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Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo

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Article 215 of the Constitution of the Democratic Republic of Congo (DRC) is the entry point for international law into the DRC legal complex. It provides that international treaties and agreements duly ratified by the state predominate over Acts of Parliament. Cases and studies involving the direct effect or self-executing norms of international law in domestic cases are rare in the DRC. The correct ways of applying Article 215 of the Constitution and international law in domestic cases have not yet been authoritatively settled. The basic dilemma is whether courts should read the provisions of relevant international treaties into disputed provisions of DRC laws or read the disputed provisions in the light of the relevant treaty provisions.

Using as a case study the emerging practice of DRC military courts of directly applying international criminal law in domestic cases, the article argues that carelessly cutting and pasting formulations found in international treaties into the texts of applicable municipal laws infringes state sovereignty. Instead, the article proposes a strategy that would avoid unpleasant friction between international criminal law and municipal law, while encouraging cultural pluralism and the judicious intervention of international law in municipal law.

Keywords: international criminal law, Democratic Republic of Congo, Constitution, subsidiarity, military courts

1. Introduction

The Democratic Republic of Congo (DRC) was, from 1998 to 2003, engulfed in a regional conflict that culminated in 'Africa's World War', drawing in eight different African countries on opposite sides of the conflict.[1] The conflict claimed the life of millions of innocent DRC nationals and resulted in the widespread and systematic commission of all manner of abuses, especially sexual violence against women and girls in eastern DRC.[2] The abuses were committed by rebels and members of the DRC army. After decades of mismanagement under Mobutu Sese Seko[3] and the nefarious legacies of the 1998–2003 conflict, the DRC army had become largely

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[1] For more information on 'Africa's World War', see Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide and the Making of a Continental Catastrophe* (Oxford University Press 2008); Phebe Mavungu Clément 'The "African World War" and the Challenges to the Enforcement of Redress for Victims of Violations of Human Rights and International Humanitarian Law' (2008) *African Yearbook of International Humanitarian Law* 137–62.

[2] Joanna Mansfield, 'Prosecuting Sexual Violence in the Eastern Democratic Republic of Congo: Obstacles for Survivors on the Road to Justice' (2009) 9 *African Human Rights Law Journal* 367–68.

[3] For more information on the reign of Mobutu Sese Seko, see Georges Nzongola-Ntalaja, *The Congo from Leopold to Kabila: A People's History* (Zed Books 2002); Isidore Ndaywel È Nziem, *Histoire Générale du Congo: De l'Héritage Ancien à la République Démocratique* (Afrique-Editions 1998).

dysfunctional, preying as it did on the very people it had been constituted to serve and protect.[4] Though conflict and impunity persist in many parts of eastern DRC, the criminal conduct of some government soldiers inexorably led to their prosecution before domestic military courts.

In two court cases arising from the DRC conflict, *Eliwo*[5] and *Massaba*,[6] both decided in 2006, military judges applied the provisions of the Rome Statute establishing the International Criminal Court (ICC Statute)[7] to DRC criminal laws in interpreting laws and sentencing the accused government soldiers. The judges directly applied the provisions of the ICC Statute to DRC criminal law by virtue of Article 215 of the DRC Constitution, which provides that international treaties duly ratified by the DRC have, upon publication, a superior authority than national legislation. *Eliwo* and *Massaba* enforced the provisions of the ICC Statute over those of DRC law for similar reasons: the ICC Statute embodies effective protective mechanisms for victims and more humane punishment.

The two cases strengthen the standard-setting role of the ICC Statute, independently of the jurisdiction of the International Criminal Court (ICC) itself, for domestic jurisdictions. The cases show that, in monist countries like the DRC, the ICC Statute may be deployed to fill gaps in national criminal law and legislation. Furthermore, in the context of post-conflict countries, the cases reveal the untapped possibilities of the ICC Statute as a basic tool for the modernisation of the judiciary within the framework of a national security sector reform programme.

However, this article recommends that domestic courts should not simply cut and paste the provisions of the ICC Statute into national criminal texts. They should rather construe national (criminal) laws, which are invariably based on national sovereignty,[8] according to the provisions of the ICC Statute, without directly applying them except over conflicting provisions in DRC law. This strategy will avoid unnecessary conflict between international criminal law and domestic law. It will harmonise the most intrusive aspects of monism with national sovereignty, while simultaneously encouraging cultural pluralism and the intervention of international law in domestic law.

The following sections of this article lead to the above recommendation, which is fully developed in Section 5. Section 2 describes the civil law and DRC traditions of interpreting legal texts, indicating the preponderance of strict interpretation in DRC law. Section 3 briefly explains that, in spite of the strict interpretive paradigm, the DRC version of monism has elevated the ICC

[4] For more information on (the reform of) the military in the DRC, see Sebastien Melmot, 'Candide in Congo: The Expected Failure of Security Sector Reform (SSR)', *Institut Français des Relations Internationales*, Focus Stratégique No 9 bis, April 2009; Maria Eriksson Baaz and Maria Stern, *The Complexity of Violence: A Critical Analysis of Sexual Violence in the Democratic Republic of Congo (DRC)* (Sida/Nordiska Afrikainstitutet 2010).

[5] The original citation of the case is *Auditeur Militaire v Eliwo Ngoy,* RP 084/2005, RMP 154/PEN/SHOF05 (on file with the author).

[6] *Military Prosecutor v Bongi Massaba,* Criminal Trial Judgment and Accompanying Civil Action for Damages, RP 018/2006, RMP 242/PEN/06, ILDC 387 (CD 2006).

[7] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

[8] Vaughan Lowe, *International Law* (Oxford University Press 2007) 6.

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Statute to the level of the 'constitution' of DRC criminal law, in light of which criminal legal texts must be interpreted. This explanation is then illustrated in Section 4 by presenting briefs of the *Eliwo* and *Massaba* cases. However, in Section 5 it is observed that the direct application of the ICC Statute in domestic cases will often infringe state sovereignty. Finally, Section 6 offers a few conclusions and recommends that, in order to avoid infringements of sovereignty, domestic courts should read national criminal laws in light of the ICC Statute instead of applying it directly.

2. INTERPRETATION OF LAW IN THE DRC

Before broaching the issue of interpretation in the DRC, it is important to understand the nature of that action and to put it in comparative perspective. The interpretation of statutes is at the heart of the legal system because statutes and codes are the foundations of legal systems in civil law countries.[9] 'Interpretation' is the action of explaining the meaning of something.[10] In a legal context, 'interpretation' has a broad and a narrow sense. In the broad sense, the term refers to the active role of judges in modifying, restricting or expanding the meaning of a rule of law contained in a statute.[11]

In the narrow sense, it refers to the explanation by a judge of the meaning of the text of a statute or code.[12] Owing to the prevalence of strict interpretation and the relatively rigid conceptualisation of the judicial office, civil law countries tend to favour the narrow understanding of 'interpretation'. This is especially the case in criminal law where principles such as *nullum poena sine lege* (no punishment without prior legislation) guide judicial interpretation.

