University of Southern Denmark. Master in International Security and Law

International Criminal Justice and International Politics Against Sexual Violence in Conflict in Eastern Democratic Republic of Congo: the Gaps of the Victim Oriented Approach

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Table of Contents

List of Cases

International Criminal Court, Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.

International Criminal Court, Trial Chamber II, The Prosecutor v. Germain Katanga, ICC-01/04-01/07.

Military Tribunal Garnison Mbandaka v. Eliwo Ngoy, (*Tribunal Militaire de Garnison de Mbandaka, Affaire Songo Mboyo*), RPA 615/2006, 12 April 2006.

List of Tables

Acronyms

AU -	African Union
DRC -	Democratic Republic of Congo
EU -	European Union
GBV -	Gender Based Violence
HRW -	Human Rights Watch
ICC -	International Criminal Court
ICJ -	International Criminal Justice
ICL -	International Criminal Law
ICTR -	International Criminal Tribunal for Rwanda
ICTY -	International Criminal Tribunal for the former Yugoslavia
ICT -	International Criminal Tribunals
IHL -	International Humanitarian Law
OTP -	Office of the Prosecutor of the ICC
WWII -	Second World War
SGBV -	Sexual and Gender Based Violence
SBV -	Sexual Based Violence
SEA -	Sexual Exploitation and Abuse
SV -	Sexual Violence
TJ -	Transitional Justice
TFV -	Trust Fund for Victims
UN -	United Nations
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

Abstract

The International Criminal Justice institutions have put major efforts into what is referred to as a victim oriented approach, specifically for victims of sexual violence in conflict. From the discourse against the *impunity gap* for Gender and Sexual Based Crimes to the provisions of the International Criminal Court's Trust Found for Victims open to victims in general and not just the ones that have accessed justice. This project argues that even though a victim oriented approach exists both theoretically and in practice, it is not efficient due to the way it is implemented. The following chapters analyse the complexity of the issue from a legal and a political point of view in the context of the most concerning situation of sexual violence today in Eastern Democratic Republic of Congo. The aim of this thesis is to suggest solutions for the victim oriented approach, and more generally for International Criminal Justice, to address more efficiently the victims' needs and to achieve deterrence. The paper challenges the theoretical fundaments of International Criminal Justice and the strategies of the International political institutions to provide an alternative approach aiming pragmatism and efficiency against Sexual Violence.

Methodology

This project aims to analyse in depth the issue of Sexual Violence (SV) in conflict and the gaps in the International Criminal Justice (ICJ) and international politics approaches in addressing it. The introduction provides a justification of the choice of case study and an overview of the different elements, socio-economic, historic, political and legal that this project analyses. The first chapter starts with a guide on how to read criminal statistic data, as it differs from non-criminal data. In the first section, the analytical focus is on the historic contextualisation of the issue of SV. Thus, the section describes the conflicts in the territory of the Democratic Republic of Congo (DRC) with a particular attention to the crime of SV, from 1990 until the present day. Further are analysed, from an international relations perspective, the major international actors that have been involved politically in these conflicts and have in one way or the other been present in DRC. The second chapter is dedicated to a legal analysis of, first the domestic law and its amendments, concluding with an overview of other issues related to access to justice; and second the international actors' efforts to end impunity, their policy approach and the victim oriented provisions. Chapter three focuses on defining deeper issues, not immediately related to the crime of SV but that have a significant impact on impunity and lack of deterrence. Throughout the political analysis of the

democratisation process, the research identifies a vicious circle between crime rates - also SV - lack of governance, lack of rule of law, mistrust in the authorities, corruption and grey economy. Specific attention is given here to the international actors and their efforts to facilitate the political transition. Further, the third section analyses the ICJ provisions and goals from theory, with a focus on the philosophical *raison d'être* of ICJ and the role of the victims, followed by practice, concentrating on the concept and need of security - intended both as economic and human security - in order to identify the reasons for quasi inefficiency of the efforts towards deterrence. Having identified a lack in organisation, in the sense of coordination between different projects and institutions, the forth chapter focuses on offering solutions to overcome the most concerning problems that have impact on impunity. In this final chapter, I argue the urgent need of developing a criminological auxiliary discipline to ICJ for the purpose of enchanting the process of Transitional Justice and the victim oriented approach itself. Before the conclusions I offer an alternative approach to the complex and abstract issue of what are the core needs of the victims. The project concludes by summarising the findings based on the DRC case study on: the complex multidisciplinary issue of SV; the different approach that needs to be adopted in order to increase the success rates of justice and political projects towards deterrence; the need of developing criminological auxiliary discipline for international core crimes in general and SV in particular.

Introduction

- International Criminal Justice

When mentioning ICJ the first thing that comes to the discussion is international criminal trial, from Nuremberg to the ICC. The trials are so far the most tangible result of those disciplines, the part that is most covered by the media and criticised by academics and political figures. However, for the purpose of this paper, the discipline of ICJ is going to be analysed in a broader perspective: as processes that starts in conflict situations and ends in peaceful times. Following this line of thought, the criminal trials are just a part of a significantly more complex process that has both political and legal components. Political interests have to be taken into account because ICJ depends on governments signing, ratifying, complying and cooperating with ICT. Legal because it involves legal norms as treaties, customary law etc.; and legal proceedings as investigations and trials. In every part of this process both components are extremely important: at the very beginning when a decision could be taken on whether to start investigations or not; during the investigations part of

this process the more cooperation there is between political and legal institutions the better is for the following legal proceedings. Before the trial there is another decision to be taken regarding the kind of justice, restorative or retributive, that would better facilitate the final part of prevention and reconciliation and/or state/nation rebuilding in some cases. Concerning the legal proceedings the same is valid, without cooperation between the key components of the ICJ process, law and politics, there is a risk to be unable to move forward with the proceedings.[1] Finally the prevention, reconciliation and/or state/nation rebuilding that would not be possible without justice nor without active political engagement. Summarised like this, the process of ICJ might even seem simplistic and easy to achieve, instead it is often severely criticised and impossible to actualise. If analysed in holistically ICJ is part of TJ, that is even more complex, as Benghellab describes it can be summarised in using legal, political, psychological, and moral tools with the purpose of satisfying national *(re)construction* from all the perspectives of justice, truth and repartition principles.[2] This viewpoint of separating the ICJ and, more generally TJ, in smaller parts allows to consider not just the trials but the entire process as a means to an end. In order to understand these processes' end it is important to focus on the fundaments of ICJ and TJ. Here the discipline encounters the problem of having a very weak *raison d'être* as shows the academic, political and doctrinal over criticism towards its political and legal ends.[3] In other words, by criticising so often and from different perspectives the ultimate goal and reason of existence of the disciplines of ICJ and TJ it can be observed that the core purpose of this discipline is very weak and allows fundamental criticism.[4] As much focus on criticism has damaged the discipline of ICJ in another way too, as it has taken from the focus on completing the discipline with auxiliary sub disciplines as criminology.[5] According to Bergsmo et al. the reason for the difficulties in defining the *raison d'être* might be found behind the fact that ICL is lacking in philosophical rational that is common for domestic norms.[6] Indeed, in

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[1] See the Omar Hassan Ahmad al-Bashir case before the ICC in the matter of cooperation and complementarity.

[2] Benghellab Nour, "Des mythes aux réalités de la justice transitionnelle", *Champ pénal/Penal field*, Vol. XIII, 2016, epub., para 2.

[3] Mégret Frédéric, "International Criminal Courts and Tribunals, the Anxiety of International Criminal Justice" in *Leiden Journal of International Law*, 2016, Issue 29, pp. 197-198.

[4] See Martineau Anne-Charlotte, "La justice pénale internationale, l'Afrique et le refoulé colonial", *Champ pénal/Penal field*, Vol. XIII, 2016, Available in French at: http://journals.openedition.org/champpenal/9300 ; Frédéric Mégret, "International Criminal Courts and Tribunals, the Anxiety of International Criminal Justice" in *Leiden Journal of International Law*, 2016, Issue 29, pp. 197–22.

[5] Further in this project is analysed in particular the consequences of the lack of a criminological approach in ICJ: see chapter II, III and IV.

[6] Bergsmo Morten and Buis Emiliano J., *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, TOAEP's Publication Series, 2018, Torkel Opsahl Academic EPublisher, p. 9.

researching the *raison d'être* of ICJ I have encountered paradoxic difficulties. From strictly legal to philosophical scholars, both oriented not so much in criticising as providing the reader with certainties it is impossible to find a common ground on the *raison d'être* of ICJ. There is also a historic driven reasoning starting with the Nuremberg Trials and Principles but this narratives, eventually, focus on the responsibility to fight impunity without further analysing the reasons for such responsibility, not to mention that not all scholars[7] agree on the Nuremberg Trials to be the basis for creating conceptually the contemporary ICJ.[8] However, even if the court's principles were not as holistic and well defined during the Nuremberg Trials,[9] the core values are the same today and the Nuremberg Trials were the first ones to apply individual *responsibility* for crimes against peace and war crimes.[10] The broader reasoning for having the Nuremberg Trials in the first place is to be found in the UN agreement for the Prosecution and Punishment of the Major War Criminals in the European Axis which states that such trials are in the "*interest of all the United Nations"*.[11] As it states in the Preamble of the UN Charter, the aim of the organisation is "*to save succeeding generations from the scourge of war…reaffirm faith in fundamental human rights, in the dignity and worth of the human person…"*[12] Following this logic, one of the many and complicated political reasons[13] to held the Nuremberg Trials was to punish war criminals with the intention of preventing such crimes from happening again and reaffirming the dignity of the European, in this case, people that suffered the atrocities of the WWII. According to Cassese, ICL further in time evolves its aim to condemn deviant behaviour and achieve prevention as an ultimate consequence of retribution.[14]

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[7] See Priemel Kim Christian, *The Betrayal The Nuremberg Trials and German Divergence*, 2016, Oxford University Press; Hennessy-Picard Michael, "La piraterie atlantique au fondement de la construction des souverainetés coloniales européennes", *Champ pénal/Penal field*, Vol. XIII, 2016; F. Mégret, "Nuremberg and the Contemporary Commitment to International Criminal Justice", *Völkerrechtsblog*, 22 February 2017, doi: 10.17176/20170222-085319. William A. Schabas, *An Introduction to the International Criminal Court,* 4rd ed., Cambridge University Press, 2011.

[8] Mégret Frédéric, "Nuremberg and the Contemporary Commitment to International Criminal Justice", *Völkerrechtsblog*, 22 February 2017, pp. 2-3.

[9] Here I am generally referring to the principle of fair trial and particularly to the difference in defence between the Nuremberg trials and the contemporary ICL trials as the ones held at the ICC.

[10] Cassese Antonio, "International Criminal Law" in Malcolm D Evans, *International Law*, Oxford University Press, 2003, First Edition, pp. 722-723, 726-727.

[11] United Nations, *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major Was Criminals of the European Axis*, Signed at London, on 8 August 1945, p.282.

[12] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Preamble.

[13] Priemel Kim Christian, *Op cit.*, pp. 64-71. The author elaborates on the decision making and *construction* of the Nuremberg trials.

[14] Cassese Antonio et alt. *Cassese's International Criminal Law*, Third edition, Oxford University Press, 2013, pp. 268-269.

As Arendt explains in the *Leader principle* the leader and the state holds total organisational responsibility for its actions and the actions of the other members of the "organisation".[15] Using Burke's theory that the state provides rights to its citizens, it can be hypothesised that the state can be hold responsible, through the *Leader principle* in violating such rights.[16] In this discourse it appears clearly that the responsibility, the two philosophers refer to, is toward the either humanity or the citizens of a nation. In this sense ICJ is a fundamental discipline for preserving the rights people and for punishing the violation of those rights. In other words, from a philosophical point of view the ultimate goal of ICJ is to deter the violation of certain fundamental rights and to establish responsibility towards the citizens of a state or humanity, more generally.

- International Criminal Court

In a modern manual on ICL the goal of the discipline has extended since the Nuremberg trials, where individual accountability was the central issue: now, there is a greater focus on prevention and elimination of international crimes, encouragement of accountability, end of impunity and even has a protective effect.[17] Considering the Nuremberg Trials as the first example of ICJ, today the ICC may symbolise nearly the end of a very fast process of establishing this discipline in the international community.[18] From 1989 to 1998 the idea that without criminal accountability, durable peace could not be achieved, was popular enough in the international community to start drafting the Rome Statute of the, then future, ICC.[19] After the Cold War the UN General Assembly for the first time suggested the potential importance of establishing an international criminal court.[20] In 2002 the Rome Statute entered into force and the ICC was established, not as much to revolutionise

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[15] Arendt Hanna, *The Origins of Totalitarianism*, Harcourt Brace & CO, 1976, pp. 374-375.

[16] Edmund Burke, *Reflections on the French Revolution*, 1790, edited by E. 1. Payne, Everyman's Library; Cited by Hanna Arendt in *The Origins of Totalitarianism*, Harcourt Brace & CO, 1976, p. 299.

[17] *Ibidem.* Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals*, Leiden, The Netherlands: Brill Nijhoff, 2014, pp. 1-2.

[18] Cassese Antonio, "International Criminal Law" in Malcolm D Evans, *International Law*, Oxford University Press, 2003, First Edition, pp. 726-731.

[19] Romano Cesare PR., Adler Karen J. and Shany Yaval, *The Oxford Handbook of International Adjudication*, Oxford University Press, 2013, pp. 69, 159.

[20] Cassese Antonio et alt. *Cassese's International Criminal Law*, Third edition, Oxford University Press, 2013, pp. 261-262.

ICJ but to attempt establishing common ICJ principles.[21] The Court's goal is to end impunity while contributing to prevention of the crimes under its jurisdiction.[22] The ICC presents highly ambitious principles: from contribution to world peace and security[23] to firmly incorporating concepts as gender[24] into ICJ, adding a victims oriented approach and even the idea of having the power to prevent[25] future crimes.[26] The choice of words of victim oriented instead of victim based approach - which is the expression that can be usually found describing policies and law - comes consequent to the several critiques of the extend of such approach and its practical outcomes.[27] The idea of justice for victims comes more openly into the debate with the ICC than with the Nuremberg trials.[28] The ICC establishes tree institutions, independent from the Court itself, to pursue the five categories of repartition defined in Art 75 (1): restitution, compensation, rehabilitation and, as William Schabas suggests, *satisfaction and guarantee of non-repetition*.[29] The Trust Fund for Victims, the Victims and Witnesses Unit and the Office of Public Counsel for Victims are the institutions concerned with the rights and interests if the victims. Just the fact that those organisations have been established is a clear sign of a victim oriented approach. In December 2017, the UN Secretary-General António Guterres underlined further the importance of such approach by stating that "*Achieving justice also means assisting victims*".[30] Therefore, it can be observed that ICJ is more and more oriented into

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[21] There are several campaigns aiming for universality of the Rome Statute that would, in this sense give world wide jurisdiction to the ICC as the one of Parliaments for Global Action (https://www.pgaction.org/campaigns/icc/universality.html). However, without the ratification of the major political powers as the US, Russia and China such projects are far from becoming reality.

[22] International Criminal Court, *Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, Preamble.

[23] Schabas William A., *An Introduction to the International Criminal Court,* 4rd ed., Cambridge University Press, 2011, pp. 62-69. Geert-Jan Knoops, *An Introduction to the Law of International Criminal Tribunals*, Leiden, The Netherlands: Brill Nijhoff, 2014, p. 312.

[24] International Criminal Court, *Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, Ar. 7 para. 3.

[25] Cassese Antonio et alt. *Cassese's International Criminal Law*, Third edition, Oxford University Press, 2013, pp. 5-7.

[26] Moffett Luke, "Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague", *Journal of International Criminal Justice*, Volume 13, Issue 2, 1 May 2015, pp. 281-289.

[27] See Moffett Luke, *Op cit.,* 281–311. Clarke K.M., Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa Cambridge University Press, 2009. Vinck P. and Pham P., Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of the Congo Harvard Humanitarian initiative and UN Development Programme, 2014.

[28] Referring to the French Prosecutor closing statement in Nuremberg International Military Tribunal (IMT),Transcripts Vol. XIX para. 569.

[29] Schabas William A., *Op. cit.*, p. 364.

[30] United Nations, *Fulfil International Criminal Court's Potential, End Impunity, Ensure Justice for Victims, Secretary-General Urges States Parties to Rome Statute*, Press Release, SG/SM/18808-L/3271, 4 December 2017.

satisfying the needs of the victims from crimes within the jurisdiction[31] of the court as it is a very urgent need in our contemporary society. Given the importance of such principle on a philosophical to practical level, this project focuses on analysing the outcomes of the victim focused approach in a contemporary context.

- Gender Based vs. Sexual Violence

The particular group of victims that this project focuses on are the people that have suffered SV in conflict. Gender Based as well as Sexual Crimes (SGBC) in International Humanitarian Law are relatively new concepts even though sexual crimes in conflict have been used as a weapon, in war times, from ancient times.[32] Such crimes are extremely serious due to the violence and the cruelty they are generally associated with, and the reasons for which these crimes are committed. In this sense, the crimes categorisable as SV have durable and sometimes permanent effects on the victims form a physical, physiological and social perspective.[33] Sexual crimes in conflict have the purpose of humiliating and stigmatising the victim, both male and female, their family and community; even after the conflict is ended many victims are marginalised from their families and sometimes from the entire community.[34] The presence of this crime influences negatively the gender role in the reconstruction of the society after the end of the conflict[35] and during the conflict contributes to the increasing crime rates as in prostitution, corruption and human trafficking while decreasing the confidence in the local authorities and rule of law.[36] In the Geneva Conventions and the Additional Protocols, women are considered as a vulnerable group in the context of violent conflict.[37] With the evolution of ICJ gradually definitions were added in order to facilitate the prosecution of such crimes. In the ICTY Statute, Article 5g, and in the Statute of the ICTR, Article 3g, rape and more

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[31] International Criminal Court, *Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, Art. 5-9.

[32] Moser Caroline O. N. and Clark Fiona, *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence*, Zed Books, 2001, pp. 55-56.

[33] *Ivi*., pp. 55, 69-71, 77-81.

[34] *Ivi.*, pp. 58-62.

[35] *Ivi.*, pp. 4-7.

[36] O'Brien Melanie, "Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes", *International Criminal Law Review,* Issue 11, 2011, Martinus Nijhoff Publishers, pp. 805-806.

[37] Crowe Jonathan and Weston-Scheuber Kylie, *Principles of International Humanitarian Law*, Edward Elgar Publishing Limited, 2013, pp. 88-89.

generally SBV is considered as a crime against humanity. In the ICTY Statute, Article 4e further defines SBV as an "*outrages upon personal dignity, in particular humiliating and degrading treatment*".[38] With the latest definition to be found in the Rome Statute in Articles 7 paragraph 1g, paragraph 2f and the Elements of Crimes under articles 8 paragraph (2b-xxii) and paragraph (2e-vi).[39] The Geneva Conventions do not make an much distinctions gender-wise,[40] women should be treated equally as man[41] meanwhile the Conventions state also that women should be treated "*with all consideration due to their sex"* or "*with all regard due to their sex"*[42]. Even though SBV and GBV are often treated together as SGBV there is a difference between the two crimes. SBV can also be a part of GBV when the crime is committed "*against a woman because she is a woman or that affects women disproportionately*".[43] With the purpose of having a broader view on the crime of SV, as it is a crime concerning not just women and girls but man and boys as well, this project is not going to take into account the gender aspect of such conduct. In addition, the gender view on SV that sees men uniquely as perpetrators and women as victims has contributed to undermine the women's role in war times; whether it is concerning physical or political violence.[44]

Those are the reasons than - particularly violent crime, particularly serious consequences for the victims and the community/nation - for this crime and its victims to be analysed separately with regard to different approaches from political, to legal and criminological. The same characteristics of this crime allow to study in depth the gap between theoretical victim oriented approach and its practical reality.

