

THE INTERNATIONAL CRIMINAL COURT APPEALS CHAMBER
RULING IN NTAGANDA: AN OPPORTUNITY TO IMPROVE
ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED CRIMES
AGAINST MEN AND BOYS

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“The crimes are intensely personal, the injuries often less visible, and the details provoke discomfort and aversion. But the alternative is silence, impunity, and grave injustice.”

Kelly D. Askin¹

I. INTRODUCTION

Sexual violence has been a part of armed conflict throughout history. Despite its prevalence, the issue has only recently been addressed in international jurisprudence. But, this growing recognition has largely focused on sexual violence against women, allowing the equally brutal physical and mental abuse of men to fade into the background.² For example, Article 76(1) of the 1997 Additional Protocol I to the Geneva Conventions specifically states that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”³

The International Criminal Court (ICC or Court) has jurisdiction, in accordance with the Rome Statute (Statute), with respect to the crime of genocide, crimes against humanity, and war crimes.⁴ The Statute specifically denotes crimes of sexual violence as both crimes against humanity and war crimes. Recognizing that the ICC’s jurisdiction extends to violence that occurs outside of “armed conflict,” as that term is defined in international law, this Note uses terms such as “wartime,” “in time of war,” “conflict,” and “extreme violence” interchangeably to encompass the larger category of “armed conflict”.

Recently in *The Prosecutor v. Bosco Ntaganda*, the Appeals Chamber of the ICC (Appeals Chamber) clarified that it has jurisdiction under the Statute over sexually violent crimes committed against members of the same armed group as the attacker or attackers.⁵ In its 2017 judgment on the appeal of Mr.

¹ Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 346 (2003).

² The instances of sexual violence against women are equally appalling, but this Note will focus on sexual violence against men and will not address in detail such violence against women.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 76(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (emphasis added).

⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Jurisdiction over the crime of genocide, crimes against humanity, and war crimes is explicitly granted under article 5 of the Statute. *Id.* art. 5(1).

⁵ Press Release, Int’l Criminal Court, Ntaganda Case: ICC Appeals Chamber Confirms the Court’s Jurisdiction over Two War Crimes Counts (June 15, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1313>.

Ntaganda, the Appeals Chamber stated there is no categorical limitation on who can be a victim of sexual violence as a war crime.⁶ Conduct is properly considered a war crime, and thus within the jurisdiction of the ICC, if “the conduct in question ‘took place in the context of and was associated with an armed conflict’ of either international or non-international character.”⁷ When this nexus requirement is met, sexual violence is considered a war crime under the Statute.⁸ This jurisdictional clarification opens the door for prosecution of sexually violent crimes committed against persons taking part in armed conflict, and may allow the ICC to play a role in defining the cultural norms surrounding wartime sexual violence.

This Note will argue that a gender-based approach to sexually violent crimes that utilizes the Appeals Chamber’s decision in *Ntaganda* can promote accountability for the virtually unrecognized male victims. Such an approach can redefine the cultural boundaries of sexual violence in the context of armed conflict. Part II explores the problem of sexual and gender-based international crimes by defining these crimes as committed against men and boys. Part II also expands on the history and progression of sexual violence against men. Part III details the ICC’s approach to sexual and gender-based crimes. Part III also explains the June 2017 decision of the ICC Appeals Chamber on Ntaganda’s Appeal. Part IV analyzes how the judgment on Ntaganda’s appeal may be used as a means to improve accountability for sexually violent crimes against men and boys. Part V concludes by arguing that the widespread issue of male sexual violence deserves increased recognition and that a gender-based approach to this problem using the decision in *Ntaganda* holds promise for male victims.

II. THE PROBLEM OF SEXUAL AND GENDER-BASED INTERNATIONAL CRIMES

The problem of sexual and gender-based international crimes is considered below by defining the crimes against male victims, exploring the history of wartime sexual violence, presenting evidence of the contemporary prevalence of male sexual violence, and expanding on the tradition of relative inattention to male victims of sexually violent crimes.

⁶ Prosecutor v. Ntaganda, ICC-01/04-02/06 OA5, Judgment on the Appeal of Mr. Ntaganda Against the “Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9,” ¶ 2 (June 15, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_03920.PDF [hereinafter *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction].

⁷ *Id.*

⁸ *Id.*

A. *Defining the Phenomenon of Sexual and Gender-Based International Crimes Against Men and Boys*

Male sexual violence in armed conflict is an act of dominance, grounded in a web of cultural preconceptions about masculinity, power, and other dynamics present in the context of sexual violence.⁹ First, this section explores the concepts of sex and gender in the context of sexual violence. Then, it addresses the two contexts in which sexually violent international crimes can occur.

1. *“Sex” and “Gender” as Targets of Atrocity*

The way in which individual cultures define and organize gender and sexuality shapes the experiences of sexual violence victims and determines how the victims’ communities react to such violence. In addition, community understandings shape the meaning of gender and sexuality within a society.¹⁰ Before discussing crimes of sexual violence committed against male victims, it is important to define “sex” and “gender” in this context.

a. *“Sex” and Biology*

The Office of the Prosecutor (OTP or Office) of the ICC in its 2014 Policy Paper on Sexual and Gender-Based Crimes (OTP Policy on Sexual and Gender-Based Crimes) states “[s]ex’ refers to the biological and physiological characteristics that define men and women.”¹¹ Sex, as so defined, denotes the biological characteristics that make a person male or female. It is, as one scholar suggests, a material concept of sexuality in which science determines what is considered male or female.¹²

⁹ AMALENDU MISRA, *THE LANDSCAPE OF SILENCE: SEXUAL VIOLENCE AGAINST MEN IN WAR* 10 (2015); Elizabeth Philipose, *Decolonizing the Laws of War*, in *THEORIZING SEXUAL VIOLENCE* 176, 185 (Renee J. Heberle & Victoria Grace eds., 2009).

¹⁰ Ann J. Cahill, *Sexual Violence and Objectification*, in *THEORIZING SEXUAL VIOLENCE*, *supra* note 9, at 14, 15; Philipose, *supra* note 9, at 185; KERRY F. CRAWFORD, *WARTIME SEXUAL VIOLENCE: FROM SILENCE TO CONDEMNATION OF A WEAPON OF WAR* 11 (2017) (proposing that sexual and gender-based violence are rooted in social norms).

¹¹ THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, *POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES* (2014), <https://www.icc-cpi.int/ic-docs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [hereinafter OTP Policy Paper SGB Crimes].

¹² Roger Scruton, *Sex and Gender*, in *SEX AND GENDER: A SPECTRUM OF VIEWS* 66, 67 (Philip E. Devine & Celia Wolf-Devine eds., 2009).

Sexual crimes that fall under the subject-matter jurisdiction of the ICC are listed under Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute.¹³ Referring to the terms as used in the above articles of the Statute, the OTP Policy on Sexual and Gender-Based Crimes clarifies that:

[in] relation to ‘rape’, ‘enforced prostitution’, and ‘sexual violence’, the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person’s incapacity to give genuine consent.¹⁴

The OTP notes, “[a]n act of a sexual nature is not limited to physical violence,” as sexual crimes often involve non-physical acts with a sexual element—for example, forced nudity.¹⁵

b. “Gender”: *The Absence or Presence of “Masculinities”*

The OTP Policy on Sexual and Gender-Based Crimes states that “[g]ender, in accordance with Article 7(3) of the Rome Statute of the ICC, refers to males and females, within the context of society.”¹⁶ This definition, according to the OTP, “acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”¹⁷

The OTP Policy on Sexual and Gender-Based Crimes defines “gender-based crimes” as those “committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.”¹⁸ The OTP noted that “[g]ender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.”¹⁹ Roger Scruton proposed in *Sex and Gender* that gender is an intentional distinction between masculine and

¹³ OTP Policy Paper SGB Crimes, *supra* note 11, at 3; *see also* Rome Statute, *supra* note 4, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

¹⁴ OTP Policy Paper SGB Crimes, *supra* note 11, at 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

feminine that considers people's reactions to the physical and behavioral differences between men and women.²⁰

"Gender perspective," according to the OTP Policy on Sexual and Gender-Based Crimes, "requires an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions."²¹ The OTP states that a gender perspective "will enable the Office to gain a better understanding of [sexual and gender-based] crimes, as well as the experiences of individuals and communities in a particular society."²² That policy further explains that "'gender analysis' examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes."²³ In regards to the work of the Office, the OTP Policy on Sexual and Gender-Based Crimes provides gender analysis and "involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities."²⁴

2. *Contexts Within Which International Crimes May Occur*

As a general matter, international crimes within the jurisdiction of the ICC fall into two categories: crimes that occur in the context of an armed conflict and crimes that occur outside the context of an armed conflict. The first category includes war crimes, while the latter includes genocide and crimes against humanity.

a. *War Crimes: Armed Conflict Nexus Required*

Article 8 of the Statute gives the Court jurisdiction over war crimes, defined in section 2(b) as including "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law."²⁵ Article 8(2)(b)(xxii) categorizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence as war crimes under the Statute.²⁶

To qualify as a war crime, the alleged conduct must have taken place in the context of and been associated with an armed conflict of international or

²⁰ Scruton, *supra* note 12, at 67.

²¹ OTP Policy Paper SGB Crimes, *supra* note 11, at 3.

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ Rome Statute, *supra* note 4, art. 8.

²⁶ *Id.*

non-international character.²⁷ This nexus requirement sufficiently and appropriately separates war crimes from ordinary crimes.²⁸ Because “[s]exual and gender-based crimes are often committed in the context of, and in association with, an international or non-international armed conflict . . . they may fall under the Court’s jurisdiction as war crimes”²⁹ In order to charge sexual violence as a war crime, prosecutors must make “an explicit connection between the sexual violence and the broader violence within which it takes place.”³⁰

b. Genocide and Crimes Against Humanity: No Armed Conflict Nexus Required

No nexus requirement exists for the crime of genocide or for crimes against humanity. Article 6 of the Rome Statute defines genocide as any of the following acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group”:

- (a) Killing members of the group;
- (b) [c]ausing serious bodily or mental harm to members of the group;
- (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) [i]mposing measures intended to prevent births within the group; [and]
- (e) [f]orcibly transferring children of the group to another group.³¹

The OTP Policy on Sexual and Gender-Based Crimes recognizes that the underlying acts of genocide within Article 6 of the Statute may have a sexual or gender element and that “[i]f committed with intent to destroy a national, ethnic, racial, or religious group, in whole or in part, such acts may amount to genocide.”³²

Article 7 of the Statute provides that a crime against humanity is “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”:

²⁷ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 2.

²⁸ *Id.*

²⁹ OTP Policy Paper SGB Crimes, *supra* note 11, at 20.

³⁰ Laurel Baig et al., *Contextualizing Sexual Violence—Selection of Crimes*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 173, 178 (Sersa Bramrertz & Michelle Jarvis eds., 2016).

³¹ Rome Statute, *supra* note 4, art. 6.

³² OTP Policy Paper SGB Crimes, *supra* note 11, at 18.

(a) Murder; (b) [e]xtermination; (c) [e]nslavement; (d) [d]eportation or forcible transfer of population; (e) [i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) [t]orture; (g) [r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) [p]ersecution against any identifiable group . . . ; (i) [e]nforced disappearance of persons; (j) [t]he crime of apartheid; [and] (k) [o]ther inhumane acts of a similar character³³

To prosecute sexual violence as a crime against humanity, the prosecutor must prove, at a minimum, that the sexually violent act was connected to the large-scale violence within which it occurred.³⁴

B. *History of Sexual and Gender-Based International Crimes*

Sexual violence has been used as a tool during armed conflict for centuries and has endured as a tactic of war throughout the twentieth century.³⁵ The materials available in the area of wartime sexual violence mostly concern crimes against women,³⁶ but, as Sandesh Sivkaumaran recognizes in his 2007 article “Sexual Violence Against Men in Armed Conflict”, “the dynamics present in [female sexual violence] are largely replicated in male sexual violence in armed conflict.”³⁷ The recent history of female sexual violence in armed

³³ Rome Statute, *supra* note 4, art. 7.

³⁴ Baig et al., *supra* note 30, at 181.

³⁵ Elisabeth Vikman, *Ancient Origins: Sexual Violence in Warfare, Part I*, 12 ANTHROPOLOGY & MED. 21, 22-24, 27-28 (2005) (noting that the Old Testament suggests a policy of rape during the early holy wars and a perception of rape as humiliating, that Greek literature contains a dominant theme of rape in the representation of siege warfare, and that Roman armies utilized sexual abuse in defeating cities); India Powell, Note, *From Incidental to Instrumental: The Codification of Rape as an International Crime*, 22 U.C. DAVIS J. INT’L L. & POL’Y 61, 63 (2015) (“Rape has historically been framed as an inevitable collateral consequence to armed conflict.”).

