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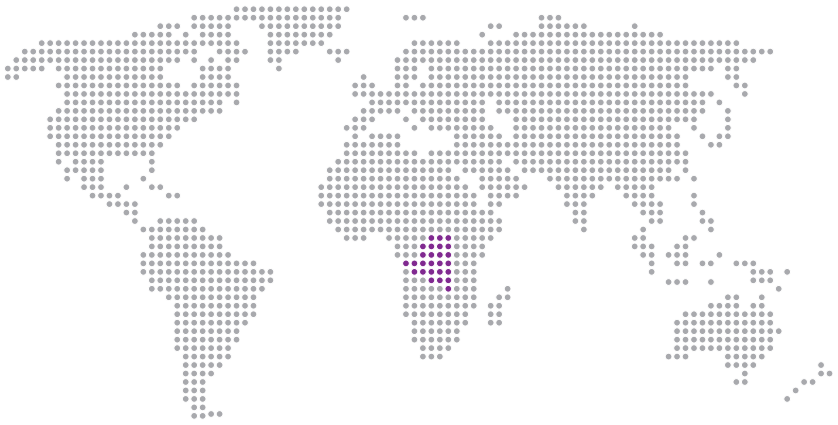
Case Matrix Network

National Legal Requirements:

Prosecution of Sexual and Gender-Based Violence in Democratic Republic of Congo

Ratification, Implementation and Co-operation



• Democratic Republic of Congo

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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 ('CILRAP'), which is an international non-profit organisation, registered in Belgium.

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Designed by Vesna Skornšek
www.vesnaskornsek.com

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Foreign & Commonwealth Office

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Executive summary

This report analyses the legal framework for the prosecution of conflict-related sexual violence crimes in the Democratic Republic of Congo ('DRC'). The use of rape and other sexual and gender-based violence ('SGBV') as a weapon of war has become widespread practice, primarily in the eastern part of the country. Victims of sexual violence face lack of access to legal services and lack of redress and compensation. Infrastructural problems within the justice system of the DRC greatly limit access to justice for the numerous victims of conflict-related sexual violence in the country. 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. Moreover, victims may also be reluctant to file a complaint because of the social stigma related to sexual crimes and a lack of confidence in the judiciary system.

The Congolese military justice system possessed exclusive jurisdiction over core international crimes (genocide, crimes against humanity and war crimes) until 2013. At that time, Parliament enacted an organic law on the functioning and organisation of courts which granted jurisdiction over these crimes to the Court of Appeal (a civilian court) when committed by civilians. Nevertheless, this law retained military jurisdiction for members of the armed forces, police and armed groups. Traditionally, military law defined core international crimes. However, Parliament passed laws implementing the ICC Statute in 2016, which abrogated those provisions of military law and brought the definitions of core international crimes in line with international standards.

Parliament enacted laws on sexual violence in 2006 which brought the definition of rape in line with international standards and introduced various crimes to the internal legal order, including sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation. Albeit with varying differences, these domestic crimes contain analogous elements to the ICC Statute and ICC Elements of Crimes ('EoC'). The domestic definition of the crime of rape requires penetration, even if superficial, of any opening of the victim's body with a sexual organ or object with the possibility of the perpetrator and victim being of either sex. Moreover, it requires an element of coercion which is in line with the international definition of the crime. The domestic crime of sexual slavery contains an element of the exercise of powers also referring to the 'right of ownership' (found in the EoC) and the causation to engage in acts of a sexual nature by referring to forcing the victim to engage in such acts. The national definition of enforced prostitution contains an element of causation to engage in an act of a sexual nature under a level of coercion as in the EoC. Moreover, it requires the perpetrator's expectation of gain as with the international definition of the crime but allows only the perpetrator to obtain the gain and not a third party. The domestic crime of forced pregnancy contains an element of confinement and making the victim pregnant by force or ruse compared to only by force with the international definition. Importantly, however, this crime does not require the specific intent of affecting the ethnic composition of a population or carrying out grave violations of international law as with the international definition.

The domestic definition of enforced sterilisation requires the deprivation of biological reproductive capacity as the international definition but without specifying whether it can encompass temporary or permanent measures. Moreover, it requires a medical decision that does not justify the act instead of a medical or hospital treatment as with the international defini-

tion. There is no single domestic provision for 'other forms of sexual violence of comparable gravity' but there are several possibilities covering this crime: indecent assault, excitement of minors to debauchery, the procurer and procuring, sexual harassment, sexual mutilation and deliberate transmission of incurable sexually transmitted diseases. Sexual crimes may also be prosecuted under other charges not necessarily of a sexual nature, such as torture, murder and aggravated assault and battery, manslaughter and unintentional bodily injuries and imprisonment or other severe deprivation of physical liberty. SGBV provisions are examined after the entry into force of the 2006 laws on sexual violence and prior thereto.

As regards criminal procedure, the judiciary police and Office of the Prosecutor are the entry points of a case to the criminal justice system. A victim may start criminal proceedings by filing a claim to the judiciary police or Office of the Prosecutor or directly attending court. Investigations are carried out by the judiciary police or the Office of the Prosecutor and the latter may close a case for 'non-serious facts'. No criteria are provided on what this term entails. There are provisions for preventive detention and provisional release pending during trial. A victim may become a civil party to the proceedings but must incur the risk of having to pay costs, court fees for both parties and damages, if the accused is not convicted. A civil party or victim bringing a case directly to court (if not declared indigent) must pay approximately a minimum of US$39 for a case to be heard in first instance, which places an enormous financial burden. An important disabling factor in the military justice system is the requirement for the judge to be of an equal or higher rank than the accused, which leads to *de facto* immunity to high-ranking officers because of the lack of military magistrates of equal or superior ranks.

This report was prepared by CMN Advisers in collaboration with the HRLC. In 2016, CMN, in partnership with the CIJA and the HRLC, received a grant from the United Kingdom ('UK'), through its Magna Carta Fund for Human Rights and Democracy, for the project "Strengthening the prosecution of sexual violence in conflict: CAR, Colombia, and DRC".

The report identified national legislation, reports and information gathered from online resources and by local partners. The relevant substantive provisions were identified and compared to the definitions found in the ICC Statute and EoC document as well as the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (1st edition). The challenges faced in accessing relevant national jurisprudence and procedural details highlight some of the operational challenges faced by those working to ensure prosecution of conflict-related sexual violence cases in the DRC. To help rectify this, copies of all sourced jurisprudence and legislation have been added to the ICC Legal Tools Database[1].

The CMN provides knowledge-transfer and capacity development services to national and international actors in the field of international criminal law. It seeks to empower those working on core international crimes cases, or on the documentation of serious human rights violations that may amount to core international crimes, by providing access to legal information, legal expertise and through additional knowledge tools.

1 ICC Legal Tools Database.

1

1. Introduction

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1. Introduction

Sexual violence, committed against females and males, remains a persistent hallmark on numerous armed conflicts, atrocities and national emergencies. Achieving accountability – particularly with regard to individual criminal responsibility – for such violence remains limited in many jurisdictions. The reasons for this are manifold: in many instances, sexual violence crimes are veiled with multiple social stigmas, they are frequently under-reported, inadequately reflected in social and public health policies as well as in domestic criminal law, while criminal justice actors may require additional resources, skills and training to respond appropriately to the complexity and sensitivities of SGBV crimes.

However, the prevalence of sexual violence in conflict and atrocity has gained visibility in recent years.[2] Political momentum from international and domestic spheres has enabled various actors to tackle its causes and effects.[3] Institutional and policy reforms have enabled more coherent approaches to providing accountability to sexual violence in conflict and atrocity[4] while several milestone judgments have been rendered in international and national jurisdictions, building on the legacies of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR') and the Special Court for Sierra Leone ('SCSL').[5]

This report is one of a series that contribute towards accountability efforts by assessing the substantive and procedural law frameworks in place in three countries – Central African Republic ('CAR'), DRC and Colombia – to investigate and prosecute sexual violence crimes. Each country has experienced high levels of conflict-related sexual violence and has attracted the attention of the ICC. Both CAR and DRC are subject to ICC investigations and active cases concerning the perpetration of sexual violence crimes[6] while the low level of national prosecutions and convictions of sexual violence crimes has continued to form part of the ongoing ICC preliminary examination in Colombia.[7] Each country has also undergone different reforms

2 A number of initiatives and academic publications have focused on addressing sexual and gender-based violence: see UN Women, "UNiTE to End Violence Against Women Campaign"; UN Action Against Sexual Violence in Conflict, "Stop Rape Now"; Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, OUP, 2016; Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, TOAEP, Beijing, 2012; Morten Bergsmo, Alf Butenschøn Skre and Elisabeth J. Wood (eds.), *Understanding and Proving International Sex Crimes*, TOAEP, Beijing, 2012.

3 A number of national and international initiatives have sought to address SGBV. A Global Summit to End Sexual Violence in Conflict, held in London in June 2014, resulted in the adoption of the FCO, 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 (1st ed.), London, June 2014 ('PSVI Protocol').

4 See ICC, OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014; Government of the CAR and the United Nations, Joint Communiqué of the Government of the Central African Republic and the United Nations, 12 December 2012 ('Joint Communiqué of the CAR and the UN'); CAR, Décrêt n°15.007 du 8 janvier 2015 portant création d'une unité mixte d'intervention rapide et de répression des violences sexuelles faites aux femmes et aux enfants; Tessa Khan and Jim Wormington, "Mobile Courts in the DRC: Lessons from Development for International Criminal Justice", *Oxford Transitional Justice Research Working Paper Series*, 2011; 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; Colombia, Attorney General's Office ('AGO'), Protocol for the Investigation of Sexual Violence, June 2016.

5 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, TC III, Judgment, Case No. ICC-01/05-01/08, 21 March 2016; DRC, High Military Court, Case *Kakwavu*, Judgement, 7 November 2014; Colombia, Constitutional Court, Order No. 092/08, 14 April 2008; Constitutional Court, Order No. 009/15, 27 January 2015.

6 Cases: (CAR) ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08; (DRC) ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06. Investigation: (CAR) ICC, *Situation in Central African Republic II*, ICC-01/14.

7 ICC, OTP, Report on Preliminary Examination Activities 2013, November 2013; ICC, OTP, Report on Preliminary Examination Activities 2014, December 2014; ICC, OTP, Report on Preliminary Examination Activities 2015, November 2015; ICC, OTP, Report on Preliminary Examination Activities 2016, November 2016.

that intend to address the low levels of sexual violence prosecutions, developing their legal as well as policy frameworks to address these limitations.[8] The availability of an adequate legal framework that supports the investigation and prosecution of sexual violence crimes is one crucial measure to ensure accountability for these offences. Equally, under the principle of complementarity in which the ICC operates, the availability of an adequate legal framework can reduce legal obstacles to their exercise of jurisdiction and subsequent determinations of willingness and ability.

The report finds that, for the most part, the Congolese legal framework has adequate provisions to deal with SGBV investigations and prosecutions. However, the lack of sufficient case law, means that many of the provisions in place have not been adequately tested by courts. The way in which the law will be interpreted in practice therefore becomes central to the success of national investigations or prosecutions. In that respect, care should be taken to utilise, as far as possible, those aspects of the national legal system that are likely to enable such prosecutions, whilst ensuring that inhibiting provisions do not impede efforts to address SGBV at the national level.

1.1. Purpose

This report has been prepared for criminal justice practitioners, researchers and policy-makers who wish to gain an in-depth understanding of the legal frameworks for prosecution of sexual violence crimes in DRC. The report analyses the substantive and procedural legal framework for the prosecution of conflict-related sexual violence in the DRC. It does so using the ICC Statute[9] as its axes of comparison while referring to the PSVI Protocol.[10] It identifies national provisions on crimes, *mens rea*, liabilities and penalties that are applicable to sexual violence and analyses them using the legal requirements of sexual violence crimes under the ICC Statute, to consider whether national laws restrict or enable the prosecution of sexual violence crimes. It also examines criminal procedures applicable to the investigation and prosecution of sexual violence crimes, assessing if they may enable or disable the prosecution of sexual violence crimes.

As such, the purpose of the report is to enable practitioners to:

- Access relevant national provisions on sexual violence, as well as relevant judgments, policies and practice directions;
- Compare the national legal classifications of SGBV with the ICC Statute and its EoC;
- Understand the different institutions responsible for investigation and prosecution of SGBV as well as the context in which such violations occur;

8 For example, CAR has enacted Loi organique n°15.003 du 3 juin 2015 portant création, organisation et fonctionnement de la Cour Pénale Spéciale, providing for the creation, organisation and functioning of a Special Criminal Court, with jurisdiction over serious violations of human rights and international humanitarian law committed on the CAR territory since 1 January 2003. In the DRC, Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, provides for the establishment and functioning of mobile courts. In Colombia, the AGO adopted the Protocol for the Investigation of Sexual Violence in June 2016; moreover, the Peace Agreement reached between the Colombian government and the Revolutionary Armed Forces of Colombia ('FARC') in November 2016 provides a transitional justice system including 1) a Truth Commission; 2) a Special unit for those who have been disappeared during and in pursuance of the armed conflict; 3) a Special jurisdiction for Peace ('SJP'); 4) reparation measures; and 5) guarantees of non-repetition.

9 ICC Statute.

10 PSVI Protocol, *supra* note 2.

- Identify national provisions, approaches or policies that aid or hinder national prosecutions of SGBV;
- Examine the possible methods of interpretation of provisions or policies that can facilitate effective prosecutions of SGBV.

1.2. Methodology

The report uses a carefully designed comparative analysis framework, which is informed by the ICC Statute and the EoC, the relevant policy papers by the ICC Office of the Prosecutor ('OTP'), key international jurisprudence on conflict related sexual violence and the PSVI Protocol. It covers each of the crimes and their underlying acts, the *mens rea*, modes of liabilities, penalties, statutes of limitations and procedural law. This ensures accurate and comprehensive comparative analysis of the relevant national provisions.

1.2.1. Crimes, underlying acts, mens rea, liabilities

The report uses the Legal Requirements Framework for Core International Crimes and Modes of Liability ('Legal Requirements Framework') to identify the structure of national crimes and underlying acts. The Legal Requirements Framework is a structure to aid the interpretation and analysis of the crimes and modes of liability found within the ICC Statute and its EoC document. It is the same methodological structure that underpins the Case Matrix[11] and the Core International Crimes Database ('CICD')[12]. It provides a clear structure to identify the legal requirements of each crime, underlying act and liability as well as the elements of each requirement.

Against this framework, the report first identifies the national provisions to establish which of the SGBV provisions enshrined in the ICC Statute have been covered. To ensure a comprehensive approach, the report discusses all underlying acts that may be applicable, using the methodology underpinning the National Implementing Legislation Database ('NILD').[13] To analyse the provisions, the report employs a comparative textual analysis research method. Having identified the relevant national provisions, the report assesses whether it is identical to the wording of the definitions found in ICC Statute and the EoC (it replicates them). Where different wording has been used, it examines whether the spirit of the provision is captured. Where the national definitions do not replicate or capture the international ones, the report examines whether they are *wider or narrower* than the ICC Statute or the EoC.

By *wider*, it is understood that the national provision goes beyond the ICC Statute. For example, provisions where additional elements have been added that allow for more acts to come under the definition of an international crime, or, where additional punishable acts have been included or thresholds lowered. *Wider* can also be qualitative, for example where causation is not required, which makes it easier to achieve accountability.

11 The Case Matrix is a software platform that provides users with legal information on international criminal law, helps organise case files and manage evidence and contains a database structure for the meeting of law and fact in core international crimes cases. See also Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, TOAEP, Beijing, 2011.

12 CICD is an online directory that classifies and deconstructs case law and doctrine, according to the means of proof and elements of core international crimes. It consists of three parts: (i) elements of crimes; (ii) means of proof and (iii) modes of liability.

13 NILD is a relational database created by the HRLC, which forms part of the ICC Legal Tools Project.

By contrast, a national provision is *narrower* where there are more restrictions on the applicability of international criminal law, or where some elements have been omitted, for example fewer punishable acts or attaching conditions to punishable acts, or the use of different terms that restrict application.

1.2.2. Penalties, statutes of limitation and procedural law

In addressing these issues it is necessary to follow a different approach. Here, the report considers whether the provisions enable or disable criminal prosecution. The report examines all stages of criminal procedure, with the view to identifying obstacles and facilitative provisions throughout the legal process.

The report also identifies national particularities and discusses how these could aid or restrict prosecutions. The report acknowledges that their impact on effective prosecutions is determined by the way courts will be called to interpret the relevant provisions.

1.2.3. Sources

The report reviews national legislation to determine the availability and suitability of national legislation to prosecute SGBV. Where possible, national provisions were identified using the NILD and all additional legislation has subsequently been added to it.[14] A broad interpretation of *legislation* has been adopted; however, binding legal documents take priority over informal practices. The examination is supplemented by national jurisprudence, where available, and by references to secondary sources that shed light on the practical application of each of the provisions. One of the challenges faced in this regard is the availability of accurate data, which can be attributed both to limited resources at the national level and to the fact that sexual violence in conflict is generally under-reported. International legislation and jurisprudence is also relied upon, where relevant.

1.2.4. Consultations

The report draws on information collected both remotely and in the field, and includes sources gathered from a wide range of domestic criminal justice actors, representatives of international organisations and members of the civil society.

1.3. Structure

Section 1 establishes the purpose, methodology and structure adopted in this report. It also includes a glossary of key terms.

Section 2 introduces the country context where sexual violence occurs. Through an introduction to key facts and figures, as well as the main actors and mechanisms for prosecution, the section aims to briefly introduce the conditions in which the national legal framework operates.

14 *Ibid.* The updates to NILD include the inclusion of all national laws cited in this report as well as the coverage of each law according to the NILD keywords.

Section 3 presents the justice sector institutions and other actors (formal or informal) that are entrusted with providing accountability for sexual violence. These include the ordinary criminal courts, military courts and specialised or traditional justice mechanisms.

Section 4 analyses the existing national legal framework for the prosecution of sexual violence in relation to crimes. It first examines whether the core international crimes (genocide, crimes against humanity and war crimes) have been implemented at the national level and whether specific definitions for sexual violence in conflict have been adopted. It then outlines the ordinary criminal law provisions to establish which conducts are criminalised. The report reviews national provisions covering rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence of comparable gravity. It also discusses the criminalisation of sexual violence as other offences, such as torture or trafficking. Case law, where available and accessible, has been used to better understand how the national legal framework on SGBV operates in practice and to highlight how the national provisions have been applied.

Section 5 discusses the *mens rea* element required by national law.

Section 6 focuses on the modes of liability and notes any aberrations from the ICC Statute provisions.

Section 7 examines applicable penalties, including aggravated/mitigating factors envisaged, mapping the severity of the national penalty scheme against that provided for in the ICC Statute, before reviewing the statute of limitations applicable to SGBV crimes.

Section 8 covers the procedural regime applicable to sexual violence prosecutions and outlines the various stages of the criminal process from the initiation phase, to the registration of the case, the investigation phase as well as the pre-trial, trial and appeal itself. Discussing also sentencing and reparations, the report examines issues pertaining to evidence and disclosure, as well as victims and witnesses. The focus of this section is on identifying those factors that are likely to enable or disable SGBV prosecutions.

Section 9 includes a complete list of sources used, including legislation and case law. Where possible, materials are also provided in the ICC Legal Tools Database.

1.4. Glossary of terms

The following list contains key terms used throughout this document. Definitions of terms are based on the approach taken by the ICC generally, and the OTP, in particular. Accordingly, when conducting legal comparisons, the terms listed below are defined in line with accepted interpretation of terms in the work of the ICC and the ICC Statute. The terms may be defined differently in national legislation, military systems, traditional justice mechanisms and the general public within a particular state.

Alternative mechanisms: justice mechanisms that are not part of the formal system of justice.

Enabler/enabling: a term adopted to describe provisions, approaches, policies or contexts that enable accountability or are facilitative in nature.

Disabler/disabling: a term adopted to describe provisions, approaches, policies or contexts that make it harder to achieve accountability or impeded investigations or prosecutions.

Gender: a term used as defined in Article 7(3) of the ICC Statute and referring to the two sexes, male and female, within the context of society. This definition acknowledges social construction of gender and accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.

Gender-based crime: a crime committed against a person, male or female, because of their sex and/or socially constructed gender roles. Such crimes are not always a form of sexual violence.

Gender perspective: a perspective, which requires the understanding of differences in status, power, roles and needs between males and females, and the impact of gender on opportunities and interactions.

Jurisprudence: case law, legal decisions and legal precedents which have developed in a particular system or court, such as the ICC.

