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Promoting the Rule of Law in the Democratic Republic of Congo:

a Clash with Traditional Justice?

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'We called them the humanoids; they're from a different planet'.[1]

'When the system fails, everyone is a victim'.[2]

'Justice amounts to replacing violence with words and terror with fairness and steering a path between too much memory and too much forgetting'.[3]

[1] Severine Autesserre, (2010), *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding*, (Cambridge University Press: New York), 1.
[2] Ilse and Femke van Velzen, (2011), *Justice for Sale,* Documentary by IF Productions.
[3] Clever Mapaure, (2010), 'Accused and Cherished: Traditional and Informal Justice Systems as Seen by International Organizations', In: M.O. Hinz, *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa*, (Namibia Scientific Society: Windhoek), 35.

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Abbreviations

ACHPR	African Charter of Human and People's Rights
CIVPOL	United Nations Civilian Police
CNDP	*Congrès National pour la Défense du Peuple*
CVR	*Commission Vérité et Réconciliation*
DDR	Disarmament, Demobilization and Reintegration
DPKO	Department for Peacekeeping Operations
DRC	Democratic Republic of Congo
FARDC	*Forces Armées de la République Démocratique du Congo*
FDLR	*Forces Démocratiques de Libération de Rwanda*
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced People
GNP	Gross National Product
LRA	Lord's Resistance Army
MLC	*Mouvement pour la Libération du Congo*
MONUC	*Mission de l'Organisation des Nations Unies en République Démocratique du Congo*
MONUSCO	*Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo*
NGO	Non-Governmental Organization
OECD	The Organization for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
RCD	*Rassemblement Congolais pour la Démocratie*
SSR	Security Sector Reform
TRC	Truth and Reconciliation Committee
UN	United Nations
UNDHR	United Nations Declaration of Human Rights
UNDP	United Nations Development Program

0. Introduction

'One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles'.[4] Thomas Carothers said these words in his article on 'The Rule of Law Revival' from 1998. By then promoting the rule of law indeed became the revived trend in international peacebuilding, though nothing new. Whether traced back to the writings of Aristotle and Plato, or to the signing of the *Magna Carta*, the concept of the rule of law was always devised as a means of protection from the arbitrariness of rule by man and from the abuse of power by the state.[5]

Consequently, rule of law is still considered the key means to create a good relationship between the state and its civilians, hence to create order, stability and peace. However, in what manner the rule of law could be 'the solution to the world's troubles' is still subject of debate. A myriad of research has been done to explain the essence of the rule of law and to underline its necessity but also its flaws. This thesis contributes to that debate, delving into the approaches of rule of law promotion in a troubled, instable, post-conflict state: the Democratic Republic of Congo (DRC).

The DRC is a vast territory, with a surface area of nearly 2.5 million square kilometres with an estimated population around 66.5 million. The enormous country has a complex and diverse social fabric and state institutions have only limited control.[6] The DRC has a long history of mass atrocities. The wars were fueled by the country's mineral wealth.[7] The International Rescue Committee calls the Democratic Republic of the Congo the worst humanitarian disaster since the Second World War. Indeed, for decades, it has been characterized by extreme violence: between

[4] Thomas Carothers, (1998), 'The Revival of the Rule of Law', In: *Foreign affairs 77 (2)*, 95.
[5] Rama Mani, (1998), 'Conflict Resolution, Justice and the Law: Rebuilding the Rule of Law in the Aftermath of Complex Political Emergencies', In: *International Peacekeeping 5 (3)*, 8.
[6] Laura Davis, (2009), 'Justice-Sensitive Security System Reform in the Democratic Republic of Congo', In*: Initiative for Peacebuilding Security Cluster, February 2009*, 8.
[7] Eirin Mobekk, (2009), 'Security Sector Reform and the UN Mission in the Democratic Republic of Congo: Protecting Civilians in the East', In: *International Peacekeeping 16 (2)*, 273.

1998 and 2011 around 5.4 million people have died and 45.000 more die each month as an (indirect) consequence of conflict.[8] The country witnessed mass population displacements. The number of internally displaced people (IDPs) is between 2.6 and 2.9 million, which gives it a top five position in the world.[9] The DRC has also been called the world capital of rape. Rape has been used as a method of strategic warfare in the Congo Wars.[10] Public health services and other necessary institutions have collapsed. In the DRC, according to Schrank, 'the horrific has become the ordinary'.[11]

At the end of the 1990s it was obvious that the DRC needed an intervention. The Congolese government needed assistance in drafting a peace agreement and needed a strategy in combatting insecurity and impunity. The international community and especially the UN assisted the country in the long road to justice. This thesis looks closely at these efforts.

An interesting documentary was the original motivation to do research on the failed justice system in the DRC and the efforts made to rebuild the system. Dutch documentary makers Ilse and Femke van Velzen made several documentaries on the Congo, especially on the subject of rape as a weapon of war. Their latest documentary, '*Justice for Sale*', gives insight in the justice system in the DRC and how the recent international involvement has influenced the system. Watching this documentary is to be recommended. A human rights lawyer is followed in her pursuit for justice, but she uncovers a system where the basic principles of law are virtually ignored. She states that everyone is a victim when the system fails.[12] Why the system was a failure and what hurdles had to be taken to fight impunity in such a complex country were some intriguing questions that had to be answered.

More questions arose on this topic. This thesis will answer the following main question: to what extent are the approaches of MONUC from 1999 till 2010 to strengthen the rule of law as part of the peacebuilding mission in the Democratic Republic of Congo contradictory to traditional justice mechanisms in Congo? In

[8] Delphine Schrank, (2012), 'Democratic Republic of Congo', In: Genser, J. and Cotler, I., *The Responsibility to Protect*, (Oxford University Press: New York) 317.
[9] Website IDMC http://www.internal-displacement.org/global-figures
[10] Mieke Buizert http://dspace.library.uu.nl/handle/1874/207696
[11] Schrank, 'Democratic Republic of Congo', 317.
[12] Ilse and Femke van Velzen, (2011), *Justice for Sale,* Documentary by IF Productions.

explaining the structure of this thesis later on in this introduction, it will become clear what further sub questions lead to answering this question.

This thesis finds its relevance in filling a void that exists in research on judicial reform in post-conflict situations, making an example of the DRC. There is no coherent body of literature on judicial reform at a global or international level. Partly this is a reflection of the fact that judicial systems are highly culturally specific and that comparisons and generalizations are both challenging and contested. As a result, any discussion of rule of law assistance at the UN takes place in a political minefield of normative disagreement while on the ground, UN officials grapple with the complexity of legal and political cultures that are ingrained in the very fabric of societies and make a mockery of any technical depictions of judicial reform.[13] This thesis assumes the connection between impunity and insecurity, in other words, the relevance of justice to reach peace and stability.[14] It specifically explains why it is an ongoing struggle so far to juggle formal justice systems and traditional customs.

Justice is deemed an integral part of conflict resolution, but poses a whole lot of challenges on its own, particularly from a human rights perspective.[15] There is a growing interest in traditional justice among NGOs and development agencies concerned with transitional justice, since they started to realize that international formal justice approaches are not always working out properly.[16] Several large organizations do research on the matter, such as the World Bank and United Nations Development Program (UNDP), which are core actors in the transitional justice programs in Africa. Joe Alie and many more scholars, see a lot of potential in traditional justice as a means to provide justice.[17] This potential was another motivation behind this research.

The case researched in this thesis is a relevant example in broader academic research. It is important to see the broader picture of strengthening rule of law in peacebuilding missions in connection with the specific target country. We are still not at the end point of the debate. Alie wonders, given the extraordinary range of

[13] William J. Durch et al, (2012), 'Understanding the Impact of Police, Justice and Corrections Components in UN Peace Operations, In: *Future of Peace Operations Program, The Stimson Center, rev 0.1., 26 June 2012,* 51.
[14] Mobekk, 'Security Sector Reform and the UN Mission in the Democratic Republic of Congo', 282.
[15] Joe Alie, (2012), 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', In: Bennett, T. et al. *African Perspectives on Tradition and Justice*, (Intersentia: Cambridge), 96.
[16] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 98.
[17] Ibidem.

national experiences and cultures, how can anyone imagine there to be a universally relevant formula for transitional justice?[18] In this thesis western views on justice are compared to the traditional African view on justice in order to get a clearer idea of the debate on merging justice systems. Also, Fukuyama expresses his hope that better knowledge of transitions to the rule of law should also make rule-of-law promoters more humble about what they can expect to achieve.[19] Bennett adds that if legal cultures in Africa were to be properly understood, the focus should not lie on rules, but on methods and procedures for dealing with disputes.[20]

The core problem with the rule of law, as mentioned by many scholars, is defining it. In the first chapter, among others, Richard Sannerholm, Roland Paris, Robert Pulver, Francis Fukuyama and Thomas Carothers give their opinions on rule of law programming as an integral part of international peacebuilding. In chapter 1 the question how the debate on rule of law programming as part of peacebuilding missions evolved will be answered. Several facets of the concept of rule of law are the common thread in this thesis.

The stability of a future rule of law would depend on which version of law most truly reflected the society's values.[21] This is why the second chapter of this thesis dives into the Congolese perceptions of justice and law. African justice systems used to be the subject of strictly anthropological research, particularly with a focus on legal pluralism in pre-colonial and colonial times. Nowadays it is a hot topic in the field of history and international relations, where scholars look at how these traditional mechanisms could contribute to building sustainable peace.[22] Chapter 2 will elaborate on what traditional justice in Sub-Saharan Africa entails and what African values concerning justice and community are. It will also answer the question how a traditional justice system works compared to the formal justice system. For this chapter literature written by a diverse group of scholars was used, including sources written by African scholars with experience in the field.

Ten years of United Nations' involvement would have, or should have, battled the lingering impunity in the country and created security according to their

[18] Ibidem, 99.
[19] Francis Fukuyama, (2010), 'Transitions to the Rule of Law', In: *Journal of Democracy 21 (1)*, 43.
[20] Thomas W. Bennett et al., (2012), *African Perspectives on Tradition and Justice*, (Intersentia: Cambridge), 22.
[21] Fukuyama, 'Transitions to the Rule of Law', 42.
[22] Luc Huyse and Mark Salter, (2008), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, (Trydells Tryckeri AB: Stockholm), 14.

mandates. What did MONUC do during its 10-year peacebuilding program to strengthen the rule of law in the DRC? And what theories did MONUC use in their rule of law programming efforts in the DRC? These will be the main questions to be answered in chapter 3. Sources that described MONUC's mandate and culture were looked at, but mostly official reports by the United Nations Security Council on the MONUC mission form the common thread in this third chapter.

Findings from these three chapters will be brought together and analyzed in chapter 4. How do liberalism, tradition and MONUC relate to one another? This analysis is followed by a chapter with concluding remarks, named chapter 5.

Consequently, the subject of research is very broad. Therefore many questions remain unasked and unanswered. This thesis only revolves around the UN-mission called MONUC (*Mission de l'Organisation des Nations Unies en République Démocratique du Congo*), even though the mission continued after 2010, renamed MONUSCO (*Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo*). This mission's mandate might have a different take on the whole subject. Within this timeframe of 1999-2010 other UN-missions were set up in other parts of the world. This thesis only focuses on this mission, without making comparisons to missions struggling with the same dilemmas. Chapter 6 is devoted to the discussion, in which there is room for suggestions for further research, stressing the gaps this thesis leaves unfilled.

This thesis is only a small part of the ongoing discussion. However, it will shed light on the debate on how to promote rule of law in war-torn societies, juxtaposing theories and uniquely introducing informal justice systems into the debate.

1. Promoting the Rule of Law in Modern-day Peacebuilding

This research revolves around the 'rule of law', a concept which therefore deserves a proper explanation. This chapter describes why the idea of rule of law was welcomed in the last decades as one of the most important aspects of international peacebuilding strategies, but criticizes the concept as well. The chapter juxtaposes neo-liberal approaches and hybrid approaches to peacebuilding and rule of law. With the concept being subject to on-going scrutiny and review, it is valid to ask whether and how all-embracing rule of law is to be promoted as part of a democratization and stabilization process in post-conflict societies.

It is relevant to have a good understanding of the theories revolving around rule of law and the history of the concept, because it is the purpose of this thesis to understand what considerations the international community had to make in rule of law promotion in the DRC. These theories underpin the UN's chosen strategy in the DRC as further explained in chapter three and provide a platform of information to understand the relation between UN rule of law promotion and traditional justice as further explained in chapter two in order to answer the main question about the relation between the two.

1.1. Defining the rule of law in peacebuilding

Over the course of the last decades, the rule of law played a large part in the peacebuilding discourse.[23] Many scholars delved into the subject. It is, however, rather problematic to offer a single explanation of what this rule of law implies. Over the past decades the Democratic Republic of Congo (DRC) has been a pilot area for the implementation of many interpretations of the rule of law. This paragraph presents some of these general interpretations and definitions of the concept by several scholars.

As a professor of law and director of the Cornell University's Institute for African Development, Muna Ndulo specializes in constitution making, governance,

[23] Chandra Lekha Sriram et al, (2010), *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge: Oxon), 3.

institution building and human rights. He believes rule of law is the 'central focus of domestic and international efforts to promote good governance and sustainable peace and development'.[24] Rule of law projects do not seek to be a panacea for the reconstruction of post-conflict societies; rather, they seek to lay the 'framework in which the rebuilding efforts can be promoted and secured'.[25] Ndulo sees rule of law as a way to regulate state authority and secure human rights and development.

According to Thomas Carothers, one of the most noted international experts on international democracy support, the rule of law can be defined as:

> A system in which the laws are public knowledge, are clear in meaning and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proven guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most importantly, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.[26]

Accordingly the rule of law can be approached as a method to organize a state: how a state's relationship to its citizens should best be regulated, and how the relationship between the citizens should be regulated. 'The rule of law refers to the juridical conceptions and mechanisms that preside over the functioning of the state'.[27]

In this sense, the rule of law has two fundamental aspects. Firstly it imposes limits on the political regime. Secondly it sets legal limits, civil and criminal, on private interactions.[28] The four principles of the rule of law are legality, legal certainty, separation of powers and equality before the law. This is with the primary purpose of protecting against arbitrary rule and guiding human conduct.[29]

In 2004 the United Nations (UN), being the major actor in rule of law programming, offered a broad definition of the rule of law in the context of transitional

[24] Muna Ndulo, (2011), 'From Constitutional Protections to Oversight Mechanisms', In: Sriram et al, *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge: Oxon), 90
[25] Ndulo, 'From Constitutional Protections to Oversight Mechanisms', 89.
[26] Carothers, 'The Revival of the Rule of Law', 96.
[27] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?,* 3.
[28] Richard Sannerholm, (2007), 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template', In: *Journal of Conflict & Security Law 12 (1),* 74.
[29] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 75.

societies. The UN stated that the rule of law is a concept at the very heart of the organization's mission:

> A principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[30]

This definition is written in terms of widely accepted human rights standards. It has been adopted by many scholars.

According to Chandra Lekha Sriram, editor of *Peacebuilding and Rule of Law in Africa,*[31] the definition lacks some components to make it more appropriate within a post-conflict peacebuilding context, e.g. components are support for national justice systems, democratic institutions and human rights institutions. Sriram states that maybe even traditional justice mechanisms could be added.[32] Richard Sannerholm works as a researcher and advisor for international organizations and is the United Nations rule of law expert and UN advisor. According to Sannerholm this definition is widely accepted because it represents 'something linked to democracy, something linked to human rights, something linked to good governance'.[33] He warns that the rule of law will be painstakingly difficult to operationalize and implement in post-conflict societies; ambitions too high are at the heart of the problem.[34]

The rule of law is represented as something linked to democracy, something linked to human rights, something linked to good governance'

Carothers and Sannerholm are among the scholars that put most emphasis on the rule of law as provider of political and civil rights to the population and as a way to organize a state, i.e. a liberalist way at approaching the subject. Sriram and Ndulo, though clinging to liberal institutionalization, are more in search of how the

[30] Ibidem.
[31] Sriram et al, (2010), *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge: Oxon).
[32] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 3.
[33] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 76.
[34] Ibidem.

rule of law can reconcile the people in war-torn societies. This reflects a propensity towards the hybrid theory, in which the hybrid nature of the conflict and the society plays a larger role. This particular theory will be highlighted at a later state in this thesis.

The UN are involved in promoting the rule of law in approximately one hundred countries.[35] Over forty UN departments, funds and agencies are engaged in support of several rule of law activities, requiring great coordination at the head-quarter level.[36] The UN illustrate their work and structure in the report '*Uniting our Strengths: Enhancing United Nations Support for the Rule of Law*'[37] by grouping the diverse rule of law activities into three baskets.

The first basket entails the rule of law at the international level. This includes issues related to the Charter of the United Nations, multilateral treaties, international dispute resolution mechanisms, the International Criminal Court (ICC) and advocacy, training and education regarding international law.

The second basket entails rule of law in the context of conflict and post-conflict situations. It includes two components: transitional justice and strengthening of national justice systems and institutions. The activities under transitional justice include the following: national transitional justice consultation processes, truth and reconciliation processes, reparations, international and hybrid tribunals, national human rights institutions, vetting processes and ad hoc investigations, fact-finding and commissions of inquiry. The second component of this basket comprises activities in the area of strengthening of national justice systems and institutions. These include prosecution, ministries of justice, criminal law, legal assistance, court administration and civil law, but also policing, penal reform, the administration of trust funds and monitoring.

