

[Unofficial translation]

DEMOCRATIC REPUBLIC OF CONGO

SUPERIOR COUNCIL OF MAGISTRATES

Cabinet of the President

**Memo N ° 02 / ... / ... / PCC – PCSM / 2018 ON THE CASE SELECTION AND
PRIORITISATION OF CRIMES AGAINST PEACE AND SECURITY OF MANKIND, IN
PARTICULAR THOSE RELATING TO SEXUAL VIOLENCE AT THE PRELIMINARY STAGE**

Chapter I – Justification

The Democratic Republic of Congo's criminal justice system is faced with a vast number of cases relating to crimes against the peace and security of mankind, especially those relating to sexual violence, many more than it is able to process. Obstacles relating to insufficient infrastructures, budgetary constraints, a shortage of the necessary legal actors, as well as other causes, lead to the dysfunction of the judiciary system and limit considerably the capacity of the Congolese legal system to address the high criminality that has taken place, especially in the context of, or in relation to, the armed conflicts. These difficulties result, among others, in heavy delays in the processing of cases, and consequently in a backlog of cases and in turn the prevalence of a sense of impunity.

In these circumstances, it is unrealistic – if not impossible – to expect that the investigations and prosecutions of so many complex cases will all be conducted at the same time.

The large backlog of cases of crimes against the peace and security of mankind, on the one hand, and the lack of means on the other, justify the need to create a prioritisation system, thereby allowing a better management of the caseload.

It is reasonable to use the case selection and prioritisation methodology to ensure that the most suitable cases will be reviewed and judged first. This process will help address the most serious atrocities and help the public understand that the accountability process is effective, fair and equitable. However, the priority treatment of such cases does not call into question the obligation of addressing other cases not classified according to the prioritisation policy.

Fixed prioritisation criteria that take into consideration both the crimes committed, as well as the surrounding circumstances, can act as guidelines to reduce the scope for arbitrariness. These formal, objective and public criteria provide a transparent standard by which the Public Prosecutors' decisions can be evaluated and they protect prosecutors of accusations of initiating politically motivated prosecutions.

Chapter II – Scope of application

The present memo applies to cases of crimes against the peace and security of mankind, namely genocide, crimes against humanity and war crimes, defined in the Rome Statute of the International Criminal Court, as well as in the Congolese Criminal Code, in articles 221-223. It particularly aims the crimes of sexual violence.

It is addressed primarily to the General Prosecutors of the Courts of Appeal as they fully exercise public action in their respective jurisdictions so that they properly exercise their powers in the context of the implementation of Article 91 of Organic Law No. 13/011-B of 11 April 2013 on the organisation, functioning and jurisdiction of the courts, which rendered the Courts of Appeal materially competent to punish crimes against the peace and security of mankind. Thus, it applies to pending cases since the awarding of this jurisdiction to the Courts of Appeal, as well as new cases to be heard and prosecuted.

However, this memo will also be applied by other prosecutorial services, both civil and military, when they are confronted with a backlog of cases which concern the offenses for which they are respectively competent according to the law.

Chapter III – Mapping: prerequisite of prioritisation

Centralised, accurate and qualitative statistical data on the number and nature of crimes against the peace and security of mankind to be prosecuted are a prerequisite for effective selection and prioritisation that will yield practical and lasting results.

This mapping will include:

1. The number of open cases in the public prosecutor's office;
2. The approximate number of suspects in the cases;
3. The nature of the offense;
4. The number of victims.

Chapter IV – Case selection and prioritisation criteria

Section 1 – Formal criteria

The following three criteria will be taken into account in case selection and prioritisation involving crimes against the peace and security of mankind: the factual context of the commission of the crime, the responsibility of the alleged perpetrator and the objective representativity of the overall scope of the prosecutions.

Each criterion includes within it a number of non-cumulative and non-exhaustive indicators.

1. Factual context of the commission of the crime

The following indicators will be taken into account:

1. Number of victims;
2. Area of destruction;
3. Duration and repetition of the offence;
4. Location of the crime;
5. Ethnicity, tribe or nationality of the perpetrators/ victims;
6. The modus operandi of the criminal conduct;
7. Discriminative motive;
8. Defencelessness of victims;
9. Consequences of crimes.

