

**SEXUAL RIGHTS VIOLATIONS  
DURING THE CONFLICTS IN THE  
DEMOCRATIC REPUBLIC OF THE CONGO  
BETWEEN 2005 AND 2015**



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Degree of Masters Legum in the Faculty of Law at the University of the  
Western Cape**

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**07-August-2018**

## DECLARATION

I declare that this thesis on *sexual rights violations during the conflicts in the DRC between 2005 and 2015* is my own work, that it has not been submitted to any other University for any degree or examination, and that all the sources I have used or quoted have been indicated and acknowledged by means of full references.

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Date: 07 August 2018



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## DEDICATION

This thesis is dedicated to you my dead Priest big brother Abbe Joachim Kadima Kadiangandu wa Kalonji. You encouraged me to study high level like you before to die, so young, at Baton Rouge – Louisiana State on 18 September 2011. I will never forget you.



## LIST OF ABBREVIATIONS

ACHPR:	African Charter on Human and People's Rights
ACRWC:	African Charter on the Rights and Welfare of the Child
CEDAW:	Committee on the Elimination of Discrimination against Women
CRC:	Convention on the Rights of Children
DRC:	Democratic Republic of the Congo
HIV/AIDS:	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
HMC:	High Military Court
HRL:	Human Rights Law
ICC:	International Criminal Court
ICCPR:	International Covenant on Civil and Political Rights
ICRC:	International Committee of the Red Cross
ICTR:	International Criminal Tribunal for Rwanda
IHL:	International Humanitarian Law
IHRL:	International Human Rights Law
LGBTI:	Lesbian, Gay, Bisexual, Transgender and Intersex
MONUSCO:	United Nations Organization Stabilization Mission in the DRC
MRM:	Monitoring and Reporting Mechanism
SCC:	Special Criminal Court
SPC:	Special Penal Court
UDHR:	Universal Declaration of Human Rights
UNGA:	United of Nations General Assembly
UNSC:	United of Nations Security Council
UNSG:	United of Nations Secretary General

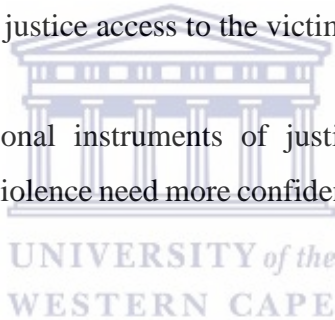
## ABSTRACT

This thesis examines the sexual rights violation in Eastern DRC, which has been described as the worst in the world. The sexual violence against women and children in this country is systematic and widespread and perpetrated by armed groups, and increasingly also by civilians.

The prosecution of sexual offences should contribute to the reduction of these offences, but the Congolese state prosecutes very few cases. The resulting impunity became an obstacle to the state to stop sexual violence, which become unable to overcome the obstacles to prosecutorial action.

The successful prosecution of sexual offenders in Eastern DRC faces many obstacles and requires an exceptional jurisdiction which must provide a minimum of better freely conditions to the prosecutors and better unrestrained justice access to the victims.

The enforcement of the international instruments of justice will be possible only by this jurisdiction. The victims of sexual violence need more confidence in the jurisdiction which is really working for them to attain justice.



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## CHAPTER ONE: BACKGROUND.

### 1.1. INTRODUCTION.

The Democratic Republic of Congo (DRC) has been experiencing armed conflict situations for the past 20 years. This armed conflict is international because of the direct participation of foreign troops from Rwanda, Burundi and Uganda in the military operations. There are also some Congolese rebel troops who are fighting against the government of DRC.

The conflict in DRC has been destabilizing the Great Lakes Region in central Africa for a long time. This Region is composed of DRC, Rwanda and Burundi. The country is adversely affected particularly in the East, where there are rampant human rights violations, such as, indiscriminate slaughter, repeated rape of women and girls, exploitation and using of children as child soldiers.

Margot Wallstrom, Special Representative of the UNSG for Sexual Violations, said that the Eastern part of DRC is designated the '*worldwide capital of rape*' with more than about 200 000 registered cases and many not registered.<sup>1</sup>

These human rights are often exposed by human rights NGOs in and outside of DRC, which have called for the Congolese Government and the international community to stop them. The perpetrators of such violations have not been brought to justice. Human rights abuses suffered by the population of DRC including sexual violence are widespread.

Some study shows that 23 per cent had witnessed an act of sexual violence and 16 per cent reported having had an experience of sexual violence.<sup>2</sup>

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<sup>1</sup> *To act against sexual violations in DRC*, Available at <http://www.adequation.org>, accessed 13 June 2016.

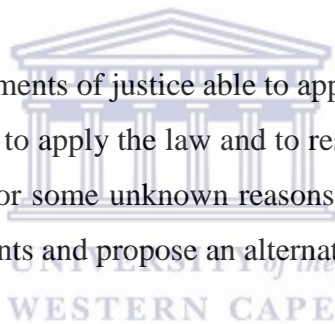
<sup>2</sup> Clifford L, Eichstaedt P and others: '*Special Report, Sexual violence in the DRC*', Institute for War and Peace Reporting, the Netherlands. Edited by Tosh C and Yigal C, 10-2008.

Not only the enemy soldiers, the militias, members of the armed bands and looters are the perpetrators, but there are also those who were supposed to protect civilians: soldiers from local army and officers of the state, like police officers or border guards.<sup>3</sup>

Generally, in the customary sphere, women and girls who have sex outside of marriage are still regarded as promiscuous, or more colloquially as slags and sluts; unmarried mothers are still unable to legitimize their children without getting married. So the discussion of female sexuality almost always invokes the determining context of marriage and the family.<sup>4</sup>

In the light of most human rights documents, the rights of children and women must be respected. This study is focussed on the question of sexual rights violations in the DRC during the conflicts, that will be worthy of intense analysis because women are experiencing increasing levels of sexual violence.

There are available legal instruments of justice able to apply against any perpetrators and there are a legal jurisdictions that are working to apply the law and to restore justice. But the enforcement of those legal instruments is not effective for some unknown reasons. So this work will analyse the reasons of non-enforcement of those instruments and propose an alternative solution.



## **1.2.THE DRC's CONFLICTS.**

The origin of the DRC's troubles can be explained, for the most part, as being due to two conflict situations: external and internal.

### **1.2.1. The external origin.**

In April 1994, the Rwanda's Hutu extremist Government orchestrated the genocide of about 800 000 Tutsi and moderate Hutu citizens. When Tutsi rebels took control of Rwanda, over a million Hutu, including many of the leaders who directed the genocide, took refuge in camps across the border in Zaire.<sup>5</sup>

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<sup>3</sup> Buchowska N, *Violated or protected. Women's rights in armed conflicts after the Second World War*, pdf. Article in International Comparative Jurisprudence. Adam Mickiewicz University, Poland 2017. Available at [www.elsevier.com/locate/icj](http://www.elsevier.com/locate/icj), retrieved January 2017, 3.

<sup>4</sup> Carol Smart, *Law, crime and sexuality*. Essays in feminism, Sage Publications, Thousand Oaks, London 1995, 55.

<sup>5</sup> 'DRC, conflicts situations', available at <http://www.hrw.org>, accessed 5-5-2015.

The DRC welcomed millions of Rwandese people without discrimination. However the Rwandese refugees started armed training with the intention of getting back their power in Rwanda. At that time, Rwanda was aiming to send more than 20 000 troops into DRC to kill, pursue and scatter all Hutu Rwandans.<sup>6</sup> The armed conflict from Rwanda continued in DRC, between Rwandan Tutsi and Hutu.

### 1.2.2. The internal origin

The internal origin had also an external origin. From November 1996 to May 1997, the Rwandan, Burundian and Ugandan armies, in support of an anti-Mobutu rebel group, the Alliance for Democracy Liberation (AFDL), attacked the Rwandan refugee camps in Eastern Zaire, seized Kinshasa and chased out Mobutu. Laurent Kabila, the rebel leader, was installed as President of DRC. However, Laurent Desire Kabila was assassinated by his bodyguard in January 2001 and his 29-year-old son Joseph Kabila, took office.<sup>7</sup>

In the East of DRC, some rebel troops had as their goal making that area uncontrollable and non-governable by the central Government. Congolese loyal troops, as well as the foreign rebel troops, are complicit in selling firearms, ivory, wild animals; and also in taking mineral resources and sending them back to Rwanda and Uganda.<sup>8</sup>



### 1.2.3. The antagonists in the conflicts.

The main armed groups which are fighting in the DRC conflicts are detailed here with the main need to know who combatants are, their origin and their organization. There are:

#### 1.2.3.1. The Congolese loyal armed troops.

The Congolese loyal troops called *Forces Armées de la République Démocratique du Congo (FARDC)*, it is the State organisation responsible for defending the DRC national territory.<sup>9</sup>

The Congolese Armed Forces may number between 144,000 and 159,000 personnel. In addition, there is a presidential force called the Republican Guard, but it and the Congolese National Police (PNC) are not part of the Armed Forces.<sup>10</sup>

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<sup>6</sup> *The Eastern of Congo*. Available at <https://www.cfr.org/eastern-congo>, accessed 3-2015.

<sup>7</sup> See 5.

<sup>8</sup> *Armed conflict, location and Event Data Project*. Available at <http://www.acleddata.com>, accessed February 2016.

<sup>9</sup> The ICD Global and Inclusive Accord on December 2002, at Sun City in South Africa.

<sup>10</sup> *Armed Forces of the DRC*. Available at <https://www.africanworldwar.org>, accessed 19 May 2017.

The Congolese army commits sexual violence on women and girls, and uses children as soldiers. State and irregular military forces are responsible for many of the worst numerous human rights abuses in the country. Senior FARDC officers have obstructed UN efforts to oversee the release of child soldiers.<sup>11</sup>

### **1.2.3.2. The rebel armed groups.**

The Eastern Congolese Region has been plagued by several armed groups. While civilians are the first victims of the conflict, the Rwandan and Congolese governments are accusing each other of supporting rival militias and rebel groups.<sup>12</sup>

Some rebel groups operating and committing sexual violence are detailing here:

#### **1.2.3.2.1. The M23 rebel group.**

This main rebel group was formed in April 2012. It mainly comprises former members of the Tutsi National Congress for the Defense of the People (CNDP) and former armed group led by Laurent Nkunda. The group takes its name from a peace agreement signed on March 23, 2009 with the Congolese government, the M23 rebellion receives military support from Rwanda and Uganda while both of these countries have denied the accusations.<sup>13</sup>

#### **1.2.3.2.2. The Democratic Forces for the Liberation of Rwanda (FDLR)**

The second rebel group known by its French acronym FDLR, this Rwandan Hutu rebel group claims to defend the Hutus, who fled to DR Congo after the Rwandan genocide in 1994. But a number of its members come from the former Army for the Liberation of Rwanda, which took part in the massacre of Tutsis. Rwanda has always accused DRC of supporting the FDLR.<sup>14</sup>

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<sup>11</sup> DRC Army. Available at <https://www.globalsecurity.org>, accessed on 23 June 2015.

<sup>12</sup> *Armed groups in Eastern Congo, the humanitarian catastrophe*. Available at <http://www.cfr.org>, accessed 03/2016.

<sup>13</sup> DRC: *Who are the various rebel groups at war?* Available at <https://www.france24.com>, Accessed at 22/08/2012.

<sup>14</sup> See 13.

#### 1.2.3.2.3. **Mai-Mai militias.**

The third armed group is completely Congolese, a broad range of armed groups active in the provinces of North and South Kivu. These militias were formed by local warlords, tribal leaders, village heads or politically motivated fighters and the movement against the aggression of Congo. They became particularly active as communities organized their self-protection against the rising tide of violence and killing of other ethnic groups.<sup>15</sup>

#### 1.2.3.2.4. **The Lord's Rebel Army (LRA)**

The Lord's Rebel Army (LRA) was founded by Joseph Kony in northern Uganda, with the goal of establishing a Christian theocracy based on the Ten Commandments. The insurgency is believed to have recruited tens of thousands of child soldiers and displaced hundreds of thousands of civilians fleeing its guerrilla warfare. The LRA is accused of committing sexual abuse and atrocities on populations.<sup>16</sup>

#### 1.2.3.2.5. **The Patriotic Forces for the Liberation of Congo (FPLC).**

The armed branch of the Union of Congolese Patriots political party has been accused of numerous abuses of human rights in the mineral-rich northeastern province of Ituri. In 2006s, the movement was weakened by the arrest of its leader Thomas Lubanga.<sup>17</sup>

#### 1.2.3.2.6. **Allied Democratic Forces (ADF).**

The ADF, a small but potent force ensconced in the Ruwenzori Mountains on the border with Uganda, has remained a threat with a spate of multiple deadly attacks on some villages. They are also committed atrocities and sexual rights violations on weak people.<sup>18</sup>

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<sup>15</sup> See 13.

<sup>16</sup> See 13.

<sup>17</sup> See 13.

<sup>18</sup> See 13.

### 1.2.3.3. The foreigners armed troops.

After a 2003s peace deal pacified the Eastern Congo, the fighting continued between loyal army forces and the rebel groups. Pro-Rwanda Banyamulenge clashed with the FDLR, as well as government soldiers.<sup>19</sup>

Since that agreement, the antagonist' countries as Rwanda, Burundi and Uganda stopped straight fighting against DRC army forces, but start using or fighting by these rebel armed groups which are working for them, receiving money, weapons and logistic support to continue fighting, and maintaining this part of country ungovernable.

### 1.2.3.4. MONUSCO.

The UN have created an armed mission which is charged to make peace in DRC, to stand between all armed groups, to protect Congolese populations with a specific counterinsurgency mandate, an 'intervention brigade,' consisting of Special Forces. MONUSCO is the UN's largest and longest-lasting mission to date with 21,000 troops.<sup>20</sup>

But rebels continue to kill and plunder natural resources with impunity and no effective steps have been taken to abide by repeated pledges to demand accountability for the war crimes and crimes against humanity.<sup>21</sup>

The initial and priority MONUSCO mandate is 'the protection of civilians' by ending the conflicts, which does mean to protect without prejudice, to provide specific protection for women and children affected by armed conflict, and the promotion of human rights.<sup>22</sup>

The next picture establishes the collaboration that exist between main armed groups in the Eastern of DRC, as well as their countries of origin.<sup>23</sup>

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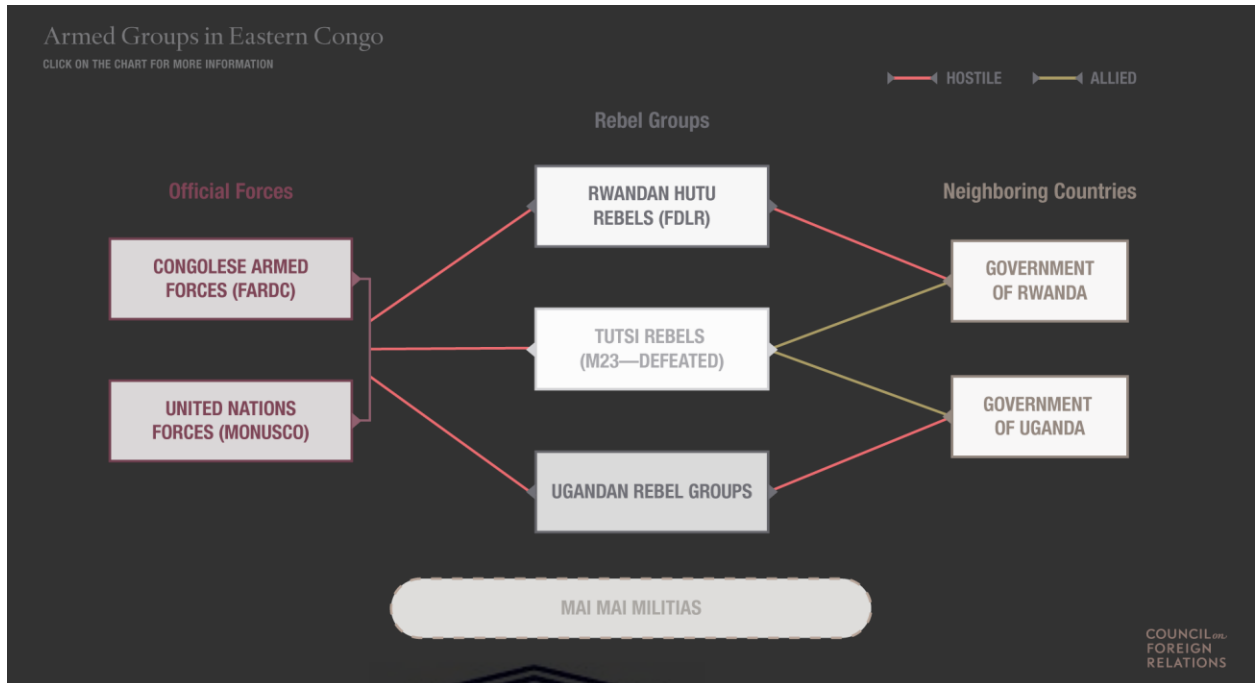
<sup>19</sup> See 13.

<sup>20</sup> *The strong UN force, known as MONUSCO.* Available at <http://www.pamf.org/teen>, accessed October 2013.

<sup>21</sup> *The conflict in the DRC.* Available at [www.worldwithoutgenocide.com/congo](http://www.worldwithoutgenocide.com/congo), accessed 2013.

<sup>22</sup> Elsa Buchanan, *DRC, what is the MONUSCO and what role does it have ahead of the elections?* Available at <http://www.ibtimes.co.uk>, accessed 7-3-2016.

<sup>23</sup> *Armed groups in Eastern Congo.* Available at <https://www.cfr.org/eastern-congo>, accessed at March 2016.



### 1.3. DELIMITATION OF STUDY.

The violence is not a means to a higher end in DRC, but the expression of a deeper social, political and historical rot. Here, the question to witness is how sexual violence becomes systemic and normal, how a region can become worldwide capital of rape, and how juridical institutions such as the HMC and ICC can work without ending or decreasing impunity and sexual violence. The study is proposing the possibility of creating a new Court.

#### 1.3.1. Delimitation of zone

The DRC is a big country, so this study is concerned only with the Eastern part where most sexual rights violations are mainly committed. This study is located nearly in Eastern Congo on the North and South Kivu provinces, as well as nearby Orientale and Maniema provinces.

#### 1.3.2. Delimitation of time.

The concerned period of this work is running between 2005 and 2015 as critical moments of increasing levels of rape, sexual violence and other acts of sexual atrocities and high level of human rights violations on girls and women in these areas.



## 1.4. CONCEPTUAL CLARIFICATION.

Some keywords need to be defined in the specific context of this study:

- 1.4.1. Conflict:** The conflict is a big or strong disagreement and dissension that come into collision between people who by contradiction and variance, are in opposition.<sup>24</sup>
- 1.4.2. Jurisdiction institution:** The jurisdiction institution is the system of courts that interprets and applies the law in the name of the state. This system also provides a mechanism for the resolution of disputes.
- 1.4.3. Human Rights:** human rights are the basic rights and freedoms that belong to every person in the world, from birth until death.<sup>25</sup> According the OHCHR, human rights are rights inherent to all human beings.<sup>26</sup>
- 1.4.4. International Criminal Court (ICC):** The ICC is a permanent jurisdiction that sits in The Hague in the Netherlands with function to investigate and prosecute individuals for international crimes of genocide, crimes against humanity, and war crimes.
- 1.4.5. High Military Court (HMC):** It is a DRC jurisdiction that has the mission to investigate and to prosecute all soldiers who committed a crimes and offences according the law and military instructions.<sup>27</sup>
- 1.4.6. Rape:** Rape as a form of sexual violence, is unlawful sexual activity and usually sexual intercourse carried out forcibly against the will usually of a female.<sup>28</sup> Rape is also to have unlawful sexual intercourse with a women who at that time, does not consent to it.<sup>29</sup> The Model Penal Code defines ‘rape’ as sexual intercourse by a man with a woman to whom he is not married, by force or threat of imminent death.<sup>30</sup> But, in my point of view, this is no longer a universally accepted definition.
- 1.4.7. Sexual rights violations:** It contains the main keyword in this work, which should be defined separately. But as a phrase, it is misconduct, disrespect of somebody by sexually abusive contact, or disrespect of his/her sexual rights.

