



UNIVERSITY *of the*
WESTERN CAPE

Faculty of Law

**Post-Conflict Gender-Justice: Access of Women Survivors of
Gender-Based Violence to the Judicial System: A Case Study of the
Democratic Republic of Congo (DRC)**

A research paper submitted to the faculty of law of the University of the Western Cape, in partial fulfilment of the requirements for the degree of Masters of law (LL.M International Protection of Human Rights and Humanitarian Law)

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DECLARATION

I, **Dignité Kangoboka Bwiza**, hereby declare that this dissertation ‘Post-Conflict Gender-Justice: Access of Women Survivors of Gender-Based Violence to the Judicial System: A Case Study of the Democratic Republic of Congo (DRC)’ is my original work and has never been presented in any other institution. I also declare that where another person’s work is used, it has been acknowledged in this dissertation.

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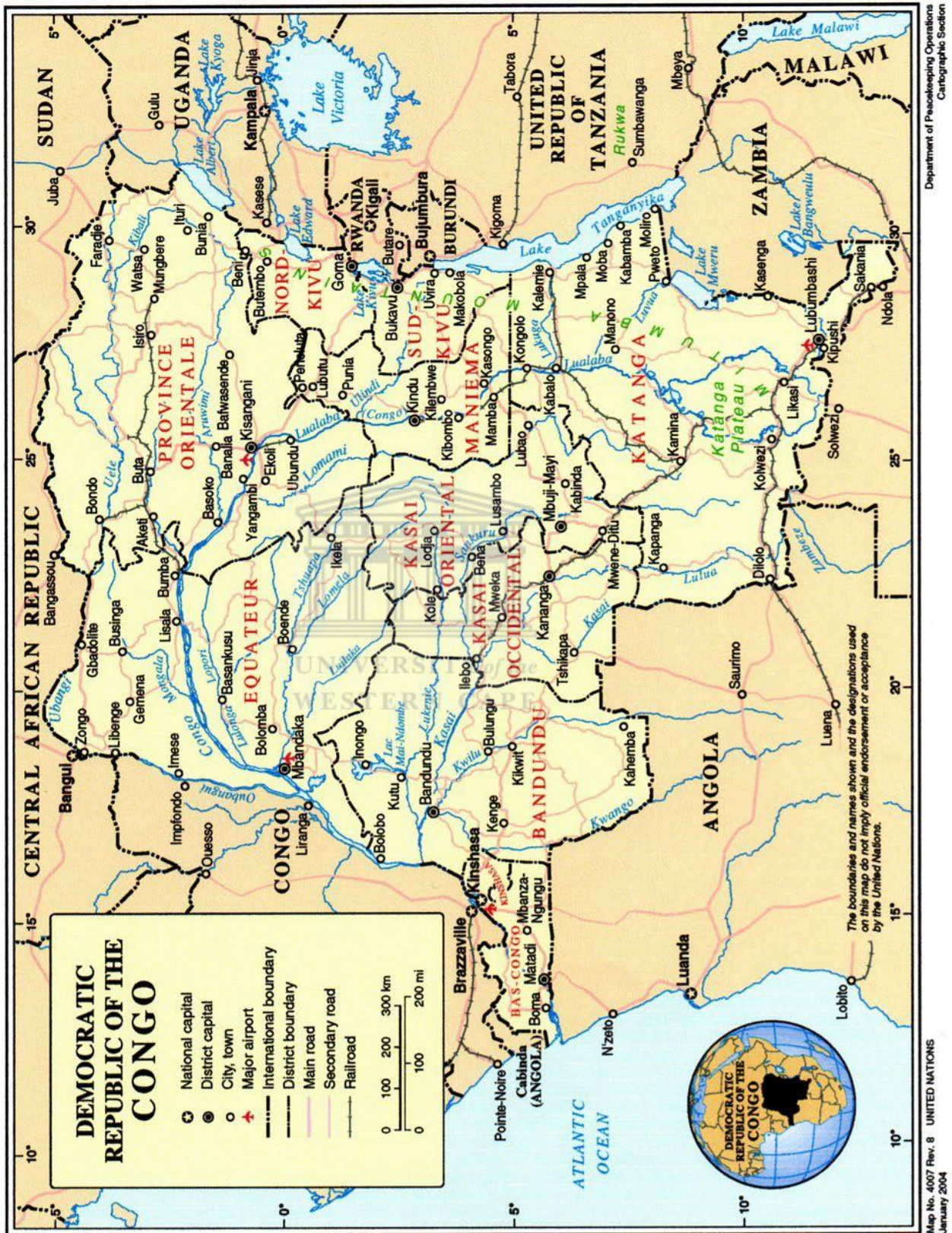
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August 2012, Cape Town, South Africa

MAP OF THE DRC



Source: United Nations Cartographic Section

MAP OF PROVINCES OF THE DRC



Source : World Atlas

LIST OF ABBREVIATIONS

ABA-ROLI	American Bar Association- Rule of Law Initiative
AFDL	Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre
AMG	Auditorat Militaire de Garnison
Art.	Article
AU	African Union
CDF	Congolese Franc
CNDP	Congrès National pour la Défense du Peuple
Doc.	Document
DRC	Democratic Republic of the Congo
FARDC	Forces Armées de la République Démocratique du Congo
FDLR-FCA	Forces Démocratiques pour la Libération du Rwanda-Forces Combattantes Abacunguzi
FPLC	Front Patriotique pour la Liberation du Congo
GA	General Assembly
GBV	Gender-Based Violence
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia

IHL	International Humanitarian Law
IHRL	International Human Rights Law
MLC	Movement of the Liberation of Congo
MONUC	United Nations Organisation Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo
No.	Number
Para	Paragraph
RCD Democracy)	Rassemblement Congolais pour la Démocratie (Congolese Rally for Democracy)
Res.	Resolution
RPA	Rwandan Patriotic Army
SC	Security Council
TCC	Troop Contributing Countries
TMG	Tribunal Militaire de Garnison
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHROHC	United Nations Human Rights Office of the High Commissioner
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNHRC	United Nations Human Rights Committee
USDS	United States Department of State



KEY WORDS

- 1 Post-conflict
- 2 Gender-justice
- 3 Gender-based violence
- 4 Women
- 5 Access to criminal justice
- 6 Case law
- 7 Democratic Republic of the Congo



ABSTRACT

During armed conflicts, women experience more abuses than their male counterpart. Besides, the disruption of national security systems resulting from the social and political troubles, exposes women to more violation of their human rights in the post-conflict setting.

During the last decade, the international community has employed noteworthy efforts to protect women from the effects of armed conflicts, and to ensure the prosecution of violators of women's rights in post-conflict situations. This included *inter alia*, the adoption of binding treaties calling for protection of women against sexual and gender based violence (GBV), and the creation of an international Criminal Court and International tribunals to prosecute persons for the most serious crimes of international concern, including sexual and gender violence.

During the armed conflict that occurred in the Democratic Republic of Congo (DRC) between 1996 and 2003, a significant number of GBV acts were committed against women. Reports and statistical data from humanitarian organisations working in the DRC indicated an increase of GBV acts against women after the official cessation of the conflict. Moreover, reports indicated the emergence of GBV acts against women in areas that did not witness such acts during the conflict.

The research paper interrogates, from a criminal justice angle, the response given to GBV acts perpetrated against women in the post-conflict setting. Furthermore, the research questions the access of women to justice and interrogates the challenges bedevilling this access at the national and international level. In addition, the research formulates recommendations aimed at enhancing the access of women survivor of GBV to justice, and for an effective prosecution of perpetrators of such acts.

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CHAPTER ONE: INTRODUCTION

1.1 Background to the study

Gender-based violence (GBV) has been used worldwide in armed conflicts as a method to brutalise and instil fear in the civilian population, with women and girls as the special target.¹ Since time immemorial, women have borne the effects of war by either being captured as spoils of war² or as comfort women for soldiers.³ They have suffered acts such as rape and mutilation or were involuntarily infected with deadly and incurable diseases as an act to demoralise the enemy soldiers.⁴ ‘Sexual violence is as old a practice as war itself’ contend Kaufman and William.⁵ The level of atrocities perpetrated against women during armed conflicts led Brownmiller to observe that ‘women’s bodies and their reproductive capacities serve as a battleground for injuring or eliminating outright an opposition group.’⁶

However, despite the multitude of gender-based atrocities that has been perpetrated against women all over the world, real attention to GBV commenced seriously only in the 1990s when international attention focused on the atrocities committed against women in the former Yugoslavia and Rwanda.⁷

In Africa, different forms of GBV perpetrated against women were reported in countries such as Sierra Leone,⁸ Rwanda⁹ and the Democratic Republic of Congo (DRC).¹⁰

¹ Sjoberg L, Via S & Enloe C *Gender, War and Militarism: Feminist Perspective* (2010) 114.

² Sjoberg L, Via S & Enloe C (2010) 114.

³ Soh SC *The Comfort Women: Sexual Violence and Postcolonial Memory in Korea and Japan* (2008) 27.

⁴ See generally Cook AB (ed) *Women and War: A Historical Encyclopedia From Antiquity to the Present* (2006).

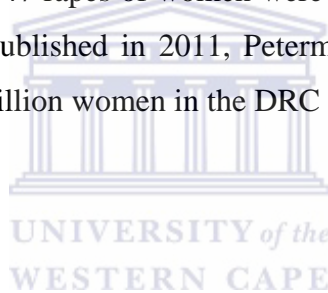
⁵ Kaufman JP & Williams KP *Women and War: Gender Identity and Activism in Times of Conflict* (2010) 37.

⁶ Brownmiller S ‘Making Women's Bodies Battlefields’ in Stiglmeier A & Faber M (eds) *Mass Rape: The War Against Women in Bosnia-Herzegovina* (1994) 181.

⁷ Schiessl C ‘An Element of Genocide: Rape, Total War, and International Law in the Twentieth Century’ (2002) 4 *Journal of Genocide Research* 199.

⁸ See generally Physicians for Human Rights War-related Sexual Violence in Sierra Leone: A Population Based Assessment (2002); Taylor L “*We’ll Kill You if You Cry*”: *Sexual Violence in the Sierra Leone Conflict* (2003) 15.

In the DRC, GBV was perpetrated massively during the armed conflict from 1996 to 2003. It is estimated that the conflict led to ‘a minimum of tens of thousands of rapes of women’¹¹ and to thousands of other forms of GBV.¹² Congolese women suffered rape with extreme violence, including beating, wounds caused with machetes, genital mutilation, burns caused by drops of hot melted plastic and insertion of objects into their genital organs.¹³ Despite the official end of the war in 2003, armed opposition groups continued to operate in the east and the north of the DRC, where serious human rights violations, particularly GBV acts against women, continue to be perpetrated.¹⁴ For instance, reports by international humanitarian agencies working in the DRC indicate that 48 women were raped every hour between 2006 and 2007.¹⁵ During the first six months of 2010, 7 685 rapes were reported, amounting to nearly double the cases reported in 2009.¹⁶ The DRC Minister for Gender, Family and Children stated that by the end of 2010, over one million women and girls had been raped in the DRC.¹⁷ In 2011, 47 rapes of women were reportedly perpetrated on new year’s day.¹⁸ In their study published in 2011, Peterman and Palermo estimate that approximately 1.69 to 1.80 million women in the DRC had been raped at least once in their lifetime.¹⁹



⁹ See generally Nowrojee B et al *Shattered Lives: Sexual Violence During The Rwanda Genocide And Its Aftermath* (1996).

¹⁰ See generally Cseste J & Kippenberg J *The War Within The War: Sexual Violence Against Women And Girls in Eastern Congo* (2002).

¹¹ Pratt M & Werchick JD *Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo* (2004) 11.

¹² Palermo T & Torpey J ‘Counting Sexual Violence in the Congo’ (2012) 11 *Contexts* 10.

¹³ Mukwege MD & Nangini C ‘Rape with Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo’ (2009) 6 *Plos Medicine* 3.

¹⁴ UN ‘Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (2012) UN Doc. S/2012/65 at paras 21-25& 29.

¹⁵ Peterman A, Palermo T & Bredenkamp C ‘Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo’ (2011) 101 *American Journal of Public Health* 1065.

¹⁶ Human Right Watch ‘World Report 2011: Events of 2010’ (2011) 107.

¹⁷ Human Rights Watch telephone interview with Marie-Ange Lukiana, Minister for Gender, Family Affairs and Children (2009) cited in Kippenberg J *Soldiers Who Rape Commanders Who Condone: Sexual violence and Military Reform in the Democratic Republic of Congo* (2009) 14, 35 &40.

¹⁸ Human Right Watch ‘World Report 2012: Events of 2011’(2012) 105; Palermo T & Torpey J (2012)10; MONUSCO & UNHROHC ‘Report on the Investigation of the United Nations Joint Human Rights Office Into the Mass Rape and Other Human Rights Violations Committed in the Villages of Bushani and Kalambahiro, in Massisi territory, north Kivu, on 31 December 2010 and 01 January 2011’(2011) 9.

¹⁹ Peterman A, Palermo T & Bredenkamp C (2011) 1060.

1.2 Statement of the research problem

GBV is a serious global concern, especially in post-conflict societies where numerous challenges hinder efforts aimed at its prevention. As asserted by Anderson, GBV 'is one of the great global security challenges of our time'.²⁰ In response to, and as an acknowledgement of the gravity of GBV, an International Criminal Court²¹ and numerous international tribunals²² were created to insure accountability for most serious crimes of international concern, including GBV acts.

The topic of this research is justified by two main problems regarding GBV acts committed against women in the DRC. The first problem is the increase in the number of GBV acts committed against women since the official end of the war. An estimated 36 000 cases of rape were committed since 1996, the beginning of the armed conflict in the DRC, and 2004,²³ one year after the official end of the conflict.²⁴ Despite the end of the conflict, the promulgation of new national laws criminalising GBV, and the contribution of various international NGOs to the prevention of GBV; figures on GBV acts committed against women keep increasing and shows no signs of decrease.

The second problem is the increase of the number of GBV acts perpetrated by non-combatants. Previously perpetrated solely by armed men engaged in the conflict, the number of rapes of women perpetrated by non-combatants in the post-conflict DRC increased 17-fold (1 733 per cent) between 2004 and 2008; while the number of rapes perpetrated by combatants decreased by 77 per cent.²⁵ Furthermore, there is an increase in the brutality with what GBV acts are committed: in 2007, 20 per cent of

²⁰ Anderson L, Advocacy and Women's Rights Specialist for UN Action, with women in camps in the eastern DRC cited in Farmer A 'Promoting Gender Justice in Conflict Zones' (2009) 18 *Perspectives* 5.

²¹ See Rome Statute establishing the International Criminal Court (1998) A/CONF.183/9.

²² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1993) UN Doc. S/25704; Statute of the International Criminal Tribunal for Rwanda (1994) UN Doc. S/RES/955; Agreement for and Statute Of The Special Court For Sierra Leone (2002).

²³ Ward C, Horwood C, McEvoy C et al *The Shame of War: Sexual Violence Against Women and Girls in Conflict* (2007).

²⁴ The conflict was put to an end by the Sun City I agreements signed in Pretoria on 16 December 2002 and the Sun City II agreements signed on 2 April 2003 in Sun City (*Accord Global et Inclusif sur la Transition en RDC Signé à Pretoria (République d'Afrique du Sud) le 17 Décembre 2002 Adopté à Sun City le 1 Avril 2003*).

²⁵ Bartels S et al *Now The World is Without Me: An Investigation of Sexual Violence in Eastern Democratic Republic of Congo* (2010) 2.

women survivors of rape required reconstructive surgery, a higher percentage compared to previous years.²⁶

The above findings denote an increase in the exposure of women to GBV, and convey a need for further protection of women against GBV in the DRC.

1.3 Research questions

The research paper aspires to answer the following questions:

- i. To what extent has the DRC domesticated and implemented the international treaties proscribing GBV, which it had ratified?
- ii. To what extent have the GBV acts perpetrated during the armed conflict in the DRC, and its aftermath, been prosecuted at the national and international level?
- iii. To what extent do women survivors of GBV access the institutions of the legal system in the DRC and international level? What are the challenges they face?

1.4 Literature review

There is an emergent global trend recognising the fact that men and women do not experience the same way violence and human rights abuse consequent to political disturbances.²⁷ Subsequently, researches were undertaken questioning the access of women to justice and reparation for the abuse they endured as a result of political troubles. For instance, Ní Aoláin contends that GBV against women increases in post-conflict situations and is often overlooked and under-reported.²⁸ She also contends that policies have had too little success in improving women's lives in post-conflict situations, and further emphasises the need to provide justice for the victims and to guarantee prosecution of the perpetrators, notwithstanding the challenges that hinder the rule of law in transitional countries, such as in the DRC.²⁹ Besides, Kirchner considers that the quest of justice for women victims of GBV acts perpetrated during

²⁶ UN SC 'Final Report of The Group of Experts on the Democratic Republic of Congo' (2008) UN Doc. S/2008/43; Mukwege M 'Rape With Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo' (2009) *Plos Medicine* 4.

²⁷ Duggan C, Abusharaf AM 'Reparation for Sexual Violence in Democratic Transitions: The Search for Gender Justice' in de Greiff P (ed) *The Handbook of Reparations* (2006) 624.

²⁸ Ní Aoláin F, Laynes DF & Cahn N *On The Front-Line: Gender, War, and The Post-Conflict Process* (2011) 70.