To ensure coherence, the third basket, rule of law in the context of long-term development, will closely mirror those activities being undertaken in the context of conflict and post-conflict societies. This basket is closely linked to the activities un-

[35] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 13.
[36] Ibidem, 12.
[37] United Nations Security Council, (2006), 'Uniting our Strengths: Enhancing United Nations Support for the Rule of Law', In: *Report Secretary-General General Assembly Security Council* (A/61/636–S/2006/980), 13.

dertaken in the second basket. It also exists to ensure that human rights standards and norms will be integrated throughout the baskets and sectors.[38]

Using the UN definition and its grouping, this thesis will focus on the second basket, primarily on the second component of this basket and a little on the first component.

It can be said that the UN, as the most important actor in rule of law programming, are confident regarding the pillars of liberal peace: security, economic reform, constitutional reform, good governance and civil society. However, they accept criticism about not involving the traditional and local point of view into peacebuilding. In their basket system the UN therefore try to merge top-down and bottom-up approaches to create a concept of rule of law that suits most people's expectations.

Relying on such broad definitions, the rule of law is subject to multiple interpretations creating a possibility for different actors to have varying ideas of what the rule of law is supposed to imply. For example, to some it implies law and order, or judicial reform. To others it means enforcement of rules without regard to compliance to international human rights standards or to whether these standards are adopted through a representative democracy. Because of the width of the term, virtually all actions of the UN system can be said to contribute to the establishment or strengthening of the rule of law at international or national levels.[39]

Sannerholm warns that it is easy to look at the definition as something positive, but questions whether a rule of law is feasible this way. Carothers, Ndulo and Fukuyama support this view, mentioning a cooperative government and a vibrant civil society are preconditions for successful rule of law programming. Critics of this view would say that these preconditions for successful rule of law are unrealistic in post-conflict societies. For example, the benefits of a functional system are spread among the population at large – the true beneficiaries of a fair and efficient justice system. Each individual actor has a relatively weak incentive to seek an improvement of the system, while those relatively few individuals with strong incentives to oppose it use any means they can, from inaction, to rhetoric about sover-

[38] United Nations General Assembly Security Council, 'Uniting our strengths', 13

[39] Robert Pulver, (2011), 'Rule of Law, Peacekeeping and the United Nations', In: Sriram et al. *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge: Oxon), 69.

eignty, to threats and violence. Thus, even though the total social benefit of strengthening the justice system outweighs the total social cost of doing so, the system of incentives leaves a relatively few powerful actors with strong disincentives for change who are able to prevent it.[40]

1. 2. The importance of rule of law

A plethora of reasons why the concept of rule of law plays such a vast role in peacebuilding missions serves as a justification for many actors involved in rule of law programming.

According to Guillermo O'Donnell, professor of government and international studies at the University of Notre Dame, the rule of law is among the essential pillars upon which any high-quality democracy rests. He speaks of the need of a truly democratic rule of law to ensure political and civil rights and liberties, a cogent liberal point of view.

The main argument is that the rule of law is suggested to be intricately connected to democracy, development and economic growth.[41] An established rule of law can be seen as the surest short-cut to market-led growth, the best defense against human rights abuses, a guarantee against the re-emergence of conflict and the basis for rebuilding post-conflict societies.[42] The rule of law is the concept that links development experts, security analysts and human rights activists.

The rule of law is the concept that links development experts, security analysts and human rights activists

Since the 1990s the UN sought to prioritize the rule of law as a UN activity, but at first solely as part of the protection of human rights, a subject of the UN High Commissioner of Human Rights.[43]

> Member states (of the UN) reaffirmed their commitment to an international order based on the rule of law and international law, stating that it was essential for peaceful coexistence and cooperation among states. Rule of law and transitional justice issues are now being consistently integrated into the strategic and operational planning of new peace

[40] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 81.
[41] Sandra Fullerton Joireman, (2001), 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy', In: *Journal of Modern African Studies 39 (4),* 572.
[42] Balakrishnan Rajapogal, (2008), 'Invoking the Rule of Law in Post-Conflict Rebuilding: a Critical Examination', In: *William & Mary Law Review 49 (4),* 1346.
[43] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 11.

> operations and member states now almost universally recognize the establishment of the rule of law as an important aspect of peacekeeping. As a result, the Security Council is increasingly engaged in including human rights and the reform of policing, judicial, penal and legal systems in mandates.[44]

The rule of law is relevant in order to protect basic human rights as encoded in international covenants. Examples are the right to life and freedom from arbitrary arrest, degrading punishment and torture. In the dominant liberalist view, a state necessarily needs an independent judiciary, a disciplined civilian police force and an efficient prison system. These are all institutions of the rule of law.[45] Procedural requirements encoded in the human rights covenants, such as the right to fair trial and the presumption of innocence are important elements of the rule of law. In consistence with liberalism, they typically can only be guaranteed within a rule of law regime, by having strong legal institutions.[46]

The rule of law can play many roles depending on the international policy agenda behind it. Davidsson and Thoroddson argue that in the DRC it has mainly been promoted in the context of Security Sector Reform (SSR). Rule of law institutions can be considered an important part of the security sector. The Organization for Economic Cooperation and Development (OECD) explains that a security system comprises all the state institutions and other entities, including the judiciary, with a role in ensuring the security of the state and its people. The security sector is therefore treated as including not only the army or militias but also those responsible for providing justice and the rule of law.[47]

Order, in the shape of rule of law is needed to guarantee security

Likewise, the rule of law is seen by liberalists as the remedy for widespread insecurity.[48] Across the UN, rule of law programming became a priority when it was acknowledged that corruption and the collapse or distortion of the rule of law in an unstable country could definitely create conflict.[49] A country able to assure its citizens protection and equal treatment under the law is less likely to be engaged in violent internal conflict.[50] Order, in the shape

[44] United Nations General Assembly Security Council, 'Uniting our strengths', 1.
[45] Mani, 'Conflict Resolution, Justice and the Law', 13.
[46] Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law', 572.
[47] Pall Davidsson and Frida Thoroddsen, (2011), 'Rule of Law Programming in the DRC for the Sake of Justice and Security', In: Chandra Lekha Sriram et al. *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge: Oxon), 114.
[48] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 68.
[49] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 11.

of rule of law is needed to guarantee security. The rule of law appeals to universal and institutionalized rights, checks on state power, and reflects an on-going process of consensus building and legitimacy of the polity of the state. Within the liberal paradigm, the rule of law is a more significant guarantee of legitimate order than state security forces.[51]

A key liberalist assumption of the rule of law is that the judiciary is central to serving society's legal needs: 'unless we fix the courts, many other legal reforms will fail and the society will become or remain unstable'.[52] In short, it is a difficult situation, a vicious circle one might say. It is widely believed among liberalists, that a non-functioning or absent rule of law could have been the cause for conflict in the first place. The few rule of law institutions, if any, a war-torn country used to have, probably did not survive the conflict. However, a new or reinstalled rule of law should be established quickly before insecurity and instability cause more conflict.

Post-conflict societies in particular need assistance in building a rule of law. The legal and administrative system is often the part of the state which is most vulnerable to conflict with a high level of destruction of official buildings, particularly court houses, police stations and prisons.[53] Therefore many post-conflict countries suffer from a lack of formal, uniform and integrated legal systems. It is usually beyond the capacity of countries emerging from conflict to rebuild the rule of law on their own, but it is important and should be high on the post-conflict agenda. It cannot be ignored or badly done.[54]

1. 3. History and development of liberal peace operations

A short history of peacebuilding operations will clarify how the rule of law has slowly found its place in peacebuilding theories in the past several decades. Peacebuilding as we know it today has developed since the end of the Cold War. It is significantly different from the peace operations the United Nations engaged in since its creation in 1945. We now talk about these initial peacekeeping strategies as

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[50] Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law', 572.
[51] Oliver Richmond, (2011), 'The Rule of Law in Liberal Peacebuilding', In: Chandra Lekha Sriram et al., *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge: Oxon), 47.
[52] Stephen Golub, (2007), 'The Rule of Law and the UN Peacebuilding Commission: a Social Development Approach', In: *Cambridge Review of International Affairs 20 (1)*, 53.
[53] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 70.
[54] Mani, 'Conflict Resolution, Justice and the Law', 19.

'traditional' or 'first generation' peacekeeping.[55] The first generation peace operations during the Cold War was about providing neutral and impartial assistance, which could only be delivered with the consent of both parties to the conflict. The mandates allowed the UN to deploy military units to monitor a ceasefire or the withdrawal of troops, but they were to stay out of domestic politics, obeying the principle of state sovereignty and non-intervention.[56] The term 'peacekeeping' covers this mission, referring to 'the deployment of a lightly armed, multinational contingent of military personnel for non-enforcement purposes'.[57]

With the end of the Cold War, a new world order, outbursts of intrastate conflicts and struggles for independence, the UN altered their discourse; their ideas of the purpose of peace operations changed.[58] By that time there was a widely shared conviction that political and economic liberalism offered a key to solving a broad range of social, political and economic problems from underdevelopment and famine, to disease, environmental degradation and violent conflict. A broad ideological shift took place towards support for elections and liberal forms of government and respect for civil and political rights.[59] The liberal epoch of international relations emerged. It was based on the consensus that democracy, the rule of law and market economy would create stability and sustainable peace in post-conflict and transitional states and societies. Liberal peace in the 1990s followed a top-down approach, assuming good governance, state cooperation and a commitment to political and economic liberalization prior to institutionalization. Liberalism is understood as the dominant critical intellectual framework currently applied to post-Cold War policies.[60] In 1993 Fukuyama was convinced that humankind had reached the liberal endpoint in its ideological evolution.[61]

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[55] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 8.
[56] Ibidem.
[57] Roland Paris, (2004), At War's End: Building Peace after Civil Conflict, (Cambridge University Press: Cambridge) 38.
[58] As does Roland Paris, I use the term peace operation or peace mission to make no distinction between international peacemaking, peacekeeping, peacebuilding, peace-enforcement or preventive diplomacy operations, Paris, *At War's End*, 38.
[59] Roland Paris, (2011), 'Critiques of Liberal Peace', In: Susanna Campbell et al, *A Liberal Peace? The Problems and Practices of Peacebuilding*, (Zed Books: London), 33.
[60] Meera Sabaratnam, (2011), 'The Liberal Peace? An Intellectual History of International Conflict Management, 1990-2010', In: Susanna Campbell et al, *A Liberal Peace? The Problems and Practices of Peacebuilding*, (Zed Books: London), 13.
[61] Paris, *At War's End*, 33

Liberal peacebuilding missions since the 1990s were multi-dimensional operations including some aspects of justice. This trend of peacebuilding reflects the recognition that the maintenance of peace and security in the aftermath of conflict requires more than traditional neutral military intervention.[62] Hence, post-Cold War peacebuilding became much more invasive in nature than peacekeeping used to be. It now seeks to prevent the recurrence of conflict through the provision of assistance to transform national structures and capabilities and strengthen or install democratic institutions. To reach this goal, UN peacebuilders are allowed to use force to some extent, to disarm warring parties, to restore order, to train security personnel and monitor elections. Furthermore they are mandated to facilitate the implementation of peace agreements, protect civilians, promote human rights and also promote rule of law reform as part of a transparent and stable new political order.[63] Through their impartial stance in these processes, peace operations gain credibility and trustworthiness.[64]

But this liberal peacebuilding approach showed some flaws after years of experimenting in the 1990s. In the wake of the failure of international efforts to create liberal governments through peace operations in the 1990s for example in Yugoslavia, Sierra Leone, Haiti, Côte d'Ivoire and the Democratic Republic of Congo, the values and validity of liberal peace became subject to debate.[65]

Roland Paris, a liberalist himself, has said that liberalization in post-war environment is destabilizing for divided societies.[66] Liberal peacebuilding is liberal in orientation and global in scope, perhaps too liberal and too global. This may be a strong indication that the ambitious and expansive peacebuilding project has fallen out of public/political favor. The international community feels increasingly unable to commit to its demands and objectives.[67]

[62] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 67.
[63] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 9 and Pulver 'Rule of Law, Peacekeeping and the United Nations', 60.
[64] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 68.
[65] Susanna Campbell, David Chandler and Meera Sabaratnam (2011), *A Liberal Peace? The Problems and Practices of Peacebuilding,* (Zed Books: London), 1.
[66] Paris, *At War's End*, 12
[67] Sabaratnam, 'The Liberal Peace? An Intellectual History of International Conflict Management', 26.

1. 4. Neo-liberal statebuilding

By the end of the 1990s and early 2000s the UN acknowledged the need for a more comprehensive and longer lasting approach to peacebuilding, a neo-liberal approach. Good governance enjoyed an ideological hegemony in the 1990s, which was now challenged by the rediscovery of statebuilding. Statebuilding is characterized by greater attention to building and strengthening governmental institutions in host countries as a means to 'lock in' post-war political and economic reforms.[68] This time around institutionalization was prioritized over liberalization. As a result operations launched from 1999 had explicit statebuilding mandates and open time frames. Missions were no longer concluded within two to three years until elections were organized. Broader sets of goals were embraced. Among them were the establishment of functional judicial and administrative structures, a rule of law within the host state and promotion of the growth of civil society groups. These goals are generally understood as preconditions for a democracy.[69]

Chandra Lekha Sriram claims that today 'peacebuilding is designed as sustained, cooperative work to deal with underlying economic, social, cultural and humanitarian problems'.[70] Richard Sannerholm, however, stresses that the role of economic, social and cultural rights should be even more clearly acknowledged in international peace missions. If left unaddressed it can provoke the re-eruption of violent conflict. Sannerholm notices that 'corruption, illicit trade and money-laundering contribute to state weakness, impede economic growth and undermine democracy'.[71] He worries that most actors in peace missions identify the rule of law as primarily a system for the protection of civil and political rights. Issues concerning the protection of social and economic rights and control of the executive power are generally left out of the statebuilding and rule of law equation.[72]

Today there is some consensus about the idea that only providing for military peacekeepers to maintain stability, while rushing into democratic elections and then rapidly withdrawing is an approach that is flawed and obsolete.[73] The international community is aware that a well-structured rule of law program with culture-

[68] Paris, *At War's End*, 35.
[69] Ibidem.
[70] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 9.
[71] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 69.
[72] Ibidem, 70.
[73] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 67.

sensitive justice reform and socio-economic aspects is needed. However, according to many critics the whole neo-liberal ideology is unfit for societies in conflict.[74] A hybrid approach should be more suitable, since many conflicts are hybrid in nature. Since this hybrid approach to peace is a complex concept, the next paragraph explains in more detail what is understood by hybrid peace and how it complements liberal approaches.

1. 5. Hybrid Peace

Roger Mac Ginty criticizes neo-liberalism in his book on hybrid forms of peace, *International Peacebuilding and Local Resistance*.[75] He sums up his unvarnished criticism on liberal peace. To start with, he claims that liberal peacebuilding is ethnocentric; it is directed from the global north and attempts to reproduce forms of peace and governance that mirror expectations from the global north. Secondly it is elitist because political and economic elites hold power at the national and international level. It is also security-centric; order and security are privileged over diversity and emancipation. Furthermore, it is superficial; peace is not sustained because underlying structural causes to conflict are not addressed. Mac Ginty also thinks liberal peace is quite rigid, because it is prone to peace by template or overly programmed peace interventions. Moreover, he criticizes the fact that neo-liberal interventions are still short-term. He proclaims that peace cannot be sustained with a short-term budget and short-term political cycles. Neo-liberalism overlooks the social cost of privileging neo-liberal economic interventions. Finally, neo-liberalism fails to fulfil and connect with local expectations; it is insufficiently agile to take account of local cultural preferences.[76]

Over all, Mac Ginty states that liberal peace often produces a poor-quality peace in societies emerging from war. Direct violence may end, a peace accord may be signed and international assistance may be flowing in, but indirect violence and other forms of exclusion persist.[77] Rather than liberal peace, a hybrid peace tends to prevail in societies that have been subject to liberal interventions.[78]

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[74] See Mac Ginty, Boege, Debiel, Golub.
[75] Roger Mac Ginty, (2011), *International Peacebuilding and Local Resistance: Hybrid Forms of Peace*, (Pelgrave Macmillan: Hampshire).
[76] Mac Ginty, *International Peacebuilding and Local Resistance*, 42.
[77] Ibidem, 42.
[78] Ibidem, 90.