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<sup>24</sup> *Conflict*, available at <https://www.merriam-webster.com/dictionary>. Accessed 2017.

<sup>25</sup> *What are human rights?* Available at <https://www.equalityhumanrights.com>, accessed at 23-01-2017.

<sup>26</sup> *What are human rights?* Available at <https://www.ohchr.org>, site MAP OHCHR 1996 - 2017.

<sup>27</sup> *The DRC, military justice and Human Rights. An urgent need to complete reforms.* Published by: Open Society Initiative for Southern Africa. Available at <https://www.afriamap.org>. Accessed 2009.

<sup>28</sup> *What is rape?* Available at <https://www.merriam-webster.com>. Accessed 2017.

<sup>29</sup> Susan Atkins and Brenda Hogget; *Women and the Law*, Basil Blackwell Inc. 432 Park Avenue South. Suite 1505, NY 10016, USA 1984, 69.

<sup>30</sup> Shimon Shetreet; *Women in Law*, Hebrew University of Jerusalem, Kluwer Law international, London The Hague-Boston 1998, 368.

**1.4.8. Sexual violence:** It is defined as a sexual act that is committed or attempted by another person without freely given consent of the victim or against someone who is unable to consent or refuse.<sup>31</sup> Sexual violence is an act of a sexual nature by force, or by threat of force or coercion.<sup>32</sup>

**1.4.9. Special Penal Court:** Special court is one that hears and decides cases with specific characteristics and has limited criminal jurisdiction which includes all courts of limited and specialized jurisdiction.<sup>33</sup>

## 1.5. RESEARCH QUESTION.

### 1.5.1. Research questions.

The big question to understand is why there are so many sexual rights violations against women and girls in the DRC, mainly during these conflicts? The reality of the increasing rate of sexual rights violations seeks to ask if the DRC needs a special penal court to end impunity for perpetrators of rape and sexual rights violations. Is there a need to provide an alternative jurisdictions? How will a new jurisdiction be monitored to ensure its ends impunity and sexual violence? Where should this jurisdiction be established?

The research will be guided by the following sub-questions which need to be asked and to shed light on possible solutions: who all are committing sexual violence and why is sexual violence so frequently repeated in DRC over such long periods of time? As regards the HMC and ICC, there is a need to seek what is wrong in their functioning and the reason for their failure?

### 1.5.2. Rationale of the study

The contradictory situations that exist in DRC make this country a place to observe things through their absence: There are many soldiers, but no state; over 21.000 UN peacekeepers, but no peace to keep; countless armies and militias groups, but no single, unified reason for their existence, two main judicial jurisdictions, but general impunity.

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<sup>31</sup> *Sexual violence surveillance* ; Available at <https://www.cdc.gov/violenceprevention/pdf>. Centers for Disease Control and Prevention. Accessed 2009.

<sup>32</sup> *Soldiers who rape, commanders who condemn*, available at <http://www.hrw.org>, (retrieved 16-08-2011).

<sup>33</sup> *Special courts definition*, available at <http://www.legal-dictionary.thefreedictionary.com>. Retrieved 2017.

The level of stigmatization of victims of sexual violations, must call upon everybody to act for ending impunity and sexual viciousness. The presence of ICC and HMC does not have enough power against many perpetrators soldiers who are not stopping committing sexual violence. The justice system cannot stay helpless and unsuited to solve the issue, because there are many ways to solve it. So, this study proposes one of them.

### 1.5.3. Literature review.

There is diverse literature on sexual rights, rights of women, and children, particularly at the international level: One of the ideas suggested is the necessity for the creation of new mechanisms of breaking and stopping the cycle of impunity.<sup>34</sup>

The need for a new jurisdiction was demonstrated by 52 women personalities, several NGOs on the rights and welfare of the child related to human rights, scientific and political personalities who are sending to the UN a petition with 47 000 signatures asking for the creation of the Special Penal Court in the DRC in order to ending impunity and sexual violence.<sup>35</sup>

On the same matter, '*Jeune Afrique*', a French political magazine, has published an article: 'International appeal for the creation of an International Penal Court in DRC'.<sup>36</sup>

This study will also try to apply the Monitoring and Reporting Mechanism (MRM) as it is presented by Child Rights International Network to protect children and women from harmful practices.<sup>37</sup>

The necessity to grant protection to women during armed conflict is recognized in the four Geneva Conventions of 1949 about civilians' rights, on international human rights law, the law of armed conflict, and the protection of civilians against arbitrary treatment.<sup>38</sup>

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<sup>34</sup> *The UN and sexual violations in DRC*, available at <http://www.rue89nouvels.com>, accessed 10/02/ 2015.

<sup>35</sup> *To act against sexual violations in DRC*, available at <http://www.adequation.org>, accessed 13 June 2014.

<sup>36</sup> International calling of penal court creation in DRC, available at <http://www.jeuneafrique.com>, accessed 2-2016.

<sup>37</sup> *Child soldiers' international*, CRIN (Child Rights International Network) USA 2015, 1.

<sup>38</sup> Van der Poll L, *The Emerging Jurisprudence on sexual violence perpetrated against women during armed conflict (2007)*, African Yearbook of IHL, 10.

The Protocol Additional of the Geneva Conventions provides some measures in favour of women and children. Article 76 states that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.<sup>39</sup>

The international law lay down the prohibition of rape and serious sexual violence. The sexual violence committed during armed conflicts is an act of torture.<sup>40</sup>

The Geneva Conventions explain the duties and role of the State, on the one hand and on the other, the treatment of protected persons during an armed conflict.<sup>41</sup> The same Geneva Conventions prohibit any coercion against protected persons to obtain information from them or from third parties.<sup>42</sup>

There is a positive role that can be played to advance children's rights independent organisations with power and a commitment to promote the interests of children. Therefore, the role of child advocacy groups, NGOs, human rights oriented legal organisations and the like in promoting actions destined to put flesh on bones of children's constitutional rights will be critical.<sup>43</sup>

Regarding child soldiers who have committed sexual violence, the matter becomes special and complicated. Some responses can be found in some international instruments, such as *The Optional Protocols* that says the sale of children, child prostitution, and child pornography are contemporary forms of slavery, and make a mockery of children's rights. Such practices violate children's rights as enumerated in numerous international treaties and conventions, such as the CRC, International Labour Organization (ILO) Convention 182 on the Worst Forms of Child Labour, the Universal Declaration on Human Rights, the ICCPR, and the International Covenant on Economic, Social and Cultural

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<sup>39</sup> ICRC, *Protocols Additional to the Geneva conventions of 12 August 1949*, Geneva (2001), 56.

<sup>40</sup> Shaun A. de Freitas; *Humanity, the Unborn and the intersection of IHL and HRL*, (2002) 22.

<sup>41</sup> ICRC; *The Geneva Conventions of 12 August 1949*, Article 27, (2010), 161.

<sup>42</sup> See 41, 162.

<sup>43</sup> Professor Sloth-Nielsen J. 'The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa'. *The International Journal of Children's Rights*, 4: 323-344, Kluwer Law International, Netherlands (1996), 342.

Rights (ICESCR).<sup>44</sup> The CRC also provides the Optional Protocol on the involvement of children in armed conflicts.<sup>45</sup>

The UN High Commissioner for Human Rights (HCHR) said that sexual violence remains extremely serious due to its scale, systematic nature and number of victims in DRC.<sup>46</sup>

Indeed half the cases reported to the DRC between 2010 and 2013 can be attributed to the members of FARDC, and other State agents are among the main perpetrators.<sup>47</sup>

Sexual rights embrace human rights that are already recognised in national laws, international human rights documents and other consensus documents.<sup>48</sup>

Women have the rights not to be subject among other things, to persecution, degrading treatment and violence, mass arrests, forcible evictions or destruction of dwellings. Since human rights are by nature applicable to ‘all persons’, every human being and all members of the human family.<sup>49</sup>

The presentation of the Beijing Platform for Action called on governments to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls.<sup>50</sup>

In the same vein of showing the problem and proposing a practical solutions, the brutality against civilians, specifically sexual violence and rape are an integral part of the war and the impunity

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<sup>44</sup> Cris R. Revaz, ‘The optional protocols to the UN Conventions on the Rights of the Child on sex trafficking and child soldiers’. Human Rights Brief, fall, USA 2001, 5.

<sup>45</sup> Optional Protocol to the CRC on the involvement of children in armed conflict. Adopted by GA Resolution 54/263 of 25-05-2000. See 63, 667.

<sup>46</sup> Rathgeber Theodor; *Performance and Challenges of the UN HRC*. Article on Dialogue on Globalization Forum Menschenrechte, Berlin Germany 2013, 11.

<sup>47</sup> *Sexual violence in the DRC, endemic sexual violence*. Available at <http://www.europarl.europa.eu>, accessed November 2014.

<sup>48</sup> Amolo Rebecca, *A critical reflection on the African women’s protocol as a means to combat HIV/AIDS among Women in Africa*, Unpublished LLM Thesis, UWC, Law faculty, 27 October 2006, 35.

<sup>49</sup> Winston E. Langley, *Women’s Rights in International Documents*, Mac Farland and company, Inc. Publishers, Jefferson, London (1991), xvi.

<sup>50</sup> Sarah Joseph and Adam Mc Beth, *Research Handbook on International Human Rights Law*, Edward Elgar, Cheltenham, UK 2010, 201.

experienced by soldiers raping civilians has also increased the proportion of sexual crimes committed by civilians.<sup>51</sup>

Several documents, news, reports, balance sheets and reports about conflicts, rape and sexual violence, the absence of justice and violations of all forms of sexual rights are given by many websites. Some of them will be provided during the study, because of their important analysis of conflicts situations and the link with ending sexual violence.

This work is proposing the creation of a Special Penal Court which will work in conjunction with local jurisdictions, but directly with victims and criminals, located in a neighbouring country, and acting in accordance with international law. That is the originality of this work.

#### **1.5.4. Research methodology.**

Some scientific methods are used to guide the process of this work; *the qualitative method* to seek the best judicial system to end sexual violence and impunity. *The analytic-comparative method* which is helping to compare various data collected by reading; the comparison of existing systems, which are not satisfying the need for an end to impunity, and the new system proposed.

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<sup>51</sup> Human Rights Watch, *the war within the war, sexual violence against women and girls in Eastern Congo. Report on human rights violations in the DRC*. Available at <http://www.hrw.org>, USA, June 2012.

## CHAPTER TWO: SEXUAL RIGHTS VIOLATIONS.

### 2.1. Introduction.

Sexual rights violations are a complex phenomenon which is fundamental and forms the basis of this work. Sexual rights are human rights, they are part of life and must be protected. The protection of the rights is the justice. Sexual rights according the law are justice.

Justice is inseparable from virtue. And virtue in the teleological sense is right conduct in accordance with the universal law. A person who practices virtue privately as well as towards others, is just in the universal sense. Universal justice is the whole of virtue. Particular justice is not the whole of virtue, but a part of it.<sup>52</sup>

The respect of sexual rights being understood as part of universal value, does mean virtue. A person who respects the sexual rights according international law, is legally just and lawful. A person who does not respect the sexual rights is legally unjust and unlawful.

The treatment of the complex sexual rights matter includes also the necessity to grant security to women and children. So that the analysis being apply on two aspects, the first is the security of sexual rights in general, that is abundantly exhibited and discussed by international law. The second is the sentence and punishment to the perpetrators of sexual rights that are also showed and discussed by international law. But this work focusses mainly on the second aspect that concerns the sentence and punishment for the perpetrators of sexual violence.

This chapter will discuss many forms of sexual violence which are used and applied by perpetrators, soldiers and combatants, on civilian populations. They prey mainly on women and children, who are easily affected by armed conflict.

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<sup>52</sup> Almquist Jessica, *Human Rights, Culture and the Rules of Law*. Vol. 6 in the series Human Rights in Perspective. Hart publishing, Oxford and Portland, Oregon, USA 2005, 324.

## 2.2. Juridical aspects of sexual rights.

The following analysis on sexual rights and sexuality concerns the conception and treatment of sexual violence as a crime against humanity and violation of the law according to international law and customs of war as law enforcement. In particular, their conception and treatment of sexual violence as, *inter alia*, torture, genocide, grave breaches of the four Geneva Conventions and their Additional Protocol and as a violation of the laws and customs of war, together with applicable provisions of the Rome Statute, will be considered.<sup>53</sup>

The question that we asked in the first chapter concerns why our two jurisdictions HMC and ICC did not apply the sentences in case of lawsuits of established infractions linked to sexual rights violations. Because everyone is aware that these are crimes, but also there is impunity. The reasons must be found following the analysis of the law.

The International Covenant on Civil and Political Rights (ICCPR), recognises that ‘every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrary deprived of his life.’<sup>54</sup> In this way, the above article 6 (1) is a rule and positive obligation that showing the responsibility of States to enforce the law and to save the life of the population.

The Committee on the Elimination of Discrimination against Women (CEDAW) defined gender-based violence as violence that is directed against a woman because she is a woman or that affects women disproportionately.<sup>55</sup>

The obligation of Article 6(1) is not only to make sure that people enjoy the right to life, but it is to ensure the quality of life. People should have the right to a better life; that is a duty and main quality objective of the States.<sup>56</sup>

There is a necessity to make a conceptual link between the right to life under Article 6(1) of the ICCPR and the prohibition of acts of sexual violence committed against women. The first fixes the quality of life according international human right law whereas the second erects a principle of one aspect of life according international criminal law.

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<sup>53</sup> Professor Van der Poll L.; *The Emerging Jurisprudence on sexual violence perpetrated against women during armed conflicts* (2007), African Yearbook of IHL, 3.

<sup>54</sup> ICCPR; *Civil and Political Rights: The Human Rights Committee*. Fact Sheet No 15 (Rev.1) UN Office at Geneva 10, Switzerland, 5-2005, 34.

<sup>55</sup> CEDAW Committee, General Recommendation No. 19, 1992, para 6.

<sup>56</sup> Professor Benyam Mezmur. Article 6 of ICCPR, IPHRL, Module of course, Law Faculty, UWC 2016.



Regarding a better life, because children in the world have the same rights, Professor Sloth-Nielsen explains two main ways contained in section 28 of constitution of South Africa; the first way advocates in recognition of children's vulnerability, it provides additional protections. These include the rights to name and nationality, to family or parental care; to be protected from maltreatment, neglect and abuse; to be protected from age inappropriate or exploitative labour; not to be detained, except as a measure of last resort. The second way, contained in section 28(2), advises the most important 'best interest of child' will be a primary consideration in all actions concerning children.<sup>57</sup> These rights are also valid for all Congolese children.

### 2.2.1. Rights relating to sexuality

The sexuality rights are the most important rights relating to the dignity and integrity of human beings. Human Rights Law (HRL) is concerned with all three core liberal values: human dignity; system stability and peace; and liberal democracy. Judge Rosalyn Higgins argues that human rights are 'part or parcel of the integrity and dignity of the human being'.<sup>58</sup>

The value of human dignity is the normative umbrella under which all human rights are the measures aimed to satisfy the human need for human dignity in all its manifestations. Human rights are the tools that enable autonomous self-realisation and the development of one's self-worth and potential for personhood in its entirety. Autonomous self-realization, self-worth, and personhood comprise the core of human dignity.<sup>59</sup>

Sexuality has an intimacy and private character linked to human nature. The rights to sexuality are acknowledged and defined according international law on this matter, to enjoy this sexuality with freedom according to the respect of law and standards erected by society. Women and girls, where the socio-economic situation worsens, may accept abusive sexual relationships in order to survive. In other cases, girls without money for school fees, have sex with their teachers in order to stay at school; or employees have sex with their employers in order to keep their job.<sup>60</sup>

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<sup>57</sup> Professor Sloth-Nielsen J. *Children's Rights*, Module of course, Faculty of Law, UWC LLM 2016.

<sup>58</sup> Armstrong D, Farrel T and Helene L, *International Law and International Relations*, Cambridge University, London 2012, 154.

<sup>59</sup> Judith Karp; *Concept underlying the implementation of the CRC*, Loyola Poverty Law Journal Spring 113, USA 2011, 1.

<sup>60</sup> Kippenberg Juliane, *The war within the war, sexual violence against women and girls in the Eastern Congo*, pdf. Article available at <http://www.hrw.org>, accessed 2012, 21.

The Charter of the UN proclaims that one of the purposes of the UN is to promote and encourage respect for human rights and fundamental freedoms for all.<sup>61</sup>

In general, the DRC tradition requires a discretion about sexuality. Diverse gender and sexual identities are ‘taboo’, there is no permission to talk some subjects in public, even between parents and children. Actually, there is no any legal disposition which recognises homosexual activity, does means lesbian, gay, bisexual, transgender and intersex (LGBTI). However, the same-sex acts can be criminalized under the ‘public decency provision’ in the Congolese penal code, Article 176.<sup>62</sup>

Definitively, the rights relating to sexuality are shared between the Congolese traditions (according various tribes) and the law which defines those rights. The villages apply mainly the rights according their traditions and the cities apply their rights according the law. However, both refer to the main law, the constitution.

### 2.2.2. Duties relating to sexuality

The respect for human rights is an obligation. Sexuality as one human rights, also has this obligatory character, as is means a duty upon everyone to respect other’s rights. Because of the intimacy and private character, sexuality becomes a right to respect and to protect. So that sexual right as a part of law, comes about duty and suitable obligation.

Article 34 of CRC concerning sexual exploitation of children, advocates to prevent: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution, pornographic performances or other unlawful sexual practices.<sup>63</sup>

But the prohibition of child sexual exploitation is extended to handle and manipulation of some body parts, exposure to pornography, sexual exploitation, and sexual abuse, verbal sexual harassment...<sup>64</sup> The prohibition of sexual rights violation is contained in a various documentations of IHR and IHL instruments. It is generally considered to have become part of customary international law.

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<sup>61</sup> Human Rights, ICCPR, Fact Sheet No 15, USA 2005, 1.

<sup>62</sup> Rights of LGBTI persons in DRC, available at <http://www.ighlhrc.org>, accessed 6-2014.

<sup>63</sup> Rachel Hodgkin and Peter Newel, *Implementation Handbook for the CRC*, Fully revised edition, UNICEF House, Three UN Plaza, New York 10017, USA 2002, 505.

<sup>64</sup> See 57.

Torture as a crime *per se* (sexual violence is a torture), (in other words as a crime which is punishable as such, even if perpetrated sporadically and regardless of whether it is perpetrated in time of peace or war) requires the involvement of State official. This requirement is expressly included in art 1(1) of the 1984 Convention against Torture which provides that.<sup>65</sup> So that there is a duty and obligation to avoid the use of torture.

### 2.3. Forms of sexual violence.

The East of the DRC in particular has been described as the prevalence and intensity of all forms of sexual violence and the worst in the world. The easy elucidation of this is the sexuality obtained by force, by threatening life with guns and causing fear of death.<sup>66</sup>

Sexual violence<sup>67</sup> takes many forms of acts which frequently are perpetrated jointly and coexist with each other. These are inter alia: torture, medical experiments, trafficking, rape, forced prostitution or forced exchange of sexual favors for crucial items or return of children, forced cohabitation or forced marriage, forced pregnancies, intentional infection with HIV, forced abortion, forced sterilization. It is very significant that sexual violence – especially in the form of rape – is the most common and predominant form of serious violation of the law against women.<sup>68</sup>

The UN includes rape, sexual slavery, forced prostitution, forced pregnancy, gang rape, forced incest, sexual mutilation, disemboweling, genital mutilation, cannibalism, deliberate spread of HIV/AIDS, and forced sterilization as other forms of sexual violence that occur in the DRC that are used as techniques in war against the civilian population.<sup>69</sup>

During the high-level meetings of the 72<sup>nd</sup> GA, the debate addressed the issue of sexual violence from the angle of a new tendency to use them as ‘tactics of war and terrorism’, as ‘tools of dehumanization and shame’, as well as ‘weapons to punish and persecute’, is described as the new dimensions of this scourge such as the use of women as suicide bombers or sex slaves, or as

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<sup>65</sup> Van der Poll L. *Torture and sexual violence as jus cogens. A critical reflexion on the Emerging Norms in IHL.* Article on African Yearbook of IHL, UWC (2010), 2.