²⁹ Ní Aoláin F, Laynes DF & Cahn N (2011) 20.

conflicts can be reinforced by awareness-raising activities for the concerned societies.³⁰

Researching the same issue, Goetz explored the structural aspect of the access of women to justice for violence they endured during wars and suggest that these abuse can be addressed either ‘in truth and reconciliation processes’ or ‘in war crimes tribunals of whatever kind’.³¹ Hudson, in turn, explores the question from a normative angle by scrutinising the linkage between Resolution 1325³² and Convention on the Elimination of All Forms of Discrimination Against Women³³ and contends that in order to reinforce gender and human security in post-conflict situations it is imperative to connect these two documents.³⁴ She also asserts that, although GBV is being condemned more vocally today, it has been tolerated for a long time, and remains under-penalised.³⁵

Reacting to the need for accountability, Cos-Montiel³⁶ is of the view that not only individual perpetrators should be held accountable for their acts, rather, there should be a possibility to hold institutions accountable if they do not provide equal access to women or allows them to participate without discrimination in accountability processes. Saris and Lofts accentuate the idea of accountability with the notion of “the need for reparation for victims” of GBV.³⁷ Nevertheless, Goetz maintains that for women’s rights to translate into substantive improvements in their lives and for gender equality to be achieved in practice, women must be able to fully participate in public decision-making at all levels, and hold those responsible to account when their rights are infringed or their needs ignored.³⁸

³⁰ Kirchner S *War-time Rape: Sexual Terrorism in Eastern Provinces of the Democratic Republic of Congo* (2008) 35.

³¹ Goetz AM *Who Answers to Women?: Gender and Accountability* (2008) UNIFEM.

³² UN SC Res. 1325 on Women, Peace and Security (2000) UN Doc. S/RES/1325.

³³ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) UN Doc. A/34/46.

³⁴ Hudson NF *Gender, Human Security and the United Nations: Security Language as a Political Framework for Women* (2010) 176.

³⁵ Hudson BBA *Understanding Justice: An Introduction to Ideas, Perspectives, and Controversies in Modern Penal Theory* (2003) 84.

³⁶ Cos-Montiel F ‘Institutionalising Equality: Putting Gender Issues at the Centre in Mexico and Sweden’ in Kabeer et al *Global Perspective on Gender Equality: Reversing the Gaze* (2008) 207.

³⁷ Saris A & Lofts K ‘Reparation Programmes: A Gendered Perspectives’ in Ferstman C, Goetz M & Stephens A (eds) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in place and Systems in the Making* (2009) 81.

³⁸ Goetz AM (2008).

Regarding GBV against women in the DRC, a large number of the available documentation is restricted to a description of the alarming extent to what GBV were committed. Little has been written on the extent to what women survivors of GBV accessed justice. Kippenberg undertook such scrutiny in 2005 as she examined the prosecution of sexual violence during the war in the DRC.³⁹ However, a lot has changed since 2005: a new Constitution was adopted in 2006, national laws were significantly amended thereafter, criminalising GBV against women and increasing the punishment for such acts; and the international obligation of the DRC has considerably changed following the ratification of binding international treaties.

1.5 Objectives

The objectives of the research are:

- i) To explore the challenges impeding effective investigation, prosecution and sentencing of perpetrators of GBV in post-conflicts situations in general, and in the DRC in particular; and
- ii) To analyse the extent to what women survivors of GBV access the legal system in the DRC.
- iii) To address the scarcity of scholar literature on the access of women survivors of GBV to justice in the DRC, and to provide updated information on gender-justice in the DRC.

1.6 Conceptual framework

1.6.1 Gender-justice

The concept of 'gender-justice' is rarely given a precise definition, and is often used interchangeably with notions of gender equality, gender equity, women's empowerment and women's rights.⁴⁰ In the area of law, the concept 'gender-justice' means formal equal rights between men and women, and it also relates to uncovering gender biases entrenched in the legal processes which affect the ways women experience the law.⁴¹ Goetz uses the words 'gender-justice' to refer to *inter alia*,

³⁹ Kippenberg J 'Seeking Justice: The Prosecution of Sexual Violence in the Congo War' (2005) 17 *Human Right Watch*

⁴⁰ Kapur R 'Challenging Liberal Subject: Law and Gender Justice in South Asia' in Mukhopadhyay M *Gender Justice, Citizenship and Development*(2007) 117.

⁴¹ Kapur R (2007) 118.

emancipatory projects that advance women's rights through legal change.⁴² She contends that 'gender-justice' is either an outcome, or a process. 'Gender-justice' as an outcome implies access of women to, and control over resources, combined with the ability to make choices.⁴³ On the other hand, 'Gender-justice' as a process brings the additional essential element of accountability, and imply the responsibility and answerability of precisely those social institutions set up to dispense justice.⁴⁴

Using Goetz's definition of gender-justice, this research paper uses the term 'gender-justice' both as a process and an outcome. 'Gender-justice' as a process refers to the process that was used by survivors of GBV in the DRC to get redress for the violation of their human rights. 'Gender-justice' as an outcome indicates the reparation obtained by survivors of GBV in the DRC for the abuses they suffered, and the extent to what perpetrators were taken accountable for their acts.

1.6.2 Gender-based violence

Two important authorities in the field of GBV in armed conflict and crisis are the Reproductive Health Response in Conflict (RHRC) Consortium and the Inter-Agency Standing Committee (IASC) Task Force on Gender and Humanitarian Assistance.

The RHRC defines 'gender-based violence' as 'an umbrella term for any harm that is perpetrated against a person's will, and that results from power inequities that are based on gender roles.'⁴⁵ The IASC uses a similar definition referring to 'any harmful act that is perpetrated against a person's will and that is based on socially ascribed (gender) differences between males and females.'⁴⁶

However, as the present research paper focuses on GBV directed against women, the definition given by the CEDAW seems more appropriate as it defines 'gender-based violence' as 'violence directed against a woman because she is a woman or that

⁴² Goetz AM 'Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debates and New Directions for Research' in Mukhopadhyay M & Singh M *Gender Justice, Citizenship and Development* (2007) 17.

⁴³ Goetz AM (2007) 17.

⁴⁴ Goetz AM (2007) 18.

⁴⁵ RHRC *Gender-based Violence Tools Manual* (2003)9.

⁴⁶ IASC Task Force on Gender and Humanitarian Assistance *Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies* (2005) 7.

affects women disproportionately'.⁴⁷

Although the words 'gender-based violence' are not limited to violence against women and girls, but includes violence against men, boys and transgender people; the present research paper uses the words 'gender-based violence' to refer to sexual and other acts perpetrated by men against women, including but not limited to rape, sexual mutilation, sexual slavery, forced impregnation, and domestic violence. This research focuses on GBV committed against women for the reason that women constitute the large majority of victims of GBV in post-conflict situations in general, and in the DRC in particular.

1.6.3 Victims and survivors

The expression 'victims' is progressively being replaced by the word 'survivors' to refer to persons who have suffered GBV. This is being done because of the concern to avoid stigmatisation of persons who have experienced sexual violence and suggests survival and resistance rather than passivity. However, in the legal system, the expression 'victim' reinforces the fact that the person has experienced a violation of their human rights and been a victim of a criminal act. The present research paper uses the words 'victims' and 'survivors' interchangeably to designate women who have suffered GBV.

1.7 Methodology

This research was conducted mainly by means of literature review where the focus was placed on existing materials on gender-justice. The information used in this research was obtained from secondary sources, such as, national legislation and government policies, case law, international treaties, protocols, and United Nations Resolutions (UN Res.). Moreover, the research used other relevant secondary sources, particularly textbooks, journal articles, reports and field studies.

1.8 Chapter outline

The research paper is divided into four chapters.

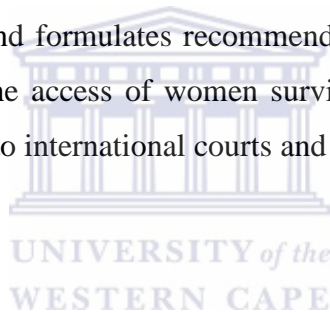
⁴⁷ Committee on the Elimination of Discrimination Against Women General Recommendation No 19: Violence Against Women (1992) A/47/38 at para 1.

Chapter One provides an introduction to the research. It delivers a background to the study, a statement of the problem, a literature review, the objectives of the research, a conceptual framework, the methodology used, and a chapter outline.

Chapter Two provides an overview of the nature of GBV committed against women during the armed conflict in the DRC and in its aftermath. Furthermore, the Chapter navigates the international and national normative frameworks related to GBV.

Chapter Three interrogates the access of Congolese women, survivors of GBV, to the national legal system. There after, the chapter enquire the extent to what these women access justice at the international level. Lastly, the Chapter highlights challenges encountered in the prosecution of GBV acts perpetrated in the DRC, both at the national and international level.

The fourth Chapter restates the major findings of the research paper, provides a conclusion to the research, and formulates recommendations on the measures to be taken in order to reinforce the access of women survivors of GBV to the national legal system in the DRC and to international courts and tribunals.



CHAPTER TWO: GENDER-BASED VIOLENCE AGAINST WOMEN IN THE DRC

2.1 Introduction

A myriad of human rights violations were committed during the armed conflict that occurred in the DRC from 1996 to 2003. To date, the effects of the conflict still reverberate throughout the country, and human rights abuses continue to be committed in the post-conflict setting, with devastating effects for women. After an introduction, this chapter provides a succinct description of the conflict in the DRC. Thereafter, the chapter categorises the diverse forms of GBV acts that were perpetrated against women during the conflict and its aftermath, and endeavours to provide statistics for each group. Afterwards, the chapter highlights the obstacles that hinder the reporting of GBV in the DRC in order to provide to the reader further information of the surroundings to the issue of GBV against women in the DRC. Lastly, the chapter undertakes an exposition of the international and national normative frameworks for the prosecution of GBV and for access to justice for survivors.

2.2 The armed conflict and the post-conflict situation

In 1996 an armed conflict arose in Zaïre between the government of the then President Mobutu Sese Seko wa Zabanga and the opposition, coalesced in the *Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre* (AFDL).⁴⁸ Liberation was achieved in May 1997 when the AFDL forced the incumbent president to flee the country, and placed its leader. Afterwards, the leader of the AFDL, Laurent Désiré Kabila, ascended to presidency and renamed the country, the Democratic Republic of Congo, from its former name of Zaïre.⁴⁹ Peace and prosperity did not, however, come with the change of government. In 1998 two-rebel movements, the Congolese Rally for Democracy in the Kivus (*Rassemblement Congolais pour la Démocratie*, RCD) and the Movement for the Liberation of the Congo in Orientale and Equateur provinces (*Mouvement pour la Libération du Congo*, MLC); staged a new uprising against Kabila's government with the support of neighbouring

⁴⁸ Wallace MN, Guignon F & Kisangani EF *The Democratic Republic of Congo: Economic Dimensions of War and Peace* (2006) 28; Davis L (2009) 32.

⁴⁹ Karbo T & Mutisi M 'Ethnic Conflict in the Democratic Republic of Congo (DRC)' in Landis D & Albert RD (eds) *Handbook of Ethnic Conflict International Perspective* (2012) 382.

countries.⁵⁰ By 1999 the war had reached a military impasse. The DRC was divided into four zones. Rebel armed groups controlled three of the zones (the MLC in the north, RCD-Goma in the east and RCD-ML in the northeast), and one zone (the west) was under the control of the government.⁵¹ To ensure the protection of the civil population during this impasse, the UN established a peacekeeping mission, the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) in 1999.⁵² The conflict officially came to an end in July 2003 with the signature of 'global and inclusive accords' in Sun City. The accords established a power-sharing government comprised by representatives from all armed and unarmed factions to the conflict.⁵³

The conflict in the DRC is reported to have led to the death of 5.4 million persons and the internal displacement of around 1.4 million people, while 322 000 fled into neighbouring countries seeking asylum.⁵⁴

The present research is undertaken whilst rebel movements from neighbouring countries and national armed groups are still active in the east and north of the country, where the armed conflict is continuing.⁵⁵ The following section provides an overview of the forms of GBV that were committed against women during the conflict and in its aftermath, and attempts to provide data for each category of GBV.

⁵⁰ RCD was backed by Rwanda and MLC was backed by Uganda. Karbo T & Mutisi M (2010) 386.

⁵¹ Wallace MN, Grignon F & Kisangani EF (2006) 49.

⁵² Protection of civilian was not the only mandate of MONUC. For details on the mandate of MONUC see UN SC Res. 1279 on the Situation Concerning the Democratic Republic of Congo (1999) UN Doc. S/RES/1279. Since June 2010, the name of MONUC changed to MONUSCO and amendments were made to its mandate. However, protection of civilians in imminent danger remained the priority of MONUSCO, although the overall mission shifted slightly to supporting national institutions. See UN SC Res. 1925 (2010) on the Situation Concerning the Democratic Republic of Congo UN Doc. S/RES/1925.

⁵³ Sun City agreements (I) signed in Pretoria on 16 December 2002 and Sun City agreements (II) signed on 2 April 2003 (*Accord Global et Inclusif sur la transition en République Démocratique du Congo-signé à Pretoria (République d'Afrique du Sud) le 16 Mai 2002*); Apuuli KP 'The Politics of Conflict Resolution in the Democratic Republic of Congo (DRC): The Inter-Congolese Dialogue process' (2004) 4 *African Journal on Conflict Resolution* 75-76; Mangu AMB 'The Conflict in the Democratic Republic of Congo and the Protection of Rights under the African Charter' (2003) 3 *African Human Rights Law Journal* 242; Coleman KP *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (2007) 120.

⁵⁴ Amnesty International 'Report 2011: The State of the World's Human Rights' (2011) 33.

⁵⁵ UN SC (2012) UN Doc. S/2012/65 at paras 21-25 & 29; UNHCR 'Renewed Clashes and Insecurity Causing Displacement in Eastern DRC' (2012) available at <http://www.unhcr.org/4f1967a19.html> (accessed 15 April 2012).

2.3 Nature and data of GBV

Congolese women suffered the most human rights abuse that occurred during the conflict in the DRC. The war was allegedly ‘being fought on their bodies’,⁵⁶ a statement based on the widespread use of rape of women.

Activity reports of NGOs running humanitarian programmes in the DRC, the main source of information in the absence of a national system of collection and centralisation of data on GBV,⁵⁷ display alarming data of acts of rape, as shown in the following subsection.

2.3.1 Rape

Rape is ‘one of the ways in which women are targeted in conflict situations’.⁵⁸ Referring to the use of rape during conflicts, Wallström stated that ‘[r]ape is cheaper, silent and has longer-lasting effects on society than bullets’.⁵⁹ Rape of women was used by all parties to the conflict in the DRC as a weapon of war.⁶⁰ In the DRC, any girl and woman could be attacked and raped at any time.⁶¹ Between 1996 and 2004, only 36 000 cases of rape were reported. However, ‘a minimum tens of thousands of rapes’⁶² are estimated to have been perpetrated during the conflict and to have remained unreported.⁶³

⁵⁶ Ohambe MCO et al *Women’s Bodies as a Battleground: Sexual Violence Against Women and girls during the War in the Democratic Republic of Congo South Kivu (1996-2003)* (2005) 8.

⁵⁷ Besides GBV acts, there is no national system of centralisation of data on human rights violations in the DRC. Furthermore, there is no centralised information on the extent to which victims accessed justice or on the extent to which perpetrators of GBV or other human rights violation were punished.

⁵⁸ Ward C et al (2007) 58.

⁵⁹ Wallström M, UN Secretary-General’s Special Representative on Sexual Violence in Conflict in an interview given to the *UN News Centre* on 11 November 2010 available at <http://www.un.org/apps/news/newsmakers.asp?NewsID=26> (accessed 19 January 2012).

⁶⁰ Zilberg J ‘Mass Rape as a Weapon of War in the Eastern DRC’ in Fayola T & Ter Haar H *Narrating War and Peace in Africa* (2010) 115; Clifford C ‘Rape as a weapon of War and Its Long Term effect on Victims and Society (NGO)’ 7th Global Conference Violence and the Contexts of Hostility (2008) 3; Cseste J & Kippenberg (2002) 23-24; Campagne des Femmes Congolaises Contre Les Violences Sexuelles en RDC ‘Sexual Violence in Eastern DRC’ (2008) <http://www.rdc-viol.org/site/fr/node/35> (accessed 28 February 2012).

⁶¹ Peterman A, Palermo T & Bredenkamp C (2011) 1065; UN Secretary General ‘Report to the Secretary-General on Children and Armed Conflict in the Democratic Republic of Congo’ (2007) UN Doc. S/2007/391 at para 40.

⁶² Pratt M & Werchick JD (2004) 11.

⁶³ See generally Ward C, Horwood C, McEvoy C et al (2007).

After the official end of the war in 2003, GBV continued to be reported. For instance, 25 000 new cases of rape were reported in eastern DRC in 2005.⁶⁴ Another 13 000 new cases of rape were reported in 2006,⁶⁵ and in 2007 about 48 women were raped every hour.⁶⁶ For the year 2008, 15 996 new cases of rape were reported in the Kivu provinces.⁶⁷ At the end of the first semester of 2009, approximately the equivalent of the new cases of rape reported for the entire year 2008, were recorded.⁶⁸ On new year's day 2011, 46 women and one girl were raped.⁶⁹ Although the above data only mention rape of women, Congolese men have likewise suffered sexual violence, however at a lower scale.⁷⁰

The majority of the rapes committed against women in the aftermath of the conflict in the DRC took place in north and south Kivu (the Kivus) where militia groups are still active.⁷¹ Nevertheless, cases of rapes were also reported in areas located far from the conflict zones of the east, such as in Equateur and Kinshasa.⁷² The viciousness, the cruelty, and the magnitude of rape in the DRC led to the labelling of the country as 'the rape capital of the world.'⁷³

As shown in this subsection, the reported number of cases of rapes of women in the DRC is alarming. Furthermore, the number continues to increase despite the end of

⁶⁴ UN SC 'Report of the Secretary-General on Protection of Civilian in Armed Conflict' (2005) S/2005/740 at para 14. A difference is made between 'new' and 'old' cases of rape. 'New' refer to rapes perpetrated during the year of reporting and 'old' cases of rape refer to cases committed in previous years of the year of reporting. In the present example, a rape committed in 2004 will be reported as 'old case' in 2005, while all the cases of rape committed in 2005 are 'new' cases.

