

SMALL STEPS, LARGE HURDLES

The EU's role in promoting justice in peacemaking
in the DRC

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Cover image: © Marie Frechon/UN. Congolese women rejoice after signing of peace accord in Goma.

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CONTENTS

Acronyms	6
Executive Summary	7
Introduction and Scope	8
Background: The DRC's Conflicts	8
Ten Years of Peacemaking: What Progress for Justice?	10
Small Steps, Large Hurdles	11
The EU's Role	13
The EUSR as Facilitator	15
The EUSR for the African Great Lakes: The Policy Framework	16
Conclusions and Recommendations	21

ACRONYMS

CFSP	Common Foreign and Security Policy
CNDP	Congrès National pour la Défense du Peuple
CSOs	Civil society organisations
DRC	Democratic Republic of Congo
EC	European Commission
EUPOL RD Congo	EU Police Mission in the DRC
EUSEC RD Congo	EU Mission to provide advice on and assistance for security sector reform in the DRC
ESDP	European Security and Defence Policy
EUSR	EU Special Representative
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Forces Démocratiques de Libération de Rwanda
FNL	Forces Nationales de Libération
ICC	International Criminal Court
IHL	International Humanitarian Law
LRA	Lord's Resistance Army
MONUC	UN Mission in the DRC
NGOs	Non-governmental organisations
SSR	Security system reform
TRC	Truth and Reconciliation Commission

EXECUTIVE SUMMARY

The human cost of the DRC's wars is immense. The massive extent of human rights violations (including widespread rape and sexual violence) committed since the 1990s in the DRC has been extensively documented, at great personal risk, by Congolese human rights defenders, civil society groups and religious organisations, as well as international non-governmental organisations (NGOs) and agencies. Civil society organisations (CSOs), and the public more generally, demand justice for these crimes.

Yet peace agreements over the past 10 years have followed a similar pattern: at each stage an agreement is reached with some but not all of the parties. Demands for justice are largely unmet, and impunity for the worst crimes becomes more entrenched. Even during periods of ceasefire, armed men continue to inflict serious abuse on the population. The root causes of the conflict remain unaddressed. Fighting then flares up again as the truce breaks down, or another group seeks to gain a place at the negotiating table through force of arms.

It is difficult to promote accountability in the DRC because the threat of continued violence is ever-present. The EU is engaging in more peace negotiations around the world, and the EU Special Representatives (EUSRs) increasingly represent the EU in peace negotiations. This is also the case in the DRC. Diplomacy at the European level is difficult since it requires considerable consensus among the Member States, which is not always possible. Acknowledging these constraints, this paper argues that the EU needs to strengthen the future role that EUSRs play in promoting justice in conflict environments, in the DRC and elsewhere.

The main recommendations of this report are as follows:

- The EU should develop key areas of policy on amnesties and transitional justice approaches. Although the EU is firmly committed politically to upholding international justice and human rights, and to supporting the International Criminal Court (ICC), its policy framework lags behind its political statements, practice on the ground and UN policy.
- Since the EU is increasingly facilitating peace processes, EU actors should be mandated to include transitional justice approaches and cooperation with international justice mechanisms in their facilitation.
- EU actors would also benefit from in-house mediation support resources, which should include expertise on transitional justice.
- Through diplomatic and financial support, the EU can also indirectly promote justice in peace negotiations by helping to establish an independent human rights monitoring mechanism to inform the process, from talks about talks to an agreement's implementation.
- Facilitating civil society engagement in peace negotiations is important for voicing demands for justice and building public confidence in the resulting agreement. The EU should support genuine civil society participation through funding and diplomatic pressure on the negotiating parties, and it should also support technical assistance to civil society participants.

Keywords: mediation and peacemaking, transitional justice, Democratic Republic of Congo, European Union

INTRODUCTION AND SCOPE

A recent study examined how justice issues have been handled in 10 years of negotiating peace agreements in the DRC, from the Lusaka Accords of 1999 to the Goma Accords of 2008.¹ Based on interviews with participants in the talks and close observers, this paper considers how the EU has addressed justice issues in recent negotiations in the DRC.² It specifically examines the role of the EUSR for the African Great Lakes and the EU's policy framework. It then offers suggestions on how the EU could strengthen the contribution to justice made by EUSRs in future negotiations, in the DRC and elsewhere.

BACKGROUND: THE DRC'S CONFLICTS

The DRC has a long history of mass atrocities that remains unaddressed. As early as 1903, Roger Casement moved international public opinion (and launched the modern human rights movement) when he published 'convincing evidence of shocking misgovernment and wholesale oppression' in Leopold II of Belgium's personal fiefdom, the Congo Free State.³

The colonial era was followed in the mid-20th century by decades of oppression, kleptocracy and state collapse under President Mobutu Sese Seko. In 1994 the genocide in Rwanda spilled over into eastern DRC. After the bloody "war of liberation" (1996-1997), Mobutu was ousted by Laurent-Desiré Kabila. Kabila then broke with his allies, Rwanda and Uganda, and the Congo War (1998-2002) ensued. The two wars, sustained by plundered natural resources, involved local, national and international conflicts and combatants. The government and rebel forces used access to land, economic resources and rights (especially citizenship) to divide and rule local communities.⁴

Laurent Kabila was assassinated in January 2001 and replaced by his son, Joseph. Peace talks opened in Sun City, South Africa in 2002. The war was at a stalemate. The agreement of December was essentially a power-sharing deal between the warring parties, with some civil society engagement, freezing rather than resolving the conflict.⁵ A transitional government, supported by the international committee to accompany the transition,⁶ prepared the way for democratic elections. The transitional government also created a new national army, the *Forces Armées de la République Démocratique du Congo* (Armed Forces of the Democratic Republic of Congo, or FARDC) from the forces of the Sun City signatories and other militias.

In 2006 Joseph Kabila was elected president. In the resource-rich and densely populated border provinces of North and South Kivu, violence continued and escalated. The disarmament, demobilisation and reintegration

1 L. Davis and P. Hayner (2009). *Difficult peace, limited justice: Ten years of peacemaking in the DRC*. International Center for Transitional Justice. This report relies in part on this prior paper.

2 This paper does not, therefore, address the peace agreement between the Government of the DRC and the Congrès National pour la Défense du Peuple (CNDP) of 23rd March 2009 as the EU was not directly involved in the process and did not witness the agreement.

3 S. Ó Siócháin and M. O'Sullivan (Eds.) (2003). *The eyes of another race: Roger Casement's Congo report and 1903 diary*. Dublin, Ireland: University College Dublin Press. p.2. Casement's Congo report is widely seen as the forerunner of human rights and humanitarian investigation and advocacy.

4 M. Nest with F. Grignon and E.F. Kisangani (2006). *The Democratic Republic of Congo: Economic dimensions of war and peace*. New York, US: International Peace Academy. Introduction, p.13.

5 The Global and All-Inclusive Agreement (December 2002). It set out the Constitution of the Transition (2003), the basis of the transitional government (2003-2006).

6 Known by its French acronym, CIAT, it comprised ambassadors of the permanent member states of the UN Security Council (China, France, Russia, the UK and US) plus those of Angola, Belgium, Canada, Gabon, Mozambique, South Africa, Zambia and the Mission of the UN in DRC (MONUC).

(DDR)⁷ processes remain incomplete, and armed groups proliferate. The two most prominent of these are the *Forces Démocratiques de Libération de Rwanda* (Democratic Forces for the Liberation of Rwanda, or FDLR), mainly in South Kivu, and *Congrès National pour la Défense du Peuple* (National Congress for the Defence of the People, or CNDP), formerly led by Laurent Nkunda and predominantly active in North Kivu.⁸ In November 2007 the governments of the DRC and Rwanda agreed to address the problem of the FDLR together; the details of the agreement were laid out in the Nairobi Communiqué. (The UN facilitated the meeting; the US and the EU were also present.)

