which the State is not entirely enforcing. The humanitarian violations continue and the law enforcement of judicial decisions does not receive appropriate follow up. This section argues about the absence of coherence in the context of governing peace, justice and security operations in the DRC. It debates about the possible evolution of international operations performed by executive and judicial mandates, providing security and law enforcement assistance, including planning and support between interdependent operations in the field. The common goal should be the preservation of law and order including a democratic transition in the country through a coherent strategy of interactions between domestic and global actors. A clear interaction strategy would have a positive impact on the rule of law, institutional building and justice in the DRC for the following main reasons. First of all, far from politicized actions and in respect of the judicial independence of the Court, such coherent efforts of governance would persuade global consent to the Court as equal, independent and enforced international judicial tool, dissolving the friction with the political and executive authority of the Security Council. Second, a coherent support to the Court would develop the ability of peace enforcement serving judicial mandates on the ground, offering more credibility to the peace operations on humanitarian protection and human rights defence in the country. Third, it would expedite the cooperation of the State

20 For an overview of the causes and the effects of the conflict in the DRC see I. Samset, 'Conflict of Interests or Interests in Conflict? Diamonds and War in the DRC', 2002 *Review of African Political Economy* 29, at 463. For an extensive overview of the local governance in Eastern DRC see also the contributions by way of working papers of K. Vlasenroot, H. Romkema, 'War and Governance in the DRC', in *Local Governance and Leadership in the DRC*, (2007) Oxfam-Novib, accessible at: http://www.psw.ugent.be/crg/publications/working%20paper/localgov_rapport_eng_def.pdf

to take over its own responsibilities against the impunity of serious crimes, while offering higher degree of deterrence, stability and democratic transition at both national and regional levels. Fourth, it would offer directions and guidelines of cooperation also for non-States Parties to the Rome Statute furthering positive engagement from them, including legal and political legitimization of multilateral involvement by regional organizations. The judicial outcomes of the Court would also serve as a signal of action required by the non members of the treaty and their future ratification of the Rome Statute.

The UN is a key actor in the DRC but not the only one engaged in the post-conflict peace-building. In general terms, the UN has the political legitimacy and the capacity to convene parties and should strengthen cooperation and cohesion with the multiple regional and international actors involved on the ground. This section recognizes that cooperation is first and foremost a responsibility of the government in the DRC but also requires the support from regional and international actors. Such actors can optimize the results on the ground through appropriate interactions and complementing with each other. With regard to the Court, the current phase of investigative and prosecutorial activities in the DRC requires cooperation with the UN mission on the ground. Such multilateral cooperation should become the priority. Only relying on the bilateral cooperation with the State and its domestic authorities is not sufficient for the Court and neither for the UN. The DRC authorities should be pressured in accordance with the respective peace and justice mandates. They should start their own judicial proceedings *in situ* challenging visibly the impunity regime of international crimes. The analysis of the UN legislative history in the DRC shows that the governance of peace operations focusing on the responsibility to protect does not take in consideration as much as necessary the presence of the ICC, neither providing support with law enforcement assistance, victims' protection and relocation, or securing assets, infrastructures and facilities. Moreover, the modernization of the operations on the ground by the Security Council require awareness about the responsibilities of the military hierarchy and criminal accountability of all parts involved in the civilian protection duties. In order to have a spectrum of governance of such operations on the ground which are characterized by the lack of coherence and coordination, and by the limited support provided to the Court, this section offers an overview of the Security Council activity in the DRC and the cooperation standards practiced with the ICC in the field operations.

7.2.1 *The prospect of coherence*

In 2004 the UN Security Council provided "*inter alia* that MONUC will have the mandate, in support of the government of national unity and transition of the DRC, to investigate human rights violations to put an end to impunity, and to continue to cooperate with efforts to ensure that those responsible

for serious violations of human rights and international humanitarian law are brought to justice, while working closely with relevant agencies of the UN".²¹ Apparently, it was early to consider the ICC presence in the planning of the UN mission in 2004. In 2005 the memorandum of understanding between MONUC and the ICC regulating such interaction finally entered into force but waits for further implementation (MoU).²² The ideal would be to reach consensus in the Security Council on the reconfiguration of its mandate. The security of the operations regarding victims' relocation and protection may also fall in the civilian protection already foreseen in such comprehensive mandate of the UN.

The investigation of the Court in the DRC situation involves allegations of thousands of deaths by mass murder and summary execution occurred since 2002, as well as large-scale patterns of rape, torture and the use of child soldiers.²³ Numerous armed groups active in the DRC were allegedly involved in these crimes. Given the scale of the situation, the investigation of the cases would proceed in sequence. Some cases selected on the basis of gravity were prioritized in 2005, while others would be developed subsequently. The first investigations and the collection of evidence brought the prosecutorial activity in The Hague with judicial proceedings. The Office of the Prosecutor and the Registry established a field office in Kinshasa and a field presence in Bunia and concluded a cooperation agreement with the government of the DRC. However, because of logistical challenges and the lack of effective control of many areas the government's ability to cooperate with the Office of the Prosecutor remains a great challenge for the current investigative and prosecutorial activity. The State indeed did not show any willingness and ability to take over the criminal proceedings *in situ*. With regard to the prosecutions and the indictments to warlords by the Court, the State failure about acceptable standards of cooperation should attract further the attention of the international community. The Security Council including non-States Parties like the US should offer political and diplomatic assistance, pressuring the DRC government to follow up on the ICC judicial decisions. In this way

21 UN doc. S/RES/1565 (2004).

22 UN Treaties Vol. 2221, I-39500 No. 1292, 8 November 2005, MoU between the UN and the ICC concerning cooperation between the MONUC and the ICC (with annexes and exchange of letters), accessible at: http://untreaty.un.org/unts/144078_158780/5/3/12842.pdf

23 The Office of the Prosecutor has been closely analyzing the situation in the DRC since July 2003, initially with a focus on crimes committed in the Ituri region. In September 2003 the Prosecutor informed the Assembly of the States Parties that he was ready to request authorization from the Pre-Trial Chamber to use his own powers to start an investigation, but that a referral and active support from the DRC would assist his work. In a letter in November 2003 the government of the DRC welcomed the involvement of the ICC and in March 2004 the DRC referred the situation in the country to the Court. See ICC doc. ICC-01/04 Situation and Cases in the Democratic Republic of the Congo, accessible at: <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/>

the critics about double standards and about the controversial US position towards the Court would be neutralized by legitimized cooperation efforts.

Despite the lessons learned after the genocide in Rwanda the DRC is still one of those that missed early intervention. Many projects have been devoted to the development of early-warning indicators about State failure, and many books and policy papers have been written about how to create the political wills for early conflict prevention, but success has been limited. In the DRC situation, early intervention has not been performed and the UN mandate in the country showed a lack of preparedness for several reasons.²⁴ As far as the situation escalated at such violent extent in the country, and no early-warning had good effect, consensus is now necessary on narrowly focused operations between complementary mandates fostering peace, justice and security. The law enforcement on the ground of some of the Court's arrest warrants against Congolese warlords requires immediate action. When the State cooperation fails, the Security Council should be engaged in law enforcement operations. The question is whether in the practice there would be at least the determination to act with human security parameters in such violent situations, or the search of measures to *prevent*, *react* and *rebuild* would only remain theoretical assumptions.

7.2.2 The standards of cooperation

In the previous chapters the structural and normative challenges embodying the emerging regime of international criminal justice based on international cooperation upraised several concerns. In accordance with the treaty provisions, Article 87(6) of the Rome Statute addresses the relationship between the Court and intergovernmental organizations in providing that: "...the Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization, and which are in accordance with its competence and mandate". Article 54(3)(d) leaves space to 'arrangements or agreements' to facilitate such cooperation. While at provisional level the Rome Statute clarifies in detail the obligation of the States Parties to cooperate with the Court, including the cooperation with non-parties under *ad hoc* agreements, international organizations such as the UN are not bound by such obligations. There is no provision in the Rome Statute defining the

24 For an overview of the challenges incurred by MONUC supporting multidimensional operations in the country such as humanitarian protection, conflict management and peace enforcement see, V. K. Holt, T. C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, (2006), at 155. For the broad range of issues arising from the fact that the UN mission in the DRC, MONUC, is an integrated mission mandated, among other things, to protect civilians and humanitarian aid workers and to improve the security conditions under which humanitarian assistance is provided and the failure to reach coherent standards of assistance on the ground see T. Mowjee, 'Coherence: Integration Missions in Theory and in the DRC', *Humanitarian Agenda 2015 DRC Case Study*, (2007), at 15.

level of involvement of multinational forces in the arrest of individuals indicted by the Court in case the State does not take its own responsibilities. Further action is left to the political interest of the international community and to the international cooperation capacity-building of the Court towards 'arrangements or agreements' with other international organizations.

