Fighting Impunity for Sexually Violent Crimes Whilst Upholding the Right to a Fair Trial: What effect have international attention and NGO influence had on procedural rights in the Democratic Republic of Congo?

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Abstract

The mobile courts in the eastern Democratic Republic of Congo (DRC) have been implemented with the financial and logistical support of the international community since 2004. Due to earmarked funding and the international rhetoric surrounding the prevalence of sexual violence in the country, they have been used, overwhelmingly, to bring sexual violence crimes to trial. This thesis looks at the work of the mobile courts and evaluates their adherence to the right to a fair trial. The right to a fair trial under international law is analysed in isolation, and in the context of its presence in the mobile courts.

The thesis questions whether the right to a fair trial is being upheld in the mobile courts, and if not, whether this is connected to expected outcomes of the fight against impunity. In order to determine the adherence to and visibility of international fair trial standards, a survey was conducted with persons working with the mobile courts. The thesis concludes that the potential for conflict between the fight against impunity and the upholding of fair trial standards for the accused is present in the mobile court system. It is suggested that when justice capacity-building is carried out as part of sexual violence response, there is greater focus on fighting impunity - as evidenced through high numbers of convictions and high case turnover. Certain aspects of a fair trial are sacrificed to achieve desired results, and the satisfaction of stakeholders. The thesis argues that there is a need for more focus on the right to a fair trial in justice capacity and Rule of Law development.
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<tr>
<td>ABA</td>
<td>American Bar Association</td>
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<td>ABA ROLI</td>
<td>American Bar Association Rule of Law Initiative</td>
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<tr>
<td>APRODEPED</td>
<td>Action pour la promotion et la défense des personnes défavorisées</td>
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<td>ACHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
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<td>ASF</td>
<td>Avocats Sans Frontières</td>
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<tr>
<td>BCNUUDH</td>
<td>Le Bureau Conjoint des Nations Unies aux Droits de l'Homme</td>
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<td>CoA</td>
<td>Court of Appeal</td>
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<td>CEDAW</td>
<td>Convention on Elimination of Discrimination Against Women</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>HRW</td>
<td>Human Rights Watch</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IO</td>
<td>International Organisation</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<tr>
<td>SFCG</td>
<td>Search for Common Ground</td>
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<tr>
<td>SGBV</td>
<td>Sexual and Gender Based Violence</td>
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<tr>
<td>TGI</td>
<td>Tribunaux de Grande Instance</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNHRC</td>
<td>United Nations Human Rights Council</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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Chapter 1: Introduction

The causes, effects, and circumstances of sexual violence in the eastern DRC is a much-discussed topic. It is one that has been considered at the United Nations (UN) level and has caught the attention of celebrities and the political elite. This global attention has led to vast amounts of funding and has earned the most affected North and South Kivu regions, the title of: ‘Rape Capital of the World’. This resulted in major sexual violence response activities being carried out across the country, with particular attention on rule of law and justice capacity-building, to fight against the widespread impunity for sexual crimes.

One facet of justice capacity-building was the revitalisation of mobile courts, which had been present in the DRC’s national law for some time, but hardly used. They allow for courts, which usually sit in cities, to travel for set periods of time to rural areas, to reach those who would otherwise be unable to bring their case before a court. These courts have been funded and facilitated almost exclusively by foreign donors, most notably the United Nations Development Program (UNDP), and the American Bar Association’s Rule of Law Initiative (ABA ROLI). The courts have mostly been used to try crimes of sexual violence, in the hope that they would be an active part of fighting impunity for such crimes in rural areas. There is no specification within the DRC’s law that the courts cannot try crimes of any nature, however, those facilitating the courts often set a quota of cases which must fall under the category of ‘sexual violence’ in order for the session to be funded and facilitated.

The mobile courts have been widely praised for taking formal justice to rural and hard to reach areas and fighting impunity in doing so. However, they have also been criticised, for compromising fair trial standards to gain convictions and present tangible results.¹ The mobile courts have great potential to contribute to the rebuilding of the DRC and advancing legal protection for women. Yet, if this is being done at the expense of a ‘fair trial’, it becomes problematic. It is this issue which the thesis intends to consider, that is: whether the mobile courts are compromising international and regional fair trial standards, in their quest to fight impunity for sexual violence (SV) crimes in the DRC. To achieve this, the thesis evaluates

whether components of certain norms are visible and adhered to in the day-to-day workings of the trials. It does this by drawing on data collected by the author through written questionnaires and telephone interviews with ten respondents who have a working knowledge of the mobile court system.

The thesis is divided into seven sections. The remainder of this introduction discusses the methodology used in the thesis. The second part outlines the background of the mobile courts, the main problems they face, and the changes the focus on SV has had on procedural and substantive law in the DRC. The third part focuses on the right to a fair trial, within international law. The fourth part addresses the right to a fair trial within the mobile courts, looking at the court’s adherence to components of the norm, and the effect that international involvement has had. Part five looks to the judiciary itself. It argues for continuing judicial education, and voices concerns surrounding the impact that victim-focused sexual violence response has had on the courts. This will be followed by a brief conclusion and recommendations for international actors.

1.1 Methodology

The thesis combines normative approaches with empirical research. It is based on legal analysis of the right to a fair trial encompassed in international legal documents, and results collected from a survey. First, the methodology for the legal analysis will be addressed. The survey relies on primary legal sources, mainly the Universal Declaration of Human Rights (UDHR); the African Charter on Human and People’s Rights (Banjul Charter); the International Covenant on Civil and Political Rights (ICCPR); and DRC’s relevant national law. The UDHR consists of 30 articles concerning individual’s rights. The Banjul Charter created a regional human rights charter for Africa and contains 68 articles establishing rights for individuals and duties incumbent on them. The DRC is a signatory to both the Declaration and the Charter. Both the UDHR and the Banjul Charter contain provisions on the right to a fair trial. The applicability of these provisions within the mobile courts is discussed in greater detail in Chapter 3.

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The sources were interpreted in a textual manner, according to the general and supplementary rules of interpretation enshrined in the Vienna Convention on the Law of Treaties (VCLT), articles 31 and 32, to which the DRC is a signatory. Article 31(1) states that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Therefore, offering a textual interpretation method. It goes on to state, in article 31(2), that the context shall include:

\[(a) \text{ any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; } \]

\[(b) \text{ any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.}\]

Article 31(3) adds that subsequent agreements and practice, and any relevant rules of international law applicable ‘shall be taken into account, together with the context.’ The supplementary means of interpretation, stated in article 32, include ‘the preparatory work of the treaty and the circumstance of its conclusion.’ This offers a more substantive method of interpretation- allowing for more contextual issues surrounding the treaties to be considered.

In taking this approach to interpretation of the primary legal sources used, the thesis aims to be able to understand how the fair trial provisions should be practically realised within the day-to-day workings of the mobile courts.

The thesis also makes extensive use of secondary source materials, such as preparatory works, case law, and policy documents. Additionally, relevant legal and sociological works such as books, journals, research paper, non-governmental organisation (NGO) and international organisation (IO) reports are used throughout to describe, analyse concepts and illustrate arguments.

The methodology for the empirical research will now be discussed. Between April and October 2017, a survey was conducted, with persons living and working in the eastern DRC. This was in the form of preliminary and main questionnaires, and one follow-up telephone interview. Purposive sampling frames were used to recruit voluntary respondents based on profession, professional experience and location. Contact with respondents was established with the help

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of persons working at two different NGOs operating in the region. In all, ten completed questionnaires were received from a variety from professionals working in the North and South Kivu regions of the DRC.

The survey sample included nine men and women. The sample includes four persons working at the Bar in Bukavu, two as lawyers, one as a magistrate and another as the President of the Court of Appeal (CoA). It also includes two persons working at the Panzi Foundation’s Legal Clinic, one as a coordinator and one as a member of staff. There are also two persons working as coordinators: one for Avocats sans Frontières (ASF), and another for Search for Common Ground (SFCG). Finally, one person is a lawyer, working with the American Bar Association (ABA). All respondents communicated in French.

All of the respondents stated that they had worked within the mobile court system. Using a three-part questionnaire, respondents were asked about the presence of the right to a fair trial within the mobile courts. Specifically, the aim was to understand whether or not respondents:

- felt that components of each norm were visible;
- felt that components of each norm were adhered to;
- felt that there was a pressure being placed on the judiciary and lawyers; and
- viewed the international community as being responsible for this.

Responses to the questionnaire varied in length and depth. The questionnaires were written in French, as were all of the responses. These were translated from French and English with the assistance of a native French speaker. The follow-up 30-minute phone interview was conducted, in French, with a native speaker working as an interpreter. Due to the sometimes technically legal nature of some of the responses, and the lack of professional translation, some liberty has been taken to edit the responses for grammar and clarity. However, all changes have been made to preserve the original meaning and substance of the respondent’s answers.

The Norwegian Centre for Research Data approved the project protocol. Consent forms were sent to all respondents, with the questionnaire, explaining the details of the project and how their personal data and responses would be used. A response to the questionnaire and written acknowledgment of the project was considered to be consent to participate. Neither monetary nor material incentives were offered for participation.
The follow-up interview conducted was transcribed. The questionnaire responses were analysed according by looking at responses one answer at a time, and cross-referencing between respondents to identify common patterns and themes. As the sample size was small this was done without the use of a coding scheme.

Respondents were assured of their anonymity within the thesis in the consent form, so that there was greater incentive to speak freely. Throughout the thesis, reference is made to the responses of the respondents, by using a coded system that maintains their anonymity. The code refers to the respondent’s job title, employer/affiliation and a number (if there was more than one person with the same title and employer) e.g. ABA, Lawyer 1. The transcript and responses to the questionnaire were saved under these references.

1.2 Limitations
The survey sample was designed to include the diverse views of those working within the mobile court system, in order to evaluate the ability of the system in practice. However, there were some limitations to the survey. First of all, the project was restricted by the fact that data was not collected in person. The collection of data in such a way does not always allow for the same personal rapport to be built between the researcher and the respondent. However, the care taken in selecting respondents and the fact that they were all persons known to be working at the Bar or for well-established organisations, ensured that the sample was dependable.

Second, the sample size was smaller than originally hoped for, and the collection took far longer than expected. This was partly due to the inability to travel to the DRC and also due to internet connectivity issues at both ends.

Third, it is possible that the responses to the questionnaires were influenced by the fact that the respondents worked within the mobile court system. There was a risk that the respondents would answer in an overly positive or favourable manner towards the court system as they are working within it and may have felt that any criticism was also a reflection on their work. Despite these limitations, the respondents frequently expressed direct criticism of the court system.
Fourth, due to the ongoing nature of the conflict in the North and South Kivu regions, it is possible that certain participants had wider safety concerns that influenced their answers.

