Delivering Justice for Sexual Violence in the D.R. Congo and Beyond: Cooperation, Education, and Capacity-Building through National and International Courts

Amanda Claire Grayson
Senior Morehead-Cain Scholar
Student Attorney General
University of North Carolina at Chapel Hill

Key Words: Capacity-Building; International Tribunals; National Courts; Sexual Violence; Democratic Republic of the Congo; Judicial Reform

ABSTRACT: The Democratic Republic of the Congo has been called “the worst place in the world to be a woman”. With mass rape and systematic sexual violence becoming an increasingly prevalent weapon of warfare, the international community has created special international criminal tribunals and courts to address crimes as such: war crimes, crimes against humanity, and even genocide. This paper aims to trace the developments in international criminal law and procedure for the prosecution of sexual violence from Nuremberg and Tokyo to Kigali and The Hague while also identifying shortcomings and potential reforms. As the International Criminal Court hears landmark evidence and testimony on charges of rape in the case of Jean-Pierre Bemba, local and national courts in the Congo still fail to deliver the more “nationalized” justice that rape victims seek and prefer. This paper, using sexual violence and conflict in the Democratic Republic of the Congo as a case study, highlights the often underestimated importance of strengthening local and national judiciaries through legal and judicial reform as well as the critical role that international courts must play in sharing information, expertise, and prosecution strategies, especially on cases of sexual violence.

Introduction

Since the beginning of warfare, armed groups from bands to national armies have considered rape as a part of the spoils of war, but only in recent years has sexual violence gone from being a side effect to an actual tool of war. As the Crimes of War Project recounts, “Rape as a spoil of combat can be found throughout history, as far back as the oral recounting of Mediterranean warrior-kings attributed to Homer” (Shanker, 2007). In World War I and World War II, soldiers on all sides of the battlefield committed sexual violence, making the crime so commonplace that armies practically considered it “S.O.P.—standard operating procedure” (Askin, 1997). For example, rapes occurred in the Armenian Genocide of 1915, in the death camps during the Holocaust, and by conquering armies including the Allied troops during World War II. Over 100,000 rapes were reported in Berlin during the last two weeks of the war alone (Askin, 1997). On
the other side of the world, Asian forces were doing the same; as Askin indicated, “The first three months of the Japanese occupation of Nanking constitutes one of the most egregious accounts of unbridled sexual rampages ever documented in military history” (Askin, 1997).

However, sexual violence did not reach such international recognition until the early 1990s when Serb and Croat armed groups mass-raped their way through town after town in the Balkans (Shanker, 2007). Some 20,000 to 50,000 mostly Bosnian women suffered rape, other forms of sexual violence, and even mutilation at the hands of mostly Serb forces, who used these crimes as a form of ethnic cleansing, humiliation, and terror (Askin, 1997). After the war, hundreds and thousands of women emerged from sex-enslavement camps pregnant or with the children of their rapists (Shanker, 2007). Such crimes have become even more common tools of warfare in the civil wars that have plagued every continent around the world. Governments, armed forces, militias, and even civilians have utilized rape and sexual violence in Bosnia, Darfur, Cambodia, Rwanda, Iraq, Sierra Leone, Bangladesh, Colombia, Chechnya, “and—to this very day—in the Democratic Republic of the Congo” (Kirchner, 2007). The recent pandemic of sexual violence as a tool of warfare has forced the international community to begin taking actions to criminalize such atrocities. This paper will study the case of sexual violence in the Democratic Republic of the Congo (DRC) in order to highlight the importance of education, expertise-sharing, and capacity-building among national and international actors in order to combat wartime sexual violence.

**Documenting Sexual Violence in the Eastern Congo**

The Democratic Republic of the Congo (DRC) is the “worst place in the world to be a woman” (Clifford et al., 2008). Mass rape, the spread of sexually transmitted infections, social stigma and inequality, and general insecurity paint a horrifying picture of the situation in the eastern Congo. With sexual violence perpetrated as a tool of warfare by armed groups, hundreds of thousands of women suffer consequences ranging from pregnancy and fistulae to social isolation and depression. As conflicts erupted in the DRC in the mid-1990s, sexual violence marked every phase of the war with every possible consequence and every possible motivation. Since the war’s official end in 2003 (though sexual violence and insecurity continue), a number of national and international responses have aimed to prevent, protect, and treat victims of sexual violence. However, only collaboration and capacity-building between these national and international actors will allow the international community to end the culture of impunity – a major underlying cause behind sexual violence’s prevalence in warfare.

The scope of sexual violence in Eastern Congo can only be adequately understood through hundreds and thousands of stories, pictures, and documentary clips in addition to an impressive array of statistics aggregating the incidence of mass rape that human rights organizations have compiled. Most alarmingly, a November 2006 Newsweek report estimated that 250,000 women were raped in the conflicts in the Democratic Republic of the Congo from 1996-1997 and 1998-2003 (Kirchner, 2007). This does not even account for the many more in North and South Kivu who have suffered even after the conflict’s official end in 2003. Between 2003 and 2007, the International Rescue Committee assisted over 40,000 Congolese rape survivors (Bartels et al., 2010). In South Kivu alone, the UN High Commission on Human Rights reported 27,000 sexual assaults in 2006 (Bartels et al., 2010) and an estimate of 25 rapes every day in 2007 (Breton-Le Goff, 2010). In 2008, the United Nations Population Fund (UNFPA) reported 15,996 cases of sexual violence throughout the country—4,820 of which occurred in the eastern province of North
Kivu (Human Rights Watch, 2009). Another striking trend can be seen in the proportion of sexual violence cases in which the survivors were children. The UNFPA estimated that over 65 percent of sexual violence victims were children, typically adolescent girls. Almost 10 percent of victims are less than 10 years old when raped (Human Rights Watch, 2009).

