

Prosecuting sexual violence in the Eastern Democratic Republic of Congo: Obstacles for survivors on the road to justice

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Summary

Sexual violence in eastern Democratic Republic of the Congo (Eastern DRC) has been described as the worst in the world. Despite the introduction of forceful legislative amendments to reduce the violence, the scourge of sexual violence still plagues Eastern DRC. Given that the Congolese state prosecutes very few cases, the paper identifies and explains the obstacles victims face when seeking the prosecution of sexual violence perpetrators in Eastern DRC. Based on interviews conducted in Eastern DRC with various vocational and demographic groups from May to August 2008, the paper reveals the magnitude of sociological, institutional, financial and legal factors hindering the prosecution of sexual offenders. The paper argues that the successful prosecution of sexual offenders in Eastern DRC faces a myriad of obstacles and requires an exceptionally lucky combination of a number of unlikely conditions. To overcome these obstacles, strategists must concentrate on what underlies the sexual violence, namely, insecurity in Eastern DRC, as well as strengthening the capacity of the judicial sector.

1 Introduction

In Eastern Democratic Republic of Congo (DRC), sexual violence is used as an instrument of war, as part of a pattern to destroy ‘the spirit, the

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will to live, and life itself'.¹ The violence is systematic and widespread against women and children and perpetrated by armed groups, and increasingly also by civilians. According to a Congolese gynaecologist, Dr Denis Mukwege, 'the word "rape" or "sexual violence" cannot fully translate the horror that hundreds of thousands of women are living with in this part of the world'.² His clinic treats rape victims in South Kivu, Panzi Hospital and receives ten new patients every day.³ In some villages, 90% of the women are survivors of sexual violence by armed men.⁴

The present research paper starts from the proposition that the prosecution of sexual offences should contribute to the reduction of these offences. However, given that, in practice, the Congolese justice system prosecutes only very few cases, the paper identifies and explains the obstacles to the successful and effective prosecution of sexual offenders in Eastern DRC. Based on interviews conducted in Eastern DRC with members (respondents) of a cross-section of vocational and demographic groups within Congolese communities from May to August 2008, the paper reveals the many sociological, institutional, financial and legal factors which hinder the criminal prosecution of sexual violence. The paper shows that the successful prosecution of sexual offences in Eastern DRC necessitates an exceptionally lucky combination of a number of unlikely conditions, which, together, are capable of overcoming the obstacles to prosecutorial action. The paper argues that the most sensible strategy to treat the obstacles to prosecution of sexual offences is to concentrate on the catalyst of most of these obstacles, namely, the insecurity that exists in Eastern DRC. The greatest obstacle to the successful and effective prosecution of sexual offenders is the instability and insecurity in the Great Lakes region of which Eastern DRC is a part.⁵ Despite recent joint military operations conducted in the first half of 2009, carried out with Ugandan and Rwandan armies, the Congolese state continues to experience instability, and the security situation remains volatile.⁶ Once this insecurity is

¹ *Prosecutor v Akayesu* Case ICTR 96-4-T, judgment 732 (2 September 1998).

² 'Rape as a weapon of war: Accountability for sexual violence in conflict: Hearing before the S Comm on the Judiciary' 110th Cong (2008) (statement of Dr Denis Mukwege, Director, Panzi General Referral Hospital, Bukavu, South Kivu, DRC).

³ 'DR Congo doctor is "top African"' *BBC News* 14 January 2009 <http://news.bbc.co.uk/2/hi/africa/7828027.stm> (accessed 20 September 2009).

⁴ 'War against women: The use of rape as a weapon in Congo's civil war' *CBS 60 Minute* 17 August 2008).

⁵ Human Rights Watch 'Renewed crisis in North Kivu' 25 (Human Rights Watch 2007), stating that sexual violence is a regular crime found in situations of armed conflicts in Eastern DRC).

⁶ MONUC *Twenty-eighth report on the United Nations Organisation Mission in the Democratic Republic of the Congo*, S/2009/335 30 June 2009; IRIN (UN Office for the Co-ordination of Humanitarian Affairs) 'DRC: MONUC sticks to its guns' *Analysis* 22 June 2009 <http://www.irinnews.org/report.aspx?ReportID=84943> (accessed 20 September 2009); 'Congo: Fighting Erupts in the East' *New York Times* 19 June 2009 http://www.nytimes.com/2009/06/20/world/africa/20briefs-Congobrf.html?_

addressed, the state will be in a more viable position to strengthen its judicial sector and overcome obstacles to the effective and successful prosecution of rapists in Eastern DRC.

1.1 Terminology

The general terms ‘victim’, ‘survivor’ and ‘complainant’ are used interchangeably in the paper to refer to someone who has suffered sexual violence. Although both men and women experience sexual violence in Eastern DRC,⁷ statistics indicate that the overwhelming majority of sexual violence is committed on women and girls by men.⁸ For this reason the paper refers to the perpetrators or rapists in the masculine.

‘Prosecution’ refers to the criminal proceedings that the state institutes against a person who has violated criminal law. In Congolese criminal procedure, violations of criminal law may constitute a civil wrong, which entitles people aggrieved by the infraction (plaintiffs), such as rape victims, to bring claims for damages. A plaintiff can either introduce a civil claim into criminal proceedings or file a separate claim before a civil court independently from criminal proceedings.

In circumstances such as those prevailing in Eastern DRC, the prosecution of sexual violence serves a number of legitimate purposes. Prosecution aims to vindicate victims’ rights, avenge offences, inculcate moral values into offenders, prevent further sexual crimes and deter potential sexual offenders, put an end to the culture of impunity, promote the rule of law and stabilise the community.⁹

The definition of sexual violence is taken from that provided by Gay McDougall, who defined sexual violence as meaning ‘any violence, physical or psychological, carried out through sexual means or by targeting sexuality’, thus including ‘both physical and psychological

r=3&partner=rss&emc=rss (accessed 20 September 2009); ‘In pictures: Congo civilians easy prey’ *BBC News* 15 June 2009 <http://news.bbc.co.uk/2/hi/africa/8100850.stm> (accessed 20 September 2009); MONUC ‘Security In Eastern DR Congo Province “rapidly deteriorating”’ 9 March 2009 <http://www.monuc.org/news.aspx?newsID=20200> (accessed 20 September 2009).

⁷ ‘Bunia: 66 hommes ont été violés de décembre 2007 à mai 2008’, *Radio Okapi* 14 August 2008 http://www.radiookapi.net/index.php?i=53&l=19&c=0&a=19949&da=&hi=0&of=8&s=&m=2&k=0&r=all&sc=19&id_a=0&ar=0&br=qst (accessed 20 September 2009), reporting that female government soldiers had raped 66 men between December 2007 and May 2008 in Bunia, the capital city of the Ituri province in Eastern DRC.

⁸ Figures indicate that around 99% of victims of recorded rapes are women: United Nations Population Fund ‘Données VAS Compilées du Volet Judiciaire Premier Semestre 2008’; United Nations Population Fund ‘Fiche de Rapportage SGBV: Volet Medico-Sanitaire Premier Trimestre 2008’.

⁹ See GE Dix & MM Sharlot *Criminal law: Cases and materials* (2002) 48; International Parliamentary Expert Mission Addressing Impunity for Sexual Crimes in the Democratic Republic of Congo (26 April-3 May 2008), organised by the Swedish Foundation for Human Rights in collaboration with the All-Party Parliamentary Group on the Great Lakes Region of Africa 18.

attacks directed at a person's sexual characteristics'.¹⁰ Sexual violence takes many forms, including rape, and can be committed by civilians or armed individuals during peace time or during armed conflict.

Armed groups in Eastern DRC rape women in a systematic and methodical manner. Dr Denis Mukwege testified that¹¹

[g]enerally the victims are raped by several men at a time. One after another. In public, in front of parents, husbands, children or neighbours. Rape is followed by mutilations or other corporal torture.

The rate at which sexual violence occurs in countries experiencing armed conflict rather than countries experiencing peace is higher. Rape is employed by military forces to destabilise, humiliate and degrade a population. However, due to the pervasive and destructive effects of conflict, rape is committed by both armed groups and civilians. Sexual violence, previously used as a weapon of war, has become indiscriminate during the ongoing conflict in Eastern DRC. There has been an increase in all forms of sexual violence, and the International Crisis Group reported that 'there has been a profound degree of normalisation of violence against women that endangers the basic foundations of social relations in the province'.¹² In this context, the paper understands 'sexual violence' as referring to 'rape as a weapon of war' committed by armed groups, as well as sexual violence perpetrated by civilians.

2 Eastern DRC: A historical background

The legacies of the 1994 genocide in Rwanda, the illegal trade of minerals in Eastern DRC,¹³ the fragility of the Congolese state and attacks by the Ugandan terrorist organisation, the Lord's Resistance Army (LRA), are the main contributors to insecurity in the Great Lakes region. The epicentres of the regional insecurity and sexual violence are the eastern provinces of North and South Kivu.

2.1 The repercussions of the 1994 Rwanda genocide in Eastern DRC

The 1994 genocide of Tutsis in Rwanda boiled over to the DRC when the Hutus, who perpetrated the genocide, flooded refugee camps in

¹⁰ Final report submitted by Ms Gay J McDougall, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Systematic rape, sexual slavery and slavery-like practices during armed conflict', E/CN.4/Sub.2/1998/13, 21–22.

¹¹ n 3 above.

¹² International Crisis Group 'Congo: Five priorities for a peacebuilding strategy' (*Africa Report 150*) 2009 5.

¹³ Mahmoud Kassem *Rapport du Groupe d'Experts sur l'Exploitation Illégale des Ressources Naturelles et Autres Richesses de la République Démocratique du Congo*, delivered to the Security Council, UNDoc S/2003/1027 (23 October 2003).

Eastern DRC. Their presence started a civil war in August 1996 which involved many neighbouring countries.¹⁴ The conflict led to massive human rights violations, killings and rapes of girls and women.

Despite peace agreements signed in 2002 and 2008, insecurity and conflict remain.¹⁵

2.2 The illegal trade of mineral resources in Eastern DRC

The illegal exploitation of mineral resources in North Kivu has provided a fertile ground for a myriad of militias to flourish in Eastern DRC. For some armed groups, the mineral wealth has been fortuitous, a way to sustain themselves while they pursue their political agenda; for others, the goal all along has been to plunder.¹⁶

Congo's mineral wealth, coupled with its weak border controls,¹⁷ has seduced several armed groups, including the Congolese army (*Forces Armées de la République Démocratique du Congo* or FARDC) and a few United Nations (UN) peacekeepers,¹⁸ to loot its natural resources. Millions of dollars generated from the illegal trade of minerals, such as gold, diamonds, cassiterite (tin ore) and coltan, have enabled many of these armed groups to become self-financing and self-sustaining.¹⁹ It is estimated that 80% of the world's reserves of coltan are found in Eastern DRC.²⁰

In 2004, when world demand escalated, cassiterite (tin ore) replaced coltan as one of the most sought-after resources in DRC.²¹ DRC produces an estimated 6% to 8% of the world's tin ore, making it the sixth

¹⁴ See H Ngbanda *Crimes Organisés en Afrique Centrale: Révélations sur les Réseaux Rwandais et Occidentaux* (2004), explaining how complex networks of multinational corporations, heads of state and individuals exploited mineral resources and destabilised Eastern DRC.

¹⁵ M Tran 'Angolan troops "reinforcing Congo army against rebels"' *Guardian* 7 November 2008 <http://www.guardian.co.uk/world/2008/nov/07/congo-angola-support> (accessed 20 September 2009).

¹⁶ E Pasha *Minerals are the problem, but can they be the solution?* (2009).

¹⁷ International Crisis Group *Security reform in the Congo* (2006) 1.

¹⁸ See R Crilly 'UN peacekeepers "traded gold, ivory and guns with Congo rebels"' *Times Online*, 28 April 2008 <http://www.timesonline.co.uk/tol/news/world/africa/article3834034.ece> (accessed 20 September 2009).

¹⁹ Chairperson of the Group of Experts, *Report of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo*, delivered to the Security Council, UN Doc S/2008/773 (12 December 2008) 73.

²⁰ C Sourt 'The Congo's blood metals' *Guardian* (UK) 25 December 2008 <http://www.guardian.co.uk/commentisfree/2008/dec/25/congo-coltan> (noting, however, that estimations suggest that only 1% of the coltan sold on the open market is from DRC).

²¹ S Sackur 'Mining a mint in Eastern Congo' *BBC Africa* (UK) 2 May 2009 http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/8027367.stm (accessed 20 September 2009).

largest producer.²² According to *Global Witness*, ‘much of the fighting that is still occurring in the east of the country is driven by the desire to control natural resources’.²³ Available evidence reveals that resource-based civil wars often result in higher levels of violence and civilian casualties.²⁴ Thus, after two civil wars, in August 1996 and August 1998, and more than five million people dead, the Congo is reeling from the worst humanitarian crisis since World War II.²⁵ Rape is an instrument of terror as armed groups attempt to exercise control over a mine or the transport and taxation of minerals. The Enough Project, an advocacy organisation, concludes that the ‘deadly nexus between the worst violence against women in the world and the purchase of electronics products containing conflict minerals from the Congo is direct and undeniable’.²⁶

2.3 The fragility of the state in DRC

The army is unable to protect the country’s borders from invasion and women from sexual violence in North Kivu. Since 1996, cohorts of armed groups, including the *Forces Démocratiques pour la Libération du Rwanda* (FDLR), a Rwandan rebel group who participated in the 1994 Rwandan genocide, have been opposing the authority of the Congolese state.

