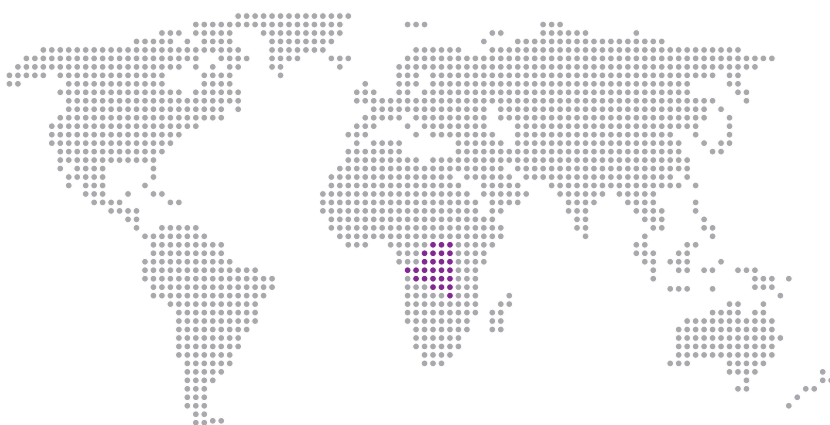


# Prioritising International Sex Crimes Cases in the Democratic Republic of the Congo.

Supporting the national justice system in the investigation and prosecution of core international crimes with a sexual element.

Case Mapping, Selection and Prioritisation



• Democratic Republic of the Congo





## Case Matrix Network

The Case Matrix Network (CMN) provides knowledge-transfer and capacity development services to national and international actors in the fields of international criminal and human rights law. We seek to empower those working to provide criminal accountability for violations of core international crimes and serious human rights violations, by providing access to legal information, legal expertise and knowledge tools. The CMN is a department of the Centre for International Law Research and Policy, which is an international not for profit organisation, registered in Belgium.

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## Foreword

It is with great pleasure that I deliver this foreword to the public who will have the opportunity and chance to have in their hands this great Report by the Case Matrix Network (CMN), developed as part of its International Criminal Justice Toolkits Project and dedicated to sexual crimes in the DRC and their prioritisation.

Those who have followed the history of the Democratic Republic of the Congo for the last thirty years know that this country has been the scene of armed conflicts, motivated by aggression and rebellion, and thus constituted a setting favourable to mass crimes, serious violations of international humanitarian law, crimes against the peace and security of mankind, core international crimes, in short, in the words of the Preamble of the Rome Statute, “serious crimes of concern to the international community as a whole, which must not go unpunished”. As in all conflicts, the life, the integrity and the dignity of the weakest and most vulnerable social groups, namely children, people with disabilities, the elderly, the sick and women were the most affected.

In the DRC conflicts, more than any other victim, women and girls were targeted as such; they have been humiliated, suffered rape and other forms of physical violence, had their physical integrity, their dignity and their privacy violated, were often tortured until death ensued, were murdered and, as in Makobola in the Province of South Kivu, they were buried alive, so as to endure their suffering for as long as possible, witnessing their own death, which, in any event, was unavoidable.

All these attacks against the dignity of Congolese women are as much attacks against all men and all women of the world, as an attack against our common humanity. We then understand better why all people of goodwill, wherever they are and wherever they come from, join forces to combat this scourge by all means, starting with the legal means.

This Report is dedicated to the principle of prioritisation, given the scale and the mass nature of these crimes on the one hand, and, on the other hand, the lack of infrastructure, human resources, material and financial resources in the Congolese judicial system. Thus, the prioritisation of the criminal cases on sexual matters depends on the nature of these crimes, their gravity, the representativity of the prosecutions and practical and political considerations.

Moreover, this Report does not lose sight of the post-conflict nature of the Congolese justice system. Taking this into account, it gathers and provides contextual information on the material and human capacity and the gaps and needs to address in order to engage on the path of compliance with the standards of fair trial, which are so essential to the rule of law.

The Report presents different prioritisation strategies of various courts and tribunals in an overview of the national legal and judicial framework of the DRC, without losing sight of the information on the measures taken to combat sexual and gender-based crimes, on national legislation adopted to this end, on jurisdictional issues and the evolution of the implementation process of the Rome Statute into domestic legislation.

It is understood by all and by the authors of the Report that most of the sexual crimes committed in Eastern DRC, given the context of mass conflicts in which they are committed, constitute serious crimes as defined in the Rome Statute. In other words, sexual crimes constituting genocide, war crimes and crimes against humanity are first in the order of importance and should be given priority for investigation and prosecution in order to focus the necessarily limited resources to build complex and time-consuming cases.

Finally, the Report concludes with recommendations to be implemented through collaboration between the project's partners and justice stakeholders at the national level. They are available to the officers of the judicial police, the public prosecution officers, judges, lawyers, clerks and civil society organisations.

In closing this foreword, I would like to express my gratitude to the Case Matrix Network and its Directors, for demonstrating their love for the Democratic Republic of the Congo, and their dedication to defending the rights of Congolese women. I do not doubt for a moment that this Report will be a major contribution to the fight against impunity for sexual violence and an indispensable tool for all judicial actors concerned with making the Democratic Republic of the Congo a State where the rule of law and peace prevail, and where it will be a pleasure to live.

Done in Kinshasa, May 18, 2015  
 Professor Raphaël Nyabirungu Mwene SONGA  
 Honorary Dean of the Faculty of Law of the University of Kinshasa

## Executive Summary

There has not been a consistent policy on prioritisation of sex crimes in the Democratic Republic of the Congo ('DRC'), owing primarily to a lack of resources, skills, and expertise. Contemporary armed conflicts are characterised by an overwhelming number of sex crimes, many more than the DRC criminal justice system is able to process. Infrastructural obstacles, including budgetary constraints, inadequate facilities, and a shortage of necessary legal actors, coupled with poor conditions of service, greatly limit the Congolese legal system's capacity and result in heavy delays and a backlog of cases. The Report intends to facilitate an increased ability of the DRC criminal justice system to investigate and prosecute international crimes with a sexual or gender-based element by providing policies and tools for prioritising and selecting cases for use by prosecutors and other legal actors in Congolese courts.

The introduction establishes the structure of the Report as well as the methodology adopted by the authors. This part of the Report, moreover, includes definitions of key terms utilised throughout, including 'core international crimes', 'sex crimes' and 'prioritisation'.

Delays and other infrastructural limitations justify the need to prioritise case files *as such*. However, as opposed to ordinary crimes, the nature of core international crimes (taking into consideration their impact on international peace and security, the large number of victims, the long-term effects on the local communities where such crimes take place, etc.) leads to the conclusion that they must be prioritised. However, even if it is decided to prioritise core international sex crimes, suitable criteria must be established according to which prioritisation can take place. A number of such criteria have been introduced and followed by the various international criminal tribunals. The Report does not merely replicate the criteria used by these international tribunals for use in the DRC; rather, the proposed criteria are based upon the *gravity* of the crimes, the notion of *representative prosecutions and practical and policy considerations*. The first section of the Report proposes that core international crimes, as "the most serious crimes of concern to the international community as a whole", fulfil these criteria before other, less grave, crimes and must therefore be prioritised.

As a result of its post-conflict situation, the DRC national criminal justice system lacks the necessary capacity to investigate and prosecute all the crimes committed during the conflict at the domestic level. *Prima facie* gaps and needs within the DRC national criminal justice system can be identified in almost all areas of its operation, constraining the effective running of the legal system as well as impeding the fair trial standards that are integral to the rule of law. The following section of the Report therefore provides contextual information on the situation on the ground in the DRC, including information on human and physical capacity.

Prioritisation strategies vary between different courts and tribunals, depending on the respective context. The overview of the DRC national legal framework is therefore of vast importance to this Report. The Report therefore includes information on what has been done in the DRC to combat the commission of sexual and gender-based crimes, information on national laws passed to this end, the jurisdictional issues encountered at the national level, and the status of the process of implementing the Rome Statute into Congolese national law.



Many crimes committed in the DRC conflict may constitute war crimes under the Rome Statute. The Report proposes that the rationale behind the selection and prioritisation of core international crimes may therefore be applied equally to the commission of sex crimes in the DRC: the sex crimes committed during the conflict in the DRC are serious crimes of concern to the international community as a whole, occurring in a context of mass violence. In light of the foregoing contextual information on the DRC, it is suggested that prioritising the investigation and prosecution of sex crimes is necessary **in order to focus limited resources to build complex and time-consuming cases**. This part of the Report concludes with the criteria most relevant to the Congolese situation along with a practical, step-by-step implementation guide adapted to the DRC criminal justice system.

Implementation of the concluding recommendations will be a collaborative exercise between project partners and criminal justice stakeholders at the national level. The recommendations are therefore specifically designed to be used by judges, prosecutorial services, lawyers, clerks, legal educators, and civil society organisations so as to integrate the prioritisation mechanisms identified for use in the DRC with national practice in a way that is both appropriate and sensitive to the post-conflict realities of the DRC criminal justice system.



## **1. Introduction**

### **1.1. Structure**

### **1.2. Methodology**

### **1.3. Definitions**

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# 1. Introduction

Contemporary armed conflicts are characterised by an overwhelming number of sexual and gender-based crimes, whose commission is often widespread and carried out in the context of a systematic campaign to brutalise and destroy targeted groups.<sup>1</sup>

As evidenced by the multiple relevant initiatives and organisations working on the issue, sexual and gender-based violence in the context of armed conflict has been gaining visibility and political momentum. Many States showed their will and determination to end conflict related sexual violence by participating in the Global Summit to End Sexual Violence in Conflict, held in London in June 2014. This forum resulted in the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, which aims to “serve as a tool to support efforts by national and international justice and human rights practitioners to effectively and protectively document sexual violence as a crime under international law”.<sup>2</sup>

The successive and concurrent wars in the DRC contributed to widespread sexual and gender-based violence both during the fighting and the ongoing transitional period.<sup>3</sup> The DRC criminal justice system is faced with a vast number of cases involving sex crimes, many more than it is able to process. Infrastructural obstacles – exacerbated by the armed conflict – including budgetary constraints, inadequate facilities, and a shortage of the necessary legal actors, coupled with poor conditions of service, greatly limit the capacity of the Congolese legal system to address the high criminality that has taken place in the context of or in relation to the armed conflict. These challenges inevitably result in heavy delays, a backlog of cases, and the prevalence of a sense of impunity.

The United Nations Security Council (‘UNSC’) has noted that:

[...] [c]onsistent and rigorous prosecution of sexual violence crimes as well as national ownership and responsibility in addressing the root causes of sexual violence in armed conflict are central to deterrence and prevention as is challenging the myths that sexual violence in armed conflict is a cultural phenomenon or an inevitable consequence of war or a lesser crime.<sup>4</sup>

In recent years, the DRC has made significant efforts to respond to this call for justice and combat impunity for mass atrocities, in general – and conflict-related sexual crimes, in particular.

The present Report aims to contribute to the development of a comprehensive national policy for the investigation and prosecution of core international crimes with a sexual and/or

<sup>1</sup> United Nations Security Council Resolution 2106, 24 June 2013, S/RES/2106 (2013) (<https://www.legal-tools.org/doc/2cfa22/>) (‘UNSC Res 2106’).

<sup>2</sup> Foreign & Commonwealth Office, “International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law”, London, June 2014, p. 10.

<sup>3</sup> Office of the High Commissioner for Human Rights (‘OHCHR’), “Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003”, August 2010, para. 531.

<sup>4</sup> UNSC Res 2106, 2013, see *supra* note 1.

gender-based element. It seeks to enhance and optimise the capacity of the national criminal justice system and to propose specific criteria and indicators for prioritising and selecting cases for use by prosecutors and other actors in the DRC legal system.

## 1.1. Structure

Section 1 establishes the structure of and the Methodology adopted in this Report. It also includes definitions of key terms, including ‘core international crimes’, ‘sex crimes’, and ‘prioritisation’.

Section 2 explains how the nature and gravity of core international crimes makes their investigation and prosecution a priority for both national and international criminal justice systems. This part will propose specific prioritisation criteria based upon the gravity of the crime, the notion of representative prosecutions and practical and policy considerations.

Section 3 provides contextual information on the situation on the ground in the DRC, to include, *inter alia*, the following information on human and physical capacity:

- The levels of sexual violence;
- The number of victims of sexual violence;
- The number of perpetrators of sexual violence;
- The number of judges in the Congolese court system;
- The number of prosecutors in the Congolese court system;
- Population size and distribution.

The organisation of the national criminal justice system and existing legal norms can greatly influence the design of the national investigative and prosecutorial strategy. An overview of the DRC national legal framework is thus of vast importance to the Report. A short analysis of the framework is therefore presented, providing information on what has been done in the DRC thus far to address sexual and gender-based crimes. The Report also examines national laws passed to this end, the jurisdictional issues encountered at the national level, and the status of the process of implementing the ICC Statute into Congolese national law. In addition, the Report discusses some of the emerging national jurisprudence.

Prosecutorial strategies vary between different courts and tribunals, depending on their respective contexts. Indeed, the prioritisation strategy implemented by an international criminal tribunal with a wide pool of available staff and a large budget cannot merely be replicated at the national level. The infrastructural limitations and delays present in the DRC context are therefore also examined, as well as the gravity and impact of sex crimes.

Finally, section 4 makes practical recommendations as to what is most feasible in this context. Specific prioritisation criteria are proposed, including ‘step-by-step’ guidelines for prioritisation tailored for use in the DRC based on the conclusions drawn from the study of the peculiarities of the Congolese national legal framework in the preceding part of the Report. These guidelines enable target groups to track their progress as regards prioritising the prosecution of sex crimes. The practical, step-by-step application process is specifically customised according to the pre-trial procedure as regulated by the DRC national legal framework and can be used as an example of how to successfully adopt a prioritised approach to core international crimes as a national policy.

The Concluding Recommendations are specifically designed for use by judges, prosecutors, lawyers, legal educators, and civil society organisations in order to integrate the prioritisation mechanisms identified for use in the DRC with national practice in a way that is both appropriate and sensitive to the post-conflict realities of the DRC criminal justice system.

## 1.2. Methodology

The purpose of this Report is to facilitate an increased ability of the criminal justice system in the DRC to investigate and prosecute core international crimes with a sexual or gender-based element by providing policies and tools for prioritising and selecting cases for use by judges, prosecutors and other actors operating within the post-conflict realities of the criminal justice system.

The Report is part of a Case Mapping, Selection and Prioritisation Toolkit designed for the DRC by the Case Matrix Network ('CMN'), a department of the Centre for International Law Research and Policy ('CILRAP'), which is an international non-profit organisation.

The CMN provides knowledge-transfer and capacity development services to national and international actors in the fields of international criminal and human rights law. The CMN seeks to strengthen national criminal justice systems by helping to reduce legal and resource constraints. To this end, the CMN and its experienced advisers have designed toolkits that are: (a) customised to the legal frameworks of target countries; (b) adapted to the working languages thereof and (c) accessible without cost to users. In addition to the present Report, the Case Mapping, Selection and Prioritisation Toolkit for the DRC includes a database on open case files involving core international crimes ('DOCF') and other publications.

The principal research method employed for the completion of this Report was desktop research. This involved sourcing all relevant primary and secondary documents emanating from the DRC, international and internationalised criminal tribunals, international and regional organisations, as well as reports by non-governmental organisations and academic articles. Once sourced, these documents were classified and analysed according to themes. The Report includes references to Persistent URLs ('PURLs') of documents in the ICC Legal Tools Database (<https://www.legal-tools.org>) as often as possible. This means that the Internet address of each document with a hyperlinked PURL contained in the free, online ICC Legal Tools Database is permanent and will not be changed, thereby democratising access to legal information.

The research for this Report has been supplemented by informal consultations with national and international partners. Informal interviews and consultations took place with the CMN's country partners – la Ligue pour la Paix, les Droits de l'Homme et la Justice ('LIPADHOJ') et le Club des Amis du Droit du Congo ('CAD') – and key local actors in order to ensure that the Report was structured and formatted appropriately to allow for effective implementation and to access difficult to obtain materials from within the DRC criminal justice system.

The availability of accurate and up-to-date information and factual data on the criminal justice system in the DRC is a challenge faced by all participants in the system on a day-to-day basis: the experience of this Report was no exception. Many of the key challenges faced during the production of the report are indicative of the needs and gaps in the Congolese criminal justice system where, for example, legal institutions rarely hold staff

records or inventories of equipment, buildings and facilities.

The Report was completed in the period between October 2014 and May 2015.

### 1.3. Definitions

Before proceeding with an analysis of the rationale behind the prioritisation of criminal cases and an in-depth analysis of the available prioritisation criteria, it is important to have a clear understanding of the terms used throughout this Report. This section provides the definitions of the key terms adopted by the authors of this Report.

#### 1.3.1. Core International Crimes

1998 saw the adoption of the Rome Statute of the International Criminal Court ('ICC Statute'), which established the International Criminal Court ('ICC'), a permanent court that aims to deal with "the most serious crimes of concern to the international community as a whole".<sup>5</sup>

There are currently 123 State Parties to the ICC. The DRC signed the ICC Statute on 8 September 2000 and ratified it on 11 April 2002, participating in the special UN treaty ceremony to mark the sixty ratifications necessary for its entry into force.

The ICC Statute is supplemented by the Elements of Crimes, a document adopted by a two thirds majority of the members of the Assembly of States Parties – the governing and management oversight body of the ICC – in order to assist the ICC in the interpretation and application of the articles defining core international crimes.<sup>6</sup>

Under the ICC Statute, there are four core international crimes. Article 5 of the ICC Statute gives the Court jurisdiction over (a) genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression. Despite the adoption of a definition of the crime of aggression at the First Review Conference of the Rome Statute in Kampala, Uganda, at the time of writing, the prosecution of aggression is not yet possible at the ICC.<sup>7</sup> In this light, for the purposes of this Report, any reference to core international crimes includes genocide, crimes against humanity and war crimes, which will be briefly examined in turn.

##### 1.3.1.1. Genocide

**'Genocide'** means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

<sup>5</sup> Rome Statute of the International Criminal Court, 17 July 1998, preambular paragraphs 4 and 9 (<https://www.legal-tools.org/doc/7b9af9/>) ('ICC Statute').

<sup>6</sup> ICC Statute, Article 9, see *supra* note 5.

<sup>7</sup> See Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, 11 June 2010 (<https://www.legal-tools.org/doc/0d027b/>).

- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.<sup>8</sup>

According to the Elements of Crimes the following requirements must be fulfilled:

- (a) the victim(s) must belong to the particular national, ethnical, racial or religious group;
- (b) the perpetrator must act with the intent to destroy in whole or in part the targeted group; and
- (c) the killings, the serious bodily harm, the serious mental harm, the conditions of life, the measures to prevent births or the forcible transfer of children must take place “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.

The punishable acts must be directed towards the destruction of a national, ethnical, racial or religious group, the *destruction of the group* being the central feature of the crime of genocide. The list of groups in the definition of the crime of genocide is exhaustive.

Additionally, “the offender is culpable only when he has committed one of the offences [...] with the clear intent to destroy, in whole or in part, a particular group”.<sup>10</sup> Consequently, in addition to the intent to commit the punishable act, there must be evidence of the *special intent to destroy the targeted group*.

Although, there is no objective requirement for scale, the intent must be to destroy at least a *substantive* part of the particular group.<sup>11</sup>

Finally, a contextual element is introduced by the Elements of Crimes. The act of genocide must have taken place “in the context of a manifest pattern of similar conduct” directed against a particular group. The wording of the provision reflects the ‘widespread or systematic’ requirement of crimes against humanity. This requirement introduces a threshold to ensure that the resources of the ICC are directed towards those crimes considered to be the most serious crimes of concern to the international community as a whole, rather than isolated or sporadic attacks.

