

# Putting the Spotlight on “The Terminator”: How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence During Conflict

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PUTTING THE SPOTLIGHT ON “THE TERMINATOR”: HOW  
THE ICC PROSECUTION OF BOSCO NTAGANDA COULD  
REDUCE SEXUAL VIOLENCE DURING CONFLICT

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## INTRODUCTION

The past two and a half decades have seen increasingly brutal conflict in the Democratic Republic of the Congo (DRC). Ethnic tensions and limited natural resources have contributed to the growth of rebel militia and unruly national armies—particularly in the East—which compete for land, resources, and soldiers. Seemingly endless clashes between these groups leave no person in the DRC untouched. Women bear some of the most horrific of the war's consequences through nonstop sexual violence and gender-motivated crimes committed by all sides.

One individual who has played a role in almost every army in the DRC conflict is Bosco Ntaganda, known as “The Terminator.” From the Rwandan Patriotic Front, to the Congolese national army, to his own created militia—M23—and others in between, Ntaganda led tens of thousands of men to sow fear in the hearts of the women of the DRC and to ruthlessly commit sexual crimes. Nine years after the International Criminal Court first issued a warrant for his arrest, Ntaganda surrendered.<sup>1</sup> However, the consequences of the crimes he committed and the attitudes and impunity he fostered in his men may never be erased. It is essential that the ICC fully and effectively prosecute Ntaganda for his sexually violent crimes in order to not only obtain justice for his countless past victims but also to prevent the making of future victims, whether by the hands of those Ntaganda trained or those who similarly take advantage of conflict to rise through military ranks as he did.

The first section of this Note addresses the historical background of, and various justifications for, sexual violence during conflict throughout the world, as well as the modern changing international norms. The first section pays specific attention to the development of conflict-related sexual violence in the Democratic Republic of the Congo, as well as the complicated web of factors that create a culture of impunity for the offenders. The second section discusses relevant international law and significant international criminal cases that bear on the prospects or likely outcome of the Ntaganda case. The third section specifically analyzes the potential of the International Criminal Court case against Bosco Ntaganda to reinforce the changing international prohibition against sexual violence in conflict. This Note does not purport to set out the legal argument for Ntaganda's conviction, but sets out a normative social argument for why the ICC should focus on prosecuting the sexual crime charges.

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1. See *ICC: Congolese Warlord to Go to Trial*, HUM. RTS. WATCH (June 9, 2014), <http://www.hrw.org/news/2014/06/09/icc-congolese-warlord-go-trial> [<http://perma.cc/FQD3-KE7S>].

## I. BACKGROUND: SEXUAL VIOLENCE DURING CONFLICT

A. *History and Justifications of Sexual Violence During Conflict*<sup>2</sup>

From the earliest records of history, women have been victims of war alongside men: “men are killed and women are often raped, beaten and raped, or raped and killed.”<sup>3</sup> There is evidence of widespread sexual violence against women during conflicts, from Ancient Greece to the Crusades.<sup>4</sup> Even the Bible appears to condone and encourage sexual violence against women during conflict: “For I [God] will gather all the nations against Jerusalem to battle, and the city shall be taken and the houses plundered and the women raped.”<sup>5</sup> In more recent periods of human history, sexual violence has persisted, “[f]rom rapes of black slave women and Shoshone Indian women before, during, and after the Civil War to the infamous ‘Rape of Nanking . . . .’”<sup>6</sup> Just as old as war and sexual violence during war is the impunity for such acts and “failure to punish the [offenders],”<sup>7</sup> and therefore the lack of justice for the victims.

Acts of sexual violence committed during the American Revolution shed light on the specific characteristics of sexual violence during a conflict, as opposed to peacetime.<sup>8</sup> Soldiers on both sides of the Revolution had direct means to commit their crimes and committed

2. It is important to note that “sexual violence in conflict” and “wartime rape” are not the same thing. “Sexual violence” broadly encompasses any sort of violent—or threatening—sexual act including rape, sexual slavery, forced prostitution, genital mutilation, forcing one individual to rape another, and sexual humiliation. Elizabeth D. Heineman, *Introduction: The History of Sexual Violence in Conflict Zones*, in *SEXUAL VIOLENCE IN CONFLICT ZONES: FROM THE ANCIENT WORLD TO THE ERA OF HUMAN RIGHTS* 1, 2 (Elizabeth D. Heineman ed., 2011). Similarly, “conflict” is a broader term than “war” because it includes conflicts in which war has not been officially declared, as well as acts committed in the area of the conflict—by soldiers or civilians—rather than limiting the scope to military acts of sexual violence. *See id.* Therefore, “sexual violence during conflict” is a much more appropriate term for the purpose of this Note.

3. Eileen Meier, *Prosecuting Sexual Violence Crimes During War and Conflict: New Possibilities for Progress*, 10 *INT’L LEGAL THEORY* 83, 84 (2004).

4. Patricia A. Broussard, *Repair Versus Rejuvenation: The Condition of Vaginas as a Proxy for the Societal Status of Women*, 9 *SEATTLE J. SOC. JUST.* 935, 944 (2011); *see also* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 *BERKELEY J. INT’LL.* 288, 297 (2003) (“History is replete with reports of women being raped, sexually enslaved, impregnated, sexually mutilated, and subjected to myriad other forms of sexual violence during periods of armed conflict, mass violence, occupation, resistance, and transition.”).

5. *Zechariah* 14:2 (English Standard Version); *see also* Broussard, *supra* note 4, at 944.

6. Broussard, *supra* note 4, at 945.

7. *Id.* at 943–44.

8. *See* Sharon Block, *Rape in the American Revolution: Process, Reaction, and Public Re-Creation*, in *SEXUAL VIOLENCE IN CONFLICT ZONES: FROM THE ANCIENT WORLD TO THE ERA OF HUMAN RIGHTS* 25, 25–38 (Elizabeth D. Heineman ed., 2011).

them with relative impunity.<sup>9</sup> They utilized their military authority to command women to open their doors or follow them to another location, forcing the women into situations in which they were assaulted.<sup>10</sup> Perhaps even more relevant to the modern day is that the Revolutionary soldiers used their weapons to threaten women.<sup>11</sup> This is particularly significant: a soldier does not need to use brute force or other means to commit these acts but has a weapon already in his hand to aid him.<sup>12</sup> This not only makes sexually violent crimes easier to commit during conflict, but often more brutal. Equally relevant to today is that often these crimes were committed—or at least began—in open view, and the soldiers justified their acts by classifying the victims as supporters of the enemy.<sup>13</sup>

There have been many justifications for sexual violence throughout history. Though they are often interrelated, the notions of property, power, “boys will be boys,” war booty, terror, and destruction of the enemy developed and evolved in some sense over time. Historically,<sup>14</sup> women were essentially the “property” of their father or husband, making them legitimate property or spoils of war after a defeat.<sup>15</sup> The sexual violence committed against women was thus a crime against the “owner”—the husband or father—and was a reward to a victor in battle.<sup>16</sup> During the Middle Ages, “unrestricted sexual access to vanquished women” incentivized soldiers to fight well and conquer towns and cities.<sup>17</sup>

Once customary law began to frown on sexual violence, such acts were not directly encouraged but were ignored by commanders who thought sexual violence made men better soldiers.<sup>18</sup> Sexual violence during the eighteenth to early twentieth centuries was characterized as a lack of military discipline, revenge, or inevitable side effects of war that “were rarely punished.”<sup>19</sup> By the twenty-first century, sexual

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9. *See id.* at 27. There were “more than [900] incidents of sexual coercion” from 1700 to 1820 in British America, including about 60 cases in which the alleged attacker was a member of the military. *Id.* Only 24 of those military cases were prosecuted. *Id.*

10. *Id.*

11. *Id.* at 27–28.

12. *Id.* at 28.

13. *Id.* (Two British officers accused of rape in 1776 said that their victim “was a Yankee whore or a Yankee bitch, and it was no great matter.”).

14. Here I specifically refer to early history, though the idea of women as the property of men is still prevalent in some cultures to this day.

15. Askin, *supra* note 4, at 296.

16. Broussard, *supra* note 4, at 945.

17. Askin, *supra* note 4, at 296.

18. *Id.* (Many of the commanders “believed sexual violence before a battle increased the soldiers’ aggression or power cravings and that rape after a battle was a well-deserved reward, a chance to release tensions and relax.”).

19. Askin, *supra* note 4, at 296; Broussard, *supra* note 4, at 945.

violence during conflict became not only an exertion of power and control by one individual over another,<sup>20</sup> but it was also used to exert military power and demonstrate national pride for the purpose of terrorizing, demoralizing, and humiliating the opposing side.<sup>21</sup>

### *B. Changing International Views on Sexual Violence in Conflict*

It is clear that the international community today is no longer the same one that used to quietly endorse the rape of women as booty. Though there have been many justifications for sexual violence in armed conflict, sexual violence is no longer considered justified in the modern age. As an international community, sexual violence is not something to let slide in the name of sovereignty. Though there may be some concerns about moral colonialism, this is one area in which international norms should outweigh those concerns.

[T]he laws of warfare have both implicitly and explicitly prohibited the rape of combatants and noncombatants for centuries. Increasingly, this prohibition extends to other forms of sexual violence, including sexual slavery, forced impregnation, forced maternity, forced abortion, forced sterilization, forced marriage, forced nudity, sexual molestation, sexual mutilation, sexual humiliation, and sex trafficking.<sup>22</sup>

Customary humanitarian law, essentially the law of war, fundamentally prohibits conflicting groups from targeting civilians and requires that warring parties "make continuous efforts to spare [civilians] from harm to the maximum extent possible."<sup>23</sup> Additionally, domestic legal systems in the world almost universally prohibit rape, making such a prohibition *jus cogens*.<sup>24</sup> Crucial to the prosecution of humanitarian law violations is the imposition of individual or superior criminal responsibility<sup>25</sup> on the perpetrators and/or their

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20. See Broussard, *supra* note 4, at 945.

21. Meier, *supra* note 3, at 87–88.

22. Askin, *supra* note 4, at 305.

23. *Id.* at 289; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention] (this convention was intended to universally serve to protect civilians in times of armed conflict).

24. *Jus cogens* is customary international law, which is binding on all states, regardless of their own domestic laws. See David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 247 (2005) (detailing the *jus cogens* prohibiting rape).