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[38] Statute of the International Criminal Tribunal for the former Yugoslavia, 1991 updated 2009, Art. 5 (g). Statute of the International Criminal Tribunal for Rwanda, 1994, Articles 3 (g), 4 (e). Zahar A. and Sluiter G., *International Criminal Law: A Critical Introduction*, Oxford University Press, 2012, pp. 128-131.

[39] International Criminal Court, *Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations.

[40] Geneva Conventions, art 3; Additional Protocol I, art 9(1); Additional Protocol II, art 2(1).

[41] Geneva Convention III, arts 14, 88.

[42] Geneva Convention I, art 12; Geneva Convention II, art 12; Geneva; Convention III, art 14.

[43] United Nations Committee on the Elimination of Discrimination against Women, *General recommendations made by the Committee on the Elimination of Discrimination against Women,* General Recommendation No. 19 (llth session, 1992) Violence against women, Background, para 6.

[44] Moser Caroline O. N. and Clark Fiona, *Op cit.*, pp. 3-4. See also S. Jacobs, R. Jacobson and J. Marchbank, *States of Conflict: Gender Violence and Resistance*, Zed Books, 2000. R. Lentin, *Gender and Catastrophe*, Zed Books, 1997.

- Choice of Case Study: Democratic Republic of Congo and the Kivu region

The purpose of this project is to study the deterrence, prevention[45] and protection[46] effects of ICJ concerning the crime of SV and the role of the victim oriented approach. The choice of this particular crime has a great significance for the political, economical and legal consequences deriving from the long-lasting effects on the victims physical, psychological and social lives.[47] Such consequences are further very important for a reconciliation process and for nation and state rebuilding. In order to see the ongoing practices of ICJ in assisting victims and addressing their needs an active conflict situation is a very accurate case study as these practices can be observed in real time and their outcome can be analysed with the purpose of suggesting additional measures that could be implemented meanwhile. In 2010 the Special Representative of the UN Security General on Sexual Violence in Conflict, Margot Wallström, after a visit to the DRC called the country the "*rape capital of the world*".[48] Since then, the Guardian and the BBC have continued to use this appellative quite often when reporting on SV in DRC. The reason for continuing to call DRC in such a way, even today, is because of the extremely high numbers of SV, the particular cruelty concerning the manner in which such crime is performed, and the 'historical culture' of the crime particularly in the Kivu region. Indeed, since the genocide in Rwanda, 1996, and the spread of the conflict in the Kivu region there have been counted approximately 1.80 million women raped by 2011.[49] This conflict has been called 'Africa's World War' with the intervention of eight foreign countries and presenting the biggest number of deaths since WWII.[50] Considering the past two Great Congo Wars and the contemporary political instability, rape has been increasingly used as a weapon. A further reason for the DRC to suit this project's purpose is the fact that the ICC is and has been very present in this conflict situation. With six cases, Katanga, Lubanga, Ntanganda, Mbarushimana, Mudacumura and Ngudjolo Chui; seven arrest warrants; one ongoing trial and the TFV engagement in the region. The Katanga case before the ICC was the first SV prosecution for

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[45] Cassese Antonio et alt. *Cassese's International Criminal Law*, Third edition, Oxford University Press, 2013, pp. 268-269.

[46] Knoops Geert-Jan, *An Introduction to the Law of International Criminal Tribunals*, Leiden, The Netherlands: Brill Nijhoff, 2014, pp. 1-2.

[47] Moser Caroline O. N. and Clark Fiona, *Op cit.*, pp. 55-56, 62.

[48] UN News, *Tackling sexual violence must include prevention, ending impunity – UN official,* 27 April 2010.

[49] Peterman A, Palermo T, Bredenkamp C, "Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo", *American Journal of Public Health,* 2011, Vol. 101, No. 6:1060-1067.

[50] Zongwe Dunia Prince, "The New Sexual Violence Legislation in the Congo: Dressing Indelible Scars on HumanDignity", *African Studies Review*, Vol. 55, No. 2, 2012, pp. 38-39.

this court. In this context it can be observed the evolution of ICJ and more specifically the ICC and its victim oriented approach. And in this sense, the the achievements of ICJ in its purpose of preventing fundamental rights violations and punishment of such violations.

Chapter I. Eastern Democratic Republic of Congo

This first chapter focuses on providing a historical introduction of the issue of SV in the DRC conflict. For this purpose the chapter begins with a historical overview of the conflicts in the country. In order to remain focused on contemporary issues related to such crime but also with the aim of providing a complete political understanding of the region, historians agree that it is best to begin with the Rwandan Genocide that originated several conflicts in DRC. Such analysis is very important in providing context to the contemporary political and geopolitical situation. Further, since ICJ has a strong political aspect to be taken into consideration, this historical analysis is very pertinent. This overview aims to provide context as well regarding the situations under the ICC. In addition, examining singular military operations will provide a deeper understanding on the militias operating methods. The second part of this chapter focuses on the role of the international actors in the conflicts. With a particular attention to the UN peacekeeping missions, the African Union initiatives and statements and finally the local and international NGOs involvement in the conflict in a humanitarian sense.

- Introduction on Criminal Statistical Data

As a SV based historical analysis this chapter contains several statistical indications. Criminal statistics need to be approached in a different way than 'normal' data. This is even more important in countries where the levels of corruption are higher. According to Transparency International, DRC is ranked 161 in 2018 from 181 countries, where number 1 is the less corrupted country and number 181 the most corrupted one.[51] In those cases both independent and official statistic suffer from being controlled by the authorities.[52] The independent statistics suffer from the lack of power and autonomy of the institutions that collected the data in the first place.[53] The official statistics in corrupt and politically unstable countries, are easily manipulated to serve the political interests of

[51] Transparency International, *Corruption perception Index: Democratic Republic of Congo*, 2018. Available in English at: https://www.transparency.org/country/COD.

[52] Miller, Gwdeland and Tatyana Koshechkina, *A Culture of Corruption? Coping with Government in Post-Communist Europe*, Central European University Press, 2001, pp. 24-25.

[53] *Ibidem.*

the moment.[54] However, this is not the only problem, the victims themselves tend to under-report the suffered crimes due to lack of confidence in the authorities. Another reason for the victims to under-report SV is related to the desire of avoidance of secondary victimisation that often occurs during the phase of questioning when reporting a crime. Or even worse, in a war situation many of the victims do not survive and cannot report the crime. On the other hand, the authorities have in their interest to under-record the crimes in order to have lower criminal rates. In other words, in this context all the parties are interested in under-reporting the crimes, as well in considering that in certain cases the authorities might be involved in the commitment of such crimes.[55] In this perspective it might be considered a progress in countering a certain crime if the official, more than the independent, statistics increase. Likewise, if there are differences between official statistics and independent ones, the second ones present higher numbers, it might be analysed as proof of corruption or problems with the rule of law. Those are all factors to keep in consideration while reading crime statistics in a corrupt context. On this note when it comes to DRC the high levels of corruption are just one of the numerous elements that provide context for understanding the political and legal circumstances in which a crime as SV in conflict exists. Two reports of Transparency International in cooperation with Anti-Corruption Resource Centre, one from 2010 and the other from 2015, show that corruption is first a result of other issues than an issue itself creating further problematics. From conflict and political fragility to weak rule of law, widespread corruption and increment of crime.[56] Therefor, the following chapter aims to provide context and not a fully analysed historical overview with the purpose of understanding how the DRC situation developed. Such context is fundamental for an attempt of suggesting possible solutions.

[54] *Ibidem.*

[55] Lotspeich, "Crime in the Transition Economies", *Europe-Asia Studies*, Vol. 47, No. 4, 1995, p. 577.

[56] Chêne Marie, Transparency International, *Overview of corruption and anti-corruption in the Democratic Republic of Congo (DRC)*, Series: U4 Expert Answer, 2010 Number: 257. and Chêne Marie, Transparency International, *Overview of corruption and anti-corruption in the Democratic Republic of Congo (DRC)*, Series: U4 Expert Answer, 2015 Number 12.

Chapter I.I. - Historical overview

- First Congo War

The two DRC wars are usually studied beginning with an analysis of the Rwandan genocide due to its influence on the peace in DRC.[57] However in the ’90s the today DRC was in a political transition period after the decolonisation waves, the withdrawal of Soviet influence in the continent and the changing of American and French foreign policies for the region.[58] This situation resulted in a very weak state fabric for the DRC, then Zaire, and more generally to regime changes in the region: Chad (1990), Liberia (1990), Ethiopia (1991), Somalia (1991), Rwanda (1994), Congo-Kinshasa (1996), and Congo-Brazzaville (1997); this led to the formation of particularly violent militias most of the time self-organised.[59] Such militias used as a weapon especially violent forms of widespread rape, along with other crimes against humanity and war crimes.[60] The reason for such violence lies in the in the loss of political ‘importance’ of the citizens caused by the methods of financing the militias. In other words, at the beginning of the ’90 the militias started funding themselves through illegal trade of mostly diamonds and other precious natural resources that led to a dysfunction of the democratic process as the resources became more important then the voting citizens.[61] Along with the widespread use of child soldiers - in 2006, 40% of the soldiers were children,[62] first abducted, then, with the use of drugs, transformed in soldiers - the levels of violence reached a not yet seen limit in the region.[63] The problem with such a high levels of violence overtime is that even within the civilian population it generates a cultural memory, first and then cultural pathology, that has consequences on the democratic process and contributes in ‘institutionalising’ more violent approaches by the militias.[64]

As a consequence of the genocide against the Tutsi in Rwanda, neighbouring country to DRC, then Zaire, many Hutu fled the country after the establishment of a Tutsi Government in Rwanda. The *interahamwe*, militia held responsible for the genocide, took control of the refuge camps in Zaire

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[57] Deibert Michael, *The Democratic Republic of Congo: between hope and despair*, Zed Books, 2013, p. 4.

[58] Clark John F., *The African Stakes of the Congo War*, Palgrave Macmillan, 2002, pp. 20-25.

[59] *Ivi*, p. 25.

[60] *Ivi*, pp. 25-26, 213.

[61] Deibert Michael, *The Democratic Republic of Congo: between hope and despair*, Zed Books, 2013, pp. 73, 111.

[62] Watchlist on Children in Armed Conflict, *Struggling to Survive:Children in Armed Conflict in the Democratic Republic of the Congo*, April 2006, p. 2.

[63] *Ivi*, pp. 41-43, 61.

[64] Bazenguissa- Ganga Remy, "The Spread of Political Violence in Congo- Brazzaville,” *African Affairs,* Vol. 98, 1999, p. 54.

and Uganda. On Zairian territory the *interahamwe* could reorganise and rearm themselves due to the approval of their actions from both the central government of Mobutu and the local *strongmen.*[65] It did not took long before the militia was lunching attacks to the neighbouring Rwandan territories, to the South Kivu and Banyaulenge - also called 'Tutsi Congolese' due to the high numbers of Tutsi population that refuged in the area.[66] This led to a Rwandan response, united with the Banyamulenge, they started to defend their territory without the support of the international community. This contributed to the *interahamwe* further advancing in Zairian territory and taking control over major cities as Uvira, Bukavu, and Goma.[67] The conflicts on Zairian territory led a change of power in 1997, when the rebel forces of Laurent-Désiré Kabila, who had gained the acceptation of Zairians, overthrew Mobutu's power. L. Kabila's Alliance of Democratic Forces for the Liberation of Congo used a strategic occupation of mineral rich territories to organise politically and militarily the change of power, further consolidated by renaming the country to DRC. In addition, L. Kabila was dependent of its alliances with Angola, Uganda and Rwanda and all four countries had straightened their ties with the United States.[68] For L. Kabila such support was justified by its promise of bringing forward a political transformation towards democracy in DRC. However, by the end of 1997 such alliances were already fragile and soon to become oppositions. L. Kabila did not address any of the issues standing on the way of continuing the alliances: the marginalised Tutsi refugees in DRC; the citizenship issues of Banyamulenge; there were no secure borders with Rwanda and Uganda which meant that the attacks from rebel groups on the DRC territory towards the neighbouring countries never stopped even after the end of the first Great War of Congo. Without a decentralised government and control over Eastern DRC the region represented an opportunity for the creation of rebel groups and militias that continued the well established practices in the territory of engaging child soldiers and financing the militias through illicit trade of mineral resources. One of the most central rebel groups for the second Great War of Congo was the Movement for the Liberation of Congo led by Jean-Pierre Bemba, later on prosecuted by the ICC. Bemba was very well connected as he is the son of a successful businessman with former ties to Mobutu and minister under L. Kabila government.[69] Along with the

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[65] Clark John F., *Op. cit,*, pp. 55-56.

[66] *Ibidem.*

[67] *Ibidem.* and Deibert Michael, *Op. cit.*, pp. 56-57.

[68] In the period after the Cold War there was a Franco-American rivalry on the control of the central African territories. The bargain in this case was quite obvious: political and financial support for access of natural resources.

[69] Clark John F., *Op. cit,*, pp. 111, 117-119.

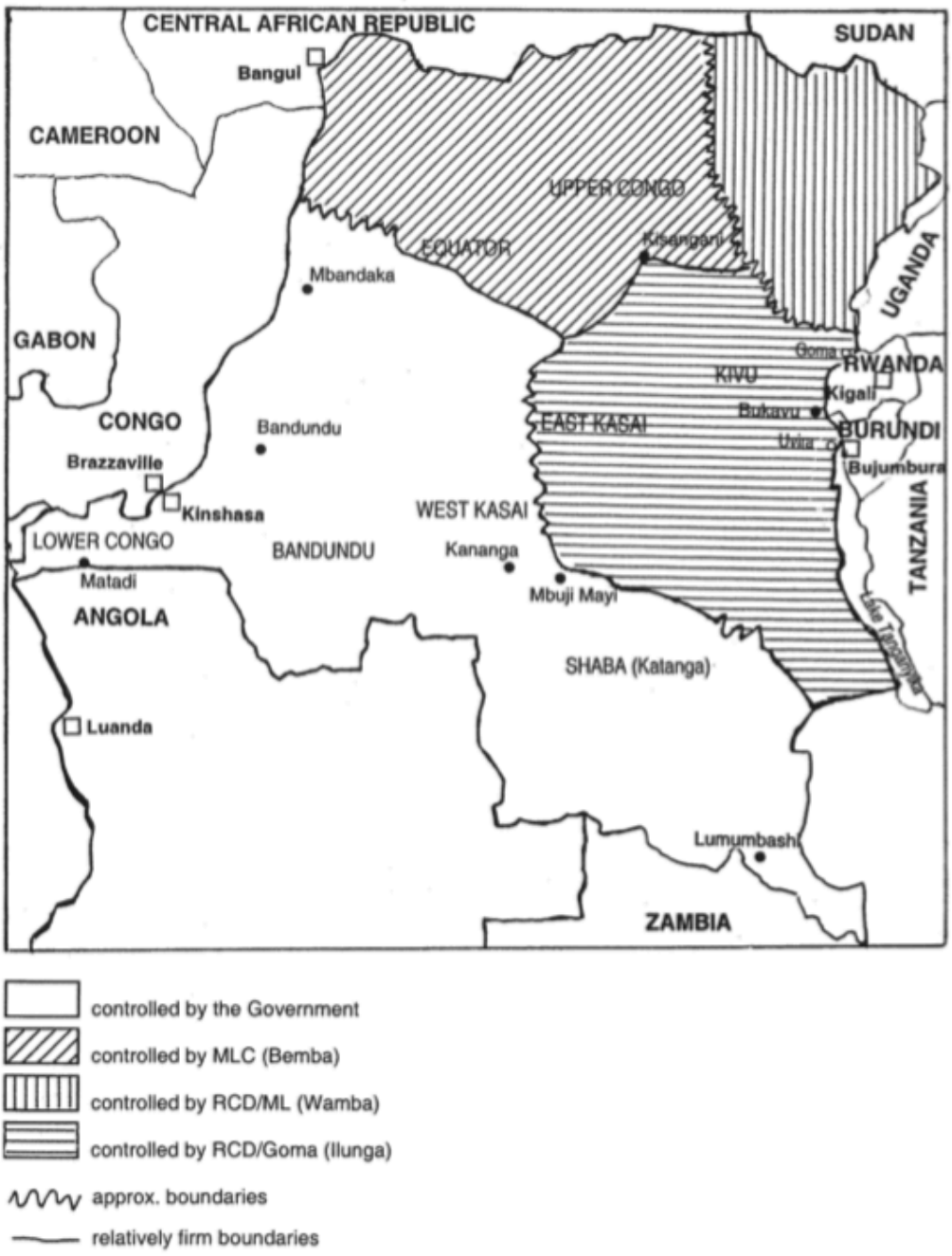
self-defence militia Mai-Mai, the *Forces Armées Congolaises* and the *Armée pour la Libération du Rwanda* had continued to spread blood in the Eastern part of the country. In addition, the Congolese people felt highly misrepresented and the situation shortly escalated. Within the month of August 1998, there were conflicts in Kinshasa; due to the new rules of citizenship of the soldiers of the *Forces Armées Congolaises*, only Congolese citizens were allowed to be part of the army, this led the Tutsi-Congolese to revolt refusing to disarm. South-Eastern DRC was under fire with an anti-L. Kabila revolt with the assistance of Rwandan and Ugandan soldiers. Congolese politicians met in Goma and created the anti-L. Kabila *Rassemblement Congolais pour la Démocratie* (RCD), their troops joined the Rwandan-Ugandan rebellion against L. Kabila and were shortly after attacked by Angola. The other countries that came in support of L. Kabila were Zimbabue, Namibia and Chad.[70] According to Osita Afoaku, the reasons for the Second Congo War were the " *strategic calculations by Rwanda and Uganda to attain security objectives that had previously motivated them to instigate the anti- Mobutu revolt*".[71]

Thus, in the year 2000, DRC was divided in four, during what was called to be the most violent conflict per number of deaths in Africa and, I would suggest, per perpetual use of systematic war crimes and crimes against humanity. The South-West part of the Country was controlled by L. Kabila's government, the Eastern part of the Country was controlled Rassemblement Congolais pour la Démocratie, the North-Eastern part by the same RCD but under different leadership and the North part of the Country was controlled by Movement for the Liberation of Congo led by Jean-Pierre Bemba.

[70] Weiss, "War and Peace in Democratic Republic of Congo", *Current African Issues*, Issue 22, 2000, Nordiska Afrikainstitutet, pp. 13-14.

[71] Clark John F., *Op. cit,*, p. 114.

The Politico-Military Zones of the Democratic Republic of the Congo—January 2000



(Weiss, *Op cit.,* p. 12.)

In February, the UN Security Council passed Resolution 1291 and deployed 5,537 peacekeepers, MONUC, to monitor the results and investigate potential violations of the 1999 Lusaka Ceasefire Agreement.[72] Shortly after followed by Resolution 1304, demanding for an observation of the 1999 Lusaka Agreement and the immediate withdrawal of the foreign armed forces from the DRC's territory.[73] However, before the arrival of MONUC in DRC, L. Kabila was assassinated and was

[72] United Nations Security Council, S/RES/1291 (2000) adopted on 24 February 2000, para. 4, 7 (a).