## Acts of sexual violence and rape can constitute genocide.

### ICC Statute Article 6 (b)

In the revolutionary case of Akayesu, the International Criminal Tribunal for Rwanda (‘ICTR’)<sup>12</sup> decided that: “[...] [r]ape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm”.<sup>13</sup>

<sup>8</sup> ICC Statute, Article 6, see *supra* note 5.

<sup>9</sup> See Elements of Crimes, 9 September 2002, Article 6 Genocide (<https://www.legal-tools.org/doc/3c0e2d/>) (‘Elements of Crimes’).

<sup>10</sup> International Criminal Tribunal for Rwanda (‘ICTR’), *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 520 (<https://www.legal-tools.org/doc/b8d7bd/>) (‘Akayesu Trial Judgment’).

<sup>11</sup> International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Goran Jelisić*, Trial Chamber, Judgement, Case No. IT-95-10-T, 14 December 1999, para. 82 (<https://www.legal-tools.org/doc/b3ece5/>) (‘Jelisić Trial Judgment’).

<sup>12</sup> For a brief introduction to the ICTR, see *infra* section 1.3.2.

<sup>13</sup> Akayesu Trial Judgment, para. 731, see *supra* note 10.



Furthermore, sexual mutilation, sterilisation, forced birth control, separation of sexes and prohibition of marriages may constitute genocide. To this end, ICTR Trial Chamber I held that:

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. [...] Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.<sup>14</sup>

### 1.3.1.2. Crimes against Humanity

**'Crimes against humanity'** include any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds;
- enforced disappearance of persons;
- the crime of apartheid;
- other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.<sup>15</sup>

**Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity are forms of Crimes against Humanity.**

*ICC Statute Article 7(1)(g)*

According to the Elements of Crimes, the following elements must be present:

- (a) the conduct must be committed as part of a widespread or systematic attack directed against a civilian population;
- (b) knowledge of a widespread or systematic attack directed against a civilian population;

<sup>15</sup> ICC Statute, Article 7, see *supra* note 5.



(c) commission of any of the acts referred to in Article 7 para.1 against a civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack. “[P]olicy to commit such attack” requires that the State or organisation actively promote or encourage such an attack against a civilian population.<sup>16</sup>

The threshold for crimes against humanity is the existence of a widespread *or* systematic attack against a civilian population. *The test is disjunctive*. The term ‘widespread’ refers to the large-scale nature of the attack and the number of victims affected, and can be based upon either the cumulative effect of numerous inhumane acts or a singular attack of extraordinary magnitude.<sup>17</sup>

The term ‘systematic’ was discussed in the *Akayesu* case, where the ICTR Trial Chamber referred to the organisation of the attacks, their regular pattern, the existence of a common policy and the use of substantial public or private resources.<sup>18</sup> The term was further discussed in the *Blaškić* case, where the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) identified four elements that can characterise an attack as systematic. More specifically, the ICTY referred to the existence of a political objective, the perpetration of a criminal act on a large scale or in a continuous manner, the preparation and use of significant public or private resources and the implication of high-level political and/or military authorities.<sup>19</sup>

The term ‘any civilian population’ in the context of crimes against humanity affords rights and protections to any civilian population regardless of their nationality, ethnicity or other distinguishing feature. It also underlines the fact that crimes against humanity do not require a direct nexus to an armed conflict.

The most controversial aspect of crimes against humanity is the ‘policy element’, requiring that an attack against a civilian population is “pursuant to or in furtherance of a State or organizational policy to commit such attack”.<sup>20</sup> Whilst the *chapeau* of the provision does not require a policy element, Article 7(2)(a) of the ICC Statute clearly does, leading to confusion.

On the one hand, the Elements of Crimes interpret the policy element as requiring the active promotion or encouragement of an attack against a civilian population and, in exceptional cases, including the deliberate failure to take action, which is consciously aimed at encouraging such an attack.<sup>21</sup> On the other hand, the jurisprudence of the *ad hoc* tribunals has rejected the existence of a policy plan as an element for crimes against humanity. The ICTY Appeals Chamber has stated that “nothing in the Statute or in customary international law [...] required proof of the existence of a plan or policy to commit these crimes”.<sup>22</sup>

<sup>16</sup> Elements of Crimes, Article 7 Crimes Against Humanity, p. 5, see *supra* note 9.

<sup>17</sup> ICTY, *Prosecutor v. Tihomir Blaškić*, Trial Chamber, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 206 (<https://www.legal-tools.org/doc/e1ae55/>) (*Blaškić Trial Judgment*).

<sup>18</sup> *Akayesu* Trial Judgment, para. 580, see *supra* note 10.

<sup>19</sup> *Blaškić* Trial Judgment, para. 203, see *supra* note 17.

<sup>20</sup> ICC Statute, Article 7(2)(a), see *supra* note 5.

<sup>21</sup> Elements of Crimes, Article 7 Crimes Against Humanity, see *supra* note 9.

<sup>22</sup> ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Appeals Chamber, Judgement, Case Nos. IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 98 (<https://www.legal-tools.org/doc/029a09/>).

To this end, questions have been raised as to what constitutes a ‘State or organisation’ and whether the term includes non-State actors, such as political parties. The ICC Pre-Trial Chamber adopted a broad approach to the term and adopted a factor-based test in order to include any organisation capable of directing mass crimes.<sup>23</sup> This approach seems to be compatible with the policy element, the purpose of which is to exclude random criminal acts of individuals that do not amount to an attack.<sup>24</sup>

The ICC definition of crimes against humanity includes a wide range of sexual offences as punishable acts. Their inclusion is an acknowledgment that these acts are inhumane acts falling within the definition of crimes against humanity.<sup>25</sup>

### 1.3.1.3. War Crimes

‘**War crimes**’ include grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict and in conflicts “not of an international character” listed in the ICC Statute, when they are committed as part of a plan or policy or on a large scale. These prohibited acts include:

- murder;
- mutilation, cruel treatment and torture;
- taking of hostages;
- intentionally directing attacks against the civilian population;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals;
- pillaging;
- rape, sexual slavery, forced pregnancy or any other form of sexual violence;
- conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

**The ICC Statute explicitly recognises rape, sexual slavery, enforced prostitution forced pregnancy, enforced sterilisation and other sexual violence as war crimes.**

*ICC Statute Article 8 (2)(b)(xxii)*

The following requirements must be fulfilled:

- (a) the conduct must be linked to an armed conflict;
- (b) awareness on the part of the perpetrator of the factual circumstances that make the conduct a war crime.<sup>27</sup>

<sup>23</sup> ICC, Situation in the Republic of Kenya, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, (<https://www.legal-tools.org/doc/338a6f/>) (‘ICC Kenya Decision’).

<sup>24</sup> Robert Cryer et al. (eds.), *An Introduction to International Criminal Law and Procedure*, Third edition, Cambridge University Press, Cambridge, 2014, pp. 251-252.

<sup>25</sup> *Ibid.*, p. 240.

<sup>26</sup> ICC Statute, Article 8, see *supra* note 5.

<sup>27</sup> Elements of Crimes, Article 8 War Crimes, pp. 13-42, see *supra* note 9.

War crimes criminalise serious violations of international humanitarian law. There must be a breach of international humanitarian law in order for a war crime to be committed. Furthermore, the violation must give rise to individual criminal responsibility.

The policy threshold is not as rigid as in the case of crimes against humanity. The need for an existence of a plan or policy for the commission of such acts on a large scale is more of a guide to focus the Court's limited resources.<sup>28</sup> Thus, even an isolated act may constitute a war crime, if it is of sufficient gravity.

Once again, the definition of war crimes is revolutionary in terms of recognising the various forms of sexual violence as war crimes.<sup>29</sup> Until the coming into force of the ICC Statute, international law did not offer sufficient protection against the sexual violence that was usually directed against women.

### 1.3.1.4. Characteristics of Core International Crimes

From the foregoing analysis, some common themes and characteristics regarding core international crimes can be inferred:

**Core International Crimes are:**

- 1. Serious crimes of concern to the international community as a whole;**
- 2. Crimes that involve systematic, serious human rights violations and grave breaches of international humanitarian law;**
- 3. Crimes that occur in a context of mass violence;**
- 4. Not sporadic or isolated in nature; and**
- 5. Crimes for which individuals may be held criminally responsible.**

### 1.3.2. Sex Crimes

The concept of criminalising sexual violence is relatively new. Historically, in most military cultures, rape was seen as a reward for the troops, an inevitable consequence of war, or worse, a means of terrorising and demoralising the enemy.<sup>30</sup> The protection afforded under international law was minimal at best and often insufficient.

In the early 1990s, a brutal conflict spread through the Balkans and especially in the territory of the former Yugoslavia. The international community was alarmed by reports of mass killings, massive, organised and systematic detention and rape of women, and of 'ethnic cleansing', leading to thousands of internally displaced persons. The atrocities were considered a "threat to international peace and security" and resulted in the establishment of the ICTY by the UNSC.<sup>31</sup>

<sup>28</sup> Cryer *et al.* (eds.), 2014, p. 284, see *supra* note 24.

<sup>29</sup> ICC Statute, Article 8(2)(b)(xxii), see *supra* note 5.

<sup>30</sup> By military culture, this Report refers to the norms, customs and values that influence the behaviour of soldiers. For discussion of this topic, see Peter H. Wilson, "Defining Military Culture", in *Journal of Military History*, 2008, vol. 72, no. 1, pp. 11-41.

<sup>31</sup> UNSC Res 827, 25 May 1993, S/RES/827 (1993) (<https://www.legal-tools.org/doc/0bff83/>).

Following the crash of the plane carrying the Rwandan President, Juvenal Habyarimana, as well as Cyprien Ntaryamira, the President of Burundi on 6 April 1994, violence erupted in Rwanda. The ethnic minority Tutsis were targeted by Hutu extremists and, in one hundred days, an estimated one million people lost their lives. The UN established the ICTR “[...] for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”.<sup>32</sup>

In 2002, the Special Court for the Sierra Leone (‘SCSL’), the first ‘hybrid’ international criminal tribunal was created.<sup>33</sup> The Court was mandated to try those bearing the greatest responsibility for crimes committed against civilians and UN peacekeepers in Sierra Leone in the course of the country’s civil war.

These conflicts were characterised by an extreme use of sexual violence. Rape was systematically used as a method of war seeking to exterminate specifically targeted groups. The jurisprudence of the *ad hoc* tribunals and the SCSL reflects this reality; it has been instrumental in defining sexual violence and its various forms and, as such, will be examined in the section that follows.

### 1.3.2.1. General Definitions of Sex Crimes

Sexual violence is not only systematically included in the ICC Statute as crimes against humanity and war crimes, but also forms part of prosecutorial strategy. In June 2014, the Office of the Prosecutor of the International Criminal Court published a Policy Paper on Sexual and Gender-Based Crimes.<sup>34</sup> For the purposes of this Report the definitions of certain key terms adopted in that paper will be used. The definitions are as follows:

**Gender:** “Gender”, in accordance with article 7(3) of the Rome Statute [...] of the ICC, refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.

**Sex:** “Sex” refers to the biological and physiological characteristics that define men and women.

**Gender-based crimes:** “Gender-based crimes” are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.

<sup>32</sup> UNSC Res 955, 8 November 1994, S/RES/955 (1994) (<https://www.legal-tools.org/doc/97d395/>).

<sup>33</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002 (<https://www.legal-tools.org/doc/797850/>).

<sup>34</sup> ICC, Office of the Prosecutor (‘OTP’), “Policy Paper on Sexual and Gender-Based Crimes”, June 2014, p. 3 (<https://www.legal-tools.org/doc/7ede6c/>) (‘Policy Paper on Sexual and Gender-Based Crimes’).

**Sexual crimes:** “Sexual crimes” that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes [...] In relation to “rape”, “enforced prostitution”, and “sexual violence”, the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person’s incapacity to give genuine consent. An act of a sexual nature is not limited to physical violence, and may not involve any physical contact — for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.

When reference to a particular crime is made, the definitions adopted under the Rome Statute as discussed in the sections below will be used.

### 1.3.2.2. Sexual Violence

The ICTR produced the first ground-breaking decision in the trial of *Akayesu*, the *bourgmestre* (mayor) of a local commune in Rwanda. The Trial Chamber held that:

The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. [...] The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of *Interahamwe* among refugee Tutsi women at the bureau communal.<sup>35</sup>

The broad definition adopted allowed for a number of previously ignored acts to be considered as acts of sexual violence. Furthermore, it recognised that:

Sexual violence in the context of genocide, crimes against humanity and war crimes occurs in settings of extreme inequality.<sup>36</sup> As a result, consent is not an element of the crime.

### 1.3.2.3. Rape

Also in the *Akayesu* case, the ICTR defined rape in international law for the first time. The Trial Chamber held that “rape is a form of aggression and that the central elements of the

<sup>35</sup> *Akayesu* Trial Judgment, para. 688, see *supra* note 10.

<sup>36</sup> *Ibid.*, para. 598.

crime of rape cannot be captured in a mechanical description of objects and body parts”.<sup>37</sup> It thus defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.<sup>38</sup> This deliberately vague definition allowed the inclusion of various acts beyond the corporal penetration of the victim’s body to be considered as rape. The ICTY distanced itself from the above definition, deciding that greater clarity was needed. In the case of *Furundžija*, the Tribunal determined the objective elements of rape as follows:

(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.<sup>39</sup>

This definition is much more mechanical; however it was endorsed in the *Kunarac* case<sup>40</sup> and became the basis of the ICC definition, as developed in the course of the negotiations for the ICC Statute.

In *Kunarac*, the Trial Chamber analysed various legal systems and concluded that the core requirement for rape is the lack of consent of the victim. It held that: “The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”.<sup>41</sup>

Finally, rape is also defined in the context of the ICC Statute system. Although not statutorily defined, rape is defined in a gender neutral manner in the Elements of Crimes:<sup>42</sup>

**An invasion of “the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”. The invasion may be “committed by force, or by threat of force or coercion, or by taking advantage of a coercive environment”, or against a person incapable of giving genuine consent.**

#### 1.3.2.4. Sexual Slavery

Sexual slavery has been often used in times of conflict. Examples include the ‘comfort stations’ set up by the Japanese Army during World War II, the detention of women in ‘rape camps’ during the conflict in the former Yugoslavia or even their detention in private houses.<sup>43</sup>

Sexual slavery was not included as a crime in either of the Statutes of the *ad hoc* Tribunals. Cases of sexual slavery were examined under the general provision of enslavement. In the

<sup>37</sup> *Ibid.*, para. 597.

<sup>38</sup> *Ibid.*, para. 598.

<sup>39</sup> ICTY, *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 185 (<https://www.legal-tools.org/doc/e6081b/>).

<sup>40</sup> ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Trial Chamber, Judgment, Case Nos. IT-96-23-T and IT-96-23/1-T, 22 February 2001 (<https://www.legal-tools.org/doc/fd881d/>) (*Kunarac et al.* Trial Judgment).

<sup>41</sup> *Ibid.*, para. 460.

<sup>42</sup> Elements of Crimes, Article 7 Crimes Against Humanity, see *supra* note 9.

<sup>43</sup> Kelly D. Askin, “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles”, in *Berkeley Journal of International Law*, 2003, vol. 21, no. 2, pp. 296-298.



*Kunarac* case, the Trial Chamber held that: “enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person”.<sup>44</sup> Indicators of the exercise of such power include elements of control and ownership and the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement. The sexual nature of the acts was considered a secondary element to the establishment of the commission of enslavement and thus it was not adequately examined.

It was the SCSL – established to adjudicate crimes against civilians and UN peacekeepers committed during the civil war in Sierra Leone – that first addressed the issues of sexual slavery and forced marriage. The Trial Chamber held that sexual slavery is a specific form of slavery, defining its elements as follows:

1. The perpetrator exercised any or all of the powers attaching to the rights of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of sexual nature.
3. The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.<sup>45</sup>

Furthermore, the Trial Chamber considered forced marriages to be covered by the crime of sexual slavery; however, it was overruled by the Appeals Chamber, which considered forced marriages to be a distinct crime against humanity in the form of an ‘other inhuman act’.<sup>46</sup> Under the ICC Statute system, the Elements of Crimes list the following requirements:<sup>47</sup>

- (a) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
- (b) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

It is also noted that the commission of sexual slavery could involve more than one perpetrator as a part of a common criminal purpose.

In its jurisprudence, the ICC has confirmed that sexual slavery also encompasses forced marriage situations, domestic servitude or other forced labour involving compulsory sexual activity, including rape.<sup>48</sup>

**Sexual slavery is a specific form of enslavement.**

<sup>44</sup> *Kunarac et al.* Trial Judgment, para. 539, see *supra* note 40.

<sup>45</sup> Special Court for Sierra Leone (‘SCSL’), *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgment, Case No. SCSL-04-16-T-613, 20 June 2007, paras. 705-708 (<https://www.legal-tools.org/doc/87ef08/>).

<sup>46</sup> SCSL, *Prosecutor v. Alex Tamba Brima et al.*, Appeals Chamber, Judgment, Case No. SCSL-04-016-A, 22 February 2008, paras. 195 and 197-203 (<https://www.legal-tools.org/doc/4420ef/>).

<sup>47</sup> Elements of Crimes, Article 7 Crimes Against Humanity, p. 8; Article 8 War Crimes, p. 28, see *supra* note 9.

<sup>48</sup> ICC, *Prosecutor v. Katanga et al.*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, paras. 442-444 (<https://www.legal-tools.org/doc/67a9ec/>).

### 1.3.2.5. Enforced Prostitution

Enforced prostitution has been prohibited in international humanitarian law as an attack upon a woman's honour and an outrage upon personal dignity.<sup>49</sup> However, the ICC Statute lists it as a crime against humanity and war crime in its own right, removing the outdated linkage to 'honour'.

Thus, according to the Elements of Crimes, enforced prostitution requires the existence of the following conditions:<sup>50</sup>

- (a) The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons incapacity to give genuine consent.
- (b) The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

### 1.3.2.6. Forced Pregnancy

Forced pregnancy is the only conduct explicitly defined in the ICC Statute, in Article 7 (2) (f).

The offence encompasses both forced impregnation (pregnancy as a result of rape or of an illegal medical procedure) and forced maternity (being forced to carry the pregnancy).

**'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.<sup>51</sup>**

### 1.3.2.7. Enforced Sterilisation

The ICC Statute is the first treaty explicitly recognising enforced sterilisation as a crime against humanity and a war crime. It is defined in the Elements of Crimes and encompasses the following elements:<sup>52</sup>

- (a) The perpetrator deprived one or more persons of biological reproductive capacity.
- (b) The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.

Classical examples of enforced sterilisation are policies of 'racial hygiene' and medical experiments, such as those practised by the Nazi regime.

<sup>49</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 27 (<https://www.legal-tools.org/doc/d5e260/>) ('Fourth Geneva Convention').

<sup>50</sup> Elements of Crimes, Article 7 Crimes Against Humanity, p. 9; Article 8 War Crimes, pp. 27 and 37, see *supra* note 9.

<sup>51</sup> ICC Statute, Article 7(2)(f), see *supra* note 5.

<sup>52</sup> Elements of Crimes, Article 7 Crimes Against Humanity, p. 9; Article 8 War Crimes, pp. 29 and 38, see *supra* note 9.



### 1.3.2.8. Other Forms of Sexual Violence

The term has been used to confirm that the list of forms of prohibited sexual conduct is **not exhaustive**. This residual conduct is defined in the Elements of Crimes as follows:<sup>53</sup>

**The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.**

The definition covers any incidents where a person is forced to engage in acts of a sexual nature, which are of comparable gravity but fall outside the above explicitly defined crimes.