As explained above, the 'multidimensional' operations in a 'failed' State, such as in the DRC, typically require the participation of several organizational entities engaged in state-building operations. In order to ensure the coherence as a whole of such complementary activities it is necessary to harmonize, integrate and coordinate their respective mandates and operations. Article 18 of the relationship agreement between the UN and the ICC clarifies that the UN "undertakes with due regard to its responsibilities and competence under the Charter of the United Nations and subject to its rules, to cooperate with the Prosecutor of the Court and to enter with the Prosecutor into such arrangement or agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises his duties and powers with respect to investigation and seeks the cooperation of the UN under Article 54 of the Statute".²⁵ In 2005 an important memorandum of understanding has been established between the UN and the ICC concerning cooperation between the MONUC and the ICC (MoU). Chapter III and particularly Article 10 on cooperation and legal assistance has been used for such governance, and will need further attention on facilitating exchange of information between the organizations including substantive and operational assistance (MoU).

When the Security Council decided to extend its mission in the DRC the reason was to respond to continued attacks against civilians, respectively, the widespread sexual violence, the recruitment of child soldiers and the extra-judicial executions. The Security Council emphasized that the protection of civilians must be given first priority in the allocation of available capacity and resources of any other tasks. In the context of civilian protection, the Security Council urged the Congolese government to establish sustainable peace in the eastern part of the country, to ensure respect for human rights and put an end to impunity, reforming the justice system and the security sectors as fundamental requirements to restore the rule of law. Furthermore, the ongoing debate in the Security Council on a strategic review of the situation in the DRC, including the reconfiguration of its mandate, was based first "to determine, in close cooperation with the Congolese government and troop- and police-contributing countries, the modalities of a reconfiguration of the UN mandate, in particular the critical tasks that must be accomplished before the mission could envisage".²⁶ In such debate the Security Council

25 For the provisions on cooperation between the organizations see respectively Article 18 of the Relationship Agreement between the United Nations and the International Criminal Court and Article 54 of the Rome Statute.

26 UN doc. S/RES/1906 (2009).

does not mention the role of the Court and the support expected by its peace operations thereof. It will be up to the Secretary-General to emphasize again the standards of cooperation to be provided in the UN mandate configuration to complementary partners involved on the ground such as the ICC. The next paragraph examines the evolution of the comprehensive mandate of the Security Council on the ground, its reconfiguration and the necessity of 'narrowly focused' operations fostering peace, justice and security in the DRC.

7.2.3 *The UN Mission in the DRC*

The necessity of a coherent model of interaction and support of the Security Council to the ICC is obvious. Some adjustments should have been considered in the reconfiguration of the new deployment of the UN mandate in the country (MONUSCO). In the first place the Security Council decided that MONUC will have the mandate, in close cooperation with the Congolese authorities and the United Nations country team and donors, to support the strengthening of democratic institutions and the rule of law and, to that end, to: *a)* provide advice to strengthen democratic institutions and processes at the national, provincial, regional and local levels; *b)* promote national reconciliation and internal political dialogue, including through the provision of good offices, and support the strengthening of civil society and multi-party democracy, and give the necessary support to the Goma and Nairobi peace processes; *c)* assist in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, investigate human rights violations and publish its findings, as appropriate, with a view to putting an end to impunity, assist in the development and implementation of a transitional justice strategy, and cooperate in national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law; *d)* in close coordination with international partners and the United Nations country team, provide assistance to the Congolese authorities, including the national independent electoral commission, in the organization, preparation and conduct of local elections; *e)* assist in the establishment of a secure and peaceful environment for the holding of free and transparent local elections; *f)* contribute to the promotion of good governance and respect for the principle of accountability; *g)* in coordination with international partners, advise the government of the DRC in strengthening the capacity of the judicial and correctional systems, including the military justice system. The further evolution of the UN mission in the field and its impact on humanitarian protection, security issues and accountability in the DRC in the post-election phase will be discussed in the next session. The next session concludes with some remarks on the presence of the Court in the DRC which confirms the need of cooperation to be settled in the configuration on the ground by a narrowly focused mandate of the Security Council.

7.2.4 *The ICC presence in the DRC*

The DRC is one of the situations that the ICC is currently investigating and prosecuting falling under the 'self-referral' category of the States Parties to the Rome Statute. The government of the DRC referred the situation to the Court which focused its attention on atrocities committed in the Ituri province. The Ituri militia leaders have been charged with crimes against the humanity and war crimes, including the involvement in the murder in February 2005 of nine Bangladeshi peacekeepers, ambushed during a MONUC patrol near Lake Albert.²⁷ As previously anticipated, between 2006-2008 the ICC secured the arrest of Thomas Lubanga, the political and military leader of the rebel *Union des Patriotes Congolais* (UPC), Germain Katanga, commander of the *Force de Résistance Patriotique en Ituri* (FRPI) and Mathieu Ngudjolo, former leader of the *Front des Nationalistes et des Intégrationnistes* (FNI). They were arrested by Congolese authorities during military training in Kinshasa and transported to The Hague. In total four arrest warrants have been issued for the DRC situation. The accused Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui are currently in the custody of the ICC. The suspect Bosco Ntaganda is now also in custody. The situation of the DRC has been assigned to Pre-Trial Chamber I, which is composed by three judges. The Court has charged Lubanga with three counts of war crimes: enlisting children under the age of fifteen years, conscripting them to the armed forces of the UPC and using them to participate actively in the hostilities. Katanga and Ngudjolo have both been charged with six counts of war crimes and three of crimes against humanity, including murder, sexual slavery and conscription of children, all stemming from an alleged joint FRPI-FNI attack on the village of Bogoro in Ituri in 2003.

7.2.5 *Conclusions*

For many human rights experts involved in the DRC the recommendations to the Security Council regarding its mandate refer to the lack of clarity of its comprehensive strategy in the country. According to the UN Special Advisor on Sexual Violence in the DRC, Dahrendorf, "the mandate to protect civilians, to monitor human rights abuses and to enforce the arms embargo has been renewed. However, since then, it is not clear how far the UN mission in the DRC will remain involved in promoting and safeguarding the remaining agendas of the peace process, such as judicial reform, devolution of central government powers to provincial assemblies and anti-corruption

27 Thomas Lubanga was arrested and imprisoned in the DRC, following the killing of nine Bangladeshi peacekeepers in the gold-rich Ituri region. The military arm of Lubanga's Union of Congolese Patriots, UPC, was implicated in the killings of the Bangladeshi peacekeepers. See Ayesha Kajee, 'Lubanga Case Signals Hope for Child Soldiers', 29 March 06 *Institute for War and Peace Reporting*, No.58, accessible at: http://www.iwpr.net/?p=%3Cp%3ENo%20item%20found.%3C/p%3E&s=f&o=260591&apc_state=henh

legislation. The UN political role will have to be re-defined by the Security Council in line with the recommendation made by the Secretary-General and with regard to the Congolese institutions. The security sector reform (SSR) in the DRC is not an isolated process, but it has to take place at different levels simultaneously and in combination with other reform processes. The SSR has to be incorporated into ongoing efforts aimed at strengthening governance, such as an effective legislature and other oversight bodies, financial management, human rights and civilian protection. There is a lack of conceptual clarity amongst all actors involved on the way the SSR is coupled with a lack of expertise and appropriate human and financial resources dedicated to these efforts. The UN's approach to SSR in the DRC has been marred at structural, conceptual and management level, and a lack of dedicated strategic capacity at the level of the UN mission to assist in the coordination of SSR".²⁸ The security sector reform in the DRC must be viewed in the broader spectrum of the development of domestic institutions and capacity-building. The Security Council needs to take such recommendation in consideration while adjusting appropriately its mandate.²⁹