On 6 August 1999, the UN Security Council established a peacekeeping mission in the Congo known by its French acronym, MONUC,²⁷ which assists the state in monitoring peace, protecting civilians and attempting to achieve security in the region.²⁸ With more than 17 000 troops and an annual budget in excess of one billion US dollars,²⁹ MONUC is the world’s largest and most expensive UN peacekeeping operation. Yet, deployed in a country roughly the size of Western Europe, MONUC is under-resourced, under-budgeted and overstretched. In order to increase the protection of civilians, the UN Security Council authorised 3 000 additional peacekeepers in November 2008. However, more than one year later, they have still not arrived in Eastern

²² Enough Project *A comprehensive approach to Congo’s conflict minerals* (2009) 2.

²³ ‘Global witness: Under-mining peace’ *A Report by Global Witness*, June 2005 3.

²⁴ JM Weinstein *Inside rebellion: The politics of insurgent violence* (2007) 7.

²⁵ See International Rescue Committee *Mortality in the Democratic Republic of Congo: An ongoing crisis* (2007).

²⁶ Enough Project John Prendergast *Can you hear Congo now? Cell phones, conflict minerals, and the worst sexual violence in the world* (2009) 8.

²⁷ SC Res 1258, UN Doc S/RES/1258 (6 August 1999).

²⁸ See United Nations Security Council Resolution 1856 (2008) of 22 December 2008.

²⁹ United Nations Missions in DR Congo (MONUC), Budget, <http://www.monuc.org/News.aspx?newsID=11533&menuOpened>About%20MONUC> (accessed 9 September 2008). The budget for the period from 1 July 2005 to 30 June 2006 was 1 133 672 200. Donor countries, such as the US, Japan and Germany, primarily finance MONUC’s budget.

DRC, despite promises from Council members that they would urge a rapid deployment. Helicopters and intelligence support, desperately needed by MONUC, have also not materialised.³⁰

2.4 Joint military operations against rebels

In view of the fact that the government and MONUC have been unable to stop armed violence in Eastern DRC, the government in the opening weeks of 2009 invited the Ugandan and South Sudanese armies, and later the Rwandan army, to help quash the Ugandan LRA and the Rwandan Hutu FDLR rebels.

The Rwandan–Congolese military operations, called *umoya wetu* (our unity), aimed to flush out Rwandan Hutu rebels. During this time, the Rwandan authorities arrested Nkunda, and are detaining him pending his possible extradition to the Congolese authorities.³¹ During a rapid integration process, at least 12 000 combatants from the CNDP and other rebel groups who agreed to join the military operations were integrated into the Congolese army.³² Operation *umoya wetu* ended in late February, when Rwandan soldiers left Eastern DRC following an agreement that the Congolese army would continue military operations against the Rwandan militias with support from MONUC. This second phase, known as Kimia II, began in North Kivu in mid-April and expanded the military operations to the South Kivu province.³³

These operations offer the opportunity to extend the control of the state to ensure lasting peace in the region. Peace is a necessary prerequisite to reduce the rate of sexual violence, as a high concentration of armed men is usually ‘directly related to a high frequency of rights violations, including ... sexual violence’.³⁴ Military operations may increase the safety of the local population and, in so doing, protect women and girls from sexual violence, and ensure that sexual offenders account for their crimes.

However, although the Rwandan–Congolese military operations have allowed the Congolese state to extend its authority to more areas

³⁰ Human Rights Watch ‘DR Congo: 100 000 civilians at risk of attack’ 29 April 2009 <http://www.hrw.org/en/news/2009/04/29/dr-congo-100000-civilians-risk-attack> (accessed 20 September 2009).

³¹ ‘Rwandan forces complete pull-out after joint operation’ 26 February 2009 <http://www.france24.com/en/20090226-rwanda-begins-dr-congo-pull-out-after-joint-operation-hutu-rebels-retaliation> (accessed 20 September 2009).

³² Human Rights Watch ‘DR Congo: Hold army to account for war crimes’ (HRW Press Release) 19 May 2009 <http://www.hrw.org/en/news/2009/05/19/dr-congo-hold-army-account-war-crimes> (accessed 20 September 2009).

³³ As above.

³⁴ IRIN (UN Office for the Co-ordination of Humanitarian Affairs) ‘DRC: Waiting for militias to leave the Kivus’ 12 March 2009 <http://www.irinnews.org/report.aspx?ReportID=83418> (accessed 20 September 2009).

in Eastern DRC,³⁵ it is widely reported that the operations so far have done little to remove the threat posed by the rebels, who have taken back much of their old ground since the February pull-out.³⁶ The long-term military gains of these operations, if any, are still unclear.

Regardless of any military achievements, it is nevertheless clear that the joint military operations have had a devastating impact on the civilian population to date. Despite expanded state presence, the humanitarian situation has deteriorated.³⁷ It is widely reported that the security in Eastern DRC worsened after the launch of the joint military operations,³⁸ when the FDLR militias committed brutal 'reprisal' attacks in North and South Kivu, deliberately attacking and killing civilians.³⁹ In addition, the rapid and unstructured integration process is not boding well, with disturbing reports that the 'ramshackle' Congolese army has also been targeting civilians whom it is intended to protect.⁴⁰ This is not surprising, given the lack of discipline, training and logistical support within the Congolese ranks.⁴¹ In June 2009, the spokesman for the UN said that Congolese soldiers had not been paid for six months and that the UN was feeding 20 000 of them every day.⁴² In this context, civilians continue to be easy prey for armed groups.⁴³

In conjunction with military operations, there has been a marked increase in the occurrence of sexual violence in North and South Kivu. As with previous processes of armed group integrations, the number of rapes and other human rights abuses since the rebels were integrated has increased.⁴⁴

It was reported in June 2009 that rape cases in South Kivu were soaring.⁴⁵ An increase in the number of sexual violence cases have been reported in the territories of South Kivu where soldiers had been deployed. The soldiers engage in looting and rape during

³⁵ M Doyle 'DR Congo outsources its military' *BBC News* 27 February 2009 <http://news.bbc.co.uk/2/hi/africa/7910081.stm> (accessed 20 September 2009).

³⁶ *BBC News* (n 6 above); IRIN (n 6 above).

³⁷ MONUC (n 6 above) 1.

³⁸ See "'Dozens killed'" in DR Congo raids' *BBC News* 13 May 2009 <http://news.bbc.co.uk/2/hi/africa/8049105.stm> (accessed 20 September 2009); MONUC (n 6 above).

³⁹ Human Rights Watch reported that in early May, around 60 civilians were killed and many others wounded in Walikale territory. Human Rights Watch (n 32 above).

⁴⁰ As above; IRIN (n 6 above); MONUC (n 6 above) 3.

⁴¹ International Parliamentary-Expert Mission (n 9 above); Guardian.co.uk 'Congo army rapes, robs and kills civilians, UN told' *Associated Press* 18 May 2009 <http://www.guardian.co.uk/world/2009/may/18/congo-army-rape-civilians-monuc> (accessed 20 September 2009).

⁴² 'Mutinous Congo troops fire at UN' *BBC News* 17 June 2009 <http://news.bbc.co.uk/2/hi/africa/8104984.stm> (accessed 20 September 2009); Guardian.co.uk (n 41 above).

⁴³ As above.

⁴⁴ Human Rights Watch (n 32 above).

⁴⁵ *BBC News* (n 6 above).

their foot patrols and are contributing to a new wave of population displacement.⁴⁶

3 Congolese laws against sexual violence

3.1 Constitutional provisions

To combat gender-based and sexual violence against women, the Congolese government has enacted a number of legal provisions. Article 14 of the Constitution expressly enjoins the state to fight all forms of sexual violence against women.⁴⁷ Article 15 of the Constitution defines sexual violence as a crime against humanity.⁴⁸ Finally, article 16 protects physical integrity and forbids cruel, inhuman or degrading treatment.⁴⁹

3.2 National legislation

In response to the large-scale perpetration of sexual violence in Eastern DRC, the Congolese Parliament amended the 1940 Penal Code and the 1959 Penal Procedure Code (2006 Amendments) in July 2006.⁵⁰ Parliament enacted these amendments to combat sexual violence, 'a new widespread form of criminality, often justified by economic, social and political interests'.⁵¹

⁴⁶ IRIN (UN Office for the Co-ordination of Humanitarian Affairs) 'DRC: Attacks against civilians and aid workers increase in the east' 22 May 2009 <http://www.irinnews.org/report.aspx?ReportID=84506> (accessed 20 September 2009).

⁴⁷ *'Les pouvoirs publics veillent à l'élimination de toute forme de discrimination à l'égard de la femme et d'assurer la protection et la promotion de ses droits. Ils prennent dans tous les domaines, notamment dans les domaines civil, politique, économique, social et culturel, toutes les mesures appropriées pour assurer le total épanouissement et la pleine participation de la femme au développement de la nation. Ils prennent des mesures pour lutter contre toute forme de violences faites à la femme dans la vie publique et dans la vie privée.'*

⁴⁸ *'Les pouvoirs publics veillent à l'élimination des violences sexuelles utilisées comme arme de déstabilisation ou de dislocation de la famille. Sans préjudice des traités et accords internationaux, toute violence sexuelle faite sur toute personne, dans l'intention de déstabiliser, de disloquer une famille et de faire disparaître tout un peuple est érigée en crime contre l'humanité puni par la loi.'*

⁴⁹ *'La personne humaine est sacrée. L'Etat a l'obligation de la respecter et de la protéger. Toute personne a droit à la vie, à l'intégrité physique ainsi qu'au libre développement de sa personnalité dans le respect de la loi, de l'ordre public, du droit d'autrui et des bonnes mœurs ... Nul ne peut être soumis à un traitement cruel, inhumain ou dégradant.'*

⁵⁰ Loi 06/018 of 20 July 2006, supplemented by Loi 06/019 of 20 July 2006, modifying and amplifying the Décret of 6 August 1959 concerning the code of penal procedure (2006 Amendments).

⁵¹ 2006 Amendments, *'exposé des motifs'*. Author's own translation. The original French version reads: *'une nouvelle forme de criminalité à grande échelle justifiée le plus souvent par des intérêts d'ordre économique, social et politique'*.

The amended article 170 of the Penal Code describes and criminalises various forms of rape.⁵² In addition to rape, the 2006 Amendments introduced new forms of sexual violence not formerly criminalised into Congolese law.⁵³ Article 2 lays out the punishment of rape: five to 20 years' imprisonment as well as damages.

Another piece of national legislation are the military codes,⁵⁴ relevant when armed perpetrators carry out sexual violence. Title V of the Congolese Military Penal Code provides for genocide, war crimes and crimes against humanity. Article 169 of the Military Penal Code lists rape, sexual slavery and other forms of sexual violence as crimes against humanity punishable, on conviction, by the death penalty.

However, it is worth noting that gender parity has not yet been reflected in all laws governing the status of women. For example, a married woman is still considered to be a minor in the eyes of the law.⁵⁵

3.3 International law

International law is also applicable to the prosecution of sexual offences in the DRC. The legal relevance of regional and international law resides in the fact that regional and international law, by virtue of article 215 of the Congolese Constitution, supersedes municipal law.

It thus appears from the above analysis of the laws relating to sexual violence that an arsenal of legal provisions to combat sexual violence exists through constitutional, criminal, military and international statutes. However, the incidence of rape remains high and prosecutions disproportionately few.

4 Prosecution of sexual violence in Eastern DRC

4.1 Sexual violence and prosecution: The statistics

The official end of the Congolese war in 2003 did not result in a corresponding end of rapes. Armed conflicts and their attendant sexual violence, looting and killings have not ceased in Eastern DRC. While exact numbers are impossible to come by, there is no doubt that rape continues to be a problem in Eastern DRC. Of the total 87 respondents

⁵² 1940 *Code Pénal*; 2006 Amendments para 2 2.

⁵³ 2006 Amendments para 3 1-14, namely the sexual exploitation of minors, acting as a pimp, forced prostitution, sexual harassment, sexual slavery, forced marriage, sexual mutilation, zoophilia, the deliberate transmission of incurable sexually transmitted diseases, child trafficking, forced pregnancy, forced sterilisation, child pornography and child prostitution.

⁵⁴ *Loi 023/2002* of 18 November 2002 *Portant code judiciaire militaire* (Military Code) and *Loi 024/2002* of 18 November 2002 *Portant Code Penal Militaire* (Military Penal Code).

⁵⁵ Family Code, arts 448 & 450.

who were asked whether sexual violence was a problem in the region, every single respondent replied in the affirmative. In October 2006, the UN Under-Secretary-General for Peacekeeping reported that over 12 000 rapes of women and girls had been reported in the preceding six months in Eastern DRC (North and South Kivu).⁵⁶

MONUC reported in 2009 that around 1 100 rapes were reported each month, with the majority of these being in North and South Kivu.⁵⁷ A census of the United Nations Children's Fund (UNICEF) and related medical centres reported treatment of 18 505 persons for sexual violence in the first ten months of 2008 in Eastern DRC.⁵⁸ The Congo Advocacy Coalition, a coalition of local and international non-governmental organisations (NGOs), states that over 2 200 cases were registered in June 2008 alone in the province of North Kivu.⁵⁹ One local NGO in North Kivu treated almost 3 000 victims of sexual violence in 2007.⁶⁰ In South Kivu, 4 500 new cases were recorded in the first six months of 2007.⁶¹ In South Kivu, between January and September 2007, Bukavu's Panzi Hospital registered 2 773 rapes, 2 447 of which were attributed to the FDLR.⁶² A group of FDLR deserters, mixed with Congolese militia called Rasta, was identified as primarily responsible for the pattern of rape and genital mutilation against Congolese women.⁶³

Given difficulties in obtaining statistics in this area — due to the manner in which victims tend to hide sexual violence as well as poor reporting mechanisms — reported cases represent only a small number of total rapes committed, and are in no way conclusive.⁶⁴ However,

⁵⁶ Statement by United Nations Under-Secretary-General for Peacekeeping, Jean-Marie Guéhenno (2006).