⁶⁵ UN Human Rights Council 'Report of the Special Rapporteur on Violence Against Women, its Cause and Consequences, Yakin Ertürk: indicators on violence against women and State response' (2008) A/HRC/7/6 at para 56.

⁶⁶ Peterman A, Palermo T & Bredenkamp C (2011) 1065.

⁶⁷ Kippenberg J (2009) 14.

⁶⁸ Kippenberg J (2009) 14.

⁶⁹ MONUSCO & UN HROHC (2011) 9.

⁷⁰ See generally Lewis DA 'Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law' (2009) 27 *Wisconsin International Law Journal*.

⁷¹ Two specialised hospitals provide free medical assistance to survivors of rape and GBV in the eastern DRC: the Panzi Hospital in south Kivu and the Doctors On Call for Service/Heal Africa Hospital in north Kivu (DOCS).

⁷² United States Department of State (USDS) *Country Report on Human Right Practices for 2007* (2008) 125; Clark M 'Shocking Congo rape statistics show husbands - not just soldiers, rebels - perpetuate the problem' (2010) *The Christian Science Monitor* available at <http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0512/Shocking-Congo-rape-statistics-show-husbands-not-just-soldiers-rebels-perpetuate-the-problem> (accessed 06 February 2012).

⁷³ Neumann CE *Sexual Crime: A Reference Handbook* (2009) 74; 'DR Congo "rape capital of the world"', (2010) available at <http://www.timeslive.co.za/africa/article423181.ece/DRC-rape-capital-of-the-world> (accessed 12 Mars 2012); Lincoln RS 'Recent Developments: Rule of Law for Whom? Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of the Congo' (2011) 26 *Berkeley Journal Gender, Law and Justice* 139.

the conflict. The UN Senior Advisor and Coordinator on Sexual Violence at MONUC contends that the number of rape cases that have been documented in the DRC represents less than 50 per cent of the actual number of rapes of women that have occurred in the DRC.⁷⁴

The displayed data illustrates a substantial increase of rape of women in the post-conflict setting in the DRC. However, rape is not the only form of GBV that was committed against women in the DRC. The following subsection examines other forms of GBV acts committed against women in the DRC.

2.3.2 Other forms of GBV

Repeatedly, women endure various forms of GBV in post-conflict settings. In the DRC, new forms of GBV against women appeared during and after the end of the conflict, as a consequence of the alteration of the protection that was given to women by the society prior to the conflict. For instance, Mukengere and Nangini reported that 72 per cent of rapes perpetrated in south Kivu were accompanied with other forms of violence, such as, beating, wounds with machetes, genital mutilation, burns by drops of heated plastic, and insertion of objects into genital organs. Such violence had not been noticed prior the conflict.⁷⁵

Other reports of international organisations succinctly mentioned other forms of GBV, such as, abduction,⁷⁶ forced labour, cutting off of breasts, intentional transmission of sexually transmitted diseases, sexual enslavement, and enforced pregnancy.⁷⁷

⁷⁴ Dahrendorf N former Senior Advisor and Coordinator on Sexual Violence at MONUC, statement at a presentation to the 'Conference on the Great Lakes Pact – Two years on: Issues of Implementation and Enforcement' London School of Economics on 29 May 2009 attended by Human Rights Watch researcher cited in Kippenberg J (2009)14.

⁷⁵ The study compiled the interview of 492 women survivors of rape. Mukwege MD & Nangini C (2009) 3; Zilberg J (2010) 115.

⁷⁶ In her study, Maedl found that 50.0 per cent of raped women were abducted, spending between one day to more than one year in abduction. See Maedl A 'Rape as a Weapon of War in the Eastern DRC? The Victims' Perspective' (2011) 33 *Human Rights Quarterly* 130.

⁷⁷ USDS *Annual Report on Human Rights 2010* (2011) 74; Kippenberg J (2009) 52; Bryant-Davis T, Tillman S & Counts PA 'Sexual Assault: A matter of Reproductive Justice' in Chrisler JC (ed) *Reproductive Justice: A Global Concern* (2012) 77; Bartels S et al (2010) 16; Lungombe AO, Kasereka MC & Ruminjo J (2008) 136.

While overlooked, the family is often the place where various forms of GBV are committed against women in post-conflict settings.⁷⁸ For instance, it is being noticed that women in the DRC, particularly in south Kivu, are no longer protected from GBV in the home setting. During the conflict, women were attacked far from inhabited areas, while farming or collecting firewood. However, this changed in the aftermaths of the conflict and women are experiencing GBV in their own homes.⁷⁹ The safety women enjoyed in the family setting is exacerbated by the fact that domestic abuse, such as beating and forced sexual intercourse with in-laws, is not considered an offence in some tribes of the DRC. In 2012, 86 per cent of women in Equateur province suffered domestic abuse either from their partners or from in-laws.⁸⁰ One should note that domestic violence against women in the DRC has been reported all around the country, both in zones undergoing conflict and in the parts of the country that have peace.

Other forms of GBV against women reported in the DRC are sexual harassment and sexual exploitation by staff members of international humanitarian organisations operational in the DRC. These forms of GBV appeared in the post-conflict setting, when approximately 150 cases of sexual abuse and exploitation of women and young girls by international humanitarian staff members, including pornographic videos and photos, were reported in the northeast of the DRC since 2004.⁸¹

Available data on other forms of GBV committed against women in the DRC are significantly limited compared to those on rape. This is due to the fact that activity reports of international humanitarian organisation that serves as main source of data on GBV acts focussed on rape. Thus, it can safely be concluded that there is a lack of sufficient data on other forms of GBV perpetrated against women in the DRC. However, the lack of data on other forms of GBV does not imply that Congolese women did not suffer GBV other than rape. This assumption can be backed by Ní Aoláin's assertion that in post-conflict situations, GBV against women increases, may

⁷⁸ Wykes M & Welsh K *Violence, Gender and Justice* (2009) 66.

⁷⁹ Bartels S et al (2010) 12.

⁸⁰ USDS (2011) 75.

⁸¹ Ertürk Y 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, Including the Right to Development: Report of the Special Rapporteur on violence against women, its causes and consequences. Addendum: Mission to the Democratic Republic of the Congo' (2008) A/HRC/7/6/Add.4, 13; Lendman S 'UN Peacekeepers Complicit in Sex Trade' (2010) *Dissident Voice* available at <http://dissidentvoice.org/2010/10/un-peacekeepers-complicit-in-sex-trade/> (accessed 29 January 2012).

be more severe, and may manifest more diverse forms than the known acts, since external mediation structures of such violence are entirely absent or are not effective.⁸²

A quick overview of the above third section of the chapter shows that rape and other forms of GBV acts were perpetrated against women at a large scale during the conflict in the DRC and in its aftermath. Deplorably, the exact number of GBV acts perpetrated during the conflict in the DRC is difficult to capture. Furthermore, although the available data display alarming numbers, they are yet to reflect the reality of the abuse endured by women.

Stockpiling data on GBV is not an easy task, specifically in the DRC where the process faces various challenges. The following section examines the challenges to reporting GBV acts against women in the DRC.

2.4 Obstacles to reporting GBV in the DRC

Various authors, scholars, human rights and humanitarian actors agree on the assumption that all GBV acts committed against women during the conflict in the DRC and its aftermath were not documented. This is a supposition made from the several obstacles jeopardising the process of reporting GBV acts, among which the main obstacles are examined below.

2.4.1 Lack of reporting structures

Many health institutions such as hospitals were destroyed during the conflict in the DRC, mostly in the east. Furthermore, judicial institutions such as courtrooms were demolished. Subsequently, survivors of GBV acts have to walk for hundreds of kilometres to access health centres and judicial institutions, and are likely to suffer more abuses on their way.⁸³

⁸² Ní Aoláin F, Laynes DF & Cahn N (2011) 70-71.

⁸³ UNDP *Human Development Report 2011: Sustainability and Equity for a Better Future for All* (2011) 126 & 145; Yager L *Democratic Republic of Congo: Information on the Rate of Sexual Violence In war-Torn Eastern DRC And Adjoining Countries* (2011) 15.

2.4.2 Restriction of movements

Some regions of the national territory of the DRC are currently under the control of militia groups who hold the population hostage in those areas. Therefore, women survivors of GBV acts cannot go out of the controlled regions to access reporting structures such as police or humanitarian organisations that provides medical assistance and which will document the cases in their activity reports. This thus leaves a significant number of GBV acts not reported.

Although the above-mentioned challenges confirm the assumption that available statistics of GBV acts perpetrated against women in the DRC are under representative, a different analysis of the post-conflict setting in the DRC led to an opposite assumption. This second assumption, explained in the next subsection, is that available data on GBV acts committed against women in the DRC are over representative.

2.4.3. Poverty and lack of tracking system

Women in the DRC are disproportionately affected by poverty and marginalisation subsequent to the predominant patriarchy in the Congolese society.⁸⁴ The armed conflict aggravated vulnerability of women by destroying the societal fabric, thus reducing the protection women received from the society, and exposing them to greater poverty and vulnerability.⁸⁵

As a consequence of the conflict, women bear the burden of tending for the family, as the majority of men were killed during the conflict or are no longer able to continue the economic activities that were the mainstay of the family during peace-time. Facing poverty and lacking alternative means to provide for their basic needs and the needs of their dependents, women who did not experience GBV may lie about their personal experience in order to obtain assistance provided *only* to survivors of GBV by humanitarian organisations.

⁸⁴ McCann CR and Kim SK *Feminist Theory Reader: Local and Global Perspectives* (2003) 211; Montreal Principles on Women's Economic, Social and Cultural Rights (2004) 26 *Human Rights Quarterly* 768.

⁸⁵ Ní Aoláin F, Laynes DF& Cahn N (2011) 70.

Moreover, it is impossible to know with exactitude whether a case of GBV has not been counted more than once. Some women have been raped more than once, at different times and places, by different individuals, and received assistance from different humanitarian organisations. Considering the absence of a national tracking system that could detect a case reported several times,⁸⁶ it is difficult to know with exactitude whether a case was not reported more than one time. Furthermore, in the early years after the end of the conflict, no coordinated method was used to collect available data on GBV acts. Thus it is difficult to know whether all women who received assistance from humanitarian organisation effectively survived GBV acts, as women who received medical assistance for sexually transmitted disease might have been included among the data of survivors of GBV.

The absence of a coordinated and centralised system of data on GBV has resulted in the release of contradictory information on GBV cases in the DRC. For instance, reporting the number of rapes perpetrated in south Kivu province for the year 2008, the medical sub-commission to combat sexual violence⁸⁷ reported 10 644 cases while the UNFPA figure was 2 883 rape cases.⁸⁸

It is evident that due to existing challenges hindering the reporting of GBV acts and the lack of an effective system of management of received information, existing data on GBV perpetrated against women in the DRC are not accurate.

Another aspect on which no precise information is available is the identification of the perpetrators of GBV acts. The following section examines the profile of perpetrators of GBV acts committed against women during the conflict in the DRC and in its aftermath, and attempt to provide information on the extent to which each category of perpetrators is responsible for reported GBV cases.

⁸⁶ There is little willingness on the ground to collaborate. Medical NGOs have their own, varying protocols and standards, as do agencies focused on psychosocial assistance and reintegration. Lack of collaboration is exacerbated by the 'remote control' nature of programs - managed by local partners but directed from abroad - and the fact that some agencies focus on emergency assistance, while others champion development. See Rodriguez (2009) 46.

⁸⁷ CPVS Sud-Kivu 'Data Presentation of the Medical Sub-Commission' (*Présentation des Données de la Sous-commission Médicale*) (2009) cited in Kippenberg J (2009) 14 & 50.

⁸⁸ UNFPA 'Figures on sexual violence reported in the DRC in 2008' (*Quelques Chiffres des Violences Sexuelles Reportées en RDC en 2008*) cited in Kippenberg J (2009) 14.

2.5 Profile of perpetrators

Individuals from various groups of the society perpetrated GBV acts against women during the conflict in the DRC and in its aftermath. For the purpose of this research, perpetrators of GBV acts has been regrouped into three main groups: Combatants (referring to all parties to the conflict irrespective of the groups to what they belonged), civilians (to denote persons who did not take an active part to the conflict), and humanitarian actors (to refer to citizens of foreign countries who came to the DRC as staff members of humanitarian organisations).

2.5.1 Combatants

The war in the DRC pitted the regular army (the FARDC) against diverse national armed groups. Both the regular army and armed groups received support from neighbouring countries that sent their soldiers to fight on the side of either the FARDC or the rebel armed forces.⁸⁹ The FARDC and the armed groups are jointly assessed the responsibility for 81 per cent of GBV acts perpetrated in conflict zones, and 24 per cent of GBV perpetrated in non-conflict areas.⁹⁰

After the official end of the conflict, members of the rebel movements moved to the FARDC through a process called *brassage*⁹¹ provided for in the Lusaka and Sun City Agreements. New integrated brigades composed of former members of rebel groups and members of the FARDC were created. The integrated brigades are allegedly responsible for 54 per cent of the rapes reported in the first semester of 2007 in the Kivu provinces,⁹² and continue to perpetrate rape in the east.⁹³ Despite their signature to the Sun City and Lusaka ceasefire agreements and their inclusion in both the

⁸⁹ For more details on the countries who backed both the FARDC and the rebel groups, see generally Prunier G *Africa's World War: Congo, the Rwandan Genocide and the Making of a Continental Catastrophe* (2009).

⁹⁰ Van Woudenberg A et al *Ituri, Covered in Blood: Ethnically Targeted Violence In North Eastern DR Congo* (2003) 44.

⁹¹ Turner T *The Congo Wars: Conflict, Myths and Reality* (2007) 130.

⁹² Human Rights Watch 'DR Congo: Hold Army to Account for War Crimes' (2009) available at <http://www.hrw.org/news/2009/05/19/dr-congo-hold-army-account-war-crimes> (accessed 17 February 2012).

⁹³ It has been reported that a growing interest of combatants towards marijuana and other drugs impacts GBV perpetrated by combatants. See Romkema H 'Opportunities and Constraints for the Disarmament and Repatriation of Foreign Armed Groups in the Democratic Republic of Congo' (2007) 2 available at <http://www.wilsoncenter.org/event/opportunities-and-constraints-for-the-disarmament-and-repatriation-foreign-armed-groups-the> (accessed 16 April 2012); Baaz M& Stern M 'Making Sense Of Violence: Voice of Soldiers in The Congo (DRC)' (2008) 46 *Journal of Modern African Studies* 60.

FARDC and governmental institutions, certain armed groups involved in the conflict of 1996 to 2003 remained active in the east of the DRC where they are alleged to be responsible for 3 per cent of the documented acts of GBV.⁹⁴

Furthermore, new militia groups were created in the aftermaths of the conflict and are alleged the commission of GBV in the territories under their control.⁹⁵ Armed opposition groups from neighbouring countries, such as Rwanda and Uganda, established their base in the east of the DRC where they are alleged to be responsible for GBV acts in the villages under their control. For instance, in the case for the Rwandan rebels the *Interahamwe* and the Ugandan rebels regrouped in the LRA and the ADF/NALU.⁹⁶

Once again, the lack of a centralised reporting system is a major obstacle. It is difficult to assert with certainty the number of GBV acts perpetrated by each armed group, and those perpetrated by the regular army. While telling their stories, victims often refer to clothing and the spoken language to classify their aggressor as belonging to one group or another. Most of the women survivors, unable to make a distinction among the various military clothes; consider any aggressor in military clothing as a member of the FARDC. On the other hand, an aggressor who speaks *Kinyarwanda* language is an *Interahamwe*. This has influenced the behaviour of perpetrators of GBV in the DRC. In order to mislead the victims, perpetrators have developed the tendency to pretend to be *Interahamwe* by speaking *Kinyarwanda* language or to be members of the FARDC by wearing military uniforms.⁹⁷

It is to be noted that soldiers of the regular armies from the neighbouring countries that were involved in the conflict in the DRC are alleged to have also perpetrated GBV acts against women.⁹⁸ This includes members from the regular armies of

⁹⁴ Van Woudenberg A et al (2003) 44.

⁹⁵ Davis L 'Justice-Sensitive Security System Reform in the Democratic Republic of Congo' (2009) 14.

⁹⁶ Dahrendorf N 'MONUC and the Relevance of Coherent Mandates; The Case of DRC' in Hänggi H & Scherrer V (eds) *Security Sector Reform and UN Integrated Missions: Experience from Burundi, the Democratic Republic of Congo, Haiti and Kosovo* (2008) 72.

⁹⁷ Maedl A (2011) 130.

⁹⁸ UN& UN HROHC 'Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003' (2010) 25.

Burundi and Rwanda, respectively alleged the responsibility of 26.6 per cent⁹⁹ and 1.8 per cent¹⁰⁰ of the rapes perpetrated in south Kivu.¹⁰¹

Although not on the front line, members of the National Congolese Police (Police Nationale Congolaise, PNC) also took part in hostilities. However, their involvement in perpetrated GBV started to be narrated recently when ‘a disturbing increase of police personnel involved as perpetrators of sexual violence, especially against women in detention’ was documented.¹⁰² The number of rapes and other GBV perpetrated by members of the police cannot, however, be affirmatively asserted due to the challenges that hinder the reporting system, displayed above.

Another group of members of regular armies of foreign countries also perpetrated GBV acts in the DRC; UN peacekeepers (both civilian staff and military) serving under the peacekeeping organisation in the DRC. The following sub-section navigates the involvement of peacekeepers in the commission of GBV against women in the DRC.