This section argued on the challenges in the governance of international responses in a failed State characterized by constant instability between the conflict and post-conflict phases. The conflict in eastern DRC is in part incited by the overflow of the genocide ideology from Rwanda, and it has involved up to seven African nations in the Great Lakes region, including Uganda. The conflict is characterized by the deliberate targeting of the civilian population which has suffered mass murder, rape, torture and mutilation. The situation continues to cause a threat to international peace and security in the whole region and it still requires appropriate consideration of peace enforcement and international criminal justice. The international community did not have the resources, the political will, or the know-how to take early action in the region. The genocide in Rwanda confirmed such trend. The international failure to take seriously the initial massacres of 1994 in Rwanda, which ultimately led to genocide became four years later a major cause of war in the DRC. The empirical data of peace enforcement at disposition in the country, since its colonial independence struggling with social, economic, and political State formation, confirm the failure of governing early signs of State failure through comprehensive international responses. However, the current struggle of the international governance institutions is not only worth it for the DRC, but for the whole region, where the needs of

28 The focus of the UN integrated mission in Security Sector Reform (SSR) is an examination of the army, police and judicial institutions in the DRC. For an analysis of the key elements and obstacles of the SSR, a brief overview of MONUC involvement in SSR activities, and final recommendations see, N. Dahrendorf, 'MONUC and the Relevance of Coherent Mandates: The Case of the DRC', in H. Hänggi, V. Scherrer (eds.), *Security Sector Reform and UN Integrated Missions*, (2008), at 98.

29 See N. Dahrendorf *supra*.

sustainable peace, justice and security are interrelated and their operations should be more coherent and complement with each other.

Questions and concerns arise on the governance of international responses, cooperation standards and their interaction thereof. There are urgent adjustments to be made considering the evolution of executive mandates on the protection of civilians with militarized operations, combined with the lacuna of supporting judicial decisions with law enforcement, police operations and protection of victims and witnesses. It is premature to establish if the membership of the DRC to the Rome Statute system and the support provided by the UN on democratic transition in the country would influence further the developments in the domestic governance institutions. The priorities remain the fight against the regime of impunity of massive crimes in the country, where the process of demilitarization, civilian protection, law enforcement and police, good governance of courts and tribunals, including the welfare of individuals and victimised communities, can be optimized by an interaction strategy of global governance institutions. These global efforts would surely reflect on the State at micro level offering at least a model of governance to be followed by the domestic institutions in the country. There is the need to avoid the militarized approach which instead should turn their support to law enforcement and police operations to an international judiciary, including civilian protection duties extended to the victims of international humanitarian crimes. Moreover, the main important element is to hold all actors involved accountable for their actions without any exclusion.

7.3 FIGHTING THE IMPUNITY AT INTERNATIONAL AND DOMESTIC LEVELS

Section Outline

This section explores the problems of ‘inability’ and ‘unwillingness’ of the DRC government investigating and prosecuting the perpetrators of serious international crimes; its domestic justice system; the impact of the Rome Statute in the judicial apparatus of the country, including other alternatives dealing with the regime of impunity falling outside the temporary jurisdiction of the ICC. In the DRC the justice system is completely unable to preserve the rule of law. Its domestic governance institutions, courts and tribunals do not have any meaning for the populations in the chaotic scenario of impunity and commission of serious crimes. The ability of domestic courts to deliver justice for victims of rape and sexual violence is almost inexistent. The prisons do not retain such violators. The majority of the criminals easily escapes and commits the same crimes over and over again. Entire communities have been victimized in the DRC and victim rights are not recognized.

Thomas Lubanga was the first to be arrested by the ICC on charges for the recruitment and use of child soldiers. This indictment drew considerable attention about the issue of child soldiers and hopefully also from other rebel

leaders in the country, the majority of which had children among their forces. On the positive side, Lubanga's arrest had an enormous educational impact, making clear what was not previously understood that "recruiting, enlisting, and using children to fight, is a war crime".³⁰ It may seem surprising that the use of child soldiers was not considered to be a crime. Instead child soldiers had been part of the entourage of every senior armed leader in the DRC, and this indeed for years. Laurent Kabila's Kadogo troops were probably the best known example. In some places in the East, parents have even 'donated' their children to an armed group to help protect the community.³¹ More commonly the conscription of children in the army was forced by kidnapping them from their villages. In those cases militia, warlords and army commanders were so familiar with such practice that they considered this being normal in time of conflict.

The views of Hayner and Davis on the demobilization of children, their rehabilitation and care after conflict are completely shared. In principle, there is no apparent procedural way to release the child soldiers into a formal system of demobilization. Children's rights advocates began to see a new pattern emerge. After Lubanga's arrest, armed groups entering demobilization programs and sites no longer brought children with them. Instead, according to NGOs involved in child demobilization, the children were abandoned, left behind in the forest or perhaps in a village. In a few cases the armed group would return the children to their families. Only a small proportion of the abandoned children would find their way to the UN or other children's service agencies, whose programs are designed on the assumption that child soldiers would be released through the official demobilization process. In addition, demobilization benefits are generally available only to those demobilized through formal entry points.³² For this reason international rehabilitation programs have been very weak either for girls as victims of sexual crimes or for child soldiers, or for both. This is another reason why the coordination between complementary actors on the ground is extremely important. This section reflects on the impact of complementary global regimes fighting against the impunity in domestic governance

30 Such unawareness of crimes in time of conflicts is empirically confirmed, according to the finding of a survey which respondents were interviewed and assessed in Ituri, North Kivu, and South Kivu. See P. Vinck, P. Pham, S. Baldo, R. Shigekane, *Living with Fear: A Population-based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo*, Human Rights Center of the University of California Berkeley, Payson Center for International Development, and ICTJ, August 2008.

31 Practice not acceptable under international standards. The donation of children was more common among local Mayi Mayi groups, which were initially conceived as community-based protection forces. This practice is also not acceptable under international standards.

32 See L. Davis, P. Hayner, 'The ICC's Impact on Children', *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, March 2009, International Center for Transitional Justice, at 30, accessible at: http://www.ictj.org/static/Africa/DRC/ICTJDavisHayner_DRC_DifficultPeace_pa2009.pdf

systems with the scope to maintain, preserve and restore the rule of law. The new inspiration comes from the principles to be applied to reparations for victims in the context of the case against Lubanga, who was found guilty by the ICC and sentenced to a total imprisonment of 14 years. Hopefully the DRC authorities will take over *in situ* very soon the judicial proceedings against other criminal perpetrators.

In order to offer an assessment of the justice system in the DRC, this section contains the finding of the report entitled *Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo* (DRC) of the International Bar Association's Human Rights Institute (IBAHRI), in conjunction with the International Legal Assistance Consortium (ILAC). The report includes recommendations to the government of the DRC at both central and regional levels; the most notable of which is for the government to increase funding of the judicial system and fight corruption within the judiciary. The report follows the IBAHRI-ILAC delegation visit to the DRC to undertake an examination of the current state of the country's justice system. The IBAHRI and ILAC experts found ongoing conflicts, serious violations of human rights, violence against women and international crimes, which have added sensitive challenges of a justice system already struggling to meet the basic demands of the population. Further, the report states that the judicial system in the DRC continues to suffer from underinvestment, corruption, and a severe lack of resources and infrastructure. The frequent disregard or delay in compliance with court orders by members of the executive and the overall difficulty for individuals to access justice and have judgments enforced, is deplored by the IBAHRI and ILAC. The two non-governmental organisations and eminent think-tanks are concerned that legal aid is not easily accessible in the DRC, and that tribunals are not present in all regions, which contributes to the feeling of injustice for victims and a sentiment of impunity for perpetrators. Christian Ahlund, Executive Director of ILAC said, right after releasing such important findings, "we wish to offer our contribution to the ongoing effort to improve the justice system in the DRC, particularly in areas that are in great need of assistance. The report includes recommendations for specific projects in areas that the delegation has visited and that are still relatively untouched by international intervention". "The current situation of the administration of justice in the DRC is of grave concern" said Justice Richard Goldstone, IBAHRI Co-Chair. "The Government must make the improvement of the justice system as a

priority. This is the only way to fight impunity and restore the rule of law in the country".³³

Extremely useful for a legal overview is also the case study and the recommendations delivered by *Avocats sans frontières*, on the application of the Rome Statute by the courts in the DRC.³⁴ Another important legal, political and institutional overview of the current state of justice in the DRC comes from an evaluation of the sensitive security system reform in the country.³⁵ This section contains an overview of the emerging regime of fighting the impunity in the DRC through the application of Rome Statute provisions in local courts, which are limited by the problems facing the judicial system (deprived judicial budget; shortage of judges and deficiencies in training; corruption; lack of independence; prisons conditions and infrastructure; poor means of communication; geographical restraints). It reports on the cases before the ICC, including limits and critics of its impact fighting the impunity in the DRC (not targeting the highest-level perpetrators; limited geographic reach in the country; unwillingness to prosecute crimes committed by government forces; limited charges on the crimes committed; limited information and outreach activity in the country). In order to complete the assessment this section also explores other alternatives dealing with impunity. It explores the evolution of the jurisprudence of domestic courts; the impunity regime of sexual violence, the international assistance for institution-building currently present in the country which lacks of coherence and cooperation.