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<sup>53</sup> Elements of Crimes, Article 7 Crimes Against Humanity, p. 8; Article 8 War Crimes, pp. 28 and 38, see *supra* note 9

## 2

## 2. Selection and Prioritisation

### 2.1. Prioritisation Criteria: Introduction

#### 2.1.1. General Principles for Establishing Prioritisation Criteria

#### 2.1.2. Prioritisation Criteria

##### 2.1.2.1. Gravity

##### 2.1.2.1.1. Seriousness of the Offence

##### 2.1.2.1.2. Responsibility of the Alleged Perpetrator

##### 2.1.2.2. The Objective 'Representativity' of the Overall Scope of the Prosecutions

##### 2.1.2.3. Policy and Practical Considerations

## 2. Selection and Prioritisation

The various international criminal justice mechanisms have, from the outset, affirmed their goal to end impunity for the perpetrators of mass atrocities. However, the nature and scale of core international crimes give rise to numerous allegations against an equally great number of individuals. It would thus be unrealistic – indeed impossible – to expect the investigation and prosecution of such a large amount of complex cases to be carried out all at once; nor is it possible to bring to justice all the perpetrators of grave violations of international law.<sup>54</sup>

**Prioritisation is understood as the mapping and selecting of cases, according to formal criteria, so that the most suitable go to trial first.**

Prioritisation has been proposed as a way to address the challenges faced by the jurisdictions that deal with mass atrocities, both on the international and national level.

In principle, prioritising specific cases does not lead to the deselection of others.<sup>55</sup> Case prioritisation seeks to ensure a more efficient administration of justice, through objective criteria that maximise the impact of criminal prosecution. Case selection may be an inevitable result of the various operational challenges faced by a specific jurisdiction.

However, formally adopted criteria based on an objective consideration of the commission of core international crimes are needed to ensure that the prioritisation of cases is not discriminatory or unfair; otherwise, a situation of *de facto* impunity for perpetrators of such crimes could be developed.

Furthermore, such criteria should be formulated after an assessment of the factual events and the practical needs of a situation involving mass atrocities. Moreover the criteria should be publicly presented and explained as “legitimacy of priorities requires identifying and communicating objective factors that have inspired them”.<sup>56</sup>

A number of different criteria may be used in the prioritisation process, as will be seen in section 2.1.2. The majority of such criteria contribute to a fair and objective assessment of the gravity and impact of the crimes committed, while others introduce policy considerations that must be taken into account in order to create a comprehensive prosecutorial strategy.

Delays and other infrastructural limitations justify the need to create a prioritisation system, thereby allowing a better management of the caseload. However, the *nature* of core

<sup>54</sup> David Schwendiman, “Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit”, as cited by Morten Bergsmo *et al.*, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Torkel Opsahl Academic EPublisher (“TOAEP”), Oslo, 2009, p. 80 (<https://www.legal-tools.org/doc/688146/>).

<sup>55</sup> Morten Bergsmo, “The Theme of Selection and Prioritization Criteria and Why it is Relevant”, in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, TOAEP, Oslo, 2010, p. 9 (<https://www.legal-tools.org/doc/f5abed/>).

<sup>56</sup> Rolf Einar Fife, “Criteria for Prosecution of International Crimes: The importance for States and the International Community of the Quality of the Criminal Justice Process for Atrocities, in Particular of the Exercise of Fundamental Discretion by Key Justice Actors”, in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, TOAEP, Oslo, 2010, p. 19 (<https://www.legal-tools.org/doc/f5abed/>).

international crimes renders them sufficiently different to and significantly graver than ordinary crimes so as to justify focusing the (often limited) resources available and efforts on their successful prosecution.

### Prioritising core international crimes is primarily justified by the gravity of these crimes.

According to the preamble of the ICC Statute, core international crimes shock the conscience of humanity and constitute a threat to international peace and security.<sup>57</sup>

Gravity is determined based on a careful assessment of both quantitative and qualitative criteria. According to ICC Pre-Trial Chamber II, gravity entails an assessment of:

- (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity);
- (ii) the nature of the unlawful behaviour or of the crimes allegedly committed;
- (iii) the employed means for the execution of the crimes (i.e. the manner of their commission); and
- (iv) the impact of the crimes and the harm caused to the victims and their families.<sup>58</sup>

In 2013, the ICC Office of the Prosecutor issued a Policy Paper in which the criteria adopted by Pre-Trial Chamber II were explained:

Determining the scale of the alleged crimes requires a determination of the number of direct and indirect victims, the extent of the damage caused by the crimes and their geographical and/or temporal spread.

The nature of the crimes includes specific elements of each offence such as killings, rapes and other crimes involving sexual and gender-based violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.

The manner of commission of the crimes should be assessed based, *inter alia*, on the means employed to execute the crime, the degree of participation and intent of the perpetrator, the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.

The impact of the crimes may be assessed in light of, *inter alia*, the suffering endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.<sup>59</sup>

It is their exceptional criminality that requires an immediate and efficient response to these crimes. Given the difficulties faced in post-conflict and transitional contexts, such a response

<sup>57</sup> ICC Statute, preambular paragraph 3, see *supra* note 5.

<sup>58</sup> ICC Kenya Decision, para. 62, see *supra* note 23.

<sup>59</sup> ICC, OTP, "Policy Paper on Preliminary Examinations", November 2013, paras. 61-65 (<https://www.legal-tools.org/doc/ach906/>) ("Policy Paper on Preliminary Examinations").

would be significantly advanced by adopting a prosecutorial approach that focuses on the investigation and prosecution of core international crimes.

## 2.1. Prioritisation Criteria: Introduction

Formally recognising and adopting criteria for the prioritisation of criminal cases requires method and a good understanding of all the relevant factors and indicators that may affect the quality of the investigations and prosecutions. The following sections will consider general principles for establishing prioritisation criteria and will proceed in identifying the most important criteria, along with their constituent factors and indicators.

### 2.1.1. General Principles for Establishing Prioritisation Criteria

A selective approach to the investigation and prosecution of criminal cases is adopted by most national and international jurisdictions.<sup>60</sup> As a result, an examination of the process of selection and prioritisation is necessary.

When faced with an overwhelming backlog of cases, a number of approaches are available to prosecutorial services with regard to selection and prioritisation. Cases may be selected as they enter the docket, on a “first come, first served” basis; alternatively, cases may be chosen based on the availability of evidence; then again, cases may even be selected as a result of political pressure.<sup>61</sup>

Admittedly, the approach used to select and prioritise cases may “substantially affect the way in which the justice process is received by victims and others affected by the atrocities. It can also influence the perceived legitimacy of the process by states and the international community”.<sup>62</sup> For example, applying a set of criteria may lead to a disproportionate number of prosecutions of certain types of crimes, while ignoring other types of criminal behaviour.<sup>63</sup>

Moreover, any decision to select and prioritise criminal cases that is not based upon objective criteria calls into question the credibility and impartiality of the criminal justice process as a whole. To follow this approach may lead to accountability for mass atrocities being perceived as a political instrument by both victims and the wider public.

Formally established criteria, however, can help prevent biased and unfair prosecutions or the use of the criminal justice system as a political tool to yield power and perpetuate discriminatory tactics.<sup>64</sup>

Formalised criteria are able to guide a transparent and credible process of selection that

<sup>60</sup> Fabrizio Guariglia, “‘Those Most Responsible’ versus International Sex Crimes: Competing Prosecution Themes?”, in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, TOAEP, Beijing, 2012, p. 46 (<https://www.legal-tools.org/doc/397b61/>).

<sup>61</sup> Bergsmo, 2010, p. 9, see *supra* note 55.

<sup>62</sup> *Ibid.*

<sup>63</sup> Christopher K. Hall, “The Danger of Selective Justice: All Cases Involving Crimes under International Law Should be Investigated and the Suspects when there is Sufficient Evidence, Prosecuted”, in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, TOAEP, Oslo, 2010, p. 176 (<https://www.legal-tools.org/doc/f5abed/>).

<sup>64</sup> Morten Bergsmo and CHEAH Wui Ling, “Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes”, in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, TOAEP, Beijing, 2012, p. 4 (<https://www.legal-tools.org/doc/397b61/>).

would encourage prosecutors to take the most suitable cases to trial first,<sup>65</sup> based on objective criteria that take into account the gravity of the crime, its victims and their suffering.

Publicly and officially articulated criteria can contribute towards a more coherent prosecutorial strategy that can be applied to all core international crimes and, at the same time, be adapted to a specific type of criminality, such as sex crimes.

Fixed prioritisation criteria that take into consideration both the crimes committed as well as the surrounding circumstances can act as guidelines to “reduce the scope for arbitrariness”.<sup>66</sup> Moreover, they are able to “provide a transparent standard by which prosecutors’ decisions can be evaluated. They ultimately protect prosecutors [...] of accusations of initiating politically motivated prosecutions”.<sup>67</sup>

Consequently, not only do criteria pose no threat to the fairness of the administration of justice, but they also offer an added guarantee for transparent and independent judicial proceedings addressing the most heinous of crimes.

As a general principle, case selection must be *consistent but flexible*, taking into account newly acquired or developed evidence – or any other new information – that may render a case more or less of a priority.<sup>68</sup> However, “exceptions made for justifiable tactical reasons necessary to pursue those with greater liability” are also justifiable and accepted.<sup>69</sup>

Indeed, the decision to prosecute a specific case is a balancing exercise, requiring an assessment of the interests of the victims, the accused and the community as a whole.<sup>70</sup> Such a delicate balance can only be achieved through the establishment of fixed criteria possessing the following characteristics: allowing for an objective evaluation of the facts relevant to the commission of a core international crime on the one hand, while at the same time remaining flexible enough to accommodate the peculiarities and unique characteristics of each situation.

### 2.1.2. Prioritisation Criteria

The present Report proposes two main criteria to be considered in the selection and prioritisation of cases involving core international crimes. Each criterion includes constituent elements that may be assessed by a number of non-cumulative and non-exhaustive factual indicators.

<sup>65</sup> Bergsmo, 2010, p. 9, see *supra* note 55.

<sup>66</sup> Daniel D. Ntanda Nsereko, “Prosecutorial Discretion before National Courts and International Tribunals”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 143.

<sup>67</sup> *Ibid.*

<sup>68</sup> Bergsmo *et al.*, 2009, p. 81, see *supra* note 54.

<sup>69</sup> *Ibid.*, p. 94.

<sup>70</sup> Alex Obote-Odore, “Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda”, in Morten Bergsmo (ed.), *Criteria for Prioritising and Selecting Core International Crimes Cases*, TOAEP, Oslo, 2010, p. 52 (<https://www.legal-tools.org/doc/f5abed/>).

The proposed criteria are:

- I. *The gravity of the offence*
- II. *The objective ‘representativity’ of the overall scope of the prosecutions*

Before proceeding to the analysis of each indicator, it is worth noting their varied nature. Some of the indicators simply facilitate the fact-finding process, such as the number of victims and the location of the commission of crimes. Other indicators necessarily involve a value judgement, such as those relevant to the role of the suspect in the crimes committed and in the general context of conflict.<sup>71</sup>

The Report, moreover, acknowledges and analyses indicators related to practical and policy considerations surrounding the prosecution of core international crimes, which are intrinsically linked to the selection process.

However, the Report also demonstrates and underlines the acute need for objective criteria that help ‘frame’ prosecutorial discretion and ensure the fairness and objectivity of the criminal justice process in post-conflict and mass violence situations.

### **2.1.2.1. Gravity**

Gravity is an extremely important criterion in deciding which case should move forward and go to trial. The determination of gravity requires an assessment of the seriousness of the alleged offence, combined with an examination of the seriousness of the responsibility of the alleged perpetrator.

#### **2.1.2.1.1. Seriousness of the Offence**

This group of indicators examines the behaviour that may form the basis of criminal prosecution. The indicators listed below help investigators to properly establish the facts and context surrounding the criminal acts in question and to assess the gravity of the crimes in a fair and objective manner. They include quantitative aspects that measure the scale and extent of the criminal behaviour under examination, as well as qualitative factors that may later be reflected in findings of aggravating and/or mitigating circumstances.

The proposed indicators are as follows:

1. Number of victims;
2. Nature of acts;
3. Area of destruction;
4. Duration and repetition of the offence;
5. Location of the crime;

<sup>71</sup> See Luc Côté, “Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 169.

6. Nationality of perpetrators/victims;
7. The modus operandi of the criminal conduct;
8. Discriminative motive;
9. Defencelessness of victims;
10. Consequences of crimes.

**1. Number of victims:** The number of direct and indirect victims is an indicator used to determine the gravity of a crime.<sup>72</sup> Establishing the number of victims of core international crimes is a challenging task which requires the use of a complex methodology.<sup>73</sup> In the aftermath of atrocity, data is collected through counting reported victims and/or estimating their number based on samples and extrapolations.<sup>74</sup>

**2. Nature of acts; and 4. Duration and repetition of the offence:** The nature of the act is a flexible indicator including a multitude of factors that assist in determining the seriousness of the crime. The nature of the crimes refers to the specific elements of each offence, such as killings, rapes and other acts involving sexual or gender-based violence.<sup>75</sup>

The duration and repetition of the offence is directly linked with the nature of the offence and its consequences. The reoccurrence and/or repetition of a crime may indicate that the crime forms part of a plan or organised policy.

**3. Area of destruction; and 5. Location of the crime:** These indicators allow investigators to assess the geographical area affected by core international crimes while also evaluating the broader and long-term impact thereof, beyond the immediate victims or damage.<sup>76</sup> Assessing the geographical spread of crimes helps to determine their gravity and facilitates the selection of the most relevant cases to be prioritised.

**6. Nationality of perpetrators/victims:** The nationality of the perpetrators/victims of the crimes is an important indicator in determining whether the crimes committed were systematic, resulted from a plan or organised policy or were committed with discriminatory intent. Common features found among the profiles of both the perpetrators and the victims of core international crimes are strong indicators of a pattern of criminality.<sup>77</sup>

**7. Modus operandi of the criminal offence:** This indicator encompasses an examination of the manner of commission of the crimes: the means employed to execute the crime, the extent to which the crimes were systematic or a product of a plan or organised policy or otherwise resulted from the abuse of power or official capacity, the commission of crimes with flagrant disregard for the law<sup>78</sup> and the existence of elements of particular cruelty.<sup>79</sup>

<sup>72</sup> Policy Paper on Preliminary Examinations, 2013, p. 15, see *supra* note 59.

<sup>73</sup> Xabier Agirre Aranburu, "Gravity of Crimes and Responsibility of the Suspect", in Morten Bergsmo (ed.), *Criteria for Prioritising and Selecting Core International Crimes Cases*, TOAEP, Oslo, 2010, p. 211 (<https://www.legal-tools.org/doc/f5abed/>).

<sup>74</sup> *Ibid.*

<sup>75</sup> Policy Paper on Preliminary Examinations, 2013, p. 15, see *supra* note 59.

<sup>76</sup> Aranburu, 2010, p. 217, see *supra* note 73.

<sup>77</sup> *Ibid.*

<sup>78</sup> Bergsmo *et al.*, 2009, p. 120, see *supra* note 54.

<sup>79</sup> Aranburu, 2010, p. 217, see *supra* note 73.



**8. Discriminative motives:** The commission of core international crimes on the basis of discriminatory motives lends an element of particular gravity to the offences committed.

Such motives may be based on national, ethnical, racial or religious issues, in the case of offences resulting in genocide.<sup>80</sup> The crime of persecution includes a broader set of motives as it encompasses “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds that are universally recognized as impermissible under international law”.<sup>81</sup>

**9. Defencelessness of the victims:** International humanitarian law affords special protection to specific groups, such as non-combatants and the civilian population, especially women and children.<sup>82</sup>

**10. Consequences of crimes:** The effects of the crimes on the victim(s) and the community are inherently linked to the gravity of the criminal acts, resulting in permanent or lasting consequences.

The vulnerability of certain groups in conflict and post-conflict situations has also been recognised by the UNSC when it expressed its “concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons”.<sup>83</sup>

The vulnerable and defenceless state of victims increases the gravity of a criminal offence.

#### 2.1.2.1.2. Responsibility of the Alleged Perpetrator

This group of indicators focuses on the perpetrators of core international crimes. The following indicators examine the position the suspect had in the leadership hierarchy and their involvement in the commission of crimes, as well the degree of personal culpability for crimes committed by the leaders or their subordinates.

The aim of such an approach is to hold to account those “people who were in positions to order, allow, or create the conditions necessary for the conduct, or who were in a position to prevent it and consciously chose not to, and those in positions of authority or influence who participated directly in the events themselves”.<sup>84</sup> It is assumed that the higher the position of the alleged perpetrator and level of involvement in the commission of a core international crime, the greater the level of their criminal responsibility, rendering prosecution imperative.

Moreover, the indicators take into account the seriousness of the crime as discussed above in order to include low-level perpetrators that have committed particularly egregious offences.

<sup>80</sup> ICC Statute, Article 6, see *supra* note 5.

<sup>81</sup> ICC Statute, Article 7(1)(h), see *supra* note 5.

<sup>82</sup> Fourth Geneva Convention, see *supra* note 49.

<sup>83</sup> UNSC Res 1325, 31 October 2000, S/RES/1325 (2000) (<https://www.legal-tools.org/doc/cd6fcc/>).

<sup>84</sup> Bergsmo *et al.*, 2009, p. 92, see *supra* note 54.

In this regard, the following indicators have been identified:

1. Position in hierarchy under investigation;
2. Status as political, military, paramilitary, religious or civilian leader;
3. Leadership at municipal, regional or national level;
4. Nationality and/or tribe;
5. Role/participation in policy/strategy decisions;
6. Personal culpability for specific atrocities;
7. Notoriousness/responsibility for particularly heinous acts;
8. Extent of direct participation in the alleged incidents;
9. Authority and control exercised by the suspects;
10. The suspect's alleged notice and knowledge of acts by subordinates.

**1. Position in Hierarchy; 2. Status as political, military, paramilitary of civilian leader; and 3. Leadership at municipal, regional or national level:** The first three indicators seek to examine the criminal responsibility of the leadership for the commission of core international crimes. These indicators cover a wide range of individuals who hold a position in the military, paramilitary, police, political or judicial chain of authority at the time of commission.<sup>85</sup> They may apply to current members of the leadership, as well as extend to past members.

Focusing on a limited number of senior leaders and notorious perpetrators has been a consistent practice since the establishment of contemporary international criminal justice in the middle of the 20<sup>th</sup> century. The Nuremberg and Tokyo International Military Tribunals were established for the prosecution of high-ranking perpetrators.<sup>86</sup> The ICTY and ICTR were created in order to hold accountable those responsible for crimes that threaten international peace and security.<sup>87</sup> Although these two Tribunals did not employ a clear prioritisation policy from the outset, the focus of prosecutorial strategy gradually shifted to the investigation and prosecution of those considered to be most responsible for serious violations of international humanitarian law. Moreover, the Statute of the International Residual Mechanism for Criminal Tribunals urged the ICTY and ICTR to focus their work on the prosecution of those “who are among the most senior leaders suspected of being most responsible for the crimes covered by paragraph 1 of this Article, considering the gravity of the crimes charged and the level of responsibility of the accused”.<sup>88</sup> The Statute of the SCSL limited the jurisdiction of the Court to “persons who bear the greatest responsibility”.<sup>89</sup>

<sup>85</sup> *Ibid.*, p. 86.

<sup>86</sup> Robert Cryer, “Prosecuting the Leaders: Promises, Politics and Practicalities”, in *Goettingen Journal of International Law*, 2009, vol. 1, no. 1, pp. 45 and 48.