2.5.2 UN peacekeepers

In early 2004, the sexual abuse of women by peacekeepers of MONUC was thrust into international awareness by the media when articles on the abuse of women by peacekeepers were published widely in local and international newspapers.¹⁰³

⁹⁹ Its presence in DRC was dictated by Burundi’s concern to protect its borders from infiltration by the various rebel movements opposed to the government, in particular the *Forces de Défense pour la Démocratie* (FDD) and the *Forces Nationales de Libération* (FNL). Burundian army officially withdrew from South Kivu in September 2002. See Ohambe MCO et al (2005) 8.

¹⁰⁰ The RPA was renamed Forces de Défense Rwandaise in July 2002, officially withdrew from the east of the DRC in September - October 2002. However, Rwanda is alleged to have restructured the military army of the RCD/Goma with its own members, creating a rapid intervention force which could be redeployed in eastern Congo if necessary. Thus, rape committed by members of the RCD/Goma would involve Rwandan military. See International Crisis Group *The Kivus: The Forgotten Crucible of the Congo Conflict* (2003) 3.

¹⁰¹ Ohambe MCO et al (2005) 37.

¹⁰² USDS *Annual Report on Human Rights 2010* (2011) 39; Manjoo R ‘Report Of The Special Rapporteur On Violence Against Women, Its Causes And Consequences’ (2011) Human Rights Council A/HRC/17/26; Van Woudenberg A *Democratic Republic of Congo: Renewed Crisis in north Kivu* (2007) 19; Human Rights Watch ‘DR Congo: Brutal Rapes by Rebels and Army’ (2009) news release available at <http://www.hrw.org/en/news/2009/04/08/dr-congo-brutal-rapes-rebels-and-army> (accessed 17 February 2012).

¹⁰³ Wald J ‘UN “Outraged” by Sex Abuse’ *CNN World* 09 January 2005 available at http://articles.cnn.com/2005-01-09/world/congo.peacekeepers.sex_1_sexual-exploitation-and-abuse-peacekeepers-jean-marie-guehenno?s=PM:WORLD (accessed 22 January 2012); Lynch C ‘UN Envoy to Resign in Wake of Sex Scandal’ *The Washington Post* 02 March 2005 available at <http://www.washingtonpost.com/wp-dyn/articles/A64482-2005Mar1.html> (accessed 22 January 2012);

Following internal investigations, UN authorities acknowledged the existence of tangible proof that civil and military peacekeepers serving under MONUC perpetrated GBV against women in the DRC. The abuse included rape, enforced prostitution, child pornography, and request for sexual intercourse in exchange for jobs.¹⁰⁴

Civil servants of MONUSCO are not the only civilians to have perpetrated GBV against women in the DRC. The following subsection provides information on Congolese nationals who perpetrated GBV against women.

2.5.3 Civilians

The enactment of GBV acts during the conflict in the DRC was a preserve of men in uniform: members of the regular army and rebels of armed opposition groups. However, in the post-conflict situation, cases of GBV perpetrated by civilians emerged and became rampant. For instance, between 2004 and 2008, rapes perpetrated by civilians increased 17 fold (an overwhelming 1 733 per cent), while the number of rapes perpetrated by armed combatants decreased by 77 per cent.¹⁰⁵

It appears that diverse groups of person perpetrated GBV acts that amounted to grave breaches of international humanitarian law (IHL). There is, therefore, a need to specify the applicable international instruments for the criminalisation and the prosecution of those acts. The next section undertakes an analysis of the normative and structural international framework on GBV applicable in the DRC.

2.6 International normative frameworks related to GBV

Since the late 1800s, GBV has been prohibited and codified as part of IHL.¹⁰⁶ Although it contained no specific and clear mention of rape and despite the fact that it is not an international instrument, the Lieber Code of 1863 is one of the oldest

Wax E 'Congo's Desperate, One Dollar UN Girls' *The Washington Post* 21 March 2005 available at <http://www.washingtonpost.com/wp-dy/articles/A52333-2005Mar20.html> (accessed 22 January 2012); *Agence France Presse* 'Ex-UN Employee on Trial in France for Raping African Girls' 09 September 2008 available at <http://afp.google.com/article/AleqM5jKxmiS-sf6O8LAU7pEoOCRmydXVA>. (accessed 22 January 2012); IRIN 'Great Lakes: Focus on Sexual Misconduct by UN Personnel' 2004 available at <http://www.irinnews.org/Report.aspx?ReportId=50804> (accessed 01 February 2012).

¹⁰⁴ Howard LM *UN Peacekeeping in Civil Wars* 309; Notar SA 'Peacekeeper as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of Congo' (2006) 14 *Gender, Social Politics & the Law* 415.

¹⁰⁵ Bartels S et al (2010) 2.

¹⁰⁶ Sellers PV 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (2007) 5-10.

documents to have criminalised rape and sexual violence by qualifying it as ‘wanton violence’.¹⁰⁷ Afterwards, the Geneva Conventions of 1949 were the first multilateral international agreements to explicitly mention and prohibit rape.¹⁰⁸ The Geneva Conventions of 1949 stated the basic principles of prosecution for GBV acts, implicitly and explicitly prohibiting both States and non-state actors from committing rape and other forms of GBV during both international and internal armed conflicts.¹⁰⁹ The Second Protocol Additional to the Geneva Conventions of 1949 further places an obligation upon States to investigate alleged crimes of GBV committed during internal armed conflicts by their nationals including members of the armed forces, and to prosecute the perpetrators for war crimes.¹¹⁰ The Basic Guidelines of the Reparation Principle define victims and outline the duty of States to provide them with effective remedies.¹¹¹

The prohibition of GBV against women is also enshrined in international human rights law (IHRL) under the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949;¹¹² the International Covenant on Civil and Political Rights (ICCPR) of 1966;¹¹³ the Convention on the

¹⁰⁷ Art. 37 & 44 of the Instructions For The Government Of Armies Of the United States in the Field of 1863 (Lieber Code).

¹⁰⁸ Art. 27& 75 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 (‘Fourth Geneva Convention’). The obligation of States to prosecute grave breaches of IHL is outlined in each of the four conventions in particular, in art. 49 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; art. 50 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; art. 129 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, and art. 146 of the Fourth Geneva Convention.

¹⁰⁹ Art. 3 common to the Geneva Conventions of 1949.

¹¹⁰ Art. 4(2)(e), Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (1978). However, this protocol was not adopted by the DRC, ratification status available at <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8> (accessed 19 February 2012).

¹¹¹ UN Res. 60/147 on ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (2005) UN Doc. A/RES/60/147 principle 11 at para 3(d); UN Human Rights Committee (HRC) ‘General Comment No 31: The Nature of the General Legal Obligation on States Parties to the Covenant’ (2004) UN Doc. CCPR/C/21/Rev.1/Add.13 at para 15; UNHRC ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (2005) UN Doc. E/CN.4/2005/102/Add.1 at para 34.

¹¹² Sets out provisions for the prevention of abuse of prostitutes and the punishment of those procuring others for the purposes of prostitution. See generally ‘Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others’ (1949) UN Res. 317(IV) of 1949. However, the convention was not ratified by the DRC, ratifications status available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-11-a&chapter=7&lang=en#1 (accessed 6 may 2012).

¹¹³ Prohibits torture and other cruel, inhuman, or degrading treatment and preserves women’s rights to be free from discrimination based on sex, slavery, and forced prostitution, torture and other ill

Rights of the Child (CRC) of 1989;¹¹⁴ the CEDAW of 1979,¹¹⁵ and the Declaration on the Elimination of Violence against Women (DEVAW) of 1993.¹¹⁶

Since 2000, the UN has increasingly paid attention to GBV and adopted particular resolutions, such as, Resolution 1325 on Women, Peace and Security;¹¹⁷ and Resolution 1820¹¹⁸ on Widespread Sexual Violence in Conflict. Both Resolution 1325 and 1820 have recognised that armed conflicts exposes women to increased levels of GBV, a major threat to women's physical integrity and rights. Among others, the UN has condemned the widespread rape of girls and women that occurred during the conflict in the DRC and has implicated the government of the DRC and non-state armed groups as perpetrators of GBV.¹¹⁹ Resolution 1960 of 2010 on Women, Peace and Security 'calls upon parties to armed conflict to make and implement specific and time-bound commitments to combat sexual violence'.¹²⁰ Moreover, the reports of the UN Secretary-General on 'Women, Peace and Security'¹²¹ dedicate considerable space to GBV as a violation of the basic rights of women and girls during armed conflict, and emphasise the need to take concrete measures to put an end to the impunity enjoyed by the perpetrators of GBV.

At a regional level, the African Union (AU), of which the DRC is a member, has

treatment. See arts. 7, 2(1) & 26 of 'International Covenant on Civil and Political Rights' (1966) UN Doc. A/6316 (1966). Accessed by the DRC on 1 November 1976, ratifications status available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 6 may 2012).

¹¹⁴ Arts. 2, 34, 37, 43; CRC (1989) UN Doc. A/44/49. Ratified by the DRC on 2 September 1990, ratifications status available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed 6 may 2012).

¹¹⁵ Art. 193, CEDAW (1979), ratified by the DRC on 17 October 1986, ratifications status available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 6 may 2012).

¹¹⁶ UN Declaration on the Elimination of Violence Against Women (1993) Res. 48/104. For the the principles related to the elimination of violence against women, see generally International Committee of the Red Cross 'Customary International Humanitarian Law' (2005).

¹¹⁷ UN SC Res. 1325 (2000).

¹¹⁸ UN SC Res. 1820 on Widespread Sexual Violence In Conflict (2008) UN Doc. S/RES/1820.

¹¹⁹ UN Secretary General 'Report of the Secretary-General on Women, Peace and Security' (2004) UN Doc. S/2004/814 at para 76.

¹²⁰ UN SC Res. 1960 on Women, Peace and Security (2010) UN Doc. S/RES/1960 at para 5. For other SC Resolutions addressing GBV perpetrated against women, see UN SC Res. on Eliminating Rape and Other Forms of Sexual Violence in All Their Manifestations Including In Conflict And Related Situations (2007) GA Res. 62/134; UN SC Res. 1612 on Children and Armed Conflict (2005); UN SC Res. 1674 on Protection of Civilians in Armed Conflict (2006); Report of the Secretary-General 'In-depth Study on All Forms of Violence Against Women' (2006).

¹²¹ UN SC 'Report of the Secretary-General on Women, Peace and Security' (2002) UN Doc. S/2002/1154; UN SC 'Report of the Secretary-General on Women, Peace and Security' (2004) UN Doc. S/2004/814, 2004.

likewise turned its attention to GBV. Protection of women against GBV is embodied in the African Charter on Human and Peoples' Rights of 1981¹²² and in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003.¹²³ Under this Protocol, States of the AU undertake to protect women during armed conflicts from all forms of sexual violence and exploitation and to ensure that such acts of violence are regarded as war crimes, crimes of genocide and crimes against humanity, and that the perpetrators of such crimes are brought to justice in the appropriate courts of law.¹²⁴

Apart from international legislation, developments in the protection of women from GBV in the international arena have been accelerated by the creation of international criminal tribunals. The International Criminal Tribunal for the Former Yugoslavia (ICTY);¹²⁵ the International Criminal Tribunal for Rwanda (ICTR);¹²⁶ and the Special Court for Sierra Leone.¹²⁷ These Tribunals paid particular attention to GBV against women and provided an extended definition of rape.¹²⁸ Furthermore, the Rome Statute of 1998 established a permanent international court, the International Criminal Court (ICC).¹²⁹

For the first time in international law, rape, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence of comparative gravity could be prosecuted as 'war crimes'.¹³⁰ When the above acts are knowingly committed as part of a widespread or systematic attack on a civilian population, they could constitute 'crimes against humanity'.¹³¹ Rape could also constitute genocide¹³² or

¹²² Arts. 2, 5, 18(3), African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3.

¹²³ Art. 11, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) herein after 'Maputo Protocol'.

¹²⁴ Art. 11 Maputo Protocol of 2003.

¹²⁵ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1993) UN Doc. S/25704.

¹²⁶ Statute of the International Criminal Tribunal for Rwanda (1994) UN Doc. S/RES/955.

¹²⁷ Agreement for and Statute Of The Special Court For Sierra Leone of 2002.

¹²⁸ The statute of these Tribunals rendered rape as *jus cogens*, thus prosecutable as grave breach to IHL. See generally Van Der Poll L 'Torture and Sexual Violence as Jus Cogens? A Critical Reflection on the Emerging Norms in International (Humanitarian) Law' (2010) 24 *Speculum Juris*.

¹²⁹ Rome Statute establishing the International Criminal Court (1998) A/CONF.183/9.

¹³⁰ *Prosecutor v Kunarac* 2001 IT-96-23 & IT-96-23/1; *Prosecutor v Kvočka et al* 2001 IT-98-30/1.

¹³¹ Arts. 1, 7-8 Rome Statute of 1998; art. 5(f) Statute of the ICTY of 1993; art. 3(f) Statute of the ICTR of 1994; *Prosecutor v Laurent Semanza* (2003) ICTR-97-20-T at para 346; De Brouwer AM *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 86.

¹³² *Prosecutor v Jean-Paul Akayesu* 1998 ICTR-96-4-T Judgment at paras 1, 12, 731 & 733.

amount to torture.¹³³ The Rome Statute of 1998 brought about a notable feature stating an unprecedented commitment to guarantee a participatory role of victims in the proceedings of the ICC, with particular attention to female victims.¹³⁴

Clearly, there exists an ample international treaties providing for the possibility to prosecute the GBV acts that were perpetrated against women in the DRC during the conflict and its aftermaths. The majority of these treaties have been ratified by the DRC. Furthermore, as the DRC has a monist system, ratified international treaties can be directly referred to in domestic courts. Besides, the ICC has the authority to prosecute GBV acts perpetrated in the DRC that amount to grave breaches to IHL.

In addition to the available international normative framework providing legal basis for the prosecution of GBV acts perpetrated in the DRC during the conflict and in its aftermath, it is important to explore the local normative framework applicable to the GBV acts perpetrated in the DRC as all GBV acts did not constitute grave breach to IHL and are thus not prosecutable at the international level. The following section analyses the existing normative and structural framework for the prosecution of GBV at the national level.

2.7 GBV in national the legislation of the DRC of the WESTERN CAPE

Subsequent to the ratification of international treaties, the DRC revised its domestic laws to match international standards. Below are the main domestic laws that were revised regarding GBV.

2.7.1 The Military Justice Code and the Military Criminal Code of 2002

The Military Code was the first national instrument enacted with the aim of upgrading the protection of women against GBV. In 2002, a new Military Justice Code¹³⁵ and a Military Criminal Code¹³⁶ were enacted, replacing the old Military Justice Code of 1972.¹³⁷ The Military justice Code of 2002 defines acts of sexual violence as a war crime and as a crime against humanity.¹³⁸ These definitions are almost similar to

¹³³ *Prosecutor v Kunarac (2002); Prosecutor v Delalic, Mucic, Delic, and Landzo* 1998 IT-96-21-I.

¹³⁴ UN 'Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records Vol. 2'(1998) 77& 96.

¹³⁵ Law N° 023/2002 of 2002, *Code Judiciaire Militaire* (herein after Military Justice Code of 2002).

¹³⁶ Law N° 024/2002 of 2002 *Code Pénal Militaire* (herein after Military Criminal Code of 2002).

¹³⁷ Law N° 72/060 of 1972, Military Justice Code of 2002.

¹³⁸ Art. 169 Military Criminal Code of 2002.

those provided in the Rome Statute. However, Adjami and Mushiata contend that the definitions of ‘war crime’ and as a ‘crime against humanity’ given by both of the Military Codes are unclear.¹³⁹ In addition, the Military Criminal Code of 2002 establishes the principle of command responsibility¹⁴⁰ and thus opens a door for the prosecution of high-ranking officers as accomplices when they have tolerated serious human rights violations, including GBV, perpetrated by their subordinates.

2.7.2 The Constitution of 2006

In 2006 a new Constitution was adopted by the DRC. The Constitution of 2006 embraced international standards on the protection of women against GBV. Thus, it repealed the gender discriminative provisions embodied in the previous Constitution, the Constitution of 1988,¹⁴¹ and explicitly prohibited discrimination on the basis of sex. The Constitution of 2006 proclaimed ‘parity’ between men and women,¹⁴² which automatically gave to women the right to equally access institution of the national legal system for the redress of their rights in the event of any abuse. Furthermore, the Constitution of 2006 specifically mentions sexual violence and provides:

‘any sexual violence committed against any person with the intention to destabilise or to displace a family and to make a whole people disappear is established as a crime against humanity punishable by law.’¹⁴³

In the same year of the adoption of the new Constitution, two additional laws specifically addressing GBV were adopted. An overview of these laws is given below.

2.7.3 The Laws on sexual violence of 2006

In 2006 the Congolese Criminal Code of 1940¹⁴⁴ was amended by Law N° 06/018 of 2006 on sexual violence.¹⁴⁵ This law criminalised new acts as GBV, such, as the insertion of objects into the female genital organs,¹⁴⁶ rendered possible rape within

¹³⁹ Adjami M & Mushiata G ‘Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court’ (2010) *ICTJ* 3; Wetsh’okonda KM *The Democratic Republic of Congo: Military Justice and Human Rights: An Urgent Need to Complete Reforms* (2010) 8.

¹⁴⁰ Art. 28 Rome Statute of 1998, art. 175 Military Justice Code of 2002.

¹⁴¹ Constitution of the Zaire Republic of 1988.

¹⁴² Art. 14 Constitution of the DRC of 2006.

¹⁴³ Art. 15 Constitution of the DRC of 2006.

¹⁴⁴ Decree on Congolese Criminal Code of 1940.

¹⁴⁵ Law N° 06/019 of 2006 modifying and completing the Criminal Code of 1940.