[73] United Nations Security Council, S/RES/1304 (2000) adopted on 16 June 2000, para. 3-5.

succeeded by his son Joseph. J. Kabila's first actions were to meet with Chirac, Bush, Kagame, Verhofstadt and address the UN Security Council. A year after the violent conflicts between MONUC militias, rebel groups and armies controlled by States and sef-organised was not over yet.[74] By the end of 2001 and the beginning of 2002 can be observed several attempts to establish regional peaces. In this period Bemba, supported by Uganda, became one of the main actors as he managed to arrange a control of the status quo in Ituri and signed a power-sharing agreement with Kinshasa. In addition to the agreement between Kinshasa and Angola with Uganda on the liberation of the two territories from Ugandan soldiers. Meanwhile the division of power and territory of Eastern DRC was still changing. What is interesting from a historic-ICL point of view is that in the second half of 2002 the Kivu region saw tree leaders rising Lubanga, Ntaganda, called *le terminateur*,[75] and Bemba with his soldiers called *les effaceurs*[76] later on this tree leaders were indicted by the ICC.[77] The conflicts in Eastern DRC were so violent that some cities, like Mongbwalu, were erased several times between 2002 and 2003. In this period, IRIN News presented a report of MONUC that stated that the more common forms of terror against the civilian population were SV, killing, torture, and forced cannibalism.[78] Nonetheless, between September 2002 and March 2003, the DRC and Rwanda, the DRC and Uganda signed the Pretoria Agreements and the Inter-Congolese Dialogue. This agreements provided with solutions for integrating various fractions of militias within the newly reorganised *Forces Armées de la République Démocratique du Congo*, as well as they established *Comité International d'Accompagnement de la Transition* a body to monitor the transition with members from South Africa, Angola, Belgium, Canada, Gabon, Zambia, the AU, the EU and MONUC.

- Second Congo War

The effect of the Agreements was very weak in Eastern DRC, where the *Front des Nationalistes et Intégrationnistes* and Uganda People's Defence Force were taking over the Ituri region. And further South in Kivu, Ugandan militias were fighting agains the *Rassemblement Congolais pour la*

[74] In this scenario it tase to be considered also the unknown number of civilians that lost their lives and/or suffered crimes against humanity.

[75] From French le terminateur - the terminator (translation by the author).

[76] From French effacer - wipe off, erase extinguish (translation by the author).

[77] Deibert Michael, *Op. Cit.*, 2013, pp. 81-84, 87.

[78] IRIN News, *DRC: MONUC confirms cannibalism in Mambasa, Mangina*, Published on 15 Jan 2003.

Démocratie. Bemba started a *campaign of rape*[79] in Central African Republic to return later on in DRC. As seen since the Rwandan genocide in Eastern DRC, the militias groups are constantly reorganising, changing alliances and names but by 2006 the Watchlist on Children in Armed Conflict was able to identify twelve parties in the ongoing conflict in violation of IHL including the official Congolese army.[80] After a few months of apparent improvement of the situation in the region facilitated by the Mai Mai militia signing an armistice with the RCD[81], and the central government promoting anti corruption and immigration policies; the ethnic fights between Hutu and Tutsi in the region, compared to "*house to house looting and raping*"[82] restarted and MONUC showed their ineffectiveness in intervening to help civilians. The ethnic motivations behind the different clashes were not an exhaustive explanation since many militias of Congolese origin were active to both defend their territory or fights for the control of mineral rich, diamonds, gold, zinc and cobalt territories. By 2004 can be observed abandoned or erased villages and counted excessive civilian victims in Kisangani, Bakavu or Ituri.[83] The conflicts between Armed Forces of the Democratic Republic of the Congo and the Mai Mai increased even though there was not much attention to this situation in Kinshasa too distracted by the elections to be conducted and the following protests.[84]

This violent situation is still ongoing in the Kivus and more generally in Eastern DRC. UN reports as well a NGOs reports like those of Human Rights Watch continue to inform on the atrocities committed until today and in the present times, rape killing and torture of soldiers and civilians as main weapons of war. As in national crimes, in international crime can be observed patterns and reasons facilitating the commission of such illicit conducts. In this scenario, atrocities committed on a daily bases can be seen for more than a decade. This contributes to the creation of a culture of crime allowed to grow more and more by impunity and lack of governance.[85] In addition, according to Schneider, Banholzer and Albarracin there are military organisational patterns that allow or

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[79] Deibert Michael, *Op. Cit.*, 2013, p. 88.

[80] Watchlist on Children in Armed Conflict, *Struggling to Survive:Children in Armed Conflict in the Democratic Republic of the Congo*, April 2006, pp. 10-11.

[81] It did not last long as less than a year after the fighting had restarted.

[82] Deibert Michael, *Op. Cit.*, 2013, p. 90.

[83] *Ivi,* pp. 93-95.

[84] *Ivi*, pp. 97-100.

[85] Allen Karen 2007, *DR Congo's terrifying ritual of violence,* BBC News. Available in English at: http://news.bbc.co.uk/2/hi/africa/6989771.stm.

encourage the crime of SV.[86] They argue, and defend, with data from the surveys they have conducted with former soldiers, that higher ranking soldiers can order to their subordinate to rape through the implementation of sanctions or rewards.[87] This is certainly not news if considered the ICTY cases of SBV and the or the UN Security Council Resolution 1820 that presents rape as weapon against civilians which's aim is to terrorise the population.[88] Nonetheless, Schneider, Banholzer and Albarracin found through their survey that in Eastern DRC the former combatants that did not join the militia or army on their own will, as the child soldiers massively used in the territory, as well soldiers that received drugs or food as a reward for violence were more likely to witness orders by their superiors to commit SBV.[89] Baaz and Stern explain, also referring to Eastern DRC, that the soldier that were not provided with food and monetary compensation were encouraged by the lack of means and the lack of organisation of the army to provide them with free time with their families, encouraging this way a 'normal' sexual behaviours, to engage in *lust rape.*[90] Analysing the different scholars findings it can be observed that there is more than one way to order the commission of SBV: a direct order is indeed less plausible than an indirect one using tools as rewards, sanctions, occasional lack of control of the militias and encouragement or forcing drugs on the soldiers.

Chapter I.II. - Local and International Actors

- MONUC and MONUSCO

The so called "Kivu Conflict", treated as a separate conflict by historians, that is still ongoing today started in 2004, with Nkunda's troops attacking North Kivu. However, there have been non stop battles and violence in the region since the Rwandan genocide. In this period, a part from the local militias, intergovernmental organisations as the UN and the AU intervened in the attempt to promote peace and protect civilians. The UN, first through MONUC and afterwards renamed and

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[86] Schneider, Banholzer and Albarracin, "Ordered Rape: A Principal–Agent Analysis of Wartime Sexual Violence in the DR Congo", *Violence Against Women*, Vol. 21 Number. 11, SAGE, 2015, pp. 1341-1342.

[87] *Ibidem.*

[88] United Nations Security Council, S/RES/1820 (2008), adopted on 19 June 2008.

[89] Schneider, Banholzer and Albarracin, "Ordered Rape: A Principal–Agent Analysis of Wartime Sexual Violence in the DR Congo", *Violence Against Women*, Vol. 21 Number. 11, SAGE, 2015, pp. 1342-1343.

[90] Baaz and Stern, "Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in theCongo (DRC)", *International Studies Quarterly*, Vol. 53, No. 2, 2009, Wiley on behalf of The International Studies Association, pp. 508-510.

reestablished MONUSCO attempted to approach the situation.[91] The mandates of the two missions are similar, however MONUC had more observatory functions,[92] than MONUSCO that increased the military personal to 19,815 and give more responsibilities to the peacekeepers as minimising threats, restoring peace and predispose local security forces to take over once they are gone.[93] As peacekeeping missions their primary goal is to protect civilians. The observatory functions of MONUC have provided several reports that are very useful in understanding the recurring issue of SBV in Eastern DRC. Nonetheless, both missions have been criticised about engaging themselves in sexual exploitation and abuse (SEA) even more than any other peacekeeping operation ever.[94] Consulting the website of Conduct in UN Field Missions it is possible to define more specifically the notion of SEA as including the following crimes: "transactional sex", "exploitative relationship", "rape", "sexual assault", "sexual activity with a minor", "soliciting transactional sex".[95] The majority of those specific crimes classify as SBV under the Rome statute Art. 7 *Crimes Against Humanity*.[96] The numbers regarding MONUC's allegations of SEA between 2007 and 2010 are 181 with 59 allegations in both 2007 and 2010.[97] Having the same number of allegations for two years is highly implausible statistically speaking. However, the numbers regarding MONUSCO between 2010 and 2019 are 182 allegations.[98] Considering that those statistics are criminal factors as under-reporting and under-recording due to lack of confidence in the rule of law and authorities and due to the not functional rule of law.[99] Kovatch identifies the reasons for such high numbers with cultural violence factors related to the host country, the troop-contributing country and the context of the mission itself within the UN.[100] In its first argument the author analyses the statistics

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[91] United Nations Security Council, S/RES/1925 (2010), adopted on 28 May 2010, para 1.

[92] United Nations Security Council, S/RES/1279 (1999), adopted on 30 November 1999, para 5 (a)-(e).

[93] United Nations Security Council, S/RES/1925 (2010), adopted on 28 May 2010, para 7.

[94] Kovatch Bonnie,"Sexual exploitation and abuse in UN peacekeeping missions: A case study of MONUC and MONUSCO", *The Journal of the Middle East and Africa*, Issue 7, Number 2, pp. 158-159.

[95] United Nations, *Conduct in UN Field Missions,* Available in English at: https://conduct.unmissions.org/table-of-allegations.

[96] International Criminal Court, *Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, Art. 7 (g).

[97] United Nations, *Conduct in UN Field Missions,* Available in English at: https://conduct.unmissions.org/table-of-allegations.

[98] *Ibidem.*

[99] Lotspeich, "Crime in the Transition Economies", *Europe-Asia Studies*, Vol. 47, No. 4, 1995, p. 577. and Miller, Gwdeland and Tatyana Koshechkina, *A Culture of Corruption? Coping with Government in Post-Communist Europe*, Central European University Press, 2001, pp. 24-25.

[100] Kovatch Bonnie, *Op cit.*

of rape and SBV in DRC as done here in the introduction and the beginning of this chapter. The second argument focuses on rape and SBV statistics of the single troop-contributing countries and finally she analyses the UN measures taken to prevent SEA and hypnotises that every mission develops a "culture" of operating on its own.[101] Thus, it might be arguable if the UN peacekeeping missions increased the culture of SBV or not but it is certain that they contributed to decrease the confidence in the authorities. In this context the statistics that are accessible become even less trustworthy considering factors as under-reporting and under-recording.[102] From another point of view this increases the possibility that victims might not even ask for medical help due to lack of confidence in the authorities; and finally increasing mortality. Further in this project are analysed the measures taken by the UN to punish and prevent SEA.[103]

- African Union

The AU has also undertaken initiatives in peace-building by cooperating with the UN Security council and the Southern African Development Community that intervened in the conflict as it represents major regional political challenges.[104] The diplomatic efforts of South Africa in the DRC conflict can be observed in several occasions as in the Pretoria Peace Accords of 2002 and the inter-Congolese dialogue. This said, it has to be considered the fact that in the list of allegations per nationality for the soldiers of MONUC and MONUSCO South Africa has the highest number.[105] The AU is also monitoring closely the situation in DRC, as in the conflict and the political transition progress.[106] However, as Carayannis and Pangburn point out that the AU's mechanisms in peace-building and prevention of human rights violations are very recent, 2002, and the situation in DRC represents the biggest challenge for them.[107]

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[101] *Ivi*, p. 169.

[102] See introduction to chapter I.

[103] See Chapter II.II.

[104] Human Rights Watch Africa Division, Binaifer Nowrojee, *Africa on its Own: Regional Intervention and Human Rights*, Policy Paper. And, World Peace Foundation, Carayannis and Pangburn, "AU and UN Cooperation in Peace Operations in the Democratic Republic of Congo", *African Politics, African Peace*, Paper No. 14, 2016.

[105] United Nations, *Conduct in UN Field Missions,* Available in English at: https://conduct.unmissions.org/table-of-allegations.

[106] African Union, *Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the region*, Event summary, 2013, para. 1-5.

[107] World Peace Foundation, Carayannis and Pangburn, "AU and UN Cooperation in Peace Operations in the Democratic Republic of Congo", *African Politics, African Peace*, Paper No. 14, 2016, pp. 2-4.

- Local and International Organisations

Between the most engaged and successful actors in countering SBV in DRC are some international and local NGOs, that report on the issue, provide medical and other types of help to victims, as well as providing legal help and have contributed to the creation of the 2006 legislation on widespread and systematic SBV. According to the World Food Program, there are 81 international NGOs, without counting some organisations as the Red Cross, Advocats sans Frontières and others.[108] It is impossible to find an updated list of the international NGOs that work and/or had worked in the DRC field. Considering also that some of the organisations do not explicitly state their projects country by country but just generally the issues they work on. It is therefore, impossible to study all of them or categorise their work. For this reason this paragraph analyses first the major NGOs that have reporting functions, as in contributing to rase awareness on the DRC situation; to follow the NGOs that provide legal help or work in the legal field; and finally humanitarian organisations.

Human Rights Watch (HRW) publishes an annual report focusing on freedom of expression and peaceful assembly, attacks on civilians by both armed groups and official military, justice and accountability regarding international trials. Along with the reports the organisation publishes relevant essays to the situation in DRC.[109] In addition HRW cooperates with the Congo Research Group, under New York University's Centre on International Cooperation on the Kivu Security Tracker Project. This project provides information on the conflict and more generally violence in Eastern DRC, the verification of this information takes up to several weeks once provided by a network of trained researchers in the field.[110] The Working Group on Women, Peace and Security reports, or even better collects since 2009 all the UN initiatives, as recommendations, resolutions etc. by date of issue in addition to reporting thoroughly the UN Security Council meetings on the region.[111]

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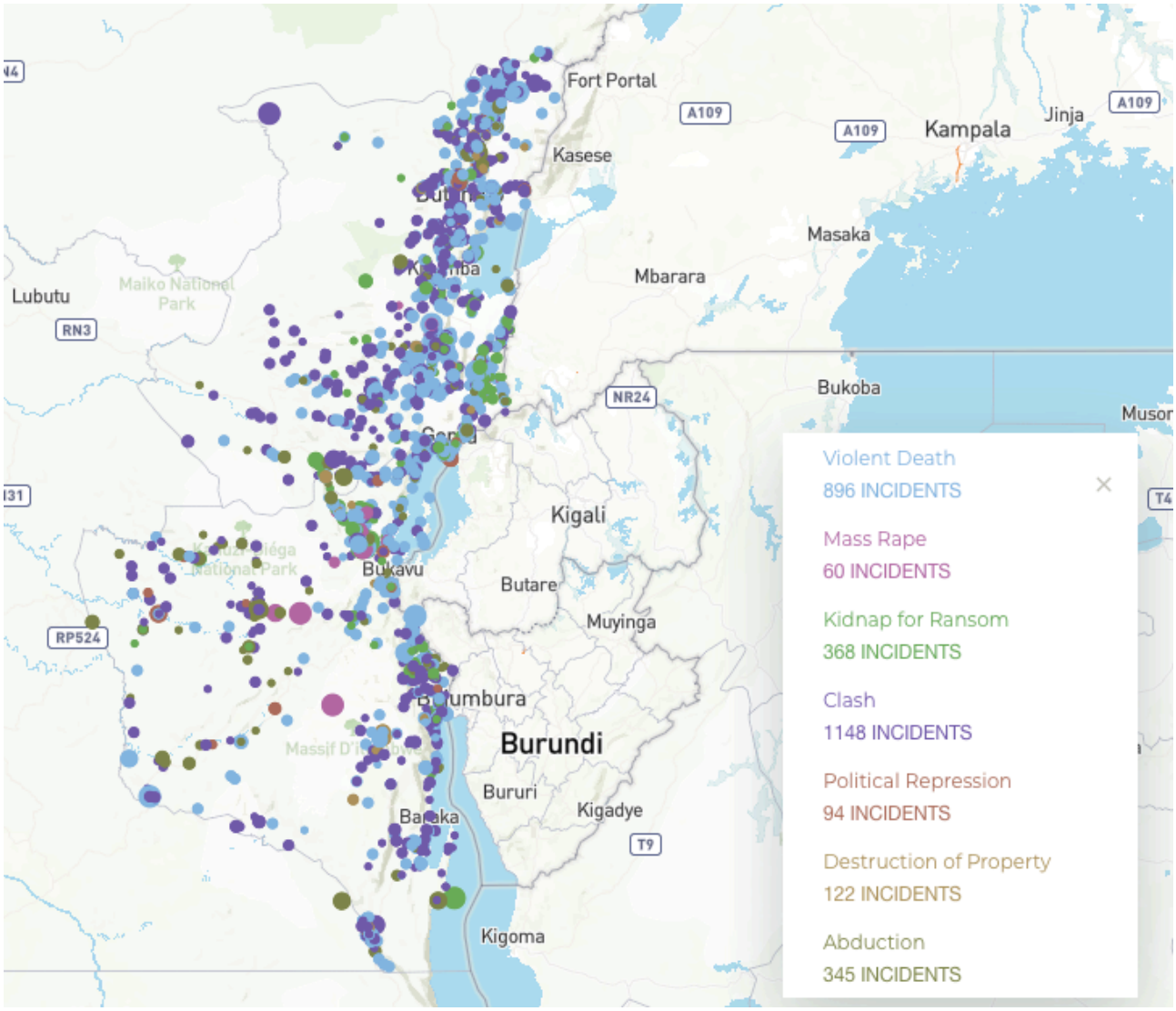
[108] World Food Programme, Powered by a free Atlassian Confluence Community License, *List of NGOs in Democratic Republic of Congo*.

[109] Human Rights Watch, *World Report 2019*.

[110] Kivu Security Tracker, Methodology.

[111] Working Group on Women, Peace and Security, database.

Kivu Security Tracker Project map of Eastern DRC violence registered April 2017-March 2018



(Kivu Security Tracker, *Methodology*, Accessed on 20 March 2019.)

Amnesty International as HRW produces a world report, to witch ads categories as detention and corporate accountability, and provides news on the political and humanitarian situation in the Country.[112] The outcome of the work of this organisations does not just contribute to raising awareness on the issues but also engages in the very common practice of *Blaming and Shaming* by NGOs to governments and international organisations violating Human Rights. By having access to well verified information, institutions as the ICC, could be facilitated in data and evidence gathering for further investigations; in the same manner in which NGOs cooperate with the International, Impartial and Independent Mechanism to Assist in the Investigation and the Prosecution of Persons

[112] Amnesty International, World Report: Democratic Republic of Congo 2017/2018.

Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. In the case of SBV evidence is extremely important as in most of the cases, the charges of this crime have been dismissed due to the lack of evidence.

A significant number of international organisations work on legal issues in DRC as access to justice, trainings for lawyers, legal assistance and trying to improve the rule of law. For instance the American Bar Association has undertaken a significant number of projects in this area as the work with the government on reforming the prison system with a particular attention to the pre-trial detentions; the ongoing project on creating a case law database; awareness tasing on SBV, offering free legal assistance on related cases and providing trainings for local lawyers; the initiative of opening mobile courts; and finally the association worked on developing an early warning system for outbreaks of violence in rural areas.[113] In this field Advocats sans Frontières cooperates with local NGOs for their three projects: first on access to justice; awareness rising on human rights in pre-election period and facilitation to access to local politics.[114] Trial International as well offers free legal assistance to victims of international crimes, provides trainings for local human rights defenders to monitor the situation of the victims and cooperates with local organisations in new methods to fight impunity and video recordings of serious violations of human rights.[115] During the drafting of the 2006 Congolese legislation on rape and SV several international and local NGOs contributed to the result of having a domestic norm inspired by the international one of the Rome Statute.[116] Indeed, without the cooperation of the local NGOs the international ones would not be able to achieve as much. For instance the projects of Advocats sans Frontières are implemented thanks to the cooperation with Goma Bar Association and *Dynamique des Femmes Juristes* that on their hand cooperate with other local and international organisations to realise project as legal assistance or awareness raising. Other local organisations that are active in different fields are *Bureau pour le Volontariat au Service de l'Enfance et de la Santé*, work and lobbying for human, women and children's rights, facilitation of societal reintegration of women victims of SBV and other humanitarian activities.[117] Likewise Women's Synergy for Victims of Sexual Violence, is active in different fields and cooperates with international organisations, however, this is a coalition

[113] American Bar Association, Our work in the DRC.