25. Superior responsibility "is not limited to war crimes," but extends to "crimes against humanity and genocide." Askin, *supra* note 4, at 326.

superiors who encouraged the criminal acts or failed to appropriately prevent them or punish them afterward.<sup>26</sup>

The Fourth Geneva Convention of 1949 explicitly forbade rape during armed conflict,<sup>27</sup> but qualified the crime as one of honor rather than a serious human rights violation: “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>28</sup> This undermines the integrity of a woman for her own sake by phrasing the crime only based on her societal value and ignores the individual, social, and cultural impacts of such a crime.<sup>29</sup> This essentially means that the worst crimes against women are those upon their honor; those crimes are not discussed in terms of the specific impact on the women themselves or their right to bodily integrity or choice, but the discussion solely of honor clearly establishes that the worst crimes against a woman are really those affecting her family and status.

The 1993 Declaration on the Elimination of Violence Against Women defined gender crimes as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>30</sup> The UN General Assembly adopted the Convention’s Declaration on the Elimination of Violence Against Women in 1993.<sup>31</sup> Article 2 of the Declaration recognizes the physical and psychological components of violence against women.<sup>32</sup> Perhaps more significantly, it recognizes that the perpetrators of these crimes can be not only within the family or community but can be the states themselves that actively perpetrate or passively condone such actions.<sup>33</sup>

The modern international criminal tribunals for the former Yugoslavia and for Rwanda, as well as the International Criminal Court, have been critical parties in the development of international law prohibiting sexual violence during conflict.<sup>34</sup> The DRC’s status

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26. *Id.* at 289.

27. Geneva Convention, *supra* note 23, art. 27.

28. *Id.*

29. Stephanie K. Wood, *A Woman Scorned for the “Least Condemned” War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 COLUM. J. GENDER & L. 274, 282–83 (2004).

30. G.A. Res. 48/104, art. 1, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).

31. Bronwyn Winter, *International Versus Transnational? The Politics of Prefixes in Feminist International Relations*, in CONFLICT-RELATED SEXUAL VIOLENCE: INTERNATIONAL LAW, LOCAL RESPONSES 15, 28 (Tonia St. Germain & Susan Dewey eds., 2012).

32. *Id.*

33. *See id.*

34. *See infra* Part II.B.



as a State Party member of the Rome Statute places it under the jurisdiction of the ICC, which applies the Rome Statute and customary international law.<sup>35</sup> Though there is a distinction between international armed conflicts and non-international armed conflicts, the ICC has jurisdiction over cases arising from both types of conflict.<sup>36</sup> Some scholars have advocated for a dismantling or reduction of this distinction in order to appropriately punish crimes committed in civil wars.<sup>37</sup> However, the international community has not embraced such a drastic change that would severely limit a nation's sovereignty.<sup>38</sup> The ICC has specific jurisdiction over the Ntaganda case because the DRC president referred the "situation."<sup>39</sup>

### C. Sexual Violence in the Democratic Republic of the Congo

#### 1. The Modern History

The complex and tumultuous modern history of the DRC with constantly shifting military and government groups has left countless victims. Soldiers and militia are not the only victims in these conflicts; they are not even the most at-risk victims. Instead, women and girls are being actively targeted in armed conflict.<sup>40</sup> Major General Patrick Cammaert, the former commander of the UN Peacekeeping Mission in the DRC, perhaps said it best in 2008: "it has probably become more dangerous to be a woman than a soldier in an armed conflict."<sup>41</sup>

In October 1996, the armed rebel group *Alliance des forces démocratiques du Congo* (AFDL)<sup>42</sup> moved from Eastern Congo<sup>43</sup> through

35. See *infra* Part II.A.

36. See *infra* Part II.A.

37. Askin, *supra* note 4, at 290.

38. See Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts*, 91 INT'L REV. OF THE RED CROSS 35, 65 (2009).

39. See *ICC: Congolese Warlord to Go to Trial*, *supra* note 1.

40. Laura Sparling, *Creating Second-Class Citizens at Home and Targets Abroad: A Feminist Analysis of Protection in the Use of Force*, in CONFLICT-RELATED SEXUAL VIOLENCE: INTERNATIONAL LAW, LOCAL RESPONSES 33, 33 (Tonia St. Germain & Susan Dewey eds., 2012). This Note focuses on sexual violence against women in conflict. However, the author does not intend to minimize the horrific attacks on men. That topic has been thoroughly addressed in numerous scholarly articles. See, e.g., Valorie K. Vojdik, *Sexual Violence Against Men and Women in War: A Masculinities Approach*, 14 NEV. L.J. 923, 923 (2013) (discussing cases of sexual violence against men).

41. Sparling, *supra* note 40, at 33 (address made at the 5916th meeting of the United Nations Security Council regarding Resolution 1820 on Women and Peace and Security).

42. Gaëlle Breton-Le Goff, *Ending Sexual Violence in the Democratic Republic of the Congo*, 34 FLETCHER F. WORLD AFF. 13, 15 (2010).

43. Destabilization in the Eastern Congo allowed the AFDL to grow in power. See JANIE L. LEATHERMAN, SEXUAL VIOLENCE AND ARMED CONFLICT 120 (2011). The AFDL



the DRC with the support of Rwanda and Uganda, eventually claiming power over the government in Kinshasa, DRC, in May 1997.<sup>44</sup> Not only did the rebel army and its supporters commit acts of sexual violence against women as it moved into the capital, but the retreating Mobutu government regime<sup>45</sup> and DRC army personnel raped and abducted women.<sup>46</sup> The new regime did not improve upon the actions of the old; instead, Laurent-Desire Kabila, the AFDL leader, and his men oppressed, attacked, tortured, and committed sexual violence against women.<sup>47</sup> Perhaps due to the relative ease with which he took power over the government, now-President Kabila actively sought out and punished those who supported or even associated with antigovernment individuals or “the enemy.”<sup>48</sup> When Kabila asked the Rwandans and Ugandans to leave the DRC in August 1998, they resisted and even more violence erupted, leading to the second Congo war<sup>49</sup> and Africa’s first “world war” due to the multinational involvement.<sup>50</sup> Amid this conflict, the *Rassemblement Congolais pour la Démocratie* (RCD) quickly emerged.<sup>51</sup>

The RCD and other regional groups<sup>52</sup> clashed in near-constant violence in which all groups tried to weaken alleged civilian supporters of other groups by engaging in vast and systematic sexually violent attacks.<sup>53</sup> Furthermore, when Rwandan and Ugandan forces tried to quash the RCD in Kisangani, DRC, both groups specifically attacked Congolese women, who were the unfortunate victims caught in the middle of this rivalry.<sup>54</sup> The RCD began to collapse, highlighting

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was formed largely due to the exodus of Hutu militia fleeing neighboring Rwanda after the genocide; they then joined up with anti-government Congolese militia and rearmed. Jeanelle Ferril, *A Call for New Justice: Victims of Sexual Violence in Africa’s Internal Conflicts*, 4 FIU L. REV. 333, 342 (2008).

44. Breton-Le Goff, *supra* note 42, at 15; LEATHERMAN, *supra* note 43, at 120.

45. The Mobutu government was plagued by rampant sexual violence. Breton-Le Goff, *supra* note 42, at 14. Not only did it know of the sexual violence problems throughout the country, but senior government officials who should have been examples of good behavior and civic morality also committed sexually violent acts. *Id.*

46. *Id.* at 15.

47. *Id.*

48. *See id.* This was especially prevalent after the creation of the anti-governmental militias or Mayi-Mayi in 1998. *See id.*

49. This war has continued since 1998, involving multiple countries thirsty for the Congo’s (Eastern Congo and the DRC) resources, which has also inspired foreign nations’ involvement. LEATHERMAN, *supra* note 43, at 122. The DRC specifically is a significant mining resource for tantalum and cassiterite, which are indispensable for making circuits in high-end electronic goods. Diane A. Desiero, *Leveraging International Economic Tools to Confront Child Soldiering*, 43 N.Y.U. J. INT’L L. & POL. 338, 368 (2011).

50. LEATHERMAN, *supra* note 43, at 121.

51. Breton-Le Goff, *supra* note 42, at 15.

52. Such as the *Interahamwe*, Hutu militias, and Burundian rebels. *Id.*

53. *Id.*

54. *Id.* at 16.

the instability in the region and the ever-present threat to women<sup>55</sup> as groups rising in power celebrated, and groups falling in power retaliated, against the civilian population with systematic and extreme, often sexual, violence.<sup>56</sup>

In 2001, President Kabila was assassinated and succeeded by his son Joseph.<sup>57</sup> The Pretoria Accord peace agreements in 2002 dictated that neighboring troops leave the DRC<sup>58</sup> and attempted “to create a coalition government and to incorporate” militia members into the DRC military, which had limited success.<sup>59</sup> Not all rebels and militia members joined the army, and of those who did, many, including Bosco Ntaganda,<sup>60</sup> later left and joined or created new armed groups.<sup>61</sup> The conflict in the region officially ended in July 2003, but the DRC remains unstable and violent.<sup>62</sup>

## 2. *The Impact of Conflict*

Since 1996, the near-constant conflict and continued insecurity in the region of the DRC has provided many opportunities for the government, military, and militia to commit acts of sexual violence against women.<sup>63</sup> The chaos and disorganization that plague the area as rebel groups push forward and retreat create a constant state of instability.<sup>64</sup> The government cannot, or does not want to, maintain control of the situation, and even has its own participants in the atrocities.<sup>65</sup> The fighting in the DRC is characteristic of post-Cold War conflicts that localize violence into small areas, neighbor against neighbor, when rebel groups are unable to expand their power over large areas of land.<sup>66</sup> However, the resource richness of the DRC exacerbates the fighting because, unlike resource-poor states, the militia and rebel groups have something of value to fight over.<sup>67</sup>

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55. *Id.* at 15–16.

56. *Id.* at 16.

57. Broussard, *supra* note 4, at 947.

58. *Id.*

59. Breton-Le Goff, *supra* note 42, at 16.

60. See ICC: *Congolese Warlord to Go to Trial*, *supra* note 1; see also *DR Congo: M23 Rebels Committing War Crimes*, HUM. RTS. WATCH (Sept. 11, 2012), <http://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes> [<http://perma.cc/8PPX-9KTG>].