³⁶ Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT’L L. 253, 254 (2007); see also Anjali Manivannan, *Seeking Justice for Male Victims of Sexual Violence in Armed Conflict*, 46 N.Y.U. J. INT’L L. & POL. 635, 653 (2014) (“Documents at the international level frame sexual violence as an issue involving women and girls, excluding men from legal frameworks, enforcement mechanisms, and receiving protection.”); and Valorie K. Vojdik, *Sexual Violence Against Men and Women in War: A Masculinities Approach*, 14 NEV. L.J. 923, 924 (2014) (stating scholars have explored the relationship between gender, female bodies, and sexual violence against women without similarly rigorous consideration of sexual violence against men).

³⁷ Sivakumaran, *supra* note 36, at 254; see also Vojdik, *supra* note 36, at 926 (“Wartime rape of both male and female victims functions as an actual and symbolic means of masculinized dominance between competing ethnic, national, and other collectives.”).

conflict is therefore applicable to the discussion of sexual violence against males as a tool of war.³⁸

1. *In General*

Leading up to and during World War II, the Japanese military used mass rape as a tactic of war.³⁹ Members of the Japanese Imperial Army raped somewhere between 20,000 and 80,000 Chinese women during the 1937 invasion of Nanking.⁴⁰ They also kidnapped an additional 200,000 women and girls, as young as eleven years old, to be used as “comfort women.”⁴¹ The Japanese forced these women and girls into rape camps to service their soldiers.⁴² Only between 25 and 30 percent of these women are estimated to have survived.⁴³

When Bangladesh seceded from Pakistan during the 1971 Liberation War,⁴⁴ Pakistani soldiers raped between 200,000 and 400,000 Bangladeshi females, leaving thousands pregnant.⁴⁵ The victims ranged in age and social class, and were ostracized by their families and communities following the assaults.⁴⁶ During the Serbian and Bosnian-Serb ethnic cleansing campaign in the early 1990s, Bosnian-Serb forces assaulted women in the streets or in their homes, and took others to concentration camps, sometimes known as

³⁸ *Id.*

³⁹ Courtney McCausland, Comment, *From Tolerance to Tactic: Understanding Rape in Armed Conflict as Genocide*, 25 MICH. ST. INT'L. L. REV. 149, 154 (2017).

⁴⁰ CRAWFORD, *supra* note 10, at 1; McCausland, *supra* note 39, at 154 (explaining how this invasion of the former capital of the Republic of China, appropriately titled the “Rape of Nanking,” included over 20,000 incidents of rape during the first six weeks); Powell, *supra* note 35, at 66.

⁴¹ Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 89-90 (1999); McCausland, *supra* note 39, at 154 (explaining how women were taken almost entirely from territories occupied by the Japanese, including Korea, the Philippines, and China, and that the phrase “comfort women” denotes the approximately 200,000 women who were recruited as prostitutes by the Imperial Japanese Army and who were often exploited as sex slaves throughout Asia during World War II); Katherine Brooks, *The History of ‘Comfort Women’: A WWII Tragedy We Can’t Forget*, HUFFINGTON POST (Nov. 25, 2013), http://www.huffingtonpost.com/2013/11/25/comfort-women-wanted_n_4325584.html.

⁴² Stephens, *supra* note 41, at 90; *see also* McCausland, *supra* note 39, at 154.

⁴³ McCausland, *supra* note 39, at 154; Brooks, *supra* note 41.

⁴⁴ The Liberation War was a nine-month war between East Pakistan (now Bangladesh) and West Pakistan (now Pakistan), during which approximately 3 million people died. Lisa Sharlach, *Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda*, 22 NEW POL. SCI. 89, 94 (2000).

⁴⁵ *Id.*; Alexandra Takai, *Rape and Forced Pregnancy as Genocide Before the Bangladesh Tribunal*, 25 TEMP. INT'L & COMP. L.J. 393 (2011); CRAWFORD, *supra* note 10, at 15.

⁴⁶ Takai, *supra* note 45, at 395; *see, e.g.*, Sharlach, *supra* note 44, at 95.

rape camps.⁴⁷ They made women serve as sex workers, and intentionally impregnated and detained them until abortion was not an option.⁴⁸ Rape, sometimes committed publicly, served as an attack on the individual victims and the ethnic group as a whole—the purpose was to “humiliate, shame, degrade, and terrify” the targeted individual and community.⁴⁹ In 1992, rape in armed conflict received international attention for the first time in connection with the collapse of the Socialist Federal Republic of Yugoslavia.⁵⁰

The 1994 genocide in Rwanda⁵¹ involved widespread sexual violence—thousands of women were raped, sexually mutilated or subjected to sexual slavery.⁵² One study, recorded in Kerry Crawford’s book *Wartime Sexual Violence*, estimates that during the genocide, there were between 250,000 and 500,000 victims of sexual violence.⁵³ Propaganda portrayed Tutsi women as beautiful and desirable, but inaccessible to Hutu men, and publicly encouraged sexual assault; rape served as a political weapon to humiliate, degrade, and destroy the Tutsi women.⁵⁴ Using such tactics to target a community can be an effective tool in times of conflict.

2. *Against Men and Boys*

There is no denying the habitual sexual violation of women and girls accompanying armed conflict. The traumatic experiences of these female victims and the importance of punishing and preventing these crimes against women cannot be overstated. There is, however, another group of victims that

⁴⁷ Sharlach, *supra* note 44, at 96; *see also* CRAWFORD, *supra* note 10, at 15 (estimating that from 1991 to 1993, there were between 20,000 and 60,000 victims of sexual violence in the Bosnian conflict).

⁴⁸ Jonathan M.H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503, 523 (2003); Stephens, *supra* note 41, at 91.

⁴⁹ McCausland, *supra* note 39, at 155-56.

⁵⁰ *Id.* at 155.

⁵¹ In less than three months, Hutu soldiers and civilians killed approximately one million Tutsi, leaving over 250,000 women widowed and between 300,000 and 400,000 children without parents. Men used rape as a political weapon during the genocide, and the UN’s Special Rapporteur on Rwanda estimates there were between 250,000 and 500,000 rapes. Sharlach, *supra* note 44, at 98; *see also* Stephens, *supra* note 41, at 92.

⁵² Lori A. Nessel, *Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women that Flee*, 15 MICH. ST. J. INT’L L. 101, 107 (2007); Stephens, *supra* note 41, at 92.

⁵³ CRAWFORD, *supra* note 10, at 15.

⁵⁴ Nessel, *supra* note 52, at 109; Sharlach, *supra* note 44, at 98.

goes largely unnoticed.⁵⁵ Men are also targets of sexual violence, but legal recognition of the issue has focused heavily on female victims alone.⁵⁶

Sexual violence against men and boys is not a novel issue—ancient civilizations used sexual violence as a tool of war, and this violence was not limited to women but also encompassed acts of brutality against males.⁵⁷ In the past three decades alone, sexual violence against men has been reported in over twenty conflict-affected countries.⁵⁸ But, firsthand information regarding male sexual violence is difficult to find—perpetrators tend to avoid accountability and victims fear social humiliation.⁵⁹

A 2014 survey of penal codes in 189 countries, documented in Chris Dolan's brief prepared for the Refugee Law Project Workshop at the Overseas Development Institute in London, revealed that sixty-two countries did not recognize male victims of sexual violence.⁶⁰ When international law has recognized sexual violence against males, it has been referred to as "torture" or "mutilation," instead of rape or sexual violence.⁶¹

Sexual violence against males takes many forms: oral and anal rape or forced rape between victims, including family members; forced sterilization, nudity, and masturbation; sexual slavery; forced penetration of dead bodies;

⁵⁵ See MISRA, *supra* note 9, at xi (noting that as far as he was aware, his book was the first attempt to develop a theory of conflict-related sexual violence against males).

⁵⁶ Sivakumaran, *supra* note 36, at 253-54; see also Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT'L L.J. 639, 644 (2015) ("Like sexual violence against women and girls, sexual violence against men and boys has a long history and a much higher number of incidents than has always been presumed; yet attention to and recognition of this phenomenon is fairly recent."); Anjali Manivannen, *Seeking Justice for Male Victims of Sexual Violence in Armed Conflict*, 41 N.Y.U.J. INT'L & POL. 635, 653 (2014) ("Documents at the international level frame sexual violence as an issue involving women and girls, excluding men from legal frameworks, enforcement mechanisms, and receiving protection.").

⁵⁷ Vojdik, *supra* note 36, at 928; Sivakumaran, *supra* note 36, at 253.

⁵⁸ Tom Hennessey & Felicity Gerry, *International Human Rights Law and Sexual Violence Against Men in Conflict Zones*, HALSBURY'S L. EXCHANGE 1, 6 (2010) (noting these countries include El Salvador, Chile, Guatemala, Argentina, Greece, Northern Ireland, Chechnya, Turkey, the former Yugoslavia, Sri Lanka, Iraq-Kuwait, Coalition Iraq, Liberia, Sierra Leone, Kenya, Sudan, the Central African Republic, Burundi, Uganda, Rwanda, the Democratic Republic of Congo, Zimbabwe, and South Africa); Sivakumaran, *supra* note 36, at 257-58.

⁵⁹ MISRA, *supra* note 9, at xi; Dustin A. Lewis, *Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law*, 27 WIS. INT'L L.J. 1, 9 (2009).

⁶⁰ CHRIS DOLAN, INTO THE MAINSTREAM: ADDRESSING SEXUAL VIOLENCE AGAINST MEN AND BOYS (2014), available at http://www.refugeelawproject.org/files/briefing_papers/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf, archived at <http://perma.cc/DK32-EY4Q>.

⁶¹ Vojdik, *supra* note 36, at 926; see also Sivakumaran, *supra* note 36, at 256; and Lewis, *supra* note 59, at 9.

and genital violence, such as genital beatings and mutilation.⁶² While these acts are certainly classifiable as torture and mutilation, they are considered sexual violence because the acts are of a sexual nature and are committed by force, or by threat of force or coercion.⁶³ It is inaccurate to classify these acts of sexual violence and rape so narrowly.

C. Contemporary Prevalence of Sexual and Gender-Based International Crimes Against Men and Boys

Hennessey and Gerry, in their article *International Human Rights Law and Sexual Violence Against Men in Conflict Zones*, state that in the 1980s, 76 percent of male political prisoners surveyed in El Salvador reported one or more instances of sexual torture.⁶⁴ Similarly, a study of 6,000 concentration camp prisoners in and around Sarajevo revealed that 80 percent of males had been raped in detention.⁶⁵ More recently, in 2013 the U.N. Commission of Inquiry on Syria reported the perpetration of sexual violence against men in detention centers.⁶⁶ In addition, a 2013 survey by the U.N. Refugee Agency involving 520 Syrian males between the ages of 12 and 24 taking refuge in Lebanon revealed that 10.8 percent of those surveyed experienced an incident of sexual harm or harassment in the past three months.⁶⁷

In *Sexual Violence in Armed Conflict*, Janie Leatherman explains that in Afghanistan, warlords have returned to the traditional practice of using young boys for sex and entertainment.⁶⁸ These boys are sold by their families or taken as street orphans.⁶⁹ They are called “bacheh beereesh,” or beardless boys, and are dressed in women’s clothing, made to sing and dance, and traded for sexual favors among warlords and other powerful figures.⁷⁰

A 2016 report by the Institute for Security Studies revealed that in 2014 one in three adult male refugees from the Democratic Republic of Congo

⁶² Vojdik, *supra* note 36, at 929; Sivakumaran, *supra* note 36, at 263-67 (discussing various forms of male sexual violence).

⁶³ Rome Statute, *supra* note 4, art. 8(2)(b)(xxii).

⁶⁴ Hennessey & Gerry, *supra* note 58, at 6; *see also* Vojdik, *supra* note 36, at 929.

⁶⁵ Hennessey & Gerry, *supra* note 58.

⁶⁶ U.N. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59, at 76-77 (Feb. 5, 2013).

⁶⁷ Sarah Chynoweth, “*We Keep It in Our Heart*”: *Sexual Violence Against Men and Boys in the Syria Crisis*, THE UN REFUGEE AGENCY 1, 30 (Oct. 2017), <https://data2.unhcr.org/en/documents/download/60864>.

⁶⁸ JANIE L. LEATHERMAN, *SEXUAL VIOLENCE AND ARMED CONFLICT* 53 (2011).

⁶⁹ *Id.*

⁷⁰ *Id.* at 53-54.

(DRC) living in western Uganda were victims of sexual violence.⁷¹ That research also supports the conclusion that boys are particularly vulnerable to conflict-related sexual violence.⁷² Because sexual violence against males has recently been particularly widespread in areas of conflict in the DRC, it is helpful to discuss the contemporary effects of such violence in that context.

