Global Campus Europe

University of Cyprus

European Master's Programme in Human Rights and Democratisation
A.Y. 2019/2020

Rape as a weapon of war:
An analysis of the impunity of perpetrators of sexual violence in the DRC

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Abstract

The use of rape as a weapon of war was only recently recognized as a military strategy, which aims to terrorize the population. Nowadays, the Democratic Republic of Congo regrettably stands out for having the higher rate of rape in the context of its armed conflict. Indeed, the numbers leave no room for doubt: this country has become "rape capital of the world" [1].

This cruel phenomenon generates many questions, particularly with regard to the impunity enjoyed by the perpetrators. This last question constitutes the common thread of this thesis, during which we will discuss the legal challenges, as well as the reasons explaining the impunity of rapists.

In an effort to capture the complexities of the phenomenon, this thesis addresses numerous aspects. Indeed, the stakes of rape as a weapon of war, the legal framework, and the national geopolitical situation, constitute crucial points in order to have a full picture of this phenomenon.

At the end of the research, some aspects emerged in the improvement of both the international and the national judicial system. Thus, investment in transitional justice, in the responsibility of military superiors, as well as in the protection and reparation of witnesses and victims, appear to be essentials.

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[1] J. MATUSITZ, « Gender Communal Terrorism or War Rape: Ten Symbolic Reasons », *Sexuality & Culture*, vol. 21, n° 3, Springer, New-York, 2017, pp. 830-844.

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Acknowledgments

I would like to express my sincere gratitude to my research supervisor, Professor Kalliope Agapiou, for giving me the opportunity to do my research on this topic in Cyprus, and for providing guidance throughout this research. Despite the unexpected coronavirus pandemic, she was present and supporting me during the writing of this thesis. Her commitment and values inspired me greatly.

I am also grateful to my parents for their support to complete this research work, as well as during all my university studies.

Finally, I am also very much thankful to my roommates and classmates, Nina and Megan, with whom we shared moments of joy and sharing, and who made these few months in Cyprus unforgettable.

Introductory chapter

October 5 looked like any other day for gynecologist Denis Mukwege, who was saving another life in his operating room. Indeed, he was not expecting the news he would receive: he just won the Nobel Peace Prize of 2018. At the ceremony, he then declared: "For almost 20 years I have witnessed war crimes committed against women, girls and even baby girls not only in my country, the DRC, but also in many other countries." He then added, "To the survivors all over the world, I would like to tell you that through this prize, the world is listening to you and refusing to remain indifferent. The world refuses to sit idly in the face of your suffering[2]". The Panzi Hospital created by Dr. Mukwege has treated more than 50,000 survivors of sexual violence, with more than 37,000 patients with gynecological injuries since 1999[3].

Indeed, sexual violence in the Great Lakes region first escalated during the first Congo war[4]. Since then, the situation has only worsened and human rights, especially women's human rights, have been massively violated in the region[5]. Commenting on this situation, Mrs. Ertürk, Special Rapporteur of the UN Human Rights Council, declared at a press conference in Kinshasa on 27 July 2007: "In the framework of my mandate, which concerns violence against women, the situation in the two Kivus is the worst crisis I have encountered so far"[6].

Rapes during wartime always occurred; what is new is its systematic and institutionalized use in nowadays conflict. However, rapes in the DRC have reached epidemic proportions and an unprecedented level of cruelty. Indeed, Human Rights Watch observers and Doctors without borders have estimated that 30% of the women were mutilated during the attacks[7]. The situation has reached such proportions that everyone agrees that it is indeed a weapon of war and not collateral damage to the conflict. For instance,

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[2] "Kaleidoscope", New African, No. 588, November 2018, available at: http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=133147512&site=eds-live (Accessed: 23 March 2020).
[3] A. BAKER, "Nobel Peace Prize: Denis Mukwege and Nadia Murad", *Time international*, Atlantic Edition, v. 192, N°16, 2018, p. 13.
[4] "Une arme de guerre : le viol et les violences sexuelles contre les femmes en République démocratique du Congo : comment le Canada peut se mobiliser et mettre fin à l'impunité", *s.l., Canada. Parliament. Chambre des communes*, Canada, may 2014, p. 24.
[5] A. MAEDL, « Rape as a Weapon of War in the Eastern DRC ? the victims' perspective », *Human Rights Quarterly*, Vol. 33, No. 1 (February 2011), John Hopkins University press, USA, p. 128.
[6] V. MOUFFLET, « Le paradigme du viol comme arme de guerre à l'Est de la République démocratique du Congo », *Afrique contemporaine*, vol. 227, n° 3, De Boeck Supérieur, 2008, pp. 119-133.
[7] F. CRAWFORD KERRY, *Wartime Sexual Violence : From Silence to Condemnation of a Weapon of War*, Georgetown University Press, Washington DC, 2017, p. 475.

4,500 rape cases were reported in the first eight months of 2007. In 2010, The Journal of the American Medical Association released a study arguing that close to 40% of the women in this region have been raped at least once in their lifetime[8]. In 2011, the New York Times published that a woman was raped every minute in DRC[9].

In this thesis, the reader will first get an overview of what rape as a weapon of war is, and what distinguishes it from the notion of "classic" rape. We will try to understand why sexual violence is used as a weapon, and what makes it such a powerful tool. In this regard, all relevant aspects will be addressed such as legal, socio-cultural, economic and political dimensions. Indeed, the use of rape as a weapon of war is part of a thoughtful and organized tactic of warfare with concrete objectives[10]. In this thesis, we will also address the consequences of sexual violence from the individual and collective aspect. This dual dimension is extremely important, because rapes will have an impact on women's lives, which will also have implications on the community to which she belongs[11].

After this re-contextualization, we will look at the core of this work: the issue of impunity. Indeed, it constitutes the major problem in DRC as well as in other places of the world. This phenomenon is partly due to the huge number of unreported crimes which can be explained by the culture of impunity that prevails. Indeed, beyond the social, emotional, and material barriers, the culture of impunity makes it worthless or even more painful for the victim to report her case. The aim will be to understand why rapists are rarely prosecuted for their crimes[12], by analyzing the legislation and decisions rendered by the judicial institutions at the international and local level. In this regard, special attention will be given to the protection and the reparation of the victims and witnesses to have a full picture of the problem. In addition, we will take stock of what has already been done concretely in the region, in particular thanks to Doctor Mukwege, and consider future solutions to combat the impunity that has prevailed to date.

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[8] J. MATUSITZ*, op. cit*., pp. 830-844.
[9] R. RUBIN, « For Nobel Peace Prize Winner Dr Denis Mukwege, His Patients Motivate and Inspire », *JAMA*, Vol. 321 (1), American Medical Association, United States, 2019, pp. 19-21
[10] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *Inflexions*, La documentation française, France, vol. 17, n° 2, 2011, p. 184.
[11] G. GAGGIOLI, "Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law", *International Review of the Red Cross*, v. 96*,* Cambridge University press, 2014, p. 450.
[12] V. MOUFFLET, *op. cit*., p. 129.

Before the twentieth century, this phenomenon has not received much attention either at the legal/political, or at the academic levels[13]. This issue was considered as a “women’s problem”[14] and was thought to be an almost inevitable “side-effect” of the war[15].

During the First World War, even if the International Military Tribunal in Nuremberg (IMTE) and the International Military Tribunal for the Far East (IMTFE) heard evidences of massive rapes, such crimes were not included in the Tribunals’ Charters[16]. Rape was not considered a crime worthy of prosecution on its own, and was only considered as such in torture cases[17]. In 1949, when the Geneva Conventions were amended, the protection of women in times of war appeared in Article 27 of the Fourth Convention which states that “women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution or any form of indecent assault”[18].

With the atrocities perpetrated in the nineties in Yugoslavia and Rwanda, it became clear that such violence could no longer be denied[19]. In 1992, the Security Council of the United Nations declared that the massive rapes perpetrated in Yugoslavia constituted "an international crime that could not be ignored"[20]. Thanks to these ad hoc jurisdictions, the first Convictions for the use of conflict-related sexual violence took place, and individuals were held responsible for their acts. It has helped to draw attention and improve the protection of civilians, but also to understand better the position of victims and the impact of gender considerations on these experiences[21]. The next step came with the International Criminal Court (ICC), more precisely through the Rome Statute (the founding treaty of the ICC) which contains a list of sexual abuses included under the notion of crimes against humanity[22]. However, even if the prohibition is legally binding through international and national law, the path to eradicating conflict-related sexual violence is still long.

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[13] J. BOURKE, « Rape as a weapon of war », *The Lancet*, vol. 383, n° 9934, Elsevier, UK, 2014, pp. 19-20,
[14] *Ibid.,* pp. 19-20,
[15] H. PORTER, « Moral spaces and sexual transgression : understanding rape in war and post conflict », Wiley & sons, USA, 2019, p. 1010.
[16] C. FOURÇANS, *op. cit.,* p. 155.
[17] Official website of the Mukwege foundation, accessed 25 march 2020, available at: https://www.mukwegefoundation.org/the-problem/rape-as-a-weapon-of-war/ (accessed 19 june 2020)
[18] Article 27, al 2, fourth Geneva Convention of 12 august 1949.
[19] A. MAEDL, *op. cit.*, p. 831.
[20] “Situation des droits de l’homme dans le territoire de l’Ex-Yougoslavie », *Assemblée générale des nations unies*, 18 december 1992, 1/RES/47/147.
[21] G. GAGGIOLI, *op. cit.,* p. 427.
[22] Article 7 (1), g) of the Rome statute of the International Criminal Court of 1998.

The growing understanding, coupled with the increasing public awareness of the phenomenon has led to a significant number of initiatives from the United Nations (UN), civil society actors, humanitarian organizations, governments, militaries and academics[23]. Indeed, experts from various fields started studying this phenomenon in order to understand all the issues at stake. Some elements came up quite frequently, without being specific to a certain conflict. Indeed, even if each attack is different, whether in terms of perpetrators, *modus operandi*, or the public nature of the attack, it is clear that common characteristics emerge. They will be discussed further in this thesis.

After reviewing the literature in order to put the topic in context, we will move on to the analysis of the impunity that prevails concerning rape as a weapon of war in the case of the DRC, and to the most innovative part of this thesis. Indeed, the contribution to the literature will consist of a reflection about ways to improve the system - especially in the DRC - regarding sexual violence both at the preventive and recovery level. We will draw inspiration from academic and field critical analysis, as well as evidence from post-conflict zones, where effective judicial systems were set-up. Thanks to this, the final part of this thesis will consist of a reflection on how to improve the conviction of perpetrators, the protection and reparation of the victims, and how to break this spiral of sexual violence. In this regard, this thesis does not pretend to solve this complex situation, or to contain the ultimate solution to eradicate impunity regarding sexual violence. Indeed, people who have devoted their time to work in the field over the years probably still has a lot to teach us. These reflections are simply a synthesis of the ideas that came up within the course of this research, and which hopefully will serve as an introductory tool for anyone who wishes to gain an insight into this problem.

This thesis adopts a mainly legal approach. Indeed, the question of the impunity is directly linked to the legal framework, the judicial institutions and the legal culture that support it. The branch of law concerned is mainly International Human Rights law, even though International Humanitarian law and International Criminal law are concerned as well[24]. We will focus on Congolese national law in order to

[23] G. GAGGIOLI, *op. cit.*, p. 427.
[24] Indeed, while international humanitarian and human rights law sanction all forms of sexual violence (no matter when or against whom they are perpetrated), international criminal law contains individual criminal responsibility for authors' of sexual crimes. As a result, these three branches reinforce each others. (G. GAGGIOLI, *op. cit.*, p. 450).
[24] J. MATUSITZ, *op. cit*., p. 503.

reflect on the key issue of the implementation of relevant laws. However, other considerations, such as the geo-political history of the country, or the sociological and psychological aspects of the phenomenon, need to be taken into account.

This multidisciplinary theoretical orientation necessarily implies a diversified methodology. Indeed, this thesis is mainly based on a literature review composed of books, articles, biographies, and reviews. In addition, various reports issued by international organizations, human rights treaty bodies, or NGOs were consulted. Moreover, being a graduate of the Faculty of Law of the University of Liège, contacts have been taken with the Mukwege Chair which was established by this University in 2018, which aims to facilitate multidisciplinary research on sexual violence committed during armed conflict. Finally, during the writing of this thesis, I had the chance to work in a Caritas office in Cyprus, and in a center for asylum seekers in Belgium, where I heard the testimonies of Congolese women who had experienced sexual violence.

The structure of this thesis will follow a pedagogical approach. We will begin by setting the scene, by explaining what is meant by rape as a weapon of war (Chapter 1). Indeed, we will first define this phenomenon (section 1), before addressing the reasons why this weapon of war has become systematic in certain conflicts and not in others (section 2). Finally, we will briefly discuss the dramatic consequences of these practices on women and the population (section 3).

We will then focus on the legal framework from the international point of view (Chapter 2). As a first step, we will consider the international legal framework (section 1), composed of the main international instrument related to sexual violence such as the Geneva Convention, the Statute of ad hoc jurisdiction as well as the International Criminal Court (ICC), and the Treaties issued by the United Nations. Afterward, we will have an overview of the main judgments delivered by the above-mentioned jurisdiction in order to learn about their contributions (section 2).

Subsequently, we will narrow down the conflict that has been taking place in the DRC (Chapter 3). In order to better understand both the causes and the magnitude of the phenomenon in this conflict, we will proceed with a brief historical overview of the country (section 1). This will provide an overview of the use of rape as a weapon of war in the country, taking into account all relevant factors (section 2). We will then examine the national legislative and judicial framework to identify gaps in it and address the

impunity that prevails there (section 3). Finally, we will discuss the actions taken by NGOs, by the national government and the United Nations, as well as the multidisciplinary cooperation at the academic level (section 4).

In the last Chapter (Chapter 4), we will elaborate an approach to sexual violence in the DRC aiming to eradicate impunity for rapists. Based on information and evidence gathered, we will try to identify the most important weaknesses and elaborate ways ahead. Reflecting on possible improvements at the level of the international (section 1) and national (section 2) level, we will conclude this analysis by taking stock of the current situation and identifying ways ahead.

Chapter 1: Rape as a Weapon of War

This chapter discusses the notion of rape as a weapon of war, which has only recently been recognized as such at the international level. While rape was initially understood as a private matter, its use in armed conflict has taken on a new dimension. As we will see, this recognition of rape as a weapon of war has generated theories in order to describe and explain this phenomenon. In order to understand this shift, the second section of this chapter is dedicated to the reasons why such a cruel method is used as a weapon against civilian populations. Finally, the last section will provide elements concerning the consequences aftereffects that rape leaves on the victims as well as their communities.

Section 1 – The notion of "rape as a weapon of war"

1. "Conventional" wartime rapes vs. rape as a weapon of war

In order to understand this notion, a fundamental distinction has to be made between "*conventional*" wartime rapes and *rape as a weapon of war*.

On the one hand, "*conventional*" wartime rapes refer to situations in which sexual violence occurs in a conflict period, without any political intent. These crimes are committed mainly because of the decline of social bonds, and the awareness that such crimes will probably go unpunished[25]. In addition, the circumstances of war may change the way rape is perceived, because it seems less shocking than in peacetime[26]. These crimes can also occur when the conflict has ended, where rapes were or are perceived a private matter[27].

The situation in Germany in the post-war period illustrates this assertion. Indeed, a significant number of rapes have been perpetrated by Soviet soldiers against German women after the liberation. This phenomenon occurred because of different factors, such as the sexual frustration of soldiers, the awareness of victory, and the feeling of a "legitimate revenge" against the civilian population identified

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[25] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* pp. 184 and 188.
[26] *Ibid.,* p. 183.
[27] V. MOUFFLET, *op. cit.*, p 128.

as the defeated enemy[28]. Rape was also perpetrated as a form of sexual domination over the women who embodied the weakened territory[29].

On the other hand, *rape as a weapon of war* is not motivated by sexual impulses, but rather by political considerations. Indeed, whereas rape in war had been existing since millennia, it has over time taken a twist as a war strategy[30]. These rapes ordered by superiors among armed groups[31] are used because it constitutes a very effective and cheap weapon[32]. This explains why it has been used in many recent conflicts such as in Sierra Leone, Liberia, Soudan, Bosnia, or Rwanda[33]. In all of these conflicts, confrontations between victims and perpetrators are deeply unequal because on the one side there are professional armed soldiers (mainly males), and on the other side there are unarmed civilians of all ages and sexes[34]. By using sexual violence, armed groups succeed in destroying local communities in several ways, which weakens them and makes them easier to control. Even though the recognition of the notion of *rape as a weapon of war* is quite recent, it generated theories to understand this phenomenon, which brings us to the next point.

2. Emergence of this concept

As already mentioned, the notion of rape as a weapon of war did not attract much legal, political or scholarly interest before the 20th century. However, this does not mean that the latter constitutes a recent phenomenon. Indeed, it is fairly easy to find evidence of sexual assault in times of conflict in history. For instance, significant documented events mention mass rapes in many cases: the Anglo-Saxon and Chinese chronicles, the conflicts between Jews and their opponents mentioned in the Bible, the Viking marauding, the rapes of the Sabines, etc.[35]. All these examples show that rapes in wartime always existed, in various cultures and societies across history.

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[28] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* pp. 188 and 195.
[29] This phenomenon has been revealed, among others, in the book « A woman in Berlin », wrote by an anonymous woman who described repeated rapes suffered by German woman (*Ibid.,* p. 188).
[30] D. WINGEATE PIKE, *Crimes against woman*, Nova Science Publishers, New-York, 2011.
[31] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* pp. 184.
[32] A. MAEDL, *op. cit.*, p. 129.
[33] « Une arme de guerre… », *op. cit.,* p. 5.
[34] V. NAHOUM – GRAPPE, « La purification ethnique et les viols systématiques. Ex-Yougoslavie 1991-1995 », *Clio. Femmes, Genre, Histoire*, n° 5, Belin, France, April 1997, p. 6.
[35] J. GOTTSCHALL, "Explaining wartime rape", *The Journal of Sex Research*, New York, Vol. 41, No. 2, May 2004, pp. 129-136

The situation changed partly thanks to feminist movements, which brought female sexual autonomy and pleasure to light[36]. Moreover, the crisis in the former Yugoslavia, coupled with the Rwandan genocide in the nineties marked a turning point in the consideration of sexual violence in wartime. The reports issued after these events stimulated human rights activists, scholars, and journalists, who tried to focus on the problem in order to explain and solve it[37]. They deconstructed the idea that rape was inevitable side-effect of war. Indeed, authors such as Brownmiller emphasized the political aspect of aggression. The latter rejected the assumption that the rapes were motivated by sexual impulses, in order to emphasize the social control aimed at by the aggressors[38]. Thanks to this intellectual work, several theories have emerged to explain this phenomenon[39]. For the purpose of this thesis, we will focus on one of them: the feminist theory.

3. The feminist theory

This theory is interesting because it was the first to address the problem of rape by systematically investigating and collecting data[40]. According to supporters of the feminist theory, such as M. E. Baaz and M. Stern, it is imperative to detach the sexual aspect of these rapes. According to them, the socio-biological explanation cannot explain the systematic occurrence of rapes. In other words, phrases such as "boys will be boys" would lead to erroneous explanations of the phenomenon, which is rather the product of sexist societies[41].

Indeed, according to feminist theorists, such as M. Mackenzie, rape is only the result of a man's desire for domination over a woman. This desire is fuelled by gendered social norms that attribute different roles to both sexes[42]. As a result, rape may be seen as a manifestation of manhood while the victims and their families (including the men in the family) are feminized by the aggression[43].