Finally, there was also a need to be aware of assumptions made prior to the project, that the right to a fair trial would not be totally present in the system. There was a concern that such an assumption would cause positive answers to be discredited by dismissing them as containing bias. This limitation was partly alleviated by the results found in the previous research of Douma et al and Quillard,\(^6\) which showed that there were clear problems with the justice system’s ability to facilitate fair trials for the accused up until 2016. Therefore, it was deemed possible that ‘positive’ responses were indicative of a recent change within the system, perhaps as a result of the previous research.

\(^6\) Douma et al researched the effects of sexual violence assistance in the DRC in two separate reports, published in 2012 and 2016 (Ibid 1). They focused on the unintended side-effects of such assistance becoming a ‘fond de commerce’, or a business. Quillard researched the effects of sexual violence assistance for her article ‘Those who have been raped raise your hand’, which won the European Press Prize for investigative reporting in 2016. The article exposes the dark side of the ‘fight against impunity’ and the heavily victim-oriented system that it has created: Marion Quillard, ‘Those Who Have Been Raped, Raise Your Hand’ (Revue XXI France, 24 March 2016) <http://www.europeanpressprize.com/article/those-who-have-been-raped-raise-your-hand/> accessed 19 January 2018.
Chapter 2: Mobile Courts in Eastern DRC

2.1 Background to the courts

The DRC is one of the most war-torn nations in the world, whilst being one of the most mineral rich. It has a violent past and present that is intrinsically linked to brutal colonisation by Belgium and subsequent Western influence in the mining industries. The First and Second war in the DRC took place consecutively and lasted from 1996 until 2003. The First War was a foreign invasion of the state led by Rwanda, who replaced President Mobuto Sésé Seko with rebel leader Laurent-Désiré Kabila. The destabilisation of eastern DRC, caused by the neighbouring Rwandan war and genocide caused numerous factors to align against the government in the capital, Kinshasa. Kabila’s leadership brought little real change to the DRC and he alienated Rwandan and Ugandan allies. In 1998, all foreign troops were expelled from the country. This action was a major cause of the Second War, which ultimately involved nine African countries and around twenty five armed groups. The Second War involved many of the same political issues as the First, but was also driven by the trade in conflict minerals from the DRC. In 2001 Laurent-Désiré Kabila was assassinated by his bodyguard, who may have been working for the Rwandan government. He was immediately succeeded by his son, Joseph Kabila.

Both wars in the DRC involved the commission of many international crimes and led to the state becoming the first self-referral to the ICC, in a move that has been criticised for being highly-politicised. The DRC signed the Rome Statute in 2000 and enacted its own instrument

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7 An estimated 54 million people died in the second Congo war, making it the deadliest war since World War II. Dr. Benjamin Coghlan et al, ‘Mortality in the Democratic Republic of Congo: An Ongoing Crisis’ (International Rescue Committee, 2007).
of ratification in April 2002. The ‘post-conflict’ government of the DRC, under President Kabila, referred themselves to the court in April 2004, with the aim of investigations being conducted into war crimes and crimes against humanity committed since the Rome Statute’s inception in 2002. The DRC investigation was the first formal investigation conducted by the ICC. There has been much debate surrounding the transparency of this kind of self-referral.\textsuperscript{15} However, it signified the state’s first step towards engagement with international law.

Much of the international community’s focus on the DRC has been upon the state and military’s use of rape as ‘a weapon of war’ during the conflict. A large amount of rule of law aid\textsuperscript{16} has been facilitated, ‘post-conflict’ in order to bring those suspected of committing sexual violence crimes to justice. One feature of the international community’s justice capacity-building efforts are the mobile courts, which have been championed as an effective, indigenous method of transitional justice.

The ability to conduct court hearings in villages and rural areas of the DRC has been written into the DRC’s national law since 1979. The Judicial Organisation Order 299/79, article 11(2) allows for ‘hearings to be held outside the ordinary seat of the court if the administration of good justice requires’.\textsuperscript{17} This is reiterated in Law No. 82-020 of the Code of Judicial Organisation and Jurisdiction, article 67, which states that ‘if the courts consider it necessary for the proper administration of justice, courts and tribunals may sit in all the localities within their jurisdiction’.\textsuperscript{18} However, despite national law allowing for mobile trials, they rarely took place, primarily due to the financial costs and organisation needed to facilitate the hearings. This changed in 2004, when the mobile courts began to be implemented with the help of the international community. The UNDP started supporting the courts in the Eastern regions of North and South Kivu in 2010. In addition, the ABA has been instrumental in the running of the courts. The ABA is, to date, the largest financial and logistical supporter of the mobile

\textsuperscript{14} Inverted commas are used here and throughout the article, as an acknowledgment of the conflict that is still ongoing in the DRC, and to mitigate the reductive nature of labelling a state as ‘post-conflict’.


\textsuperscript{17} Article 11(2) of the Arrêté d’organisation judiciaire [No. 299/79 of 20/8/79] governing the operation of courts, tribunals, and prosecutor’s offices (1979).

\textsuperscript{18} Article 67 of the Code of Judicial Organisation and Jurisdiction [No. 82-020] relating to the code organising and setting the jurisdiction of the courts (1982).

The mobile courts are held in the most remote areas of the eastern DRC, often under tents, and watched by villagers, many of whom are witnessing a ‘court-room’ for the first time. Each session is organised and facilitated in cooperation by several international partners, usually UNDP, ABA, ASF and the United Nations Organisation Stabilisation Mission in the DRC (MONUSCO). The courts are facilitated through collaboration between one or more of these organisations and the Bar Association for the region where the session will be held. The North and South Kivu regions have seen the most ‘post-conflict’ justice capacity building, thus, the Bar in the capitals of Goma and Bukavu have been the most involved in the organising of the mobile courts. The Goma and Bukavu Bar are part of the national bar of the DRC, the head of which is based in the capital, Kinshasa. However, due to the large geographical distance between the capital and the Kivu regions, the Bar in Goma and Bukavu have a high degree of autonomy and are more likely to receive support, assistance and training from international partners working in the region.\footnote{Ibid, 34.}

The court that sits in each capital periodically identifies the needs of rural areas within their spatial jurisdiction, where arrests have been made by local police or military, but justice services are absent. In order for a session to commence, the court must present a request for support from one of the international partners, which details the type of cases that will be heard and a budget.\footnote{Monica Rispo, ‘Evaluation of UNDP’s Support to Mobile Courts in DRC’ (United Nations Development Programme, 2014) 9.} The request is either approved or refused by a forum composed of judicial authorities and the international partners, mentioned above, who intend to financially and logistically support the particular session. If authorised, lawyers who are willing to travel with the mobile courts are appointed by the local Bar Association. A date is then set by the President of the Court, and finally the mobile court team, lawyers and a Registrar travel to the area where the court will be held. The courts sit for a set period, ranging from two weeks to two months. The courts may be civilian or military in nature. The jurisdiction for military courts is expansive and extends beyond members of the Congolese army, to the police force, members of rebel groups...
and those committing crimes using army weapons. A civilian court requires a minimum of three judges. A military court requires one judge and four locally recruited assessors, who are non-lawyers with a knowledge of the local context. The cost of each session varies, but a 15-day hearing is estimated to be around $25,000.22

A paper published by ABA ROLI in 2012 stated that locally-delivered justice, such as the mobile courts, is more ‘immediate and satisfying to victims…than a trial conducted by an international tribunal.’23 The paper referred to Professor Cherif Bassiouni, one of the architects of the ICC, who remarked in 2010 that the court had regrettably pursued only four cases and seven defendants in its first seven years of operation.24 The large budget for the ICC ($150 million per year) and the ICTY and ICTR ($1.7 billion spent prosecuting the first 177 defendants) were also cited as illustrations of the importance of investment in national trials.25 It is apparent from reading the paper, that ABA ROLI believe the mobile courts to be a cheaper, quicker and more community-based method of delivering justice in developing nations. There is a call for further investment in what is hailed as a successful example of a ‘conflict-ridden country’s justice sector’.26

The international community’s involvement in the mobile court system through financial and logistical support, has undoubtedly shaped the focus of the courts, and one of the ways this has occurred is in the over-representation of sexual violence crimes. Due to new military and criminal procedural codes adopted in 2002, both civilian and military courts can prosecute sexual violence crimes. These cases are prioritised in the court system. The UNDP’s official statistics from 2012 notes that sexual violence crimes make up 60% of the caseload in the Congolese court system.27 However, respondents in the survey indicated that it is more than 70%.28 The UNDP will not fund court sessions unless a minimum number of sexual crimes are heard.29 This has created a situation in which victims of rape are actively sought, in order for a

22 Ibid.
23 Ibid.
25 Maya (2012).
26 Ibid.
28 President of CoA, Bukavu Bar: according to the questionnaire distributed by N.A.White (Preliminary Questionnaire, June 2017).
project to go ahead. Marion Quillard is an investigative journalist who has written about sexual violence response in the DRC. She interviewed a former consultant for a programme financed by Cordaid, a Dutch NGO, which in 2013 set a target of 60 cases of sexual violence victims for the Kabare, South Kivu area. She was informed that:

finding this volume of cases in one year was quite simply impossible! So they rushed to identify cases, cutting out all the usual procedural rules. There were flagrant examples of insufficient evidence, cases turning out to be false.\(^{30}\)

Due to the international rhetoric of the DRC as the ‘rape capital of the world, funding and facilities are earmarked for victims of sexual crimes. This pressure from donors and the international community means that crimes being brought before a court almost always have a sexual element to them and reinforces the need for a response to sexual violence in the justice sector. Thomson and Kihika state that such a focus does not appear to be based on a strategy that reflects victim’s interests, but rather is shaped by international stakeholders.\(^{31}\) Similarly, those working within the region, at various NGOs and legal clinics have an interest in maintaining the image of rape as being extremely widespread, because this is what funding is being allocated and used for, and it keeps projects running. However, it is problematic when a value judgement is placed on the importance of fighting impunity for one genre of criminal activity. There is a real danger that sexual violence is considered the most damaging part of war for women, and that other experiences such as loss of family, land and homes are not taken as seriously.\(^ {32}\) Further problems apparent in the mobile courts were time restrictions for cases, large caseloads that had to be finished in a short sitting, budget constraints, and the ability of the judiciary and lawyers to withstand pressure from donors and the organisers of the trials.\(^ {33}\)

The practical effect of some of these problems can be seen in the Minova trials of 2013 before North Kivu Operational Military Court, which concerned a 10-day campaign of mass rape in

\(^{30}\) Quillard (2016).
\(^{33}\) Various respondents: according to the questionnaire distributed by N.A.White (Main Questionnaire, September 2017).
the town of Minova. More than 200 victims were represented, and 39 persons accused, yet only two defendants were convicted on charges of rape. The trials have been criticised for failing to deliver justice for victims or the accused, despite widespread international attention. They are an example of a failure to properly harness the criminal justice system’s investigative powers, to secure justice. The trial was regarded as a test case for the judiciary’s ability to handle cases of mass human rights abuses. However, it was widely considered a failure not only because convictions were not gained, but also because the trial failed to establish what had happened, or to identify those who were actually responsible for the crimes. Those charged were a mixture of lower-ranking officers and soldiers, and those convicted were two lower-ranking soldiers. High-level commanders who held overall responsibility over the troops were never charged. This is a recurring situation throughout the mobile courts, and illustrates an evident unwillingness and inability of the justice system to move away from military pressure and politicisation.