2. Responsibility of the alleged perpetrator:

The indicators to be considered are:

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

3. The objective representativity of the overall scope of the prosecutions

A prosecution is considered representative when:

1. It is based on the actual scale and nature of victimisation rather than the political, ethnic or religious affiliation of perpetrators or victims;
2. It does not refer to the parties to the conflict, but rather to groups that have been affected by these parties and who expect justice to be done;

3. It reconciles the interests of victims and society as a whole with the reality of limited resources and the limited capacity of the criminal justice system in question.

Section 2 – Policy and Practical Considerations

In addition to the above criteria, strategic and practical considerations must be taken into account in order to make an early assessment of the effectiveness and efficiency of the Public Prosecutor's actions. These include:

1. Available investigative resources;
2. Evidence/witness availability;
3. Completeness of evidence;
4. Availability of exculpatory information and evidence;
5. Arrest potential;
6. Responsibility of each potential suspect;
7. Potential legal impediments to prosecution and potential defences;
8. Overall strategic direction;
9. Impact that the new investigation will have on ongoing investigations and on making existing indictments trial ready;
10. The estimated time to complete the investigation;
11. Investigation into higher political, military, police and civil chains of command;
12. Consider to what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions.

Chapter V – Final provisions

They chart the way forward depending on whether it is a new case or one from the backlog.

Section 1 – New cases entering the criminal system

When there is a new case, the public prosecutor examines the file in light of the criteria and the strategic and practical considerations mentioned above in order to decide whether the new case should be treated as a priority or not. For the same purpose, they will eventually establish contacts with victims' organisations and interested civil society organisations.

Section 2 – Backlog of cases

In this case, the public prosecutor will regularly evaluate and update the list of backlogs of cases.

I invite the Attorney General of the Republic and the Military Prosecutor of the Armed Forces of the Democratic Republic of Congo, each in their own area, to contribute to the application of this memo by the judges working under their command.

Signed in Kinshasa, the 19/03/2018

The President of the Superior Council of Magistrates

Benoît LWAMBA BINDU

President of the Superior Council of Magistrates.

[signed and stamped]

DEMOCRATIC REPUBLIC OF CONGO
SUPERIOR COUNCIL OF MAGISTRATES
Cabinet of the President

The President of the Constitutional Court President
of the Superior Council of Magistrates

to

Heads of Jurisdictions and
Civil and Military Prosecutor's Offices

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Date of application: The practice direction is of immediate application.

Thematic classification: Jurisdictions and Civil and Military Prosecutor's Offices.

Validated by a Commission of 50 civil and military Magistrates (across all categories) during a workshop held to this end on 04 December 2017 in KINSHASA.

Category: Below, the practice direction issued by the President of the Constitutional Court President of the Superior Council of Magistrates to the Heads of Jurisdictions and Civil and Military Prosecutor's Offices responsible for its application.

Context: In the context of the adherence of the Democratic Republic of Congo to the Treaty of Rome and facing repeated sexual violence during the war, our country signed the above-mentioned Treaty with the aim of effectively combating this violence that the various protagonists use as a weapon of war.

It is for this reason that the Superior Council of Magistrates ("CSM" in acronym), in partnership with Case Matrix Network ("CMN" in acronym) have thought about the preparation of a practice direction on the case selection and prioritisation of crimes against the peace and security of mankind, in particular those relating to sexual violence at the preliminary stage, which was adopted unanimously by 50 Magistrates of various categories of the hierarchy of the judicial power (see annexed list).

Aim: The aim is to prioritise cases of crimes against the peace and security of mankind, in particular those relating to sexual violence at the preliminary stage.

Keywords: selection, prioritisation, crime against the peace and security of mankind, sexual violence, preliminary stage.

Reference texts:

- Constitution of 18 February 2006, as modified by Law n° 11/002 of 20 January 2011 revising certain articles of the Constitution;
- Organic Law n° 06/020 of 10 October 2006 on the status of magistrates;
- Organic Law n° 12/011-B of 11 April 2013 on the organisation, function et competence of the courts;
- Law n° 06/018 of 20 July 2006 modifying and completing the Decree of 30 January 1940 on the Congolese Criminal Code;
- Law n° 06/019 of 20 July 2006 modifying and completing the Decree of 06 August 1959 on the Congolese Criminal Procedure Code;
- The Order of judicial organisation 299/79 of 20 August 1979 internally regulating the courts, tribunals et prosecutor's offices.

Annex(es): None.

Distribution: To be managed by the CSM, with the support of CMN.

Mapping: Prerequisite of prioritisation.

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Case selection and prioritisation criteria.**Section 1 – Formal criteria.**

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