⁵⁷ MONUC *Twenty-seventh report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo S/2009/160* 27 March 2009 14.

⁵⁸ International Crisis Group (n 12 above) 4.

⁵⁹ Congo Advocacy Coalition *Update on protection of civilians in Eastern Congo's peace process* (2008) 2. North Kivu contains an estimated 40% of the total sexual offence cases of the entire Congo: *Initiative conjointe de prévention des violences sexuelles et de réponses aux droits et besoins des victimes/survivant(e)s, Situation des violences sexuelles au Nord Kivu. Période : Premier semestre 2008 (Rapport préliminaire)* (2008) 4.

⁶⁰ Heal Africa *Guéris Mon Peuple Deuxième Rapport (janvier-décembre 2007) Assistance Médicale, Psychosociale et Economique pour les Survivants des Violences Sexuelles au Nord Kivu, RD Congo* (2007) 4.

⁶¹ Y Ertürk *Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Addendum: Mission to the Democratic Republic of the Congo* (2008) 17.

⁶² IRIN (UN Office for the Co-ordination of Humanitarian Affairs) 'DRC: Rape cases soar in South Kivu' 3 June 2009 <http://www.irinnews.org/report.aspx?ReportID=84685> (accessed 20 September 2009).

⁶³ International Crisis Group (n 12 above) 5.

⁶⁴ n 9 above.

they are useful in giving a conservative statistical indication of the wide scope of the under-prosecution of sexual offences.

4.1.1 Identity of victims and perpetrators

According to MONUC, 81% of cases of sexual violence are committed by armed perpetrators such as members of armed groups.⁶⁵ The medical/psychological sector of UNFPA reports that only 10% of victims are minors, and only 10% of perpetrators are civilians.⁶⁶ These figures align roughly with individual numbers provided by Joint Initiative and Heal Africa that show that around 30% of victims are minors, and 20-34% of perpetrators are civilians.⁶⁷ A UNFPA-commissioned assessment also indicates that, while the proportion of civilian perpetrators is rising, the majority of rapes continue to be carried out by armed perpetrators.⁶⁸ Therefore, armed men or men in uniform perpetrate the majority of rapes against adult women.

4.1.2 Representation of victims and perpetrators in courts

According to the Joint Initiative of Prevention of Sexual Violence and Response of Rights and Needs of Victims/Survivors (Joint Initiative), of the reported 2 288 cases, only 152 cases — representing 7% of perpetrators — were referred to a tribunal.⁶⁹ This figure represents a very small percentage of all perpetrators of sexual violence, when it is recalled that many instances of sexual violence are not reported.

Data from the United Nations Population Fund (UNFPA) shows that only 44 civil and 10 military decisions on sexual offences were passed down during the first quarter of 2008 for the entire South Kivu province, a region with hundreds of thousands of inhabitants.⁷⁰ These figures correlate with this paper's field research experience in

⁶⁵ MONUC (n 57 above) 14.

⁶⁶ United Nations Population Fund, Fiche de Rapportage SGBV: Volet Medico-Sanitaire Premier Trimestre 2008.

⁶⁷ Heal Africa (n 60 above).

⁶⁸ n 9 above, 14.

⁶⁹ *Initiative conjointe de prévention des violences sexuelles et de réponses aux droits et besoins des victimes/survivant(e)s, Initiative conjointe de prévention des violences sexuelles et de réponses aux droits et besoins des victimes/survivant(e)s, Situation des violences sexuelles au Nord Kivu. Période: Premier semestre 2008 (Rapport préliminaire)* (2008) 12. Likewise, of the 2 672 victims identified by Heal Africa (a local NGO focusing on ending gender-based violence and providing health care to victims), only 165 prosecutions were initiated, being 6% of total rapes. Heal Africa had no details to show how many, if any, resulted in successful prosecutions; Heal Africa (n 60 above) 12.

⁷⁰ These statistics exclude the city of Bukavu. United Nations Population Fund, Fiche de Rapportage SGBV: Volet Medico-Sanitaire Premier Trimestre 2008. Interview with Ligongo, UNFPA officer.

four tribunals in North and South Kivu. Each tribunal had reached only between one and 38 decisions during the first half of 2008.⁷¹

However, prosecution figures pertaining to sexual violence tend to be misleading, because the figures and the reality they should represent do not match.⁷² It is necessary to examine the types of rape cases presented before the tribunals. Since the introduction of the new laws on sexual violence in 2006, cases of consensual, statutory rape have inundated tribunals. Some lawyers and judges estimated that a staggering 80% of cases of sexual violence before the tribunals are these types of cases.⁷³ An increase in sexual crimes committed by minors was observed by NGO members of the provincial sub-commission on sexual violence in Goma, North Kivu, who estimated that 90% of minors in prison had been convicted of rape.⁷⁴

Information from UNFPA also shows the overrepresentation of civilian statutory rape cases, with the effect that the type of case that reaches the courts does not reflect the reality in the DRC. UNFPA's legal sector's statistics suggest that as many as 79% of victims who are before the courts are minors and 87% of perpetrators are civilians.⁷⁵

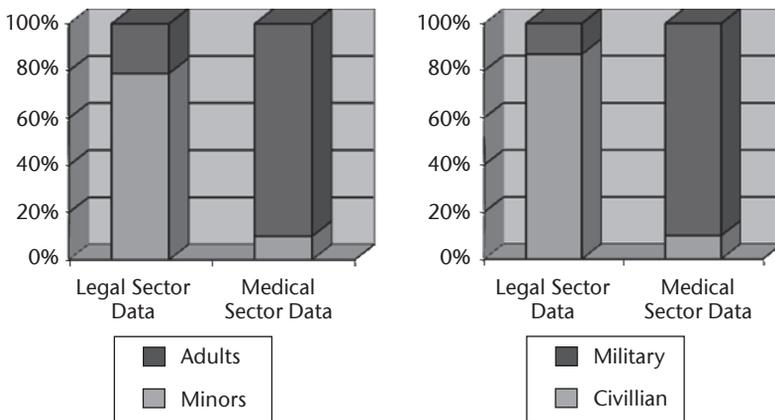


Figure 1: Disparity between statistics of the legal and medical sectors of UNFPA data

⁷¹ The Goma *Tribunal de Grande Instance* had reached 38 (interview with Registrar of Goma *Tribunal de Grande Instance*; the Goma military court only two (interview with Registrar of Goma *Tribunal Militaire de Garnison*). The Uvira *Tribunal de Grande Instance* had delivered 11 judgments in 2008 (interview with Mr Samuel, Prosecutor of Uvira *Tribunal de Grande Instance*). The Uvira Military Prosecution (*Auditeur Militaire près le Tribunal Militaire de Garnison*) stated that around 24 judgments are delivered each semester (interview with Prosecutor Francis of the Uvira *Auditeur Militaire du Tribunal Militaire de Garnison*).

⁷² Interview with Judge Lunanga, President of the Uvira *Tribunal de Grande Instance*.

⁷³ Interview with Mr Samuel, Prosecutor of Uvira *Tribunal de Grande Instance*; interview with Judge Solomon, judge of the Goma *Tribunal Militaire de Garnison*.

⁷⁴ International Crisis Group (n 12 above) 5.

⁷⁵ United Nations Population Fund, Données VAS Compilées du Volet Judiciaire Premier Semestre 2008.

The majority of victims — adult women violated by armed men — therefore remain drastically underrepresented in the Congolese judicial system. There is a shockingly high number of rapes in Eastern DRC, often committed in horrific ways. However, the Congolese justice system handles only a few of the mildest cases.

In examining the prosecution of sexual violence, it is problematic that Congolese criminal law does not distinguish between the consensual, statutory rape of a young victim and violent rape committed without her consent. In 2006, the age of consent increased from 14 to 18 years of age. Three years ago, 14 year-old girls were legally entitled to have sexual relations and marry. Today those same girls are in the curious position of being below the legal age of consent introduced by the 2006 sexual amendment laws. Most people in the local community expressed difficulty comprehending that a girl under the age of 18 years is not able by law to engage in sexual acts. An overwhelming number of lawyers, judges and the Congolese population alike voiced their criticism that the current laws do not reflect the realities of Congolese life, and are 'more international than national'.⁷⁶ Others commented that the law was too strict and was an emotional reaction to the war and associated sexual violence rather than a considered law appropriate to Congolese civil life. The criticism of this aspect of the law is epitomised by a judge who commented in resignation: 'My job is to apply the law, not to judge it.'⁷⁷

Mr Samuel, a prosecutor in Uvira, South Kivu, deplored the invariant nature of sexual violence crimes appearing before tribunals, in view of the unrepresented range of sexual violence that the law recognises and that occurs in communities. He complained that tribunals are overrun with cases involving minors, brought before tribunals solely for profit.⁷⁸ It is not infrequent that the parents of a girl, without her consent, bring these cases to court. Judges and lawyers speak frankly of the common problem of parents trying to gain compensation and damages by starting a case against their daughter's boyfriend or fiancé. There are also cases where parents lie about their daughter's age so that she is considered a minor. In this way, prosecutions 'become like a business'.⁷⁹

4.2 Competent courts

The appropriate tribunal in which to present a case of rape is a *Tribunal de Grande Instance* (General Tribunal), a court with wide jurisdiction for civil litigation and for indictable offences, or a *Tribunal Militaire de*

⁷⁶ Interview with Mr Aimé, Lawyer with Arche d'Alliance.

⁷⁷ As above; interview with Colonel Pascale, President of the Military Court of Goma.

⁷⁸ Interview with Mr Samuel, Prosecutor of Uvira *Tribunal de Grande Instance*.

⁷⁹ As above. Similar comments were made by Mathieu Ngongo. Interview with Mr Mathieu Ngongo, Director of the American Bar Association.

Garrison (Military Tribunal), in cases where the perpetrator is an armed civilian or a member of an armed force.⁸⁰ If the perpetrators are civilians, the 2006 Amendments apply instead of the Military Code. In such an event, the competent court is the General Tribunals and not the Military Tribunals.

5 The obstacles to prosecution

In trying to understand the breadth of the difficulties in the prosecution of sexual violence, this research paper benefited from the responses of 87 Congolese men and women – victims, attorneys, judges, NGO workers, counsellors and doctors, as follows:

GROUP	NUMBER OF RESPONDENTS	NUMBER OF FEMALES	NUMBER OF MALES
Survivors	28	28	0
Lawyers	9	2	7
NGOs	9	3	6
Doctors	5	3	2
Judges	9	0	9
General Population	27	17	10
Total	87	53	34

Figure 2: Breakdown of respondents by group

These respondents were sampled from various locations in North and South Kivu, including Goma, Uvira, Bukavu and Katanga. Their responses were significant, particularly when responding to a consistent question posed: ‘What is the biggest obstacle which stops a victim of rape from obtaining a successful prosecution?’ With only a few exceptions, all respondents provided more than one obstacle as asked, and instead proceeded to outline at least three or four significant issues, spanning a range of institutional, sociological, financial and legal realms.

This in itself conveys the complexity of the judicial environment in the DRC. It is not possible to simply name one or two problems to solve. Unfortunately – and worryingly – the problems are complex, daunting and plentiful. The following graph depicts the obstacles identified most commonly by respondents.

⁸⁰ Military Code, arts 76, 88 & 111; *Code d’Organisation et de Compétence Judiciaires* art 91.

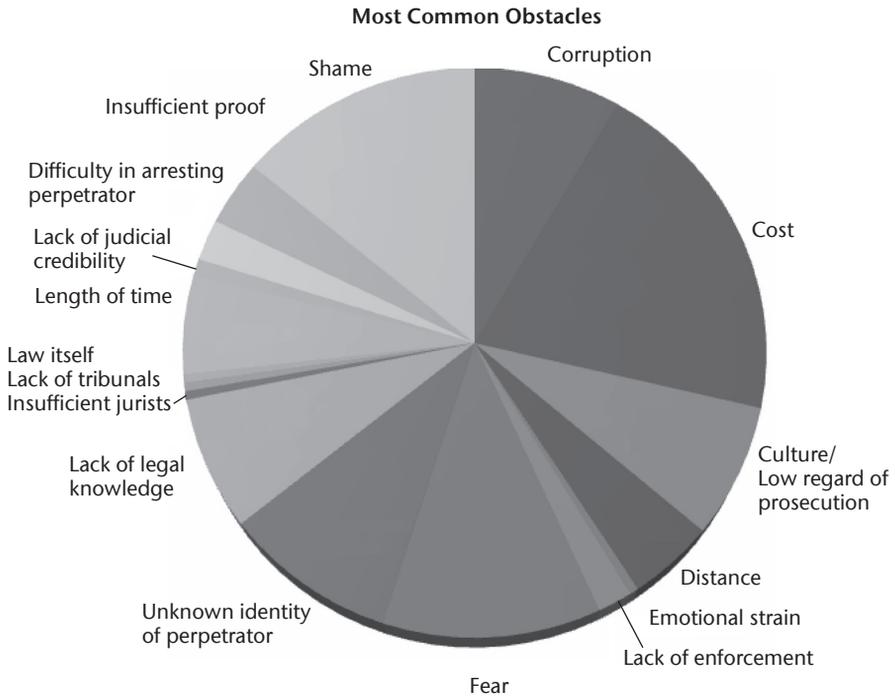


Figure 3: Factors identified most frequently by respondents to be obstacles to prosecution of sexual violence. Sectors are represented as a percentage of total responses.