Legal Requirements Framework: a structure to aid the interpretation and analysis of the crimes and modes of liability found within the ICC Statute and its EoC document, which has been used in the process of analysis.

National Implementing Legislation Database: a database of enacted national legislation implementing the ICC Statute, which has been created by the HRLC and forms part of the ICC Legal Tools Project.

Narrower: a term adopted to describe provisions where there are more restrictions on the applicability of international criminal law, or where some elements have been omitted.

International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: a non-binding Protocol containing basic standards of best practice on the documentation of sexual violence as a crime under international law, first published in June 2014. The second edition of the PSVI Protocol is expected in early 2017.

Sexual crimes or sexual violence or sexual and gender-based violence: terms that can be and are often used interchangeably. 'Sexual crimes' cover both physical and non-physical acts with a sexual element. Sexual crimes falling under 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 EoC. In relation to 'rape', 'enforced prostitution', and 'sexual violence', the EoC require the perpetrator to have:

- Committed an act of a sexual nature against a person; or
- Caused another to engage in such an act;
- By force, or 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.

Traditional justice: customary legal practices, which have gained authority among the population of a state from long standing practices and beliefs. Traditional justice systems are diverse, having derived from different societies and localities. They therefore take multiple forms and can encompass procedures or elements unfamiliar to Western models of justice. There is often no professional legal representation, and traditional justice can ultimately focus on community cohesion, rather than being of strictly punitive nature.

Wider: a term adopted to describe provisions that go beyond what is required under the ICC Statute and/or the EoC.

2

2. Context of the country and country-specific issues

2. Context of the country and country-specific issues

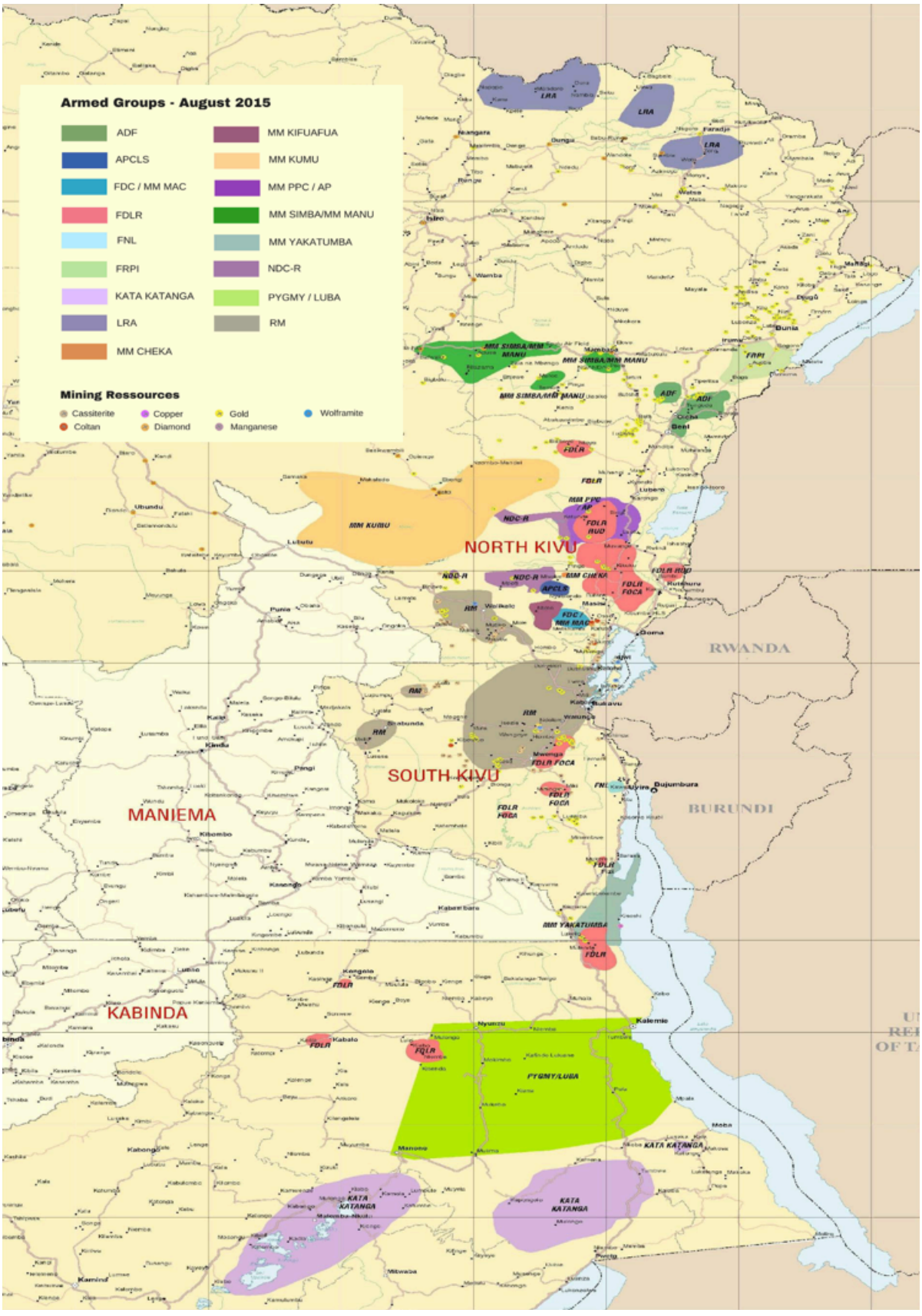
2.1. Context

The DRC has an estimated population of 77.27 million and spans an area of 2.34 million square kilometres,[15] which roughly amounts to the size of Western Europe.[16] In 2015, 42.5 per cent of the population could be characterised as urban.[17] Between 1998 and 2003, more than five million people lost their lives in connection to the armed conflict.[18] As a result of the long-lasting conflict, the State apparatus has collapsed and the judicial system is facing serious challenges to its work. Reliable and up-to-date information, including statistics, legislation, policies and jurisprudence is not readily available.

The armed conflict largely affects Eastern DRC, including North Kivu, South Kivu and the former Katanga and Orientale provinces.[19] At least 70 armed groups are engaged, alongside the Congolese armed forces ('FARDC') and UN peacekeeping forces ('MONUSCO') (see Map 1 for the main armed groups operating in Eastern DRC).[20] MONUSCO took over from the previous peacekeeping operation ('MONUC') in 2010 and was authorised to use all necessary means to carry out its mandate.[21] The UN Security Council created an Intervention Brigade within MONUSCO in 2013 due to waves of conflict in eastern DRC to neutralise armed groups.[22] Since the late 19th century, the DRC's vast natural resources have attracted violent interventions from neighbouring countries and stirred internal conflict.[23] Rebel groups continue to fight the government and local enemies, often with the intention of maintaining or establishing control over mineral wealth.[24] The most significant human rights violations include unlawful killings, sexual and gender-based violence ('SGBV'), abductions, torture and other cruel, inhuman and degrading treatment.[25] This is coupled with widespread impunity and prevalent corruption.[26]

Sexual and gender-based violence has been used as a weapon of war by all parties to the conflict; as such, it continues to be an extremely prominent concern in the DRC.[27] Between September 2013 and April 2014, 443 cases related to sexual violence were started by the authorities in one part of the former Oriental province.[28] Out of these cases, 436 were started in the

15 World Bank, "Democratic Republic of the Congo".
16 United Nations, "DR of Congo: As the country moves boldly towards historic vote, humanitarian concerns continue to demand attention", 2006.
17 UN Data, "Democratic Republic of the Congo".
18 International Rescue Committee, "Democratic Republic of Congo".
19 Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "We are Children Not Soldiers".
20 Jason Stearns and Christoph Vogel, *The Landscape of Armed Groups in the Eastern Congo*, Center on International Cooperation Congo Research Group, December 2015, pp. 5, 8.
21 MONUSCO, "Mandate".
22 *Ibid.*
23 Enough, "Roots of the Crisis – Congo".
24 *Ibid.*
25 United States Department of State, 2015 Country Reports on Human Rights Practices - Democratic Republic of the Congo, 13 April 2016, Executive Summary ('USDOS 2015 Human Rights Report DRC').
26 *Ibid.*
27 United Nations Human Rights Council ('UNHRC'), Situation of human rights and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo, 12 August 2016, A/HRC/33/36, para. 34 ('UNHRC Report Human Rights DRC 2016').
28 CMN, Database on open case files involving core international crimes ('DOCF'). DOCF is currently utilised in North Kivu to organise open case files involving core international crimes.



Map 1: Armed groups operating in Eastern DRC as of August 2015.[29]

29 MONUSCO, "Invisible Survivors: Girls in Armed Groups in the Democratic Republic of Congo from 2009 to 2015", 25 November 2015.

civilian judicial system and 12 in the military judicial system.[30] Only three judgments (0.69 per cent of the cases started) were delivered in the civilian judicial system during this time period.[31] Despite the fact that various organisations purport to collect statistics on SGBV incidents in the country, it is very difficult to obtain consistent, reliable and up-to-date data. The Ministry of Gender, Family and the Child maintains a website[32] with SGBV data, which documents 10.936 reported cases in 2016.[33] There are clear limitations and problems with the methodologies for collection of such data. However, it is clear that this data does not pertain to all cases or regions where sexual violence has occurred. Moreover, it is unclear whether the reported SGBV is conflict-related or whether it includes incidents of domestic violence as well.

The United Nations Joint Human Rights Office documented 635 victims of rape in conflict-affected provinces, including North Kivu, South Kivu and Ituri between June 2015 and May 2016.[34] 76 per cent of the victims were raped by members of armed groups and nearly 24 per cent by State agents.[35] The United Nations Population Fund ('UNFPA') recorded 11.769 cases of sexual and gender-based violence in the provinces of North Kivu, South Kivu, Maniema and the former Orientale and Katanga provinces between January and September 2014.[36] 39 per cent of these cases were considered to be directly linked to the armed conflict.[37] The Ministry of Gender, Family and the Child has provided much greater numbers in its 2013 report which documented 10.322 incidents of sexual violence in 2011 in the context of the armed conflict in Eastern DRC.[38] This number increased in 2012 by 52 per cent to 15.654 reported incidents.[39] The Office of the Personal Representative of the Head of State on the Fight against Sexual Violence has created a website which includes information on the perpetration of sexual violence (referring to the 2013 report by the Ministry of Gender, Family and the Child) as well as the progress and obstacles that the DRC faces.[40] It is important to note that sexual violence (including conflict and non-conflict related) is also underreported[41] and that the numbers are likely to be considerably higher.

Sexual violence against children continues to be alarmingly high: in 2015, it accounted for 41 per cent of all cases.[42] In 2014, UNICEF registered 24.347 child survivors of SGBV,[43] while a UN report on girls associated with armed groups conducted between 2009 and 2015 described incidents of forced marriage and sexual slavery.[44] According to the UN Secretary General, a pattern of extreme violence against children in Kavumu, South Kivu, which includes kidnapping and rape, has been exacerbated by impunity.[45] In recent years, limited available

30 *Ibid.*
31 *Ibid.*
32 DRC, Ministry of Gender, Family and the Child, "Donnees sur les violences sexuelles et basees sur le genre".
33 *Ibid.*
34 UNHCR Report Human Rights DRC 2016, para. 34, *supra* note 27.
35 *Ibid.*
36 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 2015').
37 *Ibid.*
38 DRC, Ministry of Gender, Family and the Child, "Ampleur des violences sexuelles en RDC et actions de lutte contre le phénomène de 2011 à 2012", June 2013 ('National Study on Sexual Violence 2013').
39 *Ibid.*
40 DRC, Office of the Personal Representative of the Head of State on the Fight against Sexual Violence, "Données statistiques".
41 In particular rape; see European Parliament, "Sexual Violence in the Democratic Republic of Congo", November 2014; USDOS 2015 Human Rights Report DRC, Section 6, *supra* note 25.
42 UN Secretary General ('UNSG'), Report of the Secretary General on conflict-related sexual violence, 20 April 2016, S/2016/361, para. 36 [UNSG Report on conflict-related sexual violence 2016].
43 USDOS 2015 Human Rights Report DRC, Section 6, *supra* note 25.
44 UNSG Report on conflict-related sexual violence 2016, para. 36, *supra* note 42.
45 *Ibid.*

data alludes also to increasing numbers of male rape.[46] However, the vast majority of victims remain women and girls.[47]

In addition, sexual and gender-based violence has been carried out with particular brutality. The Harvard Humanitarian Initiative studied the types of sexual violence committed between 2004 and 2008 at Panzi Hospital, South Kivu province and released the following statistics:[48]

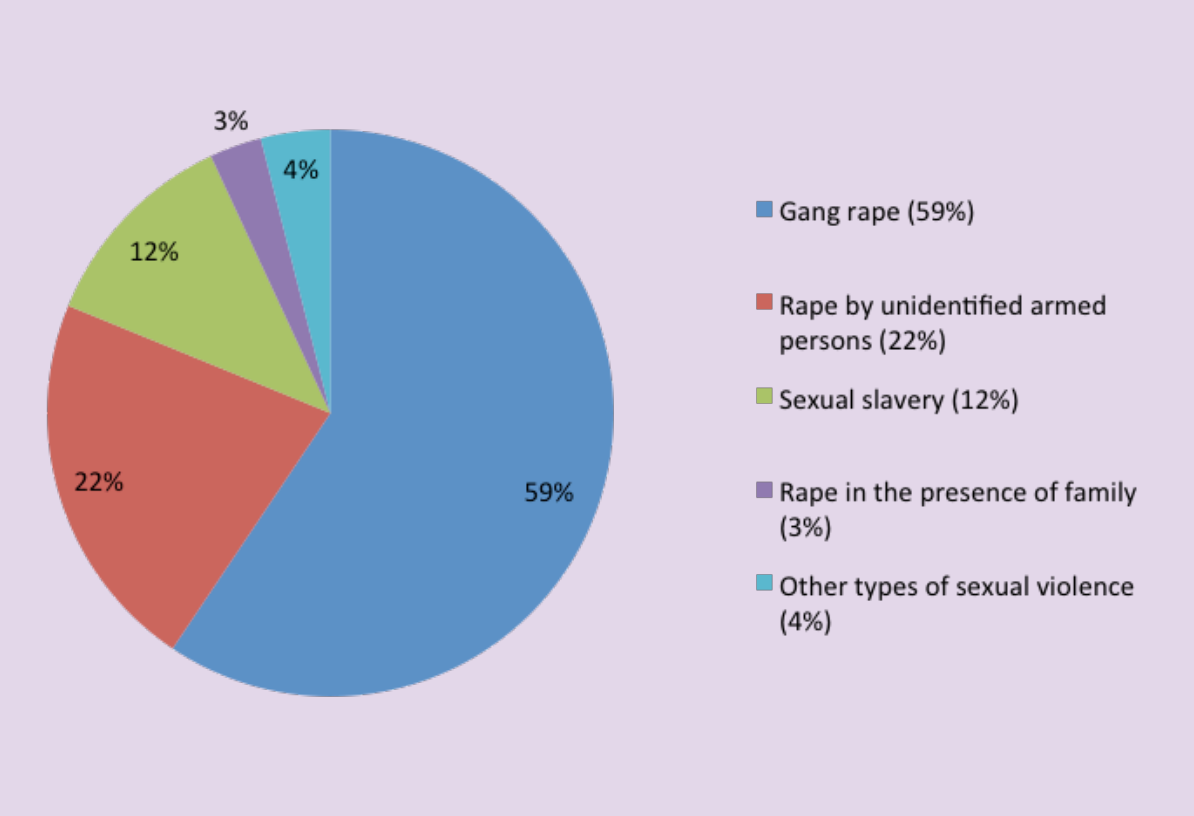


Table 1: Harvard Humanitarian Initiative Study on sexual violence in Eastern DRC in 2010.

The crimes are often aggravated by additional violence, varying from genital mutilation, the usage of sticks and guns and forced cannibalism.[49]

2.2. Impediments to access to justice

Victims of sexual violence continue to experience limited access to legal services, redress and compensation.[50] Comprehensive care, including medical, psychological, legal and economic assistance is available in some urban areas, yet remains insufficient or inadequate elsewhere.[51] In remote areas where the judicial system is absent, 'amicable agreements', which

46 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').
47 National Study on Sexual Violence 2013, p. 2, *supra* note 38.
48 HHI/Oxfam Report, Figure 4, *supra* note 46.
49 *Ibid.*, p. 36.
50 UNHCR Report Human Rights DRC 2016, para. 35, *supra* note 28.
51 *Ibid.*

include financial or other conditions (including marriage to the perpetrator) are commonly used to close cases without the victim's rights being addressed.[52]

The latest number of available civilian and military magistrates remains insufficient to meet the needs of the national criminal justice system.[53] As of 2014, an estimated 400 military magistrates had been appointed to 50 military courts and a number of secondary military justice outposts across the DRC.[54] This included 140 judges and 260 prosecutors. They are responsible for investigating and prosecuting the crimes committed by the Congolese army, national police and members of armed groups.[55] The ratio *per capita* is estimated to be one military magistrate per 187.000 inhabitants.[56] As of 2013, there were approximately 3.700 magistrates, which would equal a ratio *per capita* of one civilian magistrate per 17.000 inhabitants.[57] Judicial staff in the DRC endures adverse conditions in carrying out its work, such as problems related to infrastructure, irregular payment of salaries and lack of necessary training.[58]

2.2.1. Insufficient budget allocation

The justice sector has been severely underfunded for many years. According to the International Bar Association ('IBA'), the total national annual budget in 2009 was US$ 4 billion, with only 0.03 per cent allocated to the justice sector - or US$ 1.2 million.[59] Should this estimate of the justice budget be correct, it would not cover the published salaries of all judicial staff for one month.[60] By way of comparison, the figure for France with a population of approximately the same size at that time was US$ 540 billion[61] which is 45.000 per cent of the DRC justice sector budget.

2.2.2. Vast and remote territory

The vast territory of the DRC and the size of its population, coupled with the effects of protracted armed conflict in various parts of the country, have created multifaceted challenges which are difficult to overcome. The DRC experiences a fundamental deficit of legal institutions: according to available data, there may be only 45 operational peace courts, 13 courts of appeal and 27 high courts,[62] whilst the military criminal justice system consists of just 50 courts.[63] The ratio *per capita* is estimated to be one peace court per 1.6 million inhabitants, one court of appeal per 5.6 million, one high court per 2.7 million and one military court per 1.4 million inhabitants.[64]

52 *Ibid.*
53 Open Society Foundations ('OSF'), "RDC : Le secteur de la justice et l'État de droit", July 2013, p. 57 ('OSF Report 2013').
54 Office of the High Commissioner for Human Rights ('OHCHR'), "Progress and Obstacles in the Fight against Impunity for Sexual Violence in the Democratic Republic of the Congo", April 2014, p. 19 ('OHCHR Progress and Obstacles Impunity DRC 2014').
55 As of 2014; see *ibid.*
56 Based on a population of 74.877.030 in 2014. See World Bank, "Population, total".
57 As of 2013, see OSF Report 2013, p. 160, *supra* note 53.
58 OHCHR, Progress and Obstacles Impunity DRC 2014, p. 19, *supra* note 54.
59 IBA, "Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo", August 2009, p. 19 ('IBA Rebuilding Courts Report 2009').
60 *Ibid.*
61 *Ibid.*
62 As of 2013, see OSF Report 2013, p. 57, *supra* note 53.
63 As of 2014, see OHCHR, Progress and Obstacles Impunity DRC 2014, p. 19, *supra* note 54.
64 Based on a population of 72.552.860 in 2013. See World Bank, "Population, total".

There is no equal distribution of magistrates across the country and people living in remote rural areas have difficulties in accessing the justice system.[65] Most courts, if any, are located in the administrative constituency capitals. Due to a lack of infrastructure, security and lack of financial means, even a distance of 60km can have a large impact on the accessibility of the population to the judicial system.[66]

2.3. Legal framework of the DRC

The Constitution of the DRC envisages three separate, independent branches of State apparatus: judicial, constitutional and administrative.[67] The judicial branch is divided into civilian and military jurisdictions, while the Cour de Cassation, the supreme national court, has final control over both systems.[68] Moreover, special prosecution cells and mobile courts have been set up with the aid of international actors,[69] with the former being under military jurisdictions and the latter under both military and civilian jurisdictions. These will be further explored in section 3. The organisation of the DRC judicial system is schematised in Table 2.

