

Discussion Notes, Part Two

Humanitarian assistance in the DRC

The DRC is without doubt one of the most dangerous places for humanitarian workers. Humanitarian organisations have to engage with all stakeholders and belligerents in order to get crucial access to suffering populations. At the same time, they remain highly dependent on the various military authorities and have to rely on negotiating skills to ensure the safety of their staff. All participants acknowledged OCHA's tremendous effort under the most difficult of circumstances. In most cases, OCHA provides concrete benefits to civilian populations, a fact which belligerents are not able to deny (even for political reasons).

In this regard, Michel Kassa put forward his vision - to work towards human decency, countering the "logic of war". In other words, OCHA's strategy challenged interlocutors to go beyond their "partisan attitude" and cooperate with OCHA out of moral consideration. In addition, OCHA had maintained an impartial reputation over the years of war in the DRC. When many Rwandans left their dependants in Kinshasa in August 1998, for example, OCHA rescued them from popular anger in the capital. As Kassa pointed out, "when we later came back and asked the Rwandans for something, they could not accuse us of being partial". It is hard for most DRC political leaders to refuse OCHA's support when faced with the honest request for the provision of emergency relief to their own people.

However, humanitarian organisations face moral dilemmas as well. As one participant pointed out, the most delicate issue in this regard concerns the distribution of food to armed groups. Although well aware of the fact that a hungry soldier can turn violent towards the civilian population, OCHA simply cannot afford to supply combatants with food. "Being seen helping the ones committing the crimes can be dangerous", Kassa emphasised. In a situation where the World Food Programme (WFP) does not even have sufficient supplies to cover civilian needs, it would be a grave mistake to privilege the militias "for reasons of priority and morality". Michel Kassa considered that military leaders should take up their responsibility to provide salaries seriously, as there are abundant resources in the country to generate much needed income.

Human rights challenges

Training in Human Rights

MONUC's Human Rights Section aims to increase much-needed methodological capacity among Human Rights workers in the DRC. While there are three specific, so-called "train the trainers" modules under way to support investigations on child soldiers, sexual violence and material evidence collection, Roberto Ricci pointed out that training for MONUC personnel remains crucial as well. Unfortunately, the introductory course, which military observers attend upon arrival in the mission, is far too short and the value thereof is strongly dependent upon the personal interest of the individual soldier.

Peter Swarbrick commented that military observers were already "frightened with loads of new and unfamiliar information", making it very tempting but impossible for every section to contribute a training component within the first weeks of deployment. As a result, the day-to-day training in the field and the continuous interaction between different MONUC sections remain the best guarantees of good performance, even though this is also highly dependent on the capacities of the various sector commanders.

However, Roberto Ricci indicated that the Human Rights Section continues to rely on information from military observers, as they provide the entry point for many human rights investigations. In this regard, independent information gathering should not be regarded as unnecessary overlap. The Human Rights Section deliberately established a separate database on human rights violations, which will provide a valuable tool for future investigations: in order to judge on accusations, a prosecutor will be able to cross reference military information with the information compiled by human rights officers.

Limited resources and operational realities

Through the implementation of the objectives of the 1992 Agenda for Peace, Human Rights components are becoming gradually more integrated into the overall concept of UN peace operations. On the political level, there is very close interaction between the OHCHR in Geneva and the UN Headquarters in New York, in order to co-ordinate recruitment and political programmes. In the particular case of the DRC, a Memorandum of Understanding between the OHCHR and MONUC ensures complementarity in the work done. Through access to regular funds, the human rights section of MONUC has more human resources and wider geographic representation in the DRC. However, peacekeeping operations have serious limitations in handling voluntary contributions for technical cooperation activities. OHCHR, on the other hand, being

dependent on voluntary contributions has a much smaller staff. Yet, OHCHR has the capacity to manage projects of technical assistance and has established itself as a credible partner with the donor community. Hence, it often happens that OHCHR develops and manages technical cooperation activities and MONUC implements them in areas where OHCHR is not present. Another difference to be noted is the very nature of the two departments. MONUC is in the DRC for the short term; OHCHR, on the other hand, will hopefully continue its work in the DRC for the medium and, possibly, long term. It is, therefore, essential that in order to ensure a certain continuity, donor support to OHCHR increases as MONUC begins to phase-out.