5.1 Participation of survivors in the prosecution of sexual violence

The obstacles identified above merit close examination in light of how justice is practised in the DRC. It is the state's responsibility to ensure an effective justice system and the role of the state prosecution is to prosecute criminal cases. However, in reality it is the survivor who must initiate and participate closely in the prosecution process, given the state's current failure to assume this responsibility. For example, although legislation provides that the victim is entitled to the assistance of legal counsel during all phases of the judicial procedure, a recent delegation on impunity of sexual crimes 'heard no examples of the Congolese state assuming this responsibility'.⁸¹

5.1.1 Obstacle 1: The role of prosecution in modern Congolese society

One cogent reason why the prosecution does not fulfil its purpose in Eastern DRC is that justice in its Western prosecutorial form is foreign

⁸¹ n 12 above, 19.

to the vast majority of Congolese. In most of Eastern DRC, criminal prosecution does not play the part that it is generally expected to play. As Gégé Katana, Director of SOFAD⁸² (an NGO which campaigns against sexual violence and which provides counselling and help to rape survivors), summarised: ‘They don’t bring prosecution of rapes, because there’s no culture of bringing this to justice.’⁸³ The Congolese do not have a history of defending or pursuing their case before a panel of judges, and therefore often lack the frame of mind to initiate legal proceedings.

Ms Masika, a lawyer in South Kivu, explains that when she arrived in a village to create awareness about criminal prosecutions, the people objected, stating ‘that’s not our way, not our custom’.⁸⁴ Of the 28 victims interviewed, not one was encouraged to initiate a criminal prosecution immediately or soon after the rape. Moreover, only two knew someone who had made an official criminal complaint, indicating the rarity of prosecutions.

The fact that prosecution is a foreign concept to most Congolese means that prosecution is a major obstacle in itself. Prosecution would derive meaning and be universally accepted and employed by Congolese people if the state were to incorporate customary laws and traditions into its definition and application of prosecution. However, any incorporation of customary laws and traditions must include effective safeguards for women, to prevent customary laws being used to discriminate against women or sustain an unequal gender balance.

Customary criminal law exhibits the following features:⁸⁵

- It does not distinguish between public law and civil law from an organic, functional and normative point of view.
- It seeks to achieve the purpose of reparation as opposed to retribution, arbitration as opposed to punishment.⁸⁶
- Its judicial structure is modelled after paternal, familial and tribal social stratifications.
- It is based on ancestral wisdom, passed down from generation to generation through oral tradition by proverbs, sentences, stories, songs, and so forth.

⁸² *Solidarité des Femmes Activistes pour la Défense des Droits Humains* (Solidarity of Activist Women for Human Rights).

⁸³ Interview with Gégé Katana, Director of SOFAD.

⁸⁴ Interview with Ms Masika, Lawyer with AJUSK (Association of Jurists of South Kivu).

⁸⁵ BM Kampetenga Lusengu *Droit Coutumier Congolais: Notes de Cours à l'Attention des Étudiants de 2e Graduat en Droit* (2006).

⁸⁶ See M Pieterse ‘Traditional African jurisprudence’ in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004), stating that traditional modes of dispute resolution are often directed at facilitating peaceful solutions to problems which are regarded as possibly having a negative impact on the harmonious co-existence of the community as a whole.

5.1.2 Obstacle 2: Health concerns

Health concerns present another obstacle faced by survivors. With a high level of sexually transmitted infections such as HIV, and a scarcity of affordable treatment, health is a primary concern for many in Congolese society. This is particularly so for women who have fistula as a result of rape. The utility and relevance of legal proceedings are thus put into question. As Helène, a rape survivor, stated, ‘You can prosecute someone – but your state of health remains the same.’⁸⁷ Without health care, victims are unwilling to pursue the difficult and uncertain effort to get justice.⁸⁸ Given the experiences of rape victims, the preoccupation with health concerns is reasonable and widespread, and distracts from a focus on prosecution. Prosecutions cannot restore the health of the victim, and it is clear that there is a lack of faith in the utility of criminal prosecutions.⁸⁹

5.1.3 Obstacle 3: Lack of knowledge of state laws and public law remedies

Most people in the DRC live traditional lifestyles – meaning they largely live in rural areas, they generally survive through subsistence agriculture,⁹⁰ and do not attain high levels of formal education. The UNFPA estimates that only 24% of boys and 12% of girls attend secondary school, and that the illiteracy rate for females over the age of 15 is 42%.⁹¹ People are prevented from gaining knowledge of state laws because information and documentation of the judicial system are not readily accessible. For example, the national government gazette, *Journal Officiel*, is expensive, so the laws are not adequately disseminated amongst the various jurisdictions.⁹²

As the above figure shows, very few of the general population believe that ignorance of legal procedures and laws is an issue. Yet, of 27 interviewees from the community, only seven said they knew anything about the laws, although from further discussion it was apparent that even these seven, in reality, knew very little.

Similarly, few survivors knew where a case would be heard, and there was a recurrent lack of understanding of the necessity to prove

⁸⁷ Interview with Helène, survivor. See also interview with Furaha, survivor. ‘I can prosecute ... But this will not bring any result for my health state.’

⁸⁸ n 12 above, 19.

⁸⁹ Interview with Vivianne, survivor; interview with Rachele, survivor.

⁹⁰ The urban population of the DRC is only about 32,7%: United Nations Population Fund and Population Reference Bureau *Country profiles for population and reproductive health, policy developments and indicators 2005, Overview: Democratic Republic of Congo* (2005) 38.

⁹¹ United Nations (n 90 above) 39. The Minister of Justice in 2007 put the figure of female literacy as just 45,9%: Ministère de la Justice *Plan d’Actions Pour la Reforme de la Justice* (2007) 13.

⁹² Ministère de la Justice (n 91 above) 55.

the wrongdoing of the perpetrator.⁹³ This lack of knowledge of the law is a problem because it means that women do not know their legal rights and do not know what the law regards as wrong.⁹⁴ The Minister of Justice stated in 2007 that ignorance by the population of the laws and law in general – and more so the individual rights and freedoms expressed in the texts – prevents people from accessing justice.⁹⁵

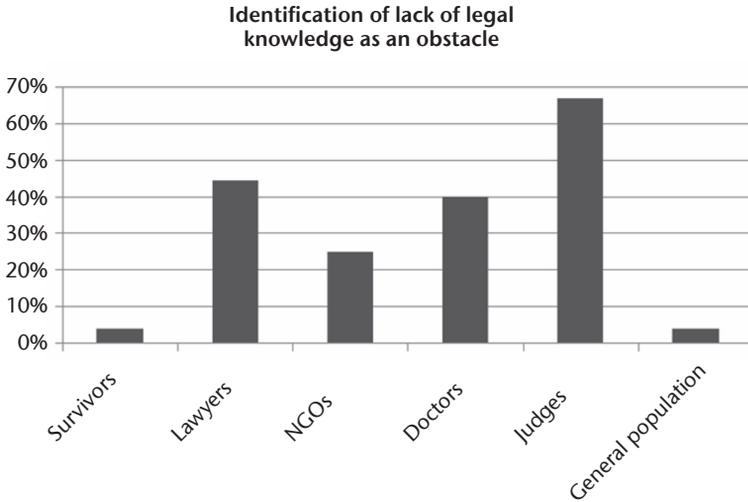


Figure 4: Percentage (by group) of respondents identifying lack of legal knowledge as an obstacle to prosecution

5.1.4 Obstacle 4: Position of women in society

In order to understand the impediments faced by Congolese women in instituting a prosecution, it is necessary to analyse their position and status in society. Professor Kahindo, a Congolese law professor, explains that great gender disparities exist in Congo, and that women have very little independent power.⁹⁶ Mr Muhindo from South Kivu concurred with this, adding that the law itself is the first obstacle that women face in prosecution because, according to the law laid out in the *Code de la*

⁹³ Interview with Nbitse, survivor. See also interview with Ndaina, survivor: 'Would I win the case? I am sure of it. The act is condemnable, I was taken by force.' One exception was 40 year-old Rosetta, who, when asked whether she would win her case before the judges, acknowledged: 'I don't know because I don't know the law, it's up to those who know the law.' Interview with Rosetta, survivor.

⁹⁴ Interview with Professor Kahindo, Professor of Law at the *Université Libre des Pays de Grand Lacs*.

⁹⁵ Ministère de la Justice (n 91 above) 30. The original French reads: '*Les entraves à l'accessibilité à la justice restent en effet très grandes en raison de ... l'ignorance par la population de la loi et du droit en général, plus encore les droits et libertés des individus tels qu'exprimés par les textes.*'

⁹⁶ n 95 above.

Famille (Family Code), a married woman must have authorisation from her husband before she can bring a legal action.⁹⁷

The customary view of women as subordinate to men creates difficulties for the criminal prosecution of sexual violence because it makes it difficult for rape to be recognised as a crime. As Mr Muhindo noted, on some interpretations of custom, ‘custom considers that any woman is available — anyone who has the desire, can take her’.⁹⁸ Most of the victims agree that women in themselves are not valued or respected in society.⁹⁹ One survivor described that ‘the husband is the one that can promote the value of a woman. Many women are despised in their own home; it is the duty of men to promote women’s value.’¹⁰⁰

The marital status of women also determines the value of a woman, as expressed by men and women alike across all groups.¹⁰¹ As husbands often reject their wives following a rape, rape survivors are even more vulnerable to losing their social status. One survivor relayed her story: ‘My mother’s relatives rejected me, because I was raped, my bladder was torn, I had no value. Families only value a healthy girl, she’ll get a dowry.’¹⁰²

The manner in which women respond to rape reflects a gender-based power imbalance. They are forced to accept the situation they are placed in, despite the extent of their suffering. For example, Rosetta, a rape survivor, stated:¹⁰³

As women, we will always be silent and not able to accuse anything that happens to us ... Just imagine: You are married, your husband is killed, you’re raped, you are leaking, your health becomes worse — you are just silent.

5.1.5 Obstacle 5: Shame

The issue of shame is a serious obstacle to prosecution and should by no means be underestimated. In analysing the interviews, shame was the second-most common response to the question as to the main obstacles to prosecution, and was common amongst all the groups interviewed.

⁹⁷ *Code de la Famille* art 448: ‘La femme doit obtenir l’autorisation de son mari pour tous les actes juridiques dans lesquels elle s’oblige à une prestation qu’elle doit effectuer en personne.’ *Code de la Famille* art 450: ‘Sauf les exceptions ci-après et celles prévues par le régime matrimonial, la femme ne peut ester en justice en matière civile, acquérir, aliéner ou s’obliger sans l’autorisation de son mari.’

⁹⁸ Interview with Mr Muhindo, Lawyer for SOFAD.

⁹⁹ Interview with Bibige, survivor.

¹⁰⁰ Interview with Rosetta, survivor.

¹⁰¹ Interview with Feza, survivor; interview with Rachelle, survivor.

¹⁰² Interview with Agues, survivor.

¹⁰³ Interview with Rosetta, survivor.

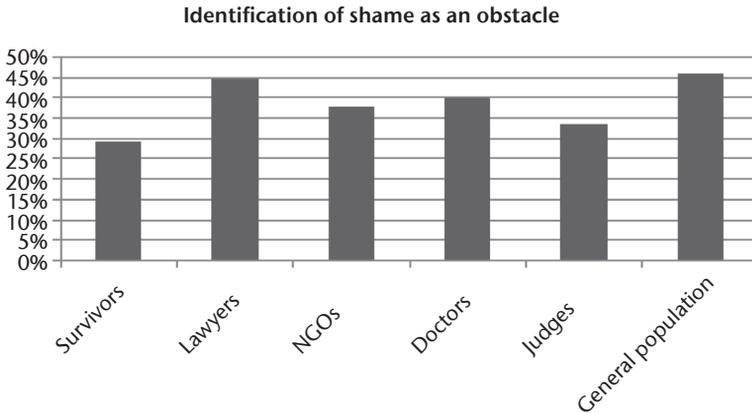


Figure 5: Percentage (by group) of respondents identifying shame as an obstacle

As a result of shame, victims prefer to act as though nothing had happened.¹⁰⁴ Judge Solomon of the Goma *Tribunal Militaire de Garnison* said that this perception of rape is the primary problem blocking criminal prosecutions: ‘It’s the culture which must be changed’, he maintains, ‘that says sex is taboo, rape is dishonourable, and that one must hide it.’¹⁰⁵ In *Eliwo Ngoy*, the military tribunal held in passing that:¹⁰⁶

Sexual assault is one of the most difficult things to report because of the socio-cultural context [of Congo]. In almost all societies, a woman, a man or a child making allegations of rape, sexual violence or mutilation, has much to lose and risks being the object of tremendous pressure and ostracism on the part of his or her immediate family members and the community in general.

Nbitse, a rape survivor, explained the effect of the shame associated with rape, saying ‘if you follow custom, you will hide the rape ... custom says that you did it by will, not by force. It’s infidelity according to custom.’¹⁰⁷

This perception dissuades victims from prosecuting offenders, given that if a woman submits a complaint, she is discredited and humiliated. The community says she wanted it to happen and so arranged a meeting, and men may be unable to comprehend how she could not

¹⁰⁴ Survey response of Noella, resident of Goma.

¹⁰⁵ Interview with Judge Solomon, judge of the Goma *Tribunal Militaire de Garnison*.