The relative inaccuracy of these statistics is even more shocking: each of the listed numbers describes verified and reported cases, but what happens to the sexual violence that is unreported or unverified? Stefan Kirchner offers an explanation:

Although the reported rate of sexual violence remains high, such incidents are underreported and accurate statistics are difficult to obtain because of a number of factors, including the fear of ostracism and retribution which prevents survivors from coming forward; the prohibitive distance and lack of access to medical care owing to the prevailing security situation in some areas; a lack of faith in the judicial system; and the local tendency of amicable settlement, whereby the perpetrator pays the victim an agreed upon sum or value in kind. (Kirchner, 2007)

Given that these statistics most likely represent the low end of the amount of mass rape that has actually occurred and is still occurring in the DRC, national and international actors must take action to stop such crimes. The high prevalence and huge impact of sexual violence in the DRC and other war-torn countries have caused the international community to consider mass rape and other forms of sexual violence as weapons or tools of warfare in themselves.

**War in the Great Lakes Region**

Prevalent enough to be considered a “defining characteristic of the war,” sexual violence in Eastern Congo has occurred at the hands of nearly every rebel, militia, and national armed group during nearly every phase of the conflict. Prior to the First Congo War’s beginning in 1996, rape was considered a serious crime (though typically punished by compensation and shaming rather than the weak court system) that violated both the individual victim and his/her family and community (Baaz, 2009). However, political officials and military leaders in Mobutu’s regime commonly committed sexual violence as a means of intimidating and controlling the population (Breton-Le Goff, 2010); Zairian state agents from prison guards, army officers (including the Forces Armées Zaïroises (FAZ)), police, and senior civil servants subjected women to rape, enforced prostitution, sexual slavery, and more (UN High Commissioner, 2010).

Not until the massive influx of Hutu genocidaires from Rwanda, though, did rape become a part of conflict and insecurity. From 1994-1995, extremist Hutu militias re-formed across Rwanda’s western border as “liberation forces” like the Forces Démocratiques pour la Libération du Rwanda (FDLR) in North and South Kivu (UN High Commissioner, 2010). As Wilhelmine Ntakebuka, the director of a sexual violence program in Bukavu, states, “The epidemic of rapes seems to have started in the mid-1990s. This date coincides with the waves of Hutu militiamen who escaped into Congo’s forests after exterminating 800,000 Tutsis and moderate Hutus during Rwanda’s genocide” (Gettleman, 2007). In 1996, Laurent-Desire Kabila’s forces known as the Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre (AFDL) attacked South Kivu with the support of Rwanda and Uganda and progressed toward Kinshasa, committing sexual violence all along the way, which was matched by the retreating national army (Breton-Le Goff,
2010). Kabila’s regime was marked by sexual violence, as his officers and soldiers raped and tortured women and punished suspected enemy supporters through abuse (Breton-Le Goff, 2010). Only a year after the end of the First Congo War, violence erupted again.

Tensions sparking the Second Congo War began in 1998 when Kabila, beginning to fear Rwanda and Uganda’s presence in Kinshasa, ordered all external military forces out of the country. The situation deteriorated when the Banyamulenge, Mayi-Mayi groups, and later the Rassemblement Congolais pour la Démocratie (RCD) movement rose up in opposition to the new government and began a regional conflict in the East (Breton-Le Goff, 2010). Human rights organizations have found evidence of nearly every armed groups’ perpetration of sexual violence, from the RCD-Goma, Mayi Mayi rebels, Burundian and Rwandan Hutu rebel groups, the RCD-ML, Ituri regional actors like the Mouvement de Libération du Congo (MLC), Union des Patriotes Congolais (UPC), and Front des Nationalistes et Intégrationnistes (FNI), and even government armed forces including the Congolese Armed Forces (FAC) and the Armed Forces of the Democratic Republic of Congo (FARDC) (Human Rights Watch, 2005).

Sexual violence in the East during the Second Congo War was intractably linked to the exploitation of valuable minerals, with data about sexual violence in South Kivu showing a clear correlation “between the location of coltan mining areas and the incidents of sexual violence” (Whitman, 2010). Walungu’s gold and coltan deposits and Kabare’s coltan-rich areas sparked FDLR control, whereas Shabunda’s coltan-rich status caused it to be attacked by the Mayi-Mayi and exploited by the Great Lakes Mining Group, controlled by armed groups; all of these areas have suffered higher than usual rates of sexual violence (Whitman, 2010). To further emphasize the connection between coltan and rape, the rapid increase in the price of coltan from $30 per pound to $380 per pound (a result of new Sony PlayStation 2 and laptop models) caused a huge coltan rush, which sparked new highs of sexual violence and attacks in Eastern Congo (Whitman, 2010). Though the war ended officially in 2003 with the signing of the Pretoria Agreement, sexual violence and general insecurity did not stop.