Volker Boege and Tobias Debiel, both researchers on hybrid peace, support Mac Ginty's view on liberalism and explain the value of a hybrid approach. Boege clarifies: 'given the hybrid nature of many of today's violent conflicts, conflict transformation also has to be of a hybrid nature, combining approaches based on state institutions, civil society and local traditional practices'.[79] Boege explains how regions of weak statehood are generally places in which diverse and competing institutions and logics of order and behavior overlap and intertwine. To be taken into consideration are the modern logic of the formal state, the pre-modern logic of the traditional and informal societal order, the post-modern logic of globalization and international civil society with its abundance of highly diverse actors.[80] Accordingly, many contemporary large-scale violent conflicts are hybrid socio-political exchanges in which modern state-centric as well as pre-modern factors get mixed up. The state has lost its central position in violent conflicts of this kind, both as an actor and as the framework for reference. This hybrid nature of many contemporary conflicts has to be taken into account when it comes to conflict prevention, conflict transformation and post-conflict peacebuilding.[81]

Statebuilding in crisis countries is a complex social and political process. Social and political structures are characterized by institutional hybridity and a blend of traditional and modern norms and practices.[82] Statebuilding in a globalized world is a contested arena in which local, national and international perceptions and interests are not necessarily compatible or reconcilable.[83]

According to liberalism, social and political order is based on institutions, rules and norms. The hybrid approach takes into account that such institutions can only be sustained when they are considered legitimate and that legitimacy in turn can be created through participative processes or when they are based on tradition, ideology, religion or custom. Nonetheless, power-holders need legitimacy in order to imbue their authority.[84] Customary law, traditional societal structures such as extended families, clans, tribes, religious brotherhoods, village communities and

[79] Volker Boege, (2007), 'Traditional Approaches to Conflict Transformation – Potentials and Limits', In: *ACPACS Occasional Paper Number 5*, 1.
[80] Ibidem, 2.
[81] Boege, 'Traditional Approaches to Conflict Transformation', 3.
[82] Tobias Debiel and Daniël Lamback, (2009), 'How State-Building Strategies Miss Local Realities', In: *A Journal of Social Justice 21 (1),* 25.
[83] Debiel and Lamback, 'How State-Building Strategies Miss Local Realities', 22.
[84] Ibidem, 25.

traditional authorities such as village elders, headmen, clan chiefs, healers and religious leaders determine the everyday social reality of large parts of the population in developing countries. Even today this is applicable, in particular in rural and remote peripheral areas. Consequently, on many occasions the only way to make institutions work is through utilizing kin-based and other traditional networks. Thus, informal societal institutions play a big role, following their own logic and set of rules within the state structure.[85]

According to promoters of hybrid peace it is important not to lose sight of the fact that many people do not perceive themselves as citizens or nationals. Instead, they define themselves as members of a particular sub- or transnational social entity, kin group, tribe or village community. This is particularly true where state agencies are not present on the ground and where the state does not deliver any services with regard to education, health, infrastructure or security. It is the community who provides basic social services. People have more trust in their community than in the government. The state is often alien and far away, physically and psychologically.[86] In Northern Kivu in the Democratic Republic of Congo, for example, non-state institutions like churches have filled the political void left by withdrawal of the state. Taking over state functions, they have become para-statal institutions.[87] Liberal peace assumes a sense of state and nation and a stronger connection between a state and its citizens.

The state is often alien and far away, physically and psychologically

Advocates of hybrid peacebuilding strategies proclaim that traditional structures are the cultural bedrocks on which future attempts at statebuilding must be constructed. In Sub-Saharan Africa retraditionalization is a trend to gain legitimacy.[88] Traditional approaches cannot be compartmentalized into political or juridical elements; rather they are holistic, comprising social, economic, cultural and religious-spiritual dimensions. This is in accordance with the entirety of traditional lifestyles in which different spheres of societal life are hardly separated.[89] Indigenous approaches to peacebuilding include much more than specific techniques and

[85] Volker Boege, Kevin Clements et al, (2008), 'On Hybrid Political Orders and Emerging States: State Formation in the Context of 'Fragility'', In: *Berghof Handbook for Conflict Transformation Dialogue Series 8*,7.
[86] Boege, 'Traditional Approaches to Conflict Transformation', 13.
[87] Boege, 'On Hybrid Political Orders and Emerging States', 14.
[88] Ibidem, 8.
[89] Boege, 'Traditional Approaches to Conflict Transformation', 9.

rituals; they encompass ways of interpreting the social environment and engaging with in-and-out group members. Societies emerging from violent conflict are likely to dwell in a hybrid environment. An environment in which varieties of exogenous and indigenous ways of interpreting the world and methods of managing social, economic and political problems co-exist, and jostle for acceptance.[90] Indigenous approaches always encourage bottom-up, people-centric views of society.

Stephen Golub, a scholar in international development, who searches for hybrid solutions in cases where state cooperation is out of the question, supports Mac Ginty's view. Golub promotes his theory of legal empowerment to increase the freedom of the people and improve the governance. This empowerment involves legal services, legal capacity-building, legal reform by and for disadvantaged populations. Local Non-Governmental Organizations (NGOs) may be involved in the process.[91] Mac Ginty states that locally owned initiatives have a greater chance of success, do not rely on costly external resources and can connect with cultural norms and expectations of local communities. He believes that promoting local ownership offers an exit strategy for international interveners.[92]

Golub opposes the liberal state-centered approach. He points out the danger of the possibility that the Rule of Law Assistance Unit of the UN Peacebuilding Commission will employ the same dominant but problematic paradigm that the international development community has pursued across the globe. This is a top-down, state-centered paradigm: 'the rule of law orthodoxy', as he calls it.[93]

Mac Ginty points out a few more ideas in which the liberal and the hybrid theory differ. In the liberal mind, the universal must be prioritized over the particular, where in the hybrid mind the particular cases come to attention.[94] Liberalism encourages us to look forward toward progressive goals, hybridity demands us to look backwards and ask questions about origins and antecedents.[95] Most importantly, the liberal peace follows a top-down approach, where hybrid peace follows a bottom-up approach. Liberal peace is less doctrinal and coherent than many ob-

[90] Mac Ginty, *International Peacebuilding and Local Resistance*, 65.
[91] Golub, 'The Rule of Law and the UN Peacebuilding Commission', 47.
[92] Mac Ginty, *International Peacebuilding and Local Resistance*, 59.
[93] Golub, 'The Rule of Law and the UN Peacebuilding Commission', 48.
[94] Mac Ginty, *International Peacebuilding and Local Resistance*, 76.
[95] Ibidem, 76.

servers may believe, though. Even a cursory glance at most interventions suggests that much policy was made on the hoof.[96]

Nevertheless, many scholars cling to neo-liberalism as the one and only solution for peace in conflict regions, claiming that alternatives to liberal peace are insufficient and troublesome. Roland Paris passionately defends liberal peace; in spite of failures in the liberal system, it remains the best system offered, he says. He refutes criticism on liberal peace, stating that comparisons that are made of peacebuilding with imperialism or colonialism are nonsense. Colonialism was mainly for the benefit of imperial states themselves. Modern interventions reflect the interests of the most powerful countries, but are not designed to extract wealth out of host societies.[97] Liberalism also suffers from mischaracterization of its track record and oversimplification of its moral complexity. When a mission is considered a partial success, the focus lies on the shortcomings rather than on the probability that these societies are better off now than they would have been without such missions.[98]

Mac Ginty is realistic about the downsides of his pursued hybrid peace. Recently, among international organizations, bilateral donors, NGOs and academics, it has become the trend to consider indigenous approaches to peacebuilding, since they are linked to 'local ownership' and 'sustainability'.[99] This all sounds fair, but romanticizing everything local and traditional is dangerous, because these approaches can be just as flawed, ineffective and counterproductive as liberal approaches.[100] It is possible to develop a simplistic binary narrative in which indigenous and traditional aspects of a society are equated with being natural, unpolluted, unsustainable, authentic and normatively good. Modern and international aspects would then be artificial, inauthentic and normatively bad. This however overlooks traditional ways of warfare, torture and exclusion one comes across.[101]

Ultimately, statebuilding is seen as a solution for fragile states and presented as sustainably strengthening state institutions in addition to enhancing capacities of state actors for control, regulation and implementation. Particularly in the core fields of statehood, namely internal security, basic social services, the rule of law

[96] Ibidem, 208.
[97] Paris, 'Critiques of Liberal Peace', 41.
[98] Ibidem, 42.
[99] Mac Ginty, *International Peacebuilding and Local Resistance*, 47.
[100] Ibidem.
[101] Ibidem, 51.

and legitimacy of government.[102] According to the opinions of African citizens, what matters most for democratization is whether the state has the capacity to fulfil its key function: creating a legitimate political order.[103] Ndulo is a professor of law and director of the Cornell University's Institute for African Development, who specializes in constitution making, governance, institution building and human rights. He contributes that the rule of law and good governance entail first and foremost a government that lives up to its responsibilities.[104] Africans apparently judge their political regimes by the acid test of human security, including protection from human rights violations perpetrated by state elites.[105]

The liberal peace is used as the principal frame of reference for this work, because of the continuing use of liberal rhetoric by leading states, international organizations, NGOs and financial institutions to justify peace-support interventions.[106] Interventions have been justified using the liberal rhetoric, in the name of freedom, human rights and democracy.[107] In the following paragraphs on the rule of law in peacebuilding programs, the liberal view is leading. However, the hybrid theory will always be taken into account for the case study in this thesis to illustrate the incessant debate.

1. 6. Challenges: where liberal approaches meet hybrid approaches

UN peacebuilding operations are frequently deployed in settings in which justice systems, along with other state institutions, have completely ceased to function and those that do operate are likely to do so in violation of national and international standards.[108] Competition over access to justice, disputes over relevant law, and disagreements over legal authority may reinforce social divides and make it somewhat common to bypass the law.

[102] Boege, 'On Hybrid Political Orders and Emerging States', 3.
[103] Patrick Vinck et al., (2008), *Living with Fear: a Population-based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo*.
[104] Ndulo, 'From Constitutional Protections to Oversight Mechanisms', 93.
[105] Michael Bratton and Eric Chang, (2006), 'State Building and Democratization in Sub-Saharan Africa: Forwards, Backwards, or Together?', In: *Comparative Political Studies 39 (1059)*, 1080.
[106] Mac Ginty, *International Peacebuilding and Local Resistance*, 5.
[107] Ibidem, 207.
[108] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 61.

When promoting rule of law in a post-conflict area, peacebuilders tend to first engage with the state to require their consent for conducting their work, as was common in traditional peacekeeping and the point of departure for liberal peace. However, it is very well possible that the state cannot or will not provide basic services, such as justice or conflict resolution to their population. Most actors, whether bilateral or multilateral, approach rule of law assistance as a purely technical effort, which simply assumes the desired willingness on the part of host-country authorities to engage in the strengthening of the rule of law. They assume that they too believe it is better for the country's stability and that it can strengthen state authority. The main challenge of rule of law programming is still having the state authority and national actors with power on your side. The political aspects of rule of law strengthening are challenging.

It is very well possible that the state cannot or will not provide basic services, such as justice or conflict resolution to their population

Some of these challenges are the need to engage political actors, the need to address corruption and the need for a public information campaign to encourage the populace to support and demand a functioning justice system.[109] Particularly in a fragile, failed or post-conflict state where the government violates the rule of law, it is highly questionable whether a government, or the forces that control it, will allow for example an independent judiciary. It would be simplistic to consider such governments as monolithic wholes, since they often comprise of individuals with diverse agendas.[110] This makes it difficult to assess the intent of the government. Fact in the liberal approach is that the rule of law can only operate where there is clear commitment by the leaders, operating by the law and separating public and private interests.[111]

Chaos in the formal judicial structure and the fact that access to formal justice is small in war-torn countries such as the DRC can make people choose to turn to non-state justice providers.[112] These forms of 'non-state justice' are very important in post-conflict societies. They are involved in conflict resolution practices and have various degrees of legitimacy as well.[113] Non-state justice is often the only

[109] Ibidem, 60-61.
[110] Golub, 'The Rule of Law and the UN Peacebuilding Commission', 53.
[111] Ndulo, 'From Constitutional Protections to Oversight Mechanisms', 104.
[112] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 2.
[113] Ibidem, 7.

type of justice accessible to a wide segment of the population.[114] However, many traditional practices of justice do not meet international standards. Punishments for example might violate international human rights standards. Nevertheless, rule of law programmers recently acknowledged that, in many cases, they and non-state justice providers depend on one another. Coordination and cooperation between the various juridical aid organizations and consensus with available (non-formal) justice structures is crucial. Furthermore, without fully engaged partners within the host country, rule of law efforts should not be initiated at all.[115] However, liberal rule of law programmers cannot accept all non-state justice providers uncritically. In chapter 2 these forms of justice will be explained more thoroughly and rule of law programmer's reservations exemplified.

In the report of the UN Secretary-General *'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies'*[116], it is stated that past experiences have demonstrated that the consolidation of peace, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.[117] The population must be well informed on their national justice system; their participation strengthens the rule of law efforts that are made.[118] Courts should play a dynamic role in post-conflict societies. They should build a relationship of trust with the population. For people that, in the light of recent conflict, often view the courts as alien, oppressive, irrelevant, and as an institution whose doors have always been kept closed to ordinary people.[119]

A vivid civil society can educate citizens about their rights and the rule of law. In most post-conflict societies civil society is judged to have better capacity than official agencies to monitor human rights violations. So a civil society is needed to improve access to courts, improve the idea people have about the law, and make sure that they regain trust in the law. But in post-conflict countries a weak information gathering, weak analytical capacities and scarce resources hamper the

[114] Ibidem.
[115] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 84.
[116] United Nations Security Council, (2004), 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', In: *Report of the Secretary-General General Assembly Security Council (S/2004/616).*
[117] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 68.
[118] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 86.
[119] Ndulo, 'From Constitutional Protections to Oversight Mechanisms', 98.

development of this desired civil society.[120] It is a catch-22: a civil society is hard to (re)build in a post-conflict situation but conversely, there needs to be some sort of rule of law to promote amongst these civilians.

Francis Fukuyama, senior fellow at the Center on Democracy, Development and the Rule of Law at Stanford University, gives some practical insight. He stresses that legal systems are among the most difficult and costly governmental systems to construct, because they have huge infrastructure needs and require both human and physical capital.[121] Countries with weak legal institutions are usually countries with low GNP per capita. The more money a country has, the better its judiciary will be trained and paid, the more complex and efficient institutions a country can develop.[122] One of the practical inconveniences that challenge the construction of legal systems is the fact that there are usually not enough qualified legal professionals to meet the needs of a society emerging from conflict.[123] Moreover, insufficient salaries for the legal personnel encourages corruption,[124] a phenomenon that is actually high on the list of behavior that rule of law programmers want to tackle.

Setting priorities is prudent as well. In addition to criminal justice, peace operations engage in a range of noncriminal matters that are seen as core to the particular conflict or peace agreement. This can include constitutional reform, land tenure, citizenship and identification processes, separation of powers, administration of the budget for the judiciary, parliamentary processes, legal education, court administration and legal professional organizations. This emphasizes on aspects of the rule of law related to sustainable peace means that other aspects drop out of scope of the mission mandates. While access to justice in a remote area outside of the capital may be extremely important for individuals in those areas, the peace operation, with limited mandate, resources and duration, is likely only to focus on that area if there is a clear link to the underlying conflict or if the lack of access to justice in that region presents a threat to sustainable peace.[125] This proves to be problematic, because currently, the international community believes that any development program needs to be applied universally if it is to be done at all. A program that works

[120] Ibidem, 105
[121] Fukuyama, 'Transitions to the Rule of Law', 41.
[122] Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law', 590.
[123] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 83 and Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law', 590.
[124] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 61.
[125] Ibidem, 66.

only in the capital city or for the privileged alone is regarded as a failure.[126] However, as mentioned, resources are scarce, cooperation is difficult and priorities shift between quantity and quality.

Developing the capacity of a society to spread important precedents of rule of law programs more broadly takes time. And developing effective institutions normally takes considerably longer than the average peacekeeping operation.[127] There may be lower-cost alternatives based on customary or hybrid rules that will work better in the meantime.[128] Promotion of good governance in post-conflict situations will require, inter alia, building the capacity of state institutions to address the root causes of the conflict, building institutions for the delivery of services such as health, education, justice and dispute settlement and police to maintain order.[129]

The types of governance which peacebuilding activities construct in post-conflict zones reflect almost exclusively the developed world's social, political and economic experiences. Particularly Chandra Lekha Sriram and Francis Fukuyama promote the rule of law, but are very much aware of the western ideas of 'good' that are intertwined with the concept. Putting emphasis on the creation of a liberal democratic government is problematic. Often it is argued to be a poor fit and unwelcome and it may even result in the renewal of conflict.

The international community seems to assume that post-colonial African states have a foundation for the construction of democratic governance. But many governments in Africa have never been (truly) democratic. States emerged from colonialism into one-party rule. This means that democratic elements of the rule of law are not being re-instituted after conflict, but rather are instituted for the first time. We can see the example of this process in the Democratic Republic of Congo. Belgium, the former colonizer of the Congo, gave little attention to building the judiciary in their colony prior to independence. Belgium was negligent in training qualified indigenous professionals in law. Insufficient legal professionals were trained.[130] When Congo became independent they had virtually no trained legal professionals to handle disputes in the national court system. The weak judiciary could in no way control the power of the state and its executives, inevitably leading

[126] Fukuyama, 'Transitions to the Rule of Law', 41.
[127] Golub, 'The Rule of Law and the UN Peacebuilding Commission', 52.
[128] Fukuyama, 'Transitions to the Rule of Law', 41.
[129] Ndulo, 'From Constitutional Protections to Oversight Mechanisms', 93.
[130] Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law', 581.

to authoritarian rule.[131] African leaders since the independence of Congo have relied on control and patronage by seizing power over the economy, rather than through the state via a functioning administration and an independent legal apparatus, leading to what we now observe, 'pathological patrimonialism'.[132]

Another implication of rule of law programs in post-conflict societies refers to the need for law to be normatively grounded in the values of the underlying society.[133] Because in the West the law is defined in purely positive and procedural terms, peacebuilders tend to promote the visible procedural infrastructure of the law as it exists in developed countries. They wish to include issues like formal legal codes, computerized dockets, bar associations, efficient courtrooms, and the like. Peacebuilders tend to be less concerned about whether the imported law actually commands the respect of people in the recipient society.[134] The stability of a future rule of law would depend on which version of law most truly reflects the society's values.[135]

A substantial volume of new laws is drafted under the auspices of international actors. In this context, law reform is seen as assistance to the host-state in ratifying or acceding to international conventions, and assisting legislatures in drafting new legislation. International Human Rights Law is perceived to be a solid basis for guidance.[136] This reveals a built-in tension in the involvement of the international community and the UN in particular in Africa. This becomes apparent, when policy proclaims that reforms should be based on the local context and take local ownership seriously, while the reality for all practical reasons sometimes makes this an unworkable approach.[137] Thus assistance, mandated by the UN Security Council and requested by the host country, is said to be tailored to the particular needs of the country, the maintenance of peace and security and the provisions of an operational peace agreement.[138] In this respect, the advocates of a hybrid approach gain ground. Pulver however adds, presumably defending Western approaches, that in

[131] Ibidem.
[132] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?*, 2.
[133] Fukuyama, 'Transitions to the Rule of Law', 41
[134] Ibidem, 42.
[135] Ibidem.
[136] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 79.
[137] Ibidem, 81.
[138] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 65.

some instances a general shift in cultural attitudes toward justice will be required, particularly where societies have lost trust in formal judicial institutions.[139]

Liberal promoters of rule of law want to see first that a law acts as a check on arbitrary executive power. Fukuyama believes that this should certainly be promoted.[140] Second, they want to see that the content of that law matches the western cultural values. For example, fully equal juridical status for women is desired. Here Fukuyama wonders whether this should be promoted as well if it weakens respect for the law as such. Presumably, it is better to 'proceed step by step in building legal institutions that work, even if we find the content of the law not to our liking?'[141] This question plays a large role in the debate on cultural sensitivity in rule of law programming. To what extent can we, or do we allow ourselves to obtrude liberal ideas of law to African societies?