The nature, methods and techniques of interpretation differ depending on the legal family and the legal system in question. In the civil law legal family, to which the DRC belongs, the primacy of the text as the pre-eminent source of law is the cornerstone of the theory and practice of interpretation.[13] In particular, Belgian law, which the DRC inherited from Belgian colonisers, considers to be most powerful the argument that court judgments directly flow from the statute,[14] which in turn directly flows from the will of the legislator. This argument derives further strength from the political theory of the separation of powers,[15] which confines the role of judges to the interpretation and application of the laws made by the legislator, who is solely authorised to make laws.

Because of the DRC's colonial heritage, the rules of statutory interpretation in the DRC are based primarily on their Belgian (and occasionally French) equivalents. The classic

[9] Claire M Germain, 'Approaches to Statutory Interpretation and Legislative History in France' (2003) 13 *Duke Journal of Comparative and International Law* 195.
[10] *Oxford Dictionary of Current English* (4th edn, Oxford University Press 2009) 477.
[11] Peter de Cruz, *Comparative Law in a Changing World* (3rd edn, Cavendish 2007) 273.
[12] ibid.
[13] Christoph Malliet, 'Update: Research Guide to Belgian Law' *GlobaLex*, October 2010, http://www.nyulawglobal.org/globalex/Belgium1.htm; de Cruz (n 11) 274–75.
[14] Hubert Bocken and Walter de Bondt, *Introduction to Belgian Law* (Kluwer Law International 2001) 28.
[15] de Cruz (n 11) 293.

maxim *interpretatio cessat in claris* encapsulates the dominant interpretation theory of the DRC. The maxim states that interpretation is not necessary when the text is clear. Lawyers use a grammatical approach, legislative materials (*travaux préparatoires*), and a historical or teleological interpretation[16] to ascertain the content of legal texts and determine whether the meaning of those texts is clear. Doctrinal writers of French law classify interpretation methods differently: René David's classification, which incidentally framed the classification used in this article, is 'probably the most lucid'.[17] In any event, the canons of statutory interpretation are flexible,[18] and lawyers may with relative ease use the different approaches to statutory interpretation.

By adopting a grammatical or literal approach, courts may conclude that the text is clear; that it is ambiguous; or that, as phrased, it does not offer any solution.[19] Thus, when a text is clear, judges apply it without interpreting it, but the *interpretatio* maxim provides for an exception when the application of a clear legal term or provision leads to an absurdity.[20] When, on the other hand, the text is not clear, judges generally look to the intention of the legislator.[21] To find this intention, the courts may use legislative materials or other historical methods, the grammatical approach and doctrinal writings. If the intention of the legislator is not clear, judges may employ teleological methods of interpretation.

As this article shows below (in discussing *Eliwo* and *Massaba*), it is often difficult to determine when a legal term or provision is obscure and its meaning is unclear. The task seems all the more difficult in civil law legal systems where legislative drafters characteristically use general clauses and abstract terms in their codes and statutes. In such circumstances, the courts may have to interpret the codes or statutes in light of contemporary conditions.

DRC judges find the laws they construe in the Constitution, international treaties and agreements, Acts of Parliament (including organic laws[22]), administrative regulations, custom (*la coutume*), judicial precedents (*la jurisprudence*), doctrinal writings (*la doctrine*) and customary laws. The Constitution is the supreme and fundamental law of the DRC.[23] It makes the international treaties that the state has ratified superior to legislation, thus ranking legislation as the third source of law in the hierarchy of norms after the Constitution and international treaties or agreements.

[16] René David, *Le Droit Français* (Pichon Et Durand-Auzias 1960) 140–46. David classifies the methods of interpretation as grammatical, logical, historical and teleological.
[17] Germain (n 9) 201.
[18] René David, *French law : Its structure, sources, and methodology* (Louisiana State University Press 1972) 166.
[19] de Cruz (n 11) 275–76.
[20] François Gény, *Méthodes d'Interprétation et sources en droit privé positif: essai critique* (2nd edn, Librairie Générale de Droit et de Jurisprudence 1919) 252.
[21] Germain (n 9) 202.
[22] The organic laws (*lois organiques*), as distinct from ordinary Acts of Parliament, are special laws that organise important areas of national life and require absolute majorities to be passed and amended: Constitution de la République Démocratique du Congo du 18 Février 2006 (Constitution), art 124.
[23] It is noteworthy that, unlike many national constitutions, the DRC Constitution does not contain any express provision declaring its own supremacy. Its supremacy is implied from its text and explicitly recognised in judicial precedents and doctrinal writings.

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The Constitution instructs courts and tribunals, civilian and military, to apply ratified international treaties, legislation and administrative regulations consistently with legislation and custom.[24] As a civil law country, the DRC does not recognise judicial precedents and doctrinal writings as binding sources of law. Finally, the different customary or tribal laws in the various traditional communities form the second basis of the DRC legal system, the first basis being Belgian law.[25] While the Constitution recognises traditional authority (*l'autorité coutumière*),[26] for much of the time DRC law treats customary law merely as an appendix to the legal system.[27]

3. MONISM AND THE ICC STATUTE

3.1 THE DRC VERSION OF MONISM

The DRC signed the ICC Statute on 8 September 2000, DRC President Joseph Kabila authorised the ratification of the Statute on 30 March 2002, and the DRC deposited the ratification instrument on 11 April 2002.[28] It is not clear whether the ICC Statute was duly ratified as there are continuing doubts over the constitutionality of the 2002 Presidential Decree that authorised the ratification.[29] Proponents and opponents of the validity of the Decree contend that constitutional law dispensed with and required, respectively, the consent of the parliament. Lawyers and the DRC government should not take this matter lightly as the Vienna Convention on the Law of Treaties may vitiate the consent of a state to a treaty if it is expressed in violation of a rule of internal law of fundamental importance.[30] Whatever the outcome of the controversy, the handful of military cases that have applied the ICC Statute in the DRC often referred to the 2002 Presidential Decree and never questioned its validity. It is thus fair to assume – at least for the purposes of this article – that the Decree is legally valid and that the DRC ratified the ICC Statute in conformity with its constitutional law.

[24] Constitution (n 22), art 153.
[25] Dunia Zongwe, François Butedi and Phebe Mavungu Clément, 'Update: The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview', *GlobaLex,* August/September 2010, http://www.nyulaw-global.org/globalex/Democratic_Republic_Congo1.htm.
[26] Constitution (n 22) art 207. For more information on DRC customary laws, see Evariste Boshab, *Pouvoir et droits coutumiers à l'épreuve du temps* (Academia-Bruylant 2007).
[27] BM Kampetenga Lusengu, 'Droit coutumier Congolais: Notes de cours à attention des étudiants de 2e Graduat en Droit', 2006 (class materials, on file with the author), 13.
[28] The DRC ratified the ICC Statute by decree: Decree-Law 0013/2002 on the Authorization of the Rome Statute of the International Criminal Court. See also the official website of the Coalition for the International Criminal Court: http://www.iccnow.org/?mod=home.
[29] Avocats Sans Frontières, 'Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo', 2009, 10–14, http://www.asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf.
[30] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331, art 46(1).