<sup>87</sup> UNSC Res 827, 1993, see *supra* note 31; UNSC Res 955, 1994, see *supra* note 32.

<sup>88</sup> Statute of the International Residual Mechanism for Criminal Tribunals, annexed to UNSC Res 1966, 22 December 2010, S/RES/1966 (2010), Article 1(2).

<sup>89</sup> Statute of the Special Court for Sierra Leone, 14 August 2000, Article 1 (<https://www.legal-tools.org/doc/aa0e20/>) (“SCSL Statute”).

Finally to this end, the ICC Statute system of criminal justice is built on the premise to indict and prosecute those with the greatest responsibility for international crimes.<sup>90</sup>

These particular indicators were developed in the context of the international criminal tribunals whose mandate and resources have been limited (taking into account the nature, number and scale of crimes falling in their jurisdiction). The *ad hoc* Tribunals have concurrent jurisdiction with the national courts of the States involved in the Balkan conflict and the Rwandan genocide.<sup>91</sup> As the tribunals gradually complete their work, the focus has shifted to those ‘most responsible’, whilst a number of cases have been returned to the national jurisdictions for investigation and prosecution. Moreover, the ICC operates pursuant to the complementarity principle, intervening only when States are “unwilling or unable genuinely to carry out the investigation or prosecution” of a case.<sup>92</sup>

In principle, national jurisdictions need to address the totality of crimes committed in their territory. However, restraints such as those that will be discussed in the DRC context in section 3.3 may create the need for a more focused prosecutorial strategy at the national level. Such an approach may also be justified by the ‘symbolic’ character prosecutions may take. Successfully prosecuting a number of high-end perpetrators can demonstrate the commitment of the State to the rule of law and contribute to the re-establishment of public trust in the State and its institutions.

**4. Nationality and/or tribe:** The nationality (or tribe) of the alleged perpetrator(s) is another factor to consider when seeking to establish a representative prosecution. This indicator aims to ensure that prosecutorial strategy address the criminal behaviour of all actors involved in the commission of mass atrocities.

Contemporary armed conflicts are characterised by a variety of actors taking part in the hostilities. The implicated individuals may be nationals of neighbouring countries or members of different tribes. Prosecution should include individuals belonging to different groups that are responsible for core international crimes in order to address the criminal behaviour of all actors involved and to demonstrate that no one can enjoy immunity from the law.

**5. Role/participation in policy/strategy decisions; 6. Personal culpability for specific atrocities; and 8. Extent of direct participation in the alleged incidents:** These indicators seek to cover all potential modes of criminal responsibility of an alleged perpetrator, whether that person commits a crime as an individual, jointly with another person or through another person; orders, solicits or induces the commission of a crime; contributes to the commission of such a crime by a group of persons acting with a common purpose; or attempts to commit a crime by taking action that commences its execution by means of a substantial step but the crime does not occur because of circumstances independent of the person’s intentions.<sup>93</sup>

<sup>90</sup> ICC, OTP, “Paper on some policy issues before the Office of the Prosecutor”, September 2003 (<https://www.legal-tools.org/doc/f53870/>).

<sup>91</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, Article 9 (<https://www.legal-tools.org/doc/b4f63b/>) (‘ICTY Statute’); and Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, Article 8 (<https://www.legal-tools.org/doc/8732d6/>) (‘ICTR Statute’).

<sup>92</sup> ICC Statute, Article 17, see *supra* note 5.

<sup>93</sup> These modes of criminal responsibility are recognised in the ICC Statute, Article 25, see *supra* note 5.

**7. Notoriousness/responsibility for particularly heinous acts:** This indicator leads to a broader interpretation of the concept of ‘those most responsible’ so as to include individuals who are accused of having committed particularly egregious crimes. It targets individuals who have allegedly committed particularly heinous crimes and have reached a certain level of notoriety that contributes to the victimisation and terrorisation of the local population. Due to the gravity and impact of their criminal behaviour these individuals can be considered to be among the ‘most responsible’ for core international crimes.<sup>94</sup>

**9. Authority and control exercised by the suspects; 10. The suspect’s alleged notice and knowledge of acts by subordinates:** These indicators are directly linked with the concept of ‘command responsibility’, which holds a military or civilian commander accountable for any offences committed by his or her subordinates.<sup>95</sup>

Command responsibility is recognised by the Statutes of the *ad hoc* international criminal tribunals as well as that of the ICC.<sup>96</sup> It is based on the existence of a superior/subordinate relationship, where the superior exercises effective control over the acts of his or her subordinates.<sup>97</sup>

‘Effective control’ is defined as a material ability to prevent or punish criminal conduct.<sup>98</sup> For example, effective control may be inferred – among other factors – from the issuance of orders<sup>99</sup>, the capacity to alter command structures and remove or promote people, as well as the ability to require people to engage or withdraw from hostilities.<sup>100</sup>

Command responsibility presupposes the fulfilment of two conditions. First, the commander must have had knowledge that their subordinates were committing or about to commit crimes or possessed information that would indicate the commission of such crimes.<sup>101</sup>

The ICC also adopts the concept of *due diligence* regarding the element of knowledge of the commander. Article 28 of the ICC Statute provides that command responsibility is triggered when the commander “knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes”.<sup>102</sup>

The second element of command responsibility is the failure to take “necessary and reasonable measures” to prevent or punish the offences the superior knew or culpably ought to have known.<sup>103</sup> Command responsibility is therefore “responsibility for an omission”.<sup>104</sup>

<sup>94</sup> An example of such a prosecution was that of *Goran Jelisić* in the context of the Balkan conflict. *Jelisić* Trial Judgment, see *supra* note 11.

<sup>95</sup> Cryer *et al.* (eds.), 2014, p. 384, see *supra* note 24.

<sup>96</sup> ICTY Statute, Article 7(3), see *supra* note 91; ICTR Statute, Article 6(1), see *supra* note 91; SCSL Statute, Article 6(1), see *supra* note 89; ICC Statute, Article 28, see *supra* note 5.

<sup>97</sup> ICTY, *Prosecutor v. Zejnil Delalić et al.*, Trial Chamber, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 344 (<https://www.legal-tools.org/doc/6b4a33/>).

<sup>98</sup> ICTY, *Prosecutor v. Zejnil Delalić et al.*, Appeals Chamber, Judgement, Case No. IT-96-21-A, 20 February 2001, para. 256 (<https://www.legal-tools.org/doc/051554/>) (‘Čelebići Appeals Judgment’).

<sup>99</sup> ICTR, *Prosecutor v. Ildéphonse Nizeyimana*, Trial Chamber, Judgement and Sentence, Case No. ICTR-2000-55C-T, 19 June 2012, para. 1528 (<https://www.legal-tools.org/doc/f8cd9/>).

<sup>100</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, para. 417 (<https://www.legal-tools.org/doc/07965c/>).

<sup>101</sup> Čelebići Appeals Judgment, paras. 226 and 239, see *supra* note 98.

<sup>102</sup> ICC Statute, Article 28, see *supra* note 5.

<sup>103</sup> ICTY, *Prosecutor v. Sefer Halilović*, Trial Chamber, Judgement, Case No. IT-01-48-T, 16 November 2005, para. 56 (<https://www.legal-tools.org/doc/abda04/>).

<sup>104</sup> *Ibid.*, para. 54.

### 2.1.2.2. The Objective ‘Representativity’ of the Overall Scope of the Prosecutions

Representative prosecutions seek to maximise the impact of prosecutorial work and minimise perceptions of unfairness and lack of justice that inevitably stem from the process of case selection and prioritisation.

It means that at the end of a process of prosecutions of core international crimes, in a conflict, post-conflict or mass violence situation, the “accumulated portfolio should reflect - or be representative of - the *overall victimisation* caused by the crimes in the conflict or situation at hand” (emphasis added).<sup>105</sup>

A representative prosecution requires a comprehensive knowledge and understanding of the criminality of a given situation. It presupposes *a mapping of the offences committed*, which will include accurate and reliable data on the criminal offences, the alleged perpetrators and the victims.

Representative prosecution also seeks to address any issues that may arise due to the selectivity and prioritisation of cases. It reconciles the interests of victims and society as a whole with the reality of finite resources and limited capacity of the criminal justice system in question.

Contemporary criminal justice has been built upon the idea that victims of mass atrocities deserve to see justice done for their suffering. The concept of the ‘interests of the victims’ is complemented by considerations of their physical and psychological well-being, dignity and privacy of victims.<sup>106</sup>

Moreover, prosecutions serve the interests of society as a whole, either by offering closure and contributing to the reconciliation process or by acting as a deterrent for potential perpetrators.<sup>107</sup> Analysing the philosophical foundations of the various justifications of the prosecution of core international crimes does not fall within the scope this Report. These considerations are relevant to the public role of the criminal justice system as both a guarantor of law and order and protector of the security and safety of the people.

In post-conflict and transitional situations, the State apparatus faces significant difficulties in carrying out its everyday functions. Justice systems are not exempt from these post-conflict realities: operating in light of high levels of criminality and an impaired infrastructure. *Representativity is therefore a key element for the conduct of effective and fair prosecutions.*

According to this criterion, cases involving offences committed in the areas and communities most affected by violence, should be given priority or form a larger part of the prosecutorial work. In the same logic, organisations or institutions most responsible for the commission of offences should face justice to a greater extent than, or ahead of, organisations and institutions of lesser influence.<sup>108</sup>

<sup>105</sup> Bergsmo *et al.*, 2009, p. 125, see *supra* note 54.

<sup>106</sup> ICC, OTP, “Policy Paper on the Interests of Justice”, September 2007 (<https://www.legal-tools.org/doc/bb02e5/>).

<sup>107</sup> For a discussion of the various justifications of prosecutions of core international crimes, see Margaret M. deGuzman, “An Expressive Rationale for the Thematic Prosecution of Sex Crimes”, in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, TOAEP, Beijing, 2012, pp. 11-44 (<https://www.legal-tools.org/doc/397b61/>).

<sup>108</sup> Bergsmo *et al.*, 2009, p. 125, see *supra* note 54.

Representative prosecutions seek to address the impunity afforded to alleged perpetrators by the dysfunction of the criminal justice system<sup>109</sup> and to create a new public perception of the system that aims to re-establish the trust of the people.

### 2.1.2.3. Policy and Practical Considerations

In most justice systems around the world, selectivity is an unavoidable fact. This section of the Report seeks to acknowledge the practical factors most often used by national and international prosecutors and investigators in their work.

By discussing and analysing the “practical realities in prosecution services”,<sup>110</sup> the Report seeks to clarify their content and advocates in favour of their formalisation and consistent application, in order to ensure transparency in the criminal justice process.

The following indicators are proposed:

1. Available investigative resources;
2. Evidence/witness availability;
3. Potential rollover witness/likelihood of linkage evidence;
4. Completeness of evidence;
5. Availability of exculpatory information and evidence;
6. Arrest potential;
7. The charging theories available;
8. Potential legal impediments to prosecution;
9. Potential defences;
10. Theory of liability and legal framework of each potential suspect;
11. Overall strategic direction;
12. Impact that the new investigation will have on on going investigations and on making existing indictments trial ready;
13. The estimated time to complete the investigation;
14. The extent to which the case can take the investigation to higher political, military, police and civil chains of command; and

<sup>109</sup> Maria Eriksson Baaz and Maria Stern, “Making sense of violence: voices of soldiers in the Congo (DRC)”, in *Journal of Modern African Studies*, 2008, vol. 46, no. 1, pp. 57-86 and p. 79.

<sup>110</sup> Bergsmo *et al.*, 2009, p. 102, see *supra* note 54.



## 15. To what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions.

**1. Available investigative resources:** The availability of investigative resources is a decisive indicator in the conduct of investigations and prosecutions. It aims to prevent the needless duplication of investigative and prosecutorial resources as well as to encourage judicial efficacy and rational resource management.<sup>111</sup>

**2. Evidence/witness availability; 3. Potential rollover witness/likelihood of linkage evidence:** An objective assessment of the available evidence is necessary before introducing charges against a specific individual. The credibility and reliability of both material evidence and witnesses must be examined before a decision is made to prosecute a particular suspect.<sup>112</sup>

Initially, the evidence must be factually examined by prosecutorial authorities to determine whether it is “admissible, substantial, reliable and sufficient to prove that there is a *prima facie* case to draft an indictment”.<sup>113</sup> Following this, the same authorities must assess the prospects of the case resulting in a conviction.<sup>114</sup> This is an essential evaluation that can help prosecutors to anticipate problems that may arise in the course of their investigation.

Furthermore, the investigation of sexual and gender-based crimes presents “its own specific challenges”.<sup>115</sup> The social stigma associated with this type of crime often deters victims not only from appearing as witnesses before a court, but also from reporting the crimes in the first place.<sup>116</sup> Intimidation and fear of retaliation also contribute to the unwillingness of victims and witnesses to contribute to the judicial process, while the often traumatising experience of testifying can act as a further deterrent.<sup>117</sup>

In addition, the availability and quality of forensic or other documentary evidence may be inadequate, due to the passage of time and the limited capacities of the national criminal justice system.<sup>118</sup> The collection of forensic evidence at the time of the commission of core international crimes is a challenging task as, during an armed conflict or a period of intense violence, the relevant State mechanisms often either collapse or do not function effectively. The conditions in which evidence is preserved, coupled with the time that passes between the collection of the evidence and its eventual use in criminal proceedings, also alters its quality. An added difficulty observed by practitioners is that the ‘standard of proof’ required in cases of sexual violence is higher than in cases involving other crimes. This is particularly relevant with regard to circumstantial evidence. In their respective case law on sexual and gender-based violence, the *ad hoc* international criminal Tribunals have been somewhat reluctant to recognise a connection between the conduct of an accused person and acts of sexual violence,

<sup>111</sup> Hall, 2010, p. 178, see *supra* note 63.

<sup>112</sup> Obote-Odore, 2010, p. 52, see *supra* note 70.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Policy Paper on Sexual and Gender-Based Crimes, 2014, p. 24, see *supra* note 34.

<sup>116</sup> *Ibid.*

<sup>117</sup> ICTR, OTP, “Prosecution of Sexual Violence: Best practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the ICTR”, 30 January 2014 (<https://www.legal-tools.org/doc/ea03f8/>).

<sup>118</sup> Policy Paper on Sexual and Gender-Based Crimes, 2014, p. 24, see *supra* note 34.

when inferred from circumstantial evidence.<sup>119</sup> As the ability to prove the charge is often a pivotal factor when deciding whether to take a case to trial, sex crimes are often avoided as ‘difficult to prove’.

**4. Completeness of evidence:** The completeness of the evidence of criminal activity is linked to its value to prosecutorial services in aiming to prove the charged crime. This indicator is essential because the provability of charges is decisive for a prosecutor when deciding to proceed with a case.

**5. Availability of exculpatory information and evidence:** This indicator is relevant to the general indicators regarding evidence. When assessing the prospects of the case resulting in the conviction of the suspect, the existence and availability of exculpatory evidence is of paramount importance. Such information indicates the probability or otherwise of achieving a conviction in a particular case. The existence of such evidence may suggest that a prosecution of a particular case could fail to result in a conviction and should consequently be avoided.

**6. Arrest potential:** Arrest potential is a practical consideration that is extremely important in a conflict/post-conflict context. The arrest of persons suspected of committing core international crimes poses a serious challenge for the national authorities of States that have experienced long periods of tension and armed conflict. Additionally, crimes are often committed in remote, difficult-to-access areas.<sup>120</sup>

Identification of the suspect is another challenge as the alleged perpetrators often do not wear insignia to indicate their affiliation to a specific armed group, the national army or the police. As a consequence, victims are not always able to identify their attacker with certainty.<sup>121</sup>

An added obstacle has been observed in the case of alleged perpetrators belonging to State forces, such as the military or the police. There have been reports of interference in order to shield alleged perpetrators from judicial proceedings.<sup>122</sup> In some cases, it is alleged that military and police commanders have refused to hand over accused persons to military justice officials<sup>123</sup> while, in others, those in command of the military and police forces have ordered their transfer to a different unit.<sup>124</sup>

**7. The charging theories available; and 10. Theory of liability and legal framework of each potential suspect:** Examining the theories of criminal responsibility at the investigative stage is directly linked to the aim of ‘representative prosecution’ and the assessment of the prospects of the case resulting in the conviction of the suspect.

Interpreting the available modes of liability can also allow prosecutorial services to cover a wide range of perpetrators and types of criminal behaviour, creating a prosecution that is truly representative of the atrocities it deals with. In addition, this assessment allows for an evaluation of conviction prospects in a more certain and objective way.

119 Susana Sá Couto and Katherine Cleary, “The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court”, in *American University Journal of Gender, Social Policy & the Law*, 2009, vol. 17, no. 2, pp. 337-359.

120 OHCHR, “Progress and Obstacles in the Fight against Impunity for Sexual Violence in the Democratic Republic of the Congo”, April 2014, p. 13 (‘OHCHR Report’).

121 Human Rights Watch (‘HRW’), “The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo”, June 2002, p. 24.

122 OHCHR Report, 2014, p.17, see *supra* note 120.

123 *Ibid.*

124 HRW, “Seeking Justice: The Prosecution of Sexual Violence in the Congo War”, March 2007, p. 41.



**8. Potential legal impediments to prosecution; and 9. Potential defences:** Legal indicators such as these help the prosecutor to build a sound case, anticipating issues and defences that may arise, such as personal immunities, superior orders and self-defence.

Defences are a “fundamental part of criminal law, and reflect important limitations on the proper scope of punishable conduct”.<sup>125</sup> They therefore need to be taken into consideration otherwise they might prove to be an obstacle to the pursuit of justice.

**11. Overall strategic direction:** These indicators seek to maximise the effects of the overall work of the prosecution.<sup>126</sup> Establishing the facts of core international crimes requires significant resources. A proper investigation strategy is consequently needed in order to ensure that limited investigative and prosecutorial resources are put to use in the most efficient way possible.<sup>127</sup>

**12. Impact that the new investigation will have on ongoing investigations and on making existing indictments trial ready and 13. The estimated time to complete the investigation:** Given the heavy delays challenging the criminal justice system of conflict and post-conflict States, temporal indicators regarding the status of cases and their ‘readiness to proceed’ are extremely important. Time is exceptionally significant in the investigation of criminal cases and permeates all aspects of the criminal prosecution and trial. It is especially important for the rights of the accused, who should be tried without undue delay according to internationally recognised human rights.<sup>128</sup>

**14. The extent to which the case can take the investigation to higher political, military, police and civil chains of commands:** This indicator seeks to ensure that those high up in the chain of command are held accountable for the crimes for which they are responsible. A case should always be examined within the general context of criminality in which it belongs in order to discern the level of involvement of commanders in the commission of mass crimes.

**15. To what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions:** This final indicator seeks to maximise the impact of the prosecutorial workload by establishing links between ongoing and future investigations and prosecutions.

<sup>125</sup> Cryer *et al.* (eds.), 2014, p. 398, see *supra* note 24.

<sup>126</sup> Bergsmo *et al.*, 2009, p. 106, see *supra* note 54.

<sup>127</sup> *Ibid.*

<sup>128</sup> International Covenant on Civil and Political Rights, 19 December 1996, Article 14(3)(c) (<https://www.legal-tools.org/doc/2838f3/>) (‘ICCPR’).

# 3

## 3. The Situation in the DRC and the Creation of a National Strategy on Prioritisation

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### 3.6. The Design of a National Policy and its Implementation

### 3. The Situation in the DRC and the Creation of a National Strategy on Prioritisation

Before discussing the prioritisation of international sex crimes cases in the DRC, it is important to understand the context in which sexual violence occurs. This section of the Report provides information on the human and physical capacity in the DRC, as well as on the existing legal framework and the emerging national jurisprudence. Following the contextual analysis, the Report examines the gravity and impact of sex crimes in the DRC and identifies the most relevant factors to be taken into consideration for the creation of a national prioritisation policy.