The DRC has a monist legal tradition, as reflected in Article 215 of the DRC Constitution. Where an international treaty or agreement has been properly concluded and published, the international instrument will possess superior authority over national laws, subject to its application by other state parties.[70] In theory, there is no need for national implementing legislation in order for an international treaty or other international norms to be binding in the DRC.[71] However, with regard to criminal law, a third condition must be fulfilled: that of certainty. This refers to the principle of legality[72] which requires existing laws prohibiting the alleged conduct at the time of commission with sufficient precision on the definition of the crime and applicable penalty.

The DRC ratified the ICC Statute on 11 April 2002 and published it in the Official Journal on 5 December 2002.[73] Notwithstanding its monist tradition, legislation implementing the ICC Statute remained in draft form between 2005[74] and 2015. Four laws were adopted by Parliament in November 2015[75] and the President promulgated three of the four on 2 January 2016.[76]

65 OSF Report 2013, pp. 127-128, *supra* note 53.

66 *Ibid*

67 Constitution od the Democratic Republic of Congo, Official Journal, 18 February 2006, Art. 149 ('DRC Constitution 2006').

68 *Ibid.*, Art. 153.

69 International Legal Assistance Consortium ('ILAC') and 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 2009'); Sofia Candeias, Luc Côté, Elsa Papageorgiou, and Myriam Raymond-Jetté, "The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)", International Center for Transitional Justice ('ICTJ'), July 2015, p. 27 ('ICTJ Accountability Landscape Eastern DRC 2015').

70 DRC Constitution 2006, Art. 215, *supra* note 67.

71 However, national legislation would be needed for issues such as the execution of ICC cooperation requests.

72 International Covenant on Civil and Political Rights ('ICCPR'), 19 December 1996, Art. 15; African Charter on Human and Peoples' Rights, 27 June 1981, Art. 7(2) ('Banjul Charter').

73 Official Journal of the Democratic Republic of Congo, Instruments internationaux et régionaux relatifs aux droits de l'homme ratifiés par la République Démocratique du Congo, December 2002, pp. 169-243.

74 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.

75 Parliamentarians for Global Action ('PGA'), "PGA congratulates the Senate of the DRC on the adoption of the implementing legislation of the ICC Statute of the ICC", 2 November 2015.

76 PGA, "PGA welcomes the enactment of the implementing legislation of the ICC Statute of the ICC by the Democratic Republic of the Congo", 4 January 2016.

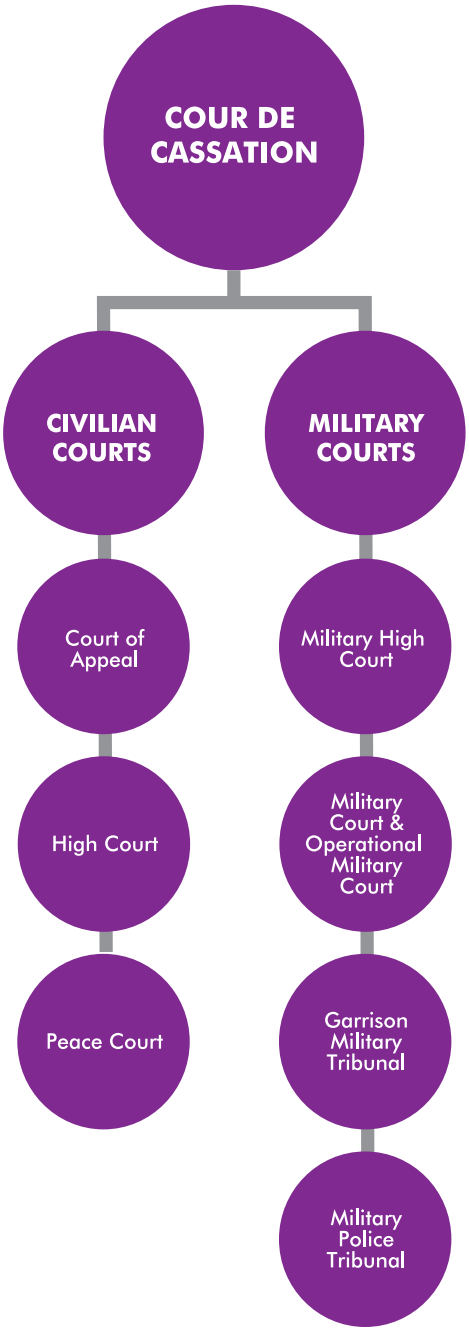


Table 2: Civilian and military courts in the DRC.

3

3. Institutional framework

3.1. Military courts

3.2. Civilian courts

3.3. Mobile courts

3.4. MONUSCO's Prosecution Support Cells

3. Institutions in charge of SGBV prosecutions in the DRC

3.1. Military courts

Since the adoption of the Military Justice Code in 1972, military law in the DRC has defined genocide, crimes against humanity and war crimes.[77] The ordinary Congolese Criminal Code did not contain provisions relating to international crimes until recently.[78] This changed with the entry into force of the legislation implementing the ICC Statute on 30 March 2016.

The **2002 Military Judiciary Code** outlines the structure of military courts (see Table 3).

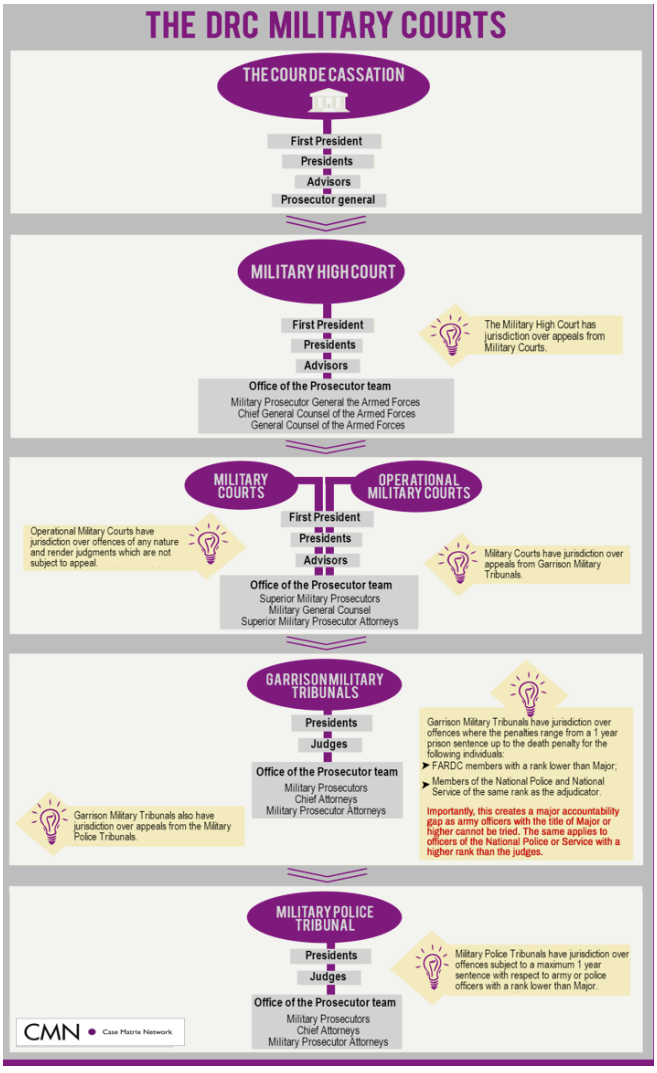


Table 3: Structure and jurisdiction of military courts.

77 ICTJ Accountability Landscape Eastern DRC 2015, p. 5, *supra* note 69.
78 *Ibid.*

Following the 2013 Act organising the functioning and jurisdiction of the courts, the jurisdiction of civilian courts was expanded to include cases of core international crimes (genocide, crimes against humanity and war crimes).[79] Within the civilian court system, the Court of Appeal has exclusive jurisdiction to try these cases. However, core international crimes cases committed by members of the national armed forces, national police or members of armed groups[80] 'during a war'[81] remain under the jurisdiction of the military courts.[82] Military courts possessed exclusive jurisdiction over these crimes prior to 2013.[83]

3.2. Civilian courts

The Act organising the functioning and jurisdiction of the courts 2013 outlines the structure of civilian courts (see Table 4).

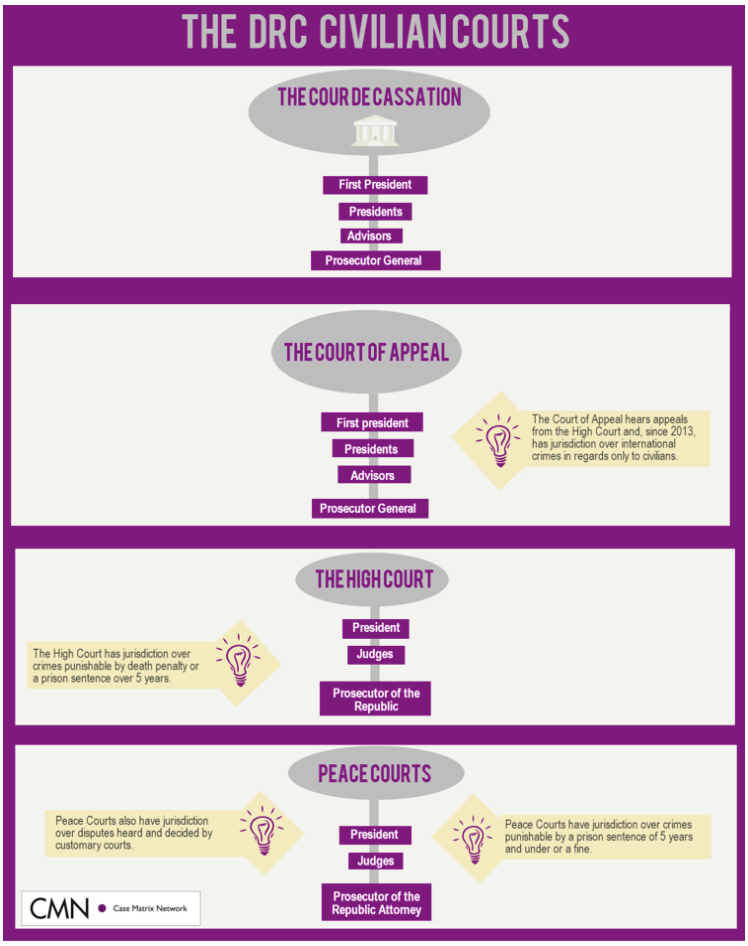


Table 4: Structure and jurisdiction of civilian courts.

79 Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013, Art. 91 ('Act organising the functioning and jurisdiction of the courts 2013').

80 Loi n° 023/2002 du 18 novembre 2002 portant Code judiciaire miliaire, 18 November 2002, Official Journal of the DRC, 20 March 2003, Art. 115 ('Judicial Military Code 2002').

81 DRC Constitution 2006, Art. 156, *supra* note 67.

82 Human Rights Watch, "Etats Généraux of the Justice System in the Democratic Republic of Congo: Recommendations on the Fight Against Impunity for Grave International Crimes", 27 April 2015.

83 DRC Constitution 2006, Art. 124, *supra* note 67; Loi n° 024-2002 du 18 novembre 2002 portant Code Pénal Militaire, 18 November 2002, Official Journal of the DRC, 20 March 2003, Art. 10 ('Military Criminal Code 2002').

3.3. Mobile courts

National legislation provides for the establishment and functioning of mobile courts.[84] Mobile courts were created to bring justice to the population in remote areas[85] and largely deal with crimes committed by soldiers against civilians, with a strong emphasis on sexual and gender-based violence.[86] Magistrates travel for specific periods of time and render their decisions on location, thus addressing claims quicker and relatively efficiently.[87] Some mobile courts initiatives have included lawyers and paralegals providing legal information to the population in preparation for the visit of the mobile court.[88] Poor security conditions affect the accessibility of victims as well as courts' organisation in certain areas[89] and there have been problems with due process guarantees.[90]

3.4. MONUSCO's Prosecution Support Cells

MONUSCO introduced Prosecution Support Cells in 2011, with the aim of the programme being "to support investigations and prosecutions relating to the commission of serious crimes within the jurisdiction of military courts, including crimes listed in the ICC Statute".[91] These cells respond to specific support requests from the military judicial authorities and provide logistical support, specialised training, practical advice, guidance and technical expertise.[92] The implementation of the cells was intended primarily to address technical gaps in investigating cases of grave crimes and providing support through experts.[93] However, the majority of experts recruited came from national courts and had no direct experience with the investigation and prosecution of international crimes.[94]

84 Act organising the functioning and jurisdiction of the courts 2013, Arts. 45-48, *supra* note 79.
85 ILAC/IBA Report 2009, p. 26, *supra* note 69.
86 Tessa Khan and Jim Wormington, "Mobile Courts in the DRC: Lessons from Development for International Criminal Justice", *Oxford Transitional Justice Research Working Paper Series*, 2011.
87 ILAC/IBA Report 2009, p. 27, *supra* note 69.
88 *Ibid.*
89 OHCHR, Progress and Obstacles Impunity DRC, para. 58, *supra* note 54.
90 OSF Report 2013, p. 128, *supra* note 53.
91 ICTJ Accountability Landscape Eastern DRC 2015, p. 27, *supra* note 69.
92 *Ibid.* See also United Nations Department of Peacekeeping Operations, Justice & Corrections, Issue 3, December 2015, p. 4.
93 ICTJ Accountability Landscape Eastern DRC 2015, p. 27, *supra* note 69.
94 *Ibid.*, Analysis of the Minova rape case found that the criminal investigation of the crimes was of poor quality, due largely to a lack of expertise of Congolese military investigators and prosecutors despite involvement of the Prosecution Support Cells: see Human Rights Watch, "Justice on Trial: Lessons from the Minova Rape Case in the Democratic Republic of Congo", October 2015, p. 25 ('HRW, Lessons Minova Rape Case 2015').

4

4. Legal framework: crimes

4. Legal framework: crimes

The DRC Parliament passed four laws in order to implement the ICC Statute. On 29 February 2016, three of those laws were published on the Official Journal, which subsequently became effective on 30 March 2016.[95] These are:

1. Law n° 15/022 of 31 December 2015 modifying and completing the Decree of 30 January 1940 comprising the Criminal Code;[96]

2. Law n° 15/023 of 31 December 2015 modifying Law n° 024-2002 of 18 November 2002 comprising the Military Criminal Code;[97]

3. Law n° 15/024 of 31 December 2015 modifying and completing the Decree of 6 August 1959 comprising the Code of Criminal Procedure.[98]

The 2015 Law modifying the Criminal Code introduces several changes to the Congolese Criminal Code. It introduces Title IX – Crimes against Peace and Security of Humanity to the Criminal Code and provides definitions for: genocide in Article 221, crimes against humanity in Article 222 and war crimes in Article 223. As will be seen in section 4.2., the definitions of international crimesthese definitions follow closely those in the ICC Statute.

Importantly, Article 224 of the 2015 Law modifying the Criminal Code, states that Crimes against Peace and Security of Humanity found in Title IX of the Criminal Code are to be interpreted and applied in accordance with the Elements of Crimes. This is significant, as the definitions contained in the EoC are thus rendered applicable in the DRC system. The same law also outlines the provisions for individual criminal responsibility in Article 21bis, which replicates Article 25 of the ICC Statute. Lastly, it affirms the non-applicability of statutory limitations to the three core international crimes as well as the non-application of immunities as a result of official capacity in Articles 34bis and 20quater, respectively.

The second law, the 2015 Law modifying the Military Criminal Code, brings several changes to the Military Criminal Code. It repeals Title V of the 2002 Military Criminal Code, which contained provisions on genocide, crimes against humanity and war crimes, whose definitions conflated crimes against humanity with war crimes. It defined crimes against humanity as grave violations of international humanitarian law and war crimes as all breaches of the laws of the Republic committed during war not justified by the laws and customs of war. It was thus not in line with the international definitions of crimes against humanity.

95 Each law contains an article stipulating that the law becomes effective 30 days after its publication on the Official Journal.

96 Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, 31 December 2015, Official Journal of the DRC, 2 January 2016 ('Law modifying the Criminal Code 2015').

97 Loi n° 15/023 du 31 décembre 2015 modifiant la Loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire 31 December 2015, Official Journal of the DRC, 2 January 2016 ('Law modifying the Military Criminal Code 2015').

98 Loi n° 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 06 août 1959 portant Code de procédure pénale 31 December 2015, Official Journal of the DRC, 2 January 2016 ('Law modifying the Code of Criminal Procedure 2015').

The 2015 Law modifying the Military Criminal Code also repeals Article 207 of the Military Criminal Code which granted exclusive jurisdiction of military courts over core international crimes. It modifies Article 1 of the Military Criminal Code so that the provisions found in Book I (General crimes and punishment) and the newly added Title IX (Crimes against Peace and Security of Humanity) of the Criminal Code are applicable to military jurisdictions. Lastly, it introduces the concept of command responsibility in Article 1.

The 2015 Law modifying the Code of Criminal Procedure introduces provisions on cooperation with the ICC as well as victim/witness protection.

The fourth law remains in draft form, as it has not yet been promulgated by the President or published on the Official Journal. Entitled "Draft organic law modifying and completing Law N° 023-2002 of 18 November 2002 comprising the judicial military code", it was sent to the Constitutional Court for revision and, on 19 February 2016, declared constitutional.[99] However, the Registrar of the Constitutional Court had not yet transmitted, at the time of writing, the law to the President for promulgation following the judgment of the Court.[100]

The 2015 Law modifying the Judicial Military Code in its Article 1 clarifies the applicable jurisdiction in the following two instances: first, both civilian and military co-perpetrators or accomplices are subject to civilian jurisdiction, except during war or when in an operational zone under a state of siege or emergency. Second, a period during which the accused was subject to civilian jurisdiction followed by a period of military jurisdiction or vice versa, is treated as a continuous crime. In this case, the accused will be subject to the jurisdiction of last status.

Sexual and gender-based violence is criminalised in the 2004 Criminal Code[101] (under the title "Crimes against the order of families"). Additional laws have also been passed in this regard, including the 2006 laws on sexual violence[102] and the 2009 Child Protection Law.[103] The 2006 laws on sexual violence which modified the 2004 Criminal Code and 1959 Code of Criminal Procedure[104] introduced detailed definitions of sex crimes. In addition, new crimes were introduced to the national legal order, including enforced prostitution, sexual slavery, forced marriage and forced pregnancy.[105] The 2009 Child Protection Law recognised specific rights and protective procedures regarding sexual violence against children, including a detailed definition of child rape and the criminalisation of sex crimes specifically targeting children.

The military justice system has exclusive jurisdiction over all SGBV acts committed by the army, police and armed groups pursuant to the Constitution, the 2002 Military Judiciary Code and the 2002 Military Criminal Code. The Military Criminal Code does not specifically prohibit sexual violence (except for a provision criminalising rape as a crime against humanity, which after 30 March 2016 no longer applies and for a provision criminalising violence against the civilian population in general).[106] However, the Criminal Code and the

99 Interview with Eloi Urwodhi Uciba Wabiyik, President of the Ligue pour la paix, les droits de l'homme et la justice ('LIPADHOJ'), 27 October 2016.

100 *Ibid.*

101 Congolese Criminal Code, 30 November 2004, Official Journal of the DRC, 30 November 2004 ('Criminal Code 2004').

102 Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais, 20 July 2006, Official Journal of the DRC, 1 August 2006 ('Law on sexual violence modifying the Criminal Code 2006'); 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, Official Journal of the DRC, 1 August 2006 ('Law on sexual violence modifying the Code of Criminal Procedure 2006').

103 Loi n° 09/001 du 10 janvier 2009 portant protection de l'enfant, 10 January 2009, Official Journal of the DRC, 25 May 2009 ('Child Protection Law 2009').

104 Décret du 6 août 1959 portant le Code de procédure pénale, 6 August 1959 ('Code of Criminal Procedure 1959').

105 The 2006 laws on sexual violence entered into force on 20 July 2006, when promulgated by the President.

106 Military Criminal Code 2002, Art. 103, *supra* note 83.

laws against sexual violence are applicable to all persons tried before military courts. Indeed, in Article 39, the Military Criminal Code is applicable two types of crimes, namely military and mixed ones, which are defined in Article 40. Mixed crimes are punishable by both the ordinary Criminal Code and the Military Criminal Code. Moreover, Article 76 of the Military Judicial Code provides that military jurisdictions are competent to adjudicate military crimes punishable pursuant to the provisions of the Military Criminal Code as well as crimes of any nature perpetrated by militaries and punishable in conformity with the provisions of the ordinary Criminal Code. Consequently, the crimes examined in this report relevant to the civilian justice system are applicable to the military judicial system as well.