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In ratifying the ICC Statute, which it considers to be a human rights instrument *par excellence*,[31] the DRC has incorporated it into its legal system by operation of Article 215 of the Constitution. Article 215 stipulates that:[32]

> [t]reaties and international agreements duly concluded shall, upon publication, prevail over Acts of Parliament, subject, with regard to each agreement or treaty, to its application by the other party.

Article 215 of the DRC Constitution is a carbon copy of Article 55 of the French Constitution, which was written 55 years earlier.[33] That resemblance is not a chance occurrence. In actual fact, French and Belgian laws are the primary substantive sources of the 2006 DRC Constitution,[34] the substantive origins of which invite judges and other interpreters to learn from French constitutional law and practice. The DRC would not be the only country on the continent to study French constitutional law as several French-speaking countries in Africa have either imitated or written word-for-word Article 55 into their constitutions.[35] The affinity between the DRC Article 215 and the French Article 55 allows readers to draw productive parallels between the two constitutions and inspiration from the rich French doctrine and jurisprudence in interpreting the DRC Constitution.

The effect of Article 215 is to place duly ratified and published international treaties above national legislation. A constitutional provision such as this indicates that a country is monist – 'monism' being the incorporation of international law into municipal law without any act of adoption or transformation.[36] It is linked to the Kelsenian concept of the relationship between international law and domestic law as a normative pyramid.[37] Most civil law countries, including the DRC and the Netherlands, have monist legal systems.

What Article 215 does not clarify is whether duly ratified and published international treaties supersede conflicting constitutional provisions. The best view is that constitutional provisions

[31] Katuala Kaba Kashala, 'La République Démocratique du Congo: Vers la mise en œuvre effective du Statut de Rome' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (2003) 221, 222.

[32] Author's own translation. The original French version reads: 'Les traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité et accord, de son application par l'autre partie.'

[33] Constitution de la République Française du 4 Octobre 1958 (French Constitution), art 55. The original French version reads: 'Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque accord ou traité, de son application par l'autre partie.'

[34] Grégoire Bakandeja wa Mpungu, 'The New Constitution of the Democratic Republic of Congo: Sources and Innovations' in Charles Fombad and Christina Murray (eds), *Fostering Constitutionalism in Africa* (Pretoria University Law Press 2010) 149, 153.

[35] Magnus Killander and Horace Adjolohoun, 'International Law and Domestic Human Rights Litigation in Africa: An Introduction' in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010) 3, 5.

[36] John Dugard, *International Law: A South African Perspective* (3rd edn, Juta 2005) 47.

[37] For a critique, see Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397.

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override international treaties. This view is a necessary inference from French constitutional theory[38] and Article 216 of the DRC Constitution, which declares that:

> If the Constitutional Court, on consultation by the President of the Republic, the Prime Minister, the President of the National Assembly or the President of the Senate, one tenth of the Members of the National Assembly or one tenth of the Senators, has held that an international undertaking contains a clause contrary to the Constitution, ratification or approbation may be given only after amending the Constitution.

A draft bill on the implementation of the ICC Statute has been tabled in the lower house of parliament, the National Assembly. Although the draft bill will provide the criminal law of the DRC with localised definitions and provisions, it will only marginally affect the implementation of the ICC Statute by DRC military courts. Monism implies that, upon ratification, the ICC Statute binds military courts and overrules domestic laws so that any domesticating legislation, such as the draft bill before the National Assembly, becomes redundant. It also means that conflict between provisions of international law and domestic law is more likely to occur in a monist legal system than in a dualist system, where domesticating legislation usually smoothes out any inconsistencies between the two systems of law.

3.2 THE PLACE OF INTERNATIONAL CRIMINAL LAW IN THE DRC LEGAL SYSTEM

The status of the ICC Statute in the DRC legal system is equivocal. On the one hand, the Statute is a ratified and published international treaty within the ambit of Article 215 of the DRC Constitution, which is why it is above national laws. At the same time, however, the Statute is 'substantive Congolese law' and forms an 'integral part of Congolese penal law'.[39] This position produces a logical absurdity because it implies that the ICC Statute, as part of DRC law, is above itself. Without thoroughly examining the status of the Statute in the DRC legal system, suffice it to say that the Janus-like status of the Statute complicates the application of international law and Article 215 of the Constitution.

Given its pre-eminence in domestic law, the ICC Statute can in many ways be regarded as the 'constitution' of DRC criminal law. However, a 'constitution' refers to the 'fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties'.[40] It appears from this definition that the ICC Statute fundamentally differs

[38] Olivier Barrat, 'Ratification and Adaptation: The French Perspective' in Roy S Lee (ed), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational 2005) 57, 61.
[39] Held by the Ituri Military Tribunal in *Milobs,* RP 103/2006, 19 February 2007. Quoted in Avocats Sans Frontières (n 29) 17.
[40] Bryan A Garner and Henry Campbell Black (eds), *Black's Law Dictionary* (8th edn, Thomson/West 2004).

from a real constitution and that the view of the Statute as a constitution is simply a metaphor, a pertinent and useful one nonetheless.

One crucial difference between the ICC Statute and a constitution is legitimacy – the notion that ties the authority of government to the consent of the governed. The ICC Statute derives its legitimacy from the consent of states (state sovereignty) whereas a constitution sources its legitimacy from the consent of people (popular sovereignty). The DRC Constitution, adopted in 2005 by popular referendum, reaffirms popular sovereignty when it states that all power emanates from the people who exercise it by dint of referenda or elections or indirectly through representatives.[41] Since the authority of a state to ratify or, after ratification, to denounce a treaty originates in the people, the inescapable conclusion is that the authority and legitimacy of the ICC Statute in the DRC ultimately emanates from the people. This conclusion is of far-reaching significance as it unmistakably places the ICC Statute below representative institutions in the interpretation of laws, notwithstanding the superiority of the ICC Statute over legislation.

4. THE ICC STATUTE IN DRC CRIMINAL LAW: *ELIWO* AND *MASSABA*

The *Eliwo* and *Massaba* cases illustrate the point discussed in the previous section – that Article 215 of the DRC Constitution places the ICC Statute above DRC penal Acts of Parliament. They are part of a nascent military jurisprudence that directly applies provisions of the ICC Statute.[42] *Eliwo* and *Massaba* tease out a host of questions with broader implications for the future application of Article 215. On what authority did the tribunals confer direct effect on the ICC Statute? Were the provisions of the ICC Statute better suited than domestic law to the disposition of the cases? Of greater relevance, how was popular sovereignty affected by such direct application of international criminal law? This article first analyses each case before addressing these questions and their implications in the following sections.