[114] Advocats sans Frontières, Projects in Democratic Republic of Congo.

[115] Trial International, Democratic Republic of the Congo projects.

[116] See Zongwe Dunia Prince, "The New Sexual Violence Legislation in the Congo: Dressing Indelible Scars on HumanDignity", *African Studies Review*, Vol. 55, No. 2, 2012, Cambridge University Press, pp. 37-57. and the 2006 legislation will be further analysed in chapter II.I.

[117] Bureau pour le Volontariat au Service de l'Enfance et de la Santé, Mission.

of 33 NGOs locally based that provide legal assistance, concealing and medical care. Other organisations treat superficially unrelated issues to SBV but central to the major issues of DRC as the coalition *Ligue Congolaise de Lutte Contre la Corruption* that cooperates with the Canadian and French government, the EU and carries on independent audits with the purpose of a national integrity system.[118] The work against corruption is very relevant to the issue of SBV as the two crimes are correlated: with more corruption there is more space for illicit exploitation of natural resources that funds local militias that use SBV as a weapon.

As for the international humanitarian organisations, there are several that treat victims of SBV, torture victims and epidemics as Ebola and Cholera. Some of this organisations, as the American Medical Association, Boston University School of Medicine, Harvard Humanitarian Initiative, Beth Israel Deaconess Medical Centre also conduct surveys with the victims of SBV and study this issue. The outcomes of such studies are of a great importance in order to understand, even if not fully, the scale of SBV in DRC and consecutive issues. As consecutive issues the medical research identifies all medical, psychological and social consequences for victims, both male and female, of SBV. However, such statistical data is often acquired form studying particular regions or a limited number of people, this creates some discrepancies in the final finings but provides a general idea of what the real situation is. For instance, the American Medical Association in 2010, indicates that 39,7% are the rates of reported SBV if adopting a wider definition of the crime, and 74.3% of women and 64.5% of men experienced conflict related SBV.[119] However, the EU presents a report in 2014 that shows that 22% of women and 10% of men are victims of SBV in a conflict context and 50% of women are victims of SBV in a domestic context.[120] Since none of the literature suggests a change in patterns of the active forces nighter a change in the conflict, this numbers must be considered as indicative because the difference between 74.3% and 50% of the population is very big. In reading, such statistics it must be considered as well that first, crime statistics thank to be under-reported and under-recorded and second that in an active war zone it is harder to keep track of crime rates in general. Nonetheless, this data is extremely useful in understanding the issues that are consequent to the crime itself. A 2009 study presents that of 255 responders, victims of SBV, 29% of women were

[118] Ligue Congolaise de Lutte Contre la Corruption , Rapport d'Audit du projet Impact.

[119] Johnson K., Scott J., Rughita, B., Kisielewski M., Asher J., Ong, R., & Lawry, L., " Associations of sexual violence and human rights violations with physical and mental health in territories of the Eastern Democratic Republic of Congo", *Journal of the American Medical Association,* Issue 304, 2010, p. 553.

[120] European Parliament, Sexual violence in the Democratic Republic of Congo, *At a glance*, November 2014.

rejected from their families and 6.2% from the entire community.[121] A subsequent qualitative study of 86 participants and victims of SBV compared the participants perception of their psyco-phisical and social estate concluding that counselling services need to increase not just for women but also for men in order to avoid family and community rejection.[122] On the same topic a 2012 study showed that of 310 responders 269 reported to be a victim of SBV and all of them experienced rejection in some form.[123] The same study presents that from 269 victims of SBV 168 have contracted HIV/AIDS or any other sexually transmitted diseases and infections from the sexual violence they suffered.[124] A 2010 study on HIV patterns and prevalence in DRC shows that the regions of the country were the conflict is ongoing is between 4.39% and 35.88%, where the percentage stands for population with the disease.[125] Thus, considering the two studies can be hypothesised that there is link between SBV in the context of conflict and spreading of HIV. Other studies show the psycho-medical traumatic effects of SBV, adopting a wide definition,[126] are higher compared to the major studies worldwide in the last 20 years.[127] This study focused on two of the three symptoms of post-traumatic stress syndrome: intrusion as in unexpected recurring memories of the trauma, and avoidance as in avoidance of the traumatic event to the point of ignoring physical complications or contact with family and close ones.

- Foundation Panzi and Panzi Hospital

It is interesting to observe that the vast majority of the statistics related to victims of SBV have been realised in cooperation with the Foundation Panzi or the Panzi Hospital. The Hospital has been

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[121] Harvard Humanitarian Initiative, *Characterizing sexual violence in the Democratic Republic of the Congo: profiles of violence, community responses, and implications for the protection of women,* Boston: Harvard Humanitarian Initiative, 2009, pp. 14-15.

[122] Kelly Jocelyn, Kabanga Justin, Cragin Will, Alcayna-Stevens Lys, Sadia Haider & Michael J. Vanrooyen, "'If your husband doesn't humiliate you, other people won't': Gendered attitudes towards sexual violence in eastern Democratic Republic of Congo", *Global Public Health*, Issue 7 No. 3, pp. 288-289, 296-297.

[123] Albutt Katherine, Kelly Jocelyn, Kabanga Justin, and VanRooyen Michael, "Stigmatisation and rejection of survivors of sexual violence in eastern Democratic Republic of the Congo", *Disasters*, 2017, Issue 41, No. 2, p. 217.

[124] *Ivi*, p. 218.

[125] Messina Jane P., Emch Michael, Muwonga Jeremie, Mwandagalirwa Kashamuka, Edidi Samuel B., Mama Nicaise, Augustin Okenge, Steven R. Meshnick, "Spatial and socio-behavioral patterns of HIV prevalence in the Democratic Republic of Congo", *Social Science & Medicine*, Issue 71, 2010, p. 1432.

[126] Generally including: sexual abuse, pelvic inflammatory disease, urinary tract infections, infertility, prolapsed uterus, vesico-vaginal fistula, cystocele and genital mutilation.

[127] Mankuta David MD, Aziz-Suleyman Aziza MD, Liron Yochai4 and Michel Allon PhD, "Field Evaluation and Treatment of Short-Term Psycho-Medical Trauma after Sexual Assault in the Democratic Republic of Congo", *IMAJ*, 2012, Issue 14, pp. 654-656.

founded in 1999 as a response to the war in the region and it is now a general reference hospital for the territory. The founder of the hospital is Dr. Denis Mukwege, gynaecological surgeon and Nobel Peace Prize 2018 winner for his work against SBV as a weapon of war. The hospital adopts a unique holistic model, the Panzi Model, for treating mainly victims of SBV. The model consists in providing medical care also sophisticated procedures, as in the cases were women were gun shot in their genitalia after sexual violence[128]; the hospital provides psychological treatment from the moment of recovery on, also adopting alternatives therapies; through Maison Dorcas, an after care centre, the hospital offers assistance with community reintegration; through the hospital victims of SBV might as well seek free legal assistance or access the education fund.[129] The importance of providing all of this services for victims in one structure is significant because it helps, throughout central organisation, effective results and cooperation between the different services to address specific needs. The impact of the hospital is quite wide, for instance in the period 2004-2008 there were treated 4709 women victims of SBV. In being cooperative with other hospitals both the Foundation and the Panzi Hospital have provided researchers with extremely valuable data for the understanding of the consequences of the wide spread SBV in the region as well as for the understanding of patterns aiming to map the militias and official armed forces behavioural trends. This information could be extremely valuable for projects or even policies against SV.

Chapter II. - Domestic and International legislation

This chapter focuses on the legal framework, first on a domestic level and afterwords on an international one. The chapter opens with an analysis of the most recent legal amendments of the domestic law against SBV, in the Penal Code, the Penal Procedural Code and the Military Code, with a consideration of the reality of the crime. The aim of this analysis is to measure the effectiveness of the national and international legislation and policies with respect to the peculiarity of the cases in DRC. The Songo Mboyo case was the first example of a progressive interpretation of the domestic pre-amendments law. For this reason this case represents a turning point after and during which the amendments took into consideration the international norms in the counteraction of SBV. After the analysis of the 2006 amendments of the domestic legislation, the chapter focuses on the issue of access to justice and the regulations related to the admissibility of cases before a court. The second part focuses on the policy changes and specific strategic plans to counteract SV,

[128] An unfortunately common practice.

[129] All information available on the website of the Panzi Foundation, available in English at their website.

both from the UN and the DRC. The analysis continues with a presentation of the ICC policies addressing SV and cases before the ICC concerning SBV in DRC. With a particular attention on the difficulties associated with the investigation and prosecution of this specific type of crime. To conclude with a focus on the work of the Trust Fund for Victims in DRC and the outcomes for the victims.

Chapter II.I. - National Legal Framework

- Between Old and New Legislation

The criminal legal system in DRC does not make difference between felonies, misdemeanours and contraventions. The different infractions under the Congolese law can be categorised as ordinary or military depending on the gravity of each case. Given the seriousness of the issue of SBV in conflict it is necessary to analyse the domestic legislation in order to understand the reasons for the lack of a deterrence effect. The reasons varay: for instance, a law would not provoke deterrence if it does not take into consideration the reality of a crime, as in the methods in which the crime is done. In other words the law might not consider or partially consider the elements of the crime of SBV. Another reason for not achieving a deterrence effect might be related to difficulties in accessing justice or difficulties related to the admissibility criteria of the domestic courts. In the particular case of the DRC can be observed some significant amendments of the domestic legislation in 2006. The previous legislation presented several gaps that severely influenced the investigations, prosecutions and protection of victims and generally vulnerable persons.[130] The most popular case that addresses such gaps is the Songo Mboyo, analysed by scholars, as Zongwe and organisations as Avocats sans Frontières or the International Centre for Transitional Justice for the initiatives and interpretation of the judges that provided the incentive for the 2006 amendments.[131] In this case eight soldiers of the official Congolese army were found guilty of crimes agains humanity and more specifically widespread and systematic rape.[132] The facts of the case are that in 2003 after not receiving their salary, the soldiers of the 9th battalion of the Armed Forces of the DRC started widespread looting and SBV in the village Songo Mboyo where were raped civilians, both female and male.[133] Since

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[130] Zongwe Dunia Prince, *Op cit.*, pp. 41-42.

[131] Military Tribunal Garnison Mbandaka v. Eliwo Ngoy, Tribunal Militaire de Garnison de Mbandaka, Affaire Songo Mboyo, RPA 615/2006, 12 avril 2006.

[132] *Ibidem*. and Zongwe Dunia Prince, *Op cit.*, pp. 42-43. and Avocats Sans Frontières, *The application of the Rome Statue of the International Criminal Court by the Courts of Democratic Republic of Congo*, Brussels, pp. 9, 112.

[133] *Ibidem*, supra nota.

the old legislation was laking in definitions, as for the needed evidence and the elements of crime, the defence argued that testimonies and the medico-gynaecological reports were not sufficient proof to consider the defendants guilty beyond reasonable doubt. In addition the defence argued that the purpose of the old Congolese Penal Code was to protect specifically female victims and not male ones.[134] Nonetheless, the Military Tribunal gave a very progressive interpretation of the legislation based on the Rome Statute. Thus, the Tribunal interpreted the act of raping more than 30 survived victims as an widespread and systematic act of SV, categorised in the Rome Statute as a crime against humanity. The Tribunal based its decision on the hard evidence provided by the medical personal and considering as evidence the testimonies of the survivors. In addition, the Tribunal, basing its opinion on the Rome Statute and Elements of Crime, interpreted the domestic law as non-gendered and not specific in the protection of just women from SV.[135] This case represents an important step forward from the past interpretations. The Military Tribunal Garnison Mbandaka's broad-minded interpretation is an example of how the international criminal legislation influenced the domestic norm to the point to subsequently base the domestic law on the international norm. Further, Zongwe argues that before the Songo Mboyo case the absence of a definition of the crime of rape in both the Penal Code and the 2002 Military Code gave space to the judges to interpret the jurisprudence with little understanding of the crime and very little consideration of the impact on the victims, specifically when those victims were female. Following the Songo Mboyo case, the DRC made amendments to the Penal Code. In the Official Journal of 20 July 2016 the motivations of changing the Penal Code are clearly expressed ad a need to both address the evolution of the way crimes are committed and the decision to address it by integrating international norms in the domestic law.[136] The amendment added to the Penal Code Section X, modified and completed Section II under Title IV and modified Section III under Title IV.[137] In the new Section X it is clearly stated the criminal responsibility for the crime of SV regardless of whether the accused is a military personal or civilian and regardless rank concerning the military personnel.[138] Section II

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[134] Zongwe Dunia Prince, *Op cit.,*p. 42.

[135] Military Tribunal Garnison Mbandaka v. Eliwo Ngoy, Tribunal Militaire de Garnison de Mbandaka, Affaire Songo Mboyo, RPA 615/2006, 12 avril 2006. and Zongwe Dunia Prince, "The New Sexual Violence Legislation in the Congo: Dressing Indelible Scars on HumanDignity", *African Studies Review*, Vol. 55, No. 2, 2012, pp. 42-43. and Avocats Sans Frontières, *The application of the Rome Statue of the International Criminal Court by the Courts of Democratic Republic of Congo*, Brussels, pp. 9, 112.

[136] Cabinet du Président de la République, *Journal Officiel de la République Démocratique du Congo*, Loi n° 06/018 du 20 juillet 2006, Partie Première, 47ème année, n_15, Kinshasa - 1er août 2006.

[137] *Ivi*, Articles 1-3.

[138] *Ivi*, Article 1.

under Title IV had modified the Articles 167 and 168 concerning immoral and indecent acts not classifiable as serious as SV. The interesting part about Article 167 is that uses the therm *consentement valable* (valid consent) in specifying that the acts described under the Articles will be considered indecent in absence of valid consent form the person towards whom the act is meant. This important part is that in this case can be observed an example of attempt to consider the victims perception of the crime and not the perpetrators.[139] In other words, focusing on determining consent moves the attention on the conduct of the victim and not to the one of the perpetrator. Therefore, being flexible on the notion of consent or not give importance at all to it, is considered to be a legislative approach that takes into consideration the victims needs with the purpose of facilitating prosecutions and increasing a deterrence effect.[140] The amendment does not consider consent in Art. 174 b against pimping and prostitution when the victim is performing debauchery acts. In this case not considering consent, and so punishing everyone who performed such acts with or without consent, has the opposite effect from Art 167. Still, under the following Art. 174 c, the consent of a person forced into prostitution is not taken into consideration and such person is to be considered a victim ad not a perpetrator. In addition, Art. 174 c uses as reference the EU definition of Trafficking in Human Beings which is intentionally drafted with a victims centred approach.[141] Likewise, many scholars agree that the interpretation that should be given to 'consent' in the amended legislation should not take into consideration as a *genuine consent* for the acts categorisable as rape; and they agree that the definition of rape is, in this case, very broad.[142] The amended Articles that define SV in the form of rape are Art. 170, 171 and 171 bis, where the last two Articles define aggravating circumstances to the conduct.[143] To summarise the crimes defined

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[139] See Pillay Navi, "Address— Interdisciplinary Colloquium on Sexual Violence as International Crime: Sexual Violence: Standing by the Victim", *Law & Social Inquiry*, Journal of American Bar Foundation, Volume 35, Issue 4, Fall 2010, pp. 849-850.

[140] A good example of legislation with a victims centred approach is the European Union definition of Trafficking in human beings. Para. 1 *The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.* Further, adding in para. 5 *When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.* Official Journal of the European Union, 15.4.2011.

[141] *Ibidem*.

[142] See Zongwe Dunia Prince, *Op cit*. And Joseph, 2008, "Gender and International Criminal Court Can Bring Justice to Victims of Sexual of Sexual Violence", *Texas Journal of Women and Law*, Issue 18. And Schomburg, Peterson. 2007. "Genuine Consent of Sexual Violence Under International Criminal Law." *American Journal of International Law*, Issue 101, pp. 121-40.

[143] Cabinet du Président de la République, *Journal Officiel de la République Démocratique du Congo*, Loi n° 06/018 du 20 juillet 2006, Partie Première, 47ème année, n_15, Kinshasa - 1er août 2006.

by the amended legislation that fall under the category of SV are: indecent assault, rape, debauchery acts, pimping, forced prostitution, sexual harassment, sexual slavery, forced marriage, genital mutilation, zoophilia, deliberate transmission of sexually transmitted diseases and infections, trafficking and sexual exploitation of children, forced pregnancy, forced sterilisation, pedopornography, prostitution of children.(See Table)

Sexual Violence under the amended Congolese Penal Code 2006

Articles	**Types of SV**
167 and 168	Indecent Assault
170, 171 and 171 bis	Rape
172, 173, 174	Debauchery
174 b	Pimping
174 c	Forced Prostitution
174 d	Sexual Harassment
174 e	Sexual Slavery
174 f	Forced Marriage
174 g	Genital Mutilation
174 h	Zoophilia
174 i	Deliberate Transmission of Sexually Transmitted Diseases and Infections
174 j	Trafficking and Sexual Exploitation of Children
174 k	Forced Pregnancy
174 l	Forced Sterilisation
174 m	Pedopornography
174 n	Prostitution of Children

(Developed by Calina Mladenova based on Cabinet du Président de la République, *Journal Officiel de la République Démocratique du Congo*, Loi n° 06/018 du 20 juillet 2006, Partie Première, 47ème année, n_15, Kinshasa - 1er août 2006.)

The Penal Code refers to SV in context of peace but the definitions that it provides are used also when it comes to consider the crime under the Military Code. Indeed, if one of the 16 crimes defined as SV by the Penal Code is committed in a manner considered "*widespread or systematic against ... civilians*"[144] such crime is to be considered under the Military Code Art. 169 para. 7 as a

[144] Cabinet du Président de la République, *Journal Officiel de la République Démocratique du Congo Loi n° 024-2002 du 18 novembre 2002 du Code pénal militaire* (Military Code), Art. 169.

crime against humanity. Later on, in 2016 with Act 15/023 amending la Act n° 024-2002 the Military Code further transferred the international norms under the Rome Statute in the domestic legislation with the purpose of updating the domestic definition of crimes against humanity. This last amendment confirms SV and the 16 crimes that classify as such to be defined as crimes against humanity and modifies the some elements as the attack must be "*widespread or systematic against any civilian population and with knowledge of the attack*".[145] The last part intends to give criminal responsibility also to the military personnel that had knowledge of the attack but was not personally involved. However, the Military Code does not make reference to the definitions of the Penal Code nor it contains suggestion or reference to use such definitions during Military Trials. This might create a problem of jurisdiction in the situation where a Military Court has to determine if a crime classifies as a crime against humanity but has no authorisation to use the Penal Code for some reason. Nonetheless, such problem would be easily avoided with a minimal amendment to the Military Code.

To summarise, the amendments in 2006 provided a very wide definition of the crimes of sexual nature that maintains a gender-neutral approach and the Military Code may be used together with the Penal Code in prosecuting widespread and systematic SV. In the case of the DRC is very important to have a wide definition of the SV related crimes due to the different and ever-changing ways such crimes are committed (as shooting women in their vaginas). Further, the gender-neutral approach of the amended law provides the opportunity to punish SV against men or committed by women. This last element if successfully put in action would represent a progressive practice not just for the region but worldwide.

The knowledge and the interpretation of the law is fundamental for understanding the statistics and reports related to the prosecution of the crimes categorisable as SV. Otherwise it might happen that if a research is solely based on a secondary sources or other reports the outcomes of such research may begin with an incomplete or inaccurate understanding of the law.[146] Likewise using unverified data might lead to a western based point of view that does not represent the reality of the situation.