¹⁴⁶ Art. 170(b) law No 06/018 of 2006.

marriage, established that men could also be victim of rape,¹⁴⁷ thus broadening the scope of acts that can constitute GBV.¹⁴⁸ Another noticeable improvement brought by law N° 06/018 of 2006, is the removal of consideration of the moral character of a victim of rape, mentioned under article four of the Criminal Code of 1940. This article provided that if the sexual character of the victim had been questionable at any time in the past, for instance if the victim had been alleged acts of prostitution or adultery, this could constitute a mitigating circumstance for the defendant.¹⁴⁹

The Criminal Procedure Code of 1959¹⁵⁰ was also amended in 2006 by another law on sexual violence, notably Law N° 06/019 of 2006.¹⁵¹ The innovations brought about by this law include: the withdrawal of the release on bail of alleged perpetrators of GBV;¹⁵² the obligation that the duration of judicial proceedings for rape must not exceed three months;¹⁵³ the institution of a right of victims to be seen by a doctor and a psychologist; and the obligation to guarantee corporal security and psychological wellbeing of victims and witnesses of GBV during legal proceedings.¹⁵⁴

Notwithstanding the significant amendments brought to the Criminal Code and the Criminal Procedure Code, the laws on sexual violence of 2006 present noteworthy disadvantages for survivors of GBV. One of the weaknesses is that the amount of 200 000 Congolese Francs (CDF) (\$US 221) allocated to survivors of forced sexual intercourse with animals;¹⁵⁵ genital mutilation;¹⁵⁶ intentional contamination with an incurable disease;¹⁵⁷ and sexual enslavement,¹⁵⁸ is insignificant compared to the damage borne. Moreover, survivors of sexual harassment and victims of enforced marriage are respectively entitled to ridiculous amounts of 50 000 CDF (US\$ 55) and 100 000 CF (US\$ 111).

¹⁴⁷ Art. 170(a) law No 06/018 of 2006. Prior to the Constitution of 2006, domestic laws provided that only women could be victim of rape. For further discussion see Bolongo L *Droit Pénal Spécial Zaïrois* (1985) 328-344.

¹⁴⁸ Art. 170 law No 06/018 of 2006.

¹⁴⁹ Art. 4 Criminal Code of 1940.

¹⁵⁰ Decree on Congolese Criminal Procedure Code of 1959.

¹⁵¹ Law N° 06/019 of 2006.

¹⁵² Art. 9 bis law N° 06/019 of 2006.

¹⁵³ Art. 7 bis law N° 06/019 of 2006.

¹⁵⁴ Art. 14 bis law N° 06/019 of 2006.

¹⁵⁵ Art. 174(h) law N° 06/019 (2006).

¹⁵⁶ Art. 174(g) law N° 06/018 (2006).

¹⁵⁷ Art. 174(i) law N° 06/018 (2006).

¹⁵⁸ Art. 174(e) law N° 06/018 (2006).

Another weakness of the 2006 laws on sexual violence is the absence of an established reparation amount for victims of forced sterilisation, enforced pregnancy, and forced prostitution. Luckily, this deficiency can be addressed by a disposition of the Civil Code of 1987 which stipulates that ‘any act whatsoever that causes harm to another obliges the person by whose offence the harm was caused to make amends for this harm’.¹⁵⁹ Furthermore, the Civil Code of 1987 implies State and command responsibility,¹⁶⁰ principles enshrined in international standards of reparation.¹⁶¹

2.8 Conclusion

Although the armed conflict that arose in 1996 was officially put to an end in 2003, the DRC is yet to enjoy peace, particularly in the east where certain armed rebel groups are still active. Available data from international humanitarian organisation shows that GBV against women was perpetrated at a large scale during the conflict and in its aftermath. Alarming numbers of rape and acts including, sexual mutilation, cutting off of breasts, intentional transmission of sexually transmitted diseases, sexual enslavement, enforced pregnancy and so forth were reported.

However, available data on GBV acts committed against women in the DRC are certainly inexact, with regards to substantial obstacles that hinder the process of reporting GBV. Thus, there is an imperative need for accurate data on GBV acts in order to guarantee prosecution of perpetrators.

There exist a large amount of normative international and national framework that addresses the GBV crimes perpetrated against women in the DRC. Furthermore, international structural frameworks, such as the ICC, can contribute to the quest of access to justice for women survivors of GBV acts committed in the DRC by prosecuting perpetrators of GBV acts that amounted to serious breaches of IHL.

The next chapter questions the extent to which the available national and international laws and institutions have been used to facilitate the access of women survivors of GBV to justice and to guarantee prosecution of perpetrators.

¹⁵⁹ Art. 258 Congolese Civil Code (1987).

¹⁶⁰ Art. 259 Congolese Civil Code (1987).

¹⁶¹ UN Res. 60/147 at para 15.



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CHAPTER THREE: ACCESS OF SURVIVORS OF GENDER-BASED VIOLENCE TO THE LEGAL SYSTEM IN THE DRC

3.1 Introduction

Prosecution of the crimes perpetrated during conflicts in order to ensure accountability of perpetrators and justice for victims is one of the critical issues in post-conflict countries. Accountability calls for the taking into consideration of the needs of victims in a traditional criminal justice system that is perpetrator-centric.¹⁶² About the crimes committed in the DRC, the United Nations Special Representative of the Secretary-General for Children and Armed Conflict, Coomaraswamy stated that it is imperative for ‘concrete and targeted’ punitive measures to be taken against violators so as to transform the ‘climate of impunity’.¹⁶³

This chapter examines the extent to which women survivors of GBV acts perpetrated during the conflict and its aftermaths accessed the national and international legal system for redress.

The chapter provides an overview of prosecution of GBV acts within the national legal system of the DRC, examines the level of participation of women survivors in the prosecution of GBV, and questions their access to reparation. Thereafter, the chapter examines the prosecution of GBV acts perpetrated against Congolese women at the international level. Lastly, the chapter discuss the impact of impunity for GBV acts perpetrated during the conflict on the security of women in post-conflict situations.

3.2 Prosecution of GBV at the national level

The Parliament of the DRC passed a law on amnesty in 2009¹⁶⁴ for acts of war and

¹⁶² Cahn N ‘Women In Post Conflict Reconstruction: Dilemmas And Directions’ (2006) 12 *William & Mary Journal of Women and the Law* 335.

¹⁶³ The UN Special Representative Secretary-General for children and armed conflict, Coomaraswamy R ‘Statement in the Security Council on the Occasion of the Open Debate on Children and Armed Conflict’ (2008) available at <http://www.un.org/children/conflict/english/12-feb-2008-open-debate-security-council.html> (accessed 10 April 2012).

¹⁶⁴ ‘*Amnistie pour Faits de Guerres et Insurrectionnels Commis dans les Provinces du Nord-Kivu et Sud-Kivu*’ (2009) herein after Amnesty law of 2009.

rebellion perpetrated in the Kivu provinces between June 2003 and 7 May 2009.¹⁶⁵ This amnesty covers all infringements perpetrated by Congolese citizens, civilians and combatants, with the exception of acts amounting to genocide, war crimes and crimes against humanity.¹⁶⁶ The implication of this amnesty is that all acts of GBV perpetrated during the period in question are not prosecutable, except once qualified as genocide, war crimes and crimes against humanity.

Although this amnesty is a noticeable restraint on the prosecution of GBV in the DRC and excludes a significant number of victims of GBV from accessing justice, some rapes perpetrated in the DRC during the period covered by the amnesty, have been documented as constitutive of war crimes.¹⁶⁷ However, given that Congolese judicial decisions are not routinely published due to the lack of resources, it is difficult to provide exhaustive and detailed information on the cases of GBV prosecuted as war crimes. However, this research paper used reports of NGOs as source of information.

Military tribunals in the DRC have competence over crimes perpetrated by the military, members of armed groups, and civilians who commit acts with military assets, such as, guns or wearing military uniform.¹⁶⁸ With regard to the information that combatant members of the armed groups parties to the conflict in the DRC are responsible for a large number of acts of GBV perpetrated during the conflict and in its aftermath, military judicial institutions have the jurisdiction over such acts. The next subsection examines prosecution of GBV acts within military courts.

3.2.1 Prosecution in military courts

In 2008, MONUC's Rule of Law Division in conjunction with the American Defence Institute of International Legal Studies (DILLS) trained military prosecutors and magistrates, and officers on sex crime investigation with the aim to increase the prosecution of military perpetrators of GBV.¹⁶⁹

¹⁶⁵ Art. 5, Amnesty law (2009).

¹⁶⁶ Art. 3, Amnesty law (2009).

¹⁶⁷ Human Rights Watch *D.R. Congo: War Crimes in Bukavu* (2004) 4.

¹⁶⁸ Arts. 106-108, 110-112 & 115 Military Justice Code (2002).

¹⁶⁹ Elachi AW 'Congo-Kinshasa: Military justice Officials Trained in Sex Crime Investigation' (2008) available at <http://allafrica.com/stories/200802081021.html> (accessed 10 April 2012).

In April 2006, the Military Court of Mbandaka gave its decision in the case involving soldiers of the ninth FARDC battalion, for various acts including rape of women perpetrated in Songo-Mboyo in 2003. The Court sentenced seven military personnel, among whom were two lieutenant-colonels, to life imprisonment for *inter alia* rape as a crime against humanity.¹⁷⁰ The accused appealed in June 2006, and one of them was released by the Appeal Court of Kisangani. The sentence was confirmed for the others six defendants and an amount of US\$ 165 317 was allocated to victims by the Court. Each survivor of rape was allocated US\$, 5 000 and US\$ 10 000 was allocated to the family of a woman who died as a result of rape.¹⁷¹ The highpoint of this case was that the Military Court of Mbandaka incorporated the provisions of the Rome Statute in their judgement, for the first time in the history of the Congolese courts. This is a pointer that international instruments are being used directly by national judicial courts; it is permissible in the monist system of the DRC, and complies with the Constitution of 2006. However, the low-point is that the sentenced prisoners escaped several months later and remain at large.¹⁷²

Another reported case of prosecution for GBV in military courts is the prosecution of a member of the Mai-mai militia group Kalonga Katamasi Alimasi in 2005 by the military court of Kindu.¹⁷³ Kalonga was charged with the rape of a woman and her abduction for three months, committed in 2004 in Kimanga Village. The accused was sentenced to death for rape as crime against humanity,¹⁷⁴ and was ordered to pay, jointly with the government of the DRC, US\$ 20 000 to the victims. However, it should be noted that the judgement was given in the absence of the Kalonga who had escaped.

In the Bavi case, Captain Mulesa Mulombo and 12 other military personnel of FARDC were prosecuted before the Military Court of Bunia for *inter alia* rape of women as crimes against humanity in Bavi/Gety village in August and September 2006.¹⁷⁵ The Appeal Court of Kisangani sentenced Captain Mulesa to life imprisonment for war crimes, and 12 of his accomplices to a maximum of 15 years of

¹⁷⁰ The Lieutenant-colonels are Eliwo Ngoy and Bokila Lolemi. TMG de Mbandaka *Auditeur Militaire c Eliwo Ngoy et Crts.* 2006 RP 084/05 at 9, 27& 31.

¹⁷¹ CM de l'Equateur *Auditeur Militaire c Eliwo Ngoy et Crts* 2006 RPA 014/06 at 27.

¹⁷² Human Rights Watch *World Report 2007: Events of 2006* (2007) 113.

¹⁷³ TMG de Kindu *Auditeur Militaire c Kalonga Katamasi* 2005 RP 011/05.

¹⁷⁴ TMG de Kindu *Auditeur Militaire c Kalonga Mulesa* 2005 RP 011/05.

¹⁷⁵ TMG de l'Ituri *Auditeur Militaire c Mulesa Mulombo* 2007 RP 101/06 at 10.

imprisonment. The government of the DRC was jointly ordered to pay US\$ 481 000 to the victims.¹⁷⁶

In 2007, in the Military Court of Bunia 17 soldiers of the 1st Integrated FARDC Brigade were prosecuted for various acts including the rape of seven women.¹⁷⁷ However, in the decisions both of the Military Court of Bunia and, at the appeal level, the Military Court of Kisangani, rape was not mentioned as being among the acts condemned.¹⁷⁸

Mambusa Mohindo and 62 other mutineer members of the MLC were prosecuted for acts including the rape of 46 women committed in July 2005 in Mbandaka.¹⁷⁹ The Military Court of Mbandaka sentenced nine of the accused to life imprisonment for crimes against humanity, one to 20 years of imprisonment and two to five years of imprisonment.¹⁸⁰ Furthermore, 29 were sentenced to a period of imprisonment varying between 12 and 14 months, and 15 others were released. At the appeal level, sentence was confirmed for eight of the accused and only three were sentenced for crimes against humanity. The government was jointly ordered to pay US\$ 126 000 to all the victims including those of rape.

In 2009, Kyungu Mutanga Gédéon was sentenced to death by the Military Court of Kipushi for inserting a stick in the genital parts of one of a woman as a crime against humanity.¹⁸¹

In the DRC, the prosecution of high ranked officers for GBV acts committed by them or by men under their command is rare. A number of criminal cases against high ranked officers for GBV acts are pending in domestic military courts, but perpetrators are yet to be held accountable. One example is the case of Colonel Mosala accused of the rape of one girl aged 14 years committed on 18 may 2005.¹⁸² An arrest warrant was issued against him on 13 February 2006, but military authorities are opposed its

¹⁷⁶ The defendant is reported to have appealed the decision. See Avocats Sans Frontières 'Etudes de Jurisprudence: l'Application du Statut de Rome de la Cour Pénale Internationale par les Jurisdictions de la République Démocratique du Congo' (2009) 116.

¹⁷⁷ TMG de l'Ituri *Auditeur Militaire c Muttins de Bunia* 2007 RP 008/2007.

¹⁷⁸ Cited in Avocats Sans Frontières (2009) 122.

¹⁷⁹ TMG de Mbandaka *Auditeur Militaire c Mutins de Mbandaka* 2006 RP 086/05; CM de l'Equateur *Auditeur Militaire c Mutins de Mbandaka* 2006 RPA 615/2006 at 12.

¹⁸⁰ TMG de Mbandaka *Auditeur Militaire c Mutins de Mbandaka* 2006 RP 086/05 at 15 &19.

¹⁸¹ AM du Haut-Katanga *Auditeur Militaire c Gédéon Kyungu* 2007 RMP N° 0468/MAK/2007 at 15.

¹⁸² AMG RMP 0093/MA/05.

implementation.¹⁸³ A similar example is the case of Major Pitchen against whom the military prosecutor of Bukavu issued an arrest warrant for rape on 13 February 2006.¹⁸⁴

The only notable case of prosecution of a high ranked officer of FARDC for GBV is the one involving General Jérôme Kakwavu, former leader of the UDC/FAPC.¹⁸⁵ The trial of Kakwavu started on 25 March 2011 at the High Military Court in Kinshasa and is still ongoing.¹⁸⁶

In her study on the reasons for rape in the DRC, Kelly established that in some cases the military leadership do not consider rape as a violation of women's rights, but rather as a contribution to the war.¹⁸⁷ Furthermore, from the interview of combatants undertaken by Baaz and Stern in the east of the DRC, it could be concluded that from the perspective of soldiers, rape becomes possible and 'normalised' in particular wars.¹⁸⁸ Subsequently, a different perception of GBV and other violations perpetrated against women may explain the reluctance of military authorities to prosecute FARDC members for acts of GBV against women, thus living an extensive number of perpetrators unpunished.¹⁸⁹

The scarcity of prosecution of members of the FARDC for acts of GBV has undermined the efforts that have been made by survivors and NGOs seeking the prosecution of both high ranked officers and low-ranking soldiers who perpetrated GBV during the conflict and its aftermaths.¹⁹⁰ Very little has been done to invoke the criminal responsibility of FARDC top officials for the GBV perpetrated by themselves and by troops under their command.¹⁹¹

¹⁸³ Cited in Lukhanda A *R.D.C le Naufrage des Droits de l'Homme* (2010) 97.

¹⁸⁴ AMG Bukavu RMP 1130/MMU/06.

¹⁸⁵ RMP AMG/ITI/065/05 Cited in Human Right Watch *World Report 2012: Events of 2011* (2012) 108.

¹⁸⁶ 'Crime de Guerre: le Général Kakwavu Comparait Devant la Haute Cour Militaire à Kinshasa' (2011) 167 *Journal d'Afrique Centrale- RDC* available at <http://www.mafrome.org/journalpac167.htm> (accessed 17 May 2012).

¹⁸⁷ Kelly J 'Rape in War: Motives of Militia in the DRC' (2010) *United State Institute of Peace*.

¹⁸⁸ See generally Baaz ME & Stern M 'Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)' (2009) 53 *International Studies Quarterly*.

¹⁸⁹ Farmer 'Promoting Gender-justice in Conflict Zones' (2009) 18 *Perspectives* 3.

¹⁹⁰ Kippenberg J (2009) 45.

¹⁹¹ Adjami M & Mushiata G 'The Rome Statute Review Conference: Case Study DRC' (2010) *ICTJ* 3.

The subsequent paragraph navigates prosecution of GBV within rebel-armed groups prior to their inclusion into FARDC.

3.2.2 Prosecution within rebel-armed groups

3.2.2.1 The Gbadolite trial by the Movement of Liberation of Congo (MLC)

In 2002 the MLC rebel group created a military court known as the *Conseil de Guerre de Garnison de Gbadolite*, which heard cases against 20 MLC combatants by February 2003.¹⁹² Two accused were found guilty of rape and were respectively sentenced to one year and to ten months of imprisonment. These prosecutions took place in reaction to GBV perpetrated by MLC forces in October and November 2002 during military operations known as *Effacer le Tableau* (Erase the Blackboard) carried out in Mambasa territory.