33 The International Bar Association's Human Rights Institute (IBAHRI) and the International Legal Assistance Consortium (ILAC) organised an international delegation of jurists to visit the Democratic Republic of Congo (DRC) in February 2009. The IBAHRI and ILAC mission was aimed at conducting a needs assessment of the Congolese judicial system in order to assess where expertise can be most constructively applied, both geographically and thematically, to assist the reconstruction of the justice system. See International Bar Association's Human Rights Institute (IBAHRI), the International Legal Assistance Consortium (ILAC), *Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo*, August 2009, OSISA and Swedish Ministry for Foreign Affairs, accessible at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6c2be523-f512-48c1-b09c-fc9a8b1d0aab>

34 *Avocats Sans Frontières*, 'Summary of Recommendations relating to the Application of the Rome Statute by the Congolese Courts', DRC Case Study, March 2009, at 125, accessible at: http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_Page-PerPage.pdf

35 L. Davis, 'The Current State of the Security System in the DRC', *Justice-Sensitive Security System Reform in the DRC*, February 2009, International Centre for Transitional Justice, accessible at: http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf C. Aptel, 'Challenges Facing Domestic Justice in the DRC', *Domestic Justice Systems and the Impact of the Rome Statute*, September 2009, International Center for Transitional Justice, at 6, accessible at: <http://www.internationalcriminaljustice.net/experience/papers/session7.pdf>

7.3.1 *The impact of the Rome Statute*

As briefly clarified above, several problems characterize the governance of the domestic system in the DRC, respectively *a)* the justice system structure, *b)* the lacuna in the national legislation, and *c)* the application of the Rome Statute provisions in domestic courts.

a) Implementing legislation

The ICC has become an important factor in the DRC following the referral by the Congolese government of the situation on its territory on 3 March 2004. The DRC's ratification of the Rome Statute instituting the ICC dates back to 11 April 2002.³⁶ Despite its ratification, the DRC has yet to actually adopt the bill formally incorporating the Rome Statute into Congolese law. The legal experts of IBAHRI-ILAC met in 2009 with representatives of the Permanent Commission of Congolese Law Reform, who explained that they had prepared a draft law at the government's request upon ratification of the Rome Statute. The acting President of the Commission said that the draft had been handed to the government two years ago. The delegation was informed that a draft law could be presented again before the National Assembly at its next session. The draft law has been a matter of debate for several years, and some speculate that certain government officials are resisting the legislation because of fears that they may themselves end up being prosecuted.³⁷ In its current format, the draft law involves changes to the Penal Code in order to include war crimes, crimes against humanity and genocide, and in order to replace the sentence of capital punishment with life imprisonment. Amendments would also be required to the Military Penal Code in order to move war crimes, crimes against humanity and genocide under the exclusive jurisdiction of the civilian Courts of Appeal. The draft legislation would also clarify the definition of these crimes, as there are currently discrepancies between the definitions found in the Military Penal Code and in the Rome Statute. This anticipated transfer of jurisdiction is the cause of debate as to the prudence of removing jurisdiction from military courts over military personnel in cases of international crimes, in light of the present state of the civilian justice system. The current draft law provides for the transfer of jurisdiction to the Courts of Appeal, but it also introduces a military judge in the composition of the five judge bench which will hear these infractions.

36 Décret-loi No 13 of 13 March 2002.

37 The Permanent Commission of Congolese Law reform modified the text before submitting it to the then Minister of Justice. Human Rights First has issued comments, jointly with Human Rights Watch, on the draft, stressing remaining concerns and suggesting alternative language, in particular with regard to the death penalty and cooperation procedures. It is now for the Minister of Justice in the current transitional government to take the legislation forward. For the comments of HRF and HRW see document accessible at: http://www.humanrightsfirst.info/cah/ij/icc/implementation/imp_dem_rep_congo.aspx

b) *Application of the Rome Statute provisions in domestic courts*

Given the monistic nature of the Congolese legal system, the Rome Statute is already part of domestic law even in the absence of an implementing law.³⁸ The Constitution provides at Article 153 that courts can apply ratified international instruments as long as these are not contrary to law and custom.³⁹ Local courts have started invoking the provisions of the Rome Statute in their judgments since 2006.⁴⁰ The *Tribunal militaire de garnison* of Mbandaka was the first one to do so in the cases of Mutins de Mbandaka⁴¹ and Songo Mboyo.⁴² In these two cases, the tribunal used the definition of crimes against humanity found in the Rome Statute. In Songo Mboyo, the tribunal used the definition of rape as a crime against humanity as outlined in the Rome Statute, which is wider than the one found in the Military Penal Code. Recently, the trial of Mai Mai militia chief Gédéon Kyungu Mutanga showed another example of the application of the Rome Statute by domestic courts. In March 2009, the *Tribunal militaire de garnison* of Haut-Katanga found Gédéon guilty of crimes against humanity. The court applied the definition of crimes against humanity as found in the Rome Statute. The jurisprudence of domestic courts as regards the application of the Rome Statute provisions is still limited not only in the number of decisions, but also in the strength of the legal reasoning found in the judgments. In its study, *Avocats sans frontières* notes the weakness of the decisions and explains that judges often omit to point out the constitutive elements of the crime or the evidence on which they are founding their decision.⁴³ Challenges to the proper functioning of the judiciary also influence the application of the Rome Statute by domestic courts. Magistrates have rarely been adequately trained and investigative capacities are very limited. The lack of qualified magistrates and judicial personnel also poses a challenge to proper application of the Rome Statute domestically.⁴⁴

38 In a *monistic system*, ratified international treaties become directly applicable national law, while a *dualistic system* requires an additional act of the legislature to transform the ratified treaty into national law.

39 While Article 156 of the 2006 Constitution of the DRC limits the jurisdiction of military justice to members of the armed forces and of the police.

40 A recent publication by Avocats Sans Frontières analyses the jurisprudence of Congolese military courts applying the Rome Statute. See ASF, *Etude de jurisprudence. L'application du Statut de Rome de la Cour Pénale Internationale par les Jurisdictions de la RDC*, March 2009, accessible at: www.asf.be/index.php?module=publicaties&lang=fr&id=51

41 Military Court of the Garrison of Mbandaka, *Affaire Mutins de Mbandaka*, 12 January 2006, RP 86/05.

42 Military Court of the Garrison of Mbandaka, *Affaire Songo Mboyo*, 12 April 2006, RP 84/05.

43 Avocats Sans Frontières, *supra* note 482.

44 Avocats Sans Frontières, 'Criminal Responsibility, Grounds for exclusion of Responsibility and Extenuating or Aggravating Circumstances', *DRC Case Study*, March 2009, at 64, accessible at: http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf

c) *Cases before the ICC in the DRC*

Following the referral by the Congolese government, the Prosecutor opened an investigation in 2004 which led to warrants of arrest being issued against four Congolese nationals. There are currently three pending cases before the ICC for the crimes committed in the DRC. Thomas Lubanga Dyilo, accused of war crimes and crimes against humanity in relation to the use of child soldiers, was arrested in 2006 and his trial began in January 2009.⁴⁵ In the joint case of Germain Katanga and Mathieu Ngudjolo Chui, charges were confirmed on 26 September 2008 and the trial started in September 2009.⁴⁶ In addition, a warrant of arrest was issued against Bosco Ntaganda, the alleged Deputy Chief of the General Staff of the *Forces Patriotiques pour la Libération du Congo* (FPLC) and alleged Chief of Staff of the *Congrès National pour la Défense du Peuple* (CNDP), an armed group active in North Kivu. In addition to the three above mentioned cases, the ICC has charged another Congolese national, former opposition leader Jean-Pierre Bemba, with crimes against humanity and war crimes committed in the Central African Republic.⁴⁷