Throughout 2007 the Congolese government attempted unsuccessfully to defeat Nkunda's CNDP by force. Negotiations followed, and in January 2008 the government, the CNDP and other armed groups across the Kivus signed a peace agreement in Goma called the *Actes d'Engagement* (Statements of Commitment).⁹ In parallel to these negotiations, a peace conference of over 1,200 members of civil society and armed groups discussed the causes of the conflict and possible solutions. The delegates agreed on two working group reports, one each for North and South Kivu, as well as a more general synopsis.¹⁰ These Goma conference reports carry no legal weight but were supposed to inform the *Amani* (peace) programme, intended to implement the peace agreement in the region. Fighting between the CNDP and the army was largely suspended between January and October 2008. Skirmishes continued with other armed groups, however, and there was violence against the civilian population (including widespread rape and sexual violence) throughout the ceasefire.

When fighting resumed in October the army again failed to defeat the CNDP. But the political dynamics in the region had changed since the Goma process. In December the UN published a report containing evidence of Rwandan support for the CNDP.¹¹ Rwanda came under considerable diplomatic pressure to sever links with the group; the Dutch and Swedish governments even suspended aid to Rwanda. Moreover, Nkunda's growing ambitions for "national liberation" in the DRC irritated those in Rwanda's capital, Kigali. Without the involvement of the international facilitators (by this time led by UN Special Envoy Olusegun Obasanjo, the former president of Nigeria, and the former Tanzanian president, Benjamin Mkapa), the Congolese and Rwandan governments agreed to joint action against armed groups in eastern DRC. The first target was the CNDP. Nkunda was detained by Rwanda, his former backer, in January 2009.

Nkunda's chief of staff, Bosco Ntaganda, and CNDP men loyal to him, became part of the joint military operations against the FDLR, under the command of John Numbi. However Ntaganda is the subject of a warrant issued by the ICC in 2006 and unsealed in 2008.¹² The ICC has been active in the DRC since 2004, when the Congolese government asked the Court to investigate crimes committed in the country. Thus, the Congolese authorities must now arrest Bosco Ntaganda and transfer him to The Hague.¹³ But despite international pressure, especially from the EU, the government is reluctant to do so, preferring that Ntaganda and his CNDP troops help fight the FDLR, for the time being at least.¹⁴

The human cost of the DRC's wars is immense: since 1998, an estimated 5.4 million Congolese have died from war-related causes,¹⁵ and conflict has forced an estimated 1.4 million people to flee.¹⁶ Although rape and sexual

7 For simplicity "DDR" is used in this paper to cover the range of programmes designed to disarm, demobilise, reintegrate and/or repatriate combatants.

8 The FDLR consists of the predominantly Hutu remnants of the former Rwandan army, militiamen and others who fled to the DRC in the wake of the Rwandan genocide, their offspring, and others, including Congolese and non-Hutus. Laurent Nkunda claims that the CNDP protects the Congolese Tutsi population, including from the FDLR.

9 The FDLR were not present at the Goma or Nairobi talks.

10 Available at <http://www.amanileo.org>.

11 UN Security Council (2008). *Final report of the group of experts on the Democratic Republic of the Congo*, 12th December 2008. S/2008/773.

12 The ICC warrant is for three counts of war crimes, including the enlistment, conscription and use in armed conflict of children under the age of 15, allegedly committed between July 2002 and December 2003 in Ituri. Bosco was then the deputy chief of staff of the Force Patriotique pour La Libération du Congo (Patriotic Forces for the Liberation of Congo, or FPLC) – the military wing of the Union des Patriotes Congolais (Union of Congolese Patriots, or UPC) led by Thomas Lubanga. Lubanga is the first person to be charged and tried by the ICC; he has been detained since March 2006 and his trial began in January 2009.

13 Alternatively, MONUC could do so on the government's behalf.

14 'Peace before justice, Congo minister tells ICC', *AFP*, 13th February 2009.

15 International Rescue Committee (2008). *Mortality in the Democratic Republic of Congo: An ongoing crisis*. Available at http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf.

16 Amnesty International (2008). *Amnesty International Report 2008: The State of the World's Human Rights*. London, UK: International Secretariat. p.11. Available at <http://thereport.amnesty.org/eng/download-report>.

violence are by no means limited to the conflict zones of the east, they have reached epidemic levels in the Kivus. According to the UN Population Fund, 2,000 cases of rape were reported in North Kivu alone between January and September 2007, with a 60 percent increase in cases between August and October of that year.¹⁷ Twenty percent of the rapes reported in the first half of 2007 in South Kivu were so violent that the victims required surgery.¹⁸

International organisations and local human rights groups have documented many of the extensive human rights violations committed in the DRC. And the public wants justice for these crimes: a survey in eastern DRC found that 85 percent of respondents believe it is important to hold those who have committed war crimes to account and that 82 percent of respondents feel accountability is necessary to achieve peace.¹⁹

TEN YEARS OF PEACEMAKING: WHAT PROGRESS FOR JUSTICE?²⁰

In a society emerging from conflict or authoritarian rule, only a few perpetrators of serious, systematic human rights violations can generally be brought to trial before domestic, international or hybrid tribunals. The “impunity gap” between the large number of perpetrators and the small number of prosecutions is exacerbated in the DRC by the abysmal state of the national justice sector. To respond to the legacy of massive human rights abuse and to promote justice, peacebuilders should consider a range of complementary measures. These include non-judicial truth-seeking measures, the best-known form of which is a truth commission; reparations for victims; and justice-sensitive reform of public institutions, particularly in the security system.

The peace agreements, ceasefires and DDR processes between 1999 and 2008 included some efforts to advance accountability, or at least preserve the possibility of justice in the future, as discussed below.

LIMITING AMNESTY FOR INTERNATIONAL CRIME

Apart from a resolution from Sun City calling for an international criminal court for the DRC, which was never acted on,²¹ the only provisions pertaining to criminal justice concern amnesties. Amnesty for certain crimes, such as treason and sedition, are common features in ceasefire and DDR agreements, as they encourage fighters to demobilise. A standard is emerging, however, in international law and practice that amnesty may not cover core international crimes: genocide, crimes against humanity and war crimes. UN officials, for example, are not permitted to witness or endorse amnesties that do not exclude these crimes, and EU officials also follow these guidelines. On the whole, amnesty provisions agreed upon in the DRC during this period have been in line with this international standard, a fact due at least in part to government reluctance to be seen to be giving in to enemies – indeed, amnesty laws have proved controversial. At Goma the CNDP demanded amnesty for all crimes and that warrants issued by international tribunals be lifted. The government strongly resisted these demands. The international facilitators, including the EUSR, pointed out that the ICC is independent, the facilitators could not influence it, and that any amnesty must exclude international crime. In the end, the parties at Goma agreed, without much discussion, to an amnesty clause that excluded genocide, war crimes and crimes against humanity, in line with international standards.²²

TRUTH-SEEKING MEASURES

The Sun City Accord provided for a Truth and Reconciliation Commission (TRC).²³ Its mandate was to establish the truth of crimes and human rights violations committed between independence (1960) and the end of the transition (2006); to identify victims and perpetrators, individually and collectively; to re-establish national unity on

17 ‘DRC: Rape cases up by 60 percent in North Kivu - UNHCR’, IRIN, 17th October 2007. Available at <http://www.irinnews.org/Report.aspx?ReportId=74767>.