The fundamental dilemma raised by these two cases is whether courts should read the provisions of relevant international treaties into the disputed provisions of DRC laws, or read the disputed provisions in the light of the relevant treaty provisions. Cases and studies involving the direct effect or self-executing norms of international law in domestic cases are rare in the DRC.[43] DRC courts commonly skirt around the direct applicability of international law, even when specifically invoked by counsel,[44] with military courts standing out as a remarkable exception. As a consequence, the correct way of applying Article 215 of the Constitution and international law in domestic cases has not yet been authoritatively settled. This article should be

[41] Constitution (n 22) art 5.

[42] In addition to *Eliwo* and *Massaba,* see Military Tribunal of the Garrison of Kindu, *Auditeur Militaire v Kalonga Katamasi,* RP 011/0526, October 2005; Military Tribunal of Ituri District, *Military Prosecutor v Kahwa Panga Mandro*, First Instance Decision, RMP 227/PEN/2006; ILDC 524 (CD 2006); *Milobs* (n 39); Military Tribunal of the Garrison of Ituri, *Bavi*, RP 101/06, 19 February 2007. For summaries of these cases, see Avocats Sans Frontières (n 29).

[43] The study by Avocats Sans Frontières (n 29) is one of the very few systematic examinations of DRC case law focusing on the applicability of art 215 of the DRC Constitution and international law by national courts.

[44] Killander and Adjolohoun (n 35) 6.

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viewed against this backdrop as a somewhat long-awaited attempt to frame the issue of applying Article 215 and international law in DRC domestic cases.

4.1 *ELIWO*

Eliwo[45] involved 12 former rebels awaiting their formal integration into the DRC army under the terms of a peace agreement. The legal question was whether these 12 soldiers were guilty of crimes against humanity for having raped one man and 30 women.[46] The provisions of the ICC Statute helped the court to avoid imposing the death penalty on the convicted rape perpetrators.

4.1.1 THE FACTS

In December 2003, in Songo Mboyo in the Equateur province (northwest) of the DRC, a captain in the DRC army, Ramazani, withheld payment of salary of soldiers under his command.[47] When a military officer responsible for intelligence urged Captain Ramazani to pay his soldiers, he resisted and proposed instead to pay the salary in two phases in order to ensure that the soldiers would not defect.[48]

The military hierarchy, the *état-major*, was opposed to the captain's proposal, but the negotiations initiated by the military hierarchy to solve the problem fell through.[49] When the soldiers under the captain's command learned that the negotiations failed, they started to sing a revolutionary song in which they demanded the immediate payment of their salary, and marched to the captain's house. There, they demanded their salary while throwing stones at the house.

After the situation quickly degenerated, the captain fled with the soldiers' salary. The soldiers then decided to turn against the civilian population. From 9:00 pm on 21 December to 6:00 am on 22 December, they looted property and raped one man and 30 women, one of whom died as a result of the sexual violence[50] while more than 80 per cent of the surviving victims contracted sexually transmitted diseases.

Thirteen surviving rape victims brought a civil action against 12 soldiers and the state, as co-respondent, seeking damages for the sexual violence committed against them.[51] The military prosecutor instituted criminal proceedings against the 12 soldiers, joined by the state as co-defendant, and brought the matter to trial on 12 September 2005. Under DRC criminal law, a victim may file a civil action with the Public Prosecutor's Department (*le Parquet*) and institute criminal proceedings at the same time,[52] as the plaintiffs did in *Eliwo* and *Massaba*.

[45] The page references in the footnotes contained in this section are drawn directly from the original *Eliwo* judgment.
[46] *Eliwo* (n 5) 12.
[47] ibid 7–8.
[48] ibid 8.
[49] ibid 9.
[50] ibid 10.
[51] ibid 11.
[52] Zongwe, Butedi and Clément (n 25).

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In the criminal proceedings, the military prosecutor put forward several charges that the accused soldiers violated various provisions of the Military Penal Code. Most importantly, the prosecutor brought charges of crimes against humanity against eight of the 12 accused soldiers ('rape perpetrators' or 'perpetrators') for the rapes of the plaintiffs.

4.1.2 The Parties' Submissions

Concerning the allegations of crimes against humanity, the eight rape perpetrators all pleaded not guilty and argued that the prosecutor had failed to adduce evidence to prove his allegations.[53] In reply, the prosecutor countered that his allegations rested on a gynaecologist's medical report and the testimony of the surviving rape victims, their respective spouses and family members.[54] Furthermore, the defence rejected the characterisation of the crimes in question as crimes against humanity on the ground that the alleged crimes had not taken place in the context of a widespread attack as they did not contain any element of planning or policy.[55] The prosecutor replied that a crime against humanity had been established because the rapes were committed as part of a widespread attack, which does not require any state policy or any plan, as in a systematic attack.

The defence regrouped the rape perpetrators according to the mode of commission of the alleged rapes. The first group included soldiers accused of the gang rape of the only rape victim who died following the sexual violence. The perpetrators argued that the prosecutor's list – containing the names of the soldiers who allegedly raped the deceased woman – contradicted the list provided by the deceased woman's uncle.[56] The prosecutor argued that the tribunal has discretion to appreciate the probative value of admissible evidence. In a second group, a 35-year old soldier, accused of having raped nine women within six hours, argued that because of temporary impotence he could not possibly have raped the nine victims in six hours.[57] In response, the prosecutor presented the tribunal with evidence to the contrary, which included descriptions by the rape victims of the soldier's sexual organ. Another soldier in the same group argued that he could not legally have committed rape since the alleged victim was male and the law on rape was not intended to protect males.[58]

4.1.3 The Applicable Law

The Military Tribunal of the Garrison of Mbandaka said that the laws applicable to the case included Articles 215 and 153 of the DRC Constitution.[59] Article 153 empowers military and ordinary courts to apply international treaties and agreements duly ratified by the DRC. DRC

[53] *Eliwo* (n 5) 26–27.
[54] ibid 27.
[55] ibid 34.
[56] ibid 28.
[57] ibid 31.
[58] ibid 32.
[59] ibid 12.

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criminal law endows military courts with exclusive jurisdiction to hear and determine cases involving genocide, war crimes and crimes against humanity.[60]

On the strength of Articles 215 and 153, the tribunal further said that the requirements for crimes against humanity are (i) any inhuman act enumerated in the ICC Statute, (ii) the means used, (iii) a systematic and widespread attack against civilians, and (iv) the mental element.[61] The inhuman acts enumerated in the ICC Statute include murder; severe physical deprivation of liberty; rape or any other form of sexual violence of comparable gravity; and other inhumane acts of a similar character, intentionally causing great suffering, or serious injury to body or mental or physical health.[62]

The tribunal noted that rape, as an inhuman act, is defined differently under international law and DRC law.[63] Unlike DRC law, the interpretation contained in the Elements of Crimes,[64] a complementary and interpretive source of the ICC Statute, widely extends the scope of rape to encompass any other act with a sexual connotation. The crime against humanity of rape means that[65]

> [t]he perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

The tribunal did not explain in its judgment how DRC law defines 'rape'. Nonetheless, the Military Penal Code stipulates that rape or any other form of sexual violence of comparable gravity – knowingly committed in peacetime or wartime in the context of a systematic and widespread attack against a civilian population – constitutes a crime against humanity.[66] Although the Military Penal Code does not define what it means by 'rape' as a crime against humanity, the ordinary Penal Code contains a definition of 'rape'[67] that is so sparse that it does not rule out males from its scope of protection. It broadly defines rape with violence (*viol à l'aide de violences*) as any bodily sexual contact committed on any person.[68] The 1949 ordinary Penal Code could not have given a more refined definition as the 2002 Military Penal Code was ahead of the DRC criminal legislation in the application of the ICC Statute crimes to domestic law. In the end, the tribunal resolved the difference between the definitions of rape in the ICC Statute and the Congolese Military Penal Code in favour of the former by virtue of Article 215.