The strategic approach and the prosecutorial policy of the ICC in the DRC have been both criticized by several scholars, human rights activists and observers on different issues. Some of them argue that the Court is not targeting the perpetrators at the highest-level. Many of the militia groups in eastern Congo have operated with the direct support of the political leadership in neighbouring countries. Human rights organizations argue that the ICC prosecutor has shown no intention to investigate this higher level of involvement. In 2006 Human Rights Watch on this issue stressed that the: "Chief prosecutor should also investigate those who armed and supported militia groups operating in Ituri, including key players in power in Kinshasa, Kampala and Kigali. The crimes committed in Ituri are part of a broader conflict in the Great Lakes region, and the Court should finally pierce the veil of impunity that stretches beyond Congo's borders".⁴⁸

7.3.2 *The limits and critics of the ICC*

A variety of limits and critics have characterized the impact of the ICC in the DRC. First of all, the Court's geographic reach within DRC is considered too limited. Some scholars and practitioners regret that the unilateral focus on Ituri during the Court's first years in the country has raised questions about its role and impact. According to Davis and Hayner, "the fighting in Ituri is less connected to the ruling elite and least implicates the government, compared to events in the Kivus and elsewhere. The judiciary is considered to

45 ICC-01/04-01/06

46 ICC-01/04-01/07

47 ICC-01/04-01/08

48 See R. Dicker, Human Rights Watch, "D.R. Congo: ICC Arrest First Step to Justice," press release, March 17, 2006; www.hrw.org

be stronger in Ituri more than in other areas of conflict because of intensive international engagement. Partly because local authorities had done some substantive investigation of the cases that the ICC selected for prosecution, these are generally considered the easier cases. The density of international peacekeeping troops was the highest in Ituri, and so it is possible that the prosecutor chose the location safest for his investigating staff as well as for the witnesses. An obvious aspect of its intervention is that the ICC became active when the conflict was calming down in Ituri. The more-entrenched, politically more complex, and longer-term conflict was centred in North and South Kivu.⁴⁹ Another issue is that the Court seems unwilling to prosecute crimes committed by government forces. For many commentators this is particularly unfortunate, "since the national army has often been cited as the worst offender in serious rights abuses".⁵⁰ Some observers believe that the Court is acting in a partial manner, perhaps worried that it might put at risk the political support and collaboration it currently receives from the government.⁵¹

The ICC prosecutor's actions in Uganda, where arrest warrants only targeted the armed opposition, reinforced this impression, as did the arrest of Jean-Pierre Bemba, President Kabila's main political rival, for crimes allegedly committed in the Central African Republic. For these groups of observers the charges are too limited. In the Court's very first case, the charges against Thomas Lubanga focused on the use of child soldiers but made no mention of killings, sexual crimes, and other severe atrocities of which Lubanga is also widely suspected. Such limited criminal charge is considered to 'undermine the credibility of the ICC' as well as limiting victims' participation, as international human rights organizations argued in an open letter to the prosecutor in 2006.⁵² Local human rights groups and women's organizations were especially critical of the failure to include sexual crimes in the charges against Lubanga, given the continued high occurrence of, and general impunity for such crimes, especially after later arrests involved much broader charges, including sexual crimes. Some NGOs strongly urge the prosecutor to broaden her investigations. Another critic is that the Court has done modest national outreach. The main consequence is the fact that the affected communities have many misconceptions about the Court's role and its powers. Although this reflects a lack of resources and insufficient in-country staff, the prosecutor said that the limited outreach was initially

49 See L. Davis, P. Hayner, 'The Role and Impact of the ICC', *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, March 2009, International Center for Transitional Justice, at 25, accessible at: http://www.ictj.org/static/Africa/DRC/ICTJDavisHayner_DRC_DifficultPeace_pa2009.pdf

50 See L. Davis, P. Hayner *supra*.

51 See P. Clark, N. Waddell 'Law, Politics and Pragmatism', *Courting Conflict? Justice, Peace and the ICC in Africa*, March 2008, at 40.

52 See HRW joint letter to the Chief Prosecutor of the International Criminal Court, July 31, 2006, accessible at: www.hrw.org

intentional to avoid jeopardizing the peace process and to protect the safety of witnesses. Local human rights advocates strongly criticized this approach and it appeared that the Court was planning a more proactive public education program in the future.⁵³ There are no doubts that these issues are all related to the necessity to improve the cooperation, assistance and support to the Court on the ground. The Court is in urgent need of securing its sites, the staff, the protection of witnesses, potential witnesses or victims identified or contacted in the course of the investigative activity, including their participation in the proceedings and relocation programs.

7.3.3 *The alternatives to the ICC*

The ICC's jurisdiction is limited not only in terms of time, as it only covers crimes committed after the entry into force of the Rome Statute on 1 July 2002, but also in terms of the number of individuals it may prosecute. The prosecution strategy of the ICC is to carry out targeted investigations and trials, and to prosecute those bearing the greatest responsibility. The ICC operates according to the principle of complementarity with the national justice system, taking over when the latter lacks the will or the capacity to judge perpetrators of the most serious crimes.⁵⁴ On this basis, it remains the responsibility of the Congolese courts to try perpetrators of serious violations of human rights and international humanitarian law. However, the present weakness of the Congolese justice system makes this difficult. As described in the sections above, judicial institutions, civil as well as military, face numerous challenges in their day-to-day operations. Moreover, the prosecution of international crimes requires extensive investigative capacities. There is also the need to strengthen current investigation capacities of the judicial police. The lack of witness protection programmes in the DRC is another obstacle to the investigation and prosecution of international crimes.⁵⁵

53 See F. Petit, *Sensibilisation à la CPI en RDC: Sortir du Profil Bas*, ICTJ, March 2007, accessible at: www.ictj.org According to the Court's outreach report which addresses many of these concerns, see Public Information and Outreach Unit of the ICC, *Outreach Report 2009*, accessible at: www.icc-cpi.int

54 Article 17, Rome Statute. See the OTP-ICC public policies and strategies accessible at: www.icc-cpi.int

55 See International Bar Association's Human Rights Institute (IBAHRI), the International Legal Assistance Consortium (ILAC), *Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo*, August 2009, OSISA and Swedish Ministry for Foreign Affairs, accessible at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6c2be523-f512-48c1-b09c-fc9a8b1d0aab>

a) *The 'Mapping Project'*

Years of conflict, notably during the wars that took place in the country between 1995-1997 and 1998-2002, caused massive human rights violations and violations of international humanitarian law, many having been committed prior to the DRC's ratification of the Rome Statute. Potential solutions to put an end to impunity for these crimes will need to be examined. An important step in that process is the Justice Mapping Project. Originally a MONUC initiative, the project was established by the Office of the High Commissioner for Human Rights (OHCHR), in close collaboration with MONUC. The Justice Mapping Project covers the most serious violations of human rights and international humanitarian law committed in the DRC between March 1993 and June 2003 (until the implementation of the transitional government). The project is divided into three steps. It aims first at establishing an inventory of human rights violations committed between 1993 and 2003. This portion of the project does not involve forensics or any formal investigation as the project's team members use a 'reliable body of evidence' established by cross-referencing sources, reports and witness statements. In this way the Congolese justice system is examined to determine its capacity to deal with the human rights violations inventoried. On this point, the director of the project noted the strong need to reinforce the country's legal aid system. Finally, the project's report proposes options for transitional justice to deal with impunity and makes suggestions to deal with related issues such as memorial, vetting and compensation.

b) *The Truth and Reconciliation Commission*

It should be recalled that the DRC made an attempt at a truth and reconciliation commission. Created by the Sun City Accord of 16 December 2002, the commission was then established by law in 2004.⁵⁶ Faced since the beginning with issues related to its credibility and independence, the DRC's Truth and Reconciliation Commission was never successful and was dissolved in December 2006, without having heard a single case. However, the idea is still alive and the former head of the Truth and Reconciliation Commission presented a proposal to the Senate in 2008 for the establishment of a new commission. The issue of amnesty will need to be examined by a future transitional justice mechanism in the DRC. Amnesty appears to be still used as a method in peace negotiations, as illustrated by the recent amnesty law covering crimes committed from June 2003 to May 2009 in the regions of North and South Kivu.⁵⁷ This law does not apply to acts of 'genocide, war crimes and crimes against humanity'.