18 UN Security Council (2008). *Final report of the group of experts on the Democratic Republic of Congo*. S/2008/43. Available at www.un.org/sc/committees/1533/egroup.shtml.

19 P. Vinck, P. Pham, S. Baldo and R. Shigekane (2008). *Living with fear: A population-based survey on attitudes about peace, justice, and social reconstruction in eastern Democratic Republic of Congo*. Berkeley, US: Human Rights Center of the University of California Berkeley, Payson Center for International Development, and the International Center for Transitional Justice.

20 For in-depth analysis, see: L. Davis and P. Hayner (2009). *Op. cit.*

21 Resolution No. DIC/CPR/05 from Sun City. The resolution called for a court to try cases of genocide, war crimes, crimes against humanity and mass violations of human rights since 1960 and including the two wars of 1996 and 1998. No request to establish such a court was made to the UN Security Council.

22 *Acte d’Engagement*, Article IV, par. 1.

23 Constitution of the Transition, Article 154 (2003). The TRC began work in February 2005.

the basis of acknowledging the facts, and perpetrators asking for and receiving pardon; and to provide reparation and rehabilitation for victims.²⁴ Yet the TRC lacked credibility: its executive committee included belligerents,²⁵ it had weak leadership and there was no public consultation on its design, membership, purpose or aim. But despite the failure of the first TRC, the desire for truth-seeking did not disappear: the Goma working group reports include explicit demands for formal truth-seeking processes,²⁶ and President Kabila, in his remarks during the closing ceremony, referred to the creation of a new TRC.²⁷

REPARATIONS

There has been very little effort to address the question of reparations on an individual or collective basis for victims of gross human rights violations in the DRC. Calls by the Goma conference for a commission to identify victims of the conflicts, to determine appropriate levels of compensation and to compensate the victims,²⁸ as well as demands for dignified funerals and symbolic memorials for victims of the war,²⁹ have not been acted on.

SECURITY SYSTEM REFORM

Dismantling the armed groups is urgent, and the police and army are in great need of justice-sensitive reform.³⁰ DDR, the most contentious element of the Goma agreements, was agreed to only in broad terms, with no reference to reform. The Goma workshop reports made specific recommendations for vetting: those guilty of massacres, sexual violence or inciting hatred were to be prevented from holding positions of responsibility.³¹ But the final conference report included no mention of vetting, even in general terms, which suggests a disconnect between popular demands and the leadership's views.

ROLE OF CIVIL SOCIETY

Civil society organisations have extensively documented human rights violations in the DRC since the 1990s, and these groups have been at the forefront of demanding an end to impunity. But over the past 10 years civil society has been excluded from most of the peace talks; Sun City and Goma are the two notable exceptions, and even these processes were dominated by the belligerents. Yet civil society participation has been crucial for raising justice issues and putting pressure on the signatories and international facilitators to address them. This was also often the only way for women's voices to be heard. In other countries, civil society organisations have played an important role in public consultations on the design and implementation of transitional justice mechanisms, but in the DRC they have not had this opportunity.

SMALL STEPS, LARGE HURDLES

The justice provisions in peace deals made between 1999 and 2008 had some strong points, but more weaknesses. The amnesty provisions were in line with international standards and best practice despite the presumption that the parties would seek impunity for their crimes. But in the absence of any serious attempts to prosecute human rights abusers at the national level, the value of the limitations on amnesty is questionable. Despite calls for justice, there was little provision for measures to pursue accountability, with the exception of the flawed TRC agreed to at Sun City.

24 Loi No. /04/018 du Juillet 30 2004 portant sur l'organisation, attributions et fonctionnement de la Commission Vérité et Réconciliation, Articles 4, 8.

25 The Executive Committee included representatives of the parties to the Sun City Accord. Constitution of the Transition, Article 157 (2003).

26 *Report from the South Kivu working group, Goma conference on peace, security and development in the Kivus* (January 2008). Recommendation f) 1, 2 and Section 3: Conflict Management and Resolution, Recommendation 1.5.7.

27 'After many years of war, peace will not flourish without dialogue and forgiveness. The conference has addressed this, and the Truth and Reconciliation Commission that you requested will complement the work that has already been initiated'. President Joseph Kabila, remarks at the closing ceremony of the conference on peace, security and development in the provinces of North and South Kivu, 22nd January 2008. Quoted in L. Davis and P. Hayner (2009). Op. cit. (Translation by authors.)

28 *Report of the South Kivu working group, Goma conference on peace, security and development in the Kivus* (January 2008). Recommendations I e) 5, 6.

29 Ibid. Recommendation I a) 16.

30 See: L. Davis (2009). *Justice-sensitive security system reform in the Democratic Republic of the Congo*. Security Cluster, Initiative for Peacebuilding. Available at http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf.

31 *Report of the South Kivu working group, Goma conference on peace, security and III c) 3. Report of the North Kivu working group*. Recommendation III 3. A. 1.

The agreements were usually negotiated while fighting was continuing in some part of the territory or sub-region, or at best during a fragile period of truce. Even when fighting was suspended, as during the Goma talks in 2008, combatants carried on illegally extracting natural resources and armed men continued to commit crimes against the civilian population. In March 2008, after successful lobbying by Congolese officials, the UN Human Rights Council failed to renew the mandate of the UN expert on the DRC, despite continued appalling levels of human rights violations. A group of national and international NGOs called for a high-level special envoy on human rights in eastern DRC to monitor the peace process after the Goma agreement.³² International facilitators, including the EU, and other donor states supported this proposal, but it came to nothing.

In future negotiations, it may help reduce ongoing violence to institute a human rights monitoring mechanism independent from the parties involved. This initiative could inform the entire peace process, from talks about talks through to implementation of an agreement. Human rights violations constitute a ceasefire violation, so if an independent human rights monitor reported that an armed group was committing abuse, then that armed groups' participation in the peace process would be put at risk. Participants in the Goma talks recalled in interviews that "respectability" was important for representatives of armed groups such as the CNDP. Reports of human rights abuses would be undesirable, as they would reduce the standing of delegates to the talks.

International facilitators tended to see political settlement – the dividing up of political power – between the warring parties as the most pressing priority. And given the constant threat of future abuses, insisting on accountability for past crimes is difficult. Moreover, root causes of the conflict remain largely ignored. This is understandable in many ways. But since there is little chance that belligerents will be held accountable for their crimes, the result is broad and deep impunity. This culture of impunity enables and perhaps even encourages ongoing violence, particularly against the civilian population.

At the time of writing, the only impediment to this culture of impunity is the ICC, but here too its impact has been mixed.³³ The ICC is not, of course, represented at negotiations, but its invisible presence is an important factor, influencing both national and international actors, particularly EU and UN officials. The DRC signed the Rome Statute, the treaty that established the ICC, in 2000 and ratified it in 2002. In 2004, largely in response to demands from civil society and international pressure, the transitional government asked the prosecutor to investigate crimes committed in the DRC. But it can consider only crimes that took place after 1st July 2002, when the Rome Statute went into force – a serious limitation on the ICC's effectiveness in the DRC. The prosecutor's early investigations focused on Ituri District, although many Congolese see the Ituri conflict as a sideshow to the real conflict. The four warrants unsealed so far are all for crimes allegedly committed in this district. Since March 2006, three men (Thomas Lubanga, Mathieu Ngudjolo and Germain Katanga) have been arrested for war crimes and crimes against humanity, and transferred to The Hague for trial. Lubanga's trial opened in January 2009. But Bosco Ntaganda, who is charged with war crimes by the ICC, is currently deputy to John Numbi in the joint DRC/Rwanda military operations against the FDLR.³⁴

The culture of impunity has many causes. Congolese elites lack the political will to bring perpetrators to account. The national justice system is extremely weak. International organisations have focused on the immediate priority of stopping the fighting rather than addressing the underlying causes. And the elites have been able to ignore demands for justice from independent advocates, who reflect public opinion.³⁵

32 Human Rights Watch, 'DR Congo: End the horrific suffering in eastern Congo: 63 leading NGOs press for urgent implementation of Goma peace agreement', 23rd April 2008. Available at <http://www.hrw.org/en/news/2008/04/21/dr-congo-end-horrific-suffering-eastern-congo>; Human Rights Watch, 'HWR letter to Abbe Malu Malu and the international facilitators to the Goma peace agreement', 1st May 2008.