61. Breton-Le Goff, *supra* note 42, at 16.

62. Ferril, *supra* note 43, at 343.

63. Breton-Le Goff, *supra* note 42, at 16.

64. *Id.*

65. See *id.*

66. LEATHERMAN, *supra* note 43, at 24.

67. See *id.* at 110; see also Desiero, *supra* note 49, at 368 (noting the DRC’s highly sought after mineral resources).

Sexual violence in the DRC has been diverse in its brutality. Soldiers and militia members commit gang rapes of women and girls out in the fields, near their homes, and in front of their families;<sup>68</sup> girls are raped and then forced to join armed groups;<sup>69</sup> rapists use different objects to commit their assaults, from rifles, to bottles, to pepper-covered pestles;<sup>70</sup> parents are forced to rape their children;<sup>71</sup> women are taken for sexual slaves, raped, tortured, beaten, humiliated, and sometimes killed.<sup>72</sup> Women suffer from “permanent injuries, fistulas, HIV infections, unwanted pregnancies, and the destruction of reproductive organs.”<sup>73</sup> Each of the dozen armed groups in the country has a “trademark manner of violating . . .”<sup>74</sup> The rampant sexual violence by mobile and constantly relocating armed groups quickly and easily spreads HIV/AIDS among victims and perpetrators alike.<sup>75</sup>

In times of armed conflict, soldiers often endeavor to prove their masculinity to their fellow soldiers, with each action or inaction proving significant.<sup>76</sup> Anneka Van Woudenberg, senior Congo researcher at the Human Rights Watch, said: “This is not rape because soldiers have got bored and have nothing to do. It is a way to ensure that communities accept the power and authority of that particular armed group. This is about showing terror. This is about using it as a weapon of war.”<sup>77</sup> Soldiers wield rape to terrorize, and women are too scared to fight back or even object because there is no one there to listen or help. Women are often too ashamed after being raped to report the rapes to the male soldiers around them, and there are no female soldiers in whom to confide.<sup>78</sup>

Women and children escape from dangerous areas only to be victimized in refugee camps by the very soldiers who are supposed to protect them.<sup>79</sup> The UN peacekeeping mission posted in the DRC

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68. Breton-Le Goff, *supra* note 42, at 16.

69. *Id.* at 16–17.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 16.

74. Stephanie Nolen, “Not Women Anymore . . .”: *The Congo’s Rape Survivors Face Pain, Shame and AIDS*, MS. MAG. (Spring 2005), <http://www.ms magazine.com/spring2005/congo.asp> [<http://perma.cc/52AS-3YUE>].

75. Ferril, *supra* note 43, at 343.

76. See LEATHERMAN, *supra* note 43, at 17–18.

77. *War Against Women: The Use of Rape as a Weapon in Congo’s Civil War*, CBS NEWS (Aug. 14, 2008), <http://www.cbsnews.com/news/war-against-women> [<http://perma.cc/BMK8-TNV3>].

78. Tonia St. Germain & Susan Dewey, *Introduction*, in CONFLICT-RELATED SEXUAL VIOLENCE: INTERNATIONAL LAW, LOCAL RESPONSES 1, 1 (Tonia St. Germain & Susan Dewey eds., 2012).

79. Ferril, *supra* note 43, at 343.

cannot even adequately protect women from sexual violence.<sup>80</sup> Horrifically, even UN peacekeepers have committed acts of sexual violence and rape with almost total impunity.<sup>81</sup> To avoid negative publicity and to create the illusion of interacting with prostitutes rather than raping these women, the forces gave out food and supplies to their victims.<sup>82</sup> Left with pregnancies and little justice, the legacy of the UN’s involvement in the DRC is not that of peacekeeping, but of violation and abuse.<sup>83</sup>

The impunity of the soldiers and militia serves only to further encourage sexually violent crimes. The 2002 Military Code for the DRC does not fully address the problem of sexual violence.<sup>84</sup> Though it allows for sexual offenses to be prosecuted as crimes against humanity and through command responsibility, the Code left a gap by not specifically utilizing the ICC definition of sexual violence, therefore leaving local military judges to define and develop this body of law.<sup>85</sup> Though the DRC criminal code can apply to both military personnel and civilians, it is rarely used to combat sexual crimes committed by official military and rebel leaders.<sup>86</sup> Despite its lack of efficacy at this time, the DRC purports to stand against sexual violence during conflict, weakening possible arguments that international involvement is purely a moral colonial endeavor.

A very small number of soldiers who have committed sexually violent acts have been prosecuted.<sup>87</sup> Out of 7,703 new cases of sexual violence the UN registered in 2008 in North and South Kivu provinces—by all perpetrators, not just soldiers—only 27 soldiers were convicted.<sup>88</sup> According to the United Nations Joint Human Rights Office in Congo, between July 2011 and December 2013, military courts only delivered 187 convictions for sexual violence, with just three senior officers convicted.<sup>89</sup> In the DRC national army, the

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80. Sparling, *supra* note 40, at 43.

81. Ferril, *supra* note 43, at 351; see also Michael Fleshman, *Tough UN Line on Peacekeeper Abuses: Action Initiated to End Sexual Misdeeds in Peacekeeping Missions*, AFR. RENEWAL (Apr. 2005) (discussing the UN steps planned to prevent future assaults on populations by UN forces).

82. Ferril, *supra* note 43, at 351.

83. *Id.*

84. *Id.* at 355.

85. Breton-Le Goff, *supra* note 42, at 23.

86. *Soldiers Who Rape, Commanders Who Condone*, HUM. RTS. WATCH (July 16, 2009), <http://www.hrw.org/node/84366/section/1> [<http://perma.cc/52HH-78QQ>] [hereinafter *Soldiers Who Rape*].

87. *Id.*

88. *Id.*

89. *Democratic Republic of Congo: Ending Impunity for Sexual Violence*, HUM. RTS. WATCH (June 10, 2014), <http://www.hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence> [<http://perma.cc/M7KL-KBKN>].

Congolese Armed Forces or *Forces Armées de la République Démocratique du Congo* (FARDC),<sup>90</sup> commanders are essentially untouchable, as only lower-ranking soldiers are prosecuted and the commanders in turn obstruct justice by protecting their soldiers.<sup>91</sup> One aspect of the Congolese military justice system that exacerbates this problem is that military judges must be higher ranked than the accused on trial in order to try that individual, leaving the highest ranked officers and commanders essentially untouchable.<sup>92</sup>

Furthermore, the policy in 2002 and 2003 that mixed rebels and militia into the government army, and “the promotion of ex-rebel leaders”—like Bosco Ntaganda<sup>93</sup>—to high-ranking FARDC positions created “an undisciplined army.”<sup>94</sup> The leadership and responsibility given to individuals who were personally responsible for crimes such as rape, sexual assault, and pillaging compromises the military institutions themselves and the society that the soldiers are meant to protect.<sup>95</sup>

The systemic acts of sexual violence by armed individuals has pervaded society, even outside of the conflict, when former “military” mix with civilians.<sup>96</sup> The lack of reintegration policy for ex-militia and military who are disarmed and sent back into the civilian community aggravates the already-existing social inequities and violence against women, as former soldiers often retain their violent tendencies.<sup>97</sup>

The institutionalized nature of sexual violence against women extends to prisons where wardens exploit female detainees.<sup>98</sup> Feminist activists are targeted then raped, tortured, and murdered, while young refugee girls are targeted by police and military then sold or forced into prostitution.<sup>99</sup> Sexual violence has truly moved beyond conditions found just in the conflict. Sexual violence against women has become “almost normal”<sup>100</sup> in regular society in the

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90. *Soldiers Who Rape*, *supra* note 86.

91. *Id.*

92. *Helping to Combat Impunity for Sexual Crimes in DRC: An Evaluation of the Mobile Gender Justice Courts*, OPEN SOC'Y INITIATIVE FOR S. AFR. 1, 12 (2012), [http://www.osisa.org/sites/default/files/open\\_learning-drc-web.pdf](http://www.osisa.org/sites/default/files/open_learning-drc-web.pdf) [<http://perma.cc/U95M-GFBW>] [hereinafter *Helping to Combat Impunity*].

93. *See infra* Part III.A.2.

94. Breton-Le Goff, *supra* note 42, at 19.

95. *See Helping to Combat Impunity*, *supra* note 92, at 12.

96. Breton-Le Goff, *supra* note 42, at 19.

97. *See id.*

98. *Id.*

99. *Id.*

100. Jeffrey Gettleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES (Oct. 7, 2007), [http://www.nytimes.com/2007/10/07/world/africa/07congo.html?\\_r=2&http://perma.cc/9M4J-J72R](http://www.nytimes.com/2007/10/07/world/africa/07congo.html?_r=2&http://perma.cc/9M4J-J72R)].

DRC, with huge increases in domestic abuse, husbands killing their wives, and general “brutality toward women.”<sup>101</sup>

### *3. Impunity as a Contributing Factor*

The basis for impunity and acceptance of sexual violence against women in the DRC is rooted in the failure of government intervention and the prevailing societal structure and mores.<sup>102</sup> This is not a problem isolated to the DRC or even to the African continent:

State-endorsed gender construction has served to advance state interests from the time of the Roman Empire, through colonialism and the Cold War, to contemporary politics. As with decisions to protect or not, state interests are seminal in shaping popular perceptions of masculinity and femininity. In turn, these constructions are used by state officials to create opportunities for the manipulation of protection.<sup>103</sup>

Women are essentially second-class citizens in the DRC: though women often bear the burden of work and keeping a family together, they have little to no power in the home or society.<sup>104</sup> The hegemonic masculinity<sup>105</sup> inherent in the DRC society gives men power and privilege while keeping it from women.<sup>106</sup> Women are technically minors for their entire lives, first under the authority of their fathers and then under that of their husbands.<sup>107</sup> Though the government manages to enforce laws that maintain gender inequalities and the superiority of men, “any new laws being enacted to protect women appear to be unenforceable.”<sup>108</sup>

Early marriage and marital rape are not viewed negatively, and sexual offenses are commonly seen as only possible “against young virgin women.”<sup>109</sup> This highlights the importance of a woman’s virginity, making her only as valuable as her sexuality, therefore classifying her worth only in terms of the honor she brings to a man.<sup>110</sup> Some tribes in the DRC require a widow to marry her deceased

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101. *Id.*

102. Broussard, *supra* note 4, at 955.

103. Sparling, *supra* note 40, at 36–37.

104. *See War Against Women*, *supra* note 77.