3.2.2.2 Prosecution by the Congolese Rally for Democracy (RCD-Goma)

The RCD-Goma opposition group also prosecuted one of its combatants for GBV in 2003. The soldier, alleged to have raped a 13 years old girl, was found guilty of rape and was sentenced to five years imprisonment.¹⁹³ His accomplice, alleged to have accompanied the rapist and to have driven away the victim's brother, was acquitted. However, one year later, the military prosecutor stated that the convicted person had escaped from prison in June 2004.¹⁹⁴

Access to justice and legal remedies, including reparations, are important points in addressing GBV perpetrated during conflicts and their aftermaths. In the aftermath of the conflict in the DRC, international humanitarian organisations and the UN included GBV in their programmes. A large number of humanitarian organisations provided medical and psycho-social assistance to victims of GBV, while a smaller number implemented programmes addressing the legal aspect of GBV by providing judicial assistance to victims of GBV or facilitating their access to the legal system.

¹⁹² MLC 'Rapport sur le Déroulement du Procès des Militaires de l'Armée de Libération du Congo, ALC Impliqués dans les Violations des Droits de l'homme dans l'Ituri' cited in Human Right Watch *Seeking Justice Prosecution of Sexual Violence in the Congo War* (2005) 30.

¹⁹³ Conseil de Guerre 2003 RMP.0508/AM-020/OPS/MBJ/SHOF, RP 081; *Ministère public et partie civile Kahasha Cizungo c militaire Djems Kakule Kambale* RPA 009 and RMPA 013/AM-020/ops/SHOF03.

¹⁹⁴ Human Rights Watch interviews with Military Prosecutor in Bukavu (15 October 2003 and 21 July 2004) cited in Van Woudenberg A et al (2003) 18.

The American Bar Association Rule of Law Initiative (ABA-ROLI) is recognised for its programmes reinforcing the access to justice in the DRC. ABA-ROLI have reportedly provided *pro bono* legal assistance to nearly 1 100 survivors of GBV for the period between January 2008 and March 2010 in the Kivu provinces. The ABA-ROLI filed roughly 550 cases with the national police, resulting thus far in 118 trials and 72 convictions.¹⁹⁵ The ABA-ROLI has also conducted GBV centred mobile courts aimed at bringing justice to women in isolated villages. In order to ensure fair trials, the ABA-ROLI has financed, and continues to finance, lawyers for both perpetrators and victims. Further, the ABA-ROLI has conducted training sessions for police, prosecutors, judges and lawyers to promote the effective investigation and prosecution of GBV. Finally, the ABA-ROLI also established a legal aid clinic in Goma (north Kivu province), which has provided judicial awareness to 700 people between 2008 and 2010, many of whom are women.

From the above information, it is clear that the number of GBV acts prosecuted at the national level is very little. The next section examines the extent to which GBV acts perpetrated in the DRC, are prosecuted at the international level.

3.3 Prosecution of GBV at the international level

Some of the GBV acts perpetrated in the DRC are prosecutable at the international level. This includes the GBV acts that constituted grave breaches of IHL, GBV committed by members of regular armies from neighbouring countries, and GBV perpetrated by UN peacekeepers. The next section investigates the extent to which GBV perpetrated in the DRC, amounting to grave breaches of IHL, has been prosecuted at the ICC.

3.3.1 Prosecution at the ICC

Consequent to signature of Rome Statute on 8 September 2000 and ratification on 11 April 2002, the government of the DRC referred the situation of crimes committed in its territories to the jurisdiction of the ICC and asked the prosecutor to investigate the

¹⁹⁵ Khan T & Wormington J 'Mobile Courts In The DRC: Lessons From Development For International Criminal Justice' (2011) *Oxford Transitional Justice Research Working Paper Series* 18 ; 'ABA ROLI Programmes in the Democratic Republic of Congo' available at http://www.ftp.abanet.org/rol/africa/democratic_republic_congo.html (2010) (accessed 26 February 2012).

crimes.¹⁹⁶ The ICC officially opened investigations in the DRC on 23 June 2004.¹⁹⁷ However, investigations were initially restricted to the Ituri district and have not dealt with crimes perpetrated elsewhere in the DRC. In 2008 the ICC Prosecutor Ocampo announced that his office would open a third investigation into crimes committed during the ongoing conflict in the Kivus.¹⁹⁸ Ocampo stated that pursuant to ‘positive complementarity’, his office would explore sharing information about its investigations with Congolese judicial authorities for prosecution of other crimes falling within the jurisdiction of national judicial institutions. Since the announcement, the Office of The Prosecutor has provided few details about the status of investigations in the Kivus.

To date, only three cases arising from the situation in the DRC have been examined at the ICC, of which only one has led to indictment for GBV acts. The first case is *Prosecutor v Thomas Lubanga Dyilo*, who is being prosecuted for enlisting and conscripting children under the age of 15 years into the Patriotic Force for the Liberation of Congo-FPLC.¹⁹⁹ The initial indictments against Lubanga comprised rape and sexual violence as war crimes and crimes against humanity, though they were not confirmed.²⁰⁰ In May 2010, the lawyers of victim participants together with international NGOs²⁰¹ petitioned the ICC to consider additional charges against Lubanga, and include sexual slavery and cruel and unusual treatment, in order to reflect the routine rape of child soldiers.²⁰² The request to expand the charges against Lubanga to include GBV was rejected, as the Office of The Prosecutor suggested that

¹⁹⁶ UN GA ‘Report of the International Criminal Court’ (2005) UN Doc. A/60/177 at para 6; ICC ‘Prosecutor receives referral to the situation in the Democratic Republic of Congo’ (2004) ICC-OTP-20040419-50.

¹⁹⁷ Kerr R & Mobekk E *Peace and Justice: Seeking Accountability After War* (2007) 74.

¹⁹⁸ ICC ‘Report of the Activities of the Court to the Assembly of States Parties’ (2009) ICC-ASP/8/40 at para 37.

¹⁹⁹ *Prosecutor v Thomas Lubanga Dyilo* 2006 ICC-01/04-01/06.

²⁰⁰ See generally *Prosecutor v Thomas Lubanga Dyilo* 2007 ‘Decision on the Confirmation of Charges’ ICC-01/04-01/06-803.

²⁰¹ Inder B ‘Reflection: Gender Issues and Child Soldiers the Case of Prosecutor v Thomas Lubanga Dyilo’ (2011) Women’s Initiative for Gender Justice available at <http://www.lubangatrial.org/2011/08/31/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/> (accessed 22 April 2012); ‘Legal Filings submitted by the Women’s Initiatives for Gender Justice to the International Criminal Court’ available at <http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf> (accessed 22 April 2012); *Prosecutor v Thomas Lubanga Dyilo*; A Turbulent but Promising Retrospective (2011) available at <http://www.haguejusticeportal.net/index.php?id=12989> (accessed 22 April 2012).

²⁰² Glassborow K ‘Call for Lubanga Charges to Cover Rape’ (2008) Institute for War and Peace Reporting available at <http://iwpr.net/report-news/call-lubanga-charges-cover-rape> (accessed 23 March 2012).

amending the indictments against Lubanga would be detrimental to the due process rights of the accused.²⁰³ During the trial hearing that started on 26 January 2009 and despite numerous testimonies of the young girl soldiers on the repeated rape they suffered on the hands of their commanders,²⁰⁴ the Trial Chamber clearly indicated that it could not consider issues of sexual violence in the context of the judgment. However, the Trial Chamber stated that issues of GBV might be relevant at the sentencing stage and could be taken into consideration at the reparation phase.²⁰⁵ Dov, in his criticism of the failure of the Trial Chambers to add charges of GBV in the indictments against Lubanga, contends that there is no clear reasoning explaining the refusal of the Trial Chamber to consider sexual violence charges against Lubanga.²⁰⁶

However, it is important to note that because no evidence of GBV was put forward in the confirmation of charges hearings, any such evidence that emerged subsequently in the trial could not be used because it would exceed the 'facts and circumstances' as confirmed in the pre-trial phase of the case. The Rome Statute of 1998 provides that 'the Court may base its decision only on evidence submitted and discussed before it at the trial', not at the confirmation of charges hearing.²⁰⁷

On 14 March 2012 Trial Chamber I of the ICC gave its first verdict and convicted Lubanga.²⁰⁸ However, the sentence will be imposed at a later date, and it's only then that the Trial Chamber I will have to decide whether girl child soldiers can receive reparation for GBV they endured.

*Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*²⁰⁹ is another case examined by the ICC and which include an indictment for GBV acts. Katanga and

²⁰³ *Prosecutor v Lubanga* ICC-01/04-01/06 (2009) Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court; Koenig AK, Lincoln R & Groth L 'The Jurisprudence of Sexual Violence' (2011).

²⁰⁴ Sharratt S *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes* (2011) 28.

²⁰⁵ *Prosecutor v Thomas Lubanga Dyilo* 2007 'Decision on the Confirmation of Charges' ICC-01/04-01/06-803 at paras 629-630; Grover SJ *Prosecuting International Crimes and Human Rights Abuses Committed Against Children: Leading International Court Cases* (2010) 583.

²⁰⁶ Dov J 'Lubanga Decision Roundtable: Lubanga, Sexual Violence and the Legal Re-Characterization of Facts' (2012) *Opinio Juris*, available at <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-lubanga-sexual-violence-and-the-legal-re-characterization-of-facts/> (accessed 21 April 2012).

²⁰⁷ Art. 74(2), Rome Statute of 1998.

²⁰⁸ See generally ICC 'Situation In The DR Congo in the Case of Prosecutor V Thomas Lubanga Dyilo: Judgment Pursuant to Art. 74(2) of the Rome Statute' ICC-01/04-01/06.

²⁰⁹ *Prosecutor v Germain Katanga* ICC-01/04-01/07.

Ngudjolo are jointly prosecuted for crimes including sexual slavery as a crime against humanity and as war crime, under the Rome Statute of 1998.²¹⁰ The charges on GBV against Katanga and Ngudjolo were confirmed on 26 September 2008,²¹¹ the trial started on 24 November 2009 and is still ongoing. On 15 May 2012, the closing statements on the trial of Katanga and Ngudjolo were being given.²¹²

Prosecutor v Bosco Ntaganda is another case under examination at the ICC for crimes perpetrated in the DRC. Although international and national human rights NGOs reports mention cases of GBV perpetrated by armed groups under the leadership of Ntaganda (the FPLC and the CNDP²¹³), no charges of GBV appears in the indictments against Ntaganda. Human rights activists deplore the limited scope of the charges against Ntaganda and seek revision of the indictments to include *inter alia* crimes of rape and sexual violence ‘in order to ensure that ICC investigations and prosecutions are representative of crimes committed’ in the DRC.²¹⁴

A fourth case, *Prosecutor v Callixte Mbarushimana*²¹⁵ was opened at the ICC and comprised GBV indictments. On 28 September 2008 an arrest warrant was issued against Mbarushimana, alleged executive secretary of the Rwandan rebel group the FDLR-FCA,²¹⁶ for *inter alia* rape acts perpetrated in the Kivus between January 2009 and 20 August 2010 that amounted to crime against humanity and war crime.²¹⁷ However, charges against Mbarushimana were declined, and on 16 December 2010 the Pre-trial Chamber I decided by majority to release him.²¹⁸

²¹⁰ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ‘Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui’ (2008) ICC-01/04-01/07.

²¹¹ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*: Decision on the Confirmation of Charges (2008) ICC-01/04-01/07.

²¹² *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* : Closing statements available at <http://www.icc-cpi.int/NR/exeres/E2E82FCC-DCFE-47B1-8B5E-7194752A2795.htm> (accessed 17 May 2012).

²¹³ *Congrès National pour la Défense du Peuple*.

²¹⁴ ‘FIDH and its Congolese Member Organisations Disappointed by the Limited Scope of The International Criminal Court’s Investigations’ available at www.fidh.org (accessed 24 April 2012).

²¹⁵ *Prosecutor v Callixte Mbarushimana* 2010 ICC- 01/04- 01/10.

²¹⁶ *Forces Démocratiques pour la Libération du Rwanda-Forces Combattantes Abacunguzi*.

²¹⁷ ICC Pre-trial chamber I, Situation in the Democratic Republic of Congo: Warrant of Arrest for Callixte Mbarushimana (2008) ICC- 01/04- 01/10 at para 7(iii).

²¹⁸ ICC Pre-trial chamber I, Situation in the Democratic Republic of Congo in the Case of *Prosecutor v Callixte Mbarushimana*: Decision on the Confirmation of Charges (2011) ICC-01/04-01/04-01/10.

The ICC established a ‘Victims Trust Fund’ with the mission to help the most vulnerable victims affected by crimes within the jurisdiction of the ICC.²¹⁹ It supports rehabilitation of victims (and their families) to directly meet their physical, material and psychological needs linked to the harm caused by crimes within the jurisdiction of the ICC. This considerably limits the number of survivors of GBV that can benefit from assistance of the Victims Trust Fund. To date, the Fund is reported to have assisted over 5 000 victims of GBV in the DRC and northern Uganda.²²⁰

It can be concluded that so far the ICC has failed to prosecute GBV acts perpetrated against women during the conflict in the DRC, a failure seen by Sharratt as indicative of the way human rights advocacy has come to overlook women.²²¹ However, Congolese women victims of GBV encountered numerous challenges to access the ICC and the advantages of the Trust Fund. The following sub-section analyses the challenges that obstructed access of women survivors of GBV to the ICC.

3.3.1.1 Challenges to the access of women survivors of GBV to the ICC

For the first time in the history of internationalised Criminal Courts, victims were given the opportunity to participate in the proceedings before an Internationalised Criminal Court, the ICC.²²² In its interpretation of article 68(3) of the Rome Statute, Trial Chamber I concluded that the participation of victims is not limited to investigation of cases as it ‘does not exclude the stage of investigation of a situation’.²²³

However, Congolese women encountered difficulties in accessing the ICC due primarily to the lack of information on the existence and the functioning of the ICC, but also due to the lack of a witness protection system in the DRC. Victims of GBV refused to testify against the perpetrators arrested at the ICC for fear of reprisal from

²¹⁹ Resolution ICC-ASP/4/Res.3 on the Regulations of the Trust Fund for Victims (2005).

²²⁰ Trust Fund for Victims *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations: Programme Progress Report 2011* (2011) 24.

²²¹ Sharratt S (2011) 28.

²²² Art. 68(3), Rome Statute (1998).

²²³ Situation in the DRC, Situation No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, Public Redacted Version, (Pre-Trial Chamber I, Jan. 17, 2006) at para 38; War Crimes Research Office & American university of Washington College of law ‘Victim Participation Before the International Criminal Court’ 5 (2007) at 8-11, 16-18.

members of the armed groups to which the perpetrators belonged, and which are still active in the east of the DRC.²²⁴

The ICC is not the only international court that has the competency to examine acts of GBV perpetrated during the conflict of the DRC. The International Court of Justice (ICJ) have the legal competence to prosecute GBV acts committed by members of regular armies of neighbouring countries involved in the conflict in the DRC. The next subsection analyses the extent to which Congolese women victims of GBV accessed justice at the ICJ.

3.3.2 Prosecution at the International Court of Justice

The ICJ subscribes to the Principle of country responsibility for acts perpetrated by its nationals in another country.²²⁵ Troops from neighbouring countries party to the conflict in the DRC, such as, Uganda, Rwanda, Burundi and Angola, allegedly perpetrated GBV. Thus they could, and should, be held responsible for serious violations of human rights committed by their national armies.

Consequently, the Security Council considered that in connection with the three wars in Kisangani in 1999 and 2000, 'the Governments of Uganda and Rwanda should make reparations for the loss of life and the property damage they have inflicted on the civilian population in Kisangani'.²²⁶ Uganda was ordered to pay reparations to the DRC for serious violations of human rights and of IHL committed by its armed forces on DRC territory, taking into account the invasion of DRC territory and the military occupation of Ituri by Uganda.²²⁷ However, the DRC requested that the two parties reach an amicable agreement as to the sum due in reparations by Uganda, which would be determined by the ICJ only in the case of a disagreement between the

²²⁴ Pena M 'Victim Participation in the International Criminal Court: Victim Participation at the International Criminal Court: Achievement and Challenges Lying Ahead' (2010) *ILSA Journal of International and Comparative Law* 499; Baumgartner E 'Aspect of Victim Participation in the Proceedings of the International Criminal Court' (2008) 90 *International Review of the Red Cross* 414.

²²⁵ See generally ILC 'Articles on the Responsibility of States for Internationally Wrongful Acts' (2001) GA Res. 56/83. Thus these articles were not adopted as an international convention, some of the provisions have been referred to by international courts and tribunals as reflective of customary international law such as the ICJ.

²²⁶ UN SC Res. 1304 on the Situation in the Democratic Republic of Congo (2000) S/RES/1304 at para 14.

²²⁷ See generally ICJ 'Armed Activities on the Territory of the Congo (DRC v Uganda)' (2005) at paras 259-260; ICJ 'Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*) (2005) .

parties. At the time of writing of this research, negotiations on this matter are still underway, and are linked to a wide-ranging process of normalisation of relations between the two countries. This is likely to have a negative effect on the rights of victims in the name of good neighbourly relations and other diplomatic considerations.²²⁸

On the other hand, the ICJ has not taken any decision against Rwanda, as Rwanda does not accept the jurisdiction of the ICJ.²²⁹

A third group of GBV acts perpetrated against women in the DRC can be prosecuted at the international level: GBV perpetrated by UN peacekeepers serving under the UN mission in the DRC, MONUC-MONUSCO. The next subsection analyses the extent to which peacekeepers have been prosecuted in their countries.