The Military Penal Code imposes the death penalty on soldiers found guilty of rape and other forms of sexual violence of comparable gravity.[69] By contrast, the ICC Statute imposes a term of

[60] Law No O24/2002 on the Military Penal Code (18 November 2002), art 161.
[61] *Eliwo* (n 5) 26–27.
[62] ICC Statute (n 7) art 7(1).
[63] *Eliwo* (n 5) 27.
[64] Elements of Crimes, ICC Assembly of States Parties, 1st Session, 3–10 September 2002, ICC-ASP/1/3, art 7(1)(g)–1.
[65] ibid art 7(1)(g)–1(1).
[66] Military Penal Code (n 60) art 169(7).
[67] Congolese Penal Code (1940), as modified and completed in 2004 (Penal Code).
[68] ibid art 170. The original French version reads: 'Est réputé viol à l'aide de violences, le seul fait du rapprochement charnel des sexes commis sur les personnes.'
[69] Military Penal Code (n 60) arts 103 and 169(7).

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life imprisonment for the crime against humanity of rape 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'.[70] The tribunal decided that Article 215 of the Constitution preferred the ICC Statute over the Congolese Military Penal Code.[71] It added that the ICC Statute had protective mechanisms for victims that were sufficiently effective to warrant the use of the Statute in this case, but did not specify which provisions of the ICC Statute afforded such protection for victims.

4.1.4 THE JUDGMENT

In proceedings that excluded the public, the military tribunal held that, since the conduct of the eight rape perpetrators had met all the elements of a crime against humanity, the charge of crime against humanity had been established in law as in fact.[72] It declared that no legal instrument, whether national or international, could justify the criminal conduct of the perpetrators. Rape had been committed through the use of force in a manifestly coercive environment.[73] Apart from their capacity as government soldiers, the perpetrators each held a weapon of war and perpetrated rapes under the crackle of gunfire, which annihilated any possibility of resistance on the part of the subdued victims.

The tribunal rejected the arguments by the defence that the attacks were not systematic because they lacked any element of planning or policy. In an earlier case, the tribunal had found that, unlike the ICC Statute, the Congolese Military Penal Code had confused crimes against humanity and war crimes.[74] In *Eliwo,* the tribunal drew a distinction between a systematic and widespread attack. The latter takes on a massive character by the plurality of victims and is of extreme gravity as it is committed collectively; the former implies the necessity of a preconceived plan or policy.

It held that, in view of the absence of any quantitative criteria or any threshold for crimes against humanity, it is left to the trial judge to appreciate the realisation of the offence.[75] It found that in the instant case the plurality of victims was sufficient to conclude that the attack was widespread. The tribunal also rejected the argument of both the defence and prosecution on the gender of the alleged male victim and found that rape, as defined in the Elements of Crime, is gender-neutral.[76] However, the rape charge could not be sustained against the soldier accused of having perpetrated the rape because the male victim did not give any testimony to support the rape charge.

The tribunal found seven of the eight rape perpetrators guilty of a crime against humanity of rape as charged and sentenced them to life imprisonment.[77] It acquitted the remaining perpetrator

[70] ICC Statute (n 7) art 77(1)(b) in conjunction with arts 5(1) and 7(1)(g).
[71] *Eliwo* (n 5) 12.
[72] ibid 35.
[73] ibid 34.
[74] Military Tribunal of the Garrison of Mbandaka, *Mutins de Mbandaka*, RP 086/0512, January 2006.
[75] *Eliwo* (n 5) 35.
[76] ibid 32. Elements of Crimes (n 64) art 7(1)(g)(1).
[77] *Eliwo* (n 5) 38.

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because neither the prosecutors nor the plaintiffs could identify him as one of the soldiers who committed the rapes. The tribunal awarded damages to the plaintiffs.[78]

4.1.5 DISCUSSION

In *Eliwo* the tribunal grounded its judgment on Article 215 of the Constitution to apply international law over DRC law with regard to the meaning of 'rape'. This move enabled the tribunal to use the clearer and more accurate definition of the crime against humanity of rape in international law. In particular, it allowed the tribunal to circumvent the outdated gender-specific definition of rape under DRC law by resorting to the more progressive and gender-neutral definition of rape in the ICC Statute. Following the *Eliwo* case and as a government reaction to the scourge of sexual violence in eastern DRC, the DRC parliament in July 2006 amended the 1940 Penal Code and the 1959 Penal Procedure Code.[79] The amendment reads in relevant part:[80]

> (a) …
> (b) …
> (c) any person who has introduced, even superficially, any other part of his body or any object into a vagina;
> (d) any person who has obliged a man or a woman to penetrate, even superficially, his or her anus, mouth or any other orifice of his or her body with a sexual organ, with any other part of his or her body or with any object;
> … shall be guilty of rape.

This new definition of 'rape' is reminiscent of the wording employed in the ICC Statute, though it is a touch more elaborate.

The provisions of the ICC Statute also allowed the tribunal to avoid imposing the death penalty. By choosing to apply the ICC Statute over the Congolese Military Penal Code, the Military Tribunal of the Garrison of Mbandaka – the first military tribunal to ever make such a move in the DRC[81] – avoided in *Eliwo* the imposition of the death penalty on the seven rape perpetrators. However, the use of the penalty provisions of the ICC Statute in that sense is problematic, and even more so today as the majority of members of the National Assembly voted in 2010 for the retention of capital punishment under DRC criminal law. Since the ICC Statute neither provides for the death penalty nor prohibits its use in domestic jurisdictions,[82] the Statute was no authority for opting for life

[78] ibid 38. The tribunal ordered the state to pay US$10,000 to the relatives of the deceased rape victim, US$5,000 to each of the surviving rape victims, US$500 to each victim for their business goods and US$200 for their other property pillaged by the accused soldiers.

[79] For an analysis of the sexual violence amendments to the DRC criminal law, see Dunia P Zongwe, 'The New Sexual Violence Legislation in the Congo: Dressing Indelible Scars on Human Dignity' (2012) 55(2) *African Studies Review* 37.

[80] Law No 06/018 on the amendment of the Penal Code (20 July 2006), art 2§2 para 2. Author's own translation. The original French version reads: 'Aura commis un viol… a) …; b) …; c) toute personne qui aura introduit, même superficiellement, tout autre partie du corps ou un objet quelconque dans le vagin; d) toute personne qui aura obligé un homme ou une femme à pénétrer, même superficiellement son anus, sa bouche ou tout orifice de son corps par un organe sexuel, par toute autre partie du corps ou par un objet quelconque.'