105. Hegemonic masculinity is “a male-centered order.” LEATHERMAN, *supra* note 43, at 17.

106. *Id.*

107. Breton-Le Goff, *supra* note 42, at 18.

108. Broussard, *supra* note 4, at 955.

109. Breton-Le Goff, *supra* note 42, at 18; *see also* LEATHERMAN, *supra* note 43, at 75.

110. *See* LEATHERMAN, *supra* note 43, at 77.



husband's brother, while others allow tribal chiefs to exercise first-right privileges to have sexual intercourse with virgin women.<sup>111</sup> The offense of sexual assault is not seen as against the victim, but against her family "whose honor has been besmirched."<sup>112</sup> For this reason, many victims hide their attacks or even run away from their communities, afraid—often justifiably—that they will no longer be accepted and supported as "damaged goods."<sup>113</sup>

The structural inequality and lack of government involvement in cases of sexual violence creates a society of impunity: in the patriarchal society of the DRC, sexual violence is rarely reported, laws do not fully protect women, and enforcement of laws to protect women is severely lacking.<sup>114</sup> A few scattered and damaged billboards across the DRC telling men that rape is wrong visibly demonstrate the government's lack of concern for the pervasive problem of sexual violence.<sup>115</sup> The fact that a once noble—though nowhere good enough—attempt to change societal perceptions of violence against women is now literally whitewashed and dilapidated demonstrates the deep-rooted injustice.<sup>116</sup> What few reports are made to the police pile up in the prosecutor's office, where it takes a bribe to even get an investigation started, yet few cases<sup>117</sup> even make it to court.<sup>118</sup> The domestic Congolese law requiring sexual violence cases to be heard within three months is almost never enforced, meaning impunity is rampant, there is a general nationwide lack of trust in the judicial system, and whatever justice is served has almost zero deterrent effect on sexual violence.<sup>119</sup>

#### 4. *Efforts to Improve the Democratic Republic of the Congo*

Despite the history of discriminatory laws and societal constructs against women in the DRC, the past decade has seen significant attempts to improve the situation for women and an internal desire

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111. Breton-Le Goff, *supra* note 42, at 18.

112. Carol Mann, *The Afghan State and the Issue of Sexual Violence Against Women*, in *CONFLICT-RELATED SEXUAL VIOLENCE: INTERNATIONAL LAW, LOCAL RESPONSES* 123, 136 (Tonia St. Germain & Susan Dewey eds., 2012).

113. Ferril, *supra* note 43, at 353–54. In 2008, researchers in South Kivu "found that over 20 percent of sexual violence survivors in [that] province" were rejected by their families and communities. Ryan S. Lincoln, *Recent Development: Rule of Law for Whom?: Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of the Congo*, 26 *BERKELEY J. GENDER L. & JUST.* 139, 147 (2011).

114. LEATHERMAN, *supra* note 43, at 75.

115. *War Against Women*, *supra* note 77.

116. *Id.*

117. A human rights investigator interviewed said she could count the number of cases brought to trial on one hand. *Id.*

118. *Id.*

119. Lincoln, *supra* note 113, at 156.



to prevent and prosecute conflict and peacetime sexual violence: “a landmark sexual violence law” was enacted in the DRC in 2006, which created an “improved legal framework” to prosecute sexual violence.<sup>120</sup> However, since then, there have been few, if any, actual results.<sup>121</sup> This law defines rape and statutory rape, criminalizes these and many other sexual acts, and details punishments of five to twenty years, which can be doubled for aggravating factors, such as gang rape or threat or use of a weapon or other violence.<sup>122</sup>

Significantly, a procedural law was also enacted in 2006 giving sexual violence victims certain protections, including medical and psychological care and the ability to give testimony during trial in camera to spare the impact of facing their attackers in person.<sup>123</sup> This procedural law also allows for “expedited proceedings in rape cases . . . .”<sup>124</sup> Both of these laws apply in civilian and military jurisdictions,<sup>125</sup> though the widespread impunity for sexual offenders often negates this significant legal effort.<sup>126</sup>

Another recent effort to prevent and punish sexual violence is the establishment of gender justice mobile courts: these courts, which work actively in local communities to fill the gaps left by the government’s justice system, have had some success in the DRC.<sup>127</sup> It is important, however, that the country itself is trying to make changes to protect its own citizens. One significant recent case is that of Colonel Engangela in August 2014.<sup>128</sup> More than 900 victims gave evidence of attacks on civilians—including mass rape, sexual slavery, kidnapping, and murder—from 2005 to 2007 perpetrated by Engangela and his men.<sup>129</sup> This case is particularly significant due to the accused’s high rank, his all-too-common story of a military soldier-turned-rebel militia leader, and the DRC government’s recognition of “ultimate civil responsibility” for Engangela’s actions by paying any damages with which he is sanctioned.<sup>130</sup> Engangela was

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120. *Soldiers Who Rape*, *supra* note 86, at 7.

121. *Id.*

122. *Helping to Combat Impunity*, *supra* note 92, at 11.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See supra* Part I.C.3.

127. *Helping to Combat Impunity*, *supra* note 92, at 18; *see also id.* at 18–26 (giving detailed examinations of three mobile trials); *id.* at 27–36 (analyzing these courts’ effectiveness).

128. ‘Crucial’ to Protect Victims in Mass Rape Trial of DRC Officer, NEWS24 (Aug. 22, 2014), <http://www.news24.com/Africa/News/Crucial-to-protect-victims-in-mass-rape-trial-of-DRC-officer-20140821-5> [<http://perma.cc/7YA5-9U5B>].

129. *Id.*

130. *Id. Contra Only 2 Convicted of Rape in DRC Mass Trial*, NEWS24 (May 5, 2014), <http://www.news24.com/Africa/News/Only-2-convicted-of-rape-in-DRC-mass-trial-20140505> [<http://perma.cc/2P2T-2TYQ>].

convicted of crimes against humanity and sentenced to life in prison.<sup>131</sup> A month earlier, the High Military Court in Kinshasa sentenced General Kakwavu to ten years in prison for rape and war crimes he and his men committed from 2003 to 2005 while they were in the *Forces Armées du Peuple Congolais* (FAPC).<sup>132</sup> Though these are just two trials among the many needed, they are a step in the right direction against impunity in the DRC, with the lengthy sentence for Engangela especially demonstrating that a once greatly feared man can face life in prison for his crimes and those of his subordinates.

The key role of politics in this internal change was made clear with the awareness and attention raised by President Kabila's wife, Olive Lemba Kabila, when she started a countrywide campaign to combat sexual violence in November 2007.<sup>133</sup> With one campaign led by this highly placed politician's wife, the problem of sexual violence in the DRC gained a much higher profile, even garnering support from UN agencies.<sup>134</sup>

Another acknowledgment of the problems the DRC is facing, and the desire to remedy them, is demonstrated by the Congolese government's request to the ICC to prosecute armed group leaders for international crimes in the DRC.<sup>135</sup> The Congo's General Prosecutor admitted that despite efforts, the judicial ability and success with sexual violence prosecutions had not improved in the Eastern Congo since 2008, citing "insecurity, lack of witness protection, and lack of expertise in investigating . . . and gathering evidence . . ."<sup>136</sup>

## II. INTERNATIONAL LAW: SEXUAL VIOLENCE DURING CONFLICT<sup>137</sup>

### A. *The Role of the International Criminal Court*

A major reason for the creation of the ICC was to end the worldwide cycle of impunity that resulted from national and international criminal systems that did not consistently try perpetrators of serious human rights violations.<sup>138</sup> The Court was created on July 17, 1998,

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131. U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *DRC: Conviction of 'Colonel 106' Major Boost in Fight Against Impunity* (Dec. 18, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15436> [<http://perma.cc/E3BB-QM8S>].

132. *Id.*

133. *Soldiers Who Rape*, *supra* note 86.

134. *Id.*

135. *Helping to Combat Impunity*, *supra* note 92, at 12.

136. *Id.*

137. See *supra* Part I.B. for a brief history of the changing international norms regarding sexual violence during conflict.

138. K'Shaani O. Smith, Note, *Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo*, 54 *HOW. L. J.* 467, 476 (2011).

when 120 states voted to adopt the Rome Statute and give the ICC subject matter jurisdiction over “grave crimes including genocide, war crimes, and crimes against humanity.”<sup>139</sup> The ICC only has temporal jurisdiction for crimes committed after July 1, 2002, when the Rome Statute came into force.<sup>140</sup> The ICC’s territorial jurisdiction is limited to crimes in the territory of a State Party, crimes for which a non-State Party accepts the ICC’s jurisdiction, and crimes committed by a State Party national.<sup>141</sup> A State Party, the UN Security Council, or the ICC Prosecutor can refer a specific case or a general “situation” in a country to the ICC for initial investigation and possible prosecution.<sup>142</sup>

As a party to the Rome Statute,<sup>143</sup> the DRC has agreed to be bound by the accepted laws and jurisdiction of the ICC. The DRC’s President Kabila referred the general situation of the conflict in the DRC, including the specific case of Ntaganda, to the ICC in 2004.<sup>144</sup> If Kabila had not referred it, another State Party, the Security Council, or the ICC Prosecutor could have also initiated the case.<sup>145</sup>

In a nod to the importance of preventing sexual and gender-based crimes, the Rome Statute specifically established measures to effectively investigate and prosecute crimes within the ICC’s jurisdiction “in particular where it involves sexual violence, gender violence or violence against children.”<sup>146</sup> In order to pursue a case that focuses on sexual violence charges, the Office of the Prosecutor (OTP) must decide to focus efforts on those crimes during the “pre-analysis phase” before beginning the investigation.<sup>147</sup> This can create difficulty with changing the direction of the case later in the process. However, the OTP has worked to build a solid team with expertise in the various aspects of sexually violent crimes to organize and prosecute these cases.<sup>148</sup> In addition to the useful case

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139. Meier, *supra* note 3, at 105.