¹⁰⁶ Military Tribunal, Mbandaka, 12 April 2006 (DRC). Author’s own translation. The original French version reads: ‘... l’atteinte sexuelle est l’une des choses les plus difficiles à signaler à cause du contexte socio-culturel. Dans presque toutes les sociétés, une femme, un homme ou un enfant qui porte des allégations des viols, de violence ou d’humiliation sexuelle a beaucoup à perdre et risqué de faire l’objet d’énormes pressions ou d’ostracisme de la part des membres de sa famille immédiate et de la société en general.’

¹⁰⁷ Interview with Nbitse, survivor; interview with Pastor Antoine, pastor of Heal Africa; interview with Ms Masika, lawyer with the Association of Jurists of South Kivu (AJUSK).

refuse.¹⁰⁸ Comments made by the general population and lawyers during interviews support the perception that rape is the result of women's poor clothing and behaviour in exposing themselves to rape.¹⁰⁹

Members of the population from all generations share this view. Three boys aged 15 to 17 years old from South Kivu all agreed that if they were married and their wives raped, they would not stay with them. One of the boys, Solomon, explained what he would do in that situation:¹¹⁰

I'd tell my wife to take me to the place where she was raped, to see if she could recognise the rapist, and if she could, I'd give my wife to him to stay with her. If she couldn't, then I'd tell her to go back to her family's house.

Rape is seen as so dishonorable, in fact, that many husbands cannot continue living with a raped wife. This shame is not only directed at the wife, but also at the husband. This was elucidated by Sidonie, a psychologist in South Kivu, who explained that following a rape, 'people will say [to the husband]: "You're going to stay with that woman?" and he will also be shamed'.¹¹¹

Women thus often lose their husbands because of the stigma attached to being raped. This loss means that they have even less support than they would otherwise have had. One victim, when asked whether her family would assist her initiate proceedings, replied 'they wouldn't accompany me. They don't love me; they've abandoned me since the rape.'¹¹² Victims are frequently ostracised in the community.¹¹³

Police often lack the necessary competence, skills and sensitivity to conduct the crucial initial investigation in a sexual violence case.¹¹⁴ The justice system of Eastern DRC does not have the means to credibly ensure confidentiality and anonymity. In addition, women may be reluctant to speak of their experiences in front of male officers, yet only 3,5% of military and civil judges and prosecutors across the DRC are female.¹¹⁵

5.1.6 Obstacle 6: Religion

Religion can act as either an encouragement or a hindrance to criminal prosecution. Religion has a powerful role in Congolese society. It is estimated that 85% of the Congolese population is Christian

¹⁰⁸ Interview with Gégé Katana, Director of SOFAD.

¹⁰⁹ Interview with Mr Aimé, Lawyer with Arche d'Alliance; interview with Vénancie, resident of Goma.

¹¹⁰ Interview with Mupenda, resident of Katana.

¹¹¹ Interview with Sidonie, psychologist with Panzi Hospital.

¹¹² Interview with Eglesia, survivor.

¹¹³ Interview with Agues, survivor.

¹¹⁴ n 9 above, 20.

¹¹⁵ n 9 above, 21.

(55% Roman Catholic and 30% Protestant).¹¹⁶ Ancestral worship is additionally very prevalent as many Congolese have multiple or mixed religious identities.¹¹⁷ The failings and injustices of both the Mobutu regime and the current Congolese legal system further strengthen the value given to religious guidance. By contrast, laws can be seen as being arbitrary and unjust, causing a widespread lack of respect for criminal procedures.¹¹⁸ Nonetheless, some respondents, including pastors, affirmed that religion encouraged criminal prosecution¹¹⁹ and supported the dichotomy of forgiveness and prosecution. In the words of Feza, a woman who had been raped by twenty militia men in 2002 and who has contracted HIV as a result, 'What do I think of those men now? I want two things: In front of the state, it's violence against women. I must prosecute, they must be judged. In front of God, I want God to pardon them.'¹²⁰

However, other respondents indicated that faith in God was incompatible with criminal prosecution, because the latter is at odds with forgiveness. Rosetta, a survivor of rape, said, when speaking generally of prosecution, that God is the only one who can judge people according to their deeds. She commented that prosecution is an alternative to forgiveness, and she feels she must forgive only, because that is what people are supposed to do.¹²¹ Prosecution is sometimes associated with revenge, which 'only belongs to God'.¹²² Pastor Antoine offered insight into the relationship between religion and the law, explaining that there was no biblical conflict between forgiveness and criminal prosecution. However, the proliferation of religions in the DRC means that each church has its own way of construing things, so that ideas that God prefers forgiveness to prosecution circulate.

5.1.7 Obstacle 7: Identifying and arresting the perpetrator

The question as to how much of an obstacle the identification of perpetrators depends largely upon the type of perpetrator: military or civilian. Although NGOs working in the region reported a worrying increase in the rate of rapes committed by civilians in recent years,¹²³

¹¹⁶ US Department of State, *2008 Report on International Religious Freedom* (19 September 2008) <http://www.unhcr.org/refworld/country,,,,DOM,4562d94e2,48d5cc022,0.html> (accessed 16 March 2009).

¹¹⁷ AMB Mangu 'Law, religion and human rights in the Democratic Republic of Congo' (2008) 8 *African Human Rights Law Journal* 523.

¹¹⁸ Interview with Pastor Antoine, Pastor of Heal Africa.

¹¹⁹ Interview with Shalukomba, resident of Katana. See similar comments in Interview with Pastor Antoine, Pastor of Heal Africa.

¹²⁰ Interview with Feza, survivor.

¹²¹ Interview with Rosetta, survivor.

¹²² Interview with H el ene, survivor.

¹²³ R Feeley & C Thomas-Jensen 'Getting serious about ending conflict and sexual violence in Congo' Enough Strategy Paper (2008).

the majority of rapes continue to be committed by the various armed groups still operating in Eastern DRC.¹²⁴ Military prosecutions are, however, extremely rare in the Congolese judicial system, in part due to the difficulties associated with securing the arrest of the perpetrators.

In respect to military rapes, women are commonly raped in the night by members of an armed group. The perpetrators come from the bush and retreat there following the rape and the theft of the victim's property. For this type of rape, victims most often cannot identify the perpetrators, and generally can only describe what language they spoke or what armed group they came from. Consequently, many women do not know who to prosecute.¹²⁵ As one rape victim, Rosetta, insisted: 'It's not possible to go to court, because they're unknown people. I could not identify them; they just rape you and leave you ... I only knew they were in uniforms.'¹²⁶

It is in addition much more difficult to compel a perpetrator belonging to an armed group to appear before a tribunal. If the perpetrator belongs to a rebel group, he often lives in the bush in the territory which his group controls, and is thus inaccessible to justice. It is therefore effectively pointless to start a prosecution against a soldier from a rebel group such as the FDLR, as they are impervious to the Congolese legal system. Although justice must apply to everyone equally, the execution of justice in the Congo means that not everyone is subject to the law.¹²⁷ Commanders of the Congolese army also protect their soldiers,¹²⁸ and the International Crisis Group reported that the Congolese national army and the police were both guilty of sexual violence but, unlike civilians, faced no risk of prosecution.¹²⁹ Furthermore, it is problematic that no military judge can hear a case in which a superior in rank is an accused, as most high-ranking judges are located in the largest cities.¹³⁰

5.1.8 Obstacle 8: Amicable arrangements

Respondents noted that, in regard to incidents of civilian sexual violence, people prefer to make arrangements according to custom in place of legal proceedings.¹³¹ The families negotiate the terms of what

¹²⁴ Human Rights Watch *DR Congo: Peace accord fails to end killing of civilians* (2008) <http://hrw.org/english/docs/2008/07/18/congo19396.htm> (accessed 20 September 2009). While military operations in February 2009 caused the CNDP to be integrated into the Congolese army, the security situation in Eastern DRC remains instable due to the many other armed groups currently active, particularly the FDLR and LRA.

¹²⁵ Interview with Feza, survivor.

¹²⁶ Interview with Rosetta, survivor.

¹²⁷ Interview with Dr Faustin, doctor at Panzi Hospital.

¹²⁸ n 9 above, 21.

¹²⁹ n 12 above, 5.

¹³⁰ n 9 above, 27.

¹³¹ Interview with Mr Samuel, prosecutor of Uvira *Tribunal de Grande Instance*.

is termed in French *arrangements à l'amiable* (amicable arrangements). These are private arrangements, rooted in customary law, whereby, after a rape, the perpetrator or perpetrator's family gives to the victim's family payment in the form of a goat, some fish or a case of beer. Assuming that the families reach such an agreement, the girl then becomes the wife of the perpetrator.¹³² Should the victim already be married, then, if her husband wants to stay with her and not give her to the perpetrator, he will receive payment.

The preference for amicable arrangements is not surprising, since customary or tribal law is the second basis of Congolese law.¹³³ In practice, various customary laws regulate the lives of the majority of Congolese, particularly those who live in rural areas. Customary laws regulate personal status, including marriage, divorce, land tenure and inheritance. Amicable arrangements are often seen as being a more conciliatory approach to the problem, since the matter is dealt with between the two families.¹³⁴ Bibige, a victim, stated:¹³⁵

On the one hand, I'd have a right to prosecute. But on the other hand, there are people from my own community who have a different perspective — because someone from our community is being prosecuted — they'll say 'you could have made an arrangement.' Prosecution raises conflicts that last forever, people would keep pointing fingers at me, it would create insecurity.

MONUC reports that encouragement for amicable arrangements is pervasive throughout the community, and that 'despite reinforcement of the laws punishing sexual violence, military commanders, police investigating officers and magistrates continue to encourage families of rape victims to engage in out-of-court settlements'.¹³⁶ Lawyers and NGOs are struggling to bring an end to these amicable arrangements. For instance, *Arche d'Alliance*, a local NGO assisting in the prosecution of cases of sexual violence, reports that in roughly one-third of such cases, a payment through an amicable arrangement has been made.

Amicable arrangements circumvent the procedures of criminal justice, and are made without the participation of the victim. These arrangements therefore do not adequately redress the wrong committed. 'We want to reject the idea that you can give a goat for a rape ...

¹³² Interview with Shalukomba, resident of Katana.

¹³³ The two bases of Congolese law are Belgian law and Congolese customary law. See D Zongwe *et al* *The legal system and research of the Democratic Republic of Congo* (2008) http://www.nyulawglobal.org/globalex/democratic_republic_congo1.htm (accessed 20 September 2009).

¹³⁴ Interview with Furaha, survivor.

¹³⁵ Interview with Bibige, survivor.

¹³⁶ MONUC (n 6 above) 10.

how can you reduce the disgrace of a rape like that?’ asks Jean-Paul, a lawyer working with Heal Africa.¹³⁷

Yet, amicable arrangements offer speed, discretion and actual results, which the justice system does not. As long as legal procedures are seen as being less advantageous to victims than amicable arrangements and the judicial system remains replete with problems and challenges, victims will continue to be discouraged from pursuing a prosecution.

5.1.9 Obstacle 9: Cost and Distance

Cost

Access to justice is one of the principal conditions of a democratic society.¹³⁸ Yet expense, too, often prevents access to justice.¹³⁹ According to the respondents, cost was the single most prevalent obstacle to prosecution.

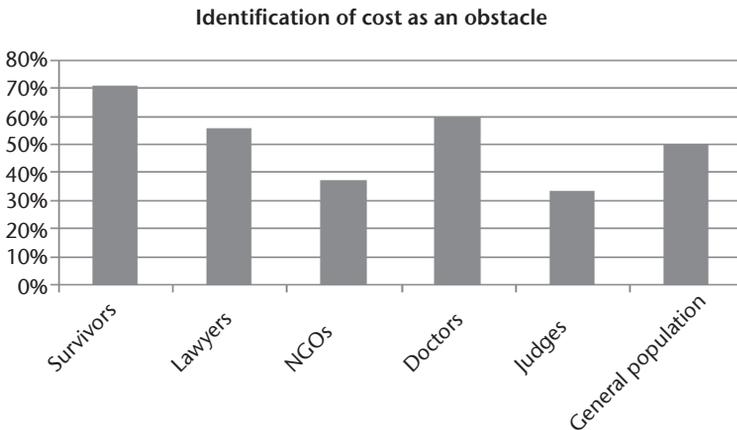


Figure 6: Percentage (by group) of respondents identifying cost as an obstacle

The Minister of Justice recognised this in the Plan of Action for Justice Reform in 2007, stating that, in addition to the expenses of ‘official justice’, which are burdensome for many litigants to bear due to their low level of income, there are also other more or less official expenses, such as the expense of filing a complaint, printing costs and expenses for the

¹³⁷ Interview with Mr Jean-Paul, Lawyer for Heal Africa. Similar comments were made in Focus group discussion with five survivors.

¹³⁸ *Ministere de la Justice* (n 91 above) 30.