After 2003, insecurity remained in the Congo and spread to new actors, including the new Congolese national army and even civilians. In a bid to stop sexual violence after the war, the FARDC “brought together soldiers from all of the main rebel groups as well as the former government army into a new force,” where by a policy of brassage, the transitional government created new brigades and divided officer and command positions amongst the rebel groups (Human Rights Watch, 2009). However, the rapid integration process worsened problems in the absence of a clear strategy regarding military discipline, salary, command and control, and especially sexual abuse (Human Rights Watch, 2009). After the elections in 2006, insecurity increased in North and South Kivu and culminated in many instances of mass rape, such as those in the gold- and tin-rich Walikale region in 2010 (Baaz, 2009; Amnesty International, 2010).

However, the FARDC was not the only “new” group committing sexual violence, as civilians came to take advantage of the insecurity and impunity in perpetrating an unprecedented number of rapes as well. A 2010 Oxfam report found that civilians perpetrated nearly 38 percent of rapes in 2008, compared to only 1 percent in 2004. Much of this increase can be explained by two factors: “an increase in demobilized combatants who have reintegrated into society with minimal rehabilitation measures, and the brutalization of society that eroded previous protective social norms” (Human Rights Watch, 2009). As Dr. Margaret Agama noted in a statement for UNFPA,
“Now sexual violence is unfortunately not only perpetrated by armed factions but also by ordinary people occupying positions of authority, neighbors, friends, and family members” (Egan, 2008). As impunity and social breakdown from the war spread into general society, sexual violence continued and is still going on today.

**Characteristics of Sexual Violence in the DRC**

The methods and types of sexual violence perpetrated span just as large of a spectrum as the types of perpetrators and the phases/areas of the conflict. While the most victimized age range is 19 to 45 years old, young adolescent girls are specifically targeted (Doctors without Borders, 2006). The Panzi Hospital has treated sexual violence victims ranging from 3.5 to 80 years old (Bartels, 2010). The types of sexual violence cover every crime mentioned in international law, from rape and forced prostitution to forced pregnancy and torture. Women are raped in front of their families, in public spaces, while going to work in the fields, while armies retreat, and even after abduction or conscription by armed forces (Breton-Le Goff, 2010). As many scholars and activists horrifyingly recount, “Rapists used different objects, including rifles, sticks, bananas, bottles, and pepper-covered pestles. These acts resulted in permanent injuries, fistulas, HIV infections, unwanted pregnancies, and the destruction of reproductive organs” (Breton-Le Goff, 2010).

Other crimes have reached new levels of atrocity. For example, Thomas Lubanga’s UPC army forced girls to undergo abortions (Breton-Le Goff, 2010). RCD prison guards subjected detainees to “electric shocking of the genitals, as well as compression or stretching of genital organs and breasts” (Breton-Le Goff, 2010). AFDL soldiers humiliated, stripped, and beat women who violated their ban on wearing pants, leggings, and mini-skirts. The FDLR would force a husband to watch while soldiers and then his own children were forced to rape his wife. Also, the Mayi-Mayi, Interahamwe, and Burundian rebels all frequently abducted women and forced them into sexual slavery. The UN mapping report also documented instances of disemboweling pregnant women, public rapes, and forced cannibalism (UN High Commissioner, 2010). Crimes of this gravity and frequency leave scholars and human rights advocates, Central African citizens, and the whole of humanity asking why? and how?

Sexual violence in Eastern Congo occurs due to a convergence of many factors that motivate and allow perpetrators to simultaneously justify and escape accountability for their crimes. Though the majority of experts who study rape “de-link” it from any kind of sexual desires and treat it merely as a violent manifestation of hatred or power, others lend credence to the “sexual urge” explanation. Some argue that warfare and conflict erode society’s constraints on a “male’s natural bestial sexual behavior,” causing men to unleash their sexual desires on women victims. In her interviews with perpetrators, Maria Baaz notes another explanation, that many soldiers “repeated that their harsh living conditions made it difficult for them to fulfill their supposed role as ‘the head and provider of the family,’” causing their wives to not love them and therefore not fulfill the conjugal obligation of sex anymore (Baaz, 2009).

In addition, tribal beliefs and customs are used to justify or even promote certain acts of sexual violence. Some tribal chiefs claim the right to sex with young virgin women, while militia groups often rape virgin girls and pregnant or breast-feeding women for their “protection” in combat or “cure” of diseases like HIV/AIDS. The Mayi-Mayi and the MLC under Jean-Pierre Bemba both
created fetishes with dried sexual parts of the body (hands, breasts, penises, etc.) and wore them during military operations for protection (Breton-Le Goff, 2010).

The group structure of military groups may also account for such widespread willingness to engage in these acts, as the conventions of obedience, loyalty, conformity, and hierarchy remove a sense of agency from individuals by allowing them to participate in collective actions for which they themselves are not responsible (Baaz, 2009). This is particularly true for men and even boys who were taught from an early age “to be ‘masculine’ and violent in the military through methods specifically designed to create soldiers who are able (and willing) to kill to protect the state/nation” (Baaz, 2009). The UN mapping report documents the use of rape with kadogo (“little ones”) as military groups force their child soldiers to rape women – the embodiment of peace and protection – in order to “toughen them up” and to teach them the “masculine” ways of “protecting, warring, and killing” (Baaz, 2009; UN High Commissioner, 2010).