[81] That tribunal first applied the ICC Statute over the Congolese Military Penal Code in Military Tribunal of the Garrison of Mbandaka, *Mutins de Mbandaka* (n 74): see Avocats Sans Frontières (n 29) 9.

[82] William Schabas, *An Introduction to the International Criminal Court* (2nd edn, Cambridge University Press 2004) 166–69.

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imprisonment rather than the death penalty. The Military Penal Code and the ICC Statute did not conflict with regard to their penalties. The tribunal's choice of the ICC Statute was almost certainly an instance of judicial creativity in order to avoid a harsh punishment. DRC criminal law demanded the death penalty to be meted out in this case[83] but the judges incorrectly thought that the ICC Statute ruled out such punishment, even in national courts.

Moreover, one of the reasons why the tribunal retained the provisions of the ICC Statute was because they contained more effective mechanisms for the protection of the victims. Nowhere in the judgment is there any indication of what those protective mechanisms were or involved. The tribunal should have explicated that crack in the domestic legal system, and so could it have disclosed the basis for the calculation of the damages awarded.

That said, all in all, *Eliwo* is a trailblazer and an excellent persuasive authority for the use of Article 215 of the DRC Constitution to rectify defects in legislation or penalties that are out of phase with the latest developments in international criminal law. This authority is all the more important given that *Eliwo* and the very few other military cases that carried over the stipulations of the ICC Statute into domestic law are not representative of decisions by military tribunals on sexual violence by government soldiers. What is more, the justice sector in the DRC suffers from under-investment, institutionalised corruption, poor infrastructures and a severe lack of resources.[84] Article 215 offers great opportunities for the DRC to mitigate some of its resource constraints and to benefit from the inputs of international legal expertise, and it introduces an inexpensive mechanism for the DRC to upgrade its legal frameworks.

Article 215 can help to address certain weaknesses in the DRC justice system only if it is utilised properly by well-informed and well-intending judges and lawmakers. If, as is usually the case, the judges administering criminal justice are corrupt, under-trained or simply unable to do it right, the capacity-building dividends of Article 215 will be minimal. It is for this reason that judges, law and policy-makers can take advantage of Article 215 of the Constitution only by running vigorous judicial training and anti-corruption programmes in parallel.

4.2 *MASSABA*

The issue in *Massaba*[85] was whether the accused, a captain in the DRC army, was guilty of the wilful killing of civilians and pillaging in eastern DRC. Despite the fact that the Congolese Military Penal Code provides for war crimes, the tribunal did not find any provision in the

[83] Constitution (n 22) art 16. Democratic Republic of Congo, Ministry of Human Rights, 'Eighth, Ninth and Tenth Periodic Reports to the African Commission on Human Rights: Implementation of the African Charter on Human and Peoples' Rights (Period – from July 2003 to July 2007)', June 2007, para 35, http://www.achpr.org/files/sessions/48th/state-reports/8th,9th,10th-2003-2007/staterep8910_drc_2007_eng.pdf .

[84] International Legal Assistance Consortium & International Bar Association Human Rights Institute, 'Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo', August 2009, 7, http://www.afrimap.org/english/images/documents/DRC-IBA-ILAC-Justice-Aug09.pdf.

[85] The page references contained in this section are drawn from Dunia Zongwe, 'Case Note on Ituri Military Prosecutor v Blaise Bongi Massaba, RP n° 018/2006 RMP n° 242/PEN/06', *Oxford Law Report*, ILDC 387 (CG 2006).

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Code that punished war crimes. To fill this gap, the tribunal considered Article 77 of the ICC Statute, which provides penalties for war crimes.

4.2.1 THE FACTS

On 24 October 2005, Blaise Massaba, a captain in the DRC army, and a group of soldiers under his command arrested five pupils (the victims) and stole goods belonging to civilians at various locations in the Ituri district of Province Orientale (northeast) in the DRC.[86] Blaise Massaba forced the victims to carry the stolen goods. Later that day, Massaba ordered his soldiers to shoot the victims on the pretext that the pupils were members of the armed militias in eastern DRC.[87] The soldiers obeyed and shot the victims and then buried the corpses. Subsequently, the victims' relatives, with the assistance of a community leader and a military officer, started to search for the victims, and eventually found them.[88]

The military prosecutor for the Military Tribunal of the Garrison of Ituri instituted criminal proceedings against Blaise Massaba. In addition, the victims' relatives filed a civil claim against Blaise Massaba and the DRC, seeking damages for the killing of the victims. They were admitted in the criminal proceedings against Blaise Massaba as civil parties, with the DRC engaged as a co-respondent with respect to the civil claim. Blaise Massaba was charged with the war crimes of wilful killing and pillaging, as provided for in the ICC Statute[89] and the Congolese Military Penal Code. The military prosecutor argued that Massaba was guilty because his conduct complied with all the definitional elements of the war crimes of wilful killing and pillaging, committed during armed conflicts of an international character.[90]

4.2.2 THE APPLICABLE LAW

The tribunal found a gap in the Military Penal Code in that it does not provide for the punishment of war crimes.[91] It noted that Articles 161 to 175 of the Code lack penalty provisions. Further, the Code stipulates that no crime may be sanctioned with a punishment that was not provided for in the law before the commission of the crime.[92] The absence of penal provisions in the Code suggested that a strict interpretation of the Code would have resulted in Blaise Massaba avoiding punishment in spite of his conviction.

Article 77 of the ICC Statute, on the other hand, imposes a series of penalties: a prison term, life imprisonment, fines and forfeiture of property. In order to fill the lacuna in the Military Penal

[86] *Massaba* (n 6) para F1.
[87] ibid para F2.
[88] ibid para F3.
[89] ICC Statute (n 7) art 8(2)(b)(xvi) and 8(2)(a)(i).
[90] *Massaba* (n 6) para F4.
[91] ibid para H4.
[92] Military Penal Code (n 60) art 2.

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Code, the tribunal applied Article 215 of the DRC Constitution to enforce the provisions of the ICC Statute.[93]

4.2.3 The Judgment

The tribunal found Blaise Massaba guilty of the war crimes of wilful killing and pillaging as charged.[94] However, it also found that the military prosecutor had failed to prove his submission that the war crimes with which Massaba was charged had been committed during armed conflicts of an international character, and concluded that they had not been so committed.[95] With regard to the lacuna in the Military Penal Code, it was evident, in the tribunal's view, that the intention of the DRC legislator was to provide for the punishment of war crimes, the gravity of which the DRC recognised by ratifying the ICC Statute.[96] The tribunal's recourse to the provisions of the ICC Statute fulfilled the purpose of the DRC legislator, which is the punishment of war crimes by military courts at the national level.[97] It thus filled the void in the Military Penal Code by applying the penalty provisions in Article 77 of the ICC Statute. The tribunal sentenced Blaise Massaba to life imprisonment and ordered that he be debarred from serving in the army.[98] The life sentence was reduced on appeal to a prison term of 20 years.