In contrast to the military component, the Human Rights Section can deploy individuals into the field more easily (while being bound by certain logistical and, above all, security constraints). This being a clear advantage, Mark Malan indicated that there might be practical ideas within the Section on how to work more effectively, for example, through the establishment of mobile teams to investigate mass graves as in the case of Sierra Leone. In response, Roberto Ricci underscored that in the DRC, "we have to be grounded on reality". In contrast to the 126 human rights officers in charge of the UN effort in Rwanda in 1995, MONUC comprises 42 [national/international] human rights officers. If the new budget is approved, the Section would increase its personnel and its operational capacity, and thus be able to expand the work of the special investigation unit from Ituri to the Kivus and other areas.

However, MONUC will still not have sufficient resources to properly investigate mass graves. For reasons of priority, the bulk of the work will have to remain centred on the "mapping of different events", and it will be difficult for any humanitarian agency to assess the situation concerning missing people in the DRC. Roberto Ricci said that as far as he knows even the International Committee of the Red Cross (ICRC) had decided not to pursue the missing persons project, at least for the time being. "There is no immediate demand from the Congolese people for investigating the whereabouts of missing people." Moreover, such projects can at times raise immense expectations among the population and face great difficulties without adequate capacity to follow up on particular cases.

Civilian-Military Cooperation

The geographic and security situation in the DRC is such that human rights officers often operate under difficult circumstances, dependent on the military for security and transport. This largely prevents the Human Rights' Section from moving about freely and pursuing their work independently. As Roberto

Ricci confirmed, it is at times frustrating that human rights officers have to abide by MONUC's strict security guidelines. However, one should not doubt the necessity of security standards: "the system is there to protect our people", Ricci emphasised. In recent times, civilian-military cooperation within MONUC has greatly improved. In this regard, Ambassador Swing pointed out that he is determined to make the work of the Human Rights Section more significant within the mission, and recommended that special hopping flights be made available for urgent human rights investigations.

Justice versus peace?

Transitional justice in the immediate post-war period

The International Criminal Court

The discussion returned to the question of impunity: how to bring to justice those responsible for war crimes and crimes against humanity without compromising the peace process? Roberto Ricci stressed the need to put on trial the perpetrators of all ongoing human rights violations "under whatever capacity there is", but admitted that for the time being, the most important issue may be to "sensitise these people not to run for elections themselves". While the engagement of the International Criminal Court is a positive step towards justice in the DRC, it is the first case for the institution. In contrast to the Yugoslavia tribunal, the ICC is not part of the UN system and has no executive power. Consequently, it remains highly dependent on the cooperation of the states concerned.

Building on what already exists

The justice system in the DRC is virtually non-existent. The transitional government will have to initiate the creation throughout the DRC of all necessary institutions in order to bring justice to the Congolese people. Mahamane Cisse-Gouro emphasised the need for coordination between the UN, local authorities and civil society in order "to build a system on what little already exists". In this light, participants discussed how to integrate traditional justice systems into such an effort. While Antero Lopes argued that traditional justice should become part of the legislative and judicial process, Hans Romkema doubted whether existing traditional structures were a good complement to a national solution. In contrast to the Rwandan case, where the traditional Gacaca courts

had become one of the main pillars for the reconciliation process, the situation in the DRC was different. Research in the Kivus has indicated that there were three major problems with traditional courts:

- there is very limited consideration for women and their individual rights;
- historically, traditional courts have never played a great role in Congolese society ; and
- most of the original judges, who presided over local courts now lived in exile, with the result that these courts now enjoy little credibility within the community.