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[36] J. BOURKE, *op. cit.*, pp. 19-20.
[37] J. GOTTSCHALL*, op. cit*., pp. 129-136
[38] M.E. BAAZ ET M. STERN, « Curious erasures: the sexual in wartime sexual violence », *International Feminist Journal of Politics*, July 2018, vol. 20, n° 3, p. 299.
[39] J. GOTTSCHALL*, op. cit.*, pp. 129-136
[40] *Ibid.,* pp. 129-136
[41] M.E. BAAZ ET M. STERN, *op. cit.,* pp. 295-314.
[42] F. CRAWFORD KERRY, *op. cit.,*p. 477.
[43] M. Mackenzie, « Securitizing Sex?: Towards a theory of the utility of wartime sexual violence" *International Feminist Journal of Politics*, June 2010, vol. 12, n° 2, pp. 202-221.

In this regard, the theorists have reused the pre-existing "pressure cooker" theory of wartime rape, which claims that these assaults are the result of an irrepressible biological desire galvanized by chaos. Indeed, feminists have used this term to explain rapes not by this irrepressible desire, but rather by their deeply misogynistic nature, which conditions them to disrespect and humiliate women[44]. This desire for domination - sometimes even unconscious - would therefore explain the systematic and concerted use of rape[45].

Moreover, authors such as A. B. Houge, F. Crawford Kerry and J. Matusitz pointed out that wartime sexual violence is the result of the radicalization of the everyday sexist behavior within society. Thus, this phenomenon theorized under the "continuum of violence perspective" shows that stealthy sexist ideas that are propagated in times of peace, can lead to extreme behavior in times of war[46]. Indeed, the collapse of society intensifies misogynist behavior, because the values and bonds that bind people are damaged[47]. Commandants are simply using this idea as a basis to reinforce patriarchal gender relations and legitimate rapes both in peace and war times[48]. In addition, because women are considered as a "second-class" citizens, it leads to the idea it is more acceptable to target them[49].

Thus, according to feminist theory, rape in wartime is gender-motivated, which means that a woman is a potential victim, just because she is a woman. The victims of conflict-related sexual violence are overwhelmingly women. Nevertheless, though at a much smaller scale, men are also victims. Thus, the main criticism raised against this theory is that it completely ignores male victims[50]. In order to fill this gap, masculinity theories have contributed to helping courts understand the links between gender, power, and sexual violence perpetrated against men in the context of armed conflict. They explain this phenomenon by the social construction of men within societies[51]. Consequently, they consider that

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[44] J. GOTTSCHALL, *op. cit.,* pp. 129-136
[45] *Ibid.,* pp. 129-136
[46] A. B. HOUGE, "Sexualized war violence: subversive victimization and ignored perpetrators", *Masculinities in the Criminological Field*, 2014, p. 167.
[47] « Une arme de guerre… », *op. cit.,*p. 6.
[48] F. CRAWFORD KERRY, *op. cit.,* p. 480.
[49] J. MATUSITZ, *op. cit.*,p. 837.
[50] V.K. VOJDIK, « Towards a Gender Analysis of Sexual Violence Against Men and Boys in Conflict: Incorporating Masculinities Theory into Feminist Theories of Sexual Violence Against Women », *in Part II - Man and children's experiences of armed conflict*, Intersentia, 22 February 2019, p. 101.
[51] *Ibid.*, p. 96.

feminist and masculinity theories are interrelated because they both denounce the "masculinized domination" during armed conflict[52].

Another criticism against feminist theory is that the data analyzed suggests that other perspectives need to be taken into account. Indeed, authors such as Cohen or Wood consider that gender inequality alone is not reliable indicators to explain the occurrence of sexual violence[53]. As a result, the feminist theory constitutes a very useful tool in order to understand this phenomenon and to devise ways to eradicate it. It would therefore be interesting to rethink the sexist and discriminatory discourse that dominates our societies in times of peace and paves the way for such atrocities during wars. This could be one way to prevent this kind of drift. Nevertheless, this theory seems insufficient to explain the whole phenomenon. In order to fill this gap, the next section contains a brief overview of the main motivations for rape as a tactic of war.

Section 2 – Why is rape used as a weapon of war?

1. The destruction of culture, ethnicity, and identity

The main reason why sexual violence is used as a weapon of war is to destroy the cultural identity of the community. Indeed, the *identicide*[54] aims to destroy everything that falls under the opponent's identity, by wiping the link between individuals[55]. By raping women, perpetrators destroy their role in the family and more generally in society. Indeed, women have a crucial role in the rebuilding of the social fabric and more generally the harmony in the community[56].

Rapes constitute a way to disrupt the society through the future birth instead of directly killing the population[57]. Through the victim's body, it destroys both the descendants and the ancestors of the woman[58]. This bond is very important because the father-to-son bloodline has an emotional importance in communities, and constitutes the way in which everyone's identity is defined[59]. This physical assault destroys the family tree which is the foundation of their identity because the family name and ancestral

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[52] V.K. VOJDIK, *op. cit.*, p. 97.
[53] A. B. HOUGE, *op. cit.*, p. 167.
[54] This term refers to the situation in which a group destroys another group's identity (J. MATUSITZ, *op. cit.*, p. 835).
[55] J. MATUSITZ, *op. cit.*, p. 835
[56] V. MOUFFLET, *op. cit.*, p. 120.
[57] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* pp. 192.
[58] *Ibid.,* pp. 187.
[59] *Ibid.,* pp. 191 – 192.

lands are derived from it[60]. As a result, sexual violence affects not only the victims, but also the whole society[61].

A relevant example of this was the rape of Bosnian women by Bosnian Serbs during the conflict in Ex-Yugoslavia[62]. Propaganda through the media has insinuated the idea of "Serbisation" into people's minds, as if a certain idea of the Serbian race would be threatened. As a result, collective rapes were an integral part of the ethnic purification strategy called "ethnic cleansing," with the aim to communicate the collective identity from father to son. These techniques have gone so far that camps[63] have been set up to confine women and rape them with the aim of giving birth to a Serbian child[64]. Victims were sequestered in these camps until their pregnancy was too far advanced for them to have an abortion[65]. Consequently, these methods make it possible to assuage the domination of one sex over the other, as well as the domination of one ethnic group over another[66].

2. The conquest of the territory

As already mentioned, rape as a weapon of war is very cheap because it does not require any investment[67]. Sexual violence constitute an effective tool in order to terrorize the population, which can lead to the exodus of civilians[68]. By raping women, the perpetrators destroy both the personal security of the victim and the security of the entire community in spreading fear among its members[69]. Strategically, the leak of the civilians facilitates domination over the territory[70], but also over the population[71]. In terms of calculating profitability, it is therefore much more interesting to use rape as a weapon of war, rather than firearms[72].

The will to conquer a territory can be explained by the resources that it contains. Indeed, it can be interesting for the attacker to take control of lucrative natural resources and land. For instance, many of

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[60] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* p. 187.
[61] J. MATUSITZ, *op. cit*., p. 838.
[62] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,*p. 183.
[63] Concentration camps were established in a city named « Foca » in 1993 (*Ibid.,* p. 189).
[64] V. NAHOUM – GRAPPE, « La purification ethnique et les viols systématiques, *op. cit.,* p. 3.
[65] *Ibid.,* p. 3.
[66] J. BOURKE, *op. cit.*, pp. 19-20,
[67] A. MAEDL, *op. cit*., p. 129.
[68] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* p. 191.
[69] F. CRAWFORD KERRY, *op. cit.,* p. 479.
[70] « Une arme de guerre… », *op. cit.,*, p. 5.
[71] *Ibid.*, p. 5.
[72] D. WINGEATE PIKE, *op. cit*., 2011.

the sexual violence occurring in African conflicts[73] are motivated by the obtaining of precious metal, oil and diamonds. Sometimes, terrorizing locals can lead to their acceptance to be controlled and to collaborate in the extraction of these resources. As a result, there can be a clear link between sexual violence, on the one hand, and economic gains, on the other hand[74].

3. The political aspect

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Since rapes used as weapons are ordered by political leaders, the number and intensity of violence depend on their temperament. Indeed, propaganda can also contribute to catalyzing the idea that rape is a legitimate form of revenge from the occupying power, that can be exerted through a woman's body [75]. It grows the idea of domination of one power over another, which can somehow be expressed in the most violent way possible[76]. Actually, this propaganda coupled with the simple fact of the armed conflict can reduce the visibility of sexual violence (which would attract more attention in peacetime). Another factor is that such violence can be used for political manipulation. Indeed, a political technique is to accuse one's opponents of resorting to these practices[77].

Quite often, rapes are allowed, and even encouraged by commanders as a reward or for boosting troop morale. Sometimes, combatants are even expected to rape women or they are deprived of food rations[78]. The indoctrination of combatants aims to depersonalize them and make them lose their independence in order to make them subject to group conformity. As a result, men are encouraged by group pressure rather than by fear. The cohesion inside armed groups is very strong, and is galvanized by the idea that they are superior to others, and represent the ultimate form of power over another person’s body[79]. Moreover, they often suffer humiliation and trauma which can lead to a spiral of violence if they try to reproduce these experiences. In this way, they are dehumanized and their status of submission decreased their conscious of personal responsibility[80].

Moreover, superstitious beliefs may play a key role in the use of rape as a weapon of war, in countries such as the DRC. For instance, combatants believe that raping prepubescent or postmenopausal women

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[73] Involving Liberia, Sierra Leone, DRC, Congo, and Angola (F. CRAWFORD KERRY, *op. cit.,*p. 477-478).
[74] *Ibid.*, p. 479.
[75] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,*p. 188.
[76] *Ibid.,* p. 192.
[77] V. MOUFFLET, *op. cit*., p. 126.
[78] F. CRAWFORD KERRY, *op. cit*., p. 480-481.
[79] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* pp. 186.
[80] D. WINGEATE PIKE, *op. cit*., p. 68.

will "give them power before the battle." They also think that having sex with a young girl can cure them of infectious virus, or that raping a pregnant or breastfeeding woman can provide them magical powers[81].

Section 3 – What are the consequences for the civilian population?

In the first instance, the most dramatic consequence is, of course, the physical pain. The barbarity of the attacks leaves lifelong marks on women's bodies. Rapists often act in groups on the same victim, which can create gynecological consequences. Worse still, they sometimes use weapons to destroy or severely damage the victims' genitals. As a result, victims sometimes become sterile after the aggression because of the brutality of the assaults. They may also be infected with very serious sexually transmitted diseases[82], become pregnant, experience severe pain and have to be hospitalized[83].

In addition, rapes are also perpetrated on children or even babies, whose genitals are not yet developed. The cruelty of these acts can thus generate fistulae, which consists of the rupture of the membrane that separates the vagina from the rectum. As a result, fistulae can make the victim become incontinent which can also damage their social life[84].

Moreover, in a significant number of societies, women's honor is defined around their sexuality. For instance, one of the consequences of the rape is that the victim will be considered as inapt for marriage (if she is single), or even motherhood[85]. Indeed, virginity upon the time of marriage can be part of a cultural identity[86]. Consequently, victims are generally ostracized by their own families because they represent a source of shame. Regarding the children born out of rapes, they are usually abandoned or even killed because of their mixed ethnicity[87]. As a result, the victims suffer twice: first because of the rapist, and second because of the rejection. A consequence of this is that these vulnerable women may more easily fall into depression, drugs, suicide, or even prostitution[88].

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[81] F. CRAWFORD KERRY, *op. cit.,* p. 481.
[82] By contaminating them with AID, it gives the possibility for them to destroy people around her by contaminating them (R. RUBIN, *op. cit*., pp. 19-21).
[83] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* p. 186.
[84] D. WINGEATE PIKE, *op. cit*., pp. 81-82.
[85] J. MATUSITZ, *op. cit*., p. 838.
[86] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* p. 187.
[87] V. MOUFFLET, *op. cit*., p. 121.
[88] J. MATUSITZ, *op. cit*., p. 838.

Finally, repeated sexual violence can have an impact on the short-term economic and social development of the country. Women may be afraid to leave their homes, which will prevent them from participating in economic life[89]. Concerning the children, they will sometimes no longer go to school, which will also have consequences for the labor market and education in general[90].

In this first chapter, we have highlighted the main elements of the concept of rape as a weapon of war, as well as the issues at stake. With this in mind, the next chapter will shed light on the legal aspect at the international level.

[89] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,*p. 186.
[90] « Une arme de guerre… », *op. cit.,* pp. 1 and 9.

Chapter 2: International framework

In this chapter, we will consider how the international community has reacted by creating an impressive amount of formal prohibitions against sexual violence in armed conflicts[91]. In the first section, the focus will be on three international criminal jurisdictions which prosecute sexual violence: the two ad hoc tribunals -ICTY and ICTR- created for specific situations, and the ICC, which is a permanent international court. All these jurisdictions are entitled to investigate and prosecute international crimes perpetrated by individuals[92]. The chapter starts with an overview of the current international legal framework in place, including the Geneva Conventions, the ad hoc jurisdiction Statutes, and the UN legal framework concerning sexual violence. It then examines the main decisions rendered by ad hoc Tribunals and the ICC in order to see how international jurisdictions have applied legal instruments to concrete cases.

Section 1 – The international legal framework

1. The Geneva Conventions and their additional protocols

Formerly, rape in wartime was prohibited in war legislations such as in article 44 of the 1863 Lieber Code[93] and in the Hague Regulations of 1899 and 1907[94]. However, the issue was not seriously addressed before the drafting of the four Geneva Convention (GC) and their additional protocols, following the Second World War[95].

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[91] C. EBOE-OSUJI, "International law and sexual violence in armed conflicts", *International Humanitarian law series*, v. 35, Martinus Nijhoff Publishers, Leiden, 2012, p. 97.
[92] C. FOURÇANS, *op. cit.* p. 156.
[93] D. WINGEATE PIKE, *op. cit.*,p. 85.
[94] G. GAGGIOLI, *op. cit.,* p. 511.
[95] *Ibid.,* p. 511.

While article 12 of the GC I[96] and article 14 of the GC III[97] provide that women shall be treated with consideration to their sex and shall benefit from the same treatment as men, the Convention IV concerning the Protection of Civilian Persons in Time of War is more explicit. Indeed, article 27 mentions expressively the problem by arguing that "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault »[98].

Concerning the minimum standards to be followed during non-international armed conflicts, Article 3 common to the four Geneva Conventions implicitly condemns sexual violence[99]. As a matter of fact, rape and sexual violence can be considered as torture as well as an outrage upon personal dignity (§1, a), and c)). These provisions are supplemented by Protocol II[100], which supports the prohibition of violence against all who do not take part to hostilities (anymore)[101].

Finally, article 75 (2) b) and 76 (1) of the Protocol I, which reinforces the protection of civilians during conflicts, gives special attention to women. Interestingly, the obligation is not limited to not attack women, but is extended to a positive obligation to protect them[102].

However, the Geneva Conventions and their additional protocols have been subject to criticisms. For instance, the phrasing of Convention IV characterizes sexual violence as an affront to the victim's honor. As a result, it gives the impression that we underestimate the gravity of the crime and it expresses the traditional role attributed to women that feminists try to deconstruct. Indeed, according to this phrasing, would a raped woman unquestionably lose her honor?[103]. Another criticism against the Geneva Conventions and its protocols is that the provisions are too broad and generally not implemented. Consequently, they do not protect women sufficiently in armed conflicts[104].

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[96] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, article 12.
[97] Convention (III) related to the Treatment of Prisoners of War. Geneva, 12 August 1949, article 14.
[98] Article 13 also provides general protection to all civilians, including women (Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, articles 13 and 27).
[99] G. GAGGIOLI, *op. cit.,* p. 512.
[100] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[101] For instance, article 4 prohibits outrage upon personal dignity (humiliation and degrading treatment, rape, enforced prostitution, or other indecent assault) and slavery. Interestingly, this article is the first to prohibit sexual violence against both men and women.
[102] D. WINGEATE PIKE, *op. cit*., p. 85.
[103] G. GAGGIOLI, *op. cit.,* p. 512.
[104] D. WINGEATE PIKE, *op. cit*., p. 56.

2. The Statute of the ICTY[105]

As already mentioned in the introductory chapter, the practice of international ad hoc tribunal started with the creation Nuremberg and Tokyo tribunal after the Second World War. However, the first explicit recognition of the gravity of conflict-related sexual violence crimes appeared later, with the Statute of the ICTY and the ICTR[106].

Indeed, the bloody war which occurred in the territory of the former-Yugoslavia pushed the Security Council to create a new ad hoc tribunal in the ninetieth. This jurisdiction was approved by the resolutions 808 and 827, and had a temporary mandate in order to cover the crimes that occurred during the dislocation of Yugoslavia[107].

Concretely, the Statute of the ICTY granted competence for *grave breaches of the Geneva Conventions* we have just mentioned (article 2)[108]. The scope of application of the Tribunal included also laws and customs of war with a non exhaustive list (article 3). As a result, it is clear that the sexual violence which has occurred during the conflict felt within the competence of the Tribunal[109].

Article 4 of the Statute defines *genocide* as listed acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". This list contains "causing serious bodily or mental harm to members of the group" and "imposing measures intended to prevent births within the group", which can also correspond to situations of sexual violence.

Finally, article 5 of the Statute extends the competence of the Tribunal to *crimes against humanity* (committed either in international or in internal conflicts), if perpetrated against civilians. This is a significant step towards the recognition of rape as an international criminal crime, because sexual violence is no longer legally considered as offenses subordinate to another crime[110]. Nevertheless, even

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[105] UN General Assembly, *Updated Statute of the international criminal tribunal for the former Yugoslavia* (last amended 209), September 2009, available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed 19 June 2020)
[106] C. FOURÇANS, *op. cit.* p. 157.
[107] R. VIONA, "The main characteristics of the international criminal tribunal for the former Yugoslavia during its mandate from 1993 to 2017", *SEEU Review*, n°1, 2019, p. 91.
[108] *Ibid.,* pp. 99, and 100.
[109] D. WINGEATE PIKE, *op. cit.*,p. 56.
[110] A. HAGAY-FREY, "Sex and Gender Crimes in the New International Law, Past, Present, Future", *Nijhoff law specials*, vol 75, Leiden, Martinus Nijhoff Publishers, 2011, pp. 79-80.

though rape is expressly mentioned in the articles, sexual violence can fall within other crimes such as torture, enslavement, and "other inhumane acts" [111].

3. The Statute of the ICTR[112]

Following the Rwandan genocide of 1994, the international community was deeply shocked. In reaction to these atrocities, the United Nations decided to establish a had hoc Tribunal in order to hold the perpetrators responsible for their acts[113]. As a result, the Security Council adopted Resolution 955, which established the International Criminal Tribunal for Rwanda in November 1994[114].

The scope of competence of the ICTR is similar to ICTY, with some small distinctive features, related to the differences in nature between the two dramatic conflicts. Indeed, it is not surprising for the ICTR statute to start with a provision expressly dedicated to *genocide* (article 2). This provision has *prima facie* the same shortcomings as article 4 of the ICTY Statute, since it contains no explicit reference to rape. Actually, the inclusion of sexual violence within the notion of genocide is the result of the case law of the Tribunal, as discussed further in this chapter.