56 Loi No /04/018 du 30 Juillet 2004 portant sur l'organisation, attributions et fonctionnement de la Commission Vérité et Réconciliation (Law on the organisation of the Truth and Reconciliation Commission).

57 Loi No 09/003 du 7 mai 2009 portant amnistie pour faits de guerre et insurrectionnels commis dans les provinces du Nord-Kivu et du Sud-Kivu (Law on amnesty for acts of war and insurrection committed in the eastern provinces of North and South Kivu).

7.3.4 The gender crimes

Rape and sexual violence are now internationally recognised as crimes against humanity, war crimes and genocide. The DRC, throughout its long running conflict, has witnessed some of the highest levels of sexual violence in the world.⁵⁸ Rape has been used as a weapon of war by all sides involved in the conflict, and an estimated 200,000 women and girls of all ages have been assaulted over the past 12 years.⁵⁹ While sexual violence is rampant and prevalent throughout the DRC, the most affected areas have been in north-eastern provinces (for example Ituri, North Kivu, South Kivu and Maniema).⁶⁰ The victims were very young in part due to the erroneous belief that raping a virgin girl is a remedy against HIV and AIDS.⁶¹ Unfortunately, despite the adoption of laws against sexual violence in the country,⁶² this crime is perpetrated at an alarmingly high rate, with many acts committed by those charged with protecting the general public (the FARDC and the PNC). The struggle of the domestic courts to apply the law properly does not show sufficient results, with most of the sexual violence cases remaining under investigation for years. Even if a perpetrator is tried and convicted, the sentence is rarely enforced. The law on sexual violence requires the courts to conclude a case within three months after the case is brought to the justice system, but this is hardly ever possible due to the fact that the justice sector is severely under-resourced and under-staffed.⁶³ The absence of an effective criminal justice delivery system has led to an increase in the number of out-of-court settlements based on traditional justice and often leading to forced marriages, to the detriment of the victim's rights and in violation of the various laws on sexual violence. The problem is two-fold. On the one hand, the major problem encountered by the victims, often leading to the perpetrators' impunity, is the difficulty to prove the crime in court, or even

58 UN doc. S/RES/1820 (2008) on Women and Peace and Security. In the resolution, passed on 19 June 2008, the Security Council noted that "women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group". The resolution demanded the "immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians".

59 According to the statistics compiled by the United Nations Children Fund (UNICEF) see UN News Service, 28 February 2009, available at: www.unhcr.org/refworld/docid/49aff7bc1e.html

60 For an assessment of programmatic responses see, M. Pratt, L. Werchick, 'Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo. An assessment of programmatic responses to sexual violence in North Kivu, South Kivu, Maniema, and Orientale Provinces', (2004), accessible at: http://www.osisa.org/resources/docs/PDFs/Sexual_Terrorism.pdf

61 See *Report of the Special Rapporteur on violence against women*, (2009), 14, at 16.

62 Loi No 06/018 modifiant et complétant le Décret du 30 janvier 1940 portant Code Pénal Congolais (Law amending the Congolese Penal Code).

63 Loi No 06/019 de 2006 sur les violences sexuelles (Law on sexual violence), Art 1, adding art 7 bis to the Code de procédure pénale (Penal Procedure Code).

bring the matter to court. This is all the more difficult issue in addition to the absence of any witness protection programme. On the other hand, even if the victim can bring the matter to court and have the perpetrator(s) arrested and convicted, there is no certainty that reparation will be paid. This is because victims may not be able to afford to pay the legal fees required for judgment enforcement, or because the perpetrator will not have sufficient resources to pay. Also, due to very deficient security in most of the prisons, it is not uncommon that the perpetrators are able to escape and become once again a threat to victims and witnesses. The inability of the justice system to handle such crimes has had the adverse effect of creating a sentiment of impunity for witnesses and victims. Unfortunately, and as a direct result of the many crimes remaining unpunished and the general sense of impunity, rape and sexual violence in the DRC is increasing at an alarming rate and is now being committed by ordinary citizens, in addition to the armed and military groups. The international community has reacted to some extent on the brutality of sexual violence committed in DRC, particularly in the east of the country. However, the efforts to fight impunity need to be re-directed in the whole region. Next paragraph has the purpose to analyse the strategies of international responses on such sensitive issues.

7.3.5 *The international assistance*

The MONUC Rule of Law Section was first set up in 2004 as a small unit to advice on a range of rule of law issues and has since expanded to support wider security sector reform, including civilian and military justice and reform of the penitentiary system. The Rule of Law Section has adopted a three-tiered approach to the support of the justice system, providing, first, immediate assistance to enable existing DRC capacity to be fully maximised. Second, the section supports DRC authorities in designing mid-term coordinated strategic plans to reform justice sub-sectors, such as legislation, military justice, prisons and courts. Third, the section supports short-term implementation of urgent elements of longer-term reform strategy, including building capacity to investigate and try cases involving international crimes. Closely attached to MONUC is the Office of the Senior Adviser and Coordinator on Sexual Violence for DRC. The Office was created in March 2008 as an answer to increasing international reaction against the extent and brutality of sexual violence in the DRC, particularly in the war-torn eastern part of the country. The Office has been set up with the support of UN Action Against Sexual Violence in Conflict, a conglomerate of 12 UN agencies and sections (including UN DPKO), and the UNDP Bureau for Crisis Prevention and Recovery (UNDP BCPR). On 18 March 2009, in consultation with UN agencies and MONUC sections, international NGOs, the Sexual Violence Task Force and the DRC's ministries of justice, defence, interior and gender, the Office launched a 'Comprehensive strategy on combating sex-

ual violence in the DRC'.⁶⁴ This strategy consists of four pillars: i) fighting impunity; ii) prevention and protection; iii) security sector reform (reforming the Congolese army and police); and iv) coordinated medical, mental-health, legal and reintegration assistance to victims. The aim of this strategy is, according to the office, to provide a practical framework for action.

There is a growing consensus in the UN system and beyond that the rule of law is a precondition for sustainable peace and development at both international and national level. It is also recognized that security and justice are essential stepping stones in achieving the rule of law. Neither can be left unattended in preventing conflict, nor in responding to or recovering from the same. At the international level, the achievement of peaceful relations will eventually be determined by the commitment to resolving conflict and disputes on the basis of the UN Charter. At the national level, conflict prevention and recovery, democratic governance, poverty reduction, gender equality and the Millennium Development Goals (MDGs) will depend on the capacity to prevent and manage conflict, while also advancing political, social and economic aspirations. According to the principles of global democratic governance the rule of law is both the vehicle and its manifestation. Its evolution however, depends from the political convergence on specific issues of capacity-building and international assistance.

As a programmatic development agency, the United Nations Development Program (UNDP) responds to requests by host-governments for capacity development support. Technical assistance to national efforts in the justice and security sector is provided by UNDP within its framework of Crisis Prevention and Recovery and Democratic Governance. In doing so, UNDP recognizes the centrality of national ownership and early foundations towards

64 UN. Doc. S/RES/1794 (2007). In response to this UNSC resolution MONUC with the support of the UN Action Against Sexual Violence in Conflict Network, would implement the Comprehensive Strategy on Combating Sexual Violence in the DRC. The Comprehensive Strategy is made up of 5 components each led by a specialist UN agency. An Operational Plan that put the strategy into action was then developed. It highlighted the fifth and final pillar dedicated to the collection and analysis of data on sexual violence. The enormity and importance of this task will not simply improve the understanding of the dynamics of this violence but offer insight into the most effective responses that may end it. Each of the five components is led by a UN agency or MONUC section: 1. Protection and prevention (UNHCR); 2. Ending impunity for perpetrators (Joint Human Rights Office – MONUC/OHCHR); 3. Security sector reform (MONUC, SSR); 4. Assistance for victims of sexual violence (UNICEF); 5. Data and mapping (UNFPA). The total appeal for the implementation of the Operational Plan in the next two years is US \$56million. At national level, the Operational Plan and costing was endorsed by the government of the DRC in November 2009. The prioritization and implementation of the activities of the Comprehensive Strategy will be coordinated by UN agencies and their governmental counterparts for each of the five components. For a detailed overview see, *The Comprehensive Strategy on Combating Sexual Violence in DRC: Executive Summary*, Final Version, 18 March 2009, accessible at: <http://monuc.unmissions.org/Default.aspx?tabid=4073>

long-term investments. The Global Programme outlines UNDP's services to rule of law programming in conflict- and post-conflict situations within its Crisis Prevention and Recovery mandate. It is a living document and will continuously be reviewed and updated on the basis of best practices and lessons learned from the field. The following terms are usually referred to: 'the rule of law', 'access to justice', 'justice and security sector reform', and 'security and sector reform'. The UNDP is an active member and important founder of the *Comité Mixte de Justice* (CMJ) and contributor to the Action Plan in the DRC. In 2008, UNDP launched a US\$390 million governance programme with the DRC. The programme, which ran throughout 2012, consists of five components, one of which, the legal and security governance component, worked towards judicial reform, capacity-building in the security forces, efforts to combat corruption in public administration, and action to strengthen internal and external audit institutions. Within the framework of the Action Plan of the CMJ, UNDP supports the drafting of organic laws for the justice system, the upgrading of equipment and the training of judges. UNDP also supports the *Conseil Supérieur de la Magistrature* (CSM) and has contributed US\$36,000 to its secretariat during the first three months of 2009. In early 2009, the UNDP Bureau for Crisis Prevention and Recovery (BCPR) decided to contribute an additional US\$2 million to reform activities in the judicial system.⁶⁵