1. 7. Making choices

Facing these challenges and inconveniences, one wonders what the real purpose of rule of law should be and what the best what to ensure sustainable peace really is. Is it about structuring the state and guaranteeing political and civil rights to the population, or should the rule of law be a method to teach the population how to deal with past trauma in order to prevent renewed conflict? This thesis shall not touch upon this particular and complex debate. It shall rather explain the choices that are made concerning rule of law programming and on what theories they are based – neo-liberal or hybrid?

This chapter clarified what the concept of rule of law entails, why a rule of law could create peace and stability, but also how opposing approaches to reach this goal work together or against each other in the same arena of peacebuilding. The following chapter elaborates on Sub-Saharan traditional perceptions of justice. The case study in this research will elaborate on rule of law programming in the DRC and its (in)consistency with Congolese tradition, values and perceptions of justice.

[139] Ibidem, 83.
[140] Fukuyama, 'Transitions to the Rule of Law', 42.
[141] Ibidem.

2. Sub-Saharan African Traditional Justice Systems

As the previous chapter explained, establishing rule of law by improving the justice system is perceived as one of the core tasks in modern-day peacebuilding. In many ways the international community wants to ensure that injustices are being taken care of in post-conflict states, whether through retributive justice or restorative justice. In cases of genocide and grave war crimes, tribunals might be installed, such as the Rwanda Tribunal in Tanzania (ICTR) and the Tribunal of the Former Yugoslavia in The Netherlands (ICTY), to punish the individual perpetrators. A Truth and Reconciliation Committee (TRC) can be installed and processes of vetting and amnesty laws can be monitored, as was the case in South Africa. These are examples of transitional justice mechanisms to fight impunity and deal with war crimes, crimes against humanity and crimes of genocide.[142]

In addition, according to liberalists, at the national and local level a functioning justice system is needed to warrant safety, security and stability and to prevent a relapse into war. National formal justice systems are sometimes the only justice systems considered appropriate by international organizations. These systems were mentioned in the second basket of the UN's basket system to group rule of law activities. The third chapter of this thesis will revolve around these types of justice systems in the DRC and specifically how they are supported by international rule of law promoting agencies.

It is, however, acknowledged that traditional justice systems play a vast role in many countries deriving from conflict, especially in the region this thesis revolves around. Given the scarcity of formal justice institutions, traditional arbitration is estimated to be the primary source of justice in 80 per cent of the country.[143] Only 20 per cent of the population has access to formal justice systems.[144]

[142] UN Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', 2.
[143] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 117.
[144] Ibidem.

Therefore this chapter explores Congolese traditional mechanisms of justice. It is necessary to understand what is understood by traditional justice in the Congo in order to answer the research question to what extent rule of law activities undertaken by the UN are contradictory to traditional ideas and practices of justice. A good understanding of traditional justice mechanisms can illustrate the difference between a tendency towards liberal rule of law or hybrid rule of law approaches.

Traditional justice systems are non-state justice systems that have existed, although not without change, since pre-colonial times, and are generally found in rural areas.[145] A focus lies on African perspectives of justice and tradition, giving an insight in the traditional or non-state institutions known in Sub-Saharan Africa and the values they express concerning justice and the community. Comparisons will be made to formal justice mechanisms. Congolese needs for and expectations of justice will also be discussed and the question on how these traditional courts have been influenced by or used during the violent conflicts in the country will be answered. This paves the way for understanding decisions made by the UN in rule of law promotion in the DRC and to what extent they can, want or should promote traditional justice.

Most literature, for example by Tom Bennett, Joanna Stevens and Luc Huyse, deals with traditional justice in (Sub-Saharan) Africa in general, hence not specifically with traditional justice in the Democratic Republic of Congo. Nevertheless, these more general African perspectives on traditional justice will suit the Congolese case.

2.1. Academics and the revival of traditional justice

Traditional justice has been studied extensively by legal anthropologists, particularly with a focus on legal pluralism in pre-colonial and colonial times. It is a relatively new subject of study in the field of history and international relations. The topic is now extensively studied for the purpose of legal reform in Africa and to understand how traditional mechanisms of justice could contribute to building sustainable peace, considering the hybrid theory.[146]

[145] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 98.
[146] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 14.

Even though traditional justice of course is nothing new, it has gained renewed attention in the aftermath of the bloody civil wars that the African continent has witnessed in the past two decades.[147] African societies are rediscovering their age-old methods of seeking justice and reconciliation to deal with the horrors of today. In pre-colonial Africa, the right to justice was taken for granted, when traditional rulers were responsible for setting moral boundaries and for providing order. During the colonial period the European powers introduced their own metropolitan law and court systems in Africa. Still, indigenous laws and procedures were allowed to coexist to the extent that they were compatible with European notions of natural justice and morality.[148] The French even tried to promote a specific African legal system, but failed in their efforts.[149] Nonetheless, the European professionalization of law in colonial times had the effect that funds and resources were concentrated in a formal court system, only addressing a fraction of the legal needs and laying beyond the reach and understanding of ordinary people.[150] Informal systems have been neglected in terms of external support.[151] Thus, Bennett, professor in public law at the University of Cape Town, states; 'ironically, the formal court system Africa inherited from the colonial era is largely responsible for creating today's problem of access to justice'.[152]

Right after most African countries became independent in the 1960s, disputes were resolved by using traditional and informal forms of justice. It was then said that these justice forums were obstacles to development. 'Traditional' meant backwards, while 'modern' formal justice mechanisms were seen as advanced and as the key to development.[153] It was believed that traditional justice was only an interim solution, which would die out when Africa started to modernize in the decades that followed.[154]

'Traditional' meant backwards, while 'modern' formal justice mechanisms were seen as advanced and as the key to development

[147] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 98.
[148] Joanna Stevens, (2000), *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems / Penal Reform International 9* (Astron Printers: London), 51, and Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy', 580, and Juan Obarrio, (2011), 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', In: Chandra Lekha Sriram et al. *Peacebuilding and Rule of Law in Africa: Just Peace?* (Routledge: Oxon), 28.
[149] Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy', 581.
[150] Bennett, *African Perspectives on Tradition and Justice*, 35.
[151] Golub, 'The Rule of Law and the UN Peacebuilding Commission: a Social Development Approach', 54.
[152] Bennett, *African Perspectives on Tradition and Justice*, 19.

The traditional justice system is, however, deeply rooted in the customs and values of African people. These values have been passed from generation to generation and have crystallized into the customary or indigenous law systems in African societies. 'These values have been formed, tested and tried by time and are fully guided by the values and beliefs of our ancestors,'[155] Borenahabokhethe Sekonyala says. Sekonyela is a traditional leader, a chief of the Batlokoa clan in Lesotho.[156] 'No fine or handsome books were written, and no sophisticated documentation was done. These customs were simply practiced and understood by the people, and their leaders stood at the helm as a symbolic authority of excellence as regards these values.'[157]

Sriram states that the key tool for institutional reform is rule of law programming that includes the reform of existing laws, constitutions, judiciaries, the use of transitional justice mechanisms and also the engagement with the 'informal' or 'traditional' justice sector.[158] The UN seem to back this idea with their definition of justice:

> An ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.[159]

Traditional justice systems can be instrumental in rebuilding collapsed states or in substituting collapsed formal institutions of justice.[160] For example, Rwandans rely since 2001 on an informal justice mechanism, called *gacaca* – as complementary to the International Criminal Tribunal for Rwanda (ICTR) – to deal with the legacy of the genocide in 1994. Many people who were suspected to participate in the genocide are tried in these gacaca trials. These processes gained much international at-

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[153] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 31.
[154] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, 1.
[155] Borenahabokhethe Sekonyela, (2010), 'Lesotho – Traditional Administration of Justice in a Monarchy: Human Rights Gaps and Strategies to encourage Respect for Human Rights', In: M.O. Hinz, *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa,* (Namibia Scientific Society, Windhoek), 182.
[156] Sekonyela, 'Lesotho – Traditional Administration of Justice in a Monarchy', 181.
[157] Ibidem, 182.
[158] Sriram, *Peacebuilding and Rule of Law in Africa: Just Peace?,* 1.
[159] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 96.
[160] Mapaure, 'Accused and Cherished: Traditional and Informal Justice Systems as Seen by International Organizations', 40.

tention and funding, which shows international confidence in this system.[161] Another example of trust in informal systems is a pact on accountability and reconciliation that was signed in June 2007 by the Ugandan government and the Lord's Resistance Army (LRA). The pact consisted of an explicit reference to traditional justice mechanisms as a helpful instrument for peace and justice. At the time these mechanisms were very innovative and a sign that attention to informal justice systems increased.[162]

Kofi Anan stated in 2004 that due regard must be given to indigenous and informal traditions for administering justice or settling disputes, among other reasons to prevent the exclusion of large sections of the society from access to justice.[163] It was essential to continue their often vital role and to do so in conformity with both international standards and local tradition,[164] though Joe Alie, professor at the University of Sierra Leone, stresses that therefore these mechanisms might need some modifications.[165]

Desmund Tutu argues that western-style justice and these international standards do not fit traditional African jurisprudence, because it is too impersonal.[166] The diversity of social acceptance and integration of traditional African healing processes harbor a high, yet very much neglected, potential for sustainable conflict resolution.[167] Sekonyela believes it is traditional justice that could be researched and used to enhance the protection of human rights.[168] Traditional leadership survived colonial and post-colonial rule, which is an important propagator of traditional ideas of justice.[169]

Western-style justice and international standards do not fit traditional African jurisprudence, because it is too impersonal.

[161] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 1.
[162] Ibidem.
[163] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 100.
[164] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 3.
[165] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 100.
[166] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences,* 5.
[167] Manfred Hinz and Helgard K. Patemann, (2010), 'Healing – Beyond Formal Conflict Resolution', In: Hinz, M.O., (2010), *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa*, (Namibia Scientific Society, Windhoek), 413.
[168] Sekonyela, 'Lesotho – Traditional Administration of Justice in a Monarchy', 207.
[169] Bennett, *African Perspectives on Tradition and Justice*, 24.

2.2. Practical reasons for the popularity of traditional courts

As already mentioned, the majority of the population in rural Africa is often not in a position to access the formal legal system for various logistical, financial, linguistic and cultural reasons. Their access to justice largely depends on the functioning of informal systems.

So primarily practical reasons explain why traditional informal justice is still popular in the DRC. The majority of Congolese live in rural villages, where traditional courts are accessible and access to the formal justice system is limited. Formal courts are usually located in the cities, the distance to these courts is big or the road unsafe, moreover travelling to the cities would be time-consuming and costly.[170] Traditional justice is considered a tool to increase access to justice for the poor.[171] Perhaps 90 per cent or more of the law-oriented problems involving the poor are handled outside the official courts in much of the developing world.[172]

Furthermore, traditional courts use local languages, where formal courts use official state languages, which is French in the case of the DRC.[173] Moreover, the oral nature of traditional justice, with uncodified custom, and conversational expedited procedures, is well adapted to a rural population with very high levels of illiteracy.[174] The procedures in formal courts are often subject to delays as a result of a limited number of courts and juridical staff, and this practice is also often too complicated and unfamiliar from the perspective of the citizens.[175]

The formal justice system is not always appropriate to settle disputes among people from rural villages; the state justice system often has little resources to deal with minor disputes or the resolution designed by a formal court might negatively affect the community that often depends on economic cooperation.[176] Alie states that on the contrary, traditional courts are more culturally relevant, less confusing and often a better fit to the priorities of rural communities.[177] Another detriment of formal courts is that they might be perceived as an integral part to the old or dis-

[170] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, 1.
[171] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 101.
[172] Golub, 'The Rule of Law and the UN Peacebuilding Commission: a Social Development Approach', 19.
[173] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 101, and Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, 7.
[174] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 34.
[175] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice System*, 7.
[176] Ibidem, 1.
[177] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 101.

trusted regime. When lack of proof leads to the acquittal of well-known perpetrators, the arbitrary justice will damage the victim's trust in the justice system.[178]

2.3. The individual versus the community

There are certain things we have to understand about the group versus the individual in traditional justice versus western ideas of justice. In western culture, crime is understood as an offence by one person against another. A comprehensive view of the society's interests is not considered or addressed in the actual execution of the justice system.[179] In most African societies on the contrary, legal rights and duties are primarily attached to a group rather than to individuals - individuals play a rather subordinate role. The members of the group, as individuals, are only users of collective rights belonging to the family, lineage, clan, tribe or ethnic group as a whole.[180] Individual conflicts involve a communal ethos, and are thus conceived as affecting the general group order.[181] Disputes are usually framed as offences affecting a sense of communal order and equilibrium which goes beyond the scope of a particular quarrel:[182]

Individual conflicts involve a communal ethos, and are thus conceived as affecting the general group order.

> A law-breaking individual thus transforms his group into a law-breaking group. In the same way a disputing individual transforms his group in a disputing group and an individual that has been wronged means that his group has been wronged.[183]

Justice provided by the state is based on punishment and retribution and seldom involves restoration of social cohesion within the community. Traditional justice on the other hand aims at reconciliation between disputing parties.[184] Penalties in traditional arbitration have the purpose to restore social harmony. Therefore a penalty is usually a compensation or restitution in order to restore status quo.[185] Non-

[178] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 5.
[179] Sekonyela, 'Lesotho – Traditional Administration of Justice in a Monarchy', 185.
[180] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, 23.
[181] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 32, and Boege, 'Traditional Approaches to Conflict Transformation', 9.
[182] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 34.
[183] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, 23.
[184] Ibidem, 7.
[185] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 32, and Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, 33.

custodial sentences permit the offender to contribute to economy, pay compensation to the victim and prevent the social and economic dislocation of the family.

The formal justice system focuses on individuals, individual cases and the direct context only. It is not designed as a means to strengthen communities, whereas relationships in rural communities are based on past and future social dependence with ties of kinship, also called multiplex relations.[186] Multiplex relationship communities mostly rely on continued social and economic cooperation with their neighbors. Traditional justice focuses - actually in accordance with the earlier mentioned UN's definition of justice - on the protection and restoration of justice to the offender, the victim and to the community, whose moral fiber has been breached.[187] Herewith traditional justice has the power to restore order and group solidarity.[188] Joanna Stevens says traditional justice works as social glue, it keeps communities strong.[189]

Traditional justice works as social glue: it keeps communities strong

Procedures in traditional courts are overly oral, hence flexible. Laws of this nature are adaptable to community practice and are to be applied within stable social structures, where people are aware of their status and responsibilities.[190] The judicial process is designed to untangle old grievances in order to let the defendants settle their differences for the sake of the community.[191] A voluntary admission of wrongdoing and the acceptance of responsibility are crucial elements of the procedure.[192] This non-repressive approach addresses the underlying causes of crime and is supposed to solve minor conflicts before they escalate. Western criticism would be that in cases with flexible laws and voluntary participation, the criminal matters are easily overlooked.

[186] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 22.
[187] Sekonyela, 'Lesotho – Traditional Administration of Justice in a Monarchy: Human Rights Gaps and Strategies to encourage Respect for Human Rights', 185.
[188] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 34, and Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 22.
[189] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 126.
[190] Bennett, *African Perspectives on Tradition and Justice*, 24.
[191] Ibidem, 23.
[192] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 12.