Concerning the *crimes against humanity*, article 3 (g) of the statute enumerate rape as one of those crimes. This explicit inclusion of sexual violence as a crime against humanity in both the ICTY and the ICTR Statute represents a significant step forward, because it constitutes the recognition of its customary status. Indeed, neither the Nuremberg nor the Tokyo Tribunals included rape as a crime against humanity. However, if we carefully study the provisions of the statutes of the ICTY and the ICTR, we will notice some differences. Indeed, article 3 of the ICTR Statute does not contain the term "armed conflict" in order to make this article applicable to both peace and war situations[115]. Moreover, the ICTR Statute adds

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[111] C. FOURÇANS, *op. cit.* p. 157.
[112] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994
[113] J. KOOMEN "'Without These Women, the Tribunal Cannot Do Anything': The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda, *Signs*, vol. 38, no. 2, University of Chicago press, 2013, p. 253.
[114] R. BOED,. "The United Nations International Criminal Tribunal for Rwanda: Its Establishment, Work and Impact on International Criminal Justice.", *Perspectives*, no. 17, 2001, pp. 60-61.
[115] The Statute of the Special Court for Sierra Leone will extend this enumeration within the crimes against humanity concerning sexual violence. Article 2 (g) of the Statute enumerates as crimes against humanity: "Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence"

that crimes against humanity must be perpetrated on "national, political, ethnic, racial or religious grounds" [116].

Finally, according to article 4, the ICTR has competence over *violations referred to in Article 3 common to the Geneva Conventions and the Additional Protocol II*. More specifically, the subsection (e) condemns "Outrages upon personal dignity, in particular humiliating and degrading treatment, *rape*, enforced prostitution and any form of indecent assault"[117]. The two last elements constitute a novelty compared to the Statute of the ICTY[118], and they generated a new jurisprudence over sexual assaults[119].

4. The United Nations legal framework

a. Statute of the ICC: The Rome Statute[120]

The Rome Statute came into force after 1 July 2002, which means that the ICC's jurisdiction does not cover crimes committed before this date[121]. ICC is an international jurisdiction which is permanent, in contrast to the ICTY end the ICTR. In addition, the Court can only intervene if a State is unable or has not the willingness to investigate and prosecute criminals (article 1).

Article 7 of the Statute enumerates different acts that are considered as *crimes against humanity*. Paragraphs (g)[122] focus on sexual crimes by enumerating a list of acts recognized as such: "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity". This enumeration constitutes remarkable innovation in comparison with the statutes of the ad hoc courts. Indeed, whereas they were limited to the crime of *rape*, the ICC Statute provides a long enumeration of sexual violence[123]. In addition, crimes such as murder (a), enslavement (c), deportation or forcible transfer (d), torture (f), and "other inhumane acts of a similar character

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[116] SAPIRO, MIRIAM, and P. VISEUR SELLERS, "Arriving at Rwanda: Extension of Sexual Assault Prosecution Under the Statutes of the Ad Hoc International Criminal Tribunals." *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 90, Cambridge University press, 1996, p. 606.
[117] This phrasing was inspired by the article 27 of the Geneva Convention IV.
[118] C. FOURÇANS, *op. cit.* p. 157.
[119] SAPIRO, MIRIAM, and P. VISEUR SELLERS, *op. cit.,* p. 610.
[120] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No° 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html [accessed 2 April 2020]
[121] D. WINGEATE PIKE, *op. cit*.,p. 86.
[122] Paragraph (h) could also cover sexual violence through persecution.
[123] D. WINGEATE PIKE, *op. cit*.,p. 58.

intentionally causing great suffering, or serious injury to body or to mental or physical health (k)", can also contain elements related to sexual violence[124].

Articles 8(2)(b)(xxii) and 8(2)(e)(vi)) of the Rome Statute both enumerate a list of sexual crimes considered as *war crimes*. In addition it is possible for other crime wars to additionally involve sexual elements[125].

Sexual crimes can also amount to *genocide* according to article 6 of the Rome Statute. Among the list, the following acts may be relevant: killing members of the group; causing serious bodily or mental harm to members of the group; and imposing measures intended to prevent births within the group. These acts must have committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group to be considered as genocide crimes[126].

The ICC Statute also provides for special procedural guarantees to ensure the protection of victims of sexual violence[127]. For example, corroboration of facts is not mandatory, and the victim's consent is not inferred from his or her lack of resistance[128]. In addition, there are also provisions for the participation of victims in the proceedings[129]. In addition, the Office of The Prosecutor ("OTP" or "Office") has strict policies and plans to better address sexual crimes. Finally, NGOs provide expertise to the Court through submissions under article 15 of the Statute, which also enhances the fight against sexual violence[130].

b. The UN Conventions and Resolutions

While international humanitarian law is limited to armed conflict situations, human rights law applies at all times. As a result, it is relevant to mention Human rights Conventions since they can

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[124] K. COMAN, M. NIKITA, "Trafficking Terror and Sexual Violence: Accountability for Human Trafficking and Sexual and Gender-Based Violence by Terrorist Groups under the Rome Statute", *Vanderbilt Journal of Transnational Law,* Vol. 52 Issue 1, 2019, p. 58.
[125] *Ibid.,* p. 60.
[126] *Ibid.,* p. 60.
[127] See articles 54(1)(b) and 68(1) of the Rome Statute, and rule n°86 of the Rules of procedure and evidence.
[128] See rules 63(4), 70 et 71of the Rules of procedure and evidences.
[129] See rules 16(1)(d), 17(2)(b)(iii), 88, 112 of the Rules of procedure and evidences.
[130] International Federation for Human Rights, *op. cit.,* pp. 103-104.

complement the legal framework examined so far. However, on a closer look, most Human rights Conventions do not contain specific provisions regarding sexual violence[131].

For the purposes of this research, we will focus on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[132] even though a large number of provisions indirectly related to sexual violence can be found in other legal instruments[133]. The Convention came into force thanks to various international women's rights initiatives[134] in order to fill the gaps of the previous Human Rights treaties. Later, the Convention was complemented in 2000 by an optional protocol which, after ratification, enabled the Committee to examine individual petitions and claims of serious or systematic violations of women's rights[135]. To date, the DRC did not ratify the optional protocol, which is regrettable since the protocol would allow formal notice to the state especially for preventive measures, prosecution and compensation for sexual violence.

This Convention constitutes a source of controversy due to the significant number of reservations it received[136]. Another criticism against the CEDAW resulted from the fact that it did not contain any provisions explicitly prohibiting violence against women. Nevertheless, it filled this gap by adopting two general recommendations (19 and 35).

Thanks to Recommendation N° 19 of the Commission[137], the issue of violence against women appeared in the World Conference on Human Rights 1993 (Vienna). The latter called upon the General Assembly to adopt the Declaration on violence against Women, which was adopted the same year. Even though the

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[131] G. GAGGIOLI, *op. cit.,* p. 519.
[132] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: https://www.refworld.org/docid/3ae6b3970.html [accessed 3 April 2020]
[133] For instance: the Convention relating to the Status of Refugees (1951) and its Protocol (1967); the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961); Convention on the Rights of the Child (1989) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000); Convention Against Transnational Organized Crime (2000) and its supplemental Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
[134] Such as the Declaration on the Elimination of Discrimination Against Women in 1967, the International Women's Year of 1975, the Women's Decade, and the women's conferences (held in Mexico City, Nairobi, and Copenhagen).
[135] D. ŠIMONOVIĆ "Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions." *Human Rights Quarterly*, vol. 36, no. 3, Hojn Hopkins University press, 2014, p. 594.
[136] *Ibid.*, p. 592.
[137] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992, available at: https://www.refworld.org/docid/52d920c54.html [accessed 3 April 2020]

preamble of this Declaration mentions the vulnerability of women in wartime, this document is not expressively dedicated to conflict-related sexual violence. Nevertheless, the attention given to the context coupled with the broad definition of violence against women (art 2) can be interpreted as including armed-conflict situations[138]. Finally, the Beijing Declaration and Platform for action adopted by the fourth Conference on Women (also known as the Beijing Conference)[139] expressed its concern about violence against women in the context of armed conflicts[140]. Thanks to all these initiatives, the international community could no longer deny the importance of protecting women against violence in the world, and more specifically in (post) conflict situations.

Taking inspiration from all these instruments, the UN Security Council passed its first resolution on women, peace and security as well as the impact of war on them in 2000. Todate (2020), ten resolutions have been adopted to specify the role of states in improving the status of women and their role in post-conflict situations. This set of resolution launched in 2000 constitute a global UN project called the Women Peace and Security (WPS) agenda[141]

The Security Council acknowledged for the first time the impact of sexual violence in the peace process in the Resolution 1325[142]. The latter stressed the women's capacity to create positive change and to be autonomous agents in the peacebuilding process[143]. Realizing that the Resolution was not sufficient to address effectively the issue, the Security Council urged the states to develop national action plans (NAPs) in order to implement it[144]. The following resolutions have explicitly recognized the concept of rape as a weapon of war[145], and have created the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict, which is entitled to monitor, report, and coordinate[146]. In

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[138] S. QURESHI, "The Recognition of Violence against Women as a Violation of Human Rights in the United Nations System", *A Research Journal of South Asian Studies*, Vol. 28, No. 1, University of Punjab, Lahore, January – June 2013, p. 189.
[139] United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, available at: https://www.refworld.org/docid/3dde04324.html [accessed 3 April 2020]
[140] G. GAGGIOLI, *op. cit.,* p. 521
[141] F. CRAWFORD KERRY, *op. cit.,*p. 95.
[142] General Assembly resolution 1325, *Security Council Resolution on women and peace and security*, S/RES/1325 (2000), 31 October 2000.
[143] General Assembly resolution 1889, *Security Council Resolution on women and peace and security*, S/RES/1889, 5 October 2009.
[144] F. CRAWFORD KERRY, *op. cit.,* p. 95.
[145] General Assembly resolution 1820, *Security Council Resolution on women and peace and security*, S/RES/1820 (2008), 19 June 2008
[146] General Assembly resolution 1888, *Security Council Resolution on women and peace and security*, S/RES/1888, 30 September 2009

addition, the fight against impunity was emphasized, with the need to carry out investigations[147], deploy teams of experts and reporting[148]. In 2019, two resolutions[149] were adopted, focusing mainly on the qualification of sexual violence in armed conflict as an act of terrorism.

Section 2 - International case Law

The international law we have just studied is only useful if meaningfully implemented by competent institutions. Even though there are some sporadic examples of condemnation for sexual violence during wartime[150], the development of those crimes appeared essentially through the ICTY and ICTR case law. Initially, international criminal justice focused on the individual responsibility of perpetrators, in order to fight the impunity enjoyed by the perpetrators. As we will see, these jurisdictions have changed their approach over time by focusing more on the victim through restorative justice, which is particularly relevant in the area of sexual violence[151]. In this chapter, we will examine the developments concerning the definition of sexual violence by the various courts, and address the main judgments that have made it possible to build a solid case law on the subject by analyzing relevant decisions taken in each Court.

1. Definition of the rape as a weapon of war

The need for a definition of sexual violence by international criminal courts is crucial in order to put an end to the impunity for rapists and provide reparation for the victims. As we have already seen *supra*, there is not a clear definition of rape in international criminal law. Judges of the ad hoc tribunals therefore had to give their own definitions of rape in order to fill this legislative gap[152].

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[147] General Assembly resolution 2106, *Security Council Resolution on women and peace and security*, S/RES/2106 (2013), 24 June 2013.
[148] General Assembly resolution 1960, *Security Council Resolution on women and peace and security*, S/RES/1960 (2010), 16 December 2010
[149] General Assembly resolution 2467, *Security Council Resolution on women and peace and security*, S/RES/2467 (2019), 23 April 2019 and General Assembly resolution 2493, *Security Council Resolution on women and peace and security*, S/RES/2493 (2019), 29 October 2019.
[150] For instance, Peter von Hangenbach was convicted in 1974 by the Holy Roman Empire in Germany for allowing his combatants to rape and kill civilians (D. WINGEATE PIKE, *op. cit.*,2011).
[151] C. EBOE-OSUJI, *op. cit.,* p. 275.
[152] *Ibid.,* p. 145.

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The *Akayesu* case[153] of the ICTR was the first judgment to address this definition[154]. In this case, the jurisdiction defined sexual violence as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive' including rape, sexual slavery, and molestation[155]. Through this definition, the ICTR emphasizes on the violence and the aggression as central aspects of the definition, and avoids using a technical description of the act. Nevertheless, the Chamber recognized that sexual abuse may not include penetration of even physical contact[156]. As a result, this definition of sexual violence is broader than the notion of rape[157].

The ICTY, however, focused rather on consent and technical description than on the violent aspect as a central element of the definition. In the *Furundžija* case[158], the Tribunal considered that both vaginally rape of women and the fact to force female victims to perform fellatio felt under the notion of rape[159]. Consequently, this definition is more restrictive than the previous one, although acts of sexual abuse may still fall within the scope of other international crimes[160].

The ICTY then reversed partly this statement in the *Kunarac* case, considering that the *Furundžija* definition was too narrow**[161]**. The Appeals Chamber also insisted on the fact that no resistance was required in order to establish the lack of consent, especially in the context of coercive circumstances[162]. As a result, the *Kunarac* case agreed with the notion of penetration, but is less restrictive regarding the notion of consent with an emphasis on the sexual autonomy of the victims[163].

The ICTR then tried to reconcile the *Akayezu* and the *Furundžija-Kunarac* definitions in the *Gacumbitsi* case[164]. In this case, the Appeal Chamber stated that evidence of lack of consent could be the direct result of the existence of a coercive context. In such circumstances, it is not required to introduce evidences

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[153] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.
[154] D. WINGEATE PIKE, *op. cit*., p. 64.
[155] Ibid., §§598 and 688.
[156] C. EBOE-OSUJI, *op. cit.,* p. 145.
[157] G. GAGGIOLI, *op. cit.,* p. 506.
[158] *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998
[159] C. EBOE-OSUJI, *op. cit.,* p. 146.
[160] D. WINGEATE PIKE, *op. cit*., p. 64.
[161] *Ibid.*, p. 64.
[162] K. E. CARSON, "Reconsidering the theoretical accuracy and prosecutorial effectiveness of international tribunal's ad hoc approaches to conceptualizing crimes of sexual violence as war crimes, crimes against humanity, and acts of genocide", *Fordham Urban Law Journal*, vol. 39, n°4, 2011, pp. 1264 – 1268.
[163] D. WINGEATE PIKE, *op. cit*., p. 64.
[164] *The Prosecutor v. Sylvestre Gacumbitsi (Trial Judgement)*, ICTR-2001-64-T, International Criminal Tribunal for Rwanda (ICTR), 17 June 2004

related to the use of force, the behavior of the victim, or the relationship it may have had with the perpetrator[165]. Another attempt to satisfy the two schools appeared in the *Muhimana* case[166]. In this case, the Court ended up on the side of the *Akayesu* definition, arguing that it had to be interpreted as encompassing the elements of rape listed in cases such as *Kunarac*[167]. In reality, we can conclude that there is not a perfect answer to this controversy, because both the violent aspects (underlined in *Akayesu*) and the sexual autonomy (the point of *Kunarac*) have to be taken into account when considering rape[168].

Having had an overview on the developments concerning definitions of sexual violence, as given by the various Courts, we will now refer to landmark judgments issued by these Courts, in order to see how, in line with their Statutes, interpreted the definition of sexual violence.

2. Cases before the ICTY

We will now turn to the Court's main judgments that illustrate the way in which it has applied the ICTY statute that we have just discussed. Of the 161 defendants heard by the court, 78 (41%) were prosecuted for sexual violence[169]. Indeed, the conflicts in the former Yugoslavia have caused a scandal, particularly for their notorious rape camps. In total, over 20 000 women were victims of sexual abuse during this conflict[170].

In the *Tadic case*[171], the Tribunal rendered its first decision after the atrocities perpetrated in the former Yugoslavia. In this case, sexual violence has been perpetrated against prisoners who were forced, among other abuses, to have oral sex between them and to mutilate other prisoner's sexual organs. The sexual abuse had been incorporated directly into the original indictment[172]. Unfortunately, the rape charges were

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[165] D. WINGEATE PIKE, *op. cit*.,p. 64.
[166] T*he Prosecutor v. Mikaeli Muhimana (Judgement and Sentence)*, ICTR- 95-1B-T, International Criminal Tribunal for Rwanda (ICTR), 28 April 2005
[167] K. E. CARSON, *op. cit.*, pp. 1264 – 1268.
[168] C. EBOE-OSUJI, *op. cit.,* p. 152.
[169] Official website of the United Nations International Criminal Tribunal for the former Yougoslavia, accessed 16 March 2020, available at: https://www.icty.org/en/features/crimes-sexual-violence/in-numbers (accessed 19 June 2020)
[170] Economic and Social Council, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution, 21 January 1999, 1997/44 Distr. GENERAL E/CN.4/1999/68/Add.4.
[171] P*rosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997.
[172] P*rosecutor v. Dusko Tadic aka "Dule" (indictment)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 13 February 1995.

withdrawn from the indictment due to the witnesses' fear of testifying about these cruel scenes[173]. Nevertheless, Tadic has been convicted under other categories of offenses for the sexual violence and genital mutilation for which he was responsible under articles 2, 3, and 5 of the Statute[174]. Even though he did not commit the crimes directly, he was held responsible on the basis of article 7 (due to his commandant status), because he was aware and did not do anything to prevent them. Interestingly the ICTY also stressed the presumption of reliability applicable to the testimony of victims of sexual assault, pursuant to rule 96 of the ICTY Rules of Procedure and Evidence[175]. In addition, this case is particularly interesting because it recognizes sexual violence against men[176].

In the *Celebici case*[177], the Tribunal had to rule on an accusation of sexual violence by hierarchical superiors on detainees at the Celebici camp (in Bosnia). In this case, the Tribunal placed particular emphasis on the influence linked to the hierarchical status of the accused[178]. Indeed, they were held responsible for the acts committed by camp guards, as the rapes took place systematically and notoriously. Thus, they could not have ignored what was happening in the camp they were responsible for[179]. Taking inspiration from the Convention against Torture, the ECtHR and the IACHR[180], the Tribunal noted that the sexual violence suffered by the women in this camp had caused such intense physical and psychological suffering that it had to be considered torture[181].

The same year, the ICTY pronounced another judgment already mentioned in the definition section. The facts in the *Furundzija case*[182] concerned a Bosnian Croat military commander who used sexual violence during interrogations. Even if he did not rape personally the victims[183], he did nothing to stop his subordinates who were repeatedly raping Muslim women during the interrogations. According to the Tribunal, this behavior has clearly contributed to the commission of the crimes, which means that

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[173] D. WINGEATE PIKE, *op. cit*., pp. 60-61.
[174] A. HAGAY-FREY, *op. cit.,* p. 88.
[175] P*rosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, §536.
[176] *Ibid.,* pp. 89-90.
[177] *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement)*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998.
[178] D. WINGEATE PIKE, *op. cit*., p. 61.
[179] *Ibid.,* p. 61.
[180] G. GAGGIOLI, *op. cit.,* p. 532.
[181] K. E. CARSON, *op. cit.*,p. 1269.
[182] *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998
[183] D. BIDERI, *Les crimes sexuels face au droit international pénal : recherche sur l'établissement d'une infraction autonome en droit international pénal,* HAL open access archives, University of Strasbourg, 2017, p. 183.

Furunzija's role was as important as the direct rapists[184]. Consequently, the Trial chamber found him guilty for the violation of the laws or customs of war contained in article 3 of the Statute[185]. Indeed, torture and outrages upon personal dignity (including rape) are covered by this provision which constitutes an "umbrella rule"[186].