In the wake of the 1994 Rwandan genocide, the DRC was the site of two civil wars beginning in 1996 and 1998.⁷³ During these conflicts, both men and women were raped and subjected to brutal sexual violence.⁷⁴ In 2011, the U.S. Government Accountability Office released a report to congressional committees containing information on the rate of sexual violence in eastern DRC and Uganda.⁷⁵ The report was based on 2010 population-based surveys.⁷⁶ The results showed that 33 percent of the population in that area experienced some form of sexual violence between 1994 and 2010.⁷⁷

According to a 2005 Human Rights Watch report, men and boys in the DRC increasingly reported having been raped and otherwise sexually assaulted in connection with armed conflict.⁷⁸ The male victims suffered mental, sexual, and health consequences—including shame, guilt, anxiety, suicidal thoughts, and disinterest in sex—similar to those experienced by female victims.⁷⁹ These male victims also suffered from sexually transmitted infections, including HIV, and sexual impotence.⁸⁰ Naomi Cahn, in her 2005 article *Beyond Retribution and Impunity*, states that the rate of HIV-AIDS in the DRC is estimated to be much higher in areas of conflict.⁸¹ Pauline Oosterhoff

⁷¹ Allan Ngari, *Male Victims of Sexual Violence: War's Silent Sufferers*, INST. FOR SEC. STUDIES (June 10, 2016), <https://issafrica.org/iss-today/male-victims-of-sexual-violence-wars-silent-sufferers>.

⁷² *Id.*

⁷³ Anna Kuniewicz, *International Criminal Court Prosecutor v. Bosco Ntaganda Preliminary Ruling*, 15 CHI.-KENT J. INT'L & COMP. L. 1, 2 (2015); Françoise Duroch et al., *Description and Consequences of Sexual Violence in Ituri Province, Democratic Republic of Congo*, BMC INT'L HEALTH & HUMAN RIGHTS (Apr. 19, 2011), <https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/1472-698X-11-5>.

⁷⁴ Gaëlle Brenton-Le Goff, *Ending Sexual Violence in the Democratic Republic of the Congo*, 34 FLETCHER F. WORLD AFF. 13, 16 (2010).

⁷⁵ U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-702, INFORMATION ON THE RATE OF SEXUAL VIOLENCE IN WAR-TORN EASTERN DRC AND ADJOINING COUNTRIES (2011).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Juliane Kippenberg, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, 17 HUM. RTS. WATCH 1, 20-21 (2005); see also Sivakumaran, *supra* note 36, at 259-60.

⁷⁹ Vojdik, *supra* note 36, at 924, 932; Sivakumaran, *supra* note 36, at 255; see generally Marion Pratt & Leah Werchick, *Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo*, USAID/DCHA ASSESSMENT REP. 9, 14-16 (2004).

⁸⁰ Vojdik, *supra* note 36, at 932; Sivakumaran, *supra* note 36, at 273.

⁸¹ Naomi Cahn, *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, 1 STAN. J. C.R. & C.L. 217, 223 (2005).

recognizes in her 2004 article *Sexual Torture of Men in Croatia and Other Conflict Situations* that men who have been victims of sexual violence such as castration or genital mutilation have higher rates of depression and suicide.⁸²

Susan Bartels argues in her 2010 report on sexual violence in eastern DRC, *Now, The World Is Without Me*, that sexual violence used to defeat a community is “the ultimate display of power and dominance . . . used by the opposing force to signify the weakness and inadequacy of the men in the targeted social grouping or community.”⁸³ These men absorb this message, perceiving their inability to protect women against assault as their own final humiliation in the war.⁸⁴ The fear of stigmatization prevents many male victims of wartime sexual assault from reporting what happened to them, and this feeds into the perception that sexual violence against males is infrequent.⁸⁵

One example of this issue is the story of Jean Paul.⁸⁶ Jean Paul said he was abducted by rebels in the DRC and raped by eleven men every night for nine days straight.⁸⁷ He said he never told his family what happened to him because he feared he would no longer be considered a man.⁸⁸ Paul explained that when a man does not reach the standard set for him—to be a leader and a provider—society perceives that something is wrong with him.⁸⁹ This perception makes men ideal victims in the context of armed conflict, as a leader cannot protect his community if the community believes that he cannot even protect himself.

Another example is the story of Stephen Kigoma, a male rape survivor from the DRC.⁹⁰ In August 2017, Kigoma spoke to BBC News regarding his experience.⁹¹ Kigoma said he was raped in 2011 during the conflict in the

⁸² Vojdik, *supra* note 36, at 932.

⁸³ Susan Bartels et al., “*Now, The World Is Without Me*”: *An Investigation of Sexual Violence in Eastern Democratic Republic of Congo*, HARVARD HUMANITARIAN INITIATIVE 1,5 (2010), <https://www.oxfamamerica.org/static/oa3/files/now-the-world-is-without-me-sexual-violence-in-eastern-drc.pdf>.

⁸⁴ *Id.*

⁸⁵ Lewis, *supra* note 59, at 9 (recognizing that the destructive stereotypes and norms attached to male victims of sexual violence impede on accurate reporting by male victims in conflict settings); *see also* de Brouwer, *supra* note 56, at 646; Vojdik, *supra* note 36, at 946-47; Sivakumaran, *supra* note 36, at 255; MIRSA, *supra* note 9, at 1 (noting statistical evidence likely underrepresents the number of male victims of sexual violence).

⁸⁶ Will Storr, *The Rape of Men: The Darkest Secret of War*, THE GUARDIAN (Jul. 16, 2011), <https://www.theguardian.com/society/2011/jul/17/the-rape-of-men>; *see also* de Brouwer, *supra* note 56, at 645.

⁸⁷ Storr, *supra* note 86.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ “*We Need to Talk About Male Rape*”: *DR Congo Survivor Speaks Out*, BBC AFRICA (Aug. 3, 2017), <http://www.bbc.com/news/world-africa-40801782>.

⁹¹ *Id.*

DRC, and that he “hid that [he] was a male rape survivor” because he could not open up about it—“it’s a taboo,” Kigoma said.⁹² “As a man,” Kigoma said he cannot cry because “[p]eople will tell you that you are a coward, you are weak, you are stupid.”⁹³ Kigoma told BBC News that his rape took place when men attacked his home and killed his father.⁹⁴ The men raped him, saying “[y]ou are a man, how are you going to say you were raped?”⁹⁵ Rape, according to Kigoma, is “a weapon they use to make you silent.”⁹⁶ These instances exemplify the experiences of countless male victims of sexual violence and offer a firsthand look at the struggle these survivors face in seeking help.

D. The Tradition in International Criminal Law of Relative Inattention to Sexual and Gender-Based International Crimes Against Men and Boys

Beginning in the 1990s, there was a great resurgence in the prosecution of sexual and gender-based crimes.⁹⁷ In 1993, the U.N. Security Council adopted Resolution 827, formally establishing the International Criminal Tribunal for the Former Yugoslavia and instigating new developments in redressing sexually violent crimes.⁹⁸ Two years later in 1995, the U.N. Security Council passed Resolution 955 and created the International Criminal Tribunal for Rwanda (ICTR)—the first criminal tribunal established to prosecute violations of international humanitarian law committed during a non-international armed conflict.⁹⁹ Then, in 2002, following a decade long civil war in Sierra Leone, the United Nations and the government of Sierra Leone adopted Security Council Resolution 1315, creating the Special Court for Sierra Leone.¹⁰⁰ These tribunals aided in developing approaches to address sexually violent crimes in international criminal tribunals.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ de Brouwer, *supra* note 56, at 660; *see also* Powell, *supra* note 35, at 68.

⁹⁸ S.C. Res. 827, ¶ 2 (May 25, 1993); Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16 (2004); *see also* Powell, *supra* note 35, at 71.

⁹⁹ S.C. Res. 955, ¶ 1 (Nov. 8, 1994).

¹⁰⁰ S.C. Res. 1315 (Jan. 16, 2002).

1. *Traditional Linkage of Sexual Violence to Crimes Against Women and Girls*

Traditionally, sexual violence has been linked to crimes against women and girls. For example, U.N. Security Council Resolution 1325 asked that all parties to armed conflict take special measures to protect women and girls from gender-based violence.¹⁰¹ Further, Article 76(1) of the 1997 Additional Protocol I to the Geneva Conventions, specifically states that “[w]omen shall be the object of special respect and shall be protected in particular” against various forms of sexual violence.¹⁰² The majority of cases heard in the ad hoc tribunals listed above involved sexual violence against women, with few addressing such violence against men.¹⁰³

Several decisions of these ad hoc tribunals are particularly worth noting in the context of sexually violent crimes. The ICTR, on multiple occasions, discussed the legal parameters of sexual violence, and issued decisions advancing international human rights norms and increasing understanding of genocidal crimes, crimes against humanity, and rape.¹⁰⁴ The ICTR played a vital role in furthering international women’s human rights when it decided *Prosecutor v. Akayesu* in 1998, recognizing rape as both an instrument of genocide and a crime against humanity for the first time in history.¹⁰⁵

Just three months later, the International Criminal Tribunal for the former Yugoslavia (ICTY) handed down the *Furundžija* judgment, in which the Trial Chamber found that the defendant’s role in facilitating the rapes of the female made him just as responsible as if he had committed the acts himself.¹⁰⁶ In February 2001, the ICTY decided its first case of rape as a crime against humanity.¹⁰⁷ In the *Kunarac* case, the court held that various forms of sexual

¹⁰¹ S.C. Res. 1325, ¶ 10 (Oct. 31, 2000); see also R. Charli Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 SECURITY DIALOGUE 83, 85 (2006).

¹⁰² Protocol I, *supra* note 3, at 3 (emphasis added).

¹⁰³ de Brouwer, *supra* note 56, at 643–44.

¹⁰⁴ Nessel, *supra* note 52, at 102; Mark A. Drumbl, *The ICTR and Justice for Rwandan Women*, 12 NEW ENG. J. INT’L & COMP. L. 105, 107 (2005).

¹⁰⁵ Prosecutor v. Akayesu, ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 735-44 (Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>; Askin, *supra* note 98, at 17.

¹⁰⁶ Prosecutor v. Furundžija, IT-95-17/1T, Trial Chamber Judgment, ¶ 186 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> [hereinafter *Furundžija* Judgment]; Askin, *supra* note 98, at 17-18.

¹⁰⁷ Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶¶ 515-43 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> [hereinafter *Kunarac* Judgment].

violence may constitute enslavement.¹⁰⁸ One defendant was convicted of “outrages upon personal dignity” for making women and girls dance nude on a table.¹⁰⁹ Importantly, both *Furundžija* and *Kunarac* held that rape can be classified as a form of torture.¹¹⁰ These decisions were instrumental in expanding the classification of sexual violence; and in 2008, U.N. Security Council Resolution 1820 condemned sexual violence as a weapon of war.¹¹¹

2. *Inclusion of Sexual Violence Against Men and Boys in Recent International Criminal Cases*

Most sexual violence cases in international criminal tribunals have dealt with female victims, but a small number of cases have involved male victims of sexual violence.¹¹² For example, the ICTY convicted several perpetrators accused of sexual violence against males.¹¹³ The ICTR, however, secured only one conviction for male sexual violence, and the Special Court for Sierra Leone had none.¹¹⁴

Numerous cases involving male victims of sexual violence were prosecuted at the ICTY, including the *Stakić*, *Cesić*, *Mucić*, *Todorović*, and *Blagoje Simić* cases. These cases involved varied forms of sexual violence, including oral and anal rape, and enforced rape between victims.¹¹⁵ In 1998, the ICTY announced its decision in the *Celebići* case, convicting three of the four accused men of various crimes, including sex crimes, committed in the Bosnian prison camp, Celebići.¹¹⁶ Three of the accused were superiors

¹⁰⁸ *Id.*; 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, 469 (2009); Askin, *supra* note 98, at 18.

¹⁰⁹ *Kunarac* Judgment, *supra* note 107, ¶¶ 515-43; Askin, *supra* note 98, at 18.

¹¹⁰ *Kunarac* Judgment, *supra* note 107, ¶¶ 655-56; *Furundžija* Judgment, *supra* note 106, ¶ 186.

¹¹¹ S.C. Res. 1820, ¶ 1 (June 19, 2008); *see also* CRAWFORD *supra* note 10, at 48.

¹¹² de Brouwer, *supra* note 56, at 643.

¹¹³ *Id.* at 643-44, 644 n.21 (“Sexual violence against men was examined in, *inter alia*, the *Tadić*, *Češić*, *Mucić*, *Todorović*, and *Simić* cases in front of the ICTY. At the ICTR, sexual violence against a man was examined in the *Niyitegeka* and *Muhimana* cases, dealing with the same incident.”).

¹¹⁴ *The Special Court for Sierra Leone Its History and Jurisprudence*, RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org> (last visited Nov. 9, 2017) (detailing the establishment of the Special Court for Sierra Leone, the first international court funded by voluntary contributions, in 2002 following a request to the United Nations for a court to address serious crimes committed during the country’s decade-long civil war).