<sup>66</sup> *To act against sexual violations in DR Congo*, Available at <http://www.adequation.org>, accessed 13-06-2016.

<sup>67</sup> ‘*Sexual violence in the DRC*’. It has been suggested that *Military macho-violence in the DRC*. Article available at <http://www.sexualviolenceindrc.com>. Accessed 05-2015.

<sup>68</sup> Buchowska N, ‘*Violated or protected, women’s rights in armed conflicts after the Second World War*’ pdf, Article in International Comparative Jurisprudence. Available at <http://www.elsevier.com/locate/icj>. Accessed 2017.

<sup>69</sup> See 66.

money used to compensate combatants, making them ‘disposable’ resources for fueling terrorism.<sup>70</sup>

It is important to note some definitions and forms of sexual violence:

**-Completed or attempted forced acts in which a victim is made to penetrate a perpetrator:** includes situations when the victim was made, or there was an attempt to make the victim, sexually penetrate a perpetrator or someone else without the victim’s consent.<sup>71</sup>

**-Completed or attempted forced penetration of a victim:** includes completed or attempted unwanted vaginal (for women), oral, or anal insertion through use of physical force or threats to bring physical harm toward or against the victim.<sup>72</sup>

**-Sexual violence:** is any unwanted sexual act or activity. Included but not restricted to: rape, sexual assault, child sexual abuse, sexual harassment, rape within marriage / relationships, forced marriage, so-called honor-based violence, female genital mutilation, trafficking, sexual exploitation, and ritual abuse.<sup>73</sup>

**-Sexual assault:** Occurs when someone touches any part of another person's body in a sexual way, even through clothes, without that person's consent.<sup>74</sup>

**-Sexual abuse:** Undesired sexual behavior by one person upon another. When force is immediate of short duration or infrequent.<sup>75</sup>

**-Physical abuse:** is any intentional act causing injury or trauma to another person or animal by way of bodily contact. In most cases, children are the victims of physical abuse.<sup>76</sup>

**-Nonphysical forced penetration:** which occurs after a person is pressured verbally, or through intimidation or misuse of authority, to consent or submit to being penetrated.<sup>77</sup>

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<sup>70</sup> *Sexual violence in conflict: how to move from impunity to deterrence?* High-level meetings of the 72<sup>nd</sup> GA UN, USA, September 19-28, 2017.

<sup>71</sup> *Sexual violence surveillance: Uniform definition and recommended data elements*, Available at <http://www.rapecrisis.org.uk/sexualviolence>, The National centre for injury Prevention and control, accessed 2017.

<sup>72</sup> See 71

<sup>73</sup> See 71

<sup>74</sup> See 71

<sup>75</sup> See 71

<sup>76</sup> See 71

<sup>77</sup> See 71

**-Unwanted sexual contact:** intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person without his or her consent.<sup>78</sup>

**-Noncontact unwanted sexual experiences:** does not include physical contact of a sexual nature between the perpetrator and the victim. Some acts of non-contact unwanted sexual experiences occur without the victim's knowledge.<sup>79</sup>

**-Completed or attempted alcohol or drug-facilitated penetration:** includes completed or attempted unwanted vaginal, oral, or anal insertion when the victim was unable to consent because he or she was too intoxicated (e.g. incapacitation, lack of consciousness, or lack of awareness) through voluntary or involuntary use of alcohol or drugs.<sup>80</sup>

This work identifies different categories of rape, all of which occur in the DRC: punitive rape (used to punish to elicit silence and control); status rape (occurring as a result of acknowledged differences in rank); ceremonial rape (undertaken as part of socially sanctioned rituals); exchange rape (when genital contact is used as a bargaining tool); theft rape (involuntary abduction of individuals as slaves, prostitutes, concubines, or spoils of war); and survival rape (when women become involved with older men to secure goods needed to survive).<sup>81</sup>



### 2.3.1. Sexual violence against women.

The most affected persons in this tragedy are the women. They are much victimized, much tortured, much manipulated, much maltreated, and less considered, less protected, less respected as persons with rights to equality and respect. Most sexual violence is targeted at them.

Indeed, tens of thousands of Congolese women and girls have suffered, and others still suffer, sexual violence related to the conflict. The rape of women and girls has been used as a weapon of war; they paid a heavy price; they have been denied all humanity.<sup>82</sup>

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<sup>78</sup> See 71

<sup>79</sup> See 71

<sup>80</sup> See 71

<sup>81</sup> See 67

<sup>82</sup> The French Documentation, *A deadly conflict. 1996 – 2007*. Available at <http://www.ladocumentationfrancaise.fr/conflict-grands-lacs>, accessed April 1, 2008.

A 2014 report<sup>83</sup> said that the usage of rape as a form of torture by security forces, focusing on case studies and accounts from torture survivors. Usually, in sexual violence circumstances, a woman said 'yes' because she was scared for her life or her safety or for the life or safety of someone she cares about; she does not agree by choice and have the freedom and capacity to make that choice. If she does not say the word 'no' or is not able to speak at all through shock, if she does not shout or fight or struggle, it does not mean she gives her consent for what happened to her.<sup>84</sup>

Moreover, rape and other forms of sexual violence have now been explicitly recognized by States as a stand-alone category of war crimes, in both international and non-international armed conflict.<sup>85</sup> The emphasis is made on the fact that sexual violence is used for forced marriage and making girls and women the forced wives of militia members.<sup>86</sup>

In a comparative study, the Second World War brought atrocities and enormous suffering to the civilians of all age, ethnicity and both gender. Similarly to any previous armed conflict, most of civilian victims were women. Correspondingly, other researchers have indicated that during WWII, all sides of that conflict perpetrated rape on a large scale.<sup>87</sup>

But in the case of DRC, sexual assault in that conflict included gang rape, represents the majority of all cases, rape in public or in presence of family members, rape with instruments, genital mutilation, perpetrated on a daily basis.<sup>88</sup> Sexual and gender-based violence has become a defining characteristic of the conflict, a tactic of war.<sup>89</sup> Persistent impunity for sexual and gender-based violence and other human rights violations in the country reinforce insecurity and violence in the region.<sup>90</sup>

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<sup>83</sup> *Sexual violence in the DRC*. Available at <http://www.freedomfromtorture.org>, accessed 2015.

<sup>84</sup> Letter dated 22-01-2014 from the Group of Experts on the DRC addressed to the President of the UNSC, No S/2014/42, 32/277.

<sup>85</sup> Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of IHL and HRL*, pdf. An Article in International Review of the Red Cross, ICRC 2015, 529.

<sup>86</sup> UNSC, Final report of the Group of Expert on the DRC, S/2015/19, No 1466372 of 28-1-2015, 30/156

<sup>87</sup> Buchowska Natalia, *Violated or protected. Women's rights in armed conflicts after the Second World War.pdf* Article on International Comparative Jurisprudence. Adam Mickiewicz University, Poland. Available at <http://www.elsevier.com/locate/icj>. Accessed 27-12-2016.

<sup>88</sup> *Stop rape in DRC*, Available at <http://www.internationaltradeunionfederation.org>, accessed October 2011.

<sup>89</sup> Ms. Wallstrom, *Violence against women in Eastern DRC: Whose responsibility? Whose complicity?* Article available at <http://www.ituc.org/violence-rdc>, Antwerpen, Belgium 11-2011, 21.

<sup>90</sup> See 89.

### 2.3.2. Sexual violence against men

Sexual violence can happen when a female soldier forces a man to commit a sexual act. In this case, the perpetrator is the woman and the man is victim. Other forms of sexual violence against men happen when soldiers force a man to sexual act with his own daughter in presence of all family members, or sexual act with another woman to remain alive.

Some research mentions that 23.6% of men have been exposed to sexual violence. And, a similar study found that 22% of men (as compared to 30% of women) reported conflict-related sexual violence. Another study found that one in four men have been the victims of sexual violence.<sup>91</sup>

The prevalence of rape of men in the country is likely to be underreported due to extreme stigma attached to sexual abuse of males. Men who admit to being raped risk ostracism by their community and criminal prosecution, because they may be seen as homosexual. Male victims are less likely to appear in court.<sup>92</sup>

### 2.3.3. Sexual violence against children

Before the adoption of the CRC, the state of the world's children 'required special protection and called for continuous improvement.'<sup>93</sup> In order to advance the goal of protecting children and ending the impunity of perpetrators, the UN Security Council identified six categories of violations, the so-called six grave violations:

- 1) Killing or maiming of children
- 2) Recruitment or use of children by armed forces or armed groups
- 3) Rape or other forms of sexual violence against children
- 4) Attacks on schools or hospitals
- 5) Abduction of children
- 6) Denial of humanitarian access to children.<sup>94</sup>

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<sup>91</sup> See 88.

<sup>92</sup> See 89.

<sup>93</sup> Rochelle D. Jackson, *the war over children's rights: and justice for all? Equalizing the rights of children*. Buffalo Human Rights Law Review 1999, 3.

<sup>94</sup> *The six grave violations against children during armed conflict: The legal foundation*. Available at <http://www.childrenandarmedconflict.un.org>, accessed September 2013, 9.

The establishment of the Monitoring and Reporting Mechanism (MRM) was an important unprecedented step in improving the protection of the most vulnerable populations affected by conflict. The MRM has proved to be far more than a tool to ‘name and shame’ parties that violate children’s rights.<sup>95</sup> As a result, the DRC government must establish protective legislation and mechanisms, children must be demobilized from armed forces and armed groups and subsequently provided with rehabilitation and reintegration assistance.

In the helplines,<sup>96</sup> children said: “We look to adults and older children for guidance about how to ‘be’ in the world, to show us what is acceptable and what is not. If a manipulative adult or older child abuses that trust and coerces a child into a sexual situation, possibly saying it is right or that something bad will happen.”

The Additional Protocol of Geneva Conventions IV lays down this principle: ‘Children shall be the object of special respect and shall be protected against any form of indecent assault.’<sup>97</sup>

The Optional Protocol to the CRC on the sale of children, addresses some of the worst forms of human rights abuses perpetrated against children worldwide.<sup>98</sup>

There was a time when the prevailing opinion was that all child soldiers were boys. This because war has traditionally been considered as a male preserve, and this remains predominantly true. Women and girls participate in warfare to a far greater degree than is generally recognized. But, in armed combat, girl soldiers are often forced to serve as sexual slaves of armed groups.<sup>99</sup>

At the continental level, although the African Children’s Charter emphasizes the girl child in general, article 22 which deals with child soldiers does not provide for a way in which the specific concerns of girl soldiers are to be dealt with.<sup>100</sup>

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<sup>95</sup> *Child Soldiers International*. An article in Child Rights International Network, USA 2015.

<sup>96</sup> *Sexual violence surveillance: Uniform definition and recommended data elements*.

Available at <http://www.rapecrisis.org.uk/sexualviolence>, accessed 11-2017.

<sup>97</sup> ICRC, *Legal protection of children in armed conflict*. Advisory service on IHL, Switzerland, Geneva 10/2001.

<sup>98</sup> Cris Revaz, *The Optional Protocols to the UN CRC, on sex trafficking and child soldiers*. Human Rights Brief 13, Fall 2001, 1.

<sup>99</sup> Benyam Mezmur, *children at both ends of the gun: Towards a comprehensive legal approach to the problem of child soldiers in Africa*. University of Pretoria LLM Human Rights and Democratization in Africa, 31-10-2005, 29.

<sup>100</sup> See 99, 30.



This important matter requires that a difference be made between child abuse and child exploitation. Child abuse is rape during which, the perpetrator often uses force, money, power, influence, weapons and other things. Child exploitation can be understood as use or utilization, especially for profit. So that the commercial exploitation of children is a commercial transaction that involves sexual exploitation.<sup>101</sup>

Both methods are used in the DRC conflicts. But the term ‘sexual exploitation’ is used to talk about involvement in the sex trade. This is the way that it is framed under the law.<sup>102</sup>

In the DRC conflict, children are sexually abused by all categories, either by adults or by another child. It is important to recognize that any sex act between youth and adults is abuse. In the armed groups, children are victims and also perpetrators of sexual violence.

The Congolese government desires to put an end to barbaric practices to subjugate the weakest -women and children- to all forms of sexual violence. Therefore Ms. Mabunda declared: "I have had the privilege of leading the fight against sexual violence and child recruitment in the DRC... and there are those who have taken advantage of this conflict to commit terrible crimes, including acts of sexual violence."<sup>103</sup>

#### **2.3.4. Sexual violence perpetrated by children.**

By Article 38 of the CRC<sup>104</sup> which focusses on protection of children affected by armed conflict, the Committee on the Rights of the Child is concerned about the participation of children in the State Party’s armed force, either as soldiers, or as helpers. It urges to end the use of children as soldiers and emphasises the protection of all children under 18 from direct or indirect involvement in hostilities.<sup>105</sup>

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<sup>101</sup> *What is sexual exploitation?* Available at <http://www.host.jibc.ca> or ‘slytookit’. Accessed May 2015.

<sup>102</sup> See 99, 35.

<sup>103</sup> *End rape and impunity for sexual violence in the DRC*. An article on opening of the Bulletin of High Court Judgements on violence against women. Ms J. Mabunda is DRC Minister and Representative on sexual violence and child recruitment. Available at <http://www.stopdrcsexualviolence.com>, accessed 19 June 2017.

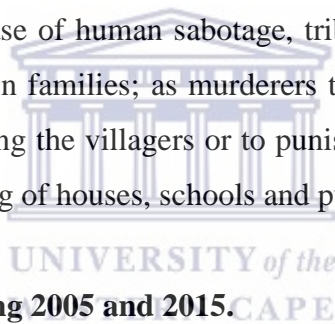
<sup>104</sup> See 62, 563

<sup>105</sup> See 62, 572

There is a strict separation of criminal acts committed by child soldiers and those committed by adults' soldiers, they have a difference in their criminal responsibilities. Any adult soldier is criminally responsible and he is criminally punishable; but any child soldier is not criminally responsible and he cannot be criminally punishable.<sup>106</sup>

Child soldiers or children associated with parties to a conflict should be treated as victims and handed over to child protection actors. In those circumstance which children are accused of a crime, any legal process should be conducted in compliance with due process and juvenile justice standards.<sup>107</sup>

According to many concordant witnesses who relate many events of the DRC armed conflicts, adults used and manipulated children as soldiers for some military operations to increase the number of combatants; as sabotage elements aiming the weakening and extermination of enemy's materials; as rapists in case of human sabotage, tribes or families humiliation, to rape women and girls, even in their own families; as murderers to kill efficient men, to maim some body parts, to enforce silence among the villagers or to punish all villagers for cooperating with and supporting enemies; for burning of houses, schools and public buildings.<sup>108</sup>



## **2.4. Sexual rights violations during 2005 and 2015.**

The circumstances and the frequencies of sexual violence during the considered period demonstrate its high level and gravity. Many acts of sexual violence are perpetrated:

### **2.4.1. By Congolese loyal armed troops**

Since 2003, the FARDC has been one of the main perpetrators of documented sexual violence in Congo. Armed commanders have frequently failed to stop sexual violence and punish those responsible for violations of IHL.<sup>109</sup> The FARDC have contributed to increased human rights violation generally, but particularly in sexual and gender based violence targeting women and girls.<sup>110</sup>

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<sup>106</sup> See 56

<sup>107</sup> UN GA, *Report of the Special Representative of the SG for Children and Armed Conflict*. No A/70/162, USA 20/07/2015.

<sup>108</sup> This is a story related by some witnesses who are survivors of those atrocities in 2015.

<sup>109</sup> *Soldiers who rape, commanders who condone, sexual violence and military reform in the DRC*. Pdf. Article published at <http://www.hrw.org>. Accessed July 2009, 21

<sup>110</sup> *Women in conflict: DRC position paper*. An article in Action Aide International. Available at <http://www.actionaid.org>, accessed 29-11-2012.

These are those also who were supposed to protect civilians: soldiers from the national army and officers of the State, like police officers or border guards are perpetrators.<sup>111</sup> The summary of the DRC allegations have focussed on war crimes and crimes against humanity.<sup>112</sup>

#### **2.4.2. By Congolese rebels troops.**

There are dozens of armed groups remaining active in the East of DRC. Those soldiers are also committing various war crimes and crimes against humanity as detailed previously for the loyal forces. In comparison with them, the Congolese rebel armed groups applied more atrocities on civilians.<sup>113</sup>

Aside from their direct criminal responsibility for crimes committed, commanders or other superiors may be guilty for failing to prevent or to punish crimes committed by their subordinates. Command responsibility is an established principle of customary IHL and has been incorporated into the Rome Statute.<sup>114</sup>

The particularity of the tactics and methods of sexual violence acts committed by rebel groups is determined also by their economic reasons in the artisanal industry of mineral resources. So that in the recent debate on ‘women and peace, sexual violence in conflict’, the Security Council called for more effective tracking of human trafficking, highlighting that sexual violence is now part of the shadow economy.<sup>115</sup>

One of the results of those tactics is the forced displacement of civilian populations. When the rebels find and start manual extraction of some minerals, they oblige all villagers to move to other places. To a lesser extent, civilians also flee across borders and seek refuge in neighboring countries. The DRC has become one of those countries generating the most refugees in the world.

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<sup>111</sup> Buchowska Natalia, *Violated or protected, women's rights in armed conflicts after the Second World War*, Article in International Comparative Jurisprudence, available at <http://www.elsevier.com/locate/icj>. Accessed 2017.

<sup>112</sup> ICC, *the jurisdiction in the general situation*. Transcripts 9 April 2017 - Session 201.

<sup>113</sup> See 112, 25.

<sup>114</sup> Rome Statute, art. 28. Customary international law results from a general and consistent practice of States followed from a sense of legal obligation.

<sup>115</sup> Letter of 5-5-2017 from the Permanent Mission of Uruguay to the UNSG ([S / 2017/402](#)).

Internal conflict is by far the most important factor generating displacement. But the prohibition on the forced displacement of civilian in internal armed conflicts, is now firmly established both in conventional and customary IHL and is binding on all parties to an internal armed conflict, state and non-state actors.<sup>116</sup>

### **2.4.3. By foreign armed troops.**

The foreign governments of Burundi, Uganda and Rwanda are present in DRC territory through their armed troops and/or through some Congolese/or other rebel troops which receive money and weapons from them.<sup>117</sup>

Rwandan, Burundians and Ugandans have been present in the DRC territory for around twenty years. They are subject to the DRC laws and jurisdictions regarding sexual violence against women.

### **2.4.4. By civilian perpetrators.**

#### **2.4.4.1. Other male perpetrators**

In the recent years, acts of sexual violence committed by civilians have also notably increased. This have been attributed to an increase number of demobilized combatants who have been reintegrated into society.<sup>118</sup>

Rapes by civilians are increasing, demonstrating that sexual violence is becoming even more widespread throughout the country.<sup>119</sup> So now, sexual violence is unfortunately not only perpetrated by armed factions but also by ordinary people occupying positions of authority, neighbors, friends and family members.<sup>120</sup>

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<sup>116</sup> Melanie Jacques, *Armed conflict and displacement. The protection of refugees and displaced persons under IHL*. Cambridge studies in International and comparative Law, Cambridge University, UK 2012, p. 65

<sup>117</sup> The conflict in the DRC. Available at [www.worldwithoutgenocide.com/congo](http://www.worldwithoutgenocide.com/congo), accessed 2013.