In 2001, in the *Kunarac case*[187], the accused raped Muslim women and girls repeatedly, keeping them in servitude in order to carry out their ethnic cleansing strategy[188]. As a result, the trial chamber found them guilty of rape as a war crime and as an outrage upon personal dignity according to the Geneva Conventions[189], as well as rape and enslavement as a crime against humanity[190]. Indeed, the Tribunal considered that the systematic nature of sexual violence was part of a widespread attack on the Bosnian Muslim women[191]. Finally, the Appeals Chamber added that rape may also constitute torture[192].

The responsibility of superiors constitutes an important aspect. Through the evocation of these case laws, we observed that their responsibility could be called into question even if they had not acted directly, or even ordered the rapes. However, their responsibility is only engaged from the moment the subordinate is "about to" commit the crime[193]. In addition, international criminal jurisdiction only prosecutes the major offenders, which means that the majority of perpetrators of sexual violence remain in their village among the victims[194].

It is interesting to compare these four judgments with regard to the protection of witnesses and victims. Indeed, the protective measures, as well as their interpretation by the Court vary. For instance, initially, the ICTY's Rules of Procedure and Evidence (RPE) did not contain any reference to testimony via

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[184] D. WINGEATE PIKE, *op. cit*., p. 62.
[185] K. E. CARSON, *op. cit.*, p. 1269.
[186] D. WINGEATE PIKE, *op. cit*., p. 62.
[187] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.
[188] G. GAGGIOLI, *op. cit.,* p. 531.
[189] D. WINGEATE PIKE, *op. cit*.,p. 62.
[190] G. GAGGIOLI, *op. cit.,* p. 531.
[191] K. E. CARSON, *op. cit.*, p. 1271.
[192] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002, §§150-155.
[193] C. EBOE-OSUJI, *op. cit.,* p. 100.
[194] A. HAGAY-FREY, *op. cit.,* p. 86.

videoconferencing[195]. Afterwards, in judgments such as *Tadic*[196] and *Celebici*[197], the Tribunal created strict conditions for using these methods. Since then, the possibility to receive testimonies through videoconferencing has been introduced in the ICTY's RPE but also in other jurisdictions[198]. Nevertheless, although this mode of testimony has become much more widespread, the courts insist that it should remain exceptional[199] and only if the conditions are met[200]. The Court also granted anonymity to the witnesses (according to rule 75) in exceptional circumstances, if the criteria expressed in the *Tadic case* were fulfilled[201].

However, although the court has moved towards the protection of witnesses and victims by introducing such measures, its judgments have sometimes gone in the opposite direction. In the *Furundzija* case, the pressure from the defense led the tribunal to expose medical and psychological reports about the victims[202]. This public exposure of their personal stories constitutes a second attack on the victims, who trusted the therapist on the assumption that this interview would remain in this room[203]. In addition, it implies that the victim's memory of rape is unreliable in legal proceedings, and this creates a greater burden of reliability than for other victims[204]. This contributes to the fact that many victims and witnesses refuse to testify about sexual abuse, as was the case in the *Kunarac case*[205].

To conclude, there is a clear tendency to recognize sexual violence in armed conflicts as war crimes and crimes against humanity. To do so, the ICTY refers to international humanitarian law through the Geneva

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[195] D. TOLBERT, F. SWINNEN, « The protection of, and assistance to, witnesses at the ICTY », *The dynamics of international criminal justice*, Martinus Nijhoff Publishers, Leiden, 2006, p. 214.

[196] The Tribunal established 2 conditions: "the testimony of these particular witnesses is sufficiently important to make it unfair to the Prosecution to proceed without it"; and "the witnesses are unable or unwilling to come to the seat of the International Tribunal" (Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence via Video-link, Prosecutor v. Tadi}, Case No. IT -94-1, T.Ch. II, 25 Jun 1996).

[197] The Tribunal takes Tadic's two criteria and adds a third: « the accused must not thereby be prejudiced in the exercise of his right to confront the witness » (§17) (Decision on the Motion to allow Witnesses K, L and M to give their Testimony by Means of Video-Link Conference, IT-96-21-T, Trial Chamber II quater, 28 May 1997).

[198] See Art 71, d) and 75 bis of the ICTY's RPE.

[199] Y. MC DERMOTT, "Regular witness testimony", *International criminal procedure: principles and rules*, Oxford University Press, Oxford, 2013, p. 872.

[200] J. FERNANDEZ, X. PACREAU, *Statut de Rome de la Cour pénale internationale : commentaire article par article : Tome 1*, A. Pedone, Paris, 2012, p. 1584.

[201] TPIY, The Prosecutor v. Dusko Tadic, Trial Chamber, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, IT-94-1-T, 10 August 1995, §§60-86.

[202] Prosecutor v. Furundzija, Decision [on Defence Motion to Strike Testimony of Witness A], Case No. IT-95-17/1-T (ICTY, 16 July 1998)

[203] A. HAGAY-FREY, op. cit.,pp. 93-94.

[204] K. CAMPBELL, "Legal Memories: Sexual assault, Memory and international humanitarian law", *Journal of women in culture and society*, vol. 28, n°1, 2002, p. 416.

[205] A. TROTTER, "Witness Intimidation in International Trials: Balancing the Need for Protection against the Rights of the Accused," *George Washington International Law Review 44*, no. 3, 2012, p. 523.

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Convention as well as human rights jurisdiction[206] and treaties[207], which reveals the complementarity of these branches. However, the Tribunal did not interpret the provisions of the Statute broadly enough to include rape (or any kind of sexual abuse) easily under other categories of crime. Moreover, the category of crime against humanity requires a high burden of proof in order to demonstrate that the rape is part of a widespread or systematic attack against civilians, which is not always the case[208].

3. Cases before the ICTR

The genocide that took place in Rwanda was also the scene of a monstrous amount of sexual violence. In this regard, the United Nations Special Rapporteur for Rwanda has stated that: « rape was the rule and its absence the exception »[209].

The emblematic case of the ICTR regarding sexual violence is the *Akayesu* case[210]. The accused was a Hutu communal leader who had witnessed sexual violence, including sexual mutilation, of women[211]. Despite his political role, he did not take any measures to prevent or punish rapists. Worse still, he has also encouraged and participated in sexual violence against Tutsi women.[212]. The main contribution of this judgment is that it is the first to consider rape as an act constituting genocide, because they were perpetrated with the intention to destroy both mentally and physically the Tutsi community[213]. Moreover, the Tribunal confirmed that it took into account mental suffering, finding the accused guilty of crimes against humanity due to the rapes, as well as the forced nudity imposed on the victims[214].

The *Nyiramasuhuko* case[215] constitutes another important decision of the ICTR. In this case Pauline Nyiramasuhuko (former Minister of Family and Women's Development for Rwanda) and her son, Arsene Ntahobali (a former militiaman), were accused of having set up a roadblock in order to rape and kill members of the Tutsi community. This case is particularly interesting because the tribunal goes

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[206] Such as the ECtHR and the IACHR.
[207] For instance, the definition of the Convention against Torture.
[208] A. HAGAY-FREY, *op. cit.,*pp. 94-95.
[209] UN Commission on Human Rights, *Situation of human rights in Rwanda.*, 23 April 1996, E/CN.4/RES/1996/76, §16.
[210] T*he Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998
[211] D. WINGEATE PIKE, *op. cit*., p. 63.
[212] G. GAGGIOLI, *op. cit.,* p. 531.
[213] C. FOURÇANS, *op. cit.* p. 158.
[214] A. HAGAY-FREY, *op. cit.,* p. 99.
[215] *Prosecutor v. Nyiramasuhuko* (Indictment), Case No. ICTR-97-21-I, , International Criminal Tribunal for Rwanda (ICTR), 26 May 1997.

further than direct sexual violence, it also takes into account the psychological aspect and especially the humiliation felt by the victims. Through this judgment, Nyiramasuhuk became the first woman convicted for rape, extermination, persecution (as a crime against humanity), as well as war crimes and genocide under international law[216]. Indeed, the fact that she used her political influence in order to support sexual abuses made her responsible for them[217].

The ICTR has benefited from the proceedings of the ICTY regarding the protection of victims and witnesses. However, the first decisions of the court did not contain any discussion of protective measures[218]. Because of that, witnesses who participated in the Akayesu case were threatened or even killed for their testimony after they came back home[219]. This kind of tragedy contributes to the perception of inability to guarantee the safety of witnesses[220].Thus, in addition to the difficulty for witnesses to speak, they have to take considerable risks by exposing themselves to possible revenge[221]. It is therefore essential to ensure trustful protections in order to encourage them to testify, as prosecution for sexual violence depends on such testimonies.

Moreover, the protection granted by the Tribunal, such as the anonymity is not adapted to sexual violence cases. Indeed, protective measures taken in cases such as *Nyiramasuhuko*[222] only protected them from journalists following the trial and the general public[223]. This is problematic because, on the one hand, witnesses who leave their villages for weeks will easily be unmasked, and, on the other hand, the accused knows their identity and is likely to contact their families. This protection is therefore rather limited[224].

To conclude, the ICTR has made significant progress in prosecuting sex criminals in times of conflict. Indeed, it should be recalled that the provision of the Statute referring to Article 3 common to the Geneva Conventions and the Additional Protocol II contains an explicit reference to rape (which was not the case

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[216] A. HAGAY-FREY, *op. cit.,*p. 100.
[217] C. FOURÇANS*, op. cit.,* p. 159.
[218] G. SLUITER, “The ICTR and the protection of Witnesses”, *Journal of International Criminal Justice*, Volume 3, Issue 4, 1 September 2005, p. 967.
[219] Canada: Immigration and Refugee Board of Canada, *Rwanda: Whether people who give testimony at the trials and hearings of those accused of genocide and crimes against humanity are being harassed, intimidated and threatened*, 1 January 1999, RWA30932.E, available at: https://www.refworld.org/docid/3ae6ac5950.html [accessed 4 April 2020]
[220] J. G. Gardam, M. J., Jarvis, Women, armed conflict and international law, Brill, 2001, The Hague, p. 222.
[221] Canada: Immigration and Refugee Board of Canada, *op. cit.*
[222] Prosecutor v. Nyiramasuhuko, Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses, File No. ICTR-97-21-T (ICTR TC II, Mar. 27, 2001)
[223] FIDH, *Report : Entre illusions et désillusions : les victimes devant le Tribunal Pénal International pour le Rwanda (TPIR),* n°343, October 2002, p. 7.
[224] *Ibid.*, p. 9.

for the ICTY). Moreover, the Tribunal has officially interpreted rape as a crime constituting genocide. However, despite these efforts, the vast majority of rapes in Rwanda were not properly investigated[225]. This is probably due to the limited number of women involved in the investigation and prosecution progress.

4. Cases before the ICC

Through the lessons of the ad hoc tribunals as well as the novelties contained in their statutes, the ICC is building on a solid foundation of sexual abuse cases. Indeed, it has been able to learn from the mistakes made in the past, in order to try not to repeat them[226]. Nevertheless, we should keep in mind that these jurisdictions were limited to particular conflicts, which is not the case for the ICC due to the fact that it is a permanent jurisdiction. Although it is still early to predict the evolution of sexual abuse prosecutions, we will review the landmark decisions that have been handed down in this area in order to draw the main conclusions that can be drawn from them.

The first case that the ICC had to examine was very disappointing regarding the fight against the impunity of rapists[227]. In this case[228], Thomas Lubanga Dyilo, the former leader of the Union of Congolese Patriots (UPC) was suspected of recruiting child soldiers in Ituri and to sexually abuse them[229]. Unfortunately, the Court limited its ruling to the charges concerning child soldier recruitment. Indeed, it declared that because sexual violence was not included in the initial charges, it could not rule on these facts[230]. As a result, the Court made a choice between charges of sexual violence, on the one hand, and the recruitment of child soldiers on the other, considering the latter charge to be more serious under international law. This shows that the ICC is not well adapted to the reality of the field, despite the financial and human resources at its disposal[231].

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[225] A. HAGAY-FREY, *op. cit.,*pp. 100-101
[226] D. WINGEATE PIKE, *op. cit*.,p. 57.
[227] C. FOURÇANS*, op. cit.,* p. 160.
[228] *Prosecutor v. Thomas Lubanga Dyilo* , ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012
[229] D. WINGEATE PIKE, *op. cit*., p. 86.
[230] C. FOURÇANS*, op. cit.,* pp. 160-161.
[231] M. ALIÉ & A. THIBAUT DE MAISIÈRES, «Les violences sexuelles dans le cadre du conflit en République démocratique du Congo. Confrontation des poursuites et des décisions judiciaires internationales et nationales aux besoins et à la reconstruction des victimes de violences sexuelles», *1er congrès de la Chaire Internationale Mukwege* [En ligne], Actes du colloque, URL : https://popups.uliege.be:443/chairemukwege/index.php?id=260.

In the *Katanga* case[232], Germain Katanga and Ngudjolo Chui were prosecuted for the attack on a village in Ituri, during and following which acts of sexual violence were allegedly committed[233]. The two cases were later separated, and Mathieu Ngudjolo Chui was acquitted of the charges against him. In the first final judgment, Germain Karanga was found guilty of crime against humanity and four counts of war crimes. Surprisingly, he was acquitted of its charges for rape and sexual slavery, even though the Court clearly established that these crimes occurred[234].

Regarding the fight against impunity for sexual violence, these decisions can be criticized in several ways. With regard to the acquittal of Mathieu Ngudjolo Chui, it is regrettable to note that since the victims are not parties to the trial, they cannot appeal the decision. This therefore calls into question the position of victims in international criminal trials. Concerning the *Katanga* case, the incapacity for the Court to link sexual violence and the objective of the attack is very disappointing. It reflects the idea that rapes are an inevitable "side effect" of the war, which completely negates its use as a tactic of war[235].

The *Bemba* case[236] has given a lot of hope for human rights defenders. The accused, Jean-Pierre Bemba, was a former vice president of the DRC, who was allegedly guilty for acts committed by his troops during fighting between 2002 and 2003. The Court initially upheld the rape charges, and even recognized their use as a weapon of war[237]. However, the Appeal Chamber of the ICC decided to overturn the verdict against Jean-Pierre Bemba, acquitting him from charges of war crimes and crimes against humanity in 2018[238].

Recently, the Court took a new position in the *Ntaganda* case[239], in which it handed down its highest sentence[240]. Indeed, Bosco Ntaganda, also known as "the terminator" was found guilty of not less than

[232] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, International Criminal Court (ICC), 25 September 2009.
[233] C. FOURÇANS, *op. cit.,* p. 161.
[234] S. SCHWARTS, *Wartime sexual violence as more than collateral damage : clarifying sexual violence as part of a common criminal plan in international criminal law*, Unitersity of New South Wales law journal, vol. 40, n°1, 2017, p. 257.
[235] S. SCHWARTS, *op. cit.,* p. 57.
[236] *Prosecutor v Bemba Gombo* (Judgment Pursuant to Article 74 of the Statute) (International Criminal Court, Trial Chamber III), Case No ICC-01/05-01/08-3343, 21 March 2016.
[237] C. FOURÇANS, *op. cit.,*p. 162.
[238] A. MEIJKNEICHT, *Hague case law: latest developments*, Netherlands international law review, Springer Science and business media B.V., vol. 64, n°1, 2017, p. 189
[239] *The prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, International Criminal Court (ICC), 8 July 2019.
[240] M. CORDER, "The associated press: Congolese warlord sentenced to 30 years", *Toronto Star*, Canada, 2019.

eighteen counts of war crimes and crimes against humanity, involving 2100 victims[241]. He was convicted due to his role as a military superior during the atrocities that have occurred in 2002-2003 in DRC. More specifically, he was found guilty as a direct perpetrator of murder as well as indirect co-perpetrator of murders, rapes, massacres and use of child soldiers (who were also raped and treated as sexual slaves)[242].

This ruling constitutes a strong message against the impunity of perpetrators of sexual violence, especially hierarchical superiors. Moreover, while most charges relating to sexual violence are often dropped and subsequently reclassified, the *Ntaganda* case constitutes an improvement in this regard because all charges have been confirmed. However, we must bear in mind that the final decision might change as Bosco Ntaganda has decided to appeal against this decision. If upheld on appeal, this could be the first final conviction at the ICC for crimes of sexual violence, including against men.

In addition, two more cases deserve our attention concerning eventual future condemnations. Firstly, the ICC is currently prosecuting Dominic Ongwen for, *inter alia*, rape, sexual slavery, mirage force and, for the first time, forced pregnancy. Within a reasonable time, the Trial Chamber will render its verdict, which, however, may also be appealed[243]. Secondly, the charges of war crimes and crimes against humanity against Al Hassan were confirmed last September by the International Criminal Court (ICC), paving the way for his trial. More specifically, he is suspected of being responsible for several sexual crimes and acts of torture[244].

Some elements of criticism raised by authors about the ICC deserve attention. Concerning the functioning of the Court, it is important to stress that many aspects need to be improved. Indeed, the total duration of decisions is extremely long (on average eight years), gathering evidence also constitutes a difficulty (especially for sexual crimes) and international criminal justice is selective (only most serious cases are considered)[245]. In addition, full decisions are thousands of pages long and can be overturned by the Court on appeal, as was the case in the *Bemba* decision. Finally, the fact that the ICC is a complementary

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[241] "Terminator" warlord is jailed for 30 years, Times, The United Kingdom, p. 32, 2019, available at: http://search.ebscohost.com/login.aspx?direct=true&db=nfh&AN=7EH154584123&site=eds-live (accessed 6 April 2020)
[242] *Ibid.,* pp. 105-106.
[243] *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, International Criminal Court (ICC), Fiche d'information sur l'affaire, March 2020.
[244] International Federation for Human Rights, *op. cit.,* p. 108.
[245] G. GAGGIOLI, *op. cit.,* p. 536.

jurisdiction means that if the case is investigated at the national level the Court has no jurisdiction, which makes it dependent on the good cooperation of states[246].

In view of the cases mentioned, it seems that there is also a tendency for the Court to focus only on the most serious crimes and not to consider sexual violence as part of them[247]. Despite the fact that it is materially impossible to prosecute all rapists in the DRC, this attitude of the Court could have the effect of encouraging the perpetrators of these crimes who will no longer fear the threat of punishment[248].

In conclusion, the ICC still has a lot of gaps to fill, mainly in the area of sexual abuse. On several occasions, the Court has failed to take advantage of the opportunities offered by the texts and the assistance provided by NGOs[249]. Generally speaking, even if the convictions have been disappointing and inconsistent, it should be borne in mind that this court is still relatively young and some judgments, including the *Ntaganda case*, still leave room for hope.

[246] D. WINGEATE PIKE, *op. cit*.,p. 66.
[247] In this regard, see also The Prosecutor v. Callixte Mbarushimana, International criminal Court (ICC), Case No ICC-01/04-01/10, 15 June 2012 and *The Prosecutor v. Laurent Gbagbo et Charles Blé Goudé,* ICC, Case No ICC-02/11-01/15 September 1019.
[248] D. WINGEATE PIKE, *op. cit*., pp. 67 and 86.
[249] International Federation for Human Rights, *op. cit.,* p. 107.

Chapter 3: The case of the Democratic Republic of Congo

Having provided the international framework, we will now narrow down on the situation in the DRC. In order to be as clear as possible, this chapter begins with a historical introduction (section 1), followed by an overview of rape in the DRC (section 2). Next, we will address the national legislative framework (section 3), and conclude this chapter with some of the actions taken to combat impunity (section 4).

Section 1 – Historical introduction

Leopold II, king of Belgium from 1865 to 1909 organized the Berlin conference of 1884 in order to divide the African continent between European powers[250]. As a result, the Democratic Republic of Congo (DRC) was offered to the king as a personal gift for his help in setting up this Conference in 1885[251].