7.3.6 Conclusions

The DRC is a country where history, geography and recent political developments present huge challenges to establish the rule of law. A number of countries, the UN, the ICC, other international and regional organisations, including NGOs, are assisting the DRC in its task to build a judicial system.⁶⁶ As clarified by Davis, "the inability of the justice and penal systems to deliver justice exacerbates violations committed against the civilian population, worsens public security (especially of vulnerable groups) and strengthens

65 For an detailed overview see, UNDP, 'A Global UNDP Programme for Justice and Security 2008-2011', *Strengthening the Rule of Law in Conflict and Post-Conflict Situations*, (2008), accessible at: http://www.undp.org/cpr/documents/jssr/rule_of_law_final.pdf

66 The main international actors involved in providing assistance in the security system in the DRC have been the UN (MONUC has been on the ground since 1999 and is now the largest peacekeeping operation in the world), World Bank, US, EU (and its Member States), Angola, South Africa and, increasingly, China. For an overview of the EU engagement in the country or test case in the field of coordination and coherence between the EU and Member State of the Security Sector Reforms programmes (SSR) see, L. Davis, 'European Engagement in Security System Reform in the DRC', *Justice-Sensitive Security System Reform in the DRC*, February 2009, International Centre for Transitional Justice, at 24, accessible: http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf For a more detailed discussion, see H. Hoebeke, S. Carette and K. Vlassenroot, *EU support to the Democratic Republic of Congo*, Centre d'Analyse Stratégique, (2007), accessible at: http://www.egmontinstitute.be/papers/07/afr/EU_support_to_the_DRC.pdf

impunity. To be successful, the reform of the police, judiciary and penal systems must necessarily be seen as interrelated and approached in a coordinated manner".⁶⁷

It appears that most of the ongoing rule of law reforms in the country is either targeting the central institutions in Kinshasa, or has been developed in response to the atrocities and human suffering in the eastern part of the DRC. As a consequence, and despite the combined efforts by the DRC government and the international community, it seems that vast areas of the country are still largely untouched by any reform activities. Against this background the reports examined recommend projects of assistance with two different approaches: one which focuses on central institutions in Kinshasa, which may or may not yet have been targeted by the current reform activities; and one which targets two important regional centres, Kisangani and Lubumbashi. For Kisangani the reports propose a holistic approach with practical projects designed to support the current objectives of the Congolese Ministry of Justice and to fit in with the priorities identified in the Ministry of Justice's Roadmap matrix. In Lubumbashi, IBAHRI's reports propose a more target-driven project to support the already well established Lubumbashi bar association. The IBAHRI, with its particular expertise, is well positioned to implement activities in that regard, which could be extended to other bar associations. It is hoped that in the near future the benefits derived from these projects could provide a foundation for similar projects within other parts of the country. Also, and particularly because of the way violence and injustice are being directed towards women, a theme that infiltrates most of the following recommendations refers to gender issues. This includes the protection of women's rights, in law and practice, and the promotion of women's participation at all levels of the judiciary, bar, government and civil society. All training programmes should include women and all access-to-justice programmes should target women.⁶⁸

67 L. Davis, 'Transitional Justice and Security System Reform', *Justice-Sensitive Security System Reform in the DRC*, February 2009, International Centre for Transitional Justice, at 24, accessible: http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf

68 For the research findings, conclusions and legal recommendations delivered by the International Bar Association's Human Rights Institute (IBAHRI), the International Legal Assistance Consortium (ILAC), see *Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo*, August 2009, research supported by the Open Society Initiative for Southern Africa (OSISA) and the Swedish Ministry for Foreign Affairs, at 45, accessible at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6c2be523-f512-48c1-b09c-fc9a8b1d0aab>

7.4 THE ABSENCE OF COORDINATION, COHERENCE AND LAW ENFORCEMENT

This chapter argued that multidimensional operations fostering peace, justice and security in the DRC lack of coherence and preparedness including also strategies of cooperation between complementary mandates. The struggle of such international responses to deliver results on the ground between conflict and post-conflict is enormous. The problem in the DRC is that international mandates active on the ground are disconnected between them. With regard to the UN mission the political nature of the MONUC/MONUSCO mandate including its operational purpose is broad and shows unfeasible expectations. The UN mandate needs a re-configuration which should think about the actors struggling *in situ* which are complementary mandates in purpose and nature. Moreover, the UN mission can provide *a)* appropriate diplomatic dialogue vis-à-vis the DRC government engaging police enforcement actions against criminals; *b)* assisting on the reform of the army, police and justice domestic systems; *c)* avoiding that the military demobilization does not preclude impunity of international crimes; and *d)* securing civilians with relocation and rehabilitation programs.

For the international responses involved in the protection of civilians, on the preservation of the rule of law, justice and human rights, including the maintenance of stability and conflict management characterized by 'zero tolerance' in peace enforcement, it is important to reach preparedness and flexibility of re-configurations and re-conceptualizations serving complementary mandates on the ground with appropriate arrangement and agreements of cooperation. Challenges exist at different levels for the UN mission in the DRC: at conceptual and structural levels and ultimately also on coherence and coordination characterizing such mandates. The conceptual level relates to *a)* the nature, purpose or scope and preparedness of the mandate's deployments; *b)* the organizational structure defining the channels of communications, the level of responsibility, accountability and chain of command including the decision making on each operation; *c)* the coherence and coordination refers to the ability to assist complementary actors, showing flexibility and preparedness of operational reconfigurations in order to deliver visible results.

The Court on its side needs to spread investigations and prosecutions, giving the priority to participation and reparation of victims including arrangements and agreements on relocation of witnesses. The DRC State must take full responsibility of its obligations falling under the Rome Statute initiating genuine criminal proceedings on the ground. The main findings of this study demonstrate that international criminal justice is not an isolated process. It has to take place at different levels simultaneously and in tandem with other global actors, as an important part of the peace-building process. Despite the critics, the limits and the few resources at disposition, international criminal justice remains a priority. The cause of some sensitive problems is found

in the difficulties on consensus and lack of flexibility to reconfigure the UN mandate on the ground, preparing its mission to serve the range of actors involved *in situ*, shifting from a 'comprehensive' unfeasible mandate to a narrowly focused one, much less costly but surely more efficient.

Political and diplomatic expertise pressuring the DRC government on its obligations is necessary. Criminals and warlords need to be released to justice with judicial proceedings on the ground. At domestic level, the effectiveness of security structures can be measured by three cornerstones: *a*) the ability to protect the national territory against aggression and internal threats, *b*) the adherence to the rule of law, and *c*) the ability of security services to protect and respect citizens' rights (army, police and justice). The domestic justice system relates to these clusters. As clarified by eminent experts involved in the UN engagement in the DRC, security forces and its governance institutions are seriously deficient in all these aspects in the country. Such malfunctioning institutions pose a security threat themselves on the communities due to corruption and bad governance.