#### 3.1. Context

The DRC has an estimated population of 67.51 million.<sup>129</sup> The country spans 2.34 million square kilometres and, in 2013, 35.4% of the population could be characterised as urban.<sup>130</sup>

Between 1998 and 2013, more than 5 million people lost their lives in the context of the armed conflict. Furthermore, the long-lasting conflict has led to a total collapse of the State's apparatus along with basic infrastructure, including roads and health facilities. As a result, reliable and up-to-date information is not readily available. Both national State actors and civil society have attempted to map the situation in the country and to identify the current needs; various international organisations and independent experts have also contributed to this end. Notwithstanding, it can be clearly stated that sexual and gender-based violence has been extremely prominent in the DRC since the outbreak of hostilities in 1998.

According to a report issued in 2013 by the DRC Ministry of Gender, Family and the Child, 10,322 sexual violence incidents were reported in 2011 in the context of armed conflict in Eastern DRC; this number increased by 52% in 2012 to 15,654 reported incidents.<sup>131</sup> The numbers were also reflected in the latest annual report of the UN Secretary General on conflict related violence. According to the report, from January to September 2014, the United Nations Population Fund ('UNFPA') recorded 11,769 cases of sexual and gender-based violence in the provinces of North Kivu, South Kivu, Orientale, Katanga and Maniema; 39% of these cases were considered to be directly linked to the armed conflict.<sup>132</sup>

In the context of the DRC conflict, sexual violence has almost exclusively targeted the female population. Indeed, the vast majority of victims are women and girls.<sup>133</sup> However, the limited

<sup>129</sup> World Bank, "Democratic Republic of the Congo", available at [data.worldbank.org/country/congo-dem-rep](http://data.worldbank.org/country/congo-dem-rep), last accessed at 14 May 2015.

<sup>130</sup> UN Data, "Democratic Republic of the Congo", available at [data.un.org/CountryProfile.aspx?crName=Democratic%20Republic%20of%20the%20Congo](http://data.un.org/CountryProfile.aspx?crName=Democratic%20Republic%20of%20the%20Congo), last accessed at 14 May 2015.

<sup>131</sup> RDC, Ministère du Genre, de la Famille et de l'Enfant, "Ampleur des violences sexuelles en RDC et actions de lutte contre le phénomène de 2011 à 2012", June 2013 ('National Study on Sexual Violence').

<sup>132</sup> UN Secretary General ('UNSG'), "Report of the Secretary General on conflict-related sexual violence", 23 March 2015, S/2015/203 (2015), para. 23 ('UNSG Report on conflict-related sexual violence').

<sup>133</sup> National Study on Sexual Violence, 2013, p. 2, see *supra* note 131.

data alludes to increasing numbers of male rape in recent years.<sup>134</sup> Sexual violence against men remains an underreported issue and further research is needed to collect accurate and reliable data.<sup>135</sup>

Rape and sexual violence have always been endemic during armed conflict. However, brutality has been one of the defining characteristics of the conflict in the DRC. Data collected by the Harvard Humanitarian Initiative indicates that gang rape represented almost 60% of the sexual assaults recorded by the study. This was followed by rape by unidentified armed persons (22%), sexual slavery (12%), rape in the presence of family (3%) and other types of sexual violence (4%).<sup>136</sup> The actual crimes are often aggravated by additional violence, varying from genital mutilation and instrumentation with sticks and guns to forced cannibalism.<sup>137</sup> Dr Denis Mukwege, the founder of the Panzi Hospital in South Kivu, which specialises in the treatment of victims of sexual violence, described rape with extreme violence as a ‘new pathology’ that damages social cohesion, destroys the identity of the rape survivor and leads to the slow death of a population unable to reproduce.<sup>138</sup>

Although there is no typical profile for the perpetrators of sexual and gender-based violence, certain members of the national army – the Forces Armées de la République du Congo (‘FARDC’) – and the national police force – the Police Nationale Congolaise (‘PNC’) – have been found to have committed acts of sexual violence.<sup>139</sup> Moreover, the UN Secretary General (‘UNSG’) has named numerous armed groups as parties that are “credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the agenda of the Security Council”.<sup>140</sup>

The conflict has severely damaged the Congolese court system and limited its ability to function effectively. Currently, an estimated 400 military magistrates – of which there are 140 judges and 260 prosecutors – staff the 50 military courts and a number of secondary military justice outposts scattered across the vast territory of the DRC. They are responsible for investigating and prosecuting the crimes committed not only by the Congolese army and the national police force but also those committed by the thousands of armed group members. Moreover, these few judicial staff often face adverse circumstances, such as infrastructural issues, irregular payment of salaries and lack of the necessary training.<sup>141</sup>

### 3.2. The DRC Legal Framework

The Constitution of the DRC provides for three separate, independent branches of the State apparatus: judicial, constitutional and administrative.<sup>142</sup>

<sup>134</sup> Harvard Humanitarian Initiative (‘HHI’) and Oxfam America, “Now, the world is without me: An investigation of sexual violence in the Eastern Democratic Republic of Congo”, April 2010, p. 36 (‘HHI/Oxfam Report’).

<sup>135</sup> Sandesh Sivakumaran, “Sexual Violence against Men in Armed Conflict”, in *European Journal of International Law*, 2007, vol. 18, no. 2, p. 253.

<sup>136</sup> HHI/Oxfam Report, 2010, Figure 4, see *supra* note 135.

<sup>137</sup> *Ibid.*, p. 36.

<sup>138</sup> Denis Mukengere Mukwege and Cathy Nangini, “Rape with Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo”, in *PLoS Medicine*, 2009, vol. 6, no. 12, p. 1.

<sup>139</sup> HRW, “Soldiers who Rape, Commanders who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo”, July 2009, p. 21 (‘HRW Military Reform Report’).

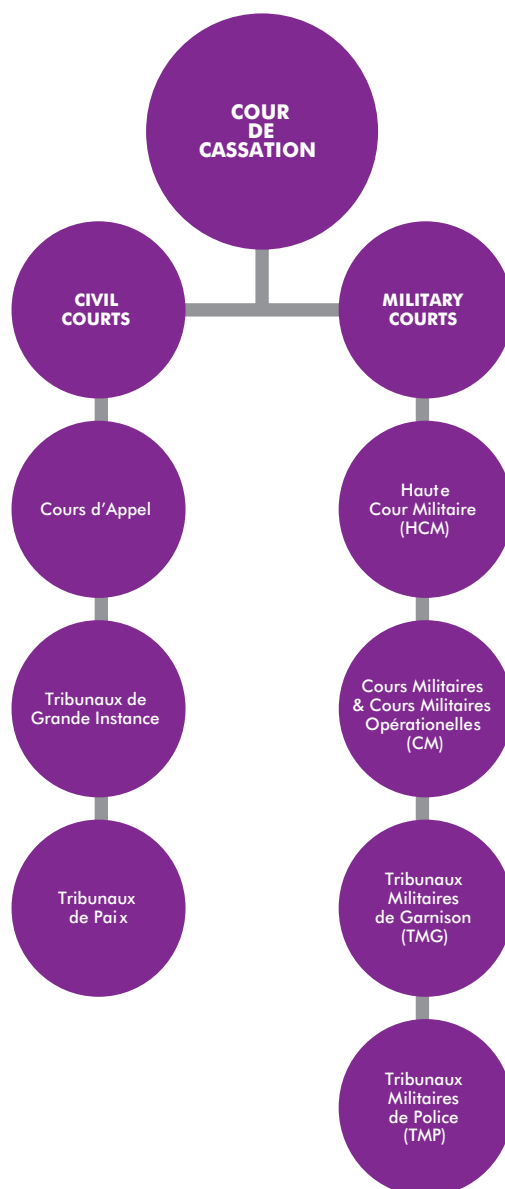
<sup>140</sup> UNSG Report on conflict-related sexual violence, 2015, Annex, see *supra* note 133.

<sup>141</sup> OHCHR Report, 2014, p.19, see *supra* note 120.

<sup>142</sup> Constitution de la République Démocratique du Congo, 18 February 2006, Journal Officiel de la RDC, 18 February 2006, Article 149 (<https://www.legal-tools.org/doc/2d693f/>) (‘DRC Constitution’).

The judicial branch is divided into civil and military jurisdictions, while the supreme national court, the *Cour de Cassation* has final control.<sup>143</sup>

The following graph explains the organisation of the DRC judicial system:



National legislation also provides for the establishment and functioning of mobile courts.<sup>144</sup>

<sup>143</sup> *Ibid.*, Article 153.

<sup>144</sup> Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Articles 45-48 ('Act organising the functioning and jurisdiction of the courts').

The DRC has a monist legal tradition, as reflected in Article 215 of the DRC Constitution, which provides that properly concluded treaties and international agreements have – upon publication – an authority superior to that of national laws, subject to their application by the other party thereto.<sup>145</sup> In theory, there is therefore no need for national implementing legislation for an international treaty or other international norms to be binding in the DRC.

An international treaty or agreement is thus directly applicable in the DRC if it has been properly ratified and published. However, with regard to criminal law, a third condition must be fulfilled: that of precision.

This requirement is based on the ‘principle of legality’.<sup>146</sup> The principle of legality requires that the criminal law must not only be applicable at the time of the commission of a crime and known to the alleged perpetrator, but must also be sufficiently precise in its definition of the criminal behaviour in question. Moreover, proper ratification gives national jurisdictions the authority to act. For example, a State cannot arrest an accused person without the requisite domestic procedures being in place (including, *inter alia*, the power to grant an arrest warrant): international treaties do not confer the necessary authorisation on national authorities. This is particularly important in the context of the ICC cooperation regime.

### 3.2.1. International Instruments and the ICC Statute

The DRC is party to a number of international instruments such as the International Covenant for Civil and Political Rights and its Optional Protocol I,<sup>147</sup> the Convention against Torture,<sup>148</sup> the Convention on the Elimination of All Forms of Discrimination against Women<sup>149</sup> and the Convention on the Rights of the Child.<sup>150</sup> It is also a party to the African Charter on Human and Peoples’ Rights.<sup>151</sup> The DRC is thus bound to not only respect the relevant human rights norms and standards enshrined in the foregoing agreements, but also to actively take the necessary measures to prevent and punish their potential violation throughout its territory, including the commission of crimes of sexual violence by both State and non-State actors.

Moreover, principles of international humanitarian law and international criminal law are binding on the DRC, through the 1949 Geneva Conventions,<sup>152</sup> the 1977 Additional Protocols I<sup>153</sup> and II<sup>154</sup> and the ICC Statute, respectively.

<sup>145</sup> DRC Constitution, 2006, Article 215, see *supra* note 143.

<sup>146</sup> ICCPR, Article 15 (1), *supra* note 128; African Charter on Human and Peoples’ Rights, 27 June 1981, Article 7 (2) (<https://www.legal-tools.org/doc/f0db44/>) (‘Banjul Charter’).

<sup>147</sup> ICCPR, *supra* note 128.

<sup>148</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, (<https://www.legal-tools.org/doc/713f11/>).

<sup>149</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979 (<https://www.legal-tools.org/doc/6dc4e4/>).

<sup>150</sup> Convention on the Rights of the Child, 20 November 1989 (<https://www.legal-tools.org/doc/f48f9e/>).

<sup>151</sup> Banjul Charter, see *supra* note 147.

<sup>152</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (<https://www.legal-tools.org/doc/baf8e7/>); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, (<https://www.legal-tools.org/doc/0d0216/>); Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949 (<https://www.legal-tools.org/doc/365095/>); Fourth Geneva Convention, see *supra* note 49.

<sup>153</sup> Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/d9328a/>).

<sup>154</sup> Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (<https://www.legal-tools.org/doc/fd14c4/>).

More specifically, the DRC ratified the ICC Statute on 11<sup>th</sup> April 2002. The legislative decree authorising the ratification of the ICC Statute was signed by the DRC President on 30 March 2002, while the ICC Statute was published in the Official Journal of the DRC on 5 December 2002.<sup>155</sup> The ICC Statute's provisions on substantive law are very detailed and precise. However, many of its provisions differ greatly from existing national legislation, while its procedural law cannot be directly applied to the DRC without some difficulty.<sup>156</sup>

Legislation implementing the ICC Statute in the DRC national legal framework has remained in draft form since its preparation in 2005.<sup>157</sup> In June 2015, the Chamber of Deputies of the DRC voted unanimously for the adoption of the legislation implementing the ICC Statute in the domestic legal order. However, the Bill must also be adopted by the Senate before entering into force.

In the meantime, national judges have started to directly apply the ICC Statute in judgments issued by domestic courts,<sup>158</sup> often preferring to apply provisions of the ICC Statute rather than national law due to the clarity of the ICC Statute's definitions.<sup>159</sup>

Some examples of cases where national judges invoked the ICC Statute and/or international jurisprudence can be found in section 3.2.5.

### 3.2.2. DRC Legislation on Core International Crimes

Until 2013, core international crimes were subject to the exclusive jurisdiction of military criminal courts in the DRC, irrespective of the civil or military status of the alleged perpetrator.<sup>160</sup> However, a newly-enacted law expanded the jurisdiction of civil courts with regard to certain cases involving core international crimes. Indeed, appellate courts (*Cours d'Appel*) can now examine cases of genocide and crimes against humanity when committed by persons falling under their jurisdiction.<sup>161</sup> Acts of genocide, crimes against humanity and war crimes allegedly committed by members of the national armed forces or the national police remain under the jurisdiction of the military courts.<sup>162</sup> The *Cour de Cassation* retains overall appellate control over the decisions issued by both military and civil courts.<sup>163</sup>

Core international crimes are defined in the Military Criminal Code. However, a simple reading of its provisions demonstrates “confusion between and within the offences of crimes against humanity and war crimes”.<sup>164</sup>

<sup>155</sup> Journal Officiel de la République Démocratique du Congo, “Instruments internationaux et régionaux relatifs aux droits de l’homme ratifiés par la République Démocratique du Congo”, December 2002, pp. 169-243.

<sup>156</sup> Avocats Sans Frontières (‘ASF’), “La mise en œuvre judiciaire du Statut de Rome en République du Congo”, April 2014, p. 11 (‘ASF Report’).

<sup>157</sup> See Olympia Bekou and Sangeeta Shah, “Realising the Potential of the International Criminal Court: The African Experience”, in *Human Rights Law Review*, 2006, vol. 6, no. 3, p. 499.

<sup>158</sup> ASF, “Case Study: The Application of the Rome Statute of the International Criminal Court by the courts of the Democratic Republic of Congo”, 2009 p. 5 (‘ASF Case Study’).

<sup>159</sup> ASF Report, 2014, p. 21, see *supra* note 157.

<sup>160</sup> DRC Constitution, 2006, Article 56, see *supra* note 143; Loi n° 024-2002 du 18 novembre 2002 portant Code Pénal Militaire, 18 November 2002, Journal Officiel de la RDC, 20 March 2003, Article 10 (‘Military Criminal Code’).

<sup>161</sup> Act organising the functioning and jurisdiction of the courts, 2013, Article 91, see *supra* note 145.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.* Article 95.

<sup>164</sup> ASF Case Study, 2009, p. 22, see *supra* note 159.



Indeed, Article 165 defines crimes against humanity as “serious violations of international humanitarian law committed against any civilian population before or during war”, adding that “crimes against humanity are not necessarily related to the state of war”.<sup>165</sup> This Article understandably creates confusion, as it combines elements of both crimes against humanity and war crimes.

International humanitarian law may only be applied in case of an armed conflict. Crimes against humanity, as the provision accurately observes, may occur *even in the absence* of armed conflict. Their acute criminality stems from the attack on a civilian population.<sup>166</sup> The confusion created by such provisions has led national courts to directly apply the ICC Statute, preferring its clear language and detailed definitions.<sup>167</sup>

### 3.2.3. DRC Legislation on Sexual Violence

Regarding the status of sexual violence in the national legislation, it is worth noting that the Constitution gives rise to an obligation on the part of the State to eliminate sexual violence, underlining that sexual violence is a crime against humanity and punishable by the law when committed against a person with the intention of destabilising and disrupting families and destroying a whole people.<sup>168</sup>

Traditionally, rape and sexual violence in general were regulated by the Congolese Criminal Code (‘CC’) under the title “Crimes against the order of families”.<sup>169</sup>

The Military Criminal Code also criminalises violence against the civilian population in general,<sup>170</sup> while also explicitly criminalising rape as a crime against humanity.<sup>171</sup> It is also notable that committing acts of sexual violence may lead to dismissal for a military officer, according to the Statute regulating the Military.<sup>172</sup>

In 2006, the government introduced two laws on sexual violence, modifying the Criminal Code and Code of Criminal Procedure (‘CCP’).<sup>173</sup> The laws on sexual violence introduced a number of innovations:

- Detailed definitions of the sex crimes prohibited in the DRC were introduced. The influence of international criminal law – and the ICC Statute in particular – is evident in the adopted definitions.<sup>174</sup>

<sup>165</sup> Military Criminal Code, 2002, see *supra* note 161.

<sup>166</sup> Cryer *et al.* (eds.), 2014, p. 232, see *supra* note 24.

<sup>167</sup> ASF Case Study, 2009, p. 24, see *supra* note 159.

<sup>168</sup> DRC Constitution, 2006, Article 15, see *supra* note 143.

<sup>169</sup> Code Pénal Congolais, 30 November 2004, Journal Officiel de la RDC, 30 November 2004, Articles 165-178 (<https://www.legal-tools.org/doc/db60e2/>) (‘Criminal Code’).

<sup>170</sup> Military Criminal Code, 2002, Article 103, see *supra* note 161.

<sup>171</sup> Military Criminal Code, 2002, Article 169(7), see *supra* note 161.

<sup>172</sup> Loi n° 13-005 du 15 janvier 2013 portant Statut du Militaire des Forces Armées de la République Démocratique du Congo, 15 January 2013, Journal Officiel de la RDC, 25 January 2013, Articles 256-257 (‘Statute regulating the Military’).

<sup>173</sup> Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais, 20 July 2006, Journal Officiel de la RDC, 1 August 2006 (<https://www.legal-tools.org/doc/d4c0ae/>) (‘Law on sexual violence modifying the Criminal Code’); Loi n° 06/019 du 20 juillet modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais, 20 July 2006, Journal Officiel de la RDC, 1 August 2006 (<https://www.legal-tools.org/doc/350150/>) (‘Law on sexual violence modifying the Code of Criminal Procedure’).

<sup>174</sup> See, for example, the definitions of actions constituting rape in Article 170 of the Criminal Code or the definitions of newly-introduced crimes: forced prostitution, sexual slavery and forced marriage in Article 174 (c), (e) and (f) thereof. Criminal Code, 2004, see *supra* note 170; Law on sexual violence modifying the Code of Criminal Procedure, see *ibid.*



- The age of consent was raised to 18, meaning that engaging in a sexual act with a minor constitutes statutory rape (Article 167 (2) and 170 CC).
- Gender neutral provisions were introduced (Article 170 (1) (a-c-d) CC).
- The context surrounding rape was modified, to include the use of psychological pressure and a coercive environment (Article 170 (1) CC).
- The applicable aggravating circumstances were modified and new ones were introduced, including rape committed in public, rape of disabled persons and rape committed with the use or threat of weapons (Article 171bis. (6)(7)(9)(10) CC).
- New crimes were introduced into the national legal order, namely forced prostitution, sexual slavery and forced marriage (Article 174 c, e and f CC).
- Capital punishment for cases of rape that result in the death of the victim was abolished (Article 171 CC).
- That the official capacity of alleged perpetrators cannot exclude their criminal responsibility was acknowledged (Article 42bis and ter CC).
- That the silence of the victim does not constitute consent, while the prior sexual conduct of the victim cannot be used in evidence against them was established (Article 14ter CCP).
- Strict temporal limits regarding the conduct of preliminary examinations, the trial and the pronouncement of the judgment were introduced (Article 7bis (1) CCP).
- Measures of protection and assistance for victims of sex crimes were introduced (Article 7bis(4), Article 14bis and Article 74bis CCP).
- The obligation of investigative and prosecutorial authorities to inform the commander of the alleged perpetrator of a sex crime before arresting them was abolished (Article 10 CCP).