The “spiral of violence” also catalyzes rape in warfare, as the stigma and sensitivity to violence decreases, creating “morally disengaged” witnesses whose morality no longer prevents them from inflicting torture and rape (Baaz, 2009). In addition, rape in recent conflict has commonly represented a form of ethnic cleansing, where perpetrators destroy social ethnicity by “inflicting shame, suffering, and humiliation” and biological ethnicity by “polluting bloodlines, forcibly impregnating women to produce ‘ethnically-cleansed’ children,” and spreading HIV/AIDS (Bartels et al., 2010). Finally, armed groups throughout history have utilized rape as a tool to demonstrate power and victory; Jullienne Chakupewa, who works in Goma as a rape counselor, told New York Times reporter Nicholas Kristof, “All militias here rape women, to show their strength and to show your weakness” (Kristof & WuDunn, 2009). As no motivating factor can explain every crime or even every rape that occurs in any country, clearly sexual violence in the Congo occurs due to combinations of each of these factors as well as others. However, each act of violence arises out of an environment of conflict and insecurity in which perpetrators realize their actions will go unpunished.

Even in the midst of a death toll upwards of 5 million, the incidence of sexual violence in the conflict in Eastern Congo has given rise to a uniquely atrocious array of physical/medical, socio-cultural, mental/psychological, economic, and political consequences. Mass rape and sexual abuse have turned the pervasive inequality and lack of autonomy that women experienced in the Congo into disease and injury, social stigma, psychological trauma, economic deterioration, and lack of political agency. The primary documentation for these consequences comes from hospitals, clinics, nongovernmental organizations, humanitarian aid organizations, and social agencies, which collect and aggregate information about sexual violence and its consequences. For example, a look at rape survivors who sought treatment at the Panzi hospital: on average 22 percent were treated for pelvic pain, 11 percent for lumbago, 7 percent for abdominal pain, and 6 percent for pregnancy (Bartels et al., 2010). With the high infection rate among perpetrators, 36 percent of the women feared contracting sexually transmitted infections or HIV/AIDS (Bartels et al., 2010; Kirchner 2007).

Many victims also suffered psycho-somatic difficulties including disrupted sleeping and eating patterns, decreased interest in sex, and behavioral changes (Rwanika, 2010). There is also the issue of social stigma, as many husbands and communities shun their rape survivors. Men often banish their wives for fear of contracting sexually transmitted infections as well as for the affront to their
masculinity because they could not protect their families (Rwanika, 2010; Clark 2009). Isolated and shunned women often are more vulnerable to additional instances of sexual violence, thereby repeating the cycle. Such stigma is often worse for male victims of rape, who lose their entire social identity due to their emasculation and forced homosexuality. Communities ridicule male victims as “bush wives” and cast them out (Rwanika, 2010).

The social stigma and memory of the rape also create mental and psychological problems including “intense fears (particularly of stimuli reminiscent of the attack), anxiety, phobias, tension, nightmares, anger, hostility, chronic depression, suicidal ideation, and/or suicide attempts, dissociative symptoms (e.g., feeling disconnected and/or ‘outside’ of our bodies) and chronic depression” (Rwanika, 2010). Victims also commonly suffer loss of economic autonomy and political agency. Physical injuries and fear of leaving the house prevent women from continuing their daily occupations and providing for households (Rwanika, 2010). Sexual violence survivors commonly feel voiceless and powerless in a male-dominated society, causing them to remain politically silent about their suffering (Rwanika, 2010). This lack of political agency is also due to a lack of confidence in a political system whose senior officials, military officers, police, and other agents perpetrate and subsequently fail to punish such crimes. In general, the culture of impunity and lack of security that create conflict and thus sexual violence also exacerbate their consequences by preventing effective treatment of and awareness about their horror.

**International Responses to Sexual Violence**

Since the international community learned of the mass sexual violence in the Congo, a number of different responses have aimed to address such large-scale violence; some have been more effective than others. The first major response came in the form of human rights reports, as awareness about sexual violence in the Congo would necessarily precede more tangible action. In 2002, Human Rights Watch released the first report focused solely on sexual violence in Eastern Congo. This sparked a number of other human rights organizations including Amnesty International and Doctors without Borders to research and publish reports as well (Breton-Le Goff, 2010). Additionally, the UN High Commissioner for Human Rights prepared the mapping report, a compilation of research that documented the “most serious violations of human rights and international law in the DRC between March 1993 and June 2003” and included an entire chapter on sexual violence (Human Rights Watch, 2010).

However, public awareness has only gone so far in spurring international action to stop sexual violence in the Congo. Several global advocacy and humanitarian aid campaigns have sought to treat sexual violence victims and share their stories, but few offer tangible solutions to stop the violence. In 2008 V-Day and UNICEF launched a global campaign called “Stop Raping Our Greatest Resource: Power to Women and Girls in DRC,” while partnering with the Panzi Foundation to build a special sexual violence center called The City of Joy in Bukavu (“City of Joy,” 2010). Doctors without Borders has succeeded in opening options for medical consultation after rape, including administration of antiretroviral prophylaxis and the morning-after pill, and providing medical certificates attesting rape to ensure legal protection (Doctors without Borders, 2006). In addition, the Enough Movement has focused on the international community’s role in the trade of conflict minerals that are associated with the increase in sexual violence. Despite the increased awareness, little has been done in terms of improvements on the ground (Enough Project Team, 2010).
Finally, international actors ranging from the US State Department to the African Union have passed laws aimed at addressing sexual violence in the DRC. After her visit to the DRC in September 2009, US Secretary of State Hillary Clinton encouraged the UN to adopt Security Council Resolution 1888 while simultaneously pushing the Congolese government to investigate and prosecute members of FARDC who committed sexual crimes (Human Rights Watch, 2010). In 2007, the UN General Assembly adopted a resolution “eliminating rape and other forms of sexual violence,” while the Security Council passed Resolution 1820 of a similar nature; neither have yet achieved their goals (Breton-Le Goff, 2010). The International Conference on the Great Lakes Region oversaw the adoption of Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, and the European Parliament passed legislation urging action from other actors (Breton-Le Goff, 2010). The UN Secretary-General also appointed Margot Wallstrom to serve as a new Special Representative for combating sexual violence in conflict (Whitman, 2010) and has since appointed Zainab Hawa Bangura to succeed her. While these efforts have been admirable and important, these actors must follow through on implementation and enforcement of resolutions in order for victims to see lasting improvement.