Military courts have directly applied the ICC Statute prior to the adoption of the laws implementing the ICC Statute in 2016. Judges in the *Songo Mboyo* case invoked the monist legal tradition embedded in Article 215 of the Constitution.[107] The *Kazungu* case, for its part, held that the ICC Statute was 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" than domestic legislation.[108]

Furthermore, in order to properly define domestic crimes, national judges have also referred to the EoC.[109] Judges in the case of *Songo Mboyo* used the definition of rape provided in the EoC for its analysis of that charge.[110] 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 as "a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends".[111]

The definitions of international crimes in the laws implementing the ICC Statute

Article 221 of the 2015 Law modifying the Criminal Code implements the crime of genocide, as found in Article 6 of the ICC Statute, almost *verbatim*. Therefore, Article 221 protects the same four groups, provides for "intent" "to destroy" the group "in whole or in part" "as such". As a result of Article 224 of the 2015 Law modifying the Criminal Code, which provides for the application of the EoC,[112] the contextual element of genocide (conduct that took place in the context of a manifest pattern of similar conduct) is also part of the crime.

Article 222 of the 2015 Law modifying the Criminal Code implements crimes against humanity enshrined in Article 7 of the ICC Statute. In similar manner to the ICC Statute, Article 222 requires a widespread or systematic attack directed against any civilian population with knowledge of the attack. However, Article 222 does not provide a definition of the "attack" contained in Article 7(2) of the ICC Statute. It is, therefore, unclear whether the 'policy element' present in the ICC Statute is also required under Congolese law. However, given that the definition of an "attack" is also found in Article 7(3) of the EoC, which applies in the national legal order, it is foreseeable that Congolese courts could require that such a policy element be established.

107 Military Tribunal of Garrison of Mbandaka, Affaire Songo Mboyo, Judgement, 12 April 2006 ('*Songo Mboyo* case').
108 Military Tribunal of Garrison of Bukavu, Affaire *Kazungu*, Judgement, 16 August 2011 ('*Kazungu* case').
109 Elements of Crimes.
110 *Songo Mboyo* case, *supra* note 107.
111 Military Court of Sud-Kivu, Affaire *Kibibi*, Judgement, 29 February 2011 ('*Kibibi* case').
112 Elements of Crimes.

In its implementing legislation, the DRC distinguishes between international and non-international armed conflicts, as is also done in the war crimes provision found in Article 8 of the ICC Statute. Article 223 of the 2015 Law modifying the Criminal Code incorporates war crimes in a very similar manner to the ICC Statute. However, the provision omits the 'non-threshold threshold' found in Article 8 which requires that war crimes must be committed as part of a plan or policy or as part of a large scale commission. That threshold, aimed at better allocating the limited ICC resources to those cases that merit prosecution before the ICC, does not need to be present when dealing with war crimes before national courts. In fact, the approach taken by the DRC will enable more prosecutions at the national level, in line with the principle of complementarity.

Article 223 of the 2015 Law modifying the Criminal Code also replicates the non-applicability of the war crimes provision to situations of internal disturbances and tensions, including riots, isolated and sporadic acts of violence or other acts of a similar nature. Similarly, Article 223 provides that its provisions on war crimes committed in non-international armed conflict apply to armed conflicts with the same characteristics as provided by Article 8(2)(f) of the ICC Statute (in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups).

With the applicability of the EoC as provided by the 2015 Law modifying the Criminal Code, the elements of war crimes committed in international and non-international armed conflict are the same in the DRC legislation as under the ICC Statute.

4.1. Rape

Rape is one of the underlying acts of both the crimes against humanity (Article 222) and war crimes (Article 223) of the Criminal Code post-2015 amendments. However, neither provision offers any detail on the definition of rape. The national courts will therefore either apply the definition of rape outlined in the Criminal Code or the EoC.

4.1.1. Post-2006 amendments

Article 170 of the Criminal Code was modified by the 2006 laws on sexual violence which considerably added more detail to the definition of the crime of rape compared to the previous version of this article.

Article 170 criminalises rape as follows:[113]

> Commits rape using grave violence or threats or by coercion against a person directly or through a third party, by surprise, psychological pressure instilled through a coercive environment or the abuse of a person who, by the condition of a disease, impairment of faculties or any other accidental cause would have lost the use of the senses or would have been deprived by tricks:

113 Law on sexual violence modifying the Criminal Code 2006, Art. 170, *supra* note 102.

> a) every man, regardless of age, who has introduced his sexual organ, even superficially, in that of a woman or every woman, regardless of age, who has forced a man to introduce even superficially his sexual organ into hers;
>
> b) every man who has penetrated even superficially the anus, mouth or any other opening of a woman's or man's body with a sexual organ, any other body part or any object;
>
> c) any person who introduces, even superficially, any other body part or any object into the vagina;
>
> d) any person who forces a man or woman to penetrate, even superficially their anus, mouth or any orifice of their body with a sexual organ, any other part of the body or any object.
>
> Anyone convicted of rape will face a sentence of five to twenty years imprisonment and a fine of no less than one hundred thousand current Congolese Francs.
>
> It is presumed that rape with violence is committed by the mere physical approximation of the sexual organs of persons designated in Article 167, paragraph 2.

Article 170 envisages, in its four paragraphs, four different situations that would qualify as rape. However, there is significant overlap amongst these situations, which may lead to confusion. Penetration, even if superficial, is required in each of these situations. This is consistent with the definition provided in the EoC, which requires penetration 'however slight'.[114]

> (a) every man, regardless of age, who has introduced his sexual organ, even superficially, in that of a woman or any woman, regardless of age, who has forced a man to introduce even superficially his sexual organ in hers

The first paragraph of Article 170 is consistent with the international definition in that it requires that the perpetrator invade the victim's sexual organ with their sexual organ. Despite the fact that Article 170(a) refers to the perpetrator as either a man or a woman, it only covers heterosexual contact. In addition, consistently with the international provision, it envisages the possibility that the penetration may be in relation to the body of the perpetrator. Interestingly, the provision specifies that the age of the perpetrator, man or woman, is irrelevant.

> (b) every man who has penetrated even superficially the anus, mouth or any other opening of a woman's or man's body with a sexual organ, any other body part or any object

The second paragraph of Article 170 covers a male perpetrator whose penetration is in relation to a part of the victim's body other than their sexual organ. Article 170(b) is consistent with the international definition, which also provides that penetration can be related to another part of the victim's body, including anal opening or other part of the body and the national provision specifically refers to the mouth as well. This second paragraph also provides that the perpetrator may use his sexual organ, an object or any other part of their body, in line with the international provision. The victim in Article 170(b) can be either a woman or a man.

> (c) any person who introduces, even superficially, any other body part or any object into the vagina

The third paragraph of Article 170 covers situations where the perpetrator is either a man or a woman, and the victim is a woman. It refers to the possibility that the penetration involves

114 Elements of Crimes, Art. 7(1)(g)-1.

any part of the perpetrator's body or any object. There is considerable overlap between Article 170(c) and Article 170(b). However, the victim of the former can only be a woman.

> (d) any person who forces a man or woman to penetrate, even superficially their anus, mouth or any orifice of their body with a sexual organ, any other part of the body or any object

The last paragraph of Article 170 covers the situations when the penetration would be in relation to any part of the perpetrator's body. It has a broad scope as it covers penetration by the victim's sexual organ, any other part of their body or an object. The provision clearly states that both the perpetrator and the victim can be a man or a woman and is in line with the EoC, which provide that penetration can also be in relation to the perpetrator's body.

To summarise, the national definition of rape is consistent with the international definition. Each of its elements is fulfilled by one or more of the paragraphs in Article 170. Nevertheless, the conduct must take place on a victim him/herself or the perpetrator – therefore, this is a more restrictive approach than adopted by the international definition which allows for the victim to be a third person. Finally, the last paragraph of Article 170 presumes rape as indecent assault committed with violence by the physical approximation of the sexual organs of a minor[115] and the perpetrator. This provision is therefore wider than the international definition because it includes situations that would not necessarily involve penetration.

> Commits rape using grave violence or threats or by coercion against a person directly or through a third party, by surprise, psychological pressure instilled through a coercive environment or the abuse of a person who, by the condition of a disease, impairment of faculties or any other accidental cause would have lost the use of the senses or would have been deprived by tricks

Consistently with the EoC, Article 170 also includes an element of coercion as part of the definition of rape. The similarity between the national provision and the international instrument is visible, since they both include the use of violence/force as well as psychological oppression or the existence of a coercive environment. Both provisions also consider that coercion may be exercised directly on the victim or through a third person. The chapeau of Article 170, however, does not include detention and abuse of power as possible means of coercion and could therefore be seen as narrower than the international definition. That being said, the national provision covers other means of coercion not envisaged in the EoC. These include surprise, the abuse of a person because of disease, impairment of faculties or any other accidental cause resulting in the loss of the use of the senses and lastly, deprivation by tricks. Although these different forms of abuses of a person are not explicitly covered in the EoC, they could potentially be linked to the person being incapable of giving genuine consent. Article 170 is, however, more specific. As a result, it may be difficult to determine whether the national provision is narrower or wider than the international provision because they do not exactly cover the same means of coercion.

The 2009 Child Protection Law provides the same definition of rape of a child as Article 170 of the 2006 laws on sexual violence, except that under paragraph (b) it also criminalises any

115 A minor is a person under 18 years of age as stipulated in Art. 167(2) of the Law on sexual violence modifying the Criminal Code 2006, *supra* note 102.

woman as the perpetrator who forces a child to expose their sexual organ to touching by a part of the woman's body or any object.[116]

4.1.2. Pre-2006 amendments

In accordance with the principle of legality, crimes committed prior to 2006 when the laws on sexual violence came into force would be subject to the law applicable at the time of commission of the crime. The pre-2006 version of Article 170 of the Criminal Code provided as follows:[117]

> A person who commits rape is punished with imprisonment from five to twenty years using serious violence or threats, deceit, abusing a person who, as a result of a disease, impaired faculties or any other accidental cause, would have lost the use of the senses, or was deprived by tricks.
>
> It is presumed that rape with violence is committed by the mere carnal approximation of the sexes of persons designated in Article 167.
>
> (Paragraph 1) A person who commits rape is punished with imprisonment from five to twenty years

Article 170 prior to the 2006 amendments did not provide a detailed definition of what the crime of rape entails, leaving it to the courts to interpret the provision. Given the absence of a detailed definition, it is difficult to establish whether the national provision is narrower or wider than the international one.

> (Paragraph 1) using serious violence or threats, deceit, abusing a person who, as a result of a disease, impaired faculties or any other accidental cause, would have lost the use of the senses, or was deprived by tricks

The coercion level required by this Article differs significantly from the various forms of coercion, surprise, psychological pressure and a coercive environment, introduced with the 2006 amendments. It provided only for serious violence or threats, deceit and abuse of power. It is interesting to note that deceit was removed from the amended Article 170. This Article also did not cover the possibility of exercising coercion on the victim through a third person. It is therefore much narrower than the international definition.

> (Paragraph 2) It is presumed that rape with violence is committed by the mere carnal approximation of the sexes of persons designated in Article 167

Like the amended Article 170, this article presumed that indecent assault as physical approximation of the sexual organs of a minor under 14 years and the perpetrator according to paragraph two was considered rape. It is worth noting that the age of the victim of indecent assault has been increased from 14 years old to 18 years with the 2006 amendments.

116 Child Protection Law 2009, Art. 171, *supra* note 103.
117 Criminal Code 2004, Art. 170, *supra* note 101.

4.2. Sexual slavery

Sexual slavery can be prosecuted as a crime against humanity under Article 222(8) and as a war crime under Articles 223(2)(v) and 223(4)(f) of the Criminal Code post-2015 amendments.

4.2.1. Post-2006 amendments

Article 174(e) of the Criminal Code following the amendments brought by the 2006 laws on sexual violence defines sexual slavery as follows:[118]

> Shall be punished with a sentence of five to twenty years of imprisonment and a fine of two hundred thousand current Congolese Francs, whoever exercised one or all of the powers attaching to the right of ownership over a person, including holding or imposing a similar deprivation of liberty, or buying, selling, lending, bartering such person for sexual purposes, and will have forced him/her to perform one or more acts of a sexual nature.

This provision uses gender-neutral terms. Both perpetrator and victim can be either a man or a woman. The exercise of powers is described in the same manner as the EoC:[119] the right of ownership over a person and includes purchasing, selling, lending or bartering the victim as well as a 'similar deprivation of liberty'. Article 174(e) also includes the term 'holding', meaning holding in detention, which is broader than the EoC that do not contain that specific term.

Another visible difference with the international definition of sexual slavery is that Article 174(e) refers to the victim as 'a person' and does not include a plural form of the word. This leaves room for prosecutors and judges to try and bring into the provision organised crime or a collective group of victims. Likewise, the EoC refer to the perpetrator but state that this could include one or more persons. The use of 'whoever' in Article 174(e) offers a similar result, as it could include one or more persons.

The crime of sexual slavery in international law has been criticised for risking to become feminised and failing to provide victims with full judicial redress.[120] Moreover, given the absence of the war crime of enslavement under the ICC Statute, certain conduct could form the basis of sexual slavery as a crime against humanity alone, but not slavery as a war crime.[121] In the DRC, Article 174(e) does not reflect the footnote in the EoC[122] on the possibility that sexual slavery may also encompass hard labour or the reducing of a person to a servile status for the deprivation of liberty and that the conduct includes human trafficking, in particular of women and children. As the laws implementing the ICC Statute came into effect in 2016, it is difficult to discern at the time of writing how Congolese courts will apply the crime of sexual slavery to various conduct and whether concerns such as feminisation of the crime and failure to provide full judicial redress will be addressed.

118 Law on sexual violence modifying the Criminal Code 2006, Art. 174(e), *supra* note 102.

119 Elements of Crimes, Article 7(1)(g)-2.

120 See Patricia Viseur Sellers, "Wartime Female Slavery: Enslavement?", *Cornell International Law Journal*, 2011, vol. 44, p. 139.

121 *Ibid.*

122 Elements of Crimes, Art. 7(1)(g)-2, footnote 18: "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children".

An alternative charge for sexual slavery could be brought under Article 174(j) of the Criminal Code - the traffic and exploitation of children for sexual purposes, provided that the material elements are met (see section 4.3.3.1. Post-2006 amendments). If the victim is a minor, Article 183 of the 2009 Child Protection Law criminalises sexual slavery committed on children.

4.2.2. Forced marriage

Forced marriage is not a crime found in the ICC Statute. The Special Court for Sierra Leone debated whether it existed as a separate and distinct crime or if it was subsumed within sexual slavery.[123] Article 174(f) of the Criminal Code following the amendments brought by the 2006 laws on sexual violence criminalises forced marriage as a distinct crime and provides the following definition:[124]

> Without prejudice to Article 336 of the Family Code, is punishable by one to twelve years' imprisonment and a fine not less than one hundred thousand current Congolese Francs, any person who, exercising parental or guardianship authority of a minor or adult, will have given him/her in or for marriage, or will have forced him/her to marry.

Article 174(f) limits its application only to persons exercising parental or guardianship authority over an individual and therefore is out of scope for members of armed groups who force recruits into marriage. Article 174(f) does not involve a sexual or gender-based element, unlike the crime of sexual slavery. Given the absence of forced marriage from the ICC Statute, the ICC decision on the confirmation of charges against Dominic Ongwen, suggests that forced marriage could be prosecuted as a criminal act, not of a sexual nature, under the charge of other inhumane acts.[125]

4.2.3. Pre-2006 amendments

There was no provision in the Criminal Code prior to 2006 criminalising sexual slavery or forced marriage.

4.3. Enforced prostitution

Enforced prostitution is recognised as a crime against humanity under Article 222(8) and as a war crime under Articles 223(2)(v) and 223(4)(f) of the Criminal Code post-2015 amendments.

123 See Special Court for Sierra Leone, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgement SCSL-04-16-A, 22 February 2008, paras. 195-196.

124 Law on sexual violence modifying the Criminal Code 2006, Art. 174(f), *supra* note 102.

125 ICC, *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15, 23 March 2016.

4.3.1. Post-2006 amendments

Article 174(c) of the Criminal Code after the 2006 laws on sexual violence criminalises enforced prostitution as follows:[126]

> Whoever causes one or more persons to engage in one or more acts of a sexual nature by force, threat of force or coercion or by taking advantage of the inability of such persons to freely provide their consent, in order to obtain a pecuniary or other advantage, will be punished with imprisonment for three months to five years.

Enforced prostitution, as defined in the EoC,[127] requires the procurer to be the cause for one or more persons to engage in prostitution. The role of the procurer is therefore central in defining enforced prostitution. The national provisions also make reference to the specific role the procurer plays in relation to prostitution. Article 174(c) uses gender-neutral terms, therefore allowing for male or female perpetrators and victims. Similarly to the international definition of enforced prostitution,[128] the provision covers one or more victims. It also uses language found in the EoC ("one or more persons") and encompasses "one" or "more" "acts of a sexual nature". Therefore, as with the international definition, a charge of enforced prostitution can be laid when the victim engages in an act of a sexual nature, provided that the other elements are met. The coercion level exercised by the perpetrator involves force, threat of force or coercion which is the same in both Article 174(c) and the EoC. However, Article 174(c) does not provide context for the force or coercion since it does not refer to fear of violence, duress, detention, psychological oppression, abuse of power or taking advantage of a coercive environment as the EoC do. It is difficult to assess whether this results in wider or narrower coverage of the force or coercion as it would depend on how the judges would interpret the terms. Article 174(c), however, does refer to the victim's inability to freely provide consent, which is also found in the EoC.

The requirement that the perpetrator obtains gain is present in Article 174(c) as it is also the case with the international definition of enforced prostitution.[129] More specifically, Article 174(c) uses the term "in order to obtain" a pecuniary or other advantage, which essentially requires the expectation of obtaining an advantage. Furthermore, although Article 174(c) does not use the term 'in exchange for' or 'in connection with' the acts of a sexual nature as found in the EoC, it is necessary that the gain be inextricably linked to the acts of a sexual nature because of the term "in order to obtain". This term therefore links the gain to the acts of a sexual nature and also covers the expectation of obtaining such a gain. In this sense, Article 174(c) is very similar to the international definition of the crime. However, an important difference is that the EoC provide the possibility for another person to obtain or expect to obtain the gain while Article 174(c) does not, therefore limiting the person obtaining the gain to the perpetrator alone. Consequently, the national provision is narrower than the international definition of the crime because it would not allow third parties to be charged with the crime if they did not coerce a victim into engaging in acts of a sexual nature.

Article 174(j) of the Criminal Code following the 2006 amendments provides for an alternative charge to enforced prostitution: the traffic and exploitation of children for sexual purposes. It

126 Law on sexual violence modifying the Criminal Code 2006, Art. 174(c), *supra* note 102.
127 Elements of Crimes, Art. 7(1)(g)-3.
128 *Ibid.*
129 *Ibid.*

provides that "[a]ny act or transaction relating to the trafficking or exploitation of children or any person for sexual ends which provide remuneration or any advantage, is punishable by a prison term between ten to twenty years". Article 174(j) requires the trafficking or exploitation of children or any other person. Although the title of the crime suggests that it protects children, it appears to also apply to adult victims. The victim(s) must engage in sexual activity and the perpetrator must obtain a gain. Whereas the perpetrator does not need to use force, threats or coercion, they needs to traffic or exploit the victim and there is no need to demonstrate the victim's capacity to give genuine consent. Similarly to the international crime of enforced prostitution,[130] Article 174(j) requires the perpetrator to obtain gain. However, the provision does not cover the expected gain but only the actual remuneration or any advantage obtained. A potential disabling factor is that this article does not provide a definition of neither trafficking nor exploitation and therefore the elements of the crime are unclear. For instance, it is not clear whether 'trafficking' would require movement of the victim.

Another alternative charge to enforced prostitution could be brought under Article 174(n) which criminalises child prostitution. It provides as follows: "[s]hall be punished by a prison term of five to twenty years and a fine of two hundred thousand current Congolese Francs, whoever uses a child under 18 for sexual activities against remuneration or any other form of advantage". Article 174(n) applies only to victims under 18 years but, similarly to enforced prostitution as an international crime,[131] requires the victim engaging in sexual activity and the perpetrator obtaining gain. The perpetrator does not need to use force, threats or coercion but simply needs to 'use' the victim. Therefore, the victim's genuine consent and a coercive environment are not requirements of this crime. Article 174(n) does not cover the expected gain but only the actual remuneration or other advantage obtained by the perpetrator.