<sup>118</sup> UN Human Rights Council, report on sexual violence against women in DRC of 28/02/2008. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs>. Accessed 11-5-2009.

<sup>119</sup> Ross and Will; *DRC gang rape crisis 'spreading', new study suggests*. BBC News. Retrieved on 01-10-2011.

<sup>120</sup> See 13.

#### **2.4.4.2. Other female perpetrators**

The researchers led by Lynn Lawry of Harvard found that 40% of the female victims and 10% of male victims said they have been assaulted by a woman. A UN expert on armed groups states, 'Women who were raped for years are now raping other women.'<sup>121</sup>

### **2.5. Some reasons for sexual rights violations.**

#### **2.5.1. Use of sexual violence as weapon of war.**

UN officially declared sexual violence in armed conflict, particularly rape, is sometimes qualified as a 'weapon of war'.<sup>122</sup> When sexual violence is used to kill and destroy women and girls, it is a weapon against them.

Under IHL, a cursory analysis reveals the existence of two common elements in the understanding of the notion: 'weapon' refers to (i) an object, material, instrument, mechanism, device or substance that is used to (ii) kill, injure, damage, threaten or destroy. If such a definition is accepted, it is clear that the characterization of rape as a weapon of war is inaccurate from a strict IHL perspective.<sup>123</sup>

#### **2.5.2. Humiliation and intimidation.**

Sometimes, rape was committed as punishment. The fighters shot their victims by introducing their weapon in their vaginas to mutilate them or penetrate them with knives or razor blades denying all humanity to the victim who is treated as an animal.<sup>124</sup>

Several reasons can be put forward, including the willingness of combatants to humiliate the enemy by inflicting inhuman and degrading treatment on him or her. Others, however, have used rape for fetishistic or magical purposes. The rebel leaders tolerated or even encouraged the

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<sup>121</sup> See 13.

<sup>122</sup> UNGA Res. 48/143 (1993); HCHR, 'Rape: Weapon of War', available at: [www.ohchr.org/en/newsevents](http://www.ohchr.org/en/newsevents).

<sup>123</sup> See 63, 576.

<sup>124</sup> The French Documentation, "A deadly conflict", 1996-2007. Available at <http://www.ladocumentationfrancaise.fr>, accessed 01-4-2008.

rapes of the women because they considered this a bonus for bravery and a perfect boost for the troops.<sup>125</sup>

### **2.5.3. The absence of law.**

The Article 3 of the ICCPR says: ‘The States Parties undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the Covenant’.<sup>126</sup> Because of the war, the DRC government cannot ensure the rights of the population staying Eastern Congo. There are many instances of torture and slavery applied to the population, but prohibited by Article 7 and 8 of ICCPR.<sup>127</sup>

But the application of those laws is not possible because of the war. The war has not allowed the prosecutors, judges and other judicial officers to work effectively in the Eastern DRC.

### **2.5.4. Others reasons**

In illegally controlling mining activities, military elements and rebel groups commit serious abuses. The revenues from these mining activities have also incentivised different armed groups and military units to create a volatile environment.<sup>128</sup>

Women in artisanal mining areas are at high risk of sexual and gender-based violence. Mining camps are dominated by young men far from home, family, and community, and by a rapid cash turnover and high consumption of alcohol and marijuana, a combination that diminishes moral responsibility and increases violent tendencies.<sup>129</sup>

The control of land, minerals riches, and economic tensions are also factors of the continued violence and conflicts. The persistence of rape is also attributed to misconceptions about rape, such as the myth that having sex with prepubescent girls will give people strength in battle or business dealings.<sup>130</sup>

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<sup>125</sup> Moswa Mombo L; *The repression of offenses relating to sexual violence in the context of the crisis of the Congolese Justice: Case of the Rape*. University of Nantes - Postgraduate Diploma in Fundamental Law France 2007, 12.

<sup>126</sup> HR, Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev. 1) USA 11-2005, 32.

<sup>127</sup> See 85, 35.

<sup>128</sup> See 35

<sup>129</sup> Global Witness, *Congo's Minerals Trade in the Balance*, 5-2011, 8-9.

<sup>130</sup> Clifford and Eichstead; ‘*Sexual violence in the DRC*’, *special report*, pdf. Institute for War and Peace Reporting, The Netherlands. Available at <http://www.iwpr.net>. Accessed 10-2008.

## 2.6. Conclusion.

Rape and other forms of sexual violence are absolutely prohibited under both IHL and IHRL. The Geneva Conventions and their Additional Protocols prohibit expressly rape. They also outlaw cruel or inhuman treatment and torture, outrages upon personal dignity, indecent assault and enforced prostitution, and require respect for persons and honors. The IHL prohibition of rape and other forms of sexual violence applies to both international and internal armed conflicts and is also part of customary law.

Human rights law prohibits sexual violence at all times.<sup>131</sup> Sexual violence can be perpetrated by a complete stranger, or by someone known and even trusted, such as a friend, colleague, family member, partner or ex-partner. Sexual violence can happen to anyone. No-one ever deserves or asks for it to happen.

The responsibility for any act of sexual violence lies with its perpetrator. There is no excuse for sexual violence; it can never be justified, it can never be explained away and there is no context in which it is valid, understandable or acceptable.

The African Union condemns all forms of sexual violence against women and girls, urges States parties to criminalize all forms of sexual violence.<sup>132</sup>

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<sup>131</sup> See 82, 537

<sup>132</sup> Christof Heyns and Magnus Killander, *Compendium of key HR documents of the African Union*, 4e Edition. Pretoria University Law Press (PULP) SA 2010, 412.

## **CHAPTER THREE: LEGAL INSTRUMENTS AGAINST SEXUAL RIGHTS VIOLATIONS IN DRC AND JURISDICTION OF TRIBUNALS.**

### **3.1. Introduction**

The substance of this chapter is the analysis of legal instruments and jurisdictions functioning to prosecute the perpetrators of sexual rights violations. The framework from the creation to the functioning shows how jurisdictions apply legal instruments. Legally, all kind of sexual violence constitutes, in general, sexual rights violations.

The main thrust matter of this major chapter is to study the way the two jurisdictions High Military Court and International Criminal Court are applied through various legal instruments against sexual rights violations which happened during the DRC's conflicts. As I have shown in the previous chapter, there are many descriptions of sexual violence which acts remain unpunished by appropriate jurisdictions.

We know that in the law in general, differences come from the interpretation and the use of the law. But in the case of international law, interpretation and enforcement must work together in the same way, because they have a same starting point.

This chapter will essentially focus on the origin, functioning and the way that legal jurisdictions work to solve the complex problem of sexual rights violations in DRC. The intention should be to achieve the establishment of justice between soldiers of armed groups and civilians victims in the communities, and to face the thorny issue of impunity, which is an obstacle to real justice.

### **3.2. Legal instruments of the DRC.**

#### **3.2.1. DRC Constitution.**

The first consideration focuses on the Constitution of 18 February 2006, as modified and supplemented by the law No 11/002 of 20 January 2011 regarding revision of some articles of the



constitution of the DRC of 18 February 2006. This work is interested in the relevance of sexual violence aspect of this Constitution.

The DRC Constitution is the great and principal source of the Congolese law, this work is interested in laws on sexual violence (enacted in 2006), amendments and modification to the DRC Penal (30.10.1940) and Procedural Code (06.08.1959) Code on combating sexual violence.<sup>133</sup>

The organization of the civil courts and tribunals is governed by ordinance - law No. 82/020 of 31-03-1982 as amended on this day, including the code of organization and jurisdiction.<sup>134</sup>

### **3.2.2. Military law.**

The military justice was endowed with a definitive code under the ordinance-law N ° 72/060 of September, 25<sup>th</sup> 1972 to fill the gaps in the provisional code. This code defines the rules of organization and competence of the jurisdictional court. The law 024/2002, Article 169, point 7 mentions many forms of sexual violence of comparable gravity are offences. This is a basic military law regarding sexual rights violations when committed by soldiers.<sup>135</sup> The remaining relevance of the 72/060 ordinance-law are the creation of a war council and the establishment of a military prosecutor office.

These derive from law No. 023/2002 of 18 November 2002 on the military judicial code, which, together with law No. 024/2002 of 18 November 2002 on the military penal code, forms the military criminal law.<sup>136</sup>

## **3.3. Instruments of International Human Rights Law.**

### **3.3.1. The Universal Declaration of Human Rights.**

The Charter of the UN adopted in 1945 is the basis of all legal instruments and international human rights law, it is a common standard achievement of law and regulation for all peoples in all

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<sup>133</sup> *The high military court, general-auditors, jurisdictions and offices of Kinshasa's parquet-2013*, pdf. Available at <http://www.cn.ohada.cd>, accessed at 2017.

<sup>134</sup> See 125, 44.

<sup>135</sup> *Violence against women in Eastern DRC. Whose responsibility? Whose complicity?* Available at [http://www.ituc.org\\_violence-rdc-eng-lr.pdf](http://www.ituc.org_violence-rdc-eng-lr.pdf). ITUC. Accessed 11-2011, 27.

<sup>136</sup> *The high military court*. Available at [http://www.congovirtuel.com/hcm\\_rdc.php](http://www.congovirtuel.com/hcm_rdc.php) . Accessed at 2015.

nations. To this Charter, is added the Universal Declaration of Human Rights (UDHR) promulgated by the UN General Assembly (UNGA) in 1948 in a single document as concrete expression of all principles to avoid the background of the horrors of the Second World War and the establishment of the rights of human beings.<sup>137</sup>

### **3.3.2. The International Covenant on Civil and Political Rights.**

The ICCPR was adopted for ratification and accession by UNGA resolution 2200 A (XXI) of 16-12-1966, with entry into force on 23-3-1976 in accordance with article 49.<sup>138</sup>

According Professor Benyam Mezmur, the ICCPR is the most important and complete international covenant on human rights and forms the cornerstone of an extensive series of internationally binding treaties covering a wide variety of issues in the field of human rights and rights, duties and obligations of States members.<sup>139</sup>

### **3.3.3. The Convention on the Rights of the Child.**

The CRC was adopted by the UNGA on 20-11-1989 has provided a complete framework for the protection of children from all forms of harmful acts. Its 54 articles serve as a milestone in the establishment and recognition of children's rights.

According Professor J. Sloth-Nielsen, the CRC is a remarkable achievement. The fact that virtually every country in the world has committed itself a code of binding obligations towards its children gives us tremendous hope for the future and puts children's rights at the cutting edge of the global struggle for human rights. She emphasises that the child, by reason of his physical and mental immaturity, needs special safeguards, care and appropriate legal protection.<sup>140</sup>

### **3.3.4. The African Charter on Human and People's Rights.**

The ACHPR (the African Charter) is the principal African justice instrument which defines all people's rights in Africa according to the spirit of the Universal Charter of UN. In the scope of this work, the main supplemental justice instruments to the African Charter for the protection of

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<sup>137</sup> Article 2 of Declaration on the protection of all person from being subjected to torture. Adopted by UNGA resolution 3254 (XXX) of 9-12-1975.

<sup>138</sup> UNHR, *Civil and Political Rights: the human rights committee*. Fact Sheet No 15 (Rev.1), 31.

<sup>139</sup> Professor Benyam Mezmur, IPHRL 814, Module of course, LLM Law faculty, UWC (2016).

<sup>140</sup> Professor Sloth-Nielsen J. *CR 817*, Module of course, Faculty of Law, UWC LLM (2016).

the rights of children and women, are the Protocol to the African Charter on Human and People's Rights (the Maputo Protocol),<sup>141</sup> the guidelines on combating sexual violence and its consequences in Africa,<sup>142</sup> African Charter on the Rights and Welfare of the Child<sup>143</sup> and the Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment in Africa.<sup>144</sup>

The Maputo Protocol defines discrimination against women as any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.<sup>145</sup>

The African Charter on Human and People's Rights of 1981, deals with specific wrongs (genocide, torture, racial discrimination) and the protection of specific categories of people (refugees, women, children, migrant workers).<sup>146</sup>

### **3.3.5. The Convention on the Elimination of Discrimination against Women.**

The CEDAW of 1979 is the main instrument that is describing the way to combat all harmful practices which negatively affect the fundamental rights of women and girls.

The General Recommendation No. 19, adopted by the CEDAW in 1992, clarifies that gender-based violence constitutes discrimination within the meaning of Article 1 of the Convention. Gender-based violence refers to violence against a woman because she is a woman.<sup>147</sup>

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<sup>141</sup> ACHPR, *Protocol to the African Charter on human and people's rights on the rights of women in Africa*, adopted by the 2<sup>nd</sup> ordinary session of the Assembly of the Union at Maputo 11-7-2003.

<sup>142</sup> ACHPR, *Guidelines on combating sexual violence and its consequences in Africa*, adopted at 60<sup>th</sup> ordinary session held in Niamey, Niger from 8 to 22-5-2017.

<sup>143</sup> ACHPR, *Declaration on the rights and welfare of the African child* (AHG/ST.4 Rev.1), adopted at Addis Ababa, at OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>144</sup> ACHPR, *Resolution on guidelines and measures for the prohibition and prevention of torture in Africa, (the Robben Island Guidelines)* 2<sup>nd</sup> edition, 90, Kairaba Avenue, Banjul Gambia, 4-2008.

<sup>145</sup> See 141, 4.

<sup>146</sup> Armstrong D, Farrell T and Lambert H, *International Law and International Relations*, Cambridge University, London 2012, 153.

<sup>147</sup> UN, General recommendation No 19 of the committee on the elimination of discrimination against women, para 7, 1992.

### 3.3.6. The International Committee of the Red Cross

The Four Geneva Conventions of 1949 and their two Additional Protocols of 1977 relate to the protection of civilian during the war. These instruments implicitly and explicitly condemn rape and other forms of sexual violence.<sup>148</sup>

In all war situations, as well as the DRC conflict situation, Article 2 of the Fourth Convention must be applied; in addition to the provisions, this Convention shall apply to all cases of declared war.<sup>149</sup>

In the light of the International Humanitarian Law<sup>150</sup> applied in these conflicts, the general ascertainment shows that all Part II of the Geneva Conventions (Articles 13, 14, 16, 18, 24, 25 and 26),<sup>151</sup> and the Protocols Additional to the Geneva Conventions (Articles 50, 51, 52, 54, 57, 59, 60, 61, 62 and 76)<sup>152</sup>, are not correctly applied.

Mainly the Articles 76 and 77 of the Protocols Additional provide ‘special’ measures in favour of women and children. The specificity of both Articles is that women and children are beneficiaries of special respect and protection during armed conflicts.<sup>153</sup>

### 3.3.7. The Convention Against Torture.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), was adopted by the UN General Assembly on 10 December 1984 (Resolution 39/46). The Torture Convention was initiated after the adoption of the Declaration on the protection of all persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment.<sup>154</sup>

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<sup>148</sup> ICRC, *the Geneva Conventions of 12 August 1949*, (2010), 31.

<sup>149</sup> See 148, 151.

<sup>150</sup> Prof. Van der Poll L. IHL 810, Module of course, Faculty of Law, UWC LLM (2016).

<sup>151</sup> See 148, 156 -160.

<sup>152</sup> ICRC, *Protocols Additional to the Geneva Conventions of 12 August 1949*, (2010), 37-58.

<sup>153</sup> See 137.

<sup>154</sup> Hans Danelius; *The Torture Conventions of 10-12-1984*, New York, USA 2007.

### 3.4. Jurisdictions against sexual rights violations in DRC.

#### 3.4.1. High Military Court (HMC)

The rules of organization and military jurisdictions that have just been guided the HMC, determine the place of each military court and the powers devolved upon them. The organization goes from the highest jurisdiction of the armed forces that is the high military court, through the intermediate courts, which are the military courts and ends at the military courts of police.<sup>155</sup>

##### 3.4.1.1. Creation

The reforms that abolished the MOC and created the HMC are established in law No. 023/2002 of 18-11-2002 on the military Judicial Code and law No. 024/2002 of 18-11-2002 on the military criminal code.<sup>156</sup> In terms of the framework law No 023/2002 on the military judicial code, military justice is rendered in the DRC by the following military jurisdictions: military police courts; military garrison tribunals; and the military high court.<sup>157</sup>

##### 3.4.1.2. Functioning.

These limitations must be provided by the law and must be necessary to protect national security, public order, public health and morale's, or the rights and freedom of others.<sup>158</sup> The composition of the HMC consists of two or more chambers. It is composed of five members, all general or superior officers, including two career judges. It sits with the assistance of the public ministry and the assistance of the registrar.<sup>159</sup>

The military courts are competent for offences including an act describing one of the components has been achieved in the DRC. The territorial jurisdiction of each military jurisdiction is determined according to the place where the offence was committed and the place where the

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<sup>155</sup> *The HMC*; Available at <http://www.congovirtuel.com>, accessed at 2015.

<sup>156</sup> *The organization and competence of the military jurisdictions courts in DRC*.

Available at <http://www.cno.ohada.cd>, accessed at 2017.

<sup>157</sup> *Law No 023 / 2002 of 18-11-2002 on the military judicial code*, Articles 1-2. Available at <http://www.droitcongolais.info/files/HMC>, accessed 11-2002.

<sup>158</sup> Armstrong A and RT Nhlapo; *Law and the sex; the legal position of women in Swaziland*, Kawluseni Swaziland University, 1985, 215.

<sup>159</sup> *See 155*.

defendant was found.<sup>160</sup> The HMC has competence regarding the officers of the armed forces, members of national police and national service who have the same grade.<sup>161</sup>

In the light of the previous texts, the HMC has all capacities and competencies to pursue and punish all perpetrators of sexual rights violations according to the laws, because we are all subject to the law.

### 3.4.1.3. Some decided cases

There are some decided cases which will illustrate the manner of rendered justice:

- The military prosecutors of the HMC opened preliminary legal investigations in Bushani and Kalambahiro under the reference No RMP 0236/MLS/011 on 4-02-2011 with the support of MONUSCO.

- On 10-02-2011, the military prosecutor's office at North Kivu issued an order requiring the commanders to be made available for questioning. However, armed officers were not made available, nor interviewed by the military justice in this case.<sup>162</sup>

This lack of cooperation is impeding the efforts to fight impunity for the alleged perpetrators of human rights violations, as well as the implementation of the zero-tolerance policy decreed by the President of the Republic on 5 July 2009.<sup>163</sup>

- The case of rape and abuse against civilians in Fizi in 2014, reveals the case in which a relatively high-ranking commander responsible for mass rape has been arrested and prosecuted.

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<sup>160</sup> See 156.

<sup>161</sup> *Evaluation's report of jurisdictions and parquet's offices of Kinshasa and the HMC of the DRC*, 6-2013, pdf, 56. Available at <http://www.droitcongolais.info/files/HMC>, accessed 7-2013.

<sup>162</sup> UNHR and MONUSCO, *Report on the investigation missions of the UN Joint HR Office into the mass rapes and other HR violations, North Kivu, on 31 Dec 2010 and 1<sup>st</sup> January 2011*. USA 7-2011.

<sup>163</sup> On the 5 July 2009, the President Joseph Kabila issued an edict defining a zero-tolerance policy for human rights violations, including acts of sexual violence committed by members of the armed forces.