140. *Id.*; *see also* Rome Statute of the International Criminal Court, art. 11, UN Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

141. Meier, *supra* note 3, at 106; *see also* Rome Statute, *supra* note 140, art. 12, § 2.

142. Meier, *supra* note 3, at 105–06; *see also* Rome Statute, *supra* note 140, arts. 12–15.

143. The DRC signed the Rome Statute, the treaty establishing the ICC, on September 8, 2000, and ratified it on April 11, 2002. *Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION (Feb. 13, 2016, 5:00 AM), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en) [<http://perma.cc/R4R8-HQCR>].

144. *ICC: Congolese Warlord to Go to Trial*, *supra* note 1.

145. Meier, *supra* note 3, at 105.

146. Dianne Luping, *Investigation and Prosecution of Sexual and Gender-Based Crimes Before the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL’Y & L. 431, 433 (2009); *see also* Rome Statute, *supra* note 140, art. 54, § 1(b).

147. Luping, *supra* note 146, at 433–34.

148. *Id.* at 434.

precedent from the ICC, the Rome Statute itself “codified rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence as grave breaches of the Geneva Conventions, and as war crimes and crimes against humanity.”<sup>149</sup> Additionally, the ICC has an independent fund from which reparations are paid to sexual violence victims, as well as other victims, if the convicted defendants are unable to pay.<sup>150</sup> This cannot repair the damage the perpetrators inflicted on these victims but it is a clear demonstration that such crimes “will not be tolerated by the international community or allowed to occur with impunity, as they have in the past.”<sup>151</sup>

### *B. Significant Cases Involving Sexual Violence During Conflict*

#### *1. International Criminal Tribunal for Rwanda*

The International Criminal Tribunal for Rwanda (ICTR) changed the course of sexual violence prosecution after a far-too-long international “historical ambivalence” toward the use of sexual violence during, and as a weapon of, war.<sup>152</sup> The prosecution of Jean Paul Akayesu, a mayor who encouraged widespread “sexual violence against Tutsi women,”<sup>153</sup> was the first case in which an international criminal tribunal convicted an official for rape as a form of genocide.<sup>154</sup> He was also convicted of rape and sexual violence committed as a crime against humanity for the actions of his subordinates.<sup>155</sup> This was a significant precedential application of the Geneva Convention in a case of sexual violence—specifically rape—as a serious human rights violation, rather than simply as an attack on a woman’s honor.<sup>156</sup>

The ICTR, with the pressure of women’s groups, recognized the importance of establishing sexual violence as one of the most serious international crimes under its jurisdiction.<sup>157</sup> It accomplished this by going through the proper procedures of “indictment, prosecution,

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149. Meier, *supra* note 3, at 113.

150. Ferril, *supra* note 43, at 362–63.

151. Meier, *supra* note 3, at 134.

152. Wood, *supra* note 29, at 276.

153. *Id.*

154. *Id.*; see also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, § 8 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998) (convicted of crimes against humanity), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/icttr-96-4/trial-judgements/en/980902.pdf> [<http://perma.cc/3G27-494Y>].

155. Ferril, *supra* note 43, at 357.

156. Wood, *supra* note 29, at 277, 282–83.

157. *Id.* at 290–91.

and conviction,” applying the legal definitions of genocide and crimes against humanity to sexual violence.<sup>158</sup> The ICTR jurisprudence of the *Akayesu* case also had a significant impact on other international tribunals, regional courts, and state domestic court systems.<sup>159</sup> Crucially, this case inspired multiple states to negotiate for improved prosecution standards for sexual violence and an improved definition of gender-based violence for the Rome Statute.<sup>160</sup>

The ICTR made history once again by prosecuting the first woman, Pauline Nyiramasuhuko, Rwanda’s Former Minister for Women’s Affairs, for rape as a crime against humanity.<sup>161</sup> The accused was a grandmother who awarded her soldiers’ efficient murders by allowing and encouraging them to abduct, systematically rape, and murder women and girls.<sup>162</sup> In June 2011, the judgment was delivered, convicting her of genocide and rape as a crime against humanity and as a war crime.<sup>163</sup> Nyiramasuhuko’s conviction highlighted the fact that sexual violence is not always easily identifiable or attributable to a certain group of perpetrators, but can in fact be encouraged by the last person you would expect—even a sweet old grandmother.<sup>164</sup> This case reinforced the ICTR-established jurisprudence against wartime sexual violence, hopefully encouraging other international and national jurisdictions to investigate, prosecute, and deter sexual violence.<sup>165</sup>

## 2. International Criminal Court

Thomas Lubanga was the first DRC warlord indicted by the ICC.<sup>166</sup> However, despite the fact that evidence demonstrated that he committed and allowed his subordinates to commit a grave number of serious sexually violent crimes, the only charges brought against him were war crimes related to child soldiers.<sup>167</sup> Upon the request of the victims’ attorneys post-prosecution, the ICC ruled

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158. *Id.*

159. *Id.* at 293–94; *see also id.* at 292–98 (analyzing the significance of the *Akayesu* decision).

160. *Id.* at 293.

161. *Id.* at 274.

162. Sam Sasan Shoamanesh, *Nyiramasuhuko: The Mother Who Awarded Rape for Murder*, WORLD POST (Aug. 9, 2011, 1:00 PM), [http://www.huffingtonpost.com/sam-sasan-shoamanesh/nyiramasuhuko-the-mother-\\_b\\_922216.html](http://www.huffingtonpost.com/sam-sasan-shoamanesh/nyiramasuhuko-the-mother-_b_922216.html) [<http://perma.cc/VX6F-9LMX>].

163. *Id.*

164. *See id.*

165. *See id.*

166. Breton-Le Goff, *supra* note 42, at 24.

167. *Id.* Multiple pragmatic reasons existed for this streamlined prosecution approach, including lack of resources and the need for a speedy trial. *Id.*

that “additional charges could be brought” as based on the facts of sexually violent crimes—such as sexual slavery—that already came up during witness testimony.<sup>168</sup> Eventually, the prosecutor addressed the sexual crimes, but only within the child soldier conscription and enlistment charges.<sup>169</sup> This failed to extend the ICTR precedent of accountability for all sexually violent crimes,<sup>170</sup> and was therefore insufficient despite the reasons for limitation. The prosecutor’s failure to indict Lubanga for separate sexual violence charges undermined the legitimacy of Lubanga’s more than 100,000 sexual violence victims, completely disregarding the issues of women and girls in the DRC.<sup>171</sup>

Another significant ICC prosecution of a DRC warlord is that of Germain Katanga, the former chief of the Lendu militia in the *Front de Résistance Patriotique d’Ituri* (FRPI).<sup>172</sup> This case was an improvement upon Lubanga, but not good enough for the people of the DRC.<sup>173</sup> Charges of rape and sexual slavery were brought against Katanga, and though they were complicated by difficulties relating to the protected status of two witnesses, the prosecutor was eventually able to bring those sexual crimes to trial.<sup>174</sup> However, the only charges of sexual violence were for crimes perpetrated in the village of Bogoro, not for the many other crimes in the region of Ituri, DRC, for which there was evidence of Katanga’s involvement and leadership.<sup>175</sup> Perhaps most upsetting for victims of sexual violence in the DRC was Katanga’s acquittal for any responsibility for a vicious mass rape that happened in Bogoro, despite his being found indirectly responsible for a massacre there.<sup>176</sup>

Despite the progress made by the prosecutor indicting Katanga—for the first time in ICC history—for sexually violent crimes, the

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168. Smith, *supra* note 138, at 473.

169. See Breton-Le Goff, *supra* note 42, at 24–25.

170. See *id.*

171. Smith, *supra* note 138, at 474.

172. Breton-Le Goff, *supra* note 42, at 25.

173. See Mark Kersten, *The Katanga Verdict and Its Legacy for International Criminal Justice*, JUST. IN CONFLICT (Mar. 12, 2014), <http://justiceinconflict.org/2014/03/12/the-katanga-verdict-and-its-legacy-for-international-criminal-justice> [<http://perma.cc/4GMH-DQ78>] (explaining that the *Katanga* case was only saved by the Trial Chamber stepping in and performing the prosecutorial role).

174. Breton-Le Goff, *supra* note 42, at 25.

175. See *id.*

176. Kelly Askin, *Katanga Judgment Underlines Need for Stronger ICC Focus on Sexual Violence*, OPEN SOC’Y JUST. INITIATIVE (Mar. 11, 2014), <http://www.opensocietyfoundations.org/voices/katanga-judgment-underlines-need-stronger-icc-focus-sexual-violence> [<http://perma.cc/4F8Q-KQA9>]. It must not be overlooked that the burden is on the prosecution to prove guilt beyond a reasonable doubt; though they were able to prove Katanga’s responsibility for the massacre, they were clearly unable to do so for the sexual violence.



failure to convict for sexually violent crimes not directly committed or encouraged by Katanga was a setback to the fight against sexual violence in armed conflict.<sup>177</sup> The lack of convictions for sexual violence generally allowed by DRC leaders, though not always specifically directed or encouraged, reveals the double standard of rape being a byproduct, rather than an instrument, of war.<sup>178</sup> With these two cases and the lack of justice for sexual violence victims, the ICC’s decision does not serve to deter sexually violent crimes in the future.<sup>179</sup> However, the Court has the opportunity to do that with the *Ntaganda* case.

### 3. *International Criminal Tribunal for the Former Yugoslavia*

In 2006, the International Criminal Tribunal for the former Yugoslavia (ICTY) issued the first indictment for rape as a war crime in the case of *Prosecutor v. Gagovic*.<sup>180</sup> After three of the accused were severed from this original indictment, the remaining *Foča* case became the most famous ICTY case prosecuting sexual violence, notable for focusing solely on crimes of sexual violence,<sup>181</sup> which enabled the prosecution to fully highlight the depravity and violence. Three Bosnian Serbs, Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, ran “quasi-brothels” in the southeastern Bosnian town of Foča, trading and selling women for sex and domestic chores.<sup>182</sup> The accused protested all of their charges, claiming (a) it was not rape because some of the women liked the men and/or enjoyed the sexual intercourse, (b) it was not enslavement because the women “were not permanently ‘in [their] possession,’” and (c) it was not torture because the women did not prove that they had suffered physically or psychologically.<sup>183</sup>

All three men were convicted by the ICTY of the mass rape and forced prostitution, among other charges, of dozens of women and

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177. *See id.*

178. *Id.*

179. *Id.* Though common sense dictates that in almost any criminal trial in the world, not every victim will feel that justice has been completely done.