Human Rights Watch (HRW) highlighted various other factors that compromised the right to a fair trial for the defendants. These were the weak legal representation offered for the low-ranking soldiers, convictions based on a lack of evidence, and the absence of a right to appeal before the type of military court that heard the trial. The inability to appeal, as provided for in article 87 of the Congolese Military Code, was not mentioned by the defendant’s lawyers—something that HRW blamed on the poor quality of representation. In fact, none of the defendants had access to legal representation during investigation, including when they were formally interrogated. The failings of the Minova trials demonstrate wider problems with the mobile court’s ability to adhere to fair trial standards, despite the fact that there was widespread international attention on the treatment of defendants in the trials.

36 Ibid, 2.
37 Ibid.
38 Douma (2016) ix.
41 This is despite the Congolese Constitution stating that an accused person should have access to legal assistance: Constitution de la République du Congo (“Congolese Constitution”), Assemblée Nationale, Kinshasa (18 February 2006) art. 19.
2.2 Procedural and substantive changes to the law

The laws on sexual violence in the DRC were revised after the international community became involved in ‘post-conflict’ capacity-building. After the DRC ratified the Rome Statute in November 2002, new military and criminal procedures were adopted to include war crimes, crimes against humanity, and genocide.\textsuperscript{42} In 2006, sexual violence was outlawed through amendments to the Penal Code.\textsuperscript{43} In 2007, Parliament broadened the definition of rape to include male victims, and address sexual slavery, sexual harassment, forced pregnancy and other sexual crimes not previously covered by law.\textsuperscript{44} The effect of justice capacity-building is evident here, in that the substantive law was developed and brought into line with international standards. One respondent to this study’s survey, the President of CoA, Bukavu Bar, expressed the opinion that the attention of the international community has had a positive impact in this respect.\textsuperscript{45} When developing a justice system, it is also necessary that procedural laws develop alongside substantive laws on sexual violence. If the procedural and substantive law develop together, it should be the case that fairness is achieved through the correct process and application of the law.

However, the creation of, and changes to, sexual violence law in the DRC have been mostly substantive. This is something that must be taken into consideration when assessing the fairness of the system, as much of procedural law entails fair trial rights for the accused. This is especially pertinent when the lack of attention to such rights may facilitate outcomes that are more favourable for international partners, as they present more tangible results in the fight against impunity. The following section will look at what fairness means, in the context of a fair trial, and then assess the applicability of the right to a fair trial within the mobile court system.


\textsuperscript{45} President of CoA, Bukavu Bar: according to the questionnaire distributed by N.A.White (Main Questionnaire, October 2017).
Chapter 3: The Right to a Fair Trial in International Law

3.1 The meaning of ‘fairness’

The Oxford English Dictionary defines ‘fair’ as being just and equitable.\(^\text{46}\) It has been reiterated throughout international case law, that the notion of a ‘fair trial’ does not equate to a ‘perfect trial’, for example, Judge Shahabuddeen stated in Milošević, at the ICTY, that:

‘the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him’.\(^\text{47}\)

However, what should a trial look like, in order to be considered ‘fair’? McDermott regards fairness in the context of the right to a fair trial as a ‘unique legal construct which is comprised of a number of procedural guarantees, in conjunction with principles of fairness such as consistency, publicity, non-retroactivity, equality before the law, and legal certainty.’\(^\text{48}\) Therefore, the concept of fairness is rooted in a number of minimum guarantees, found in human rights law instruments and reinforced by practice.\(^\text{49}\)

The African Commission on Human and Peoples’ Rights (ACHPR) offered clarification about these guarantees in their 2003 Principles and Guidelines on the Right to a Fair Trial (Principles), through the formulation of rules in order to ‘further strengthen and supplement the provisions relating to fair trial in the Charter and to reflect international standards’.\(^\text{50}\) Section A.2 lists ten essential elements of a ‘fair hearing’, focusing on equality of persons, respect for dignity, certain entitlements and adequate opportunity to prepare.\(^\text{51}\) Thus, it follows that the component parts of the right to a fair trial- in combination and synchronisation, are what makes a fair trial, ‘fair’.

For the purpose of this thesis and in the context of the mobile court system, the adherence to these procedural guarantees, as a way of achieving ‘fairness’, is the main focus. Importance is placed on a trial being perceived as ‘fair’, due to the idea that this will create greater acceptance


\(^{47}\) Milošević Case (Separate Opinion of Judge Mohammed Shahabuddeen Appended to the Appeals Chamber Decision on Admissibility of Evidence-in-Chief in the form of Written Statements) No. IT-02-54-AR 73.4 (30 September 2003).


\(^{49}\) Ibid 34.


\(^{51}\) Ibid ss A.
of legitimisation of the outcome. This notion was explored by Luhmann, in his theory of ‘legitimation through procedure’, and further developed in a number of studies which found that defendant’s perceptions of experiences were as much based on procedure followed than the ultimate outcome. This may be classified as ‘procedural fairness’, which is concerned with the procedures followed by decision-makers, and the belief that there is an increased likelihood of a correct outcome if a fair framework is followed.

There is another consideration that ensures fairness in criminal trials that is the fairness of the law itself. The satisfaction of the substantive rule of law and the satisfaction of criminal liability, to reach a conviction, leads to the establishment of ‘substantive fairness’. If the law itself is not ‘fair’ in nature, then the application of it, even if through proper channels and procedures, cannot produce a fair trial. It is important to keep the distinction between procedural and substantive norms, whilst considering that they are linked and inevitably impact one another. The intersection between the two concerns the ability of those accused to access their de jure and de facto rights. In this context, it is important to bear in mind the ability of procedural law to protect fair trial standards and to allow access to the substantive right to a fair trial - when the focus of the justice system is heavily victim-oriented.

3.2 Applicability of international and regional norms

The right to a fair trial is universally acknowledged and included in various fundamental human rights declarations. It is undisputed that a fair trial forms the basis of a functioning and competent legal system and is something that is beneficial for those within the courtroom, and society in general. This thesis will consider the right to a fair trial as enshrined in one

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international and one regional legal document. These are by no means the only applicable fair trial norms to the mobile courts, however for the purpose of the survey they were selected and presented to respondents for analysis. They are, article 10 of the UDHR, which states that:

\[
\text{everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.}\]^{56}

Article 11(1) of the UDHR is also considered, it states that:

\[
\text{Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.}\]^{57}

Additionally, article 7(1)a-d of the Banjul Charter is considered. It states that:

\[
\text{Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proved guilty by a competent court or tribunal; (c) The right to defence, including the right to be defended by counsel of his choice; (d) The right to be tried within a reasonable time by an impartial court or tribunal.}\]^{58}

The DRC is a signatory to both the UDHR and the Banjul Charter. The basic principle of \textit{pacta sunt servanda} is enshrined in article 26 of VCLT, and states that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith.’\textsuperscript{59} Thus, it follows that the DRC is bound, in good faith, to the norms contained in the UDHR and Banjul Charter. The fact that the DRC is a signatory state is the first reason why the instruments have been used throughout the survey and thesis, as examples of fair trial norms that should be present in the mobile courts. Similarly, the DRC is a signatory to the ICCPR, which will be used throughout as a supplementary primary legal source.

Secondly, the customary nature of the right to a fair trial is considered as a reason for necessary implementation in the mobile courts. For law to be considered customary, and therefore binding

\begin{itemize}
\item[(56)] (UDHR) art 10.
\item[(57)] Ibid, art 11(1).
\item[(58)] (Banjul Charter) art 7(1)a-d.
\item[(59)] VCLT art 26.
\end{itemize}
upon states, it must be an identifiable state practice, and evidence should be shown that states recognise the practice as obligatory. The right to a fair trial has a long history, yet has changed little since first appearing in the first written code of laws of the Roman Republic, in 455 B.C. It has since been included in legal instruments such as the Magna Carta (1215); the 6th Amendment to the United States Constitution (1791); the French Declaration of the Rights of Man (1789); and subsequent modern-day human rights treaties. The widespread state practice, supported by *opinio juris* supports the notion that the right to a fair trial is a customary norm, and there is no debate disputing this. The International Committee of the Red Cross (ICRC) included fair trial guarantees in their study on customary international humanitarian law, demonstrating that the right to a fair trial is an existing customary rule that binds all parties in wartime. When looking to recent international courts and tribunals, the customary nature of the right is widely considered as indisputable. It was stated in the ICTY judgement of *Aleksovski* that the right to a fair trial is ‘of course, a requirement of international law’. When a law is considered to be customary, it is binding upon states regardless of whether there has been codification in national law. Thus, the mobile courts are bound to uphold the right to a fair trial, even in absence of the DRC’s national law specifically requiring so.