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[145] Cabinet du Président de la République, *Journal Officiel de la République Démocratique du Congo Loi n° 15/023 du 31 décembre 2015 modifiant la Loi n° 024/2002 du 18 novembre 2002 portant Code pénal militaire*, 31 décembre 2015. Section 2, Art. 222.

[146] See the following briefing that considers just the Military Code and does take into consideration the Penal Code just partially and does not take into consideration at all its amendments. Therefore the analysis of the accountability presents anomalies as not being possible to consider all cases that fall into the category of international crimes under domestic law. Candeias, Côté, Papageorgiou, and Raymond-Jetté, *The Accountability Landscape in Eastern DRC Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)*, International Centre for Transitional Justice, July 2015.

In the case of widespread and systematic SV the rules for access to justice are to be found in the Military Judicial Code since the crime is classifiable under crime against humanity and it is under the jurisdiction of the Military Tribunals. Article 129 of the Military Judicial Code states that the Military jurisdiction accepts the rules of the common criminal law.[147] Under the common criminal procedure there are three ways to begin a criminal case: if an officer of the judicial police or a judge or a public prosecutor is witness of a crime; if a victim of a crime submits a written or oral complaint to n officer of the judicial police or a judge or a public prosecutor; and lastly if a witness of the crime testifies before an officer of the judicial police or a judge or a public prosecutor.[148] However, for some crimes, as sexual harassment, or infractions for which the penalty is more than five years and are committed in foreign countries, or insult to an official authority as a police officer, or counterfeit of intellectual property etc. the victim itself has to testify of the crime and testimonies of witnesses cannot start a criminal case.[149] After the confirmation of the infraction the officer of the judicial police or the judge or the public prosecutor may open an investigation.[150] Regarding SV related crimes in conflict the judicial police has the obligation to refer the situation to a prosecutor within 24 hours.[151] The investigation in the case of SV classifiable as crime against humanity must be conducted within a month from the referral to the judiciary authority and the judgement must be issued within three months from the same moment.[152] Concerning the same crime an officer may proceed to an arrest before informing the superior officers.[153] During the trial the judge has to request a medical and psycho-medical opinion in determining the physical and mental estate of the victim and to rule appropriate treatments that the victim has to receive.[154] During the trial, consent cannot be presumed under no circumstances and the previous sexual behaviour of the victim cannot exonerate the defendant from responsibility.[155] All physical exams

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[147] Cabinet du Président de la République, *Journal Officiel de la République Démocratique du Congo Loi n° 023/2002 du 18 novembre 2002 portant Code Judiciaire Militaire*, 20 March 2003, Art. 129.

[148] USAID and ProJustice, *Guide pratique d'accès à la justice en R.D. Congo: Repertoire des Organisations de la Société Civile (Kindu/Maniema, Sud-Kivu, Katanga, Bandundu, Kinshasa)*, Series: Les dix clefs de l'accès à la justice, 2010, pp. 53-57.

[149] *Ivi*, p. 55.

[150] *Ivi*, p. 57.

[151] Cabinet du Président de la République, *Journal Officiel de la République Démocratique du Congo Loi n° 023/2002 du 18 novembre 2002 portant Code Judiciaire Militaire*, 20 March 2003, Art. 7 bis.

[152] *Ibidem.*

[153] *Ivi*, Art. 10.

[154] *Ivi*, Art. 14.

[155] *Ibidem.*

must be conducted by a doctor of choosing or by a person from the same sex.[156] The prosecutor and the judge are under obligation to assure the safety, the dignity, the respect, the physical and psychological well being of the victim and its private life.[157] From a victim oriented point of view the Criminal Procedural Code and the Military Judiciary Code cover the needs of the victims and attempt to avoid any kind of secondary victimisation. On paper the legislation respects very well the reality of this kind of crimes and shows attention to the victims, all characteristics that are to be associated with very progressive and victim oriented rules. Nonetheless, there is no evidence of a deterrence effect after the amendments in 2006.

- Access to, and Other Issues Related to Justice

Organisations as Physicians for Human Rights, Avocats sans Frontières, the UN Human Rights Office of the High Commissioner and the EU have reported problems related to the access to justice generally and specifically for victims of SV. For instance, Avocats sans Frontières have published a ten year report, 2002-2012, on the jurisprudence related to SV in DRC. The report analyses 209 sentences concerning SV of which the wider number is located in the Kivu region.[158] The major issues concerning the access to justice presented in this report are the numerous situations in which a case can become inadmissible, due to very complex procedures or negligence of lawyers who reveal the name of victims during the trial or several judgments have been decided to be inadmissible in second instance due to the errors in establishing competence of the court in first instance.[159] In other words, there is a high risk to declare a case inadmissible due to small procedural errors as well as serious negligence mistakes. The report further presents that there are major difficulties in obtaining a medical visit and then document proving the estate of the victim, around 30% of the times such visit is performed.[160] This becomes a significant problem in proving that the act of SV actually occurred and cases are often dismissed. The judges often interpret the legislation regarding consent in a wrongful way and the act of SV cannot be determined with certainty which results in the dismissal of the case.[161] Some tribunals, that are very isolated in the

[156] *Ivi*, Art. 26.

[157] *Ivi*, Art. 74.

[158] Avocats sans Frontières, *La Justice Face à la Banalisation du Viol en République Démocratique du Congo: Etude de jurisprudence en matière des violences sexuelles de droit commun*, 2012, pp. 7-10.

[159] *Ivi*, pp. 33-34.

[160] *Ivi*, p. 35.

[161] *Ivi*, pp. 39-41.

territory, have continued to use pre-amended legislation.[162] The report shows that the aggravating circumstances of being a public officer and exercising authority over the victim is very rarely used by the judges.[163] Generally the report presents how the judges are interpreting the law in different way and sometimes using partially the existing legislations.

Another report, more recent, made in cooperation between Trial International, the UN, the EU and Foundation Panzi made in the period between 2006 and 2017, presents other issues related to the access to justice. For instance, the remote location of the courts that makes it difficult to physically reach justice for the victims, the mobile courts that are extremely expensive.[164] The report further explains that the reason for having such a small number of trials is due to the adversity in investigating colleagues, most of the SV related crimes are committed by public officials and they have to be investigated by public authorities as well.[165] This contributes to the difficulties that the judicial authorities have in guaranteeing the safety of the victims.[166] The judicial authorities are not aware of the legal amendments nor the progressive interpretation of the legislation over all.[167] The judgments very rarely rule in favour of compensations for the victims,[168] which does not increase the trust to the authorities and provokes a decrease in approaching the justice system by the victims.

The issues presented by this two reports are the main issues that can be found on the topic of access to justice regarding SV in DRC. Such issues might be emerging from the corruption problems that the country has as well as from a lack in informing and awareness raising about the amendments of the domestic legislation in the legal practitioners community.

Chapter II.II. - International Efforts Against Impunity

- United Nations and Strategies Against Sexual Violence

There have been major international efforts to counteract SV from both legal and political perspectives. Mostly the UN and the ICC have undertaken initiatives with the purpose of

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[162] *Ivi*, p. 44.

[163] *Ivi*, p. 45.

[164] Trial International, *Rapport présenté au Comité des droits de l'homme en vue du quatrième examen périodique de la République démocratique du Congo, le 16 octobre 2017*, à Genève, 18 septembre 2017, para. 11-14.

[165] *Ivi*, para. 15-16, 20.

[166] *Ivi*, para. 17-18, 21.

[167] *Ivi*, para. 22-27.

[168] *Ivi*, para. 34-37.

prevention, ending impunity and assistance to victims. In 2009, the UN Action Against Sexual Violence in Conflict Network has contributed significantly to the development of a Comprehensive Strategy on Combating Sexual Violence in DRC that served as basis for the creation of the National Strategy for Combating Gender Based Violence by the end of the same year. The two strategies are very similar and are meant to complement each other with the cooperation between national authorities and UN Agencies. The UN Strategy is composed of five elements, each of them under a different UN Agency: the UN High Commissioner for Refugees leads the protection and prevention program; MONUSCO and the Office of the UN High Commissioner for Human Rights work on ending impunity; MONUSCO specifically leads the security sector reform; UN Children's Emergency Fund leads the program for assistance of victims of SV; and finally the UN Fund for Population Activities works on mapping and collecting data on SV. Since the UN strategy is integrated in the National one, this last one is complete of both the international and the national actions against SV. For this reason the analysis of the political efforts against SV will begin with the National Strategy (*Stratégie Nationale de Lutte contre les Violences Basées sur le Genre*). The National Strategy adopts a wide definition of GBV as it includes all crimes categorised as SV under domestic law, both conflict related and not, socio-economical and cultural violence against the dignity of the victim, and domestic violence.[169] The DRC's strategy is very ambitious in its goals: from, assuring prevention and protection, awareness and understanding raising, assuring services provisions for victims, increase cooperation between the different organisations providing services for victims, to reeducation of the persons responsible of SBV and GBV.[170] The strategy uses a multidisciplinary approach, addressing each challenge under a different ministry, for instance the Ministry of Labour addresses issues related to the reintegration of victims in the labour market or the Ministry of Gender, Family and Children addresses issues related to awareness raising. From a legal point of view the strategy includes specifically a development of Criminal Procedural rules specific to SBV and GBV[171] that have not been developed yet. The strategy also finds necessary a reform within the police and the military, both as a training, including gender training, and introductions to sanctions for situations where SV is committed.[172] This point unfortunately is under

[169] Ministère du Genre, de la Famille et de l'Enfant République Démocratique du Congo, *Stratégie Nationale de Lutte contre les Violences Basées sur le Genre*, November 2009, pp. 13-14.

[170] *Ivi*, pp. 24-25.

[171] *Ivi*, p. 25.

[172] *Ivi*, p. 27, 31.

number 6 of priority.[173] Overall, the strategy adopts an multidisciplinary and multi-sectoral approach that takes into consideration the different needs that the victims have. Nonetheless, such an ambitious strategy is hardly achievable by a state that has fully completed a transition process to democracy and has very low to none corruption. For the DRC such strategy is certainly a step forward in approaching issues related to SV, but it is hardly achievable. First of all, in the East of the DRC there is an ongoing conflict that the authorities are not able to contain. Simply put, the government is not able to exercise full control over the entire territory of the country. Second, when problems as corruption are present the control and actual governance that the State exercise are compromised. Both elements, control over the territory and efficient governance, are essential for the National Strategy to be put in practice and have a successful outcome. However, specific strategy points, as the amendments to the Criminal Procedural Code, could be achieved despite this issues. The problem would be in a second phase, to ensure the application of the amended law, as seen with the 2006 amendments of the Criminal Code there are still problems related to the fact that the law is not used everywhere and when used there is a high risk that its interpretation might be in contradiction with the jurisprudence. Further, an interesting part of both the National Strategy and the UN Strategy, is the creation of special units within the DRC army and MONUSCO to protect and surveil territories of high risk of SV in conflict. The curious bit is that both FARDC and MONUSCO have been accused of being the actors themselves of SV. Even if the DRC Government includes in the training of the military the notion of gender and other elements for the prevention and discouragement of using SV as a weapon; the trainings would have actual results over time and not immediately as what needs to be changed is part of a cultural pattern and this takes time. MONUSCO on the other hand, a part from cooperating with FARDC, established a specific SV Unit responsible for the implementation of the UN Strategy, for the monitoring of the implementation of such strategy by the government and monitoring the situations related to SV. The UN has put in action trainings, conduct code, awareness raising programs and facilitating accountability measures to ensure that the peacekeepers abstain from SEA related crimes.[174] MONUSCO has developed a holistic approach with the purpose of helping victims of SEA. The approach of *remedial action* consists in assisting victims, as medical and psychological help and protection; the establishment of the Trust Fund in Support of Victims of Sexual Exploitation and Abuse, which provides victims with assistance in filling formal complaints and has community outreach activities; finally the *paternity claims* program that assists the victims of SEA to

[173] *Ibidem.*

[174] See UN, SEA Risk Management Toolkit. And UN, 10 *Rules:* Code of Personal Conduct for Blue Helmets.

determinate paternity and contact the father for child support claims.[175] However, concerning MONUSCO, this measures, put in action by the UN to avoid SEA, have not decreased the number of allegations.[176] Thus, the joint special unit of FARDC and MONUSCO protecting and surveilling territories at risk of SV has an additional challenge to overcame, counteract SV coming from within the unite, in order to serve its mandate. Nor the National Strategy nighter the UN Strategy provides practical solutions for this last challenge's overcoming.

- International Criminal Court and the Trust Fund for Victims

The ICC, with the election of Fatou Bensouda as Chief Prosecutor, begun a narrative against impunity for sexual and gender based crimes. There are different reasons for this and the change of the Chief Prosecutor is the main one. The figure of Chief Prosecutor assumes significant importance due to its duties to represent the ICC before the international community and organisations as the UN. During Luis Moreno Ocampo's therm, predecessor of Bensouda, newspapers and scholars accused the ICC to fail in prosecuting SGBC and later under Bensouda it was the Chief herself to carry on a political discourse against the impunity gap for SGBC. Bensouda's aim is for the ICC to address more efficiently SGBV and start convicting perpetrators of those crimes. Indeed, since 2011, the ICC Strategic Plans, increase their focus and dedicate themselves to solve the challenges related to SGBC. The 2012-2015 ICC Strategic Plan sets very high standards in resolving the issues concerning the effective prosecution of SGBC and the following Plan 2016-2018 reaffirms the same commitment. The 2012-15 Plan focuses on tree key elements: development of new guidelines to facilitate proving SGBC beyond reasonable doubt; elaboration of procedures to avoid re-victimisation and secondary victimisation; and development of training for investigators on how to conduct interviews with vulnerable witnesses and victims.[177] It has to be considered that such strategic plans are not followed by reports or monitoring to evaluate their outcome and the potential progress. From a strictly legal point of view, the prosecution of SV presents numerous challenges in the different procedural stages, from the investigation to the case building and the conviction itself. First of all there is an objective difficulty to conduct investigations while there is an ongoing

[175] United Nations, Conduct in UN Field Missions.

[176] *Ibidem*.

[177] International Criminal Court Office of the Prosecutor Strategic Plan June 2012-2015, paragraph 63.

conflict.[178] Since the crime has to be proven beyond reasonable doubt,[179] it would be an advantage for straightening the case to acquire forensic and documentary evidence even if it is not required to prove the sexual crime.[180] In order to be able to gather such evidence the OTP has to have enough funds dedicated to the investigation, there must be a full cooperation with the State as well with the stockholders and various organisations working in the field. The cooperation has to be stable and it should start from the earliest stages of the violent conflict to enable the ICC to act under Article 68 (1)[181] of the Rome Statute. Further, if those two elements, cooperation and investigation are impossible to achieve the ICC must become open to cooperate with private investigators and regulate formally the admissibility criteria for evidence provided by them. Since such evidence is very difficult to acquire, usually the only evidence used are testimonies, allowed as evidence before the ICC by Rule 72 (1) of the Rules of Procedure and Evidence.[182] The use of testimonies is quite difficult too: first it is difficult to find witnesses or to convince victims to testify, second the testimony sometimes cannot provide proof beyond reasonable doubt, third the ICC stuff conducting interviews has to have proper training[183] and during the interviews there have to be considered the mental elements[184] in relation to the witness, during both the cross examination and the testimony in court. The fact remains that SV due to its nature is a *"disproportionately difficult offence to investigate"* compared to other crimes agains humanity, in William Wiley's words.[185] William Wiley is the founder of the Commission for International Justice and Accountability (CIJA) that focuses on evidence gathering and case building of crimes against humanity and war crimes in conflict zones.[186] For instance, the ICC prosecuted Thomas Lubanga Dyilo for using child soldiers in DRC but the OTP failed to proof beyond reasonable doubt his involvement in SV even with 3

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[178] Prosecutor Office ICC, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paragraphs 50-51.

[179] International Criminal Court, *Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, Art. 66 (4).

[180] Prosecutor Office ICC, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paragraphs 50-51.

[181] This article enables the Court to protect and provide safety to victims and people in danger.

[182] International Criminal Court, *Rules of Procedure and Evidence of the International Criminal Court*, Second edition, 2013, Rule 72 (1).

[183] Prosecutor Office ICC, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paragraph 37.

[184] *Ivi*, paragraphs 25, 28, 30.

[185] Wiley William, "The Difficulties Inherent in the Investigation of Allegations of Rape before International Courts and Tribunals", in Bergsmo and Wood, *Understanding and Proving International Sex Crimes*, Second Edition, TOAEP's Publication Series, 2012, Torkel Opsahl Academic EPublisher, pp. 367-369.

[186] Rankin Melinda, "The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)", *Journal of Genocide Research*, Volume 20:3, pp. 392-393.

testimonies[187] affirming so.[188] Likewise, in the Katanga case the OTP failed to proof beyond reasonable doubt the involvement of Katanga in the SV during the 24 February 2003 attack on Bogoro.[189] The outcome regarding SV in this two cases indicates serious difficulties in the investigation and in the Katanga case mostly in the case building because in this case there was much more evidence than in the Lubanga case. Nonetheless, ICJ is a complex process that includes more than prosecutions and in the case of the ICC's Rome Statute Article 79 establishes a Trust Fund for Victims (Trust Fund).[190] The Trust Fund's aim is to provide support to victims of crimes under the jurisdiction of the ICC. It has a double mandate: under Article 75 of the Rome Statute the Trust Fund can administer repartitions, such as *restitution, compensation and rehabilitation*;[191] and it can provide assistance such as medical support, physical and psychological rehabilitation.[192] In its website the Trust Fund states that the provisions are not just meant for the victims of crimes prosecuted before the ICC but for all the victims and their families.[193] In addition, it specifies that it serves in supporting especially victims of SGBV.[194] Specifically for the situation in DRC, the Trust Fund is active since 2008 providing medical referral and psychological rehabilitation in groups and individually in addition to the socio-economical activities for the reinsertion of the victims into the labour market. The Rome Statute, the internal Plans of action of the ICC along with the Trust Fund for Victims respect deeply the needs of the victims and form a counteraction point of view provide the means to achieve deterrence. However, the data shows that deterrence is still remote to achieve. From the victims point of view, the election of the new Chief Prosecutor has contributed to address with a wider attention issues related to SV. For instance, the 2014 trainings on how to interrogate

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[187] International Criminal Court, Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, Prosecution's Closing Brief, ICC-01/04-01/06, 01 June 2011, para. 214 (c), 229, 395, 405.

[188] International Criminal Court, Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, Sentence ICC-01/04-01/06, 10 July 2012, para. 60-76.

[189] International Criminal Court, Trial Chamber II, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014.

[190] International Criminal Court, *Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, Article 79.

[191] *Ivi*, Article 75 (1).

[192] International Criminal Court, *Rules of Procedure and Evidence of the International Criminal Court*, Second edition, 2013, Rule 98 (5). and Assembly of State Parties of the International Criminal Court, Resolution ICC-ASP/4/Res.3, *Regulations of the Trust Fund for Victims*, Adopted at the 4th plenary meeting on 3 December 2005, by consensus, Rule 47.

[193] Trust Fund for Victims of the ICC, Two Mandates.

[194] *Ibidem*.

victims and witnesses will avoid re-victimisation and will certainly increase the trust in the authorities in the long therm.

It has to be taken into account that the therm victim i mostly used to describe survivors of SV that have accessed justice and not generally all of the victims of systematic and widespread violence that still deserve justice, medical treatments, reinsertion in society.