- The South Kivu military court declared nine soldiers, including Lieutenant-Colonel Kibibi, guilty of crimes against humanity. They were sentenced to 10 to 20 years in prison. A victim woman testified at the trial against Kibibi and the other soldiers:

*"But we have been threatened by other soldiers who are still around", she added." They said they would kill us because we are the ones who have accused their colleagues. For me, nine [condemned soldiers] is not enough. There were many who committed crimes."*<sup>164</sup>

- The prosecutions of Brigadier General Jerome Kwakavu who became the first Congolese general to be found guilty of rape and murder in 2014 and several other colonels.<sup>165</sup>

- On 20-11-2013, the military operational court began the trial of 39 soldiers, including five high-ranking officers, for crimes against humanity and war crimes. The verdict was announced on May 5, 2014 and only two junior soldiers were convicted of rape. In addition, 22 soldiers were found guilty of looting and disobeying orders and only one of murder. Thirteen other officers were acquitted.<sup>166</sup>

- The trial of the Minova incidents, the proceedings ordered protective measures for victims of sexual violence, including in camera sessions and allowing victims to hide their faces when appearing as witnesses. The participation of victims in court hearings has been important. Cases of interference by high-ranking officers have been reported.<sup>167</sup>

The previous trials shown the justice in the inadequate environment which does not allow those jurisdictions to work properly. As a consequence, there are many unregistered and undecided cases because of two reasons: horizontal and vertical. The horizontal reasons find themselves in the local tradition, young ladies and women fear to report sexual violence, because they don't want

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<sup>164</sup> HRW, *DRC, end impunity for sexual violence; Need for a new legal mechanism to bring those responsible to justice*. Available at <http://www.hrw.org>, accessed at 10-4-2014, 14.

<sup>165</sup> *End rape and impunity for sexual violence in the DRC*. Available at <http://www.stopdrcsexualviolence.com>, accessed 6-2017.

<sup>166</sup> See 164.

<sup>167</sup> See 31.

to be rejected from families and communities. The vertical reasons are based on the fear of retaliation and vengeance from soldiers when they are reported to have sexually assaulted civilians.

#### **3.4.1.4. HMC and sexual rights violation.**

States have an obligation under international law to investigate violations of International Humanitarian Law and Human Rights Law, to take appropriate measures in respect of the perpetrators, to ensure that they are prosecuted, tried and sentenced and provide the victims with effective remedies. Impunity is therefore a failure of States to meet these obligations.<sup>168</sup>

So for the DRC government, recurrent fighting will continue to erode efforts to combat rape and sexual violence. But, much work has been done to bring justice to the victims and put an end to impunity by punishing those who commit crimes. The commitment made by the DRC government to zero tolerance on this pandemic atrocity is well documented.<sup>169</sup>

The DRC is living a real contradiction between what it's officially said and what it is done. Minister Mabunda, said: "The message is clear. No one, no one at all, regardless of the level of his rank or the extent of his influence, ... we firmly believe that the pursuit of authors of all ranks in the military, is a crucial step in the fight for justice for the victims and it is therefore important to highlight the progress we are making".<sup>170</sup>

According to me, the declarations of Minister Mabunda contain an empty promise, because the government does not put much efforts to realise its promises. It does not give a necessary urgency to the prosecutors to freely pursue their work. During investigations on the alleged officers, the government prevents all rightful prosecutions. The Congolese justice has difficulty monitoring and following-up on the cases of sexual violence and ensuring that allegations against high ranking officials of army are followed up on.

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<sup>168</sup> Beigbeder Y, *Judging War Criminals; the politics of International Justice*, Palgrave, NY, USA 1999, 125.

<sup>169</sup> Opening of the Bulletin of High Court Judgments on violence against women. *End rape and impunity for sexual violence in the DRC*. Available at <http://www.stopdrcsexualviolence.com/vernissage-bulletin>. Accessed 5-2015.

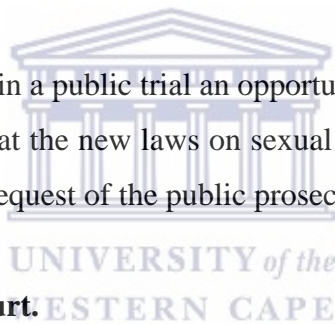
<sup>170</sup> See 169.



Then the victims do not have easy access to justice. Some obstacles are often erected in this way, poverty and ignorance of the law; insufficiency and geographical distance of jurisdictions; filing a complaint against an unknown person; mistrusting in the justice system as well as insecurity and fear of reprisals.

The Congolese judicial system is described as weak and lacking in independence, which has rendered many cases to go investigated, unprosecuted, or unconvicted. Officers protect their soldiers from justice, interfering during investigations and trials, and by assisting in prison escapes. Furthermore, almost all military prosecutions of sexual violence have been of lower-ranking soldiers. When mid-level or senior-level officers do get prosecuted, sentences are rarely carried out. The legal requirement that the highest-ranking judge has to be of equal or greater rank than the accused is one factor contributing to the low number of trials against high-ranking officers.<sup>171</sup>

In addition, the women see in a public trial an opportunity to defame their reputation, they do not easily agree to that. Note that the new laws on sexual violence allow the judge to declare the hearing to be in-camera at the request of the public prosecutor or the victim.<sup>172</sup>



### **3.4.2. International Criminal Court.**

The ICC is an international tribunal that sits in The Hague in the Netherlands. It has the jurisdiction to prosecute individuals for the international crimes. The ICC is intended to complement existing national judicial systems and it may therefore only exercise its jurisdiction when certain conditions are met.<sup>173</sup>

#### **3.4.2.1. The ICC and the DRC.**

In April 2002, the DRC ratified the Rome Statute, and in April 2004, referred the situation in its territory since 1<sup>st</sup> July 2002 to the ICC. Under the Rome Statute's complementarity principle,

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<sup>171</sup> See 89, 27.

<sup>172</sup> See 125.

<sup>173</sup> ICC. Available at <http://www.icc-cpi.int>, accessed 11-2015.

domestic courts continue to have the duty to deliver justice, so that the ICC remains a court of last resort.<sup>174</sup>

### 3.4.2.2. Functioning.

The Court's subject-matter jurisdiction refers to the crimes that are listed in article 5 of the Statute and defined: genocide (article 6), crimes against humanity, (article 7), war crimes (article 8), and crimes of aggression (article 8).<sup>175</sup>

The ICC investigations have focused on alleged crimes committed mainly in eastern DRC. It led to a number of cases, which have involved charges that include the following crimes:

-**War crimes:** enlisting and conscripting child soldiers; murder; wilful killing; attacking civilians; sexual slavery of civilians; pillaging; displacing civilians; attacking protected objects; destroying property; destruction of property; outrages against personal dignity.<sup>176</sup>

- **Crimes against humanity:** murder and attempted murder; torture; rape; sexual slavery; inhuman acts; persecution; forcible transfer of population, attacking a civilian population; mutilation; cruel treatment.<sup>177</sup>

According to the Rome Statute, the Prosecutor will initiate an investigation when taking into account the gravity of the crime and the interests of victims. Furthermore, the Prosecutor must determine whether a prosecution would serve the interests of justice taking into account all the circumstances of the alleged perpetrator.<sup>178</sup>

### 3.4.2.3. Some decided and pending cases

The ICC has been dealing with: 6 cases, 1 ongoing trial, 7 warrants of arrest, 3 accused in custody, 1 suspect at large, 1 ongoing appeals, 1 suspect in custody:

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<sup>174</sup> *Situation in the DRC*. Available at <http://www.icc-cpi.int/courtstructure>, ICC-01/04, accessed at 6-2004.

<sup>175</sup> The ICC. Available at <http://www.icc-cpi.int>, accessed at 17 November 2017.

<sup>176</sup> See 175

<sup>177</sup> See 175

<sup>178</sup> Rome statute, Articles 53 (1c) and 53 (2c). The ICC, interests of justice. Available at <http://www.icc-cpi.int>, accessed at 17-11-2017.

**-Thomas Lubanga:** Reparation and compensation.

The accused was found guilty, on 14-03-2012, of the war crimes of enlisting and conscripting child soldiers. He was sentenced, on 10-7-2012, to a total of 14 years of imprisonment. The verdict and sentence were confirmed by Appeals Chamber on 1<sup>st</sup>/12/ 2014. The next steps: Hearings and decision on victim reparations.<sup>179</sup>

**-Bosco Ntaganda:** Trial

This trial opened on 2-09-2015. He is now detained by the ICC where he faces charges of war crimes and crimes against humanity for alleged murder, rape, sexual slavery, recruiting and using child soldiers, and pillaging in Ituri, from 2002 to 2003. The next steps: Trial continues.<sup>180</sup>

**-Germain Katanga:** Reparation and compensation.

The accused was found guilty on 7-03-2014, as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24-02-2003. The judgment is final, as both the Defence and Prosecution withdrew their appeals on 25-06-2014. He was sentenced to a total of 12 years' imprisonment. An order on victims' reparations was delivered on 24-03-2017.<sup>181</sup>

**-Callixte Mbarushimana:** Charges not confirmed.

The pre-Trial Chamber 1 declined to confirm the charges for lack of sufficient evidence and did not commit the case to trial. The Prosecution's appeal was dismissed. On 23-12-2011, the ICC has indicted this FDLR leader for war crimes and crimes against humanity in Congo. The next steps: The case is considered closed.<sup>182</sup>

**-Sylvestre Mudacumura:** Pre-trial

A warrant of arrest was issued for him on 13-07-2012. The suspect is still at large. This FDLR's military commander committed war crimes, including murder, mutilation, rape, torture, cruel

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<sup>179</sup> Lubanga case. Available at <https://www.icc-cpi.int/drc#cases>, accessed at 11-2017

<sup>180</sup> Ntaganda case. Available at <https://www.icc-cpi.int/drc/ntaganda>, accessed at 11-2017

<sup>181</sup> Katanga case. Available at <https://www.icc-cpi.int/pages/item.aspx/pr1288>, accessed at 11-2017.

<sup>182</sup> Mbarushimana case. Available at <https://www.icc-cpi.int/drc/mbarushimana>, accessed at 2017.

treatment and pillaging committed in 2009 and 2010 by the troops under his command. The next steps: Nothing until he is arrested and transferred to the seat of the Court.<sup>183</sup>

**-Ngudjolo Chui:** He is acquitted.

On 18-12-2012, the Trial Chamber 2 acquitted him of the charges of war crimes and crimes against humanity and ordered his immediate release. The prosecution appealed the verdict on 20-12-2012. On 27-02-2015, the verdict was upheld by the appeals Chamber. Next steps: Case closed.<sup>184</sup>

**-Innocent Ziimurinda:** There is a complicated and pending case. It is not aware of any judicial investigation into abuses and amount to crimes against humanity and war crimes under International Law. This former CNDP Lt Col. directly ordered the killing of all persons taken by their forces, including the refugees. In May 2013, Congolese authorities issued an arrest warrant. At time of writing, he is believed to be protected in Rwanda.<sup>185</sup>

**- Ignace Murwanashyaka and Straton Musoni:**<sup>186</sup> Two FDLR political leaders, former president and vice-president were arrested in France, extradited to face trial at ICC under Germany's universal jurisdiction legislation on 28-09-2015 for the crimes committed by FDLR troops in Congo between 2008 and 2009.<sup>187</sup> They are sentenced 13 and eight years in prison, both men were charged with 26 crimes against humanity and 39 war crimes as well as commanding a terrorist organization abroad.<sup>188</sup>

#### 3.4.2.4. ICC and sexual rights violation.

'All human rights are universal, indivisible, interdependent and interrelated'. The rights include the rights to life, to liberty and security, to equality before the courts, to peaceful assembly, to marry and found a family and to vote.<sup>189</sup>

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<sup>183</sup> Mudacumura case. Accessed at <https://www.icc-cpi.int/drc/mudacumura>, accessed at 2017.

<sup>184</sup> Ngudjolo case. Available at <https://www.icc-cpi.int/pages/closed/asp.aspx>, accessed at 2017.

<sup>185</sup> *DRC, ending impunity of sexual violence*. Available at <http://www.hrw.org/news>, accessed at 10-6-2014.

<sup>186</sup> ICC, Trial international. Available at <http://www.trialinternational.org/latest-post>, accessed 4-2018.

<sup>187</sup> *DRC, German Court convicts 2 Rwandan rebel leaders*. Available at <http://reliefweb.int>, accessed 4-2018.

<sup>188</sup> The condemnation of Murwanashyaka and Musoni. Available at <http://www.cnlg.gov.rw/news>, accessed 4-2018.

<sup>189</sup> Armstrong A and Nhlapo RT, *Law and the sex. The legal position of women in Swaziland*, Kalwuseni, Swaziland University 1985, 215.

The sexual and gender-based violence (SGBV), against women include rape, sexual slavery, forced prostitution, forced pregnancy and forced sterilisation or abortion, crimes of sexual torture, sexual humiliation and forced nudity. Against men, SGBV means anal and oral rape, sexual torture, castration or genital beatings, forced nudity and masturbation.<sup>190</sup>

Regarding prosecutions and sentencing, as the experience of the ICC but also the ad-hoc international tribunals demonstrate there is often no evidence of orders to commit sexual and gendered violence. Since the ICC primarily concentrates on crimes perpetrated by those deemed ‘most responsible’, linking sexual crimes committed by soldiers or rebels to the accused with command responsibility is extremely challenging.<sup>191</sup>

In the DRC, many attested cases of sexual crimes committed on women and girls are not decided yet and perpetrators are running freely. There is not enough legal pressure and actions taken against them are slow. The functioning system of ICC, concentrating on those responsible, cannot work successfully in regards to many independent groups which are sustained by some governments or other groups.

Because when the leaders are arrested by ICC, the groups survive and continue doing harm. So the few ICC legal actions do not have any impact on the groups or on the victims. It is become impossible through this way to remove sexual rights violations. The intention to complement existing national jurisdiction as good idea, cannot be success, because the Congolese jurisdictions are not working properly.

Professor Sloth-Nielsen J. said that laws, national and international, are after all, words on paper. They may codify attitudes, but the real results depends on how they are implemented, what is done to follow up and to reach the ideals.<sup>192</sup> So, I can say that, from ICC, if the ideal is done just with 6 officers arrested, the results will be unsuccessful. There is not any impact of ICC actions, and the real result is not felt on ground by both sides, perpetrators and victims.

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<sup>190</sup> Philipp Schulz, *what is the SGBV exactly? The ICC and crimes of sexual and gender-based violence*. Available at <http://www.icc-cpi.int>, accessed at 25-3-2015.

<sup>191</sup> See 188.

<sup>192</sup> Professor Sloth-Nielsen J. *The contribution of children’s rights to the reconstructions of society: Some implications of the constitutionalisation of children’s rights in South Africa*. Published article in *The International Journal of Children’s Rights*, Kluwer Law International. Netherlands 1996, 323.

### 3.5. The Juvenile justice system.

As it said before in this work, child justice has two levels, the first being the perpetrators, who raped other children and adults. The second level is the child victims who were abducted to serve as sex slaves.

At the second level, the law condemns any who did harm to children. In the CRC, the four cardinal principles: non-discrimination; best interests; the right to life, survival and development; and respect for the views of the child, frame children's protection from violence and harmful practices. Articles 19 and 24 require State to ban all forms of violence against children.<sup>193</sup>

In the same way, the Article 39 of the CRC preconizes the rehabilitation of child victim. This concerns physical and psychological recovery and social integration for children in situations of emergency, children in conflict with the law, drug abuse and children in situations of exploitation.<sup>194</sup>

The Hague International war crimes judges awarded \$ 10 m in landmark reparation to “hundreds or thousands” of former child soldiers left brutalised and stigmatised after being conscripted into armed group by Lubanga Thomas who is liable for compensation.<sup>195</sup>

Until recently, violence against children during armed conflict remained largely unpunished and the perpetrators of these crimes were not brought to justice.<sup>196</sup> Child soldiers are still used. Ituri remains ‘a highly militarised province’ where child recruitments remains prevalent.<sup>197</sup>

The first level concerns children in conflict with the law. There can be unfamiliarity or ignorance of the law. Children were not to be held responsible for crimes according the law. For their best interests, the law needs to clearly provide for a normative standard so to minimise and

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<sup>193</sup> See 63, 579.

<sup>194</sup> See 193.

<sup>195</sup> ICC, *victims children awarded*. Available at <http://www.icc-cpi.int>, accessed 4-2018.

<sup>196</sup> ‘*Children and justice*’ Available at <https://childrenandarmedconflict.un.org>, accessed Marc 2015.

<sup>197</sup> See 195.

abolish the negative impact of harmful practices such as sexual violence of children upon adult women or girls.

The issue of the involvement of children in armed conflict is an acute problem in Africa. The African Charter on the Rights and Welfare of the Child (ACRWC) addresses the issue head on. Article 22(2) provides for a blanket prohibition against the recruitment of children into the armed forces.<sup>198</sup>

The Article 40 of the CRC relating to juvenile justice, ensure that:

- (a) No child shall be alleged, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by the law;
- (b) Every child alleged as or accused has a least the following guarantees:
  - (i) To be presumed innocent until proven guilty according to law.
  - (ii) To be informed promptly and directly of the charges against him or her.
  - (iii) To have the matter determined without delay.
  - (iv) Not to be compelled to give testimony or to confess guilt.
  - (v) To have this decision and any measures imposed in consequence reviewed, etc.
  - (vi) To have the free assistance of an interpreter.
  - (vii) To have his or her privacy fully respected at all stages of the proceedings.<sup>199</sup>

In the DRC, under the law on the protection of the child, children's courts cannot hold children criminally responsible for an offence committed while under the age of 14. [Law No 09/001 of 10/01/2009, article 95]. The UN Committee of the Rights of Child expressed concern that children under the age of 14 were being charged because of the DRC's failure to implement this legislation. [CRC/CO/2, 10/2/2009, para. 90].<sup>200</sup>

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<sup>198</sup> Benyam Mezmur, *The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?* Inedited UWC, Cape Town, SA 2008, 21.

<sup>199</sup> See 193, 589

<sup>200</sup> Children Rights International Network, *Minimum ages of criminal responsibility in Africa, DRC*. Available at <http://www.crin.org>, accessible 4-2018.

Child soldiers should not be prosecuted for crimes they have committed when they were children. They can only be liable for those committed from the age of criminal liabilities (15 or over), since they are not able to control their intent in accepting to be a child soldier and committing crimes before that age.<sup>201</sup>

The UN Committee on the Rights of the Child issued General Comment No 10, in which it declared that a minimum age of criminal responsibility below 12 years is unacceptably low. It recommended a fixed minimum age of criminal responsibility of not lower than 12 years.<sup>202</sup>

For the reintegrating process of children who offended by rape and other crimes against humanity, the article 39 associated to articles 3 and 19 on the CRC shall be applied in the best social and familial interests of children who are victimised by armed groups. For them, doing justice is much more than punishing the perpetrators.

The issue of children who sexually abuse other children is not something that can be ignored. The complexity is one of ‘protection against the criminalization’. Some studies show that children who have been sexually abused at a younger age, who have been abused by a family member, or whose abuse involved penetration are at greater risk of developing sexual behaviour problems.<sup>203</sup>

Because of the complexity of juvenile justice, the ICC proposes transitional justice mechanisms such as truth-seeking, institutional reform, reparations and criminal tribunals can be powerful tools to address the effects of violations perpetrated against young people.<sup>204</sup>

This work supports the *Children, Not Soldiers* campaign. Launched in 2014, the campaign aims to mobilize a global consensus that child soldiers should not be used in conflict and supports

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<sup>201</sup> Kabano Jacques; *Minimum ages of criminal responsibility in Africa*. Available at <http://www.crin.org>, accessible 4-2018.

<sup>202</sup> Ann Skelton, *Proposals for the review of the minimum age of criminal responsibility*. A chapter in South African Criminal Justice (SACJ) 2013-3, Pretoria, SA 2013, 272.

<sup>203</sup> Simon Hackett; *Protection v Criminalization*. Available at [http://congovirtuel.com/hcm\\_rdc](http://congovirtuel.com/hcm_rdc), accessed 4-2018.