¹¹⁵ Sivakumaran, *supra* note 36, at 264; de Brouwer, *supra* note 56, at 643-44, 644 n.2; *see also* Maïke Isaac, *The Prosecution of Sexual Violence Against Men in International Criminal Law*, INTLAWGRRLS (Feb. 11, 2016), <https://ilg2.org/2016/02/11/the-prosecution-of-sexual-violence-against-men-in-international-criminal-law/>.

¹¹⁶ Prosecutor v. Delalić, IT-96-21-T, Trial Chamber Judgment, ¶ 394 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), <http://www.icty.org/x/cases/mucic/tjug/en/981>

in the Celebići camp and were charged with superior responsibility for the sexual abuse of male detainees by their subordinates.¹¹⁷

In 2013, U.N. Security Council Resolution 2160 recognized men and boys as targets of sexual violence as a weapon for the first time.¹¹⁸ Sexual and gender-based violence has traditionally been linked to crimes against women and girls, although men and boys have been victims of such violence throughout history. The 2013 U.N. Security Council Resolution and the inclusion of sexual violence against males in international criminal cases demonstrate a progressive approach to the problem of sexual and gender-based crimes in international law.

III. THE INTERNATIONAL CRIMINAL COURT CASE AGAINST NTAGANDA AND ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED CRIMES

Bosco Ntaganda is currently on trial in the ICC for various war crimes and crimes against humanity associated with the recent struggle for power in the DRC.¹¹⁹ In June 2017, the Appeals Chamber announced its judgment on Ntaganda's challenge to the Court's jurisdiction, a decision that may help increase accountability for sexually-violent crimes against men and boys.¹²⁰ But before examining the judgment, it is necessary to begin with an explanation of the ICC and its place in international law.

A. Overview of the International Criminal Court

The ICC is a treaty-based criminal court established by the Rome Statute, the Court's constituting instrument.¹²¹ The Statute was adopted at the conclusion of the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.¹²² The Conference took place

116_judg_en.pdf; Askin, *supra* note 98, at 17.

¹¹⁷ Prosecutor v. Delalić, IT-96-21-I, Indictment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 1996), <http://www.icty.org/x/cases/mucic/ind/en/cel-ii960321e.pdf>; Askin, *supra* note 98, at 17.

¹¹⁸ S.C. Res. 2106 (June 24, 2013); *see also* CRAWFORD, *supra* note 10, at 49.

¹¹⁹ Prosecutor v. Ntaganda, ICC-01/04-02/06-309, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (June 9, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF [hereinafter *Ntaganda*, Decision Pursuant to Article 61].

¹²⁰ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 6.

¹²¹ Rome Statute, *supra* note 4; Powell, *supra* note 35, at 77; Harvard Law Review, *International Criminal Law—Sexual and Gender-Based Crimes—ICC Outlines Policies to Improve Prosecutorial Outcomes—The Office of the Prosecutor of the ICC*, Policy Paper on Sexual and Gender-Based Crimes, 128 HARV. L. REV. 793, 794 (2014).

¹²² Rome Statute, *supra* note 4; Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 22 (1999).

in Rome and involved 160 states, 33 intergovernmental organizations, and a coalition of 236 nongovernmental organizations.¹²³ The results of a non-recorded vote at the conclusion of the conference indicated 120 countries in favor of the Statute, 7 against, and 21 abstentions.¹²⁴ The United States publicly announced that it had voted against the Statute.¹²⁵ The Statute acquired the requisite sixty ratifications in early 2002 and entered into force in July of that year.¹²⁶

B. *Key Aspects of the Rome Statute of the International Criminal Court*

The Rome Statute, in addition to establishing the ICC, details the crimes that fall within the jurisdiction of the ICC and explains the composition of the Court.

1. *Crimes of Sexual Violence Within the Jurisdiction of the Court*

Crimes of sexual violence fall within the jurisdiction of the ICC in several different ways. Sexually violent conduct is explicitly included in the Rome Statute as a war crime and as a crime against humanity.¹²⁷ The OTP also recognizes that the underlying acts of genocide within Article 6 of the Statute may have a sexual or gender element and “[i]f committed with intent to destroy a national, ethnic, racial, or religious group, in whole or in part. . . , such acts may amount to genocide.”¹²⁸

Article 7 of the Statute, which defines crimes against humanity, includes “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” when committed knowingly and as part of a widespread or systematic attack on a civilian population.¹²⁹ Article 7 also includes the crime against humanity of persecution—an important recognition within the Statute that will help prevent impunity for systematic persecution based on gender or other grounds.¹³⁰ Other crimes within the jurisdiction of the ICC—such as enslavement,

¹²³ Arsanjani, *supra* note 122, at 22.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Rome Statute, *supra* note 4, art. 126; Diane Marie Amann, *The International Criminal Court and the Sovereign State*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 185, 188 (Ige F. Dekker & Wouter G. Werner eds., 2004).

¹²⁷ Rome Statute, *supra* note 4, arts. 7(1)(g), 7(1)(h), 8(2)(b)(xxii), 8(2)(e)(vi).

¹²⁸ *Id.* art. 6; OTP Policy Paper SGB Crimes, *supra* note 11, at 18.

¹²⁹ Rome Statute, *supra* note 4, art. 7(1)(g).

¹³⁰ *Id.* art. 7(1)(h); OTP Policy Paper SGB Crimes, *supra* note 11, at 19.

deportation or forcible transfer of a population, torture, and murder—may also include a sexual element.¹³¹

Article 8 of the Statute gives the Court jurisdiction over war crimes, defined in section 2(b) as including “serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.”¹³² War crimes within the jurisdiction of the ICC include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence also constituting a grave breach of the Geneva Conventions or a serious violation of Common Article 3.”¹³³ All other types of war crimes listed in Article 8 may also contain sexual or gender elements.¹³⁴

2. *Composition of the Court*

Four organs—the Presidency, the Chambers, the OTP, and the Registry—make up the ICC.¹³⁵ Here, the focus will be on the OTP and the Chambers.

a. *Role of the Prosecutor*

The OTP is an independent organ of the ICC whose mandate is:

to receive and analyse information on situations or alleged crimes within the jurisdiction of the ICC, to analyse situations referred to it in order to determine whether there is a reasonable basis to initiate an investigation into a crime of genocide, crimes against humanity, war crimes or the crime of aggression, and to bring the perpetrators of those crimes before the Court.¹³⁶

The prosecutorial policy of the OTP is to investigate and prosecute those who the evidence shows bear the greatest responsibility for committing the alleged crime.¹³⁷ The Office has three divisions, each with its own responsibilities.¹³⁸

¹³¹ OTP Policy Paper SGB Crimes, *supra* note 11, at 19-20.

¹³² Rome Statute, *supra* note 4, art. 8(2)(b)(xxii); OTP Paper Sexual and Gender-Based Crimes, *supra* note 11, at 20.

¹³³ OTP Policy Paper SGB Crimes, *supra* note 11, at 20.

¹³⁴ *Id.*

¹³⁵ *Understanding the International Criminal Court*, INT’L CRIMINAL COURT 1, 8, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (last visited May 20, 2019).

¹³⁶ *Id.* at 10.

¹³⁷ *Id.* at 17.

¹³⁸ *Id.* at 10-11.

The Investigation Division is responsible for conducting investigations, which includes gathering and examining evidence and questioning those under investigation, the victims, and available witnesses.¹³⁹ The Statute requires the OTP to investigate both incriminating and exonerating circumstances.¹⁴⁰ The Prosecution Division's principal responsibility is litigating cases before the Court's various chambers.¹⁴¹ The Jurisdiction, Complementarity, and Cooperation Division is responsible for assessing information received and situations referred to the ICC, determining the admissibility of situations and cases, and helping to secure the cooperation required by the OTP.¹⁴²

Any State Party to the Statute can request that the OTP carry out an investigation.¹⁴³ The U.N. Security Council may also refer situations to the Court for investigation.¹⁴⁴ The Prosecutor, after receiving permission from the Pre-Trial Chamber, may initiate investigations into crimes that are within the jurisdiction of the ICC.¹⁴⁵ The Prosecutor is required to analyze the seriousness of the information and may seek additional information.¹⁴⁶ If the Prosecutor finds a reasonable basis to proceed with an investigation, he or she must submit a request to the Pre-Trial Chamber for authorization of an investigation, along with any supporting materials the prosecutor has gathered.¹⁴⁷ Where the Pre-Trial Chamber refuses to authorize an investigation and new facts or evidence become available regarding the same situation, the Prosecutor may present a subsequent request based on the new information.¹⁴⁸ If following the preliminary examination of the evidence the Prosecutor does not find a reasonable basis for an investigation, he or she must inform the persons who provided the information.¹⁴⁹ Nevertheless, the Prosecutor may still consider new information regarding the same situation.¹⁵⁰

Article 54 of the Statute denotes the duties and powers of the Prosecutor with respect to investigations.¹⁵¹ Under that article, the Prosecutor is required to extend the investigation to all facts and evidence—both incriminating and exonerating—relevant to the determination of whether criminal responsibility under the Statute exists.¹⁵² He or she must ensure the effective investigation

¹³⁹ *Id.* at 10.

¹⁴⁰ Rome Statute, *supra* note 4, art. 54.

¹⁴¹ *Understanding the International Criminal Court*, *supra* note 135, at 11.

¹⁴² *Id.*

¹⁴³ *Id.* at 17.

¹⁴⁴ *Id.*

¹⁴⁵ Rome Statute, *supra* note 4, art. 15.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* art. 54.

¹⁵² *Id.*

and prosecution of crime, considering the nature of each offense, and must also respect the interests of victims and witnesses.¹⁵³ The Prosecutor must fully respect a person's rights arising under the Statute.¹⁵⁴

b. Roles of the Pre-Trial, Trial, and Appeals Chambers

The ICC has eighteen judges who are assigned to the Court's three judicial divisions—the Pre-Trial Division, the Trial Division, and the Appeals Division.¹⁵⁵ The Court's Chambers are similarly divided, with each Pre-Trial Chamber having one or three judges, each Trial Chamber having three judges, and the Appeals Chamber having five judges.¹⁵⁶

The Pre-Trial Chambers are responsible for supervising how the OTP conducts its investigatory and prosecutorial activities, for guaranteeing the rights of suspects, victims, and witnesses during the investigation, and for ensuring the integrity of the proceeding.¹⁵⁷ These chambers decide whether to confirm the charges against a person, and may also decide on the admissibility of cases and situations and on the issue of victim participation at the pre-trial stage.¹⁵⁸ After an arrest warrant is issued, the suspect is arrested, and the charges are confirmed by a Pre-Trial Chamber, a Trial Chamber tries the case.¹⁵⁹

The primary function of a Trial Chamber is to ensure that trials are fair, expeditious, and conducted with full respect for the rights of all persons involved.¹⁶⁰ The Trial Chamber determines the guilt or innocence of the accused and, if the accused is found guilty, may impose a sentence of imprisonment, financial penalties, restitution, or rehabilitation.¹⁶¹ The Appeals Chamber, composed of the President of the Court and four other judges, reviews the decisions of the Pre-Trial and Trial Chambers when a party to the trial appeals a decision.¹⁶² The Appeals Chamber can then decide whether to uphold, reverse, or amend the decision.¹⁶³ It may also revise a final conviction or sentence and can “order a new trial before a different Trial Chamber.”¹⁶⁴

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Understanding the International Criminal Court*, *supra* note 135, at 9.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 10.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

C. Prosecutor's Initiative Regarding Sexual and Gender-Based Crimes

The OTP, along with much of the international community, has demonstrated increasing concern for sexual and gender-based crimes in its strategic plans and office policies.

1. Strategic Plans

The OTP currently has six strategic objectives, one of which is to “[e]nhance the integration of a gender perspective in all areas of [its] work and continue to pay particular attention to sexual and gender-based crimes and crimes against children.”¹⁶⁵ To date, the OTP has released four strategic plans—one in 2006, 2010, 2013, and 2015.¹⁶⁶

In the 2006 plan, the OTP announced its objective to conduct between four and six “new investigations of those who bear the greatest responsibility in [its] current or new situations.”¹⁶⁷ Under that objective, the OTP announced its intent to pay particular attention to the methods used to investigate sexual and gender-based crimes.¹⁶⁸ Four years later in 2010, the OTP released another report on prosecutorial strategy. In the 2010 report, the OTP announced that in an effort to enhance predictability and consistency, the Office would publish its policy papers on sexual and gender-based crimes.¹⁶⁹ The OTP also pledged to work with external actors to constantly update its prosecutorial techniques in regard to crimes of sexual and gender-based violence.¹⁷⁰ That report mentions issues of sexual and gender-based violence throughout, indicating a movement on the part of the OTP towards greater recognition of those crimes.¹⁷¹

¹⁶⁵ ICC Office of the Prosecutor, *Policies and Strategies*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx> (last visited Mar. 25, 2019).