33 See: L. Davis and P. Hayner (2009). *Op. cit.*

34 Jean-Pierre Bemba, former rebel leader, vice-president and senator, also awaits trial in The Hague. But the charges against him relate to crimes allegedly committed in the Central African Republic, not the DRC.

35 P. Vinck et al. (2008). *Op. cit.*

THE EU'S ROLE

Efforts to halt the fighting in the DRC have gained considerable international attention over the years. The Organisation of African Unity (now African Union) facilitated the Sun City talks. The UN Mission in the DRC (MONUC) has been active in peace negotiations since it was established in 1999. With 17,000 troops, it is now the largest peacekeeping operation in the world. Since mid-2007, the US has been increasingly engaged in the DRC. The focus of this section, however, is the EU's role in recent negotiations.

Foreign policy is still seen as part of a Member State's sovereignty; the Common Foreign and Security Policy (CFSP) is decided by the 27 Member States, not the European institutions *per se*. Member States have different opinions and traditions regarding some regions of the world, often rendering a common position difficult. Javier Solana, the High Representative of CFSP and Secretary-General of the Council of the EU, is the EU's foreign policy chief, supported by the Council secretariat in Brussels. The European Commission (EC) and European Parliament have limited political influence over CFSP. They do, however, control the budgets for the EC's large aid programmes, some of which – like the Instrument for Stability and some of the regional instruments – complement and reinforce CFSP in the medium and long term. The Treaty of Lisbon (2007) has various provisions that might enable more common foreign policy, but the Irish rejection of the treaty in June 2008 has stalled reform for the present, at least.³⁶

Two components of CFSP are important for the purposes of this paper: the European Security and Defence Policy (ESDP) "pillar", which includes peacekeeping and crisis management missions, and the EUSR's. The EUSR's – of which there are currently 11 – are appointed to support Javier Solana in specific regions of the world. Their mandates vary according to the political context, but in general their role is to promote EU policies and interests, to assist in efforts to consolidate peace, stability and the rule of law, and to help coordinate EU policy.

The DRC has proven something of a test case for the EU. The first EUSR, Aldo Ajello, was appointed in 1996.³⁷ Ambassador Roeland van de Geer, a Dutch diplomat with considerable Africa experience, succeeded him in February 2007.

In 2003 the EU launched its first military operation independent of NATO assets in Bunia, Ituri at the request of the UN Security Council.³⁸ French-led and code-named Artemis, it was the first ESDP mission in the DRC – it also formed the basis of future EU battlegroups, intended to be rapid response capabilities to be used primarily at the request of the UN Security Council.³⁹ The Artemis mission's mandate was short term (less than three months) and geographically limited to Bunia. A highly trained and well-equipped peacekeeping mission, it was charged with increasing security and protecting civilians.⁴⁰ It was not a low-risk operation. It showed that the EU can (and did) act quickly and decisively when there is the political will to do so.⁴¹ It had considerable impact, improving security in Bunia and demonstrating a united European commitment to stability in the region. In 2006 the EU launched a second military operation, EUFOR RD Congo, to help provide security in Kinshasa during the elections.⁴²

³⁶ In order to come into force, the treaty has to be ratified by each Member State.

³⁷ Then "special envoy".

³⁸ UN Security Council Resolution 1484, 30th May 2003, and Council Joint Action 2003/423/CFSP, 5th June 2003, on the EU military operation in the DRC.

³⁹ S. Biscop (2005). *The European security strategy: a global agenda for positive power*. Surrey, UK: Ashgate. p.77.

⁴⁰ UN Security Council Resolution 1484, 30th May 2003, para. 1.

⁴¹ S. Biscop (2005). *Op. cit.* p.12.

⁴² UN Security Council Resolution 1671, 25th April 2006, and Council Joint Action 2006/319/CFSP, 27th April 2006.

In November 2008 the UN Security Council authorised an increase of nearly 3,000 peacekeepers in the DRC.⁴³ Throughout 2008 European NGOs campaigned for an “Artemis II”: a European peacekeeping mission of combat troops to be sent to eastern DRC to protect civilians.⁴⁴ In December UN Secretary General Ban Ki-moon made a formal request to the EU for such a mission. Discussions within the EU over the proposal were heated. Development Commissioner Louis Michel addressed the EU foreign ministers’ discussion by telephone from the DRC, and reported that UN Special Envoy Obasanjo and President Kabila felt that the political process in the east was gaining ground and that a separate EU force was not necessary.⁴⁵ In the end the French, German and UK governments were against sending a separate EU force, preferring to reinforce MONUC; of the Member States most active in the DRC, only the Belgians were strongly in favour.⁴⁶ At the time of writing, although EU Member States such as Belgium and the Netherlands have increased their material support to MONUC, no Member State has committed extra troops to the mission.

Although there are now no EU military operations in the DRC, two of the 11 current ESDP missions are in the DRC: the EU Mission to provide advice on and assistance with security sector reform in the DRC (EUSEC RD Congo) and the EU Police Mission in the DRC (EUPOL RD Congo). Both are civilian missions concerned with security system – or sector – reform (SSR)⁴⁷ of the military and police respectively,⁴⁸ and both report to the EUSR. The EC has significant development and humanitarian aid programmes, plus projects financed under other instruments, such as the Instrument for Stability and the Instrument for Democracy and Human Rights (EIDHR). Since 2003, for example, the EC has committed €300 million for humanitarian assistance, rehabilitation and capacity-building programmes in eastern DRC. An additional €75 million was made available for post-urgency programmes in the east via the European Development Fund (EDF) and a further €50 million of humanitarian aid in 2008 that focuses largely on the east.⁴⁹ The EC also made €10 million available to support peace and stabilisation in the Kivus via the Instrument for Stability.⁵⁰

In addition to the European institutions, many Member States themselves have a presence in the DRC. The most active in terms of bilateral diplomacy and aid are Belgium, France, the Netherlands, Sweden and the UK. Of these, Belgium, France and the UK have the strongest presence; each has its own history in the region that influences its engagement in the DRC. The UK’s foreign policy in the DRC tends to be seen in light of its strong relations with Rwanda and Uganda – and east Africa in general. France’s diplomacy in the region is tempered by accusations that it assisted Hutu Power and the Interahamwe during the Rwanda genocide of 1994. Today France has no diplomatic presence in Kigali. Although France led the Artemis mission in Bunia, its relationship with Kigali would prevent French troops leading, or perhaps even contributing to, an EU peacekeeping mission in the Kivus, close to the border with Rwanda.