In response, Mahamane Cisse-Gouro pointed out that there would be an EU/UN mission visiting all eleven provinces in order to consult with grass-roots organisations on this matter. However, the UN will most likely play a facilitating role in this process. Even though the conclusions of the mission will be discussed with the transitional government, Mahamane Cissé-Gouro underscored that “the Congolese people will have to decide themselves”.

Justice versus political expediency

As there is no capacity to trial human rights violations, MONUC is concentrating on the documentation of key events. The discussion returned to the possible judicial mechanisms that would present the right balance between political expediency and the power to bring about real justice. In order to deal with the prosecutions, Anneke van Woudenberg emphasised that very objective people would be needed. Ideally, officials in charge would also come from countries that had not been implicated in the DRC conflict. “That is the only way you can assure that justice is done in a most fair and objective manner.” Consequently, most human rights organisations recommended a mixed court with a prosecutor’s office made up of “a mixed bag of people”. According to Anneke van Woudenberg, civil society groups and NGO’s had been lobbying for such a solution in order to guarantee a Congolese component within a valid national justice system, “but they want the mixed element in order to ensure that there’s as much objectivity as possible”. In response to Francois Grignon’s suggestion that the temporal jurisdiction of a mixed court should extend to the period before 1996, Anneke van Woudenberg argued against any earlier investigations. 1996 marked the crucial divide between civil war and international conflict, as international actors (in particular Rwanda) entered the scene at that point. Even though the massive human rights violations (i.e. the Lubumbashi massacres in 1993/94) should not go unpunished, it remained an inner-state affair to be tackled by the new Congolese authorities.

Transitional justice through a mixed court?

There is a clear and urgent need to fill the juridical vacuum in the DRC. As Mahamane Cisse-Gouro put it: "at this point, there is no way you can bring even one case to trial." Even though there are some well-trained magistrates who are willing to do the job, there are simply no means for them to operate. As a result, corruption is rife within the justice system, and this makes the DRC an inappropriate environment in which to bring about justice. The enormous resources needed for expensive investigations and the protection of witnesses indicate that in the short-term Congolese authorities will not be able to sustain serious judicial efforts.

As Mahamane Cisse-Gouro pointed out, it would take quite some time to develop an adequate justice apparatus that is capable of responding to the demands of the people. Given the obvious need for a long-term process that establishes a new national criminal justice structure, the transitional government has to devise ways to apply justice in the immediate future. In this regard, the International Criminal Court is not fully appropriate, as it would above all concentrate on economic crimes in the Ituri province and would have to struggle with continued resistance from the US to accept its legal authority.

Instead, participants suggested that a mixed court would be a good option to bridge the legal gap during the transition. In order to combine international experience and local expertise, both national and international appointees could be placed in charge of such a court. In Sierra Leone, the same concept was applied for trying combatants for war crimes committed during the war. However, it was argued that it was still too early to evaluate the performance of the Sierra Leone court. In addition, Anneke van Woudenberg pointed out that it should be kept in mind that it is inappropriate to compare the two countries, because in the case of the DRC, there was the delicate issue of judging non-Congolese actors. Rather than having a UN-mandated court or an expensive war crimes tribunal, Anneke van Woudenberg suggested installing a more flexible ad-hoc mechanism to deal with the period between 1996 and 1 July 2002, after which the ICC mandate would be applicable.

Mahamane Cisse-Gouro confirmed that there had already been consultations on a possible ad-hoc mechanism during the Inter-Congolese Dialogue. Ad-hoc or permanent, a mixed court would have to include a range of stakeholders, with whom OHCHR is in contact on a daily basis. As a purely national solution may be out of reach at this point, "a mixed court may indeed be helpful in addressing these issues".

The Truth and Reconciliation Commission (TRC)

While the composition of the Truth and Reconciliation Commission remains uncertain, the body will have to start its reconciliatory work in the near future. Despite the obvious lack of objectivity and the logistic impossibility to conduct serious human rights investigations, Hans Romkema recommended that the UN, the OHCHR and MONUC get involved in the process as soon as possible. In the Kivus, local NGOs and civil society members have already started to organise numerous (though small-scale) grassroots initiatives, and the UN might quickly be “overtaken by events”.