<sup>204</sup> Marcie Mersky; *Can transactional justice helps promote justice for women?* Available at <http://www.ictj.org>, accessed at 5-6-2017.



to turn the page once and for all on the recruitment of children by national security forces in conflict situations.<sup>205</sup>

The DRC put in place all necessary measures to end and prevent the recruitment of children in its armed forces and is no longer listed for this violation in the annexes of the Annual report of the Secretary-General on children and armed conflict.<sup>206</sup>

### **3.6. Conclusion.**

In general, HMC and ICC did their job. They instituted free-and-easy complaints from any victims of sexual violence, they prosecuted and arrested some rapist civilians and soldiers, and members of armed groups. But their results are not enough to stop sexual rights violations, because they have low impact, they are bootless.

The image of Congolese justice does not give hope to solve impunity dilemma. The perpetrators of listed and define war crimes and crimes against humanity are not prosecuted in the same way according the law. By interfering with judicial independence, the government disorientates the prosecutors from making appropriate investigations against their protected officers.

The working methods of the ICC in DRC do not allow this international jurisdiction to end impunity and to stop sexual violence, because of the numerous of armed groups, the complexity of their organization, the gravity of their crimes, and their link with a stronger multinational mining companies which support and finance them. The ICC must adopt another method to fulfil its aims. To deal only with leaders of groups does not have any impact on the groups.

The ICC complementarity with the existing national judicial system needs to be reviewed according to the way the DRC justice is working. To push the Congolese justice system to work properly according the international rules, is an actually important need.

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<sup>205</sup> UN, *Children, Not Soldiers*. Available at <http://www.childrenandarmedconflict.un.org/children-not-soldiers>, accessed 4-2018.

<sup>206</sup> See 205.

## CHAPTER FOUR: APPRECIATION OF JURISDICTIONS ON THE GROUND AND CALLING OF THE CREATION OF A SPECIAL COURT.

### 4.1. Introduction.

The proposed main theme of this work is combating impunity and sexual violence that DRC has experienced for twenty years. There are many effects and repercussions on the civilian population and on the normal functioning of the Congolese State institutions. So, the repercussion has a major risk to disturb the strict application of the law. But, from this viewpoint, despite all form of interferences, the law shall be enforced and obeyed by everybody without any exception.

The previous chapter details the behaviour of juridical institutions in DRC, the way the civilian population are tortured and violated, and the way the law is not applied against so many perpetrators of torture and sexual violence on women and girls. The impunity applies to many protected perpetrators for various political reasons. So it appears like a conflict between the politics and the law, with politics coming before the law and the law being applied to selected persons according to the will of political authorities.

The actions of HMC are not appreciated on ground, because of growing level of impunity and corruption. This bad consequence can be considered as a result of HMC actions. So this jurisdiction can be treated as inappropriate for this matter. As well as the ICC, since it is working in DRC, a few cases of responsible perpetrators are treated, but it's not enough to end impunity and to prosecute real perpetrators. So these jurisdictions don't have a power to remove or to end impunity, and its level is always going up.

The need for the creation of a Special Court and the need for sexual violence impunity to end are the desire of all categories of actors who really want justice in the DRC. The ideal is sustained by insufficiencies of HMC and limits of ICC, the existing jurisdictions which are previously demonstrated to be inadequate, and by the increase in sexually violent criminal acts on the ground. The satisfaction of some countries who experienced the Special Court or Special Tribunal is giving hope and power to go forward and to continue pleading for the creation of a Special Court in DRC.

## 4.2. The effects of the war.

The main effect of the war, in general, is torture. Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>207</sup>

The analysis of effects of war or conflict require more study of this matter. So, this chapter will show some aspects of those effects which involve justice and law actions to resolve those effects. As a consequence of the conflict, they are impacting differently on men, women and children.

### 4.2.1. Effects on women

From 2005 to 2015, the DRC's conflicts have led to heavy effects on the physical and reproductive health of girls and women. There is no way to detail exactly all tortures and sexual violence effects on women and girls, but some of them are described to show the reality.

Sexual violence is rife, ongoing and targeting all women (and some men), regardless of age or ethnicity. It is generally very violent, resulting in extensive physical trauma. Perpetrators are mostly fighters.<sup>208</sup>

Many of women suffer multiple injuries: some on their bodies, others on the genitals pierced by firearms or sharp objects. Thus, there were cases of pelvic fracture which affected the sexual life of the victims in the long term. They can become infertile or have difficulties having normal sexual relations. Many cases of internal bleeding have been reported as well as fistulas.<sup>209</sup>

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<sup>207</sup> UN HCHR, *Istanbul Protocol, Manuel on the effective investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. Professional training series No 8 / Rev.1. Geneva 2004, 1.

<sup>208</sup> DRC, *country info*. Available at <http://www.wewillspeakout.org>, accessed April 2018.

<sup>209</sup> World health organization, *DRC Health update*, 7-2011, 2.

The rapes also resulted in many unwanted pregnancies. Victims suffered medical complications during their pregnancy or childbirth. Others, braving the prohibition of abortion by Congolese law, have had an illegal abortion with medical personnel in unsafe conditions, opening the door to complications and even death. Sexually transmitted infections have increased in prevalence in eastern DRC. This is particularly the case of HIV / AIDS.<sup>210</sup>

There are many psychological effects that occur to victims of rape. They are often emotionally disturbed by physical symptoms such as headaches, nausea, stomach pain, redness, sexual dysfunction, insomnia, or fatigue. These emotional disorders occur especially in the form of depression, post-traumatic stress syndrome, and shock. Feelings of fear, anger, and anxiety can also appear and be expressed by crying, laughter, great agitation, indifference, or apathy. It should be emphasized that the deterioration of victim's mental health is compounded by the fear of being repudiated by their husbands.<sup>211</sup>

Rape victims are subject to social effects. They are often regarded as contemptible or dirty, insulted, threatened or even rejected by their community. They often find no comfort with their husbands who abruptly abandon them following the stigma thrown on the family or the fear of being contaminated by the AIDS virus.<sup>212</sup>

From an economic aspect, women and girls are the main productive forces of the rural subsistence economy. They cultivate the soil, make small local trade in staple foods and staples (cassava, fish, vegetables, palm oil, salt, soap, etc.), fetch wood and draw water, feed livestock and care for children. But following the outbreak of the conflicts that have increased the mortality rate of men, the responsibilities of women have become heavier: they must now look after orphaned children alone, and ensuring the survival of their children has become a daily struggle.<sup>213</sup>

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<sup>210</sup> HRW, 'War in the War, sexual violence against women and girls in Eastern Congo'. Report on the DRC, available at <http://www.hrw.org/english/reports/drc>, accessed March 20-3-2008.

<sup>211</sup> Amnesty International; DRC, *Sexual violence: an urgent need for adequate responses*, pdf, USA 26-10-2004, 30.

<sup>212</sup> See 211.

<sup>213</sup> Adetunji Jo; *Forty-eight women raped every hour in Congo*, pdf. Article on Study finds. The Guardian. Retrieved 13-03-2014.

#### 4.2.2. Effects on children

The children are the most high affected by conflict because of their age and physical development. Because they can't go to school, they can't grow up normally and receive a good education in the family, they are mentally and physically affected, it may be that they can have lost hope for all life. Child rape is one of the most devastating consequences of armed conflict.<sup>214</sup>

Children born as a result of rape also face serious discrimination. Designated as the children of the enemy, they are condemned to face the same humiliation and rejection as their mothers. They may be abandoned by their mothers or left to die to end the humiliation they endure.<sup>215</sup>

Especially the girls face hurdles at school that can be exacerbated in crisis situations, including preventive social norms. They need more care against sexual and gender-based violence, early pregnancy and marriage, what to do in case of rape and the sexual violence that is happening regularly. They are facing a complex problematic of forcing girls and women to become 'wives' for militia members.<sup>216</sup>

Children, boys and girls are also facing forced recruitment problems, those between 9 and 17 years, have been recruited as combatants and soldiers. They are obliged to leave their family and become soldiers. As soldiers, they can drug, kill, rape and become completely harmful.<sup>217</sup>

The Istanbul Protocol says that torture can impact a child directly or indirectly. The impact can be due to the child's having been tortured or detained. When individuals in a child's environment are tortured, the torture will inevitably have impact on a child, albeit indirect, because torture affects the entire family and community of torture victims.<sup>218</sup>

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<sup>214</sup> UN, *Children and justice*, pdf. Available at <http://childrenandarmedconflict.un.org/publications/workingpaper-3>. Retrieved 11-2014.

<sup>215</sup> See 211.

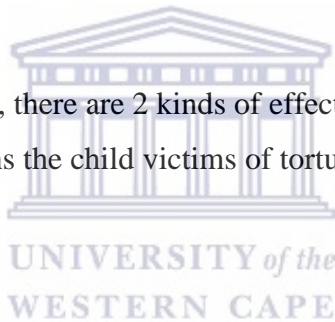
<sup>216</sup> UN SC, *letter dated 22 January 2014 from the coordinator of the group of experts on the DRC addressed to the president of SC*, No S/2014/42, 32/277.

<sup>217</sup> See 214.

<sup>218</sup> See 207, 57.

In the light of the experimental study of Children's Rights,<sup>219</sup> the DRC government and all armed groups, transgressed some Articles of CRC and that situation affected children:

- Article 2: Non-discrimination; 'there are children living exceptionally difficult conditions'.<sup>220</sup>
- Article 3: The best interests of the child shall be a primary consideration.<sup>221</sup>
- Article 6: Child's right to life and maximum survival and development.<sup>222</sup> The right to life is upheld as a universal human rights principle in Article 3 of the Universal Declaration of Human Rights: 'Everyone has the rights to life, liberty and security of person.'<sup>223</sup>
- Article 19: Child's right to protection from all forms of violence; from physical torture, and mental violence.<sup>224</sup>
- Article 38: Protection of children affected by armed conflict. The best provision for this article is the Graca Machel report on the impact of armed conflict on children.<sup>225</sup>



In the DRC armed conflicts, there are 2 kinds of effects on children, the first regards child soldiers and the second concerns the child victims of torture.

#### 4.2.3. Effects on men

Men also are affected by sexual violence, but less than women. They are not stigmatized inside their bodies, but psychologically and socially because sexual violence affects families, divides couples, dissociates parents and children, disturbs and disorganizes the customs, culture and communities.

To accept the wife who was raped in public, in front of her husband and children, is the hard resolution that a man can decide with regard to his family and community which are necessarily attached to their customs and culture. This becomes more complicated when it's about

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<sup>219</sup> See 57.

<sup>220</sup> See 63, 19.

<sup>221</sup> See 220, 39.

<sup>222</sup> See 220, 95.

<sup>223</sup> See 220, 99.

<sup>224</sup> See 220, 257.

<sup>225</sup> See 220, 563 & 571.

several raped women in the village. The law and the customs are broken, so it's an exceptional situation, which calls for an exceptional solution.<sup>226</sup>

Anywhere, men are raped also by women soldiers, men are sexually forced to have intercourse by another man or women soldiers. This form of rape happens according to the women's will and it's the easy way to transfer infections and HIV/AIDS to other people.<sup>227</sup>

The level of sexual rights violations from 2005 to 2015 is ascending. The impunity of State institutions which are installed become part of life; the Eastern-Congo presents the appearance of 'the jungle'.

### **4.3. Appreciation of jurisdictions actions at National level.**

#### **4.3.1. Limit actions against perpetrators.**

The near-total impunity for perpetrators of sexual assaults and other human rights violations in the country is a major reason for the persistent and endemic nature of gender-based violence in Eastern DRC. The Congolese justice system is dysfunctional, under resourced and staffed, and highly politicised due to frequent interferences by political and military authorities. Different forms of sexual violence are crimes against humanity under the Congolese military penal code, as well as under international law. Military courts and tribunals have the sole authority over international crimes.<sup>228</sup>

In the case of rape committed by FARDC, several offenders have been arrested and sentenced in the military justice system.<sup>229</sup> But interference by the executive branch in the administration of military justice is not a new phenomenon. There are several reasons underlying the rise in repeated intrusions of the political authorities in the functioning of military justice in order to protect leaders of armed factions from being prosecuted in military courts.<sup>230</sup>

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<sup>226</sup> World without genocide at Mitchell Hamline school of Law. Accessed 5-2015. Available at <http://www.worldwithouthgenocide.org/genocide-and-conflict/congo>.

<sup>227</sup> See 213.

<sup>228</sup> See 135, 27.

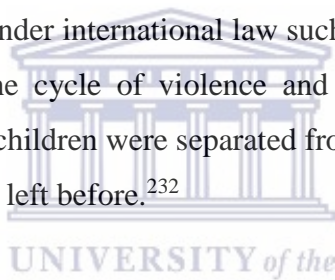
<sup>229</sup> See 211.

<sup>230</sup> The DRC, *Military justice and human rights –An urgent need to complete reforms*, pdf. A review by Afrimap and the open society initiative for Southern Africa. Johannesburg, SA 2009, 8.

The legal jurisdictions in DRC have many instruments to apply against perpetrators. All jurisdiction's actions shall be evaluated according the basis for developing a strategy on sexual violence and in particular to address impunity for sexual violence that is contained in international and national legal instruments and directives.

There are no courts of law in the rural areas that have jurisdiction over crimes of sexual violence. The only tribunal that exist in those areas is the *Tribunal de Paix*, which deals with crimes punishable by less than five years' imprisonment, while crimes of sexual violence are punishable from five to twenty years of imprisonment. Because of that, sometimes the government agrees to the support of international partners in organising mobile courts in those areas.<sup>231</sup>

Accountability for crimes under international law such as the recruitment and use of child soldiers is essential for ending the cycle of violence and impunity that can lead to the re-commission of such crimes. 7.736 children were separated from armed groups in 2014. However, it is alarming that around 20 % had left before.<sup>232</sup>



The DRC is responsible for the violation of children's rights set in various legal instruments protecting children in periods of armed conflict. Despite the responsibility of the State, armed groups or individual are also recognized as criminally responsible for the violations of the rights of children within the Congolese jurisdictions only if the material elements are committed intentionally and with knowledge. Nevertheless, during armed conflict, it is almost impossible to respect all obligations set in IHL and IHRL. It has been estimated that 2 million children have been killed, and more than 6 million have been injured during armed conflict. For instance, they have suffered sexual violence, grave psychological trauma, malnutrition and diseases.<sup>233</sup>

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<sup>231</sup> Shirambere Tunamsifu P, *The rights to justice: A challenge for survivors of conflict-related sexual violence in the Eastern DRC*. Article at <http://www.scielo.org.za>, African Human Rights Law Journal, Pretoria, retrieved 2015.

<sup>232</sup> Children in armed conflict: *A war crimes we have the responsibility to prevent*. Available at <http://www.childsoldiersin.org>, accessed at 2016.

<sup>233</sup> Mundela Bilonda G; *The responsibility of the State on the violation of the child during the post-armed conflict, the case of DRC*. Unpublished, LLM University of Pretoria 2013.



Another aspect of limited legal actions is about foreigner soldiers who have freely committed sexual rights violations. Rwandan, Burundian and Ugandan soldiers have committed various crimes of war and crimes against humanity. The DRC jurisdictions did not pursue them for political reasons.

#### **4.3.2. Analysis of these actions.**

At the light of the preceding, this strategy charts a way that can be followed to achieve a better result. As shown before, the actions of DRC justice jurisdictions are selective in that some soldiers that are not protected, can be prosecuted, arrested and stay for a long time in jail without any government assistance. But those who are working under government connivance, cannot be prosecuted. If they are, it will be to organize an informal trial or their prison evasion.<sup>234</sup>

While there is extensive evidence of the societal and individual ramifications caused by the sexual violence in the country, the government has been criticised for not doing enough to stop it. Although Congolese law criticizes many forms of sexual violence, these laws are not enforced.<sup>235</sup>

According to MONUSCO, combatting impunity for cases of sexual violence notes some obstacles toward prosecuting crimes of sexual violence, they are:

- Reluctance to prosecute high-ranking officials
- Lack of capacity within the DRC justice system
- Limited access to justice
- Weak administration of justice and implementation of a legal framework
- Absence of reparation

The same analysis details the weak administration of justice and implementation of a legal framework in which the victims of sexual violence or witnesses have no confidence. This is due in large part to the following:

- Lack of any protection mechanisms for victims and witnesses.
- Lack of independence and impartiality of the justice system.
- Most alleged perpetrators are apprehended.

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<sup>234</sup> The DRC, *Military justice and human rights –An urgent need to complete reforms*, pdf. A review by Afrimap and the open society initiative for Southern Africa. Johannesburg, SA 2009, 8.

<sup>235</sup> Kenneth Poorthvilier; *The sexual violence in DRC*. Article available at <http://www.study.com>, accessed 15-3-2018.

- Sentences for sexual violence are either minimum sentences or not implemented.
- Perpetrators escape from prisons
- No provisions of reparation for victims of sexual violence exists.<sup>236</sup>

Evidently, the establishment of the materiality of the offense of rape is a real obstacle course in eastern DRC because the evidence of rape is difficult to obtain. Investigating judicial police officers often have trouble getting to the crime scene to investigate. The reasons are, among others, geographical inaccessibility to certain territories and districts, distance reasons, insecurity, lack of road infrastructure or lack of transport.

Indeed, the rape victim inhabited by a sense of shame and humiliation and haunted by the fear of being rejected by her family or her community tends to take refuge in silence. This silence does not allow judicial police officer to collect the evidence he needs. It is important to note that the lack of female police officers creates a barrier for the woman who has difficulty in bringing to justice the fact that she feel a great embarrassment to tell of the rape suffered to a male person.<sup>237</sup>

From this point of view, sexual rights violations comprise verbal sexual threats, abuse and mocking which is tantamount to torture, so that the way torture must be punished in the same way as sexual rights violations, because they are both crimes against humanity.

The non-prosecution of Rwandan, Burundian and Ugandan soldiers by the DRC justice jurisdictions is unlawful, it is a weakness and an unconstitutional matter. Because those soldiers stay in DRC from 15 to 20 years, they must be subject to the Congolese jurisdictions.

Article 2(1) of ICCPR said that: 'Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.'<sup>238</sup>

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<sup>236</sup> See 216.

<sup>237</sup> See 125.

<sup>238</sup> HRC, *Civil and Political rights: the HRC*, Fact Sheet No 15 (Rev.1) Office of the UNHCHR, 8-14, Avenue de la Paix, 1211 Geneva 10, Switzerland, 5-2005, 32.

The fundament of this principle in the Article 2 which is one of the most important object of ICCPR, concerns the jurisdictions, within its obligations the rights recognized without distinction of any kind.<sup>239</sup>

This philosophy, logically shall be applied to the various armed groups which have been present in Eastern DRC for a long time, the Congolese rebel armed groups and all foreigners armed groups which are committing sexual rights violations, are subjects to the Congolese jurisdictions, and they are under Congolese law and obligations.<sup>240</sup>

Because of armed conflict, any judicial jurisdiction cannot work properly there. Congolese prosecutors cannot enforce the law or apply any legal instrument against those perpetrators who are taking advantage the fact of the war to commit multiple crimes and stay free. There is no way for better solutions for the DRC human rights issues, there is no way to stop impunity, to end sexual rights violence. So that there is a necessity of other international jurisdictions to work correctly in this region.

The following example of limited actions is one of application of Article 2 (1) of ICCPR. The Congolese party seeks UN intervention to pursue the FDLR soldiers and this happened only infrequently. The Congolese military prosecutors, with the assistance of the UN, opened a judicial investigation. Suspects were later arrested, but they escaped from prison.<sup>241</sup>

#### 4.3.3. Jurisdiction's results

According to the 2013 report on DRC judicial jurisdictions, the output rate of the HMC was estimated to be 17, 2%: its rate of output appears rather low. The judicial output of auditor's armed forces jurisdictions of DRC, it is about 34. 7%. It is not easy to explain the low output of the HMC. Many reasons could yet be advanced:

- The low financial allowance granted to the HMC.
- The bad quality of transmitted files by the inferior jurisdictions of the HCM.