180. Luping, *supra* note 146, at 446; *see also* Prosecutor v. Gagovic, Case No. IT-96-23, Indictment, Counts 1–12 (Int’l Crim. Trib. for the Former Yugoslavia June 26, 1998), <http://www.icty.org/x/cases/zelenovic/ind/en/foc-ii960626e.pdf> [<http://perma.cc/58RB-CKUJ>].

181. Luping, *supra* note 146, at 446; *see* Prosecutor v. Kunarac, Case No. IT-96-23-PT, Indictment, Charges (Int’l Crim. Trib. for the Former Yugoslavia Nov. 8, 1999), <http://www.icty.org/x/cases/kunarac/ind/en/kun-iii991108e.pdf> [<http://perma.cc/FX4B-H58G>].

182. Marlise Simons, *Bosnian War Trial Focuses on Sex Crimes*, N.Y. TIMES (Feb. 18, 2001), <http://www.nytimes.com/2001/02/18/world/bosnian-war-trial-focuses-on-sex-crimes.html> [<http://perma.cc/N6EH-GXRJ>].

183. *Id.*



girls.<sup>184</sup> They were also convicted by the ICTY of rape and enslavement as crimes against humanity.<sup>185</sup> Unfortunately, this case heightened the international standard for proving rape, now requiring the prosecutor to show that the victim did not consent, therefore subjecting victims to extreme and personal questioning, and possibly leading to fewer victims coming forward in the future.<sup>186</sup>

### *C. Other Difficulties in Prosecuting Sexual Violence in an International Court*

A significant challenge in the international—and really any domestic—justice system’s prosecution of sexual violence is giving a voice and justice to the victims. Unfortunately, this difficulty is also one of the major reasons for such prosecutions. In order to effectively argue their cases, prosecutors need certain information from a perpetrator-driven perspective, going through a narrative of the perpetrator’s actions and words rather than approaching the case based on how the victims experienced the events.<sup>187</sup> This prevents witnesses from telling their stories in the way they naturally remember them, which is often non-linear and contains understandable discrepancies “due to post-traumatic stress syndrome.”<sup>188</sup> Additionally, defense counsel tactics can traumatize and revictimize the witnesses by discrediting their testimony if they have sought psychological counseling or are inconsistent.<sup>189</sup> One defense counselor in the *Foča* trial asked a woman who described not being chosen to be raped one night “if she was jealous of” those who were.<sup>190</sup> The questioning from both sides’ counsel demonstrates that “courts of law mistrust the natural voice of survivors” and consequently can make victims mistrust the courts as well.<sup>191</sup>

Even before a trial begins, the intensely personal and sometimes less visible nature of sexual crimes can create discomfort and, ultimately, reluctance to investigate.<sup>192</sup> This has, fortunately, been improving, but there is still a long way to go. Additionally, even when

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184. *Id.*

185. Press Release, International Criminal Tribunal for the Former Yugoslavia, Judgment of Trial Chamber II in the Kunarac, Kovač and Vuković Case, U.N. Press Release JL/P.I.S/566-e (Feb. 22, 2001), [http://www.icty.org/x/cases/kunarac/tjug/en/010222\\_Kunarac\\_Kovac\\_Vukovic\\_summary\\_en.pdf](http://www.icty.org/x/cases/kunarac/tjug/en/010222_Kunarac_Kovac_Vukovic_summary_en.pdf) [<http://perma.cc/2MR9-ZSSW>].

186. Ferril, *supra* note 43, at 366–67.

187. *See* Wood, *supra* note 29, at 311.

188. *Id.*

189. *Id.*

190. *Id.* at 311–12.

191. *Id.* at 312.

192. *See* Askin, *supra* note 4, at 347.

charges for sexual violence are brought, procedural and practical trial delays can significantly impede “the delivery of justice to survivors and the deterrent effect on perpetrators.”<sup>193</sup>

Specific attention should be drawn to several other international prosecution difficulties that were touched upon previously. It is impossible to prosecute every crime. That is common sense in either a domestic or international context, and because of it, prosecutors have to make tough decisions. Not every crime can be prosecuted, so not every victim has the chance of getting her own justice. Hopefully, for at least some victims, the punishment of their attackers for other crimes gives them some relief. In addition to the pragmatic reasons, usually limited money and time, for not prosecuting every alleged crime, there are also institutional and political reasons to limit the indictment—including focusing on other key problems in those areas, as the prosecutor focused on child soldier issues with Lubanga’s case. However, such restrictions on time, money, institutional pressures, and national or international politics should not limit prosecutions for sexual violence. Prosecuting sexual violence is imperative at this point in time because of the abysmal history of failing to prosecute those crimes internationally and domestically. This failure to prosecute, along with the overall culture of impunity for sexual violence, has subsequently furthered the status of women as second-class citizens in the DRC. The meager prosecutions to date, and the cultural problems leading to and resulting from sexual violence, simply reinforce the need to develop international jurisprudence on sexual offenses. Therefore, the international criminal community should not only resist any possible reasons to avoid indicting and prosecuting sexual crimes, but it should actively and enthusiastically investigate and prosecute them.

### III. SIGNIFICANCE OF THE ICC CASE AGAINST BOSCO NTAGANDA

#### A. *Bosco Ntaganda in the Democratic Republic of the Congo*

##### 1. *Rise to Power*

Bosco Ntaganda was born in Rwanda in 1973.<sup>194</sup> He fled to the eastern DRC as a teenager when ethnic violence against fellow Tutsis in Rwanda escalated.<sup>195</sup> As a seventeen-year-old in 1990, he

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193. Wood, *supra* note 29, at 313.

194. Penny Dale, *Profile: Bosco Ntaganda the Congolese ‘Terminator,’* BBC NEWS AFR. (Aug. 28, 2015), <http://www.bbc.com/news/world-africa-17689131> [<http://perma.cc/JCQ8-G5ZS>].

195. *Id.*

joined the Rwandan Patriotic Front (RPF) rebels composed mostly of ethnic Tutsis in southern Uganda,<sup>196</sup> and then fought in 1994 to end the genocide in Rwanda.<sup>197</sup> As the conflicts between groups in Rwanda started to affect neighboring countries, including the DRC, Ntaganda began to move back and forth between rebel groups and national armies in both Rwanda and the DRC.<sup>198</sup> The ease with which he was able to switch armies truly demonstrates the extreme volatility in this region and the plethora of opportunities for a charismatic fighter to advance up the ranks of violent groups.

Though Ntaganda “is not an articulate or persuasive speaker” according to Human Rights Watch researcher Anneke van Woudenberg who met “The Terminator” several times, he does have presence due to his 6 foot height and affinity for leather cowboy hats.<sup>199</sup> His ruthlessness is clear as he denies any accusation of wrongdoing “and comes up with excuse after excuse to justify what he has done.”<sup>200</sup> In an interview, Ntaganda referenced his responsibility during the Rwandan genocide: to protect his fellow Tutsis, likely indicating that he sees any of his actions as excusable because he has a duty to “protect[] his own tribe . . . Tutsis in Eastern Congo, where they’re a minority.”<sup>201</sup>

The combination of the violent, chaotic atmosphere in the DRC and Ntaganda’s particular set of leadership and fighting qualities evidently created a great opportunity for his upward mobility through the national and rebel armies. Similarly, other individuals with those same characteristics could, and do, take advantage of the same chaotic situations in war-torn areas.

## 2. Ntaganda’s Actions as Militia Leader

Ntaganda served as the Deputy Chief of Staff and commander of Military Operations of the *Union des Patriotes Congolais* (UPC) from 2002 to 2005.<sup>202</sup> As a leader of the military wing, the *Forces*

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196. *Id.*

197. *See id.* The RPF formed the government that is still presently in power in Rwanda. Q&A: *Hearing to Confirm the Charges Against Bosco Ntaganda at the International Criminal Court*, HUM. RTS. WATCH (Feb. 6, 2014), <http://www.hrw.org/news/2014/02/06/qa-hearing-confirm-charges-against-bosco-ntaganda-international-criminal-court#1> [<http://perma.cc/8G2T-9E9R>].

198. Dale, *supra* note 194.

199. *Id.*

200. *Id.*

201. Fiona Lloyd-Davies, *The Terminator: General Bosco Ntaganda*, STUDIO 9 FILMS (May 21, 2012), <http://www.studio9films.co.uk/blog/?p=171> [<http://perma.cc/9WWU-MC2Q>].

202. ICC: *Congolese Warlord to Go to Trial*, *supra* note 1. The Confirmation of Charges for Ntaganda confirms that he was Deputy Chief. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶ 15 (Int’l Crim. Ct. June 9, 2014),

*Patriotiques pour la Libération du Congo* (FPLC),<sup>203</sup> Ntaganda likely had superior responsibility for his subordinate forces’ “many serious human rights abuses, including ethnic massacres, torture, rape, and recruitment of child soldiers.”<sup>204</sup>

Ntaganda left the UPC in 2006 and joined the rebel group National Congress for the Defense of the People (*Congrès National pour la Défense du Peuple*, CNDP) for several years.<sup>205</sup> The CNDP consisted of mostly ethnic Tutsis and was secretly backed by the Rwandan government.<sup>206</sup> On January 5, 2009, Ntaganda ousted the leader of the CNDP and, despite an ICC-issued arrest warrant, integrated the CNDP troops into the national army (FARDC) with the government’s approval as part of a peace effort.<sup>207</sup> Ntaganda was even promoted to the rank of general in the FARDC in 2009.<sup>208</sup> The government claimed that his role was crucial for attaining peace in the country and that his arrest “would undermine [that] . . . process.”<sup>209</sup>

Ntaganda’s clear impunity, as he easily moved around the country, understandably deeply offended his victims and those working through the proper processes for peace.<sup>210</sup> A coalition of 51 non-governmental organizations in the eastern DRC wrote to Congolese President Kabila regarding the issue and encouraging him to turn Ntaganda over to the ICC.<sup>211</sup> The hypocrisy of the Congolese government protecting Ntaganda after referring the DRC situation to the ICC<sup>212</sup> highlights the difficulties of prosecuting, and even capturing, highly situated and powerful military leaders.<sup>213</sup>

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<http://www.icc-cpi.int/iccdocs/doc/doc1783301.pdf> [<http://perma.cc/ASS3-5C9N>] [hereinafter Confirmation of Charges].