3.3.3 Prosecution in United Nations Troop Contributing Countries

In 2004, the UN undertook an extensive investigation to uncover the existence and extent of GBV perpetrated by UN peacekeepers deployed under MONUC. The investigation panel examined 77 cases from December 2004 to June 2005, and found that 46 cases were substantiated.²³⁰ Hence, UN officials acknowledged the commission of GBV against women by peacekeepers in the DRC.²³¹

However, prosecution of peacekeepers is subject to the following conditions. First, UN peacekeepers are covered by an immunity provided by the Vienna Convention of 1961.²³² Thus, no prosecution can be instituted against them at the local level.

²²⁸ Under the 'Agreement concerning Bilateral Co-operation between the DRC and the Republic of Uganda' of 2007, the DRC and Uganda agreed to form an *ad hoc* Committee that will be made responsible for studying the ICJ decision on compensation for crimes committed in the DRC and to recommend practical steps to be taken for its implementation (Art. 8).

²²⁹ ICJ Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v Rwanda*) Jurisdiction of the Court and Admissibility of the application) judgment of 3 February 2006, at para 19.

²³⁰ Ndulo M 'The United Nations Responses To The Sexual Abuse And Exploitation Of Women And Girls By Peacekeepers During peacekeeping Missions' (2009) 27 *Berkeley Journal of International Law* 132; Durch WJ & England ML *Ending Impunity Improving Criminal Accountability in United Nations Peace Operations: Report from the Project on Rule of Law in Post-Conflicts Settings Future of Peace Operations Program* (2009) 300.

²³¹ 'UN Faces More Accusations of Sexual Misconduct: Officials Acknowledge 'Swamp' of Problems and Pledges Fixes Amid New Allegations in Africa and Haiti' The Washington Post 13 March 2005 available at <http://www.washingtonpost.com/wp-dyn/articles/A30286-2005Mar12.html> (accessed 15 February 2012).

²³² Art. 31 Vienna Convention on Diplomatic Relations of 1961; Convention on Privileges and Immunities of the United Nations of 1946 at para 7(2); Rule No 4, UN Department of Peacekeeping

Secondly, consequent to the agreements between the UN, Troop Contributing Countries (TCC) and host states; military and civilian UN personnel are subject to the exclusive jurisdiction of their sending State.²³³ Thus, alleged perpetrators of GBV or any other criminal acts are sent back to their home countries, upon whom the obligation to prosecute is incumbent. Further, following dispositions of Resolution 1422 of 2002, peacekeepers who are nationals of countries that are non-signatories of the Rome Statute are immune from prosecution at the ICC for acts perpetrated in peacekeeping operations.²³⁴

In the DRC, 17 peacekeepers were repatriated and disciplinary action had been initiated against eight civilian personnel in 2005.²³⁵ In 2009, 11 military personnel serving under MONUSCO were repatriated on disciplinary grounds,²³⁶ and substantiated investigation reports were submitted to concerned countries with the requirement to take swift disciplinary action.²³⁷ However, there is ‘no guarantee that they [perpetrators] will be disciplined’ or prosecuted in their countries, as the UN can only repatriate to his country a peacekeeper alleged to have perpetrated sexual offences, but cannot supervise the prosecution in the country of origin.²³⁸ However, one case of prosecution of peacekeepers in their national countries for GBV perpetrated in the DRC transpired. Didier Bourguet,²³⁹ a UN senior official from

Operations ‘Ten Rules Code of Conduct for Blue Helmets’ available at http://www.un.org/en/peacekeeping/documents/ten_in.pdf (accessed 20 February 2012); International Peace Academy *Peacekeeper’s Handbook* 3 ed (1984) 5; UN GA ‘Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects’ (2005) UN Doc. A/59/710 at para 37-97.

²³³ Spees P *Gender-Justice and Accountability in Peace Support Operations: Closing the Gap* (2004) 21.

²³⁴ UN Security Council Res. 1422 (2002) UN Doc. S/RES/1422; see generally Stahn C ‘The Ambiguities of Security Council Resolution 1422 (2002)’ (2003) 14 *European Journal International Law*.

²³⁵ UN Secretary-General ‘Eighteenth Report of the Secretary-General on MONUC’ (2005) UN Doc. S/2005/506 at para 72-73.

²³⁶ USDS (2011) 50.

²³⁷ UN SC ‘Seventeenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo’ (2005) UN Doc. S/2005/167; UN GA ‘Investigation by the Office of Internal Oversight Services into Allegations of sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo’ (2005) UN Doc. A/59/661.

²³⁸ McAskie C, head of the new UN Operation in Burundi, to IRIN ‘Great Lakes: Focus on sexual misconduct by UN personnel’ (2004) available at <http://www.irinnews.org/Report.aspx?ReportId=50804> (accessed 01 February 2012).

²³⁹ Wax E ‘Congo’s Desperate, One Dollar UN Girls’ *The Washington Post*, 21 March 2005 available at <http://www.washingtonpost.com/wp-dy/articles/A52333-2005Mar20.html> (accessed 15 May 2012); ‘Ex-UN Employee on Trial in France for Raping African Girls’ *Agence France Presse* 09 September 2008 available at <http://afp.google.com/article/AleqM5jKxmjS-sf6O8LAU7pEoQCRmydXVA>. (accessed 15 May 2010).

France handed over to French authorities in 2004,²⁴⁰ was sentenced by a French tribunal in 2008 to nine years imprisonment for the rape of two girls.²⁴¹

Failure to prosecute more peacekeepers for GBV perpetrated against Congolese women, left ‘a feeling of impunity’ among the local population.²⁴² Prosecution of GBV acts perpetrated in the DRC faces numerous challenges both at the national and international level. The next section navigates those challenges.

3. 4 Obstacles to the prosecution of GBV

3.4.1 Challenges to prosecution of GBV at the national level

Numerous obstacles hinder the access of women to the judicial system in the DRC. The majority of these obstacles are closely related to the post-conflict setting. As in most post-conflicts countries, the reconstruction of the judicial system is the highest challenge in the DRC. Most judicial structures are either weak or not fully operational and unable to guarantee complete prosecution of perpetrators. Subsequently, survivors of GBV and witnesses who testify in GBV cases are exposed to reprisal, re-victimisation, and stigmatisation.²⁴³

Both military and civil institutions of the judicial system in the DRC face the same challenges regarding functioning. One of the challenges is an overall lack of resources, with only 0.03 per cent of the country’s annual budget allocated to the justice sector.²⁴⁴ The lack of resources limits investigation capacity of judicial institutions and has had a negative impact on available infrastructures. In his report on the DRC from 11 April 2008, the UN Special Rapporteur on the Independence of Judges and Lawyers noted the impact of financial constraints on access to justice when he wrote that: ‘The main reason for the shortage of judges and courts, low

²⁴⁰ ‘Ex-UN Employee Charged with African Rape Cases’ *Mail & Guardian* 11 September 2008 available at <http://mg.co.za/article/2008-09-11-exun-employee-charged-with-af> (accessed 15 May 2011).

²⁴¹ Available at <http://www.lefigaro.fr/actualites/2008/09/11/01001-20080911ARTFIG00493-affaire-bourguet-ans-de-reclusion-requis-.php> (accessed 10 March 2012);

²⁴² Ladley A ‘Peacekeeper Abuse, Immunity And Impunity: The Need For Effective Criminal And Civil Accountability On International Peace Operations’ (2005) 1 *Politics and Ethics Review* 83.

²⁴³ Kelly J et al ‘If Your Husband Doesn’t Humiliate You, Other People Won’t: Gendered Attitudes Towards Sexual Violence in Eastern Democratic Republic of Congo’ (2012) 7 *Global Public Health* 287.

²⁴⁴ ‘Feuille de Route du Ministère de la Justice pour l’Exercice 2009’ (2009) at para 45. Herein after Report of the Ministry of Justice (2009).

salaries and the deplorable material conditions in which they perform their duties is the negligible share of the budget allocated to the judicial authority.²⁴⁵

The legal system in the DRC suffers a shortage of judges and magistrates as noted by Leandro above. This is exemplified by the lack of sufficiently trained judges to operate at the Constitutional Court created in 2006, which has been noted by the Ministry of Justice.²⁴⁶ In 2009, the DRC had 2 150 magistrates both civilian and military, making for a ratio of 25 000 litigants per judge.²⁴⁷ In comparison with the international recommended minimum ratio of one magistrate per 3 000 to 5 000 litigants,²⁴⁸ the judge to litigants ratio in the DRC is very high. Furthermore, access to justice is exacerbated by the limited capabilities of the judges to deal with a majority of issues, especially the lack of strong knowledge on international law and capacity to conduct comparative research. The limitations of the skills of judges resulted in low conviction rate for GBV acts.

At present there is no functioning school for magistrates in the DRC. Trainings on basic notions of international law are offered by NGOs operating in the DRC, but remain insufficient to effectively enhance the capacity of judges and magistrates to undertake effective adjudication with regard to GBV cases. There is a significant need to reinforce the capacity of judges and magistrates on international law, especially international human rights law and international humanitarian law as espoused in treaties and other international instruments to which DRC is a state party.²⁴⁹

Corruption is another challenge to the legal system in the DRC, and has reduced the trust of the overall population in the judicial system. The corruption in the legal system has led the UN Rapporteur to state that in the DRC ‘[j]ustice is thus for sale to those who can afford it’.²⁵⁰

²⁴⁵ UNGA ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy’ (2008) UN Doc. A/HRC/8/4/Add.2 at para 36.

²⁴⁶ Report of the Ministry of Justice (2009) at para 18.

²⁴⁷ Report of the Ministry of Justice (2009) at para 23.

²⁴⁸ Report of the Ministry of Justice (2009) at para 12, available on the Ministry of Justice website at http://www.justice.gov.cd/j/index.php?option=com_docman&task=cat_view&gid=30&dir=DESC&order=name&Itemid=54&limit=5&limitstart=10 (accessed 27 April 2012).

²⁴⁹ International Bar Association & International Legal Assistance Consortium ‘Rebuilding Courts and Trusts: An assessment of the needs of the justice system in the Democratic Republic of Congo’ (2009) 20.

²⁵⁰ UN GA ‘Report of the UN Special Rapporteur on the Independence of Judges and Lawyers’ (2008) at para 35.

The military branch of the legal system in the DRC faces particular obstacles. Interference from hierarchy is frequent, and seriously hinders the independence of judges. This is exemplified by the delay or failure in the prosecution of GBV perpetrated by FARDC officials and members of armed opposition groups. Military interference and a culture of unaccountability in the military structures has also led to the non-prosecution of members of armed opposition groups who joined FARDC through the *brassage* process. Furthermore, lawyers and advocates in cases involving high ranked officers are often threatened and intimidated.²⁵¹ Another obstacle to prosecution of GBV in military courts is the provision of the Military Criminal Code of 2002 stipulating that military judges must have a similar or higher rank than the defendants.²⁵² This reduces the chances of prosecution of high ranked officers, as high ranked military magistrates are rare.

The detention system, one of the last steps of the judicial system, is also not effectively operational in the DRC. Frequent escapes of inmates from detention facilities combined with the lack of a witness protection system expose survivors of GBV to re-victimisation. In addition, the DRC was ranked 168 out of 182 countries in the worldwide corruption perceptions ranking of countries in the 2011 report, clearly indicating that corruption is endemic in the DRC.²⁵³ Prisoners bribe penitentiary officers who let them 'escape' from prisons.²⁵⁴

Dysfunctions in the judicial system of the DRC have seriously eroded the trust of the population regarding its capacity to render justice to survivors of GBV. The Congolese population often resort to non-judicial resolution for GBV cases that occurs in their communities, through arrangements between the perpetrator's family and the family of the survivor. In some instances, survivors are encouraged to marry the perpetrators of rape, or to accept gifts as compensation for assault.²⁵⁵

A further challenge that affects the prosecution of GBV acts in the DRC is the lack of accurate data and underreporting of cases of GBV.²⁵⁶

²⁵¹ Kippenberg J (2009) 48.

²⁵² Art. 34-35 Military Justice Code (2002).

²⁵³ Transparency International 'Surveys and Indices: Corruption Perceptions Index 2010' (2011) 14.

²⁵⁴ Human Right Watch (2012) 108.

²⁵⁵ Rodriguez C 'Sexual Violence in South Kivu, Congo' (2009) 27 *FMR* 45.

²⁵⁶ World Organisation Against Torture *Report 2008* (2008) 56.

In an attempt to respond to the challenges constraining *inter alia* the access to justice for women survivors of GBV, the government of the DRC presented a draft law to Parliament in August 2011 on the establishment of a specialised mixed court composed of national and international judicial staff to try perpetrators of the most serious crimes committed in the DRC between 1993 and 2003.²⁵⁷ However, the draft was rejected by the Senate, which asked the government to harmonise its proposal with other draft laws to combat serious human rights violations in the DRC. No information transpired on the advancement in the drafting of new laws by the government.

Women in the DRC face particular obstacles, attached to their gender. These obstacles, which worsen the access of women survivors of GBV to justice, are exposed in the next subsection.

3.4.2 Specific challenges to women

3.4.2.1 Illiteracy and ignorance of laws

In the DRC, 42.8 per cent of the national female population is illiterate.²⁵⁸ Only 10.7 per cent of adult women have reached a secondary or higher level of education compared to 36.2 per cent of their male counterparts.²⁵⁹ Education is one of the obstacles that restrain women from accessing justice in the DRC. These women cannot read or write, and do not speak or understand French, the official language in which trials and proceedings are conducted. As a consequence, women are reluctant to engage in a process that will be held in a language that they do not understand. Furthermore, there is no available national *pro bono* legal assistance service available to all women in the DRC, further exacerbating the plight of women survivors of GBV with regard to access to justice.

There is also a general misunderstanding of the criminal justice system as a whole, national and international, in the DRC, an ignorance that is most pronounced among

²⁵⁷ See Observatoire Congolais des Droits Humains 'Argument In Support Of The Creation Of Joint Benches In The Congolese Courts' (2005). This document took its inspiration from the UN High Commissioner for Human Rights 'Rule Of Law Tools For Post-Conflict States: Maximizing The Legacy Of Hybrid Courts' (2008) HR/PUB/08/2, 37.

²⁵⁸ Gender Development UNDP 'Rapport National Sur le Développement Humain 2008: Restauration de la Paix et Reconstruction' (2008).

²⁵⁹ UNDP (2011) 142.

women due to their level of education and literacy. For instance, a study undertaken by the ICC noted that only 27 per cent of the Congolese population in the eastern DRC and 28 per cent in the capital city Kinshasa are aware of the existence of the ICC.²⁶⁰

3.4.2.2 Societal barriers and national legislation

Society in the DRC is marked by strong patriarchy. For examples widows are considered to be the property of the deceased husband's family in some traditions in the DRC and therefore are exposed to suffer GBV from members of his family.²⁶¹ Furthermore, access of married women to the judicial system is limited by the Civil Code of 1987 which requires married women to have written authorisation from their husband prior to taking any judicial action.²⁶² The Family Code expressly provides that 'a married woman must obtain the authorisation of her husband to effect all legal acts for which she must present herself in person'.²⁶³ The married woman does not need the authorisation only if the author of violence is her husband.²⁶⁴ This reflects the dependence of women on men in Congolese society, and reflect the rejection and discrimination women would face while trying to access the judicial systems without assistance from a male member of the community. Rejection and ostracisation of sexually assaulted women is frequent in all the parts of the DRC. In 2005, 12.5 per cent of raped women were expelled from their homes after experiencing sexual violence, and 6 per cent were similarly treated in both in 2006 and 2007.²⁶⁵ Often this rejection is further exaggerated for victims who suffer from fistula, victims who become pregnant and bear children as a result of rape, or victims who contract sexually transmitted diseases, including HIV/AIDS.²⁶⁶ Moreover, blurred lines of

²⁶⁰ Vinck P 'Outreach Evaluation: The International Criminal Court in the Central African Republic (2010) *International Journal of Transitional Justice* 30; Petit F *Sensibilisation à la CPI en RDC: Sortir du Profil Bas* (2007) 13.

²⁶¹ VanWoudenberg A *Country of Origin Information Report: Democratic Republic of Congo* (2008) 258.

²⁶² Art. 454 Law N°87-010 on Family Code of 1987.

²⁶³ Art. 448 Family Code (1987).

²⁶⁴ Art. 451 Family Code (1987). Married women represent the majority of women victims of GBV. In south Kivu for example, they represented 59.1 per cent of the victims of rape. Single women, not subject to the marital authorisation represent only 17.7 per cent of victims. However, they still faces societal discrimination. See Ohambe MCO et al (2005) 30.

²⁶⁵ Steiner B et al 'Sexual Violence in the Protracted Conflict of DRC Programming for Rape Survivors in South Kivu' (2009) 3 *Conflict and Health* 5.

²⁶⁶ 'Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights' (2011) 49.

‘consent’ add to women’s vulnerability. Any man in the extended family or in the community can have access to her without the woman being able to refuse. The notion of consent is non-existent and therefore cases are not reported as violations.²⁶⁷

3.4.2.3 The place given to women in the judicial system

As a result of cultural barriers, women often do not make complaints of, or report rape as soon as they are perpetrated, rendering it difficult for forensic doctors to collect evidence of the offence. Furthermore, judges often tend to display a discriminatory attitude regarding the complaints of women victims of rape,²⁶⁸ and most communities stigmatise women who have been raped and hold them equally responsible for the shame and humiliation that they have suffered.²⁶⁹

3.4.2.4 Economic obstacles

The DRC was ranked 142 out of 146 countries by the 2011 Development Index, which indicated that 80 per cent of the 67 million population of the DRC live on less than US \$2 per day.²⁷⁰ Economic constraints are a further barrier for women survivors of GBV. They lack money to pay required justice fees or do not obtain justice when combatting economically strong perpetrators. For instance, the position of women in South Kivu is characterised in economic terms by the ‘feminisation of poverty’, exacerbated by the lack of policies and mechanisms for the advancement of women. Economic instability aggravates the vulnerability of women to GBV.²⁷¹

3.4.3 Challenges to prosecution of GBV at the ICC

The jurisdiction of the ICC over GBV perpetrated in the DRC is limited by the doctrine of complementarity, and ought only to relate to the prosecution of crimes of ‘sufficient gravity’. As such, the ICC cannot shoulder full responsibility for enforcing international norms for all acts of GBV perpetrated during the conflict in the DRC. It

²⁶⁷ Rodriguez C (2009) 45.