Rapidly, the international community has been made aware of cruel practices that took place in this country. Indeed, as part of his significant rubber business, the king ordered the hands of the indigenous to be cut off if they were not working efficiently enough. Many of them were either beaten with brutality, or killed, which created a significant diminution of the indigenous population[252]. Following a report of the international commission of inquiry on brutal colonial exploitation, coupled with both internal and external pressure[253], the king was forced to transfer DRC to Belgium in November 1908[254]. The latter engaged itself to act in a better way and to be an "exemplary colonialist"[255].

[250] The beneficiary of this conference was mainly France, Great Britain, Portugal, and Germany (P. BADRU, « Ethnic conflict and state formation in post-colonial africa : a comparative study of ethnic genocide in Congo, Liberia, Nigeria, and Rwanda-Burundi », *Journal of third world studies*, Vol. 27 (2), Florida, 2010, p. 151)
[251] E. F. KISANGANI, *Civil wars in the Democratic Republic of Congo 1960 - 2010*, Lynne Rienner publishers, United states, 2012, p. 11.
[252] F. BUELENS, « Le tournant de 1908 : de l'Etat indépendant du Congo au Congo belge », *Outre-mers*, 2012, Vol. 99 (376), Persée, Lyon, pp. 197 and 204.
[253] E. F. KISANGANI, *op. cit.,* p. 13.
[254] P. BADRU, *op. cit.,* p. 151
[255] F. BUELENS, *op. cit.*, p. 198.

In 1950, the increase of agitation in the colonized country pushed the Belgian authorities to agree on the independence of DRC, the 30 June 1960[256]. The first government was formed by Patrice Lumumba as prime minister, and Joseph Kasavubu as president[257]. Shortly after, Joseph Mobutu (sergeant of the colonial army) took advantage of a crisis in the government's legitimacy to start a *coup d'état*[258]. After this event, Mobutu Sese Seko gave himself the title of president for life[259] and renamed the country "Zaire"[260]. For three decades, he remained the uncontested president of the country and ruled an authoritarian regime dominated by terror[261], until the first war of Congo (1996-1997).

After the Rwandan genocide, a significant number of Hutu migrated to east Congo, in the Kivu region[262]. The failure of the democratic transition, coupled with this refugee influx have fed the idea of a rebellion[263]. In October 1996, Laurent Désiré Kabila created the ADFLC (Alliance of Democratic Forces for the Liberation of Congo-Zaire) with the support of Rwanda and Uganda, and overthrew Mobutu[264]. May 29, 1997, Kabila became president[265] and renamed the country "Democratic Republic of Congo" [266]. However, the dethronement of Mobutu did not produce much peace[267].

Indeed, Kabila rapidly surrounded himself with loyalists from his ethnic groups, completely denying the other actors[268] who had allowed him to overthrow Mobutu[269]. This event led to the second Congolese war[270] in 1998 accompanied by a mutiny in order to depose Kabila[271]. In reaction, the international community intervened with the Lusaka cease-fire agreements, and the security Council of the United

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[256] P. BADRU, *op. cit.,* p. 152.
[257] E. F. KISANGANI, *op. cit.,*p. 16.
[258] *Ibid.,* p. 18.
[259] P. BADRU, *op. cit.,* p. 153.
[260] E. F. KISANGANI, *op. cit.,* p. 11.
[261] P. BADRU, *op. cit.,* p. 153.
[262] R. POURTIER, « Le Kivu dans la guerre : acteurs et enjeux », *EchoGéo*, janvier 2009, available at: https://doaj.org/article/ab226ab7bc0a4310aaadd7eb29c72ccf. (accessed 19 June 2020)
[263] N. NZEREKA MUGHENDI, *Les déterminants de la paix et de la guerre au Congo-Zaïre*, Bruxelles ;, Peter Lang, 2011, p. 21.
[264] J. POTTIER, « Everybody needs good neighbours: understanding the conflict(s) in Eastern DRC », *Cadernos de Estudos Africanos*, juin 2002, vol. 2, n° 2, pp. 141-166, available at: http://journals.openedition.org/cea/1318. (accessed 19 June 2020)
[265] E. F. KISANGANI, *op. cit.* Pottier, J., « Everybody needs good neighbours: understanding the conflict(s) in Eastern DRC », *Cadernos de Estudos Africanos*, juin 2002, vol. 2, n° 2, pp. 141-166, available at: http://journals.openedition.org/cea/1318. (accessed 19 June 2020)
[266] N. NZEREKA MUGHENDI, *op. cit.,* p. 22
[267] P. BADRU, *op. cit.,* p. 150.
[268] He ordered the foreingn troops of Rwanda and Uganda to leave the territory, ending the military cooperation that overthrew his predecessor. (E. F. KISANGANI, *op. cit.,*p. 29.
[269] P. BADRU, *op. cit.,* p. 153.
[270] From 1998 to 2003.
[271] J. POTTIER, *op. cit.,* pp. 141-166.

Nations created the MONUC (United Nations Organization Mission in the Democratic Republic of Congo) through the resolution 1279 of the 30 November 1999.

On January 16, 2001, Kabila was murdered by one of his bodyguards and succeeded by his son Joseph Kabila on 26 January[272]. One year later, the war ended with peace agreements in December 2002[273]. In 2003, all foreign forces left the territory, except in the Kivu region. Because of these changes, the United Nations adopted the resolution 1925 in order to protect the civilians, the humanitarian personnel, and to help the government to stabilize the country. This resolution changed the name of the mission from MONUC to MONUSCO (United Nations organization Stabilization Mission in the Democratic Republic of Congo)[274]. However, even if this deployment is one of the biggest UN missions in terms of staff and budget, it has not been able to prevent most of the atrocities resulting from the conflict[275]. Worse still, the UN mission has been accused of being involved in the sexual exploitation and abuse of the Congolese population in 2004-2005[276]…

The recent Congolese elections do not leave much hope improvements, as the new president, Félix Tshisekedi, is accused of electoral fraud[277]. Indeed, its opponents (especially Martin Fayulu) argue that his victory was the result of an agreement between Joseph Kabila and Félix Tshisekedi[278]. Moreover, violence still occurs in DRC and mainly in the eastern region because the Country is not unified on the administrative, political, and financial point of view. Local militias continue to compete for power in certain areas of influence[279]. The number of players involved[280], the geographical situation of the

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[272] F. REYNTJENS, "Briefing: The Democratic Republic of Congo, from Kabila to Kabila." *African Affairs*, vol. 100, no. 399, 2001, pp. 311–317. *JSTOR*, www.jstor.org/stable/3518770. Accessed 3 Mar. 2020.

[273] S. ANDREW SCOTT, *Laurent Nkunda et la rébellion du Kivu : au cœur de la guerre congolaise*, Karthala, Paris, 2008

[274] The mission has been extended several times and is still active today. (Official website of the MONUC mission, accessed 19 march 2020, available at: https://monuc.unmissions.org/en/background (accessed 19 june 2020).

[275] N. NZEREKA MUGHENDI, *op. cit.*

[276] « Une arme de guerre… », *op. cit.,*p. 23.

277 AFP, « Election en RDC: Félix Tshisekedi officiellement proclamé président par la Cour constitutionnelle », *Le soir,* 20 january 2019, available at https://plus.lesoir.be/201619/article/2019-01-20/election-en-rdc-felix-tshisekedi-officiellement-proclame-president-par-la-cour (accessed 19 June 2020).

278 F. MISSER, « DRC appoints Félis Tshisekedi president », *Le monde diplomatique*, March 2019, available at :https://mondediplo.com/2019/03/07drc (accessed 19 June 2020).

[279] B. KABAMBA, « Et demain, le Congo ? », *Fédéralisme régionalisme volume 5 : 2004-2005, la IIIe République Démocratique du Congo*, Université de Liège, Belgium, 2006, available at : https://popups.uliege.be:443/1374-3864/index.php?id=188 (accessed 19 June 2020).

[280] Seven states engaged their troups in this country : Rwanda, Burundi, Uganda, Angola, Namibia, Tchad and Zimbabwe. Other rebel movements, the national army, and the UN are also involved (B. KABAMBA, *op. cit.*).

region[281], and the economic stakes, particularly because of the mining resources involved[282], can explain the complexity of the situation[283]. This conflict is characterized by the cruelty of the methods employed by armed groups, the famine, plundering of the region's natural resources, and sexual violence [284]. The next section will focus on this last element, where we will try to understand the factors that have led to the systematic occurrence of sexual violence in the DRC.

Section 2 – The use of rape as a weapon of war in DRC

The first time the international community officially became aware of the magnitude of the problem in the DRC was through the mapping project. This report was issued by the Office of the UN High Commissioner for Human Rights, which describes the numerous human rights violations that took place in the DRC between 1993 and 2003, after a 12-month investigation. The report documents more than 600 cases of serious crimes, and focuses on disproportionate attacks against women and children. The mapping project is a first step towards a truth process, which was, however, put aside until Dr. Mukwege's intervention.

The specificity of rapes perpetrated in DRC is the cruelty that characterizes them. Indeed rape is so widespread that it has become part of women's daily lives, especially in the eastern part of the country.

Sexual violence is perpetrated by a multiplicity of actors, including civilians and members of the armed groups involved in the conflict[285]. In some cases, for example, the victim does not even know which group the rapist belongs to[286]. In addition, crimes can be directed against all civilians, be they women, men, children, or even the elderly. Moreover, rapes are generally collective and occur on a systematic basis[287]. These atrocities are generally perpetrated in public, and can even involve members of the family who are forced to assist or even participate in the rape. Victims are generally abandoned unconscious after the assault, or kidnapped in order to be used as sexual slaves [288].

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[281] N. NZEREKA MUGHENDI, *op. cit.,* p. 26.
[282] Un resolutions 1856 and 1857 tend to fight illigal exploitation of natural resources (Roland Pourtier, « Le Kivu dans la guerre : acteurs et enjeux », *EchoGéo*, January 2009, available at: https://doaj.org/article/ab226ab7bc0a4310aaadd7eb29c72ccf (accessed 19 June 2020)).
[283] N. NZEREKA MUGHENDI, *op. cit.,*, p. 25
[284] B. KABAMBA, *op. cit.*
[285] V. MOUFFLET, *op. cit*., pp. 128 - 129.
[286] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* p. 184.
[287] J. MATUSITZ, *op. cit*., pp. 831.
[288] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* pp. 121.

Nowadays, these atrocities are still part of the daily life of the civilian population in DRC. Indeed, according to the latest UN report covering the period from 2018 to 2019, at least 726 women, 234 children and 3 men were victims of conflict-related sexual violence. Generally speaking, the report states that there is an overall increase in cases of sexual violence compared to the previous reporting period[289]. In this section, the aim will be to analyze the main factors behind the continuation of sexual violence in the DRC, despite numerous attempts to denounce and eradicate the phenomenon.

1. The sociological context

Congo's history has been marked by violence, both during colonization and post-colonial dictatorships. Because of this, the Congolese people have embraced the idea that violence is the only effective way to bring change. Indeed, the country's system does generally not allow for social or political ascension through the rule of law or through merits[290].

Another relevant element is the multiplicity of parties to the conflict, which all have recourse to the rape as a weapon of war. Indeed, civilians are attacked by armed groups[291], foreign military, state authorities, and even by other civilians[292]. This is actually not surprising, due to the fact that when an armed conflict lasts, the chances for it to crystallize new social norms are greater. Living in a war context for years can alter perceptions of what is acceptable or not[293]. Thus, even if a peaceful situation was to be achieved one day, mentalities would still have to change[294].

In addition, discrimination against women is widespread in Congolese society. According to the UN gender inequality index of 2019, the DRC is ranked 179th out of 189[295]. Indeed, women are almost seen as objects since being married is a sign of social integration and respectability. For instance, the payment of dowry remains a very common practice[296]. Moreover, certain negative social attitudes towards women

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[289] *Human rights situation and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo*, Report of the United Nations High Commissioner for Human Rights, A/HRC/42/32, 14 August 2019
[290] V. MOUFFLET, *op. cit*., pp. 129-130.
[291] Over twenty armed groups are involved in this conflict (J. MATUSITZ, *op. cit*., p. 833).
[292] V. MOUFFLET, *op. cit*., p. 129.
[293] C. EBOE-OSUJI, *op. cit.,* p. 264.
[294] « Une arme de guerre… », *op. cit.,* p. 26.
[295] "Gender inequality index », *Human development report 2019*, United Nations Development Programme, p. 319, available at : http://hdr.undp.org/en/content/table-5-gender-inequality-index-gii (accessed 19 June 2020).
[296] V. MOUFFLET, *op. cit*.,p. 129.

are widely accepted in Congolese society, such as conjugal violence[297]. Finally, as already mentioned, women are generally rejected by their families and communities, sometimes even to the point of murder. Indeed, they are considered responsible and become a source of shame for the community to which they belong. As a result, the sociological context is far from being conducive to improvement towards women's condition and it is therefore imperative to educate boys from childhood to respect women[298].

2. The attractiveness of natural resources

At the Nobel Peace Prize ceremony in 2018, Dr. Mukwege said: "I come from one of the richest countries in the world and yet the people of my country are among the poorest in the world"[299].

Indeed, the eastern regions of the country benefit from great mining wealth including copper, cobalt, diamonds, coltan, zinc, tin and tungsten[300]. As a result, economic profits may motivate opportunistic sexual violence. Indeed, some soldiers are underpaid (if paid at all), which means that their salary is not sufficient to cover all expenses of their families. Due to that, they need to find other of ways economic opportunities in order to get out of the cycle of poverty. The survival of armed groups often depends on the resources and material goods they will find, which means that they need to take absolute control over the territory.

Their loot is not limited to immediate material goods, but extends to all potential resources of the territory. Practically, the tactical consists of make the population flee the area in order to access the land and its resources. They can also take advantage of the instability due to the conflict in order to illegally take control of the mines and impose taxes on minors, or even force the population to work. Thanks to the benefit they perceive, they can then extend their control over other territories by buying new weapons, for example. It is therefore the responsibility of the Congolese government to regain control of these mines so that the revenues from these activities could help to improve the country, particularly in terms of justice, which would allow victims of sexual violence to receive reparation[301].

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[297] « Une arme de guerre… », *op. cit.,*p. 35.
[298] D. MUKWEGE, “Viols en RDC : mettre fin à la culture de l'impunité”, *Libération*, 25 April 2018, available from : https://www.liberation.fr/debats/2018/04/25/viols-en-rdc-mettre-fin-a-la-culture-de-l-impunite_1645796
[299] Original version : « Je fais partie d'un des pays les plus riches de la planète et pourtant le peuple de mon pays fait partie des plus pauvres du monde ». (P. LEPIDI, « Les cinq phrases à retenir du discours de Denis Mukwege, Prix Nobel de la paix 2018 », *le Monde*, 12 december 2018, available at: https://www.lemonde.fr/afrique/article/2018/12/12/les-cinq-phrases-a-retenir-du-discours-de-denis-mukwege-prix-nobel-de-la-paix-2018_5396536_3212.html (accessed 19 June 2020).
[300] « Une arme de guerre… », *op. cit.,*p. 13.
[301] *Ibid.*, p. 45.

In other cases, they also attack women on their way to the market when they want to buy food or sell their goods in order to rape and steal them. In fact, women are perceived as a consumer commodity to which they are entitled, as any other goods[302]. Finally, many Congolese women migrate to mining towns in order to find economic opportunities. However, when they arrive, they sometimes become marginalized and fall into prostitution trades. In conclusion, given that rapes are directly linked to the exploitation of mining resources, it would be relevant to focus human rights actions in these places[303].

3. The health system in the DRC

In armed conflicts, aggression can take many forms, and sometimes rape can be accompanied by the mutilation of women's bodies. These mutilations consist of cutting breasts, clitorises and vaginal lips with machetes and razor blades. Sometimes, women get shot in the vagina after rape, or can be mutilated with gun barrels, broken bottles and spears[304].

In fact, the intention is to mark the victim for the rest of her life instead of killing her[305]. Some armed groups also developed systematic mutilation techniques in order to make their identity clear to the community[306]. Consequently, the repercussions of rape include fractures, amputations, burns, mutilations, urinary incontinence, unwanted pregnancies, sterility, and the spread of sexually transmitted infections[307].

Due to the monstrous number of rapes perpetrated in the DRC, international organizations became aware of the situation and decided to intervene[308]. Concerning the health system, the international community supports associations fighting against sexual violence. The support to these associations is one of the only remedies for victims, as the health system is poorly funded by the Congolese state. Indeed, the patients have to cover part of the staff's salaries and specific treatments for sexual aggression are very

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[302] F. CRAWFORD KERRY, *op. cit.,* p. 477-478.
[303] « Une arme de guerre… », *op. cit.,* pp. 46 to 47.
[304] F. CRAWFORD KERRY, *op. cit.,*p. 475.
[305] D. WINGEATE PIKE, *op. cit*., 2011.
[306] For instance, these techniques include raping only eleven to fourteen years old girls, or hanging the victims so hard that they have to go through an imputation (*Ibid.,* pp. 81-82).
[307] The physical consequences are even more serious for young girls because their physical development is not complete « Une arme de guerre… », *op. cit.,*, p. 29).
[308] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* p. 193.

expensive[309]. For instance, a simple consultation costs an average of one working day (for the middle class), with the result that 50% of the population does not go to these centers[310].

Moreover, moving to the country constitutes another obstacle. Indeed, victims have to walk at least 4 hours before finding a hospital or a dispensary[311]. Nevertheless, improving the health care system cannot solve the problem alone. Indeed, the national legislative and judicial framework are also crucial.

Section 3 – National legislative and judicial framework

1. Legislation

Thanks to the intervention of activists and of the international community, the Congolese government took measures in order to improve the national legislation concerning sexual violence. In this regard, articles 14 and 15 of the Congolese constitution[312] give the government the responsibility to eliminate all forms of discrimination against women and to eliminate sexual violence[313].

More concretely, the first legislative reform took place in 2006 through the adoption of two laws modifying the Congolese Criminal Code[314] and Code of Criminal Procedure[315]. The first legislation[316] mentions sixteen types of sexual violence, such as marital rape, forced marriage, forced pregnancy, genital mutilation and sexual slavery[317]. In addition, the law clarified the definition of rape for which five to twenty years of imprisonment are prescribed (article 170 of the penal code)[318]. If the sexual violence led to the death of the victim, article 171 provides for the death penalty or life imprisonment[319]. Finally,

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[309] V. NAHOUM-GRAPPE, « Sexual violence in wartime », *op. cit.,* p. 193.
[310] « Une arme de guerre… », *op. cit.,*p. 26.
[311] « Une arme de guerre… », *op. cit.,*p. 26.
[312] Constitution de la République Démocratique du Congo, Journal officiel de la République démocratique du Congo, 18 February 2006.
[313] « Une arme de guerre… », *op. cit.,*p. 33.
[314] Code pénal Congolais : Décret du 30 janvier 1940 tel que modifié et complété à ce jour, Journal officiel de la République Démocratique du Congo, last amended in 2015.
[315] Décret du 6 août 1959 portant le Code de procédure pénale, Journal officiel de la République Démocratique du Congo, last amended 2015.
[316] *Law n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais*, Journal officiel de la République démocratique du Congo, 1st August 2006.
[317] « Une arme de guerre… », *op. cit.,*p. 33.
[318] D. HILHORST, D. NYNKE, *Beyond the hype? The response to sexual violence in the Democratic Republic of the Congo in 2011 and 2014*, Wiley-Blackwell, vol. 42, suppl. S.1, 2012, p. 583.
[319] D. WINGEATE PIKE, *op. cit*., p. 83.

the legislation mentions aggravating factors, especially if the offense has caused the victim a serious impairment of his or her health (article 171 bis, 6°). This provision is particularly relevant in the hypothesis of pregnancy following the rape, or in case of serious disease[320]. The second legislation provides[321] for the consultation of a doctor and a psychologist to assess the harm suffered and treat the patient (article 14 bis). The law also provides for the victim to have access to a lawyer. Unfortunately, there is no victim and witness protection program within the judicial system[322].