Chapter III - The Deeper Roots of the Issue of Sexual Violence

In the previous chapter the analysis of the domestic and international legislation showed a very advanced jurisprudential interpretation and over all progressive law drafting outcomes. However, difficulties and obstacles in using this norms and adopting the victim centred provisions exist. This is as well one of the reasons for not achieving a deterrence effect. This result is independent of regional and national contextualisation: if the norm, however advanced and progressive, is not used, such norm would never achieve the desired effect, in this case deterrence and victim based practices. In a way, the reality of having the legislation but not using it or partially using it is even worse than the case of not having the legislation at all. Indeed, the existence of the norm and its un-use or relative use could increase the over all mistrust in authorities and consequently increase levels of corruption. From a criminological point of view corruption is one of those elements that have the capacity to influence negatively crime rates for all sorts of offences and to slower down or even make policies ineffective. In order to analyse the reasons for the lack of deterrence effect this chapter focuses on political, administrative, criminal and cultural issues specifically related to the DRC and the crime of SV. The methodology of analysis follows the other chapters, starting with domestic issues and actors and continuing with international issues in approaching the problems and actors. The elements mainly associated with the correct functioning of domestic norms that are analysed here are the rule of law and corruption, plus, related specifically to the crime of SV in a conflict context the chapter focuses on administrative issues concerning the national army. The second part of the chapter developed a discussion on the ideological foundations of ICJ opposed to the critiques of the discipline as a political tool. The analysis of the theory is later compared to the practice and the possible results that a different way of conceiving the discipline might have on the victims.

Chapter III.I. - National Political and Socio-Economic Issues

- Political Transitions and Corruption

The main aim of this project is to analyse the instruments and provisions for victims of SV in the context of conflict. The central element, and in my opinion the most important one, is deterrence: when a crime is committed less and less to the ideal point of not having the crime anymore, the victims and potential victims of such crime could be satisfied by the state governance. For this reason, one of the focuses of this thesis is the deterrence effect of the policies, legislations, amendments and local and international initiatives towards the deterrence of SV in conflict. The social science, and particularly criminology, literature suggests that the main elements on which crime rates depend are governance and administration, rule of law and the component of corruption. Those elements all depend on political factors which are shaped by historical events. To analyse such political factors, it has to be considered the over all historico-political framework. In this sense when focusing on the political transition the object of the analysis becomes plural: political transitions. Colonisation itself could be considered as a political regime that requires structure change, as well decolonisation is another transition and democratisation. In this context are analysed just the major historico-political events and not the however major regime changes as the one from Mobuto to L. Kabila. A political transition presupposes changes in the administration and in the authorities, for this reason it has an impact on the rule of law. In the case of the DRC the political transition period is identified with the transition government of J. Kabila from 2001 to the elections in 2006. In other words, concerning the DRC, scholars and the international community expected the country to undertake a massive change in the administration, authorities and compliance with international norms in the short period of less than six years. This appears to be an extremely short period of time compared to other political transitions as the ones of the Eastern European post-communist countries. In the case of the post-communist countries the political transition took, and in some cases it is still uncompleted, more than 25 years.[195] If the two contexts were to be compared the post-communist countries, as Bulgaria and Romania, had to make a transition from communism to democracy and DRC had to make a transition from colonialism to decolonisation to foreign political intervention to democratisation and all of this while the country, or at least part of it, was at war. It is clear that the task to develop a fully functional liberal democracy in less than six years, given the context, is impossible by comparison with other political

[195] See Vachudova Milada, *Europe Undivided: Democracy, Leverage, and Integration After Communism*, Oxford University Press, 2005.

transitions. The outcome of giving such a small amount of time in completing a political transitions is to be found in the scholarly discourse of *failed states* which appears to be a non-constructive categorisation that does not promote a faster democratisation nor human rights respect increase. Following this logic, the therm *failed state* might be appropriate only to describe the model of having to undertake at least three political transitions at once but not the outcome of lack of functioning governance. In this context must be analysed the reasons or factors slowing down the political transition and the international actors' behaviour related to this.

Indirectly, the unsuccessful democratisation influences crime rates and SV in particular because of the effects that political transitions have on rule of law. Now, the concepts of rule of law and democracy go hand by hand, in the sense that they are inter-dependant: democracy needs rule of law and a just and human rights respectful rule of law needs democracy. Thus, in order to have this kind of rule of law and achieve deterrence of SV crimes, the political transition to democracy must be completed. Since this usually takes a lot of time the focus of this article shifts on the factors slowing down the political transition and their impact on the rule of law. In the context of the DRC, since the colonisation the foreign, or even better western powers performed what Felices-Luna calles a *knowledge-power dominion*.[196] The author explains how, starting with the colonisation period, the western authorities exercised power thanks to the knowledge that had in comparison to the indigenous population. The knowledge of science brought by western society shifted the roles in the Congolese society: the science established that the western and northern values were superior and civilised and the local African values were therefore, inferior according to a western based model of governance.[197] In this context Felices-Luna argues how the phenomenon of corruption might be interpreted as a form of "*resistance"* or even "*as a vehicle of exploitation and domination"*[198] of the imposed western based governance model and the capitalistic model. *Resistance* in the sense of opposing the power that exercises dominion.[199] For instance not following the administrative rules, seen as a form of imposed dominion,[200] and turning instead, to a known person for the administrative matter in exchange of a gift. Corruption as a "v*ehicle of*

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[196] Felices-Luna, "Justice in the Democratic Republic of Congo: Practicing Corruption, Practicing Resistance?", *Critical Criminology*, Springer Science+Business Media B.V. Issue 20, 2011, pp. 197-199.

[197] *Ivi*, p. 201. See also Fanon, *Les damnés de la terre*, Grove Press, 1961, pp. 39-44.

[198] Felices-Luna, *Op. cit.*, p. 200.

[199] *Ivi*, pp. 200-201.

[200] Fanon, *Les damnés de la terre*, Grove Press, 1961, pp. 199-203.

exploitation and domination"[201] is a more complex process: with the colonisation, and Fanon argues even after the decolonisation,[202] the new social class system changes the social hierarchy in the DRC due to the fact that to be *superior* one has to have knowledge in the form of science and has to be entitled in the first place of such knowledge and therefore be originally form the western/nordic society.[203] In this sense the only way left to become part of the elite in DRC is through power, a person holding power in this case would be a person that people turn to for favours, and through money.[204] The problem of corruption in relation to rule of law is that the more corruption there is the less the laws are respected and the less confidence people have in authorities. The link between the dismissed legal cases, from the previous chapter, the lack in reporting crimes of SV and the low confidence in the authorities is immediate. However, the problem of corruption is that by influencing the rule of law it also influences the crime statistics generally, as it increases the crime rates. Here I am referring to crime rates in reality and not just the reported or investigated crimes. In other words, the reality of the situation and not the one presented by official statistics. In this sense the issue of corruption becomes one of the biggest enemies to overcome in order to achieve a functioning rule of law and consequently provoke a deterrence effect with a specific reference to SV crimes.

- International Efforts in Facilitating the Political Transition

If rule of law and democracy are considered as inter-dependent than issues with the rule of law influence the political transition by slowing it down. For this reason the international actors have tried to tackle the issue of corruption in different ways. The strategy that Vachudova theorises for the post-communist, here called the *leverage model*, was adopted by the international actors also in the case of the DRC. This strategy requires that the international actors offer something as leverage for obtaining the desired political changes. For instance, in Eastern Europe the EU offered membership to Bulgaria and Romania under the condition that the countries adapt to, or satisfy the standards of the EU.[205] In the same example, the EU give the membership to the two countries

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[201] Felices-Luna, *Op. cit.*, p. 200.

[202] Fanon, *Les damnés de la terre*, Grove Press, 1961, pp. 40-42,

[203] Felices-Luna, *Op. cit.*, pp. 201-203.

[204] *Ibidem.*

[205] Vachudova Milada, *Op cit.*, pp. 108-120.

before such criteria were fully satisfied and continued the *leverage model* offering financial aid.[206] In this second phase the strategy was proven to be unsuccessful.[207] Vachudova makes distinction between active leverage and passive one, in this sense having official criteria to satisfy in exchange of a membership or financial aid represents active leverage; offering financial aid to improve the democratisation is considered as a passive leverage. In the case of the DRC the international community, organisations like the UN or NGOs or donor countries provide financial and other kind of aid to help the DRC government to successfully complete the democratisation process. Thereby, applying Vachudova's *leverage model* in the case of the DRC, it can be observed that the international community and the NGOs behave in a similar way to the EU's approach towards Bulgaria and Romania. However, in the Bulgarian and Romanian example the EU represents an alternative to the *oppressor,* the Soviet Union that throughout dominion established communism. In the DRC, the same countries that represented the *oppressor* during colonisation are now the countries that leverage the state in completing the democratisation process. This makes it extremely difficult for the *leverage model* to work and might even provoke opportunistic effects, as purposely slowing down the political transition in order to increase the international financial aid. In the worst case scenario this dynamic creates a vicious circle in which the instruments, as the capitalistic model, that created corruption in the first place are now attacking it leaving the state in a perpetual disorder and lack of governance. However, such international aid has not been proven to be influencing positively the national governance or administration. For instance, in 2006 the World Bank involvement created a worse situation for the Congolese military forces. In this instance, the World Bank in cooperation with the government changed the payment process for the Congolese military with the purpose of achieving a military reform following the Disarmament, Demobilisation and Reintegration process.[208] With the new system the salaries go from the Central Bank to the administration to the military personnel, a biometric ID is required, with the aim of eliminating *ghost soldiers* - soldiers that do not exist and others committing fraud receive their salary - and aiming to renew the military starting with the newly formed troops.[209] Nonetheless, the *ghost soldiers* remained, new military personal was enrolled and the funds for the Disarmament, Demobilisation and Reintegration process were exhausted before the process could become fully

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[206] *Ivi*, 139-177.

[207] *Ivi,* pp. 219-223.

[208] Africa Research Bulletin: Political Social and Cultural Series, "Democratic Republic of Congo: Corruption Purge", March 1st–31st 2007, Military, pp. 17024-17025.

[209] *Ibidem*.

active.[210] This is a very illustrative example of international aid that did not fully consider the domestic procedures and administrative rules and created a worse situation than the one it found. This risk is very common as well when other factors as local corruption or lack of rule of law are not fully considered. From the point of view of SV the example provided is also very relevant due to the fact that very poor soldiers are likely to engage in SV related crimes.[211]

Corruption, lack of rule of law and lack of effective governance contribute indirectly to the exploitation of the natural resources, diamonds, gold, copper, cobalt, cassiterite and coltan, that are traded illegally with the purpose of financing unofficial militias.[212] Illicid trade on the other hand, has extremely negative consequences for the state economy as it increases the grey economy of the country and, if systematical, it may even decrease the GDP. On the issue of exploitation of natural resources the UN International Law Commission has started in 2014 an initiative on *protection of the environment* in both the context of armed conflict and peace building. The UN International Law commission has drafted 21 principles on the exploitation of the environment, prevention, in bello, post-bellum and general principles.[213] However, such principles remain a draft and haven't been adopted as law and have not been categorised as common law. In addition the principles cannot be found in an unique document as they are spread in four different UN General Assembly documents. This fact is quite unusual, generally the drafts regarding a single topic are collected in one document. In may be deduced that those principles will need more time to become law.

Chapter III.II. - Issues with the International Approach against Sexual Violence

- From International Criminal Law Theory...

In theory the role of the state is to guarantee certain rights to its citizens and protect their security and the security of the state as a whole. In this sense, citizenship is what Hannah Arendt called the "*right to have rights"*.[214] Following this idea, the role of the international community is to maintain

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[210] *Ibidem.*

[211] Baaz and Stern, *Op cit.*, pp. 507-508.

[212] See chapter I.I.

[213] United Nations General Assembly, International Law Commission Sixty-eighth session Geneva, 2 May-10 June and 4 July-12 August 2016. United Nations General Assembly, International Law Commission Sixty-eighth session Geneva, 2 May-10 June and 4 July-12 August 2016. United Nations General Assembly, International Law Commission Sixty-sixth session Geneva, 4 May-5 June and 6 July-7 August 2015. United Nations General Assembly, International Law Commission Seventieth session New York, 30 April–1 June and Geneva, 2 July–10 August 2018.

[214] Arendt Hannah, *The Origins of Totalitarianism*, A Harvest Book, 1976, Second Edition, pp. 292-296.

the world order and intervene by helping states that cannot guarantee those rights to its citizens. On this matter Nash describes a link between the concept of citizenship, human rights and international community as they share the same theoretical base of liberal individualism.[215] Following both the theories of Arendt and Nash, the state becomes responsible towards its citizens.[216] In such sense, the state has also the responsibility to provide justice to victims by punishing trough the domestic legal instruments the persons responsible for crimes. The ICC complementarity principle is an example of international community helping a state to ensure such responsibility. Even prior to the formulation of the concept of ICL the idea of international law originates from the need of reassuring a common security.[217] Indeed, according to Schroder the today order of the international relations started throughout the formulation of treaties, fist the Congress of Vienna and later the Declaration of Paris.[218] In this context international order includes concepts as mutual security, as in avoidance of conflicts between nations, and as balance of powers.[219] After the two World Wars this ideas of balance of power and responsibility towards security became central to the political strategies, the international order that led to the creation of international organisations as the UN and to the creation of criminal justice with the trials of Nuremberg and Tokyo. This narrative establishes a link between international order, responsibility, rights, security and citizenship. Teitel even suggests the concept of *Humanity's law* that can be on the bases of war, as a regulation of war time state behaviour, or human rights, as a more universalistic rules on state behaviour in peaceful times.[220] In both ways the *Humanity's law* purpose is to safeguard a general security that can be interpreted from state economic security to human security.[221] Such law, thus, is meant to extend beyond the domestic legislative framework and it is supposed to regulate the conduct of the states between each other. The concept, if seen from a more universalistic perspective, grows this way into being a part of the rules that contribute to achieving an international order. The origins and the evolution of ICJ further focuses on the rights of the people that suffered from what in Nuremberg

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[215] Nash Kate, "Between Citizenship and Human Rights", Goldsmiths, University of London, *Sociology*, Volume 43 Issue 6, pp. 1067-1068.

[216] Arendt Hannah, *The Origins of Totalitarianism*, A Harvest Book, 1976, Second Edition, p. 176.

[217] Schroeder Paul, "The 19th-Century International System: Changes in the Structure," *World Politics* 39, no. 1 (1986), pp. 1-2.

[218] *Ibidem.* See also Jan Martin Lemnitzer (2013) 'That Moral League of Nations against the United States': The Origins of the 1856 Declaration of Paris, *The International History Review*, 35:5, 1068-1088.

[219] Schroeder Paul, *Op cit.*, p. 4.

[220] Teitel Ruti, *Humanity's Law*, Oxford University Press, 2011, pp. 106-108.

[221] *Ibidem.*

was called a crime against peace. From this point of view the philosophical foundations of ICJ are intertwined with such a responsibility towards security and rights. This may even be seen from Teitel as a law that is *protecting humanity*.[222] A very similar intellectual argument justified the Nuremberg trials that acted in defence of a *human good* in a universalistic sense.[223]

However, if the law and this noble interpretation of the world politics is seen as a secondary element and capitalistic and globalisation strategies are considered as the primary element the victim oriented system of ICJ becomes much harder to argument in a philosophical debate. In this interpretation between realism and constructivism, the international community is much less of a community in such sense, due to the strong interest driven behaviour of the different states. The interest driven narrative explained better with what Felices-Luna calls "*dominion through knowledge* and *exploitation through capitalism*",[224] that transforms ICJ in nothing more than a mere business conducted by interest driven professionals.

- ...To Practice

These two very different lenses presenting reality the problem is that nighter one nor the other would actually succeed in explaining the complexity of the multidisciplinary of ICJ within world politics. Indeed, there are many factors to be considered: history as events, as practical and economic consequences and as socio-cultural consequences of those historic events; economic interest driven strategies and scholarly narratives; philosophical naiveté juxtaposed to pure capitalistic strategies. In this sense the frame of what defines political science expands to legal, anthropological and economics studies. No wonder why the question of what is ICJ's *raison d'être* is such a disputed argument and a source of perpetual criticism that very rarely is constructive. Considering this problematic from a monodisciplyinary perspective suggests that every discipline taken singularly would come with different answers most likely some of them would even be in contradiction between themselves. The problem that this would create is that it would make more difficult the policy or/and strategy planning or, even, it would create different strategies and policies that, in the best case scenario would be inefficient and in the worst case scenario would be contradictory and counterproductive. Therefore, there is a need for a more or less unified *raison*

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[222] *Ivi*, p. 105..

[223] Carlson Kerstin Bree, "International Criminal Law and its Paradoxes: Implications for Institutions and Practice", *Journal of Law and Courts*, spring 2017, University of Chicago Press, pp. 35-36.

[224] Felices-Luna, *Op. cit.*, pp. 197-200.

d'être of ICJ in order to understand its aims and develop strategies and policies to make it have a sizeable impact on the international community and the single countries. To achieve the element of unity the entire picture has to be taken into consideration and in such sense: economic and political interests and agendas, historical factors, cultural factors and international order also in the sense of balance of power. However, a problem appears when all of this elements are included into the general analysis as the ICJ discipline rejects its political aspects as in the case of its legitimacy.[225] In other words, if ICJ is based on the *Humanity's law* and protects the universalistic notion of non-derogable human rights and aims to imitate the justice and fairness goals of domestic criminal law the justification of ICJ would have to come from politics and not law, as disciplines, which is not acceptable.[226] The question of legitimacy is meant to have very separated political and legal aspects. The reason for such separation is to promote this universalistic aspect of ICJ and in such manner attempt to achieve a much general acceptance of its norms whiten the international community. However, the international political system does not allow for separation of powers as the domestic systems. From a sovereignty point of view International Law is not there to substitute the domestic legislation but to help with developing a more homogeneous legal principles and establish an order between countries. Further if the purpose of any kind of International Law was to substitute or rule over national law there would be no International Law. No sovereign country would agree to that. For this reason ICL is applying, as can be seen by the ICC, the complementarity principle. In such sense courts like the ICTY exist to complement a national juridical system when such system is not capable of exercising its functions. A curious and potentially very efficient proposition would be to exploit the absence of separation of powers to cooperate on common goals. There are many other differences between domestic criminal law and ICL, for instance the lack of a well developed criminology to complement the jurisprudence. The criminological notions about the different domestic crimes[227] are used in the policymaking process as well as in the legal drafting process. ICL on the other hand uses primarily jurisprudence. This creates a series of problems in all of the phases of the process of ICJ; from the investigation to the reconciliation. For instance, within the ICC it is the OTP that has an investigative role, the investigations are made with the cooperation of local organisations and consist mainly in the collection of evidence. In such case collection of evidence is just one of the steps, because in order for the evidence to be used in court such evidence has to be verified, and used first to build a case. A good example of efficient case building can be observed in

[225] Carlson Kerstin Bree, *Op cit.*, p. 40.

[226] *Ibidem.*

[227] As opposed to grave or core international crimes.

the investigation office of the ICTY.[228] In the process of case building is necessary to have a good knowledge of the legal elements of the crime but also of the reality of the crime. By reality of the crime here I mean the social, economical and cultural elements of a particular crime, that in domestic jurisdictions are usually provided by the criminological studies conducted. Further, in the case of the ICC the OTP office has the obligation to hand to the defence any evidence that might be useful for their case.[229] This practice might create a conflict of interest that could jeopardise the entire case. For this reason and for a general problems that this practice has for the justice of the trial, the practice has been widely criticised. Such criminology notions might be put also into good practice during an eventual reconciliation process as well. Indeed, the knowledge on the cultural, economic and societal reasons for having a particular type of crime might be used to establish programs for facilitating reconciliation between victims and perpetrators. In a more advanced thinking, that considers the possibility of reintegration into society of perpetrators and their reeducation and in this instances the above mentioned knowledge might be used as well.