¹⁶⁶ THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, STRATEGIC PLAN 2016-2018 (2015), https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf [hereinafter 2015 Strategic Plan]; THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, STRATEGIC PLAN JUNE 2012-2015 (2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> [hereinafter 2013 Strategic Plan]; THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, PROSECUTORIAL STRATEGY 2009-2012 (2010), <https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> [hereinafter 2010 Strategic Plan]; THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, REPORT ON PROSECUTORIAL STRATEGY (2006), https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf [hereinafter 2006 Strategic Plan].

¹⁶⁷ 2006 Strategic Plan, *supra* note 166, at 3.

¹⁶⁸ *Id.* at 7.

¹⁶⁹ 2010 Strategic Plan, *supra* note 166, at 7.

¹⁷⁰ *Id.* at 8.

¹⁷¹ *Id.* at 7-8, 16-18.

The Office issued its next strategic plan in 2013, announcing its goal to “[e]nhance the integration of a gender perspective in all areas of [its] work and continue to pay particular attention to sexual and gender based crimes and crimes against children.”¹⁷² The 2013 strategy included plans to implement specialized training, issue guidelines on proving sexual and gender-based crimes, and finalize its policy on sexual and gender-based crimes.¹⁷³ In 2015, the OTP disseminated its most recent strategic plan, reaffirming its commitment to pay particular attention to these crimes.¹⁷⁴ From 2006 to 2015, the OTP steadily increased its strategic goals regarding sexually violent crimes, demonstrating its growing concern with punishing and preventing these acts.

2. Policies

The OTP has released two policy papers relevant to the issue of wartime sexual violence—the 2014 Policy Paper on Sexual and Gender-Based Crimes and the 2016 Policy on Children.¹⁷⁵ Both policies demonstrate that the OTP is highly concerned with the prosecution of sexual and gender-based crimes.

a. 2014 Policy Paper on Sexual and Gender-Based Crimes

In 2014, the OTP released its Policy Paper on Sexual and Gender-Based Crimes, noting that in the past few decades the international community has taken steps to end impunity for sexual and gender-based crimes.¹⁷⁶ In that policy paper, the OTP stated its intent to pay particular attention to these crimes at all stages of its work and reaffirmed that it would apply a gender analysis to all crimes within its jurisdiction.¹⁷⁷ The OTP acknowledged that the investigation of sexual and gender-based crimes has its own specific challenges, and vowed to pay particular attention to these crimes in order to address those challenges.¹⁷⁸

¹⁷² 2013 Strategic Plan, *supra* note 166, at 27.

¹⁷³ *Id.*

¹⁷⁴ 2015 Strategic Plan, *supra* note 166.

¹⁷⁵ OTP Policy Paper SGB Crimes, *supra* note 11; THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, POLICY ON CHILDREN (2016), https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF [hereinafter OTP Policy on Children].

¹⁷⁶ OTP Policy Paper SGB Crimes, *supra* note 11, at 5.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 5-6 (“These include the under- or non- reporting owing to societal, cultural, or religious factors; stigma for victims; limited domestic investigations, and the associated lack of readily available evidence; lack of forensic or other documentary evidence, owing, *inter alia*, to the passage of time; and inadequate or limited support services at the national level.”).

This policy recognized that Article 68(1) of the Statute requires the OTP take appropriate measures to “protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses,” particularly where the crime involves sexual or gender violence or violence against children.¹⁷⁹ According to the Policy on Sexual and Gender-Based Crimes, the OTP attempts to maximize awareness by including a gender perspective in its public information, and endeavors to provide ongoing staff training to ensure these crimes are investigated and prosecuted effectively.¹⁸⁰

The OTP included in the policy several goals and procedures pertaining to the charges it would bring in cases involving sexually violent crimes. The OTP aims to bring charges for sexual and gender-based crimes wherever “sufficient evidence” exists to support such charges.¹⁸¹ Moreover, the OTP will bring cumulative charges to fairly reflect the severity of these crimes.¹⁸² The policy states that, where appropriate, the Office will bring charges for sexual violence under multiple categories of crime and will seek to highlight the gender-related aspects of non-sexually violent crimes.¹⁸³

Further, the policy notes that sexual and gender-based crimes may be committed in several situations—as a result of orders or instructions to do so, as a consequence the individual was aware would ordinarily occur, or as a result of an omission or failure to act.¹⁸⁴ Because of this, the OTP included in the policy that it will consider, on a case-by-case basis, every mode of liability as well as the applicable mental element under the Statute, and it will, where appropriate, charge different levels of liability alternatively.¹⁸⁵

b. 2016 Policy on Children

In the 2016 Policy on Children, the OTP recognized that “children may be impacted differently by crimes based on their sex, gender, or other status or identities.”¹⁸⁶ It stated children are particularly vulnerable to sexually violent crimes.¹⁸⁷ Moreover, the OTP referenced Article 54 of the Rome Statute, which requires that the Prosecutor, in conducting investigations and prosecutions, respect the interests and personal circumstances of victims, particularly where the crime involves sexual violence, gender violence, or violence against

¹⁷⁹ *Id.* at 6.

¹⁸⁰ *Id.* at 7.

¹⁸¹ *Id.* at 6.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 6-7.

¹⁸⁶ OTP Policy on Children, *supra* note 175, at 2.

¹⁸⁷ *Id.* at 6-7.

children.¹⁸⁸ Similar to its Policy on Sexual and Gender-Based Violence, the OTP mentions Article 68(1) of the Statute in its Policy on Children.¹⁸⁹

The Policy on Children details certain crimes that specifically target children.¹⁹⁰ For example, child trafficking can be considered a form of enslavement or sexual slavery, both of which are crimes against humanity under the Statute.¹⁹¹ That policy recognizes that children in the armed forces may face different experiences on account of their sex or gender.¹⁹² Some crimes, including those which are sexual or gender-based, may be committed against children by members of the armed forces.¹⁹³

D. *The ICC's Case Against Congolese Militia Leader Bosco Ntaganda*

In June 2017, the Appeals Chamber confirmed the charges against Bosco Ntaganda, a Congolese war criminal, for the war crimes and crimes against humanity he committed during the conflict in the DRC.¹⁹⁴ The Chamber clarified there is no categorical limit on who may be a victim of sexually violent war crimes.¹⁹⁵

1. *Background: The Situation in the DRC*

In 2003, Human Rights Watch issued a report recognizing that the war in the DRC “represents an ongoing struggle for power at the national and international levels.”¹⁹⁶ That report also asserted that in the Ituri region, located in northeastern DRC, combatants slaughtered over 5,000 civilians between 2002 and 2003 based on their ethnic affiliation.¹⁹⁷ The DRC is a state party to the Rome Statute; it signed the treaty in September 2000 and ratified it in April 2002.¹⁹⁸ The ICC has jurisdiction over cases in which a state party is unwilling or unable to investigate or prosecute a crime listed in the Statute.¹⁹⁹

¹⁸⁸ *Id.* at 7.

¹⁸⁹ *Id.* at 7-8.

¹⁹⁰ *Id.* at 12.

¹⁹¹ *Id.*; Rome Statute, *supra* note 4, art. 7(1)(c), 7(1)(g).

¹⁹² OTP Policy on Children, *supra* note 175, at 21.

¹⁹³ *Id.* at 34.

¹⁹⁴ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 64.

¹⁹⁵ *Id.*

¹⁹⁶ *Ituri: Bloodiest Corner of Congo*, HUMAN RIGHTS WATCH (July 8, 2003), <http://pantheon.hrw.org/legacy/campaigns/congo/ituri/ituri.htm>.

¹⁹⁷ *Id.*

¹⁹⁸ Rome Statute, *supra* note 4, art. 14; *Bosco Ntaganda: Background*, INT'L JUSTICE MONITOR, <https://www.ijmonitor.org/bosco-ntaganda-background/> (last visited Jan. 4, 2018).

¹⁹⁹ Rome Statute, *supra* note 4, art. 14.

Therefore, the ICC investigation into crimes in the DRC began after the Congolese government referred the DRC's situation to the ICC in April 2004.²⁰⁰

Two months later, the ICC Prosecutor officially began to investigate the situation in the Ituri Province of eastern DRC.²⁰¹ The evidence uncovered during that investigation was sufficient to suggest that "the FPLC [Patriotic Forces for the Liberation of Congo] carried out repeated acts of enlistment, conscription, and use of children under the age of fifteen who were trained to participate in armed conflict" during the Ituri conflict.²⁰²

In regard to the conflict in the DRC, the ICC has decided two cases of particular significance: first, the trial of Thomas Lubanga, and second, the trial of Germain Katanga. Also of significance is the trial of Jean-Pierre Bemba Gombo, in which the ICC found Bemba guilty of rape as a war crime under the Rome Statute.²⁰³

Thomas Lubanga was a founding member of the Union des Patriotes Congolais.²⁰⁴ Along with his co-perpetrators, he was charged with enlisting and conscripting children under the age of fifteen into the FPLC and using them to actively participate in hostilities.²⁰⁵ In March 2012, ICC Trial Chamber I found him guilty of the war crimes of enlisting and conscripting children under fifteen years old and using them as child soldiers in active hostilities.²⁰⁶ He was sentenced to fourteen years imprisonment,²⁰⁷ and the Appeals Chamber confirmed both the verdict and the sentence in December 2014.²⁰⁸

²⁰⁰ *Bosco Ntaganda: Background*, *supra* note 198.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Prosecutor v. Bemba, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 752 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF [hereinafter *Bemba*, Judgment Pursuant to Article 74]; see also Clay Anthony, *In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo: Cementing Sexual Violence and Command Responsibility Within International Criminal Law*, 25 TUL. J. INT'L & COMP. L. 403, 412-13 (2017).

²⁰⁴ *Prosecutor v. Thomas Lubanga Dyilo: Alleged Crimes (Non-Exhaustive List)*, INT'L CRIMINAL COURT (2012), <https://www.icc-cpi.int/drc/lubanga/pages/alleged-crimes.aspx>.

²⁰⁵ Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 1 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF; see also *Prosecutor v. Thomas Lubanga Dyilo: Alleged Crimes (Non-Exhaustive List)*, *supra* note 204.

²⁰⁶ Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 97 (Jul. 10, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_07409.PDF.

²⁰⁷ *Id.* ¶ 99.

²⁰⁸ Prosecutor v. Lubanga, ICC-01/04-01/06-3122, Judgment on the Appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo Against the "Decision on Sentence Pursuant to Article 76 of the Statute," ¶ 119 (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09849.PDF.

Germain Katanga was a general in the Armed Forces of the DRC.²⁰⁹ Trial Chamber II found Katanga guilty as an accessory to multiple crimes committed during an attack on a village in the Ituri district, including murder as a crime against humanity and several war crimes.²¹⁰ He was sentenced to twelve years imprisonment.²¹¹ More recently, in 2016, the ICC found an individual guilty of rape as a war crime for the first time in the trial of Jean-Pierre Bemba.²¹² Trial Chamber III found Bemba criminally responsible for “the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging committed by his forces.”²¹³

2. *The Charges Against Ntaganda*

In August 2006, ICC Pre-Trial Chamber I issued an arrest warrant alleging there were reasonable grounds to believe that Bosco Ntaganda, acting as the Deputy Chief of General Staff for Military Operations for the armed branch of the Union of Congolese Patriots, the Patriotic Forces for the Liberation of Congo,²¹⁴ used his authority to actively implement a policy of enlisting, conscripting, and using children younger than fifteen to actively participate in the conflict.²¹⁵ Specifically, Pre-Trial Chamber I found reasonable grounds to believe that Ntaganda was criminally liable for the war crimes of enlistment of children under the age of fifteen, conscription of children under the age of fifteen, and the use of children under the age of fifteen to participate actively in hostilities.²¹⁶

Reportedly known as “the Terminator” or “Warrior” by his troops, Ntaganda served in various rebel groups in eastern Congo for more than ten

²⁰⁹ Prosecutor v. Katanga, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 6 (Mar. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

²¹⁰ *Id.* ¶¶ 1, 1691; see also *The Prosecutor v. Germain Katanga: Alleged Crimes (Non-Exhaustive List)*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/drc/katanga/pages/alleged-crimes.aspx> (last visited Sep. 7, 2019).

²¹¹ Prosecutor v. Katanga, ICC-01/04-01/07, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 147 (May 23, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_18046.PDF.

²¹² *Bemba*, Judgment Pursuant to Article 74, *supra* note 203, ¶ 742; see also Anthony, *supra* note 203, at 420.

²¹³ *Bemba*, Judgment Pursuant to Article 74, *supra* note 203, ¶ 752.

²¹⁴ The Patriotic Forces for the Liberation of Congo, or FPLC, recruited about 3,000 child soldiers and was involved in heinous human rights violations in the DRC, including killings, sexual violence, torture, and mutilations. Elsa Buchanan, *Battle for Control of the DRC: Who Are the Patriotic Forces for the Liberation of Congo (FPLC)?*, INT’L BUS. TIMES (Feb. 22, 2017), <http://www.ibtimes.co.uk/battle-control-drc-who-are-patriotic-forces-liberation-congo-fplc-1526292>.