Furthermore, in 2009 the national legislator drafted legislation to ensure the protection of children.<sup>175</sup> The law recognised specific rights and protective procedures for children against sexual violence:

- Aggravating circumstances particular to sex crimes against children were recognised (Article 170 Law on the protection of children).
- A detailed definition of the crime of rape of children was introduced (Article 171 Law on the protection of children).

It criminalised sex crimes specifically targeting children, including sexual slavery of children, sterilisation of children and deliberate transmission of AIDS/STDs (Arts. 175-183 Law on the protection of children).

### 3.2.4. DRC Criminal Procedure

Criminal Procedure in the DRC is regulated by the combined application of the Code of Criminal Procedure and the Act Organising the Functioning and Jurisdiction of the Courts.<sup>176</sup>

The responsibility for the initiation of investigation proceedings for a criminal offence lies with the State, represented by the Public Prosecutor (*Ministère Public*).<sup>177</sup>

<sup>175</sup> Loi n° 09/001 du 10 janvier 2009 portant protection de l'enfant, 10 January 2009, Journal Officiel de la RDC, 25 May 2009 ('Law on the protection of children').

<sup>176</sup> Act organising the functioning and jurisdiction of the courts, 2013, see *supra* note 145.

<sup>177</sup> Act organising the functioning and jurisdiction of the courts, 2013, Article 67, see *supra* note 145.

The *Police judiciaire* is the entry point of a case to the criminal justice system. This is the body responsible for receiving any complaints or reports of criminal offences, apprehending offenders, and collecting evidence.<sup>178</sup>

Once the *Police judiciaire* is informed of a criminal offence, its agents must investigate and collect any available evidence in accordance with Articles 1-10 CCP. The law requires that they create a detailed file of the case (*Procès-verbal*), which ought to be immediately transmitted to the competent authority.<sup>179</sup>

The competent authority is the officers of the Parquets (local prosecutorial services) within each jurisdiction.<sup>180</sup> Once they receive the *Procès-verbal*, the investigators are to proceed with further enquiries into the case and to examine all available information. They may invite witnesses to provide testimony at this stage of the process,<sup>181</sup> while they may also request the provisional detention of the alleged perpetrator.<sup>182</sup>

If the public prosecutors within the Parquets decide to proceed with the case, they must transmit it to the relevant court.<sup>183</sup> The trial stages are described in Article 74 CCP and ensure the participation of all interested parties in the proceedings. Courts are to pronounce their judgment within a period of eight days from the closure of the proceedings.<sup>184</sup>

The accused, any civil parties and the Public Prosecutor have the right to appeal the judgment,<sup>185</sup> while the responsibility for the execution of the judgment lies with the Public Prosecutor.<sup>186</sup>

### 3.2.5. National Jurisprudence

To better appreciate the application of the framework described above, the Report will turn to some examples of the emerging national jurisprudence and domestic application of international law.

#### 3.2.5.1. Applicable Law

Congolese judges first invoked the direct applicability of the ICC Statute in the DRC in 2006, in accordance with Article 215 of the Constitution. More specifically, the judges in the case of *Songo Mboyo* stated that:

[...] international treaties and agreements that have been properly ratified and published have supremacy over national legislation, subject to their respect by the

<sup>178</sup> Décret du 6 août 1959 portant le Code de procédure pénale, 6 August 1959, Article 2 (<https://www.legal-tools.org/doc/734d4e/>) ('Code of Criminal Procedure').

<sup>179</sup> *Ibid.*, Article 2(2).

<sup>180</sup> Act organising the functioning and jurisdiction of the courts, 2013, Article 65, see *supra* note 145.

<sup>181</sup> Code of Criminal Procedure, 1959, Article 16 et seq., see *supra* note 179.

<sup>182</sup> *Ibid.*, Articles 27-47.

<sup>183</sup> *Ibid.*, Article 53.

<sup>184</sup> *Ibid.*, Article 80.

<sup>185</sup> *Ibid.*, Article 96.

<sup>186</sup> *Ibid.*, Article 109.

other contracting party.<sup>187</sup>

The direct applicability of the ICC Statute was upheld more recently in the *Kazungu* case, where the judges decided that:

[...] The Tribunal will apply the Rome Statute of the International Criminal Court, which, since its ratification, forms part of the national legal system, especially since this legal instrument is more explicit as to the definition of concepts, more favourable to defendants in that it does not provide for the death penalty and better suited in that it provides clear mechanisms for protecting the rights of victims.<sup>188</sup>

### 3.2.5.2. Crimes

To properly define rape, national judges have also referred to referred to the Elements of Crimes, an interpretative document for the ICC Statute.<sup>189</sup> In the case of *Songo Mboyo*, it was held that:

Rape as an inhuman act is defined differently under domestic law and international law. In fact, the interpretation included in the Elements of Crimes, a supplementary source to the Rome Statute, greatly extends the scope of rape to include any inhuman act with gender-specific connotations. Thus, incidents where the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim by the perpetrator, including the anus or vagina either with a sexual organ or any object or any other part of their body constitutes rape under the present Statute. In the case under consideration, there was sexual penetration by the insertion of the erect penis of the agent in the vaginal parts of the victims [...].<sup>190</sup>

The judges in the *Kibibi* case went to great lengths to analyse the concept of crimes against humanity consisting of ‘other inhumane acts’. Drawing upon the jurisprudence of the ICTR, they explained that the crimes committed against the population of *Fizi* constituted crimes against humanity:

International jurisprudence holds that [...] “a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends”. (ICTR, *Prosecutor v. Kayishema and Ruzindana*, para. 154 sic. 153). The human dignity of children, husbands and other members of a family, unable to prevent the rape of women by multiple assailants, greatly suffers, while the destabilisation of many homes, depriving marital joy [and] looting the goods or private property of small traders inflict great harm on the victims; while bodily harm, inflicted by the use of daggers and bayonets, causes great injury to the physical and mental integrity of the victims.<sup>191</sup>

<sup>187</sup> Tribunal Militaire de Garnison de Mbandaka, *Affaire Songo Mboyo*, Jugement, 12 April 2006 (*Songo Mboyo* case’).

<sup>188</sup> Tribunal Militaire de Garnison de Bukavu, *Affaire Kazungu*, Jugement, 16 August 2011 (*Kazungu* case’).

<sup>189</sup> Elements of Crimes, see *supra* note 9.

<sup>190</sup> *Songo Mboyo* case, see *supra* note 188.

<sup>191</sup> Cour Militaire du Sud-Kivu, *Affaire Kibibi*, Arrêt, 29 February 2011 (*Kibibi* case’).

### 3.2.5.3. Victims' Rights

The Military Tribunal in the *Kazungu* case recognised the protection afforded to victims by international criminal law. The judges sought to protect the victims that provided testimony and/or were civil parties to the case. According to the Judgment:

[...] The Military Tribunal, in accordance with Article 68 of the Rome Statute of the ICC, decided to anonymise those who are civil parties, especially those who testified before the judges since they are exposed to retaliation by other elements of the FDLR RASTA that have not yet been arrested. This fear was substantiated by the Tribunal since the V17 victim argued that ever since the accused MANIRAGUHA was arrested in the village of KALEGA, their village has in effect remained uninhabited until now for fear of reprisals.<sup>192</sup>

Equally, in the *Kibibi* case, the Military Court for South Kivu decided to apply Article 68 of the ICC Statute and assign code-names to the civil party members to protect rape victims, stating that:

They (the victims) are still exposed to reprisals by elements of the 43rd military division still present in the area. This fear was deemed well-founded by the Court as Ms Aline Santa Mambo, a nurse working at the hospital that received many of the victims, has confirmed that she has been threatened after refusing to give out the names of the women she took care of.<sup>193</sup>

This brief discussion of the emerging jurisprudence emanating from national courts in the DRC aims to highlight national practice and the themes for which national judges have sought the guidance of international law. Other issues that have been examined by national courts in the DRC with reference to the applicable principles of international humanitarian law and international criminal law and procedure include defences<sup>194</sup>, the concept of command responsibility<sup>195</sup> and sentencing.<sup>196</sup>

## 3.3. Obstacles and Challenges

All national prosecutorial systems are selective in one way or another. Decisions are made every day that consciously – or otherwise – give priority to one case over another.

The decision to focus on specific types of criminality is linked to the concept of prosecutorial discretion. Prosecutorial discretion involves the exercise of the prosecutor's independent professional judgment and "enables the decision maker to choose between two or more permissible courses of action and to adapt his decision to existing circumstances".<sup>197</sup>

<sup>192</sup> *Kazungu* case, see *supra* note 188.

<sup>193</sup> *Kibibi* case, see *supra* note 191.

<sup>194</sup> *Songo Mboyo* case, see *supra* note 187.

<sup>195</sup> *Kazungu* case, see *supra* note 188.

<sup>196</sup> *Ibid.*

<sup>197</sup> Nsereko, 2005, pp. 124-144, see *supra* note 66.

The decision to prioritise the investigation and prosecution of specific cases in the docket may be influenced by a number of factors such as limited resources, the availability of legal actors in the criminal justice system, and the presence and quality of available evidence.

In post-conflict and/or transitional situations, State mechanisms, designed to protect the wider population and to ensure law and order, are severely impaired, if not completely destroyed. Moreover, the capacity of national criminal justice systems is challenged by high levels of criminality and the inability to react thereto in a timely and effective manner. Using the criteria proposed in this Report, the national authorities in the DRC can maximise the impact of their work and greatly facilitate the work of national judges. The proposed criteria seek to hold responsible those most responsible for mass atrocities in the DRC<sup>198</sup> and address evidence and operational related issues. They moreover, aim to provide judges with detailed and well supported information regarding the commission of crimes, allowing them to have a full overview of the facts of a given case and to identify and apply the relevant legislation.

The DRC criminal justice system faces a number of challenges caused – at least in part – by the contemporary armed conflict. Despite the concerted efforts of government authorities to rebuild and strengthen national justice mechanisms, a number of issues remain.

These challenges are explored below, followed by a consideration of the reasons for prioritising cases involving core international crimes in general, and sex crimes in particular.

### 3.3.1. Budget

The smooth functioning of any criminal justice system depends on the working conditions in its institutions and the resources placed at its disposal. The justice sector in the DRC has been severely underfunded for many years. In this regard, the Special Rapporteur on violence against women, its causes and consequences has noted that “while most countries dedicate 2-6 per cent of their national budget to the justice sector, in the Democratic Republic of the Congo this was only 0.6 per cent of the 2005 and 2006 national budget”.<sup>199</sup>

It appears that a conscious effort is being made on the part of the government to increase its expenditure on the justice sector.<sup>200</sup> For example, in the 2015 budget, the DRC government has allocated 30.91% of its general budget for the continuation and completion of institutional reforms to strengthen the effectiveness of the State. Indeed, 126.3 billion Congolese Francs (‘CF’) were dedicated to the judicial system, while 49.4 billion CF were allocated to promote gender equality and improve the status of women and children.<sup>201</sup> These represent 1.40% and 0.58% of the overall national budget, respectively.

The increased allocation of resources to the judicial sector is very encouraging. Civil society, however, remains cautious to this end and has previously claimed that even an allocation of

<sup>198</sup> See analysis in section 3.5.4, *infra*.

<sup>199</sup> UN Human Rights Council (‘UNHRC’), “Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk”, Addendum, 28 February 2008, A/HRC/7/6/Add.4, para. 71.

<sup>200</sup> Open Society Foundations (‘OSF’), “RDC : Le secteur de la justice et l’Etat de droit”, July 2013, p. 57 (‘OSF Report’).

<sup>201</sup> RDC, Ministère du Budget, “Budget Citoyen 2015: Chiffres, Politiques publiques, Actions et Mesures en condensés”, February 2015.

2-6 per cent of the overall State budget to the justice sector would not be sufficient to ensure the smooth functioning of the national justice system in the DRC.<sup>202</sup>

### 3.3.2. Availability of Legal Actors

The quality of the services offered by a national criminal justice system is greatly influenced by the availability of legal actors. The vastness of the territory of the DRC and the size of its population – coupled with the effects of the protracted armed conflict in many parts of the country – have created a multitude of needs that may be problematic to overcome.

As of July 2013, there were only 45 operational *Tribunaux de Paix* (Peace Courts), 13 *Cours d'Appel* (Courts of Appeal) and 27 *Tribunaux de Grande Instance* (High Courts) across the DRC.<sup>203</sup> Moreover, the military criminal justice system currently comprises 50 courts.<sup>204</sup>

The work carried out by these permanent mechanisms of justice has been supplemented by the establishment of mobile courts. Mobile courts are legally recognised, established under Article 45 of the Act organising the functioning and jurisdiction of the courts.<sup>205</sup> These courts were created to bring justice to the population of remote areas,<sup>206</sup> largely dealing with crimes committed by soldiers against civilians, with a strong emphasis on sexual and gender-based violence.<sup>207</sup>

Moreover, the latest number of available Magistrats (Magistrates) – both civilian and military – is not sufficient to meet the needs of the national criminal justice system.<sup>208</sup> The ratio *per capita* was estimated in 2013 to be one magistrate per 17,000 inhabitants.<sup>209</sup> With regard to military justice in particular, as of 2014, there were only 400 military magistrates, expected to try all the crimes committed by the national military forces and the National Police.<sup>210</sup>

It must be noted, however, that significant efforts seem to be taking place to reinforce the judicial system in the DRC, through the deployment to the field of a significant number of additional magistrates and the construction of judicial infrastructure.<sup>211</sup> Moreover, the UN Secretary General observed that not only did President Joseph Kabila appoint a Personal Representative on Sexual Violence and Child Recruitment in July 2014 – Jeanine Mabunda Lioko – but also that the DRC Government has taken unprecedented steps towards criminal accountability in 2014, including the prosecution of high-ranking military officials and the payment of compensation to survivors of conflict-related sexual violence.<sup>212</sup>

<sup>202</sup> OSF Report, 2013, p. 57, see *supra* note 200.

<sup>203</sup> *Ibid.*

<sup>204</sup> OHCHR Report, 2014, p. 19, see *supra* note 120.

<sup>205</sup> Act organising the functioning and jurisdiction of the courts, 2013, Article 45, see *supra* note 144.

<sup>206</sup> International Legal Assistance Consortium ('ILAC') and International Bar Association ('IBA'), "Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of the Congo", August 2009, p. 26 ('ILAC/IBA Report').

<sup>207</sup> Tessa Khan and Jim Wormington, "Mobile Courts in the DRC: Lessons from Development for International Criminal Justice", in Oxford Transitional Justice Research Working Paper Series, 2011, available at: <http://otjr.crim.ox.ac.uk/materials/papers/178/mobile%20courts%20DRC.pdf>, last accessed at 14 May 2015.

<sup>208</sup> OSF Report, 2013, p. 57, see *supra* note 200.

<sup>209</sup> *Ibid.*

<sup>210</sup> OHCHR Report, 2014, p. 19, see *supra* note 120.

<sup>211</sup> *Ibid.*

<sup>212</sup> UNSG Report on conflict-related sexual violence, 2015, paras. 23 and 25, see *supra* note 132. See also Women Under Siege, "The woman charged with stopping rape in Congo: A Q&A with Jeanine Mabunda", available at <http://www.womenundersiegeproject.org/blog/entry/the-woman-charged-with-stopping-rape-in-congo-a-qa-with-jeanine-mabunda>, last accessed at 19 May 2015.



### 3.3.3. Inadequate Facilities

The work carried out by judicial staff in the DRC is hindered by the difficult conditions they face in the course of the day-to-day functioning of the criminal justice system.

Most of the buildings that host legal services were built in the 1920s. As a result, the passage of time and the long periods of fighting over a number of decades have left the buildings in poor condition.<sup>213</sup> This situation is aggravated by a lack of regular maintenance.<sup>214</sup>

Essential equipment such as typewriters, filing cabinets and communication tools is often unavailable. This permits the misplacement – or destruction – of legal documents,<sup>215</sup> while communication and exchange of information between jurisdictions is limited and irregular.<sup>216</sup>

An added difficulty that the national legal actors face is their limited access to legal documentation.<sup>217</sup> The Official Journal of the DRC (*Journal Officiel*) is the main outlet for the publication and dissemination of legal information. However, its publication has often been irregular, while its distribution is limited to only twelve points throughout the DRC territory.<sup>218</sup>

### 3.3.4. Provision and Accessibility of Legal Services

Among the services available to the victims of sexual and gender-based violence in the DRC, those offered by the judicial sector are the least used.<sup>219</sup>

This disuse has been justified by a variety of reasons in a 2013 Report report by the DRC Ministry of Gender, Family and the Child.<sup>220</sup> Lack of trust on the part of victims in the justice system and a fear of intimidation and reprisals by the accused were cited by 20% of participating survivors as the reason behind their decision against formally pursuing justice. Geographical restraints, such as the location of legal service providers in the big cities, far from the place of residence of most victims, also represented a deterring factor. The lack of financial means was an additional reason for which many victims prefer not to legally pursue the perpetrator of the crime committed against them: 15% of the participants claimed distance and lack of financial means were the reason for not turning to the official justice mechanisms.<sup>221</sup>

<sup>213</sup> OSF Report, 2013, p. 64, see *supra* note 200.

<sup>214</sup> ILAC/IBA Report, 2009, p. 26, see *supra* note 206.

<sup>215</sup> OHCHR Report, 2014, p. 19, see *supra* note 120.

<sup>216</sup> ILAC/IBA Report, 2009, p. 24, see *supra* note 206.

<sup>217</sup> OSF Report, 2013, p. 66, see *supra* note 200.

<sup>218</sup> *Ibid.*, p. 67.

<sup>219</sup> National Study on Sexual Violence, 2013, p. 26, see *supra* note 131.

<sup>220</sup> *Ibid.*, p. 34.

<sup>221</sup> *Ibid.*, p. 34.

### 3.3.5. Traditional Justice

The limited accessibility of formal justice mechanisms in the DRC leads many victims of sexual and gender-based violence to pursue traditional and family-centred proceedings.<sup>222</sup>

Traditional justice is formally recognised in the DRC and the Ministry of Justice has acknowledged that, in many cases, traditional leaders are the first judicial authorities to which many citizens refer their complaints.<sup>223</sup> Concerns have, however, been expressed about the rights and respect afforded to the victim in the course of such proceedings.<sup>224</sup>

### 3.3.6. Delays

Time represents a significant challenge for any criminal justice system faced with a large number of case files. The right to a fair trial prescribes that an accused person should be tried without undue delay.<sup>225</sup> In this light, each case must be processed by the national criminal justice system within a reasonable timeframe.