Thirdly, the *jus cogens*, or peremptory, nature of the right to a fair trial is considered as a reason why the mobile courts are bound to such norms. A customary law may become peremptory through acceptance by the international community as being such. Article 53 VCLT offers the following definition:

> 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

The ILC expanded on this by stating that,

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60 North Sea Continental Shelf (Germany v Denmark/Germany v Netherlands) (Judgment) I.C.J. Rep 1969 para 77.
61 Lex Duodecim Tabularum- the Law of the Twelve Tables 455 B.C.
63 *Aleksovski Case* (Judgement) No.IT-95-14/1-A 113 (24 March 2000).
64 VCLT art 53.
rules may have a jus cogens character inasmuch as they are accepted and recognised by the international community of States as a whole as norms from which no derogation is possible’.65

Judge Trindade has stated that within the right to a fair trial and fundamental guarantees ‘there are some minimum standards of protection of the human person below which no country can allow itself to fall.’66 Furthermore, that ‘the basic principles of the due process of law…correspond to certain elementary notions of justice, found in all states and all legal systems’.67

It is widely recognised that the right to fair trial is a universal and general principle of law. However, there is some scholarly debate concerning the jus cogens nature of the right to a fair trial. Article 4(1) of the ICCPR allows for derogations from certain rights contained within the treaty, in times of public emergency. Yet, this is prohibited for certain rights listed in article 4(2), but the list contained does not mention the right to fair trial. This has led to some questioning over whether the right is in fact peremptory. However, this thesis argues that the exclusion of the right to a fair trial from article 4(2) is not conclusive. Judge Patrick Robinson draws attention to the fact that when nations do derogate from the right in times of public emergency, ‘they almost invariably represent that the procedures which they adopt are fair in the context of those exceptional circumstances.’68 In support of this argument, there is a wealth of judicial statements, from international courts and tribunals, concerning the peremptory nature of the right. For example, the Appeals Chamber in Tadić commented that article 14 of the ICCPR reflected ‘an imperative norm of international law to which the Tribunal must adhere.’69 Furthermore, the ACHPR, in their Principles, included a ‘non-degorability clause’, which states that ‘no circumstances whatsoever…may be invoked to justify derogations from the right to a fair trial’.70 It follows that norm is well-established and does not allow for derogation, in both national and international courts.

66 A.A Cançado Trindade, ‘The Right to a Fair Trial under the American Convention on Human Rights’ in A.Byrnes (ed), The Right to a Fair Trial in International and Comparative Perspective (Hong Kong, University of Hong Kong, 1997) 10-11.
67 Ibid.
70 ACHPR 2003 ss R.
Fourthly, the applicability of the UDHR, specifically, is discussed. The fundamental human rights contained in the UDHR are considered binding under international customary law. In 1958, on the twentieth anniversary of the adoption of the Declaration, 84 states were represented at a conference, in which it was stated that the UDHR ‘constitutes an obligation for the Members of the international community’.\textsuperscript{71} Since this, there has been much governmental, judicial and scholarly acknowledgment of the customary nature of the rights enshrined in the UDHR.\textsuperscript{72} Therefore, it follows, that national courts are bound to the right to a fair trial as illustrated in articles 10 and 11, and that legislation should be in place to consolidate the norm in national courts, including the mobile court system.\textsuperscript{73}

Finally, the applicability of the Banjul Charter is considered. The Charter signified the embrace of the international human rights movement by African states and the acknowledgment of the universality of certain norms.\textsuperscript{74} It reiterates similar components of the right to a fair trial as seen in the UDHR and ICCPR, thus further acknowledging the general and customary nature of the right to a fair trial. The Charter is overseen and interpreted by the ACHPR and is incorporated into the African Court of Justice. Thus, the norms contained in the charter are accessible and enforceable, through judicial mechanisms and are directly applicable in signatory states. African Union member states, of which the DRC is one, are required to ensure that domestic legislation and policy are in compliance with the Charter. Therefore, the right to a fair trial, as stated in articles 7 and 25 are binding upon the DRC and should be present in the national legal system.

The next section will examine each of the component parts of the right to a fair trial in detail, referring to human rights law, the Principles and case law, to illustrate the standards that are expected.

\textsuperscript{73} Weissbrodt has emphasised the importance of compliance to the UDHR, through the enactment of national legislation: David Weissbrodt, \textit{The Right to a fair trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights} (Martinus Nijhoff, The Hague, 2001) 153.
Chapter 4: The Right to a Fair Trial in the Mobile Courts

4.1 The court’s adherence to fair trial norms

The right to a fair trial is a customary, international norm, which is arguably of a *jus cogens* nature. Thus, it should follow that the right and its necessary components be implemented as part of justice capacity-building in the DRC, and incorporated into the mobile court system. However, the survey conducted found that this was often not the case, as the fight to end impunity for sexual crimes often places greater importance on hearing a high number of cases and gaining convictions, even when certain standards are not met. The right to a fair trial, as encompassed in article 10 and 11(1) UDHR and 7(1) of the Banjul Charter, was presented to respondents of the survey, who were asked to evaluate its presence within the mobile court system. Each component of the above-mentioned articles, which in combination formulate the fairness of a trial, were considered by at least one respondent to not be visible or adhered to, to some degree. These components, will now be discussed, in turn. Reference will be made to human rights law, fair trial guidelines, case law and the results of the survey.

4.1.1 Time Constraints Impacting Fairness:

Section A.2(e) of the ACHPR Principles, states that there should be ‘adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence’ and (i) refers to ‘an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions’. It follows that giving time to both the prosecution and defence team is essential in the formation of a fair trial. However, the strict time constraints placed on mobile trials, and the subsequent negative effects, were a recurring topic in the survey. Official ABA statistics state that, between October 2009 and February 2011, nine mobile court sessions were organised by the ABA ROLI, in which 116 individual cases were tried. Considering that each mobile court session lasts around 12 days, this means that at least one case would be tried each day. Such a short amount of time allotted to each case implies that time constraints are paramount within the system, and that trials may not be given enough time to allow for adequate opportunity to prepare, or with adequate notice of reasons.

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55 Ibid ss A.2(e) and (i).
57 16 mobile court sessions held totalling 198 days on circuit. Rispo (2014) 10.
When asked about the timings of mobile trials, many respondents to the survey drew attention to the short time that it took for the court to deal with the case, once presented with it. Bukavu Bar/ABA, Lawyer stated that the mobile courts sit ‘in a hurry’,\(^78\) and the President of CoA, Bukavu Bar noted that trials are carried out ‘at short notice’.\(^79\) Some respondents viewed the quick turnover of cases as positively contributing to the accused’s right to be tried within a reasonable time, especially when contrasted with the DRC’s national criminal system, where accused persons spend months or years in prison before trial.\(^80\) However, such practices present other challenges. Bukavu Bar, Magistrate 2, was asked about time constraints in their follow-up interview; they said that ‘each case is given 30 minutes to one hour to be heard…it does not depend on the seriousness of the case’.\(^81\) The magistrate linked these short hearings to the lack of respect for a fair trial, thereby reflecting that they do not consider 30 minutes to one hour to be long enough to ‘fairly’ hear an entire case.\(^82\) Additionally, ASF, Coordinator noted that the limited time may be so ‘as to violate the rights of the defence’.\(^83\) Such short proceeding times and trials being held at short notice, are indicators of concern, and would not satisfy the elements listed in the ACHPR Principles.

4.1.2 ‘Public’:

The ACHPR’s Principles list nine elements of a ‘public’ hearing, in section A.2(a)-(j). They primarily involve access to information and attendance by the public, a media presence and publication of the venue. The mobile courts are facilitated and funded on an ad-hoc basis, according to the needs of the court. Thus, there is a ‘Memorandum of Understanding’ for each session, between the international partners and the court. This document lists the expectations of each side and provides for determinations regarding the time and location of the session. This, combined with the fact that the lawyers, registrar and mobile court team travel to the location ahead of the session commencing, should ensure that the hearings will be publicised

\(^{78}\) Bukavu Bar/ABA, Lawyer: according to the questionnaire distributed by N.A.White (Preliminary Questionnaire, June 2017).

\(^{79}\) President of CoA, Bukavu Bar (Preliminary Questionnaire, June 2017).

\(^{80}\) Douma et al (2016) 37.

\(^{81}\) Bukavu Bar, Magistrate 2: according to the interview conducted by N.A.White (Follow-Up Interview, 04 October 2017).

\(^{82}\) This is in contrast to the United Kingdom where the average hearing time for criminal not-guilty plea trials, in Crown Courts, is 15.8 hours: Ministry of Justice Criminal court statistics quarterly: England and Wales, April to June 2017 (National Statistics, 2017) 5


\(^{83}\) ASF, Coordinator: according to the questionnaire distributed by N.A.White (Main Questionnaire, September 2017).
and therefore public. In fact, publicity of hearings was not an issue that was raised negatively by any respondent to the survey.

The nature of SV crime trials allows for some mitigation surrounding publicity of trials, and this is accounted for in the Principles section A.3(f)i, which states that:

the public and the media may not be excluded from hearings before judicial bodies except if it is determined to be in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence.\(^84\)

This was raised by some participants, who referred to ‘specific reasons’ that might cause the court to be closed.\(^85\)

The majority of respondents to the survey believed that the right to a ‘fair and public hearing’ is respected. Four respondents stated that the norm is ‘always’ respected and/or visible in the mobile court system, one answer stated ‘respected’, and another ‘often’. Most answers did not discuss the terminology of ‘fair’ or consider defining the term. The Memorandum of Understanding was considered to have both positive and negative repercussions. ABA Lawyer 1 noted that the Memorandum, which is signed before hearings take place, can oblige lawyer’s advice to avoid measures that may hinder the speed of proceedings’.\(^86\) However, Bukavu Bar, Lawyer 2 stated that adherence to the right to a fair and public hearing, as stated in article 10 UDHR, was dependent on ‘the context of the country’.\(^87\) This is an attitude that may allow for the compromising of certain fair trial norms due to the status of the DRC as a developing, ‘post-conflict’ state. This can be problematic for defendants’ rights if it fosters the notion that any kind of hearing is better than nothing.

4.1.3 ‘Independent and impartial’:

The independence of a judiciary hinges on its ability to remain separate from other branches of government. In the Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt case, considered by the ACHPR, it was stated that:

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\(^84\) ACHPR (2003) ss A.3(f)i.
\(^85\) ASF, Coordinator (Main Questionnaire, September 2017).
\(^86\) ABA, Lawyer 1: according to the questionnaire distributed by N.A.White (Main Questionnaire, September 2017).
\(^87\) Bukavu Bar, Lawyer 2: according to the questionnaire conducted by N.A.White (Main Questionnaire, September 2017).
the independence of a court must be judged in relation to the degree of independence of the judiciary vis-à-vis the executive. This implies the consideration of the manner in which its members are appointed, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence.\textsuperscript{88}

This is reiterated in the Principles, section A.2.1(g).\textsuperscript{89} Furthermore, the UN Basic Principles on the Independence of the Judiciary states that ‘there shall not be any inappropriate or unwarranted interference with the judicial process’.\textsuperscript{90} Section A.2.1(f) of the Principles repeats this statement verbatim.