²¹⁵ Prosecutor v. Ntaganda, ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006), https://www.icc-cpi.int/CourtRecords/CR2007_03633.PDF.

²¹⁶ *Id.* at 4.

years.²¹⁷ Backed by Rwanda, he overthrew Laurent Nkunda to become the leader of the National Congress for the Defense of the People, a Congolese Tutsi-led rebel group, before he and his fighters were integrated into the Congolese army in 2009.²¹⁸ Between 2009 and 2012, he served as a general in the Congolese army.²¹⁹ Then in 2012, Ntaganda led a mutiny of Congolese soldiers and became a leader of a new group of rebel fighters—M23.²²⁰ This group participated in acts including summary executions, mass rape, forced recruitment of child soldiers, and other horrific human rights violations.²²¹

In March 2012, the situation in the DRC was reassigned to Pre-Trial Chamber II.²²² The Chamber issued a broader arrest warrant against Ntaganda based on materials indicating Ntaganda engaged in crimes against humanity and war crimes during the conflict in Ituri between September 2002 and September 2003.²²³ This Chamber also found reasonable grounds to believe that Ntaganda “is responsible as an indirect co-perpetrator for the crimes against humanity of murder, rape and sexual slavery, and persecution as well as the war crimes of murder, rape and sexual slavery, pillaging, and attacks against the civilian population.”²²⁴ After fighting and conflict between M23 factions ensued, Ntaganda voluntarily surrendered to the U.S. embassy in Rwanda, and asked to be transferred to the ICC in the Hague.²²⁵ Four days later, on March 22, 2013, Ntaganda was taken into ICC custody.²²⁶

In June 2014, Pre-Trial Chamber II unanimously confirmed 18 charges against Ntaganda for war crimes and crimes against humanity, including those listed in counts 6 and 9.²²⁷ Count 6 alleged that Ntaganda was “criminally responsible for the rape of *Union des Patriotes Congolais/Forces Patriotiques pour la Liberation du Congo (UPC/FPLC)* child soldiers,” a war crime delineated in Article 8(2)(e)(vi) of the Statute.²²⁸ Count 9 charged Ntaganda with

²¹⁷ *Ntaganda: Background*, *supra* note 198.

²¹⁸ Jeffery Gettleman, *A Congolese Rebel Leader Who Once Seemed Untouchable is Caught*, *NEW YORK TIMES*, <https://www.nytimes.com/2009/01/24/world/africa/24congo.html> (Jan. 23, 2009); *see also* *Bosco Ntaganda: Timeline*, *INT'L JUSTICE MONITOR*, <https://www.ijmonitor.org/bosco-ntaganda-timeline/> (last visited May 20, 2019); *and National Committee for the Defense of the People (CNDP)*, *GLOB. SEC.*, <https://www.globalsecurity.org/military/world/para/cndp.htm> (last modified Nov. 21, 2012).

²¹⁹ *Ntaganda: Background*, *supra* note 198.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Ntaganda*, Decision Pursuant to Article 61, *supra* note 119.

²²⁸ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 3.

sexual enslavement of UPC/FPLC child soldiers under Article 8(2)(e)(vi).²²⁹ The Court found facts to support sexual violence charges against Ntaganda, and the “Updated Document Containing the Charges” alleged that the UPC/FPLC raped its own soldiers as a form of punishment.²³⁰

On September 1, 2015, Ntaganda challenged the court’s subject-matter jurisdiction with respect to counts 6 and 9.²³¹ In October 2015, Trial Chamber VI rejected Ntaganda’s challenge, concluding that it:

[N]eed not address at this stage whether such children, or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to Article 8(2)(e)(vi) when committed by members of the same group. Such questions of substantive law are to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged.²³²

But the Appeals Chamber reversed that decision in March 2016, because the question of whether restrictions exist on who may be victims of wartime rape and sexual slavery is an essential legal issue that is jurisdictional in nature.²³³

3. *Confirmation of Charges Proceedings*

Ntaganda again challenged the Court’s jurisdiction with respect to Counts 6 and 9, and on January 4, 2017, Trial Chamber VI returned the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9.”²³⁴ The Trial Chamber found that it had jurisdiction over both counts, because “members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery, as

²²⁹ *Id.*

²³⁰ Prosecutor v. Ntaganda, ICC-01/04-02/06-458-AnxA, Updated Document Containing the Charges, ¶¶ 100, 102 (Feb. 16, 2015), https://www.icc-cpi.int/RelatedRecords/CR2015_01030.PDF.

²³¹ Prosecutor v. Ntaganda, ICC-01/04-02/06-892, Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, ¶ 28 (Oct. 9, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_19303.PDF.

²³² *Id.*

²³³ Prosecutor v. Ntaganda, ICC-01/04-02/06-1225, Judgment on the Appeal of Mr. Bosco Ntaganda Against the “Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9,” ¶¶ 40-42 (Mar. 22, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02293.PDF.

²³⁴ Prosecutor v. Ntaganda, ICC-01/04-02/06-1707, Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9 (Jan. 4, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_00011.PDF.

listed in Articles 8(2)(b)(xxii) and (2)(e)(vi).²³⁵ Ntaganda appealed from this decision on January 26, 2017.²³⁶ The principal issue on appeal was whether the Trial Chamber erred in holding that, under Article 8 of the Statute, victims of the war crimes of rape and sexual slavery do not have to be “protected persons” under the Geneva Conventions or “persons taking no active part in the hostilities” under Common Article 3.²³⁷ These are referred to in the decision of the Appeals Chamber as “Status Requirements.”²³⁸

a. Challenge by the Accused

Ntaganda argued the acts of sexual violence committed by members of the UPC/FPLC against child soldiers in the same group could not be within the jurisdiction of the ICC, because the victims were not protected persons and had an active part in the hostilities.²³⁹ He contended the Trial Chamber erred in finding that applying the Status Requirements to the crimes listed under Articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Statute would distort the distinction between these crimes and the crimes listed under Articles 8(2)(a) and 8(2)(c).²⁴⁰ Articles 8(2)(b)(xxii) and 8(2)(e)(vi) denote the war crimes of rape and sexual slavery.²⁴¹ Articles 8(2)(a) and 8(2)(c) explicitly contain Status Requirements.²⁴²

According to Ntaganda, applying Status Requirements to sub-paragraphs 8(2)(b) and 8(2)(e) would not create redundancy with sub-paragraphs 8(2)(a) and 8(2)(c), given the provisions contain no textual overlap.²⁴³ He also claimed that any potential redundancy is “not an appropriate basis on which to infer a legislative intent” to exclude any Status Requirements, and that the article’s drafting history does not indicate an intent to depart from the generally accepted Status Requirements.²⁴⁴

The two sub-paragraphs at issue grant the ICC jurisdiction over serious violations of the laws and customs applicable in international and non-intentional armed conflicts, “within the established framework of international

²³⁵ *Id.* ¶ 54.

²³⁶ Prosecutor v. Ntaganda, ICC-01/04-02/06-1754, Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9 (Jan. 26, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_00364.PDF.

²³⁷ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 16.

²³⁸ *Id.*

²³⁹ *Id.* ¶ 31.

²⁴⁰ *Id.* ¶ 26.

²⁴¹ Rome Statute, *supra* note 4, art. 8.

²⁴² *Id.*

²⁴³ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 26.

²⁴⁴ *Id.*

law.”²⁴⁵ Ntaganda argued that the Trial Chamber did not address whether this phrase meant the crimes listed under Articles 8(2)(b) and 8(2)(e) were subject to a Status Requirement.²⁴⁶ He concluded by asking the Appeals Chamber to reverse the Trial Chamber’s decision and hold that the Court does not have jurisdiction over Counts 6 and 9, or in the alternative, that it remand the matter for a new decision.²⁴⁷

b. Counterarguments by the Prosecution

In response, the Prosecutor argued the Trial Chamber was correct in finding the crimes of rape and sexual slavery were not intended only as grave breaches and serious violations of Common Article 3, and that the Trial Chamber properly interpreted Article 8 of the statute.²⁴⁸ She agreed that “the structure of Article 8 reflects the distinction between the different types of war crimes over which [the ICC] has subject-matter jurisdiction,” and averred that Ntaganda’s arguments recommend a departure from the ordinary meaning of the text, and would render Articles 8(2)(b) and 8(2)(e) meaningless repetitions of 8(2)(a) and 8(2)(c).²⁴⁹ She argued that the crimes listed under Articles 8(2)(b) and 8(2)(e) were already understood as “serious violations of laws and customs within the established framework of international law.”²⁵⁰

Regarding Ntaganda’s argument that the Court lacked jurisdiction based on the victim’s membership in the UPC/FPLC, the Prosecutor argued there are three distinct, but potentially coinciding, principles concerning this subject: the ban on unlawfully recruiting children, the right of civilians not taking direct part in the hostilities to remain free from direct attack, and the fundamental and universal protection against inhumane treatment afforded all persons not actively participating in hostilities.²⁵¹ She noted that when all three concepts are present, children may be unlawfully recruited and take an active role in combat, but still be protected against inhumane treatment.²⁵²

c. Second Decision of the Appeals Chamber

On June 15, 2017, the Appeals Chamber unanimously rejected Ntaganda’s appeal and affirmed the Trial Chamber’s holding that the Court had

²⁴⁵ Rome Statute, *supra* note 4, arts. 8(2)(b)(xxii), 8(2)(e)(vi).

²⁴⁶ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 28.

²⁴⁷ *Id.* ¶ 32.

²⁴⁸ *Id.* ¶ 33.

²⁴⁹ *Id.* ¶ 34.

²⁵⁰ *Id.* ¶ 35.

²⁵¹ *Id.* ¶ 37.

²⁵² *Id.*

jurisdiction over Counts 6 and 9.²⁵³ The Appeals Chamber considered certain sections of the Statute relevant to the issues raised on appeal, providing first the relevant provisions of Article 8(2).²⁵⁴ Article 8(2) defines the following actions as “war crimes” and therefore within the jurisdiction of the ICC:

(a) Grave breaches of the Geneva Conventions...[;] (b) [o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts...(xxii) [c]omitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;... (c) [i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions..., namely, any of the following acts committed against persons taking no active part in the hostilities...[;] (e) [o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts... (vi) [c]omitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions[.]²⁵⁵

The judgment of the Appeals Chamber addressed two critical issues in turn. The first was whether Articles 8(2)(b) and 8(2)(e) of the Statute include Status Requirements for who may be victims of the war crimes of rape and sexual slavery.²⁵⁶ The second issue was whether the established framework of international law includes Status Requirements as an additional element to these crimes²⁵⁷. To reach its decision, the Appeals Chamber did not defer to the Trial Chamber’s interpretation of Article 8 but instead came to its own conclusion regarding the applicable law needed to determine if the Trial Chamber misinterpreted Article 8.²⁵⁸

²⁵³ *Id.* ¶ 70.

²⁵⁴ *Id.* ¶ 18.

²⁵⁵ Rome Statute, *supra* note 4, art. 8(2).

²⁵⁶ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 46.

²⁵⁷ *Id.* ¶ 52

²⁵⁸ *Id.* ¶ 17.

First, the Appeals Chamber addressed whether Articles 8(2)(b) and 8(2)(e) incorporate the Status Requirements.²⁵⁹ It found no error in the Trial Chamber's finding that these requirements do not apply to the victims of the war crimes of rape and sexual slavery.²⁶⁰ The Court said little weight should be given to the potential overlap between provisions in the interpretation of Article 8(2).²⁶¹ Acknowledging that the drafting history of Article 8 is silent regarding whether the drafters intended to subject the war crimes of rape and sexual slavery to the Status Requirements, the Appeals Chamber concluded the drafters clearly intended these crimes to be "distinct war crimes," and not just examples of grave breaches of the Conventions or violations of Common Article 3.²⁶²

The Appeals Chamber affirmed the Trial Chamber's conclusion that the reference to the Conventions in Articles 8(2)(b)(xxii) and 8(2)(e)(vi) only limits "any other form of sexual violence" and only for the purposes of setting a gravity threshold.²⁶³ That threshold is meant to exclude lesser sexually violent conduct "which would not amount to crimes of the most serious concern to the international community."²⁶⁴ According to the judgment, "rape and sexual slavery are by definition crimes of a gravity comparable to that of a grave breach of the Geneva Conventions or serious violation of Common Article 3."²⁶⁵

Second, the Appeals Chamber addressed whether the established framework of international humanitarian law includes Status Requirements for the war crimes of rape and sexual slavery.²⁶⁶ It began by determining there is no rule in international humanitarian law categorically excluding members of an armed group from protection against the crimes of other members of that same group.²⁶⁷ The Appeals Chamber then recognized that the prohibitions of such sexual violence in conflict are well established under international humanitarian law, and agreed with the Trial Chamber that sexual violence against any person is never justifiable.²⁶⁸

In its judgment, the Appeals Chamber emphasized that the nexus requirement for war crimes under the Statute sufficiently and appropriately separates war crimes from ordinary crimes.²⁶⁹ This nexus requirement states the alleged conduct must have taken place in the context of and been associated with an

²⁵⁹ *Id.* ¶¶ 46-51.