In 2009, a law concerning child protection[323] entered into force, including provisions on physical, moral, psychological and sexual exploitation. This law established specialized courts for children and an age limit of 18 years for informed consent to sexual relations[324].

As regards international obligations, the DRC is a monist state, which means that no transposition law was necessary following the ratification of the Rome Statute in 2002[325]. However, four laws of 2015 have made it possible to resolve conflicts between Congolese legislation and the Statute: the legislation amending and supplementing the Criminal Code[326], the Code of Criminal Procedure[327], the Military Criminal Code[328] and the Military Judicial Code[329].

Previously, military jurisdictions had the exclusive competence for international crimes[330]. In this regard, article 169, 5° of the Military Criminal Code listed as crimes against humanity[331], « rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and other forms of sexual violence of comparable gravity." At that time, there was a contradiction between the 2006 Constitution and the

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[320] D. WINGEATE PIKE, *op. cit*., p. 83.
[321] *Law n° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais*, Journal officiel de la République démocratique du Congo, 1st August 2006.
[322] M. ALIÉ & A. THIBAUT DE MAISIÈRES, *op. cit.*
[323] *Loi No. 09/001 du 2009 portant protection de l'enfant*, Journal officiel de la République Démocratique du Congo, 10 January 2009,
[324] A. VASSEUR, A. BERNARDO, G. MELO-PINZON, E. MUSAFIRI MASIKA, *op. cit.*, p. 23.
[325] M. ALIÉ & A. THIBAUT DE MAISIÈRES, *op. cit*.
[326] *Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal*, Journal officiel de la République démocratique du Congo, 29 February 2016.
[327] *Loi n° 15/024 modifiant et complétant le Décret du 06 août 1959 portant Code de procédure pénale*, Journal officiel de la République démocratique du Congo, 29 February 2016.
[328] *Loi n° 15/023 modifiant la Loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire*, Journal officiel de la République démocratique du Congo, 29 February 2016.
[329] *Loi organique n° 17/003 du 10 mars 2017 modifiant et completant la Loi n° 023-2002 du 18 novembre 2002 portant Code judiciaire militaire*, Journal officiel de la République démocratique du Congo, 10 March 2017.
[330] Previous article 161 of the Military Criminal Code.
[331] D. WINGEATE PIKE, *op. cit*., pp. 83-84.

Judicial Code which meant that many civilians were tried before military courts[332]. Nevertheless, in 2013, a law[333] gave more competences to the civil courts, which are now also competent to prosecute international crimes committed after its entry into force[334].

Finally, the law of 1 August 2015[335] on the implementation of women's rights and parity and the 2016 family law reform[336] have made significant changes to the regime. Indeed, before the reform, Article 448 of the Congolese Family Code stated that women had to obtain marital authorization in order to bring their cases to court. However, many husbands cut ties with their wives and refused to support them when they were raped, which constituted a serious obstacle to justice[337].

In light of the recent legislative changes, the fight against impunity regarding sexual violence seems to be heading in the right direction. More generally, despite many challenges, the protection of victims has generally improved, as well add the legislation condemning sexual violence.

2. Judicial system

Despite Doctor Mukwege's struggle, and the worldwide recognition of the atrocities perpetrated, the situation remains alarming[338]. As we have seen, the Congolese legislative system addresses sexual violence against women quite explicitly. But then, how can we explain the impunity of rapists in the DRC? How does the judicial system implement these laws?

Initially, cases of rape in the DRC were settled through informal, "amicable" arrangements. Far from restoring justice for the victims, these arrangements consisted of either forced marriage to "clean up" the crime or compensation for the victim's husband. Over time, thanks to the intervention of external actors (including NGOs), Congolese justice has gradually improved in this regard and jurisprudence has

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[332] Amnesty International, « Il est temps que justice soit rendue, la République Démocratique du Congo a besoin d'une nouvelle stratégie en matière de justice », *public document AFR 62/006/2011 AILRC-FR*, August 2011, pp 18-19.
[333] Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, Journal officiel de la République démocratique du Congo,
[334] M. ALIÉ & A. THIBAUT DE MAISIÈRES, *op. cit.*
[335] *Loi n° 15/013 portant modalités d'application des droits de la femme et de la parité*, Journal officiel de la République démocratique du Congo, 1st August 2015.
[336] *Loi n°16/008 du 15 juillet 2016 modifiant et complétant la loi n°87-010 du 1er aout 1987 portant code de la famille*, Journal officiel de la République démocratique du Congo, 15 July 2016.
[337] D. WINGEATE PIKE, *op. cit.*, pp. 83-84.
[338] V. MOUFFLET, *op. cit.*, pp. 123 – 125.

emerged[339]. Thus, from 2006 (the year the penal reform took place) to 2013, the four civil prosecution institutions in North Kivu have registered 1,293 complaints of sexual violence[340].

Military Courts

As already mentioned, prior to the 2013 reform, only military tribunals were competent to judge international crimes. To be able to prosecute, magistrates, judges and military officers must be of equal or higher rank than the accused. Therefore, the hierarchical superiors will benefit from *de facto* impunity due to the lack of magistrates in the field[341].

Furthermore, corruption and the lack of judicial independence of the military tribunals also constitute an obstacle to the fight against sexual violence, since high-ranking soldiers or civilians are less likely to be convicted[342].

Finally, the DRC mapping report[343] argued that very few cases have resulted in convictions by the military courts. Moreover, most of those convicted have managed to escape from prison, and no victims have received the reparation they were promised[344].

Thanks to the reform promulgated by former President Kabila in 2013, Appeal Courts now have jurisdiction to hear war crimes, crimes against humanity and genocide (Article 91). Unfortunately, this article mentions that the appeal courts have jurisdiction when these crimes are "committed by persons falling within their jurisdiction and that of the high courts," which seems to exclude military personnel[345]. In addition, military tribunals remain competent to sue civilians when they commit a crime with a military

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[339] D. HILHORST, D. NYNKE, *Beyond the hype, op. cit.,* p. 584.
[340] *Ibid.,* p. 591.
[341] M. ALIÉ & A. THIBAUT DE MAISIÈRES, *op. cit*.
[342] « Une arme de guerre… », *op. cit.,*p. 42.
[343] Office of the high commissioner on Human rights of the United Nations, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010.
[344]Amnesty International, *op. cit.,* pp 11-12.
[345] *Justice pour les atrocites perpetrees au pays*, SyndiGate Media Inc, Washington, 2014, available at : https://search.proquest.com/docview/1511688302?accountid=17200 (accessed 19 June 2020).

member, or with a weapon of war. Finally, civilian courts are not sufficiently equipped to deal with cases of serious human rights violations[346].

Mobile Courts

Another important element is the fact that it is very difficult for the victims to access both military and civilian courts because of the distance, the poor quality of the roads and the cost of travel. As a result, mobile courts ("audiences foraines") have been established under article 67 of the Code of organization and competence of jurisdiction[347]. These courts can move, for short periods, the Tribunals of 3 provinces from their capitals to small localities falling under their jurisdiction[348].

These mobile court hearings have many advantages, such as the geographical proximity between the crime and the judgment, which facilitates the investigation and the participation of the community. In addition, this type of judicial procedure makes it possible to deal with a significant number of cases. Finally, it also leads to awareness and prevention among the local population, who will become aware of the laws and see their application in practice.

However, mobile court hearings also face challenges, especially with regard to significant budgetary and logistical constraints, which can lead to expeditious justice. Moreover, the enforcement of judgments constitutes an additional difficulty, although the victims are sometimes satisfied with the conviction of the perpetrators[349].

Non-judicial transitional justice

With regard to non-judicial bodies, the Congolese "Transitional Constitution" of 2003 provided for five institutions in support of democracy under article 154: the Independent Electoral Commission, the

[346] Trial International, *Rapport présenté au Comité des droits de l'homme en vue du quatrième examen périodique de la République démocratique du Congo,* Geneva, 18 Septembre 2017, pp. 8-9.
[347] *Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*, Journal officiel de la République démocratique du Congo, 11 April 2013.
[348] D. HILHORST, D. NYNKE, *Beyond the hype, op. cit.,* p. 584.
[349] H. AMANI, «Adéquation du mécanisme des chambres foraines avec le droit de la défense et l'accès à la justice en République démocratique du Congo», *1er congrès de la Chaire Internationale Mukwege* [En ligne], Actes du colloque, URL : https://popups.uliege.be:443/chairemukwege/index.php?id=268.

National Human Rights Observatory, the High Authority for the Media, the Truth and Reconciliation Commission (TRC) and the Ethics and Anti-Corruption Commission[350].

The TRC is an instrument of non-judicial transitional justice, which makes it possible to re-establish the truth about past events by publicly acknowledging the facts and their perpetrators. However, they have been subject to numerous criticisms, particularly because of the proximity between some members of the commission and some accused. In addition, the Mapping Report showed that no reparation was granted at the end of the process, which is a terrible failure. Moreover, these commissions were only operational from July 2003 to February 2007[351]. Indeed, the 2006 Constitution promulgated by Joseph Kabila no longer makes any mention of them. At his inauguration, President Felix Tshisekedi announced his determination to combat human rights violations, impunity and corruption; the future will tell whether the establishment of a transitional justice system will be one of his priorities.

3. What are the factors that explain the failure of the judicial system regarding sexual violence in DRC?

As already mentioned, the geographical accessibility of the Courts, coupled with Court and travel expenses make it very difficult for the victims to go through with the process[352]. Moreover, most of the Congolese women are not familiar with the rule of laws in force, and the possibilities they have to access justice. Even if they manage to be heard, the slowness and malfunctioning of the justice system, coupled with the lack of human, material and financial resources leads to discouragement and lack of confidence from the population[353]. Regarding their personal life, they will also have to face stigma and fair of reprisals[354].

Both international law and the Congolese Constitution guarantee judicial independence and impartiality, which are prerequisites for the right to a fair trial[355]. Unfortunately, corruption within the Congolese

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[350] Office of the high commissioner on Human rights of the United Nations, *Report of the Mapping Exercise …, op. cit.,* p. 458.
[351] Amnesty International, *op. cit.,* pp 13-14.
[352] H. AMANI, *op. cit.*
[353] *Ibid.*
[354] T. MAHESHE MUSOLE, S. SAROLEA & H. GRIBOMONT, *op. cit.*
[355] « Une arme de guerre… », *op. cit.,*p. 43.

judicial system is still very much present[356]. Indeed, wealthy individuals are generally not prosecuted, or have the ability to influence the judge's decision. The others, however, are victims of political interference from the upper class and have to face a much slower justice system. For example, the magistrates give priority to profitable cases, with the consequence that bail bonds are sometimes used as a business by judges[357]. The lack of a clear division between the executive and the judiciary also leads to a series of acquittals when the perpetrators are high-ranking officers. For instance, in the Minova trial, even though the Congolese army raped 76 women and children, only two low-ranking soldiers had been convicted among the 39 defendants[358].

In cases where decisions are pronounced, the compensation awarded is rarely paid to the victims[359]. As a result, this has an impact on the confidence that Congolese women have in the judicial system, which increases amicable settlements. In reality, one of the reasons for the lack of implementation of decisions is the general poverty of the country's inhabitants. Indeed, when a soldier is found guilty, he will generally lose his job and thus his income, which makes it impossible for him to compensate the victim. It is therefore essential for the State to take its responsibility and provide reparations for crimes caused by the agents for whom it is responsible[360]. The state should also invest more in the judicial system in order to create more courts, which would facilitate access to justice and improve the penitentiary system. For instance, between June 2018 and May 2019, 1610 people escaped from detention centers in the DRC due to poor infrastructure, lack of trained staff, and corruption[361].

To conclude, the malfunctioning of the Congolese judicial system contributes to the culture of impunity and the absence of the rule of law[362]. The country's justice system is generally seen as ineffective, inaccessible, arbitrary, and incapable of resolving the problems of its population[363]. Nevertheless, there

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[356] « Une arme de guerre… », *op. cit.,*p. 42.
[357] Amnesty International, *op. cit.,* pp 37-38.
[358] HAUCHARD, "Des avocats dénoncent « l'impunité pour les violeurs en RDC", *Le monde*, 10 march 2016, https://www.lemonde.fr/afrique/article/2016/03/10/des-avocats-denoncent-l-impunite-pour-les-violeurs-en-rdc_4880555_3212.html
[359] D. HILHORST, D. NYNKE, *Beyond the hype, op. cit.,* p. 584.
[360] Amnesty International, *op. cit.,* pp 40-41.
[361] *Human rights situation and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo*, Report of the United Nations High Commissioner for Human Rights, A/HRC/42/32, 14 August 2019, p. 62.
[362] « Une arme de guerre… », *op. cit.,*p. 43.
[363] H. AMANI, *op. cit.*

is still room for hope, particularly following the latest judicial and penal reforms[364]. In this regard, military jurisdiction has recently sentenced the former provincial deputy Frédéric Batumike and his co-defendants to life imprisonment. They were found guilty of crimes against humanity, in a case involving the abduction and rape of dozens of children in Kavumu between 2013 and 2016[365]. In addition, out-of-court reforms and actions have emerged, which brings us to the next section.

Section 4 – Actions undertaken against rape as a weapon of war

1. Actions undertaken by NGOs

Thanks to Doctor Mukwege's work and commitment, coupled with the first reports on sexual violence, more and more international organizations came to the DRC, in order to contribute to the fight against impunity, especially by releasing funds. As a result, a growing number of Congolese NGOs have emerged, supported by international NGOs[366]. These organizations cover various areas in the fight against sexual violence, such as medical and legal support, psychological support, socio-economic support, improvement of the education, etc.[367]. Generally speaking, NGOs assist women to rebuild themselves after aggression, by transforming them from the status of "victims" to "survivors"[368]. For the purpose of this thesis, we will mainly address the intervention of NGOs regarding the legal system.

Their intervention has been crucial in the development of the legal framework and judicial infrastructure, which made numerous prosecutions for sexual violence in the DRC possible[369]. In this regard, NGOs have had an influence on the adoption of the legislative reform mentioned above, especially in 2006[370]. International NGOs have also made it possible to support the Congolese judicial authorities and to train local staff in order to contribute to a better knowledge of international law[371].

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[364] For instance, in the Fizi-Baraka trial, a senior army officer was found guilty of crimes against humanity, especially for rapes. This trial is proof that it is possible to obtain justice at the national level, as long as there are the necessary political will and financial support. (Amnesty International, *op. cit.,* pp 18-19).

[365] *Human rights situation and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo*, Report of the United Nations High Commissioner for Human Rights, A/HRC/42/32, 14 August 2019, p. 10.

[366] N. DOUMA AND D. HILHORST, *Fond de commerce? Assistance aux victimes de violences sexuelles en République Démocratique du Congo*, Disaster studies occasional papers n°3, Wageningen University, 2012,

[367] Amnesty International, *op. cit.,*, p. 548.

[368] D. MUKWEGE, *op. cit.*

[369] M. LAKE, I. MUTHAKA, G. WALKER, *Gendering Justice in Humanitarian spaces: opportunity and (dis)empowerment through gender-based legal development outreach in the eastern democratic republic of Congo*, Law and society review, 2016, p. 549.

[370] *Ibid.,* p. 544.

[371] Amnesty International, *op. cit.,* pp 16-17.

In addition, they have set up intermediary mechanisms to connect victims to the law, for example by providing financial support to the mobile courts[372]. Thanks to this, victims living in rural areas enjoy better access to the courts, and they can even benefit from free legal advice.

However, NGOs have been criticized for prioritizing sexual violence while ignoring other crimes. Indeed, rather than selecting the case themselves, mobile courses only consider cases proposed by NGOs. Moreover, their mandate does not cover the defense of suspects who are defended by pro-bono lawyers, which raises questions about the rights of the defense. In addition, the fact that NGOs pay for the transport, accommodation and food of legal personnel also raises questions about their impartiality[373].

At the regional level, NGOs and national human rights institutions contribute to the good functioning of the African Commission. In this respect, NGOs with observer status have the right to participate in the public sessions of the commission, to have access to the documents, or to intervene during the debates. More concretely, they draw the attention of the Commission to the human rights violations taking place in their countries. They can also contribute to the interpretation of the African Charter by elaborating norms and principles, thus popularizing the rules of law and making them more accessible[374].

All the programs concentrating on sexual violence have had positive impacts on the population which resulted in an increase in rape prosecutions. Moreover, the stigmas around sexual violence have changed, resulting in a decrease in the social rejection of raped women. People's attitudes and perceptions of violence have changed, so that survivors no longer go to court only to get material compensation, but also to stand for their rights[375].

However, donors' insistence on focusing on sexual violence creates a situation where other issues are neglected[376]. In this respect, some NGOs have been suspected of taking an opportunistic interest in sexual violence in order to benefit from funds[377]. In addition, this growing support for victims can sometimes lead to abuse. Indeed, some cases in which pregnant women have filed complaints of rape have turned

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[372] N. DOUMA AND D. HILHORST, *op. cit.,* p. 56.
[373] *Ibid.,* p. 57.
[374] MD. EVANS, R. MURRAY, *op. cit.,* pp. 289-293.
[375] D. HILHORST, D. NYNKE, *Beyond the hype, op. cit.,* p. 584.
[376] *Ibid.,* pp. 584-586.
[377] N. DOUMA AND D. HILHORST, *op. cit.,* pp. 35-36.

out to be lies in order to obtain material benefits[378]. As the population in the DRC is generally poor, women sometimes make up facts in order to benefit from aid that is only available to rape victims[379].

2. National policies

In order to tackle sexual violence effectively, the work of NGOs must be supported by the state[380]. In this regard, the Congolese state reacted for the first time against sexual violence in 2003, through the adoption of the joint initiative to combat sexual violence. This action was aimed to be multisectoral and to coordinate the different sectors, comprising four components: medical, psychosocial and judicial, security and protection[381].

Afterwards, the 2006 legal reform created the minister of gender, family and children's affairs within the government. In addition, a national strategy against gender-based violence was created, as well as a provincial committee to combat sexual violence and a special police force for the protection of women and children[382].