4.3.2. Pre-2006 amendments

There was no provision in the Criminal Code prior to 2006 criminalising enforced prostitution. The closest crime to enforced prostitution would be the crime against morality described in Article 174bis,[132] which required hiring, abducting or enticing someone over 21 years of age to debauchery or prostitution. It did not limit the victim to one person, so it could encompass more than one individual. Therefore, Article 174bis included both elements of coercion and acts of a sexual nature. Even though this provision did not provide context for the coercion, it still required the victim to engage in acts of a sexual nature by force (through the abduction). Moreover, paragraphs three and four of Article 174bis required that the perpetrator or others obtained gain. Article 174bis therefore allowed for the indictment of another person who obtained a gain from the prostitution of the victim. This provided wider coverage as compared with Article 174(c) of the Criminal Code following the 2006 laws on sexual violence amendments. Importantly, however, Article 174bis required the actual gain and did not provide for the expectation of gain since it referred to the procurer as the one who lives at the expense of the person being exploited with prostitution or others who exploit the victim's prostitution. In this manner, it is narrower than Article 174(c) and the international definition of enforced prostitution[133] because a perpetrator or associated individual who expected to gain from the acts

130 *Ibid.*
131 *Ibid.*
132 Criminal Code Art. 174bis 2004, *supra* note 101; see section 4.3.6.3.
133 Elements of Crimes, Art. 7(1)(g)-3.

would technically not have been covered by this provision. Lastly, Article 174bis only covered victims who are over 21 years of age; anyone under that age would not have been covered.

To fill this gap, Article 172 of the Criminal Code[134] (the moral crime) could perhaps be used, although the conduct forced on the victim(s) would need to fit within the terms "debauchery" or "corruption". Article 172 covered victims below 21 years. Article 172 contained no element of coercion or gain but simply inciting, promoting or facilitating, which differs greatly from the reality of enforced prostitution. Nonetheless, due to a lack of appropriate provision to accurately describe the conduct and suffering of a victim below 21 years, this provision could be useful.

4.4. Forced pregnancy

Forced pregnancy is criminalised as a crime against humanity in Article 222(7) and a war crime in 223(2)(v) and 223(4)(f) of the Criminal Code post-2015 amendments. Forced pregnancy is the only sexual crime to be explicitly defined in Article 222 on crimes against humanity and is worded similarly to the ICC Statute definition.[135]

4.4.1. Post-2006 amendments

Article 174(k) of the Criminal Code following the 2006 amendments criminalises forced pregnancy and provides the following:[136] "anyone who detains one or more women made pregnant by force or ruse will be punished with imprisonment for ten to twenty years". The international definition of forced pregnancy includes the following elements: the perpetrator confining one or more women; the victim being forcibly made pregnant, and the perpetrator's intent to affect the ethnic composition of any population or to carry out other grave violations of international law.[137] Compared to the international definition of forced pregnancy,[138] Article 174(k) also requires confinement but uses the word "*aura détenu*", which means 'will have detained' or 'will have held'. Despite the different verb tense, the outcome is similar. The perpetrator is described in gender-neutral terms and it can therefore be a man or a woman, whereas the victim must self-evidently be a woman. Article 174(k) allows for a single or multiple victims and requires the use of force or ruse. In this sense, it provides wider protection compared to the international definition which requires only force exercised by the perpetrator for the pregnancy. Importantly, Article 174(k) does not refer to the intent of the perpetrator to affect the ethnic composition of a population or carrying out other grave violations of international law as the ICC Statute does. This specific intent is therefore not a component of the national provision. Instead, the provision places emphasis on the victim of forced pregnancy, confinement, and ultimately giving birth to a child born of rape and not on the perpetrator's intention and wider context. Lastly, the level of force needed for the forced pregnancy is not qualified. Therefore, it is unclear whether this encompasses physical force, threats, intimidation, extortion and other forms of duress as envisaged under the international definition of the crime. In addition, Article 174(k) does not specify what confinement entails and whether the victim

134 Criminal Code 2004, Art. 172, *supra* note 101.
135 ICC Statute.
136 Law on sexual violence modifying the Criminal Code 2006, Art. 174(k), *supra* note 102.
137 Elements of Crimes, Art. 7(1)(g)-4.
138 ICC Statute, Art. 7(2)(f); Elements of Crimes, 2002, Art. 7(1)(g)-4.

may have been made pregnant prior to being confined. Consequently, the judges would need to interpret the various terms and it is therefore difficult to determine whether these differences offer victims lesser or greater protection than the ICC Statute.

4.4.2. Pre-2006 amendments

Prior to 2006, there was no provision in the Criminal Code criminalising forced pregnancy.

4.5. Enforced sterilisation

Enforced sterilisation can be charged under Article 222(8) of the Criminal Code as a crime against humanity or as a war crime under Articles 223(2)(v) and 223(4)(f) of the Criminal Code post-2015 amendments.

4.5.1. Post-2006 amendments

Article 174(l) of the Criminal Code following the amendments introduced by the 2006 laws on sexual violence criminalises enforced sterilisation as an ordinary crime and provides the following:[139]

> Shall be punished by imprisonment of five to fifteen years, whoever committed on a person an act to deprive biological and organic reproductive capacity without such an act being previously subject to a justified medical decision and free consent of the victim.

The international definition of enforced sterilisation includes the following elements: the perpetrator deprived one or more persons of biological reproductive capacity; the conduct was not justified by a medical or hospital treatment of the person concerned and the conduct was not carried out with the genuine consent of the person or persons concerned.[140] Article 174(l) is construed in gender-neutral terms and therefore covers male or female perpetrators or victims. As the international definition of enforced sterilisation does, the provision requires the deprivation of biological reproductive capacity. However, distinctly from it, it only appears to cover one victim as it uses "une personne" (a person). The latter provides narrower coverage as it does not cover a group of persons. With regard to genuine consent, which is part of the international definition of enforced sterilisation, Article 174(l) also requires the free consent of the victim. The national provision does not explicitly refer to the fact that consent cannot be obtained by deception, as provided for in footnote 20 of the EoC.[141] Lastly, Article 174(l) requires a medical decision that does not justify the act, whereas the EoC require that the victim undergo a medical or hospital treatment. It is difficult to determine whether this constitutes a narrower or wider provision since it depends entirely on the circumstances of each case.

139 Law on sexual violence modifying the Criminal Code 2006, Art. 174(l), *supra* note 102.
140 Elements of Crimes, Art. 7(1)(g)-5.
141 *Ibid.*

4.5.2. Pre-2006 amendments

There was no provision in the Criminal Code prior to 2006 criminalising enforced sterilisation.

4.6. Other forms of sexual violence of comparable gravity

Other forms of sexual violence can be charged under Article 222(8) of the Criminal Code following the amendments by the 2015 Law modifying the Criminal Code as a crime against humanity or Articles 223(2)(v) and 223(4)(f) as a war crime of the Criminal Code post-2015 amendments.
Article 7(1)(g) of the ICC Statute is an open-ended provision which, in addition to the SGBV crimes listed, includes "any other form of sexual violence of comparable gravity".[142] Such crimes must involve acts of sexual nature, a coercive dimension and it must be of comparable gravity as the other crimes listed in the provision.[143] In addition, the perpetrator must be "aware of the factual circumstances that established the gravity of the conduct".[144] The national legislation criminalises various offences of a sexual nature that could possibly fall under the scope of other forms of sexual violence of comparable gravity. The following section will assess whether the provisions criminalising these crimes encompass the different elements contained in the 'other forms of sexual violence' definition of the EoC.

4.6.1. Indecent assault

A crime falling under the scope of other forms of sexual violence of comparable gravity can be found in Articles 167 and 168 of the Criminal Code[145] following the 2006 amendments which cover indecent assault.

Article 167:

> The indecent assault committed without violence, deceit or threats on persons or with the assistance of a child under the age of 18 shall be punished with imprisonment from six months to five years. The age of the child can be determined by a medical examination, in the absence of personal records.

Article 168:

> The indecent assault committed with violence, deceit or threats on persons of either sex will be punished with imprisonment from six months to five years.
>
> The indecent assault committed with violence, deceit or threats on a person or with the assistance of a child under the age of 18 shall be punished with imprisonment from five to fifteen years. If the assault was committed on persons or with the assistance persons aged less than ten, the penalty is five to twenty years.

142 ICC Statute, Art. 7(1)(g).
143 Elements of Crimes, Art. 7(1)(g)-6.
144 *Ibid.*, Art. 7(1)(g)-6.
145 Law on sexual violence modifying the Criminal Code 2006, Arts. 167 and 168, *supra* note 102.

The term indecent assault is not adequately defined in the above provisions. The first paragraph of Article 167 of the Criminal Code following the 2006 amendments also provides a definition of acts contrary to morals as follows: "[a]ny act contrary to morals practiced intentionally and directly on a person without the valid consent of the latter is an indecent assault". It is unclear what an act contrary to morals exactly entails. If the victim is a child under 18 years of age, Article 172 of the 2009 Child Protection Law applies which criminalises indecent assault committed on children.

Although it does not directly refer to the nature of the crime, the definition of indecent assault in Article 167 and 168 is clearly of a sexual nature because it is included in the section of the Criminal Code which covers sexual violence. It would therefore fall under the scope of other forms of sexual violence of comparable gravity enshrined in Article 7(g) of the ICC Statute. The second element of this type of crimes provided for in the Elements of Crimes requires that the perpetrator caused the person to engage in an act of sexual nature. Similarly, the definition of indecent assault in the Criminal Code[146] clearly suggests that the perpetrator induced the victim to perform an act of sexual nature. It would therefore be consistent with the international provision.

The coercive element of indecent assault is worth exploring further. Article 167 of the Criminal Code provides that indecent assault may be carried out without violence, deceit or threats on persons. The lack of coercion, would not satisfy the requirement under the Elements of Crimes.[147] . In contrast, Article 168 clearly encompasses a coercive element, as it requires indecent assault to be committed with violence, deceit or threats on persons of either sex.

The national provision does not encompass further detail on what violence, deceit or threats may entail. In a nutshell, indecent assault is considered as a sexual crime that could potentially cover situations where no violence has been used. As a result, the national provision could be seen as wider than the international provision, since it also criminalises sexual crimes committed without violence.

Articles 167 and 168 are similar to Articles 167 and 168 of the Criminal Code before the 2006 amendments. It is, nevertheless, worth noting that the age of the child providing assistance has been increased from 14 to 18 years of age.

4.6.2. Excitement of minors to debauchery

Article 172 of the Criminal Code following the 2006 amendments criminalises the excitement of minors to debauchery as follows:[148]

> Whoever commits a moral crime by exciting, facilitating or promoting to satisfy the passions of others, debauchery or the corruption of persons of either sex, under the age of eighteen years shall be punished with a prison term of three months to five years and a fine of 50,000 to 100,000 current Congolese Francs.

146 *Ibid.*, Art. 167.
147 Elements of Crimes, Art. 7(1)(g)-6.
148 Law on sexual violence modifying the Criminal Code 2006, Art. 172, *supra* note 102.

Article 173 of the 2009 Child Protection Law also criminalises the excitement of minors to debauchery.[149] The provision is almost identical to the previous version of the Criminal Code prior to the 2006 amendments.[150] The elements of this crime are therefore a perpetrator(s) exciting, facilitating or promoting debauchery or the corruption of the victim(s). The victim must be a minor under 18 years of age. The victim(s) and perpetrator(s) can be of either sex.

This provision, however, lacks clarity, as it does not define debauchery or corruption and what the conduct exactly entails. Nevertheless, this clearly indicates that the crime of excitement of minors to debauchery is of sexual nature. The second element, that the perpetrator must cause the victim to engage in an act of sexual nature, can be found in the fact that the perpetrator must commit the crime in order to satisfy the "passions" of others. Article 172 of the Criminal Code does not explicitly refer to a coercive element or the gravity of the crime, although the coercive element may be implicit. It is therefore difficult to determine whether the provision would be wider or narrower in comparison with the international provision of other forms of sexual violence of comparable gravity.[151] An important limitation of the moral crime provisions found in Articles 172 and 173 is that they require the "satisfaction of the passion of others" and therefore the perpetrator who sexually enslaves someone for their own pleasure is not covered.

4.6.3. The procurer and procuring

Article 174(b) of the Criminal Code post the 2006 amendments criminalises the procurer and procuring as follows:[152]

> Shall be punished with imprisonment of three months to five years and a fine of 50,000 to 100,000 current Congolese Francs:
>
> 1. any person who, to satisfy the passions of others, has hired, enticed or abducted for debauchery or prostitution, even with their consent, a person over the age of eighteen; the age of the person can be determined by medical examination, if no civil registry exists;
> 2. whoever keeps a bawdy or prostitution house;
> 3. the procurer: the procurer is one who lives in whole or in part, at the expense of a person he exploits with prostitution;
> 4. whoever habitually exploits in any other way, the debauchery or prostitution of others.
>
> When the victim is a child under 18, the penalty is five to twenty years.

This provision is almost identical to Article 174bis of the Criminal Code prior to the 2006 amendments. The only differences are that the victim of this article must be over 18 years old (whereas they must be over 21 years in Article 174bis the fines imposed and the heavier penalty for a minor under 18 years. Article 182 of the 2009 Child Protection Law criminalises procuring on children.

149 Child Protection Law 2009, Art. 173, *supra* note 103.
150 Criminal Code 2004, Art. 172, *supra* note 101.
151 Elements of Crimes, Art. 7(1)(g)-6.
152 Law on sexual violence modifying the Criminal Code 2006, Art. 174(b), *supra* note 102.

The crime of the procurer and procuring can be considered as another form of sexual violence of comparable gravity because it fulfils the different criteria outlined in the EoC.[153] The crime is clearly of sexual nature and Article 174(b), particularly paragraphs one and four, imply that the perpetrator caused the victim to engage in an act of a sexual nature. The coercive element of this crime may be less clear as it is not explicitly stated in the provision. Nevertheless, it can be deduced from the use of the term "even with their consent" that the provision covers situations where the person engaged in prostitution would not have consented to do so. The absence of consent implied in the provision covers situations where the victim would have been coerced to engage in prostitution. The definition of the procurer and procuring would therefore be consistent with the international provisions on other form of sexual violence.[154] Article 174(b) does not, however, refer to the gravity of the crime. It is therefore difficult to determine whether this crime would be of comparable gravity to the crimes listed in Article 7(1)(g) of the ICC Statute[155] (rape, sexual slavery, etc.).

Articles 174bis and 172, discussed in the previous section, could help prosecute members of a group responsible for sexual slavery, provided that the conduct forced on the victim(s) can be described as debauchery or corruption for those under 21 years of age (Article 172) and debauchery or prostitution for those over 21 years of age (Article 174bis). The perpetrator must incite, promote or facilitate (Article 172) or hire, abduct or entice (Article 174bis). These provisions contain elements of ownership and acts of a sexual nature, which are some of the components of sexual slavery.

4.6.4. Sexual harassment

Article 174(d) of the Criminal Code following the 2006 amendments criminalises sexual harassment and provides as follows:

> Anyone who adopts a persistent behaviour toward others, resulting in words, gestures, by giving orders or uttering threats, imposing constraints, exerting serious pressure or abusing the authority conferred by duties in order to obtain sexual favours, shall be punished with a prison term of one to twelve years and a fine of 50,000 to 100,000 current Congolese francs or only one of these penalties.

The conduct must seek to obtain sexual favours, without necessarily resulting in a sexual act being carried out. In addition to this, this provision for sexual harassment has as its elements the perpetrator adopting a persistent behaviour and proffering words, gestures, giving orders, uttering threats, imposing constrains, exerting serious pressure or abusing authority conferred by duties. This implies that the perpetrator played a role in causing the victim to engage in an act of sexual nature. Moreover, it also involves an element of duress that would be consistent with the international definition of other forms of sexual violence. The conduct described in this provision may not be of similar gravity to crimes such as rape, sexual slavery, enforced prostitution, etc. However, it provides the possibility to prosecute conduct where the perpetrator imposes conditions of duress on a victim and expects sexual favours from him/her. Article 181 of the 2009 Child Protection Law criminalises sexual harassment of children with a sentence of three to 12 years imprisonment.

153 Elements of Crimes, Art. 7(1)(g)-6.
154 *Ibid.*
155 ICC Statute, Art. 7(1)(g).

4.6.5. Sexual mutilation

Article 174(g) of the Criminal Code, following the 2006 amendments, criminalises sexual mutilation. It requires the perpetrator committing an act to violate the physical or functional integrity of the genitals of a person.

Sexual mutilation, which is inherently of a sexual nature, can fall under the crime of other forms of sexual violence, because it relates to a sexual part of the victim's body. However, it does not involve a sexual act *per se*. In this sense, sexual mutilation may be seen as being akin to torture, cruel, inhuman and degrading treatment, than rape or indecent assault. That being said, it could nevertheless be considered as an act of a sexual nature, similar to enforced sterilisation. Article 174(g) does not clearly refer to the coercive aspect of the crime. A possible reason explaining this could be that the coercion may not be as direct as it is in relation to other sexual crimes. The coercion exercised on the victim may be more subtle through the pressure imposed by the culture, the victim's family or community and not by the perpetrator him/herself. In the absence of a direct reference to coercion in the national provision, it is difficult to determine whether the criminalisation of sexual mutilation would be considered as another form of sexual violence, consistently with Article 7(g) of the ICC Statute. Finally, it is difficult to determine whether sexual mutilation would be of comparable gravity to other SGBV crimes. Nevertheless, Article 174(g) provides that when sexual mutilation resulted in the death of the victim, the penalty will be increased to life imprisonment. This suggests that the crime may be of comparable gravity as other SGBV crimes.

It is interesting to note that Article 174(g) is gender-neutral. Although it is probably included in the Criminal Code to cover female genital mutilation, it does not differentiate whether the mutilation affects a woman or a man.

4.6.6. Deliberate transmission of incurable sexually transmitted diseases

Article 174(i) of the Criminal Code post 2006 amendments criminalises the deliberate transmission of incurable sexually transmitted diseases. For this provision to apply, the perpetrator has to deliberately infect a person with an incurable sexually transmitted infection ('STI'). This provision does not require acts of a sexual nature on the part of the perpetrator or victim but simply the intent of deliberately infecting the victim. A limitation to this provision is that the STI must be incurable and so victims of sexual violence who are given STIs which can be cured through treatment, would not be protected by this provision. Article 177 of the 2009 Child Protection Law criminalises the deliberate contamination of a child with an incurable sexually transmitted infection and provides a life prison sentence and a fine of 500.000 to 1.000.000 Congolese Francs.

The coercive element of Article 174(i) is not clear since the transmission of an incurable sexually transmitted disease does not necessarily involve coercion on the victim. The victim may ignore that the perpetrator was carrying this disease. The EoC include in the different elements of coercion that the victim may not have been able to give genuine consent.[156] Although it would be absurd to consider the victim's consent to be infected, this element could be seen as including deceit or surprise. As a result, the deliberate transmission of incurable sexually

156 Elements of Crimes, Art. 7(1)(g)-6(1).

transmitted disease could be seen as another form of sexual violence, similar to enforced sterilisation for example. The fact that the disease is incurable also suggests that the crime would be of comparable gravity as the other SGBV crimes.

Provisions related to SGBV in the 2009 Child Protection Law could also be used as an alternative to prosecute SGBV against children. Several provisions would be relevant. These include Article 175 of the 2009 Child Protection Law on the detention of one or more children with the intention of abusing them sexually, encompassing a sentence of ten to 20 years imprisonment. It also includes Article 178 of the 2009 Child Protection Law on exposing a child to sexual exhibition. It defines sexual exhibition as showing intimate body parts and/or making sexual gestures in public. It imposes a sentence of five to ten years imprisonment and a fine of 200.000 to 600.000 Congolese Francs. Child pornography could also be considered as an alternative for prosecution and it is prohibited in Article 174(m) of the Law of 2006 amending the Criminal Code.

4.7. Other criminalisation of sexual violence

The previous sections examined provisions that criminalise crimes directly related to sexual violence. The following section covers other provisions that could be considered to prosecute SGBV crimes as part of another crime that is not explicitly of a sexual nature.

4.7.1. Torture

SGBV could also be prosecuted as torture. Torture is criminalised under Article 222(6) as an underlying act of crimes against humanity and Article 223(1)(b) and Article 223(3)(a) and (b) as an underlying act of war crimes of the Criminal Code post-2015 amendments. Article 223(2)(j) and Article 223(4)(k) which cover the detention of civilians and the conduct of experiments on them involving causing harm and Article 223(2)(u) on humiliating and degrading treatment could also be relevant.