Belgium, the former coloniser, has both the most strained relationship with Kinshasa and the largest formal and informal networks across the country. Diplomatic relations can be difficult: in May 2008 Belgian Foreign Minister Karel de Gucht commented that, given that annual Belgian aid to the DRC totals over €200 million, Belgium had the moral right – even the obligation – to say when things were going wrong, including criticising the elites. Kinshasa reacted angrily and relations deteriorated swiftly, culminating in the closure of the Belgian Consulates-General in Lubumbashi and Bukavu.⁵¹

43 UN Security Council Resolution 1843, 20th November 2008.

44 For example, see: Oxfam, ‘Oxfam calls for EU troops to support UN peacekeepers in Congo’, 2nd November 2008. Available at <http://www.oxfam.org.uk/applications/blogs/pressoffice/?p=2144>.

45 British Foreign Minister David Milliband’s blog, ‘Congo: Setting the record straight’, 15th December 2008. Available at blogs.fco.gov.uk/roller/miliband/entry/congo_setting_the_record_straight.

46 For example, see: T. Vogel, ‘EU rejects UN request for Congo force’, *EuropeanVoice.com*, 12th December 2008. Available at <http://www.europeanvoice.com/article/2008/12/eu-rejects-un-request-for-congo-force-/63419.aspx>.

47 For simplicity, SSR denotes both “security sector reform” and “security system reform” in this paper.

48 EUSEC is staffed primarily by military personnel, but unlike Artemis (2003) and EUFOR RD Congo (2006), EUSEC is a civilian mission: its mandate does not include peacekeeping tasks.

49 European Commission (undated). *Democratic Republic of Congo (DRC) elements of the European response to the crisis*. Available at http://www.consilium.europa.eu/uedocs/cmsUpload/DRC-Elements_on_European_response-v.EN.pdf.

50 European Commission External Relations website. Available at http://ec.europa.eu/external_relations/ifs/projects/sub_saharan_africa/index_en.htm.

51 An example of press coverage in Congo: ‘RDC-Belgique: le conflit’, *Le Potentiel*, 26th May 2008. Available at http://www.lepotentiel.com/afficher_article.php?id_edition=&id_article=64884; in Belgium: ‘Congolees-Belgische relaties stevenen af op een zelden gezien dieptepunt’, *De Morgen*, 26th May 2008. Available at <http://www.demorgen.be/dm/nl/990/Buitenland/article/detail/289212/2008/05/26/Congolees-Belgische-relaties-stevenen-af-op-een-zelden-gezien-dieptepunt.dhtml>; ‘La crise entre Bruxelles et Kinshasa’, *RTL-TVi*, 24th May 2008. Available at <http://www.rtlinfo.be/rtl/archive/article/132608/?&archiveYear=2008>. At the time of writing, relations have improved.

In recent years Belgium has not contributed combat troops in central Africa; the parliamentary enquiry investigating the deaths of 10 Belgian paratroopers during the Rwandan genocide recommended that no Belgian combat troops participate in peacekeeping missions in former Belgian colonies.⁵² By December 2008, however, in response to the UN request for a EU peacekeeping mission, the Belgian foreign minister indicated that Belgium could contribute combat troops to a European mission but would not act as lead nation.⁵³

Member States also retain bilateral aid programmes of varying sizes covering a range of areas, from humanitarian relief and development aid at one end of the policy spectrum through to defence at the other. Bilateral aid programmes are decided in national capitals and designed separately from EC programmes, while bilateral defence programmes are sometimes decided in national capitals without consultation of in-country embassy staff.⁵⁴ Despite these structural hurdles to cooperation, EU Member States in the DRC manage a level of coordination and information sharing that, while falling short of a common policy or common strategy, is probably 'as good as it gets anywhere'.⁵⁵

The EU institutions and Member States support a range of programmes to promote justice, human rights and the rule of law in the DRC. The Rejusco project to restore the justice sector in the east, for example, is co-financed by the EC, Belgium, the Netherlands and the UK. There are also extensive projects with civil society in this field. The EU institutions and Member States also provide assistance to DDR programmes and SSR projects. While these projects do not form part of facilitating peace processes, they may form part of the EU's leverage in the DRC.⁵⁶ They are also crucial to any implementation of justice elements in peace deals given the weakness of the DRC's justice sector.

THE EUSR AS FACILITATOR

One of the objectives of the CFSP is 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'.⁵⁷ The EU, which is increasingly engaged in facilitating peace processes, has been characterised as combining a non-interventionist, facilitative style in conflict resolution with a power-based approach to mediation.⁵⁸ This seems a reasonable description of the EU in Congo, where the EUSR has been active in facilitating peace negotiations while the EC and Member States have provided substantial funding to support and implement the agreements: extensive EC and Member State aid provides much of the leverage for the EU in this context. Still, it is not an option to withdraw this "carrot" – officials are determined that a lack of money will not cause a peace process to falter in the east.

EU and Member State officials alike regret the EU's lack of "sticks" to help enforce peace agreements. Demands for an "Artemis II" peacekeeping mission were not met. Other options, such as extending existing UN sanctions against named individuals, were dismissed on political grounds.⁵⁹ In fact, those interviewed for this study agreed that, unfortunately, the only stick is the ICC, which is of course independent and can target only a very small number of alleged abusers.

The role that the EUSR played in the negotiations between the government and armed groups is important. But note that this was not a role he played independently. The EUSR was very much part of the international facilitation team – the core of which consisted of the EU, UN and US – and acted as part of that team. Observers considered the coordinated operations of the EU, UN and US in the talks as an advantage; the close working

52 'Recommendation 5: Parliamentary commission of inquiry regarding the events in Rwanda: Report in the name of commission of inquiry by Mr. Mahoux and Mr. Verhofstadt', Belgian Senate Session 1997-1998, 6th December 1997, Doc. 1-611/7. This recommendation is not legally binding and, predating ESDP missions, refers to UN missions, but Belgian officials took this as policy until late 2008. Interviews, Belgian officials, Brussels, May 2008.

53 'No prospects of EU force in Congo-Belgium', *Reuters AlertNet*, 2nd December 2008. Available at <http://www.alertnet.org/thenews/newsdesk/L2152930.htm>. Although Belgium would commit troops to a EU mission, it would not place troops under UN command.

54 Interviews, European diplomatic staff, Kinshasa, June 2008; Interviews, European officials, Brussels, May 2008.

55 Interview, European official, Brussels, May 2008.

56 A. Herrberg (2008). *Perceptions of international peace mediation in the EU: A needs analysis*. Mediation Cluster, Initiative for Peacebuilding, p.15. Available at http://www.initiativeforpeacebuilding.eu/pdf/Needs_analysis.pdf.

57 Article 11, Treaty on EU.

58 A. Herrberg (2008). Op. cit. pp.6-7 and 9. In a power-based approach to mediation, the mediator plays a direct role in formulating solutions and enticing partners to agree to a solution, often bringing his/her interests into the negotiations.

59 Interview, European diplomat, Goma, 2008; Interview, European official, Brussels, 2008.

relationship between Roeland van de Geer, his US counterpart Tim Shortley, and Alan Doss for the UN,⁶⁰ was considered one of the strengths of the facilitation team. Other international actors welcomed the fact that all EU Member States were represented by the EUSR and so could 'speak with one voice'.⁶¹

The group deliberately uses the term "facilitator", not "mediator", the latter apparently implying too much influence over the outcome of negotiations. The EUSR's signature to the Goma peace agreement is as an observer and as a guarantor of its implementation, particularly the disarmament, demobilisation and reintegration of the armed groups.⁶² In June 2008 the mandates of EUSEC and EUPOL were extended to explicitly include support for implementing the Goma agreements. EUSEC was tasked with 'providing support for the EUSR, as and when necessary, in the context of the work carried out by the committees for the process of pacification of the Kivus'.⁶³ EUPOL would provide support to implementing police reform in the context of the agreements.⁶⁴ The EUSR's signature did not – and could not – commit the EC to anything. But the EC and Member States committed funding to follow up and implement the agreements, and the EUSR was certainly perceived as being able to influence these decisions.