²⁶⁸ Art. 448, Family Code (1987)

²⁶⁹ Ohambe MCO et al (2005) 27.

²⁷⁰ African Economic Outlook (2008) available at http://www.afdb.org/portal/page?_pageid=473,20970243&_dad=portal&_schema=PORTAL (accessed 23 April 2012).

²⁷¹ International Monetary Fund *Interim Poverty Reduction Strategy Paper* (2002) 15.

is crucial that the government of the DRC do its part to complement the work of the ICC.²⁷²

Another challenge is the fact that contrary to the ICTY and the ICTR, the ICC did not emphasise prosecuting GBV perpetrated in the DRC. Furthermore, the ICC has failed to place other acts, such as, ‘enforced prostitution’ and ‘forced pregnancies’ mentioned in the Rome Statute at the centre of prosecutions.

3.5 Impact of impunity of GBV on the safety of women

The large number of civilian perpetrators can only be due to the collapse of the state security apparatus and the crumbling of social and communal protection mechanisms. Impunity of military perpetrators who used rape as a weapon of war has permeated society, as a result of which women collectively suffer harm. It was reported that husbands and other intimate partners perpetrated 22.5 per cent of the documented rape in the DRC in 2010.²⁷³ Such revelations contradict the general perception that only combatants perpetrated rape and other forms of GBV in the DRC. Although the law considers assault to be a crime, it does not specifically address spousal abuse, and police rarely intervene in domestic disputes. No reports of judicial authorities have shown that any action has been taken in domestic jurisdictions in cases of domestic or spousal abuse.²⁷⁴

Furthermore, the rare victims of GBV who were able to overcome the challenges to access to the judicial system and who were able to bring their case to court and get a judgment that condemns the perpetrators and awards them reparations in the form of damages, there is great frustration. The indemnity awards are not paid, even in the cases where the state has been held liable *in solidum*. This is a matter of widespread concern to judicial officers and provincial government authorities, as well as civil

²⁷² Schiff BN *Building the International Criminal Court* (2008) 54.

²⁷³ USDS *Country Report on Human Right Practices for 2007* (2008) 125; Clark M ‘Shocking Congo rape statistics show husbands - not just soldiers, rebels - perpetuate the problem’ (2010) *The Christian Science Monitor* available at <http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0512/Shocking-Congo-rape-statistics-show-husbands-not-just-soldiers-rebels-perpetuate-the-problem> (accessed 06 February 2012).

²⁷⁴ USDS (2007) 5.

society and the victims themselves. The failure to pay these awards is undermining the judiciary and the confidence of victims in the justice system.²⁷⁵

3.6 Conclusion

This chapter indicates that there is no accurate information on the extent to what GBV perpetrated during the conflict in the DRC and in its aftermaths has been prosecuted at the national level. In the absence of a national system of centralisation of lawsuits, the rare available information on the prosecution for GBV transpired in reports from international human rights organisations.

A fact emerging from these reports is that the few instances of prosecution for GBV is far infinitesimal compared to the number of GBV perpetrated, leaving the majority of perpetrators unpunished. This is due in part to the challenges that hinder the functioning of the legal system in the post-conflict setting prevailing in the DRC.

Congolese women faces specific challenges inherent to the patriarchal nature of the DRC society while attempting to access the criminal justice system for the redress of GBV abuses they endured. Some of the specific challenges include lack of financial and educational empowerment and patriarchal legislative instruments, among others. While there exist various programs that directly support victims of GBV, notably medical services and socio-economic support, there is a largely unmet tremendous need of justice for survivors of GBV. Furthermore, the high level of impunity has deteriorated the safety and well being of women, exposing them to further abuses.

Despite various challenges, some progress has been made in the prosecution for GBV acts, with the assistance of international humanitarian organisations. Subsequently, military courts have prosecuted a limited number of GBV acts. This has also been complimented, although in a limited way, by prosecutions at the international level; two ongoing cases and one finalised, at the ICC level.

The next chapter of this research paper provides conclusions and formulate recommendations on measures to be taken in order to reinforce access of women survivors of GBV to the legal system in the post-conflict situation in the DRC.

²⁷⁵ ‘Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights’(2011) 49.

CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

As generally observed during conflict situations, GBV were perpetrated against women in the conflict that prevailed in the DRC from 1996 to 2003. After the official end of war in 2003, GBV have continued to be perpetrated against women at a larger scale, not only in areas that are still experiencing active conflict activities, but have also extended to areas in relative calm. The number of civilians as perpetrators has increased, combined with GBV committed by staff of humanitarian organisations.

4.2 Research questions answered

The present research was aimed at responding to three important, but related questions. The present section provides a synopsis of the research findings in relation to the three questions.

4.2.1 Research question 1: To what extent has the DRC implemented the international treaties proscribing GBV, which it had ratified?

The research found that the DRC has domesticated most of the international treaties concerning GBV that it had ratified. For instance, the Military Justice Code and the Military Penal Code were amended in 2002 to, not only include prohibition of GBV, but also to confer power to the military courts to prosecute GBV as war crimes and crimes against humanity. The Constitution adopted in 2006 prohibits GBV as war crime and crimes against humanity. Furthermore, amendments were made to the Penal Code and the Civil Procedure Code in 2006 through two laws on sexual violence: the law N° 06/018 of 2006 and law N° 06/019 of 2006. These laws broadened the definition of acts constituting GBV by including acts such as enforced pregnancies, rape within marriage and other acts into acts constituting GBV against women. However, despite the above progressive developments with regard to the domestication of international treaties, their actual implementation in practice has been minimal due to the political, financial and institutional challenges that have bedevilled the DRC after the conflict. The above challenges have limited the potential of the domestic normative and institutional structures to respond effectively to the plight of women survivors of violations, especially with regard to access to justice,

the punishment of the perpetrators of GBV and the payment of reparations to the survivors of GBV. Moreover, regressive paternalistic laws and practices that remain in force, such as those requiring married women to obtain written authorisation from their husbands for them to be able to initiate judicial action, have also limited the ability of women survivors of violence to access justice and reparations.

4.2.2 Research question 2: To what extent have GBV perpetrated during the armed conflict in the DRC and its aftermaths been prosecuted at the national and the international level?

Concerning the prosecution of GBV at the international level, the research showed that only one case involving indictments on GBV is being examined at the ICC against Germain Katanga and Mathieu Ngudjolo Chui. The prosecution of Mbarushimana for, *inter alia*, GBV perpetrated by members of the FDLR against women in the Kivus have been cancelled. On another note, in the prosecution of Thomas Lubanga, charges of GBV could not be confirmed despite numerous testimonies of GBV endured by girl child soldiers enrolled in the FPLC. Similarly, no GBV acts are part of the indictments against Bosco Ntaganda despite reports of human rights NGOs displaying a number of acts perpetrated by troops of FPLC and CNDP under his control.

At the ICJ level, the research found that among neighbouring countries alleged of commission of GBV in the DRC, only Uganda has been condemned for human rights violations including GBV. The research has also indicated that there has been no report of prosecution of UN peacekeepers in the UN troop contributing countries for GBV acts perpetrated in the DRC, although GBV perpetrated by peacekeepers were widely reported and were acknowledged by UN officials.

Analysis of access to justice for women survivors of GBV at the national level suffered a major challenge due to the lack of sufficient information or a law-reporting database where decided cases are reported. Congolese judicial decisions are not published, either in a law report or in a journal, nor are they centralised. Thus while gathering information on prosecution of GBV at the national level, it has been extremely difficult to provide exhaustive and detailed information on the number of GBV cases that has been examined by domestic civil and military court, and the

number of perpetrators that were found guilty. However, scarce information on the prosecution of perpetrators within military courts could be gleaned from reports of international humanitarian organisation and were provided in chapter three. Contrary to the first years of the post-conflict situation when prosecution of GBV was only directed at junior army officers, there is a growing number of prosecutions of high ranked FARDC military officers, such as the trial of General Jérôme Kakwavu, Lieutenants-Colonel Eliwo Ngoy and Bokila Lolemi, and Colonel Mosala. Another encouraging fact is that GBV perpetrated outside conflict zones of the east are also being prosecuted as in the example of the prosecution of GBV in Mbandaka, Equateur province.

4.2.3. Research question 3: To what extent do women survivors of GBV access the institutions of the legal system in the DRC and international level? What are the challenges they face?

The research found that women faced difficulty in accessing the ICC due primarily to the lack of information on the existence and the functioning of the ICC, and also due to the lack of a witness protection system in the DRC. Victims of GBV refused to testify against the perpetrators arrested at the ICC for fear of reprisal from members of the armed groups to which the perpetrators belonged, and which are still active in the east of the DRC.

Challenges to the access of women to the domestic judicial system were displayed in chapter three and were compartmented into two groups: challenges related to the judicial system and challenges related to women. The judicial system of the DRC faces numerous challenges that obstruct its functioning including, minimal budget, corruption, understaffing and lack of infrastructures. These challenges considerably reduce the capacity of the judicial system to prosecute GBV effectively. Furthermore, women survivors of GBV continue to experience excessive discrimination within the judicial system as judges overlook complaint of women.

Challenges on the side of women include societal barriers influencing the place given to women in the Congolese society, which is a result of the patriarchal system that is prevailing in the DRC. Ignorance and economic constraints are other challenges specifically affecting women's access to the judicial system.

4.3 Conclusions

The research has highlighted the difficulty in determining the actual extent of GBV perpetration in the DRC due to a lack of accurate data and a coordinated documentation of the GBV incidences in the DRC. A reliance on GBV data provided by the international humanitarian organisations working in the DRC, some of which are at times contradicting, makes it difficult to determine the actual extent of the problem, making it even more difficult to design adequate responses to the problem. The need for an efficient and coordinated data collection, collation and documentation strategy is therefore key in the development of responses to the GBV situation in the DRC, of which access to justice is but one.

Although the DRC has established legislation and mechanisms for addressing GBV perpetrated during the conflict, GBV acts are not efficiently prosecuted. A significant number of perpetrators were not held accountable for their acts, and survivors of GBV seldom accessed the judicial system. Moreover, the research has demonstrated that the inadequate access of women to the judicial system and the minimal trial of perpetrators of GBV have generated a general impunity in the DRC. This impunity resulting from the insufficient prosecution of perpetrators has further exposed women to more instances of GBV, as has been indicated by the massive rise in the number of GBV perpetrated after 2003, and the increased involvement of civilians in the perpetration of GBV.

4.4 Recommendations

Although political and financial challenges prevailing in the post-conflict situation in the DRC limits the availability of means to address the problem of access of survivors of GBV to the judicial system, a number of actions can be undertaken in order to address the challenges that obstructs the access of women to the judicial system in the DRC.

The research paper thus proposes the following recommendations:

4.4.1 Reinforcement of the judicial system

Further efforts are necessary to reform the justice system encompassing both military and civilian courts and reinforcing all stages of the criminal justice processes. There is

an urgent need to strengthen the penitentiary system, as it is one of the steps that allow enforcement of judgment produced by courts. This aspect of the criminal justice system plays an important deterrent role, as it ensures that perpetrators sentenced to imprisonment spend their time behind bars, sending a strong message on the seriousness of prohibition of GBV, and consequently strengthening the security of women. Reinforcement of the judicial system should be done through the allocation of a more consistent budget for the running of the judicial system. Reform of the judiciary should also encompass the appointment of more women as police investigating officers, prosecutors, magistrates and judges to enhance the reporting, investigation, prosecution and punishment of GBV perpetrators.

4.4.2 Revision of domestic laws

There is a need for judicial reform to enhance the access of women to the judicial system, in compliance with the international and national instruments that forbid latent discrimination against women. For instance, the imposition of an authorisation from the husband for a married woman to access the judicial system should be removed from the Civil Code. The process of legislative reforms should be consultative and must draw from the experiences of women survivors of GBV. In reviewing (discriminatory) legislation, due consideration needs to be directed at guaranteeing that all existing loopholes in domestic legislation which foster discrimination are fully plugged.

4.4.3 Sensitisation on women's rights

There is a need for intensive sensitisation on the rights of women to eradicate the perception that the rights of women are not part of the corpus of human rights, and thus the perception of GBV as normal acts. Post-conflict gender-justice is a key component of post-conflict reconstruction in the DRC. Its implementation needs to be understood as a broad strategy of fostering reconciliation by prioritising the access of women survivors of GBV to the judicial system. Consistent with the former, its implementation should be emphasized, as it conveys a strong message that a just society does not turn a blind eye to the violation of women's rights.

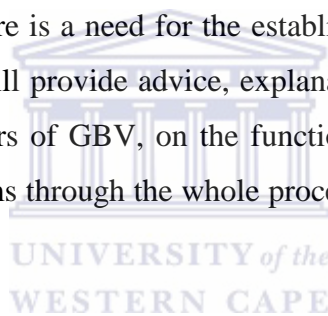
4.4.4 Follow up of prosecution of GBV acts at the international level

A follow up on the prosecution of GBV should be undertaken at the international level, both at the ICC and in the countries of origin of UN peacekeepers responsible of GBV. If accountability is to prosper and impunity is to be dealt with, the need for the zealous implementation of the laws on GBV at all levels cannot be overemphasised.

4.4.5 Women's access to legal aid programmes

With regard to the long-term strategies, it is suggested that authorities establish targeted programmes to address and ameliorate the challenges women survivors encounter in accessing the judicial system such as widespread illiteracy and ignorance of the law.

In relation to institutions, there is a need for the establishment of a *pro bono* judicial assistance programme that will provide advice, explanation and assistance especially to women, including survivors of GBV, on the functioning of the domestic judicial system and accompany victims through the whole process and duration of the judicial proceedings.



4.4.6 Addressing compensation of women victims of GBV

The authorities in the DRC need to finalise the settlement of compensation in relation to the perpetration of GBV committed by neighbouring national armies during their campaign on DRC territory. The former needs to be undertaken as a crucial component of the broad healing process essential for sustaining stability in the aftermath of conflict.

Furthermore, the state must be prompted to fulfil its obligation of damages towards survivors of GBV to whom reparation have been given by judicial institutions. In this regard, a scaled plan of payment of reparation to survivors of GBV, which takes into account the capacity of the state, should be established and commence to function in order to send a strong signal that GBV are a priority for the DRC and that they are being addressed.

As the DRC consolidates its post-conflict reconstruction programmes, post-conflict gender justice needs to be treated as a fundamental pillar of the restoration of state institutions, thus acknowledging that women are the backbone of the DRC and that they have endured untold suffering from which they need reparation.



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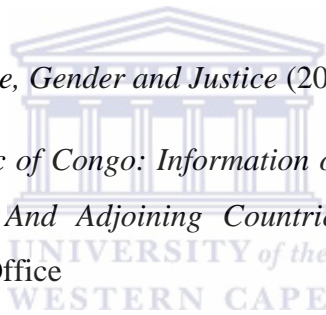
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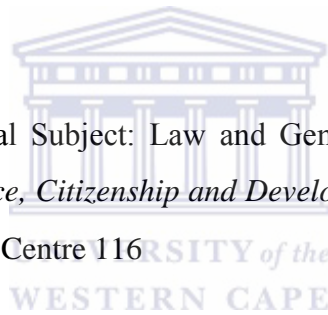
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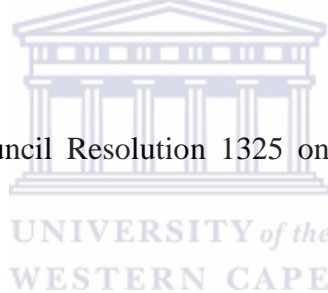
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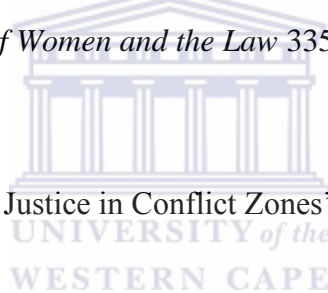
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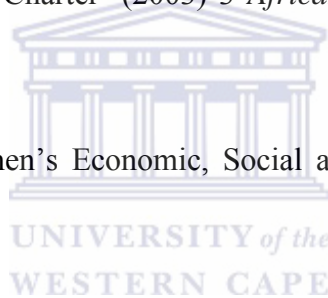
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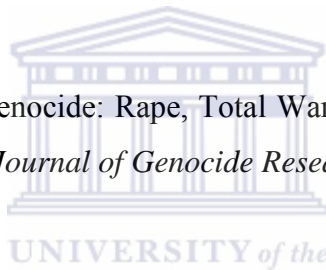
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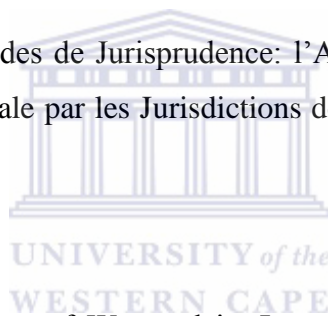
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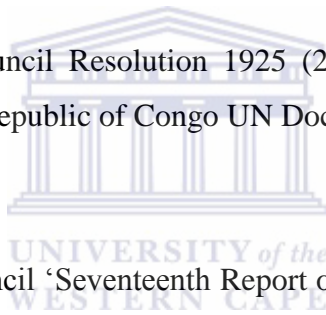
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