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<sup>239</sup> See 56.

<sup>240</sup> This is my rationally best interpretation of this principle's application in this field.

<sup>241</sup> HRW, *DRC: Ending impunity for sexual violence, new judicial mechanism needed to bring perpetrators to justice*. Available at <http://www.hrw.org>, accessed 10-6-2014.

- The complexity of the procedure that especially demands that the military must be judged by their superiors or those equivalent to them. This condition is not easily applied.
- The multiplicity of appeals introduced by the respondents through their counsel.<sup>242</sup>

#### **4.4. Appreciation of jurisdiction actions at the International level.**

##### **4.4.1. Limited actions against perpetrators.**

The ICC is the main justice jurisdiction at the international level working on DRC conflict situations that has the mandate regarding prosecutions and sentencing of the perpetrators.

Regarding prosecutions and sentencing, as the experience of the ICC but also the ad-hoc international tribunal demonstrate, there is often no evidence of orders to commit sexual and gendered violence. Since the ICC primarily concentrates on crimes perpetrated by those deemed ‘most responsible’, linking sexual crimes committed by soldiers or rebels to the accused with command responsibility is extremely challenging.<sup>243</sup>

About these atrocities, the UN Secretary General uses the term ‘Conflict-Related Sexual Violence’ (CRSV) that refers to; Rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilisation and others forms of sexual violence of comparable gravity perpetrated against women, men, girls and boys that is linked directly or indirectly to a conflict.<sup>244</sup>

The previous chapter has detailed that in the DRC, the various cases the ICC has treated: 6 cases, 1 ongoing trials, 7 warrants of arrest, 3 accused in custody, 1 suspects at large, 1 ongoing appeal, 1 suspect in custody. In all, the ICC cannot do more, its actions are very limited regarding the large field of various perpetrators from all four countries which are fighting in Eastern Congo.<sup>245</sup>

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<sup>242</sup> See 133, 70.

<sup>243</sup> See 190.

<sup>244</sup> See 234.

<sup>245</sup> *Situation in the DRC*. Available at <http://www.icc-cpi.int/courtstructure>, ICC-01/04, accessed at June 2004.

#### 4.4.2. Analysis of these actions.

The international jurisdiction enforces the international instruments to accomplish its obligations. The actions of ICC in DRC to prosecute perpetrators of crimes of war and crimes against humanity are criticized from all points of view. The prosecution methods which are used by the ICC to work in the DRC need to be reviewed to improve the quality of service.

The quality of service, from my point of view, has three meanings here:

The first sense is the number of the people who are prosecuted by this jurisdiction. Regarding the amplex of the situation in the field, the physical quantity of the victims and devastating consequences produced by sexual violence and other forms of rape, the number of the accused by the victims compared to the number of ICC respondents (6), demonstrates insufficiency.

The second sense is the quality of those responses. There is no way to stop this kind of extensive sexual violence by arresting only six armed groups' leaders. The reality is showing that, always when the ICC arrests the leader of armed group, the members of this group are going to join other groups or one of them will become a new leader and the group will survive, continue and multiply.

The third sense is the achievement and realisation of the purpose of the ICC. In my viewpoint, the basic aim of any justice jurisdiction is about the prosecution and arrest of all or a great number of criminals, to end all forms of contravention and to restore the justice in the society.

But the jurisdiction like ICC, in this way of working, cannot end the tragedy and cannot stop that criminality, so its main aim will never be attained. There are some unfocused methods which render ICC incapable of addressing the Congolese conflict situations.

According to IFHR (International Federation of Human Rights), the ICC is a solid symbol of fighting against impunity, but it is limited. The ICC does not have a mandate to judge all crimes in any country. The general policy of the ICC prosecutor is to conduct an investigation and targeted lawsuit which cover only a sample of committed crimes in any area at any fixed time. Then, the

ICC works on the complementarity principle with national justice systems if the internal one does not have the will or capacity to judge any perpetrators of severe crimes.<sup>246</sup>

As defined in the Rome Statute of ICC, international crimes have been incorporated in the military criminal code of the DRC in the same words.<sup>247</sup>

In the DRC case, this complementarity doesn't have any impact or any effect, because ICC still keeping only 6 prisoners and HMC is still working badly on any sexual violence perpetrators. The enforcement of their complementarity becomes impossible and both their actions are very limited and weak against that vast tragedy.

#### **4.4.3. Jurisdiction's results.**

The issue of ICC in the Congolese conflicts does not give hope that the situations will end. The real result is that, despite the ICC presence in DRC since 2004, sexual rights violations levels are increasing every day. The natural consequence is assuredly the continuity of sexual rights violations.

As it is shown in first chapter by Ms Wallstrom, the Eastern part of DRC is designated and remains the '*worldwide capital of rape*' with more than about 200 000 registered cases and many not registered.<sup>248</sup>

#### **4.5. Ending sexual violence by ending general impunity.**

It will be difficult to end the cycles of violence in the DRC until those responsible for grave abuses are removed from the security forces and brought to justice. To this end, the creation of a vetting mechanism should be a central component of Security Sector Reform in DRC. Such a mechanism would make it possible to exclude from the ranks of the security forces the perpetrators of serious human rights violations.<sup>249</sup>

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<sup>246</sup> IFHR; *Sexual crimes at DRC, break down the impunity*, pdf. Paris-Geneva-Bruxel-The Hague, 12/03 – 15/04/2008.

<sup>247</sup> See 233.

<sup>248</sup> *To act against sexual violations in DRC*, Available at <http://www.adequation.org>, pdf. Accessed 13-6-2016.

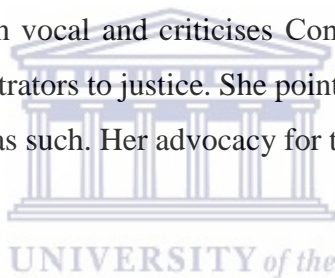
<sup>249</sup> *DRC; End impunity for sexual violence, need for a new legal mechanism to bring those responsible to justice*. Available at <http://www.hrw.org>, accessed at 10-4-2014.

Considering its current limited capacities, the Congolese judicial system is based on partnerships to initiate and experience the investigation and prosecution of international crimes. The main reason is an absence of financial and logistic autonomy, organisational follow ups, and specialised technical capacity and judicial strategic objectives.

The agreement on judicial cooperation, signed between the prosecutor of ICC and the DRC on a provisional basis, shows that the government has come to the realisation that the ICC is no less a panacea to all problems related to peace as it is to concerns of justice in the country.<sup>250</sup>

The following critical analysis of the actions of the ICC in the DRC is grounded in the belief that criminal justice has an important expressive role to play, building a historic narrative in the efforts to achieve political reconstruction in post-conflict society.<sup>251</sup>

Margot Wallström has been vocal and criticises Congo's deep-rooted impunity and has emphasised the need to bring perpetrators to justice. She points to the fact that rape is not cultural, but criminal and should be treated as such. Her advocacy for these issues in the Congo has helped to raise international awareness.<sup>252</sup>



As a response to the 'zero tolerance' policy decreed by the Congolese President,<sup>253</sup> Ms Wallström says that you cannot have a zero tolerance policy supported by zero consequences. She urges the DRC government to translate its policies against sexual violence in reality, with consistent and visible consequences for the perpetrators of such crimes.<sup>254</sup>

#### **4.6. Calling for the creation of a Special Court.**

Although progress has been made in recent years in prosecutions, it will be difficult to end the cycles of violence in the DRC until those responsible for serious abuses are removed from the

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<sup>250</sup> Musila Godfrey; *Between rhetoric and action, the politic, processes and practice of the ICC's work in the DRC*. Monograph 164, Institute for security studies, Pretoria, SA 2009, 44.

<sup>251</sup> Christian De Vos, Kendall S. and Carsten Stahn, *Contested justice, the politics and practice of ICC*, Cambridge University, London UK 2015, 107.

<sup>252</sup> AFP, *150 raped in DRC rampage: UN News Centre, UN envoys voice outrage after mass rape in eastern DRC*, retrieved 24 June 2011.

<sup>253</sup> See 169.

<sup>254</sup> UN-MONUSCO, *Mass rape in the DRC: UN Calls for end to impunity*. Available at <http://monusco.unmissions.org/en/mass-rape-drc-un-calls-end-impunity>, accessed 10 September 2010.

security forces and brought to justice. To this end, the creation of a vetting mechanism should be a central component of a security sector reform in DRC.<sup>255</sup>

#### 4.6.1. Local calling.

The transitional government in July 2003, engaged in an internal debate on the implementation of the recommendations of the Internal Congolese Dialogue (ICD);<sup>256</sup> it approved a decision to refer to the ICC international crimes committed throughout the territory of the DRC and to request the creation, by the UN Security Council, of an International Special Tribunal for the DRC to deal with crimes that would fall outside the jurisdiction of the ICC.<sup>257</sup>

The origin of this local calling is the ‘mapping report’ which detailed the human rights situation in the DRC. Moreover, the petition emphasizes that failure to do so would be a denial of international justice.

The DRC Ambassador to the UN said that, the mapping report favours the creation of a possible ‘mixed chamber’ in the justice system with national and international judges and other experts. As noted, bringing justice for the crimes committed in Congo is not something the Congolese government can act on alone. The perpetrators of these crimes are both Congolese and non-Congolese nationals, including those, African or not, who have profited from Congolese mineral resources and helped to drive the war.<sup>258</sup>

A new judicial mechanism is needed in Congo to end the impunity protecting perpetrators of serious crimes, including sexual violence in violation of international law. The chambers would be located within the Congo. It would be staffed by Congolese and non-Congolese judges and other personnel, with non-Congolese staff phased out as the chambers gain legitimacy, credibility, and independence.<sup>259</sup>

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<sup>255</sup> DRC, *end impunity for sexual violence, need for a new legal mechanism to bring those responsible to justice*. Available at <http://www.hrw.org>, accessed at 10 Avril 2014.

<sup>256</sup> The ICD global and inclusive accord on 25 September 2003 at Sun City in South Africa.

<sup>257</sup> See 211, 176.

<sup>258</sup> Ambassador Ileka Atoki (DRC Representative to the UN), *Justice for the Victims in Congo. Article available at [https://www.huffingtonpost.com/amb-ileka-atoki/post\\_976](https://www.huffingtonpost.com/amb-ileka-atoki/post_976)*, accessed 1-10-2010.

<sup>259</sup> *Ending impunity of sexual violence*. Available at <http://www.hrw.org/news/2014-06-10>.



The Specialised Mixed Court is the result of a long process of consultation and discussion about the best way to prosecute international crimes in the DRC. The Congolese Minister of Justice circulated a bill that would establish Special Chambers to prosecute these crimes. In that initial draft prepared by the government, the Special Chambers were intended to function within existing courts.<sup>260</sup>

The presence of international staff at all levels of the Court (prosecution, trial chamber, appeal chamber, supreme court, registrar, etc.) would provide a significant barrier to political intervention in the exercise of justice. The establishment of a specialised mixed court would mean that the DRC would have to incorporate into domestic law rules of international criminal law and procedure.<sup>261</sup>

On May 8, 2014, the National Assembly of the DRC rejected a government bill seeking to establish Special Chambers within the Congolese Judiciary system. This follows the rejection of a similar proposal by the DRC's Senate in 2010 which called for the creation of a new specific court. The creation of special chambers would demonstrate that justice is back on the government agenda.<sup>262</sup>

The internal demand for justice for international crimes committed during the decades-long civil war has been consistently high. Congolese human rights and victims groups have agitated for justice, while a coalition of NGOs was created to push for a comprehensive transitional justice mechanism.<sup>263</sup>

The summer of 2013 witnessed the launch of a petition,<sup>264</sup> initiated by '52 prominent women' including some Congolese lawyers, calling for the creation of an International Criminal

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<sup>260</sup> Pascale Kambale, *Plans for a hybrid court in Congo*. Article at <http://www.osisa.org/openspace/drc>, accessed 06-03-2012.

<sup>261</sup> International Federation for Human Rights (FIDH); *DRC, victims of sexual violence rarely obtain justice and never receive reparation. Major changes needed to fight impunity*. Paris-France, 11-2013, 65.

<sup>262</sup> Nick Elebe ma Elebe; *Why DRC Lawmakers again rejected Special Chambers to prosecute international crimes*. Article in International Justice Monitor. Available at [www.ijmonitor.org](http://www.ijmonitor.org), accessed 5-23, 2014.

<sup>263</sup> See 163.

<sup>264</sup> *Stop au viol comme arme de guerre pour un tribunal pénal international pour la RDC*. Available at <http://www.change.org/fr/petition>, accessed Sept 2013.

Tribunal for the DRC. The petition, which is still open for signatures, was addressed to the international community leaders.

Regarding the arguments and motivations, the content of the call for signatures specifies that these 52 ‘prominent women’, the godmothers (*marraines*) of this appeal, cannot think of the trauma suffered by women in the eastern DRC without having their heart pierced by the deepest grief, representing their fellow women, united by triple bond of humanity. They are worried, with reason, for the next generations.<sup>265</sup>

The petition calls for the establishment of an International Criminal Tribunal for the DRC by the Security Council to prosecute the crimes listed in the ‘mapping report’.<sup>266</sup>

#### 4.6.2. International calling

As with the local call, the idea is encouraged and sustained in the international level for involving justice mechanisms which will freely work on a large scale to investigate grave international crimes and prosecute all perpetrators. The call at the international level is made by different partners of the DRC human rights NGOs.

The UN published a significant report on DRC conflict situations. One of the ideas suggested is the necessity for the creation of new mechanisms for breaking and stopping the circle of impunity.<sup>267</sup>

Amid them, on the same matter, ‘*Jeune Afrique*’, a French political magazine, has published an article ‘*Appel international a la creation d’un Tribunal Penal International en RDC*’, (International appeal for the creation of an International Penal Court in DRC). One of the important ideas supported was that: ‘to not establish this special court, will be a discrimination against Congolese women.’<sup>268</sup>

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<sup>265</sup> Manuel Eynard, *the Creation of an International Criminal Tribunal for the DRC*. Article at <https://beyondthehague.com/the-creation-of-an-international-criminal-tribunal-for-the-drc>. Accessed 22-9-2013.

<sup>266</sup> See 220.

<sup>267</sup> ‘*The UN and sexual violations in DRC*’ on 1 October 2016, available at <http://www.rue89nouvelids.com>, accessed 10/02/ 2017.

<sup>268</sup> *Jeune Afrique*, ‘*International calling of special penal court creation in DRC*’, available at <http://www.jeuneafrique.com>, accessed 02-2016.

#### 4.6.3. A comprehensive necessity of Special Court creation.

Regarding the harmful situation of repetitive and increased acts of sexual violence in the Eastern of DRC, the issue of creation and establishment of a Special Penal Court in the DRC has become a great preoccupation. Providing real justice is a legal obligation of states toward individuals who have suffered grave crimes.

It should be noted that if the International Criminal Tribunal for the DRC were to be established, its jurisdiction would be concurrent with that of the ICC, which is itself complementary to the national jurisdiction of DRC courts and to the possible extraterritorial jurisdiction for foreign nationals. The above should be analysed in light of the difficulties in precisely identifying the facts that engage criminal responsibility.<sup>269</sup>

Given the limited number of cases that the ICC can handle and the low capacity and lack of independence of the Congolese justice system, the new mechanism is needed to prosecute all sexual violence and other serious human rights violations. The situation in the DRC would have allowed the 52 ‘prominent women’ not to neglect several relevant factors, such as the operation of mobile gender courts across the territory of the DRC.<sup>270</sup>

In fact, the profoundly humanist motivations behind this petition should be saluted. It is regrettable that this message does not offer integrated solutions, thus giving the negative impression of a lack of in-depth analysis of the situation. Their message is calling for “For an International Criminal Tribunal for the DRC” (*Pour un Tribunal Pénal International pour la RDC*).<sup>271</sup>

All in all, various positions can be argued on the question whether an International Criminal Tribunal for the DRC is needed. My view is that there is a need for a coordination and integration of the establishment of such international tribunal.

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<sup>269</sup> OHCHR; *The report mapping*. Available at <http://www.ohchr.org/Documents/Countries/drc>, accessed at 20-09-2015, 481.

<sup>270</sup> *Annual report of 2013*; The open society justice initiative. Available at <http://www.opensocietyfoundations.org/justice-drc>, pdf. Accessed 14-01-2013.

<sup>271</sup> See 24.

#### **4.6.4. Estimated functioning of a Special Court.**

The Special Criminal Court would be created with the mandate to prosecute the perpetrators of war crimes and crimes against humanity committed in Eastern DRC. The prosecution would concern the members of the Congolese security forces and the members of rebel armed groups and other civilian perpetrators.

Another relevant factor that merits attention in the establishment of Special Courts is that these hybrid courts, which have been accepted in principle by the Government of the DRC, would have the functions of rendering justice and strengthening the Congolese judicial capacity and infrastructures.<sup>272</sup>

#### **4.6.5. Expected results of Special Court.**

The Special Court would create a fair and effective structure within the Congolese system. It will effectively to fight impunity, focused exclusively on prosecuting the most serious international crimes such as described in chapter two according to IHL.

The Special Court will also try to end all government interference during the prosecution of the high ranking soldiers. Because the national jurisdictions, which are working under government influence, did not have powerful judicial authority with respect to the highest ranking officers who remain unpunished.

The expected prosecution will also concern the foreign armed troops from Rwanda, Burundi and Uganda which have committed many atrocities, including all forms of sexual violence on Congolese women and girls. They must be prosecuted without any distinction, even in-side their own countries.

The victims of the most serious crimes of international concern, deserve to see justice and the establishment of a Special Criminal Court being effected. It is certainly a very important step in the right direction, thus fulfilling DRC's obligations under international law and its duties

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<sup>272</sup> *Common position regarding special court in DRC.* Available at <http://www.fidh.org>, pdf. Accessed at 14-4-2011.

towards the victims. This Court would also contribute to the international efforts undertaken to bring about long term peace and stability in the Great Lakes region.<sup>273</sup>

The Special Penal Court will not hear charges related to political or military aspects of conflicts. It will work under the supervision of the international community, and must be established in another country to avoid government influence. It will deal directly with the perpetrators individually after hearing from the victims and after serious investigations; it can assist restore the human rights, sexual autonomy and dignity that are violated by sexual rights violations.

Such a Court can bring international expertise and experience in the investigation and prosecution of these crimes, and bring hope to victims who want justice to be done, and pave the way for sustainable peace in DRC.<sup>274</sup>

#### 4.7. The Rwanda example.

The genocide of 1994 in Rwanda entailed human rights abuses against women. Hutu militia groups and Rwandan military regularly used rape and other sexual violence as weapons in their genocidal campaign against the Tutsi community.<sup>275</sup> The genocide violates the Universal Declaration of Human Rights (UDHR). It is not only the Rwandan genocide, but every single genocide that violates the UDHR.

The UNSC<sup>276</sup> established the International Criminal Tribunal for Rwanda (ICTR), in order to ‘prosecute persons responsible for genocide and other serious violations of IHL committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994’. The Tribunal was located in Arusha, Tanzania, and was offices in Kigali, Rwanda. Its Appeals Chamber was located in The Hague, Netherlands. The Tribunal has indicted 93 individuals; 62 were sentenced,

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<sup>273</sup> PGA support the creation of a special criminal court in CAR. Available at <http://www.pgaction.org/news/car/html>, accessed 24-02-2015.

<sup>274</sup> See 33.

<sup>275</sup> *Rwanda genocide, Human Rights abuses against women*. Available at <http://www.hrw.org/news/1996/09/24>, accessed at 03-2018.

<sup>276</sup> Ref. to [http://www.unmict.org/itcr-remembers/docs/res955-1994\\_en.pdf](http://www.unmict.org/itcr-remembers/docs/res955-1994_en.pdf), retrieved 2017.