Preventing and Protecting against Sexual Violence

As the general insecurity in Eastern Congo allows sexual violence to continue, it is imperative that national and international actors prioritize the prevention of and protection against sexual violence, as well as security sector and military reform in order to establish peace and security in the region. The UN Mission in the Democratic Republic of the Congo (MONUC, now MONUSCO) failed through its temporary and limited mandate to protect civilians from rape or to secure the eastern region of the Congo. As Human Rights Watch explained in its 2010 annual report:

> MONUC struggled to balance its mandate for civilian protection with its support to the Congolese military operations [... Diplomats] raised human rights concerns, especially on sexual violence, but stopped short of putting pressure on the Congolese government or MONUC to suspend military operations until measures for civilian protection were in place. (Human Rights Watch, 2010)

These peacekeeping forces must stop sexually exploiting Congolese women and girls, as this jeopardizes the mission’s legitimacy as a whole (Human Rights Watch, 2005).

A major mistake on the part of the UN Mission was to shift its focus toward post-peace processes before peace was ever established. A 2008 MONUC inventory of donor funding logged that only 11 percent of funds were devoted to protecting women and girls from sexual violence, while the rest was spent on “medical treatment, legal assistance, and capacity-building” (Human Rights Watch, 2009). The UN Mission must fulfill its obligations under Chapter 7 to protect civilian lives first and foremost by implementing a number of reforms: mobile police forces that patrol villages likely to be attacked, more secure prison systems, an Early Warning System to determine and spread awareness of sexual violence on a massive scale, a Women’s Protection Unit within the UN’s Department of Peacekeeping Operations, and other strategies to protect civilians (Bhanji et al., 2009). Such innovations would prevent attacks like what took place in Goma and Walikale where nearby UN peacekeepers could not reach the afflicted areas in time to protect civilians from rape and sexual violence (Breton-Le Goff, 2010).
While the peacekeeping force’s 2009 Comprehensive Strategy has achieved some success, it “faces severe challenges due to the lack of functioning formal state institutions and a professional police force” (Solhjell, 2009). Security sector and military reform are absolutely critical to effective state institutions that can control the violence and negotiate for peace. The local and national governments must professionalize the police force through enhanced training and higher salaries in order to reduce corruption. Security agents and forces must vet all state institutions—from the civil service and law to the army’s ranks and police—to remove individuals who have committed breaches of international humanitarian and criminal law (UN Mission in Democratic Republic of Congo, 2009). Additionally, armed groups must undergo demobilization and disengagement plans as well as more effective brassage in order to reform the FARDC and prevent its perpetration of sexual violence as well as insecurity overall (UN Mission in Democratic Republic of Congo, 2009).

The United Nations should encourage women’s participation in government, “including the political, judicial, and law enforcement sectors” (Bhanji et al., 2009). Women’s participation in peace processes could change the bargaining dynamic in favor of peaceful resolution; participation as judges in rape cases could prevent such corruption and partiality in the judicial system; participation in police forces could create a security sector more willing to accept reports of sexual violence; and participation in government could allow women to advocate for better services for rehabilitation and recovery. Overall, the national government and the UN Mission must make sweeping reforms and innovations to establish peace (or at least security from sexual violence) in the eastern Congo; lack of basic security will prevent the DRC and international actors from ever effectively investigating and prosecuting sexual violence crimes.

Responding to Sexual Violence

To address the culture of impunity that allows perpetrators to escape punishment, the DRC and international actors have taken limited but somewhat effective steps toward establishing judicial accountability. However, the international community must devote more attention, political will, and resources toward judicial reform that punish past crimes and deter future ones. Of those surveyed in a national poll, 82 percent of respondents believed that accountability is necessary to secure peace, and 70 percent believe that rape/sexual violence crimes are the most important to hold war criminals accountable for. Furthermore, the general population surveyed supported more nationalized trials as opposed to those at the International Criminal Court (Vinck, Pham, Baldo, & Shigekane, 2008). While judicial reform in 2006 created revolutionary laws against sexual violence including rape, forced pregnancy, sexual slavery, forced prostitution, and forced sterilization, the UN mapping report still predicted that the Congolese judicial system would “lack the capacity in the short- or medium-term to prosecute the crimes it documented” (Human Rights Watch, 2010).