¹³⁹ n 9 above, 19.

bailiffs. The end result of these costs is that justice is made inaccessible to the most destitute, who make up the majority of the population.¹⁴⁰

Sexual violence laws require items such as doctor's certificates,¹⁴¹ which cost around US \$40.¹⁴² In addition, explained Mr Muhindo, even if a victim is considered indigent, the lawyer must have some money to pay for the running costs of the case.¹⁴³ It is these ancillary costs which are beyond the means of many rape victims, the majority of whom are living in extreme poverty, as they are often abandoned following the rape.¹⁴⁴ Most victims opt to pay for health costs instead of continual and undetermined judicial costs.¹⁴⁵ Pastor Antoine sighed that 'you need to pay costs, in each office you go to. You need to have three or four pockets; you need to keep refilling them.'¹⁴⁶

Cost is the reason why the survivors of rape often prefer amicable arrangements, because that way they can at least hope to get some animals or money,¹⁴⁷ and the need to survive takes precedence over any higher goals of prosecution. A lawyer explained that when she suggested prosecution, women asked her: 'Apart from justice, what are you going to give me? I need a way to survive.'¹⁴⁸

Distance

The issues of distance and accessibility of the tribunals are closely linked to cost. The DRC is a vast country,¹⁴⁹ and there are few tribunals in Eastern DRC, so victims seeking to initiate prosecutorial proceedings must often travel very far from where they live. The Minister of Justice has stated that the physical distance between people and the judicial system prevents access to justice for all.¹⁵⁰ North and South

¹⁴⁰ *Ministere de la Justice* (n 91 above) 10. The original French version reads: 'Outre les frais de justice officiels (consignation, frais d'actes, droits proportionnels, etc.) qui sont lourds à supporter par un grand nombre de justiciables à cause du faible niveau des revenus, il y a lieu de relever que le justiciable congolais est soumis à d'autres frais plus ou moins officieux (frais de notification d'actes par les huissiers, frais de dépôt de la plainte, achat d'imprimés pour les procès – verbaux, etc.) qui achèvent de rendre la justice inaccessible pour les plus démunis qui constituent la majorité de la population.'

¹⁴¹ 2006 Amendments, art 1: '... l'Officier du Ministère Public ou le juge requiert d'office un médecin et un psychologue, afin d'apprécier l'état de la victime des violences sexuelles et de déterminer les soins appropriés ainsi que d'évaluer l'importance du préjudice subi par celle-ci et son aggravation ultérieure.'

¹⁴² Interview with Mr Samuel, prosecutor of Uvira *Tribunal de Grande Instance*.

¹⁴³ Interview with Mr Muhindo, lawyer for SOFAD.

¹⁴⁴ Interview with Ms Masika, lawyer with AJUSK (Association of Jurists of South Kivu).

¹⁴⁵ Interview with Rosetta, survivor.

¹⁴⁶ Interview with Pastor Antoine, pastor of Heal Africa.

¹⁴⁷ Interview with Ms Masika (n 144 above).

¹⁴⁸ As above.

¹⁴⁹ DRC is the third largest country by land area size in Africa after Sudan and Algeria.

¹⁵⁰ *Ministere de la Justice* (n 91 above) 9.

Kivu together cover 48 170 square miles,¹⁵¹ and there are not enough tribunals accessible to the Kivu population having jurisdiction to adjudicate cases of sexual violence.

For example, the Uvira General Tribunal is responsible for all the territories of South Kivu except for Bukavu city.¹⁵² Just one of these eight territories for which it is responsible, Shabunda, covers over 10 000 square miles,¹⁵³ bigger than all of neighbouring Rwanda.¹⁵⁴

There are supposed to be more than six tribunals in each of the North Kivu and South Kivu provinces, as judges in theory travel around the Kivu territories to various ancillary hearings. But, with no cars and no fuel provided by the state, it is plain to see why they travel across territories so rarely.

This geographical issue poses an immense stumbling block for victims, who do not have the means to pay for transport to the tribunal.¹⁵⁵ This is particularly so, given the high proportion of victims who come from insurgent areas, for whom the main towns are even more inaccessible due to insecurity.¹⁵⁶

Many victims live in extreme poverty, often as a direct result of the rapes. One survivor, Upole, described how she had been in pain since being raped whilst eight months pregnant, but the nearest hospital where there are specialists and where she can get free treatment is about 28 miles away. While for many in the world this would be a negligible distance, for Upole it is enough to keep her from treatment. It is too far to walk, she has no way of paying for transport, and has no one to care for her children during the time that she will be gone.

Some NGOs help in this regard by transporting victims to tribunals. Yet, there are much too few to meet the scale of need,¹⁵⁷ and travelling away from their communities places the victims in a vulnerable position. As Richard, a NGO worker involved in helping to bring women to the tribunal, commented: 'The problem for women is what to eat. We can't bring them here only to let them die of hunger.'¹⁵⁸

¹⁵¹ P Simo *et al* *Ending Congo's nightmare – What the US can do to promote peace in Central Africa* (2003) 29.

¹⁵² The Uvira *Tribunal de Grande Instance* is, however, assisted by two sub-tribunals at Kavumu and Kamituga.

¹⁵³ C Mampasu 'Shabunda: The "forgotten Kosovo"' (2002) *Humanitarian Exchange Magazine*.

¹⁵⁴ Interview with Mr Samuel, prosecutor of Uvira *Tribunal de Grande Instance*.

¹⁵⁵ Interview with Mr Jean-Paul and Ms Cristina, lawyers for Heal Africa; interview with Judge Solomon, judge of the Goma *Tribunal Militaire de Garnison*; interview with Mr Alexis, prosecutor of the Goma *Auditeur du Tribunal Militaire de Garnison*.

¹⁵⁶ Interview with Mr Alexis (n 155 above).

¹⁵⁷ As above.

¹⁵⁸ Interview with Richard, member of ASJPD (Association de Secours aux Jumeaux et Leurs Parents en Détresse/Association of Assistance to Twins and their Parents).

5.1.10 Obstacle 10: Fear

Fear of reprisals

In discussing all the institutional and social factors which impede prosecutions, it is easy to overlook psychological factors. Women who have been the victims of sexual violence have undergone traumatic experiences. For the most part, their rapes were violent and brutal: Many women were raped by multiple perpetrators; others were raped on numerous occasions.

The women therefore fear reprisals — that the same thing will happen again, and that next time, they may be killed. Their fear has a direct impact on their willingness to pursue prosecution.¹⁵⁹ Of the victims interviewed, 42% said that fear of reprisals was an obstacle to prosecution, making it the third most common response amongst rape victims. Taking into account the fact that the women may have been reluctant to admit that they were apprehensive of reprisals, that percentage is a conservative estimate.

It is problematic that there is no protection mechanism for victims and witnesses,¹⁶⁰ particularly given that threats and attacks against both groups are widely acknowledged.¹⁶¹ Mr Aimé, a lawyer from the NGO *Arche d'Alliance*, verified this, regretting that his organisation could only provide legal assistance and not any form of protection for women instituting prosecutions, despite many such requests.¹⁶² One victim, Ndaina, described why fear is an obstacle to prosecution:¹⁶³

If you make a prosecution, he can send friends to kill you ... Even if I had the means to prosecute, he can give money, and tomorrow he's free, to kill my family, even the children.

Fear of the judicial process

The judicial process is intimidating and frightening for a victim. For example, the Goma Military Tribunal itself is an intimidating place. On the ground are a big tent (the court room), a large army truck, and a building which houses the judges and the prosecutor's offices. This is the place to which a woman must come if she wishes to initiate criminal proceedings. Given the experiences of the women, and the fact that most have been raped by one or more members of an armed group, it is difficult to imagine what it must be like for these women to

¹⁵⁹ Particularly for those, such as Eglesia, who were ordered by the perpetrators after the rape not to tell anyone what they had done to them. Interview with Eglesia, survivor.

¹⁶⁰ *Ministere de la Justice* (n 91 above) 30; MONUC Combating Impunity for Cases of Sexual Violence: Concept Note 5.

¹⁶¹ *Ministere de la Justice* (n 91 above) 35.

¹⁶² Interview with Mr Aimé, lawyer with *Arche d'Alliance*.

¹⁶³ Interview with Ndaina, survivor.

enter this place to prosecute a soldier in front of other soldiers, and the fear and intimidation that they must feel.

Appearing before a judge is also intimidating, all the more so given the power disparity between a judge and an uneducated, poor, raped woman. Judges are seen as little gods,¹⁶⁴ and simply to appear and speak before a panel of judges about something as shameful as rape requires an enormous amount of courage.

5.1.11 Obstacle 11: Evidence

Article 14 (*bis*) of the 2006 Amendments requires reports from both a doctor and a psychologist to assist judges when adjudicating a sexual violence case. However, the nature of the required evidence — of a sexual act — creates difficulties, and often there is no evidence beyond the word of the victim.

In Congolese culture, sexual intercourse is a taboo public subject, so it is difficult for evidence to be presented.¹⁶⁵ Sidone, a psychologist in South Kivu, illustrates the modesty associated with sexual matters: ‘Women who visit me don’t say the word “vagina” — they just say it hurts “down there”.’¹⁶⁶ Women who hide the rape from their husbands may be reluctant to go to hospital for fear of their husbands finding out.¹⁶⁷ In the case of young girls, parents prefer to flee and leave the place of the crime in order to save the honour of the family.¹⁶⁸

There are few certified doctors and much fewer psychologists in remote areas and villages.¹⁶⁹ According to prosecutor Alexis, the requirement for psychologists’ reports is one area where the law is simply not applied.¹⁷⁰

Doctors are often unable to produce evidence of the rape. It may take two or three days before a woman reaches the nearest hospital. Most victims live far away, with few roads leading to a hospital, or the victims may be unable to pass through because of insecurity along the way.¹⁷¹ Doctors commented that often, by the time a medical report is requested, a long period of time has passed and the medical examination cannot provide evidence of rape,¹⁷² particularly in the case of women who have previously had children.¹⁷³

¹⁶⁴ Interview with Pastor Antoine, pastor of Heal Africa.

¹⁶⁵ Interview with Judge Lunanga, President of the Uvira *Tribunal de Grande Instance*.

¹⁶⁶ Interview with Sidonie, psychologist with Panzi Hospital.

¹⁶⁷ Interview with Gégé Katana, Director of SOFAD.

¹⁶⁸ Interview with Colonel Pascale, President of the Military Court of Goma.

¹⁶⁹ Although there are sufficient health centres, they are not qualified to provide the necessary reports.

¹⁷⁰ Interview with Mr Alexis, prosecutor of the Goma *Auditeur du Tribunal Militaire de Garnison*.

¹⁷¹ Interview with Gégé Katana, Director of SOFAD.

¹⁷² Interview with Mr Aimé, lawyer with Arche d’Alliance.

¹⁷³ Interview with D Noella, doctor of Heal Africa; interview with Rosetta, survivor.

Even if evidence of rape is present, the lack of scientific evidence, such as DNA, as well as a rarity of witnesses, mean that it is hard to impute responsibility to the particular perpetrator.¹⁷⁴

5.1.12 Obstacle 12: Protracted judicial proceedings

It is discouraging to note the small number of successful prosecutions arising from sexual violence cases. Many judgments are not handed down or are ‘non-drafted’.¹⁷⁵ From the four tribunals physically visited, the number of judgments handed down varied from one to 38 decisions during the first half of 2008.¹⁷⁶ In South Kivu, UNFPA recorded that, while 107 files in the civilian jurisdiction were opened in the first quarter of 2008, the tribunals only rendered 44 decisions during the same period.¹⁷⁷ Similarly, the prosecution for the Goma General Tribunal received 141 complaints in the first half of 2008, 77 of which were sent on to the tribunal. During this period, the Goma General Tribunal handed down 38 judgments. Therefore, only around 27% of initial complaints reached the judgment stage.¹⁷⁸

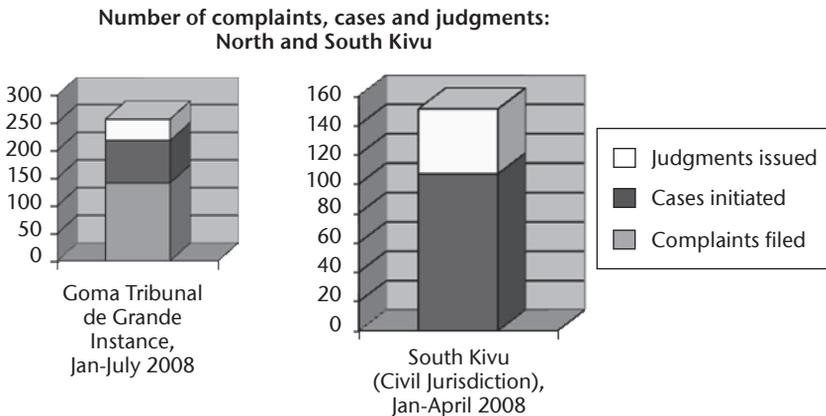


Figure 7: Displaying the number of judgments issued from initial complaints filed or cases initiated

¹⁷⁴ Interview with Judge Richard, President of the Goma *Tribunal de Grande Instance*.

¹⁷⁵ *Ministere de la Justice* (n 91 above) 30.

¹⁷⁶ The Goma *Tribunal de Grande Instance* had made 38 (interview with Registrar of Goma *Tribunal de Grande Instance*). The Goma military court only two: interview with Registrar of Goma *Tribunal Militaire de Garnison*. The Uvira *Tribunal de Grande Instance* had made 11 judgments in 2008: interview with Mr Samuel, prosecutor of Uvira *Tribunal de Grande Instance*. The Uvira Military Prosecution (*Auditeur Militaire près le Tribunal Militaire de Garnison*) stated that around 24 judgments are made each semester. Interview with prosecutor Francis of the Uvira *Auditeur Militaire du Tribunal Militaire de Garnison*.

¹⁷⁷ United Nations Population Fund, *Données VAS Compilées du Volet Judiciaire Premier Semestre 2008*.

¹⁷⁸ This is a conservative percentage, given that it does not take into account the likely scenario that some cases did not arrive at the courts through the prosecution, which would result in more initial complaints.