In 2009, the joint initiative to combat sexual violence gave way to the National Strategy to Combat Gender-based Violence (SNVBG)[383], which operates within the context of the Stabilization and Reconstruction Plan for Eastern Democratic Republic of the Congo program (STAREC)[384]. The SNVBG was officially launched in 2011, to strengthen prevention, protection and response capacities[385]. The action plan focused mainly on sexual violence in the east of the country, in particular through the harmonized collection of data and information[386]. In concrete terms, the SNVGB is based on five pillars: strengthening law enforcement and combating impunity; prevention and protection; reform of the security and justice system; care for victims (including socio-economic reintegration and community

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[378] M. LAKE, I. MUTHAKA, G. WALKER, *op. cit.,*p. 550.
[379] N. DOUMA AND D. HILHORST, *op. cit.,* p ; 51.
[380] *Ibid.,* p. 37.
[381] A. VASSEUR, A. BERNARDO, G. MELO-PINZON, E. MUSAFIRI MASIKA, *op. cit.,* p. 13.
[382] M. LAKE, I. MUTHAKA, G. WALKER, *op. cit.,*p. 548.
[383] *Stratégie nationale de lutte contre les violences basées sur le genre (SNVBG)*, Ministère du genre, de la famille et de l'enfant, République Démocratique du Congo, Kinshasa, 2009.
[384] N. DOUMA AND D. HILHORST, *op. cit.,*, p. 37.
[385] A. VASSEUR, A. BERNARDO, G. MELO-PINZON, E. MUSAFIRI MASIKA, *op. cit.,* pp. 7-8.
[386] *Ampleur des violences sexuelles en RDC et actions de lutte contre le phénomène de 2011 à 2012*, Ministère du genre, de la famille et de l'enfant, République Démocratique du Congo, Kinshasa, June 2013, p. 4.

recovery); and data and information management[387]. The United Nations has supported this project[388], especially through financial support from the United Nations Population Fund (UNFPA), as well as technical and financial support from MONUSCO[389]. Other UN agencies also support the SNVGB in the implementation of the 5 Pillars[390], such as UNDP, UNHCR, the UN Gender Office, UNICEF and UNFPA[391].

In 2014, the creation of the Office of the Personal Representative of the Head of State for Combating Sexual Violence and Recruitment of Children, in order to support the Ministry of Gender marked a high point in the country's involvement in the fight against sexual violence[392]. However, the role of the Ministry of Gender has been diluted over time due to the multiplication of programs and international donors in support of the SNVBG[393].

What is the track record for these national policies today? In this regard, the United Nations Population Fund (UNFPA) has issued a joint evaluation of programs to combat sexual violence in the DRC from 2005 to 2017, in which it calls on the country to redouble its efforts in this area. Sexual violence is usually addressed in a reactive rather than proactive manner[394]. Generally speaking, national institutions need to be strengthened in terms of financial and human resources. Indeed, delays in the adoption of new measures and legislation are being pointed at, particularly by NGOs[395]. In addition, allocations of international funds are sporadic, which prevents projects from coordinating and benefiting from a continuous long-term approach. Indeed, the lack of sufficient national funding for projects makes them dependent on international donations[396]. Finally, according to the last report of the United Nations, members of armed forces and militias were responsible for 68% of sexual abuses, while members of the

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[387] *Stratégie nationale de lutte contre les violences basées sur le genre (SNVBG)*, Ministère du genre, de la famille et de l'enfant, République Démocratique du Congo, Kinshasa, 2009, p. 25.
[388] The UN's intervention in the DRC consists of the peacekeeping mission (MONUSCO) as well as 21 specialized programs, funds and agencies: FAO, IAEA, IFAD, ILO, IMF, IOM, OCHA, OHCHR, UN-Habitat, UN Women, UNAIDS, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNIDO, UNOPS, UN Volunteers, WFP, WHO and the World Bank.
[389] *Ampleur des violences sexuelles en RDC et actions de lutte contre le phénomène de 2011 à 2012*, Ministère du genre, de la famille et de l'enfant, République Démocratique du Congo, Kinshasa, June 2013, p. iii.
[390] Amnesty International, *op. cit.,*, p. 15.
[391] N. DOUMA AND D. HILHORST, *op. cit.,* p. 37.
[392] A. VASSEUR, A. BERNARDO, G. MELO-PINZON, E. MUSAFIRI MASIKA, *op. cit.,* p. 23.
[393] *Ibid.,* pp. 64-65.
[394] A. VASSEUR, A. BERNARDO, G. MELO-PINZON, E. MUSAFIRI MASIKA, *op. cit.,* p. 10.
[395] N. DOUMA AND D. HILHORST, *op. cit.,* p. 37.
[396] A. VASSEUR, A. BERNARDO, G. MELO-PINZON, E. MUSAFIRI MASIKA, *op. cit.,* p. 10.

national armed forces were accountable for 22% of them[397]. Recently, the new government led by Felix Tshisekedi has put in place an action plan to combat sexual violence committed by the national police, with the support of the United Nations[398].

As a result, even though clear improvement has taken place at the national level (especially from the legislative point of view), this brief analysis of the Congolese system regarding sexual violence shows that there is still much to do. Now that we have an idea of the international and national legal and judicial framework, we will try to translate these information into a reflection around possible improvements of the system regarding sexual violence.

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[397] *Human rights situation and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo*, Report of the United Nations High Commissioner for Human Rights, A/HRC/42/32, 14 August 2019, p. 9.
[398] « RDC : l'ONU se félicite du plan d'action pour lutter contre les violences sexuelles par la police nationale », *United Nations info*, 11 novembre 2019, available at : https://news.un.org/fr/story/2019/11/1055851 (accessed 19 june 2020).

Chapter 4: Reflections on how to improve the judicial framework relating to sexual violence

This last chapter builds on the previous ones and elaborates suggestions for ways ahead, in order to fight against impunity in the DRC. It is clear that improving the situation goes hand in hand with multi-sectoral collaboration, as suggested by the Mukwege Chair. Nevertheless, this chapter will be limited to a legal contribution for the purpose of the thesis. Short-term political solutions have not reached the expectations, which is why it is important to think about long-term solutions, enshrined in law[399]. As already mentioned in the introduction, the situation in the DRC - and more generally the problem of sexual violence in armed conflict - are themes that need much more than a thesis to be fully developed. Thus, this chapter does not claim to solve the problem, but rather to highlight some of the avenues that have emerged from the research conducted in the framework of this thesis. While the first section of this charter is dedicated to the possible improvements of the international legal framework, the second one focuses on recommendations at the national level.

Section 1 - Improving the international legal framework

1. The creation of a protocol dedicated to violence against women

As developed in the second chapter, while CEDAW explicitly addresses women's rights in a well-defined treaty, it can be criticized in several ways. Indeed, the treaty does not mention violence against women, and it has been the subject of a significant number of reservations. In addition, the DRC has not ratified the CEDAW protocol, which sets up a committee responsible for implementing the treaty.

Because the non-binding statements and general recommendations of the commission do not allow to reach the expected result, some authors have thus put forward the idea of a new protocol to CEDAW or ICCPR that would focus on violence against women. They point to the fact that, in general, provisions

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[399] "Congo: No peace without Women", *Journal of International Affairs*, v. 67, N°1, 2013, pp. 208-209.

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relating to women are usually inserted in pre-existing texts. It would therefore be more symbolic to create a protocol specifically dedicated to women, in order to confirm that their rights are recognized by all[400].

In concrete terms, this protocol should provide clearly defined guidelines, in particular by establishing define sexual violence, and more specifically in the context of armed conflict[401]. In this regard, they could take inspiration from the case-law of the jurisdictions mentioned in the second chapter. In addition, this protocol should contain a non-exhaustive list of acts considered sexual violence in order to avoid any interpretation-related abuses[402].

Nevertheless, the implementation of this treaty would inevitably depend on the goodwill of the signatory states. Considering the CEDAW and the MAPUTO Protocol, we realize that states generally agree that women should deserve special protection. However, when it comes to concrete situations, they are way more reluctant.

2. Strengthening the responsibility of hierarchical superiors

As mentioned in Chapter 2, most of the decisions issued by the ad hoc tribunals and the ICC concerned superiors' responsibility for acts committed by military employees under their command. Concretely, their responsibility is established on two elements: the effective control of the troops, and the fact that the commander knew or ought to have known that the offense was about to be committed[403].

The second element (the psychological aspect) is governed by article 28 of the Rome Statute and is a novelty compared to previous international documents. While other hierarchical superiors will only be criminally liable if they "knew that these subordinates were committing or about to commit these crimes...", military superiors have an additional burden in that they are liable if they "knew or ... should have known" and that they "have not taken all the measures necessary and reasonable within its power to prevent or repress its execution …" [404].

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[400] A. EDWARDS, *Violence Against Women Under International Human Rights Law*, Cambridge: Cambridge University Press, 2010, pp. 328-343.
[401] G. GAGGIOLI, *op. cit.,* p. 532.
[402] A. EDWARDS, *op. cit.,* p. 242.
[403] D. K. COHEN, A. H. GREEN, AND E. J. WOOD, "Wartime Sexual Violence Misconceptions, Implications, and Ways Forward", *United States Institution of Peace (USIP), special report*, February 2013, p. 13.
[404] R. GRONDIN, « La responsabilité pénale du chef militaire : un défaut d'agir mais pas un défaut d'état d'esprit », *Revue Générale de droit*, Volume 34, numéro 2, Éditions Wilson & Lafleur, inc., 2004, p. 326-327.

The problem is that, in practice, international courts only prosecute superiors when they directly ordered or were aware of certain information relating to the rapes, and chose to ignore it. Proving that they knew about the crimes is very difficult because in most cases, the liability is not clear[405]. As a result, in some cases, the sanction consists of a disciplinary sanction without incurring criminal liability[406].

Consequently, a way to improve the system could consist of strengthening the duty of prevention of hierarchical superiors. In other words, they would take reasonable steps long before the risk arises[407]. If crimes of sexual violence have occurred, we could consider improving the investigative capacity, in order to determine whether or not the commander knew or ought to have known about the crime[408]. Therefore, a condition could be added to section a) of article 28 of the Rome Statute, according to which if the superior has not taken concrete preventive measures[409], he is liable for the crimes of the combatants under his command.

In addition, this legislative change should benefit from the expertise of scholars and policymakers on armed groups and group dynamics[410]. To do so, they could take inspiration from organizations which do not engage in sexual violence[411]. Peace-time successful initiatives could provide relevant ideas such as social norms campaigns, or male-to-male peer counselling programs[412]. Indeed, we must bear in mind that these rapes are the result of a tactic of war. Although some groups may appear disparate, they are in fact all more or less hierarchical. In general, the process of integrating combatants into the armed group is accompanied by a brainwash. If this indoctrination is successful, and the leader expressively prohibits rape, combatants under his command will generally not rape[413]. This means that leaders have a real role to play, which depends on their good will[414].

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[405] N. ZAKR, « La responsabilité du supérieur hiérarchique devant les tribunaux pénaux internationaux », *Revue internationale de droit pénal*, 2002/1, vol. 73, p. 79.
[406] R. GRONDIN, *op. cit.,* p. 327-328.
[407] C. EBOE-OSUJI, *op. cit.,* p. 98.
[408] D. K. COHEN, A. H. GREEN, AND E. J. WOOD, *op. cit.*, p. 13.
[409] Concretely, high ranking officers should provide clear guidelines on prevention. If they have been given, then the responsibility would fall to lower-ranking commanders.
[410] *Ibid.,* p. 12.
[411] E.J. WOOD, “Conflict-related sexual violence and the policy implications of recent research”, *International Review of the Red Cross*, 96 (894), 2014, p. 475.
[412] *Ibid.,* p. 476.
[413] *Ibid.,* pp. 466-469.
[414] D. K. COHEN, A. H. GREEN, AND E. J. WOOD, *op. cit.*, p. 12.

3. Protection of witnesses and victims

The protection of witnesses and victims participating in a criminal trial is a fundamental aspect. Indeed, their testimony is crucial to the success of the trial, and to ending impunity. The fear of reprisals may deter them (see *Tadic case* mentioned above). Moreover, when witnesses agree, they take enormous risks at the end of the trial when they return home or to their village (see the *Akayesu case*). For victims, confessing about their aggression in front of the judge constitutes a second trauma, and can be particularly delicate. The humiliation experienced by the victim, coupled with the stigma, generates a need to adapt procedures in the case of sexual crimes[415]. All this has created situations where rape victims have suffered frustration and indignation at the outcome of the trial, which has only made their situation worse[416].

In this respect, the ICTY took the lead by changing the rules of procedure in an inclusive way for these factors. Indeed, the establishment of flexible *rules of procedure and evidence* have improved the investigative methods, by adapting them to sexual offenses[417]. For instance, rule n°98[418] provides that the testimony of the victim does not need to be corroborated, that her sexual past does not constitute evidence, and points out that the victim's consent is not valid if he or she was threatened. In addition, the rules of procedure provide a unit for victims and witnesses, which aims to provide them counseling and support[419].

The ICTR also has *rules of procedure*[420] that allow the victim to testify anonymously and confidentially, possibly in writing or electronically[421].

Finally, the ICC provides for the participation of the victim in the proceedings, which was previously not the case. This allows the victim to become an actor in the trial, and to be considered as a subject of

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[415] A. HAGAY-FREY, *op. cit.,* p. 86.
[416] D. BIDERI, *op. cit.,* 2017, p. 219.
[417] A. HAGAY-FREY, *op. cit.,* p. 85.
[418] UN General Assembly, *Rules of Procedure and evidence*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, IT/32/Rev.50 , 8 July 2015.
[419] Rule 34 (A).
[420] UN General Assembly, *Rules of Procedure and evidence*, ICTR, U.N. Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995.
[421] Article 69 (A) and 75 (A).

international criminal law if he or she so wishes. Better still, witnesses and victims participating in the trial have access to physical and mental health support[422].

Despite these remarkable advances, serious procedural problems remain. Indeed, there have been cases where courts have been negligent, and information about victims and witnesses have been published[423]. In addition, there is a lack of follow-up after the trial, with the consequence that their safety is no longer guaranteed afterwards. Moreover, the victim's right to participate in the ICC remains very limited. Indeed, they cannot be parties to the proceedings, they can only participate by expressing their views and concerns[424]. Finally, the procedure takes an average of eight years for the victims, and the collection of evidence is very difficult concerning sexual violence[425].

A way to improve the situation would be to valorize and hire more female professional staff within the jurisdictions, as mentioned in the rule 34 (B) of the ICTY rules[426]. Another way would be through the integration of local organizations specialized in conflict-related sexual violence within the process. They could then be used as a bridge between the prosecutor and the victims/witnesses, and provide them financial, social and psychological help during as well as after the trial[427]. Thanks to these improvements, the ICC could create an appropriate and coherent strategy, in order to avoid the systematic dropping of charges related to sexual violence. This strategy could encourage all participants to the trial to express themselves freely, within an atmosphere of tolerance.

4. The right to reparation for victims

Regarding sexual violence, several measures can help the individual reconstruction of the victim, such as restitution, compensation, satisfaction, or appropriate measures. These measures can be individuals, collectives, or even a combination of both. They aim to mitigate the consequences of the acts and to contribute to the reintegration of the victims into the society[428].

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[422] D. BIDERI, *op. cit.,* p. 195.
[423] A. HAGAY-FREY, *op. cit.,* p. 87.
[424] M. ALIÉ & A. THIBAUT DE MAISIÈRES, *op. cit.*
[425] *Ibid.*
[426] A. HAGAY-FREY, *op. cit.,* p. 86.
[427] D. BIDERI, *op. cit.,* p. 219.
[428] I. MOULIER, «Le droit à réparation des victimes de violences sexuelles», *1er congrès de la Chaire Internationale Mukwege* [En ligne], Actes du colloque, URL : https://popups.uliege.be:443/chairemukwege/index.php?id=270.

While the Statutes of the ICTY and the ICTR did not recognize any right to reparation[429], the Rome Statute is rather innovative in this respect. Indeed, article 79.1 of the Rome Statute created the Trust Fund for Victims (TFV) in order to provide reparations to victims. Great care must be taken so as not to endanger the compensated victims who could be attacked after the receipt of the compensation[430]. In this regard, the TFV is also mandated to provide other forms of general support to populations affected by the crimes dealt with by the court, such as physical and psychosocial rehabilitation[431]. Finally, beneficiaries from the reparation can be direct or indirect victims, whether or not they participated in the trial[432]. For instance, even though Bemba was acquitted, the TFV has set up initiatives to help children born out of rape[433]. It will therefore be interesting to see if the TFV intervenes following the appeal of Bosco Ntanganda's decision. This fund is crucial because none of the Court's order has been executed so far[434].

In conclusion, we can see that the ICC is increasingly focusing on witnesses and victims, which was not previously the case. However, the remedies offered by the courts are insufficient and inconsistent[435]. The methods of the Court need to be improved in order to allow for the collection of sufficient evidence through testimonies, on the one hand, and to ensure their safety after the fact, on the other.

Section 2 – Improving the national judicial system

We have seen in Chapter 3 that the legal framework in the DRC is relatively favorable to the fight against sexual violence. Indeed, the issue is rather the judicial system. This is why this section aims to suggest some ideas in order to improve the national system.

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[429] They were only empowered to make orders for restitution of property and then the applicant had to seek compensation before the national courts.
[430] M. ALIÉ & A. THIBAUT DE MAISIÈRES, *op. cit.*
[431] « Une arme de guerre… », *op. cit.*, p. 50.
[432] I. MOULIER, *op. cit.*
[433] « Une arme de guerre… », *op. cit.,*p. 50.
[434] M. ALIÉ & A. THIBAUT DE MAISIÈRES, *op. cit.*
[435] « Une arme de guerre… », *op. cit.,*p. 50.

1. Transitional justice instruments

With regards to the complexity of the situation, it is crucial to put in place various mechanisms, both judicial and non-judicial[436]. In this section, we will address two models encouraged by the Mapping report in order to restore justice: mixed jurisdictions, and truth and reconciliation commissions.

a. Specialized mixed chambers

The idea of mixed jurisdictions in the DRC emerged in 2004, on the initiative of the Congolese civil society[437]. Later, the NGO Human Rights Watch proposed a model of 3 mixed chambers of first instance, composed of: 5 magistrates, a specialized investigation unit, a public prosecutor's office, a specialized registry and a specialized appeal chamber. In addition, the NGO asked for the creation of a specialized sexual violence unit and training for investigators and prosecutors[438].

These mixed jurisdictions would be integrated directly into the appeal courts. They would only deal with war crimes, crimes against humanity and genocide that have taken place in the DRC since 1990. In order to benefit from the best expertise, non-Congolese staff would work together with Congolese staff for a limited period of time[439].

In October 2013, Joseph Kabila declared himself in favor of the creation of mixed chambers[440], and a project was adopted in 2014. Unfortunately, this law was finally not approved by the parliament, which claimed technical difficulties. The government undertook to correct these errors, but has so far failed to keep its word[441]. This is extremely regrettable, because this model has many advantages. Indeed, an

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[436] Office of the high commissioner on Human rights of the United Nations, *Report of the Mapping Exercise …, op. cit.,* pp. 409-410, p. 466.

[437] *Justice pour les atrocites perpetrees au pays*, SyndiGate Media Inc, Washington, 2014, p. 2, available at : https://search.proquest.com/docview/1511688302?accountid=17200 (accessed 19 June 2020).

[438] Human Rights Watch, Document de réflexion préparé par Human Rights Watch : Une "chambre mixte" pour le Congo ?, Septembre 2009, available at : https://www.hrw.org/sites/default/files/related_material/DRC%20-%20A%20Mixed%20Chamber%20for%20Congo%201009%20FR%20HRW%20Format.pdf (accessed 19 June 2020).

[439] *Justice pour les atrocites perpetrees au pays*, SyndiGate Media Inc, Washington, 2014, pp. 2-3, available at : https://search.proquest.com/docview/1511688302?accountid=17200 (accessed 19 June 2020).

[440] Democratic Republic of Congo: No More Delays for Justice – Establish Specialized Mixed Chambers and Adopt ICC Implementing Legislation During the Current Parliamentary System',Human RightsWatch, 1 April 2014, available at www.hrw.org/news/2014/04/01/democratic-republic-congo-no-more-delays-justice. (accessed 19 June 2020).