4.2.4 Discussion

The decision of the Ituri Military Tribunal shows the gap-filling function of Article 215 of the DRC Constitution and thereby international treaties and agreements in relation to domestic legislation. The tribunal construed the Military Penal Code purposively. The purpose of the Code, according to the tribunal, is to empower military courts to punish war crimes. Following the purpose of the Code, the tribunal cured its defect by relying on *Eliwo* (discussed above) and Article 77 of the ICC Statute, which provides for penalties for war crimes.

In the final analysis, the entire *Massaba* case hinges on the tribunal's finding of a shortcoming in the Military Penal Code. However, it is debatable that a gap existed in the Military Penal Code. The tribunal's finding that there was such a gap flies in the face of Article 26 of the Code, which explicitly empowers military courts to impose penalties for violations of the Code.[99] Notwithstanding that Article 26 is silent as to the penalties applicable for each violation of the Military Penal Code, it is a general penalty clause and, as such, it is functionally equivalent to Article 77 (containing penalty provisions) of the ICC Statute. Seen from this vantage point, it

[93] *Massaba* (n 6) paras H7, H9.
[94] ibid para H1. With respect to the civil claim, Blaise Massaba and the government were jointly liable to the victims' relatives in the amount of US$300,000.00 for the killing of the victims.
[95] ibid paras H2–H3.
[96] ibid para H5.
[97] ibid para H8.
[98] ibid para H11.
[99] It is noteworthy that the tribunal itself referred to art 26 in the final part of the judgment as a reason for its decision.

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is surprising that the tribunal chose to go for the provisions of the ICC Statute directly where there was a provision under domestic law to punish Massaba.

It could be argued, however, that Article 26 was not specific enough to form the basis of a sentence. The principle of legality insists on laws being easily ascertainable. That principle could thus justify the finding in *Massaba* that the Military Penal Code came short of punishing war crimes.

5. MONISM, THE ICC STATUTE AND SUBSIDIARITY

5.1 THE NORMATIVE PRIORITY OF THE ICC STATUTE

The above review of *Eliwo* and *Massaba* paints a picture of Article 215 of the DRC Constitution in which the article serves as a fail-safe device for progressive judges who wish to clarify the texts of national criminal legislation, avoid harsh punishments and prevent criminal defendants from exploiting legislative loopholes to escape liability, for instance because the law did not provide for male rape. The DRC government can, and indeed must, also integrate Article 215 in its security sector reform – more precisely the security dimension of its stabilisation and reconstruction programme for zones emerging from armed conflict (STAREC)[100] – because it allows the state the means to improve its criminal justice system.

The application of Article 215 of the DRC Constitution in *Massaba* is distinguishable from its application in *Eliwo*. Judges brandished Article 215 to ward off the death penalty in *Eliwo* and to provide for what they adjudged as a missing penalty in *Massaba.* In both cases, judges seemingly upheld the principle in Article 215 of the Constitution that duly ratified and published treaties prevail over Acts of Parliament of the DRC. In so doing, *Eliwo* and *Massaba* join the small rank of military cases in the DRC that gave direct effect to international law as a result of Article 215 of the Constitution.[101] However, the judges did not pause to unpack the phrase 'prevail over Acts of Parliament' (…*ont une autorité supérieure à celle des lois*) in Article 215. Yet that phrase holds the key to an application of Article 215 that is in tune with its own text and international law.

The rub is that in both cases the judges misapplied Article 215 because provisions already existed under DRC law that governed the sentencing of convicted soldiers. Conversely, in *Kalonga* – a case in which the military tribunal sentenced to death a rebel leader who had abducted and raped 10 women – the judges espoused the definition of crime against humanity in the Congolese Military Penal Code instead of the Statute formulation.[102] The fact that the

[100] From its French name, Programme pour la Stabilisation et la Reconstruction des Zones Sortant des Conflits Armés. STAREC is a comprehensive programme for the reconstruction of zones in the DRC that have been afflicted by conflict, notably North Kivu and South Kivu. It has three components: (i) economic, (ii) social and humanitarian, and (iii) security components. Art 215 is relevant to the security component of STAREC.

[101] Military Tribunal of the Garrison of Ituri, *Auditeur Militaire v Kahwa*, RP 039/06, 2 August 2006; *Bavi* (n 42). For summaries of these cases, see Avocats Sans Frontières (n 29) 100ff.

[102] Military Tribunal of the Garrison of Kindu, *Auditeur Militaire v Kalonga Katamasi*, RP 011/0526, October 2005.

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provisions under domestic law differed from those of the ICC Statute does not mean that they contradicted them. Ratification of the ICC Statute does not preclude states from restructuring, refining or modifying the formulation of the Statute crimes.[103] Similarly, the normative priority of the ICC Statute does not intimate its direct application in all relevant matters, just as the supremacy of the Constitution does not entail its direct application in all matters and in all circumstances. Clearly, DRC case law has not yet clarified the relationship and difference between the primacy and direct effect of international law.

The distinctive application of Article 215 by the military tribunals betrays the unstated premises of the judges that the phrase 'prevail over Acts of Parliament' is synonymous with the direct effect of duly ratified and published international treaties in national courts. The military tribunals could have interpreted provisions in the Military Penal Code in light of the provisions of the ICC Statute without cutting and pasting the Statute provisions into Code provisions. This observation restates the essential dilemma identified by this article, which is whether the military tribunals should have read the provisions of the ICC Statute into the Military Penal Code or read the Code in light of the provisions of the ICC Statute.

It is a dilemma between the direct application of international criminal treaties and the wide construction of national penal legislation. Both options pose a problem. The direct application of international criminal treaties offends state sovereignty where the treaties duplicate provisions of national criminal legislation, while the liberal reading of national criminal legislation is foreign to the comparatively strict interpretive philosophy and praxis of the DRC.

5.2 Subsidiarity

5.2.1 The Principle

This dilemma may be recast as a subsidiarity issue. In legal circles, subsidiarity is frequently theorised in relation to the European Union[104] and to European and American federalism.[105] The distinction of this article is to link subsidiarity to monism and post-conflict national security sector reform. Monist countries are more prone than dualist jurisdictions to the types of contradiction between national law and international law seen in *Eliwo* and *Massaba* because incorporation of international law is effective in monist countries upon ratification, as opposed to transformation. Though nothing keeps a monist state from thoroughly

[103] Roy S Lee, 'States' Responses: Issues and Solutions' in Roy S Lee (ed), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational 2005) 1, 31.

[104] Thomas Spijkerboer, 'Subsidiary and "Arguability": The European Court of Human Rights' Case Law on Judicial Review in Asylum' (2009) 21 *International Journal of Refugee Law* 48; Florian Sander, 'Subsidiarity Infringements before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism' (2006) 12 *Columbia Journal of European Law* 517.