²⁶⁰ *Id.*

²⁶¹ *Id.* ¶ 48.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* ¶ 49.

²⁶⁶ *Id.* ¶ 55.

²⁶⁷ *Id.* ¶ 64-67.

²⁶⁸ *Id.* ¶ 65.

²⁶⁹ *Id.* ¶ 68.

armed conflict of international or non-international character.²⁷⁰ In short, sexual violence is considered a war crime under the Statute as long as the crime took place in association with an armed conflict—even if that conflict is not international.

The Appeals Chamber affirmed the decision of the Trial Chamber.²⁷¹ However, its judgment expanded the Trial Chamber's holding, finding the explicit protection of victims of rape and sexual slavery in armed conflict under international humanitarian law not limited to the victim's status.²⁷² This decision allows the ICC to prosecute a wide range of sexually violent war crimes under the Rome Statute, and can be used to improve accountability for sexually violent crimes against men and boys.

IV. USING THE ICC APPEALS CHAMBER'S DECISION IN *NTAGANDA* AS A MEANS TO IMPROVE ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED INTERNATIONAL CRIMES AGAINST MEN AND BOYS

The Appeals Chamber's decision in *Ntaganda* may be used to improve accountability for sexual violence against men and boys. The ICC can hold perpetrators of sexually violent war crimes accountable for their actions, and can help shift the public perception of these male victims through public information and judgments reflecting the severity and reality of sexually violent crimes. The lack of recognition given to sexually violent crimes against males has to do with several factors. Those factors include the tendency to conflate such violence with violence against women and girls.²⁷³ There is also the issue of underreporting by male victims.²⁷⁴ However, international organizations are beginning to recognize and advocate for these male victims.

For example, in December 2016, the International Center for Transnational Justice released a report recognizing the “alarmingly common” issue of sexual

²⁷⁰ *Id.*

²⁷¹ *Id.* ¶ 71.

²⁷² *Id.* ¶ 64.

²⁷³ Amrita Kapur & Kelli Muddell, *When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts*, INT'L CTR. FOR TRANSNAT'L JUSTICE 1 (Dec. 2016), https://www.ictj.org/sites/default/files/ICTJ_Report_SexualViolenceMen_2016.pdf.

²⁷⁴ *Id.*; *Hidden Victims: Sexual Violence Against Boys and Men in Conflict*, U.N. OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SEC'Y-GEN. FOR CHILD. & ARMED CONFLICT (Dec. 19, 2017), <https://childrenandarmedconflict.un.org/hidden-victims-sexual-violence-boys-men-conflict/> [hereinafter *Hidden Victims*] (attributing the lack of attention given to issues of male sexual violence to stigmatization, a problematic legal frameworks, and norms of gender identity and stating that the vast majority of sexual violence cases pertain to women and girls); Ngari, *supra* note 71 (“Underreporting is therefore a significant obstacle to effective intervention, and severely limits our understanding of the issue [of male sexual violence].”).

violence against men and boys in times of conflict.²⁷⁵ The report stated that transnational justice mechanisms are in a position to begin tackling these issues, but unless the rights and concerns of male victims are given a specific focus like that now increasingly given to female victims, there remains a significant risk these victims will remain invisible.²⁷⁶

The Africa Institute for Security Studies stated in a 2016 article that “the focus has largely been on women and girls as victims of sexual violence, [but] boys and men are equally at risk.”²⁷⁷ The article also quoted the U.N. Secretary-General’s special representative on sexual violence in conflict, Zainab Hawa Bangura, who pointed out that “[t]he crippling repercussions of rape in war are devastating for women, but our sons and brothers who are victims also suffer in silence.”²⁷⁸ In October 2017, the U.N. Refugee Agency released the findings of an exploratory study examining sexual violence against men and boys in the Syria crisis and the devastating impacts of such violence.²⁷⁹ One finding was that Syrian men and boys were subjected to sexual violence, including sexual torture, by multiple parties involved in conflict.²⁸⁰

A December 2017 article, released by the United Nations, stated that the U.N. Special Representative of the Secretary-General (SRSG) for Children and Armed Conflict, Virginia Gamba, recognized the critical problem of sexual violence against men and boys in armed conflict and asserted that the issue has not been given the attention it deserves by the international community.²⁸¹ SRSG Gamba attributed the lack of discussion regarding sexual violence against men and boys to stigmatization, problematic legal frameworks, and norms of gender identity.²⁸² She recommended that particular attention be paid to situations where boys may be at a heightened risk of sexual violence, such as in detention and in armed groups.²⁸³

These examples demonstrate the increasing attention given to sexual violence against men and boys. The Appeals Chamber’s decision from June 2017 on Ntaganda’s challenge to the court’s jurisdiction (Appeals Chamber’s decision) offers an opportunity to improve accountability for these crimes and foster continuing recognition of the issues surrounding male sexual violence. In *Ntaganda*, the Appeals Chamber clarified that international humanitarian law does not provide any categorical limitations on who may be victims of the war

²⁷⁵ Kapur & Muddell, *supra* note 273, at 1.

²⁷⁶ *Id.*

²⁷⁷ Ngari, *supra* note 71.

²⁷⁸ *Id.*

²⁷⁹ Chynoweth, *supra* note 67, at 6-7.

²⁸⁰ *Id.* at 7.

²⁸¹ *Hidden Victims*, *supra* note 274.

²⁸² *Id.*

²⁸³ *Id.*

crimes of rape and sexual slavery.²⁸⁴ It explicitly recognized that these crimes are “of a gravity comparable to that of a grave breach of the Geneva Conventions or serious violation of Common Article 3.”²⁸⁵

As was the case in *Ntaganda*, sexual or gender-based crimes may be committed against children, including boys, by members of the armed forces into which they are recruited.²⁸⁶ Those victims would not be “protected persons” under the Geneva Conventions or “persons taking no active part in the hostilities” under Common Article 3, but under *Ntaganda*, sexual violence against these victims is considered a war crime as long as the conduct took place in the context of and was associated with an armed conflict.²⁸⁷

In its 2014 Policy Paper on Sexual and Gender-Based Crimes, the OTP reaffirmed that it will apply a gender analysis to all crimes within its jurisdiction.²⁸⁸ This analysis “involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.”²⁸⁹ Therefore, before explaining how the Appeals Chamber’s decision may be implemented to improve accountability for crimes of male sexual violence, it is necessary to begin with a brief recap of the gender dynamics involved in these crimes.

Sexual violence against men and boys in armed conflict is an element of a larger social and gender system that glorifies masculinity and portrays the male body as masculine, heterosexual, and dominant.²⁹⁰ By attacking the male body, perpetrators attack the perception of that body as masculine, heterosexual, and dominant in an attempt to exert dominance and power over the victims and their community.²⁹¹ Such attacks facilitate dominance during war because the male victims are deemed to have feminine attributes, which are often viewed as weaknesses that can lead to dishonor or death.²⁹²

Men are charged with protecting their community.²⁹³ However, when men become victims of sexual violence, the societal construction of men as strong, dominant, and heterosexual comes in conflict with their inability to protect

²⁸⁴ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 64.

²⁸⁵ *Id.* ¶ 49.

²⁸⁶ *Id.* ¶ 3; OTP Policy on Children, *supra* note 175, at 4.

²⁸⁷ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 16.

²⁸⁸ OTP Policy Paper SGB Crimes, *supra* note 11, at 5.

²⁸⁹ *Id.* at 4.

²⁹⁰ CRAWFORD, *supra* note 10, at 11; Vojdik, *supra* note 36, at 927.

²⁹¹ Vojdik, *supra* note 36, at 926; Lewis, *supra* note 59, at 7; Manivannan, *supra* note 36, at 640.

²⁹² Lewis, *supra* note 59, at 8; Vojdik, *supra* note 36, at 945.

²⁹³ Vojdik, *supra* note 36, at 946

themselves against sexual violence.²⁹⁴ Male rape during conflict situations inverts the gendered construction of protector/protected roles in an attempt to terrorize entire societies.²⁹⁵ The amplified societal effects of male sexual violence in armed conflict make it a frequent and effective weapon of war.

For example, Yovanka Perdigao explained in her 2012 article, *Invisible Victims: Sexual Violence Against Men in the Great Lakes*, that in much of Africa men are considered to be the providers and protectors in their communities.²⁹⁶ They represent the power of these communities, and sexual violence against men is used as a means of disempowering men and undermining the strength of the community.²⁹⁷ Male rape can represent “a community’s powerlessness as its protectors are perceived to be emasculated and unable to defend themselves and by extension their families and kin.”²⁹⁸

Society encourages this gendered understanding of masculinity by attaching a stigma to male victims of sexual violence.²⁹⁹ Many cultures have attached and continue to attach a stigma to these victims, which likely plays a role in the lack of knowledge regarding acts of male sexual violence.³⁰⁰ Male victims are often ostracized and ridiculed, and they are discouraged from speaking out, reinforcing the perception that sexual violence is directed exclusively at women.³⁰¹ Many are not willing to report the sexual violence they have suffered for fear that others will stigmatize, reject, or disbelieve them.³⁰² This underreporting leads to, among other things, health consequences and destructive social behavior.³⁰³

The OTP Policy on Sexual and Gender-Based Crimes asserts that the Office applies a gendered perspective in its public information activities and endeavors to provide ongoing staff training to ensure these crimes are

²⁹⁴ *Id.* (“[T]he sexual violation of men repositions them as powerless victims of male sexual power, challenging social definitions of masculinity.”); see also Carpenter, *supra* note 101, at 95.

²⁹⁵ Carpenter, *supra* note 101, at 96.

²⁹⁶ Yovanka Perdigao, *Invisible Victims: Sexual Violence Against Men in the Great Lakes*, THINK AFRICA PRESS (Jun. 28, 2012), <https://reliefweb.int/report/democratic-republic-congo/invisible-victims-sexual-violence-against-men-great-lakes>; see also Lewis, *supra* note 59, at 9; and de Brouwer, *supra* note 56, at 646.

²⁹⁷ Perdigao, *supra* note 296.

²⁹⁸ *Id.*

²⁹⁹ Valorie K. Vojdik, *The Invisibility of Gender in War*, 9 DUKE J. GENDER L. & POL’Y 261, 266-67 (acknowledging the masculine construction and portrayal of male U.S. military recruits); Lewis, *supra* note 59, at 9 (recognizing the destructive stereotypes and norms attached to male victims of sexual violence impede on accurate reporting by male victims in conflict settings); see also Manivannan, *supra* note 36, at 646.

³⁰⁰ Lewis, *supra* note 59, at 9; see also de Brouwer, *supra* note 56, at 646.

³⁰¹ Lewis, *supra* note 59, at 9; de Brouwer, *supra* note 56, at 646; see also Perdigao, *supra* note 296.

³⁰² Vojdik, *supra* note 36, at 946.

³⁰³ *Id.* at 932; see, e.g., Cahn, *supra* note 81, at 223.

investigated and prosecuted effectively.³⁰⁴ The lack of attention given sexual violence against men and boys is detrimental to the victims of such violence.³⁰⁵ By ignoring the reality of these crimes, society imposes unhealthy expectations about the masculinity of males.³⁰⁶ The victims are expected to keep quiet about being victimized.³⁰⁷ The *Ntaganda* decision gives the OTP an opportunity to reshape the public perception of male victims of sexual violence because it acknowledges a previously unrecognized category of victims that largely includes men and boys involved in armed conflict.³⁰⁸

The Appeals Chamber's finding that international humanitarian law does not provide any limit on who may be considered victims of rape and sexual slavery in armed conflict allows the OTP to charge sexual violence as a war crime, regardless of whether the victim was involved in the conflict.³⁰⁹ In *Ntaganda*, this finding allowed sexual violence against child soldiers by members of the same armed group to qualify as a war crime under Article 8 of the Statute.³¹⁰ Going forward, the OTP may also use this decision to prosecute acts of sexual violence used as a weapon of war against enemy soldiers.

The Office has stated its commitment to prosecuting crimes of sexual violence.³¹¹ Based on the OTP's prioritization criteria and the gravity of the problem of sexual violence in armed conflict, crimes of sexual violence against male victims should receive priority.³¹² Action by the OTP concerning these crimes would explicitly criminalize such conduct against men and boys—even those participating in combat—and possibly prevent similar future crimes by making an example out of those brought before the Court.

³⁰⁴ OTP Policy Paper SGB Crimes, *supra* note 11, at 7.

³⁰⁵ Misra, *supra* note 9, at 225.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ See *infra*, Part III(D)(2) and (3), detailing the charges brought against Ntaganda and the decision of the Appeals Chamber, which found no categorical limitation on who may be a victim of the war crimes of rape and sexual slavery.