THE EUSR FOR THE AFRICAN GREAT LAKES: THE POLICY FRAMEWORK

Ambassador van de Geer's mandate includes contributing to the stabilisation and consolidation of the post-conflict situation in the African Great Lakes region; addressing the problem of cross-border armed groups; and contributing, 'where requested, to the negotiations and implementation of peace and ceasefire agreements between the parties'.⁶⁵

His mandate also stipulates contributing to the post-conflict stabilisation in Burundi, Rwanda and Uganda, and to accompanying peace negotiations with armed groups like the *Forces Nationales de Libération* (National Forces of Liberation, or FNL) and the Lord's Resistance Army (LRA).⁶⁶ Yet the DRC-specific policy objectives relate to SSR and consolidating the new "post-transition" institutions; there is no reference to accompanying peace negotiations.⁶⁷ This discrepancy is not due to a lack of will for the EUSR to be engaged in talks in the DRC, for he enjoyed considerable political support from Member States in this regard. Rather the explanation lies in the date that the EUSR's mandate was drafted: no talks were foreseen in February 2007 when the original mandate was drawn up, and by February 2008, when the mandate was renewed, the Nairobi and Goma agreements had already been finalised.⁶⁸ The EUSR is also to promote a human rights agenda based on the EU's human rights policies.⁶⁹

JUSTICE IN PEACE NEGOTIATIONS

As noted above, a society emerging from conflict or authoritarian rule has a variety of means for seeking justice: criminal prosecution of at least those most responsible for serious, systematic human rights violations; non-judicial truth-seeking measures, such as truth commissions; reparations for victims; and justice-sensitive reform of public institutions, particularly the security system. Justice, therefore, includes and goes beyond a narrow definition of criminal justice: punishing the perpetrators of crimes. Justice also seeks to acknowledge the harms inflicted on the victims – and, crucially, to recognise that this was and remains wrong. It aims to restore the

60 Tim Shortley was senior advisor for conflict resolution in the US Department of State and represented US Assistant Secretary of State for African Affairs Jendayi Frazer. Alan Doss became special representative of the UN Secretary-General (SRSG) in the DRC in January 2008. UN representation at Goma was somewhat interrupted: the outgoing SRSG, William Swing, was present at the opening ceremony, and Doss took up his position as SRSG while the negotiations were underway. For the most part, the UN was represented by senior staff in Goma.

61 Interview, US official, Goma, June 2008.

62 *Acte d'Engagement*, Article IV. 6. Goma, January 2008.

63 EU, Council Joint Action 2008/491/CFSP, 26th June 2008.

64 EU, Council Joint Action 2008/405/CFSP, 23rd June 2008.

65 EU, Council Joint Action 2007/112/CFSP, 15th February 2007, and Council Joint Action 2008/108/CFSP, 12th February 2008.

66 EU, Council Joint Action 2008/108/CFSP, 12th February 2008, Article 2. The FNL and LRA are respectively Burundian and Ugandan rebel groups.

67 EU, Council Joint Action 2007/112/CFSP, 15th February 2007, and Council Joint Action 2008/108/CFSP, 12th February 2008.

68 Interview, European official, Brussels, September 2008.

69 EU, Council Joint Action 2007/112/CFSP, Article 3(g), 15th February 2007 and Council Joint Action 2008/108/CFSP, Article 3(g), 12th February 2008.

victims' dignity and to (re)establish their position in society as fully rights-bearing citizens. This more inclusive definition of justice is key to peacebuilding efforts, as EU External Relations Commissioner Benita Ferrero-Waldner commented:

'Addressing the question of human rights abuse in transitional and post-conflict situations is instrumental in order to foster reconciliation and sustainable peace and stability'.⁷⁰

Analysis of peace agreements in the DRC between 1999 and 2008 shows how their terms have influenced the "post-conflict" settlements. At each stage, impunity has been entrenched. The result is ongoing conflict between armed groups and continuing abuse of the population. This suggests that addressing justice options during peace agreements is necessary for durable peace.

So what guidance is there for EU mediators on issues related to justice in peace negotiations?

CRIMINAL JUSTICE AND AMNESTY

Two aspects of criminal justice should be considered during peace negotiations. The first is preserving the possibility for justice even if prosecution of the worst offenders is not possible immediately or in the near future. This means avoiding amnesty for human rights offences in peace agreements, and at a minimum limiting amnesty to exclude international crimes: genocide, war crimes and crimes against humanity. The second aspect is rarely addressed at the negotiating table but provides the context for discussions of amnesty and broader justice issues: the likelihood that offenders will be prosecuted, nationally or internationally. Many factors contribute to this analysis, including the condition and capacity of the national justice system, the willingness of the authorities to investigate and prosecute, and the presence or absence of the ICC or other international or hybrid court.

The UN has clear guidelines for mediators: no amnesty may include international crimes or serious human rights violations. The EU does not, but the UN guidelines provide guidance for EU actors.⁷¹

EU actors also cited the Rome Statute as an important influencing factor.⁷² Although the EU itself cannot be a signatory, 25 of the 27 EU Member States are state parties to the Rome Statute.⁷³ The EU is a strong advocate of the ICC: in 2003 the European Security Strategy committed to further developing the ICC.⁷⁴ This was reaffirmed in 2008:

'The International Criminal Court should grow further in effectiveness, alongside broader EU efforts to strengthen international justice and human rights'.⁷⁵

The EU is committed to advancing universal support for the Rome Statute⁷⁶ and has an extensive agreement on cooperation and assistance with the ICC.⁷⁷ This agreement sets out the ways in which, in accordance with the EU Treaty, the EU institutions⁷⁸ would share information (including EU classified information) with the Court, cooperate with the prosecutor, waive privileges and immunities, and support training for Court personnel. The EU, upon the request of the Court, shall also provide facilities and services, including 'support at field level'.⁷⁹

70 EU, 'European Commission supports additional assistance for reconciliation of societies affected by human rights abuses', 1st July 2008, IP/08/1057, Brussels.

71 Interviews, European officials, Brussels, May 2008, and Goma, June 2008.

72 Interview, European official, Brussels, 2008.

73 The exceptions are the Czech Republic and Cyprus.

74 European Council (2003). *A secure Europe in a better world: European Security Strategy*. Brussels, Belgium. p.10. Available at <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>.

75 European Council (2008). *Report on the implementation of the European Security Strategy – Providing security in a changing world*. S407/08. p.12. Available at http://www.eu-un.europa.eu/articles/en/article_8370_en.htm.

76 Council Common Position 2003/444/CFSP.

77 Agreement between the International Criminal Court and the European Union on cooperation and assistance, ICC-PRES/01-01-06. For more information, see <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=2141>.

78 The Council of the EU, the Secretary-General/High Representative, the General Secretariat of the Council, and the EC, and specifically not the Member States. Ibid. Article 2.1.