14 acquitted, and 10 referred to national jurisdictions for trial, 3 became fugitives, 2 were deceased prior to judgement and in the case of 2 persons, the indictment was withdrawn before trial.<sup>277</sup>

Established 8 November 1994 and dissolved 31 December 2015, the tribunal had jurisdiction over genocide, crimes against humanity and war crimes, which are defined as violations of Common Article 3 and Additional Protocol II of the Geneva Conventions.<sup>278</sup>

On 9 January 1997, the ICTR held its first trial, one of the most momentous cases in international law: *The Prosecutor v. Jean-Paul Akayesu*. J-P Akayesu served as the mayor of Taba, a city in which thousands of Tutsis were systematically raped, tortured and murdered. At the start of his trial Case No ICTR-96-4-T, Akayesu faced 12 charges.<sup>279</sup>

The ICTR found Akayesu guilty of nine counts of genocide, direct and public incitement to commit genocide and crimes against humanity for extermination. The conviction of Akayesu marked ‘the first in which an international tribunal was called upon to interpret the definition of genocide.’<sup>280</sup>

The Prosecutor charged Akayesu with genocide (Article 2(3)(a) of the Statute of the Tribunal; complicity of genocide (Article 2(3)(e)); crimes against humanity (extermination) (Article 3(b)); incitement to commit genocide (Article 2(3)(c)); murder (Article 4(a)); and violations of Article 3 common to the Geneva Conventions; torture (Article 3(f)) and cruel treatment (Article 4(a)); rape (Article 3(g)); other inhuman acts (Article 3(i)); violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2, as incorporated by Article 4(e) (outrage upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).<sup>281</sup>

As well as interpreting the definition of genocide, the ICTR also indicated that the crime of rape was underscored that sexual assault constitutes “genocide in the same way as any other act as

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<sup>277</sup> UN, *Mechanism for International Criminal Tribunals*. Legacy website of the ICTR. Since the ICTR’s closure on 31 December 2015, the Mechanism maintains this website as part of its mission to preserve and promote the legacy. Website <http://www.unmict.org>.

<sup>278</sup> ICTR, available at <http://www.unict.org>, accessed 02-2016.

<sup>279</sup> See ICTR, Fact Sheet No. 1; The Tribunal at a Glance.

<sup>280</sup> Scharf Michael P, *Statute of the ICTR*, pdf. Article available at <http://www.unict.org>, Retrieved 2016.

<sup>281</sup> ICTR, Chamber 1, the Prosecutor (Louise Arbour) versus JP Akayesu, judgement pdf, Decision 2-9-1998.

long as [it was] committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such".<sup>282</sup>

The ICTR is a good example and model for the DRC case of creation and establishment of Special Criminal Court. The enforcement of the Statute allowed the Tribunal to prosecute all perpetrators including high rank soldiers, end impunity and stop sexual rights violations, so that the protection of civilians was effective.

Despite the apparent political will of the DRC to pursue some individuals and the Rwandan engagement to cooperate pursuant to accord, Rwanda does not ever practice the necessary judicial cooperation in order to promote the penal responsibility of the perpetrators of those crimes.<sup>283</sup> Four demands of extradition against Zimurinda, Ngaruye, Badege and Runigaet were transmitted to the Rwandan government on July 2013. The Congolese military auditors in January 2014, issued 13 mandates to arrest the older members of M23. But not one was arrested.

#### 4.8. The CAR example.

The jurist and military official, Colonel Toussaint Muntazini Mukimapa, a military prosecutor in the DRC was appointed by the president of Central African Republic (CAR) to be the Prosecutor of the country's Special Criminal Court (SCC).<sup>284</sup>

The SCC is a special jurisdiction within the CAR justice system created by Act No 15.003<sup>285</sup>, to investigate and bring to court serious human rights violations and violations of IHL committed since 1 January 2003.

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<sup>282</sup> See 47.

<sup>283</sup> The judicial cooperation is part of a whole integral accord of Addis Ababa, which is preventative for the region of States of Great Lakes to act and facilitate the cooperation of the justice. By this judicial cooperation in the region, they cannot accommodate or furnish protection of any nature to the persons accused for crimes of war and crimes against humanity, of genocide acts or crimes of aggression or to the persons under the sanctions of UN. See the report of SG on the application of the accord of the peace, security and cooperation for the region of Great Lakes, UN Doc. S/2014.154 (5-3-2014).

<sup>284</sup> *The SCC officially created*. Available at <http://www.fidh.org/en/impacts/CAR/SCC>, accessed June 2015.

<sup>285</sup> *CAR, Organic Law of creation, organization and functioning of SCC*. Available at <http://www.fidh.org/img>, pdf. Accessed 03-06-2015.

The impunity that has plagued the CAR for several decades has, and continues to cause, the commission of further serious violations of human rights and IHL. Thus, fair and just trials would not only be an obligation to victims who have suffered atrocious crimes but would also send a strong signal that serious crimes will no longer be tolerated.<sup>286</sup>

The comparison of these special jurisdictions shows that the ICTR was established by the UNSC with an international capacity to act anywhere. But the SCC was created and established by the CAR president with a national capacity to act only in CAR.

#### **4.9. Judicial aspect of the question.**

The judicial aspect in this work concerns ‘transitional justice’ as a mechanism strategy that can help promote justice for women. Transitional justice responses to gender-based violations during conflict and authoritarian rule are essential for ensuring justice for victims, combating women’s marginalization, gender inequality, and gender-based human rights violations and preventing future violations against women.<sup>287</sup>

This shortcoming is compounded when women are also excluded from the decision-making process. Women must play a central role in the design and implementation of transitional justice measures if policy is to adequately respond to their needs. This is especially true when attempting to implement policy amid ongoing sexual and gender-based violence.<sup>288</sup>

#### **4.10. Conclusion.**

Between 2005 and 2015, the Congolese situation was bad and hopeless in all aspects of life. Accordingly, the domain of sexual rights violation during the considered period was at a high level and was marked by a worrying increase in all forms of sexual violence on the civilian population which suffered various effects from these conflicts. Widespread sexual rights violations in eastern Congo will not end until the perpetrators are brought to real justice.

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<sup>286</sup> *What is the SCC?* Available at <https://www.fidh.org/en/region/Africa/car>, accessed 30/08/2017.

<sup>287</sup> ICC, *Can Transitional Justice Help Promote Justice for Women?* International Centre for Transitional Justice. Available at <http://www.icc-cpi.int>. Accessed at 05-2017.

<sup>288</sup> See 41.



The main effects are remarkable on women and children, even in the context of family, and the violence against women remains widespread and continues to have a negative impact on children. The men who have an attachment to their customs and culture find it difficult to forgive and to accept back their raped wives, especially those raped in public or before their family.

The Congolese justice tried to establish some rules and acts against all perpetrators. These rules and law are applying to everybody without exception. But this law remains unenforced.

The creation of the permanent international criminal court, with jurisdiction over violations of the law committed during internal armed conflicts<sup>289</sup> should signal the end for *ad hoc* criminal tribunals. Crimes against humanity are subjects to universal jurisdiction and the acceptance that breaches of common Article 3 and the laws and customs of the war entail international criminal responsibility must also carry with it the acceptance that these acts are equally subject to universal jurisdictions.<sup>290</sup>

It is no longer sufficient to remain with empty condemnations and denunciations of sexual violence acts when the law remains unenforced. That inactive time and ineffective measures are over. Where human rights violations are deep and systematic, rights advocates must devise strategies for political change that are not in the scope of human rights.<sup>291</sup>

Despite their presence and their efforts to stop sexual violence and to end impunity, the Eastern of DRC remained the worldwide capital of rape.

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<sup>289</sup> See Rome statute of the ICC, UN Doc A/CONF. 183/9, 17 July 1998, Art 5-8.

<sup>290</sup> See 55, 235.

<sup>291</sup> James Nickel, *Making sense of Human Rights*, 2<sup>nd</sup> Edition. Blackwell Publishing, UK 2007, 50.

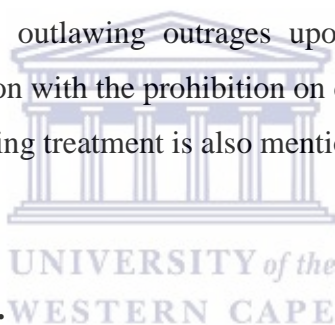
## CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION.

### 5.1. Introduction.

Building on the earlier analysis, this chapter addresses how the fight against conflict-related sexual violence in the DRC has become the fight against impunity. Rape and sexual violence are the worst crimes, but they are not an inevitable part of war. There is a need to end sexual violence in conflict, by ending impunity.

The Congolese Constitution protects and promotes human rights, fundamental freedoms, and the duties of citizens. The grave human rights situation and the fragile social context in the DRC bears witness to the necessity of constitutionalizing and enforcing human rights.<sup>292</sup>

Common Article 3 (1)(c), outlawing outrages upon personal dignity and degrading treatment, can be read in conjunction with the prohibition on cruel treatment and torture provided for in Article 3 (1)(a), since degrading treatment is also mentioned expressly in the non-derogable torture provision above.<sup>293</sup>



### 5.2. A Human Rights perspective.

The High Commissioner for Human Rights produced an important 581-page report which addresses violations of human rights allegedly committed in the DRC between March 1993 and June 2003. It listed 617 violent incidents in the context of tens of thousands of people killed and many others raped and mutilated.<sup>294</sup>

Ranked among the most important human rights provisions as a *jus cogens* norm of customary international law, the first modern prohibition against torture is found in Article 5 of the Universal Declaration of HR (UDHR). It provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.<sup>295</sup>

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<sup>292</sup> Dunia P, Butedi F and Mavungu P; *The Legal System of the DRC: Overview and Research*, pdf. Article at <http://www.nyulawglobal.org/globalex/drc>, accessed 02-2015.

<sup>293</sup> Lindsay Moir; *The Law of internal armed conflict*. Cambridge University Press. London UK 2003, 201.

<sup>294</sup> OHCHR, *Rapport Mapping*, available at [http://www.ohchr.org/documents/countries/drc\\_mapping\\_report](http://www.ohchr.org/documents/countries/drc_mapping_report), pdf.

<sup>295</sup> Alice Eddwards; *Violence against women under IHRL*. Cambridge University, USA 2011, 199.

### 5.3. The UN point of view

Criminal prosecution has become the framework within which all matters to do with conflict-related sexual violence are dealt with. Zainab Bangura<sup>296</sup> has emphasized there is no way to end sexual violence unless there is an end to impunity.<sup>297</sup>

During the UN Security Council,<sup>298</sup> Ms Wallström pleads: “Women have no rights, if those who violate their rights go unpunished. Ending impunity for sexual violence is a critical part of the Council’s broader mandate to shepherd situations ‘from might to right, from rule of war to rule of law, from bullets to ballots’. If women continue to suffer sexual violence, it is not because the law is inadequate to protect them, but because it is inadequately enforced. Women are still not safe, under their own roofs, in their own beds, when night falls. Our aim must be to uphold international law, so that women can sleep under the cover of justice. Ending impunity is one of the priorities.”

Ms Wallström gave some recommendations: “I urge the Government of the DRC to ensure full implementation of the armed forces actions plan against sexual violence. To systematically bring perpetrators to justice. The UN continues to support the implementation of the national strategy on sexual and gender-based violence. The DRC has developed a strategy for joint Government - UN action for the fight against sexual violence, but efforts to implement it must be strengthened.”<sup>299</sup>

The representative of Costa Rica to the UN, expressed concern that the UN has failed to address the causes of the violence and eliminate impunity. In view of this, he urged to establish strong national bases for the protection of women and girls, as well as vulnerable populations. He said that we must make sure that all countries sanction all acts of sexual violence.”<sup>300</sup>

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<sup>296</sup> Zainab Bangura was UN SG's Special Representative on Sexual Violence in Conflict (2013).

<sup>297</sup> Bringedal Houge and Kjersti L, *End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law*. Article at <http://onlinelibrary.wiley.com>, accessed 9-11-2017.

<sup>298</sup> Margot Wallström, *Tackling sexual violence must include prevention, ending impunity – UN official*. Addressed to the SC on 27 April 2010. Article on <http://www.un.org/apps/news>.

<sup>299</sup> UN, *Sexual violence in conflict. How to move from impunity to deterrence*. Available at <http://www.un.org/sexualviolenceinconflict/countries/drc>, accessed 23-03-2015.

<sup>300</sup> See 10.

In various resolutions, the UNSC requested furthermore that MONUC pays particular attention to sexual violence. It provides important on-the ground information essential for efforts to fight impunity and it saves lives by allowing humanitarian workers to operate in dangerous areas. Despite these strong mandates and many resolutions, however, MONUC has often been criticised for failing to adequately protect civilians.<sup>301</sup>

#### **5.4. Recommendations.**

This work calls on the DRC government, donors and other partners to support the following efforts to ensure that the individuals responsible for the international grave crimes described above, as well as the crimes of sexual violence, are brought to the real justice in the framework of fair and credible trials in the Special Criminal Court.

The DRC government must raise awareness and strengthen the national strategy for combating sexual violence, by significantly increasing the budget of the national Agency to eliminate violence against Women and Girls, within the Ministry of Gender, promoting gender equality.

The government must implement a national awareness-raising campaign; increase the budget allocated to the justice system, particularly to courts with jurisdiction over crimes of sexual violence and crimes under international law; guarantee effective implementation of the 2006 laws on sexual violence and access to justice for victims of crimes; adopt a victim and witness protection programme.

The government must also provide training to prosecutors and judges on prosecuting crimes of sexual violence under international criminal law, international human rights law and international humanitarian law; amend national legislation so that human rights violations and crimes under international law, are tried before civilian courts.<sup>302</sup>

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<sup>301</sup> UN, International Peace Institute, *Renewing MONUSCO's Mandate*. USA, 05-2011, 4.

<sup>302</sup> International Federation for Human Rights (FIDH); *DRC victims of sexual violence rarely obtain justice and never receive reparation. Major changes needed to fight impunity*. Paris-France, 11-2013, 70.

The DRC should ensure that new legislative proposals presented to Parliament on the jurisdiction of the civil and military courts over international crimes are harmonized. Emphasis regarding the characteristics of serious crimes, the structure and organization of perpetrators and the responsibility of commanders.<sup>303</sup>

The Secretary General of UN urges the Government of the DRC to sustain its efforts to combat sexual violence, including by bringing perpetrators to justice irrespective of rank or affiliation, ensuring that victims and witnesses are protected and that reparations are paid.<sup>304</sup>

The contribution of this work is to appeal to the international community and Congolese authorities' consciences and to show them the necessity for a Special Penal Court that will restore dignity and justice and ensure the respect for the international law that DRC has ratified. The reality of the increasing rate of sexual rights violations shows the DRC needs a Special Penal Court as global solution to end impunity for perpetrators of sexual rights violations. It is necessary to provide an alternative jurisdiction.

The governments of neighbouring countries and the regional community in the Great Lakes must ensure that ending fighting and restoring peace and security are paramount. They must act in accordance with relevant legal instruments to end impunity and sexual violence in their region. They are requested to provide co-operation to the success of the Special Penal Court by sending their rapist soldiers if there is a need for them to appear.

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<sup>303</sup> The International Centre for Transitional Justice; *The Accountability Landscape in Eastern DRC Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)*, DRC, 07-2015, 5.

<sup>304</sup> UN; *Report of the Secretary-General on Conflict-related on sexual violence 15 April 2017 | s/2017/249*. Available at <http://www.un.org>, pdf, accessed 2017.

## 5.5. Conclusion.

Rape and other forms of sexual violence have now been explicitly prohibited in both international and internal armed conflicts by conventional international law. This prohibition has furthermore been held to have ‘evolved in customary international law’. There can be no doubt, then, that rape is a violation of human rights as well as HRL.<sup>305</sup>

So many observations and resolutions were taken by the UNSC without any concrete results. The UNSC has been resolute on measures to fight impunity. In resolution 1888, the UNSC urges all conflict parties to investigate reports of sexual violence committed by military personnel and to bring perpetrators to justice. The resolution 1960 similar to resolution 1820 which both condemn the use of rape and other forms of sexual violence during wartime.<sup>306</sup>

The UN efforts to end sexual violence, to stop impunity and to bring perpetrators to the justice were not successful at all. The Congolese justice system remains weak and unable to punish perpetrators for international grave crimes of war and crimes against humanity.<sup>307</sup>

Where human rights violations are deep and systemic, rights advocates must devise strategies for political change that are not in the normal scope of human rights.<sup>308</sup>

Regarding the rights of the victims of sexual rights violations, the AU presents a resolution on the rights to remedy and reparation for women and girl victims of sexual violence.<sup>309</sup> The key ideas in this resolution are that the AU condemns and criminalizes all forms of sexual violence. The AU ensures that police and military forces as well as all the members of the judiciary, receive adequate training on the principles of IHL, women and children rights.

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<sup>305</sup> Lindsay Moir, *The Law of internal armed conflict*. Cambridge University Press. London UK 2003, 217.

<sup>306</sup> See 5

<sup>307</sup> Amnesty International, *The Time for Justice is now*. According to the Rome Statute of the ICC, Articles 7 and 8, August 2011.

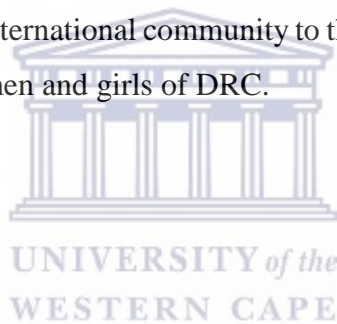
<sup>308</sup> James Nickel W; *Making sense of Human Rights*, 2<sup>nd</sup> Edition. Blackwell Publishing, UK 2007, 50.

<sup>309</sup> Heynes C and Killander M; *Compendium of key human rights documentation of the AU*, 4<sup>th</sup> Edition. Pretoria University Law Press (PULP), Pretoria, SA 2010, 142.

Sexual violence in the DRC demands a response. Until the crisis has been curbed, thousands of women and girls remain at constant risk. While there may be no single measure that will halt the violence, a nuanced effort to strengthen the rule of law can help alleviate the problem. Weak rule of law is undoubtedly a significant contributing factor to the problem.<sup>310</sup>

According to the DRC government, the proposal to establish specialized mixed chambers is not a stand-alone, temporary measure, it is one of a number of important legislative proposals.<sup>311</sup> But, the DRC government is not to be trusted in that matter, because it has not always respected its commitment.

Therefore, this work supports the creation of a Special Criminal Court by the UN Security Council to end impunity which is countenanced by the DRC leadership which is part of some armed groups. The support of the international community to this Special Criminal Court is needed to give back the dignity to the women and girls of DRC.



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<sup>310</sup> Ryan S. Lincoln; *Rule of law for Whom: Strengthening the Rule of Law as Solution to Sexual Violence in the DRC*. Article in Berkeley Journal of Gender, Law and Justice, USA 2011, 30.

<sup>311</sup> *Accountability for atrocities committed in the DRC, supporting the government's Proposals to establish Specialized Mixed Chambers and other related Judicial Reforms*. Available at <http://www.hrw.org>, accessed 1-4-2014.

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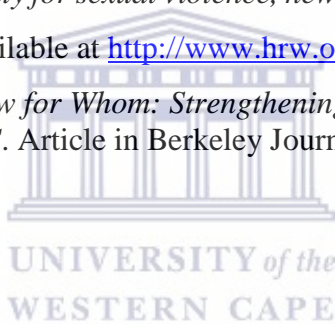
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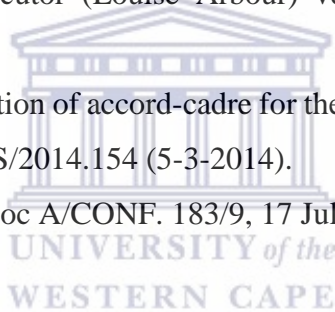
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