[441] Rapport de suivi sur les Observations finales du Comité pour l'élimination de la discrimination à l'égard des femmes sur la République démocratique du Congo en juillet 2013 (CEDAW/C/COD/CO/6-7), August 2015, p. 20.

international staff would be able to pass on their knowledge and experience to local employees. It would also help to ensure fair and credible trials, in particular in order to respect the rights of the accused, while combating corruption. In addition, it would help to draw attention to war crimes[442].

President F. Tshisekedi has made no mention of the crimes against humanity committed in the DRC, nor of the possibility of setting up mixed chambers, or of setting up an international tribunal for the DRC[443]. Thus, the mapping report published more than 10 years ago, as well as Dr. Mukwege's calls for help, do not seem to be among the new president's priorities.

As mentioned above, the ICC tends to fill the gaps of member states when they are unable or unwilling to act. Establishing mixed chambers would therefore help to ease the ICC's congestion by encouraging complementarity. However, if the DRC continues to deny the problem, it may be necessary to turn to the creation of an international criminal tribunal specially dedicated to its situation, along the lines of Rwanda and Yugoslavia.

b. Truth and reconciliation commission

The legal path does not always offer the most appropriate solutions for a country in crisis. Thus, non-judicial mechanisms are sometimes preferable, such as truth and reconciliation commissions (TRC), victim compensation funds, and institutional reforms (including police, military, and justice sectors). As mentioned in Chapter 3, the TRC attempt put in place by the Transitional Constitution of 2003 was a failure. Nevertheless, the mapping report highlighted that victims were calling for the establishment of a new commission[444].

Indeed, these commissions are well suited to cases of sexual violence, in particular because they make it possible to welcome the victim's witness without questioning it. The TRC aim to establish the truth and

[442] Office of the high commissioner on Human rights of the United Nations, *Report of the Mapping Exercise ..., op. cit.,* pp. 409-410, p. 484.
[443] C. FRÈRE, « Document: le discours d'investiture de Félix Tshisekedi", La libre, 25 January 2019, available at : https://afrique.lalibre.be/31447/document-le-discours-dinvestiture-de-felix-tshisekedi/ (accessed 19 june 2020).
[444] Amnesty International, *op. cit.,* pp 13-14.

make recommendations. They also make it possible to establish the responsibilities of both public and private actors, and to propose reparation measures, or reforms[445].

The biggest advantage of TRCs is that they can handle a very large number of cases. This makes it possible to take a collective and global view[446]. Indeed, TRC provide an opportunity to reflect on the underlying reasons for these phenomena, especially concerning the impunity.

For instance, the TRC in Canada had to judge sexual crimes committed in residential schools against indigenous children. The commission highlighted the fact that the primary purpose of these boarding schools was to weaken family ties and indoctrinate these children to adhere to the culture valued by the state[447]. Another recent example is the establishment of an independent commission on sexual abuse within the Catholic Church in France[448]. This commission proposes reparations for the victims, and makes it possible to go beyond the legal statute of limitations. These two examples show that this type of non-judicial initiative can easily be adapted to cases of sexual violence. Indeed, in this type of case, the victims mainly need to be listened to, and to know that society recognizes the facts that have occurred.

However, for these initiatives to work, a caring and supportive environment is imperative. With the continuing crisis in the east, this may expose victims and witnesses to reprisals. Moreover, this solution is characterized by a total absence of legal responsibility, and decisions may remain a dead letter, which is equivalent to a form of amnesty for rapists[449].

Nevertheless, the mapping report expressed a favorable opinion about such commissions. Unfortunately, the Congolese government expressed its disagreement with the establishment of TRCs in its response to the report[450]. Since then, no serious TRC proposals have been put forward, despite strong calls from civil society. In my view, it is fundamental to establish the truth in order to allow the victims to be recognized as such, because it is clear that the DRC will not be able to rebuild itself by minimizing the atrocities that

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[445] Office of the high commissioner on Human rights of the United Nations, *Report of the Mapping Exercise ..., op. cit.,* pp. 409-410, p. 492.
[446] J-P., MASSIAS, 1er Congrès Chaire Mukwege - Prise en charge juridique (pilier 4), 15 November 2019, available at : https://www.youtube.com/watch?v=HBeWWMQvR8A&feature=youtu.be (accessed 19 June 2020).
[447] *Honorer la vérité, réconcilier pour l'avenir Sommaire du rapport final de la Commission de vérité et réconciliation du Canada*, Commission de vérité et réconciliation du Canada, 2015, p. 2., available at : http://www.trc.ca/assets/pdf/French_Exec_Summary_web_revised.pdf (accessed 19 June 2020).
[448] Commission indépendante sur les abus sexuels dans l'Église (CIASE), Dossier de presse, 8 February 2019, available at : https://www.ciase.fr/wordpress/wp-content/uploads/2020/04/Dossier-de-presse-FINAL-Word-5-fe%CC%81vrier-V2.pdf (accessed 19 June 2020).
[449] J-P., MASSIAS, *op. cit.*
[450] Amnesty International, *op. cit.,* pp 13-14.

have taken place. Other transitional justice situations have already proven that TRCs are an effective tool. However, such a project should be done in good faith, taking into account the mistakes of the previous commission, in order to gain trust and legitimacy.

2. Protection of witnesses and victims

Unfortunately, there is no victim and witness protection program, nor a unit specifically dedicated to this issue within the Congolese judicial system[451]. Indeed, the law only requires judges to take all necessary measures to ensure the safety, physical and psychological well-being, dignity and privacy of victims (or any other person involved in the trial). This leaves a wide margin of appreciation to the judges, who have been reluctant to take protective measures for victims such as removing their names from statements or not mentioning their names during the trial. Moreover, judges rarely agree to hold hearings in camera, and where they are held, only the public is excluded from the courtroom[452].

This lack of protection creates real problems, especially for the risks of reprisals and aggression[453]. As a result, most victims of sexual violence abandon the criminal proceedings initiated. In addition, corruption can create a situation where victims are forced to accept amicable (yet illegal) settlements[454].

These threats also concern human rights defenders, particularly those supporting victims of sexual violence. They may be subjected to arbitrary detention, threats, unlawful restrictions on their activities, judicial harassment and defamation[455]. In reaction, the government set up a Protection Unit for Women's Human Rights Defenders in 2009, which concluded in failure[456].

As a result, the protection of victims and witnesses, as well as the fight against corruption can be improved. In this respect, a protection program and a unit specifically dedicated to their protection should be created. The training of judicial officials on sexual violence should be a priority, so that they can improve the procedures and take appropriate measures. In addition, the margin of appreciation of judges,

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[451] Rapport de suivi sur les Observations finales du Comité pour l'élimination de la discrimination à l'égard des femmes sur la République démocratique du Congo en juillet 2013 (CEDAW/C/COD/CO/6-7), August 2015, p. 21.
[452] *Ibid.,* p. 22.
[453] Office of the high commissioner on Human rights of the United Nations, *Report of the Mapping Exercise …, op. cit.,* p. 435.
[454] Rapport de suivi sur les Observations finales … (CEDAW/C/COD/CO/6-7), *op. cit*., p. 21.
[455] *Ibid.,* p. 23.
[456] Rapport de la société civile au Comité des droits de l'homme : Examen du 4e rapport de la République Démocratique du Congo Octobre, 121e session, Mise en œuvre du Pacte International des droits civils et politiques, 2017, p. 11.

in particular in obtaining a closed hearing, should be restricted by stricter and more transparent rules, which respect the anonymity of the victim.

3. The right to reparation for the victims

At the national level, this right is recognized in Articles 258 to 260 of the Congolese Civil Code[457]. Unfortunately, victims rarely receive compensation. For instance, if the sexual violence was committed by members of the Congolese army, their income is too low to pay the condemnation[458].

With regard to the responsibility of the State, these articles also mention the possibility of an *in solidum* condemnation of the Congolese state and those responsible to pay damages to the victims[459]. The problem is that this procedure is very long, expensive and incredibly complex. Indeed, in order to benefit from this mechanism, victims must bring a civil action (in addition to the criminal action) against the person who committed the sexual violence. In addition, the victim is usually required to pay an administrative fee before initiating this procedure[460]. The documents must then be forwarded to the Ministry of Justice and Budget, which can sometimes take up to a year. At the end of this process, the victim may receive a random sum, determined without any objective and transparent criteria. Finally, it should be noted that this procedure must be conducted individually, which prevents collective redress[461].

The 2004 bill to establish a fund to assist victims of sexual violence never came to life, and most reparations are made through amicable settlements outside any legal framework[462]. Congolese legislation provides only for monetary redress, but other crucial aspects of redress could also be effective[463]. Indeed, symbolic reparation could be a solution, in particular through public acknowledgement of the crime, such as an apology from the state or places of commemoration, as a

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[457] Office of the high commissioner on Human rights of the United Nations, *Report of the Mapping Exercise …, op. cit.,* p. 502.
[458] Rapport de suivi sur les Observations finales du Comité pour l'élimination de la discrimination à l'égard des femmes sur la République démocratique du Congo en juillet 2013 (CEDAW/C/COD/CO/6-7), August 2015, p. 25.
[459] Trial International, *op. cit*., p. 10.
[460] Rapport de suivi sur les Observations finales du Comité pour l'élimination de la discrimination à l'égard des femmes sur la République démocratique du Congo en juillet 2013 (CEDAW/C/COD/CO/6-7), August 2015, p. 26.
[461] Trial International, *op. cit*.,pp. 11-12.
[462] A. VASSEUR, A. BERNARDO, G. MELO-PINZON, E. MUSAFIRI MASIKA, *op. cit.,* p. 10.
[463] E. NOVIC, A. FALISSE & D. KAMUANDU, «Quelles perspectives de justice pour les victimes de violences sexuelles basées sur le genre ? Étude des stratégies mises en oeuvre par les pourvoyeurs d'aide légale en République démocratique du Congo, en République centrafricaine et en Ouganda», *1er congrès de la Chaire Internationale Mukwege* [En ligne], Actes du colloque, URL : https://popups.uliege.be:443/chairemukwege/index.php?id=264.

promise of non-repetition[464]. As for counseling, psycho-social and economic support services, they are mainly guaranteed and financed by NGOs and not by the State, which makes these measures precarious (because they depend on financing)[465].

In order to improve the system, several issues need to be addressed. For instance, a system of collective reparations and symbolic reparations should be established (through the construction of schools, health care centers, rehabilitation centers, ...)[466]. The 2004 proposal for the establishment of a victims' compensation fund should be reconsidered by taking inspiration from the ICC. With regard to civil action for damages against the state, the procedure could be simplified. For instance, the calculation of compensation should be clear and transparent. This should be accompanied by better training for judges, who could guide victims and their lawyers towards this procedure. In general, judgments should be enforced, and measures should be tailored to specific situations of sexual abuse.

4. Final recommendations for a zero-tolerance policy for sexual violence in the DRC

After having mentioned the main dysfunctions and accomplishments of the Congolese system regarding conflict-related sexual violence, this last subsection, focuses on some specific points that should be among the priorities for adopting a zero-tolerance policy. Indeed, this policy is fundamental to closing the impunity gap, which threatens to persist in peacetime[467].

As mentioned above, the lack of financial, material and human resources seriously undermines the fight against impunity. We have also seen that one of the main factors in the conflict in the east is the important natural resources found in this area[468]. If the Congolese State manages to regain control of these resources, this could benefit to the population.

Consequently, part of these benefits could be allocated to the judicial system, in order to make the system efficient, fast and accessible to victims. As a reminder, physical access to justice in the DRC is very complicated due to the lack of legal services in the landlocked territories of the country[469]. Even if the establishment of mobile courts has helped to partly solve this problem, it is generally funded exclusively

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[464] Office of the high commissioner on Human rights of the United Nations, *Report of the Mapping Exercise …, op. cit.,* pp. 409-410, p 510.
[465] Trial International, *op. cit*.,p. 12.
[466] *Ibid.,* p. 13.
[467] C. EBOE-OSUJI, *op. cit.,* p. 263.
[468] « Une arme de guerre… », *op. cit.,*pp. 46-47.
[469] Trial International, *op. cit*.,pp. 3-4.

by international actors. If the Congolese state invests in mobile courts, it would relieve local NGOs of this burden. This funding could also be used to increase human resources in order to reduce delays in legal proceedings. Indeed, victims of sexual violence have to wait on average one year between the filing of the complaint and the beginning of the trial[470].

The awareness of judges and the population about the problem of sexual violence in times of conflict is also crucial. Indeed, Congolese judges generally have no training in international law or human rights because there is no specialized institute for continuing judicial training[471]. Because of this, at the pre-trial stage, the authorities are less likely to investigate or prosecute sexual violence compared to other crimes. Indeed, only 35% of the cases brought by NGOs are subject to judicial proceedings[472]. Judgments for crimes under international law are very complex, which requires the communication of international standards[473]. It is the responsibility of the State to ensure the training of judicial and police personnel, through training courses.

With regard to the population, prevention efforts should be strengthened by popularizing legislation and reforms[474]. In this regard, the UNFPA Joint Evaluation of Programs to Combat Sexual Violence in the Democratic Republic of the Congo (2005-2017) recommends actions relating to education on gender equality. It also promotes sex education before the age of 18 with training on negative consent, in other words, learning to say no to a sexual proposal[475]. I do not fully agree with this proposal because I think it promotes the idea of "victims shaming." Indeed, even though sex education must be given to all, special attention needs to be given to boys in order to raise their awareness, and explain in depth why this type of behavior is prohibited.

Finally, in case of sexual crimes involving the national army, the education of combatants should be improved, and supported by solid sanctions. As mentioned in Chapter 3, these crimes are sometimes motivated by economic misery. If their incomes were increased, it would probably prevent them from taking advantage of their position against the population.

[470] Trial International, *op. cit*., p. 24.
[471] *Ibid.*, p. 6.
[472] *Ibid.*, p. 6.
[473] Amnesty International, *op. cit.,* pp 18-19.
[474] Rapport de la société civile au Comité des droits de l'homme : Examen du 4e rapport de la République Démocratique du Congo Octobre, 121e session, Mise en œuvre du Pacte International des droits civils et politiques, 2017, p. 16.
[475] A. VASSEUR, A. BERNARDO, G. MELO-PINZON, E. MUSAFIRI MASIKA, *op. cit.,* pp. 11-12.

In conclusion, various aspects need to be taken into consideration in order to improve the system regarding sexual violence. One element that seems to be decisive is the funding of judicial and police institutes, particularly in order to combat corruption. Indeed, the enhancement of democracy and the rule of law has a key role to play in the fight against impunity. In addition, the general awareness of the population and state employees is important in order to change mentalities for future generations, and to address the situation adequately. There is also room for improvement regarding peace-building, which could be improved by taking into consideration sexual violence in order to make the transition to sustainable peace.

This should be done in a favourable context, through a holistic approach (including socio-economic, psychological, and medical aspects) by all the actors involved in the process of rebuilding the victims. To do so, the fight against corruption and the establishment of the rule of law should probably be led by a strong politician, through responsible policies.

Conclusion

This thesis provided an analysis of the issues surrounding sexual violence against women in situations of armed conflict, with an emphasis on the legal aspects. We have seen that this concept has only recently been recognized and studied in depth by experts from various areas. These researches have brought to light the main factors that explain the use of rape as a weapon of war. Although the destruction of culture and identity partly explains these atrocities, we have seen that other elements may come into play. Indeed, the resources of a country as well as political motives may explain this phenomenon. In addition, reports and studies showed that the dramatic consequences for the civilian population, both for the victim (physically and psychologically) and for the community in general.

The recognition of this phenomenon has therefore led to a better understanding of all the issues, and to the establishment of legal mechanisms to find solutions and restore justice. At the international level, the Geneva Conventions, the ICTY and ICTR Statutes, as well as UN texts (such as the Rome Statute, or CEDAW) have made reference to sexual violence. These achievements were then translated into criminal convictions, as first steps in the long way of the struggle aiming at ending impunity. Thus, at the same time, revealing to the public that these crimes, which had hitherto been silenced, were no longer tolerated.

Leading cases such as *Akayezu*, *Furunzija* and *Kunarac* made it possible to partly agree on a definition of sexual violence, which was then used in other crucial cases discussed in the second chapter. Later, the ICC, which was supposed to learn from these judgments, was rather disappointing, particularly in the acquittal of Jean-Pierre Bemba in 2018. In this regard, the gender aspect should be reconceived in depth. Indeed, the decisions of the ICC have been extremely disappointing with regard to convictions for sexual violence. The lack of staff expertise in this area and the systematic acquittal of commanders suggest that sexual crimes are still considered as an "underclass" of crimes. In general, women's rights need to be reaffirmed and reconsidered outside the predominant patriarchal approach. The gender aspect should also be reflected in all strata of society, so as to emphasize the preventive and educational aspect, in order to change the balance of power between genders. Nevertheless, as already mentioned, judgments such as the *Ntaganda* case give hope for the Court's appreciation of sexual violence in armed conflict.

At the national level, we have mentioned a brief history of the country, in order to understand the main issues at the local level, as well as the basis of the conflict in the east of the country. The case study of

the DRC, where conflict-related sexual violence reached unprecedented magnitude, revealed several challenges and ways ahead.

The attention given by the international community can be explained, on the one hand, by the impressive number of victims of sexual violence, and on the other hand, by the cruelty of these assaults. In the DRC, the number of parties involved in the conflict makes the situation even more complex. In addition, sexism, natural resources and the Congolese health system contribute to maintaining this vicious circle. Nevertheless, we have seen that the government has been able to enforce good laws to combat impunity in the DRC. The most problematic aspect of the system is rather the judicial system, which is not adapted to sexual crimes, despite the recent reforms that have taken place. In addition, we have seen that access to justice in general is difficult, especially due to the quality of roads, the cost and slowness of proceedings, and corruption. Although there have been improvements at the national level, the figures that appear in the reports leave no room for doubt: the situation is far from being resolved.

The research carried out for this thesis has made it possible to highlight areas for reflection in order to target the main aspects that need to be improved. In the last chapter, we have briefly raised points of attention from a legal perspective.

At the international level, the creation of a protocol dedicated to violence against women deserves attention, as it would fill the gaps in other legal instruments such as CEDAW. In addition, the responsibility of superiors in the army is a crucial point, as it would make it possible, in particular, to work on the prevention of sexual assaults. Finally, the protection and the right to reparation of victims are fundamental points. As mentioned in the ICTY and ICTR case law study, these two aspects must be a priority if the impunity for sexual assault is to be effectively fought.

At the national level, transitional justice instruments seem to be adapted to the situation in the DRC. It is a pity that the mixed specialized chambers proposed in the framework of the mapping project and supported by Joseph Kabila, have never come to life. The same applies to the truth and reconciliation commissions, which are still being called for by civil society. With regard to the protection and reparation of victims and witnesses, attention should be even more focused than at the international level. Finally, fundamental aspects such as funding of the judiciary, training of judges in international law, and education were elements that emerged from the research. All multisectoral aspects of the fight against sexual violence should be coordinated in order to open the debate on an effective holistic approach adapted to the country's needs.

Although this thesis alone will never be enough to pay tribute to all the people who devote their time every day to the victims (such as Dr. Mukwege), I hope that these few lines of thought will have given the reader an overview of the situation and the challenges that characterize it.

Lastly, we must keep in mind that the limit of the law is also the limit of society. Social tolerance of rape must stop, both during peace and conflict. The preservation of women's rights is a never-ending struggle, and it is fundamental to continue fighting all over the world to ensure that they are respected. Indeed, as Simone De Beauvoir has already pointed out:

> "Never forget that it will only take a political, economic or religious crisis for women's rights to be called into question. These rights can never be taken for granted. You will have to remain vigilant for the rest of your life."

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