The Law on Sexual Violence requires that a case is concluded within three months after it enters the justice system.<sup>226</sup> The number of cases in the docket of the criminal justice system in the DRC and the infrastructural constraints analysed in previous paragraphs have resulted in heavy delays in the processing of cases. Indeed, the legally prescribed maximum period of three months is often exceeded.<sup>227</sup> According to a 2008 report by the independent expert on the situation of human rights in the DRC, in South Kivu, nearly 80% of rape cases had been under investigation for more than two years.<sup>228</sup> In Province Orientale, 54% of cases of sexual violence exceeded the three-month maximum time period before their first hearing.<sup>229</sup> For example, the trial of the persons accused in the Minova mass rape incident in 2012 was concluded on 5 May 2014.<sup>230</sup>

Concerns have also been raised regarding the reluctance of the military and police authorities to cooperate with investigators and to arrest or hand over the suspects.<sup>231</sup>

## 3.4. Sex Crimes in the DRC

The foregoing infrastructural and budgetary constraints result in an overwhelming backlog of cases, which the DRC national legal system will never be able to process. Prioritisation has been designed in order to deal with concrete challenges such as those analysed above.

<sup>222</sup> *Ibid.*

<sup>223</sup> ILAC/IBA Report, 2009, p. 24, see *supra* note 206.

<sup>224</sup> HHI, "Characterizing Sexual Violence in the Democratic Republic of the Congo: Profiles of Violence, Community Responses, and Implications for the Protection of Women", August 2009, p. 28 ('HHI Profiles of Violence Report').

<sup>225</sup> ICCPR, Article 14(3) (c), *supra* note 128.

<sup>226</sup> Law on sexual violence modifying the Criminal Code, 2006, see *supra* note 173.

<sup>227</sup> Mpaka Kiansiku, "Rapport des Infractions de Violences Sexuelles: Statistiques des Infractions de Violences Sexuelles Rapportées en Province Orientale entre Septembre 2013 et Avril 2014", October 2014 (on file with authors) ('Statistical Report').

<sup>228</sup> UNHRC, "Report of the independent expert on the situation of human rights in the Democratic Republic of the Congo, Mr. Titinga Frédéric Pacéré", 29 February 2008, A/HRC/7/25, para. 47 ('UNHRC DRC Report').

<sup>229</sup> Statistical Report, 2014, Executive summary, see *supra* note 227.

<sup>230</sup> UNSG Report on conflict-related sexual violence, 2015, para. 25, see *supra* note 132.

<sup>231</sup> UNHRC DRC Report, 2008, paras. 23-24, see *supra* note 228; OHCHR Report, 2014 p. 13, see *supra* note 120.



## Crime selection and prioritisation in the field of criminal justice for atrocities primarily takes place in response to the practical challenge of prudently applying limited resources.<sup>232</sup>

A selection of cases is therefore deemed necessary. The following section of the Report will explain why cases involving core international crimes in general, and sex crimes in particular, should be prioritised. In addition, the subsequent section will propose a number of specific indicators that are particularly relevant in the DRC context.

Narrowing the scope of an investigation and prosecution to a specific type of criminality such as sexual and gender-based crimes inevitably raises questions. One cannot but wonder why sex crimes should be prioritised over other core international crimes.

Before explaining the rationale behind a prioritised prosecution of sex crimes, a clarification is needed; the present Report is not advancing the thematic prosecution of international sex crimes *to the exclusion of* other core international crimes.

By their very nature, all core international crimes need to be addressed and all their victims deserve justice. National criminal jurisdictions should therefore strive to respond to all the various types of violence and victimisation over which they have jurisdiction.

However, when a jurisdiction faces challenges like those analysed in section 3.3. or simply aims to administer justice in a more effective and efficient manner, the proposed indicators provide an objective basis on which such an approach can be based.

Therefore, the present Report simply suggests *a structured prosecutorial strategy* that will be *inclusive and representative* of the criminality observed in a specific post-conflict and/or transitional situation. The indicators proposed in section 3.5. can be adapted to respond to the different needs that arise during conflict and the ensuing transitional period, but also to facilitate the administration of justice in well-established criminal justice systems.

However, before examining the indicators that should be used for the prioritisation of cases in the DRC, it is imperative to identify the reasons for which *a sexual and gender-based perspective must be mainstreamed into national prosecutorial strategy in the DRC*, given the prominence of the phenomenon in the contemporary conflict and its grave impact on the local communities.

Sex crimes constitute an affront to the physical integrity of a person and are therefore deemed very serious by many jurisdictions around the world. However, they are often viewed as less serious than crimes resulting in death.<sup>233</sup> As examined above, it took many years before crimes of a sexual nature were included in the definition of core international crimes, while their successful prosecution remains a challenge for international prosecutors.

<sup>232</sup> Bergsmo and CHEAH, 2012, p. 4, see *supra* note 64.

<sup>233</sup> deGuzman, 2012, p. 13, see *supra* note 107.

The examination of the gravity of sex crimes in the DRC highlights the need for a prioritised approach to core international crimes cases with a sexual and gender-based element, as a way to address the widespread damage caused by such crimes.

The following analysis examines the scale, nature, manner of commission and impact of sex crimes in the DRC context.

### 3.4.1. Scale

Since the first reports on sexual violence in the DRC surfaced, a wide range of institutions, organisations and independent researchers have attempted to map the incidents of sexual violence using statistical analysis and population surveys.<sup>234</sup>

Although the methodologies and limitations of these surveys differ widely and aim to achieve diverse goals, they all share one principal conclusion: that the use of sexual and gender-based violence in the DRC has been widespread and regularly used since the mid-1990s to terrorise and dominate the local population.

A survey published in 2007 reported that approximately 1.69 to 1.80 million women claimed to have been raped in their lifetimes.<sup>235</sup> A nationwide study conducted by the DRC Ministry of Planning – examining the time-period between January and August 2007 – indicated that 16% of women had experienced forced sex, with 9.9% of the women surveyed claiming that their first sexual experience was forced.<sup>236</sup> The UNFPA reported that 15,996 new cases of sexual violence were registered in 2008 throughout the country, of which 4,820 cases were reported in the eastern province of North Kivu.<sup>237</sup> The DRC Ministry of Gender, Family and the Child released data indicating that 10,322 sexual violence incidents were reported in 2011 in the context of armed conflict in Eastern DRC. Moreover, this number increased by 52% in 2012 to 15,654 reported incidents.<sup>238</sup>

These figures listed above demonstrate that sexual violence is extremely prominent in the DRC and has affected a large part of the population. The scale of sex crimes in the DRC makes imperative the need for an immediate and efficient response.

### 3.4.2. Nature

Sexual violence in the DRC is usually perpetuated through rape. Indeed, approximately 90% of cases of sexual violence are cases of rape.<sup>239</sup>

Sexual slavery is also a common practice in the DRC: members of armed groups will often abduct women and young girls and keep them as ‘bush wives’. A common consequence of

<sup>234</sup> Nynke Douma and Dorothea Hilhorst, “Fond de commerce? Sexual violence assistance in the Democratic Republic of Congo”, Wageningen University, 2012, p. 27.

<sup>235</sup> Amber Peterman, Tia Palermo and Caryn Bredenkamp, “Estimates and Determinants of Sexual Violence against Women in the Democratic Republic of Congo”, in *American Journal of Public Health*, 2011, vol. 101, no. 6, p. 1060.

<sup>236</sup> *Ibid.*

<sup>237</sup> HRW Military Reform Report, 2009, p. 14, see *supra* note 139.

<sup>238</sup> National Study on Sexual Violence, 2013, see *supra* note 131.

<sup>239</sup> *Ibid.*

this practice is the birth of many children born as a result of forced sexual contact during the women's captivity.<sup>240</sup>

Genital mutilation is also particularly prevalent in the context of the armed conflict in the DRC.<sup>241</sup>

### 3.4.3. Manner of Commission

According to Dr Mukwege, the perpetration of sexual and gender-based violence in the DRC can be characterised as “extreme violence”.<sup>242</sup>

The majority of rape cases in the DRC are gang rapes.<sup>243</sup> They also include rape carried out in public or in the presence of family members, forced incest and rape with instruments.<sup>244</sup>

Sexual violence is often accompanied by other acts of violence. For example, gang rape and rape in public are frequently committed while whole villages are attacked and looted.<sup>245</sup>

### 3.4.4. Impact

The impact of sex crimes is often much greater than that of other core international crimes. It is not only the direct victim that suffers the physical and mental effects of a violent act of sexual nature. Sexual and gender-based violence is a tool used to terrorise and dominate local communities and destroy a population. It has far-reaching consequences that may define the future of an entire people.

#### 3.4.4.1. Medical Issues and Reproductive Health

The high prevalence of sex crimes is not only an issue of public security and order, but also an issue of public health. The majority of the victims of sexual violence in the DRC are female: girls aged 12-17 years and women aged 18-25 years have been those most affected by sexual and gender-based crimes.<sup>246</sup>

As a consequence, many victims have developed serious medical problems that threaten their reproductive health and indeed their lives. The Panzi Hospital, the best-funded hospital in South Kivu for the treatment of sexual violence, has received – over a number of years – thousands of patients requiring medical care for urogenital traumas, genital and/or anal wounds, genital mutilations and other complications, such as fractures of the pelvis and femur. HIV/AIDS and other sexually transmitted infections represent an additional serious consequence of the widespread sexual violence in the DRC.<sup>247</sup>

<sup>240</sup> HRW Military Reform Report, 2009, p. 14, see *supra* note 139.

<sup>241</sup> Mukwege and Nangini, 2009, p. 2, see *supra* note 138.

<sup>242</sup> *Ibid.*

<sup>243</sup> National Study on Sexual Violence, 2013, see *supra* note 131.

<sup>244</sup> International Trade Union Confederation, “Violence against women in Eastern Democratic Republic of Congo: Whose responsibility? Whose complicity?”, November 2011, p. 26.

<sup>245</sup> HHI Profiles of Violence Report, 2009, p. 16, see *supra* note 224.

<sup>246</sup> National Study on Sexual Violence, 2013, p. 17, see *supra* note 131.

<sup>247</sup> Mukwege and Nangini, 2009, p. 2, see *supra* note 138.

The age of most sex crimes victims – coupled with the regular, serious medical complications experienced thereby – threaten the reproductive health of women of childbearing age, thus leading an entire population towards a slow death.<sup>248</sup>

#### 3.4.4.2. Impact on the Local Economy

Women in the DRC assume a multitude of roles. They are, first and foremost, wives and mothers. However, as a result of the conflict, they have often become the primary income earner for entire families, with their husbands either at war, dead or unable to find a job. Women have thus become the ‘driving force’ of the local economy.<sup>249</sup>

The post-traumatic stress experienced by victims of sexual and gender-based violence has resulted in a significantly reduced ability and desire of women to farm, trade and travel. Consequently, local communities suffer from a considerable reduction in their income, lack of everyday necessities and increased poverty.<sup>250</sup>

#### 3.4.4.3. Impact on Families and Local Communities

The trauma of sexual and gender-based violence extends to the community level due to the social stigma associated with it and the ensuing social exclusion of its victims. As families disintegrate for reasons associated with sexual violence, social cohesion also breaks down.<sup>251</sup>

This observation is commonplace in communities that have endured long periods of conflict and social disorder. It was especially noted in Sierra Leone, whose conflict was characterised by high levels of sexual and gender-based violence. The SCSL – the tribunal established to adjudicate crimes committed during the eleven-year civil war – observed that:

[...] the victims of sexual violence continue to live their lives in isolation, ostracised from their communities and families, unable to be reintegrated and reunited with their families and/or in their communities. Many of these victims of sexual violence were ostracised or abandoned by their husbands, and daughters and young girls were unable to marry within their community [...]. The Chamber observes that the shame and fear experiences by the victims of sexual violence, alienated and tore apart communities, creating vacuums where bonds and relations were initially established.<sup>252</sup>

<sup>248</sup> *Ibid.*

<sup>249</sup> HHI, “Hope for the Future Again: Tracing the effects of sexual violence and conflict on families and communities in eastern Democratic Republic of the Congo”, April 2011, pp. 11 and 17 (‘HHI Hope for the Future Report’).

<sup>250</sup> Réseau des Femmes pour un Développement Associatif, Réseau des Femmes pour la Défense des Droits et la Paix and International Alert, “Women’s Bodies as a Battleground: Sexual Violence Against Women and Girls During the War in the Democratic Republic of the Congo, South Kivu (1996-2003)”, April 2005, p. 29.

<sup>251</sup> HHI Hope for the Future Report, 2011, pp. 21-28, see *supra* note 249.

<sup>252</sup> SCSL, *Prosecutor v. Sesay et al.*, Sentencing Judgment, Case No. SCSL-04-15-T, 8 April 2009, para. 135 (<https://www.legal-tools.org/doc/f7fbfc/>).

#### 3.4.4.4. Children Born as a Result of Rape

An additional consequence of the increased number of incidents of sex crimes is the number of children born as a result of rape. These children face rejection by both their families and wider communities due to their association with rape, often being abandoned without care or access to basic services.<sup>253</sup>

#### 3.4.4.5. 'Normalisation' of Rape

In the DRC, after decades of widespread sexual violence in the context of armed conflict going unpunished, there has been an increase in the rates of rape and other types of sexual violence amongst civilians. This may be explained by a number of reasons.

To begin with, for the many men who have grown up in the recent decades of intense fighting, rape has become the norm.<sup>254</sup> The shift from war-related rape to increased incidents of civilian rape indicates a 'normalisation' of sexual violence within communities as a result of the widespread rape during the conflict as well as the ensuing impunity.<sup>255</sup>

Moreover, the chronic under-enforcement of the norms prohibiting sex crimes has rendered them weaker and less respected than norms criminalising other conduct. In the case of the DRC, laws prohibiting acts of sexual violence have not been ardently enforced, encouraging the repeat of such offences and perpetuating the sense of impunity.<sup>256</sup>

#### 3.4.4.6. Reproducing Discriminatory Practices

Finally to this end, allowing incidents of sexual and gender-based violence to go unpunished exacerbates discriminatory practices and ideas that existed prior to the conflict. Indeed, Margaret deGuzman correctly observes that "impunity of sex crimes reaffirms that women are second-class citizens and leaves them vulnerable and unprotected".<sup>257</sup>

The widespread occurrence of sex crimes and their grave impact in DRC society require an immediate and effective response. In light of the contextual information available on the DRC, it is suggested that prioritising the investigation and prosecution of sex crimes is necessary in order to focus its limited resources to successfully build complex and time-consuming cases. Fighting impunity for sexual and gender-based violence would allow the State apparatus to deal more effectively with its destructive effects.

<sup>253</sup> HHI Hope for the Future Report, 2011, p. 40, see *supra* note 249.

<sup>254</sup> HHI Profiles of Violence Report, 2009, p. 22, see *supra* note 224.

<sup>255</sup> HHI/Oxfam Report, 2010, p. 39, see *supra* note 134.

<sup>256</sup> HRW Military Reform Report, 2009, p. 14, see *supra* note 139.

<sup>257</sup> deGuzman, 2012, p. 41, see *supra* note 107.

### 3.5. Prioritisation in the DRC context

“The issue of thematic prosecution of international sex crimes, and other core international crimes, must be addressed by each jurisdiction on its own terms”.<sup>258</sup>

Indeed, every post-conflict and transitional situation presents unique characteristics. Each situation brings forward different needs and gaps to be filled. As such, uniformly applying the same indicators would be unwise and ineffective. However, the indicators listed in section 2.1.2. may be used as the starting point from which a prosecutorial strategy can be developed and adapted to the needs of any situation.

The indicators analysed in section 2.1.2. may offer useful guidance in mapping the types of criminality and victimisation that have taken place – and which may remain present – in the DRC. They should be used for the creation of a comprehensive prosecutorial strategy that will be *representative of the violence perpetuated in the country*.

The following indicators are identified as the most relevant to the DRC situation:

#### 3.5.1. Nature of the Criminal Acts

Rape remains the predominant form of sexual and gender-based violence in the DRC, as reported by a number of sources.<sup>259</sup> It is indicative that rape accounted for 90% and 82% of the reported incidents of sexual and gender-based crimes in 2011 and 2012, respectively.<sup>260</sup> Incidents of rape were followed by incidents of sexual slavery and other forms of sexual violence.<sup>261</sup>

#### 3.5.2. Modus Operandi of the Criminal Conduct

A comprehensive prosecutorial strategy requires that potential aggravating circumstances are taken into account when deciding which cases to prioritise for investigation and prosecution. In this regard, the nature of the act and the manner of its commission are the most important factors. The amount of violence involved, the number of perpetrators and the age of victim(s) also ought to be taken into account.

<sup>258</sup> Bergsmo and CHEAH, 2012, p. 4, see *supra* note 64.

<sup>259</sup> National Study on Sexual Violence, 2013, see *supra* note 131; Mukwege and Nangini, 2009, see *supra* note 138; UNSG Report on conflict-related sexual violence, 2015, para. 26, see *supra* note 132.

<sup>260</sup> National Study on Sexual Violence, 2013, p. 13, see *supra* note 131.

### 3.5.3. Location of the Crimes

In a country as vast as the DRC, it is extremely important to identify the locations where sexual and gender-based violence is most prominent.

Eastern DRC has been the focal point of the contemporary armed conflict. North and South Kivu in particular have been identified as ‘hot spots’ of sexual violence.<sup>262</sup> Province Orientale is another region identified as a region with a high prevalence of sexual violence.<sup>263</sup>

This is primarily due to the vulnerable geographical location of the region, near the borders of the DRC with Uganda, Rwanda and Burundi. Its position means that the numerous armed groups active in the area originate not only from the DRC but also from neighbouring States.

Spreading prosecutions geographically in order to cover as much of the affected territories as possible would dismiss any claims of bias, discrimination or favouritism and would take into consideration broader parts of the population affected by sexual and gender-based violence.

### 3.5.4. ‘Those Most Responsible’: Command and Superior Responsibility

The possibility to pursue those ‘most responsible’ for the sex crimes committed in the DRC is perhaps the definitive criterion for the prioritisation of crimes in this particular context.

As the Secretary General of the United Nations observes, “[m]ilitary personnel are responsive to training, unequivocal orders, disciplinary measures and the example set by their hierarchy”.<sup>264</sup> In the DRC, sexual violence has not been discouraged and punished; indeed, it has been used strategically.<sup>265</sup> Acts of sexual and gender-based violence have been used to garner political attention, as an instrument of control or as a way to terrorise the population in order to facilitate lootings.<sup>266</sup>

All the parties involved in hostilities in the DRC are responsible for committing sex crimes. As mentioned earlier in the Report, civilians have been targeted either as a terrorisation and domination technique or as a reprisal, on the basis of the real or perceived ethnicity of the population or their presumed political affiliation.<sup>267</sup>

Further difficulties are created by the complicate and delicate situation regarding the military. The disarmament, demobilisation and reintegration procedures have created an army that is largely constituted by ex-members of armed militia groups.<sup>268</sup> As a consequence, multiple and parallel chains of command are observed, with the units remaining “responsive to the

<sup>261</sup> *Ibid.*

<sup>262</sup> National Study on Sexual Violence, 2013, p. 11, see *supra* note 131.

<sup>263</sup> UNSC, “Report of the Security Council mission to the Democratic Republic of the Congo (13 to 16 May 2010)”, 30 June 2010, S/2010/288 (2010), para. 8; Statistical Report, 2014, Executive summary, see *supra* note 227; UNSG Report on conflict-related sexual violence, 2015, para. 23, see *supra* note 132.

<sup>264</sup> UNSG, “Conflict-related sexual violence: Report of the Secretary-General”, 13 January 2002, A/66/657\*-S/2012/33\* (2012), para. 5.

<sup>265</sup> LOGICA, “Sexual and Gender-based Violence in the Kivu Provinces of the Democratic Republic of Congo: Insights from Former Combatants”, September 2013, pp. 60-61.

<sup>266</sup> *Ibid.*

<sup>267</sup> UNSG, “Sexual violence in conflict: Report of the Secretary-General”, 14 March 2013, A/67/792-S/2013/149 (2013), para. 39.