Mahamane Cisse-Gouro reaffirmed the UN’s involvement and commitment to the TRC process: “our office in Kinshasa is working on ways to surpass the difficulties in terms of appointees, timing and mandate.” In addition, the OHCHR continues to lobby the transitional government and potential donors in order to secure a workable Truth and Reconciliation Commission. It became clear however, that the body was not workable as it stood in September 2003, for “it *de-facto* promotes impunity”.

Francois Grignon stressed that the crucial question of what kind of court would be an appropriate adjunct to the TRC still remains. Especially as regards economic crimes committed over the last decades, there had to be a decisive mechanism to ensure “that those criminals do not line up for the next election and gain control of the parastatals.”

The challenges of investigation

United Nations’ investigations

Until the Congolese state has a workable justice system, it remains a major challenge for the international community to continue investigatory efforts on human rights perpetrators. Even though the UN may, in some quarters, have gained the sad reputation of being the mere caretaker of the dead, the world body will surely have to expand its investigation engagement beyond documentation (even though within these capacities are limited and prospects far from satisfactory). Roberto Ricci pointed out that coordination within the UN family was still in the making, and that in addition, there would have to be a guarantee of regular funding for the UN Office of the High Commission of Human Rights so that proper investigative work can be conducted. “You can have as many people as you wish, but it is to no use if it is based on voluntary contributions.”

Michel Kassa explained some of the possible consequences of the above: when massacres occurred in Ituri in 2001, several humanitarian organisations

organised human rights teams to investigate the mass graves. Due to major delays in funding, however, the detainees had corrupted civil servants and had fled the town by the time the teams had arrived. However, Mahame Cisse-Gouro emphasised that the concept of mobile justice teams, while very tempting in theory, might be too expensive and donors may be hesitant in providing support. "There must be an alternative way to reshuffle and strengthen the justice system" he added.

Impact of the Mambasa Investigation

The Mambasa case marked the first of eleven UN-led human rights investigations. Due to incorrect press statements by the UN and the international press as regards cannibalism charges against the MLC military, this first investigation "made far more noise than any other" as Roberto Ricci pointed out. Even though the allegations were helpful in creating international pressure towards the MLC leader, Jean-Pierre Bemba, several participants expressed concern on whether it had been appropriate to use human rights investigations for political ends. However, it became clear that the way the Mambasa case had been published had a major impact on the peace process. First, it damaged Jean-Pierre Bemba's reputation and forced the MLC leadership to support the Gbadolite cease-fire agreement. Second, participants suggested that there was a direct link between growing international awareness about the massive scale of human rights violations in the DRC and the upgrading of MONUC to a Chapter VII peace operation. Rejecting this interpretation, Col. Cornett saw MONUC's new mandate rather as a result of "accumulating factors": at the time the French-led Interim Emergency Multinational Force (IEMF) was being planned, the French government set the Chapter VII as a precondition for their military engagement. After the transition from IEMF to MONUC, "it made little sense to have one sector operating under Chapter VII and the rest under Chapter VI." In this light, Col. Cornett argued that the Mambasa case did not have an impact on the overall UN operation. However, Mahame Cisse-Gouro noted that the case broke a taboo, in addressing the issue of impunity in the DRC.

In general, however, participants agreed that the repeated calls by the Security Council against impunity had certainly been a result of the Mambasa investigation and the subsequent visit of the late High Commissioner for Human Rights to the DRC (who had then presented the findings of the MONUC investigation in Geneva and New York). Mahame Cisse-Gouro concluded: "I think one of the major impacts was to bring the issue of impunity to the attention of the international community". While acknowledging that the fact that Mambasa was "blown out of proportion" had some positive effects,

Anneke van Woudenberg rejected politically-motivated investigations and called for a minimum of standards of international justice: "justice should not be different because of a different political reality."