- International Criminal Justice and State Building

All of the criticism towards the discipline and the practices of ICJ as well as the political theoretical and practical criticism towards states recovering form political transitions, eventually is slowing down the evolution of ICL, the transfer of ICL norms into domestic legislation and the achievement of a full liberal democratisation. Altogether this factors have a negative effect on the both national and international security, intended here as both economic and human security. Unstable territories do not create stable economics, on the contrary the instability contributes to the increase of the grey economy. Likewise, political and economical instability create a major risk for the human security. From the point of interest of this paper, these mechanisms have a severally dramatic effect on the victims of international core crimes generally, and particularly victims of SV in the context of war. For instance, Fukuyama sees the security problems of African or East European countries that are in a stage of state building as a common problem to the international community.[230] In such context the international community and particularly some countries as the United States of America,

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[228] Wiley William, *Op cit.*

[229] International Criminal Court, *Rules of Procedure and Evidence of the International Criminal Court*, Second edition, 2013, Rule 77, 81, 82.

[230] Fukuyama Francis, *State-Building: Governance and World Order in the 21st Century*, Cornell University Press, 2004, pp. ix-xiii.

England and France have directly contributed in the processes of state and nation building.[231] Nonetheless, the actions of those countries and the international community have not worked in the same way everywhere and have taken different amount of time to be effective.[232] This would suggest that the regional and local elements are a very important part to be taken into consideration. From one side, there is the struggle for universalistic economical development and non-derogable rights and from the other local elements must be taken into consideration to achieve such universalism from a security point of view. The connection with security comes from the notion that politically and economic stable countries can provide security for their citizens and contribute to the international security. Thus, the same factors that would increase security might have a severe negative impact on this achievement. In other words, the standardised tools that the international community uses to provoke and incentive the state development and security does not take usually in consideration the regional elements as history, economics and culture, both in sense of human and institutional[233] culture. In such context a specifically developed, region by region, mechanisms to help the sate and nation building process would have much more efficient results from a security point of view.

- Benefits of Developing an International Core Crimes Criminology

From the perspective of the ICJ such specifically developed mechanism would not work because it would create regionally different alternatives of ICL. However, as the development of a criminology in ICL, regional strategies for victims outreach and other kinds of provisions would serve the purpose of victims oriented discipline. The parallel with creating a criminological study of the region and regionally developed strategies is a very strait-forward one since both have as focus the study of local institutions, the culture of the institutions, the economy and other cultural factors. A priori, the risk of not engaging in such studies is that the work of the ICJ institutions and the ICL norms, even if already transferred in domestic law, might be seen as an imposition by western countries. In the case of DRC, as we have seen some tribunals are not using the amended legislation against SV and through the possible reasons such un-use is connected to the fact that the amendments are seen as imposition. In the aftermath bot the political and legal elements are

[231] *Ivi*, pp. 99-104.

[232] *Ibidem.*

[233] Vico Gianbattista, *Principi di Scienza Nuova d'intorno alla Comune Natura delle Nazioni (Principles of New Science around the Common Nature of Nations)*, edited by Paolo Rossi, Milan, Rizzoli, 1959, pp. 79-85.

extremely relevant to the analysis of the victim oriented or attempted victim oriented practices of the ICJ institutions.

Chapter IV. - Budget Friendly Solutions Addressing Deeper Legal and Political Issues Related to Sexual Violence

This chapter focuses on possible solutions and ideas to complement the solutions already in action. The section does not follow the same methodology and structure of the previous ones because every paragraph concerns a different problematic or approach in solving it. With the purpose of clarifying the issues that need addressing and how they are linked and influence each other the section starts with a summary of those findings during the project. Further, the chapter juxtaposes the legal approach to a more political approach in finding solutions for the issues related to SV in conflict. Then one by one the issues of political transition, rule of law, corruption, territorial exploitation, army disciplines, and NGOs organisation are analysed, suggesting possible and budget friendly strategies in i addressing those issues. The aim with which the issues are addressed is to meet the victims' of SV in conflict needs, and this is what the section focuses further on. To conclude the chapter proposes theoretical and practical suggestions for the ICJ institutions to achieve their goals from a victim oriented point of view.

Chapter IV.I. - Most Concerning Problems and Suggested Approach for Solving Them

The research conducted for this project underlined that the reasons for such severe numbers of SV in conflict have deeper political reasons. In fact, the legal framework - both domestic and international - is very advanced and the domestic interpretation is categorised as positively progressive. The reason for an impunity gap concerning SV in DRC has political roots and it is not due to issues with the legislation per se. As analysed in the second and third section of this thesis, the problems that create the impunity gap are related to difficulties in accessing justice, lack of rule of law, corruption and mistrust in the authorities.[234] Another element that is very relevant for this analysis is that the DRC is in conflict, which does not facilitate the government's task in tackling the SV issue. The peculiarity of this conflict is that it is a result of a more than 20 years of violence in the region, so it has culturally and economically very deep roots. In addition to the fact that many militias are not affiliated with any State and both international law and domestic law is challenged

[234] See chapter II.I, II.II and III.I.

in dealing with non-State actors. The DRC's conflict can be defined as extremely complex for this reasons of existence and also because it affects directly the wealth of the country. The usual expenses of a conflict, in this case, have to be considered together with the loss of the country from the illicit exploitation and trade of natural resources. Thus, this factors influence negatively not just the governance of the country but also the political transition to democracy, the economy of the country and the rule of law. All this elements together might seem distant to the crime of SV but they are extremely correlated. For instance, the lack of rule of law makes possible impunity that per se increases mistrust in authority; this factors together increase corruption that increases impunity, illicit exploitation of natural resources and trade, mistrust in authority and increases the grey economy of the DRC. This represents a vicious circle that is extremely difficult to interrupt in order to move on with the political transition and the consequent establishment of a functioning rule of law. The economic factors are very relevant when it comes to issues related to the provisions offered to the victims of SV in conflict because the DRC is paradoxically[235] a very poor country and cannot provide the necessary medical, psychological and socio-economical help to the victims of SV. The same economic factors can be analysed as well as a reason for committing crimes related to SV. In the first section of this thesis are considered studies on the reasoning behind soldiers engaging in SV related crimes and one of this reasons is the lack of or the extremely law salary of the soldiers, that could not afford a paid sexual service.[236] Here it is not considered the criminalisation of prostitution in DRC; the crime is classified as SV in peaceful context.[237] The issue of SV in conflict and in peaceful times as other crimes have very deep and variegated roots in this particular region and the vicious cell connecting the reasons for having high numbers of crime is a very strong to break. A comparison can be made with the political transitions in Eastern Europe, corruption and human trafficking.[238] The discipline that usually studies the correlation between social sciences, anthropology and socio-economic factors is criminology. In the policy making process as well as in the law drafting one, the findings of criminological studies are used as proven to be very useful in tackling the issue from its roots. In the context of researching possible solutions to be adopted by the political and legal bodies - both national and international - this project aims to

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[235] The paradox comes from observing the natural resources that the country has compared to the GDP. The illicit exploitation of such resources, lack of rule of law and corruption has a direct impact on the impoverishment of the State.

[236] Baaz and Stern, *Op cit.*, pp. 512-513.

[237] Cabinet du Président de la République, *Journal Officiel de la République Démocratique du Congo, Loi n° 06/018 du 20 juillet 2006*, Partie Première, 47ème année, n_15, Kinshasa - 1er août 2006, Art. 174 (b).

[238] See Vachudova Milada, *Op* cit.

achieve a similar result to what criminology achieves in domestic jurisdictions: analysing the political and the legal aspects adopting a victim centred approach. As seen in chapter III of this project the consideration of just one of the disciplines would not be holistic in analysing the issue of SV in conflict in DRC and particularly in the Eastern part of the country. This suggests the need of examining all of the elements - both political and legal - at the same time. This approach would provide multidisciplinary solutions to complex problems as the SV one. Here I argue as well that if coordination between the different apparatuses is going to achieve much less expensive and efficient solutions than the current strategies. Such current strategies as the National Plan against SV or the UN Plan against SV are extremely well developed and progressive but as seen in chapter II the strategies are taught as elements to be added to the current governance strategies. In doing so they do not take into account the current governance problems in order to prevent the foreseeable issues originated by those problems, with the implementation of the strategy. Therefore, the solutions proposed by this section attempt a holistic analysis that takes into consideration apparently distant but extremely relevant political issues, both national and international, that have an impact on the policies and legislation against SV. Thus, the issue is approached in a different way from the beginning in order to suggest such solutions. Nonetheless, this approach takes into consideration the legislation and the legal tools in a second phase - by starting with a purely legal approach the analysis would not take into consideration numerous elements influencing the functioning of the legal system concerning the issue of SV.

- The Legal Approach and Its Gaps

By analysing the domestic legislation it can be observed an extremely progressive legal drafting and very advanced norms over all.[239] Likewise, from international point of view the DRC is a State Party to the Rome Statute and has transferred the rules on SV into domestic law. At first approach, there should be no issue which means that the *impunity gap* for SV in conflict should, even if slowly, decrease and deterrence should increase. Nonetheless, this does not happen and, to use Wallström's words, the DRC remains *the rape capital of the world* while other African countries, as South Africa, attempt to withdraw form the Rome Statute. This leads to the suggestion that there are other elements to take into consideration in order to obtain a functional and largely adopted and used legislation. Indeed, as suggested above, the political factors and the international relations have an extremely relevant impact on the compliance with international law and the functioning of the

[239] See chapter II.I.

domestic judiciary. In this sense it is not conceivable to approach the issue just from a legal perspective. Further, within the legal approach, there have to be taken into consideration the ICL institutions and not just the courts; this means that in the case of the DRC it has to be taken into consideration not just the ICC but also the Trust Fund for Victims and its operate. The mandate of the Trust Fund, in considering the judiciary issues surrounding the crime of SV, is very limited. In fact, A) implementing court ordered repartitions for victims against convicted persons and B) providing assistance for the victims and their families are essentially helping those victims however, the Trust Fund does not have the financial means to help all of the victims.[240] Due to these limits the Trust Fund cannot have a real impact on issues as access to justice or mistrust in the authorities. Indeed, this was never the idea behind this institution as its mandate limits to the previously described point A and B.[241] It could be argued that limiting the mandates of this type of institutions would facilitate their mission, increase their impact and it would be less expensive. Nonetheless, if the mandate remains limited but is open to the possibility for the institution to coordinate with local organisations and coalitions of organisations it would have a bigger impact on those issues surrounding and incrementing the crime of SV. For instance, if institutions as the Trust Fund for Victims were coordinating with NGOs working to achieve access to justice, the operate of the Trust Found itself would be part of the awareness raising and outreach programs of those NGOs and that would have an impact, even if small, on the increasing trust in the authorities. In addition, if considered cultural elements of this hypnosis, such cooperation would have good chances in presenting western intervention under a different than imposition and *dominion*[242] light. Nonetheless, another argument against such cooperations or flexibility of mandates is that the strictly legal institutions have a strong adversity in adopting political approaches to achieve improvements from a legal and judiciary point of view. This paper takes a neutral side in those debates in order to focus on the proposition of an approach that is effectively oriented to help the victims throughout the empowerment of justice, democratic and human rights respectful policies. Thus, the analysis of the issues should not be limited by a single discipline. Indeed, the lack of a deterrence effect as seen in chapter III is not due to the legal factors but to problems related to the political, economic and socio-historic situation in the DRC. Even without taking a side in the debate, the most pragmatic aspect to consider is that with a little more flexibility and coordination

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[240] Trust Fund for Victims of the ICC, Two Mandates.

[241] *Ibidem.*

[242] Felices-Luna, *Op* cit., pp. 197-201.

ICJ institutions would be more accepted politically. This factor is to be considered in avoiding future withdrawals from the Rome Statute.

- Political Approach Towards Legal Progress

From a strictly pragmatic point of view it does not matter how advanced is the domestic legislation if the political and administrative apparatuses do not provide yet the possibility for the law to function, the domestic legislation is going to fail. To use a metaphor, the political and administrative apparatuses provide an under-structure on which the judiciary system can develop and evolve. Without such fundaments the legal progress remains on a theoretical level and does not become a part of the governing reality. In the case of *weak or failed states*, to use Fukuyama's words, there different techniques must be used to achieve a full political transition - from a failed state, to a weak one, to a fully functional one and later to a strong state - than the strategies that were used for the majority of the western world.[243] Fukuyama's theory on state building describes in a very detailed and holistic manner the process of political transition developed above in this project. The categorisation of *failed* or *weak* states serves the purpose of referring to states that are not fully functional as in the case of countries thorn apart by war.[244] The problem with such a semantically negative definition is that it might decrease the progress on the political transition. When this is the case the dynamics of decreasing political evolution have historic-socio-economic reasons: the same foreign powers that colonised Sub-Saharan Africa are now intervening in "helping" the country to achieve yet another political transition. In this context the "help", in the form of humanitarian, financial and other kinds of aid might be seen as an external imposition on domestic politics. Thus, the effects of this aid might have counterproductive effects despite the international community's good intentions. Fukuyama's definition seems more of a political discourse, in a sense, because it seems that it is meant to challenge the international community in adopting a more complete and holistic approach as considering cultural and economic and historic factors when intervening to help developing countries. The author indeed suggests that different countries and situations need different approaches and such approaches need to be based on a careful consideration of diverse factors, not just related to the public administration and governance.[245] In the case of the DRC, the external political and economic conditionality was counterproductive during both Mobuto and L.

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[243] Fukuyama Francis, *Op* cit., pp. ix-xiii.

[244] *Ibidem.*

[245] *Ivi*, pp. 16-17.

Kabila's governments.[246] Following Fukuyama's theory the administrative and institutional developments have an impact, as they are changing the social structure.[247] From a legal perspective this means that there must be preconditions of a political nature for the justice apparatus to be functional. This is particularly highlighted by James Morrow, who argues that there should be a particular political regime, liberal democracy, in order for the country to be more inclined to comply with international humanitarian law and ICL.[248] This would suggest less of a co-dependency between ICL and domestic politics and more a direct dependency of the international law on the "right kind" of political regime. However, from a practical, more pragmatic point of view and less theoretical one, both Fukuyama and Vachudova propose an international intervention in the form of aid to countries experiencing a political transition. The *leverage method* of Vachudova requires strategic and holistic thinking, in analysing the different socio-economic and historic-cultural factors before using the right kind of leverage in order to stimulate a progress in the political transition process.[249] Fukuyama used a more holistic approach, first divided in phases depending on the conditions of the country and then he suggests that before the state building process there should be a nation building one.[250] The concept of nation building is not as political as socio-historic; in the sense that cultural differences originate differences within the political structure of the different countries. This would mean, however, that the western countries providing help to a developing country have to be flexible enough and take the risk to let the country organise under a different socio-economic model. This presents also as an invite in considering that many strictly capitalistic elements existed already in Sub-Saharan Africa - so even if the economic model to develop were not capitalism it would be close enough to allow globalisation. From one side this would help the country experiencing political transition to have the time to fully overcome every step of such transition in its own way; from the other side this would create different political processes than the one proposed by the western countries after the WW II. The problem of having such different process is concerning security, both economic and human, on an international level. After 9/11 and the Bush administration, the concerns related to the so called weak and failed states are that they could affect the national security of great power countries as the United States. In other words, such

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[246] *Ibidem*.

[247] *Ivi*, p. 82.

[248] Morrow James D., "When Do States Follow the Laws of War?", *The American Political Science Review*, Volume 101, Number 3, 2007, pp. 560-563.

[249] Vachudova Milada, *Op cit.*, pp. 108-120.

[250] Fukuyama Francis, *Op* cit., pp. 88-89.

risk might be just too much to take. For this reason the proposition of both Vachudova and Fukuyama would come as compromise between too risky and liberal, and too restrictive and inefficient. For the case of the DRC it would mean to offer development programs in considering the issues of the public administration, those of the rule of law, of the economic system and so forth. As it concerns international core crimes the framework needed to achieve a functional justice system is more complicated as it would require either the cooperation between political institutions and ICJ ones or ICJ have to come after the most of the political transition is completed. The case that we observe in reality is somewhere in-between as the DRC become a State Party of the Rome Statute before being politically ready and the cooperation between the political and the ICJ institutions is not complete. An instance of such incomplete cooperation can be seen with the same example of the Trust Fund for Victims seen before. The Trust Fund is not cooperating nor coordinating with other organisations on more political aspects, issues of access to justice and trust in authorities, of ICJ that would help the functioning of the justice mechanisms. To use Fukuyama's theory as a suggestion, this problematic could be overcame with a more considered and holistic analysis of the problematic elements when strategising and policy making on an international level. In addition, since the discipline of ICJ is incomplete, in the sense that lacks of criminology bases as it funds its legislative drafting mostly on jurisprudence, ICJ needs to coordinate in this manner with the domestic authorities that consider criminology studies. This would be difficult as it would mean that ICJ even if just considering political factors could be considered as a hybrid body between politics and justice. However, just by considering local criminological factors ICJ would not create a political agenda on its one, thus, it cannot be considered as a hybrid institution between politics and justice. By considering such factors the operate of the ICJ institutions could gain much more respect and legitimacy before the sovereign states as considering those factors could increase the cooperation and complementarity between the national authority and the international institutions. Theoretically, this kind of approach would result into a win-win situation. In the hypothesis that these kinds of elements were taken into consideration by the ICC it could have been observed already a bigger presence of the Institution in DRC because, as seen by the statistics in chapter II.II, the DRC judiciary system is not able to bring perpetrators to justice.

Chapter IV.II. - Practical Issues Related to Sexual Violence

- Corruption and Rule of Law

Some of the administrative and governance issues have a direct impact on the justice system as well. Lack of rule of law and corruption are some of those issues. Indeed, they increase mistrust in authorities, influence negatively the unreliability of the criminal statistics, increase problems related to access to justice, decrease the efficiency of the justice system and generally contribute to the existence and amplify the phenomenon of *impunity*. Lack of rule of law and corruption are also a direct cause for more crimes to be committed; in this sense there is a vicious circle that is very difficult to interrupt. Further, this vicious circle has a negative effect on the prosecution of crimes of SV in conflict and peaceful times and on the deterrence effect. This represents enough o a reason for the ICJ institutions to take into consideration the issues of lack of rule of law and corruption while investigating cases and implementing programs as the Trust Found for Victims. Such consideration would provoke coordination within the operate of the ICJ institutions the domestic authorities and the local organisations in tackling the issues from different angles. However, as the past initiatives, as the All Inclusive Agreement between the *Commission de l'Ethique et de la Lutte contre la Corruption* (Ethics and Anti-corruption Committee), the UN Development Programme and the Department for International Development Agency of the United Kingdom; and as the *Observatoire du Code d'Ethique Professionnelle* (Observatory of the Code of Ethics of Public Officials) were initiatives that failed mostly because were originated from foreign powers and organisations and were not planned and implemented by the Congolese government itself.[251] In this cases, the government and the authorities did not fully engage in the strategies and policies because those where seen as an addition to the domestic public policy and not as a policy per se, in addition of the cultural factors concerning foreign powers carrying out policies in DRC, that could have been seen as an imposition. These international driven strategies had another problem: they were not considering the reality of the issue of corruption in the DRC which led to wrongly distributed budget and high inefficiency of the strategies.[252] The result of this approach indicates a clear need of change in both the approach, in terms of actors and cooperation between them and the elements that should be considered in the strategy planning. Another example of past initiative in tackling corruption is the subsequent Reduction of Poverty Strategy defined and implemented by both the DRC government and the International Monetary Fund. This strategy interpreted corruption as one

[251] Kodi Muzong W., "Anti-Corruption Challenges in Post-Election Democratic Republic of Congo" Chatham House, The Royal Institute of International Affairs, 2007, *An Africa Programme Report*, pp. 11-13.