It is, moreover, discouraging for a victim to learn of the low percentage of successful convictions: The International Parliamentary-Expert Mission Addressing Impunity for Sexual Crimes calculated that in 2007 and 2008, only around 21% of judgments led to a conviction, causing victims to perceive prosecution as hopeless.¹⁷⁹

In respect of the Goma Military Tribunal, prosecutor Alexis reported that he receives about two or three cases each day, conservatively about 40 per month, although he had no statistics available. Most of these cases reach a military tribunal. This means that, even if he sends only half of the complaints on to the tribunal, there should be about 120 judgments delivered every six months. However, according to the registrar of the tribunal, during this period, the tribunal only delivered four judgments.¹⁸⁰

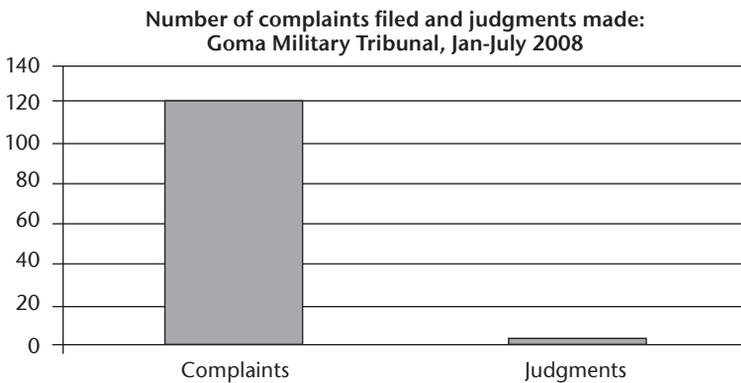


Figure 8: Conservative comparison of complaints filed and judgments delivered

The obvious difference between these figures is troubling, and is accounted for by lengthy delays in the judicial process. According to the law, a case of sexual violence should run from first complaint to judgment in three months.¹⁸¹ This is simply not the reality in many cases. In the Military Court of Goma, for example, of the 11 cases initiated in 2007, five were still running as of August 2008.¹⁸² For example, MONUC reports that 60% of the cases of sexual violence brought before South Kivu courts are still continuing one year after the complaints were registered.¹⁸³ There are several reasons, primarily based on the lack of resources, which account for these extensive delays.

¹⁷⁹ n 9 above, 15.

¹⁸⁰ Interview with Registrar of Goma *Tribunal Militaire de Garnison*.

¹⁸¹ Art 7 *bis* of the 2006 Amendments.

¹⁸² n 180 above.

¹⁸³ n 9 above, 15.

Without exception, all the regular and military tribunals and courts visited were under-resourced and could not cope with the vastness of the territory over which they assert their jurisdiction. A recurrent complaint of the judiciary is the lack of transport. Judicial officers are required to travel to various ancillary court hearings around the territories, yet they are not provided with adequate means of transport.¹⁸⁴ In addition, the DRC has only around 1 500 civil and military magistrates to cover the entire population.¹⁸⁵ The resulting lengthy delays deter victims of rape from even initiating proceedings,¹⁸⁶ because prosecution consumes time, money and energy.¹⁸⁷

Moreover, delays are prejudicial to the rights of the accused. According to prosecution records, the police automatically send an accused person to prison in at least half of the complaints filed.¹⁸⁸ In Goma Prison in 2008, inmates charged with rape represent over 10% of the total inmates. However, due to the high prevalence of ‘preventative detention’, around three-quarters of inmates are criminal defendants awaiting trial.¹⁸⁹ Therefore, if a person is charged with a crime, he is immediately incarcerated in prison, without any hearing, where he must wait an indefinite time for his trial to start.

5.1.13 Obstacle 13: Corruption and enforcement

Corruption

Respondents mentioned corruption as an obstacle to prosecution, which was the third highest obstacle identified by rape survivors and the general population. Ironically, not a single member of the judiciary considered corruption to be a problem. Judges were also the only group of respondents who did not consider corruption to be an obstacle.

¹⁸⁴ Interview with Judge Solomon, judge of the Goma *Tribunal Militaire de Garnison*; interview with Colonel Wilfred, President of the Goma *Tribunal Militaire de Garnison*; interview with Dr Anyesi, doctor of Heal Africa.

¹⁸⁵ n 9 above, 21.

¹⁸⁶ Interview with Dr Noella, doctor of Heal Africa. Similar comments by Gégé Katana. Also interview with Dr Anyesi, doctor of Heal Africa.: ‘The numbers of lawyers are limited. It takes lots of time — when a victim sees that it takes lots of time, they decide not to lodge a criminal complaint.’

¹⁸⁷ Interview with Bibige, survivor. Similar comments in interview with Pastor Antoine, pastor of Heal Africa, 30.

¹⁸⁸ Eighty-four of 141 complaints recorded that the defendant was imprisoned. Prosecution of the Goma *Tribunal de Grande Instance*, Case Records.

¹⁸⁹ While ‘preventative detention’ is said to be an exceptional measure, there are no additional requirements to be met in order to place someone in detention other than that the defendant is accused of a crime to which a penalty of at least six months’ imprisonment attaches: Arts 205 & 209 of the Military Code. Similar figures of non-convicted prisoners have been observed elsewhere: n 9 above, 17.

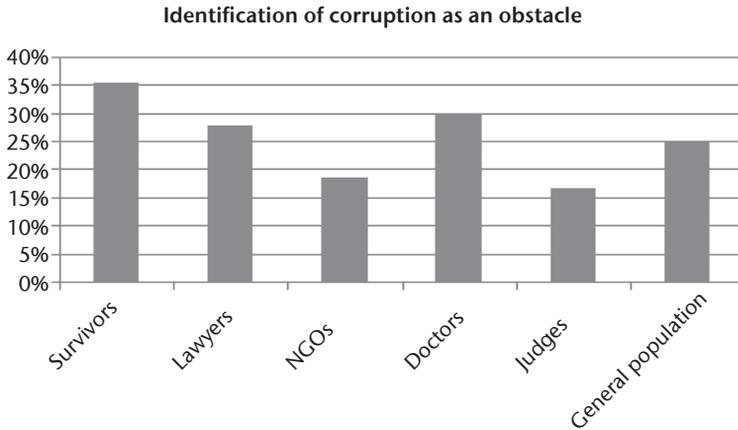


Figure 9: Percentage (by group) of respondents identifying corruption as an obstacle to prosecution

Corruption appears to take two forms: First, litigants must pay court officials merely for the court to hear a case. One NGO worker explained:¹⁹⁰

You need money for the folder to progress [through the judicial proceedings] ... How do you apply pressure for this to happen if you have nothing? For someone to listen to the case, he needs to have something in his stomach.

Corruption is a reflection of the failure by the state to adequately pay the judiciary. Mr Lunanga, a judge in Eastern DRC, said that it was common knowledge that the government did not pay judges decent salaries.¹⁹¹ Mr Pacéré's report for the UN also stated that funds allocated to justice in the 2004 and 2005 budgets were negligible.¹⁹² Monthly salaries range from US \$13 for a local magistrate to US\$ 30 for senior Supreme Court judges.¹⁹³ The report also noted that some judges had to wait for years to receive a small advance, and concluded that '[s]uch working conditions leave them at the mercy of those appearing in court'.¹⁹⁴

The public perception is that judges create obligatory 'costs' to supplement their income. The complainant must pay these costs, which

¹⁹⁰ Interview with Richard, member of ASJPD (Association de Secours aux Jumeaux et Leurs Parents en Détresse/Association of Assistance to Twins and their Parents).

¹⁹¹ Interview with Judge Lunanga, President of the Uvira *Tribunal de Grande Instance*.

¹⁹² TF Pacéré *Report submitted by the independent expert to the Commission on Human Rights on the situation of human rights in the Democratic Republic of the Congo, 2006* 130.

¹⁹³ The report also notes that, in theory, substantial monthly bonuses ranging from US \$350 to US \$500 are paid to all judges and magistrates. However, it notes that a distinction must be drawn between impoverished rural magistrates working in extremely difficult conditions and judges in urban areas who have guaranteed salaries.

¹⁹⁴ n 192 above, 132-135.

cover everything – even the costs of securing the attendance of the perpetrator.¹⁹⁵ This corruption is prevalent throughout the judicial process, with any involved person – whether judge, doctor or prosecution – susceptible to corruption.¹⁹⁶ For example, several respondents said that it was widely acknowledged that perpetrators often ‘disappear’ on their way to the tribunal due to corruption.¹⁹⁷

Second, corruption also influences court decisions. One official from the UNFPA made the disturbing comment that there was no independent justice in the DRC.¹⁹⁸ Shalukoma, a civil servant, likewise confirmed the pandemic existence of corruption within the state system.¹⁹⁹

Corruption deters prospective litigants from prosecuting criminal defendants.²⁰⁰ A victim named Munyerenkana eloquently conveyed her feelings about prosecution:²⁰¹

It is good, if one judges on the basis of right and wrong. But here in Congo, you can be right, but it's as if you're wrong ... if you have no money you are judged as wrong.

It must, however, be borne in mind that corruption cuts both ways, against and in favour of the victim. While victims commonly lack the means to bribe a judicial officer, this is not always the case, and corruption can work injustices both against the complainant and the defendant.

Enforcement

Judgments normally include both a criminal and civil order, meaning that courts commonly sentence perpetrators to certain prison terms and order them to pay damages to the victim²⁰² in an amount usually in the vicinity of US \$2 000.²⁰³ The lack of enforcement is rife in relation to both the criminal and civil court decisions.²⁰⁴

Respondents consistently complained that prison penalties were not commonly enforced.²⁰⁵ They said that, even if prosecuted and found

¹⁹⁵ Interview with Rachelle, survivor.

¹⁹⁶ Interview with Mr Muhindo, lawyer for SOFAD.

¹⁹⁷ Interview with Ms Masika, lawyer with AJUSK (Association of Jurists of South Kivu).

¹⁹⁸ Interview with Celeste, gender-based violence officer with UNFPA.

¹⁹⁹ Interview with Shalukomba, resident of Katana. Similar comments in interview with Vénancie, resident of Goma.

²⁰⁰ Interview with Francine, resident of Goma.

²⁰¹ Interview with Munyerenkana, survivor. Similar comments in interview with Pastor Antoine, pastor of Heal Africa.

²⁰² Arts 77 & 226 of Military Code; art 15 of the Code Penal.

²⁰³ This figure is obtained from a review of judgments of the Goma Military Tribunal and the Goma General Tribunal.

²⁰⁴ Ministère de la Justice (n 91 above) 30.

²⁰⁵ Eg Interview with Pastor Antoine, pastor of Heal Africa; interview with Sidonie, psychologist with Panzi Hospital.

guilty, convicted criminals are sometimes released,²⁰⁶ or escape due to the dilapidated state of the prisons.²⁰⁷ MONUC also reports incidents of army soldiers being released from prison with the assistance of colleagues.²⁰⁸ This impunity greatly discourages prospective litigants from prosecuting offenders.²⁰⁹

Civil penalties such as damages are enforced even less frequently. When courts order criminal defendants to pay damages, there is rarely, if ever, any enforcement of the monetary award in favour of the victim.²¹⁰ Characteristically, the perpetrators have absolutely no means of paying the required damages. If the perpetrator is a government soldier, the state is required to pay the amount along with the perpetrator, but MONUC as well as respondents insisted that payment by the state never happens.²¹¹ Even though they hand down a judgment, the tribunals have no means to coerce the state to enforce it. Damages paid by the state are in fact completely unrealistic, given that the total amount allocated in the national budget in 2008 to payment of damages is around US \$5 350 – the amount that would be awarded to just one victim.²¹²

Lack of enforcement is the rule, and enforcement the exception. In 2008, *Arche d'Alliance* in Uvira reported that in the past two years it had assisted with 120 cases. Of the decisions eventually rendered, not one single civil penalty had been enforced.²¹³ The lack of enforcement causes victims to question the utility of prosecutions, given that there is no certainty that perpetrators will be arrested, prosecuted, convicted and punished, nor that the complainants will actually receive any damages.²¹⁴

6 Overcoming the obstacles

6.1 Summary of the obstacles to prosecution

The obstacles that rape survivors face in Eastern DRC are overwhelming. When rape survivors look to prosecutions, mountains of obstacles block their view, making the mere attempt of prosecution seem futile

²⁰⁶ Interview with Vivianne, survivor.

²⁰⁷ Ministère de la Justice (n 91 above) 49; MONUC, *Twenty-eighth report on the United Nations Organisation Mission in the Democratic Republic of the Congo*, S/2009/335 30 June 2009 14.

²⁰⁸ MONUC (n 207 above) 7 10.

²⁰⁹ Interview with Feza, survivor. See also comments in Interview with Iglesia, survivor: 'If you don't have money, he is arrested, then gives money, and he is liberated.' Similar comments by Interview with Mr Aimé, lawyer with *Arche d'Alliance*.

²¹⁰ Interview with Celeste, gender-based violence officer with UNFPA.

²¹¹ n 9 above, 16; Interview with Mr Aimé, lawyer with *Arche d'Alliance*; interview with Celeste, gender-based violence officer with UNFPA.

²¹² n 9 above, 16.

²¹³ Interview with Mr Aimé, lawyer with *Arche d'Alliance*.

²¹⁴ Interview with Francine, resident of Goma.

and meaningless. Ultimately, what a successful prosecution necessitates is an exceptionally lucky combination of a number of unlikely conditions.