Article 48bis introduced to the Criminal Code through Law No. 11/008 of 9 July 2011 on the criminalisation of torture[157] criminalises torture perpetrated by any civil servant, public officer, person in charge of delivering a public service or any person acting under the orders or instigation of any of these individuals. The conduct requires intentionally inflicting severe pain or suffering, whether physical or mental on a person. Likewise, it requires a purpose of obtaining information or a confession, punishing the victim for an act they or a third person committed (or is suspected of), intimidating or putting pressure on him/her or a third person or for any other reason based on discrimination of any kind. The sentence for this crime is five to ten years imprisonment and a fine of 50.000 to 100.000 Congolese Francs.

Article 48bis is narrower than the definition of torture in the ICC Statute[158] because it is limited to civil servants, public officers, persons delivering public services or any other person following the orders of any of these individuals. Therefore, it could not cover members of armed groups or civilians who have perpetrated sexual crimes on a victim. Moreover, this article

157 Loi n° 11/008 du 09 juillet 2011 portant criminalisation de la torture, 9 July 2011, Official Journal of the DRC, 15 July 2011.
158 ICC Statute, Art. 7(2)(e).

does not require that the victim be in the custody or control of the accused but requires one of four purposes (the last one being wide but based on discrimination). The application of this provision to sexual violence cases can only be made on a narrow scope because the provision requires that the perpetrator have a specific purpose. Perpetrators of sexual violence do not necessarily have the purpose of intimidating the victim or punishing him/her for an act committed, depending on the circumstances. Importantly, together with international crimes, the crime of torture is the only one that is not subject to prescription.

4.7.2. Murder and aggravated assault and battery

The 2004 Criminal Code provides for voluntary homicide and corporal lesions in Articles 43-51. Articles 44 and 45 of the Criminal Code criminalise murder (homicide committed with the intention to kill) and assassination (murder committed with premeditation). SGBV crimes that cause the death of the victim could therefore be prosecuted with these provisions where the perpetrator intended to kill the victim. Article 46 criminalises the voluntary injury or physical strike of a person. Article 47 provides for aggravating circumstances where the victim obtains an illness, work incapacity, an absolute loss of an organ or a serious mutilation from the injury or strike. Article 48 criminalises the situation where the physical striking or injuries are voluntary but without the intention of killing the victim. Articles 46, 47 and 48 can therefore be used in sexual violence cases where the perpetrator intended to injure or strike the victim.

4.7.3. Manslaughter and unintentional bodily injuries

The Criminal Code also provides for manslaughter and unintentional bodily injury in Articles 52-56. Article 52 criminalises manslaughter and corporal lesions of the perpetrator who did not have the intention to kill or cause the lesions. This provision can be useful in many cases where the perpetrator did not intent to kill the victim or cause corporal lesions when raping the latter. Article 54 criminalises the physical strike or injuries committed on a victim as a result of lack of foresight or precaution.

4.7.4. Imprisonment or other severe deprivation of physical liberty

Imprisonment or other severe deprivation of physical liberty is criminalised as an underlying act of crimes against humanity in Article 222(5) and of war crimes under Article 223(1)(g) of the Criminal Code post-2015 amendments.

Article 67 of the 2004 Criminal Code on imprisonment or other severe deprivation of physical liberty could also be used to prosecute SGBV in certain circumstances:

> A person(s) is punished with imprisonment of one to five years who, through violence, deceit or threats, abducted or had any person abducted, arrested or had any person arbitrarily arrested, detained or had any person detained.
>
> If the person abducted, arrested or detained has been subjected to physical torture, the culprit is punished with imprisonment from five to twenty years. If the torture has resulted in death, the offender is sentenced to life imprisonment or death.

The elements of this crime are one or more perpetrators (of either sex) resorting to violence, deceit or threats in order to abduct, arrest or detain one or more victims (of either sex). Importantly, it appears that the perpetrator who provides orders but does not carry out the action themselves is also covered by this provision ("had any person abducted [...]"). Moreover, it provides for the arbitrary arrest of a victim, which in theory covers members of the police or armed forces who arbitrarily arrest a person. This crime, however, is essentially about abducting a person through extrajudicial means. Nevertheless, the fact that extra prison time is envisaged if physical torture is inflicted on the victim(s) might be significant in the case of SGBV victims in case there is insufficient evidence to prove a sexual crime.

5

5. Legal framework: *mens rea*

5. Legal framework: *mens rea*

Article 30 of the ICC Statute encompasses a general provision on the mental elements required for the commission of each of the crimes under the ICC's jurisdiction. In the DRC, the 2015 laws implementing the ICC Statute do not include a provision similar in nature to Article 30 of the ICC Statute and there is no equivalent provision specifying the requisite mental element for any of the crimes contained therein. Similarly, the 2006 laws on sexual violence do not include any provision on the mental element of crimes. There is no general provision in the 2004 Criminal Code that provides for the mental element requirement for the commission of a crime. In other words, the Criminal Code does not explicitly state that the intent and knowledge of the perpetrator must be proven for an individual to be held responsible for a crime. The general requirement for intent can therefore only be deduced from other provisions or is implied in the definition of each of the crimes.

The mental element is therefore included in each particular crime. For example, in the case of murder and corporal lesions, Article 43 of the Criminal Code provides that the voluntary nature of the act is the intent of attacking the victim even if this intention would be dependent on any circumstance or condition. There is no mention of knowledge, except for the accomplice provision which will be examined in the section on modes of liability below.

6

6. Legal framework: liabilities

6.1. Modes of liability for international crimes

6.2. Modes of liability for ordinary crimes

6. Legal framework: liabilities

6.1. International crimes

The 2015 Law modifying the Criminal Code brings the modes of liability applicable to genocide, crimes against humanity and war crimes in line with those found in the ICC Statute. Article 21bis(1) covers direct perpetration, co-perpetration and indirect perpetration in the exact same manner as Article 25 of the ICC Statute. Article 21bis(2) covers ordering, soliciting or encouraging the commission of a crime. Article 21bis(3) covers aiding and abetting. Article 21bis(4) covers the contribution to the commission of a crime in any other way by a group of persons with a common purpose in the exact same manner as the ICC Statute. Article 21bis(5) covers directly and publicly inciting others to commit genocide. Article 21bis(6) covers attempt. All of the provisions found in Article 21bis of the Criminal Code are an exact copy of the ICC Statute.

The 2015 Law modifying the Criminal Code also covers accomplice liability, which appears to apply not only to international crimes but also to ordinary ones. Article 21ter considers as accomplices: 1) those who have given instructions to commit the crime; 2) those who have procured weapons, instruments or any other means used in the crime knowing that these are to be used for the crime; 3) those who have knowingly helped or assisted the perpetrator or perpetrators who prepared or facilitated the crime or those who perpetrated the crime; 4) those who, aware of the criminal conduct of offenders engaging in armed robbery or violence against the state security, public order, persons or property, habitually provide housing, retreat or a meeting place.

Additionally, the 2015 Law modifying the Criminal Code provides for command responsibility in non-military situations for international crimes in Article 22bis. The provision replicates *verbatim* the content of Article 28(b) of the ICC Statute and therefore provides for the knowledge of crimes by the superior through activities within their effective responsibility and control and they failed to take all necessary and reasonable measures to prevent or repress the commission of the crimes. Article 1 of the 2015 Law modifying the Military Criminal Code covers command responsibility for military commanders in the exact same manner as the ICC Statute does in Article 28(a).[159]

It is important to emphasise that the provisions on modes of liability found in the Criminal Code, apply to cases that come under military jurisdiction.[160] The modes of liability for international crimes in the Criminal Code also apply to international crimes in military jurisdictions. However, the Military Criminal Code also contains the same provisions on modes of liability as the Criminal Code. Article 5 of the Military Criminal Code is equivalent to Article 21 of the Criminal Code and Article 6 of the Military Criminal Code is equivalent to Article 22 of the Criminal Code.

159 For an analysis of command responsibility through the direct application of the ICC Statute in a Congolese military court, see High Military Court, Affaire *Kakwavu*, Judgement, 7 November 2014, pp. 61-80 ('*Kakwavu* case').

160 See Law modifying the Military Criminal Code 2015, Art. 1, *supra* note 97; Military Criminal Code 2002, Art. 1, *supra* note 83.

Prior to the 2015 amendments introduced by the laws implementing the ICC Statute, the Military Criminal Code did not provide a mode of liability equivalent to command responsibility. Instead, in Article 175, it provided, only for war crimes, that in the case where a subordinate is prosecuted as the principal perpetrator and that their superiors cannot be sought as co-perpetrators, the latter are considered accomplices to the extent that they tolerated the criminal behaviour of the subordinate. The effect of this provision appears to be that a superior would only be prosecuted if theirs subordinates are also prosecuted and that they would be considered a co-perpetrator or accomplice but not a principal perpetrator.[161] Importantly, this provision was repealed in 2016 following the enactment of the legislation implementing the ICC Statute. However, this provision would be applicable for the prosecution of crimes committed prior to 2016.

6.2. Ordinary crimes

Article 21 of the Criminal Code provides for direct perpetration, co-perpetration and indirect perpetration. It considers perpetrators of a crime: 1) those who have committed or who have cooperated directly in its execution; 2) those who, by any fact, have lent assistance to its execution such that without their assistance, the crime would not have been committed; 3) those who through offers, gifts, promises, threats, abuse of authority or power, scheming or contrivance, directly incited the offense; 4) those who, by making speeches at meetings or in public places, by posted placards, by writings, printed or not printed, and sold or distributed, or by drawings or emblems, have provoked directly to the commission, without prejudice to the penalties that could be imposed by decrees or orders against the perpetrators of provocations to offenses, even if these provocations did not lead to results. Article 21(2) is similar to Article 25(3)(c) of the ICC Statute in assisting with the commission of a crime but it is narrower in scope since it requires essential assistance for the perpetration of the crime, without which it would not have been committed. Article 21(3) and (4) is similar to Article 25(3)(b) of the ICC Statute regarding soliciting and inducing the commission of a crime except that paragraph three requires offers, gifts, promises, threats, abuse of authority or power, scheming or contrivance and paragraph four refers specifically to speeches at meetings or public places.

The 2015 Law modifying the Criminal Code also provides for the accomplice as a mode of liability, which appears to apply not only to international crimes but also to ordinary ones. Article 21ter considers as accomplices: 1) those who have given instructions to commit the crime; 2) those who have procured weapons, instruments or any other means used in the crime knowing that these are to be used for the crime; 3) those who have knowingly helped or assisted the perpetrator or perpetrators who prepared or facilitated the crime or those who perpetrated the crime; 4) those who, aware of the criminal conduct of offenders engaging in armed robbery or violence against the state security, public order, persons or property, habitually provide housing, retreat or a meeting place .

Article 22 of the Criminal Code is worded in the exact same manner as Article 21ter of the 2015 Law modifying the Criminal Code, which provides for accomplices. Therefore, Article 22(1), which provides for giving instructions to commit the crime, is analogous to Article 25(3)(b) of the ICC Statute on ordering the commission of a crime. Article 21(2), which provides for procuring means used in the crime, covers the last part of Article 25(3)(c) of the ICC

161 ICTJ Accountability Landscape Eastern DRC 2015, *supra* note 69.

Statute regarding the provision of means for the commission of the act. However, it is more specific since it requires the provision of weapons, instruments or any other means and it also requires knowledge on the part of the accomplice that such means are going to be used for the perpetration of the crime. Article 21(3), which covers help or assistance given to the perpetrator is similar to the part of Article 25(3)(c) of the ICC Statute that covers the participation of the accomplice in aiding and assisting the principal of the crime. However, it is more specific in that it covers the case where the accomplice helps those who prepare or facilitate the crime as well as the direct perpetrators of the crime. The national provision also covers those who benefited from the crimes. This form of participation is not included in the ICC Statute. Therefore, the scope of the national provision is wider than the ICC Statute as it could possibly encompass more persons. Article 22(4) only covers situations when the accomplice would provide assistance to the criminal group, with knowledge of their criminal purpose, but it is not clear whether the accomplice would actually aim to further the criminal activity of the group, as envisaged in Article 25(3)(d)(i) of the ICC Statute.

7

7. Legal framework: penalties

7.1. Genocide, crimes against humanity and war crimes

7.2. Rape

7.3. Sexual slavery

7.4. Enforced prostitution

7.5. Forced pregnancy

7.6. Enforced sterilisation

7.7. Indecent assault

7.8. Excitement of minors to debauchery

7.9. The procurer and procuring

7.10. Sexual harassment

7.11. Sexual mutilation

7.12. Deliberate transmission of incurable sexually transmitted diseases

7.13. Torture

7.14. Murder and aggravated assault and battery

7.15. Manslaughter and unintentional bodily injuries

7.16. Imprisonment or other severe deprivation of physical liberty

7.17. Statutes of limitations

7. Legal framework: penalties

Article 5 of the Criminal Code covers the applicable penalties which are: 1) death; 2) hard labour; 3) incarceration; 4) fines; 5) special confiscation; 6) the obligation to keep away from certain places or a certain region; 7) residence in a determined place; 8) surveillance from the Government. Article 6 stipulates that the death penalty is executed in the manner determined by the President. There is no mention of the maximum time that a person can serve in prison. Article 6bis provides that hard labour ranges from a minimum of one year to a maximum of 20 and that the sentence is carried out in conformity with regulations enacted by orders of the President. Article 7 provides that incarceration lasts a minimum of 24 hours and Article 8 that convicted persons serve their sentence at determined prisons by the President. Article 10 provides that the minimum fine is one Zaire and that fines are levied by the Republic. Article 11 provides that fines are pronounced individually against each person convicted of the same crime. Article 20 of the Criminal Code specifies that if the perpetrator committed several crimes, the highest penalty will be imposed.

The military criminal system covers the applicable penalties, which are similar to those provided in the civilian system. The Military Criminal Code provides the following penalties in Article 26: 1) death by arms; 2) hard labour; 3) incarceration; 4) fines; 5) special confiscation; 6) reduction in rank; 7) discharge; 8) deprivation of rank or demotion; 9) temporary prohibition of the exercise of political and civil rights. There is also no mention of the maximum amount of jail time that a person can serve in the Military Criminal Code.

The Military Criminal Code stipulates in Article 39 that it covers and punishes two categories of crimes: 1) military crimes and 2) mixed crimes. According to Article 40, military crimes are those committed by military or assimilated personnel and consist of a breach of duty of their functions and mixed crimes are common crimes aggravated by the circumstances in which they occurred and covered by both the ordinary Criminal Code and the Military Criminal Code. There is currently a moratorium with regard to the death penalty in the DRC.[162]

Having considered general provisions on penalties applicable to any crime, the specific penalties for the crimes discussed in this report will now be examined.

7.1. Genocide, crimes against humanity and war crimes

Articles 221, 222 and 223 of the Criminal Code, following the 2015 amendments by the Law modifying the Criminal Code, envisage the death penalty for such crimes. It remains to be seen what penalties will be imposed on the three international crimes given the moratorium on the death penalty[163] and the fact that there is no stipulation of the maximum amount of time that a prison sentence can encompass.

162 ICTJ Accountability Landscape Eastern DRC 2015, p. 7, *supra* note 69.
163 *Ibid.*

Prior to the 2015 amendments introduced by the laws implementing the ICC Statute, the Military Criminal Code envisaged the death penalty for persons convicted of genocide through Article 164. For crimes against humanity, it provided for life imprisonment and death penalty depending on the crime in Articles 167 and 169. Article 167 also provided for aggravating circumstances for particular crimes against humanity which caused the death of the victim or serious harm to physical integrity of health of the victim through Article 167. These aggravating circumstances increased the penalty to death. Other aggravating circumstances providing for the death penalty in Article 168 were for certain crimes which caused an incurable illness, permanent work incapacity, the absolute loss of an organ or a serious mutilation. Problematically, the Military Criminal Code did not provide penalties for war crimes, which is in direct conflict with the principle of legality, which requires that a clear penalty scheme be established within the juridical order before it can be imposed (*nulla poena sine lege*).[164]

7.2. Rape

The Criminal Code, following the 2006 laws on sexual violence amendments, provides, in Article 170, a penalty of five to 20 years imprisonment and a fine of no less than 100.000 current Congolese Francs. Article 171 outlines aggravating circumstances if the rape or indecent assault caused the death of the victim, which increases the sentence to life imprisonment. Moreover, the minimum sentence is doubled for the following reasons according to Article 171bis: 1) if the perpetrators are ascendants or descendants of the victim; 2) if they have authority over the victim; 3) if the perpetrator is a teacher, servant or hired servant of the victim; 4) if the perpetrator is a public agent or cult minister abusing their power, or medical personnel, social assistants; 5) if the perpetrator was assisted by one or several persons; 6) if the crime is committed on captive individuals by their guardians; 7) if the crime is committed in public; 8) if the act caused a serious alteration to the health of the victim and/or serious psychological consequences; 9) if the crime is committed on a handicapped victim; 10) if the rape is committed using or with the threat of using a weapon.

The 2009 Child Protection Law provides aggravating circumstances for rape of children and doubles the sentence in situations of authority or if the crime is perpetrated by parents, teachers, public agents and guardians.[165] Other aggravating circumstances which also double the sentence are committing the crime with the assistance of one or more persons, if it is committed in public, if the victim suffers a serious health alteration or serious physical or psychological consequences as a result of the rape, if the child is handicapped and if the crime is committed with a weapon.[166]

Prior to the 2006 amendments, the Criminal Code envisaged, in Article 170, a prison term between five to 20 years. Article 171 increased the penalty to death or life imprisonment if the rape or indecent assault caused the death of the victim. Article 171bis provided for aggravating circumstances in a similar manner to the provision after the 2006 amendments. Paragraphs one, two and three were the same, while paragraph four covered only doctors, surgeons, and obstetricians, instead of general medical personnel. Paragraph five was the same and paragraph six added causing a serious alteration to the health of the victim. The minimum sentence was doubled as a result of these aggravated circumstances from Article 171bis.

164 ICTJ Accountability Landscape Eastern DRC 2015, p. 1, *supra* note 69.
165 Child Protection Law 2009, Art. 170, *supra* note 103.
166 *Ibid.*

7.3. Sexual slavery

The Criminal Code following the 2006 amendments in Article 174(e) provides a sentence of five to 20 years imprisonment for sexual slavery.

7.4. Enforced prostitution

The Criminal Code following the 2006 amendments in Article 174(c) provides a sentence of three months to five years imprisonment for enforced prostitution.

7.5. Forced pregnancy

The Criminal Code following the 2006 amendments in Article 174(k) provides a sentence of ten to 20 years imprisonment for forced pregnancy.

7.6. Enforced sterilisation

The Criminal Code following the 2006 amendments in Article 174(l) provides a sentence of five to 15 years imprisonment for enforced sterilization.

7.7. Indecent assault

Article 167 of the Criminal Code following 2006 amendments provides that indecent assault without violence is punishable by six months to five years imprisonment. The penalty applicable before 2006 was five to 15 years of imprisonment. Article 168 on indecent assault with violence provides that the applicable penalty is five to 15 years imprisonment. The applicable penalty prior to 2006 was six months to five years of imprisonment. Paradoxically, the penalty for indecent assault without violence was harsher than indecent assault with violence. Aggravated circumstances include the commission of the crime with the assistance of another person or the assistance of persons below the age of ten and the penalty is increased to five to 20 years of imprisonment.

7.8. Excitement of minors to debauchery

Article 172 of the Criminal Code following 2006 amendments criminalising excitement of minors to debauchery provides that the crime is punishable by three months to five years of imprisonment and a fine. Prior to 2006, the applicable penalty was identical. Article 173 specifies that if the crime is committed against a child below the age of 10 years, the penalty will be increased to ten to 20 years of imprisonment and a higher fine. The increased penalty prior 2006 was five to ten years of imprisonment. If the perpetrator of the crime was the father, the mother or the tutor, they will no longer have parental authority, consistently with Article 174 of the Criminal Code and Article 319 of the Family Code.

7.9. The procurer and procuring

Article 174(b) of the Criminal Code following 2006 amendments provides that the procurer and procuring is punishable by three months to five years of imprisonment and a fine. Prior 2006, the same penalty was applicable.

7.10. Sexual harassment

Article 174(d) of the Criminal Code following 2006 provides that sexual harassment is punishable by one to 12 years of imprisonment and a fine.

7.11. Sexual mutilation

Sexual mutilation is punishable by a penalty of two to five years imprisonment and a fine, according to Article 174(g) of the Criminal Code following 2006. The penalty is increased to life imprisonment if death resulted from sexual mutilation.

7.12. Deliberate transmission of incurable sexually transmitted diseases

Article 174(i) of the Criminal Code following 2006 provides that the deliberate transmission of incurable sexually transmitted diseases is punishable by life imprisonment and a fine.