[105] Greg Taylor, 'Germany: A Slow Death for Subsidiarity' (2009) 7 *International Journal of Constitutional Law* 139; Jared Bayer, 'Re-balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States' (2004) 53 *American University Law Review* 1421.

assessing the impact of an international treaty on its legal system before ratifying the treaty, monist states will sometimes find it hard to mediate unforeseen discrepancies between national law and international law after ratification; dualist states, on the other hand, can always mediate those discrepancies through the enactment and amendment of domestic legislation.

Paolo Carozza's working definition is that subsidiarity is the 'principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself'.[106] When specifically transposed to the enforcement of international law by domestic courts, the subsidiary principle postulates that international law steps in when national law fails. In the same vein, DRC judges should not apply the ICC Statute directly, except where national law fails to provide for anything covered by the Statute or when its provisions conflict with those of the Statute. In all other circumstances, judges should first look to national law.

Pleading that, as a rule of thumb, courts should first apply national law before seeking assistance from international treaties is not the same as claiming that those treaties are not self-executing. It is not denying the normative superiority of international law over national law. It is more subtle; it is tantamount to forging a robust and sustainable policy framework for the application of duly ratified international treaties in monist countries.[107] Subsidiarity is pragmatic because states, unlike supra-national bodies, possess powers to enforce international law and a greater expertise regarding the situations in their countries, thus sitting in a better position to reach optimal results.[108] In view of the culture-specificity of laws in general and of DRC law,[109] subsidiarity lays a fertile ground for cultural pluralism to flourish. Since subsidiarity may undermine the universality of international norms,[110] such as those that nestle in the ICC Statute, the same respect for cultural pluralism calls for the circumscription of subsidiarity. Where Article 215 of the DRC Constitution is concerned, this circumscription lies in the exception that judges should implement domesticated treaties directly after they determine that DRC law is at odds with international law or the ICC Statute.

5.2.2 RELATIONSHIP WITH SOVEREIGNTY

The subsidiarity principle is a manifestation of state sovereignty. State or national sovereignty is an elusive concept with a convoluted history and an absence of well-demarcated boundaries. For

[106] eg Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38 fn 1.
[107] Tara J Melish, 'From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies' (2009) 34 *Yale Journal of International Law* 392 (arguing that the US anchoring in the principle of subsidiarity may be the foundation necessary for building a strong and sustainable domestic human rights policy).
[108] William M Carter Jr, 'Rethinking Subsidiarity in International Human Rights Adjudication' (2008) 30 *Hamline Journal of Public Law and Policy* 319 (stating that before a supranational or multinational body issues a decision on a matter of international human rights, it must first be assured that the domestic government has been afforded an opportunity to redress the situation).
[109] On the culture-specificity of African laws and respect for difference, see Werner F Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd edn, Cambridge University Press 2006) 26–36 and 380–491.
[110] Carter Jr (n 108) 330ff.

Vaughan Lowe, 'sovereignty' refers to a knot of concepts centred on two related ideas: (i) the formal independence of decision-making of the state, and (ii) its freedom to exercise that independence in practice.[111] Sovereignty is the right of each state to be different. It is a significant part of what makes the state different from its neighbours.[112] Put another way, the very nature of the state subsumes subsidiarity. An international corpus of legal rules that leaves no breathing space for subsidiarity is unlikely to attract the consent of states. Thus understood, subsidiarity is inevitable.[113]

As a foundational principle of international law, subsidiarity has been organising international human rights law since its inception.[114] It appears in many places in international law, from the interpretive discretion granted to states, to the complementarity principle, to the relationships between regional and universal systems.[115] It would not be far-fetched to extrapolate that, inasmuch as it reflects state sovereignty, subsidiarity is already deep-rooted in the existing structures of international law.[116] In *Massaba* the tribunal held that the jurisdiction of the ICC was fettered by the principles of complementarity and subsidiarity in that domestic courts were preferred and that the ICC could only intervene in circumstances set out in the ICC Statute[117] Subsidiarity harmonises the domestic legal system with international law while exhorting cultural pluralism and international cooperation and intervention. In short, therefore, any construction of Article 215 of the DRC Constitution that contravenes the subsidiarity principle would infringe the sovereignty of the state and the spirit of the ICC Statute, insofar as the principle of complementarity in the ICC Statute is deferential to national jurisdictions.

6. CONCLUSION

This article addresses the interpretation of the law of the DRC and the application of international law in the DRC legal system. Article 215 of the Constitution is the entry point for international law into the DRC legal system. It articulates the DRC brand of monism. It stipulates that the international treaties and agreements duly ratified by the DRC prevail over Acts of Parliament. This stipulation places ratified international treaties and agreements above DRC laws, except the Constitution.

The fundamental question is whether courts should read the provisions of relevant international treaties into the disputed provisions of DRC law or read the disputed provisions in

[111] Lowe (n 8) 138–39.
[112] ibid 7.
[113] Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review* 229–72 (arguing that a certain degree of differentiation between international legal standards and their interpretation in domestic courts is inevitable and even desirable).
[114] Carter Jr (n 108) 319.
[115] Carozza (n 106) 40.
[116] State sovereignty is a well-established principle of international law. The United Nations Charter also recognises that principle: Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI, art 2(1).
[117] *Massaba* (n 6) para C8.

the light of the relevant treaty provisions. This article answers that question by arguing that cutting and pasting the formulations contained in the ICC Statute directly into the text of applicable domestic laws infringes state sovereignty. This argument flows from two interconnected sub-arguments. The first of these is that a sensible interpretation of the hierarchical priority of international law, as expressed in Article 215 of the DRC Constitution, does not suggest that judges should apply duly ratified and published international treaties where national law enshrines concurrent provisions. The article paved the way for that sub-argument in Section 2 when it described the DRC tradition of interpreting legal texts, and in Sections 3 and 4 when it explained the DRC version of monism generally, and specifically by outlining two military cases in which judges gave direct effect to Article 215. Despite the false starts as a result of inexperience and the infancy of the practice, the execution of Article 215 by military courts in the DRC is an almost imperceptible yet heartening trend that points to expeditious ways in which post-conflict countries can rebuild their criminal justice systems on stronger foundations and combat impunity.

The second sub-argument is that subsidiarity not only structures the fundamental dilemma but solves it, as it directs states to apply their own law and to resort to international treaties exceptionally when domestic law fails or does not avail. This sub-argument is elaborated upon in Section 5 of the article. Subsidiarity is a foundational principle in international law that organises the whole set of legal rules deferential to the states and developed to accommodate state sovereignty. Courts should construe national criminal law, the product of national legislative sovereignty, according to the provisions of the ICC Statute, without directly applying them, except over conflicting provisions in national law. Otherwise, the entry into force of ratified and published treaties and agreements would work as an automatic repeal of applicable DRC provisions or laws. The approach advocated in this article promises to reconcile international treaties and national sovereignty as reflected in legislation. The mischief that judges should strive to prevent is that, when they uncritically – and perhaps out of zealous activism – cut text from the ICC Statute and paste it over relevant provisions in DRC law, they risk tearing apart pieces of their country's sovereignty.