³⁰⁹ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 64.

³¹⁰ *Id.* ¶ 70.

³¹¹ OTP Policy Paper SGB Crimes, *supra* note 11, at 5.

³¹² Once cases have been selected for prosecution, the OTP prioritizes these cases, considering several criteria: a comparative assessment of selected cases; whether a person, or members of the same group, have already been investigated or prosecuted by the OTP or a State for another serious crime; the impact the OTP's actions have on ongoing criminality and the OTP's contribution to crime prevention; and the impact and ability of the OTP to pursue cases involving opposing parties to a conflict in a parallel or sequential basis. The Office of the Prosecutor of the ICC, *Policy Paper on Case Selection and Prioritisation*, INT'L CRIMINAL COURT ¶ 50 (2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

Perpetrators of male sexual violence gain power based on what the act represents to society—the domination of a community’s protectors.³¹³ As such, the goal in prosecuting sexual violence against males should be to transform the culture—reconciling the conflict, preventing violence, and repairing the lives harmed—by holding perpetrators accountable for their crimes and by implementing judgments sufficient to accomplish this goal.³¹⁴

As noted by the former head prosecutor of the ICC, the purpose of the tribunal and its trials is to make an example of those before the Court and prevent future crimes.³¹⁵ The methods by which those convicted by the ICC are held accountable further this purpose. Following a conviction, the Trial Chamber determines the appropriate sentence to be imposed, considering the relevant evidence presented and submissions made during the trial.³¹⁶ The Court has the discretion to impose either a specified term of imprisonment that does not exceed thirty years or a term of life imprisonment when justified by the gravity of the crime and the circumstances of the convicted person.³¹⁷ The Statute also allows the Court to make an order directly against a convicted person specifying appropriate reparations to the victims, including restitution, compensation, and rehabilitation.³¹⁸

The Court’s decisions on sentencing and reparations in the *Lubanga* and *Katanga* cases are informative regarding criminal accountability and victim relief. In the case of Thomas Lubanga, Trial Chamber I found Lubanga guilty of the war crimes of enlisting and conscripting children under fifteen years old and using them as child soldiers in active hostilities.³¹⁹ He was sentenced

³¹³ See generally Vojdik, *supra* note 36, at 946; Lewis, *supra* note 59, at 7; Manivannan, *supra* note 36, at 640.

³¹⁴ Misra, *supra* note 9, at 207-8.

³¹⁵ Anthony, *supra* note 203, at 423.

³¹⁶ Rome Statute, *supra* note 4, art. 76(1).

³¹⁷ *Id.* art. 77(1).

³¹⁸ *Id.* at art. 75(2) (“Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.”). Where the convicted person is indigent and unable to comply with an order for reparations, the Trust Fund for Victims may complement the resources collected. The Trust Fund is charged with aiding victims within the Court’s jurisdiction and implementing Court ordered reparations. Prosecutor v. Lubanga, ICC-01/04-01/06-3129, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures to be Applied to Reparations” of 7 August 2012, ¶¶ 106-10 (Mar. 3, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_02631.PDF [hereinafter *Lubanga*, Judgment on Appeals]. Where the Trust Fund advances resources to implement an order of the Court, it can later claim the advanced resources from the convicted person or persons liable for those reparations. *Id.* ¶ 5. The Trust Fund, in designing the reparations awards, must provide physical or psychological care or material support for the benefit of the victims and their families. *Id.* ¶ 107.

³¹⁹ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3122, Judgment on the Appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo Against the “Decision on Sentence Pursuant to Article 76 of the Statute,” ¶¶ 97-99 (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09849.PDF.

to fourteen years imprisonment, and the Appeals Chamber confirmed both the verdict and sentence in December 2014.³²⁰ The Appeals Chamber also confirmed the Trial Chamber's finding that the reparations programs should "be directed at preventing future conflicts and raising awareness that the effective reintegration of these children requires eradicating the victimisation, discrimination and stigmatisation of young people in these circumstances."³²¹ The Appeals Chamber also emphasized that the principles and procedures to be applied to reparations should be guided by a gender-inclusive approach.³²²

Reparations, according to both the Trial and Appeals Chambers, should reflect the local culture and customary practices unless such practices are discriminatory.³²³ Both Chambers agreed reparations should be awarded based on the convicted person or persons' proportional liability for the harm caused as a result of the commission of any crime within the jurisdiction of the Court.³²⁴ In December 2017, Trial Chamber II issued a decision setting Lubanga's liability for reparations at USD 10,000,000.³²⁵

In the case of Germain Katanga, Trial Chamber II convicted Katanga as an accessory to murder as a crime against humanity and as an accessory to several different war crimes.³²⁶ Katanga's contribution to the violence only lasted four months, and because the Trial Chamber did not take any aggravating circumstance into account it found that the imposition of life imprisonment was unjustified.³²⁷ The Court considered several mitigating circumstances, and it sentenced Katanga to a total of twelve years imprisonment with deduction for time served.³²⁸

³²⁰ *Id.* ¶ 98.

³²¹ *Lubanga*, Judgment on Appeals, *supra* note 318, ¶ 202; *see also* Press Release, Int'l Criminal Court, Lubanga Case: ICC Appeals Chamber Amends the Trial Chamber's Order for Reparations to Victims (Mar. 3, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1092> [hereinafter *Lubanga* Press Release].

³²² *Lubanga*, Judgment on Appeals, *supra* note 318, ¶ 206; *see also* *Lubanga* Press Release, *supra* note 321.

³²³ *Lubanga*, Judgment on Appeals, *supra* note 318, ¶ 213; *see also* *Lubanga* Press Release, *supra* note 321.

³²⁴ *Lubanga*, Judgment on Appeals, *supra* note 318, ¶ 237; *see also* *Lubanga* Press Release, *supra* note 321.

³²⁵ Press Release, Int'l Criminal Court, Lubanga Case: Trial Chamber II Issues Additional Decision on Reparations (Dec. 15, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1351>.

³²⁶ Prosecutor v. Katanga, ICC-01/04-01/07-3484, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 143 (May 23, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_18046.PDF.

³²⁷ *Id.* ¶¶ 143-44.

³²⁸ *Id.* ¶¶ 144, 147, 171.

The Court also awarded victim reparations for the harm suffered as a result of Katanga's crimes.³²⁹ Trial Chamber II found that 109 victims established material harm,³³⁰ 297 victims established psychological harm,³³¹ and 2 victims established physical harm.³³² Based on the scope of the harm suffered and the proportion of the harm caused by Katanga, the Chamber set Katanga's liability for reparation at USD 1,000,000.³³³

Considering the gravity of sexually violent war crimes and the mental and physical damage inflicted on its victims,³³⁴ the Court is likely to impose longer terms of imprisonment in these cases compared to the cases of Lubanga and Katanga. In doing so, it would communicate the seriousness of sexually violent crimes, make an example out of the offender, and potentially deter future similar crimes.

Further, male and female victims of sexual violence suffer mental and physical harm.³³⁵ In some cases, the victims contract a sexually transmitted infection from their attacker.³³⁶ Reparations awarded in cases involving these crimes may be used to fund medical treatment for the physical and psychological harm done to victims. Because male victims of sexual violence are often stigmatized in connection with the crimes against them, it is important that the Court educate victims' communities on male sexual violence through public information and fund necessary services for these victims. Reparations awarded in cases of sexual violence can be put towards programs to educate the victims' communities, promote recovery for both male and female victims, and facilitate victim reintegration into society.

In 2017, the International Center for Transnational Justice released a report containing several recommendations for reparations programs to facilitate a more inclusive understanding of sexual violence and to allow victims to move forward following an attack.³³⁷ It endorses the use of gender-inclusive language in victim registration that does not reclassify abuses against male victims, and directs that male and female victims of sexual violence be treated

³²⁹ Prosecutor v. Katanga, ICC-01/04-01/07-3728, Order for Reparations Pursuant to Article 75 of the Statute, ¶ 171 (Mar. 24, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05121.PDF [hereinafter *Katanga*, Order for Reparations]; see also Press Release, Int'l Criminal Court, Katanga Case: ICC Trial Chamber II Awards Victims Individual and Collective Reparations (Mar. 24, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1288> [hereinafter *Katanga* Press Release].

³³⁰ *Katanga*, Order for Reparations, *supra* note 329, ¶ 171.

³³¹ *Id.* ¶ 175; see also *Katanga* Press Release, *supra* note 329.

³³² *Katanga*, Order for Reparations, *supra* note 329, ¶ 173; see also *Katanga* Press Release, *supra* note 329.

³³³ *Katanga*, Order for Reparations, *supra* note 329, ¶ 264; see also *Katanga* Press Release, *supra* note 329.

³³⁴ Lewis, *supra* note 59, at 8; see also de Brouwer, *supra* note 56, at 646.

³³⁵ *Id.*

³³⁶ Vojdik, *supra* note 36, at 932.

³³⁷ Kapur & Muddell, *supra* note 273, at 2.

with comparable sensitivity and privacy.³³⁸ The report also advises reparations programs to incorporate psychological support for male victims of sexual violence as well as material support to provide income-generating alternatives for men who cannot continue their previous jobs.³³⁹

In December 2017, the Prosecutor of the ICC, Fatou Bensouda, appointed a Special Adviser on Gender, whose purpose is to advise the Prosecutor in the ongoing implementation of the Office's Policy Paper on Sexual and Gender-Based Crimes.³⁴⁰ Prosecutor Bensouda announced that further integrating a gender perspective into all areas of the OTP's work is a priority, and the immediate priority of the new Special Adviser on Gender is to strengthen the Office's approach to gender issues and support strategic responses by the OTP to sexual and gender-based crimes under the Statute.³⁴¹

This appointment demonstrates the OTP's commitment to holding perpetrators of sexually violent crimes accountable and to increasing the OTP's knowledge of and responses to gender issues. The Appeals Chamber's decision in *Ntaganda* clarifies who may be considered victims of war crimes of sexual violence,³⁴² and the Special Adviser on Gender, in strengthening the OTP's understanding of and approach to gender issues, will likely consider this decision significant in the area of sexual and gender-based crimes. When war crimes of sexual violence are examined, it is apparent the gendered nature of war gives rise to such crimes against men and boys.³⁴³ The new Special Adviser on Gender can provide Prosecutor Bensouda with valuable insight regarding wartime sexual violence against males.

Together, the growing recognition of sexually violent crimes against male victims and the Appeals Chamber's decision in *Ntaganda* hold promise for increasing accountability for sexual violence against men and boys. The ICC can help shift the public perception of these male victims by explicitly recognizing them in its public information and by reflecting the severity and reality of sexually violent crimes in the Court's judgments. In holding that international humanitarian law does not provide any categorical limitations on who may be victims of the war crimes of rape and sexual slavery, the Court made a significant step towards justice for the men and boys affected by wartime sexual violence.³⁴⁴

³³⁸ *Id.* at 3.

³³⁹ *Id.*

³⁴⁰ Press Release, Mrs. Fatou Bensouda, The Prosecutor of the International Criminal Court, Appoints Patricia V. Sellers as Her Special Adviser on Gender (Dec. 19, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1352>.

³⁴¹ *Id.*

³⁴² *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 64.

³⁴³ Lewis, *supra* note 59, at 7-8; *see also* Vojdik, *supra* note 36, at 926-27.

³⁴⁴ *Ntaganda*, Judgment on Appeal Against Second Decision on Jurisdiction, *supra* note 6, ¶ 64.

V. CONCLUSION

Sexual violence against men in the context of armed conflict is a widespread issue that has an enormous impact on its victims and on society. From ancient to modern conflict, rape and other forms of sexual violence have been used as weapons of war to dehumanize victims and shatter their communities. The growing recognition of female victims of sexual violence and the actions taken to hold the perpetrators of these crimes accountable indicate that the international community is no longer comfortable allowing sexual violence to go unnoticed and unpunished.

The brutal violence suffered by male victims cannot continue to be ignored in international and domestic jurisprudence. The stigma attached to male victims and the perception that men are the protectors of their communities make such violence against men especially effective during armed conflict. The situation in the DRC provides context for what many male victims suffer as a result of sexual violence and offers insight into the community's perception of these victims.

Through its decision on Ntaganda's appeal, the ICC clarified its jurisdiction over rape and sexual violence as a war crime and thus provided an avenue for that tribunal to influence the treatment of sexual violence worldwide. The ICC made clear that prosecuting crimes of sexual violence is a priority in international law. When coupled with the increasing attention given to the phenomenon of male sexual violence, this decision holds promise for the future.

Using gender analysis to understand why men are subjected to sexual violence and how society views these victims, it is possible to shed light on the virtually unrecognized male victims of sexual violence and develop viable solutions to help these men heal. By approaching sexual violence from a gender perspective and implementing forms of justice that not only punish criminals but also educate states and provide victim relief, the ICC can hold perpetrators of male sexual violence accountable while also shifting the current negative perception of these male victims within their communities.