The impartiality of a hearing requires that bias should not play a role in the decisions of the court. The UN Basic Principle on the Independence of the Judiciary states that the judiciary shall decide matters

‘impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’\textsuperscript{91}

Weissbrodt’s analysis of the travaux préparatoires of the fair trial provisions of the UDHR, concludes that article 10 prohibits discrimination based on the grounds mentioned in article 2 UDHR,\textsuperscript{92} and any other inappropriate distinctions, listing the ‘gravity of the case’ as one such example.\textsuperscript{93} This thesis argues that if a case is decided with considerations of the effect of a conviction or acquittal on the wider ‘fight against impunity’ and the goals of stakeholders, it is based on the gravity of the case in the wider context, and an ‘inappropriate distinction’.

\begin{footnotesize}
\textsuperscript{88} Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt, ACHPR 334/06 9\textsuperscript{th} Extraordinary Session (1 March 2011) para 206.

\textsuperscript{89} ACHPR (2003) ss A.2.1(g): All judicial bodies shall be independent from the executive branch.


\textsuperscript{91} UN Basic Principles (1985) art 2.

\textsuperscript{92} UDHR article 2: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.’

\end{footnotesize}
When asked to evaluate the right to a fair trial, by way of ‘independent and impartial tribunal’,\textsuperscript{94} some respondents to the survey mentioned the political or military pressure placed upon the judiciary in the mobile courts. The President of CoA, Bukavu Bar stated that ‘judges are subject to threats, especially in cases where the perpetrators of armed groups or the army are charged’.\textsuperscript{95} ASF, Coordinator asserted that the norm was sometimes and/or often respected. They stated that this depended on the ‘nature and sensitivity of the case’, and that ‘when there is a political interest, there is often an influence of power that overrides the independence and impartiality of the judiciary’.\textsuperscript{96} The pressure being placed upon the judiciary, by politicians or army personnel, is something that the ‘fight against impunity’ aims to quash. It aims to mitigate these pressures, by separating the judiciary and the justice system from politicised outcome expectations. However, it appears that there is still a struggle to achieve this, thus creating an inability to manage ‘inappropriate or unwarranted interference’.

Arguably, this was one of the major issues with the Minova trials, in only bringing low-level soldiers to trial, who had weak access to legal representation. Several officers were not indicted, despite being present in Minova at the time the atrocities were committed, leading defence lawyers to complain that only commanders lower down in the chain had been charged.\textsuperscript{97} Furthermore, the officers who were accused, due to rules of command responsibility, were acquitted despite being present and aware of the crimes, on the basis that 6 months later, after pressure to, they gave the names of soldiers that they believed to be involved.\textsuperscript{98} The trials seemingly did not properly allow for investigation of against those in positions of military and political power.

The respondents to the survey also raised issues concerning independence and impartiality, due to pressure and influence coming from international partners who are funding and facilitating the courts. The mobile courts are carried out on an ad-hoc basis and rely on funding being secured for each round. The international partners have an interest in fighting impunity because it satisfies their agenda for the region and doing so often leads to further performance-based funding. Thus, there is the risk that the expectation of certain outcomes for justice-building

\textsuperscript{94} UDHR, article 10.
\textsuperscript{95} President of CoA, Bukavu Bar (Main Questionnaire, October 2017).
\textsuperscript{96} ASF, Coordinator (Main Questionnaire, September 2017).
\textsuperscript{97} Mattioli-Zeltner (2015) 46.
\textsuperscript{98} Ibid 43.
projects will impact the ability of the judiciary to remain independent or impartial. One of the respondents, Bukavu Bar, Magistrate 2 noted the judiciary’s ‘need to please the donors’.\textsuperscript{99} When asked whether they thought that there was something that the donors particularly wanted to see, they said ‘they want to see a lot of cases go through the system and a lot of convictions’.\textsuperscript{100} When considering how the fight against impunity is affecting the court, it is apparent that there is an expectation placed on the mobile courts to play a pivotal role in tackling what is not only a legal, but also a social issue.

The study indicates direct and indirect pressure being placed on the judiciary by the DRC government, military, and by international partners- who have a strict focus on fighting impunity. However, the futility of achieving a fair trial in such a climate is illustrated in the DRC’s case law and its social reality.

One of the issues raised by respondents to the study, was the expectation placed on the judiciary that trials would result in convictions. The respondent, ASF, Coordinator stated that ‘some organisations expect specific outcomes in relation to the outcome of trials’, and that these organisations ‘may find that the trial necessarily leads to conviction, when the project purpose is mainly or exclusively oriented towards supporting victims’.\textsuperscript{101} This illustrates how operational aims can potentially create a ‘functional bias’ in the courtroom.\textsuperscript{102} Furthermore, there is a risk that a victim-oriented approach of justice capacity-building, led by sexual violence response, may amount to a form of ‘operational bias’. There is particular risk when there are performance-related pressures being placed on the judiciary. This thesis suggests that when the judiciary is aware of donor and stakeholder goals of this nature, this must be classified as \textit{some form} of bias. Thus, potentially contravening the right to be heard by an independent and impartial court.

4.1.4 ‘Presumed innocent until proven guilty’:

The UDHR article 11(1), the Banjul Charter article 7(1)(b), and the ICCPR article 14(2) each refer to the presumption of innocence. The right to be presumed innocent until proven guilty is

\begin{itemize}
  \item \textsuperscript{99} Bukavu Bar, Magistrate 2 (Follow-Up Interview, 04 October 2017).
  \item \textsuperscript{100} \textit{Ibid}.
  \item \textsuperscript{101} ASF, Coordinator (Main Questionnaire, September 2017).
  \item \textsuperscript{102} Within this article, the term ‘functional bias’ refers to the prejudices that are apparent in the functioning of the court, and the persons who administer justice; ‘operational bias’ refers to the biases of the system in which the court is operating in and under.
\end{itemize}
a consistent component of the right to a fair trial and is intrinsically linked to the right to liberty. The right to liberty is enshrined in article 3 of the UDHR, and states that ‘everyone has the right to life, liberty and security of person.’\textsuperscript{103} Article 6 of the Banjul Charter states that:

\textit{every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.}\textsuperscript{104}

The right to liberty is also linked with the right to be tried without undue delay, thus preventing an unnecessary or arbitrary amount of time spent in detention. None of the respondents to the survey mentioned how long it might take for a person’s case to come before a court. However, the intersection between the right to presumption of innocence and the right to liberty arose when respondents drew attention to recent changes in the law concerning provisional liberties for those accused of sexual crimes.

In May 2015, the Ministry of Justice adopted a policy on the exclusion of provisional liberty for sexual violence offenders. This change to the law has been used as part of the campaign to fight impunity, specifically for sexual violence. The President of CoA, Bukavu Bar, explained in his response to the survey, that after the adoption of relevant substantive laws, the judiciary began to instruct magistrates to prohibit granting temporary liberties to persons accused of sexual violence crimes.\textsuperscript{105} The denial of provisional liberty while being presumed innocent is a paradoxical situation that is usually only reserved for the most necessary cases. Article 9(4) of the ICCPR states that ‘it shall not be the general rule that persons awaiting trial shall be detained in custody’.\textsuperscript{106} However, widespread use of this measure in the DRC is an example of when the fight against impunity for sexual violence has overridden the adherence to procedural guarantees - thus impacting the ability to access the right to a fair trial. ABA, Lawyer 1 stated that the judiciary would not be ‘entitled to error’ as they ‘know that all eyes are turned towards them’,\textsuperscript{107} causing them to refer to the law and policy directives in all decisions, as they believed that this was particularly pertinent where the victims and witnesses of sexual violence crimes were concerned. Frequent implication of the policy directive could be regarded as a simple

\textsuperscript{103} UDHR art 3.
\textsuperscript{104} Banjul Charter art 6.
\textsuperscript{105} President of CoA, Bukavu Bar (Main Questionnaire, October 2017).
\textsuperscript{106} ICCPR art 9(4).
\textsuperscript{107} ABA, Lawyer 1 (Main Questionnaire, September 2017).
pressure to follow procedure. However, it illustrates the fine line between following normative standards set in international law, and wider program goals set by organisers and funders.

The respondent Bukavu Bar, Magistrate 2, stated that ‘in most cases, the perpetrators of the crimes of sexual violence are presumed guilty of the crimes they are accused of’. In the follow-up interview it was asked whether they thought the presumption of guilt in sexual crimes was due to the nature of the crime or structure of the courts. The respondent said, ‘I think it is because of the nature of the crime: it happens behind closed doors…the perpetrator is going to deny and deny and the victim will accuse and accuse’. The respondent’s answer shows that they believe sexual violence crimes specifically, to be where the presumption of innocence is not respected. Due to the large number of sexual violence cases being heard in the mobile courts, it follows that the presumption of innocence is potentially being compromised in the majority of the court’s work.

4.1.5 ‘All the guarantees necessary for his defence’:

The travaux préparatoires of the fair trial provisions in the UDHR show that the term ‘all the guarantees necessary for his defence’ was an integral part of article 11(1) from the early stages of drafting. The term reflects the notion of a ‘fair and public trial’ in article 10 UDHR, specifically reinforcing the norm for those accused of a criminal offence. The Banjul Charter does not use this phrase. However, article 7(1) states the right to have one’s cause heard and lists what this should comprise in (a)-(d). The Principles elaborate further on each of these points, thus establishing the guarantees that are necessary for a fair trial and defence. Similarly, the ICCPR also lists ‘minimum guarantees’ in article 14(3)(a)-(g), which include the assurance that proceedings will be in a language that the accused understands, to be tried in their own presence, and to have adequate time and facilities to prepare the defence.

It is the latter guarantee that shall be focused on here. One respondent, Bukavu Bar, Magistrate 2 stated that accused persons ‘do not always enjoy all the guarantees necessary for

108 Bukavu Bar, Magistrate 2: according to the questionnaire conducted by N.A.White (Main Questionnaire, September 2017).
109 Bukavu Bar, Magistrate 2 (Follow-Up Interview, 04 October 2017).
112 ICCPR art 14(3)(b): To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.
their defence, due to the limited and insufficient time available to the Tribunal to hear a large number of cases'. Therefore, linking the time restrictions discussed above, to the inability of the court to comply fully with article 11(1) UDHR. The lawyers who are appointed by the Bar, to act on behalf of defendants and victims in the mobile courts are expected to travel to the area where the session will be heard, in order to meet with their clients before commencement. Many defence lawyers are appointed as part of legal aid programs, due to the often low socio-economic status of the accused. Furthermore, Bukavu Bar, Magistrate 2 noted that defence legal aid was provided by ‘trainees’ who ‘come fresh from the university and do not have the necessary experience’. Therefore, it is often the case that defendants are represented by newly-appointed lawyers, in cities far from where they live. The ability of these lawyers to be present throughout all stages of the criminal proceedings, as required by article 19 of the DRC’s constitution, seems unlikely. This was an issue raised in the Minova trials and was noted by lawyers to have created difficulties and contradictions throughout the trial. Therefore, it must be questioned whether adequate time and facilities for the defence can possibly be assured, in such a situation where defendants are likely geographically far away, and not in contact with the appointed legal aid. Thus, the court system is unable to provide ‘all the guarantees necessary for defence’ as required.