A number of military tribunals have begun trying soldiers charged with sexual violence (including the Mbandaka and Walikale military courts). Critics, however, point out that military law does not follow the ICC’s definition of sexual violence nor does the procedure guarantee many internationally standardized rights including the right to appeal (Breton-Le Goff, 2010). On this local and national level, NGOs have successfully trained “activists, lawyers, police officers, and judicial bodies” while the European Union provided capacity building through construction of court houses, prisons, and other structures in the Bunia region (Breton-Le Goff, 2010; Oury et al., 2005). Of the 1,221 rape and sexual violence cases monitored since 2008, the Human Rights Office has documented conviction of 374 war criminals (Breton-Le Goff, 2010). Unfortunately, these
prosecutions face inefficiency, as gathering evidence takes time; corruption, as perpetrators pay off judges; insecurity, as witness protection programs are lacking; and impunity, as many prisoners escape from jail after conviction (Clark, 2009). These major problems stem from a lack of political will, as the weak judicial system received no more than 0.3 percent of the national budget in 2007 (Bhanji, 2009).

On an international level, the DRC government reported its situation to the International Criminal Court in 2004 (Human Rights Watch, 2010). Since then, the Office of the Prosecutor has charged two individuals – Germain Katanga and Mathieu Ngudjolo Chui – with rape and sexual slavery, though notably dropping sexual slavery counts and also choosing not to indict Thomas Lubanga for sexual violence (Breton-Le Goff, 2010). By fusing international criminal law with the national judicial system, the DRC can learn from the expertise of international prosecutions and further the pursuit of justice for victims of sexual violence.

Applying International Criminal Law

International law has, especially throughout the 20th century, come to criminalize sexual violence and developed procedure to prosecute such crimes. While the history and role of rape in warfare dates back to the beginnings of war itself, international law’s inclusion of sexual violence as a war crime or other violation of international law is a more recent development. The first international criminal trial occurred 471 years before Nuremberg, when 27 judges of the Holy Roman Empire tried Sir Peter von Hagenbach in Breisach, Germany for crimes of pillage, murder, and rape (Shanker, 2007; Askin, 1997). The 1907 Hague Convention implicitly criminalized rape in Article 46 when guaranteeing respect for “family honour and rights” (Shanker, 2007), and Article 3 of the Geneva Conventions of 1949 declared sexual violence a “crime against humanity” (Bartels et al., 2010). While the Nuremberg Trials did contain some witness testimony about cases of sexual violence, neither rape nor any other sexual crime was prosecuted in the trials or in their counterparts in Tokyo.

Much of the important case law about sexual violence came from the International Criminal Tribunals for the former Yugoslavia and for Rwanda, as these represented the first modern attempts to prosecute sexual violence as a crime of war (Bartels et al., 2010). In The Prosecutor v. Jean-Paul Akayesu, the trial chamber of the Rwanda tribunal (ICTR) convicted the defendant of rape as a form of genocide on September 2, 1998 (The Prosecutor, 1998). Just two months later on November 16, 1998, the trial chamber of the Yugoslavia tribunal (ICTY) determined that in the case of The Prosecutor v. Zejnil Delalic, rape could constitute torture if it met all of the necessary elements, as it likely would (The Prosecutor, 1998). In the subsequent ICTY verdict of The Prosecutor v. Dragoljub Kunarac, the trial chamber convicted the defendant of sexual slavery, rape, and violations of human dignity as war crimes and crimes against humanity (The Prosecutor, 2001).

On July 1, 2002, international law jumped leaps and bounds toward prosecuting sexual crimes when the UN General Assembly convened in Rome, Italy, for a diplomatic conference in which the Rome Statute establishing the International Criminal Court was adopted (UN High Commissioner, 2010). The Rome Statute (ratified by the DRC on April 11, 2002) defines “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of a comparable severity” as a crime against humanity. The ICC could also define sexual violence as genocide if carried out with “intent to destroy, in whole or in part, a national, ethnic,
racial, or religious group” (Rome Statute, 2002). These recent developments in international law are of the utmost importance in the current conflict in the DRC, where impunity reigns and international actors turn to the law for solutions.

Applying International Criminal Procedure

A number of very important procedural innovations have occurred between the first trial of Sir Peter von Hagenbach for rape in 1474 and the trial of Ratko Mladic that began in summer 2011. Across the board, war crimes tribunals have realized the importance of a more gender-balanced staff in addition to advisors and legal officers who possess specific experience related to sexual violence, women’s issues, trauma, and other topics (Women’s Initiatives for Gender Justice, 2011). In October 1994, ICTY Prosecutor Richard Goldstone appointed Patricia Viseur Sellers as the first Legal Advisor for Gender to the Office of the Prosecutor; she served as Legal Advisor for Gender to the ICTY Prosecutor from 1995 to 1999 (Sellers, 2009). Sellers notes, however, that despite being hired to develop investigation and prosecution strategies to effectively address sexual violence, “[The legal advisors] commanded a limited sphere in which to set gender policy and monitor its execution” (Sellers, 2009). The Rome Statute establishing the International Criminal Court requires that the Prosecutor “take appropriate measures to ensure the effective investigation and prosecution of crimes,” giving particular interest to “sexual violence, gender violence, or violence against children” (Rome Statute, 2002).