This chapter argued that international responses are an essential cornerstone to influence the domestic governance institutions and the future stability of the DRC. Army, police and justice are the most vulnerable to corruption and graft and have been neglected aspects by the UN and by the involvement of donors. According to the UN experts directly involved on these issues the "*problematique* consists of the entangled history of a factionalised army, with major access to and control of vast natural resources, the lack of division of powers between police and army, and the political control exerted over the judiciary. Regulatory bodies such as courts, parliament, and anti-corruption and auditing institutions remain ineffective and are themselves prone to corruption".⁶⁹

Another problem is the lack of balance between the bilateral cooperation with the DRC government and the multilateral cooperation standards of global mandates involved on the ground. This chapter argued that due to the situation in the country the centrality of cooperation should raise the standards of multilateral cooperation, avoiding unilateral and opportunistic consensus with the leadership of the country. After all, the involvement of global mandates is to centralize the interests of individuals more than the interests of the government. These are enduring issues with which political mediation efforts will have to contend raising the international standards of cooperation between complementary mandates deployed on the ground, in order to challenge criminal, aggressive and violent regimes victimizing entire communities. After all, these communities are supposed to receive

69 See N. Dahrendorf, 'MONUC and the Relevance of Coherent Mandates: The Case of the DRC', in H. Hänggi, V. Scherrer (eds.), *Security Sector Reform and UN Integrated Missions*, (2008), Chapter 3, Introduction, at 67.

development and humanitarian aid but they only experience war and death without a well-functioning domestic accountability system.

7.5 THE NECESSITY OF STRENGTHENING PARTNERSHIPS ON THE GROUND

At provisional level and pursuant to Article 2 of the Rome Statute, on 4 October 2004 the Secretary General of the United Nations and the President of the International Criminal Court signed an agreement that provides for the structure of the relationship between these institutions. The relationship-building between the organizations is still at its initial stage. In order to deliver better results on the ground in conflict and post-conflict situations under investigation or prosecution, high level of political and diplomatic engagement is required. In order to preserve the rule of law, human rights and justice, the implementation of partnerships between the actors engaged to bring stability in failed States, is an important requirement of global governance. The Court needs to rely on the multidimensional operations of the UN. Such pragmatic support would translate the political determination expressed in the Preamble of the Rome Statute recognizing the link between peace and justice and that “grave crimes threaten the peace, security, and well-being of the world”. Cooperation is fundamental in order to contribute to the prevention of these crimes, and put an end to impunity for the perpetrators of such crimes. As stated by the UN Secretary General in his remarks to the Sixth Assembly of States Parties to the Rome Statute of the International Criminal Court, “there are no easy answers to this morally and legally charged balancing act. However, the overarching principle is clear: there can be no sustainable peace without justice. Peace and justice, accountability and reconciliation are not mutually exclusive. To the contrary, they go hand in hand”.

In the absence of a self sufficient domestic system of governance in the DRC, ‘narrowly focused’ mandates have to work together, complementing each other in order to challenge the criminal regime of impunity. The role of the Court is quite limited, and in most scenarios primary activities will remain with States, international organizations and civil society. The issue of cooperation is at the core of the Rome Statute. An important cluster of cooperation as recognized by the Assembly of States Parties to the Rome Statute is the one with the UN system. The UN can provide documents and information, it can supply logistical and other technical support to Court field operations, and it can even accommodate the Court in its security arrangements. The implementation of such cluster of cooperation is urging if we consider the multidimensional operations taking place in a ‘failed’ State such as in the DRC. The legal obligations of the States Parties, including the important support from international, regional organizations, States non-Parties and other stakeholders, are also important clusters of cooperation interrelated between them, and on which the ICC needs to rely.

The role and limitations of the UN in the DRC with regard to the security sector reform (army, police and judiciary) have to be clearly defined as well as the reconfiguration of the comprehensive range of tasks received by MONUC/MONUSCO. In order to strengthen partnerships on the ground between complementary mandates: reconfiguration, cooperation standards, sharing knowledge, expertise and lessons learned are all areas in need of implementation. The general recommendations, as the explicit outcome of this case study, are addressed to the UN Security Council, General Assembly, the Secretary General, including the Assembly of the States Parties of the Rome Statute. The MONUC (MONUSCO) mandate, to protect civilians, monitoring human rights abuses and enforcing arms embargo, needs to be re-defined. Political and diplomatic pressure on the DRC government to fulfil its obligation is mandatory. The important feature of enforcing the judicial decisions of the ICC, including providing support for the protection and relocation of victims and witnesses would be a serious engagement strengthening partnerships on the ground.

The general provisions in the memorandum of understanding (MoU) concerning cooperation between the UN mission in the field and the Court need to be revisited. Particularly its *purpose*: Article 1 (MoU) should set out modalities of cooperation not only on investigations but also on prosecutions and enforcement of arrest warrants, due to the State not performing its duties; *cooperation*: Article 2 (MoU) should clarify in detail the modalities of cooperation and law enforcement. Furthermore at structural level, the UN Rule of Law section, which is supporting short-term implementation of urgent elements of longer-term strategy of reforms, including building capacity to investigate and try cases involving international crimes, may use the ICC expertise including cooperation with the Office of the Senior Adviser and Coordinator on Sexual Violence for the DRC.⁷⁰ Such liaisons between the UN mission deployed on the ground and the ICC would facilitate the flow of information and legal assistance in order to speed up the judicial proceedings challenging the criminal regime in the country. At operational level, specific arrangements of law enforcement cooperation after prosecutions of war criminals need to be put in place. Such arrangements would complement the demobilization activity of combatants in lower ranks which must be prosecuted by the local authorities.

70 The Office was created in March 2008 as an answer to increasing international reaction against the extent and brutality of sexual violence in the DRC, particularly in the war-torn eastern part of the country. On 18 March 2009, in consultation with UN agencies and MONUC sections, international NGOs, the Sexual Violence Task Force and the DRC's ministries of justice, defence, interior and gender, the Office launched a 'Comprehensive strategy on combating sexual violence in the DRC' consisting of four pillars: i) fighting impunity; ii) prevention and protection; iii) security sector reform (reforming the Congolese army and police); and iv) coordinated medical, mental-health, legal and reintegration assistance to victims. The aim of this strategy is to provide a practical framework for action.

The Assembly of the States Parties to the Rome Statute should facilitate legal assistance on the implementation of legislation and criminal law in the DRC, in line with other UN channels and donors involved in the security sector reform (army, police, and justice). To make the Rome Statute system work effectively, the interaction with an important partner such as the UN is fundamental. In order to accomplish visible results, States, international organizations, civil society and other actors have to cooperate and interact with unity of intents, implementing a system of international justice based on democratic governance. This chapter offered an overview of the challenges in the framework of cooperation in a failed State. It proposed an urgent implementation of the relationship of complementing mandates involved in peace-making, peace-keeping, peace-building, security sectors reforms, law enforcement, criminal and restorative justice, including the challenges to preserve further the rule of law and human rights as important prerequisites of democratic governance.⁷¹ In other words, it offered an overview of the actions required by the political premises enforcing global governance institutions of complementary character.

The next chapter offers the concluding assessment and provides the answers to the research questions addressed in this work. The examination of the case studies selected point out many challenges which will surely need further investigation. The governance of complementary global regimes depends from both the States and the international community, including the strategies of interactions between themselves. The political convergence about the systemic changes required is still to be found. We have seen that the governance of justice and its impact on sustainable peace in conflict and post-conflict situations cannot be assessed on its own. It depends from several factors. Besides, there are difficulties to uphold the idea of an international architecture of governance based on human security and fostering peace and justice in conflict and post-conflict situations. In principle, an understanding of the past is fundamental to determine the way forward in the global fight against war and crime.⁷² The current devastating effects on civilians in conflict and post-conflict situations require, without any doubt, the attention of decision-makers. First of all, they have to find political convergence at domestic, regional and international dimensions. The actions required are the reforms in both systems of the United Nations and the Rome Statute in accordance with their complementary nature. In this way the results of their actions would be maximized and their role amplified.

71 For the UNDP programmatic approaches see, 'Role of UNDP in Crisis and Post-Conflict Situations', DP/2001/4 of 27 November 2000. UNDP Strategic Plan 2008-2011/DP/2007/43, 16 July 2007, paragraphs 84 and 102. See also the UNDP global programme on 'Strengthening the Rule of Law in Conflict and Post-Conflict Situations 2008-2011. A Global UNDP Programme for Justice and Security', accessible at: http://www.undp.org/cpr/documents/Rule_of_Law_Global_Programme.pdf

72 J. Muravchik, *The Future of the United Nations: Understanding the Past to Chart a Way Forward*, 2005.