Following a rape in Eastern DRC, the typical Congolese rape survivor firstly needs the desire to initiate a criminal action against the sexual offender. However, she would have to identify the perpetrator beforehand, which in itself is difficult. She also needs to know how to commence a prosecution and where and in which tribunal to proceed. She needs to be healthy to be able to focus on the criminal proceedings. She has to live in a peaceful region, and perhaps travel a large distance and must be able to compel the perpetrator, through community pressure or other means, to appear before the court. If married, she needs the consent of her husband to be able to bring an action for damages. In any case, she needs to brave the communal shame associated with the publicity about her rape that a criminal trial would entail. Similarly, she needs to brave the fear of reprisals upon herself and her family.

She needs sufficient finances to pay for medical certificates and court costs. She needs to adduce evidence, first, that she was raped and, second, that it was the person that she identifies as the perpetrator who actually raped her. She needs much perseverance to cope with a lengthy judicial process. In most situations, she needs more money to unofficially pay court officials. Finally, if awarded civil damages, she needs to be one of the lucky few in the region who actually receive it.

Successfully overcoming the above conditions is virtually impossible. The problems are profound and numerous, and the probability that the right combination of these conditions, among all the possible combinations, would work for the successful prosecution of a sexual offender is unlikely. Looking at the odds of success, the Eastern DRC woman would never stake money on criminal prosecution; particularly if she is as disadvantaged as the average Eastern DRC woman — she simply cannot afford to gamble.

It is tempting to admit defeat before the Everest of obstacles and to abandon prosecution and public law remedies in favour of amicable arrangements. However, the state bears the duty to prevent, investigate and punish sexual violence.²¹⁵ The interests of justice and peace in Eastern DRC, as well as of the countless victims, demand it.

6.2 Recommendations for overcoming these obstacles

6.2.1 Security-related recommendations

How may Congolese, regional and multilateral strategists tackle these obstacles? Through tackling the actual cause: The underlying cause of many of these obstacles is not inherently judicial. Ultimately, the problem with the prosecution of sexual violence is not institutional,

²¹⁵ See *Velasquez Rodriguez v Honduras*, 4 Inter Am Ct HR Ser C 4 1988.

legal, sociological or psychological. It is the omnipresence of insecurity in Eastern DRC. It is recognised that the 'conflict in Eastern DRC is a root cause of much of the problem of wide-spread sexual violence, and that ending it would be of enormous value in addressing this problem'.²¹⁶ There is a strong correlation between sexual violence and armed conflict,²¹⁷ with the presence of multiple armed groups being responsible for much of the sexual violence.²¹⁸ However, the persistent insecurity not only facilitates the commission of rapes, but also causes several obstacles to prosecuting sexual violence perpetrators, thus posing a significant obstacle to justice.²¹⁹ For example, the ongoing fighting in Eastern DRC has decimated health services for rape victims, diverting their focus away from prosecution. Reform of the security sector has thus been described as the most obvious avenue for action to tackle the underlying conflict and insecurity which feed violence against women.²²⁰

The Enough Project is of the opinion that²²¹

[m]easures to deal with rape as a weapon of war in isolation will fail and fail miserably. If we truly want to end this scourge we must move from managing conflict symptoms to ending the conflicts themselves.

As of late 2009, security had not yet been achieved in the Kivu territories.²²² In part due to its size, the DRC is the only country in Africa surrounded by nine neighbours such that its peace and stability depend on its regional diplomatic relations.²²³ MONUC notes that the ongoing conflict in Eastern DRC and large-scale displacement of the population pose obstacles to the implementation of an effective response to sexual violence.²²⁴

For that reason, the paper's first recommendation is that the DRC focuses on attaining security throughout Eastern DRC, for example

²¹⁶ n 9 above 11.

²¹⁷ Notes from briefing with SRSG DRC Alan Doss, United for Women of All Nations 6 April 2008, <http://www.uwan.info/a/Doss.html> (accessed 20 September 2009).

²¹⁸ MONUC 'DRC: Waiting for militias to leave the Kivus' 12 March 2009, <http://www.irinnews.org/report.aspx?ReportID=83418> (accessed 20 September 2009).

²¹⁹ Ministère de la Justice (n 91 above) 22.

²²⁰ n 9 above, 29.

²²¹ Enough Project John Prendergast 'Confronting rape and other forms of violence against women in conflict zones — Spotlight: DRC and Sudan' 13 May 2009 <http://www.enoughproject.org/publications/confronting-rape-and-other-forms-violence-against-women-conflict-zones%E2%80%944spotlight-drc-an> (accessed 20 September 2009).

²²² n 6 above.

²²³ DP Zongwe 'The legal justifications for a people-based approach to the control of mineral resources in the Democratic Republic of the Congo' 26 April 2008 *Cornell Law School LLM Papers Series Paper 12* <http://lsr.nellco.org/cornell/lps/clacp/12> (accessed 20 September 2009) 66.

²²⁴ MONUC Comprehensive Strategy on Combating Sexual Violence in DRC, Executive Summary, 18 March 2009 5.

by solidifying regional military co-operation so that, jointly with neighbouring countries, they can flush out rebels and extinguish the remaining pockets of insecurity in Eastern DRC and the entire Great Lakes region.

Further, the Congolese government, the UN and the international community at large must urgently adopt measures to exorcise the DRC's resource curse, seen in the illegal trade of strategic minerals. The Congolese government must increase security around mining areas and the UN must reinforce the military strength and mandate of MONUC.

Accountability for the regulation of multinational corporations must be increased,²²⁵ in order that there are transparent procedures from buyers all along the supply chain – from people buying minerals from the mines to the manufacturers through to retail companies – to ensure that minerals do not originate from armed conflicts.²²⁶

Finally, the international community must maintain pressure on the former belligerents long enough for the state, the UN and the international community to address the economics of the conflicts in Eastern DRC. Such security reform is essential, not only to reduce the causes of the high level of sexual violence, but also to make available precious Congolese financial and human resources to be spent on the judicial sector.

6.2.2 Prosecution-related recommendations

Combating impunity through judicial means is essential to the restoration of peace.²²⁷ As long as it is unable to arrest, convict and secure perpetrators, the state will not serve the interests of peace and justice. And as long as the law is not applying equally to all, there will be no end to impunity. Security Council Resolution 1820 affirms that 'effective steps to prevent and respond to acts of sexual violence can significantly contribute to the maintenance of international peace and security'.²²⁸

An ongoing problem is the lack of any overall strategy or co-ordination in international assistance in the field of gender justice.²²⁹ One promising proposal is the establishment of a temporary special international criminal tribunal or, alternatively, mixed criminal chambers,

²²⁵ See D Renton *et al The Congo: Plunder and resistance* (2007) 210, stating that private and speculative capital and multinationals have frequently provided a reason for the armed groups in the DRC.

²²⁶ See Press Release *Global Witness* 'Resource plunder still driving Eastern Congo conflict' 1 November 2008 http://www.globalwitness.org/media_library_detail.php/678/en/resource_plunder_still_driving_eastern_congo_conflict (accessed 20 September 2009).

²²⁷ n 192 above, 148.

²²⁸ United Nations Security Council Resolution 1820 (2008) of 19 June 2008.

²²⁹ n 9 above, 32.

such as recommended by Mr Pacéré.²³⁰ This would take the form of a new Congolese tribunal or chambers with international support, connected to and building upon the existing court system, which does not have sufficient capacity to deal with all the crimes resulting from the conflict.²³¹ This institution would be similar in concept to the Special Court for Sierra Leone, and would be responsible for trying persons accused of serious violations of human rights, including sexual violence. Such a model of transitional justice involving special measures for a limited time is necessary to recognise the scale of the crimes committed throughout the conflict in Eastern DRC.²³² This institution would be seated in the Congo and be made up of judicial personnel from the Congo, thus reinforcing and supporting Congo's existing judicial system, in terms of staff, training, equipment and living and working conditions.²³³ The tribunal or chambers would be supported by the international community, who thus build the capacity of local courts while allowing them to take ownership of the accountability and peace process.

The state must also carry on with its efforts to upgrade the domestic legal system and local knowledge of state laws and public law remedies. It is important that judicial institutions are strengthened so that the laws on sexual violence are effectively applied. As the Minister of Justice noted, the judicial sector suffers from serious problems that gravely affect the administration of justice and weaken the state.²³⁴ The capacity of the state must be strengthened so that the state can properly assume its responsibility to prosecute criminal cases and thereby relieve the burden on victims.²³⁵

The state must address its deplorable lack of attention and support for the judiciary in Eastern DRC. Figures from 2007 reveal that an insignificant amount (0,3%) of the national budget was allocated to the justice sector.²³⁶ The DRC must give greater support to both the civil and military judicial systems by, for instance, ensuring the rehabilitation of the prison system and strategic training, awareness raising and capacity-building programmes on sexual violence and its handling for those involved in these cases, such as judges, police and prosecutors.²³⁷ The state can do this regardless of whether or not armed conflict is taking place, and the international community should lend its support to such efforts.

²³⁰ n 227 above.

²³¹ n 9 above, 34.

²³² n 9 above, 35.

²³³ n 192 above, 151.

²³⁴ *Ministere de la Justice* (n 91 above) 7.

²³⁵ MONUC (n 160 above) 4.

²³⁶ n 9 above, 17.

²³⁷ n 9 above, 42.

There is an urgent need for trained and specialised investigators to conduct investigations into sexual violence crimes. The state must improve the working conditions of judicial personnel, particularly their remuneration, and put effective sanctions in place so as to combat corruption.²³⁸ Access to justice for victims must be improved so that victims are not prevented from accessing the courts through physical, financial or other barriers, including fear of reprisals.²³⁹ Furthermore, the enforcement of judgments – both in terms of ensuring reparation payments as well as the reliable and secure imprisonment of convicted perpetrators – is necessary to ensure the judiciary is respected.²⁴⁰

In addition, the Congolese population must continue to receive training and education on sexual violence laws and the means of prosecuting sexual perpetrators. Such education will lead to better access to justice.²⁴¹ It is essential that women's rights and gender equality are promulgated, since sexual violence is one manifestation of an underlying gender imbalance. This may lead to reduced incidents of sexual violence as well as the increased empowerment of victims and the community to be able to reject sexual violence.²⁴² Crucially, since government intervention in this area has generally been deficient and ineffective, NGOs can assist in training and education, especially by confronting existing mindsets and assisting rape victims to commence criminal prosecutions.²⁴³ There are numerous courageous NGOs supporting even more courageous women. The efforts and progress of these NGOs are instrumental in forcing perpetrators to account for their actions.²⁴⁴ They can assist the state and local communities to challenge mentalities and behaviours in sexual violence matters, to alleviate the shame too often associated with rape, and to help redress the wrongs committed against rape survivors. It is true that these measures will be difficult for the DRC to achieve alone; they must have the long-term assistance and engagement of international donors.²⁴⁵

In addition, it is recommended that Congolese law be amended to draw a distinction between statutory rape and violent rape against minors. The

²³⁸ *Ministere de la Justice* (n 91 above) 10.

²³⁹ MONUC (n 160 above) 2.

²⁴⁰ n 9 above, 18.

²⁴¹ *Ministere de la Justice* (n 91 above) 17.

²⁴² n 9 above, 41.

²⁴³ The 1993 Declaration on the Elimination of Violence Against Women (DEVAW) also recognises the role of NGOs in combating sexual violence against women: Declaration on the Elimination of Violence against Women GA Res 48/104 (20 December 1993) art 4.

²⁴⁴ See, eg, the case of Gédéon, Mai Mai militia leader, handed down 5 March 2009, with the assistance of submissions of Human Rights Watch: Human Rights Watch 'DR Congo: Militia leader guilty in landmark trial' 10 March 2009 <http://www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial> (accessed 20 September 2009).

²⁴⁵ *Ministere de la Justice* (n 91 above) 22.

equal treatment of these forms of sexual violence inflates official rape prosecution statistics and leads one to an inaccurate perception of the number of violent rape cases handled by the courts. This is dangerous because it affects the assessment of the severity of sexual violence in the DRC, as well as the urgency of measures needed to respond.

6.2.3 Role of customary law

Drawing from experiences in post-conflict countries, the DRC should consider adopting legislative and other measures to empower traditional courts to determine the guilt or innocence of persons accused of perpetrating sexual violence during the armed conflict. In the same vein, the state should encourage traditional chiefs to help former soldiers, rape survivors and some sexual offenders re-integrate into their respective traditional communities. However, the state also has the obligation to protect women's rights, and that implies developing customary laws and circumscribing the criminal jurisdiction of traditional courts as certain aspects of customary laws discriminate against women²⁴⁶ and rape survivors. If it is to avoid gender injustice, the state must define the limits of the jurisdiction of traditional courts so that these courts comply with gender rights. Incorporating customary law is important, given that the jurisprudential representation of the state as a sovereign with exclusive prosecutorial power in the DRC is a myth, debunked every day as traditional courts take up an overwhelming proportion of cases.

Customary prosecutions can remove many obstacles to the effective and successful prosecution of sexual offences, namely, acceptance by the people of prosecution as an effective remedy, a lack of knowledge of state laws, shame, costs, distance, fear of the judicial process, evidence, long delays, corruption and enforcement.

7 Conclusion

Travelling around North and South Kivu, one cannot help but notice the public advertisement campaign against sexual violence. 'A real man doesn't force a woman to make love. A real man waits', reads one sign. 'Perpetrators of sexual violence? Imprisonment!' exclaims another. Yet, despite the public awareness and international denunciation of sexual violence, the problem and impunity remain widespread.²⁴⁷ Evidently, the widespread public campaign has not yet resulted in the deterrence of sexual violence. More must be done to assist victims of sexual violence to seek and attain justice.

²⁴⁶ African Women's Protocol, Preamble.

²⁴⁷ n 12 above, 5.