2.4. Procedures in traditional justice

Accountability is important in traditional justice mechanisms. A voluntary admission of wrongdoing and the acceptance of responsibility are crucial elements of the procedure.[193] In formal justice the victim is a witness in criminal cases, but in traditional justice the victim is central to the decision making. The victim and the offender both need to agree with the final decision.[194] Formal justice strives for as much attention to the victim as to the offender; this ideal is intrinsic to traditional justice. It is believed that traditional justice has the power to restore order and group solidarity.[195] Globally spoken, western formal justice is overly perpetrator-based, while traditional justice is more victim-based.[196]

Traditional hearings are characterized by a high degree of public participation.[197] These hearings lapse into a free-for-all debating society. Family, clan members, elders, neighbors and even complete strangers can pass by and put questions to defendants, give their opinion or give suggestions to the judge.[198] Thus disputes are not settled in public, but by the public.[199]

Sekonyela is convinced that public participation guarantees better justice for the offender, the victim and the community, moreover, he states, it ensures ownership and transparency.[200] Other modes of reaching a solution are to be found in various African societies, but reconciliation based on consensus is by far the most characteristic. Nelson Mandela writes that this ritual meant democracy to the people; everyone was given a voice, was heard, hence the people make a decision.[201] Thus disputes are not only settled in public, but by the public. In some cases a formal courts feature a jury, which gives citizens a voice, but this jury still has to be independent, abide the law, and cannot have personal connotations to the case or to those involved.

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[193] Ibidem.
[194] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 23.
[195] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 34.
[196] O. Oko Elechi, (2004), 'Human Rights and the African Indigenous Justice System', A paper for: *Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8-12 2004, Montréal,* 18, and Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 5.
[197] Stevens, Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems, 22.
[198] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 32.
[199] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 27.
[200] Sekonyela, 'Lesotho – Traditional Administration of Justice in a Monarchy: Human Rights Gaps and Strategies to encourage Respect for Human Rights', 195.
[201] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 27.

A judge of chief is always present at the public discussions. A good judge in this scene is one who patiently listens and watches, waiting for the solution to emerge as the common product of many minds. Mandela speaks about the role of the judge as the one in the back, seemingly powerless, but 'only at the end of the meeting, as the sun was setting, the regent would speak'.[202] His purpose was to listen to all the stories, ignore the irrelevant, analyse the relevant and marshal the evidence available, form some consensus among the diverse opinions and subtly lead the crowd to a solution they all agree on.[203] 'A true leader is like a shepherd', Mandela says, 'he stays behind the flock, letting the most nimble go on ahead, whereupon the others follow, not realizing that all along they are being directed from behind'.[204]

The judges often originate in kin-based authority groups, as well as by lineage and inheritance.[205] On occasion, they are also selected collectively due to their notable status among communities.[206] The state does not interfere with the informal arbitrators within a community. The informal system works when the whole community is unanimous about the selection of the traditional arbitrator. This arbitrator usually knows all the people in the community well and knows what solutions to disputes are most helpful in this community. An arbitrator from outside the community could have a negative effect on the community-focused justice.[207] In contrast to formal justice, it is thus a virtue within informal justice when judges have personal knowledge of the case or are acquainted to those involved in the trial. The accused's past or the past of his or her family is taken into account while deciding over his or her faith. It can assist them in deciding how to solve the problem bearing in mind everyone's interests.[208] The western idea of judicial ignorance would be severely strained in African customary processes.[209]

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[202] Ibidem.
[203] Ibidem, 32.
[204] Ibidem, 27.
[205] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 37.
[206] Ibidem, 32
[207] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 128, and Bennett, *African Perspectives on Tradition and Justice*, 25.
[208] Bennett, *African Perspectives on Tradition and Justice*, 25.
[209] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 26.

In the formal justice system, a rule-based system, one party tends to win and the other to lose in accordance with the rules. Here it is more important what can be shown to have happened than to question why something occurred. In traditional courts the dispute is not isolated from the social context. Outcomes are the product of consensus, generally compromises rather than zero-sum decisions, taking into account the relationship between the parties.[210] Additionally, when decisions are reached, the families of parties involved and other closely related social groups are expected to be guarantors of agreements. This social control and social pressure secure the enforcement of final agreements in a traditional court.[211] Importantly, disobeying the penalty is disobeying the community, since the solution is reached through a participating community.[212]

Social control and social pressure secure the enforcement of final agreements in a traditional court

Parts of procedures in traditional justice are spiritual in nature. Sacrificial ritual purporting to promote reconciliation is still used. Spiritual elements and the power of rituals in a community's justice process are important ingredients of traditional justice, contributing to its effectiveness and creating its legitimacy.[213] Decisions made by all participants are sometimes confirmed through rituals aiming at reintegration.[214] Most of these practices take place in rural polities, or through semi-secret associational life, beyond the gaze of state officers and international actors, as well as the scope of their legal programs, policies of juridical reform and judicial institutions. [215]

In conclusion, the characteristics of traditional justice make it more accessible for the majority of the DRC than formal justice. The community is prioritized over the individual, which suits the African culture. The procedures in traditional courts are comprehensible for the African victims and perpetrators. These aspects make traditional justice a valid option to be included in transitional justice programs. In theory, traditional justice is a mechanism to bring justice, to stop impuni-

[210] Ibidem, 28.
[211] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 32, and Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 22.
[212] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 34.
[213] Mapaure, 'Accused and Cherished: Traditional and Informal Justice Systems as Seen by International Organizations', 37, and Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 34.
[214] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 22.
[215] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 37.

ty. From the western perspective there are however still some hurdles, especially when looking at internationally agreed on human rights.

2.5. Traditional justice in relation to human rights

Some perceive that pre-colonial Africa had no concept of human rights. These human rights are assumed to be only achievable through liberal regimes, since they are products of western culture.[216] However, concerns for human rights are as old as humanity itself. Humanity, interpersonal relations and the position of individuals as group members are also issues in the African indigenous justice system, but with a culturally specific take on them. Human rights as we know them were often not a priority in pre-colonial African societies. In cases where Africans had personal rights vis-à-vis their government, these rights were not based on one's humanity per se, but rather on membership in the community, status or other ascriptive characteristics. However, believing in the sanctity of human life was deeply rooted in pre-colonial African society. But human dignity was deemed more important than human rights.[217] Restoration of rights, dignity, interests and well-being of victims, offenders and the entire community is the goal of African indigenous justice systems.[218] This means that practitioners of indigenous justice have a somewhat flexible attitude towards the basic human rights that are so important in liberal western culture.

Concerns for human rights are as old as humanity itself

The first part of the United Nations Universal Declaration of Human Rights, protects the individual's civil and political rights, which include the right to life, freedom from torture and inhuman treatment, the right to liberty and security, equality before the law, and freedom of thought. The second part contains of economic, social and cultural rights. The declaration protects against arbitrary deprivations of life and liberty and therefore includes notions of due process i.e. right to fair trial, right to present evidence, right to appeal and right to confront witnesses.[219]

The right to a fair trial is considered one of the most broadly conceived human rights, defined by the 1948 UN Declaration of Human Rights (UNDHR), the

[216] Elechi, 'Human Rights and the African Indigenous Justice System', 1.
[217] Ibidem, 8.
[218] Ibidem, 18.
[219] Ibidem, 5.

1966 International Covenant on Civil and Political Rights (ICCPR) and the 1981 African Charter of Human and People's Rights (ACHPR).[220] However, the concept of 'fair' proves to be culturally malleable. The concept of justice is derived from what society considers to be fair and just in light of the overall context and not what is fixed in advance by law.[221] The traditional justice process is voluntary and the decision is based on agreement, which results in the possibility that like cases need not be treated alike.[222] The African justice system is more process-oriented than rule-based.[223] Rules of evidence and procedure are flexible.[224] This does not mean that there are no rules; the rules are the bargaining counters or the framework for discussion.[225] For traditional courts the procedural formalities are not their first concern, as they are results-driven.[226]

Often, women and children in Africa do not appear in their own right, they are represented by older male relatives who are expected to make decisions on the woman's behalf. The solution to a conflict may thus also reflect inequality between parties on the basis of gender, status or age. Corporal punishment could be administered, though usually only on boys and young men. Extreme brutal punishments are especially meted out in South Asia, also on girls and women in Islamic communities. In Africa such brutal punishments are rare.[227]

The presumption of innocence until proven guilty, the right to remain silent and the right not to be forced to make confessions are all protections of the defendant; strict rules in western societies, but not so important in African traditional courts.[228] Also, standards of proof in these courts are not linked to strict rules; confessions are deemed the most important. This procedure makes a right to remain silent an inconvenient right in traditional courts; it raises the question whether the defendant has something to hide which makes it hard for the traditional court to presume the innocence of the defendant.[229]

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[220] Bennett, *African Perspectives on Tradition and Justice*, 20.
[221] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 28.
[222] Ibidem, 22.
[223] Alie, 'Traditional Justice and Human Rights in Post-War African Countries: Prospects and Challenges', 101.
[224] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 22.
[225] Ibidem, 28 and Bennett, *African Perspectives on Tradition and Justice*, 23.
[226] Mapaure, 'Accused and Cherished: Traditional and Informal Justice Systems as Seen by International Organizations', 43.
[227] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 128.
[228] Ibidem.
[229] Bennett, *African Perspectives on Tradition and Justice*, 32.

Traditional courts do not need full-time lawyers, professional legal representation is not necessary in the traditional procedures. The courts rather need adults that are well aware of the rules of the community. This explains the lack of well-trained lawyers. However, legal representation forms a big part of formal justice procedures, since it is deemed a core human right. Hence, for rule of law programmers, the lack of well-educated juridical staff and lawyers created a challenge.[230]

2.6. Traditional justice in a post-conflict context

In countries with many different ethnic groups, such as the DRC, traditional justice systems may be just as diverse.[231] There are as many different traditional approaches to conflict transformation as there are different societies and communities with a specific history, culture and customs. Traditional approaches are therefore always context specific, not universally applicable.[232] In any case, traditional justice is not static: it changes with changing circumstances. Many forms of informal justice are relatively new and are a direct product of colonial activity, in particular missions and colonial forms of organization and control.[233] The utilitarian position of traditional justice aims to satisfy the society, but to reach this goal adaptations had to be made.[234]

In the DRC, the system clearly had to adjust to times of severe conflict. Change is taking place in indigenous communities at a more rapid pace than ever before; causing problems for traditional systems. Although the traditional legal system is widely used, it is facing several challenges to its continued existence. When after conflict the social fabric has broken down, the natural biotope of traditional practices is damaged.[235] Clever Mapaure however, believes that even in the face of these changes and in communities that have been impacted by conflict, the traditional system is managing to maintain a strong moral code and is trying to adapt to the many new complex conflicts.[236]

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[230] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, 22.
[231] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 183.
[232] Boege, 'Traditional Approaches to Conflict Transformation', 6.
[233] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 26.
[234] Mapaure, 'Accused and Cherished: Traditional and Informal Justice Systems as Seen by International Organizations', 27.
[235] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 185.
[236] Mapaure, 'Accused and Cherished: Traditional and Informal Justice Systems as Seen by International Organizations', 41.

The ultimate goal of traditional justice among most of Africa is reconciliation. Local reconciliation efforts are often focused on the return of ex-combatants into the community. Traditional courts would invent reintegration rituals for ex-soldiers or cleansing rituals for those who participated in conflict but want to live harmoniously in their communities again.[237]

Reparation for the victims is very important in traditional courts, but after conflict people often do not know who is responsible for what happened to them. And even when victim and perpetrator are identifiable, it is impossible to repay the victim because of the general impoverishment after conflict. The practice that one should repair the damage they caused is hard to maintain after a civil war.[238]

War and genocide have a devastating effect on the capacities of traditional leaders to perform justice and reconciliation rituals. Traditional justice systems are designed to deal with relatively small numbers of cases and small wrongdoings, not with war crimes, crimes of genocide or crimes against humanity.[239] It is doubtful whether they can adapt the original design to mass human rights violations.[240]

Many actors in the international field say that traditional tools do not respect the duty under international law to prosecute genocide, war crimes and gross violations of human rights. Blanket amnesty is not acceptable; all alternative justice strategies must have an accountability element.[241] This means that traditional courts are not sufficiently effective in post-conflict situations and their level of legitimacy is unsure.[242] The fact that traditional courts are cultural-specific; limited to ethnic, religious and regional communities, makes their scope limited. That is why one can question their ability to reach an audience big enough to produce sufficient healing, social repair and durable peace after conflict.[243] According to Huyse, traditional justice systems have a limited range of action and effect.[244]

[237] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 11.
[238] Ibidem, 13.
[239] Ibidem, 185.
[240] Ibidem, 189.
[241] Ibidem, 191.
[242] Ibidem, 192.
[243] Ibidem, 189.
[244] Ibidem, 182.

2.7. Popular, but compatible with a United Nations approach?

Summarizing, traditional justice has its reasons to be still popular among the Congolese population, though it obviously struggles with functioning in a changing war-filled environment. It demonstrates culturally specific notions of justness and fairness, but in the eyes of western critics lacks employment of internationally recorded human rights. Moreover, traditional justice practices cannot keep up with the current character of crimes. Severe crimes of genocide and war crimes are hard to deal with in a justice system based on truth, forgiveness and restoration. These examples probably make it harder for international agencies to promote this kind of justice in a post-conflict context.

The contemporary re-emergence of a plurality of mechanisms of traditional justice in Africa may signal a divorce between the state apparatus proper and rural forms of governance. Juan Obarrio argues that international agencies and scholars try to bridge the gap between rural and urban, between non-state and state, between traditional justice and liberal rule of law.[245] The question is asked to what extent the approaches of the UN to strengthen the rule of law are contradictory to traditional justice mechanisms in Congo. The next chapter will test the hypothesis that the UN as an international agency are bridging the above mentioned gap by connecting the traditional or hybrid and the neo-liberal.

[245] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 24.

3. Rule of law activities in the DRC

The DRC has suffered a great deal of conflict over the past decades, especially since the outbreak of civil war in 1994. This left the country in a state of chaos, poverty and lawlessness. The DRC needed international help to create order and stability. This chapter focusses on international initiatives to improve the justice system in the DRC. Initiatives that should fight the lingering impunity, create security and stabilize the situation in the country, in order to rebuild the state and to prevent the country from a relapse into war.

As mentioned in chapter 1, the rule of law has become more central to the agendas of the international agencies, also those operating in the DRC. This development is not merely the result of a growing recognition of the inherent value of justice, but rather a growing understanding of its importance in achieving other goals such as stability, security and even economic development.[246] This chapter uncovers the approach of MONUC (*Mission de l'Organisation des Nations Unies en République Démocratique du Congo*) as the main international actor in the field, regarding their mission towards a rule of law.

Chapter 2 delved into traditional justice. At the end of this third chapter we can determine if the United Nations give room for the provision of justice through informal methods to complement rule of law promotion. Or does this chapter show that traditional justice is too contradictory to neo-liberal rule of law for MONUC to promote? The peace operation in the DRC was a major test case for the UN; can we recognize neo-liberal or hybrid paradigms in the agreements that have been signed along the way as well as in the methods of MONUC and other rule of law promoting agencies in the course of about ten years from 1999 till 2010?

To begin this third chapter with, a short paragraph will explain the volatile situation in the DRC since decolonization. Afterwards peace agreements, in which the United Nations were involved, will be looked at. These documents will give

[246] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 126.

insight in the prevailing theories and planned action. But predominantly MONUC's rule of law promotion will be researched.

Relevant literature, by scholars such as Davis, Savage, Kambala wa Kambala, Davidsson and Thoroddsen, is considered. But predominantly UN reports concerning MONUC operations and the judicial situation between 1999 and 2010 in the DRC will give insight in the matter.

3.1. A short history of conflict in the DRC

The Democratic Republic of Congo is the largest country in sub-Saharan Africa. It shares borders with nine countries: Burundi, Uganda, Angola, Sudan, Congo-Brazzaville, Central African Republic, Zambia and Tanzania. The country houses over 200 separate ethnic groups. Professor Jeremy Sarkin of University of the Western Cape describes the DRC as 'a highly polarised, divided and conflict-ridden society. Which has been the result of divide and rule tactics, combined with a continued policy of relying on and entrenching ethnic identity, together with a policy of excluding some groups from power and any fruits of development.'[247]

The DRC thus has a long history of conflict and mass atrocities. A summary of these conflicts since decolonization in the mid-20th century will give some background information that explains the current situation in the DRC. A *coup d'état* in 1965 by Mobutu Sese Seko, who was backed by the United States of America and Belgium, inaugurated decades of oppression, kleptocracy and state collapse.[248] Under Mobutu's presidency the country was called Zaïre. In 1994 the genocide in Rwanda spilled over into the DRC precipitating Mobutu's downfall. After a bloody war between 1996 and 1997 president Mobutu was ousted by Laurent-Desiré Kabila.

Kabila inherited a fragmented and divided country, along ethnic and geographic lines

Kabila inherited a fragmented and divided country, along ethnic and geographic lines. He also faced considerable opposition from powerful individuals who had benefited from Mobutu's system of patronage and who thus stood

[247] Jeremy Sarkin, (2001), 'Problems Created by the Politics of Identity in the Democratic Republic of the Congo (DRC): Designing a Constitutional Framework for Peaceful Cooperation', In: Seminar *Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation,* University of Pretoria, 67.
[248] Laura Davis, (2009), 'Small steps, Large Hurdles: The EU's Role in Promoting Justice in Peacemaking in the DRC', In: *Initiative for Peacebuilding Mediation Cluster, May 2009*, 8.

to lose their considerable power-bases under the new regime.[249] Furthermore Kabila broke with the allies Rwanda and Uganda. In 1998, two rebel movements – the *Rassemblement Congolais pour la Démocratie* (RCD, backed by Rwanda) in the Eastern Kivu provinces and the *Mouvement pour la Libération du Congo* (MLC, backed by Uganda) in Orientale and Equateur provinces, launched attacks on the Kabila government. The Congo War ensued between 1998 and 2002, called the Second Congo War.[250] Zimbabwe and Angola supported Kabila's government and a myriad of other African states and militias were also engaged at various times. War thus combined local, national and international conflicts. The two wars, sustained by plundered natural resources. The government and rebel forces used access to land, economic resources and rights (especially citizenship) to divide and rule local communities.