79 Ibid. Article 14.

The EU's commitment to the ICC and the Rome Statute is important, as in practice the Rome Statute provides policy guidance for actors in the field when it comes to amnesty. The Rome Statute does not refer explicitly to amnesty, but it states that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.⁸⁰ It also says that immunities enjoyed by heads of state, for example, are not a bar to prosecution by the ICC for these crimes.⁸¹ Taken together, these provisions can be interpreted as rendering amnesties for international crimes irrelevant to ICC prosecutions. Indeed, granting amnesty for these crimes could even amount to an unwillingness or inability to prosecute these crimes domestically, which could then make a case admissible before the Court.⁸² Although the Rome Statute and ICC are young and such interpretations remain untested, these provisions are nonetheless understood as the basis for a non-negotiable policy for EU representatives: the EU could never witness or otherwise endorse an amnesty for international crime.⁸³

EU actors in the DRC were thus influenced by both UN guidelines and the Rome Statute. But what guidance does the EU's human rights policy framework offer on these questions?

In fact, EU policy on amnesty is piecemeal. Amnesties for certain crimes, such as war crimes, or against certain victims, such as children, are explicitly banned. EU guidelines on promoting compliance with international humanitarian law (IHL) only addresses war crimes:⁸⁴

'Individual responsibility: while, in post-conflict situations it is sometimes difficult to balance the overall aim of establishing peace and the need to combat impunity, the European Union should ensure that there is no impunity for war crimes'.⁸⁵

Explicit provisions on amnesty are laid out in the updated EU guidelines on children and armed conflict:

'The EU will seek to ensure that specific needs of children will be taken into account in early-warning and preventive approaches as well as actual conflict situations, peace negotiations, peace agreements, ensuring that crimes committed against children be excluded from all amnesties'.⁸⁶

As part of the international facilitation team and following advice from headquarters, the EUSR and his staff took a non-negotiable position on amnesty at Goma, guided by UN policy. This position was supported politically by Member States. But there is no central statement of EU policy on amnesty for genocide, war crimes and crimes against humanity. Now, however, there is precedent that the EU cannot accept amnesty for international crimes, and the policy gap should be closed. Otherwise in the future EUSRs who are not part of an international team including the UN might find themselves lacking the legal basis to insist on excluding international crimes from amnesty, a position that would put them at odds with international standards.⁸⁷

Limiting amnesties to exclude international crime can have unexpected results. An important challenge in the DRC is the demobilisation of child soldiers. Although DDR provisions were not agreed to in any detail at Goma, EUSEC was to provide technical assistance in implementing the Goma agreements, particularly DDR. The EU's position is clear: no children could be included in troop numbers as the armed groups demobilised. The intention is to remove any incentive to recruit child soldiers.⁸⁸ But the phenomenon known as the "Lubanga effect" by child protection experts poses a problem. Thomas Lubanga is charged with war crimes that include the recruitment, enlistment and use of child soldiers. His transfer to The Hague in March 2006 and the opening of his trial at the ICC in January 2009 raised awareness of the fact that enlistment and use of child soldiers is illegal. Armed groups seeking to demobilise would therefore incriminate themselves if they were to release the children

80 The Rome Statute of the International Criminal Court (July 2002), Preamble.

81 Ibid. Article 27.2.

82 Arguably, the obligation for states to investigate and prosecute core international crimes also emanates from the statute of the ICC, as state parties risk an intervention by the court if there is no genuine investigation or prosecution of these crimes.

83 Interview, European official, Brussels, May 2008.

84 Crimes against humanity are therefore not covered.

85 'The European Union guidelines on promoting compliance with international humanitarian law (IHL)'. Doc. 15246/05 III, Operational Guideline B16 (g) in European Communities (2008). *Mainstreaming human rights and gender into European security and defence policy: Compilation of relevant documents*. Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news144.pdf.

86 'EU guidelines on children and armed conflict'. Doc. 10019/08 II. 7. in Ibid.

87 Interview, European official, Brussels, February 2009.

88 Interviews, UN and European officials, Goma, June 2008.

in their ranks to child protection agencies as part of formal DDR processes. As a result, more children are now abandoned in the forest, beyond the reach of child protection agencies, which now have to redesign their strategies and programmes.⁸⁹

Under international law a state is obliged to investigate, prosecute and punish the perpetrators of certain international crimes.⁹⁰ Arguably, the value of limiting amnesties to exclude these crimes is realised only when perpetrators are prosecuted. The EU guidelines on promoting compliance with IHL includes the following, which is limited to war crimes:

‘To have a deterrent effect during an armed conflict the prosecution of war crimes must be visible, and should, if possible, take place in the State where the violations have occurred. The EU should therefore encourage third states to enact penal legislation to punish violations of IHL. The EU’s support of the ICC and measures to prosecute war criminals should also be seen in this context’.⁹¹

Yet despite significant funding from the EC and Member States for projects to rebuild the justice sector in the DRC, the state has made no meaningful attempt to meet its obligation to investigate these crimes and prosecute the perpetrators, particularly the high-level perpetrators, of serious human rights violations.

As noted above, the EUSR’s mandate includes a provision on promoting a human rights agenda. The EUSEC mission is mandated to contribute to reforming the army ‘with due respect for the principles of human rights, IHL, gender issues and children affected by armed conflict’.⁹² The EUPOL mission is to supply advice and assistance on police reform to the Congolese authorities, ‘taking care to promote policies compatible with human rights and international humanitarian law’.⁹³ But none of the CFSP mandates in the DRC – for the EUSR and for the two ESDP missions, EUPOL and EUSEC – explicitly address the prevention or suppression of violations of IHL by third parties or require active collaboration with the ICC, although EU guidelines on promoting compliance with IHL allow for such a possibility.⁹⁴

BEYOND CRIMINAL JUSTICE

While the EU is committed politically to supporting international justice, EU human rights policies offer insufficient guidance on amnesty for international crimes. And there is a whole range of transitional justice measures, beyond promoting the prosecution of the worst offenders, which EU facilitators could draw on, including non-judicial measures such as truth-seeking, reparations for victims and justice-sensitive institutional reform. The EU ‘Checklist on children affected by armed conflict’ includes provisions for engaging children in accountability and truth-seeking mechanisms and for protecting child participants.⁹⁵ The ‘Draft document on “transitional justice and ESDP”’ recognises that transitional justice can provide guidance in facilitating peace processes.⁹⁶ It also suggests developing transitional justice guidelines in line with UN standards and considering appropriate transitional justice elements in EUSR mandates.⁹⁷ Realising these commitments could greatly enhance the EU’s ability to promote justice in peace processes, especially through its Special Representatives.

THE POLITICAL CONTEXT

During the summer of 2007, concerned at the lack of progress in addressing the problem of armed groups in the DRC, a group of European diplomats started meeting in Kinshasa to reflect on possible strategies. One of the main impediments the group saw in the government’s response to the CNDP and the FDLR was an

⁸⁹ For more discussion, see L. Davis and P. Hayner (2009). *Op. cit.*

⁹⁰ This includes genocide and war crimes. The Rome Statute also prohibits crimes against humanity, so arguably the EU Member States (except Cyprus and the Czech Republic, which have not ratified the statute) must also prosecute crimes against humanity.

⁹¹ ‘The European Union guidelines on promoting compliance with international humanitarian law (IHL)’. Doc. 15246/05 III, Operational Guideline B16 (g), in European Communities (2008). *Op. cit.*

⁹² EU, Council Joint Action 2008/491/CFSP, 26th June 2008, Article 1 a) indent 3.

⁹³ EU, Council Joint Action 2007/405/CFSP, 12th June 2007, Article 1.1.