[252] *Ibidem.*

of the reasons for poverty and therefore aimed to counteract corruption along with other issues.[253] Nonetheless, it does not provide practical propositions on how to overcome the corruption issue. The strategy makes a general reference to the government's intention to engage in fighting corruption through capacity building programs and codes of conduct.[254] In other words the strategy does not provide any obligation nor an active engagement from the part of the government in directly approaching the corruption problem. Judging from other countries experiencing political transition, as Romania, there is a need of a strong judicial reform that takes into consideration the corruption issues whit-in the country with differences between the different regions. Considering the particularly difficult transition period, the judicial reform of 2013 implemented by J. Kabila's government and its outcome few other judicial reforms might be needed in order to obtain a functional justice system. This was the case of Romania as well.[255] Indeed, such reforms need to consider criminological factors on how the phenomenon of corruption is operating and its reasons of existence in order to be able to tackle the issue from its roots and be effective in less time. Solving, or even diminishing the issue of corruption would be extremely beneficial as it would act on the vicious circle as a whole: less corruption means directly more respect of rule of law, that provokes a smaller range of impunity; in addition less corruption would result in decrease of grey economy and increase in the GDP that might influence positively the salaries of the soldiers and decrease the statistics of SV related crimes used as a weapon of war.

- Exploitation of Natural Resources and Militias Funding

The issue of the exploitation of natural resources is one of the shortly linked issues that contribute to the high numbers of SV used in the Easter DRC. Indeed, since the early '90s the newly formed non-State actors militias saw an opportunity in the natural resources that the DRC is reach of.[256] The illicit occupation and exploitation of the mines with the purpose of illegal trade of these valuable resources became thus the most simple and lucrative way to finance the independent militias.[257] This practice creates different severe problems. First, from a politico-economic perspective the illicit trade increases the grey economy by taking directly from the GDP of the

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[253] International Monetary Fund, "Democratic Republic of the Congo: Poverty Reduction Strategy Paper", July 2013, *IMF Country Report*, No. 13/226, para. 1-11.

[254] *Ivi*, para. 11,67, 139, 143.

[255] See Vachudova, *Op cit.*

[256] Deibert Michael, *The Democratic Republic of Congo: between hope and despair*, Zed Books, 2013, pp. 73, 111.

[257] *Ibidem.*

DRC. Second, the practice is directly linked with an increase of the use of child soldiers[258] and has a negative effect on the rule of law in general. As it concerns specifically the crime of SV, several studies show a connection between the high presence of ex-child soldiers and crimes under the category of SV.[259] Such link is given by the use of drugs on child soldiers since the beginning of their recruitment first to assure obedience and later to establish a reward system. The studies, further, show that narcotic rewards are often linked to SV used as a weapon of war.[260]

The issue of illicit exploitation of natural resources should not be treated as a secondary problem but as an issue that needs to be approached with great urgency. The reasons for this problem to necessitate prioritisation are both political and legal, as it slows down the democratisation process by having negative effects on the rule of law, by allowing the conflict to continue and thus, worsening the governance issues; and finally by increasing the use of SV as a weapon of war. On the other hand, if this issue were to be approached would create a chain of positive effects. A State control and benefit from its own natural resources would be extremely beneficial for the economy of the country in general and with specific policies might be used to finally end the conflict in Eastern Congo. This would decrease grey economy, increase rule of law and it would allow the state to exercise governance over its territory. If the benefits from the trade of the natural resources were used primarily, at least for the first years, to reform and increase the salary of the DRC army this would help not only to put an end to the violence in the region but also to disincentive SV used as a weapon of war. In fact, the studies conducted on the *order* of SV crimes show that the lack of an adequate salary increases the commission of crimes classifiable as SV.[261] In addition, State soldiers are more prone to observe humanitarian law than the non-State actors.

A well strategised policy to approach the issue of illicit exploitation would include domestic legislation on this kind of crime, national army reform in a first phase or in a second one if used independent actors, as the UN peacekeepers to secure the natural resources. From an international point of view there have been some attempts to codify the exploitation of natural resources during conflict, and more generally the impact of armed conflict on the environment.[262] Nonetheless, the

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[258] *Ibidem.*

[259] Baaz and Stern, *Op cit.*, pp. 508-510. And Schneider, Banholzer and Albarracin, "Ordered Rape: A Principal–Agent Analysis of Wartime Sexual Violence in the DR Congo", *Violence Against Women*, Vol. 21 Number. 11, SAGE, 2015, pp. 1342-1343. United Nations Environmental Program, Meith Nikki, *République Démocratique du Congo: Evaluation Environnementale Post-Conflit*, 2011, pp. 69-73.

[260] *Ibidem,* supra note.

[261] Baaz and Stern, *Op cit.*, pp. 507-508.

[262] *Ibidem supra note* 213.

attempt of the International Law Commission is a long way from becoming customary law and several more years will be needed in order to have such rules on an international level.[263]

- Democratic Republic of Congo's Army Reform or Disarmament?

The analysis of the first section of this project showed that SV is used as a weapon of war by all of the active militias, both State connected and non-State actors. This fact presents the need of an extensive army reform in the DRC. The undertaken measures by the international community and the DRC government are part of a complex program called Disarmament, Demobilisation and Reintegration (DDR). Such program is supposed to prepare the terrain for a future reform in order for it to be successful. Apart from the UN also the World Bank is cooperating with the national authorities on this programme.[264] The DDR is a very complex programme, that apart from the obvious disarmament of the army, its demobilisation and the reintegration of the former soldiers into society, includes also food aid, women and youth rights and health programs.[265] In a sense this complex mechanism makes the national army ready not just for a military reform but more generally for a security reform. The objectives of the DDR are to change the soldiers with better trained ones on matters regarding humanitarian law, in general and gender, in particular.[266] This program would be extremely positive considering the DRC context; however it has not given as good results as in other African Countries.[267] The main reason for the DDR to be poorly efficient is that the World Bank and the UN have not considered the local realities in the implementation of the program.[268] If the implementation of the DDR considered not just corruption on a higher level but also on a lower level the program would be more successful. Nonetheless, apart from not having dedicated enough budget for the soldiers training another problem that has a direct consequence on the crime of SV is the amount of salary decided by the World Bank. Such salary should have increased to a maximum of 24 US dollars, however given the misdistribution of the budget the

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[263] See chapter III.I.

[264] See chapter III.I.

[265] United Nations, The Operational Guide to the Integrated Disarmament, Demobilisation and Reintegration Standards, 2014.

[266] *Ivi*, pp. 121, 135, 143, 157, 182.

[267] Africa Research Bulletin: Political Social and Cultural Series, "Democratic Republic of Congo: Corruption Purge", March 1st–31st 2007, Military, pp. 17024-17025.

[268] *Ibidem*, and see chapter III.I.

soldiers' salary did not increase as much.[269] In the hypothesis that it would have such a remuneration would be still very law to discourage SV. As approached in the first part of this thesis, one of the reason for soldiers to engage in the crime of SV is that they cannot afford to pay for their sexual needs.[270] Overall the DDR is an extremely complex program that has the potential to be very effective as seen in Cote d'Ivoire, for instance, but the program is implemented differently in every country and the implementation chosen for the DRC needs to be changed in order for the program to have a positive outcome. For this to happen, as for the majority of international projects in developing countries, there is a need of consideration to a variety of local and regional elements, as corruption rule of law and crime rates in general and organised crime.

- The Role of the NGOs and the Stakeholders

In the DRC are active numerous international and local organisations and foundations addressing issues of SV or related. These institutions are active on different levels and approach the issue from numerous perspectives: some address issues as access to justice, others provide medical care, others provide psychological care, others offer services related to reintegration to a community and so forth. The problem that I underline here is that there is no database of all of the organisations active on the field. This is a problem because not knowing about other organisations active on the same issue means that cooperation, or even, coordination might be as difficult as impossible. A database with listed all of the organisations and NGOs active on the field and their area of work would be very helpful as well in redistributing the already determined budget. In such sense if two or more NGOs were to work on the same issue they could coordinate and save parts of the budget for additional projects. This would create more opportunities for the Organisations on the field and it would be very useful for bigger institutions as the UN agencies or the ICC as they could coordinate their work with the local actors and have a better inside for policy making and implementation. Such coordination would not be difficult to realise and it would use the already existing budget in a much more efficient way. From a management point of view, coordination is different than a full cooperation, as seen from past experiences, a full cooperation is extremely difficult to put in action and obtain efficient results. In the case of the database, highly efficient outcome might be achieved with a simple organisation as a database. Finally, the existence of such a database would help donor States and international organisations in choosing better how to distribute their funding. In the sense

[269] Africa Research Bulletin: *Op cit.*, pp. 17024-17025.

[270] Baaz and Stern, *Op cit.*, pp. 512-513.

that from looking at the database those institutions would have much less research to do in order to understand which sector or initiative needs more funding and suites the best their agenda.

- What do Victims Really Need?

One of the most disputed questions by both academics and practitioners is what the ultimate victims' needs are. Of course, when it comes to crimes as SV in conflict medical help is the first answer to this question but that is not nearly enough. The need of more medical facilities is a strong one, considering the vast territory of the DRC. Nonetheless, just by receiving medical help it does not prepare the victim to reintegrate in her/his community nor to take an active part of the social and political life in that same community. On one side TJ is a process that should end in peace with reconciliation and the UN makes efforts towards peace building and state building; for this processes to be functional the victims of war crimes and crimes against humanity, in general and SV in particular need to be reintegrated into society because if they would remain marginalised the "new" state would be built mostly by perpetrators, given the effectiveness of both the national and international justice system. On the other side political and legal institutions avoid carefully to engage in activities related to trauma, secondary trauma and stigma. These are issues that are not properly approached if not by few local actors as the Panzi Hospital and the respective Foundation. Further, when approaching such issues, even theoretically, taking into consideration historical culture and gender roles in the DRC society might easily become an excuse for not approaching these problems accordingly. In such way the DRC lacks the cultural uses to respect gender and not much could be done until this does not change. Nonetheless, non-approaching accordingly issues as stigma and trauma effects might be even more damaging than what would be imagined: in the case were victims participate to micro credit initiatives they might have lower or none chance of succeeding because still marginalised by society. In this case the risk is taken by the institutions that provide the micro credit; in economics this usually means less credits in the future or credits at a higher interest which are both circumstances that are not convenient for the victims. In this context of trying to answer the question of what are the ultimate needs of the victims of SV, the idealistic answer would be to implement policies, programs and projects considering how much easier it is to be a woman in a western society; this would provoke the development of strategies to ease the women's life from a gender perspective. Indeed, making such a comparison would also help in seeing the figure of the victim in a less abstract way and thus, closer to the women walking on our western streets. From a less idealistic point of view, but still theoretical, the victims are the main

justification for TJ and ICL disciplines under a human rights discourse. Thus, arguably the ICJ institutions primary goal is to provide justice to victims by ending impunity. This theoretical discourse makes perfect sense until the victim is considered in an abstract way, but when the victim becomes a man or a woman with free will things might change. In a way the beneficiary of ICJ is the victim but this comes at a price for the person that has suffered the crime. As Mégret suggests, the truth-telling as a result of a TJ process might be comforting for the victims but that is a public truth-telling were the victim can easily loose her/his privacy and even be putted in danger as a consequence.[271]

However, if such abstract idea of the victim were to be abandoned and victims of SV in conflict were to become people with different and yet very similar needs the theoretical discourse would change. Following this idea the priority comes easier to define as "safety" or, in other words the condition of feeling safe that SV is repressed. The success of the deterrence effect would perfectly provide such repression of crime and feeling safe. This, however, complicates the framework as the deterrence effect is extremely difficult to achieve,[272] as it would require both political and legal active engagement and cooperation on this issue. This considered, there are other ways to tackle the issue of deterrence by implementing different kind of auxiliary projects to help what ICJ is trying to achieve. From awareness raising, educational initiatives against corruption, access to justice advocating, trauma effects treatments, reintegration into society and women empowerment initiatives.

Conclusions

Throughout this project I had the possibility to define the issue of SV in the Eastern part of the DRC. Such issue has very deep roots that have a socio-economic and cultural nature. After more than 20 years of conflict the inhabitants of this region are suffering of a culturally rooted violence and the national and international institutions and organisations are trying to combat the same issue. The international institutions are often criticised without taking into consideration how young are those institutions and that they are still learning from their mistakes. A perfect example of this is MONUSCO and its allegations of SEA, followed by a series of provisions to counteract this issue. This example shows that the institution is evolving and learning empirically. Likewise, the ICC, metaphorically is a extremely young institution comparable to a child not yet capable of standing up

[271] Mégret Frédéric, "The Strange Case of the Victim Who Did Not Want Justice", *International Journal of Transitional Justice*, 2018, Issue 12, Oxford, pp. 445-446.

[272] Schense and Carter, *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, Torkel Opsahl Academic EPublisher, 2017.

for itself: from one side the very ambitious mandate, affirming its intention of a victim oriented approach and willingness to prevent and protect from future crimes;[273] and from the other carefully avoiding all behaviour that might be characterised as political, even if this might be considered counterproductive for the Court itself or its mandate. This is most likely the result of an attempt to resemble the separation of powers that can be observed in national political system. Still such separation of powers does not exist in international politics due to the very process of legitimising international law in general. Consequently, if such separation of powers existed on international level, as it exist in national democratic regimes, international law of any kind would not exist. Paradoxically, the aim to distinct the different institutions as solely political or legal prevents even the siltiest flexibility in their mandates and ultimately coordination between their operates. The international institutions, guided by the best intentions and with a pathological fear of loosing their theoretical and doctrinal independence, intervene politically in States and often worsen the situation that they found. In this project I argue that a more pragmatic approach - that does not consider as much theoretical questions as ICJ‘s doctrinal independence from politics - would result in an active victim based, and not just oriented approach. Further, such approach would create the possibility for the different types of institutions and organisations to coordinate and achieve their goals in a less costly and faster manner. This last factor, in my opinion, would increase the adoption of ICL norms. For instance, a coordination between the ICC, local institutions and criminological researchers would help the local governments and institutions as the AU, to see the ICC less as an “oppressor” and more as the international institution that it is: aiming to contribute to peace, which would be economically positive for the local governments and institutions. This would potentially help in avoiding other withdrawal threats. Lastly, is abandoned the national idea of separation of power for the international system there will be a very positive outcome for TJ, here intended as a process. The increased coordination between institutions, organisations and authorities would benefit every part of the process of TJ - from the investigations to the state building - giving a chance to ICJ to a heave its heights ambition in protecting from future crimes throughout deterrence. In other words, if the lack of separation of powers on an international level is seen as a strength instead of a weakness it would facilitate coordination, and throughout coordination it would increase the positive effects of TJ.

[273] International Criminal Court, *Rome Statute of the International Criminal Court*, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, Ar. 7 para. 3. and Moffett Luke, *Op cit.*, pp. 281-289. And Cassese Antonio et alt. *Cassese's International Criminal Law*, Third edition, Oxford University Press, 2013, pp. 5-7.

If framing the issue of SV in DRC in a more pragmatic way it would result in a more sustainable, economically speaking, approach to be adopted by the national authorities and the international institutions. Pragmatism, in this sense, becomes a protagonist when analysing complex issues as the one of SV in DRC: it allows to consider the issue from a multidisciplinary perspective with the purpose of assisting international and national institutions in tackling serious problems related to core international crimes. The facts that suggest all of this are the extensive legislative efforts that resulted in amendments of Criminal Code, Criminal Procedural Code, Military code and Military Procedural Code and that had almost no tangible effect on the general situation concerning SV in DRC. The transfer of international law into the domestic legislation is significant, not just from the Rome Statute but also from European Union Norms as the one against trafficking in human beings.[274] Thus, there is something different that must be done: either invest in more programs either change the approach and redistributing the funds in considering the issue holistically. The critiques attack ICJ of not being victim oriented and international political institutions to be self interested. Even if well argued and structured those critiques lack in a holistic framework that examines all the elements related to a single issue. From a completely different perspective, such critiques might be interpreted also as a political discourse meant to push the international institutions to do more and to do it more carefully. However, the fact that these international institutions tend to operate separately and avoid cooperation for the purpose of making smaller and easier mandates hoping to be more effective, results the implementation of projects that have a low success rate. This eventually transfers in a standardised approach of nation and state building that harms the outcome of the political transition, the legal implementation and the rule of law more generally. For the ICJ institutions it results in critiques, both academic and political, about the lack of victim oriented approach and even worse imposition of western legal values. This discourse aims to express the need of approaching the issue from a different perspective: practical oriented and holistic. When implementing coordination between the different types of institutions is not a matter of changing the core type of the institution but it is a matter of mare management of the different resources and provisions that can be offered. The coordination might represent a risk for ICJ institutions to be too politically active or, otherwise expressed, to have a strong political agenda. However, all of the efforts towards standards and awareness raising on integrity for the practitioners of ICL has the purpose of avoiding such risk. In this discourse the concepts of integrity and pragmatically approach are not juxtaposed but instead they are seen as two codependent elements.

[274] See Chapter II.I.

Following the same logic, when adopting this practical oriented approach it must be considered the cost of impunity and lack of deterrence effect. First, as seen in the second and third part of this project, elements as impunity, high crime rates, corruption, lack of rule of law and other related issues create a vicious circle that increases the grey economy and decreases the GDP. Those two economic issues represent a problem not just for the State but also for the foreign investors and the international institutions present on the territory due to the high risk rates. Second, it must be considered the cost of the peacekeeping missions, the cost of the tribunals, and the cost of the humanitarian aid. Having a conflict, and a widespread use of war crimes and crimes against humanity means that the international community, for the sake of human security, will intervene with measures, as these, to help the State suffering from a conflict. Third, there is an additional cost, not economic, the use of widespread SV has consequences on the way gender issues are perceived in the DRC and neighbouring Countries; consequences on the compliance with human rights norms; and consequently on the culture. All of this factors have an effect on the political transition. When seen in this way the issue superficially appears to be very far away from the victims, intended as persons and not abstractly. An in-depth analysis showed that a victim based approach on its own has the power of penetrating the vicious circle of corruption, SV, luck of rule of law, grey economy and related issues. Intended, in this manner the victim oriented approach would have practical results, in a first phase, on the trust in the authorities, on the access to justice; on a second phase, on the rule of law and the political transition; and finally on the achievement of deterrence. Thus a properly functioning and *brave*, considering doctrinal independence, victim based approach is not to be underestimated.

The case of the DRC and its issues of SV in the Eastern region, show clearly that two elements are several missing: coordination between actors and consideration of local strengths and weaknesses. Thus, the victim based approach is not lacking, it is just implemented in a limited manner, considering the missing elements. This practical case showed that just by building a database about all of the international and local actors the rates of coordination would be much higher. This would significantly increase the success rates of the singular projects. Additionally, a consideration of local strengths and weaknesses would avoid inefficient policies and strategies, and wrongly distributed budget. Concerning strictly ICJ, taking into account these local elements would improve the functioning of the entire process: investigations that consider local criminological notions would result in better case building, more successful trials; and the same consideration would provide knowledge on the crime's cultural elements useful in offering the proper provisions to the victims. Thus, this practical case underlines that the discipline of ICJ lacks not as much a victim oriented

approach but in criminological notions. As criminology shows crime varies from country to country and from region to region and jurisprudence alone cannot exhaust this issue. As it concerned the existing ICL norms they must be universalistic but the approach to the particular crime needs to be adapted to a particular situation, during the investigation process and for the victim oriented approach. The lack of use of the criminological notions results in an additional cost both financial and otherwise. The financial cost is very similar and connected to the cost of impunity and lack of deterrence. The other kinds of cost include negative effects on human security, impunity, lack of trust in the authorities and eventually negative consequences on the rule of law. This issue is not associated just to the case of the DRC but generally to situations where war crimes and crimes against humanity are present.

The issue of SV in conflict in general, needs a particular kind of attention because of the nature of the crime and the aimed long lasting effects of this crime when used as a weapon of war. In order for the victim oriented approach to be efficient there must be developed a criminological sub-discipline in ICJ to provide knowledge and deeper understanding of the issues that ICJ is tackling. Likewise, a more flexible conception of the nature of the international institutions would improve coordination for the purpose of achieving common goals as deterrence for the horrible crime of SV in conflict.

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