In 2001 Laurent Kabila was assassinated and replaced by his son Joseph Kabila. The conflict was frozen, but not resolved. A national army was created, the *Forces Armées de la République Démocratique du Congo* (FARDC). However, in the resource-rich and densely populated border provinces of North and South Kivu, violence continued and escalated. The disarmament, demobilisation and reintegration (DDR) processes remain incomplete, and armed groups proliferate until today. The two most prominent of these are the *Forces Démocratiques de Libération de Rwanda* (FDLR), mainly in South Kivu, and *Congrès National pour la Défense du Peuple* (CNDP), formerly led by Laurent Nkunda and predominantly active in North Kivu.[251]

3.2. Peace agreements

Multiple ceasefire agreements and peace accords were signed between 1999 and 2010. As with many peace processes, negotiations in the DRC were merely focused on power sharing and political spoils of the peace than on accountability for serious crimes.[252] However, the accords of Lusaka in 1999, Sun City in 2002, Ituri in 2006, and Goma in 2008 show a general consistency on issues of war crimes and accountability. Preserving the possibility of prosecutions for serious international crimes is

[249] Davis, 'Justice-Sensitive Security System Reform in the Democratic Republic of Congo', 9.
[250] Davis, 'Small steps, Large Hurdles', 8.
[251] Ibidem, 9.
[252] Laura Davis and Priscilla Hayner, (2009), 'Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC', In: *International Center for Transitional Justice, March 2009*, 15.

often presumed to be among the most difficult aspects of peace negotiations.[253] But justice issues have always been present in one form or another.

To start with, the 1999 Lusaka cease-fire agreement was an attempt to end the Second Congolese War, which had taken on regional dimensions and directly involved several neighboring nations. Representatives of Angola, Namibia, Rwanda, Uganda, Zimbabwe, and the DRC signed the agreement in July 1999 in Lusaka, Zambia. Representatives of the two main rebel groups, the MLC and the RCD, added their signatures. Representatives of the Organization of African Unity, South Africa, Zambia, and the UN signed as witnesses.[254] Leaders of the other Congolese rebel groups did not sign.[255]

The Lusaka agreement established a general cease-fire and ordered the withdrawal of foreign troops and the disarmament of militias. The UN set up the MONUC mission to assist in peacekeeping.[256] The mandate of this UN mission plays a central part in this chapter. The mission was important, but with many rebel groups not signing the agreement, the country was still very volatile and unsafe. Moreover political aspects of the peace process were addressed and a timeline for governmental elections was set up.[257] The agreement also called for the Inter-Congolese Dialogue.

In December 2002, the Inter-Congolese Dialogue was intended to be a more-inclusive peace conference, including civil society representatives and addressing broader concerns beyond the cease-fire. The talks in Sun City and Pretoria, South Africa, resulted in a Global and All-Inclusive Agreement in December 2002; the Sun City Accord. This agreement laid out the framework of a post-war political transition. The accord set up a power-sharing arrangement for the warring factions of the 1998-2002 conflict with some civil society involvement and the accord would pave the way for democratic elections in 2006. Moreover, the armed factions were to be integrated into the national army. The agreement also included a Truth and Reconciliation Commission and an ambitious call for the creation of a new Criminal Court specifically for the DRC to address crimes in the country since its independence in 1960. The Sun City Agreement established four other institutions to support democ-

[253] Davis and Hayner, 'Difficult Peace, Limited Justice', 16.
[254] Ibidem, 12.
[255] Ibidem, 15.
[256] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 112.
[257] Davis and Hayner, 'Difficult Peace, Limited Justice', 12.

racy: commissions on the media, corruption, elections, and human rights monitoring. However, Laura Davis and Priscilla Hayner argue that the accord did not address the root causes of the conflict or the need for justice and human rights in a meaningful way.[258]

In 2006 in the Ituri region three armed groups that were not parties to the Sun City Accord signed agreements with the government to demobilize their troops and join the national army in mid- to late 2006. The UN facilitated these agreements. One of these agreements awarded a general amnesty to the fighters, but no other justice-related measures were included in the agreements.[259]

In Goma in January 2008 the US, the UN, and the EU served as the primary international facilitators of a national peace conference for the Eastern Congo that would provide an opportunity to negotiate a peace agreement between the Congolese government and the CNDP. The agreements made were known as the *Actes d'Engagement* (statements of commitment). They were in substance cease-fire agreements, focusing mostly on security issues. A large side conference gave civil society and almost twenty self-proclaimed armed groups a voice. Attention was given to the situation in the provinces of North and South Kivu. Reports that were made outlined several thoughtful, transitional justice-related recommendations, including vetting, truth-seeking, and victim reparations.

The *Actes d'Engagement* also included a commitment to amnesty, though the UN and international representatives involved in the talks insisted that any amnesty must exclude crimes against humanity, war crimes, or genocide.[260] Warring parties are likely to demand immunity from prosecution, but international law cannot overlook serious crimes. Only in cases of insurrection and treason amnesty is acceptable according to international law. Therefore the UN is always cautious in granting amnesty.

3.3. The DRC's need for justice and rule of law to reach sustainable peace and order

The Democratic Republic of the Congo faced a pervasive climate of impunity.[261] Apart from the above mentioned peace negotiations many challenges remain in

[258] Davis, 'Justice-Sensitive Security System Reform in the Democratic Republic of Congo', 14.
[259] Ibidem, 16.
[260] Davis and Hayner, 'Difficult Peace, Limited Justice', 3, 16.
[261] UN Security Council MONUC report 23, 20 March 2007, S/2007/156, point 36.

combating this impunity. Savage and Kambala wa Kambala argue that prosecutions are seen as integral to efforts to combat impunity, they would act as a deterrent against similar crimes in the future and they would be the basis for the possibility of a national reconciliation process. In other words; justice would be an integral part of creating sustainable peace.[262]

The DRC lacks all critical components of a liberal rule of law

Davidsson and Thoroddson state in their contribution to Sriram's work on rule of law in Africa, that the DRC lacks all critical components of a liberal rule of law. Components such as infrastructure, humane prison conditions, human and material resources, laws, adequate training and free press.[263] Limited judicial capacity and independence, and the minimal authority of the transitional government weaken the system even more.

The infrastructure of the judicial system has virtually collapsed after years of conflict.[264] Human Rights Watch has documented several instances where for example accusations of rape were not investigated simply because the investigators could not travel to the scene of the crime.[265] Capacity of civilian and military judicial authorities to carry out independent and thorough investigations and to provide protection to victims and witnesses is very limited.[266] For example, fewer than 60 of the 180 first-instance courts, required by MONUC, exist.[267]

The justice sector in the DRC has historically lacked independence and an ability to prosecute crimes and enforce judgments.[268] Formal justice systems have, throughout the history of Congo, been the plaything of political forces: the *ad hoc* justice meted out by European overlords in Leopold's time, the judicial powers granted to mining companies during colonial times, the machinations of Mobutu and Laurent Kabila's use of the courts to undermine critical opponents. The Congo-

[262] Tyrone Savage and Olivier Kambala wa Kambala, (2008), 'Decayed, Decimated, Usurped and Inadequate: the Challenge of Finding Justice through Formal Mechanisms in the DR Congo', In: Aertsen, I., *Restoring Justice after Large-scale Violent Conflicts: Kosovo, DR Congo and the Israeli-Palestinian Case*, (Willan Publishing: Devon), 336.
[263] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 115.
[264] Savage and Kambala wa Kambala, 'Decayed, Decimated, Usurped and Inadequate', 339.
[265] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 116.
[266] UN Security Council MONUC report 19, 26 September 2005, S/2005/603, point 49.
[267] UN Security Council MONUC report 23, 20 March 2007, S/2007/156, point 35.
[268] Ibidem.

lese judiciary has effectively functioned at the pleasure of the powers-that-be since time immemorial.[269]

Judges and prosecutors lack copies of basic legal texts and are in urgent need of training.[270] Also, the system cannot deliver effective and fair justice due to corruption – low salaries have compounded corruption – and interference in judicial processes.[271] The formal justice system is perceived as the most corrupt institution of the state.[272] MONUC provides an example of the lack of judicial independence, it writes that after the murder of a human rights activist in Bukavu in July 2005, a military commander intervened in the investigation and ordered the release of the suspects. [273] In 2006, the President of the Congolese Military High Court himself stated that the court system was ineffective, suffered from corruption, and was in dire need of reform.[274]

According to Special Rapporteur for Human Rights, Roberto Garretón, irregularities during the trials are unexceptional; defendants often have no right of appeal and often have no access to legal representation.[275] Arbitrary detentions, disappearances and extrajudicial executions are commonplace.[276] Prison conditions are horrible, certainly not humane and the death penalty is still carried out, being a thorn in the side of the UN.

In 2001 MONUC reported that several militias had committed frequent atrocities against civilian communities, including horrendous widespread sexual violence used as a weapon of intimidation and war.[277] The strategic rapes are a serious problem in the DRC causing a disruption in the Congolese society. The hatred and violence are of a genocidal character and these militia leaders act with impunity.

When MONUC started working in the Ituri region in the DRC, they realized that the involvement of the transitional government was only at the very symbolic stage, though sustainable peace in Ituri and other areas could only be established

[269] Savage and Kambala wa Kambala, 'Decayed, Decimated, Usurped and Inadequate', 338.
[270] Ibidem, 339.
[271] UN Security Council MONUC report 23, 20 March 2007, S/2007/156, point 35, and Mobekk, 'Security Sector Reform and the UN Mission in the Democratic Republic of Congo', 279.
[272] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 119.
[273] UN Security Council MONUC report 19, 26 September 2005, S/2005/603, point 49.
[274] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 116.
[275] UN Security Council MONUC report 9, 16 October 2001, S/2001/970, point 47.
[276] UN Security Council MONUC report 7, 17 April 2001, S/2001/373, point 78.
[277] UN Security Council MONUC report 15, 25 March 2004, S/2004/251, point 68.

when a credible local governance structure, strongly backed by the central government, was in place. MONUC faced the dilemma of finding itself responsible for managing extremely volatile regions in the absence of a sustainable political process, but they could not be expected to fill this vacuum. Great efforts had to be made by the local transitional governments to extend effective administration, particularly in the area of criminal justice to banish impunity.[278]

In mid-April 2001, President Kabila restructured the Government of the Democratic Republic of the Congo through new ministerial appointments. The President cautioned the newly sworn-in ministers to guard against corruption and respect the rule of law, principles that would also help to create the conditions required for favorable consideration for economic assistance from international financial institutions.[279] MONUC appreciates the progress the government has made in establishing human rights laws and standards. Some non-judicial detention centers notorious for torture and extrajudicial killings have been closed, and there is a growing awareness on the part of the authorities of the need for democratic decision-making, good governance and respect for the rule of law.[280]

Accordingly, it was important for the DRC that the widespread (genocidal) violence would come to an end; that the peace accords would be respected by the government forces and all rebelling parties. Institutions to lay the foundations for rule of law had to be built. Capacity of judicial authorities had to be increased. The rampant corruption had to be tackled. Ideally the Congolese government would support the United Nation's view on promoting justice and rule of law to reach sustainable peace and order.

3.4. MONUC and its rule of law promoting activities

As mentioned in the first chapter, nowadays statebuilding is characterized by greater attention to building and strengthening governmental institutions in host countries as a means to 'lock in' post-war political and economic reforms. Longer time frames and broader sets of goals are embraced. MONUC follows this new version of peacebuilding, having had no qualms prolonging and extending the mission in the DRC. Though MONUC still emphasizes the importance of elections, institutionali-

[278] UN Security Council MONUC report 15, 25 March 2004, S/2004/251, point 71.
[279] UN Security Council MONUC report 8, 8 June 2001, S/2001/572, point 5.
[280] UN Security Council MONUC report 9, 16 October 2001, S/2001/970, point 45.

zation is deemed more important than liberalization.[281] MONUC's principal mission was to ascertain that the Lusaka peace agreement was respected, to support and sustain the transitional process in the DRC and provide assistance to the government in achieving security.[282] Realizing that the country was in a bad state, a thorough reconstruction of rule of law was needed to create safety, stability and the foundation for democracy.

3.4.1. MONUC's mandate

Pulver notes that rule of law activities vary considerably depending upon the situation. The assistance, mandated by the UN Security Council and delivered at the request of the host country, should always be tailored to the particular needs of the country.[283] In the case of the DRC the UN Security Council proposed that the principal elements of the MONUC mandate would be to 'assist the Government of the Democratic Republic of the Congo in (a) building a stable security environment, (b) consolidating democracy, (c) planning security sector reform and participating in its early stages, (d) protecting human rights and strengthening the rule of law, (e) the protection of civilians and (f) the conduct of local elections.'[284]

The first chapter explained the structure of UN missions to be divided into baskets, reiterating:

> The second basket entails rule of law in the context of conflict and post-conflict situations. It includes two components: transitional justice and strengthening of national justice systems and institutions. (…) The second component of this basket comprises activities in the area of strengthening of national justice systems and institutions. These include prosecution, ministries of justice, criminal law, legal assistance, court administration and civil law, but also policing, penal reform, the administration of trust funds and monitoring.[285]

The reports on MONUC's efforts to promote the rule of law in the DRC make it clear that all the elements mentioned in the second basket are deemed important for MONUC's goals.

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[281] In the reports of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo between 1999 and 2006 much emphasis is laid on electoral laws, and the organisation of legitimate elections. These elections were considered a milestone in the DRC's process of becoming a democracy.
[282] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 120.
[283] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 65.
[284] UN Security Council MONUC report 23, 20 March 2007, S/2007/156, point 58.
[285] United Nations General Assembly Security Council, 'Uniting our Strengths', 13.

The UN mission, *Mission de l'Organisation des Nations Unies en Republique Démocratique du Congo,* was authorized by UN Security Council Resolution 1258 in August 1999 to assist in the peace process to end the war. Initially 90 UN observers started on the job, this number quickly building up to 500 observers and around 5500 military personnel in 2000, further growing to 10800 personnel in 2003 and already 18700 in 2006. This however represented merely one peacekeeper per 125 square kilometer, considering the enormous size of the country. In comparison, the UN mission in Kosovo provided for 2.6 peacekeepers per square kilometer.[286]

With the number of peacekeepers grew the robustness of the mandate. The UN Security Council Resolution 1565 of 1 October 2004 enabled them to use more force under Chapter VII of the UN charter to protect civilians. In 2003 William Lacy Swing was appointed Special Representative for the Secretary General. He coined the phrase 'First we hold our noses, then we seek justice'; The UN had to appear neutral, supporting compromise and conciliation amongst the parties, while not being impartial to the conflict. This meant working in a host country that is in a terrible state, with some 'unsavory characters' that could make part of the government.[287] First it is a matter of clearing debris, preferably without mingling too much with all the wants and needs of all the parties involved, and at a later stage there is room to 'get to work' and improve the justice system. This typifies MONUC's interaction with the host country.[288] MONUC understood it well not to challenge or supplant the new government. They were there to support this government. They had to be impartial, though not neutral.[289] Moreover, the UN are generally limited to an advisory role.[290]

Very important for this research is the fact that MONUC has a special Rule of Law Unit. The Unit enjoys legitimacy among government officials because it is part of the UN and mostly because it has access to MONUC's unparalleled logistical capacity including transport and support staff in field offices throughout the country.

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[286] Larry Aitken, (2009), '"First We Hold our Noses, Then We Seek Justice." The Application of the Soft Approach in the Chapter VII Operations Conducted in the Democratic Republic of Congo', In: *Canadian Military Journal 10 (1)*, 16.

[287] Aitken, "*First We Hold our Noses, Then We seek Justice*"', 18.

[288] Ibidem.

[289] Ibidem, 19.

[290] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 120.