The reluctance and ignorance of many prosecutors, investigators, judges, and others to devote extra time, effort, and resources on a specific strategy for sexual violence presents a key problem even today. National and international NGOs lobbied at the Rome Conference for courts not only to focus on women more but also to include more women on staff and achieved requirements in the Rome Statute for a legal advisor for sexual and gender-based violence as well as “fair and equal representation of female and male” judges, prosecutors, and staff (Rome Statute, 2002). Currently, the International Criminal Court as a whole is 46% female, including a 58% female Judiciary, a 46% female Office of the Prosecutor, and a 48% female Registry (Women’s Initiatives for Gender Justice, 2011). Many looked to the election of a new female Chief Prosecutor, Fatou Bensouda, to give sexual violence the focus its victims deserve. Bensouda warned war criminals the day after her election that, while sexual violence too often goes unreported and unpunished, that her office “will make sure that these crimes that they have suffered will be punished – their perpetrators being arrested and prevented from committing additional crimes” (ICC, 2012).

In addition to increased focus on ensuring prosecutions and convictions for sexual violence, tribunals have developed procedures to protect victims and witnesses of rape and sexual violence. At the International Criminal Tribunal for Rwanda (ICTR), victims and witnesses who testified in Arusha often returned home to harassment and even violence (Nowrojee, 2005); as a result, the Tribunal implemented local protection measures including extra security and surveillance, psychosocial support, identity protection, and even witness relocation programs (De Brouwer, 2005). In-hearing privacy measures include closed and private sessions, voice and picture scrambling, in camera testimony, and redacted/protected names and information (De Brouwer, 2005). During the trials, ICTR and ICTY victims and witnesses may be provided support staff, psychologists, or therapists to assist them in testifying (De Brouwer, 2005). The ICC’s Victims and Witnesses Unit coordinates witnesses and helps them to understand and prepare for trial
proceedings, especially when testimony may include traumatic events or discussion of private sexual parts or acts (Pillay, 2010).

Finally, prosecutors and defense attorneys are expected to respect gender sensitivity during questioning and cross-examination periods by not asking repetitive questions, allowing for breaks, and avoiding unnecessary questions about consent (De Brouwer, 2005). The ICC’s Rules of Procedure and Evidence contain special rules regarding evidence in sexual violence cases; Rules 70, 71, and 72 declare inadmissible any evidence regarding the victim’s prior or subsequent sexual conduct or the victim’s consent, and Rule 63 states that additional testimony is not required to corroborate a victim’s testimony, as is the case in many national jurisdictions (Rules of Procedure and Evidence, 2002).

**Reforming the Congolese Judicial System**

In order to overcome the lack of capacity and political will to prosecute sexual violence, the DRC should embrace a number of judicial reforms informed by years of developments and lessons learned at other tribunals. Existing international tribunals in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and The Hague must spread their best practices and legal developments on sexual violence to national jurisdictions such as the DRC through capacity-building, legal and judicial reform, training, and other innovative practices.

First, the international community should assist the DRC in establishing a hybrid war crimes tribunal or a domestic mixed chamber to prosecute genocide, crimes against humanity, and war crimes. This tribunal or chamber should include a special division or team devoted to investigating and prosecuting sexual violence. While an ad hoc International Criminal Tribunal like that in the former Yugoslavia or Rwanda is no longer internationally popular, and International Criminal Court jurisdiction cannot extend to acts before its ratification in 2002, the Congolese government can and should establish a chamber or tribunal with both national and international officials that can investigate and prosecute crimes dating back to the DRC’s first war in 1996. By modeling its structure and jurisdiction on the Bosnian War Crimes Chamber – a domestic chamber – or the Special Court for Sierra Leone – an international hybrid tribunal, officials from these judicial bodies can assist in the creation and practice of a Congolese body effective at prosecuting international crimes, especially sexual violence. In November 2010, the Congolese Minister of Justice proposed a bill establishing a specialized mixed court to prosecute international crimes and has since procured the advise of almost fifty Congolese and international organizations (Lee, 2012). By publicly investigating, prosecuting, and potentially convicting the most well-known government officials and military commanders notorious for sexual crimes, this judicial body can make important strides in restoring the public’s faith in the judicial system, deterring future crimes, and ending the culture of impunity (Pratt & Werchick, 2004).

In addition, the Congolese judicial system should continue utilizing mobile courts, traditional mechanisms, and international assistance in bolstering its prosecutions of sexual violence. Recently, the American Bar Association’s Rule of Law Initiative harnessed mobile courts – which have long traveled throughout remote regions in the DRC to hear cases – to develop specialized bodies to try gender crimes (“Justice in DRC,” 2012). Out of 248 cases heard from 2009 to 2011 by one mobile court, 140 resulted in rape convictions and yielded sentences ranging from 3 to 20 years (“Justice in DRC,” 2012). Further, the DRC should draw on the experience of Rwanda’s gacaca courts in
order to develop its informal judicial processes into effective responses to sexual violence (Freccero et al., 2011). While this will require ensuring protection for due process and international human rights standards as well as adequate security and sensitivity for such crimes, these informal judicial systems can represent the most accessible, culturally-friendly, efficient, and cost-effective means of achieving justice and reconciliation for masses of victims.