203. Confirmation of Charges, *supra* note 202, ¶¶ 12, 15.

204. *ICC: Congolese Warlord to Go to Trial*, *supra* note 1.

205. *Id.*

206. David Smith, *M23 May Be DRC’s New Militia, but It Offers Same Old Horrors*, THE GUARDIAN (Nov. 20, 2012, 11:32 AM), <http://www.theguardian.com/world/2012/nov/20/m23-drc-militia-horrors> [<http://perma.cc/8W76-792C>].

207. “*You Will Be Punished*: Attacks on Civilians in Eastern Congo, HUM. RTS. WATCH (Dec. 13, 2009), <http://www.hrw.org/node/87142/section/1> [<http://perma.cc/3933-F8U7>]. Many of the former rebels who agreed to integrate into the FARDC remained loyal to their former commanders, undermining real integration. *See id.*

208. *DR Congo: Arrest Bosco Ntaganda for ICC Trial*, HUM. RTS. WATCH (Apr. 13, 2012), <http://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial> [<http://perma.cc/32XA-VWZS>].

209. *Id.*

210. *Letter from National Organisations to the President of the DR Congo on the Arrest of Bosco Ntaganda*, HUM. RTS. WATCH (Feb. 19, 2009), <http://www.hrw.org/news/2009/02/19/letter-national-organisations-president-dr-congo-arrest-bosco-ntaganda> [<http://perma.cc/WM99-2538>] [hereinafter *Letter from National Organisations*]; *see also DR Congo: Arrest Bosco Ntaganda for ICC Trial*, *supra* note 208.

211. *Letter from National Organisations*, *supra* note 210.

212. *See Breton-Le Goff*, *supra* note 42, at 26.

213. There are commonly held doubts across Africa concerning the credibility of the ICC. *Id.*

Despite those efforts, Ntaganda was not arrested or turned over to the ICC; instead, he controlled 50,000 FARDC soldiers stationed in Goma, in eastern DRC, and for years was allowed to enjoy “a life of impunity and luxury”<sup>214</sup> while he and his soldiers wreaked havoc through “rapes, looting and murders” in the north-eastern DRC, as well as displacing 800,000 people from their homes.<sup>215</sup>

In April 2012, following calls for his arrest and attempts by the Congolese government to limit his power,<sup>216</sup> Ntaganda led his loyal supporters, who had also been reintegrated into the army, to mutiny.<sup>217</sup> This put his new rebel army in direct opposition to the FARDC, and even inspired another mutiny by a former colleague of Ntaganda’s from the CNDP, Sultani Makenga, with whom he joined to create M23.<sup>218</sup> The group claimed to be protesting the DRC “government’s failure to fully implement the March 23, 2009, [Pretoria] peace agreement” with the CNDP, leading to the group’s name “M23.”<sup>219</sup> This highlights the volatility of the situation in the DRC and the danger faced by civilians caught in the middle between warring groups with little stability and loyalty.

After Ntaganda created M23, the Rwandan government directly aided the rebel group by deploying and recruiting troops and providing weapons, ammunition, and training.<sup>220</sup> The United Nations High Commissioner for Human Rights, Navi Pillay, named five M23 leaders, including Ntaganda, “among the worst perpetrators of human rights violations in the DRC, or in the world.”<sup>221</sup> The brutality of these leaders clearly led the soldiers to act with complete impunity, as they still commit brutally sexually violent crimes, including raping eight-year-old girls, murdering a twenty-five-year-old pregnant woman for resisting rape, and pouring fuel between a woman’s legs and lighting her on fire after gang-raping her.<sup>222</sup>

On March 18, 2013, Ntaganda voluntarily surrendered himself—the first ICC accused to ever do so—to the United States embassy in Kigali, Rwanda in order to be transferred to ICC custody in The Hague, Netherlands.<sup>223</sup> His surrender was likely due to infighting in

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214. Dale, *supra* note 194.

215. *Id.*

216. *DR Congo: M23 Rebels Committing War Crimes*, *supra* note 60.

217. *ICC: Congolese Warlord to Go to Trial*, *supra* note 1.

218. *See DR Congo: M23 Rebels Committing War Crimes*, *supra* note 60. M23 and the FARDC fought back and forth over the region around Goma, putting the community there in the middle of incredible violence for the sole purpose of accumulating power and control of mineral wealth in the area. *See* Smith, *supra* note 206.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *ICC: Congolese Warlord to Go to Trial*, *supra* note 1.

M23 and loss of Rwandan backing.<sup>224</sup> Ntaganda’s diminished presence in the rebel groups and his constant cohort of bodyguards since July 2012<sup>225</sup> make it probable that he feared for his life and was pushed out by soldiers loyal to his M23 rival, Sultani Makenga.<sup>226</sup>

### 3. ICC Charges Against Ntaganda

In 2004, Congolese President Joseph Kabila referred the situation in the DRC to the ICC Prosecutor.<sup>227</sup> The ICC already had jurisdiction over crimes committed in the area because the DRC ratified the Rome Statute on April 11, 2002.<sup>228</sup> The Prosecutor initiated an investigation on June 21, 2004, after a preliminary investigation determined that action was warranted.<sup>229</sup> The ICC’s first arrest warrant for Ntaganda as a rebel leader of the UPC was issued under seal on August 22, 2006, “for the war crimes of recruiting and using child soldiers during the war in Ituri in 2002 and 2003.”<sup>230</sup> His second arrest warrant, on July 13, 2012, covered the broader grave crimes committed in Ituri,<sup>231</sup> however, disappointingly, no charges are being brought for the crimes committed in North Kivu by Ntaganda’s troops due to restricted time and resources.<sup>232</sup> The charges Ntaganda faces were confirmed on June 9, 2014,<sup>233</sup> and he faces individual criminal responsibility through the various modes of liability of indirect co-perpetration, direct perpetration, and ordering, inducing, contributing, and acting as a military commander “for the crimes committed . . . .”<sup>234</sup> The eighteen charges unanimously confirmed by ICC Pre-Trial Chamber II<sup>235</sup> consist of thirteen counts of war

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224. *Id.*

225. *DR Congo: M23 Rebels Committing War Crimes*, *supra* note 60.

226. Dale, *supra* note 194.

227. *ICC: Congolese Warlord to Go to Trial*, *supra* note 1.

228. Rome Statute, *supra* note 140 (The DRC signed the Rome Statute establishing the ICC on September 8, 2000, and ratified the Statute on April 11, 2002.).

229. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Case Information Sheet (Int’l Crim. Ct. Sept. 7, 2015), <http://www.icc-cpi.int/iccdocs/PIDS/publications/NtagandaEng.pdf> [<http://perma.cc/8L2K-89WR>] [hereinafter Case Information Sheet].

230. *ICC: Congolese Warlord to Go to Trial*, *supra* note 1; *see also* Case Information Sheet, *supra* note 229. The arrest warrant was unsealed on April 28, 2008. *See* Case Information Sheet, *supra* note 229; *see also* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest, 1–3 (Int’l Crim. Ct. Aug. 22, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc305330.pdf> [<http://perma.cc/V6SD-KB2R>].

231. *ICC: Congolese Warlord to Go to Trial*, *supra* note 1.

232. *Id.*; *see also* Case Information Sheet, *supra* note 229.

233. *ICC: Congolese Warlord to Go to Trial*, *supra* note 1.

234. *See* Confirmation of Charges, *supra* note 202, ¶ 97.

235. The ICC has multiple pretrial, trial, and appeals chambers that are numbered for clarity and distinction between cases.



crimes<sup>236</sup> and “[five] counts of crimes against humanity . . . .”<sup>237</sup> These include four charges of war crimes (rape, sexual slavery of civilians, rape of child soldiers, and sexual slavery of child soldiers) and two charges of crimes against humanity (rape and sexual slavery) that focus on sexual violence.<sup>238</sup>

*B. Individual Significance: Practical Implications*<sup>239</sup>

*1. Expressive Value of a Sexual Violence-Focused Case*

Charging Ntaganda with six charges of sexual violence is a statement in and of itself. The ICC only has the funds to prosecute several defendants each year, so it must select very carefully among thousands of options with a specific goal in mind.<sup>240</sup> Among select audiences, the ICC’s actions merit respect, and therefore, the cases it brings serve to increase the Court’s legitimacy.<sup>241</sup> Though it may have been ideal to have a *Foča*-like focus solely on sexual crimes, Ntaganda’s case is a step in the right direction not only for the DRC but also for the world. These charges demonstrate to the international community that despite Ntaganda’s growing influence and power over the last two decades, his rampant sexually violent crimes are unacceptable under international law. The ICC is using its limited resources to bring *his* crimes to trial and give justice to his victims.

*2. Example Against Impunity for Sexual Violence*

To this day, soldiers and civilians who commit sexually violent crimes in the DRC have nearly complete immunity. Ntaganda is well-known domestically and internationally for his crimes. As an individual who worked his way up from the bottom ranks of a foreign resistance army through the upper echelons of not only Congolese militias but also the national army, he is the best possible example

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236. The thirteen war crimes charges are “murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy’s property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities . . . .” Case Information Sheet, *supra* note 229.

237. The five crimes against humanity charges are “murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population . . . .” *Id.*

238. *Id.*

239. This final portion of the Note alludes to facts and issues discussed throughout the Note, and discusses arguments and solutions in light of those facts.

240. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 267 (2012).

241. *Id.* at 268.



to those still committing horrific sexual violence in the DRC and around the world. Ntaganda may not have faced prosecution during his time in the DRC, but he is not escaping justice. There is an end to his impunity. It is not realistic to expect the prosecution of every individual who commits sexually violent crimes, but the trial of Ntaganda—someone who once had so much power and control—could serve to generally deter further crimes. Any individual who commits and incites sexual violence during conflict will have to consider the risk of an ICC investigation, prosecution, and sentence. Furthermore, the ICC’s demonstration of justice for such a formerly powerful individual may reenergize and inspire domestic governments and peoples to fight for an end to impunity and a stronger judicial system that prosecutes sexual violence.