The substantive support of the Rule of Law Unit falls into three broad areas of activity: ensuring coordination and coherence among the many United Nations entities engaged in rule of law activities; developing system-wide strategies, policy direction and guidance for the UN's activities in promoting the rule of law; and enhancing partnerships between the UN and other rule of law actors.[291] The main tasks of the Rule of Law Unit include developing plans for legislative reforms, initiating reform initiatives for the development of independent and functioning rule of law institutions, and developing programs for capacity-building of personnel.[292]

The Rule of Law Unit works through partnerships, using its knowledge of the field and presence in the DRC to attract actors with programmatic capacity. This way, the unit delivered training on investigation and prosecution of sexual crimes in collaboration with the US Defense Institute of International Legal Studies and Canadian forces. The unit also conducted in partnership with the United Nations Development Program (UNDP) a nationwide training of military judges. And it assisted in the deployment of judges in areas where there were none before.[293]

Especially after the 2006 elections MONUC started to identify areas in which legislative drafting or reform was needed to comply with the new constitution. Together with the Ministry of Justice the mission searched for laws that needed to be amended in order to comply with international standards, for example on the issue of corruption. They provided advice for reform of military justice codes.[294]

The European Union is also a significant actor in the promotion of rule of law. It has initiated a comprehensive assessment of the justice sector in the Democratic Republic of the Congo with the close participation of MONUC, the Department of Peacekeeping Operations, UNDP, the Office of the United Nations High Commissioner for Human Rights (OHCHR), and the Governments of Belgium, France and the United Kingdom. The assessment, which commenced in 2003, was expected to provide recommendations for short-, medium- and long-term strategies to restore and strengthen the capacity for the administration of justice, particular

[291] United Nations, (2008), 'The Rule of Law at the National and International Levels: Strengthening and Coordinating United Nations Rule of Law Activities', In: *Report of the Secretary-General General Assembly (A/63/226)*, 1,2.
[292] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 120.
[293] Ibidem.
[294] UN Security Council MONUC report 21, 13 June 2006, S/2006/390, point 58.

attention being paid to the organization and functioning of the judiciary and the police and penal institutions in the Democratic Republic of the Congo.[295]

MONUC plays a big role in monitoring human rights in the DRC. The security of defendants, witnesses and judicial personnel for such trials is not assured in the DRC. In this connection, MONUC has set up a unit to facilitate the physical protection of witnesses, victims of human rights violations and human rights defenders at risk of attack from members of the security forces due to their involvement in cases.[296] MONUC also monitored election-related human rights violations during the electoral process, such as those related to press freedom, freedom of peaceful assembly and association, freedom of opinion and expression and freedom from arbitrary arrest and torture.[297] More awareness of human rights is raised through organized trainings and the provision of information. In the DRC, radio serves as the primary means of accessing information: 54 per cent of the population of eastern DRC listens to the radio on a daily basis.[298]

3.4.2. Fighting impunity by providing training and information

As mentioned in the first chapter, according to the dominant liberalist view, a state necessarily needs an independent judiciary, a disciplined civilian police force and an efficient prison system. These are all institutions of the rule of law the UN wish to promote.[299]

One of the core activities of MONUC is organizing training sessions for juridical personnel, soldiers and police officers. MONUC, the European Commission and the Congolese minister of justice established the joint Congolese-International Justice Reform Coordination Mechanism. It was intended to foster a coordinated strategy regarding judicial issues. In light of this, in September and October 2005, MONUC supported training sessions on professional ethics and corruption organized by the Ministries of Defense and Justice for some 100 military and civilian magistrates in the UN office in Kisangani, the administrative town in the eastern province Orientale and in the office in harbor city Matadi, in Bas Congo. The semi-

[295] UN Security Council MONUC report 14, 17 November 2003, S/2003/1098, point 40.
[296] UN Security Council MONUC report 20, 28 December 2005, S/2005/832, point 53.
[297] UN Security Council MONUC report 21, 13 June 2006, S/2006/390, point 56.
[298] Vinck, *Living with Fear: a Population-based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo*, 3.
[299] Mani, 'Conflict Resolution, Justice and the Law, 13.

nars were combined with prison inspections and training of military justice personnel such as prison staff. They led to a commitment on the part of the minister of justice to increase the deployment of magistrates and prosecutors in Province Orientale, the Kivus, Maniema and Equateur, in order to expedite the processing of cases, eliminate unlawful detention and reduce prison overcrowding.[300]

In June 2009 about 600 persons received a five-day training session on military justice, international criminal law and international human rights law, including issues relating to command responsibility and sexual violence. Together with the United States MONUC organized a training program benefiting 400 FARDC officers on the rule of law and military justice in professional armed forces. The creation of prosecution support cells in North and South Kivu, Maniema, Katanga and Ituri should strengthen the investigative capacity of military prosecutors. An objective of this initiative was to enhance the collaboration of military justice authorities with the International Criminal Court (ICC).[301] At the ICC in The Hague those convicted of responsibility for war crimes during the Congolese wars – the 'big fish' – are brought to trial.

MONUC also supported the Office of the Auditor General in Kinshasa in developing a training package for military and civilian magistrates on ethics in the administration of justice, targeting the role of civil authorities in the administration of justice.[302]

It was very important that the behavior of armed elements, militia members, foreign armed groups and state law enforcement agencies was addressed. These groups are responsible for the majority of human rights abuses, such as violations of the right to security and private property. They are also responsible for killings, torture and inhuman and degrading treatment, including the widespread practice of detaining prisoners in inhumane prison conditions, such as underground cells.[303] Across the Democratic Republic of the Congo, looting, armed robberies, extortions, illegal taxation, arbitrary arrest and illegal detention continued to be key means of subsistence for unpaid soldiers.[304]

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[300] UN Security Council MONUC report 20, 28 December 2005, S/2005/832, point 52.
[301] UN Security Council MONUC report 28, 30 June 2009, S/2009/335, point 61.
[302] UN Security Council MONUC report 19, 26 September 2005, S/2005/603, point 53.
[303] UN Security Council MONUC report 15, 25 March 2004, S/2004/251, point 46.
[304] Ibidem.

Therefore, a continuous reporting mechanism has been established within the mission's military component to report monthly on serious human rights violations by members of the armed forces, which are transmitted to the Ministry of Defense. Cases of ill-discipline and harassment of the population are also collated and sent every month to the Chief of Defense Staff. Incidents of sexual violence are monitored and reported. Furthermore, lists of reported high level perpetrators within the FARDC are assembled as a basis for collecting evidence for possible prosecutions.[305] MONUC has been working closely with its local partners to raise awareness of the issue of sexual violence and is continuing to impress upon judicial authorities the need investigate sexual crimes and to arrest and prosecute perpetrators. The mission uses quick impact project funds to support non-governmental organizations that are assisting victims.[306]

MONUC and the Ministry of Defense are developing the means to improve understanding and application of international humanitarian law and international criminal law by FARDC military magistrates in the eastern Democratic Republic of the Congo.[307] To illustrate the popularity of these legal seminars and trainings:

> One of the participants, an old man who was visibly ill, had travelled more than two hours at his own cost on a bumpy road to attend the half-day event in Bukavu. He had worked for over 13 years as a clerk at a neighbouring court in Kavumu without being put on any staffing table, much less being paid. He said that he worked there to help his country. Being invited to the seminar was the first hint of recognition he had received, the first manifestation of a hope that things would change. He was not the only one appreciating the opportunity. Sixty had been invited to the seminar, more than 200 showed up.[308]

MONUC explores ways to support and strengthen the investigative capacity of the *Auditeur Militaire* through technical and logistical assistance and capacity building and to assist the Congolese authorities in building legal cases to meet the necessary burden of proof.[309] MONUC also assists in addressing the gap between ordinary criminal courts and military courts. Congolese criminal courts do not proscribe war crimes, crimes against humanity and the crime of genocide. The Congolese military

[305] UN Security Council MONUC report 25, 2 April 2008, S/2008/218, point 61.
[306] UN Security Council MONUC report 19, 26 September 2005, S/2005/603, point 48.
[307] UN Security Council MONUC report 26, 3 july 2008, S/2008/433, point 46.
[308] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 115.
[309] UN Security Council MONUC report 18, 2 August 2005, S/2005/506, point 63.

Criminal Code does address these violations, but not in correspondence with the 2002 Rome Statute of the ICC.[310]

According to the UN it is necessary that the police force is professionalized in order to protect it from undue political influence and to stress its civilian, non-military character. MONUC wants to ensure that the police force demonstrates a commitment to human rights, the rule of law and the principles of policing in a democratic society, so as to earn the confidence of the local population.[311] This is necessary, since MONUC has found that the civilian police officers have committed acts of violence against the civilian population and use of torture to obtain confessions from criminal suspects is routine in police stations throughout the country.[312]

Thus, MONUC puts a lot of effort in training civilian police officers. UN Civilian Police (CIVPOL) trains Congolese officers, who in their turn will train other judicial and civilian police officers, to create a sustainable training system. By 2003, over 200 police officers were trained. Qualitative evaluations show that all personnel trained by CIVPOL increased measurably their technical knowledge of law enforcement, including criminal procedure and international human rights standards.[313] However, the impact of these training activities has been limited by the lack of salaries and equipment for local police.[314] MONUC encouraged the Transitional Government to take urgent action to increase judicial capacity and to ensure humane conditions of detention. The Congolese authorities were asked to allocate adequate financial resources for strengthening the justice sector in the 2006 State budget and donors were asked to increase their support to this vital area.[315]

Aside from civilian police, the formation of a suitably sized, professional, well-managed and well-equipped national Congolese army, loyal to the State and capable of protecting the Congolese people and territory was a goal of MONUC.[316]

Workshops and seminars are also available for citizens, to sensitize the Congolese population and authorities on human rights issues, on the administration of justice in Kalemie and on the participation of women in the forthcoming elections in

[310] Savage and Kambala wa Kambala, 'Decayed, Decimated, Usurped and Inadequate', 339.
[311] UN Security Council MONUC report 11, 5 June 2002, S/2002/621, point 36.
[312] UN Security Council MONUC report 21, 13 June 2006, S/2006/390, point 56.
[313] UN Security Council MONUC report 13, 21 February 2003, S/2003/211, point 26.
[314] UN Security Council MONUC report 15, 25 March 2004, S/2004/251, point 30.
[315] UN Security Council MONUC report 19, 26 September 2005, S/2005/603, point 74.
[316] UN Security Council MONUC report 21, 13 June 2006, S/2006/390, point 45.

Goma and Kisangani.[317] A Sexual Violence Working Group, chaired by the Office for Addressing Sexual Exploitation and Abuse, educated the population on rape and sexual violence in Goma and Lubumbashi and reviews existing legislation on the matter.[318] MONUC also reinforced the community-outreach by disseminating over 100.000 posters and 20.000 magazines promoting national reconciliation and explaining their role and mandate. Radio broadcasts on Radio Okapi and newsletters in national languages contribute to the civic education.[319]

3.4.3. International tribunals, hybrid courts or domestic courts?

A possibility that comes to mind looking at examples of providing transitional justice in war-torn societies is an *ad hoc* tribunal such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). At the Sun City Accords the United Nations were unwilling to create another such tribunal because of the costs and the limited efficiency in dealing with mass crimes.

The alternative was a hybrid court, e.g. the special court for Sierra Leone. The hybrid court would be located in the DRC. Proceedings *in situ* have the advantage of being close to the victims and perpetrators; principles of justice are manifested cultivating public faith in justice mechanisms. Federico Borello, in his piece for the International Center for Transitional Justice promotes hybrid courts, he believes the DRC is the perfect target country for such a court. The DRC could use a court based upon an open and consultative process in which the views of civil society and victims are taken into account.[320] The government of the DRC was willing to discuss the possibilities of a hybrid court.[321] This option was however also not welcomed by the UN. It was undesirable in the DRC because of the fractured condition of the Congolese society; the selection of local participants would be biased; the continuing instability was a security threat; the costs would be very high and looking at the international context, the International Criminal Court was deemed more important

Hybrid courts were undesirable in the DRC because of the fractured condition of the Congolese society

[317] UN Security Council MONUC report 16, 31 December 2004, S/2004/1034, point 53.
[318] UN Security Council MONUC report 19, 26 September 2005, S/2005/603, point 62.
[319] UN Security Council MONUC report 16, 31 December 2004, S/2004/1034, point 58.
[320] Federico Borello, (2004), 'A First Few Steps. The Long Road to a Just Peace in the Democratic Republic of Congo', In: *Occasional Paper Series International Center for Transitional Justice*, V.
[321] Borello, 'A First Few Steps', 35.

and better up to the task of prosecuting the 'big fish'. However, the ICC cannot deal with crimes before 2002 as these crimes are no part of the ICC jurisdiction. Furthermore domestic courts should be more suitable for restoring confidence in local institutions than hybrid courts. The money available for justice improvement could be best invested in domestic courts, according to the UN.

3.4.4. What about truth and reconciliation?

In 2002 a *Commission Vérité et Réconciliation* (CVR) was set up, better known abroad as a Truth and Reconciliation Committee (TRC). The aim was to copy the TRC that worked for South Africa. The establishment of the TRC was determined in Sun City, the interests of the warring parties were firmly ensconced within the structure of the TRC.[322]

The Congolese TRC had failed to investigate even a single case

A TRC could play a role in helping survivors of past abuses gain closure, creating opportunities for perpetrators to acknowledge their actions, entrenching the rule of law and initiating a shared national process.[323] But at first there was no consultation with the population on the design, purpose or aim of the TRC. For this purpose in February 2004, a national consultation on the Truth and Reconciliation Commission was convened in Kinshasa, bringing together 125 participants, including a wide cross-section of the Congolese population from all 11 provinces, parliamentarians, justice sector representatives and national and international experts. Many participants questioned whether the timing and situation was right for the TRC, with serious daily violations of human rights and a fragile peace. In this connection, many participants also called for the appointment of apolitical and credible members to the Commission. The transitional government had to make decisions on amnesty laws and the transitional constitution, bearing in mind not to lose the support of the international community.[324]

Truth-seeking proved difficult in a volatile situation. By the end of 2004, the National Human Rights Observatory and the TRC, mandated under the Global and All-Inclusive Agreement, were not fully established and the appointment of the 13

[322] Davis and Hayner, 'Difficult Peace, Limited Justice', 21.
[323] Savage and Kambala wa Kambala, 'Decayed, Decimated, Usurped and Inadequate', 346.
[324] UN Security Council MONUC report 15, 25 March 2004, S/2004/251, point 49.

additional members to the TRC was marred by irregularities that affected its independence as an institution.[325] The TRC consisted of political appointees that had themselves been involved in abuses.

The Congolese TRC ended in 2006, it had failed to investigate even a single case. The TRC was doomed to fail due to an unrealistically large mandate, covering a period from 1960 to 2006. A lack of professional capacity among commission staff members and corruption among magistrates was an obstacle to truth-finding. Amnesties could not be granted because of international rules on the exceptions. Moreover, a TRC can only work in a stable and non-volatile situation, which the DRC has not been ever since MONUC's presence.[326]

Nevertheless, in the DRC specifically, it was important that a transitional justice strategy was implemented, including a mapping exercise documenting the most serious violations of human rights and international humanitarian law committed between March 1993 and June 2003. That mapping exercise was decided on in 2004 and was deemed important for long-term national reconciliation and justice in the country. The cooperation in this effort between the UN and the Congolese government was an encouraging and much needed step towards the pursuit of accountability in the DRC.[327] MONUC would continue to cooperate in efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice.[328] Moreover, various political and civil society actors have undertaken local initiatives to promote dialogue. Provincial reconciliation cells were established and North Kivu has an inter-ethnic committee.[329]

3.5. MONUC and the guiding principles of transitional justice

The basket system the UN uses to categorize its activities, as described in chapter 1, theoretically shows the willingness to merge top-down and bottom-up approaches, or liberal and hybrid approaches. The same can be said about another important document drafted by the UN: the guiding principles of transitional justice. It is noticeable that MONUC's actions in promoting rule of law are based on these princi-

[325] UN Security Council MONUC report 16, 31 December 2004, S/2004/1034, point 53.
[326] Savage and Kambala wa Kambala, 'Decayed, Decimated, Usurped and Inadequate', 344.
[327] Ibidem, 337, and UN Security Council MONUC report 15, 25 March 2004, S/2004/251, point 68.
[328] UN Security Council MONUC report 23, 20 March 2007, S/2007/156, point 59 and UN Security Council MONUC report 21, 13 June 2006, S/2006/390, point 54.
[329] UN Security Council MONUC report 24, 14 November 2007, S/2007/671, point 18

ples. The principles are overly liberal, with a touch of hybridity. If MONUC follows these principles it could mean that the UN try to combine liberal and hybrid approaches, but how does that work out for the DRC?

To give some examples from the list, the UN is supposed to support and actively encourage compliance with international norms and standards when designing and implementing transitional justice processes and mechanisms.[330] This chapter gave examples of MONUC's desire to work in accordance with international norms, i.e. compliance with human rights law, refugee law, international humanitarian law and criminal law. The principles also explicitly protect women and children, something MONUC took seriously in their mission. Another principle is about taking account of the political context in the host country. MONUC had to be impartial towards the transitional government, but encouraged it to strive for democracy and transparency.

Principles that are more hybrid are the principle that ensures the centrality of victims and the principle that transitional justice needs to be based on the unique country context and that it needs to strengthen national capacity to carry out community-wide transitional justice processes.[331] This would show a tendency towards a bottom-up approach. In comparison to what chapter 2 explains about traditional justice versus formal justice, the formal justice that MONUC promotes emphasizes less on the victim than traditional justice. Pulver writes about the DRC that there is very little assistance in the area of the protection of victims and witnesses.[332] MONUC puts effort in strengthening civil society and therewith the national capacity to fight impunity, but the unique country context would maybe demand more support for traditional justice.

This shows that with the best intentions it is hard for MONUC to promote formal liberal justice and be open to hybrid approaches as well.

3.6. Bridging the gap proved to be difficult

Among other activities MONUC trained judicial and military personnel and police, informed the population on justice and human rights and improved the conditions

[330] United Nations, (2010), 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice', 2.
[331] United Nations, 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice', 2.
[332] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 69.

of courts and prisons. They however realized it was complicated to make real changes in the justice system. The UN speak in broad terms about rule of law programming. The reports show MONUC's frustration with the transitional government in the DRC and the difficulties they meet in implementing their obviously neo-liberal vision on a well-functioning justice system. MONUC needs full cooperation from the government and sharing in their ideas, because MONUC cannot take over the role of the government.

Except for the efforts to pursue a TRC, it seems that traditional justice is often neglected in MONUC's approaches. The connection between the above mentioned rule of law activities and the previously discussed theories will be reviewed in more detail in the analysis in chapter 4.

4. Analysis

'We will spare no effort to (…) strengthen rule of law'.[333] This was the standpoint of the UN in their Millennium Declaration in September 2000.[334] The mandates expanded over time, besides the organization and monitoring of elections and restoring order and peace much effort was put in the promotion of rule of law.