7.13. Torture

Article 48ter of the Law on the criminalisation of torture provides that torture is punishable by ten to 20 years of imprisonment and a fine when the acts would have resulted in serious trauma, illness, a permanent inability to work, a physical or psychological deficiency or if the victim was pregnant, a minor, an elderly or a person living with a disability. If torture resulted in death, the penalty is increased to life imprisonment.

7.14. Murder and aggravated assault and battery

Articles 44 and 45 of the Criminal Code provide that murder and assassination are punishable by death. According to Article 46, aggravated assault and battery are punishable by eight days to six months of imprisonment and a fine. If the act was premeditated, the penalty is increased to one month to two years of imprisonment and a fine. Article 47 provides that if the assault and battery resulted in an illness or an inability to work, or the complete loss of an organ or a serious mutilation, the penalty will be increased to two years to five years of imprisonment and a fine.

7.15. Manslaughter and unintentional bodily injuries

Article 48 provides that manslaughter is punishable by five years to 20 years of imprisonment and a fine if death resulted from aggravated assault and battery. Article 53 includes a general

provision on manslaughter and provides for a penalty of three months to two years of imprisonment and a fine.

7.16. Imprisonment or other severe deprivation of physical liberty

Article 67 provides that imprisonment and other severe deprivation of physical liberty is punishable by one year to five years of imprisonment. If acts of torture were inflicted on the victim, the penalty will be increased from five to 20 years of imprisonment. If the acts of torture caused death, the perpetrator should be sentenced to a life imprisonment or death penalty.

7.17. Statutes of limitations

Article 34bis of the Criminal Code following the 2015 amendments by the laws implementing the ICC Statute provides that international crimes and respective sentences are not subject to statutory limitations, which is in line with Article 29 of the ICC Statute. The article also provides that these crimes cannot be subject to amnesties or pardon.

The Criminal Code provides for limitations and holds in Article 24 that the public right of action for a crime will be subject to prescription: 1) after one year if the crime is punishable with a fine or if the maximum applicable prison term does not exceed one year; 2) after three years if the maximum applicable prison term does not exceed five years; 3) after ten years if the crime can result in a prison term over five years or the death penalty. Article 25 holds that the period of prescription runs from the day the crime was committed. Article 26 stipulates that prescription is interrupted by acts of investigation or prosecution made within one, three or ten years from the day the crime was committed. It also provides that the day the crime was committed is included in the period of limitation.

This means that in the ordinary justice system, the crime of enforced prostitution has a period of prescription of three years starting from the date that it was committed, provided that Articles 26-33 do not apply because there were no investigations or a court case started. There is no clarification in the Criminal Code as to the exact date that the period of prescription will start running in a long-lasting crime, such as enforced prostitution. The crimes of rape, sexual slavery, forced pregnancy and enforced sterilisation have a prescription period of ten years starting from the time that the crime was committed.

The Military Criminal Code also contains provisions regarding prescription and holds in Article 8 that the provisions in Articles 24 and following of the Criminal Code are applicable to military jurisdictions, except for where it is otherwise stated. Genocide, crimes against humanity and war crimes are not subject to prescription, pursuant to Article 10. Importantly, Article 10 refers to the three core international crimes that were included in the Military Criminal Code up until 2016, when the laws implementing the ICC Statute came into force. Lastly, Article 11 holds that prescription of sentences pronounced for genocide, crimes against humanity and war crimes do not begin until the convicted person turns 50 years.

8

8. Procedural law

8. Procedural law

8.1. The triggering/registration of a case in the DRC judicial system

The procedure applicable to criminal cases 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 2013,[167] as well as the Military Judicial Code. In order to better understand the criminal procedure provisions, an explanation of the bodies involved in the process is necessary. Magistrates are either judges or prosecutors.[168] The responsibility for the initiation of investigation proceedings for a criminal offence lies with the state, represented by the Office of the Prosecutor.[169]

8.1.1. The civilian judicial system

The judiciary police or Office of the Prosecutor are the entry points of a case to the criminal justice system. They are both responsible for receiving any complaints or reports of criminal offences, apprehending offenders, and collecting evidence.[170] The Act organising the functioning and jurisdiction of the courts 2013 provides that the Office of the Prosecutor receives criminal complaints and denunciations, completes all investigative actions and seizes courts and tribunals.[171] The Office of the Prosecutor can exercise all the functions of the judiciary police.[172]

There are three ways to initiate criminal proceedings: 1) an officer of the judiciary police or a magistrate of the Office of the Prosecutor is present at the time the crime is committed and a referral is made to an officer of the judiciary police or magistrate of the Office of the Prosecutor; 2) the victim files an oral or written complaint to an officer of the judiciary police or a magistrate of the Office of the Prosecutor; 3) a person with knowledge of the offence files a denunciation with an officer of the judiciary police or a magistrate of the Office of the Prosecutor.[173] It is worth noting, however, that the crime of sexual harassment cannot be subject to investigation by the judiciary police or the Office of the Prosecutor unless a complaint is filed by a victim.[174] Once the judiciary police or Office of the Prosecutor has been informed of the commission of an offence or the complainant (victim or third party) confirms its commission, they can open an investigation.[175]

167 Code of Criminal Procedure 1959, *supra* note 104; Act organising the functioning and jurisdiction of the courts 2013, *supra* note 79.
168 Act organising the functioning and jurisdiction of the courts 2013, Art. 2, *supra* note 79.
169 *Ibid.*, Art. 67.
170 Code of Criminal Procedure 1959, Art. 2, *supra* note 103.
171 Act organising the functioning and jurisdiction of the courts 2013, Article 67, *supra* note 79.
172 Code of Criminal Procedure 1959, Art. 11, *supra* note 104.
173 USAID and ProJustice, "Guide pratique d'accès à la justice en R.D. Congo 2010", pp. 53-55 ('Guide Access to Justice DRC 2010').
174 *Ibid.*, p. 55.
175 *Ibid.*, p. 57.

The law requires that the judiciary police create an affidavit containing the facts/witness statements, which ought to be immediately transmitted to the competent authority.[176] The judiciary police must include in the affidavit the nature and circumstances of the offence(s), the time and place of perpetration, evidence or indicia relating to the accused as well as statements of persons who were present when the offence was committed or have relevant information.[177] The judiciary police also interrogate the accused and collect their statement.

A victim may also file an action directly in court and thereby initiate criminal proceedings. A victim may complete a direct citation which includes the facts and date that the offence was committed and personal information about the victim and the accused.[178] A direct citation cannot be used in military courts[179] and therefore is not valid against police officers, members of the army or armed groups. This option for the victim, however, may have important repercussions if carried out, as will be seen later.

8.1.2. The military judicial system

The military judicial system is also subject to the rules contained in the ordinary Code of Criminal Procedure.[180] However, public action commences by magistrates of the Military Public Prosecution, the Commander, the Ministry of Defence or the injured party.[181] These magistrates who begin public action are prosecutors.[182] Importantly, the procedure during the investigation and pre-trial phases is secret, except where the law provides otherwise and without prejudice to the rights of the accused.[183] Moreover, anyone who contributes to this process is bound by professional secrecy and is subject to the penalties provided by the ordinary Criminal Code.[184]

The judiciary police exercise their role under the authority of the Military Public Prosecution.[185] Officers and non-commissioned officers of the National Police and the Military Provost are members of the judiciary police.[186] Contrary to the ordinary judiciary police, the military judiciary police may not request a monetary sum from an accused in the military judicial system.[187]

8.2. The investigation phase

8.2.1. The civilian judicial system

There is an Office of the Prosecutor within each court level.[188] Investigations are carried out either by the judiciary police or the Office of the Prosecutor. Once the Office of the Prosecutor

176 Code of Criminal Procedure 1959, Art. 2(2), *supra* note 104.
177 *Ibid.*, Art. 2(2).
178 Guide Access to Justice DRC 2010, p. 62, *supra* note 173.
179 *Ibid.*
180 Judicial Military Code 2002, Art. 129, *supra* note 80.
181 *Ibid.*, Art. 130.
182 Interview with Jérôme Nengowe, deputy President of LIPADHOJ, 31 October 2016 ('Interview Jérôme Nengowe').
183 Judicial Military Code 2002, Art. 132, *supra* note 80.
184 *Ibid.*, Art. 133.
185 *Ibid.*, Art. 134.
186 *Ibid.*, Art. 135.
187 *Ibid.*, Art. 138.
188 Act organising the functioning and jurisdiction of the courts 2013, Art. 65, *supra* note 79.

receives the affidavit, 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,[189] while they may also request the provisional detention of the alleged perpetrator.[190]

Once the judiciary police are informed of a criminal offence, its agents must investigate and collect any available evidence in accordance with Articles 1-10 of the Criminal Procedure Code. After the investigation, the judiciary police officer or officer of the Office of the Prosecutor in charge of the investigation can decide to take the following actions with the case: 1) to close the file without follow-up; 2) to close the case as a result of the payment of a transactional fine; or 3) to transfer the case file to a judge.[191] The case may be closed by the Office of the Prosecutor[192] without follow-up as a result of the death of the accused, amnesty provided by law, prescription of the offence or non-serious facts.[193] No criteria are provided on what non-serious facts encompass, whether they relate to lack of gravity and the interpretation of the term is left at the discretion of the prosecutor.[194] A case may not be closed as a result of the payment of a transactional fine if the offence involves sexual violence.[195]

The Office of the Prosecutor has the ability to charge the alleged perpetrator and 'confront' perpetrators with each other or with witnesses.[196] The confrontation between the perpetrator and the witness may potentially have a negative impact on prosecution of SGBV as the witness may be reluctant to be identified. The Office of the Prosecutor also creates an affidavit of all operations.[197] The Office of the Prosecutor can instruct the judiciary police to carry out investigations, visits of places, searches and seizures.[198] It also has the ability to request the assistance of the Public Forces in the exercise of functions.[199]

8.2.2. The military judicial system

The military investigating magistrate closes the investigation phase with a note that they communicates to the Military Prosecutor who then provides their opinion within three days for offences subject to sentences over one year imprisonment.[200] It appears that the military investigating magistrate is a prosecutor because they has the same powers as the prosecutor in the ordinary judicial system but the Judicial Military Code does not provide clarity on this.

The military investigating magistrate has the power to decide that there are no grounds for prosecution if one of the following engage: if they believes that the facts do not constitute an offence under criminal law; the accused could not be identified; or the charges are not

189 Code of Criminal Procedure 1959, Art. 16 ff, *supra* note4.
190 *Ibid.*, Arts. 27-47.
191 Guide Access to Justice DRC 2010, p. 61-62, *supra* note 173.
192 Code of Criminal Procedure 1959, Arts. 9, 11, *supra* note 104.
193 Guide Access to Justice DRC 2010, p. 61, *supra* note 173.
194 Interview Jérôme Nengowe, *supra* note 182.
195 Guide Access to Justice DRC 2010, p. 61, *supra* note 173.
196 Code of Criminal Procedure 1959, Art. 11, *supra* note 104.
197 *Ibid.*
198 *Ibid.*, Art. 12.
199 *Ibid.*, Art. 14.
200 Judicial Military Code 2002, Art. 197, *supra* note 80.

sufficient.[201] In such a case, if the accused is detained, they is then set free.[202] Unless new charges are laid the accused cannot be investigated again for the same facts.[203]

8.3. Pre-trial process

8.3.1. The civilian judicial system

The judiciary police may request any person that may be able to provide information for its affidavit and compel them to testify under oath.[204] The judiciary police may also impose a restraining order until the closing of the affidavit.[205] Violations of these aforementioned provisions may result in a one month prison sentence and/or a fine of 1.000 Francs.[206] Having restraining orders in place may prove particularly useful for victims/witnesses, who can then be protected from intimidation or reprisals.

An accused may not be placed in preventive detention unless there are serious indices of culpability and the facts appear to constitute an offence punishable with a prison sentence of at least six months.[207] However, the accused may be placed in preventive detention for a sentence lower than six months if it appears that they might escape, their identity is unknown or doubtful or if the preventive detention is in the interests of public safety as a result of serious and exceptional circumstances.[208] Therefore, preventive detention is an exceptional measure, which begins with a provisional arrest warrant issued by the Office of the Prosecutor after interrogation and is transformed to preventive detention following an order by a judge.[209] The accused under a provisional arrest warrant must appear within five days in front of a judge of a Peace Court,[210] if a judge is available in the same locality as the Office of the Prosecutor.[211] The preventive detention order is made initially for 15 days and following this, it may successively be made for one-month periods.[212] An enabling factor for the investigation of SGBV matters in this regard is that, in theory, any person accused of having committed a sexual violence offence may be placed in preventive detention provided that there are serious indices of culpability. Consequently, investigations can be carried out by interviewing the victim(s) as well as any witnesses without fearing reprisals coming directly from the perpetrator. It is interesting to note that Article 10 of the 2006 Law on sexual violence amending the Criminal Code of Procedure explicitly states that the requirement to inform the superior of a person holding an official position before arresting this person is lifted in SGBV cases.[213]

A judge may order the provisional release of the accused, if the latter requests it, on bail with conditions attached.[214] Some of those conditions may be to live in the same locality where the office of the Office of the Prosecutor is found, to not leave that geographic area and to not be

201 *Ibid.*, Art. 199.
202 *Ibid.*, Art. 199.
203 *Ibid.*, Art. 199.
204 Code of Criminal Procedure 1959, Art. 5, *supra* note 104.
205 *Ibid.*
206 *Ibid.*
207 *Ibid.*, Art. 27.
208 *Ibid.*
209 *Ibid.*, Art. 28.
210 *Ibid.*, Art. 29.
211 *Ibid.*, Art. 28.
212 *Ibid.*, Art. 31.
213 Law on sexual violence modifying the Code of Criminal Procedure 2006, Art. 10, *supra* note 102.
214 Code of Criminal Procedure 1959, Art. 32, *supra* note 104.

present in certain places, including train stations, ports, etc.[215] Provisional release may be revoked if new and serious circumstances make it necessary.[216] The Office of the Prosecutor has the same powers as the judge to revoke bail as long as the case has not reached a trial judge.[217] An accused that violates their bail conditions may be placed back in detention.[218] There are simply no criteria provided for the judge or Office of the Prosecutor to assess whether the accused should be granted provisional release. If it transpires that the accused is granted bail in SGBV cases, it could have a serious impact on the conduct of the investigations and on reprisals faced by the victim(s), their family and witnesses.

Any person can act as court interpreter or translator after being assessed by presiding judges.[219] These individuals must be sworn and may receive an indemnity to be determined by the judges during the trial phase or the Office of the Prosecutor during the investigation phase.[220] Such indemnity comes from the Treasury or provincial governors.[221] This constitutes a disabling factor since non-qualified interpreters and translators for victims who do not speak French may not accurately describe/interpret the victim's words, details and emotions. Inexperienced interpreters or translators may shorten victims' or witnesses' testimony as a result of the lack of knowledge of importance of detail and context.

8.3.2. The military judicial system

In cases of flagrant offences subject to a prison sentence of at least six months and without prejudice to disciplinary powers held by superiors, the military judiciary police may detain military perpetrators or accomplices of offences.[222] Flagrant offences are those that are presently committed or that have just been committed.[223] Reputed flagrant offences are those where a person is pursued as a result of public outcry or where they are found with objects, weapons, instruments or documents which would lead one to believe that they are the perpetrator or accomplice, provided this occurs in a span of time close to the commission of the offence.[224] This detention may not last longer than 48 hours.[225] Superiors must comply with requests from the military judiciary police or searches by the ordinary judiciary police and present the concerned military officer.[226] Following the 48 hour maximum detention period, the military officer detained in the circumstances of a flagrant offence or against whom there are serious indices of culpability is transferred to the competent judicial authority[227] and their superiors are informed.[228]

The military judiciary police officer who receives a complaint or denunciation or who is present at the commission of an offence by a junior officer, superior officer or an assimilated person

215 *Ibid.*
216 *Ibid.*
217 *Ibid.*, Art.33.
218 *Ibid.*, Art. 34.
219 *Ibid.*, Art. 50.
220 *Ibid.*, Arts. 50, 51.
221 *Ibid.*, Art. 51.
222 Judicial Military Code 2002, Art. 145, *supra* note 80.
223 Code of Criminal Procedure 1959, Art. 7, *supra* note 104.
224 *Ibid.*, Art. 7.
225 Judicial Military Code 2002, Art. 146, *supra* note 80.
226 *Ibid.*, Art. 147.
227 *Ibid.*, Art. 149.
228 *Ibid.*, Art. 150.

is to transmit the documents to the Military Prosecutor at the competent military court.[229] If the concerned officer is a general officer, a military magistrate or an assimilated person, the documents are transferred to the Military Prosecutor General of the Armed Forces.[230]

In cases of offences subject to a prison sentence of over five years, the prosecution (depending on the case, either military or civilian) may decide, instead of detaining the accused, to take them to the respective military authority.[231] There, superiors may order that they be kept in disciplinary premises pending the decision of the judicial authority.[232] There is no mention of whether these disciplinary premises allow the accused to leave the military camp and/or have contact with any other person, including fellow military personnel who may have been involved in the perpetration of the offence. Therefore, this could be a disabling factor if the accused is able to leave the premises or have contact with military personnel to hamper the investigation of the case.

In the military judicial system, it is the Military Prosecutor who decides to lay charges at their discretion following an affidavit of the judiciary police, a complaint or denunciation.[233] No criteria are provided for the Military Office of the Prosecutor to decide on which factors should be considered when making the decision as to whether to lay charges. The Military Prosecutor must inform the commander of the unit where the accused belongs.[234]

8.4. Trial and appeal procedures

8.4.1. The civilian judicial system

The accused under preventive detention, with or without provisional release, on the day the trial court is seized, will remain in detention until the judgment is rendered.[235] However, the accused may request the termination of their preventive detention and/or provisional release.[236]

If the Office of the Prosecutor decides to proceed with the case, they must transmit it to the relevant court where the judge fixes a hearing date.[237] The trial court is seized by a citation given to the accused at the request of the Office of the Prosecutor or the victim.[238] The period in between the citation and the hearing date is eight days, with one day extra per 100 kilometres of distance.[239] This means that the earliest court date possible is eight days after the accused is served with the citation document. The citation document can be replaced with a verbal summons to be made personally to the accused, victim and/or witnesses if the sentence is not over five years imprisonment or consists only of a fine.[240]

229 *Ibid.*, Art. 151.
230 *Ibid.*, Art. 152.
231 *Ibid.*, Art. 153.
232 *Ibid.*, Art. 154.
233 *Ibid.*, Art. 163.
234 *Ibid.*, Art. 163.
235 Code of Criminal Procedure 1959, Art. 45, *supra* note 104.
236 *Ibid.*, Art. 45.
237 *Ibid.*, Art. 53.
238 *Ibid.*, Art. 54.
239 *Ibid.*, Art. 62.
240 *Ibid.*, Art. 66.

When the tribunal is seized, the day before the hearing, a party may request the court to estimate damages, issue the affidavit and order any actions that are time-sensitive.[241] This is an enabling factor in regards to damages since an evaluation may be made by the court at the request of the victim and be ready for the date of the hearing. In regards to access to the affidavit, the day before the hearing does not give sufficient time to the victim and/or their counsel to review the file for any impact it may have on damages since the victim does not have a role in the prosecution but, as will be seen, as a civil party, with regards to claiming damages from the accused.