4.1.6 ‘Competent court or tribunal’:
The right to be heard by a competent court or tribunal refers to the ability of the court hearing the case, and entails matters of jurisdiction of the court in question. The mobile courts may be civilian or military in nature, and as discussed above, military jurisdiction is wide. Thus, military courts may hear matters not only concerning members of the Congolese army, but also the police force, members of rebel groups and those committing crimes using army weapons. International law restricts the trial of civilians before military courts, and African regional mechanisms prohibit it. Section L of the Principles refers to the ‘right of civilians not to be tried by military courts’ and states that: ‘the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.’ In the case of Law Office of Ghazi Suleiman v Sudan it was held by the African Commission that ‘civilians

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113 Bukavu Bar, Magistrate 2 (Main Questionnaire, September 2017).
114 Ibid.
115 Congolese Constitution art 19.
117 Principles ss L(a).
appearing before and being tried by a military court presided over by active military...violates the fundamental principles of fair trial.\textsuperscript{118} The UN Human Rights Council’s (UNHRC) principles for the Promotion and Protection of Human Rights through Action to Combat Impunity, state in principle 29: ‘the jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel’.\textsuperscript{119}

The Minova trials were criticised for the use of a military tribunal, due to the inability to appeal in this type of court.\textsuperscript{120} In the case of \textit{Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt}, the African Commission held that the fact that the decisions of the emergency court in question were not subject to appeal manifestly violated article 7(1)(a) of the Banjul Charter.\textsuperscript{121} In the context of the mobile courts, the overly wide jurisdiction of military courts remains a potential bar to a fair trial, if the right to appeal is not upheld. Furthermore, it has potential to contravene regional human rights law, as it would allow for civilians committing a crime of a non-military nature, but using a military weapon, to be prosecuted in a military court.

4.1.7 ‘Counsel of choice’:

Article 7(1)(c) of the Banjul Charter and 14(3)(b) of the ICCPR specify that the right to a fair trial encompasses defence by counsel of the accused’s choosing. The right to counsel has been reiterated throughout African human rights documents and case law. Both the Principles and the Robben Island Guidelines, produced by the ACHPR, state that any person who has been arrested or detained shall have prompt access to a lawyer.\textsuperscript{122} The mobile court system should therefore ensure that defendants are represented. However, research that was conducted in 2011 indicated weak or absent legal support for the defence of suspects.\textsuperscript{123}

\textsuperscript{120} Mattioli-Zeltner (2015) 34.
\textsuperscript{121} Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt para 205.
\textsuperscript{123} Douma \textit{et al} (2012). This has improved somewhat in 2014, with support being given to the Bar Association that offers pro-deo assistance to suspects. Douma \textit{et al} (2016) 36.
The right to legal aid is something that has been considered in various regional human rights courts as an intrinsic part of the right to a fair trial. In the African Court decision of *Thomas*, it was held that provision of legal aid is a right implicit in the right to defence enshrined in Article 7(1) (c).\(^{124}\) In *Onyachi and Others*\(^{125}\) the African Court reiterated statements in *Thomas* and took inspiration from the European Court’s judgements in *Benham v UK* and *Granger v UK*.\(^{126}\) The court held that the two requirements for provision of free legal aid were: (i) indigence; and (ii) interests of justice. In assessing whether these requirements were met the African Court considered several circumstances including: (i) the seriousness of the crime alleged; (ii) the severity of the potential sentence; (iii) the complexity of the case; and (iv) the social and personal situation of the defendant. It follows that persons in the mobile court system charged with sexual violence crimes who are often faced with long custodial sentences, and are almost inevitably from a low socio-economic background, should have access to legal aid. The respondents to the survey spoke of the legal aid afforded to defendants but framed it with regards to the ‘choice’ element of the right to counsel. Four respondents to the study drew attention to the fact that most accused persons were from socio-economic levels that would not allow them to ‘choose’ anything other than the legal aid given to them.

Due to what they determined as ‘poor quality’ of legal aid in the mobile courts and the inability of most defendants to afford an alternative, more than half of the respondents felt that article 7(1)(c) was not respected. In the follow-up interview with Bukavu Bar, Magistrate 2, I asked whether their opinion that the right was ‘never respected’ was something that they had noticed from their personal experience working as a defence lawyer in the mobile courts. They replied, ‘yes, I was just assigned the cases, you don’t have a choice, nor does the accused’.\(^{127}\) It was also asked whether the lack of choice applied equally to those who could afford to instruct a lawyer privately. The respondent answered by saying that, ‘the people who are using the courts don’t have the means to do this, none of them’.\(^{128}\) Therefore, it appears that although defendants are accessing legal representation consistently, this is almost exclusively done through legal aid that arrives shortly before the court session commences. Thus, eroding the element of choice in


\(^{126}\) *Benham v United Kingdom* (Judgement of 10 June 1996) ECHR App No 19380/92 ECHR 1996 III; *Granger v United Kingdom* (Judgement of 28 March 1990) ECHR App.No. 11932/86 para 44.

\(^{127}\) Bukavu Bar, Magistrate 2 (Follow-Up Interview, 04 October 2017).

\(^{128}\) Ibid.
article 7(1)(c). In summary, the right to council in the mobile courts is respected, but without an element of ‘choice’ incorporated for the majority of those brought before the court, thereby not adhering to all components of the norm.

The next section will analyse the fairness of the courts further, by looking at the involvement of international partners and the effects that this has had on the mobile courts and questioning whether a high degree of control has created an inability or unwillingness to adhere to fair trial standards.

4.2 Effects of international involvement

The international partners who facilitate the courts are able to have a large degree of operational control over the court sessions due to various factors. First of all, funding will only be released for sessions whose work the international actors approve of, and is subsequently managed by the partners.\textsuperscript{129} This includes the policy that funding will only be released for a session that has a high enough ratio of sexual to non-sexual crimes.\textsuperscript{130} Secondly, the judiciary and lawyers receive their salary from the international partners and this includes motivational fees and bonuses.\textsuperscript{131} The UNDP’s report on mobile courts openly declares that staff wages are funded through the international partners. One respondent referred also to the use of motivational fees as a means for partners to see the results that they expect and want.\textsuperscript{132} Thirdly, the Memorandum of Understanding between the court and the partners sets duties and obligations for the court to follow. Thus, there is a system of control that can be used by the international partners to apply pressures, onto the courts and judiciary. This system and its effects will now be discussed in greater detail, making reference to the responses of the survey.

First of all, the financial support of international partners is essential to the mobile courts. The withdrawal of this would have implications throughout the DRC’s justice system. Therefore, there is a direct interest in the satisfaction of donors, not only by the judiciary, but by the DRC’s government too. One repercussion of this unbalanced relationship is the adoption of a strict ‘zero tolerance’ on sexual violence, by the DRC government. The policy has had some negative

\begin{itemize}
\item\textsuperscript{129} Rispo (2014) 9.
\item\textsuperscript{130} UNDP requires that a minimum number of SGBV cases are heard in order to fund a mobile court session: \textit{Ibid}.
\item\textsuperscript{131} Seventy percent of the budget for each court session is for the ‘per diems’ of mobile court staff: \textit{Ibid}.
\item\textsuperscript{132} Bukavu Bar, Magistrate 2 (Main Questionnaire, September 2017).
\end{itemize}
impacts on the ability of the justice system to maintain fair trial standards, and here one sees a
direct overlap between social policy and judicial activity. When the judiciary is expected to
carry out social change, each case becomes tied into, and symbolic of, wider issues. This is a
concern in respect of the criminal justice system, because of the danger that each person
acquitted becomes symbolic of impunity for sexual violence crime. Thus, each trial takes on a
‘pedagogical role’ \(^{133}\) of teaching society about the consequences of sexual violence, within a
climate of ‘zero tolerance’ – with the inevitable expectation that the consequence should entail
the attribution of blame and punishment.

A stark example was given by one respondent, President of CoA, Bukavu Bar, who stated that
the practice of restricting provisional liberties, is ‘part of the policy of zero tolerance’ that the
government has adopted ‘to show the international community that it has taken solid measures
against these crimes’. \(^{134}\) They also spoke of the pressure on the courts to ‘align a large number
of files on the issues that interest organisations’. \(^{135}\) The respondent who noted this, went on to
state that this is ‘justified by the fact that these organisations support justice in the context of
projects which they must also report to their donors’. \(^{136}\) There is an apparent need to report
success through convictions, something that the respondent felt had led to cases where ‘certain
organisations reprimanded (magistrates for) the acquittals and the perpetrators prosecuted’. \(^{137}\)

The issue of funding restrictions was raised by another respondent to the survey, ASF,
Coordinator, who directly linked the fact that the court is ‘not the master of the budget’ with
their inability to ‘carry out the tasks which are likely to cause it to exceed (past the time set for
the session)’. They stated that ‘certain measures of inquiry’ would be restricted or unavailable,
due to the funding and time restrictions. Many respondents noted that a pressure to hear cases
quickly often resulted in rushed hearings and arbitrarily short amounts of time given to hear
complicated trials. ABA Lawyer, 1 drew attention to the pressure to hear cases ‘in record
time’, \(^{138}\) noting that a case that could take years in an ordinary hearing, could be heard in one
or two weeks.

\(^{133}\) President of CoA, Bukavu Bar and Bukavu Bar/ABA, Lawyer both used this term in their responses to the
preliminary questionnaire. President of CoA, Bukavu Bar (Preliminary Questionnaire, June 2017); Bukavu
Bar/ABA, Lawyer (Preliminary Questionnaire, June 2017).

\(^{134}\) Ibid.

\(^{135}\) President of CoA, Bukavu Bar (Main Questionnaire, October 2017).

\(^{136}\) Ibid.

\(^{137}\) Ibid.