This thesis was written in order to find an answer to the question to what extent the approaches of the MONUC from 1999 till 2010 to strengthen the rule of law as part of the peacebuilding mission in the Democratic Republic of Congo were contradictory to traditional justice mechanisms in Congo. Were these approaches mainly based on neo-liberal theories or as well on hybrid theories? Hence, did they consider traditional justice or was the gap unbridgeable?

In the previous chapters several sub questions have been answered. The first chapter explained how the debate on rule of law programming as part of peacebuilding evolved. Rule of law has become a more significant part of peacebuilding missions in the last decades, with definitions of the concept emerging in peace accords and mandates. Given that peacebuilding has been a matter of trial and error it is subject to fierce debate. The best way to strengthen the justice system in post-war situations is still unclear. As explained in the first chapter, hypothetically, a paradigm shift could have occurred: the leading liberal approach making way for the more hybrid approach. The top-down approach could be replaced by a bottom-up approach. Initially, the UN stated to be receptive to traditional influences.

The second chapter explained what these traditional influences were. The chapter delved into values in Sub-Saharan traditional justice and how it works compared to the formal justice system, showing already some friction between the two.

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[333] Joris Voorhoeve, (2007), Fro*m War to the Rule of Law: Peacebuilding after Violent Conflict,* (Amsterdam University Press: Amsterdam), 91.
[334] Voorhoeve, *From War to the Rule of Law,* 91.

The third chapter revolved around MONUC's peacebuilding program to strengthen the rule of law in the DRC. The chapter researched whether MONUC has found a way to shift from the liberal approach of peacebuilding to a hybrid version.

This chapter explains the difficulties of merging these theories and underlines the contradictions between the diverging mechanisms of finding justice.

4.1. MONUC and liberalism

In the first chapter some definitions on rule of law were reviewed. Ndulo stated that rule of law projects do not seek to be a panacea for the reconstruction of post-conflict societies; rather, they seek to lay the 'framework in which the rebuilding efforts can be promoted and secured'.[335] Ndulo sees rule of law as a way to regulate state authority and secure human rights and development. Chapter 3 showed that the UN in their mission try to achieve this goal. We see that MONUC's main mission was to support the interim government of the DRC to lay this framework and prepare the government for its task of protecting human rights.

Rama Mani argued in the first chapter that in the dominant liberalist view, a state necessarily needs a disciplined civilian police force and an efficient prison system.[336] These are all aspects of the rule of law that the UN valued in their mandate and approach. From the execution of their mandate, as researched in chapter 3, we can deduce that much emphasis was laid on civilian and military police reform. Also the reports showed MONUC's frustration with the situation in the DRC concerning the efficiency and humaneness of the Congolese prison system. MONUC also invested in training for judicial and police personnel, striving for independence and consistency. Here, MONUC's approach was in accordance with the liberal view.

According to the liberal view as described in the first chapter, democratic elections and a stable transparent government were deemed very important. The UN stressed in the process of signing peace agreements and in the designing of MONOC's mandate, as shown in chapter 3, that these were crucial elements of the way they see rule of law.

[335] Ndulo, 'From Constitutional Protections to Oversight Mechanisms', 89.
[336] Mani, 'Conflict Resolution, Justice and the Law', 13.

The UN discouraged many cases of amnesty because of their wish for formal prosecution. They wished amnesty never to be granted to those guilty of crimes against humanity, crimes of war and crimes of genocide, but preferably also other crimes should be followed by suitable punishments. This showed their tendency towards retributive justice and neglected options for restorative justice. It was believed that amnesty is only an option when a TRC works, otherwise it will obstruct reconciliation, as happened in the DRC.

The UN discouraged many cases of amnesty because of their wish for formal prosecution

The problems mentioned in paragraph 3.3., in which the need for justice in the DRC was illustrated, are problems looked at from a liberal perspective. The presence of infrastructure, humane prison conditions, human and material resources, laws, adequate training, free press, independence, judicial capacity and governmental authority are all aspects of a liberal rule of law and all aspects MONUC wanted to improve with their mission.[337]

A government that follows the rules is a first step towards peace, according to liberalism. Fairness, accountability, equality and separation of powers, these are all aspects that should diminish or dispel corruption, and corruption is deemed to stand in the way of peace and stability. MONUC advised the government in these issues.

4.2. Traditional justice and liberalism

Chapter 2 explained what traditional or informal justice entails in Sub-Saharan Africa. A couple of characteristics of traditional justice were fundamentally at odds with formal justice the way the UN like to see it. In the first chapter the UN argued that the rule of law is

> a principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in deci-

[337] Davidsson and Thoroddsen, 'Rule of Law Programming in the DRC for the Sake of Justice and Security', 115.

> sion-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[338]

This is a definition based on the liberal perception of justice and order. It shows however many aspects that are contradictory to how traditional justice works. In traditional trials precisely independence, equality before the law, accountability to the law, fairness in application of law, legal certainty, avoidance of arbitrariness and procedural and legal transparency cannot be ensured. A trial according to traditional leaders is based on public debate in which laws are not equally enforced and independently adjudicated. Moreover, consistency with international human rights norms and standards are not guaranteed.

As concluded in the second chapter, the idea of fair justice is based on universal human rights. Men and women are equal before the law and access to justice and to legal representation should be assured. The trial should be transparent, with an independent judge, presumption of innocence. Formal justice is rather perpetrator-based and justice provided is overly retributive and not designed to heal the community. Conversely, informal justice is victim-based and restorative in nature, designed for a well-functioning community.

The examples showed the difficulty to coincide traditional mechanism of justice and liberal formal ways of justice.

4.3. MONUC and traditional justice

A myriad of reasons, as laid out in chapter 2, can be adduced to support the fact that traditional justice still functions in the DRC. Due to a lack of institutionalization informal practices are easier to be reached by the rural population than formal systems. Chapter 3 showed that MONUC worked on this much needed institutionalization. Even though it makes sense that traditional justice is still preserved in rural villages to solve minor crimes, from the liberal point of view these practices are not in line with international agreements. Liberal institutionalization should make traditional justice eventually less needed, because the accessibility of formal courts will be increased. This means that MONUC has put more effort into making traditional courts unnecessary, than into supporting and sponsoring their existence.

[338] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 75.

The South African TRC was a creative mix of formal and informal procedures and of informal norms and domestically designed techniques, a hybrid solution for reconciliation.[339] MONUC encouraged the establishment of a Congolese version of a TRC. However, this endeavor turned out to be a failure, as described in chapter 3. The TRC could not be used as a way to connect victims and perpetrators, it turned out not to be the platform for storytelling and forgiveness that it was supposed to be. Soon MONUC gave up on this idea and focused their support and funding on the more official aspects of rule of law. Also a hybrid court, seen as a way to bring justice closer to the population, was not considered to be an option in the DRC.

4.4. Merging formal and informal justice?

Ideally, Huyse stressed, local justice should adapt to meeting international standards and international strategies should be transformed to fit local socio-cultural and economic realities.[340] The debate on whether to transform certain features of traditional justice, adapting them to novel realities, and redefining the relationship between them and formal state juridical systems remains controversial.[341] One sees that the traditional justice system is accessible, time and money economic, understandable and informal. Incorporating these aspects into the formal system, which is impartial, uniform and legitimate, seems like a perfect plan. Incorporation of existing traditional justice forums into the formal state system is however impossible.

Local justice should adapt to meeting international standards and international strategies should be transformed to fit local realities

Making defendants subject to two justice systems is impossible as well. Hinz gives the example that you cannot ask from a defendant who served his time in prison as a result of a formal court ruling to pay compensation to the victim, for example in cattle, too.[342] Linking the two systems tends to undermine the positive attributes of the informal system. The voluntary nature of traditional justice is undermined by state coercion. The courts may end up with neither positive attributes

[339] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 6.
[340] Ibidem, 193.
[341] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 34.
[342] Manfred O. Hinz, (2010), *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa.* (Namibia Scientific Society, Windhoek),15.

when combining the informal with the due process.[343] Stressing the struggle of merging theories leads to the final conclusion of this research.

4.5. Complementary roles for traditional justice

Apparently, all reports written by MONUC showed a lack of interest in informal justice mechanisms. But in the final pages of this thesis some advantages of traditional or informal justice cannot remain unnamed. It is important to understand why we must maintain to pay attention to traditional justice.

Traditional authorities and customary judicial mechanisms have been reinforced by recent policies, albeit with paradoxical and ambivalent effects. In the process of recognition, there has been the contradictory tendency to mythologize and generalize these specific values, while at the same time attempting to bring these forms in line with modern conceptions of human rights and democratic principles.[344]

The main argument used against investing in traditional justice is the idea that traditional justice, for above mentioned reasons, is undermining human rights. Traditional courts are often considered unable to comply with fundamental human rights, while formal courts enjoy prestige. But Bennett, as a defender of traditional courts, argues that formal courts are equally serious offenders of human rights: a point frequently overlooked is the fact that western style proceedings may well offend African views of fairness. In some respect traditional courts come closer to realizing human rights than formal state courts, according to Bennett.[345]

The diversity of social acceptance and integration of traditional African healing processes harbor a high, yet very much neglected, potential for sustainable conflict resolution.[346] Sekonyela believes it is traditional justice that could be researched and used to enhance the protection of human rights.[347] This is some food for thought, though the UN still disregarded this argument, believing in their liberal solutions to protect human rights.

True, traditional justice is not sufficient to deal with war crimes. The international and national formal tribunals should address grave human rights violations

[343] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems*, 130.
[344] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 24.
[345] Bennett, *African Perspectives on Tradition and Justice*, 38.
[346] Hinz and Patemann, 'Healing – Beyond Formal Conflict Resolution', 413.
[347] Sekonyela, 'Lesotho – Traditional Administration of Justice in a Monarchy', 207.

and crimes against humanity, where traditional justice systems should deal with less severe crimes. Traditional justice cannot cure all ills, but it can work as complement to the efforts of national and international (more formal) criminal justice systems.[348] Mapaure states that traditional mechanisms should complement national processes, they should not take over these processes.[349]

Despite the many negatives on the effectiveness of traditional justice in the context of war, traditional systems can certainly work as interim instruments when an official transitional justice system is not in place or crippled by war. Stevens is very clear about her opinion that the international community should not try to heavily restrict the traditional justice jurisdiction. This would lead to the denial of justice to those who cannot afford formal justice.[350]

Moreover, leave aside the relationship between traditional justice and international standards, traditional justice is an acceptable mechanism to use in case of smaller abuses or to address issues of forgiveness and reconciliation. Furthermore, traditional courts can deal with the more forgotten effects of violent conflict, such as property conflicts when refugees return or marital violence.[351] And for traditional justice setting wrongs right does not mean sending people to prison.[352] It means striving for sustainable peace within communities.

Traditional courts can deal with the more forgotten effects of violent conflict, such as property conflicts when refugees return or marital violence

Rule of law promotion cannot follow a pre-fixed institutional template, but any rule of law strategy must be context specific and holistic in its perception of problems and challenges.[353] Actors also need to look more at what they can expect from post-conflict societies; they are already under an immense pressure to conform to international standards while at the same time they experience serious difficulties

[348] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 185 and 193.
[349] Mapaure, 'Accused and Cherished: Traditional and Informal Justice Systems as Seen by International Organizations', 37.
[350] Stevens, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems,* 137.
[351] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 190.
[352] Hinz, *In Search of Justice and Peace,*13.
[353] Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies', 93.

with providing basic services.[354] Either way, there is no generally working concept, and critical questions still need to be asked.

[354] Ibidem, 80.

5. Conclusion

It was a challenge for MONUC to find their way in the DRC with the relatively weak or vague mandate for rule of law programming they had at first in the peacekeeping mission. However, there has been substantial progress on this front since 2003, when the Department for Peacekeeping Operations (DPKO) first developed a capacity at Headquarters to plan and support justice and corrections aspects of peacekeeping operations. Prior to this, there was little or no advance planning for rule of law aspects of peacekeeping, and the Security Council generally did not refer directly to the rule of law or key elements of it in the peacekeeping mandates.[355] MONUC was right in the middle of this development. Along the way the mission got more specific on rule of law approach and the reports that were used in this thesis mentioned more on these approaches.

What theory, as discussed in the first chapter, suits MONUC's rule of law promoting approaches in the DRC? Today's statebuilding is somewhat in line with the hybrid ideology, meaning that it is more extensive in terms of time frames and manpower. Moreover, the hybrid theory has already factored in a non-cooperative government. The DRC has had an unstable government consisting of important people with their own agendas. The cultural fabric of the society which is very diverse, asks for an approach that respects the diversity. This makes a solid argument to promote a hybrid view on state and people.

However, chapter 3 showed that over the years it became evident that MONUC did not deviate from the liberal point of view in promoting rule of law. All elements deemed important for reconstruction of the DRC's legal system were linked to the liberal theory. Eventually, most focus lay on training of police, the military and judicial staff. Most important was the establishment of national formal courts and improving the prisons. Along the way, MONUC kept referring to human rights. Moreover, MONUC rather saw the state involved in practices that were taken over by non-state institutions like churches, filling the political voids left by

[355] Pulver, 'Rule of Law, Peacekeeping and the United Nations', 82.

state withdrawal. That meant that the state had to show political will and ensure human and material resources, which was a challenge in the DRC.[356]

But noticeably, the liberal approach predominated. MONUC and its international partners aspired to erect a stable, liberal order. This approach was in accordance with international standards and would therefore find more international support. Evidently, in the DRC, MONUC rarely chose to embrace a more hybrid theory, to focus on bottom-up strategies or to invest in traditional justice.

Were MONUC's approaches to promote rule of law in the DRC contradictory to traditional justice? As demonstrated in chapter 2, the conceptions of justice, rights, community, harm, retribution, reparation, punishment and redress are highly culturally specific.[357] Local forms of traditional justice are thus understood by international policy-makers to have fundamentally different concepts and values than those enshrined in western law.[358] This thesis showed that MONUC seemed to have decided that formal justice and traditional justice are overly incompatible. MONUC chose an approach in ten years of peacebuilding that gave little attention to traditional mechanisms of justice, but rather chose to promote formal liberal practices of justice. Since this thesis showed that the differences between these formal practices of justice and traditional justice are so big and unbridgeable, we can conclude that MONUC's promotion of justice was very contradictory to traditional justice in the DRC.

The conceptions of justice, rights, community, harm, retribution, reparation, punishment and redress are highly culturally specific

To summarize, chapter 2 concluded that there is a strong contrast between formal and informal justice. Because the two versions of justice are hard to reconcile, MONUC had to make choices on what approach to follow, as became clear in chapter 3. An overarching justice system, merging traditional and formal justice practices, as was suggested by several scholars in chapter 4, was too hard to realize. The UN opted for the liberal theory in their promotion of rule of law in the DRC, holding on to international agreements, laws and human rights: the liberal values as discussed in chapter 1.

[356] UN Security Council MONUC report 21, 13 June 2006, S/2006/390, point 54.
[357] Obarrio, 'Traditional Justice as Rule of Law in Africa: an Anthropological Perspective', 24.
[358] Ibidem.

The predominance of the liberal point of view on statebuilding between 1999 and 2010, MONUC's years of operating, shaped their approach and caused the reluctance to focus on traditional justice as a way to bring justice to the DRC. As came forward in chapter 2 and the analysis in this thesis, traditional justice systems anyhow have an added value in post-conflict transition, facilitating post-conflict truth-telling and reconciliation.[359] Yet, these systems were thus far not incorporated in MONUC's statebuilding mission in the Democratic Republic of Congo.

The predominance of the liberal point of view on statebuilding, shaped MONUC's approach, causing the reluctance to focus on traditional justice

[359] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 192.

6. Discussion

This research only delved into a small part of the issue of statebuilding in the DRC or statebuilding in general. Choices had to be made and several questions were not specifically asked in this research, hence not yet answered. Therefore, some questions are asked and hypotheses are put forward in this discussion.

Promoting rule of law is described as one of the most important activities to create stability and peace. The UN claim to work country and context specific when incorporating rule of law promotion in peacebuilding missions. Nonetheless, they try to find the perfect mold for rule of law promotion. The DRC has been and still is a complex case for the UN in this matter. We now have an understanding of the friction between liberal rule of law and traditional justice in the case of MONUC and the DRC. It would be interesting to see how the UN deals with the same issue in other conflict areas where informal justice or formal justice are dominant or where the two try to coexist. Do the same problems of achieving a national formal justice system occur in other parts of the world?

In this thesis I conclude that MONUC did not put much effort into the support and strengthening of traditional justice mechanisms in the DRC. In this thesis, MONUC was considered the main actor in rule of law promotion, and therefore subject to research. However, MONUC was not the only actor in the field. In the DRC NGO's and local organizations were promoting justice as well. Slightly less literature is available on rule of law promoting activities by other organizations. Field research could give insight in these activities and comparisons could be made between the UN approach and the approach of other organizations.

Also, further research could be based on the very interesting research by Patrick Vinck. For example, his field research uncovered that half of the Congolese population defines justice as establishing the truth or being just or fair and half of them defines it as applying the law. To achieve justice again half of the population endorsed the national court system. Interestingly, only 15 per cent endorses traditional justice. Vinck discovered that among the population there is a strong desire,

82 per cent, for the international community to assist in national prosecutions.[360] These findings, complemented by more such research, could support MONUC's approach in the sense that it was never necessary to support traditional justice in the DRC.

[360] Vinck, *Living with Fear: a Population-based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo*, 2

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