### 3. *Giving Victims a Voice*

Thousands upon thousands of women have been attacked because of Bosco Ntaganda; whether by his own hand, or those of his men, he is responsible for many victims.<sup>242</sup> Each of the men who committed such attacks is responsible. The other armed groups that committed the attacks are responsible. Even if a victim has suffered multiple attacks from various attackers, each and every attack matters. It does not lessen the culpability of Ntaganda or any one of those attackers. It does not change what those victims felt. Even if they never get a chance to speak out against their other attackers, those victims deserve to have a voice and speak out against at least Ntaganda. They deserve a chance to finally be able to advocate for themselves since they were unable to do so when they were attacked.

Fortunately, the ICC has already been very open to victim participation in the Ntaganda case: in the pretrial proceedings for the confirmation of charges, 1,120 victims participated,<sup>243</sup> and Trial Chamber IV issued a decision on February 6, 2015, detailing the process for victim participation during the trial stage.<sup>244</sup> One vast improvement is the reduction of the victim application form from seventeen pages to just one.<sup>245</sup> This procedural change eliminates a

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242. See *DR Congo: Victims, Activists Respond to Warlord’s Surrender*, HUM. RTS. WATCH (Mar. 26, 2013), <http://www.hrw.org/news/2013/03/26/dr-congo-victims-activists-respond-warlord-s-surrender> [http://perma.cc/TLH3-K8T6].

243. Mariana Pena, *Victim Participation Decision in the Ntaganda Case: How Does the System Compare to Previous Experiences?*, INT’L JUST. MONITOR (Feb. 17, 2015), <http://www.ijmonitor.org/2015/02/victim-participation-decision-in-the-ntaganda-case-how-does-the-system-compare-to-previous-experiences> [http://perma.cc/7JGP-DUAB].

244. *Id.*

245. *Id.*

significant barrier for victims to participate in the prosecution of Ntaganda. Additionally, support from various sources—such as the ICC Registrar and the NGO *Avocats sans Frontières*—helps to make the process as smooth and easy as possible for the many victims who want their voices heard.<sup>246</sup> The huge turnout of victims simply for the pre-trial stage demonstrates how eager victims are to have their voices heard.

#### 4. *Logistically*

The ICC is the best-situated court to prosecute Ntaganda. Of course, if the Congolese government wanted to step up and charge him domestically, that would be the ideal example of the domestic fight against impunity. However, as has been addressed, domestic prosecution is slow to improve in the DRC amid rampant impunity and cultural views, though a clear effort is being made. Congolese President Kabila himself referred the situation to the ICC in order to attain international interference in a conflict that he could not, or would not, handle domestically. Though Ntaganda was pushed out of power in M23 and may therefore have fewer powerful friends in the DRC, it is unlikely that the government would adequately prosecute him when the same crimes are still being committed daily by those in high positions of power.

Unfortunately, Ntaganda is the only remaining DRC leader with an ICC arrest warrant.<sup>247</sup> This is far from saying that there are no other people who should be prosecuted. At this point in time, however, there are no other outstanding warrants. Logistically, there are no other options. There are no “re-dos” available to serve as an example to the country and the world about the extreme violence and horrific acts committed daily against Congolese women. Ntaganda is it. That places an extraordinary amount of pressure on the Prosecutor to make this trial a demonstration of the power of international law, but it also provides a fantastic opportunity to make this case a changing point in the DRC’s, and the world’s, history, and a deterrent example against sexual violence during conflict.

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246. See *id.*; see also *Victims’ Consultation on the Grouping for Their Legal Representation in the Bosco Ntaganda Case*, AVOCATS SANS FRONTIÈRES (Nov. 2013), [http://www.asf.be/wp-content/uploads/2013/11/ASF\\_IJ\\_Grouping-victims-in-the-Bosco-Ntaganda-Case.pdf](http://www.asf.be/wp-content/uploads/2013/11/ASF_IJ_Grouping-victims-in-the-Bosco-Ntaganda-Case.pdf) [<http://perma.cc/2FEZ-UT5W>].

247. *International Criminal Court Prosecutions*, INTERNATIONAL CRIMINAL COURT, [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/prosecutions/Pages/prosecutions.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/prosecutions/Pages/prosecutions.aspx) (last visited Mar. 23, 2016).

### C. *Learning from Prior Cases in the Ntaganda Trial*

The Ntaganda trial continues the pattern of sexual violence prosecutions set by the ICTR *Akayesu* trial. It once again highlights the seriousness of sexual violence and the necessity to follow proper prosecutorial procedures to punish and deter such crimes.

The Prosecutor made a positive step by indicting Ntaganda for all crimes enumerated in the Rome Statute’s jurisdiction that the evidence supports,<sup>248</sup> unlike the prosecutor in *Lubanga*.<sup>249</sup> A focus solely on sexual violence may have been a victory for sexual violence victims, but the inclusion of all the crimes now enables, rather than hinders, a sexual violence focus. Even at the time that the *Lubanga* case was being tried, the chance for improvement with the Ntaganda case was already clear: just as the *Lubanga* case gave a voice to the victims of child soldier recruitment, Ntaganda’s prosecution will give a voice to the victims of sexual violence in the DRC, as *Lubanga*’s did not.<sup>250</sup>

Unfortunately, the indictment against Ntaganda only addresses crimes committed in the Ituri region, neglecting those from the North Kivu region. This continues the shortfall of the *Katanga* case in which only one area of crimes was prosecuted. The ICC could correct this problem in *Ntaganda* by amending the indictment. The shortage of funds, however, and the failure to amend the original indictment thus far, makes that unlikely. The justice felt by the female victims from Ituri would hopefully be a victory felt by all of Ntaganda’s victims because, though Ntaganda may not be charged or convicted with all of his crimes, he will face justice and no other women will have to face his brutality.

### D. *Potential Impact and Legacy of the Ntaganda Trial*

#### 1. *ICC: Strong Sexual Violence Prosecution Precedent*

The ICC does not yet have a landmark sexual violence case that establishes strong prosecution precedent. The *Foča* case was a turning point of sorts for the ICTY, demonstrating that the Tribunal recognized and was willing to focus its efforts and resources to punish those responsible for sexual violence. However, the jurisdiction of the ICTY does not have the same deterrent effects on the DRC or other nations

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248. See Confirmation of Charges, *supra* note 202.

249. Smith, *supra* note 138, at 476–77.

250. Eva Smets, *Justice for “Bush Wives”: The ICC and Bosco Ntaganda*, WORLD POST (May 31, 2012, 10:26 AM), [http://www.huffingtonpost.com/eva-smets/justice-for-bush-wives-congo\\_b\\_1534000.html](http://www.huffingtonpost.com/eva-smets/justice-for-bush-wives-congo_b_1534000.html) [<http://perma.cc/K2KA-WW3C>].

like the ICC has. The ICC has wide jurisdiction over many countries and needs to establish its own precedent against sexual violence.

The *Ntaganda* case will be that landmark case for the ICC. The six charges alone are very powerful indictment precedent for the Court. *Lubanga* was the first step for the DRC as a whole, holding a leader responsible for his crimes and those of his subordinates. *Katanga* went further by prosecuting sexual violence crimes. However, the emphasis on child soldiers in *Katanga* did not make it the sexual violence precedent that the ICC—and the DRC as a country—needed. *Ntaganda* is the right opportunity for the ICC to demonstrate that sexual violence is just as serious of a war crime and crime against humanity, and thus warrants recognition, prosecution, and prevention. The precedent established by this international court will ideally impact many domestic governments and courts as they pursue their own sexual violence prosecutions.

### *2. Domestic Impact on the Democratic Republic of the Congo*

This trial will undoubtedly demonstrate to the people of the DRC that sexual violence is not acceptable. First, it will show that even the most powerful people in the country cannot escape prosecution for their crimes. The government of the DRC itself referred the *Ntaganda* case to the ICC so that the international community could effect justice. Clearly, there was already an internal perspective that impunity for sexual violence in the DRC should end. This case will hopefully further the resistance against the cultural perception of these crimes and against impunity as a whole. Second, this example to the Congolese people and government could spur a domestic change to prosecute these individuals on the home front. The incredible involvement of victims in the pretrial phase shows just how much the communities want these attacks and crimes to stop. They are willing to work with an international court. This case is a strong and inspiring example for the DRC fighters against impunity to continue their efforts until there is a full cultural and judicial shift in the perception of these crimes.

### *3. Impact on the International Community*

The DRC is not the only country facing internal and cross-border difficulties with various armies and militia. These conflicts rarely leave the civilian population untouched. The prosecution of *Ntaganda* will serve as an example to areas outside of the DRC that the ICC prosecutes sexually violent crimes. In order to avoid the risk of the ICC investigating a situation in a country, that country's government should take the initiative to prevent and punish sexual crimes.

Perhaps the most important impact that the *Ntaganda* trial can have on the international community is the development of customary international law. As addressed above, the world attitude toward sexual violence has changed throughout time, moving toward a more prohibitive perspective. *Foča* was crucial in its time for the United Nations and the ICTY expressing their disapproval and willingness to prosecute for sexual violence in the former Yugoslavia. However, the ICTY's limited jurisdiction and dwindling caseload limit the impact that it has on the world overall. The ICC is an established and permanent international court intended to prosecute international crimes well into the future. *Ntaganda* will build upon the precedent of *Foča* and other cases, and will be a clear and demonstrative sign of the growing international abhorrence for sexual violence. The legal precedent will continue to impact future cases, while the publicity of the trial itself will also help make sexual violence not just an international crime but also universally prohibited. With a universal distaste for such crimes, the law will become customary and therefore binding on all people and states, not just those under ICC jurisdiction.

#### CONCLUSION—NOW IS THE TIME FOR CHANGE

For millennia, women have been victims of sexual violence during times of conflict. For two decades, the women of the Democratic Republic of the Congo have endured violent attacks by militia and government armies. Enough is enough. Bosco Ntaganda is the last DRC leader with a warrant for his arrest. He is in ICC custody. Eighteen charges have been confirmed against him, including six for sexually violent crimes. His trial will be the example of the modern age, showing definitively that the international community is against sexual violence and that conflict is no excuse for such crimes. It is unfortunate that an international court even needs to step in to deal with a mostly domestic situation, but that further highlights the unacceptability of the crimes committed in the DRC and the need for change domestically and internationally. The international community will step in and intervene, because such crimes should not occur in the future.

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