\(^{138}\) ABA, Lawyer 1 (Main Questionnaire, September 2017).
Secondly, the use of motivation fees and bonuses for the judiciary is problematic and almost inevitably adds pressure to produce desired results. Bukavu Bar, Magistrate 2 referred to ‘incentives’ that are given to judges, who ‘must show that they deserve the money they have received from donors’. \footnote{Bukavu Bar, Magistrate 2 (Main Questionnaire, September 2017).} The respondent elaborated, stating that the ‘the number of judgments rendered is the objectively verifiable indicator’. \footnote{Ibid.} They believe that this leads judges to ‘carry out the instruction in haste, even if to sacrifice the rights of the parties to the trial.’\footnote{Ibid.} This is another explicit example of how the input of finance and funding is tied into the desired outputs of the system. If the judiciary are financially rewarded on a performance-basis, there is real potential for their independence and impartiality to be compromised. The justice system in the DRC has been heavily criticised for corruption,\footnote{International Legal Assistance Consortium and International Bar Association Human Rights Institute, ‘Rebuilding Courts and Trust: An assessment of the needs of the justice system in the Democratic Republic of Congo’ (2009) OHCHR, Mapping Exercise (n 86) 891.} and the mobile courts risk being equated with this if continuing such practices. Douma at al’s research suggested that sexual violence response in the DRC has become a ‘fond de commerce’, or business. It was noted in both of their reports, that there was concern that the fight against impunity had ‘found a way in the political economy of survival and corruption’ and that ‘citizen disengagement had become stronger as a result’.\footnote{Douma \textit{et al} (2016) x.} Therefore, problematic practices of the mobile courts have potential for damage in the equation of the system with wider problems in the DRC’s regular justice system, and national sexual violence response.

Thirdly, the Memorandum of Understanding for a mobile court session sets the duties and obligations of the court and the international partners. Additionally, the organisations involved monitor the hearings, raise irregularities and report on proceedings. This administrative and organisational control has the potential for positive effects, when it mitigates influence coming from other stakeholders in the trials. For example, large trials that have involved military personnel and also the application of international law, clearly show the need for some level of international involvement. HRW noted that more attention was paid to respecting the rights of the accused in the \textit{Minova} case than in many other war crimes trials in Congo, and linked this to the amount of international attention on the trials.\footnote{Mattioli-Zeltner (2015) 31.} In support of this, the respondent, ABA,
Lawyer 1, noted that although the obligations caused pressure, they also encouraged the judges ‘to refer to the law in all decisions’. Similarly, the *Fizi* trials, held in February 2011, with the help of ABA ROLI, saw the leaders of mass-rape attacks in South Kivu held accountable and sentenced. As with *Minova*, the trials in *Fizi* involved international crimes and military defendants, and would not have been held were it not for international pressure and facilitation. Therefore, there are circumstances where the involvement of international actors arguably lends protection to the judiciary, so that they can work with impartiality.

However, the majority of work being conducted in the mobile courts does not involve international law, nor military personnel. A representative of the ABA ROLI in the DRC stated that the proportion of the ROLI's legal cases attributed to armed conflict or armed groups was only around 10 to 13 percent. Furthermore, Quillard found that the mobile court system was primarily being used to prosecute sexual violence crimes of a ‘civilian’ nature. She interviewed a doctor at the Panzi Clinic who stated that he had worked on 64 cases at the court-59 of which involved rapes perpetrated by civilians. Similarly, Douma *et al* analysed 86 cases in 2011 and 2014 in their reports. They found that many cases involved young couples where the boyfriend was accused of rape against the wishes of the young woman. Therefore, it appears that the majority of cases being heard in the mobile courts are of a domestic and civilian nature. Thus, it is argued that the positive effects of international partner control, which can be seen in larger, international criminal trials in the DRC, do not have the same affect in the day-to-day workings of the court, rendering the high levels of control unnecessary and potentially heavy-handed.

There are, of course, additional positive effects of international involvement in the mobile courts that should be considered. The most obvious being the fact that the courts would not be in operation if it were not for international partner finance and facilitation. This was recognised by respondents to the survey, for example Bukavu Bar/ABA, Lawyer, who noted how international involvement has made it possible for justice to ‘reach the greatest number of

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145 ABA Lawyer 1 (Main Questionnaire, September 2017).
147 Khan and Wormington, (2012).
149 Douma *et al* (2016) 42.
victims’[^150]. Furthermore, one respondent noted the revision of the DRC’s Penal Code and the Code of Criminal Procedure, to adopt laws on sexual violence. They felt that international attention had been positive in this respect.

[^150] Bukavu Bar/ABA, Lawyer: according to the questionnaire distributed by N.A. White (Main Questionnaire, September 2017).
Chapter 5: Discussion

This chapter will discuss the wider framework in which the mobile courts operate, this primarily entails looking at the courts in the context of their focus on sexual violence crimes. First of all, it will be argued the high amount of sexual violence cases being heard creates a need for judicial education, specifically regarding gender sensitisation. Secondly, the impact of victim-focused sexual violence response on the courts and the context in which they work shall be discussed.

5.1 The need for judicial education in sexual violence trials

The right to a fair trial, is stated in article 10 UDHR as encompassing ‘a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him’.\(^\text{151}\) The notions of fair, public, independent and impartial have already been discussed- with great attention paid to the competences of the government, international partners and the law itself to uphold these standards. However, this section will look at the judiciary itself, and the ability of judicial actors to remain impartial when working in a context such as the DRC. For decades in the DRC, impunity for violence against women was rife, many forms were not criminalised, and the legal profession considered cases of inferior interest.\(^\text{152}\) This behaviour was set against a back-drop of general social norms that considered many forms of violence and sexual violence to be permissible, as women held a status as second-class citizens- and arguably still do.\(^\text{153}\) The judiciary does not operate within a vacuum, and they function within their own societal framework. Therefore, the ability of a court to remain impartial also requires management of judicial action and education of the judiciary themselves.

The Principles acknowledge the reality of maintaining an impartial judiciary in section B, which outlines the need for judicial training. This encompasses not only the necessary legal training, but also ‘continuous training and education throughout their career including, where appropriate, in racial, cultural and gender sensitisation’\(^\text{154}\) Considering that the mobile courts mostly deal with sexual violence, where the alleged victim is a female and the defendant a male, it is argued that the need for gender-specific training is imperative. However, in the survey conducted, not a single respondent mentioned the need for continuing judicial education. It is

\(^{151}\) UDHR art 10.
\(^{153}\) Douma \textit{et al} (2016) 5.
\(^{154}\) Principles ss B(c).
suggested here, that the breakdown of discriminatory norms is something that good justice capacity-building must incorporate, to ensure that fair trial standards are met for all parties.

The need for gender-specific judicial training derives from the negative effect that judicial bias, in the form of gender stereotyping, can have on a rape trial. The Convention of Elimination of Discrimination Against Women (CEDAW)\(^\text{155}\) recognised this need in article 5(a), which requires the state to take all appropriate measures:

‘to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.\(^\text{156}\)

Judicial bias was considered by the Committee of Elimination of Discrimination Against Women (Committee)’s decision in the *Vertido v The Philippines* case.\(^\text{157}\) This case illustrated the need for judicial education and training regarding gender and cultural biases, which may affect their expectations and views of female victims within a trial.\(^\text{158}\)

In *Vertido*, the committee considered the effect of such gender stereotyping in criminal trials, that involved sexual violence, concluding that gender stereotypes were damaging to alleged victims, and constituted a violation of CEDAW article 2(c) and (f), and article 5(a), read in conjunction with article 1 of the Convention.\(^\text{159}\) Article 2(c) obliges the state party ‘to undertake legal protection of the rights of women on an equal basis with men’;\(^\text{160}\) and article 2(f) states that the party must ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’.\(^\text{161}\) Therefore, ensuring formal equality before the law for women. Article 5(f) refers


\(^{157}\) Committee on the Elimination of Discrimination against Women (Committee) ‘Forty-sixth session, July 2010’ (Committee on the Elimination of Discrimination against Women, 2010).

\(^{158}\) Pandey (2013).

\(^{159}\) Committee (2010).

\(^{160}\) CEDAW art 2(c).

\(^{161}\) Ibid art 2(f).
to the elimination of stereotypes, thus seeking to ensure substantive equality before the law. Article 1 defines ‘discrimination against women’ as meaning

‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.162

The decision clearly highlights the need for judiciaries that are working in societies with a history of inequality for women and conservative attitudes, to undergo training that aims to remove their preconceived opinions about sexual violence from the courtroom. It is argued that the need for this in the DRC is even greater, considering the long history of impunity for violence against women.

There have been considerable substantive and procedural changes to the law on sexual violence in the DRC. However, this reform has been introduced as part of sexual violence response that has been criticised for being solely victim-oriented. Therefore, the changes to procedure have often been framed in goal-specific terms, concerning the fight against impunity. This, combined with a lack of training to challenge the personal opinions of the judiciary, creates a danger that there will be a focus on reaching general quotas, rather than working to challenge impunity within specific cases. Subsequently, the impartiality of the court may be compromised, if these goals lead to ‘inappropriate distinctions’ being made in cases that are considered important for operational aims.163

5.2 The impact of victim-focused sexual violence response on the courts

The mobile courts work within, and as part of, sexual violence response in the DRC. The fight against impunity, for sexual violence crimes, is an integral part of the capacity building work being done in the region. Therefore, naturally, there is a heavy focus on victim support and care. This arguably presents problems for a justice system, as there is the necessity that the law treats both parties the same. However, sexual violence response expects there to be greater assistance for the victim. It is argued that, the victim-oriented approach of the system is intrinsically linked with the international focus on rape being used ‘as a weapon of war’, in the DRC.

162 Ibid art 1.
The international attention that has surrounded the conflict in the DRC, and specifically sexual violence crimes has almost exclusively focused on the graphic details of violent rapes of women, in wartime. This type of sexual violence does take place, and war can heighten the chance of such a violent crime occurring.\textsuperscript{164} However, Douma \textit{et al} found that international attention was drawn to the most extreme cases, due to the tendency of international actors to visit the same clinics in urban areas and listen to the same Congolese activists.\textsuperscript{165} Therefore, there is a danger of hyperbolic conversation, especially when a narrative is created from the most extreme examples of violence, in wartime. The statistics of sexual violence in the DRC are usually reduced to headlines such as ‘48 women raped per hour’.\textsuperscript{166} This reinforces the notion that the DRC is the ‘rape capital of the world’. Furthermore, in the particular context of the DRC and its decades of civil war, the levels of impunity for sexual violence have been inextricably linked with the conflict and armed forces. However, research has suggested that sexual violence is not taking place in the same way that international discussion suggests, in that the majority of cases involve civilian rather than military situations.