Finally, the Congolese judicial system can harness international expertise surrounding sexual violence by domesticating the Rome Statute; allowing international attorneys, judges, and staff to train their local and national judicial counter-parts and recruiting sexual violence experts with international tribunal expertise. By enacting legislation to implement the Rome Statute, the DRC will ensure its judicial system possesses jurisdiction over international crimes and that its law and procedure conform to international standards. For example, the current Congolese Criminal Code should be revised to define penetration with objects and male rape as “rape” and to incorporate war crimes and crimes against humanity (Human Rights Watch, 2005). In training local and national police, prosecutors, and judges to properly investigate and prosecute sexual violence, the international community can assist in effective prosecutions of sexual violence. These trainings should focus on collections of forensic evidence, medical examinations of sexual violence survivors, evidentiary analysis, gender sensitivity, criminal law and prosecution strategies, varying modes of liability, sexual violence jurisprudence, judgments and sentencing, and appellate procedures. Specialized international sexual violence and gender experts should be infused into the mixed chamber or hybrid tribunal to support investigations and prosecutions. Many of these reforms themselves are not novel or untested, but rather have been unsuccessful due to lack of coordination, training, capacity-building, and lessons-sharing.

Cooperating, Educating, and Building Capacity to Prosecute Sexual Violence

While no two national systems share identical challenges or require identical solutions, the international community should utilize the mounting attention to and expertise in sexual violence that exists among current legal scholars, prosecutors, and judges to design and implement tested and effective practices. David Kaye (2011) of the Council on Foreign Relations notes, “Typically, governments and international organizations do not coordinate their efforts […] The creation of regularized information sharing and joint country approaches would go a long way to improve coordination”. Possible venues for information sharing include outreach strategies, best practice manuals and guides, joint investigations, an online database of jurisprudence and resources, legal trainings and education, trial monitoring, and conferences of experts and donors. First, an outreach strategy can drastically improve the efficacy and perception of a controversial war crimes tribunal within local communities; the International Criminal Tribunal for the former Yugoslavia learned this the hard way when, after six years of existence, the court had still not developed an outreach strategy and faced significant disillusionment in local communities due to political and media bias.

An effective outreach strategy is one of many best practices and lessons learned that should be utilized from successful international courts, including the tribunals in the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia. In 2008, the International Criminal Tribunal for Rwanda published a manual that outlined best practices – for senior management, dedicated teams, investigations, witness preparation, trial chamber prosecutions, appeals, interpretation, witness care
and protection, and courtroom environment – for effectively handling sexual violence cases (Best Practices Manual, 2008). In addition, the UN High Commission for Refugees and the Women’s Commission for Refugee Women and Children have each published guidelines and manuals for sexual and gender-based violence, though neither have been widely disseminated or utilized (Pratt & Werchick, 2004).

The United States and its allies should also encourage international NGOs – including the American Bar Association, Avocats San Frontieres, and the Open Society Justice Initiative – to develop training programs and centers to provide education to prosecutors, judges, counsels, and other staff (Kaye, 2011). Moreover, the International Criminal Court’s new Chief Prosecutor, Fatou Bensouda, has considered allowing the Court to share information gathered on lower-level perpetrators in the DRC (Clifford et al., 2008), an innovation piloted in Bosnia’s War Crimes Chamber for the ICTY’s Rule 11bis cases. By drawing on the ICTY’s model and practices, the Chief Prosecutor can infuse proper investigation and prosecution tactics in the Congolese system while also bolstering the potential success of prosecutions and convictions. The ICC could even utilize this leverage to secure Congolese judicial reforms – abolition of the death penalty, witness protection, enforcement of arrests, etc. – in the absence of true political will (Clifford et al., 2008).

Establishing a legal library or an online database would allow Congolese staff to access the jurisprudence and resources of other international tribunals while also sharing their own effective strategies and developments for future tribunals. In a similar vein, prior to or upon creating a hybrid tribunal or domestic war crimes chamber, the international community should convene a series of conferences in which donors, legal scholars, NGOs, and Congolese officials can share effective strategies, build upon existing legal knowledge, and advance the collective will and expertise internationally for prosecuting sexual violence (Kaye, 2011). Finally, the appointment of international trial monitors to ensure that due process standards are met, sexual violence cases are prioritized, and prosecutions are effective, has historically raised awareness of the problems facing domestic chambers. According to Amnesty International (2009), in Bosnia and Herzegovina, a backlog of between 6,000 and 16,000 unresolved war crimes cases existed in the War Crimes Chamber; a sexual violence trial monitoring project launched last year by UN Women is tracking these prosecutions and putting pressure on the Chamber to make progress (ACIPS, 2011).

Through all of these different avenues – outreach strategies, best practice manuals and guides, joint investigations, an online database of jurisprudence and resources, legal trainings and education, trial monitoring, and conferences of experts and donors – the international community should facilitate the cooperation and coordination of international experts to advance the collective knowledge on justice for sexual violence. In this way, the international community can work with the Congolese judicial system to end impunity for sexual violence while also building upon the experience of the DRC to shape future justice for sexual violence.

Conclusion

In conclusion, local communities, the national government, and international actors must implement a broad array of reforms and policies designed to eliminate the culture of impunity and insecurity, which are characterized by high rates of sexual violence. The incidence of sexual violence as a tool of warfare in the Congo began in the early 1990s when, through the breakdown of local accountability mechanisms, Hutu genocidaire from Rwanda created insecurity in the East,
sparking civil and later all-out regional war. This insecurity and environment of conflict, as well as the pervasive culture of impunity, allowed sexual violence to flourish as a “war within the war” (Human Rights Watch, 2002). Only when the DRC addresses structural issues of impunity and insecurity through seeking cooperation with and capacity-building from the international community can it truly remove sexual violence’s place in warfare.
References