The victim may become a civil party to the criminal proceedings when the trial court is seized in order to request damages as reparation.[242] They may do this at any time from the moment the trial court is seized until closing statements through a declaration to the Registrar or during the hearing.[243] The victim who introduced a direct citation or who became a civil party to the proceedings may withdraw their request at any time until closing statements through a declaration in the hearing or to the Registrar.[244]

A court hearing is carried out in the following order: 1) the Registrar reads the affidavit; witnesses for the prosecution and defence are heard and facts and charges are stated; 2) the accused is examined; 3) the civil party, if one exists, provides their conclusions; 4) the tribunal orders any other complementary measure necessary to obtaining the truth; 5) the Office of the Prosecutor summarizes the case and makes their requests; 6) the accused makes their defence; 7) the debate is closed.[245] The conclusions made by the civil party at trial focus on demonstrating that the accused committed the offence and that the former was harmed as a result of the offence.[246] The civil party also requests pecuniary reparation in the form of damages.[247] The judgment is pronounced eight days after closing statements at the latest.[248]

Witnesses who have been summoned regularly and who do not appear in court without a legitimate reason or who refuse to be sworn may be subject to a maximum of one month prison sentence and/or a fine not exceeding 1.000 Francs.[249] The tribunal may order that witnesses be subpoenaed.[250] In contrast, the ICC Statute provides that a witness cannot be subpoenaed and relies on their voluntary attendance.[251]

In relation to fees and costs, non-vexatious fees incurred by the accused, if not convicted, are the responsibility of the Treasury while their costs remain their responsibility.[252] However, if the case began as a result of a direct citation brought by a victim directly to court, the civil party will bear all costs.[253] If the civil party was constituted after the trial court was seized of the matter, they will bear half the costs.[254] The civil party who withdraws within 24 hours of the direct citation or of being constituted as such, will not be held liable to costs after withdrawal,

241 *Ibid.*, Art. 67.
242 *Ibid.*, Art. 69.
243 *Ibid.*, Art. 69.
244 *Ibid.*, Art. 70.
245 *Ibid.*, Art. 74.
246 Guide Access to Justice DRC 2010, p. 68, *supra* note 173.
247 *Ibid.*
248 Code of Criminal Procedure 1959, Art. 80, *supra* note 104.
249 *Ibid.*, Art. 78.
250 *Ibid.*
251 ICC Statute, Art. 64(6)(b).
252 Code of Criminal Procedure 1959, Art. 82, *supra* note 104.
253 *Ibid.*
254 *Ibid.*

without prejudice to any damages to the accused, if any.[255] This is a major disabling factor to SGBV prosecutions because the victims, who are often in vulnerable financial situations, may be liable not only for vexatious costs but also all costs and even damages to the accused if the latter is not convicted. A victim may thus face considerable risk in becoming a civil party or initiating a case directly because their financial situation may be jeopardized as a result. A 'safer' choice for the victim is therefore letting the Office of the Prosecutor deal completely with the case and not seeking damages from the accused as a civil party to the proceedings.

An important disabling factor for victims wishing to initiate a case directly in court using a direct citation is the fees that they must pay both in order to begin criminal proceedings and also at each step of the criminal justice process. This becomes important when the judiciary police or Office of the Prosecutor are unwilling/unable to act and the only option is for the victim to go to court directly. When a case is set for hearing, the judge verifies that all the fees have been paid. If they have not been paid, the case will not proceed and is taken out of the docket and therefore deleted.[256] A similar concern exists for victims wishing to be added as civil parties to the proceedings since they must incur fees for any requests made before the court. Before the case comes to an end, the Registrar may request the victim (if they started the case with a direct citation or became a civil party) to pay supplementary fees, without which the case will not be heard.[257] If damages are awarded, the court levies 6 per cent of the sum.[258] When a judgment is rendered, the losing party bears responsibility for all court fees.[259]

The following are some of the fees that the victim must pay in a criminal case if they starts a court case with a direct citation or becomes a civil party (only for the acts they requests) (amounts as of 2010): US$2 for an affidavit; US$2 for any summons; US$3 for an order from a judge; US$3 for a requisition to the Public Forces; US$3 for any citation to court; US$10 for the assignment of a registry number by the Registrar; US$2 for an affidavit of the hearing (different from that of the investigation); US$5 to become a civil party to the proceedings; US$3 for the judgment; US$3 for any document held by the Registrar; US$3 for a requisition to the Office of the Prosecutor.[260] Moreover, certain fees such as service fees (of documents to another party) and compensation for experts, doctors, interpreters and witnesses are determined by the judges of the case.[261] Therefore, not counting fees to be determined by judges as well as supplementary fees, the victim bringing a case with a direct citation would have to pay a minimum of approximately US$39 for a criminal case to be heard in first instance. The majority of the fees for appeals are double the amount of those for first instance.[262] This places an enormous burden on the victim in a country where the monthly minimum wage is US$65 in its largest business city.[263]

The only possible avenue for victims who do not have the financial support of civil society to bring cases before courts is to be declared "indigent". Trial judges decide on the status of a party being indigent and the amount which they must pay (either half of the fees or no fees at all).[264] No criteria are provided in the Criminal Procedure Code for a judge to make a decision

255 *Ibid.*
256 Guide access to Justice DRC 2010, p. 101, *supra* note 173.
257 *Ibid.*
258 *Ibid.*
259 *Ibid.*, p. 102.
260 *Ibid.*, p. 102-3.
261 *Ibid.*, p. 102-3.
262 *Ibid.*, p. 102-3.
263 World Bank, Doing Business Project, Labor Market Regulation in Congo, Dem. Rep., June 2016.
264 Code of Criminal Procedure 1959, Art. 123, *supra* note 104.

on the status of a party being indigent, which leaves room for arbitrary decisions. In theory, a person must produce the certificate of indigence issued by the social services office of the commune and it should be provided free of cost.[265]

A Ministry of Justice pamphlet describes militaries, state agents with a position not higher than director, retired and unemployed persons as indigents.[266] Therefore, these individuals can benefit from lower fees or must not pay any fees at all. It is unclear whether there are criteria to fulfil the role of unemployment (such as being employed in the formal economic sector previously or not working in the informal economic sector). It appears therefore that military officers and civil servants, while in a considerably higher socio-economic position than most victims of sexual violence, enjoy more benefits than the latter in criminal proceedings. An important disabling factor is requiring victims to pay at least US$39 for criminal proceedings (provided they are not declared indigent) while military officers and civil servants pay half of that amount or nothing at all.

SGBV cases are in theory processed quickly.[267] Once the judiciary police learn of the commission of a crime of a sexual nature, they are supposed to inform the Office of the Prosecutor within 24 hours of the crime.[268] If the accused is placed in detention, it may not last longer than 48 hours and the investigation cannot last longer than one month.[269] From the moment that a judicial authority (judiciary police, Office of the Prosecutor or a court) is informed of the commission of a sexual crime, a judicial decision must be rendered within three months.[270]

The accused, any civil parties and the Office of the Prosecutor have the right to appeal the judgment[271] and the convict may oppose[272] it in the case of a default judgment. A default judgement is rendered without the presence of the accused. Opposition to the judgment entails a request to have a re-trial by the same court[273] and may be requested within ten days after being personally served with the judgment or learning about it, if not personally served.[274] If it is not established that the convict knew about the judgment, they may oppose it until the expiration of the prescription period of the sentence.[275] The civil party may also oppose the judgment within ten days of service.[276] The costs and fees of opposing the judgment are born by the opposing party.[277]

The parties appealing a judgment have ten days after it is rendered or, for a default judgment, after being served.[278] The Office of the Prosecutor assigned to the appeal court, however, may appeal a judgment within three months after it is rendered.[279] The convict who was detained during judgment or immediately arrested following the judgment remains under this status

265 Guide Access to Justice DRC 2010, pp. 107-108, *supra* note 173.
266 *Ibid.*, p. 108.
267 *Ibid.*, p. 94.
268 *Ibid.*; Law on sexual violence modifying the Code of Criminal Procedure 2006, Art. 7bis, *supra* note 102.
269 Guide Access to Justice DRC 2010, p. 94, *supra* note 173.
270 *Ibid.*; Law on sexual violence modifying the Code of Criminal Procedure 2006, Art. 7bis, s*supra* note 102.
271 Code of Criminal Procedure 1959, Art. 96, *supra* note 104.
272 *Ibid.*, Art. 89.
273 Guide Access to Justice DRC 2010, p. 69, *supra* note 173.
274 Code of Criminal Procedure 1959, Art. 89, *supra* note 104.
275 *Ibid.*, Art. 89.
276 *Ibid.*, Art. 90.
277 *Ibid.*, Art. 95.
278 *Ibid.*, Art. 97.
279 *Ibid.*, Art. 99.

during the appeal.[280] However, they can request provisional release.[281] The appeal proceedings are scheduled three months after the first instance judgment is rendered.[282]

Outside of the ordinary recourses (opposition and appeal), extraordinary recourses exist and consist of cassation and revision, which are heard by the Court of Cassation.[283] The grounds for cassation are irregularities with procedure and composition of the tribunal[284] and the outcome may be a re-trial at the same or another court.[285] Revision consists of correcting judicial errors with regards to facts.[286]

8.4.2. The military judicial system

Military courts are seized of a matter either by direct referral or referral issued by the Military Prosecutor.[287] A direct referral is an order by the Military Prosecutor to arraign an accused before the court against whom there are serious indices of culpability and strong evidence gathered by the judiciary police in its investigation.[288] A direct referral is similar to a direct citation in the civilian system but instead of the victim going directly to court, they must go to the Military Prosecutor who then goes to court and serves the accused with the court documents.[289] It is therefore not possible for victims to go directly to a military court to start proceedings. A court may also be seized of a matter through the voluntary appearance of the accused.[290] The Military Prosecutor is in charge of prosecuting the accused either directly referred or referred to the military court.[291] If there is more than one accused for the same offence, the judge can join the cases of their own initiative or by request by the Military Prosecutor, the civil party[292] or the defence.[293] The same may be done for one accused with various charges.[294] During wartime, under siege or emergency or in the course of an operation to maintain or restore public order, the accused has the right to have any witness heard prior to the opening of the hearing, subject to the discretion of the judge.[295] This provision is geared to accommodate witnesses in situations of war when regular hearings may not be able to be held due to insecurity.[296]

Hearings in military courts are public.[297] However, if public access is detrimental to "military public order" or "morality", the court may order that the hearing take place in closed session with a decision rendered in a public hearing.[298] The judge may prohibit access to the courtroom to minors or certain individuals[299] – without listing any particular individuals or criteria for

280 *Ibid.*, Art. 103.
281 *Ibid.*.
282 Guide Access to Justice DRC 2010, p. 70, *supra* note 173.
283 *Ibid.*
284 *Ibid.*
285 *Ibid.*, p. 71.
286 *Ibid.*
287 Judicial Military Code 2002, Arti. 214, *supra* note 79.
288 Patrick Katsuva Mulere, "Organisation et fonctionnement des juridictions militaries in Armée et état de droit en République Démocratique du Congo", *Konrad Adenauer Stiftung*, Kinshasa, 2014, p. 106.
289 Interview Jérôme Nengowe, *supra* note 182.
290 Judicial Military Code 2002, Art. 214, *supra* note 80.
291 *Ibid.*
292 A victim may become a civil party in the military system under Article 226 of the Judicial Military Code 2002.
293 Judicial Military Code 2002, Art. 222, *supra* note 80.
294 *Ibid.*
295 *Ibid.*, Art. 224.
296 Interview Jérôme Nengowe, *supra* note 182.
297 Judicial Military Code 2002, Art. 230, *supra* note 80.
298 *Ibid.*
299 *Ibid.*

determining who these individuals may be. Any person attending hearings must be unarmed and may not display signs of approval or disapproval. Otherwise, they might face expulsion by the judge.[300] This is an important enabling factor to guarantee the safety of everyone in the courtroom and most importantly of the victim(s) and witnesses. Likewise, this provision, in theory, prevents meddling of the public with testimony provided, although it does not go into further detail with provisions such as the prohibition of addressing witnesses who are not finished testifying. For sentences over one year imprisonment, the accused who has been regularly cited and does not appear in court, faces a default judgment after submissions by their counsel or designated officer and as long as that they did not provide a valid reason for not attending.[301]

The judge orders the witnesses to retire to a room set aside for them, which they should not leave until they are called to testify.[302] The judge is to take "all necessary measures" to prevent witnesses from conferring with each other before they give their testimony.[303] This is an enabling factor but does not provide enough detail as to the measures that may be imposed by the judge. More detailed measures would be important, considering that witnesses sat together in one room set aside for them, could face pressure or threats from other witnesses to alter their testimony or recant.

The parties may oppose or appeal a judgment from military courts or tribunals except for those stemming from the Operational Military Courts.[304] A party opposing the judgment must do so within five days of learning about it.[305] The appealing party also has five days to perfect an appeal after learning about the judgment.[306]

In the military system, the Office of the Prosecutor is in charge of executing judgments.[307] A disabling factor is the power of the Military Prosecutor during wartime, if defence needs require it, to suspend the execution of any judgment with a sentence other than the death penalty within three months of the judgment becoming final and binding.[308] The Minister of Defence also has the same power and is not bound by the three-month period following the judgment becoming final.[309] Furthermore, the convict who benefits from a suspension of their sentence is deemed to serve the sentence while serving in the Forces.[310] The period for prescription begins with the start of the suspension.[311] This could be a major impediment to hold members of the armed forces accountable considering that there has been ongoing conflict in the eastern part of the DRC for several years.

One of the greatest disabling factors in the prosecution of SGBV is the limit placed on the jurisdiction of military courts depending on the rank of the accused. In first instance, Military Garrison and Police Tribunals may only prosecute soldiers up to the rank of major,[312] while

300 *Ibid.*, Art. 233.
301 *Ibid.*, Art. 238.
302 *Ibid.*, Art. 242.
303 *Ibid.*
304 *Ibid.*, Art. 276.
305 *Ibid.*, Art. 277.
306 *Ibid.*, Art. 278.
307 *Ibid.*, Art. 345.
308 *Ibid.*, Art. 356.
309 *Ibid.*
310 *Ibid.*, Art. 358.
311 *Ibid.*, Art. 360.
312 *Ibid.*, Art. 122.

the Military Court may prosecute superior officers.[313] The highest-ranking officers (generals) may only be prosecuted by the High Military Court.[314] Furthermore, judges and military prosecutors participating in court proceedings must be of an equal or higher rank than the accused.[315] As a result, high-ranking officers may benefit from *de facto* immunity because of the lack of military magistrates of equal or superior ranks.[316]

8.5. Sentencing and reparations

It is important to note that victims have two options to claim damages in the DRC. The first option is to file a civil action before the Office of the Prosecutor and at the same time commence criminal proceedings.[317] The second option is to file a separate action before civil courts independently from criminal proceedings, which would be stayed until a final judgment is rendered in the criminal case.[318] The requirements to have standing for a civil lawsuit is that the plaintiff suffered harm from the crime and that they has an interest, which is a "material or moral benefit deriving from the civil claim for damages and capable of redressing the plaintiff".[319] It is unclear how any damages awarded to the victim are calculated.

8.6. Evidence and disclosure

The Criminal Procedure Code does not explicitly outline the types of evidence required for criminal proceedings nor the disclosure procedure. Moreover, there is a lack of clarity as to the main means of proof and the acceptability of various types of evidence.

Certain cases have enunciated important evidentiary principles, including the standard of proof. The *Lemera*[320] and *Balumisa Manasse*[321] cases affirm that the applicable standard of proof is beyond reasonable doubt.[322] Nonetheless, cases such as *Songo Mboyo*[323] declared that victims' depositions serve as illustration but constitute evidence, which would mean they have a certain probative value.[324] The Military Garrison Tribunal in this case also held that this type of evidence allows proving the culpability of the accused when the latter cannot dismiss it.[325] This would mean that the standard of proof is no longer beyond reasonable doubt but that of the most probable hypothesis.[326]

313 *Ibid.*, Art. 121.
314 *Ibid.*, Art. 120
315 OHCHR, Progress and Obstacles Impunity DRC, p. 18, *supra* note 54; *Ibid.*, Art. 35.
316 OHCHR, *ibid.*
317 Dunia P. Zongwe, François Butedi and Phebe Mavungu Clément, "UPDATE: The Legal System of the Democratic Republic of the Congo ('DRC'): Overview and Research", GlobaLex, February 2015, Section 5.3 ('Globalex, DRC Legal System 2015').
318 *Ibid.*
319 *Ibid.*
320 Military Tribunal of Garrison of d'Uvira, Affaire *Lemera*, RMP 0933/KMC/10, 30 October 2010.
321 Military Court of Sud-Kivu- Bukavu, Affaire *Balumisa Manasse (Katasomwa)*, RMP n° 1280/MTL/09, 9 March 2011.
322 Avocats sans frontières ('ASF'), "La Mise en Œuvre Judiciaire du Statut de Rome en Republique Democratique du Congo", April 2014, pp. 61-62 ('ASF La Mise en Oeuvre Judiciaire du Statut de Rome 2014').
323 *Songo Mboyo* case, *supra* note 108.
324 ASF la Mise en Oeuvre Judiciaire du Statut de Rome 2014, p. 62, *supra* note 322.
325 *Ibid.*
326 *Ibid.*

Courts often use medical certificates as evidentiary means.[327] In most cases, these certificates are used for two constitutive elements: the commission of the sexual act through the "defloration" of the victim (through a hymen tear) or other injuries; and establishing the age of the victim.[328] A doctor called to testify in court about the medical certificate must be sworn.[329] Moreover, a medical certificate done by a nurse in one court case was dismissed because it was not sealed, authenticated and did not contain detailed information.[330]

In the absence of a medical certificate, a judge may rely on other means of proof such as an amicable settlement signed by the accused.[331] However, in various cases, no evidence was presented other than the declaration of the victim or their counsel.[332] In the case of Uvira, a tribunal held that the declaration alone of the victim did not suffice as sufficient evidence to convict the accused.[333]

The 2006 Law on sexual violence amending the Criminal Procedure Code provides important provisions regarding evidence. It stipulates that consent cannot be inferred from words or the conduct of the victim when under a coercive situation.[334] Furthermore, it holds that silence cannot constitute consent and prior sexual conduct cannot be used in evidence against him/her.[335] It also provides that the victim's or witness' credibility cannot be inferred from previous sexual behaviour.[336] Lastly, evidence relating to a victim's previous sexual behaviour may not exonerate the accused of their criminal responsibility.[337]

8.7. Victim and witness issues

The 2006 Law on Sexual violence amending the Criminal Procedure Code provides that the Office of the Prosecutor or judge requests the services of a doctor and psychologist immediately in order to assess the appropriate care and evaluate the harm suffered by the victim and any possible aggravation.[338] This is an enabling factor as it requires the judge or Office of the Prosecutor to obtain expert evidence from a medical doctor who can not only assess the physical and mental damage to the victim and any aggravating circumstances but also provide care to them. The same law provides that the victim be assisted by legal counsel during the proceedings.[339] In contrast, witnesses cannot be assisted by legal counsel, which may be seen as a disabling factor as witnesses of SGBV may be reluctant to testify if they fear they might incriminate themselves.[340]

There is no comprehensive protection programme for victims and witnesses in the DRC and no specific unit working on this issue in the judicial system.[341] There is no legal provision

327 ASF, "La Justice Face a la Banalisation du Viol en République Démocratique du Congo : Étude de Jurisprudence en Matière des Violences Sexuelles de Droit Commun", May 2012 at p. 35 ('ASF Jurisprudence violence sexuelle 2012').
328 *Ibid.*
329 Code of Criminal Procedure 1959, Art. 49, *supra* note 91.
330 ASF Jurisprudence violence sexuelle 2012, p. 37, *supra* note 327.
331 *Ibid.*
332 *Ibid.*
333 *Ibid.*
334 Law on sexual violence modifying the Code of Criminal Procedure 2006, Article 14ter(1), *supra* note 102.
335 *Ibid.*, Art. 14ter(2).
336 *Ibid.*, Art. 14ter(3).
337 *Ibid.*, Art. 14ter(4).
338 *Ibid.*, Art. 14bis.
339 *Ibid.*, Art. 7bis.
340 Guide Access to Justice DRC 2010, p. 67, *supra* note 173.
341 OHCHR Progress and Obstacles Impunity DRC 2014, p. 22, *supra* note 54.

criminalising intimidation and threats against victims and Article 74bis of the 2006 Law on sexual violence modifying the Criminal Code of Procedure[342] simply requires judges to take all necessary measures to ensure the safety, physical and mental well-being, dignity and respect for privacy of victims or other persons involved in the trial.[343] This creates a disabling factor, as there have been reports that judges have been unwilling to take basic measures including removing the names of victims from depositions or not read the names of victims in court.[344] Judges have also been found to rarely allow closed hearings when victims feel threatened[345] even though closed sessions should be implemented when the victim or the Office of the Prosecutor request it.[346]

342 Law on sexual violence modifying the Code of Criminal Procedure 2006, Art. 74bis, *supra* note 102.

343 OHCHR Progress and Obstacles Impunity DRC, pp. 22-23, *supra* note 54.

344 *Ibid.*, p. 23.

345 *Ibid.*; however, a few cases demonstrate the recognition of the protection afforded to victims by international criminal law by directly applying the ICC Statute: see *Kazungu* case, *supra* note 108; *Kibibi* case, *supra* note 111; *Kakwavu* case, *supra* note 159.

346 Law on sexual violence modifying the Code of Criminal Procedure 2006, Art. 74bis, *supra* note 102.

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KH
Knowledge Hub

I-DOC
Investigation Documentation System

DOC F
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

Case Matrix Network, Centre for International Law Research and Policy (CILRAP-CMN), 100 Avenue des Saisons 1050 Brussels, Belgium / blog.casematrixnetwork.org/toolkits / E-mail: ICJToolkits@casematrixnetwork.org

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