As discussed in Chapter four, the majority of sexual violence cases in the mobile courts involve crimes of a civilian nature.\textsuperscript{167} ABA ROLI believe the proportion of their legal cases concerning armed conflict or armed groups to be around 10-13 percent.\textsuperscript{168} Here, attention is drawn to the gap between the international discussion of ‘rape as a weapon of war’ in the ‘rape capital of the world’, and the reality of criminal activity on the ground. It may be the case that this is simply criminal activity that is \textit{actually prosecuted}. However, even if this point is taken into consideration, it is still the case that the discourse is removed from and serves to distort the reality. One effect of this distortion is the emphasis placed on the importance of bringing sexual violence crimes to trial, and their placement above non-sexual crime in the justice system.

\textsuperscript{165} Douma \textit{et al} (2012) 30.
\textsuperscript{167} Quillard (2016) 5.
\textsuperscript{168} Khan and Wormington (2012).
The international community’s focus on and fascination with the DRC as the ‘rape capital of the world’, has arguably led to a ‘two-tier justice system’ that distinguishes between victims of sexual and non-sexual crimes.\footnote{Rispo (2014) 11.} Organisers of the mobile courts, such as the UNDP, create quotas for sexual violence crimes that must be included in the case load before funding will be given for the session.\footnote{Ibid 9.} One respondent, Buakvu Bar/ABA, Lawyer stated that, 

\begin{quote}
there are no legal restrictions that would prevent courts from organizing public hearings for other crimes. However, in view of the often-high costs involved in conducting court hearings, the courts are not yet in a position to do so on their own.\footnote{Bukavu Bar/ABA, Lawyer: according to the questionnaire distributed by N.A.White (Main Questionnaire, September 2017).}
\end{quote}

Quillard attributed the huge emotional factor involved in sexual violence cases as being reason for their prioritisation by the international community.\footnote{Quillard (2016) 3.} Similarly, the treatment of sexual offenders is tied to the importance and ‘moral obligation’ placed upon the prosecution of sexual crimes. Such measures restrict the court’s ability to serve justice on an equal basis.

The prioritisation of prosecution for sexual violence crime can be important in changing societal views surrounding the criminal nature of crimes against women, in circumstances where the system is fair and able to withstand corruption. However, it is argued that this is not having its intended effect in the DRC, where there is ‘a severe crisis of confidence and legitimacy in the system.’\footnote{Douma et al (2016) 34.} Douma et al classify the fight against impunity as being ‘based on the idea that prosecution and conviction sets an example and has a deterring influence’,\footnote{Ibid, 34.} but rightly question the ability of the system to have these effects when trials like the ones in Minova highlight the general inability of the courts to hold balanced trials.\footnote{Ibid, 35.}

The notion that sexual violence is intrinsically linked to war in the DRC, and the subsequent prioritisation of sexual violence victims, has led to an expectation that the judiciary become a part of peace and security building when working on sexual violence cases in the mobile courts. Therefore, the expectation placed on the courts to ‘fight impunity’ is heightened. It is argued that the use of the justice system to actively respond to sexual violence should only be one component of the fight against impunity. If the judiciary is on the frontline of this fight, there...
is a real danger that there will be a trade-off of independence, due to it becoming a tool of policy implementation imperatives. In 2012, Douma et al noted that only a small number of NGOs and donors were focusing attention on preventative measures, such as addressing gender roles at a community level.\textsuperscript{176} In their follow-up report in 2016, they noted that assistance was ‘highly victim-oriented, with a strong emphasis on direct service delivery to victims, rather than strengthening institutions that can respond to sexual violence’.\textsuperscript{177} The issue of sexual violence in the DRC is very much a social issue and one that permeates all levels of society – thus needing a comprehensive approach to tackle it effectively. This requires a balance between victim support and education and rehabilitation of offenders or potential offenders. This thesis believes that the approach that is referred to in Douma et al’s research, is not necessarily looking at the root causes of issues, and is relying too heavily on the deterrent effect of punishment through the criminal justice system.

The DRC’s national legal system been characterised by high levels of corruption and weak investigation capacities,\textsuperscript{178} and has faced criticism within the DRC and internationally, for being unsatisfactory.\textsuperscript{179} Therefore, the judiciary arguably has inadequate ability to tackle social issues. This is less the case in the mobile courts, as access to a hearing in a more timely and direct manner mitigates some of the apathy found in the national courts. Thus, the mobile courts are regarded as being at the forefront of the fight against impunity in rural areas. However, there is potential for judicial independence to become compromised when the judiciary become part of peace and security building, and expectations placed upon the system render certain results desirable. It has been argued throughout, that the operational aims of sexual violence response have an impact on certain components of the right to a fair trial. Therefore, it is necessary that moving forwards, a balance is found between fighting impunity for sexual violence crimes and facilitating and encouraging a fair trial for all parties in the mobile courts.

\textit{5.3 Conclusion}

Mobile courts in the DRC are a direct form of transitional justice, which have been essential in bringing the fight against impunity for sexual violence to the most rural areas of eastern DRC.

\textsuperscript{176} Douma \textit{et al} (2012) 25.
\textsuperscript{177} Douma \textit{et al} (2016) 19.
\textsuperscript{178} Ibid xi.
\textsuperscript{179} Aaron Hall and Annette LaRocco, ‘Time Works against Justice: Ending impunity in Eastern Congo’ (Enough Project, February 2012) 5.
Large trials, such as those held for the atrocities in Minova and Fizi, would not have been possible without the mobile courts, the international partners involved, and finance from international donors. The positive effects of the mobile justice system, such as their potential to advance legal protection for women, should not be understated however, one has to look at the courts with a critical eye. This thesis has shown that the right to a fair trial for the accused is being compromised. A fair trial, has the effect of contributing to the rule of law and its enforcement, by attributing blame and punishment when a crime is committed. However, the ability of the court to render meaningful justice is severely diminished when components of the right to a fair trial are not upheld.

The survey results undertaken for this thesis highlight the pressures that are placed upon the judiciary in the mobile courts from different stakeholders, including international partners and donors; the military; and the DRC government. The thesis has illustrated that the fight against impunity can result in direct conflict with fair trial standards for the accused. Furthermore, the potential for such conflict is heightened when the system is particularly victim-oriented and in circumstances where the wider national justice system is weak. Such conditions hinder adherence to international and customary fair trial norms. In order for the mobile courts to move forward and to deliver a fair trial for both parties, there is a crucial need for capacity development in respect of the rights of the accused. The decade-long focus on the widespread occurrence of sexual violence in the DRC has created a rhetoric that has become hyperbolic in nature. High conviction rates for sexual violence crimes serve to add weight to the government’s claim to be fighting impunity, in an attempt to break free of the title of ‘the rape capital of the world’. However, such rhetoric has proved damaging to the mobile court system, and it has the potential to cause further damage – should belief in the system continue to diminish.

Several recommendations arise as a result of the research. First of all, there is a direct and immediate need for justice capacity building in eastern DRC to pay more attention to the rights of the accused, in order to ensure a fair trial, as illustrated in the Universal Declaration of Human Rights article 10 and 11; the International Covenant on Civil and Political Rights article 14 and 16; and the Banjul Charter article 7 and 26.
Secondly, the focus on defendants’ rights needs to entail international partner attention on legal aid. This should include assessing the current system of legal aid; the competence of the lawyers available; the ability of these lawyers to be present throughout proceedings; and the amount of choice given to defendants. Equal attention should be paid to legal representation for alleged victims and those accused.

There should be more focus, from the international community and the DRC’s government on limiting the wide scope of military jurisdiction, in order to bring national law in line with principle 29 of the UNCHR’s ‘Principles for the Promotion and the ACHPR’s Protection of Human Rights through Action to Combat Impunity’, and section L of the ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’.

There should be a right to appeal in every court, including military courts, in order to ensure adherence to article 7(1)(d) of the Banjul Charter.

International partners need to pay greater attention to the need for judicial education and training, specifically with a gender focus, in order to properly comply with section B of the ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’.

Finally, there should be more realistic reporting of the work of the courts, in order to create a more accurate international rhetoric surrounding sexual violence in the DRC. This includes statistics that represent accurately the types of cases that are brought before the courts, including declaration of quotas, and the status of the defendants as military or civilians.

The DRC has struggled with impunity for SV crime for decades, but the mobile courts are a positive step towards achieving gains in fighting this. However, meaningful work will not be done without adherence to fair trial norms and a serious commitment to rights for both victims and defendants. It is this commitment that will set the mobile court system apart from the DRC’s national system, and hopefully elevate it to an example of how lasting justice can be achieved for women and wider society.
Annexes

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2. Preliminary questionnaire

1. Please briefly describe your experience with the mobile court system, being used in the DRC- particularly in relation to sexual crimes.

2. Have any changes occurred in the mobile court system since 2010?

3. Who is involved in the lead up to the trial? Which groups/actors are usually present at a mobile trial?

4. How does the procedure of a mobile trial compare to the procedure of regular criminal trial, in the DRC?

5. What do you believe are the 3 most important factors to the procedure of a mobile trial for a sexual or gender based violent crime? In relation to the victim and the accused.
3. Main questionnaire

Part 1:

In your experience with the mobile courts, have you noticed a pressure on the judiciary or lawyers? Possibly coming from international organisations or donors that facilitate or fund the trials? If yes, what kind of pressure?

Part 2:

The DRC is a signatory to the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights (Banjul Charter). The right to a fair trial is contained in both of these statutes.

I have highlighted certain terms in red, these represent the components of each right. In your opinion, how much is each of these components evident in the mobile court system? And how often is each component adhered to?

It may be useful to answer according to this scale:

Never-rarely-sometimes-often-always evident / respected.

Article 10 of the Universal Declaration on Human Rights states that:

- Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.1 states that:

- Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Article 7.1 of the Banjul Charter states that:

- Every individual shall have the right to have his cause heard. This comprises: The right to be presumed innocent until proved guilty by a competent court or tribunal; The right to defence, including the right to be defended by counsel of his choice; The right to be tried within a reasonable time by an impartial court or tribunal.
Similarly, the Rules of Procedure and Evidence, of the ICC, of which the DRC is a member, states in Rule 22.1:

- A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.

*Part 3:*

If you noticed a pressure on the judiciary or lawyers, in part 1:

Do you think that there is a link between the pressure you mentioned and the standards that you believe are not being upheld?

How true is the following statement?:

‘the attention of the international community has affected standards of a fair trial in the DRC, with regards to SGBV crimes being heard by mobile courts’.

In your opinion, is this effect negative or positive?