<sup>268</sup> Maria Eriksson Baaz and Maria Stern, “The Complexity of Violence: A critical analysis of sexual violence in the Democratic Republic of the Congo”, Nordic Africa Institute, 2010, p. 19.



former and current belligerents, and not to the integrated command structures”.<sup>269</sup>

The foregoing facts underline the need to bring an end to impunity for those high in the chain of authority, particularly in the military. Consequently, as a general principle, priority must be given to cases involving (i) the mode of liability of command responsibility, (ii) crimes committed by public officials still in office, regardless of mode of liability, or (iii) by law enforcement officials, regardless of mode of liability.<sup>270</sup>

### 3.6. The Design of a National Policy and its Implementation

After examining the national legal framework in section 3.2., and having identified criteria and specific indicators for the selection and prioritisation of cases that aim to facilitate the work of national legal actors, the Report will now put forward practical steps to enable the practical application of these criteria. The implementation of such criteria may be adopted as a general national policy, but also as specific steps during the pre-trial stage of the criminal justice process in the DRC.

**Step 1: Mapping Exercise:** It is necessary for the Ministry of Justice and the Public Prosecutor (*Ministère Public*) to have a complete understanding of the criminality regarding sexual and gender-based violence in the DRC. A mapping of the open case files, which will create records of the total number of crimes committed, as well as the total number of suspects, will allow the Prosecutor to better understand where the need to address impunity is greater and more imperative.

**Step 2: Design and Implementation of a National Policy:** Having collected all the data through the mapping exercise, the Ministry of Justice should assess the existing gaps and needs and create a comprehensive national policy to be used by the Prosecutor and the Courts alike.

By using the indicators proposed in section 2.1.2., while also retaining a strong focus on those identified in the specific DRC context (section 3.5.), the policy created must assign clear tasks to all the actors of the criminal justice system. The policy should adopt an *overall strategy* for the investigation and prosecution of core international crimes with a sexual and/or gender-based element, taking into account the gravity of the crimes committed along with the overall recorder criminality and victimisation.

It is noted that the adopted policy should be in harmony with fair trial standards as regulated in the national and international level. Furthermore, it must respect the independence of the judiciary and seek the creation of an efficient and smooth system of case management, through the prioritisation of cases.

For the creation of such policy, the Report underlines the need for extensive consultations among the various level of jurisdictions (national and regional/local) and calls for cooperation among national and international stakeholders in building national capacity and knowledge.

<sup>269</sup> Maria Eriksson Baaz and Maria Stern, “Why do Soldiers Rape? Masculinity, Violence and Sexuality in the Armed Forces in the Congo (DRC), in *International Studies Quarterly*, 2009, vol. 53, no. 2, pp. 495-518.

<sup>270</sup> Bergsmo *et al.*, 2009, p. 85, see *supra* note 54.



**Step 3: Practical Application in the Pre-Trial stage: Creation of a Comprehensive Case File:** The officers within the Police Judiciaire are those who receive any complaints or reports of criminal offences.<sup>271</sup> They are required by law to create a case file (*Procès-verbal*) that will include information on:

1. The nature and circumstances of the commission of the offence;
2. The time and place of commission;
3. Any evidence or indicators as to the identity of the perpetrator;
4. Any testimony that may be available by persons who were present during the crime or who have any other relevant information.<sup>272</sup>

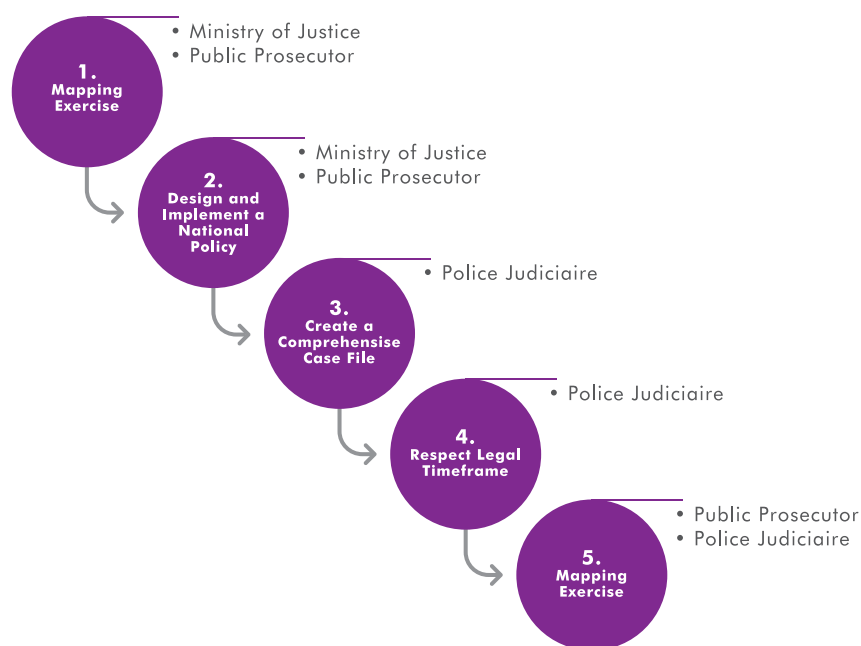
This stage of the criminal justice process is the most crucial. The legally required elements listed above provide the necessary information that will allow the Prosecutor to properly determine the gravity of the crimes allegedly committed.

Collecting this information immediately after the commission of the alleged crime creates a solid base for the investigation and prosecution of the case.

Respecting the Legal Timeframe: Article 7bis CCP provides that any investigation by the *Police Judiciaire* must be conducted *immediately and with no intermissions*, in order for the case to be transmitted to the relevant Public Prosecutor within a *24-hour timeframe*.<sup>273</sup>

Application of the Prioritisation Criteria: At this stage, the Public Prosecutor must carefully examine the *Procès-verbal* prepared by officers of the *Police Judiciaire*, advance the investigation and collect enough information and evidence in order to decide whether the case should be prioritised.

Utilising the information in the *Procès-verbal* and the results of their own investigation, the Prosecutor must decide which cases should be prioritised, using the indicators selected in the national policy, focusing on the gravity of the crimes committed and the representativity of the overall prosecutorial scope in regards to the criminality and the ensuing victimisation in the DRC.



<sup>271</sup> Code of Criminal Procedure, 1959, Article 2, see *supra* note 178.

<sup>272</sup> *Ibid.*

# 4

## **4. Concluding Recommendations**

### **4.1. To the DRC Government**

### **4.2. To the Public Prosecutor and the National Investigators and Prosecutors**

### **4.3. To the National Judges**

### **4.4. To Lawyers, Clerks, Legal Educators and Civil Society Organisations**

## 4. Concluding Recommendations

Following the analysis on the prioritisation and the criteria and indicators put forward, along with unique context that characterises the DRC situation, the Report makes the following recommendations:

### 4.1. To the DRC Government

- Fully implement the ICC Statute in the national legal order and advance the harmonisation of national legislation with international humanitarian law and international criminal law.
- Collaborate with the judicial sector, especially the Public Prosecutors, in order to comprehensively map the totality of crimes committed in the DRC, and particularly in the East of the country. This process should result in a clear organisation of the crimes committed.
- Design a comprehensive national policy formally adopting and implementing the proposed criteria and their factual indicators:

#### Criterion 1: Gravity

Constituent Element 1: Seriousness of the offence:

1. Number of victims;
2. Nature of acts;
3. Area of destruction;
4. Duration and repetition of the offence;
5. Location of the crime;
6. Nationality of perpetrators/victims;
7. The modus operandi of the criminal conduct;
8. Discriminative motive;
9. Defencelessness of victims.

Constituent Element 2: Responsibility of the alleged perpetrator:

1. Position in hierarchy under investigation;
2. Political, military, paramilitary or civilian leader;
3. Leadership at municipal, regional or national level;
4. Nationality and/or tribe;
5. Role/participation in policy/strategy decisions;
6. Personal culpability for specific atrocities;
7. Notoriousness/responsibility for particularly heinous acts;
8. Extent of direct participation in the alleged incidents;
9. Authority and control exercised by the suspects;
10. The suspect's alleged notice and knowledge of acts by subordinates.

## Criterion 2: Representative Prosecutions

- Pursue investigations and prosecutions that represent the overall criminality and victimisation of a conflict, post-conflict or mass violence situation.
- Formalise and publicly articulate any policy and practical considerations, taking into account the proposed indicators:
  1. Available investigative resources;
  2. Evidence/witness availability;
  3. Potential role-over witness/likelihood of linkage evidence;
  4. Completeness of evidence;
  5. Availability of exculpatory information and evidence;
  6. Arrest potential;
  7. The charging theories available;
  8. Potential legal impediments to prosecution;
  9. Potential defences;
  10. Theory of liability and legal framework of each potential suspect;
  11. Overall strategic direction;
  12. Impact that the new investigation will have on ongoing investigations and on making existing indictments trial ready;
  13. The estimated time to complete the investigation;
  14. The extent to which the case can take the investigation to higher political, military, police and civil chains of command; and
  15. To what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions.
- Make available to all judges and prosecutors nationwide the latest legislation on core international crimes in general, and sex crimes in particular, along with updated commentary and information on the relevant international jurisprudence. For example, where possible, use of the ICC Legal Tools Database (<https://www.legal-tools.org>), a freely accessible online library of legal resources, could be of assistance.

## 4.2. To the Public Prosecutor and the National Investigators and Prosecutors

- Apply and implement the prioritisation criteria in prosecutorial work.
- Create detailed and comprehensive files for each case that will include all pertinent information, especially:
  - i. Identity of the victim and their age;
  - ii. The crime committed;
  - iii. Any information on the alleged perpetrator, including any indication on their official capacity; and
  - iv. Any information on the available evidence, including any forensic material, medical examinations and witnesses that are willing to testify.

- As a general principle, give priority to cases involving:
  - i. The mode of liability of command responsibility;
  - ii. Crimes committed by public officials still in office regardless of mode of liability; and/or
  - iii. By law enforcements officials regardless of liability.

#### **4.3. To the National Judges**

- Apply Article 21 of the Constitution, by consistently providing detailed legal reasoning to support judgments.
- Consistently interpret Congolese and international law in cases involving sexual violence, utilising the international jurisprudence on sexual and gender-based crimes.
- Take into consideration and apply internationally-recognised fair trial standards.

#### **4.4. To Lawyers, Clerks, Legal Educators and Civil Society Organisations**

- Recognise the impact of sexual and gender-based violence on society and strive to bring those responsible to account.
- Utilise the international jurisprudence on sexual and gender-based crimes.
- Support the design and implementation of a national policy on the selection and prioritisation of sex crimes cases.

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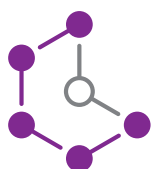
## ANNEXES



## Annex I: The CMN International Criminal Justice Toolkits Project

The CMN-ICJ Toolkits Project supports legal work, policy and advocacy concerning core international crimes and serious human rights violations through the development of four technology-driven Toolkits.

Investigation  
and Fact-Finding  
Toolkit



**I-DOC**

Case Mapping,  
Selection and  
Prioritisation  
Toolkit



**DOCF**

Case Analysis  
Toolkit



**CICD**

Ratification,  
Implementation  
and Cooperation  
Toolkit



**CJAD**

The Toolkits are designed to provide systematic support for actors who are working on criminal justice for core international crimes and serious human rights violations at each stage of the accountability process. Each Toolkit includes a database, publications and services, organised to reflect the different stages of criminal proceedings, and which are customised to the specific requirements of our national and international users.

**Databases:** our databases use open-source software to provide technology-driven solutions to the real and day-to-day challenges of ensuring criminal accountability and reducing impunity for the perpetrators of core international crimes. They are informed by years of experience in post-conflict settings and international criminal justice institutions, including international criminal courts and tribunals.

**Publications:** our publications provide information, knowledge, skills and analysis on each of the Project themes. They address general, global as well as country-specific issues and will be published by the Torkel Opsahl Academic EPublisher (‘TOAEP’).

**Services:** our services include training, technical assistance and capacity development partnerships on the use and methodologies of the tools and on the substantive and work processes that underpin them.

During the first phase of the project the Toolkits will be customised to the specific legal and resource needs of seven target countries.



#### CMN ICJ Toolkit Project Countries

##### Investigation and Fact-Finding

1- Georgia / 2- Mexico

##### Case Mapping, Selection and Prioritisation

3- DRC / 4- Colombia

##### Case Analysis

Global

##### Ratification, Implementation, Cooperation

5- Mongolia / 6- Indonesia / 7- Sierra Leone

#### KH CASE MATRIX NETWORKS

Argentina, Bangladesh, Belgium, Bosnia and Herzegovina, Brasil, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Croatia, Denmark, DRC, France, Georgia, Germany, Guatemala, Indonesia, Iraq, Italy, Lebanon, Mexico, Mongolia, FR Y Macedonia, Netherlands, Norway, Peru, Poland, Philippines, Rwanda, Serbia, Spain, Sierra Leone, Solomon Islands, Sweden, Switzerland, UK, Uganda, Uruguay, USA.

This project is directed and coordinated by the Case Matrix Network ('CMN'), which is a department of the Centre for International Law Research and Policy ('CILRAP'). Phase 1 of the project (November 2013 and October 2016) is implemented in partnership with the University of Nottingham Human Rights Law Centre ('HRLC'), the Central and Eastern European Initiative for International Criminal Law and Human Rights ('ICLHR Initiative') as well as national partners Ligue pour la Paix, les Droits de l'Homme et la Justice ('LIPADHOJ') and Club des Amis du Droit du Congo ('CAD') and technical partners Dr William E. Lowe and Europäische EDV-Akademie des Rechts ('EEAR').

The CMN-ICJ Toolkits Project is funded by the European Union and the Royal Norwegian Ministry of Foreign Affairs under the formal project title "Enhancing the ICC System of Justice: Supporting National Ownership of Criminal Justice Procedures Through Technology-Driven Toolkits".

## Annex II: The Case Mapping, Selection and Prioritisation Toolkit

Criminal justice institutions are frequently required to respond to high quantities of core international crimes and gross human rights violations. The scale and characteristics of the offences frequently challenge the available management tools, policies and resources for criminal accountability.

The scale of the violations as well as the contextual circumstances and resources available to the State can lead to large backlogs of unaddressed cases or reports, over-crowded detention facilities, accusations of selective, discriminative or biased prosecutions, paralysis in criminal proceedings and impunity for the perpetrators.

Moreover, national justice systems often need to prioritise or even select cases for criminal investigation and prosecution, possibly alongside other measures of accountability and justice, to ensure fair and transparent responses to these challenges.

Prioritisation can be understood as the mapping of violations and then the identification of cases, according to formal criteria, so that the most suitable go to trial first. A carefully balanced ‘Prioritisation Policy’ can address the challenges faced by jurisdictions that deal with mass atrocities, both on the international and national level and ensure a more efficient administration of justice that balances the interests of victims, accused persons and the broader community.

However, this requires the adoption of formal criteria, based on an objective consideration of the commission of the crimes, to ensure that the prioritisation of cases is not biased, discriminatory or unfair and in order to maximise the impact of criminal prosecutions. It is often necessary to adopt new policies and tools that are capable of responding to these challenges.

The **Case Mapping, Selection and Prioritisation Toolkit** aims to support the work of those engaging in the adoption, implementation and review of prioritisation policies and tools.

### Database:



DOCF provides a structure to organise open case files involving core international crimes and gross human rights violations to enable better-informed decisions on the prioritisation and selection of cases.

- Mapping of violations, victims and perpetrators according to the legal classifications of the judicial system;
- Substantive, quantitative and qualitative analysis of violations;
- Facilitation of objective case selection and prioritisation;
- Analysis of case flow, backlogs, bottlenecks;
- Increased accuracy, information flow and transparency;
- Customisation according to national legal frameworks.

It builds on earlier models developed by CMN Advisers in Bosnia and Herzegovina (through the OSCE Mission) and in the DRC (through UNOPS).

## **Publications**

- Guidelines and methodologies on case mapping, selection and prioritisation
- Materials on thematic issues (e.g. specific crime categories, liability types)
- Policy briefs

## **Services**

- Technical Assistance
- Capacity Development Partnership

## **Related Publications**

Rolf Einar Fife, “Criteria for Prosecution of International Crimes: The importance for States and the International Community of the Quality of the Criminal Justice Process for Atrocities, in Particular of the Exercise of Fundamental Discretion by Key Justice Actors”, in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 15-21 (<https://www.legal-tools.org/doc/f5abed/>).

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## SYNOPSIS: DRC / Case Mapping, Selection and Prioritisation Toolkit

The Case Mapping, Selection and Prioritisation Toolkit ('CMSP Toolkit') for the DRC is designed for judges, prosecutors, lawyers, legal educators and civil society organisations in order to integrate the selection and prioritisation mechanisms identified with national practice in a way that is appropriate to the post-conflict realities of the DRC criminal justice system.

It responds to the overwhelming number of sex crimes committed as part of the contemporary armed conflict in the DRC, to support the development of a consistent policy on prioritisation of sex crimes in the DRC. It does so in recognition that the scale of sex crimes is far greater than the national criminal justice system can process. In response, the CMSP Toolkit includes a tool to map and manage sex crimes cases and a series of publications that provide succinct - yet accurate - information on the methods and criteria to select and prioritise these cases.

### Consultations

The country activities are based on extensive consultations with national criminal justice actors from government, international organisations and civil society organisations who are based in Kinshasa, Eastern DRC and internationally.

### Database: Adaptation of DOCF (Database on Open Case Files)



DOCF is a database currently utilised in North Kivu to organise open case files involving core international crimes. Following extensive consultations with local actors, the software will be updated and further trainings will be provided.

### Publications

A document analysing prioritisation policies for sex crimes will be produced for use by judges, prosecutors and other legal actors within the Congolese legal system. This publication intends to support the justice system in the DRC to investigate and prosecute core international crimes by providing policies and tools for prioritising and selecting cases.

### Training Module on International Sex Crimes

This module will summarise the key findings of landmark sex crimes cases from international criminal tribunals and will provide an analysis of the constituting elements of sex crimes in international criminal law. The module aims to strengthen the capacity of national criminal justice actors in the DRC to adjudicate sexual crimes cases in light of international best practice guidelines, and will be readily available for use in trainings.

**Publication: Flash cards on sex crimes, defining key terms and policies for selecting and prioritising cases**

The flash cards will provide concise definitions of the key terms involved in sex crimes cases for application by judges, prosecutors and defence counsel during criminal trials. The definitions will be taken from international criminal law. The flash cards will also include summarised guidelines and readily applicable criteria for the prioritisation of sex crimes case files at the national level, based on the conclusions of the prioritisation report. The flash cards are intended to serve as accessible, useful resources to legal actors working on sex crimes cases at the national level in the DRC.

All publications will be made available in both English and French.

**Services: Capacity Development Events**

Events will be held in Kinshasa and in Eastern DRC to address the themes of prioritisation of sex crimes.

**Implementation Period: January 2014 – October 2016**





**I-DOC**

Investigation  
Documentation  
System



**DOCF**

Database on Open  
Case Files



**CICD**

Core International  
Crimes Database



**CJAD**

Cooperation and  
Judicial Assistance  
Database



**CLICC**

Commentary on the  
Law of the International  
Criminal Court



**CM**

Case Matrix

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The CMN Knowledge Hub and Thematic Toolkits are developed and customised through the project "Enhancing the Rome Statute System of Justice: Supporting National Ownership of Criminal Justice Procedures through Technology-Driven Services" which is implemented by the Case Matrix Network, the University of Nottingham Human Rights Law Centre and the Initiative for International Criminal Law and Human Rights.



● Case Matrix Network

KNOWLEDGE-TRANSFER, LEGAL EMPOWERMENT, CAPACITY BUILDING



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