⁹⁴ ‘The importance of preventing and suppressing violations of IHL by third parties should be considered, where appropriate, in the drafting of mandates of EU crisis-management operations. In appropriate cases this may include collecting information which may be of use for the ICC or in other investigations of war crimes’. ‘The European Union guidelines on promoting compliance with international humanitarian law (IHL)’. Doc. 15246/05 III, Operational Guideline B16 (f), in European Communities (2008). *Op. cit.*

⁹⁵ ‘Checklist on children affected by armed conflict’, Doc. 9822/08, in *Ibid.*

⁹⁶ ‘Draft document on “transitional justice and ESDP” in view of the PSC meeting on 20 June 2006’. Doc 10674/06, para. 8, in *Ibid.*

⁹⁷ *Ibid.* para.9 d, e.

insistence on tackling the problem militarily (which, given the state of the army, it was badly placed to do) rather than politically. The group was informal, the core comprising British, Dutch, French and Swedish diplomats, and drew in experts from other institutions, former military advisers, and consultants. The group drafted a proposal with a common approach based on a shared analysis. It suggested a range of options within an integrated plan for addressing the FDLR and CNDP in turn. The plan adopted a “3-D approach” – development, diplomacy and defence – that included activities in Europe (and elsewhere) to target FDLR leaders.⁹⁸

But the group hit an obstacle: resistance from some national capitals, which found the proposal simply “too political”. One member of the group felt that parliaments and ministries have ambitious plans for meeting the Millennium Development Goals (MDGs) to combat poverty, which carry a high risk of failure in fragile or failed states. But the same government departments prove highly risk-averse when it comes to measures targeting a key root cause of poverty and underdevelopment in the DRC: insecurity.⁹⁹ But the group persisted. Members recounted how they found in the EUSR a catalyst for a common European position. At the same time, international concern at the growing casualties – and particularly the extent of rape and sexual violence in the east – brought more political attention in many European capitals to the conflict in eastern DRC. Member States that were not willing or able to increase their diplomatic engagement in the Kivus were happy to see an increased role for the EUSR.¹⁰⁰

The EUSR, Ambassador van de Geer, enjoyed strong political support from European diplomats in the DRC and in national capitals. Although not every Member State may have agreed with every action he took, they did agree that he spoke for the EU as a whole, and through him the Member States, even the larger and more active ones, presented a united front. For example, Belgium’s special envoy to the Great Lakes, Jozef Smets, played an active role during the Goma talks, yet Belgium declined to sign the agreement bilaterally, preferring to reinforce the EUSR’s role in representing all Member States.¹⁰¹

The EUSR’s office is reasonably well resourced, with two experienced staffers based in eastern DRC and a team in Brussels that has expertise in international justice. The EUSR’s staff is seconded from national governments, indicating that Member States’ political will is necessary for funding similar posts.

However, EU institutions have no dedicated mediation support resource (unlike the UN, which has a mediation support unit in the Department of Political Affairs¹⁰² and an expert five-person mediation support standby team). Such a resource could provide justice-oriented support to facilitators during negotiations. It could go beyond maximising the options for international criminal justice, drawing on experts from the transitional justice field to learn from past practice and to make EU facilitators more aware of the justice options available. This resource could complement the geographic expertise of the EUSRs’ teams as well as develop institutional memory and expertise.

98 Interviews, European diplomats, Kinshasa, 2008.

99 Interview, European diplomat, Kinshasa, 2008.

100 Interview, European diplomat, Goma, 2008.

101 Interview, Belgian official, Brussels, May 2008.

102 Formed in 2006, the UN’s mediation support unit is still fairly small.

CONCLUSIONS AND RECOMMENDATIONS

The last 10 years of peacemaking in the DRC have failed to bring to account those responsible for massive human rights violations. Despite some efforts to advance justice, impunity prevails. The justice provisions in the Goma peace agreement were limited to an exclusion of amnesty for genocide, crimes against humanity and war crimes. But perpetrators of these crimes are yet to be prosecuted in any systematic way in the DRC. The ICC has to date arrested only three suspects, all reasonably low level, for crimes believed to have been committed in the DRC. Despite the ICC warrant for Bosco Ntaganda's arrest, he holds a high position in the army. The reports of the Goma conference made detailed demands for truth-seeking, reparations and institutional reform, but these were not implemented.

In the DRC the EUSR, in close partnership with the US and UN representatives, was able to lead European diplomacy in facilitating a peace process in the east. This was achieved in part because of rising international concern at the plight of civilians (especially women), long-standing EU engagement in the country and good coordination between the EU actors in Kinshasa. In contrast to the situations in some other countries, Member States were willing for the EU to play a strong role. They supported the EUSR and were happy to be represented by him.

It is difficult to promote accountability in the DRC because the threat of continued violence is ever-present. In addition, diplomacy at the European level requires consensus among the Member States, which is not always possible. Recognising these two considerable constraints, this paper argues that the EU needs to develop policy in the key areas of amnesty and transitional justice to strengthen the EUSRs' role in promoting justice during future peace negotiations.

POLICY GUIDELINES FOR TRANSITIONAL JUSTICE

The EU's 'Draft document on "transitional justice and ESDP"' notes that a transitional justice framework can be useful for facilitators of peace agreements.¹⁰³ But despite political statements, EU policy currently provides very little guidance on how to address impunity for massive human rights abuse. To be most effective, ESDP guidelines would be supported by a Commission Communication on Transitional Justice to ensure coherence and continuity. This would also strengthen the EU's role in supporting the implementation of justice provisions in peace agreements.

FILLING THE POLICY GAP ON AMNESTY

In the DRC, the EUSR was influenced by the Rome Statute, UN guidelines and emerging international standards dictating that international crimes be excluded from amnesties. He took a firm position, with the full support of the Member States, ensuring that any amnesty with which the EU was associated excluded genocide, war crimes and crimes against humanity. Yet the EU does not have a written policy on amnesty for these crimes, relying instead on inference from various statements in human rights policies and the Rome Statute. This policy gap should be closed so that in the future, EUSRs have clear guidelines.

IN-HOUSE MEDIATION SUPPORT

The EUSR can draw on an experienced staff and on their expertise in international justice. But the EU has very little experience in facilitating peace agreements and lacks institutional memory. Although the EUSR may be able to draw on the experience of Member States, the EU needs to develop its own in-house resource offering

¹⁰³ 'Draft document on "transitional justice and ESDP", in view of the PSC meeting of 20 June 2006'. Doc 10674/06, in European Communities (2008). *Op. cit.*

technical assistance, including on transitional justice, to geographically-specific units. As the international legal landscape changes rapidly, this support could also include training in specific policy areas, developing guidelines for EU mediators and raising awareness of the justice options available to mediators.

TRANSITIONAL JUSTICE IN MANDATES

In areas where EUSRs and/or ESDP missions are playing an increased role in facilitating peace processes and supporting the implementation of peace agreements, the mandates should include consideration of transitional justice processes and cooperation with international justice mechanisms. The mandates could also explicitly refer to the prevention or suppression of violations of IHL.

INDEPENDENT HUMAN RIGHTS MONITOR

Even during periods of ceasefire and while negotiations are underway, armed men often continue to abuse the population. Appointing an independent human rights monitor during the peace process – from the talks leading to talks, through active mediation and facilitation, to the implementation stage – to advise negotiators of new human rights abuses could help to reduce the crimes committed against civilians. The monitor should be independent, but the EU could provide the funding and diplomatic support for such a position.

CIVIL SOCIETY

It is important that civil society be engaged in peace negotiations, to voice demands for justice and build public confidence in the resulting agreement. Careful selection of participants should ensure that legitimate civil society actors, especially human rights defenders, are represented. Technical assistance for civil society participants – such as training in negotiating skills – has been shown to be very useful in the DRC. The EU should support genuine civil society participation through funding and diplomatic pressure on the negotiating parties. CSOs can also play an instrumental role in the consultations crucial to successful transitional justice processes.

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